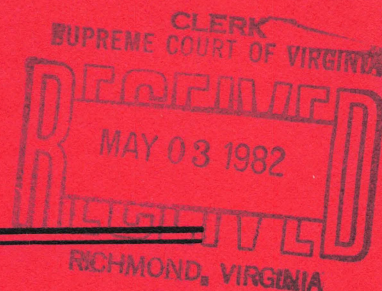


229 Va 367



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 811139

ROBERT W. AKERS and
C. GORDON ZEEMAN,

Appellants

v.

JAMES T. BARNES OF WASHINGTON, D.C., INC.,

Appellee

APPENDIX

Walter H. Hylton, III
BEAN, KINNEY, KORMAN & HYLTON
2007 North Fifteenth Street
P. O. Box 749
Arlington, Virginia 22216

Counsel for Appellant

Gary W. Swindell
REPETTI, MURPHY & EVANS
1010 Wisconsin Ave., N.W.
Suite 630
Washington, D.C. 20007

Counsel for Appellees

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 6/27/80

Filed in the Clerk's Office of the Circuit Court of June 1, 1980

Writ Tax \$ 25.00
 Fee 1.25
 Deposit 30.00
 Total Paid \$ 56.25

WANDA A. BELL, Clerk
 Elizabeth J. Perry, D.C.

LAW OFFICES
 BEAN, KINNEY, KORMAN & HYLTON
 2007 NORTH FIFTEENTH STREET
 P.O. BOX 749
 ARLINGTON, VIRGINIA 22216

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

Robert W. Akers
 1215 North Herndon Street
 Arlington, Virginia 22201
 and
 C. Gordon Zeeman
 1215 North Herndon Street
 Arlington, Virginia 22201

Plaintiffs,

v.

James T. Barnes of Washington, D.C., Inc.
 a body corporate,

SERVE:

Deborah J. Moore, Registered Agent
 6901 Old Keene Mill Road, Suite 310
 Springfield, Virginia

Defendant.

LAW NO. 21817

MOTION FOR JUDGMENT

COME NOW plaintiffs, Robert W. Akers and C. Gordon Zeeman and move for judgment against the Defendant on grounds and in the amounts as herein-after set forth:

1. Plaintiffs, Akers and Zeeman, are principals of North American Real Estate and Land Company, Inc. a Virginia corporation duly licensed to transact business in the Commonwealth.

2. At all times relevant hereto, defendant James T. Barnes of Washington, D.C., Inc. was a corporation qualified to transact business in this Commonwealth.

3. On March 27, 1980, at their offices located at 1215 North Herndon Street, Arlington, Virginia, plaintiffs executed a certain brokerage agreement with the defendant. A copy of the executed brokerage agreement is attached hereto, marked Exhibit A and made a part hereof by this reference.

4. Pursuant to paragraph 7 of the brokerage agreement, a deposit of \$10,000.00 was paid to defendant by plaintiff Akers which deposit was to be returned if the defendant was unable to obtain a commitment substantially in accordance with the terms of paragraph 2 of the agreement. A copy of the face of the said deposit check is attached hereto, marked Exhibit B and made a part hereof by this reference.

5. Pursuant to paragraph 3 of the brokerage agreement, the agreement was to remain in effect for a period of 45 days, or until May 10, 1980, and until either party terminated the agreement by written notice to the other. On May 16, 1980, plaintiff Akers mailed such a termination letter to defendant, an unsigned copy of which is attached hereto, marked Exhibit C and made a part hereof by this reference.

6. During the duration of the agreement, defendant did not obtain a commitment substantially in accordance with paragraph 2 of the brokerage agreement (Exhibit A).

7. Plaintiffs have demanded the return of the deposit of \$10,000.00 and defendant has refused these demands. Plaintiffs believe, and therefore allege, that defendant deposited the said deposit check of \$10,000.00 into its own accounts, prior to the termination date of the brokerage agreement, in complete disregard and violation of a previous oral agreement between the parties that such would not be done. Thus, defendant wrongfully took and converted all of plaintiffs' deposit funds to its own use and have placed the funds beyond plaintiffs' reach.

8. Plaintiffs have, as a result of the intentional, wanton and fraudulent actions of defendant been caused to incur attorneys fees to prosecute this action and capital needed for the transaction of business has been jeopardized because of defendants' retention of the said deposit funds.

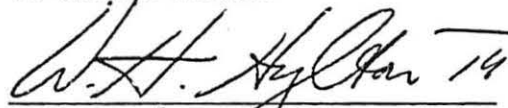
9. Plaintiffs reposed trust and confidence in the defendant, relied to their detriment upon the defendant and in its duty to act in a quasi-

fiduciary capacity, and the defendant willfully and fraudulently breached that trust and confidence. The actions of defendant were intended to cause harm to the plaintiffs and said actions have in fact caused immediate and potentially irreparable harm and will in the future cause additional harm to plaintiffs.

WHEREFORE, plaintiffs pray:

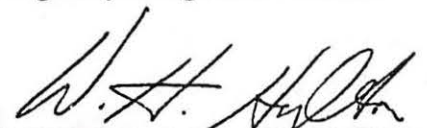
1. For judgement against the defendant, in the amount of \$10,000.00, plus interest from the date of the conversion.
2. That plaintiffs be awarded attorneys fees for the prosecution of this action, costs of this action, such compensatory damages as Plaintiffs have and will suffer as a consequence of defendant's actions as aforesaid and punitive damages in the amount of \$100,000.00.
3. For such other relief as to the Court may seem proper.

Robert W. Akers
C. Gordon Zeeman


By Counsel

BEAN, KINNEY, KORMAN & HYLTON
2007 North 15th Street
P.O. Box 749
Arlington, Virginia 22216

By:


W. H. Hylton, III
Counsel for Plaintiffs

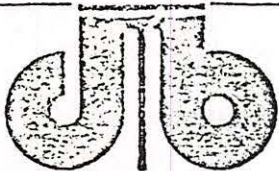


EXHIBIT A

James T. Barnes Mortgage Company

One Central Plaza, 11300 Rockville Pike
Rockville, Maryland 20852 (301) 468-9300

James T. Barnes of Washington,
D.C., Inc.
One Central Plaza
11300 Rockville Pike
Rockville, Maryland 20852

RE: Construction/Permanent Financing

BROKERAGE AGREEMENT

Robert W. Akers, EDWIN A. BALKANAN &

Agreement between *C Gordon Zeman* (hereinafter called the "Owner") and JAMES T. BARNES OF WASHINGTON, D.C., INC. (hereinafter called the "Broker").

1. Exclusive Right to Obtain Commitment. In consideration of the Broker's best efforts to obtain a commitment from a responsible lender for a mortgage loan on the property known as

according to the general terms specified in paragraph 2, the Owner grants the Broker the sole and exclusive right to obtain a financing commitment on said property.

2. Terms.

- (a) Type of loan: Construction and Permanent Commitments.
- (b) Amount: \$1,300,000.00, but not to exceed 75% of value.
- (c) Interest Rate: Construction loan at prime plus 2%.

Permanent loans at the higher of 2% above the gross FHLMC 60 day auction rate, 30 days prior to closing or the lender's prevailing commercial mortgage rate.

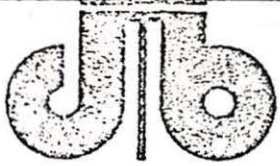
- (d) Term of loan: Construction loan for 12 months, with extension for additional 6 months for additional fee.
Permanent loans for 5 years with amortization not to exceed 25 years.

- (e) Commitment fees: Construction at 2 points.

Permanents at 2 points plus 2 points paid by buyer.

- (f) Term of Commitment: Construction loan settlement to take place within 60 days. Permanent loan term for 12 months with 6 month extension for additional fee.

- (g) Guarantees: Personal guarantee of principals.



Brokerage Agreement
Page Two

3. Duration of Agreement.

(a) This agreement shall remain in effect for a period of 45 days from the date specified above and shall continue thereafter until either party terminates by written notice to the other party not less than fifteen (15) days prior to the date intended for termination. The Owner acknowledges his affirmative duty to provide all documents necessary for all loan applications and agrees that should he fail to provide all such documents within ten (10) days of the date of this agreement, or subsequent request by any lender or potential lender, this agreement shall thereupon be extended for a period equivalent to the number of days after the ten (10) day period until all the necessary documents are provided.

(b) During the period specified in paragraph 3(a), this agreement shall be irrevocable.

(c) Should the Owner fail to execute or submit necessary documents in connection with a loan application, withdraw a loan application or otherwise fail to cooperate with a lender, or otherwise prevent the Broker from obtaining a commitment, the Broker will be entitled to its commission in full. X

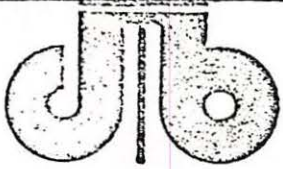
4. Authority of Broker. During the term of this agreement, the Broker is granted the sole authority to contact lenders and to take all steps necessary to obtain a commitment for a mortgage loan. The Owner agrees to refer to Broker all inquiries or offers he may receive from lenders and represents and warrants to Broker that he has contacted no other lenders or other brokers than as specified on Schedule A attached hereto. Owner agrees that Broker shall be entitled to a commission regardless of whether a loan commitment is obtained from a lender listed on Schedule A hereto.

5. Representations. The Owner represents that he is the Owner in fee simple of the property and that there are no encumbrances thereon other than as listed in Schedule B attached hereto. The Owner further represents that all information submitted relative to any commitment application shall be true and accurate to the best knowledge of the Owner.

6. Commission.

(a) If a commitment is obtained substantially in accordance with the terms contained in paragraph 2 of this agreement (or a commitment at such other terms as are acceptable to the Owner), or, if the Broker locates a lender ready, willing

The Barnes Companies - The Largest Privately Held Mortgage Banking Firm



Brokerage Agreement Page Three

and able to make such a commitment, or in the event that a commitment is obtained while this agreement is in force, by the Owner or anyone else, the Broker will be entitled to, and Owner agrees to pay, a commission in an amount equivalent to 1 % of the amount of the loan.

(b) Any efforts undertaken by the Owner in obtaining, or assisting in the obtaining of a commitment, whether occurring before, during or after execution of this agreement, shall in no way affect the Broker's entitlement to commission.

(c) The Owner agrees that the Broker shall be the sole broker in procuring this commitment and, therefore, agrees to hold the Broker harmless against any claim of other brokers for a share in the commission for producing the loan and to defend any such claims, including without limitation the payment of attorney's fees.

(d) The Owner understands and agrees that the Broker may receive a fee or other compensation from a lender for the placement and/or servicing of the loan. Such services or fees shall in no way affect the Owner's obligations under this agreement.

(e) The Broker's commission shall be deemed earned, and due and payable upon issuance of commitment.

7. Deposit. Broker hereby acknowledges receipt of a good faith deposit in the amount of \$10,000.00 which shall be applied towards the commission due the Broker if a commitment is obtained. The deposit shall be refunded if Broker is unable to obtain a commitment substantially in accordance with paragraph 2 of this agreement.

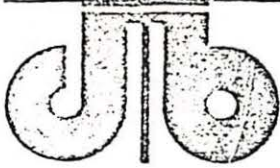
8. Obtaining of Commitment After Termination of Agreement.

(a) If a commitment is obtained from a lender to whom application was made on behalf of Owner by the Broker after expiration of the term of this agreement, the Broker will nevertheless be entitled to its full commission.

(b) If, within twelve (12) months from date of issuance of a commitment, Owner shall accept another commitment from the same lender(s), issuing the commitment, Broker shall be deemed to have earned the same percentage fee on the later transaction as is set forth in paragraph 6(a) of this agreement.

9. Fees. Owner agrees to pay upon request by a lender all fees and disbursements, including but not limited to, lender's attorney fees, title insurance premium, recording tax, government stamps, survey, appraisal and correspondent fees, if any, and any and all other reasonable expenses in connection with the loan.

The Barnes Companies - The Largest Privately Held Mortgage Banking Firm



Brokerage Agreement
Page Four

10. Publicity.

(a) The Owner agrees to permit the Broker to erect a sign on the property during the period of construction, which shall indicate that the Broker has arranged the mortgage financing. In the event the building is completed, the Broker agrees that said sign shall be placed on the property for sixty (60) days. The cost of preparing the sign shall be borne by the Broker.

(b) In the event a commitment is obtained, the Owner authorizes the Broker to transmit new releases to various real estate trade and other publications announcing the arrangement for financing and related details.

11. Construction of Agreement. The parties agree that this agreement shall be construed in accordance with the laws of the State of Maryland.

IN WITNESS WHEREOF the parties hereto have executed this agreement this

27th day of MAR, 1986

OWNER: _____

BY: _____

TITLE: _____

BROKER: JAMES T. BARNES OF WASHINGTON, D.C., INC.

BY: _____

TITLE: _____

Vice - Pres



ROBERT W. AKERS
PH. 703-534-0128
1024 N. ARLINGTON MILL DRIVE
ARLINGTON, VIRGINIA 22205

22

612

22 MAY 80

68-424-50
560

Pay to the order of

James T. Barnes

\$ 10,000.00

Ten Thousand & 00/100

DOLLARS

1st AMERICAN
FIRST AMERICAN BANK OF VIRGINIA
MCLEAN, VIRGINIA 22102

MEMO

[Signature]

⑆056004241⑆ 40089851⑈ 0612

EXHIBIT B

RECEIVED MAY 19 1980

NORTH AMERICAN
REAL ESTATE & LAND COMPANY, INC.

1215 NORTH HERNDON STREET

P. O. BOX 390

ARLINGTON, VIRGINIA 22210

703 522-2236

May 16, 1980

Mr. Michael W. Fraley
Vice President
James T. Barnes of Washington, D.C., Inc.
One Central Plaza
11300 Rockville Pike
Rockville, Maryland 20852

Dear Mike:

This is to inform you that your exclusive employment contract to procure a loan for our Hartland Road project, dated 27 March 1980, to run for 45 days, has expired and is hereby terminated. Please return our \$10,000 deposit check immediately.

Sincerely,

Robert W. Akers
President

cc: Walter N. Hylton III, Esq.
Bean, Kinney, Korman & Hylton

Don Shircliff, VMC Mortgage Co.

Charles V. Hardwick, Jr.
The Barnes Co.

Habib Hakim
North American Financial Investment
& Management Group, N.V.

EXHIBIT C 9

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ROBERT W. AKERS)
and)
C. GORDON ZEEMAN,)
)
Plaintiffs,)
)
v.)
)
JAMES T. BARNES OF)
WASHINGTON, D.C., INC.,)
)
Defendant)

AT LAW NO. 21817

JUL 23 1980

DAVID A. BELL, Clerk
Circuit Court, Arlington County, Va.
Deputy Clerk

ANSWER AND COUNTERCLAIM

COMES NOW the Defendant, James T. Barnes of Washington, D.C., Inc., by counsel, and in answer to the Motion For Judgment filed herein, states as follows:

1. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Motion For Judgment and, therefore, denies said allegations.

2. Defendant admits the allegations contained in paragraph 2 of the Motion For Judgment.

3. Defendant admits the allegations contained in paragraph 3 of the Motion For Judgment.

4. Defendant admits a deposit of \$10,000.00 was paid to it by Plaintiff Akers pursuant to paragraph 7 of the exclusive brokerage agreement attached to the Motion For Judgment as Exhibit A (hereinafter the "Exclusive Brokerage Agreement"), and that a copy of the said deposit check is attached to the Motion For Judgment as Exhibit B. Defendant denies the remainder of the allegations of paragraph 4 of the Motion For Judgment since these the Exclusive Brokerage Agreement "speak for themselves" as to the contract between Plaintiffs and Defendant.

5. Defendant admits that it received a signed letter equivalent to the letter attached to the Motion For Judgment as Exhibit C. Defendant is without knowledge or information sufficient to form a belief as to the date the letter was mailed or by whom, and, therefore, denies that it was mailed by Plaintiff Akers on May 16, 1980. Defendant also denies that the letter was effective as a "termination" letter pursuant to the Exclusive Brokerage Agreement. In addition, Defendant denies the remainder of the allegations contained in paragraph 5 of the Motion For Judgment since these allegations constitute conclusions of law and the provisions of the Exclusive Brokerage Agreement "speak for themselves" as to the contract between Plaintiff and Defendant.

6. Defendant denies the allegations contained in paragraph 6 of the Motion For Judgment.

7. Defendant admits that Plaintiffs have requested the return of the \$10,000.00 deposit and that this request has been denied. Defendant denies the remainder of the allegations contained in paragraph 7 of the Motion For Judgment.

8. Defendant denies the allegations contained in paragraph 8 of the Motion For Judgment.

9. Defendant denies the allegations contained in paragraph 9 of the Motion For Judgment.

WHEREFORE, Defendant requests that the Motion for Judgment be dismissed and that it be awarded its costs and fees expended and such other and further relief as the Court deems just and proper.

COUNTERCLAIM

For its Counterclaim the Defendant states as follows:

1. Defendant operates as a mortgage company and is a corporation organized and existing under the laws of the District

2. Plaintiffs are citizens of the United States of America and at all times herein relevant, were residents of the Commonwealth of Virginia.

3. On March 27, 1980, Plaintiffs and Defendant entered into an exclusive brokerage agreement pursuant to which Defendant agreed to attempt to obtain a financing commitment for a construction loan and permanent loans to qualified purchasers in conjunction with the development of certain real property owned by Plaintiffs and known as Hartland Roads Condominium Office Project, upon which Plaintiffs intended to construct office condominium units. Said brokerage agreement is attached to the Plaintiffs' Motion for Judgment as Exhibit A and hereinafter is referred to as the "Exclusive Brokerage Agreement." In consideration of Defendant obtaining such a financing commitment, Plaintiffs agreed to pay Defendant a commission in the amount of one (1%) percent of the amount of the construction loan and permanent loans obtained.

4. In accordance with the Exclusive Brokerage Agreement, Defendant obtained a commitment for permanent financing of qualified purchasers of the units to be constructed on the aforementioned real property in the total amount of \$1,624,500.00

5. Despite Defendant's performance in accordance with the Exclusive Brokerage Agreement, Plaintiffs refused to accept the

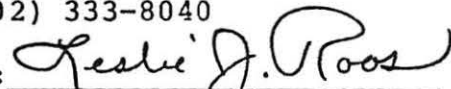
commitment and to proceed to perform their obligations in conjunction with the Exclusive Brokerage Agreement, thereby breaching the Exclusive Brokerage Agreement.

6. In accordance with paragraphs 3 and 6 of the Exclusive Brokerage Agreement, Defendant is entitled to a commission equal to one (1%) percent of the \$1,624,500.00 permanent financing obtained for Plaintiffs, or \$16,245.00; and to a commission equal to one (1%) percent of the \$1,300,000.00 construction loan which Defendant was prevented from obtaining due to Plaintiffs' breach of the Exclusive Brokerage Agreement.

WHEREFORE, Defendant requests judgment against Plaintiffs in the amount of \$29,245.00 plus interest from the date of judgment, costs and attorney's fees, such compensatory damages as Defendant will suffer as a consequence of Plaintiffs' actions and such other relief as the Court may deem proper.

JAMES T. BARNES OF
WASHINGTON, D.C., INC.
By Counsel

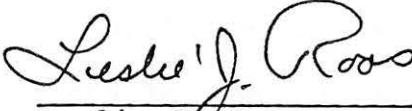
REPETTI, DEERIN & MURPHY, P.C.
1010 Wisconsin Avenue, N.W.
Suite 630
Washington, D.C. 20007
(202) 333-8040

By: 
Leslie J. Roos
Counsel for Defendant

Virginia Address: 4231 Markham Street
Suite 200
Annandale, Virginia 22003

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer and Counterclaim was mailed, postage prepaid, this 21st day of July, 1980 to W. H. Hylton, Esquire, 2007 North 15th Street, P.O. Box 749, Arlington, Virginia 22216, Counsel for Plaintiffs.



Leslie J. Roos

P R O C E E D I N G S

*

*

*

THE COURT: All right. I have the decision here and have made notes of it and will read those to you so the stenographer can take it down and there will be no question then of what was said and here is the decision: Argument that the commitment which was brought back by Mr. Fraley is not the one which the Plaintiffs wanted or would be happy with is really not the point. The real question here is whether the Barnes Company through Mr. Fraley performed its contract of brokerage and should be paid in accordance with it.

Earlier on in the meetings, it was made clear to the Plaintiffs that the loan would not be procurable by the Defendant unless the Plaintiffs produced some additional financial banking.

As distasteful as this was to the Plaintiffs, they nevertheless said that they could comply with this requirement.

It is not important to the decision here whether Mr. Hakim ever became the partner in the legal sense of the Plaintiffs, but rather from the point of view of one

1 dealing with the Plaintiffs in good faith was he, Hakim,
2 a part of their group for purposes of this transaction?

3 Clearly, I think the answer to that must be
4 yes.

5 The Plaintiffs introduced Hakim to the entire
6 transaction. The submission to Hanson is replete with
7 information about him. A meeting was held in his office
8 and a proposed partnership was set up on his letterhead.

9 Significantly, at no time was anyone told
10 that they could not deal with Hakim in the case.

11 The Court, therefore, finds that this individual
12 was held out to the Defendant as a person who was either
13 a part of their group or was in the process of becoming
14 a part of the group, and as such, communications to him
15 or emanating from him are binding upon the Plaintiffs.

16 Much has been said of this case about the
17 brokerage contract and any deviations which might exist
18 between it and the loan commitment which was obtained.

19 It should be noted that the brokerage contract
20 is general in its terms and is not designed to cover
21 every contingency that might arise. If the latter were
22 the case, the document would have to be about as long as
23 the mortgage or the deed of trust itself.

1 It should be remembered that it is not a
2 mortgage or a loan commitment, but rather a contract of
3 employment. It is not required to cover all contingencies
4 and need not have the precision of a loan document.

5 It is also important to remember that these
6 documents, that is, brokerage agreements, are used in the
7 mortgage lending business and the law presumes that people
8 who sign them are familiar with the practices that prevail
9 in the trade or profession. That is the principle reason
10 why all details need not be included in them.

11 The Court views this case as one that depends
12 upon whether or not there has been a substantial performance
13 of the brokerage contract. It is why my concern throughout
14 the case has been with the claimed deviations between it
15 and the terms of the commitment of the John Hanson Company.

16 In the early stages of the case the subject
17 of presale requirements came up. All the evidence before
18 me is that they are common in the permanent financing
19 of commercial or office units.

20 One expert, I believe, said that it is ex-
21 ceptional when they are not required and another said that
22 he was not aware of an instance where they were not required.
23 It would have been a waste of a broker's time to seek a

1 loan without such requirements so long as the Hanson
2 commitment was in line with prevailing requirements of
3 the mortgagees.

4 In this regard, there was no deviation from
5 the brokerage contract.

6 The provisions relating to presale requirements
7 meet that standard. The same may be said for the terms
8 of the loan produced by Mr. Fraley insofar as they dealt
9 with the rate of interest, the floor on interest and the
10 buy-down provisions in the commitment from John Hanson.

11 If anything, those conditions were more
12 favorable to the borrower or developer than the ones
13 contained in the brokerage contract.

14 The Court finds as to the claimed deviations
15 from the terms of the brokerage contract that they are
16 not of such character that they may be said to constitute
17 breach of the terms of the brokerage contract.

18 In this case, I have examined the evidence
19 very carefully in an effort to determine the legal con-
20 sequences of what the parties wrote, said, or did in the
21 course of their dealings. I do not attribute bad faith
22 to either party to this case.

23 I do think, however, that it was unreasonable

1 for the Plaintiffs to feel that the Defendant broker
2 would continue to perform his side of the contract without
3 even clearing the deposit check in an escrow account.
4 The reason why the check was deposited is of no consequence.
5 It was certainly held for more than a reasonable time.

6 In any event, the deposit of the check seemed
7 to trigger the occurrence of a number of things and bring
8 the case to a head.

9 The Court finds that the Plaintiffs effort to
10 terminate the contract in his letter of May 16, 1980 by
11 the passage of time was ineffectual and that the Defendant
12 was not required to return the deposit.

13 In passing, it should be noted that even at
14 this stage, Mr. Hakim was sufficiently in the deal to
15 receive a copy of Mr. Akers letter of May 16, namely,
16 Plaintiffs' Exhibit No. 3.

17 The Court, therefore, on the original motion
18 for judgment finds in favor of the Defendant and in favor
19 of the Defendant on its counterclaim for its commission.

20 Judgment is to be entered in its behalf with
21 interest from this date. Counsel are to prepare the
22 order and upon its endorsement present it to me for entry.

23 ~~Now, the stenographer can prepare for you that~~

PRINTERS NOTE:

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VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

ROBERT W. AKERS, et al,

Plaintiff,

v.

JAMES T. BARNES OF
WASHINGTON, D.C., INC.,
Defendant

At Law No. 21817

FINAL ORDER

The above-entitled cause came on for trial, before THE HONORABLE WILLIAM L. WINSTON, Judge, in and for the Circuit Court of Arlington County, Virginia, at 10:00 o'clock a.m. on February 23, 1981 and continued at 10:00 o'clock a.m. on February 25, 1981, and upon trial of this matter, the introduction into evidence of various documents by both parties, the testimony adduced at trial and the arguments of counsel for the parties hereto, the Court issued the following opinion and final order:

Argument that the commitment which was brought back by Mr. Michael W. Fraley of James T. Barnes of Washington, D.C., Inc. is not the one which the Plaintiffs wanted or would be happy with is really not the point. The real question here is whether the Defendant through Mr. Fraley performed its contract of brokerage and should be paid in accordance with it.

Earlier on in the meetings among the parties, it was made clear to the Plaintiffs that the loan would not be procurable by the Defendant unless the Plaintiffs produced some additional financial backing.

As distasteful as this was to the Plaintiffs, they nevertheless said that they could comply with this requirement.

It is not important to the decision here whether Mr. Habib Hakim ever became the partner of the Plaintiffs in the legal sense, but rather from the point of view of one dealing with the Plaintiffs in good faith was he, Hakim, a part of their group for purposes of this transaction?

Clearly, I think the answer to that must be yes.

The Plaintiffs introduced Hakim to the entire transaction. The submission of the loan package by Barnes to John Hanson Savings & Loan, Inc. is replete with information about Hakim. A meeting was held in his office and a proposed partnership was set up on his letterhead.

Significantly, at no time was anyone told that they could not deal with Hakim in the case.

The Court, therefore, finds that this individual was held out to the Defendant as a person who was either a part of their group or was in the process of becoming a part of the group, and as such, communications to him or emanating from him are binding upon the Plaintiffs.

Much has been said of this case about the brokerage contract and any deviations which might exist between it and the loan commitment which was obtained.

It should be noted that the brokerage contract is general in its terms and is not designed to cover every contingency that might arise. If the latter were the case, the document would have to be about as long as the mortgage or the deed of trust itself.

It should be remembered that it is not a mortgage or a loan commitment, but rather a contract of employment. It is not required to cover all contingencies and need not have the precision of a loan document.

It is also important to remember that these documents, that is, brokerage agreements, are used in the mortgage lending business and the law presumes that people who sign them are familiar with the practices that prevail in the trade or profession. That is the principle reason why all details need not be included in them.

The Court views this case as one that depends upon whether or not there has been a substantial performance of the brokerage contract. It is why my concern throughout the case has been with the claimed deviations between it and the terms of the commitment of John Hanson Savings & Loan, Inc.

In the early stages of the case the subject of presale requirements came up. All the evidence before me is that they are common in the permanent financing of commercial or office units.

One expert, I believe, said that it is exceptional when such presales requirements are not required and another said that he was not aware of an instance where they were not required. It would have been a waste of a broker's time to seek a loan without such requirements so long as the John Hanson commitment was in line with prevailing requirements of the mortgagees. In this regard, there was no deviation from the brokerage contract. The provisions relating to presale requirements meet that standard.

The same may be said for the terms of the loan produced by Mr. Fraley insofar as they dealt with the rate of interest, the floor on interest and the buy-down provisions in the commitment from John Hanson.

If anything, those conditions were more favorable to the borrower or developer than the ones contained in the brokerage contract.

The Court finds as to the claimed deviations from the terms of the brokerage contract that they are not of such character that they may be said to constitute breach of the terms of the brokerage contract.

In this case, I have examined the evidence very carefully in an effort to determine the legal consequences of what the parties wrote, said, or did in the course of their dealings. I do not attribute bad faith to either party to this case.

I do think, however, that it was unreasonable for the Plaintiffs to feel that the Defendant broker would continue to perform his side of the contract without even clearing the deposit check in an escrow account. The reason why the check was deposited is of no consequence. It was certainly held for more than a reasonable time.

In any event, the deposit of the check seemed to trigger the occurrence of a number of things and bring the case to a head.

The Court finds that the Plaintiffs effort to terminate the contract in his letter of May 16, 1980 by the passage of time was ineffectual and that the Defendant was not required to return the deposit.

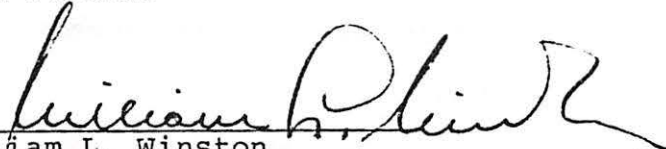
In passing, it should be noted that even at this stage, Mr. Hakim was sufficiently involved in the deal to receive a copy of Mr. Akers letter of May 16, namely, Plaintiffs' Exhibit No. 3.

The Court, therefore, on the original motion for judgment finds in favor of the Defendant and in favor of the Defendant on its counterclaim for its commission.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the Motion for Judgment is denied, that Defendant is awarded judgment in the amount of Sixteen Thousand Two Hundred Forty-Five and 00/100 Dollars (\$16,245.00) on its Counterclaim, plus interest at the judgment rate of interest from February 25, 1981, and that the transcript of these proceedings be made a part of the record.

AND THIS ORDER IS FINAL.

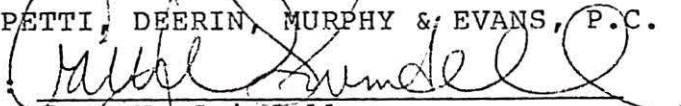
Entered: April 13, 1981.


William L. Winston
Judge

Seen and Agreed:

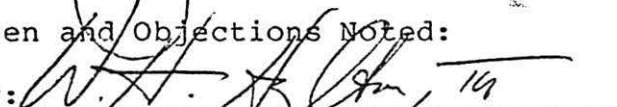
REPETTI, DEERIN, MURPHY & EVANS, P.C.

By:


Gary W. Swindell
Counsel for Defendants

Seen and Objections Noted:

By:


W.H. Hylton, Jr.
Counsel for Plaintiffs

ASSIGNMENTS OF ERROR

I. The trial court erred in ruling that there was no deviation from the brokerage contract in the terms of the loan commitment by the John Hanson Savings and Loan Association with regard to the presales requirement.

II. The trial court erred in ruling that the law presumes that the brokerage contract included authority for the agent to obtain a loan commitment with a presale requirement.

III. The trial court erred in failing to find that the aforesaid presumption, if any there be, was rebutted by the evidence.

IV. The trial court erred in failing to find that the terms of the loan applications prepared by Barnes, Inc., would have been rejected by the John Hanson Savings and Loan Association, the lender.

V. The trial court erred in finding that the rate of interest of the John Hanson loan commitment produced by Barnes, Inc. did not deviate from the rate of interest specified in the brokerage contract.

VI. The trial court erred in finding that the claimed deviations from the terms of the brokerage contract did not constitute a breach of its terms.

1 MR. HYLTON: I understand.

2 THE COURT: All right.

3 MR. HYLTON: Your Honor, basically, this case
4 fits in the category of a brokerage fee dispute as we
5 see it. The seeds of the dispute began in the early part
6 of March, 1980 a little less than a year ago. Mr. Akers
7 and Mr. Zeeman who are sitting at my right are or were
8 the owners at that time of some commercial ground near
9 Merrifield just after Hartland Road and they were desirous
10 of developing this property. They had been working with
11 a particular broker in order to find construction or
12 permanent financing which, of course, was necessary in
13 order for them to develop and build as they desired condo-
14 minimum offices, approximately 10 units of office condo-
15 minimums.

16 They were introduced to the Barnes Company in
17 about the middle of March of last year by a mutual ac-
18 quaintance that they met with Mr. Mike Fraley and Vince
19 Hardwick on a certain day and discussed whether or not
20 Barnes thought they could get some permanent financing or
21 construction financing.

22 The consensus out of that meeting was they
23 could work together and on the 27th of March a brokerage

1 agreement was signed by Akers and Zeeman individually,
2 not in their capacity as principles of a real estate firm
3 that they work with here in Arlington.

4 The brokerage agreement, of course, will be
5 introduced into evidence when Mr. Akers testifies. The
6 pertinent terms are -- the paragraphs that we're going to
7 be concentrating on are Paragraph 2, primarily. I think
8 there is a Paragraph 6 that may come into it and there
9 may be some other paragraphs as we go through it, but
10 basically the case revolves, as we see it, around their
11 brokerage agreement, the exact terms, because in the
12 brokerage agreement the terms of the loan that the brokers
13 were supposed to go out and get are set up in Paragraph 2
14 and it is our position that they had to stick to those
15 terms, in other words, be governed by them.

16 Subsequent to March 27 --

17 THE COURT: And you say that there was no
18 modification as matters progressed?

19 MR. HYLTON: Right. The brokerage agreement
20 was typed apparently for Mr. Fraley; that is, Mr. Zeeman
21 and Mr. Akers had nothing to do with the preparation of it.
22 I guess they don't know exactly who prepared it, but it
23 was presented to them and I don't believe any changes were

1 made.

2 THE COURT: Who do you say prepared the agree-
3 ment?

4 MR. HYLTON: The Barnes Company, Your Honor.
5 I doubt that Mr. Fraley typed it himself, but it was pre-
6 pared under his guidance and it was presented to our
7 clients to them to the Plaintiffs and I believe there were
8 no changes made in that brokerage agreement on the 27th.

9 After that time, Mr. Fraley went about
10 apparently trying to get permanent and construction financ-
11 ing. There were various communications back and forth
12 between the parties; that is, Mr. Fraley primarily and
13 Mr. Zeeman. There was communication by telephone with
14 Mr. Zeeman at one point. Communications with Mr. Akers,
15 primarily.

16 The brokerage agreement had a 45 day drop dead
17 date, if you will. It was designed to go for 45 days or
18 within -- I believe there was an "or" in there that said
19 that the agreement had to be terminated within 15 days by
20 limit.

21 In any event, at some point, Mr. Akers who had
22 put up a deposit of \$10,000 by personal check requested
23 the check back and found that Barnes had or Mr. Fraley

1 had seen to it that the check was deposited so that he
2 could not get the money back and there was discussions
3 about that and Mr. Fraley refused to give the money back
4 and subsequent their relationship deteriorated or began
5 to deteriorate.

6 At one point, I believe, on May 16, Mr. Akers
7 wrote to Mr. Fraley and terminated the brokerage agreement.

8 Subsequent discussions about the \$10,000
9 deposit was fruitless with respect to the return of it.
10 So, basically, that's our case.

11 Simply stated, the brokerage agreement was
12 signed. It involved Mr. Fraley and the Barnes Company
13 getting financing for Mr. Akers and Mr. Zeeman for which
14 they would be paid a commission. A \$10,000 deposit was
15 placed at the end of the agreement and during the period
16 of time no such or any kind of commitment or financing
17 was brought forward and it's our position that the Barnes
18 Company did not perform their end of the contract and are,
19 therefore, not entitled to any commission and, therefore,
20 the \$10,000 deposit which was placed by Mr. Akers and
21 Mr. Zeeman should be returned to them.

22 We have asked in this suit not only for compen-
23 satory damages, but also based on the facts and circumstances

1 that we will develop with Mr. Akers we have asked for
2 punitive damages. They have had substantial risk and
3 they have had substantial expenses as a result of the
4 refusal of the Barnes Company to return this deposit to
5 them. That, basically, is our case. I'll have Mr. Akers
6 testify and then Mr. Zeeman and Mr. Falcone.

7 THE COURT: This suit is for the return of the
8 \$10,000?

9 MR. HYLTON: From our side, Your Honor. There
10 is also a counterclaim.

11 THE COURT: You claim in addition to that
12 punitive damages?

13 MR. HYLTON: Yes, sir.

14 THE COURT: But, there are no other general
15 or consequential damages which you claim over and above
16 the \$10,000 other than the punitive damages. Is that fair
17 to say?

18 MR. HYLTON: Your Honor, I'd like for Mr. Akers
19 to talk with you about that and explain what their position
20 is with respect to that. It's conceivable that because
21 of the way -- because of the context in which this case
22 developed.

23 THE COURT: How will he talk to me about it?

1 loan was not on the terms substantially in accordance
2 with the brokerage agreement.

3 THE COURT: You're not limiting that contention,
4 however, to the fact that there was not construction
5 financing, are you?

6 MR. HYLTON: No, sir. We're in agreement that
7 as the case developed -- see, everybody was working here
8 to make the project work.

9 THE COURT: If your people continued to deal
10 with them having accomplished the construction financing
11 elsewhere, you would concede that there could still be
12 liability under the contract?

13 MR. HYLTON: Not for that, because --

14 THE COURT: Not for that.

15 MR. HYLTON: Not for the construction financing.

16 THE COURT: No.

17 MR. HYLTON: Right, because it's our position
18 that he agreed not to since he wasn't --

19 THE COURT: I assume they're not claiming for
20 the construction financing.

21 MR. HYLTON: Well, I don't know. I couldn't
22 tell, sir. But, that basically is the sum and substance
23 of our case as we see it, whether they presented a lender

1 in substantial accordance with the terms of Paragraph 2
2 of the brokerage agreement.

3 THE COURT: Uh-huh.

4 MR. HYLTON: Of course, we're saying they didn't.

5 THE COURT: Have your first witness, sir.

6 Whereupon,

7 ROBERT W. AKERS,

8 a Plaintiff herein, was called as a witness by and on his
9 own behalf, having been previously duly sworn by the Clerk
10 of the Court, was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. HYLTON:

13 Q. Mr. Akers, would you state your full name, please?

14 A. Robert W. Akers.

15 Q. And your address?

16 A. 1024 North Arlington Mill Drive, Arlington,
17 Virginia.

18 Q. Are you one of the Plaintiffs in this case?

19 A. Yes, I am.

20 Q. Are you a principle in a firm located in
21 Arlington known as North American Real Estate and Land
22 Company, Inc.?

23 A. I am.

1 Q In March, around the middle of March of 1980,
2 were you and your partner, Mr. Zeeman, introduced to
3 Mr. Mike Fraley from the James T. Barnes Company?

4 A Yes, we were.

5 Q Who were you introduced to him by?

6 A We were introduced by Don Shircliff who is
7 the president of Virginia Mortgage Corporation who at
8 that time was a lender who held the land loan on a project
9 that we owned in Merrifield and were in the process of
10 trying to develop.

11 Q You owned some property?

12 A Right.

13 Q Is it in your own name?

14 A It was individually held by Mr. Zeeman, myself
15 and another partner of ours, Mr. Ed Buchanan.

16 Q All right. And do I understand at the time
17 you were introduced to Mr. Fraley by Mr. Shircliff that
18 there was a loan against the property at that time?

19 A There was a -- you might call it a bridge loan
20 or a temporary loan that we had put on and the reason for
21 this had been that we went to settlement on the land the
22 day after the weekend in which the interest rates went from
23 normal to astronomical in October of 1979 and we were

1 attempting to get a construction land loan to pay off the
2 temporary loan that we had on a basis of 90 day notes re-
3 newable for an additional 90 days and we were coming up
4 on the end of our second 90 day period.

5 Q How much was this loan?

6 A It was \$160,000 and it was coming due for the
7 entire principle.

8 Q When was it coming due, what date?

9 A Well, it would have been six months after about
10 the 10th of October so I guess that was coming due in
11 April.

12 Q Rough calculation?

13 A Or, May.

14 Q Around April 10?

15 A Somewhere in that neighborhood.

16 Q Of '80?

17 A (Witness nods in the affirmative.)

18 Q What kind of interest rate did you have on
19 this loan?

20 A We were paying Chase Manhattan prime which was
21 at that point around 20 plus 2 plus a point a month for
22 our loan that was eating us up.

23 Q So, you were paying about 22% interest plus you

1 were paying the VMC mortgage people a point a month meaning
2 1% of the loan which would have been \$16,000?

3 A. \$1600 a month plus 22% interest.

4 Q. Okay. So, you were introduced to --

5 THE COURT: On the loan?

6 THE WITNESS: Yes.

7 THE COURT: 160?

8 THE WITNESS: Yes, sir, and the reason I point
9 this out is because --

10 THE COURT: That was a 90 day renewal?

11 THE WITNESS: 90 day renewal. We were coming
12 up on the end of our second 90 days and we were considerably
13 under pressure to pay that loan off and I think this is
14 important because we were introduced to Mr. Fraley and
15 Mr. Hardwick of the Barnes Company by the individual who
16 we owed this money to and we were under some pressure to
17 work with them, because we were relying on him to continue
18 to renew this for us if we couldn't find a loan and we
19 certainly couldn't act uncooperative with anyone that he
20 introduced us to.

21 BY MR. HYLTON:

22 Q. When you say you were under pressure to pay
23 this land loan off, you were under pressure from Shircliff?

1 A. That's right. He was being as cooperative as
2 he could be, but he was under pressure from his investors
3 to have it paid off.

4 Q. Had you ever met Mr. Fraley or Mr. Hardwick
5 before?

6 A. No.

7 Q. Do you know about when this meeting took place?

8 A. It was within a week or 10 days prior to the
9 date we signed our brokerage agreement which was -- we
10 signed on the 27th of March so I would say it was sometime
11 the week of the 20th of March or thereabouts.

