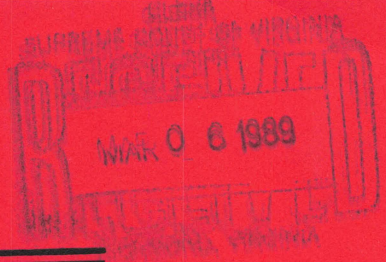


238Va 262



IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 880603

W. LOWRY MANN, III and BARBARA MANN,

Appellants,

v.

ADDICOTT HILLS CORPORATION,

Appellee.

JOINT APPENDIX - VOLUME II

Glenn H. Silver
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Fairfax, VA 22030

Jose Aunon
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Sandra L. Hughes
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Counsel for Appellee

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PRINTER'S NOTE: APPENDIX CONTINUED FROM VOLUME I

C

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June 8, 1988

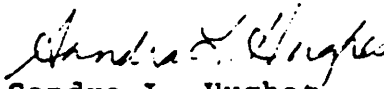
Glenn H. Silver, Esq.
RUST, RUST & SILVER
4165 Chain Bridge Road
Fairfax, Virginia 22030

Re: Mitigating Damages in Mann v. Addicott Hills Corporation

Dear Glenn:

My client desires to mitigate its damages by renting Lot 11 in Union Farm Subdivision, the property which is currently involved in the Mann v. Addicott Hills Corporation and Snelling v. Addicott Hills Corporation litigation. However, we have some concern that if the property is rented it will no longer be a "new" home. Therefore, we are requesting that you on behalf of Mr. and Mrs. Mann and on behalf of Mr. and Mrs. Snelling notify us that you do not wish us to rent the above referenced property in order to mitigate our damages. Otherwise, if we do not hear from you within five (5) business days of your receipt of this letter, we will have to assume that your clients have waived any claim for damages in the event that either of them eventually acquires the property pursuant to the contracts currently being litigated.

Very truly yours,


Sandra L. Hughes

cc: Carl Bernstein

MEMORANDUM OF LIS PENDENS

Title of Cause of Action: W. Lowry Mann III and Barbara C. Mann
v.
Addicott Hills Corporation
In Chancery No. 1C1273

General Object: Declaratory Judgment, specific performance requiring Addicott Hills Corp. to convey Lot 11, UNION FARM SUBDIVISION, also known as 9105 Peartree Landing, to W. Lowry Mann III and Barbara C. Mann and for money damages.

Court Where Action is Pending: Circuit Court of Fairfax County, Virginia

Amount of Claim: Specific performance requiring Addicott Hills Corporation to convey Lot 11, UNION FARM SUBDIVISION to W. Lowry Mann III and Barbara C. Mann and \$100,000.00 damages and \$200,000.00 punitive damages.

Description of Property Affected: Lot 11, UNION FARM SUBDIVISION as the same appears and is duly dedicated in a Deed of Subdivision recorded at Deed Book 6445 at page 843 of the land records of Fairfax County, Virginia. Also known as 9105 Peartree Landing, Alexandria, (Fairfax County) Virginia.

Name of Person whose Estate Is Intended to Be Affected: Addicott Hills Corporation, a Virginia corporation.

Witness the signatures of W. Lowry Mann III and Barbara C. Mann by Jose E. Aunon, Counsel this 3 day of April 1987.

W. Lowry Mann III

Barbara C. Mann

by Jose E. Aunon

Commonwealth of Virginia
County of Fairfax

Sworn, subscribed and acknowledged before me this 3rd day of April 1987.

by Common Exps
4/4/90

RECORDED W/CERTIFICATE ANNEXED

1987 APR -3 2:32

FAIRFAX COUNTY

TESTE JP
CLERK

STATE TAX

COUNTY TAX

TRANSFER FEE

CLERK'S FEE 10.00

GRANTOR TAX

CONS.

471

88 039858

MAR 29 1988

NOTICE

W. LONNY MANN, III and
BARBARA MANN,

Complainants

IN CHANCERY NO. 101273

v.

ADDICOTT HILLS CORPORATION,

Defendant.

NOTICE

A Final Decree releasing a lis pendens BOOK 6969 PAGE 590 was inadvertently filed in Land Records prior to the appeal period expiring. (Sec.8.01 - 269)

This document is to provide notice that the lis pendens filed by the Manns against the property known as 9105 Peartree Landing, Alexandria, Virginia and as Lot 11, Union Farm Subdivision in Deed Book 6677 at page 0919 is still valid and has not been released.

BM6986 1307


WARREN E. BARRY
CLERK OF THE COURT

COMMONWEALTH OF VIRGINIA
COUNTY OF FAIRFAX

Subscribed, sworn to, and acknowledged before me by
WARREN E. BARRY this 29 day of March 1988.

My commission expires 2/9/91


Notary Public

RECORDED W/CERTIFICATE ATTACHED

MAR 29 1988

FAIRFAX COUNTY, VA.

TESTE: 
CLERK

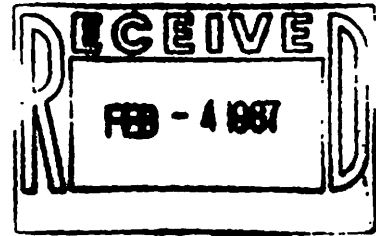
A COPY TESTE:
WARREN E. BARRY, CLERK

By: 
Deputy Clerk

472

JOSE E. AUÑON
ATTORNEY AT LAW
9701 MAIN STREET
P.O. BOX 2405
FAIRFAX, VIRGINIA 22031

(703) 323-1700



February 3, 1987

Addicott Hills Corporation
7345 McWhorter Place
Suite 100
Annandale, Virginia 22003

Gentlemen:

Please be advised that I have been retained by Mr. and Mrs. W. Lowry Mann to represent them in the purchase of Lot 11, UNION FARMS SUBDIVISION in Fairfax County, Virginia.

My clients have performed and are ready, willing and able to continue to perform their obligations under the contract dated March 1, 1986. You have no grounds to cancel this contract and I have advised my clients accordingly.

In an effort to resolve this dispute in an amicable way, my clients are enclosing herewith a Waiver of their right to have the contract contingent upon the sale of their house. They do qualify for the loan without the sale.

In addition, today my clients have listed their house for sale with Coldwell Banker. A check in the amount of \$5,950.00 is enclosed herewith, as well as a copy of the listing agreement.

Please contact me at your earliest convenience.

Very truly yours,


Jose E. Aunon

Enclosure



COMMON DATA BASE SERVICE
LISTING AGREEMENT - EXCLUSIVE RIGHT TO SELL



This Agreement made this 2nd day of February, 1987, by and between Barbara C. and W. Lowry Mann III OWNER(S)

and GOLDWELL BANKER REC (Firm Name) REALTOR® (AGENT).

In consideration for services and facilities the REALTOR® (AGENT) is hereby granted the exclusive right to sell the property, which is known as

8716 Falkstone Lane, Alexandria

, Virginia 22309

Legal Owner(s) Barbara C. and W. Lowry Mann III

Legal Description Lot 6, Block 14, Section 1, Mt. Vernon Manor

1. This property, to include any chattels as listed below, is offered for sale at a selling price of One hundred sixty three thousand and no/100 DOLLARS (\$163,000.00) or such other price as later agreed upon, which price includes selling compensation.

Settlement to coincide with settlement on sellers' home at
9105 Peartree Landing, Alexandria, VA 22309

2. The OWNER(S) agrees to pay to REALTOR® (AGENT) a compensation of 6% In cash if, during the listing period, the property is sold to anyone or if anyone produces a purchaser ready, willing and able to buy the property, or if within 30 days after the expiration of the listing agreement a sale is made to any person(s) to whom the property has been shown during the listing period. This last clause shall not be effective if the property is subsequently listed with another real estate broker.

3. This exclusive right to sell will expire at midnight September 2, 1987

4. This property shall be shown and made available to all persons without regard to race, color, creed, religion, national origin, sex, marital status, age or handicap.

5. Authorization is granted to the REALTOR® (AGENT) to: a. Place a "For Sale" sign on the property and to remove all others. b. Show the entire property during reasonable hours. c. Place a common key lockbox on the property. d. Make a blanket unilateral offer of subagency to real estate brokers and to participants in any Multiple Listing Service that the REALTOR® (AGENT) deems appropriate. e. Disseminate information regarding real estate offered for sale, under contract for sale, sold, expired and/or withdrawn by printed form and/or electronic computer service.

6. It is understood that no Multiple Listing Service or Board of REALTORS® is a party to this listing agreement and that no Multiple Listing Service or Board of REALTORS® sets, controls, recommends, or suggests the amount of compensation for any brokerage service rendered pursuant to this listing agreement, whether by the listing broker or by any other broker acting as subagent or otherwise.

7. It is understood and agreed that Virginia licensed real estate salespersons and appraisers, inspectors, or other persons may require access to the property to facilitate and/or consummate a sale.

8. The OWNER(S) retains full responsibility for the property, including all utilities, maintenance, physical security and liability during the term of this Agreement.

9. The OWNER(S) understands and agrees that in consideration of the use of REALTOR® (AGENT) services and facilities and of the facilities of any REALTORS® Multiple Listing Service OWNER(S) and OWNER(S) heirs and assigns agree that REALTOR®, all agents accompanying purchasers or prospective purchasers, any REALTORS® Multiple Listing Service, and the directors, officers and employees thereof, including officials of any parent Board of REALTORS®, except for malfeasance on the part of such parties, are not responsible for vandalism, theft or damage of any nature whatsoever to the real property or its contents during the period of exclusive privilege to sell, and that OWNER(S) waives any and all rights, claims, and causes of action against them and holds them harmless for any property damage or personal injury arising from the use of or access to the property by any person during the listing period.

10. The property may be sold subject to existing Deed(s) of Trust, having an unpaid principal balance of approximately \$ 44,200

11. OWNER(S) will take back a N/A Deed of Trust in the amount of \$ N/A with further terms to be negotiated.

12. In the event of a sale, OWNER(S) will execute a sales contract enforceable in the Commonwealth of Virginia. Condominiums or Cooperatives being offered for sale are subject to the receipt by purchasers of the required Disclosures, and OWNER(S) is responsible for securing and furnishing these to prospective purchasers as prescribed in the Cooperative Act, Section 55 - 424 Et. Seq. of the Condominium Act, Section 55 - 79.39 Et. Seq. of the Code of Virginia (1950 AS AMENDED).

13. The terms and conditions of this Agreement may be used as a basis for presenting the property to prospective purchasers, and, unless amended in writing, contain the final and entire agreement between the parties hereto. The parties shall not be bound by any terms, conditions, oral statements, warranties or representations, not herein contained.

I CERTIFY THIS TO BE A TRUE

COPY

Bonita K. Akopian

Notary Public

MY COMM. EXPIRES 5/29/90

Seen and agreed and receipt of a signed copy of this Agreement is hereby acknowledged.

Barbara C. Mann OWNER

W. Lowry Mann III OWNER

MAILING ADDRESS (Owner's) 8716 Falkstone Lane

Alexandria, VA 22309

PHONE (OFFICE) 836-9336/836-6200

PHONE (HOME) 360-3880

Coldwell Banker REALTOR® (AGENT)

(Firm Name)

By: Charles E. Woodward (Broker/Sales Manager)

SALES ASSOCIATE Barbara C. Mann

PHONE (OFFICE) 836-6200/836-9336

PHONE (HOME) 360-3880

INVOICE#	DATE	AMOUNT	DISCOUNT	NET AMT -	INVOICE#	DATE	AMOUNT	DISCOUNT	3753
1-1	01/30/87	5,950.00	0.00	5,950.00					

GROSS AMOUNT 5,950.00 DISCOUNT 0.00 WORKER'S COMP. 0.00 NET AMOUNT 5,950.00

CARL BERNSTEIN AND ASSOCIATES, INC. • ANNANDALE, VA 22003



CARL BERNSTEIN
AND ASSOCIATES, INC.
PH. 703-941-6076
7345 McWHORTER PLACE, SUITE 100
ANNANDALE, VA 22003

3753

68-1261
560

3753

GUARANTY BANK
AND TRUST COMPANY
RRIFIELD, VIRGINIA 22116

DATE	AMOUNT
01/30/87	*****5,950.00*

*****5,950* DOLLARS AND **0* CENTS

TO THE
ORDER OF

W. LOWRY & BARBARA C HANA

CARL BERNSTEIN AND ASSOCIATES, INC.

Henry M. Rully

⑈003753⑈ ⑈056001260⑈

383072 1⑈

of Addicott & Hills
Corporation
without recourse

Barbara C. Plummer
Attest my hand

WAIVER

The undersigned hereby waive the right to have the validity of the contract dated March 1, 1986, contingent upon the sale of their house.

This contingency is hereby removed.

DATED:

7/4/87

Barbara C. Mann

Henry Mann

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

FRANK PREGANO

and

EVELYN PREGANO,

Plaintiffs,

v.

Chancery No. 10685

✓ THE CONNEMARA CORPORATION

Serve: Kerry M. Reilly
7345 McWhorter Place
Suite 100
Annandale, Virginia 22003
Registered Agent

and

CARL BERNSTEIN AND ASSOCIATES, INC.

Serve: Carl Bernstein
7345 McWhorter Place
Suite 100
Annandale, Virginia 22003
Registered Agent

and

BUILDERS MARKETING, INC.

Serve: Steven C. Gibboney
7361 McWhorter Place
Annandale, Virginia 22003
Registered Agent,

Defendants.

BILL OF COMPLAINT

1. Plaintiffs Frank Pregano and Evelyn Pregano ("the Preganos") are individual persons who reside in Fairfax County, Virginia.

2. Defendant The Connemara Corporation ("Connemara") is a corporation organized and existing under the laws of the Commonwealth of Virginia with business offices located in Fairfax County, Virginia.

3. Defendant Carl Bernstein and Associates, Inc. ("Bernstein") is a corporation organized and existing under the laws of the Commonwealth of Virginia with business offices located in Fairfax County, Virginia.

4. Defendant Builders Marketing, Inc. ("BMI") is a corporation organized and existing under the laws of the Commonwealth of Virginia with business offices located in Fairfax County and in Loudoun County, Virginia.

5. The claims set forth in this bill of complaint involve real property situated in Loudoun County, Virginia, commonly known and referred to as 118 Connemara Drive, Sterling, Virginia 22170, and more particularly described as follows:

All of that certain piece, parcel or lot of land and improvements thereon described as all of Lot 9, Block 1, Section 1 of Connemara Woods Subdivision, Loudoun County, Virginia.

Such property as is described in this paragraph shall be referred to herein as "the Property."

6. By a certain written agreement dated as of October 24, 1986, the Preganos as Purchaser agreed to purchase the Property from Connemara as Seller. As part of such agreement, the Preganos and Connemara also entered into a certain General Addendum, dated as of October 24, 1986, which became a part of the agreement of sale. The written agreements were both executed

by the Preganos as of October 24, 1986, and by Connemara as of November 26, 1986. Copies of the written agreements are attached as Exhibit A, and shall be referred to below as the "Sales Contract".

7. BMI, through its employee Bill Scott ("Scott"), acted as Connemara's agent in making the sale of the Property by Connemara to the Preganos. In the course of making such sale of the Property, BMI through Scott made certain representations to the Preganos upon which they relied, as will be set forth more fully below.

8. Under the Sales Contract, the parties agreed to a purchase price of \$170,890 to be comprised of a cash deposit of \$5,000, a loan of \$135,000 and additional cash at settlement of \$30,890. The Preganos paid to Connemara the cash deposit of \$5,000 pursuant to the Sales Contract.

9. Under the Sales Contract, the parties agreed that the loan to be obtained by the Preganos would be a loan guaranteed by the Veterans Administration ("VA"). The Preganos made timely application for such loan, and have received in writing a commitment for such loan from Dominion Bankshares Mortgage Corporation.

10. On information and belief, Connemara has not obtained the necessary approvals from the VA so that the Preganos' VA loan can close.

11. On information and belief, Connemara did not make a timely application to obtain such necessary VA approvals.

12. Under the Sales Contract, Connemara agreed that if settlement on the Property had not occurred by December 30, 1986, Connemara would nevertheless have the Property ready to occupy, and the Preganos could occupy the Property provided that the Preganos paid rent to Connemara in an amount equal to the sum they would otherwise pay as principal and interest on the loan they agreed to obtain under the Sales Contract.

13. On or about December 30, 1986, Connemara, acting through BMI and Scott, agreed that the Preganos could move their furniture into the Property (which furniture had been transported to Northern Virginia from the Preganos home in Ohio), such furniture was moved into the Property and the Preganos were instructed by Scott to execute a "Furniture Letter", a copy of which is attached hereto as Exhibit B. The Furniture Letter, like the Sales Contract, contemplated that the Preganos would be permitted to occupy the Property (along with their furniture) until settlement on the Property occurred.

14. Beginning in December, 1986, and continuing thereafter, Connemara, Bernstein, BMI and Scott demanded, in writing and orally, that in addition to the terms agreed to in the Sales Contract, the Preganos would be required to pay to Connemara, without there being a settlement on the Property or delivery to the Preganos of a deed, the sum of \$30,890 as a condition to their occupying the Property before settlement, and in addition thereto, the sum of \$37 per day from January 1, 1987 until settlement.

15. The Preganos have agreed, in accordance with the Sales Contract, to pay to Connemara the sum of \$37 per day in rent for each day they occupy the Property until settlement. The Preganos have refused to pay to Connemara the sum of \$30,890 before settlement on the Property.

16. As of January 9, 1987, Bernstein, through one Sandra K. Lindsay, communicated to the Preganos, for Bernstein and evidently for Connemara, that the Preganos would be required to pay, before settlement on the property, the "collateral down payment" which the Preganos have understood to mean that they would be required to pay to Connemara the sum of \$30,890 which, under the Sales Contract, is the additional cash due at settlement.

17. As of on or about January 16, 1987, Bernstein notified the Preganos, for itself and evidently for Connemara, that the Sales Contract was deemed terminated, on the basis of "purchaser default."

18. Despite Bernstein's termination letter of January 16, 1987, Connemara and Bernstein through BMI have, at various times, induced or led the Preganos to believe that Connemara intended to honor its contract obligations under the Sales Contract.

19. As of February 6, 1987, Connemara through its counsel again gave notice to the Preganos that they were in breach of the Sales Contract due to the Preganos' refusal to pay Connemara the sum of \$30,890 prior to occupancy of the Property.

20. As of February 7, 1987, BMI through Scott advised the Preganos that the Property had been sold already to a third party, and that the Property would be conveyed to such third party on February 13, 1987.

21. Throughout the foregoing series of events, the defendants Connemara, Bernstein and BMI have actively and consciously attempted, individually and in concert with one another, to attempt to apply pressure or leverage to the Preganos so that they would pay to Connemara the sum of \$30,890 which payment was not called for or required under the Sales Contract, and which payment the defendants knew was not called for or required under the Sales Contract. In carrying out this objective, the defendants have engaged, intentionally and maliciously, in the following acts:

(a) BMI, through Scott, has represented to the Preganos, in connection with their agreement to enter into the Sales Contract, that the written agreements between Connemara and the Preganos were the sole agreements of the parties, while intending to assert falsely that additional, non-written agreements were made by the parties.

(b) All of the defendants misrepresented to the Preganos what they had done to secure VA approval, which was a necessary precondition to the Preganos being able to settle on the loan agreed to in the Sales Contract.

(c) Defendants have referred or alluded to a "preoccupancy agreement" which does not exist or never existed or

which, if it does exist, has never been exhibited to the Preganos, and has never been agreed to by the Preganos.

22. In reliance upon the false representations and improper conduct of defendants, the Preganos have incurred expenses in connection with not being able to occupy the Property as of December 30, 1986, and additional expenses all caused and occasioned by such representations and conduct.

Count I

(Declaratory Judgment)

23. The allegations of paragraphs 1-22 are incorporated into this Count I by reference.

24. The parties to this action have asserted conflicting claims as to the content and meaning of the agreement under which Connemara agreed to sell the Property to the Preganos.

25. The dispute between the Preganos and defendants involves the construction of written documents, and an actual controversy between them, which dispute is susceptible of being resolved by a declaration of the parties' rights by this Court.

WHEREFORE, the Preganos request that the Court enter its declaratory judgment, declaring that the written agreements between the Preganos and Connemara constitute a valid, binding contract; such written agreements permit the Preganos to occupy the Property before settlement and conveyance of the Property to the Preganos, provided the Preganos pay rent for such occupancy

to Connemara equal to that sum the Preganos would otherwise have to pay as monthly principal and interest installments on the loan described in the Sales Contract; and the Preganos have the right to so occupy the Property immediately.

Count II

(Specific Performance)

26. The allegations of paragraphs 1-25 are incorporated into this Count II by reference.

27. The Preganos have performed fully and completely all of their obligations under the Sales Contract.

28. Connemara has breached the Sales Contract by demanding performance by the Preganos of terms which are not part of the agreement of the parties, and by attempting to terminate the Sales Contract.

29. The Property is unique real property, and unless the equitable remedy of specific performance is granted by the Court, the Preganos will incur damages irreparable in law.

WHEREFORE, the Preganos request that the Court decree that Connemara tender a deed to the Property to the Preganos, on condition that the Preganos pay to Connemara the purchase price called for in the Sales Contract, in accordance with the terms of the Sales Contract.

Count III

(Injunctive Relief)

30. The allegations of paragraphs 1-29 are incorporated into this Count III by reference.

31. Defendant BMI has advised the Preganos that it has sold the Property to a third-party which, if true, violates the Preganos rights under the Sales Contract and will cause irreparable harm to the Preganos.

WHEREFORE, the Preganos request that the Court decree that all defendants be enjoined, temporarily and permanently, from conveying or attempting to convey the Property to any party other than the Preganos.

Count IV

(Breach of Contract)

32. The allegations of paragraphs 1-31 are incorporated into this Count IV by reference.

33. The defendants attempt to declare the Preganos in default under the Sales Contract, and to terminate such sales contract, constitutes a breach of the Sales Contract, entitling the Preganos to an award of damages for the breach thereof.

WHEREFORE, the Preganos demand judgment against Connemara in the amount of \$100,000, plus interest, their costs and attorneys' fees, and such other and further relief as the Court deems proper.

Count V

(Violation of Va. Code §18.2-59)

33. The allegations of paragraphs 1-32 are incorporated into this Count V by reference.

34. Connemara, acting with and through Bernstein and BMI, entered into the Sales Contract with the Preganos knowing at such time that it did not intend to perform such agreement in accordance with its terms, and knowing that the Preganos would expose themselves to economic risk.

35. The Preganos entered into the Sales Contract with Connemara, and incident thereto, had their furniture transported to Northern Virginia and placed upon the Property, entered into temporary arrangements to lease living quarters at Reston, Virginia, expended time and money to apply for financing in accordance with the Sales Contract, and otherwise relied upon the Sales Contract in entering into agreements with third parties.

36. Thereafter, defendants attempted to exact monies, property and pecuniary benefits from the Preganos on the threat of causing the Preganos economic harm and exposing the Preganos to economic peril which defendants have further attempted to seize for their own advantage.

37. The foregoing conduct constitutes a violation and attempted violation of Va. Code §18.2-59, causing damages to the Preganos.

38. The foregoing conduct was wilful, intentional, malicious and tortious, entitling the Preganos to an award of punitive or exemplary damages in addition to compensatory damages.

WHEREFORE, the Preganos demand judgment against defendants, jointly and severally, in the amount of \$100,000 compensatory damages, \$300,000 in punitive or exemplary damages, plus interest, their costs and attorneys' fees and such other and further relief as the Court deems proper.

FRANK PREGANO
EVELYN PREGANO

By Counsel

MURPHY, McGETTIGAN & WEST, P.C.
921 King Street
Alexandria, Virginia 22314
(703) 549-5353
Attorneys for plaintiffs

By: 
Michael McGettigan

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

FRANK PREGANO, et ux.

Complainants,

v.

THE CONNEMARA CORPORATION, et al.

Defendant.

CHANCERY 10685

PLEA IN BAR

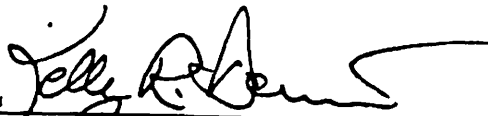
COMES NOW your Defendants, all of them, by their counsel undersigned, and respectfully filed this, their Plea in Bar of Complainants' prosecution of this matter, for the following reasons:

1. The Complainants have an adequate remedy at law in money damages.
2. The Contract between the parties which is attached as Exhibit A to the Complainants' Bill of Complaint shows unequivocally that there exists a "liquidated damages" provision which limits the Complainants' remedies to the forfeiture of their deposit.
3. The Contract between the parties also contains a "merger

clause" which restricts the parties ability to form other agreements in contravention of the actual Contract between them.

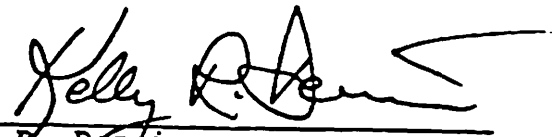
Respectfully submitted,

THE CONNEMARA CORPORATION,
et al.
By Counsel


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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, first-class postage prepaid to Michael McGettigan, Murphy, McGettigan & West, P.C., 921 King Street, Alexandria, Virginia 22314 this 17th day of February, 1987.


Kelly R. Dennis

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

FRANK PREGANO, et ux.

Complainants,

v.

THE CONNEMARA CORPORATION, et al.

Defendant.

CHANCERY 10685

DECREE OF DISMISSAL

THIS CAUSE came before me on the 6th day of March, 1987, at the regular Motion's Day Docket, upon the Motion of the Defendants, all of them, by their counsel, Light & Harrison, P.C., to sustain the plea in bar filed by them on the basis that the contract between the parties limited the parties' rights and remedies.

IT APPEARING, upon argument of counsel for all parties, as well as the ~~consideration~~ ^{consideration} of ~~the~~ ^{filed with the Bill as argued by counsel} exhibits, and ~~the~~ ^{the} case law submitted by them, that the contract between the parties limited the parties' ~~rights and~~ ^{thereunder} remedies, and, as such, the purchaser's sole remedy is the return of their deposit. It is, therefore,

ORDERED that ~~Counts I, II, III, and IV~~ of this cause be, and hereby is, DISMISSED with prejudice as to the Complainants, Frank and Evelyn Pregano, ~~and Defendants have twenty one (21) days to~~ ^{insofar as their remedies under the contract of 24 October 1986, may 6} ~~file any responsive pleadings they may determine are proper; and,~~ ^{conform} that certain lis pendens filed by the Preganos against the property, known as Lot 9, Block 1, Section 1 of Connemara Woods ^{in Deck Book 931, at Page 376} Subdivision, is hereby released and The Connemara Corporation shall

cause a copy of this Order to be filed among the land records of Loudoun County, *the deposit of \$5,000.00 this day having been delivered by counsel for Defendant, Connemara Corporation, to*
THIS ORDER IS FINAL.

GIVEN BY MY HAND this 31 day of April, 1987.

Carleton Penn
Hon. Carleton Penn, Judge *Daughate*
Loudoun County Circuit Court

WE ASK FOR THIS:

Kelly R. Dennis
Kelly R. Dennis, Esq.
Light & Harrison, P.C.
6849 Old Dominion Drive
Suite 410
P. O. Box 6625
McLean, Virginia 22106
(703)356-9751
Counsel for Connemara
Corporation and Carl
Bernstein & Associates, Inc.

SEEN AND ~~AGREED~~ OBJECTED TO: *N*

ALL RESPECTS
Michael McGettigan
Michael McGettigan, Esq.
Murphy, McGettigan & West, P.C.
921 King Street
Alexandria, Virginia 22314
(703)549-5353
Counsel for Frank and Evelyn
Pregano

SEEN AND AGREED:

Douglas W. Coleman
Douglas W. Coleman, Esq.
Cunningham & Hudgins
115 S. St. Asaph Street
Alexandria, Virginia 22314
(703)684-0909
Counsel for Builders
Marketing, Inc.

** Counsel for Complainants in open court without
prejudice to Complainants.*

IN THE
SUPREME COURT OF VIRGINIA

FRANK PREGANO, et al.,
Appellants,

v.

THE CONNEMARA CORPORATION, et al.,
Appellees.

PETITION FOR APPEAL

(From a Decree of Dismissal of the Circuit
Court of Loudoun County, Chancery No. 10685)

Michael McGettigan
Murphy, McGettigan & West, P. C.
921 King Street
Alexandria, Virginia 22314
(703) 549-5353
Counsel for appellants

IN THE
SUPREME COURT OF VIRGINIA

FRANK PREGANO, et al.,
Appellants,

v.

THE CONNEMARA CORPORATION, et al.,
Appellees.

PETITION FOR APPEAL

(From a Decree of Dismissal of the Circuit
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Counsel for appellants

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IN THE
SUPREME COURT OF VIRGINIA

FRANK PREGANO, et al.,
Appellants,
v.
THE CONNEMARA CORPORATION,
Appellees.

I. NATURE OF CASE AND PROCEEDINGS BELOW

This case involves the intentional and willful breach of contract by the seller of a new home. Under the order of the Circuit Court of Loudoun County appealed from here, which dismissed the claims asserted for such breach pursuant to the sellers' plea in bar, the home purchasers have been denied any remedy.

Appellants are Frank Pregano and his wife Evelyn Pregano ("the Preganos") who, on February 10, 1987, filed a bill of complaint in the Circuit Court. Appellees (defendants below) are three corporations (collectively, "defendants"): The Connemara Corporation ("Connemara"), Carl Bernstein and Associates, Inc. ("Bernstein") and Builders Marketing, Inc. ("BMI").

All defendants in the Circuit Court filed a plea in bar as their only initial response to the bill of complaint. Argument on the plea in bar was heard on March 6, 1987 by the Circuit Judge, Hon. Carleton Penn. On March 16, 1987, the Circuit Judge issued a letter opinion under which (upon entry of

an order) defendants' plea in bar would be sustained, and the Preganos' cause dismissed. The Preganos opposed entry of the order submitted by defendants and requested that the Circuit Judge reconsider his ruling. The Circuit Judge entered a final decree of dismissal on April 3, 1987 dismissing the Preganos' cause with prejudice. The Preganos filed their notice of appeal on April 28, 1987.

II. ASSIGNMENTS OF ERROR

The Preganos assign as error the following:

1. The Circuit Judge committed reversible error in upholding the enforceability of a liquidated damages provision in a sales contract for residential real estate, which provided for the payment of no damages to the contract purchasers in the event of the seller's willful breach, since such provision only required that the breaching seller return to the non-breaching purchasers the purchasers' own deposit.
2. The Circuit Judge committed reversible error in denying such innocent purchasers the equitable remedy of specific performance, and, instead, upholding an unenforceable liquidated damages provision in a sales contract for residential real estate, because the seller willfully breached the sales contract, and enforcement of such contract by specific performance would not have imposed any hardship on the seller.
3. The Circuit Judge committed reversible error in sustaining a plea in bar and dismissing the cause with prejudice

where such plea did not assert a defense which could properly have determined the entire case.

4. The Circuit Judge committed reversible error in sustaining a plea in bar and dismissing the cause with prejudice since, under settled law applicable to the enforceability of liquidated damages provisions, it was necessary for the Circuit Judge to first determine as a matter of fact whether such liquidated damages provision provided for damages to be paid to the non-breaching purchasers under a residential sales contract.

5. The Circuit Judge committed reversible error in sustaining a plea in bar and dismissing the cause with prejudice where such plea did not purport to assert, nor could it assert, a bar to all of the claims in the cause, including specifically the purchasers' tort claim against the breaching seller.

III. QUESTIONS PRESENTED

1. Whether a liquidated damages provision in a contract for the sale of residential real estate is enforceable where such provision provides that the purchasers' sole remedy for seller's breach is the return of purchasers' own deposit and such seller has willfully breached the sales contract. (Assignment of Error 1).

2. Whether a liquidated damages provision should be enforced to bar the innocent purchasers' equitable remedy of specific performance where the seller willfully breaches the sales contract, and the liquidated damages provision provides

only for the return to the innocent purchasers of their own money, the deposit. (Assignment of Error 2).

3. Whether a plea in bar, which does not even purport to assert a bar to all claims, should be sustained and the cause be dismissed with prejudice where the Circuit Judge was required to determine, as a matter of fact, whether a liquidated damages provision provided for compensation to innocent purchasers caused by a seller's willful breach of contract, and where such innocent purchasers had asserted a tort claim to which such plea was not addressed. (Assignments of Error 3, 4 and 5).

IV. STATEMENT OF FACTS

The facts under which this appeal arises are those facts alleged in the Preganos' bill of complaint and the terms of written agreements attached to the bill of complaint. The recitation in this statement is taken from those allegations.

Under a written agreement dated as of October 24, 1986 ("the sales contract"), the Preganos agreed to purchase from Connemara a new home then under construction in Sterling, Loudoun County, Virginia. The Preganos and Connemara also entered into an addendum to the sales contract, also dated October 24, 1986. The Preganos executed the sales contract on October 24, 1986, and the addendum on October 23, 1986; Connemara executed both documents on November 26, 1986. In the negotiations for these agreements, Connemara's agent was BMI, principally BMI's employee Bill Scott.

Under the sales contract, the Preganos agreed to pay \$170,890 for the new home. The Preganos made a cash payment of \$5,000 as a deposit, and agreed to pay the remainder at settlement with additional cash of \$30,890, and loan proceeds of \$135,000 from a loan to be guaranteed by the Veterans Administration.

The addendum to the sales contract provided as follows:

(1) Purchaser [the Preganos] agrees to preoccupy, if necessary, on December 30, 1986. Property will be ready to occupy on or before December 30, 1986.

(2) Purchaser to pay pro-rated rent on principal and interest only.

The bill of complaint alleges that the language of the addendum was intended to accommodate the possibility that if settlement under the sales contract could not occur by December 30, 1986, the Preganos could nevertheless occupy the home and pay to Connemara as pro-rata rent the amount they would otherwise have to pay as monthly principal and interest installments on the VA loan they were to obtain.

There was no settlement on the home by December 30, 1986, because Connemara had failed to apply for and obtain from the Veterans Administration the approvals necessary for the contemplated VA guaranteed loan to be obtained by the Preganos. The Preganos were blameless in this process, having timely applied for the loan called for by the sales contract. The Preganos did receive a written commitment for such loan from a lender, Dominion Bankshares Mortgage Corporation.

Connemara and its agent BMI advised the Pregaros to move their furniture to the new home as of December 30, 1986, when the home was completed. At their own considerable expense, the Pregaros therefore moved their furniture from their former house in Ohio into the new home. As of about the same time, however, Connemara, BMI and Scott, as well as Bernstein (a company with which Connemara is affiliated) refused to allow the Pregaros to occupy the new home, even though the Pregaros were ready, willing and able to abide by all of the terms of the sales contract and its addendum, including the requirement of paying pro-rata rent. Instead, defendants demanded that the Pregaros pay to Connemara, as a condition to pre-settlement occupancy of the home, the sum of \$30,890. This was to be the cash portion of the purchase price which the Pregaros had agreed to pay at settlement. Defendants thus sought to require a very substantial payment to Connemara by the Pregaros without any deed being delivered to the Pregaros, or indeed, without their having any definite prospect of receiving such a deed. The Pregaros refused to accede to this new demand, and were therefore not allowed to occupy the new home.

As of January 16, 1987, Connemara and Bernstein notified the Pregaros that the sales contract was deemed terminated on the basis of the Pregaros' default. As of February 6, 1987, this claimed default of the Pregaros was identified by Connemara's counsel to be the Pregaros' refusal to pay Connemara the additional sum of \$30,890 to occupy the home before

settlement was held. On February 7, 1987, the Preganos were notified by BMI's employee Scott that Connemara had sold the property to a third party, and conveyance to such third party would occur on February 13, 1986.

These events prompted the filing of the bill of complaint which sets forth all of the facts recited above. Connemara had claimed the Preganos had breached the sales contract by refusing to comply with its demand for a payment not called for by the sales contract. At no time did Connemara or the other defendants state that Connemara had breached the sales contract, and return the Preganos' \$5,000 deposit to them. Rather, defendants' claim was that the Preganos were entirely at fault in not meeting their demand for payment of \$30,890.

The Preganos' bill of complaint based upon these facts contained five counts. Count I sought a declaration that the sales contract was binding, and a construction of its terms. Count II demanded that the Court order Connemara to convey the home to the Preganos, and Count III sought an injunction barring a sale or attempted sale to anyone other than the Preganos. Count IV sought an award of compensatory damages for Connemara's breach of the sales contract. Count V alleged that defendants' conduct constituted a willful, intentional tort harming the Preganos.

No defendant answered these allegations. Instead, all defendants filed a plea in bar, and a motion to sustain their plea in bar. These pleadings alleged that the Preganos had an

adequate remedy at law in money damages, the sales contract had a "liquidated damages" provision limiting the Preganos to "forfeiture [sic] of their deposit", and a "merger clause" in the sales contract precluded any other agreement.

The liquidated damages provision on which defendants rely provides as follows:

15. DEFAULT BY EITHER PARTY. (a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by Seller and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable of precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agrees to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

The Circuit Judge's letter opinion stated in its entirety as follows:

Upon the Plea in Bar argued by you on 6 March 1987, the court is of the opinion that it must be sustained and this cause dismissed.

Although §15 (b) of the contract which is the subject of this suit, is harsh, such constituted the agreement of the parties, and the purchasers are left with their sole remedy, the return of the deposit. They have contracted away any other rights and remedies.

The decree of dismissal entered pursuant to the letter opinion held that the Preganos' sole remedy under the sales contract was to have their deposit returned to them, and noted that such deposit was contemporaneously delivered to the Preganos' counsel in open court, without prejudice to the Preganos. The Preganos' cause was dismissed with prejudice under the decree of dismissal. No adjudication was made, therefore, that the Preganos breached the sales contract. The Circuit Court, however, conditioned its order on the return of the Preganos' deposit to them.

V. ARGUMENT

- A. A contract provision in a real estate sales contract limiting the purchaser to the return of its deposit, under the guise of providing liquidated damages for a seller's willful breach, is void since it provides for no damages at all.

The legality of a "liquidated damages" provision which provides no compensation at all to the party injured by a breach

of contract is not the usual issue where liquidated damages provisions are litigated. Usually, the issue is whether the liquidated damages called for in an agreement are grossly in excess of actual damages, and therefore deemed to be an unenforceable penalty.

This Court recently considered the usual issue in Taylor v. Sanders, ___ Va. ___, 353 S.E.2d 745 (1987). In Taylor, this Court held, in accordance with what it termed "settled law", that parties may agree in advance "upon the amount to be paid for loss which may result from breach of the contract":

When the actual damages contemplated at the time of the agreement are uncertain and difficult to determine with exactness and when the amount fixed is not out of proportion to the probable loss, the amount is deemed to have been intended as enforceable liquidated damages.

Id. at ___, 353 S.E.2d at 746-47. This Court in Taylor went on to uphold as enforceable a \$3,000 note, agreed by the parties to be liquidated damages in a residential real estate transaction, which the seller could retain upon the purchaser's failure to close the transaction. This Court noted that the sum of \$3,000 "was not disproportionate to the probable loss sustained by the seller as a result of the breach." Id. at ___, 353 S.E.2d at 747.

In deciding Taylor, this Court referred to the rule, long established in Virginia law, that the construction to be given a liquidated damages provision "depends in each case upon the intent of the parties as evidenced by the entire agreement

construed in the light of the circumstances under which it is made." Id. citing Crawford v. Heatwole, 110 Va. 358, 360, 66 S.E. 46, 47 (1909).

In the instant case, the contract provision relied upon by defendants as a liquidated damages clause provides for no damages at all in the event of a breach of contract by the seller Connemara. The \$5,000 deposit was, of course, the Preganos' money. They would therefore receive no compensation for a breach by the seller Connemara such as occurred here. No case decided under Virginia law in accordance with the "settled law" of liquidated damages sanctions such a result since the clause, if upheld, would guarantee that the purchaser received no damages. Far from predicting the proportionate expected losses of the Preganos at the time the sales contract was made, the clause assured they would not be compensated if the seller Connemara defaulted.

Such a result in this case, moreover, violates the longstanding Virginia rule that where a seller of real estate willfully defaults and refuses to convey in accordance with his contract, the purchaser is entitled to recover actual damages, not limited to purchase money paid. Williams v. Snider, 190 Va. 226, 228-33, 56 S.E.2d 63, 65-67 (1949). In Williams, this Court dealt with the contention of a seller of real estate, who willfully refused to honor her contract and then sold the property at a greater price to another, that the innocent purchaser could recover only to the extent of purchase money

paid. This Court in Williams rejected the seller's claim, and held that the measure of damages was the difference between the contract price and the value of the property at the time of breach. In Williams, this Court noted that a long line of Virginia cases rule that the measure of damages, where the seller acts in bad faith, or disables himself from conveying, or willfully refuses or neglects to perform, is the purchaser's loss of his bargain, not the return of purchase money paid. Davis v. Buery, 134 Va. 322, 339-44, 114 S.E. 773, 777-79 (1922); Spruill v. Shirley, 182 Va. 342, 348-50, 28 S.E.2d 705, 708 (1944); Horner v. Holt, 187 Va. 715, 728, 47 S.E.2d 365, 371 (1948).

The reason given by this Court in Williams for adhering to the rule that an innocent purchaser may recover actual damages from a seller who willfully breaches applies with full effect to the facts in the instant case:

In no field of the law of contracts may a party deliberately refuse to perform his agreement, when it is in his power to fulfill his bargain, without subjecting himself to liability for compensatory damages. To countenance a contrary rule in contracts for the sale of real estate

would greatly impair, and in many cases entirely destroy, the value of the contract and seriously obstruct the conduct of the real estate business.

190 Va. at 233, 56 S.E.2d at 66.

The Virginia law of remedies for the breach of a real estate sales contract thus focuses on the issue of compensation for the innocent party. The rationale of Taylor, which dealt with a liquidated damages clause, was that to be valid such a clause

had to provide for damages proportionate to actual expected loss. Williams held, in a case not involving a liquidated damages provision but which dealt with proper compensation for the injured party, that the proper measure of damages turns on the innocent party's actual injuries. In the instant case, these principles of contract remedies were wholly ignored. Under the construction employed by the Court below, the Preganos' contract with Connemara had no value. Such a result is unprecedented where a seller like Connemara willfully breaches its agreement.

- B. An unenforceable liquidated damages provision should not be upheld where the result is to bar consideration of the remedy of specific performance in a case where the seller of real estate willfully breached the sales contract.

In one of the claims in their amended complaint, the Preganos sought the equitable remedy of specific performance. In dismissing the bill of complaint because of the liquidated damages provision in the sales contract, the Circuit Judge thus cut off any consideration of whether specific performance is appropriate in this case involving the willful breach of the seller, Connemara. The Circuit Judge's ruling thus impaired the remedy that this Court has found should be provided under circumstances like those here.

In Haythe v. May, 223 Va. 359, 288 S.E.2d 487 (1982), a seller of real estate willfully breached a contract to convey to its contract purchaser, and instead conveyed the real estate to another party. The trial court found that the seller breached

its contract by conveying to a third party, but ordered that the innocent purchaser recover only his deposit and incidental expenses. This Court reversed, and held that where a valid contract exists, and the enforcement of such contract would not work any hardship or unfairness on the seller, specific performance should be granted:

Although it is not a matter of absolute right, "where the contract sought to be enforced is proved, and it is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity to decree specific performance as it is for a court of law to give damages for a breach of it."

Haythe v. May, 223 Va. at 361, 288 S.E.2d at 488, quoting Pavlock v. Gallop, 207 Va. 989, 995, 154 S.E.2d 153, 157 (1967).

In this case where Connemara, in concert with the other defendants, willfully and egregiously breached the sales contract by terminating it for an improper reason, specific performance is an appropriate remedy. Such a remedy should not be made unavailable, especially where no other remedy is provided the Preganos.

- C. A plea in bar was not a proper procedural vehicle for deciding the issues involved in this case, or dismissing all claims alleged in the bill of complaint.

The Circuit Judge issued his letter opinion sustaining defendants' plea in bar without even deciding whether the Preganos breached the sales contract, or whether Connemara was the party in default. The plea in bar did not, of course, admit that Connemara

breached the sales contract, nor did defendants in raising the plea assert that Connemara had returned to the Preganos the \$5,000 deposit which defendants claim is the Preganos' sole remedy. As the decree of dismissal notes, however, the \$5,000 deposit was returned to the Preganos' counsel in open court in conjunction with the entry of the decree of dismissal.

These anomalous events demonstrate, at the least, that the opinion and order sustaining defendants' plea in bar was inappropriate as to the bill of complaint filed on behalf of the Preganos in this case. This is because a plea in bar is a proper defensive pleading only where there is an issue raised in defense which can decide the entire case.

In his treatise on Virginia procedure, Professor Boyd notes that a plea in bar, or special plea, "may be useful to present a single issue which may result in ending the proceeding; for example, statute of limitations, *res judicata*, collateral estoppel by judgment, accord and satisfaction, or statute of frauds." Boyd, Graves & Middleditch, Virginia Civil Procedure §8.4 at 336 (Michie 1982). Recognizing that such issues can also be raised by answer, the treatise goes on to say, "In equity as at law, however, the defendant may find it advisable to file a special plea if there is one issue upon which the determination of the case could lie." *Id.* (emphasis supplied). In a similar vein, Michie's notes that pleas in bar are intended to bar the rights of plaintiff to recover at all, as distinguished from other pleas

which go to jurisdiction and similar matters. 14B Mich. Jur. Pleading §45 at 219 (1978 Repl. Vol.).

The decision of the Circuit Judge below sustaining the plea in bar and dismissing the cause filed on behalf of the Preganos was error in several distinct respects. First, in ruling in effect that the liquidated damages clause was valid on its face, the Court below failed to inquire, by taking evidence or otherwise, as to whether such clause satisfied the benchmark criteria to be considered under Virginia law in ruling upon the validity of such a clause.^{1/} Under Taylor v. Sanders, supra, and the prior decisions of this Court, the Circuit Judge should have determined, at minimum, whether actual damages at the time the Preganos and Connemara entered into the sales contract were uncertain and difficult to ascertain, and whether the amount of damages provided for was not out of proportion to the parties' probable losses. Taylor v. Sanders, supra at ___, 383 S.E.2d at 746-47.

