

1990

# Giles H. Florence v. S.N.L. Financial Corporation and George Quist : Brief of Appellant

Utah Court of Appeals

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BRIEF

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DOCKET NO.

900533CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

GILES H. FLORENCE,  
Plaintiff/Appellant,

vs.

S.N.L. FINANCIAL CORPORATION,  
and GEORGE QUIST,  
Defendants/Appellees.

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Case No. 900533-CA

*Priority #16*

BRIEF OF APPELLANT

Appeal From Order of Summary Judgment Entered By  
Third Judicial District Court  
Honorable Homer F. Wilkinson, District Court Judge Presiding

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2001

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Plaintiff/Appellant,

vs.

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and GEORGE QUIST,

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
JURISDICTION .....	1
STATEMENT OF ISSUES AND STANDARD OF REVIEW .....	1
STATEMENT OF THE CASE .....	3
STATEMENT OF FACTS .....	3
SUMMARY OF ARGUMENTS .....	6
POINT I .....	6
POINT II .....	7
POINT III .....	7
POINT IV .....	8
ARGUMENT .....	8
I.    INTERPRETATION OF A CONTRACT IS EITHER A QUESTION OF LAW OR A QUESTION OF FACT .....	8
A.    THE TRIAL COURT DETERMINED THE APRIL 22, 1983 AGREEMENT TO BE AMBIGUOUS AS A MATTER OF LAW .	9
B.    THE LOWER COURT ERRED IN FAILING TO CONSIDER PAROL EVIDENCE TO RESOLVE AMBIGUITY IN THE PARTIES' APRIL 22, 1983 AGREEMENT.....	15
II.    THE LOWER COURT ERRED IN DETERMINING THAT THE AGREEMENT DID NOT SATISFY THE STATUTE OF FRAUDS ...	18
III.   THE LOWER COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT THE AGREEMENT BETWEEN THE PARTIES WAS NOT A BROKERAGE AGREEMENT ENTITLING APPELLANT TO AN AGREED COMMISSION UPON COMPLETION OF HIS PERFORMANCE .....	20
IV.   THE LOWER COURT ERRED IN FAILING TO RECOGNIZE A CONDITION PRECEDENT IN THE MAY 31, 1984 RELEASE AGREEMENT BETWEEN THE PARTIES WHICH HAD NOT BEEN SATISFIED .....	23
CONCLUSION .....	25



## TABLE OF AUTHORITIES

### CASES CITED

<u>Allstate Enterprises, Inc. v. Heriford,</u> 772 P.2d 466 (Utah App. 1989) .....	9, 11, 13
<u>Atlas Corp. v. Clovis Nat. Bank,</u> 737 P.2d 225, 229 (Utah 1987) .....	1, 25
<u>Barker v. Francis,</u> 741 P.2d 548 (Utah App. 1987) .....	17
<u>Big Butte Ranch, Inc. v. Holm,</u> 570 P.2d 690 (Utah 1977) .....	9
<u>Bushnell Real Estate, Inc. v. Nielson,</u> 672 P.2d 746 (Utah 1983) .....	21
<u>C.J. Realty, Inc. v. Willey,</u> 758 P.2d 923 (Utah App. 1988) .....	12, 14
<u>Colonial Leasing Co. v. Larsen Bros. Const.,</u> 731 P.2d 483 (Utah 1986) .....	14, 16
<u>DuBois v. Nye,</u> 584 P.2d 823 (Utah 1978) .....	25
<u>Fashion Place Inv. v. Salt Lake County,</u> 776 P.2d 941 (Utah App. 1989) .....	2
<u>Faulkner v. Farnsworth,</u> 665 P.2d 1292 (Utah 1983) .....	9, 14
<u>Grow v. Marwick Development, Inc.,</u> 621 P.2d 1249 (Utah 1980) .	9
<u>Holbrook Co. v. Adams,</u> 542 P.2d 191 (Utah 1975) .....	2
<u>Jarman v. Reagan Outdoor Advertising,</u> 794 P.2d 492 (Utah App. 1990) .....	15
<u>Langston v. McQuarrie,</u> 741 P.2d 554 (Utah 1987) .....	21
<u>Machan Hampshire v. Western Real Estate,</u> 779 P.2d 230, 234 (Utah App. 1989) .....	20
<u>Oberhansly v. Earle,</u> 572 P.2d 1384 (Utah 1977) .....	25
<u>Power Systems &amp; Controls, Inc. v. Keith's Elec. Constr. Co.,</u> 765 P.2d 5, 9 (Utah App. 1988) .....	2

<u>Redevelopment Agency of Salt Lake City v. Daskalas,</u> 785 P.2d 1112, 1118 (Utah Ct. App. 1989) .....	15
<u>Ron Case Roofing &amp; Asphalt v. Blomquist,</u> 773 P.2d 1382, 1385 (Utah 1989) .....	16
<u>Spor v. Crested Butte Silver Min., Inc.,</u> 740 P.2d 1304, 1307 (Utah 1987) .....	2
<u>Welch Transfer and Storage, Inc. v. Oldham,</u> 663 P.2d 73 (Utah 1983) .....	24
<u>Whitehouse v. Whitehouse,</u> 131 Utah Adv. Rep. 28, 31 (Ct.App. 1990) .....	9

#### **STATUTES**

Section 78-2a-3(j), U.C.A. 1953, as amended .....	1
Statute of Frauds, 25-5-4 U.C.A., as amended .....	7, 18
Utah R.Civ.P. 56(c) .....	2

#### **OTHER AUTHORITY AND REFERENCES**

Restatement of Contracts (Second) Section 225 .....	23
Black's Law Dictionary, 174 (5th Ed.) .....	20
17 Am. Jur.2d <u>Contracts</u> , Section 320 et.seq (1964) .....	23

### JURISDICTION

Jurisdiction is conferred upon the Utah Court of Appeals to hear this appeal by Section 78-2a-3(j), U.C.A. 1953, as amended (cases transferred from to the Court of Appeals from the Supreme Court).

### STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issues presented on appeal are whether or not the lower court erred in (1) failing to consider parol evidence after finding as a matter of law that the parties' April 22, 1983 letter agreement contained obvious and admitted ambiguities; (2) determining as a matter of law that the subject agreement was not to be considered a brokerage agreement because there was no real property involved in the transaction entitling plaintiff to an agreed commission upon performance; or (3) failing to recognize a condition precedent in the May 31, 1984 release agreement between the parties which had not been satisfied.

The standard of review when considering a challenge to summary judgment is well settled. In reviewing a grant of summary judgment, the appellate court analyzes the facts and inferences to be drawn therefrom in the light most favorable to the losing party. Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225, 229 (Utah 1987). Since summary judgment is granted as a matter of law, the Court reviews the trial court's conclusions of law for correctness.

Whether an ambiguity exists in a contract is a question of law which is reviewed on appeal for correctness. Jarman v. Reagan Outdoor Advertising, 794 P.2d 492 (Utah App. 1990). If a trial court interprets a contract as a matter of law, that interpretation is not afforded any particular deference on appeal. Power Systems & Controls, Inc. v. Keith's Elec. Constr. Co., 765 P.2d 5, 9 (Utah App. 1988). If the contract is ambiguous, but the case is decided on summary judgment, the appellate court can affirm only if the undisputed material facts concerning the parties' intent demonstrate that the successful litigant's position is correct as a matter of law. Utah R.Civ.P. 56(c); Fashion Place Inv. v. Salt Lake County, 776 P.2d 941 (Utah App. 1989).

In cases involving the interpretation of a document or an agreement, it is improper for a lower court considering summary judgment to weigh disputed evidence concerning its meaning; the sole inquiry is whether a genuine issue of material fact is presented. Spor v. Crested Butte Silver Min., Inc., 740 P.2d 1304, 1307 (Utah 1987). Only one sworn statement is required to dispute averments on the other side of the controversy and create issues of fact precluding summary judgment. Holbrook Co. v. Adams, 542 P.2d 191 (Utah 1975).

### STATEMENT OF THE CASE

This is an action for breach of contract to pay a commission which was commenced on September 12, 1985. Before trial, defendant submitted a Motion for Summary Judgment of Dismissal to the Honorable Homer Wilkinson, District Judge, which motion the District Court granted for the reason that the court considered the written agreement of the parties insufficiently clear to stand as a contractual agreement entitling appellant to the payment of a commission. The District Court acknowledged in its bench ruling that the language and legibility of the parties' agreement presented ambiguities which made it difficult to determine the parties' intent.

The court further noted in its bench ruling that a "Form A" filing of defendant with the North Dakota Insurance Department which was made for the purpose of obtaining approval of the subject acquisition also contained an ambiguity concerning the matter of a commission. The court refused to consider parol evidence which was available in the record to resolve either or both ambiguities which the court found to exist.

### STATEMENT OF FACTS

1. On or about April 22, 1983, a letter was directed to Appellant by Defendant Quist as president of S.N.L. Financial (S.N.L.), which set forth certain conditions including a price,

terms, and exchange properties which defendant S.N.L. Financial was willing to give in exchange for one David B. Johnson's stock holdings in Security International Company (SIC), a North Dakota corporation, the assets of which included as a wholly owned subsidiary Security International Insurance Company (SIIC), a domestic North Dakota life insurer.

2. The subject letter of April 22, 1983 provides under item six (6) for a "\$200,000.00 annuity", without further explanation. Parol evidence in the record, if considered, would establish that the annuity was a consideration to be paid appellant by S.N.L. as an agreed commission for bringing S.N.L. Financial as buyer and David B. Johnson as seller together on mutually agreeable terms. [Deposition of David B. Johnson, 24:5, Addendum, Exhibit 6; Affidavit of Giles H. Florence, Addendum, Exhibit 4]

3. On or about May 19, 1983, a definitive agreement was executed between S.N.L. as buyer and David B. Johnson as seller which set forth the detailed terms and conditions of the transaction, after the parties had been brought together by and the agreed terms had been negotiated through the appellant. The terms included real property and security interests in real property as partial consideration. [George Quist depo., 8:23-9:11, Addendum, Exhibit 5]

4. On or about September 28, 1983, defendant S.N.L. Financial filed with the Insurance Department of North Dakota a "Form A" document entitled "Statement Regarding the Acquisition of Control of a Domestic Insurer," setting forth the agreed terms for its purchase of Security International Corporation ("SIC") and its wholly owned subsidiary, Security International Insurance Company (SIIC) from David B. Johnson. [Deposition of George R. Quist, Addendum, Exhibit 5]

5. Defendant's "Form A" filing acknowledged a commission or finder's fee obligation to be paid appellant [George Quist Depo. pg. 24; Form "A", Addendum, Exhibit 7], which provision the trial court determined to be unclear and ambiguous. [Tr. Bench Ruling, Addendum, Exhibit 1, pg. 45]

6. The Boards of Directors of SIC, Security Holding, and S.N.L. Financial Group each by resolution unanimously approved the agreed transaction, and regulatory approval of the North Dakota Department of Insurance was obtained for the acquisition upon those agreed terms during the month of October 1983. [Affidavit of Giles Florence, Addendum, Exhibit 4]

7. Defendants' letter agreement to appellant dated April 22, 1983, specified certain conditions to be satisfied before the \$200,000.00 annuity would become payable. All of those conditions had been satisfied by the time the parties met for closing at

Fargo, North Dakota on or about May 31, 1984. [Affidavit of Giles Florence, Addendum, Exhibit 4; Johnson depo., pg. 60, Addendum, Exhibit 6]

8. At the time of closing, defendant Quist acting in his capacity as an officer of defendant S.N.L. unexpectedly refused to close according to the parties' agreement, the boards' approval, and the regulatory approval which had been given; and imposed new terms which were unacceptable to Mr. Johnson. The sale and exchange accordingly failed. [Florence Affidavit, Addendum, Exhibit 4; Johnson depo., pgs. 53-64, Addendum, Exhibit 6]

9. Before trial, defendants submitted a Motion for Summary Judgment of Dismissal to the Honorable Homer Wilkinson, District Judge, which motion the District Court granted for the reasons more fully discussed below.

#### SUMMARY OF ARGUMENTS

##### POINT I.

The trial court determined as a matter of law that the April 22, 1983 letter agreement was ambiguous and unclear as to its meaning. The court could not make out the language contained in the critical paragraph number six (6) which provided for a "\$200,000 annuity", without further explanation. The document is unclear concerning who was to receive the annuity, when, and for what. Appellant maintains that the annuity was agreed to be paid



to him as a commission for his brokerage services. No other or better explanation has been offered for its existence. The trial court determined that the language of paragraph 6 was ambiguous; but failed to consider available parol or extrinsic evidence to determine its meaning.

#### POINT II.

The trial court erred in ruling that the April 22, 1983 letter agreement did not meet the requirements of the Statute of Frauds. The Statute of Frauds, 25-5-4 U.C.A., 1953 as amended<sup>1</sup>, provides that "[e]very agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith." The Statute of Frauds does not require that the "note or memorandum" be clear or unambiguous, but only that it exist. For the trial court to conclude as it did that the written agreement did not satisfy the Statute of Frauds because its meaning was unclear to the court is manifest error.

#### POINT III.

The trial court determined that the letter agreement of April 22, 1983, did not amount to a "brokerage" agreement because it was

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<sup>1</sup> 1989 amendment, effective April 24, 1989, rewrote the beginning of the section and made minor stylistic changes. The pre-1989 amendment should apply to this case. Section 68-3-3 U.C.A. (1986) provides that "[n]o part of these revised statutes is retroactive, unless expressly so declared." See also Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1988).

unclear and there was no "real property" involved in the transaction. The letter agreement identified certain real property which was to be exchanged in the transaction, and a brokerage agreement need not involve real property at all. The trial court erred by ignoring the fact that real property was involved, and in applying an interpretation of the term "broker" which makes it applicable only to real property transactions. Appellant was clearly acting as a "broker" from a legal standpoint.

#### POINT IV.

The trial court erred in considering the effect of the parties' subsequent May 31, 1984 agreement, which contained an unsatisfied condition precedent; specifically the unobtained approval of a third party. Appellant contends that the trial court failed to consider the entire transaction and both agreements as a whole in order to determine the parties' intent, once the court determined that ambiguity existed.

#### ARGUMENT

##### POINT I.

#### **INTERPRETATION OF A CONTRACT IS EITHER A QUESTION OF LAW OR A QUESTION OF FACT**

The interpretation of a contract is either a question of law, which is to be determined by the words of the agreement; or a question of fact to be determined by considering extrinsic evidence

concerning the parties' intent. Allstate Enterprises, Inc. v. Heriford, 772 P.2d 466 (Utah App. 1989); Kimball v. Campbell, 699 P.2d 714 (Utah 1985). A determination of ambiguity must be made before the court will consider parol or extrinsic evidence of the parties' intent. Once an ambiguity is found to exist, available extrinsic evidence is admissible and must be considered.

The language in a written document is considered ambiguous if the words used in the contract may be understood to support two or more plausible meanings. Whitehouse v. Whitehouse, 131 Utah Adv. Rep. 28, 31 (Ct.App. 1990).

**A. THE TRIAL COURT DETERMINED THE APRIL 22, 1983 AGREEMENT TO BE AMBIGUOUS AS A MATTER OF LAW**

The Utah Supreme Court in Faulkner v. Farnsworth, 665 P.2d 1292 (Utah 1983), held:

[w]hen a contract is ambiguous, because of uncertain meaning of terms, missing terms, or other facial deficiencies, parol evidence is admissible to explain the parties' intent.<sup>2</sup> Whether an ambiguity exists is a question of law to be decided before parol evidence may be admitted. As this court stated in Big Butte Ranch, Inc. v. Holm, 570 P.2d 690, 691 (Utah 1977):

[T]he court should first examine the language of the instruments and accord to it the weight and effect which it may show was intended and if the meaning is ambiguous or uncertain then consider parol evidence of the parties' intentions.