12 Q. Had you been trying to get a construction and
13 permanent financing on this project before at this time?

14 A. I had been trying to get permanent and con-
15 struction financing ever since October, ever since we had
16 gone to settlement on the land loan and I had worked with
17 a number of people including some other mortgage brokers.
18 I had worked directly with some lenders myself. We had
19 received a verbal commitment from the Bank of Virginia
20 for construction financing with an indication that they
21 could help to secure the permanent and the reason we had
22 not rejected that was we were still in the negotiating
23 stage, but it appeared that it was not going to be sufficient

1 for our needs. We needed more money than they were willing
2 to lend, so that's why we were willing to work with Mr.
3 Fraley and Mr. Hardwick.

4 Q Had you been working with another broker?

5 A I had been working with another broker. We
6 had been working rather closely together and he had asked
7 me for an exclusive authorization to work on our behalf
8 and I had refused it.

9 Q This broker's agreement that you ended up
10 signing with the Barnes Company was an exclusive --

11 A It was an exclusive with the deposit which was
12 something that I had refused to do prior to this.

13 Q Will you elaborate on what an exclusive brokerage
14 agreement means to you as a principle?

15 A Exclusive brokerage agreement means that during
16 the period of the exclusive the broker that is working for
17 you has the right to secure the loan for you and if the
18 loan is secured either by him or by you or working together,
19 whatever, in whatever capacity, he is due his commission.
20 So, you're really putting everything in his hands, giving
21 -- you're taking -- you're reducing your options.

22 Q You're putting your eggs in one basket?

23 A You're putting all your eggs in one basket.

1 Q Now, when you had your first meeting with Mr.
2 Fraley and Mr. Hardwick and Mr. Zeeman, did you explain
3 to them that you had, in fact, contacted other financing
4 sources?

5 MR. SWINDELL: Objection, Your Honor.

6 THE WITNESS: I explained to them who I had
7 been working with, because when we entered this agreement
8 you will have to remember that we entered an agreement to
9 try to accomplish a purpose. I mean, we were certainly
10 not at odds when we entered this agreement so we were
11 doing everything that we could to help them in accomplishing
12 our purpose and so I told them at that time who we had
13 already contacted, who we had been working with, because
14 I didn't want us to duplicate any effort that we had in
15 the past. I explained that we had worked with the Bank
16 of Virginia. I also explained that I had a rather lengthy
17 session one morning with the President of John Hanson
18 Savings & Loan Service Corporation along with this other
19 broker and that we had left that meeting and gone next
20 door to a restaurant, had a cup of coffee and had come to
21 the conclusion that we weren't going to get anywhere with
22 them. We just were not going to be able to get a loan from
23 them on terms that we could live with.

1 THE COURT: From whom?

2 THE WITNESS: John Hanson Savings & Loan.

3 This was their service corporation which is slightly
4 different from the savings and loan itself, but it's kind
5 of two peas in a pod.

6 THE COURT: And when was this, the conversation
7 relating to John Hanson came up?

8 THE WITNESS: When we met with Mr. Fraley and
9 signed our brokerage agreement on the 27th of March I
10 explained to him who we had been working with and what our
11 results had been of these conversations.

12 BY MR. HYLTON:

13 Q All right, sir. Not at the first meeting. It
14 was at the second meeting?

15 A It's possible that we discussed this at the
16 first meeting with Mr. Fraley and Mr. Hardwick, but I'm
17 not positive in my recollection that it was discussed then,
18 but I am positive that it was discussed in the meeting of
19 the 27th.

20 Q All right. Back to the first meeting then.
21 Did you discuss loan terms? What did you discuss?

22 A The first meeting with Mr. Shircliff?

23 Q (Counsel nods in the affirmative.)

1 A. We explained our general circumstances. I
2 explained the amount of money that we needed. I explained
3 our position particularly in regard to presale requirements
4 which was discussed at that meeting.

5 Q. Presale requirement, would you elaborate,
6 explain what that is?

7 A. On a bill project such as this the permanent
8 lender who is going and the construction lender both
9 generally who are going to be making a commitment to you
10 want to have an indication that you're going to be able
11 to -- that your project will be able to sell and sell along
12 the projections that you have in your loan package and
13 so the presale requirement is a marketing indication to
14 them that you're going to be able to sell your project. We
15 were particular adamant against presales in this particular
16 case and the reason we were was because we were in rampaging
17 inflation of 20%. We wouldn't be delivering these units
18 for 18 months or better and for us to commit to a fixed
19 price for 18 months in the future with 20% inflation going
20 on was something that scared us to death. We were afraid
21 that we might be committed to deliver something at a price
22 that our cost would exceed our selling price and we were --
23 this had been a position I had taken not just then. I had

1 taken it with everyone I had talked with.

2 Q In addition to the presale, did you discuss
3 anything else?

4 A Well, we discussed interest rates.

5 Q How much money you needed?

6 A And how much money that we needed.

7 Q Did they respond to you? What did they say to
8 you about their ability to get the money that you seemed
9 to need?

10 A Well, they convinced us that not only could
11 they get us the loan, but they told us that they would
12 probably be able to have a verbal commitment to us within
13 10 days that would be followed up by a written commitment
14 later and they made us feel that they had a source in mind
15 and that they would not be going out and shopping, but
16 they had a source in mind that would have money available
17 along the lines that we were looking for. I might add,
18 if they had told us at that point that all they wanted
19 was the authorization to go out and shop a loan for us
20 we would have refused it. We had been refusing all along
21 to give that to anyone else and why should we give it to
22 them and they did a very good selling job on us.

23 Q So, when did you see Mr. Fraley next?

1 A. Well, the essence of that meeting was that we
2 would meet with him again. We would give him an exclusive
3 authorization and we would give him --

4 THE COURT: That was the meeting of the 27th
5 of March?

6 THE WITNESS: No, the first meeting, Your Honor,
7 was the meeting I'm referring to.

8 THE COURT: Referring to now and the 27th was
9 when you signed up?

10 THE WITNESS: The 27th was when we signed an
11 agreement substantially in accordance with what we had
12 discussed on the prior meeting.

13 THE COURT: But, it's your testimony that on
14 the meeting of the week prior to the signing meeting that
15 you had been told that they had a ready source.

16 THE WITNESS: That was what they led us to
17 believe.

18 THE COURT: And would not shop, as you call it,
19 the loan?

20 THE WITNESS: They didn't specifically say they
21 wouldn't shop it, but our entire tone of our conversation
22 was that they had a source; that this was not a shopping
23 expedition.

1 BY MR. HYLTON:

2 Q All right, sir. The next time you saw Fraley
3 was on the 27th. Is that right?

4 A The next time we saw him was in our office in
5 Arlington on the 27th and he brought a typed brokerage
6 agreement which we signed.

7 MR. HYLTON: Your Honor, I'd like to offer this
8 brokerage agreement with stipulation of counsel.

9 THE COURT: There is no objection?

10 MR. SWINDELL: No objection, Your Honor.

11 MR. HYLTON: I can have Mr. Akers identify this
12 if you wish.

13 THE COURT: Without objection, the agreement
14 on the letterhead of Barnes Company is received as Plaintiff's
15 No. 1.

16 (The document, brokerage
17 agreement, was marked for
18 identification as Plain-
19 tiff's Exhibit No. 1 and
20 was received in evidence.)

21 MR. HYLTON: I'd like to introduce also -- this
22 would be a good opportunity again with stipulation of
23 counsel no objection the check which Mr. Akers gave to Mr.

1 Fraley.

2 THE COURT: I'm marking it on the reverse side
3 of the check as Plaintiff's No. 2 received into evidence
4 without objection.

5 MR. HYLTON: Thank you, Your Honor.

6 (The document, a check, was
7 marked for identification
8 as Plaintiff's Exhibit No. 2
9 and was received in evi-
10 dence.)

11 THE COURT: Now, before you go forward I think
12 I should stop and look at these.

13 Referring to Plaintiff's No. 2 being the
14 \$10,000 check drawn by you, was this on a personal account
15 or a business account?

16 THE WITNESS: That was my personal.

17 THE COURT: This was a personal account.

18 THE WITNESS: Personal account, Your Honor.

19 THE COURT: Was there any particular part of
20 this that you wanted me to refer to now over and above
21 just the general terms of it?

22 MR. HYLTON: Your Honor, the particular para-
23 graphs and, of course, I don't mean to represent anything

1 here which will be wrong, of course, but it seems to me
2 that we're primarily interested in all of it in Paragraph
3 2 which sets out the terms of the loan.

4 THE COURT: Right.

5 MR. HYLTON: We're interested in Paragraph 3
6 which covers the duration of the agreement.

7 THE COURT: Yes, sir.

8 MR. HYLTON: We're interested in 6, Paragraph 6,
9 particularly 6A.

10 THE COURT: All right.

11 MR. HYLTON: I don't mean to limit my ability
12 to argue, but I think that's all there is.

13 THE COURT: All right, and I take it you would
14 agree those are the parts you would be interested in.

15 MR. SWINDELL: In addition, Your Honor, we
16 would direct your attention to Paragraph 3C.

17 THE COURT: 3C. All right.

18 MR. SWINDELL: And Paragraph 7.

19 THE COURT: 3C and 7.

20 MR. SWINDELL: Yes, Your Honor. 7 simply indi-
21 cates the deposit was made for consideration for the con-
22 tract.

23 THE COURT: In Paragraph 2 of this agreement

1 when it refers to the commitment fees construction at 2
2 points --

3 THE WITNESS: Yes, sir.

4 THE COURT: -- that means 2% of the construction
5 loan?

6 THE WITNESS: Yes, sir.

7 THE COURT: Then, when it says permanent
8 meaning for each year then at 2 points plus 2 points paid
9 by buyer, that means the buyer of the house?

10 THE WITNESS: Yes, sir.

11 THE COURT: And 2 points by the developer or
12 the seller?

13 THE WITNESS: Right.

14 THE COURT: And in the paragraph dealing with
15 the terms of the loan, construction 12 months for additional
16 6 months for additional 30, then it says permanent loans
17 for five years with amortization not to exceed 25 years.
18 Does that mean it's a type of loan that would become due
19 and payable in full after five years, but be amortized on
20 a 25 year schedule?

21 THE WITNESS: Basically.

22 THE COURT: It may not have anything to do
23 with this case.

1 THE WITNESS: It's written that way because
2 loans have been changing particularly in the last 12 to 18
3 months and the lenders want to be able to renew the
4 interest rate every five years. I believe we're talking
5 about a five year period in which the lender can take a
6 look at the loan and renew the interest rate.

7 THE COURT: I understand. That would be the
8 practical effect of it.

9 THE WITNESS: Yes.

10 THE COURT: But, if the buyer didn't negotiate
11 then --

12 THE WITNESS: It could --

13 THE COURT: -- the whole thing is up?

14 THE WITNESS: Yes.

15 THE COURT: All right.

16 BY MR. HYLTON:

17 Q. Mr. Akers, let me go back again before we go
18 further with the meeting on the 27th. Let's go back to
19 the first meeting just for a second. Did they react to
20 your ability to get the loan on your own?

21 A. Yes. I told them that we had been attempting
22 to get the loan on our own up to this point with the ex-
23 ception we did have another individual who had been working

1 with us that indicated a willingness to join with us and
2 add his financial statement to ours in order to give us
3 additional financial strength, and in fact, we had even
4 been to his bank at one point to talk with a loan officer
5 there and he was willing to come in with us and do this
6 for a relatively modest percentage of our project not to
7 exceed one-third and we discussed the fact that well,
8 maybe, we might need more strength than his so that it
9 would be possible that we would have to come in and have
10 some kind of a joint venture partner. We indicated that
11 we had several sources in mind.

12 THE COURT: You told this to these people?

13 THE WITNESS: Yes, sir.

14 THE COURT: At the first meeting?

15 THE WITNESS: At the first meeting.

16 THE COURT: Well, then, you were talking then
17 though about a lender who wanted to become your partner,
18 weren't you?

19 THE WITNESS: No, sir, we were talking about
20 another individual who would join with us and become our
21 partner to give us additional financial strength.

22 THE COURT: To get to a lender?

23 THE WITNESS: To get to a lender, because the

1 lenders in this case are looking for more security than the
2 property itself. They want personal guarantees.

3 BY MR. HYLTON:

4 Q So, you said that there were several options,
5 you had several outside investors, shall we say, independent
6 of you?

7 A Right.

8 Q That you could look to?

9 A Right.

10 Q So, you told them that?

11 A Yes.

12 Q Back to the 27th of March now you had a meeting
13 with Mr. Fraley. Who was present at this meeting?

14 A Mr. Fraley, Mr. Zeeman and myself.

15 Q And this meeting took place in your office?

16 A Right.

17 Q Did you -- he came in with his brokerage agree-
18 ment?

19 A Right.

20 Q Did you prepare the brokerage agreement?

21 A No.

22 Q So, as far as you know he prepared it?

23 A It was typed and presented to us already typed

1 when he came to the office.

2 Q Did you renew the terms of this brokerage agree-
3 ment with him?

4 A Yes.

5 Q Did you make any changes to any of the terms?

6 A No.

7 Q Did you sign the agreement?

8 A Yes.

9 Q You and Mr. Zeeman signed it?

10 A Right.

11 Q And Mr. Buchanan did not sign it?

12 A He wasn't available. It was mentioned at that
13 time that -- Mr. Fraley said, well, you two are sufficient.
14 You sign and that will be sufficient for this purpose.

15 Q So, did you give him a check for \$10,000?

16 A I gave him a \$10,000 check at that point. I
17 told him that the check was good, but we didn't want to
18 tie up our funds any more than we had to and please hold
19 the check and don't cash it without notifying me that he
20 was going to cash it.

21 Q Did he agree to that?

22 A Yes, he did.

23 Q So, you had an expressed understanding with him

1 in your opinion about whether the check was to be deposited?

2 A. That's right.

3 Q. Did he object to this business of handing him
4 a check but asking him not to deposit?

5 A. No. I told him it was out of my personal
6 account and I just -- it was inconvenient for me to have
7 that money not available to me so, if possible, please
8 don't cash it, but if he had to notify me in advance.

9 THE COURT: And there was no -- was there any
10 time mention in connection with that agreement relating
11 to the holding of the check?

12 THE WITNESS: No, sir.

13 THE COURT: That is to say, the check was to
14 be held just for an indefinite period of time or held until
15 you said you could put it through?

16 THE WITNESS: That's right.

17 BY MR. HYLTON:

18 Q. And all the terms of this brokerage agreement
19 were acceptable to you?

20 A. Yes.

21 Q. All right. Well, what happened after that? What
22 was the next thing that happened with respect to Mr. Fraley?

23 A. Well, at that particular meeting on the 27th, we

1 had between the time of the previous meeting and the
2 meeting of the 27th based on the strong feeling that we
3 had gotten from them that we could obtain a loan, we went
4 back to a party that we had previously talked to the project
5 about and he rejected it back in October or November, but
6 with the feeling that we were in a position to get a loan
7 on a certain amount of money that would reduce the amount
8 of cash that would be needed in the project, we went back
9 to him and this was Habib Hakim and told him that we felt
10 we were going to be able to get a loan and then asked him
11 again if he would want to come in with us. He said yes
12 if we could get a loan under those conditions he would be
13 our joint venture partner and we told him we were having
14 a meeting with the Barnes Company again and they had asked
15 for an exclusive and he agreed that that was all right
16 with him and so we had an understanding to have an under-
17 standing at that point.

18 THE COURT: This was between the 20th and 27th?

19 THE WITNESS: That was between the 20th and the
20 27th, so by the time Mr. Fraley came back we had our joint
21 venture partner pretty well lined up provided we could get
22 the loan and at the meeting on the 27th we told Mr. Fraley
23 who it was. I don't remember that we gave him anything at

1 that point to keep as far as financial information is
2 concerned.

3 BY MR. HYLTON:

4 Q You mean, you gave Fraley?

5 A Fraley. We probably showed him some financial
6 information on Hakim. We may even have given him some
7 copies of it, but we, at that point, agreed that perhaps
8 the next thing to do since we were going to be partners
9 with this individual was to have a meeting with all of us
10 so that we could all work together.

11 Q So, you said the partner was a condition in
12 getting a loan; is that right?

13 A That's correct.

14 Q In other words, if you could get the con-
15 struction or permanent financing which you had been led
16 to believe would be forthcoming from Barnes efforts, you
17 would have a parntership?

18 A That's right.

19 Q Okay. Now, so you had a meeting with Mr. Hakim
20 and I don't want you to testify about anything Mr. Hakim
21 said, but just relate when this meeting happened.

22 A This meeting took place sometime within a week
23 after the 27th. We met in Hakim's office in Georgetown and

1 it was a working session. I mean, here were a number of
2 people sitting around an office with a problem that they
3 were trying to solve and we sat around and tossed out a
4 lot of things and we discussed the aspects of getting the
5 loan and one of the important things here I think is the
6 fact that in order to get a construction loan you have to
7 have a permanent loan. The construction lender wants to
8 know that you have -- that his loan is going to be paid
9 off at a certain point so we wanted to concentrate on the
10 permanent loan, because Mr. Hakim had several sources for
11 a construction loan that he had some very close relation-
12 ships with. They were banks and the banks did not parti-
13 cularly want to or felt justified in making a construction
14 loan without having a permanent commitment prior to it, so
15 at that point we told him concentrate on the permanent
16 loans and we can either help or secure getting the con-
17 struction loan.

18 Q You told Mr. Fraley to concentrate on the
19 permanent loan?

20 A That's right and he agreed to that.

21 Q He agreed to that. Did you reach any kind of
22 agreement with him that related to his fee for getting a
23 construction loan?

1 A. Well, basically it was this: Our agreement with
2 him called for him to get us both permanent and construction
3 loans, but we would try to make it easy on him if he only
4 secured permanent loan and we secured the construction loan.
5 We were still willing to pay him his commission on a
6 permanent loan although he hadn't performed both tasks.

7 Q. What was that again?

8 A. Our agreement with him was that he was supposed
9 to get us both loans in order to earn his fee. Now, if
10 he only -- we agreed in order to make it easy on him that if
11 he concentrated and got the permanent loan and we were able
12 to get the construction loan and fulfill that part of the
13 problem and he solved the other without having done both,
14 we would still pay him his fee on the permanent loan.

15 Q. You wouldn't pay anything on the construction
16 loan?

17 A. Not if he didn't get it.

18 Q. But, he was agreeable not to go to work. He
19 didn't object to the fact that you were taking him out of
20 the ball game on the construction --

21 MR. SWINDELL: Objection, Your Honor.

22 THE COURT: Objection is sustained.

23 THE WITNESS: You have to look at the context

1 in which this was done. If this was -- this was, again,
2 a working meeting. We were attempting to solve a problem
3 and rather than object this was reducing his task and
4 making it easy for him to perform and earn a fee. He
5 accepted it, because it was to his advantage to accept it.

6 THE COURT: You mean, just for getting the
7 permanent financing he would get a commission that would
8 be based on the 2 plus 2?

9 THE WITNESS: No, that's what would be paid
10 to the lender itself. His brokerage fee would have been
11 1% of the --

12 THE COURT: Of the total of the loan. All
13 right.

14 BY MR. HYLTON:

15 Q. Did you have occasion to talk at that meeting
16 or as time was going by, did you have occasion to talk
17 with Mr. Fraley about how he was doing in terms of getting
18 the financing?

19 A. At that particular point, he mentioned several
20 lenders that he had in mind. He mentioned an insurance
21 company. He mentioned, and I think this was a slip of
22 the tongue and if it hadn't been we would have said some-
23 thing, but he mentioned one of the places he was thinking

1 about looking was John Hancock Savings & Loan and being
2 rather familiar with most of the lenders around here I
3 questioned John Hancock Savings & Loan and Mr. Zeeman and
4 I came to the conclusion he was talking about some outfit
5 in Baltimore, because if he had mentioned John Hanson I
6 would have at that point told him about our -- reiterated
7 our experience with John Hanson.

8 Q. Did he introduce you to any lenders?

9 A. No -- yes, excuse me.

10 Q. I don't mean at that meeting.

11 A. At that meeting or did he ever introduce us
12 to any lenders?

13 Q. It's kind of a broad question. During the
14 time of the brokerage agreement, did he introduce you to
15 any lenders?

16 A. Yes, during the time of the brokerage agreement
17 we had a meeting with Mr. Fraley, Mr. Pearson Ames who was
18 Hakim's advisor and two loan officers from Chevy Chase
19 Savings & Loan. We had a meeting in a restaurant in
20 Merrifield and inspected the property which was close by.

21 Q. When was that about?

22 A. That was sometime around the first of May.

23 Q. Nothing happened from that?

1 A. Then, we were informed sometime after that that
2 Chevy Chase Savings & Loan had decided against the loan.

3 Q. Did he introduce you to any other lenders?

4 A. He never introduced us to anyone else.

5 Q. All right. Your meeting in Hakim's office
6 happened about when?

7 A. Within a week of the 27th of March.

8 Q. So, the early part of April?

9 A. Right.

10 Q. When was your next contact --

11 THE COURT: Were you actually introduced, did
12 you say, to a lender by Mr. Fraley?

13 THE WITNESS: We had a meeting with two loan
14 officers from the Chevy Chase Savings & Loan.

15 THE COURT: That was at this luncheon meeting?

16 THE WITNESS: That was at a luncheon meeting.

17 We were told before that meeting that Chevy Chase seemed to
18 be a very good prospect for making good permanent commitments
19 for us.

20 THE COURT: This was to be for permanent
21 commitment only?

22 THE WITNESS: Yes.

23 THE COURT: And, thereafter, you were told that

1 they were not interested?

2 THE WITNESS: That's right.

3 BY MR. HYLTON:

4 Q And he didn't introduce you to anybody else.

5 In your discussions with Mr. Fraley, did he tell you that
6 he was contacting other lenders?

7 A He indicated that he was working on it and still
8 trying to solve the problem, but there was never anything
9 else of any substance that he mentioned to me about anything
10 that he had -- any results of any dealings with any lenders
11 at all. In fact, his communication with us was rather
12 sparse from the time that we had the meeting in Hakim's
13 office. It was -- we really didn't have very much communi-
14 cation with him.

15 Q Let's take that time then from the early part
16 of April until, let's say, the middle of May -- 15th of May.
17 Did Mr. Fraley bring to you a commitment from any lender
18 during that period of time?

19 MR. SWINDELL: Objection, Your Honor. That's
20 leading the witness.

21 MR. HYLTON: I can rephrase that.

22 THE COURT: Go ahead.

23

1 BY MR. HYLTON:

2 Q When was the next time you saw Mr. Fraley after
3 this meeting in Hakim's office personally?

4 A The next time I saw him was at the meeting
5 with Chevy Chase Savings & Loan in Merrifield.

6 Q And after that?

7 A No more.

8 Q You didn't see him again after that?

9 A No.

10 Q Did you have any conversations with him after
11 that meeting with Chevy Chase Savings & Loan?

12 A Yes. I called him and asked him the results
13 of the Chevy Chase meeting in which he told me that they
14 had decided against the loan. I probably called him and
15 asked him if he had any more results maybe once or twice
16 again and then I talked with him on the 15th after I found
17 out that he had cashed my check and told him that the
18 period that was up for our exclusive --

19 THE COURT: This was in May?

20 THE WITNESS: This was on the 15th of May.

21 BY MR. HYLTON:

22 Q Let me show you a document here and can you
23 identify that?

1 A. Yes, this is a letter that I wrote to Mr. Fraley
2 informing him that his exclusive employment contract to
3 procure a loan had been expired and was terminated and
4 asked for the return of my \$10,000 deposit.

5 Q. And this is an unsigned letter?

6 A. The copy that you have is unsigned. The copy
7 I sent to Mr. Fraley was signed.

8 MR. HYLTON: Your Honor, I'd like to introduce
9 this. I think counsel has no objection as Plaintiff's 3.

10 MR. SWINDELL: I have no objection. If you'd
11 rather mark the original I'd be more than happy to supply
12 it.

13 THE COURT: You take this then and give me that.

14 Plaintiff's Exhibit No. 3 is received in evi-
15 dence without objection being the letter of May 16, 1980
16 from Mr. Akers to Mr. Fraley.

17 (The document, letter dated
18 5-15-80, was marked for
19 identification as Plaintiff's
20 Exhibit No. 3 and was
21 received in evidence.)

22 THE WITNESS: There is something else that --

23 THE COURT: Excuse me just a second. Did you

1 know at the time this letter was written or sent -- well,
2 let's say written that your check had been put through?

3 THE WITNESS: That was one of the reasons I
4 made the telephone call.

5 THE COURT: Which preceded this?

6 THE WITNESS: The cashing of the check preceded
7 that. I called the bank and found out it had already been
8 --

9 THE COURT: So, your request was to return our
10 \$10,000 deposit check immediately. You knew that that was
11 impossible.

12 THE WITNESS: That wording is probably unfortu-
13 nate. I meant our deposit.

14 THE COURT: So, you could get your \$10,000 back.

15 THE WITNESS: Yes, sir.

16 BY MR. HYLTON:

17 Q. Mr. Akers, you started to say something.

18 A. I think there is something else important that
19 happened in this telephone conversation and I think it
20 shows the type of working relationship we thought we had
21 with Fraley. At this point, when I said we were terminating
22 our exclusive agreement I told him that we were not termi-
23 nating his ability to continue to procure a loan for us and

1 that we were not asking him to lose all the investment
2 of his time that he had so far, but if he was able to get
3 us a loan along the lines that we had outlined in our
4 brokerage agreement we would give him every consideration.
5 We were looking for a loan and we knew he had invested
6 time and effort in it and it wouldn't be lost. We just
7 couldn't continue to keep all of our eggs in one basket
8 and I was rather surprised when his attitude about the
9 return of the \$10,000 was what it was. I full expected
10 him to say sure, I'll send it back, our agreement is over,
11 but he took an entirely different attitude at which point
12 I told him that if he didn't return the \$10,000 we didn't
13 want him to continue working on our project any more,
14 because we didn't have any more confidence in him. In fact,
15 Hakim and I had a conference call with Fraley either that
16 day or the following day in which Hakim --

17 Q I don't want you to testify about what he said,
18 what Hakim said.

19 A All right. My conversation with him in that
20 telephone call was a repeat of the one of the day before;
21 give us our money back and you can continue working.

22 Q All right. Let me show you another letter,
23 Mr. Akers. Could you identify this document for me? Have

1 you received that letter?

2 A. This is a copy of a letter in which Mr. Fraley
3 sent us a copy of a two page letter and the letter was a
4 letter that he had written which was a letter that was
5 addressed to him from us asking us to modify the terms
6 of our brokerage agreement along certain lines and apply
7 for a loan according to the modified agreement with John
8 Hanson Savings & Loan and it was received on the 16th --

9 THE COURT: Had the subject matter of that
10 letter been discussed by you and him before?

11 THE WITNESS: Never.

12 THE COURT: Do you introduce that letter into
13 evidence?

14 THE WITNESS: That letter is dated the 16th.

15 MR. HYLTON: Plaintiff's Exhibit No. 4.

16 THE COURT: Dated the 16th with the attachment
17 of the letter to Mr. Fraley attached to it.

18 THE WITNESS: That's right.

19 THE COURT: And the envelope. Plaintiff's
20 Exhibit No. 4 received in evidence without objection.

21

22

23

1 (The document, letter with
2 attachments, was marked
3 for identification as Plain-
4 tiff's Exhibit No. 4 and
5 was received in evidence.)

6 MR. HYLTON: I'd like to say, Your Honor, with
7 respect to your question to Mr. Akers about whether he
8 and Mr. Fraley had ever had a conversation about this
9 particular document I might proffer that Mr. Zeeman will
10 testify about a conversation that he had with Mr. Fraley
11 about this before this letter.

12 THE COURT: But, not this witness?

13 MR. HYLTON: Right, this witness apparently
14 didn't have any communication with Mr. Fraley about the
15 John Hanson proposal, but Mr. Zeeman did so he can cover
16 that.

17 THE COURT: Are you aware that your parnter
18 did have a conversation about this with these people? Just
19 the question are you aware.

20 THE WITNESS: About the substance, yes, sir.

21 THE COURT: All right. Just the subject matter.

22 THE WITNESS: Not this letter specifically, but
23 about John Hanson Savings & Loan he had a conversation with

1 them, but I'm not aware that he had a conversation about
2 this letter.

3 THE COURT: All right.

4 THE WITNESS: Because, the reason this letter
5 was sent to me on the 16th is when I had this conversation
6 with Fraley on the 15th, I believe, and he told me did
7 you get the letter that I sent you about John Hanson
8 Savings & Loan and I said no.

9 THE COURT: Who was the author of this letter,
10 the undated letter?

11 THE WITNESS: The author of that letter was
12 Mr. Fraley. It was a letter sent to us for us to sign
13 back to him changing the terms of our brokerage agreement.

14 THE COURT: Let me read it.

15 BY MR. HYLTON:

16 Q. Mr. Akers, is it your testimony that you never
17 got the deposit check back or never got your \$10,000 back?

18 A. That is correct.

19 Q. Did you have any further -- after your letter
20 to Mr. Fraley in which you terminated the brokerage agree-
21 ment, did you have any further discussion with Mr. Fraley?

22 A. Well, there were several telephone calls made
23 to him.

1 Q By you?

2 A Attempting to get our deposit back.

3 Q Was that the sum and substance?

4 A That was the sum and substance of our -- any
5 further dealings with Mr. Fraley.

6 Q And subsequent to that time you did not get
7 any permanent financing from John Hanson Savings & Loan?

8 A We did not.

9 Q Have you suffered any damages with respect to
10 this situation?

11 A Well, it changed our entire project. Prior to
12 the time that we met with the Barnes Company we had been
13 attempting to do this project on our own and when we put
14 all of our eggs in one basket and gave them an exclusive
15 listing and followed their suggestion that we bring in
16 this joint venture partner and we became committed to --
17 because of the time factor we were never able to pursue
18 it again on our own. We were committed to working on a
19 basis where we had given away half of our project and the
20 loss of the revenues we would have gotten from the project
21 if we had had it on our own or substantially on our own
22 I think are quite damaging. We also were delayed because
23 they had an exclusive to do this and didn't perform in

1 getting our loan, so I think we also had considerable
2 legal expense because of the fact that it was quite a bit
3 of effort made trying to obtain the return of our deposit
4 and we have had to spent a lot of our time because of
5 this case and it's been damaging to our other pursuits.

6 Q Can you estimate in a concrete fashion the loss
7 of dollars that you have suffered on this project?

8 A Well, I would say it's very easy that the loss
9 of half of our project is worth at least \$200,000. We
10 have had at least \$3000 in legal fees and I haven't even
11 put any estimate on the loss of our time.

12 Q When you say the value of this project is
13 \$200,000, how are you arriving at that figure?

14 A Our projected profit on the project would be
15 roughly half a million dollars for the full project if
16 we had -- if it were built out and half of that is \$250,000.

17 Q So to recap, during the time that this exclusive
18 brokerage agreement was in effect from March 27, 1980 until
19 May 16, 1980 and thereafter assuming that made delay for
20 this thing to take effect under the brokerage agreement,
21 did you receive a loan commitment from anybody?

22 A No, in no form whatsoever and we didn't -- we
23 never saw anything in writing. We never really -- all we

1 got was this letter which was an attempt to change the terms
2 of our brokerage agreement to make it conform to loan
3 terms that were unacceptable to us. That's the only thing
4 we ever got. In fact, the lack of communication was one
5 of our biggest complaints.

6 MR. HYLTON: That's all the questions I have.

7 THE COURT: What was your wording of your
8 question again? I was interested in the time frame from
9 which you put your question, the last question.

10 MR. HYLTON: I began with March 27, Your Honor,
11 of 1980 was the date of the brokerage agreement.

12 THE COURT: Until what?

13 MR. HYLTON: Until 15 days after -- I think
14 a literal reading of the brokerage agreement indicates
15 that it would be terminated by 15 days written notice to
16 the other party and figuring that way it would be on May 16
17 he wrote, Mr. Akers wrote a letter to Mr. Fraley and I
18 would say that that effectively terminated the project --
19 terminated this effort.

20 Now, of course, I don't want to box myself in
21 too much. It's our position he didn't perform and I think
22 that if the brokerage agreement was breached -- in fact,
23 if Your Honor found that the brokerage agreement was breached

1 that we would argue that the termination dates would more
2 or less go out the window and it would be terminated as
3 of the breach, but for the sake of our view of this case
4 I have no trouble with this 15 day waiting period.

5 THE COURT: Well, all I asked was how you
6 worded your question and you had it begin with the date
7 of execution of the paper March 27 through May 16 plus
8 15 days.

9 MR. HYLTON: Right.

10 THE COURT: The question was did you during
11 that period of time have any loan commitment presented
12 to you by the Defendant; is that correct?

13 MR. HYLTON: That's right. Your Honor, I might
14 add a logical next question to that one would be: Did
15 you get a permanent or construction commitment from any
16 lender that was introduced to you by Mr. Fraley or the
17 Barnes Company?

18 THE WITNESS: No.

19 MR. SWINDELL: Your Honor, I would object to
20 that question as being leading and ask that it be stricken.

21 MR. HYLTON: I don't think it's an issue in
22 the case, Your Honor. I don't mind.

23 THE COURT: The question is withdrawn.

* * *

CROSS EXAMINATION

BY MR. SWINDELL:

Q Mr. Akers, you testified that your land loan was coming due about April 10; is that correct?

A It was coming due six months from October 9. If that's April --

Q Let's count it.

A If it's May, it was a short time.

Q So, the first contact you had with Varnes was on March 19 or 20 or thereabouts?

A That's right.

Q And you signed the brokerage agreement on the 27th?

A That's correct.

Q And so you had approximately 14 days from the date you signed the brokerage agreement till the date that the land loan was due; is that correct?

A Before I can answer that, I think we ought to look at a calendar and see what six months from the 9th is.

Q Let's count them. We'll start -- October 9 you said.

A October 9.

Q November 9 is one month.

1 THE COURT: Let me ask you this: Whether it's
2 13 days, 14 days, however you count it's one or the other,
3 isn't it?

4 MR. SWINDELL: I believe so, Your Honor.

5 THE WITNESS: It might have been a month plus
6 13 days.

7 THE COURT: Did you say your loan date -- the
8 date of the loan was in April?

9 THE WITNESS: No, I said that the --

10 THE COURT: Was it in October?

11 THE WITNESS: That was the date we placed the
12 loan and it had six months term.

13 THE COURT: Six months after that. If that's
14 the 10th month and you add 6 to it you get 16 which is
15 the 4th month of the new year, April.

16 MR. SWINDELL: Do you take judicial notice of
17 that, Your Honor, 6 months after October is April?

18 THE COURT: Well, no. You tell me then if it
19 isn't.

20 MR. SWINDELL: It is.

21 THE COURT: I'm sure everyone fixes dates in
22 that way that I know.

23 MR. SWINDELL: Okay.

1 THE COURT: You don't have to prove that.

2 BY MR. SWINDELL:

3 Q Assuming that we're correct in counting 6 months
4 from October 9, the land loan was due on April 9?

5 A That's correct.

6 Q And you signed a brokerage agreement on March
7 27?

8 A That's right.

9 Q Of 1980?

10 A (Witness nods in the affirmative.)

11 Q So, if we counted days it would be 13 or 14 days

12 --

13 A Right.

14 Q -- till the land loan was due. Now, under
15 Paragraph 3 of the brokerage agreement you gave Barnes
16 45 days to secure loans; is that correct?

17 A That's correct.

18 Q So, would it be fair to assume that time wasn't
19 really that much of a factor if you were giving Barnes --

20 A No.

21 Q You didn't request that Barnes issue or secure
22 a commitment for you within the 14 day period, though?

23 A Well, we had been introduced to Barnes by the

1 land lender who was prepared to extend our loan if need
2 be, but he certainly wanted our full cooperation in trying
3 to procure a new loan. We all knew that you couldn't get
4 a loan in writing in a 10 or 14 day period. All of us
5 had dealt with these types of things before so the 45 day
6 period was put in because that was a practical time for
7 them to secure the loan if they had something already in
8 mind. They told us that they would know within 10 days
9 from the time that we signed the agreement so time was
10 a factor, but we were -- we all knew we had to extend it
11 somewhat.

12 Q In other words, -- strike that.

13 Your testimony was that when you first approached
14 Barnes however you did so with the knowledge that you would
15 like to close a loan prior to April 9 to pay off the land
16 loan?

17 A No. We had approached our land lender with the
18 fact that we would probably have to extend our loan because
19 we didn't think we had a chance of getting one prior to
20 the time it was -- the land loan was due to expire so he
21 approached the Barnes Company and brought us in and asked
22 our cooperation to work with them in order to get a loan
23 as fast as possible. We all knew we couldn't do it by the

1 time the land loan was due.

2 Q At that first meeting which occurred on March
3 19 or 20, did you disclose to either Mr. Fraley or Mr.
4 Hardwick or both that you had potential outside investors
5 to come in on this project?

6 THE COURT: When is your question directed to?

7 MR. SWINDELL: I'm sorry, Your Honor.

8 THE COURT: To what date is your question
9 directed?

10 MR. SWINDELL: The first meeting that they had
11 with Barnes and Mr. Shircliff.

12 THE WITNESS: Did we disclose at that time?

13 MR. SWINDELL: Yes.

14 THE WITNESS: The matter was brought up by the
15 Barnes Company as to whether or not our financial strength
16 was sufficient to procure the loan that we needed and if
17 it wasn't did we have some other sources that we could
18 bring in to add to our financial strength and we said yes.

19 THE COURT: Did you say any more than yes?

20 THE WITNESS: Yes, we even mentioned several
21 possibilities that we had in mind including Hakim, but
22 we -- at that point they were all -- that was all conjecture
23 on our part as to who it could be.

1 BY MR. SWINDELL:

2 Q You mentioned Hakim, nevertheless, at the
3 first meeting?

4 A I believe we did, yes.

5 Q Did you provide Mr. Fraley -- this is now
6 directing your attention to the March 27 meeting where you
7 signed the brokerage agreement, did you provide Mr. Fraley
8 with any financial information regarding Mr. Hakim?

9 A I said so before that we showed him some infor-
10 mation. Whether we gave him copies of it at that time or
11 not, I don't remember, but we definitely did show him some
12 financial information on Mr. Hakim at that meeting.

13 Q But, you did know from your discussions at
14 your first meeting that Barnes thought you might need an
15 outside investor to help you secure the loan?

16 A I'm sorry. I don't understand.

17 Q You just testified a few minutes ago that at
18 your first meeting that you thought or that Barnes told
19 you that you would need an outside investor to help you
20 secure the loan.

21 A That's the reason we had a meeting with Hakim
22 between the time of the first meeting and the time of the
23 27th.

1 Q. Okay.

2 THE COURT: Is there no objection to that
3 document?

4 MR. HYLTON: If he wants to have it introduced
5 I have no objection.

6 MR. SWINDELL: I would like to, Your Honor.

7 THE COURT: Thiis the memorandum of proposed
8 partnership agreement, etcetera dated March 26 on the
9 stationery of North American which is marked for identifi-
10 cation as Defendant's Exhibit No. 1.

11 MR. SWINDELL: Thank you, Your Honor.

12 THE COURT: I assume you don't wish to begin
13 presenting your evidence until the Plaintiff rests?

14 MR. SWINDELL: That is correct, Your Honor.

15 THE COURT: Marked for identification as
16 Defendant's No. 1.

17 (The document, memorandum of
18 proposed partnership, was
19 marked for identification as
20 Defendant's Exhibit No. 1.)

21 THE COURT: You may present it if you wish and
22 if you do present, you do not waive your rights to stand
23 on a motion.

1 MR. SWINDELL: Okay.

2 BY MR. SWINDELL:

3 Q I'd like you to identify that document, if you
4 can, please.

5 A This is a memorandum of proposal partnership
6 agreement between North American Financial Investment
7 which is in effect Habib Hakim and the principles of
8 North American Real Estate and Land Company which is Mr.
9 Zeeman and Mr. Buchanan and myself. It's unsigned, I
10 believe, because it was a memorandum that -- it was a
11 proposal and it was given to us for comment or review or
12 revision.

13 Q With respect to that proposal, did you provide
14 a copy to Mr. Fraley or do you recall?

15 A I may very well have. We had certainly nothing
16 to hide from Mr. Fraley.

17 THE COURT: A copy of what?

18 MR. SWINDELL: The memorandum, the document that
19 I just gave.

20 THE COURT: That emanated from these people.

21 All right.

22 BY MR. SWINDELL:

23 Q In your March 27 meeting --

1 THE COURT: And is it your testimony that you
2 did furnish this or that you did not furnish that?

3 THE WITNESS: I may have. I don't remember.
4 I don't recall, Your Honor.

5 BY MR. SWINDELL:

6 Q. In your March 27 meeting, you testified earlier
7 that at that time you knew the consummation of that
8 partnership agreement was conditional upon securing the
9 financing; is that correct?

10 A. That's correct.

11 Q. However, you did know from the March 20 meeting
12 that Barnes had indicated to you that you couldn't get
13 the financing unless you had an outside investor? Is that
14 correct?

15 A. I really didn't understand your question.

16 Q. Let me rephrase it then. At the March 20
17 meeting, Barnes had indicated to you that you would need
18 an outside investor to fund the project, the financial
19 strength of an outside investor would help considerably.

20 A. That's correct.

21 Q. And on March 27, you signed a brokerage agree-
22 ment with a full knowledge of what Barnes had indicated
23 to you that you would probably need an outside investor;

1 is that correct?

2 A. That's correct.

3 Q. Now, you did that with the knowledge that you
4 had talked with Hakim and that Hakim told you that --
5 not that Hakim told you. Strike that -- that the partner-
6 ship agreement would be conditioned upon you securing the
7 financing; is that correct?

8 A. That's correct.

9 Q. Yet, you knew from the March 20 meeting that
10 you wouldn't get the financing unless you had an outside
11 investor; is that correct?

12 A. That's right.

13 Q. When did you first disclose -- strike that.
14 When you met with Mr. Hakim, did he provide
15 you with financial statements?

