

IN THE

***Supreme Court of Virginia***

AT RICHMOND

RECORD NO. 931436

DAVID E. COTTRELL  
and  
CHRISTINE G. COTTRELL,

Appellants,

V.

GENERAL SYSTEMS SOFTWARE, INC.,

Appellee.

JOINT APPENDIX

Edward D. Barnes  
Brian J. Grossman  
EDWARD D. BARNES  
& ASSOCIATES, P.C.  
Centre Court, Suite 300  
9401 Courthouse Road  
Chesterfield, VA 23832  
(804) 796-1000

Counsel for Appellants

Archibald Wallace, III  
Elaine Scott Moore Goodwin  
SANDS ANDERSON MARKS  
& MILLER  
The Ross Building  
801 East Main Street  
P.O. Box 1998  
Richmond, VA 23216-1998  
(804) 648-1636

Counsel for Appellee



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V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF GOOCHLAND

GENERAL SYSTEMS SOFTWARE  
CORP.,

Plaintiff,

v.

LAW NO. L92-60

DAVID E. COTTRELL and  
CHRISTINE G. COTTRELL,

Serve At: 550 Lee Road  
Crozier, Virginia  
(Goochland County)

Defendants.

MOTION FOR JUDGMENT

NOW COMES the Plaintiff, General Systems Software Corporation ("General"), and sets forth its Motion for Judgment as follows:

1. Plaintiff, General, is a Virginia corporation, having its principal place of business in Henrico County, Virginia. General is owned and operated by William J. Kenney, Jr. He also serves as its president.

2. Defendants, David E. Cottrell and Christine G. Cottrell (the "Cottrells") are husband and wife and residents of the County of Goochland, Virginia with their last known address as 550 Lee Road, Crozier, Virginia.

3. Under a contract dated February 26, 1991, plaintiff agreed to sell, and Defendants agreed to purchase, certain real property located in Goochland County, Virginia, known as Lot 2, Block A, Section III, Broad Run Subdivision (the "Property") for ..

Filed in the Clerk's Office the 2nd day of July, 1992.  
Writ Tax \$ 2.00      Teste:  
Fee 35.00  
2.00  
Total Paid \$ 42.00      Lee H. Turner, Clerk  
Debra B. Kuler D. C.

the sum of \$147,500.00. A copy of the Contract of Purchase is attached as Exhibit A.

4. The Contract of Purchase stated that the closing was to occur on or before July 1, 1991, however, the time of closing was not stated to be, "Time is of the essence".

5. Closing did not take place July 1, 1991, or at any time thereafter, because of the unilateral decision of the defendants not to close, which decision constituted a wrongful breach of the contract by the defendants.

6. At all times during the existence of the Contract of Purchase, the Plaintiff was ready, willing and able to perform all of the requirements owed under the terms of the Contract of Purchase, including the readiness, ability and willingness to supply good and marketable title to the Property to the defendants.

7. When defendants breached the contract by wrongly refusing to close on the contract, and when all efforts to resolve the defendants breach failed, plaintiff notified defendants of its intent to attempt to re-sell the property and of its intent to look to each of the defendants for any loss incurred if a second sale produced a lesser amount than the first sale.

8. On February 6, 1992, plaintiff was finally able to sell the real estate to Gary H. MacDonald and Terri A. MacDonald for the sum of \$100,000.00, since the real estate market had fallen considerably. This was the best price plaintiff could obtain



under the circumstances. A copy of the settlement statement for the sale to the MacDonalds is attached as Exhibit B.

9. Subsequent to the breach by the defendants in wrongfully refusing to perform under the contract, the real estate agent under the original sale (Exhibit A) brought an action against the defendants for loss of commission. On the eve of trial the defendants paid, or agreed to pay, and have now paid, the real estate commission in full.

10. The MacDonald purchase price was \$47,500.00 less than the price which Defendants agreed to pay, and by reason thereof, Plaintiff has suffered damages in the sum of \$47,500.00, less the commission recovered by Wood in the amount of \$8,850.00, which plaintiff would have had to pay, leaving a balance owing plaintiff of \$38,650 from and after July 1, 1991, and for which plaintiff seeks judgment against the defendants for the breach of contract stated, plus interest from and after July 1, 1991.

**WHEREFORE**, by reason of the foregoing, Plaintiff requests judgment be entered in its favor against the Defendants, both jointly and severally, in the amount of \$38,650.00, together with interest thereon at the legal rate from and after July 1, 1991, and its fees and costs herein expended.

GENERAL SYSTEMS SOFTWARE CORP.

By Counsel



*Archibald W. Wallace, III*

4

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Archibald W. Wallace, III  
Robert J. Burr  
SANDS, ANDERSON, MARKS & MILLER, P.C.  
801 East Main Street, Suite 1400  
P.O. Box 1998  
Richmond, Virginia 23216-1998  
(804) 648-1636



V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF GOOCHLAND

GENERAL SYSTEMS SOFTWARE, CORP.,

Plaintiff,

v.

LAW NO. L92-60

DAVID E. COTTRELL

and

CHRISTINE G. COTTRELL,

Defendants.

GROUND'S OF DEFENSE

Come now the defendants, by counsel, and as and for their Grounds of Defense, and state the following:

1. There is insufficient information to affirm or deny the allegation contained paragraph 1.
2. The allegation contained in paragraph 2 is admitted.
3. The contract speaks for itself, but the defendants deny that the contract is an enforceable or legitimate contract.
4. The allegation contained in paragraph 4 is denied.
5. The allegation contained in paragraph 5 is denied.
6. The allegation contained in paragraph 6 is denied.
7. The allegation contained in paragraph 7 is denied.
8. The allegation contained in paragraph 8 is denied.
9. The allegation contained in paragraph 9 is denied.
10. The allegation contained in paragraph 10 is denied.

AFFIRMATIVE DEFENSES

1. That the contract entered into and signed by the parties was unconscionable.
2. That the contract was entered into as a result of fraud and misrepresentation with respect to the value of the property.
3. That the plaintiff, its officers and agents, and the





real estate agent knew that the price was unconscionable.

4. That the contract violates the Statute of Frauds.

WHEREFORE, the defendants pray that the Court will dismiss the Motion for Judgment filed in this matter; that they be awarded attorney's fees and costs in the matter.

*Trial by Jury is Demanded.*

DAVID E. COTTRELL  
and  
CHRISTINE G. COTTRELL

By:

*Edward D. Barnes*

Counsel

Edward D. Barnes (VSB #12288)  
Englisby, Barnes, Hennessy & Englisby  
P. O. Box 85  
10101 Iron Bridge Road  
Chesterfield, VA 23832  
(804) 748-5897  
(804) 751-0918 (telecopier)

CERTIFICATE

I hereby certify that on this 30<sup>th</sup> day of July, 1992, I mailed a true copy of the foregoing Grounds of Defense to Archibald Wallace, III, Esquire, Sands, Anderson, Marks & Miller, P. O. Box 1998, Richmond, VA 23216-1998.

*Edward D. Barnes*

Edward D. Barnes



V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF GOOCHLAND

GENERAL SYSTEMS SOFTWARE  
CORP.,

Plaintiff,

v.

CASE NO. L92-60

DAVID E. COTTRELL and  
CHRISTINE G. COTTRELL,

Defendants.

RESPONSE TO AFFIRMATIVE DEFENSES

The plaintiff, by counsel, responds to the Affirmative  
Defenses of the defendants as follows:

1. It denies the allegations of paragraph 1 of the  
Affirmative Defenses.

2. It denies the allegations of paragraph 2 of the  
Affirmative Defenses.

3. It denies the allegations of paragraph 3 of the  
Affirmative Defenses.

4. It denies the allegations of paragraph 4 of the  
Affirmative Defenses.

WHEREFORE, having responded fully to the Affirmative  
Defenses, plaintiff restates the allegations it has heretofore  
made in this case, asks that it be granted judgment as requested,  
and that the Affirmative Defenses be stricken.

GENERAL SYSTEMS SOFTWARE CORP.

By Counsel



*Archibald Wallace, III*

Archibald Wallace, III  
Sands, Anderson, Marks & Miller  
801 East Main Street  
1400 Ross Building  
Richmond, Virginia 23219  
(804) 648-1636

CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing was mailed, postage prepaid, to Edward D. Barnes, Esquire, Englisby, Barnes, Hennessy & Englisby, P. O. Box 85, Chesterfield, Virginia 23832, counsel for defendants, this 4th day of August, 1992.

*Archibald Wallace, III*

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V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF GOOCHLAND

GENERAL SYSTEMS SOFTWARE, CORP.,

Plaintiff,

v.

LAW NO. L92-60

DAVID E. COTTRELL

and

CHRISTINE G. COTTRELL,

Defendants.

AMENDED AFFIRMATIVE DEFENSES

COMES NOW, the defendants, David E. Cottrell and Christine G. Cottrell, by counsel, and states as and for their Amended Affirmative Defenses the following:

1. That the plaintiff failed to mitigate its damages in that the plaintiff has failed to sell the property at its fair market value and has intentionally sold the property below its fair market value.

2. That alternatively, the contract entered into and signed by the parties was unconscionable.

3. That alternatively, the contract entered into was a result of fraud and misrepresentation with respect to the value of the property.

4. That alternatively, the plaintiff, its officers and agents, and the real estate agent, knew that the price was unconscionable.



WHEREFORE, the defendants pray that the Court will dismiss the Motion for Judgment; and that the plaintiffs be awarded attorneys' fees and costs.

DAVID E. COTTRELL  
and  
CHRISTINE G. COTTRELL

By: *Daniel M. Koliadko, Jr.*  
Counsel

Edward D. Barnes (VSB #12288)  
Daniel M. Koliadko, Jr. (VSB #30033)  
Edward D. Barnes & Associates, P.C.  
P. O. Box 104  
10101 Iron Bridge Road  
Chesterfield, VA 23832-0104  
(804) 748-5897  
(804) 751-0918 (telecopier)

CERTIFICATE

I hereby certify that on this 13<sup>th</sup> day of October, 1992, I mailed a true copy of the foregoing Amended Affirmative Defenses to Archibald Wallace, III, Esquire, Sands, Anderson, Marks & Miller, P. O. Box 1998, Richmond, VA 23216-1998.

*Daniel M. Koliadko, Jr.*  
Daniel M. Kolidako, Jr.

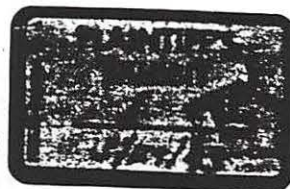




# VIRGINIA ASSOCIATION OF REALTORS®

## CONTRACT OF PURCHASE

(This is a legally binding contract; if not understood, seek competent advice before signing.)



This CONTRACT OF PURCHASE, made as of FEBRUARY 26, 1991, between WILLIAM J. KENNEY, JR. (the "Seller", whether one or more), and DAVID E. & CHRISTINE G. COTTRELL (the "Purchaser", whether one or more), provides:

Seller and Purchaser acknowledge that THE WOOD COMPANY is the Listing Broker for the Property, as defined below, and SAME ("REALTOR®") is the Selling Broker, and that such brokers are the sole procuring agents for the transaction described in this Contract.

1. **PROPERTY.** Purchaser agrees to buy and Seller agrees to sell the real estate, and all improvements thereon, located in the County or City of GOOCHLAND, Virginia, and described as: LOT 2, SECTION III OF BROAD RUN SUBDIVISION

and commonly known as 323 HOLLY LAKE DRIVE (street address), together with the following items of personal property:

(collectively, the "Property").

2. **PURCHASE PRICE.** The purchase price (the "Purchase Price") of the Property is ONE HUNDRED FORTY-SEVEN THOUSAND, FIVE HUNDRED AND NO/100 Dollars (\$ 147,500.00), which Purchaser shall pay to the Seller at Settlement in cash or by cashier's or certified check, subject to the prorations described herein and further subject to one or more of the following financings, check as applicable:

☐ (a) **THIRD PARTY FIRST TRUST:** This sale is subject to Purchaser obtaining ( ) or assuming ( ): a conventional ( ), FHA ( ), VA ( ), VHDA ( ) or other (describe) ( ) loan secured by a first deed of trust lien on the Property, in the principal amount of \$ , bearing interest ( ) at a fixed rate not exceeding % per year, or ( ) at an adjustable rate with an initial rate not exceeding % per year, or ( ) at the prevailing rate of interest at the time of Settlement, amortized over a term of years, and requiring not more than a total of loan discount points, excluding a loan origination fee. (If this Contract provides for the assumption of a loan, the parties acknowledge that the balance set forth above is approximate, and that the principal amount to be assumed will be the outstanding principal balance on the date of Settlement.)

☐ (b) **THIRD PARTY SECOND TRUST:** This sale is also subject to Purchaser obtaining a loan secured by a second deed of trust lien on the Property in the principal amount of \$ , bearing interest at a rate not exceeding % per year, amortized as follows: , and requiring not more than a total of loan discount points, excluding a loan origination fee.

☐ (c) **SELLER FINANCING:** Seller agrees that \$ of the Purchase Price shall be evidenced by a note made by Purchaser in the principal amount of \$ , bearing interest at the rate of % per year, amortized as follows:

The Note shall be secured by a first ( ), second ( ) or (specify priority) ( ) deed of trust on the Property. The deed of trust and note shall provide, among other things, that: (i) the note shall be due and payable in full if the Property, or any interest therein, is transferred, sold or conveyed; (ii) Purchaser shall have the right to prepay the note at any time and from time to time in whole or in part ( ) with premium or penalty of % of the amount prepaid or ( ) without premium or penalty; (iii) a late charge of may be assessed by Seller for any payment more than days late; and (iv) Other terms:

☐ (d) **ADDITIONAL FINANCING TERMS:**

### 3. DEPOSIT.

(a) Purchaser has made a deposit with THE WOOD COMPANY ("Escrow Agent") of ONE THOUSAND Dollars (\$ 1,000.00) (the "Deposit") in cash ( ), by check ( ☒ ), or by a note ( ) and due and payable on , 19 , receipt of which is hereby acknowledged. The Deposit shall be held in escrow by the Escrow Agent until settlement and then applied to the Purchase Price or settlement costs.

(b) If the Escrow Agent is a licensed real estate broker, the Deposit shall be held and applied in conformity to the regulations of the Virginia Real Estate Board. Pursuant to such regulations, the Deposit will be held intact in the escrow amount of the Escrow Agent until this transaction has been consummated or terminated. If this transaction is terminated due to the failure of a condition or a contingency set forth herein, the Deposit shall be returned to Purchaser; PROVIDED, HOWEVER, that in the event the transaction is not consummated, such regulations require the Escrow Agent to retain the Deposit intact until all parties to the transaction have agreed in writing to the disposition thereof, or until a court of competent jurisdiction orders disbursement.



N/A 4. **FINANCING.** This Contract is contingent upon Purchaser obtaining a written commitment or commitments, as the case may be, for the third party financing described in paragraph 2. Purchaser agrees to make written application for such financing within \_\_\_\_\_ business days of the date of acceptance of this Contract by Seller and to diligently pursue obtaining a commitment for such financing. If Purchaser is unable to obtain such a commitment and so notifies Seller or REALTOR® in writing before 5:00 P.M. local time on \_\_\_\_\_, 19\_\_\_\_, then this Contract shall become null and void and the Deposit shall be returned to Purchaser. If such a notice is not received by the deadline, the financing contingency shall expire. Failure of Purchaser to make such application or to diligently pursue obtaining such financing shall be a default hereunder, entitling the Seller to all of the rights and remedies available at law or in equity.

N/A 5. **LOAN FEES.** If a lender making a loan described in paragraph 2 requires a discount fee or "points" as a condition of making the loan, Seller agrees to pay the first trust lender up to \_\_\_\_\_% of the principal amount of the first trust loan and the second trust lender up to \_\_\_\_\_% of the principal amount of the second trust loan, if any. Except as otherwise agreed in this paragraph 5, Purchaser shall pay all other costs and fees associated with obtaining the loan or loans.