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<sup>2</sup> Grow v. Marwick Development, Inc., 621 P.2d 1249 (Utah 1980).

Of course, a motion for summary judgment may not be granted if a legal conclusion is reached that an ambiguity exists in the contract and there is a factual issue as to what the parties intended. (Emphasis added) Id. at 691.

Ironically, the trial court in this case made a legal conclusion that ambiguity existed and then granted summary judgment because of the ambiguity, without any attempt to resolve it by considering available extrinsic evidence or allowing the question to be decided by a jury. Referring to the \$200,000.00 annuity provision, the trial court stated in its bench ruling [Addendum, Exhibit 1]:

....I could not make it all out (page 45)

....it does not spell out anything really as far as the terms (page 46)

....But this one just does not even get to the heart of it as far as indicating what is going to be done as far as the payment of a finders, a brokerage fee (Page 46)

....I am not persuaded that either the wording in paragraph 6 or the wording in the Form A is sufficient of a brokerage agreement to satisfy that a commission would be paid upon the broker finding a willing and able buyer (Page 45)

....I don't think the letter of April 22nd or anything in Form A satisfies [sic] the requirement of the law of the Statute of Frauds or the requirement as far as what must be in writing for a brokerage. (Page 46)

....I am of the opinion that the wording in the April 22nd letter and the Form A is not sufficient to spell out that anything was going to be paid regardless of what took place. I think the parties came down to it, that they did negotiate, and there may have been some misunderstanding as far as what was supposed to be paid [to] Mr. Florence. (Page 47, emphasis added)

By those statements, the trial court expressed its inability to comprehend the parties' intent because the written language employed was illegible and ambiguous. Inexplicably, the court refused to consider available extrinsic evidence of the parties' intent although it was clearly brought to the court's attention in memoranda and argument. In effect, the trial court resolved the issue by determining that it could not understand what the parties intended from the language used, and that since the court could not discern the parties' intent from the written language, the agreement was unenforceable; regardless what the other evidence outside the writing itself may disclose concerning its meaning. That view does violence to the Parol Evidence Rule, which exists for the very purpose of resolving such ambiguities.

The trial court's ruling in that respect is not in accord with prevailing authority. As indicated above, the interpretation of a contract may either be a question of law, to be determined by the words of the agreement if they are clear and unambiguous; or a question of fact to be determined by extrinsic evidence of intent. Allstate Enterprises, Inc. v. Heriford, 772 P.2d 466 (Utah App. 1989). If the contract is found to be ambiguous and the trial court makes findings regarding the intent of the parties, on appeal those findings will not be disturbed unless they are clearly erroneous. Id. at 468. It would follow that if the trial court

determines the contract to be ambiguous and makes no findings regarding the intent of the parties but dismisses because of the ambiguity, that failure would constitute reversible error. Such is the posture of this case. The trial court made no attempt to determine the intent of the parties, after having found the critical ambiguity.

In C.J. Realty, Inc. v. Willey, 758 P.2d 923, 929 (Utah App. 1988), the Court of Appeals reversed a trial court's order granting defendant's motion for summary judgment with the following language:

Since the very essence of a finder's arrangement is locating buyers with whom a seller might do business...it would be extraordinary if the trial court were to conclude, absent a contractual provision expressly and unambiguously so providing, that the parties really meant to exclude certain properties from the scope of their agreement. (Emphasis in original) Nonetheless, the ambiguity in the contract leaves that possibility open. That ambiguity creates a material factual issue making summary judgment inappropriate and requiring resort to extrinsic evidence by the fact finder in an effort to determine what the parties actually intended. (Emphasis added) Id. at 929.

An ambiguity obviously exists in paragraph six (6) of the April 22, 1983, agreement pertaining to the \$200,000.00 annuity. As the trial court correctly observed, that provision has no clear meaning without further explanation.<sup>3</sup> It does not state to whom

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<sup>3</sup> Trial Court's Bench Ruling, page 45-6 (Addendum, Exhibit 1)

the annuity is to be paid, when, or for what. Standing alone, it has no apparent meaning; yet it must mean something or the parties would not have written it into their agreement. Available parol evidence clearly discloses its meaning and should have been considered by the court, but was not.

Appellant maintains, and his position is amply supported by the record, that paragraph six (6) of the April 22, 1983 agreement provides for his commission, payable subject to the conditions appearing above it; that each of those conditions were satisfied; and that the commission was thereby earned. Those assertions are supported by the deposition testimony of the seller, Mr. David Johnson, which the trial court failed to consider. Defendants have offered no other or better explanation for the \$200,000.00 annuity provision, despite close questioning in the Quist depositions concerning its meaning and intent. There is quite simply no other or better meaning to be given the language used than that suggested by the appellant.<sup>4</sup>

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<sup>4</sup> The trial court determined that the opposing affidavit of plaintiff was "flawed" but did not identify any particular portions that did not conform to Rule 56(e). There are clearly certain portions of the Florence affidavit which are admissible and pertain to the parties' intent in the April 22, 1983 agreement. The trial court disregarded all matters it considered to be extrinsic evidence.

Under applicable law, to the extent there is ambiguity there exists an issue of fact which, standing alone, precludes summary judgment. Parol evidence is always to be considered upon a finding of ambiguity in such cases to explain the parties' intent; which may indeed be explained in no other way. Faulkner, at 1293.

Where intent is at issue, under Utah law it must be determined by a finder of fact and cannot be resolved by summary judgment. The Appellate Court in C.J. Realty, supra, held:

Because there is a genuine issue of material fact as to whether the parties intended the property at issue to be included in the contract, we reverse the trial court's summary judgment and remand for further factual findings consistent with this opinion. Id. at 929.(emphasis added)

Only when contract terms are complete, clear, and unambiguous can they be interpreted as such by the judge and made a basis for summary judgment. Colonial Leasing v. Larson Bros. Const., 731 P.2d 483 (Utah 1986). If the evidence as to the terms of an agreement is in conflict, the intent of the parties as to the terms of the agreement may only be determined by the use of extrinsic evidence, and submission to a jury. Id. at 488. In this case the trial court did neither. Where questions arise in the interpretation of an agreement, the first source of inquiry is within the document itself. It should be looked at in its entirety and in accordance with its purpose. All of its parts should be given



effect insofar as that is possible. Regional Sales Agency, Inc. v. Reichert, 122 Utah Adv.Rep. 46, 48 (Ct. App. 1989)(quoting Big Cottonwood Tanner Ditch Co. v. Salt lake City, 740 P.2d 1357, 1359 (Utah Ct. App. 1987)). When that process fails to produce a clear meaning and intent, other evidence should, and must, be considered. In this case it quite clearly was not.

It remains uncertain from the contract language itself whether paragraph six (6) of the April 22, 1983 agreement was contemplated a commission to be paid appellant for his successful efforts in bringing the buyer and seller together on mutually agreeable terms, was part of the consideration to be paid by S.N.L. for purchase of SIC, or was something else. Since two or more plausible meanings can be derived from the language used (to the extent it is legible), and the trial court failed to consider available parol evidence to determine the parties' intent; the trial court clearly erred in ruling as it did.<sup>5</sup>

**B. THE LOWER COURT ERRED IN FAILING TO CONSIDER  
PAROL EVIDENCE TO RESOLVE AMBIGUITY IN THE  
PARTIES' APRIL 22, 1983 AGREEMENT.**

It is the well-settled general rule that if an agreement is ambiguous because of lack of clarity in the meaning of particular

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<sup>5</sup> Jarman v. Reagan Outdoor Advertising, 794 P.2d 492 (Utah App. 1990); Redevelopment Agency of Salt Lake City v. Daskalas, 785 P.2d 1112, 1118 (Utah Ct. App. 1989).

terms, it is subject to parol evidence concerning what the parties intended. Colonial Leasing Co. v. Larsen Bros. Const., 731 P.2d 483 (Utah 1986).<sup>6</sup>

Appellant maintains that the trial court erred in refusing to consider extrinsic or parol evidence which was available in the record to resolve ambiguity in the April 22, 1983 letter agreement between the parties. As indicated, the trial court in its bench ruling determined that paragraph six (6) of the letter agreement was ambiguous and for that reason insufficient to constitute an enforceable contract; without considering extrinsic or parol evidence which was available to resolve the ambiguity and clarify the parties' intent. The Utah Supreme Court in Ron Case Roofing & Asphalt v. Blomquist, 773 P.2d 1382, 1385 (Utah 1989) stated:

[The Court] first looks to the four corners of the agreement to determine the intentions of the parties and the use of extrinsic evidence is permitted only if the document appears to incompletely express the parties' agreement or if it is ambiguous in expressing that agreement.

The trial court in this case did not first "look to the four corners" of the letter agreement as a whole. The court considered only the language contained in paragraph six (6) which it determined was ambiguous and therefore not sufficient "of a brokerage

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<sup>6</sup> Citing Faulkner v. Farnsworth, 665 P.2d 1292 (Utah 1983)

agreement."<sup>7</sup> Viewing the subject agreement as a whole, several points are established. The agreement is between the appellant and the defendants. The agreement sets forth the financial terms for the purchase of S.I.C. by S.N.L. Financial. The agreement provides for an annuity in the amount of \$200,000.00 which is not part of the consideration to be given for S.I.C.. Available parol evidence in the record discloses that the \$200,000.00 annuity represents an agreed broker's commission to appellant for bringing the buyer and seller together on mutually agreeable terms.

As a matter of law, the trial court committed error in not considering extrinsic or parol evidence to determine the parties' intent. The parties and the court acknowledge that the language of paragraph six is somewhat illegible and that, standing alone, it is ambiguous to the extent it is legible. If its' meaning or the parties' intent is to be understood, other evidence is required. Other evidence was available in the record but was not considered by the court.

In Barker v. Francis, 741 P.2d 548 (Utah App. 1987), the court stated "[I]t is not necessary, however, that the contract itself contain all the particulars of the agreement. The crucial factor is that the parties agreed on the essential elements of the

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<sup>7</sup> Tr. Bench Ruling, pg. 45.

contract." In the present case, S.N.L. agreed in writing as part of its agreement to pay someone a \$200,000.00 annuity for something. That item was not a part of the purchase price, and from the available, but unconsidered evidence, it is undisputed that the \$200,000.00 annuity was in fact the appellant's commission. Mr. Johnson did not regard that item as part of his consideration from SNL. He understood and has testified that the \$200,000.00 annuity was in fact the appellant's commission.<sup>8</sup> The appellant has testified he understood that to be the case, and the defendants have provided no other explanation. The hard fact is that paragraph six annuity was the appellant's commission, and nothing else.

#### POINT II.

#### **THE TRIAL COURT FURTHER ERRED IN DETERMINING THAT THE AGREEMENT DID NOT SATISFY THE STATUTE OF FRAUDS.**

The trial court stated:

I am not persuaded that either the wording in paragraph 6 or the wording in the Form A is sufficient of a brokerage agreement to satisfy that a commission would be paid upon the broker finding a willing and able buyer. I don't think it's sufficient writing to meet that requirement and must be in writing under the Statute of Frauds.<sup>9</sup>

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<sup>8</sup> Johnson depo., pg. 24, Addendum, Exhibit 6.

<sup>9</sup> Tr.Bench Ruling, pages 4-5 [Addendum, Exhibit 1].

The Statute of Frauds, 25-5-4 U.C.A., 1953 as amended<sup>10</sup>, provides that "[e]very agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith." Since the document is unquestionably a "note or memorandum" of some agreement between the parties and is subscribed by the "party to be charged" (S.N.L.), it obviously satisfies the Statute of Frauds. The trial court erred in ruling that the April 22, 1983 letter agreement did not.

It is also well settled that the Statute of Frauds does not preclude a party from proving the true nature of an agreement when that is the issue, rather than enforceability.<sup>11</sup> In this case, the only issue presented on summary judgment was whether there existed an agreement which provided Appellant a commission. The Statute of Frauds does not require that the "note or memorandum" be clear or unambiguous, but only that it exist. For the trial court to conclude as it did that the written agreement did not satisfy the

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<sup>10</sup> 1989 amendment, effective April 24, 1989, rewrote the beginning of the section and made minor stylistic changes. The pre-1989 amendment should apply to this case. Section 68-3-3 U.C.A. (1986) provides that "[n]o part of these revised statutes is retroactive, unless expressly so declared." See also Madsen v. Borthick, 769 P.2d 245, 253 (Utah 1988).

<sup>11</sup> Colonial Leasing v. Larson Bros. Const., 731 P.2d 483, 486 (Utah 1986).

Statute of Frauds because its meaning was unclear to the court is manifest error.<sup>12</sup>

In order to satisfy the requirements of the Statute of Frauds, Utah courts have held that the required "memorandum must identify the parties, subject matter, and set out the conditions of the transaction with adequate certainty." Furthermore, "the memorandum must show what the contract was, and not merely note the fact that some contract was made." Machan Hampshire v. Western Real Estate, 779 P.2d 230, 234 (Utah App. 1989)(emphasis added). The subject agreement clearly meets the above requirements by identifying the parties<sup>13</sup>, subject matter<sup>14</sup>, and conditions<sup>15</sup> of the transaction.

### POINT III.

THE LOWER COURT ERRED IN DETERMINING AS A MATTER OF LAW THAT THE AGREEMENT BETWEEN THE PARTIES WAS NOT A BROKERAGE AGREEMENT ENTITLING APPELLANT TO AN AGREED COMMISSION UPON COMPLETION OF HIS PERFORMANCE.

By definition, a "broker" is a person whose duties are not limited to the sale of real property. Black's Law Dictionary, 174

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<sup>12</sup> Footnote 2, supra.

<sup>13</sup> The April 22, 1983 agreement was addressed to the appellant and signed by appellee George Quist. [Addendum, Exhibit 2]

<sup>14</sup> Subject matter of the April 22, 1983 set forth with particularity the items for purchase by SNL. [Addendum, Exhibit 2]

<sup>15</sup> Conditions are set forth in the first paragraph of the April 22, 1983 agreement. [Addendum, Exhibit 2]

(5th Ed.) defines a "broker" as:

An agent employed to make bargains and contracts for a compensation. A middleman or negotiator between parties...A person whose business it is to bring buyer and seller together. The term extends to almost every branch of business, to realty as well as personalty.

The trial court narrowly considered appellant's role as a "broker" to be limited to the sale of real property.<sup>16</sup> The trial court stated: "I so find that, I don't think that this is a brokerage situation. There is not the sale of real property here. ... Therefore, I don't think that law applies at the outset."<sup>17</sup>

The court obviously erred in disregarding the fact that the agreement on its face involves several pieces of real property as part of the consideration to be given for S.I.C. [Addendum, exhibit 2]; and in overlooking the fact that a broker's rights and duties are not limited to transactions only involving "real property."

The general rule accepted in Utah is that a "broker" has earned his commissions upon the procuring of a buyer who is ready, willing and able to buy on terms acceptable to the seller. This general rule applies whether or not real property is involved. Langston v. McQuarrie, 741 P.2d 554 (Utah 1987); Bushnell Real

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<sup>16</sup> Bench Ruling, page 5 (Addendum).

<sup>17</sup> Id.

Estate, Inc. v. Nielson, 672 P.2d 746 (Utah 1983). Significantly to this case, the court in Langston held:

Absent a contractual provision which conditions the right to a commission on the performance or part performance of the buyer, the broker is not an insurer of the subsequent performance of the contract and is not deprived of his right to a commission by the failure or refusal of the buyer to perform. Langston, at 558. (Emphasis added)

In this case, the evidence if it were allowed to be considered by a finder of fact would establish the existence of a commission agreement, full performance by the broker, and an unexcused refusal to perform at the time of closing by defendant S.N.L., the buyer. Appellant is entitled to have that evidence fully and fairly considered by a fact finder.

