

---

IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 880603

---

W. LOWRY MANN, III and BARBARA MANN,

*Appellants,*

v.

ADDICOTT HILLS CORPORATION,

*Appellee.*

---

JOINT APPENDIX - VOLUME I

---

Glenn H. Silver  
Donna H. Henry  
RUST, RUST & SILVER  
4165 Chain Bridge Road  
Fairfax, VA 22030

Jose Aunon  
9701 Main Street  
Fairfax, VA 22030

*Counsel for Appellants*

John E. Harrison  
Sandra L. Hughes  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
McLean, VA 22101

*Counsel for Appellee*



## TABLE OF CONTENTS

	PAGE
1. BILL OF COMPLAINT, FILED APRIL 3, 1987.....	1
2. DEFENDANT'S NOTICE AND MOTION TO SUSTAIN PLEA IN BAR AND TO REMOVE LIS PENDENS FROM LAND RECORDS, FILED APRIL 17, 1987.....	5
3. PLEA IN BAR, FILED APRIL 17, 1987.....	7
4. DEFENDANT'S NOTICE AND MOTION TO SUSTAIN PLEA IN BAR AND TO REMOVE LIS PENDENS FROM LAND RECORDS, FILED MAY 19, 1987.....	9
5. TRANSCRIPT OF THE MOTION ON PLEA IN BAR HEARD BEFORE THE HONORABLE QUINLAN H. HANCOCK ON MAY 22, 1987.....	11
6. DEFENDANT'S NOTICE AND MOTION TO RECONSIDER COURT'S RULING ON THE DEFENDANT'S MOTION TO SUSTAIN PLEA IN BAR AND TO REMOVE THE LIS PENDENS FROM LAND RECORDS, FILED MAY 29, 1987.....	39
7. SUMMARY MEMORANDUM.....	41
8. ORDER, ENTERED JUNE 12, 1987.....	47
9. ANSWER AND GROUNDS OF DEFENSE, FILED JUNE 16, 1987.....	49
10. DECREE, ENTERED JULY 17, 1987.....	54
11. DEFENDANT'S ADDITIONAL AFFIRMATIVE DEFENSES, FILED OCTOBER 14, 1987.....	56
12. DEFENDANT'S NOTICE AND MOTION FOR SUMMARY JUDGMENT, FILED OCTOBER 22, 1987.....	58
13. COMPLAINANT'S RESPONSES TO REQUEST FOR ADMISSIONS, FILED OCTOBER 26, 1987.....	60
14. DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, MAILED OCTOBER 30, 1987.....	64
15. COMPLAINANT'S ANSWERS TO DEFENDANT'S INTERROGATORIES, MAILED NOVEMBER 2, 1987.....	85
16. DEFENDANT'S NOTICE AND MOTION FOR SUMMARY JUDGMENT ON THE BILL OF COMPLAINT, FILED NOVEMBER 5, 1987.....	94

17. TRANSCRIPT OF THE TRIAL HELD BEFORE THE HONORABLE JACK B. STEVENS ON NOVEMBER 19, 1987.....	96
a) Testimony of W. Lowry Mann, III.....	99
b) Testimony of Barbara Mann.....	127
c) Testimony of Mark Kaywood.....	154
d) Testimony of Sandra K. Lindsay.....	159
e) Testimony of Martha Allen.....	168
f) Proceedings.....	172
g) Testimony of Sandra K. Lindsay.....	204
h) Testimony of Daurie Schwab.....	219
i) Testimony of Barbara Mann.....	238
j) Proceedings.....	244
18. COMPLAINANT'S EXHIBITS:	
1 - Sale of Existing Residence Addendum.....	249
2 - New Home Sales Agreement, Dated 3/01/86.....	250
3 - Letter Dated 1/13/87 to Mr. & Mrs. Mann from Sandra K. Lindsay.....	252
4 - Letter Dated 1/21/87 to Sandra K. Lindsay from Barbara C. Mann W/Listing Agreements Attached...	253
5 - Letter Dated 1/30/87 to Mr. & Mrs. Mann from Carl Bernstein.....	257
6 - Waiver Dated 2/04/87 signed by Mr. & Mrs. Mann..	258
7 - Agreement Dated 2/02/87.....	259
8 - Residential Use Permit Dated 9/04/87.....	260
9 - New Home Sales Agreement.....	261
19. DEFENDANT'S EXHIBITS:	
1 - Daily Reports from Union Farms.....	269
2 - Delivery and Payment of Non-standard Options Addendum.....	335
3 - Copy of Certified Mail Receipt.....	336
4 - Market Profile.....	337
5 - Photo of house w/site plan on the back.....	339
6 - Photo of house w/site plan on the back.....	340
7 - Confidential Customers Information Sheet.....	341
20. DECREE, ENTERED NOVEMBER 19, 1987.....	342
21. COMPLAINANT'S POST-TRIAL MEMORANDUM OF POINTS AND AUTHORITIES, MAILED DECEMBER 3, 1987.....	344
22. DEFENDANT'S POST-TRIAL MEMORANDUM OF POINTS AND AUTHORITIES, FILED DECEMBER 17, 1987.....	358
23. COMPLAINANT'S RESPONSE TO DEFENDANT'S MEMORANDUM, FILED JANUARY 6, 1988.....	403
24. TRANSCRIPT OF THE FINAL AGREEMENT OF TRIAL HEARD BEFORE THE HONORABLE JACK B. STEVENS ON JANUARY 22, 1988.....	407

25. LETTER OPINION OF THE HONORABLE JACK STEVENS, DATED FEBRUARY 4, 1988.....	443
26. FINAL DECREE, ENTERED FEBRUARY 26, 1988.....	446
27. NOTICE OF APPEAL, FILED MARCH 11, 1988.....	448
28. DEFENDANT'S OBJECTION TO INCOMPLETE TRIAL TRANSCRIPT FILED FOR PURPOSES OF APPEAL, FILED MARCH 17, 1988.....	450
29. COMPLAINANT'S MOTION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT THEREOF, FILED MARCH 25, 1988.....	452
30. FINAL DECREE, ENTERED MARCH 25, 1988.....	467
31. ASSIGNMENTS OF ERROR.....	469
32. LETTER, DATED JUNE 8, 1988, FROM SANDRA L. HUGHES TO GLENN H. SILVER.....	470
33. MANNS' LIS PENDENS RECORDED APRIL 3, 1987 IN DEED BOOK 6677 AT PAGE 919.....	471
34. NOTICE REINSTATING MANNS' LIS PENDENS FILED BY WARREN E. BERRY, CLERK OF COURT, AMONG THE FAIRFAX COUNTY LAND RECORDS ON MARCH 29, 1988, RECORDED IN DEED BOOK 6986 AT PAGE 1307.....	472
35. LETTER FROM MR. AUNON, THE MANN'S ATTORNEY (AT THE TIME) TO ADDICOTT HILLS CORPORATION, DATED FEBRUARY 3, 1987 (RECEIVED FEBRUARY 6, 1987) WITH FEBRUARY 2, 1987 LISTING AGREEMENT ATTACHED.....	473
36. BILL OF COMPLAINT, <u>FRANK PREGANO, ET AL. v.</u> <u>THE CONNEMARA CORPORATION, ET AL.</u> , IN CHANCERY NO. 10685 IN THE CIRCUIT COURT OF LOUDOUN COUNTY.....	478
37. PLEA IN BAR, <u>FRANK PREGANO, ET AL. v. THE CONNEMARA</u> <u>CORPORATION, ET AL.</u> , IN CHANCERY NO. 10685 IN THE CIRCUIT COURT OF LOUDOUN COUNTY, MAILED FEBRUARY 17, 1987.....	489
38. DECREE OF DISMISSAL, <u>FRANK PREGANO, ET AL. v. THE</u> <u>CONNEMARA CORPORATION, ET AL.</u> , IN CHANCERY NO. 10685 IN THE CIRCUIT COURT OF LOUDOUN COUNTY, ENTERED APRIL 3, 1987.....	491
39. PETITION FOR APPEAL, <u>FRANK PREGANO, ET AL. v.</u> <u>THE CONNEMARA CORPORATION, ET AL.</u> , IN CHANCERY NO. 10685 IN THE CIRCUIT COURT OF LOUDOUN COUNTY.....	493



40. OPPOSITION TO PETITION FOR APPEAL, <u>FRANK PREGANO, ET AL. v. THE CONNEMARA CORPORATION, ET AL.</u> , IN CHANCERY NO. 10685 IN THE CIRCUIT COURT OF LOUDOUN COUNTY.....	516
41. NOTICE FROM SUPREME COURT DENYING WRIT FOR PETITION FOR APPEAL, <u>FRANK PREGANO, ET AL. v. THE CONNEMARA CORPORATION ET AL.</u> , IN CHANCERY NO 10685 IN THE CIRCUIT COURT OF LOUDOUN COUNTY.....	532
42. BILL OF COMPLAINT, <u>GEORGE WHITE, v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	533
43. PLEA IN BAR, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	555
44. LETTER OPINION, DATED JUNE 25, 1987, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	557
45. DECREE SUSTAINING DEMURRER AND PLEA IN BAR ON CONTRACT CLAIMS, STATED IN COUNTS I AND III OF THE BILL OF COMPLAINT AND GRANTED LEAVE TO AMEND, COUNT II, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	559
46. AMENDED COMPLAINT, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	561
47. DEMURRER, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	566
48. PLEA IN BAR, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	577
49. LETTER OPINION, DATED JANUARY 12, 1988, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	595
50. DECREE GRANTING PLEA IN BAR AND DEMURRER AND DISMISSING COMPLAINT WITH PREJUDICE, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	596
51. PETITION FOR APPEAL, SUPREME COURT RECORD NO. 880417, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	598

52. OPPOSITION TO PETITION TO APPEAL, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	667
53. REPLY TO OPPOSITION FOR PETITION OF APPEAL, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	709
54. NOTICE FROM SUPREME COURT DENYING WRIT FOR PETITION FOR APPEAL, <u>GEORGE WHITE, ET AL. v. THE CONNEMARA CORPORATION</u> , CIRCUIT COURT OF LOUDOUN COUNTY, CHANCERY NO. 10629.....	728
55. MOTION FOR JUDGMENT, <u>SNELLINGS, ET AL. v. ADDICOTT HILLS CORPORATION</u> , IN THE CIRCUIT COURT OF FAIRFAX COUNTY, AT LAW NO. 81675.....	729
56. ANSWER AND AFFIRMATIVE DEFENSES, <u>SNELLINGS, ET AL. v. ADDICOTT HILLS CORPORATION</u> , IN THE CIRCUIT COURT OF FAIRFAX COUNTY, AT LAW NO. 81675.....	749
57. DEPOSITION TRANSCRIPT OF ALEXANDRIA SNELLINGS, DATED JUNE 2, 1988, PAGES 51-54, 61-63, 66, 71, 77, <u>SNELLINGS, ET AL. v. ADDICOTT HILLS CORPORATION</u> , IN THE CIRCUIT COURT OF FAIRFAX COUNTY, AT LAW NO. 81675.....	755
58. DEPOSITION TRANSCRIPT OF RONALD L. SNELLINGS, DATED JUNE 1, 1988, PAGES 43-49, 52-59, 94-98, 100-112, 135, 143-148, 152-153, 158-161.....	764
59. LETTER, DATED APRIL 8, 1988, FROM SANDRA L. HUGHES TO GLENN H. SILVER, RE: REINSTATEMENT OF LIS PENDENS IN <u>MANN, ET AL. v. ADDICOTT HILL CORPORATION</u> .....	810

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY -3 11/2/19

W. LOWRY MANN III

and

BARBARA C. MANN

Complainants

vs.

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION

Serve: Registered Agent

CRAIG E. BUCK  
4304 Evergreen Lane  
Annandale, Virginia 22003

Defendant

BILL OF COMPLAINT

To the Honorable Judges of said Court: Your Complainants represent as follows:

1. That on March 1, 1986, the Defendant, Addicott Hills Corporation, was the owner in fee simple of the following described real property lying and being situated in the County of Fairfax, State of Virginia, to wit:

Lot 11, UNION FARM SUBDIVISION also known as 9105

Peaktree Landing, Alexandria, Virginia 22309, and on that day entered into a written agreement with your Complainants for the sale of the same which said agreement was signed by all the parties hereto and delivered to your Complainant.

By said agreement, the Defendant covenanted and agreed for and in consideration of the sum of \$296,580.00 to



convey by a General Warranty Deed in fee simple to your Complainants, and your Complainants, covenanted and agreed to pay the Defendant the sum of \$296,580.00 in following manner:

A. \$5,000.00 delivered to the Defendant on March 1, 1986.

B. \$100,000.00 from the proceeds of a 30 year conventional loan to be obtained by purchasers.

C. \$191,580.00 cash at settlement.

In addition to the above your Complainants have given the Defendants \$13,042.50 for improvements and upgrading the quality of the construction.

2. That the construction of the house was to be completed on or before November, 1986, and settlement to take place at such time.

3. That your Complainants are ready, willing, and able to perform their obligations.

4. That your Complainants represent that to the best of their knowledge the house to be built by the Defendant is not yet completed, but it is near completion. Though the Complainants have duly performed all of their obligations under said agreement, the Defendant notified the Complainants of its refusal to perform its obligations under said agreement and that the property had been placed for sale in the open market.

5. That the Defendant has listed the house for sale with a real estate broker for the sum of \$362,500.00.

6. That since real property is the subject matter of said contract, damages are not easily ascertainable and would not adequately compensate the Complainants for Defendant's refusal to convey said property, therefore, the complainants lack an adequate legal remedy.

#### Count II

The allegations of paragraphs 1 through 6 are incorporated by reference herewith.

7. That the Defendant never intended to complete the construction on time nor to sell the property for the price agreed to in the contract with the Complainants.

8. That from its conduct toward these Complainants and others, the Defendant showed a clear intent of using funds for the construction, then attempted to fraudulently terminate the contract to obtain the benefit of the increased value of the property.

9. That the Defendant's action were malicious and fraudulent toward your Complainants with absolute disregard for your complainants' rights.

10. That as a result of the Defendant's actions, your Complainants have and will continue to expend substantial legal fees and have suffered and will continue to suffer mental anguish and distress.

WHEREFORE, it is respectfully prayed that this Court grant judgment as follows:

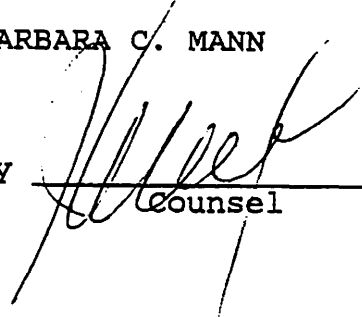
1. Declaring the rights of the parties under the contract of sale;


2. Requiring the Defendant to specifically perform under the said contract;

3. Granting compensatory damages to the Complainants in the sum of \$100,000.00 and punitive damages in the sum of \$200,000.00.

W. LOWRY MANN III

BARBARA C. MANN

by  Counsel

  
Jose E. Aunon  
9701 Main St.  
Fairfax, Virginia 22031  
Counsel for Complainant  
Telephone 703-323-1700



V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED  
1987 APR 17 PM 2:03

MARSHALL E. GARRY  
CLERK OF THE CIRCUIT COURT  
OF FAIRFAX COUNTY, VA.

W. LOWRY MANN III

and

BARBARA C. MANN

Complainants,

v.

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION


Defendant.

NOTICE AND MOTION

PLEASE TAKE NOTICE that on the 8<sup>th</sup> day of May, 1987, at 10 a.m., or as soon thereafter as counsel may be heard, the undersigned will move this Honorable Court, and hereby so moves, that the Defendant's Plea in Bar be sustained and that the lis pendens filed by the Complainants in this cause against the subject property be removed from the land records of the County of Fairfax.

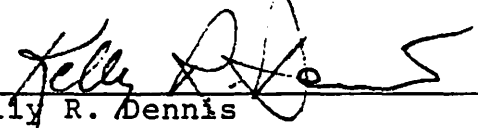
Respectfully submitted,

ADDICOTT HILLS CORPORATION,  
et al.  
By Counsel

  
Kelly R. Dennis, Esq.  
Light & Harrison, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first-class postage prepaid to Jose Aunon, Esq., 9701 Main Street, Fairfax, Virginia 22031 this 16<sup>th</sup> day of April, 1987.

  
\_\_\_\_\_  
Kelly R. Dennis

FILED

1987 APR 17 PM 2:03

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY  
OF FAIRFAX COUNTY, VA.

W. LOWRY MANN III

and

BARBARA C. MANN

Complainants,

v.

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION

Defendant.

PLEA IN BAR

COMES NOW your Defendant, by it's counsel undersigned, and respectfully submits this, it's Plea in Bar of Complainants' prosecution of this matter, for the following reasons:

1. The Complainants have an adequate remedy at law in money damages for any actions ex contractu.

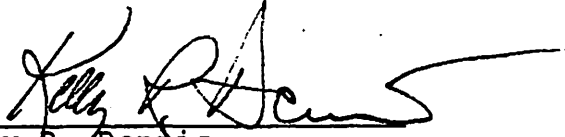
2. The Contract between the parties which is attached hereto as Exhibit A shows unequivocally that there exists an election of remedies and a liquidated damages provision, provisions which limit any Complainants' remedies to the forfeiture of their deposit. The Contract between the parties also contains a "merger clause" which restricts the parties



ability to form other agreements in contravention of the actual Contract between them.

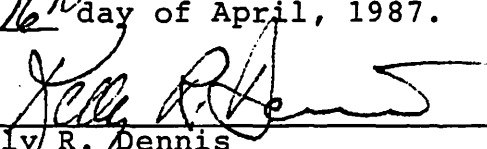
Respectfully submitted,

ADDICOTT HILLS CORPORATION,  
et al.  
By Counsel

  
Kelly R. Dennis  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first-class postage prepaid to Jose Aunon, Esq., 9701 Main Street, Fairfax, Virginia 22031 this 16<sup>th</sup> day of April, 1987.

  
Kelly R. Dennis

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

1987 MAY 18 PM 3:15  
BARBARA C. MANN  
CLERK OF THE CIRCUIT COURT  
OF FAIRFAX COUNTY, VA.

W. LOWRY MANN III

and

BARBARA C. MANN

Complainants,

v.

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION

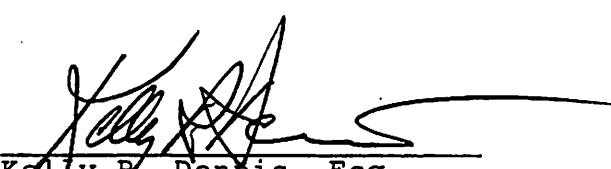
Defendant.

NOTICE AND MOTION

PLEASE TAKE NOTICE that on the 22nd day of May, 1987, at 10 a.m., or as soon thereafter as counsel may be heard, the undersigned will move this Honorable Court, and hereby so moves, that the Defendant's Plea in Bar be sustained and that the lis pendens filed by the Complainants in this cause against the subject property be removed from the land records of the County of Fairfax.

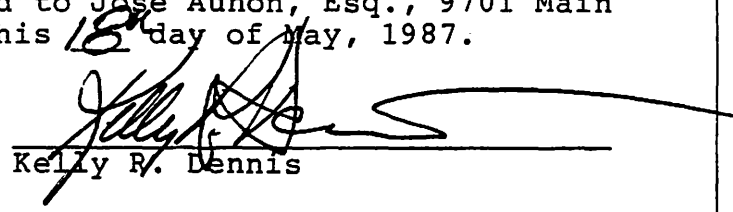
Respectfully submitted,

ADDICOTT HILLS CORPORATION,  
et al.  
By Counsel

  
Kelly B. Dennis, Esq.  
Light & Harrison, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first-class postage prepaid to Jose Aunon, Esq., 9701 Main Street, Fairfax, Virginia 22031 this 18<sup>th</sup> day of May, 1987.

  
\_\_\_\_\_  
Kelly R. Dennis



1 V I R G I N I A

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 - - - - - X

4 W. LOWRY MANN, and BARBARA MANN, :

5 Plaintiff's, :

6 versus, : IN CHANCERY NO. 101193

7 ADDICOTT HILLS CORPORATION, :

8 Defendant. :

9 - - - - - X

10 KENNETH LEON, and BARBARA LEON, :

11 Plaintiff's, :

12 versus, : IN CHANCERY NO. 101273

13 ADDICOTT HILLS CORPORATION, :

14 Defendant. :

15 - - - - - X

16 Fairfax, Virginia

17 Friday, May 22, 1987 ,

18 The above-entitled action came on to be heard before  
19 the Honorable Quinlan H. Hancock, a Judge in and for the Circuit  
20 Court of Fairfax County, in Courtroom 4-G, Fairfax County  
21 Judicial Center, 4110 Chain Bridge Road, Fairfax, Virginia  
22 22030, beginning at approximately 2:41 o'clock p.m.  
23



1 APPEARANCES:

2 For the Plaintiff's:

3 JOSE E. ANUNON, ESQUIRE  
 4 9701 Main Street  
 5 Post Office Box 2405  
 6 Fairfax, Virginia 22031  
 7 Representing Kenneth and Barbara Leon.

8 and,

9 GLENN HUGH SILVER, ESQUIRE  
 10 Mackall, Mackall, Walker & Silver  
 11 4031 Chain Bridge Road  
 12 Fairfax, Virginia 22030  
 13 Representing W. Lowry Mann and Barbara  
 14 Mann.

15 For the Defendant:

16 KELLY R. DENNIS, ESQUIRE  
 17 Light & Harrison, P.C.  
 18 6849 Old Dominion Drive  
 19 Suite 410  
 20 McLean, Virginia 22101

21 C O N T E N T S

22 Argument by Counsel on Motion

Page 3

23 E X H I B I T S

None.



P R O C E E D I N G S

(The Court Reporter was sworn.)

THE COURT: All right. There are two cases here, but the issue appears to be the same with both cases; is that right?

MR. SILVER: Precisely, Your Honor.

THE COURT: All right. Fire away.

MR. DENNIS: Your Honor, in that regard, I am going to just argue it as if it was just one case. They are, as you said, identical; and essentially our position is very simple. Paragraph fifteen of the standard new homes sales agreement used by VMI, which is the builders rep, which I think you have in front of you in at least one of the files, and it should have been attached as Exhibit A in the bill of complaint.

MR. SILVER: If Your Honor please, I blew it up for you, and ---

MR. DENNIS: And I will confine my argument to that clause any way, and in fact the case turns on that clause, I think.

THE COURT: All right.

MR. DENNIS: It is our position that it is absolutely clear that when they contracted with the seller in



1 this case that they took the terms of that clause, and that  
2 they agreed to them, and notwithstanding the harsh result  
3 it may beget, and notwithstanding whether whether they have  
4 an independent tort of fraud, is the animal they seem to be  
5 shooting for in their bill of complaint, but their remedies  
6 that they seek are only declaratory, specific performance,  
7 and then of course, the damages with punitives.

8 But the language in fifteen, subparagraph  
9 left parens, small b, right parens, couldn't be any clearer.  
10 It even states in the parenthetical, down about what looks  
11 like to be the fourth line, whether or not the purchaser  
12 elects to terminate.

13 In other words, the purchaser could just  
14 walk away, and leave his deposit sitting there. The point we  
15 are making is that the parties knew going into this, with  
16 their eyes wide open, that if either party essentially did  
17 not, or even could not -- pardon me -- could not or even did  
18 not perform, that the remedies were as listed in paragraph fifteen.

19 And it specifically excludes, I think, the  
20 right to Lis pendens the property, and subsequently dismiss  
21 it in performance, and obviously as you can well imagine, what  
22 is going on here is that these properties are tied up by these  
23 gentlemen's Lis pendens, and their position is whether we sell,

1 and our position is, no, that it really borders on slander of  
2 title.

3 The cases that I have to discuss with you  
4 today are -- well, first of all, I did want to point out to  
5 the court that obviously one of the best responses that they  
6 may raise would be that our -- you know, that truly we are  
7 entitled to prove our breach, and then let the chips fall  
8 where they may.

9 Well, no, I think the whole intent of that  
10 paragraph is that, no, there is no need to do that. The  
11 seller can, if they feel that the sale has essentially come to  
12 an end, or at least if it is only in their mind, say look, I  
13 am not going to get myself into litigation, into a litigation  
14 position.

15 I am not going to get myself in any further  
16 problems with you all. Take your money back, and take a hike,  
17 and that is exactly what this clause says that he is allowed  
18 to do, and as Your Honor doesn't know, because all you are  
19 concerned with now is the pleadings right now, is if and when  
20 we have to file an answer, our client is going to cite breach,  
21 too, and it is precisely the reason why paragraph fifteen is  
22 in these contracts, because the seller in this case, without  
23 this kind of protection, every time he negotiates with a



1 purchaser at all, let alone signs a contract with him, holds  
2 himself up to having this property tied up by a Lis pendens  
3 and/or a suit for specific performance.

4 Now, there is a case that I think is really  
5 instructive in this area. It does not come out, at least on  
6 its face, in the favor of the Plaintiff in this case. I mean,  
7 the defendant in this case, Addicott Hills, but it is  
8 interesting, because I think the facts are really on all  
9 fours.

10 And it is the case of Haythe -- H-A-Y-T-H-E,  
11 versus May, and Judge Cacheris heard that case a few years ago  
12 when he was still here.

13 MR. SILVER: Can we have the cite on the  
14 case?

15 MR. DENNIS: I'm sorry. It is 223  
16 Virginia 359. In that case, Mr. May was going to sell his  
17 property to a gentleman by the name of Haythe, and Mr. Haythe  
18 and he got into essentially a squabble, and eventually Mr.  
19 May just threw up his hands, and essentially kind of like  
20 the Addicott Hills folks did here, and said, look, I am selling  
21 it to somebody else, and you do whatever you are going to do  
22 and take your best shot.

23 (Brief Pause.)





1 MR. DENNIS: Judge Cacheris at the trial  
2 decided that, you know, it's true, yes, that Mr. Haythe has  
3 this right, and probably ought to even have specific  
4 performance, but because of his living circumstances versus  
5 the living circumstances of the purchaser who came in  
6 subsequent to him, that he wasn't going to order that.

7 And the Supreme Court said, as you can  
8 imagine, no, that is not the way that you judge a case like  
9 that, Judge Cacheris. If you feel that he had a contract to  
10 purchase, and that he was essentially defaulted on without --  
11 you know, without reason or recourse, then he has a right to  
12 specific performance, and you can't use other factors to  
13 decide that.

14 The reason why I bring that case up is  
15 because I think it is the one that is on all fours, and  
16 obviously it goes against the arguments of Addicott Hills in  
17 this case, but I went a little bit further. I went down to  
18 the files, and I got out the contract that was involved there,  
19 and that contract has absolutely no liquidated damages provision  
20 in it, and it has absolutely no election in remedies  
21 provision in it.

22 The thing that I think is very crucial in  
23 this case is that not only does paragraph fifteen discuss



1 liquidated damages, but it also talks to an election of  
2 remedies by the parties.

3           The people, when they signed these  
4 contracts, the Leon demands are no different than anybody else,  
5 and they are agreeing that no other damages, rights, or  
6 remedies, even if they elect to terminate, and I am reading  
7 the last sentence, shall in any case be collectable,  
8 enforceable, or available to the purchaser, and the purchaser  
9 agrees to accept and take the said cash payment, which is  
10 essentially the return of the monies that are being held by  
11 the seller, in satisfaction of the -- in satisfaction of the  
12 lost sale, or the lost purchase.

13           It's really ambivalent with regard to  
14 who is in breach, or who is in default. It is a way that  
15 the seller took it upon himself, and the way that the  
16 purchaser agreed to, by -- he is charged with a duty of  
17 knowing what is in this document, and he placed his signature  
18 on it.

19           It is a way of avoiding litigation, and  
20 it is a way of avoiding tying up the title to these  
21 properties, especially in a market that we have today, which  
22 is very liquid, and obviously their argument in that regard  
23 is that, yes, this market is very liquid, and by the time my



1 client were to have gone to settlement, the price of the house  
2 had risen thirty or forty thousand dollars, and that is a  
3 horrible loss to them.

4 Well, you know, if we have to get to the  
5 defenses that would be raised by Addicott Hills, the point  
6 would be that they should have thought of that, you know, when  
7 they took on the things that were required by the seller.

8 But all I am saying is that the seller is  
9 reserving his right in this contract, to which the purchaser  
10 agreed, to essentially terminate and give back the monies, and  
11 go on, especially as I pointed out in this liquid market,  
12 where they've got to get in and out of these subdivisions  
13 very quickly, or lose all.

14 THE COURT: What good is the contract under  
15 those circumstances?

16 MR. DENNIS: Well, it is bilateral in that  
17 sense, Judge, if what you mean is what good does it do to the  
18 Leon's and the Mann's. My point would be what good does it  
19 do Addicott Hills, too, because they couldn't sue for specific  
20 performance either.

21 No matter how egregious the breach is by  
22 a prospective purchaser, they have to accept pursuant to this  
23 contract, they have to accept that deposit as a full and fair



1 adjustment of any damages they may incur, and that includes,  
2 which is exactly the case in at least one of these houses,  
3 that includes the situation where the purchaser has asked for  
4 extras, or additional contract items that are above and beyond  
5 the base price as they call it of the house, and the seller  
6 has gone ahead and put those into the house, and all of a  
7 sudden they walked away.

8 Well, you know, yes, it is true in a sense  
9 that it is a harsh remedy, but that brings me to my final  
10 point, and I know that you are not bound by what another  
11 Circuit Court Judge does, and certainly you are only bound by  
12 the Supreme Court of Virginia, and the Federal Courts that  
13 rule in that area, but this precise issue has come before  
14 Judge Penn already this year, and as he stated in his  
15 memorandum opinion, although Section 15b of the contract, which  
16 is the subject of this suit is harsh, such constituted the  
17 agreement of the parties, and the purchasers are left with  
18 their sole remedy, the return of the deposit.

19 They have contracted away any other rights  
20 and remedies. And it is absolutely clear that they have  
21 contracted away not only their rights in a sense of monetary  
22 damages, but they literally contracted away their remedy. Now,  
23 that brings me to the point that I think is very apparent here



1 in the lawsuit they filed. You know, their bill of complaint.  
2 Apparently, with regard to the Court's ancillary powers in  
3 the chancery case, to also adjudicate a law issue, they have  
4 accused our client of fraud, and seek money damages for that.

5 We don't deny that they have every right  
6 in this world to maintain a fraud action or any kind of tort  
7 action independent of -- an independent tort action, but they  
8 have no right to Lis pendens the property or seek specific  
9 performance. They gave that up in the contracting process,  
10 and there is no bearing here.

11 All they had to do was walk away from that  
12 table. They did not have to sign this contract. They could  
13 have asked to have this clause omitted, but they didn't, and  
14 in addition to that, I guarantee would have looked them right  
15 in the eye and said, no way am I getting rid of this  
16 paragraph. That is my only control that I have over the  
17 speed with which I move these units out there.

18 And, so I urge Your Honor to essentially  
19 follow the lead of Judge Penn, although I have to state in all  
20 fairness that that case is on appeal, and the attorneys on the  
21 other side did not agree with his ruling there, but I think  
22 it is the way that you have to read that clause. It is  
23 absolutely unequivocal what the purchasers are agreeing to



1 there, and although as Judge Penn said, the result is harsh,  
2 they are left with that; and then there is one other thing  
3 that I wanted to point out, and that is the case of Brown  
4 versus Friedburg, which is found at 127 Virginia 1, the first  
5 page there of that volume.

6 At issue there was a liquidated damages  
7 clause not unlike ours, except that it did not have any regard  
8 to the election of remedies question, but I say this because  
9 I anticipate the briefs that both of these gentlemen have  
10 brought with them here today.

11 What Brown, and what the Court, the Supreme  
12 Court of Virginia was saying in Brown essentially was that  
13 as long as these clauses are -- on page four of the case, it  
14 says that as long as these clauses are not a mere incident of  
15 the transaction, or also not merely to induce performance, or  
16 where it can be fairly inferred that either party might at his  
17 option repudiate the sale, and if that is clear to the  
18 purchaser, or to the party who is essentially seeking the  
19 specific performance, then they should be upheld, because  
20 that is the contractual right of both of these parties.

21 And, Your Honor, I have brought with me  
22 Judge Penn's memorandum opinion, the Haythe versus May case,  
23 and the Brown versus Friedberg cases that I have cited if you



1 would like to see them.

2 THE COURT: Mr. Dennis, let me ask you  
3 this question. If I read 15a, if the purchaser defaults or  
4 decides not to perform, the seller can terminate the contract  
5 and keep the purchasers money, right?

6 MR. DENNIS: That is correct.

7 THE COURT: Okay. In paragraph 15b, if the  
8 seller defaults, or decides not to go through with it, all the  
9 seller has to do is give the purchaser back the money; isn't  
10 that right?

11 MR. DENNIS: That is correct. Or, any sums  
12 of money held by them it says.

13 THE COURT: Right. Well, under the -- under  
14 the way this is structured, what is to preclude the defendant  
15 in this case from selling thirty or forty houses, and taking a  
16 deposit from each person. They start building the house, and  
17 they have had the use of these people's monies for a year, or  
18 six or seven months, or whatever, and whether they get interest  
19 on it or use it to continue the construction or whatever, and  
20 decide a half-year later, or a year later, whenever, that we  
21 are not going to go through with it, and here is your money  
22 back. Is that possible?

23 MR. DENNIS: I think that is correct, Your



1 Honor, but this is something that I think is a burgeoning area  
2 of the law, and primarily started as you can imagine on the  
3 West Coast.

4 Implicit in every contract, and especially  
5 in the restatement of contracts now, is the duty of good  
6 faith, and there are -- that would be an independent tort.  
7 In other words, if the only reason they did that was because  
8 they did not like the purchaser, or they just wanted to bilk  
9 the purchaser -- they wanted to get the additional amount of  
10 money that the house had increased just while it was being  
11 built -- then you are right.

12 That would be a separate and independent  
13 tort for which they could recover, but the key here is that  
14 they should not be allowed to tie up this property while they  
15 are pursuing this tort that they claim our client has  
16 permitted.

17 What I think is involved here is a real  
18 fine distinction between traditional real estate law, and what  
19 is a viable tort in a breach of a contract. Now, we don't deny  
20 that they have every right in this world to maintain a tort  
21 action and say exactly what you said. You did not deal in good  
22 faith, and in fact, you were fraudulently dealing with us,  
23 because you never intended to give us this project.





1           You wanted to use our deposit money, as  
2 Your Honor suggests, to get the project rolling, and then when  
3 you saw the amount of increase in these houses, you then went  
4 out and got new purchasers at the new level.

5           Well, if that turns out to be the case,  
6 which I submit the evidence probably would not show, then of  
7 course they have every right to recovery, and probably for  
8 thousands of dollars.

9           But they don't have a right, especially  
10 because of this clause, to tie that property up by a Lis  
11 pendens, and a suit for specific performance, which  
12 essentially has that house, as they know, and as Your Honor  
13 knows, sitting there just in limbo for as long as they keep  
14 this suit going, and admittedly, yes, you are right. I know if  
15 you are thinking as a settlement judge, that would put  
16 pressure on Addicott Hills to do something about the case,  
17 but that is not what they contracted for.

18           And quite frankly, since we are in equity,  
19 I don't think that is just. So, I think that is what is at  
20 issue here. Yes, they have the right to go after damages, and  
21 probably big damages if they can prove it, but they don't have  
22 the right to specifically enforce this agreement, because  
23 they contracted away that right, and for the very good reason



1 that I have just cited.

2 The builder or developer needs to get  
3 on, and he needs to get to another project, and if in fact he  
4 has violated the duty of good faith, and if in fact he has  
5 committed an actual fraud, then he will suffer for it. Thank  
6 you, Your Honor.

7 THE COURT: All right.

8 MR. SILVER: If Your Honor please, we have  
9 two memorandums of law here; one from Mr. Aunon's client, and  
10 one by my client, to submit to you. Would the court like to  
11 take a few minutes to read those? They are fairly short.

12 MR. DENNIS: I would just state for the  
13 record that I just received both of them this morning.

14 (Brief Pause.)

15 MR. DENNIS: That's when they were  
16 finished.

17 (Brief Pause.)

18 THE COURT: Go ahead, Mr. Silver.

19 MR. SILVER: Your Honor, what happened here  
20 is that my clients and Mr. Aunon's clients both contracted to  
21 buy these houses around February of 1986. They put down five  
22 thousand dollars apiece at that time. The deed of the  
23 subdivision was not even recorded by the builder until July of



1 1986, and a contract called for settlement on the houses in  
2 October. Now, it was perfectly obvious that those houses  
3 were not going to be finished by October, and the builder  
4 should have known that.

5 What is happening in this case, and there  
6 are two of us that this has happened to, is that during this  
7 period of time, from February of '86, when we bought the  
8 house for two hundred and ninety-one thousand dollars through  
9 today, there has been an increase in value.

10 They have it now listed for three hundred  
11 and fifty-five thousand dollars, and I have the things with  
12 me. They decided, you know, what can we do to make our profit,  
13 because we procrastinated, and we didn't get the deed of  
14 the subdivision recorded, and if we take a look at paragraph  
15 15b, we are going to breach our contract, and what we are  
16 going to do is give back the five thousand dollars, and we are  
17 done with it.

18 But they are coming into a court of equity,  
19 and saying, Chancellor, even though we are the one who  
20 breached, and that is all that is before the Court, they are  
21 the one who breached, even though we have done that, we are  
22 going to insist that you permit a forfeiture by the innocent  
23 purchasers, because the contract says that.



1           They are saying that paragraph 15b says  
2 that the only thing the purchaser can do, even though he is  
3 innocent, and I am no good and I have declared the default,  
4 is get liquidated damages of five thousand dollars, the five  
5 thousand dollar deposit.

6           The five thousand dollar deposit is not  
7 liquidated damages, Your Honor. It is liquidated damages the  
8 other way. The seller gets to keep five thousand dollars  
9 and it is liquidated damages to him, but to us, it is getting  
10 the return of our own property. We have not collected a single  
11 red penny that is damages. We collected back our own money.

12           But this case is even worse, in that  
13 in the contract, that when you purchase these houses, you have  
14 to -- if you want additions, you have to pay for them at the  
15 time, and that contract says that if this house does not go to  
16 settlement for any reason, no matter how justified, you don't  
17 get back the money you advanced for the options. That is not  
18 the deposit. That is money advanced for options.

19           If this court buys the argument of Addicott  
20 Hills, Addicott Hills gets several things. One, they get  
21 to sell this house, which is still not complete by the way.  
22 Two, they get to keep the thirteen thousand dollars -- the  
23 thirteen thousand, eight hundred dollars in option money.



1 Three, they get all of the appreciation  
2 caused by their delay in performance. What does my client get?  
3 They get back their five thousand dollars, and that is it.  
4 That is not liquidated damages. They are getting back their  
5 own money.

6 Equity, Your Honor, and a forfeiture, and  
7 it also provides a remedy for every wrong. This contract, if  
8 read to be what is in here, does not provide a remedy for a  
9 wrong. The seller is wrong, and he is the one that breached,  
10 and what do my clients get back? Their five thousand dollars,  
11 and told to take a hike.

12 That is not what equity is all about, Your  
13 Honor. Their reading of this contract, if this clause is  
14 enforceable, says I can commit a fraud, and that is what we  
15 think they did here, because there are two of us, and there  
16 may be others lurking out there, and all you can do is get  
17 your five thousand dollars back, and not liquidated damages  
18 at all.

19 Yet, they want us to suffer the forfeiture.  
20 They want us to suffer all the consequences, and all the loss  
21 of their breach of the contract, and that is not what equity  
22 is about, Your Honor. They argue that if we were in default  
23 all they could do would be to keep the deposit. That is not



1 true, Your Honor.

2 They keep the five thousand dollars, and  
3 they keep the thirteen thousand, eight hundred dollars, but  
4 if you look at 15a, they also have the right to specific  
5 performance.

6 All paragraph 15a says is that we can get  
7 liquidated damages, but all of the case law says that unless  
8 it says it is exclusive, you still can go on the alternative  
9 contract and go for specific performance. Every case that we  
10 have found has said that, and had that been what paragraph b  
11 said, this case would be easy, Your Honor.

12 We would have had ten thousand cases to give  
13 to you then. This is a very unusual situation, where it is  
14 the seller who has breached, and not the purchaser, and we  
15 want this house. We have elected not to terminate this  
16 contract. We want this house, and we are entitled to it. We  
17 have done everything that we are supposed to do, and that is  
18 what the pleadings before the court are.

19 And under Pleas in bar, under the rules  
20 of equitable pleading and practice, they are limited to what  
21 they have said in their Plea in bar, and their only defenses,  
22 even though we are in default, even though the seller is in  
23 default, paragraph 15b says there is nothing you can do about



1 it. We can breach this contract, and we can commit fraud, and  
2 we can do anything we want, and all you can do is return to  
3 the people their five thousand dollars, and that is liquidated  
4 damages, and it is not because it is our own money.

5 I think the Court hit the nail on the head  
6 on what was happening here. They stand to gain a hundred  
7 thousand dollars, and we stand to get our five thousand dollars  
8 back, and lose the thirteen thousand, eight hundred, and lose  
9 our house which we have been waiting for, Your Honor, for over  
10 a year now, and lose whatever appreciation there is in that.

11 That is not equity, Your Honor. The Haythe  
12 case I haven't read, and I think it talks about when specific  
13 performance can be decreed, and it is obvious it can be  
14 decreed in this type of case. The case that was heard by  
15 Judge Penn, I do not know much about that. I don't know  
16 whether it had the same -- the initial contract, paragraph  
17 15b, obviously is there, but as to whether they were going to  
18 suffer the additional loss of thirteen thousand, eight hundred  
19 dollars, which was the extras, because no matter how justified,  
20 I don't know if that was in there, and I don't know what was  
21 argued in that case, and what evidence was presented, and  
22 whether it was done on a Plea in bar, or anything else, but  
23 I do submit to Your Honor that this case is very important.



1           This case is telling builders to put in  
2 your contract what you want, and we are going to enforce it,  
3 and it doesn't matter that you are the bad guys, and you have  
4 done wrong, we are going to enforce it, and this court, as a  
5 court of equity, ought to say, no.

6           We are going to enforce those provisions  
7 that are enforceable, and paragraph 15b not only treats a  
8 forfeiture, but it creates a penalty. It penalizes us, the  
9 innocent person.

10           And as a penalty clause, it cannot be  
11 enforced. Your Honor, if you were to rule their way, and give  
12 us a wrong without a remedy, we end up with zip. Your Honor,  
13 I ask you to throw out paragraph 15b, and compel specific  
14 performance.

15           We are ready, able, and willing, and have  
16 been, and it is perfectly obvious what they are doing here,  
17 and they have done it to my client, and they have done it to  
18 his client. They want the extra hundred thousand dollars  
19 appreciation.

20           THE COURT: Mr. Aunon.

21           MR. AUNON: Your Honor, the facts of my  
22 client's case are exactly the same, and I join in the argument  
23 of Mr. Silver.





1 THE COURT: All right. Thank you.

2 MR. DENNIS: Mr. Aunon told me he was  
3 going to do that. Your Honor, and I accept that, obviously,  
4 but the first thing, Your Honor, is -- and I touched on this  
5 earlier, we are not admitting that we breached, and I think  
6 it is unfair for them to stand there and say that is the way  
7 that the case is going to come out.

8 What this clause stands for the proposition  
9 of, is that there is no need to get to that issue. The  
10 raison detra (Phonetic), is you will, of these kinds of  
11 clauses, is the right to pay the deposit back, and say, you  
12 know, I think you are at fault, but it is not worth my time  
13 and resources to go to court and prove it.

14 Or it is certainly not worth my time and  
15 resources to get tied up defending a suit like this. So, what  
16 I am going to do is say here is your deposit back, and I will  
17 go with business. It is only because of the way that this  
18 market is, Your Honor, that they are able to make some of  
19 these arguments, and say that it is fraud on its face.

20 Well, you know, fraud has to be proven,  
21 and there are nine elements to fraud, and I think as I said  
22 before, that I think it is really unfair to stand here and  
23 tell the court that is what they are going to be able to prove.



1 All I am saying is that is precisely why  
2 these clauses are inserted in there, and that the purchaser  
3 accepts by his signature, is to avoid exactly what they want  
4 you to do.

5 The next point I wanted to touch on in  
6 rebuttal, Your Honor, is that as Mr. Silver indicates, it is  
7 the only thing that the purchaser can do, is to accept his  
8 money back and that is the end of that. Well, that is not  
9 true. As I told you in my opening argument, they have every  
10 right to sue us in tort, and to sue for fraud if they think  
11 they can prove that.

12 As I said, I don't think so, but they are  
13 not without a remedy, and don't let them try to kid you that  
14 they are, because they have a very valid legal remedy, and  
15 they ought not to be in equity, especially in the face of a  
16 clause like this.

17 The Plea in bar, I have to take issue with  
18 what Mr. Silver said. What we said in the Plea in bar was  
19 and is right there in black and white, and it is not what Mr.  
20 Silver said I said, and it is right there for you to read,  
21 and it says essentially that there exists an election of  
22 remedies, et cetera, et cetera. I am not so much concerned  
23 about the liquidated damages aspect of that clause.



1 I, quite frankly, might agree with these  
2 gentlemen given this -- given the current scenario of the way  
3 this works, that this is -- well, that the liquidated damages  
4 aspect of it does not fly, but these people also chose to sign  
5 a contract that contained an election of remedies clause in  
6 there, and that is without regard to whether it operates as a  
7 forfeiture or not.

8 They chose in the contracting process to  
9 agree to these terms. Our client, if they were asked to  
10 delete those would have said, no. End of the deal. Right then  
11 it would have been the end of the deal, but, no, they took  
12 it, and they had stars in their eyes, and just like my client  
13 had stars in his eyes, and they sat down at that table and  
14 they agreed to these terms.

15 The Haythe v. May case, Mr. Silver is  
16 absolutely right. I would only point out to you that in that  
17 case that there was no such clause in that contract in that  
18 case. There is no election of remedies in that case, and no  
19 liquidated damages provisions whatsoever in that case. So,  
20 the Judge was not presented with that kind of dilemma. So,  
21 Haythe v. May is not controlling.

22 The reason I brought it up is because if  
23 you look at the case it is on all fours, but it is not on all



1 fours with regard to that one thing.

2 And then with regard to what happened down  
3 in Loudoun County, all I can say is, yes, yes, yes. It was a  
4 Plea in bar, and it was before any other pleadings whatsoever  
5 were filed, and it was precisely the same thing, because I  
6 doubt you will find a pocket of land around here where the  
7 prices have not gone up fifty thousand dollars in the last  
8 year or two.

9 THE COURT: Regardless of whether the  
10 property escalates in value, the Court finds that paragraph  
11 fifteen to be unconscionable. Mr. -- you know, I can't bring  
12 myself to believe that the Supreme Court of Virginia would  
13 permit anyone, a builder or anybody else, to be able to either  
14 not comply or not perform a contract such as this, with what  
15 I will refer to as impunity.

16 As Mr. Silver suggests, it is not just a  
17 matter of liquidated damages. This actually would and could  
18 result in a penalty to the purchasers. So, the court in each  
19 case, is going to deny the Plea in bar, and overrule it.

20 MR. DENNIS: Your Honor, how long do I have  
21 to file other responsive pleadings? Is twenty-one days  
22 acceptable?

23 MR. SILVER: If Your Honor please, I think



1 the rule on Pleas in bar is -- he is saying to the court that  
2 there is one issue in this case, and that is the issue of law  
3 that has to be decided, and I think once that is done, I think  
4 the case is over with, as far as we are entitled to specific  
5 performance.

6 I don't think he can come in now and plead  
7 other matters.

8 THE COURT: Oh, yeah, I think he has a  
9 right to file responsive pleadings. The defendant was served  
10 on the 13th of April.

11 MR. SILVER: Your Honor, if he needs  
12 twenty-one days, he can have it.

13 THE COURT: , All right. Put twenty-one  
14 days in the order.

15 MR. DENNIS: Is Mr. Aunon and Mr. Silver  
16 to prepare the order?

17 THE COURT: Yes, sir.

18 (Whereupon, at approximately 3:09 o'clock  
19 p.m., the hearing was concluded.)  
20  
21  
22  
23



CERTIFICATE OF COURT REPORTER

I, PAUL S. INTRAVIA, a Verbatim Court Reporter, do hereby certify that I took the notes of the foregoing hearing by Stenomask and reduced the same to typewriting; that the foregoing is a true record of said hearing to the best of my knowledge and ability; that I am neither related to nor employed by any attorney or counsel employed by the parties thereto; nor financially or otherwise interested in the action.

Paula S. [Signature]

PAUL S. INTRAVIA  
Court Reporter



VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

1987 MAY 29 AM 9:49  
WARREN F. BARRY  
CLERK OF THE CIRCUIT COURT  
OF FAIRFAX COUNTY, VA.

W. LOWRY MANN III

and

BARBARA C. MANN

Complainants,

v.

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION


Defendant.

NOTICE AND MOTION

PLEASE TAKE NOTICE that on the 5th day of June, 1987, at 10 a.m., or as soon thereafter as counsel may be heard, the undersigned will move this Honorable Court, and hereby so moves, that the court RECONSIDER it's decision of May 22, 1987, denying the Defendant's Plea in Bar and will rely for support upon it's Memorandum of Points and Authorities to be submitted prior thereto.

Respectfully submitted,

ADDICOTT HILLS CORPORATION,  
et al.  
By Counsel

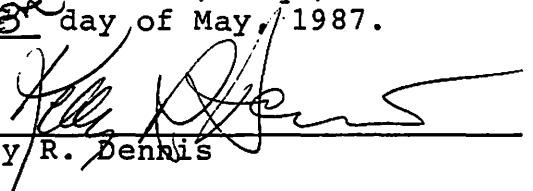
  
Kelly R. Dennis, Esq.  
Light & Harrison, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751

1206/12/ncy  
5/28/87(1)

called attorney to 1- will call back  
BEJ - \* copy called to 2- will R-notice  
C.R.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first-class postage prepaid to Jose Aunon, Esq., 9701 Main Street, Fairfax, Virginia 22031 this 28<sup>th</sup> day of May, 1987.

  
\_\_\_\_\_  
Kelly R. Dennis



V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN III )

and )

BARBARA C. MANN )

Complainants. )

v. )

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION )

Defendant )

SUMMARY MEMORANDUM

ISSUE NUMBER 1

Is The Plaintiffs' Remedy At Law Adequate, Thereby  
Precluding Specific Performance In Equity Of The Land Sale  
Contract?

As one authority has stated:

The subject matter most commonly involved in actions for specific performance is that of contracts for the sale of land or contracts which otherwise involve interests in real estate. The reason for this lies not so much in any tendency of equity to distinguish between kinds of property as in the fact that the remedy at law is less likely to be adequate in the case of land than in the case of other property, for if the proper elements of jurisdiction are present, equity impartially grants specific performance of any contract, regardless of whether it involves real or personal property. The most important aspect of land insofar as equity jurisdiction for specific performance is concerned, is that no piece of land has its counterpart anywhere else, and is impossible of duplication by the expenditure of any amount of money.

The courts assume, in almost every case in which action is brought to enforce specific performance of a contract for the sale of land or an interest therein, that money damages do not constitute an adequate remedy for the breach of such a contract, and take jurisdiction without the necessity of an actual showing that that is the case. This is said to be true in actions where land is the subject matter of the agreement, the jurisdiction of equity to grant specific

performance does not depend upon the existence of special facts showing the inadequacy of a legal remedy in the particular case. This it is said that whenever a contract concerning real property is in its nature and incidence entirely unobjectionable and possesses none of the features which might call for the discretion of the court, it is as much a matter of course for a court of equity to decree specific performance of the contract as it is for a court of law to give damages for its breach, and under such circumstances, equity will enforce the contract as a matter of right, where there is nothing connected with the contract making its enforcement inequitable, irrespective of the plaintiff's right to recover damages for its breach.

71 Am. Jur. 2d "Specific Performance" Section 112 at 143-44 (1973) (footnotes omitted).

Similarly, the authors of the Restatement (Second) of Contracts state:

Contracts for the sale of land have traditionally been accorded a special place in the law of specific performance. A specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money. Furthermore, the value of land is to some extent speculative. Damages have therefore been regarded as inadequate to enforce a duty to transfer an interest in land, even if it is less than a fee simple.

Restatement (Second of Contracts Section 360 comment (e) (1981); see also Belin v. Stikeleather, 232 S.C. 116, 101 S.E.2d 185, 188 (1957) (where the court granted specific performance to a purchaser of land, and noted that "It is elementary that the jurisdiction of equity to grant specific performance of an agreement of this kind does not depend upon the inadequacy of the legal remedy in the particular case").

The inadequacy of the legal remedy to enforce a contract for the sale of land has been assumed in many cases where no objection has been made thereto, and specific performance of the contract follows as a matter of course. See Annot., "Specific Performance As Matter of Right," 65 A.L.R. 7, 39 (1930) (citing

in part Davis v. Bewry, 134 Va. 322, 114 S.E. 773 (1923)); Mafney v. Barnes, 116 Va. 713, 82 S.E. 801 (1914); Croghan v. Worthington Hardware Co., 115 Va. 497, 79 S.E. 1039 (1913)).

We did not locate Virginia authority explicitly stating that the damages available at law for breach of contract were inadequate in cases of contracts to convey real estate. However, there is Virginia authority which states that where a contract for the sale of realty is unobjectionable, it is as much a matter of course for a court of equity to decree specific performance of it as it is for a court of law to award damages for its breach. Sims v. Nideffor, 203 Va. 749, 127 S.E. 2d 85 (1962); Pond v. Fisher, 201 Va. 542 112 S.E.2d 147 (1960); Bond v. Crawford, 193 Va. 437, 69 S.E.2d 470 (1952); Walker v. Henderson, 151 Va. 913, 145 S.E. 311 (1928).

## ISSUE NUMBER 2

Is The Plaintiff Barred From The Remedy Of Specific Performance By The Contract Provision Which Purports To Limit The Plaintiffs' Remedies To Return Of His Deposit?

It is recognized that a liquidated damages clause will not be enforced if it is in fact a penalty. See generally 5 S. Williston, A Treatise on the Law of Contracts Section 776 (W. Jaeger 3d ed. 1961). As one court has stated:

Where the parties do not undertake to estimate damages in advance of the breach and instead provide for both a forfeiture [penalty] plus actual damages, the amount, even though called liquidated damages, is instead an unenforceable penalty. See Foote & Davies Co. v. Malony, 115 Ga. 985, 42 S.E. 413 (1902).

Southeastern Land Fund v. Real Estate World, Inc., 237 Ga. 227, 227 S.E.2d 340, 342 (1976) (in an action by a seller against a buyer for breach of a real estate contract, the court held that

the liquidated damages provisions could not be enforced because they were a penalty).

In deciding whether a contract provision is enforceable as liquidated damages, the court makes a tripartite inquiry to determine if the following factors are present:

"First, the injury caused by the breach must be difficult or impossible of accurate estimation; second, the parties must intend to provide for damages rather than for a penalty; and third, the sum stipulated must be a reasonable pre-estimate of the probable loss." (footnotes omitted)

The Virginia Supreme Court has stated that

[a] court of equity will neither enforce a penalty or forfeiture, nor permit it to be enforced in a court of law. It will go even further than this. It will not permit a party, by the voluntary payment of the agreed penalty, to defeat the enforcement of the alternative contract..... [I]f the damages for the breach of contract have been liquidated by the parties to the contract (that is, ascertained and agreed upon), that fact, so far from inviting the assistance of a court of equity, is sufficient to repel it. Indeed, this must of necessity be so, for, as the jurisdiction of the court to enforce contracts specifically rests upon the insufficiency of damages as a redress or remedy for failure to comply with a contract, the very foundation of jurisdiction seem wanting in those cases where the parties themselves have otherwise determined, and have fixed a money value in the form of liquidated damages upon the injury sustained by its breach. In this view is found an explanation of the leaning shown by courts of equity, in doubtful cases, to construe such agreements as we are here considering as creating a penalty or forfeiture rather than liquidated damages. For, if it be determined that it is but liquidated damages, the jurisdiction of a court of equity is at an end, but if it be construed as a forfeiture or penalty, then it affords no obstruction to the interpretation of the court of equity, because it will prohibit either the enforcement or the voluntary payment of the penalty or forfeiture, and will compel the performance of the alternative contract if a proper case be made. Courts of equity, therefore, always strongly incline to that construction which declares it to be a forfeiture or penalty rather than liquidated damages.

Ewing v. Litchfield, 91 Va. 575, 22 S.E. 362, 363-64 (1895)

(holding that equity would not enforce the payment of a liquidated damages provision).

Furthermore, as professor Williston notes, "In spite of the language of cases regarding the intention of the parties, there is little doubt that a sum named as liquidated damages in order to be given effect must be reasonable in amount." 5 S.

Williston, supra, Section 779 at 695 (footnote omitted).

Similarly, it is established:

Where the court is considering either the indefiniteness and uncertainty of probable damages or the reasonableness of the pre-estimate of probable damages in its attempt to determine whether a clause is one stating liquidated damages or a penalty, the court will, as a general rule, view the situation as of the time the parties entered into the contract. However, a stipulated sum may be held to be one for liquidated damages (1) where the damages which the parties might reasonably anticipate are uncertain or difficult to ascertain and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages, the court necessarily must look at the situation, not at the time that the contract was entered into, but at the time of the breach. If the stipulated sum is grossly disproportionate to the actual damages, the sum will be held to be a penalty. This gross disproportion may result from the sum stipulated being either too high or too low.

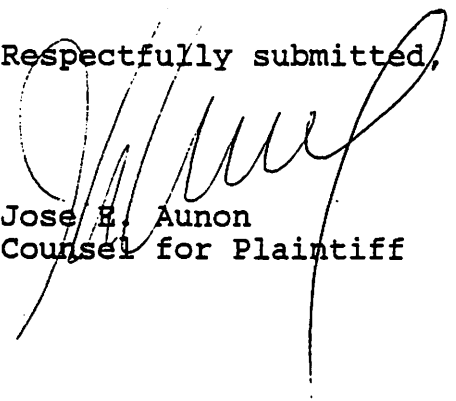
22 Am. Jur. 2d "Damages" Section 221 at 307, 308 (1965)

(footnotes omitted; emphasis added).

In the case at bar the liquidated damages clause is not valid because it was not a reasonable estimation of the Buyers' damages. Indeed the clause really provides for no damages to the Buyers in the event Sellers breach. In fact, it allows the Defendant to benefit from his breach by not only keeping the deposit, but also to keep the \$13,000.00 in improvements already paid by the Plaintiff. Even without the clause, the Buyers would have been entitled to the return of their deposit on the Sellers'

breach, see 19 Michie's Jur. Va. & W.Va. "Vendor and Purchaser" Section 106 (1979). Consequently, the liquidated damages clause is invalid and specific performance may be granted. See 71 Am. Jur. 2d, supra, Section 57.

Respectfully submitted,



Jose E. Aunon  
Counsel for Plaintiff

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W LOWRY MANN, III )

and )

BARBARA C. MANN )

Complainants )

v. )

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION )

Defendant )

O R D E R

THIS CAUSE came on this 22nd day of May, 1987 upon the Bill of Complaint, the Plea In Bar and all other papers formally filed herein and all parties having been represented by counsel and counsel having argued and it appearing to the Court that Paragraph 15(b) of the Contract of Sale dated March 1, 1986, which Contract is annexed to the Plea In Bar is unconscionable and therefore unenforcible by reason that it permits the Seller to breach the Contract with impunity resulting in a forfeiture and a penalty to the Purchaser who is not in default and because the return of the Purchaser's own money which is the deposit, does not constitute liquidated damages, it is, therefore,

~~ADJUDGED, ORDERED AND DECREED that Paragraph 15(b) of the Contract of Sale dated March 1, 1986 is unconscionable and unenforcible and therefore stricken from the Contract; and it is further~~

ADJUDGED, ORDERED AND DECREED that the Plea In Bar is denied; and it is further

ADJUDGED, ORDERED AND DECREED that Defendant shall have twenty-one (21) days from May 22, 1987 to file any other appropriate pleadings.

ENTERED this 12th day of June, 1987.

  
QUINLAN HANCOCK,  
JUDGE OF THE CIRCUIT COURT

SEEN  ~~AND~~ ~~FILED~~ ~~IN~~ ~~THE~~ ~~CLERK'S~~ ~~OFFICE~~ ~~OF~~ ~~THE~~ ~~CIRCUIT~~ ~~COURT~~ ~~IN~~ ~~FAIRFAX~~ ~~COUNTY~~ ~~VA~~ ~~ON~~ ~~JUNE~~ ~~12~~ ~~1987~~

JOSE E. AUNON  
Counsel for Complainants  
9701 Main Street  
Fairfax, Virginia 22030  
(703) 323-1700

SEEN  ~~AND~~ ~~FILED~~ ~~IN~~ ~~THE~~ ~~CLERK'S~~ ~~OFFICE~~ ~~OF~~ ~~THE~~ ~~CIRCUIT~~ ~~COURT~~ ~~IN~~ ~~FAIRFAX~~ ~~COUNTY~~ ~~VA~~ ~~ON~~ ~~JUNE~~ ~~12~~ ~~1987~~

LIGHT & HARRISON  
P.O. Box 6625  
6849 Old Dominion Drive, #410  
McLean, Virginia 22106

By: 

Kelly R. Dennis  
Counsel for Defendant



V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN, III,

and

BARBARA C. MANN,

Complainants,

v.

ADDICOTT HILLS CORPORATION

Defendant.

FILED  
JUL 16 1987  
CLERK OF THE CIRCUIT COURT  
FAIRFAX COUNTY, VA.

IN CHANCERY NO. 101273

ANSWER AND GROUNDS OF DEFENSE

COMES NOW your Defendant and, as it's Answer and Grounds of Defense in the above-styled cause, avers as follows:

FIRST DEFENSE

Your Complainants are in pari delicto with respect to the Defendant.

SECOND DEFENSE

Your Complainants have an adequate remedy at law in money damages.

THIRD DEFENSE

Your Complainants are estopped from making a contract claim under the contract.

FOURTH DEFENSE

Your Complainants have failed to state a claim upon which relief can be granted.

ANSWER TO COUNT I

COMES NOW your Defendant, for it's Answer to Count I of the Complainant's Bill, states in correspondingly numbered paragraphs as follows:

1. Your Defendant admits all of Paragraph 1 with the exception that your Defendant states that it never received any monies from your Complainants with the exception of those escrowed funds to be held in anticipation of settlement on the property in question.

2. Your Defendant admits that the original target date for construction completion was November, 1986; however, this was not promised and settlement was to take place at a reasonable time after construction.

3. Defendant denies that Complainants are ready, willing and able to perform their obligations under the contract and state, further, the Complainants have already breached the contract between the parties as early as November, 1986 by failing to list their present dwellings and/or rental properties owned by them as required by the contract.

4. Defendant denies that it notified the Complainants that it would refuse to perform it's obligations. Rather, Defendant gave notice to Complainants of their breach under the agreement well in advance of completion of the home as well as any scheduled settlement.

5. Defendant admits Paragraph 5.

6. Defendant denies that the real property which is the subject matter of the contract is at all unique. Further, the damages claimed by the Complainants are easily ascertainable and the Complainants have an adequate remedy at law and in fact are precluded by the terms of the contract from maintaining any equitable or legal action other than an action ex contractu.

ANSWER TO COUNT II

COMES NOW your Defendant, and as it's answer to Count II of the Complainant's Bill, states in correspondingly numbered paragraphs as follows:

7.-10. Defendant denies each and every allegation contained in Paragraph 6 through 10 of the Complainant's Bill and, further, demands a Bill of Particulars, Complainant's Bill failing to state a claim for which relief can be granted.

CROSS-BILL OF COMPLAINT ✓

COMES NOW your Defendant and makes the following claims against the Complainants as and for it's Cross-Bill of Complaint against them suing them for the following:

1. On or about the 1st day of March, 1986, the Defendant contracted with the Complainants for the sale of Lot 11, Union Farm Subdivision, also known as 9105 Peartree Landing in that certain Contract Agreement and all of its addenda whether made simultaneously or subsequent to that Agreement.

2. In relevant part, the Agreement specified that, upon completion of framing of the house, the Complainants would list their present residences for sale with a reputable broker in order to insure your Defendant that their ability to purchase the dwelling in question would not be impaired.

3. On or about January 13, 1987, your Complainants were notified of the completion of the framing of the dwelling and reminded that they must list their home. In addition to this, orally, your Complainants were notified numerous times of this requirement and reminded that they were required to list their present residences. Despite these repeated warnings, your Complainants refused and failed to do this.

4. As a result of your Complainant's breach of the Agreement, they were notified, on January 30, 1987, that they were, in fact, in breach and their deposit monies were returned, less any "options" monies which were not returnable.

5. Your Complainants, after already being notified that they were in breach, and knowing, presumptively, of the contractual provisions against their maintaining a legal or equitable action with regard to the property in questions, nonetheless on April 3, 1987 filed among the Land Records of Fairfax County a lis pendens against the property thus placing a cloud upon the title of said property and making it impossible to in any way convey, encumber, or hypothecate said property.

6. The actions of your Complainants were intentional, in bad faith, and solely to gain an advantage in their civil action against your Defendant. As such, the filing of said lis pendens constituted a slander of title.


7. As a direct and proximate result of your Complainant's actions, your Defendant has suffered monetary damages of approximately \$50,000.00 including unnecessary legal costs to maintain construction draws, permanent loans, and attorney's fees, costs, and related expenses, to that financing.

WHEREFORE, your Defendant having fully answered the Complainant's averments, your Defendant respectfully request that the Complainant's Bill be DISMISSED; and, further,

YOUR DEFENDANT requests judgment on it's Cross-Bill for so much damage as is proven at trial but not less than \$50,000.00, including it's attorney's fees and costs related to the cloud upon title created by the Complainants and for pursuant of this cause.

Respectfully submitted,

ADDICOTT HILLS CORPORATION  
By Counsel

  
\_\_\_\_\_  
Kelly R. Dennis  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751  
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand-delivered to Jose Aunon, 9701 Main Street, Fairfax, Virginia 22031 this 16th day of June, 1987.

  
\_\_\_\_\_  
Kelly R. Dennis

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN  
BARBARA MANN

Plaintiffs

v.

ADDICOTT HILLS CORPORATION

Defendant

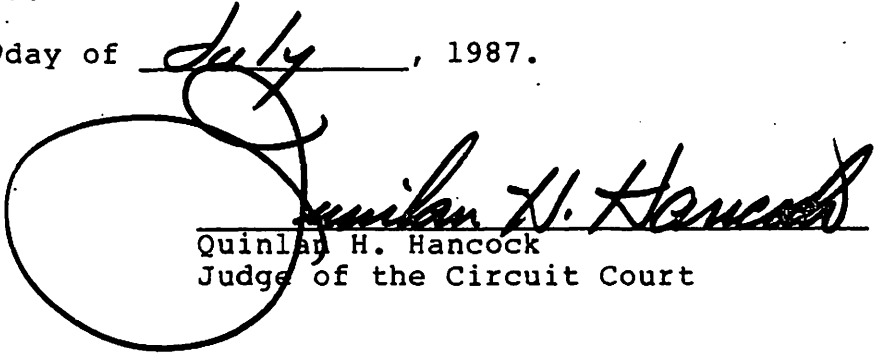
IN CHANCERY NO. 101<sup>273</sup>~~103~~

DECREE

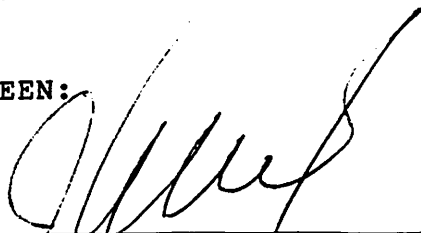
THIS CAUSE came on this 12th day of June, 1987 upon the Defendant's motion for reconsideration of the decision of this Court on May 22, 1987 as set forth in a Decree entered on June 12, 1987 and all parties having been represented by counsel and counsel for the Defendant having argued that paragraph 15(b) of the contract in issue was not unconscionable and having further argued that paragraph 15(b) of the contract, even if unconscionable, was still unenforcible to the extent that it was an election of remedies and that, therefore, an action for specific performance could not be maintained and it appearing to the Court that its initial decision embodied in the Decree entered June 12, 1987 was correct, it is therefore

ORDERED AND DECREED that the motion for reconsideration be and the same hereby is denied.

