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**Notice of Appeal.**

(Filed January 31, 1945.)

**In Chancery of New Jersey**

99-590.

IN THE MATTER

*of*

Proceedings under the Mortgage  
Guaranty Corporations' Re-  
habilitation Act affecting the  
FIDELITY UNION TITLE AND  
MORTGAGE GUARANTY COMPANY.

Re: Mortgage  
Investment  
No. M-64178.  
Notice of  
Appeal.

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The New Jersey Realty Company, a corporation of the State of New Jersey, hereby appeals to the Court of Errors and Appeals in the Last Resort in All Causes from such part or portion of the interlocutory decree made by the Chancellor of the State of New Jersey on the advice of Vice-Chancellor Alfred A. Stein in the above entitled cause, on January 23, 1945, which Orders, Adjudges and Decrees:

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A. That it was necessary and proper for the Fidelity Union Trust Company as Trustee to create an exclusive sales agency with J. I. Kislak, Inc. to procure an offer for the purchase of the premises more particularly described in such decree and that payment of commissions to J. I. Kislak, Inc. is approved.

B. That unless the New Jersey Realty Company serves notice upon the Trustee within five days from the date of said decree that it will take

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*Notice of Appeal.*

10 title to said premises and pay to the Trustee the sum of \$100,500.00 and comply with the other terms and conditions contained in a contract between Trustee and Louis Drogin, marked Exhibit P-3, the said Trustee is authorized and directed to sell and convey said premises to Louis Drogin or his assignee.

C. In the event New Jersey Realty Company serves the aforesaid notice then said Trustee is authorized and directed to sell and convey said premises to New Jersey Realty Company on the terms and conditions contained in said Exhibit P-3.

20 D. That the payment of commissions to J. I. Kislak, Inc. is approved and that said J. I. Kislak, Inc. is entitled to commissions in the event New Jersey Realty Company takes title to said property.

E. That said Fidelity Union Trust Company as Trustee is authorized and directed to execute such deeds and instruments as may be necessary to consummate the directions contained in said decree.

Dated: January 26, 1945.

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McCARTER, ENGLISH & EGNER,  
McCarter, English & Egner,  
Solicitors for New Jersey  
Realty Company.

JAMES R. E. OZIAS,  
James R. E. Ozias,  
Of Counsel with New Jersey  
Realty Company.

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*Notice of Appeal.*

I conceive that there is good cause for appeal in the above entitled cause.

JAMES R. E. OZIAS,  
Of Counsel with New Jersey  
Realty Company.

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Service of a copy of the within Notice of Appeal is hereby acknowledged this 26th day of January, 1945.

HOOD, LAFFERTY & EMERSON,  
Hood, Lafferty & Emerson,  
Solicitors for and of Counsel with  
Fidelity Union Trust Company as  
Trustee of Mortgage Investment No.  
M-64178, etc.

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Service of a copy of the within Notice of Appeal is hereby acknowledged this 29th day of January, 1945.

SAMUEL KAUFMAN,  
Solicitor for J. I. Kislak, Inc.

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**Petition of Appeal.**

(Filed February 20, 1945.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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IN THE MATTER

of

Proceedings under the Mortgage  
Guaranty Corporations' Re-  
habilitation Act affecting the  
FIDELITY UNION TITLE AND  
MORTGAGE GUARANTY COMPANY.

Re: Mortgage  
Investment  
No. M-64178.

On Appeal  
from the Court  
of Chancery.  
Petition of  
Appeal.