6. **OTHER TERMS.** (Use this space for additional terms not covered in the Contract.) \_\_\_\_\_

PURCHASER ACKNOWLEDGES RECEIPT OF SEPTIC  
PERMIT ISSUED BY GOODLAND HEALTH DEPARTMENT

Addendum Attached: \_\_\_\_\_ Yes, \_\_\_\_\_ No, Consisting of \_\_\_\_\_ pages

N/A 7. **APPRAISAL/VA/FHA/HUD.** If VA or FHA financing applies, any other provisions of this Contract notwithstanding, Purchaser shall not incur any penalty for forfeiture of Deposit or any other penalty, or be further obligated under this Contract unless there has been default delivered to the Purchaser a certificate issued by VA or FHA (whichever financing is applicable) setting forth the appraised value of the Property (exclusive of closing costs if FHA) of not less than \$\_\_\_\_\_. It is Purchaser's option to proceed with this Contract without regard to the appraised value, and/or Seller's option to alter this Contract to comply with the appraised value providing one or the other option is exercised in writing signed by Seller and Purchaser within 72 hours of receipt of the certificate of value. No appeal of said appraised value may be made without written mutual consent of Purchaser and Seller. If HUD/FHA financing applies, the appraised valuation is arrived at to determine the maximum mortgage which HUD/FHA will insure. HUD/FHA does not warrant the value or the condition of the Property. The Purchaser should satisfy himself/herself that the price and condition of the Property are acceptable.

N/A 8. **NEW IMPROVEMENTS.** If the Property includes a new house, new condominium unit, new cooperative unit, or new modular home (all herein called "New Home") either subparagraph (a) or (b) must be fully completed before execution of this Contract by Purchaser. Seller represents and warrants that the information checked below is true and correct as of the date of execution of this Contract and will be true and correct at the time of Settlement. Check as applicable:

N/A ☐ (a) Ceilings in the New Home are insulated with \_\_\_\_\_ type of insulation having a thickness of \_\_\_\_\_ inches, resulting in an R-value of \_\_\_\_\_ according to the manufacturer. Exterior walls in the New Home are insulated with \_\_\_\_\_ type of insulation having a thickness of \_\_\_\_\_ inches, resulting in an R-value of \_\_\_\_\_ according to the manufacturer.

☐ (b) No insulation has been or will be installed in the New Home.

N/A 9. **CONDOMINIUM RESALE.** If this Contract covers the resale of a condominium unit, Section 55-79.97 of the Virginia Condominium Act (the "Act") requires Seller to obtain from the unit owner's association and furnish to Purchaser, prior to the contract date, certain information. Check one of the following as applicable:

- ☐ Purchaser acknowledges receiving the information required by the Act prior to the date of Seller's acceptance of this Contract.
- ☐ All of the required information has not yet been provided. Seller agrees to promptly obtain and furnish to Purchaser the required information. If Purchaser has not received such information within fifteen (15) days of the date of acceptance hereof by Seller, or if upon receipt Purchaser finds such information to be unacceptable, in Purchaser's sole discretion, Purchaser shall have the option, exercisable within three (3) days following the due date or date of receipt, as applicable, to terminate this Contract by giving notice to Seller. Upon such termination, the Deposit shall be returned to the Purchaser.

Nothing herein shall affect the rights of Purchaser with respect to updating the required information in the event more than sixty (60) days elapses between the contract date and the date of Settlement. For purposes of the Act, the parties agree the contract date shall be the date this Contract is accepted by Seller.

10. **TITLE.** Seller agrees to convey the Property to Purchaser by general warranty deed with English covenants of title and free and clear from all encumbrances, tenancies, and liens (for taxes or otherwise), but subject to applicable restrictive covenants and customary utility easements of record not adversely affecting the marketability of the Property. Notwithstanding anything herein to the contrary, Seller shall not be required to bring any action or proceeding or otherwise incur any expense to render marketable the title to the Property, and if Seller shall be unable or unwilling to remedy any valid objections to the marketability of the title of Seller, not waived by Purchaser in writing, the sole obligation of Seller shall be to refund the Deposit. Upon the making of such refund this Contract shall be terminated, and no party shall have any claim against any other by reason of this Contract.

11. **SETTLEMENT; POSSESSION.** Settlement ("Settlement") shall be made at PURCHASER'S ATTORNEY on or before JULY 1, 1991, or as soon thereafter as title can be examined and necessary documents prepared. Possession of the Property shall be given at Settlement, unless otherwise agreed in writing by the parties.

12. **EXPENSES; PRORATIONS.** Seller agrees to pay the expense of preparing the deed and the recordation tax applicable to grantors. Except as otherwise agreed herein, all other expenses incurred by Purchaser in connection with this purchase, including without limitation title examination, insurance premiums, survey costs, recording costs and fees of Purchaser's attorney, shall be borne by the Purchaser. All taxes, assessments, interest, rent, and escrow deposits, if any, shall be prorated as of the date of Settlement. In addition to the Purchase Price, the Purchaser agrees to pay the Seller for all fuel oil remaining in the tank (if applicable) at the prevailing market price as of date of Settlement.



13. **RISK OF LOSS.** All risk of loss or damage to the Property by fire, windstorm, casualty, or other cause is assumed by Seller until Settlement. In the event of substantial loss or damage to the Property before Settlement, Purchaser shall have the option of either (i) terminating this Contract and recovering the Deposit, or (ii) affirming this Contract, in which event Seller shall assign to Purchaser all of Seller's right under any policy or policies of insurance applicable to the Property.

14. **EQUIPMENT CONDITION AND INSPECTION.** Purchaser agrees to accept the Property at Settlement in its present physical condition, except as otherwise provided herein. Seller warrants that all appliances, heating and cooling equipment, plumbing and electric systems, and well and/or septic systems will be in working order at the time of Settlement or of Purchaser's occupancy, whichever occurs first. Seller agrees to deliver the Property in clean condition and to exercise reasonable and ordinary care in the maintenance and upkeep of the Property between the date this Contract is executed by Seller and the time of Settlement or of Purchaser's occupancy, whichever occurs first. Seller grants to PURCHASER or his representative the right to make a pre-occupancy or presettlement inspection.

15. **BROKERAGE FEE.** Seller represents that he has agreed that the Listing Broker will be paid a fee for services of SIX PERCENT OF SALE PRICE. From that fee, the Selling Broker is to receive \$\_\_\_\_\_ or \_\_\_\_\_% of the fee to be paid the Listing Broker. Seller hereby authorizes and directs the settlement agent to disburse to the Listing Broker and the Selling Broker at settlement and from the Seller's proceeds their respective portions of the fee.

16. **DEFAULT.** If either party defaults under this Contract, the defaulting party, in addition to all other remedies available at law or in equity, shall be liable for the fee to which the Listing Broker would have been entitled if this Contract had been performed and for any damages and all expenses incurred by the non-defaulting party and by Listing Broker in connection with this transaction and the enforcement of this Contract, including, without limitation, attorneys' fees and costs, if any. Payment of a real estate broker's fee as the result of a transaction relating to the Property which occurs subsequent to a default under this Contract, shall not relieve the defaulting party of liability for the fee of Listing Broker in this transaction and for any damages and expenses incurred by the non-defaulting party and by Listing Broker.

17. **TERMITE, ETC. INSPECTION.** Prior to Settlement, Seller shall provide Purchaser an inspection report from a termite control company certified and licensed by the Commonwealth of Virginia concerning the presence of, or damage from termites or other wood-destroying insects. If the inspection reveals active infestation in, or damage to the dwelling on the Property, Seller shall have the dwelling treated and the damage repaired by a company certified and licensed by the Commonwealth of Virginia and shall furnish a one-year bond on such work from the company, all at the Seller's expense; PROVIDED, HOWEVER, if the estimated cost of such repairs exceeds \$\_\_\_\_\_, Seller shall have the option to terminate this Contract unless Purchaser and Seller mutually agree to share the costs exceeding the amount above.

18. **MISCELLANEOUS.** This Contract represents the entire agreement between the parties and may not be modified or changed except by written instrument executed by the parties; PROVIDED, HOWEVER, that the provisions of paragraph 15 above may not be modified or changed without the written consent of REALTOR®. This Contract shall be construed, interpreted, and applied according to the laws of the Commonwealth of Virginia, and shall be binding upon and shall inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties. To the extent any handwritten or typewritten terms herein conflict with, or are inconsistent with the printed terms hereof, the handwritten or typewritten terms shall control.

19. **ACCEPTANCE.** If this offer is not accepted by Seller on or before \_\_\_\_\_ (time), \_\_\_\_\_, 19\_\_\_\_\_, it shall become null and void without further action by Purchaser.

WITNESS the following signatures and seals:

(SEPARATE ALL COPIES BEFORE SIGNING BELOW)

Seller accepts this offer this 6th day

of March, 1986

William H. Smith (SEAL)  
Seller  
Michael S. Smith (SEAL)  
Seller

David C. Blottel (SEAL)  
Purchaser  
Patricia Blottel (SEAL)  
Purchaser  
Edwin M. [unclear] (SEAL)  
REALTOR®

REALTOR® executes this Contract (if appropriate) to acknowledge receipt of the Deposit and agrees to hold the Deposit in accordance with the terms of this Contract.

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VAR Form 600 Rev. 7/85



9 1 2 / 13  
COMMONWEALTH OF VIRGINIA



THOMAS P. HANWYCH, JR.  
CHAIRMAN  
DEBORAH C. SHANNON  
COMMISSIONER  
THOMAS A. SHERRIDAN, JR.  
COMMISSIONER

LEWIS W. BRYANT, JR.  
CLERK OF THE COMMISSION  
BOX 1197  
RICHMOND, VIRGINIA 23209  
(804) 786-3711

STATE CORPORATION COMMISSION

NOTICE OF TERMINATION OF CORPORATE EXISTENCE

SEPTEMBER 11, 1989

ROBERT F. PAMELL  
CLOVERLEAF WEST OFFICE PARK  
211 RUTHERS RD., SUITE 101  
RICHMOND, VA 23235

RE: GENERAL SYSTEMS SOFTWARE CORP.  
ID: 0240063-8

In early June of this year, the State Corporation Commission mailed the above-named corporation a notice of impending termination of corporate existence. According to the records of the Commission, the corporation failed to comply by September 1 with the statutory requirements referred to in the notice. Consequently, on September 1 of this year, the corporation's existence was terminated by operation of law.

Among other things, this termination means that the corporation can no longer lawfully conduct business and its directors are required to liquidate its business and affairs.

As there might be other consequences resulting from the termination, it is suggested that the corporation, its officers and its directors seek the advice of counsel.

If the corporation wishes to reinstate, it may do so by complying with the applicable statutes. For more information concerning reinstatement, write to:

State Corporation Commission  
Corporate Operations Division  
P. O. Box 1197  
Richmond, VA 23209  
(804) 786-3713





THIS DEED, made this 9th day of July, 1987, by and between GENERAL SYSTEMS SOFTWARE CORP., a Virginia corporation, hereinafter designated "Grantor," and William J. KENNEY, Jr. and Pamela A. KENNEY, his wife, herein after designated Grantees";

WITNESSETH:

That for and in consideration of the sum of TEN DOLLARS (\$10.00) to Grantor in hand paid, and other good and valuable consideration, the receipt whereof is hereby acknowledged, the Grantor does hereby grant and convey, with General Warranty of Title, and subject to the terms hereof, with English Covenants of Title, unto the Grantees, as tenants by the entirety with the right of survivorship as at common law, the following described property, to-wit:

ALL that certain lot, piece or parcel of land with the improvements thereon and appurtenances thereto belonging, lying and being in Dover District, Goochland County, Virginia, containing 2.763 Acres and being known and numbered as Lot 2, Block A, Section III, Broad Run, as shown on plat of Broad Run, Section III, by Foster and Miller, P.C., Certified Surveyors, dated May 22, 1985, recorded May 23, 1985, Clerk's Office, Circuit Court, Goochland County, Virginia, in Plat Book 12, page 84.

BEING the same real estate conveyed to General Systems Software Corp. by deed from TuSa, Incorporated, dated December 5, 1986, recorded December 11, 1986, Clerk's Office, Circuit Court, County of Goochland, State of Virginia, as in Deed Book 208, page 110.

This conveyance is made subject to the lien of a deed of trust dated December 11, 1986, from General Systems Software Corp. to William H. Neal, Jr. and Ernest K. Geisler, Jr., Trustees, recorded December 11, 1986, in the Clerk's Office of the Circuit Court of Goochland County, Virginia, in Deed Book 208, page 112, securing the original principal amount of \$45,000.00 and interest, on which the principal balance is approximately \$42,703.87 and which balance with interest thereon, Grantees, by accepting this deed, and by signing the same, assumes and agrees to pay.

This conveyance is also made subject to existing restrictions and easements of record affecting the aforesaid property.

WITNESS the following signature and seal:

William J. Kenney, Jr.  
William J. Kenney, Jr.

GENERAL SYSTEMS SOFTWARE CORP.,  
a Virginia corporation

Pamela A. Kenney  
Pamela A. Kenney

By: William J. Kenney, Jr. (SEAL)  
William J. Kenney, Jr.,  
President

STATE OF VIRGINIA

County of Chesapeake, to-wit:

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that William J. Kenney, Jr., President of General Systems Software Corp., whose name is signed to the foregoing Deed bearing date on the 9th day of July, 1987, has acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand this 15th day of July, 1987.

My Commission expires: March 24, 1991.

Mary K. Lee  
Notary Public

GRANTEES' ADDRESS:

9411 Avalon Drive  
Richmond, VA 23229

VIRGINIA: CLERK'S OFFICE OF THE CIRCUIT COURT OF GOOCHLAND COUNTY.  
St.R.Tax 64.20  
Co.R.Tax 21.40  
Transfer 1.00  
Clerk 10.00  
GrantorTax 96.60  
Total 96.60  
The foregoing instrument with acknowledgment was admitted to record on Aug 12 1987 at 9:50 A.M. in D.B. 287 Page(s) 1  
Recording costs paid as shown.  
Teste: Lee B. Turner Deputy Clerk



1285  
EX-263-541

This Deed of RESCISSION, CANCELLATION and QUITCLAIM made this 13th day of July, 1987, by and between WILLIAM J. KENNEY, Jr. and PAMELA A. KENNEY, his wife, hereinafter designated parties of the first part, and GENERAL SYSTEMS SOFTWARE CORP., a Virginia corporation, hereinafter designated as party of the second part;

Whereas, by deed dated July 9, 1987, General Systems Software Corp. granted and conveyed unto William J. Kenney, Jr. and Pamela A. Kenney the hereinafter described property; and

Whereas, said deed was mistakenly and erroneously prepared, executed, and recorded; and

Whereas, said deed was recorded on the 12th day of August, 1987, in the Clerk's office of the Circuit Court of Goochland County, Virginia, in Deed Book 217, Page 21; and

Whereas, it was at all times, and still is, the intention of the parties that said property should be that of General Systems Software Corp. and not that of William J. Kenney, Jr. and Pamela A. Kenney; and

Whereas, the deed was and is to have no effect and the parties wish to totally rescind and cancel the conveyance between them;

Now, Therefore, the parties do hereby RESCIND and CANCEL the prior erroneous conveyance between them, the parties of the first part hereby granting, conveying, and quitclaiming unto the party of the second part any and all right, title, and interest which they may have in and to the following described property, to-wit:

ALL that certain lot, piece or parcel of land with the improvements thereon and appurtenances thereto belonging, lying and being in Dover District, Goochland County, Virginia, containing 2.763 Acres and being known and numbered as Lot 2, Block A, Section III, Broad Run, as shown on plat of Broad Run, Section III, by Foster and Miller, P.C., Certified Surveyors, dated May 22, 1985, recorded May 23, 1985, Clerk's Office, Circuit Court, Goochland County, Virginia, in Plat Book 12, page 84.



BEING the same real estate conveyed to General Systems Software Corp. by deed from TuSa, Incorporated, dated December 5, 1986, recorded December 11, 1986, Clerk's Office, Circuit Court, County of Goochland, State of Virginia, in Deed Book 208, page 110.

WITNESS the following signatures and seals:

William J. Kenney Jr. (SEAL)  
William J. Kenney Jr.

Pamela A. Kenney (SEAL)  
Pamela A. Kenney

STATE OF VIRGINIA

County of Chesterfield, to-wit:

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that William J. Kenney, Jr., whose name is signed to the foregoing Deed bearing date on the 13th day of July, 1987, has acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand this 10 day of December, 1987.

My Commission expires: January 29, 1990.

Robert J. Penney  
Notary Public

STATE OF VIRGINIA

County of Henrico, to-wit:

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that Pamela A. Kenney, whose name is signed to the foregoing Deed bearing date on the 13th day of July, 1987, has acknowledged the same before me in my jurisdiction aforesaid.