16 A. When we met with him did he provide us?

17 Q. Yes, between the 20th and the 27th of March.

18 A. We had already had his financial statement,
19 because we had had several other transactions with him
20 in which we had been real estate brokers in some projects
21 in which he had been the purchaser so we had his financial
22 statements from those transactions.

23 Q. Had you provided those financial statements at

1 any time to Barnes?

2 A. At the meeting on the 27th we definitely showed
3 Mr. Fraley those financial statements and maybe have given
4 him a copy of it.

5 Q. Did you, yourself, arrange for Mr. Fraley to
6 meet Mr. Hakim and Mr. Ames?

7 A. Yes.

8 Q. And you did that because of the partnership
9 agreement that you were contemplating?

10 A. Well, we did that because they were going to
11 be our partners if we got financing and so they were
12 certainly a very interested party and in trying to get
13 the financing and since their statement was going to be
14 needed it was just logical that we all get together and
15 try to do our -- use everybody's best efforts to get the
16 loan.

17 Q. So, as of March 27 you knew that Mr. Hakim
18 would come in on the deal with you if you secured financing?

19 A. That's right.

20 Q. And you presented financial statements to Mr.
21 Fraley of Mr. Hakim which respect to the financing you
22 were securing; is that correct?

23 A. That's correct.

1 Q Did you do so with the knowledge that Mr. Fraley
2 would present it to outside lenders in order that they
3 might secure the loan for you?

4 A That would be logical that we would expect --
5 we needed his financial strength to procure the loan it
6 had to be shown to outside lenders.

7 THE COURT: Well, now, Habib or Hakim was only
8 interested in coming in if you had a loan; isn't that
9 right?

10 THE WITNESS: Yes, sir. He had previously
11 refused to come in with us several months before when we
12 didn't have any prospect of getting a loan.

13 MR. SWINDELL: It's confusing for the Court
14 and it's confusing for the defense counsel as well.

15 BY MR. SWINDELL:

16 Q Now, on the meeting of March 27, had you
17 arranged for -- is that when you arranged for the meeting
18 with Mr. Hakim and Mr. Fraley?

19 A On the 27th?

20 Q Yes.

21 A Probably, it was by phone the next day or so.

22 Q Now, at that meeting, do you recall if you
23 had suggested that Mr. Hakim would personally guarantee

1 any financing that --

2 A. Had I suggested?

3 Q. Yes.

4 A. It was probably -- that was probably discussed
5 in the meeting with Hakim and Fraley and Ames and Zeeman
6 and myself in Hakim's office. That was certainly one of
7 the things that was discussed in that meeting I'm sure.

8 Q. Isn't it a fact that it was discussed prior
9 to that meeting between March 20 and 27?

10 A. It probably was. It was one of the reasons we
11 needed him.

12 Q. Direct your attention to Paragraph 7. First,
13 would you say that NAFIM is North American Financial and
14 Management Group?

15 A. Right.

16 Q. And you testified earlier that that is basically
17 Mr. Hakim?

18 A. That's right.

19 Q. Now, Paragraph 7 states that corporation will
20 through its principles do whatever is necessary within
21 reason to obtain the financing.

22 A. Well, it also says something else. It very
23 clearly explains our position here. It says NOREL which is

1 us, has or will make application for construction of
2 permanent financing commitments. NAFIM and NOREL will
3 jointly co-sign the construction loan. It's understood
4 that financing is difficult in the current market and NAFIM
5 will through its principles do whatever is necessary within
6 reason to obtain favorable financing.

7 THE COURT: Let me read that.

8 Is this your witness? You might talk to him
9 if it is.

10 MR. HYLTON: Could be, Your Honor. I haven't
11 met him.

12 MR. SWINDELL: Your Honor, I really am not sure
13 how long my part will take. I would suspect not more
14 than 10 minutes.

15 THE COURT: Well, I assume there is no problem
16 with him testifying before this witness's testimony is
17 completed and before the various documents have been
18 presented that would be presented. Did you want to pro-
19 ceed with him now?

20 MR. HYLTON: Your Honor, I would be more con-
21 venient for Mr. Falcone, but whether it's more convenient
22 for the Court is also my concern.

23 THE COURT: Let's have this witness now. Do you

1 mind if he steps down?

2 MR. SWINDELL: No objection, Your Honor.

3 THE COURT: Step down and have your witness
4 sworn and have him come up here.

5 Whereupon,

6 RALPH G. FALCONE,
7 was called as a witness by and on behalf of the Plaintiffs,
8 having been first duly sworn by the Clerk of the Court,
9 was examined and testified as follows:

10 DIRECT EXAMINATION

11 BY MR. HYLTON:

12 Q. Mr. Falcone, would you state your full name,
13 please?

14 A. Ralph G. Falcone.

15 Q. And your address?

16 A. 5117 Swann Avenue, Alexandria, Virginia.

17 Q. What is your position, Mr. Falcone?

18 A. I'm Senior Vice President and General Manager
19 of the Mortgage Loan Department of Washington-Lee Savings
20 & Loan Association located in McLean, Virginia.

21 Q. In your capacity, do you make permanent
22 financing loans for building projects?

23 A. Yes, I do.

1 Q. How long have you been involved in this kind
2 of work?

3 A. About 15 years.

4 Q. How long have you been with Washington-Lee?

5 A. About four and a half years.

6 Q. During this time, you have -- well, don't let
7 me put words in your mouth.

8 Can you elaborate for us briefly as to what
9 your job entails presently?

10 A. Well, I'm responsible for the production of
11 mortgage lending in both residential and commercial lending
12 for the association, for the savings association.

13 Q. And people present loans to you for approval?

14 A. That's correct.

15 Q. I'd like to go back a little bit in your back-
16 ground with respect to what is your formal education.

17 A. I'm a graduate of George Washington University,
18 a business administration degree.

19 Q. When did you graduate?

20 A. I graduated in '64 or so.

21 Q. Have you had occasion to teach in your field?

22 A. Yes, I have taught in the Income Property
23 Division of the Mortgage Banking School several years ago

1 before I joined Washington-Lee.

2 Q. Have you had occasion to publish anything in
3 the field?

4 A. I have published some articles in the field,
5 yes. I think the most recent was in the Realtor Magazine
6 a couple of years ago.

7 Q. And this relates, generally, to the field of
8 mortgage banking?

9 A. That's correct.

10 Q. Do you belong to professional organizations?

11 A. Yes, I do.

12 Q. Could you enumerate a few of those for us?

13 A. I belong to the Northern Virginia Board of
14 Realtors. I belong to the Northern Virginia Builder's
15 Association, the Mortgage Bankers Association of Metropolitan
16 Washington, the Virginia Savings & Loan League, the Virginia
17 State Mortgage Banking Association.

18 Q. Have you testified before as an expert witness?

19 A. Yes, I have.

20 Q. Have you testified in your capacity as a mortgage
21 banker or broker?

22 A. Well, I'm not a mortgage banker or a broker.
23 I'm a primary lender. I've never acted in the capacity as

1 a mortgage banker or mortgage broker.

2 Q With respect to your previous testimony, what
3 subjects did you testify on?

4 A Related to commercial, basically commercial
5 loans and disputed questions in that area.

6 Q Have you had an opportunity to --

7 MR. HYLTON: Well, at this point I'd like to
8 submit that this man is an expert and ask him an expert
9 question. I have one hypothetical question.

10 BY MR. HYLTON:

11 Q Have you had a chance to review, Mr. Falcone,
12 a document that is dated March 27, 1980 entitled Brokerage
13 Agreement, Plaintiff's Exhibit No. 1?

14 A Yes, I have it. There was no date on the top
15 of mine, but there is a date on Page 4, I guess.

16 Q Have you had occasion also to review two other
17 documents?

18 A Yes.

19 Q Could you relate to the Court what they are?

20 A Well, these appear to be agreements to enter
21 into an application for a commercial loan or commercial
22 land loans.

23 THE COURT: Now, I'm gonna have to know and I

1 think the record would have to know too, what he's talking
2 about. Has that been marked and identified?

3 MR. HYLTON: The brokerage agreement has, Your
4 Honor. One of the letters has.

5 THE COURT: Tell me which one it is. Is it the
6 one attached to this letter?

7 MR. HYLTON: Plaintiff's Exhibit 4, I believe.

8 THE COURT: Yes.

9 MR. HYLTON: Right, it's a short form or what
10 we have called the short form authorization or application
11 letter.

12 THE COURT: All right.

13 MR. HYLTON: Now, there is a long form. I
14 might proffer that to the Court. There is a long form.

15 MR. SWINDELL: I have no objection if you want
16 to enter it.

17 THE COURT: Let me say this: I assume that
18 whatever you're asking him to look at is going to become
19 an exhibit. It will have to and if it's to be his exhibit,
20 I'll makr it for identification and if it's to be yours
21 and there is no objection, I'll receive it in evidence,
22 but it ought to be so that anyone who might read this
23 transcript can tell what the witness has before him. It

1 should be marked.

2 MR. SWINDELL: If Your Honor would please mark
3 it as Defendant's Exhibit No. 2 for identification.

4 THE COURT: This is known shortly as the long
5 form of what?

6 MR. SWINDELL: The application for permanent
7 loan financing.

8 THE COURT: All right. Now, this is the one
9 that consists of 26 numbered paragraphs and you wish to
10 have this marked for identification as Defendant's No. 2?

11 MR. SWINDELL: That is correct, Your Honor.

12 THE COURT: It's so marked.

13 (The document, application
14 long form, was marked
15 Defendant's Exhibit No. 2
16 for identification.)

17 BY MR. HYLTON:

18 Q Mr. Falcone, you have had an opportunity to
19 look at a brokerage agreement which for our purposes is
20 Plaintiff's Exhibit No. 1 and you have had an opportunity
21 to look at a short form authorization application letter
22 which in our parlance is Plaintiff's Exhibit No. 4, I
23 believe, and you have had an opportunity to look at a longer

1 form authorization application letter which has been marked
2 for identification here and entered into evidence as
3 Defendant's Exhibit No. 2.

4 A. Right.

5 Q. Have you had an opportunity to review these
6 completely in your opinion?

7 A. Yes.

8 Q. Now, I'm going to recite for you a hypothetical
9 question and I want you to listen carefully. If you do
10 not understand something, ask me to repeat it again.

11 THE COURT: Let me ask one question, because
12 I think that I would probably either have to know it or
13 it would be of aid to me to know it before he's asked
14 the question and answers it.

15 Now, I know that Plaintiff's No. 1 was entered
16 into. That's signed by all. Now, was the Plaintiff's
17 No. 4 or Defendant's No. 2 ever executed?

18 MR. HYLTON: They were never -- not only never
19 executed, but they were never received by the Plaintiffs
20 unless that's a misstatement on my part. They were received
21 on May 16 or 17. One of those, the short form was received
22 by Mr. Akers on or about the 17th of May.

23 THE COURT: Yes.

1 MR. HYLTON: Okay. The other, the longer form
2 they never received.

3 MR. SWINDELL: Your Honor, I'd proffer that is
4 subject to proof. We will put on testimony that perhaps
5 they did.

6 THE COURT: Go ahead with your question. In
7 any event, they were never signed?

8 MR. HYLTON: Exactly, and part of perhaps the
9 Court's confusion is caused by the fact that he's -- the
10 witness is being called out of order. He would have been
11 -- had we had the proper timing he would have been a
12 rebuttal witness, so to a degree he's considering things
13 beyond what we have admitted.

14 THE COURT: Go ahead.

15 BY MR. HYLTON:

16 Q Mr. Falcone, please assume the following facts
17 are true: The owners of the property make clear to the
18 broker that they wanted no presale requirement from any
19 lender. Number two, that the interest rates set out in
20 the brokerage agreement were satisfactory to the owners;
21 three, that the broker, in this case, the Barnes Company,
22 received an oral commitment from a lender for permanent
23 financing that included a 65% presale requirement and a

1 14% floor as a condition to the interest as an addition
2 to the interest picture. Do you have an opinion whether
3 the proposed commitment -- the sort of commitment I just
4 mentioned -- was substantially in accordance with the
5 terms contained in Paragraph 2 of the brokerage agreement?

6 The first question to you, is do you have an
7 opinion?

8 A. Well, taking into consideration the assumptions
9 a presale requirement would be a major issue in any
10 commitment that was put forward so that a presale require-
11 ment being recognized as an important feature of a
12 financial transaction of this sort, I would say that there
13 is a substantial difference there.

14 THE COURT: He does have an opinion?

15 MR. HYLTON: Yes, he does.

16 THE COURT: Now he's stating what that is.

17 BY MR. HYLTON:

18 Q. Have you reached this opinion with a reasonable
19 certainty?

20 A. Yes.

21 THE COURT: Your opinion is that there is a
22 substantial difference between the commitment which he
23 described in his question and the one called for in

1 Plaintiff's Exhibit No. 1?

2 THE WITNESS: Taking into consideration the
3 assumptions that were made, that he pointed out initially.

4 MR. HYLTON: All right. Thank you, Mr. Falcone.

5 CROSS EXAMINATION

6 BY MR. SWINDELL:

7 Q. Mr. Falcone, I'm sorry we haven't had an
8 opportunity to talk. I'd like to get a little more back-
9 ground on you if I could, please.

10 Have you ever from Washington-Lee settled or
11 placed a loan for permanent financing for condominium
12 office units?

13 A. Yes, I have.

14 Q. How many?

15 A. I've been involved in probably four or five
16 projects, I guess.

17 Q. Generally, what type of loans did you place?

18 A. You mean, in general, or having to do with
19 this particular issue?

20 Q. In general.

21 A. We make residential loans of all sorts and
22 commercial loans of various types.

23 Q. What kind of commercial loans are you talking

1 about?

2 A. Commercial loans on office buildings, apartment
3 projects, shopping centers, condo offices, condo industrial
4 properties, large condominium conversions, industrial
5 property, just about anything that runs in general nature
6 of commercial loans.

7 Q. What would you say the bulk of your work con-
8 sists of?

9 A. The bulk of our association's work?

10 Q. Yes.

11 A. Well, by regulation the bulk of our annual
12 production is in residential loans.

13 Q. Now, with respect to the documents that you
14 testified that you have reviewed, I'd like to direct your
15 attention to Plaintiff's Exhibit No. 4, I believe, and
16 also to the brokerage agreement.

17 THE COURT: You're referring to Plaintiffs'
18 No. 1 as the brokerage agreement and the short form is
19 what we call Plaintiffs' No. 4 and the long form is
20 Defendant's No. 2.

21 BY MR. SWINDELL:

22 Q. Now, unless I understood your testimony in-
23 correctly, there is two deviations that you saw with

1 respect to the brokerage agreement and the short form;
2 is that correct?

3 A. Well, that wasn't -- the question was given
4 the assumption the question was did I think that the
5 addition of a presale was a substantial change which is
6 a little different from what you're just saying.

7 Q. Okay. The addition of presales is the only
8 substantial change that you saw?

9 A. Well, that and the addition of the floor on
10 the interest rates. That's not in the -- if you're limiting
11 this to that one Exhibit 4, then that's not. There is
12 one change, that's correct.

13 Q. There is one change in the short form; is that
14 correct?

15 A. That's true.

16 Q. And there is only one change?

17 A. That's correct.

18 Q. Well, in terms of the long form, there were
19 two changes. Is that your testimony, that there is a 14%
20 floor and that there is a 65% presales requirement?

21 A. Right.

22 Q. In the short form, what the presales requirement?

23 A. The presale requirement was 50%.

1 Q All right. Would you say in your considered
2 opinion as an expert that it is industry practice to in-
3 clude a presales requirement and a permanent loan?

4 A Yes.

5 Q It is?

6 A (Witness nods in the affirmative.)

7 Q Do many savings and loans make loans without
8 a presales requirement -- make commitments. I'm sorry.

9 A I really couldn't answer that question.

10 Q But, it is an industry practice to include the
11 presales requirement in the permanent loan commitment?

12 A Yeah, I believe that to be an accurate statement.

13 MR. SWINDELL: Beg the Court's indulgence for
14 a second.

15 THE COURT: When you say it conforms with
16 industry practice to require a presale requirement --

17 THE WITNESS: Yes.

18 THE COURT: -- does that depend on what the
19 percentage requirement is?

20 THE WITNESS: Well, I think that has varying
21 degrees, but the question of whether a presale requirement
22 as such is normal practice, my answer is yes, it is.

23 Now, they vary in degrees from say the 50% that

1 we see here to a greater number. Normally, I would say
2 that 50% would be a threshold, yeah.

3 MR. SWINDELL: I have no further questions,
4 Your Honor.

5 MR. HYLTON: I've got one question.

6 REDIRECT EXAMINATION

7 BY MR. HYLTON:

8 Q Would it be fair to say that this industry
9 practice to take each deal or project and look at it on
10 an individual basis? I mean, when you review a given
11 condominium office project you review that one individual
12 project, right?

13 A Correct.

14 Q So, that you would -- you make a decision as
15 to presales and the degree of presales depending on what
16 I asked you?

17 A Well, if you're talking about presale isolated,
18 there are a number of factors that would dictate whether,
19 first of all, there would be a presale and what the extent
20 of that would be and that would depend on the whole under-
21 writing of that particular loan; the location of the pro-
22 perty, the probability of sales, how many sales were
23 intended initially before the proposal was brought to the

1 lender, market conditions at the time of the particular
2 transaction, what is the atmosphere for the purchase of
3 condominium units at that particular time, but I think
4 the overall underwriting of a loan dictates that you look
5 at all factors individually.

6 Q. Let me ask you a question this way. Are there
7 projects where you don't put any presale requirement on
8 them?

9 A. In a condominium office situation?

10 Q. All right.

11 A. No.

12 Q. Yes?

13 THE COURT: No. The answer to that is no.

14 THE WITNESS: The answer is no that there --
15 I have not done one where there has not been a presale
16 requirement, condominium office project.

17 MR. HYLTON: Are there other kinds of projects
18 where there are no presale requirements?

19 THE WITNESS: Residential projects.

20 MR. HYLTON: That's all I have.

21 MR. SWINDELL: Just one more question, Your
22 Honor.

1 RE CROSS EXAMINATION

2 BY MR. SWINDELL:

3 Q With respect to the brokerage agreement and
4 either form as you reviewed them, did you note that there
5 are many other terms that are included in the long form
6 and the short form applications that are not included in
7 the brokerage agreement?

8 A Yes.

9 Q There are many?

10 A Well, I don't know by many. In the short
11 form, there isn't much of anything. There are items
12 covered in this that are not covered in here, yes, and
13 there are items covered in here that are not covered in
14 here, yes. If that's your question.

15 Q Yes, that is my question. Just follow up on
16 that one as well. Is there anything in the brokerage
17 agreement which prohibits presales requirements in the
18 permanent commitment?

19 A That prohibits there being -- no.

20 Q Is there anything that prohibits a 14% floor?

21 A No.

22 MR. SWINDELL: That's all, Your Honor.
23

REDIRECT EXAMINATION

BY MR. HYLTON:

Q. mr. falcone, in light of your answers to Mr. Swindell who asked you questions, does that change your opinion that you stated originally? Have you said anything or has anybody asked you a question here this morning that would change the original opinion that you gave us earlier?

A. Again, the opinion was based on assumptions and with those assumptions still in place, my answer doesn't change.

MR. HYLTON: Okay. Thank you very much.
That's all I have.

THE COURT: We thank you, sir. You're excused.

(Witness excused.)

THE COURT: Now, we'll recess until 2:00 o'clock and come back and continue with the cross-examination.

MR. HYLTON: Thank you for your indulgence.

THE COURT: Sure.

(Whereupon, at 1:00 o'clock p.m., the trial was recessed, to reconvene at 2:00 o'clock p.m.)

* * *

1 BY MR. SWINDELL:

2 Q With respect to that meeting, do you recall
3 informing Mr. Fraley that he should keep communication
4 lines with Mr. Hakim and Mr. Ames as well as with you and
5 Mr. Zeeman?

6 A Yes.

7 Q Now, I'd like to talk about your check for a
8 minute, the \$10,000 deposit. You testified there was
9 never any time limitation on when Mr. Fraley could deposit
10 that check; is that correct?

11 A That's correct.

12 Q According to your understanding. When did you
13 first find out that it was deposited?

14 A Somewhere around the 15th. It may have been
15 the 14th. It might have been the 15th, because the thing
16 that prompted my call was after I had called the bank to
17 check on whether or not that check had been deposited and
18 I found out it had been and that prompted my call to
19 Mr. Fraley. The call was on the 15th.

20 Q Do you recall the reason you gave Mr. Fraley
21 for him holding the check?

22 A The reason I gave?

23 Q Yes. You asked him specifically to hold the

1 check for one reason; is that correct, a couple of reasons?

2 A. I told him it was drawn on my personal account
3 and quite frankly, \$10,000 is a pretty good piece out of
4 my personal account and I didn't want it deposited unless
5 it absolutely had to be and I wanted to make sure that it
6 was going to be covered whenever it was deposited.

7 Q. But, you informed Mr. Fraley at the time you
8 tendered it to him?

9 A. Yes, I did.

10 Q. Did you give him any other reason for not
11 depositing the check?

12 A. Well, I was hoping that I would be able to
13 get someone to replace the money in the check.

14 Q. Would that someone be the outside investor?

15 A. Hopefully, they would be where I would be
16 getting the money.

17 Q. Would that be Mr. Hakim?

18 A. Probably.

19 Q. So, you gave Mr. Fraley a check, asked him not
20 to deposit it, therefore, incurring no obligation on your
21 part until he did and yet your understanding with Mr. Hakim
22 is that you would not consummate a partnership agreement
23 until you got the financing; is that correct?

1 A. That's correct.

2 Q. So, it seems to me that what you're doing is
3 you're trying to have your cake and eat it, too.

4 THE COURT: Is this a question?

5 MR. SWINDELL: Strike that.

6 THE COURT: Don't argue your case as you go
7 along or make side comments. Just ask your questions.

8 MR. SWINDELL: Strike that, Your Honor.

9 BY MR. SWINDELL:

10 Q. To reiterate, you told Mr. Fraley that or
11 Mr. Fraley had told you at that first meeting that you
12 could not obtain the financing until you had an outside
13 investor; is that correct?

14 A. That's correct.

15 Q. And Mr. Hakim or you told Mr. Hakim that you
16 wouldn't consummate a partnership until you had financing?

17 A. That's correct.

18 Q. And that was the case also when you posed the
19 check?

20 A. (Witness nods in the affirmative.)

21 THE COURT: Did I understand you to say that
22 you told Hakim or Hakim told you that he wasn't interested
23 in a partnership until you had the financing?

1 THE WITNESS: Hakim told us.

2 THE COURT: He told you that, didn't he?

3 THE WITNESS: He told us, yes, sir.

4 BY MR. SWINDELL:

5 Q But, you presented the loan package to Fraley
6 with the idea of bringing Hakim in as a partner?

7 A That's correct. Let me add this, though, as
8 far as the check is concerned. The check was a deposit
9 which could be applied against the loan commitment and
10 without a loan the check should have been returned or the
11 deposit should have been returned.

12 Q We'll get to that in a minute.

13 You testified that the check was deposited
14 around the beginning of May; is that correct?

15 A Sometime, around, I think it was, the 3rd of
16 May that it was -- that the bank showed that it was
17 collected against my account.

18 Q That was approximately five or six weeks after
19 you had tendered the check to Mr. Fraley?

20 A That's right.

21 Q I'd like you to examine the brokerage agreement.

22 THE COURT: Plaintiff's No. 1?

23 MR. SWINDELL: Thank you.

1 THE COURT: Yes, sir.

2 BY MR. SWINDELL:

3 Q Directing your attention to Paragraph 2 which
4 outlines the terms of the loans that you applied for and
5 ask you if those are the terms as you requested?

6 A Yes.

7 Q Now, with respect to the permanent loan commit-
8 ment, did you require a 1.3 million dollar commitment?

9 A For the permanent loans?

10 Q That's correct.

11 A The permanent loans we were asking for 75% of
12 the sell out price which was approximately a million six,
13 I believe, because our sales price on the project would
14 have been 2 million four. 75% of that is a million six.

15 Q You were looking for a million six on the
16 permanent loan?

17 A That's right.

18 Q Now, your testimony also was that at your
19 first meeting, the one prior to the date where you executed
20 the agreement, that you expressed a great deal of concern
21 about presales requirements.

22 THE COURT: Let me ask this question. Doesn't
23 this 1.3 million here represent both the construction and

1 permanent financing?

2 THE WITNESS: The million three would be the
3 construction loan amount, Your Honor. The million six
4 would be the permanent loan.

5 THE COURT: I'm sorry. I'm sure it's here,
6 but I don't see it. Where is the million six in here?

7 THE WITNESS: It's referred to in the 75%.

8 THE COURT: Well, it says a million three hundred
9 thousand or but not to exceed --

10 THE WITNESS: 75% of the value.

11 THE COURT: That's a limitation on the million
12 three hundred, isn't it?

13 THE WITNESS: No, that's the limitation on the
14 value of the --

15 THE COURT: Permanent financing?

16 THE WITNESS: It's the -- the permanent
17 financing based on the value we're talking about is the
18 value of the built units.

19 THE COURT: The sales -- the aggregate sales
20 price of the built units?

21 THE WITNESS: Yes.

22 THE COURT: You say the permanent loan is to
23 be --

1 THE WITNESS: 75% of that amount which would
2 have been 75% of 2 million four.

3 MR. ZEEMAN: 2 million two.

4 THE COURT: Objection sustained to that. We
5 have to have it from one witness. We can't have anyone
6 from the floor commenting.

7 MR. SWINDELL: The reason that I'm offering
8 it eliciting this testimony is to indicate the intention
9 of the parties with respect to the permanent loan amount.

10 THE COURT: I'm looking at the paper to try
11 to follow the testimony and I don't see a million six
12 and I have to try to understand this as we go along.

13 MR. SWINDELL: That's why I asked the question,
14 Your Honor.

15 THE COURT: Then, you continue.

16 BY MR. SWINDELL:

17 Q Now, the question I was going to ask previously
18 was you testified at the, let's say, the March 20 meeting
19 that you had a concern about presales?

20 A That's right.

21 Q Is there any language in the brokerage agreement
22 that prohibits presales in the application or the commit-
23 ments?

1 A. There is no reference to presales at all in
2 the brokerage agreement.

3 Q. And you didn't insist that that be put in?

4 A. I didn't insist that the fact that there was
5 no presale requirement in the brokerage agreement?

6 Q. Yes.

7 A. If there had been one in there, I wouldn't have
8 signed it.

9 Q. I don't believe that answers my question. Did
10 you insist that a prohibition on presales be placed in
11 the brokerage agreement?

12 A. No.

13 Q. Okay. Now, with respect to the 14% floor which
14 is in the long form, did you insist that a requirement
15 that it be an open-ended commitment with respect to a floor?

16 A. With no floor?

17 Q. Yes.

18 A. It never occurred to me that there would be a
19 loan with a floor.

20 Q. So, you didn't ask that the language be put in
21 it?

22 A. I never heard of loan commitment that way before.

23 Q. Mr. Akers, when did you consider the brokerage

1 agreement terminated with the Barnes Company?

2 A. When did I consider it terminated? I considered
3 it terminated two weeks after -- 15 days after the notice
4 was given at the end of the 45 day period.

5 Q. Yet, you request in your letter that the check
6 be returned immediately and not at the end of the 15 day
7 period. I'll show you your letter. For the record
8 reference, it's Plaintiff's No. 3.

9 MR. HYLTON: It's an argumentative question
10 it seems to me.

11 THE COURT: What is your question?

12 MR. SWINDELL: My question is whether Mr. Akers
13 requested the check be returned at the end of the 15 day
14 waiting period.

15 MR. HYLTON: I just objected, because it's
16 obvious from the letter that he did that.

17 THE COURT: You mean, did he request it at the
18 end of that or at some other time?

19 MR. SWINDELL: Well, Your Honor, the document
20 itself indicates that he requested the return of the check
21 immediately and I asked him if he meant immediately the
22 day that -- I didn't phrase it this way -- immediately the
23 day that Barnes received the termination letter or

1 immediately after the 15 day period.

2 THE COURT: Do you want to ask him which he
3 meant by that?

4 THE WITNESS: I asked that it be returned
5 immediately.

6 BY MR. SWINDELL:

7 Q Now, you also testified that you received on
8 or about May 17 what we'll describe as the short form
9 application?

10 A That's correct.

11 Q Let me show that to you.

12 THE COURT: That's Plaintiffs' 4.

13 BY MR. SWINDELL:

14 Q Do you recall exactly when you received that?

15 A I received that, I believe, on the 17th.

16 Q The 17th of May?

17 A 17th of May.

18 Q So, in your mind the brokerage agreement was
19 still in effect when you received that; is that correct?

20 A The brokerage agreement was still in effect
21 when I received that?

22 Q Yes.

23 A Yes.

1 THE COURT: Let me see that, please.

2 BY MR. SWINDELL:

3 Q Did you ever execute that document?

4 A No.

5 Q Did you ever contact Barnes about any of the
6 provisions in that document?

7 A Well, I talked with Fraley about the document
8 on the 16th. The reason he mailed me a copy of it is
9 because of our discussion about it. We didn't discuss
10 it any further.

11 Q But, you didn't receive the document until the
12 17th; is that correct?

13 A That's correct.

14 Q And you didn't discuss the terms of that
15 document with Mr. Fraley after you received that document?

16 A No.

17 Q It's your testimony then that you did not; is
18 that correct?

19 A That's correct.

20 Q Now, did you contact Mr. Fraley at any time
21 after you received that document?

22 A I believe I had several more discussions with
23 him about the return of our deposit.

1 Q. But, not about the terms of that document that
2 you received?

3 A. No, I didn't.

4 Q. At the meeting that you had with Mr. Hakim and
5 Mr. Ames and Mr. Zeeman and Mr. Fraley, is it your testimony
6 that you informed Mr. Fraley that he need not secure the
7 construction loan at that time, that he concentrate his
8 efforts on the permanent loan?

9 A. Did we agree for him to concentrate? Is that
10 what your question is?

11 Q. Yes.

12 A. Yes, sir.

13 Q. Do you recall who specifically informed him to
14 do that?

15 A. It was something that came out of a round
16 robin discussion in a room, so who initiated it, exactly
17 who brought it up first, I couldn't say. It was the result
18 of a working session in a room.

19 Q. What were the reasons for that, specifically?

20 A. Well, the reason for it was an attempt to assist
21 him in solving the problem that we all wanted to solve and
22 that was to get us a loan commitment and if we could relieve
23 him of the burden of getting the construction loan and

1 concentrate on the permanent and that was -- it was an
2 attempt to assist him and he accepted it that way. That
3 was the way I -- it was my impression at the meeting that
4 he was happy that we were in a position to help.

5 Q The contacts you -- did you have any specific
6 contacts in mind with respect to getting the construction
7 loan?

8 A Yes.

9 Q What was the source of those contacts?

10 A Well, one was a bank in D. C. which Hakim --
11 he maintained considerable deposits and they had informed
12 him if he could get permanent financing that they were pre-
13 pared to assist him with construction financing on -- not
14 on this particular project, but on a general basis.

15 Q So, it was on the strength of Hakim's financial
16 position that you were able to offer that to Mr. Fraley?

17 A That's correct.

18 Q Now, with respect to your testimony as to the
19 damages, I'm a little unclear as to how you arrived at the
20 figure of \$200,000. Explain that again.

21 A Our contention was that up until the time we
22 went with the Barnes Company we had been pursuing this
23 particular project in an attempt to do it substantially on

1 our own and we had a bottom line profit on the project of
2 \$500,000. Because, of the -- we accepted the Barnes Company
3 at their word and we followed their advice and in an attempt
4 to get the financing we got ourselves in a position where
5 we were giving up half of our project and it was -- the
6 door was closed on us, because of the timing after that.
7 We never could go back the other way, so we wound up with
8 a project in which we only had a 50% interest instead of
9 100%.

10 Q. Who owns the other 50%?

11 A. Who owns the other 50%?

12 Q. Yes.

13 MR. HYLTON: I don't think that's relevant,
14 Your Honor, to this case.

15 THE COURT: The other 50% of the land interest?

16 MR. HYLTON: Your Honor, I want to object. I
17 think we're talking about a time of March 27 until sometime
18 in May of 1980.

19 THE COURT: You mean, at the time of the signing
20 of the brokerage agreement who was the principles in it?

21 MR. SWINDELL: No. We know the principles in
22 the brokerage agreement, Your Honor.

23 THE COURT: I understand, but I mean, you want

1 to know who the principles in the land ownership were at
2 that time?

3 MR. SWINDELL: No, I want to know who the
4 principles are in the land ownership at the time Mr. Akers
5 was attempting to affix his damages that one half of \$500,000
6 and I think it's relevant.

7 THE COURT: Why do you see that that is not
8 relevant to this case?

9 MR. HYLTON: Because, I think it opens the door
10 to what happened after; that is, there is obvious --

11 THE COURT: It may, indeed do that, but your
12 claim for damages opens the door to what might have happened
13 afterwards too, because the damages can only follow the
14 alleged breach. They can't be before it.

15 MR. HYLTON: All right.

16 THE COURT: Objection is overruled.

17 MR. SWINDELL: I will repeat my question.

18 BY MR. SWINDELL:

19 Q Who owns the other 50% in the land project?

20 A NAFIM.

21 Q NAFIM. You testified earlier that NAFIM is
22 Mr. Hakim; is that correct?

23 A That is correct.

1 Q You contemplated him in all along?

2 A We were hoping to once we got the loan commit-
3 ment.

4 MR. SWINDELL: Beg the Court's indulgence.

5 THE COURT: When did that become a fact that
6 he had a half ownership in the project?

7 THE WITNESS: It did not become a fact until
8 September.

9 THE COURT: When did it become known between
10 the parties whether it was written up as a contract or a
11 partnership or not?

12 THE WITNESS: Well, prior to September, we were
13 continuing with our pursuant of trying to secure loans and
14 again with the same intention that if we could secure a
15 loan or NAFIM could be reasonably assured that a loan could
16 be secured then we would execute the agreement which we did,
17 I think it was, September 16th.

18 MR. SWINDELL: I have one further question,
19 Your Honor, of this witness.

20 BY MR. SWINDELL:

21 Q You testified that NAFIM owns approximately
22 50% of the project?

23 A That's correct. He actually owns 52%.

1 Q. He owns 52% now?

2 A. That's correct.

3 Q. On this memorandum dated March 26, can you tell
4 the Court how much he proposed to own at that time?

5 A. 52%.

6 THE COURT: Is that what you have meant when
7 you said 50%?

8 THE WITNESS: Yes, sir.

9 MR. SWINDELL: I don't believe I have any
10 other questions, Your Honor.

11 THE COURT: All right, sir.

12 MR. HYLTON: I have no questions, Your Honor.

13 THE COURT: You may resume your seat, sir.

14 MR. HYLTON: Let me ask one question.

15 THE COURT: Okay.

16 REDIRECT EXAMINATION

17 BY MR. HYLTON:

18 Q. Mr. Akers, I want to clarify the situation
19 about your relationship with Mr. Hakim that you have
20 testified about in response to questions from Mr. Swindell.

21 Could you state in your own words just kind of
22 off the cuff what is your understanding back then, back in
23 March, April and May of his relationship with you and what

1 he was supposed to do and what you were supposed to do?

2 A. Back at that time he was a potential joint
3 venture partner with us in the Hartland Road project. Under
4 certain conditions, we would become partners and proceed
5 with the project.

6 Q. And in addition was getting the loan through
7 the brokerage agreement or through this association you had
8 with Mr. Fraley?

9 A. It was getting the loan.

10 Q. From any source?

11 A. From any source.

12 Q. Okay. Did you, at that time, advise Mr. Fraley
13 to talk with Mr. Hakim?

14 A. Well, at that point, we were all working to-
15 gether to try to accomplish a purpose and he had to utilize
16 certain information from Mr. Hakim to include in the loan
17 package specifically certain background information, certain
18 financial information from him and it was just a practical
19 matter for him to have communication with him, because it
20 was -- he was part of the package that we were utilizing
21 in order to get the loan.

22 Q. Did you ever tell Mr. Fraley to deal solely
23 with Mr. Hakim from some point on?

1 A. We gave him no indication that Mr. Hakim was
2 standing in our stead and he should deal with him solely
3 from a practical standpoint. It was impossible for him to
4 do so, because we were the sole owners of the property and
5 we were the only people who could pledge the property for
6 collateral, so we had to be the ones to be signed on a loan
7 application.

8 Q. Did you ever tell Mr. Fraley to exclude you
9 from any further communications about this project?

10 A. Absolutely not.

11 MR. HYLTON: I don't have any other questions.

12 MR. SWINDELL: No questions, Your Honor.

13 THE COURT: Be seated.

14 MR. HYLTON: Mr. Zeeman, Your Honor.

15 Whereupon,

16 CHARLES G. ZEEMAN,
17 was called as a witness by and on behalf of the Plaintiffs,
18 having been first duly sworn by the Clerk of the Court, was
19 examined and testified as follows:

20 DIRECT EXAMINATION

21 BY MR. HYLTON:

22 Q. Mr. Zeeman, would you state your full name, please?

23 A. Charles Gordon Zeeman.

1 Q And your address?

2 A 4321 Duncan Drive in Annandale, Virginia.

3 Q Are you one of the Plaintiffs in this case?

4 A Yes, sir.

5 Q You have heard testimony -- you have been
6 sitting here and you have heard testimony that Mr. Akers
7 has given. Are you in agreement with all of the testimony
8 that he has given?

9 A General agreement, yes.

10 Q Are you in agreement with the terms of the
11 brokerage agreement that you have seen introduced here
12 today?

13 A Yes, I was and I certainly was agreeable to
14 them at the time that we signed them, however, if we had
15 added in the presales and the 65% and 14% floor, I would
16 not have been in agreement. I was in agreement as they
17 were put into the agreement.

18 Q At a point in time, did you have a telephone
19 conversation with Michael Fraley about commitments?

20 A Yes, I'm a little unsure as to the exact date,
21 but it was approximately, I would say, the 2nd or 3rd of
22 May, sometime between the 2nd and 5th of May. I placed a
23 call to Mr. Fraley to just generally see how progress was

1 coming on obtaining these loans, because we hadn't heard
2 anything from anybody and Mr. Fraley returned my call
3 sometime, I think it was, in the early afternoon and told
4 me that he thought he had a good source. I believe he
5 mentioned some insurance company on the West Coast.

6 THE COURT: Who told you this?

7 THE WITNESS: Excuse me?

8 THE COURT: Who told you this?

9 THE WITNESS: Mr. Fraley. You have to excuse
10 me. I don't hear out of this ear. And that he was hopeful
11 that they would come through with a commitment, however,
12 they would probably be a little slower than he had desired.
13 He told me that he had gotten a commitment from John Hanson
14 Savings & Loan, but that it was on terms and conditions that
15 would be totally unacceptable to him and to us and I think
16 the conversation would have ended at that point if I hadn't
17 insisted on knowing what the terms and conditions were,
18 because they weren't volunteered. Mr. Fraley went through
19 the basic conditions, terms and conditions that he felt
20 were not agreeable to us which was a 65% presale require-
21 ment, a 14% floor on the permanent and I remember specifically
22 having a discussion with him at that particular point that
23 they were also requiring a point as an eighth on a take down

1 and I remember specifically Mr. Fraley saying that that
2 was terrible and maybe on that one he could win if he went
3 back to them and argued that maybe they should consider
4 a point as a quarter.

5 BY MR. HYLTON:

6 Q Would you explain what you mean by take down?

7 A Well, I'm a real estate salesman. I'm not
8 a mortgage banker, but if the prevailing rate at the time
9 of closing of these loans was say 12% in order to give a
10 buyer one of these units a competitive market rate there
11 would then be a 2 point difference between what our floor
12 was that we signed for, 14%, and what the competitive market
13 was, so in order to give that buyer a competitive rate of
14 12%, if a point is an eighth, we would have to pay 16 points
15 to close the loan and if it's on a \$200,000 unit that would
16 be approximately \$32,000 and I'll submit for your con-
17 sideration if the product costs \$200,000 and we were working
18 on a 20% profit, John Hanson Savings would get \$32,000 and
19 we'd get \$32,000 and we'd get eight \$8,000.

20 Q Let's go back through that again. When you
21 say a point is an eighth on a take down that means for
22 every -- correct me if I'm wrong -- for every point one
23 percentage point of the loan which would be \$16,000,

1 approximately, that you would pay the interest rate would
2 be reduced 1/8 of 1%?

3 A For every eighth that you bought down it would
4 cost you one point.

5 Q So, you had 8 eighths and one percentage point
6 so you'd have to pay eight times \$16,000 to get the interest
7 rate from 14% to 13%; is that right?

8 THE COURT: Now, you're assuming now that you've
9 got a money market that is lower than the floor put in
10 the agreement.

11 THE WITNESS: That's correct.

12 MR. HYLTON: We're talking about what he meant
13 by this take down. I just want him to elaborate. I'm not
14 questioning what he says.

15 THE COURT: It never became relevant in this
16 case.

17 MR. HYLTON: No. It's arguable that it might
18 be relevant.

19 THE COURT: I mean, as a fact, though, it never
20 came about.

21 MR. HYLTON: Right, there was never any commit-
22 ment to that extent.

23 THE WITNESS: It was relevant enough for Mr. Fraley

1 express concern that it was not something that he felt
2 was in our interest or that he felt that we should look
3 at favorably or he would look at favorably.

4 BY MR. HYLTON:

5 Q With respect to that take down, did he suggest
6 something that he might do about it?

7 A He suggested that he might discuss it further
8 with John Hanson Savings & Loan at that particular point.

9 Q And to what end?

10 A To see if they would consider making the point
11 as an eighth a point as a quarter so that it would cut in
12 half whatever -- this take down requirement would then be
13 cut in half.