ENTERED this 12th day of July, 1987.

  
Quinlan H. Hancock  
Judge of the Circuit Court

SEEN:




---

Jose E. Aunon  
Counsel for Complainants  
9701 Main Street  
P.O. Box 410  
Fairfax, Virginia 22030  
(703) 323-1700

LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P.O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751

By:



---

Kelly R. Dennis  
Counsel for Defendant

DIRECTED TO

FAX COUNTY

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Complainants,

IN CHANCERY NO. 101273

Defendant.

COMES NOW, the Defendant, by counsel, and states the following  
Additional Affirmative Defenses:

2. The Bill of Complaint fails because there is no contract therefore violates the statute of frauds.

3. The Court has ruled that Paragraph 15(b) of the Contract is unconscionable and therefore not enforceable by the Seller, Addicott Hills Corporation, and therefore because there is no severability provision, the contract is null and void.

4. The Complainants are in first breach and therefore are not entitled to any rights or remedies under the Contract.

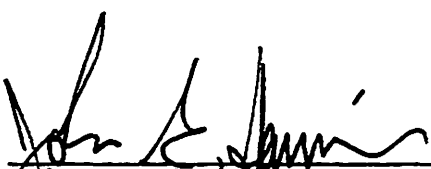
5. The Contract was properly terminated by the Defendant as a



result of the Complainants first breach.

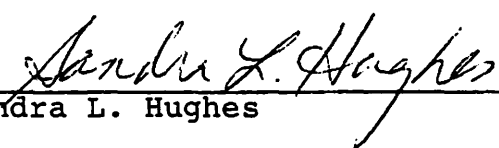
Respectfully submitted,

ADDICOTT HILLS CORPORATION  
By Counsel

  
\_\_\_\_\_  
John E. Harrison  
Jack L. Wuerker  
Sandra L. Hughes  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
P. O. Box 6625  
McLean, Virginia 22101  
(703)356-9751  
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first-class, postage prepaid to the offices of Jose E. Aunon, Esq., Counsel for Complainants, 9701 Main Street, Fairfax, Virginia 22031 this 12<sup>th</sup> day of October, 1987.

  
\_\_\_\_\_  
Sandra L. Hughes

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN, III and )  
BARBARA MANN, )  
 )  
Complainants, )  
 )  
v. )  
 )  
ADDICOTT HILLS CORPORATION, )  
 )  
Defendant. )

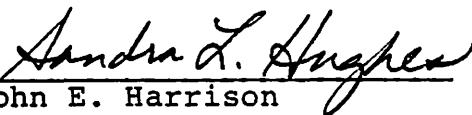
IN CHANCERY NO. 101273

NOTICE AND MOTION

PLEASE TAKE NOTICE that on October 30, 1987, at 10 a.m., or as soon thereafter as counsel may be heard, the undersigned will move this Honorable Court, and hereby so moves, this Honorable Court to grant Summary Judgment on the Bill of Complaint on the above-referenced matter.

Respectfully submitted,

ADDICOTT HILLS CORPORATION  
By Counsel



John E. Harrison  
Jack L. Wuerker  
Sandra L. Hughes  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751  
Counsel for Defendant

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed, first-class, postage prepaid to Jose E. Aunon, Esq., 9701 Main Street, P. O. Box 2405, Fairfax, Virginia 22031 on this 20<sup>th</sup> day of October, 1987.

  
Sandra L. Hughes

V I R G I N I A :

OCT 26 1987

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN et al

WARREN E. LARRY  
Clerk of the Circuit Court  
of Fairfax County, Va.

4:20 P.M.

Complainants,

v.

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION

Defendant

## RESPONSE TO REQUESTS FOR ADMISSIONS

1. Denied. A listing agreement was prepared and submitted to the defendant on January 21, 1987.
2. Admitted. It is a true copy of one of the listing agreements. There were other listing agreements.
3. Denied. There was only one telephone conversation on or about the first week of January. She stated that the builder wanted us to put our house on the market. We asked for a firm delivery date of the new house but she could not give us one.
4. Admitted.
5. Admitted.
6. Denied. Same as number 3 above.
7. Admitted.
8. Denied.
9. Denied.
10. Admitted. We were under no obligation to do so.
11. Admitted. We were under no obligation to do so.
12. Denied. We were notified of the framing of the house by letter dated January 13, 1987 signed by Sandra K. Lindsay. On January 21, 1987 a listing agreement was submitted.

13. Admitted. We were under no obligation to do so.
14. Denied.
15. Admitted.
16. Admitted.
17. Admitted.
18. Admitted.
19. Admitted.
20. Admitted.
21. Denied. This provision was waived by the defendant by his failure to act within the time constraints of the contract.
22. Denied. Our Attorney filed the Lis Pendens on our behalf. The document speaks for itself.
23. Denied. The purpose of the Lis Pendens is to give public notice that we intended to protect our interest in the property.
24. Denied. The document speaks for itself.
25. Denied.
26. Denied. Once the contract was breached by the Defendant by his failure to deliver the house on or before November, 1986, the parties modified the agreement by acquiescence.
27. Denied. We cannot properly answer this request due to the fact that we have not been able to inspect the house.
28. Denied. We were advised by Mutual Mortgage Corporation that we were qualified. We are ready, willing and able to perform.
29. Denied. Purchaser is ready, willing and able to perform the contract assuming the seller complies with all the terms of said contract.

30. Denied. There is a listing dated February 2, 1987 and another listing agreement dated March 1, 1987.
31. Admitted.
32. Admitted.
33. Denied. We read the contract and thought we understood it, but after talking to our Attorney, we found that we did not.
34. Denied. See number 33 above. We agreed to the terms and conditions of the contract.
35. Admitted.
36. Admitted.
37. Denied. This is a true copy of the contract. There were various addendums to it.
38. Denied. Same as number 37.
39. Denied. We were notified that the agreement was ratified and we were not advised of any changes. There are some changes in Exhibit "E". It is different than the one executed by us. We do not know when the changes were made and never received a ratified copy of this addendum.
40. Denied. This is an addendum to the contract that is identified herein as Exhibit "D".
41. Denied. Same as number 40.
42. Denied. Same as number 40.
43. Denied. Same as number 40.
44. Denied. We can not answer this request. Exhibit "J" was not attached to the request for admissions.

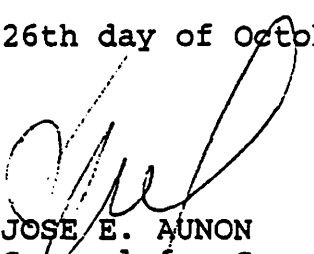
W. LOWRY MANN  
BARBARA C. MANN

BY

COUNSEL

CERTIFICATE OF HAND-DELIVERY

I certify that the original of this Response was hand-delivered to John Harrison, Esquire, Counsel for Defendant, at 6849 Old Dominion Drive, Suite 410, McLean, Virginia 22101, this 26th day of October, 1987.

  
JOSE E. AUNON  
Counsel for Complainants  
P.O. Box 2405  
Fairfax, Virginia 22031  
Telephone (703) 323-1700

  
  
\_\_\_\_\_  
Jose E. Aunon

## TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF UNDISPUTED FACTS . . . . .	1
ARGUMENT . . . . .	4
I. INTERPRETATION OF AN UNAMBIGUOUS CONTRACT, SUCH AS THE AGREEMENT IN THIS CASE, IS A MATTER OF LAW FOR THE COURT'S DETERMINATION . . . . .	4
A. Clear and Unambiguous Contracts Are to Be Interpreted by the Court . . . . .	4
B. All Provisions of the Contract Are Clear and Unambiguous . . . . .	5
II. THE LEONS AND THE MANNS LOST THEIR RIGHT TO ENFORCE THE CONTRACT WHEN THEY FAILED TO PERFORM THEIR RESPECTIVE OBLIGATIONS UNDER THE CONTRACT AND COMMITTED THE FIRST BREACH ON THE CONTRACT . . . . .	6
III. TIME IS OF THE ESSENCE FOR ALL OF THE PURCHASER'S OBLIGATIONS UNDER THE CONTRACT . . . . .	8
IV. THE MANNS AND THE LEONS BREACHED THEIR CONTRACTS BY FAILING TO LIST AND MAKE DILIGENT, GOOD FAITH EFFORT AND PROMPT EFFORTS TO SELL THEIR HOMES WHEN REQUIRED BY THE CONTRACT . . . . .	9
V. BARBARA MANN'S LETTER, DATED JANUARY 21, 1987, CONSTITUTES AN OFFER TO RENEGOTIATE THE CONTRACT BETWEEN THE PARTIES, AND AN ADMISSION OF BOTH THE LEONS AND THE MANNS FAILURE TO COMPLY WITH THE CONTRACT . . . . .	12
VI. THE LEONS AND MANNS HAVE BREACHED THE CONTRACT BY RECORDING LIS PENDENS . . . . .	13
VII. PARAGRAPH 15(b) CANNOT BE SEVERED WITHOUT VOIDING THE ENTIRE CONTRACT . . . . .	14



# TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>ADC Fairways Corporation v. John Mark Construction, Inc.</u> , 231 Va. 312 (1986) . . . . .	7
<u>Ayres v. Harbeysville Mutual Casual Company</u> , 172 Va. 383 (1939) . . . . .	14
<u>Berry v. Klinger</u> , 225 Va. 201 (1983) . . . . .	5
<u>Epperson v. Epperson</u> , 108 Va. 471 (1908) . . . . .	17-18
<u>Erlich v. Hendrick Construction Company</u> , 217 Va. 108 (1987) . . . . .	7
<u>Hurly v. Bennett</u> , 163 Va. 241 (1934) . . . . .	7
<u>Johnson v. Hoffman</u> , 130 Va. 335 (1921) . . . . .	7
<u>Leslie v. Knits</u> , 212 Va. 480 (1970) . . . . .	4
<u>W. F. Magann Corporation v. Virginia-Carolina Electrical Works, Inc.</u> , 203 Va. 259 (1962) . . . . .	14
<u>McCrowell v. Busson</u> , 79 Va. 290 (1984) . . . . .	17
<u>Morris v. Harrop</u> , 154 Va. 127 (1930) . . . . .	8
<u>Murphy v. Holiday Inns, Inc.</u> , 216 Va. 490 (1976) . . . . .	4
<u>Russel Company v. Carrol</u> , 194 Va. 699 (1953) . . . . .	5
<u>Shelton v. Stewart</u> , 193 Va. 162 (1951) . . . . .	15, 16-17
<u>Wilson v. Holyfield</u> , 227 Va. 184 (1984) . . . . .	4, 5-6
<u>Winn v. Aleda Construction Company</u> , 227 Va. 304 (1984) . . . . .	4-5
<u>Other</u>	
17 Am. Jr. <u>Contracts</u> §332 . . . . .	9

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN,  
AND BARBARA MANN,

Complainants,

v.

ADDICOTT HILLS CORPORATION,

Defendant.

IN CHANCERY NO. 101273

-----  
KENNETH LEON,  
AND BARBARA LEON,

Complainants,

v.

ADDICOTT HILLS CORPORATION,

Defendant.

IN CHANCERY NO. 101193

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, ADDICOTT HILLS CORPORATION, by its counsel, undersigned, and, in support of its motion for summary judgment in the above styled cases, files this Memorandum of Points and Authority:

STATEMENT OF UNDISPUTED FACTS

On February 28, 1986, Kenneth F. Leon and Barbara T. Leon, Complainants, entered into a New Home Sales Agreement (dated February 22, 1987) with the Addicott Hills Corporation ("Addicott Hills") to purchase Lot 10 of the Union Farm Subdivision. W. Lowry Mann, III and Barbara C. Mann entered into a similar agreement

(dated March 1, 1987) with Addicott Hills on March 30, 1986, to purchase Lot 11 of the Union Farm Subdivision. Mrs. Mann is a licensed real estate agent and is the selling real estate agent on both the Mann and the Leon contracts.

Paragraph 18(d) of both contracts states:

"Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations hereunder."

At the time the Manns and the Leons executed their respective New House Sales Agreement, both the Leons and the Manns signed almost identical Sale of Existing Residence Addendums ("Addendum") to their contracts.

This Addendum states in pertinent part:

Buyer shall:

- (a) Immediately commence to use diligent and good faith efforts to sell Buyer's residence;
- (b) Immediately list the Buyer's Residence with a reputable real estate broker in the vicinity in which Buyer's Residence is located, which broker shall be a member of the "Multiple Listing Service" and Buyer shall produce satisfactory evidence of such listing to Seller within fifteen (15) days, after the start of house framing;
- (c) Make diligent, good faith and prompt efforts to enter into a contract for the sale of Buyer's Residence.

Both the Leons and the Manns have admitted that "After the subject Contract was ratified, you did not immediately commence to use diligent and good faith efforts to sell Buyer's residence . . . (Request 10).

The Manns and the Leons also both admitted that "After the subject Contract was ratified they did not immediately list the

Buyer's Residence . . . with a reputable real estate broker."  
(Request 11).

While in both instances the Leons and Manns in identical language go on to say in their defense of their admission that they do not believe that they were required by their contracts to perform these actions, this Court as a matter of law must determine from the contracts that in fact they were bound.

On January 21, 1987, Barbara Mann, one of the purchasers and as noted above the realtor on both sales wrote to Addicott Hills offering to list both houses [the Leon's and Mann's Residences] as of March 1, 1987 and included a copy of the executed post-dated listing agreements. She noted in her letter:

"Above all I would like to assure the builder that we are not trying to sidestep the issue; rather, we are attempting to determine a realistic occupancy date . . ."

The Court must determine as a matter of law that this letter constituted an offer with knowledge that was rejectable at will by Addicott Hills.

On January 30, 1987 as a result of both the Manns and Leons failures to timely list their properties, Addicott Hills terminated both contracts, and expressly rejected the offer to list their home on March 1, 1987 contained in the January 21, 1987 letter to modify the contracts to better suit the schedules of the Leons and Manns.

Paragraph 18(c) of both contracts expressly states:

Purchaser is expressly prohibited from recording this Agreement or any memorandum thereof, and any attempted recordation at Seller's option, this Agreement shall become null and void and all rights of Purchaser shall cease and terminate.

On April 3, 1987 the Manns caused to be recorded a lis pendens claiming specific performances for Lot 11, Union Farm. Prior to this, on March 31, 1987 the Leon's had already recorded a substantially similar lis pendens against Lot 10 Union Farm.

On May 22, 1987 the Court heard argument regarding a Plea In Bar filed by Addicott Hills. At the conclusion of the argument the Court found that paragraph 15(b) of both Contracts was unconscionable and therefore unenforceable as a matter of law and denied the Plea In Bar. An order incorporating this decision was entered June 12, 1987 by the Honorable Quinlan Hancock, Circuit Judge.

#### ARGUMENT

The purpose of summary judgment pursuant to Rule 3:18 is to expedite litigation with as few technicalities as possible and thus avoid common law procedural tactics which are interposed for delay. Leslie v. Knits, 212 Va. 480 (1970). All of the questions in this case rest upon written documents and the proper interpretation of those documents. Therefore, the questions presented are purely matters of law for determination by the Court, and summary judgment is appropriate. Murphy v. Holiday Inns, Inc., 216 Va. 490 (1976).

I. INTERPRETATION OF AN UNAMBIGUOUS CONTRACT, SUCH AS THE AGREEMENT IN THIS CASE, IS A MATTER OF LAW FOR THE COURT'S DETERMINATION

A. Clear and Unambiguous Contracts Are to Be Interpreted by the Court.

Whether a contract is ambiguous is a question of law for the court's determination. Wilson v. Holyfield, 227 Va. 184, 187, 313 S.E.2d 396, 398 (1984). If the court determines the contract is unambiguous, it proceeds to interpret the contract. Winn v. Aleda Constr. Co., 227 Va. 304, 307, 315 S.E.2d 193 (1984); Russel Co. v. Carol, 194 Va. 699, 703, 74 S.E.2d 685, 688 (1953). Parol evidence is not admissible to explain a written, unambiguous contract. Russell, 194 Va. at 702. If the Court determines, as it must, that the relevant Contract provisions are unambiguous, all parties are precluded from introducing parol evidence.

B. All Provisions of the Contract Are Clear and Unambiguous.

The Virginia Supreme Court has, on many occasions, defined ambiguity. In Berry v. Klinger, 225 Va. 201 (1983), the Court stated:

"Ambiguity" is defined as: "the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time." Webster's Third New International Dictionary 66 (3rd ed. 1976). "Doubtfulness; doubleness of meaning . . . of an expression used in a written instrument." Black's Law Dictionary, 73 (5th ed. 1979).

Id. at 207. Similarly, in Wilson v. Holyfield, supra, the Court stated:

Contracts are not rendered ambiguous merely because the parties disagree as to the meaning of the language employed by them in expressing their agreement. Further, the question whether a contract is ambiguous is not one of fact but one of law.

\* \* \*

Relying upon the foregoing principles, we conclude that the financing provision is not ambiguous. We think the terms used in that provision are

sufficiently exact and definite to provide for enforcement. The problem here is similar to the one the Court faced in Mass-Owens Co. where we said there was no uncertainty as to the language by which the parties expressed their agreement; instead, the uncertainty sprang from their difference of opinion as to the meaning of the provision.

227 Va. 187, 188 (citations omitted).

The language of the default provisions of the contract are not ambiguous. The relevant portion of the default provision states:

"15. DEFAULT BY EITHER PARTY.

(a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions this Contract may be terminated by Seller . . ."

and

"In the event Buyer fails to secure a written contract for the sale of Buyer's Residence, by reason of Buyer's acts or failure to act, or Buyer fails to deliver a copy of the sales contract so obtained or a copy of the listing contract to Seller within the time period above specified, Buyer shall be deemed in default of this Contract, and the provisions of the contract shall govern."

The contract has not been performed by the purchasers as evidenced by their own admissions. Both the Leons and the Manns failed to:

Deliver a copy of a listing agreement within fifteen (15) days of framing.

Both the Leons and the Manns have admitted that they:

(a) failed to immediately list their homes [see Response #11 to Request for Admissions], and

- (b) that they had not made diligent and good faith efforts to sell their properties [see Response #10 to Request for Admission].

And these admissions, freely given, come in the face of clear contractual provisions which required them to act differently. Therefore, they have breached their contract - and more importantly they have admitted it. The clear admission of a lack of "good faith" efforts is particularly telling.

II. THE LEONS AND THE MANNS LOST THEIR RIGHT TO ENFORCE THE CONTRACT WHEN THEY FAILED TO PERFORM THEIR RESPECTIVE OBLIGATIONS UNDER THE CONTRACT AND COMMITTED THE FIRST BREACH ON THE CONTRACT.

The time honored concept of the one who breaches a contract first loses all standing to bring an action on that contract has been endorsed by the Virginia Supreme Court. In Hurly v. Bennett, 163 Va. 241 (1934), the Virginia Supreme Court stated as follows:

The party who commits the first breach of a contract, is not entitled to enforce it, or to maintain an action thereon, against the other party for his subsequent failure to perform.

163 Va. 241 at 253. This rule was also followed in Johnson v. Hoffman, 130 Va. 335 (1921), where the Virginia Supreme Court made the following comments:

The rule is strict and inflexible that a plaintiff has no right of action for damages for a breach of contract where he himself has breached the contract. He may under certain circumstances have such right of actions where he has not performed the contract on his part, but that is only where the circumstances are such that under the rules of law applicable he is excused from such



performance, so that his conduct cannot be regarded as a breach of the contract; and even then he has no such right of action unless it appears from the evidence in the case that he was willing and was either able or would have been able to fully perform the contract on his part, but for his having been relieved from that duty by the excusing circumstances.

130 Va. 335 at 344.

The concept that the one who breaches first is not entitled to recover for any subsequent breach was recognized in the more recent case of ADC Fairways Corp. v. John Mark Construction, Inc., 231 Va. 312 at 318 (1986). (Contractor not entitled to offset where he breached the contract.) Although this doctrine has been eroded in the field of building contracts, see Erlich v. Hendrick Construction Co., 217 Va. 108 (1987), (the no recovery rule is inapplicable in building contract cases), it is still enforced to the remainder of contract law. It is clear from Paragraph 3(d) of the subject contracts that "the Purchaser is purchasing a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of the dwelling". Therefore, neither the Manns nor the Leons are entitled to maintain any claim of breach.

### III. TIME IS OF THE ESSENCE FOR ALL OF THE PURCHASER'S OBLIGATIONS UNDER THE CONTRACT.

It is clear that the Leons and the Manns breached the subject contracts for failing to timely satisfy any of the Contract Obligations Relating to Sale of Existing Residence (hereinafter defined).

Paragraph 18(d) of the subject contracts reads as follows:

"Time is hereby declared to be of the essence in the performance by Purchaser of each of purchaser's obligations hereunder."

It is beyond any argument that the parties have expressly set forth their intent, in forceful language, that time is of the essence. In Morris v. Harrop, 154 Va. 127 (1930), The Virginia Supreme Court stated:

"[i]t is a general rule that language of a milder interpretation, shall not be so construed as to work a forfeiture."

The inverse of this rule is that language of a very strong interpretation, shall be, in fact, must be construed as a forfeiture. In the present case, the language is explicit and forceful that time is of the essence in the purchaser performance of his obligations (Paragraph 18(d) of the subject contracts); therefore, the Leons and the Manns have admitted that they violated their contracts by not performing them on time. This view is in accordance with other authorities. See 17 Am.Jur. Contract §332.

("Where time is of the essence, the right to recover on the contract is conditioned upon performance within the time limited, and moreover, if the time is specified by an hour, there must be compliance in or prior to such compliance".)

IV. THE MANNS AND THE LEONS BREACHED THEIR CONTRACTS BY FAILING TO LIST AND MAKE DILIGENT, GOOD FAITH EFFORT AND PROMPT EFFORTS TO SELL THEIR HOMES WHEN REQUIRED BY THE CONTRACT.

The Sale of Existing Residence Addendum clearly requires the Leons and the Manns to:

"Within sixty (60) calendar days from the date of house framing starts Buyer shall deliver a copy of a written contract by and between Buyer and the third party, for the sale and purchase of Buyer's present residence . . . ("Buyer's Residence"), and in connection herewith, Buyer shall:

- (a) Immediately commence to use diligent and good faith efforts to sell Buyer's Residence;
- (b) Immediately list the Buyer's Residence with reputable real estate broker in the vicinity in which the Buyer's Residence is located, which broker shall be a member of the "Multiple Listing Service, and Buyer' shall produce satisfactory evidence of such listing to Seller within fifteen (15) days after the start of the house framing;
- (c) Make diligent, good faith and prompt efforts to enter into a contract for the sale of Buyer's Residence".

The above requirements are hereinafter collectively referred to as "Contract Obligations Relating to Sale of Existing Residence". The Leons and Manns each failed to timely satisfy any of the above Contract Obligations Relating to Sale of Existing Residence, even though Mrs. Mann is an active real estate agent in the market with Coldwell Banker Realtors.

The Leons have admitted that they have not satisfied the Contract Obligations Relating to the Sale of Existing Residence in the following Request For Admissions and the Leons Response to Request For Admissions:

"REQUEST 4: You viewed the subject property, while it was under construction, at sometime between December 15, 1986 thru January 15, 1987.

RESPONSE 4: We drove by it. If this is a viewing, then this is admitted.

REQUEST 5: You viewed the subject property, while it was under construction, at sometime between December 15, 1986 thru January 30, 1987.

RESPONSE 5: We drove by it. If this is a viewing, then this is admitted.

REQUEST 7: Between February 22, 1986 and January 15, 1987 you did not list for sale the property located at 3910 Gibbs Street,

Alexandria, Virginia with a reputable real estate broker in the vicinity in which the property was located.

RESPONSE 7: Admitted. There was no requirement for this.

REQUEST 10: After the subject Contract was ratified, you did not immediately commence to use diligent and faith efforts to sell Buyer's Residence (3910 Gibbs Street, Alexandria, Virginia 22309)

RESPONSE 10: Admitted. We were under no obligation to do so.

REQUEST 11: After the subject Contract was ratified you did not immediately list the Buyer's Residence (3910 Gibbs Street, Alexandria, Virginia 22309) with a reputable real estate broker.

RESPONSE 11: Admitted. We were under no obligation to do so.

Similarly, the Manns have also admitted that they have not satisfied the Contract Obligations Relating to Sale of Existing Residence in the following Request For Admissions and the Manns Response To Request For Admissions:

REQUEST 4: You viewed the subject Property while it was under construction, sometime between November 12, 1986 thru January 15, 1987.

RESPONSE 4: Admitted.

REQUEST 5: You viewed the subject Property, while it was under construction, sometime between November 12, 1986 thru January 30, 1987.

RESPONSE 5: Admitted.

REQUEST 7: Between March 1, 1986 and January 15, 1987 you did not list for sale the property located at 8716 Falkstone Lane, Alexandria, Virginia.

RESPONSE 7: Admitted.

REQUEST 10: After the subject Contract was ratified, you did not immediately commence to use diligent and faith efforts to sell Buyer's Residence (8716 Falkstone Lane, Alexandria, Virginia 22309).

RESPONSE 10: Admitted. We were under no obligation to do so.

REQUEST 11: After the subject Contract was ratified you did not immediately list the Buyer's Residence (8716 Falkstone Lane, Alexandria, Virginia 22309) with a reputable real estate broker.

RESPONSE 11: Admitted. We were under no obligation to do so.

REQUEST 13: After the subject Contract was ratified, you did not make diligent, good faith and prompt efforts to enter into a contract for the sale of Buyer's Residence (8716 Falkstone Lane, Alexandria, Virginia 22309).

RESPONSE 13: Admitted. We were under no obligation to do so.

Carl Bernstein & Associates, Inc. ("CB&A"), agent of Seller, sent a letter to the Leons and the Manns, each dated January 13, 1987 stating that more than two weeks have lapsed since the framing on Lot 10 and 11, respectively, at Union Farm and they had not received as of that date a copy of the listing on their present residence as provided in the contract addendum. The sales agent, Daurie Schwab, had alerted Addicott Hills with some concern that they had ignored her reminders and have taken no action to remove their contingency. In order to avoid termination of the Sales Agreement, both the Leons and the Manns were requested to provide this office with a copy of you listing within five (5) days of receipt of this letter.

The Leons and the Manns complete failure to timely satisfy the Contract Obligations Relating to Sale of Existing Residence on or before January 30, 1987, resulted in CB&A sending a second certified

letter to the Leons and the Manns stating, that their failure to timely list their present homes for sale as required by Sales Agreement, has resulted in the breach of Contract, and that the sales agreements were thereby terminated.

The Leons were also advised of the breaches to Contract Obligations Relating to Sale of Existing Residence by a letter from Light & Harrison, P.C.

V. BARBARA MANN'S LETTER, DATED JANUARY 21, 1987, CONSTITUTES AN OFFER TO RENEGOTIATE THE CONTRACT BETWEEN THE PARTIES, AND AN ADMISSION OF BOTH THE LEONS AND THE MANNS FAILURE TO COMPLY WITH THE CONTRACT.

Barbara Mann's letter, dated January 21, 1987, sought an unacceptable postponement to listing the Buyer's Residence. For reasons she and the Leons found persuasive they wanted to wait until March 1, 1987 to put their respective homes on the market. This was a clear breach for both. They were required to act, what they did was offer to act. This was a breach.

The subject Addendum to the Contract state the following breach consequences:

In the event Buyer fails to secure a written contract for the sale of Buyer's Residence, by reason of Buyer's acts or failure to act, or Buyer fails to deliver a copy of the sales contract so obtained or a copy of the listing contract to Seller within the time period above specified, Buyer shall be deemed in default of this Contract, and the provisions of the contract shall govern.

It is clear as a matter of law that the parties intended that the sales agreement would be breached by the Buyer's failure to timely satisfy the Contract Obligations Relating to Sale of Existing

Residence. Both the Leons and the Manns failed to immediately commence to use diligent and good faith efforts to sell Buyer's Residence; to provide Addicott Hills with a copy of the listing agreement within fifteen (15) days after the start of house framing; and make diligent, good faith and prompt efforts to enter into a contract for the Sale of Buyer's Residence. Therefore, they breached the contract and cannot now recover.

VI. THE LEONS AND MANNS HAVE BREACHED THE CONTRACT BY RECORDING LIS PENDENS.

The Leons and the Manns have also breached their contracts, respectively, by failing to comply with paragraph 18(c) of the sales agreement. Paragraph 18(c) states as follows:

Purchaser is expressly prohibited from recording this Agreement or any memorandum thereof, and upon any recordation, at Seller's option, this Agreement shall become null and void and all rights of Purchaser hereunder shall thereupon cease and terminate.

The Leons and the Manns breached paragraph 18(c) by filing a memorandum of lis pendens. The filing of a lis pendens clearly is a violation of Paragraph 18(c). The lis pendens clearly falls under the definition of "memorandum" as used in Paragraph 18(c). The Seller has elected to declare the Agreement null and void. This breach committed by the Leons and the Manns acts as a bar to any suit for damages or specific performance brought by the Leons and the Manns. The rule of no recovery applies in this situation without limitation.

**VII. PARAGRAPH 15(b) CANNOT BE SEVERED WITHOUT VOIDING THE ENTIRE CONTRACT.**

It is one of the most basic principles of contract law, that a court cannot make a contract for the parties which the parties to the contract did not make themselves and never intended to make. Ayres v. Harbeysville Mutual Casual Co., 172 Va. 383 at 389 (1939). (Insurer was liable to employee of the insured for injuries suffered while riding in employees truck.) W. F. Magann Corp. v. Virginia-Carolina Electrical Works, Inc., 203 Va. 259 at 264 (1962) (subcontractor liable under its indemnity contract for damage done by the third party.) If the court decides that Paragraph 15(b) can be severed without effecting the validity of the entire contract, then the court will be rewriting the contract to provide the Manns and the Leons with remedies which neither side bargained for or agreed to include in the contract.

The analysis which leads to this conclusion begins with the common law of contracts. "The spirit of the common law was opposed to the apportionment of contracts, and this seems to be still true as to all entire contracts which do not admit of apportionment and as to many others, such as employment of clerks and ordinary servants, "Michies Jurisprudence, Contracts §3 (1986). Since an "entire" contract cannot be severed into parts without doing extreme violence to the parties intent, the common law courts will not sever such contracts.

The Supreme Court of Virginia stated in Shelton v. Stewart, 193 Va. 162 (1951) the following rules:

Primarily, the question of whether a contract is entire or severable is one of the intentions to be



determined from the language which the parties have used and the subject matter of the agreement.

As a general rule it may be said that a contract is entire when by its terms, nature, and purpose it contemplates and intends that each and all of its parts and consideration shall be common each to the other and interdependent.

193 Va. 162 at 167.

It is abundantly clear from the general rule announced in the Shelton case that the sale agreement between Addicott Hills and the Manns and the Leons is an entire agreement. The subject matter is a single sum of money given in exchange for the purchase of a new home.

The language of the contract itself also supports the conclusion that this is an entire contract and not a severable one.

Paragraph 18(e) states:

"This Agreement contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warrants or representations, oral or written, not herein contained." This language can not be more explicit.

If the Court declared that Paragraph 15(b) is unconscionable and unenforceable but did not find the entire contract to be void, the court would be rewriting the contract. The Leon and Mann contracts plainly contemplated and intended, by their terms, nature, and purpose, that each and all of their parts and consideration shall be common to each other and interdependent. As previously mentioned, it is impossible to divide up the parts and considerations between the parties when they involve a single consideration such as a house or a lump sum.

The problem now arises: what occurs when a court strikes down a single provision of an "entire" contract. The answer provided by Virginia case law is clear: The entire contract will either stand or fall together. Either the paragraph applies or the entire contract is void. In the Shelton case mentioned above, 193 Va.. 162, the Virginia Supreme Court was asked to construe an agreement for the sale of land which contained a provision requiring the wife to obliterate her husband's right of courtesy in the land. The Court found that such a provision promoted divorce and violated public policy. The Court went on to state as follows:

The covenant was the essence of the agreement. Its purpose was to invite, encourage and require a continued estrangement of husband and wife, and their ultimate and permanent separation through divorce. It was thus against public policy and rendered the entire contract void from its inception.

193 Va. at 167.

The contract in the Shelton case, like the contract in this case, did not contain a survival clause. This clause is also often mistakenly called a severability clause. Such a clause actually makes the contract "survive".

Paragraph 15(b), like the covenant in the Shelton case above, was an integral part and essence of the agreement. It provided all parties with an alternative to performance. If Paragraph 15(b) is unconscionable, then the entire agreement shall fall.

Similar language is found throughout Virginia cases. In McCrowell v. Busson, 79 Va. 290 at 303, (1884), the Virginia Supreme Court stated "[i]t is also true that where there is an

entire consideration for the defendant's promise, made up of several particulars, and one of these consists of an agreement by the defendant, which the statute of frauds requires to be in writing, and for want of such a writing, is void, the whole consideration is void, and the promise cannot be supported."

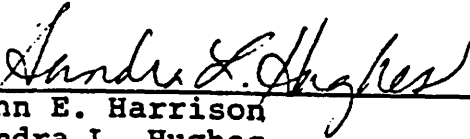
The idea that entire contracts are void if a portion fails is also supported by Epperson v. Epperson, 108 Va. 471 at 476 (1908), ("Here, then, we have a plain and positive contract, distinctly stated, between a father and his two sons, that, in consideration of the conveyance of a farm to them (proved to be worth \$3,000), each would build and settle upon the land, and jointly support and care for their parents while they lived, followed by a defeasance clause, that if the parties fail to comply with any one of the provisions of the agreement the whole shall be null and void. The non-compliance, therefore, by either obligor fulfills the condition upon which the defeasance attaches, and voids the instrument in its entirety.)

If a provision in an entire contract is void, then the entire contract is void and nonexistent. The parties would be restored to their original positions just as if no contract ever existed. The Manns and Leons would have their deposit monies refunded to them and no other remedy.

CONCLUSION

For these reasons, Addicott Hills respectfully requests the Court to enter summary judgment in its favor on Addicott Hills' Motion for Summary Judgment.

ADDICOTT HILLS  
By Counsel



John E. Harrison  
Sandra L. Hughes  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
P. O. Box 6625  
McLean, Virginia 22101  
(703) 356-9751  
Counsel for Defendant

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed, first-class, postage prepaid to Jose E. Aunon, Esquire, 9701 Main Street, P. O. Box 2405, Fairfax, Virginia 22031 and to Glenn H. Silver, Esquire, Rust, Rust & Silver, 4126 Leonard Drive, P. O. Box 460, Fairfax, Virginia 22030 on this 30th day of October, 1987.

  
Sandra L. Hughes

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN, III AND )  
BARBARA MANN, )

Complainants, )

v. )

ADDICOTT HILLS CORPORATION, )

IN CHANCERY NO 101273

Defendant.

ANSWERS TO DEFENDANT'S INTERROGATORIES

COMES NOW the Complainants, by Counsel and state the following answers to the Interrogatories previously propounded upon it in accordance with the rules of the Supreme Court of Virginia.

INTERROGATORY #1: If you allege that Settlement was tendered, please state the time and place of such tender.

ANSWER #1:

Tender by complainant was not required as the defendant repudiated the contract. Complainants were, and are at present ready, willing and able to perform. We learned that the structure was completed when we received the answer from defendant.

INTERROGATORY #2: Please state in detail all expenses incurred and itemize such expenses which support you claim for \$100,000.00 compensatory damages and for \$200,000.00 punitive damages.

ANSWER #2:

These expenses can not be fully detailed at this time. Attorney fees are estimated to exceed \$10,000.00. The interest rates, points and lender fees have increased. The sale price of the house has increased from the original sales price of \$296,580.00. The complainants have suffered and presently suffer mental anguish and anxiety, and is for the Court to determine. We have not had access to the money held by the defendant. Punitive damages are for the Court to decide.

INTERROGATORY #3: In accordance with Rule 4:1 (b)(4) of the Rules of Virginia Supreme Court, please identify each person you expect to call as an expert witness at trial and state the subject matter on which the expert is expected to testify, state the substance of the facts and opinions which each expert is expected to testify and provide a summary of the grounds for each opinion.

ANSWER #3:

None at this time has been identified by our Attorney.

INTERROGATORY #4: Identify all documents and objects (real evidence) which relates in any way to your claims, relief requested or damages set forth in your Bill of Complaint.

ANSWER #4:

Objected due to its vagueness--Without waiving said objections: The contract and its addendums. The listing agreements. The correspondence of the parties. The contract with the new purchasers and sales brokers.

INTERROGATORY #5: Describe in detail the facts which you contend support your allegations in Paragraph 3 of the Bill of Complaint.

ANSWER #5:

The complainants were waiting for the house to be completed and all permits obtained. Upon notification by the defendant that it was ready to tender performance, the Complainants were and are at the present time to accept a deed and pay the necessary funds.

INTERROGATORY #6: Describe in detail the facts which you contend support your allegations in Paragraph 4 of the Bill of Complaint.

ANSWER #6:

The Complainants observed the unreasonable delay in commencing the construction and the extremely slow progress. The Complainants never inspected the inside of the house. Mrs. Lindsay has stated under oath that the builder decided to build the houses in sequence because it was not economical to do it otherwise. The defendant refused to give a date certain for the delivery of the house.

The Defendant failed to deliver the house on or before November 1986.

The Defendant requested on February 2, that the contingency of the contract be waived and the Complainants did.

INTERROGATORY #7: Describe in detail the facts which you contend support your allegations in Paragraph 7 of the Bill of Complainant.

ANSWER #7:

The Defendant knew that it has no right to sell lots where the subdivision has not been approved by the County and that it was having difficulties in obtaining said approval. The deed of dedication of the subdivision was not recorded in the land records until July 31, 1986.

The Defendant knew that it would not be economical to build the homes out of sequence.

The Defendant did not start the construction until three months before the completion date shown in the contract.

The Builder did not meet promised delivery dates for other lots in the Subdivision and failed to give the Complainants a firm delivery date.

Carl Bernstein stated that he was a business man and had no reason to honor the contract and that he could sell the property for much more than the original sales price.

INTERROGATORY #8: Describe in detail the facts which you contend support your allegations in Paragraph 8 of the Bill of Complaint.

ANSWER #8:

The contract was made with full knowledge that the house was not to be delivered as stipulated in the Contract.

Complainants were sold a lot on a subdivision that did not exist at the time.

The contracts were sent to the Defendant's lender to obtain



financing.

Because the increased value of the property, the Defendant, after the Complaints removed the sale of the house as a contingency, put the house on sale for a much higher price. Statements by Carl Bernstein mentioned in Answer #7 confirm the intent of Defendant.

The check delivered to the Complainants intending to return the escrow money was drawn from an account not of Addicott Hills.

INTERROGATORY #9: Describe in detail the facts which you contend support your allegations in Paragraph 9 of the Bill of Complainant.

ANSWER #9:

Same answer as Number 8.

INTERROGATORY #10: Identify any and all communications, oral or written, you have had with the Defendant or any agent of the Defendant concerning the subject Contract.

ANSWER #10:

October 1985                      Conversations and letters with Daurie Schwab.

November 1985                      Daurie Schwab, holding lot 11

Late January 1986

or Early February              1) Daurie Schwab hold lot 15 for Mr. and Mrs. Leon.

2) Daurie Schwab, lot 10 was available for Mr. and Mrs. Leon.

3) Daurie Schwab re contingencies in contract

<u>February 22, 1986</u>	Conference with Daurie Schwab re: Leon's purchase
<u>March 1, 1986</u>	Daurie Schwab Conference regarding sale contract and its execution
<u>May 1986</u>	Daurie Schwab re: delivery date
<u>May/June 1986</u>	Daurie Schwab delay in construction
<u>Aug/Sept. 1986</u>	Daurie Schwab Selection of colors and delivery date.
<u>January (first week)</u>	Daurie Schwab Occupancy date and placing house on market.
<u>January</u>	Letters dated January 17 from Sandra Lindsay
<u>Jan 19</u>	Conversation with Sandra Lindsay re: Placing houses on market-occupancy date.
<u>Jan 21</u>	Letter enclosing listing of house.
<u>Feb 2</u>	Letter from Carl Bernstein
<u>Feb 2</u>	Telephone conversation with Carl Bernstein.
<u>Feb 2</u>	Daurie Schwab Removal of Contingency
<u>Feb 3</u>	Daurie Schwab re: Builder not honoring the contract.
<u>Feb 4</u>	Letter from Attorney to Addicott Hills.

There may have been other communications of which complainants have no recollection at this time.

SECOND INTERROGATORY #9: Identify the date you first knew the house framing had begun on the subject Property.

ANSWER #9:

We were first notified by Sandra Lindsay in writing by letter dated January 17, 1987 that the house framing had been done.

SECOND INTERROGATORY #10: Describe any and all efforts taken to see Buyer's Residence (8716 Falkstone Lane, Alexandria, Virginia 22309) between March 1, 1986 and March 1, 1987.

ANSWER #10:

There were two listing agreements made for the sale of the house. There were discussions with Coldwell Banker as stated in our letter to Sandra Lindsay dated January 21, 1987. This sale contingency was waived by the Complainants at the request of Mr. Bernstein.

INTERROGATORY #11: As to each of your responses to any request for admissions propounded to you by Defendant which is other than an unqualified admission, describe the facts which support in any manner your refusal to admit or your unqualified admission, and identify all persons purporting to have any knowledge or factual dates, and all documents, notes, reports, memorandums, electronic and/or tape recording, or any other tangible thing, which you contend support your refusal to admit or your qualified admission.

ANSWER #11:

Denial #8 and 9 of admissions. We have no knowledge of what was meant by framing in the addendum.

Denial to #14. Complainants complied with all the terms of the contract as modified.

Denial to #25. Addicott Hills, by their unreasonable delay in the delivery of the house subject matter of this suit, by their communications with the Complainants; its actions and their failure to act including their refusal to furnish a date certain for delivery, waived the time of the essence requirements as well as other provisions in the contract.

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LORY MANN, III AND  
BARBARA MANN,

Complainants,

v.

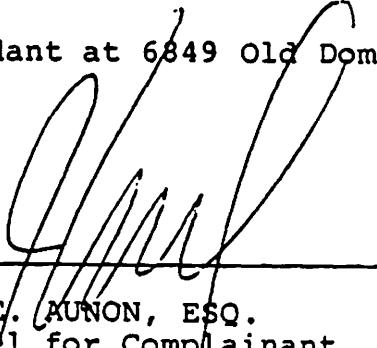
ADDICOTT HILLS CORPORATION,

Defendant.

IN CHANCERY NO 101273

CERTIFICATE

I hereby certify that on this 2nd day of November, 1987 the answer to interrogatories and the response to the request for production of documents were hand delivered to counsel for Defendant at 6849 Old Dominion Drive Suite 410, McLean, Virginia 22106.

  
JOSE E. NUNON, ESQ.  
Counsel for Complainant  
9701 Main Street  
P.O. Box 2405  
Fairfax, Virginia 22031  
(703) 323-1700

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN, III and )  
BARBARA MANN, )  
Complainants, )  
v. )  
ADDICOTT HILLS CORPORATION, )  
Defendant. )


IN CHANCERY NO. 101273

NOTICE AND MOTION

PLEASE TAKE NOTICE that on November 13, 1987, at 10 a.m., or as soon thereafter as counsel may be heard, the undersigned will move this Honorable Court, and hereby so moves, this Honorable Court to grant Summary Judgment on the Bill of Complaint on the above-referenced matter.

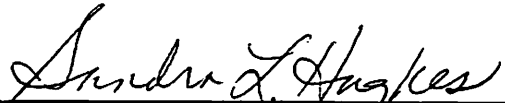
Respectfully submitted,

ADDICOTT HILLS CORPORATION  
By Counsel

  
John E. Harrison  
Jack L. Wuerker  
Sandra L. Hughes  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751  
Counsel for Defendant

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed, first-class, postage prepaid to Jose E. Aunon, Esq., 9701 Main Street, P. O. Box 2405, Fairfax, Virginia 22031 on this 5<sup>th</sup> day of November, 1987.

  
Sandra L. Hughes

1 AG-186-87

2 V I R G I N I A

3 IN THE CIRCUIT COURT OF FAIRFAX COUNTY, VA

4 -----X

5 W. LOWRY MANN, III, :

6 and, :

7 BARBARA MANN, :

8 Complainants, :

9 versus, : IN CHANCERY NO. 101273

10 ADDICOTT HILLS CORPORATION, :

11 Defendant. :

12 -----X

13 Fairfax, Virginia

14 Thursday, November 19, 1987

15 The above-entitled action came on to be heard before  
16 the Honorable Jack B. Stevens, a Judge in and for the  
17 Circuit Court of Fairfax County, in Courtroom 4-F, Fairfax  
18 County Judicial Center, 4110 Chain Bridge Road, Fairfax,  
19 Virginia 22030, beginning at approximately 11:30 o'clock  
20 a.m., before Anita B. Glover, a Certified Verbatim Court  
21 Reporter.

22

23



**Anita B. Glover & Associates, Ltd.**  
**Post Office Box 100**  
**Fairfax Station, Virginia 22039-0100**

(703) 278-8636  
278-8606  
Prince William Metro 690-2070



P R O C E E D I N G S

(The Court Reporter was sworn.)

MR. HARRISON: Your Honor, we checked last night, on a court reporter, but it was Mr. Silver's reporter and he cancelled her, and that is why the Court Reporter is late.

THE COURT: All right.

And Mr. Aunon prevails.

Do you want to endorse this as objected to?

MR. HARRISON: Yes, Your Honor, I will endorse it as objected to.

Your Honor, I take it that Judge Plummer did know that there were two conflicting decrees coming to him?

THE COURT: You presented both of them; didn't you?

THE CLERK: Yes.

MR. HARRISON: I did know that you had presented them, but they might have been left for him was the only thing. This is a copy -- that is why I said that -- rather than an original.

THE COURT: My clerk took them up.

MR. HARRISON: It is fine with me if she says



1 that.

2 THE CLERK: I gave him what they gave me.

3 MR. HARRISON: Just to clarify it, Your  
4 Honor, the one that he signed is an original. The one that  
5 I just got back is a copy.

6 Unless Judge Plummer was told that they were  
7 conflicting orders, he might have assumed that this was a  
8 copy of the order that he signed. That is my point.

9 THE CLERK: I gave him the two orders.

10 THE COURT: Did you tell him anything?

11 THE CLERK: Like what, that they were  
12 conflicting?

13 THE COURT: That they were two different  
14 orders.

15 THE CLERK: I think he realized that from  
16 what he said. He looked at them.

17 He said, well, I guess I will sign this one.  
18 I think he realized that.

19 MR. AUNON: The typing was different. There  
20 is no way that --

21 THE CLERK: Exactly.

22 THE COURT: I will double check it.

23 MR. HARRISON: Thank you, Your Honor.



1 And in the meantime --

2 THE CLERK: He did not think it was a copy.

3 MR. AUNON: May I call my first witness, Your  
4 Honor?

5 THE COURT: Yes.

6 MR. AUNON: I call Mr. Lowry Mann.

7 Whereupon,

8 W. LOWRY MANN, III,

9 a complainant, was called for examination by counsel in his  
10 own behalf, and, having been first duly sworn by the Court,  
11 was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. AUNON:

14 Q. Would you please state your name, sir?

15 A. Lowry Mann.

16 Q. What is your address?

17 A. 8716 Foxstone Lane, Alexandria, Virginia.

18 Q. How did you hear about Union Farm?

19 A. My wife saw a sign up on the road, and she  
20 inquired into its being constructed.

21 Q. And let me show you this document here.

22 MR. HARRISON: No objection as to  
23 authenticity, Your Honor.



1 BY MR. AUNON:

2 Q. Do you recognize this document, sir?

3 A. Yes, I do.

4 MR. AUNON: Mark it as Exhibit No. 1,  
5 please.

6 (The document referred to above  
7 was marked Complainants'  
8 Exhibit No. 1 for  
9 identification.)

10 BY MR. AUNON:

11 Q. What is that document, sir?

12 A. It is an early draft of a site plan back in  
13 the fall of '85.

14 Q. And you received that from whom?

15 A. From Daurie Schwab.

16 Q. And who was Daurie Schwab?

17 A. She was the agent for the builder.

18 Q. For the builder?

19 A. Yes.

20 MR. AUNON: I would like to introduce this  
21 into evidence.

22 THE COURT: Any objection?

23 MR. HARRISON: No objection as to  
authenticity. I don't know what relevance it has at the  
present time. This is a contract case.



1 THE COURT: I thought that you were handing  
2 me a contract.

3 MR. AUNON: No, Your Honor. Those are the  
4 brochures that my client received before entering into the  
5 contract.

6 MR. HARRISON: The contract has an  
7 integration clause, Your Honor, which would integrate prior  
8 documents.

9 THE COURT: At the risk of messing up your  
10 case, can we stipulate if it is just the contract in a  
11 specific performance suit, unless there is some reason,  
12 couldn't we just stipulate what the pertinent documents are  
13 in this case?

14 MR. HARRISON: I have no problem with that,  
15 Your Honor.

16 MR. AUNON: I have no problem with that.

17 MR. HARRISON: I have no question that this  
18 is the contract.

19 The contract and the addendum.

20 THE COURT: Unless this has some bearing on  
21 something, Mr. Aunon, I would rather not get into documents  
22 such as this.

23 Don't let me preempt you by any means.



1 MR. AUNON: I understand.

2 Your Honor, the basis for this is to  
3 establish that my clients were not told at all that there  
4 was a subdivision at the time when they entered into the  
5 contract.

6 THE COURT: That it was not a subdivision?

7 MR. AUNON: It was not a subdivision.

8 THE COURT: He can testify to that.

9 MR. HARRISON: We will stipulate that it was  
10 not a subdivision at the time.

11 Again, authenticity, we will stipulate that  
12 that is part of the contract, not all of the contract, but  
13 part of it.

14 MR. AUNON: Are we going to stipulate it is  
15 part of the contract at all?

16 I think, Your Honor --

17 THE COURT: I don't know if we are going to  
18 get this off the ground or not.

19 But why don't we take a short recess and you  
20 gentlemen see if you can stipulate all exhibits. I can't  
21 imagine how there could be a dispute over what is pertinent  
22 here.

23 MR. HARRISON: I don't think there is.



1 Well, if we could confer, Your Honor.

2 THE COURT: Sure.

3 (Discussion off the record not reported by the court  
4 reporter.)

5 MR. HARRISON: We have reached a stipulation,  
6 Your Honor, that there are two documents which Mr. Aunon  
7 would put into the record which comprise the part of the  
8 contract which is at issue, that there are other parts to  
9 the contract which may be relevant as to damages, but as  
10 far as the basic issue of liability, the two parts that he  
11 has in his left hand that were put in as Exhibits 1 and 2  
12 comprise the contract; is that correct?

13 MR. AUNON: That is correct, except that  
14 there are some addendums to the contract stating that there  
15 were some options that were supposed to be paid by my  
16 client.

17 MR. HARRISON: That is correct, I agree.

18 MR. AUNON: And if he agrees with that, I  
19 don't have any problem

20 MR. HARRISON: I agree with that.

21 MR. AUNON: There are three addendums, Your  
22 Honor.

23 THE COURT: When you say other addendums, are



1 the damages out of this case?

2 MR. AUNON: Yes, Your Honor.

3 THE COURT: This is strictly specific  
4 performance.

5 MR. AUNON: We want specific performance, and  
6 the Court of course has the power to award any damages.

7 MR. HARRISON: I think it is an election  
8 item, Your Honor, and that is one of the problems when I  
9 get to the motion to strike that I will make.

10 He does have to make an election whether he  
11 goes for specific performance or damages.

12 I don't want to be here all day on proving  
13 damages, and have him elect specific performance, and then  
14 we have wasted that time.

15 It seems to me to be --

16 MR. AUNON: Your Honor, I think this Court  
17 has the power to grant specific performance and award any  
18 damages. This Court has power to do that.

19 MR. HARRISON: You either affirm the contract  
20 and sue for specific performance, or you disaffirm the  
21 contract and sue on the breach.

22 You don't get both.

23 THE COURT: Doesn't the Court have the power





1 to award damages coincident to the specific performance,  
2 not damages for nonperformance of the contract?

3 MR. AUNON: Right.

4 MR. HARRISON: Your Honor, if you affirm the  
5 contract and sue on the contract which is specific  
6 performance, you must waive the breach to do that. You  
7 cannot get both.

8 You don't get to come in and say, this  
9 contract is broken, but I want to enforce it anyway,  
10 because if the contract is broken, it is in breach, and  
11 your remedy is damages, and there is no reason to come into  
12 equity, which is where he is.

13 THE COURT: It has to be for specific  
14 performance --

15 MR. HARRISON: Yes, sir.

16 THE COURT: -- something is sticking in my  
17 mind.

18 MR. AUNON: I think the Court has the power  
19 to grant damages incidental to the specific performance,  
20 Your Honor.

21 That is why we want specific performance.

22 THE COURT: You want specific performance?

23 MR. AUNON: Yes, Your Honor.



1 THE COURT: You give me the other authorities  
2 that you are relying on for whatever else.

3 Anything that you can stipulate to, why don't  
4 you have the Clerk mark it, and then we can admit it into  
5 evidence.

6 MR. HARRISON: Your Honor, I said those had  
7 been marked as 1 and 2. I think they were marked as 2 and  
8 3 and the first one ought to be marked still for  
9 identification as 1 offered and not accepted by the Court  
10 at this time just so the record is clear if an appeal was  
11 necessary.

12 MR. AUNON: I think it was accepted, Your  
13 Honor, just 2 and 3. It was not rejected by the Court; was  
14 it?

15 MR. HARRISON: It wasn't --

16 THE COURT: No, I thought you were  
17 withdrawing it. Do you want this?

18 MR. AUNON: No, I will withdraw it, Your  
19 Honor. Just mark these as 1 and 2.

20 (The documents referred to above  
21 were marked Complainants'  
22 Exhibits Nos. 1 and 2 for  
23 identification, and the  
document previously marked  
Exhibit No. 1 for  
identification withdrawn.)



1 MR. AUNON: Can we stipulate also that it was  
2 not a subdivision at the time and that the subdivision was  
3 recorded in August of '86?

4 MR. HARRISON: That is correct.

5 There was no subdivision at the time of the  
6 contract, and it was recorded in August of '86.

7 THE COURT: You are talking about the deed of  
8 dedication was recorded?

9 MR. AUNON: Yes, sir. And the subdivision  
10 approved, Your Honor.

11 MR. HARRISON: The plat of subdivision was  
12 approved in August and recorded.

13 THE COURT: '86?

14 MR. AUNON: '86.

15 MR. HARRISON: '86.

16 BY MR. AUNON:

17 Q. Did you make any down payment on that  
18 contract?

19 A. Yes, we did.

20 Q. How much did you pay?

21 A. The down payment on the contract was \$5,000.

22 Q. And that contract has a contingency clause;  
23 is that correct?



1 A. That is correct.

2 Q. Why is that?

3 A. That was to protect us in case we were not  
4 able to sell our house.

5 Q. After you signed the documents, the contract,  
6 when did you expect to move into the house?

7 A. November of '86.

8 Q. And did you ask for delivery?

9 A. Yes, we did.

10 Q. To whom and when?

11 A. Daurie Schwab.

12 Q. When?

13 A. Probably in May.

14 Q. May of '86?

15 A. Yes.

16 And possibly again in September, and again in  
17 January.

18 Q. And what --

19 A. Never.

20 We were never given a delivery date.

21 Q. Did you apply for a loan?

22 A. Yes, we did.

23 Q. Where?



1 A. Mutual Mortgage.

2 Q. And who owns Mutual Mortgage?

3 A. Mr. Ferris is the president I believe.

4 Q. And were you directed over there by anybody?

5 A. By the builder.

6 Q. By the builder?

7 A. Yes.

8 Q. And were you approved on the loan?

9 A. Yes, we were.

10 Q. I am going to show you this letter.

11 MR. HARRISON: We will stipulate to the  
12 authenticity of the document.

13 MR. AUNON: Will you mark it, please?

14 (The document referred to above  
15 was marked Complainants'  
16 Exhibit No. 3 for  
identification.)

17 BY MR. AUNON:

18 Q. What is that letter?

19 A. That was a letter from Sandra Lindsay asking  
20 that we list our house.

21 Q. And what happened? What happened after  
22 that?

23 A. My wife, Barbara, talked with Sandra Lindsay.

Q. Who is Sandra Lindsay?



1 A. She works for the builder.

2 And it was my understanding that Barbara and  
3 Sandra --

4 MR. HARRISON: Objection, Your Honor.  
5 Hearsay. She can testify as to the conversation. He  
6 cannot testify as to what his wife told him about the  
7 conversation.

8 THE COURT: Objection sustained.

9 BY MR. AUNON:

10 Q. What did you do as a result of that  
11 conversation?

12 A. The house was listed and recorded with  
13 Coldwell Banker as a listing.

14 Q. Did you ask or did your wife ask for a  
15 delivery date at the time?

16 MR. HARRISON: Objection to the question or  
17 the answer, did his wife ask. If the question is did he  
18 ask, then the question is unobjectionable.

19 MR. AUNON: I will withdraw the question,  
20 Your Honor.

21 MR. HARRISON: Stipulate as to authenticity  
22 of the letter dated January 21.

23 Is that marked as Exhibit No. 4?



1 THE CLERK: Yes.

2 (The document referred to above  
3 was marked Complainants'  
4 Exhibit No. 4 for  
5 identification.)

6 BY MR. AUNON:

7 Q. Look at this, please. Do you recognize this  
8 document?

9 A. Yes, I do.

10 Q. What is that letter?

11 A. It is a letter from my wife to Sandra  
12 Lindsay.

13 MR. AUNON: I am going to introduce all of  
14 these documents into evidence.

15 THE COURT: Any objection.

16 MR. HARRISON: What documents are we moving  
17 in?

18 MR. AUNON: All of the ones I have marked as  
19 exhibits.

20 MR. HARRISON: Exhibits 1 through 4, I have  
21 no objection to, Your Honor.

22 THE COURT: They will be received.

23 (The documents previously marked  
Complainants' Exhibits Nos. 1  
through 4 for identification  
were received into evidence.)



1 BY MR. AUNON:

2 Q. What is that letter?

3 A. It summarizes my wife's conversation with  
4 Sandra Lindsay and also attaches a copy --

5 MR. HARRISON: Objection to the answer, Your  
6 Honor.

7 The answer it summarizes my wife's  
8 conversation, I ask that that part of the answer be  
9 stricken.

10 It is not called for by the question and is  
11 in any event hearsay.

12 MR. AUNON: The document speaks for itself,  
13 Your Honor.

14 MR. HARRISON: Then you don't need the  
15 question.

16 MR. AUNON: It was admitted into evidence  
17 without objection.

18 THE COURT: The document speaks for itself.  
19 The objection is sustained.

20 MR. HARRISON: Thank you, Your Honor.

21 MR. AUNON: Exhibit No. 5.

22 (The document referred to above  
23 was marked Complainant's  
Exhibit No. 5 for  
identification.)





1 BY MR. AUNON:

2 Q. Do you recognize that?

3 A. Yes, I do.

4 Q. What is it?

5 A. It is a letter from Mr. Bernstein.

6 MR. AUNON: I move it into evidence.

7 MR. HARRISON: No objection, Your Honor.

8 THE COURT: It will be received.

9 (The document previously marked  
10 Complainant's Exhibit No. 5  
11 for identification was  
received into evidence.)

12 BY MR. AUNON:

13 Q. Were you surprised by that letter?

14 A. Very much so.

15 Q. Why?

16 A. Because my wife and Sandra Lindsay had come  
17 to an agreement.

18 MR. HARRISON: Objection, Your Honor, to the  
19 answer as being not responsive to the question and being  
20 hearsay in and of itself.

21 And because it was not responsive, it cannot  
22 be objected to until he has already said it.

23 THE COURT: Objection sustained.

BY MR. AUNON:



1 Q. Why were you surprised by the letter or the  
2 conversation?

3 A. Because we had an agreement to buy a house,  
4 and we very much wanted to buy a house, and this came as a  
5 total shock.

6 Q. Did you list your house?

7 A. Yes, we did.

8 MR. HARRISON: No objection to these  
9 documents as to authenticity. I do object as to  
10 relevance.

11 We are here on a contract breach, and I don't  
12 think they are part of a breach.

13 THE COURT: What are those documents?

14 MR. AUNON: Your Honor, one of them is a  
15 waiver to the contingency by my clients, and the other one  
16 is a listing of the house.

17 (The documents referred to above  
18 were marked Complainants'  
19 Exhibits Nos. 6 and 7 for  
identification.)

20 BY MR. AUNON:

21 Q. I show you this document, Mr. Mann. What is  
22 that?

23 A. It is a waiver of the contingency.

MR. HARRISON: Exhibit 7 is the waiver?



1 MR. AUNON: Exhibit 6.

2 MR. HARRISON: Exhibit 6 is the waiver.

3 BY MR. AUNON:

4 Q. What is that?

5 A. It is a listing for our house.

6 Q. Dated?

7 A. February 2nd.

8 Q. Did you authorize your attorney to send these  
9 documents to the builder?

10 A. Yes, I did.

11 MR. AUNON: I introduce Exhibit 6.

12 MR. HARRISON: Objection to No. 6.

13 THE COURT: The objection to No. 6 is  
14 overruled. I will receive it.

15 (The document previously marked  
16 Complainants' Exhibit No. 6  
17 for identification was  
received into evidence.)

18 THE COURT: What is that?

19 MR. AUNON: It is the listing of a house,  
20 Your Honor.

21 THE COURT: The objection to No. 7 is  
22 overruled. I will receive it.

23 (The document previously  
marked Complainants' Exhibit  
No. 7 for identification



1 was received into evidence.)

2 BY MR. AUNON:

3 Q. Have you sold your present house?

4 A. No, we have not.

5 Q. How come you waived your right to that  
6 contingency that protected you?

7 MR. HARRISON: Objection, relevance.

8 MR. AUNON: Your Honor, I think it is  
9 important for the Court to know why he waived it.

10 His financial condition changed. He is in a  
11 position to buy the house now.

12 I think it is important for the Court to know  
13 that he is ready, willing and able to do it, that is what I  
14 am driving at, to buy the house even without the sale of  
15 his house.

16 MR. HARRISON: Your Honor, I would agree that  
17 he has to prove with respect to the financial condition as  
18 of the date of the dispute.

19 The individual's financial condition as of  
20 today if he made a million in the stock market or lost a  
21 million in the stock market, it really is irrelevant.

22 It may be relevant in January of 1987 as of  
23 the date.



1 THE COURT: Objection overruled.

2 MR. HARRISON: Thank you, Your Honor.

3 BY MR. AUNON:

4 Q. How come you waived -- are you in a financial  
5 condition now to buy the house?

6 A. That is true.

7 Q. Without selling your house?

8 A. That is true.

9 Q. Why is that?

10 A. We have been right along.

11 Q. For how long have you been able to do that?

12 A. For well over a year.

13 Q. And did you apply for a loan?

14 A. Yes, we did.

15 Q. Where? Where did you apply for loans?

16 A. Well, the first one was Mutual Mortgage in  
17 September of '86.

18 And then in February of '86 I went back to  
19 Mutual Mortgage and they assured me that I could --

20 MR. HARRISON: Objection, Your Honor, hearsay  
21 or best evidence. If they assured him, they do it in  
22 writing with a loan commitment.

23 If he is telling what they said, it is



1 hearsay.

2 THE COURT: Objection sustained.

3 MR. HARRISON: Thank you, Your Honor.

4 THE WITNESS: I have a letter from Mutual  
5 Mortgage; is that sufficient?

6 BY MR. AUNON:

7 Q. Did you go somewhere else to apply for a  
8 loan?

9 A. Yes.

10 Q. Where?

11 A. Coldwell Banker.

12 Q. And what happened?

13 A. It was approved.

14 Q. Did you go somewhere else too?

15 A. Yes.

16 Q. Where?

17 A. Burke and Herbert.

18 Q. Are you now in a condition to buy the house?

19 A. Yes.

20 Q. Did you order a title insurance commitment?

21 A. Yes.

22 Q. May I show it to you?

23 This is what you received?



1           A.       Yes.

2                   MR. AUNON:   If you will mark this as an  
3 exhibit.

4                               (The document referred to above  
5                               was marked Complainants'  
6                               Exhibit No. 8 for  
7                               identification.)

8                   MR. AUNON:   I will introduce this into  
9 evidence, Your Honor.

10                   MR. HARRISON:   Your Honor, at the present  
11 time, in the first place I don't know if I have ever seen  
12 it before in discovery, and in the second place, it is  
13 undated, and a title policy rundown that is undated, that  
14 is one of the more useless things that life has to offer I  
15 suppose.

16                   But it makes it very difficult for me to say  
17 what it could prove in the absence of a date at all that  
18 would be relevant.

19                   MR. AUNON:   It shows the interest of my  
20 client in obtaining the property and inquiring as to the  
21 title of the property.

22                   THE COURT:   The interest of your client?

23                   MR. AUNON:   Yes., that my client is willing  
to buy the property.

                  THE COURT:   I am assuming that or he would



1 not be here.

2 MR. AUNON: All right.

3 THE COURT: I am not going to accept this.

4 MR. HARRISON: Thank you, Your Honor.

5 BY MR. AUNON:

6 Q. Did you suffer any damages as a result of  
7 this?

8 A. Yes.

9 Q. What?

10 A. A \$5,000 deposit.

11 Well, a \$2,000 lot hold in October of 1985.

12 Q. Those are not damages.

13 A. Well, I lost the use of the money.

14 Q. What money?

15 A. The down payment and the upgrades.

16 Q. Anything else?

17 A. Attorneys' fees.

18 Q. How much?

19 A. \$10,000 or more.

20 Q. Do you still want the house?

21 A. Yes, very much.

22 MR. AUNON: That is all the questions I have.

23 CROSS-EXAMINATION





1 BY MR. HARRISON:

2 Q. You knew or understood -- strike that.

3 Isn't it true, Mr. Mann, that you understood  
4 that your contract in effect gave you an out if you could  
5 not sell your house?

6 A. That is true.

7 Q. And you knew that you still had that out as  
8 of January, 1987; isn't that true?

9 A. That is true.

10 Q. And you knew that you had told Mr. Bernstein  
11 in your application that you needed the money from the sale  
12 of your house for your down payment on the new house; isn't  
13 that true?

14 A. That is what the application in September of  
15 '86 stated, yes.

16 Q. And you never changed that until after the  
17 January 30th letter; isn't that true?

18 A. My situation changed substantially.

19 Q. Yes, sir, but you never changed and  
20 informed Mr. Bernstein that your situation had changed; did  
21 you?

22 A. He never asked me.

23 Q. Would you answer my question?



1 A. No, I did not.

2 Q. Thank you.

3 Now, you state that you were not given a  
4 delivery date; is that correct?

5 A. That is correct.

6 Q. You knew when you purchased the house that  
7 you did not have a fixed delivery date; isn't that true?

8 A. That is true.

9 Q. Is there anything in your contract that led  
10 you to understand that the builder was required to give you  
11 a fixed delivery date?

12 MR. AUNON: I think that calls for a legal  
13 conclusion.

14 MR. HARRISON: As far as he understood, Your  
15 Honor. I am not asking about the conclusion. What he  
16 understood the deal to be.

17 THE WITNESS: Are you interested in my  
18 understanding of the contract?

19 BY MR. HARRISON:

20 Q. No, sir. I am interested in you answering my  
21 question.

22 My question is is there anything in the  
23 contract that led you to believe that the builder was



1 going to give you a specific date of delivery for the  
2 house?