Given under my hand this 18th day of June, 1988.

My Commission expires: October 29, 1991

Jeremiah D. Hornum

LAW OFFICES  
SANDS, ANDERSON, MARKS & MILLER  
A PROFESSIONAL CORPORATION  
THE ROSS BUILDING  
801 EAST MAIN STREET  
Post Office Box 1998  
RICHMOND, VIRGINIA 23216-1998  
804/648-1636

ARCHIBALD WALLACE, III



TELECOPIER  
804/783-2926  
804/783-7291

Direct Dial: 804/783-7265

July 23, 1991

Mr. David E. Cottrell  
Mrs. Christine G. Cottrell  
c/o Edward D. Barnes, Esquire  
10101 Ironbridge Road  
Chesterfield, Virginia 23832

Dear Mr. & Mrs. Cottrell:

On February 26, 1991 you entered into a real estate sales contract with General Systems Software Corp., in and through William J. Kenney, Jr. to purchase Lot 2, Section 3, Broad Run Subdivision, Goochland County, Virginia known as 323 Holly Lake Drive. The contract called for closing to be on or before July 1, 1991, or as soon thereafter as title could be examined and necessary documents prepared. The purchase was all cash and without contingencies.

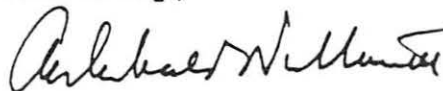
The date for settlement has come and gone. I am advised by Mr. Kenney that numerous efforts have been made to contact you about closing, either directly, through the real estate agent, or through your counsel. To date closing has not occurred.

Please be advised that you have had a reasonable time in which to close on this contract, and having failed to do so, we now call upon you to close within fifteen (15) days from today's date, or on or before August 7, 1991. In the event you are unable, my client reserves the right to declare this contract voidable as of that date, and to put the property back on the market for sale. In the event my client exercises this option, and in the event on resale the property brings a lesser amount, my client will of necessity look to you for the difference in damages for breach of contract.

Mr. & Mrs. David E. Cottrell  
Page 2  
July 23, 1991

All of this can be avoided by your prompt closing. I look forward to a quick resolution of this problem without the necessity of the extreme action above.

Sincerely,

A handwritten signature in cursive script, appearing to read "Archibald Wallace, III".

Archibald Wallace, III

AWIII:swb

cc: Mr. William J. Kenney, Jr.



LAW OFFICES  
SANDS, ANDERSON, MARKS & MILLER  
A PROFESSIONAL CORPORATION  
THE ROSS BUILDING  
801 EAST MAIN STREET  
POST OFFICE BOX 1998  
RICHMOND, VIRGINIA 23216-1998  
804/648-1636

ARCHIBALD WALLACE, III



TELECOPIER  
804/783-2926  
804/783-7291

Direct Dial: 804/783-7265

August 29, 1991

Edward D. Barnes, Esquire  
10101 Ironbridge Road  
Chesterfield, Virginia 23832

Re: Kenney to Cottrell  
Broad Run Subdivision

Dear Ed:

This will confirm our conversation of August 28, 1991 regarding my letter of August 26, 1991 to Mr. & Mrs. David E. Cottrell.

You advised that Mr. and Mrs. Cottrell would like to resolve the real estate purchase problem by the following compromise:

1. Mr. and Mrs. Cottrell would pay \$100,000 now to Mr. Kenney and \$47,000 when they receive the financing for the construction of their home on the lot. In the interim they will pay Mr. Kenney \$500 per month interest; OR

2. They will pay Mr. Kenney \$100,000 cash now, and they will give him a deed of trust note secured by a deed of trust on the property in the amount of \$47,000, payable in 30 days from the date of its making.

Your offer did not recite a settlement date, and I told you it would be imperative to have a closing date within the next week to ten days before I could recommend Mr. Kenney consider either of the settlement options offer. You requested that Mr. Kenney set such a date in his response, keeping in mind week ends and holidays. Your suggestion implied you did not object to an early closing date.

I also told you that Mr. Kenney has placed the property for sale once again with Ed Wood and his company, and sales efforts are ongoing. It is my opinion that Mr. Kenney is no longer contractually bound to your clients under the contract of

Edward D. Barnes, Esquire  
Page 2  
August 29, 1991

February 26, 1991. If he wishes to take your clients offer, which involves personal financing, he may, and if he wishes to accept an offer from a third party for the purchase, he may.

I have tried to contact Mr. Kenney to discuss your offer, but he is in New Jersey. I am sending him a copy of this letter. I have also apprised Ed Wood of the situation.

As soon as I hear from Mr. Kenney I will respond to your clients offer.

Sincerely,



Archibald Wallace, III

AWIII:swb

cc: William J. Kenney, Jr.



LAW OFFICES  
SANDS, ANDERSON, MARKS & MILLER  
A PROFESSIONAL CORPORATION  
THE ROSS BUILDING  
801 EAST MAIN STREET  
POST OFFICE BOX 1998  
RICHMOND, VIRGINIA 23216 - 1998  
804 / 648 - 1636



TELECOPIER  
804 / 783 - 2926  
804 / 783 - 7291

ARCHIBALD WALLACE, III

Direct Dial: 804/783-7265

October 4, 1991

Edward D. Barnes, Esquire  
Englisby, Barnes, Hennessy & Englisby  
P. O. Box 166  
Chesterfield, Virginia 23832

Re: General Systems Software to Cottrell  
Lot 2, Block A, Section III, Broad Run  
Goochland County, Virginia

Dear Ed:

This is to confirm that your client did not close on the contract he signed, or accept and close under the special arrangements that were extended. I am in receipt of the closing documents which you returned. I have advised Mr. Kenney and his company of your clients refusal to honor their contract. I have advised him to have Mr. Wood place the property on the market again for sale, and I am advised it is so up for sale. In the event the sale does not bring the same amount as the contract we had with your client, I will recommend to Mr. Kenney that he undertake legal action against your clients to recover the loss.

Sincerely,

A handwritten signature in dark ink, appearing to read "Archibald Wallace, III". The signature is fluid and cursive, with a prominent "A" and "W".

Archibald Wallace, III

AWIII:swH

cc: Mr. & Mrs. David E. Cottrell  
William J. Kenney, Jr.

**A. SETTLEMENT STATEMENT****U.S. Department of Housing  
and Urban Development****B. Type of Loan**

1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> FmHA	3. <input checked="" type="checkbox"/> Conv. Unins.	6. File Number	7. Loan Number	8. Mortgage Insurance Case No.
4. <input type="checkbox"/> VA	5. <input type="checkbox"/> Conv. Ins.		25-92		

**C. NOTE:** This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked (P.O.C.) were paid outside the closing; they are shown here for information purposes and are not included in the totals.

<b>D. Name and Address of Borrower</b> Gary H. MacDonald Terri A. MacDonald  1801 Windingridge Drive Richmond, VA 23233	<b>E. Name and Address of Seller</b> General Systems Software Corp. a Virginia corporation	<b>F. Name and Address of Lender</b> Fidelity Federal Savings Bank 2809 Emerywood Parkway Richmond, VA 23294
--	--	---

<b>G. Property Location</b>  2.763 acres Holly Lake Drive  2/A/III/Broad Run Goochland County, Virginia	<b>H. Settlement Agent</b>  Parker, Pollard & Brown, P.C. Place of Settlement  5511 Staples Mill Road Richmond, VA 23228	<b>I. Settlement Date</b>  02/06/92
--	--	---

<b>J. SUMMARY OF BORROWER'S TRANSACTION:</b>				<b>K. SUMMARY OF SELLER'S TRANSACTION:</b>			
<b>100. Gross Amount Due From Borrower</b>				<b>400. Gross Amount Due To Seller</b>			
101. Contract sales price	100,000.00	401. Contract sales price	100,000.00				
102. Personal property		402. Personal property					
103. Settlement charges to borrower (line 1400)	1,925.00	403.					
104.		404.					
105.		405.					
<b>Adjustments for items paid by seller in advance</b>		<b>Adjustments for items paid by seller in advance</b>					
106. City/town taxes to		406. City/town taxes to					
107. County taxes to		407. County taxes to					
108. Assessments to		408. Assessments to					
109.		409.					
110.		410.					
111.		411.					
112.		412.					
<b>120. GROSS AMOUNT DUE FROM BORROWER</b>		101,925.00		<b>420. GROSS AMOUNT DUE TO SELLER</b>		100,000.00	
<b>200. Amounts Paid By or In Behalf of Borrower</b>				<b>500. Reductions In Amount Due To Seller</b>			
201. Deposit or earnest money	100.00	501. Excess Deposit (see instructions)	100.00				
202. Principal amount of new loan(s)	100,000.00	502. Settlement charges to seller (line 1400)	6,155.00				
203. Existing loan(s) taken subject to		503. Existing loan(s) taken subject to					
204.		504. Payoff of first mortgage loan					
205.		505. Payoff of second mortgage loan					
206.		506. Payoff Jefferson Nat'l	19,500.72				
207.		507. Courier Payoff	8.00				
208.		508. '90/'91 real estate tax	504.77				
209.		509.					
<b>Adjustments for items unpaid by seller</b>		<b>Adjustments for items unpaid by seller</b>					
210. City/town taxes to		510. City/town taxes to					
211. County taxes 01/01 to 02/06	41.15	511. County taxes 01/01 to 02/06	41.15				
212. Assessments to		512. Assessments to					
213.		513.					
214.		514.					
215.		515.					
216.		516.					
217.		517.					



220. TOTAL PAID BY/FOR BORROWER	100,141.15	520. TOTAL REDUCTION AMOUNT DUE SELLER	26,309.64
300. Cash At Settlement For or To Borrower		600. Cash At Settlement To or From Seller	
301. Gross amount due from borrower (line 120)	101,925.00	601. Gross amount due to seller (line 420)	100,000.00
302. Less amounts paid by/for borrower (line 220)	100,141.15	602. Less reduction amount due seller(line 520)	26,309.64
303. CASH FROM BORROWER	1,783.85	603. CASH TO SELLER	73,690.36

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT  
SETTLEMENT STATEMENT

PAGE 2

L. SETTLEMENT CHARGES:		FILE NO. #: 25-92	PAID FROM BORROWER'S FUNDS AT SETTLEMENT	PAID FROM SELLER'S FUNDS AT SETTLEMENT
700. TOTAL SALES/BROKER'S COMMISSION based on price \$ 100,000.00 @ 6.00 = 6,000.00				
Division of commission (line 700) as follows:				
701. \$	6,000.00 to	Era Woody Hoog & Associates		
702. \$	to			
703. Commission paid at Settlement				6,000.00
704.				
800. ITEMS PAYABLE IN CONNECTION WITH LOAN				
801. Loan Origination Fee	%			
802. Loan Discount	%			
803. Appraisal Fee	to			
804. Credit Report	to			
805. Lender's Inspection Fee	to			
806. Mortgage Application Fee	to			
807. Assumption Fee	to			
808.				
809.				
810.				
811.				
900. ITEMS REQUIRED BY LENDER TO BE PAID IN ADVANCE				
901. Interest from	to	@ \$ /day		
902. Mortgage Insurance Premium for	to			
903. Hazard Insurance Premium for	yrs to			
904.				
905.				
1000. RESERVES DEPOSITED WITH LENDER FOR				
1001. Hazard Insurance	mo. @ \$	/mo.		
1002. Mortgage Insurance	mo. @ \$	/mo.		
1003. City Property Taxes	mo. @ \$	/mo.		
1004. County Property Taxes	mo. @ \$	/mo.		
1005. Annual Assessments	mo. @ \$	/mo.		
1006.	mo. @ \$	/mo.		
1007.	mo. @ \$	/mo.		
1008.	mo. @ \$	/mo.		
1100. TITLE CHARGES				
1101. Settlement or closing fee	to			
1102. Abstract or title search	to			
1103. Title examination	to			
1104. Title insurance binder	to			
1105. Document Preparation	to	Arch Wallace, Esq. (POC)		
1106. Notary Fees	to			
1107. Attorney's fees	to	Parker, Pollard & Brown, P.C.	875.00	
(includes above items No: )				
1108. Title Insurance	to	Chesterfield Title	622.00	
(includes above items No: )				
1109. Lender's coverage \$	---			
1110. Owner's coverage \$	---	622.00		
1111.				
1112.				
1113.				
1200. GOVERNMENT RECORDING AND TRANSFER CHARGES				
1201. Recording Fees:	Deed \$	14.00 ; Mortgage \$	14.00 ; Releases \$	55.00
1202. City/county tax/stamps:	Deed \$	50.00 ; Mortgage \$	50.00	100.00
1203. State Tax/stamps:	Deed \$	150.00 ; Mortgage \$	150.00	300.00
1204. Grantor's Tax -			26	100.00
1205.				



<b>1200. ADDITIONAL SETTLEMENT CHARGES</b>		
1301. Survey	to	
1302. Pest Inspection	to	
1303.		
1304.		
1305.		
<b>1400. TOTAL SETTLEMENT CHARGES</b> (enter on lines 103 and 502, Sections J and K)		<b>1,925.00      6,155.00</b>

I have carefully reviewed the HUD-1 Settlement Statement and to the best of my knowledge and belief, it is a true and accurate statement of all receipts and disbursements made on my account or by me in this transaction. I further certify that I have received a copy of the HUD-1 Settlement Statement.

General Systems Software Corp.

Buyer/Borrower Gary H. MacDonald

By: Seller William J. Kenney, Jr., President

Buyer/Borrower Terri A. MacDonald

Seller

The HUD-1 which I have prepared is a true and accurate account of this transaction. I have caused the funds to be disbursed in accordance with this statement.

February 6, 1992

Settlement Agent Gregory D. Foreman

Date

WARNING: It is a crime to knowingly make false statements to the United States on this or any other similar form. Penalties upon conviction can include a fine and imprisonment. For details see: Title 18 U.S. Code Section 1001 and Section 1010.

REV. HUD-1 (3/86)

RECEIVED FROM 8042623284

02.06.1992 12:03

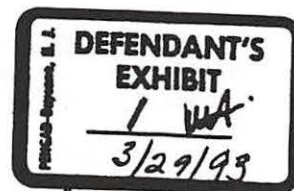
P. 3



MOORE • SPEEDSET • MCP • PATENTED 226

**EXCLUSIVE  
AUTHORIZATION  
TO SELL**

FIRM NAME THE WOOD COMPANY  
 ADDRESS 8100 THREE CHOPT RD. STE 152  
 CITY & STATE RICHMOND VA ZIP 23229



The undersigned owner hereby grants unto the above named firm as agent for and in consideration of the services to be rendered by agent, the exclusive and irrevocable right and privilege for the period of 180 days from the date of the last signature obtained on this agreement, to sell the property described herein for the price and upon the terms and conditions as set forth herein, or for such other price, terms or conditions as may be hereafter agreed upon in writing. In the event the owner, during the term hereof, agrees to sell the property described herein, and for any reason the purchase and sale transaction is not consummated, the owner agrees that the agent shall continue to have the right to sell the property and to file the property with Richmond Multiple Listing Service, Inc., (RMLS).

Owner agrees that "For Sale" signs may be placed on the property.

Property located in City/County GOOCHLAND, State of Virginia, commonly known as:

(Street Address) HOLLY LAKE DRIVE

(Legal Description) LOT 2, BROAD RUN, SECTION III

Said property to include the following items: \_\_\_\_\_

The sale price of the above mentioned property is to be \$ 175,000.00, which price includes selling compensation, and the terms and conditions of said sale are as follows:

- (a) All cash, provided that if purchaser wishes to finance said purchase, the undersigned agrees to pay and assume brokerage or placement fees incident to obtaining a loan for said purchaser providing same does not exceed 2 percent of said loan.
- (b) Possession shall be at settlement unless otherwise agreed by seller and purchaser.
- (c) Settlement date/days: AT CLOSING
- (d) \_\_\_\_\_

The undersigned owner is aware that the agent has an agreement to file the property with RMLS for the term of this agreement. It is understood and agreed that the agent will submit pertinent information concerning this listed property to RMLS, in which the agent is a member. **OWNER HEREBY CONVENANTS THAT OWNER HAS DISCLOSED TO THE AGENT THE ACTUAL PHYSICAL CONDITION OF THIS PROPERTY AND HAS MADE NO DELIBERATE MISREPRESENTATION AS TO THE CONDITION OF THE PROPERTY. ANY KNOWN DEFECTS ARE HEREBY NOTED AND WILL BE DISCLOSED.** It is further understood that the agent will timely furnish to such RMLS notice of all changes of information concerning listed property as agreed by the undersigned owner, and that upon completion of a fully executed sales agreement on listed property, the agent will notify RMLS of said sale and authorize the dissemination of sales information including selling price to the participants of said RMLS prior to closing of transaction. Owner acknowledges that the services of said RMLS have been explained.