14 Q Was that the extent of the conversation?

15 A No. Mr. Fraley said to me that although it
16 was a lousy commitment, that we might want to consider the
17 commitment in order to obtain our construction loan knowing
18 that in all likelihood we would walk away from it and forfeit
19 our deposit money with John Hanson if we could arrange a
20 better deal between the time we got a construction loan and
21 got started and the time to go to settlement.

22 Q What does buying the commitment mean?

23 A It means that we accept a commitment and put

1 up the points that are necessary to go to settlement which
2 I believe in this case I think was 2 points on \$32,000 in
3 order to consummate the loan agreement and that it would
4 be penalized if we didn't execute it at a later date. We
5 would walk away from \$32,000.

6 Q What would be the point of doing that?

7 A The point of that would be that maybe we could
8 obtain a loan on the basic terms and terms and conditions
9 that we had in our agency agreement from somebody else
10 after we had obtained our construction loan and replace it,
11 so-to-speak, with a better deal.

12 Q So, you'd buy the permanent loan --

13 THE COURT: Did anybody suggest doing that?

14 THE WITNESS: Mr. Fraley did.

15 THE COURT: That you buy up the John Hanson
16 commitment and then continue your efforts to find a better
17 one and if you did take the better one and forfeit the
18 Hanson?

19 THE WITNESS: Yes, sir.

20 MR. HYLTON: I think the point was, Your Honor,
21 put in terms of a question is the idea would be to buy the
22 permanent loan or go to settlement on the permanent loan
23 as offered by John Hanson on the basis of having your

1 permanent loan in hand you would get a construction lender
2 and you could say hey, I've got the permanent financing and
3 get the construction lender to commit so you can get your
4 construction loan then while you're working for the con-
5 struction lender you'd be working for --

6 THE WITNESS: We would continue to try to get
7 a permanent loan that we all knew was what we were looking
8 for and not this.

9 MR. HYLTON: And the point is that you would
10 lose -- risk losing \$32,000.

11 MR. SWINDELL: Object, Your Honor. That's
12 leading.

13 MR. HYLTON: I'm just trying to clear up --

14 THE COURT: It's summation of what he has
15 testified to. It is already in evidence so he can do that.

16 MR. HYLTON: That's all the questions I have,
17 Your Honor.

18 THE COURT: When did you first learn that there
19 was a presale condition and an interest floor in the loan
20 commitment -- proposed loan commitment.

21 THE WITNESS: Proposed loan commitment the
22 first I heard of this is during that telephone conversation
23 with Mr. Fraley.

1 THE COURT: And when was that?

2 THE WITNESS: It was sometime between the 2nd
3 of May and the 5th of May. I'm guessing at the exact date,
4 but it was in the first few days of May.

5 THE COURT: Now, is that the first commitment
6 that had been presented to you at all?

7 THE WITNESS: Yes, except I don't -- I mean,
8 it wasn't as if it was really even a commitment, because
9 he was telling me not to accept it.

10 THE COURT: Because, he felt there might be
11 one on the West Coast that would be better?

12 THE WITNESS: Right.

13 THE COURT: But, it was in connection with the
14 Hanson commitment that he mentioned their presale require-
15 ments and the requirement that there be a floor?

16 THE WITNESS: Yes, sir.

17 THE COURT: What did you say to that?

18 THE WITNESS: I agreed with him it wasn't
19 acceptable. He told me it wasn't acceptable and I fully
20 agreed with him it was not acceptable. It didn't bear a
21 whole lot of comment.

22 THE COURT: What reasons did he give for it
23 being unacceptable?

1 THE WITNESS: Well, the fact that he knew our
2 position on presales, the floor at 14 and the take down at
3 point is an eighth. I think our position was very clear
4 with them as to what we were trying to obtain. He told me
5 it wasn't worthwhile.

6 THE COURT: Let me ask you this: I'm sure that
7 the loan commitment itself would be the place where you
8 would find a presale requirement and a floor on interest
9 if they were going to be there, but would that -- would
10 reference be made to those things in the brokerage agreement
11 with the lender tthat tiy gad iyt -- with the mortgage
12 broker you had out trying to get your loan for you? Would
13 that be a part of your contact with him or is that a
14 condition then made of the package that he brings to you
15 for your financing?

16 MR. SWINDELL: Your Honor, I'm not sure the
17 witness is qualified to answer that. He's already stated
18 that he's a real estate salesman and not a lender or broker.

19 THE COURT: You would not know the answer to
20 that, would you?

21 THE WITNESS: I can tell you the way I feel
22 about it.

23 THE COURT: Well, no. I think your point is

1 well taken. It calls for his opinion. He would not be one
2 who could give an opinion on the subject if that's what it
3 would be.

4 Now, if it's a matter of experience of what he
5 has seen in practice, I think he can state what that is
6 because there he is dealing with facts and not opinion.
7 Follow what I mean?

8 MR. SWINDELL: Yes, Your Honor.

9 THE COURT: If you know it's a fact whether
10 or not a brokerage contract with a mortgage lender or a
11 mortgage loan broker contains reference to these things,
12 you may state that, whether you have ever had any before
13 where it was referred to.

14 THE WITNESS: I have not handled many loan
15 packages, so, I think I'll be quiet.

16 THE COURT: All right, sir. Any other questions?

17 CROSS EXAMINATION

18 BY MR. SWINDELL:

19 Q Now, you testified that you would corroborate
20 most of Mr. Akers testimony; is that correct?

21 A Yes.

22 Q Would you corroborate his testimony that you
23 had contact with lenders prior -- lenders or brokers prior

1 to contacts with Barnes?

2 A Yes, I was, although I never met personally and
3 talk to Mr. Rick Hutton who Bob worked with. I was sitting
4 next to him while he was talking to him on the telephone.
5 I accompanied Mr. Akers to the bank when we spoke to the
6 bank about giving us a loan. I was there with him per-
7 sonally so I do know that he had conversations with the
8 brokers and I attended meetings with him with the bank and
9 also with the prospective general contractors.

10 Q Hadn't you walked with various lenders about
11 the financing specifically for this project?

12 A Yes.

13 Q And hadn't the lenders indicated to you a pre-
14 sales requirement would be included in anything that they
15 could produce?

16 A I don't recall any conversations about presales
17 at all with the bank.

18 Q Isn't that why you went to Barnes, though,
19 because you couldn't, at the time, consider a presales re-
20 quirement?

21 A We didn't go to Barnes.

22 Q You had no knowledge prior to your contact
23 with Barnes that it was industry practice to include presales

1 requirements and permanent loan commitments?

2 A Well, I'll go back to what I said before. I
3 don't think that I'm an expert witness on this subject. I
4 do know that sometimes presales are required. Whether or
5 not they are always required or are necessary to do this
6 project, I don't know, because I'm not that familiar with
7 this end of the business.

8 MR. SWINDELL: No further questions, Your
9 Honor.

10 MR. HYLTON: I have known, Your Honor Honor.

11 THE COURT: You can resume your seat, Mr.
12 Zeeman.

13 (Witness excused.)

14 MR. HYLTON: That's the Plaintiffs' case, Your
15 honor.

16 THE COURT: Plaintiff rests. Are you ready
17 to proceed?

18 MR. SWINDELL: Your Honor, I'd like the Court
19 to entertain a motion to strike.

20 THE COURT: As to the entire case or only as
21 to a part of it?

22 MR. SWINDELL: As to the motion for judgment
23 that was filed against my clients.

* * *

1 witness, Michael Fraley.

2 Whereupon,

3 MICHAEL FRALEY,
4 was called as a witness by and on behalf of the Defendant,
5 having been previously duly sworn by the Clerk of the Court,
6 was examined and testified as follows:

7 EXAMINATION BY COUNSEL FOR DEFENDANT

8 BY MR. SWINDELL:

9 Q For the record, would you please state your
10 full name?

11 A Michael W. Fraley.

12 Q Where do you reside?

13 A 8 Scofield Court, Westport, Connecticut.

14 Q How long have you resided there?

15 A About a month and a half, two.

16 Q What is your occupation up there?

17 A I am manager of a business development for
18 General Electric Credit Corporation.

19 Q Could you describe for the Court some of your
20 duties and responsibilities there?

21 A I am responsible for the real estate --
22 commercial real estate investment activity for the credit
23 corporation for production of business.

1 Q With respect to this matter, was there a time
2 when you worked for James C. Barnes of Washington, D. C.?

3 A Yes.

4 Q When was that?

5 A From early February of last year until about
6 December 1 of this year.

7 Q In what capacity did you work for them?

8 A As a vice president of the mortgage production.

9 Q And what were your duties and responsibilities
10 with respect --

11 A Originate, underwrite mortgage investments and
12 place financing for fees.

13 Q How long have you done this sort of work?

14 A About 10 years.

15 Q And how long have you done it specifically
16 with respect to your duties with Barnes?

17 A In the brokerage capacity as opposed to the
18 institutional investment side?

19 Q (Counsel nods in the affirmative.)

20 A Four and a half years, five years.

21 THE COURT: You mentioned that you were with
22 them from, I take it, February of '79 through December of
23 '80?

1 THE WITNESS: Yes.

2 THE COURT: In the capacity as vice president?

3 THE WITNESS: That's right.

4 THE COURT: You had been there longer than that?

5 THE WITNESS: No, I just joined the Barnes
6 Company firm in February of that year.

7 MR. HYLTON: Was it February of '79 or February
8 of '80?

9 THE WITNESS: '80.

10 THE COURT: So, it was less than one year?

11 THE WITNESS: Right.

12 BY MR. SWINDELL:

13 Q Do you know the Plaintiffs in this case?

14 A Yes, I do.

15 Q Could you describe your first contact with
16 Messrs. Akers and Zeeman?

17 A Well, it was a meeting there we had in the
18 office of VMC mortgage company. I think it was about --
19 well, the date has been brought up beforehand -- the meeting
20 with Shircliff, Akers, Zeeman, Mr. Hardwick and myself.
21 That was the first time we met. Want me to describe what
22 went on in the meeting and things of that nature?

23 Q What specifically occurred at that meeting?

1 A We were approached to provide permanent and
2 construction financing for a condominium office project
3 down on Hartland Road that we talked about. Asked questions
4 about the project in general; size, how many units, layout,
5 at what point the developers were at that particular juncture,
6 asked about their financial position, things of that nature
7 in order to make a determination of whether we thought their
8 financing that they required was feasible.

9 Q What was your response to that discussion or --

10 A Just generally speaking, we felt that there were
11 -- there was really a short sight in one area and that was
12 the personal financial capabilities of financial strength
13 and development capabilities of that ground and management
14 in development suggested that in order to put the trans-
15 action together that would be required.

16 Q What exactly would be required?

17 A A partner, part of the borrowing entity with
18 greater financial strength, with development expertise and
19 background and general management skills and a track record
20 in developing this type of commercial property.

21 Q What was their response to that suggestion?

22 A It was suggested that there was someone and it
23 is possible -- I'm really not certain whether Habib Hakim

1 name was mentioned specifically at that meeting, but there
2 was a foreign investor with which they had consummated one
3 or two sizable transactions of one nature or another, not
4 necessarily as a partner, that they felt they could bring
5 into the transaction to cover that ingredient.

6 Q Was anything discussed at that meeting with
7 respect to presales?

8 A Yes, presales were addressed. We suggested
9 that some type of presales would be required in the invest-
10 ment, asked at what point they were with regard to presales.
11 They suggested that they had not -- did not ^{have} presales at this
12 time, however, a requirement for presales could be covered
13 in a number of ways. This project encompassed, at that
14 point, I think about 10 units. They figured that business
15 associates, acquaintances, people that they knew generally
16 would be capable of filling that presale requirement just
17 because of the sheer numbers. In addition, they were
18 familiar with another similar project, that is, a condo-
19 minimum office project that was being finalized in McLean.
20 They were familiar with the sales people there. Being that
21 that project was higher priced than the one that we were
22 dealing with, the contacts that they had with those people
23 they felt could provide referrals of people that could not

1 those prices, but might be able to purchase this property.
2 All in all, the question of presales was addressed and that
3 was the response that I got to that question when it was
4 brought up.

5 THE COURT: Was this in March, this meeting?

6 THE WITNESS: This was the very first meeting.

7 THE COURT: About how long before the contract
8 was entered into?

9 THE WITNESS: About a week. Was this March 17
10 or 19?

11 THE COURT: Did you make notes?

12 THE WITNESS: Well, a long time ago.

13 MR. SWINDELL: The notes were prepared and
14 they have been produced for opposing counsel. I have some
15 earlier --

16 THE COURT: For depositions?

17 MR. SWINDELL: In response to Interrogatories.
18 I asked him earlier if he had any objections to Mr. Fraley
19 referring to them and he had no objections.

20 MR. HYLTON: I have no objection. Apparently,
21 this was prepared back in July of 1980.

22 THE WITNESS: A long time ago. When things
23 first proceeded --

1 THE COURT: Do they refresh your recollection?

2 THE WITNESS: Mr. Swindell's firm asked me --
3 well, the first thing they said to do is they said sit down
4 and right everything you can and all the dates down as
5 accurately as you can and that's what I have here. That's
6 been provided for everybody, I understand. I don't really
7 need it except that I think we're talking about the first
8 meeting. Whether that --

9 THE COURT: If it refreshes your recollection
10 as to dates and names of people present and things of that
11 kind, you may use them.

12 MR. HYLTON: I have no objection, Your Honor.

13 THE WITNESS: Okay, fine. The first meeting,
14 whatever it was, March 19. This is what I'm talking about,
15 the discussions that I'm describing right now were March 19.

16 BY MR. SWINDELL:

17 Q Do you recall who was present at that meeting?

18 A Yes. Mr. Hardwick, Don Shircliff, Mr. Zeeman
19 and Mr. Akers and myself.

20 Q I believe Mr. Akers testified that he discussed
21 the fact that he had talked with John Hanson Service Cor-
22 poration with respect to this financing. Do you recall
23 that discussion?

1 A I really don't. I recall that Mr. Akers and/or
2 Mr. Zeeman suggested that they had been talking to other
3 people. In fact, there was a letter, authorization letter
4 to a Mr. Hutton who was a mortgage banker and I raised the
5 question about well, we want to make sure that he's not
6 involved in the transaction somehow that would create a
7 conflict. He expressed that he had worked with the bank,
8 one of the Virginia banks. As I said, I don't recall that
9 he mentioned John Hanson Service Corporation or not, but
10 I wanted to make sure and it was expressed to us that Mr.
11 Hutton was no longer involved and we didn't have to be
12 concerned about people that he would have contacted and,
13 therefore, we would be walking into the same door that he
14 had.

15 Q Now, with respect to that meeting -- again,
16 approximately how long did it last?

17 A Probably, an hour and a half.

18 Q Did you provide any documents for Plaintiffs?

19 A Before the meeting was over -- well, yes. We
20 provided the employment agreement, the brokerage agreement.
21 Other than that, before the meeting was finished, we did
22 provide a list of additional documentation and exhibits, but
23 I think what you're asking me is, yes, the brokerage agreement

1 in the same form that we all have here was provided and
2 reviewed and a copy for everybody.

3 THE COURT: Had it been typed up then?

4 THE WITNESS: Yes, and it's really in the same
5 form that it is in now and if I'm not mistaken, if not a
6 copy for everyone at least two or three copies so people
7 could be reviewing them at the same time and refer to any
8 questions that came up.

9 BY MR. SWINDELL:

10 Q Do you recall any questions about it?

11 A There was a question as to the fees, the
12 commitment fees, the brokerage fees, money that had to be
13 posted, one that had to be posted. Frankly, we reviewed
14 generally the personal financial position of the prospective
15 borrowers and I asked the question about being able to come
16 up with the money and we went down the list specifying what
17 fees would be required and when they would be required prior
18 to closing of the construction loan, when it's a time when
19 a lot of other costs are covered; that is, the loan that
20 existed on the ground. Generally, that's funded by the
21 construction lender. Maybe, architect's fees and things
22 of that nature. When you're in the construction phase, a
23 construction lender will fund some of those, but we still

1 resolved that prior to that, prior to closing of the con-
2 struction loan there would probably have to be about 40,000
3 -- 39,000 for some reason seems to be the number. That was
4 based on a million three loan commitment, but about \$40,000
5 would be required. Payment to the construction lender. One
6 point to the permanent lender which is the same as in the
7 Hanson thing. Point for application for construction loan
8 and a point to the Barnes Company.

9 Q Did you provide Plaintiffs a copy of that for
10 them to keep at the meeting?

11 A No, I didn't.

12 Q Why not?

13 A Well, for two reasons. First of all, it's
14 really not customary for a mortgage banker or an investor,
15 for that matter, to issue someone an application on their
16 letterhead for them to just walk out of the room with the
17 prospect that they could shop it. Frankly, it's happened
18 to me before in the business. Even in a brokerage capacity
19 or as a mortgage banker if I were to submit an application
20 to someone, that application itself could be used with a
21 competitive mortgage banker to say this is what Fraley will
22 get from me and if your reputation is any good, you probably
23 are gonna be able to use that as a negotiating tool. For

1 that reason I did not provide them to stick the application
2 in their brief case and walk out the door.

3 THE COURT: What application?

4 THE WITNESS: When I say application, I'm talking
5 about the brokerage agreement.

6 THE COURT: Well, you're talking about a meeting
7 on the 19th of March.

8 THE WITNESS: Right.

9 THE COURT: Well, the agreement was signed on
10 the 27th.

11 THE WITNESS: Right.

12 THE COURT: And you're saying you did not give
13 them a copy of this then?

14 THE WITNESS: Right.

15 THE COURT: It was signed on the 27th.

16 THE WITNESS: Right.

17 THE COURT: And the reason you didn't give them
18 a copy of the agreement was that you didn't want it taken
19 around so that they could get it a better brokerage deal?

20 THE WITNESS: They could just walk out the
21 door and we might never see them again. In addition, of
22 course, not having the agreement with them, but I wanted
23 them to think about any terms and conditions in that

1 brokerage agreement before we met again and get the infor-
2 mation together that I needed.

3 THE COURT: You must have been talking to them
4 on the phone to find out -- did you have to find out any-
5 thing that was going in this agreement referring to Plain-
6 tiffs' No. 1?

7 THE WITNESS: No. Actually, subsequent to --

8 THE COURT: Well, your first meeting was on
9 March 19?

10 THE WITNESS: Right.

11 THE COURT: You say you had this written then?

12 THE WITNESS: Right.

13 THE COURT: But, you must have had another
14 meeting with them to get the details of what was to go in
15 here?

16 THE WITNESS: Really, the details are the loan
17 amount, the terms that we were presenting, etcetera, etcetera,
18 it would not have been -- it's not difficult for us to pre-
19 pare an application prior to the meeting.

20 BY MR. SWINDELL:

21 Q Were those amounts provided for you before you
22 got to that meeting?

23 A Yes.

1 Q What was your next contact with the Plaintiffs?

2 A On the 27th, I believe is the date.

3 Q 27th of March?

4 A Yeah, in their office, yeah.

5 Q Let's go back to the meeting of the 19th. What,
6 if anything, was said about the land loan?

7 THE COURT: Said about what?

8 MR. SWINDELL: The land loan.

9 THE WITNESS: Existing land loan?

10 MR. SWINDELL: Yes.

11 THE WITNESS: I asked for a copy of the
12 security instrument. VMC Mortgage Company who is Don
13 Shircliff, I believe is the president, was there. He indi-
14 cated that they were holding the land loan. Aside from
15 that, not much.

16 BY MR. SWINDELL:

17 Q Now, when was your next meeting with the
18 Plaintiffs?

19 A On the 27th.

20 Q What occurred at that meeting?

21 A Essentially, I was provided the information
22 that I requested. There was some bits of financial infor-
23 mation that were to follow, but nothing really significant.

1 I was given the financial information on Habib Hakim and
2 how that North American Financial and Management -- the
3 other people that were involved in that. I think I was
4 provided a set of plans, survey, financial statements.

5 THE COURT: That was the meeting of the 27th?

6 THE WITNESS: This was the 27th, and really
7 the things I was provided were pursuant to the lists that
8 we had prepared at the prior meeting and I received a signed
9 brokerage agreement and a check for \$10,000.

10 BY MR. SWINDELL:

11 Q What kind of document were you provided regarding
12 Mr. Hakim?

13 A A brief descriptive information on who was
14 involved in the organization and financial statements on
15 the people that were there. Described pretty much that --
16 I don't know if it is a shell investment company or not,
17 but essentially there were people in Kuwait who were
18 significant wealth and Hakim who was the managing principle
19 of the organization was here and there was another in-
20 dividual involved and there was financial information on
21 them that listed all sorts of investments, domestic and
22 foreign.

23 Q Did you disclose to the Plaintiffs what you

1 were going to do with that documentation?

2 A I'm sure it was understood that I was to include
3 it in the presentation that I was putting together.

4 Q What was your understanding at the time of
5 Mr. Hakim's relationship with the Plaintiffs?

6 A It was my understanding at that time that they
7 had, as they described in a meeting prior to that, we're
8 familiar with each other having been involved in a trans-
9 action or two transactions or something beforehand and
10 that they were, in fact, going to be partners in this in-
11 vestment more specifically, but before that meeting was
12 over, it was indicated to me that the following Monday would
13 be the day when the partnership would be consummated or
14 -- no. A week from that day the partnership would be con-
15 summated and that's where ultimately Hakim was going to
16 put his money in for the check or he was going to substitute
17 his check for the check that I was holding. That's why I
18 agreed to hold the check for a week.

19 Q Would you explain for the Court exactly what
20 you agreed with respect to the check?

21 A Okay. I agreed that I would hold the check
22 for one week and then I would cash it.

23 Q What was Mr. Akers response? There really

1 wasn't any response. I was asked if I would hold the check
2 for a week and I asked, first of all, if it is a check which
3 I think is a fair question if somebody asks you to hold it.
4 He said it was a good check and I asked for what reason I
5 should hold it for a week and they said because they were
6 going to substitute for those funds money from Hakim and
7 I said all right, I will hold the check for a week.

8 Q I'd like to show you the brokerage agreement.
9 Is this the document that you had the Plaintiffs execute?

10 A Yeah.

11 Q Would you describe for the Court the circum-
12 stances that led up to the execution? Were there any
13 questions?

14 A Actually, on that particular morning I don't
15 -- let me check. I don't recall any questions. Most of
16 the things that were in connection with the fees. That
17 was the major item. In reviewing this clause by clause,
18 that was covered in the prior meeting.

19 Q There is one other question I want to ask you
20 with respect to the check. What was your understanding
21 that check was for?

22 A That was a good faith deposit as outlined in
23 the brokerage agreement.

1 Q Was this the first meeting Mr. Hakim's name
2 was mentioned?

3 A As I said, his name specifically might have
4 been brought up in the first meeting, but, again, it may
5 not have been. His name specifically was brought up at
6 this meeting and financial statements on him specifically
7 were provided me.

8 Q In what capacity was his name mentioned?

9 A As a prospective partner at that time, but as
10 the partner that I needed for the transaction.

11 Q Did anything else occur at that first meeting
12 -- second meeting where the brokerage agreement was executed?

13 A Oh, yeah. The issue about when I would report
14 back on the progress report. I mentioned that within 10
15 days to two weeks I could have a preliminary indication of
16 where we were. Frankly, it would take that much time to
17 get photographs developed, to have aerial photographs
18 delivered to me to compile the package and really get any
19 kind of indication from a prospective investor. That was
20 also brought up at the meeting.

21 Q What did you do subsequent to that meeting?

22 A Okay. That day I went back to the office, gave
23 the check to the assistant treasurer of our company for

1 safe keeping to put in the vault. I ordered aerial photos
2 from Blue Ridge Aerial so that they could get on those right
3 away. Ordered credit reports on Mr. Zeeman, Mr. Akers,
4 Habib Hakim which as it turns out he declined any information
5 anyway and started contacting people that afternoon -- now,
6 it takes a while to follow up with this kind of information
7 -- but appraisal people, realtors, developers that I knew
8 were -- had been active in that area in that kind of pro-
9 duct that I was going to develop information from.

10 Q How long did it take you to assemble the loan
11 package?

12 A Probably, took 10 days.

13 Q What did you do with it after it was assembled?

14 A I either delivered it in person, mailed it to
15 the people that I had been in contact with or the prospective
16 financing. This all kinds of happens at the same time
17 when you're talking to your prospective investor as you're
18 finalizing the presentation. You can't put one too far
19 ahead of the other or you end up with a timing gap. When
20 the package was completed, I delivered it to the people I
21 had been discussing the financing with.

22 Q How many lenders did you contact? Do you
23 recall?

1 A. I would say at least a half a dozen. I have
2 nine listed here, but at least that many. It was brought
3 up earlier it was my understanding that my intention for
4 -- or we had one specific investor who wanted to do this
5 project and it was just a matter of walking down to that
6 investor and providing the information and getting the
7 commitment. That was never my understanding at all. It
8 was always my understanding and even in the process of
9 our communications that who are you talking with, are you
10 talking to so and so and are you making sure that you're
11 covering enough people. The idea of our expressing that we
12 had one particular institution who was ready to do this
13 project really was not my understanding at all.

14 Q What was your next contact with the Plaintiffs
15 or either of them? Do you recall?

16 A. Phone call with Mr. Akers on April 3 we talked
17 generally about what I was doing. I don't really recall
18 if I called him or he called me. I wouldn't be afraid to
19 say I called him. It would be normal practice. We discussed
20 the borrowing entity, because, of course, that has to go
21 in the package and it was expressed to me verbally the
22 52-48% ownership and really that was -- and that the partner-
23 ship agreement was being drafted. There was some under-

1 standing that the document that's moved around here -- I
2 never saw, incidentally.

3 Q The memorandum?

4 A The one on their letterhead.

5 THE COURT: You never saw that?

6 THE WITNESS: No, but it was later -- well,
7 actually that was after the next meeting that we had, but
8 I was provided from Pearson Ames some descriptive infor-
9 mation on the partnership and resume information on him
10 which I --

11 BY MR. SWINDELL:

12 Q Who is Pearson Ames?

13 A He was expressed to me by he and Hakim that he
14 is an employee of Hakim's firm, was running his own firm
15 up in Baltimore, development contracting type thing.

16 MR. HYLTON: Your Honor, could I interject an
17 objection at this point? We're getting to the point in
18 the case where the meeting took place between Mr. Hakim
19 and Mr. Pearson Ames who was just mentioned here and I am
20 going to object to any kind of hearsay.

21 THE COURT: And who?

22 MR. HYLTON: These two gentlemen here.

23 THE COURT: Your people?

1 haven't seen yet is anything that has a signature on it.
2 Now, maybe you have something that will show me that they
3 got him finally to the point where he signed something. I
4 don't see that, but you may develop what he said and in
5 line with what I have just completed here.

6 BY MR. SWINDELL:

7 Q With respect to your April 3rd conversation
8 with Mr. Akers, what was disclosed to you at that time
9 with respect to the borrowing entity?

10 A I'm not really sure what just went on with
11 all this conversation, but just stop me if I do something.

12 THE COURT: This is the meeting that these two
13 gentlemen were there and you were there?

14 THE WITNESS: No, this is just the phone call
15 that set up the meeting; is that correct?

16 MR. SWINDELL: That's correct.

17 THE COURT: This is you and Akers?

18 THE WITNESS: It was described to me over the
19 telephone that the terms of the partnership entity, because
20 I needed a little something more specific to put in my
21 package other than to just say the partners, I came up with
22 a 52-48% ownership position and didn't really pursue it
23 that much further, that conversation over the phone, because

1 we were doing that same conversation setting up a meeting.
2 Can I say that it was my understanding from really the day
3 that the brokerage agreement was signed and I got the check,
4 okay, that there was a partnership agreement that was being
5 negotiated and it would ultimately be signed and subsequently
6 it certain -- as a result of the meeting that we're just
7 getting into, I was certainly led to believe and it was
8 always my understanding that there was a partnership between
9 these people. The complaint has been made that I didn't
10 deal enough with Mr. Akers. That was no accident. I was
11 led to believe that not only could I deal with both of these
12 people, but frankly, some of the information I needed
13 Pearson Ames was more obviously able to provide. Hakim was
14 more obviously able to provide and I worked with the source
15 of the group that could most easily and most conveniently
16 and it made more sense to go to. Apparently, that was all
17 right to say.

18 BY MR. SWINDELL:

19 Q With respect to this conversation you said that
20 the meeting was set up among you and Mr. Hakim, Mr. Ames
21 and the Plaintiffs. Who suggested that meeting, do you
22 recall?

23 THE COURT: Mr. Hylton, let me say this about

1 the ruling that you had asked for and that I had made and
2 said that these people were not partners and I think that's
3 true. That would not necessarily mean, though, that the
4 subject matter that they were dealing in that they could
5 not have been agents one for another. That is to say, that
6 Hakim could be responsible for what was said by these
7 people in his behalf or that whatever Hakim said would be
8 said in their behalf insofar as their interest joined in
9 the consummation of this project.

10 MR. HYLTON: Your Honor, could I respond to
11 that to make sure I understand?

12 THE COURT: Yes, sir. And that's not to say
13 though that they were partners in that sense, but for what
14 they were doing they were treating one another as having
15 the authority to speak for the other.

16 MR. HYLTON: Your Honor, the only point I want
17 -- I understand what you're saying. The point that I wanted
18 to make was that Mr. Fraley wants to testify about what
19 Mr. Hakim said on behalf of these two gentlemen and offer
20 it to prove the truth of what it was, then that's hearsay
21 and it shouldn't be admitted and should not be considered.

22 THE COURT: But, wouldn't be admissible, however,
23 as something that was uttered; that is, the fact of its

1 having been said in the presence of your clients?

2 MR. HYLTON: I would think it depends on what
3 was said and you see -- maybe, I'm jumping too far ahead
4 of myself.

5 THE COURT: Well, apparently, neither one of
6 you know.

7 MR. HYLTON: Well, we don't know.

8 THE COURT: And Mr. Swindell said he didn't
9 know.

10 MR. SWINDELL: Your Honor, I was anticipating
11 this objection and I've got the specific mark in the law
12 of evidence in Virginia which I was going to use later on.

13 MR. HYLTON: Obviously, the reason we're
14 interested is because Mr. Hakim is not here. Now, I'm
15 trying to keep this case in the context of the brokerage
16 agreement and what was said and what was done to bring a
17 commitment within the terms of Paragraph 2 of that brokerage
18 agreement and if Mr. Hakim said something like go out and
19 get us a good loan, I don't have any problem with that. I
20 don't have any problem at all, but when you get down to
21 the -- I don't know how to make a distinction between good
22 hearsay and bad hearsay and I just am concerned about Mike
23 saying well, Mr. Hakim said thus and so about the brokerage

1 agreement or let me give -- cite you a hypothetical.
2 Suppose, Mike's testimony is that he brought a commitment
3 in and Mr. Hakim said to Mr. Fraley -- and this would be
4 his testimony -- this commitment satisfies every aspect of
5 the brokerage agreement. We'd be out of Court maybe and
6 I believe that that is blaten hearsay. It would be if Mr.
7 Akers or Mr. Zeeman said that to Mr. Fraley, then I would
8 think it could come in under the exception absent of an
9 admission against interest of a party, but Hakim is not a
10 party and we are not in agreement that he could bind them
11 as a partnership so it all kind of relates or perhaps I'm
12 premature in the suggestion, because I don't know exactly
13 what is going to be said, but I thought it might be helpful
14 for you to have our position on this.

15 THE COURT: Proceed.

16 BY MR. SWINDELL:

17 Q I believe I asked the question and it was
18 unanswered. Who suggested the meeting? Do you recall?

19 A I believe it was Mr. Akers. At the prior
20 meeting, it was discussed as soon as it was convenient
21 that we ought to have a meeting, because it makes sense to
22 bring all the people together. As I said, I'm really not
23 certain whether I called or he called, but he at least set

1 up the time for the meeting. To the best of my knowledge,
2 he suggested the meeting if you need a yes or no answer.

3 Q When and where was that meeting to be held?

4 A It was held in Hakim's office in Georgetown
5 on 31st Street in that area.

6 Q Do you recall the specific date?

7 A I believe it was April 7, the week of April 7.
8 I'm really not sure of the exact date. 1103 30th Street,
9 Suite 303.

10 Q Who attended that meeting, Mr. Fraley?

11 A Mr. Akers, Mr. Zeeman, Pearson Ames, Habib
12 Hakim and myself.

13 Q What occurred at that meeting?

14 A We started out generally by making introductions.
15 I was asked numerous questions about my background in the
16 business. I was asked specifically if I had ever had any
17 financing transaction where a commitment was issued and
18 loan never closed. The answer to that is no and still is
19 no. I guess it's not no any more. Scratch that last part.
20 Asked how much business I had done which is somewhere in
21 the neighborhood of 200 million dollars and I had responsi-
22 bility for. To the best of my knowledge, everything that
23 was done is current and good standing and nothing is in

1 foreclosure. Those kinds of questions were asked of me. I
2 expressed an interest on my part that some of the things
3 that I would expect in performance by way of a developer
4 are that being that they should be expected to have to sign
5 an application and post a check for commitment, because I
6 was very sensitive to asking an investor to issue a commit-
7 ment that would not be accepted. I guess descriptively
8 I could get into that a little bit. It is possible in our
9 industry with some investors to get a commitment issued.
10 All right. Coming from a background in the investment area
11 if I were to issue a commitment to someone and that commit-
12 ment was never accepted and the loan not closed, that would
13 be a negative from my point of view. The point being that
14 I expressed to these people that they would have to sign
15 an application and post money with an investor to make sure
16 that they were going to accept the commitment letter.

17 Q What else was discussed at that meeting? Do you
18 recall? Can you think of any?

19 A Oh, yes. This issue came up about the con-
20 struction loan. It was expressed that the borrowing entity,
21 prospective borrowing entity with the financial strength
22 and responsibility, experience and whatever, have the
23 capability of providing a construction loan very easily with

1 a permanent loan commitment and for that reason they really
2 didn't need me to get a construction loan. Frankly, I
3 didn't make a big negotiating issue of that. I agreed to
4 it. As a matter of fact, in this type of financing once
5 the permanent loan commitment is issued, it is true that
6 the construction loan is very easy to get no matter who you
7 are, because the construction lender is banking the
8 permanent commitment.

9 Although the brokerage agreement provides for
10 a permanent and construction loan, I decided personally
11 not to make an issue and I'm not making an issue of it now.
12 At that point, we switched from my delivering both loans
13 and being paid on both loans from me just providing the
14 end loans and being paid on just the end loans and I agreed
15 to that.

16 Q When you refer to end loan --

17 A I mean, the permanent loan.

18 Q Was there anything else discussed at that
19 meeting that you recall?

20 A Well, I recall -- well, I guess I can't say
21 specifically who I asked and what they thought of the project
22 and so on, but since I had more people now to talk with,
23 I just generally asked the people who were there what they

1 thought of the project generally, what their impressions
2 were, etcetera. It was expressed that a presale require-
3 ment would be expected if not by the permanent loan,
4 certainly by the construction lender that they were suggest-
5 ing we use.

6 Again, the issue of presales was discussed at
7 the meeting, was addressed as something that would result
8 -- frankly, would be required by the construction lender
9 no matter what the permanent loan commitment said and that
10 concept was expressed for certain.

11 Q Was that acceptable to the Plaintiffs at the
12 time? Do you recall?

13 A I didn't hear any objections to it.

14 Q Did you receive any documents from the Plaintiffs
15 in regard to that meeting?

16 A Documents? Well, I asked when the new partner-
17 ship agreement was going to be signed. This is on the way
18 out of the meeting, not in the meeting, because I didn't
19 want to get involved in the negotiations between the
20 partners in their deal, but on the way out the door, I
21 asked Mr. Akers when the partnership agreement would be
22 signed so I could cash the check and he expressed to me
23 that the following Monday was the time when it would be

1 consummated.

2 Q Did you ever receive a partnership agreement?

3 A Never did.

4 Q Did they provide you anything else with respect
5 to the loan package at that meeting? Do you recall?

6 A Really, no, except that it was agreed that
7 information would be developed and provided to me that
8 outlined the development expertise background in the con-
9 struction business and so on on the borrowing entity.

10 Q In the chronology of events, what occurred
11 after that meeting? Do you recall?

12 A Well, on my list in addition to continuing
13 to work on the financing of the property -- in fact, the
14 information that I just described about the resume infor-
15 mation, that was provided later and was sent out to the
16 people who had already had a package and consequently the
17 next thing I have on my list is that on the 29th I delivered
18 a copy of that information to Mike Hall over at John Hanson
19 who -- in fact, I remember taking it over there myself on
20 that morning, because the committee met that day and I had
21 already had the package and reviewed the information and
22 we discussed --

23 THE COURT: The John Hanson committee had the

1 package?

2 THE WITNESS: Exactly.

3 THE COURT: And they met that day?

4 THE WITNESS: They met that day. I delivered

5 --

6 THE COURT: You had given them the package?

7 THE WITNESS: Right.

8 THE COURT: Which was given to you by Mr. Akers?

9 THE WITNESS: No, I prepared the package.

10 THE COURT: The presentation information given
11 by them?

12 THE WITNESS: By them and from other sources
13 in the market place so that I could put together a pre-
14 sentable mortgage --

15 THE COURT: When was it before John Hanson?

16 THE WITNESS: I don't know. In one of the
17 files here, there is probably a cover letter that went
18 along with the initial package when it was presented to them.
19 I know I carried it over there, because I addressed
20 specifically with Mike Hall the issue of a rate that floated
21 over an index as opposed to an open-ended -- a rate that
22 was up to the discretion of the lender at the time he
23 funded. That's one of the things that -- I assume we're

1 going to get into that specifically, because that's a point
2 of argument.

3 BY MR. SWINDELL:

4 Q Before we get into the meeting you had with
5 Mike Hall, on the basis of information provided by Mr. Akers
6 to you, did you inform the lender you had contacted with
7 respect to the borrowing entity?

8 A Certainly.

9 Q What did you inform them?

10 A That it was a combination of a partnership
11 with North American -- I've got two North Americans here
12 -- the realty and land group; Mr. Akers and Mr. Zeeman,
13 and North American Investment and Management Company which
14 was Habib Hakim. It was a partnership existed 52% plus
15 48% and included resume information that I described.

16 Q All right. Now, would you please explain in
17 detail the meeting you had with Mr. Hall of John Hanson?

18 MR. HYLTON: Can I interpose an objection?
19 I think that anything he testifies to -- again, I'm back
20 to the same position. I believe I'm back to the same
21 position I was in discussing evidence --

22 THE COURT: What was your question? I didn't
23 hear your question.

* * *

1 MR. SWINDELL: Yes, Your Honor.

2 MR. HYLTON: My only question -- I wanted kind
3 of to explore this distinction. If, in fact, there is no
4 competent -- and we're not going to get into any competent
5 evidence here of what the Barnes Company did do, then how
6 can these people be held culpable for what they did or
7 didn't do with respect to something we don't have any proof
8 about? Do you follow that?

9 MR. SWINDELL: Your Honor, I would submit that
10 this whole line of argument is way, way premature, that
11 we're just getting collared into something that might not
12 even be an issue.

13 THE COURT: All right, Mr. Swindell. Proceed.

14 BY MR. SWINDELL:

15 Q With respect to your meeting with Mike Hall,
16 what did you do?

17 A Made an appointment, brought the presentation
18 over, sat down and talked generally with Mr. Hall. In fact,
19 generally over the phone outlined the parameters of the
20 investment, generally where it was located and what type
21 it was, whether they were doing those kinds of financing.
22 We went to talk to Mike specifically -- had one issue that
23 I really wanted to address with him and this is something

1 that we had discussed. What I wanted them to do was to
2 commit the permanent loan rate to some index rather than
3 the language which we'd known them to commit to before
4 and which is language in the brokerage agreement that says
5 that the rate will be at the prevailing commercial rate of
6 the lender at the time of the commitment, something to
7 that effect, which is language which allows the lender to
8 pick whatever rate essentially he happens to want at that
9 time. That language, to me, I was trying to better some-
10 what.

11 Q Is that language in the brokerage agreement?

12 A Yes, it is. The brokerage agreement says the
13 greater of, doesn't it? The brokerage agreement says
14 permanent loans at the higher of two above the gross FHLMC
15 60 day auction rate 30 days prior to the closing or lender's
16 prevailing commercial mortgage rate. What I wanted to
17 accomplish with Mr. Hall is to get out, if possible, that
18 language about the lender's prevailing commercial mortgage
19 rate. It was an unfavorable climate that we were operating
20 in during that period of time and I could see this as an
21 alternative for the lender to just quote himself out of
22 all practical terms of doing the investment. What I hoped
23 to accomplish, and frankly I think I did accomplish, was to

1 get a specific index that you could refer to. FHLMC -- two
2 over FHLMC generally understood to be at some indication
3 where commercial mortgage rates ought to be and I wanted
4 them to commit to doing that. That was the major issue
5 with Mr. Hall and, frankly, it's part of the reason why I
6 asked him to go to his committee to get approval for the
7 loan and report back to me to see if those terms were
8 acceptable rather than to have me prepare an application
9 and have it go to their committee, be turned down on those
10 terms or being accepted with wide open language. At that
11 point, I would be in a position to trying to go back and
12 forth and that is not advantageous to anybody's own
13 business. That was the general tone and content of the
14 conversation with Mike Hall the first time I met with him
15 and, as I said, the only time aside from maybe calling him
16 on the phone and making sure that he was going to discuss
17 it at the meeting and the next time I saw Mike was just to
18 drop off the information, the additional information.

19 Q Were the terms of the agreement specifically
20 discussed with him?

21 A Yes.

22 Q There came a time later on where you took
23 certain actions with respect to your discussions with

1 Mr. Hall?

2 A Right. Mr. Hall went to his finance committee,
3 got approval of the loan which is --

4 MR. HYLTON: I'm going to object, Your Honor,
5 on the basis of hearsay.

6 THE COURT: What do you say to that?

7 MR. SWINDELL: Your Honor, with respect to that
8 I would say that it's not offered for the truth of the
9 matter. It's offered to indicate Mr. Fraley's subsequent
10 actions.