3 A. He gave me an estimated date. When that date  
4 passed, I expected to get another estimated date.

5 Q. But you knew that the next date might also  
6 pass; is that correct?

7 A. Right.

8 But I never got a next date.

9 Q. Now, on January 13, 1987, you got a letter  
10 from the builder; right?

11 A. That is correct.

12 Q. And the letter said list your house?

13 A. Yes.

14 Q. And your response to that letter was to list  
15 your house effective March 1; isn't that correct?

16 A. My response to that letter was a telephone  
17 call to the builder.

18 Q. But you did not make that call?

19 A. No, I did not.

20 Q. But you did sign a listing dated March 1?

21 A. That is correct.

22 Q. Now, did you ever drive by the property?

23 A. Yes.



1 Q. Did you ever notice that framing was going up  
2 on the property?

3 A. I noticed some activity and a pile of mud,  
4 yes.

5 Q. Did you notice when framing began?

6 A. No, I did not.

7 Q. Now, did you drive by the property in  
8 December of 1986?

9 A. Quite possibly.

10 Q. Do you recall if there was any framing on the  
11 property?

12 A. I don't recall, no.

13 Q. Did you take an interest in the construction?

14 A. It was very hard to get interested because  
15 nothing ever happened.

16 Q. Now, with respect to the property, isn't it  
17 true that on a weekly basis you drove by the subdivision?

18 A. No, it is not true. I did not drive by on a  
19 weekly basis.

20 Q. How often did you drive by?

21 A. Probably once a month.

22 Q. Now, did you ever get any dates from Daurie  
23 Schwab that were unrealistic?



1 A. I didn't.

2 Q. Your wife did?

3 A. My wife did.

4 Q. But you considered those dates unrealistic  
5 and not responsive?

6 A. That is correct.

7 Q. Who was Daurie Schwab, just so she is  
8 identified?

9 A. She is a real estate agent and works for BMI,  
10 works for Bernstein.

11 Q. And BMI was the listing agent on this  
12 property?

13 A. I believe so, yes.

14 Q. Now, you read the contract before you signed  
15 it; right?

16 A. I glanced over it.

17 Q. You intended to be bound by the contract when  
18 you signed it; didn't you?

19 A. That is true.

20 MR. HARRISON: No further questions of this  
21 witness at this time, Your Honor.

22 (The witness was excused.)

23 MR. AUNON: I call Barbara Mann, Your Honor.



1           Whereupon,

2                           **BARBARA MANN,**

3       a complainant, was called for examination by counsel in her  
4       own behalf, and, having been first duly sworn by the Court,  
5       was examined and testified as follows:

6                           DIRECT EXAMINATION

7                   MR. AUNON:   Your Honor, can I have the  
8       contract and the addendums?

9                   THE COURT:   Is she simply going to testify to  
10      what he testified to?

11                  MR. AUNON:   Your Honor, she has more.

12                  She was the one who had -- conversations  
13      with her between my client and Sandra Lindsay, and she had  
14      some conversation with Daurie Schwab the real estate agent.

15                  She is the one that was handling most of the  
16      conversations.

17                  THE COURT:   Can you proffer what  
18      conversations, and how they bear on it?

19                  MR. AUNON:   Your Honor, my client was asking  
20      for delivery dates continuously from Daurie Schwab, and she  
21      did not give either reasonable or any delivery dates at  
22      all.

23                  My client was insisting continually on a



1 delivery date.

2 THE COURT: Go ahead.

3 BY MR. AUNON:

4 Q. Your name is?

5 A. Barbara Mann.

6 Q. And you are a complainant in this suit also?

7 A. Yes.

8 Q. I show you this letter.

9 A. Yes.

10 Q. What happened after you -- what is this  
11 letter?

12 A. This is a letter from Sandra Lindsay to us  
13 telling us that more than two weeks had elapsed since  
14 framing on the house, and asking us to list the house. I  
15 got that on the 17th of January.

16 Q. The 17th of January.

17 What did you do as a result of that letter?

18 A. I called Sandra on Monday.

19 Q. Who is Sandra?

20 A. Sandra Lindsay.

21 Q. And who is Sandra Lindsay?

22 A. She was the vice-president I believe at that  
23 time for the developer.



1 Q. Yes.

2 A. And I called her and explained what the  
3 situation was, that I had talked to Daurie Schwab who was  
4 the agent for the builder.

5 Q. When?

6 A. Actually from the beginning. From October of  
7 '85 to September of '86.

8 And then I got a call from her January 9th of  
9 '87, and the conversations were about varying things.

10 My concern in the beginning was that no trees  
11 had been cut down on the lot.

12 Q. The beginning, that was when?

13 A. Well, the beginning was -- the lot hold was  
14 October of '85, and there were just trees up, but when we  
15 went to contract on March 1st of '86, there were still  
16 trees there.

17 And we had discussed prior to that putting  
18 our house on the market.

19 And I said, how can I put my house on the  
20 market when all I see is trees there. And how can I be  
21 expected to sell my house --

22 MR. HARRISON: Your Honor, I have to object  
23 to the whole line of questioning.





1 We have an integrated contract. This is  
2 either pre-contract and it falls under that clause --

3 MR. AUNON: This is after the contract,  
4 conversations after the contract.

5 MR. HARRISON: My understanding is she was  
6 talking about the lot hold and prior to the contract. If  
7 that is correct, it is pre-contract and it is merged  
8 pursuant to the provisions of the contract, and therefore  
9 objectionable at this time.

10 BY MR. AUNON:

11 Q. After the contract, did you have any  
12 conversations with Daurie Schwab?

13 A. Yes.

14 Q. Let's start there.

15 A. About delivery?

16 Q. About anything.

17 A. We talked about upgrades and the mechanics of  
18 delivery, and it was going to be in November.

19 Q. November of what year, 86?

20 A. Yes, as per the contract.

21 And I talked to her probably half a dozen  
22 times. And every time I asked when delivery was going to  
23 be, and because as I recall in May of '86, there still



1 other than the model had not been anything, not a tree cut  
2 down on the site.

3 And I said, how can you meet a November date  
4 on this.

5 And she said, oh, the county is holding us  
6 up. Call the county.

7 This is getting to this letter, believe it or  
8 not.

9 Q. Were you told at the time of signing the  
10 contract that it was not a subdivision?

11 A. No.

12 I had no idea that the subdivision had not  
13 had approval until just several weeks ago when the  
14 builder's interrogatory papers said that.

15 Q. Please continue.

16 A. So we had no idea that we were working in a  
17 situation where there was no subdivision approval. I  
18 assumed that things were going along fine, but obviously  
19 they were not.

20 Q. What did you say about the November  
21 termination date -- rather delivery date?

22 A. We never discussed a November termination  
23 date. It was obvious in May that November was unrealistic



1 because the trees had not been cut down.

2 So eventually the houses started going up,  
3 and I started to watch Lot 4, and I knew that they had been  
4 promised a September, '86, delivery.

5 And then I knew that it had been revised to  
6 January of 1987, and we had never gotten our revision date  
7 that made any sense.

8 So I watched Lot 4, and in January they were  
9 not in. And I knew that they had moved out of their house  
10 in October and were in temporary quarters -- his wife  
11 called it camping out -- since October, and it was now  
12 January, and the road was not even in.

13 Q. The road was not even in?

14 A. No, the road was not in.

15 And there was a sea of mud there. If you  
16 peeked in the windows -- we didn't even have to peek in,  
17 the paint was still on the windows.

18 Nothing was progressing in January. And I  
19 had been over on the site in January, and so I had talked  
20 to Daurie on January 9th, and she had said that we would  
21 have an April delivery date.

22 And I said -- I didn't say, you are crazy,  
23 but I said it cannot be given the fact that he has got to



1 deliver six houses or seven before ours.

2 He is not making any of his delivery dates in  
3 January that he promised.

4 Q. What else did she tell you and what did you  
5 tell her at the time?

6 A. Daurie?

7 Q. Yes.

8 A. She said, the builder wants you to list your  
9 house.

10 And I said, what delivery date can you give  
11 me?

12 And she said April.

13 And I said, that is a ridiculous date.

14 And then she said May.

15 And I said, that is not going to make it in  
16 May either.

17 And then she said June.

18 I said, Daurie, give me a date and I will put  
19 my house on the market. But in real estate, if you -- and  
20 she said, just put in settlements to coincide.

21 Everything will work out, Barbara, don't  
22 worry about it.

23 Q. After you received the letter from Sandra--



1 then you received a letter from Sandra Lindsay?

2 A. And then I called Sandra Lindsay.

3 Q. After you received the letter?

4 A. Yes.

5 Q. And what happened there? What was the  
6 conversation?

7 A. I reiterated basically what I have told you,  
8 that Daurie was giving me these very flaky delivery dates,  
9 and I said, I am very concerned about this because I have  
10 watched Lot 4.

11 The builder has not met his target date of  
12 January.

13 And what date do you see that he will be able  
14 to meet?

15 And she said, we don't have any delivery  
16 dates at all at this point for any house.

17 And I said, well, that is what I was thinking  
18 was the situation. And I understand that you want me to  
19 put my house on the market.

20 And I want to put my house on the market, but  
21 I want it with settlements to coincide at a realistic  
22 ballpark -- a realistic ballpark date.

23 Q. Why did you want to do that?



1           A.       So that I could make my house saleable  
2 because nobody is going to come in and buy a house with no  
3 date to settle.

4                   And that is what I was leading up to.

5           Q.       And what did she tell you?

6           A.       Okay.

7                   What we discussed, I said what I would like  
8 to do is put my house on the market, give you the listing  
9 as of today basically or within the timeframe -- I think it  
10 said within five days she needed a response on that -- but  
11 date it March 1, 1987, because I said, I think you will  
12 agree as we get towards the end of February, you will have  
13 probably been able to deliver Lots 2, 3, and 4, and that  
14 will give you and me -- and I will be able to see.

15          Q.       Were they being built in sequence?

16          A.       Yes.

17                   It was 2, 3, 4, 5, and as the settlement on 4  
18 --once we see how 4 does because you are going to miss the  
19 January date obviously, we can get a more realistic target  
20 date for our house which will render it saleable at that  
21 point.

22                   I said, do you have a problem with that.

23                   And she said no, I have absolutely -- I don't



1 know whether she said absolutely, but she said, I will not  
2 have a problem with that.

3 If I -- and I had asked her, do you have a  
4 problem with my giving you the listings now, and dating  
5 them March 1 so that we can establish a realistic target  
6 date at that time.

7 And she said, no, I have no problem.

8 I said, will the builder have a problem?

9 And she said, no, I will run it by him.

10 And I said, will you let me know if you have  
11 a problem.

12 And that was basically the gist of the  
13 conversation.

14 She also said that Daurie did not know how to  
15 calculate delivery dates either.

16 Q. But she was not able to give you a delivery  
17 date either?

18 A. No.

19 She said she did not handle delivery dates.

20 Q. I show you that letter that is Exhibit No. 4.  
21 What is that letter?

22 A. This is a letter that I wrote to Sandra  
23 Lindsay reiterating the conversation I had with her on that



1 Monday. And it also attached a listing.

2 Q. And you mailed that letter to her?

3 A. Yes.

4 I am sure that I mailed that letter to her on  
5 the 21st attaching her listing.

6 MR. AUNON: Did you receive the letter?

7 MR. HARRISON: I have no problem. I already  
8 stipulated to it.

9 MR. AUNON: Please mark this as an exhibit.

10 (The document referred to above  
11 was marked Complainants'  
12 Exhibit No. 9 for  
identification.)

13 BY MR. AUNON:

14 Q. When was the next time you heard about the  
15 builder after that letter?

16 A. When we got a letter from Carl Bernstein.

17 Q. This Exhibit No. 5?

18 A. Yes.

19 And my husband read it to me over the phone,  
20 and I just could not believe it.

21 And it was the first time that I saw the word  
22 or read the word breach. I just -- as a matter of fact, I  
23 don't think the word breach is in here.

Q. It is misspelled, but it is there.





1           A.       At any rate, I called Mr. Bernstein up  
2 immediately after my husband read me this letter.

3           Q.       You talked to Mr. Bernstein?

4           A.       Yes, I did.

5                   And I was just in absolute shock and I told  
6 him who I was. And he found my file.

7                   And I said, I just do not understand why you  
8 sent this letter.

9                   And he said, well, I want you to remove your  
10 contingency. And I said, I can remove my contingency.  
11 Should I use your form or mine?

12                   And he said, well, you are a real estate  
13 agent; aren't you? Basically you figure it out. And then  
14 he terminated the conversation.

15                   He said, call my agent, Daurie Schwab, and  
16 talk to her if you want to have any further talk about  
17 this.

18                   So I called Daurie that evening. She was not  
19 in her office.

20           Q.       Daurie Schwab is?

21           A.       The agent, the BMI agent.

22           Q.       For Addicott Hills?

23           A.       Yes.



1 And she expressed shock that it had happened.  
2 She had found out that he had put the houses back on the  
3 market that morning.

4 And I said, Daurie, I can remove my  
5 contingency.

6 Shall I go to Coldwell Banker, or I will go  
7 to Coldwell Banker tonight and fill out a removal of the  
8 contingency, and I will hand deliver it to you tonight, or  
9 I will hand deliver it to you tomorrow morning, because she  
10 had informed me that there was a builder's meeting every  
11 Tuesday.

12 Q. And what did she say?

13 A. She said, no, no, let me talk to the builder  
14 about this tomorrow at the meeting. It depends on his mood  
15 as to whether he is going to retract it or not.

16 Q. Let me backtrack a little bit to that letter  
17 you sent to Sandra Lindsay summarizing your conversation  
18 with her.

19 Did you attach a listing to that letter?

20 A. Yes.

21 I had a listing attached.

22 Q. Did you register that listing with anybody?

23 A. Yes.



1                   It shows on the books of Coldwell Banker,  
2 January 21.

3           Q.       You delivered it to Coldwell Banker?

4           A.       Yes.

5           MR. HARRISON: Objection, Your Honor.

6                   We have got the best evidence rule here. If  
7 it shows in the books, bring the books in.

8           BY MR. AUNON:

9           Q.       My question is, did you deliver that listing  
10 to Coldwell Banker?

11          A.       Yes, on the 21st.

12          Q.       Exhibit 6?

13          A.       Yes.

14                   That is a waiver of our contingency.

15          Q.       And Exhibit No. 7?

16          A.       And that is a listing of our house on  
17 February 2nd.

18          Q.       Did you register that also with Coldwell  
19 Banker?

20          A.       Yes.

21          Q.       Did you authorize your attorney to send that  
22 letter to Addicott Hills?

23          A.       Yes, I did.



1 Q. Do you still own the house?

2 A. Yes, I do.

3 MR. AUNON: That is all the questions I have.

4 CROSS-EXAMINATION

5 BY MR. HARRISON:

6 Q. How long have you been a licensed real estate  
7 agent?

8 A. Since 1977.

9 Q. What companies have you worked for?

10 A. I started out with J. Edwards and General  
11 Brokerage, and I was there about six months.

12 And then I went what was then Routh Robbins  
13 and became Coldwell Banker. And I spent about a year with  
14 Long and Foster in 1981 I believe.

15 Q. And what did you do as a real estate agent?

16 A. I was in general brokerage until late 1979.  
17 And then I went into new home sales as a closeout agent, so  
18 I was not involved with brand new construction.

19 The houses were already built, and the  
20 subdivision had three, four, five houses left to sell in  
21 it.

22 And then in '82, I left and became a part-  
23 time agent at Coldwell Banker.



1 Q. So you were familiar with new home sales  
2 agreements; is that correct?

3 A. We used the Coldwell Banker form.

4 Q. Did you use the Long and Foster new home  
5 sales agreement when you were with Long and Foster?

6 A. Yes.

7 And the Long and Foster new home sales  
8 agreement, yes.

9 Q. You said that you received the call on  
10 January 9 from Daurie Schwab?

11 A. Right.

12 Q. Will you tell me what was the nature of that  
13 call?

14 A. She said, the builder wants you to put your  
15 house on the market. And I said, when is it going to be  
16 delivered.

17 And she said April.

18 And I said, that is ridiculous. And May and  
19 June and July.

20 Q. So did you refuse to put your house on the  
21 market?

22 A. I did not refuse to put my house on the  
23 market. She said, put in settlements to coincide.



1 And I said, what date am I going to use,  
2 Daurie.

3 And that is when she said April, May, June or  
4 July.

5 I was just searching for a realistic date for  
6 the settlements to coincide.

7 Q. Will you pass to the witness Exhibit 7,  
8 please?

9 A. That is your second listing agreement;  
10 right?

11 A. This is Exhibit 5. This is 7.

12 Q. That is the second listing agreement?

13 A. That is right.

14 Q. And that has written on it, settlements to  
15 coincide; right?

16 A. Yes.

17 Q. Why didn't you just do that in January?

18 A. I think that is a good question, and you  
19 asked it before and it was a good question. And I did some  
20 thinking about it.

21 Our financial situation changed dramatically  
22 at the end of December of '86 -- excuse me, I am sorry--  
23 it changed dramatically enough so that we discussed going



1 in all cash on the house which we could have done -- which  
2 we could do by selling our house.

3 In other words, we were discussing not  
4 getting a loan out.

5 And we thought at that time, and we thought  
6 in the beginning -- I think it was the beginning of  
7 December -- that going in all cash would be very smart  
8 because we would have two kids in college, and it would  
9 just ease the burden of that \$1,100 a month payment plus  
10 college tuition.

11 Q. Would you like to take a minute?

12 A. No.

13 And so what I was fixed on the whole time,  
14 and it never even occurred to me because I thought, you  
15 know, that is the answer, go in all cash, take a loan out  
16 for the kids to go to college if we had to on the new  
17 house, and then we would not be up a tree or feeling like  
18 we were up a tree with all of these payments with two  
19 college educations and making a house payment and all, so  
20 when we retired we would not be facing that \$1,100 a month  
21 going on in perpetuity.

22 So I never thought about listing -- putting  
23 it on that way.



1 I needed -- in my mind I needed to sell the  
2 house with settlements to coincide, and I needed it to give  
3 to the buyers of my house so that they would give me a fair  
4 price for my house or even just render it saleable.

5 So that was my thinking at the time. So the  
6 change was of course the letter from Mr. Bernstein. It  
7 changed everything at that point.

8 Q. Now, when you signed the contract, you  
9 intended to live up to the contract; right?

10 A. Yes, I did.

11 Q. Now, you had never bought a house from plans  
12 before; isn't that correct?

13 A. That is right.

14 Q. And you had never sold a house from plans?

15 A. Yes, that is correct.

16 Q. And isn't it true, without using the word too  
17 much, that you were basically worried about it, and wanted  
18 to see what the houses looked like and the builder that was  
19 really going to build it?

20 A. I was concerned that he was able to build the  
21 house and get it up.

22 Q. Isn't that why you were watching Mr. Roberts'  
23 house?





1 A. Yes.

2 And the timing, the timing as far as if they  
3 were giving him a date of January of '87, how close were  
4 they making that, because that was the second date for him.  
5 He had moved out of his house.

6 How close were they going to get to that date  
7 so that I could see what their occupancy dates were and how  
8 well they could project.

9 And at that time, it looked very casual.

10 Nobody asked me for my upgrade money until  
11 September.

12 The contract had said they wanted upgrade  
13 money, half of it, within ten days of the contract  
14 ratification.

15 So it was kind of casual dates that people  
16 were being given, yet these people were out in temporary  
17 quarters, and that scared the heck out of me.

18 Q. But they called you on the phone and they  
19 said, list your house; right?

20 A. In January.

21 Q. Yes, ma'am.

22 A. Yes.

23 Q. And they sent you a letter on January 13 and



1 said, list your house; right?

2 A. Right.

3 And I still had not seen anybody move in.

4 Q. Now, just to get the record straight, Lot 4,  
5 the purchaser of Lot 4 was Mr. Will Roberts; is that  
6 correct?

7 A. Yes.

8 Q. And Mr. Roberts is a Coldwell Banker agent  
9 too; is that correct?

10 A. Yes.

11 Q. Now, in your testimony about Lot 4 and Mr.  
12 Roberts on direct, you said temporary quarters and camping  
13 out in a sea of mud, and I believe that you were over there  
14 in January, and that there was a paint on all of the  
15 windows; is that right?

16 A. That sounds right.

17 Q. So you had walked through?

18 A. I did not walk through his house. I saw it  
19 from outside.

20 Q. So you knew in January that the houses were  
21 up; isn't that right?

22 A. His house was up, and it had paint on its  
23 windows, yes.



1 Q. How about your house?

2 A. It was up, and I don't know at what stage it  
3 was in because I was concentrating on Will's.

4 Q. But the framing was up?

5 A. What do you mean by framing?

6 Q. What do you mean by framing?

7 A. I thought I knew.

8 And in talking to people since, I have gotten  
9 a different answer from everybody.

10 Q. Let me just find out --

11 A. In January of 1987, I think that the roof was  
12 on.

13 Q. Yes, ma'am.

14 And you could see that from the road; right?

15 A. No. From driving by?

16 Q. Yes, ma'am.

17 A. Not without stopping and getting out of your  
18 car and trying to go into the subdivision a little bit,  
19 unless you come from the other way which I never did.

20 Q. Do you recognize this picture?

21 MR. AUNON: It is pretty.

22 THE WITNESS: That is a pretty picture. That  
23 is a pretty picture.



1 BY MR. HARRISON:

2 Q. Is that a picture of your house from the  
3 road; right?

4 A. Not from the road.

5 Q. Yes, ma'am.

6 A. Is it?

7 Q. You don't have to agree with me.

8 A. I don't know.

9 Q. Do you recognize that picture?

10 A. No, I do not.

11 Q. It is the back of your house.

12 Again, from George Washington Parkway.

13 Do you recognize that?

14 A. No, I don't.

15 Q. Mount Vernon Parkway, excuse me.

16 A. No, I don't.

17 MR. AUNON: She said she does not recognize  
18 it.

19 MR. HARRISON: May I approach the witness,  
20 Your Honor?

21 THE COURT: Yes.

22 BY MR. HARRISON:

23 Q. I have a map of two subdivisions, and I am



1 marking in red around the star on one map which is  
2 denominated as where Union Farms is.

3 Will you mark approximately on this map which  
4 says Union Farms area map where your current home is?

5 A. I can do it on that one better.

6 Q. Do it on the one adjoining.

7 A. That one is not to scale.

8 It must be about here.

9 Q. Put your initials by that mark, please.

10 Now, as far as you are concerned -- strike  
11 that.

12 The roof was on in January. When did the  
13 roof go on?

14 A. I don't know.

15 Q. Was it on in December?

16 A. I don't know.

17 Q. Was it on January 1st?

18 A. I don't know either.

19 Q. I believe your prior testimony indicated  
20 although you did not say it that you knew the condition of  
21 the house with the roof on or about January 9th when you  
22 talked to Daurie; is that correct?

23 A. I don't know for certain. I know that I knew



1 on the 18th of January.

2 Q. When you had received the January 13th demand  
3 letter?

4 A. On the 17th when we went to the site. Yes.

5 Q. You were told that the county was holding up  
6 the project; weren't you?

7 A. No.

8 Q. You were not?

9 A. No, not per se.

10 Q. You said on your direct, and I believe this  
11 is a quote, I may not have it exactly, the county is  
12 holding us up.

13 And I believe you said that some people had  
14 even talked to the county, and you knew that, regarding the  
15 initial delays in the subdivision.

16 A. I talked to Daurie in May of 1986, and she  
17 said -- it is in my deposition I believe --

18 Q. You talked to Daurie when?

19 A. I believe this is in my deposition.

20 I talked to her in May of 1986, and she said,  
21 we are having problems with the county. Why don't you call  
22 them and see what the problem is?

23 And I said who to call. And she said, call



1 the building inspector, and so I did.

2 And the building inspector said that the  
3 builder owes us one or two pieces of paper, and he owes us  
4 money.

5 And so I called Daurie back and I told her  
6 because she had asked me to. And I told her this was the  
7 information that the building inspector had given me.

8 And she said, that is not true. The builder  
9 does not owe them any papers.

10 Q. Okay.

11 A. And he has paid his money. So that is not  
12 true. So what was I supposed to do.

13 Q. Now, would you take a look at Exhibit No. 4,  
14 please, which is the January 21st letter which you wrote to  
15 Sandy Lindsay. Do you have that?

16 A. I am sorry, the January 21st. Yes, I do have  
17 that.

18 Q. Now, at the bottom of the first page, the  
19 last sentence, it says, above all I would like to assure  
20 the builder that we are not trying to sidestep the issue.

21 Rather we are attempting to determine a  
22 realistic occupancy date so that both houses are sold to  
23 enable the moves to be house to house.



1 Now, you wrote that after your discussion  
2 with Sandy Lindsay; isn't that right?

3 A. That is right.

4 Q. Now, isn't it true that at the time that you  
5 wrote this while you were perhaps not happy with the delay  
6 at that time, you recognized that that was a part of  
7 building a house in Fairfax County because of your  
8 experience as a real estate agent?

9 A. No, that is not true.

10 Q. All right, it is not true.

11 Would you state what is true regarding the  
12 delays at that time?

13 A. The delays at that time, I was trying to  
14 figure out why there were happening.

15 We had originally gotten a November date. In  
16 May when we saw no trees had been cut down -- I mean nobody  
17 was going to get their August and September dates.

18 In January I knew of three people who had  
19 moved out -- had sold their houses and were living in  
20 temporary quarters.

21 And I could not determine the delay, the  
22 reason for the delay.

23 Daurie certainly did not tell me why there





1 was a delay. She could never give me an occupancy date  
2 that was realistic.

3 I quite frankly did not know whether they  
4 knew what they were doing, because they had not put a  
5 road in and they had the houses up, and it was going to  
6 snow.

7 I was very, very, very concerned that they  
8 were going to be able to complete my house, much less  
9 anybody else's in the project. And I was very, very, very  
10 concerned about being out on the street without a house to  
11 move to.

12 Q. Now, with respect to the listing agreement  
13 which is attached to Exhibit No. 4, dated March 1, 1987,  
14 did you know at the time that you filled that out whether a  
15 postdated listing agreement was acceptable to multiple  
16 listing?

17 A. No.

18 It did not even occur to me that it would not  
19 be. And I don't know today. I don't know whether that is  
20 true or not.

21 Q. You do know that multiple listing will accept  
22 a listing that is like Complainants' Trial Exhibit No. 7  
23 which is dated the date that it is signed; isn't that



1 correct?

2 A. Yes.

3 MR. HARRISON: I have no further questions at  
4 this time of this witness, Your Honor.

5 THE COURT: Anything further of this witness,  
6 Mr. Aunon?

7 MR. AUNON: No.

8 (The witness was excused.)

9 MR. AUNON: I call Mark Kaywood.

10 Whereupon,

11 MARK KAYWOOD,

12 a witness, was called for examination by counsel for the  
13 complainants, and, having been first duly sworn by the  
14 Court, was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. AUNON:

17 Q. What is your name, sir?

18 A. Mark Kaywood.

19 Q. And what is your address?

20 A. Home address, 418 North Columbus, Alexandria,  
21 Virginia.

22 Q. What is your occupation?

23 A. Sales manager for Coldwell Banker, Old Town



1 Alexandria.

2 Q. What are your duties as office manager?

3 A. As officer manager, I review cases, training,  
4 recruiting of new agents.

5 Q. Among your duties, do you receive any  
6 listings?

7 A. It is my major duty.

8 Q. Did you receive any listing from Barbara Mann  
9 and Lowry Mann?

10 A. Yes, I have.

11 Q. When and how many?

12 A. Two.

13 One on January 21st -- may I refer?

14 Q. Yes.

15 MR. HARRISON: Your Honor, could I know what  
16 the witness is referring to?

17 THE WITNESS: A listing agreement.

18 MR. HARRISON: Is that what you are looking  
19 at?

20 THE WITNESS: Yes.

21 BY MR. AUNON:

22 Q. Is that your file?

23 A. It is my office file on 8716 Foxstone Lane.



1                   Okay, one listing received on January 21st,  
2 the other listing on the 2nd of February.

3           Q.       For the same house?

4           A.       That is correct.

5                   MR. AUNON: That is all the questions that I  
6 have.

7           BY MR. AUNON:

8           Q.       That was registered with Coldwell Banker?

9           A.       Yes, and sent -- entered into the corporate  
10 computer.

11                   THE COURT: Two listings for the same house?

12                   THE WITNESS: One listing was dated -- was to  
13 go on the market March 1.

14                   And then the second one, it was to be put on  
15 immediately when March 1 was rejected, was not entered at  
16 that point into the corporate computer.

17                   I cannot alter that. It is a completely  
18 separate listing.

19                               CROSS-EXAMINATION

20           BY MR. HARRISON:

21           Q.       So the March 1st listing was not entered into  
22 the computer?

23           A.       It was entered into the corporate computer.



1 Q. It was not entered into multiple listing?

2 A. It was to be put into multiple on the first  
3 of March.

4 Q. Let me get the answer to the question again.

5 Was it or was it not entered in multiple  
6 listing on the date you received it?

7 A. No.

8 Q. Why was it not listed in multiple on the date  
9 you received it, because it did not comply with multiple  
10 listing rules; isn't that correct? You cannot have a  
11 postdated listing?

12 A. You cannot put into multiple that listing;  
13 that is correct.

14 MR. HARRISON: Thank you. No further  
15 questions.

16 MR. AUNON: For the record, I think that the  
17 addendum that provides for the sale of the house does not  
18 require that there be a multiple listing.

19 MR. HARRISON: Objection, Your Honor. We  
20 will argue that at the time that we argue.

21 THE COURT: Objection sustained.

22 MR. AUNON: That's all of the questions I  
23 have.



1 MR. HARRISON: Thank you, Your Honor.

2 THE COURT: May this witness be excused?

3 MR. HARRISON: Yes, Your Honor.

4 MR. AUNON: Yes, Your Honor.

5 THE COURT: You are excused and free to go.

6 (The witness was excused.)

7 MR. AUNON: I am going to call Sandra Lindsay  
8 as an adverse witness.

9 Whereupon,

10 SANDRA K. LINDSAY,

11 a witness, was called for examination by counsel for the  
12 complainants, and, having been first duly sworn by the  
13 Court, was examined and testified as follows:

14 DIRECT EXAMINATION

15 MR. HARRISON: While she is testifying, Your  
16 Honor, we will bring Mr. Bernstein in as corporate  
17 representative.

18 THE COURT: No.

19 MR. HARRISON: If she is testifying, Your  
20 Honor?

21 THE COURT: There is no difference. You  
22 brought her in as the corporate representative, and she is  
23 it.



1 MR. HARRISON: I cannot substitute?

2 THE COURT: No.

3 I am not going to let you run in another  
4 corporate representatives. That is the whole purpose of  
5 the rule.

6 MR. HARRISON: Thank you, Your Honor.

7 BY MR. AUNON:

8 Q. Your name and address, please?

9 A. I am Sandra Lindsay, and I reside at 4810  
10 West Braddock Road, Alexandria, Virginia.

11 Q. And you are an officer of Addicott Hills?

12 A. I am.

13 Q. I show you this document. Do you recognize  
14 that document?

15 A. Yes, I do.

16 Q. And what is it?

17 A. It is the residential use permit issued by  
18 Fairfax County.

19 Q. And it shows that the Lot 11 completion date  
20 was September 9, 1987?

21 A. That is correct.

22 MR. AUNON: Your Honor, I would like to  
23 introduce that into evidence.



1 MR. HARRISON: We stipulate as to  
2 authenticity, Your Honor. I object as to relevance.

3 So what? It doesn't relate to the contract  
4 that was terminated some months before that or breached  
5 some months before that.

6 THE COURT: What is this?

7 MR. AUNON: Your Honor, the contract -- this  
8 is when the house was final, the end of September of this  
9 year.

10 THE COURT: What is this?

11 MR. AUNON: Your Honor, this is the  
12 residential use permit issued by Fairfax County saying the  
13 house is okay, it is completely finished.

14 THE COURT: The objection is overruled. It  
15 will be received.

16 MR. HARRISON: Thank you, Your Honor.

17 (The document previously marked  
18 Complainants' Exhibit No. 8 for  
19 identification was received  
into evidence.)

20 BY MR. AUNON:

21 Q. Do you recall a conversation between you and  
22 Barbara Mann?

23 A. Yes, I do.

Q. And at that time, she asked you for a





1 delivery date?

2 A. Yes, she did.

3 Q. And you could not give her a delivery date?

4 A. I was able only at the time to give her  
5 projected completion dates on the house.

6 Q. Let me refresh your memory.

7 In your deposition, page 19 it says, did she  
8 ask you for a delivery date?

9 Yes, she did.

10 What did you tell her?

11 That I could not give her a delivery date. I  
12 in fact offered a projected completion date for the house  
13 which is standard procedure.

14 Is that correct?

15 MR. HARRISON: Objection, Your Honor.

16 Three objections. First, lack of proper  
17 foundation for using the witness' deposition to impeach,  
18 and second, there is no substantive difference between her  
19 testimony here and her testimony there, and therefore it is  
20 either a device to intimidate her or it is improper, and I  
21 would like the question stricken.

22 MR. AUNON: I am not intimidating the witness  
23 at all, Your Honor. I am just trying to refresh her



1 memory.

2 I hope you are not intimidated, Ms. Lindsay.

3 THE COURT: She said she could not give a  
4 date. That is substantially what she said. The objection  
5 is sustained.

6 BY MR. AUNON:

7 Q. The houses were built in sequence; is that  
8 not correct?

9 A. Yes.

10 Q. Meaning Lot 1 was first, 2, 3, 4, up to 11;  
11 is that correct?

12 A. No, not quite in that sequence.

13 Q. What was the sequence?

14 A. The sequence would have entailed 1 through 5,  
15 Lots 10, 11, 12, 13 and 21.

16 Q. So that was made for the convenience of the  
17 owner or the builder?

18 A. It was our construction schedule.

19 Q. Let me show you this.

20 MR. HARRISON: Your Honor, I will stipulate  
21 as to authenticity, but I object to it again.

22 It is a follow-up contract on the same  
23 property, that is true.



1 MR. AUNON: This is a contract in which the  
2 builder sold the house on the 11th of February, Your Honor,  
3 without any contingency or anything, and it is relevant to  
4 the case.

5 BY MR. AUNON:

6 Q. This is the contract?

7 A. Yes.

8 I recognize that contract.

9 MR. AUNON: I would introduce that into  
10 evidence.

11 THE COURT: Your objection is relevancy?

12 MR. HARRISON: I object, Your Honor. It has  
13 got nothing to do with either the breach or non-breach of  
14 the contract that we have.

15 It cannot have any relevancy; it was entered  
16 into after that.

17 THE COURT: The objection is overruled. It  
18 will be received.

19 MR. HARRISON: Thank you, Your Honor.

20 (The document previously marked  
21 Complainants' Exhibit No. 9  
22 for identification was received  
23 into evidence.)

MR. HARRISON: If I could have one further  
thing, Your Honor.



1           The problem I really have with it is anything  
2 that I try to put into evidence to explain why that was  
3 entered into is also properly objectionable.

4           And if I try to put it in, he will object to  
5 explaining why that contract was entered into. And it is  
6 proper. And that is the reason that I did not want it in,  
7 Your Honor.

8           It is not just that it is irrelevant which it  
9 is, but it is irrelevant and calculated to taint the  
10 proceedings, which I will not be able to cure in following  
11 the normal rules.

12           THE COURT: I will let you cure it. It is an  
13 equitable proceeding.

14           MR. HARRISON: Thank you, Your Honor.

15           MR. AUNON: That is all the questions I have  
16 for this witness.

17           THE COURT: Do you have any questions of this  
18 witness at this time?

19           MR. HARRISON: If I could have one minute,  
20 Your Honor.

21                           CROSS-EXAMINATION

22           BY MR. HARRISON:

23           Q.       Do you recall a conversation with Barbara



1 Mann?

2 A. Yes, I do.

3 Q. What day was that conversation?

4 A. I cannot recall the specific date.

5 Q. The approximate date.

6 A. Approximately around the 16th or 17th of  
7 January.

8 Q. Of this year?

9 A. Of 1987.

10 Q. Did you agree at that time to a March 1  
11 listing date?

12 A. No, I did not.

13 Q. Did you have the authority to agree to a  
14 March 1 listing date?

15 A. Yes, I did.

16 Q. Did you discuss listing their house?

17 A. Yes, I did.

18 Q. And what was that discussion?

19 A. My recollection is that I had given Mrs. Mann  
20 a June completion date for that house, and that in her  
21 submission of a listing agreement as we requested, that it  
22 would be helpful to them to have the settlements of the  
23 houses coincide to address her concerns about the moving.



1 Q. So you did discuss coinciding settlements?

2 A. Yes, I did.

3 Q. Did you agree to allow settlements to  
4 coincide?

5 A. Yes.

6 Q. What was that, what did you say?

7 A. It is rather difficult to recall the exact  
8 conversations, but it is rather common practice to work  
9 with our customers once the houses have been sold to allow  
10 some flexibility in arranging for the settlement of the  
11 purchaser's old home and attempts to make the settlements  
12 coincide with ours even on the same day.

13 Q. Did they offer to do anything in return for  
14 that? Strike that I guess.

15 Was there any agreement that you understood?

16 A. No.

17 Q. Did you understand that they were going to  
18 list their house thereafter immediately?

19 A. Quite frankly I was not sure whether or not  
20 Mrs. Mann was going to do this at that particular time.

21 Q. But was there any -- strike that.

22 MR. HARRISON: No further questions. Thank  
23 you.



1 THE COURT: You may step down.

2 Do you have more questions?

3 MR. AUNON: Not from her, no, Your Honor.

4 THE COURT: We will recess until 2:00  
5 o'clock.

6 (The witness was excused.)

7 (Whereupon, at approximately 12:55 o'clock p.m., the  
8 hearing in this matter was recessed for lunch, to reconvene  
9 at approximately 2:00 o'clock p.m.)  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



AFTERNOON SESSION

(Whereupon, at approximately 2:05 o'clock p.m., the hearing in this matter was reconvened.)

MR. AUNON: One last witness, Your Honor.

Whereupon,

MARTHA ALLEN,

a witness, was called for examination by counsel for the complainants, and, having been first duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. AUNON:

Q. Will you please state your name?

A. Martha Allen.

Q. And what is your address?

A. 8704 Foxstone Lane, Alexandria, Virginia.

Q. And you are employed by whom?

A. I am self-employed, associated with Coldwell Banker.

Q. Are you familiar with Barbara and Lowry Mann?

A. Yes.

Q. How long have you known them?

A. Ten to fifteen years.

Q. Friends I presume?





1 A. Correct.

2 Q. Do you know of this lawsuit?

3 A. Yes.

4 Q. Did you contact Addicott Hills concerning  
5 this matter?

6 A. Yes.

7 Q. How? How and when?

8 A. While I was working with Barbara on another  
9 case, and then became somewhat involved with this case.

10 Q. And what did you do? Did you contact  
11 Addicott Hills?

12 A. Yes, I did.

13 Q. And when was that?

14 A. February 4th.

15 Q. February 4th?

16 A. Yes.

17 Q. And what did you do?

18 A. I called Mr. Carl Bernstein.

19 Q. And did you talk to him?

20 A. And then somebody called me back and said  
21 that they were Carl Bernstein.

22 Q. And what conversation took place? Will you  
23 explain to the Court what happened?



1 A. I was contacting him because --

2 Q. What did you tell him?

3 A. I told him that the Leons and the Manns  
4 wanted to buy his house and that they wanted to perform  
5 under the terms of the contract.

6 Q. And what did he say?

7 A. The first conversation, he asked me if I had  
8 read the contract, and I said, yes, I had.

9 And he kept coming back saying, read the  
10 facts, read the facts. He said, they are in breach of  
11 their contract.

12 I suggest that you read the facts and get  
13 back to me.

14 So he hung up. And then I called him back  
15 another time.

16 Q. On the same day?

17 A. The same day, I think it was the same day.

18 And again, I said that they wanted to perform  
19 under the contract, and he said that they were in breach of  
20 the contract, for me to read the facts.

21 And then he said that he was a business man,  
22 and I was a business woman, and surely I would understand  
23 that the houses were worth \$50,000 or \$60,000 more than



1 when he had sold them to them.

2 Q. And what did you reply to him, or did you  
3 tell him after he said that?

4 A. He said, give me one good reason why I should  
5 honor this contract and I will.

6 Q. Did you give him a good reason or any reason?

7 A. Well, I answered him that they had entered  
8 into a contract in good faith, and they thought that he had  
9 entered a contract in good faith.

10 Q. And what did he say after that?

11 A. He did not say anything. There was just  
12 silence.

13 Q. That was the end of the conversation?

14 A. He said, I suggest that you read the  
15 contract. And that was the end of the conversation.

16 MR. AUNON: That is all the questions I have  
17 of this witness, Your Honor.

18 MR. HARRISON: No questions, Your Honor.

19 THE COURT: May this witness be excused?

20 MR. HARRISON: Yes, Your Honor.

21 THE COURT: You may step down. You are free  
22 to go.

23 (The witness was excused.)



1 MR. AUNON: That is the complainants' case,  
2 Your Honor.

3 MR. HARRISON: I have a motion, Your Honor.

4 THE COURT: Fine.

5 MR. HARRISON: Your Honor, this is a simple  
6 case as I said at the beginning.

7 It is a case about a contract. The contract  
8 is a new home sales agreement which we have agreed to plus  
9 an addendum which we have agreed, the addendum is described  
10 -- the new home sales agreement is Complainants' Trial  
11 Exhibit No. 1.

12 The sale of existing residence addendum is  
13 Trial Exhibit No. 2.

14 The law, of course, in Virginia is clear even  
15 a court of equity is required to enforce contracts.

16 With respect to the contract, the paragraphs  
17 that I feel are important for the purposes of this motion,  
18 in particular paragraph 18(d), second page towards the  
19 bottom for the record.

20 Time is hereby declared to be of the essence  
21 in the performance by purchaser of each of the purchaser's  
22 obligations hereunder.

23 Even in equity the requirement that that is



1 put in a contract will enforce the forfeiture if it is not  
2 complied with strictly even unto the hour if performance is  
3 required by an hour.

4 Now, what performances are we talking about?

5 Looking over at Trial Exhibit No. 2, sale of  
6 existing residence. And again --

7 THE COURT: They are marked in reverse order.

8 MR. HARRISON: I am sorry, Your Honor.

9 Okay, Trial Exhibit No. 1 is the sale of  
10 existing residence.

11 THE COURT: The addendum.

12 MR. HARRISON: This is 2. Thank you very  
13 much. I am sorry I mismarked them.

14 THE COURT: They probably should have been  
15 marked the other way.

16 MR. HARRISON: Well, Trial Exhibit No. 1  
17 then, sale of existing residence.

18 Within ninety calendar days from the date of  
19 house framing, buyer shall deliver seller a written copy of  
20 a contract.

21 We are not here on that one, but it says in  
22 connection herewith, buyer shall -- the word shall  
23 mandatory, not predicated -- immediately commence to use



1 diligent and good faith efforts to sell buyers' residence.

2 There is absolutely --

3 THE COURT: That part is so that the first  
4 part of the ninety days can be satisfied.

5 MR. HARRISON: Yes, sir, so it can begin.

6 THE COURT: So long as it is required?

7 MR. HARRISON: Yes, sir.

8 Immediately list buyers' residence with a  
9 reputable real estate broker in vicinity in which buyers'  
10 residence is located which broker shall be a member of  
11 multiple listing service, and buyer shall produce  
12 satisfactory evidence of such listing to seller within  
13 fifteen days after the start of house framing.

14 Time limit fifteen days after the start of  
15 house framing.

16 Now, a contract purchaser seeking specific  
17 performance must prove compliance with all terms of the  
18 contract, and I submit as the first reason to strike the  
19 evidence at this point is that there is no proof before you  
20 where you can find that they delivered to the seller a  
21 satisfactory listing for multiple listing service within  
22 fifteen days after the start of house framing.

23 That is a requirement of the plaintiff. The



1 burden is on the plaintiff always to carry its load, but in  
2 this particular -- to carry the burden of proof, but in  
3 this particular case even more so than normal.

4 Now, the Lerner versus Guldeski case, 230  
5 Virginia 124, a 1985 case tried in this court by Judge  
6 Jamborsky, the Court reversed on that very ground that the  
7 plaintiff in a contract case -- and we are not dealing  
8 with an inexperienced plaintiff here, a realtor of ten  
9 years experience, specialized in new home sales, admittedly  
10 a close-out agent according to her testimony, but a  
11 realtor of ten years' experience, specializing in new home  
12 sales.

13 THE COURT: Let me see the Lerner case.

14 MR. HARRISON: Yes, sir.

15 THE COURT: Do you have a copy of that?

16 MR. HARRISON: I just want to hand it up to  
17 the Court.

18 THE COURT: Do you need this for your  
19 argument?

20 MR. HARRISON: Not right now, Your Honor.  
21 The Court can have that at the present time.

22 The point with respect to that case, it  
23 stands for the proposition that the Court may not go



1 outside the plain and unambiguous instrument to search for  
2 the instrument's meaning. And once it finds that meaning,  
3 it must enforce that meaning.

4 And the meaning I would ask the Court here to  
5 enforce -- and towards the end of it, it says that the  
6 burden is always on the plaintiff.

7 The case actually is reversed on the basis  
8 that the plaintiff did not prove compliance with the  
9 contract and therefore Judge Jamborsky was ultimately  
10 reversed.

11 However --

12 THE COURT: This was for the return of the  
13 deposit?

14 MR. HARRISON: The return of the deposit on  
15 Tysons II, yes, Your Honor.

16 Now, with respect to the sale of existing  
17 residence addendum, the second point with respect to the  
18 fifteen days, Your Honor, is not only did they have to  
19 prove it, but I believe their evidence shows that they did  
20 not do that.

21 The evidence shows that at least as of  
22 January 13th, framing had commenced, not completed, house  
23 framing starts on the property.





1           They received a notice sometime immediately  
2 after January 13th, perhaps as late as January 17th, that  
3 said, house framing started.

4           She has admitted that on January 9th, she  
5 received a notice that said, hey, house framing has  
6 started. List your house. Do it, please.

7           The Court will search the contract in vain to  
8 find a requirement of notice. There isn't one.

9           But they gave her notice anyway. They said,  
10 look, even though we don't have to, please list your  
11 house.

12           She didn't do it. They wrote her a letter  
13 that said, list your house. She didn't do it.

14           The sale of existing residence addendum at  
15 the bottom. In the event buyer fails to secure a written  
16 contract for the sale of the buyer's residence -- we are  
17 not worried about that -- but fails to deliver a copy of  
18 the listing contract to seller within the time above  
19 specified, buyer shall be deemed in default of this  
20 contract.

21           Again, the mandatory word, shall be deemed in  
22 default. Again, time is of the essence, stressed as to  
23 importance as the agreement between the parties.



1           Again, no evidence of that. No evidence of  
2 compliance. Definite evidence of breach of that particular  
3 contract.

4           Now, what happens if they are in default?

5           Well, as a matter of law, one thing that  
6 happens if they are in default, if they are not in perfect  
7 compliance, they cannot get specific performance as  
8 absolutely beyond the pale of remedies that would be  
9 available to them.

10           Secondly, and more important than that, if  
11 they are in breach, not only do they not deserve specific  
12 performance, but they have certain liabilities under the  
13 contract.

14           Paragraph 15, now, paragraph 15(e) is the  
15 paragraph that was stricken or declared to be not  
16 enforceable by Judge Hancock, which I will come back to in  
17 a minute.

18           But 15(a) has been ruled upon by no judge.  
19 And the addendum says they are in default of the contract,  
20 and the provisions of the contract shall govern.

21           15(a). In the event contract is not  
22 performed by purchaser in accordance with its terms and  
23 provisions, this contract may be terminated by seller.



1 Now, their evidence under the best terms, no  
2 question the seller terminated the contract. And that  
3 expressly allows the seller to terminate the contract.

4 May be terminated by seller and seller shall  
5 have the right to retain all amounts paid by purchaser as  
6 liquidated damages.

7 Now, there are two possible results the Court  
8 can come to here.

9 One, they are in breach. Ergo the seller  
10 gets to keep it.

11 Another possible result on a motion to strike  
12 is they have failed to prove -- they have failed to prove  
13 that they are in compliance.

14 Therefore, their suit is merely dismissed.  
15 No decision on the other issue, there is no counterclaim in  
16 this case at this time, Your Honor.

17 Now, with respect to the remainder of the  
18 provisions of the contract, there are several, several  
19 contingencies which would allow the purchaser to walk.

20 There is a standard sale of existing  
21 residence contingency. There is the financing contingency.  
22 And there are several other contingencies within the  
23 contract.



1           The principal idea of equity is mutuality.  
2   If you cannot have specific performance going both ways,  
3   you cannot have specific performance.

4           This contract was at best on their testimony  
5   still contingent on the basis of financing. Since it was  
6   still contingent, that is to say, not specifically  
7   enforceable against them by the seller, it cannot be  
8   specifically enforced against the seller.

9           Mutuality of contract. Absolutely essential,  
10   particularly in equity.

11           I think the most telling and probably the  
12   most difficult part of the case was I asked the question  
13   which I had asked on discovery -- it was no surprise -- why  
14   didn't you list it?

15           Why not? Good question.

16           The first answer right out of her mouth, good  
17   question.

18           And then she said -- I wrote it down -- she  
19   said, in my mind, I needed the settlements to coincide.  
20   Not in my mind I was going to do what the contract said,  
21   but in my mind I needed the settlements to coincide.

22           There is no question that she asked several  
23   times for that. The Court again can search in vain



1 throughout this contract for any requirement to make the  
2 settlements coincide.

3 And in point of fact, the testimony that they  
4 have given would make it inequitable for this Court to  
5 require that because they said that they did not need the  
6 settlements to coincide.

7 They just wanted them to coincide. They  
8 could have bought the house.

9 All they had to do was waive the contingency  
10 or list their house or buy the house when it came through,  
11 and sell theirs later if they were concerned about that.

12 THE COURT: They did waive the contingency;  
13 didn't they?

14 MR. HARRISON: They waived the contingency  
15 well after the time, sir.

16 THE COURT: After what time?

17 MR. HARRISON: The fifteen days from the  
18 start of house framing.

19 THE COURT: But well within ninety-five days;  
20 right?

21 MR. HARRISON: It would be within ninety days  
22 from the date house framing starts, yes, sir.

23 THE COURT: Ninety-five days.



1 MR. HARRISON: What is ninety-five?

2 THE COURT: Doesn't the contract say ninety-  
3 five days after framing starts?

4 MR. HARRISON: No, sir.

5 The sale of existing residence addendum says,  
6 and I quote: within ninety days from the date house framing  
7 starts.

8 THE COURT: Ninety days.

9 MR. HARRISON: But that ninety days, Judge,  
10 only relates to the delivery of a written contract of sale  
11 of an existing residence.

12 THE COURT: But that is the whole purpose of  
13 the listing.

14 MR. HARRISON: The purpose of the listing is  
15 to procure the sale of the existing residence.

16 However, Your Honor, that is correct, but the  
17 parties have expressly made the listing of the essence of  
18 the agreement as well as that contract by their own words  
19 down at the bottom where it says, a copy of the listing  
20 contract to the seller within the time period specified.

21 And the time period specified for that is  
22 within fifteen days of the beginning of house framing.

23 THE COURT: I understand.



1 MR. HARRISON: Now, the question that I  
2 asked, why didn't you just list it?

3 Good question. Because I wanted something  
4 else.

5 She wilfully breached the contract at that  
6 point. She had two notices at least, perhaps as many as  
7 three.

8 Important point with respect to that, a  
9 willful breach, a knowing breach of a contract provision,  
10 will convert even a non-material breach into a material  
11 breach precisely because of the willfulness of the  
12 breach.

13 THE COURT: Isn't this a very minor breach,  
14 the failure to list in the overall picture of the purpose  
15 of the listing, and in the overall purpose of the contract  
16 itself?

17 MR. HARRISON: May it please the Court, is it  
18 a minor breach? No, it would be --

19 THE COURT: Why isn't it?

20 MR. HARRISON: It would be a minor breach  
21 except for the following points which were brought out in  
22 their case in chief.

23 Number one, that the sale of their house was



1 absolutely essential as far as my client knew to the  
2 purchase of their new home.

3 THE COURT: But within the ninety-day period  
4 they removed that as a condition. It is no longer  
5 important at all to your client.

6 They are going to produce cash and they are  
7 in breach?

8 MR. HARRISON: No, sir.

9 THE COURT: Why not?

10 MR. HARRISON: They waived one condition.  
11 They never waived the financing condition. That was the  
12 reason I said that earlier. You see, they have agreed--  
13 Mr. Lowry Mann on the stand agreed that the addendum, the  
14 information they supplied --

15 THE COURT: You mean getting the mortgage?

16 MR. HARRISON: Yes, sir.

17 THE COURT: Are you contending that that is a  
18 breach?

19 MR. HARRISON: No, sir.

20 What I am contending is -- you said is it an  
21 important provision.

22 My answer to you is it has be viewed not in  
23 the beauty of hindsight, but in the prospective beauty of





1 what was happening at the time.

2 At the time when this was going on, the  
3 builder thought because of information Mr. Lowry admitted  
4 they told him, they needed the sale of their house to pay  
5 for the new house, needed to have it.

6 Now, they could waive the contingency, but  
7 they could not get the financing and they never waived the  
8 financing contingency.

9 THE COURT: Well, there is no evidence before  
10 me that they couldn't get the financing; is there?

11 MR. HARRISON: There is no evidence that they  
12 had it and there would have to be, Judge, compliance with  
13 the contract.

14 Moving on, however --

15 THE COURT: I am not going to let you raise  
16 that, no, sir, I am not going to consider that.

17 MR. HARRISON: Moving on, what attempt was  
18 made to comply?

19 A postdated listing which could not be  
20 entered in multiple listing, totally at variance with the  
21 contract, absolutely again a willful breach. No attempt to  
22 comply.

23 Now, that is at best, Your Honor, an offer.



1 Now, it may be, Judge -- it may be that at that point you  
2 are talking --

3 THE COURT: An offer to do what, to modify an  
4 existing contract.

5 MR. HARRISON: Yes, sir.

6 THE COURT: Well, that doesn't constitute a  
7 breach of an existing contract.

8 MR. HARRISON: It does if you are required  
9 immediately to list your house and to exhibit the listing  
10 within fifteen days.

11 THE COURT: Well, if I hold the failure to  
12 list was non-material in the light of the purpose of the  
13 listing, then we are at square one, aren't we?

14 MR. HARRISON: No, sir.

15 Because at that point, that is the second or  
16 third time a judge has said a provision of this contract is  
17 not enforceable, and at that point --

18 THE COURT: I did not say it wasn't  
19 enforceable.

20 I said that it seems to me that it is of  
21 minor significance in the light of the purpose of the  
22 listing clause in the first place.

23 MR. HARRISON: But the parties have the right



1 by their contract, Judge, to declare it material.

2 Whether you or I agree with it -- what you  
3 are looking for, and I strongly, respectfully suggest to  
4 the Court under Guldeski, what you must look for, is the  
5 intent of the parties within the contract.

6 I can declare -- I can agree with you that  
7 climbing that flagpole out front is of the essence of a  
8 contract, and I won't pay somebody else any money until  
9 they do it.

10 And we can say that is silly.

11 THE COURT: But it is all tied to the  
12 condition precedent to assure the seller there is going to  
13 be funds there to go through with the purchase; isn't it?

14 MR. HARRISON: Yes, sir, and the specific --

15 THE COURT: Once that contingency is removed,  
16 why can't I as a matter of law hold that the listing is not  
17 a material part of the contract?

18 MR. HARRISON: If it was not time is of the  
19 essence, and if they had proved that they had done it  
20 within the fifteen days.

21 THE COURT: You are missing the point.

22 MR. HARRISON: Well, let me put it this way,  
23 Judge.



1 THE COURT: You are missing my point. Maybe  
2 I am missing yours.

3 MR. HARRISON: Perhaps I am, and I apologize  
4 for that.

5 But what I would like to say is that assuming  
6 that is the case, that it is not material and they have  
7 missed it, my response to you is that the parties have  
8 expressly declared in their agreement that it is material.

9 THE COURT: I understand that, but once the  
10 buyer removes the conditions precedent to tying the sale of  
11 their house, what difference does it make?

12 MR. HARRISON: It makes --

13 THE COURT: Your client could not deliver  
14 occupancy at that time anyway; could he?

15 MR. HARRISON: Not at that time --

16 THE COURT: Not from the testimony I heard.

17 MR. HARRISON: -- occupancy could not be  
18 delivered at that time.

19 THE COURT: Then how is your client  
20 prejudiced?

21 MR. HARRISON: Financing on his house.

22 THE COURT: I am supposed to do equity in  
23 this case; aren't I?



1 MR. HARRISON: Yes, sir.

2 THE COURT: I don't have to follow all the  
3 rules of law as to enforcement of a contract or breach; do  
4 I?

5 MR. HARRISON: You have to follow the intent  
6 of the parties, yes, sir. You are absolutely bound by the  
7 intent of the parties I think.

8 THE COURT: I understand that. And I think  
9 -- well, go ahead.

10 MR. HARRISON: The contract was terminated  
11 under the evidence that we have. They have given the  
12 letter to the Court.

13 THE COURT: If I hold the failure to list was  
14 not a material aspect, your client is in breach for  
15 terminating prior to the ninety days; isn't he?

16 MR. HARRISON: I don't think -- if the Court  
17 holds that was a breach, Your Honor.

18 THE COURT: What right did your client have  
19 to terminate the contract unilaterally prior to the ninety  
20 days if the listing was not a material breach on the part  
21 of the buyer?

22 MR. HARRISON: Because the contract said it  
23 was a material breach subject to the default provision,



1 said it in words in black and white that they signed. That  
2 is why.

3 They had an absolute right to do it in  
4 writing that both sides agreed to. That is the intent of  
5 the parties set forth right here.

6 It says if they fail to do it, it shall be  
7 deemed -- shall -- be deemed in default of the contract and  
8 subject to the provisions of the contract.

9 Now, as an example, Judge, I have an absolute  
10 right to record a mechanic's lien by statute. I may record  
11 it mistakenly.

12 That does not make me in breach. He may have  
13 done it mistakenly. That does not make it -- assuming you  
14 are correct -- that would not make it a breach.

15 But I don't think it is mistaken even based  
16 on the black letter of this contract.

17 The second question, serious question,  
18 regarding the \$300,000 plus house, they have admitted no  
19 performance.

20 She has admitted special expertise, realtor  
21 new house specialist.

22 At best, at best what they are trying to  
23 offer is some kind of argument of diminimous breach. It



1 may be a diminimous breach. The parties agreed to it.

2 THE COURT: Well, if it is a diminimous  
3 breach, does that put the plaintiff out of court?

4 MR. HARRISON: Yes, sir.

5 It puts him -- if it is a breach at all  
6 because of what the contract says, it puts them out of  
7 court for the breach. What is perhaps --

8 THE COURT: Your authority is the Lerner  
9 case?

10 MR. HARRISON: My authority is the Lerner  
11 case and the Shelton case.

12 THE COURT: Let me see that.

13 MR. HARRISON: Now, Your Honor, also--  
14 excuse me.

15 THE COURT: Go ahead, I am listening.

16 MR. HARRISON: Also I would cite to the Court  
17 two additional cases which I have copies of.

18 One is Mercer versus South Atlantic Insurance  
19 Company, 111 Virginia 699.

20 In the Mercer case, you have two ideas I  
21 think that are very important.

22 Now, generally I was taught in law school,  
23 whether it is true or not, that in Virginia there are two



1 rules on taking the bar exam. One is on the tax question,  
2 you owe the tax.

3 And the second if it is an insurance case,  
4 the insurance company always loses.

5 In the Mercer case, the insurance company  
6 won.

7 The answer to that case is under paragraph  
8 one of the head notes, it says, the contract of the parties  
9 is the law of the case unless it is repugnant to some rule  
10 of law or some written principle of public policy.

11 Hence a life insurance policy cannot be held  
12 to run from the date of its delivery where the parties have  
13 agreed it shall run from the date of the policy.

14 An insured should look to his policy and  
15 conform to it.

16 This is an insurance company winning on the  
17 basis of the terms of the contract.

18 And limitation of the agent's authority  
19 should be effective unless there is shown a waiver -- has  
20 waived the limitation or the agent's power.

21 An agent to collect premiums has no authority  
22 to extend time.

23 Now, another recent case.





1 Not just the Guldeski case -- that was an  
2 older case, a 1911 case, but a more recent case, Winn  
3 versus Aleda Construction Company, 227 Virginia 304, a 1984  
4 case.

5 A contract binds the parties unless it  
6 violates law or public policy.

7 When a contract is clear and unambiguous, the  
8 Court rather than a jury determines its meaning.

9 Words used by the parties are given their  
10 usual ordinary meaning.

11 No word or clause will be treated as  
12 meaningless.

13 Conditions precedent specified in a contract  
14 must be performed. That is a condition precedent.

15 It must be performed.

16 It matters not whether on an objective basis  
17 we look at it and we say, that does not seem to be. That  
18 seems to be harsh. I am not saying I think it is, but I am  
19 saying that does not matter.

20 We may think that. The Court is here, a  
21 contract is here to be enforced if it can be enforced.

22 We have got a 1984 case and a 1985 case.

23 Your Honor, the Supreme Court of the State of



1 Virginia has said repeatedly that it is reversible error  
2 for a court to substitute a rule of man for the rule of  
3 law, and where the parties by their contract bind  
4 themselves to a particular rule, it is not the business of  
5 the Court later to look at it and relieve somebody perhaps  
6 from a bargain that the Court would not have made,  
7 particularly not a bargain -- particularly when one of the  
8 parties to the contract is a realtor.

9 THE COURT: I understand that. That is not  
10 what I am looking at.

11 MR. HARRISON: All right, sir.

12 Your Honor, now, if that particular provision  
13 is not to mean what it says to mean, all of these cases  
14 again require the Court at some point to say what it does  
15 mean.

16 And a particular provision that I am pointing  
17 to, again is in what has been admitted as the parties'  
18 contract, Trial Exhibit No. 1.

19 Buyer shall be deemed in default of the  
20 contract if it didn't do two things.

21 One, fail to secure a written contract within  
22 the ninety days -- the ninety days is the written contract.

23 And, two, deliver a copy of the listing



1 agreement within fifteen days of the start of house  
2 framing.

3 THE COURT: And why does the addendum require  
4 the buyer to deliver a copy of the listing agreement if it  
5 failed to make a sale after listing?

6 If it has already delivered it within the  
7 fifteen days, if that is so important, why do they have to  
8 deliver a second copy?

9 MR. HARRISON: They don't.

10 I don't see that, Judge. I don't see that in  
11 this document.

12 THE COURT: You don't? I thought I read  
13 that.

14 MR. HARRISON: Your Honor, it is not in there  
15 that I see. If it is, it would surprise me.

16 THE COURT: The paragraph below the  
17 subparagraph (c), in the event buyer fails to secure a  
18 written contract for the sale of buyer's residence through  
19 no fault of buyer within the period above specified, buyer  
20 may terminate this contract provided buyer give written  
21 notice hereof to seller within the period above specified  
22 accompanied by a copy of buyer's listing contract.

23 MR. HARRISON: Yes, sir.



1 THE COURT: Why should you supply it a  
2 second time if supplying it within fifteen days is so  
3 important?

4 MR. HARRISON: I do not know.

5 All I know is that the parties agreed to  
6 that. I don't know why.

7 I can tell you one reason why I think it is  
8 important there perhaps is because at that point the buyer  
9 can walk.

10 THE COURT: If you have already got the copy,  
11 what is the difference?

12 MR. HARRISON: Because it also requires --

13 THE COURT: Isn't the whole purpose of this  
14 as I stated to insure your client that the buyer is either  
15 going to sell their house or waive that contingency?

16 In fact, your letter from Ms. Lindsay made  
17 reference to removing the contingency; didn't it?

18 MR. HARRISON: I think the purpose of this is  
19 to do one of two things.

20 The purpose of this is, one, to insure that  
21 if the sale of the house is essential, that it moves ahead  
22 as rapidly as possible.

23 THE COURT: So no delay can come to your



1 client?

2 MR. HARRISON: So no delay can come to my  
3 client, and the delay that can come to my client, Judge, is  
4 not just the delay of the sale.

5 My client secures financing from lenders on  
6 that house pursuant to various agreements that he has with  
7 lenders. And that financing does not come on contingent  
8 contracts.

9 THE COURT: Was your client delayed in this  
10 case?

11 MR. HARRISON: Were they delayed? Yes, sir.

12 You heard testimony already that the house  
13 was not finished until September. The house was not  
14 finished.

15 It was delayed by choosing the extras and  
16 putting the extras in the house, and the house was not  
17 ultimately completed until September. The elimination of  
18 the contingency --

19 THE COURT: Well, the buyers were told that  
20 it would not be done until June before all this  
21 correspondence back and forth took place.

22 MR. HARRISON: Yes, sir.

23 They were told that the house would not be



1 ready for occupancy until June.

2 And if the coincidental settlement date had  
3 been important to them, they should have negotiated it at  
4 the time.

5 And, again, Your Honor, I would feel a lot  
6 more like the Court seems to feel if we were not dealing  
7 with a realtor.

8 If we were not dealing particularly with a  
9 realtor that was in new home sales, and even more  
10 particularly if we were not dealing with a situation where  
11 without any demand for notice -- now, if you look at the  
12 sale of existing residence addendum, there is provisions in  
13 here for notice, not with respect to house framing and not  
14 with respect to other things, but notice is somewhat  
15 required.

16 The Court is saying this is a small thing  
17 perhaps.

18 THE COURT: What I am saying is that it seems  
19 to me to be a diminimous thing when viewed in the  
20 objectives to be attained under the contract.

21 It seems clear to me that the reason it is in  
22 there is so that your client can be assured that the buyers  
23 are going to have the money to go through with this



1 purchase.

2 MR. HARRISON: And to get the money from the  
3 lender at the time they are supposed to get it.

4 THE COURT: There is no evidence before me--

5 MR. HARRISON: Not yet.

6 THE COURT: -- that they could not get it.  
7 And I am ruling at this point on your motion to strike I  
8 guess.

9 MR. HARRISON: The Lerner versus Guldeski  
10 case, it is also designed to put trip wires in the contract  
11 to make them definite because it is a \$300,000 house that  
12 costs X number of dollars a day to keep out there.

13 That particular provision is designed to say  
14 you either do it or don't do it.

15 Now, what did my client do under the admitted  
16 testimony of these people?

17 With no requirement in the contract for  
18 notice, they called them up and they said, would you please  
19 list it. They didn't list it.

20 With no requirement in the contract for  
21 notice, they wrote them a letter and said, list it.

22 With no requirement in the contract of  
23 saying, you have to have it done within fifteen days, if



1 you haven't got it then, you are out, they gave them five  
2 more days and said list it within five days. And they  
3 still did not list it.

4 Now, I would urge upon the Court again the  
5 idea that even an immaterial breach that is wilfully done  
6 is a material breach for all purposes.

7 And that is clearly the law of the  
8 Commonwealth of Virginia, and I think is enforceable in  
9 this case.

10 And the Lerner case says, the plain language  
11 of the agreement was designed to protect against the  
12 dangers of the very kind which in fact arose.

13 And I would very much urge on the Court that  
14 the plain language of this agreement was designed to  
15 protect my client against the very dangers that arose. And  
16 the failure --

17 THE COURT: What was that?

18 MR. HARRISON: That they would not list their  
19 house for sale.

20 THE COURT: Once they removed the contingency  
21 within the ninety-day period, your client is home free;  
22 isn't he?

23 MR. HARRISON: No, sir.





1 THE COURT: Why not?

2 MR. HARRISON: Because they still had the  
3 contingency on the financing, and they told my client that  
4 the failure to sell the house would preclude them from  
5 getting any financing.