If at any time during the term of this agreement the owner sells or otherwise transfers the property or enters into a contract to sell or transfer the property to a purchaser ready, willing and able to purchase on terms acceptable to the owner, or the owner receives an offer in writing signed by a purchaser by which such purchaser offers to purchase the property on the terms and conditions set forth herein, then the undersigned expressly agrees to pay to the agent a compensation of SIX PERCENT OF SALES PRICE. The undersigned further agrees that such compensation shall be paid even though the property may be sold or otherwise transferred by the owner with or without the assistance of the agent or any other member of RMLS. **RICHMOND MULTIPLE LISTING SERVICE DOES NOT FIX, CONTROL, RECOMMEND, SUGGEST OR MAINTAIN COMPENSATION RATES OR FEES FOR SERVICES TO BE RENDERED BY MEMBERS.**

In accordance with the Regulations of the Real Estate Board, REALTOR® hereby discloses to owner that REALTOR® and REALTOR'S® salespeople are the agents of owner in connection with marketing the property under this Agreement. As such, REALTOR® and its salespeople owe owner duties of loyalty and faithfulness. At the same time, brokers and their salespeople are required to treat all parties to a transaction fairly. Without breaching their duties to owner, REALTOR® and its salespeople may provide prospective purchasers with information about the property and may assist a prospective purchaser in preparing an offer to purchase the property. REALTOR® and its salespeople have a duty to respond accurately to a prospective purchaser's questions, to disclose to a prospective purchaser material information known about the property, and to submit to owner all offers to purchase the property.



**ALL PARTIES TO THIS AGREEMENT ACKNOWLEDGE THAT MEMBERS OF RMLS SHALL NOT DENY EQUAL PROFESSIONAL SERVICES TO ANY PERSON FOR REASONS OF RACE, RELIGION, COLOR, SEX, NATIONAL ORIGIN, ELDERLINESS, HANDICAP OR FAMILIAL STATUS.**

If the owner sells, conveys, or otherwise transfers the above property within 30 days after the expiration of this agreement to a person or persons with whom said agent or any member of RMLS has negotiated as a prospective purchaser, the compensation shall be paid pursuant to the terms herein stated, provided the owner has been notified, in writing prior to the listing expiration date, by said agent of the name of said prospective purchaser. However, the owner shall not be obligated to pay such compensation if a valid listing agreement is entered into during the term of said protection period with another licensed real estate broker and the sale, conveyance, or transfer of the property is made during the term of said protection period.

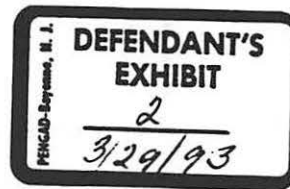
Owner ☐ requests ☐ does not request (CHECK ONE) the installation and use of a lockbox on said property. Owner is aware and understands that a lockbox is a means by which persons who have authorized access to said lockbox keys may gain entrance for the purpose of showing said property to prospective purchasers. Owner hereby jointly and severally releases and forever discharges agent and all other persons who have authorized access to said lockbox keys from all liability, obligations, causes of action, claims and demands whatsoever which the undersigned may have by virtue of the installation and use of such lockbox. Seller agrees to notify tenant, if any, of intended use of lockbox.

(Owner Initials)

This agreement shall be legally binding upon the undersigned, their heirs, personal representatives or assigns. We acknowledge that we have each received a copy hereof.

FIRM: <u>The Wood Company</u>	<u>William J. Kimm</u>	<u>11/16/90</u>
	Owner	Date
Accepted by: <u>Edwin Wood</u>		
	Owner	Date
Public ID #: <u>Wood01</u>		
	Owner	Date
RENEWAL: <input type="checkbox"/> CHECK		
	Owner	Date

PINK - OWNER'S COPY



ARTICLES OF INCORPORATION  
OF  
GENERAL SYSTEMS SOFTWARE CORP.

I, William J. Kenney, Jr., hereby associate to form a stock corporation under the provisions of Chapter 1 of Title 13.1 of the 1950 Code of Virginia, as amended, and to that end set forth the following:

ARTICLE I: NAME.

The name of the corporation shall be General Systems Software Corp.

ARTICLE II: PURPOSES.

The purposes for which the corporation is organized is that of providing data processing programming services and related needs to small and medium-sized businesses. In addition, the corporation shall have the authority to engage in the transaction of any and all lawful business not required to be specifically stated in the Articles of Incorporation.

ARTICLE III: CAPITALIZATION.

The aggregate number of shares which the corporation shall have the authority to issue and the par value per share are as follows:

<u>Class</u>	<u>Number of Shares</u>	<u>Par Value Per Share</u>
Common	4,000	\$10.00

ARTICLE IV: REGISTERED OFFICE AND REGISTERED AGENT.

The post office address of the initial registered office, located in the City of Richmond, Virginia, is 700 East Main Street,



Suite 1304, Richmond, Virginia, 23219-2689. The registered agent is John W. Anderson, who is a resident of Virginia and a member of the Virginia State Bar, and whose business address is the same as the registered office of the corporation.

ARTICLE V: DIRECTORS.

The number of directors constituting the initial board of directors is two (2), all shares of stock of the corporation being owned by less than three (3) persons, and the names and addresses of the persons who are to serve as the initial directors are:

<u>Name</u>	<u>Address</u>
William J. Kenney, Jr.	1577 Constitution Drive Richmond, Virginia. 23233
Pamela A. Kenney	1577 Constitution Drive Richmond, Virginia. 23233

ARTICLE VI: DURATION.

The corporation shall exist perpetually.

THESE Articles of Incorporation are signed and executed at Richmond, Virginia, on this 25 day of Feb, 1983.

  
\_\_\_\_\_  
William J. Kenney, Jr.

SCC9A

5 5 1 5 5 5 5 3

240063

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

RICHMOND, March 28, 1983

The accompanying articles having been delivered to the State Corporation Commission on behalf of

GENERAL SYSTEMS SOFTWARE CORP.

and the Commission having found that the articles comply with the requirements of law and that all required fees have been paid, it is

ORDERED that this CERTIFICATE OF INCORPORATION

be issued, and that this order, together with the articles, be admitted to record in the office of the Commission; and that the corporation have the authority conferred on it by law in accordance with the articles, subject to the conditions and restrictions imposed by law.

STATE CORPORATION COMMISSION

By Thomas P. Harwood, Jr.  
Commissioner



# Commonwealth of Virginia



## State Corporation Commission

I Certify the Following from the Records of the Commission:

the foregoing is a true copy of all documents constituting the charter of GENERAL SYSTEMS SOFTWARE CORP..

Nothing more is hereby certified.

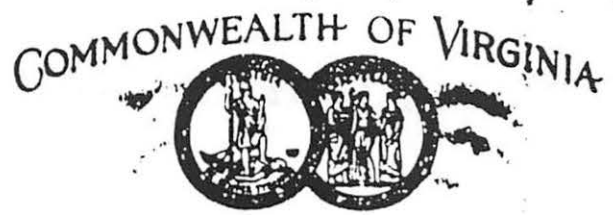


Signed and Sealed at Richmond  
on this Date: March 23, 1993

*William J. Bridge*

William J. Bridge, Clerk of the Commission

DEFENDANT'S  
EXHIBIT  
3  
9/27/93  
FMCAD-Boysen, N. J.



THOMAS P. HARWOOD, JR.  
CHAIRMAN  
PRESTON C. SHANNON  
COMMISSIONER  
THEODORE A. MORRISON, JR.  
COMMISSIONER

GEORGE W. BRYANT, JR.  
CLERK OF THE COMMISSION  
BOX 1197  
RICHMOND, VIRGINIA 23209  
(804) 786-3733

STATE CORPORATION COMMISSION

NOTICE OF TERMINATION OF CORPORATE EXISTENCE

SEPTEMBER 11, 1989

ROBERT F. PANFELL  
CLOVERLEAF WEST OFFICE PARK  
211 RUTHERS RD., SUITE 101  
RICHMOND, VA 23235

RE: GENERAL SYSTEMS SOFTWARE CORP.  
ID: 0240063-8

In early June of this year, the State Corporation Commission mailed the above-named corporation a notice of impending termination of corporate existence. According to the records of the Commission, the corporation failed to comply by September 1 with the statutory requirements referred to in the notice. Consequently, on September 1 of this year, the corporation's existence was terminated by operation of law.

Among other things, this termination means that the corporation can no longer lawfully conduct business and its directors are required to liquidate its business and affairs.

As there might be other consequences resulting from the termination, it is suggested that the corporation, its officers and its directors seek the advice of counsel.

If the corporation wishes to reinstate, it may do so by complying with the applicable statutes. For more information concerning reinstatement, write to:

State Corporation Commission  
Corporate Operations Division  
P. O. Box 1197  
Richmond, VA 23209  
(804) 786-3733



# Commonwealth of Virginia



## State Corporation Commission

I Certify the Following from the Records of the Commission:

the foregoing is a true copy of the notice of termination issued for GENERAL SYSTEMS SOFTWARE CORP. on September 01, 1989.

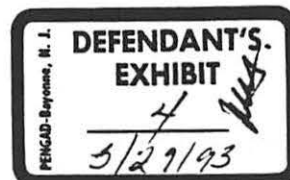
Nothing more is hereby certified.



Signed and Sealed at Richmond  
on this Date: March 23, 1993

*William J. Bridge*

William J. Bridge, Clerk of the Commission

REAL ESTATE CONTRACT

THIS AGREEMENT between GARY H. MACDONALD, (Buyer) and WILLIAM H. KENNEY, JR. and PAMELA KENNEY, (Sellers), provides as follows:

1. Buyer hereby agrees to purchase and Sellers hereby agree to sell that certain parcel of real estate located in the Goochland County, Virginia containing approximately 2.763 acres of land located on Holly Lake Drive and known as Lot 2, Block A, Section III, Broad Run, for the price of \$100,000.00, as shown on a plat attached, payable in cash at settlement provided the title is marketable, free from valid objections and insurable by a recognized title insurance company at regular rates.

2. Buyer shall have the right to inspect the real estate and all governmental records to determine its suitability for residential usage, as in his sole discretion he deems appropriate. In the event Buyer determines that the land is not acceptable for his usage as a residence and notifies Sellers in writing by January 21, 1992 that he will not close on the sale of the land, this contract shall be null and void and Buyer shall have no obligation to settle pursuant to the terms hereof. If no notice is given pursuant to this paragraph the Buyer will be bound to the other terms of this agreement.

3. Buyer hereby makes a deposit of \$100.00 by check as earnest money to be held by Sellers, which is to be applied on the purchase price, or refunded upon demand if this offer is not



accepted, or if the Sellers are unable to deliver marketable and insurable title, or if the terms and conditions above cannot be fulfilled without fault on Buyer's part.

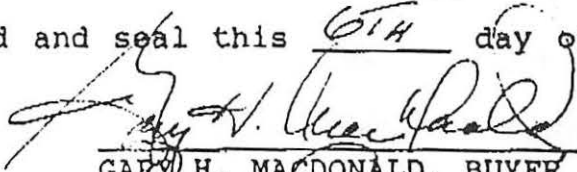
4. Settlement shall be made at the office of Parker, Pollard & Brown at 5511 Staples Mill Road, Richmond, Virginia, on or before February 6, 1992 allowing a reasonable time to correct any objections reported by the title examiner. The conveyance shall be a marketable title and be made by a General Warranty Deed with usual English Covenants. Possession shall be delivered at settlement.

5. Taxes, interest, insurance and rent, if any, are to be prorated as of the date of settlement. The risk of loss or damage to said property by fire or otherwise is assumed by Sellers until settlement is made.

6. All parties agree that no real estate broker or agent is entitled to a commission hereunder and Sellers and Buyer reciprocally agree to indemnify the other from the payment of same.

7. All notices shall be made in writing to the Sellers at 9411 AVALON DRIVE, RICHMOND, VA 23229, and to the Buyer at 1801 Windingridge Drive, Richmond, Virginia, 23233.


Witness my hand and seal this 6TH day of January, 1992.

  
GARY H. MACDONALD, BUYER

(SEAL)

  
WILLIAM J. KENNEY, JR., SELLER

(SEAL)

  
PAMELA KENNEY, SELLER

(SEAL)

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF GOOCHLAND

GENERAL SYSTEMS SOFTWARE CORP.,

Plaintiff,

v.

LAW NO. L92-60

DAVID E. COTTRELL

and

CHRISTINE G. COTTRELL,

Defendants.

DEFENDANTS' MOTION AND MEMORANDUM TO DISMISS

Comes now the defendants, David E. Cottrell and Christine G. Cottrell, by counsel, and sets forth the following as and for their Motion and Memorandum to Dismiss:

INTRODUCTION

This case was heard in the Goochland County Circuit Court without a jury on March 29, 1993. On a joint motion to transfer this case to the chancery side of the Court, the Court granted the Motion and transferred the case to chancery and it was heard by the Court. Counsel made the stipulation that all documents recorded in the clerk's office would be deemed admissible in this case. This stipulation was accepted by the Court. After the evidence was presented, the Court gave each party the opportunity to submit written arguments on the following issues:

1. Whether the real estate contract between the parties is enforceable when the plaintiff (General Systems Software, Corp.) was neither in existence at the time the contract was executed nor at the time the suit was filed?

2. Whether the purported contract was unconscionable?





### STATEMENT OF FACTS

The plaintiff, General Systems Software, Corp., was originally incorporated on February 25, 1983. William Kenney, Jr. was the President of this company and initially was the sole stockholder. Later, Mr. Kenney's wife, Pamela Kenney, became a 40% stockholder. The company was in the business of selling computer software to customers in central Virginia.

In 1986, the corporation purchased 2.7 acres of undeveloped land for \$58,000.00. This property is known as Lot 2, Section 3, Broadrun Subdivision, Goochland County, 323 Hollylake Drive, Manakin-Sabot, Virginia. Mr. Kenney testified that the land was purchased as an investment. By deed dated July 9, 1987, this property was transferred from General Systems Software, Corp. to William and Pamela Kenney. Please see plaintiff's Exhibit No. 3. Then on July 13, 1987, a Deed of Recision and Cancellation was signed by Mr. and Mrs. Kenney purportedly transferring the property back to the corporation. Please see plaintiff's Exhibit No. 4. This purported deed, however, was not recorded by Mr. Kenney at that time. Mr. Kenney testified that he had not reported any of the transactions of the transfer of the land to the taxing authorities and paid no taxes on these transfers.

On September 1, 1989, the corporate existence of General Systems Software, Corp. was terminated by operation of law for failure to file the Annual Report and pay the annual franchise tax for two successive years. Please see plaintiff's Exhibit No. 2, which is the Notice of Termination letter from the State

Corporation Commission dated September 11, 1989. Mr. Kenney admitted in his testimony that he knew that he received the termination letter. Mr. Kenney testified that at about that time, summer of 1989, he had discussed with his corporate counsel that he wanted to terminate the corporation. Based on those discussions, he testified that he would let the corporation dissolve itself. Mr. Kenney never explained why he did not pay the annual taxes or file the Annual Report for two years previous to 1989. At this point, the corporation was dissolved and had disposed of all of its property.