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*To the Honorable The Court of Errors and Ap-  
peals in the Last Resort in All Causes:*

The petition of the New Jersey Realty Com-  
pany, the appellant in the above entitled cause,  
respectfully shows that:

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1. Petitioner finds itself aggrieved by an inter-  
locutory decree made in the Court of Chancery  
by his Honor, Luther A. Campbell, Chancellor  
of the State of New Jersey, on the advice of the  
Honorable Vice Chancellor Alfred A. Stein, bear-  
ing date January 23, 1945, in a certain cause in  
said Court of Chancery entitled as above (Docket  
99/590) in this respect, to wit, that the said de-  
cree orders, adjudges and decrees:

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A. That is was necessary and proper for  
the Fidelity Union Trust Company as  
Trustee to create an exclusive sales agency  
with J. I. Kislak, Inc. to procure an offer for

*Petition of Appeal.*

the purchase of the premises more particularly described in such decree and that payment of commissions to J. I. Kislak, Inc. is approved.

B. That unless the New Jersey Realty Company serves notice upon the Trustee within five days from the date of said decree that it will take title to said premises and pay to the Trustee the sum of \$100,500.00 and comply with the other terms and conditions contained in a contract between Trustee and Louis Drogin, marked Exhibit P-3, the said Trustee is authorized and directed to sell and convey said premises to Louis Drogin or his assignee. 10

C. In the event New Jersey Realty Company serves the aforesaid notice then said Trustee is authorized and directed to sell and convey said premises to New Jersey Realty Company on the terms and conditions contained in said Exhibit P-3. 20

D. That the payment of commissions to J. I. Kislak, Inc. is approved and that said J. I. Kislak, Inc. is entitled to commissions in the event New Jersey Realty Company takes title to said property. 30

E. That said Fidelity Union Trust Company as Trustee is authorized and directed to execute such deeds and instruments as may be necessary to consummate the directions contained in said decree.

The petitioner appeals from the said decree of the Chancellor, as to the above stated parts thereof, upon the ground that the same is erroneous in that: 40

*Petition of Appeal.*

1. The said decree deprives the New Jersey Realty Company of rights which were fixed and determined by the applicable orders of the Court of Chancery entered in this cause prior to the entry of the decree in question.

10 2. The decree deprives the New Jersey Realty Company of its right to take the trust *res* upon payment to the investors of the amount which they would have received had the sale to Louis Drogin been consummated, as determined and confirmed by General Order Number Two promulgated in this cause on April 16, 1935, and in particular paragraph 17 thereof.

20 3. Contrary to General Order Number Two, the decree imposes upon New Jersey Realty Company the payment of commissions to the broker, J. I. Kislak, Inc., notwithstanding that said commissions were not due and the trustee was not legally obligated to pay any such commissions.

30 4. The Court of Chancery should not have undertaken to approve the payment of commissions to the broker, J. I. Kislak, Inc., for the reason that the broker had an adequate remedy at law to enforce the payment of any commissions which may have been due to it.

Petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

MCCARTER, ENGLISH & EGNER,  
Solicitors for Appellant.

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JAMES R. E. OZIAS,  
Of Counsel with Appellant.

## Order.

IN CHANCERY OF NEW JERSEY.

99-590.

IN THE MATTER  
*of*  
 Proceedings under the Mortgage  
 Guaranty Corporations' Re-  
 habilitation Act affecting the  
 FIDELITY UNION TITLE AND  
 MORTGAGE GUARANTY COMPANY.

Order.  
 Filed April 26,  
 1934.  
 M. L. B.  
 v. C.

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This matter being opened to the Court by Mer-  
 ritt Lane, and Aaron Lesser, of counsel with the  
 Trustees upon the adjourned return of the hear-  
 ing upon the order of February 15th, 1934 and  
 upon the date fixed for the continued hearing upon  
 the matter of the consideration of any plan with  
 respect to the withdrawal of mortgages, in the  
 presence of Louis J. Cohen, of counsel with the  
 Commissioner of Banking and Insurance, Trustee,  
 Louis Hood, of counsel with Fidelity Union Trust  
 Company, Fidelity Union Trust Company, Trust-  
 tee, and other holders of investments and inter-  
 ests in investments, Josiah Stryker and James  
 E. M. Tams, of counsel with Protective Committee  
 for Investors in Fidelity Union Title and Mort-  
 gage Guaranty Company, Guaranteed First  
 Mortgages and Guaranteed First Mortgage Par-  
 ticipation Certificates, Frederick J. Waltzinger,  
 of counsel with holders of investments and inter-  
 ests in investments, and other counsel and inter-  
 ested parties whose appearances are noted upon  
 the record of the proceedings, and the Trustees