A broker cannot control the parties' behavior after a definitive agreement to buy and sell has been reached, but can only bring the buyer and seller together on mutually agreeable terms. This the appellant did at his own effort and his own expense in consideration for S.N.L.'s promise to pay him a commission if he succeeded in doing so. The Appellant, as a broker, can do no more than that. Under Utah law, he is entitled to his commission under the facts of this case. Resolving the ambiguities should be left to a jury rather than being preempted by summary judgment.



POINT IV.

THE LOWER COURT ERRED IN FAILING TO RECOGNIZE  
A CONDITION PRECEDENT IN THE MAY 31, 1984 RELEASE  
AGREEMENT BETWEEN THE PARTIES WHICH HAD NOT BEEN SATISFIED.

Appellees argued in support of their motion for summary judgment that the parties' May 31, 1984 agreement [Addendum, exhibit 3] superceded the April 22, 1983 agreement; and that failure of the sale to actually close precluded appellant from claiming his commission. Appellant argued that the May 31, 1984 agreement was prospective and void for failure to satisfy one of its conditions precedent; namely the approval of a third party. Although the trial court did not base its ruling upon the May 31, 1984 document because it found there to be no brokerage agreement, the court did indicate that if there were a brokerage agreement, the condition precedent would be considered of no importance. [Tr. Bench Ruling, pg. 45, addendum exhibit 1]

The plain language of the May 31, 1984 document includes a "subject to" provision requiring prior approval by the third party which was never forthcoming. The law of contracts is well settled regarding such conditions precedent and the necessity of satisfying them before the agreement becomes enforceable.<sup>18</sup> Restatement of Contracts (Second) Section 225 states the general rule as follows:

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<sup>18</sup> 17 Am. Jur.2d Contracts, Section 320 et.seq (1964).

Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.

Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur. (Emphasis added)

The second paragraph of the May 31, 1984 agreement specifically creates a condition precedent to the entire May 31, 1984 agreement, which it is undisputed never occurred. That paragraph provides:

"This agreement is subject to approval of Mr. Joseph Henroid of the law firm of Nielson and Senior of Salt Lake City, Utah, particularly in regard to that certain court order of approximately October 1983 regarding the divorce of Giles H. and Ululani Florence." (Emphasis added)

The Utah Supreme Court addressed this issue in Welch Transfer and Storage, Inc. v. Oldham, 663 P.2d 73 (Utah 1983):

Where fulfillment of a contract is made to depend upon the act or consent of a third person over whom neither party has control, the contract cannot be enforced unless the act is performed or the consent given.(citations omitted)(Emphasis added)

In this case, the trial court indicated that the condition requiring approval by a third party had "no bearing whatsoever as far as this situation is concerned."<sup>19</sup> That view is contrary to well established principles of contract law.

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<sup>19</sup> Bench Ruling, page 45 [Addendum, exhibit 1]

The basic objective in construing any contract must be to give effect to the intentions of the parties. If possible, those intentions must be determined from an examination of the texts of the agreements. Atlas Corp. v. Clovis Nat. Bank, 737 P.2d 225, 229 (Utah 1987); DuBois v. Nye, 584 P.2d 823 (Utah 1978); Oberhansly v. Earle, 572 P.2d 1384 (Utah 1977). It is apparent in this case both that the trial court failed to view the two written documents as a whole, or harmonize them if possible. Upon finding that ambiguities existed, the trial court failed to consider available evidence of the parties' intent outside the April 22, 1983 agreement and without such evidence held the agreement to be unenforceable. The trial court then suggested that if there were an enforceable brokerage agreement the May 31, 1984 release agreement would apply, while failing to recognize the significance of a failed condition precedent to that agreement. The trial court erred in disregarding the significance of the failed condition precedent.

#### CONCLUSION

The trial court committed reversible error in failing to consider extrinsic or parol evidence to determine the intent of the parties' April 22, 1983 letter agreement, after finding as a matter of law that the agreement was unclear and ambiguous. The trial

court erred in granting summary judgment after making that determination because the court's finding in and of itself legally acknowledged that a genuine issue of material fact exists, namely the meaning of the ambiguous terms. The trial court failed to follow the basic legal process in construing any ambiguous contract term by considering extrinsic evidence of the parties' intent.

The trial court erred in determining that the parties' agreement did not satisfy the Statute of Frauds, since the parties to be charged did in fact sign a "note or memorandum" of their agreement.

The trial court erred in determining that the parties' agreement was not a brokerage agreement entitling Appellant to a commission upon completion of his performance, for the stated reason that the court did not understand real property to be involved in that agreement.

Finally, the trial court erred in failing to recognize the significance of a failed condition precedent in the May 31, 1984 prospective release agreement between the parties.

For any or all of the foregoing reasons, the trial court's order granting Appellee a summary judgment of dismissal should be reversed and the case remanded for further proceedings consistent with applicable law. The trial court's errors are so numerous and apparent that this court should clearly set forth the applicable

standards for the trial court's guidance on remand.

RESPECTFULLY SUBMITTED this 23 day of April, 1991.



ANTHONY M. THURBER  
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a copy of the foregoing  
APPELLANT'S BRIEF this 23 day of April, 1991, to the following:

Arthur H. Nielsen  
NIELSEN & SENIOR  
Suite 1100, Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111



## Addendum 1

## ADDENDUM

### Contents

1. Transcript of Judge Homer F. Wilkinson's Bench Ruling
2. April 22, 1983 Letter Agreement
3. May 31, 1984 Release Agreement
4. Giles Florence Affidavit
5. George Quist Deposition, pgs. 1-3; 7-9
6. David B. Johnson Deposition, pgs. 1-4; 24; 53-66
7. Form "A" Filing, re: Finder's Fee

Tab 1



( ) ( ) U U

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

\* \* \*

GILES H. FLORENCE, :  
Plaintiff, : Case No. C85-2501  
v. : Transcript of:  
S.N.L. FINANCIAL CORPORATION, : PROCEEDINGS on MOTION  
and GEORGE R. QUIST, : FOR SUMMARY JUDGMENT  
Defendants. :

\* \* \*

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BEFORE THE HONORABLE JUDGE HOMER F. WILKINSON

Friday, May 18, 1990

Salt Lake City, Utah

APPEARANCES

For the Plaintiff: ANTHONY M. THURBER  
Attorney at Law  
8 East Broadway, #735  
Salt Lake City, Utah 84111

For the Defendant: ARTHUR H. NIELSEN  
Attorney at Law  
Nielsen & Senior  
60 East South Temple, #1100  
Salt Lake City, Utah 84111

REPORTER: SUZANNE WARNICK, CSR, RPR-CM  
Official Court Reporter  
240 East 400 South, #534  
Salt Lake City, Utah 84111  
801-535-5479

1 FRIDAY, MAY 18, 1990; 9:00 A.M.

2 P R O C E E D I N G S

3  
4 THE COURT: The matter before the Court is the  
5 case of Giles Florence versus S.N.L. Financial  
6 Corporation and George Quist.

7 Is the plaintiff present and ready to  
8 proceed?

9 MR. THURBER: Plaintiff is, your Honor.

10 THE COURT: And the defendant?

11 MR. NIELSEN: And the defendant is ready, your  
12 Honor.

13 THE COURT: Then you may proceed. Would you  
14 please state your names for the benefit of the reporter.

15 MR. THURBER: Anthony M. Thurber for the  
16 plaintiff.

17 MR. NIELSEN: Arthur H. Nielsen, attorney for  
18 the defendant and movant in the matter of the Motion for  
19 Summary Judgment.

20 If it please the Court, and counsel, at the  
21 outset I would like to move the publication of the  
22 depositions of George Quist and Scott Quist which were  
23 taken by the plaintiff some years ago, your Honor. And  
24 during my absence in Israel, apparently the originals  
25 got misplaced. We have not been able to locate the

1 original deposition of Mr. George Quist. But I have  
2 asked Mr. Thurber if he has any objection to using a  
3 Certified Copy, and he said no. And I have the  
4 Certified Copy here before me and would like to have it  
5 published and would like to refer to it during the  
6 course of my argument.

7 THE COURT: Any problem, counsel?

8 MR. THURBER: No.

9 MR. NIELSEN: With reference to the original  
10 deposition of Mr. Scott Quist, we did locate that. And  
11 Mr. Scott Quist put it in the mail to me and it didn't  
12 get to my office by yesterday. And I went down again  
13 this morning and it was not there. I would only have to  
14 say, I would like to file that with the Court if the  
15 Court desires to pursue it in any respect. But as far  
16 as I know, I don't believe his deposition will be  
17 significant in connection with the argument. If it is,  
18 I don't intend to utilize it. And if counsel for the  
19 plaintiff does, I'll certainly see that your Honor gets  
20 the original during the day.

21 Now, again as a preliminary matter in the  
22 course of my discussion this morning, your Honor has,  
23 I'm sure, reviewed the Motion for Summary Judgment as  
24 well as counsel for the plaintiff's opposition thereto.  
25 And I would like to make an observation that, with

1 reference to the counterobjections to the Motion for  
2 Summary Judgment which were filed by the plaintiff, to  
3 the extent that they rely upon the evidence of  
4 Mr. Florence, we object to the use of that Affidavit  
5 because it is not in conformity with Rule 56 of the  
6 Rules of Civil Procedure relating to affidavits to be  
7 filed in connection with summary judgments.

8 Let me just read to your Honor Rule 56(e)  
9 which provides as to the form of affidavits that further  
10 testimony defense is required.

11 "Supporting and opposing affidavits shall  
12 be made on personal knowledge, shall set  
13 forth such facts as would be admissible in  
14 evidence, and shall show affirmatively that  
15 the affiant is competent to testify to the  
16 matter stated therein."

17 Now, on its face the Affidavit says that it's  
18 based upon the best knowledge and belief of the client.  
19 And therefore, the jurat, itself, does not conform to  
20 the rule. But a very casual perusal of that Affidavit  
21 would indicate to your Honor that it is full of  
22 conclusions, interpretations of the witness, legal  
23 opinions, so to speak, and is not based upon the  
24 client's actual knowledge.

25 Now, there may be some matters in that

1 Affidavit that would be pertinent. And to the extent  
2 that your Honor feels that they are, I certainly have no  
3 objection to your Honor considering them. But above  
4 all, I think that it is significant to note that, in our  
5 opinion, they do not identify any relevant evidence in  
6 this matter.

7           Let me just point to two items in the  
8 evidence that I think clearly identify or illustrate  
9 what I am referring to. First of all, the Affidavit  
10 refers to a certain exhibit, our document, which the  
11 Affidavit states was the final agreement between  
12 Mr. Johnson, who is the principal owner of the Security  
13 International Life Insurance Company and S.N.L.  
14 Financial. And that document, itself, on page 3, when  
15 it is identified by Mr. Florence in his Affidavit as the  
16 final agreement states on its face, "...with definite  
17 agreement to follow." In other words, these were  
18 preliminary negotiations. And the parties, themselves,  
19 over their signature said, this would have to be  
20 followed by a definite agreement.

21           Likewise, Mr. Florence in his Affidavit  
22 refers to a letter dated May 31, 1984, on which we rely  
23 as a matter of fact, addressed to G.H. III National  
24 Corporation of Las Vegas, Nevada in which S.N.L.  
25 Financial Corporation agrees that, "Upon the closing of

1 the transaction described below, S.N.L. Financial  
2 Corporation agrees to pay to your company \$50,000," and  
3 it goes on in the recital.

4 The final paragraph says,

5 "This agreement is subject to approval of  
6 Mr. Joseph Henroid of the law firm of  
7 Nielsen & Senior of Salt Lake City,  
8 particularly in regard to that certain court  
9 order of approximately October 1983  
10 regarding the divorce of Giles H. and Euloni  
11 Florence."

12 The Affidavit then goes on to say that  
13 Mr. Henroid was not approached and did not approve it.  
14 Obviously Mr. Florence could not know that. If he was  
15 the one that had the duty to do it, he could testify  
16 that he did not do it. But whether somebody else did it  
17 or not, he obviously couldn't testify.

18 But it is, I think, of some significance that  
19 there was a divorce pending between Mr. Florence and  
20 Mrs. Florence in the State of Arizona. And a suit was  
21 filed in this court by Mrs. Florence against S.N.L.  
22 stating that, if and when there was any commission  
23 payable to Mr. Florence, that there be an injunction  
24 issued prohibiting Mr. Florence or the S.N.L.  
25 Corporation from paying Mr. Florence. And it was that

1 matter, I'm sure, that precipitated this kind of a  
2 statement.

3 In other words, S.N.L. couldn't pay  
4 Mr. Florence anything, even if it owed it to him under  
5 that order. But for the purpose again of this record,  
6 your Honor, and the particular case here filed in this  
7 case -- I can give you the case number -- that did  
8 dissolve that injunction. So again, that matter would  
9 not be, in my opinion, relevant to this case.

10 Now, with those preliminary remarks, let me  
11 state that there was a final and formal agreement  
12 entered into by Mr. Johnson, not Mr. Florence but by  
13 Mr. Johnson with S.N.L. Corporation with respect to the  
14 purchase by S.N.L. Corporation of Mr. Johnson's stock in  
15 the Security International Corporation, Security  
16 International Insurance Company. I guess we need to  
17 distinguish between the two companies. We could call  
18 S.N.L. by its initials, and we could refer to the other  
19 corporation in North Dakota as the "international"  
20 corporation. At least that word is in its name.

21 Now, I point out to your Honor, again by way  
22 of a preliminary background statement, that in order for  
23 S.N.L. Corporation to acquire the stock of the  
24 international corporation in North Dakota, it was  
25 necessary that the matter be submitted to the Insurance

1 Department of North Dakota. Everyone agrees to that.  
2 For that purpose S.N.L. Corporation had hired a  
3 Mr. Gilbert McSwain of Denver, a securities lawyer who  
4 had done work both for S.N.L. Corporation and also for  
5 the international North Dakota corporation in times past  
6 relating to their securities matters.

7 But in this particular situation, Mr. McSwain  
8 was employed by S.N.L. Corporation to prepare all of the  
9 necessary documents to submit to the Insurance  
10 Department of North Dakota for confirmation and approval  
11 of this acquisition. And that is done under a formal  
12 document sometimes referred to as a prospectus but  
13 principally referred to as a Form A. And I'll be  
14 referring to that Form A in the course of my discussion  
15 here, again to bring your Honor up to the point where I  
16 think it becomes critical with reference to our motion.

17 That Form A is Exhibit 4 to Mr. Quist's  
18 deposition. And if the clerk would hand your Honor the  
19 deposition of Mr. Quist, I would like you to refer to  
20 Exhibit 4 which is a rather lengthy document consisting  
21 of a number of sections.

22 Approximately in the first third or near the  
23 center of this Form A is a document entitled Stock  
24 Purchase Agreement. I wish, your Honor, that I could  
25 give you better identification for it, but it follows



1 immediately after page 29 and is identified as  
2 Appendix B.

3 THE COURT: Well, I have got page 29.

4 MR. NIELSEN: What's the next page?

5 THE COURT: Page 30.

6 MR. NIELSEN: Then you have the wrong  
7 section. May I come to the bench?

8 THE COURT: You may.

9 MR. NIELSEN: This is the formal final  
10 agreement between Mr. Johnson and S.N.L. Corporation,  
11 which of course had to be submitted along with the  
12 other documents to the Department of Insurance of North  
13 Dakota for the purpose of confirming and confirmation  
14 of this transaction. And it was approved by the  
15 Department of Insurance.

16 Now, with regard to that Stock Purchase  
17 Agreement, let me identify for your Honor two or three  
18 items in it that I think are of significance here,  
19 particularly as they relate to the Affidavit of  
20 Mr. Florence, as well as to other response by the  
21 plaintiff in this matter with respect to our Motion for  
22 Summary Judgment.