In the fall of 1990, Mr. Kenney approached a real estate broker, Ed Wood, regarding marketing the unimproved property in the Broadrun Subdivision. The property was listed for sale on November 16, 1990 for \$175,000.00. Mr. Kenney testified that there was no formal appraisal used in arriving at the figure of \$175,000.00. Ed Wood testified that he compared the lot to other lots that were listed in the area. Mr. Wood testified to the following lots and prices and stated that these were listed prices (not sales):

1.	1 acre	\$135,000.00
2.	1.75 acres	\$175,000.00
3.	2.32 acres	\$185,000.00
4.	5 acres	\$250,000.00
5.	4 acres	\$175,000.00
6.	2+ acres	\$200,000.00
7.	2.1 acres	\$185,000.00
8.	3 acres	\$183,000.00

Mr. Wood testified that these listings were for December, 1990 and January, 1991. On direct examination, Mr. Wood did not testify as to whether these properties had been sold. Accordingly, the plaintiff, in its brief to the Court, is incorrect in stating on



page 9 of the brief that "he listed the following sales in that area in the 1991 time frame." In fact, when questioned on cross-examination, on whether the properties he had listed had sold, he answered that one of the lots had sold for \$174,000.00 in 1992 and that he had not sold any other lots in the Broadrun Subdivision except for a property exchange that he did with a business partner. On further questioning, he stated that he had misunderstood the question and he changed his answer and said that there had been other sales of these properties. Significantly, he did not state which sales were made and for how much the lots sold for. Also, a correction in the plaintiff's brief on page 10 needs to be made. On the third line down from the top of page 10, the plaintiff states that "Mr. Wood's opinion was that the price of \$147,500.00 was a fair and acceptable price considering market conditions in February, 1991." First, Mr. Wood never testified that the \$147,500.00 was a fair and acceptable price. Secondly, Mr. Wood is admittedly not a real estate appraiser. Mr. Wood did testify, after having been asked some voir dire questions regarding his qualifications, that there was a recession in the real estate market in the fall of 1991. The Court asked Mr. Wood if there was a reduction in the real estate market in the Broadrun area during that time period and what was the percentage of reduction. Mr. Wood said that he would not be able to give a percentage of any reduction.

The Listing Agreement, which is defendant's Exhibit No. 1, dated November 16, 1990, was signed in the name of Mr. Kenney, not

the corporation. Mr. Kenney signed the listing agreement although at that time the property was titled in the corporation's name. However, also at that time, the corporation did not exist. Mr. Wood was asked the following question:

Q: As a real estate broker, would you allow someone to list their property for sale if they did not own the property?

A: I would not do that.

Mr. Wood further stated that Mr. Kenney represented to him that he and his wife owned the property. He further testified that it was his understanding that Mr. and Mrs. Kenney were the owners of the property.

On February 26, 1991, the parties entered into a Contract to Purchase, which is the subject of this suit. Mr. Wood testified that Mr. Kenney's name was placed on the front of the contract as the seller. Mr. Wood further testified that Mr. and Mrs. Cottrell signed the second page of the contract first and, accordingly, when Mr. and Mrs. Cottrell signed the contract there was no reference to a corporation on the document. Later, Mr. Kenney signed the document on the second page for and on behalf of the corporation, but the name of the seller on the contract was not changed. The contract called for a closing date of July 1, 1991.

Mr. Kenney was questioned regarding why he used his own name instead of the corporate name on the listing agreement and on the front of the Contract to Purchase. He stated that he did not think it made any difference. He further testified that Mr. Wood had advised him of how it should read because Mr. Wood had searched the

courthouse records and determined how the property was titled. This was contrary to Mr. Wood's testimony. Mr. Wood testified that he received the information from Mr. Kenney. Mr. Wood testified that he would only put the name of the current owner on a listing agreement and a contract and that Mr. Kenney told him that he and his wife were the current owners.

July 1, 1991 came and the contract was not closed. Thereafter, Mr. Kenney put the property back on the market for sale. On January 6, 1992, a real estate contract was signed between Mr. and Mrs. Kenney and Mr. and Mrs. McDonald for the sale of the property in the amount of \$100,000.00. Again, Mr. Kenney signed the real estate contract in his name although by this time he had put the title to the land back in the name of the corporation. Mr. Kenney paid no tax on this transfer. The deed transferring the property from General Systems Software, Corp. to Mr. and Mrs. McDonald was recorded February 2, 1992 at a sales price of \$100,000.00.

On the issue of the fairness of the contract, the defendants presented P.E. Turner, a certified appraiser who has been in the business of appraising properties for 21 years. Mr. Turner's appraisal of the property was admitted into evidence as defendant's Exhibit No. 5. Mr. Turner testified to a fair market value on the property of \$100,000.00 as of February, 1993. He further testified that due to market conditions, the value was the same for this property in February of 1991. He testified that values have basically remained the same in the Broadrun Subdivision for over 2-



3 years. Contrary to the allegations made in the plaintiff's brief, Mr. Turner actually walked on the subject lot and described the lot to the Court. This was done on cross-examination. Mr. Turner's testimony and evidence regarding the value of the lot was basically uncontroverted. Mr. Wood, who is not an appraiser, testified to certain listings in the area. Mr. Wood, however, did not testify or provide any values of sales in the February, 1991 time frame. Mr. Wood only testified to a recent sale in 1992. Mr. Wood did not testify to how that sale and how that particular lot compared to the lot in question. In contrast, Mr. Turner provided comparables in the appraisal report which were on properties which had sold, except for number 4, which was a contract for sale.

The plaintiff corporation was dissolved and wrapped up as of September 1, 1989 and did not reinstate until 8:00 a.m. on March 29, 1993.

#### ARGUMENT

I. THE COURT MUST DISMISS THE PLAINTIFF'S CLAIM FOR BREACH OF CONTRACT AS THE PLAINTIFF DID NOT EXIST AT THE TIME THE CONTRACT WAS MADE; WAS NOT AUTHORIZED TO CONTRACT OR FILE SUIT BY STATUTE AND HAS COME IN TO THIS COURT WITH UNCLEAN HANDS.

The issue of whether a terminated corporation can contract in Virginia and then later file suit on that contract is an issue of first impression in Virginia. There have been recent cases such as Harris v. T.I. Inc., 243 Va. 63 (1992) and McLean Bank v. Nelson, 232 Va. 420 (1986), which have dealt with the issue of whether the corporation or the directors are liable for claims made against the corporation or director during a time when the corporation was

dissolved. The plaintiff has not cited any case dealing with this issue and defendant has not found a Virginia case on point. It is clear, however, that the public policy interest and the interest of the Commonwealth is strongly opposed to the continuing of the normal business affairs of a dissolved corporation. The Court in McLean Bank v. Nelson clearly stated this at page 428:

"Indeed, the criminal provision in our statutory's scheme is a clear manifestation of the Commonwealth's disapproval of continuing the normal business affairs of a dissolved corporation. We think it incongruous to suggest that conducting the affairs of a dissolved corporation can lead to criminal punishment but not personal liability."

The Court in McLean Bank v. Nelson was referring to Section 13.1-613 of the Code of Virginia which reads as follows:

This shall be unlawful for any person to transact business in this Commonwealth as a corporation or to offer or advertise to transact business in this Commonwealth as a corporation unless the alleged corporation is either a domestic corporation or a foreign corporation authorized to transact business in the Commonwealth. Any person who violates this section shall be guilty of a Class 1 misdemeanor.

The Virginia courts have clearly held that "a dissolved domestic corporation is no corporation at all". McLean Bank v. Nelson, 232 Va. at 426; see also Moore v. Occupational Safety and Health review Com'n, 591 F.2d 991 (4th Cir. 1979). In the case at bar, the plaintiff was not a corporation at the time it entered into the contract. This was clearly in violation of Section 13.1-613 of the Code of Virginia and is against the sound public policy of Virginia.

Further, Section 13.1-755 of the Code of Virginia provides as follows:

The termination of corporate existence shall not take away or impair any remedy available to or against the corporation, its directors, officers, or shareholders, for any right or claim existing or any liability incurred, prior to such termination. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors, and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim (emphasis added).

Again, a strict reading of this statute disallows any claim being made by the plaintiff in this case. The corporation was terminated and did not exist after September 1, 1989. Any possible claim made by the plaintiff would have first occurred July 1, 1991.

Under the common law, once a corporation's existence is terminated, its capacity to sue, or be sued, likewise is terminated, irrespective of when the cause of action arose. Shepherd v. Box Company, 154 Va. 421, 425, 153 S.E. 649, 650 (1930). Code Section 13.1-755, however, partially changed the common law rule. The statute, being in derogation of the common law, must be strictly construed. Hyman v. Glover, 232 Va. 140, 143, 348 S.E. 2d 269, 271 (1986). This rule of strict construction applies even if the statute is remedial. O'Connor v. Smith, 188 Va. 214, 222, 49 S.E.2d 310, 313 (1948).

In Harris v. T.I. Inc., 243 Va. 63 (1992), the Court considered whether the estate of a decedent could maintain an action for wrongful death against a corporation when the wrongful



death occurred subsequent to the corporation's termination. At page 68, the Court held the following:

Turning our attention to Code Section 13.1-755, we note that only a "claim existing" or a "liability incurred" will survive the termination of a corporation's existence. These phrases are clear. Giving them their plain meaning and construing Code Section 13.1-755 strictly, we conclude that a claim against a corporation must have existed or the liability of a corporation must have been incurred prior to the date of the corporation's termination in order for the claim or liability to survive the termination.

The Court affirmed the trial courts holding in denying the wrongful death action against the terminated corporation on the basis that the cause of action did not arise until more than two years after the corporation had ceased to exist.

In the present case, the Court must also strictly construe 13.1-755 of the Code of Virginia, as it is in derogation of the common law rule of law. A strict construction of that section of the Code clearly disallows any claim by the plaintiff in this case. Further, it is clear there is a strong public policy in Virginia against a dissolved corporation continuing to do business as the General Assembly has made it a misdemeanor.

The plaintiff contends that the reinstatement of the corporation cures all interim acts. The plaintiff relies on the case of In Re: Wine Farms, Inc., 94B.R. 410 (Bankruptcy W.D. Va. (1988)). However, that case is easily distinguished from the case at hand. That case involved the filing of a bankruptcy petition during the time period when the corporation was dissolved. The Court stated that Chapter 11 of the Bankruptcy Code is available to

a debtor for winding up corporate affairs and liquidating in an orderly fashion. Thus, Chapter 11 can be used to wind up the corporate affairs of a corporation which has been dissolved by operation of state law. In the case at hand, the plaintiff was not winding down the corporation, but was transacting business with another member of the public. Mr. Kenney was transacting business in the name of the corporation, but never advised anyone involved in the transaction, including his realtor, that a corporate name was involved. In fact, Mr. Kenney had nothing to wind down. He testified that he had sold the computer equipment previously and had transferred the real estate to himself and his wife. Mr. Kenney put the real estate back into the corporation's name for unreported reasons. It is asserted that the property was placed back into the corporate name by cancellation deed to avoid paying a capital gains tax.

The plaintiff also contends that the corporation was winding down and, irrespective of whether the corporation ever reinstated, the corporation could contract and sue to wrap up its affairs. This is not the law in Virginia. The plaintiff relies on a law review article, "Dissolution, Forfeiture, and Liquidation of Virginia Corporations", by Joel D. Gusky, 12 U. Rich. L. Rev., 333, 1978 for this proposition. Although it is clear that time is no longer a factor in the corporation winding up its affairs, it is clear that a dissolved corporation can only sue and be sued for acts committed or debt incurred prior to the termination date of the corporation. Nowhere in that article does it state otherwise.

In other words, under the statute, a corporation could sue on a corporate debt incurred prior to dissolution ten years after the date of termination. The corporation, however, could not sue on a debt or on a purported corporate transaction one year after the termination of the corporation if the transaction occurred after termination. Any other interpretation or application of the statutes would be diametrically opposed to Sections 13.1-613 and 13.1-755 and render them meaningless.

The law in Virginia is clear as set forth in McLean Bank and Harris, that one cannot sue a corporation for a claim that arose subsequent to the termination of that corporation. Likewise, it is also the case that a corporation cannot sue and enforce a contract for a claim that existed subsequent to the termination of the corporation. In McLean Bank, the Court stated as follows:

As the bank argues, if a group of individuals have not done the things necessary to secure or retain de jure corporate status, then they will not have corporate protection. They will be exposed to personal liability.

Similarly, because Mr. Kenney failed to retain the corporate status of the plaintiff, he should not be allowed to transact business in the Commonwealth of Virginia, and should further not be allowed to file suit on a contract which occurred after the termination of the corporation.

Further, this matter having been transferred to the Chancery side of the Court, the plaintiff must come to the Court with clean hands. In this case, the plaintiff has violated Section 13.1-613 of the Code of Virginia, which is a misdemeanor. Further, the



plaintiff's conduct in placing his name and his wife's name on listing agreements and contracts, and then withholding the recording of a deed, indicate and attempt to manipulate his own liability or worse, avoid taxes. Mr. Kenney very well knew that in order for him to contract as a corporation, he had to be in good standing with the State Corporation Commission. He testified that he recently had the corporation reinstated for the purposes of entering into a contract. Accordingly, the plaintiff's claim should be barred based on the unclean hands doctrine.

Finally, there was no mutuality of assent in this matter and, accordingly, it cannot be said that there was ever a contract to enforce. Mutual assent by the parties to the terms of a contract is crucial to the contracts validity. See Valjar, Inc. v. Maritime Terminals, 220 Va 1015, 265 S.E.2d 734 (1980); Chittum, Sheriff v. Potter, 216 Va. 463, 219 S.E.2d 859 (1975). In this case, Mr. and Mrs. Cottrell thought they were contracting with Mr. Kenney. His name was on the listing agreement and on the front of the contract. However, in fact, they were contracting with an entity that did not exist. There was no mutuality of assent, no meeting of the minds and accordingly this case must be dismissed.

## II. THE PURPORTED CONTRACT WAS UNCONSCIONABLE AND, ACCORDINGLY, UNENFORCEABLE IN EQUITY.

It is clear that a Court sitting in equity has the jurisdiction to avoid a contract on the ground that it is an unconscionable bargain. An unconscionable bargain has been defined to be "one that no man in his senses and not under delusion would

make, on the one hand, and as no fair man would accept, on the other." Smyth Bros., et al. v. Beresford, 128 Va. 137, 104 S.E. 371 (1920).

In the case at hand, a contract was signed for 150 percent of the true value of the bargain. Mr. T. E. Turner's testimony in this regard was clear. The property in question was purchased in 1986 for \$58,000.00. Mr. Turner testified that, at the time the contract was made in February, 1991, the property was worth no more than \$100,000.00. While Mr. Wood testified regarding the real estate market and the recession that took place, Mr. Wood did not present any evidence to establish that the property has ever been worth more than \$100,000.00.

In this case, the plaintiff was able to get the defendants to sign a contract to pay \$147,500.00 for a piece of property that had a fair market value of \$100,000.00. When Mr. and Mrs. Cottrell did not perform, the plaintiff then sold the property for its fair market value of \$100,000.00 shortly thereafter. Accordingly, the plaintiff has now received the value of the property. The plaintiff, nevertheless, is asking the Court to award it over and above what the property was worth.

In the domestic case of Derby v. Derby, 8 Va. App. 19, 378 S.E.2d 74 (1989), the Court, in considering a property settlement agreement, held that certain bargains may be unconscionable when the value exchanged is unequal and when there are other attending circumstances to the contract which makes it inequitable. In Derby, the Court held that the agreement was unconscionable. In

the case at hand, the agreement clearly was unequal in the amount of values to be exchanged. The plaintiff was asking \$147,500.00 for a property worth \$100,000.00. The plaintiff's conduct has been inequitable in that the plaintiff failed to represent its true identity; failed to represent that the corporation did not truly exist; and placed different names on legal documents, whereby leaving the plaintiff an option of declaring the contract or agreements unenforceable.

The defendants respectfully move the Court to find this agreement unconscionable and, in equity, refuse to enforce it.

#### CONCLUSION

The defendants move this Court to enter judgment in their favor denying the plaintiff's breach of contract claim for the following reasons:

The plaintiff does not have the authority under statutory law in Virginia to contract or transact business at a time when the corporation is not in existence and, accordingly, the contract is unenforceable.

Secondly, enforcement of a transaction which took place while a corporation was in dissolution, is clearly against the sound public policy in Virginia.

Thirdly, the plaintiff comes into this Court with unclean hands, and the relief requested should be denied.

Fourthly, there was no mutuality of assent between the parties in this case since the plaintiff never existed.



Finally, the claim by the plaintiff should be denied based on the parties having entered into an unconscionable bargain.