6 THE COURT: I am ruling on what is in the  
7 contract.

8 There is no evidence before me as to  
9 financing, one.

10 And, secondly, I missed it if you raised it  
11 as a defense. Didn't you?

12 MR. HARRISON: The financing?

13 THE COURT: Yes.

14 Did you raise it in the pleadings?

15 MR. HARRISON: I raised it in the answers,  
16 yes, sir. It is in the answers to interrogatories as a  
17 defense to this case.

18 THE COURT: Where in the answers?

19 MR. HARRISON: Example -- No. 4, Judge. On  
20 page 6 of them, Your Honor, it says, in addition it is  
21 believed that the complainants additionally breached the  
22 contract by failing to timely comply with the provisions of  
23 paragraph 2 of the contract which is the financing



1 provisions of the contract.

2 THE COURT: Page what?

3 MR. HARRISON: Page 6 of the answer to  
4 interrogatories.

5 THE COURT: Well, where is it in the answer  
6 to the bill of complaint?

7 MR. HARRISON: It is not in the answer to the  
8 bill of complaint.

9 At the time the answer to the bill of  
10 complaint was filed, and there has been no objection to the  
11 interrogatories, they asked --

12 THE COURT: Interrogatories don't become  
13 answers to bills of complaint, at least I am not aware of  
14 it. Is there some authority for that?

15 MR. HARRISON: Let me put it this way, Judge.

16 Their failure to prove full compliance with  
17 all portions of the contract, the burden is on the  
18 plaintiff.

19 I don't have to raise it. They have to prove  
20 full compliance.

21 THE COURT: Your motion to strike is denied.

22 MR. HARRISON: Thank you, Your Honor.

23 I call my first witness.



1 MR. AUNON: Your Honor, may I address the  
2 Court?

3 I think the defendant at this time is limited  
4 to a defense on the failure to -- they based the breach of  
5 contract with my client only and exclusively on the failure  
6 to list the house. And he is bound to that in that letter,  
7 Your Honor.

8 No other defenses or any claims were made  
9 that my client breached except that point, and that is the  
10 only thing they used to terminate the contract was the  
11 claiming that my client's failure to list the house within  
12 fifteen days that was reason to terminate the contract, but  
13 that is the only reason that they used.

14 THE COURT: They have got other reasons in  
15 their answer and grounds of defense.

16 The fact that they made a motion for summary  
17 judgment or a plea in bar does not preclude them from  
18 putting on proof of those defenses.

19 MR. HARRISON: I call my first witness, Your  
20 Honor. I call Sandra Lindsay.

21 Whereupon,

22 SANDRA LINDSAY,

23 a witness, was called for examination by counsel for the



1 defendant, and, having been first duly sworn by the Court,  
2 was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. HARRISON:

5 Q. State your name for the record, please.

6 A. Sandra Lindsay.

7 Q. And you are a vice-president of Addicott  
8 Hills, assistant secretary of Addicott Hills?

9 A. Yes, I am.

10 Q. An officer of Addicott Hills?

11 A. Yes, I am.

12 Q. And Ms. Lindsay, you are the authorized  
13 officer for the purposes of these proceedings; is that  
14 correct?

15 A. That is correct.

16 Q. The Snelling contract has been placed into  
17 evidence in this case.

18 Do you recall that agreement?

19 A. Yes, I do.

20 Q. Do you recall when that property was listed  
21 for sale?

22 MR. HARRISON: The Snelling contract is  
23 Exhibit No. 10 for the record.



1 record?

2 Do you recall when the property was re-listed  
3 for sale?

4 A. Yes.

5 We released it to Builder's Marketing, Inc.,  
6 on the afternoon of January 30th, and it was placed on  
7 multiple listing on February 6th.

8 Q. And was that before or after the January 30th  
9 termination letter was written?

10 A. It was after?

11 Q. Was the property exposed to sale prior to the  
12 termination?

13 A. No, it was not.

14 Q. Now, have there been any prior cases with  
15 respect to 15(b) which is, I will loosely characterize as a  
16 waiver of specific performance?

17 Has the company been involved in any prior  
18 cases?

19 MR. AUNON: Your Honor, that is irrelevant to  
20 this case at all.

21 MR. HARRISON: Your Honor, this is an  
22 equitable action. It is only relevant, not for the truth  
23 or falsity of the matter, but as to the good faith of the



1 parties in terminating the contract and relisting the  
2 contract.

3 And I will proffer to the Court that what she  
4 will say is that the paragraph that was construed by  
5 Quinlan Hancock to be unconscionable and unenforceable is  
6 to say a waiver of specific performance had previously been  
7 construed by two other judges, both of whom had found that  
8 provision of the contract harsh but enforceable and had  
9 dismissed specific performance before.

10 It is not offered to show that those other  
11 judges were correct, but merely to show the state of mind  
12 of Addicott Hills with respect to that case. They felt  
13 that --

14 THE COURT: I will accept that as a proffer  
15 if you want to examine her about it.

16 MR. HARRISON: Thank you, Your Honor.

17 BY MR. HARRISON:

18 Q. Now, did you have any discussion with Daurie  
19 Schwab about the Mann contract?

20 A. Yes.

21 Q. Was Daurie reporting to you?

22 A. Yes, she does.

23 Q. What did she tell you about the Mann --



1 MR. AUNON: That was hearsay, Your Honor. I  
2 would object to that.

3 MR. HARRISON: Your Honor, it would be  
4 hearsay except that she is reporting as a business person  
5 to another business person and is subject to the business  
6 exception to such reporting.

7 If you receive normal reports from somebody,  
8 oral or written, you can repeat those for the fact that you  
9 have received such reports.

10 Now, I have got Daurie Schwab here. I will  
11 put Daurie on. I can do it that way.

12 THE COURT: Go ahead with it. She is here if  
13 you want to examine her.

14 BY MR. HARRISON:

15 Q. When did framing occur? I will withdraw the  
16 question. When did the framing occur?

17 A. Framing occurred on December 12th, 15th,  
18 somewhere in that vicinity, '86.

19 THE COURT: Do you mean completed or started?

20 MR. HARRISON: Started.

21 BY MR. HARRISON:

22 Q. Did you receive --

23 THE COURT: That is the lot in question here?



1 THE WITNESS: Yes.

2 BY MR. HARRISON:

3 Q. Did you receive a copy of a listing within  
4 fifteen days after the start of house framing?

5 A. No, I did not.

6 Q. Did you give any instructions regarding a  
7 copy of the listing?

8 Did you understand the question?

9 A. I wasn't sure whether or not you had  
10 completed the question.

11 Q. Let me go back to the framing.

12 MR. HARRISON: Will you pass this to the  
13 witness? This is Defendant's Exhibit No. 1.

14 (The document referred to above  
15 was marked Defendant's Exhibit  
16 No. 1 for identification.)

16 BY MR. HARRISON:

17 Q. Do you recognize that?

18 A. Yes, I do.

19 Q. What is it?

20 A. These are copies of the construction log  
21 maintained at Union Farm by our project staff.

22 Q. Would you look through to the one dated  
23 11/13, and tell me what you see about framing on that





1 one?

2 A. 11/13. Carpentry had begun. Lot 11 is noted  
3 on that date.

4 Q. So what does that mean?

5 A. That means that the framing on the house was  
6 under way.

7 Q. What date?

8 A. It was November 13, 1986.

9 Q. Now, are these records kept in the normal  
10 course of business?

11 A. Yes.

12 We require these of all our project  
13 superintendents on each job.

14 Q. And are they brought in at a certain time and  
15 then kept at the office as a normal course?

16 A. They are maintained at the site until the  
17 project is finished, and then they are maintained in the  
18 office in our files.

19 MR. HARRISON: Your Honor, I move these  
20 documents in as business records.

21 MR. AUNON: You are moving in the documents  
22 to impeach the witness as to what she testified that the  
23 framing started in December or as to what?



1 MR. HARRISON: I am not moving them to  
2 impeach her. If I want to impeach her --

3 BY MR. HARRISON:

4 Q. Do these refresh your recollection as to the  
5 date?

6 A. Yes, it does.

7 MR. HARRISON: I am moving them to show the  
8 proof of what they are is business records. I am not  
9 impeaching the witness as to start of framing.

10 MR. AUNON: Your Honor, all it says here is  
11 carpentry, Lots 4 and 7 and 11. As to that effect, I will  
12 have no objection whatever that means.

13 THE COURT: You don't object to the documents  
14 coming in?

15 MR. AUNON: To that document particularly on  
16 11/13/86, it says carpentry, Lots 4, 7, and 11, whatever  
17 that means.

18 MR. HARRISON: Is Exhibit No. 1 accepted,  
19 Your Honor?

20 THE COURT: Yes, sir.

21 (The document previously marked  
22 Defendant's Exhibit No. 1  
23 for identification was  
received into evidence.)

BY MR. HARRISON:



1 Q. Did anything happen when framing had started  
2 and you had not received a copy of the listing?

3 A. Yes.

4 As a matter of fact, on our policy procedure  
5 at the office is basically every Tuesday I and the  
6 marketing manager at BMI conduct weekly meetings with every  
7 sales agent on a current project, and we review each and  
8 every contract, current contract, as to the status of the  
9 loan and the status of --

10 MR. AUNON: I will object, Your Honor, to the  
11 policy of the office. I think it is irrelevant.

12 Whatever they do in this particular case is  
13 important, but not the policy of the office.

14 THE WITNESS: I am getting to that if I  
15 could.

16 MR. AUNON: I object to that testimony, Your  
17 Honor.

18 THE WITNESS: So as a result, in January, in  
19 requesting a report from Daurie Schwab, the agent on this  
20 case, she reported to us a conversation she had had with  
21 Barbara Mann.

22 BY MR. HARRISON:

23 Q. Don't tell us the conversation. Just tell us



1 what you did.

2 A. She had reported --

3 Q. Don't say what she reported. If you  
4 instructed her to do something, tell me what you instructed  
5 her to do.

6 A. Yes.

7 We had asked Daurie Schwab to contact the  
8 Manns to inform them of the fact that we were requiring  
9 their listing, a copy of their listing agreement.

10 MR. HARRISON: I would like to pass up the  
11 second document. Have this one marked as Defendant's  
12 Exhibit No. 2.

13 (The document referred to above  
14 was marked Defendant's  
15 Exhibit No. 2 for  
16 identification.)

17 BY MR. HARRISON:

18 Q. I ask you if you recognize that document?

19 A. Yes, I do.

20 Q. What is it?

21 A. This is an addendum to the contract with  
22 Lowry and Barbara Mann for delivery and payment of  
23 nonstandard options.

MR. HARRISON: Specifically, Your Honor, the  
area that I would ask the Court's attention be directed to



1 is paragraph one which states, purchaser acknowledges that  
2 the projected delivery date is an estimate only and cannot  
3 be guaranteed by the seller or its agent.

4 And the bottom one where it says, that this  
5 agreement upon its execution is made an integral part of  
6 the aforementioned purchase agreement.

7 I would like to pass another document to the  
8 witness.

9 THE COURT: Is that offered?

10 MR. HARRISON: Yes, sir.

11 THE COURT: Any objection?

12 MR. AUNON: No objection.

13 THE COURT: It will be received.

14 (The document previously marked  
15 Defendant's Exhibit No. 2 for  
16 identification was received  
17 into evidence.)

18 MR. HARRISON: This would be Defendant's No.

19 3.

20 (The document referred to above  
21 was marked Defendant's Exhibit  
22 No. 3 for identification.)

23 MR. AUNON: What you are trying to accomplish  
here? We might stipulate --

MR. HARRISON: Defendant's No. 3 is a copy of  
the letter that went to Mr. and Mrs. Lowry Mann -- of the



1 return receipt which is associated with the letter dated  
2 January 30th of Mr. Bernstein, where he terminated them.

3 MR. AUNON: Your Honor, we will stipulate  
4 that we received that letter.

5 MR. HARRISON: Do you stipulate that you  
6 received it on 2/2/87? That is the January 30th one.

7 MR. AUNON: Yes, we stipulate to that.

8 MR. HARRISON: Do you stipulate that you  
9 received the January 13th one on 1/17?

10 MR. AUNON: Yes.

11 BY MR. HARRISON:

12 Q. Now, did you have any discussions with  
13 Barbara Mann other than the one discussion that we already  
14 covered?

15 A. That was the only time that I talked to  
16 Barbara Mann.

17 MR. HARRISON: I have got one additional  
18 document which I would like admitted which should be  
19 Defendant's Exhibit No. 4.

20 THE COURT: What was 3?

21 MR. HARRISON: That was the mail receipt.

22 THE COURT: The mail receipt of what?

23 MR. HARRISON: The return exhibits to the



1 January 30th letter was No. 3, Your Honor.

2 That one there was a stipulation too, but  
3 since I had already offered it, I will just put it in.

4 THE COURT: 1, 2, and 3 are received.

5 (The document previously marked  
6 Defendant's Exhibit No. 3 for  
7 identification was received  
8 into evidence.)

9 MR. HARRISON: And the market profile is  
10 Defendant's Exhibit No. 4.

11 THE COURT: Any objection to No. 4 Mr. Aunon?

12 MR. AUNON: I don't have any idea what --

13 MR. HARRISON: Your Honor, I will proffer to  
14 the Court that in the deposition of his client, his clients  
15 have acknowledged this and that they completed it.

16 THE COURT: What is it?

17 MR. HARRISON: It is the market profile which  
18 shows among other things that there --

19 MR. AUNON: Counsel is correct, Your Honor.  
20 I have no objection to this.

21 THE COURT: It will be received.

22 (The document referred to above  
23 was marked Defendant's Exhibit  
No. 4 for identification and  
received into evidence.)

MR. HARRISON: Just to save the Court time,



1 the area that we are putting it in for particularly is on  
2 the second page.

3 It says, source of down payment, liquidation  
4 equity from sale of previous home.

5 And also on page one where it says, I own a  
6 home not listed, must sell, for the transaction to be  
7 completed.

8 MR. HARRISON: Is there any other document  
9 that we need?

10 BY MR. HARRISON:

11 Q. Now, with respect to the listing of the  
12 house, would you explain to the Court why, or is that  
13 viewed as an important matter by Addicott Hills?

14 A. Yes, it is.

15 Q. Will you explain why it is viewed as an  
16 important matter?

17 A. The listing of the house is critical to us  
18 because at that particular time we did not have a loan  
19 approval.

20 Our understanding and the information that we  
21 had indicated that Mr. and Mrs. Mann had to sell their  
22 house to use the equity from that sale to qualify for a  
23 loan to proceed to settlement.





1 And at this particular time, we were not  
2 getting any cooperation from Mr. and Mrs. Mann to list the  
3 house and were very much concerned.

4 Q. Did Addicott Hills Corporation have a loan  
5 from a lender on this subdivision?

6 A. Yes, it did.

7 Q. And what were the terms of that loan as far  
8 as receiving draws were concerned? Did you have to have a  
9 number of sales?

10 A. Yes. A certain number of sales are  
11 required.

12 Q. And is there any restrictions regarding  
13 contingent contracts?

14 A. As far as contingent contracts, it is my  
15 understanding that contingent contracts are not a valid--  
16 a solid contract per se.

17 Q. So they did not count?

18 A. No, they did not.

19 MR. HARRISON: No further questions for this  
20 witness, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. AUNON:

23 Q. You testified that the house was not exposed



1 to sale after the contract with the Manns; is that  
2 correct?

3 A. I beg your pardon?

4 Q. Using the words of your counsel, the property  
5 was not exposed to sale after the contract with the Manns;  
6 is that correct?

7 A. Not while the Manns' contract was in place;  
8 that is correct.

9 MR. AUNON: I have no further questions.

10 MR. HARRISON: No redirect.

11 THE COURT: You may step down.

12 (The witness was excused.)

13 MR. HARRISON: Call Daurie Schwab.

14 Whereupon,

15 **DAURIE SCHWAB,**

16 a witness, was called for examination by counsel for the  
17 defendant, and, having been first duly sworn by the Court,  
18 was examined and testified as follows:

19 MR. AUNON: Your Honor, there is a rule on  
20 witnesses, and I would like to voir dire Daurie Schwab  
21 before she testifies.

22 I would like to inquire whether she talked  
23 during intermission with some of the other witnesses.



1 MR. HARRISON: Your Honor, there was no  
2 instruction given to the witnesses about that.

3 Had there been instruction given to the  
4 witnesses, they might have violated a rule, but expecting  
5 the witnesses to know and to act in a certain way.

6 THE COURT: That is true. They were just  
7 simply excluded.

8 MR. AUNON: All right.

9 MR. HARRISON: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MR. HARRISON:

12 Q. Will you state your name for the record,  
13 please?

14 A. Daurie Schwab.

15 THE COURT: That does not preclude you from  
16 asking about it.

17 BY MR. HARRISON:

18 Q. Do you know Barbara Mann?

19 A. Yes, I do.

20 Q. How did you meet her?

21 A. I met her when she inquired about the Union  
22 Farms subdivision.

23 Q. When did she first inquire?



1 A. She inquired by telephone around September of  
2 1985.

3 Q. And to move it along, did she put a lot hold  
4 on?

5 A. Yes.

6 Q. And is a lot hold --

7 MR. AUNON: Your Honor, we went through all  
8 that. We stipulated nothing before the contract,  
9 everything was merged, so why go into that again?

10 THE COURT: The objection is sustained.

11 MR. HARRISON: Thank you, Your Honor.

12 BY MR. HARRISON:

13 Q. With respect to that post contract, did you  
14 have a discussion?

15 MR. HARRISON: Your Honor, with respect to  
16 that one area which I think has been put in relevance  
17 prior to the contract which the Court has admitted evidence  
18 to, it is the question of the Fairfax County subdivision of  
19 that property and whether his clients knew of it or not.

20 As long as all evidence with respect to that  
21 is excluded and it is either -- there is no basis for them  
22 to say they did not know that it had not been a subdivision  
23 or that forms no part of the Court's decision, then I won't



1 go into this area.

2 But I think if that has any relevance to the  
3 case, then I have a right with this witness to show that  
4 these people were told that Fairfax County had not granted  
5 a subdivision to this property at the time they were in  
6 contract.

7 THE COURT: Did you object to the subdivision  
8 matter?

9 MR. AUNON: Your Honor, we stipulated that  
10 the subdivision was not recorded until August.

11 MR. HARRISON: We stipulated it was not  
12 recorded until August.

13 The point that I am raising is that came in.  
14 I think I am allowed to ask this witness about that small  
15 discreet point, that is it.

16 Not the stipulation, but I think anything  
17 that is open on the direct case I am fully free to  
18 counteract in my defense case.

19 THE COURT: I don't know that I agree with  
20 that. Go ahead.

21 MR. HARRISON: Thank you, Your Honor.

22 With the approval of the Court, of course.

23 BY MR. HARRISON:



1 Q. Did you tell the Manns whether or not --

2 MR. AUNON: Is that a leading question,  
3 Counsel?

4 MR. HARRISON: Not when we say whether or  
5 not, I don't think, Your Honor.

6 THE COURT: Objection overruled.

7 BY MR. HARRISON:

8 Q. Did you or did you not tell the Manns whether  
9 or not Fairfax County had approved Union Farms subdivision  
10 at the time they contracted for that house?

11 A. Yes, I did.

12 Q. And what did you tell them?

13 A. I told them that we did not have subdivision  
14 approval.

15 Q. Did you tell them to go and talk to the  
16 county at some point?

17 A. I told them and I told other purchasers as  
18 the delays kept coming.

19 Q. Now, will you tell us about conversations you  
20 had with Barbara Mann regarding Barbara Mann's decision  
21 whether or not to list her house?

22 A. Well, on November 12th the house framing had  
23 started and she had signed the contingency addendum, and in



1 that contingency addendum we had put when house framing is  
2 started they would list their house with a broker who is a  
3 member of multiple listing.

4 So I was notified by the superintendent that  
5 the house framing had started on November 12th, and I  
6 called her and told her it was time to --

7 MR. AUNON: May I inquire, what is she  
8 reading from?

9 THE WITNESS: From my notes that you saw the  
10 other day.

11 THE COURT: Don't look at your notes.

12 BY MR. HARRISON:

13 Q. Go ahead.

14 A. So I had informed her that it was time to put  
15 her house on the market.

16 Q. And did you have any other conversations with  
17 her?

18 A. Yes.

19 After we wrote the contract on March 1st of  
20 1986, she had called me again on the 6th to add and delete  
21 some options, and then on August -- around the end of  
22 August I called her again and asked her if there were any  
23 more options she wanted to add because at the time I did



1 not have a complete option list, and she told me -- it was  
2 on August 26th that I had called her.

3 And she said she could not talk to me that  
4 evening, she was too busy, but I could call her two days  
5 later, and I did, and she added another group of options.

6 So I sent out an option sheet, another  
7 addendum.

8 Q. Not about the options. Let's talk about  
9 asking her to list her house.

10 A. Well, at that time I told her that she ought  
11 to think about listing her house soon. This was around the  
12 end of August or early September.

13 Q. And how about in November, did you talk to  
14 her in November?

15 A. Yes.

16 November I called her because I had been  
17 notified that framing had started.

18 Q. And what did you tell her?

19 A. I told her that the house framing had started  
20 and it was time for her to put her house on the market.

21 Q. And what did she say?

22 A. She refused to do it. She said that we did  
23 not have any delivery so far, and she just refused to put





1 her house on the market at that time.

2 And I advised her that she also had a client  
3 by the name of Leon who had purchased a home, and I said it  
4 was time for the Leons to put their house on the market  
5 also.

6 Q. And what did she --

7 A. But she said she was --

8 MR. AUNON: Well, the Leon case doesn't have  
9 anything to do with this case any more, Your Honor.

10 MR. HARRISON: No, Your Honor, I think it  
11 does to the following extent which I already raised in the  
12 motion to strike, and that is that the willfulness of a  
13 breach even though it is a small breach can convert it to a  
14 material breach.

15 Now, this was a realtor that was receiving a  
16 commission on the sale of this house, and was not only  
17 refusing to list her own house but was advising others not  
18 to list their house.

19 And I believe that that is material in a  
20 court of equity.

21 THE COURT: I will listen to it. Go ahead.

22 MR. HARRISON: Thank you, Your Honor.

23 BY MR. HARRISON:



1 Q. Now, what did you tell -- what did she say  
2 about the Leon's listing?

3 A. She said she would not advise her clients to  
4 put their house on the market either.

5 Q. Now, you are a realtor; right?

6 A. Yes.

7 Q. And who do you work for?

8 A. Realtors Marketing, Incorporated.

9 Q. And is Barbara Mann a realtor?

10 A. Yes, she is.

11 Q. And who does she work for?

12 A. Coldwell Banker.

13 Q. And were you co-oping the sale with her?

14 A. Yes.

15 Q. Does that mean that she was going to receive  
16 a commission?

17 A. Yes.

18 Q. Was she going to receive a commission on the  
19 Leon sale as well?

20 A. Yes.

21 Q. Now, did you talk to her again in December  
22 about listing her house?

23 A. Yes, I did.



1 Q. How many times in December?

2 A. I talked to her at least twice in December.

3 Q. And what did she say about listing in  
4 December?

5 A. She repeatedly said that she would not put  
6 her house on the market at that time and would advise her  
7 clients again not to put their house on the market.

8 Q. How about in January?

9 A. January 9th, I called her one more time, and  
10 I said it was well overdue, it is definitely time to put  
11 the house on the market.

12 And she refused to comply and said that the  
13 builder is not meeting his production schedule, that Will  
14 Roberts' home which is Lot 4 and opposite her house, was  
15 not delivered, not completed, and she would not put her  
16 house on the market.

17 Q. Did you report back to the builder on the  
18 regular Tuesday morning meetings these conversations?

19 A. Yes.

20 They would ask me how the contingencies were  
21 coming along because we did have other contingent  
22 contracts.

23 Q. And what happened to all of those contracts?



1 A. The other contracts, when the house framing  
2 started on each individual lot, I would call those  
3 purchasers and tell them house framing had started, and  
4 that it was time to put their house on the market, and they  
5 did.

6 Q. How many?

7 A. There were approximately eight contingencies.

8 MR. AUNON: Your Honor, that is irrelevant to  
9 this case what all of the other purchasers were doing and  
10 what she was telling everybody else?

11 THE COURT: I have already heard it now. The  
12 horse is out of the barn.

13 BY MR. HARRISON:

14 Q. The last question again I suppose is evidence  
15 of willfulness. Did you talk to Mrs. Mann or did you talk  
16 to the Leons about Mrs. Mann's advice?

17 A. On January 9th.

18 MR. AUNON: Your Honor, again, I raise the  
19 objection that it is irrelevant to this case whether she  
20 talked to the Leons or what the Leons said.

21 That would definitely be hearsay what the  
22 Leons say.

23 THE COURT: Objection sustained as to



1 hearsay.

2 MR. HARRISON: May it please the Court, may I  
3 respond then?

4 THE COURT: Yes.

5 MR. HARRISON: I am not asking her what the  
6 Leons told her. I am asking what she told the Leons. With  
7 respect to Mrs. Mann's advice, again, the issue that it  
8 goes to is as to willfulness.

9 THE COURT: What she told the Leons?

10 MR. HARRISON: May I proffer it to the Court?

11 THE COURT: Yes.

12 MR. HARRISON: What she told the Leons was  
13 stop listening to Mrs. Mann's advice. She is going to put  
14 you in breach of your contract if you don't hurry up and  
15 list your house.

16 And in relying on Mrs. Mann's advice, they  
17 did not.

18 But that second one I am not going to put in,  
19 but the first part I think relates to willfulness, Your  
20 Honor.

21 THE COURT: The objection is sustained.

22 MR. HARRISON: Thank you, Your Honor.

23 No further questions of this witness at this



1 time.

2 CROSS-EXAMINATION

3 BY MR. AUNON:

4 Q. Ms. Schwab, have you talked to anybody about  
5 your testifying here today?

6 A. No.

7 Q. You didn't talk to anybody?

8 A. No.

9 Q. Not even to Sandra Lindsay?

10 A. This morning I mean.

11 Q. Have you talked to anybody concerning your  
12 testifying here today?

13 A. No, not my testimony, no.

14 Q. Did you go to lunch with Sandra Lindsay?

15 A. Yes.

16 Q. What did you talk about?

17 A. Her meeting with her board in Alexandria on  
18 the abortion issue for the high school.

19 Q. You did not talk about the case at all?

20 A. No, we did not.

21 Q. When you came here, you started looking at  
22 some pictures. Did she tell you about some pictures?

23 A. No.



1                   When I walked in here and saw the pictures, I  
2 looked at them because I recognized them as Union Farm.

3           Q.       She did not tell you about the pictures?

4           A.       No, she didn't.

5           MR. AUNON: I have no questions.

6           THE COURT: May this witness be excused?

7           MR. HARRISON: Just one question that was  
8 raised on cross that I meant to get in before, but since  
9 the pictures have been talked about, which house is 11?

10          MR. AUNON: I just asked --

11          MR. HARRISON: He opened it, Judge.

12          THE COURT: I think you opened it.

13          MR. HARRISON: I will bring it up.

14          THE COURT: I would allow you to recall her  
15 anyway.

16          Are you offering these?

17          MR. HARRISON: I guess I had better offer  
18 them, yes, Your Honor.

19                   REDIRECT EXAMINATION

20          BY MR. HARRISON:

21          Q.       Which house is it?

22          MR. AUNON: I object to that.

23          MR. HARRISON: They ought to be marked.



1           What I was saying, Judge, is they ought to be  
2 marked because they have been referred to.

3           THE WITNESS: This one.

4           BY MR. HARRISON:

5           Q.       That one is 11?

6           A.       Yes.

7           MR. HARRISON: I would offer both of these to  
8 be marked in case there is an appeal on this case.

9                     (The documents referred to above  
10                     were marked Defendant's  
11                     Exhibits Nos. 5 and 6 for  
12                     identification.)

13           MR. HARRISON: I will have them marked and  
14 then I will identify them for the record.

15           THE COURT: They are not into evidence.

16           MR. HARRISON: Not right now.

17           BY MR. HARRISON:

18           Q.       I am holding up what has now been marked as  
19 Defendant's Exhibit No. 5 and ask you if you recognize  
20 that?

21           A.       Yes.

22           Q.       Is that an accurate portrayal of Union Farms  
23 subdivision, looking down the middle of the subdivision?

          A.       Yes.

          MR. HARRISON: Your Honor, I move Defendant's





1 Exhibit No. 5 into the record as an accurate portrayal, and  
2 I guess I had better do the back or you are going to object  
3 to the back.

4 MR. AUNON: I am not only going to object to  
5 the back, I am going to object to the front.

6 MR. HARRISON: I move it in as an accurate  
7 portrayal, Your Honor, a picture of the subdivision.

8 MR. AUNON: Your Honor, I don't know if it is  
9 accurate or not. I don't know who took the picture. I  
10 don't know when the pictures were taken.

11 THE COURT: Accurate as to when?

12 MR. HARRISON: What?

13 THE COURT: Accurate as to when?

14 BY MR. HARRISON:

15 Q. Is that accurate as to now?

16 A. Yes.

17 MR. AUNON: I would object to that, Your  
18 Honor. There is snow on the ground. There is no snow here  
19 in Virginia at this time.

20 THE COURT: What is the relevancy of that?

21 MR. HARRISON: The relevancy Your Honor of  
22 that is the prior witness' testimony that looking down the  
23 street that they could not see the house, and it is clearly



1 visible from the street.

2 That is the first relevancy of it.

3 And the second relevancy of it I think an  
4 accurate picture of the house in question is always  
5 relevant when the house is subject to specific performance.

6 THE COURT: Is that all, that you can see it  
7 from the street; is that the only purpose?

8 MR. HARRISON: Yes, sir.

9 And that reflects on the credibility of prior  
10 witnesses saying they could not see it from the street.  
11 The court can draw what inferences it wants to.

12 THE COURT: Now, the only purpose it is being  
13 offered for is you can see the house from the street?

14 Do you object to the photo?

15 MR. AUNON: Your Honor, I don't even know  
16 whether that picture was taken from the street. I don't  
17 know who took that picture.

18 THE COURT: Have you been out there?

19 MR. AUNON: No.

20 THE COURT: Well, why don't you ask your  
21 clients whether it represents a view from the street?

22 MRS. MANN: I believe I testified to that,  
23 and you can't..



1 MR. AUNON: I will object to that on the  
2 ground my client said no.

3 THE COURT: Well, go ahead.

4 Ask this witness. Did she say it can be  
5 seen?

6 BY MR. HARRISON:

7 Q. Can you see it from the street?

8 A. Yes, you can.

9 Q. And is this a view from the street?

10 A. Yes, it is.

11 MR. HARRISON: I offer it again, Your Honor,  
12 in evidence.

13 THE COURT: It will be admitted.

14 (The photograph previously  
15 marked Defendant's Exhibit  
16 No. 5 for identification was  
received into evidence.)

17 MR. HARRISON: That is No. 5.

18 No. 6.

19 (The document referred to above  
20 was marked Defendant's Exhibit  
21 No. 6 for identification.)

22 BY MR. HARRISON:

23 Q. Defendant's No. 6 is a second view of the  
street from the back of the houses.

Can you see -- actually I am not sure you can



1 see 11 from this view, so I will bring it up and ask the  
2 witness if the witness can identify 11.

3 A. Where are we now?

4 Q. These are the backs of that row over there.

5 A. These are the backs, okay, so it would be  
6 that.

7 Q. Let me ask you, can you identify this  
8 picture?

9 A. Yes, I can.

10 Q. And what is this picture?

11 A. That is the back of the homes.

12 Q. On the back of the picture, there is a site  
13 plan where Lot 11 is set out. Do you recognize that?

14 A. Yes, definitely.

15 Q. And does that correspond to this property?

16 A. Yes, it does.

17 MR. MANN: Can I say something?

18 No way. I will show you the house. No way  
19 that is our house, I am sorry.

20 BY MR. HARRISON:

21 Q. I ask you if you recognize what has now been  
22 identified and marked as Defendant's Exhibit 6?

23 A. Yes.



1 Q. Is that an accurate depiction of the houses?

2 A. Yes.

3 MR. HARRISON: Your Honor, I move Defendant's  
4 Exhibit 6 into the record.

5 THE COURT: What is the purpose?

6 MR. HARRISON: The purpose of 6 again, Your  
7 Honor, as you can see, the witness has stated that you can  
8 clearly see Lot 11 from the road from a different  
9 perspective, both the front and the back of the same house,  
10 the road being Mount Vernon Memorial Highway.

11 THE COURT: For that purpose only.

12 MR. HARRISON: Thank you, Your Honor.

13 (The photograph previously  
14 marked Defendant's Exhibit  
15 No. 6 for identification  
was received into evidence.)

16 MR. HARRISON: I have no further questions  
17 for this witness.

18 MR. AUNON: None.

19 THE COURT: May this witness be excused?

20 MR. HARRISON: Yes, Your Honor.

21 THE COURT: You may step down. You are free  
22 to go.

23 (The witness was excused.)

MR. HARRISON: I call Barbara Mann.



1 Whereupon,

2 BARBARA MANN,

3 a complainant, was called for examination by counsel for  
4 the defendant, and, having been previously sworn by the  
5 Court, resumed the stand and was examined and testified as  
6 follows:

7 DIRECT EXAMINATION

8 BY MR. HARRISON:

9 Q. Mrs. Mann, you have testified before; right?

10 A. Right.

11 Q. You are a licensed real estate agent in the  
12 Commonwealth of Virginia; right?

13 A. That is correct.

14 Q. You were going to receive a commission on the  
15 sale of this house to yourself; is that right?

16 A. That is correct.

17 Q. What was the amount of that commission?

18 A. I would have to look at the sales agreement  
19 to see.

20 Q. Approximately?

21 A. I honestly do not know.

22 Q. Do you recall it being 3 percent of the sales  
23 price?



1           A.       It could well have been. If that is what it  
2 says in the contract, sure.

3           Q.       And do you recall that that sales price was  
4 to be split fifty-fifty with your broker, Coldwell Banker?

5           A.       It is not a fifty-fifty split.

6           Q.       What is it?

7           A.       I don't know.

8                   I don't know what the bottom level split is.

9           MR. AUNON: Your Honor, I don't see what the  
10 relevance of this question is.

11           MR. HARRISON: The relevance of the question,  
12 Your Honor, is very simple.

13                   This is a real estate agent that was working  
14 as an agent on this project, owed a fiduciary duty as well  
15 as being the purchaser on this particular house.

16                   Now, again, the Court has indicated a certain  
17 question about the materiality of this.

18                   I am talking about a licensed real estate  
19 agent where she has some fiduciary duty not only not  
20 listing her own house but advising another client not to  
21 list their house.

22                   I think it is extremely material, Your Honor,  
23 to the case.



1 THE COURT: Is this raised as a defense, a  
2 breach of fiduciary duty?

3 MR. AUNON: It is not.

4 MR. HARRISON: It does not have to be.

5 It is bias -- the breach is raised, Your  
6 Honor. The materiality of the breach is -- we have alleged  
7 it is material. I am now attempting to show why it is  
8 material.

9 As a matter of law, a willful breach of even  
10 a minor matter, the willfulness of it can make it material.

11 To that extent, yes, sir, it is raised in the  
12 pleadings as a material breach.

13 THE COURT: Where?

14 MR. HARRISON: In the pleadings where we say  
15 they breached their contract by failing to list the house.

16 An example of it, Your Honor, would be in the  
17 Guldeski case, the Court goes to pains to point out Mr.  
18 Lerner and Mr. Guldeski were experienced real estate  
19 people.

20 This is an experienced real estate person.  
21 That is my point.

22 THE COURT: Did you take back Guldeski?

23 MR. HARRISON: Yes, sir.





1 THE COURT: Go ahead.

2 MR. HARRISON: I think that we are waiting  
3 on a ruling on the objection as to whether that is a proper  
4 objection, Your Honor, with respect to the amount of money  
5 she was receiving on this.

6 THE COURT: My question went to the fiduciary  
7 duty aspects.

8 Simply declaring there was a breach, I don't  
9 see how that gets into a fiduciary duty that exists.

10 MR. HARRISON: I agree with that except to  
11 the extent, Your Honor, that she is advising the Leons as  
12 well.

13 THE COURT: That has nothing to do with her  
14 own breach.

15 What does that have to do with her breach?

16 MR. HARRISON: I think it has to do with her  
17 breach again with respect to the willfulness of the breach.

18 If I have somebody working for me and they  
19 are breaching their contract too, that is one thing.

20 If I have somebody working for me and not  
21 only are they breaching their contract, but they are  
22 encouraging other people to breach their contract and I am  
23 supposed to be paying them 3 percent on \$300,000 twice,



1 which is net 50 percent of that, \$10,000 that I am paying  
2 them for the privilege of costing me a great deal of money,  
3 I think that my client properly can take that into account  
4 in deciding how to deal with somebody who is going around  
5 urging people to break their own contract.

6 THE COURT: Objection sustained.

7 MR. HARRISON: Thank you, Your Honor.

8 I would like to have this document marked as  
9 the next defendant's exhibit.

10 (The document referred to above  
11 was marked Defendant's Exhibit  
No. 7 for identification.)

12 BY MR. HARRISON:

13 Q. I ask you if you recognize that.

14 MR. AUNON: We stipulate the authenticity.

15 BY MR. HARRISON:

16 Q. Do you recognize this document?

17 A. My husband filled it out. I don't have a  
18 signature on it. It is a confidential customer estimate.

19 Q. As a realtor, you know what it is filled out  
20 for?

21 MR. AUNON: Is it a copy she has?

22 MR. HARRISON: That is a copy of this.

23 MR. AUNON: She has just stated she has no



1 signature on it.

2 MR. HARRISON: Her signature.

3 THE WITNESS: My signature is not on it and I  
4 don't know when it was filled out.

5 BY MR. HARRISON:

6 Q. Do you recognize what it is for?

7 A. Tell me what it is for, please.

8 Q. You don't know what it is for?

9 A. Out of context, I don't know.

10 This says Carl Bernstein and Associates, and  
11 I don't know when it was filled out.

12 Q. Do you ever collect confidential customer  
13 information to qualify a buyer for a --

14 A. Remember, I am part time, sir, and have been  
15 since '82.

16 I have a full-time job, and I am a part time  
17 agent.

18 So I have not been involved in transactions  
19 as we discussed during the deposition in any manner where I  
20 was controlling -- I have not been involved in that many  
21 transactions in the last five years that I can answer  
22 exactly what is done today.

23 I work with a partner on that, and she



1 follows the leads.

2 Q. You have no doubt that that information is  
3 correct and was given to Mr. Bernstein; is that right?

4 A. I don't know. I really don't.

5 MR. HARRISON: No further questions for this  
6 witness, Your Honor.

7 (The witness was excused.)

8 MR. HARRISON: Your Honor, that concludes the  
9 defendant's case.

10 THE COURT: Do you have any rebuttal?

11 MR. AUNON: No, Your Honor.

12 THE COURT: This was offered. Is there any  
13 objection to No. 7. This was the confidential customer --

14 MR. HARRISON They stipulated to it, Your  
15 Honor.

16 MR. AUNON: No objection.

17 THE COURT: 7 is admitted.

18 (The document previously marked  
19 Defendant's Exhibit No. 7  
20 for identification was received  
21 into evidence.)

22 THE COURT: I am interested in what  
23 authorities you are relying on. I want to read them.

MR. HARRISON: Your Honor, what I would  
suggest at this time would be if we conclude at this time



1 and we brief it.

2 And the reason I say that is I have a drift  
3 obviously not where the Court is going but what the Court  
4 is interested in.

5 THE COURT: There is no secret of it.

6 There is no question that the literal terms  
7 of the listing were not complied with.

8 MR. HARRISON: Yes, sir.

9 I think the problem that I see is that if we  
10 do it lightly, and I am not suggesting anybody is thinking  
11 about that, these people even if they win, that may be the  
12 worst thing that ever happens to them because if it is ever  
13 reversed -- as a matter of fact, it will be if it is ever  
14 reversed -- because at that time, two years from now the  
15 damages will be in the hundreds of thousands of dollars and  
16 they will be bankrupt if it is reversed.

17 MR. AUNON: I think that is a threat to my  
18 clients, Your Honor.

19 MR. HARRISON: It is not a threat, Your  
20 Honor, it is a statement.

21 I am not trying to be threatening, but the  
22 point I am raising is -- what I would suggest is that we  
23 brief it, come back on Friday.



1 I can argue it in fifteen minutes after I  
2 have briefed it. It may take me an hour right now.

3 MR.. AUNON: I think it will take more than  
4 half an hour for me to argue. Knowing my brother John  
5 here, it will take more than half an hour for him to say  
6 his piece.

7 THE COURT: Why don't we do this? If it is  
8 agreeable with you, I would like it briefed because I want  
9 to read the cases you are relying on.

10 I don't make any pretense that I think I am  
11 infallible by any means, and I would prefer to have read  
12 the law that you rely on before I make any decisions. I  
13 would like to have it briefed.

14 You tell me how long you are going to need  
15 for that, and then we will arrange -- if you need more than  
16 thirty minutes on a Friday, how long do you think that you  
17 would need?

18 You may not be able to tell me that. I don't  
19 know.

20 MR. AUNON: I don't know right now, Your  
21 Honor, but definitely knowing John it is going to take more  
22 than half an hour.

23 THE COURT: I am saying would it take an hour



1 for both of you?

2 MR. AUNON: Let's say an hour for me.

3 THE COURT: An hour for you?

4 MR. AUNON: Maybe forty-five minutes. Well,  
5 after we have a brief, it may not take that long, maybe an  
6 hour for both of us, Your Honor.

7 THE COURT: I am suggesting to you thirty  
8 minutes apiece after you brief it.

9 MR. HARRISON: Fine.

10 MR. AUNON: Fine.

11 THE COURT: And to schedule it from a quarter  
12 of nine to a quarter of ten some morning without any  
13 difficulty?

14 MR. HARRISON: That will be fine, Your Honor.

15 If he wants to brief in two weeks and me  
16 reply in two weeks after that.

17 MR. AUNON: Two weeks is fine, Your Honor.

18 MR. HARRISON: Is that all right?

19 THE COURT: Sure.

20 MR. HARRISON: Thank you, Your Honor.

21 MR. AUNON: Your Honor, you will hear the  
22 motion, the final argument?

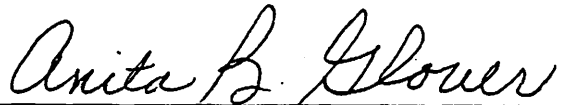
23 THE COURT: Unless I drop dead.



1 (Whereupon, at approximately 3:30 o'clock p.m., the  
2 hearing in this matter was concluded.)  
3

4 CERTIFICATE OF COURT REPORTER

5 I, ANITA B. GLOVER, a Certified Verbatim Court  
6 Reporter, do hereby certify that I took the notes of the  
7 foregoing hearing by Stenomask and reduced the same to  
8 typewriting; that the foregoing is a true record of said  
9 hearing to the best of my knowledge and ability; that I am  
10 neither related to nor employed by any attorney or counsel  
11 employed by the parties thereto; nor financially or  
12 otherwise interested in the action.

13 

14 ANITA B. GLOVER, CVR-CM  
15 Court Reporter  
16  
17  
18  
19  
20  
21  
22  
23





SALE OF EXISTING RESIDENCE ADDENDUM

Within ninety (90) calendar days from the date house framing starts  
~~Seller signs this~~  
~~Contract~~, Buyer shall deliver to Seller a copy of a written contract by and  
between Buyer and a third party, for the sale and purchase of Buyer's  
present residence known as 8716 Falkstone Lane Alex VA 22309  
("Buyer's Residence"), and in connection herewith, Buyer shall:

- (a) Immediately commence to use diligent and good faith efforts to sell Buyer's Residence;
- (b) Immediately list the Buyer's Residence with a reputable real estate broker in the vicinity in which the Buyer's Residence is located, which broker shall be a member of the "Multiple Listing Service," and Buyer shall produce satisfactory evidence of such listing to Seller within fifteen (15) days after the start of house framing
- (c) Make diligent, good faith and prompt efforts to enter into a contract for the sale of Buyer's Residence.

In the event Buyer fails to secure a written contract for the sale of Buyer's Residence, through no fault of Buyer, within the period above specified, Buyer may terminate this Contract, provided Buyer gives written notice thereof to Seller, within the period above specified, accompanied by a copy of Buyer's listing contract and the affidavit of the broker thereunder that such efforts were unsuccessful. In the event this contract as set forth above shall conclusively be deemed waived by Buyer, but Seller shall thereafter have the right to terminate this Contract at any time prior to receipt by Seller of evidence satisfactory to Seller that Buyer is able to sell Buyer's Residence on or prior to closing hereunder.

In the event that Seller obtains a contract offer on the Property which is the subject of this Contract, said offer not being conditioned upon the sale of an existing property, then Seller shall so notify the Buyer hereunder and Buyer shall have the right to remove the condition stated hereon and proceed with the purchase. If Buyer is unwilling or unable to proceed within            hours of notice from Seller, then Seller may, at its option, terminate this Agreement and return Buyer's deposit hereunder. ✓

In the event Buyer fails to secure a written contract for the sale of Buyer's Residence, by reason of Buyer's acts or failure to act, or Buyer fails to deliver a copy of the sales contract so obtained or a copy of the listing contract to Seller within the time period above specified, Buyer shall be deemed in default of this Contract, and the provisions of contract shall govern.

ATTEST OR WITNESS:

Doraine Schwab  
Sales Manager

March 1, 1986  
Date

Seller: \_\_\_\_\_

By: \_\_\_\_\_ (Seal)

Date: 3/1/86

Purchaser: Barbara C. Mann (Seal)

Purchaser: H. Louie Mann III (Seal)

T #1  
C101273  
11-19-87

*[Handwritten initials]*



## NEW HOME SALES AGREEMENT



Virginia

THIS AGREEMENT, made this 1 day of MARCH 1986, by and between W. LOWRY MANN III.  
BARBARA C. MANN (hereinafter known as the Purchaser) and  
Adelco & Hills Corporation (hereinafter known as the seller) and

Builders Marketing INC. (hereinafter known as the Agent).

WITNESSETH: That for and in consideration of the sum of FIVE THOUSAND Dollars  
(\$5,000) by cash, check, or note due \_\_\_\_\_, the receipt of which is hereby acknowledged, the Purchaser  
agrees to buy, and the Seller agrees to sell all of that certain place, parcel or lot of land and improvements thereon described as follows, to wit:

All of Lot 11 Block \_\_\_\_\_ Section 2 Union Farm Subdivision, Fairfax  
County, State of Virginia, together with a house generally known as the 2nd - Elevation, 2  
Model, known by street address as 9105 PEARTREE LANDING ALEXANDRIA VA 22304;  
Seller agrees to provide 5.50% of five options to the purchaser which include  
all standard features stated in brochure plus fireplace in Basement Bay window  
in kitchen and rear wall in dining room Hall lamp Testament Fin in Master Bath and  
Hall Bath Laundry Tub Shower Skylight 2'x4' in Master Bath R.D. Plum  
in Basement Central Vacuum System Garage Catwalk power window  
in attached addendum. This contract is contingent upon sale of purchaser's  
home (see attached addendum)

1. PURCHASE PRICE. The purchase price payable for the Property is the sum of TWO HUNDRED NINETY-SIX  
THOUSAND FIVE HUNDRED EIGHTY Dollars (\$296,580) which is payable as follows:

- (a) \$5,000 being an earnest money deposit, the receipt of which is hereby acknowledged by Seller; and,  
(b) \$100,000 representing the proceeds of a loan to be made to Purchaser by the mortgage lender; and  
(c) \$191,580 being the balance of the purchase price, payable by Purchaser by certified or cashier's check at settlement as  
hereinafter provided. CONV. 30 YR.

2. MORTGAGE LOAN. (a) Purchaser, at its own expense, is to negotiate, procure and place a loan commitment secured by a First Deed of Trust on the house and  
lot in the sum of ONE HUNDRED THOUSAND Dollars (\$100,000), bearing interest at the rate of  
10 % per annum, or at the prevailing rate at the time of settlement hereunder. Purchaser shall make diligent, truthful and proper application thereof within five (5)  
days from the date of notification by the Seller, with such lending agencies or institutions as shall be designated or approved by the Seller, the proceeds of which First Trust  
loan are to be applied toward payment of the aforesaid purchase price.

(b) It is expressly agreed that in the event the Purchaser is unable to obtain the First Trust loan referred to above from the lending agency or institution named or  
approved by Seller, or if a loan is committed by such lending agency or institution but the Lender shall thereafter refuse to consummate the loan by reason of  
non-performance of any conditions of such commitment within the period of time prescribed for such performance under the provisions of the commitment, or if said Lender  
refuses to consummate and make the loan for any other reason either before or after commitment is issued, the Seller shall have the right at its option to cancel and  
terminate this agreement and refund to the Purchaser the deposit hereinbefore mentioned; or, at the Seller's option, the Purchaser shall have the privilege of obtaining the  
First Trust loan from other sources, if the lending agency or institution named or approved by Seller refuses to make such loan. In no event shall Seller have any obligations  
or liabilities to Purchaser on account of the Lender's refusal to make such loan, for any reason whatsoever, other than the obligation of refunding to Purchaser the deposit  
made by him. Seller to pay up to 2.5 loan discount points on specified loan amount.

3. THE DWELLING. (a) Seller has erected or will erect upon the said lot a LEE-2 Model dwelling substantially in accordance  
with plans and specifications, together with amendments thereto, on file with the County of \_\_\_\_\_ (the "Plans"). Seller shall have the right to  
substitute materials, fixtures, equipment and appliances of substantially equal quality as those specified in the Plans. Seller further reserves the right (but shall not be  
obligated) to make changes in construction as may be required from time to time by Purchaser's mortgage lender, the Federal Housing Administration, the Veterans  
Administration, or any other governmental authority having jurisdiction over the Property, or as may be otherwise required by material shortages, work stoppages or  
emergencies.

(b) Seller shall complete construction of the dwelling on or before NOVEMBER (the "Completion Date") provided, however, that if Seller shall be  
delayed at any time in the progress of construction by Acts of God, labor disputes, Seller's inability to obtain material and/or labor, inclement weather, and any other causes  
beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay. Seller undertakes  
and agrees to complete construction of the dwelling within a period of one (1) year after the date of this Contract, notwithstanding any longer period which may otherwise be  
provided for under this agreement.

(c) Purchaser shall have the right to select the dwelling's decorating colors from among color samples to be provided by Seller in accordance with the policy applicable  
thereto prescribed by Seller. In the event the Purchaser shall fail to exercise the said right of selection within ten (10) days after receipt of notice from Seller, then Seller shall  
have the right to decorate the interior of the dwelling as Seller may determine.

(d) No alterations, changes or additions shall be made in the construction of the dwelling nor shall any extra work be performed or materials added by Seller unless  
approved by a duly authorized agent of Seller in writing and payment is made for such changes at the time requested by Purchaser. It is understood that Purchaser is  
purchasing a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of the dwelling and that Purchaser shall acquire no right, title  
or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion. Equitable title shall remain  
vested in Seller until delivery of deed.

4. THE SETTLEMENT. (a) Settlement shall occur at such time as designated by the Seller by notice to the Purchaser that the dwelling is ready for occupancy.  
which shall be evidenced by the issuance of a temporary or permanent Residential Use Permit by the County of FAIRFAX. On Settlement date,  
Purchaser shall pay to Seller by certified or cashier's check the unpaid balance of the purchase price provided for in Section 1 herein and all other sums payable to Seller  
hereinunder, and Seller shall deliver to Purchaser a General Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property.

(b) Settlement shall be held at the offices of STALL & BUCK. Deposit with said office of the cash payment as  
aforesaid, the deed of conveyance and such other papers as are required by the terms of this Contract shall be deemed and construed as a good and sufficient tender.  
performance of the terms hereof. THE PURCHASER HAS THE RIGHT TO SELECT THE SETTLEMENT ATTORNEY OR TITLE COMPANY FOR SETTLEMENT.

5. AGENT. (a) Seller hereby recognizes 3% TO COLDWELL BANKER, ALEX VA BARBARA C. M.  
as the Agent(s) responsible for this transaction, and the Seller agrees to pay said Agent(s) a sales commission at settlement as follows: AND  
BUILDERS MARKETING INC BY SEPARATE AGREEMENT

The Purchaser acknowledges that he has read and understands the terms and conditions set forth in Paragraphs 1 through 18  
hereof, on the face and reverse of this form, and that he and Seller are bound by the terms hereof.

DATE: 3/1/86 W. Lowry Mann III (Purchaser)  
Barbara C. Mann (Purchaser)

DATE: March 1, 1986 Adelco & Hills Corp (Seller)  
3/20/86

David A. Schmitt (Sales Agent)  
BY: W. Lowry Mann III (Purchaser)

Purchaser acknowledges and agrees that he understands that, while the Agent may have advised and consulted with the Seller, its architects and its contractors during the design, construction and development of the house, the Agent does not accept, nor will Purchaser attempt in any manner to charge the Agent with, any liability or responsibility whatsoever for said design, or the construction and/or development of the house, or any defaults in performance by the Seller, the architects or the contractor.

(c) Further, Purchaser recognizes that the Agent receives all information as to probable delivery dates from the Seller and that in this regard the Agent is merely acting as a conduit of information and not in any respect as the Agent of the Seller. The Agent shall not be responsible in any manner whatsoever to Purchaser for failure or inability of the Seller to meet projected delivery dates, it being agreed that Purchaser shall look solely to the Seller in this regard.

**6. RISK OF LOSS.** Seller assumes the risk of loss or damage to said property by fire or other casualty until the date of settlement under this Agreement.

**7. TITLE.** The Property shall be sold free of encumbrances, except as aforesaid. Title at settlement is to be good of record and fully insurable by a title insurance company at regular rates, subject, however, to covenants, easements, rights-of-way, conditions and restrictions of record and such restrictions as are specifically set forth herein, and any other easements which may be observed by an inspection of the Property. Otherwise, the deposit is to be returned and this Agreement declared null and void at the option of the Purchaser, unless the defects are of such character that they may be remedied by Seller, if it elects to do so. The Seller and its Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action, if Seller elects to undertake same, must be taken promptly by and at the Seller's expense, whereupon the time herein specified for full settlement by the Purchaser will be extended for the period necessary for such action, but not in excess of 12 additional months. The premises are sold subject to easements, if any, created or to be created, prior to or after settlement in favor of utility companies, municipal authorities, or quasi-governmental authorities for the installation of utilities or streetlights and/or additional covenants, restrictions or easements which may be placed on record by the Seller after execution hereof for the benefit of the Property and/or the community of which it is a part. This Agreement shall be subordinate to any such easements, rights-of-way, covenants, etc.

**8. SETTLEMENT COSTS.** It is agreed that the costs and fees incident to settlement shall be paid as follows (unless specified otherwise herein):

(a) Rents, taxes, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to certificate of taxes, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by Seller, or allowance made therefor at the time of transfer.

(b) The Purchaser agrees to pay the following costs at settlement: examination of title, all title insurance premiums, all mortgage insurance premiums, if any, land survey fee, loan placement fees, and any other fees assessed by lender, title insurance binder, closing and settlement fees, notary fees, convenancing fees, preparation of papers, county and state transfer taxes, all recording charges, including those for Purchase Money Trust, if any, preparation of trust and note, and insurance and tax escrows.

(c) The Seller agrees to pay the following costs at settlement: charges for preparation of deed and Virginia State Grantor's Tax, if applicable.

**9. OCCUPANCY.** (a) Occupancy hereunder shall be given to Purchaser immediately after settlement. However, if, at the Seller's discretion, the Purchaser shall accept occupancy of its completed dwelling prior to the conveyance of such unit in fee simple to the Purchaser, the Purchaser shall execute the Seller's Standard Occupancy Agreement and shall continue to be subject to the terms hereof as if Purchaser did not occupy such dwelling unit.

(b) Notwithstanding the Purchaser's right of occupancy as aforesaid, the Seller shall have the right to enter upon property of the Purchaser at any time after settlement for the purpose of making exterior changes to the lot and improvements thereon, including grading changes and the removal of trees, as may be required by Seller's site plan, or any modification thereof, or any changes which may be required as a condition of Seller's release by applicable governmental authorities from any and all subdivision or site plan bonds or other escrows.

**10. UNSOLD UNITS.** Until such time as all of the dwelling units in Seller's subdivision are sold, the Seller reserves the right to make such use of unsold dwelling units, the common elements, street and the main entrance of the project, as are necessary for its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction equipment and personnel and noise and other inconveniences attendant thereto may be present. Purchaser agrees not to obstruct or impede any such construction or sales activities.

**11. ACCESS.** The Purchaser may not have access or entry to the dwelling unit or the construction site during construction, nor may he store any of his possessions in or about the dwelling unit or the construction site prior to the settlement of this Agreement and delivery in possession to the Purchaser hereunder. Any violation of this provision may, at the election of the Seller, be considered a material breach of this Agreement and, in addition to any other remedies available to Seller, Seller may declare this Agreement void and, in such event, any amount paid toward the purchase price may be retained by Seller as liquidated damages.

**12. TREES AND LOCATION.** The location, area, and ground elevation of the building on the lot, elevation of dwelling unit, and the reversing of the plan, if necessary, to conform to the existing lot contours, are to be determined by the Seller at its sole discretion. Seller shall remove such trees from the lot as it may deem necessary and it shall not be responsible for any damage to or destruction of remaining trees during the process of construction. Seller shall be responsible only for trees planted by him. Seller's obligations to replace trees, shrubbery and other landscaping, as well as all of Seller's other repair and warranty obligations, shall be limited solely to the warranties set forth in the Builder's Limited Warranty mentioned in paragraph #14 below.

**13. MODELS AND DISPLAYS.** It is hereby agreed that all furniture and apartment property, special household appliances, furnishings, special features special carpeting and floor tile, special mirrors, wallpaper, window decorating treatments, special trees, shrubbery, landscaping, special decks and patios, certain rooms, special fireplaces and other features and recreational facilities exhibited in the model units and model area are for exhibition purposes only and are not included in the purchase price, unless otherwise expressly provided herein.

**14. WARRANTIES.** Purchaser hereby waives any and all warranty rights provided by Section 55-70.1 of the Code of Virginia. Unless specified otherwise herein, all warranties other than those expressly provided in the Builder's Limited Warranty are hereby excluded. Purchaser has been afforded the opportunity to review this warranty prior to execution of this Agreement, and agrees to accept this warranty as the sole warranty being given by the Seller to the Purchaser. Purchaser and Seller shall inspect the house and lot before settlement and note in the Pre-Settlement Inspection Report any incomplete work or defects. Thereafter, Purchaser agrees that Seller shall not be liable for any patent incomplete work or defects not specifically noted in said Pre-Settlement Inspection Report, unless otherwise specifically provided in the Builder's Limited Warranty. It is further agreed that there shall be no withholding of Seller's funds at settlement for any such items.

THE SELLER MAKES NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, OR IMPLIED BY STATUTE, TO THE PURCHASER.

**15. DEFAULT BY EITHER PARTY.** (a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by Seller and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable of precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agrees to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

**16. DISCLOSURE.** (a) When applicable, the Purchaser by execution hereof acknowledges receipt, prior to the execution of this Agreement, of a completed copy of the Disclosure Bill of Particulars for New Home Buyers, as required by Section 10-6-3, Chapter 10 of the 1976 Code of the County of Fairfax, Virginia, as amended.

(b) Purchaser acknowledges that he has had the opportunity, prior to the execution of this Agreement, to examine manufacturers' warranties on appliances and equipment included in the home.

**17. HOME OWNERS ASSOCIATION.** In the event there is a Homeowner's Association, then Purchaser acknowledges receipt, prior to execution of this Agreement, of copies of the Homeowner's Association by-laws and related documents. Purchaser agrees to be bound by the regulations, by-laws and declarations of the Association and agrees to pay the assessments established by such Association.

**18. MISCELLANEOUS.** (a) The principals to the Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns, provided, however, that the Purchaser shall have no right to assign this Agreement without the prior written consent of the Seller.

(b) The terms and provisions of this Agreement shall survive the Settlement hereunder.

(c) Purchaser is expressly prohibited from recording this Agreement or any memorandum thereof, and upon any attempted recordation, at Seller's option, this Agreement shall become null and void and all rights of Purchaser hereunder shall thereupon cease and terminate.

(d) Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations hereunder.

(e) This Agreement contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.



CARL BERNSTEIN  
AND ASSOCIATES, INC.

CERTIFIED MAIL  
Return Receipt Requested

January 13, 1987

Mr. & Mrs. W. Lowry Mann  
8716 Falkstone Lane  
Alexandria, Virginia 22309

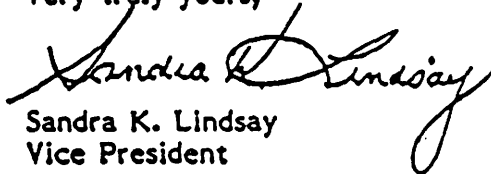
Re: Sales Agreement dated 3/1/86  
Lot 11 - Union Farm

Dear Mr. & Mrs. Mann:

More than two weeks have elapsed since the framing on Lot 11 at Union Farm, and we have not received to date a copy of the listing on your present residence as provided in the contract addendum. Our sales agent Daurie Schwab has alerted us with some concern that you have ignored her reminders and have taken no action to remove this contingency.

In order to avoid termination of the Sales Agreement, please provide this office with a copy of your listing within five days of receipt of this letter.

Very truly yours,

  
Sandra K. Lindsay  
Vice President

SKL/bjc.

2K

252

π # 3  
C101273  
11-19-87





JAN 27 1987

COLDWELL BANKER  
RESIDENTIAL REAL ESTATE SERVICES  
620 GIBSON STREET  
ALEXANDRIA, VA 22314

January 21, 1987

Ms. Sandra K. Lindsay  
Vice President  
Carl Bernstein and Associates, Inc.  
7345 McWhorter Place  
Suite 100  
Annandale, VA 22003

Re: Lots 10 and 11 - Union Farm

Dear Ms. Lindsay:

Thank you for the time you spent with me Monday discussing the listing of our property as well as the Leon's. We have been following with great interest the progress of the first six houses scheduled for delivery at Union Farm and are concerned about delivery dates for the second group of six which includes Lots 10 and 11. Unlike others I know moving to Union Farm, the Leons and I both have children at home which would make a move to temporary quarters as near a disaster as I can think of at this point.

As we discussed, it looks like a quite accurate estimate of occupancy on the various lots at Union Farm should be able to be made early in March. Such an estimate will surely make both the Leons' and our house more saleable. Accordingly, I have drawn up and enclosed two listing agreements effective March 1, 1987: one for the Leon's house on Gibbs Street and one for ours on Falkstone Lane. I will check with you at the end of February to determine an estimated month of occupancy for Lots 10 and 11 to add to the listings and will enter the listings into the computer on March 1. At that time I'll forward to you a computer printout for each of the properties so you will be assured they have been put into the MLS system. Above all, I would like to assure the builder that we are not trying to sidestep the issue; rather, we are attempting to determine a realistic occupancy date so that both houses are sold to enable the moves to be house-to-house.

TH 4  
C101273  
11 19 87

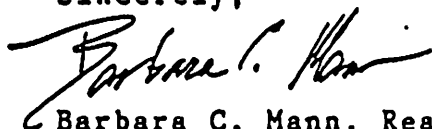
*[Handwritten signature]*

*[Handwritten signature]* #1

My partner, Martha Allen, and I will be marketing both houses. Martha has been with Coldwell Banker-Routh Robbins for 16 years and is one of the top producers in the company. I have been with Coldwell Banker for 10 years, with three years experience in New Home sales; thus, I am very familiar with delays caused by counties, "concerned citizens" and the like. We have priced both houses well within the range of value indicated by the comparables. The Leon's house is in top condition with numerous upgrades; ours is in the process of final painting, recarpeting and appliance replacement - all scheduled for February. Given the current interest rates, an historical strong Spring market and the low supply of houses on the market in the 150's in Mt. Vernon, Martha and I predict a fast sale for both houses if we have a probable occupancy date at Union Farm.

I appreciate your attention to this matter. Please call me at 836-9336 if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Barbara C. Mann".

Barbara C. Mann, Realtor

COMMON DATA BASE SERVICE  
LISTING AGREEMENT - EXCLUSIVE RIGHT TO SELL



Agreement made this First day of March, 1987, by and between William Lowry Mann III  
and Barbara C. Mann OWNER(S)  
and Caldwell Banker REC REALTOR® (AGENT).  
(Firm Name)

In consideration for services and facilities the REALTOR® (AGENT) is hereby granted the exclusive right to sell the property, which is known as  
9716 Falkstone Lane  
Alexandria, Virginia 22309

Legal Owner(s) William Lowry Mann III and Barbara C. Mann  
Legal Description Lot 6, Block 14, Section 1, Mt. Vernon Manor

1. This property, to include any chattels as listed below, is offered for sale at a selling price of one hundred sixty three  
thousand and no/100 DOLLARS (\$163,000.00) or such other price as later agreed upon, which price includes selling compensation.  
Settlement to coincide with settlement on purchase of home at 9105 Peartree Landing, Alexandria VA 22309

2. The OWNER(S) agrees to pay to REALTOR® (AGENT) a compensation of 6% in cash if, during the listing period, the property is sold to anyone or if anyone produces a purchaser ready, willing and able to buy the property, or if within \_\_\_\_\_ days after the expiration of the listing agreement a sale is made to any person(s) to whom the property has been shown during the listing period. This last clause shall not be effective if the property is subsequently listed with another real estate broker.

3. This exclusive right to sell will expire at midnight August 31, 1987

4. This property shall be shown and made available to all persons without regard to race, color, creed, religion, national origin, sex, marital status, age or handicap.

5. Authorization is granted to the REALTOR® (AGENT) to: a. Place a "For Sale" sign on the property and to remove all others. b. Show the entire property during reasonable hours. c. Place a common key lockbox on the property. d. Make a blanket unilateral offer of subagency to real estate brokers and to participants in any Multiple Listing Service that the REALTOR® (AGENT) deems appropriate. e. Disseminate information regarding real estate offered for sale, under contract for sale, sold, expired and/or withdrawn by printed form and/or electronic computer service.

6. It is understood that no Multiple Listing Service or Board of REALTORS® is a party to this listing agreement and that no Multiple Listing Service or Board of REALTORS® sets, controls, recommends, or suggests the amount of compensation for any brokerage service rendered pursuant to this listing agreement, whether by the listing broker or by any other broker acting as subagent or otherwise.

7. It is understood and agreed that Virginia licensed real estate salespersons and appraisers, inspectors, or other persons may require access to the property to facilitate and/or consummate a sale.

8. The OWNER(S) retains full responsibility for the property, including all utilities, maintenance, physical security and liability during the term of this Agreement.

9. The OWNER(S) understands and agrees that in consideration of the use of REALTOR® (AGENT) services and facilities and of the facilities of any REALTORS® Multiple Listing Service OWNER(S) and OWNER(S) heirs and assigns agree that REALTOR®, all agents accompanying purchasers or prospective purchasers, any REALTORS® Multiple Listing Service, and the directors, officers and employees thereof, including officials of any parent Board of REALTORS®, except for malfeasance on the part of such parties, are not responsible for vandalism, theft or damage of any nature whatsoever to the real property or its contents during the period of exclusive privilege to sell, and that OWNER(S) waives any and all rights, claims, and causes of action against them and holds them harmless for any property damage or personal injury arising from the use of or access to the property by any person during the listing period.

10. The property may be sold subject to existing Deed(s) of Trust, having an unpaid principal balance of approximately \$ 44,000

11. OWNER(S) will take back a N/A Deed of Trust in the amount of \$ \_\_\_\_\_ with further terms to be negotiated.

12. In the event of a sale, OWNER(S) will execute a sales contract enforceable in the Commonwealth of Virginia. Condominiums or Cooperatives being offered for sale are subject to the receipt by purchasers of the required Disclosures, and OWNER(S) is responsible for securing and furnishing these to prospective purchasers as prescribed in the Cooperative Act, Section 55-424 Et. Seq. of the Condominium Act, Section 55-79.39 Et. Seq. of the Code of Virginia (1950 AS AMENDED).