23 Paragraph 1.1 on page 2 is the Agreement of  
24 the Seller to sell his stock in the corporations known  
25 as Security International Insurance Company, as well as

1 Security Insurance National Corporation. Point 1.3 is  
2 the Agreement of the Purchaser. The Agreement of the  
3 Purchaser says that,

4 "At the closing purchaser shall purchase  
5 and accept the sales from the seller for an  
6 aggregate version of the following..."

7 And then on the following page, page 3, there  
8 identifies all of the consideration that S.N.L.  
9 Corporation is to pay for Mr. Johnson's stock.

10 Now, if you were to review that very  
11 carefully, and we can go over it for all of those assets  
12 that are to be transferred, you will note, your Honor,  
13 that there is nothing said about, quote, "renewal  
14 commissions," or anything of that kind. This is a  
15 matter which, although Mr. Florence says they got in an  
16 argument about that matter, that's not a part of this  
17 Agreement. So if they did get into an argument about  
18 it, it had no relevance about whether there was an  
19 agreement to sell or not to sell.

20 The next page, on page 4, paragraph 2.2 says  
21 that, "There are no conflicting agreements." This is a  
22 representation and warranty by Mr. Johnson. So if he  
23 had some other conflicting agreement with reference to  
24 this, that he represents that there are none.

25 If you carry on then to page 6, paragraph

1 2.8, subparagraph (c) near the top of the page, he also  
2 warrants that,

3 "There are no employment or deferred  
4 compensation agreements between S.I.C or  
5 S.I.I.C. and its shareholders, officers,  
6 directors, employees, agents or  
7 consultants."

8 Well, Mr. Johnson was president of both of  
9 those companies. And here he represents and warrants  
10 that there are no conflicting agreements as to any kind  
11 of compensation that he is supposed to get.

12 Paragraph (f) also states that any  
13 indebtedness,

14 "There is no indebtedness or other  
15 liability or obligation, whether absolute,  
16 accrued, contingent or otherwise incurred or  
17 other transaction engaged in by S.I.C or  
18 S.I.I.C. except in the ordinary course of  
19 business with the parties, other than  
20 seller, which is material."

21 So now he is saying there is none with any --  
22 with him with S.I.C or with S.I.I.C.

23 May I then ask your Honor to turn to  
24 paragraph 10 -- excuse me, page 10, paragraph 5. In the  
25 middle of page 10 is says Conditions and Obligations of

1 Each Party.

2 "The obligations of each party to  
3 consummate this Agreement and the  
4 transaction to be consummated by them  
5 hereunder on the closing shall be subject to  
6 the satisfaction prior to or concurrently  
7 with the closing of each of the conditions  
8 set forth in this Section 5."

9 Then it goes on to delineate what those items  
10 are, so that there can be no question about the fact  
11 that there are to be no changes or no inconsistency.

12 Paragraph 9, then we come to a very  
13 interesting paragraph on page 12. Paragraph 9 says,

14 "Closing of this Agreement and certain of  
15 the transactions provided for herein shall  
16 take place at the offices of Keller,  
17 McSwain, Wing and Maxfield --" noting, your  
18 Honor, that McSwain is the attorney who is  
19 handling this matter -- "in the City of  
20 Denver, Colorado at 10 a.m. local time, not  
21 later than the third business day following  
22 the day that seller acquires the shares, or  
23 such other time as the parties may mutually  
24 agree."

25 Now, Mr. Florence in his Affidavit says that

1 they met up in North Dakota on the 31st of May to close  
2 it. Mr. McSwain was not there. And this Agreement says  
3 they'll close it in Denver in Mr. McSwain's office.  
4 Mr. Quist in his deposition says they didn't meet up  
5 there for the purpose of closing but to negotiate  
6 because there were some changes which Mr. Johnson wanted  
7 to make.

8 But that I am merely again pointing out to  
9 your Honor in terms of the background. And I would  
10 confess that if that is a critical matter, then there is  
11 a dispute. But I don't think it is critical. It just  
12 merely points out the inaccuracy, so to speak, of  
13 Mr. Florence's Affidavit. But it does illustrate the  
14 position that I am going to present to your Honor in  
15 just a moment or two.

16 On the following page, page 13, it says that,

17 "Each party hereto shall pay its own  
18 expenses in connection with this Agreement  
19 and the transaction contemplated hereby."

20 And the final one which I think is very  
21 important, paragraph 13.1 says,

22 "This Agreement supersedes all prior  
23 discussions and agreements between the  
24 parties with respect to the sale of the  
25 shares and the other matters contained in

1                   this Agreement. And this Agreement,  
2                   including the exhibits hereto, contain the  
3                   sole and entire agreement between the  
4                   parties hereto with reference to the  
5                   transactions contemplated hereby."

6                   Now, regardless of anything else, these  
7                   exhibits to Mr. Florence's deposition, or Affidavit,  
8                   clearly now are superseded by this final Agreement  
9                   entered into by Mr. Johnson and S.N.L. Corporation and  
10                  submitted to the Insurance Department of North Dakota  
11                  for its approval. So we are not concerned here with  
12                  these writings which have formed a part of  
13                  Mr. Florence's Affidavit.

14                  One other point, then I'll get down to the  
15                  critical matter, is that Mr. Florence said that one of  
16                  the first things that happened -- again referring to his  
17                  deposition -- when they got in the meeting up in North  
18                  Dakota on the 31st of May was that he and Mr. Quist got  
19                  into an argument about what commission he was supposed  
20                  to get. And Mr. Quist said he was going to deduct the  
21                  expenses from any commission which Mr. Florence would  
22                  get when the deal was finally closed. And Mr. Florence  
23                  says that was not a part of the transaction.

24                  Let me refer your Honor to an earlier portion  
25                  of this same Exhibit 4. And that is again a numbered

1 portion of it. But it is on page 26 of the section just  
2 before the one that we referred to. So if your Honor  
3 would go back to the first of that exhibit, or Appendix  
4 B, and just two pages before that I think is page 26.

5 Do you have it?

6 THE COURT: Section 15?

7 MR. NIELSEN: Yes. Here again this is the  
8 Form A that's submitted to the insurance department for  
9 its approval. In this it refers to commissions and  
10 finder's fees.

11 "S.I.C and Security Holding agree that  
12 Mr. Giles Florence of Phoenix, Arizona has  
13 acted as a finder in connection with the  
14 transactions contemplated herein and that no  
15 other party will serve as a finder. The  
16 parties agree that their respective expenses  
17 --" talking about the parties was the seller  
18 and the buyer -- "they agree that their  
19 respective expenses incurred and to be  
20 incurred in connection with the transaction  
21 contemplated hereby -- including without  
22 limitation attorney fees, accountants fees,  
23 travel, printing, mailing and postage --  
24 shall be deducted from the fee of  
25 Mr. Florence."

1                   So here it is stated before the Insurance  
2 Department of North Dakota that these expenses which  
3 Mr. Florence was apparently objecting to be deducted  
4 from his fee when the matter was closed were already  
5 identified, had been approved by the Department of  
6 Insurance, and they were to all of these expenses  
7 including attorney fees of the parties and all other  
8 expenses to be deducted from whatever fee he was going  
9 to get.

10                   Now, let me address now what I considered to  
11 be the substance of our Motion for Summary Judgment.  
12 All other matters aside, we find the parties up in  
13 Fargo, North Dakota on the 31st of May of 1984, almost a  
14 year after the negotiations for the purchase of this  
15 stock had begun. And at that time it is recognized and  
16 we don't dispute the fact that Mr. Florence was  
17 concerned about getting a fee when this matter closed.  
18 And he was concerned that these expenses were going to  
19 be deducted.

20                   Mr. Quist, on the other hand, took the  
21 position that when they got the matter closed -- and  
22 they were there for some period of time, no documents  
23 had even been prepared according to the testimony of  
24 everybody. They were there to further discuss the  
25 matter -- that Mr. Florence should get a fee. There was



1 no argument about the fact that he should get a fee. He  
2 had rendered some services as a finder. The question  
3 was, one, how much it was going to be; and two, when was  
4 he to get it and the conditions incident thereto. And  
5 it was finally agreed that he would get a fee.

6 But Mr. Florence did not want to get the  
7 fee. He wanted it paid to a third party. So Exhibits A  
8 and B to our Motion for Summary Judgment, also Exhibit 5  
9 to Mr. Quist's deposition, came into being. Exhibit B  
10 is a Release. And this Release says that,

11 "I, Giles H. Florence, in consideration  
12 --" note, your Honor, it says -- "in  
13 consideration of a letter dated May 31, 1984  
14 from George R. Quist of S.N.L. Financial  
15 Corporation hereby agree to release and  
16 forever discharge all of the following  
17 corporations and persons from any further  
18 liability relating to the matters described  
19 in the letter referred to."

20 And then the first corporation listed on that  
21 is S.N.L. Financial Corporation.

22 We submit, your Honor, this resolves any  
23 issue between Mr. Florence and S.N.L. Corporation in  
24 this matter. This document has released.

25 Now, however, there was to be consideration

1 for it. So the second document, also dated May 31,  
2 1984, which is addressed, your Honor, to G.H. III  
3 National Corporation of Las Vegas, Nevada, Mr. Florence  
4 has now transferred or committed that whatever fee he is  
5 going to get, if he was to get it, shall not be paid to  
6 him but shall be paid to a third party.

7 Now, Mr. Florence in his Affidavit says he is  
8 the sole owner of that corporation. And I would accept  
9 the fact that he is the president, although it would not  
10 be the best evidence, he would properly testify that he  
11 is the sole owner. But I don't know if it would be  
12 admissible. It would require the Articles or the  
13 document, itself. But regardless of that, it is a  
14 different entity, a different person. And whatever  
15 interest Mr. Florence had in any commissions was  
16 released and discharged by the first document.

17 And upon the second document it says,

18 "Upon the closing of the transaction  
19 described below, S.N.L. Financial  
20 Corporation agrees to pay your company  
21 \$50,000 as further payments on a monthly  
22 basis for 50 consecutive months." And it  
23 says, "The \$50,000 is to be paid at the  
24 closing of said transaction. And such  
25 payments shall be in full satisfaction of

1 any and all claims of any kind or nature,  
2 whether arising before or after the date  
3 hereof against S.N.L. Financial  
4 Corporation," and so forth.

5 This Agreement then says,

6 "Is subject to the approval of Mr. Joseph  
7 Henroid."

8 Aside from that, Mr. Florence agrees that  
9 Mr. Henroid didn't even have an opportunity, I guess, on  
10 his side to review the document because the matter  
11 didn't close. And Mr. Florence says it didn't close in  
12 his Affidavit. Mr. George Quist says it didn't close  
13 because they did get into a dispute with Mr. Johnson  
14 about other matters.

15 And it may take a long time if your Honor  
16 were to go back to the consideration that was referred  
17 to on page 3 of the Purchase Agreement. Paragraph 1.9  
18 on page 3 says,

19 "At that time purchaser will issue or  
20 will cause to have issued and guarantee a  
21 premium note to seller which shall be  
22 payable monthly."

23 A premium note, your Honor, is one that is  
24 contingent, based upon the fact of whether premiums are  
25 actually paid. This was explained in great detail by

1 Mr. McSwain at the hearing before the insurance  
2 department. It was clearly identified that Mr. Johnson,  
3 although he was to receive a note for a substantial sum  
4 of money, nevertheless, that was not payable absolutely  
5 but only in the event that premiums continued to be  
6 paid.

7 In other words, he was to be paid out of the  
8 premiums that were paid to the company. And if the  
9 premiums were not enough, then he did not get his note  
10 paid. As I said, that was clearly explained before the  
11 insurance department. It was clearly explained in the  
12 correspondence. It was clearly explained in this  
13 contract for the purchase of the stock.

14 THE COURT: Where is that you are reading  
15 from, counsel?

16 MR. NIELSEN: What?

17 THE COURT: Where is that you are referring  
18 to?

19 MR. NIELSEN: That's at page 3 of the Stock  
20 Purchase Agreement that I had just reviewed with your  
21 Honor.

22 THE COURT: You say it's page 3. 1.9?

23 MR. NIELSEN: 1.9, right.

24 "Purchaser will issue or will cause to  
25 have issued and guarantee a premium note to

1 seller which shall be payable monthly."

2 And it goes on and describes it.

3 THE COURT: Okay.

4 MR. NIELSEN: There is no dispute as to what  
5 a premium note is, although again other documents in the  
6 file -- Mr. Johnson's deposition does not refer to it  
7 but Mr. Quist's deposition, I think, does. And a  
8 premium note is one that is contingent upon the payment  
9 of the premiums. So that these people got into a  
10 discussion about trying to change the terms of this  
11 Stock Purchase Agreement when they were up in North  
12 Dakota on the 31st of May. And they were not able to  
13 agree, and so they agreed to disagree.

14 Now, that was not the only disagreement.  
15 There were many. But the significant and important  
16 thing for this Motion for Summary Judgment is that the  
17 matter did not close. And so the conditions incident  
18 to the payment of this money to G.H. III National  
19 Corporation, not to Florence but to G.H. III, never came  
20 to fruition.

21 It was there. The Agreement was there. It's  
22 a binding agreement. And we submit, your Honor, that if  
23 a condition incident to it did not take place, and  
24 regardless of what you might say about who was at fault  
25 or was not at fault, the matter remains that it just did

1 not occur; and therefore, the obligation to pay G.H. III  
2 Corporation never, shall I say, came to a point of when  
3 the payment would be required to be made.

4           It was not that there wasn't any  
5 requirement. It's the date on which it is to be paid.  
6 And if I give your Honor a promissory note payable when  
7 somebody dies and the person doesn't die, I don't ever,  
8 I guess, have to pay it. That's a poor illustration of  
9 what I am trying to say. But it does illustrate the  
10 fact that a condition did attach, and therefore the  
11 payment did not become due.

12           But in any event, if it had become due or if  
13 there is any claim of breach on the part of S.N.L.,  
14 which Mr. Florence seems to indicate that there was,  
15 that it was S.N.L.'s thought that it didn't come to a  
16 closing, that would be the concern of G.H. III, not the  
17 concern of Florence. Because he has waived and released  
18 all his rights. It would be G.H. III's right if there  
19 is one to bring an action on the basis there was a  
20 breach on the part of S.N.L. of the conditions which  
21 made it impossible for performance; and therefore, G.H.  
22 III is entitled to payments or for damages by reason of  
23 that breach.

24           We submit, therefore, that there is no  
25 material fact that is in dispute. The material facts

1 are found within the four corners of those two  
2 documents, Exhibits A and B to the Motion, and also  
3 Exhibit 5 to Mr. Quist's deposition. And we submit,  
4 therefore, we are entitled to summary judgment.

5 MR. THURBER: Judge, before we begin, as I  
6 indicated to Mr. Nielsen this morning and the Court  
7 yesterday, there is a later version of the document  
8 that's so difficult to read. And it does have all the  
9 initials. And I think that's the one we should use.  
10 Mr. Nielsen has a copy and here is a copy for you.

11 MR. NIELSEN: May I mention this, your Honor.  
12 The new document which Mr. Thurber has given to me  
13 purports to have some marking at the very bottom of the  
14 page. I have shown that to Mr. George Quist, and he  
15 denies that that is his initials or any signature of  
16 his. And he is not aware of how or when that got onto  
17 the document.

18 But as I have previously indicated, this  
19 document would be entirely a preliminary one, and there  
20 would be no way that I could identify which is  
21 Mr. Quist's handwriting and someone else's. And you  
22 will note that Mr. Quist, the initials do not appear in  
23 the margin next to any of the so-called changes or  
24 additions or corrections.