Second, unlike a plea in bar based on an issue such as (for example) the statute of limitations, defendants' plea had no

^{1/} The apparent rationale of the letter opinion of the Circuit Judge is that the liquidated damages provision would be enforced because it was part of the parties' agreement, and purchasers had contracted away any other rights and remedies. Yet this is so in every case where an agreement contains a liquidated damages provision and a claim of unenforceability is made. There would be literally no case law on the enforceability of such provisions if the trial judge's inquiry were limited to whether such a provision is in an agreement. The voluminous body of case law on this issue demonstrates, of course, that courts typically inquire carefully into enforceability, which always involves inquiry into factual matters beyond the self-evident proposition that an agreement contains a liquidated damages clause.

focus apart from their claim that the Preganos' contract remedies were limited. The bill of complaint here sets forth, in great detail, the acts of the various defendants which add up to an independent, willful tort. These allegations include false and fraudulent statements by the defendants which induced the Preganos to enter into the sales contract, attempts to extort monies from the Preganos nowhere agreed to in the sales contract and the intentional breach of the sales contract so that defendants could sell the property to a third party. This Court has recognized that such a claim may be joined in a case in which contract claims are also made, so long as an independent, willful tort is alleged beyond the mere breach of a duty imposed by contract. Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983). Defendants' conduct, as alleged in the bill of complaint here, is similar to conduct branded illegal under Virginia law recently in Battlefield Builders, Inc. v. Swango, 743 F.2d 1060 (4th Cir. 1984) (considering conduct which amounted to attempted extortion under Virginia law).

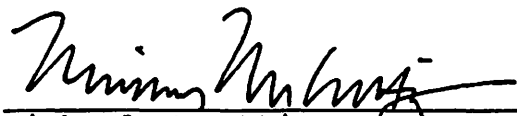
Finally, by sustaining the plea in bar without taking any evidence, the Court below reached a result which is not just "harsh", as the Circuit Judge observed, but which in light of the allegations of the bill of complaint and settled law should not have been countenanced. A plea in bar is available as a defensive pleading where it is clear that all proceedings ought to be ended without further consideration. Under the allegations of the bill of complaint here, all remedies in contract or in tort to provide

compensation to the Preganos should not have been nullified pursuant to a plea in bar.

VI. CONCLUSION

For the foregoing reasons, appellants request that an appeal be granted so that the decree of dismissal entered by the circuit Court of Loudoun County may be reversed, and the case remanded to the Circuit Court for further proceedings.

Respectfully submitted,



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VII. CERTIFICATE

(1) The parties to this appeal and their counsel are as follows:

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(b) Appellees: The Connemara Corporation,
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Builders Marketing, Inc.

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Counsel for appellee Builders Marketing, Inc. only:

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(2) A copy of the foregoing Petition for Appeal was mailed to each of the counsel for appellees, this 20th day of June, 1987.

(3) Counsel for appellant wishes to state orally, in person, to a panel of the Court the reasons why this Petition for Appeal should be granted.


Michael McGettigan

IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

FRANK PREGANO, et. al.

Petitioners (Appellants)

vs.

THE CONNEMARA CORP., et. al.

Respondents (Appellees)

BRIEF IN OPPOSITION
TO PETITION FOR APPEAL

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July 17, 1987

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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

FRANK PREGANO, et. al.

Petitioners (Appellants)

vs.

THE CONNEMARA CORP., et. al.

Respondents (Appellees)

BRIEF OF ALL APPELLEES IN OPPOSITION TO PETITION FOR APPEAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF VIRGINIA

STATEMENT OF THE CASE

Appellants "Nature of the Case and Proceedings Below" (Page 1, Appellant's Petition) is not correct insofar as a factual account of the proceedings in the trial court are concerned.

This case does not involve an "intentional and willful breach" on the part of a seller of a new home as stated by counsel for the Appellants. This case involves whether or not Mr. and Mrs. Pregano, having failed to deposit certain monies which were required under their contract, may, in the face of a clause, which they agreed to, which prohibits them from bringing a contract action, sue the seller and "tie-up" his property while that suit is pending. The relevant contractual provision, is not, as stated by counsel for the Appellant, a liquidated damages clause; it is in fact an election of remedies clause. Further, the Appellants have not been denied "any remedy" as asserted in their Brief. The Judge specifically stated

in his Final Order entered on April 3, 1987, that the Plaintiffs have every right to bring actions ex contractu.

Further, on March 6, 1987, the Motion to Sustain the Defendant's Plea-in-Bar, which judgment is appealed from herein, was heard by the Hon. Carleton Penn, and many factual averments were stated by both counsel. None of these factual averments were objected to and, as such, constituted the "facts" of this case. After hearing the facts and reviewing the case law suggested by counsel in their oral argument, Judge Penn indeed ruled against the Plaintiffs. It was only then that a Brief was filed by the Plaintiffs and this in support of their Motion for Judge Penn to reconsider. Judge Penn refused to reconsider his decision and in fact entered the Order appealed from on April 3, 1987. Thus, Appellees' Motion to Dismiss Appellant's Appeal is properly taken and should be granted. (See said Motion filed herewith.)

ASSIGNMENTS OF ERROR

Counsel for Appellant has stated numerous "assignments of error" which entirely missed the point of Judge Penn's ruling. Appellee takes issue with the following points raised therein.

1. The Judge did not hold that the clause was a "liquidated damage" clause and this was not argued by the Appellee. The clause in question is an election clause wherein the contract purchaser agreed that they would assert no actions under the contract and would, instead, accept their deposit back. Judge Penn ruled this squarely in his Memorandum Opinion and, later in his formal Order,

holding that the purchasers had waived any contractual rights they may have.

2. Judge Penn's sustaining of the Plea-in-Bar raised by the Defendant was entirely correct in that the Judge specifically found, in his remarks from the bench during oral argument at the two separate hearing dates, that the Pregano's "tort" claim was really a contractual claim. To paraphrase the Judge, Judge Penn stated: "Isn't this really just breach of contract stated in tort language?" 1/

Thus, while the Appellant may assign any error he wishes, subject to the rules, the actual hearings on this matter yield quite a different result from the assignments raised by the Preganos.

ARGUMENT

I. THE CLAUSE IN QUESTION DOES NOT PURPORT TO BE A LIQUIDATED DAMAGE CLAUSE ONLY. IT IS, IN ADDITION THERETO, AN ELECTION OF REMEDIES.

The Appellant incorrectly argues that the Judge below held that this was a permissible liquidated damage. It is, without question, not solely a liquidated damage clause. Appellees do not argue that "damages" are returned to the perspective purchaser. Never could it be more true than in the instant case that, as stated by this Court in the recent case of Taylor v. Sanders, 233 Va. ___, 353 S.E.2d 745 (1987), construction to be given stipulations by parties to a contract "depends upon the intent of the parties as evidenced by the entire contract viewed in the light of the circumstances under which the contract was made." Id. at ___ 353 S.E.2d at 747. The contract in question between the parties contained not just the original contract but certain contract addendums and incorporated by

1/ Because all of the claims raised by the Plaintiff below were contractual in nature, Builder's Marketing, Inc. and Carl Bernstein & Associates, Inc. are not proper parties in any event and are not discussed herein.

reference other documents which the Preganos were required to execute and, in fact, refused to so execute.

One of the most misleading arguments made by the Appellants in this case is their assertion that The Connemara Corporation is allowed to benefit from a large increase in the prices of their homes between the time of contracting and the present and also is allowed to retain the Purchaser's deposit monies. First, the argument with regard to the increased sales price is completely ignorant of the substantial sums of money that a developer/seller such as The Connemara Corporation must shoulder during the pendency of any project it might venture into. This is known in the industry as the "carry," or "debt load." These sums of money, especially where a protracted suit for specific performance is allowed to "freeze" any one or more of the properties in those projects, are substantial. This was an important fact given to Judge Penn and considered by him. Secondly, The Connemara Corporation is not seeking to retain the monies of the Preganos; and, in fact, the monies have been returned on more than one occasion and rejected by them until they were returned in open court.

Although the Appellants seek tirelessly to characterize Paragraph 15 as a liquidated damages clause that has run afoul of the law to the extent that it has become a penalty, the examination of this area by the Virginia Supreme Court has long recognized the right of a vendor to specify an election and be protected in that endeavor. In the case of Brown v. Friedberg, 127 Va. 1, 102 S.E. 468 (1920), the court was confronted with a situation in which a sum

of \$500.00 was agreed upon as liquidated damages for a breach by either party. The vendee brought a suit for specific performance upon the breach of the vendor and the court granted specific performance. It is true that the court, in that case, affirmed the trial court; however, the observations they made in their reasoning are particularly important to the case at bar. As stated by the court:

"The approved rule is that a court of equity may decree specific performance of a contract, for the sale and conveyance of real estate which also requires the payment of a sum of money, whether by way of penalty or damages, to secure the performance of such contract; but if the contract is in the alternative and provides for the performance of either of two things - that is, where the vendor is given the right either to make the conveyance or to pay a stipulated sum of money in lieu thereof - then equity will not decree specific performance of the contract to convey." [Citations omitted] Id. at 3, 102 S.E. at 470.

There was no such alternative available to the vendor in the Brown case and, therefore, the Brown case is distinguishable from the case at bar. Further, the court in Brown expressly recognizes the right of a company such as The Connemara Corporation to protect itself from suits such as filed by the Appellants which, quite literally, tie up the property, and provide for an alternative remedy under the contract.

It is important to note here, whether or not the remedy afforded the Preganos has become a poor remedy is immaterial. They have the right to maintain any action ex contractu that they may wish. Hopefully, it will be supported by appropriate facts. But, the point being, they do not have the right to tie up the property with a lis pendens and, further, to render uncertain the title of

this property for a period which would make it "unconscionable" to the Appellee if specific performance were, after the case is heard upon its merits, denied.

The Brown court goes further on this issue. In that decision the court was also concerned that the insertion of the \$500.00 liquidated damage provision in that case was a "mere incident of the transaction and . . . was not designed either to change the substance of the agreement or to give either of the parties the option of abandoning the contract and liquidating the damages therefore." Id. at 4, 102 S.E. at 472. The facts are exactly the opposite in the case at bar, where The Connemara Corporation has reserved for itself, and also given the same right to the prospective purchasers, the right to abandon the contract for whatever reason may exist. Whether or not this is done in good faith has nothing to do with the contract action. This is more appropriately the subject of an action ex contractu for a breach of the covenant of good faith or similar tort for damages.

The Brown court did not stop there, however, and went on to observe the following:

"There is no statement, either verbally or in writing, in connection with the transaction from which it may be fairly inferred that either party might at his option repudiate the sale, or that either had the alternative of renouncing the contract upon the payment of the \$500.00. Most, if not all, of the authorities cited to support the vendor's contention are based upon the fact that there was some language in the contract clearly indicating the right or option, either to repudiate the contract of sale or to pay the stipulated amount." Id.

Thus, we can see that the important consideration is whether or not the agreement of the parties was unequivocal and not a "mere

incident" or non-essential aspect of the agreement. How interesting it would be, for example, if the market for real estate in Northern Virginia were far more elastic, or, for example, static. Then, we would see the Preganos filing a Plea-in-Bar to The Connemara Corporation's attempt to compel specific performance. What is worse, there is no comparable "leverage" that The Connemara Corporation would be able to employ in that situation for they would have nothing to "freeze" as has been the effect of the lis pendens and the related suit for specific performance filed by the Preganos.

In their brief, the Appellants cite hornbook principles of law, which the Defendant will agree are axiomatic in this area, that state, essentially, the time-honored principle that a court of equity may grant specific performance in a case involving the state of realty. Certainly, the equity court has relatively infinite powers in cases where it can be shown that there is no adequate remedy at law. However, as the Brown court has stated, even equity itself may be enjoined. This is such a case.

Again, were it not for the volatile real estate market that currently exists, a rising one, the result chosen by The Connemara Corporation acceded to by the Preganos in Paragraph 15 would most likely be "unconscionable" to The Connemara Corporation. Yet, such is the nature of anticipatory clauses such as the election of remedies found in Paragraph 15.

Perhaps the most enlightening case to be found from the Virginia Supreme Court is that of Haythe v. May, 223 Va. 359, 288 S.E.2d 487 (1982). In that case, Judge Cacheris, Fairfax County

Circuit Court Judge, heard a dispute involving a situation strikingly similar to the one between Connemara and the Preganos. In June of 1977, the Plaintiff in that case had contracted with May Properties for construction of the dwelling that was at issue. A closing was scheduled for April at which time the purchaser in that case refused to settle due to certain construction defects. The trial court in that case found specifically that such a refusal was justified. However, at a later date, when the purchaser attempted to settle on the contract with May Properties once again, it found that the property had been conveyed from May Properties to another purchaser.

Haythe thereupon sued May Properties and its principals for specific performance. Judge Cacheris, after hearing the evidence and being satisfied that May had breached the contract by conveying the property to another purchaser, nonetheless, because of Haythe's "personal situation" refused specific performance and ordered that Haythe recover his deposit and incidental expenses.

At first blush, this case would seem to be on all fours with Connemara's case and, indeed, adverse to Connemara's position in this case. However, a review of the Fairfax County Circuit Court files made by counsel for Connemara has disclosed that, in the contract between Haythe and May, there is no liquidated damages provision at all and, further, not even a mention of any election of remedies or any remedies of any nature.

As was pointed out to Judge Penn in the oral argument, the contract in Haythe v. May was absolutely silent with regard to any

liquidated damages or election of remedies. In other words, the seller in the case of Haythe v. May did not have available to him the fully negotiated contractual provision which Judge Penn correctly decided acts as a bar to any actions that may be brought under the contract. Thus, the holding of Haythe v. May, while Appellee admits it is good law, has absolutely no bearing on the case involving the Preganos.

Once again, as well, the Virginia Supreme Court observed that with respect to specific performance, although it is a matter of course for courts of equity to make such a decree, "the granting of specific performance is addressed to the sound discretion of the trial court." Id. at 361, 288 S.E.2d at 490. And, further, quoting from First National Bank v. Roanoke Oil Company, 169 Va. 99, 192 S.E. 764 (1937), the court noted that part of the inquiry must be whether or not there is anything "to indicate that its [the contract's] enforcement would be inequitable to a Defendant . . . " Id.

Thus, we can see, the inquiry is not confined to whether the Preganos will suffer a harsh result from the bargain they made but whether, in light of all the surrounding circumstances, and the contract terms, it is equitable to force the transfer of the realty rather than to award damages. One must also bear in mind that, in their suit, the Preganos have asked for damages and declaratory relief in addition to specific performance. This, more than anything else, undercuts their assertion that they have no adequate legal remedy. The Preganos also include a count of fraud, in the

nature of a tort ex contractu, and in that count they seem to have no problem whatsoever in identifying the nature and extent of their legal damages.

Other than citing Hornbook Law with regard to the "uniqueness" of real property and its relatively presumptive equity jurisdiction, the Appellants alleged nothing to guide this court with regard to the Appellants' need for the actual property in order to make them whole. Again, as stated above, they have no problem at all quantifying their damages in nature and amount and, this in and of itself should be enough to deny equity jurisdiction and consequently the privilege of specific performance therein.

The Appellant cites numerous cases standing for the proposition that the seller may not willfully refuse to convey, and if he does, he will suffer damages measured by the difference between the contract price and the value of the property at the time of the breach. However, this ignores the fact that was raised in oral argument before Judge Penn, and not objected to by the Plaintiff at the time, that the Preganos were alleged to be in breach and not the Seller.

In the case of Williams v. Snider, 190 Va. 226, 56 S.E.2d 63 (1949), it was "not disputed that the evidence supports a finding by the jury that the Defendant, without just cause, willfully refuse to convey . . ." Id. at 227, 190 S.E.2d 64. Thus, the Williams case is in apposite to the case at bar for two reasons. One, the Preganos' own pleadings admit that the Defendant had cited breach on the part of the Preganos. Two, there is no indication in the

Williams case that there existed a contractual provision akin to the contractual provision in the case at bar. (See, Appellant's Brief, page 8 for a full reading of the applicable contractual provision.)

Additionally, and totally consistent with the Williams decision, the Preganos are not barred from bringing any action they wish ex contractu. Indeed, if they can prove that the seller committed a tort against them, in other words, if it is true as they assert in their pleadings that the seller has defrauded them or has committed some other independent tort, they are free to sue and, as Williams suggests, the measure of damages would be readily available to them. However, they may not, consistent with the contractual provision they agreed to, seek specific performance or, for that matter, "tie-up" the property by using a lis pendens.

II. THE PLEA IN BAR WAS A COMPLETELY PROPER PROCEDURAL VEHICLE FOR DISMISSING THE CASE. THE JUDGE SPECIFICALLY HELD THAT THE "TORT" CLAIMS OF THE PLAINTIFFS WERE NOTHING MORE THAN "RESTATED" CONTRACT CLAIMS.

Turning to the paragraph in question, we see that in the last sentence of Paragraph 15(b) the purchaser agreed that it will not seek any other remedies, damages, or rights under the contract. This is the gravamen of Judge Penn's decision. Thus, had the Preganos sued the Appellee in tort, that contractual provision would have no bearing. Further, a plea-in-bar would, indeed, be an improper legal vehicle. However, where the contract itself states that no remedies exist other than those found in Paragraph 15, a plea-in-bar is a wholly proper responsive pleading. It does, as is denied by the Appellant, determine the case on a single issue.

Finally, it should be noted, although not controlling, in a very recent case decided by the Supreme Court of New York, Appellate Division, it was decided that this type of clause does, indeed, limit the purchaser's remedies to the return of the deposit.

In the case of Mancini-Ciolo, Inc. v. Scaramellino, 500 N.Y.S.2d 276 (N.Y. App. Div., 1986), it was held that the trial court was proper in granting summary judgment in favor of the Defendant on the strength of such a clause. The Court stated "the parties to a contract for the sale of real property may agree to restrict the liability consequent upon a breach, or may agree that no damages will be payable at all once the status quo has been restored . . . implicit in such a limitation is the obligation to act in good faith. It contemplates the existence of a situation beyond the control of the parties." Id. at 278.

In the case at bar, the Pregano's original Bill of Complaint, although making conclusory allegations of willfulness, malice, and bad faith, nowhere states facts sufficient to show this Court, or the trial court, anything other than a dispute that had arisen between the seller and purchaser; and, indeed, the Plaintiff's admit in their pleadings that the seller had cited breach on their part also.

CONCLUSION

WHEREFORE, for the reasons stated herein in addition to the Motion to Dismiss for lack of a record or statement of facts, your Appellees, all of them, respectfully pray that this Court dismiss the Petition of the Appellant.

THE CONNEMARA CORPORATION
CARL BERNSTEIN & ASSOCIATES, INC.

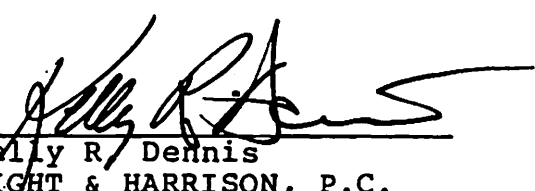
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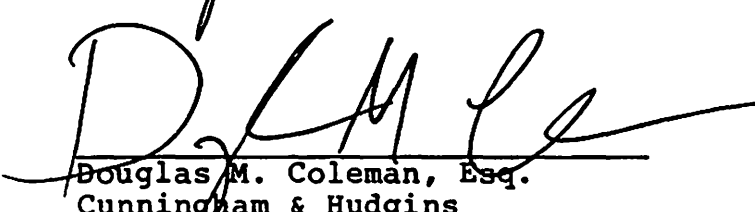

Kelly R. Dennis, Esq.

BUILDER'S MARKETING, INC.

By:

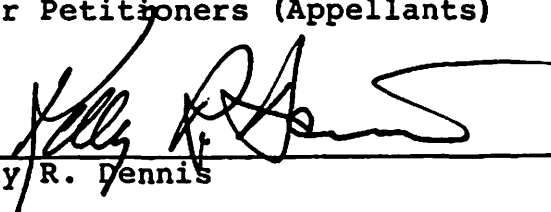

Douglas M. Coleman, Esq.


Kelly R. Dennis
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6849 Old Dominion Drive
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P. O. Box 6625
McLean, Virginia 22106
(703) 356-9751
Counsel for Appellees
The Connemara Corporation
Carl Bernstein & Associates,
Inc.


Douglas M. Coleman, Esq.
Cunningham & Hudgins
115 S. St. Asaph Street
Alexandria, Virginia 22314
(703) 684-0909
Counsel for Appellee
Builder's Marketing, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed first-class, postage prepaid to Michael McGettigan, 921 King Street, Alexandria, Virginia 22314, counsel for Petitioners (Appellants) this 17th day of July, 1987.


Kelly R. Dennis

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Friday the 6th day of May, 1988.*

Frank Pregano, et al., Appellants,

against Record No. 870720
Circuit Court No. CH 10685

The Connemara Corporation, et al., Appellees.

From the Circuit Court of Loudoun County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: *Debra A. R. Allen*

Deputy Clerk

V I R G I N I A :

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

GEORGE and CYNTHIA WHITE
7315 Dartford Drive, #2
McLean, Virginia 22102

Plaintiffs

v.

Chancery No. 10629

THE CONNEMARA CORPORATION
7345 McWhorter Place
Suite 100
Annandale, Virginia 22003

SERVE:

Kerry M. Reilly
7345 McWhorter Place
Suite 100
Annandale, Virginia
22003
Registered Agent

Defendant

BILL OF COMPLAINT

To the Honorable Judges of said Court:

Your Plaintiffs respectfully represent as follows:

1. That George and Cynthia White (hereinafter "Plaintiffs") have entered into a new home sales agreement for the purchase of a new single family house at 114 Connemara Drive, Sterling, Virginia.

2. The Defendant, The Connemara Corporation, (hereinafter "Defendant") is a corporation incorporated under the laws of the State of Virginia, which has its principal place of business at 7345 McWhorter Place, Suite 100, Annandale, Virginia, 22003, and

which at all relevant time thereto has been in the business of constructing new homes in Loudoun County, Virginia.

Count I

(Specific Performance)

3. Plaintiffs, for their First Count herein, make all of paragraphs 1 and 2, by way of reference, a part of this, their First Count, as completely as though said paragraphs were set out herein at length.

4. That on the 14th day of March, 1986, the Plaintiffs entered into a written new home sales agreement with the Defendant to purchase a certain parcel of real property and the improvements thereon described as follows, to wit:

Lot 7, Block 1, Section 1, Connemara Subdivision, being situated in Loudoun County, Virginia, together with a single family house thereon generally known as the Cedarwood Model located at 114 Connemara Drive, Sterling, Virginia, 22170.

A copy of said agreement is attached hereto, made part hereof, and marked as Exhibit "A."

5. That under the terms of said agreement, the Plaintiffs agreed to pay, as consideration, the sum of \$142,450.00 and that the Defendant agreed to deliver good and marketable title to the said real property at the time of settlement.

6. That under the terms of said agreement, the Defendant also agreed to erect upon the said parcel of real property a house generally known as the Cedarwood Model.

7. At the time of the sale, the Defendant, through its sales presentation and materials, represented to the Plaintiffs that the Cedarwood Model house would be constructed as shown in Elevation No. 1 of the sales material furnished to the Plaintiffs by the Defendant. Elevation No. 1 shows that the Cedarwood Model house is constructed with a completely brick front exterior. A true and correct copy of the said sales material is attached hereto, made part hereof, and marked as Exhibit "B."

8. Under the terms and conditions of said agreement, the Defendant agreed to construct a Cedarwood Model dwelling upon said lot substantially in accordance with the plans and specifications on file with the County of Loudoun. Said plans show that the front exterior of the Cedarwood Model is constructed entirely of brick. A true and correct copy of said plans are attached hereto, made part hereof, and marked as Exhibit "C."

9. During construction, the Plaintiffs became aware of the change in the construction of their home and contacted the Defendant who informed them that the exterior of the front elevation above the entrance and porch would be aluminum siding rather than brick.

10. Upon learning of this change, the Plaintiffs, in a timely fashion, communicated their objections to the change in the construction of the house, directly to the Defendant and

sought to have the problem corrected during construction by the installation of brick on the front elevation above the entrance and porch.

11. However, the Defendant refused to correct the problem and refused to construct the Cedarwood Model house in accordance with the representations made to Plaintiffs and in accordance with the plans submitted to the County of Loudoun at the time of the sale.

WHEREFORE, your Plaintiffs pray that the Defendant be ordered specifically to perform the agreement entered into with your Plaintiffs as aforesaid, and to construct the Cedarwood Model house with a brick front on the elevation above the entrance and porch, your Plaintiffs being ready and willing, and hereby offering to specifically perform the agreement on their part, and that your Plaintiff may have such other and further relief as may be deemed appropriate and as equity may require.

Count Two

(Fraud)

12. Plaintiffs, for their Second Count herein, make all of paragraphs 1 through 11, by way of reference, a part of this, their Second Count, as completely as though said paragraphs were set out herein at length.

13. As an inducement to enter into a sales agreement, the Defendant furnished to the Plaintiffs certain aforesaid.

promotional material (marked Exhibit "B") which showed two types of houses more generally known as the Cedarwood Model. The Plaintiffs were informed that the house that would be built for them pursuant to the sales agreement would resemble that house shown as Elevation No. 1 in the promotional material, having a completely brick front exterior.

14. As a further inducement to enter into the said sales agreement, the Defendant represented in the sales agreement that the Cedarwood Model house would be constructed on the property substantially in accordance with the plans and specifications on file with the County of Loudoun at the time of the sale. Those plans (marked Exhibit "C") showed the front exterior of the Cedarwood Model house would be constructed entirely of brick.

15. The Defendant knew or should have known, that the representations that the Cedarwood Model house with a completely brick front exterior was a material fact to be relied upon by the Plaintiffs in making a decision on whether to enter into the said sales agreement.

16. To their detriment, the Plaintiff relied upon the aforesaid misrepresentations and entered into the sales agreement to purchase a Cedarwood Model house for the sum of \$142,450.00 and tendered a \$2,500.00 earnest money deposit to the Defendant.

17. The actual house constructed by the Defendant varied substantially from what was represented to the Plaintiffs at the

time of sale. Instead of an all brick front exterior, the house constructed had aluminum siding on the exterior of the front elevation above the entrance and porch.

18. In a timely fashion, the Plaintiffs informed the Defendant of their objection to the change in the construction of the house and sought to have the deficiency corrected during construction. However, the Defendant refused to correct the deficiency and continued construction of the house.

19. As a result thereof, the Cedarwood Model house that was constructed by the Defendant was of lower value and varied substantially in appearance than the house which was represented to the Plaintiffs at the time of execution of the sales agreement.

20. Due to all the foregoing, the Plaintiffs have experienced substantial monetary injury and have suffered a great deal of aggravation and inconvenience.

WHEREFORE, your Plaintiffs pray that this Court award damages to the Plaintiffs which have resulted from the fraudulent misrepresentation made by the Defendant; award reasonable attorney's fees and costs for the institution and prosecution of this litigation; award punitive damages in the amount of three times the amount of actual damages, and grant such other and further relief as may be deemed appropriate and as equity might require.

Count III

(Breach of Contract)

21. Plaintiffs, for their Third Count herein, make all paragraphs 1 through 20, by way of reference, as part of this, their Third Count, as completely as though said paragraphs were set out herein at length.

22. Under the terms and conditions of the sales agreement entered into by the parties on March 14, 1986, (marked as Exhibit "A"), settlement was to occur on December 9, 1986. On that date, the Defendant, acting through Sandra K. Lindsey, notified the Plaintiffs that the settlement scheduled for that day had been cancelled and rescheduled for December 12, 1986. A true and correct copy of the Defendant's letter to the Plaintiffs confirming this change is attached hereto, made part hereof, and marked as Exhibit "D."

23. The Defendant breached the sales agreement by failing to give the Plaintiffs at least fifteen (15) days notice of the December 12, 1986, date as required by Item 3 of the General Addendum to the sales agreement and refusing to complete the settlement which was rescheduled for December 12, 1986, under the terms set forth in paragraph 4 of the sales agreement. (See Exhibit "A.")

24. Under paragraph 3 of the sales agreement, the Defendant, as seller, was to complete construction of the dwelling on or before October 10, 1986. (See Exhibit "A.")

25. The Defendant breached the sales agreement by failing to complete the dwelling on or before October 10, 1986, as set forth in Paragraph 3 of the sales agreement.

26. Under the terms and conditions set forth in paragraph 3 of the sales agreement, the Defendant was under a duty to erect upon said Lot 1 Cedarwood Model dwelling substantially in accordance with the plans and specifications together with any amendments on file with the County of Loudoun. (See Exhibit "A.")

27. At the time of the execution of the sales agreement, the plans and specifications, which were made part of the sales agreement by reference and which were filed with the County of Loudoun showed the Cedarwood Model house as constructed with an entirely brick front. (See Exhibit "C.")

28. The Defendant has breached the sales agreement by constructing a house with aluminum siding rather than brick, on the exterior of the front elevation above the entrance and porch and which varied substantially in appearance and value from the plans and specifications on file with the County of Loudoun.

29. Under the terms and conditions set forth in paragraph 14 of the sales agreement, the Plaintiffs, as purchasers, and the Defendant, as seller, were required to inspect the house and lot before settlement, and note in the Pre-Settlement Inspection Report any incomplete work or defects. (See Exhibit "A.")

30. On November 12, 1986, a pre-settlement inspection of the property was conducted but not completed on that date, because Defendant, its agents or employees, refused to list any deficiency, including the lack of brick on the front elevation above the entrance and porch.

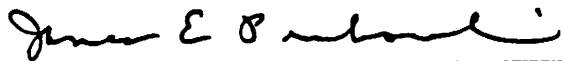
31. The Defendant breached the sales agreement by failing to list said deficiency on the Pre-Settlement Inspection Report and by failing to complete the inspection on November 12, 1986.

32. Due to the Defendant's breach of the sales agreement, the Plaintiffs have experienced substantial economic injury and have suffered a great deal of aggravation and inconvenience.

WHEREFORE, your Plaintiffs pray that this Court award damages in the amount of \$50,000.00 for the Defendant's breach of said sales agreement, their costs in this behalf expended and grant such other and further relief as may be deemed appropriate and as equity might require.

George and Cynthia White

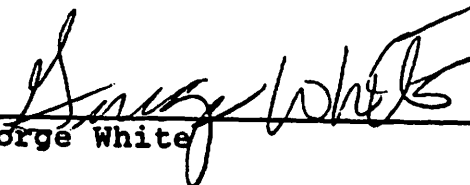
By Counsel




James E. Pinkowski
Andrew N. Felice
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060

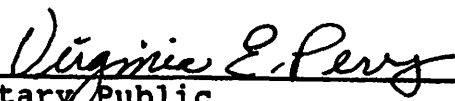
STATE OF VIRGINIA:
COUNTY OF FAIRFAX, to wit:

George and Cynthia White being duly sworn, upon their oath state that they are the Plaintiffs in this action and that the facts and allegations in the foregoing Bill of Complaint are, to the best of their knowledge and belief, true and accurate.


George White


Cynthia White

Subscribed and sworn to before me, Virginia E. Perry,
a Notary Public in the County and State aforesaid, this 23rd
day of December, 1986.


Notary Public

My Commission expires: 10-25-88

DEMAND FOR JURY TRIAL

Trial by jury is demanded on all issues.



James E. Pinkowski
Andrew N. Felice
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060

EXHIBIT "A"



NEW HOME SALES AGREEMENT



Virginia

THIS AGREEMENT, made this 14th day of March, 1986, by and between George White and Cynthia Graham (hereinafter known as the Purchaser) and Builder's Marketing Corporation (hereinafter known as the Seller) and

Builder's Marketing INC. (hereinafter known as the Agent)

WITNESSETH: That for and in consideration of the sum of Two Thousand and Five Hundred Dollars (\$2,500) by (cash, check, or note due _____), the receipt of which is hereby acknowledged, the Purchaser agrees to buy, and the Seller agrees to sell all of that certain piece, parcel or lot of land and improvements thereon described as follows, to wit: All of Lot 7, Block 1, Section 1, Canemara Subdivision, Loudoun County, State of Virginia, together with a house generally known as the Cedarwood Model, known by street address as 114 Canemara Drive, Sterling, Virginia 22170 with: 2-car Garage, Walk-out Basement, Rough-in Plumbing.

NOTICE - An ADDENDUM is attached which is an integral part of this Agreement of Sale.

1. PURCHASE PRICE. The purchase price payable for the Property is the sum of One Hundred Forty-Two Thousand and Four Hundred and Fifty Dollars (\$142,450) which is payable as follows:

- (a) \$ 2,500 being an earnest money deposit, the receipt of which is hereby acknowledged by Seller; and
(b) \$ 145,000 representing the proceeds of a loan to be made to Purchaser by the mortgage lender; and
(c) \$ 11,950 being the balance of the purchase price, payable by Purchaser by certified or cashier's check at settlement as hereinafter provided. Seller will pay up to 3 loan discount points on specified loan amount

2. MORTGAGE LOAN. (a) Purchaser, at his own expense, is to negotiate, procure and place a First Trust Mortgage Loan secured by a First Deed of Trust on the house and lot in the sum of One Hundred Twenty-Eight Thousand Dollars (\$128,000), bearing interest at the rate of 10 % per annum, or at the prevailing rate at the time of settlement hereunder. Purchaser shall make diligent, truthful and proper application therefor within five (5) days from the date of notification by the Seller, with such lending agencies or institutions as shall be designated or approved by the Seller, the proceeds of which First Trust loan are to be applied toward payment of the aforesaid purchase price.

(b) It is expressly agreed that in the event the Purchaser is unable to obtain the First Trust loan referred to above from the lending agency or institution designated or approved by Seller, or if a loan is committed by such lending agency or institution but the Lender shall thereafter refuse to consummate the loan by reason of non-performance of any conditions of such commitment within the period of time prescribed for such performance under the provisions of the commitment, or if said Lender refuses to consummate and make the loan for any other reason other than or after commitment is issued, the Seller shall have the right at its option to cancel and terminate this agreement and refund to the Purchaser the deposit hereinbefore mentioned; or, at the Seller's option, the Purchaser shall have the privilege of obtaining the First Trust loan from other sources, if the lending agency or institution designated or approved by Seller refuses to make such loan. In no event shall Seller have any obligation or liability to Purchaser on account of the Lender's refusal to make such loan. and points are not to be used as a buydown

3. THE DWELLING. (a) Seller has erected or will erect upon the said lot a Cedarwood Model dwelling substantially in accordance with plans and specifications, together with amendments thereto, on file with the County of Loudoun (the "Plans"). Seller shall have the right to substitute materials, fixtures, equipment and appliances of substantially equal quality as those specified in the Plans. Seller further reserves the right (but shall not be obligated) to make changes in construction as may be required from time to time by Purchaser's mortgage lender, the Federal Housing Administration, the Veterans Administration, or any other governmental authority having jurisdiction over the Property, or as may be otherwise required by material shortages, work stoppages or emergencies.

(b) Seller shall complete construction of the dwelling on or before October 9, 1986 (the "Completion Date"); provided, however, that if Seller shall be delayed at any time in the progress of construction by Acts of God, labor disputes, Seller's inability to obtain material and/or labor, inclement weather, and any other causes beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay. Seller undertakes and agrees to complete construction of the dwelling within a period of one (1) year after the date of this Contract, notwithstanding any longer period which may otherwise be provided for under this agreement.

(c) Purchaser shall have the right to select the dwelling's decorating colors from among color samples to be provided by Seller in accordance with the policy applicable thereto prescribed by Seller. In the event the Purchaser shall fail to exercise the said right of selection within ten (10) days after receipt of notice from Seller, then Seller shall have the right to decorate the interior of the dwelling as Seller may determine.

(d) No alterations, changes or additions shall be made in the construction of the dwelling nor shall any extra work be performed or materials added by Seller unless approved by a duly authorized agent of Seller in writing and payment is made for such changes at the time requested by Purchaser. It is understood that Purchaser is purchasing a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of the dwelling and that Purchaser shall acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion. Equitable title shall remain vested in Seller until delivery of deed.

4. THE SETTLEMENT. (a) Settlement shall occur at such time as designated by the Seller by notice to the Purchaser that the dwelling is ready for occupancy, which shall be evidenced by the issuance of a temporary or permanent Residential Use Permit by the County of Loudoun. On Settlement date, Purchaser shall pay to Seller by certified or cashier's check the unpaid balance of the purchase price provided for in Section 1 herein and all other sums payable to Seller hereunder, and Seller shall deliver to Purchaser a General Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property.

(b) Settlement shall be held at the offices of Stahl and Buck, P.C.. Deposit with said office of the cash payment as aforesaid, the deed of conveyance and such other papers as are required by the terms of this Contract shall be deemed and construed as a good and sufficient tender of performance of the terms hereof. THE PURCHASER HAS THE RIGHT TO SELECT THE SETTLEMENT ATTORNEY OR TITLE COMPANY FOR SETTLEMENT.

5. AGENT. (a) Seller hereby recognizes Builder's Marketing Inc. (BMT) and Coburn Banker Real Estate as the Agent(s) responsible for this transaction, and the Seller agrees to pay said Agent(s) a sales commission at settlement as follows: 3% of purchase price to Coburn Banker and remaining commission to BMT as specified in a separate agreement between Seller and BMT.

The Purchaser acknowledges that he has read and understands the terms and conditions set forth in Paragraphs 1 through 18 hereof, on the face and reverse of this form, and that he and Seller are bound by the terms hereof.

DATE: March 14, 1986
DATE: March 14, 1986
BY: George White (Purchaser)
Cynthia Graham (Purchaser)
Builder's Marketing Inc. (Seller)
BY: A. R. [Signature] (Agent)

(b) Purchaser acknowledges and agrees that he understands that, while the Agent may have advised and consulted with the Seller, its architects and its contractors concerning the design, construction and development of the house, the Agent does not accept, nor will Purchaser attempt in any manner to charge the Agent with, any liability or responsibility whatsoever for said design, or the construction and/or development of the house, or any defaults in performance by the Seller, the architects and/or the contractor.

(c) Further, Purchaser recognizes that the Agent receives all information as to probable delivery dates from the Seller and that in this regard the Agent is merely acting as a conduit of information and not in any respect as the Agent of the Seller. The Agent shall not be responsible in any manner whatsoever to Purchaser for failure or inability of the Seller to meet projected delivery dates, it being agreed that Purchaser shall look solely to the Seller in this regard.

6. RISK OF LOSS. Seller assumes the risk of loss or damage to said property by fire or other casualty until the date of settlement under this Agreement.

7. TITLE. The Property shall be sold free of encumbrance, except as aforesaid. Title at settlement is to be good of record and fully insurable by a title insurance company at regular rates, subject, however, to covenants, easements, rights-of-way, concessions and restrictions of record and such restrictions as are specifically set forth herein, and any other easements which may be observed by an inspection of the Property. Otherwise, the deposit is to be returned and this Agreement declared null and void at the option of the Purchaser, unless the defects are of such character that they may be remedied by Seller, if it elects to do so. The Seller and its Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action, if Seller elects to undertake same, must be taken promptly by and at the Seller's expense, whereupon the time herein specified for full settlement by the Purchaser will be extended for the period necessary for such action, but not to exceed 12 additional months. The premises are sold subject to easements, if any, created or to be created, prior to or after settlement in favor of utility companies, municipal authorities, or quasi-governmental authorities for the installation of utilities or streetlights and/or additional covenants, restrictions or easements which may be placed on record by the Seller after execution hereof for the benefit of the Property and/or the community of which it is a part. This Agreement shall be subordinate to any such easements, rights-of-way, covenants, etc.

8. SETTLEMENT COSTS. It is agreed that the costs and fees incident to settlement shall be paid as follows (unless specified otherwise herein):

(a) Rents, taxes, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to certificate of taxes, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by Seller, or allowance made therefore at the time of transfer.

(b) The Purchaser agrees to pay the following costs at settlement: examination of title, all title insurance premiums, all mortgage insurance premiums, if any, final survey fee, loan placement fees, and any other fees assessed by lender, title insurance binder, closing and settlement fees, notary fees, conveyancing fees, preparation of papers, county and state transfer taxes, all recording charges, including those for Purchase Money trust, if any, preparation of trust and note, and insurance and tax escrows.

(c) The Seller agrees to pay the following costs at settlement: charges for preparation of deed and Virginia State Grantor's Tax, if applicable.

9. OCCUPANCY. (a) Occupancy hereunder shall be given to Purchaser immediately after settlement. However, if, at the Seller's discretion, the Purchaser shall accept occupancy of its completed dwelling prior to the conveyance of such unit in fee simple to the Purchaser, the Purchaser shall execute the Seller's Standard Occupancy Agreement and shall continue to be subject to the terms hereof as if Purchaser did not occupy such dwelling unit.

(b) Notwithstanding the Purchaser's right of occupancy as aforesaid, the Seller shall have the right to enter upon property of the Purchaser at any time after settlement for the purpose of making exterior changes to the lot and improvements thereon, including grading changes and the removal of trees, as may be required by Seller's site plan, or any modification thereto, or any changes which may be required as a condition of Seller's release by applicable governmental authorities from any and all subdivision or site plan bonds or other escrows.

10. UNSOLD UNITS. Until such time as all of the dwelling units in Seller's subdivision are sold, the Seller reserves the right to make such use of unsold dwelling units, the common elements, street and the main entrance of the project, as are necessary for its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction equipment and personnel and noise and other inconveniences attendant thereto may be present. Purchaser agrees not to obstruct or impede any such construction or sales activities.

11. ACCESS. The Purchaser may not have access or entry to the dwelling unit or the construction site during construction, nor may he store any of his possessions in or about the dwelling unit or the construction site prior to the settlement of this Agreement and delivery of possession to the Purchaser hereunder. Any violation of this provision may, at the election of the Seller, be considered a material breach of this Agreement and, in addition to any other remedies available to Seller, Seller may declare this Agreement void and, in such event, any amount paid toward the purchase price may be retained by Seller as fixed and liquidated damages.

12. TREES AND LOCATION. The location, area, and ground elevation of the building on the lot, elevation of dwelling unit, and the reversing of the plan, if necessary, to conform to the existing lot contours, are to be determined by the Seller at its sole discretion. Seller shall remove such trees from the lot as it may deem necessary and it shall not be responsible for any damage to or destruction of remaining trees during the process of construction. Seller shall be responsible only for trees planted by him. Seller's obligations to replace trees, shrubbery and other landscaping, as well as all of Seller's other repair and warranty obligations, shall be limited solely to the warranties set forth in the Builder's Limited Warranty mentioned in paragraph #14 below.

13. MODELS AND DISPLAYS. It is hereby agreed that all furniture and appurtenant property, special household appliances, furnishings, special fixtures, special carpeting and floor tile, special mirrors, wallpaper, window decorating treatments, special trees, shrubbery, landscaping, special decks and patios, certain rooms, special fireplaces and other features and recreational facilities exhibited in the model units and model area are for exhibition purposes only and are not included in the purchase price, unless otherwise expressly provided herein.

14. WARRANTIES. Purchaser hereby waives any and all warranty rights provided by Section 55-70.1 of the Code of Virginia. Unless specified otherwise herein, all warranties other than those expressly provided in the Builder's Limited Warranty are hereby excluded. Purchaser has been afforded the opportunity to review this warranty prior to execution of this Agreement, and agrees to accept this warranty as the sole warranty being given by the Seller to the Purchaser. Purchaser and Seller shall inspect the house and lot before settlement and note in the Pre-Settlement Inspection Report any incomplete work or defects. Thereafter, Purchaser agrees that Seller shall not be liable for any patent incomplete work or defects not specifically noted in said Pre-Settlement Inspection Report, unless otherwise specifically provided in the Builder's Limited Warranty. It is further agreed that there shall be no withholding of Seller's funds at settlement for any such items.

THE SELLER MAKES NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, OR IMPLIED BY STATUTE, TO THE PURCHASER.

15. DEFAULT BY EITHER PARTY. (a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by Seller and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable of precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agrees to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

16. DISCLOSURE. (a) When applicable, the Purchaser by execution hereof acknowledges receipt, prior to the execution of this Agreement, of a completed copy of the Disclosure Bill of Particulars for New Home Buyers, as required by Section 10-5-3, Chapter 10 of the 1976 Code of the County of Fairfax, Virginia, as amended.

(b) Purchaser acknowledges that he has had the opportunity, prior to the execution of this Agreement, to examine manufacturers' warranties on appliances and equipment included in the home.

17. HOME OWNERS ASSOCIATION. In the event there is a Homeowner's Association, then Purchaser acknowledges receipt, prior to execution of this Agreement, of copies of the Homeowner's Association by-laws and related documents. Purchaser agrees to be bound by the regulations, by-laws and declarations of the Association and agrees to pay the assessments established by such Association.

18. MISCELLANEOUS. (a) The principals to the Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns, provided, however, that the Purchaser shall have no right to assign this Agreement without the prior written consent of the Seller.

(b) The terms and provisions of this Agreement shall survive the Settlement hereunder.

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

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

(e) This Agreement contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.

In reference to the Agreement of Sale between George White
and Cynthia Graham,
the Buyer, and Connemara Corporation, and Seller,
dated March 14, 1986,
covering the real property commonly known as 114 Connemara Drive,
Sterling, Virginia 22170
the undersigned Buyer and Seller hereby agree to the following:

- Item 1: ~~This contract is contingent upon Purchaser receiving BUYER'S~~
~~WARRANTY and FLOORING COLOR SPECIFICATIONS for dwelling~~
~~specified herein from Seller. Purchaser to have five (5)~~
~~business days following receipt of said warranty and color~~
~~specifications to approve said items in writing.~~
- Item 2: Seller, or Seller's Agent shall deposit the entire EARNEST
MONEY DEPOSIT of Twenty-five Hundred Dollars (\$2500) in an
ESCROW ACCOUNT to conform with the regulations of the
Virginia Real Estate Commission and be maintained under custody
of Builders Marketing, Inc., account trustee, within four (4)
days following ratification of contract. Said EARNEST MONEY DEPOSIT
shall be held in escrow by said trustee until settlement or until this
Contract is declared null and void.
- Item 3: Seller shall give Purchaser not less than ~~thirty (30)~~ ^{forty-five (45)} days but not more than forty-
five (45) days prior written notice of actual settlement date.
- Item 4: Seller shall deliver good and marketable TITLE at settlement.
- Item 5: It is understood by all parties that George White is a licensed
real estate salesperson and that said party is engaging in this
transaction only for his own account.