DAVID E. COTTRELL  
and  
CHRISTINE G. COTTRELL

By: *Daniel M. Koliadko, Jr.*  
Counsel

Edward D. Barnes (VSB #12288)  
Daniel M. Koliadko, Jr. (VSB #30033)  
Edward D. Barnes & Associates, P.C.  
P. O. Box 104  
10101 Iron Bridge Road  
Chesterfield, VA 23832-0104  
(804) 748-5897  
(804) 751-0918 (telecopier)

CERTIFICATE

I hereby certify that on this 26 day of April, 1993, I mailed a true copy of the foregoing Defendants' Motion and Memorandum to Dismiss to Archibald Wallace, III, Esquire, Sands, Anderson, Marks & Miller, P. O. Box 1998, Richmond, VA 23216-1998.

*Daniel M. Koliadko, Jr.*  
Daniel M. Koliadko, Jr.

**VIRGINIA:**

**IN THE CIRCUIT COURT OF THE COUNTY OF GOOCHLAND**

**GENERAL SYSTEMS SOFTWARE  
CORP.,**

**Plaintiff,**

**v.**

**Case No. L92-60**

**DAVID E. COTTRELL and  
CHRISTINE G. COTTRELL,**

**Defendants.**



**PLAINTIFF'S REPLY TO DEFENDANTS'  
MOTION AND MEMORANDUM TO DISMISS**

The plaintiff, General Systems Corp. ("General Systems"), by counsel, files its reply to the Motion and Memorandum to Dismiss ("Memorandum") filed on behalf of defendants David E. and Christine G. Cottrell (the "Cottrells"). For the reasons specified below, as well as those set forth in its letter brief of April 12, 1993, General Systems respectfully submits it was able and in fact entitled to execute the Contract of Purchase, and that the sales price, negotiated at arms length between the parties, was conscionable. Accordingly, General Systems requests the entry of the an order denying the Cottrells' Motion to Dismiss and awarding judgment in its favor.

**ANALYSIS**

General Systems will not repeat its factual and legal argument as set forth in its letter of April 12, 1993 as it incorporates by reference those arguments as if specifically set forth in this reply. Rather, General Systems responds to the legal conclusions urged by the defendants in their Memorandum.

A. General Systems Was Capable of Executing and Entitled to Execute the Contract of Purchase

The Cottrells contend General Systems' Motion for Judgment ought to be dismissed because Virginia's public policy is diametrically opposed to corporations which continue their normal business affairs after dissolution. First, they argue Virginia Code § 13.1-755 disallows General Systems' claim because it was not a corporation at the time the contract was executed. They cite a number of cases, distinguishable on their face, and urge the Court to construe Virginia Code § 13.1-755 (the survival of remedy provision) in such a way as to defeat the very purpose for which the Code's dissolution provisions were enacted. Second, the Cottrells, without supporting fact or legal justification, boldly accuse General Systems of committing a misdemeanor by arguing it has continued to transact business in the Commonwealth of Virginia as a dissolved corporation in violation of Virginia Code § 13.1-613. Therefore, they contend, General Systems comes to this Court with unclean hands and ought to be denied the relief to which it is clearly entitled under the law.

The defendants' position is wholly without merit. As a preliminary observation, their argument basically asks this Court to find that the provisions of Title 13.1 of the Virginia Code operate to forbid the very practices which they were enacted to facilitate. They argue General Systems could not enter a contract to sell property because it was as a dissolved or terminated corporation notwithstanding the fact that Virginia Code §§ 13.1-745(A) and 13.1-752 expressly authorize such activity (1) when a corporation is dissolved and (2) when a corporation is automatically terminated, respectively. Indeed, the antithesis of defendants' argument has already been expressly rejected by the Supreme Court of Virginia in *McLean Bank v. Nelson*, 232 Va. 420, (1986). In *McLean Bank*, the Court rejected a corporate



officer's argument that personal liability could not be imposed upon reinstatement of a corporation's existence noting that "[i]t is inconceivable that a statute could operate in such a way as to permit the very thing it expressly forbids." *Id.* at 428.

The defendants argue that Virginia Code § 13.1-755, the survival of remedy provision, "clearly disallows any claim by [General Systems] in this case." Memorandum at 10. In support of their argument, defendants urge the Court to strictly construe Virginia Code § 13.1-755 as it is a statutory provision in derogation of the common law. However, the defendants fail to recognize that as a remedial measure, the survival of remedy and the dissolution provisions are entitled to a liberal construction to effectuate their purpose. *United States v. Village Corp.*, 298 F.2d 816, 819 (4th Cir. 1962). Indeed, the liberal construction approach was adopted by the *Village Corp.* Court after reviewing the recommendations prepared by the Virginia Code Commission in conjunction with the drafting of Title 13.1. Thus, the provisions of § 13.1-755 ought to be read in conjunction with the rest of Title 13.1 and liberally construed so as to not defeat the purposes for which the dissolution provisions were enacted.

As a practical matter, however, it makes no difference whether a strict construction or a liberal construction approach is applied when reading § 13.1-755. In either case, the Cottrells are clearly incorrect when they assert that the provision "clearly disallows any claim by the plaintiff in this case." Memorandum at 10. A careful reading of the provision reveals that the General Assembly merely intended to reserve all available remedies to enforce rights or claims existing prior to termination of corporate existence to ensure that the remnants of the common law do not operate to impair those rights. It does not address in

any manner whatsoever, either by granting or by withdrawing, the availability of any remedy to enforce a right or a claim arising after termination. It is an enabling, not a disabling statute. Indeed, § 13.1-755 need not address any rights arising after termination as those are addressed elsewhere in the title.

General Systems was both capable of entering and was entitled to enter a contract to sell its real property as either a dissolved corporation or as a corporation whose existence had been terminated. To paraphrase the provisions of Virginia Code § 13.1-745(A), a dissolved corporation is expressly authorized to wind up and liquidate its business and affairs by collecting its assets, disposing of its properties, discharging its liabilities, distributing its remaining property and doing every other act necessary to wind up and liquidate its business and affairs. Va. Code § 13.1-745(A), as amended. Similarly, a corporation whose existence is automatically terminated is expressly authorized by Virginia Code § 13.1-752(A) to engage in such activity. Specifically, when a corporation's existence is automatically terminated, § 13.1-752(A) provides, in pertinent part, that:

[The corporate] properties and affairs shall pass automatically to its directors as trustees in liquidation. Thereupon, the trustees shall proceed to collect the assets of the corporation; sell, convey and dispose of such of its properties as are not to be distributed in kind to its shareholders; pay, satisfy and discharge its liabilities and obligations; and do all other acts required to liquidate its business and affairs.

Va. Code § 13.1-752(A), as amended (emphasis provided). Clearly, General Systems, both as a terminated corporation under the provisions of Virginia Code § 13.1-752 and as a dissolved corporation under the provisions of Virginia Code § 13.1-745(A), was capable of contracting and in fact entitled to contract to sell its real property. To construe Virginia

Code § 13.1-755 (the survival of remedy provision) in the manner in which the defendants suggest would clearly defeat the purposes of Virginia Code §§ 13.1-745(A) and 13.1-752. General Systems respectfully submits that the liberal construction to which the *Village Corp.* Court referred would effectuate the remedial measures of the entire title.

Defendants also suggest by implication that General Systems was not capable of filing suit because it was a dissolved corporation both at the time the contract was entered and at the time it filed suit. They also argue in no uncertain terms that General Systems' reliance on the reinstatement provisions of Virginia Code § 13.1-754 are insufficient to cure or resurrect General Systems corporate status such that it was capable of entering a contract and suing to remedy the Cottrells' breach of that contract.

The defendants fail to note that § 13.1-745(B)(5) expressly provides that the "[d]issolution of a corporation does not . . . prevent [t]he commencement of a proceeding by or against the corporation in its corporate name." Va. Code § 13.1-745(B)(5), as amended. In enacting this provision, the General Assembly imposed no limitations which would preclude General Systems' suit. Indeed, it would be inconceivable that the legislature would attempt to do so. Virginia Code § 13.1-752(A) specifically empowers its directors to enforce the corporate obligations as trustees in liquidation. General Systems has in fact commenced a proceeding to recover on a claim which arose by virtue of the Cottrells' breach of their agreement to buy real property to liquidate the assets. The mere fact that it was in dissolution or was automatically terminated is irrelevant as both §§ 13.1-745(A) and 13.1-752(A) specifically authorize dissolved and automatically terminated corporations to do all other acts required to liquidate its business and affairs.



The defendants also fail to recognize that Virginia Code § 13.1-754 specifically authorizes a corporation whose existence has been terminated to be reinstated upon proper application. Once accepted, the Commission is required to enter an order of reinstatement, at which time "the corporate existence shall be deemed to have continued from the date of termination of corporate existence." Va. Code § 13.1-754, as amended (emphasis added). In short, this section provides that, once reinstated, a corporation's existence is retroactively reconferred and since that existence "shall be deemed to have continued from the date of termination", all acts that the corporation undertakes are deemed to be acts of the corporation. *In re Wine Farms, Inc.*, 94 Bankr. 410 (Bankr. W.D. Va. 1988).

Of particular interest is the fact that the General Assembly chose to include only one proviso when authorizing the reinstatement of a corporation under § 13.1-754. Under this section, although the corporate existence relates back to the date of termination, the General Assembly specifically provided that any "reinstatement shall have no effect on any question of personal liability of the directors, officers or agents in respect to the period between termination of corporate existence and reinstatement." Va. Code § 13.1-745. As enacted, the statute does not supply any other proviso; it does not except from its enabling provisions a dissolved or terminated corporation's actions in entering a contract to sell real property. It merely provides that personal liability of the officers and directors will not be affected. As the *McLean Bank* Court noted, "[u]nder the well established principles of statutory interpretation, where possible, every word of a statute must be given meaning." 232 Va. 420 at 427 (citation omitted). As the *Village Corp.* Court noted, "the provisions of Title 13.1 are "entitled to a liberal construction to effectuate their purposes." 298 F.2d 816,

819 (citation omitted). Had the General Assembly intended to limit the retroactive effect of the reinstatement provisions or to disable what a reinstated corporation was authorized to do, it could and would have expressly limited the effect of reinstatement in a manner much broader than it did.

The Cottrells attempt to distinguish *In re Wine Farms, Inc.*, 94 Bankr. (Bankr. W.D. Va. 1988) case on the grounds that the case involved a corporate debtor which was winding down its corporate affairs, but that in the case at bar General Systems was transacting business, not winding down, in violation of Virginia Code § 13.1-613.

Once again, the defendants' argument is without merit. The mere fact that a corporation happens to be a bankrupt debtor and successfully petitions for reinstatement in order to complete the adjudication in bankruptcy has no bearing whatsoever on the effect of the reinstatement. General Systems, although not a bankrupt debtor, successfully petitioned for reinstatement to complete the process of dissolution. There is no material difference between a reinstated corporation's status as a bankrupt debtor and a liquidating corporation in dissolution which would justify the application of a different rule for the retroactive effect of reinstatement.

Moreover, there is no factual basis upon which to conclude that General Systems was "transacting" business as contemplated by Virginia Code § 13.1-613. As the facts clearly establish and as the defendants themselves expressly acknowledge, General Systems was in the business of selling computer software in Central Virginia. Memorandum at 2. It was not incorporated to sell nor was it in the business of selling real property in the normal course of its business. The sale which is the subject of this suit was incidental to its business

purpose and was, in fact, part of the dissolution of the corporation.

The significance of this point is highlighted in *Continental Properties, Inc. v. Ullman Co.*, 436 F. Supp. 538 (E.D. Va. 1977). In *Ullman*, Judge Warriner held that a foreign corporation which was engaged in the manufacture and sale of household items was not "transacting business" by entering a land purchase agreement and executing a construction contract. The Court found that the company was engaged in "what some courts refer to as 'acts preliminary to doing business' and that those acts were not ordinary business transactions, but merely incidental transactions." *Id.* at 542. Consequently, the Court found that the corporation was not required to procure a certificate of authority and that the corporation's officers and directors were not subjected to personal liability. *Id.* at 543. The same reasoning applies in the case at bar. General System's sale of its real estate is an incidental transaction having nothing to do with its business purpose other than liquidation and dissolution.

The Cottrells also cite a number of cases, including *Harris v. T.I., Inc.*, 243 Va. 63 (1992) to support their proposition that a cause of action which arises subsequent to the corporation's termination is not enforceable. However, *Harris* is easily distinguishable from the case at bar. The *Harris* Court analyzed a corporation's liability on a personal injury cause of action which did not arise until after the corporation's termination. Relying upon Virginia Code § 13.1-755, the Court found that the termination of the corporate existence did not "take away or impair any remedy available to or against the corporation . . . for any right or claim existing or liability incurred, prior to such termination." *Id.* at 67. In addition, the cause of action which the Court declined to enforce as a potential liability was asserted



by a third party in a case having nothing to do with the conduct or winding down of the corporation's business and affairs.

In contrast, General Systems is exercising its statutory rights, indeed obligations, under the express provisions of Virginia Code §§ 13.1-745 and 13.1-752. The General Assembly would hardly permit a corporation to enter into a contract or perform "all other acts required to liquidate its business and affairs" unless those actions were enforceable. Once again, the antithesis of the *McLean Bank* Court's observation applies; as antithetically paraphrased, it is inconceivable that a statute could operate in such a way as to forbid or preclude the very thing which it expressly permits. It is inconceivable that the General Assembly would authorize a corporation to do all those things which are necessary to wind down its business and affairs without allowing some remedy when, during the course of that dissolution, a breach of contract occurs. Moreover, it would be inconceivable that the General Assembly would enact a statute which, if interpreted as the defendants suggest, would effectively preclude the owner of real estate, which happened to be a terminated or dissolved corporation, from ever disposing of its real property because it no longer retained its corporate status. Otherwise, real property would be held in perpetuity by entities which are no longer recognized by the Commonwealth, a concept completely foreign to the public policy of this state.

B. The Sales Price Negotiated Between the Parties Was Conscionable

Defendants argue that the contract of purchase was unconscionable because they elected (without any fraud, misrepresentation or undue influence) to sign a contract to pay \$147,500.00 for real property which General Systems was ultimately forced to sell after their

breach for the reduced price of \$100,000.00 to avoid foreclosure. They suggest the purchase price is unconscionable notwithstanding the fact that the property was originally listed for \$175,000.00 and the fact that they first offered to purchase the property in January of 1991 for \$135,000.00, \$35,000.00 over and above what they now contend was the true and fair market value.

General Systems relies upon its arguments in its letter of April 12, 1993. However, it merely notes, once again, that "whether wise, or unwise, the agreement, in view of the testimony that [a purchaser] had the capacity to make it and that it was his own free, voluntary act, cannot be impeached, however unreasonable and imprudent it may seem to others." *Banner v. Rosser*, 96 Va. 238, 250 (1898). There is evidence to support the price contracted and the price for which the property originally listed. Moreover, none of the requisite circumstances exist which would justify any findings that this contract of purchase was unconscionable. In fact, the case upon which the Cottrells rely, *Derby v. Derby*, 8 Va. App. 19, 378 S.E.2d 74 (1989), involved gross disparities between the value of the properties the divorcing properties would receive. The disparities alone were insufficient to find the deal unconscionable. But, when coupled with a party's concealment about her adulterous relationships, her misrepresentations about her intentions to return to the marital relationship, and her successful orchestration of events in connection with the execution of the separation agreement to prevent her husband's prior consultation with legal counsel, the totality of circumstances justified a finding of unconscionability. None of the circumstances present in *Derby*, all of which were designed to take advantage of weakness of mind and emotion, exist in this case.

As the *Derby* Court notes, "[i]f inadequacy of price or inequality of value are the only indicia of unconscionability, the case must be extreme to justify equitable relief." *Id.* at 79 quoting *Smith Bros. v. Beresford*, 128 Va. 137, 169-170 (1920). The *Derby* Court further noted that "[a] person may legally agree to make a partial gift of his or her property or may legally make a bad bargain." *Id.* To the extent the Cottrells made a bad bargain, they were legally entitled to do so and they exercised that right. Notwithstanding General Systems' disagreement with the Cottrells view of the purchase price, there is no evidence of improper conduct, fraud or other unconscionable or extreme conduct which would justify a finding that this contract, negotiated at arms length, was unconscionable.