25 MR. THURBER: Well, for our purposes today,

1 all that doesn't matter, your Honor. The point is that  
2 this is the latest version of the document that we are  
3 discussing. And whose initials are where doesn't matter  
4 for our purposes right now.

5 I think it's important for the Court to  
6 understand something about the background of this  
7 insurance company in North Dakota that was to be sold  
8 and acquired by S.N.L. here. This is a company that was  
9 founded by David Johnson, and he built this company --  
10 it's a small, relatively small North Dakota domestic  
11 life insurance company -- over the last 25 or 30 years  
12 with his own efforts. He was an insurance salesman who  
13 formed the company and built the company.

14 The question, the issue that destroyed this  
15 closing was the question of his right to continue  
16 renewals. Now, renewals are something that are outside  
17 the terms of this sale. They aren't mentioned in the  
18 Sales Agreement, but they are mentioned in the May 19th  
19 agreement, specifically that Mr. Johnson will retain his  
20 renewals.

21 Now, the renewals are simply the on-going  
22 commissions that result to any general or ordinary agent  
23 of a life insurance carrier for his production. And  
24 those are contractual matters between the company and  
25 the agent. And Mr. Johnson was a general agent in



1 addition to being a major stockholder in the holding  
2 company. He was a general agent and had renewal rights  
3 in all of the production that he and his sub-agents had  
4 produced for this North Dakota insurance company. And  
5 these renewals meant in terms of present value dollars  
6 at the time that this closing should have occurred in  
7 North Dakota something on the order of a million dollars  
8 or more. So it's a major, major item.

9 Now, Mr. Nielsen in his argument failed to  
10 mention why it was that the deal didn't close in North  
11 Dakota. He indicated that these people went up to  
12 North Dakota for the purpose of discussing the matter  
13 further. But the evidence is and the testimony of  
14 Mr. Johnson, the seller, whose deposition we took a  
15 couple of weeks ago in Fargo, that he was there and they  
16 were there for the purpose of closing.

17 And Mr. Quist came with his checkbook and  
18 checked his bank balances and determined he didn't have  
19 enough to come up with \$350,000 down payment, and asked  
20 Mr. Johnson to come up with the rest, the \$150- of the  
21 \$200- that Mr. Quist had from his own company, which was  
22 agreed to. Mr. Johnson and he agreed with that.

23 And then after this happened, Mr. Quist comes  
24 up with that brand new off-the-wall demand that Johnson  
25 throw in his renewals. It amounted to a demand for a

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1           Mr. Nielsen's argument overlooks the entire  
2 body of Utah and neighboring state law relating to  
3 broker's commissions. This is a case that is not  
4 governed by the ordinary law of contracts, because it  
5 stands in a category of its own which is the category  
6 dealing with agents and brokers commissions.  
7 Consideration does not play a role in contracts of this  
8 nature.

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9           The well-established law in Utah and  
10 Colorado and Arizona and Idaho and other neighboring  
11 jurisdictions is that a broker performs his duty and  
12 becomes entitled to his commission, his agreed  
13 commission, when he produces a ready, willing and able  
14 buyer upon terms acceptable to both parties.

15           Now, Mr. Nielsen has not mentioned anything  
16 in his memorandum or in his argument about that well-  
17 established and accepted body of Utah law which applies  
18 clearly to the facts of this case. He in his latest  
19 memorandum suggests or he states -- I think it's on page  
20 3 -- that this case involving this transaction did not  
21 involve real property.

22           Well, quite the opposite is true. If the  
23 Court will look at the documents, there were at least  
24 four pieces of real property, including a couple of  
25 office buildings, that were part of the consideration

1     that he ever signed.

2                 Now, going ahead with Mr. Nielsen's argument,  
3     he said that the parties went to Fargo for the purpose  
4     of further discussing this transaction and not for the  
5     purpose of closing. Well, that directly conflicts with  
6     both Mr. Florence's Affidavit -- he was present at that  
7     closing meeting -- and what Mr. Johnson's deposition  
8     says, which was taken a couple of weeks ago. They both  
9     stated that the purpose of going there and the only  
10    purpose of going there was to close the transaction. We  
11    at the very least have an issue of fact regarding that.

12                It's significant that the Form A filing,  
13    neither the Form A filing nor any of the other documents  
14    leading up to the closing meeting May 31st or the next  
15    morning, June 1st of 1984, say anything about  
16    Mr. Johnson giving up his renewals. And the only  
17    mention of his renewals is in the May 19, '83 Agreement  
18    which provides that Johnson will retain those renewals.  
19    That's a handwritten provision that was never changed  
20    throughout this thing. It's a contractual right that  
21    Johnson had to renewals between he and his insurance  
22    company that had nothing to do with the sale of the  
23    stock.

24                Mr. Nielsen argues that because of the  
25    language of the Agreement about the closing date in

1 Denver and the fact that it was to be in Denver, this  
2 deal failed and there is no obligation on anybody's  
3 part. What he failed to point out is that that very  
4 Agreement stated that the closing would be then and  
5 there unless the parties mutually agreed otherwise.  
6 Now, the evidence here is that the parties in Denver  
7 agreed to adjourn for about a month. It was in April  
8 when they met in Denver to adjourn for about a month and  
9 finish it up in Fargo. The reason for that is that the  
10 seller's attorney had some I's to dot and T's to cross,  
11 but nothing substantial. Nothing of a substantive  
12 nature needed to be changed..

13 Now, Mr. Nielsen and Quist urge or argue that  
14 at the closing Mr. Johnson came up with a number of new  
15 and different conditions and demands. Mr. Florence in  
16 his Affidavit and Mr. Johnson in his testimony at Fargo  
17 have stated unequivocally that there was not a single  
18 new or different demand by Johnson. But the only change  
19 was this new off-the-wall demand by Quist that Johnson  
20 throw in his million dollars of renewals. And that  
21 killed the transaction.

22 At the very least we have an issue of fact  
23 concerning why the transaction failed. But under the  
24 applicable law, it doesn't matter. If the law relating  
25 to brokers commissions applies to this transaction,

1 which it does, it doesn't matter that the transaction  
2 fails. The entitlement exists regardless of the closing  
3 happening or not.

4           And the reason is very simple. The broker  
5 who brings the parties together, who negotiates or works  
6 out a mutually agreeable transaction between them, has  
7 no control from that point on over whether or not the  
8 transaction closes. And either party for reasons, for  
9 any reason or no reason, can decide not to go through  
10 with the deal.

11           If the law were otherwise, the poor broker is  
12 left out in the cold after he, at his own expense, at  
13 his own effort and his own risk, has pulled together and  
14 put together a transaction or a deal. In this case we  
15 are talking about a multi-million-dollar deal. This  
16 isn't just a sale of a house or a garage. This is a  
17 big, big transaction that took more than a year of  
18 Mr. Florence's time and effort and experience to put it  
19 together. That is the reason that a particular body of  
20 law applies to brokers agreements and commissions. And  
21 the usual law relating to contracts generally doesn't  
22 have complete application in this field.

23           Going to the document on which Mr. Nielsen  
24 relies, if the Court examines both the Agreement and the  
25 so-called Release that are attached together and dated

1 May 31st, I think the Court will see quite clearly that  
2 we are dealing with a conditional agreement here. The  
3 conditions appearing in the Agreement of George Quist  
4 are two: One is that the Agreement be approved by  
5 Joseph Henroid. Now, Joseph Henroid -- he is not now  
6 but he was at that time, as I understand it, associated  
7 in Mr. Nielsen's office. Mr. Nielsen represents S.N.L.  
8 and George Quist.

9           Mr. Florence of course would have no control  
10 over what Mr. Henroid did or didn't do in the way of  
11 approval because Henroid was not Florence's attorney.  
12 So the point is, or the bottom line here is that the  
13 Agreement was never submitted to Mr. Henroid for  
14 approvals. He never even saw it at all.

15           So by its very terms, a condition precedent  
16 to the validity or the enforceability of this Agreement  
17 didn't occur. Now, if a condition doesn't occur, the  
18 Agreement is void. And if the Agreement is void, we  
19 revert to the underlying agreement, which was the April  
20 22nd agreement of the previous year, providing for a  
21 \$200,000 annuity.

22           Now, going beyond that though, there was  
23 another condition, and this is the condition that on  
24 which Mr. Nielsen relies. That is that the closing  
25 occurred before a commission becomes due. Well, of

1 course it was the contemplation of the parties that a  
2 closing would occur. And this reduction of Florence's  
3 commission by \$25,000 was the removal of the last  
4 impediment to a closing. So in everyone's mind, except  
5 perhaps Mr. Quist, it was contemplated that the closing  
6 would follow. He would pay the down payment of \$350,000  
7 to Mr. Johnson, and everyone would go their way and the  
8 transaction would be concluded.

9 If that had happened, of course Mr. Florence  
10 would be paid, or his wholly-owned company, G.H. III,  
11 would be paid the \$50,000 down and 50 payments of \$2,500  
12 a month.

13 Now, if that had happened, then according to  
14 the Release Agreement that's attached, Mr. Florence  
15 would become obligated to release, but only then. And  
16 here is why: If we read the Release, this is the  
17 language of the release. It is not a present release;  
18 it's a contemplated release. It's a release to be given  
19 in the future.

20 It says,

21 "I, Giles Florence, in consideration of the  
22 letter dated May 31, '84 from Mr. George R.  
23 Quist, president of S.N.L. Financial  
24 Corporation, hereby agrees to release --  
25 hereby agree to release and forever

1 discharge..."

2 It's prospective. And of course the  
3 condition on which the release is to be given or to  
4 become effective is the closing and the payment of the  
5 agreed commission.

6 Well, that never happened. So the release  
7 never, by its very terms, became effective. It was a  
8 prospective release. And of course the whole purpose of  
9 it was to reduce what was already a fixed obligation of  
10 a \$200,000 annuity to Mr. Florence by \$25,000 to  
11 facilitate the closing so that everybody can see that  
12 this transaction completed. There would be no reason in  
13 the world for Mr. Florence to give up his \$200,000  
14 entitlement in return for a piece of paper. And he  
15 obviously didn't do that.

16 He was agreeing to a reduction and fixed  
17 obligation that Mr. Quist and S.N.L. could not get out  
18 of at that time. His commission was earned before this  
19 Agreement of May 31st was ever entered into. It was a  
20 fixed obligation. And he had not given it up, and he  
21 did not give it up in return for a piece of paper, as  
22 Mr. Nielsen would urge on the Court.

23 Mr. Quist has acknowledged an obligation to  
24 Mr. Florence in the Form A filing, that there was not an  
25 existing obligation at the time the filing was made,



1 which was September of '83. There would have been no  
2 mention in that Section 15 of a finder's fee obligation  
3 to Mr. Florence. So it existed and it was a fixed  
4 amount, it was determined, of \$200,000 before that Form  
5 A submission was ever made.

6 The evidence -- and this is in Mr. Florence's  
7 Affidavit and in Mr. Johnson's deposition -- was that  
8 when they met for the closing on May 31st, Mr. Quist  
9 raised this question about Florence paying the expenses,  
10 which came as a surprise to Florence. And there ensued  
11 a two-hour argument that involved yelling and shouting,  
12 and the other parties dismissed themselves. This  
13 happened in the attorney's office in Fargo where we did  
14 the depositions a couple of weeks ago.

15 And they finally hammered out this reduction  
16 of \$25,000. And they came out and Mr. Quist typed up  
17 the Agreements and the Release. So to the extent they  
18 are ambiguous, it would be an ambiguity, it's  
19 interpretable to the Quists. But in any event, the only  
20 purpose of that was to facilitate the closing.

21 Now, if the defendants' position were  
22 accepted here, what it means is that a party is going to  
23 be allowed with the sanction of the law to benefit from  
24 his own wrong. In effect, what we would be saying here  
25 is, from Mr. Quist's standpoint, that through my fault,

1 through my own fault, I didn't close an enforceable  
2 agreement. I didn't close and perform on an enforceable  
3 agreement.

4 And he says to Mr. Florence, that, Although  
5 you have performed, and although I have agreed to pay  
6 you for your performance, I am relieved from my  
7 obligation by my own wrong in refusing to close on the  
8 terms to which I have agreed.

9 Now, the policy of our law cannot be to allow  
10 parties to benefit from their own wrongdoing. The law  
11 should encourage the performance of obligations that are  
12 fixed and agreed upon rather than to encourage their  
13 nonperformance by allowing the parties to escape  
14 liability.

15 The obvious purpose of this May 31st  
16 Agreement was to take -- for Mr. Florence to take a  
17 reduced commission upon the closing and not to eliminate  
18 a commission at all totally if the buyer decided for  
19 whatever reason not to close. That would have been  
20 insanity on the part of Mr. Florence's part. And he  
21 certainly would not have put a year or more of his time  
22 and effort and expense in this transaction and agreed to  
23 such a foolish thing. And he didn't agree to it.

24 That Agreement was not made in return for a  
25 piece of paper. It was made in return for an agreement

1 to reduce a fixed, binding obligation of Quist and  
2 S.N.L.

3 As I have indicated, there were conditions  
4 that were not met in the May 31st Agreement. There were  
5 at least three. It, by its very terms in plain  
6 language, is not effective and never became effective.  
7 It's a legal nullity.

8 Had the conditions been satisfied, had Joe  
9 Henroid approved that Agreement, had the closing  
10 occurred, and had the commission been paid as agreed,  
11 Mr. Florence would be obligated to accept the \$175,000  
12 instead of the \$200,000 payout. And he would be bound  
13 by that, and he would agree to do that and he would give  
14 a binding release. But that never happened. Since it  
15 never happened, he cannot be held to a release. A  
16 release was to be given in return for something and that  
17 something never happened.

18 Well, at the very least, your Honor, there  
19 are issues of fact here. As we discussed yesterday, the  
20 handwriting is somewhat ambiguous, although we believe  
21 we have deciphered it, on the April 22nd note. The  
22 reasons for the closing are disputed. Mr. Quist says it  
23 was a negotiating session; it wasn't to be a closing.  
24 And Mr. Florence and Mr. Johnson say, No, it was a  
25 closing. He came with his checkbook and checked his

1 balances, and then he changed the terms.

2 For either of those reasons, your Honor, or  
3 all of those reasons, I submit summary judgment would be  
4 an error at this point in the proceeding.

5 MR. NIELSEN: Very briefly, your Honor. I  
6 hope that the dissertation by either Mr. Thurber or me  
7 relative to the background does not suggest to your  
8 Honor that, because there are differences as to how the  
9 background occurred, that there are differences or that  
10 there are issues of fact with respect to the critical  
11 matters, which are those two documents before you.

12 Now, I am surprised that Mr. Thurber would  
13 say that Mr. Florence, when he says, I agree to release,  
14 means that he is going to do it some time in the  
15 future. The document is entitled, Release. It isn't  
16 entitled, Agreement to Release. He releases. And the  
17 language that "I agree to release" is a common  
18 expression in all releases. He hereby agrees to release  
19 the person, which is the release, itself.

20 As long as those two documents, your Honor,  
21 are unambiguous and there are no issues of fact, there  
22 is no claim here by Mr. Thurber or Mr. Florence that he  
23 was induced to sign either one of those by any fraud or  
24 misrepresentation, although Mr. Thurber indicates that  
25 there were some two hours of argument about what he was

1 to get, if and when, before they prepared these and  
2 signed them. That merely indicates, your Honor, that it  
3 was what I would consider to be an arm's length,  
4 knock-down drag-out kind of an agreement. And it didn't  
5 supersede any other.