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*Order.*

having presented their petition by which they present to the court a plan providing for extending to certain investors the option to withdraw mortgages and properties from the control of the Trustees upon terms, which said plan is in the form of a proposed order, and the court having  
10 declared a recess, to the end that those present, aggregating in number upwards of 150, could consider the said plan, and the parties present having considered it, and the court having reconvened, and the court having heard all of the parties interested who desired to be heard, as appears by the record, and having considered all of the proceedings in this cause and the statements and arguments of the counsel and of the parties, and being of the opinion that it is fair and equitable  
20 under all of the circumstances of the case that an option or privilege should be extended to the class of investors hereinafter in this order designated to withdraw mortgages and properties from the control of the Trustees upon the terms and conditions prescribed by this order, and that the provisions of this order are fair and equitable and in the interest of a proper and efficient administration of the trust or trusts:

30 It is, on this 24th day of April, 1934, ORDERED:

1. The holder or holders of any guaranteed bond and mortgage or the holder or holders of all of the guaranteed mortgage certificates issued against a bond and mortgage shall be permitted to withdraw such bond and mortgage from the control of the Trustees and have the interest of the Trustees released upon the following terms and conditions:

40 (a) The payment to the Trustees of a sum equal to 1% of the principal amount remaining unpaid

*Order.*

to the investor or investors at the time of such withdrawal and 1/12 of the interest, if any, collected by the Company or the Trustees, but not distributed to the investor, which said sums so paid shall constitute general funds of the Trustees.

In cases in which principal or interest has been paid on account of an investment withdrawn and the Trustees have retained 25% of interest and 3% of principal in accordance with the provisions of the order of February 26, 1934, the Trustees shall pay to the withdrawing investor or investors the excess retained of principal over 1% and the excess retained of interest over 1/12 of the interest. 10

(b) The surrender and release of all claims against the Trustees or the trust, the Company or any of its subsidiaries upon any contract of guarantee or bond or other obligation secured by the mortgage, provided, however, that if there is a bond or other obligation of the Company or any of its subsidiaries secured by the said mortgage the withdrawing investor or investors may give a covenant not to sue the Company or any of its subsidiaries for deficiency. 20

(c) The repayment in cash to the Trustees of the amounts advanced by the Company or by any of its subsidiaries from their general funds for: 30  
 (1) foreclosure costs and disbursements as taxed;  
 (2) insurance premiums; (3) taxes and assessments; (4) principal or interest; (5) any other sums advanced by the Trustees or the Company or any of its subsidiaries on account of the investment for the special benefit of the investment, in cases in which such amounts as heretofore indicated in items 1, 2, 3, 4 and 5 of this subdivision 40

*Order.*

(c) have been advanced since the going into effect of general order No. 1 of the Commissioner of Banking and Insurance, i.e., March 21, 1933.

10 (d) Securing the repayment to the Trustees, after the claim of the investor or investors shall be satisfied, of all amounts which have been advanced by the Company or its subsidiaries for the purposes indicated in items 2, 3, and 4 of subdivision (c) of this paragraph prior to March 21, 1933 in such manner as the Trustees and the investor may agree, or, in the event, of the failure to agree, as the Court may prescribe upon application in any individual case upon five days notice given by any interested party to the other parties interested in the particular investment.

20 All papers and documents deposited with the Trustees in cases in which participation certificates have been issued under the terms of Chapter 192 of the Laws of 1920 and the acts amendatory thereof or supplemental thereto shall be delivered to the withdrawing investor or investors but no withdrawing investor or investors shall have any claim against the Trustees appointed herein or the Company or any of its subsidiaries upon any title policy issued in connection with any withdrawn mortgage.