13. The terms and conditions of this Agreement may be used as a basis for presenting the property to prospective purchasers, and, unless amended in writing, contain the final and entire agreement between the parties hereto. The parties shall not be bound by any terms, conditions, oral statements, warranties or representations, not herein contained.

Seen and agreed and receipt of a signed copy of this Agreement is hereby acknowledged.

William Lowry Mann III OWNER  
Barbara C. Mann OWNER  
Caldwell Banker REALTOR® (AGENT)  
(Firm Name)

MAILING ADDRESS 9716 Falkstone Lane  
(Owner's) Alexandria VA 22309  
SALES ASSOCIATE Barbara C. Mann  
(Broker/Sales Manager)

PHONE (OFFICE) 836-9336  
PHONE (HOME) 360-3880  
PHONE (OFFICE) 836-6200  
PHONE (HOME) 360-3880

THIS AGREEMENT EXECUTED IN TRIPPLICATE; Original - REALTOR®, - Yellow - Owner's Final Copy, - Pink - Owner's First Copy

COMMON DATA BASE SERVICE  
LISTING AGREEMENT - EXCLUSIVE RIGHT TO SELL



A Agreement made this 1ST day of MARCH, 1987, by and between  
KENNETH FRANCIS LEON + BARBARA T. LEON OWNER(S)  
COLDWELL BANKER REALTOR® (AGENT),  
(Firm Name)

In consideration for services and facilities the REALTOR® (AGENT) is hereby granted the exclusive right to sell the property, which is known as  
3910 GIBBS STREET  
ALEXANDRIA, Virginia 22309

2nd Owner(s) KENNETH FRANCIS LEON & BARBARA T. LEON  
2nd Description LOT 3, BLOCK 1, SECTION 1, SEDGEWICK FOREST.

This property, to include any chattels as listed below, is offered for sale at a selling price of ONE HUNDRED FIFTY SEVEN  
AND 4/100 DOLLARS (\$ 157,000.00) or such other price as later agreed upon, which price includes selling compensation.

SETTLEMENT MUST COINCIDE WITH SELLERS' PURCHASE OF  
923 PEAR TREE LANDING 67

The OWNER(S) agrees to pay to REALTOR® (AGENT) a compensation of 6% in cash if, during the listing period,  
a property is sold to anyone or if anyone produces a purchaser ready, willing and able to buy the property, or if within 180 days after the expiration of the  
listing agreement a sale is made to any person(s) to whom the property has been shown during the listing period. This last clause shall not be effective if the property  
subsequently listed with another real estate broker.

This exclusive right to sell will expire at midnight SEPT. 1, 1987

This property shall be shown and made available to all persons without regard to race, color, creed, religion, national origin, sex, marital status, age or handicap.  
Authorization is granted to the REALTOR® (AGENT) to: a. Place a "For Sale" sign on the property and to remove all others. b. Show the entire property  
during reasonable hours. c. Place a common key lockbox on the property. d. Make a blanket unilateral offer of subagency to real estate brokers and to participants  
in any Multiple Listing Service that the REALTOR® (AGENT) deems appropriate. e. Disseminate information regarding real estate offered for sale, under contract  
for sale, sold, expired and/or withdrawn by printed form and/or electronic computer service.

It is understood that no Multiple Listing Service or Board of REALTORS® is a party to this listing agreement and that no Multiple Listing Service or Board of  
REALTORS® sets, controls, recommends, or suggests the amount of compensation for any brokerage service rendered pursuant to this listing agreement, whether  
by the listing broker or by any other broker acting as subagent or otherwise.

It is understood and agreed that Virginia licensed real estate salespersons and appraisers, inspectors, or other persons may require access to the property to  
facilitate and/or consummate a sale.

The OWNER(S) retains full responsibility for the property, including all utilities, maintenance, physical security and liability during the term of this Agreement.

The OWNER(S) understands and agrees that in consideration of the use of REALTOR® (AGENT) services and facilities and of the facilities of any REALTORS®  
Multiple Listing Service OWNER(S) and OWNER(S) herein and assigns agree that REALTOR®, all agents accompanying purchasers or prospective purchasers, any  
REALTORS® Multiple Listing Service, and the directors, officers and employees thereof, including officials of any parent Board of REALTORS®, except for  
negligence on the part of such parties, are not responsible for vandalism, theft or damage of any nature whatsoever to the real property or its contents during the  
period of exclusive privilege to sell, and that OWNER(S) waives any and all rights, claims, and causes of action against them and holds them harmless for any property  
damage or personal injury arising from the use of or access to the property by any person during the listing period.

0. The property may be sold subject to existing Deed(s) of Trust, having an unpaid principal balance of approximately \$ 55,000.00
1. OWNER(S) will take back a Deed of Trust in the amount of \$ 55,000.00 with further terms to be negotiated.
2. In the event of a sale, OWNER(S) will execute a sales contract enforceable in the Commonwealth of Virginia. Condominiums or Cooperatives being offered for  
sale are subject to the receipt by purchasers of the required Disclosures, and OWNER(S) is responsible for securing and furnishing these to prospective purchasers  
as prescribed in the Cooperative Act, Section 55 - 424 Et. Seq. of the Condominium Act, Section 55 - 79.39 Et. Seq. of the Code of Virginia (1950 AS AMENDED).
3. The terms and conditions of this Agreement may be used as a basis for presenting the property to prospective purchasers, and, unless amended in writing,  
contain the final and entire agreement between the parties hereto. The parties shall not be bound by any terms, conditions, oral statements, warranties or representa-  
tions, not herein contained.

Seen and agreed and receipt of a signed copy of this Agreement is hereby acknowledged.

Barbara T. Leon OWNER  
Kenneth F. Leon OWNER

MAILING ADDRESS 3910 Gibbs Street  
(Owner's)  
Alexandria Virginia 22304

PHONE (OFFICE) 644-5043-360-4228

PHONE (HOME) 360-2672

COLDWELL BANKER REALTOR® (AGENT)  
(Firm Name)

By [Signature]  
(Broker/Sales Manager)

SALES ASSOCIATE [Signature]

PHONE (OFFICE) 836-6200

PHONE (HOME) 360-3935

256 THIS AGREEMENT EXECUTED IN TRIPLICATE; Original - REALTOR®, - Yellow - Owner's Final Copy, - Pink - Owner's First Copy





CARL BERNSTEIN  
AND ASSOCIATES, INC.

CERTIFIED MAIL  
Return Receipt Requested  
January 30, 1987

Mr. & Mrs. W. Lowry Mann  
8716 Falkstone Lane  
Alexandria, Virginia 22309

Re: Sales Agreement dated 3/1/86  
Union Farm, Lot 11

Dear Mr. & Mrs. Mann:

Your failure to timely list your present home for sale, as required by the subject Sales Agreement, has resulted in breach of contract. The framing on the house at Lot 11 began November 12, 1986, and despite repeated request from our sales agent, Daurie Schwab, you did not cooperate. Your decision to list your home as of March 1 is totally unacceptable. Consequently, the sales agreement is herewith terminated.

With regard to your deposit monies, the majority of the customer options have already been installed and/or ordered, with the exception of the central vacuum system and the air cleaner. In addition to the \$5,000 earnest money deposit, your refund at this time will only include \$950, representing your 50% deposit on those non-installed items. Should we recover our costs for the other customer options on the occasion of the resale of this lot, the balance of your option deposit totaling \$12,092.50 will be refunded to following settlement of Lot 11.

Very truly yours,

*Carl Bernstein*  
xl

Carl Bernstein  
President

CB/bc

Enclosure

Copy to:  
Daurie Schwab/BMI

TT # 5  
C101273  
11-19-87 *JS*

WAIVER

The undersigned hereby waive the right to have the validity of the contract dated March 1, 1986, contingent upon the sale of their house.

This contingency is hereby removed.

DATED:

2/4/87

Barbara C. Mann

W. Leroy Mann

This Agreement made this 2nd day of February, 1987, by and between Barbara C. and W. Lowry Mann III OWNERS

and GOLDWELL BANKER REC REALTOR® (AGE  
(Firm Name)

In consideration for services and facilities the REALTOR® (AGENT) is hereby granted the exclusive right to sell the property, which is located at

8716 Falkstone Lane, Alexandria

Virginia 22309

Legal Owner(s) Barbara C. and W. Lowry Mann III

Legal Description Lot 6, Block 14, Section 1, Mt. Vernon Manor

1. This property, to include any chattels as listed below, is offered for sale at a selling price of One hundred sixty three thousand and no/100 DOLLARS (\$163,000.00) or such other price as later agreed upon, which price includes selling compensation.

Settlement to coincide with settlement on sellers' home at  
9105 Peartree Landing, Alexandria, VA 22309

2. The OWNER(S) agrees to pay to REALTOR® (AGENT) a compensation of 6% In cash if, during the listing of the property is sold to anyone or if anyone produces a purchaser ready, willing and able to buy the property, or if within 30 days after the expiration of the listing agreement a sale is made to any person(s) to whom the property has been shown during the listing period. This last clause shall not be effective if the property is subsequently listed with another real estate broker.

3. This exclusive right to sell will expire at midnight September 2, 1987

4. This property shall be shown and made available to all persons without regard to race, color, creed, religion, national origin, sex, marital status, age or handicap.

5. Authorization is granted to the REALTOR® (AGENT) to: a. Place a "For Sale" sign on the property and to remove all others. b. Show the entire property during reasonable hours. c. Place a common key lockbox on the property. d. Make a blanket unilateral offer of subagency to real estate brokers and to participate in any Multiple Listing Service that the REALTOR® (AGENT) deems appropriate. e. Disseminate information regarding real estate offered for sale, under contract for sale, sold, expired and/or withdrawn by printed form and/or electronic computer service.

6. It is understood that no Multiple Listing Service or Board of REALTORS® is a party to this listing agreement and that no Multiple Listing Service or Board of REALTORS® sets, controls, recommends, or suggests the amount of compensation for any brokerage service rendered pursuant to this listing agreement, whether by the listing broker or by any other broker acting as subagent or otherwise.

7. It is understood and agreed that Virginia licensed real estate salespersons and appraisers, inspectors, or other persons may require access to the property to facilitate and/or consummate a sale.

8. The OWNER(S) retains full responsibility for the property, including all utilities, maintenance, physical security and liability during the term of this Agreement.

9. The OWNER(S) understands and agrees that in consideration of the use of REALTOR® (AGENT) services and facilities and of the facilities of any REALTOR® Multiple Listing Service, OWNER(S) and OWNER(S) heirs and assigns agree that REALTOR®, all agents accompanying purchasers or prospective purchasers, REALTORS® Multiple Listing Service, and the directors, officers and employees thereof, including officials of any parent Board of REALTORS®, exercise no malfeasance on the part of such parties, are not responsible for vandalism, theft or damage of any nature whatsoever to the real property or its contents during the period of exclusive privilege to sell, and that OWNER(S) waives any and all rights, claims, and causes of action against them and holds them harmless for any injury damage or personal injury arising from the use of or access to the property by any person during the listing period.

10. The property may be sold subject to existing Deed(s) of Trust, having an unpaid principal balance of approximately \$ 44,200

11. OWNER(S) will take back a N/A Deed of Trust in the amount of \$ N/A with further terms to be negotiated

12. In the event of a sale, OWNER(S) will execute a sales contract enforceable in the Commonwealth of Virginia. Condominiums or Cooperatives being offered for sale are subject to the receipt by purchasers of the required Disclosures, and OWNER(S) is responsible for securing and furnishing these to prospective purchasers as prescribed in the Cooperative Act, Section 55-424 Et. Seq. of the Condominium Act, Section 55-79.39 Et. Seq. of the Code of Virginia (1950 AS AMER).

13. The terms and conditions of this Agreement may be used as a basis for presenting the property to prospective purchasers, and, unless amended in writing, contain the final and entire agreement between the parties hereto. The parties shall not be bound by any terms, conditions, oral statements, warranties or representations, not herein contained.

Seen and agreed and receipt of a signed copy of this Agreement is hereby acknowledged.

Barbara C. Mann OWNER

W. Lowry Mann III OWNER

MAILING ADDRESS 8716 Falkstone Lane  
(Owner's)

Alexandria, VA 22309

PHONE (OFFICE) 836-9336/836-6200

PHONE (HOME) 360-3880

Coldwell Banker REALTOR® (AC  
(Firm Name)

Charles L. Woodward  
(Broker/Sales Manager)

SALES ASSOCIATE Barbara C. Mann

PHONE (OFFICE) 836-6200/836-9336

PHONE (HOME) 360-3880

REPLICATE: Original - REALTOR®, - Yellow - Owner's Final Copy, - Pink - Owner's First Copy

CD8-12/84 C101273  
11.19.87

259

COUNTY OF FAIRFAX, VIRGINIA  
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT  
DIVISION OF DESIGN REVIEW  
RESIDENTIAL USE PERMIT  
09/04/87

STREET NUMBER	STREET NAME	ST TY	ACT NO.	LEVEL	UNIT	ACT NO.
09105	PEARTREE	LD	001			01

LOT NUMBER	SUBDIVISION NAME	MAP REFERENCE NUMBER	INSP AREA
00011	UNION FARM	110-1- /26/ /0011-	1

	INSPECTED BY	DATE
ELECTRICAL	Peters	8/14/87
PLUMBING	Dunston	9/2/87
MECHANICAL	Heath	8/26/87
BUILDING	Mullins	9/3/87
PUBLIC UTILITIES	Hwang	9/9/87
APPROVED	Ed. H. H. H.	9/9/87
REMARKS		

THE FOLLOWING REQUIREMENTS, IF CHECKED, ARE BEING WAIVED IN ACCORDANCE WITH CHAPTER 112 ARTICLE 16 PART 201 OF THE FAIRFAX COUNTY CODE TO OBTAIN A RESIDENTIAL USE PERMIT.

- ☐ FINAL GRADING, SODDING AND SEEDING OF LOT
- ☐ COMPLETION OF LANDSCAPING AND MAINTENANCE REQUIREMENTS
- ☐ COMPLETION OF SIDEWALKS
- ☐ BITUMINOUS CONCRETE DRIVE/DRIVEWAY SURFACING
- ☒ ADEQUATE STAMP OF GRASS

\*\*\*\*\*

ADDITION

\* NO TREES OR SHRUBS MAY BE PLANTED IN THE DEDICATED

\* RIGHT-OF-WAY WITHOUT FIRST OBTAINING A PERMIT FROM

\* FAIRFAX COUNTY. FOR FURTHER INFORMATION CALL 691-7401.

\* WHEN COLLECTIONS ARE FINAL GRADING, SODDING AND/OR

\* SEEDING ARE GRANTED DURING THE PERMIT TERM, THE BUILDING

\* IS OBLIGATED TO COMPLETE THE WORK BY THE FIRST DAY OF MAY

\*\*\*\*\*

HOME WORK  
SCHEDULE  
20 IN

Page 8  
C101273  
11.19.87



# NEW HOME SALES AGREEMENT



Virginia

THIS AGREEMENT, made this 11 day of February, 1987, by and between Donald V. Chellings

Robert H. H. Co. Jr. (hereinafter known as the Purchaser), and Builders Marketing INC. (hereinafter known as the Seller) and

WITNESSETH: That for and in consideration of the sum of Five thousand Dollars

(5,000.00) by (cash, check, or note due the receipt of which is hereby acknowledged, the Purchaser agrees to buy, and the Seller agrees to sell all of that certain piece, parcel or lot of land and improvements thereon described as follows, to wit:

All of Lot 11, Block 2, Section 1, Subdivision Trinity

County, State of Virginia, together with a house generally known as the Trinity

Model, known by street address as 9145 Counters Landing, Albemarle Co. VA

which goes to include all standard fixtures stated in brochure

plus optional items as acknowledged

all cash with two points paid by builder for optional items

subject to approval by Donald V. Chellings, the February 1987

Whelan & Chellings memo will be added to the deed

1. PURCHASE PRICE. The purchase price payable for the Property is the sum of Five thousand six hundred Dollars (\$5,600.00), which is payable as follows:

(a) 500.00 being an earnest money deposit, the receipt of which is hereby acknowledged by Seller; and

(b) 0.00 representing the proceeds of a loan to be made to Purchaser by the mortgage lender; and

(c) 0.00 being the balance of the purchase price, payable by Purchaser by certified or cashier's check at settlement as hereinafter provided.

2. MORTGAGE LOAN. (a) Purchaser, at his own expense, is to negotiate, procure and place a loan commitment secured by a First Deed of Trust on the house and lot in the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) bearing interest at the rate of \_\_\_\_\_ % per annum, or at the prevailing rate at the time of settlement hereunder.

Purchaser shall make diligent, truthful and proper application therefor within five (5) days from the date of notification by the Seller, with such lending agencies or institutions as shall be designated or approved by the Seller, the proceeds of which First Trust loan are to be applied toward payment of the aforesaid purchase price.

(b) It is expressly agreed that in the event the Purchaser is unable to obtain the First Trust loan referred to above from the lending agency or institution named or approved by Seller, or if a loan is committed by such lending agency or institution but the Lender shall thereafter refuse to consummate the loan by reason of failure to perform any conditions of such commitment within the period of time prescribed for such performance under the provisions of the commitment, or if said Lender terminate this agreement and make the loan for any other reason either before or after commitment is issued, the Seller shall have the right at its option to cancel and First Trust loan from other source and refund to the Purchaser the deposit hereinbefore mentioned; or, at the Seller's option, the Purchaser shall have the privilege of obtaining the loan from another lending agency or institution named or approved by Seller, in no event shall Seller have any obligations or liabilities to Purchaser.

3. THE DWELLING. (a) Seller has erected or will erect upon the said lot a Trinity Model dwelling substantially in accordance with plans and specifications, together with amendments thereto, on file with the County of Trinity (the "Plans").

Seller shall have the right (but shall not be obligated) to make changes in construction as may be required from time to time by Purchaser's mortgage lender, the Federal Housing Administration, the Veterans Administration, or any other governmental authority having jurisdiction over the Property, or as may be otherwise required by material shortages, work stoppages or emergencies.

(b) Seller shall complete construction of the dwelling on or before May 1987 (the "Completion Date") provided, however, that if Seller shall be delayed at any time in the progress of construction by Acts of God, labor disputes, Seller's inability to obtain material and/or labor, inclement weather, and any other causes beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay. Seller undertakes and agrees to complete construction of the dwelling within a period of one (1) year after the date of this Contract, notwithstanding any longer period which may otherwise be provided for under this agreement.

(c) Purchaser shall have the right to select the dwelling's decorating colors from among color samples to be provided by Seller in accordance with the policy applicable thereto prescribed by Seller. In the event the Purchaser shall fail to exercise the said right of selection within ten (10) days after receipt of notice from Seller, then Seller shall have the right to decorate the interior of the dwelling as Seller may determine.

(d) No alterations, changes or additions shall be made in the construction of the dwelling nor shall any extra work be performed or materials added by Seller unless approved by a duly authorized agent of Seller in writing and payment is made for such changes at the time requested by Purchaser. It is understood that Purchaser is purchasing a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of the dwelling and that Purchaser shall acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion. Equitable title shall remain vested in Seller until delivery of deed.

4. THE SETTLEMENT. (a) Settlement shall occur at such time as designated by the Seller by notice to the Purchaser that the dwelling is ready for occupancy, which shall be evidenced by the issuance of a temporary or permanent Residential Use Permit by the County of Trinity. On Settlement date, Purchaser shall pay to Seller by certified or cashier's check the unpaid balance of the purchase price provided for in Section 1 herein and all other sums payable to Seller hereinafter, and Seller shall deliver to Purchaser a General Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property.

(b) Settlement shall be held at the offices of Bank of America. Deposit with said office of the cash payment as aforesaid, the deed of conveyance and such other papers as are required by the terms of this Contract shall be deemed and construed as a good and sufficient tender of performance of the terms hereof. THE PURCHASER HAS THE RIGHT TO SELECT THE SETTLEMENT ATTORNEY OR TITLE COMPANY FOR SETTLEMENT.

5. AGENT. (a) Seller hereby recognizes 3% to David Paul Brown, Realtor, Independent One as the Agent(s) responsible for this transaction, and the Seller agrees to pay said Agent(s) a sales commission at settlement as follows:

Real Estate Marketing Inc. as per agreement

The Purchaser acknowledges that he has read and understands the terms and conditions set forth in Paragraphs 1 through 18 hereof, on the face and reverse of this form, and that he and Seller are bound by the terms hereof.

DATE: 2/11/87 Donald V. Chellings (Purchaser)

Robert H. H. Co. Jr. (Purchaser)

DATE: 2/11/87 Builders Marketing INC. (Seller)

Donald V. Chellings (Sales Agent)

BY: Donald V. Chellings (Sales Agent)

(b) Purchaser acknowledges and agrees that he understands that, while the Agent may have advised and consulted with the Seller, its architects and its Contractors concerning the design, construction and development of the house, the Agent does not accept, nor will Purchaser attempt in any manner to charge the Agent with, any liability or responsibility whatsoever for said design, or the construction and/or development of the house, or any defaults in performance by the Seller, the architects and/or the contractor.

(c) Further, Purchaser recognizes that the Agent receives all information as to probable delivery dates from the Seller and that in this regard the Agent is merely acting as a conduit of information and not in any respect as the Agent of the Seller. The Agent shall not be responsible in any manner whatsoever to Purchaser for failure or inability of the Seller to meet projected delivery dates, it being agreed that Purchaser shall look solely to the Seller in this regard.

**8. RISK OF LOSS.** Seller assumes the risk of loss or damage to said property by fire or other casualty until the date of settlement under this Agreement.

**7. TITLE.** The Property shall be sold free of encumbrance, except as aforesaid. Title at settlement is to be good of record and fully insurable by a title insurance company at regular rates, subject, however, to covenants, easements, rights-of-way, conditions and restrictions of record and such restrictions as are specifically set forth herein, and any other easements which may be observed by inspection of the Property. Otherwise, the deposit is to be returned and this Agreement declared null and void at the option of the Purchaser unless the defects are of such character that they may be remedied by Seller if it elects to do so. The Seller and its Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action, if Seller elects to undertake same, must be taken promptly by and at the Seller's expense, whereupon the time herein specified for full settlement by the Purchaser will be extended for the period necessary for such action, but not to exceed 12 additional months. The premises are sold subject to easements, if any, created or to be created, prior to or after settlement in favor of utility companies, municipal authorities, or quasi-governmental authorities for the installation of utilities or streetlights and/or additional covenants, restrictions or easements which may be placed on record by the Seller after execution hereof for the benefit of the Property and/or the community of which it is a part. This Agreement shall be subordinate to any such easements, rights-of-way, covenants, etc.

**9. SETTLEMENT COSTS.** It is agreed that the costs and fees incident to settlement shall be paid as follows (unless specified otherwise herein):

(a) Rent, taxes, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to certificate of taxes, except that assessments for improvements completed prior to the date hereof, whether assessments therefor has been levied or not, shall be paid by Seller, or allowance made therefore at the time of transfer.

(b) The Purchaser agrees to pay the following costs at settlement: examination of title, all title insurance premiums, all mortgage insurance premiums, if any, final survey fee, loan placement fees, and any other fees assessed by lender, title insurance binder, closing and settlement fees, notary fees, conveyancing fees, preparation of papers, county and state transfer taxes, all recording charges, including those for Purchase Money trust, if any, preparation of trust and note, and insurance and tax escrows.

(c) The Seller agrees to pay the following costs at settlement: charges for preparation of deed and Virginia State Grantor's Tax, if applicable.

**9. OCCUPANCY.** (a) Occupancy hereunder shall be given to Purchaser immediately after settlement. However, if, at the Seller's discretion, the Purchaser shall accept occupancy of its completed dwelling prior to the conveyance of such unit in fee simple to the Purchaser, the Purchaser shall execute the Seller's Standard Occupancy Agreement and shall continue to be subject to the terms hereof as if Purchaser did not occupy such dwelling unit.

(b) Notwithstanding the Purchaser's right of occupancy as aforesaid, the Seller shall have the right to enter upon property of the Purchaser at any time after settlement for the purpose of making exterior changes to the lot and improvements thereon, including grading changes and the removal of trees, as may be required by Seller's site plan, or any modification thereto, or any changes which may be required as a condition of Seller's release by applicable governmental authorities from any and all subdivision or site plan bonds or other escrows.

**10. UNSOLD UNITS.** Until such time as all of the dwelling units in Seller's subdivision are sold, the Seller reserves the right to make such use of unsold dwelling units, the common elements, street and the main entrance of the project, as are necessary for its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction equipment and personnel and noise and other inconveniences attendant thereto may be present. Purchaser agrees not to obstruct or impede any such construction or sales activities.

**11. ACCESS.** The Purchaser may not have access or entry to the dwelling unit or the construction site during construction, nor may he store any of his possessions in or about the dwelling unit or the construction site prior to the settlement of this Agreement and delivery of possession to the Purchaser hereunder. Any violation of this provision may, at the election of the Seller, be considered a material breach of this Agreement and, in addition to any other remedies available to Seller, Seller may declare this Agreement void and, in such event, any amount paid toward the purchase price may be retained by Seller as fixed and liquidated damages.

**12. TREES AND LOCATION.** The location, area, and ground elevation of the building on the lot, elevation of dwelling unit, and the reversing of the plan, if necessary, to conform to the existing lot contours, are to be determined by the Seller at its sole discretion. Seller shall remove such trees from the lot as may be necessary and it shall not be responsible for any damage to or destruction of remaining trees during the process of construction. Seller shall be responsible and limited solely to the warranties set forth in the Builder's Limited Warranty mentioned in paragraph #14 below.

**13. MODELS AND DISPLAYS.** Appliances, furnishings, special fixtures, special carpeting and floor tile, special mirrors, wallpaper, window decorating treatments, special trees, shrubbery, landscaping, show cases, wing patio, certain rooms, special fireplaces and other features and recreational facilities exhibited in the model units and model area are for exhibition purposes only and are not included in the purchase price, unless otherwise expressly provided herein.

**14. WARRANTIES.** Purchaser hereby waives any and all warranty rights provided by Section 55-70.1 of the Code of Virginia. Unless specified otherwise herein, all warranties other than those expressly provided in the Builder's Limited Warranty are hereby excluded. Purchaser has been afforded the opportunity to review this warranty prior to execution of this Agreement, and agrees to accept this warranty as the sole warranty being given by the Seller to the Purchaser. Purchaser and Seller shall inspect the house and/or before settlement and note in the Pre-Settlement Inspection Report any incomplete work or defects. Thereafter, Purchaser agrees that Seller shall not be liable for any patent incomplete work or defects not specifically noted in said Pre-Settlement Inspection Report, unless otherwise specifically provided in the Builder's Limited Warranty. It is further agreed that there shall be no withholding of Seller's funds at settlement for any such items.

THE SELLER MAKES NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, OR IMPLIED BY STATUTE, TO THE PURCHASER.

**15. DEFAULT BY EITHER PARTY.** (a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by Seller and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable of precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agrees to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

**16. DISCLOSURE.** (a) When applicable, the Purchaser by execution hereof acknowledges receipt, prior to the execution of this Agreement, of a completed copy of the Disclosure Bill of Particulars for New Home Buyers, as required by Section 10-6-3, Chapter 10 of the 1978 Code of the County of Fairfax, Virginia, as amended.

(b) Purchaser acknowledges that he has had the opportunity, prior to the execution of this Agreement, to examine manufacturers' warranties on appliances and equipment included in the home.

**17. HOME OWNERS ASSOCIATION.** In the event there is a Homeowner's Association, then Purchaser acknowledges receipt, prior to execution of this Agreement, of copies of the Homeowner's Association by-laws and related documents. Purchaser agrees to be bound by the regulations, by-laws and declarations of the Association and agrees to pay the assessments established by such Association.

**18. MISCELLANEOUS.** (a) The principals to the Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns, provided, however, that the Purchaser shall have no right to assign this Agreement without the prior written consent of the Seller.

(b) The terms and provisions of this Agreement shall survive the Settlement hereunder.

(c) Purchaser is expressly prohibited from recording this Agreement or any memorandum thereof, and upon any attempted recordation, at Seller's option, this Agreement shall become null and void and all rights of Purchaser hereunder shall thereupon cease and terminate.

(d) Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations hereunder.

(e) This Agreement contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.



GENERAL ADDENDUM

In reference to the Agreement of Sale between Samuel J. Shilling, and  
Whispering Willows / Addison Hills Corp., the Purchaser and Seller,  
dated February 11, 1987, covering the real property commonly known  
as Lot 11-4105, Addison Hills, Addison, IL  
the undersigned Purchaser and Seller hereby agree to the followings:  
Builder agrees that \$7250.00 (2% of sales price \$362,500.00)  
will be used for temporary construction of a permanent  
climate bar window on kitchen in dining room. This work  
will 2 skylights in kitchen area  
Electric Bar Blinds  
2 exterior double agent lights on rear of house  
Shut off doors on Butler's Pantry  
Stained in place Wood Floor (dark natural stain) in  
Living Room, Dining Room, Kitchen, Entryway, Pantry  
Ceramic tile floor in Powder Room  
Extend Dining Room thru Entry Room  
(Credit purchase for steel beams) <\$170>

check for \$11,240 is attached herewith for items  
listed above

The herein agreement, upon its execution by both parties, is herewith made an  
integral part of the aforementioned Agreement of Sale.

Date 2/21/87  
Date 2/21/87  
Date 2/5/87

Alexander Inc.  
Purchaser  
Robert L. Shilling  
Purchaser  
ADDICOTT HILLS CORPORATION  
Seller Sandra K. Lindsay  
BY: Sandra K. Lindsay  
Assistant Corporate Secretary



# CLOSING COST ADDENDUM

This addendum to Sales Agreement dated February 11, 1987 by and between Ronald L. Snelling & Alexander Smith Purchaser, and ADDICOTT HILLS CORP. Seller, specifies all closing costs, prepaid expenses and optional or elective services or charges to be paid by Purchaser or Seller in connection with the Sales Agreement.

## I. Purchaser or Seller shall pay those charges as checked below:

PURCHASER	SELLER	
<input type="checkbox"/>	<input type="checkbox"/>	ATTORNEYS FEES
<input type="checkbox"/>	<input type="checkbox"/>	Tax Service Fees
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Examination of Title
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Title Attorney's Fee
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Preparation of Deed
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Preparation of Mortgage Papers
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Mortgagee (Lender) Title Insurance Premiums
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Notary Fees
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Survey
<input checked="" type="checkbox"/>	<input type="checkbox"/>	City, County and State Transfer Taxes for the Deed, Mortgage and Purchase Money Mortgage (if applicable) X
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Recording Charges
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Construction Loan Release Fees
<input type="checkbox"/>	<input checked="" type="checkbox"/>	State Grantor's Tax (VA) or State Stamp (MD)
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Termite Inspection and Certificate
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Mortgage Lender's Loan Origination Fee
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Prepaid or Escrowed Property Taxes
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Prepaid Interest
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Prepaid or Escrowed Hazard Insurance Premiums
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Appraisal Fee
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Inspection Fee
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Credit Report Fee
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Private Mortgage Insurance (if applicable)
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Any and All Other Prepaid Expenses or Escrows Required by the Mortgage Lender
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Homeowner Association Dues or Prorations (if appl.)
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Property Tax Prorations (if applicable)
<input type="checkbox"/>	<input type="checkbox"/>	VA Funding Fee/FHA Mortgage Insurance Premium
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Title Insurance Binder

II. Purchaser shall reimburse Seller in the amount of \$ N/A at settlement, to be applied toward the Purchaser's closing costs as specified above.

III. ALL OPTIONAL OR ELECTIVE SERVICES OR CHARGES SHALL BE AT THE SOLE EXPENSE OF PURCHASER. THESE OPTIONAL SERVICES INCLUDE, BUT ARE NOT LIMITED TO THE FOLLOWING ITEMS:

Purchaser's Attorney, Accountant, Inspector or Other Professional Fees for Services Rendered at Purchaser's Request

Owner's Title Insurance Premiums

Optional Mortgage Lender Services Including but not Limited to Amortization Schedules, Mortgagor Life Insurance or Other Optional Services

PURCHASER: Ronald L. Snelling & Alexander Smith SELLER: ADDICOTT HILLS CORPORATION  
BY: Sandra K. Lindsay ASST. CORP. SEC.  
PURCHASER: Alexander Smith DATE: 2/5/87





GENERAL ADDENDUM

In reference to the Agreement of Sale between Ronald L. & Alexandra Snellings  
and Addicott Hills Corporation, the Purchaser and Seller,  
dated February 11, 1987, covering the real property commonly known  
as Lot 11- 9105 Peartree Landing, Alexandria, Va. 22309  
the undersigned Purchaser and Seller hereby agree to the following:  
Credit to purchaser for Standard Carpeting & Padding in: \$818.00  
Upstairs Hall, Master Bedroom and Bedrooms 2,3,& 4

We, the purchasers of Lot 11, have elected to furnish our own  
carpeting and padding in the house we have purchased at 9105 Peartree  
Landing, in the Union Farm Sub-Division, and take full responsibility  
for having our choice of carpeting and padding installed in the house  
after settlement. We release the builder Carl Bernstein & Assoc. from  
responsibility to install carpeting and padding and any damage incurred  
during it's installation.

The herein agreement, upon its execution by both parties, is herewith made an  
integral part of the aforementioned Agreement of Sale.

5/2/87  
Date  
5/21/87  
Date  
5/6/87  
Date

Ronald L. Snellings  
Purchaser  
Alexandra Snellings  
Purchaser  
ADDICOTT HILLS CORPORATION  
Sandra K. Lindsay  
Seller  
BY: Sandra K. Lindsay  
Assistant Corporate Secretary



# CHANGE ORDER

NOTE:  
PRICES ARE BASED ON PRESENT  
CONSTRUCTION STATUS. A DELAY  
IN RETURNING THIS FORM COULD  
INCREASE THE COST OR ELIMINATE THE  
POSSIBILITY OF ANY OR ALL REQUESTED  
CHANGES.

Subdivision: Union Farm

Lot: 11 Block - Type See - see 2

Purchaser: Smalling's

Telephone: \_\_\_\_\_

ITEM	PRICE
<del>ADD</del> DELETE <u>Butter Pantry</u>	—
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD	
DELETE	
ADD _____ to put change order into effect	

1. I understand that the above work is not included in the terms of my contract, and a check covering this work is attached hereto.
2. If requested change or changes require some deviation from normal plans, purchaser agrees to accept same and fully relieve Seller of responsibility for same. In the event the Seller inadvertently omits to install any of the items set forth herein, Seller's liability shall be limited to return of purchaser's deposit for said terms.
3. It is hereby agreed and understood that if settlement on the subject property is not consummated for any reason NO MATTER HOW JUSTIFIED, the money referred to above will not be refunded. However, should the property be resold and next purchaser willingly agrees to pay the whole amount referred to above or a part thereof, the recovered amount will be returned to the undersigned purchaser upon receipt of same by the Seller.

Ronald Lee Smalling  
Purchaser

5/2/87  
Date

Richard Smalling  
Purchaser

5/2/87  
Date

ADDICOTT HILLS CORPORATION  
Sandra K. Lindsay  
Seller's Approval

5/7/87  
Date

BY: Sandra K. Lindsay  
Assistant Corporate Secretary



# NEW HOME SALES AGREEMENT



Virginia

THIS AGREEMENT, made this 1 day of MARCH 1986, by and between W. LOURY MANN III  
BARBARA C. MANN (hereinafter known as the Purchaser) and  
Builders Marketing Inc. (hereinafter known as the Seller) and

Builders Marketing INC. (hereinafter known as the Agent).

WITNESSETH: That for and in consideration of the sum of FIVE THOUSAND Dollars  
(\$5,000) by (cash, check, or note due                     ), the receipt of which is hereby acknowledged, the Purchaser  
agrees to buy, and the Seller agrees to sell all of that certain piece, parcel or lot of land and improvements thereon described as follows, to wit:  
All of Lot 11, Block                     , Section                     , Union Farm Subdivision, Fairfax

County, State of Virginia, together with a house generally known as the 2nd - Elevation Model, known by street address as 9105 PEARTREE LANDING ALEXANDRIA VA 22303

Seller agrees to provide 5,000 of free options to the purchaser. John Davis includes  
all standard features stated in brochure. Plus fireplace in Basement, Bay window  
in kitchen and new wall in dining room. Heat pump. Exhaust Fan in Master Bath and  
Hall Bath, Laundry Tub, Window Sills, Skylight 2'x4' in Master Bath, R/L Plumb  
in Basement, Central Vacuum System, Garage. Contract price as set in  
attached addendum. This contract is contingent upon sale of purchaser's  
home (see attached addendum)

1. PURCHASE PRICE. The purchase price payable for the Property is the sum of TWO HUNDRED NINETY-SIX  
THOUSAND FIVE HUNDRED EIGHTY Dollars (\$296,580), which is payable as follows:

- (a) \$5,000 being an earnest money deposit, the receipt of which is hereby acknowledged by Seller; and
- (b) \$10,000 representing the proceeds of a loan to be made to Purchaser by the mortgage lender; and
- (c) \$191,580 being the balance of the purchase price, payable by Purchaser by certified or cashier's check at settlement as  
hereinafter provided. COPY 30 YR

2. MORTGAGE LOAN. (a) Purchaser, at his own expense, is to negotiate, procure and place a loan commitment secured by a First Deed of Trust on the house and  
lot in the sum of ONE HUNDRED THOUSAND Dollars (\$100,000) bearing interest at the rate of  
10 percentum, or at the prevailing rate at the time of settlement hereunder. Purchaser shall make diligent, truthful and proper application therefor within five (5)  
days from the date of notification by the Seller, with such lending agencies or institutions as shall be designated or approved by the Seller, the proceeds of which First Trust  
loan are to be applied toward payment of the aforesaid purchase price.

(b) It is expressly agreed that in the event the Purchaser is unable to obtain the First Trust loan referred to above from the lending agency or institution named or  
approved by Seller, or if a loan is committed by such lending agency or institution but the Lender shall thereafter refuse to consummate the loan by reason of  
non-performance of any conditions of such commitment within the period of time prescribed for such performance under the provisions of the commitment, or if said Lender  
refuses to consummate and make the loan for any other reason either before or after commitment is issued, the Seller shall have the right at its option to cancel and  
terminate this agreement and refund to the Purchaser the deposit heretofore mentioned; or, at the Seller's option, the Purchaser shall have the privilege of obtaining the  
First Trust loan from other sources, if the lending agency or institution named or approved by Seller refuses to make such loan. In no event shall Seller have any obligations  
or liabilities to Purchaser on account of the Lender's refusal to make such loan, for any reason whatsoever, other than the obligation of refunding to Purchaser the deposit  
made by him. Seller to pay up to 2.5 loan discount points on specified loan amount.

3. THE DWELLING. (a) Seller has erected or will erect upon the said lot a LEE-2 Model dwelling substantially in accordance  
with plans and specifications, together with amendments thereto, on file with the County of                      (the "Plans"). Seller shall have the right to  
substitute materials, fixtures, equipment and appliances of substantially equal quality as those specified in the Plans. Seller further reserves the right (but shall not be  
obligated) to make changes in construction as may be required from time to time by Purchaser's mortgage lender, the Federal Housing Administration, the Veterans  
Administration, or any other governmental authority having jurisdiction over the Property, or as may be otherwise required by material shortages, work stoppages or  
emergencies.

(b) Seller shall complete construction of the dwelling on or before NOVEMBER (the "Completion Date"); provided, however, that if Seller shall be  
delayed at any time in the progress of construction by Acts of God, labor disputes, Seller's inability to obtain material and/or labor, inclement weather, and any other causes  
beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay. Seller undertakes  
and agrees to complete construction of the dwelling within a period of one (1) year after the date of this Contract, notwithstanding any longer period which may otherwise be  
provided for under this agreement.

(c) Purchaser shall have the right to select the dwelling's decorating colors from among color samples to be provided by Seller in accordance with the policy applicable  
thereto prescribed by Seller. In the event the Purchaser shall fail to exercise the said right of selection within ten (10) days after receipt of notice from Seller, then Seller shall  
have the right to decorate the interior of the dwelling as Seller may determine.

(d) No alterations, changes or additions shall be made in the construction of the dwelling nor shall any extra work be performed or materials added by Seller unless  
approved by a duly authorized agent of Seller in writing and payment is made for such changes at the time requested by Purchaser. It is understood that Purchaser is  
purchasing a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of the dwelling and that Purchaser shall acquire no right, title  
or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion. Equitable title shall remain  
vested in Seller until delivery of deed.

4. THE SETTLEMENT. (a) Settlement shall occur at such time as designated by the Seller by notice to the Purchaser that the dwelling is ready for occupancy,  
which shall be evidenced by the issuance of a temporary or permanent Residential Use Permit by the County of FAIRFAX. On Settlement date,  
Purchaser shall pay to Seller by certified or cashier's check the unpaid balance of the purchase price provided for in Section 1 herein and all other sums payable to Seller  
hereunder, and Seller shall deliver to Purchaser a General Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property.

(b) Settlement shall be held at the office of STARR & BUCK. Deposit with said office of the cash payment as  
aforesaid, the deed of conveyance and such other papers as are required by the terms of this Contract shall be deemed and construed as a good and sufficient tender of  
performance of the terms hereof. THE PURCHASER HAS THE RIGHT TO SELECT THE SETTLEMENT ATTORNEY OR TITLE COMPANY FOR SETTLEMENT.

5. AGENT. (a) Seller hereby recognizes 3% TO COLLEEN BANNER, ALEX VA BARBARA C. M.  
as the Agent(s) responsible for this transaction, and the Seller agrees to pay said Agent(s) a sales commission at settlement as follows: AND  
BUILDERS MARKETING INC. BY SEPARATE AGREEMENT

The Purchaser acknowledges that he has read and understands the terms and conditions set forth in Paragraphs 1 through 5  
hereof, on the face and reverse of this form, and that he and Seller are bound by the terms hereof.

DATE: 3/1/86 W. Loury Mann III (Purchaser)

DATE: March 1, 1986 Barbara C. Mann (Purchaser)

Builders Marketing Inc. (Seller)

David E. Evers (Agent)

BY: W. Loury Mann III (Purchaser)

(b) Purchaser acknowledges and agrees that he understands that, while the Agent may have advised and consulted with the Seller, he architects and the contractors concerning the design, construction and development of the house, the Agent does not accept, nor will Purchaser attempt in any manner to charge the Agent with, any liability or responsibility whatsoever for said design, or the construction and/or development of the house, or any defaults in performance by the Seller, the architects and/or the contractor.

(c) Further, Purchaser recognizes that the Agent receives all information as to probable delivery dates from the Seller and that in this regard the Agent is merely acting as a conduit of information and not in any respect as the Agent of the Seller. The Agent shall not be responsible in any manner whatsoever to Purchaser for failure or inability of the Seller to meet projected delivery dates. It being agreed that Purchaser shall look solely to the Seller in this regard.

**6. RISK OF LOSS.** Seller assumes the risk of loss or damage to said property by fire or other casualty until the date of settlement under this Agreement.

**7. TITLE.** The Property shall be sold free of encumbrance, except as aforesaid. Title at settlement is to be good of record and fully insurable by a title insurance company at regular rates, subject, however, to covenants, easements, rights-of-way, conditions and restrictions of record and such restrictions as are specifically set forth herein, and any other easements which may be observed by an inspection of the Property. Otherwise, the deposit is to be returned and this Agreement declared null and void at the option of the Purchaser, unless the defects are of such character that they may be remedied by Seller, if it elects to do so. The Seller and its Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action, if Seller elects to undertake same, must be taken promptly and at the Seller's expense, whereupon the time herein specified for full settlement by the Purchaser will be extended for the period necessary for such action, but not to exceed 12 additional months. The premises are sold subject to easements, if any, created or to be created, prior to or after settlement in favor of utility companies, municipal authorities, or quasi-governmental authorities for the installation of utilities or streetlights and/or additional covenants, restrictions or easements which may be placed on record by the Seller after execution hereof for the benefit of the Property and/or the community of which it is a part. This Agreement shall be subordinate to any such easements, rights-of-way, covenants, and

**8. SETTLEMENT COSTS.** It is agreed that the costs and fees incident to settlement shall be paid as follows (unless specified otherwise herein):

(a) Rents, taxes, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to certificate of taxes, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by Seller, or allowance made therefor at the time of transfer.

(b) The Purchaser agrees to pay the following costs at settlement: examination of title, all title insurance premiums, all mortgage insurance premiums, if any, final survey fee, loan placement fees, and any other fees assessed by lender, title insurance binder, closing and settlement fees, notary fees, conveyancing fees, preparation of papers, county and state transfer taxes, all recording charges, including those for Purchase Money Trust, if any, preparation of trust and note, and insurance and tax escrows.

(c) The Seller agrees to pay the following costs at settlement: charges for preparation of deed and Virginia State Grantor's Tax, if applicable.

**9. OCCUPANCY.** (a) Occupancy hereunder shall be given to Purchaser immediately after settlement. However, if, at the Seller's discretion, the Purchaser shall accept occupancy of its completed dwelling prior to the conveyance of such unit in fee simple to the Purchaser, the Purchaser shall execute the Seller's Standard Occupancy Agreement and shall continue to be subject to the terms hereof as if Purchaser did not occupy such dwelling unit.

(b) Notwithstanding the Purchaser's right of occupancy as aforesaid, the Seller shall have the right to enter upon property of the Purchaser at any time after settlement for the purpose of making exterior changes to the lot and improvements thereon, including grading changes and the removal of trees, as may be required by Seller's site plan, or any modification thereto, or any changes which may be required as a condition of Seller's release by applicable governmental authorities from any and all subdivision or site plan bonds or other escrows.

**10. UNSOLD UNITS.** Until such time as all of the dwelling units in Seller's subdivision are sold, the Seller reserves the right to make such use of unsold dwelling units, the common elements, street and the main entrance of the project, as are necessary for its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction equipment and personnel and noise and other inconveniences attendant thereto may be present. Purchaser agrees not to obstruct or impede any such construction or sales activities.

**11. ACCESS.** The Purchaser may not have access or entry to the dwelling unit or the construction site during construction, nor may he store any of his possessions in or about the dwelling unit or the construction site prior to the settlement of this Agreement and delivery of possession to the Purchaser hereunder. Any violation of this provision may, at the election of the Seller, be considered a material breach of this Agreement and, in addition to any other remedies available to Seller, Seller may declare this Agreement void and, in such event, any amount paid toward the purchase price may be retained by Seller as fixed and liquidated damages.

**12. TREES AND LOCATION.** The location, area, and ground elevation of the building on the lot, elevation of dwelling unit, and the reversing of the plan, if necessary, to conform to the existing lot contours, are to be determined by the Seller at its sole discretion. Seller shall remove such trees from the lot as it may deem necessary and it shall not be responsible for any damage to or destruction of remaining trees during the process of construction. Seller shall be responsible only for trees planted by him. Seller's obligations to replace trees, shrubbery and other landscaping, as well as all of Seller's other repair and warranty obligations, shall be limited solely to the warranties set forth in the Builder's Limited Warranty mentioned in paragraph #14 below.

**13. MODELS AND DISPLAYS.** It is hereby agreed that all furniture and appurtenant property, special household appliances, furnishings, special fixtures, special carpeting and floor tile, special wallpaper, window decorating treatments, special trees, shrubbery, landscaping, special decks and patios, certain rooms, special fireplaces and other features and recreational facilities exhibited in the model units and model area are for exhibition purposes only and are not included in the purchase price, unless otherwise expressly provided herein.

**14. WARRANTIES.** Purchaser hereby waives any and all warranty rights provided by Section 55-70.1 of the Code of Virginia. Unless specified otherwise herein, all warranties other than those expressly provided in the Builder's Limited Warranty are hereby excluded. Purchaser has been afforded the opportunity to review this warranty prior to execution of this Agreement, and agrees to accept this warranty as the sole warranty being given by the Seller to the Purchaser. Purchaser and Seller shall inspect the house and lot before settlement and note in the Pre-Settlement Inspection Report any incomplete work or defects. Thereafter, Purchaser agrees that Seller shall not be liable for any patent incomplete work or defects not specifically noted in said Pre-Settlement Inspection Report, unless otherwise specifically provided in the Builder's Limited Warranty. It is further agreed that there shall be no withholding of Seller's funds at settlement for any such items.

THE SELLER MAKES NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, OR IMPLIED BY STATUTE, TO THE PURCHASER.

**15. DEFAULT BY EITHER PARTY.** (a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by Seller and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable of precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agrees to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

**16. DISCLOSURE.** (a) When applicable, the Purchaser by execution hereof acknowledges receipt, prior to the execution of this Agreement, of a completed copy of the Disclosure Bill of Particulars for New Home Buyers, as required by Section 10-6-3, Chapter 10 of the 1978 Code of the County of Fairfax, Virginia, as amended.

(b) Purchaser acknowledges that he has had the opportunity, prior to the execution of this Agreement, to examine manufacturers' warranties on appliances and equipment included in the home.

**17. HOME OWNERS ASSOCIATION.** In the event there is a Homeowner's Association, then Purchaser acknowledges receipt, prior to execution of this Agreement, of copies of the Homeowner's Association by-laws and related documents. Purchaser agrees to be bound by the regulations, by-laws and declarations of the Association and agrees to pay the assessments established by such Association.

**18. MISCELLANEOUS.** (a) The principals to the Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns, provided, however, that the Purchaser shall have no right to assign this Agreement without the prior written consent of the Seller.

(b) The terms and provisions of this Agreement shall survive the settlement hereunder.

(c) Purchaser is expressly prohibited from recording this Agreement or any memorandum thereof, and upon any attempted recordation, at Seller's option, this Agreement shall become null and void and all rights of Purchaser hereunder shall thereupon cease and terminate.

(d) Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations hereunder.

(e) This Agreement contains the first and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT

DAILY REPORT

PREPARED BY

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1								
Engineering				1	1				Start of work on 1st floor interior walls.
Footings									Excavation & pouring of footings.
Walls					1	1			Foundation walls & exterior walls.
Dampproofing								3	
Backfill									
Slab									
Carpentry									
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									2nd floor
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Exterior									

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

PLR/DEP # 1  
DATE 11-19-87  
JUDGE JMS  
CASE # C101273

CARL BERNSTEIN & ASSOCI ES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

DAILY REPORT

PROJECT

PREPARED BY

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						1	
Engineering									
Footings				1	2				SET FOOTINGS 9:00 AM
Walls				1	4				SET WALLS 5:00 PM
Dampproofing				1	2				LET # 2 & 3
Backfill									
Slab									
Carpentry									
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
PLUMBING				1					DIG LOT 10
Site UTILITY CONNECTION				6					WORKING CONNECTION TO POOL & SEWER

PROBLEMS

COMMENTS Cell Damage RE: numerous problems

LOW MOISTURE & TRUCK TIRE DUE TO MUD & SLIME TRUCK

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00  
75° 82° 84°  
RAIN

RAIN  
EVENING FORECAST

UNION FARMS  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

8/27/86  
DATE

STARTS

FINISHES BASE WHIS LOTS  
Regl Grate PAVING CANE

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering				3					WHI Check #2:3 Complete H-100S RESIDE 2 OF STREET
Footings				1					SET FORMS & PUMP FOOTINGS
Walls									FINISH PAVING & PUMP WARE
Dampproofing				2					DRIVE TIE LOT 12
Backfill									
Slab									
Carpentry									
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
EX. SAVING				1					FINISH LOT 10 & RUSH IN STREET
UTILITY CONNECTIONS				6					SANITARY
PROBLEMS	RAIN!!								
COMMENTS	HEAVY RAIN, STAY UNDER WATER ALL LOTS THAT WAS PREVIOUSLY RUNNED FULL OF WATER (ASPH) (CAMEL) CONCRETE TRUCK ON LOT 10 BUT FINISH FOOTINGS								
VISITORS									
INSPECTIONS	Public work SEDIMENT CONTROL								
ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FILE					

CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

Clear 50 70 75  
 WEATHER 7:30 12:00 4:00

Clear  
 EVENING FORECAST

Union Farm  
 PROJECT

DAILY REPORT

PAT DALY  
 PREPARED BY

8/2/86  
 DATE

STARTS

FINISHES Recessing Panel LOTS  
LOTS # 3 & 4 12:50 AM to 7:45 PM

CONTRACTOR	SUPERINTENDENTS	ASST. SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN									
Engineering									Pumping out LOT # 3 - 4 - 5 - 10 - 21
Footings									
Walls									Recessing wall panels LOTS
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
<u>Trace LARRY</u>									<u>1st Standing Snow Fence</u>

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE



CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
AMMANDALE, VA 22003  
703/941-6076

Cloudy  
WEATHER 75 7:30 12:00 4:00

EVENING FORECAST

Union Farm 5  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

9/12/86  
DATE

STARTS

FINISHES

CONTRACTOR	WORK AREA & COMMENTS						
BERNSTEIN	1	1					2 MEN T-1 / Labor SUT 15' x 12' 3' x 12'
Engineering							
Footings							Finish 1st 10' x 12' 3' x 12'
Walls							Start 1st 10' x 12' 3' x 12'
Dampproofing							
Backfill							Start 1st 10' x 12' 3' x 12'
Slab			1	8			Garage Slab Lot 2 - Drain Tills inside Hall SLO
Carpentry							
Prefab Fireplace							
Roofing							
Masonry							
Painting							
Siding							
Garage Doors							
HVAC							
Plumbing							
Electrical							
Insulation							
Drywall							
Ceramic							
Cleaning							
Cabinets & Tops							
Hardware							
Storm Windows							
Resilient							
Carpet							
Landscaping							
Excavation							Garage Slab / B. Slab 3
Drainage							Get up T-EE
PROBLEMS							

COMMENTS Terminated 1/1/86

VISITORS

INSPECTIONS

Don't know - removed 1/1/86

E.C. Slab Ins. Lot #2

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE



CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

2/24/86  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

9/22/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							1. <u>Interior Finish 49</u>
Engineering									
Footings									
Walls				1	5				Finish LT 9
Dampproofing					2				Backfill Lot 14 LT 10
Backfill									
Slab									
Carpentry				1	3	1			Framing LT #2
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing					2				Lot # 13 Ground marks LT #14 6 marks
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Backfill				1					Backfill Lot 13 - 21 <u>Partial</u>
UTILITY				1					Storm Sewer
PROBLEMS									

COMMENTS LYON DRYWALL WINDOW FRAME LT 21  
POUR CONCRETE FINISH 7:00 - 8:00 PM 2:00

VISITORS

INSPECTIONS

FC BACKFILL Lot 13-21 SOIL C 13-21  
FC LAB LT 2-3 Poured (P-121)  
FC Framing Inspector / FC Sub Gravel

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Cloudy  
WEATHER

7:30 12:00 4:00

EVENING FORECAST

Union Farm 5  
PROJECT

DAILY REPORT

Pat Daly  
PREPARED BY

9/23/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN									
Engineering									RETROFIT 16, 17 affected from previous
Footings									
Walls									STP LATER SET WALLS LATER
Dampproofing									REMOVE TILE LATER #10
Backfill									
Slab									6 SLAB LATER #2 LATER #3 COMPLETION
Carpentry									1 Change 4 BEAMS LATER SET STAIR LATER
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
UTILITY									Storm
PROBLEMS									

Lumber Delivered AT 4 AM

COMMENTS Lower LOT 11 Lumber

DELIVERED LUMBER 8:00 PM NIGHT

VISITORS

None - no visit

None - no visit

LOT 4

INSPECTIONS

D.C. STAGE LOTS 16, 17 with check 14:00

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Cloudy  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farms  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

9/24/86  
DATE

STARTS

FINISHES

CONTRACTOR	WORK AREA & COMMENTS						
BERNSTEIN	1	1				2	
Engineering							
Footings							
Walls			1	2	2		REMOVING WALL LOT #7 FOOTINGS LOT #C
Dampproofing							
Backfill							
Slab							
Carpentry			1	3	1		FRAMING LOT #3 & LOT #4
Prefab Fireplace							
Roofing							
Masonry							
Painting							
Siding							
Garage Doors							
HVAC							
Plumbing							
Electrical							
Insulation							
Drywall							
Ceramic							
Cleaning							
Cabinets & Tops							
Hardware							
Storm Windows							
Resilient							
Carpet							
Landscaping							
Excavation				1			LOT LOT #6 & LOT 2 BASEMENTS
UTILITY				6			Storm
PROBLEMS							

COMMENTS

VISITORS

INSPECTIONS

Soils Soil C. Backfill LOT 14 & 15 Paving LOT  
ADKT " " "  
Prob. C. Sediment (OK)

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Shower 5  
WEATHER

7:30 12:00 4:00

EVENING FORECAST

UNION Farms  
PROJECT

DAILY REPORT

RAT DAL-1  
PREPARED BY

9/25/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						2	Curb Foot
Engineering									
Footings									LT #20
Walls				1	5				Strip for 7 more LT #26. Add Footings LT 20 (Times)
Dampproofing									
Backfill									
Slab									
Carpentry				2	9	2			Forming LT #3 LT #4
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing					1	1			Finish LT #13 & LT #14
Electrical					1				mixer lot
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Excavator					1				Finish LT #20 Start LT #6 BACKFILL LTs 14 & 20
UTILITY					6				STORM
PROBLEMS									

COMMENTS

VISITORS

BEC STAFF OUT LT 11 WALL  
CHUCK L. TAYLOR

INSPECTIONS Paula approached 20

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CHRY  
WEATHER      7:30      12:00      4:00

**STARTS**

## FINISHES

# DAILY REPORT

9/27/86  
DATE

SUPERINTENDENTS  
ASS'T SUPER.  
CLERKS  
ENGINEERS  
FOREMAN  
JOURNEYMEN  
APPRENTICES  
LABORERS

### COMMENTS

## VISITORS

## INSPECTIONS

ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FILE
------------	------	------------	-------------	-------------

CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Form  
 PROJECT

DAILY REPORT

PAT O'NEIL  
 PREPARED BY

9/30/86  
 DATE

STARTS

FINISHES

CONTRACTOR	WORK AREA & COMMENTS						
BERNSTEIN	1	1					2 SAWN FENCE
Engineering							
Footings							Estimate Lot #11
Walls							5th LT #20 SET MORE L.T.F.I.C.
Dampproofing							
Backfill							
Slab							14th Slab LT 13 314 21
Carpentry							27th LT 314 Finishing Windows LT #2 SET FENCE
Prefab Fireplace							
Roofing							
Masonry							
Painting							
Siding							
Garage Doors							
HVAC							
Plumbing							13th LT #21 1 LT #10 14th LT #11
Electrical							
Insulation							
Drywall							
Ceramic							
Cleaning							
Cabinets & Tops							
Hardware							
Storm Windows							
Resilient							
Carpet							
Landscaping							
Generator							1 LT #11 2 LT #11
PROBLEMS							

COMMENTS

VISITORS

INSPECTIONS

BOET. BIRM. LT#11 1st Party  
 S. Comm. Filing LT#11  
 Bob C. F.C. OK

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE



CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Clear ACT  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

10/1/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						
Engineering								
Footings								
Walls								Finish LOT #11 and PRR
Dampproofing								Paving LOT 16
Backfill								
Slab								
Carpentry								
Prefab Fireplace								2 Framing LOT #3 & 4
Roofing								
Masonry								
Painting								
Siding								
Garage Doors								
HVAC								
Plumbing								1/1/1 <del>PRR</del> CEMENT WORKS LOT #10 & 9
Electrical								
Insulation								
Drywall								
Ceramic								
Cleaning								
Cabinets & Tops								
Hardware								
Storm Windows								
Resilient								
Carpet								
Landscaping								
UTILITY								6 WATER LINE
EXCAVATION								1 GARAGE LOT 10 CUT THROUGH LOT #8
PROBLEMS								

COMMENTS

VISITORS

INSPECTIONS

ADST E Soil C LOT 16 LOT 17-11  
PAID FOR Co. WATER  
TERMITE CCV Tr. 1 LOT #11 S/O

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

*10/2/86*  
WEATHER *15* 7:30 12:00 4:00

EVENING FORECAST

STARTS

FINISHES

*10/2/86*  
PROJECT

DAILY REPORT

PREPARED BY

DATE

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
UTILITY									
Problems									

COMMENTS

VISITORS

INSPECTIONS

*Sail C. For LT#8*

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT UNION Farm

DAILY REPORT

PREPARED BY PAT DALY

DATE 10/3/86

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						
Engineering								
Footings			1	2				FINISH FOOTING L#28
Walls			1	3				FINISH WALLS L#21
Dampproofing			1	4				MAN. TILE L#6 & 20 SLAB L#29
Backfill								
Slab								
Carpentry	1			1	5			CONCRETE L#4 W/C
Prefab Fireplace								
Roofing								
Masonry								
Painting								
Siding								
Garage Doors								
HVAC								
Plumbing			1	1	1			BRICK L#7 & 20
Electrical								
Insulation								
Drywall								
Ceramic								
Cleaning								
Cabinets & Tops								
Hardware								
Storm Windows								
Resilient								
Carpet								
Landscaping								
PAVING				1				BRICK L#7

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

BART SLAB L#21 & 10 F. L#4 W/C  
TERRACE L#7

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

UNION FARM S  
PROJECT

DAILY REPORT

PREPARED BY  
DALE

DATE  
10/6/86

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						2-11-86 WORK ON WALKS
Engineering								
Footings								
Walls								
Dampproofing				1	3			Per wall L.T. 8
Backfill								
Slab				1	5			SLAB - BACKFILL L.T. 21 C. 10
Carpentry				2	6			2 Framing L.T. 8 & 15
Prefab Fireplace								
Roofing								
Masonry								
Painting								
Siding								
Garage Doors								
HVAC								
Plumbing								
Electrical								
Insulation								
Drywall								
Ceramic								
Cleaning								
Cabinets & Tops								
Hardware								
Storm Windows								
Resilient								
Carpet								
Landscaping								
EXCAVATOR				1				Backfill L.T. 9 GARAGE
UTILITY				6				Backfill L.T. 6 - 5' from
PROBLEMS								

COMMENTS

VISITORS

INSPECTIONS

Bill C. MARTIN L.T. 6

BOB - SPAD-7-10-9 G. SLAB L.T. 6 & 10

BACKFILL L.T. 6

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Clear  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farms  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

1/16/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMEN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									2311 Framing LIT # 13
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									2 Ground LIT # 11
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Excavation - 2 Trunks									Fill Street MD. V 11

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

Soil C. C. TEST STREET MD. V 11  
Mark Fill

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT UNION FARMS

DAILY REPORT

PREPARED BY PAT DALY

DATE 10/6/86

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	2						
Engineering								
Footings								
Walls								
Dampproofing								
Backfill								
Slab								
Carpentry								#16 2 Roof Lot #2 Framing Lot #13
Prefab Fireplace								
Roofing								
Masonry								
Painting								
Siding								
Garage Doors								
HVAC								
Plumbing								11 Finish Lot #8 & 11 STARTED Lot #16
Electrical								
Insulation								
Drywall								
Ceramic								
Cleaning								
Cabinets & Tops								
Hardware								
Storm Windows								
Resilient								
Carpet								
Landscaping								
Excavation								1 Re-work Planter L. cut STREET
UTILITIES								6 Storm Along MT. VIEW Hwy

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Cloudy  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

UNION FARMS  
PROJECT

DAILY REPORT

PAT DELAY  
PREPARED BY

10/17/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab				1	4				PREA SLAB LOT # 11
Carpentry				1	6	2			ROOF LOT # 2 Finishing LOT # 13
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing				1	1				LOT # 16 Ceramic works
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
EXCAVATION				1					# 1 TRUCK LOT STREET
UTILITY				6					STORM MI. UNDERWAY
PROBLEMS									

COMMENTS

VISITORS

INSPECTIONS

Sail C. BACK FILL

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

10/1/86 UNION Form  
PROJECT

DAILY REPORT

PREPARED BY  
10/1/86

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMEN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1	1						
Engineering					1				SLAB & T L-8
Footings									
Walls									
Dampproofing				1					LOT 5 #16-20
Backfill									
Slab					1				BASEMENT SLAB L-TR C-11
Carpentry					2	5			Finish LOT 2-16 & 20 - Framing LOT 13
Prefab Fireplace									
Roofing					3				LOT #2
Masonry					1				Check material sit up LOT 2 & 3
Painting									
Siding									
Garage Doors									
HVAC					1				LOT #2
Plumbing					1				Finish LOT 16 & 20 LOT #1 Basement finished EXISTING
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
ELECTRICAL					1				LOT 57-101 - BACKUP LOT #7 & 16
UTILITY					3				TEST SANITARY
PROBLEMS									

COMMENTS

VISITORS

INSPECTIONS

F.C. DIBC PRESSURE TEST SANITARY  
F.C. Union Works LOT # 20

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE



CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

UNION Farm 5

DAILY REPORT

PROJECT

PAT OALY

PREPARED BY

10/24/96

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEY MEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					1	3			Garage Slabs LT 10-9-7-20
Prefab Fireplace					1	4	2		Rm F LT #3
Roofing					1				LT #2
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing					2	1	3		Rush in LT #2
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Exterior					2	2			UNDERWAY

PROBLEMS

COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FIL

Ch. 01  
WEATHER

7:30      12:00      4:00

EVENING FORECAST

STARTS \_\_\_\_\_

FINISHES \_\_\_\_\_

**DAILY REPORT**

10/9/86  
DATE

SUPERINTENDENTS  
ASS'T SUPER.  
CLERKS  
ENGINEERS  
FOREMAN  
JOURNEYMEN  
APPRENTICES  
LABORERS

290

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

UNION FARMS  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

10/20/86  
DATE

STARTS

FINISHES

CONTRACTOR	WORK AREA & COMMENTS						
BERNSTEIN	/	/					/
Engineering							
Footings							
Walls							
Dampproofing							
Backfill							
Slab							
Carpentry			1	4	Basement Slab L7#6		
Prefab Fireplace			2	7	Roof L7#2 Frames L7#13		
Roofing							
Masonry							
Painting							
Siding							
Garage Doors							
HVAC							
Plumbing							
Electrical							
Insulation							
Drywall							
Ceramic							
Cleaning							
Cabinets & Tops							
Hardware							
Storm Windows							
Resilient							
Carpet							
Landscaping							
EXCAVATOR							
UTILITY							
PROBLEMS							

COMMENTS

VISITORS

INSPECTIONS

F.C. COMACTION MT. VERN. HUN.  
BOET - SLAB L7# 8 & 11

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Rain  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Wallow Falls  
PROJECT

DAILY REPORT

PFT DALY  
PREPARED BY

11/11  
DATE

STARTS

FINISHES

CONTRACTOR	WORK AREA & COMMENTS						
BERNSTEIN	1	1					Clearing lot #4 & 5
Engineering							
Footings							
Walls							
Dampproofing							
Backfill							
Slab							
Carpentry							
Prefab Fireplace							
Roofing							
Masonry							
Painting							
Siding							
Garage Doors							
HVAC							
Plumbing							
Electrical							
Insulation							
Drywall							
Ceramic							
Cleaning							
Cabinets & Tops							
Hardware							
Storm Windows							
Resilient							
Carpet							
Landscaping							
Excavation							
PROBLEMS							Ground lot #11 under Porch

RAM  
COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Chalky  
WEATHER

7:30

12:00

4:00

EVENING FORECAST

UNION FARM  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

11/12/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						1	
Engineering									
Footings									
Walls									Stonehenge curb
Dampproofing									
Backfill									
Slab									
Carpentry					3/1	2			Ref LTHS corner LTH 4 Ref Plan LTH 2 Ref Plan LTH 3
Prefab Fireplace									
Roofing									
Masonry									
Painting					4				Fireplace LTH 2 & 3
Siding									
Garage Doors									
HVAC									
Plumbing					1/1				Plumb LTH 3
Electrical					1/1				Plumb LTH 3
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

Billboard  
PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Clear - Cold  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Mon Farm  
PROJECT

DAILY REPORT

PAV DRY  
PREPARED BY

11/15/86  
DATE

STARTS \_\_\_\_\_

FINISHES \_\_\_\_\_

CONTRACTOR	WORK AREA & COMMENTS						
BERNSTEIN	1	1					
Engineering							
Footings							
Walls							
Dampproofing							
Backfill							
Slab							
Carpentry			3	3	LTA 4:7011		
Prefab Fireplace							
Roofing							
Masonry			3	1	Pavement LTA 2:3		
Painting							
Siding							
Garage Doors							
HVAC			5		Rough-in LTA 4		
Plumbing							
Electrical			1	1	Rough-in LTA 43		
Insulation							
Drywall							
Ceramic							
Cleaning							
Cabinets & Tops							
Hardware							
Storm Windows							
Resilient							
Carpet							
Landscaping							

11/15/86  
PROBLEMS

COMMENTS

VISTORS	INSPECTIONS
	FC DMC MANDALC
	SOIL C.

ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FIL

CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

DAILY REPORT

PROJECT UNION PARKS

PREPARED BY PAT OALY

DATE 11/14/86

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER	CLERKS	ENGINEERS	FOREMAN	JOURNEY MEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					3	9			LT #4 - LT #7 & LT #11
Prefab Fireplace									
Roofing									Disturbed LT #4
Masonry					2	1			LT #2
Painting									
Siding									
Garage Doors									
HVAC					4				Rough LT #4
Plumbing									
Electrical					1	1			Rough - in LT #3
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
REMARKS					1				1475-000 AT 16000 Hwy.

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT UNKNOWN Farms

DAILY REPORT

PREPARED BY PAT DALY

DATE 11/17/86

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry				3/6	1	LT#5	LT#7	LT#11	
Prefab Fireplace									
Roofing									
Masonry				4	2	LT#2	LT#3		
Painting									
Siding									
Garage Doors									
HVAC				1		LT#4			
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS Extensive 12 hours MT. unknown m/j.

COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FIL



CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Clouds w/ET  
WEATHER 7:30 12:00 4:00

UNION FARMS  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY  
12/1/86  
DATE

EVENING FORECAST

STARTS \_\_\_\_\_

FINISHES \_\_\_\_\_

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/						/	
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry				2	2				LTA#11 & 17
Prefab Fireplace									
Roofing									
Masonry				2					LTA#4 FIREPLACE
Painting				1					LTA#1 & LTA#2
Siding									
Garage Doors									
HVAC				3					Rough in LTA#5
Plumbing				3					Rough in LTA#4
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Excavation									GRADE STREET BACKFILL ends LTA#18 & 2
PROBLEMS									

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIA S  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

RAV  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Form  
PROJECT  
PAT DALY  
PREPARED BY  
12/2/86  
DATE

DAILY REPORT

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/					/	
Engineering								
Footings								
Walls								
Dampproofing								
Backfill								
Slab								
Carpentry				1	4			100% LT #1
Prefab Fireplace								
Roofing								
Masonry								
Painting								
Siding								
Garage Doors				1				Garage Ceiling Remains Hung
HVAC				2				10 WRT
Plumbing				4				Inspection LT #2 Fixed LT #2 Kitchen Remains Hung
Electrical								
Insulation								
Drywall								
Ceramic								
Cleaning								
Cabinets & Tops								
Hardware								
Storm Windows								
Resilient								
Carpet								
Landscaping								
Excavation				1				10 WRT

PROBLEMS

COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

UNION *FARRAS*  
PROJECT

DAILY REPORT

*PAT DALY*  
PREPARED BY

*12/3/86*  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									2/11 1 LA #6 & 11
Roofing									2 LA #4
Masonry									1 LA #4 & 3 FIREWORKS
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									2 Rough in LA #7
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCI. ES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Form  
PROJECT  
PAT DAL-1  
PREPARED BY  
DATE

DAILY REPORT

STARTS  
FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							4 Trax Flg: - Clean LTH 305
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry				3/6	3				Roof LTH 6 1st DICK wall LTH 9 - LTH 10
Prefab Fireplace									
Roofing				5					LTH 5 - 13 - 21 (BLACK-12)
Masonry				2	2				LTH 3 - LTH 5 FIREPLACE
Painting				2					Entered thru LTH 3
Siding				2					LTH 3
Garage Doors									
HVAC				2					Work on LTH 2-3 system 4-5
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Remnants				1					Remnants out in site 10 Trucks

PROBLEMS  
COMMENTS

VISTORS  
INSPECTIONS  
F.C. Mech LTH 2-3 Failed  
B.D.C. Compate LTH 2-3

ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FILE

CARL BERNSTEIN & ASSOCIA S  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

12/17/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	2						4	2 Trays Plus 1 Clean - 2nd Day
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry				3	6	3			LT#6 Rmt 2nd Day LT#4 E 10 Rmt LT#11
Prefab Fireplace									
Roofing									
Masonry				1	3	3			LT#3 LT#4 MASONRY LT#5 FIREPLACE
Painting									LT#3 EXTERIOR
Siding									LT#3
Garage Doors									
HVAC									
Plumbing									
Electrical					1				check 1 hour
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
EXCAVATOR				1					CLCA JDS 10 Trucks
PROBLEMS									

COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
PROJECT

DAILY REPORT

PAT DALY

PREPARED BY

11/9/80

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry						112			BELOW BAR LONG 28' x 110' ROOF
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding					3				LT # 5
Garage Doors									
HVAC					1				Range LT # 13 & 11
Plumbing									
Electrical					2				Range LT # 13
Insulation									
Drywall					3				LT # 3
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Excavation					3				FINISHES REMAIN OUT LT # 13 & 11

PROBLEMS

SEE OUR INTERVIEW

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

CLEAR  
WEATHER

7:30

12:00

4:00

EVENING FORECAST

DAILY REPORT

WIN EX-1  
PROJECT

PAT O'NEIL  
PREPARED BY

11/12/87  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									4 Garage Slab 9-10-11-7-6
Prefab Fireplace									2nd Garage Slab 9-10-11-7-6
Roofing									
Masonry									6 5 L#5 & L#13 VAND
Painting									
Siding									2 L#5
Garage Doors									
HVAC									2 Rough-in L#11-13
Plumbing									2 L#13 Rough-in
Electrical									2 L#13 Rough-in
Insulation									
Drywall									4 L#2-13
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Excavation									1 Trusses L#8 Garage L#11-13
PROBLEMS									

Garage Slabs in Passy Pns.  
Drywall Quality L#5 needs work

COMMENTS

VISITORS

INSPECTIONS

ROBT SLABS  
FC SITE

ACCIDENTS	NAME	SUPERVISOR	DESCRIPTION	REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

CLEAR  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

11/13/87  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab					5				Garage slabs L#7-9-10-11
Carpentry					4	2			Trusses L#8 Run out LT
Prefab Fireplace									
Roofing									
Masonry									L#6 L#2 L#13 (Front)
Painting									
Siding									
Garage Doors									
HVAC					2				Finsh L#13 Rough L#11 Rough
Plumbing									
Electrical					2				L#13 Finish Rough L#11 S.W.
Insulation									
Drywall					2				L#2 S.W. L#2 T.B.R.
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows					1				Remove Storm L#2 (S)
Resilient									
Carpet									
Landscaping									
Excavation					1	1			MT. HANCOCK - Clean up yard (Curb Area)

PROBLEMS

1. Routines Along of SUBS (Back chng.) (2) No Labor (3) SC  
2. R.F.T. QRS (AND ATTRACTION) (3) NO INSULATION FOR L#15.

COMMENTS

VISTORS

INSPECTIONS

SITE (F.C.)

BOAT Garage slabs L#7-9-10-11

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE





CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

*LAG*  
WEATHER 7:30 12:00 4:00  
EVENING FORECAST  
STARTS \_\_\_\_\_  
FINISHES \_\_\_\_\_

*Valley Farm*  
PROJECT  
*RAT VAL*  
PREPARED BY  
*11/19/87*  
DATE

DAILY REPORT

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN									
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									<i>Lat # 9/10s Portland 1st FB back out</i>
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									<i>Lat # 2 Kitchen</i>
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Form  
PROJECT

DAILY REPORT

PREPARED BY  
1/20/87

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						2	
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					7				Removal of 1st floor exterior wall. L.F.#4
Prefab Fireplace									
Roofing					3				L.F.#9
Masonry					5	3			L.F.#13
Painting									
Siding									
Garage Doors									
HVAC					2				Set Furnace L.F.#33 L.F.#4
Plumbing					3	2			Gas L.F.#33 L.F.#15 L.F.#13
Electrical									
Insulation									
Drywall					1				Trim L.F.#3
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
1/20/87									
100% Complete									

PROBLEMS

Rain damage to Gas Lines not Timed

COMMENTS

VISITORS

INSPECTIONS

ONE

F.C. S.I.T.

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT WILSON Farm

DAILY REPORT

PREPARED BY PAI DALY

DATE 1/21/87

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						1	
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					4				Paint strips L#2 17-C-83-21
Prefab Fireplace					8				L#17 9/8/81 17 sheeting
Roofing									
Masonry					8	3			L#13 1/2 1/2 1/2 1/2 1/2 1/2 1/2 1/2
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing					4				Gas Run L#3 3/4" 11 Run L#10
Electrical					2				Rough L#13 3/4" TRANSFER L#1
Insulation									
Drywall					1				IMP L#3
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Gas									Finish Gas not used 14-0
Video									Transfer L#1 1/2

PROBLEMS Gas company sub. wants to fill lateral with 257  
A SCW. Monkey Promotions. Don't show 1/24/87 11:10-11:40  
Framing Inspection not show

COMMENTS

VISTORS

INSPECTIONS

F.C. Framing

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FIL

O.O.#3116

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Weather  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

STARTS 8:10

FINISHES 12

DAILY REPORT

PROJECT

PREPARED BY

1-22-87  
DATE

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN									
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									Work in Lot 10
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing	1			1					Work in Lot 10
Electrical	0								
Insulation	0								
Drywall				1					Work Lot 4
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Sum  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Abner Lane  
PROJECT

DAILY REPORT

David Bams  
PREPARED BY

1-26-87  
DATE

STARTS \_\_\_\_\_

FINISHES \_\_\_\_\_

CONTRACTOR	SUPERINTENDENTS	ASST SUPER	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						3	
Engineering					3				REPLACE CURB & GUTTER (WALL CHASE) - LT#9-1
Footings									
Walls					3				REPAIR WALLS LT#17
Dampproofing									
Backfill									
Slab									
Carpentry					6				PAV DIRT LT#9.
Prefab Fireplace									
Roofing					3				LT#8
Masonry					4				LT#1
Painting					4				EXTERNAL LT#21
Siding									
Garage Doors									
HVAC					1				Check WASH-O ALL LOTS
Plumbing					6				Now LT#6
Electrical					2				Now LT#14
Insulation					3				PIP STOP LT#10
Drywall									
Ceramic					4				LT#5 & 13
Cleaning					2				PAV LT#4
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

EXCAVATION PROBLEMS mt. Vln. Hwy. Water and 2 LPA's adjacent

LT#1 DIR-OFF AGAIN

COMMENTS

we had another 15" of rain

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Clear cold!!!  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

STARTS \_\_\_\_\_

FINISHES \_\_\_\_\_

Vina Farm  
PROJECT

DAILY REPORT

PAT J.  
PREPARED BY

1/27/87  
DATE

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/						/	
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					3				Finish L.P.#11
Prefab Fireplace									
Roofing									
Masonry									
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS

24" SNOW FELL 1/22 - 1-26

COMMENTS

Closed TOID 1-22-87 1-25/87

VISITORS

INSPECTIONS

Closed

ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

clear  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
PROJECT

DAILY REPORT

PREPARED BY

DATE

STARTS

FINISHES

CONTRACTOR	WORK AREA & COMMENTS						
BERNSTEIN							
Engineering							
Footings							
Walls							
Dampproofing							
Backfill							
Slab							
Carpentry							
Prefab Fireplace							
Roofing							
Masonry							
Painting							
Siding							
Garage Doors							
HVAC							
Plumbing							
Electrical							
Insulation							
Drywall							
Ceramic							
Cleaning							
Cabinets & Tops							
Hardware							
Storm Windows							
Resilient							
Carpet							
Landscaping							

PROBLEMS

JOB COVERED WITH SUMMER ROAD WORKS GOING TO  
FREE SUPER IN THE FALL

COMMENTS

VISITORS

INSPECTIONS

F.C. Fanning L2# 13 i.m.m.

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE



CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

Clear  
 WEATHER 7:30 12:00 4:00

EVENING FORECAST

STARTS \_\_\_\_\_

FINISHES \_\_\_\_\_

UNION FARM  
 PROJECT  
PAT DALY  
 PREPARED BY  
2/1/87  
 DATE

DAILY REPORT

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN									
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									7 1 RUF PARTS 1 2# 7# Trim LTH 2
Carpentry									
Prefab Fireplace									
Roofing									8 LTH 9 x 10 LTH 7
Masonry									4 2 MUDS SILL: REARVING SUPER
Painting									
Siding									
Garage Doors									
HVAC									3 RUGH-IN LTH 2-1 START LTH 7
Plumbing									2 RUGH-IN LTH 10
Electrical									
Insulation									
Drywall									1 BLK - SILL LTH 4
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Electrical									1 MUDS SILL MATERIAL
Gas Comb									1 1/2 LTH 1
PROBLEMS									

COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FIL

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Clear W. Firm  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
PROJECT

DAILY REPORT

PAT OAL  
PREPARED BY

2/13/87  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									Remain L#10 Int L#14
Roofing									L#10
Masonry									L#13
Painting									
Siding									
Garage Doors									
HVAC									(L#1 + 21)
Plumbing									to be h - L#7 - 7
Electrical									+ hugh on L#14
Insulation									
Drywall									some L#13 14K / L#14
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

CRS Camp S.O.  
PROBLEMS

STREET becoming impassable (snow melting)

COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

CLEAR  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT 1016 UNICA Bldg DAILY REPORT

PREPARED BY PAT DALY

DATE 2/5/87

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						2	
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab					3				FRONT STAIRS 12-4-10-10-9-8-126
Carpentry					7	1			CEILING 12-11-10 12-11-14
Prefab Fireplace									
Roofing									
Masonry					4	3			LT #13
Painting									
Siding									
Garage Doors					1				LT #4
HVAC									
Plumbing									
Electrical									LT #13
Insulation									
Drywall					1				hick & beam LT #4
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS

STREET UNDER WATER

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

UNION Farm  
 PROJECT

DAILY REPORT

PAH DAY

PREPARED BY

2/10/87

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					8				Cornish L-7471E 10
Prefab Fireplace									
Roofing									
Masonry				6					L-7471
Painting									
Siding									
Garage Doors									
HVAC					2				Rough in L-7471
Plumbing									
Electrical					2				Finish L-7471 L-7471
Insulation									
Drywall					1				Paint-out L-7471
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Telephone					1				Cut back for gravel
PROBLEMS									
COMMENTS									
VISITORS					INSPECTIONS				
ACCIDENTS:									
NAME	SUPERVISOR	DESCRIPTION	REPORT FILE						

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

*Cloudy*  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

*Mon Farm*  
PROJECT

DAILY REPORT

*PAT DALY*  
PREPARED BY

*2/14/87*  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN									
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									11/1 Concrete L#10 Finisher L#10
Prefab Fireplace									
Roofing									
Masonry									6 L#10
Painting									
Siding									
Garage Doors									
HVAC									2 Rough-in L#17
Plumbing									
Electrical									1000
Insulation									
Drywall									2 HWS L#15
Ceramic									4 L#12
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Electrical									15 Cut Street Ready for STAIR
PROBLEMS									

*STAT UDHET CUT OFF TRUCKS MED ON STREET*  
COMMENTS (2) HT WATER PATROL

VISTORS

INSPECTIONS

ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FIL

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

UNION Farm  
PROJECT

PAT DAL-1  
PREPARED BY

2/15/87  
DATE

DAILY REPORT

STARTS

FINISHES

CONTRACTOR											WORK AREA & COMMENTS
BERNSTEIN	1	1									
Engineering											
Footings											
Walls											
Dampproofing											
Backfill											
Slab											
Carpentry											
Prefab Fireplace											
Roofing											
Masonry											
Painting											
Siding											
Garage Doors											
HVAC											
Plumbing											
Electrical											
Insulation											
Drywall											
Ceramic											
Cleaning											
Cabinets & Tops											
Hardware											
Storm Windows											
Resilient											
Carpet											
Landscaping											
ELEVATOR											
PROBLEMS											
NO PAINTING L#22											
COMMENTS											
VISTORS											
INSPECTIONS											
ACCIDENTS:											
NAME SUPERVISOR DESCRIPTION REPORT FILE											

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Clear  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

DAILY REPORT

UMOW FARM  
PROJECT

PAT DALY  
PREPARED BY

2/21/87  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	2						1	
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									2. Finish Trim Lot#4
Roofing						1			FLAT TOP Lot# 10-9
Masonry						1			Finish Lot#21
Painting						3			Exterior Lot#2 & 3
Siding									
Garage Doors									
HVAC					6				Roughed Lot#10
Plumbing									
Electrical									
Insulation									
Drywall						3			Finish Walls Lot#13
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS

No Block on Lot#5

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Form  
PROJECT

DAILY REPORT

PREPARED BY

DATE

Pat Daly

2/24/17

SUPERINTENDENTS  
ASS'T SUPER.  
CLERKS  
ENGINEERS  
FOREMAN  
JOURNEYMEN  
APPRENTICES  
LABORERS

STARTS

FINISHES

CONTRACTOR								WORK AREA & COMMENTS
BERNSTEIN	1	1					3	
Engineering								
Footings								
Walls								
Dampproofing								
Backfill								
Slab								
Carpentry								
Prefab Fireplace								Work on LP#10-9 LP#1 Framing LP#54
Roofing								
Masonry								
Painting								
Siding								
Garage Doors								
HVAC								
Plumbing								Recheck in LP#9-10
Electrical								Recheck in LP#13
Insulation								Recheck in LP#7 basement LP#21
Drywall								Block.
Ceramic								
Cleaning								
Cabinets & Tops								
Hardware								
Storm Windows								
Resilient								
Carpet								
Landscaping								
PROBLEMS								Recheck in LP#17
COMMENTS								
VISTORS								
INSPECTIONS								
ACCIDENTS:								
NAME	SUPERVISOR	DESCRIPTION		REPORT FILE				



CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

DAILY REPORT

Union Farm  
PROJECT  
CAT DALY  
PREPARED BY  
2/25/87  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						3	
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					1				Reinforce 1st flr 10-9 16
Prefab Fireplace									
Roofing									
Masonry									
Painting				3					Finish 1st flr 2nd flr 1st flr 3
Siding									
Garage Doors									
HVAC				2					Final 1st flr 21
Plumbing				3					Leakage 1st flr 4
Electrical									
Insulation				2					Form 1st flr 21
Drywall				3					Block 1st flr 15 Block 1st flr
Ceramic									
Cleaning									
Cabinets & Tops				5					SET 1st flr 3
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
UTILITY ROOM									MT. V.
REAR PORCH					1				MASON 1st flr 16 1st flr 12
PROBLEMS									
COMMENTS									
VISITORS									INSPECTIONS
									P.C. Framing 1st flr 21
									SOIL Footing 1st flr 19 17
ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FILE					

WEATHER	7:30	12:00	4:00
EVENING FORECAST			
STARTS			
FINISHES			

1/11/07 Farm  
PROJECT  
PAT DALY  
PREPARED BY  
2/26/07  
DATE

## DAILY REPORT

PROJECT: PAT DALL

PREPARED BY 2/26/87

DATE \_\_\_\_\_

SUPERINTENDENTS

ASS'T SUPER.

CLERKS

ENGINEERS

FOREMAN

JOURNEYMEN

APPRENTICES

LABORERS

STARTS \_\_\_\_\_

FINISHES \_\_\_\_\_

CONTRACTOR									WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									Work on 1st fl. 10-7. 1st fl. 1st fl.
Prefab Fireplace									Tr. 1st fl. 5
Roofing									
Masonry									5th fl. 1st fl. 2
Painting									4th fl. 1st fl. 2
Siding									
Garage Doors									
HVAC									
Plumbing									1st fl. 1st fl. 7 1st fl. 1st fl. 7
Electrical									1st fl. 1st fl. 7
Insulation									1st fl. 1st fl. 7
Drywall									1st fl. 1st fl. 7
Ceramic									1st fl. 1st fl. 7
Cleaning									
Cabinets & Tops									1st fl. 1st fl. 7
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Exterior									1st fl. 1st fl. 7
PROBLEMS									
COMMENTS									
VISITORS									
INSPECTIONS									
ACCIDENTS:	NAME	SUPERVISOR	DESCRIPTION	REPORT FILE					

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT

DAILY REPORT

PREPARED BY

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									STAKE SET L#12
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									Day L#10 2nd Floor L#11C
Prefab Fireplace									
Roofing									
Masonry									L#11
Painting									Trim L#12
Siding									L#11
Garage Doors									
HVAC									Rough-in 2nd floor
Plumbing									L#11 L#12
Electrical									
Insulation									
Drywall									Mark room L#13 Put up L#15
Ceramic									
Cleaning									Fin Rough clean L#12
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									L#12
Carpet									
Landscaping									

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

<u>WEATHER</u>	<u>7:30</u>	<u>12:00</u>	<u>4:00</u>

**STARTS**

## FINISHES

**SUPERINTENDENTS**  
**ASS'T SUPER.**  
**CLERKS**  
**ENGINEERS**  
**FOREMAN**  
**JORNEYMEN**  
**APPRENTICES**  
**LABORERS**

324

CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT 11000 FA24

DAILY REPORT

PREPARED BY JAT DALY

DATE 3/4/87

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN								
Engineering								
Footings				4				LATH
Walls								
Dampproofing								
Backfill								
Slab								
Carpentry				10				Co. LATH-1 2nd fl. w/ 1st fl. in 1/4"
Prefab Fireplace								
Roofing				3				1st fl. 2nd fl. 1st fl. 5"
Masonry				5				LATH
Painting				4				1st fl. 2nd fl. 1st fl. 5"
Siding				2				1st fl. 2nd fl. 1st fl. 5"
Garage Doors								
HVAC								
Plumbing				4				1st fl. 2nd fl. 1st fl. 5"
Electrical				4				1st fl. 2nd fl. 1st fl. 5"
Insulation								
Drywall				3				1st fl. 2nd fl. 1st fl. 5"
Ceramic								
Cleaning								
Cabinets & Tops								
Hardware								
Storm Windows				2				LATH
Resilient				7				LATH
Carpet								
Landscaping				4				LATH
REPAIRS				1				1st fl. 2nd fl. 1st fl. 5"

PROBLEMS

LATH Basement

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

HEB  
 960-1367

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

OWEN FAROM  
PROJECT

DAILY REPORT

PAT DALY  
PREPARED BY

3/7/86  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN									
Engineering									
Footings									
Walls									Rem. v. 20 Form L7419
Dampproofing									
Backfill									
Slab									
Carpentry									
Prefab Fireplace									
Roofing									
Masonry									5 Fireplaces L7411
Painting									
Siding									
Garage Doors									
HVAC									
Plumbing									
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning									3 L743 Rough-A
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									6 L743
Landscaping									

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

WEATHER	7:30	12:00	4:00
EVENING FORECAST			
STARTS			
FINISHES			

Union Park  
PROJECT  
PAT DILL  
PREPARED BY  
3/9/87  
DATE

## DAILY REPORT

327

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT Duane Farm

DAILY REPORT

PREPARED BY BSY DALY

DATE 3/12/87

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									LF#17
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					6				Ceramic Lath LF#16 Framing
Prefab Fireplace									
Roofing					4				LF#14-20
Masonry					5				LF#11
Painting					3				SPRINT Fume LATH RZ. LF#14
Siding									
Garage Doors									
HVAC					1				Plumbing LF#2-3
Plumbing					2				Plumbing LF#4-5
Electrical					2				Roof - LF#10
Insulation									
Drywall					2				Plumb LF#21
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
PROBLEMS					2				10 Trucks Removed A.T. P.S. 1000

COMMENTS

VISITORS

INSPECTIONS

Site FOTOS 1/9/87  
WALK LR#19

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE



CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

Union Farm  
PROJECT

RAT DAL 1  
PREPARED BY

3/13  
DATE

DAILY REPORT

WEATHER 7:30 12:00 4:00

EVENING FORECAST

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1				1	3			
Engineering									
Footings									
Walls					4				Lot 19 Filing L#17
Dampproofing									
Backfill									
Slab					1				L#14 Slop
Carpentry					5				Work at L#16 - concrete L#17
Prefab Fireplace									
Roofing					4				L#14 020
Masonry					3				L#11 Fireplace
Painting					4				
Siding									
Garage Doors									
HVAC					2				Work at -
Plumbing					3				L#11 L#12 021
Electrical					2				L#10 020
Insulation									
Drywall					1				Work at 5:00 L#12 21
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
EXHAUST					2				Work at 12:00 L#12 020

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER  
*RAIN*

7:30 12:00 4:00

EVENING FORECAST

*WATER FARM*  
PROJECT DAILY REPORT

*PAT DALY*  
PREPARED BY

*3/16/87*  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASST'T SUPER	CLERKS	ENGINEERS	FOREMAN	JOURNEY MEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry					5				LP#20
Prefab Fireplace									
Roofing									
Masonry									
Painting					2				LP#5
Siding									
Garage Doors									
HVAC					2				LP#33.3
Plumbing					3				LP#11
Electrical									
Insulation									
Drywall									
Ceramic					2				LP#3
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS

COMMENTS

VISTORS

INSPECTIONS

*Pl. Plumbing LP#11*

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

Clear  
 WEATHER

7:30 12:00 4:00

EVENING FORECAST

11/10/76 Farm  
 PROJECT

DAILY REPORT

BAT DAILY  
 PREPARED BY

3/18/76  
 DATE

STARTS 12#6

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering									
Footings									
Walls									
Dampproofing									2-4#17
Backfill									1-5-1
Slab									
Carpentry									
Prefab Fireplace									1-1-1 11-17 Dist 2-#6
Roofing									
Masonry									11-1-1 2-#10
Painting									1-1-1 2-#4
Siding									
Garage Doors									2-#11
HVAC									Sub 1-1 2-#4 11-1-1 2-#4
Plumbing									1-1-1 2-#4
Electrical									11-1-1 2-#10 Finishes 2-#4
Insulation									11-1-1 2-#11
Drywall									
Ceramic									
Cleaning									2-11-1 2-#4
Cabinets & Tops									2-#5
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
Excavate									17 Trucks moving 12-#12
PROBLEMS									

COMMENTS

VISITORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
 7345 MCWHORTER PLACE SUITE 100  
 ANNANDALE, VA 22003  
 703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
 PROJECT

DAILY REPORT

PREPARED BY  
 PAT DAN

DATE  
 3/23

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1						3	
Engineering									
Footings									
Walls									
Dampproofing					2				L2#19
Backfill									
Slab									
Carpentry					6				L2#26
Prefab Fireplace									
Roofing					3				L2#8
Masonry					5				L2#9
Painting					4				EXTEND L2#9
Siding									
Garage Doors					2				L2#10
HVAC									
Plumbing					2				L2#15 L2#16
Electrical									
Insulation									
Drywall									
Ceramic									
Cleaning					2				L2#44 Doug
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
EXCAVATOR					2				MT UCCOM HWY 6000 L2#11
PROBLEMS									

COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS: NAME SUPERVISOR DESCRIPTION REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

WEATHER 7:30 12:00 4:00

EVENING FORECAST

Union Farm  
PROJECT

DAILY REPORT

RAT DAL-1  
PREPARED BY

3/24/87  
DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	1	1							
Engineering					1				11m Section missing and 50' x 10' - 12' x 11'
Footings									
Walls					4				Down L#10
Dampproofing					2				L#11
Backfill									
Slab									
Carpentry					6				L#12 & 13 both L#11
Prefab Fireplace									
Roofing					2				L#14
Masonry									
Painting					4				EXTERNAL L#13 - 21
Siding									
Garage Doors									
HVAC									
Plumbing					5				Plumb L#15
Electrical					2				Plumb L#16
Insulation									
Drywall					2				L#17 & 18
Ceramic					2				L#19 & 20
Cleaning					2				L#21 - 13
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									
<u>Gas Company</u>					4				L#22 To Pipe
<u>Plumber</u>					5				MT. Vernon Blvd & Gwa. - 16.17.18 L#23 - 1-2175

PROBLEMS

COMMENTS

VISITORS

INSPECTIONS

MT. Vernon Blvd L#22 OK  
MT. Vernon Blvd & Gwa. - 16.17.18 L#23 OK

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

CARL BERNSTEIN & ASSOCIATES  
7345 MCWHORTER PLACE SUITE 100  
ANNANDALE, VA 22003  
703/941-6076

*Karn*  
WEATHER 7:30 12:00 4:00

EVENING FORECAST

PROJECT *DUNN Farm* DAILY REPORT

PREPARED BY

DATE

STARTS

FINISHES

CONTRACTOR	SUPERINTENDENTS	ASS'T SUPER.	CLERKS	ENGINEERS	FOREMAN	JOURNEYMEN	APPRENTICES	LABORERS	WORK AREA & COMMENTS
BERNSTEIN	/	/							
Engineering									
Footings									
Walls									
Dampproofing									
Backfill									
Slab									
Carpentry									<i>Carpet 12-17</i>
Prefab Fireplace									
Roofing									
Masonry									<i>12-17</i>
Painting									
Siding									
Garage Doors									
HVAC									<i>Refrigerator 12-13 Furnace 12-14</i>
Plumbing									<i>Refrigerator 12-13 5-4 Sewer 12-14</i>
Electrical									<i>Refrigerator 12-13 2C</i>
Insulation									
Drywall									
Ceramic									
Cleaning									
Cabinets & Tops									
Hardware									
Storm Windows									
Resilient									
Carpet									
Landscaping									

PROBLEMS

COMMENTS

VISTORS

INSPECTIONS

ACCIDENTS:

NAME

SUPERVISOR

DESCRIPTION

REPORT FILE

DELIVERY AND PAYMENT OF NON-STANDARD OPTIONS ADDENDUM

In reference to the Purchase Agreement between W. Lowry Mann III and Barbara C. Mann the Purchaser, and Addicott Hills Corporation, Seller, dated March 1, 1986, covering the real property commonly known as 9105 Pearline Landing, Alexandria VA 22309 the undersigned Purchaser and Seller hereby agree to the following:

1. Purchaser acknowledges that the projected delivery date is an estimate only and cannot be guaranteed by the Seller or its agent, Builders Marketing, Inc.

2. Purchaser agrees that within ten (10) days after contract ratification on the above referenced property Purchaser shall pay to Seller the following:

A. 50% of all construction options other than flooring and appliance upgrades. In addition to major construction options the selection of kitchen counters, cabinets, marble, vanities and the exterior color selections must be made at this time.

3. Purchaser further agrees that within 30 days after the start of construction on the above referenced property that Purchaser shall pay to the Seller the following:

A. 50% of all additional options.

B. Purchaser also agrees at this time to have finalized all standard and upgrade color selections on the above referenced property. (To include carpeting, ceramic tile, hardwood and appliance colors and upgrades.)

Purchaser understands that any options or selections made after the above stated time frame could result in the nonavailability of some options and delays in completing the home. Furthermore purchaser acknowledges that any options requested after the above time period will be subject to a 50% increase in their cost and availability will be at the sole discretion of the Seller.

Purchaser understands and agrees that the cash portion of a deposit for options, upgrades and modifications ordered or installed is not refundable if Purchaser does not go to settlement for any reason.

The herein agreement, upon its execution by both parties, is herewith made an integral part of the aforementioned Purchase Agreement.

3-1-86

Date

W. Lowry Mann III  
Purchaser

3-1-86

Date

Barbara C. Mann  
Purchaser

Date

Daurie Schuch  
Sales Representative

Addicott Hills Corporation by  
[Signature]

3/2/86

Mem # 2(e)

A#2  
C101273  
11-19-87

JB3 -

336  
11.14.87  
C101273  
A#3

Complete items 1, 2, 3 and 4.

Put Jr. address in the "RETURN TO" space on the reverse side. Failure to do this will prevent this card from being returned to you. The return receipt fee will provide you the name of the person delivered to and the date of delivery. For additional fees the following services are available. Consult postmaster for fees and check box(es) for service(s) requested.

1. ☒ Show to whom, date and address of delivery.

2. ☐ Restricted Delivery.

3. Article Addressed to:  
Mr. & Mrs. W. Henry Mann  
8716 Talbotstone Farm  
Alexandria, VA 22309

4. Type of Service:  
☐ Registered ☐ Insured  
☐ Certified ☐ COD  
☐ Express Mail

Article Number  
P442458 777

Always obtain signature of addressee or agent and DATE DELIVERED.

5. Signature - Addressee *[Signature]*  
X

6. Signature - Agent  
X

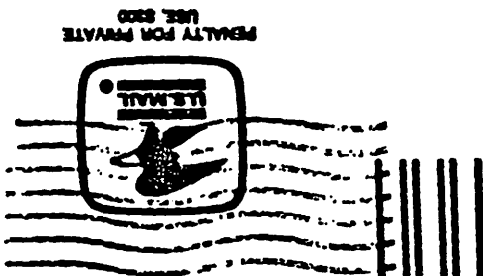
7. Date of Delivery  
9-2-87

8. Addressee's Address (ONLY if requested and fee paid)

PS Form 3811, July 1983 447-845

DOMESTIC RETURN RECEIPT

Coal Run Dr. & 8000  
#  
T345 Melvin Dr. Bldg. 100  
(No. and Street, Apt., Suite, P.O. Box or R.D. No.)  
Alexandria, VA 22303  
(City, State, and ZIP Code)



SENDER INSTRUCTIONS  
Print your name, address, and ZIP Code in the space below.  
• Complete items 1, 2, 3, and 4 on the reverse.  
• Attach to front of article if space permits.  
• Otherwise write to back of article.  
• Endorse article "Return Receipt Requested" adjacent to number.

RETURN TO



# MARKET PROFILE

PLEASE READ QUESTIONS CAREFULLY. PRINT ANSWERS ON SPACES PROVIDED OR FILL IN BOXES AS INSTRUCTED.

SALESPERSON: Please fill out this section. PRINT

Salesperson: DAURIE SCHWAB Company You Work For: BUILDERS MARKETING INC

Date of Sale ..... 3/11/86  
 Expected Settlement Date .... 11/1/86  
 Co-op Broker COLDWELL BANKER  
 Address of This Sale: Street 9105 PEARTREE LANDING  
 City ALEX State VA Zip 22309  
 Sales Price \$296,500

Check One  
☒ New Home — Development Name UNION FARM  
 Builder Name ADDICOTT HILLS COR.  
 Lot Number 111  
☐ Conversion — Project Name \_\_\_\_\_  
 Developer Name \_\_\_\_\_

<p><b>AMOUNT OF DOWN PAYMENT</b>  <u>\$196,500</u></p> <p><b>EXPECTED INTEREST RATE</b>  <u>9.5</u> %</p> <p><b>LOAN TERM</b>  <u>30</u> YEARS</p>	<p><b>FINANCING</b>                  Check One                  1 <input type="checkbox"/> FHA                  2 <input type="checkbox"/> VA                  3 <input checked="" type="checkbox"/> Conventional                  4 <input type="checkbox"/> Insurance                  5 <input type="checkbox"/> Cash                  6 <input type="checkbox"/> Subsidized                  7 <input type="checkbox"/> Other _____                  (Specify)</p>	<p><b>ARRANGEMENTS</b>                  Check One                  1 <input type="checkbox"/> Builder Buy Down                  2 <input type="checkbox"/> Adjustable Interest Rate                  3 <input type="checkbox"/> Rollover Mortgage                  4 <input type="checkbox"/> Shared Mortgage                  5 <input type="checkbox"/> Appreciation                  6 <input type="checkbox"/> Graduated Payment Plan</p>	<p><b>SQUARE FOOTAGE</b>                  Finished <u>3000</u>                  Unfinished _____                  Lot Size _____                  (Total square footage)</p>	<p><b>NUMBER OF BEDROOMS</b>                  (Include den — but NOT family room)                  Check One                  1 <input type="checkbox"/> One Bedroom                  2 <input type="checkbox"/> Two Bedrooms                  3 <input type="checkbox"/> Three Bedrooms                  4 <input checked="" type="checkbox"/> Four Bedrooms                  5 <input type="checkbox"/> Five or more Bedrooms</p>
<p><b>NUMBER OF BATHS</b>                  Check One                  1 <input type="checkbox"/> One                  2 <input type="checkbox"/> One &amp; 1/2                  3 <input type="checkbox"/> Two                  4 <input checked="" type="checkbox"/> Two &amp; 1/2                  5 <input type="checkbox"/> Three                  6 <input type="checkbox"/> Three &amp; 1/2                  7 <input type="checkbox"/> Four or more</p>	<p><b>NUMBER OF STORIES</b>                  Check One                  1 <input type="checkbox"/> One                  2 <input type="checkbox"/> Two                  3 <input type="checkbox"/> Split Level                  4 <input checked="" type="checkbox"/> Three                  Model Name <u>LEE-2</u>                  (Specify)</p>	<p><b>EXTERIOR MATERIAL</b>                  Check All That Apply                  1 <input checked="" type="checkbox"/> Brick                  2 <input checked="" type="checkbox"/> Aluminum                  3 <input type="checkbox"/> Composition/Wood                  4 <input type="checkbox"/> Other _____                  (Specify)</p>	<p><b>TYPE OF HOME</b>                  Check One                  1 <input checked="" type="checkbox"/> Single Detached                  2 <input type="checkbox"/> Townhouse/Duplex                  Condominium                  3 <input type="checkbox"/> Townhouse/Duplex                  4 <input type="checkbox"/> Garden Apartment                  5 <input type="checkbox"/> High Rise Apartment                  6 <input type="checkbox"/> Other _____                  (Specify)</p>	

BUYER: Please fill out this section. PRINT

NAME — HEAD OF HOUSEHOLD: First W. Lowery Initial \_\_\_\_\_ Last Man III

YOUR PRESENT ADDRESS: Street 9716 Falkstone City Alexandria State VA Zip 22304

EMPLOYER USDA LOCATION OF EMPLOYMENT Independence 4 14th Wash. DC

PRESENT LIVING SITUATION		IF YOU PRESENTLY LIVE IN OWNED OR RENTED HOME, FILL IN THE INFORMATION IN THE APPROPRIATE COLUMN BELOW	
<p><b>I OWN A HOME</b></p> <p>1. What is its current value?  <u>\$134,500</u>                  (Price at which sold, or will be sold)</p> <p>Check One                  2 <input type="checkbox"/> Sold                  3 <input type="checkbox"/> Guaranteed listing.                  Broker _____                  (Specify)                  4 <input type="checkbox"/> Listed, no guarantee                  Broker _____                  (Specify)                  5 <input checked="" type="checkbox"/> Not listed, must sell                  6 <input type="checkbox"/> Not selling                  7 <input type="checkbox"/> Other _____                  (Specify)</p>	<p><b>I DO NOT OWN A HOME</b>                  Check One                  1 <input type="checkbox"/> Renting                  2 <input type="checkbox"/> Government Quarters                  3 <input type="checkbox"/> Living with relatives                  4 <input type="checkbox"/> Other _____                  (Specify)</p>	<p><b>OWNERSHIP ONLY</b>                  Check One                  1 <input checked="" type="checkbox"/> Single Detached                  2 <input type="checkbox"/> Townhouse/Duplex                  Condominium                  3 <input type="checkbox"/> Townhouse/Duplex                  4 <input type="checkbox"/> Garden Apartment                  5 <input type="checkbox"/> High Rise Apartment                  6 <input type="checkbox"/> Other _____                  (Specify)</p> <p><b>MONTHLY PAYMENT (PITI)</b>  <u>\$560</u></p> <p><b>SQUARE FOOTAGE</b>                  Finished <u>2600</u>                  Unfinished _____                  Lot Size _____                  (Total Square Footage)</p>	<p><b>RENTAL ONLY</b>                  Check One                  1 <input type="checkbox"/> Garden Apartment                  2 <input type="checkbox"/> High Rise Apartment                  3 <input type="checkbox"/> Townhouse/Duplex                  4 <input type="checkbox"/> Single Detached                  5 <input type="checkbox"/> Other _____                  (Specify)</p> <p><b>MONTHLY RENT</b>  <u>\$</u> _____</p> <p>Does this rent amount include utilities  <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p><u>B. Mann 2-6 114-PT. BS</u></p>

Δ = 4  
 C101273  
 11-19-87

PLEASE  
 Continue on the back  
 of this page

<b>SOURCE OF DOWN PAYMENT FOR THE HOME YOU ARE BUYING</b> Check All That Apply 1 <input checked="" type="checkbox"/> Savings 2 <input checked="" type="checkbox"/> Liquidation of investments 3 <input checked="" type="checkbox"/> Equity from sale of previous home 4 <input type="checkbox"/> Second mortgage from another private source 5 <input checked="" type="checkbox"/> Family inheritance 6 <input type="checkbox"/> Help from other relatives 7 <input type="checkbox"/> Other _____ (Specify)	<b>HOW MANY TIMES DID YOU VISIT THIS HOUSE BEFORE YOU DECIDED TO BUY IT?</b> Check One 1 <input type="checkbox"/> One Time 2 <input type="checkbox"/> Two Times 3 <input type="checkbox"/> Three Times 4 <input type="checkbox"/> Four Times 5 <input checked="" type="checkbox"/> Five or more times	<b>REASONS FOR BUYING</b> Check All That Apply A <input type="checkbox"/> Tired of renting B <input type="checkbox"/> Closer to work C <input type="checkbox"/> Larger home D <input type="checkbox"/> Job transfer E <input type="checkbox"/> Better schools F <input type="checkbox"/> Better area G <input type="checkbox"/> Less maintenance H <input type="checkbox"/> Smaller home I <input type="checkbox"/> Widowed/divorced J <input type="checkbox"/> Newly married K <input type="checkbox"/> Retiring L <input type="checkbox"/> Plan to rent my existing home M <input type="checkbox"/> Moved from out of town Z <input checked="" type="checkbox"/> Other <u>need full basement garage</u> (Specify)	<b>ADVERTISING WHICH MADE YOU AWARE OF THIS HOME</b> Check All That Apply A <input type="checkbox"/> Post B <input type="checkbox"/> Other papers C <input type="checkbox"/> Friends/Relatives U <input type="checkbox"/> New Home Guide Mag E <input type="checkbox"/> (Other) Magazines F <input type="checkbox"/> Radio/Television G <input checked="" type="checkbox"/> Broker/Agent H <input checked="" type="checkbox"/> Road Signs/Driving Area Z <input type="checkbox"/> Other _____ (Specify)
<b>WHAT ARE YOUR REASONS FOR BUYING THIS PARTICULAR HOME?</b> Check All That Apply 1 <input type="checkbox"/> Price 2 <input checked="" type="checkbox"/> Style 3 <input checked="" type="checkbox"/> Layout 4 <input checked="" type="checkbox"/> Lot	<b>WHAT ARE THE DIFFERENT TYPES OF HOMES YOU LOOKED AT?</b> Check All That Apply 1 <input checked="" type="checkbox"/> Single Detached 2 <input type="checkbox"/> Townhouse/Duplex Condominium: 3 <input type="checkbox"/> Townhouse/Duplex 4 <input type="checkbox"/> Garden Apartment 5 <input type="checkbox"/> High-Rise Apartment 6 <input type="checkbox"/> Other _____ (Specify)	<b>DID YOU LOOK AT NEW AND RESALE HOMES?</b> Check All That Apply 1 <input checked="" type="checkbox"/> Newly-built 2 <input checked="" type="checkbox"/> Resale 3 <input type="checkbox"/> Other _____ (Specify)	<b>COMBINED HOUSEHOLD INCOME</b> Check One 1 <input type="checkbox"/> Less than \$15,000 2 <input type="checkbox"/> \$15,000-\$19,000 3 <input type="checkbox"/> \$20,000-\$24,999 4 <input type="checkbox"/> \$25,000-\$34,999 5 <input type="checkbox"/> \$35,000-\$49,999 6 <input checked="" type="checkbox"/> \$50,000-\$74,999 7 <input type="checkbox"/> \$75,000 and over

WHAT FEATURES DO YOU LIKE ABOUT THIS HOUSE? (Specify)

Master Bedroom

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

NAME OF OTHER SUBDIVISION(S) NEIGHBORHOOD(S) WHERE YOU WERE SERIOUSLY INTERESTED AS AN ALTERNATIVE TO THIS HOUSE

(Fill in name(s))

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_



AGE OF HEAD OF HOUSEHOLD

Check One

1 ☐ Less than 25

2 ☐ 25-34 years

3 ☐ 35-44 years

4 ☒ 45-54 years

5 ☐ 55-64 years

6 ☐ 65 years and over

INDICATE HOW MANY HOUSEHOLD MEMBERS CONTRIBUTE TO INCOME

Check One Percent of Total Inc

1 <input type="checkbox"/> One Person	<input type="checkbox"/> 10
2 <input checked="" type="checkbox"/> Two Persons	<input type="checkbox"/> 20
3 <input type="checkbox"/> Three or More Persons	<input type="checkbox"/> 100

WHICH TYPE OF HOUSEHOLD DESCRIBES YOUR SITUATION

Check One

A ☐ Husband and wife only

B ☒ Husband and wife with children

C ☐ Father with children

D ☐ Mother with children

Group of related individuals

E ☐ Male

F ☐ Female

G ☐ Both

Group of unrelated individuals

H ☐ Male

I ☐ Female

J ☐ Both

Single

K ☐ Male

L ☐ Female

IF YOU HAVE CHILDREN LIVING HOME, HOW MANY IN EACH AGE GROUP?

1 ☐ 0-6 years of age

2 ☐ 7-12 years of age

3 ☒ 13-18 years of age

4 ☒ 19-24 years of age

PRINTER'S NOTE: Defendant's Exhibit 5 is not reproducible  
and is on file in the Clerk's Office.

PRINTER'S NOTE: Defendant's Exhibit 6 is not reproducible  
and is on file in the Clerk's Office.

# CARL BERNSTEIN & ASSOCIATES, INC.

7345 McWhorter Place, Suite 100  
Annandale, Virginia 22003  
703-941-6076

Union Farm  
Subdivision

11 - 9105 Pear Tree Lane  
Lot No. Address

## CONFIDENTIAL CUSTOMER INFORMATION SHEET (to be completed and signed by purchaser)

How did you happen to contact US?

Referred: Referral By Whom: \_\_\_\_\_ Called on at: \_\_\_\_\_ Which paper: \_\_\_\_\_ Post Star Other: \_\_\_\_\_ Saw Sign on Property: ☒

Other - please explain briefly: \_\_\_\_\_

BUYER I: Birthdate: 3/15/51 Dependents: 2 - 16y, 19y  
(Age) 16y, 19y

Name: W. Leroy Mearns III  
Address: 8716 Kalkstone Ln, Alexandria  
Phone: 360-3800 677 7309  
Social Security No. 118-24 6642  
Employed by: U.S. Dept. of Agriculture - NARS  
Address: 1400 S. Washington St. N.E.  
Washington, D.C. 20251  
Occupation: Agriculture Economist  
Salary: (Gross) \$40,000 No. of years: 10  
Overtime: \_\_\_\_\_ Phone: 447-2650  
If Self-Employed - Gross Income: \_\_\_\_\_  
Year to Date Net Income: \_\_\_\_\_

PREVIOUS EMPLOYMENT, if on present job less than two years:

Employed by: \_\_\_\_\_  
Address: \_\_\_\_\_  
Occupation: \_\_\_\_\_  
Salary: (Gross) \$ \_\_\_\_\_ No. of years: \_\_\_\_\_  
Reason for leaving: \_\_\_\_\_

BUYER II: Birthdate: 3/15/51 Dependents: \_\_\_\_\_ Ages: \_\_\_\_\_  
Name: Barbara C. Mearns  
Address: 8716 Kalkstone Ln  
Social Security No. 166-30-3818  
Employed by: Professional Insurance Agent  
Address: 4400 N. Washington St.  
Alexandria, VA  
Occupation: Insurance Commissioner  
Salary: (Gross) \$18,000 No. of years: 3 1/2  
Phone: 636-9340

EXTRA EMPLOYMENT OF HUSBAND AND/OR WIFE, if applicable:

Employed by: Goldwell Banker REC  
Address: 400 N. Washington St.  
Alexandria, VA  
Occupation: Realtor  
Salary: (Gross) \$10,000 No. of years: 9  
Phone: 636-6200  
Other extra income: (if applicable) \_\_\_\_\_  
Reserve unit: \$ \_\_\_\_\_ Disability: \$ \_\_\_\_\_  
Investments: \$ \_\_\_\_\_ Remarks: \_\_\_\_\_  
Rental income: \_\_\_\_\_  
Other: \_\_\_\_\_

ASSETS:

Bank accounts: (Name)	Type of Account (Savings/Check)	Bal. on dep.
<u>Washington Nat</u>	<u>savings market</u>	<u>\$7,500</u>
<u>Union Fed</u>	<u>NOV</u>	<u>3,000</u>
U.S. Savings Bonds:		
Stocks or other Bonds: (Current Value)		<u>175,000</u>
Life Insurance: (face value)		<u>42,000</u>
Cash surrender value of ins.		
Property Owned:		Current Value
Address: <u>8716 Kalkstone Ln, Alexandria</u>		
Equity: <u>104,000</u>		<u>150,000</u>
Address: <u>Barry Rd, Hickory Hill</u>		
Equity: <u>55,000</u>		<u>55,000</u>
Address: _____		
Equity: \$ _____		
Household furnishings: (current value)		<u>20,000</u>
Automobile: Yr. <u>80</u> Make <u>Chrysler</u>		<u>2,000</u>
Automobile: Yr. <u>80</u> Make <u>Chrysler</u>		<u>2,000</u>
Other assets:		
Unusual remarks:		

LIABILITIES:

	TOTAL	Monthly Payment
Automobile:	\$ _____	\$ _____
Property:	\$ <u>46,000</u>	\$ <u>500</u>
Payments made to:	<u>1st Fed 1 546</u>	
	<u>Higginston Rd</u>	
Other: (installment accounts, etc.)		
Balance Due		Monthly Payment
<u>2054</u>		<u>51</u>
<u>7900</u>		<u>80</u>
Support payments (Alimony, parents)		
Rent payment: \$ _____		
Has buyer declared bankruptcy in past 5 years?	Yes	No <input checked="" type="checkbox"/>

Appt. is source of money needed for down payment and settlement charges (bank accounts, bonds, insurance, etc.) Alexandria, VA - equity  
bank account, stock

The foregoing information is true and accurate to the best of my knowledge and belief. Purchaser expressly permits the revelation of the above information to the Seller and Seller's agent only for the purpose of establishing Purchaser's reported ability to consummate this transaction.

SIGNED: W. Leroy Mearns III (SEAL) SIGNED: \_\_\_\_\_ (SEAL)

Δ-7-  
11-19-87  
C101273

7  
C  
VIRGINIA;  
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN and  
BARBARA MANN

Complainants,

v.  
ADDICOTT HILLS CORP.

CHANCERY No. 101273

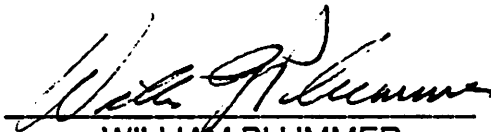
Defendant.

DECREE

THIS CAUSE having come on this 13th day of November, 1987 upon the Defendant's Motion for Summary Judgment and all parties having appeared by counsel and counsel for the defendant having argued that the defendant's motion for summary judgment should be granted as a matter of law in that the filing of a Memorandum of Lis Pendens by the defendants was a breach of the paragraph 18c of the contract in issue which contract provision states: 'PURCHASER IS EXPRESSLY PROHIBITED FROM RECORDING THIS AGREEMENT OR ANY MEMORANDUM THEREOF, AND UPON ANY RECORDATION AT SELLER'S OPTION, THIS AGREEMENT SHALL BECOME NULL AND VOID AND ALL RIGHTS OF PURCHASER HEREUNDER SHALL THEREUPON CEASE AND TERMINATE' and the Court having been of the opinion that the filing of the Memorandum of Lis Pendens in this case was not a violation of paragraph 18c and therefore the Motion for Summary Judgment in this regard should be denied; and defendant having further argued that the Decree of this Court dated June 12, 1987 entered by Honorable Quinlan Hancock rendered the entire contract void and the Court being of the opinion that the June 12, 1987 decree of this Court did not render the entire contract void , it is therefore,

ADJUDGED, ORDERED and DECREED that the Defendant's Motion  
for Summary Judgment be and the same hereby is denied.

ENTERED THIS 19<sup>th</sup> DAY OF NOVMEBER, 1987.

  
WILLIAM PLUMMER  
JUDGE OF THE CIRCUIT COURT

SEEN AND OBJECTED TO;

  
JOHN HARRISON  
COUNSEL FOR DEFENDANT

SEEN AND AGREED TO;

  
JOSE AUNON  
COUNSEL FOR COMPLAINANTS

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN III )

and )

BARBARA C. MANN )

Complainants )

vs. )

ADDICOTT HILLS CORPORATION )

Defendant )

**FILED**

**MAR 25 1988**

**WARREN E. SARRY**

**Clerk of the Circuit Court  
of Fairfax County, Va.**

IN CHANCERY NO. 101273

**COMPLAINANTS' POST-TRIAL  
MEMORANDUM OF POINTS AND AUTHORITIES**

COME NOW the Complainants, W. LOWRY MANN III and BARBARA C. MANN, by their counsel undersigned, and files this, their Memorandum of Points and Authorities:

**STATEMENT OF FACTS**

On or about March 1, 1986, W. Lowry Mann III and Barbara Mann ("Purchasers" or "Plaintiffs") and Addicott Hills Corporation ("Seller" or "Defendant") entered into a New Home Sales Agreement for Lot 11, Union Farm Subdivision, Fairfax County, Virginia ("Contract"). The Contract was Seller's form and contained blanks to be filled in by the parties. Other than the price, there were two significant handwritten terms added to the Contract. First, the



Contract states that "Seller shall complete construction of the dwelling on or before *November* [1986] . . . ." Second, the Contract states that "[t]his contract is contingent upon sale of purchasers' home (see attached addendum)." The attached addendum, entitled Sale of Existing Residence Addendum ("Addendum") was also Seller's form. It essentially provided that the Contract was contingent upon Purchasers' sale of their existing home and, as conditions to the contingency, required the Purchasers to list their home with a real estate broker within 15 days of house framing and to enter into a contract of sale on the existing home within 90 days of house framing.

The undisputed evidence presented at trial shows that at the time the Contract was entered into, the Seller did not have subdivision approval on the subject property and, in fact, did not receive such approval until July 31, 1986. Thus, Lot 11, Union Farm Subdivision, was not even created, and work did not commence on the Mann's home, until several months after that. Needless to say, as of November, 1986, the date referred to in the Contract as the "Completion Date," construction on the house had barely begun. In fact, the house was not completed until September 9, 1987, some 10 months after the "Completion Date." The evidence produced by Seller at trial was devoid of justification for this excessive delay, and in no way excused this dilatory conduct under the *force majeure* exceptions to the Completion Date.

On or about January 9, 1987, Daurie Schwab, Seller's sales agent, contacted Barbara Mann to advise her that house framing had begun and that the Manns should list their existing home with a real estate broker. When asked by Mrs. Mann when their new home would be completed, Ms. Schwab refused to make an estimate or a commitment. Thereafter, by letter to the Manns dated January 13, 1987, Sandra Lindsey of Addicott Hills Corporation reiterated that house framing had begun and requested that they list their existing home within 5 days of receipt of the letter. After receiving this letter on January 17, Mrs. Mann contacted Ms. Lindsey and suggested that the Manns delay listing their house for sale at that time. As Mrs. Mann discussed with Ms. Lindsey, she was concerned, in view of the excessive construction delays, that if they were to immediately list their existing house without even a rough estimate of the completion date of their new house, they might sell their existing house prior to completion of the new one and have no house to live in for a period of time. Ms. Lindsey told Mrs. Mann she would get back to her after discussing the matter with the builder at their weekly meeting.

As a follow-up to her conversation with Ms. Lindsey, Mrs. Mann sent a letter to Ms. Lindsey dated January 21, 1987, enclosing a listing agreement the Manns had entered into with Coldwell Banker on January 20, 1987, which was within the time period referred to in Ms. Lindsey's January 13 letter, to be effective on March 1, 1987. By letter dated January 30, 1987, Carl Bernstein, president of Addicott Hills Corporation, notified the Manns that the Seller was purportedly

terminating the Contract, that the Seller would be retaining \$12,092.50 which the Manns had paid for optional improvements on their new home, and that this decision was based upon the Manns' failure to list their existing home for sale as required by the Addendum. In response to this letter, counsel for the Manns sent a letter to Seller dated February 4, 1987, enclosing another listing agreement between the Manns and Coldwell Banker effective February 2, 1987, together with a written waiver signed by the Manns formally waiving the sale of existing home contingency contained in the Addendum. As a result of Seller's adamant refusal to change their position on this matter, Purchasers filed this Bill of Complaint with this Honorable Court seeking specific performance and damages.

As demonstrated by the evidence at trial, the Manns had sufficient funds to go to settlement on their new home, and were ready, willing, able and eager to do so. Martha Allen, a real estate broker with Coldwell Banker, testified that when she discussed the situation with Carl Bernstein, president of Addicott Hills Corporation, he implied that the decision to terminate the contract was a business decision based upon his belief that he could get an additional \$60,000 for the Manns' home from a new buyer.

## ARGUMENT

- I. Sale of Existing Residence Addendum is a condition for the sole benefit of Buyers and was properly waived by them.

The Addendum provides, in essence, that if the Manns attempted to sell their existing home in accordance with the requirements of the Addendum, but were unable to do so, they would have the option of demanding a return of their deposit and cancelling the Contract, or alternatively electing to waive the contingency and continuing to settlement. In the event the Manns failed to comply with the requirements of the Addendum relating to the listing and sale of their existing home, they would lose the benefit of the election created by the contingency and would be liable to the Seller for contract damages if they were unable to settle. However, if the Manns desired to settle despite their failure to comply with the requirements of the contingency, they were entitled to do so and Seller would have no damages.

Despite the Seller's contention that this Court should construe this standard provision which was clearly inserted for the sole benefit of the Purchasers, to create a condition precedent to the Seller's obligation to perform under the Contract, it is a well-established principle that a condition inserted for the benefit of one party may be unilaterally waived by that party, without affecting the other party's obligation to perform. See generally M. Friedman, Contracts and Conveyances of Real Property § 1.5 (4th ed. 1984).

Seller's contention, therefore, is not only illogical but contrary to established legal precedent.

It is simply logical that whether a purchaser sells his existing residence is of absolutely no consequence or benefit to a seller if the purchaser is otherwise prepared to close on the property, and a contingency to this effect is therefore a condition inserted for the sole benefit of the purchaser. Furthermore, it is abundantly clear from the Contract itself that the parties intended that the Addendum benefit the Purchasers.<sup>1</sup> The Addendum is expressly referred to in the main portion of the Contract of Sale ("Contract") as a contingency. This reference was handwritten into Seller's form contract at the request of the Purchaser and had to be accepted by the Seller before any contract existed between the parties. The fact that the Seller did not include this contingency in its form contract, and that the Purchaser requested it, is indicative of the fact that it was intended for the sole benefit of the Purchasers.

Moreover, the Addendum is analogous to financing contingencies, often included in land sales contracts, which courts have uniformly held to be provisions inserted for the sole benefit of

---

<sup>1</sup> "The guiding light in the construction of a contract is the intention of the parties . . . ." Wilson v. Holyfield, 227 Va. 184, 187 (1984) (citing Meade v. Wallen, 226 Va. 465, 467 (1984)). See also Pederson v. McGuire, 333 N.W.2d 823 (S.D. 1983) ("A determination of whether or not time is of the essence depends upon the intention of the parties and the purpose of the contract, rather than the printed contract clauses claiming time to be of the essence")..

purchasers, waivable by such purchasers. In Wolf v. Crosby, 377 A.2d 22 (Del. Ch. 1977), for instance, prospective purchasers of real property brought suit for specific performance against the property owners. The property owners defended on grounds that the contract was contingent upon plaintiffs obtaining financing upon certain terms, and that they had not obtained such financing, but rather had accepted financing on different terms. The court held that the financing contingency "constituted a condition precedent imposed for the protection and benefit of the plaintiffs" in which the defendants did not have an ascertainable interest, and "[a]s such, the condition could be waived by the plaintiffs if they were willing to accept financing on less favorable terms." Id. at 27. Accordingly, the court granted the plaintiff's prayer for specific performance. See also Edwards v. McTyre, 271 S.E.2d 205 (Ga. 1980) (provision in contract as to the procurement of a loan was merely for the protection of the buyer and could be waived by him); Lipscomb v. Chadbourne, 378 So.2d 147 (La. App. 1979) (buyer's failure to obtain loan commitment within 30 days as required by contract did not excuse seller's performance, despite provision that failure to obtain loan within 30 days would render contract "null and void"); Renouf v. Martini, 577 S.W.2d 803 (Civ. App. Tex. 1979) (financing contingency

provision "is not to be used by seller for his own benefit if the purchaser can perform under the contract").<sup>2</sup>

As an illustration of the above case law, a sales contract might provide that the purchaser's obligations under a sales contract are contingent upon his obtaining financing upon certain terms, and that purchaser is to make application for such a loan within five days of the contract date. If the purchaser fails to make application as required, but has cash to proceed to settlement as otherwise provided in the contract, courts will demand specific performance of the seller. In the case before this court, the sales contract provided that the Purchasers' obligations under the sales contract were contingent upon their selling their existing home, and that in order to have the advantage of the contingency the Purchasers had to list their home with a real estate broker within 15 days of house framing. The purchasers allegedly failed to list their home as required (which allegation was disproved at trial), but were

---

<sup>2</sup> Purchasers have also been permitted by courts to waive a variety of other contractual provisions included for their benefit, including a requirement that the property be found to contain certain minerals, Amann v. Frederick, 257 N.W.2d 436 (N.D. 1977), that final map approval be obtained on the subject property, Weinprop, Inc. v. Foreal Homes, Inc., 434 N.Y.S.2d 471 (App. Div. 1981), or that building permits be acquired prior to a certain date. Prestige House, Inc. v. Merrill, 624 P.2d 188 (Or. 1981). See also Unsinger v. Campbell, 672 P.2d 1020 (Or. 1977) (unfulfilled contingencies in sales contract that purchasers sell their existing house and obtain septic tank approval by a date certain were "conditions . . . for the benefit of [purchasers, and] the nonoccurrence of the conditions would not excuse [seller's] performance").

nevertheless prepared to proceed to settlement as otherwise provided in the Contract. The clear analogy to the financing contingency cases mandates that the court reach the same result, and order specific performance by the Sellers.

II. "Time is of the Essence" provision does not apply to Purchaser's obligation to list their existing home.

Paragraph 18(d) of the Contract, provides that "[t]ime is ... of the essence in the performance by Purchaser of each of purchaser's obligations hereunder." Sellers have taken the position that this clause applies to the Addendum provision that Purchasers list their existing home with a real estate broker within 15 days of house framing, and that Purchaser's failure to comply with such provision is a breach justifying cancellation of the entire Contract. This position is untenable for several reasons.

First, it is undisputed that Purchasers waived the entire Sale of Existing Residence Addendum within the 90 day period of the contingency, as they are permitted to do as discussed supra. Thus, even if they did fail to list their house within 15 days -- a technical condition of the contingency -- the issue became moot when the contingency was waived by purchasers in its entirety. Thus, seller has failed to set forth even an arguable violation of the "time is of the essence" clause.



Second, Seller's excessive delay in completing the house was the reason Purchasers were hesitant to list their existing house for sale. As such, any "time is of the essence" provision relating to the listing of their existing house was waived by the Seller's dilatory conduct. See Hamilton v. Newbold, 154 Va. 347, 354 (1930). It is simply unreasonable for Addicott Hills to justify cancellation of the Contract on the basis of the Mann's alleged delay, when they themselves were guilty of gross delay which created the problem to begin with.

Third, a condition for the benefit of the purchaser may be waived by the purchaser before or after the date upon which the condition was to have been fulfilled. As the court noted in Koedding v. Slaughter, 634 F.2d 1065 (8th Cir. 1980), "a promise to perform all of part of an antecedent conditional duty in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur . . . ." (citing Restatement of Contracts § 88(1)).

Finally, the "time is of the essence" provision was merely "boilerplate" language which should not be construed to apply to the Addendum. In Jackson v. Holmes, 307 So.2d 470 (Fla. Ct. App. 1975), a buyer who failed to provide seller with a loan certification by a certain date as required by the contract, but who nonetheless was prepared to close, sought specific performance after seller cancelled. Seller argued that the "time is of the essence" provision of the form contract applied to purchaser's obligation to provide the loan

certification and his failure to do so justified seller's cancellation. The court disagreed, noting that the failure to perform was "not substantial," and that in such a circumstance "the non-performing party should not be deprived of his rights unless it appears that this was clearly contemplated by the parties." *Id.* at 471. The fact that the "time is of the essence" clause was contained in a form contract and did not expressly relate to the loan certification requirement, convinced the court that such a harsh construction was not within the contemplation of the parties and that specific performance was appropriate.<sup>3</sup>

III. Principles of equity direct that specific performance be granted under the facts presented

"Every bill for the specific execution of a contract is an application to the sound discretion of the court. It is not a case requiring the interposition of the courts *ex debito justitiae*, but rests in their discretion upon all the circumstances." *Grubb v. Moore*, 108 Va. 72, 84 (citing *Cox v. Cox*, 26 Gratt. 305, 308-09). The facts of this case clearly mandate that this court exercise its discretion to grant specific performance.

---

<sup>3</sup> The court discussed 3A *Corbin on Contracts* § 715, in which Professor Corbin noted that "[a] contract may have in it many promises for sundry performance, varying in amount and importance. A general provision that 'time is of the essence' should not be held to be applicable to all of them alike . . . ."

The heart of Seller's argument is that this court should permit the Seller to cancel the Contract on the basis of the purchasers' failure to list their home within 15 days of house framing -- a minor condition of a contingency properly and timely waived by the purchasers. Even if this alleged failure were a breach of purchaser's obligations under the contract, which it is not, such an insignificant flaw in the purchaser's performance does not begin to justify the Seller's termination of the contract -- especially in view of the fact that Purchasers' deposit would be subject to forfeiture.<sup>4</sup> "The rule laid down by an eminent writer and supported by abundant authority is that when the substance of the agreement can be fully executed, and when a trifling adjustment only is needed to satisfy the equities of the case, performance can be decreed with satisfaction." 17 Michie's Juris. Specific Performance § 26 at 41.

The type of breach significant enough to justify denial of specific performance was found by the Supreme Court in Grubb v. Moore, supra, involving a contract for the sale of an insurance agency business. The contract provided that the price of the business would be a percentage of the first renewal premiums, and further provided that buyers would use "reasonable diligence" to secure such renewal premiums. When buyers later sought specific performance of another provision of the contract forbidding the sellers from reentering the insurance business, the Court declined upon a showing

---

<sup>4</sup> Forfeitures are not favored by the courts and will not be declared or enforced unless justice clearly demands it. 14B Michie's Juris. Penalties and Forfeitures § 5.