NOTE: This is page one (1) of two (2) page Addendum.

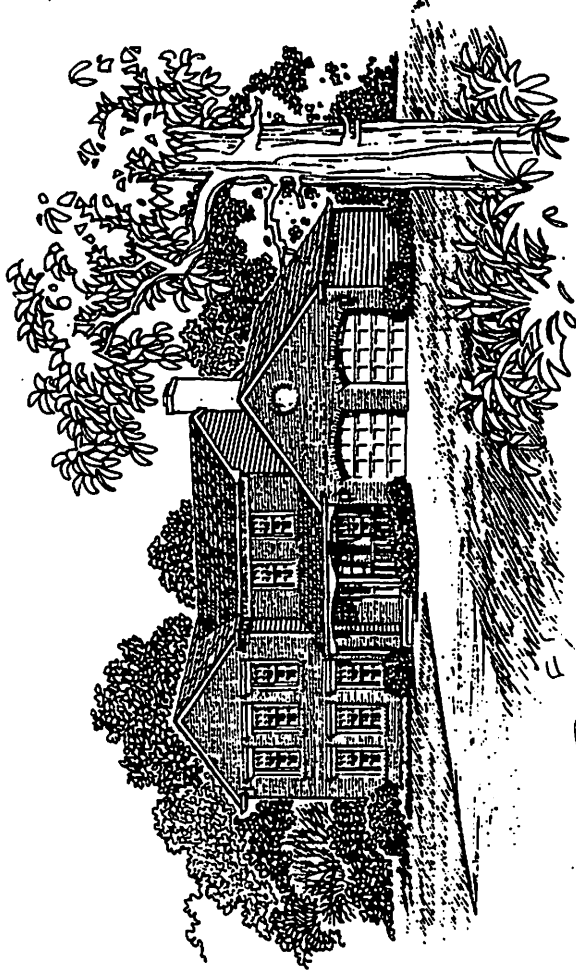
The herein agreement, upon its execution by both parties, is herewith made an
integral part of the aforementioned Agreement of Sale.

Dated: March 24, 1986
Cynthia P. Graham
Purchaser
George White
Purchaser

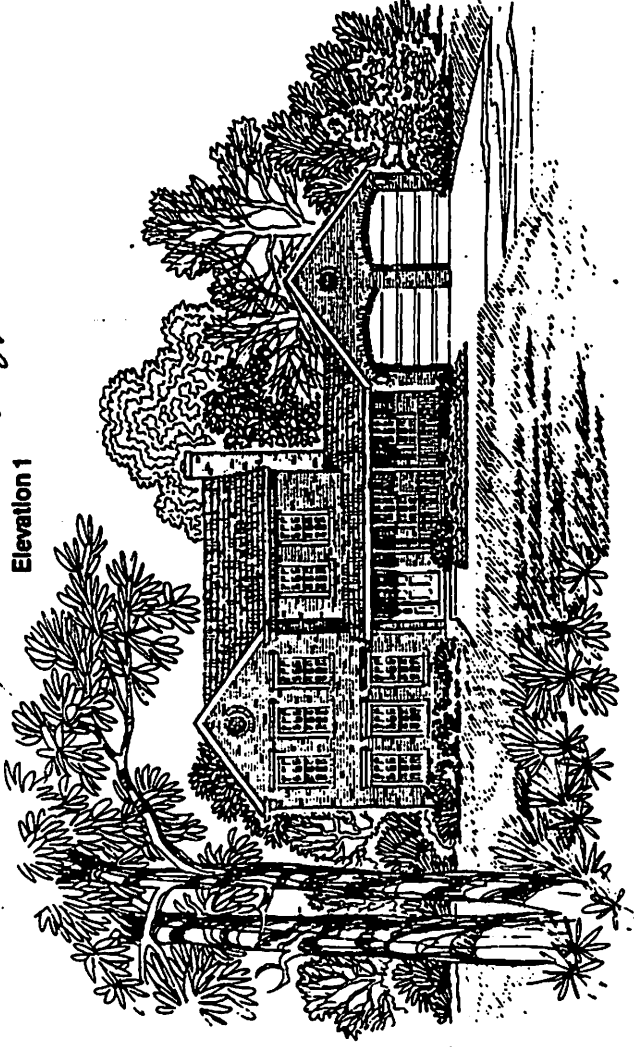
Dated: April 11, 1986
The Connemara Corp
Seller
by William President 4/11/86

EXHIBIT "B"

The Cedarwood

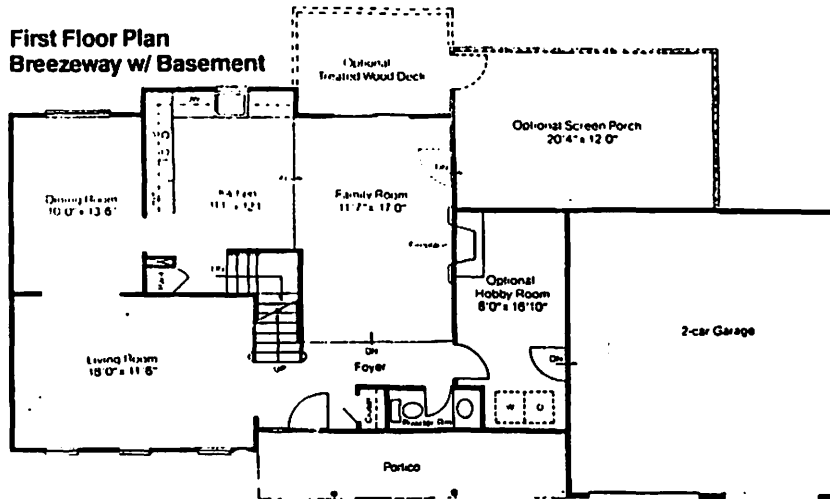


Elevation 1

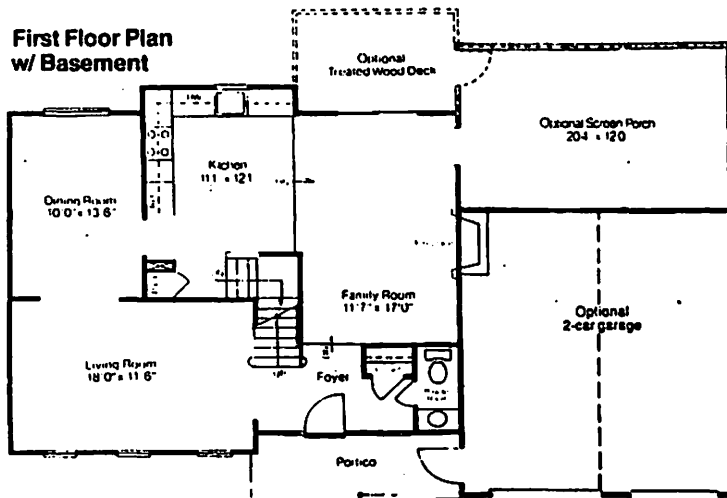


Elevation 2

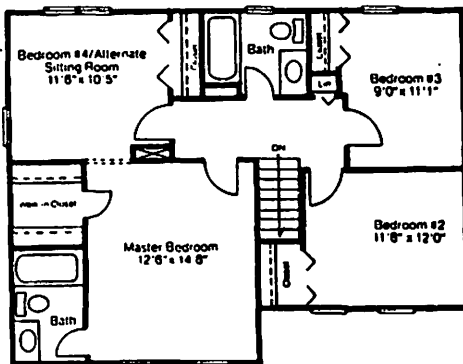
**First Floor Plan
Breezeway w/ Basement**



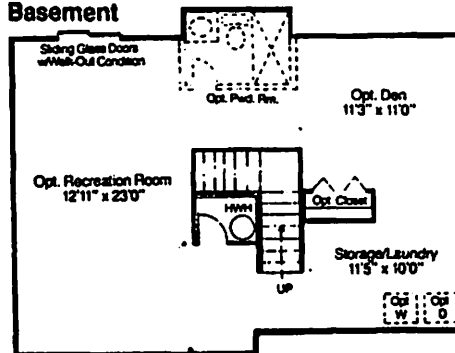
**First Floor Plan
w/ Basement**



Second Floor



Basement

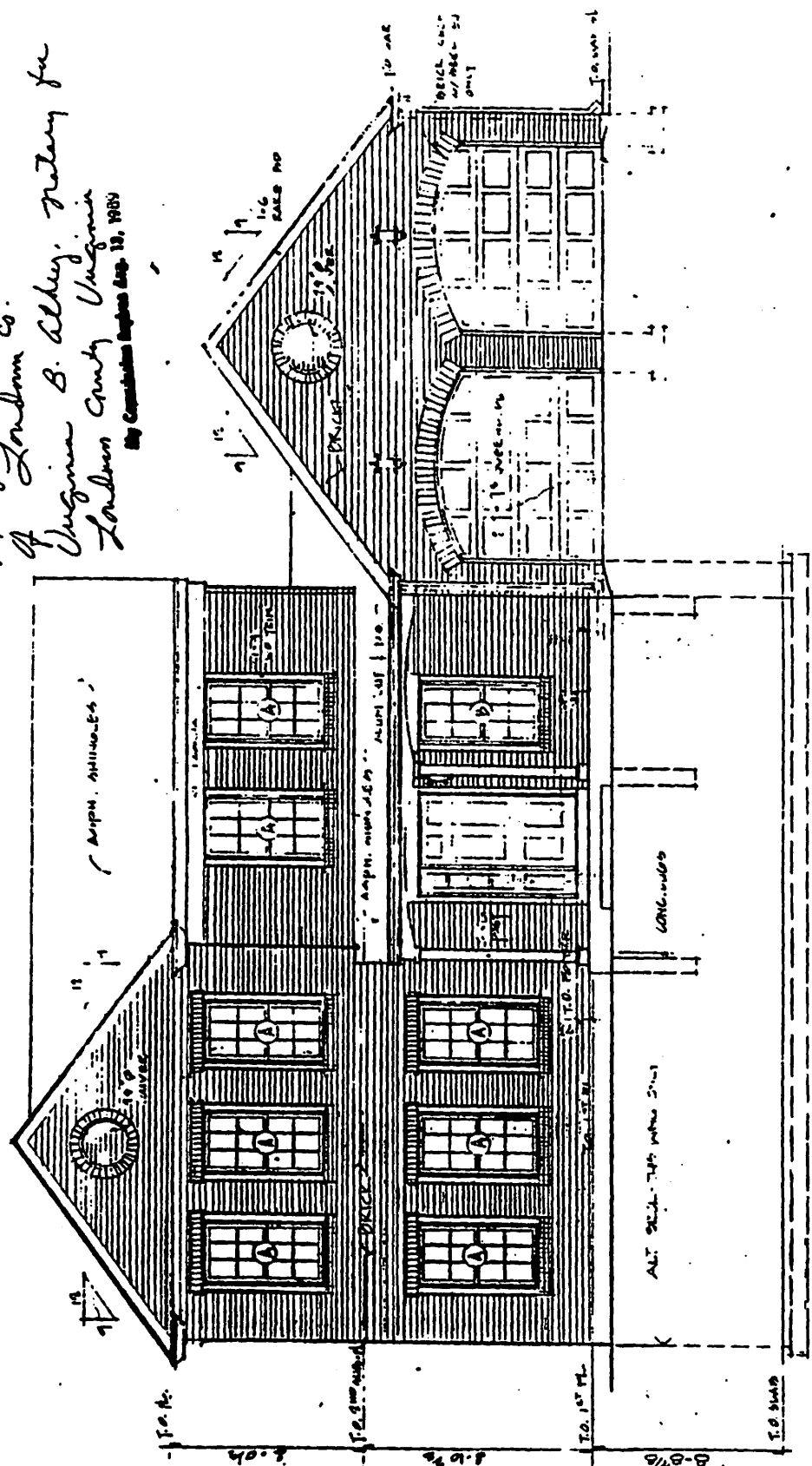


All dimensions approximate



EXHIBIT "C"

I hereby certify that this is a
 copy from the Architectural plans
 of London Co.
 Virginia B. Alley, Secretary for
 Loudoun County Virginia
 By Commission Expires Aug. 18, 1989



FRONT ELEVATION

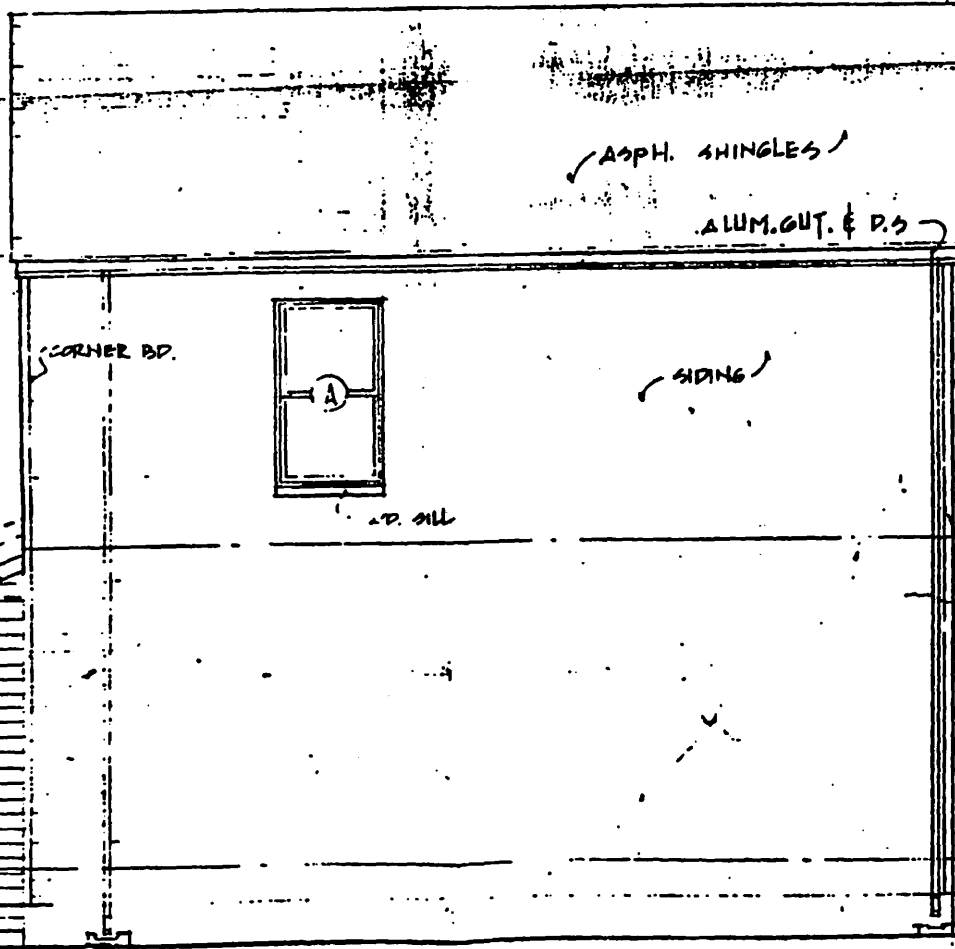
3x10 CONC. FTG.

BSMT. SLAB

RIGHT SIDE ELEVATION

I hereby certify that this is a copy from
the Architecture plans of London Co. Virginia
Virginia B. Alby - History for London Co.
Virginia

City Commission Expires Dec. 13, 1964



T.O. H.

8.34'

T.O. 2ND SUB-

T.O. GAR. FL.

8.63'

T.O. 1ST SUB-FL.

T.O. GAR. SL.

and Hat Holtz Kerylon

V I R G I N I A:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

GEORGE WHITE,
CYNTHIA WHITE, et ux.,

Plaintiffs,

v.

THE CONNEMARA CORPORATION,

Defendant.

CH. 10629

PLEA IN BAR

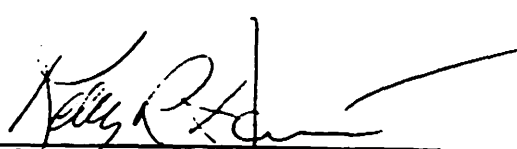
COMES NOW the Defendant, by it's counsel undersigned, and files this Plea in Bar of further prosecution of this cause by the Plaintiff and states as follows:

1. Paragraph 15(b) of the contract between the parties constitutes Plaintiff's sole remedy under the contract. See Exhibit "A" hereto.

2. Plaintiff's allegations of fraud are insufficient as a matter of law to allow the Plaintiff to go beyond the written terms of this agreement.

Respectfully submitted,

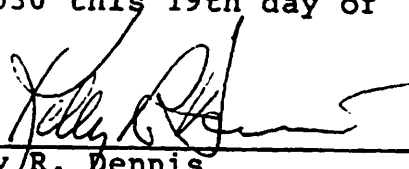
THE CONNEMARA CORPORATION
By Counsel


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

1215/12/ncy
1/19/87(1)

CERTIFICATE OF DELIVERY

I hereby certify that a true copy of the foregoing was mailed first-class postage prepaid to James Pinkowski, 4020 University Drive, Suite 200, Fairfax, Virginia 22030 this 19th day of January, 1987.



Kelly R. Dennis

1215/12/ncy
1/19/87(1)

-2-

556

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

25 June 1987

James E. Pinkowski, Esq.
4020 University Drive
Suite 200
Fairfax, Virginia 22030

Kelly R. Dennis, Esq.
6849 Old Dominion Drive
Suite 410
McLean, Virginia 22106

Re: White v. The Connemara Corporation
In Chancery No. 10629

Gentlemen:

The plaintiffs have filed a Bill of Complaint against the defendant for specific performance of a real estate sales agreement dated March 14, 1986, or, in the alternative, for damages for fraud related to the agreement and damages for breach of the agreement. The defendant has filed a Plea in Bar alleging that Paragraph 15 (b) of the agreement constitutes the plaintiff's sole remedy (terminate the contract and receive a refund of all funds paid by them to the defendant seller as liquidated damages) and that the allegations of fraud are insufficient as a matter of law to allow the plaintiffs "to go beyond the written terms of the agreement."

After consideration of the argument of counsel on June 5, 1987, the authorities cited by counsel and the transcript of a hearing before Judge Hancock of the Circuit Court of Fairfax County on May 22, 1987, in two cases involving similar contract provisions, I am of the opinion that the Plea in Bar must be sustained.

The plaintiffs argue that Paragraph 15 (b) of the agreement is unconscionable because the only remedy it affords them in the event of a breach of the agreement by the defendant is the return of the plaintiff's own money. While I agree not only that the remedy involves the return of the plaintiff's own money, but also that the default provisions are very harsh, I feel that three other considerations are stronger and more compelling in this case.

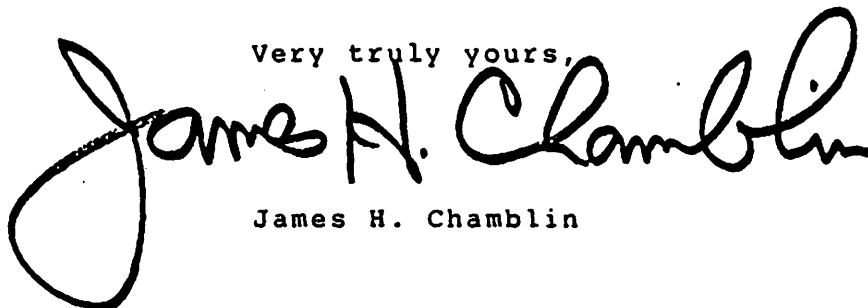
First, just as Courts do not measure the adequacy of consideration, I do not feel they should judge the adequacy of the remedy. I don't think anyone would deny that a person can bargain away his rights. There would be some measure of consideration to be given if a purchaser had contracted away all his remedies whatsoever, but that is not the situation in the instant case.

Second, the plaintiffs do have a remedy, as limited and harsh as it may be. They can terminate the contract and be relieved of any liability under it. Rescission is certainly a recognizable remedy for breach of contract.

Third, the plaintiffs still may have a tort cause of action against the defendant. In this regard, I feel that Count II of the Bill of Complaint does not set forth a separate cause of action for fraud against the defendant, but merely tries to make a breach of contract claim sound like a tort claim.

Let Mr. Dennis prepare the appropriate decree sustaining the Plea in Bar and dismissing this cause.

Very truly yours,

A large, stylized handwritten signature in black ink, reading "James H. Chamblin". The signature is written in a cursive style with a large loop at the beginning and end.

James H. Chamblin

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

GEORGE AND CYNTHIA WHITE,

Complainants,

v.

THE CONNEMARA CORPORATION,

Defendant.

CHANCERY NO. 10629

DECREE

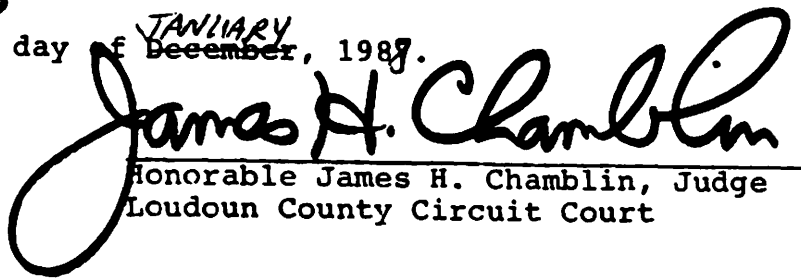
THIS CAUSE came to be heard by conference call with Judge Chamblin, Counsel for the Defendant, and Counsel for the Complainants on November 25, 1987, at 2:00 p.m., upon the motion of the Complainants, by their Counsel, James Pinkowski, to rule on the Defendant's Plea in Bar and Demurrer.

IT APPEARING TO THIS COURT, upon argument of counsel for all parties and pleadings filed, that the Plea in Bar and the Demurrer should be granted and that this Cause should be dismissed with prejudice. It is therefore

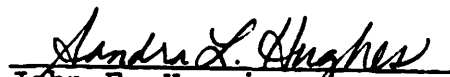
ADJUDGED, ORDERED AND DECREED that the Defendant's Plea in Bar and the Demurrer are sustained and it is further

ADJUDGED, ORDERED AND DECREED that this Cause is dismissed with prejudice, *for the reasons set forth in the Court's letter of January 12, 1988.*
THIS CAUSE HAS ENDED.


Entered this 12th day of ^{JANUARY} ~~December~~, 1987.


Honorable James H. Chamblin, Judge
Loudoun County Circuit Court

WE ASK FOR THIS:


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

SEEN AND OBJECTED TO:


James E. Pinkowski
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060
Counsel for Complainants

70108 #

V I R G I N I A :

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

GEORGE and CYNTHIA WHITE
7316 Dartford Drive, #2
McLean, Virginia 22102

Plaintiffs

v.

Chancery No. 10629

THE CONNEMARA CORPORATION
7345 McWhorter Place
Suite 100
Annandale, Virginia 22003

SERVE:

Kerry M. Reilly
7345 McWhorter Place
Suite 100
Annandale, Virginia
22003
Registered Agent

Defendant

AMENDED BILL OF COMPLAINT

To the Honorable Judges of said Court:

Your Plaintiffs respectfully represent as follows:

1. That George and Cynthia White (hereinafter "Plaintiffs") are husband and wife, who reside at 7316 Dartford Drive, #2, McLean, Virginia 22102.

2. The Defendant, The Connemara Corporation, (hereinafter "Defendant") is a corporation incorporated under the laws of the State of Virginia, which has its principal place of business at 7345 McWhorter Place, Suite 100, Annandale, Virginia, 22003, and which at all relevant time thereto has been in the business of constructing new homes in Loudoun County, Virginia.

Same as #2

LAW OFFICES
JAMES E. PINKOWSKI
4020 UNIVERSITY DRIVE
SUITE 200
FAIRFAX, VA. 22030

(703) 385 0060

3. That on the 14th day of March, 1986, the Plaintiffs entered into a written new home sales agreement with the Defendant to purchase a certain parcel of real property and the improvements thereon described as follows, to wit:

Lot 7, Block 1, Section 1, Connemara Subdivision, being situated in Loudoun County, Virginia, together with a single family house thereon generally known as the Cedarwood Model located at 114 Connemara Drive, Sterling, Virginia, 22170.

A copy of said agreement is attached hereto, made part hereof, and marked as Exhibit "A."

4. That under the terms of said agreement, the Plaintiffs agreed to pay, as consideration, the sum of \$142,450.00 and that the Defendant agreed to erect upon the said parcel of real property a house generally known as the Cedarwood Model.

5. As an inducement to Plaintiffs to enter into a sales agreement, the Defendant furnished to the Plaintiffs certain promotional material (marked Exhibit "B") which showed two types of houses more generally known as the Cedarwood Model. The Plaintiffs were informed that the house that would be built for them pursuant to the sales agreement would resemble that house shown as Elevation No. 1 in the promotional material, having a completely brick front exterior.

6. As a further inducement to enter into the said sales agreement, the Defendant represented in the sales agreement that the Cedarwood Model house would be constructed on the property substantially in accordance with the plans and specifications on file with the County of Loudoun at the time of the sale. Those

plans (marked Exhibit "C") showed the front exterior of the Cedarwood Model house would be constructed entirely of brick.

7. The Defendant knew or should have known, that the representations that the Cedarwood Model house with a completely brick front exterior was a material fact to be relied upon by the Plaintiffs in making a decision on whether to enter into the said sales agreement.

8. To their detriment, the Plaintiff relied upon the aforesaid misrepresentations and entered into the sales agreement to purchase a Cedarwood Model house for the sum of \$142,450.00 and tendered a \$2,500.00 earnest money deposit to the Defendant.

9. The actual house constructed by the Defendant varied substantially from what was represented to the Plaintiffs at the time of sale. Instead of an all brick front exterior, the house constructed had aluminum siding on the exterior of the front elevation above the entrance and porch.

10. In a timely fashion, the Plaintiffs informed the Defendant of their objection to the change in the construction of the house and sought to have the deficiency corrected during construction. However, the Defendant refused to correct the deficiency and continued construction of the house.

11. As a result thereof, the Cedarwood Model house that was constructed by the Defendant was of lower value and varied substantially in appearance than the house which was represented to the Plaintiffs at the time of execution of the sales agreement.

12. As a further result thereof, the Defendant has refused to convey fee simple title for the aforementioned property to Plaintiffs, and Defendant has elected to void the contract of sale with Plaintiff.

13. The Plaintiffs have suffered monetary damages from Defendant's refusal to construct and convey the house represented to them by the Defendant's sales promotional material as an inducement to enter the contract to purchase said property from Defendant.

14. The Plaintiffs have suffered monetary damages from Defendant's refusal to construct and convey the house represented to them in the sales agreement dated March 14, 1986, and the plans and specifications filed with Loudoun County for the aforesaid property.

15. Due to all the foregoing, the Plaintiffs have experienced substantial monetary injury and have suffered a great deal of aggravation and inconvenience.

WHEREFORE, your Plaintiffs pray that this Court award damages to the Plaintiffs which have resulted from the fraudulent misrepresentations made by the Defendant; award reasonable attorney's fees and costs for the institution and prosecution of this litigation; award punitive damages in the amount of three times the amount of actual damages, and grant such other and further relief as may be deemed appropriate and as equity might require.

George and Cynthia White
By Counsel



James E. Pinkowski
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Amended Bill of Complaint was mailed, postage prepaid, this 18th day of September, 1987 to Kelly R. Dennis, Esquire, Light & Harrison, P.C., P.O. Box 6625, McLean, Virginia 22106, Counsel for Defendant.



James E. Pinkowski

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

GEORGE AND CYNTHIA WHITE,
Complainants,
v.
THE CONNEMARA CORPORATION,
Defendant.

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CHANCERY NO. 10629

DEMURRER

COMES NOW, the Defendant, The Connemara Corporation, by counsel, and demurrers to the Amended Bill of Complaint on the following grounds:

1. The Amended Bill of Complaint fails to state a claim upon which relief can be granted against the Defendant.

2. The allegation set forth in the Amended Bill of Complaint are almost identical to those set forth in Count II of the Bill of Complaint and Judge James H. Chamblin in a letter opinion, dated June 25, 1987 stated "Third, the Complainants still may have a tort cause of action against the Defendant. In this regard, I feel that Count II of the Bill of Complaint does not set forth a separate cause of action for fraud against the Defendant, but merely tries to make a breach of contract claim sound like a tort claim". The Amended Bill of Complaint appears to be Count II of the Bill of Complaint retyped almost verbatim. In support of this see the comparison of paragraphs of the Amended Bill of Complaint to the paragraphs of the Bill of Complaint, which is attached hereto and made a part hereof as Exhibit "A".

The Amended Bill of Complaint has not been changed

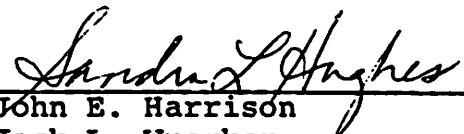
substantially to allege sufficient allegations as a matter of law to allow the Complainant to go beyond the written terms of the agreement or to be maintained as a separate cause of action. The Amended Bill of Complaint remains as previously labelled by Judge Chamblin, not sufficient as a separate cause of action for fraud against the Defendant, but merely a breach of contract claim that sounds like a tort.

This Demurrer should be sustained on the same grounds set forth in Judge Chamblin's letter opinion on the Plea In Bar to the Bill of Complaint.

WHEREFORE, The Connemara Corporation requests that this action be dismissed as to it and that it be awarded its costs expended herein.

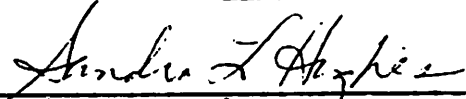
Respectfully submitted,

THE CONNEMARA CORPORATION
By Counsel


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

CERTIFICATE OF SERVICE

I hereby certify the foregoing document was mailed, first-class, postage prepaid, to James Pinkowski, Esq., 4020 University Drive, Suite 200, Fairfax, Virginia 22030, this 9th day of October, 1987.


Sandra L. Hughes

567

21102/21/ncy
10/09/87(3)

EXHIBIT "A"

COMPARISON OF PARAGRAPHS OF AMENDED BILL OF COMPLAINT
AND BILL OF COMPLAINT IN WHITE v. THE CONNEMARA CORPORATION
AMENDED BILL OF COMPLAINT

1. That ~~George~~ and Cynthia White (hereinafter "Plaintiffs") are husband and wife, who reside at 7316 Dartford Drive, #2, McLean, Virginia 22102.

BILL OF COMPLAINT

1. That George and Cynthia White (hereinafter "Plaintiffs") have entered into a new home sales agreement for the purchase of a new single family house at 114 Connemara Drive, Sterling, Virginia.

***PARAGRAPHS ARE VERY SIMILAR**

AMENDED BILL OF COMPLAINT

2. The Defendant, The Connemara Corporation, (hereinafter "Defendant") is a corporation incorporated under the laws of the State of Virginia, which has its principal place of business at 7345 McWhorter Place, Suite 100, Annandale, Virginia, 22003, and, which at all relevant time thereto has been in the business of constructing new homes in Loudoun County, Virginia.

BILL OF COMPLAINT

2. The Defendant, The Connemara Corporation, (hereinafter "Defendant") is a corporation incorporated under the laws of the State of Virginia, which has its principal place of business at 7365 McWhorter Place, Suite 100, Annandale, Virginia, 22003, and which at all relevant time thereto has been in the business of constructing new homes in Loudoun County, Virginia.

***PARAGRAPHS ARE IDENTICAL**

AMENDED BILL OF COMPLAINT

4. That under the terms of said agreement, the Plaintiffs agreed to pay, as consideration, the sum of \$142,450.00 and that the Defendant agreed to erect upon the said parcel of real property a house generally known as the Cedarwood Model.

BILL OF COMPLAINT

5. That under the terms of said agreement, the Plaintiffs agreed to pay, as consideration, the sum of \$142,450.00 and that the Defendant agreed to deliver good and marketable title to the said real property at the time of settlement.

+

BILL OF COMPLAINT

6. That under the terms of said agreement, the Defendant also agreed to erect upon the said parcel of real property a house generally known as the Cedarwood Model.

*PARAGRAPHS ARE SIMILAR

AMENDED BILL OF COMPLAINT

5. As an inducement to Plaintiffs to enter into a sales agreement, the Defendant furnished to the Plaintiffs certain promotional material (marked Exhibit "B") which showed two types of houses more generally known as the Cedarwood Model. The Plaintiffs were informed that the house that would be built for them pursuant to the sales agreement would resemble that house shown as Elevation No. 1 in the promotional material, having a completely brick front exterior.

BILL OF COMPLAINT

13. As an inducement to enter into a sales agreement, the Defendant furnished to the Plaintiffs certain aforesaid promotional material (marked Exhibit "B") which showed two types of houses more generally known as the Cedarwood Model. The Plaintiffs were informed that the house that would be built for them pursuant to the sales agreement would resemble that house shown as Elevation No. 1 in the promotional material, having a completely brick front exterior.

*PARAGRAPHS ARE IDENTICAL 2

AMENDED BILL OF COMPLAINT

3. That on the 14th day of March, 1986, the Plaintiffs entered into a written new home sales agreement with the Defendant to purchase a certain parcel of real property and the improvements thereon described as follows, to wit:

Lot 7, Block 1, Section 1, Connemara Subdivision, being situated in Loudoun County, Virginia, together with a single family house thereon generally known as the Cedarwood Model located at 114 Connemara Drive, Sterling, Virginia, 22170.

A copy of said agreement is attached hereto, made part hereof, and marked as Exhibit "A."

BILL OF COMPLAINT

4. That on the 14th day of March, 1986, the Plaintiffs entered into a written new home sales agreement with the Defendant to purchase a certain parcel of real property and the improvements thereon described as follows, to wit:

Lot 7, Block 1, Section 1, Connemara Subdivision, being situated in Loudoun County, Virginia, together with a single family house thereon generally known as the Cedarwood Model located at 114 Connemara Drive, Sterling, Virginia, 22170.

A copy of said agreement is attached hereto, made part hereof, and marked as Exhibit "A."

*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

6. As a further inducement to enter into the said sales agreement, the Defendant represented in the sales agreement that the Cedarwood Model house would be constructed on the property substantially in accordance with the plans and specifications on file with the County of Loudoun at the time of the sale. Those

plans (marked Exhibit "C") showed the front exterior of the Cedarwood Model house would be constructed entirely of brick.

BILL OF COMPLAINT

14. As a further inducement to enter into the said sales agreement, the Defendant represented in the sales agreement that the Cedarwood Model house would be constructed on the property substantially in accordance with the plans and specifications on file with the County of Loudoun at the time of the sale. Those plans (marked Exhibit "C") showed the front exterior of the Cedarwood Model house would be constructed entirely of brick.

Exhibit "C."

*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

7. The Defendant knew or should have known, that the representations that the Cedarwood Model house with a completely brick front exterior was a material fact to be relied upon by the Plaintiffs in making a decision on whether to enter into the said sales agreement.

BILL OF COMPLAINT

15. The Defendant knew or should have known, that the representations that the Cedarwood Model house with a completely brick front exterior was a material fact to be relied upon by the Plaintiffs in making a decision on whether to enter into the said sales agreement.

*PARAGRAPHS ARE IDENTICAL.

AMENDED BILL OF COMPLAINT

8. To their detriment, the Plaintiff relied upon the aforesaid misrepresentations and entered into the sales agreement to purchase a Cedarwood Model house for the sum of \$142,450.00 and tendered a \$2,500.00 earnest money deposit to the Defendant.

BILL OF COMPLAINT

16. To their detriment, the Plaintiff relied upon the aforesaid misrepresentations and entered into the sales agreement to purchase a Cedarwood Model house for the sum of \$142,450.00 and tendered a \$2,500.00 earnest money deposit to the Defendant.

*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

9. The actual house constructed by the Defendant varied substantially from what was represented to the Plaintiffs at the time of sale. Instead of an all brick front exterior, the house constructed had aluminum siding on the exterior of the front elevation above the entrance and porch.

BILL OF COMPLAINT

17. The actual house constructed by the Defendant varied substantially from what was represented to the Plaintiffs at the time of sale. Instead of an all brick front exterior, the house constructed had aluminum siding on the exterior of the front elevation above the entrance and porch.

*PARAGRAPHS ARE IDENTICAL

10. In a timely fashion, the Defendant of their objection to the change in the construction of the house and sought to have the deficiency corrected during construction. However, the Defendant refused to correct the deficiency and continued construction of the house.

BILL OF COMPLAINT

18. In a timely fashion, the Plaintiffs informed the Defendant of their objection to the change in the construction of the house and sought to have the deficiency corrected during construction. However, the Defendant refused to correct the deficiency and continued construction of the house.

*PARAGRAPHS ARE IDENTICAL

BILL OF COMPLAINT

10. Upon learning of this change, the Plaintiffs, in a timely fashion, communicated their objections to the change in the construction of the house, directly to the Defendant and sought to have the problem corrected during construction by the installation of brick on the front elevation above the entrance and porch.

BILL OF COMPLAINT

11. However, the Defendant refused to correct the problem and refused to construct the Cedarwood Model house in accordance with the representations made to Plaintiffs and in accordance with the plans submitted to the County of Loudoun at the time of the sale.

*PARAGRAPHS ARE SIMILAR

AMENDED BILL OF COMPL. INT

11. As a result thereof, the Cedarwood Model house that was constructed by the Defendant was of lower value and varied substantially in appearance than the house which was represented to the Plaintiffs at the time of execution of the sales agreement.

BILL OF COMPLAINT

19. As a result thereof, the Cedarwood Model house that was constructed by the Defendant was of lower value and varied substantially in appearance than the house which was represented to the Plaintiffs at the time of execution of the sales agreement.

~~_____~~
*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

12. As a further result thereof, the Defendant has refused to convey fee simple title for the aforementioned property to Plaintiffs, and Defendant has elected to void the contract of sale with Plaintiff.

*NO CORRESPONDING PARAGRAPH

AMENDED BILL OF COMPLAINT

13. The Plaintiffs have suffered monetary damages from Defendant's refusal to construct and convey the house represented to them by the Defendant's sales promotional material as an inducement to enter the contract to purchase said property from Defendant.

AMENDED BILL OF COMPLAINT

14. The Plaintiffs have suffered monetary damages from Defendant's refusal to construct and convey the house represented to them in the sales agreement dated March 14, 1986, and the plans and specifications filed with Loudoun County for the aforesaid property.

*PARAGRAPHS ARE SIMILAR

AMENDED BILL OF COMPLAINT

15. Due to all the foregoing, the Plaintiffs have experienced substantial monetary injury and have suffered a great deal of aggravation and inconvenience.

BILL OF COMPLAINT

20. Due to all the foregoing, the Plaintiffs have experienced substantial monetary injury and have suffered a great deal of aggravation and inconvenience.

*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

WHEREFORE, your Plaintiffs pray that this Court award damages to the Plaintiffs which have resulted from the fraudulent misrepresentations made by the Defendant; award reasonable attorney's fees and costs for the institution and prosecution of this litigation; award punitive damages in the amount of three times the amount of actual damages, and grant such other and further relief as may be deemed appropriate and as equity might require.

BILL OF COMPLAINT

WHEREFORE, your Plaintiffs pray that this Court award damages to the Plaintiffs which have resulted from the fraudulent misrepresentation made by the Defendant; award reasonable attorney's fees and costs for the institution and prosecution of this litigation; award punitive damages in the amount of three times the amount of actual damages, and grant such other and further relief as may be deemed appropriate and as equity might require.

*PARAGRAPHS ARE IDENTICAL.

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

GEORGE AND CYNTHIA WHITE,

Complainants,

v.

THE CONNEMARA CORPORATION,

Defendant.

CHANCERY NO. 10629

PLEA IN BAR

COMES NOW, the Defendant, by counsel, and files this Plea In Bar a further prosecution of this cause by the Complainants and states as follows:

1. Complainants' allegations of fraud in the Amended Bill of Complaint are almost identical to Count II of the Bill of Complaint. In evidence of this, see the comparison of the applicable paragraphs of the Bill of Complaint and the Amended Bill of Complaint attached hereto and made a part hereof as Exhibit "A". Judge Chamblin stated in his letter opinion " . . . I feel that Count II of the Bill of Complaint does not set forth a separate cause of action for fraud against the Defendant, but merely tries to make a breach of contract claim sound like a tort claim. In support of this see Judge Chamblin's letter opinion, dated June 25, 1987 attached hereto and made a part hereof as Exhibit "B". Given that the Amended Bill of Complaint is so similar to Count II of the Bill of Complaint, the Amended Bill of Complaint does not set forth a separate cause of action for fraud and is insufficient as a matter of law to

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allow the Complainants to go beyond the written terms of this agreement.


2. Paragraph 15(b) of the Contract between the parties constitutes Complainants' sole remedy under the Contract. In support of this see the Contract Exhibit "B" attached hereto and made a part hereof as Exhibit "C".

3. The Complainants have elected to exercise their sole remedy under the Contract and have requested this Court to return their \$2,500.00 deposit under the Contract, as evidenced by the Decree entered by this Court, dated September 8, 1987, and, therefore, the Complainants are estopped from requesting any further relief from this Court. If the Complainants wanted to preserve a cause of action for fraudulent misrepresentation, they should have foregone exercising any rights under the Contract and claim the deposit as actual damages as a result of the fraudulent misrepresentation.

WHEREFORE, the Defendant respectfully requests that the Amended Bill of Complaint be dismissed against it and that it be awarded its expenses incurred in this action.

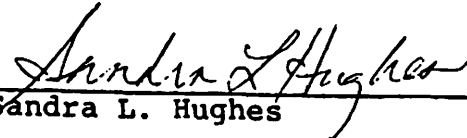
Respectfully submitted,

THE CONNEMARA CORPORATION
By Counsel


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

CERTIFICATE OF SERVICE

I hereby certify the foregoing document was mailed, first-class, postage prepaid, to James Pinkowski, Esq., 4020 University Drive, Suite 200, Fairfax, Virginia 22030, this 9th day of October, 1987.


Sandra L. Hughes

COMPARISON OF PARAGRAPHS OF AMENDED BILL OF COMPLAINT
AND BILL OF COMPLAINT IN WHITE v. THE CONNEMARA CORPORATION

AMENDED BILL OF COMPLAINT

1. That George and Cynthia White (hereinafter "Plaintiffs") are husband and wife, who reside at 7316 Dartford Drive, #2, McLean, Virginia 22102.

BILL OF COMPLAINT

1. That George and Cynthia White (hereinafter "Plaintiffs") have entered into a new home sales agreement for the purchase of a new single family house at 114 Connemara Drive, Sterling, Virginia.

*PARAGRAPHS ARE VERY SIMILIAR

AMENDED BILL OF COMPLAINT

2. The Defendant, The Connemara Corporation, (hereinafter "Defendant") is a corporation incorporated under the laws of the State of Virginia, which has its principal place of business at 7345 McWhorter Place, Suite 100, Annandale, Virginia, 22003, and, which at all relevant time thereto has been in the business of constructing new homes in Loudoun County, Virginia.

BILL OF COMPLAINT

2. The Defendant, The Connemara Corporation, (hereinafter "Defendant") is a corporation incorporated under the laws of the State of Virginia, which has its principal place of business at 7345 McWhorter Place, Suite 100, Annandale, Virginia, 22003, and which at all relevant time thereto has been in the business of constructing new homes in Loudoun County, Virginia.

*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

4. That under the terms of said agreement, the Plaintiffs agreed to pay, as consideration, the sum of \$142,450.00 and that the Defendant agreed to erect upon the said parcel of real property a house generally known as the Cedarwood Model.

BILL OF COMPLAINT

5. That under the terms of said agreement, the Plaintiffs agreed to pay, as consideration, the sum of \$142,450.00 and that the Defendant agreed to deliver good and marketable title to the said real property at the time of settlement.

+

BILL OF COMPLAINT

6. That under the terms of said agreement, the Defendant also agreed to erect upon the said parcel of real property a house generally known as the Cedarwood Model.

*PARAGRAPHS ARE SIMILAR

AMENDED BILL OF COMPLAINT

5. As an inducement to Plaintiffs to enter into a sales agreement, the Defendant furnished to the Plaintiffs certain promotional material (marked Exhibit "B") which showed two types of houses more generally known as the Cedarwood Model. The Plaintiffs were informed that the house that would be built for them pursuant to the sales agreement would resemble that house shown as Elevation No. 1 in the promotional material, having a completely brick front exterior.

BILL OF COMPLAINT

13. As an inducement to enter into a sales agreement, the Defendant furnished to the Plaintiffs certain aforesaid promotional material (marked Exhibit "B") which showed two types of houses more generally known as the Cedarwood Model. The Plaintiffs were informed that the house that would be built for them pursuant to the sales agreement would resemble that house shown as Elevation No. 1 in the promotional material, having a completely brick front exterior.

*PARAGRAPHS ARE IDENTICAL²

AMENDED BILL OF COMPLAINT

3. That on the 14th day of March, 1986, the Plaintiffs entered into a written new home sales agreement with the Defendant to purchase a certain parcel of real property and the improvements thereon described as follows, to wit:

Lot 7, Block 1, Section 1, Connemara Subdivision, being situated in Loudoun County, Virginia, together with a single family house thereon generally known as the Cedarwood Model located at 114 Connemara Drive, Sterling, Virginia, 22170.

A copy of said agreement is attached hereto, made part hereof, and marked as Exhibit "A."

BILL OF COMPLAINT

4. That on the 14th day of March, 1986, the Plaintiffs entered into a written new home sales agreement with the Defendant to purchase a certain parcel of real property and the improvements thereon described as follows, to wit:

Lot 7, Block 1, Section 1, Connemara Subdivision, being situated in Loudoun County, Virginia, together with a single family house thereon generally known as the Cedarwood Model located at 114 Connemara Drive, Sterling, Virginia, 22170.

A copy of said agreement is attached hereto, made part hereof, and marked as Exhibit "A."