6 To say that a real estate broker or anyone  
7 else can't on the day of closing, if it be the day of  
8 closing or any other time, sign an agreement in writing  
9 as to what his commission is going to be is just  
10 absolutely contrary to the law. He can have a listing  
11 agreement that says, I'll get a 10 percent commission.  
12 But before the commission becomes due or before it's  
13 paid, he says, I'll take 5 percent before the  
14 transaction is closed, that could very well be. Or it  
15 might be 12 percent. The conditions can change. And  
16 there is consideration for both of them in that his  
17 release says that the consideration is the giving of the  
18 letter.

19 Now, Mr. Florence wanted to make sure that he  
20 was not going to be stuck with this income, whatever it  
21 was going to be, when the deal closed. He wanted it to  
22 go to his corporation. And if that's the case and he  
23 agreed and said, "In consideration of this letter, I  
24 hereby agree to release," all right. The letter is  
25 given. And the consideration is given.

1                   Now, if the events in the letter to which he  
2 has agreed, and he identifies the letter, do not occur,  
3 then the liability to pay is not there. And if there is  
4 a dispute with reference to whether or not somebody  
5 prevented it from occurring, that does not cancel the  
6 agreement. It does not subrogate the agreement.

7                   What it does is it gives rise to a cause of  
8 action for the person who is the recipient or the  
9 beneficiary of that letter to take action for his  
10 compensation based upon the failure of S.N.L. or  
11 somebody else to follow through or prevent its  
12 occurring. It doesn't arise and revert back to  
13 Mr. Florence. It would be G.H. III's right, if there is  
14 one, to sue for, if the claim is made -- and we  
15 certainly dispute that it is -- but if the claim is made  
16 that the transaction was prevented from closing on the  
17 part of S.N.L., it seems clear to me that they have said  
18 that it was Mr. Johnson who reneged because S.N.L. said,  
19 You are not going to get paid any further commissions.

20                  Well, if your Honor goes back to the Stock  
21 Purchase Agreement, paragraph 1.9 indicates the payment  
22 of a premium note to the seller based upon premiums,  
23 which if you were to compute, that would be  
24 substantially in excess of a million dollars. This man  
25 Johnson was getting a lot of money for this

1 corporation. And when we talk about Mr. Florence  
2 suffering any damages, S.N.L. suffered substantial  
3 damages by this transaction not going through after  
4 having spent all of the time, the cost and the expenses  
5 of Mr. McSwain, all of which were paid out of S.N.L.'s  
6 pockets.

7 And then not to have this transaction close,  
8 it seems awfully -- I was going to say "difficult to  
9 swallow." That S.N.L. decided not to go through with  
10 the transaction, they were anxious to have it go  
11 through. I submit, therefore, your Honor, that on the  
12 basis of those two documents, there being no dispute to  
13 their language to see them and interpret that, we are  
14 entitled to summary judgment.

15 THE COURT: Counsel, I do want to give you my  
16 decision at this time

17 Let me indicate to you that I spent  
18 considerable time going over your memorandums and  
19 affidavits, the applicable law. I guess the only thing  
20 I haven't seen is the Form A of which has been referred  
21 to here today and which substantiates the position that  
22 the Court had while the Court was looking at this.

23 First of all, let me indicate to you that I  
24 do think the Affidavit of Mr. Florence, as Mr. Nielsen  
25 has pointed out, is flawed with certain material and

1 statements which would not be admissible in a court of  
2 law. However, there are statements in there that would  
3 be admissible.

4 But assuming and accepting all of the  
5 Affidavit, and assuming Mr. Thurber's position that this  
6 is a broker situation -- and I think his statement of  
7 the law is absolutely correct as far as a broker's  
8 commission is concerned as far as producing an able and  
9 willing buyer -- I first look at the letter of May 31st  
10 and the Release of the same date. And if the Court  
11 accepts those -- of course I am bound to accept them --  
12 but if I say they are the final documents, then by their  
13 terms, they state that the money is not due until the  
14 transaction or unless the transaction closes. The  
15 release would come into effect immediately upon the  
16 letter becoming effective.

17 I don't think the release is effective until  
18 the letter -- there is no release. There is nothing to  
19 be released until the letter becomes effective really.  
20 And of course that is the law of brokerages, as  
21 Mr. Thurber points out in his brief, that the commission  
22 is due to a broker when he produces that willing and  
23 able buyer, unless there are terms contained within the  
24 agreement that makes it otherwise. But I certainly  
25 think that there are terms contained within the letter



1 of May 31st. So as I say, assuming there was a  
2 brokerage situation, that that would prevent the  
3 commission from being paid.

4 I don't think -- I am not persuaded that the  
5 approval of Mr. Henroid has any bearing whatsoever as  
6 far as the situation is concerned. It's been pointed  
7 out here today, and I assumed that in reading this  
8 yesterday, that when it refers to a divorce situation,  
9 that it had something to do with the payment of money as  
10 far as the divorce and the parties were concerned. So I  
11 don't think that has any bearing on it.

12 Now, again assuming that this is a brokerage  
13 situation, I go back to the letter of April 22nd and to  
14 Form A of which has been referred to here today. And on  
15 page 26, Section 15, the commission and finder's fee --  
16 and of course I called Mr. Thurber yesterday and I  
17 believe he was in touch with Mr. Nielsen as to the  
18 wording of this paragraph 6, that the Court did feel  
19 this was a critical situation, that the wording was  
20 given to me.

21 And of course as I was able to read it  
22 myself, which I could not make it all out, I am not  
23 persuaded that either the wording in paragraph 6 or the  
24 wording in the Form A is sufficient of a brokerage  
25 agreement to satisfy that a commission would be paid

1 upon the broker finding a willing and able buyer. I  
2 don't think it's sufficient writing to meet that  
3 requirement and must be in writing under the Statute of  
4 Frauds. That it does not spell out anything really as  
5 far as the terms.

6 And I know Mr. Thurber argues in his brief  
7 that every particular term doesn't need to be spelled  
8 out. And I think that is correct also as far as the  
9 Agreement is concerned. But this one just does not even  
10 get to the heart of it as far as indicating what is  
11 going to be done as far as the payment of a finder's or  
12 brokerage fee.

13 So assuming that everything that Mr. Thurber  
14 says in his argument as far as the Affidavit and as far  
15 as this being a brokerage transaction, I don't think the  
16 letter of April 22nd or anything in Form A says the  
17 requirement of the law of the Statute of Frauds or the  
18 requirement as far as what must be in writing for a  
19 brokerage.

20 Now, I am of the opinion, and I so find, that  
21 I don't think that this is a brokerage situation. There  
22 is not the sale of real property here. Real property is  
23 being traded or paid for the stock. But this is not the  
24 sale of real property. Therefore, I don't think that  
25 law applies at the outset.

1           I am of the opinion that the wording in the  
2 April 22nd letter and the Form A is not sufficient to  
3 spell out that anything was going to be paid, regardless  
4 of what took place. I think the parties came down to  
5 it, that they did then negotiate, and there may have  
6 been some misunderstanding as far as what was supposed  
7 to be paid by Mr. Florence. They reduced that to  
8 writing as far as the letters of May 31st, the letter of  
9 Release of May 31st -- I think that's the date, May  
10 31st, 1984.

11           MR. NIELSEN: Yes, sir.

12           THE COURT: And in those matters they did  
13 spell out that a commission was going to be paid upon  
14 the closing of the transaction, which never closed. I  
15 don't think it's material to this Court in this case as  
16 to why this transaction did or did not occur. That may  
17 be a cause of action in another action with other  
18 parties, some of these parties. But I don't think it is  
19 material as far as this particular case is concerned.

20           I don't think the questions of fact -- and I  
21 think there are questions of fact as far as what took  
22 place or what did not take place at the time of closing,  
23 and what was said and what was not said, and why it  
24 didn't close; there are disputes. But I don't think  
25 they are material as far as this particular case is

1 concerned.

2           So based on that, the Court does feel that  
3 the motion of the defendant is well taken and would  
4 grant the Motion for Summary Judgment.

5           Mr. Nielsen, would you prepare the pleadings?

6           MR. NIELSEN: May I prepare an Order and  
7 Judgment, your Honor, on the Motion?

8           THE COURT: Yes.

9           MR. THURBER: Thank you.

10          THE COURT: If there are no further questions,  
11 court will be in recess.

12          (This concludes these proceedings at 10:45 a.m.)

13                               \* \* \*

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C E R T I F I C A T E

STATE OF UTAH                    )  
:  
COUNTY OF SALT LAKE        )

I, SUZANNE WARNICK, CSR, RPR-CM, do certify  
that I am a Certified Shorthand Reporter, Registered  
Professional Reporter with the Certificate of Merit, and  
Notary Public in and for the State of Utah.

That at the time and place of the proceedings  
in the foregoing matter, I appeared as the court  
reporter in the Third Judicial District Court for the  
Honorable Judge Homer F. Wilkinson, and thereat reported  
in stenotype all of the proceedings had therein;

That thereafter, my said shorthand notes of  
the Proceedings on the Motion for Summary Judgment were  
transcribed by computer into the foregoing pages; and  
that this constitutes a full, true and correct  
transcript of the same.

WITNESS MY HAND and official seal at Salt Lake  
City, Utah, this 10th day of January, 1991.

*Suzanne Warnick*  
Suzanne Warnick, CSR, RPR-CM



My commission expires:  
1 April 1991.

Tab 2

April 22, 1982

Giles Florence,

Subject to the approval  
of Security National Life  
Board of Directors, availability  
of cash to fund the initial  
payment & subject to regulatory  
approval, examination of  
the insurance in force and  
the assets of subject company  
S. N. L. Financial will pay  
for 6 1/2% more or less for  
Security International to operate  
the following:

- 1) Building located at 5636<sup>15th</sup> Ave.  
Phoenix Arizona  
\$450,000
- 2) Land covered Security  
International Books  
52 + 26 acres.  
\$100,000
- 3) Building lot located in  
Sedona Arizona + Arizona City  
Ariz. area  
\$80,000
- 3A) 7 acres and home in Washington St.  
\$150,000
- 4) \$200,000.00 cash
- 5) Payment of \$160,000.00 annually  
commencing on the 1st of Jan. after closing  
of the contract & continuing for  
9 (nine) additional years and balance  
payment 11th year of \$620,000  
\$2,220,000
- 6) \$200,000.00 annuity (investments made  
with one month of cash and

Subject to inspection of office building and Washington St.  
and 7 acres and personal guarantee by George Pickett and company

Tab 3



May 31, 1984


CH3 National Corporation  
4920 Paradise Road  
Las Vegas, Nevada 89119

Gentlemen:

Upon the closing of the transaction described below, S.N.L. Financial Corporation agrees to pay your company \$50,000 cash plus \$2,500 a month for fifty (50) consecutive months commencing 31 days after closing of the transaction whereby Security International Insurance Company is acquired by S.N.L. Financial Corporation. The \$50,000 is to be paid at the closing of said transaction. Such payment shall be in full satisfaction of any and all claims of any kind or nature whether arising before or after the date hereof against S.N.L. Financial Corporation, Security National Life, Security Holding Corporation, Security International Corporation, Security International Insurance Company, Northwest Sales Co., George Quist or David Johnson.

This agreement is subject to approval of Mr. Joseph Henroid of the law firm of Nielson and Senior of Salt Lake City, Utah, particularly in regard to that certain court order of approximately October, 1983, regarding the divorce of Giles H. and Ululani Florence.

S.N.L. Financial Corporation

  
\_\_\_\_\_  
George R. Quist  
President

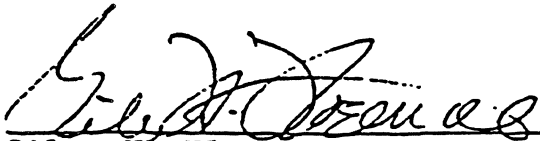
DEFENDANT'S

RELEASE

I, Giles H. Florence, in consideration of a letter dated May 31, 1984, from Mr. George R. Quist, President of S.N.L. Financial Corporation, hereby agree to release and forever discharge all of the following corporations and persons from any further liability relating to the matters described in the letter referred to herein:

S.N.L. Financial Corporation  
Security National Life  
Security Holding Corporation  
Security International Corporation  
Security International Insurance Company  
Northwest Sales Co.  
George R. Quist  
David Johnson

This release is given this 31st day of May, 1984.

  
\_\_\_\_\_  
Giles H. Florence

Tab 4

ANTHONY M. THURBER (#A3261)  
Attorney for Plaintiff  
8 East Broadway, #735  
Salt Lake City, Utah 84111  
Telephone: (801) 533-0181

---

IN AND FOR THE THIRD JUDICIAL DISTRICT COURT  
SALT LAKE COUNTY, STATE OF UTAH

---

GILES FLORENCE,	:	
Plaintiff,	:	AFFIDAVIT OF GILES FLORENCE
-vs-	:	Civil No. C85-2501
S.N.L. FINANCIAL CORPORATION,	:	Judge Homer Wilkinson
and GEORGE QUIST,	:	
Defendant.s	:	

---

Giles Florence being first duly sworn upon his oath, deposes and states:

1. At all times material herein I have held a valid Utah Real Estate Agent's License authorizing me to derive commissions from the sale or exchange of real properties for cash or other forms of consideration.

2. During the month of April, 1983 I obtained from one David Johnson of Fargo, North Dakota, an option to buy or sell Mr. Johnson's 62-1/2% control of Security International Corporation (SIC), a North Dakota holding company which owned 100% of the outstanding stock of Security International Insurance Company (SIIC), a domestic North Dakota life insurer.

3. On or about April 22, 1983, defendant George Quist for and in behalf of defendant SNL Financial Corporation executed an agreement to purchase Mr. Johnson's holdings in SIC for certain consideration which included as Item 6 a \$200,000 annuity in payment of my commission. Other terms of that agreement included the payment of certain amounts of cash, the exchange of certain real properties, and a premium note in favor of Mr. Johnson; the consideration totaling approximately \$3,570,000 exclusive of my agreed commission. Exhibit A attached is a copy of that document bearing signatures and initials of George Quist as buyer, David Johnson as seller, and myself as the agent, all confirming and accepting the terms and conditions therein provided.

4. The agreed commission provided by paragraph 6 thereof was the agreed consideration for my producing and bringing together a willing buyer and a willing seller on terms agreeable to each. The agreement to pay a commission was not and never has been dependent upon an actual closing.

5. A refined typewritten agreement between the buyer and seller was executed during the month of May 1983 and is attached hereto as Exhibit B. By the terms and conditions of that agreement, all negotiations and "fine tuning" necessary to conclude a purchase and sale had been completed and agreed upon. All that remained to be done from that point on was to obtain board approval from the respective insurance companies and regulatory approval in

the state of North Dakota.

6. Subsequent to May 19, 1983, necessary board approvals were in fact obtained from the involved companies' respective boards of directors, and following a hearing on October 26, 1983, the North Dakota Commissioner of Insurance approved the transaction.

7. All parties to the transaction, including attorneys for SNL Financial, David Johnson and myself met in the office of attorney Kermit Bye at Fargo, North Dakota on May 31, 1984 for the purpose of closing, as a firm agreement had been made and all required approvals had been obtained. Mr. George Quist at that time and for the first time asserted that it was my responsibility to pay the costs and attorneys fee incident to the transaction from my agreed commission of \$200,000. I objected to that new demand as it was contrary to our agreement of the previous April. It is not customary or appropriate for agents to pay such costs and fees.

8. Following a heated discussion with Mr. Quist and for the sole purpose of facilitating the closing for which the parties had traveled to Fargo, I reluctantly agreed to a reduction of \$25,0000 in my agreed commission; provided the closing followed immediately and Mr. Quist insisted upon no additional changes from the signed agreement. Mr. Quist and I thereupon executed the documents attached as Exhibit C, which were prepared by George Quist and Attorney Scott Quist his son in the office of Mr. Johnson's attorney Kermit Bye, where we had all met for the closing that day.