11 THE COURT: Then, it's not proof of a fact
12 that Hanson Company ever committed to make the loan. Do
13 you understand that?

14 MR. SWINDELL: Yes, Your Honor.

15 MR. HYLTON: Did you rule on mine?

16 THE COURT: Yeah, that if it's admissible it
17 is simply to show what he did and why he did it, but not
18 for the truth of the fact that the Hanson Company through
19 their loan committees or board agreed to the proposal. I
20 do not think that can be proven through this witness based
21 on conversation with representatives of that company. Do
22 you have something that tells me that it can and distinguishes
23 that from hearsay and if you do I would be glad to have it.

1 MR. SWINDELL: Well, first I offered it, as I
2 said, to indicate the legitimacy of Mr. Fraley's follow up
3 actions. Secondly, I would proffer that not only Mr. Fraley
4 but Mr. Hardwick as well would testify --

5 THE COURT: I don't really think the legitimacy
6 of the follow up actions is going to be the issue in the
7 case. The issue in the case is whether the terms of the
8 contract have been complied with; isn't that correct?

9 MR. SWINDELL: Yes, Your Honor, but what I was
10 about to say is that Mr. Fraley and Mr. Hardwick will both
11 testify that based on their prior experience receiving such
12 information from John Hanson indicated to them in every
13 instance that John Hanson was ready, willing and able to
14 make the loan, so it's not from John Hanson itself that
15 we're getting the information. It's from these two people
16 that worked with John Hanson in the past.

17 THE COURT: I question that you can prove that
18 they were working to make the loan by the statement of
19 someone other than Mr. Hall or someone in that organization.
20 Isn't he then simply repeating what another person told
21 him who is not here to be cross examined? And I think it
22 would appear to me that it would be something that in the
23 final analysis you would be interested in proving the truth

1 of the statement.

2 MR. SWINDELL: Yes, Your Honor, I agree.

3 THE COURT: That is to say -- let me put it
4 this way: Suppose he had done everything that he would
5 have to do to get a loan, but from inside of the lending
6 institution some representative of it misstated to him
7 when they told him yes, I can get the loan, it's all
8 squared away and everything will go fine and he was simply
9 misleading the broker and it was not true. Then, the fact
10 that the broker had done all that he had to do would still
11 not entitle him to the commission if he had not gotten the
12 product, the commitment. You see?

13 MR. SWINDELL: Yes, Your Honor. Well, perhaps
14 we can proceed then with Mr. Fraley's testimony and what
15 I'll do is if I can impose -- indulge the Court's time
16 I'll ask --

17 THE COURT: We'll take a brief recess and you
18 discuss this with your client and look into it and if you
19 have something else you want to argue to me, you may, but
20 I do think that if you're offering it for the truth of what
21 Mr. Hall said, the statement repeated by this witness, I
22 think that would be hearsay. Suppose the man had told him
23 and misstated the fact that he says I have a commitment.

1 Really, the fact is he doesn't have a commitment. He relies
2 on it. He goes to these people and they rely on it. There
3 is no commitment. There is no commission earned. There-
4 fore, the truth of what Hall would say in the final analysis
5 would be important, would it not, because upon that testi-
6 mony depends whether there was or was not a commitment and
7 whether or not there was a commitment is a part of the
8 proof of this case for the broker's commission.

9 All right, sir. We'll take a recess.

10 (Whereupon, a short recess was taken.)

11 BY MR. SWINDELL:

12 Q Mr. Fraley, in terms of chronology of events
13 from your own experience, what did you do next?

14 A I prepared an application for the -- okay.

15 This is after I heard back from Mr. Hall --

16 THE COURT: Let me say this. What I'm going
17 to do is permit you to prove through this witness the
18 matters that Hall had told him about. Now, rather --
19 because if you need a record made of the case you have to
20 tender that proof anyway of what it would be in the event
21 I rule that it could not be considered and ought to be
22 excluded and also subject to the further possibility that
23 if the case goes over, say until tomorrow morning, and you

1 need to have someone here from Hanson to make proof of that
2 item that you can do that. In other words, it's not ruling
3 that it is admissible for proof of the truth of it. You
4 have to make a proffer of that anyway through the witness
5 in case it's excluded so that you could show what could
6 be proven and then subject to your right to call a witness
7 from Hanson to prove the fact of the commitment if, indeed,
8 that was the case.

9 MR. SWINDELL: Thank you.

10 THE COURT: Now, that will also go for state-
11 ments made by Hakim and dealings had with him and ruling
12 then would be made on whether or not there was either an
13 estoppel, agency by estoppel or a joint venture where
14 either or both of the two Plaintiffs in the case had held
15 him out to be an associate intending that person to rely
16 upon him in dealing with that, all of which would have to
17 be proven, of course, and would have to be shown by the
18 evidence.

19 All right, sir.

20 MR. HYLTON: Your Honor, if I might note my
21 exception.

22 THE COURT: Well, I'm permitting him to prove
23 the proffer. He may proffer that.

1 MR. HYLTON: So, we haven't gotten there, yet.

2 THE COURT: Yeah.

3 BY MR. SWINDELL:

4 Q What did you do chronologically next?

5 A Well, go ahead and tell me when I get out of
6 range.

7 Q He prepared the application; is that correct?

8 A Right. What I want to say here is that sub-
9 sequent to my call from Mike Hall after their committee
10 had met he outlined the terms of the financing that they
11 had approved, discussed and approved at the committee meeting.
12 That's okay for me to say. From that, I went back and pre-
13 pared an application to be signed by the borrowers and
14 presented to John Hanson so that they would issue a formal
15 written commitment.

16 Q Did you prepare one application? Just one?

17 A Two.

18 Q Why did you prepare two?

19 A Well, for two reasons. Really descriptive, as
20 I mentioned, what I wanted -- an application submitted to
21 John Hanson I wanted the borrower to understand as much as
22 possible all of what the commitment letter would look like.
23 We were talking earlier -- it was discussed earlier about

1 what is customary and what is not customary. I wanted to
2 make sure that the commitment would come back with even
3 verbage that was not a surprise to people. Okay. That's
4 the reason for the long form application.

5 THE COURT: Well, were the two submitted to
6 these people at the same time?

7 THE WITNESS: There seems to be some confusion
8 on that. To the best of my knowledge at the time that I
9 prepared those applications and wrote the letter to Habib
10 Hakim, which I think you have here, to the best of my know-
11 ledge a copy of both applications and that cover letter
12 were sent to Mr. Akers.

13 MR. SWINDELL: Your Honor, we'll get more
14 specifically into the events that we submit provided
15 Plaintiffs with copies of these.

16 BY MR. SWINDELL:

17 Q Now, I ask you to examine Plaintiffs' Exhibit
18 No. 4, the attachment to the cover letter, and Defendant's
19 Exhibit No. 2 for identification purposes and ask if those
20 are the applications that you prepared?

21 A Yes.

22 Q What information did you rely on when you pre-
23 pared them?

1 A The information that Mike Hall had conveyed
2 to me over the telephone.

3 Q Anything else?

4 A Well, frankly, a lot of the language was taken
5 from a prior commitment letter that had been issued by
6 John Hanson.

7 THE COURT: But, not for these people?

8 THE WITNESS: Right.

9 BY MR. SWINDELL:

10 Q Had you considered the brokerage agreement in
11 preparing these?

12 A I don't know if I understand. I mean, I didn't
13 -- I, of course, considered the brokerage agreement when I
14 started talking with John Hanson as well as other investors.
15 If you're asking did I go back to the brokerage agreement
16 and make the application that way, no. I prepared the
17 application according to what Hall told me.

18 Q But, the terms of the brokerage agreement were
19 disclosed to various lenders?

20 A Really, no. That is --

21 THE COURT: What was your question?

22 MR. SWINDELL: I asked if the terms of the
23 brokerage agreement were disclosed to various lenders.

1 THE WITNESS: No. That is not a practice. That
2 is information between the client and us. What I did for
3 compared to purposes I, of course, was certain that the
4 terms of the application were in accordance with the
5 brokerage agreement, substantially in accordance with. I
6 think that's the question we're not getting to.

7 BY MR. SWINDELL:

8 Q Well, we won't get to that right now. What
9 happened next after you prepared the applications?

10 A I called up Habib Hakim to set up a meeting to
11 bring the applications down, talk about them, sign them
12 and get a check to get them to John Hanson. As it turns
13 out, I had a call on my desk or return a call to Mr. Zeeman
14 and I called him back and requested their presence at the
15 same meeting. I believe that was a Friday. I was trying
16 to set up a meeting on Monday when we could all get to-
17 gether. I think Mr. Akers was out of the office at the
18 time.

19 THE COURT: When would this have been?

20 THE WITNESS: This was --

21 MR. SWINDELL: Perhaps, I can assist you.

22 THE WITNESS: On or about the 2nd or 3rd. The
23 meeting I had --

1 THE COURT: 2nd or 3rd of what?

2 THE WITNESS: Of May, May 2. Friday is what --

3 THE COURT: Now, how does that stand with your
4 conversation with Hall about the committee having approved
5 the commitment?

6 MR. SWINDELL: Chronologically speaking --

7 THE COURT: You've got to bring this along
8 chronologically.

9 MR. SWINDELL: I am, Your Honor.

10 THE COURT: Please, do it.

11 MR. SWINDELL: He's already testified that he
12 discussed the terms with Mr. Hall on April 29.

13 THE COURT: And he sent these two forms out
14 to these people based on the information he got from Hall?

15 MR. SWINDELL: That's correct.

16 THE COURT: All right.

17 THE WITNESS: Right.

18 THE COURT: Then, are we now setting up a
19 meeting?

20 MR. SWINDELL: Yes, Your Honor.

21 THE COURT: All right, sir.

22 THE WITNESS: Okay. Set up the meeting. I
23 hand carried the applications down to that meeting on Monday.

1 The conversation -- telephone conversation with Mr. Zeeman
2 was on Friday, the 2nd, May 2.

3 THE COURT: But, you didn't send the applications
4 to these people until the 16th.

5 THE WITNESS: No, no. On the 2nd is when I
6 talked to Mr. Zeeman, tried to set up the meeting. At
7 that time, I had not sent --

8 THE COURT: May 2?

9 THE WITNESS: -- applications to anybody. Right.

10 THE COURT: Had Hall told you he approved the
11 loan then?

12 THE WITNESS: That's right. Prepared the
13 application --

14 THE COURT: Where is the Defendant's Exhibit
15 No. 2 and Plaintiffs' No. 4? Let me see those.

16 BY MR. SWINDELL:

17 Q So, you testified you contacted them on May 2;
18 is that correct?

19 A Yes.

20 Q What was the substance of that conversation?

21 A I conveyed to Mr. Zeeman that John Hanson had
22 gone to their committee, directed me to go ahead with the
23 application so that they could issue a formal commitment

1 written commitment letter and I described the terms of
2 that transaction which I also put into the application
3 form the same day. Okay. Told him that I would like to
4 have a meeting as soon as possible preferably on Monday
5 with everybody to discuss the terms, sign the application
6 and put the check up and take the deal to John Hanson.

7 Mr. Zeeman said that Mr. Akers wasn't in at
8 the time apparently, but he would discuss it with him or
9 see him over the weekend or something and probably would
10 be at the meeting. They'd be there on Monday.

11 I called there on Monday morning and they --
12 talked to Mr. Akers who said that the description I had
13 made of the terms to Mr. Zeeman seemed to him to not be
14 satisfactory at all and he had -- they had better things
15 to do than to attend the meeting.

16 THE COURT: This was on a Monday following
17 May 2?

18 THE WITNESS: Exactly. This was a follow up
19 call Monday morning for the meeting that afternoon to
20 confirm that they would be at the meeting. At that point,
21 I gave my secretary directions to send a copy of the in-
22 formation, the applications and cover letter to Mr. Akers.

23 THE COURT: The two forms, short and long?

1 THE WITNESS: That's right, which it has been
2 expressed here neither of which were received as a result
3 of that mailing.

4 BY MR. SWINDELL:

5 Q First, with respect to that May 2 meeting, did
6 Mr. Zeeman express to you any dissatisfaction with the
7 terms that you had disclosed?

8 A Yes, it would be unfair to say that, you know,
9 elated about it. At least had some questions about it.
10 Frankly, I wasn't overly anxious to get into a lot of
11 specifics on the terms with Mr. Zeeman, because I wanted
12 to get everybody together and to not bits and piece about
13 this information and that information and have a lot of
14 confusion. I wanted to have a meeting so that we could
15 all sit down and clear the air on everything.

16 Q Had you informed him that the application
17 which you prepared was something that you believed that
18 they wouldn't be happy with?

19 A No, I did not indicate that.

20 Q So, the meeting occurred on or about May 6;
21 is that correct?

22 A Yes.

23 Q Did the meeting occur on the Monday after or the

1 Tuesday after? May 6 would be the Tuesday.

2 A For some reason, I think I wrote down May 6
3 here and for some reason it seems to me that it was on
4 Monday. I really can't recall. It was Monday or Tuesday.

5 Q How was that meeting arranged?

6 A I called Hakim and I called Gordon Zeeman.

7 THE COURT: This is after you got a negative
8 response from Mr. Akers?

9 THE WITNESS: No, this is -- no. We're way
10 back on Friday now, my setting up the meeting.

11 MR. SWINDELL: That occurred on Friday, May 2?

12 THE WITNESS: That's right, and it was done
13 through -- I just mentioned as a sideline that I was really
14 returning Mr. Zeeman's call when I was calling to set up
15 the meeting as well and that same day I called Hakim to
16 set up the meeting as soon as possible. It seems to me
17 that it was on Monday. My notes indicate that the date
18 was Tuesday, but it was the first thing next week I wanted
19 to get together.

20 BY MR. SWINDELL:

21 Q Where did that meeting occur?

22 A In Hakim's office same place down in Georgetown.

23 THE COURT: When did this meeting take place?

1 THE WITNESS: This is on May 5 or 6.

2 THE COURT: On Monday?

3 THE WITNESS: Right. I believe it was Monday.

4 THE COURT: And this is the one that Mr. Akers
5 you said declined to attend because he had better things
6 to do?

7 THE WITNESS: That's right.

8 THE COURT: And who did attend it?

9 THE WITNESS: Habib Hakim, Pearson Ames and I.

10 BY MR. SWINDELL:

11 Q I'd like to show you a letter and ask you if
12 you can identify it, a copy of a letter.

13 A Yeah, this is -- okay. This is the cover letter
14 that I took along with the applications down to Mr. Hakim
15 and as indicated at the bottom a copy sent to Mr. Akers
16 sent out on Monday as a result of the phone conversation
17 and finding that Mr. Akers would not be there. Want me to
18 read it?

19 Q No. To the best of your knowledge, was that
20 specific letter dispatched to Mr. Hakim?

21 A This was hand delivered to Mr. Hakim by me.

22 Q To the best of your knowledge, was a copy of
23 that letter sent to Mr. Akers?

1 A Yes.

2 Q Were the applications included?

3 A Yes.

4 Q That occurred on or about May 5?

5 A Right.

6 Q After you had been informed that Messrs. Akers
7 and Zeeman believed that they had better things to do?

8 A That's right.

9 Q What occurred at the meeting of May 5 or 6
10 with Mr. Hakim and Mr. Ames?

11 A Really, I did not -- was not overly successful
12 in getting into a lot of the specifics of the application.

13 THE COURT: Did you call Mr. Hakim about this
14 meeting before you had the conversation with Akers?

15 THE WITNESS: Really, about the same time. It
16 was just a matter of walking in the office and calling
17 Hakim and picking up the phone and calling Akers' office
18 and getting Mr. Zeeman. I mean, it could have been the
19 other way around.

20 BY MR. SWINDELL:

21 Q What occurred at that meeting?

22 A Hakim and Ames generally paged through the
23 application forms, had some comments about the fact that

1 they didn't think they were very favorable, frankly, but
2 at least had a question about the rate provision.

3 MR. HYLTON: I'm going to have to register
4 an objection, Your Honor. This is hearsay.

5 THE COURT: Subject to that objection which
6 I'm going into with you and will rule on when this is
7 argued, he has to prove it as a proffer in any event and
8 I will hear it determining then when it's ruled on whether
9 it will be received in evidence or not.

10 MR. HYLTON: I'm not exactly sure that I under-
11 stand what you mean by he's got to proffer.

12 THE COURT: Well, in order to make a record of
13 the case on appeal he would have to put into the record
14 material that would be excluded and the trial court -- let's
15 say I sustained your objection to any of this testimony.
16 It's necessary now for him to put in the record what the
17 testimony was so the Appellate Court can read it. Follow
18 that?

19 MR. HYLTON: Yes, sir.

20 THE COURT: It's coming in in that sense. Now,
21 whether or not it is to be considered or not I will hear
22 you argue that whether it should be rejected and excluded
23 when you argue the case. Do you understand that?

1 MR. HYLTON: Yes. So, really, you're not
2 ruling on my motion at this point. You will rule on it
3 later.

4 THE COURT: I don't know how I can until I
5 hear what the man said and be able to determine whether
6 it is truly hearsay or not.

7 MR. HYLTON: Yes, sir.

8 THE COURT: It may not be offered for the
9 truth of it. If it isn't, you don't even get to hearsay.
10 If it is, then it may be hearsay, then you get to the
11 question of agency or estoppel, things of that kind, or
12 whether it constitutes an exception to the hearsay rule.

13 MR. HYLTON: Thank you.

14 BY MR. SWINDELL:

15 Q First, with respect to this letter, is that
16 your signature on that?

17 A Yes, it is.

18 MR. SWINDELL: I'd like to have this marked
19 as Defendant's Exhibit No. 3.

20 THE COURT: Any objection?

21 MR. HYLTON: No objection.

22 THE COURT: Without objection, it is received
23 in evidence.

1 (The document, letter, was
2 marked for identification
3 as Defendant's Exhibit No. 3
4 and was received in evidence.)

5 MR. SWINDELL: Your Honor, at this time, I'd
6 also like to move the long form -- Defendant's Exhibit No.
7 2 and Defendant's Exhibit No. 1. I'd like to move both
8 of those into evidence at this time.

9 MR. HYLTON: No objection.

10 THE COURT: All right. Defendant's 1 and 2 are
11 received into evidence without objection.

12 (The document referred to,
13 heretofore marked for identi-
14 fication as Defendant's
15 Exhibit No. 1, was received
16 in evidence.)

17 (The document referred to,
18 heretofore marked for identi-
19 fication as Defendant's
20 Exhibit No. 2, was received
21 in evidence.)

22 BY MR. SWINDELL:

23 Q What happened at that meeting --

1 THE COURT: I take it that Defendant's No. 2
2 then was the enclosure that accompanied Defendant's No. 3?

3 MR. SWINDELL: No. 2 and also Plaintiffs' No. 4,
4 Your Honor.

5 THE COURT: Both the long and short form?

6 MR. SWINDELL: Yes, Your Honor.

7 THE COURT: Went with the letter from Fraley
8 to Hakim?

9 MR. SWINDELL: Yes, Your Honor.

10 BY MR. SWINDELL:

11 Q What occurred at that meeting, Mr. Fraley?

12 A We talked generally about the application. It
13 really wasn't an in depth review clause by clause as I
14 really had hoped to get into. I had outlined numerous
15 things on one of the copies of the things that I wanted to
16 discuss. Pearson Ames asked for a copy of that one. I
17 gave it to him, he made a copy and he had to leave the
18 office at which point he left. Before he left, we discussed
19 generally the terms and what other transactions -- now,
20 this is probably really hearsay, but at the same time they
21 were working on financing a property with Perpetual on
22 another townhouse office project in McLean on Curran Road.
23 These were running parallel and as a matter of fact they had

1 asked me to stay away from that investor with this particular
2 deal, because they didn't want to jam up the two loans
3 going to the same investor at the same time. I'm getting
4 to a point here --

5 THE COURT: Who didn't want you to do that?

6 THE WITNESS: Hakim and Ames who were --

7 THE COURT: Well, did that have anything to
8 do with these then?

9 THE WITNESS: Well, I'm really not sure if
10 they were in on the conversation when that was brought up.
11 They were certainly aware of the fact that these people
12 were developing this other townhouse project at the same
13 time.

14 THE COURT: These people being Ames and Hakim?

15 THE WITNESS: Yes.

16 THE COURT: You know of no interest that these
17 people had in the other transaction, though?

18 THE WITNESS: No.

19 BY MR. SWINDELL:

20 Q What relationship did Mr. Hakim ascribe to that?

21 A Pardon me?

22 Q What relationship would this lawsuit or this
23 issue did Mr. Hakim ascribe to that Perpetual loan?

1 A Well, we agreed that I would not take this
2 investment to Perpetual because they were in -- negotiations
3 with that firm had proceeded to a pretty great extent. I
4 hesitate to say that they thought they had agreed to finance
5 the property, but they were at least for the purposes of
6 this transaction, they were negotiating final language on
7 rate language on what the commitment would be for that
8 property, okay, and indicated to me that they wanted to
9 at least wait with this application until the language for
10 that transaction had been agreed to and if it was more
11 favorable they wanted to include it in the application back
12 to John Hanson so that I was able to argue that someone
13 else in the market was doing this and, therefore, they
14 ought to commit to that language as well.

15 Q Did anything else occur at that meeting as you
16 recall?

17 A Really, no. The issue of presales was brought
18 up again just with Hakim and that's -- Ames wasn't even
19 there. I mean, about where they expected to be and he
20 thought they would probably end up somewhere in the neighbor-
21 hood of 50% presale requirement on the permanent and maybe
22 30% on the construction loan that he was gonna get and
23 that's he and I standing in the hall talking.

1 Q What were your subsequent contacts with the
2 Plaintiffs? Would you describe them for the Court, please?

3 A The next time I heard from Plaintiffs was a
4 phone call during the week of the 12th. I returned the
5 phone call to Mr. Akers who at that point --

6 THE COURT: When?

7 THE WITNESS: I don't know the exact date.

8 THE COURT: Approximately.

9 THE WITNESS: The week of the 12th.

10 BY MR. SWINDELL:

11 Q That's May 12?

12 A May 12. Returned his phone call where he
13 expressed his disturbance that the check had been cashed,
14 wanted his money back and described something to do with
15 the effect that I was welcome to continue working on the
16 loan, but he had his money back and I was on my own. There
17 was no agency agreement. Wasn't anything I could rely on.

18 Q When was the check deposited?

19 A I directed it to be deposited, I believe, the
20 afternoon that I came back from the meeting with Hakim
21 when I realized that Akers and Zeeman were not even attending
22 the meeting or had the application, went back to the office
23 and checked with the assistant treasurer to find out if

1 the check had been deposited, found out that it had not
2 been and ordered that it be deposited.

3 Q Where was it deposited?

4 A Into an escrow account, a separate account
5 with the Barnes Company.

6 Q Do you know if that money is still in that
7 escrow account?

8 A It's my understanding that the money is still
9 in that escrow account.

10 Q After your conversation with Mr. Akers where
11 he asked that you return the money, did you have any sub-
12 sequent discussions with either Messrs. Akers or Zeeman?

13 A Yes, I did. During that same weekend -- it
14 was towards the end of the week during the week of May 12.
15 Toward the end of the week, I received a conference call
16 with Mr. Hakim and Mr. Akers. Mr. Akers' comments were
17 generally the same, demanded his money back. The appli-
18 cation -- did say the application was not in accordance
19 with the brokerage agreement.

20 Q How did you respond?

21 A Well, I'm thinking right now. At this point,
22 he's not supposed to have received the application. Well,
23 anyway, I responded that -- and the agreement had expired.

1 MR. SWINDELL: By his testimony, Your Honor.

2 THE WITNESS: I responded that -- I asked him
3 if he ever intended me to cash the check. He said he
4 expected me to call him beforehand and I told him that I
5 thought I was very flexible in delaying as long as I had.
6 Okay. Come to find out this partnership agreement was
7 never -- apparently never consummated. We discussed the
8 terms of the application. Okay. Number one -- okay, al-
9 though verbally I had agreed not to work on the construction
10 loan there was no dispute over that, because I wasn't going
11 to earn a fee for doing it anyway. The loan amount in the
12 application was higher than the brokerage agreement which
13 is a positive factor. They had no argument over that. The
14 interest rate although having a 14% floor was better in the
15 fact that it did specify an indexable amount, if you will,
16 rather than to be totally open to the lender's discretion.
17 In addition, the application provides for a buy down pro-
18 vision no matter at what price provides for a capability
19 of buying down the loan which the brokerage agreement did
20 not include at all which is definitely an advantage in
21 selling the condo end units.

22 THE COURT: Was complaint made then about the
23 provision related to the floor on the interest?

1 THE WITNESS: Yes, that's what we were dis-
2 cussing right there. The issue was brought up about this
3 14th floor. It's not something we talked about. I described
4 that it was an issue that I had really pursued, as a matter
5 of fact, with John Hanson to get them away from the totally
6 open language of a commitment that is at their prevailing
7 commercial rate.

8 THE COURT: All right.

9 THE WITNESS: We had, incidentally, or had
10 received commitments from John Hanson that included that
11 prevailing rate information subsequently and, as a matter
12 of fact, my intention was to better that language somewhat.
13 Well, jumping ahead a little bit, but that prompted me to
14 ask the question -- and this is obviously considered hearsay
15 -- prompted me to ask the question, because I knew John
16 Hanson would agree to that I said if they were to issue a
17 commitment which was exactly -- included exactly the terms
18 of that brokerage agreement, would you take it and Habib
19 Hakim said, "no, I would not."

20 Mr. Akers, I would have to note, was silent.
21 He didn't say a word.

22 Now, after that or prior to that we did go
23 down and discuss the other provisions of the agreement, the

1 fact that the application includes a rate adjustment pro-
2 vision as opposed to a call provision. Some people are
3 putting a term -- a five year term in the loans; that is,
4 it's not a renewable rate. When it comes to the end of
5 the five years the borrower -- you pay it fully or renegoti-
6 ate with us. John Hanson's deal provided for a negotiation
7 at that time. That's an advantage, a sales tool perhaps,
8 but an advantage. Commitment fees are 1% less. Agency
9 agreements we anticipate at 2 points to the seller and the
10 deal included 1 point to the seller which, again, may not
11 financially benefit the borrower except that they had a
12 better end loan commitment. The purchaser of the property
13 would be better off. And the extension. The extension
14 was quite flexible to extend for an extra six months after
15 that so that they could continue to run on their con-
16 struction loan if they ran into commitment problems.

17 BY MR. SWINDELL:

18 Q Did anything else happen in that conversation
19 as you recall?

20 A Well, Mr. Akers said that if he didn't get
21 his money back he'd sue me and I said that I really didn't
22 feel that I could be intimidated by a threat. Suggested
23 that we leave the deposit where it is and that we continue

1 to work together to finance the property. That was totally
2 unacceptable. Hakim suggested the conversation was over.
3 We had nothing else to say to each other and we hung up
4 the phone. That was it.

5 Q I'd like to show you Plaintiffs' Exhibit No. 3
6 and ask if you can identify that.

7 THE COURT: Well, at no time did Hakim indicate
8 acceptance of any responsibility for any of this on his
9 behalf?

10 THE WITNESS: I don't have anything in writing.
11 It's my understanding --

12 THE COURT: Verbally?

13 THE WITNESS: Yes.

14 THE COURT: He did?

15 THE WITNESS: When I'm talking to someone and
16 holding an application and he says I don't like the deal
17 or I have a problem with this or that, to me, that indicates
18 that he is acting as my client whether I've been provided
19 a partnership agreement or whatever the case may be.

20 Frankly, if Hakim had signed the application
21 in his office, I'd have taken it over to John Hanson. I'd
22 have considered that satisfactory. I mean, I'm working
23 with two people. It's not that unusual that you put a

1 transaction together and there are two people in different
2 geographical locations who are both handling the financing.

3 THE COURT: Well, didn't it occur to you though
4 that their position might be that whereas they were trying
5 to get this man into to create a more favorable picture
6 that he wasn't then in it?

7 THE WITNESS: It seemed to me that if there
8 had been a problem in my overcommunication with Hakim and
9 the lack of communication with Mr. Zeeman and Mr. Akers
10 that that would or should have been brought to my attention.
11 I communicated with both people, got information from both
12 people. It was never expressed to me that I should be
13 working solely with them. To the contrary, it was emphasized
14 to me at my request that they needed a partner. They needed
15 the financial strength. They needed someone brought to
16 their entity to provide that and when I had the under-
17 standing that this partnership agreement was being drawn
18 up, I commenced to start working with both of them, really,
19 with the understanding that -- if they had told me, for
20 example, that Hakim was not part of their ownership entity,
21 I'd have stopped right then and said we're not moving until
22 he is, because I'm presenting to investors that the borrowing
23 entity is made up of more than just you. I was not

1 presenting that some day before the loan closes --

2 THE COURT: I don't question that. Well, you
3 knew that that was not the picture at the time, though.

4 THE WITNESS: No, I did not. My understanding
5 was not that prior to closing that would be the borrowing
6 entity. My understanding was that at the same time that
7 they were signing the agency agreement they were putting
8 together this partnership agreement and some time within
9 weeks or days or depending on the mechanics of just finalizing
10 verbage after that first meeting that there was a -- that
11 I was dealing with both of these people and not just one.
12 I never considered that a condition of closing. I considered
13 that a condition of getting the loan committed, presenting
14 it to an investor. I was presenting this investment as
15 though that business relationship were already in existence.

16 BY MR. SWINDELL:

17 Q I asked you with regard to Plaintiffs' Exhibit
18 No. 3, I believe. Do you recall receiving this?

19 A Yes, I do.

20 Q Do you recall when, approximately?

21 A I don't have it in my notes, but it's a
22 registered letter and I assume that I got it on the day that
23 it says.

1 Q Did you have any subsequent conversations with
2 Plaintiffs or Mr. Hakim after you received that letter?

3 A No, not that I know of. As far as I know, I
4 had communication with your law firm.

5 MR. SWINDELL: I have no further questions,
6 Your Honor.

7 THE COURT: Mr. Hylton.

8 MR. HYLTON: Thank you, Your Honor.

9 THE COURT: Now, you may cross examine with
10 respect to material that is within the proffer; that is,
11 either partnership or representations made of actual agent
12 and also may cross examine with respect to the testimony
13 relating to the commitment from John Hanson without waiving
14 your position taken on your objection or your right to be
15 heard on it further in this case.

16 MR. HYLTON: All right, sir.

17 CROSS EXAMINATION

18 BY MR. HYLTON:

19 Q Mr. Fraley, what was going to be the interest
20 rate on the permanent loan from John Hanson?

21 A From John Hanson?

22 Q Yes.

23 A I believe it was FHLMC rate plus 2%.

1 Q Do you want to look? I think it's --

2 A No. Actually, here --

3 Q -- Plaintiffs' 4.

4 THE COURT: Plaintiffs' 4 and Defendant's 2.

5 That's the short form and long form, respectively.

6 THE WITNESS: FHLMC gross rate plus 2% but not
7 less than 14%.

8 BY MR. HYLTON:

9 Q When would that commitment come into play?

10 A When would the rate come into effect?

11 Q Yeah.

12 A At the time that the permanent loan closed
13 30 days -- the rate would be fixed 30 days prior, 60 days
14 perhaps.

15 Q This would be after the construction loan?

16 A That's right. These are the commitments for
17 the individual purchasers of the units.

18 Q Right. Approximately, how long would that
19 be between the time of this commitment assuming that this
20 had gone through?

21 A Depending on how fast they build the project
22 and sell it, 12 months, 18 months, perhaps, is the time
23 frame anticipated.

1 Q What would be the normal time? Is there a
2 normal time?

3 A I don't know if I understand. It goes into
4 effect when -- you mean, what's a normal commitment? How
5 long is the commitment outstanding?

6 Q For a permanent loan -- from the time a lender
7 like John Hanson would make a commitment to provide these
8 end loans that the permanent loan for the purchaser from
9 that time when the commitment goes into effect approximately,
10 how long is it until they start putting out the money?

11 A Usually, 12 to 18 months and I say that -- of
12 course, on a larger project it's going to be longer, but
13 commitment terms are generally set up where the commitment
14 is issued with a 10 year or 12 month expiration date with
15 extensions after that. Does that answer your question at
16 all?

17 Q Yes. Referring you to Plaintiffs' Exhibit No.
18 4. That's the short form authorization application letter.
19 The short form is Plaintiffs' 4.

20 THE COURT: What is your question?

21 MR. HYLTON: Well, I hadn't gotten to that.

22 BY MR. HYLTON:

23 Q The interest rate on Page 1 says the interest

1 rate shall be 2% above the average rate of gross FHLMC 60
2 day auction rate at the time of settlement of each individual
3 unit.

4 A Uh-huh.

5 Q Now, is that the same interest rate that is
6 shown on the long form authorization application letter?

7 A No, it is not. The long form indicates a 14%
8 floor as was committed or -- yes, as was committed.

9 Q Now, the next item -- the next paragraph says
10 the John Hanson Savings & Loan, Inc. will allow a buy down
11 on the interest rate of a relationship of 1.8 equal to a
12 quarter. That is one-quarter. That is one-quarter percent?

13 A Right.

14 Q Is that also in the long form?

15 A That's right.

16 Q Okay.

17 THE COURT: The buy down is in both forms?

18 THE WITNESS: That's right.

19 BY MR. HYLTON:

20 Q Now, when you talked to Mike Hall and you got
21 the terms, did you not get a buy down provision at 1 point
22 is equal an eighth?

23 A Yes.

1 Q So, this application authorization letter does
2 not really reflect at least in this particular one what you
3 got from John Hanson or Mike Hall; is that correct?

4 A That's right.

5 Q Why is that?

6 A This form together with the long form, and
7 that's the purpose for both of them, what I'm suggesting
8 here is the possibility of submitting an application.

9 Q Negotiating?

10 A Yes, that's right.

11 Q Now, on the second page of the short form
12 presale requirement says not less than 50% of the project.
13 The long form says 65%?

14 A That's right.

15 Q Which is right?

16 A The long form --

17 THE COURT: Excuse me. Come again with what
18 you said about the reason for submitting both the long
19 and short forms was for negotiating purposes with John
20 Hanson?

21 THE WITNESS: Exactly. The reason why I wanted
22 to set up a meeting is as a strategy meeting to determine
23 what was available. The long form application includes

1 all the standard language in John Hanson's letter, includes
2 the terminology of commitment terms, etcetera. This
3 application is something that could have been submitted
4 to them in short form, okay, with the purpose of possibly
5 getting them to come down on the presale requirement. For
6 example, getting them to accept an argument for the buy
7 down provision. Being that the loans were only five years
8 in duration a point equal to an eighth concept is usually
9 predicated on a 10 to 12 year loan. Being that it is five,
10 I feel that I had good grounds to argue a quarter of a
11 percent.

12 BY MR. HYLTON:

13 Q So, you had gotten a commitment from John
14 Hanson oral, a proposed commitment?

15 A Right.

16 Q They said -- I guess Mike Hall said if you
17 come to us with a application that includes these terms
18 we'll give you a loan. Is that fair? I don't mean to put
19 words in your mouth.

20 A I'd say that is as fair as anything. So, we
21 met today and we agreed to do the deal with these terms.

22 Q And they gave you the terms and it included
23 the 14% floor, a buy down of an eighth and a presale of 65?

1 A That's right.

2 Q Okay. So, you decided on your own in order
3 to get a better deal to not take those terms, but to improve
4 on them by leaving out the 14% floor, the buy down is a
5 quarter instead of an eighth which is -- you increased your
6 profits by 50% or 100% and you knocked down their commitment
7 from 65% to 50%, the presale requirement. Okay.

8 THE COURT: I'm going to need -- I've got to
9 have this to look at.

10 THE WITNESS: That's why both applications
11 were submitted at the same time.

12 THE COURT: Does the long form refer to 65%?

13 MR. HYLTON: Yes, sir, and the 14% floor and
14 I don't know if the buy down is still a quarter in the long
15 form.

16 BY MR. HYLTON:

17 Q But, my point is this, and correct me if I'm
18 wrong, if they had signed this application, the short form
19 application which we've been talking about all day long
20 which was mailed to them you say on the 2nd or 5th or some-
21 thing and they say they got it on the 17th after the commit-
22 ment --

23 A I'm saying that it was sent together with the

1 long form twice. That's what I'm saying.

2 Q I understand your position. Now, if they had
3 signed this application this application would not have
4 been in acceptance of the loan commitment that you had
5 gotten orally?

6 A That is true.

7 Q It would have been a negotiated deal; is that
8 true?

9 A That's true.

10 Q When you first --

11 THE COURT: That would go for either the long
12 or short form of it?

13 THE WITNESS: Wrong. The long form is accept-
14 able.

15 MR. HYLTON: No, because the buy down provision
16 -- Your Honor, I'm saying that I think I'm right. The long
17 form has a buy down -- it's Mr. Fraley's testimony that the
18 proposed commitment from Mike Hall included a floor of 14%,
19 a buy down of the interest rate at a relationship of 1 point
20 equal to 1/8 and the other thing we talked about is the pre-
21 sale of 65%.

22 THE COURT: You're in the short form now?

23 MR. HYLTON: Well, what I was giving you --

1 what I understand what Mike Hall said was, among other
2 things, 14% floor, buy down at a point equal to 1/8 and a
3 presale requirement of 65%.

4 THE COURT: Uh-huh.

5 MR. HYLTON: Now, one application even if it
6 had been signed wouldn't have meant that we had a deal,
7 wouldn't have meant that we had a commitment from John
8 Hanson. It merely left us in a negotiation position.

9 Now, the question that comes is that the same
10 case with the long form and in two instances that's not
11 right, but in one instance the buy down, 1 point equals to
12 one-quarter, is in the long form so even this one -- even
13 if the long form had it been executed could have gone back
14 to John Hanson in a negotiation position, a far cry from
15 having a commitment.

16 THE COURT: You may respond to that.

17 THE WITNESS: My response is that it should
18 have indicated an eighth and also that any buy down pro-
19 vision at all is better than the brokerage agreement which
20 does not allow for any buy down. That's my response.

21 BY MR. HYLTON:

22 Q Let me address that a minute, because you
23 covered it and made several points that your deal or

1 agreement with Hall was better than the brokerage agreement?

2 A Yes.

3 Q You said that there was a 14% floor. The pre-
4 sale agreement was obviously not in the brokerage agreement.
5 There was a more favorable buy down or a buy down which
6 was not mentioned in the brokerage agreement and that the
7 points were different?

8 A Uh-huh.

9 Q Now, my question to you is this: When you
10 make that point for us that these terms are better than was
11 in the brokerage agreement, aren't you making my point for
12 me that these terms are, in fact, different than those terms
13 listed in the brokerage agreement? Aren't you admitting
14 that they are, in fact, different when you say they're
15 better? It's inherently different.

16 A If something is better, it's different.

17 Q When you had your first meeting with these
18 guys, Akers and Zeeman back at the very beginning when you
19 were introduced to them, do you recall Mr. Akers saying
20 to you that he had been to John Hanson Savings & Loan?

21 A No, I don't.

22 Q Do you recall him ever saying that to you? Do
23 you recall him ever saying to you that he had been to

1 John Hanson?

2 A Yes, I do.

3 THE COURT: At what stage?

4 THE WITNESS: Way at the back. It might have
5 been after I received his letter cancelling the brokerage
6 agreement, but I do recall but way toward the end of any
7 of our --

8 THE COURT: Way to the end of what?

9 THE WITNESS: Of our discussions.

10 THE COURT: Not back at the beginning of it?

11 THE WITNESS: No, not at the beginning. I'm
12 trying to think. It would make sense that he would mention
13 it when I talked to him Monday morning trying to set up
14 the meeting, but I honestly don't recall.

15 BY MR. HYLTON:

16 Q Do you recall ever saying to them about going
17 to John Hancock Savings & Loan?

18 A Yes, I do.

19 Q Was it a misstatement?

20 A It was a misstatement on my part. Instead of
21 saying John Hanson I said John Hancock.

22 THE COURT: But, that was about the time of
23 the supposed cancellation?

1 THE WITNESS: That was one of the earlier
2 meetings. That was when we -- in fact, it might have been
3 the first meeting with Hakim and --

4 BY MR. HYLTON:

5 Q That was the first meeting with Hakim and that
6 would have been early in April as I understand your testi-
7 mony?

8 A Yes.

9 Q When you had your first meeting with -- and
10 this back in around the 19th or 20th of March you had
11 various discussions about presale. Did you also have a
12 discussion about a floor, an interest floor?

13 A No, quite honestly, we didn't.

14 Q The brokerage agreement you mentioned that you
15 had showed to everybody or showed it around in this first
16 meeting but had then taken it back up apparently?

17 A Right.

18 Q And you said -- why did you take it back?

19 A That is a normal practice for me at least and
20 for a lot of other people in our business. I have sat
21 down with people, suggested an application on our letter-
22 head. They have walked out of my office with a letterhead
23 and gone to a competitor of mine and used that to negotiate

1 the terms of a deal that might be available from another
2 mortgage banking company.

3 Q You mean, a better brokerage agreement?

4 A That's correct. What I'm saying is that there
5 is a certain amount of credibility that comes from an
6 application from a brokerage agreement that's presented.
7 Just as a lender issues an application that is not a commit-
8 ment. There is a certain amount of credibility that goes
9 along with that application if it's on the lender's letter-
10 head. It's a shopping tool.

11 Q What are they shopping for?

12 A A better brokerage arrangement. It is possible.
13 I don't want to sit here and flatter what we do for a
14 living. You could take that brokerage firm and walk over
15 to Walker & Dunlop or Smith E. Company and say this is
16 what Fraley told me he would get. Can you beat it? And
17 it's possible that they could at least find someone who
18 would say I'll match the deal or I'll do it for a quarter
19 of a percent or less.