*PARAGRAPHS ARE IDENTICAL

AMENDED LL OF COMPLAINT

6. As a further inducement to enter into the said sales agreement, the Defendant represented in the sales agreement that the Cedarwood Model house would be constructed on the property substantially in accordance with the plans and specifications on file with the County of Loudoun at the time of the sale. Those

plans (marked Exhibit "C") showed the front exterior of the Cedarwood Model house would be constructed entirely of brick.

BILL OF COMPLAINT

14. As a further inducement to enter into the said sales agreement, the Defendant represented in the sales agreement that the Cedarwood Model house would be constructed on the property substantially in accordance with the plans and specifications on file with the County of Loudoun at the time of the sale. Those plans (marked Exhibit "C") showed the front exterior of the Cedarwood Model house would be constructed entirely of brick. Exhibit "C."

*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

7. The Defendant knew or should have known, that the representations that the Cedarwood Model house with a completely brick front exterior was a material fact to be relied upon by the Plaintiffs in making a decision on whether to enter into the said sales agreement.

BILL OF COMPLAINT

15. The Defendant knew or should have known, that the representations that the Cedarwood Model house with a completely brick front exterior was a material fact to be relied upon by the Plaintiffs in making a decision on whether to enter into the said sales agreement.

*PARAGRAPHS ARE IDENTICAL.

AMENDED BILL OF COMPLAINT

8. To their detriment, the Plaintiff relied upon the aforesaid misrepresentations and entered into the sales agreement to purchase a Cedarwood Model house for the sum of \$142,450.00 and tendered a \$2,500.00 earnest money deposit to the Defendant.

BILL OF COMPLAINT

16. To their detriment, the Plaintiff relied upon the aforesaid misrepresentations and entered into the sales agreement to purchase a Cedarwood Model house for the sum of \$142,450.00 and tendered a \$2,500.00 earnest money deposit to the Defendant.

*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

9. The actual house constructed by the Defendant varied substantially from what was represented to the Plaintiffs at the time of sale. Instead of an all brick front exterior, the house constructed had aluminum siding on the exterior of the front elevation above the entrance and porch.

BILL OF COMPLAINT

17. The actual house constructed by the Defendant varied substantially from what was represented to the Plaintiffs at the time of sale. Instead of an all brick front exterior, the house constructed had aluminum siding on the exterior of the front elevation above the entrance and porch.

*PARAGRAPHS ARE IDENTICAL

10. In a timely fashion, the Plaintiff is informed the Defendant of their objection to the change in the construction of the house and sought to have the deficiency corrected during construction. However, the Defendant refused to correct the deficiency and continued construction of the house.

BILL OF COMPLAINT

18. In a timely fashion, the Plaintiffs informed the Defendant of their objection to the change in the construction of the house and sought to have the deficiency corrected during construction. However, the Defendant refused to correct the deficiency and continued construction of the house.

*PARAGRAPHS ARE IDENTICAL

BILL OF COMPLAINT

10. Upon learning of this change, the Plaintiffs, in a timely fashion, communicated their objections to the change in the construction of the house, directly to the Defendant and sought to have the problem corrected during construction by the installation of brick on the front elevation above the entrance and porch.

BILL OF COMPLAINT

11. However, the Defendant refused to correct the problem and refused to construct the Cedarwood Model house in accordance with the representations made to Plaintiffs and in accordance with the plans submitted to the County of Loudoun at the time of the sale.

*PARAGRAPHS ARE SIMILAR

11. As a result thereof, the Cedarwood Model house that was constructed by the Defendant was of lower value and varied substantially in appearance than the house which was represented to the Plaintiffs at the time of execution of the sales agreement.

BILL OF COMPLAINT

19. As a result thereof, the Cedarwood Model house that was constructed by the Defendant was of lower value and varied substantially in appearance than the house which was represented to the Plaintiffs at the time of execution of the sales agreement.

~~_____~~
*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

12. As a further result thereof, the Defendant has refused to convey fee simple title for the aforementioned property to Plaintiffs, and Defendant has elected to void the contract of sale with Plaintiff.

*NO CORRESPONDING PARAGRAPH

AMENDED BILL OF C 'PLAINT

13. The Plaintiffs have suffered monetary damages from Defendant's refusal to construct and convey the house represented to them by the Defendant's sales promotional material as an inducement to enter the contract to purchase said property from Defendant.

AMENDED BILL OF COMPLAINT

14. The Plaintiffs have suffered monetary damages from Defendant's refusal to construct and convey the house represented to them in the sales agreement dated March 14, 1986, and the plans and specifications filed with Loudoun County for the aforesaid property.

*PARAGRAPHS ARE SIMILAR

15. Due to all the foregoing, the Plaintiffs have experienced substantial monetary injury and have suffered a great deal of aggravation and inconvenience.

BILL OF COMPLAINT

20. Due to all the foregoing, the Plaintiffs have experienced substantial monetary injury and have suffered a great deal of aggravation and inconvenience.

*PARAGRAPHS ARE IDENTICAL

AMENDED BILL OF COMPLAINT

WHEREFORE, your Plaintiffs pray that this Court award damages to the Plaintiffs which have resulted from the fraudulent misrepresentations made by the Defendant; award reasonable attorney's fees and costs for the institution and prosecution of this litigation; award punitive damages in the amount of three times the amount of actual damages, and grant such other and further relief as may be deemed appropriate and as equity might require.

BILL OF COMPLAINT

WHEREFORE, your Plaintiffs pray that this Court award damages to the Plaintiffs which have resulted from the fraudulent misrepresentation made by the Defendant; award reasonable attorney's fees and costs for the institution and prosecution of this litigation; award punitive damages in the amount of three times the amount of actual damages, and grant such other and further relief as may be deemed appropriate and as equity might require.

*PARAGRAPHS ARE IDENTICAL.

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

25 June 1987

James E. Pinkowski, Esq.
4020 University Drive
Suite 200
Fairfax, Virginia 22030

Kelly R. Dennis, Esq.
6849 Old Dominion Drive
Suite 410
McLean, Virginia 22106

Re: White v. The Connemara Corporation
In Chancery No. 10629

Gentlemen:

The plaintiffs have filed a Bill of Complaint against the defendant for specific performance of a real estate sales agreement dated March 14, 1986, or, in the alternative, for damages for fraud related to the agreement and damages for breach of the agreement. The defendant has filed a Plea in Bar alleging that Paragraph 15 (b) of the agreement constitutes the plaintiff's sole remedy (terminate the contract and receive a refund of all funds paid by them to the defendant seller as liquidated damages) and that the allegations of fraud are insufficient as a matter of law to allow the plaintiffs "to go beyond the written terms of the agreement."

After consideration of the argument of counsel on June 5, 1987, the authorities cited by counsel and the transcript of a hearing before Judge Hancock of the Circuit Court of Fairfax County on May 22, 1987, in two cases involving similar contract provisions, I am of the opinion that the Plea in Bar must be sustained.

The plaintiffs argue that Paragraph 15 (b) of the agreement is unconscionable because the only remedy it affords them in the event of a breach of the agreement by the defendant is the return of the plaintiff's own money. While I agree not only that the remedy involves the return of the plaintiff's own money, but also that the default provisions are very harsh, I feel that three other considerations are stronger and more compelling in this case.

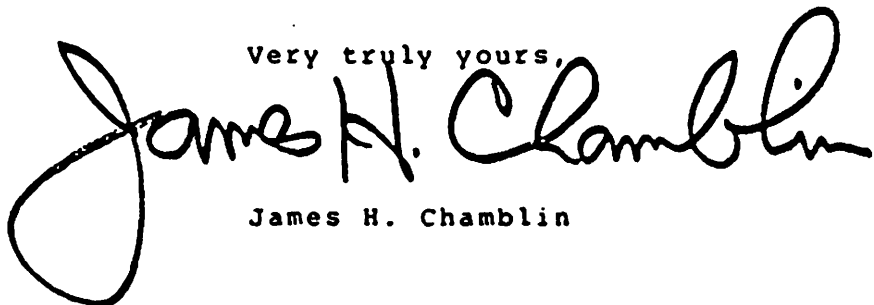
First, just as Courts do not measure the adequacy of consideration, I do not feel they should judge the adequacy of the remedy. I don't think anyone would deny that a person can bargain away his rights. There would be some measure of consideration to be given if a purchaser had contracted away all his remedies whatsoever, but that is not the situation in the instant case.

Second, the plaintiffs do have a remedy, as limited and harsh as it may be. They can terminate the contract and be relieved of any liability under it. Rescission is certainly a recognizable remedy for breach of contract.

Third, the plaintiffs still may have a tort cause of action against the defendant. In this regard, I feel that Count II of the Bill of Complaint does not set forth a separate cause of action for fraud against the defendant, but merely tries to make a breach of contract claim sound like a tort claim.

Let Mr. Dennis prepare the appropriate decree sustaining the Plea in Bar and dismissing this cause.

Very truly yours,

A large, stylized handwritten signature in black ink, reading "James H. Chamblin". The signature is written in a cursive style with a large loop at the end.

James H. Chamblin



NEW HOME SALES AGREEMENT



Virginia

THIS AGREEMENT, made this 14th day of March, 1986, by and between George White
and Cynthia Graham (hereinafter known as the Purchaser) and
BK Connemara Corporation (hereinafter known as the Seller) and
Builders Marketing INC. (hereinafter known as the Agent)

WITNESSETH: That for and in consideration of the sum of Two Thousand and Five Hundred Dollars
(2,500) by (cash, check or note due _____), the receipt of which is hereby acknowledged, the Purchaser
agrees to buy, and the Seller agrees to sell all of that certain place, parcel or lot of land and improvements thereon described as follows, to wit:
All of Lot 7, Block 1, Section 1, Connemara, Subdivision, Loudoun
County, State of Virginia, together with a house generally known as the Cedarwood
Model, known by street address as 114 Connemara Drive, Sterling, Virginia 22170
with: 2-car Garage
Walk-out Basement
Rough-in Plumbing

NOTICE - An ADDENDUM is attached which is an integral part of this Agreement of Sale.

1. PURCHASE PRICE. The purchase price payable for the Property is the sum of One Hundred Forty-Two Thousand and Four Hundred and Fifty Dollars (\$142,450), which is payable as follows:

- (a) 2,500 being an earnest money deposit, the receipt of which is hereby acknowledged by Seller; and
(b) 119,950 representing the proceeds of a loan to be made to Purchaser by the mortgage lender; and
(c) 11,950 being the balance of the purchase price, payable by Purchaser by certified or cashier's check or settlement as hereinafter provided. Seller will pay to 3 loan discount points on specified loan amount

2. MORTGAGE LOAN. (a) Purchaser is herein agreeing to request, prepare and execute a loan commitment secured by a First Deed of Trust on the house and lot in the sum of One Hundred Twenty-Eight Thousand Dollars (\$128,000), bearing interest at the rate of 10 % per annum, or at the prevailing rate at the time of disbursement hereunder, Purchaser shall make diligent, truthful and proper application therefor within five (5) days from the date of notification by the Seller, with such lending agencies or institutions as shall be designated or approved by the Seller, the proceeds of which First Trust loan are to be applied toward payment of the aforesaid purchase price.

(b) It is expressly agreed that in the event the Purchaser is unable to obtain the First Trust loan referred to above from the lending agency or institution approved by Seller, or if a loan is committed by such lending agency or institution but the Lender shall thereafter refuse to consummate the loan by reason of non-performance of any conditions of such commitment within the period of time provided for such performance under the provisions of the commitment, or if said Lender refuses to consummate and make the loan for any other reason other than non-performance of such conditions, or if the Seller's opinion, the Purchaser shall have the right to cancel and terminate this agreement and refund to the Purchaser the deposit heretofore mentioned; or, at the Seller's option, the Purchaser shall have the right to obtain the First Trust loan from other sources. If the lending agency or institution approved by Seller refuses to make such loan, in no event shall Seller have any obligation or liability to Purchaser on account of the Lender's refusal to make such loan. and points are not to be used as a house down

3. THE DWELLING. (a) Seller has created or will create upon the said lot a Cedarwood (the "Plan"). Seller shall have the right to substitute materials, fixtures, equipment and appliances of substantially equal quality to those specified in the Plan. Seller further reserves the right (but shall not be obligated) to make changes in construction as may be required from time to time by Purchaser's mortgage lender, the Federal Housing Administration, the Veterans Administration, or any other governmental authority having jurisdiction over the Property, or as may be otherwise required by material shortages, work stoppages or emergencies.

(b) Seller shall complete construction of the dwelling on or before October 8, 1986, the "Completion Date" provided, however, that if Seller shall be delayed in any time in the progress of construction by Act of God, labor disputes, Seller's inability to obtain material and/or labor, inclement weather, and any other causes beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay. Seller understands and agrees to complete construction of the dwelling within a period of one (1) year after the date of this Contract, notwithstanding any longer period which may otherwise be provided for under this agreement.

(c) Purchaser shall have the right to access the dwelling's decorating colors from among color samples to be provided by Seller in accordance with the color application forms prescribed by Seller. In the event the Purchaser shall fail to exercise the said right of selection within ten (10) days after receipt of samples from Seller, then Seller shall have the right to decorate the interior of the dwelling as Seller may determine.

(d) No alterations, changes or additions shall be made in the construction of the dwelling nor shall any extra work be performed or materials added by Seller unless approved by a duly authorized agent of Seller in writing and payment is made for such changes at the time requested by Purchaser. It is understood that Purchaser is purchasing a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of the dwelling and that Purchaser shall acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in compliance with the terms of this Contract upon its completion. Equitable title shall remain vested in Seller until delivery of deed.

5. THE SETTLEMENT. (a) Settlement shall occur at such time as designated by the Seller by notice to the Purchaser that the dwelling is ready for occupancy, which shall be evidenced by the issuance of a temporary or permanent Residential Use Permit by the County of Loudoun. On Settlement date, Purchaser shall pay to Seller by certified or cashier's check the unpaid balance of the purchase price provided for in Section 1 herein and all other sums payable to Seller hereunder, and Seller shall deliver to Purchaser a General Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property.

(b) Settlement shall be held at the offices of Stahl and Buck P.C. Deposit with said office of the cash payment on or around the date of conveyance and such other papers as are required by the terms of this Contract shall be deemed and construed as a good and sufficient tender of performance of the terms hereof. THE PURCHASER HAS THE RIGHT TO SELECT THE SETTLEMENT ATTORNEY OR TITLE COMPANY FOR SETTLEMENT.

6. AGENT. (a) Seller hereby designates Builders Marketing Inc. (BMT) and Caldwell Banker Real Estate as its Agent responsible for this transaction, and the Seller agrees to pay said Agent a sales commission at settlement as follows: 3% of purchase price to Caldwell Banker and remaining commission to BMT as specified in a separate agreement between Seller and BMT.

The Purchaser acknowledges that he has read and understands the terms and conditions set forth in Paragraphs 1 through 18 herein, on the face and reverse of this form, and that he and Seller are bound by the same hereof.

DATE March 14, 1986

DATE [Signature]

[Signature] (Purchaser)
[Signature] (Purchaser)
[Signature] (Agent)
[Signature] (Agent)

(b) Purchaser acknowledges and agrees that he understands that, while the Agent may have advised and consulted with the Seller, its architects and its contractors concerning the design, construction and development of the house, the Agent does not accept, nor will Purchaser attempt in any manner to charge the Agent with, any liability or responsibility whatsoever for said design, or the construction and/or development of the house, or any defaults in performance by the Seller, the architects or the contractor.

(c) Further, Purchaser recognizes that the Agent receives all information as to probable delivery dates from the Seller and that in this regard the Agent is merely acting as a conduit of information and not in any respect as the Agent of the Seller. The Agent shall not be responsible in any manner whatsoever to Purchaser for failure or inability by the Seller to meet projected delivery dates, it being agreed that Purchaser shall look solely to the Seller in this regard.

RISK OF LOSS. Seller assumes the risk of loss or damage to said property by fire or other casualty until the date of settlement under this Agreement.

TITLE. The Property shall be sold free of encumbrance, except as aforesaid. Title of settlement is to be good of record and fully insurable by a title insurance company on equal terms, subject, however, to covenants, easements, rights-of-way, conditions and restrictions of record and such restrictions as are specifically set forth herein, and any other easements which may be observed by an inspection of the Property. Otherwise, the deposit is to be returned and the Agreement declared null and void at the option of the Purchaser, unless the defects are of such character that they may be remedied by Seller, if it elects to do so. The Seller and its Agents are hereby expressly released from all liability for damages by reason of any defect in the title, in case legal steps are necessary to perfect the title, such action, if Seller elects to undertake same, shall be taken promptly by and at the Seller's expense, whereupon the time herein specified for full settlement by the Purchaser will be extended for the period necessary for such action, but not to exceed 12 additional months. The premises are sold subject to easements, if any, created or to be created, prior to or after settlement in favor of utility companies, municipal authorities, or quasi-governmental authorities for the installation of utilities or streets and/or additional covenants, restrictions or easements which may be placed on record by the Seller after execution hereof for the benefit of the Property and/or the community of which it is a part. This Agreement shall be subordinate to any such easements, rights-of-way, covenants, etc.

SETTLEMENT COSTS. It is agreed that the costs and fees incident to settlement shall be paid as follows (unless specified otherwise herein):

(a) Rents, taxes, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to certificate of taxes, except that assessments for improvements completed prior to the date hereof, whether assessments therefor have been levied or not, shall be paid by Seller, or otherwise made therefor at the time of transfer.

(b) The Purchaser agrees to pay the following costs at settlement: examination of title, all title insurance premiums, all mortgage insurance premiums, if any, final real estate fees, loan placement fees, and any other fees assessed by lender, title insurance binder, closing and settlement fees, notary fees, conveyancing fees, preparation of deed, county and state transfer taxes, all recording charges, including those for Purchase Money trust, if any, preparation of trust and note, and insurance and tax returns.

(c) The Seller agrees to pay the following costs at settlement: charges for preparation of deed and Virginia State Grantor's Tax, if applicable.

OCCUPANCY. (a) Occupancy hereunder shall be given to Purchaser immediately after settlement. However, if, at the Seller's discretion, the Purchaser shall accept occupancy of its completed dwelling prior to the conveyance of such unit in fee simple to the Purchaser, the Purchaser shall execute the Seller's Standard Occupancy Agreement and shall continue to be subject to the terms hereof as if Purchaser did not occupy such dwelling unit.

(b) Notwithstanding the Purchaser's right of occupancy as aforesaid, the Seller shall have the right to enter upon property of the Purchaser at any time after settlement for the purpose of making exterior changes to the lot and improvements thereon, including grading changes and the removal of trees, as may be required by Seller's site plan, or any modification thereof, or any changes which may be required as a condition of Seller's release by applicable governmental authorities from any and all subdivision or site plan bonds or other covenants.

UNSOOLD UNITS. Until such time as all of the dwelling units in Seller's subdivision are sold, the Seller reserves the right to make such use of unsold dwelling units, the common elements, streets and the main entrance of the project, as are necessary for its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction equipment and personnel and noise and other inconveniences attendant thereto may be present. Purchaser agrees not to obstruct or impede any such construction or sales activities.

ACCESS. The Purchaser may not have access or entry to the dwelling unit or the construction site during construction, nor may he store any of his possessions on or about the dwelling unit or the construction site prior to the settlement of this Agreement and delivery of possession to the Purchaser hereunder. Any violation of this provision may, at the election of the Seller, be considered a material breach of this Agreement and, in addition to any other remedies available to Seller, Seller may declare this Agreement void and, in such event, any amount paid toward the purchase price may be retained by Seller as liquidated damages.

TREES AND LOCATION. The location, area, and ground elevation of the building on the lot, elevation of dwelling unit, and the reversing of the plan, if necessary, to conform to the existing lot contours, are to be determined by the Seller at its sole discretion. Seller shall remove such trees from the lot as it may deem necessary and it shall not be responsible for any damage to or destruction of remaining trees during the process of construction. Seller shall be responsible only for trees planted by him. Seller's obligations to replace trees, shrubbery and other landscaping, as well as all of Seller's other repair and warranty obligations, shall be limited solely to the warranties set forth in the Builder's Limited Warranty mentioned in paragraph 814 below.

MODELS AND DISPLAYS. It is hereby agreed that all furniture and appliances property, special household appliances, furnishings, special fixtures, special carpeting and floor tile, special murals, wallpaper, window decorating treatments, special trees, shrubbery, landscaping, special decks and patios, certain rooms, special fireplaces and other fixtures and recreational facilities exhibited in the model units and model area are for exhibition purposes only and are not included in the purchase price, unless otherwise expressly provided herein.

WARRANTIES. Purchaser hereby waives any and all warranty rights provided by Section 55-70.1 of the Code of Virginia. Unless specified otherwise herein, all warranties other than those expressly provided in the Builder's Limited Warranty are hereby excluded. Purchaser has been afforded the opportunity to review this warranty prior to execution of this Agreement, and agrees to accept this warranty as the sole warranty being given by the Seller to the Purchaser. Purchaser and Seller shall inspect the house and lot before settlement and note in the Pre-Settlement Inspection Report any incomplete work or defects. Thereafter, Purchaser agrees that Seller shall not be liable for any patent incomplete work or defects not specifically noted in said Pre-Settlement Inspection Report, unless otherwise specifically provided in the Builder's Limited Warranty. It is further agreed that there shall be no withholding of Seller's funds at settlement for any such home.

THE SELLER MAKES NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, OR IMPLIED BY STATUTE, TO THE PURCHASER.

DEFAULT BY EITHER PARTY. (a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by Seller and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable of precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies whether or not Purchaser shall elect to terminate this Contract shall in any case be collectable, enforceable or available to Purchaser, and Purchaser agrees to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

DISCLOSURE. (a) When applicable, the Purchaser by execution hereof acknowledges receipt, prior to the execution of this Agreement, of a completed copy of the Disclosure Bill of Particulars for New Home Buyers, as required by Section 10-6-3, Chapter 10 of the 1976 Code of the County of Fairfax, Virginia, as amended.

(b) Purchaser acknowledges that he has had the opportunity, prior to the execution of this Agreement, to examine manufacturers' warranties on appliances and equipment included in the home.

HOME OWNERS ASSOCIATION. In the event there is a Homeowner's Association, then Purchaser acknowledges receipt, prior to execution of this Agreement, of copies of the Homeowner's Association by-laws and related documents. Purchaser agrees to be bound by the regulations, by-laws and decisions of the Association and agrees to pay the assessments established by such Association.

MISCELLANEOUS. (a) The principals to the Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns, provided, however, that the Purchaser shall have no right to assign this Agreement without the prior written consent of the Seller.

(b) The terms and provisions of this Agreement shall survive the Settlement hereunder.

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

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

(e) This Agreement contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.



GENERAL ADDENDUM

In reference to the Agreement of Sale between George White
and Cynthia Graham,
the Buyer, and Connemara Corporation, and Seller,
dated March 14, 1986,
covering the real property commonly known as 114 Connemara Drive,
Sterling, Virginia 22170
the undersigned Buyer and Seller hereby agree to the following:

- 1: ~~This contract is contingent upon Purchaser receiving BUILDER'S WARRANTY and EXISTING CURB SPECIFICATIONS for dwelling specified herein from Seller. Purchaser to have five (5) business days following receipt of said warranty and curb specifications to approve said items in writing.~~
- 2: Seller, or Seller's Agent shall deposit the entire EARNEST MONEY DEPOSIT of Twenty-five Hundred Dollars (\$2500) in an ESCROW ACCOUNT to conform with the regulations of the Virginia Real Estate Commission and be maintained under custody of Builders Marketing, Inc., account trustee, within four (4) days following ratification of contract. Said EARNEST MONEY DEPOSIT shall be held in escrow by said trustee until settlement or until this Contract is declared null and void.
- 3: Seller shall give Purchaser not less than ^{fourteen (14)} ~~thirty (30)~~ days but not more than forty-five (45) days prior written notice of actual settlement date.
- 4: Seller shall deliver good and marketable TITLE at settlement.
- 5: It is understood by all parties that George White is a licensed real estate salesperson and that said party is engaging in this transaction only for his own account.

NOTE: This is page one (1) of two (2) page Addendum.

The herein agreement, upon its execution by both parties, is herewith made an Integral part of the aforementioned Agreement of Sale.

Dated: March 24, 1986
Cynthia A. Graham
Purchaser
George White
Purchaser

Dated: April 11, 1986
The Connemara Corp
Seller
Christina President 4/1/86



GENERAL ADDENDUM

In reference to the Agreement of Sale between George White
and Cynthia Graham,
the Buyer, and Cannemara Corporation, and Seller,
dated March 14, 1986,
covering the real property commonly known as 114 Cannemara Drive,
Sterling, Virginia 22170

the undersigned Buyer and Seller hereby agree to the following:

- 6: Seller shall not require Purchaser to make any loan applications
or conduct any business proceedings whatsoever related to the terms
and conditions of this contract during the period from May 17, 1986
to June 8, 1986. During said period, and only during said period,
Purchaser is expressly released from any and all time obligations
and deadlines stated within this contract.
- 17: Any and all handwritten provisions included in this contract
shall be merged and become part of this contract.
- 8: Time is hereby declared to be of the essence in the performance
by Seller and Purchaser of all obligations as specified within
this contract.
- 9: It is hereby agreed that this contract is null and void
without the expressed written approval of all parties
for all terms and conditions of this contract.

NOTE: This is page (2) two of two (2) page Addendum.

The herein agreement, upon its execution by both parties, is herewith made an
Integral part of the aforementioned Agreement of Sale.

Dated: March 24, 1986
Cynthia P. Graham
Purchaser
George White
Purchaser

Dated: April 11, 1986
The Cannemara Corp.
Seller
Carl F. Smith, President

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

12 January 1988

John E. Harrison, Esquire
Sandra L. Hughes, Esquire
LIGHT & HARRISON, P.C.
6849 Old Dominion Drive
Suite 410
P.O. Box 6625
McLean, Virginia 22106

James E. Pinkowski, Esquire
4020 University Drive
Suite 200
Fairfax, Va. 22030

In Re: White vs. Connemara Corporation
In Chancery No. 10629

Gentlemen:

The purpose of this letter is to confirm the reasons for my sustaining of the defendant's Plea in Bar and Demurrer as communicated to you by my assistant on November 25, 1987.

The Complainants had previously been granted leave to file an Amended Bill of Complaint which they did, but all of the elements of a fraud action are not properly pled in the Amended Bill. See Winn v. Aleda Const., 227 Va. 304 (1984). There are no allegations that the representations were false when made and were made intentionally and knowingly with the intent to mislead.

Because the Complainant had previously been granted leave to amend to allege a fraud action, no further leave to amend is granted. The suit is dismissed, with prejudice.

Very truly yours,

James H. Chamblin

JHC:dm

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

GEORGE WHITE, et ux.

Complainants,

v.

Chancery 10629

THE CONNEMARA CORPORATION,

Defendant.

DECREE

THIS CAUSE came before me on the 5th day of June, 1987, at the regular Motion's Day Docket, upon the Motion of the Defendant, by ~~these~~ ^{its} Counsel, Light & Harrison, P.C., to sustain the plea in bar filed by ~~them~~ ^{it} on the basis that the contract between the parties limited the parties' rights and remedies, ~~and~~ ^{and} ~~upon the subsequent Complainants' Motion for Reconsideration filed herein~~ ^{upon the Complainants' Motion for Reconsideration filed herein} ~~as to the fraud count of the Bill of Complaint.~~ ^{as to the fraud count of the Bill of Complaint.}

IT APPEARING, upon argument of Counsel for all parties, as well as the authorities cited by Counsel, and the transcript of a hearing ^{on 22 May 1987} before Judge Hancock of the Fairfax Circuit Court ~~that~~ ^{and for the reasons set forth in Court's opinion letter of 25 June 1987, that} the Plea in Bar must be sustained as to the contract counts of the Bill of Complaint based upon Paragraph 15(b) of the contract agreement. It is therefore

ORDERED that this cause be, and hereby is, DISMISSED with prejudice as to the Complainants, George and Cynthia White, insofar as their remedies, stated under Counts I and III of the Bill of Complaint are concerned and, that certain lis pendens filed by the Whites against the property, known as Lot 7, Block 1, Section 1 of Connemara Woods Subdivision in Deed Book 924, at

Page 1232 is hereby released and The Connemara Corporation shall cause a copy of this Decree to be filed among the land records of Loudoun County, and return the deposit of \$2,500.00 to Counsel for Complaintants, and it is

FURTHER ORDERED that Complaintants ^{*Motion for Reconsideration is granted and they are*} ~~be~~ granted leave to Amend their Bill of Complaint, ~~to plead facts in support of a fraud cause of action set forth in Count II of the Bill of Complaint.~~ Said Amended Bill of Complaint to be filed within ten days of this Decree.

ENTERED this 8th day of September, 1987.

James H. Chamblin
Hon. James H. Chamblin,
Judge ~~Designate~~
Loudoun County Circuit Court

WE ASK FOR THIS:

SEEN AND AGREED/OBJECTED:

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

James E. Pinkowski
James E. Pinkowski, Esq.
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060
Counsel for Complaintants

Counsel for Connemara
Corporation and Carl
Bernstein & Associates, Inc.

RECEIVED IN CERTIFICATE ANNEXED

1987 SEP 14 PM 3:53

RECORDED & INDEXED
TESTED & FILED
CLERK

IN THE
SUPREME COURT OF VIRGINIA

GEORGE AND CYNTHIA WHITE

Appellants,

v.

THE CONNEMARA CORPORATION

Appellee

Appeal No. _____

PETITION FOR APPEAL

(From Decrees of Dismissal of the Circuit Court of Loudoun
County, Chancery No. 10629)

James E. Pinkowski
King & King, Chartered
Suite 650
2033 M Street, N.W.
Washington, D.C. 20036
(202) 296-5195

James E. Pinkowski
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060

Counsel for Appellants

IN THE
SUPREME COURT OF VIRGINIA

GEORGE AND CYNTHIA WHITE)	
)	
Appellants,)	
)	
v.)	Appeal No. _____
)	
THE CONNEMARA CORPORATION)	
)	
Appellee)	

PETITION FOR APPEAL

(From Decrees of Dismissal of the Circuit Court of Loudoun
County, Chancery No. 10629)

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Counsel for Appellants

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**IN THE
SUPREME COURT OF VIRGINIA**

GEORGE AND CYNTHIA WHITE)	
)	
Appellants,)	
)	
v.)	Appeal No. _____
)	
THE CONNEMARA CORPORATION)	
)	
Appellee)	

I. NATURE OF THE CASE AND PROCEEDINGS BELOW

This case involves the fraudulent inducement of a real estate contract for the purchase of a new home in the Connemara Subdivision of Loudoun County, Virginia. A subsequent breach of that contract by the Seller, Connemara Corporation, when Purchasers, George and Cynthia White, demanded that the house be constructed as represented in the sales literature and relied upon by Purchasers in contracting for the purchase of the house.

The sales literature represented the house purchased by Appellants as having a brick front exterior over the entire front of the house. The sales literature was prepared by Appellee for use in obtaining contracts for the sale of homes constructed by Appellee. The house was constructed with a half brick front and half aluminum siding front.

The contract entered into between Appellants and Appellee stated that the house would be constructed as shown in the sales literature. The actual house constructed for Appellants was not as shown in the sales literature, and when they learned of that fact, they requested that Appellee change the front to an all brick exterior. The Appellee refused and denied that the house was shown with a brick front exterior in the sales literature.

On December 23, 1986, Appellants filed suit in the Loudoun County Circuit Court by a Bill of Complaint with three separate Counts in the Complaint: Count I Specific Performance, Count II Fraud, and Count III Breach of Contract. Appellees filed a Plea in Bar to the Bill of Complaint arguing that paragraph 15(b) of the Contract providing for a refund of Purchaser's earnest money deposit in the event of default by either party was the purchaser's sole remedy for Seller's actions.

The Plea in Bar was argued before Judge James H. Chamblin on June 5, 1987. In the argument before Judge Chamblin two cases heard in the Nineteenth Judicial Circuit, Fairfax Circuit Court before Judge Quinlan H. Hancock, were argued to the Court, where the identical paragraph 15(b) contract provision was found by Judge Hancock to be unconscionable and unenforceable under Virginia law. On June 25, 1987, Judge Chamblin issued a letter opinion sustaining Appellee's Plea in

Bar and Dismissing Appellant's Complaint without citing any legal authority for his ruling. Judge Chamblin stated that he believed the entire suit by Appellants was based upon contract and barred by paragraph 15(b). He further stated that the fraud Count may be a tort cause of action but he believed that Appellants were making Count II an action for fraud when it has a breach of contract claim (A copy of Judge Chamblin's letter is attached and marked as Exhibit "A" hereto).

Appellants objected to the decision by Judge Chamblin and filed a Motion for Reconsideration. Judge Chamblin based upon the Motion for Reconsideration agreed to allow Appellants leave to file an Amended Bill of Complaint as to the fraud Count of the Complaint. A decree was entered on September 8, 1987 dismissing with prejudice Counts I and III of Appellants Bill of Complaint and granting leave to Appellants to file an Amended Bill of Complaint. An Amended Bill of Complaint was filed with the Loudoun Circuit Court on September 21, 1987. Appellee filed a Plea in Bar and Demurrer to the Appellant's Amended Bill of Complaint arguing that Judge Chamblin's ruling on the original Bill of Complaint was dispositive of the Amended Bill of Complaint because the Amended Bill of Complaint was similar to Count II of the Original Complaint.

Judge Chamblin heard the Appellee's Plea in Bar and Demurrer by telephone conference call on November 25, 1987 and ruled that the Demurrer and Plea in Bar should be Sustained, and

the case should be dismissed with prejudice. Judge Chamblin on January 12, 1988 issued a letter of explanation for his ruling and stated that the ruling was based upon Winn v. Aleda Construction Co., Inc., 227 Va. 304, 315 S.E.2d 193 (1984) because all the elements of fraud were not plead in the Amended Complaint as delineated by the Winn case. (A copy of Judge Chamblin's letter is attached and marked at Exhibit "B" hereto.) A Decree dismissing with prejudice the entire case was entered on January 12, 1988. Appellants filed their Notice of Appeal on January 28, 1988.

II. ASSIGNMENTS OF ERROR

The Appellants assign as error the following:

1. Judge Chamblin committed reversible error in not following the cases decided by the Nineteenth Circuit which would not permit paragraph 15(b) of the Contract between Appellants and Appellee to be enforced under Virginia law.

2. Judge Chamblin committed reversible error in denying innocent purchasers of real estate the equitable remedy of specific performance for default by the Seller.

3. Judge Chamblin committed reversible error in denying the Appellants a breach of contract action for

Appellee's willful default of the terms and conditions of the contract between Appellee and Appellants.

4. Judge Chamblin committed reversible error in denying innocent purchasers of real estate a fraud cause of action against the Seller for misrepresentation of facts pertaining to the house being purchased which induced Purchasers to enter into contract with Seller.

5. Judge Chamblin committed reversible error in sustaining a plea in bar filed by Appellees against the Original Bill of Complaint and dismissing with prejudice Counts I and III of the Original Bill of Complaint.

6. Judge Chamblin committed reversible error in sustaining a Demurrer and Plea in Bar filed by Appellee against the Amended Bill of Complaint and dismissing with prejudice the Appellants' Cause of action for fraud against Appellee.

III. QUESTIONS PRESENTED

1. Whether the liquidated damages provision in the Contract for the purchase of real estate (Paragraph 15(b)) in this case is enforceable when the provision only provides for the return of Purchaser's earnest money deposit for the Seller's willful default of the Contract.

2. Whether the liquidated damages provision in the Contract for the purchase of real estate (Paragraph 15(b)) in this case should be enforced to bar the innocent Purchasers' equitable remedy of specific performance where the Seller willfully breached the Contract and is in default of the contract.

3. Whether the liquidated damages provision in the Contract for the purchase of real estate (Paragraph 15(b)) in this case should be enforced to bar the innocent purchaser from a breach of contract action where the Seller willfully breached the Contract and is in default of the Contract.

4. Whether there is a separate cause of action for fraudulent misrepresentation based upon the sales literature utilized by Seller to induce Purchasers to Contract for the purchase of the house and whether that fact was adequately plead in the Original and Amended Bills of Complaint.

IV. STATEMENT OF FACTS

On or about March 14, 1986, Appellants, George and Cynthia White, were shown by Appellee's Agent sales literature depicting the "Cedarwood Model house" in the Connemara Subdivision in Loudoun County, Virginia. The "Cedarwood Model house" was depicted in the sales literature as a house with a

completely brick front exterior. As a result of the sales literature, a contract was prepared by Appellee's agent, Builders Marketing, Inc., and a contract was entered into by the parties for the purchase of the "Cedarwood Model house" for the purchase price of \$142,450.00.

The contract provided that the Cedarwood Model would be constructed in accordance with the plans and specifications filed with Loudoun County, Virginia. The plans and specifications filed with Loudoun County showed the Cedarwood Model as being constructed with a completely brick front exterior.

Appellants entered into the Contract with Appellee based upon the representations made in the sales literature and the representations of the Sales agent for Connemara that the Cedarwood Model house would be constructed with a completely brick front exterior. Appellants would not have entered the contract if the house were represented as being constructed with a partial brick front exterior and a partial aluminum siding.

Appellee constructed the Cedarwood house purchased by Appellants with a partial brick front exterior and partial aluminum siding. Appellee never discussed with Appellants any changes to the front of the Cedarwood Model house from what was shown on the sales literature and the plans and specifications filed with Loudoun County, Virginia. Appellee never advised

Appellants that a change would be made to the Cedarwood Model house they purchased. When Appellants discovered that the Cedarwood Model constructed by Appellee was different from what was represented to them prior to signing the Contract, they contacted representatives of Appellee and requested that the house be corrected to conform to what was represented to them in the sales literature and the plans and specifications filed with Loudoun County, Virginia. Appellee refused to take any corrective action and stated that the house was not changed, and it was constructed as originally designed for Appellee.

Appellants continued to pursue a resolution of the problem with Appellee representatives to only experience resistance and a flat refusal by Appellee to take any action, and a complete refusal by Appellee to settle on the Contract with Appellants. A lawsuit was filed by Appellants against Appellee because of the complete refusal by Appellee to correct the house and settle on the contract. Appellee has refused to convey the property to Appellants, and the property was listed and sold to a third party while the lawsuit was pending. The house was sold for a price significantly higher than Appellee contracted to sell the house to Appellants.

The Bill of Complaint filed by Appellants was based upon the foregoing facts and it contained three Counts. Count I sought Specific Performance of the Contract entered into between Appellants and Appellee on March 14, 1986. Count II sought

damages for false representations made by Appellee and its agents to induce Appellants to enter a contract to purchase the Cedarwood Model house. Appellee and its agents misrepresented that the house would be constructed as shown on the sales promotional literature, that the Cedarwood Model would have an entire brick front exterior, and that the house would be constructed in accordance with plans and specifications filed with Loudoun County which showed a completely brick front exterior for the Cedarwood Model house. Count III sought damages for Breach of Contract by Appellee in the amount of \$50,000.00 due to Appellee's failure to comply with numerous provisions of the contract, as follows: (1) failure to give fifteen days notice for settlement, and refusal to settle on December 12, 1986 the date unilaterally scheduled by Appellee; (2) failure to complete construction of Appellants' house on or before October 10, 1986; (3) failure to construct Appellants' house as shown on the plans and specifications filed with Loudoun County Virginia; and (4) failure to permit the Appellants a pre-settlement inspection to note deficiencies in work and the difference in the front exterior of the house.

Appellee never answered any of the allegations of the Bill of Complaint. Instead, Counsel for Appellee filed a plea in bar to Appellants Bill of Complaint. The plea in bar claimed that paragraph 15(b) of the contract barred any legal action by Appellants in connection with the purchase of a house from Appellee. Paragraph 15(b) reads, as follows:

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forewith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agreed to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

Appellee argued that Appellants sole remedy was to have the earnest money deposit of \$2,500.00 returned to Appellants, and that the Bill of Complaint should be dismissed. On June 25, 1987 Judge James H. Chamblin sustained the Plea in Bar and dismissed the cause of action. In his letter decision, Judge Chamblin stated that there may be a tort cause of action against Connemara, but he felt Count II of the Bill of Complaint merely tried to make a breach of contract claim sound like a tort claim.

Appellants' Counsel filed a Motion for Reconsideration and requested Judge Chamblin to grant them leave to file an amended Bill of Complaint. Judge Chamblin modified the Decree prepared by Appellee's counsel and indicated he would permit an

Amended Bill of Complaint as to Count II only and not Counts I and III of the Complaint. Appellants' Counsel noted objection to Judge Chamblin's decision.

An Amended Bill of Complaint was filed by Appellants on September 21, 1987 alleging fraudulent inducement by Appellee causing Appellants to enter the Contract to purchase the Cedarwood Model house from Appellant by misrepresenting the front exterior of the house in the sales promotional literature and the provisions of the sales contract itself. A plea in bar and demurrer were filed by Counsel for Appellee arguing that Judge Chamblin's previous decision was dispositive of the Amended Bill of Complaint. On January 12, 1988, Judge Chamblin issued a letter decision sustaining the plea in bar and demurrer to the Amended Bill of Complaint and dismissed the lawsuit with prejudice.

V. ARGUMENT

- A. A contract provision in a real estate sales contract limiting the purchaser to the return of its deposit, under the guise of providing liquidated damages for a seller's willful default of contract is void since it provides for no damages at all
-

The Circuit Court of Fairfax County considered the identical contract provision (Paragraph 15(b)) in the cases of W. Lowry Mann and Barbara Mann v. Addicott Hills Corporation

(Chancery No. 101193), and Kenneth Leon and Barbara Leon v. Addicott Hills Corporation (Chancery No. 101273), and Judge Quinlan H. Hancock ruled that paragraph 15(b) was unconscionable under Virginia law and refused to sustain pleas in bar filed by Counsel for Addicott Hills Corporation. Incidentally, the principal owners of Addicott Hills Corporation are the same parties who own Connemara Corporation involved in this appeal. Also, the same counsel was involved in all three cases.

During oral argument in the action involved in this Appeal, counsel for Appellants made Judge Chamblin aware of Judge Hancock's decision in the Fairfax Circuit Court cases. In fact, a copy of the transcript for those cases was furnished to Judge Chamblin for his review in rendering a decision in the instant matter. (A copy of the transcript is attached and marked as Exhibit "C" hereto).

It is inconceivable that two different State Courts in Virginia could be so diametrically opposite in result in applying Virginia law for the interpretation of the same identical contract provision. Appellants firmly believe that the Fairfax Circuit Court was correct in its ruling and interpretation of paragraph 15(b).

Paragraph 15(b) of the contract is repugnant to the essence of the contract. It is inconsistent with the terms and

provisions of the contract as a whole. It is contrary to public policy. Thus, it should be unenforceable and stricken from the contract.

Paragraph 15(b) makes the innocent Purchaser suffer a penalty for the willful breach of contract by the Seller. To state that such a result would be inequitable is not sufficient. Such a result would shock the conscience of all fair-minded men. Principles of equity do not permit penalty provisions to be enforced when the party to be penalized is the one who is not in default. It is contrary to the Principles of equity to permit a nondefaulting party to suffer either a penalty or a forfeiture and to permit a defaulting party to benefit from its own wrong.

The Restatement (Second) of Contracts §208 (1964) states:

If a contract or a term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

The law does not look with favor on provisions which release one from liability for his own fault or wrong. 17 Am Jur. 2d Contracts §189 (1964).

Willard Van Dyke Productions, Inc. v. Eastman Kodak Co. 12 N.Y.2d 301, 239 N.Y.S.2d 337, 189 N.E.2d 693 (1963) holds: "The law will not sustain a covenant of immunity which protects against fraud."

Since it is the policy of law to furnish everyone with legal remedies for any injuries received, an agreement which essentially imposes a penalty for seeking such legal remedy is contrary to that policy. Robins Drydock and Repair v. Navigazione Libera Triestina, S.A., 261 N.Y. 455, 185 N.E. 698 rearg. denied, 262 N.Y. 521, 188 N.E. 47 cert. denied, 290 U.S. 657 (1933).

17 Am. Jur. 2d Contracts §190 (1964):

No covenant of immunity can be drawn that will protect a person who acts in bad faith, because such a stipulation is against public policy and the courts will not enforce it. Similarly, the courts will not permit a covenant of immunity to be drawn that will protect a person against his own fraud; such a covenant is unenforceable because of public policy.

Industrial & General Trust v. Tod, 180 N.Y. 215, 73 N.E. 7 (1905)

Bates v. Southgate, 30 Mass. 170, 31 N.E.2d 551 (1941).

17 Am. Jur. 2d Contracts §499 (1964):

"A party cannot terminate a contract by reason of his own default under a forfeiture provision for the benefit of the other party."

The case of Ewing v. Litchfield, 91 Va. 575, 22 S.E. 362 (1895), is a Virginia case which holds that equity would not enforce the payment of a liquidated damages provision, when the liquidated damages provision would amount to a penalty. The Court said:

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

strongly incline to that construction which declares it to be a forfeiture or penalty rather than liquidated damages. [91 Va. at 581, 22 S.E. at 363-64.]

The principle that oppressive or unconscionable agreements will not be enforced has been recognized by equity courts. 17 Am. Jur. 2d Contracts §192 (1964).

A similar case is Margolis v. Taratz, 265 Mass. 540, 164 N.E. 451 (1929). In this case the Seller intentionally breached the contract by failing to provide good title to the property when it was within his power to do so. The contract provided if the Seller was unable to give good title or make the conveyance as stipulated, any payments made under the agreement were to be refunded and all other obligations of either party shall cease. The Seller attempted to give back the deposit and terminate the contract. The Supreme Court of Massachusetts in permitting specific performance held that where the vendor intentionally neglects to perform, the provisions for a refund of the deposit and the termination of obligations does not relieve the vendor from performance.

The same situation applies to this Appeal. Appellee intentionally breached the contract with Appellants and seeks to be relieved of all obligations by merely returning the \$2,500.00 deposit. Paragraph 15(b) of the contract is a penalty and

forfeiture for Appellants, who are not in breach, and it permits a wrong to be committed without providing for a remedy. Moreover Paragraph 15(b) would not constitute liquidated damages under the facts of our case. The mere return of one's own money without more does not constitute a remedy. As is stated in 27 Am Jur. 2d Equity §120 (1966): "Equity will not suffer a wrong to be without a remedy."