For the reasons stated, General Systems respectfully requests the entry of an order denying defendants' Motion to Dismiss and awarding judgment in its favor

**GENERAL SYSTEMS CORP.**

By Counsel



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Archibald Wallace, III  
Richard T. Pledger  
SANDS, ANDERSON, MARKS & MILLER  
1400 Ross Building  
801 East Main Street  
Post Office Box 1998  
Richmond, Virginia 23216-1998  
(804) 648-1636



CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing was mailed, postage prepaid, to Edward D. Barnes, Esquire, P. O. Box 104, 10101 Iron Bridge Road, Chesterfield, Virginia 23832-0104, counsel for defendants, this 7<sup>th</sup> day of May, 1993.



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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF GOOCHLAND

GENERAL SYSTEMS SOFTWARE  
CORP.,

Plaintiff,

v.

Case No. L92-60

DAVID E. COTTRELL and  
CHRISTINE G. COTTRELL,

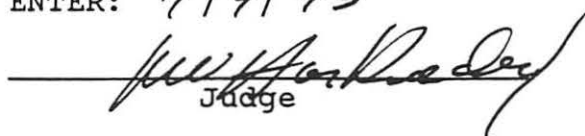
Defendants.

FINAL ORDER

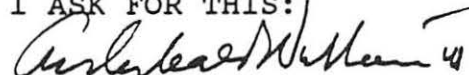
On March 29, 1993, this matter was tried before the Court, sitting without a jury. At the request of the Court, the parties prepared and submitted post-trial memoranda of law. After review of the evidence and legal memoranda, the Court finds for the plaintiff, General Systems Software Corp.

It is therefore ADJUDGED and ORDERED that the plaintiff, General Systems Software Corp., recover and have judgment against the defendants, David E. Cottrell and Christine G. Cottrell, for the sum of FORTY SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$47,500.00), less a six (6) percent real estate commission of TWO THOUSAND EIGHT HUNDRED FIFTY DOLLARS (\$2,850.00). Interest on the judgment shall accrue as of June 4, 1993, the date of the Court's opinion, at the judgment rate of nine (9) percent, until paid.


ENTER: 7/9/93

  
Judge

I ASK FOR THIS:

  
Archibald Wallace, III

SEEN, OBJECTED AND EXCEPTED TO:

  
Daniel M. Koliadko, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF GOOCHLAND

GENERAL SYSTEMS SOFTWARE  
CORP.,

Plaintiff,

v.

Case No. L92-60

DAVID E. COTTRELL and  
CHRISTINE G. COTTRELL,

Defendants.



CLARIFIED  
AND  
AMENDED STATEMENT OF FACTS

Come now the defendants, by counsel, and pursuant to Rule 5:11(c) of the Rules of the Supreme Court of Virginia, submit the following Statement of Facts and request that this honorable Court sign the certificate attached, that this document may become part of the record on appeal.

Opening Statement of Plaintiff:

Archibald Wallace began his opening comments discussing General Systems Software Corporation and how Mr. William Kenney, Jr. had run this business selling computer software to customers in Central Virginia. He stated that in the late 1980's Mr. Kenney was changing his business and went into the franchising business with Tom's Company. General Systems Software was automatically dissolved September 1, 1989 and at that time the only asset of the corporation was the land that it owned at Broadrun Subdivision, which is adjacent the Hermitage Country Club. He stated that in 1987 a deed was signed and recorded transferring the land from the



corporation to Mr. and Mrs. Kenney. He stated that for tax reasons, a Deed of Recision was signed transferring the property back to the corporation.

Following that time period, Mr. Kenney was looking into new business opportunities. Mr. Kenney needed cash and he arranged to list the subject property through Mr. Ed Wood. Mr. Wood showed the property to a number of interested individuals and it was listed for \$175,000.00. Mr. Wallace described the subject property as overlooking the golf course with a lake view. He stated that there was a number of people interested in the property, including a Mr. Cottrell who looked at a number of pieces of land and decided to negotiate with respect to the property known as Lot 2, Block A, Section 3, The Broad Run Subdivision.

Mr. Wallace stated that there were offers and counteroffers and ultimately the parties agreed on a price of \$147,000.00. A contract was signed and a closing date was set for July 1, 1991.

When July 1, 1991 came there was no closing. He stated that the plaintiff made efforts to continue to work out the closing for July or early August of 1991. He stated that Mr. Kenney, upon the advice of counsel, put the Cottrells on terms; if they did not close the property the plaintiff would seek legal remedies against them. He stated that on October 1, 1991, Mr. Kenney came to the conclusion that nothing was going to happen with the Cottrells and on October 4, 1991, again on advice of counsel, the Cottrells were advised that their failure to close was deemed to be in breach and that the property was relisted in October.

Mr. Wallace stated that there were two reasons why Mr. Kenney had to move the property quickly: (1) Mr. Kenney's own financial situation was at the critical stage; and (2) the real estate market had collapsed.

By the end of 1991 they had come across a buyer and the property was sold to Mr. and Mrs. MacDonald in early 1992 in the amount of \$100,000.00. Accordingly, the plaintiff was seeking damages in the amount of \$47,500.00 minus the amount of the real estate commission previously paid which was \$8,850.00, for a net amount of \$38,750.00 plus interest from July 1, 1991.

Opening Statement of Defendant:

It should be noted that the parties stipulated that any of the documents in the Goochland Circuit Court Clerk's office related to this matter would be admissible in this case. Edward D. Barnes stated that there was lack of a mutuality of consent, which is required in real estate contracts, because the plaintiff did not exist at the time the contract was made. He then stated that the plaintiff has not come to court with clean hands as he had misrepresented himself and his authority to transact business. He stated that not only was this company winding down but as of September 1, 1989 the company had wound down as far as it could go. He stated that as early as 1987 the company no longer filed annual reports, which caused the company to be terminated on September 1, 1989. The deed of July 9, 1987 transferring the property from the corporation to Mr. and Mrs. Kenney was introduced. The Deed of

Recision which was not recorded until June, 1991, was introduced.

He stated that the contract on its face is not valid and that the reinstitution of the corporation the morning of trial was an attempt to resurrect that which has been gone.

The Court:

The Honorable F. Ward Harkrader, Jr. granted the defendant's motion to transfer the case to the Chancery side of the court and stated that evidence would be presented today and, following the evidence, each side would be given an opportunity to submit written arguments, and that he was particularly interested in ratification of acts by a corporation upon reinstatement and duration of a wind down.

PRESENTATION OF EVIDENCE:

Plaintiff's Case

First witness, Ed Wood:

Mr. Wood testified that he currently resides at 8110 Saltmill Road, Henrico, Virginia. He has been president of the Wood Company for fourteen years as a real estate broker. He further stated that he has been selling real estate in western Henrico and eastern Goochland for approximately eleven years and that he has sold approximately fifty lots in the eastern Goochland area. He further stated that he was a co-developer of a seven lot area and a general partner in another area. He further stated in response to a question by Mr. Wallace, that from 1990 to 1992 he was active in



selling real estate in the eastern Goochland area.

He testified that in 1990 he first got involved with Mr. Kenney with respect to the listing of Lot 2, Section 3, of the Broad Run Subdivision. He stated that he listed this lot on November 16, 1990 for \$175,000.00 and that this was a formal listing. He was asked what marketing efforts he used. The witness replied that he used personal contacts with people with whom he had dealt in the past; the multi-listing service; and advertisements in the newspapers.

Q: Did you use other lots in the area to compare with the \$175,000.00 you were asking for the lot in question?

A: Yes, I used the following lots which were listed and marketed:

1. a 1 acre lot listed for \$135,000.00;
2. a 1 and 3/4 acre lot for \$175,000.00;
3. 2.32 acres lot for \$185,000.00;
4. a 5 acre lot for \$250,000.00;
5. a 4 acre lot for \$175,000.00;
6. 2+ acre lot for \$200,000.00;
7. 2.1 acre lot for \$185,000.00; and
8. a 3 acre lot for \$193,000.00

These listings were for December, 1990 and January, 1991.

Mr. Wallace continued his examination:

Q: What would cause the difference in the prices that you have just listed?

A: The location and proximity to the golf course and the size of the lot would cause the difference in prices.

Mr. Wood testified that he had listed only some of these lots that he had testified to and that he had some sales in 1989 and 1990. He did not testify as to how much any of these properties were sold for.

Q: How would property on a golf course affect its value?

A: It would markedly increase the value. This particular lot in question had two golf courses running beside it.

Q: After listing the lot for \$175,000.00, did you have anyone interested in it?

A: Yes.

Q: Was Mr. Cottrell one of them?

A: Yes, both Mr. and Mrs. Cottrell looked at the subject property and other property at Goosepoint, one for \$185,000.00 and one for \$175,000.00.

Mr. Wood testified that they just drove by the 1.75 acre lot for \$175,000.00 and the 2.32 acre lot for \$185,000.00. He stated that all the properties were shown to the Cottrells on the same day, and that they walked through the lot (Mr. Kenney's, the lot in question). He stated that no offer was made on that day but shortly thereafter Mr. Wood talked to the Cottrells and they signed an offer for \$135,000.00. This offer was given to Mr. Kenney and he countered for \$150,000.00. The Cottrells then counter offered for \$142,500.00. Again Mr. Kenney countered at \$150,000.00.

Q: What happened next?

A: There was a period of time where there was not action taken. Then, on February 20, Mr. Kenney withdrew his offer. At that point

Mr. Cottrell made an offer of \$147,500.00 and it was accepted by Mr. Kenney on March 6, 1991. Mr. Wallace then showed Mr. Wood the Contract for Purchase and asked him to identify the signatures of the purchasers. Mr. Wood testified that the purchasers were David E. Cottrell and Christine Cottrell, as evidenced by their signatures.

Q: Mr. Wallace asked Mr. Wood to testify as to how the seller had signed the contract.

Mr. Barnes objected to Mr. Wood testifying as to how it was signed and the Court said the witness would be allowed to merely answer how it read.

Q: Mr. Wallace asked were there any questions in anybody's mind that the corporation was signing this contract?

Again Mr. Barnes objected and the Court sustained the objection and would not allow the witness to answer that question. Mr. Wallace then moved for the admission of the Contract to Purchase and Mr. Barnes objected on the grounds that this was not a contract between the parties to the suit; that the front of the contract stated that William Kenney, Jr. was the seller and Mr. Barnes said that he wanted to preserve the fact that the defendant objects to the contract as being a binding instrument. The judge said that it would be preserved but that the contract would be admissible in evidence.

Mr. Wood further testified that he had sporadic contact with Mr. and Mrs. Cottrell over the next seven days and only over the telephone. He testified that he discussed with Mr. Cottrell that



this was an all cash contract. At one point, Mr. Cottrell informed Mr. Wood that the Cottrells were going to obtain funds through an equity line and Mr. Wood stated that it made no difference to him where the funds came from.

Mr. Wood testified that neither Mr. nor Mrs. Cottrell expressed any problems with being able to close on the closing date of July 1, 1991.

Q: Mr. Wallace asked whether there was any reason why the contract would not close?

Mr. Barnes objected stating that the question was too broad and the judge sustained the objection. Finally, Mr. Wood said that he had not received any comments from the Cottrells indicating that there were any reservations regarding being able to close on July 1, 1991 prior to July 1, 1991.

At that point, Mr. Barnes said that the defendant would stipulate that the closing did not occur and Mr. Wallace stated that they would not accept that stipulation.

Mr. Wood further testified that there was no closing on July 1, 1991 and that he spoke with Mr. Barnes' office and found out that the title work had been completed and he further testified that he called the real estate assistant at Mr. Wallace's office and that on July 10, 1991 he called Mr. Cottrell but found out Mr. Cottrell was out of state and left two messages. He testified that on July 12, 1991, Mrs. Cottrell talked to him and stated that they still wanted to continue and try to close the deal and that they would be willing to put more money up front as earnest money. On

July 15, 1991, Mr. Wood spoke with Mr. Cottrell who stated that they would like to get the financing and close the deal and that they would put up more earnest money if necessary. On July 19, 1991, Mr. Wood admitted that he telephoned Mr. Cottrell and spoke rudely to Mr. Cottrell at that time. There was no closing on the property by the Cottrells.

Mr. Wood next testified that the property was then put back on the market at \$160,000.00 at Mr. Kenney's request. Then later it was reduced to \$145,000.00. On December 15, 1991, Mr. Kenney informed Mr. Wood that he would withdraw the listing and would list with another real estate broker.

At that point, Mr. Wallace began to ask Mr. Wood questions regarding what he experienced in the real estate market in the Fall of 1991. Mr. Barnes objected on the grounds that Mr. Wood had not been qualified as an expert. The judge allowed Mr. Barnes to voir dire Mr. Wood on his qualifications as follows:

Q: Are you a certified appraiser?

A: No.

Q: Mr. Barnes inquired about his schooling.

A: He had received a bachelor of arts degree in history.

Q: Was the bulk of your practice in listing and selling?

A: Yes.

Mr. Wood stated that he had never testified as an expert before in court. Following the voir dire, and Mr. Barnes' objection, the Court stated that he was qualified as an expert real estate broker regarding sales in eastern Goochland County, including the Broad

Run Subdivision where the subject property was located.

The examination by Mr. Wallace continued:

Q: Did anything happen in the Fall of 1991 in the real estate market?

A: The economy was going into a recession and there was a fall-off in prices in the real estate market at that time.

Q: Did you compare the \$100,000.00 to other sales at that time? The judge interrupted and asked the witness whether there was a reduction in the Broad Run area and what was that percentage of reduction. Mr. Wood said that he could not give a percentage of reduction because each property was different.

Cross Examination of Mr. Wood by Mr. Barnes:

Mr. Barnes first asked Mr. Wood for the listing agreement that he had in this file. Mr. Wood produced the listing agreement signed by Mr. Kenney and it was introduced as an exhibit at trial. Mr. Barnes then asked Mr. Wood:

Q: As a real estate broker would you allow someone to list their property for sale if they did not own the property?

A: I would not do that. He further stated that Mr. Kenney represented to him that he owned the property and that Mr. Wood thought that Mr. Kenney was the owner of the property and not the corporation. He clearly stated that he would not allow someone to list a piece of property if they were not the owner and that based on Mr. Kenney's representation, he thought Mr. Kenney was the owner of the property. He did state that there was some confusion



regarding the deed and whether the deed had been recorded properly but that he was clearly under the impression that Mr. Kenney was the owner of the property and not the corporation. Mrs. Kenney did not sign the listing agreement.

He further testified that the contract to purchase, dated February 26, 1991 had Mr. Kenney listed as seller on the front. When the Cottrells signed the contract to purchase there was no reference to the corporation on the document because the Cottrells signed the document first and at a later time Mr. Kenney signed the document. Mr. Barnes asked:

Q: Have you ever modified the listing agreement?

A: I have never modified it to change the name to the corporation. Mr. Wood stated that he did not recall Mr. Kenney ever telling him that he was winding down the corporation. He further stated that he never had any discussions with lawyers for the corporation or could not recall having such discussions. He could not recall whether Mr. Kenney ever said he was going to record a deed putting the property back into the corporate name. Mr. Barnes then asked:

Q: If you understood from Mr. Kenney that he was the owner of the corporation and that this is what you put down on the listing agreement, then why was there any confusion?

A: He said that there was some question about the recording of the deed at the courthouse.

The judge inquired of the witness that, if he thought the property was titled in the husband and wife's name, why didn't he

get the wife to sign it? It was suggested by Mr. Barnes that he thought he would not have any problems getting the wife's signature and he would do that on occasion.

Mr. Barnes continued his examination:

Q: Regarding the properties that you have discussed earlier, did any of those lots sell?

A: The witness responded that one of the lots sold for \$174,000.00 and it was a 2.5 acre lot on First Flight Lane, and it sold in 1992. He then stated that he had not sold any of the lots in the Broad Run division except for a property exchange with a business partner. Then the witness stated that he misunderstood the question, and that, in fact, there were some sales made of those lots he had listed, but he never identified the lots sold or the purchase price. Mr. Wood then stated that there was a second listing agreement but he could not locate that agreement and he did not remember how it was signed.

Redirect Examination by Mr. Wallace:

Q: You began to describe a conversation with the Cottrells regarding the status of the title.

A: The witness again said, as he did on cross examination, that he did not recall the conversation.

Next witness, William Kenney, Jr.:

Mr. Kenney first testified that General Systems Software Corporation purchased the property in question back in 1986, that

it measured 2.7 acres of undeveloped land, and at that time did not have a golf course. He paid \$58,000 for it. He further testified that the General Systems Software Corporation was a company that he owned and had rented office space and bought the real estate as an investment. He stated that he was the original stockholder and then at a later time his wife became a 40% stockholder. He stated that his wife never took an active role in the corporation as she had a full time job at Virginia Power. He stated that the company leased some office space and owned some equipment.