20 Q Answer me this question. You didn't take it
21 back up because you felt these guys might read it, did you?

22 A No, I did not.

23 Q And take it into consideration and worry about

1 it and understand the provision? You didn't take it back
2 because you wanted them to read it and understand it.

3 THE COURT: You didn't take it back?

4 MR. HYLTON: Well, he took it back was my
5 point and was suggesting to him --

6 THE COURT: On May 19th?

7 MR. HYLTON: The first day.

8 THE WITNESS: I did not rush these people into
9 signing anything if that's what you're getting at.

10 THE COURT: The signing was on the 27th at
11 which time they then had the paper there?

12 THE WITNESS: They had a chance, but what I
13 think is being suggested here is that I didn't give these
14 people time to read it, that I laid it on his desk and said
15 read it and then I took it back and then went over on the
16 27th and said here it is, sign it, again hurry up and sign
17 it and don't read it. That was not the case at all.

18 THE COURT: Well, could they not have done on
19 the 27th the same thing that would appear they would have
20 done on the 19th?

21 THE WITNESS: Well, at the point that it's the
22 agency agreement is signed and the check is deposited,
23 then we have a working relationship.

1 THE COURT: You didn't want to leave it blank?

2 THE WITNESS: Right.

3 BY MR. HYLTON:

4 Q Now, did I understand that you had already
5 before you came to the first meeting, which was on the 19th,
6 that you had the terms which are listed in Paragraph 2 of
7 this already completed?

8 A Yes, sir.

9 Q Where did you get the information from to
10 complete this? You mean, before you even talked to these
11 guys you already had this filled out?

12 A That's right. At that point, I knew the loan
13 amount that they were looking for and they are looking to
14 me to see what kind of financing is available in the market
15 and it's my job to know on a daily basis even though I'm
16 not working on a specific loan what type of financing is
17 available in the market, type up the terms and conditions
18 on that basis and if there is something that has to be
19 scratched out and initialed or changed we do that at that
20 time.

21 Q So, you essentially had this agreement done
22 on the 19th of March?

23 A Right.

1 Q And essentially --

2 THE COURT: Plaintiffs' No. 1.

3 BY MR. HYLTON:

4 Q So, you essentially had it done on the 19th
5 so there were no changes essentially?

6 A Right.

7 Q Between the time you handed and the time you
8 gave it back to them again on the 27th?

9 A That's right.

10 Q Now, there has been testimony in the case that
11 it's commonplace for particularly a permanent -- well,
12 there was some question about that. I think there was
13 some testimony that Pearson Ames said a construction lender
14 would always want some kind of a presale requirement agree-
15 ment and there was also some testimony, I think, that a
16 permanent lender would have some presale. Is that common-
17 place?

18 A Yes, sir.

19 Q Is a percentage floor commonplace?

20 THE COURT: Is what?

21 MR. HYLTON: An interest percentage floor. I
22 was getting at the 14 --

23 THE COURT: What word did you use after that?

1 MR. HYLTON: Floor.

2 THE COURT: You said is it common or --

3 MR. HYLTON: Commonplace in the industry or
4 in the real estate industry.

5 THE COURT: In which type of loan.

6 MR. HYLTON: Well, let's concentrate on per-
7 manent, because that's what we're dealing with.

8 BY MR. HYLTON:

9 Q Is that commonplace?

10 A I'd have to say generally not. We're dealing
11 and have been in the last year or better and prior to this
12 a five year term was unusual. At the time that this was
13 going on, that's very commonplace. I would say today that
14 it is certainly more commonplace than it was when this
15 transaction was consummated. It was not something that
16 was unheard of, but to answer your question, generally
17 that's -- it would be less than commonplace. If you looked
18 at ten typical commitments that were issued around that
19 period of time, maybe two would have an interest rate floor,
20 two or three. Is that fair?

21 Q Yes.

22 A It's not something that is just totally out of
23 left field, but it is -- you don't expect to see it in 100%

1 of the commitment letters.

2 Q In light of the fact that this requirement
3 seems commonplace --

4 THE COURT: Are you referring to presale now
5 or the interest floor?

6 MR. HYLTON: Going back to the presale.

7 THE COURT: That it is commonplace in both
8 construction lending commitments and permanent commitments?

9 THE WITNESS: (Witness nods in the affirmative.)

10 THE COURT: At the time we're talking about
11 both things were commonplace?

12 THE WITNESS: Exactly.

13 THE COURT: Meaning more often than not?

14 THE WITNESS: Meaning almost always.

15 BY MR. HYLTON:

16 Q All right. So, the question is in light of
17 your discussion with the gentlemen at your first meeting
18 and in light of the fact that it is commonplace, why didn't
19 you put a presale requirement, some mention in your brokerage
20 agreement?

21 A Hard to define exactly what it might be. No
22 reason to. I mean, I don't mean to answer your question
23 with a question, but a lender requiring a first lien

1 position on mortgage is required too, but that isn't anything

2 --

3 THE COURT: That's what I was going to ask you
4 about. Was a presale requirement ever mentioned by either
5 of the signers of this agreement, brokerage agreement at
6 or about the time of the signing?

7 THE WITNESS: Yes. It was expressed in the
8 meeting even before we went over --

9 THE COURT: About the presale?

10 THE WITNESS: Right.

11 THE COURT: What did they say?

12 THE WITNESS: There was -- I asked a question
13 whether they had any presales. They said no, they didn't
14 at that time. They didn't anticipate that it would be a
15 great problem because, one, there was a small number of
16 units like 10 and they thought satisfying a commitment with
17 people that they even knew would not be overly difficult.
18 They were familiar with another project at a near-by
19 location that was priced higher. They thought they could
20 find purchasers there and the speculation on the acquisition
21 of the units.

22 THE COURT: But, you were not told that it was
23 not acceptable?

1 THE WITNESS: I was not told that it was not
2 acceptable, that's true.

3 THE COURT: And is mention of the presale
4 requirement a usual term in the brokerage contract or would
5 it be unusual to find that in the brokerage contract, the
6 loan brokerage contract?

7 THE WITNESS: I would not be surprised to see
8 one either way. It wouldn't surprise me to see a brokerage
9 agreement that didn't speak to presales. On the other
10 hand, it wouldn't surprise me to see it in there either.
11 I guess it's a point of trying to cover as many bases as
12 you can. You realize that a brokerage agreement is some-
13 thing that is negotiated. If someone has a major complaint
14 over an issue, you're going to decide it, you're going to
15 change it if you can deliver on that basis and you're going
16 to initial it and you're going to add it to the agreement.

17 THE COURT: Well, that term of not less than
18 50% of the project shall be under contract at the time of
19 the settlement of the first loan, that would mean the
20 settlement of the first -- what first loan are we referring
21 to there?

22 THE WITNESS: Right. Well, the permanent loan
23 here, Your Honor, is really a group of loans.

1 THE COURT: On individual either lots or condos
2 in this case?

3 THE WITNESS: Exactly.

4 THE COURT: Now, is that the settlement on the
5 first loan we're talking about, the settlement on the first
6 sale out on the permanent finance?

7 THE WITNESS: They're really saying two things,
8 that you can't close the first until 50% of them are sold.

9 THE COURT: Under contract?

10 THE WITNESS: Well, under contract. I mean,
11 they would probably almost all close at the same time.
12 There is an underwriting question as well, a presale one.
13 If the lender takes the property back he has a rental pro-
14 perty rather than something with a couple of units sold.

15 THE COURT: Is this only in commercial or office?

16 THE WITNESS: It's residential as well. Resi-
17 dential meaning condominiums. Yes, I think it's fair to
18 say when you're -- in residential condominiums it's more
19 general purpose and there is a wider range of the market.
20 It's a little less conservative. Right now for the business
21 that I'm doing today I'm quoting a 30 to 40% presale require-
22 ment for residential condominiums which is designed to be
23 very competitive.

1 THE COURT: Is the presence of a presale require-
2 ment on a loan frequently the subject of negotiations for
3 that commitment?

4 THE WITNESS: Yes.

5 THE COURT: It is?

6 THE WITNESS: Right.

7 THE COURT: And the established builders who
8 have been in the -- have a record and all and it's easy
9 for them to satisfy that requirement, but a newcomer in
10 the industry would have trouble with it. Is that generally
11 the long and short of it?

12 THE WITNESS: Yeah. I think -- well, maybe
13 it says something about the lending business, but when you
14 have a product and a client that isn't bothered with the
15 presale requirement that's when you need it as an investor
16 and the reverse as well, but it does vary with the people
17 that you're dealing with, the product, where it's located,
18 how different it is compared with what is selling around
19 it.

20 THE COURT: What I'm saying too, is that if
21 you put into -- although your contract with brokerage is
22 only between you and your clients and I understand that --
23 nevertheless, the presence of a requirement in there that

1 there be no presale agreement, that would, I think, frighten
2 the broker. You couldn't take it anywhere.

3 THE WITNESS: I'd have been wasting my time
4 to start working on it.

5 THE COURT: Not that you would show anybody
6 that -- I don't mean that -- but you would know that they
7 wouldn't take that with that in it and there would be
8 little use of you going to insurance companies if you knew
9 that restraint was on you. Is that fair?

10 THE WITNESS: Exactly. I mean, there is a
11 fair amount of time and effort and expense that I have to
12 go through just to get a presentation ready and if I know
13 I can't deliver, it doesn't make sense to sign it up.

14 MR. HYLTON: At the risk of belaboring this
15 on presales and I don't mean this question to be impertinent
16 because I think you've been fair and conceding to a couple
17 of my points anyway.

18 MR. SWINDELL: I didn't intend to concede
19 anything.

20 MR. HYLTON: Maybe, it's just my view.

21 BY MR. HYLTON:

22 Q Could it be that the reason you didn't put
23 any mention of the presales in there -- let's just deal

1 with that one and leave out the 14% floor which I don't
2 think anybody anticipates. Could it be the reason you
3 didn't put in the presales, because you know they would
4 have opposed it?

5 A I did not leave out the presale with the in-
6 tention of duping someone into signing something they
7 really didn't intend to.

8 Q That's not my point. My point is in light,
9 and we're going back a year or more now and the only way
10 you've really been able to bring this up and speak about
11 it is by looking at your memorandum?

12 A Right.

13 Q So, if you're going back almost a year -- I'm
14 asking you again just to consider that possibility -- the
15 reason you didn't put in the presales was because these
16 guys didn't want it and whether or not that was a realistic
17 position is another matter. Whether or not they could --

18 THE COURT: Is that a question?

19 MR. HYLTON: That is my question.

20 THE COURT: Now, ask the question.

21 BY MR. HYLTON:

22 Q The question is, again, could it be that the
23 reason you didn't put it in is because you had had

1 discussions with these people, with the Plaintiffs, and
2 you knew that they had some problems with that presale?

3 A I know that is not the case, because I don't
4 business that way.

5 Q What does that mean?

6 A That means to me you're suggesting that in
7 order to sell a brokerage agreement I constructed the language
8 in a certain fashion where it was easy to sell and that's
9 not the case. Does that answer your question? The answer
10 to the question, I think, is no.

11 Q All right. The terms of your brokerage agree-
12 ment -- this is Plaintiffs' Exhibit 1 -- Paragraph 1 reads,
13 exclusive right to attain commitment in consideration --

14 THE COURT: Do you have one of these he can
15 look at? I want to follow this. I have to and I think
16 he can follow you speaking, but it's better if he has it
17 before him.

18 BY MR. HYLTON:

19 Q This is Paragraph 1, number one on the first
20 page. Exclusive right to attain commitment in consideration
21 of the broker's best efforts to attain a commitment -- dah
22 da dah -- according to the general terms specified in
23 Paragraph 2 the owner grants the broker the sole and

1 exclusive right to attain a financing commitment on said
2 property. I just want to call that language to your
3 attention, that particular paragraph.

4 Now, Plaintiffs' Exhibit 4 which is the short
5 form, what I call authorization letter --

6 A Right.

7 Q -- have you got that?

8 A No, I know what you're talking about, though.

9 Q I'm going to read you something else.

10 THE COURT: This is the short form?

11 MR. SWINDELL: Yes, sir.

12 BY MR. HYLTON:

13 Q First paragraph: In accordance with our agency
14 agreement, please consider this our authorization for you
15 to apply on our behalf, John Hanson Savings & Loan, for
16 permanent financing on the above referenced property.

17 Now, my question is -- perhaps, I'm being too
18 superficial -- but in light of the language in your brokerage
19 agreement, why did you come back to these guys with this
20 letter asking for another authorization when it seems to
21 me that in the brokerage agreement you had already had the
22 power to act for them? The question is, why did you feel
23 it important to come back to them with this authorization

1 letter?

2 A Because, I wanted them to make specific appli-
3 cation through me to John Hanson; that is, our brokerage
4 agreement is not something that I should use as an appli-
5 cation to John Hanson. There are things, as I suggested,
6 that were more favorable than the brokerage agreement. Am
7 I missing the point?

8 Q No, you're making it for me. The point is
9 that there were different terms in the brokerage agreement
10 then are in this one; is that right?

11 A Yes.

12 Q Speaking with this short form authorization
13 letter for a minute, your testimony is that on or around
14 -- well, when were you supposed to have mailed a copy of
15 the long form and short form letter to Mr. Akers the first
16 time?

17 A Probably, around May 5 or 6.

18 Q Is that the same day that you had the meeting
19 with Hakim?

20 A Right.

21 THE COURT: Mailed the long and short forms?

22 THE WITNESS: And the cover letter that went
23 along with them.

1 THE COURT: To whom?

2 THE WITNESS: To Akers.

3 BY MR. HYLTON:

4 Q Now, I'm going to Page 2 now on the short form
5 -- and the long form, both of these documents have a drop
6 dead date of May 15? Okay?

7 A Uh-huh.

8 Q I don't mean to characterize it that way exactly
9 but that makes sense to me. It says that John Hanson must
10 receive on or before the close of business May 15. Okay.

11 Now, assuming that the truth of the matter is
12 that you did mail these two to Akers, you knew that the
13 application -- and this was around the 5th or the 6th so you
14 had like 10 days, maybe 9 days to get something into John
15 Hanson and you talked to Hakim and based on your testimony
16 apparently they were not enamored with this and, as a matter
17 of fact, they turned it down, right?

18 A They didn't sign it. They said we ought to
19 wait until, frankly, that afternoon or the next day when
20 Perpetual was going to come up with their formula.

21 Q So, they didn't sign it?

22 A That's true.

23 Q What did you do between the 5th or 6th and the

1 15th to talk to these guys, Akers and Zeeman, about getting
2 this application signed?

3 A Not a lot. In fact, I don't recall if I -- I
4 believe we had a telephone conversation shortly after that
5 but I can't say that for certain. I mean, it was a question
6 of what I had to focus on was finding out from -- apparently,
7 there was more that I was supposed to focus on and find out
8 from Ames what this language was to put in the application.

9 Q In light of the fact that your brokerage agree-
10 ment and your contract and the deposit had come from Akers
11 and Z-eman, did it not occur to you to come back to them
12 to discuss these matters to see if they had received the
13 letters, to converse with them about what the terms were,
14 to explain to them how you were trying to get them a better
15 deal?

16 A It did not occur to me.

17 Q All right. Now, in light of the fact that you
18 have agreed with me that this short form authorization letter
19 which is such a controversial matter about whether they
20 received it or not and whether it was signed or not and in
21 light of the fact that this very substantially in at least
22 three different areas from a commitment --

23 MR. SWINDELL: Your Honor, I'm going to object

1 to the language. I think it's a matter of law whether it
2 varies substantially.

3 THE COURT: I'm going to have to --

4 MR. SWINDELL: Ask him to rephrase his question.

5 THE COURT: Then, you'll have to bring this
6 testimony on down to a close, because we're going to have
7 to recess soon till tomorrow morning. I've got a case set
8 to start trial here tomorrow morning at 9:00 o'clock and
9 I've got a jury coming in for trials beginning at 10:00.

10 Now, I'm gonna have to --

11 MR. HYLTON: I'm just about through.

12 THE COURT: -- schedule you for concluding
13 this, but it isn't going to be concluded today.

14 MR. HYLTON: I'm just about through, I believe.

15 THE COURT: I understood this morning you could
16 finish this today, but I can't stay here and then be back
17 and start the case at 9:00 in the morning and another one
18 at 10:00 and do this. Bring it on down to -- finish your
19 question.

20 Objection is overruled.

21 MR. HYLTON: I think that question is going to
22 be argumentative, Your Honor.

23 THE COURT: Well, rephrase it and ask the

1 question.

2 MR. HYLTON: I have thought about it. I don't
3 think it will add any.

4 BY MR. HYLTON:

5 Q Mr. Fraley, you testified a little earlier
6 to the best of your knowledge you mailed the application,
7 the short and long form to Mr. Akers on the 5th or 6th and,
8 I think, again on the 16th. Is that fair?

9 A Yeah.

10 Q Is that a fair statement of what you said?

11 A (Witness nods in the affirmative.)

12 Q What did you mean by the best of your knowledge?

13 A There is no way aside from the performance
14 record of my secretary which is -- until the two issues
15 we're talking about right now -- really perfect. When I
16 hand the letter to her that has a cc to Akers and ask her
17 to send all of this stuff to Mr. Akers, then she will send
18 it. The same is true on the 16th. In fact, I didn't even
19 write the letter. If I'm leaving the office or if I'm not
20 going to be there I'll tell Diane to send it out and she'll
21 sign it herself and send it out.

22 Q So, your secretary had the responsibility of
23 mailing the letter; is that right, you didn't?

1 A I had the responsibility for the letter getting
2 out.

3 Q Who mailed them?

4 A Pardon me?

5 Q Did you mail these letters?

6 A She mailed them.

7 Q To the best of your knowledge?

8 A To the best of my knowledge, right.

9 Q Did you go with her when they were mailed?

10 A Frankly, to the best of my knowledge, she pro-
11 bably put it in with the other outgoing mail from the Barnes
12 Company. It was not sent registered mail. I don't make
13 a practice of sending everything signature return receipt.
14 In the same fashion, the mail has been moving out of my
15 office for some time it was mailed.

16 Q Would you agree with me that in light of the
17 fact that the short and long form application authorization
18 letters said that John Hanson's commitment would expire on
19 May 15, 1980 and that the mailing of these forms to Mr.
20 Zeeman and Mr. Akers on the 15th was of no use?

21 A No, I do not agree with you on that. Frankly,
22 even with the expiration date -- unless there was a drastic
23 change in their market position -- these terms are still

1 available and could be confirmed with a phone call in
2 changing the expiration date. They would not have to go
3 back to their committee again, okay, if there had not been
4 a change in their policy.

5 Q Okay.

6 A If someone is very strict about that usually
7 in our business, and I'm not a lawyer, but the phrase time
8 is of the essence is very often used in our business when
9 it comes to people having for real dates when loans will
10 not be closed and when fees will be posted, etcetera,
11 etcetera.

12 Q I don't mean to be argumentative, but this is
13 just your opinion, and, in fact, the letter does say it
14 expires on the 15th; is that right?

15 A That it does.

16 Q When you were talking to Mr. Zeeman, I under-
17 stood you testified that at some point you did have a
18 conversation and you heard Mr. Zeeman's testimony this
19 morning about his conversation with you?

20 A Right.

21 Q Did you characterize the commitment from John
22 Hanson as being unacceptable?

23 A No, I did not.

1 Q How did you characterize it?

2 A I indicated that it was something that I wanted
3 to sit down and have everybody talk about and -- well, one
4 thing that Gordon said too, -- that I did not want to get
5 into the specifics of it. I thought it was something that
6 we had to look over in its entirety which is why I prepared
7 the long form so that we could go over all the terms whether
8 they were numerical or pricing in nature and submitted them
9 along with the short form. I wanted to have a meeting. It
10 was an appropriate time to have a meeting.

11 Q At any time while you were working for Mr. Akers
12 and Mr. Zeeman, did you get a commitment from a lender?

13 A Yes, over the telephone from John Hanson it
14 was explained to me that their finance committee had agreed
15 to finance this property and it was also described to me
16 the terms under which they would.

17 Q Did you get a commitment on any other terms
18 from any other lender?

19 A No.

20 Q Did you get any written commitment?

21 A No.

22 Q From anybody?

23 A No.

1 MR. HYLTON: That's all I have, Your Honor.

2 MR. SWINDELL: Just one quick question on
3 redirect, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. SWINDELL:

6 Q With respect to the period of May 6 to May 15,
7 you testified that you did not contact either of the
8 Plaintiffs with regard to the application?

9 A I said I may have.

10 Q You may have. Was there any reason that you
11 had not to contact them?

12 A Not in particular except that Hakim says we're
13 looking to formalize this language so that we could sign
14 the application and Akers was telling me on Monday that he's
15 not even interested in coming to a meeting to discuss it.
16 I'm going to focus my attention where I'm getting the re-
17 sults. That's about all I can say, I guess.

18 MR. SWINDELL: That's all.

19 THE COURT: You may step down. Thank you.

20 (Witness excused.)

21 THE COURT: Let me suggest this to you,
22 gentlemen: First, with respect to the objection that was
23 made about whether or not there was a commitment from the

* * *

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*

THE COURT: All right. I believe that Mr. Fraley's testimony had been completed the other day.

MR. SWINDELL: That's correct, Your Honor.

THE COURT: You told me that, I believe, you had one or two more witnesses to put on.

MR. SWINDELL: Yes, Your Honor. I would call as my next witness Mr. Michael Hall and ask that he be sworn.

Whereupon,

MICHAEL H. HALL,

was called as a witness by and on behalf of the Defendant, having been duly sworn by the Clerk of the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SWINDELL:

Q Mr. Hall, for the record, would you please state your full name?

A Michael Hugh Hall.

Q Where do you reside, Mr. Hall?

A Route 5, Box 321, Waldorf, Maryland.

Q By whom are you employed?

1 A John Hanson Savings & Loan.

2 Q And, where are they located?

3 A 7610 Forestville Road in Forestville, Maryland.

4 Q How long have you been employed there?

5 A 10 years.

6 Q In what capacity?

7 A Most of it is either Assistant Vice President
8 or Vice President.

9 Q What are your duties and responsibilities?

10 A In charge of the commercial lending for John
11 Hanson's construction, development loans, etcetera.

12 Q What types of loans do you place?

13 A We do the same type of loans that we were
14 looking at today basically, any residential construction,
15 commercial construction.

16 Q How many loans have you placed personally?

17 A Personally?

18 Q Approximately.

19 A 2500, I would say, minimum.

20 Q And, would you please describe for the Court
21 the procedure involved with John Hanson before loans are
22 placed?

23 A The procedure is in some cases a telephone

1 conversation with someone regarding an application for
2 a loan. They would then, after talking to me, submit a
3 package for an application and then it would have to be
4 presented to the Executive Committee for their review.

5 Q Does the Executive Committee approve or dis-
6 approve?

7 A Yes, they do.

8 Q Do you know Michael Fraley?

9 A Yes, I do.

10 Q Have you had contacts with him in the past?

11 A I talked to Mike previous to this application,
12 yes.

13 Q Did he provide you with anything with respect
14 to --

15 A Yeah, he provided me with a package for the
16 submission on this particular loan.

17 Q The package that you brought, is that the
18 package that he provided for you?

19 A Yes, it is.

20 Q Would you explain for the Court the contents
21 of that package?

22 A It's basically a table of contents summarizing
23 the loan request, the amount, the percentage they were

1 looking for, the interest rate, fees, term of the loan
2 and so forth and involves site location of the project,
3 an aerial view of the project, pictures of the actual
4 project itself, another location, area analyses of the
5 project. There are financial statements on -- there are
6 also comparables. There are four or five comparables
7 involved, cost break down for the construction of the
8 project, credit report on North American Real Estate,
9 resume on Charles Gordon Zeeman, financial on Mr. Zeeman
10 along with a credit report, personal financial statement
11 on Robert Akers along with a credit report, personal
12 financial statement on Habib Hakim. I think there is
13 an appraisal report on the project covering the ground,
14 size and description of the ground itself, a contract of
15 sale for the purchase of the ground and that should
16 cover it.

17 MR. SWINDELL: May I have this?

18 Your Honor, I'd ask that this be marked as
19 Defendant's Exhibit No. 4 for identification purposes
20 for now.

21 THE COURT: I'm going to so mark it on the
22 Table of Contents page of the brochure as Defendant's
23 Exhibit No. 4 for identification, and before you proceed,

1 you have no objection to this, I assume.

2 MR. HYLTON: I have no objection, Your Honor.

3 THE COURT: Let me then -- I'd like to look
4 at it before you go further.

5 (The document, brochure, was
6 marked Defendant's Exhibit
7 No. 4 for identification.)

8 BY MR. SWINDELL:

9 Q Mr. Hall, do you recall when Mr. Fraley pro-
10 vided you with that document?

11 A I believe it would have been April 28 which is
12 the day of his cover letter to me.

13 THE COURT: What date was that?

14 THE WITNESS: April 28.

15 BY MR. SWINDELL:

16 Q Did he provide anything else to you?

17 A The cover letter along with the package.

18 Q This document that you brought along with you,
19 is that the cover letter that Mr. Fraley provided?

20 A Yes.

21 MR. SWINDELL: Your Honor, I'd ask that this
22 be marked for identification purposes as Defendant's
23 Exhibit 5.

1 THE COURT: All right, sir.

2 (The document, cover letter,
3 was marked Defendant's
4 Exhibit No. 5 for identifi-
5 cation.)

6 BY MR. SWINDELL:

7 Q When you received that package from Mr. Fraley,
8 what did you do with it?

9 A Obviously, I reviewed it and then I presented
10 it to the Executive Committee on the 29th which, I believe,
11 would have been a Tuesday.

12 Q That's the 29th of April?

13 A The following day, right.

14 THE COURT: Was this hand delivered to you?

15 THE WITNESS: Yes, it was.

16 THE COURT: At your place?

17 THE WITNESS: Hand carried to my place in
18 Forestville.

19 THE COURT: All right, sir.

20 BY MR. SWINDELL:

21 Q What were the results of that meeting on the
22 29th of April?

23 A The Executive Committee approved a permanent

1 loan request to qualify the purchasers for the project.
2 Do you want the specific terms of that?

3 Q Yes, please.

4 A Okay. It was for -- the permanent loan to
5 qualify purchasers for \$1,624,500. It was F.H.L.M.C.
6 weighted average plus two points and commitment time was
7 12 months.

8 THE COURT: Wait. The FHMC was plus two points?

9 THE WITNESS: Yes, sir.

10 THE COURT: Plus what?

11 THE WITNESS: Plus the commitment time on
12 the -- the commitment time was a 12 month period. In
13 other words, it was F.H.L.M.C. weighted average plus two
14 points.

15 THE COURT: All right.

16 THE WITNESS: Time for the commitment was 12
17 months. The fees were one point of point acceptance of
18 our commitment, one point at settlement of the construction
19 loan and one point from each purchaser at the time of
20 individual settlement on the permanent loan. They were
21 25 year loans with the call provision in those loans
22 every five years.

23 The buy-down arrangement at the time of

1 settlement was to be one point for every eighth, one-eighth
2 of the percent of interest rate bought down. There was
3 a 65% presale requirement of the 37 units in the project.

4 THE COURT: What was that?

5 THE WITNESS: 65% presale requirement which
6 meant that before the first settlement on any of our
7 permanent loans, the project would have to have 65% presale
8 requirement. There also was a floor of 14% on the interest
9 rate which meant a minimum rate of 14%.

10 Of course, it would have been subject to an
11 MAI on each individual unit before the loans were settled
12 along with credit information on each one of those
13 individuals.

14 BY MR. SWINDELL:

15 Q Now, you said that the loan was approved for
16 qualified purchasers. Who were the qualified purchasers?

17 A Well, the commitment would have been issued
18 to Barnes and they subsequently would have issued a
19 commitment to the principle for the development of the
20 project. The qualified purchasers, of course, would have
21 been the purchasers as they bought individual units and
22 we would have had to prequalify those people as they
23 submitted applications for loans.

1 Q What sort of documents did the Executive
2 Committee rely on in order to make the determination?

3 A Well, the documents that we rely on, of course,
4 from the financing basically, or the statements that had
5 been submitted for the individuals that were involved,
6 the three individuals financial statements that are in
7 the package and the perform~~a~~ that was submitted to me
8 in the package.

9 THE COURT: Was your action and that of the
10 Executive Committee, is that the correct name for the
11 Loan Committee?

12 THE WITNESS: Yes, sir.

13 THE COURT: Was your action and that of the
14 Committee based upon the contents of this brochure?

15 THE WITNESS: Yes, it is.

16 BY MR. SWINDELL:

17 Q I would like to show you Defendant's Exhibit
18 No. 2 and Plaintiffs' Exhibit No. 4 and before I ask you
19 about the documents, I would ask you, did you communicate
20 the results of that Executive Committee meeting to Mr.
21 Fraley?

22 A Of course, by telephone.

23 Q Did you instruct him to do anything with respect

1 to that?

2 A Well, the first thing he would have had to
3 let me know is their indication whether they were going
4 to accept the terms or not of our approval and then, of
5 course, I would subsequently issue a written commitment
6 on it.

7 Q Have you ever seen Defendant's Exhibit No. 2
8 or Plaintiffs' Exhibit No. 4 before?

9 MR. SWINDELL: They are the applications,
10 Your Honor.

11 THE COURT: The short form and the long form,
12 okay.

13 THE WITNESS: As far as I can tell, no, I have
14 not.

15 BY MR. SWINDELL:

16 Q Would you say that those documents are typical
17 loan applications for John Hanson?

18 A This, a loan application? No, that's not a
19 loan application.

20 THE COURT: What you may do is if you want
21 to stop and look at the two -- you said you hadn't seen
22 them before -- why don't you stop and look at the two
23 documents and then you proceed with the questioning.

1 MR. SWINDELL: All right.

2 THE WITNESS: Some of the wording is very
3 similar to what we would use in a commitment, but I don't
4 remember seeing this particular commitment.

5 THE COURT: That goes for both the short form
6 and the long form?

7 THE WITNESS: Yes, that's right.

8 THE COURT: Do you have a question you wish to
9 ask him though, about those two forms?

10 MR. SWINDELL: No, Your Honor, I do not believe
11 so.

12 THE COURT: Well, there was never any question.
13 I understood that they didn't emanate him.

14 MR. SWINDELL: That's correct, Your Honor.
15 I was just making sure in the Court's mind as well as in
16 mine that they did not.

17 THE COURT: Let me ask you a question. Do
18 either of those conform to the commitment that was issued
19 by the Hanson Company?

20 THE WITNESS: I would have to go over the
21 commitment in a little more detail in order to -- this,
22 of course, would not --

23 THE COURT: I will withdraw that question. That

1 question will be gone into, I'm sure, by either you or
2 counsel here, so you will do it.

3 BY MR. SWINDELL:

4 Q I'd like to show you the brokerage agreement
5 marked Plaintiffs' Exhibit No. 1 and direct your attention
6 to Paragraph 2 and ask you in the time frame we're talking
7 about, around April 29, did John Hanson issue any loans
8 or loan commitments?

9 A What was the time period again? I'm sorry.

10 Q April 29, 1980.

11 A Or, prior to that are you asking me?

12 Q Right in that area, a month either way, was
13 John Hanson in a position to issue loan commitments that
14 would comport with the terms of this brokerage agreement?

15 MR. HYLTON: Your Honor, I'm going to object
16 to that, because I think the way the question is phrased
17 is very broad. This man had a certain, as I understand
18 his job description, responsibility to review packages
19 that came into him and to make recommendations to a
20 Executive Committee. The way the question was phrased,
21 it's very broad and it calls for a conclusion.

22 THE COURT: What is the purpose of the question
23 in that he has stated that the Committee did issue a

1 commitment and he communicated the commitment to Mr.
2 Fraley on or shortly after the 29th of April.

3 MR. SWINDELL: Well, the only purpose, Your
4 Honor, is to indicate to the Court that John Hanson was
5 in a position to issue loans.

6 THE COURT: Well, the testimony is they did.

7 MR. SWINDELL: All right, I withdraw that.

8 THE COURT: But, you want to ask whether one
9 would comply with the terms of the brokerage --

10 MR. SWINDELL: Agreement itself.

11 THE COURT: All right, objection is overruled.

12 MR. SWINDELL: I will restate my question.

13 BY MR. SWINDELL:

14 Q Would you examine Paragraph 2 of the brokerage
15 agreement and tell the Court if John Hanson was in a
16 position to issue commitments for those terms around
17 April 28?

18 A Well, this calls for construction and
19 permanent commitment. We were only considering permanent
20 financing at the point in time that we looked at the
21 performa.

22 Q In terms of the terms required for the
23 permanent financing, was John Hanson in a position around

1 that time?

2 A Well, it says permanent higher 2% above the
3 or 30 days prior to closing or availing
4 commercial mortgage rate which we would have been prepared
5 to do that, yes, the higher of the two figures.

6 THE COURT: And, your answer is that insofar
7 as the terms of the loan are put out in Paragraph No. 2
8 of Plaintiffs' No. 1 and insofar as it applies to
9 permanent financing, that your company was prepared to
10 meet that; is that correct?

11 THE WITNESS: Insofar as permanent financing
12 is concerned, yes.

13 BY MR. SWINDELL:

14 Q Had you ever seen that document prior to
15 April 29?

16 A No.

17 MR. SWINDELL: I have no further questions,
18 Your Honor.

19 THE COURT: All right, sir.

20 CROSS EXAMINATION

21 BY MR. HYLTON:

22 Q Mr. Hall, after you were presented with the
23 package you went to your Executive Committee with it and

1 out of that meeting came a commitment to provide a million
2 six hundred and some odd thousand dollars?

3 A Right.

4 Q How did you arrive at that figure?

5 A 75% of their projected sellout of the units.

6 Q Okay. Let me ask you another question. Are
7 your commercial rates, your prevailing commercial mortgage
8 rates generally competitive with other savings and loan
9 institutions?

10 A Certainly. We hope we are.

11 Q Why would you pick the F.H.L.M.C. rate then
12 rather than your prevailing commercial mortgage rate?

13 A We have used it in other commitments before.
14 We've used something tied into F.H.L.M.C. that sometimes
15 give the customer at least an indication on where they
16 think their rate is going to be. At least they have an
17 idea based on the F.H.L.M.C. auction using 2% above that.
18 At least they have some idea and concept of where they
19 are going to be as far as the permanent rate is concerned.
20 Some people feel more comfortable with that than they do
21 a market rate commitment based on our market rate.

22 Q So, it's not based on any kind of consideration
23 of your financial requirement at the time of the loan, but

1 based on trying to make the borrower feel more comfortable?

2 A Well, we want to make sure they understand
3 what kind of rate we're dealing with. Sometimes, a po-
4 tential customer might have a problem with looking at a
5 market rate commitment not really knowing what the market
6 rate is. Everybody doesn't know the market rate. Of
7 course, the market rate on commercial fluctuates a great
8 deal depending on the market conditions.

9 Q And, the F.H.L.M.C. rate could change the same
10 way, I take it.

11 A F.H.L.M.C. has been known to change on a weekly
12 basis, certainly.

13 Q So, six and one half dozen of the other. You
14 don't really know what the F.H.L.M.C. rate is going to be
15 and you don't know what your commercial lending rate is
16 going to be. Is that fair to say?

17 A Depends on the market, of course. You know,
18 you have different market times when the rates are going
19 to fluctuate more than they would when the market is more
20 stable depending on what the market is.

21 Q The 14% floor, where did that come from?

22 A It's not unusual to put a minimum rate on
23 these kinds of loans. We've done it in the past on other

1 projects we've been involved in and there are similar
2 projects that are very similar to this one.

3 Q Now, going back --

4 A We have an existing loan now that we made a
5 commitment for the same basic terms.

6 Q Let's go back a year now.

7 THE COURT: You did what?

8 THE WITNESS: We have an existing loan of
9 which we made a commitment on that was accepted and the
10 terms are basically the same as this commitment that we
11 agreed to do.

12 THE COURT: Not with this case, though?

13 THE WITNESS: No, sir.

14 THE COURT: Of the borrower's?

15 THE WITNESS: Right, that's correct.

16 I'm sorry. What did you say?

17 BY MR. HYLTON:

18 Q We're talking about March of 1980. Now, that's
19 a year ago and a lot of water has passed under the bridge
20 since that time. Was it that commonplace then to put a
21 floor --

22 A Yes, sir.

23 Q -- cf 143?

1 A At that particular time, yes, to my knowledge.
2 You're asking a question of me and I would say yes.

3 Q I'm not exactly sure the point of the previous
4 question. You were asked, though, in terms -- you were
5 shown the brokerage agreement?

6 A Right.

7 Q Which I presume you had not seen before?

8 A Correct.

9 Q And, were asked whether the terms, whether
10 John Hanson at the time you were presented with this
11 package back in April of 1980, that you would have been
12 in a position to make a loan under the terms of this
13 document?

14 A Looking at the related interest rates.

15 Q Yeah.

16 A It's the substance of two loans within this
17 No. 2 paragraph and we're only looking at permanent
18 financing.

19 Q All right. Now, you were also shown the two
20 exhibits, an application short form and a long form --
21 that's what we're calling them, but one is a brief document
22 and one is a longer document. You were also shown those
23 two documents?

1 A Right.

2 Q If you had received -- you have testified about
3 what your Executive Committee came out with and what you
4 told Mr. Fraley. If you had received a letter application
5 in which the floor had been removed, that is, it was coming
6 back to you now -- let me make sure you understand I'm
7 building a little scenario.

8 You tell Mr. Fraley, as you apparently did,
9 that you are waiting to receive an application from
10 borrowers and if they applied on certain terms you would
11 accept it. Is that a fair statement?

12 A Yes, sir.

13 Q Of what the situation was at that time?

14 A Yes, sir.

15 Q And, you said that the interest rate was going
16 to be F.H.L.M.C., dada dada dada with a 14% floor and you
17 said that there was a presale requirement of 65% and you
18 said among other things that a buy-down on the interest
19 rate, an eighth of a point, could be bought for a point.
20 Okay? Are those three things that I just said part of
21 what you told Mr. Fraley?

22 A Yes.

23 Q Now, the next step. If you had received an

1 application letter and the short form letter that you've
2 got there or that you were referred to that contains these
3 terms I might add, if you had received the letter from
4 the borrowers where the 14% floor was taken out; that is,
5 they were applying for a loan that didn't have a 14% floor
6 and that the buy-down was at -- they paid you a point
7 and you ^{refused} ~~refused~~ the interest rate by a quarter rather than
8 an eighth and the presale requirement was changed from
9 65 which you said you would accept the 50, would you have
10 accepted that application?

11 A No, sir.

12 Q All right. What would you have done with it?

13 A Sent it back.

14 Q Sent it back to the borrower?

15 A I would have sent it back to whoever it came
16 from.

17 THE COURT: Your question was to modify the
18 buy-down provision, correct?

19 MR. HYLTON: It included a buy-down, Your Honor.
20 The application -- the short form application also in-
21 cluded two other significant changes. It took out the
22 14% floor.

23 THE COURT: Who has those two exhibits here?

1 Do you have them?

2 THE WITNESS: I believe this is the form that
3 they're talking about here.

4 THE COURT: Do you have the other one?

5 THE WITNESS: The brokerage agreement?

6 THE COURT: The one in your right hand, I
7 think that's it.

8 MR. HYLTON: I guess Defendant's 2 and
9 Plaintiffs' 4. Plaintiffs' 4 was the short form.

10 THE COURT: Now, you're referring to Plaintiffs'
11 4?

12 MR. HYLTON: Yes, sir.

13 BY MR. HYLTON:

14 Q If you have received an application -- I'm
15 talking about the long form, what we call the long form
16 which you have just been shown which is another exhibit,
17 in this case Defendant's 2. If you have received an
18 application which included, apparently, the terms that
19 you had told Mr. Fraley over the phone that there was one
20 change and that was the quarter -- the buy-down was still
21 at a point as a quarter, would you have accepted that
22 application?

23 A No, sir.

1 Q And, you would have sent that back?

2 A Yes, sir.

3 MR. HYLTON: I don't think I have any other
4 questions.

5 THE COURT: What you just said are the exact
6 terms of the long form of the commitment letter?

7 MR. HYLTON: Well, of course, the long form
8 contained many other terms and the other paragraphs and
9 provisions, but --

10 THE COURT: But, you would not have accepted
11 either of those modifications?

12 THE WITNESS: No, sir, because it's not what
13 was approved at our meeting.

14 REDIRECT EXAMINATION

15 BY MR. SWINDELL:

16 Q Mr. Hall, who does the buy-down benefit? Who
17 does the buy-down provision benefit?

18 A Well, it's a question that probably can be
19 answered in two ways.

20 MR. HYLTON: I didn't hear the question.

21 MR. SWINDELL: Who does the buy-down provision
22 benefit.

23 MR. HYLTON: Okay.

1 THE WITNESS: It certainly could benefit the
2 potential buyer of the individual units or it could help
3 the builder or developer if he wanted to buy a particular
4 rate down or to sell one of his units, so it could help
5 either one, probably.

6 BY MR. SWINDELL:

7 Q Would it benefit the borrower?

8 A It would get them a better interest rate on
9 their loan.

10 Q Would you say that a buy-down commitment that
11 was issued with a buy-down was better than one that was
12 issued with no buy-down in terms of the borrowers?

13 A I would say it was depending on what the
14 terms were, of course.

15 THE COURT: As an enhancement to sales?

16 THE WITNESS: Certainly.

17 THE COURT: To the alternate purchasers?

18 THE WITNESS: Certainly.

19 MR. SWINDELL: No questions, Your Honor.

20 MR. HYLTON: I've got another question. If
21 you don't mind, one more question.
22
23

RECORSS EXAMINATION

BY MR. HYLTON:

Q You've testified about what the benefit is on the buy-down. Who gets the benefit of the 14% floor, the lender or borrower?

A Of course, the borrower. We're making loans to borrowers, okay? Our commitment is to qualify borrowers so we're talking in terms of a floor of 14 to potential buyers of these units. They would get the benefit of the 14% is the answer.