In this Appeal, the contract provision relied upon by Appellee as a liquidated damages clause provides for no damages at all in the event of a breach of contract by the Seller. The \$2,500 deposit was, of course, Appellants' money. They would therefore receive no compensation for a breach by the Seller such as occurred here. Far from predicting the proportionate expected losses of the Appellants at the time the sales contract was made, the clause assured they would not be compensated if the Seller defaulted.

Such a result, violates the longstanding Virginia rule that where a seller of real estate willfully defaults and refuses to convey in accordance with his contract, the purchaser is entitled to recover actual damages, not limited to purchase money paid. Williams v. Snider, 190 Va. 226, 228-33, 56 S.E.2d 63, 65-67 (1949). In Williams, the Supreme Court of Appeals of

Virginia dealt with the contention of a seller of real estate, who willfully refused to honor her contract and then sold the property at a greater price to another and argued that the innocent purchaser could only recover the extent of purchase money paid. The Court rejected the seller's claim, and held that the measure of damages was the difference between the contract price and the value of the property at the time of breach. The Williams case recognized a long line of Virginia Cases establishing the rule of law that the measure of damages, where the seller acts in bad faith, or disables himself from conveying, or willfully refuses or neglects to perform, is the purchaser's loss of his bargain, not the return of purchase money paid. Davis v. Buery, 134 Va. 322, 339-44, 114 S.E. 773, 777-79 (1922); Spruill v. Shirley, 182 Va. 342, 348-50, 28 S.E.2d 705, 708 (1944); Horner v. Holt, 187 Va. 715, 728, 47 S.E.2d 365, 371 (1948).

The Supreme Court of Appeals of Virginia said in Williams:

In no field of the law of contracts may a party deliberately refuse to perform his agreement, when it is in his power to fulfill his bargain, without subjecting himself to liability for compensatory damages. To countenance a contrary rule in contracts for the sale of real estate would greatly impair, and in many cases entirely destroy, the value of the contract and seriously obstruct the conduct of the real estate business.

[190 Va. at 233, 56 S.E.2d at 66]

It is respectfully submitted that this Honorable Court should determine that Paragraph 15(b) of the contract is unenforceable and should be disregarded for the following reasons:

1. It is punitive in nature and causes the penalty to be suffered by the innocent party.

2. It causes the nondefaulting party to suffer a forfeiture because of the Seller's default.

3. It permits a wrong committed by Appellee to be without a remedy.

4. It is an unconscionable term which renders the remainder to the contract meaningless since it allows the Seller to breach the contract with impunity.

5. It is contrary to public policy because it permits the defaulting party to exculpate itself from its own intentional acts of wrongdoing without suffering any consequence.

6. It is inconsistent with the intent of the contract requiring Appellee to construct and sell a house as specified and purchased by Appellants.

- B. An unenforceable liquidated damages provision should not be upheld where the result is to bar consideration of the remedy of specific performance in a case where the seller of real estate willfully breached the sales contract

Appellants sought the equitable remedy of specific performance in Count I of the original Bill of Complaint. In dismissing the original Bill of Complaint based upon Paragraph 15(b) of the contract, Circuit Judge Chamblin cut off any consideration of whether specific performance is appropriate in this case due to the willful breach of the Appellee. Judge Chamblin's ruling was in error and contrary to established case law in Virginia.

In Haythe v. May, 223 Va. 359, 288 S.E.2d 487 (1982), a seller of real estate willfully breached a contract to convey to its contract purchaser, and instead conveyed the real estate to another party. The trial court found that the seller breached its contract by conveying to a third party, but ordered that the innocent purchaser recover only his deposit and incidental expenses. The Supreme Court of Virginia reversed, and held that where a valid contract exists, and the enforcement of such contract would not work any hardship or unfairness on the seller, specific performance should be granted:

Although it is not a matter of absolute right, "where the contract sought to be enforced is proved, and it is in its nature and circumstances unobjectionable, it is as much a matter of course for courts of equity

to decree specific performance as it is for a court of law to give damages for a breach of it."

[Pavlock v. Gallop, 207 Va. 989, 995, 154 S.E.2d 153, 157 (1967), quoted in Haythe v. May, 223 Va. at 361, 288 S.E.2d at 488]

In this case where Appellee willfully and egregiously breached the sales contract by terminating it for the purpose of setting up a defense for the misrepresentation it made to Appellants specific performance is an appropriate remedy. Such a remedy should not be unavailable to the Appellants as this Court has said under a similar factual pattern in the Haythe v. May case.

- C. A misrepresentation of fact pertaining to the house to be sold pursuant to a contract of sale in sales promotional literature prior to consummation of the contract of sale is actionable for fraudulent misrepresentation and as constructive fraud for inducement of a contract

Judge Chamblin in sustaining the plea in bar and demurrer of Appellee for the original Bill of Complaint and the Amended Bill of Complaint apparently was not convinced that the Appellants were pursuing a separate cause of action for the fraudulent misrepresentations made by representatives of Appellee and the misrepresentation contained in the sales promotional literature prepared by Appellee and furnished to Appellants for the purpose of inducing them to contract for purchase the Cedarwood Model home.

The original Bill of Complaint and the Amended Bill of Complaint both set forth the misrepresentations upon which Appellant relied in entering into the contract. The facts speak for themselves. Appellee misrepresented the house as having an entire brick front exterior in the sales promotional literature to entice Appellants to purchase the Cedarwood Model. Appellee constructed the Cedarwood Model without a completely brick front exterior, and representatives of Appellee stated that the house was never to have a completely brick front exterior.

If that was true, why was the Cedarwood model represented in the sales literature as having a completely brick front exterior? Appellants firmly believe that Appellee intentionally deceived them into believing that the house they were purchasing would have a completely brick front exterior in order to get Appellants to sign a contract of purchase.

Appellants firmly believe that Appellee never intended to construct the Cedarwood Model with a completely brick front exterior. Appellants firmly believe Appellee knew that fact at the time they contracted with Appellants and deliberately withheld information from Appellants to obtain the Contract of purchase.

The facts plead in the Bill of Complaint and the Amended Bill of Complaint described facts showing how Appellants believe they were defrauded from the misrepresentations made by

Appellee and its agents, despite the fact that conclusory words, such as "fraudulent misrepresentation" were not used in drafting the Bill of Complaint. Whether the actions of Appellee and its agents constituted a fraudulent misrepresentation is the ultimate issue to be decided by the Court. Judge Chamblin cited Winn v. Aleda Construction Co., Inc., 227 Va. 304, 315 S.E.2d 193 (1984) for the position that allegations that representations were false when made and were intentionally and knowingly made with intent to mislead was required for the plea in bar and demurrer to be overruled.

The Winn case on the issue of fraud does not discuss the sufficiency of the pleadings filed by the Plaintiff. Instead, it discusses the burden of proof that a Plaintiff must meet to establish fraud. In the instant Appeal, we submit that the facts set forth in the Bill of Complaint and Amended Bill of Complaint indicate the basis for the fraud cause of action sufficiently to have that action go to the finder of fact. The question on the adequacy of the evidence before the finder of fact is a different question and can be tested by a Motion to Strike as was done in the Winn case. The demurrer tests whether a prima facie cause of action is indicated by the pleadings. We submit a prima facie cause of action was so stated.

Judge Chamblin's decision ignores principles espoused by the Virginia Supreme Court of Appeals for pleadings in an equity action.

The express policy in Virginia is that leave to amend should be liberally granted by the Courts in furtherance of the ends of justice. 1B, M.J., Amendments, §10.

The Virginia Supreme Court of Appeals, in Wolford v. Williams, 195 Va. 489, 78 S.E.2d 660, 666 (1953), said as follows:

A court of equity regards substance rather than mere form and when it has all the parties before it, may very properly mold the pleadings so as to ascertain all the rights of the parties and thus end the litigation by securing and enforcing those rights by proper decrees.

* * * *

"Leave to amend shall be liberally granted in furtherance of the ends of justice." [quoting Va. Code §8-119 and Rule 2:12 of the Rules of the Supreme Court of Virginia.]

[195 Va. at 500, 78 S.E.2d at 666]

It is the position of the Appellants that the Bill of Complaint and Amended Bill of Complaint properly and sufficiently alleged a cause of action based upon the fraudulent conduct of Appellee. The Bill of Complaint and Amended Bill of Complaint specifically stated that Appellee through its promotional material and sales agreement represented to the Appellants that the house being purchased would be constructed with a completely brick front exterior. (Paragraphs 13 and 14, Bill of Complaint) (Paragraphs 5 and 6, Amended Bill of Complaint) The Appellants relied upon the aforesaid

representations as a basis for entering into the sales agreement. Appellee knew that the representation that the Cedarwood Model house would be constructed with a completely brick front exterior was a material fact relied upon by Appellants in making a decision to purchase the house and signing the Sales Agreement. (Bill of Complaint, Paragraph 15) (Amended Bill of Complaint, Paragraph 8). The house that was constructed by Appellee varied substantially in appearance and value from what was represented to the Appellants by Appellee. The Appellants objected to the manner in which the house was being constructed while construction was on going. Appellee took the position at that time that the house was not to be constructed with a brick front. As a result of Appellee's misrepresentations and fraudulent conduct, the Appellants allege that they have and will continue to suffer substantial monetary injury and have suffered a great deal of aggravation and inconvenience because it is not possible for them to find a comparable house for the same price in the current market. (Bill of Complaint, Paragraphs 19 and 20) (Amended Bill of Complaint, Paragraphs 11, 13, 14 and 15). Because of Appellee's fraudulent misrepresentations Appellants have been placed in a position of economic detriment.

Appellants submit that their action based upon the fraudulent misrepresentations of Appellee is not affected by Paragraph 15(b) of the sales agreement which sets forth a provision for liquidated damages. In Horner v. Ahern, 207 Va.

860, 867, 153 S.E.2d 216, 221 (1967), the Supreme Court of Appeals held that while a contractual clause may fix a remedy applicable to a set of circumstances, it would not fix a remedy for the fraudulent conduct of the defendants. The court noted that if the Plaintiff was precluded from bringing an action for damages, it would in effect permit the Defendants to set up their own fraud as a defense, and, the Court held, such a position should not be permitted. Horner, 207 Va. at 867, 153 S.E.2d at 221. The court also held that the Plaintiff's action for fraud and deceit was not based upon the contract, but was in tort and was independent of the contract. Thus, the Plaintiff was not limited to the remedy specified in the contract and could maintain an action for the fraudulent conduct. Horner, 207 Va. at 867, 153 S.E.2d at 221.

Additionally, the Supreme Court of Virginia has held that while contracting parties may waive the contractual rights and disclaim or limit certain liabilities, a false representation of a material fact, constituting an inducement to contract, on which a purchaser has a right to rely, is always grounds for a revision of the contract or an action for damages. George Robberecht Seafood, Inc. v. Maitland Brothers Company, 220 Va. 109, 111-12, 255 S.E.2d 682, 683 (1979). It is elementary that where a contract or transaction was induced by false representations, the representations and the contract are distinct and accordingly, fraud in the inducement of or preliminary to negotiations for a written contract is not

ordinarily merged in the contract so as to preclude an action for the fraud. 37 Am. Jur. 2d Fraud and Deceit §387 (1968). In this Appeal Appellants cause of action, is based upon the fraudulent misrepresentations of a material fact causing the inducement of Appellants to contract for the purchase of the house. Therefore, this cause of action, as set forth in the Appellants' Bill of Complaint and Amended Bill of Complaint, is independent of the contract and the liquidated damages clause may not be asserted against Appellants.

Breach of contract damages specified by the contract are not adequate to compensate Appellants for their loss suffered as a result of Appellee's fraudulent conduct. Since Appellants have been denied the opportunity to purchase the home covered by the sales agreement, they have suffered damages from the difference in the cost for a new replacement house comparable to what they were purchasing from Appellee. The estimated difference in cost based upon a current sales price is approximately \$20,000. Appellants lost the loan application fee in the amount of \$1,300 paid to obtain a mortgage for the purchase of the house from Appellee. Appellants have also incurred approximately \$3,500 in legal fees in attempting to resolve this matter with Appellee. If Appellants only remedy is the return of their earnest money deposit in the amount of \$2,500, clearly such compensation would not be adequate and does not reflect the scope or amount of the actual damages that Appellants have sustained.

Appellee has asserted that this action is barred from further prosecution by Paragraph 15(b) of the contract between the parties which constitutes the sole remedy under the contract. As discussed earlier, this provision does not affect the Appellants' ability to recover damages for the fraudulent inducement to contract. It is the position of Appellants that this provision is not applicable where the breach of the agreement by the seller is deliberate and willful. Parties to a contract may provide a remedy in the event of breach so long as that remedy is not contrary to law or public policy. See In re James R. Corbitt Co., 48 B.R. 937, 941 (Bkrcty 1985).

Also, in Horner v. Holt, supra, the court held that a builder-seller who willfully refused to build a residence pursuant to a contract and convey the property to a purchaser was liable for damages to the purchaser for the loss of the bargain. The court found that the builder-seller's non-compliance with the contract was deliberate and intentional in order to avoid the increase in the cost of materials and labor and allowed the purchaser to recover compensatory damages. Holt, 187 Va. at 729; see also Williams v. Snider, 190 Va. 226, 228, 56 S.E.2d 63, 65 (1949). Thus, if the breach is willful and deliberate, the non-breaching party is entitled to recover its actual damages.

Paragraph 15(b) of the sales agreement purports to establish the sole remedy for the non-breaching party, i.e.,

return of the earnest money deposit. Where the breach is willful this remedy would be contrary to the law in Virginia. Appellants in this action have asserted that Appellee deliberately and willfully breached the sales agreement by not constructing their house according to the representations made at the time the contract documents were signed and by its refusal to convey the property to Appellants pursuant to the sales agreement. As such, the provision found in Paragraph 15(b) should not operate to limit the remedies available to Appellants where Appellee's breach was willful and deliberate. Appellee should not benefit from its own wrongful conduct and this action is not barred by Paragraph 15(b). Appellants should receive full damages sustained as a direct result of Appellee's wrongful action.

Judge Chamblin's sustaining the Plea in Bar against the original Bill of Complaint and Amended Bill of Complaint was improper. A plea in bar is a proper defensive pleading only where there is an issue raised in defense which can decide the entire case.

In his treatise on Virginia procedure, Professor Boyd notes that a plea in bar, or special plea, "may be useful to present a single issue which may result in ending the proceeding; for example, statute of limitations, res judicata, collateral estoppel by judgment, accord and satisfaction, or statute of frauds." Boyd, Graves & Middleditch, Virginia Civil

Procedure, 336, §8.4. Recognizing that such issues can also be raised by answer, the treatise goes on to say, "In equity as at law, however, the defendant may find it advisable to file a special plea if there is one issue upon which the determination of the case could lie." Id. (emphasis added). In a similar vein, Michie's notes that pleas in par are intended to bar the rights of plaintiff to recover at all, as distinguished from other pleas which go to jurisdiction and similar matters. 14B M.J., Pleading, §45.

The decisions of Judge Chamblin sustaining the pleas in bar and demurrer and dismissing the cause filed on behalf of the Appellants was error in several distinct respects. First, in ruling in effect that the liquidated damages clause was valid on its fact, the Court below failed to inquire, by taking evidence or otherwise, as to whether such clause satisfied the benchmark criteria to be considered under Virginia law in ruling upon the validity of such a clause. ^{1/} Under Taylor v. Sanders,

^{1/} The apparent rationale of the letter opinion of the Circuit Judge is that the liquidated damages provision would be enforced because it was part of the parties' agreement, and purchasers had contracted away any other rights and remedies. Yet this is so in every case where an agreement contains a liquidated damages provision and a claim of unenforceability is made. There would be literally no case law on the enforceability of such provisions if the trial judge's inquiry were limited to whether such a provision is in an agreement. The voluminous body of case law on this issue demonstrates, of course, that courts typically inquire carefully into enforceability, which always involves inquiry into factual matters beyond the self-evident proposition that an agreement contains a liquidated damages clause.

233 Va. 73, 353 S.E.2d 745, 746-47 (1987) and the prior decisions of this Court, Judge Chamblin should have determined, at minimum, whether actual damages at the time the Appellants and Appellee entered into the sales contract were uncertain and difficult to ascertain, and whether the amount of damages provided for was not out of proportion to the parties' probable losses.

Second, unlike a plea in bar based upon an issue such as (for example) the statute of limitations, defendants' plea had no focus apart from their claim that the Appellants' contract remedies were limited. The Bill of Complaint and Amended Bill of Complaint set forth, in great detail, the acts of Appellee which add up to an independent, willful tort. These allegations include false and fraudulent misrepresentations by Appellee which induced Appellants to enter into the sales contract, and the intentional breach of the sales contract so that Appellee could sell the property to a third party. This Court has recognized that such a claim may be joined in a case in which contract claims are also made, so long as an independent, willful tort is alleged beyond the mere breach of a duty imposed by contract. Kamlar Corp. v. Haley, 224 Va. 699, 707, 299 S.E.2d 514, 518 (1983).

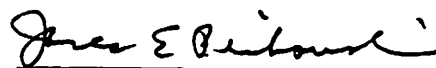
Finally, by sustaining the plea in bar without taking any evidence, the Court below reached a result which is not just "harsh", as the Judge Chamblin observed, but which in light of

the allegations of the Bill of Complaint and Amended Bill of Complaint and settled law should not have been countenanced. A plea in bar is available as a defensive pleading where it is clear that all proceedings ought to be ended without further consideration. Under the allegations of the Bill of Complaint and Amended Bill of Complaint in this Appeal, all remedies in contract or in tort providing compensation for Appellants should not have been nullified by a plea in bar.

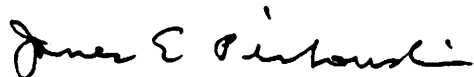
VI. CONCLUSION

For the foregoing reasons, appellants request that an appeal be granted so that the decrees of dismissal entered by the Circuit Court of Loudoun County may be reversed, and the case remanded to the Circuit Court for further proceedings.

Respectfully submitted,



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Washington, D.C. 20036
(202) 296-5195



James E. Pinkowski
Suite 200
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Fairfax, Virginia 22030
(703) 385-0060

CERTIFICATE

(1) The parties to this Appeal and their counsel are as follows:

(a) Appellants: George and Cynthia White

Counsel for Appellants:

James E. Pinkowski, Esquire
King & King, Chartered
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(202) 296-5195

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Fairfax, Virginia 22030
(202) 385-0060

(b) Appellee: The Connemara Corporation

Counsel for Appellee:

John E. Harrison
Sandra L. Hughes
Light & Harrison, P.C.
6849 Old Dominion Drive
Suite 410
P.O. Box 6625
McLean, Virginia 22106
(703) 356-9751

(2) A copy of the foregoing Petition for Appeal was mailed to Counsel for Appellee, this 12th day of April 1988.

(3) Counsel for Appellant wishes to state orally, in person, to a panel of the Court the reasons why this Petition for Appeal should be granted.


James E. Pinkowski

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 988
WARRENTON, VIRGINIA 22188

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

25 June 1987

James E. Pinkowski, Esq.
4020 University Drive
Suite 200
Fairfax, Virginia 22030

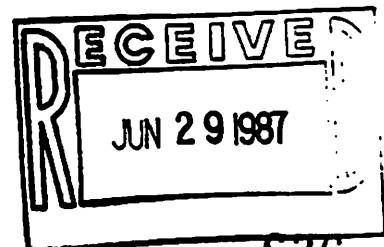
Kelly R. Dennis, Esq.
6849 Old Dominion Drive
Suite 410
McLean, Virginia 22106

Re: White v. The Connemara Corporation
In Chancery No. 10629

Gentlemen:

The plaintiffs have filed a Bill of Complaint against the defendant for specific performance of a real estate sales agreement dated March 14, 1986, or, in the alternative, for damages for fraud related to the agreement and damages for breach of the agreement. The defendant has filed a Plea in Bar alleging that Paragraph 15 (b) of the agreement constitutes the plaintiff's sole remedy (terminate the contract and receive a refund of all funds paid by them to the defendant seller as liquidated damages) and that the allegations of fraud are insufficient as a matter of law to allow the plaintiffs "to go beyond the written terms of the agreement."

EXHIBIT A



After consideration of the argument of counsel on June 5, 1987, the authorities cited by counsel and the transcript of a hearing before Judge Hancock of the Circuit Court of Fairfax County on May 22, 1987, in two cases involving similar contract provisions, I am of the opinion that the Plea in Bar must be sustained.

The plaintiffs argue that Paragraph 15 (b) of the agreement is unconscionable because the only remedy it affords them in the event of a breach of the agreement by the defendant is the return of the plaintiff's own money. While I agree not only that the remedy involves the return of the plaintiff's own money, but also that the default provisions are very harsh, I feel that three other considerations are stronger and more compelling in this case.

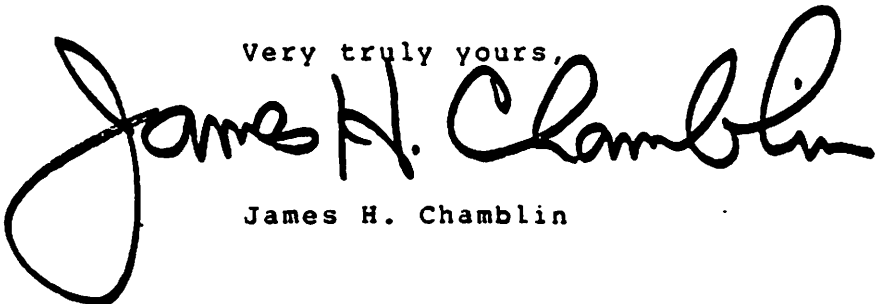
First, just as Courts do not measure the adequacy of consideration, I do not feel they should judge the adequacy of the remedy. I don't think anyone would deny that a person can bargain away his rights. There would be some measure of consideration to be given if a purchaser had contracted away all his remedies whatsoever, but that is not the situation in the instant case.

Second, the plaintiffs do have a remedy, as limited and harsh as it may be. They can terminate the contract and be relieved of any liability under it. Rescission is certainly a recognizable remedy for breach of contract.

Third, the plaintiffs still may have a tort cause of action against the defendant. In this regard, I feel that Count II of the Bill of Complaint does not set forth a separate cause of action for fraud against the defendant, but merely tries to make a breach of contract claim sound like a tort claim.

Let Mr. Dennis prepare the appropriate decree sustaining the Plea in Bar and dismissing this cause.

Very truly yours,

A large, stylized handwritten signature in black ink, reading "James H. Chamblin". The signature is written over the typed name and extends upwards and to the left.

James H. Chamblin

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
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LEESBURG, VIRGINIA 22075

12 January 1988

John E. Harrison, Esquire
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James E. Pinkowski, Esquire
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Suite 200
Fairfax, Va. 22030

In Re: White vs. Connemara Corporation
In Chancery No. 10629

Gentlemen:

The purpose of this letter is to confirm the reasons for my sustaining of the defendant's Plea in Bar and Demurrer as communicated to you by my assistant on November 25, 1987.

The Complainants had previously been granted leave to file an Amended Bill of Complaint which they did, but all of the elements of a fraud action are not properly pled in the Amended Bill. See Winn v. Aleda Const., 227 Va. 304 (1984). There are no allegations that the representations were false when made and were made intentionally and knowingly with the intent to mislead.

Because the Complainant had previously been granted leave to amend to allege a fraud action, no further leave to amend is granted. The suit is dismissed, with prejudice.

Very truly yours,

James H. Chamblin

JHC:dm

638

EXHIBIT B

V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - X

W. LOWRY MANN, and BARBARA MANN, :

Plaintiff's, :

versus, : IN CHANCERY NO. 101193

ADDICOTT HILLS CORPORATION, :

Defendant. :

- - - - - X

KENNETH LEON, and BARBARA LEON, :

Plaintiff's, :

versus, : IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION, :

Defendant. :

- - - - - X

Fairfax, Virginia

Friday, May 22, 1987

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



ANITA B. GLOVER & ASSOCIATES, LTD.

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(703) 278-8636

278-8606

Prince William Metro 690-2070

EXHIBIT C

1 APPEARANCES:

2 For the Plaintiff's:

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5 Post Office Box 2405
6 Fairfax, Virginia 22031
7 Representing Kenneth and Barbara Leon.

8 and,

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

15 For the Defendant:

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

21 C O N T E N T S

22 Argument by Counsel on Motion

Page 3

23 E X H I B I T S

None.



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P R O C E E D I N G S

(The Court Reporter was sworn.)

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

MR. SILVER: Precisely, Your Honor.

THE COURT: All right. Fire away.

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

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

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

THE COURT: All right.

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



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1 this case that they took the terms of that clause, and that
2 they agreed to them, and not withstanding the harsh result
3 it may beget, and not withstanding whether whether they have
4 an independent tort of fraud, is the animal they seem to be
5 shooting for in their bill of complaint, but their remedies
6 that they seek are only declaratory, specific performance,
7 and then of course, the damages with punitives.

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

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

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



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

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

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

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



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

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

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

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

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

23 (Brief Pause.)



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

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

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

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



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

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

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

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



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

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

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

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

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

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



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

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

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



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

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

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

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



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

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

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

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



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1 would like to see them.

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

6 MR. DENNIS: That is correct.

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

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

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

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



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

4 Implicit in every contract, and especially
5 in the restatement of contracts now, is the duty of good
6 faith, and there are -- that would be an independent tort.

7 In other words, if the only reason they did that was because
8 they did not like the purchaser, or they just wanted to bilk
9 the purchaser -- they wanted to get the additional amount of
10 money that the house had increased just while it was being
11 built -- then you are right.

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

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



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

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

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

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



1 that I have just cited.

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

7 THE COURT: All right.

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

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

14 (Brief Pause.)

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

17 (Brief Pause.)

18 THE COURT: Go ahead, Mr. Silver.

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



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

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

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

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



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

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

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

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



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

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

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

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



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1 true, Your Honor.

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

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

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

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



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

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

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



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

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

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

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

20 THE COURT: Mr. Aunon.

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



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1 THE COURT: All right. Thank you.

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

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

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

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



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

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

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

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



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

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

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

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



1 fours with regard to that one thing.

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

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

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

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

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



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

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

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

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

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

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

17 THE COURT: Yes, sir.

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



CERTIFICATE OF COURT REPORTER

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



PAUL S. INTRAVIA
Court Reporter



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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

GEORGE AND CYNTHIA WHITE,

Petitioners (Appellants)

vs.

THE CONNEMARA CORPORATION,

Respondent (Appellee)

BRIEF IN OPPOSITION
TO PETITION FOR APPEAL

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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

GEORGE AND CYNTHIA WHITE,
Petitioners (Appellants)

vs.

THE CONNEMARA CORPORATION,
Respondent (Appellee)

BRIEF OF APPELLEE IN OPPOSITION TO PETITION FOR APPEAL

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE
JUSTICES OF THE SUPREME COURT OF VIRGINIA

COUNTER-STATEMENT OF THE CASE

Appellants "Nature of the Case and Proceedings Below" (Page 1-4 Appellants' Petition) is not correct insofar as a factual account of the proceedings in the trial court are concerned.

This case does not involve an "intentional and willful breach" on the part of a seller of a New Home Sales Contract as stated by counsel for the Appellants. There was no finding of fact as to which party, if either, breached the Contract.

This case involves a New Home Sales Contract dated March 14, 1986, by and between George White and Cynthia Graham [now known as Cynthia White] ("Purchaser") and The Connemara Corporation ("Seller") and Builders Marketing, Inc. ("Agent"), for the property located at 114 Connemara Drive, Sterling, Virginia ("Property"), which was ratified on April 11, 1986 ("Contract").

The pertinent provisions of the Contract which relate to the dispute are as follows:

15. DEFAULT BY EITHER PARTY.

(a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by the parties and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable for precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this Contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agrees to accept and take this cash payment as Purchaser's total damages and relief hereunder in such event.

18. MISCELLANEOUS. . . .

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

. . . .

(e) This Agreement contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warranties or representations, oral or written, not herein contained.
(Emphasis added).

Sometime prior to the scheduled settlement on the Contract, the Whites began complaining that an area, approximately 6' by 6', on the front brick exterior immediately above the porch and entrance on

the second story was covered with aluminum siding and not covered with brick. The Connemara Corporation told the Whites that aluminum siding was planned for this small portion of the exterior because the structure would not support a brick face above the porch and entrance on the second floor.

The Whites now allege that documents not a part of the Contract also were a part of the Contract. However, in the Court below this material was alleged by the Whites to be a part of the Contract. The Connemara Corporation objects to this being raised for the first time on Appeal and in any event the Contract controls. Paragraph 18(e) of the Contract supports the position that the Contract contains the final and entire agreement and the parties are not bound by anything not contained within its four corners.

Settlement was scheduled for December 12, 1986 at the offices of Stahl and Buck as settlement attorneys. The Whites did not tender settlement on the Contract at that time or at any time thereafter.

On or about December 23, 1986, the Whites filed a lis pendens on the Property in violation of Paragraph 18(c) of the Contract. Also, on or about December 23, 1986, the Whites filed their Bill of Complaint against The Connemara Corporation for specific performance, for fraud, and for breach of contract.

On or about January 19, 1987, the Defendant filed its Plea-In-Bar, asserting the following:

1. Even if the Connemara Corporation is in default of the Contract, Paragraph 15(b) of the Contract constitutes the Whites' sole and exclusive remedy under the Contract, and

2. The Whites' allegations of fraud as set forth are insufficient as a matter of law to allow the Whites to go beyond the written terms of the Agreement.

On June 5, 1987, The Connemara Corporation moved the Court to sustain the Plea-In-Bar which it had filed and moved the Court to remove the lis pendens filed against the subject Property from the land records of Loudoun County. Judge Chamblin took this matter under advisement and on June 25, 1987, issued his Letter Opinion, which is attached hereto and made a part hereof as Exhibit 1, sustaining the Plea-In-Bar on all three counts and dismissing this cause. As stated in the Letter Opinion, Judge Chamblin considered the argument of each Counsel on June 5, 1987, the authorities cited by each Counsel and the transcript of the hearings before Judge Hancock of the Circuit Court of Fairfax County on May 22, 1987, in the two cases involving similar contract provisions, prior to rendering his opinion to sustain the Plea-In-Bar with respect to all three counts and dismissing this cause.

On or about September 3, 1987, the Whites filed a Motion to Reconsider the decision concerning only the fraud count. As a result of the Motion to Reconsider, the Court used its discretion under Rule 1:8 of the Rules of the Supreme Court of Virginia to allow the Whites leave to amend its Bill of Complaint to plead facts in support of their fraud cause of action in lieu of filing a new Bill of Complaint as a separate lawsuit.

On September 8, 1987 a Decree was entered dismissing with prejudice Count I (specific performance) and Count III (breach of contract) of the Bill of Complaint, removing the lis pendens and

returning the deposit on the Contract to the Whites and granting the Complainant's Motion to Reconsider for leave to amend Count II (fraud) of the Bill of Complaint. A copy of the September 8, 1987 Decree is attached hereto and made a part hereof as Exhibit 2.

This Decree was signed by the Whites' counsel as "SEEN AND AGREED/OBJECTED". Under Rule 5:25 of the Rules of the Supreme Court it is questionable whether the Whites' objection was stated with reasonable certainty at the time of the ruling on the contract claims, but it is clear that the Whites did not preserve an objection to the Court's finding that Count II (fraud) did not set forth an independent cause of action because the Court granted the Whites' Motion for leave to amend. Furthermore, pursuant to Rule 1:1 of the Rules of the Supreme Court this Decree was final as to the specific performance claim and the breach of contract claim 21 days after entry (September 29, 1987). No appeal to this Decree was filed within 30 days of entry (October 10, 1987) in accordance with Rule 5:9(a) of the Rules of the Supreme Court.

On or about September 18, 1987, the Whites filed their Amended Bill of Complaint. This Amended Bill of Complaint was almost word for word the same allegations set forth in Count II of the Bill of Complaint. No substantial changes were made between Count II of the Bill of Complaint and the Amended Bill of Complaint. The Court had previously stated its Letter Opinion that Count II (fraud) as set forth in the original Bill of Complaint did not set forth a separate cause of action for fraud against the Defendant but merely tried to

make a breach of contract claim sound like a tort claim. See Exhibit 1.

On or about October 9, 1987, the Defendant filed a Demurrer and Plea in Bar to the Amended Bill of Complaint stating among other things that there was no substantial difference between Count II (fraud) of the original Bill of Complaint and the Amended Bill of Complaint and therefore, the Amended Bill of Complaint should be dismissed because it did not set forth a separate cause of action for fraud and was insufficient as a matter of law.

On November 25, 1987, Judge Chamblin heard argument on the Whites' Motion to Rule on The Connemara Corporation's Plea in Bar and Demurrer. By Order dated January 12, 1988, Judge Chamblin sustained The Connemara Corporation's Plea in Bar and Demurrer and dismissed the cause with prejudice. This second Letter Opinion is attached hereto and made a part hereof as Exhibit 3. Judge Chamblin states in his Letter Opinion dated January 12, 1988:

The Complainants had previously been granted leave to file an Amended Bill of Complaint which they did, but all of the elements of a fraud action are not properly pled in the Amended Bill of Complaint. See Winn v. Aleda Const., 227 Va. 304 (1984). There are no allegations that the representations were false when made and were made intentionally and knowingly with the intent to mislead.

Because the Complainants had previously been granted leave to amend to allege a fraud action, no further leave to amend is granted. The suit is dismissed, with prejudice.

The Appellant noticed an Appeal from the Decrees of this Court entered on September 8, 1987 and January 12, 1987. However, it

should again be noted that the September 8, 1987 Order was signed by the Whites' Counsel as "Seen and Agreed/Objected" but was not appealed within 30 days of entry. Therefore, there is a question as to what was agreed to, what was properly objected to, and whether under Rule 5:25 the Whites can now ask this Court to assign an error to this Decree. And finally whether the appeal of the September 8, 1987 Decree is untimely filed.

ARGUMENT

I. THIS COURT MUST AFFIRM THE TRIAL COURT'S RULING BECAUSE IT PROPERLY ENFORCES THE PLAIN MEANING RULE ON THE PROVISIONS THE CONTRACT.

Courts of equity must follow the law. Nelson v. Jennings, et al., 2 Pat. & H. 357, 368 (1956). See Coles Adm's v. Ballard, et al., 78 Va. 139, 149 (1883). See also Jackson v. Holmes, 307 So. 2d 470 (Fla. Dist. Ct. App. 1975) While Courts of Equity are charged with the conscience of the community, they are not allowed to abuse their authority by relieving individuals from their solemn bargains, however, improvidently these bargains may have been made. Newport News v. Doyle and Russell, 211 Va. 603, 607, 179 S.E.2d 493 (1971); Smyth Bros., et al. v. Beresford, 128 Va. 137, 170, 105 S.E. 673 (1920); Portsmouth v. Portsmouth, 122 Va. 258, 262, 195 S.E. 278 (1918). See also, Jackson at 471 ("The nonperform- ing party should not be deprived of his rights unless it appears from the Contract that this was clearly contemplated by the parties.") [Emphasis supplied.] The Court reviewed the Contract of the parties and determined its plain meaning. After having accomplished this, the

trial court enforced the meaning of the Contract, by returning the Whites deposit on the Contract as set forth in Paragraph 15(b) of the Contract.

A. The Court Is Not Free To "Interpret" An Unambiguous Document.

Rules of construction only apply when a Contract is ambiguous. The contract in issue here is not ambiguous. The Supreme Court of Virginia stated in Wilson v. Holyfield, 227 Va. 184, 187, 313 S.E. 2d 396 (1984): "The principles surrounding court review of contracts are well settled. Contracts are not rendered ambiguous merely because the parties disagree as to the meaning of the language employed by them in expressing their agreement." See, Ross v. Craw, 231 Va. 206, 212-213, 343 S.E.2d 312 (1986). In Berry v. Klinger, 225 Va. 201, 208, 300 S.E.2d 792 (1983), the Virginia Supreme Court defined "ambiguity" as doubtfulness, or doubleness of meaning, cited in, Renner Plumbing v. Renner, 225 Va. 508, 515, 317 S.E.2d 484 (1983). The language of this Contract is unequivocal.

In the absence of ambiguous language the Court must enforce the agreement of the parties as it finds it. The Court is not free to make a new agreement, nor is it free to interpret an agreement that is free from ambiguity. Id.

The Contract at issue is clear. Assume for argument sake that The Connemara Corporation breached its Contract with the Whites, under Paragraph 15(b) the Whites' sole and exclusive remedy is to terminate this Contract and receive a full refund of the money paid.

The trial court assumed this "worst case scenario" and ordered the Whites' deposit returned and terminated the Contract".

B. The Contract Is Clear And Was Enforced As Written.

This Contract is not ambiguous. The intent of the parties is clear. The Whites' problem with the Contract is not that the document is ambiguous, but rather that they do not like what it says, given the position which they have placed themselves in. In the absence of ambiguity the Court is required to enforce the Contract as written, and it did so. This Court should affirm the trial court's decision on this matter.

C. The Trial Court Correctly Noted It Cannot Simply Disregard The Contract Or Rewrite The Contract.

The parties being sui juris are empowered to make their own agreements without help or hindrance from this Court. Lerner v. The Gudelsky Co., 230 Va. 124, 132, 334 S.E.2d 629 (1985). While the Whites have requested this Court to twist or turn or disregard terms and provisions of the Contract in the light of the Court's own conscience or business judgment or in light of later discovered facts and arguments, such an incredible request does not carry with it the power to comply. The trial court must and did enforce the intent of the parties, as the intent of the parties is expressed within their own words in their Contract. Supra. Newport News at 607; Smyth Bros. at 170; Portsmouth at 262.

D. The Trial Court Accurately Held The Parties' Contract To Be The Law Of This Case.

The Contract is the law of the case. Winn v. Aleda Const. Co., 227 Va. 304, 307, 315 S.E.2d 193 (1984); Mercer v. S. Atlantic

Insurance Co., 111 Va. 699, 704, 69 S.E. 961 (1911). The Virginia Supreme Court, in Ross at 212, held:

A well settled principle of contract law dictates that 'where an agreement is complete on its face, is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself.' Globe Company v. Bank of Boston, 205 Va. 841, 848 (1965).

This Court has been adamant and clear on this inviolability of the unambiguous contract and has repeatedly and recently reversed lower courts on this issue. See Westbury Coal Mining Partnership v. J. S. & K. Coal Corp., 233 Va. 226, 229-230, 355 S.E.2d 571 (1987), ("Resting our decision, as we did in Ames v. American National Bank, 163 Va. 1, 38, 176 S.E. 204 (1934), upon 'what the instrument itself says it says,' . . ."); Lerner at 132. ("Where an agreement is complete on its face and is plain and unambiguous in its terms, the court is not at liberty to search for its meaning beyond the instrument itself."); Wilson at 187 (. . . it is the duty of the court to construe a contract as written . . ."); Meade v. Wallen, 226 Va. 465, 467, 311 S.E.2d 103 (1984); Eagler v. Little, 217 Va. 869, 873, 234 S.E.2d 242 (1977). In Meade at 467 the Court stated:

It is the function of the court to construe the contract made by the parties, not to make a contract for them. The question for the court is what did the parties agree to as evidenced by their contract. The guiding light in construction of [the] contract is the intention of the parties as expressed by them in the words they have used, and courts are bound to say that the parties intended what the written instrument plainly declares. (Emphasis added).

The Court also said in Wilson at 187: "Courts cannot read into contracts language which will add to or take away from the words already contained therein." The Court may not go outside a plain

and unambiguous instrument to search for the instrument's meaning because the instrument is the repository of the final agreement of the parties. Berry at 208.

This Court has also upheld lower courts invoking the absolute authority of an unequivocal contract. Berry at 298; Winn at 307; Quesenberry v. Nichols and Erie, 208 Va. 667, 671, 159 S.E.2d 636 (1968); Globe Company v. Bank of Boston, 205 Va. 841, 849, 140 S.E.2d 629 (1965). This case is clearly covered by this Rule. Therefore, this Court must affirm the trial Court's decision.

II. THE CONTRACT IS NOT SEVERABLE. THE FAIRFAX COUNTY COURT COMMITTED REVERSIBLE ERROR IN SEVERING PARAGRAPH 15(b).

A. The Words Of The Contract Say The Contract Is Not Severable.

The parties in their own words have expressed their view that the Contract is "entire." See Paragraph 18(e) of the Contract. The word "entire" in this sense is a term of art as specifically defined as "time is of the essence". Therefore, it is the expressed intent of the parties that this Contract be viewed as one entire Contract and that the covenants are not independent but are each dependent upon the other. The concept of a severable contract is more applicable to multiple purchase contracts, (e.g. 10 widgets for fifty dollars). See Buchanan v. Buchanan, 174 Va. 255, 278, 6 S.E.2d 612 (1940). (The divisibility of the subject matter, although not determinative is indicative.) Simpson, Contracts at 318. Calmari and Perillo, Contracts at 429-431. In the instant case, since the promised performance by The Connemara Corporation is a single one,

(a single sale), this is also indicative of an entire contract. An entire contract is not severable.

B. Under Common Law The Absence Of A Survival Clause Means That If Any Part Of The Contract Is Voided, The Entire Agreement Fails.

There is no survival clause in this Contract. Therefore, in the absence of such survival clause, the removal of any part of this Contract by the Court would render the Contract void and unenforceable. See Engleby v. Harvey, 93 Va. 440, 25 S.E. 225 (1896). Noyes' Ex'x v. Humphreys, 52 Va. 335, 11 Gratt. 636 (1854). Judge Hancock's prior finding that Paragraph 15(b) of the Contract, in two similar Fairfax County cases, is unenforceable rendered those contracts void and was reversible error. The trial court in this case properly refused to commit this reversible error.

In the two Fairfax cases, Judge Hancock said Paragraph 15(b) of the contract is unenforceable and read that provision out of the contracts under consideration in those cases.

Virginia case law clearly states the consequences of a court striking down a single provision of an entire contract: the entire contract fails. Engleby, supra. McCrowell v. Burson, 79 Va. 290, 303 (1884); Noyes, supra. The entire contract will either stand or fall together. Either all provisions of the "entire" Contract apply or the "entire" Contract is void. "The court cannot write a new contract for the parties even when, in light of the facts known to them the Court might think they should have adopted different language. The Court should have given effect to the plain words of the Agreement." Lerner at 132, Berry at 208, Usinger v. Campbell, 572 P.2d 1018, 1021 (1977).

Similar language is found throughout Virginia cases. In McCrowell at 303, this Court stated:

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

The idea that entire contracts are void if a portion fails is also supported by Epperson v. Epperson, 108 Va. 471, 476, 62 S.E. 344 (1908).

C. Judge Hancock Erred In Ruling Paragraph 15(b) Of The Contract Was Unconscionable.

The Fairfax County Court erred in ruling that Paragraph 15(b) of the Contract is unconscionable. Paragraph 15(b) does not even approach the very high standard for unconscionability set by this Court. An unconscionable bargain is "one that no man in his senses and not under a delusion would make, on the one hand, and no fair man would accept, on the other." Smyth at 170. See Eagler at 872. In Banner v. Rosser, 96 Va. 238, 251, 31 S.E. 67 (1898) the court stated:

"The further objection was made that the agreement was unconscionable. . . . Can it be said that he acted unwisely, or that his conduct was not that of a prudent business man? But whether wise or unwise the agreement, in view of the testimony that he had the capacity to make it, and that it was his own free voluntary act, cannot be impeached, however unreasonable or imprudent it may now seem to others."

Given the circumstances of the transaction, and the experience of the parties, the Contract is not unconscionable.

Once again the intention of the parties is to be found from their own words. Buchanan at 278; Eschner v. Eschner, 146 Va. 417, 422, 131 S.E. 800 (1926); Shelton v. Stewart, 193 Va. 162, 67 S.E.2d 841 (1951); Allemong v. Augusta National Bank, 103 Va. 243, 249, 46 S.E. 897 (1904); Bream v. Marsh, 31 Va. 852, 853, 4 Leigh 21, 25, (1832).

"While the jurisdiction undoubtedly exists in the courts to avoid a contract on the ground that it makes an unconscionable bargain, nevertheless an inequitable and unconscionable bargain has been defined to be 'one that no man in his senses and not under a delusion would make, on the one hand, and as no fair man would accept, on the other.' The inequality must be so gross as to shock the conscience."

Smyth at 170. This cannot be said of the Contract in the instant case. This is the standard which the trial court has found has not been violated by Paragraph 15(b), therefore it was able to enforce the letter of the Contract.

"But whether wise or unwise the agreement, in view of the testimony that he had the capacity to make it and that it was his own free voluntary act, cannot be impeached, however unreasonable or imprudent it may seem to others."

Banner at 251. There is no rule which allows a Court of equity any more power than this. Judge Chamblin clearly recognized this law in making his decision in the instant case.

III. THE CLAUSE IN QUESTION DOES NOT PURPORT TO BE A LIQUIDATED DAMAGE CLAUSE ONLY. IT IS, IN ADDITION THERETO, AN ELECTION OF REMEDIES.

The Whites incorrectly argues that the Judge below held that this was a permissible liquidated damage. It is, without question, not solely a liquidated damage clause. The Connemara Corporation

does not argue that "damages" are returned to the perspective purchaser. Never could it be more true than in the instant case that, as stated by this Court in the recent case of Taylor v. Sanders, 233 Va. 73, 353 S.E.2d 745 (1987), the construction to be given stipulations by parties to a contract "depends upon the intent of the parties as evidenced by the entire contract viewed in the light of the circumstances under which the contract was made." Id. at 75 S.E.2d. The contract in question between the parties contained not just the original contract but certain contract addendums and incorporated by reference other documents.