9. The agreement dated May 31, 1983 included as a condition that it was subject to the approval of Joseph L. Henriod, a Salt Lake City attorney; particularly in regard to that certain court order of approximately October 1983 regarding the divorce between myself and my ex-wife Ululani Florence.

10. The subject documents were never submitted to, reviewed, nor approved by Attorney Joseph Henriod, for the reasons appearing below.

11. On June 1, 1984, all the parties including myself again met in the office of Attorney Kermit Bye in Fargo, North Dakota for the purpose of finally closing the transaction, as all the terms and conditions had previously been agreed upon and I had agreed to a reduction of \$25,000 in my commission. At the commencement of the meeting, Mr. George Quist called his office in Salt Lake City to determine whether his company's bank balance was sufficient to cover the \$350,000 down payment required to be made that morning to Mr. David Johnson, and learned that his balance was approximately \$150,000 deficient. He thereupon asked Mr. David Johnson to authorize his company (SIIC) to make up the deficiency; as both companies would after the transaction become as one. Mr. Johnson agreed after calling his company to determine its current bank balance, which was sufficient.

12. Mr. George Quist then surprised all those present by stating to Mr. David Johnson "you are going to include your renewals, aren't you"? The retention of his renewals by Mr. Johnson was an item which had been negotiated and agreed upon in writing by the parties as early as May 19, 1983 (See Exhibit B attached). The relinquishing of his renewals by Mr. Johnson would amount to a reduction in the purchase price being paid by the Quist-SNL contingent by an amount in excess of \$1,000,000; and was a new condition which was totally unacceptable to Mr. Johnson.

13. Mr. Johnson properly refused to accede to Mr. Quist's new and unexpected demand, and the transaction did not close as anticipated that day, or ever. Mr. Johnson thereafter sold his interests for the same price as had been agreed upon by Mr. Quist and SNL Financial, without relinquishing his renewals. That sale involved no commission at all.

14. The day before we left for the closing in Fargo, North Dakota, I met with George Quist and SNL's Attorney Scott Quist in Salt Lake City at their request to discuss the closing. They suggested to me that they planned to "force" David Johnson to relinquish his renewals because of a deadline set by the Minnesota Commissioner of Insurance for increasing the capitol of SIIC by \$1,000,000, the deadline being June 6 of the following week. They indicated that they knew there was no way for Mr. Johnson to raise the required additional capital than through the proposed sale, for



the reason he had not sought out other sources in reliance upon George Quist's commitment. They stated they thought Mr. Johnson would "give in" because of the impending deadline.

15. When that suggestion was made, I informed the Quists that I would have no part in such an attempt to reduce the purchase price or otherwise change the terms of the purchase agreement in

any way, as all the terms had been fully agreed upon and required approvals of the respective boards and regulatory authority upon those terms had been obtained. I told them I would not consider any such attempt to blackmail, and that I would be no part of it.

16. There was no excuse, legal, equitable, or otherwise, for the defendants failure to close the transaction upon the agreed terms June 1, 1984.

17. I have fully performed the duties of an agent in bringing a ready, willing and able buyer and seller together upon mutually agreeable terms, and in satisfying all the conditions specified by Mr. Quist in his April 22, 1983 agreement.

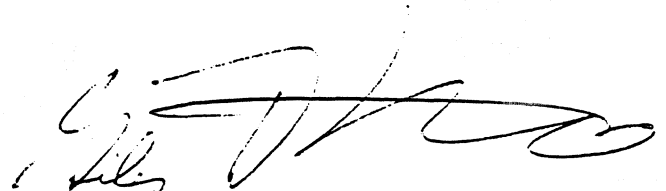
18. The agreed commission was to be paid by George Quist and Security National Life, and not the seller David Johnson, according to the terms of the subject agreement of Mr. Quist and SNL dated April 22, 1983.

19. To my knowledge Mr. Quist never obtained board approval of Security National Life or its holding company SNL Financial to

change the terms of the agreement with Mr. Johnson which existed at the time of closing. Board approval had been obtained upon the terms originally agreed as they appear in the attached Exhibit B. It is my understanding and belief that George Quist on his own initiative demanded the additional, unreasonable, and unacceptable concession of Mr. Johnson to lower his price by an amount in excess of \$1,000,000 for the purpose of forcing Mr. Johnson to complete the transaction at the lower price because of the impending deadline in Minnesota.

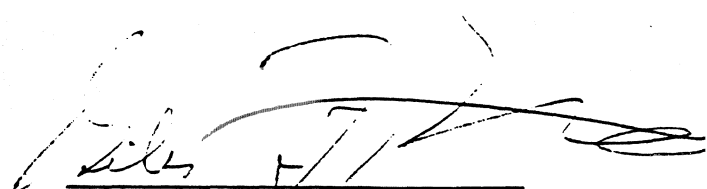
20. I informed David B. Johnson in April 1983, of my \$200,000 annuity commission agreement to be paid by SNL Financial Corporation, and that there would be no commission obligation to me from Mr. Johnson in connection with the transaction.

DATED this 10 day of May, 1990.

  
\_\_\_\_\_  
GILES FLORENCE

VERIFICATION

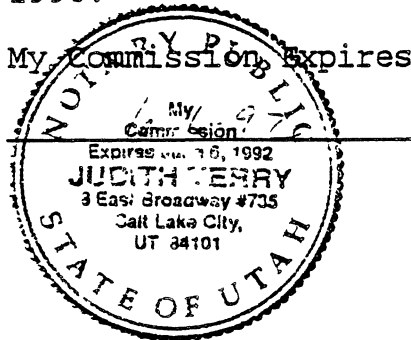
I have read the foregoing affidavit and declare the contents thereof to be true to the best of my knowledge, recollection and belief.

  
\_\_\_\_\_  
GILES FLORENCE

STATE OF UTAH )  
 ) ss  
County of Salt Lake )

SUBSCRIBED and SWORN to before me this 10 day of May, 1990.

My Commission Expires:



NOTARY PUBLIC, residing,  
Salt Lake County, Utah

## CERTIFICATE OF DELIVERY

I hereby certify that I hand-delivered a copy of the foregoing Affidavit, postage prepaid, this   5   day of May, 1990, to the following:

Arthur Nielsen  
Nielsen & Senior  
36 South State Street, 11th Floor  
Salt Lake City, Utah 84111

Anna Perry

Tab 5

# CERTIFIED COPY

1 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

2 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

3 \* \* \*

4 GILES FLORENCE,

5 Plaintiff,

6 vs.

7 S.N.L. FINANCIAL  
CORPORATION,

8 Defendants.  
9

)  
)  
)  
)  
)  
)  
)  
)  
)

Civil No. C85-2501

Deposition of:

GEORGE QUIST

10  
11 BE IT REMEMBERED that on Thursday, the 13th day  
12 of February, 1986, commencing at the hour of 10:00 a.m.,  
13 the deposition of GEORGE QUIST, produced as a witness  
14 at the instance and request of the Plaintiff in the  
15 above-entitled action now pending in the above-named Court,  
16 was taken before me, JILL CROXFORD, a Certified Shorthand  
17 Reporter and Notary Public, in and for the State of  
18 Utah, at the offices of Anthony M. Thurber, 8 East Broadway,  
19 Suite 735, Salt Lake City, Utah; and

20 That said deposition was taken pursuant to  
21 Notice.

22 \* \* \*  
23  
24  
25

ASSOCIATED PROFESSIONAL REPORTERS

420 KEARNS BUILDING  
SALT LAKE CITY, UTAH 84101

A P P E A R A N C E S

For the Plaintiff: Anthony M. Thurber  
 Attorney at Law  
 Suite 735 Judge Building  
 8 East Broadway  
 Salt Lake City, Utah 84111

For the Defendant: Arthur H. Nielsen  
 NIELSEN & SENIOR  
 Attorneys at Law  
 1100 Beneficial Life Tower  
 36 South State Street  
 Salt Lake City, Utah 84111

Also Present: Scott Quist  
 Giles Florence

\* \* \*

I N D E X

<u>The Witness</u>	<u>Page</u>
GEORGE QUIST	
Examination by Mr. Thurber	3

\* \* \*

E X H I B I T S

<u>Number</u>	<u>Description</u>	<u>Page</u>
1	Letter of 5-19-83	11
2	Handwritten Note of 4-1-82	15
3	Handwritten Note of 4-22-83	15
4	Statement Regarding Acquisition of Control	23
5	Letter of 5-31-84	29

\* \* \*

P R O C E E D I N G S

GEORGE QUIST,

called as a witness for and on behalf of  
the Plaintiff, being first duly sworn,  
was examined and testified as follows:

EXAMINATION

BY MR. THURBER:

Q Mr. Quist, would you please state your name  
and address for the record.

A George R. Quist, 4491 Wander Lane, Salt Lake  
City, Utah.

Q How long a time have you resided in the Salt  
Lake area?

A I was born in Salt Lake County.

Q So, all your life?

A Nearly all my life.

Q What is the nature of your relationship with  
S. N. L. Financial Corporation and its affiliates?

A I'm the president and chairman of the board.

Q What, just generally and quickly, is that  
company and what are its affiliates?

A Well, it's a holding company which owns  
Security National Life and other properties.

Q Do you hold the same positions in the  
affiliated companies?

1 A Yes.

2 Q How was Mr. Florence compensated for his  
3 involvement in it, simply by the acquisition of the loan?

4 A I'm not sure I can answer for Mr. Florence.

5 Q He wasn't paid a finder's fee or a commission  
6 from the Security National Life end of the transaction,  
7 was he?

8 A He paid Security National Life a fee to make  
9 the CD deposit in the bank in Wyoming.

10 Q So, beyond that, you have no knowledge of how  
11 he was compensated, if at all?

12 A I have no knowledge.

13 Q Do you recall when it was Mr. Florence  
14 first came to you with a proposal concerning Mr. David  
15 Johnson's companies?

16 A As I recall, it was the spring of 1983.

17 Q How did he come to you or how did he come  
18 into contact concerning that matter? Did he call you  
19 and come and discuss it?

20 A Florence contacted me.

21 Q Did he come to you directly or did he come in  
22 a group of the officers of your company at first?

23 A I think initially, it was myself.

24 Q Do you recall, was it face-to-face meeting or  
25 did you learn of the possibility of that acquisition



1 by telephone?

2 A As I recall at the moment, it was from a  
3 telephone call. I think he said he was in Arizona.

4 Q Did he describe to you what he or what  
5 Mr. Johnson had to offer?

6 A It may have been the initial contact. It may  
7 have been in the form of a question.

8 Q Well, in any event, did you learn that there  
9 was a holding company and a wholly-owned North Dakota  
10 Domestic Insurance life insurance company available for  
11 acquisition?

12 A I was so informed.

13 Q During the ensuing several weeks, were negotiations  
14 undertaken?

15 A Yes.

16 Q And was an agreement finally reached and signed  
17 or initialed outlining the terms of a proposed acquisition?

18 A The general terms were.

19 Q And is that agreement this, the preliminary  
20 form of it, what appears on S.N.L. letterhead, three-page  
21 document dated May 19 of 1983?

22 A This was prepared for Mr. Johnson.

23 Q This document has a number of typewritten  
24 provisions and then a number of handwritten interlineations  
25 and additions. Do you see that and a number of initials?

1           A     Yes.

2           Q     Can you tell me who drafted the agreement,  
3 the typewritten portions of it?

4           A     I would suspect our joint thinking went into it  
5 and the actual drafting may have been left to our corporate  
6 counsel.

7           Q     In any event, from the fact that the typewritten  
8 portions of the document appear on S.N.L. Financial  
9 Corporation letterhead, does that suggest to you that it  
10 was prepared within the S.N.L. organization?

11          A     Yes.

12          Q     Now, do you recall a meeting or a series of  
13 meetings at which the changes and additions were discussed  
14 and agreed upon?

15          A     You would have to enumerate it, if you would  
16 be kind enough, to enumerate the changes you are referring  
17 to.

18          Q     Changes that I'm asking you about now are  
19 those that appear by handwritten interlineations in  
20 several points in this document. First, let me ask you,  
21 were you present when those changes were made?

22          A     No.

23          Q     Who was, if you know?

24          A     I don't know.

25          Q     Were you aware of the terms of the proposal

Tab 6

IN THE DISTRICT COURT  
OF THE THIRD JUDICIAL DISTRICT  
IN AND FOR THE COUNTY OF SALT LAKE  
STATE OF UTAH

-----  
GILES FLORENCE,

Plaintiff,

vs.

Civil No. 850902501 CV

S.N.L. FINANCIAL CORPORATION,  
GEORGE QUIST,

Defendants.  
-----

D E P O S I T I O N

OF

DAVID B. JOHNSON

April 30, 1990

10:00 o'clock, a.m.

Taken at:  
Offices of VOGEL, BRANTNER, KELLY,  
KNUTSON, WEIR & BYE, LTD.  
502 First Avenue North  
Fargo, North Dakota

REPORTER: LISA SICKLER, RPR

(PURSUANT TO NOTICE)

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A P P E A R A N C E S

ANTHONY M. THURBER  
Attorney at Law  
Suite 735, Judge Building  
8 East Broadway  
Salt Lake City, Utah 84111  
COUNSEL FOR PLAINTIFF

ARTHUR H. NIELSEN  
Attorney at Law  
of  
NIELSEN & SENIOR  
1100 Beneficial Life Tower  
36 South State Street  
Salt Lake City, Utah 84111  
COUNSEL FOR DEFENDANTS

Also present: Kermit Bye  
Giles Florence

## I N D E X

## WITNESS:

PAGE NO.

DAVID B. JOHNSON

Examination - - By Mr. Thurber 4

Examination - - By Mr. Nielsen 69

Cont. Examination By Mr. Thurber 111

## EXHIBITS

MARKED

Deposition Exhibit No. 1 15

Deposition Exhibit No. 2 15

Deposition Exhibit No. 3 15

Deposition Exhibit No. 4 15

Deposition Exhibit No. 5 15

Deposition Exhibit No. 6 15

Deposition Exhibit No. 7 15

Deposition Exhibit No. 8 111

1 WHEREUPON,

2 the following proceedings were had,  
3 to-wit:

4 DAVID B. JOHNSON, a witness, called  
5 by the Plaintiff, being first duly sworn,  
6 testified on his oath as follows:

7 BY MR. THURBER EXAMINATION

8 Q. Will you state your full name and  
9 your address for the record please, Mr.  
10 Johnson?

11 A. My name is David, middle initial  
12 B. Johnson. My address is Route 1, Box 391,  
13 Fargo, North Dakota, 58104.

14 Q. Will you review for us just  
15 briefly the nature of your educational  
16 background and experience?

17 A. I'm a graduate of North Dakota  
18 State University. I took graduate work in  
19 business administration at Stanford  
20 University and the University of Minnesota.

21 Q. How long a time have you resided  
22 in this area, that is, the Fargo area?

23 A. I have lived in Fargo since I  
24 believe in 1960.

25 Q. Will you tell us how and when you

1           A.     Well, I'll read off the document  
2           if you want me to.

3           Q.     (BY MR. THURBER)   Well, read us  
4           what it says.

5           A.     Point 6 there's a figure of, Point  
6           6, \$200,000 and then the next word that I can  
7           read says annuity and I can't read the rest  
8           of it.

9           Q.     Okay.   Do you know what that --  
10          let me ask you first, did the proposal of the  
11          Quists to you involve that \$200,000 annuity  
12          to you or to anyone in your family?

13          A.     No.    I really knew nothing about  
14          it up to -- I certainly knew when I signed  
15          this document that there was a request, the  
16          request of a \$200,000 annuity.   But other  
17          than that I was not to receive anything of  
18          that.

19          Q.     Do you know who was to be the  
20          beneficiary of that if anyone?

21                 MR. NIELSEN:   Objection.  
22          Speculative.   This person would never  
23          know.

24          A.     Giles.   He was to be compensated  
25          by an annuity.



1 conversation with reference to renewals. If  
2 renewals had ever come up where I was to give  
3 up any of my renewals, the negotiation would  
4 have ceased at that time.