Q Assuming that the rate was 14% or above, but the other side of that coin is the interest rate to the lender would be no lower than --

A They could have bought down the rate if the market had been at some point in time 14 and a quarter, for example, and they wanted to buy-down that particular loan below 14, they could have done it if they bought it down.

Q Am I putting two and two together? If you didn't have the floor, you wouldn't need the buy-down, right?

A Not necessarily.

Q Okay. I just wanted to try it on for size.

1 But, the 14% floor means that the lender would make no less
2 than 14% ever?

3 A. That's correct, unless the market was there
4 and they were going to buy-down, they could really buy-
5 down as much as they wanted to do so, the developer.

6 Q. All right, sir.

7 MR. HYLTON: I have no further questions.

8 MR. SWINDELL: Your Honor, I'd ask that the
9 witness be excused.

10 THE COURT: Let me make a couple of inquiries
11 and it may lead to some further questioning.

12 You communicated the Committee's action to
13 Mr. Fraley about the, I think you said, 29th of April?

14 THE WITNESS: I don't remember, sir, if it
15 was the 29th. It was our date of the meeting.

16 THE COURT: It would have been then or the
17 next day?

18 THE WITNESS: It would have been within that
19 week, certainly.

20 THE COURT: By telephone?

21 THE WITNESS: Yes, sir.

22 THE COURT: And, did you hear back from him
23 regarding this?

1 THE WITNESS: I really don't recall. It's
2 possible. You know, it's been almost a year. I can't
3 really say for sure if I talked to him after our initial
4 conversation, you know, after the Executive Committee
5 meeting.

6 THE COURT: I take it the delivery of the
7 brochure had been proceeded by conversations between you
8 and him?

9 THE WITNESS: Yes, sir.

10 THE COURT: Which made him feel it was worth
11 his while to submit the brochure?

12 THE WITNESS: Yes, sir.

13 THE COURT: In any of those discussions, had
14 the subject of presale requirements on the permanent loan
15 financing been discussed?

16 THE WITNESS: I believe so.

17 THE COURT: And, was it what the percentage
18 would be or whether there would be any?

19 THE WITNESS: I think it was based on what we
20 were talking about specifically as far as what percentage
21 we would want, not if whether there would be one or not.
22 It was fairly obvious that we would have some percentage
23 in our requirements.

1 THE COURT: For an office condominium commit-
2 ment, permanent commitment.

3 THE WITNESS: Right.

4 THE COURT: Are those made without any -- are
5 the commitments for that type of property and for that
6 type of financing made without presales?

7 THE WITNESS: Very, very unusual to make them
8 without any presale requirements, very definitely. We
9 haven't made any in the past without any presale require-
10 ments.

11 THE COURT: You mean, never?

12 THE WITNESS: Not to my knowledge, sir.

13 THE COURT: This paper that is Defendant's
14 Exhibit 1 here, memorandum of proposed partnership agreement
15 that was dated March 26, had that either been given to
16 you or shown to you or one like it, a copy of it?

17 THE WITNESS: No, sir.

18 THE COURT: And, the brochure, however, that
19 was submitted to you --

20 THE WITNESS: Unless it's in here. It could
21 be in the package.

22 THE COURT: Whether it is exactly in the
23 package or not --

1 THE WITNESS: Very possible that it is in the
2 package.

3 THE COURT: -- is it your recollection that
4 the substance of it was contained in the package?

5 THE WITNESS: I don't recall, no, sir, that
6 it was in the package. It's been quite a while ago and
7 I really hadn't had time to go through the whole package
8 prior to coming to this Court.

9 THE COURT: Well, reference is made here to
10 somebody named Hakim in this package.

11 THE WITNESS: Uh-huh.

12 THE COURT: In other words, reference was
13 made to people other than Messrs. Zeeman and Akers.

14 THE WITNESS: (Nodding in the affirmative.)

15 THE COURT: You do recall that?

16 THE WITNESS: Yes.

17 THE COURT: Do you recall any conversation
18 that had to do with whether there was anything remaining
19 to be done in connection with setting up the borrower
20 entity?

21 THE WITNESS: I really don't, sir. We were
22 not specifically involved in that part of the arrangement.
23 We, of course, were relying on the three individuals --

1 THE COURT: You would either make it or not
2 make it and if you did it would be to the people that
3 were involved here?

4 THE WITNESS: The people that were involved
5 in the package that were there.

6 THE COURT: All right, gentlemen, do either
7 of you have any other questions in light of any of this?

8 MR. HYLTON: No, sir.

9 MR. SWINDELL: No.

10 THE COURT: MaY Mr. Hall be excused?

11 MR. HYLTON: Yes, sir.

12 THE COURT: You're excused, sir.

13 THE WITNESS: Thank you.

14 (Witness excused.)

15 MR. SWINDELL: One more witness, Your Honor.

16 I'd like to call Mr. Charles V. Hardwick.

17 Before we start, I'd like to remind Mr. Hardwick
18 he's still under oath.

19 THE COURT: Yes. You were sworn?

20 MR. HARDWICK: Yes, sir.

21

22

23

1 Whereupon,

2 CHARLES V. HARDWICK,

3 was called as a witness by and on behalf of the Defendant,
4 having been previously duly sworn by the Clerk of the Court,
5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. SWINDELL:

8 Q For the record, would you please state your
9 full name?

10 A Charles V. Hardwick, Jr.

11 Q Where do you reside?

12 A 2031 Royal Fern Court, Reston, Virginia.

13 Q And, by whom are you employed?

14 A James T. Barnes of Washington, D. C., Incor-
15 porated.

16 Q What is your capacity in that employment?

17 A My capacity is the 1st Vice President for --
18 in charge of income, property production and subdivision
19 loan construction permanent production.

20 Q What are your duties and responsibilities with
21 respect to that position?

22 A My duties are to go out and generate new
23 business by calling on developers and builders of income

1 properties, namely, shopping centers and office buildings,
2 this type of property, condominium office property,
3 condominium residential property, single family detached
4 subdivisions for acquisition development construction and
5 the permanent commitment to the developers in all cases
6 as well as construction loan in income properties.

7 Q How long have you been involved in that
8 business?

9 A Since April 15, 1970.

10 Q Do you know Mr. Michael Fraley?

11 A Yes.

12 Q Do you know the Plaintiffs, Mr. Akers and
13 Mr. Zeeman?

14 A Yes.

15 Q Do you recall a meeting that occurred on or
16 about March 19 with Messrs. Fraley, Zeeman and Akers?

17 A Yes.

18 Q Was anybody else present?

19 A Another gentleman from Virginia Mortgage &
20 Investment who I understand had made these folks a land
21 loan.

22 Q What do you recall occurred at that meeting?

23 THE COURT: When was this meeting, sir?

1 THE WITNESS: Approximately, March 19, 1981.

2 MR. SWINDELL: 1980?

3 THE WITNESS: 1980. I'm sorry.

4 THE COURT: Place.

5 THE WITNESS: It was over in Annandale, I
6 believe, in Virginia National Bank of United National
7 Bank building, same offices of Virginia Mortgage & Invest-
8 ment in the conference room.

9 BY MR. SWINDELL:

10 Q What occurred at that meeting?

11 A The gentleman from Virginia Mortgage & Invest-
12 ment introduced us to these Mr. Akers and Mr. Zeeman at
13 this table and indicated that they were in need of a
14 construction permanent loan for a townhouse, I believe,
15 a ten unit townhouse condominium project to be built
16 over in Merrifield, Virginia.

17 Q Do you recall the substance of any of the
18 conversations with respect to this?

19 A I think the conversation lasted an hour or
20 an hour and a half and basically Mr. Fraley and myself
21 participated back and forth in asking questions of the
22 developer in order to determine whether or not it was
23 something that we might be able to help them with. Some

1 of the things covered were was there financial strength
2 and they did -- I did look at Mr. Zeeman and Mr. Akers
3 financial statements. I asked them -- I specifically
4 recall asking them about their experience as an entity
5 which had or had not developed townhouse condominium
6 offices prior to this project and I recall that they had
7 not. They had not operated in this capacity prior to
8 this. I evaluated the financial statements and determined
9 that -- and I told Mr. Fraley that I didn't feel that
10 the investors that we had would lend them a construction
11 loan or permanent financing based on the strength. Their
12 liquid assets were insufficient.

13 THE COURT: Was that statement made at the
14 meeting?

15 THE WITNESS: Yes, sir.

16 THE COURT: In the presence of everybody?

17 THE WITNESS: Yes, sir.

18 THE COURT: All right, sir.

19 THE WITNESS: And, they responded by telling
20 me that they did have a foreign investor who they had,
21 I think, sold some property to on several occasions. We
22 also discussed at that time the requirement for presale
23 because they were weak and I felt if we could go to a

1 lender with part of the project presold it would take --
2 it would put the burden less on their credit, because
3 then you would merely shift your attention and focus to
4 their ability to build the project which was already pre-
5 sold so it would be beneficial to them in light of their
6 inexperience and weak financial position as presented to
7 us at that time to present a project which already had
8 been presold.

9 THE COURT: Let me ask this and it's only
10 for the information on it, but even at that time, of
11 course, you were thinking of getting them the construction
12 money and the permanent money?

13 THE WITNESS: That's correct.

14 THE COURT: Now, you mentioned the presale
15 requirement.

16 THE WITNESS: Correct.

17 THE COURT: And, the discussion of it.

18 THE WITNESS: Right.

19 THE COURT: Now, presale, as I understand it,
20 only applies to the permanent financing.

21 THE WITNESS: Correct.

22 THE COURT: And, it only comes in --

23 THE WITNESS: Well, I do want to correct myself.

1 A construction lender would want that also, would put that
2 in his commitment also based on my experience.

3 THE COURT: But, I'm thinking of it then in
4 terms of when in point of time does this presale require-
5 ment have to be met. Now, according to these papers, it
6 would have to be met by the closing of the first permanent
7 loan on the first unit before they would close, before
8 they would advance upon it.

9 THE WITNESS: My experience is limited to two
10 projects in 1980 in January for \$2,500,000 where I secured
11 a construction loan from Riggs Bank and also the permanent
12 takeout from John Hanson and a presale was required in
13 both cases prior to funding any --

14 THE COURT: Of the construction?

15 THE WITNESS: Even land advances or any con-
16 struction draws, it was in both of those.

17 THE COURT: Both wanted commitments of people
18 that had committed to purchase those units, really, from
19 a plat before.

20 THE WITNESS: From a sales brochure.

21 THE COURT: Before any building had been --

22 THE WITNESS: Correct. And, I also had done
23 another project which was committed on March 20 which was

1 permanent only which required presales also, of 1980. That
2 was \$1,800,000.

3 THE COURT: A commercial development?

4 THE WITNESS: Townhouse condominium project
5 in Annandale. The first one in January was in Rockville
6 for \$2,500,000 so we were right in the middle of talking
7 to other developers and other lenders at this very moment
8 and we were quite aware of what the market conditions were
9 with this John Hanson as well as Metropolitan Savings --
10 Metropolitan Federal Savings & Loan in Bethesda and Chevy
11 Chase Savings & Loan in Bethesda and Suburban Savings Loan
12 in Annandale.

13 THE COURT: Who first brought up the subject
14 of presale requirements at this meeting?

15 THE WITNESS: I'm sure that I did.

16 THE COURT: What was said about it?

17 THE WITNESS: I recall saying that I felt that
18 our investor would require at least 50% presale, and the
19 two commitments that I originally had experienced was one
20 was 50 and one was 75% only because they had been able to
21 demonstrate that and the lender just took the figures that
22 I gave him.

23 THE COURT: I take it that was even assuming

1 their ability to get the man of foreign nationality to
2 come into the deal?

3 THE WITNESS: His name was not discussed
4 specifically. I just told them that I didn't feel and
5 I expressed to Mike Fraley -- and we were doing this
6 jointly -- that I didn't feel they could do it on their
7 own. We couldn't do it without someone else.

8 THE COURT: In other words, discussion about
9 the presale requirement wasn't that -- did it mean that
10 if you got more financial strength there wouldn't have
11 to be any presale?

12 THE WITNESS: No, sir, it still would be a
13 requirement. They were both standard. That was standard
14 in every deal that I've done and subsequent to that even.

15 BY MR. SWINDELL:

16 Q What was the response of the Plaintiffs with
17 respect to the presale discussions?

18 A As I recall, they said that -- they looked at
19 each other and they said that they were acquainted with
20 another realtor and/or developer who had a condominium
21 office project and they could either get leads from him
22 to satisfy requirements or if they couldn't, they had
23 enough acquaintances of their own to satisfy the five unit

1 purchase. I think there are only ten in the project.
2 So, it didn't bother them. They wanted to go forward
3 even after we mentioned this.

4 Q What was their response with respect to the
5 discussions of an outside investor?

6 A I don't think -- as I recall, it did not
7 please them and I think they said that they didn't want
8 to go out and get an investor so that they would have to
9 give any part of it away. They weren't happy that this
10 came up.

11 Q Did you have any contacts with them subsequent
12 to that?

13 A Myself personally, no.

14 Q Now, I'd like to ask you a couple of questions
15 about your background, specifically.

16 What kind of education do you have?

17 A I have a B.S. degree from the Virginia Poly-
18 technic Institute. I graduated in 1962 and I spent --
19 I went to the University of Richmond Law School one year
20 in 1966.

21 Q What is your B.S. degree in?

22 A Public Administration, Business Administration.

23 Q And, do you belong to any professional

1 organizations?

2 A I'm a member of the National Association of
3 Review Appraisers.

4 Q Do you have any professional licenses?

5 A I have a real estate license in Maryland and
6 Virginia and I took the exams in both states and passed
7 them and currently in good standing.

8 MR. SWINDELL: Your Honor, based on Mr.
9 Hardwick's background and his education, I'd ask that
10 he qualified as an expert witness so that I could pose
11 both the hypothetical question that Mr. Hylton posed and
12 another question myself.

13 THE COURT: If there is no objection or I hear
14 no objection.

15 MR. HYLTON: I'll object, Your Honor, for the
16 record.

17 THE COURT: On what ground?

18 MR. HYLTON: Based on what I have heard so
19 far is very vague.

20 THE COURT: You mean, on qualifications?

21 MR. HYLTON: Yes, sir, very vague picture of
22 his -- overlooking the fact that he --

23 THE COURT: You have been with the Barnes

1 Company, you say, for 10 years?

2 THE WITNESS: Since October of -- I have been
3 in business for 10 years. I've been with Barnes since
4 October of 1977.

5 BY MR. SWINDELL:

6 Q How many types of these loans have you placed?

7 A I have successfully placed two condominium
8 townhouse projects. It was a relatively new thing at
9 that time. Back in February, March of '80 there weren't
10 that many. There were two or three in Maryland and there
11 were about 15 in Virginia.

12 Q On commercial properties, how many loans have
13 you placed?

14 A Maybe, 30 or 40. I might add that I do con-
15 struction loans for Riggs Bank, Union First, NS&T and I
16 do their draws. I go out and inspect the foundations,
17 the various stages of the house and okay draws for their
18 release. I physically inspect these myself and have been
19 doing them for three years.

20 THE COURT: I'm going to permit him to ask
21 the questions and the objection -- and you may cross
22 examine him even now or later on his qualifications, but
23 I think your objection really goes to the extent of his

1 qualifications hence, it would bear on the weight to be
2 given to the opinion, but not to his ability to ask the
3 question.

4 MR. HYLTON: I'll withdraw the objection to
5 the qualifications, Your Honor.

6 THE COURT: Well, you may stand on it and it
7 will proceed with the ruling that I made. That is, to say,
8 the objection will be considered as to the weight to be
9 given to the opinion.

10 THE WITNESS: I can expand a little bit on
11 the qualifications for this National Association of Review
12 Appraisers. It is an association which consists of
13 primarily the loan officers for banks and insurance
14 companies, savings and loan, mortgage bankers whose job
15 it is to review professional MAI appraisals to determine
16 whether or not they have been properly documented and
17 whether the logic is sound or not and you can do it based
18 on your resume of experience or by taking the national
19 test. They accepted my resume and gave me the designation
20 as a senior member for James T. Barnes of Washington, D. C.
21 based on my resume and all types of property.

22 BY MR. SWINDELL:

23 Q Now, with respect to this, I'd like to read the

1 hypothetical question that Mr. Hylton read to Mr. Falcone
2 Monday and --

3 MR. HYLTON: Could I interject something at
4 this point? It seems to me that we ought to ask this
5 question or keep in mind with the context of the question
6 is a year ago, that is, March or --

7 THE WITNESS: I'm very aware of the time.

8 MR. HYLTON: What you have experienced since
9 then and what -- it's perfectly natural, I think, to be
10 talking in terms of what your experience --

11 THE WITNESS: I remember that time frame very
12 distinctly.

13 MR. HYLTON: I think that would be of more
14 help to us.

15 BY MR. SWINDELL:

16 Q I will ask as Mr. Hylton asked Mr. Falcone
17 that you listen very carefully. Please, assume the
18 following facts as true: / The owners of the property
19 made clear to the broker that they wanted no presale
20 requirements from any lender, that the interest rates set
21 out in the brokerage agreement were satisfactory to the
22 owners, that the broker received an oral commitment from
23 a lender for permanent financing that included a 65%

1 presale requirement and a 14% floor as a condition to
2 the interest picture./

3 Do you have an opinion whether the proposed
4 commitment, which I will show you --

5 THE COURT: Plaintiffs' No. 4 and the one
6 you took over there was, I think, Defendant's No. 2.

7 MR. SWINDELL: Yes, Your Honor. Let me start
8 again.

9 BY MR. SWINDELL:

10 Q Mr. Hardwick, I would like to show you
11 Plaintiffs' Exhibit No. 1 and Defendant's Exhibit No. 2
12 and ask you if you had occasion to look at those?

13 A Yes, I have seen these before.

14 Q Now, I'll start the hypothetical question.

15 Please, assume the following facts as true:
16 One, the owners of the property made clear to the broker
17 that they wanted no presale requirement from any lender;
18 two, the interest rates set out in the brokerage agreement
19 were satisfactory to the owners; three, that the broker
20 received an oral commitment from a lender for permanent
21 financing that included a 65% presale requirement and a
22 14% floor as a condition to the interest picture.

23 Do you have an opinion whether the proposed

1 commitment was substantially in accordance with the terms
2 contained in Paragraph 2 of the agreement?

3 A Which is the proposed commitment?

4 Q Defendant's Exhibit No. 2.

5 A You asked me -- what is the question?

6 Q I asked if you had an opinion whether the
7 proposed commitment was substantially in accordance with
8 the terms in Paragraph 2 of the agreement. Do you have
9 an opinion?

10 THE COURT: Paragraph 2 of the brokerage
11 agreement and whether Defendant's No. 2 --

12 MR. HYLTON: I'm afraid he may be confused,
13 because he doesn't -- he's looking at --

14 THE WITNESS: I do have it.

15 MR. HYLTON: I'm sorry.

16 THE WITNESS: In my opinion, I would say it
17 would be substantially within the terms, although the
18 difference in Defendant's No. 2 and the brokerage agreement,
19 Plaintiffs' Exhibit 1 --

20 THE COURT: You say substantially?

21 THE WITNESS: I feel it is substantially in
22 accordance with the brokerage agreement, although there
23 are differences.

1 BY MR. SWINDELL:

2 Q Now, I would like to remind you again that you
3 were to assume certain facts as true.

4 A Right.

5 Q The fact that the owners made clear that they
6 wanted no presale requirement, that the interest rates
7 set out in the brokerage agreement was satisfactory to
8 the owners and that the broker received an oral commitment
9 from the lender for permanent financing that included
10 65% presale requirement and 14% floor as a condition to
11 the interest picture.

12 A You say that they accepted those?

13 Q Assuming those facts are true, would you, in
14 your opinion, state that the terms of the brokerage
15 agreement are substantially in accordance with the terms
16 of --

17 A It would be, in my opinion, that they are. ✓

18 Q Assuming those facts not to be true, just
19 looking at the terms of the brokerage agreement and at
20 the terms of the long form application, is it your
21 opinion that the brokerage agreement or the terms of
22 the long form application are substantially in accordance
23 with the terms of the brokerage agreement?

1 A Yes, that's my opinion, they are.

2 Q I would ask that you compare the brokerage
3 agreement which is Plaintiffs' Exhibit 1 with the short
4 form application which is Plaintiffs' Exhibit No. 4.

5 THE COURT: Let me see the brokerage contract
6 for a moment. You are asking him now to look at what
7 paper?

8 MR. SWINDELL: He's looking at the short form.

9 THE COURT: Plaintiffs' Exhibit No. 4?

10 MR. SWINDELL: That's correct.

11 THE COURT: While you're looking at that, let
12 me look back at this.

13 BY MR. SWINDELL:

14 Q Now, comparing Plaintiffs' Exhibit No. 1,
15 which is the brokerage agreement, with Plaintiffs' Exhibit
16 No. 4, which is the short form application, would you
17 please assume the following facts as true; one, the owners
18 of the property made clear to the broker that they wanted
19 no presale requirement from any lender; two, that the
20 interest rates set out in the brokerage agreement was
21 satisfactory to the owners; three, that the broker
22 received an oral commitment from a lender for permanent
23 financing that included a 50% presale requirement and no

1 floor on the interest rate as a condition to the interest
2 picture.

3 A And, no floor?

4 Q No floor. Do you have an opinion whether the
5 proposed commitment was substantially in accordance with
6 the terms contained in Paragraph 2 of the agreement?

7 A Would you state the question again?

8 Q Do you have an opinion as to whether the pro-
9 posed commitment which we identified as Plaintiffs'
10 Exhibit 4, assuming those facts are true, are substantially
11 in accordance with the terms contained in Paragraph 2 of
12 the brokerage agreement?

13 A Yes.

14 Q What is that opinion?

15 A I say, yes, it is. It is substantially in
16 accordance with the brokerage agreement based on those
17 assumptions.

18 THE COURT: The short form?

19 THE WITNESS: Yes, sir.

20 THE COURT: What were your assumptions again?

21 MR. SWINDELL: I asked the same basic assump-
22 tions that we used for the long form except I changed the
23 terms of the presale requirement to comply with the short

1 form which is 50% and no floor which also complied with
2 the short form.

3 BY MR. SWINDELL:

4 Q Now, assuming those facts not making those
5 assumptions specifically about the presale requirement
6 and the interest rate being approved by the owners as
7 contained in the brokerage agreement, would you compare
8 Plaintiffs' Exhibit No. 1 and Plaintiffs' Exhibit No. 4
9 and would you say that you have an opinion as to whether
10 the commitment was substantially in accordance with the
11 terms contained in Paragraph 2?

12 A Conditions being that the owners did not
13 approve of presale and of floor?

14 Q No, the conditions contained in Paragraph 2
15 of the brokerage agreement itself.

16 A Okay. I'm familiar with those and you're
17 asking me --

18 Q I'm asking you to compare the terms in Para-
19 graph 2 of the brokerage agreement and the terms contained
20 in the short form application and ask, in your opinion,
21 if you have any, whether the terms of the application
22 substantially comply with the terms of the brokerage
23 agreement.

1 A I would say that they comply inasmuch as
2 nothing in the short form or Plaintiffs' No. 4 violates
3 anything in the brokerage agreement.

4 MR. SWINDELL: Okay. Before I give the
5 witness over to Mr. Hylton, I'd ask that the documents
6 which I haven't moved into evidence be so moved.

7 THE COURT: All right. Those were No. 4 and
8 No. 5. The brochure is received in evidence as Defendant's
9 No. 4.

10 (The document referred to,
11 heretofore marked for identi-
12 fication as Defendant's
13 Exhibit No. 4, was received
14 in evidence.)

15 MR. HYLTON: Your Honor, can I interpose an
16 objection to the letter, I believe, that is No. 5?

17 THE COURT: Yes, sir.

18 MR. HYLTON: The point I'd like to make is
19 that the information that is contained in that letter
20 is reflective of what Mr. Fraley thought a situation was
21 and it is hearsay.

22 THE COURT: You mean, of the involvement of
23 Nafim?

1 MR. HYLTON: There are two paragraphs, as I
2 remember reading that letter. One has to do with North
3 American Real Estate and one has to do with North American
4 Financial and, number one, it reflects his concept of
5 what -- well, let me back up a second. It seems to me
6 it's in the nature of hearsay. It's being offered -- I
7 take it it is being offered to prove the truth of the
8 assertions in that letter and the danger, as I see it,
9 is that it is -- perhaps, my objection goes to the weight
10 --

11 THE COURT: Objection is overruled. Received
12 into evidence as Defendant's Exhibit No. 5 being the
13 letter of transmittal that sent Defendant's No. 4 to the
14 Hanson Company.

15 (The document referred to,
16 heretofore marked for identi-
17 fication as Defendant's
18 Exhibit No. 5, was received
19 in evidence.)

20 CROSS EXAMINATION

21 BY MR. HYLTON:

22 Q Mr. Hardwick, you testified that part of your
23 job was to generate new business for the Barnes Company;

1 is that right?

2 A Correct.

3 Q Now, if I understand based on the testimony
4 of all the witnesses in this case so far, including you,
5 the atmosphere at this first meeting on March 19 of 1980
6 in Annandale was an introductory meeting?

7 A Primarily, they introduced each other and
8 they introduced the product and we responded based on
9 what they said at that meeting to what we felt we might
10 be able to do based on what they presented at that point.

11 Q Bear with me. I don't want to ask you any
12 unfair questions and if I do you just say so.

13 A Sure.

14 Q But, you kind of wanted to get a brokerage
15 agreement out of this meeting, right? I mean, you had
16 already prepared the thing. Mr. Fraley testified you
17 had already prepared the thing ahead of time and brought
18 it with you. It's a good deal to have an exclusive
19 brokerage agreement, right?

20 A That's the only way I work.

21 THE COURT: You don't work on them just as
22 a listing if it were comparable to selling real estate?

23 THE WITNESS: No, sir, it's a company policy

1 that we do not.

2 BY MR. HYLTON:

3 Q That's not exactly responsive to my question.
4 One of the things that you wanted to get out of this
5 meeting was a brokerage agreement?

6 A I recall -- I don't think I had seen the
7 agreement that Mr. Fraley had. I knew he had one, but
8 it was really his client and his meeting, so I was
9 really going along for the ride and to assist him and
10 it was entirely in his control and I'm not really sure
11 what his plans were.

12 Q Now, would it be fair to say that at that
13 meeting it was a kind of work session in a sense? You
14 had some people who had a problem, I mean, in financing
15 and you were coming into them and saying to them, we think
16 we can find you that financing. It was a kind of a
17 problem solving session?

18 A We told them that we could.

19 Q You told them that you could get the financing
20 on no uncertain terms?

21 A I won't say on no uncertain terms, but I told
22 them I felt that we could. That was the opinion. They
23 asked could we do it and I said, I think we can.

1 Q I think that would be a perfectly natural
2 thing for you to say.

3 A Not necessarily.

4 THE COURT: Objection sustained to that. If
5 that is a question, you may ask it, but please don't
6 comment on his answer with expressing your opinion.

7 MR. HYLTON: Right.

8 THE COURT: Such as I think that's a perfectly
9 natural thing for you to do.

10 MR. HYLTON: It's not exactly a question,
11 Your Honor.

12 THE COURT: You're right, it sure isn't.

13 MR. HYLTON: Since it's not a question, I
14 won't withdraw it.

15 BY MR. HYLTON:

16 Q You were trying to be accomodating; is that
17 right?

18 A As much as it served our purpose.

19 Q And, theirs at the same time, I take it?

20 A If it was mutually beneficial, yes.

21 Q It was not the kind of atmosphere, if I'm
22 understanding the atmosphere of this meeting, and correct
23 me if I'm wrong, but it's not the kind of atmosphere

1 where you would necessarily bring somebody up short. For
2 instance, if Mr. Akers had said we don't want any presales
3 you wouldn't have sat down with Mr. Akers, for instance,
4 and said Mr. Akers, you don't know what you're talking
5 about and there is no way in the world we're ever going
6 to get this commitment for you?

7 A I would have.

8 Q You would have?

9 A That's my manner. I don't think it's Mr.
10 Fraley's, but I do, because it's a waste of time to
11 proceed beyond that.

12 Q So, coming out of that meeting you didn't get
13 the impression that he had any objection to the presale
14 requirement that you-all had discussed in the meeting?

15 A Yes.

16 Q But, you did come away with the impression
17 that he had some problems or they had some problems, Mr.
18 Akers and Mr. Zeeman, with bringing in an outside investor?

19 A No, they didn't discuss -- they didn't say they
20 had any problems. They said they had someone that they
21 could go to.

22 Q I thought you testified --

23 A If they needed to.

1 Q Correct me if I'm wrong. Didn't you indicate
2 to me that -- to us -- in testimony a few minutes ago that
3 the discussion about the outside investor did not please
4 them?

5 A Correct, they weren't happy.

6 THE COURT: You're asking two different
7 questions. One, I think his testimony was that your
8 clients didn't -- now, this is what he says. I'm not
9 finding facts here -- that your clients were not pleased
10 with any requirements that new backing needed to be
11 brought in.

12 MR. HYLTON: Yes, that's what I remember him
13 testifying.

14 THE COURT: Right.

15 MR. HYLTON: And, my concern was that is the
16 first time in this trial I have heard that. My impression
17 based on Fraley's testimony and Akers and Zeeman's testi-
18 mony --

19 THE COURT: But, that's different from the
20 question you just asked him, though.

21 MR. HYLTON: I'm sorry. Let me go back.

22 BY MR. HYLTON:

23 Q Your testimony about their reaction to the

1 discussion about bringing in a foreign investor surprised
2 me, because Mr. Fraley had indicated that when the subject
3 was discussed, they said yes, we have persons, more than
4 one presumably. Mr. Akers testified to that subject and
5 he said, as I recall, that they had people they thought
6 they could get?

7 A That's the way I understood it.

8 Q That's the way you understood it and my
9 suggestion to you was, could your reaction or your
10 remembrance that they were not pleased with the dis-
11 cussion about the outside investor be a misrecollection
12 and that this --

13 A No, because --

14 Q Let me finish my question. -- a misrecollection
15 and that, in fact, they were displeased about the other
16 subject you talked about, that is, the presales?

17 A No, I quite distinctly remember they were not
18 unhappy about the presales. They were unhappy about the
19 fact that they would have to give away some of their
20 project to someone else.

21 Q Is it fair to say that, and you have testified
22 generally about what is done and what is not done, what
23 is included as a requirement and what isn't. It is true,

1 too, that each individual project is evaluated on its own?

2 A. True.

3 Q. And, that it is possible and conceivable that
4 you could have a project where permanent financing is
5 involved which would not require presales?

6 A. That is a true statement.

7 MR. HYLTON: That's all I have, Judge.

8 MR. SWINDELL: I have no further questions,
9 Your Honor.

10 I would ask, if I haven't done so already,
11 any documents which I have identified that they be moved
12 into evidence.

13 THE COURT: I think that all of those that
14 you have identified have been received in evidence, they
15 being 1 through 5.

16 In other words, you were saying that they
17 were not happy with any mention of having to bring in
18 any other backing, but did not indicate that it couldn't
19 be accomplished?

20 THE WITNESS: Correct.

21 THE COURT: You can step down.

22 (Witness excused.)

23 MR. SWINDELL: Your Honor, I'd like to call

1 Mr. Hardwick for one question if I could please, in
2 rebuttal.

3 THE COURT: Is that a new matter that was
4 brought up?

5 MR. SWINDELL: Yes.
6 Whereupon,

7 CHARLES V. HARDWICK,
8 was recalled as a rebuttal witness, having been previously
9 sworn, was examined and testified further as follows:

10 DIRECT EXAMINATION

11 BY MR. SWINDELL:

12 Q In your capacity as 1st Vice President of
13 James T. Barnes it's your obligation to know the interest
14 rates on loans at all times; is that correct?

15 A Correct.

16 Q Has the interest rate for the F.H.L.M.C.
17 floating rate ever fallen below 14% at anytime since
18 March?

19 A It has. I get peak reports, data reports
20 from Maryland, Virginia, every single lender every week.
21 I know what the rates are and every lender every week
22 and also, we get the results of the F.H.L.M.C. hold on
23 quote. It's published in the Wall Street Journal every

1 two weeks. Single family rates have -- in June, by mid-
2 June and July were about 13-1/2 for single family resi-
3 dential rates, not investment property.

4 Q In terms of the brokerage agreement and keeping
5 that in mind, what is the lowest interest rate that the
6 Plaintiffs could receive on the terms of that agreement
7 even in June?

8 A On the basis of the agreement, I'd say around
9 15-1/2.

10 MR. SWINDELL: That's all, Your Honor.

11 THE COURT: The lowest of -- what was your
12 question?

13 MR. SWINDELL: The lowest possible rate in
14 terms of the agreement.

15 THE COURT: That the lender could receive?

16 MR. SWINDELL: The borrowers could receive.

17 BY MR. SWINDELL:

18 Q Have the prevailing commercial rates been
19 lower?

20 A No, insurance companies have never dropped
21 below 14% from October of '79 through today.

22 MR. SWINDELL: That's all.

23 THE COURT: Any questions?

CROSS EXAMINATION

BY MR. HYLTON:

Q In your experience during the time that you have been in the mortgage brokerage business, have mortgage rates been below 14%?

A In the 11 years I've been in the business, yes.

Q Yes, they have.

MR. HYLTON: I guess that's all I've got.

THE COURT: You may resume your seat.

(Witness excused.)

(End of Partial Transcript.)

P R O C E E D I N G S

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MR. HYLTON: Mr. Akers is next up.

Whereupon,

ROBERT W. AKERS,

was recalled as a witness in rebuttal, having been previously sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. HYLTON:

Q Mr. Akers, I want to go back on two items, the initial meeting on the 19th, on or about the 19th of March of 1980, and then I want to discuss with you one of your last conversations with Mr. Fraley.

On the 19th of March, you testified earlier about presales?

A Right.

Q And you've heard Mr. Fraley and Mr. Hardwick's testimony about the subject of presales. I'd like to go back through that with you and make sure that we understand what you testified to before. Was the subject of presales brought up at that meeting?

A Yes, it was.

1 Q And it was brought up by Mr. Hardwick or Mr.
2 Fraley?

3 THE COURT: This is the March 19 meeting?

4 MR. HYLTON: Yes, sir.

5 THE WITNESS: Yes, sir. I don't remember who
6 brought it up. It could have been brought up by any one
7 of us, because it was something I had very much on my mind.
8 One of the reasons I had it on my mind is I had been working
9 very recently with Jim Lewis, a loan officer at the Bank
10 of Virginia, and he had made us a construction loan commit-
11 ment and indicated that he was in a position to find the
12 permanent in order to be able to do it.

13 MR. SWINDELL: Your Honor, I would object to
14 that testimony. It's hearsay.

15 THE COURT: That is absolutely not being
16 received for the truth of it and I will disregard it as
17 being proof intrinsically of the existence of other loan,
18 but it is admitted only to show the reason why he will
19 testify to what he did. That is, it goes to the state of
20 mind, but not to the truth of the content of the utterance.

21 THE WITNESS: And with him --

22 THE COURT: And what did he say?

23 THE WITNESS: He indicated that he wanted some

1 presales. We had compromised, however, on a position
2 where rather than -- I told him that my objection was to
3 committing too far in advance for something that we would
4 be delivering with conditions so uncertain and inflation
5 at an all time high could we do something that wouldn't
6 commit us to having to deliver something at a fixed price
7 so far in the future and yet satisfy the reason he wanted
8 his presales which was to indicate a market for the product,
9 for the units.

10 So, at that point, I had mentioned to him that
11 we were aware of other developments in the area, the McLean
12 development which we had had some familiarity with. We
13 had, in fact, sold the ground for that particular develop-
14 ment and we also were doing some other things in brokerage
15 in the Merrifield area so we were aware of market conditions.

16 So, our agreement with him was that we would
17 furnish him with either some holds that would show an
18 interest and an approximate -- at approximate price, but
19 it wouldn't commit us or commit them fully and/or we would
20 show them -- we would produce some very firm comparables
21 that he would be able to use to satisfy his need for having
22 a market analysis which is one of the things that a presale
23 really does and this was the same type of -- at the meeting

1 on the 19th I mentioned all of the things that I have just
2 said as a way that we might be able to satisfy presales
3 without actually having presales, because they scared me
4 to death.

5 BY MR. HYLTON:

6 Q When you say satisfy presales, you mean, satisfy
7 a lender who brought it up?

8 A Satisfy a lender's requirement for presales,
9 that's correct. And, in fact, I may have been the one
10 that brought it up, because it was so much on my mind.

11 Q All right. So, what was your -- as you left
12 that meeting, what was the last word on the subject or
13 was there an agreement? What came out of that with respect
14 to presales?

15 A With respect to presales, when we left the
16 meeting I was under the impression that they were fully
17 aware of my reluctance to have presales.

18 THE COURT: At all? Or, 50%?

19 THE WITNESS: Well, the 50% figure was never
20 really brought up. The most I ever conceded was that we
21 would have an indication of some holds on the property
22 which would -- at an approximate price which would not
23 commit us to delivering them at a fixed price sometime in

1 the future, but would be an indication that there was a
2 market for the units in that area.

3 BY MR. HYLTON:

4 Q So, your desire was to have no presales?

5 A That's exactly right and I didn't really feel
6 that that was such an unusual attitude for me to take in
7 light of my previous experience with the Bank of Virginia
8 which I had been sent to the Bank of Virginia by a pro-
9 spective general contractor who had just finished the condo-
10 minimum townhouse development himself and this was the
11 same man who had financed his loan. So, I was dealing with
12 somebody who had had recent experience with it at the time.

13 Q So, to sum up your testimony then about the
14 subject of presales, you didn't want them and you felt that
15 there were ways to satisfy the lender which would not in-
16 volve a presale requirement?

17 A At a definite fixed price in the future, yes.

18 Q In other words, in the back of your mind you
19 knew that a lender would probably ask for presales and you
20 thought that you could satisfy him by not agreeing to pre-
21 sales but doing something else?

22 A That's right.

23 Q Is that right?

1 A That's correct.

2 Q So, you dealt with the presale -- this concept
3 which seems to be so prevalent in the business, you dealt
4 with it by saying, okay, if they bring it up we'll do
5 something else?

6 A That's right. I knew why they would want it.
7 I knew that they would want it, because they wanted to make
8 sure there was a market for the product in the future, but
9 I felt that times were so unusual that the normal require-
10 ment for presales just was something that was unrealistic
11 and we were going through a period of time in which the
12 lenders, they were -- admitted, I had talked to a number
13 of lenders and we had been talking about trying to get
14 commitments particularly in the previous three or four
15 months and one the reasons we couldn't get a commitment
16 because things were so unusual and the times were so
17 different from anything anyone had experienced that the
18 lenders didn't want to make a commitment on anything until
19 things settled down. Their attitude for the most part
20 was just sit and wait and see what happens and maybe things
21 will settle down to normal and under those circumstances
22 it was pretty understandable why we didn't want to commit
23 ourselves out in the future; the lenders were afraid to

1 commit themselves.

2 Q All right. Now, let's go to a telephone con-
3 versation that you had with Mr. Fraley in May. I don't
4 know exactly what date, but let's go back and approach it
5 this way. On or around the 6th of May of 1980 you know
6 that Mr. Fraley had a meeting with Mr. Hakim and Mr. Ames
7 and you were not there. That was in their offices in
8 Georgetown and you did not go; is that right?

9 A I didn't know there was going to be a meeting.

10 Q Okay. You didn't know personally?

11 A No.

12 Q Let's start with that date then. When did you
13 next talk with Mr. Fraley?

14 A Next time I talked with him was on the 15th of
15 May.

16 Q This was by telephone?

17 A This was by telephone.

18 Q Did you call him?

19 A I called him.

20 Q He didn't call you?

21 A No. I called him, because I had found out from
22 my bank at that time that the \$10,000 check had been cashed
23 and I called him to find out why he cashed it.

1 Q And did you discuss the commitment that John
2 Hanson had proposed in this conversation?

3 A That was the first time I had ever heard about
4 it.

5 Q You personally?

6 A Personally, that was the first time I had ever
7 heard about it. He mentioned to me that there was a
8 respective commitment from John Hanson and that he had sent
9 us a letter about it and had I received it and I told him
10 I had not and he said well, I'll send you another copy.

11 Q Now, when you say you hadn't heard about it,
12 according to the previous testimony Mr. Zeeman had a con-
13 versation with Mr. Fraley, if you didn't, on or about the
14 5th or 6th of May and you hadn't had any conversation with
15 Mr. Zeeman about the content of that telephone call?

16 A Mr. Zeeman didn't mention that conversation
17 to me.

18 Q So, when you found out that there was this
19 proposed commitment, what did you do or what did you say?

20 A I asked him to send me a copy of it.

21 Q Did he agree to do that?

22 A He agreed to do that. I told him at that
23 particular point that we were willing to continue working

1 with him trying to get us the loan which we still desperately
2 needed.

3 Q And so basically your conversation was about
4 the check?

5 A Basically, our conversation was about get me
6 -- send us back our check and we'll continue working with
7 you in any way we can in order to get us a loan.

8 Q Did he say anything about sitting down with
9 you and discussing the terms of this proposed commitment
10 from John Hanson?

11 A He made no attempt to pursue trying to get
12 the commitment any further than sending me another copy of
13 the letter which he had sent to Hakim with a copy supposedly
14 with a copy to me.

15 Q Did he say anything like I think the terms
16 are -- did he discuss the terms of the commitment with you
17 at all?

18 A No.

19 Q Did he say anything like we've got an expiration
20 date by a certain time and we need to get back to him or
21 anything like that?

22 A No.

23 Q So, the sum and substance of the conversation

1 was the return of the deposit check and you asked for it
2 and he refused it?