Although the Appellants seek tirelessly to characterize Paragraph 15 as a liquidated damages clause that has run afoul of the law to the extent that it has become a penalty, the examination of this area by the Virginia Supreme Court has long recognized the right of a vendor to specify an election and be protected in that endeavor. In the case of Brown v. Friedberg, 127 Va. 1, 102 S.E. 468 (1920), the court was confronted with a situation in which a sum of \$500.00 was agreed upon as liquidated damages for a breach by either party. The vendee brought a suit for specific performance upon the breach of the vendor and the court granted specific performance. The court affirmed the trial court, and the observations they made in their reasoning are particularly important to the case at bar. As stated by the court:

"The approved rule is that a court of equity may decree specific performance of a contract, for the sale and conveyance of real estate which also requires the payment of a sum of money, whether by way of penalty or damages, to secure the performance of such contract; but if the contract is in

the alternative and provides for the performance of either of two things - that is, where the vendor is given the right either to make the conveyance or to pay a stipulated sum of money in lieu thereof - then equity will not decree specific performance of the contract to convey." [Citations omitted] Id. at 3.

There was no alternative available for the vendor to pay money in the Brown case and, therefore, the Brown case is distinguishable from the case at bar where The Connemara Corporation had such a right. The court in Brown expressly recognized the right of a company such as The Connemara Corporation to protect itself from suits such as the one filed by the Whites by providing for an alternative remedy in the contract.

The Brown court goes further on this issue. In that decision the court was also concerned that the insertion of the \$500.00 liquidated damage provision in that case was a "mere incident of the transaction and . . . was not designed either to change the substance of the agreement or to give either of the parties the option of abandoning the contract and liquidating the damages therefore." Id. at 4, 102 S.E. at 472. The facts are exactly the opposite in the case at bar, where The Connemara Corporation has reserved for itself, and also given the same right to the prospective purchasers, the right to abandon the contract for whatever reason may exist. Whether or not this is done in good faith has nothing to do with the contract action. This is more appropriately the subject of an action ex contractu for a breach of the covenant of good faith or similar tort for damages.

The Brown court did not stop there, however, and went on to observe the following:

"There is no statement, either verbally or in writing, in connection with the transaction from which it may be fairly inferred that either party might at his option repudiate the sale, or that either had the alternative of renouncing the contract upon the payment of the \$500.00. Most, if not all, of the authorities cited to support the vendor's contention are based upon the fact that there was some language in the contract clearly indicating the right or option, either to repudiate the contract of sale or to pay the stipulated amount." Id.

Thus, we can see that the important consideration is whether or not the agreement of the parties was unequivocal and not a "mere incident" or non-essential aspect of the agreement. If the market for real estate in Northern Virginia were far more elastic, or, for example, static. Then, we would see the Whites filing a Plea-in-Bar to The Connemara Corporation's attempt to compel specific performance. What is worse, there is no comparable "leverage" that The Connemara Corporation would be able to employ in that situation for they would have nothing to "freeze" as has been the effect of the lis pendens and the related suit for specific performance filed by the Whites.

In their brief, the Whites cite Hornbook Principles Of Law, which The Connemara Corporation will agree are axiomatic in this area, that state, essentially, the time-honored principle that a court of equity may grant specific performance in a case involving real estate. It is also axiomatic that sui juris parties may waive their rights, and that is exactly what happened here.

In the Haythe v. May, 223 Va. 359, 288 S.E.2d 487 (1982) case, Judge Cacharis, then a Fairfax County Circuit Court Judge, heard a dispute involving a situation seemingly strikingly similar to the

one between The Connemara Corporation and the Whites. In June of 1977, the plaintiff in Haythe had contracted with May Properties for construction of the dwelling that was at issue. A closing was scheduled for April at which time the purchaser in that case refused to settle due to certain construction defects. The trial court in that case found specifically that such a refusal was justified. However, at a later date, when the purchaser attempted to settle on the contract with May Properties once again, it found that the property had been conveyed from May Properties to another purchaser.

Haythe thereupon sued May Properties and its principals for specific performance. Judge Cacheris, after hearing the evidence and being satisfied that May Properties had breached the contract by conveying the property to another purchaser, nonetheless, because of Haythe's "personal situation" refused specific performance and ordered that Haythe recover his deposit and incidental expenses. The Supreme Court reversed.

At first blush, this case would seem to be on all fours with The Connemara Corporation case and, indeed, adverse to The Connemara Corporation's position in this case. However, a review of the Fairfax County Circuit Court files made by counsel for The Connemara Corporation has disclosed that, in the contract between Haythe and May, there was no liquidated damages provision at all and, further, not even a mention of any election of remedies provision.

As was pointed out to Judge Chamblin in the oral argument, the contract in Haythe v. May was absolutely silent with regard to any liquidated damages or election of remedies. In other words, the

seller in the case of Haythe v. May did not have available to him the fully negotiated contractual provision which Judge Chamblin correctly decided acts as a bar to any actions that may be brought under the contract. Thus, the holding of Haythe v. May has absolutely no bearing on the case involving the Whites.

Once again, as well, the Virginia Supreme Court observed that with respect to specific performance, although it is a matter of course for courts of equity to make such a decree, "the granting of specific performance is addressed to the sound discretion of the trial court." Id. at 361. And, further, quoting from First National Bank v. Roanoke Oil Company, 169 Va. 99, 192 S.E. 764 (1937), the court noted that part of the inquiry must be whether or not there is anything "to indicate that its [the contract's] enforcement would be inequitable to a Defendant . . . " Id.

Thus, we can see, the inquiry is not confined to whether the Whites will suffer a harsh result from the bargain they made but whether, in light of all the surrounding circumstances, and the contract terms, it is equitable to force the transfer of the realty rather than to award damages. One must also bear in mind that, in their suit, the Whites have asked for damages and declaratory relief in addition to specific performance. This, more than anything else, undercuts their assertion that they have no adequate legal remedy.

Other than citing Hornbook Law with regard to the "uniqueness" of real property and its relatively presumptive equity jurisdiction, the Whites alleged nothing to guide this court with regard to the Whites' need for the actual property in order to make them whole.

Again, as stated above, they have no problem at all quantifying their damages in nature and amount and, this in and of itself should be enough to deny equity jurisdiction and consequently the privilege of specific performance therein.

The Whites cite numerous cases standing for the proposition that the seller may not willfully refuse to convey, and if he does, he will suffer damages measured by the difference between the contract price and the value of the property at the time of the breach. However, this ignores the fact that was raised in oral argument before Judge Chamblin and not objected to by the Whites at the time, that the Whites were alleged to be in breach and not the Seller.

In the case of Williams v. Snider, 190 Va. 226, 56 S.E.2d 63 (1949), it was "not disputed that the evidence supports a finding by the jury that the Defendant, without just cause, willfully refuse to convey . . ." Id. at 227, 190 S.E.2d 64. There is no indication in the Williams case that there existed a contractual provision akin to the contractual provision in the case at bar.

Additionally, and totally consistent with the Williams decision, the Whites were not barred from bringing any action they wish ex contractu. Indeed, if they had alleged and proven that the seller committed a tort against them, in other words, if it is true as they attempted to assert in their pleadings that the seller has defrauded them or has committed some other independent tort, they were free to sue and, as Williams suggests, the measure of damages would be readily available to them. However, having expressly

waived the remedy of specific performance, they may not, consistent with the contractual provision they agreed to, seek specific performance or, for that matter, "tie-up" the property by filing a lis pendens.

IV. THE PLEA-IN-BAR WAS A COMPLETELY PROPER PROCEDURAL VEHICLE FOR DISMISSING THE SPECIFIC PERFORMANCE CLAIM AND THE BREACH OF CONTRACT CLAIM. THE TERMS OF PARAGRAPH 15 LIMITED THE PARTIES REMEDIES UNDER THE CONTRACT.

Turning to the paragraph in question, we see that in the last sentence of Paragraph 15(b) the purchaser agreed that it will not seek any other remedies, damages, or rights under the contract. This is the gravamen of Judge Chamblin's decision as it related to the claim for specific permanence and for breach of contract. Thus, had the Whites properly alleged a tort either in Count II of the Bill of Complaint or in their Amended Bill of Complaint, the contractual provision would have no bearing on the fraud claim.

Finally, it should be noted, although not controlling, in a very recent case decided by the Supreme Court of New York, Appellate Division, it was decided that this type of clause [Paragraph 15] does, indeed, limit the purchaser's remedies to the return of the deposit.

In the case of Mancini-Ciolo, Inc. v. Scaramellino, 500 N.Y.S.2d 276 (N.Y. App. Div., 1986), it was held that the trial court was proper in granting summary judgment in favor of the Defendant on the strength of such a clause. The Court stated "the parties to a contract for the sale of real property may agree to restrict the liability consequent upon a breach, or may agree that

no damages will be payable at all once the status quo has been restored . . . implicit in such a limitation is the obligation to act in good faith. It contemplates the existence of a situation beyond the control of the parties." Id. at 278.

In the case at bar, the White's original Bill of Complaint, although making conclusory allegations of willfulness, malice, and bad faith, nowhere states facts sufficient to show this Court, or the trial court that the alleged representations were false when made and were made intentionally and knowingly with the intent to mislead.

V. THE TRIAL COURT'S DECISION ON THE PLEA-IN-BAR AND THE DEMURRER ON THE FRAUD CLAIM SHOULD BE AFFIRMED BECAUSE THE ELEMENTS OF FRAUD WERE NOT PLED.

A. The Allegations In The Amended Bill Of Complaint Sounded Like A Contract Claim.

The Amended Bill of Complaint, like Count II of the Bill of Complaint did not set forth an independent tort, but sounded like a tort clothed in a breach of contract claim. Therefore, the Plea-In-Bar was properly sustained if this cause of action is found to be a contract claim because of the exclusive remedy language in Paragraph 15(b).

B. Fraud Was Not Pled With Sufficient Particularity.

Actual fraud is a tort, an action independent of the contract. The essential elements of fraud are:

1. a false misrepresentation,
2. of a material fact,

3. made intentionally and knowingly,
4. with intent to mislead,
5. reliance by the party mislead, and
6. resulting damage to the party mislead.

Chander v. Satchell, 160 Va. 160, 171, 172, 168 S.E. 744 (1933); Moore v. Gregory, 146 Va. 504, 523, 131 S.E. 692 (1925); Winn at 308.

Where fraud is relied on, the bill must show specifically of what the fraud consists so that the defendant may have the opportunity of shaping his defense accordingly, and since it must be clearly proven as alleged, it must be distinctly stated. A mere general charge is not sufficient. Fraud must be particularly alleged, as well as all essentials which warrant the charge.

Dickenson v. Bankers' Loan, et al., 93 Va. 498, 501-502, 25 S.E. 548 (1896).

"In pleading a fraud, the pleader must by apt words allege in his pleading every act, fact and intent which necessarily enter into and constitute that particular fraud; and these essentials must be alleged with such precision and certainty as to exclude every construction except the fraudulent and wrongful purpose complained of; and if, from the face of the pleading, it is doubtful whether the allegations do, in fact, amount to that particular fraud or not, it is not well plead." Loomis v. Jackson, 6 W.Va. 613 (1873). The facts showing the fraud and the resulting damage must be alleged. Lloyd v. Smith, 150 Va. 132, 149, 142 S.E. 363 (1928). Fraud is a conclusion of law from facts, and it is a well-settled rule of

pleading, both at law and in equity, that the facts out of which the fraud arises must be alleged as well as proven to justify relief on that ground. Virginia Pass & P. Co. v. Fisher, 104 Va. 121, 132, 51 S.E. 198 (1905).

Judge Chamblin correctly noted in his second Letter Opinion that "there are no allegations that the representations were false when made and were made intentionally and knowingly with the intent to mislead. The Whites have failed to allege at least 3 of the 6 elements of fraud in their second attempt to make out a cause of action for fraud in this lawsuit. Therefore, the trial court's action to sustain the Demurrer as to the Amended Bill of Complaint is correct and is supported by the above reference to the case law.

The trial court should recall that the trial court did give the Whites a chance to replead their fraud count in an Amended Bill of Complaint after the trial court told the Whites the current pleading was insufficient to allege an independent tort action, however, the Whites chose to replead the same allegations in their Amended Bill of Complaint.

C. The Words Of The Contract Say The Contract Contains The Final And Entire Agreement.

Paragraph 18(e) says that the Agreement contains the final entire agreement and that the parties shall not be bound by any terms, conditions, statements, warranties or representation, oral or written, not herein contained. Therefore, even if the Whites relied on the preliminary promotional material and even if it is construed as showing a full brick face, the parties are not bound by this

artist rendition because it was not part of the Agreement. However, because a fraud claim was never properly pleaded the trial court never reached this issue.


In Koch v. Seventh St. Realty Corp., 205 Va. 65, 71, 135 S.E.2d 131 (1964) the court sustain the demurrer on the grounds that the facts did not support the charge of fraud. Similarly in the case at hand with Paragraph 18(e), the facts do not support a claim for fraud based on an artist's rendition in preliminary promotional material which is not part of the contract.

CONCLUSION

WHEREFORE, for the reasons stated herein your Appellee respectfully pray that this Court affirm the Circuit Court of Loudoun County's Orders and dismiss the Petition of the Appellants.

RESPECTFULLY SUBMITTED,

THE CONNEMARA CORPORATION



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

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed first-class, postage prepaid to the offices of James E. Pinkowski, King & King, Chartered, Suite 650, 2033 M Street, N.W., Washington, D.C. 20036 and to the offices of James E. Pinkowski, 4020 University Drive, Suite 200, Fairfax, Virginia 22030, counsel for Petitioners (Appellants) this 3rd day of May, 1988.

Handwritten Signature

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22188

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

THOMAS D. HORNE, JUDGE
POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

25 June 1987

James E. Pinkowski, Esq.
4020 University Drive
Suite 200
Fairfax, Virginia 22030

Kelly R. Dennis, Esq.
6849 Old Dominion Drive
Suite 410
McLean, Virginia 22106

Re: White v. The Connemara Corporation
In Chancery No. 10629

Gentlemen:

The plaintiffs have filed a Bill of Complaint against the defendant for specific performance of a real estate sales agreement dated March 14, 1986, or, in the alternative, for damages for fraud related to the agreement and damages for breach of the agreement. The defendant has filed a Plea in Bar alleging that Paragraph 15 (b) of the agreement constitutes the plaintiff's sole remedy (terminate the contract and receive a refund of all funds paid by them to the defendant seller as liquidated damages) and that the allegations of fraud are insufficient as a matter of law to allow the plaintiffs "to go beyond the written terms of the agreement."



After consideration of the argument of counsel on June 5, 1987, the authorities cited by counsel and the transcript of a hearing before Judge Hancock of the Circuit Court of Fairfax County on May 22, 1987, in two cases involving similar contract provisions, I am of the opinion that the Plea in Bar must be sustained.

The plaintiffs argue that Paragraph 15 (b) of the agreement is unconscionable because the only remedy it affords them in the event of a breach of the agreement by the defendant is the return of the plaintiff's own money. While I agree not only that the remedy involves the return of the plaintiff's own money, but also that the default provisions are very harsh, I feel that three other considerations are stronger and more compelling in this case.

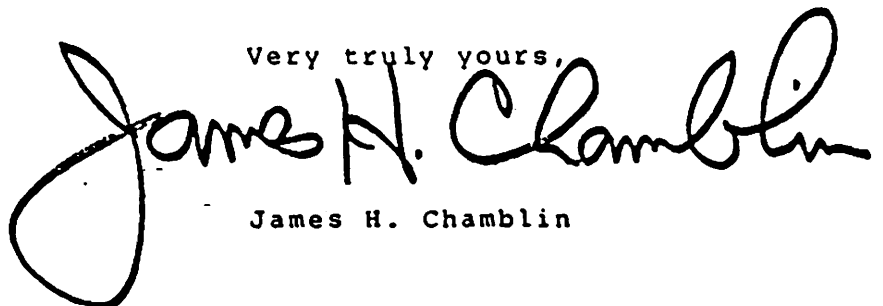
First, just as Courts do not measure the adequacy of consideration, I do not feel they should judge the adequacy of the remedy. I don't think anyone would deny that a person can bargain away his rights. There would be some measure of consideration to be given if a purchaser had contracted away all his remedies whatsoever, but that is not the situation in the instant case.

Second, the plaintiffs do have a remedy, as limited and harsh as it may be. They can terminate the contract and be relieved of any liability under it. Rescission is certainly a recognizable remedy for breach of contract.

Third, the plaintiffs still may have a tort cause of action against the defendant. In this regard, I feel that Count II of the Bill of Complaint does not set forth a separate cause of action for fraud against the defendant, but merely tries to make a breach of contract claim sound like a tort claim.

Let Mr. Dennis prepare the appropriate decree sustaining the Plea in Bar and dismissing this cause.

Very truly yours,

A large, stylized handwritten signature in black ink, reading "James H. Chamblin". The signature is written over the typed name and the closing "Very truly yours,".

James H. Chamblin

V I R G I N I A:

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

GEORGE WHITE, et ux.

Complainants,

v.

Chancery 10629

THE CONNEMARA CORPORATION,

Defendant.

DECREE

THIS CAUSE came before me on the 5th day of June, 1987, at the regular Motion's Day Docket, upon the Motion of the Defendant, by ~~these~~ ^{its} Counsel, Light & Harrison, P.C., to sustain the plea in bar filed by ~~them~~ ^{it} on the basis that the contract between the parties limited the parties' rights and remedies, ~~and~~ ^{and} upon the Complainants' Motion for Reconsideration filed herein ~~the subsequent Complainants' Motion for Reconsideration filed as to the ~~same~~ fraud count of the Bill of Complaint.~~ ^{herein.}

IT APPEARING, upon argument of Counsel for all parties, as well as the authorities cited by Counsel, and the transcript of a hearing ^{on 22 May 1987} before Judge Hancock of the Fairfax Circuit Court ~~that~~ ^{and for the reasons set forth in Court's opinion letter of 25 June 1987, that} the Plea in Bar must be sustained as to the contract counts of the Bill of Complaint based upon Paragraph 15(b) of the contract agreement. It is therefore

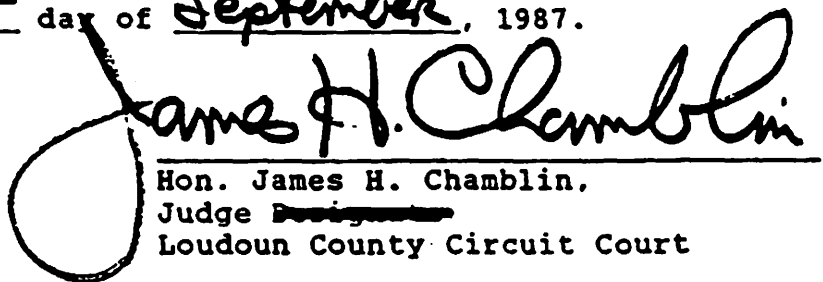
ORDERED that this cause be, and hereby is, DISMISSED with prejudice as to the Complainants, George and Cynthia White, insofar as their remedies, stated under Counts I and III of the Bill of Complaint are concerned and, that certain lis pendens filed by the Whites against the property, known as Lot 7, Block 1, Section 1 of Connemara Woods Subdivision in Deed Book 924, at



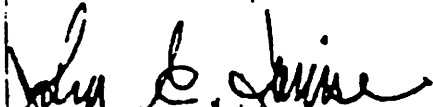
Page 1232 is hereby released and The Connemara Corporation shall cause a copy of this Decree to be filed among the land records of Loudoun County, and return the deposit of \$2,500.00 to Counsel for Complaintants, and it is

FURTHER ORDERED that Complainants ^{Motion for Reconsideration is granted and they are} granted leave to Amend their Bill of Complaint, ~~to plead facts in support of a fraud cause of action set forth in Count II of the Bill of Complaint.~~ Said Amended Bill of Complaint to be filed within ten days of this Decree.

ENTERED this 8th day of September, 1987.



Hon. James H. Chamblin,
Judge ~~Designated~~
Loudoun County Circuit Court

WE ASK FOR THIS:


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

Counsel for Connemara
Corporation and Carl
Bernstein & Associates, Inc.

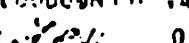
SEEN AND AGREED/OBJECTED:


James E. Pinkowski, Esq.
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060
Counsel for Complaintants

RECORDED W/ CERTIFICATE ANNEXED

1987 SEP 14 PM 3:53

LOUDOUN CO VA

Notary:  Clerk

703

TWENTIETH JUDICIAL CIRCUIT
OF VIRGINIA



RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
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FAUQUIER, LOUDOUN AND
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POST OFFICE BOX 727
LEESBURG, VIRGINIA 22075

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

12 January 1988

John E. Harrison, Esquire
Sandra L. Hughes, Esquire
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Fairfax, Va. 22030

In Re: White vs. Connemara Corporation
In Chancery No. 10629

Gentlemen:

The purpose of this letter is to confirm the reasons for my sustaining of the defendant's Plea in Bar and Demurrer as communicated to you by my assistant on November 25, 1987.

The Complainants had previously been granted leave to file an Amended Bill of Complaint which they did, but all of the elements of a fraud action are not properly pled in the Amended Bill. See Winn v. Aleda Const., 227 Va. 304 (1984). There are no allegations that the representations were false when made and were made intentionally and knowingly with the intent to mislead.

Because the Complainant had previously been granted leave to amend to allege a fraud action, no further leave to amend is granted. The suit is dismissed, with prejudice.

Very truly yours,

James H. Chamblin



JHC:dm

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

GEORGE AND CYNTHIA WHITE,
Complainants,
v.
THE CONNEMARA CORPORATION,
Defendant.

CHANCERY NO. 10629

DECREF

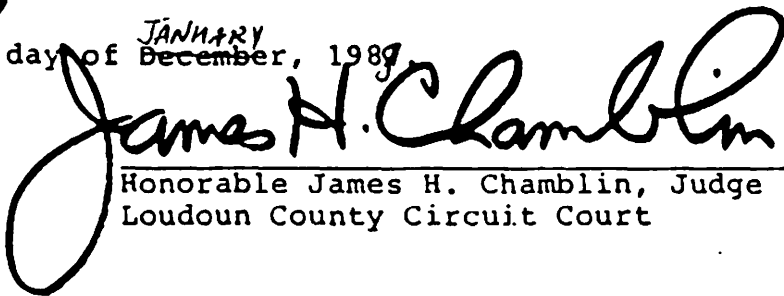
THIS CAUSE came to be heard by conference call with Judge Chamblin, Counsel for the Defendant, and Counsel for the Complainants on November 25, 1987, at 2:00 p.m., upon the motion of the Complainants, by their Counsel, James Pinkowski, to rule on the Protective Order and Defendant's Plea in Bar and Demurrer.

IT APPEARING TO THIS COURT, upon argument of counsel for all parties, that the Protective Order should be denied, and that the Court would review the oral arguments and pleadings on the Plea in Bar and the Demurrer and render a decision later in the day. It is therefore

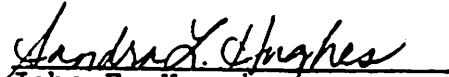
ADJUDGED, ORDERED AND DECREED that the Motion for Protective Order filed by the Complainants be denied and that this Court take under advisement for ruling at a later time the Plea in Bar and the Demurrer filed by the Defendant.

THIS CAUSE IS CONTINUING.


Entered this 12th day of ^{JANUARY} December, 1987.


Honorable James H. Chamblin, Judge
Loudoun County Circuit Court

WE ASK FOR THIS:


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

SEEN AND OBJECTED TO:


James E. Pinkowski
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060
Counsel for Complainants

706

21102/21/smd/ncy
12/02/87(3)

V I R G I N I A :

IN THE CIRCUIT COURT FOR THE COUNTY OF LOUDOUN

GEORGE AND CYNTHIA WHITE,

Complainants,

v.

THE CONNEMARA CORPORATION,

Defendant.

CHANCERY NO. 10629

DECREE

THIS CAUSE came to be heard by conference call with Judge Chamblin, Counsel for the Defendant, and Counsel for the Complainants on November 25, 1987, at 2:00 p.m., upon the motion of the Complainants, by their Counsel, James Pinkowski, to rule on the Defendant's Plea in Bar and Demurrer.

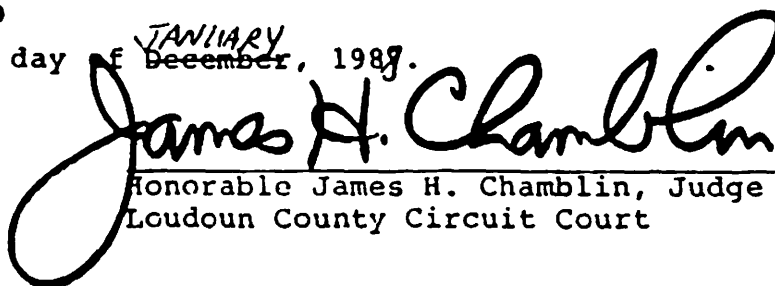
IT APPEARING TO THIS COURT, upon argument of counsel for all parties and pleadings filed, that the Plea in Bar and the Demurrer should be granted and that this Cause should be dismissed with prejudice. It is therefore

ADJUDGED, ORDERED AND DECREED that the Defendant's Plea in Bar and the Demurrer are sustained and it is further

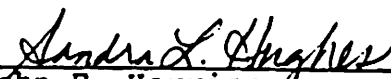
ADJUDGED, ORDERED AND DECREED that this Cause is dismissed with prejudice, for the reasons set forth in the Court's letter of January 12, 1988.
THIS CAUSE HAS ENDED.

THIS CAUSE HAS ENDED.

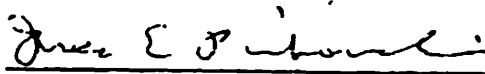
Entered this 12th day of ^{JANUARY} December, 1987.


Honorable James H. Chamblin, Judge
Loudoun County Circuit Court

WE ASK FOR THIS:


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708

21102/21/ncy
12/02/87(1)

IN THE SUPREME COURT OF VIRGINIA

GEORGE and CYNTHIA WHITE

Appellants,

vs.

THE CONNEMARA CORPORATION

Appellee

APPELLANTS' REPLY BRIEF

James E. Pinkowski
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IN THE SUPREME COURT OF VIRGINIA

GEORGE and CYNTHIA WHITE

Appellants,

vs.

THE CONNEMARA CORPORATION

Appellee

REPLY BRIEF OF APPELLANTS

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

APPELLANTS' RESPONSE TO APPELLEE'S STATEMENT OF THE CASE

The Appellee has argued and furnished a Counter-Statement of the Case in its Brief in Opposition to the Petition for Appeal that this case does not involve the fraudulent inducement of a contract for the sale of a new house and the subsequent intentional and willful breach of that contract by the seller.

The Appellee argues that there was a valid contract between Appellee and Appellants for the sale of a new house located at 114 Connemara Drive, Sterling, Virginia, and that the provisions of the contract are controlling to avoid the breach of the contract by the Appellee.

It has been and continues to be the position of the Appellants that the contract entered into with Appellee was based upon fraudulent misrepresentations involving the construction of the exterior of the house. The

misrepresentations constituted a fraudulent inducement to Appellants to contract for the purchase of the house. The house was misrepresented as being completely different in appearance and economic value from the house that the Appellee intended to sell Appellants, and the house actually constructed for Appellants.

The misrepresentations were part of the sales promotional literature prepared by the Appellee, and its agents, to sell new homes in Sterling, Virginia. The contract referenced the house as a "Cedarwood Model" which was illustrated in the sales literature as a house with a completely brick front exterior. The contract also provided that the house would be constructed in accordance with plans and specifications filed with Loudoun County, Virginia. The plans and specifications filed with Loudoun County showed the "Cedarwood Model" the same as the sales promotional material with a completely brick front exterior. Appellants firmly believe they were defrauded by the Appellee and the contract should not be effective to prevent them from recovering damages for the fraud of the Appellee. The Appellants further believe that the fraud continued through the formation of the contract by virtue of the reference to a "Cedarwood" house to be constructed in accordance with plans and specifications filed with Loudoun County which also showed the "Cedarwood" house with a brick front exterior.

The Appellee's argument concerning timeliness of the Appeal on the contract Counts I and III of the Bill of Complaint, the argument that the decision of Judge Chamblin was not objected to, the argument that the Fairfax County Circuit Court erred in ruling that paragraph 15 (b) of the contract was unconscionable, and the argument that the contract was an entire contract and not severable are arguments not supported by the record or facts of this case.

ARGUMENT

I. THE PLAIN MEANING RULE FOR THE INTERPRETATION OF CONTRACTS IS NOT APPLICABLE IN THIS APPEAL WHERE THE ISSUE IS FRAUDULENT INDUCEMENT OF A CONTRACT AND FRAUDULENT MISREPRESENTATION OF MATERIAL FACTS.

The Appellee argues that this Appeal involves the interpretation of the contract between Appellee and Appellants and under the plain meaning rule the contract clause provides that the Seller can breach the contract and refund the sums of money advanced by Purchasers to Seller as liquidated damages for the breach.

This Appeal involves more than the interpretation of the contract between the parties. This Appeal involves fraudulent misrepresentations of material facts to induce a party to enter a contract independent from the contract provisions, and the contract cannot be relied upon by the party committing the

fraudulent misrepresentations as a defense to his fraudulent action. In Horner v. Ahern, 207 Va. 860, 153 SE. 2d 216 (1967), the Supreme Court of Appeals of Virginia reviewed an action for fraud brought by Purchasers against vendors for misrepresentation made concerning termite damage in a house being purchased. The court said that the action of fraud and deceit was not based upon the contract in that case, but was independent of it. The action is not in contract, but is tort. The bringing of the action has the effect of affirming the contract, but that does not constitute a release or waiver of damages for the alleged tort. Horner, 207 Va. at 867, 153 S.E. 2d at 221.

One complaining of fraud and deceit may rescind what was done as a result thereof and sue for damages, or may affirm the action taken and sue for damages. The contract in Horner contained a clause that if termites were found, the Purchasers could be relieved of the conditions of the contract. The vendors in Horner argued as the Appellee does in our Appeal that the contract provisions should govern and provide the sole remedy to the Purchasers. The Virginia Supreme Court of Appeals refused to accept that argument in Horner and held, as follows:

To say under these circumstances that the Plaintiffs have no right to elect to bring an action for damages would, in effect, permit the Defendants to set up their own fraud as a defense. This they cannot do. Horner 207 Va. at 867, 153 S.E. 2d. at 221.

Fraud is purely tort and it involves a misrepresentation, detrimentally relied upon, that occasions a loss. Pigott v. Moran 231 Va. 75, 81, 341 S.E. 2d. 179, 182 (1986); Jefferson

Standard Insurance Company v. Hendrick 181 Va. 824, 833-34, 27 S.E. 2d. 198, 202 (1943). The duty to refrain from fraudulent acts is imposed by tort law, not by any contract between the parties. The character of fraud is not changed from tort to contract merely because the parties are also engaged in a contractual relationship. House v. Kirby 233 Va. 199, 355 S.E. 2d 303 (1987).

It is elementary that where a contract or transaction was induced by false representation, the contract is distinct and separable, so that an action for fraud is not precluded by the contract. 27 Am. Jur. 2d., Fraud and Deceit Section 387.

Accordingly, it would be inappropriate for this Court to look to the Contract to resolve the issue of fraud in this Appeal. The plain meaning rule has no application to the facts of our case since a interpretation of the contract is not involved. The contract provisions whatever their meaning would not preclude the separate action for fraud as indicated in the above cited case.

II. THE APPELLEE'S ARGUMENT ON SEVERABILITY OF THE CONTRACT IS SIMILARLY INAPPLICABLE BECAUSE THE CONTRACT CANNOT BE ASSERTED AS A BASIS TO PRECLUDE THE ACTION FOR FRAUD AND SUCH A RELIANCE UPON THE CONTRACT WOULD BE UNCONSCIONABLE UNDER THE FACTS OF OUR CASE.

In this portion of Appellee's brief, the Appellee argues the concept of entire contract, and that the Fairfax Circuit Court's ruling on paragraph 15(b) of the contract in a similar case was

reversible error because the Court should have found the entire contract void.

Appellee's argument is confusing and unclear because the terms "entire" or "indivisible" on the one hand and "divisible" or "severable" on the other are often confusing in themselves in their meaning and interpretation. Michie's Jurisprudence, Contract, Section 324 discusses in detail the confusing and often misunderstood nature of the terms "entire or divisible contracts". 4B, M.J., Contracts, Section 324.

Michie's Jurisprudence also discusses Entire and Severable Contracts in Section 127, and in that section it is indicated that Courts can separate good from bad and valid from invalid in contracts and enforce the good or valid portions of such contracts. 4B, M.J., Contracts, Section 127.

However, the discussion in this Appeal of entire and inseverable contracts is really misplaced because the Appellants are claiming there was a fraudulent inducement of the contract by Appellee which would make the contract voidable by Appellants. To enforce their rights, Appellants do not have to disavow the contract. They can affirm the contract and sue for damages. 8B, M.J., Fraud and Deceit, Section 36.

We would submit that the Fairfax Circuit Court's ruling was correct regarding paragraph 15(b) of the contract as being unconscionable. The ruling by the Fairfax Circuit Court would even be more appropriate under the facts of this Appeal because to enforce paragraph 15(b) would permit Appellee to set up a

defense to the fraudulent inducement of a contract by the terms and conditions of the contract itself. Such a result would be unconscionable and contrary to public policy in Virginia. A contract provision providing for immunity from bad faith or fraud is against public policy in Virginia. 4B, M.J. Contract, Section 180.

Accordingly, we would submit that the Circuit Court of Fairfax County was correct in ruling that paragraph 15(b) was unconscionable. We would further submit that the argument of "entire contract" has no application in this Appeal because of the fraud involved.

III. THE ISSUE ON WHETHER PARAGRAPH 15(b) WAS A LIQUIDATED DAMAGE PROVISION IN THE CONTRACT, OR WHETHER IT WAS AN ELECTION OF REMEDIES, MUST BE CONSTRUED AGAINST THE APPELLEE AND IN FAVOR OF APPELLANTS.

At best paragraph 15(b) is ambiguous and under the rules of contract interpretation the language must be constructed against the drafter of the language. In this case, the contract was drafted by Appellee and its agents.

Moreover, Appellee relies upon Brown v. Freedberg, 127 Va 1, 102 SE. 468 (1920) for the position that paragraph 15(b) was an election of remedies. But, a close reading of the Brown v. Freedberg decision discloses that the Virginia Supreme Court actually found that the liquidated damages provision of the contract in that case was only inserted to induce prompt performance of the contract and not a substitute for performance.

Consequently, these were not two remedies to elect from in the Brown case, and it was not intended by the liquidated damages clause to give either of the parties the option of abandoning the contract and liquidating the damages therefor.

It is our position that Brown v. Freedberg does not alter Appellants position that paragraph 15(b) is not a liquidated damage provision at all since it would merely give Appellants their own money for the breach by Appellee. For the reasons already stated herein and in the Petition for Appeal, we firmly believe such a contract provision is unconscionable under the facts of our case.

IV. THE PLEA-IN-BAR WAS NOT A PROPER PROCEDURAL VEHICLE FOR DISMISSING ANY PORTION OF APPELLANTS COMPLAINT.

The case authority cited in Appellants' Petition for Appeal and the legal arguments presented therein have not been rebutted in Appellee's Brief in Opposition to the Petition for Appeal. In lieu of rebuttal based upon Virginia law, Appellee has cited a case from the State of New York which enforced a contract remedy clause similar to paragraph 15(b) by granting summary judgment to the party relying upon the contract clause. The New York Case does not provide support for the Appellee's position because the New York Supreme Court said that the enforcement of such a clause implies that the party has acted in good faith, and the existence of a situation beyond the control of the parties. Mancini-Cielo, Inc. v. Scaramellino, 500 NYS 2d 276, 278 (N.Y. App. Div. 1986)

In our Appeal there is a substantial question raised by Appellants that Appellee has not acted in good faith, nor is the situation complained of by Appellants beyond the control of Appellee. The Appellee completely controlled the matter complained of by Appellants. Also, the New York Case does not involve a Plea-in-Bar as the procedural device to bring the case to disposition. Appellants submit there has been no rebuttal to their arguments that the Plea-in-Bar was the incorrect pleading for resolving the Contract counts of the Complaint.

V. THE TRIAL COURT'S DECISION ON THE PLEA IN BAR AND DEMURRER ON THE FRAUD COUNT OF THE COMPLAINT AND THE AMENDED COMPLAINT WAS REVERSIBLE ERROR.

The Appellee's Opposition to the Appellants' arguments on this issue is that the fraud count sounded like a contract claim and the action was barred by the contract remedy clause set forth in paragraph 15(b). The Appellee has also argued that the elements for actual fraud were not pled in the Original Complaint and the Amended Complaint. Appellee cited Winn v. Aleda Construction Co., Inc., 227 Va. 304, 315 S.E. 2d 193 (1984) relied upon by Judge Chamblin to establish the elements of actual fraud.

The Appellee's arguments miss the mark for the same reasons that Judge Chamblin's decision was in error. Actual fraud is not the issue in Appellants' Case. Constructive fraud and fraudulent inducement of a contract through misrepresentations of material

facts are the issues in Appellants' Case. Michie's

Jurisprudence defines Constructive Fraud as follows:

Constructive Fraud is a breach of legal or equitable duty, which, irrespective of moral guilt of the fraud feator, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests.¹⁹ Thus, a representation, untrue in fact, made by one party to a contract, as of his own knowledge, which induces the other party to enter into the contract, whereas the first party was uninformed as to the truth or falsity of the representation, is fraudulent in equity, even in the absence of actual fraudulent intent.²⁰ Even an incorrect misrepresentation of a material fact, made for the purpose of having the other party rely upon it, makes a contract entered into pursuant thereto voidable.¹

8B M.J. Fraud and Deceit Section 3

19. Moore v. Gregory, 146 Va. 504, 131 S.E. 692 (1925); Miller v. Huntington, etc. Bridge Co., 123 W. Va. 320, 15 S.E. 2d 687 (1941); Jackson v. Seymour, 193 Va. 735, 71 S.E.2d 181 (1952); Bowie v. Sorrell, 113 F. Supp. 373 (W.D. Va. 1953); Steele v. Steele, 295 F. Supp. 1266 (S.D. W. Va. 1969).

20. Gall v. Cowell, 118 W. Va. 263, 190 S.E. 130 (1937); Purcell v. Robertson, 122 W. Va. 287, 8 S.E.2d 881 (1940). In Purcell v. Robertson, 122 W. Va. 287, 8 S.E. 2d 881 (1940), it was stated: "It (constructive fraud) is presumed from the relation of the parties to a transaction or from the circumstances under which it takes place. The conscience is not necessarily affected by it. Indeed, it has been said that it generally involves a mere mistake of fact. Hence, the terms 'constructive fraud' and 'legal fraud' both connote that in certain circumstances, one may be charged with the consequence of his words and acts, as though he has spoken or acted fraudulently, although, properly speaking, his conduct does not merit this opprobrium."

1. Gall v. Cowell, 118 W. Va. 263, 190 S.E. 130 (1937).

American Jurisprudence Second says with regard to fraudulent inducement of contracts as follows:

In regard to contracts made by parties affecting their rights and interests, the general theory of the law is that there must be full and free consent. It is said that if consent is obtained by meditated imposition or circumvention, it is to be treated as a delusion, and not as a deliberate and free act of the mind. Although the law will not generally inquire into men's acts and contracts to determine whether they are wise and prudent, yet it will not suffer them to be entrapped by the fraudulent contrivances or cunning or deceitful management of those who purposely mislead them.¹⁹ Fraud is material to a contract where the contract would not have been made if the fraud had not been perpetrated.²⁰

.....In determining whether the making of a contract has been induced by fraud, the mental capacity of the defrauded party is an important consideration. The law recognizes the fact that strong-minded persons cannot always protect themselves from deceit....

17 Am. Jur 2d, Contracts Section 151.

Accordingly, we would submit that based upon the foregoing, the trial court's interpretation of this case as an actual fraud case is in error.

19. Juzan v. Toulmin, 9 Ala. 662, Smith v. Kimble, 31 DS 18, 139 NW 348. Generally, see FRAUD AND DECEIT.

20. Homelite v. Trywilk Realty Co., (CA4 NC) 272 F2d 688.

The remedies available to Appellants for constructive fraud are discussed in Michie's Jurisprudence and they are as follows:

The usual consequence of fraud is that, as between the parties, the one who is defrauded has a right, if possible, to be restored to his former position.¹⁵ Thus, where a party has been induced to contract through the fraud of the other party, he need not attempt to rescind the contract, and thus be released from his obligations, but he is entitled to affirm the transaction, and sue for any damages he may have sustained, or defend an action at law on his undertaking by the other party, by setting up the fraud.¹⁶

15. Jefferson Standard Life Ins. Co. v. Hedrick, 181 Va. 824, 27 S.E. 2d 198 (1943).

16. Zinn v. Mendel, 9 W.Va. 580 (1876); Watkins v. West Wytheville Land etc. Co., 92 Va. 1, 22 S.E. 554 (1895); Hudson v. Waugh, 93 Va. 518, 25 S.E. 530 (1896); Hurt v. Miller, 95 Va. 32, 27 S.E. 831 (1897); Wilson v. Hundley, 96 Va. 96, 30 S.E. 492 (1898); Crockett v. Burleson, 60 W.Va. 252, 54 S.E. 341 (1906); Jordon v. Annex Corp., 109 Va. 625, 64 S.E. 1050 (1909); Osborne v. Holt, 92 W. Va. 410, 114 S.E. 801 (1922). In an action of fraud and deceit brought by the purchasers of a house against the vendors and a real estate firm, the defendants demurred on the ground that the plaintiffs' only remedy was rescission since the contract provided that in the event of termite damage they would "be relieved of the conditions of this contract." This ground was held invalid because the remedy of rescission was obviously intended to apply if the damage was found prior to closing, which discovery the defendants' alleged fraud had prevented. It was invalid also because the action for fraud and deceit is independent of the contract, being based rather in tort. The plaintiffs were not seeking to disaffirm the clause in the contract relating to termite damage. To the contrary, they relied heavily upon that clause for their position that there was imposed upon the defendants the duty to make full disclosures, prior to settlement, of the true situation with respect to termite damage. It is for the breach of that duty that the plaintiffs sought recovery for fraud and deceit. Horner v. Ahern, 207 Va. 860, 153 S.E. 2d 216 (1967).

The action for fraud and deceit is independent of the contract, being based rather in tort;¹⁷ thus, it follows that the bringing of an action for damages has the effect of affirming the contract but does not constitute a release or waiver of the right to seek recovery of damages for the alleged tort.¹⁸

8B M.J. Fraud and Deceit Section 36.

Finally, Appellee argues in its Counter-Statement of the Case that the Appeal was not timely filed or properly objected to for the Contract Counts of the Complaint. Despite the existence of that argument in the Counter-Statement of the Case, no legal authority is cited in the brief or further legal argument is made by Appellee in the brief. It should be stated unequivocally there does not appear to be any issue as to the timeliness of the Appeal for the fraud action.

The Appellants' position on the timeliness of the Appeal pertaining to the Contract Counts of the Original Complaint is that the case authority interpreting Rule 1:1 of the Rules of the Supreme Court of Virginia provides that a decree does not become final for purposes of an Appeal until the whole action before the Court is disposed of by the Court. In Daniels v. Truck & Equipment Corp., 205 Va. 579, 139 S.E. 2d 31, 35 (1964), the Supreme Court of Appeals of Virginia held that:

17. Horner v. Ahern, 207 Va. 860, 153 S.E.2d 216 (1967).

18. Horner v. Ahern, 207 Va. 860, 153 S.E.2d 216 (1967).

A final order is one which disposes of the whole subject, gives all the relief contemplated, provides with reasonable completeness for giving effect to the sentence, and leaves nothing to be done in the cause save to superintend ministerially the execution of the Order.

In the Appellants' Case, the Trial Court did not dispose of the entire action by granting a decree for two Counts of the Complaint. The Appellants were permitted to Amend their Complaint to plead a cause of action for matters raised in the Original Complaint. The Court had jurisdiction over the Appellants' action until the decision on the Amended Complaint was rendered on January 12, 1988. The fact that portions of the Original Complaint were not still before the Court is not considered final until the Appellants' entire cause of action is no longer before the Court.

Accordingly, we believe the Appeal on the Contract Counts was timely filed.

CONCLUSION

For all the foregoing reasons, as well as, the reasons set forth in the Petition for Appeal, Appellants request that their Appeal be granted and that the decrees of dismissal entered by

the Circuit Court of Loudoun County be reversed and the case remanded for further proceedings.

Respectfully submitted,

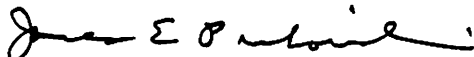
GEORGE and CYNTHIA WHITE
By Counsel



James E. Pinkowski
4020 University Drive
Suite 200
Fairfax, Virginia 22030
(703) 385-0060

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, to John E. Harrison and Sandra L. Hughes, 6849 Old Dominion Drive, Suite 410, McLean, Virginia 22106, this 23rd day of May, 1988.



James E. Pinkowski

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on* Wednesday the 1st day of February, 1989.

George White, et al.,

Appellants,

against

Record No. 880417

Circuit Court No. C-10629

The Connemara Corporation,

Appellee.

From the Circuit Court of Loudoun County

Upon review of the record in this case and consideration of the arguments submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By:

a. a. ai

Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RONALD SNELLING and
ALEXANDRA SNELLING

Plaintiffs,

v.

ADDICOTT HILLS CORPORATION
Serve: Craig Buck, Registered
Agent
4304 Evergreen lane
Annandale, Virginia 22003

Defendant

AT LAW No. 81675

MOTION FOR JUDGMENT

COME NOW the plaintiffs, Ronald Snelling and Alexandra Snelling, by counsel, as and for their Motion for Judgment complaining of the defendant and state as follows:

1. The Defendant is a corporation authorized to do business in the Commonwealth of Virginia and is doing business in Fairfax County, Virginia.

2. The defendant is in the land development and construction business and has developed a subdivision of residential houses known as Union Farm located in Fairfax County, Virginia.

3. As part of its business the defendant sells the houses it builds and places the said houses for sale through advertising and real estate listings including Multiple Listing Service.

4. That as the result of the real estate listings and advertising upon which the plaintiffs relied, the plaintiffs were

introduced on or about February 1987 to a house known as Union Farm Lot 11 and also known as 9105 Peartree Landing. The said property was being offered for sale by plaintiff through its agents.