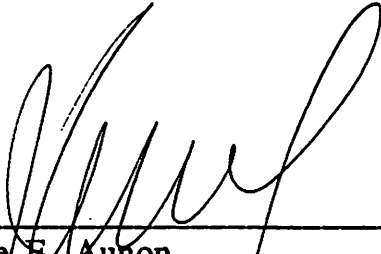
by Seller's that buyers had failed to use "reasonable diligence to secure the renewal premiums. The Court noted that it "was of the greatest importance to the defendants that the complainants should in good faith exercise reasonable diligence in the performance of that duty, since the only consideration which the defendants were to receive for the transfer of their business . . . was the fifteen percent of the first renewal premiums of such policies." Thus, the complainant, having failed in a condition "which went to the essence of the agreement, [were] not entitled to have a direct decree for specific performance . . . ." Id. at 84-85.

The 15-day provision allegedly breached by the Manns cannot compare with the "reasonable diligence" provision breached by the purchasers in Grubb. Whereas the breach in Grubb reached the most essential element of the contract from the seller's perspective -- the price -- the alleged breach in the present case had absolutely no effect on the Seller. Indeed, the only reason the 15-day provision was significant to the Seller is that it became evident that the subject property could be sold for more than the contract price. However, the mere fact that a seller may be able to obtain a better price does not pose a hardship on the Seller justifying the denial of specific performance. Haythe v. May, 223 Va. 359, 361 (1982).

CONCLUSION

For the reasons stated above, W. Lowry Mann III and Barbara C. Mann respectfully request the Court to enter a decree granting specific performance and such other and further relief as the Court may deem mete and proper.

W. LOWRY MANN and  
BARBARA C. MANN  
By counsel

---

Jose E. Aunon  
9701 Main Street  
Fairfax, Virginia 22031  
Counsel for Complainants  
Telephone (703) 323-1700

CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed, first-class, postage prepaid to John E. Harrison, Light & Harrison, P.C. 6849 Old Dominion Drive, P.O. Box 6625, McLean, Virginia 22101 on this 3<sup>rd</sup> day of December, 1987

---

Jose Aunon

# TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF FACT . . . . .	1
ARGUMENT . . . . .	10
I. THIS COURT MUST ENFORCE THE PLAIN MEANING RULE . . . .	11
II. THE COURT HAS ALREADY FOUND THAT THE MANNS HAVE NOT COMPLIED WITH THE LITERAL TERMS OF THE CONTRACT, AND THEREFORE THE MANNS HAVE BREACHED THEIR CONTRACT .	11
III. THE CONTRACT DECLARES THAT THE MANNS' FAILURE TO DELIVER A COPY OF THE LISTING AGREEMENT TO ADDICOTT HILLS WITHIN THE PERIOD SPECIFIED [15 DAYS AFTER THE START OF HOUSE FRAMING] TO BE MATERIAL . . . . .	12
A. This Court Is Not Free To "Interpret" An Unambiguous Document . . . . .	12
B. The Contract Is Clear And Should Be Enforced	13
C. The Court Cannot Simply Disregard The Contract Or Rewrite The Contract . . . . .	14
D. The Parties Contract Is The Law Of This Case	14
E. The Parties Have Negotiated A Sale Of Existing Residence Addendum, Which Has Become A Part Of Their Contract Which Controls This Case . . . . .	16
i. The Addendum creates a contingency beneficial to the Manns . . . . .	16
ii. The creation of such a contingency is an extraordinary concession by Addicott Hills. . . . .	17
iii. The listing within 15 days of framing provision is for the benefit of the Seller and is not waivable by the Manns . . . . .	18
F. Materiality Is Not Objectively Determined But Is To Be Gleaned From The Words Of The Parties As Expressed In Their Own Contract .	19
G. The Breaches Are Material. . . . .	20

	<u>Page</u>
H. The Common Law Rule Against Forfeiture Is Inapplicable In The Instant Case . . . . .	21
IV. THE CONTRACT IS NOT SEVERABLE. . . . .	23
A. The Words Of The Contract Say The Contract Is Not Severable . . . . .	23
B. Under Common Law The Absence Of A Survival Clause Means That If Any Part Of The Contract Is Voided, The Entire Agreement Fails. . . . .	24
C. Judge Hancock Erred In Ruling Paragraph 15(b) Of The Contract Was Unconscionable . . . . .	25
D. If A Court Strikes Out Yet Another Single Provision Of This Contract, Then The Entire Contract Fails . . . . .	26
V. THE MANNS BREACHED THEIR CONTRACT IN AT LEAST THREE SEPARATE WAYS . . . . .	27
A. The Manns Breached Their Contract By Failing To List Their Existing Residence Within The Time Limit Required By The Contract. . . . .	27
B. There Is No Question That The Manns Failed To Attempt To Sell Their Property In Good Faith . . . . .	28
C. The Manns Breached The Contract By Recording A <u>Lis Pendens</u> . . . . .	28
VI. EACH BREACH BY THE MANNS WAS WILLFUL . . . . .	29
A. The Manns Did Not Just Fail To Refuse To Exhibit Their Listing, They Refused To List The Property Too . . . . .	29
B. The Willful Nature Of The Manns' Breaches Are Exacerbated By The Corresponding Breach By Mrs. Mann Of Her Fiduciary Duty To Addicott Hills . . . . .	29
C. The Willful Nature Of These Breaches Is Even More Exacerbated By Mrs. Mann's Experience As A Licensed Real Estate Agent And Her Undeniable Knowledge That Each Of The Acts Complained Of Was A Willful Breach Of The Contract . . . . .	30

	<u>Page</u>
VII. SPECIFIC PERFORMANCE AS AN EQUITABLE REMEDY AND CANNOT BE GRANTED TO A PARTY WITH UNCLEAN HANDS . . . . .	30
A.    Unclean Hands Is A Term Of Art And Applies In This Situation . . . . .	30
B.    Since No Damages Have Been Proven, No Damages Are Available . . . . .	32
VIII. THE MANNS HAVE ELECTED SPECIFIC PERFORMANCE INSTEAD OF DAMAGES AND THEREFORE NO DAMAGES ARE AVAILABLE. . .	32
IX. PARTIES ARE REQUIRED TO PROVE FULL PERFORMANCE OF THEIR OWN PART BEFORE THEY CAN REQUIRE SPECIFIC PERFORMANCE OF THE OTHER PARTY . . . . .	32
X. THE FAILURE OF THE MANNS TO PROVE THAT THE CONTRACT WAS SPECIFICALLY ENFORCEABLE BY ADDICOTT HILLS MEANS THE SPECIFIC PERFORMANCE IS NOT AVAILABLE TO THEM . . . . .	32
XI. A PARTY IN FIRST BREACH CANNOT ENFORCE THE CONTRACT. .	33
A.    Specific Performance Is An Act Of Affir- mation Of The Contract . . . . .	33
XII. THE MANNS DID NOT AND COULD NOT WAIVE THE FIFTEEN DAY DUTY . . . . .	34
A.    Not A Waiver Because You Cannot Waive A Duty . . . . .	34
B.    Once A Party Has Relied Upon A Breach It Cannot Be Waived . . . . .	36
CONCLUSION . . . . .	37



# TABLE OF CITATIONS

<u>Tab #</u>	<u>Cases</u>	<u>Page</u>
1.	<u>ADC Fairways Corp. v. Johnmark Construction, Inc.,</u> 231 Va. 312, 318 (1986) .....	33
2.	<u>Allemong v. Augusta National Bank,</u> 103 Va. 243, 249 (1904) .....	25
3.	<u>Am. Realty Trust v. Chase Manhattan,</u> 222 Va. 392, 403 (1981) .....	16
4.	<u>Ames v. American National Bank,</u> 163 Va. 1, 38 (1934) ..	15
5.	<u>Ballou v. Basic Construction Company,</u> 407 F.2d 1137, 1140 (4th Cir., 1969) .....	19,22
6.	<u>Banner v. Rosser,</u> 96 Va. 238, 245, 251 (1898) .....	25, 26, 31
7.	<u>Beckett v. Kornegay,</u> 150 Va. 636, 640 (1928) .....	11
8.	<u>Bell v. Commonwealth of Va.,</u> 220 Va. 87 (1979)	
9.	<u>Berry v. Klinger,</u> 225 Va. 201, 208 (1983) .....	13, 15, 27
	<u>Bond v. Crawford,</u> 193 Va. 437, 447 (1952) .....	30
10.	<u>Bream v. Marsh,</u> 31 Va. 852, 853, 4 Leigh 21, 25 (1832) .....	25
11.	<u>Buchanan v. Buchanan,</u> 174 Va. 255, 277-278 (1940) ....	24, 25, 33
12.	<u>Callanan Industries, Inc. v. Smirolodo,</u> 474 N.Y.S.2d 611, 612 (A.D.3d, 1984) .....	20
13.	<u>Cantrell v. Booher, Administratrix,</u> 201 Va. 649, 654 (1960) .....	36
14.	<u>Coles Adm's v. Ballard et al.,</u> 78 Va. 139, 149 (1883)	10
15.	<u>Day v. Vaughn &amp; Usilton, Inc.,</u> 193 Va. 168 (1951) ....	
16.	<u>Dime Deposit Bank v. Wescott,</u> 113 Va. 567, 573 .....	16
	(1912)	

	<u>Page</u>
17. <u>Eagler v. Little</u> , 217 Va. 869, 872-873 (1977) .....	15, 22, 25, 28, 34, 36
<u>Edwards v. McTyre</u> , 271 S.E.2d 205 (Ga. 1986) .....	33
18. <u>Engleby v. Harvey</u> , 93 Va. 440 (1896) .....	24
19. <u>Epperson v. Epperson</u> , 108 Va. 471, 476 (1908) .....	27
20. <u>Eschner v. Eschner</u> , 146 Va. 417, 422 (1926) .....	25
21. <u>Funkhouser v. Million</u> , 209 Va. 89, 91 (1968) .....	34
22. <u>Globe Company v. Bank of Boston</u> , 205 Va. 841, 848-849 (1965) .....	14, 15
23. <u>Hadden v. Consolidated Edison Co.</u> , 356 N.Y.S. 2d 249, 255 (1974) .....	20
24. <u>Harris v. City of Roanoke</u> , 179 Va. 1, 5 (1942) .....	36
25. <u>Heath v. Valentine</u> , 177 Va. 731, 737 (1941) .....	36
26. <u>Hurley v. Bennett</u> , 163 Va. 241, 253 (1934) .....	32, 33
27. <u>Jackson v. Holmes</u> , 307 So. 2d 470 (Fla. Dist. Ct. App. 1975) .....	10, 12, 21, 26
28. <u>Jacob &amp; Youngs v. Kent</u> , 129 N.E. 889, 891 (1921) .....	
29. <u>Johnson v. Hoffman</u> , 130 Va. 335, 344 (1921) .....	33, 34
30. <u>Kendall Bank Note Co. v. Commissioners Sinking Fund</u> , 79 Va. 563, 574 (1884) .....	19
31. <u>Koedding v. Slaughter</u> , 634 F.2d 1095 (8th Cir., Mo. 1980) .....	12
32. <u>Lerner v. The Gudelsky Co.</u> , 230 Va. 124, 132 (1985) .....	14, 15, 21, 27, 32
33. <u>Lipscomb v. Chadbourne</u> , 378 So. 2d 147 (1st Cir., La. 1979) .....	12

	<u>Page</u>
34. <u>LeRoy Dyal Co., Inc. v. Allen</u> , 161 F.2d 152, 155 (4th Cir., S.C. 1947) .....	11
35. <u>McCrowell v. Burson</u> , 79 Va. 290, 303 (1884) .....	27
36. <u>Meade v. Wallen</u> , 226 Va. 465, 467 (1984) .....	15
37. <u>Mercer v. S. Atlantic Insurance Co.</u> , 111 Va. 699, 704 (1911) .....	14
38. <u>National Airlines v. Shea</u> , 223 Va. 578 (1982) .....	36
39. <u>Neely v. White</u> , 177 Va. 358, 366-367 (1941) .....	19,33
40. <u>Neff v. Garrard</u> , 216 Va. 496 (1975) .....	
41. <u>Nelson v. Jennings et al.</u> , 2 Pat. & H. 369, 386 (1856) .....	10
42. <u>Nelson and Co. v. Taylor Heights Development Corp.</u> , 207 Va. 386, 391 (1966) .....	16
43. <u>Newport News v. Doyle and Russell</u> , 211 Va. 603, 607 (1971). ....	10, 14, 21
44. <u>Noyes' Ex'x v. Humphreys</u> , 52 Va. 335, 11 Gratt. 636 (1854). ....	24
45. <u>Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp.</u> , 109 Va. 513, 520 (1909) .....	16
46. <u>Prestige House, Inc. v. Merrill</u> , 624 P.2d 188 (OR. Ct. App. 1981) .....	12
47. <u>Portsmouth v. Portsmouth</u> , 122 Va. 258, 262 (1918) ....	10,14, 21
48. <u>Quesenberry v. Nichols and Erie</u> , 208 Va. 667, 671 (1968) .....	15
49. <u>Renner Plumbing v. Renner</u> , 225 Va. 508, 515 (1983) ...	13, 21
50. <u>Renouf v. Martini</u> , 577 S.W. 803 (Tx. 1979) .....	12
51. <u>Ross v. Craw</u> , 231 Va. 206, 212-213 (1986) .....	13, 14

	<u>Page</u>
52. <u>Schneider v. Dumbarton Developers, Inc.</u> , 767 F.2d 1007, 1012-1014 (D.C. Cir., 1985) .....	20
53. <u>Security Company v. Juliano, Inc.</u> , 203 Va. 827, 833 (1962) .....	36
54. <u>Shelton v. Stewart</u> , 193 Va. 167 (1951) .....	25
55. <u>Sims v. Nidiffer</u> , 203 Va. 749, 752 (1962) .....	11
56. <u>W. T. Smith, Administrator v. Grenadier, et al.</u> , 203 Va. 740 (1962) .....	
57. <u>Smyth Bros. et als. v. Beresford</u> , 128 Va. 137, 170 (1920) .....	14, 25, 26
58. <u>T... v. T...</u> , 216 Va. 867, 873 (1976) .....	36
59. <u>The Covington Virginian v. Woods</u> , 182 Va. 538, 547 (1944) .....	34, 35
60. <u>The Texas Co. v. Northup</u> , 154 Va. 428, 440-441 (1930) .....	16
61. <u>J.M. Turner &amp; Co., Inc. v. Delaney</u> , 211 Va. 168, 171 (1970) .....	16
62. <u>Typhoon Air Conditioning Co., Inc. v. Fried</u> , 24 A.2d 926, 927 (1942) .....	20, 34
63. <u>Usinger v. Campbell</u> , 572 P.2d 1018 (1977) .....	12, 27
64. <u>Westbury Coal Mining Partnership v. J. S. &amp; K. Coal Corp.</u> , 233 Va. 226, 229-230 (1987) .....	14
65. <u>Wilson v. Holyfield</u> , 227 Va. 184, 187 (1984) .....	12, 15
66. <u>Winn v. Aleda Const. Co.</u> , 227 Va. 304, 307 (1984) .....	14
67. <u>Wood v. Wood</u> , 216 Va. 922, 925 (1976) .....	11

TABLE OF AUTHORITIES

17 Am. Jur. 2d Contracts §377, p. 820-821 (1964).

Calmari and Pierillo On Contracts, p. 407-410 (1977).

Corbin On Contracts, §707, p. 327-331 (1960).

Restatement (Second) of Contracts, §241, p. 237 (19xx).

Simpson On Contracts, §334-335 (1965).

Williston On Contracts, §842 (3d ed. 19xx).

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED

W. LOWRY MANN,  
AND BARBARA MANN,

Complainants,

v.

ADDICOTT HILLS CORPORATION,

Defendant.

DEC 27 1987

WALTER L. GUNN  
Clerk of the Circuit Court  
Fairfax County, Va.

IN CHANCERY NO. 101273

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES

COMES NOW the Defendant, ADDICOTT HILLS CORPORATION, by its counsel, and files this Memorandum of Points and Authorities in response to the request of the Court at the conclusion of the evidence on November 19, 1987. Copies of each case cited have been provided, as requested, in the attached binder.

STATEMENT OF FACT

On March 30, 1986 W. Lowry Mann, III and Barbara C. Mann entered into a New Home Sales Agreement, and additional Addenda described below all dated March 1, 1987 ("the Contract") with the Addicott Hills Corporation ("Addicott Hills") to purchase Lot 11 of the Union Farm Subdivision, Fairfax County, Virginia. Mrs. Mann is a licensed real estate agent of ten (10) years experience, TR. 11/19/87, Mrs. Mann at 48-49, and is the selling real estate agent on the Manns' sale. TR. 11/19/87, Mrs. Mann at 146. The Contract, for the purpose of these proceedings, consists of three (3) contemporaneously signed documents: the New Homes Sales Agreement

("Agreement"), Plaintiff's TR. EX. "1", the Sale of Existing Residence Addendum ("Addendum"), Plaintiff's TR. EX. "2") and Delivery and Payment of Non-Standard Options Addendum ("Delivery Addendum"), Defendant's TR. EX. "2".

#### THE CONTRACT

While the Contract must be considered by the Court as a whole, the following points are significant if not determinative of the rights of the parties in this action:

Paragraph 18(d) of the Contract states:

Time is hereby declared to be of the essence in the performance by Purchaser of each of Purchaser's obligations hereunder.

The Agreement provides this Contract is contingent upon sale of Purchaser's home (see attached addendum).

The Addendum states in pertinent part:

Buyer shall:

- (a) Immediately commence to use diligent and good faith efforts to sell Buyer's Residence;
- (b) Immediately list the Buyer's Residence with a reputable real estate broker in the vicinity in which Buyer's Residence is located, which broker shall be a member of the "Multiple Listing Service," and Buyer shall produce satisfactory evidence of such listing to Seller within fifteen (15) days, after the start of house framing;
- (c) Make diligent, good faith and prompt efforts to enter into a contract for the sale of Buyer's Residence. (Emphasis supplied.)

The Contract is expressly made contingent upon the sale of the Manns' home. Since these provisions of the Contract were not waived, prior to the Contract's termination by Addicott Hills, the Contract was not specifically enforceable against the Manns.

Under Paragraph 2 of the Contract, the Manns were required to secure a Mortgage Loan in the amount of \$100,000.00 bearing interest at the rate of 10% or at the prevailing rate at the time of Settlement. Paragraph 2 therefore expressly relieved the Manns from any obligations to purchase the subject property if the Manns were unable to secure this financing. This particular provision has not been waived to this date by the Manns. In addition, at the time of contract the Manns provided personal financial information to Addicott Hills, Defendant's TR. Ex. "4" and "7". This information indicated that it was absolutely essential for the Manns to sell their existing residence in order to qualify for their purchase money financing and in order to make the down payment necessary to purchase the house under the terms of the Contract. Addicott Hills relied to its detriment on these representations by the Manns. It started construction, it personalized the house to the Manns specifications, and it withheld the house from the market for almost one year. This financing contingency of the Contract has not been waived. So again, the Contract is not now and never has been specifically enforceable by Addicott Hills against the Manns.

Under Paragraph 7 of the Contract, both parties are released from all liability under the Contract should there be a failure of title. While there are no allegations of defects in the title in this case, it should be noted that this provision, which the parties agreed to and which is standard in most new home sales contracts, effectively waives specific performance for both parties, and waives any rights to damages by either party upon a failure of title.



Under Paragraph 15(a) of the Contract the parties have agreed that in the event the Contract is not performed by the Manns in accordance with its terms and provisions, the Contract may be terminated by Addicott Hills. Paragraph 15(a) remains in the Contract, is an operative paragraph, and controls the rights of these parties at this time. On January 30, 1987 Addicott Hills lawfully terminated the Contract because of the Manns failure to list. Plaintiff's TR. EX. "2".

Erroneously, this Court, in a Decree dated June 12, 1987, struck Paragraph 15(b) and declared it unconscionable. Paragraph 15 of the Contract, similar to Paragraph 7, provided upon the occurrence of certain events of default, the parties rights would be fixed and limited in certain crucial respects. These included that both parties waived any right to specific performance against the other. In addition, rights to damages were fixed, liquidated and limited. The Court in reviewing Paragraph 15(b) found that it was unconscionable for the Purchaser, in all other respects sui juris, to waive their right of specific performance and to liquidate their damages at a nominal amount. No case law is cited in the Court's Decree dated June 12, 1987, nor did the Court review Paragraph 7 or even Paragraph 15(a) of the Contract to determine whether or not it was unconscionable for the parties to limit the Purchaser's liability under the Contract in exactly the same fashion.

In essence, by holding that Paragraph 15(b) of the Contract is unenforceable, the Court revised the parties' agreement. Such a ruling from a Court of equity places at risk all the other similar

provisions of the Contract, specifically: Paragraph 15(a) and the title provision of Paragraph 7, which provide similar protections for both parties. Finally, such agreements limiting liability and remedies between the parties do not in any way eliminate the warranty of good faith, which is present in all contracts in Virginia and which, as noted below, would ultimately provide the protection which Judge Hancock felt was missing.

Other than recording a lis pendens or a copy of the contract itself there is not other way to "record a contract or any memorandum of contract" in the Commonwealth of Virginia. The parties agreed in Paragraph 18(c) that the Manns were expressly prohibited from recording the Contract or any memorandum thereof, and that upon any attempt of recordation, Addicott Hills could declare the Contract null and void. The Manns did record a lis pendens against the subject property on April 3, 1987. On November 19, 1987, this Court found that the recording of a Memorandum of lis pendens which asserted a contractual right of specific performance was not a recording of a memorandum of the Contract, even though by the court's own rules, the contract was included in the memorandum of lis pendens in its entirety, Rule 1:4(i), Rules of the Supreme Court of Virginia. So now, it is deemed that this suit is not barred by the Contract under Paragraph 15(b) because that paragraph was found by Judge Hancock to be 'unenforceable', Decree 6/12/87, and that the Contract was not declared null and void by Addicott Hills as a result of the Manns willful breach of Paragraph 18(c) because the recording of a memorandum of lis pendens requesting specific

performance of a contract is not the same as recording any memorandum of contract, by Judge Plummer by Decree 11/19/87.

The final Paragraph of the Addendum states that the Purchaser "shall" be deemed in default of this Contract and the provisions of the Contract shall govern if the Purchaser fails to comply with the provisions of the Addendum concerning the listing of their house. This Court has already found that the Manns' failed to comply with this provision. TR. 11/19/87, the Court at 153. ("There is no question that the literal terms of the listing agreement provisions of the Contract were not complied with.") Therefore, the only question is whether the "literal terms" of the Contract control.

Both Manns intended to live up to the Contract when they signed it. TR. 11/19/87, Mr. Mann at 32, Mrs. Mann at 33. Both Manns admitted at trial that Addicott Hills had demanded that they list their house. TR. 11/19/87, Mr. Mann at 31, Mrs. Mann at 35, 40, 41 and 49. Mr. Mann knew that he had a way to void the Contract in January 1987, TR. 11/19/87, Mr. Mann at 20, that he never told Addicott Hills that their financial position had changed. Id. at 29-30. Neither Mr. Mann nor Mrs. Mann ever offered an excuse why they had not listed their home almost two months after the Contract required it to be listed. The Manns are asking the Court to refrain from enforcing the intent of the parties as expressed by their own words. There is no question raised by the Manns as to ambiguity. The Contract is clear. This Addendum says that if you fail to do what the Addendum requires you to do in certain specifics, then you are deemed in "default" of the Contract. Similarly, the Contract in

Paragraph 15(a) is equally clear: if the purchaser is in default of the Contract, the Contract is terminated.

The Manns are asking this Court to relieve them from their admittedly willful failure to list their home and from their inherently willful recording of the lis pendens. Their only basis for this extraordinary request is that after the breach and after the forfeiture they want the Court to waive their financing contingency, waive the sale of their existing residence contingency and ignore their other breaches of the Contract and ultimately, allow them to purchase the house and allow Mrs. Mann to receive a commission of almost ten thousand dollars.

The house framing began on about November 13, 1986 as evidenced by testimony and the construction logs. See Defendant's TR. Ex. "1" and TR. 11/19/87, Mrs. Lindsay at 117. The Manns presented no evidence to contradict this date, therefore the evidence of the listing agreement was required to be produced by the Manns to Addicott Hills no later than November 28, 1986. Listing the Manns existing residence in compliance with the Contract would have been a simple task given that Mrs. Mann was a licensed real estate agent, working for a reputable broker that does multiple listings. But after almost two months and multiple notices the Manns refused to list their home in compliance with the Contract. TR. 11/19/87, Mr. Mann at 31, Mrs. Mann at 35, 40-41 and 49.

The Manns have admitted that "After the subject Contract was ratified, you did not immediately commence to use diligent and good

faith efforts to sell Buyer's residence . . ." (Request For Admission 10).

The Manns also admitted that "After the subject Contract was ratified you did not immediately list the Buyer's Residence . . . with a reputable real estate broker." (Request For Admission 11).

In a letter received January 27, 1987 (dated January 21, 1987), Mrs. Mann, one of the purchasers and as noted above, the realtor on the sale, wrote to Addicott Hills offering to list the house [the Mann's Residence] as of March 1, 1987 and included a copy of the executed post-dated listing agreements. Plaintiff's TR. EX. "4". She noted in her letter:

"Above all, I would like to assure the builder that we are not trying to sidestep the issue; rather, we are attempting to determine a realistic occupancy date . . ." (Emphasis supplied)

This Court must determine as a matter of law that this letter constituted an offer to modify to the Contract, with knowledge that such offer was rejectable at will by Addicott Hills. No other information has ever been offered by the Manns as to why they did not timely list their existing residence.

On January 30, 1987 as a result of the Manns failure to timely list their property, Addicott Hills terminated the contract, and expressly rejected the offer to permit the Manns' to list their home as of March 1, 1987, instead of within fifteen days of the start of framing as required by the Contract.

Other pertinent parts of the Contract are:

Paragraph 3(b) of the Agreement provides in pertinent part:

Seller shall complete construction of the dwelling on or before November (the "Completion Date"); provided, however, that if Seller shall be delayed at any time in the progress of construction by Acts of God, labor disputes, Seller's inability to obtain material and/or labor, inclement weather, and any other causes beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay. Seller undertakes and agrees to complete construction of the dwelling within a period of one (1) year after the date of this Contract, notwithstanding any longer period which may otherwise be provided for under this agreement.

The Delivery Addendum states in pertinent part:

1. Purchaser acknowledges that the projected delivery date is an estimate only and cannot be guaranteed by the Seller or its agent, Builders Marketing, Inc.

Paragraph 3(d) of the Agreement provides in pertinent part:

It is understood that Purchaser is purchasing a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of the dwelling and that Purchaser shall acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion. Equitable title shall remain vested in Seller until delivery of deed.

The house under contract was completed in September 1987.

Plaintiff's TR. EX. "9". The Deed of Dedication, Subdivision and Easement was recorded after a great many problems in the approval process with the County. Other delays in completion were attributable to soil conditions, mud, community groups and/or concerned citizens groups, weather, availability of labor and/or supplies. See Defendant's TR. EX. "1" and Plaintiff's TR. EX. "4". These delays in the commencement and progress of construction were due to causes beyond reasonable or practical control of Addicott Hills. In

addition, after the sale to the Manns fell out, work on the house was slowed.

## ARGUMENT

### I. THIS COURT MUST ENFORCE THE PLAIN MEANING RULE.

Courts of equity must follow the law. Nelson v. Jennings et al., 2 Pat. & H. 357, 368 (1856). See Coles Adm's v. Ballard et al., 78 Va. 139, 149 (1883). See also Jackson v. Holmes, 307 So. 2d 470 (Fla. Dist. Ct. App. 1975) (Cited by the Plaintiff's as good law in their brief.) While Courts of Equity are charged with the conscience of the community, they are not allowed to abuse their authority by relieving individuals from their solemn bargains, however improvidently these bargains may have been made. Newport News v. Doyle and Russell, 211 Va. 603, 607 (1971); Smyth Bros. et al. v. Beresford, 128 Va. 137, 170 (1920); Portsmouth v. Portsmouth, 122 Va. 258, 262 (1918). See also Jackson at 471 ("the nonperforming party should not be deprived of his rights unless it appears from the Contract that this was clearly contemplated by the parties.") (Emphasis supplied.) The Court is required to review the Contract of the parties and determine its plain meaning. After having accomplished this it is required to enforce this meaning.

II. THE COURT HAS ALREADY FOUND THAT THE MANNS HAVE NOT COMPLIED WITH THE LITERAL TERMS OF THE CONTRACT AND THEREFORE THE MANNS HAVE BREACHED THEIR CONTRACT.

---

There is no question that the Manns failed to comply with the provisions of their Contract requiring them to present a listing within 15 days of the start of framing. TR. 11/19/87, the Court at 153. There is also no question that the Contract makes this specific failure a material breach. Plaintiff's TR. EX. "1" and "2". This provision requiring a prompt listing was for the benefit of Addicott Hills.

On April 3, 1987 the Manns recorded a notice lis pendens for Lot 11, Union Farm, Subdivision 1, Fairfax County, Virginia, while the Court has found in a preliminary hearing that this does not violate Paragraph 18(c) of the Contract, which provision prohibited any recordation of the Contract or of any memorandum thereof, this decision is not binding on the trial court Rule 1:1, Rule of the Virginia Supreme Court, and in any event is clearly erroneous.

The Manns actions were in continual and flagrant violation of Paragraph 18(d) of the Contract which clearly states that time is of the essence in the Purchaser's performance of their duties. Virginia enforces this rule. Wood v. Wood, 216 Va. 922, 925 (1976); Sims v. Nidiffer, 203 Va. 749, 752 (1962); Beckett v. Kornegay, 150 Va. 636, 640 (1928). See LeRoy Dyal Co., Inc. v. Allen, 161 F.2d 152, 155 (4th Cir., S.C. 1947) for the more liberal rule outside of Virginia holding that while the common law is moving away from implied statements that time is of the essence, but that nonetheless express stipulations remain enforceable.



All of the cases cited by the Manns have some excuse cognizable by equity for their failure to comply or in fact the Courts found that the parties did comply. Prestige House, Inc. v. Merrill, 624 P.2d 188 (ORE. 181) (No demand for performance made); Jackson supra (Contract provision did not apply) Koedding v. Slaughter, 634 F.2d 1095 (8th Cir. 1980) (Defendant attempted to withdraw valid waiver.) Lipscomb v. Chadbourne, 378 So.2d 147 (La. 1979) (performance was within time required) Renouf v. Martini, 577 S.W.2d 803 (Tx. 1979) (No deadline for performance); etc. All of these cases are either distinguishable or they support Addicott Hills position, or they are contrary to controlling Virginia precedent.

The Manns' failures are breaches of the Contract, no excuse has been shown and the Contract requires certain results to flow from these breaches. If there is no excuse then the Contract must be enforced. Usinger supra. at 1020 ("the purchaser . . . showed no excuse for its lateness . . .") (As stated above this case is cited as good law by the Manns.)

III. THE CONTRACT DECLARES THAT THE MANNS' FAILURE TO DELIVER A COPY OF THE LISTING AGREEMENT TO ADDICOTT HILLS WITHIN THE PERIOD SPECIFIED [15 DAYS AFTER THE START OF HOUSE FRAMING TO BE MATERIAL.

---

A. This Court Is Not Free To  
"Interpret" An Unambiguous  
Document.

---

Rules of construction only apply when a Contract is ambiguous. The contract in issue here is not ambiguous. The Supreme Court of Virginia stated in Wilson v. Holyfield, 227 Va. 184, 187 (1984): "The principles surrounding court review of contracts are well

settled. Contracts are not rendered ambiguous merely because the parties disagree as to the meaning of the language employed by them in expressing their agreement." See, Ross v. Craw, 231 Va. 206, 212-213 (1986). In Berry v. Klinger, 225 Va. 201, 208 (1983), the Virginia Supreme Court defined "ambiguity" as doubtfulness, or doubleness of meaning, cited in, Renner Plumbing v. Renner, 225 Va. 508, 515 (1983). The language of this Contract is unequivocal.

In the absence of ambiguous language the Court must enforce the agreement of the parties as it finds it. The Court is not free to make a new agreement, nor is it free to interpret an agreement that is free from ambiguity. Id.

B. The Contract Is Clear And Should Be Enforced.

This Contract is not ambiguous. The intent of the parties is clear. It is obvious that the Manns are in default. TR. 11/19/87, the Court at 153. The Manns' problem with the Contract is not that the document is ambiguous, but rather that they do not like what it says, given the position which they have placed themselves in. The Court should not dispense its sympathy for those who have purposefully, however improvidently, placed themselves in a position of default. Rather the Court should concern itself with the rights of Addicott Hills which is the victim of a willful default by the Manns. In the absence of ambiguity the Court is required to enforce the Contract as written.

C. The Court Cannot Simply  
Disregard The Contract Or  
Rewrite The Contract.

The parties being sui juris are empowered to make their own agreements without help or hindrance from this Court. Lerner v. The Gudelsky Co., 230 Va. 124, 132 (1985). While the Manns have requested this Court to twist or turn the Contract in the light of the Court's own conscience or business judgment or in light of later discovered facts or in any way that allows them to buy the house, such an incredible request does not carry with it the power to comply. The Court must enforce the intent of the parties, as the intent of the parties is expressed within their own words in their Contract. Supra. Newport News at 607; Smyth Bros. at 170; Portsmouth at 262.

D. The Parties Contract  
Is The Law Of This Case.

The Contract is the law of the case. Winn v. Aleda Const. Co., 227 Va. 304, 307 (1984); Mercer v. S. Atlantic Insurance Co., 111 Va. 699, 704 (1911). The Virginia Supreme Court, in Ross at 212, held:

A well settled principle of contract law dictates that 'where an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself.' Globe Company v. Bank of Boston, 205 Va. 841, 848 (1965).

The Supreme Court of Virginia has been adamant and clear on this inviolability of the unambiguous contract and has repeatedly and recently reversed lower courts on this issue. See Westbury Coal Mining Partnership v. J. S. & K. Coal Corp., 233 Va. 226, 229-230

(1987), ("Resting our decision, as we did in Ames v. American National Bank, 163 Va. 1, 38 (1934), upon 'what the instrument itself says it says,' . . ."); Lerner at 132. ("Where an agreement is complete on its face and is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself."); Wilson at 187 ( . . . it is the duty of the court to construe a contract as written . . ."); Meade v. Wallen, 226 Va. 465, 467 (1984); Eagler v. Little, 217 Va. 869, 873 (1977). In Meade at 467 the Court stated:

It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in construction of [the] contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares.

The Court also said in Wilson at 187: "Courts cannot read into contracts language which will add to or take away from the words already contained therein." The Court may not go outside a plain and unambiguous instrument to search for the instrument's meaning because the instrument is the repository of the final agreement of the parties. Berry at 208.

The Virginia Supreme Court has also upheld lower courts invoking the absolute authority of an unequivocal contract. Berry at 298; Winn at 307; Quesenberry v. Nichols and Erie, 218 Va. 667, 671 (1968); Globe Company at 849.

E.    The Parties Have Negotiated  
      A Sale Of Existing Residence  
      Addendum, Which Has Become A  
      Part Of Their Contract Which  
      Controls This Case.

The Contract's parts, signed contemporaneously, must be construed as parts of a single transaction. The Virginia Supreme Court has repeatedly held that contemporaneously executed documents concerning the same matter must be construed as parts of a single transaction. "Where two papers are executed at the same time or contemporaneously between the same parties, in reference to the same subject matter, they must be regarded as parts of one transaction, and receive the same construction as if their several provisions were in one and the same instrument." Oliver Refining Co. v. Portsmouth Cotton Oil Refining Corp., 109 Va. 513, 520 (1909). See, Am. Realty Trust v. Chase Manhattan, 222 Va. 392, 403 (1981); J.M. Turner & Co., Inc. v. Delaney, 211 Va. 168, 171 (1970); Nelson and Co. v. Taylor Heights Development Corp., 207 Va. 386, 391 (1966); The Texas Co. v. Northup, 154 Va. 428, 440-441 (1930); Dime Deposit Bank v. Wescott, 113 Va. 567, 573 (1912). The Manns contemporaneously signed, on March 1, 1986, the Addendum, the Delivery Addendum, and the Agreement. Thus, the Addendum, the Delivery Addendum, and the Agreement must be construed as parts of a single contract covering a single transaction.

i.    The Addendum creates a contingency  
      beneficial to the Manns.

The Addendum allows the purchasers to avoid its obligations under the Contract in the event that their house is not sold. This is a benefit to the purchasers. The purchasers gain a right to

avoid the Contract and have no liability under the Contract should they be unable to sell their house. The only agreement they made to acquire this right is an agreement relating to their efforts to sell their house.

By the express terms of this Addendum any failure to secure a written Contract for the sale of Buyer's Residence by reason of Buyer's actions or failure to act, or if Buyer fails to deliver a copy of the Sales Contract, or a copy of the listing Contract, to the Seller within the time period above specified, the "Buyer shall be deemed in default of this Contract and the provisions of Contract shall govern." Plaintiff's TR. EX. "1". (Emphasis supplied).

This language is mandatory not precatory. This language clearly expresses the intent of the parties that the failure of the purchaser to perform the acts enumerated shall be a material breach subject to the default provisions of the Contract. There is no room for interpretation here.

- ii. The creation of such a contingency  
is an extraordinary concession by  
Addicott Hills.

Addicott Hills agreed to construct a house costing almost a third of a Million Dollars. At the same time Addicott Hills is beginning construction of this house for the Manns, the Manns are not required to be absolutely liable for the purchase of the house. Because of this contingency there is no ability retained by Addicott Hills to enforce the Contract specifically. The Contract at this point, even before Addicott Hills began to personalize the home to

the requirements of the Manns is extraordinarily one-sided, in favor of the Manns.

There is little doubt that if the housing market had moved against these parties and the Manns were unable to sell their house and therefore were unable to purchase the Addicott Hills house, and because of the adverse movement of the housing market that the value of the house built by Addicott Hills went down, the Manns could have refused to purchase the house that Addicott Hills built and customized for them. This risk was specifically assumed by Addicott Hills. But this risk was assumed with the understanding that any breaches as set forth in Addendum would be deemed material by this Court and would be enforced by this Court.

iii. The listing within 15 days of framing provision is for the benefit of the Seller and is not waivable by the Manns.

---

The right of the seller to terminate the Contract upon failure to list within 15 days of the start of house framing is reasonable and fully negotiated, given the risk faced by Addicott Hills in constructing an enormously expensive house with a contingent Contract. The right of Addicott Hills to terminate the Contract upon the stated events contained within this Addendum is reasonable when compared with the granting of such an extraordinary right of contingency to the Manns.

Not only did Addicott Hills not waive the 15 day time limit it repeatedly notified the Manns to list. Only after the Manns refused to comply was the contract terminated. The Manns have cited as good law cases to this Court where mere passage of time is sufficient for

a forfeiture. Usinger at 1020. The flat, unexplained refusal of the Manns is much worse. "When the sacredness of contracts fairly entered into shall be disregarded, under any pretense, there will be an end of all confidence and protection of persons or property." Kendall Bank Note Co. v. Commissioners Sinking Fund, 79 Va. 563, 574 (1884) (Emphasis supplied). This rule of law and not man is essential to the trust which Addicott Hills placed in the Manns in honoring their agreement. In going ahead and constructing a house for almost a third of a Million Dollars, Addicott Hills fully performed its part of the bargain. The Manns did not.

F.    Materiality Is Not Objectively  
      Determined But Is To Be Gleaned  
      From The Words Of The Parties  
      As Expressed In Their Own Contract.

In Neely v. White, 177 Va. 358, 366 (1941) the issue of material breach centers upon whether the breach goes to "the root of the contract" and whether the damage is easily liquidated and compensable. The Manns' breaches are material most importantly because the Contract makes them material, Addendum, but also because they go to the root of the Contract and because the damage is neither easily liquidated nor compensable.

Each of the Manns' breaches violated an express provision of the Contract upon which Addicott Hill expressly relied. If any purchaser much less a licensed real estate agent makes a specific bargain and is then allowed to ignore vital elements of that agreement, then a seller's future ability to make a contract is severely compromised. See also Ballou v. Basis Construction Company, 407



F.2d 1137, 1140 (4th Cir., 1969) (Doctrine of substantial performance is designed to assist a party guilty of only unintentional and "trivial breaches of contract."); Schneider v. Dumbarton Developers, Inc., 767 F.2d 1007, 1012-1014 (D.C. Cir., 1985).

The Manns should not be allowed to trivialize their multiple violations of their responsibilities. They made a bargain. They broke it absolutely on purpose. They should be required to live with the consequences of the actions which are set forth in their Contract.

G. The Breaches Are Material.

The Manns cannot seek refuge within the doctrine of immaterial breach (or its parallel doctrine, substantial performance) because a willful breach in bad faith shuts the gate on that doctrine. Clearly Mrs. Mann, a licensed real estate agent with 10 years experience, Plaintiff's TR. EX. "4", understood her obligations under the Contract. The Manns willfully, for their own advantage, breached their Contract with Addicott Hills. Although the Supreme Court of Virginia has not yet spoken on the effect of a willful breach, there is irresistible support for the statement that a willful breach in bad faith cannot be an immaterial breach. See Callahan Industries, Inc. v. Smirolodo, 474 N.Y.S.2d 611, 612 (A.D. 3d, 1984); Typhoon Air Conditioning Co., Inc. v. Fried, 24 A.2d 926, 927 (1942); Hadden v. Consolidated Edison Co., 356 N.Y.S.2d 249, 255 (1974); 17 Am. Jur. 2d Contracts §377, pp. 820-821 (1964); Second

Restatement of Contracts, §241, p. 237; Corbin on Contracts, §707, pp. 327-331 (1960); Williston on Contracts 3rd Ed., §842; Simpson on Contracts, §§334-335 (1965); Calmari and Perillo on Contracts, pp. 407-410 (1977).

H.     The Common Law Rule Against  
Forfeiture Is Inapplicable In  
the Instant Case.

The common law rule against forfeiture is inapplicable in the instant case. As the Virginia Supreme Court stated in Newport News at 607: "The rule that courts do not favor forfeitures has no application to cases such as the one at bar and is never carried to the extent of relieving parties from the express terms of their own contracts." See Renner at 515 (1983) and Portsmouth at 262 and Jackson at 71. Since under the law of the Commonwealth of Virginia, Paragraphs 15(a) and 18(c) of the Contract each expressly require forfeiture subsequent to the breach, any common law rule against forfeiture is inapplicable.

If the Court fails to enforce this Contract and instead relieves the Manns from the effects of their admitted willful breach of the Contract then the Court will have done exactly what the Supreme Court of Virginia said Judge Jamborsky could not do in the Lerner case. Similar to this case the Supreme Court held in Lerner: "The plain language of the Agreement was designed to protect him against dangers of the very kind which in fact arose." Lerner at 133. The plain language of the Contract, requiring that the house be listed within 15 days and stating that the alternative was

termination were designed to protect Addicott Hills "against dangers of the very kind which in fact arose." Id. There is no excuse or license plead by the Manns.

While the Manns have given no reason, they have asked the Court to excuse their lack of performance, but the Court is not allowed to excuse performance unless such performance is inherently impossible. Virginia adheres to the strict standard of objective impossibility rather than other standards in accepted other states. Ballou at 1140. Not only is there not any impossibility alleged, it is unquestioned that the actions required of the Manns were in essence totally possible and the Manns purposefully and willfully refused to do what the Contract clearly required them to do. TR. 11/19/87, Mrs. Mann at 50.

Similarly the Court is not allowed to find that the Manns' breaches were cured by substantial compliance. Eagler at 873. There is no compliance with the Contract by the Manns. Not only is there no compliance there is willful breach.

The Eagler case is directly on point and very instructive. The Manns were in breach when Addicott Hills exercised its right of forfeiture. In the Eagler case, while "the trial court held, in effect, that even after the right of forfeiture had been exercised, the several acts of forfeiture were cured by "substantial compliance." Eagler at 873, and therefore there was no forfeiture. But, the Virginia Supreme Court held otherwise and reversed the trial court on this very issue. Similarly, the Manns were, as this Court noted at the conclusion of taking evidence, clearly in default when

Addicott Hills terminated the Contract. Therefore according to the controlling precedent as set forth in Eagler, the Manns could not waive the contingency and cure the default after the right of forfeiture had been exercised. The case is directly on point on this issue.

The Manns are asking this Court, in spite of their willful failure to perform the Contract, to find that the Manns nonetheless have the right of specific performance since after being notified of their default by Addicott Hills and after the Contract was terminated, the Manns waived the 90 day contingency in the Addendum. Plaintiff's EX. "6". Under Eagler, supra this does them no good. In any event the 15 day contingency is the one that needs to be waived, and that belongs to Addicott Hills not the Manns. Specific performance is an equitable right which can only be obtained by parties having clean hands. In effect, the Manns are asking this Court to find that they could breach their Contract with impunity and that equity can be made to reward a wrongdoer. A curious position at best and one that finds no support even among the far flung cases, stretching from Florida to Oregon and beyond, cited by the Manns.

#### IV. THE CONTRACT IS NOT SEVERABLE.

##### A. The Words Of The Contract Say The Contract Is Not Severable.

The parties in their own words have expressed their view that the Contract is "entire." Plaintiff's TR. EX. "2", Paragraph 18(e).

The word "entire" in this sense is a term of art as specifically defined as "time is of the essence". Therefore, it is the expressed intent of the parties that this Contract be viewed as one entire Contract and that the covenants are not independent but are each dependent upon the other. The concept of a severable contract is more applicable to multiple purchase contracts, (e.g. 10 widgets for fifty dollars). See Buchanan v. Buchanan, 174 Va. 255, 278 (1940). (The divisibility of the subject matter, although not determinative is indicative.) Simpson, Contracts at 318. Calmari and Perillo, Contracts at 429-431. In the instant case, since the promised performance by Addicott Hill is a single one, (a single sale), this is also indicative of an entire contract. An entire contract is not severable.

B. Under Common Law The Absence  
Of A Survival Clause Means  
That If Any Part Of The Contract  
Is Voided, The Entire Agreement  
Fails.

---

There is no survival clause in this Contract. Therefore, in the absence of such survival clause, the removal of any part of this Contract by the Court renders the Contract void and unenforceable. See Engleby v. Harvey, 93 Va. 440 (1896). Noyes' Ex'x v. Humphreys, 52 Va. 335, 11 Gratt. 636 (1854). Judge Hancock's prior finding that Paragraph 15(b) is unenforceable renders the Contract void. Judge Plumber's prior finding that the recording of a memorandum of Lis Pendens does not violate Paragraph 18(c)'s prohibition against recording "any memorandum" of the Contract is reversible error or it

reads yet another provision out of the Contract. Therefore since the Contract is void there is nothing for this Court to specifically enforce and the Manns case should be dismissed.

C. Judge Hancock Erred In Ruling  
Paragraph 15(b) Of The Contract  
Was Unconscionable.

The Court erred in ruling that Paragraph 15(b) is unconscionable. Paragraph 15(b) does not even approach the very high standard for unconscionability set by the Virginia Supreme Court. An unconscionable bargain is "one that no man in his senses and not under a delusion would make, on the one hand, and no fair man would accept, on the other." Smyth at 170. See Eagler at 872. In Banner v. Rosser, 96 Va. 238, 251 (1898) the court stated:

"The further objection was made that the agreement was unconscionable. . . . Can it be said that he acted unwisely, or that his conduct was not that of a prudent business man? But whether wise or unwise the agreement, in view of the testimony that he had the capacity to make it, and that it was his own free voluntary act, cannot be impeached, however unreasonable or imprudent it may now seem to others."

Mrs. Mann is a ten (10) year veteran real estate agent. Plaintiff's TR. EX. "4" and TR. 11/19/87, at 48. She knew, far better than most home purchasers, the obligations she was undertaking. Given the circumstances of the transaction, and the experience of the parties, the Contract is not unconscionable.

Once again the intention of the parties is to be found from their own words. Buchanan at 278; Eschner v. Eschner, 146 Va. 417, 422 (1926); Shelton v. Stewart, 193 Va. 162 (1951); Allemon v. Augusta National Bank, 103 Va. 243, 249 (1904); Bream v. Marsh, 31

Va. 852, 853, 4 Leigh 21, 25, (1832). As the "trial" court this court after a full trial must accept responsibility for or reject the prior orders which have been entered in preliminary motions.

Rule 1:1 Rules of the Supreme Court of Virginia.

"While the jurisdiction undoubtedly exists in the courts to avoid a contract on the ground that it makes an unconscionable bargain, nevertheless an inequitable and unconscionable bargain has been defined to be 'one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other.' The inequality must be so gross as to shock the conscience."

Smyth at 170. This cannot be said of the Contract in the instant case. This is the standard which this Court must find has been violated by Paragraph 15(b) in order to avoid enforcing the letter of the Contract.

"But whether wise or unwise the agreement, in view of the testimony that he had the capacity to make it and that it was his own free voluntary act, cannot be impeached, however unreasonable or imprudent it may seem to others."

Banner at 251. There is no rule which allows a Court of equity any more power than this. See also, Jackson cited by the Manns as good law.

D. If A Court Strikes Out Yet  
Another Single Provision Of  
This Contract, Then The Entire  
Contract Fails.

Judge Hancock has said Paragraph 15(b) is unenforceable. Decree 6/12/84. Judge Plumber has defined Paragraph 18(c) out of existence. Decree 11/19/87. And now the Manns are asking the Court

to remove several more provisions including the entire Addendum, and Paragraphs 2, 15(a) and 18(d) and (e) of the Agreement.

Virginia case law clearly states the consequences of a court striking down a single provision of an entire contract: the entire contract fails. Eugleby, supra. McCrowell v. Burson, 79 Va. 290, 303 (1884); Noyes, supra. The entire contract will either stand or fall together. Either all provisions of the "entire" Contract apply or the "entire" Contract is void. "The court cannot write a new contract for the parties even when, in light of the facts known to them the Court might think they should have adopted different language. The Court should have given effect to the plain words of the Agreement." Lerner at 132, Berry at 208, Usinger at 1021.

Similar language is found throughout Virginia cases. In McCrowell at 303, the Virginia Supreme Court stated:

It is also true that where there is an entire consideration for the defendant's promise, made up of several particulars, and one of these consists of an agreement by the defendant, which the statute of frauds requires to be in writing, and which, for want of such a writing, is void, the whole consideration is void, and the promise cannot be supported.

The idea that entire contracts are void if a portion fails is also supported by Epperson v. Epperson, 108 Va. 471, 476 (1908).

V. THE MANNS BREACHED THEIR CONTRACT IN AT LEAST THREE SEPARATE WAYS.

- A. The Manns Breached Their Contract By Failing To List Their Existing Residence Within The Time Limit Required By The Contract.



There is no question that the Manns not only failed to exhibit their listing agreement, they willfully failed to list their property during the time required by the Contract period. TR. 11/19/87, the Court at 153; TR. 11/19/87, Mr. Mann at 31; TR. 11/19/87, Mrs Mann at 49-50.

B.    There Is No Question That  
         The Manns Failed To Attempt  
         To Sell Their Property In  
         Good Faith.

This is perhaps the most telling admission by the Manns, that they failed to list and sell their property in "good faith" as required by the Contract (TR. 11/19/87, at 30) and that they now ask this Court to relieve them from this failure is incredible.

The admitted willful breach of "good faith" goes to the very essence of all contractual agreements. Simply stated, no party should have the right to breach a good faith covenant in a contract but nonetheless receive specific performance of that Contract from a court of equity.

C.    The Manns Breached The  
         Contract By Recording A  
         Lis Pendens.

Recording the lis pendens created a statutory lien upon Addicott Hills' title. This is material. The courts are required to hold the parties to their bargain. Eagler at 873. Simply stated, the Manns bargained not to record a lis pendens as expressed in Paragraph 18(c) of the Contract. The only items that can be recorded in Virginia are either the entire contract or a memorandum

signed by all the parties or a lis pendens. Either all of these are covered by Paragraph 18(c) or Paragraph 18(c) does not mean anything. The decree by Judge Plumber to the contrary notwithstanding. Decree 11/19/87. They willfully breached this part of the Contract when they recorded the lis pendens. A willful breach of this part of the Contract gives Addicott Hills the right to void the Contract.

VI. EACH BREACH BY THE MANNS WAS WILLFUL.

A. The Manns Did Not Just Fail  
To Refuse To Exhibit Their  
Listing, They Refused To List  
The Property Too.

The Manns knew failure to list their property or to exhibit the listing agreement was a material part at least as far as Addicott Hills knew of their ability to purchase the house. Defendant's TR. EX. "4" and "7". They cannot be surprised that Addicott Hills treated this provision of the Contract as extremely serious and revoked the Contract. Plaintiff's TR. EX. "5". The Manns had told Addicott Hills that it was essential that they sell their house within the time limits required for them to be able to make their down payment on the new house and for them to be able to qualify for a loan. Defendant's TR. Ex. "4" and "7".

B. The Willful Nature Of The  
Manns' Breaches Are Exacerbated  
By The Corresponding Breach By  
Mrs. Mann Of Her Fiduciary Duty  
To Addicott Hills.

Mrs. Mann was the selling agent on this house. She stands to be compensated to the amount of approximately Ten Thousand Dollars

(\$10,000.00), however, she fully participated in each of the above breaches, and worse than that advised other clients to do the same. TR. 11/19/87, Mrs. Mann at 146-147. A court of equity cannot order Addicott Hills to pay her for this. It would be inequitable.

C. The Willful Nature Of These Breaches Is Even More Exacerbated By Mrs. Mann's Experience As A Licensed Real Estate Agent And Her Undeniable Knowledge That Each Of The Acts Complained Of Was A Willful Breach Of The Contract.

Mrs. Mann has ten (10) years of experience as a licensed real estate agent in the Commonwealth of Virginia. See Plaintiff's TR. EX. "4" and TR. 11/19/87, Mrs. Mann at 48 and 146-150. In her letter to Sandra Lindsay of January 21, 1987 [Plaintiff's TR. EX. "4"], she told Sandra Lindsay that she had been with Coldwell Banker for ten (10) years and with three (3) years experience in new home sales. See TR. 11/19/87, Mrs. Mann at 48-49. This in and of itself makes Mrs. Mann an "expert" in the field and makes the breach even more incredible.

VII. SPECIFIC PERFORMANCE AS AN EQUITABLE REMEDY AND CANNOT BE GRANTED TO A PARTY WITH UNCLEAN HANDS.

A. Unclean Hands Is A Term Of Art And Applies In This Situation.

Unclean hands does not imply moral turpitude or scienter (guilty knowledge) rather it shows a party acting in a way which they are not allowed to act. Bond v. Crawford, 193 Va. 437, 447 (1952). In effect, in this particular situation the Manns would be

taking advantage of their willful breach of Contract, and their willful breach of their fiduciary duty. This a Court of equity ought not to countenance.

Mrs. Mann, if she secures this house through specific performance, will also receive as a commission, almost Ten Thousand Dollars (\$10,000), she will therefore receive a double profit in spite of her breach. She will get both the house and a commission. TR. 11/19/87, Mrs. Mann at 146. She will get this commission in spite of the fact that she has admitted to this Court numerous breaches of practically every duty a real estate agent owes to its principal. And she will receive this award from a Court of Equity. Such a result is totally and completely wrong. TR. 11/19/87, Mrs. Mann at 48-50.

"Equity wisely views with jealousy transactions between persons holding a fiduciary or confidential relation to each other, and will not suffer one party. Standing in a relation of which he can avail himself against the other, to derive an advantage from that circumstance, for it is founded in a breach of confidential." Banner v. Rosser, 96 Va. 238, 245 (1898).

It would be incredible, after closely scrutinizing this transaction that a Court of Equity would order Addicott Hills to pay Barbara Mann almost Ten Thousand Dollars (\$10,000.00) for acting as a real estate agent. In this transaction where she has a fiduciary duty to Addicott Hills when there is every evidence that not in one situation did she put her principal's interest ahead of her own. On the contrary, at every turn she looked out for herself and neglected her principal. TR. 11/19/87, Mrs. Schwab at 141-150.

B. Since No Damages Have Been  
Proven, No Damages Are Available.

The Manns have alleged damages, TR. 11/19/87, Mrs. Mann at 12, but at the trial they could prove no damages which are recognized by this Court. Furthermore, no documents were produced in discovery or cited in response to interrogatories or request for production of documents to support such alleged damages. Therefore, in the absence of proof, they can get no remedy from this Court.

VIII. THE MANNS HAVE ELECTED SPECIFIC PERFORMANCE INSTEAD  
OF DAMAGES AND THEREFORE NO DAMAGES ARE AVAILABLE.

The election of specific performance is binding. Hurley v. Bennett, 163 Va. 241, 253 (1934). Since such an election has been made (TR. 11/19/87, Mr. Mann at 13) no damages can be paid. It must dismiss this claim since a valid election has been made.

IX. PARTIES ARE REQUIRED TO PROVE FULL PERFORMANCE OF THEIR  
OWN PART BEFORE THEY CAN REQUIRE SPECIFIC PERFORMANCE OF  
THE OTHER PARTY.

The Manns' have failed to prove full performance they have admitted that their performance was at best defective, and at worst willfully wrong. TR. 11/19/87, the Court at 153 (Court holding that "literal terms of the listing were not complied with."). TR. 11/19/87, Mr. Mann at 31 (Lowry Mann signing the March 1st listing.) A party in breach of the agreement cannot enforce such agreement. Lerner at 132.

X. THE FAILURE OF THE MANNS TO PROVE THAT THE CONTRACT WAS SPECIFICALLY ENFORCEABLE BY ADDICOTT HILLS MEANS THE SPECIFIC PERFORMANCE IS NOT AVAILABLE TO THEM.

"There must be mutuality before there can be a decree for specific performance." Buchanan at 277. Edwards v. McTyre, 271 S.E.2d 205 (GA. 1986) (cited as good law on the subject by the Manns). There is no argument or consideration for specific performance in this Contract, these rights were waived by the parties respectively. Since Addicott Hills does not have a remedy for specific performance under the rule of mutuality the Manns' cannot have specific performance. Ib.

XI. A PARTY IN FIRST BREACH CANNOT ENFORCE THE CONTRACT.

A. Specific Performance Is An Act Of Affirmation Of The Contract.

"The Contract was based upon the mutual promises of the parties. The party who commits the first breach of a contract, is not entitled to enforce it, or to maintain an action thereon, against the other party for his subsequent failure to perform". Hurley v. Bennett, 163 Va. 241, 253 (1934).

Even if the Manns breach is not material it is most certainly first and it precludes specific performance.

The Virginia Supreme Court stated the law in Johnson v. Hoffman, 130 Va. 335, 344 (1921):

"The rule is strict and inflexible that a plaintiff has no right of action for damages for breach of contract where he himself has breached the contract." (Emphasis Supplied).

See ADC Fairways Corp. v. Johnmark Construction, Inc., 231 Va. 312, 318 (1986); Neely at 366-367; Hurley at 253.

This rule is not limited by materiality but is "strict and inflexible." Johnson at 344. The Manns are in breach of the Contract therefore, even assuming their breaches were immaterial, nonetheless because of their failure to prove performance of the Contract (TR. 11/19/87, Mr. Mann at 31 and Mrs. Mann at 61) they cannot now have specific performance. As noted above, the Court is not allowed to find "that breaches can be cured by substantial compliance." Eagler at 873.

"It is equally well settled that to entitle a plaintiff to the benefit of the rule [substantial performance rule], it must be shown that his failure to completely perform was not willful or tainted with bad faith." Typhoon Air Conditioning Co., Inc. v. Fried, 24 A.2d 926, 927 (Pa. 1942) (Emphasis supplied).

In the absence therefore of showing that the failure to perform completely was not willful or tainted with bad faith, there is no right of specific performance. The Manns breaches are clearly willful.

#### XII. THE MANNS DID NOT AND COULD NOT WAIVE THE FIFTEEN DAY DUTY.

##### A. Not A Waiver Because You Cannot Waive A Duty.

The Supreme Court of Virginia in The Covington Virginian v. Woods, 182 Va. 538, 547 (1944) defined waiver:

A waiver, such as is claimed here may be generally defined as a voluntary abandonment of some known legal right, advantage or privilege, or such conduct as warrants an inference of the abandonment of such right, or the intentional doing of an act consistent with claiming it, all of which is usually dependent upon the peculiar circumstances of the case. Cited in Funkhouser v. Million, 209 Va. 89, 91 (1968).

Addendum Subsection (b) states that the Manns shall immediately list their residence within 15 days after framing begins. Framing began on November 12, 1986. TR. 11/19/87, Mrs. Lindsay at 117. The listing was due by November 28, 1986 at the latest. On January 13th (Plaintiff's TR. EX. "3") Addicott Hills sent the Manns a letter giving the Manns 5 additional days to fulfill their obligation. Manns failed to meet this additional five day deadline. TR. 11/19/87, Mr. Mann at 31. On January 27, 1987 Addicott Hills received notice stating that the house would be listed on March 1, 1987. Addicott Hills rejected this offer in their letter dated January 30, 1987 and terminated the Contract as provided for in the Addendum. After the forfeiture the Manns sent a letter to Addicott Hills dated February 3, 1987 in which they claimed to waive the contingency. Addendum Subsection (b).

Addendum Subsection (b) is clearly not for the exclusive benefit of the Manns but rather obviously also for the benefit of Addicott Hills. Until the Manns either satisfied or waived the contingency, Addicott Hills could not obtain additional construction financing. Also, while the Manns equivocated, Addicott Hills was prevented from locating a serious purchaser. Clearly Addendum Subsection (b) is not simply a right of the Manns but also one of their duties. Under Covington, infra, a waiver is the abandonment of a right, not a duty.



B. Once A Party Has Relied Upon  
A Breach It Cannot Be Waived.

Even if the Manns had the power to waive Addendum Subsection (b) after the Contract terminated, they would be estopped because Addicott Hills relied on their breach and acted according to their detriment. The Supreme Court of Virginia articulated the doctrine of estoppel by conduct in Harris v. City of Roanoke, 179 Va. 1, 5 (1942): One is estopped from denying what by one's conduct one has induced others to act upon as true. The Virginia cases are legion which establish this Rule." T . . . v. T . . ., 216 Va. 867, 873 (1976) holds: "Elements necessary to establish equitable estoppel, absent a showing of fraud and deception are representations, reliance, a change of position, and detriment." Eagler, supra. Security Company v. Juliano, Inc., 203 Va. 827, 833 (1962); Heath v. Valentine, 177 Va. 731, 737 (1941). Silence can constitute representation for estoppel purposes:

In general, a person is required to speak only when common honesty or fair dealing demand that he do so, and in order that a party may be estopped by silence, there must be on his part an intent to mislead, or at least a willingness that others should be deceived, together with knowledge or reason to suppose that someone is relying on such silence or inaction and in consequence thereof is acting or is about to act as he would not act otherwise.

National Airlines v. Shea, 223 Va. 578, 583 (1982), See Cantrell v. Booher, Administratix, 201 Va. 649, 654 (1960), Heath at 737.

Addicott Hills understandably relied upon the Manns' unequivocal refusal as a statement of their breach. Addicott Hills relied upon that breach as factual and took appropriate actions changing their position which, in the absence of that breach, would be to their detriment. Upon termination of the Contract, Addicott

Hill's placed the subject property back on the market and entered into a new non-contingent contract of sale with a new purchaser.

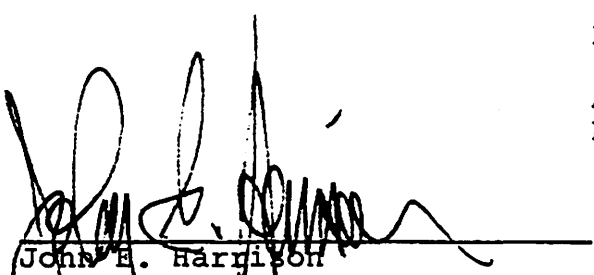
Justice and equity can only be served by estopping the Manns from now asserting a breach.

#### CONCLUSION

The Bill of Complaint filed by the Manns should be dismissed because of their prior breaches and Addicott Hills should be awarded their costs and attorney's fees.

Respectfully submitted,


ADDICOTT HILLS CORPORATION  
By Counsel



John E. Harrison  
Sandra L. Hughes  
Adam D. Elfenbein  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751  
Counsel for Defendant

#### CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first-class, postage prepaid to the offices of Jose Aunon, Esq. 9701 Main Street, Fairfax, Virginia 22031, Counsel for Complainants, this 17<sup>th</sup> day of December, 1987.



Sandra L. Hughes

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN III

and

BARBARA C. MANN,

Complainants

IN CHANCERY No. 101273

v.

ADDICOTT HILLS CORPORATION

Defendant.

**COMPLAINANTS' RESPONSE TO DEFENDANT'S MEMORANDUM**

The Defendant, Addicott Hills Corporation, has presented this Honorable Court with a lengthy brief addressing numerous issues, most of which have been argued and reargued unsuccessfully before The Honorable Quinlan Hancock, The Honorable William Plummer and now before this Honorable Court. This Brief in Response, therefore, will not readdress the issues of the enforceability of paragraph 15(b) of the contract, whether the filing of the *lis pendens* was violative of paragraph 18(c) of the contract, or whether the contract was severable or not.

Rather, this brief will address the sole dispositive issue remaining in this Cause -- whether the contingency in the Contract for the sale of the Mann's existing residence is a contingency for the sole benefit of the Purchaser. That the contingency is, in fact, for the

FILED

1998 JAN -6/ PH 2: 39

WARREN C. GARRY  
CLERK OF THE CIRCUIT COURT  
OF FAIRFAX COUNTY, VA.

sole benefit of the Purchaser has been expressly conceded by the Defendant in its Post-trial Brief, which states: "The Addendum Creates a Contingency Beneficial to the Manns." (Defendant's argument "E(i)" at page 16.)

As set forth more fully in Complainants' Post-trial Brief, the law is abundantly clear that a contingency for the sole benefit of a Purchaser may be waived, or not complied with, by the Purchaser without affecting the Seller's obligation to perform under the contract. The only effect of a Purchaser's waiver or failure to comply with a contingency for his sole benefit, is that he loses the benefit of the contingency. Thus, for example, if a Purchaser fails to apply for financing within 5 days as required by the financing contingency of his contract, he is obligated to proceed to settlement regardless of whether he has obtained financing. Similarly, if, as Defendant alleges, Complainants failed to list their existing home for sale in accordance with the terms of the contingency, they were obligated to proceed to settlement regardless of whether they were able to sell their existing home. In either instance the Seller may sue the Purchaser for damages or specific performance if he is unable to settle, but the Seller is not relieved of his contract obligations.

In the case at bar, the Manns contend that they fully complied with the requirements of the contingency. Even if this Court were to find, however, that the Manns unjustifiably failed to list their existing home in a timely manner, this failure would not constitute a

breach of contract, but rather merely a waiver of the benefit of the contingency.

Finally, despite the length of its brief, Addicott Hills proffers no justification for its failure to deliver a new home to the Manns as promised, by, or even reasonably close to, a "Completion Date" of November 1986. Indeed, Defendant had barely begun construction at that time and was physically unable to deliver possession until September 1987 when the structure was completed and the Residential Use Permit was granted. These circumstances, which were entirely under the control of the Defendant, spawned this litigation. Defendants should not now be permitted to rely upon a technicality to escape from a liability of their own making.

For the reasons stated above and in Complainants' Post-trial Brief, it is respectfully prayed that this Court issue its Decree compelling Addicott Hills Corporation to specifically perform and convey the subject property to the complainants, Mr. and Mrs. Lowry Mann.

Respectfully submitted,

  
JOSE AUNON  
Counsel for Complainants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed,  
postage prepaid, to John Harrison, Esquire, Counsel for the Defendant  
at 6849 Old Dominion Drive, McLean, Virginia 22101 this 6 day  
of January, 1988.

  
\_\_\_\_\_  
JOSE AUNON

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

-----X

W. LOWRY MANN, III, et al, :

Complainants, :

versus, :

IN CHANCERY NO. 101273

ADDICOTT HILL CORPORATION, :

Defendant. :

-----X

Fairfax, Virginia

Friday, January 22, 1988

The above-entitled action came on to be heard before  
the Honorable Jack B. Stevens, a Judge in and for the  
Circuit Court of Fairfax County, in the Fairfax County  
Judicial Center, 4110 Chain Bridge Road, Fairfax, Virginia  
22030, beginning at approximately 8:45 o'clock a.m.