About 1988 he wanted to gear down the business and get into another line of business. He went to his lawyer and inquired about the corporation and his lawyer advised him that it would dissolve itself. At that time there were a couple of assets left in the corporation's name including equipment, a lease, and the land in question. The equipment assets were transferred to Master Computer. Ultimately the only asset remaining in the dissolved corporation was the real estate which is the subject of this action. Mr. Kenney testified he was both a shareholder and director of General Systems Software Corp.

Q: Regarding the letter of September 11, 1989 terminating the corporation, did you ever receive this notice?

A: Yes. The witness began to testify about some information from his corporate attorney and the State Corporation Commission, and Mr. Barnes objected on hearsay grounds, which objection was sustained. He went on to testify that, as a result of his conversation with Mr. Pannell, he decided to let the corporation



dissolve. In 1989 he testified that the corporation still owned property at the Broad Run Subdivision and several computer systems.

Q: From the summer of 1989 onward, were you engaged in other services?

A: No, at that time I was only doing computer software business. In late January, 1990 I started to investigate other alternatives including Toms Company, and I pursued other businesses, including the Toms franchise, and discussed my options with Forbes, a business broker. He testified that, in order to buy into the franchise, he was going to put up the corporation's only asset, that he was going to sell the property to get the cash to get into the franchise business. At that time he put the property up for sale with Ed Wood.

Q: At the time you met with Mr. Wood for the sale of the property, did you discuss what name would be used?

A: Yes. Then the listing was signed by William Kenney, Jr. Mr. Barnes made the objection to Mr. Kenney testifying about why the name of William Kenney was used based on the parol evidence rule, and the Court overruled the objection. Mr. Wallace made the argument that the document at issue is the contract to purchase and that the listing agreement was really at issue anyway.

Mr. Kenney testified that he put his name on the listing document because no deed was recorded at the courthouse which put the property back into the corporation's name. He stated that he needed to get it cured and needed to record the Deed of Recision.

Q: Was the price determined based on other listing prices in the

area?

Mr. Barnes objected, unless the witness had firsthand knowledge. The Court sustained the objection if the question was based on listings in the area. The witness testified that in his conversations with Mr. Wood he decided to put a fair price on the property that would allow the property to be moved and that is why he chose the \$175,000.00.

Q: Were you involved in the marketing of the property?

A: Not really. Just if someone would ask me about the property I would state what it was going to sell for and who was my broker.

The witness continued to testify that the next thing that happened was Mr. Wood brought him an offer of \$135,000.00 from the Cottrells. He said that the offer was too low and that he countered but he could not remember the exact numbers. He stated that he didn't have any reason to believe that the numbers given by Mr. Wood were incorrect regarding the counteroffers. Ultimately a contract was signed. He received the offer of \$147,000.00 while he was out of town and when he came back to town he accepted it.

Mr. Kenney further testified that all the handwriting on the left side of the Contract to Purchase was his handwriting and that he signed his name and then under that he put "for General Systems Software Company." He further testified that he put it in the name of General Systems Software to make it legal as only the corporation could transfer the property.

He then testified that he had no contact with the Cottrells after July 1, 1991 and that he was mainly dealing with Mr. Wood and

with his attorney. He testified that the Deed of Recision was recorded prior to the closing set for July 1, 1991. The Deed of Recision was admitted into evidence.

He further testified that there was no indication that the contract would not close on July 1, 1991. When the contract did not close, Mr. Kenney called Mr. Wood's and Mr. Wallace's offices. At this point there was an objection to hearsay, which was sustained.

Q: Did the contract close in the first two to three weeks of July?

A: No sir. Mr. Kenney instructed his attorney to draft a letter to Mr. and Mrs. Cottrell, which letter was dated July 23, 1991. Mr. Barnes objected to the admission of this letter because of the opinions in it, which were incorrect and irrelevant. The Court said that it would admit the letter but may not accept the opinions stated in the letter.

Q: As of July 23, 1991, did you have any contact with the Cottrells?

A: I had not had contact but I did have contact with Mr. Cottrell shortly thereafter. The witness then testified that he instructed Mr. Wallace to send the closing documents to the closing attorney.

Q: Had you heard from the Cottrells in response to the July 23, 1991 letter?

A: No sir. The witness testified that August 15, 1991 came, and there was no closing.

Mr. Kenney then called Mr. Cottrell, who said there was no



problem, and they met for breakfast. Mr. Cottrell stated at breakfast that he still wanted the property and asked Mr. Kenney if he could do some of the financing and Mr. Kenney said that he could do that. Mr. Kenney testified that they left the breakfast meeting with the understanding that the lawyers would handle the details.

Mr. Kenney then instructed his attorney to send a letter dated August 29, 1991. This letter was admitted into evidence as Plaintiff's No. 6. After that, there was no response by the Cottrells and the letter of August 29, 1991 did not call for a closing date.

Mr. Kenney then testified that Mr. Barnes called, whereupon Mr. Barnes objected. The question was changed, and Mr. Kenney testified that Cottrell never accepted the offer.

Mr. Kenney then testified that he had never heard anything from the Cottrells in this time period about the corporation not being authorized to do business or whether there was any problem with the corporation.

Mr. Kenney then instructed Mr. Wood to place the property back on the market. After thirty days the listing price was dropped to \$145,000.00 and at that point Mr. Kenney switched agents.

Mr. Kenney was asked questions about his personal financial condition during this time period and Mr. Barnes objected. The Court overruled the objection after asking Mr. Barnes whether failure to mitigate was still a part of the defense, and Mr. Barnes said that it was. Mr. Kenney testified that he had to get an equity line to pay the debt service on the subject property. Mr.

Kenney then testified that the tax returns for the corporation were showing a loss and there was an objection regarding this. The judge overruled the objection based on the fact that Mr. Kenney was the stockholder of the corporation and prepared all the information for the tax returns. Mr. Kenney testified that he continued to take money out of his equity line to make the payments on the property and then later approached Jefferson National Bank for a loan.

Mr. Kenney testified that the Cottrells never complained about the price or suggested that the price was too high.

Cross Examination by Mr. Barnes:

Mr. Barnes gave Mr. Kenney a copy of the articles of incorporation and asked him to identify it. The witness replied that these were the Articles of Incorporation for General Systems Software Corp.

Q: Did your wife plan an active part in the corporation?

A: No.

Q: Your wife is listed as a director on the articles, isn't that correct?

A: The witness looked at the articles again and said yes that was correct, but she is a full time employee with Virginia Power and did not play an active role.

Q: Was the property transferred to Mr. and Mrs. Kenney on July 9, 1987?

A: Yes sir.

Q: Then at that point, the corporation no longer owned the property, isn't that correct, because the deed transferred it out of the corporate name?

A: I cannot answer that because I am not a lawyer.

Mr. Barnes showed the witness the notice of termination, and this was admitted as defense Exhibit 3.

Mr. Kenney was questioned about where the corporation did its business. He stated that the company was first located at his house at 1377 Constitution Drive and then they rented office space in Mechanicsville, but he couldn't remember the exact date that they started renting office space, but he thought it was in 1985. He did not recall when they left that particular office.

The witness stated further that he has traded under PM Services, a subchapter S corporation, and that this company was started in 1984 or 1985. He stated that it went out of business in approximately 1989.

He further stated that he operated individually and that the corporation was reinstated this morning, being March 29, 1993. Upon further questioning, he stated that he had filed tax returns for the corporation for 1989, 1990, 1991, and 1992. He stated that he had shown losses for those tax returns and that he did have the tax returns with him. He stated that Mark Jones & Associates did his taxes for him. He further testified that he did not pay for a business license for the years 1988, 1989, 1990, and 1992. He was asked about whether the corporation had paid insurance, and he was not sure about whether they had. He admitted that the deed



transferring the property from husband and wife back to the corporation was not recorded until 1991. He was questioned regarding the contract that he signed with Mr. and Mrs. MacDonald and why the contract was just in Mr. Kenney's name and not the corporation.

A: I signed it because in my viewpoint I was the corporation.

Q: So it does not matter if you or the corporation signs it?

A: That is not correct, you are making assumptions.

The witness was asked whether he had corporate counsel throughout these transactions and he said yes except when he signed the contract with the MacDonalds. He was asked about a second listing agreement and he stated that he did not think there was one. He was questioned on whether he had filed anything with the employment commission and he stated that for a while he sent in "0". He responded to the employment commission by sending in "0" for employees, and then there came a time when that stopped and he did not need to do that any longer. He further testified that he did not report any of these transactions or changing of title to the taxing authorities. He further testified that he had a board of directors meeting in late February, 1993. He admitted that the corporation's existence was terminated September 1, 1989. It was not reinstated again until March 29, 1993, although efforts at reinstatement began in February, 1993. He stated that the reason for getting the corporation reinstated was that he planned to reactive that business and needed it in existence to execute a new contract that he was planning to execute here shortly. He stated

that he did not recall any transactions by the corporation in 1988 or 1989 and that by September 1, 1989 the lease and equipment were gone. He admitted that as far as the courthouse was concerned the lot at issue was titled in his and Mrs. Kenney's name.

Again, he was asked why he would use his name instead of the corporate name on the listing agreement, on the front of the Contract to Purchase, and in the contract with the MacDonalds. He stated that he did not think it made any difference. He was asked whether an appraisal was done to determine a listing price of \$175,000.00 and he said that he could not say whether an appraisal had been done.

When asked about the front of the document of the Contract to Purchase and his name being placed thereon, he stated that he did not know if this was incorrect as he was not a lawyer. He stated that Mr. Wood had advised him as to how it should read because Mr. Wood had searched the courthouse records and determined how the property was titled. This was contrary to Mr. Wood's testimony. Mr. Wood testified that he received the information from Mr. Kenney, and that is why Mr. Kenney's name was placed on the front of the Contract to Purchase.

Mr. Kenney was then asked if the county records from 1989 forward would show that the subject property was titled in Mr. and Mrs. Kenney's name. He said that they would show that until the time the recording was done in 1991. He testified that the corporation did no other business other than try to sell the property. He was asked about the contract with Toms Company and he

stated that he did not know whose name was on the contract.

He stated that a new account was opened with Fidelity Federal in the name of General Systems Software Corp; this new account was opened to place the monies in it from the sale of the land. He stated that basically the corporation was starting out anew. He was questioned regarding whether his wife had any objection to him placing the monies in the account, and he replied that she understood that it was his company and she had no problem with it.

Redirect Examination by Mr. Wallace:

Mr. Wallace asked Mr. Kenney who was the grantor of the deed of the property to the MacDonalds and Mr. Kenney was the grantor was General systems Software Corp. Then Mr. Wallace showed Mr. Kenney the settlement statement from General Systems Software Corp. to MacDonald and that was admitted into evidence.

Re-Cross Examination by Mr. Barnes:

Mr. Barnes asked one further question: Do you have any copies of any other listing agreement other than what was signed in this case? Mr. Kenney showed Mr. Barnes a copy of a listing agreement dated November 20, 1991 which did not have his wife's name on it and was signed only by Mr. Kenney.

Whereupon the plaintiff rested.



Defense Case:

First Witness, P.E. Turner:

Mr. Turner testified that he had been appraising properties for 21 years. He had purchased two properties and sold one in the Goochland area, and has been appraising property in eastern Goochland for many years. Upon proper motion, the Court qualified Mr. Turner as an expert in the appraisal of property in eastern Goochland County. He testified regarding how he arrived at a value in this case. He said that he did research at the courthouse for four hours, spoke with agents active in the area, spoke to two or three property owners, and that he lives within one mile of the subject property. He stated that the market has not changed very much and that this particular property was influenced by the country club and the golf course in particular. He considered lot sales within a reasonable time frame and looked at sales ranging from \$60,000.00 to \$199,000.00. He stated that it was his opinion the property was worth \$100,000.00 as of March 22, 1993. He stated that, in his opinion, the value has not changed much in the past two to three years except that it takes more time to market a piece of property. He testified that the real estate market in the Broad Run Subdivision experienced a recession in 1989 through 1990. He was asked whether there was any appreciable change in value and he testified that there was no change in hard values and that you can use the same comparables. He discussed the comparables cited in his report and testified that he had looked at others. He made a correction in the report stating that comparable no. 4 was a

contract for sale and had not actually closed. His appraisal was admitted into evidence without objection.

Cross Examination by Mr. Wallace:

Q: Have you sold properties?

A: I am strictly a licensed appraiser, no real estate sales. The witness gave Mr. Wallace descriptions of the road and how to get to the Broad Run Subdivision. He stated that the Red Fox road was the first road into Broad Run coming from Richmond. He stated comparable no. 2 was across Route 621 in another subdivision and had no golf course. He stated that comparable no. 3 had a golf course and a lake view. The witness was questioned regarding a lot sold for \$175,000.00, and whether he had considered it. Mr. Turner said he was aware of it. He testified that he walked on the lot in question and that it overlooks a pond and two golf holes. He stated that he did not do a separate appraisal for February, 1991.

Whereupon, the defense rested.

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LIST OF EXHIBITS

PLAINTIFF'S EXHIBITS:

- No. 1            Contract to Purchase between the Cottrells and General Systems Software Corp. dated February 26, 1991.
- No. 2            Notice of Termination letter from the State Corporation Commission dated september 11, 1989.
- No. 3            Deed dated July 9, 1987 transferring the property from General Systems Software Corp. to William and Pamela Kenney.
- No. 4            Deed of Recision and Cancellation dated July 13, 1987 transferring the property to the corporation (not recorded until June 12, 1991).
- No. 5            A letter from Arch Wallace to David Cottrell dated July 23, 1991.
- No. 6            A letter from Arch Wallace to EDB dated August 29, 1991.
- No. 7            A letter from Arch Wallace to EDB dated October 4, 1991.
- No. 8            Settlement Statement between General Systems Software Corp. and the MacDonalds, date of settlement February 6, 1992.

DEFENDANT'S EXHIBITS:

- No. 1            Exclusive Authority to sell Listing Agreement dated November 16, 1990.
- No. 2            Articles of Incorporation of General systems Software Corp.
- No. 3            Notice of Termination of the Corporate Existence dated September 11, 1989.
- No. 4            Real estate contract between Mr. Kenney and the MacDonalds.
- No. 5            Mr. Turner's appraisal of the property dated March 22, 1993.



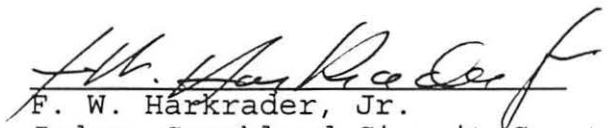
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CHRONOLOGY

March 28, 1993	Date of Incorporation for General systems Software Corp.
December 5, 1986	Deed from Tusa, Inc. to General systems Software Corp.
July 9, 1987	Deed from General Systems Software Corp. to William and Pamela Kenney.
July 13, 1987	Deed of Recision and Cancellation from Mr. and Mrs. Kenney to General Systems Software Corp. (This deed was not recorded until June 12, 1991).
September 1, 1989	General Systems Software Corp. date of termination.
February 26, 1991	Contract to Purchase signed by Cottrells and Mr. Kenney.
June 12, 1991	Deed of Recision and Cancellation recorded.
July 1, 1991	Closing date for contract which did not take place.
February 2, 1992	Deed from General systems Software corp. to Mr. and Mrs. Macdonald

CERTIFICATE OF TRIAL JUDGE

I hereby certify that the foregoing Statement of Facts is a true and accurate representation of the proceedings at the trial of this matter.

  
F. W. Harkrader, Jr.  
Judge, Goochland Circuit Court

### Assignments of Error

1. The trial court erred when it denied the defendants' motion to dismiss as to the first ground asserted therein, that the real estate sales contract at issue is not enforceable by the plaintiff, an entity without contractual capacity at the time of contracting.
2. The trial court erred in admitting into evidence plaintiff's exhibit one, the Contract to Purchase dated February 26, 1991, over defense counsel's objection because the proffered exhibit was irrelevant, not being evidence of a contract between the parties to the suit.
3. The trial court erred in admitting into evidence plaintiff's exhibit one, the Contract to Purchase dated February 26, 1991, over defense counsel's objection because the authenticating witness failed to establish the authenticity of the document.