5. The plaintiff and defendant on or about February 11, 1987 entered into a contract wherein the plaintiffs were to purchase and the defendant was to sell the property referred to herein for the sum of \$362,500.00 less a 2% discount if the plaintiff was to pay for the property in cash without resort to borrowing money from a lending institution.

6. Settlement and transfer of title to the premises was to be on or before May 1987 (the completion date).

7. Annexed hereto marked Exhibit "A" is a copy of said contract.

8. Because of the existence of the contract referred to herein the plaintiffs terminated all efforts to purchase suitable housing in the Northern Virginia area.

9. The plaintiffs prior to this time had engaged in an extensive search for a home to purchase since they were relocating to the Northern Virginia area from California.

10. The defendant knew that because of the plaintiffs' relocation and the employment of Ronald Snelling as President of the Pentagon Federal Credit Union that it was essential that he and his family be situated in their home at the earliest time so that they could immediately begin using said home as a place to carry out the social and business obligations necessitated by the type of position held by Ronald Snelling.

11. At the time that the Snellings contracted to purchase the home set forth herein the defendant had already contracted to sell the house to W. Lowry Mann, III and Barbara C. Mann, by contract dated March 1, 1986. A copy of said contract is annexed hereto and marked Exhibit "B".

12. At the time of contracting with the plaintiffs herein the defendants knew that the Manns intended to purchase the subject property and had in fact threatened the institution of legal proceedings to compel the defendant to specifically perform pursuant to their contract.

13. Shortly thereafter Mr. and Mrs. Mann did in fact file a lis pendens amongst the land records of Fairfax County and also filed a Bill of Complaint seeking specific performance and damages. That action is presently pending in the Circuit Court of Fairfax County. A copy of said lis pendens and Bill of Complaint are annexed hereto and marked Exhibits "C" and "D".

14. Up until immediately prior to the scheduled settlement date established by the parties hereto under the Snelling contract the defendant maintained its silence concerning its inability to transfer title with general warranty to the property, the issues raised by the Manns, and the institution of pending litigation.

15. As the result of the defendant's concealment of the true state of facts and its misrepresentations as to the facts concerning the settlement on the property the plaintiffs continued to rely on their belief that they would have settlement on this property as scheduled.

COUNT I (Breach of Contract)

16. The allegations of paragraphs "1-15" are incorporated by reference herein.

17. The defendant has failed to perform under the contract between it and the plaintiffs herein and has breached the said contract.

18. As the result of said breach of contract the plaintiffs have incurred rent at temporary premises at the rate of \$930.00 per month and incidental expenses related thereto, which sums they would not have incurred had settlement taken placed as scheduled. Plaintiffs will continue to incur these expenses until permanent housing is available to them.

19. As the result of said breach of contract the plaintiffs have lost the appreciated value of the said property.

20. As the result of said breach of contract the plaintiffs have been compelled to contract for another house at a cost in excess of \$400,000.00 which cost is approximately \$40,000.00 more than the cost would have been had plaintiffs contracted to buy it at the time they contracted with the defendant.

21. The defendant still retains the plaintiffs' earnest money deposit and option payment of \$16,400.00 which it has failed to return.

COUNT II (Fraud)

22. The allegations of paragraphs "1-15" are incorporated by reference herein.

23. The defendants at all times material hereto intentionally and with actual knowledge of the true state of facts misrepresented to the plaintiffs that it could deliver possession and general warranty title to the property as required by the contract.

24. The defendant deliberately concealed the true state of facts and maintained its silence in failing to inform the plaintiff of the problems attendant to its inability to settle on the subject property and thereby caused the plaintiffs to detrimentally rely on the terms and provisions of the contract to their damage and detriment.

25. Alternatively, the defendant negligently concealed the true state of facts and maintained its silence in failing to inform the plaintiff of the problems attendant to its inability to settle on the subject property and thereby caused the plaintiffs to detrimentally rely on the terms and provisions of the contract to their damage and detriment.

26. The defendant fraudulently and willfully concealed from the plaintiffs material facts and failed to disclose title defects in conscious and reckless disregard of plaintiffs' rights and interests.

27. Alternatively, the defendant fraudulently and negligently concealed from the plaintiffs material facts and failed to disclose title defects in conscious and reckless disregard of plaintiffs' rights and interests.

COUNT III (Outrageous Conduct)

28. The allegations of paragraphs "1-15" and "23-27" are incorporated by reference as if fully set forth, at length, herein.

29. The defendant's actions were so deceitful and of such wanton and willful disregard for the rights of plaintiffs as to shock the conscience and constitute outrageous conduct.

30. The defendant on this occasion and on others willfully entered into multiple contracts for the same property and has entered upon a deliberate course of reckless and deceitful conduct for the purpose of maximizing its profits with a total disregard for the rights of these plaintiffs and others.

31. The plaintiffs as the direct result of defendant's conduct aforesaid have suffered and continue to suffer acute anxiety and mental anguish and have been embarrassed by their inability to entertain business associates and reciprocate to others in a manner consistent with their standing in the community and in business.

32. The allegations of paragraphs 1 - 15 and 17 - 20 are incorporated by reference herein.

33. The plaintiff has demanded the return of its deposit.

34. The defendant has failed and refused to return the plaintiff's deposit unless plaintiffs agree to release and terminate any rights that they may have under their contract.

35. The defendant, during this time, has, upon information and belief, used the deposit moneys for its own benefit and has otherwise converted plaintiff's funds.

WHEREFORE, it is prayed that this Honorable Court grant judgment to the plaintiffs, as follows:

a) Count I \$125,000.00 compensatory damages
together with interest thereon from the date of contract;

b) Count II \$100,000.00 compensatory damages and
\$250,000.00 punitive damages;

c) Count III \$100,000.00 compensatory damages and
\$250,000.00 punitive damages; and

d) Count IV \$16,400.00 compensatory damages and
\$250,000.00 punitive damages; and

e) Granting such other and further relief as may seem
proper, including costs, interest and attorneys' fees.

RONALD SNELLING
ALEXANDRA SNELLING

BY: _____

COUNSEL



GLENN H. SILVER
COUNSEL FOR PLAINTIFFS
RUST, RUST & SILVER
P. O. BOX 460
4165 Chain Bridge Road
Fairfax, Virginia 22030
703-591-6666



(b) Purchaser acknowledges and agrees that he understands that, while the Agent may have advised and consulted with the Seller, its architects and its contractors concerning the design, construction and development of the house, the Agent does not accept, nor will Purchaser attempt in any manner to charge the Agent with, any liability or responsibility whatsoever for said design, or the construction and/or development of the house, or any defaults in performance by the Seller, the architects and/or the contractor.

(c) Further, Purchaser recognizes that the Agent receives all information as to probable delivery dates from the Seller and that in this regard the Agent is merely acting as a conduit of information and not in any respect as the Agent of the Seller. The Agent shall not be responsible in any manner whatsoever to Purchaser for failure or inability of the Seller to meet projected delivery dates, it being agreed that Purchaser shall look solely to the Seller in this regard.

6. RISK OF LOSS. Seller assumes the risk of loss or damage to said property by fire or other casualty until the date of settlement under this Agreement.

7. TITLE. The Property shall be sold free of encumbrance, except as aforesaid. Title at settlement is to be good of record and fully insurable by a title insurance company at regular rates, subject, however, to covenants, easements, rights-of-way, conditions and restrictions of record and such restrictions as are specifically set forth herein, and any other easements which may be observed by inspection of the Property. Otherwise, the deposit is to be returned and this Agreement declared null and void at the option of the Purchaser, unless the defects are of such character that they may be remedied by Seller. If it elects to do so, the Seller and its Agent are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action, if Seller elects to undertake same, must be taken promptly by and at the Seller's expense, whereupon the time herein specified for full settlement by the Purchaser will be extended for the period necessary for such action, but not to exceed 12 additional months. The premises are sold subject to easements, if any, created or to be created, prior to or after settlement in favor of utility companies, municipal authorities, or quasi-governmental authorities for the installation of utilities or streetlights and/or additional covenants, restrictions or easements which may be placed on record by the Seller after execution hereof for the benefit of the Property and/or the community of which it is a part. This Agreement shall be subordinate to any such easements, rights-of-way, covenants, etc.

8. SETTLEMENT COSTS. It is agreed that the costs and fees incident to settlement shall be paid as follows (unless specified otherwise herein):

(a) Rents, taxes, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to certificates of taxes, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by Seller, or allowance made therefor at the time of transfer.

(b) The Purchaser agrees to pay the following costs at settlement: examination of title, all title insurance premiums, all mortgage insurance premiums, if any, final survey fee, loan placement fees, and any other fees assessed by lender, title insurance binder, closing and settlement fees, notary fees, conveying fees, preparation of papers, county and state transfer taxes, all recording charges, including those for Purchase Money trust, if any, preparation of trust and notes, and insurance and tax escrows.

(c) The Seller agrees to pay the following costs at settlement: charges for preparation of deed and Virginia State Grantor's Tax, if applicable.

9. OCCUPANCY. (a) Occupancy hereunder shall be given to Purchaser immediately after settlement. However, if, at the Seller's discretion, the Purchaser shall accept occupancy of its completed dwelling prior to the conveyance of such unit in fee simple to the Purchaser, the Purchaser shall execute the Seller's Standard Occupancy Agreement and shall continue to be subject to the terms hereof as if Purchaser did not occupy such dwelling unit.

(b) Notwithstanding the Purchaser's right of occupancy as aforesaid, the Seller shall have the right to enter upon property of the Purchaser at any time after settlement for the purpose of making exterior changes to the lot and improvements thereon, including grading changes and the removal of trees, as may be required by Seller's site plan, or any modification thereto, or any changes which may be required as a condition of Seller's release by applicable governmental authorities from any and all subdivision or site plan bonds or other escrows.

10. UNSOLD UNITS. Until such time as all of the dwelling units in Seller's subdivision are sold, the Seller reserves the right to make such use of unsold dwelling units, the common elements, street and the main entrance of the project, as are necessary for its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction equipment and personnel and noise and other inconveniences attendants thereto may be present. Purchaser agrees not to obstruct or impede any such construction or sales activities.

11. ACCESS. The Purchaser may not have access or entry to the dwelling unit or the construction site during construction, nor may he store any of his possessions in or about the dwelling unit or the construction site prior to the settlement of this Agreement and delivery of possession to the Purchaser hereunder. Any violation of this provision may, at the election of the Seller, be considered a material breach of this Agreement and, in addition to any other remedies available to Seller, Seller may declare this Agreement void and, in such event, any amount paid toward the purchase price may be retained by Seller as liquidated damages.

12. TREES AND LOCATION. The location, area, and ground elevation of the building on the lot, elevation of dwelling unit, and the reversing of the plan, if necessary, to conform to the existing lot contours, are to be determined by the Seller at its sole discretion. Seller shall remove such trees from the lot as may be necessary and it shall not be responsible for any damage to or destruction of remaining trees during the process of construction. Seller shall be responsible and limited solely to the warranties set forth in the Builder's Limited Warranty mentioned in paragraph #14 below.

13. MODELS AND SAMPLES. Appliances, furnishings, special fixtures, special carpeting and floor tile, special mirrors, wallpaper, window decorating treatments, special trees, shrubbery, landscaping, flower beds and patios, certain rooms, special fireplaces and other features and recreational facilities exhibited in the model units and model area are for exhibition purposes only and are not included in the purchase price, unless otherwise expressly provided herein.

14. WARRANTIES. Purchaser hereby waives any and all warranty rights provided by Section 55-70.1 of the Code of Virginia. Unless specified otherwise herein, all warranties other than those expressly provided in the Builder's Limited Warranty are hereby excluded. Purchaser has been afforded the opportunity to review this warranty prior to execution of this Agreement, and agrees to accept this warranty as the sole warranty being given by the Seller to the Purchaser. Purchaser and Seller shall inspect the house and lot before settlement and note in the Pre-Settlement Inspection Report any incomplete work or defects. Thereafter, Purchaser agrees that Seller shall not be liable for any patent incomplete work or defects not specifically noted in said Pre-Settlement Inspection Report, unless otherwise specifically provided in the Builder's Limited Warranty. It is further agreed that there shall be no withholding of Seller's funds at settlement for any such items.

THE SELLER MAKES NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, OR IMPLIED BY STATUTE, TO THE PURCHASER.

15. DEFAULT BY EITHER PARTY. (a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by Seller and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable of precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agrees to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

16. DISCLOSURE. (a) When applicable, the Purchaser by execution hereof acknowledges receipt, prior to the execution of this Agreement, of a completed copy of the Disclosure Bill of Particulars for New Home Buyers, as required by Section 10-5-3, Chapter 10 of the 1976 Code of the County of Fairfax, Virginia, as amended.

(b) Purchaser acknowledges that he has had the opportunity, prior to the execution of this Agreement, to examine manufacturers' warranties on appliances and equipment included in the home.

17. HOME OWNERS ASSOCIATION. In the event there is a Homeowner's Association, then Purchaser acknowledges receipt, prior to execution of this Agreement, of copies of the Homeowner's Association by-laws and related documents. Purchaser agrees to be bound by the regulations, by-laws and declarations of the Association and agrees to pay the assessments established by such Association.

18. MISCELLANEOUS. (a) The principals to the Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns, provided, however, that the Purchaser shall have no right to assign this Agreement without the prior written consent of the Seller.

(b) The terms and provisions of this Agreement shall survive the Settlement hereunder.

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

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

(e) This Agreement contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.



GENERAL ADDENDUM

In reference to the Agreement of Sale between James F. [unclear] and Windsor [unclear] / [unclear] Inc., the Purchaser and Seller, dated February 11, 1987, covering the real property commonly known as Sub 11-9103 [unclear] [unclear] the undersigned Purchaser and Seller hereby agree to the following:

Purchaser agrees that \$7250.00 (seven thousand two hundred and fifty dollars) will be credited towards purchase price of the property.
Eliminate bay window in kitchen in dining room and install
2 skylights in kitchen area.
Eliminate the chimney.
2 exterior double agent lights on each of house.
2nd floor in Butler's Property.
Stained in place solid Floor (dark wood stain) in
Living Room, Dining Room, Kitchen, Pigeon Room, Family
Room, Tile floor in Powder Room.
Extend Dining Room thru entry area.
(Credit purchase for solid beam) <\$170>

Check for \$11,240 is attached herewith for items
listed above.

The herein agreement, upon its execution by both parties, is herewith made an integral part of the aforementioned Agreement of Sale.

2/21/87
Date
2/21/87
Date
2/5/87
Date

[Signature]
Purchaser
[Signature]
Purchaser
ADDICOTT HILLS CORPORATION
[Signature]
Seller
BY: Sandra K. Lindsay
Assistant Corporate Secretary



CLOSING COST ADDENDUM

This addendum to Sales Agreement dated February 11, 1987 by and between Ronald F. Snelling, r Alexander Snelling Purchaser, and Addcott Hills Corp, Seller, specifies all closing costs, prepaid expenses and optional or elective services or charges to be paid by Purchaser or Seller in connection with the Sales Agreement.

I. Purchaser or Seller shall pay those charges as checked below:

PURCHASER	SELLER	
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Attorneys Fees
<input type="checkbox"/>	<input type="checkbox"/>	Tax Service Fees
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Examination of Title
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Title Attorney's Fee
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Preparation of Deed
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Preparation of Mortgage Papers
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Mortgagee (Lender) Title Insurance Premiums
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Notary Fees
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Survey
<input checked="" type="checkbox"/>	<input type="checkbox"/>	City, County and State Transfer Taxes for the Deed, Mortgage and Purchase Money Mortgage (if applicable) X
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Recording Charges
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Construction Loan Release Fees
<input type="checkbox"/>	<input checked="" type="checkbox"/>	State Grantor's Tax (VA) or State Stamp (MD)
<input type="checkbox"/>	<input checked="" type="checkbox"/>	Termite Inspection and Certificate
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Mortgage Lender's Loan Origination Fee
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Prepaid or Escrowed Property Taxes
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Prepaid Interest
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Prepaid or Escrowed Hazard Insurance Premiums
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Appraisal Fee
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Inspection Fee
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Credit Report Fee
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Private Mortgage Insurance (if applicable)
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Any and All Other Prepaid Expenses or Escrows Required by the Mortgage Lender
<input type="checkbox"/>	<input type="checkbox"/>	Homeowner Association Dues or Prorations (if appl.)
<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	Property Tax Prorations (if applicable)
<input type="checkbox"/>	<input type="checkbox"/>	VA Funding Fee/FHA Mortgage Insurance Premium
<input checked="" type="checkbox"/>	<input type="checkbox"/>	Title Insurance Binder

II. Purchaser shall reimburse Seller in the amount of \$ N/A at settlement, to be applied toward the Purchaser's closing costs as specified above.

III. ALL OPTIONAL OR ELECTIVE SERVICES OR CHARGES SHALL BE AT THE SOLE EXPENSE OF PURCHASER. THESE OPTIONAL SERVICES INCLUDE, BUT ARE NOT LIMITED TO THE FOLLOWING ITEMS:

Purchaser's Attorney, Accountant, Inspector or Other Professional Fees for Services Rendered at Purchaser's Request

Owner's Title Insurance Premiums

Optional Mortgage Lender Services Including but not Limited to Amortization Schedules, Mortgagor Life Insurance or Other Optional Services

PURCHASER: Ronald F. Snelling SELLER: ADDICOTT HILLS CORPORATION
BY: Sandra K. Lindsay
PURCHASER: Alexander Snelling DATE: 3/3/87
BY: Sandra K. Lindsay, Asst. Corp. Sec.



GENERAL ADDENDUM

In reference to the Agreement of Sale between Ronald L. & Alexandra Snellings
and Addicott Hills Corporation, the Purchaser and Seller,
dated February 11, 1987, covering the real property commonly known
as Lot 11- 9105 Peartree Landing, Alexandria, Va. 22309
the undersigned Purchaser and Seller hereby agree to the following:
Credit to purchaser for Standard Carpeting & Padding in: \$818.00
Upstairs Hall, Master Bedroom and Bedrooms 2,3,& 4

We, the purchasers of Lot 11, have elected to furnish our own
carpeting and padding in the house we have purchased at 9105 Peartree
Landing, in the Union Farm Sub-Division, and take full responsibility
for having our choice of carpeting and padding installed in the house
after settlement. We release the builder Carl Bernstein & Asso. from
responsibility to install carpeting and padding and any damage incurred
during it's installation.

The herein agreement, upon its execution by both parties, is herewith made an
integral part of the aforementioned Agreement of Sale.

5/2/87
Date
5/21/87
Date
5/6/87
Date

Ronald Lee Snellings
Purchaser
Alexandra Snellings
Purchaser
ADDICOTT HILLS CORPORATION
Sandra K. Lindsay
Seller
BY: Sandra K. Lindsay
Assistant Corporate Secretary



CHANGE ORDER

Subdivision: Union Farm
Lot: 11 Block - Type Low - rise 2
Purchaser: Snodgrass
Telephone: _____

NOTE:
PRICES ARE BASED ON PRESENT
CONSTRUCTION STATUS. A DELAY
IN RETURNING THIS FORM COULD
INCREASE THE COST OR ELIMINATE THE
POSSIBILITY OF ANY OR ALL REQUESTED
CHANGES.

ITEM	PRICE
ADD DELETE <u>Butler Pantry</u>	—
ADD	
DELETE	
ADD	
DELETE	
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ADD	
DELETE	
ADD _____ to put change order into effect	

1. I understand that the above work is not included in the terms of my contract, and a check covering this work is attached hereto.
2. If requested change or changes require some deviation from normal plans, purchaser agrees to accept same and fully relieve Seller of responsibility for same. In the event the Seller inadvertently omits to install any of the items set forth herein, Seller's liability shall be limited to return of purchaser's deposit for said terms.
3. It is hereby agreed and understood that if settlement on the subject property is not consummated for any reason **NO MATTER HOW JUSTIFIED**, the money referred to above will not be refunded. However, should the property be resold and next purchaser willingly agrees to pay the whole amount referred to above or a part thereof, the recovered amount will be returned to the undersigned purchaser upon receipt of same by the Seller.

Ronald Lee Lundy
Purchaser
William A. Snodgrass
Purchaser
ADDITIONAL HILLS CORPORATION
Sandra K. Lindsay
Seller's Approval
BY: Sandra K. Lindsay
Assistant Corporate Secretary

5/2/87
Date
5/2/87
Date
5/7/87
Date



NEW HOME SALES AGREEMENT



Virginia

THIS AGREEMENT, made this 1 day of MARCH 1986, by and between W. LOWRY MANN III,
BARBARA C. MANN (hereinafter known as the Purchaser) and
Builders Marketing Inc. (hereinafter known as the Seller) and

Builders Marketing INC. (hereinafter known as the Agent).

WITNESSETH: That for and in consideration of the sum of FIVE THOUSAND Dollars
(\$5,000) by (cash check), or note due _____, the receipt of which is hereby acknowledged, the Purchaser
agrees to buy, and the Seller agrees to sell of that certain piece, parcel or lot of land and improvements thereon described as follows, to wit:

All of Lot 11, Block _____ Section Union Farm Subdivision Fairfax
County, State of Virginia, together with a house generally known as the Union Farm
Model, known by street address as 9105 PEACOCK LANDING ALEXANDRIA VA 22303
Seller agrees to provide \$5000 of free options to the purchaser. These include
all standard features stated in brochure. Plus fireplace in Basement, Bay window
in kitchen and new wall in dining room. Heat pump, Jetted tub in Master Bath and
Hall Bath, Laundry tub, Window blind, Skylight 2'x4' in Master Bath, R.R. Plum
in Basement, Central Vacuum System, Josselyn Cattle press as shown
in attached addendum. This contract is contingent upon sale of purchaser's
home (see attached addendum)

1. PURCHASE PRICE. The purchase price payable for the Property is the sum of TWO HUNDRED NINETY-SIX
THOUSAND FIVE HUNDRED EIGHTY Dollars (\$296,580) which is payable as follows:

- (a) \$5,000 being an earnest money deposit, the receipt of which is hereby acknowledged by Seller; and
- (b) \$10,000 representing the proceeds of a loan to be made to Purchaser by the mortgage lender; and
- (c) \$191,580 being the balance of the purchase price, payable by Purchaser by certified or cashier's check at settlement as hereinafter provided. CONF. 30 YR.

2. MORTGAGE LOAN. (a) Purchaser, at its own expense, is to negotiate, procure and place a loan commitment secured by a First Deed of Trust on the house and
lot in the sum of ONE HUNDRED THOUSAND Dollars (\$100,000) bearing interest at the rate of
10 % per annum, or at the prevailing rate at the time of settlement hereunder. Purchaser shall make diligent, truthful and proper application therefor within five (5)
days from the date of notification by the Seller, with such lending agencies or institutions as shall be designated or approved by the Seller, the proceeds of which First Trust
loan are to be applied toward payment of the aforesaid purchase price.

(b) It is expressly agreed that in the event the Purchaser is unable to obtain the First Trust loan referred to above from the lending agency or institution named or
approved by Seller, or if a loan is committed by such lending agency or institution but the Lender shall thereafter refuse to consummate the loan by reason of
non-performance of any conditions of such commitment within the period of time prescribed for such performance under the provisions of the commitment, or if said Lender
refuses to consummate and make the loan for any other reason either before or after commitment is issued, the Seller shall have the right at its option to cancel and
terminate this agreement and refund to the Purchaser the deposit hereinbefore mentioned; or, at the Seller's option, the Purchaser shall have the privilege of obtaining the
First Trust loan from other sources, if the lending agency or institution named or approved by Seller refuses to make such loan. In no event shall Seller have any obligations
or liabilities to Purchaser on account of the Lender's refusal to make such loan, for any reason whatsoever, other than the obligation of refunding to Purchaser the deposit
made by him. Seller to pay up to 2.5 loan discount points on specified loan amount.

3. THE DWELLING. (a) Seller has erected or will erect upon the said lot a LEE-2 Model dwelling substantially in accordance
with plans and specifications, together with amendments thereto, on file with the County of _____ (the "Plans"). Seller shall have the right to
substitute materials, fixtures, equipment and appliances of substantially equal quality as those specified in the Plans. Seller further reserves the right (but shall not be
obligated) to make changes in construction as may be required from time to time by Purchaser's mortgage lender, the Federal Housing Administration, the Veterans
Administration, or any other governmental authority having jurisdiction over the Property, or as may be otherwise required by material shortages, work stoppages or
emergencies.

(b) Seller shall complete construction of the dwelling on or before NOVEMBER (the "Completion Date"); provided, however, that if Seller shall be
delayed at any time in the progress of construction by Acts of God, labor disputes, Seller's inability to obtain material and/or labor, inclement weather, and any other causes
beyond the reasonable or practical control of Seller, then the Completion Date shall be extended for a number of days equal to the period of any such delay. Seller undertakes
and agrees to complete construction of the dwelling within a period of one (1) year after the date of this Contract, notwithstanding any longer period which may otherwise be
provided for under this agreement.

(c) Purchaser shall have the right to select the dwelling's decorating colors from among color samples to be provided by Seller in accordance with the policy applicable
thereto prescribed by Seller. In the event the Purchaser shall fail to exercise the said right of selection within ten (10) days after receipt of notice from Seller, then Seller shall
have the right to decorate the interior of the dwelling as Seller may determine.

(d) No alterations, changes or additions shall be made in the construction of the dwelling nor shall any extra work be performed or materials added by Seller unless
approved by a duly authorized agent of Seller in writing and payment is made for such changes at the time requested by Purchaser. It is understood that Purchaser is
purchasing a completed dwelling, and that Seller is not acting as a contractor for Purchaser in the construction of the dwelling and that Purchaser shall acquire no right, title
or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Contract upon its completion. Equitable title shall remain
vested in Seller until delivery of deed.

4. THE SETTLEMENT. (a) Settlement shall occur at such time as designated by the Seller by notice to the Purchaser that the dwelling is ready for occupancy,
which shall be evidenced by the issuance of a temporary or permanent Residential Use Permit by the County of FAIRFAX. On Settlement date,
Purchaser shall pay to Seller by certified or cashier's check the unpaid balance of the purchase price provided for in Section 1 herein and all other sums payable to Seller
hereunder, and Seller shall deliver to Purchaser a General Warranty Deed, duly executed by Seller, conveying to Purchaser title to the Property.

(b) Settlement shall be held at the offices of STAN & BUCK. Deposit with said office of the cash payment as
aforesaid, the deed of conveyance and such other papers as are required by the terms of this Contract shall be deemed and construed as a good and sufficient tender of
performance of the terms hereof. THE PURCHASER HAS THE RIGHT TO SELECT THE SETTLEMENT ATTORNEY OR TITLE COMPANY FOR SETTLEMENT.

5. AGENT. (a) Seller hereby recognizes 3/4 TO COLDWELL BANKER, ALEX VA BARBARA C. M.
as the Agent(s) responsible for this transaction, and the Seller agrees to pay said Agent(s) a sales commission at settlement as follows: AND
BUILDERS MARKETING INC. BY SEPARATE AGREEMENT

The Purchaser acknowledges that he has read and understands the terms and conditions set forth in Paragraphs 1 through 18
hereof, on the face and reverse of this form, and that he and Seller are bound by the terms hereof.

DATE: 3/1/86 W. Lowry Mann III (Purchaser)

DATE: March 1, 1986 Barbara C. Mann (Purchaser)

Daurie Schmitt (B) Appl. Hilly Corp (Seller)

BY: Chris Smith President 3/20/86

(b) Purchaser acknowledges and agrees that he understands that, while the Agent may have advised and consulted with the Seller, its architects and its contractors concerning the design, construction and development of the house, the Agent does not accept, nor will Purchaser attempt in any manner to charge the Agent with, any liability or responsibility whatsoever for said design, or the construction and/or development of the house, or any defaults in performance by the Seller, the architects and/or the contractor.

(c) Further, Purchaser recognizes that the Agent receives all information as to probable delivery dates from the Seller and that in this regard the Agent is merely acting as a conduit of information and not in any respect as the Agent of the Seller. The Agent shall not be responsible in any manner whatsoever to Purchaser for failure or inability of the Seller to meet projected delivery dates. It is agreed that Purchaser shall look solely to the Seller in this regard.

6. RISK OF LOSS. Seller assumes the risk of loss or damage to said property by fire or other casualty until the date of settlement under this Agreement.

7. TITLE. The Property shall be sold free of encumbrance, except as aforesaid. Title to settlement is to be good of record and fully insurable by a title insurance company at regular rates, subject, however, to covenants, easements, rights-of-way, conditions and restrictions of record and such restrictions as are specifically set forth herein, and any other easements which may be observed by an inspection of the Property. Otherwise, the deposit is to be returned and this Agreement declared null and void at the option of the Purchaser, unless the defects are of such character that they may be remedied by Seller, if it elects to do so. The Seller and its Agents are hereby expressly released from all liability for damages by reason of any defect in the title. In case legal steps are necessary to perfect the title, such action, if Seller elects to undertake same, must be taken promptly beyond at the Seller's expense, whereupon the time herein specified for full settlement by the Purchaser will be extended for the period necessary for such action, but not to exceed 12 additional months. The premises are sold subject to easements, if any, created or to be created, prior to or after settlement in favor of utility companies, municipal authorities, or equal governmental authorities for the installation of utilities or streetlights and/or additional covenants, restrictions or easements which may be placed on record by the Seller after execution hereof for the benefit of the Property and/or the community of which it is a part. This Agreement shall be subordinate to any such easements, rights-of-way, covenants, and

8. SETTLEMENT COSTS. It is agreed that the costs and fees incident to settlement shall be paid as follows (unless specified otherwise herein):

(a) Rents, taxes, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of transfer. Taxes, general and special, are to be adjusted according to certificate of taxes, except that assessments for improvements completed prior to the date hereof, whether assessment therefor has been levied or not, shall be paid by Seller, or allowance made therefor at the time of transfer.

(b) The Purchaser agrees to pay the following costs at settlement: examination of title, all title insurance premiums, all mortgage insurance premiums, if any, and survey fee, loan placement fees, and any other fees assessed by lender, this insurance binder, closing and settlement fees, notary fees, conveyancing fees, preparation of papers, county and state transfer taxes, all recording charges, including those for Purchase Money Trust, if any, preparation of trust and note, and insurance and tax escrows.

(c) The Seller agrees to pay the following costs at settlement: charges for preparation of deed and Virginia State Grantor's Tax, if applicable.

9. OCCUPANCY. (a) Occupancy hereunder shall be given to Purchaser immediately after settlement. However, if, at the Seller's discretion, the Purchaser shall accept occupancy of his completed dwelling prior to the conveyance of such unit in fee simple to the Purchaser, the Purchaser shall execute the Seller's Standard Occupancy Agreement and shall continue to be subject to the terms hereof as if Purchaser did not occupy such dwelling unit.

(b) Notwithstanding the Purchaser's right of occupancy as aforesaid, the Seller shall have the right to enter upon property of the Purchaser at any time after settlement for the purpose of making exterior changes to the lot and improvements thereon, including grading changes and the removal of trees, as may be required by Seller's site plan, or any modification thereof, or any changes which may be required as a condition of Seller's release by applicable governmental authorities from any and all subdivision or site plan bonds or other escrows.

10. UNSOLD UNITS: Until such time as all of the dwelling units in Seller's subdivision are sold, the Seller reserves the right to make such use of unsold dwelling units, the common elements, street and the main entrance of the project, as are necessary for its sales and construction program. Purchaser recognizes and acknowledges his understanding that in order to accomplish Seller's construction program, trucks, construction equipment and personnel and noise and other inconveniences attendant thereto may be present. Purchaser agrees not to obstruct or impede any such construction or sales activities.

11. ACCESS. The Purchaser may not have access or entry to the dwelling unit or the construction site during construction, nor may he store any of his possessions in or about the dwelling unit or the construction site prior to the settlement of this Agreement and delivery of possession to the Purchaser hereunder. Any violation of this provision may, at the election of the Seller, be considered a material breach of this Agreement and, in addition to any other remedies available to Seller, Seller may declare this Agreement void and, in such event, any amount paid toward the purchase price may be retained by Seller as fixed and liquidated damages.

12. TREES AND LOCATION. The location, area, and ground elevation of the building on the lot, elevation of dwelling unit, and the reversing of the plan, if necessary, to conform to the existing lot contours, are to be determined by the Seller at its sole discretion. Seller shall remove such trees from the lot as it may deem necessary and it shall not be responsible for any damage to or destruction of remaining trees during the process of construction. Seller shall be responsible only for trees planted by him. Seller's obligations to replace trees, shrubbery and other landscaping, as well as all of Seller's other repair and warranty obligations, shall be limited solely to the warranties set forth in the Builder's Limited Warranty mentioned in paragraph 14 below.

13. MODELS AND DISPLAYS. It is hereby agreed that all furniture and appurtenant property, special household appliances, furnishings, special fixtures, special carpeting and floor tile, special wallpaper, window decorating treatments, special trees, shrubbery, landscaping, special decks and patios, certain rooms, special fireplaces and other features and recreational facilities exhibited in the model units and model area are for exhibition purposes only and are not included in the purchase price, unless otherwise expressly provided herein.

14. WARRANTIES. Purchaser hereby waives any and all warranty rights provided by Section 55-70.1 of the Code of Virginia. Unless specified otherwise herein, all warranties other than those expressly provided in the Builder's Limited Warranty are hereby excluded. Purchaser has been afforded the opportunity to review this warranty prior to execution of this Agreement, and agrees to accept this warranty as the sole warranty being given by the Seller to the Purchaser. Purchaser and Seller shall inspect the house and lot before settlement and note in the Pre-Settlement Inspection Report any incomplete work or defects. Thereafter, Purchaser agrees that Seller shall not be liable for any patent incomplete work or defects not specifically noted in said Pre-Settlement Inspection Report, unless otherwise specifically provided in the Builder's Limited Warranty. It is further agreed that there shall be no withholding of Seller's funds at Settlement for any such items.

THE SELLER MAKES NO OTHER WARRANTIES, EXPRESSED OR IMPLIED, OR IMPLIED BY STATUTE, TO THE PURCHASER.

15. DEFAULT BY EITHER PARTY. (a) In the event that this Contract is not performed by Purchaser in accordance with its terms and provisions, this Contract may be terminated by Seller and upon such termination Seller shall have the right to retain all amounts paid by Purchaser hereunder as liquidated damages. It is acknowledged and agreed by Seller and Purchaser that the aforesaid liquidated damages are not a penalty, but represent actual damages which Seller will sustain upon any default by Purchaser, which damages will be substantial but are not capable of precise determination.

(b) In the event that this Contract is not performed by Seller in accordance with its terms and provisions, Seller being in default and Purchaser not being in default hereunder, Purchaser may, as Purchaser's sole and exclusive remedy hereunder, terminate this contract by giving prompt written notice thereof to Seller, and Seller, upon receipt of such notice, shall forthwith return to Purchaser all sums theretofore paid by Purchaser to Seller hereunder, such sums being agreed upon as liquidated damages as a result of Seller's default because of the difficulty and uncertainty of ascertaining actual damages. No other damages, rights or remedies (whether or not Purchaser shall elect to terminate this Contract) shall in any case be collectible, enforceable or available to Purchaser, and Purchaser agrees to accept and take said cash payment as Purchaser's total damages and relief hereunder in such event.

16. DISCLOSURE. (a) When applicable, the Purchaser by execution hereof acknowledges receipt, prior to the execution of this Agreement, of a completed copy of the Disclosure Bill of Particulars for New Home Buyers, as required by Section 10-8-3, Chapter 10 of the 1978 Code of the County of Fairfax, Virginia, as amended.

(b) Purchaser acknowledges that he has had the opportunity, prior to the execution of this Agreement, to examine manufacturers' warranties on appliances and equipment included in the home.

17. HOME OWNERS ASSOCIATION. In the event there is a Homeowner's Association, then Purchaser acknowledges receipt, prior to execution of this Agreement, of copies of the Homeowner's Association by-laws and related documents. Purchaser agrees to be bound by the regulations, by-laws and declarations of the Association and agrees to pay the assessments established by such Association.

18. MISCELLANEOUS. (a) The principals to the Agreement mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns, provided, however, that the Purchaser shall have no right to assign this Agreement without the prior written consent of the Seller.

(b) The terms and provisions of this Agreement shall survive the Settlement hereunder.

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

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

(e) This Agreement contains the final and entire agreement between the parties hereto, and they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained.

MEMORANDUM OF LIS PENDENS

Title of Cause of Action: W. Lowry Mann III and Barbara C. Mann
v.
Addicott Hills Corporation
In Chancery No. 101273

General Object: Declaratory Judgment, specific performance requiring Addicott Hills Corp. to convey Lot 11, UNION FARM SUBDIVISION, also known as 9105 Peartree Landing, to W. Lowry Mann III and Barbara C. Mann and for money damages.

Court Where Action is Pending: Circuit Court of Fairfax County, Virginia

Amount of Claim: Specific performance requiring Addicott Hills Corporation to convey Lot 11, UNION FARM SUBDIVISION to W. Lowry Mann III and Barbara C. Mann and \$100,000.00 damages and \$200,000.00 punitive damages.

Description of Property Affected: Lot 11, UNION FARM SUBDIVISION as the same appears and is duly dedicated in a Deed of Subdivision recorded at Deed Book 6445 at page 843 of the land records of Fairfax County, Virginia. Also known as 9105 Peartree Landing, Alexandria, (Fairfax County) Virginia.

Name of Person whose Estate Is Intended to Be Affected: Addicott Hills Corporation, a Virginia corporation.

Witness the signatures of W. Lowry Mann III and Barbara C. Mann by Jose E. Aunon, Counsel this _____ day of _____ 1987.

W. Lowry Mann III

Barbara C. Mann

by _____
Jose E. Aunon

Commonwealth of Virginia
County of Fairfax

Sworn, subscribed and acknowledged before me this _____ day of April 1987.

"C"

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

W. LOWRY MANN III

and

BARBARA C. MANN

Complainants

vs.

IN CHANCERY NO. 101273

ADDICOTT HILLS CORPORATION

Serve: Registered Agent

CRAIG E. BUCK
4304 Evergreen Lane
Annandale, Virginia 22003

Defendant

BILL OF COMPLAINT

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

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

Lot 11, UNION FARM SUBDIVISION also known as 9105 Peaktree Landing, Alexandria, Virginia 22309, and on that day entered into a written agreement with your Complainants for the sale of the same which said agreement was signed by all the parties hereto and delivered to your Complainant.

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

"D"

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

- A. \$5,000.00 delivered to the Defendant on March 1, 1986.
- B. \$100,000.00 from the proceeds of a 30 year conventional loan to be obtained by purchasers.
- C. \$191,580.00 cash at settlement.

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

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

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

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

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

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

Count II

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

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

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

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

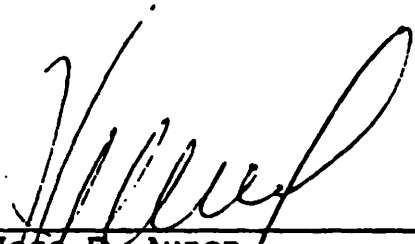
10. That as a result of the Defendant's actions, your Complainants have and will continue to expend substantial legal fees and have suffered and will continue to suffer mental anguish and distress.

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

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

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

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

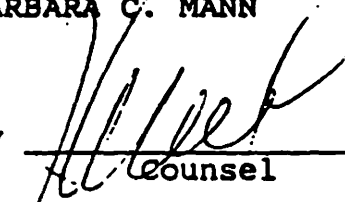


Jose E. Aunon
9701 Main St.
Fairfax, Virginia 22031
Counsel for Complainant
Telephone 703-323-1700

W. LOWRY MANN III

BARBARA C. MANN

by



Counsel

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5. Defendant admits that the plaintiffs and defendant entered into a New Home Sales Agreement with written addenda (the "Contract"), and refers the Court to the Contract for its true and correct terms and denies all allegations in Paragraph 5 inconsistent with those terms and denies all other allegations set forth in Paragraph 5.

6. Denied.

7. Denied.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 8 and therefore denies the same.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 9 and therefore denies the same.

10. Defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 10 and therefore denies the same.

11. Denied

12. Denied.

13. Defendant admits that Exhibit "D" is a copy of a Bill of Complaint filed by Mr. and Mrs. Mann against Addicott Hills in the Circuit Court of Fairfax County, Virginia and denies all other allegations set forth in Paragraph 13.

14. Denied.

15. Denied

COUNT I - BREACH OF CONTRACT

16. Defendant incorporates as if fully set forth herein its answers to Paragraphs 1 through 15 of plaintiffs' motion for judgment.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Defendant admits that it is in possession of Plaintiffs' earnest money deposit and option payment, affirmatively states has attempted to return the earnest money deposit and option payment and denies all other allegations set forth in Paragraph 21.

COUNT II - FRAUD

22. Defendant incorporates as if fully set forth herein its answers to Paragraphs 1 through 15 of plaintiffs' motion for judgement.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

27. Denied.

COUNT III - OUTRAGEOUS CONDUCT

28 - 35. Paragraphs 28 - 35 are stricken by this Court's Order sustaining the defendant's demurrer to Count III.

36. Defendant denies all other allegations contained in plaintiffs' motion for judgement other than those which it has expressly admitted.

AFFIRMATIVE DEFENSES

1. Plaintiffs have waived any claim for damages or liability against the Defendant by the terms of the Contract.
2. Plaintiffs failed to exercise one of the remedies set forth in the Contract.
3. Plaintiffs are in first breach of the Contract and, therefore, are not entitled to the relief sought.
4. Plaintiffs are estopped from making a contract claim under the Contract by its terms.
5. Plaintiffs have failed to state a claim upon which a claim can be granted.
6. Defendant is not in breach of the Contract.
7. The causes of action set forth in the motion for judgement are not ripe for adjudication.
8. Plaintiffs agreed to the election of remedies set forth in Paragraph 15 of the Contract and, therefore, remedies other than those set forth in the Contract are barred.
9. Plaintiffs have waived any claim of fraud by ratifying the Contract after they had actual knowledge of the lis pendens and/or the Chancery action filed by the Manns on the subject Property.
10. Lis Pendens is public notice and, therefore, full disclosure of this title defect on the Property was a matter of public record at the time it was filed.
11. The Manns' Chancery suit is public record and, therefore, full disclosure of this title defect on the Property was a matter of public record at the time it was filed.

12. The Manns' lis pendens and Chancery suit was filed after the Contract was entered into; therefore, there is no misrepresentation relating to title which can be alleged as an inducement for Plaintiffs to enter into the Contract.

13. The cause of action is not ripe for adjudication as the Defendant promptly and diligently took the necessary legal steps to attempt to perfect title to the Property and continued to do so during the remainder of the 12 month period in accordance with Paragraph 7 of the Contract. The Defendant was successful in its defense on the merits of the Manns' Chancery action. Judge Stevens found in his decision in the Mann case that the contract with the Manns was properly terminated as a result of the Manns' breach of contract.

14. Plaintiffs have expressly released the Defendant and its agents from all liability for damages by reason of any defect in title.

15. Plaintiffs were not damaged.

16. Defendant was excused from a May 1987 Completion Date due to causes beyond its reasonable or practical control.

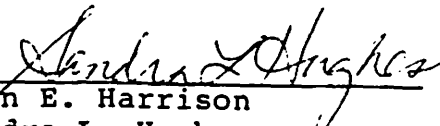
17. Defendant was excused from settling on the Contract until the title defect(s) were cleared up, provided such title defect(s) were cleared up within a twelve (12) month period.

18. There was no misrepresentation.

19. There was no reliance by plaintiffs on the defendant's representations and/or any such reliance was not reasonable.

Respectfully submitted,

ADDICOTT HILLS CORPORATION
By Counsel


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CERTIFICATE

I hereby certify that a true copy of the foregoing was mailed, first-class, postage prepaid to the offices of Glenn H. Silver, Esq., 4165 Chain Bridge Road, P.O. Box 460, Fairfax, Virginia 22030 on this 14 day of April, 1988.


Sandra L. Hughes

1 Q Okay, and you were able to put up with the
2 circumstances you were living under for that period.

3 A For that period, yes, we were able to because your
4 mind is adjusted to that and your mind is not set that, okay,
5 within a few months -- we were able to do it because our
6 attitude had to change. You know, people are flexible to
7 a degree that we knew what the circumstances were, we knew
8 when our house was going to be ready. We were not living
9 from day to day waiting for someone to say, yes, your house
10 is coming along just fine.

11 Q Okay, so if they had told you exactly when they
12 could deliver the house to you, then it would have been
13 all right at Union Farm?

14 A It would have been preferable. At that time I
15 might have said, I don't want to wait that long, I don't
16 know what I would have said. It's unfair of you to ask me
17 a question like that.

18 Q It is?

19 A Yes, I think it is.

20 Q Why is it unfair?

21 MR. SILVER: Oh, come on, John.

22 THE WITNESS: You know why it's unfair, I don't
23 even have to tell you and I don't like being badgered, John,



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1 come on.

2 BY MR. HARRISON:

3 Q I'm sorry if you feel I am badgering you.

4 A Yes, I do at times. Because your attitude changes,
5 people change, your thoughts change and you know that you,
6 too, or anybody would be influenced by what was happening
7 to them.

8 If you were told that something would be a matter
9 of months, then you would be psyched up for that and I don't
10 know what I would have said if he had told us. But he still
11 doesn't have a clear title, so there is no way he could have
12 told us when that house was going to be ready for delivery.

13 Q That's right, there is no way.

14 A That's right, so if he had said two years -- but
15 that's because of what he is doing. It's not because --
16 it is in his control, he can settle with the Manns, he can
17 do whatever he wants to get the lease pendence off.

18 Q His title is within his control, he can settle
19 with the Manns.

20 A Yes, he can do whatever he wants to.

21 Q Do you know that your attorney represents the
22 Manns in their appeal?

23 A Yes, I found out. You told me yesterday, I think I



1 knew it before.

2 Q You knew it before.

3 A Yes.

4 Q You say you found out yesterday, or did you know
5 it before?

6 A I heard it again yesterday.

7 Q You heard it again yesterday, all right.

8 A I don't know if he is representing them or if
9 he is assisting.

10 Q Is there a difference in your mind?

11 A Yes.

12 Q All right. Have we talked about every communication
13 you have had with Daurie Schwab at this point?

14 A Probably. She called me afterwards. I never
15 returned her call because I felt there was nothing to say
16 to her.

17 Q Okay. She called you after the meeting?

18 A After the meeting. I felt there was nothing
19 more I wanted to say to her.

20 Q So you did not return her calls from that point
21 on.

22 A That's right. I don't have anything to say to her
23 ever again.



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1 Q Okay.