AG-9-88

407



Anita B. Glover & Associates, Ltd.  
Post Office Box 100  
Fairfax Station, Virginia 22039-0100

(703) 278-8636  
278-8606  
Prince William Metro 690-2070

## 1 APPEARANCES:

2 For the Complainants:

3 JOSE E. AUNON, ESQUIRE  
4 9701 Main Street  
Fairfax, Virginia 22031

5 For the Defendant:

6 JOHN E. HARRISON, ESQUIRE  
and,  
7 MS. SANDRA L. HUGHES  
Light and Harrison  
8 6849 Old Dominion Drive  
Suite 410  
9 McLean, Virginia 2210110 C O N T E N T S

11 ARGUMENT OF COUNSEL

PAGE 3

12 E X H I B I T S13 None.  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23



P R O C E E D I N G S

(The Court Reporter was sworn.)

THE COURT: Mr. Aunon, your response to defendant's memorandum which it is indicated was filed January 6th, found its way to my office this morning, and in fact I read it just then.

Go ahead.

MR. AUNON: Your Honor, that was going to be my first question, if the Court has in its possession my two memorandums.

THE COURT: There are two memorandums. I have read the other one, and I have read this one.

MR. AUNON: You read my response also?

THE COURT: Yes.

MR. AUNON: If that is the case, Your Honor, I could repeat what I said. I will rely on those memoranda to state my case.

THE COURT: You say that the breach of the condition is solely for the complainants' benefit, the condition contingency.

MR. AUNON: That is correct, Your Honor.

THE COURT: An example you cite is one to apply for financing within five days.



1 MR. AUNON: See, if I have to apply -- in a  
2 sales contract, I have a contingency that requires me to get  
3 financing, and one of the requirements is that I apply for  
4 financing within five days, if I do not apply for financing  
5 within five days, I lose the benefit of my contingency.

6 But if I have money, I can still go ahead  
7 and buy the property.

8 THE COURT: I am not sure that an  
9 application for financing in five days would be a  
10 contingency for the benefit of the buyer. How would that be  
11 for the benefit?

12 MR. AUNON: No, I am talking about the  
13 contingency for financing.

14 THE COURT: That is what I am talking about.

15 MR. AUNON: If the contingency -- one of the  
16 requirements of the contingency is that I apply for  
17 financing within five days, and I don't apply, then I breach  
18 that. I lose the benefit of my contingency which is for my  
19 benefit.

20 THE COURT: Well, one, I would say that  
21 contingency is for the benefit of the seller, not the buyer.  
22 And, two, if you did it within five days, I would have no  
23 trouble at all finding that to be a breach of contract.



1                   How could applying for financing in five  
2 days possibly be a contingency to the buyer?

3                   MR. AUNON: No, that is not a contingency.  
4 The contingency for financing, no, no. Part of the  
5 financing requires that I apply within five days, and I  
6 don't do that.

7                   THE COURT: That is not what I read your  
8 example to be.

9                   Go ahead.

10                  MR. AUNON: Your Honor, I think this is a  
11 court of equity.

12                  THE COURT: Let me ask you a question.

13                  Why didn't the buyer list the contract and  
14 make settlement as a condition of the sale of the buyer's  
15 house coincide with the settlement on her purchase or their  
16 purchase?

17                  MR. AUNON: They could have done that, Your  
18 Honor.

19                  THE COURT: Why didn't they?

20                  MR. AUNON: Very many reasons.

21                  First of all, they never got a date for  
22 settlement, again -- a completion date. They refused to  
23 give my clients a completion date.



1 THE COURT: What does that have to do with  
2 the listing?

3 MR. AUNON: But when you are going to sell a  
4 house and you don't know exactly when the settlement is  
5 going to be, the price goes tremendously down. Who is going  
6 to buy a house when they don't know when the settlement is  
7 going to take place, a year or ten months after that.

8 THE COURT: I am just asking why not. It  
9 seems to me that would have been a very -- particularly Mrs.  
10 Mann is a real estate agent. She ought to know that better  
11 than anybody; shouldn't she?

12 MR. AUNON: Yes.

13 But again, when you sell something and you  
14 don't know when you are going to be able to deliver your  
15 property, the prices of that property -- you don't know.

16 THE COURT: I don't see that this has  
17 anything at all to do with this property. What does that  
18 have to do with this property?

19 MR. AUNON: Your Honor, that is one of the  
20 reasons my client did not list the house.

21 THE COURT: That may be a valid reason, but  
22 she may have to bear the consequences of choosing profit  
23 over completion of this contract.



1 MR. AUNON: Your Honor, on the other hand we  
2 have the builder who delays without reasonable justification  
3 the completion of the house for ten months after the  
4 delivery date.

5 THE COURT: Well, there is no evidence at  
6 all of that before me; is there?

7 MR. AUNON: Yes.

8 THE COURT: What?

9 MR. AUNON: The completion of the house was  
10 supposed to be in November '86, and they ended up in  
11 September '87.

12 THE COURT: I understand.

13 But I don't know whether that was justified  
14 or not justified.

15 MR. AUNON: They did not present any  
16 evidence at all to that effect.

17 THE COURT: You did not present any the  
18 other way; did you?

19 MR. AUNON: No, that is correct.

20 THE COURT: So that matter is not even  
21 before me. I cannot consider that; can I?

22 MR. AUNON: Well, the unreasonable delay was  
23 a tremendous delay, a ten-month delay.



1 THE COURT: How do I know it is  
2 unreasonable? Do you want me to speculate?

3 MR. AUNON: No, we are not speculating, Your  
4 Honor. It is a delay.

5 THE COURT: Well, it is a delay, yes.

6 But your characterization of it is something  
7 that I cannot --

8 MR. AUNON: But the contract says on or  
9 before November of '86, and they have the burden to prove  
10 that the delay was for a just reason, for a just cause.

11 THE COURT: Well, this is here on a summary  
12 judgment motion. So if those are necessary material facts,  
13 then I could not grant it in any event; could I?

14 Go ahead.

15 MR. AUNON: Your Honor, I think everything  
16 that I said is in the brief. Honestly I believe that equity  
17 is on the side of the complainants, Your Honor, and we would  
18 request this Court to grant specific performance on the  
19 contract.

20 THE COURT: Okay.

21 MR. HARRISON: If it please the Court, for  
22 the record, John Harrison for Addicott Hills. With me at  
23 the counsel table is Sandra Hughes, an associate in my



1 office, and Sandy Lindsay, a representative of Addicott  
2 Hills.

3 I adopt my brief.

4 I think the plaintiff has the burden of  
5 proof, Your Honor, which the Court correctly noted.

6 In their reply brief and in fact in their  
7 principal brief, the Manns rested their entire case on the  
8 proposition that, quote: the only effect of the purchasers'  
9 waiver or failure to comply with the contingency for his  
10 sole benefit is that he loses the benefit of the  
11 contingency.

12 That is in their reply brief.

13 In their principal brief and their reply  
14 brief, they cite no Virginia case that supports that  
15 proposition, absolutely none.

16 In their principal brief, they cite a few  
17 cases that circle around that.

18 THE COURT: Do you doubt that?

19 MR. HARRISON: I think that the purchaser  
20 can waive if they waive a contingency. Yes, sir, I believe  
21 that. They can absolutely waive it. If they fail to  
22 comply, they are in breach. You cannot --

23 THE COURT: We are in equity though; aren't



1 we?

2 MR. HARRISON: Yes, sir.

3 And you can set aside the breach in that  
4 extent. However, we are in equity in this case, and I think  
5 that proposition is generally true law that these parties  
6 are sui juris, and they are free to contract.

7 And their words in the contract part that in  
8 the event buyer fails to deliver a copy of the listing  
9 contract to sellers -- this is a quote -- within the time  
10 period above specified, buyer shall be deemed in default of  
11 the contract.

12 Shall, mandatory.

13 Now, that takes it out of that rule, Judge.  
14 These parties have said, we don't care what the law is. And  
15 the law in Virginia is, of course, that the contract becomes  
16 the law of the case.

17 And they are free in this state to say  
18 normally that would be the case, but in this specific  
19 instance if this happens, this is what is going to happen.

20 Now, the classic law school example is going  
21 up the flagpole. If I say I am not going to pay until he  
22 gets to the top of the flagpole, I don't have to pay, not in  
23 law, not in equity, not in anything. Because that is --





1 THE COURT: It is a unilateral contract;  
2 isn't it?

3 MR. HARRISON: That is an executory  
4 contract. That is something both sides have to do. But  
5 this is the same in that regard. That is a condition.

6 Now, I think it is clear beyond argument  
7 that the Manns failed to comply with the contract. That is  
8 what she said at the conclusion of the trial, that they are  
9 at least in technical breach. And I agree with that.

10 I don't think really there has been any  
11 question about that. They failed to deliver the listing  
12 agreement. They failed to list their house.

13 THE COURT: Well, the thing that bothers me  
14 is -- as I expressed at trial -- this is a harsh contract.

15 MR. HARRISON: Yes, sir.

16 It is a \$350,000 house.

17 THE COURT: No, I am talking about the  
18 forfeiture provisions.

19 If the buyer for some reason cannot go  
20 through with the contract, the buyer forfeits all of the  
21 deposit.

22 MR. HARRISON: No, sir.

23 THE COURT: Well, they forfeit it for



1 anything that was ordered as an option; right?

2 MR. HARRISON: No, sir.

3 I told the Court at trial that -- under  
4 certain circumstances they could. And I told the Court at  
5 trial that those circumstances do not obtain here.

6 This house has been sold to another buyer  
7 who has agreed to pay for all of those options. There is no  
8 question about forfeiting that option money, Judge, in this  
9 case.

10 THE COURT: That is not what these buyers  
11 were told at the time, though; were they?

12 MR. HARRISON: Yes, they were.

13 They were told that if they could sell the  
14 house to another -- Addicott Hills told them that if they  
15 could sell the house to another buyer who would buy the  
16 options, which is what, in spite of this litigation,  
17 Addicott Hills did, they sold the house with the options,  
18 and that buyer bought it and is going to pay for them.

19 And if that sale goes through, these people  
20 get it.

21 And there was -- in the January 30th letter  
22 which is in evidence in this case, Your Honor, which Mr.  
23 Bernstein sent to them, with regard to your deposit money,



1 the majority of the customer options have already been  
2 installed and/or ordered with the exception of the central  
3 vac and the air cleaner.

4 In addition to the \$5,000 earnest money  
5 deposit, your refund at this time will only include \$950  
6 representing your 50 percent deposit on these non-installed  
7 items.

8 Should we recover our costs for the other  
9 customer options on the occasion of the resale of this lot,  
10 the balance of your option deposit totalling \$12,092.50 will  
11 be refunded following settlement of Lot 11.

12 And I proffered to the Court in the trial  
13 that that in fact occurred and that those monies would be  
14 refunded to these people at the conclusion of the case when  
15 the settlement goes forward with the new purchasers, and  
16 that is clearly set forth in the contract, and they clearly  
17 knew it prior to this time, Your Honor.

18 Now, if the contract was silent -- if the  
19 contract did not have the language in it that said, shall be  
20 a default, a material default, then I would agree with the  
21 Court that is harsh. It may or may not be material under  
22 the circumstances, but assuming arguendo for this case that  
23 you find it is not material, then you could say, I am going



1 to set it aside.

2 But I think the proposition, Your Honor,  
3 that the parties can declare something in material default,  
4 that they are free to contract with each other and say, this  
5 will be a material default, I think the Court has to agree  
6 that that is something that freedom of contract is all  
7 about.

8 And it is not whether you think it is a good  
9 idea or I think it is a good idea. It is a question the  
10 parties have to be free if it is a free society to make a  
11 fool of themselves.

12 THE COURT: This is a contingency; is it  
13 not?

14 MR. HARRISON: To a certain extent, yes,  
15 sir.

16 THE COURT: And if I find that they waived  
17 that timely, then that is not even in the contract; is it?

18 MR. HARRISON: If they waive the entire  
19 contingency. That was the point that I made in my brief,  
20 and they never waived the financing part of the contingency,  
21 never.

22 They have only waived -- see, the important  
23 part of it, Your Honor, and it is pure argument which is why



1 it really has not come forward at this point.

2 The important part of that is, yes, they got  
3 up and they wrote my client a letter and said, we are  
4 waiving the house sale provision. But they never waived the  
5 financing part. And they admitted that on the stand.

6 Now, how is that effective? That is tied  
7 together in the following sense.

8 The documents which I showed them on the  
9 stand which were their own financials, said that they could  
10 not afford to buy this house. Their application documents  
11 which are defendant's exhibits in this case said that they  
12 needed the sale of their house for the down payment and to  
13 qualify for a loan.

14 Mr. Mann, on the stand, admitted that he  
15 knew in January that his contract -- that he could have  
16 voided because of a lack of financing being in place at the  
17 time.

18 They never either satisfied the financing  
19 contingency in Paragraph 2 of the contract, nor did they  
20 waive that part of it.

21 And that is related to the sale of their  
22 house. And I think that that is tremendously important.

23 Also on an equitable basis, Your Honor, I



**Anita B. Glover & Associates, Ltd.**

Post Office Box 100  
Fairfax Station, Virginia 22039-0100

(703) 278-8636  
278-8606

Prince William Metro 690-2070

1 think what is equally important is they just ignored two  
2 months of warnings. I mean Addicott Hills did everything  
3 they could possibly do to get this real estate agent to list  
4 her house.

5 They wrote her, they called her, they said,  
6 list it please.

7 THE COURT: Are you talking about when you  
8 say you argued the financing portion in your brief? Is that  
9 the brief that was filed before?

10 MR. HARRISON: Yes, sir.

11 Under my brief, Your Honor, Roman Numeral  
12 III, subparagraph (e), we talk about the sale of the  
13 existing residence, how that became part of the contract.

14 And Roman Numeral X, Your Honor,, the  
15 failure of the Manns to prove was specifically enforceable.

16 That begins on page 32. I apologize for the  
17 length of the brief, Your Honor, but the longer I have to  
18 write one, the shorter it gets. But this one didn't.

19 They did not ever waive the specific  
20 financing provision set forth under paragraph 2, which was  
21 something that I asked Mr. Mann.

22 A subsidiary to this, Your Honor, nowhere  
23 mentioned in any of Mr. Aunon's briefs is the fact that if



1 the Court should order specific performance --

2 THE COURT: Show me what you are looking at.

3 MR. HARRISON: Here is the brief.

4 THE COURT: I am not sure that we have  
5 anything filed in the form that you just handed me.

6 MR. HARRISON: The indexes were sent over  
7 later, Your Honor.

8 THE COURT: I have an index 10/30/87 and I  
9 have separate briefs and/or points and authorities. This is  
10 a combination.

11 MR. HARRISON: It is just a combination.  
12 Add those two together, Judge. It just gives you an index  
13 so you can get back into it.

14 MR. AUNON: I don't know that I have ever  
15 seen it.

16 MR. HARRISON: You have got it right there.  
17 This is what he is talking about. That is all it is. It  
18 just takes the index, pulls it out, and sets it on top.

19 THE COURT: We never got any index. All we  
20 got was the 10/30.

21 MR. HARRISON: The brief didn't change, Your  
22 Honor.

23 THE COURT: Are you talking about the points



1 and authorities?

2 MR. HARRISON: Yes, sir.

3 If you look on page 29 of that brief, it  
4 says under subparagraph (a), the Manns did not just fail or  
5 refuse to exhibit their listing. They refused to list it.

6 Then it goes on to say that the Manns knew  
7 their failure to list the property or exhibit the listing  
8 agreement was a material part, at least as far as Addicott  
9 Hills knew, of their ability to purchase the house.

10 THE COURT: But once they waive that, then  
11 they are stuck with the --

12 MR. HARRISON: No, sir.

13 Because they waived that contingency. But  
14 if they didn't get financing under paragraph 2, they can  
15 walk.

16 Under paragraph 2 of the contract, they can  
17 absolutely walk from the contract by failure to get  
18 financing, and Mr. Mann admitted that on the stand and in  
19 the brief -- I cite to exactly the place where he says, yes,  
20 I knew in January that we could still get out of the  
21 contract.

22 Now, the big thing about specific  
23 performance, you were talking about equitable remedies





1 earlier, Your Honor, and I think the big thing about  
2 specific performance is mutuality, mutuality of remedy. You  
3 cannot have specific performance without mutuality.

4 THE COURT: What page do you say this is on?

5 MR. HARRISON: Page 29 of the brief, Your  
6 Honor.

7 I talk about it and I cite the Court to the  
8 two documents, Defendant's Trial Exhibits 4 and 7, which  
9 they presented to Addicott Hills and said in those  
10 documents, that we need the proceeds from the sale of our  
11 house for the down payment, and we need the proceeds of the  
12 sale of the house to qualify for the new loan.

13 THE COURT: The paging I don't think is the  
14 same.

15 So I copied that copy from the copy?

16 MR. HARRISON: It certainly should be, Your  
17 Honor, from the one I just gave you unless you have got--  
18 we filed a trial memo too.

19 THE COURT: That is what I have got. Where  
20 did you file this, the Clerk's office?

21 MR. HARRISON: Yes, sir.

22 I have got the stamp filed right on the  
23 front of this one, Judge.



1 THE COURT: We don't have it. We will find  
2 it.

3 MR. HARRISON: I will be glad to give the  
4 Court another copy.

5 THE COURT: Do you have another copy?

6 MR. HARRISON: Keep my copy. I have got  
7 this one to work from. That is fine.

8 I apologize to the Court.

9 THE COURT: It is not your fault. You filed  
10 it. It is supposed to get here.

11 MR. HARRISON: Yes, sir. In any event, Your  
12 Honor, I adopt the brief. I rely on the brief, but I think  
13 the one curious point, talking about equity again, first is  
14 the mutuality of remedy, but also in neither one of the two  
15 briefs, the complainant's post-trial memorandum of points  
16 and authority and his response to ours, do the Manns,  
17 mention that Mrs. Mann gets a \$10,000 commission from  
18 Addicott Hills if specific performance is ordered for being  
19 the listing agent -- for being the selling agent, not the  
20 listing agent, the selling agent on this house. She gets  
21 that commission.

22 Now, equitably, this Court would order that  
23 that commission be paid. That is part of the specific



1 performance. For what services?

2 The testimony at the trial is that she did  
3 not perform the services that she was supposed to perform.  
4 In point of fact, not only in this case did she refuse to  
5 list, but she advised other clients to refuse to list.

6 Daurie Schwab testified to that, and it was  
7 absolutely uncontradicted by any other evidence in the case.

8 Now, that \$10,000 commission is not an  
9 insignificant thought. And the Lerner case has some  
10 language which I believe is instructive with respect to  
11 this. The Lerner case says, you cannot recover unless you  
12 prove your right to recover.

13 They have not proved any right to recover  
14 that \$10,000 commission. There is no evidence before the  
15 Court that she performed the duties of that agent.

16 Now, the failure to present that evidence,  
17 the failure to go forward with their burden of proof, is of  
18 course the plaintiff's failure.

19 That, however, would be grossly inequitable.  
20 Now, the Court has said it is a harsh contract. I think any  
21 forfeiture provision can be described as harsh.

22 Typically courts of equity do not like  
23 forfeiture provisions. I don't particularly like them.



**Anita B. Glover & Associates, Ltd.**

Post Office Box 100  
Fairfax Station, Virginia 22039-0100

(703) 278-8636  
278-8606

Prince William Metro 690-2070

1 However, the law is clear and we have cited case after case  
2 in our brief that a forfeiture provision that is not  
3 unreasonable on its face will be enforced if the facts have  
4 occurred.

5 The Lerner case stands for that proposition.  
6 Other cases that we cited, the Eagler case stands for that  
7 proposition as well.

8 Now, when you have that equitable  
9 forfeiture, equity has no special power to relieve parties  
10 from their contracts merely because the result may appear on  
11 reflection to be harsh.

12 And this is a licensed real estate agent  
13 asking this Court to relieve her from a contractual  
14 provision which is plain on its face and is not an unusual  
15 provision at all.

16 That is something else that we set forth in  
17 the brief, that that type of provision, when you are  
18 building a spec \$300,000 plus house, is not unusual and it  
19 comes up in the title provisions of this contract, it comes  
20 up in other areas of this contract which says, hey, if this  
21 happens, all bets are off.

22 There was no absolute obligation on either  
23 side to always sell the property. If there was bad title,



1 for example, Addicott Hills could either fix it or walk.

2 Both sides knew that. There were no damages for that.

3 There are certain things you cannot provide  
4 for in a building contract. Addicott Hills cannot provide  
5 for weather. They cannot provide for the county agreeing to  
6 do various things.

7 They cannot necessarily guarantee a delivery  
8 date. And the contract says that delivery date is an  
9 estimate and that they are not responsible for a failure to  
10 meet it. They just say they will get it to you within a  
11 year if we have to unless there is an unreasonable delay.

12 The Court is quite correct. The burden was  
13 on them to show that the delay that actually occurred was  
14 unreasonable, and there is no evidence whatsoever that it  
15 was unreasonable.

16 Now, the parties provided under that section  
17 that I have cited to the Court for exactly what happened.  
18 The parties agreed that if they did not do it, they were in  
19 default.

20 Now, the contract is clear. She is under no  
21 disability, a licensed real estate agent, and the express  
22 terms of the agreement require the Court to find a default.  
23 That is the gravamen of the Lerner case.



1           If that occurs and the contract language  
2 says that is what is supposed to happen, unless it is  
3 unconscionable or there is some other reason -- you cannot  
4 say this is unconscionable -- unless there is some other  
5 reason to relieve it, you have to do it.

6           You may not want to do it. The parties--  
7 Lerner, this is a quote: the parties are entitled to rely  
8 on the express terms of a written agreement.

9           Why should the Court set aside the contract  
10 and order the house to be sold and the commission paid?  
11 What are the relative equities? What did they tell you why  
12 they would not do it?

13           She did not want to do it, and that was  
14 evident. I asked her on the stand, I said, why didn't you  
15 list the house?

16           And she sat there. And she sat there. And  
17 then she said, that is a good question, Mr. Harrison. And  
18 she was honest about it. She did not have an answer to that  
19 question.

20           That is not equity, Judge, to give them a  
21 \$330,000 house when they don't have a reason for a willful  
22 breach.

23           It is not equity to give her \$10,000 ordered



1 paid by Addicott Hills when they do not have a reason for  
2 the breach.

3 Now, there is no case law whatsoever that  
4 holds -- and this is a quote from their brief. I am going  
5 to add a little sentence to the end of it which I think puts  
6 it into this case.

7 Their brief says, the only effect of a  
8 purchaser's waiver or failure to comply with the contingency  
9 for his sole benefit is that he loses the benefit of the  
10 contingency.

11 If you add the sentence, if the contract  
12 says otherwise, there is no case that holds that.

13 They cited the Jackson case to you. And the  
14 Jackson case clearly says, equity will not enforce a  
15 forfeiture unless the contract says so.

16 They cited that as good law to Your Honor.  
17 Now, that is their case. The direct quote from that case  
18 is, the non-performing party should not be deprived of his  
19 rights unless it appears from the contract that this was  
20 clearly contemplated.

21 And the contract says, the buyer shall be  
22 deemed in default.

23 I mean you cannot have it more clearly



**Anita B. Glover & Associates, Ltd.**

Post Office Box 100  
Fairfax Station, Virginia 22039-0100

(703) 278-8636  
278-8606

Prince William Metro 690-2070

1 contemplated. The contract, their own cases that they have  
2 cited to you, stand for the proposition that I am citing to  
3 the Court.

4 The parties agreed in their contract that if  
5 the property was not listed, the person in default would be  
6 the Manns. Because that specific part of the contract is  
7 not for their sole benefit, as I explained in the brief.

8 It is also for Addicott Hills' benefit  
9 because it gives them that -- it removes the contingency and  
10 makes the contract fixed.

11 It makes them required to purchase it. You  
12 cannot be more clear, a quote from Lerner. The plain  
13 language of the agreement was designed to protect them  
14 against the dangers of the very time which in fact arose.

15 Change it just a little bit. The plain  
16 language of the addendum to the contract was designed to  
17 protect Addicott Hills against the dangers of the very kind  
18 which in fact arose, the willful refusal of the purchaser  
19 not to list their house.

20 Simply stated, I think on the basis of the  
21 addendum's language, the Manns had previously waived in  
22 writing and for consideration any right they may have had to  
23 waive that contingency.





1           They had to comply with that contingency  
2 because the bottom part of that addendum says if you don't  
3 do it, you are in default.

4           And it does not say every one of them,  
5 Judge. There are a lot of contingencies up above that, but  
6 in the addendum, only a few specific acts that the buyer is  
7 required to do are declared to be defaults.

8           If they fail to secure a written contract  
9 but only by reason of the buyer's acts or failures to act,  
10 if they fail to do that within the ninety days, if the buyer  
11 fails to deliver a copy of the sales contract so obtained,  
12 if they fail to do that, that is a material default.

13           If they fail to deliver a copy of the  
14 listing agreement to the seller within the time period  
15 specified, that.

16           Now, if you look up above on the addendum,  
17 there are several -- they have to use diligent and good  
18 faith efforts to sell the buyer's residence. That is not  
19 necessarily made a material default.

20           They had to immediately list with a real  
21 estate broker. That is within fifteen days after the start  
22 of framing. That one is.

23           Make diligent good-faith, prompt efforts.



**Anita B. Glover & Associates, Ltd.**

Post Office Box 100  
Fairfax Station, Virginia 22039-0100

(703) 278-8636  
278-8606  
Prince William Metro 690-2070

1 They had to deliver a copy of the selling contract between  
2 buyer and a purchaser. That was made to be a material  
3 default.

4 The contract is very specific as to what it  
5 picks in the addendum regarding the contingency will be a  
6 material default.

7 And they have, in that language and by that  
8 signature, agreed under those areas that they will not have  
9 necessarily just the right of waiver that they have to do  
10 them.

11 Now, the Manns' later attempt of waiver was  
12 not effective because it was not complete. As I mentioned  
13 before, it did not really do anything. It still left the  
14 financing situation in place.

15 Now, that becomes even more significant here  
16 because we are dealing again with a realtor. She knew that.  
17 She knew that. She knew that waiver did not take care of  
18 the whole problem.

19 The thing that had to go out was the  
20 contingency, the whole financing contingency.

21 Now, I think that what has been  
22 characterized as the seemingly artless eloquence of Justice  
23 Cardozo is directly on point here.



1           The willful transgressor must accept the  
2 penalty of his transgressions. For him, there is no  
3 occasion to mitigate the rigor of implied conditions. The  
4 transgressor whose default is unintentional and trivial may  
5 hope for mercy if he will offer atonement for his wrong.

6           That is Jacob V. Kent.

7           What we have here is an intentional breach  
8 for no reason whatsoever given to this Court, cognizal by  
9 equity. Why didn't they list it?

10          There is no reason this Court can say that  
11 equitable remedy lies because the Manns were in some way put  
12 upon or in some way would have been hurt by listing this  
13 property.

14          As the Court correctly noted, all she had to  
15 do was list it. It is an intentional breach of an express  
16 condition, not even an implied condition, absolutely an  
17 express condition.

18          And the default is made material by the  
19 agreement of the parties.

20          Now, the Eagler case, Your Honor, Eagler  
21 versus Little, which is cited in the brief, and I say in the  
22 brief and underline that I think it is clear that it is  
23 controlling, and I think -- it is a 1977 case -- stands for



1 the proposition, the one significant fact that is totally  
2 ignored by the argument that they still had the right to  
3 waive the contingency.

4 One very significant fact is that forfeiture  
5 had already been enforced, already been enforced.

6 The example that I will give you, Judge,  
7 which I think has to be agreed with, if I give you an offer  
8 to purchase this courtroom for \$100, and before you accept  
9 it, I cancel it.

10 I deliver notice of revocation of the offer  
11 before it is accepted. You cannot accept it.

12 That power is extinguished immediately. And  
13 the Eagler case stands for the proposition that if the Manns  
14 wanted to waive that contingency, they had to waive it  
15 before the forfeiture was declared, because if they did not  
16 waive it before the forfeiture was declared, they lost the  
17 right to waive it. Absolutely gone.

18 The law in Virginia -- and I cited this in  
19 my brief, and there is no response to that argument, no  
20 response in the complainant's response to defendant's  
21 memorandum, it is a 1977 case.

22 You cannot cure the default after the  
23 forfeiture has been exercised.



1 In the Eagler case what happened was there  
2 was an obligation under the lease to pay taxes. And after  
3 the landlord terminated the lease for failure to pay taxes  
4 just a day or so later, the tenant came forward and  
5 proffered the money, and the court of equity held, said,  
6 hey, he gave you the money.

7 The Supreme Court reversed and said, yeah,  
8 that is true. Even after the default if he had tendered the  
9 money before the forfeiture, the court of equity may be able  
10 to intervene.

11 Once that contract is extinguished, it is  
12 gone. The Court cannot revive that contract.

13 That is where the language of the parties  
14 becomes abundantly clear. As the Court says it is a harsh  
15 contract. I would prefer to describe it as a clear  
16 contract.

17 It clearly says forfeiture if this happens  
18 at the option of the seller.

19 Now, I say again to the Court that I have  
20 done the research and there is absolutely no reply to that  
21 in their brief, either one of them.

22 And I do not know of a case anywhere that  
23 holds otherwise. And Eagler is absolutely controlling



1 authority on this point.

2 I think the Court is being invited to commit  
3 reversible error in this case in several respects.

4 THE COURT: It happens every day.

5 MR. HARRISON: It happens, but it is  
6 directly contrary to law.

7 There are three cases, the Winn case 1984,  
8 which says essentially the parties are free to contract,  
9 free country. They can make important whatever they want to  
10 make important and the Court has to enforce the claim.

11 The Lerner case stands for the proposition,  
12 again, the parties write their own contract. If there is a  
13 forfeiture, if it is clear on its face, then the Court must  
14 enforce the forfeiture.

15 Eagler, if the forfeiture has already  
16 occurred, there is no power in a Court of Equity to revive  
17 the contract.

18 I appreciate the opportunity to file the  
19 brief. I am sorry that there is some screw-up with this and  
20 I would like a chance to look through the file and make sure  
21 that we get you the right one, Your Honor.

22 THE COURT: You handed me the right one. It  
23 is just a mix-up in the Clerk's office.



1 MR. HARRISON: I would point out one small  
2 correction. This is not summary judgment. We are here on  
3 post-trial after a full trial.

4 THE COURT: What did I say, summary  
5 judgment?

6 MR. HARRISON: You said summary judgment.  
7 It was a misstatement, Your Honor. I just wanted to put  
8 that in the record.

9 But one final thing is as the Court knows  
10 and said at the conclusion of the case, this is a case over  
11 a \$350,000 house. It is obviously important to the Manns.  
12 It is very important to my client.

13 At this point, the damages, because of the  
14 refund of the deposit, et cetera, are fairly small. The  
15 equity can come in and cut it and say, you all go away and  
16 do better next time.

17 On an appeal, the damages will be massive,  
18 and I think that the case law, particularly the Eagler case  
19 law, as I said is controlling.

20 Thank you, Your Honor.

21 MR. AUNON: Your Honor, I want to make clear  
22 we do not want this Court to make reversible error. We want  
23 it to apply equity.



1 I want to make a couple of things clear.  
2 First of all, the husband is not a real estate agent. Mr.  
3 Mann is not a real estate agent.

4 Second, Mrs. Mann does not get \$10,000.  
5 Coldwell Banker gets whatever the commission is. And at  
6 trial my clients proved that they could settle without  
7 financing.

8 Now, if they are denied financing, I don't  
9 think they can -- that we can get out of the contract  
10 because they waived the sale of the house.

11 Now, the other part, Your Honor, is the ten-  
12 month delay. If the builder did not deliver the house on  
13 November the 10th, I think they had the burden to prove why  
14 they didn't.

15 They were obligated by the contract to do  
16 so. It is a burden. They did not prove that evidence at  
17 trial at all.

18 Also, we maintain that my clients listed the  
19 house effective March the 1st, okay, but they attempted to  
20 list the house. But anyway, Your Honor, we had ninety days  
21 to produce a contract, ninety days for the sale of the house  
22 according to the addendum.

23 What would have happened if we did not list





1 the house but we produced a contract? Would we have been in  
2 breach? I don't think so.

3 But I think that makes the whole thing moot,  
4 Your Honor, because we did waive that contingency.

5 And also another point I want to make clear  
6 is that Addicott Hills is not giving my client the \$300,000  
7 house. We are buying a \$350,000 house.

8 He said that we did not answer certain parts  
9 in our brief, Your Honor. On page 10, the middle paragraph  
10 says, certain conditions for the benefit of the purchaser  
11 may be waived by the purchaser before or after the date upon  
12 which the conditions had to be fulfilled.

13 I cite a case here, despite the promise to  
14 perform despite the nonoccurrence of the condition is  
15 binding, whether the promise is made before or after the  
16 time for the condition to occur.

17 That is on page 10 of our brief.

18 I think, Your Honor, equity is on our side  
19 at this time, and again, we want to have an opportunity to  
20 buy the house. My clients want the house and it is very  
21 important for them to buy the house.

22 And that is all.

23 THE COURT: I will let you know just as soon



1 as I can.

2 (Whereupon, at approximately 9:30 o'clock a.m., the  
3 hearing in this matter was concluded.)  
4

5 CERTIFICATE OF COURT REPORTER

6 I, ANITA B. GLOVER, a Certified Verbatim Court  
7 Reporter, do hereby certify that I took the notes of the  
8 foregoing hearing by Stenomask, and reduced the same to  
9 typewriting; that the foregoing is a true record of said  
10 hearing to the best of my knowledge and ability; that I am  
11 neither related to nor employed by any attorney or counsel  
12 employed by the parties thereto; nor financially or  
13 otherwise interested in the action.

14  
15 Anita B. Glover

16 ANITA B. GLOVER, CVR-CM  
17 Court Reporter  
18  
19  
20  
21  
22  
23





NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center  
4110 Chain Bridge Road  
Fairfax, Virginia 22030

COUNTY OF FAIRFAX

CITY OF FAIRFAX

BARNARD F. JENNINGS  
WILLIAM G. PLUMMER  
THOMAS J. MIDDLETON  
RICHARD J. JAMBORSKY  
LEWIS HALL GRIFFITH  
F. BRUCE BACH  
QUINLAN H. HANCOCK  
JOHANNA L. FITZPATRICK  
J. HOWE BROWN  
JACK B. STEVENS  
THOMAS A. FORTKORT  
JUDGES

JAMES KEITH  
LEWIS D. MORRIS  
BURCH MILLSAP  
RETIRED JUDGES

February 4, 1988

Jose E. Aunon, Esq.  
9701 Main Street  
Fairfax, Virginia 22031

John E. Harrison, Esq.  
Sandra L. Hughes, Esq.  
Adam D. Elfenbein, Esq.  
Light & Harrison, P.C.  
6849 Old Dominion Drive, Suite 410  
P. O. Box 6625  
McLean, Virginia 22106

Re: W. Lowry Mann and Barbara Mann v.  
Addicott Hills Corporation, Chancery No. 101273

Dear Counsel:

This matter is before the Court on a Bill of Complaint for specific performance of a New Home Sales Agreement. Mr. and Mrs. Mann ("Complainant" or "Buyers") and Addicott Hills Corp. ("Defendant" or "Seller") entered into a sales contract for Lot 11, Union Farm Subdivision, Fairfax County, Virginia. An Addendum to the contract contained the particulars of a contingency provision which would relieve Buyers of their contractual obligation in the event they were unable to sell their present home. The Addendum required the Buyers to list immediately their current residence and produce evidence of the listing within fifteen days after the start of house framing.

Buyers were advised in January 1987 by Ms. Schwab and Ms. Lindsey that it was time to list the house, but failed to take any action. On January 30, 1987 seller terminated the contract in accordance with the Addendum and clause 15 of the Agreement. Five days later, Buyers produced a listing agreement effective February 2, 1987 and a formal waiver of the contingency. Seller has since found a new purchaser and no longer desires to convey the house to Complainants, who are now seeking specific performance of the New Home Sales Agreement.

Jose E. Aunon, Esq.  
John E. Harrison, Esq.  
Sandra L. Hughes, Esq.  
Adams D. Elfenbein, Esq.  
Re: Mann v. Addicot Hills Corp.  
Chancery No. 101273  
February 4, 1988  
Page 2.

Seller contends that its termination of the contract was proper since Buyers failed to comply with the terms of the contingency as set forth in the Addendum. Complainants argue that the contingency was for their sole benefit and that they had the option of cancelling the contract should their present home not sell or of waiving the contingency and proceeding to settlement. While it is true that a condition solely for the benefit of one party may be unilaterally waived without affecting the other party's contractual obligation to perform, there is insufficient evidence to indicate that the sale-of-existing-residence contingency was for Complainants' benefit only. No language in the Addendum would indicate such an understanding. The arrangement gives the Seller a measure of assurance that a buyer will be able to perform. If buyer waives, the Addendum gives Seller "the right to terminate . . . at any time prior to receipt . . . of evidence satisfactory to Seller that Buyer is able to sell Buyer's Residence on or prior to closing hereunder." So the Addendum is not totally one sided; the Seller derives some benefit from it as well.

Complainants further contend that they successfully waived the contingency and are therefore not in breach. Their waiver is dated February 4, 1987. Seller, by letter of Carl Bernstein, terminated the New Home Sales Agreement on January 30, 1987. Buyers' right to waive the contingency was extinguished on January 30th. Once Seller exercised its right to terminate, Buyer can no longer attempt to cure the default. Cf. Eagler v. Little, 217 Va. 869 (1977) (substantial compliance will not cure a breach once the right of forfeiture has been exercised).

Given Buyers' breach of the listing requirement and their failure to timely waive the contingency, they are not entitled to specific performance of the New Home Sales Agreement. The remedy of specific performance is not an absolute right, but rather is left to the sound discretion of the Court. See Grubb v. Moore, 108 Va. 72, 84 (1908). Equity will not enforce a contract at the request of a party who is in default or has violated a term of the contract. Id. at 83. The Complainants contend that their breach is not of the magnitude warranting denial of specific performance; however, the clear language of the contract would indicate otherwise. The Addendum provides that (1) failure to secure a written contract for sale of the present residence; (2) failure to deliver a copy of the sales contract to Seller; or, (3) failure to deliver a copy of the listing contract to Seller within time periods specified would be deemed a default. The parties agreed that such failures to act would be material breaches. In hindsight, this may seem harsh;

Jose E. Aunon, Esq.  
John E. Harrison, Esq.  
Sandra L. Hughes, Esq.  
Adams D. Elfenbein, Esq.  
Re: Mann v. Addicot Hills Corp.  
Chancery No. 101273

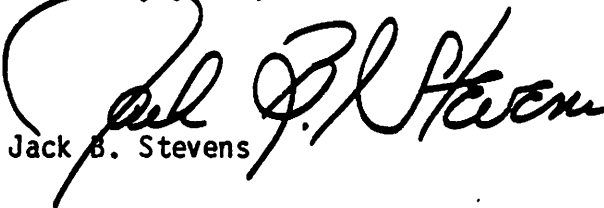
February 4, 1988

Page 3.

nevertheless, it is the result of the parties' bargaining. While the Court does not favor forfeitures, neither is it free to relieve a party from the express terms of a contract into which the party freely entered. See Newport News v. Doyle and Russell, Inc. 211 Va. 603, 608 (1971); Portsmouth v. Portsmouth and Norfolk Corp., 122 Va. 258, 262 (1918).

Mr. Harrison will please prepare an appropriate order reflecting the Court's ruling and submit it to other counsel for endorsement, preserving all objections, and presentment to the Court.

Sincerely yours,

  
Jack B. Stevens

JBS/11r

g  
U

W. LOWRY MANN, III and  
BARBARA MANN,

[illegible]

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION,

Defendant.

## FINAL DECREE

THIS CAUSE cam this 19th day of November, 1987, to be heard on the pleadings, evidence adduced at trial, upon argument of Counsel and upon the Memorandum of Law filed by the parties, and

IT APPEARING TO THE COURT that this Court should find for the Defendant for the reasons stated in the attached letter of opinion, dated February 4, 1988, by Jack B. Stevens, it is accordingly

ADJUDGED, ORDERED AND DECREED that judgment be entered in favor of the Defendant and that this lawsuit be dismissed with prejudice and stricken from the docket of this Court; and it is further

ADJUGED, ORDERED AND DECREED that certain lis pendens filed by the Manns against the property known as 9105 Peartree Landing, Alexandria, Virginia, and as Lot 11, Union Farm Subdivision in Deed Book 6677 at page 0919 is hereby released and the Clerk of the Court shall cause a copy of this Decree to be filed among the land records of Fairfax County.

THIS ORDER IS FINAL.

ENTERED this 26<sup>th</sup> day of February, 1988.

Sub. J. H. H. H.

Judge, Jack B. Stevens, Judge  
19th Judicial Circuit

I ASK FOR THIS:



---

John E. Harrison  
Sandra L. Hughes  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P.O. Box 6625  
McLean, Virginia 22101  
(703) 356-9751  
Counsel for Defendant

SEEN AND OBJECTED TO:

---

Jose E. Aunon, Esq.  
9701 Main Street  
Fairfax, Virginia 22031  
(703) 323-1700  
Counsel for Complainants

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN III

and

BARBARA C. MANN,

Complainants

IN CHANCERY No. 101273

v.

ADDICOTT HILLS CORPORATION

Defendant.

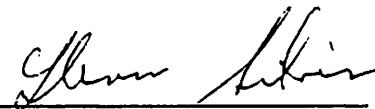
### NOTICE OF APPEAL

PLEASE TAKE NOTICE that the Complainants herein,. W. Lowry Mann and Barbara C. Mann, pursuant to Rule 5:9 of the Rules of the Supreme Court of Virginia hereby file their Notice of Appeal to the Supreme Court of Virginia from the Final Decree of the Circuit Court of Fairfax County in the above styled matter.

A transcript of the testimony and other incidents of trial has or will be filed.

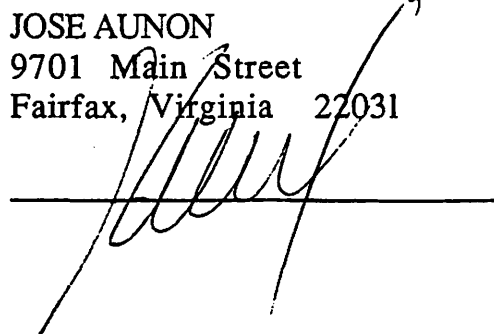
W. Lowry Mann  
Barbara Mann

by



counsel

JOSE AUNON  
9701 Main Street  
Fairfax, Virginia 22031

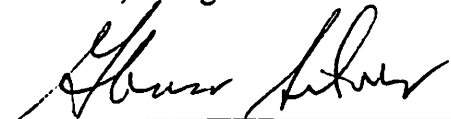


1003 MAR 11 PM 12:05  
HARRISON L. GARRY  
CLERK OF THE CIRCUIT COURT  
OF FAIRFAX COUNTY, VA.



Counsel for Complainants

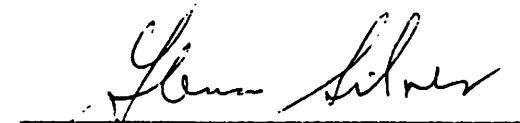
GLENN H. SILVER  
Rust, Rust & Silver  
4165 Chain Bridge Road  
Fairfax, Virginia 22030



Co-Counsel for Complainants  
for the purpose of this Motion

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed,  
postage prepaid, to John Harrison, Esquire, Counsel for the Defendant  
at 6849 Old Dominion Drive, McLean, Virginia 22101 this 11<sup>th</sup> day  
of March, 1988.

  
\_\_\_\_\_  
GLENN H. SILVER

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

18 MAR 17 PM 3:46

PAULETTE GARRY  
CLERK OF THE CIRCUIT COURT  
OF FAIRFAX COUNTY, VA.

W. LOWRY MANN, III and )  
BARBARA MANN, )

Complainants, )

v. )

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION, )

Defendant. )

OBJECTION TO INCOMPLETE TRIAL  
TRANSCRIPT FILED FOR PURPOSES OF APPEAL

COMES NOW, the Defendant, Addicott Hills Corporation, by Counsel, and objects to the incomplete filing of the Trial Transcript on the above referenced case for the purposes of the appeal. The transcript filed did not include the transcript of the final argument of the trial which was heard before Judge Stevens on January 22, 1988.

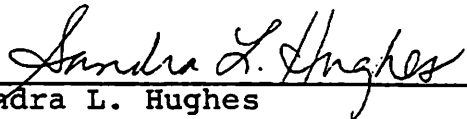
Respectfully submitted,

ADDICOTT HILLS CORPORATION  
By Counsel

*Sandra L. Hughes*  
John E. Harrison, Esq.  
Sandra L. Hughes, Esq.  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751  
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage pre-paid to the offices of Jose E. Aunon, Esq., 9701 Main Street, P. O. Box 2405, Fairfax, Virginia 22031 and to the offices of Glenn H. Silver, Esq., Rust, Rust & Silver, P.O. Box 460, 4165 Chain Bridge Road, Fairfax, Virginia 22030 on this 15<sup>th</sup> day of March, 1988.

  
\_\_\_\_\_  
Sandra L. Hughes

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN III

and

BARBARA C. MANN,

Complainants

v.

ADDICOTT HILLS CORPORATION

Defendant.

FILED

MAR 25 1988

WARREN F. CARRY

Clerk of the Circuit Court  
of Fairfax County, Va.

IN CHANCERY No. 101273

**COMPLAINANT'S MOTION FOR RECONSIDERATION**

COMES NOW the Complainants W. Lowry Mann, III and Barbara Mann, by counsel and respectfully request this Honorable Court to reconsider its decision as set forth in this Court's letter opinion dated February 4, 1988 and enter judgment in favor of these Complainants granting them specific performance upon the contract which formed the basis of this Cause.

In support of this Motion these complainants state as follows:

1. The findings of this Court are contrary to the evidence presented as is more fully set forth in a memorandum annexed hereto and the transcript of the proceedings which is being filed herein with this Motion
2. The findings of this Court are contrary to the evidence as is more fully set forth in a memorandum annexed hereto

WHEREFORE, it is respectfully prayed that this Honorable Court reconsider its findings of fact and law and enter a decree granting

specific performance to the Complainants herein and granting such other and further relief as may seem mete.

W. Lowry Mann  
Barbara Mann

by Jose Aunon  
counsel

JOSE AUNON  
9701 Main Street  
Fairfax, Virginia 22031

Jose Aunon  
Counsel for Complainants

GLENN H. SILVER  
Rust, Rust & Silver  
4165 Chain Bridge Road  
Fairfax, Virginia 22030

Glenn Silver  
Co-Counsel for Complainants  
for the purpose of this Motion

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to John Harrison, Esquire, Counsel for the Defendant at 6849 Old Dominion Drive, McLean, Virginia 22101 this 3<sup>rd</sup> day of <sup>March</sup> ~~February~~, 1988.

Glenn Silver  
JOSE AUNON

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN III	)	
	)	
and	)	
	)	
BARBARA C. MANN	)	
	)	
Complainants	)	IN CHANCERY NO. 101273
	)	
vs.	)	
	)	
ADDICOTT HILLS CORPORATION	)	
	)	
Defendant	)	

**MEMORANDUM IN SUPPORT OF  
MOTION FOR RECONSIDERATION**

Throughout the trial of this Cause, this Court correctly recognized that the Complainants, Mr. & Mrs. Lowry Mann, were entitled to specific performance of their contract to purchase Lot 11, Union Farm Subdivision, from Addicott Hills Corporation. This is clearly evidenced from the transcript of the proceedings which has now been filed with the Court. Unfortunately, and perhaps due to the amount of time which had elapsed between the trial, the submission of briefs, the final argument and the rendering of the decision, this Court's letter opinion of February 4, 1988 fails to reflect the Court's rulings during the trial and the pertinent evidence presented therein.

**Facts Presented at Trial**

In March, 1986, Mr. & Mrs. Mann and Addicott Hills entered into a contract for the purchase of a new home (Ex. 2), the building of which was to be completed pursuant to the terms of the contract, by

November, 1986. An addendum to the contract (Ex. 1) created a contingency for the sale of the Manns' existing home (Ex. 1), and provided that they were to list their home for sale within 15 days of house framing and their home was to be sold within 90 days of house framing.

For reasons which were never addressed at trial, the house was not completed until September 1987 -- approximately 11 months after the completion date set forth in the contract. On or about January 13, 1987, Addicott Hills advised Mrs. Mann that house framing had begun and that she should list her house for sale. Mrs. Mann had a lengthy discussion with Sandra Lindsay, Vice President of Addicott Hills Corporation, expressing her concern with listing her existing house for sale before the completion date for the new home was set. Nonetheless, Mrs. Mann listed her house with Coldwell Banker within the time frame demanded by Ms. Lindsay, although the listing was dated March 1, 1987. There was discrepancy in the testimony of Mrs. Mann and Ms. Lindsay as to whether this March 1st date placed on the listing was satisfactory. By letter dated January 31, 1987, Carl Bernstein, President of Addicott Hills, sent a letter to the Manns terminating the contract. At that point the Manns immediately relisted their house with a February 2, 1987 listing date, and then waived the contingency dealing with the sale of their house. This waiver was not accepted by Addicott Hills and this Cause was commenced.

### Trial Proceedings

After all of the evidence was presented there were several integrally related issues which required resolution by this Court. They were as follows:

1. Whether the Manns' delivery to Addicott Hills of the listing agreement within the time frame required, although dated March 1, 1987, was sufficient to satisfy the requirements of the Sale of Existing House Addendum;

2. Whether the Manns' waiver of the contingency in the Sale of Existing House Addendum, after the letter purporting to terminate the contract but before the 90 day period for selling their home, was timely; and

3. Whether the failure of the Manns to list their home within 15 days of house framing constituted a breach of the magnitude to prevent this Court from granting specific performance.

During the trial and upon the Motion to Strike the evidence the Court recognized these issues and properly rejected Addicott Hills position. For instance, this Court expressly recognized that the Manns waived the sale of existing home contingency well within the 90 day time frame required by the addendum. (Tr. page 89 lines 11-23, 1-8). Further, this Court characterized the Manns' failure to list the home within 15 days as "minor:"

*Isn't his a very minor breach, the failure to list in the overall picture of the purpose of the listing, and in the overall purpose of the contract itself? (Tr. page 91)*

In a colloquy with counsel for Addicott Hills, the issue of the postdated listing was discussed. The Court recognized that the postdated listing in itself ". . . doesn't constitute a breach of an existing contract" and that if the Court holds that the "failure to list was non-material in the light of the purpose of the listing, then we are at square one, aren't we". The Court went on to say ". . . I said that it seems to me that it is of minor significance in the light of the purpose of the listing clause in the first place." (Tr. page 95).

The Court then addressed the following question to defense counsel: "Once that contingency is removed, why can't I as a matter of law hold that the listing is not a material part of the contract?"



(Tr. page 95). The Court responded to its own question by stating:

*" . . . but once the buyer removes the conditions precedent to tying the sale of their house, what difference does it make? . . . Your client could not deliver occupancy at the time anyway; could he? . . . Then how is your client prejudiced? . . . I am supposed to do equity in this case; aren't I?" (Tr. at 96-97)*

The Court further recognized the ambiguity in the contract vis-a-vis the 15 day time for listing and the 90 day time for selling. The Court queried the following:

*If I hold the failure to list was not a material aspect, your client is in breach for terminating prior to the ninety days; isn't he? . . . What right did your client have to terminate the contract unilaterally prior to the ninety days if the listing was not a material breach on the part of the buyer? (Tr. at page 97)*

The Court then found that the breach, if there was one, was de minimis. In denying the Motion to Strike, the Court stated: *What I am saying is that it seems to me to be a de minimis thing when viewed in the objectives to be attained under the contract.* (Tr. at 106).

### Discussion

The Court in its opinion later dated February 4, 1988 at paragraph "2" states correctly that the Manns were advised in January, 1987 that it was time to list the house. The Court then incorrectly states that they "failed to take any action". Undisputed evidence presented at trial established that the Manns discussed listing the house with Ms. Lindsay, and then promptly listed the house with Coldwell Banker, post-dating such listing to March 1. It was only after this that Addicott Hills sent the letter dated January 31, 1987 terminating the contract. Immediately upon receipt of this

letter the house was relisted with a February 2, 1987 date and then the contingency was waived altogether.

It is respectfully submitted that the Manns did not breach the contract under the facts of this case. However, even if post-dating the listing agreement did constitute a breach, such breach was so "de minimis," as this Court aptly characterized it, that there was no prejudice to Addicott Hills and specific performance should be allowed.

In its opinion letter this Honorable Court relies upon Eagler v. Little, 217 Va. 869 (1977) in holding that the waiver was ineffectual because it was made after defendant terminated the contract. It is respectfully submitted that the Eagler case does not support this finding for three reasons. First, Eagler involved the question of whether the breach of a condition subsequent in a lease could be cured after a lease was terminated. In that case the lessee failed for several years to pay real estate taxes as required by the lease which he drafted, and went to great lengths to fraudulently conceal this from the lessor. Second, the Supreme Court noted that the delinquent real estate taxes created statutory liens upon the property substantially affecting the landlord's title. Thus, the Court held that the breaches of the conditions or covenants subsequent were continuing in nature and continued after the termination was created. Third, the Supreme Court emphasized the rule set forth in Pence v. Tidewater Townsite Corp., 127 Va. 447, 451 (1920) that "[c]onditions subsequent, because they tend to destroy estates, are not favored in law, and when effective to work a forfeiture of title they must have been created by express terms or clear implication."

The case at bar is entirely distinguishable from Eagler. First, the requirements of the Sale of Existing House Addendum were not conditions subsequent to the contract but were conditions precedent for the right to benefit from the contingency created. The Addendum was also not a covenant as was the requirement to pay real estate taxes in Eagler. Second, the Manns' alleged failure to list

their home within the 15 day period had absolutely no effect on Addicott Hills' title -- indeed, the defendant was not in a position to convey the property until some 9 months later. Third, the Addendum itself did not have the "express terms or clear implications" referred to by the Court in Eagler. This Court recognized that the Manns could have sold their house or waived the benefit of the contingency within the 90 day time frame even though they may have failed to properly list their home for sale within 15 days of house framing. The Court correctly queried whether Addicott Hills even had the right to terminate within the 90 days since the house could have been sold during this time or the contingency waived. This Court throughout the argument on the Motion to Strike made it abundantly clear that it did not believe that the Addendum had express terms or clear implications.

The importance of the distinctions between the case at bar and the Eagler case cannot be overemphasized. In Eagler the Supreme Court made clear that conditions subsequent are not favored because they create a forfeiture and therefore in order to create such a forfeiture they must be created by express terms or clear implication. In the case at bar there was no condition subsequent to the contract but rather a condition precedent to the contingency addendum, and the language of the addendum does not either expressly or by implication clearly state that a forfeiture could result from failure to list the house within 15 days or to sell the house within 90 days of house framing. Since this was the form created by Addicott Hills it must be construed against it. In Selden v. Camp et al., 95 Va. 527 (1898) the Supreme Court of Virginia addressed the distinction between conditions subsequent and conditions precedent and said that Courts of equity can grant relief even against the failure to perform punctually conditions precedent unless the party who requests the relief is guilty of gross negligence.

In Eagler the Supreme Court could not say as this Court did during the trial of these proceedings that even if there was a breach it was de minimis. The Eagler breach in not paying the real estate

taxes for 3 consecutive terms was not de minimis but was obviously substantial. Moreover, the Manns' breach, if there was one, lasted but a day or two at best. The Court's attention is specifically directed to the fact that within the time limit set forth in Sandra Lindsay's letter the Manns had their house listed with Coldwell Banker although it was to be effective on March 1st. Mrs. Mann thought that this had been agreed to. The only response to this was the termination letter rather than a letter stating that this was not agreed to. Immediately upon receipt of the letter the listing was updated to make it effective immediately and within another 2 days the contingency was waived altogether.

Finally, in light of the de minimis nature of the breach, if there was one at all, it is clear that specific performance is an appropriate remedy. In Michie's Jurisprudence §26 Specific Performance it is stated as follows:

The rule laid down by an eminent writer and supported by abundant authority is that when the substance of the agreement can be fully executed, and when a trifling adjustment only is needed to satisfy the equities of the case, performance may be decreed with satisfaction. If, however, the default of the plaintiff goes to the substance of the agreement or if there be something which he is bound to do and cannot do, or has not done, and the court cannot compel him to do it, equity will not decree specific execution in his favor. Where the party seeking performance is himself in default, it depends in a great measure upon how far the default goes to the essence of the contract whether he can have performance or not.

When the terms of an agreement have not been strictly complied with or are incapable of being strictly complied with, still if there has not been gross negligence on the part of the party, it is conscientious that the agreement should be performed and if compensation can be made for any injury occasioned by the noncompliance with the strict terms, in all such cases equity will

interfere, and decree specific performance. For the doctrine of equity is not forfeiture but compensation, and nothing but such a decree will in such cases do entire justice between the parties. Likewise, if the defendant's delay or default has caused the plaintiff's failure to perform in time, he cannot object to such failure as a defense, however plain and explicit may be the provision of the contract requiring punctuality. For example, a vendor who cannot make a clear title in time cannot set up the purchaser's default in prompt payment of price. (emphasis added) {Citing the following authorities: Harvie v. Banks, 22 Va. (1 Rand) 408 (1823); Pigg v. Corder, 39 Va. (12 Leigh) 69 (1849); Cox v. Cox, 67 Va. (26 Gratt) 305 (1875); Grubb Bros. v. Moore, Clemens & Co., 108 Va. 72 (1908); Selden v. Camp, 95 Va. 527 (1898); Wheeling Creek Gas, Coal & Coke Co. v. Elder, 54 W. Va. 335, 46 S.E. 357 (1903)}.

It is important to note at this juncture that Addicott Hills failed to deliver the house in a timely fashion. It is clear from the evidence that in November 1986, the date when the house was to be completed pursuant to the terms of the contract, the house in actuality was barely begun. It was not completed until September 1987 almost a year after the contractual date for completion. The Court in reaching its decision indicated that the Manns' sole breach of the contract was their failure to list their home within 15 days of house framing. This is not totally true. The Manns did, in fact, list their house within the time with Coldwell Banker who is a member of the Multiple Listing Service. The listing was effective for March 1, 1987. Mark Kaywood the office manager for Coldwell Banker testified as follows: (Questions by Jose Aunon)

Q. Did you receive any listing from Barbara Mann and Lowry Mann?

A. Yes, I have.

Q. When and how many?

A. Two. One on January 21st--may I refer . . .

Okay, one listing received on January 21st, the other listing on the 2nd day of February.

Q. For the same house?

A. That is correct.

Q. That was registered with Coldwell Banker?

A. Yes, and sent--entered into the corporate computer

By John Harrison:

Q. So the March 1st listing was not entered into the computer?

A. It was entered into the corporate computer.

Q. It was not entered into multiple listing?

A. It was to be put into multiple on the first of March.

(Transcript at 63-65).

In reviewing the requirements of the Addendum, they are as follows:

1. The Manns were to submit a listing agreement within 15 days of house framing;
2. The Realtor had to belong to the Multiple Listing Service; and
3. The house had to be sold within 90 days thereafter.

It is respectfully submitted that even though the Mann listing was dated March 1, 1987, the listing agreement itself was made on January 21st, was entered onto Coldwell Banker's computer on that day and a copy of the listing was delivered to Addicott Hills within the time frame set forth in Sandra Lindsay's January 21st letter. Although defense counsel seemed to make a big thing out of the fact

that the listing could not be entered into multiple listing, the contract only requires that *which broker shall be a member of the 'Multiple Listing Service'*. The Addendum, moreover, requires the listing with a broker and nothing more. It is silent as to the terms of the listing. In the context of the failure of Addicott Hills to deliver the house by November 1986, that it was not in a position to deliver the house until September 1987 and that Addicott Hills continually refused to give a new delivery date, the March 1st listing was eminently reasonable. As explained by Barbara Mann, it would be most difficult for them to sell their house unless they could tell a buyer when it would be available for them to settle on. Thus, the entire problem revolves right back to Addicott Hills failure to deliver the new house in a timely manner. Interestingly enough, Addicott Hills offered no evidence why the house was so delayed other than saying it was Fairfax County's fault. The main portion of the contract in this regard states:

*Seller shall complete construction of the dwelling on or before November 1986 (the completion date) provided, however, that if Seller shall be delayed at any time in the progress of construction by Acts of God, labor disputes, Seller's inability to obtain material and/or labor, inclement weather, and any other causes beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay.*

Once it was determined by the evidence that the house was unable to be delivered by November, 1986, as a matter of law this Court should have found that Addicott Hills was in breach of the contract unless Addicott Hills, whose burden it was, presented sufficient evidence that the delay was caused by Acts of God, labor disputes, their inability to obtain material and/or labor, inclement weather, and any other causes beyond their reasonable or practical control. Addicott Hills only explanation on this point was that it was caused by Fairfax County and that the purchasers should call the County and complain. There was no evidence as to how long a delay

was caused by the County, if any at all, and only this period should have been added to the completion date assuming the explanation was adequate to overcome the contract completion date. Thus, Addicott Hills was the first party to breach the contract, their breach went to the very essence of the contract and they should not be permitted to complain about a de minimis breach of a condition precedent contained in a contingency which did not go to the essence of the contract at all. As earlier quoted from Michie's, "if the defendant's delay or default has caused the plaintiff's failure to perform in time, he cannot object to such failure as a defense, however plain and explicit may be the provision of the contract requiring punctuality." In Keffer and Wife v Grayson, 76 Va. 517 (1882) the Supreme Court of Virginia further held that even in contract where time is of the essence this can be modified by peculiar circumstances, accounting for delay, and showing the party in default is still entitled to relief. In reviewing the facts of this case, the Manns' delay, if there was any, should be ignored in view of Addicott Hills breach and failure to deliver in a timely manner and the Manns should prevail.

With regard to the Addendum, this Court held in its opinion letter that the Sale of Existing Home contingency is not for the sole benefit of the purchaser because "the arrangement gives the Seller a measure of assurance that a buyer will be able to perform . . . the Addendum is not totally one-sided; the Seller derives some benefit from it as well." The same argument could be made about a financing contingency -- a seller would derive at least an equal measure of assurance concerning the purchaser's ability to perform if that purchaser had applied for financing. However, as discussed at length in Complainant's Post-trial Brief, courts have uniformly held that financing contingencies are for the sole benefit of the purchaser and may be waived by them. See Complainants' Post-trial Brief at 6-7; Lipscomb v. Chadbourne, 378 So.2d 147 (La. App. 1979) (buyer's failure to obtain loan commitment within 30 days as required by contract did not excuse seller's performance, despite provision that failure to obtain loan within 30 days would render contract "null and



void"). Therefore, merely because the Addendum was reassuring to Addicott Hills does not change the fact that it was for the sole benefit of the Manns. Their alleged failure to comply with the contingency merely resulted in a forfeiture of the contingency and obligated them to proceed to settlement on the house regardless of whether they sold their existing house.

Only one case was found discussing the contingency for the sale of the purchaser's house. In Usinger v. Campbell, 572 P.2d 1018 (1977) there was a clause making the purchase of the house contingent upon the sale of the purchasers existing house. Although purchaser ultimately lost this case, a footnote on page 1020 of that decision is important and states as follows:

*It also appears that plaintiffs did not sell their home or obtain septic tank approval by March 15. However, since those conditions were for the benefit of plaintiffs, the nonoccurrence of the conditions would not excuse defendant's performance. However, their nonoccurrence does bear on the question of whether the parties seriously intended to go through with the sale . (emphasis added).*

In the case at bar there is no contention that the Manns did not seriously intend to go through with the sale but the remainder of this footnote is clearly applicable.

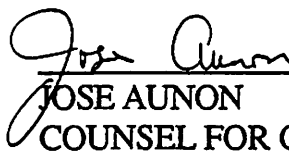
Of considerable importance in determining whose benefit the contingency is for is clearly evidenced by asking the question: Does one of the parties have the sole and unilateral right to waive the contingency without the acquiescence of the other party? If the answer is in the affirmative, then, that party has the sole benefit of the contingency. In the case at bar, only the Manns could waive the contingency and therefore it is clear that this contingency was for their sole benefit. Looking at the proposition from another view, would it ever make sense for a seller to place in his contract a contingency for financing or for the sale of an existing home? It is

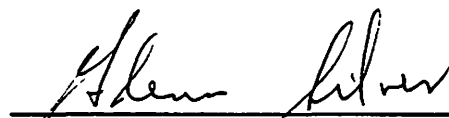
axiomatic that a seller always wants a clean, non-contingent contract. Thus, it is respectfully submitted that the addendum on its face clearly demonstrated that this contingency was for the sole benefit of Mr. & Mrs. Mann and could be waived by them until 90 days after house framing occurred.

### CONCLUSION

For all of the reasons set forth herein it is respectfully requested that this Honorable Court reconsider its decision and grant specific performance to the Complainants, Mr. & Mrs. Lowry Mann.

LOWRY MANN  
BARBARA MANN  
By Counsel

  
JOSE AUNON  
COUNSEL FOR COMPLAINANTS

  
GLENN H. SILVER  
RUST, RUST & SILVER  
CO-COUNSEL ON THIS MOTION  
FOR RECONSIDERATION

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN, III and )  
BARBARA MANN, )

Complainants, )

v. )

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION, )

Defendant. )

DECREE

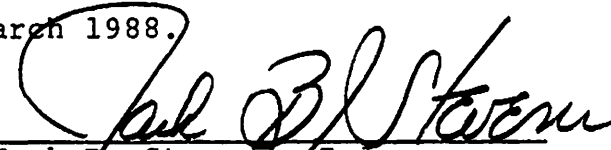
THIS CAUSE came this 10th day of March, 1988, to be heard upon the Motion of the Complainants, by Counsel, on to reconsider the Final Decree in this Cause dated February 22, 1988 and upon argument of all Counsel, and

IT APPEARING TO THE COURT that this Motion should be denied, it is

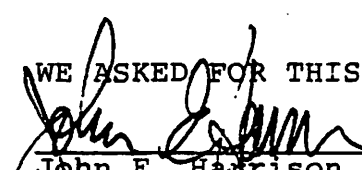
ADJUDGED, ORDERED AND DECREED that the Complainants' Motion to Reconsider the Final Decree in this Cause is denied.

THIS CAUSE IS ENDED. THIS DECREE IS FINAL.

ENTERED THIS 25<sup>th</sup> day of March 1988.

  
Jack E. Stevens, Judge  
19th Judicial Circuit

WE ASKED FOR THIS:

  
John E. Harrison, Esq.  
Sandra L. Hughes, Esq.  
LIGHT & HARRISON, P.C.  
6849 Old Dominion Drive  
Suite 410  
P. O. Box 6625  
McLean, Virginia 22106  
(703) 356-9751  
Counsel for Defendant

SEEN AND OBJECTED TO:

---

Glenn H. Silver, Esq.  
RUST, RUST & SILVER  
P.O. Box 460  
4165 Chain Bridge Road  
Fairfax, Virginia 22030  
(703) 591-6666  
Co-Counsel for Complainants

---

Jose E. Aunon, Esq.  
9701 Main Street  
Fairfax, Virginia 22031  
(703) 323-1700  
Co-Counsel for Complainants

## ASSIGNMENTS OF ERROR

I. The Trial Court erred in holding that the contingency for the sale of the Manns' existing home was not a provision for the sole benefit of the purchaser.

II. The Trial Court erred in holding that the Manns' *de minimus* breach of a condition of the contingency resulted in a forfeiture of the entire contract.

III. The Trial Court erred in denying specific performance of the contract.

**PRINTER'S NOTE: APPENDIX CONTINUED IN VOLUME II**