3 A That was basically our -- he did mention to me,
4 he says I've got a tight agreement and I asked him to return
5 the deposit and he said well, I'm not going to do that and
6 I says how can you possibly claim that you've earned your
7 fee and have any right to claim to keep the deposit and he
8 says well, I got a tight agreement and you're not gonna --
9 you're not gonna get out of it and that was his response
10 to me.

11 Q All right. Was that the end of the phone con-
12 versation?

13 A That was the end of the conversation.

14 Q And later on you had another telephone conference
15 call. How many more phone calls did you have?

16 A There was a conference call between myself,
17 Fraley and Hakim and there may have been another call or
18 two, but the only one I can remember for sure is the con-
19 ference call.

20 Q All right. And during that conference call,
21 did he say anything to you about the terms of the agreement?

22 A No, all we discussed was --

23 Q I mean, the terms of the commitment.

1 A -- his wanting to retain our deposit and how
2 we weren't going to get it back and he -- and we made,
3 really, no attempt to try to pursue the Hanson commitment.

4 Q Well --

5 THE COURT: Because, of the presale requirement?

6 THE WITNESS: No, sir. It was just not any
7 attempt to try to go back and really do anything about any-
8 thing. I mean, if we had a lender that was ready to make
9 us a loan on any condition, I mean, on some condition I
10 would have been willing to sit down and talk with him or
11 do something, but I was never asked to do that. We really
12 didn't ever try to pursue going after this loan commitment
13 and making it something that we could live with. It was,
14 I felt, -- my feeling was that it was being used as a way
15 to satisfy a technicality that would enable them to claim
16 that they had earned their commission rather than something
17 that they were trying to do for us.

18 MR. HYLTON: All right. I think that's all the
19 questions I have.

20 THE COURT: Mr. Swindell?

21 MR. SWINDELL: Just a couple questions, Your
22 Honor.

23

CROSS EXAMINATION

BY MR. SWINDELL:

Q Is it your testimony, Mr. Akers -- I believe Mr. Hylton asked you a question that was sort of leading and I just want you to reaffirm that that was your testimony.

When you went into the March 19th you knew that lenders would require presales; is that correct?

A I had been talking with lenders for six months and I was certainly aware that a lot of lenders wanted some kind of a presale requirement.

Q And you stated that you would have -- you could produce other things that in your mind would satisfy that?

A That's correct.

Q I believe you called them holds?

A Huh?

Q Did you call them holds or holes?

A It was a hold or a letter of intent to buy in a market range or a letter of interest of buying a unit in that particular area of the county and it was an expression of interest on the part of a bona fide purchaser that would allow the lender to feel that these units were marketable.

Q Did you ever produce any of those holds for

1 Barnes?

2 A Did I produce any for Barnes?

3 Q Yes.

4 A Well, it was certainly premature to do some-
5 thing like that. We were never asked to do anything like
6 that.

7 Q Now, you testified that on May 15 you were
8 strapped for the loan or you were strapped for financing;
9 is that correct? You really wanted the loan and you were
10 interested in pursuing with Mr. Fraley any avenue that
11 is possible to get the loan; is that correct?

12 A Well, if you were paying \$1600 a month plus
13 22% interest and you had \$160,000 loan coming due in full
14 within two weeks or so, wouldn't you be?

15 Q It was due in two weeks from May 15?

16 A Oh, May 15. I thought you were talking about
17 the March 19.

18 Q I'm sorry. May 15. You testified in your
19 discussion with Mr. Fraley as sort of the collateral testi-
20 mony in terms of your discussions?

21 A On May 15 that had not changed. Our land lender
22 was going along with us on a month to month basis.

23 Q So, you were looking for --

1 THE COURT: That has not been renegotiated or
2 replaced in any way. He was just carrying the loan following
3 --

4 THE WITNESS: He was continuing to carry the
5 loan, follow it on a month to month on the same terms on
6 a month to month basis.

7 THE COURT: How long had he agreed to do it,
8 just month to month?

9 THE WITNESS: It was just -- yes. At that
10 point, we were just going month to month.

11 BY MR. SWINDELL:

12 Q So, on May 15 you were still very, very
13 interested in getting a loan?

14 A Very much.

15 Q Yet, you testified that Mr. Fraley did not dis-
16 cuss the terms of the commitment that he received with you?

17 A Not really.

18 Q Did you press him for those terms?

19 A I'll say that I found out about these terms
20 then from Mr. Zeeman who told me about his previous conver-
21 sation with him and I may have mentioned the fact that
22 these terms, that the 2 points -- yes. Let me -- and I'm
23 not trying to contradict myself, but I'm sure that the 2

1 points, the presale and the 14% floor were something that I
2 mentioned in stating that this was unacceptable to me at
3 that point, because they definitely were.

4 THE COURT: The floor was unacceptable?

5 THE WITNESS: Absolutely, Your Honor.

6 THE COURT: And the reason being?

7 THE WITNESS: The reason the floor was un-
8 acceptable, but it would make us -- it could easily make
9 us non-competitive.

10 THE COURT: You felt the interest rate may
11 go below that?

12 THE WITNESS: Yes, sir. In fact, the interest
13 rate did go below that not very long after the time after
14 May 15. It dropped down to 12 and I even saw some 11 --
15 some loans in the 11% range, high 11. We, in fact, ourselves
16 closed on a loan of our own as late as October at 12-3/4
17 for something else.

18 BY MR. SWINDELL:

19 Q Well, I'm a little bit confused by your testi-
20 mony because a few minutes ago you said that you didn't
21 recall Mr. Zeeman indicating to you the substance of the
22 conversation between Mr. Fraley and Mr. Zeeman. Now, can
23 you clarify that, please?

1 A Well, when I made that telephone call or talked
2 with Fraley and at this point Mr. Zeeman was sitting at my
3 elbow, okay, and at this point he mentions to me something
4 about this letter that we were supposed to have received
5 and I said what are you talking about and I turned to Mr.
6 Zeeman and I said, do you know what he's talking about and
7 he says, I talked to him about something a couple of weeks
8 ago and he said he had a commitment or was about to get a
9 commitment from Hanson with a floor of 14 and 65% presales
10 and I think that's what he is talking about and that was
11 the first time I was aware of the terms. I'm sure I made
12 some mention to him if that's what you're talking about,
13 that's not acceptable, but that was the first time I knew
14 it during that conversation which was with Mr. Zeeman at
15 my elbow and Fraley on the telephone.

16 Q Did you talk about -- did you press Mr. Fraley
17 for any terms other than the 14% floor and the 65% presales?

18 A Why should I? They were so bad I didn't want
19 to.

20 Q Your testimony is that you did not?

21 A No.

22 Q Now, you testified also that on May 15 you
23 agreed to continue to work with Mr. Fraley to get the loan?

1 A Not only in that conversation, but with the
2 conversation, the conference call with Hakim. The same
3 thing was brought up.

4 Q And you sent the termination letter a day later,
5 a day after the May 15 conversation?

6 A I told my secretary -- I gave it to her to type
7 up probably on the 15th and she probably typed it up the
8 next morning and dated it and sent it out which I think
9 it has a date of the 16th.

10 Q So, you terminated your agreement with Barnes
11 on the 16th?

12 A I sent him notification that the agreement was
13 to be terminated. I was fully aware according to the
14 terms of the contract that there was a 15 day period con-
15 tinuing.

16 MR. SWINDELL: No further questions, Your Honor.

17 MR. HYLTON: I have none, Your Honor.

18 THE COURT: You may return to your seat.

19 (Witness excused.)

20 MR. HYLTON: I'd like to call Mr. Zeeman,
21 Your Honor.
22
23

1 Whereupon,

2 CHARLES G. ZEEMAN,
3 was recalled as a witness in rebuttal, having been previously
4 sworn, was examined and testified further as follows:

5 DIRECT EXAMINATION

6 BY MR. HYLTON:

7 Q I want to go back, Mr. Zeeman, to your tele-
8 phone conversation on or about the 5th or 6th of May with
9 Mr. Fraley, your broker at that time.

10 Did you talk about a loan commitment, a proposed
11 loan commitment he had got from John Hanson Savings & Loan?

12 A Yes. When Mr. Fraley returned my call that I
13 placed to him earlier in the morning, I asked him if he
14 had been able to accomplish anything as far as getting
15 this loan and he said that he was continuing to work on it,
16 that he felt he had a good source in California.

17 THE COURT: When was this?

18 THE WITNESS: Excuse me?

19 THE COURT: When was this?

20 THE WITNESS: I think it was about May 2nd. It
21 could have been the first or 2nd. I think it was May 2nd.
22 It was prior to the meeting that Mr. Fraley eventually had,
23 as we found out, with Mr. Hakim and Mr. Ames which I believe

1 was on a Tuesday, the 6th. This was probably the previous
2 Friday if my recollection is correct. And he said that he
3 had gotten a verbal commitment from John Hanson Savings &
4 Loan and I asked him if he would like to discuss it with
5 me since we are the owners of the brokerage agreement and
6 he said that he really didn't want to go into a lot of
7 detail, but I pressed him about what it said. I did write
8 down each of the things as Mr. Fraley told me what John
9 Hanson said they would do and they are exactly as the terms
10 with one exception on that long form application to John
11 Hanson as far as the financial terms are concerned. We,
12 of course, didn't go into all the knitpicking language of
13 the balance of the contract, but the terms were exactly
14 the same as outlined in that long form application to John
15 Hanson with the exception that he told me that a point was
16 an eighth on a take down and that application states a point
17 is a quarter. He indicated that it was not worth of our
18 consideration.

19 BY MR. HYLTON:

20 Q Let me stop you there now. When you say indi-
21 cated, what do you mean?

22 A He said --

23 Q Did he say something?

1 A He said it to me that I know it's not what you
2 guys want and I know it's not in conformance with our
3 agreement. It's not what I would advise you to accept
4 unless you want to buy it in order to better it at a later
5 date.

6 Q I don't want you to embellish that now. He
7 said to you that the terms were not in accordance with the
8 agreement?

9 A Yes, that he would not advise us accepting it
10 under the present conditions.

11 Q So, what did you do? What was your response?

12 A Well, I guess we belabored this point but the
13 65% presales were entirely unsatisfactory.

14 Q What did you say to him back?

15 A I agreed with him that it was totally unsatis-
16 factory because primarily a 65% presale and 14% floor,
17 which is by far in a way my primary objection, and the
18 take down provision at a point is an eighth.

19 Q All right. So, what was the extent of the
20 conversation?

21 A It was -- Mr. Fraley indicated that he realized
22 that the take down provision a point is an eighth was not
23 at all satisfactory and that he was going to go back to

1 John Hanson. He was going back to John Hanson to see if
2 he couldn't convince them that on a commercial loan of
3 this sort that it should be changed to a point is a quarter,
4 not an eighth, and left me with the indication that the
5 ball was in his court, that he was going back to John
6 Hanson. There was never any indication or anything said
7 about sending any papers, forms, applications, anything.

8 Q He didn't say that he was going to prepare
9 an application and send it to you for your signature?

10 A No. He said he was going to go back and try
11 to renegotiate this point with John Hanson.

12 Q Was that the extent of the conversation?

13 A That was the extent of the conversation.

14 Q You-all hung up?

15 A That was the last time I ever heard from him.

16 MR. HYLTON: That's all I have.

17 MR. SWINDELL: I have no questions, Your Honor,
18 of this witness.

19 THE COURT: All right. You may resume your
20 seat, sir.

21 (Witness excused.)

22 MR. HYLTON: ~~That's all the rebuttal I have,~~
23 ~~Your Honor.~~



PLAINTIFF'S EXHIBIT 1

James T. Barnes Mortgage Company

One Central Plaza, 11300 Rockville Pike
Rockville, Maryland 20852 (301) 468-9300

James T. Barnes of Washington,
D.C., Inc.

One Central Plaza
11300 Rockville Pike
Rockville, Maryland 20852

RE: Construction/Permanent Financing

BROKERAGE AGREEMENT

Robert W. Akers *Edwin A. Buchanan* &

Agreement between *C Gordon Zeeman* (hereinafter
called the "Owner") and JAMES T. BARNES OF WASHINGTON, D.C., INC. (hereinafter
called the "Broker").

1. Exclusive Right to Obtain Commitment. In consideration of the
- Broker's best efforts to obtain a commitment from a responsible lender for
a mortgage loan on the property known as

according to the general terms specified in paragraph 2, the Owner grants the
Broker the sole and exclusive right to obtain a financing commitment on said
property.

2. Terms.

(a) Type of loan: Construction and Permanent Commitments.

(b) Amount: \$1,300,000.00, but not to exceed 75% of value.

(c) Interest Rate: Construction loan at prime plus 2%.

Permanent loans at the higher of 2% above the
gross FHLMC 60 day auction rate, 30 days prior
to closing or the lender's prevailing commercial
mortgage rate.

(d) Term of loan: Construction loan for 12 months, with extension
for additional 6 months for additional fee.
Permanent loans for 5 years with amortization not
to exceed 25 years.

(e) Commitment fees: Construction at 2 points.

Permanents at 2 points plus 2 points paid by buyer.

(f) Term of Commitment: Construction loan settlement to take place within
60 days. Permanent loan term for 12 months with
6 month extension for additional fee. **309**

(g) Guarantees: Personal guarantee of principals.

Robert W. Akers
Edwin A. Buchanan
2/23/81

3. Duration of Agreement.

(a) This agreement shall remain in effect for a period of 45 days from the date specified above and shall continue thereafter until either party terminates by written notice to the other party not less than fifteen (15) days prior to the date intended for termination. The Owner acknowledges his affirmative duty to provide all documents necessary for all loan applications and agrees that should he fail to provide all such documents within ten (10) days of the date of this agreement, or subsequent request by any lender or potential lender, this agreement shall thereupon be extended for a period equivalent to the number of days after the ten (10) day period until all the necessary documents are provided. ✓

(b) During the period specified in paragraph 3(a), this agreement shall be irrevocable.

(c) Should the Owner fail to execute or submit necessary documents in connection with a loan application, withdraw a loan application or otherwise fail to cooperate with a lender, or otherwise prevent the Broker from obtaining a commitment, the Broker will be entitled to its commission in full.

4. Authority of Broker. During the term of this agreement, the Broker is granted the sole authority to contact lenders and to take all steps necessary to obtain a commitment for a mortgage loan. The Owner agrees to refer to Broker all inquiries or offers he may receive from lenders and represents and warrants to Broker that he has contacted no other lenders or other brokers than as specified on Schedule A attached hereto. Owner agrees that Broker shall be entitled to a commission regardless of whether a loan commitment is obtained from a lender listed on Schedule A hereto.

5. Representations. The Owner represents that he is the Owner in fee simple of the property and that there are no encumbrances thereon other than as listed in Schedule B attached hereto. The Owner further represents that all information submitted relative to any commitment application shall be true and accurate to the best knowledge of the Owner.

6. Commission.

(a) If a commitment is obtained substantially in accordance with the terms contained in paragraph 2 of this agreement (or a commitment at such other terms as are acceptable to the Owner), or, if the Broker locates a lender ready, willing and able to make such a commitment, or in the event that a commitment is obtained while this agreement is in force, by the Owner or anyone else, the Broker will be entitled to, and Owner agrees to pay, a commission in an amount equivalent to 1 % of the amount of the loan.

(b) Any efforts undertaken by the Owner in obtaining, or assisting in the obtaining of a commitment, whether occurring before, during or after execution of this agreement, shall in no way affect the Broker's entitlement to commission.

(c) The Owner agrees that the Broker shall be the sole broker in procuring this commitment and, therefore, agrees to hold the Broker harmless against any claim of other brokers for a share in the commission for producing the loan and to defend any such claims, including without limitation the payment of attorney's fees.

(d) The Owner understands and agrees that the Broker may receive a fee or other compensation from a lender for the placement and/or servicing of the loan. Such services or fees shall in no way affect the Owner's obligations under this agreement.

(e) The Broker's commission shall be deemed earned, and due and payable upon issuance of commitment.

7. Deposit. Broker hereby acknowledges receipt of a good faith deposit in the amount of \$10,000.00 which shall be applied towards the commission due the Broker if a commitment is obtained. The deposit shall be refunded if Broker is unable to obtain a commitment substantially in accordance with paragraph 2 of this agreement.

8. Obtaining of Commitment After Termination of Agreement.

(a) If a commitment is obtained from a lender to whom application was made on behalf of Owner by the Broker after expiration of the term of this agreement, the Broker will nevertheless be entitled to its full commission.

(b) If, within twelve (12) months from date of issuance of a commitment, Owner shall accept another commitment from the same lender(s), issuing the commitment, Broker shall be deemed to have earned the same percentage fee on the later transaction as is set forth in paragraph 6(a) of this agreement.

9. Fees. Owner agrees to pay upon request by a lender all fees and disbursements, including but not limited to, lender's attorney fees, title insurance premium, recording tax, government stamps, survey, appraisal and correspondent fees, if any, and any and all other reasonable expenses in connection with the loan.

10. Publicity.

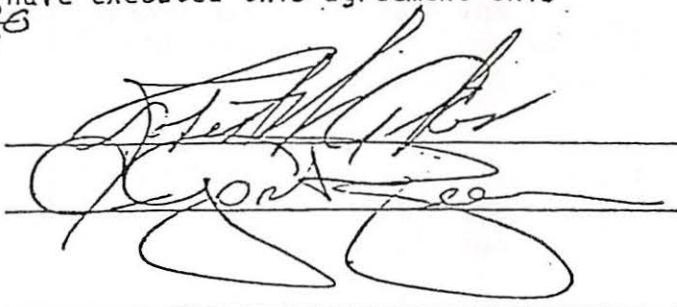
(a) The Owner agrees to permit the Broker to erect a sign on the property during the period of construction, which shall indicate that the Broker has arranged the mortgage financing. In the event the building is completed, the Broker agrees that said sign shall be placed on the property for sixty (60) days. The cost of preparing the sign shall be borne by the Broker.

(b) In the event a commitment is obtained, the Owner authorizes the Broker to transmit new releases to various real estate trade and other publications announcing the arrangement for financing and related details.

11. Construction of Agreement. The parties agree that this agreement shall be construed in accordance with the laws of the State of Maryland.

IN WITNESS WHEREOF the parties hereto have executed this agreement this
day of MAR, 1986

OWNER: _____

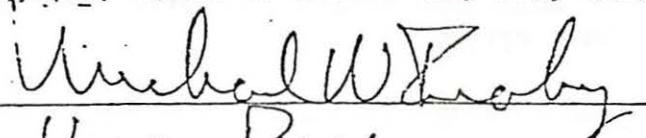


BY: _____

TITLE: _____

BROKER: JAMES T. BARNES OF WASHINGTON, D.C., INC.

BY: _____



TITLE: _____

Vice - Pres

**NORTH AMERICAN
REAL ESTATE & LAND COMPANY, INC.**

1215 NORTH HERNDON STREET

P. O. BOX 390

ARLINGTON, VIRGINIA 22210

703 522-2236


May 16, 1980

Mr. Michael W. Fraley
Vice President
James T. Barnes of Washington, D.C., Inc.
One Central Plaza
11300 Rockville Pike
Rockville, Maryland 20852

Dear Mike:

This is to inform you that your exclusive employment contract to procure a loan for our Hartland Road project, dated 27 March 1980, to run for 45 days, has expired and is hereby terminated. Please return our \$10,000 deposit check immediately.

Sincerely,



Robert W. Akers
President

cc: Walter N. Hylton III, Esq.
Bean, Kinney, Korman & Hylton

Don Shircliff, VMC Mortgage Co.

Charles V. Hardwick, Jr.
The Barnes Co.

Habib Hakim
North American Financial Investment
& Management Group, N.V.

Pliff # 3
as per
2/23/81

The Barnes Companies

—The Largest Privately Held Mortgage Banking Firm



PLAINTIFF'S EXHIBIT 4

James T. Barnes Mortgage Company

One Central Plaza, 11300 Rockville Pike
Rockville, Maryland 20852 (301) 468-9300

May 16, 1980

Mr. Robert W. Akers
North American Real Estate & Land Company, Inc.
1215 North Herndon Street
Arlington, Virginia 22201

Dear Mr. Akers:

On behalf of Mr. Michael W. Fraley, please find the enclosed copies
for your information.

Sincerely,

Diane Strickland
Secretary-Commercial Loan Department

/ds

Enclosure:

Pltff # 4
W80
2/2-3/81

Mr. Michael W. Fraley
James T. Barnes Mortgage Company
One Central Plaza
11300 Rockville Pike
Rockville, Maryland 20852

RE: Hartland Road Townhouse Offices

Dear Mr. Fraley:

In accordance with our agency agreement, please consider this our authorization for you to apply on our behalf to John Hanson Savings & Loan, Inc. for permanent financing to qualified purchasers in the amount of \$1,624,500.00, on the above referenced property.

In consideration for issuance of a commitment, John Hanson Savings & Loan, Inc. shall receive a non-refundable commitment fee of 1% (\$16,245.00) to be paid and deemed earned upon issuance of a commitment in accordance with this application. An additional fee of 1% (\$16,245.00) shall be paid and deemed earned by John Hanson Savings & Loan, Inc. upon closing of the construction loan.

1. INTEREST RATE:

The interest rate shall be 2% above the average weighted gross FHLMC 60 day auction rate at the time of settlement of each individual unit. Principal and interest payment shall be due and payable on the 1st day of every month during the term of the loan.

John Hanson Savings & Loan, Inc. shall allow a "buy down" of the interest rate at a relationship of 1 point equal to 1/4% in rate.

2. LOAN TERM:

The term of the loans shall be 25 years, with a 5 year call provision, with a call provision each 5 years thereafter. The commitment term shall be twelve (12) months, with an extension of up to 6 months upon payment of 1/6 of 1% for each additional month.

3. PRESALE REQUIREMENT:

Not less than 50% of the project shall be under contract at the time of settlement of the first loan.

4. SETTLEMENT FEE:

In addition to fees mentioned above, John Hanson Savings & Loan, Inc. shall receive a 1 point fee at settlement which may be paid by the purchasers.

5. ACCEPTANCE BY CONSTRUCTION LENDER:

John Hanson Savings & Loan, Inc. agrees to make reasonable and customary, but non-monetary, modifications to the commitment so as to make the commitment bankable with the construction lender.

Acceptance of the terms and conditions hereof by John Hanson Savings & Loan, Inc. must be received on or before May 15, 1980, otherwise this application shall expire without notice.

Very truly yours,

ACCEPTANCE:

Intending to be legally bound, the undersigned hereby accepts and agrees to the terms and conditions hereof.

DATE: _____ BY: _____

NORTH AMERICAN

FINANCIAL INVESTMENT & MANAGEMENT GROUP N.V.
1101 30TH STREET, N.W. SUITE 303
WASHINGTON, D.C. 20007

DEFENDANT'S EXHIBIT 1

TELEPHONE: (202) 338-9357
TELEX: 64390 (HAKIM)

March 26, 1980

MEMORANDUM OF PROPOSED PARTNERSHIP AGREEMENT FOR DEVELOPMENT OF HARTLAND ROAD CONDOMINIUM OFFICE PROJECT

The principals of North American Real Estate and Land Co., Inc. have acquired a parcel of land (48,200 s.f.) in Merrifield, Falls Church, Virginia. They have had it rezoned to C-2 (commercial). They propose a development of 10-3 story townhouse office condominium units on this site (22,800 s.f.) for which site and preliminary building plans have been prepared.

The principals of North American Real Estate and Land Co. (NAREL), have approached North American Financial Investment and Management Group N.V. (NAFIM), regarding a partnership arrangement to develop this project.

NAFIM proposes the following format:

1. Limited Partnership

General Partner - NAFIM	2%
Limited Partners NAFIM*	50%
NAREL*	48%
	<u>100%</u>

*As a Firm or Individually.

2. Equity Contributions

NAFIM	5,200
NAREL	4,800
	<u>\$10,000</u>

Ref #1
10/80
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3. Loan commitments to Partnership

NAFIM:	75,000
NAREL:	50,000
	<u>125,000</u>

4. Land - To be assigned to partnership at purchase price (\$210,000) plus expenses of settlement, rezoning, etc. to be documented. The land is presently subject to a land loan by NAREL of \$170,000 and a subordinated trust of \$45,000+ held by the seller. NAFIM will become liable with NAREL on both of these obligations.

5. Architectural, Engineering, Financing, etc., costs to date will be assigned to the partnership along with their benefits. Those costs, paid to date by NAREL will be counted against their equity and loan commitments. Those unpaid will be paid for from the partnership funds.

NORTH AMERICAN

FINANCIAL INVESTMENT & MANAGEMENT GROUP N.V.
1101 30TH STREET, N.W. SUITE 303
WASHINGTON, D.C. 20007

TELEPHONE: (202) 338-9357
TELEX: 64390 (HAKIM)

Page 2

6. Construction Consultant: The partnership will contract with Ames Associates at a monthly fee of \$1,000 to handle the planning, design and construction of the development at the direction of the partnership.
7. Financing: NAREL has or will make application for construction and permanent financing commitments. NAFIM and NAREL will jointly co-sign the construction loan. It is understood that financing is difficult in the current market. NAFIM will, through its' principals, do whatever is necessary, within reason, to obtain favorable financing.
8. NAFIM is in the process of setting up a Real Estate Firm solely for the purpose of Marketing the commercial and residential units that they develop. It is mutually agreed that this firm will be given the opportunity to market the units provided that the fees are within the partner's budget.
9. It is anticipated that development cost for this project will be approximately \$1,450,000. The proposed equity and loan requirements are computed as follows:

Estimated Development Cost		\$1,450,000
Less:		
Proposed Construction Loan	\$1,300,000	
Subordinated Land Trust	<u>45,000</u>	<u>1,345,000</u>
		105,000
Marketing (to be paid from Sales Closings)		<u>50,000</u>
		55,000
Contingency		<u>80,000</u>
Total Equity and Loan Requirements		<u><u>135,000</u></u>

All equity and loan funds to remain as working capital until project completion.

Mr. Michael W. Fraley
James T. Barnes Mortgage Company
One Central Plaza
11300 Rockville Pike
Rockville, Maryland 20852

DEFENDANT'S EXHIBIT 2

RE: Hartland Road Townhouse Offices

Dear Mr. Fraley:

In accordance with our agency agreement, please consider this our authorization for you to apply on our behalf to John Hanson Savings & Loan, Inc. for permanent financing to qualified purchasers in the amount of \$1,624,500.00, on the above referenced property.

In consideration for issuance of a commitment, John Hanson Savings & Loan, Inc. shall receive a non-refundable commitment fee of 1% (\$16,245.00) to be paid and deemed earned upon issuance of a commitment in accordance with this application. An additional fee of 1% (\$16,245.00) shall be paid and deemed earned by John Hanson Savings & Loan, Inc. upon closing of the construction loan.

1. INTEREST RATE:

The interest rate shall be 2% above the average weighted gross FHLMC 60 day auction rate at the time of settlement of each individual unit, with a floor of 14%. Principal and interest payment shall be due and payable on the 1st day of every month during the term of the loan.

John Hanson Savings & Loan, Inc. shall allow a "buy down" of the interest rate at a relationship of 1 point equal to 1/4% in rate.

2. LOAN TERM:

The term of the loans shall be 25 years, with a 5 year call provision, with a call provision each 5 years thereafter. The commitment term shall be twelve (12) months, with an extension of up to 6 months upon payment of 1/6 of 1% for each additional month.

3. GUARANTEES:

The loans shall be personally guaranteed jointly and severally as to repayment of principal and interest by each individual purchaser. In addition, John Hanson Savings & Loan, Inc. shall also require an escrow account be maintained to cover real estate taxes and insurance.

4. REQUIRED SECURITY:

Each loan shall be secured by:

- a. The first lien Deed of Trust on the fee simple title on each unit.

- b. A perfected security interest which shall constitute a first lien on all fixtures and equipment installed in and affixed to the mortgaged premises, and all replacements thereof, additions thereto, and substitutions therefore, except for any such items of property which are owned by purchasers.
- c. An interim title insurance binder without exception for mechanics' and materialsmen's liens which shall be furnished to John Hanson Savings & Loan, Inc. prior to settlement by a title insurance company satisfactory to John Hanson Savings & Loan, Inc. The title insurance binders shall be acceptable to John Hanson Savings & Loan, Inc. in form and substance, cover all the mortgaged premises, and insure John Hanson Savings & Loan, Inc. and its successors and assigns, for the full term of the loans in an amount not less than the full amount of the loans. An endorsement to the title insurance binders evidencing that John Hanson Savings & Loan, Inc.'s Deeds of Trust is a first lien against the subject properties be furnished to John Hanson Savings & Loan, Inc. immediately following recordation of the Deeds of Trust. Title to the mortgaged premises and the improvements shall be marketable and free and clear of all defects, liens, including mechanic's and materialsmen's liens, leases, encumbrances, security interests, assessments, restrictions and easements, which are not acceptable to John Hanson Savings & Loan, Inc.
- d. A prepaid insurance policy (including fire and extended coverage in an amount not less than the loan amount, and vandalism and malicious mischief endorsements) and such other insurance as John Hanson Savings & Loan, Inc. may reasonably from time to time require. All such insurance shall be obtained and maintained in full force and effect from the date of settlement of each loan, without cost to John Hanson Savings & Loan, Inc. and shall be of the non-reporting variety or such other form acceptable to John Hanson Savings & Loan, Inc. which approval shall not be unreasonable withheld, in such amounts, and with such provisions as John Hanson Savings & Loan, Inc. deems necessary or desirable to protect its interest, and shall contain an acceptable mortgage clause in favor of John Hanson Savings & Loan, Inc.

5. LOAN TO VALUE RATIO: (otherwise referred to as LTV)

Loans to be made to qualified purchasers 75% LTV. Maximum LTV ratios, as determined by the lower of the selling price or appraisal, by an appraiser approved by John Hanson Savings & Loan, Inc. (otherwise referred to as JHS&L, Inc.) All cash above the first trusts shall be required on each loan.

- 6. A final inspection will be required on each unit and a re-certification of value by an appraiser acceptable to JHS&L, Inc.
- 7. JHS&L, Inc. reserves the right to review and approve any change in the selling price of the various units.

8. _____ agrees to pay, or have the purchaser pay, for loan processing fees, appraisals, credit reports, lender inspection fees, and all other costs necessary to prepare the loan package. In addition to the above fees, the purchasers will be required to pay 1% at the time of settlement.
9. JHS&L, Inc. will inspect and approve each unit prior to closing. There will be a charge of \$50.00 per unit for this inspection.
10. Review of the title binders and preparing the individual loan documents (Note and Deeds of Trust) and final review of loan documents will be performed by attorneys approved by JHS&L, Inc. the cost of which will be borne by _____ or the individual purchasers.
11. _____ hereby authorizes JHS&L, Inc. to disclose, as may be required under applicable law, all fees paid by them in conjunction with either this commitment, or the individual loan commitments to be issued to the purchasers.
12. All loans under this commitment must be closed no later than October 31, 1982
13. Qualifications of the purchasers will be determined by the use of JHS&L, Inc. guidelines.
 - a. Purchaser must have an excellent credit rating and a stable employment history.
 - b. All income and deposit claims must be verified by JHS&L, Inc.
14. Approval of condominium documents by our legal counsel at a charge of \$75.00.
15. Loans to qualified purchasers will be for twenty-five (25) years with a five (5) year call provision in each Note and Deed of Trust.
16. DEED OF TRUST PROVISION:

The Deeds of Trust shall contain, in addition to other provisions which may be required by John Hanson Savings & Loan, Inc. and its Counsel, the following covenants which shall be binding on the borrowers and all successive owners of the mortgaged premises:

 - a. To obtain and maintain in full force and effect, without cost to John Hanson Savings & Loan, Inc. . an insurance policy (including fire and extended coverage and vandalism and malicious mischief endorsements), and such other insurance as John Hanson Savings & Loan, Inc. may reasonably from time to time require.
 - b. In the event the title to the mortgaged premises becomes vested in anyone other than the individual purchasers, principal balance plus accrued interest shall, at the option of the Noteholder,

immediately become due and payable unless; (i) the Noteholder shall have approved in writing such new owner(s) prior to the time of any such transfer; and (ii) Noteholder may make a charge for assumption of the Note.

- c. In the event that any monthly payment shall remain unpaid for a period in excess of fifteen (15) days, a "late charge" of ten cents (\$.10) for each dollar so unpaid may be charged by the Noteholder for the purpose of defraying the expenses incidental to such delinquency.
- d. Any default on the indebtedness secured hereby shall be deemed to have occurred only in the event any such default is not so corrected within fifteen (15) days after the borrower's receipt of written notice from the Noteholder.
- e. Final title insurance policies without exception of any kind shall be furnished no later than thirty (30) days from settlement dates, said final title insurance policies shall be acceptable to John Hanson Savings & Loan, Inc. in form and substance.
- f. The privilege is hereby reserved to prepay said indebtedness in whole or in part, in an amount of not less than one monthly installment of principal, provided that two month's advance interest, at the then current rate, may be charged on that part of the aggregate amount of all prepayments made in any twelve month period which exceeds thirty-three and one-third per cent ($33\frac{1}{3}\%$) of the original principal amount of the loan as a consideration for the acceptance of such prepayment, provided that no such charge may be imposed after the expiration of five (5) years from the date hereof.

17. SURVEY:

John Hanson Savings & Loan, Inc. shall be furnished prior to settlement a current certified wall check survey acceptable to John Hanson Savings & Loan, Inc. and the title company. All surveys shall be made without cost to John Hanson Savings & Loan, Inc.

18. LOAN SETTLEMENT:

Settlement of the loans shall occur at the offices of a title company or title attorney acceptable to John Hanson Savings & Loan, Inc. within 12 months after the acceptance of this commitment.* John Hanson Savings & Loan, Inc.'s liability to fund the subject loan shall be terminated as of that date. In no event shall the settlement dates be extended in any manner other than by express written agreement by John Hanson Savings & Loan, Inc. which agreement may be conditioned upon such changes in the terms hereof which John Hanson Savings & Loan, Inc. in its sole and exclusive opinion deems appropriate. Settlement may not take place unless and until all of the required conditions set forth herein have been complied with fully.

The applicants shall furnish prior to settlement of the loan all documentation including appropriate corporate authority and good standing necessary in the opinion of John Hanson Savings & Loan, Inc.'s Counsel to establish that the applicant has the legal authority to execute and deliver the financing and loan documents contemplated hereunder and that the applicant has the requisite authority to enter into the transaction contemplated by this letter.

Applicants shall execute or cause to be executed all instruments which John Hanson Savings & Loan, Inc. may reasonably require in the settlement of the loan, including without limitation, Deed of Trust, Deed of Trust Note, Security Agreement and Financing Statement, all of which shall be in form mutually satisfactory to Counsel for John Hanson Savings & Loan, Inc. and the Applicant. Applicants shall pay all legal expenses covering the cost of preparation of papers, title examination, title insurance, recording fees, credit reports, appraisal fees, John Hanson Savings & Loan, Inc. Counsel fees, and all other expenses incidental to the settlement of this loan.

*unless an extension has been arranged and the fee therefore has been paid.

Applicants shall be responsible for the payments of any of the aforementioned fees incurred if the loans are not settled within the specified time period. Loans shall settle within 12 months * from this date. An endorsement must be received on title binders or title insurance policies in favor of John Hanson Savings & Loan, Inc. The closing of these loans is subject to a bonded closing certificate from the title insurance company. Our funds will not be disbursed unless this bond accompanies the settlement statement or unless we have a permanent bond in our files for the closing attorney.

19. BREACH, DEFAULT OR ASSIGNMENT OF COMMITMENT:

Regarding all matters, provisions, terms and requirements set forth, in this commitment letter, time is hereby deemed and agreed to be of the essence. Either (1) any breach or default by applicant in the performance of any undertaking, obligation or requirement imposed on applicants by the terms thereof; (2) the failure or inability for any reason to satisfy any requirements of John Hanson Savings & Loan, Inc. hereunder; or (3) the assignment or transfer by applicant of this commitment, in whole or in part, and whether by operation of law or otherwise, without the prior written consent of John Hanson Savings & Loan, Inc. shall constitute an event of default, upon the occurrence of which John Hanson Savings & Loan, Inc. may terminate its undertaking hereunder without liability of any kind upon John Hanson Savings & Loan, Inc. and without any obligation to make reimbursement to applicants of any sums of money therefore paid to John Hanson Savings & Loan, Inc. pursuant to the provisions hereof.

20. LEGAL DESCRIPTION OF PROPERTY AND IMPROVEMENTS:

Tax Map No. 49-2 Double Circle One, Parcels 75-75A-75B and Parcel 76, Fairfax County, Virginia.

*unless an extension has been arranged and the fee therefore has been paid.

21. ASSIGNMENT OF RENT:

That any time within thirty (30) days after notice and demand by Beneficiary, Grantor will deliver to Beneficiary, but not more frequently than once in every twelve (12) month period, (i) a statement in such reasonable detail as Beneficiary may request, certified by the owner or an executive officer or a corporate owner, of the leases relating to the premises, and (ii) a statement in such reasonable detail as Beneficiary may request, certified by a certified public accountant, or by the owner, or an executive officer or treasurer of a corporate owner, of the income and expenses of the premises for the last twelve (12) month calendar period prior to giving of such notice and that on demand Grantor will furnish to the Beneficiary executed counterparts of any such statement.

That Grantor will not assign the whole or any part of the rents, income or profits arising from the premises without the written consent of Beneficiary and any assignments thereof shall be null and void; that in the event of any default by Grantor in the performance of any of the terms, covenants and provisions of this Deed of Trust or the Note, it shall be lawful for Beneficiary to enter upon and take possession of the premises with or without the appointment of a receiver, or an application therefore, and to let the same, either in its own name or in the name of Grantor, and to receive the rents, issues and profits of the premises and to apply the same, after the payment of all necessary charges and expenses, on account of the amount hereby secured; and that said rents and profits are, in the event of any such default, hereby assigned to Beneficiary; and that upon notice and demand, Grantor will transfer the lessor's interest in any lease now or hereafter affecting the whole or any part of the premises.

22. LEASES:

It is understood that leases are to be assigned to John Hanson Savings & Loan, Inc.

23. ADDITIONAL REQUIREMENTS:

This commitment is subject to the completion of the project exclusive of tenant finish prior to John Hanson Savings & Loan, Inc. funding of the project. Subject to an M.A.I. appraisal before settlement based on the finished building. Our loan shall not exceed 75% of the finished appraisal value or \$1,624,500.00, whichever is less.

- a. Not less than 65% of the project shall be under contract prior to funding of the first individual loan.
- b. A current financial statement shall be submitted each year on each individual purchaser and further subject to approval of financial statement by the Executive Committee.
- c. This commitment is also subject to completion of the enclosed loan application.

24. WAIVER:

A waiver by John Hanson Savings & Loan, Inc. of any of the terms and conditions of this commitment letter shall not be deemed a continuing waiver of said terms and conditions.

25. ACCEPTANCE BY CONSTRUCTION LENDER:

John Hanson agrees to make customary and reasonable but non-monetary modifications to the commitment so as to make the commitment bankable with the construction lender.

26. ENTIRE AGREEMENT:

This agreement constitutes the entire agreement among the parties and may not be modified except by a subsequent agreement in writing executed by the parties. However, John Hanson Savings & Loan, Inc. reserves the right unilaterally, to establish such policies and procedures as it, in its sole discretion, deems necessary or appropriate to carry out the terms and conditions of the agreement.

John Hanson Savings & Loan, Inc.'s acceptance of the terms and conditions hereof must be received on or before the close of business May 15, 1980, otherwise this application shall expire without notice.

Very truly yours,

ACCEPTANCE:

Intending to be legally bound, the undersigned hereby accepts and agrees to the terms and conditions hereof.

DATE: _____ BY: _____



DEFENDANT'S EXHIBIT 3

James T. Barnes Mortgage Company

One Central Plaza, 11300 Rockville Pike
Rockville, Maryland 20852 (301) 468-9300

May 5, 1980

Mr. Habib Hakim
North American Financial Investment
and Management Group N.V.
1101 30th Street, N.W.
Suite 303
Washington, D. C. 20007

RE: Hartland Road Townhouse Offices

Dear Habib:

Pursuant to our meeting today, enclosed is the proposed application to John Hanson Savings & Loan, Inc. At my request, their finance committee discussed the project and indicated their willingness to provide financing last Tuesday. Issuance of a commitment is pending our formal application.

Yours very truly,

Michael W. Fraley
Vice President

MWF/ds

cc: R.W. Akers

Enclosure:

Def # 3
MWF
9/23/81

The Barnes Companies

- The Largest Privately Held Mortgage Banking Firm



DEFENDANT'S EXHIBIT 5

James T. Barnes Mortgage Company

One Central Plaza, 11300 Rockville Pike
Rockville, Maryland 20852 (301) 468-9300

April 28, 1980

Mr. Michael H. Hall
Vice President
John Hanson Savings & Loan, Inc.
7610 Pennsylvania Avenue
Forestville, Maryland 20028

RE: Hartland Road Office Townhouses

Dear Mike:

The following describes in general the development team:

NORTH AMERICAN REAL ESTATE AND LAND COMPANY, INC. with Robert W. Akers and C. Gordon Ziemann as principals have assembled the land and brought the project to its current status. This includes site acquisition and coordination of marketing aspects, architectural work and dealings with Fairfax County. They will continue as 48% owners to work with North American Financial Investment and Management Group through the life of the project.

NORTH AMERICAN FINANCIAL INVESTMENT AND MANAGEMENT GROUP N.V. as 52% owners is the financial partner and will coordinate all continuing aspects of development. Primary responsibility for this function is with F. Pearson Ames (resume attached) with ultimate accountability to and with continuing input from Habib Hakim (Managing Director of North American Financial Investment and Management Group) and the principals of North American Real Estate and Land Company.

All of the people mentioned above would welcome the opportunity to meet with you to discuss any aspects of the project and answer any questions you may have.

Thank you for your continued cooperation and efforts.

Yours truly,

Michael W. Fraley
Vice President

MWF:ds

Enclosure

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Def #5
WFW
2/25/81