2 Now, in paragraph 12 it states, "At the time of
3 contracting with the Plaintiffs herein the Defendants knew
4 that the Manns intended to purchase the subject property and
5 had in fact threatened the institution of legal proceedings
6 to compel the Defendant to specifically perform."

7 A No, that's not true.

8 MR. SILVER: That's your motion for judgment.

9 MR. HARRISON: That's your motion for judgment.

10 THE WITNESS: Wait a minute, at the time of
11 contracting with the Plaintiffs -- who are the Plaintiffs?
12 Oh, we are the Plaintiffs. Oh, got to get that straight
13 before I answer.

14 Oh, yes, okay, I had that mixed up.

15 BY MR. HARRISON:

16 Q Okay, that happens sometimes, that's all right.

17 A I'm sorry, thank you for clarifying that.

18 Q So you think that the Plaintiffs knew that the
19 Manns intended to purchase the property.

20 A Yes.

21 Q What makes you think that?

22 A Well, they had contracted for it, so I assume they
23 intended to purchase it.



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1 Q Okay, and you know that, prior to the time that you
2 purchased the house, a letter terminating that contract had
3 been delivered to the Manns.

4 A No, didn't even know the Manns existed at the time
5 of contract.

6 Q You were not told that the house had been sold
7 to somebody else and you had to buy a bay window because
8 they had already bought it?

9 A Yes, we were at that time, yes, sir.

10 Q Yes, you were, okay.

11 A That was after the contract.

12 Q No, that was at the contract because you had to
13 pay that price, remember, \$1,700?

14 A Okay, that's right, I beg your pardon, okay.
15 I guess I didn't know the name of the people.

16 Q All right, you may or may not have --

17 MR. SILVER: Or the circumstances.

18 THE WITNESS: No, certainly didn't know the
19 circumstances.

20 BY MR. HARRISON:

21 Q Okay, but you did know the house had been sold to
22 someone else and there had been a contract on it.

23 A The house had been sold before, yes, okay.



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1 Q All right, they didn't keep that from you.

2 A No.

3 Q Did you ask any questions?

4 A No, actually it did not occur to me to ask any
5 questions about that. Their implication was that the house
6 was -- that there was not a contract on the house at the
7 time that we bought it.

8 Q They indicated to you that the prior contract had
9 been terminated, right?

10 A Yes, that it would be -- there would be no problem
11 with ours.

12 Q Did you understand that that is exactly what the
13 judge found, that the prior contract had been properly
14 terminated?

15 A I don't know what the judge thought.

16 Q Okay, now --

17 MR. SILVER: We will stipulate as to what the
18 judge's letter says.

19 MR. HARRISON: That's fine.

20 BY MR. HARRISON:

21 Q Now, in paragraph 20 of your Bill of Complaint you
22 say, "As a result of the said breach of contract the Plaintiffs
23 have been compelled to contract for another house at a cost



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1 people say it's going to be ready for delivery, you feel
2 it's going to be ready for delivery and move in.

3 Q I'm just trying to establish that what you were
4 relying on is what the contract says, not what any individual
5 told you.

6 A Well, they did not specifically say they would not
7 have a clear title either.

8 Q Okay, so actually there was no comment about
9 title, isn't that correct?

10 A That's right.

11 Q Okay. Now, you say that the Defendants -- I say
12 "you", obviously your attorney wrote this. "The Defendant
13 deliberately concealed the true state of facts", page 4.
14 Now, the Defendant did not conceal the Public Notice, right?
15 What you are saying is that they didn't tell you, not that
16 they really concealed something, but they concealed it by
17 not telling you, right?

18 A If that's how you want to define concealing.

19 Q No, I'm not trying to do that. What this says --
20 we will go it the other way, then, the Defendant deliberately
21 concealed. What did they do to deliberately conceal the
22 true state of facts?

23 MR. SILVER: I think she has already testified to



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1 Q Okay, and we've talked about all the ways that you
2 know of that they did not act in good faith, right?

3 A As I can recall at the moment, yes. I think there's
4 enough there even if there weren't anything else.

5 Q Now, you say in Paragraph 30, again your lawyer
6 says it, "The Defendant on this occasion and on others
7 willfully entered into multiple contracts for the same
8 property and has entered upon a deliberate course of reckless
9 and deceitful conduct for the purpose of maximizing its
10 profits with a total disregard for the rights of these
11 Plaintiffs and others."

12 Now, I would like you to identify all the others
13 you are talking about.

14 A Well, I guess you can start with the Manns on this
15 one.

16 Q All right, and the Court found that the Manns lost,
17 right?

18 MR. SILVER: Well, that's on appeal so you can't
19 really say that. The Circuit Court did, I agree with you,
20 but that doesn't mean that that's going to hold.

21 MR. HARRISON: I'll take bet on that, but that's
22 all right.

23 THE WITNESS: He has many cases, you know -- okay,



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1 either.

2 MR. HARRISON: I understand what it doesn't say,
3 does it --

4 MR. SILVER: The letter speaks for itself and you're
5 going to have other testimony -- or you're probably going to
6 have to have other testimony as to what went on on that
7 occurrence. It's part of settlement negotiations.

8 MR. HARRISON: Are you planning on testifying?

9 MR. SILVER: If you're planning on testifying
10 we may have to testify, too. It's a double-edged sword,
11 if that's what you are talking about.

12 MR. HARRISON: I'm not planning on testifying,
13 you are planning on testifying.

14 MR. SILVER: You're not going to get that letter
15 in evidence, either, without testifying.

16 MR. HARRISON: You don't think so?

17 MR. SILVER: No.

18 MR. HARRISON: I think it will.

19 BY MR. HARRISON:

20 Q Does that letter have any conditions in it as
21 far as you can see?

22 A No.

23 Q Now, you say, "The Defendant during this time has



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1 Q. Did you understand that that prospective
2 buyer lost the court case?

3 A. I understood that he lost it and then
4 appealed it.

5 Q. Lost it at the trial level?

6 A. Yes, or whatever.

7 Q. Now, did you authorize your attorney or
8 instruct your attorney to assist -- he's going to make an
9 objection -- to assist in the appeal that was filed by the
10 Manns, which were the people that placed the lis pendens on
11 the property?

12 MR. SILVER: I object to the question as to
13 attorney-client privilege. Don't answer it.

14 BY MR. HARRISON:

15 Q. Are you going to follow your attorney's
16 instructions?

17 A. Yes, sir.

18 Q. Now, with respect to -- strike that.

19 Are you aware who the Manns' attorneys are?

20 A. Who the Manns' attorneys are?

21 Q. Yes, sir.

22 A. I remember it was a name like Arabic.

23 Q. How about Jose Aunon?



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1 A. Yes, okay.

2 Q. A-u-n-o-n.

3 A. Yes, I am aware of him.

4 Q. Are you aware that Mr. Silver has entered an
5 appearance?

6 MR. SILVER: Objection. Now go ahead and
7 answer that.

8 MR. HARRISON: No, you can't claim that one I
9 don't think.

10 BY MR. HARRISON:

11 Q. Are you aware that Mr. Silver has entered an
12 appearance?

13 A. Mr. Silver told me that he was assisting with
14 an appeal. That's the only thing I know about it.

15 Q. Are you aware that Mr. Silver entered an
16 appearance and made a motion to reconsider that was denied
17 by the judge?

18 Let me try that again.

19 At the conclusion of the trial after the
20 judge issued a decision, after that decision had been
21 issued, after that decision on behalf of the Manns, are you
22 aware that Mr. Silver assisted in filing a motion to
23 reconsider and, in fact, argued that motion for the Manns



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1 for the judge to reconsider and change his mind about the
2 trial?

3 A. I don't recall that.

4 Q. Now, do you understand that the reason that
5 Mr. Bernstein's company, Addicott Hills, could not tender
6 title on the date, place, and time of settlement was the
7 lis pendens filed by the Manns?

8 MR. SILVER: Well, I going to object. It
9 calls for a legal conclusion.

10 MR. HARRISON: What he understands.

11 THE WITNESS: I understand he couldn't-
12 deliver a clear title because of the lien on the property
13 which matched the contract.

14 BY MR. HARRISON:

15 Q. Are you aware of the fact that the appeal is
16 precisely what is continuing that lien in existence?

17 MR. SILVER: Again it calls for a legal
18 conclusion.

19 BY MR. HARRISON:

20 Q. Do you understand that that is the case,
21 that, but for the appeal, the lis pendens would have been
22 stricken from the land records?

23 A. I don't know that. I mean, I -- all I know



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1 is that as long as the lis pendens is there, he cannot
2 deliver a clear title. If it is the appeal holding it up,
3 that's -- I don't -- I am not -- I don't know how the
4 mechanics work.

5 Q. You are aware that the Manns lost their case
6 at the trial level?

7 A. Yes.

8 Q. And do you understand that that being the
9 case, that but for the appeal, the lis pendens would be
10 stricken from the records, removed from the land
11 records?

12 A. I don't know that. I mean, I --

13 Q. Do you understand that your attorney, Mr.
14 Silver, on behalf of the Manns, is working to continue the
15 lien in place?

16 MR. SILVER: Objection. That is a legal
17 conclusion. It is not an accurate statement of the law or
18 of the facts.

19 If you can answer it, go ahead, but I am not
20 sure --

21 THE WITNESS: I guess I am not --

22 BY MR. HARRISON:

23 Q. Are you aware that your attorney is



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1 representing the Manns on the appeal?

2 A. Yes.

3 Q. Are you aware that, or do you understand that
4 the object of that appeal is to transfer the property to
5 the Manns, to require Addicott Hills to sell the property
6 to the Manns?

7 A. As I understand it, the Manns' suit is for
8 specific performance --

9 Q. Yes.

10 A. -- which is for the property. And I guess
11 that is what has been decided. And then they are now
12 appealing the decision.

13 MR. SILVER: For the property? It is also
14 for damages.

15 MR. HARRISON: I would like this marked as
16 Defendant's No. 3, please.

17 (The document referred to
18 above was marked Snellings
19 Deposition Exhibit No. 3
20 for identification.)

21 BY MR. HARRISON:

22 Q. I pass you a document that has previously
23 been marked as Defendant's No. 3 and ask if you have seen
that before, sir?



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1 A. No, I have not seen that before.

2 Q. Are you aware that the Clerk of the Court--
3 that it was brought to the attention of the Clerk of Court
4 by Mr. Silver, that the final decree releasing the lis
5 pendens was inadvertently filed in the land records prior
6 to the appeal period expiring, and that thereafter, the
7 Clerk entered this document of the records, reinstating the
8 lis pendens?

9 A. I am not aware of the land record.

10 Mr. Silver did tell me that the Clerk of the
11 Court or the judge had erred in releasing the lis pendens
12 because that was not something that could be done if there
13 was an appeal, and that there was some appeal time, thirty
14 days or whatever, after the decision, and that the lis
15 pendens would continue for that period.

16 I don't know, once the appeal is filed, what
17 happens to lis pendens.

18 Q. Now, would you tell me, have you ever met the
19 Manns?

20 A. The Manns?

21 Q. Yes.

22 A. No. I don't think so.

23 There was some couple ahead of us. I think



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1 they were the second buyers of the property next door
2 when we met with Mr. Bernstein. I don't recall who they
3 were.

4 Q. Now, is it your understanding that in the
5 purchases of houses that, from time to time, contracts kick
6 out?

7 A. Kick out?

8 Q. In other words, don't go through for one
9 reason or another.

10 A. I know about mortgage applications, and if
11 they are unable to provide the mortgage within the
12 period of time, there is something called a kick-out
13 clause.

14 Q. For example, on your contract, if your wife
15 had not liked the house after she looked at it --

16 A. Yes.

17 Q. -- the contract could have kicked out?

18 A. Yes, sir.

19 Q. So it is your understanding that it is not
20 unusual in the business for there to be one, two, three,
21 four prospective buyers of one house by the time it
22 ultimately goes to settlement?

23 MR. SILVER: What?



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1 Could you ask your client to keep quiet
2 during the deposition, please?

3 MRS. SNELLINGS: I will try. It is very
4 difficult.

5 BY MR. HARRISON:

6 Q. Now, with respect to the -- with respect to
7 this particular contract, when did you start looking for a
8 second property to buy?

9 A. Looked as soon after the meeting with Mr.
10 Bernstein.

11 MR. HARRISON: Mark this as Defendant's No. "
12 4, please.

13 (The document referred to
14 above was marked Snellings
15 Deposition Exhibit No. 4
16 for identification.)

17 BY MR. HARRISON:

18 Q. I pass you the document that has previously
19 been marked as Defendant's Exhibit No. 4 and ask you if you
20 recognize that document?

21 A. Yes, I do.

22 Q. What is it?

23 A. This is a letter from Mr. Bernstein or Carl
Bernstein and Associates to us advising us of the lis



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pendens problem and calling for a meeting.

Q. Is this the letter you discussed earlier that led to the meeting with you and Mr. Bernstein, Sandy Lindsay, and Kelly Dennis?

A. Yes, sir.

Q. Now, in the third paragraph it states, based on legal precedent cited by Mr. Dennis in his letter, we have every reason to believe that another judge would find in our favor, thus removing the lis pendens well before settlement.

Do you recall reading that?

A. Yes, sir.

Q. Was it discussed with you what cases Mr. Dennis was talking about?

A. I recall him referring to a case in Loudoun County which Mr. Bernstein had been involved in that had been -- that the decision of the court had been in Mr. Bernstein's favor.

Q. And you -- did you --

A. I don't know the name of the case at this time.

Q. Did you understand that that case had been appealed?



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1 A. I don't remember that.

2 Q. Have you heard that the decision in that case
3 has come down, and that the trial judge has been sustained
4 in that case?

5 MR. SILVER: Well, that's not an exactly true
6 statement of the law.

7 If you want to ask him the question, say
8 to him that a writ was not granted on a petition for
9 appeal.

10 That does not mean that it was sustained.
11 -- There's no, you know -- the denial --

12 BY MR. HARRISON:

13 Q. Do you understand that the court has
14 denied any appeal in that case, in that first Loudoun
15 case?

16 A. I don't remember that specifically.

17 I had understood that it was a closed issue,
18 that the decision --

19 MR. HARRISON: Just so we don't have any real
20 argument, mark this as the next number.

21 (The document referred to
22 above was marked Snellings
23 Deposition Exhibit No. 5
for identification.)



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1 BY MR. HARRISON:

2 Q. I would like to pass you a document that has
3 previously been marked as Defendant's Exhibit No. 5 and ask
4 if you recognize that document?

5 A. I don't know anything about it, never seen
6 it.

7 Q. Did you hear about the Pregano case as being
8 one of the Loudoun County cases?

9 A. No, I don't recall the name.

10 I did not know there was more than one
11 Loudoun County case, though.

12 Q. You have not been told there is more than one
13 Loudoun County case on the same contract?

14 A. Not that I recall.

15 I think I recall them saying that there had
16 been other similar decisions in Loudoun County, not
17 necessarily involving Mr. Bernstein.

18 Q. And you had not been told then that -- Well,
19 strike that.

20 You have been told that these other decisions
21 were also favorable to the same position?

22 A. Of the ones mentioned, they all have been in
23 favor of the builder himself, the seller.



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MR. HARRISON: No. 6.

(The document referred to above was marked Snellings Deposition Exhibit No. 6 for identification.)

BY MR. HARRISON:

Q. I am going to pass you a document that has previously been marked as Defendant's Exhibit No. 6 and ask you if you recognize that?

A. Yes, sir.

Q. Would you identify it for the record, please?

A. This is a letter addressed to the general counsel of the Pentagon Federal Credit Union, Mr. Isenberg, who was one of the people present during the Bernstein meeting from Mr. Dennis, who was with your -- with Light and Harrison at the time.

Q. Did you get this on or about July 30th, 1987?

A. I don't recall when Steve passed it to me, but not too far after the date.

Q. Do you -- had you purchased your new house as of the time you received this letter or begun negotiating for it?



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1 A. No,

2 That contract was dated August the 11th, I
3 believe, '87.

4 Q. Had you reserved the lot at the time?

5 A. We had a hold on the lot, had put up a
6 thousand dollars in a week, I think, or something. I don't
7 recall the date of that hold.

8 Q. Let me see if I can refresh your
9 recollection.

10 A. I didn't bring those records of the other
11 house with me.

12 (The document referred to above
13 was marked Snellings Deposition
14 Exhibit No. 7 for
15 identification.)

16 BY MR. HARRISON:

17 Q. I pass you another document that has been
18 previously marked as Defendant's Exhibit No. 7, and ask you
19 if you recognize that?

20 Do you recognize Defendant's Exhibit No. 7?

21 A. Yes.

22 Q. And is that the lot-hold agreement?

23 A. That looks like it, the same thing.

Q. Did you negotiate this on the 27th day of
July?



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1 A. I don't really recall.

2 Q. Would your time records indicate anything, or
3 calendar?

4 A. I think -- I think we have a check that we
5 gave them for the thousand. It probably has the date. I
6 have another copy of this, and I don't remember that -- I
7 have no reason to believe it is not the date.

8 Q. Well, this is not signed is the only reason I
9 am --

10 A. Yes, that's why I am not sure.

11 I know that we executed documents similar to
12 this. And it was about a week ahead of the sales agreement
13 because we reserved the lot for a week. And then we
14 executed the sales agreement about a week later.

15 MR. HARRISON: Mark this one as No. 8,
16 please.

17 (The document referred to above
18 was marked Snellings Deposition
19 Exhibit No. 8 for
20 identification.)

21 BY MR. HARRISON:

22 Q. I pass you a document which has previously
23 been marked as Defendant's Exhibit No. 8 and ask you if you
recognize that and if you can tell me what that is?

A. It would be the purchase agreement for the



1 house that we just closed on two weeks ago and moved into
2 in McLean.

3 Q. So you entered into this agreement in August
4 of '87, and you closed on it in May of '88, late May of 88?

5 A. Yes, May 12th, I think, or 11th.

6 Q. Now, when did you begin negotiations on this,
7 if you recall?

8 I have given you the documents that I have,
9 and I am trying to refresh your recollection, not put you
10 in a box, because I don't know myself.

11 A. I don't know exactly because we looked at a
12 lot of properties following the meeting with Mr. Bernstein
13 and took a while to identify.

14 We spent most of the time trying to look
15 in the Mount Vernon area because we wanted to be in Mount
16 Vernon as opposed to McLean because of the commute
17 traffic.

18 So I don't know when the first time we looked
19 at it -- I believe my wife was the first one to see this
20 one, and then later called me in to look at it.

21 But I don't -- I may have it in the other
22 files, but I don't think I keep those kind of -- as to when
23 we went to see it.



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1 Exhibit (c) to the motion for judgment, which is
2 Defendant's Exhibit 11, come from?

3 A. No, sir.

4 Q. Were you aware that a memorandum of lis
5 pendens was -- and, again, I have to ask closing questions
6 -- was going to be filed prior to the time that it was
7 filed?

8 A. A memorandum of lis --

9 Q. Yes.

10 In other words, were you aware that this
11 memorandum was going to be filed prior to the time it
12 actually was filed, filled out, and the remainder of it
13 filed?

14 MR. SILVER: I think he has already answered
15 that. He did not know anything about it until he got Mr.
16 Bernstein's letter.

17 THE WITNESS: No --

18 BY MR. HARRISON:

19 Q. Now, when was the first time you ever heard
20 of Jose Aunon?

21 A. I think Mr. Silver mentioned to me that he
22 was going to be assisting Mr. Aunon in an appeal. That is
23 in this context.



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1 Now, if he -- again, if he is the successor
2 to Mickey Goldman, I have known of the name. I have never
3 met the gentleman.

4 Q. Just parenthetically, Mickey and Jose did
5 share offices at one time.

6 A. Yes, I knew of his name. I did not even know
7 how to spell his name, but I have heard -- I keep wanting
8 to make onion, because we had an attorney Onion for the
9 Pentagon Credit Union some while back.

10 But I was aware of that person's name
11 associated with Mickey.

12 Q. Now, the date of your contract is what?

13 A. The date?

14 Q. Your original contract, Exhibit 2.

15 A. February 11, '87.

16 Q. And the ratification date was 2 March or
17 somewhere in that neighborhood?

18 A. I think the seller signed on March 5th. I
19 believe we had the release date something around the
20 22nd.

21 I think we released, that is subject to
22 inspection by Mrs. Snellings -- and I think we released
23 it the next day. We went one day over that, I believe.



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1 Q. Now, the Plaintiff's -- excuse me--
2 Defendant's Exhibit No. 10 which is a memorandum of lis
3 pendens shows that it was recorded on April 3rd, 1987.

4 Do you have any reason to believe that it was
5 recorded prior to that time, or that --

6 MR. SILVER: We will stipulate that is was
7 recorded on the date that it says.

8 BY MR. HARRISON:

9 Q. Do you have any reason to believe that
10 Addicott Hills had any knowledge that the memorandum of lis
11 pendens was going to be recorded prior to the time it was
12 recorded?

13 A. Yes, but I -- it's hearsay, as far as --

14 Q. Well, what is that knowledge?

15 A. It is my understanding that attorneys for the
16 Manns had advised Bernstein or a representative of the
17 Bernstein company of intent to sue -- I don't know if they
18 said lis pendens was an expected outgrowth of that
19 -- and that that was done prior to February 11, '87.

20 MR. HARRISON: Can we take a short break?
21 Let me read this for just a minute.

22 (Brief interruption.)

23 MR. HARRISON: Excuse me. I am sorry.



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1 Would you repeat just the last sentence?

2 (The Court Reporter complied with the request of
3 counsel.)

4 BY MR. HARRISON:

5 Q. So you understood that Addicott Hills had
6 been informed prior to February 11, 1987, that the Manns
7 intended to sue; is that correct?

8 A. Yes, sir.

9 Q. Have you ever been informed that the Manns
10 intended to file a lis pendens and to sue for specific
11 performance?

12 A. Informed -- I found out about it later after
13 the Bernstein had -- they were suing for specific
14 performance. I do not recall the term lis pendens being
15 used.

16 Q. Now, do you have any reason to believe
17 that Mr. Bernstein or Addicott Hills knew as of February
18 11th that the Manns were going to sue for specific
19 performance?

20 A. I only know the hearsay thing that they were
21 going to sue. What basis, I did not know that.

22 Q. You didn't hear that. Who did you hear the
23 hearsay from?



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1 A. Mr. Silver.

2 Q. Now, in paragraph ten of your motion for
3 judgment, you state, and I quote -- and that is 11, I
4 believe, Exhibit 11 -- you state, the defendant knew that
5 because of the plaintiffs' relocation and the employment of
6 Ronald Snellings as President of the Pentagon Federal
7 Credit Union that it was essential that he and his family
8 be situated in their home at the earliest time so they
9 could immediately begin using said home as a place to carry
10 out social business obligation necessitated by the type of
11 position held by Ronald Snellings.

12 How would the defendant know that?

13 A. I told them.

14 Q. When did you tell them?

15 A. When?

16 Q. Yes, sir.

17 A. At the time I bought the house?

18 Q. Who did you tell?

19 A. Daurie.

20 Q. What did you tell her?

21 A. I told her that we were buying a new house.
22 We usually had a house larger than normal because there was
23 only two of us and we liked large rooms.



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1 field, if you ever call for an expert in that way.

2 So I have out-of-town visitors as well as I
3 am well known in the area.

4 Q. Now, in paragraph fifteen, you state, as a
5 result of defendant's concealment of the true state of
6 facts and its misrepresentation as to facts concerning the
7 settlement on the property, the plaintiffs continued to
8 rely on their belief that they would have settlement on the
9 property as scheduled.

10 First I would like you to tell me what facts
11 have you found out that the defendant concealed from you on
12 the date the contract was entered into?

13 MR. SILVER: I think that refers to
14 thereafter.

15 MR. HARRISON: Okay.

16 THE WITNESS: Well, the Manns' suit, the
17 subject lien, lis pendens, the failure to be able to
18 deliver a title clear as it says in the contract.

19 BY MR. HARRISON:

20 Q. Now, as of the date of the contract, there was
21 no suit by the Manns, right?

22 A. As far as I know.

23 Q. They did not conceal that from you, right?



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1 A. There was a threat to sue.

2 Q. So you are saying they did not tell you that
3 the Manns had threatened to sue?

4 A. On February 11th, no.

5 Q. Now, how many times has one of your companies
6 been threatened with a lawsuit?

7 A. Many times.

8 MR. SILVER: That is irrelevant.

9 BY MR. HARRISON:

10 Q. And how many times has that threat just gone
11 away?

12 MR. SILVER: Objected to as irrelevant.

13 BY MR. HARRISON:

14 Q. You still get to answer.

15 A. A lot of times.

16 Q. It is not unusual, is it, for people to yell
17 suit and then walk away and not sue?

18 MR. SILVER: It is objected on grounds of
19 relevancy, and it is a characterization of what is usual
20 and what is unusual.

21 BY MR. HARRISON:

22 Q. You still get to answer the question.

23 MR. SILVER: If you understand it.



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1 THE WITNESS: If suits have been dropped or
2 not filed, yes, a lot of times.

3 BY MR. HARRISON:

4 Q. Now, again, what I would like to get to, and
5 I am going to do it piece by piece, time by the time. We
6 are talking about the contract.

7 I want to know exactly what facts were
8 concealed from you as of the date of contract?

9 A. As of the date --

10 Q. Yes, sir.

11 A. -- of the contract?

12 Q. Yes, sir.

13 What facts were concealed from you? One we
14 have got so far is that the Manns had threatened to sue.
15 Were there any others?

16 A. I don't know what Bernstein would be able to
17 guess as to the readiness of the property.

18 He had May down when it seems as though he
19 went way beyond that. Whether he knew that or not, I don't
20 know.

21 The threat of the suit, I think, was ongoing.
22 I think the fact that there had been other similar
23 disputes, the fact there had been a contract ahead of that



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1 which he himself supposedly has claimed or vacated
2 unilaterally, whether that is pertinent or not, it would
3 seem to me we should have some knowledge of that if he is
4 expecting any trouble along that line.

5 Those do not seem to be very fair
6 dealings.

7 Q. Now, let me -- Isn't it true that all of that
8 relates to the fact that he has not told you about the
9 dispute with the Manns?

10 A. I think it all relates to, not only the
11 Manns, but if he has had other suits similar to this and
12 vacated other contracts, it would seem as though he has a
13 reputation.

14 Q. Now, how many times has Pentagon Federal
15 Credit Union been sued?

16 MR. SILVER: Objected to, and you do not have
17 to answer that.

18 MR. HARRISON: Are you instructing the
19 witness not to answer it?

20 MR. SILVER: Yes. It is irrelevant.

21 BY MR. HARRISON:

22 Q. Are you following your attorney's
23 instructions?



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1 A. Yes, sir.

2 Q. Does Pentagon Federal Credit Union file the
3 equivalent of a 10K?

4 A. No.

5 MR. SILVER: I am going to object to
6 anything about the Federal -- Pentagon Federal Credit
7 Union and their business and instruct the witness not
8 to answer it. It is totally irrelevant to these
9 proceedings.

10 MR. HARRISON: It is not irrelevant to this
11 witness' ability to judge the actions of others.

12 BY MR. HARRISON:

13 Q. Is it a policy --

14 MR. SILVER: I think it is.

15 BY MR. HARRISON:

16 Q. Is it a policy of Pentagon Federal Credit
17 Union to disclose lawsuits that are filed against the
18 credit union to its customers.

19 MR. SILVER: I object. You do not have to
20 answer it.

21 BY MR. HARRISON:

22 Q. Are you refusing to answer that question?

23 A. Yes, sir.



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1 Q. Do you believe that it is appropriate -- that
2 it is an appropriate policy to disclose lawsuits to all
3 customers.

4 MR. SILVER: Objected to, and you do not have
5 to answer that.

6 MR. HARRISON: I did not ask about Pentagon
7 Federal Credit Union.

8 MR. SILVER: I am sorry. I thought you were.

9 MR. HARRISON: No.

10 I said, do you believe that it is an
11 appropriate policy to require a corporation to disclose all
12 its lawsuits to all its customers.

13 MR. SILVER: It calls for a legal conclusion.

14 If you can answer it, go ahead.

15 MR. HARRISON: I do not think it calls for
16 any conclusion.

17 MR. SILVER: It goes to a question of there
18 are certain laws that would require it, some that do not.
19 And I do not think that he is a position to state one way
20 or the other.

21 He can only talk about in this particular
22 case whether he thought it was something that should have
23 been disclosed to him.



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1 MR. HARRISON: That is fine.

2 MR. SILVER: If you want to ask about this
3 particular case, he can answer that.

4 THE WITNESS: I would think -- and, of
5 course, this is a circumstance that is now after the facts.
6 It is very hard to say what should be done at the time.

7 But it would seem to me as though it was
8 incumbent on Mr. Bernstein or his representatives to cite
9 that there could be a problem in this particular sale.

10 And we should have been alerted to it and not
11 left in the position we now are.

12 BY MR. HARRISON:

13 Q. My first question is, do you think that
14 it is a proper policy for a business to be required or
15 to disclose to all its customers every time it has been
16 sued?

17 MR. SILVER: I would object to the question.
18 It calls for speculation of different circumstances and
19 everything else.

20 I do not think he can answer that question.
21 It is not a fair question.

22 MR. HARRISON: That is fine.

23 MR. SILVER: If you can answer it, go ahead.



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1 THE WITNESS: I can only answer from a CPA
2 position. It is not unusual to see suits listed at the
3 bottom of the financial if they are material. Some are.
4 Some aren't.

5 BY MR. HARRISON:

6 Q. Now, with respect to threats of suit, same
7 question.

8 Is it appropriate as far as your
9 understanding of business ethics to require corporations or
10 should they -- let's take the word require out because that
11 might be a legal conclusion -- but should they disclose
12 every time to all their customers that they have been
13 threatened with a lawsuit?

14 MR. SILVER: I am going to object to the
15 question again on grounds of relevancy and on the grounds
16 if you give specific instances and different circumstances,
17 sometimes they should, sometimes they should not.

18 If you can answer that question, then go
19 ahead.

20 MR. HARRISON: I object to the suggestion of
21 the answer for the witness. I do not mind the objection.
22 I object to the suggestion of his answer.

23 MR. SILVER: I am not sugg. anything to



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1 the witness. I am suggesting what the -- I am telling you
2 what the objection is.

3 MR. HARRISON: No, you were suggesting.

4 MR. SILVER: I do not think so.

5 MR. HARRISON: You were also suggesting an
6 answer to the witness, and I object to that.

7 MR. SILVER: No, I was not suggesting
8 anything.

9 MR. HARRISON: Now, if the witness would
10 answer the question, please.

11 THE WITNESS: I can only repeat that good
12 business ethics to me under the circumstances that this was
13 involved, I would have expected to have been involved, I
14 would expect that if I were the seller, to have so
15 disclosed a possible problem.

16 BY MR. HARRISON:

17 Q. Isn't it true that you do not believe that it
18 is appropriate in all cases to disclose threats of
19 lawsuits, and that it is a judgment call as to whether any
20 individual threat of a lawsuit should be disclosed; isn't
21 that true?

22 MR. SILVER: I am going to object to the
23 question, it calls for speculation on his part as to



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1 certain circumstances and things of that nature.

2 To the extent you can answer it, go ahead.

3 THE WITNESS: I have lost the question on
4 this round.

5 BY MR. HARRISON:

6 Q. Isn't it true -- isn't it true that, with
7 respect to threats of suit, that you believe that it is a
8 judgment call and that in some cases, they should be
9 disclosed and in other cases, they ought not to be
10 disclosed.

11 MR. SILVER: Again, I think he can only talk
12 about this particular situation. That is the ~~only~~ one that
13 has relevance.

14 THE WITNESS: It is very hard to take
15 something in the sort of abstract or subjective. I only
16 look at it that, if would materially affect the
17 transaction, I would think good business practice would
18 suggest a disclosure be made.

19 Idle suits, nuisance-type suits could be a
20 circumstance where you, you know, would not be expected to
21 bear your soul. You are trying to do business in a normal
22 way.

23 BY MR. HARRISON:



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1 Q. Now, you understand that the trial court
2 agreed that Addicott properly terminated its contract with
3 the Manns, right?

4 MR. SILVER: I am going to object to that
5 because it calls for a legal conclusion, that whatever the
6 trial court did is on appeal. And we are waiting for a
7 final decision on that.

8 MR. HARRISON: I understand that you are
9 representing the appeal and you have great hopes for it.
10 However, I disagree as to those hopes.

11 BY MR. HARRISON:

12 Q. You understand that the trial court said that
13 Addicott Hills properly terminated the contract, don't you?
14 Or do you not understand that?

15 A. The part I am not understanding is, if they
16 so agree, why don't they release the lien.

17 Q. Now, that may or may not be the law with
18 respect to whether the lien can be released. And, of
19 course, the case is on appeal.

20 However, do you understand that the trial
21 court agreed that Addicott Hills properly terminated the
22 contract?

23 A. All I understand is that the Manns lost.



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1 That is all I understand. You asked me what I
2 understand.

3 MR. HARRISON: Put this document in the
4 record. Would you make it the next exhibit, please?

5 (The document referred to above
6 was marked Snellings Deposition
7 Exhibit No. 12 for
8 identification.)

9 BY MR. HARRISON:

10 Q. It is Plaintiff's No. 12. Would you take a
11 minute to read it? Defendant's No. 12, excuse me.

12 Have you had a chance to read Judge Stevens'
13 letter?

14 A. Yes, sir.

15 Q. Have you read that before?

16 A. No.

17 Q. Do you understand that Judge Stevens ruled
18 that Addicott Hills properly terminated the contract?

19 MR. SILVER: I think the letter opinion
20 speaks for itself.

21 MR. HARRISON: I am asking him what he
22 understands. I agree the letter opinion speaks for itself.

23 I can ask him what he understands from it.
He may disagree with it. He may not speak English. I
don't know.



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1 I mean, it is theoretically possible, but
2 anyway --

3 THE WITNESS: My understanding is the same.
4 The Manns lost the case. Judge Stevens found in favor of
5 the defendant.

6 BY MR. HARRISON:

7 Q. Do you have any reason to believe that at
8 the time Addicott Hills entered into the contract that
9 they felt in any way that they would not prevail over the
10 Manns?

11 A. I would just guess that they would feel they
12 would be successful. Why else would they be trying to sell
13 the property to me?

14 Q. Do you have any reason to believe that
15 Addicott Hills felt at the time that they sold you the
16 property that they could not deliver the property to you
17 because of anything the Manns could do?

18 A. I don't really know that because I don't know
19 what the threat of suit would mean to --

20 MR. SILVER: Objection.

21 BY MR. HARRISON:

22 Q. Well, see -- but I am trying to ask you what
23 you know, and you may not know that.



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deposits?

A. Do I have any indication?

Q. Yes, sir.

A. It is my understanding that that is what happened in the Loudoun County properties and the Mann property and the house next door and I don't know how many others.

Q. Did he offer you back your deposit?

A. Yes, sir.

Q. As soon as the problem -- at least as far as you know, as soon as that letter came to you and you had the meeting, he offered you your deposit back, right?

A. That is right.

MR. SILVER: Subject to a condition.

BY MR. HARRISON:

Q. And what was that condition?

A. That I release him of all liability.

Q. Sole condition, right?

A. (Nodding head.)

Q. Now, do you have any indication that Mr. Bernstein was engaging in a pattern or practice of keeping deposits or is that just a supposition?

A. Only from the knowledge that I have which is



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1 A. See, I think it is both.

2 I think you have got a breach because you
3 cannot deliver and then you deliberately lied about it.

4 Q. Okay. And the cannot deliver is because the
5 house is not finished, or the cannot deliver is because of
6 the lien?

7 A. Both.

8 Q. Or both?

9 A. If you cannot give me a house that I can go
10 to settlement with, it is whatever stops that.

11 MR. HARRISON: Mark this one as the next
12 exhibit, please.

13 (The document referred to above
14 was marked Snellings Deposition
15 Exhibit No. 13 for
16 identification.)

17 BY MR. HARRISON:

18 Q. I pass you Exhibit No. 13 and ask you if you
19 recognize it?

20 MR. SILVER: Looking at Exhibit No. 13, I
21 think that goes to settlement negotiations. I will object
22 on those grounds.

23 MR. HARRISON: No, I do not believe it goes
to settlement negotiations.

I believe it goes to paragraph seven of the



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1 settlement -- of the contract regarding the tender.

2 MR. SILVER: I think we were going to go
3 -- at the time that this happened, we were negotiating
4 several cases. And I think that is how this came about,
5 and I am going to object to it.

6 MR. HARRISON: I do not think that is the
7 case.

8 MR. SILVER: I do.

9 MR. HARRISON: Well, that is fine.

10 BY MR. HARRISON:

11 Q. This document is not limited in any way,
12 shape, or form.

13 MR. SILVER: I think the discussions that
14 surrounded it were what was going on surrounding the
15 document which is important.

16 BY MR. HARRISON:

17 Q. Now, did you review this letter? Have you
18 seen the letter, Defendant's Exhibit 13?

19 A. Not before today.

20 Q. Is there anything in this letter that
21 indicates there is going to be a release in any way that
22 was requested or that it was conditioned upon any
23 release?



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1 MR. SILVER: Again, I am going to object to
2 this.

3 I had discussions and my office had
4 discussion with Sandy Hughes on that evening when this came
5 in.

6 And there was talk about what this proposal
7 meant and the conditions placed on it with the releases in
8 compliance with paragraph seven -- in compliance with
9 paragraph seven of the contract.

10 MR. HARRISON: There are no -- Just to put
11 the record straight --

12 MR. SILVER: The letter -- it speaks for
13 itself.

14 MR. HARRISON: The letter speaks for itself,
15 and the check --

16 MR. SILVER: But there are discussions
17 surrounding this letter.

18 MR. HARRISON: -- is delivered
19 unconditionally with the letter.

20 MR. SILVER: But there were discussions
21 surrounding this letter.

22 MR. HARRISON: There are always settlement
23 discussions that may or may not go forward. But this check



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1 was delivered unconditionally with the letter.

2 MR. SILVER: It was not delivered
3 unconditionally with the letter. That is unfair.

4 MR. HARRISON: The check is delivered -- if
5 it was not -- I will give you a check right now for this
6 amount right now, unconditionally. And that check was
7 delivered unconditionally.

8 MR. SILVER: It was not.

9 MS. HUGHES: Absolutely.

10 MR. HARRISON: Absolutely.

11 MR. SILVER: We talked to you that evening. *
12 And there were conditions placed on it that this was the
13 settlement for the whole case. And it was in compliance
14 with paragraph seven.

15 MR. HARRISON: No such conditions were
16 stated. And no such conditions can be implied from the
17 letter.

18 I will write you a check right now from my
19 firm for that amount.

20 BY MR. HARRISON:

21 Q. Do you want the check?

22 A. Not unless he tells me to take it.

23 Q. \$16,000 --



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1 MR. HARRISON: Give me a check.

2 MS. HUGHES: I have the --

3 MR. HARRISON: Get me the check.

4 BY MR. HARRISON:

5 Q. If you were told that that check was
6 conditioned upon anything, you were erroneously informed.
7 And I intend to deliver you today, not maliciously,
8 perhaps --

9 MR. SILVER: No, that is --

10 MR. HARRISON: You were erroneously informed.

11 MR. SILVER: I do not think he was
12 erroneously informed.'

13 If you look at this letter, it says,
14 consistent with our telephone conversation of 5:45 where I
15 informed you that we had just received your check with the
16 accompanying letter regarding the Snellings, I am
17 returning that check to you.

18 Be advised that this check is a return of the
19 deposit pursuant to the contract.

20 That is paragraph seven of the contract
21 terminating all rights. And that is the condition which we
22 disagreed with.

23 BY MR. HARRISON:



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1 Q. This check is delivered to you by the letter
2 -- delivered to your attorney by the letter without
3 condition.

4 When it comes back here in a minute, I am
5 going to deliver it to you again without condition.

6 You can either accept it or reject it. It is
7 not made in settlement. It is delivered to you.

8 MR. SILVER: For what purpose?

9 MR. HARRISON: It is a refund of his deposit,
10 the entire deposit.

11 MR. SILVER: I do not think that is the
12 purpose of this deposition. I am not going to have him
13 accept it or reject it.

14 MR. HARRISON: You can do what you wish.

15 MRS. SNELLINGS: We have also lost interest
16 money on this.

17 MR. HARRISON: You can do what you wish.

18 MR. SILVER: But I do not accept it or reject
19 it. That is not the purpose of the deposition.

20 If you want enter into settlement discussions
21 with me, let's talk about it.

22 MR. HARRISON: Do what you wish. The check
23 will be delivered to you.



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at this point though is furniture; is that right?

A. As far as I know.

Q. Now, have we identified every oral or written communication you have had with Carl Bernstein so far?

A. Carl himself?

Q. Yes, sir.

A. As far as I know.

Q. And Daurie Schraub regarding the breach or your allegations?

A. I am not sure about Daurie.

There were so many conversations, visits to the office, that sort of thing.

Q. I would like to tender to you a check in the amount of \$16,240.

MR. SILVER: I am going to object to the tendering of anything at the deposition.

The deposition is for asking questions and for discovery purposes and things like that. It is not for tendering checks or anything else.

We are neither accepting or rejecting it. If you want to do it in proper fashion to me, that is how it should be done.



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MR. HARRISON: That is fine.

BY MR. HARRISON:

Q. Now, do you understand the check has been
tendered to you without reservation?

MR. SILVER: The check has not been tendered
to him.

BY MR. HARRISON:

Q. Do you understand the check has been tendered
to you without reservation?

MR. SILVER: You do not have to answer that
question.

MR. HARRISON: Are you instructing the
witness not to answer.

MR. SILVER: It is an improper purpose of a
deposition. I am telling not to answer the question.

BY MR. HARRISON:

Q. Are you following your attorney's
instructions?

A. Yes, sir.

Q. It is tendered to you without reservation.

Now, have we discussed every discussion you
have had with Daurie Schraub?

A. I don't know because there were so many. All



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1 told me that. I don't know who told me that. That is the
2 truth.

3 Q. You don't know that Mr. Bernstein went
4 through bankruptcy, do you?

5 A. No, but I could find out in a hurry if I
6 wanted to.

7 Q. So can anybody else.

8 A. That is right. It is a public record.

9 Q. That is right.

10 MR. SILVER: Did he go through bankruptcy?

11 MR. HARRISON: I don't know.

12 BY MR. HARRISON:

13 Q. Have you been to or participated in any
14 meetings with the other homeowners in Union Farm?

15 A. No.

16 Q. Do you have any agreement with the Manns to
17 sell them the Addicott Hills house if you can get it?

18 A. No.

19 Q. Have you discussed that in any way with
20 anybody?

21 A. I have, but not with the Manns.

22 Q. Who have you discussed it with?

23 MR. SILVER: Other than your counsel.



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BY MR. HARRISON:

Q. No, if you have discussed that with your counsel, I want to know about it.

MR. SILVER: Just do not answer it.

BY MR. HARRISON:

Q. Was your counsel representing the Manns or representing you?

MR. SILVER: Do not answer the question.

BY MR. HARRISON:

Q. Have you negotiated with anybody but your counsel for the sale of the house to the Manns?

A. Negotiated for the sale of the house to the Manns --

Q. To the Manns, yes, sir.

A. -- with anyone else? No.

Q. Have you had any discussions with Mr. Silver or conversations about --

MR. SILVER: Do not answer the question.

BY MR. HARRISON:

Q. Have you had any discussions with Mr. Silver about conversations with Mr. and Mrs. Mann -- the basis of their appeal?

MR. SILVER: Do not answer the question.



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1 MR. HARRISON: Are you claiming the attorney-
2 client privilege as the privilege with these clients or
3 with that client?

4 That is to say, are you claiming the
5 attorney-client privilege for representing these
6 individuals in this case --

7 MR. SILVER: I have a privilege with the
8 plaintiffs, but in this case you are asking if his
9 conversations with me.

10 MR. HARRISON: Yes, I am, regarding an
11 adversary party.

12 BY MR. HARRISON:

13 Q. Do you understand that the Manns --

14 MR. SILVER: What do you want to know,
15 John? Ask me and I may tell you. What do you want to
16 know?

17 MR. HARRISON: I want to know if you are
18 negotiating for the sale of this house from these people to
19 the Manns.

20 MR. SILVER: No.

21 MR. HARRISON: Have you discussed it with
22 them?

23 MR. SILVER: With who?



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1 MR. HARRISON: With these people, the sale of
2 the house -- the Snellings -- the sale of the house with
3 the Manns -- to the Manns.

4 That is what I want to know. And I think a
5 judge is going to make you answer that.

6 MR. SILVER: I do not think a judge is going
7 to. That is attorney-client privilege.

8 MR. HARRISON: Well I do not think it is. I
9 think you have got too many clients to have that kind of
10 privilege because I get it one way or the other.

11 And the problem with that is once it is
12 waived, it is waived.

13 MR. SILVER: I think you can ask the Manns
14 about it.

15 MR. HARRISON: All right. I may just do
16 that.

17 MR. SILVER: I do not see the relevance to
18 the proceedings anyway.

19 BY MR. HARRISON:

20 Q. What conversations have you had with Carol
21 Brown relating to delivery of the house?

22 A. Relating to delivery?

23 Q. Yes, sir.



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April 8, 1988

Glenn H. Silver, Esq.
RUST, RUST & SILVER
4165 Chain Bridge Road
Fairfax, Virginia 22030

Re: Reinstatement of Lis Pendens in Mann v. Addicott Hills Corporation

Dear Mr. Silver:

It is my understanding that you brought \$8.01-269 to the attention of the Clerk of the Court in order to have the lis pendens which was previously released by the Clerk of the Court reinstated pursuant to \$8.01-269 of the Virginia Code.

As long as the lis pendens is in effect, the damages to Addicott Hills continues to accrue.

Very truly yours,


Sandra L. Hughes

cc: Sandy Lindsay