5 Q. Had there been any discussion or  
6 suggestion from the Quist side of the table  
7 that any of the terms and conditions  
8 reflected by Exhibit 4 be changed, be  
9 materially changed or changed at all from May  
10 of '83 until this meeting on June 1 of 1984?

11 A. No. Other than the fine tuning  
12 that you see depicted on the various sheets  
13 of paper.

14 Q. Were you ready, willing and able  
15 to close on those terms, namely, the May 1983  
16 terms on the morning of June 1, 1984?

17 A. Yes.

18 Q. Was there any other reason for the  
19 meeting than to close?

20 A. Not that I know of.

21 Q. All right. After the discussion  
22 that you've related about the down payment of  
23 \$350,000 was concluded, tell us what happened  
24 next.

25 A. Well, George stated that they had

1           no intention of paying me the renewals and  
2           basically that was the end of the  
3           discussion.    I left my mind open to see if  
4           they'd change their mind and really nothing  
5           happened after that date.    I don't recall  
6           any communication with them after they left  
7           on the 1st.

8                   Q.    Was that the first discussion that  
9           had been made to you about relinquishing your  
10          renewals?'

11                  A.    It's the only time that renewals  
12          were mentioned that I was going to forfeit my  
13          renewals.    Like I said a moment ago, I would  
14          have never proceeded with another matter with  
15          the Quists had that ever come up prior to the  
16          closing date of June 1 of '84.

17                  Q.    In terms of volume or in terms of  
18          dollars in this transaction what difference  
19          would have been made had you relinquished  
20          your renewals?

21                  A.    Well, I'm going to estimate that  
22          my renewals at that time would have been  
23          running between 5 and 10,000 a month.    And  
24          so you're talking a very significant amount  
25          of money over the years and it could be in

1           the range of or close to a million dollars.

2           Q.     And would the bottom line effect  
3           of relinquishing renewals had you done so at  
4           Mr. Quist's request been to reduce his cost  
5           of acquisition by that amount?

6           MR. NIELSEN:   I object to the form  
7           of the question.   Leading and suggestive.

8           A.     Over the period it would have been  
9           reduced by the amount of the renewals.

10          Q.     (BY MR. THURBER)   And was that  
11          something acceptable to you?

12          MR. NIELSEN:   Same objection.

13          A.     I had stated twice during the  
14          deposition that I would have absolutely  
15          refused to negotiate any further with the  
16          Quists had the subject of renewals and my  
17          forfeiture of the renewals against the  
18          purchase price ever come up.   I feel that we  
19          basically wasted one year in this, in the  
20          matter of negotiations.

21          Q.     I'm going to read to you just a  
22          couple of statements by Mr. Scott Quist in  
23          his deposition which appear at pages 13 and  
24          14 and just ask you to, for your  
25          observations.   At page 14 Mr. Quist makes

1 the statement relating to your demands as of  
2 June 1, 1984. That they were "all very  
3 dramatic changes. And that they" -- meaning  
4 your demands -- "were specifically not agreed  
5 to in the forme, not contained in the forme."  
6 Can you comment on that statement?

7 MR. NIELSEN: I object to the form  
8 of the question. No proper foundation.

9 Q. (BY MR. THURBER) Well, let me ask  
10 it this way. Were there any dramatic, what  
11 could be remotely termed dramatic changes in  
12 your position as of June 1, 1984?

13 A. None whatsoever.

14 Q. Dramatic or otherwise?

15 A. That is correct.

16 Q. Would there be any truth to the  
17 notion or the statement that from the point  
18 of your demands or your position the "basic  
19 structure had changed"?

20 A. No.

21 MR. NIELSEN: I object to that on  
22 the same grounds.

23 Q. (BY MR. THURBER) Or that your  
24 terms were "radically different"?

25 A. That statement is utterly

1           ridiculous.

2                   Q.    Or that your position as of June  
3                   1, 1984 bore no resemblance to the May  
4                   1983 --

5                   MR. NIELSEN:   Same objection.

6                   A.    Again utterly ridiculous.

7                   Q.    (BY MR. THURBER)   Specifically had  
8                   any of your terms changed regarding or your  
9                   demands changed as of June 1, 1984 regarding  
10                  any of the following matters, first, the  
11                  manner or the amount of the consideration to  
12                  be paid to you?

13                  A.    No.

14                  Q.    Secondly, the premium note  
15                  provided by the agreement being contingent or  
16                  fixed, that is the payment pursuant to the  
17                  premium note being contingent or fixed?

18                  A.    No.

19                  Q.    Third, the continuation, matter of  
20                  continuation of presidential compensation to  
21                  you?

22                  A.    All I received from the company  
23                  other than in the formative years after 1963  
24                  were commissions for running the company and  
25                  being responsible for virtually all of the

1 sales. And at one time some of the  
2 compensation was under a different caption.  
3 At no time have I ever been paid a salary per  
4 se as a president or in any other capacity.  
5 My commissions were at one standard or fixed  
6 rate and they continued.

7 Q. Fourth, the maintenance of agents  
8 office facilities?

9 A. During our Denver meeting I had  
10 suggested to George Quist that he consider  
11 continuing paying our agency director of a  
12 salary for a, for a possible year as a means  
13 of simplifying this change of ownership.  
14 Mr. Davidson at the time knew virtually all  
15 of the stockholders and all of the policy  
16 holders, and in order to pacify and work with  
17 these people and to assure him of the merits  
18 of the merger, I thought it would be to the  
19 company's advantage to be supportive of Mr.  
20 Davidson. But that was only a suggestion,  
21 not a demand or even a request.

22 Q. And, fifth, the provision or the  
23 supplying of banks for the agents to solicit  
24 from which the agents might solicit bank  
25 business after the transaction?

1           A.    If you'll refer to Mr. Quist's  
2           original offers, they agreed to set up the  
3           banks at their expense.    Later on in the  
4           negotiations they offered Northwest Sales  
5           Company an additional commission rate I  
6           believe of 5 percent if we would take on that  
7           responsibility of signing up the banks, but  
8           originally that was to be their job.   So that  
9           statement is again completely false.

10           Q.   Were there any terms reflected by  
11           either the forme submission of Scott Quist  
12           dated September 28, 1983 or the letter  
13           agreement and interlineated and initialed May  
14           19, 1983 that were not totally acceptable to  
15           you on June 1, 1984?

16                   MR. NIELSEN:   Object to the form  
17           of the question.

18           A.    No.

19           Q.    (BY MR. THURBER)   Your answer?

20           A.    No.

21           Q.    Did you ever either orally or in  
22           writing either suggest any different terms?

23           A.    No.

24           Q.    Did you ever request of the  
25           Quists, either of them, that Giles not be

1           contacted about any aspect of this  
2           transaction?

3           A.     Would you repeat that?

4           Q.     Did you ever request of the Quists  
5           that Giles Florence not be contacted  
6           concerning any aspect of this transaction?

7           MR. NIELSEN:   Same objection.

8           A.     No.

9           Q.     (BY MR. THURBER)   Did you ever  
10          suggest to the Quists that you didn't want to  
11          deal with Mr. Florence?

12          A.     No.

13          MR. NIELSEN:   Same objection.

14          Q.     (BY MR. THURBER)   As of June 1,  
15          1984 had Mr. Florence done all that you  
16          wanted or expected of him?

17          MR. NIELSEN:   Same objection.

18          A.     Yes.

19          Q.     (BY MR. THURBER)   Was there  
20          anything remaining to be done in what Giles  
21          Florence had been undertaking to do?

22          MR. NIELSEN:   Same objection.

23          A.     No.

24          Q.     (BY MR. THURBER)   Was Mr. Quist's  
25          demand on the morning of June 1, 1984



1 something you would describe or not describe  
2 as a radical change in the agreement?

3 MR. NIELSEN: Same objection.

4 A. Absolutely. And I refer to my  
5 former answers, had that ever come up that  
6 the negotiations would have stopped at that  
7 point. It would have been totally  
8 unacceptable from the very beginning, from  
9 the very mention of giving up of the  
10 renewals.

11 Q. (BY MR. THURBER) Do you know why  
12 Mr. Quist inserted that demand into this  
13 transaction on that date?

14 MR. NIELSEN: Same objection.

15 A. I don't know why he did that. I  
16 can refer to one passing thought --

17 MR. NIELSEN: Let me interject  
18 here. Apparently Mr. Florence is coaching  
19 Mr. Johnson. Mr. Florence just made a  
20 comment to Mr. Johnson which Mr. Johnson  
21 apparently is now going to interject in his  
22 testimony and I object to it and I object to  
23 the fact that he has also done this before.

24 Q. (BY MR. THURBER) Okay. We only  
25 want you to testify from your own

1 recollection.

2 A. No. I realize that Giles said  
3 something, but I also related to you earlier  
4 this morning that I have no hearing in my  
5 right ear and my left eardrum was shot out by  
6 the Shriners during an initiation and so I  
7 have a great difficulty hearing. I did hear  
8 the word Minnesota.

9 And I'll refer back to my sheet  
10 that gives the date of the Florence matter on  
11 5-4-84, and this had been referred to and  
12 discussed prior to this moment, that I called  
13 Giles Florence on that date and he stated, it  
14 says here, states George Quist trying to make  
15 distress buy of Security International  
16 Insurance Company due to the Minnesota  
17 capital and surplus problem.

18 But I had no, no idea other than  
19 an assumption that this could have some part  
20 of why George Quist came in at the last  
21 minute and tried to renegotiate the price  
22 based on the forfeiture of my renewals other  
23 than to try to beat down the price assuming  
24 that we're under pressure to act because of  
25 the Minnesota situation. And I can assure

1           you that that tactic would never work with me  
2           because we could have forfeited Minnesota  
3           from that standpoint plus I had other means  
4           of raising that money.

5           Q.     (BY MR. THURBER) Can you identify  
6           for us anything other than this new demand of  
7           Mr. Quist's that morning of June 1 that  
8           caused this transaction to fail, anything  
9           else?

10                  MR. NIELSEN: I object to it on  
11           the form of the question and calls for a  
12           speculative answer of the witness.

13           A.     No.

14           Q.     (BY MR. THURBER) Was that the end  
15           of the discussion with Mr. Quist?

16           A.     Well, I know on that date that  
17           Quist also had an appointment with Basil  
18           Walker on 6-1 of '84 and that he went over  
19           and met with him at the Townhouse, had lunch  
20           over there at the Townhouse.

21           Q.     Was that before or after this?

22           A.     This would have been after the  
23           meeting in the morning. Yes, it would have  
24           been at noon.

25           Q.     Did the transaction go any

1 further?

2 A. Well, I never heard from them  
3 again after this time.

4 Q. After June 1 what happened with  
5 regard to the sale of your position?

6 A. Well, I communicated with actuary  
7 Mr. Bill Buchanan and he apparently suggested  
8 a --

9 MR. NIELSEN: I object to any  
10 conversations with somebody else on the  
11 grounds that it's hearsay.

12 Q. (BY MR. THURBER) You can tell us  
13 what you did.

14 A. Well, I talked to Mr. Buchanan and  
15 he apparently suggested that a fellow, one of  
16 his clients come up and view and examine  
17 Security International and this gentleman  
18 ultimately did come up here. So that was  
19 it.

20 Q. Was a sale on the same or similar  
21 terms as the Quist agreement negotiated?

22 A. Yes. On 10-10, 1984 we concluded  
23 the sale of our controlling interest in  
24 Security International Corporation and  
25 insurance company to another party, yes.

1                   Q.     And was it on the same or  
2                   different terms to which you agreed with Mr.  
3                   Quist?

4                   A.     It was on the, I would say almost  
5                   identical terms.

6                   Q.     And what if anything was done with  
7                   regard to your renewals in that transaction?

8                   A.     I continue to receive my renewals  
9                   and I continue to receive them to this date.

10                  Q.     Was there any suggestion made at  
11                  the closing of that transaction that you  
12                  relinquish your renewals?

13                  A.     No.

14                  Q.     And who was the buyer?

15                  A.     The buyer was American Insurance  
16                  Management Company, Incorporated out of  
17                  Phoenix, Arizona.

18                  Q.     Were those same terms acceptable  
19                  to you both before and after the June 1, 1984  
20                  meeting with Mr. Quist?

21                  A.     Yes.

22                  Q.     From your standpoint as a party to  
23                  this transaction had Mr. Giles performed  
24                  totally what he'd undertaken to perform?

25                         MR. NIELSEN:   Same objection.

1           It's leading and suggestive and calls for a  
2           conclusion.

3           A.     Yes.

4           Q.     (BY MR. THURBER) Was there  
5           anything more for him to do?

6           A.     There was nothing more that I knew  
7           of.

8           Q.     Had he produced a ready and able  
9           buyer?

10           MR. NIELSEN: Same objection.

11           A.     Yes.

12           Q.     (BY MR. THURBER) On terms  
13           acceptable to you?

14           A.     Yes.

15           Q.     Was there anything more that a  
16           broker or a finder is required to do?

17           MR. NIELSEN: Same objection.

18           A.     No.

19           Q.     (BY MR. THURBER) From your point  
20           of view was there an enforceable agreement  
21           with --

22           MR. NIELSEN: Same --

23           MR. THURBER: Let me finish the  
24           question, please. Was there an enforceable  
25           agreement with the Quist interest as of June

Tab 7

STATEMENT REGARDING THE ACQUISITION OF CONTROL  
OF A DOMESTIC INSURER

Security International Insurance Company

By

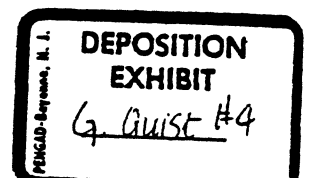
S.N.L. Financial Corporation

Filed with the Insurance Department of North Dakota

Dated September 28, 1983

Correspondence concerning this statement should be addressed to:

Scott M. Quist, Esq.  
General Counsel  
S.N.L. Financial Corporation  
P.O. Box 9249  
Salt Lake City, Utah 84109-0249





failure to comply in any way with or perform any term, covenant or condition of this Agreement or any related agreement, document or instrument executed or to be executed pursuant to or in connection with this Agreement; (c) the inaccuracy of any certificates to be supplied by any officer of Security Holding pursuant to this Agreement.

14.3 Special Provisions As a condition precedent to the right to receive any indemnification hereunder, the party seeking indemnification shall give the indemnitor prompt written notice of any event which might give rise to a claim from indemnification specifying the nature of the possible claim and the amount believed to be involved. If the claim for indemnification arises from a claim or dispute with any third party, the indemnitor shall have the right, at its own expense, to defend such claims or disputes and the indemnified party shall cooperate with the indemnitor in such defense. The indemnitor shall reimburse the indemnified party at any time after the Closing, based on the judgment of any court of competent jurisdiction or pursuant to a bona fide compromise or settlement or claims, demands or actions in respect of any damages to which the indemnification hereinabove set forth relates.

## SECTION FIFTEEN

### Commissions and Finders' Fees

Finder SIC and Security Holding agree that Mr. Giles Florence of Phoenix, Arizona, has acted as a finder in connection with the transactions contemplated herein and that no other party will serve as a finder. The parties agree that their respective expenses incurred and to be incurred in connection with the transactions contemplated hereby, including without limitation, attorneys' fees, accountants' fees, travel, printing, mailing and postage, shall be deducted from the fee of Mr. Florence.

## SECTION SIXTEEN

### Plan of Dissolution and Liquidation

It is the intention of the parties hereto that this Agreement and the transactions set forth herein be considered a purchase and liquidation within the meaning of Sections 338 and 337 of the Internal Revenue Code of 1954, as amended.