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2. In cases in which properties have been foreclosed and the investment is now represented by the properties, the title to which is in the name of the Company, its Trustees or any of its subsidiaries, guaranteed assignees, Fidelity Union Trust Company, Trustee, such properties may be withdrawn by the guaranteed assignee or by the holders of all of the participation certificates issued against the mortgage which has been fore-

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*Order.*

closed upon the same terms and conditions as mortgages may be withdrawn provided, however, that in any case in which the Trustees conceive that the fair value of the property is substantially in excess of the amount due the investor or investors the Trustees may decline to surrender the property unless an agreement be made which will protect the equity in the property for the benefit of the trust, or in case of the failure of the Trustees and the investor or investors to agree the matter may be submitted to the Court upon five days notice by any interested party to the other parties specifically interested in the investment. 10

3. In cases in which mortgages have been made by the Broadbank Corporation, the Broadbank Corporation remaining title, or in which the Company or its subsidiaries have interests by way of second mortgages or the like, the Trustees when they conceive that the fair value of the property is substantially greater than the amount due the investor or investors may decline to surrender the mortgage unless an agreement be made satisfactory to the Trustees which shall protect the interests of the Company or its subsidiaries; and, in the event of a failure to agree the matter may be brought to the attention of the Court for appropriate order upon five days notice by any interested party to the other parties interested in the particular investment. 20 30

4. In all cases in which the Trustees, the Company or its subsidiaries own participation certificates in any mortgage or have a retained interest in such mortgage, the Trustees, the Company or its subsidiary shall have the same rights as any other holder of a participating certificate. 40

*Order.*

- 5: The holders of 25% or more in face value of participating certificates issued against any mortgage investment may apply to the Court upon ten days notice to the Trustees and to the others interested in such investment for the privilege of having the mortgage withdrawn upon the terms and conditions heretofore set forth which will secure to the Trustees the rights hereinbefore accorded to them upon the withdrawal of mortgages or properties, and upon such other terms and conditions as the Court may prescribe; the Trustees may upon application of any holder of a participating certificate issued against any mortgage call a meeting of all the holders of participating certificates in such mortgage upon ten days notice, to the end that all of the holders of participating certificates in any investment may express their views with respect to the exercise of the options heretofore accorded, or may otherwise obtain the views of said holders of participating interests. The Trustees may, if they so elect and determine proper but shall not be required to, make a reasonable charge to cover the cost of such service to be paid by the investor or investors requesting such meeting or otherwise as may be agreed.
6. In all cases, in which notice is required under the terms of this order, such notice may be given by service upon the Trustees at their office No. 828 Broad Street, Newark, New Jersey, and by mail to all other parties interested, addressed to their addresses as they appear upon the books of the Trustees or of the Company and its subsidiaries.
7. The right to withdraw accorded by this order is an option or privilege only and all provisions

*Order.*

of this order are without prejudice to the rights of the investors who do not elect to exercise the option, and without prejudice to the rights of the Trustees against such investors and shall not be considered in any wise as a determination of the rights of any of the parties with respect to the right to withdraw or otherwise. 10

8. The Trustees are authorized, in arranging for the withdrawal of mortgages or properties in specific cases, where in their discretion they deem it advisable for the benefit of the estate, to compromise any claim which the Trustees, the Company or any of its subsidiaries may have arising under this order and to arrange for the securing of the payment of any moneys to which they may be entitled under the terms of this order or of the immediate payment of moneys to liquidate subordinate claims and the like, or otherwise to, in individual cases, make such arrangements as they deem best in the interest of the trust as a whole. 20

Respectfully advised,

MAJA LEON BERRY,  
V.-C.

LUTHER A. CAMPBELL,  
C.

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**General Order No. 2.**

IN CHANCERY OF NEW JERSEY.

99-590.

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IN THE MATTER

*of*

Proceedings under the Mortgage  
Guaranty Corporations' Re-  
habilitation Act affecting the  
FIDELITY UNION TITLE AND  
MORTGAGE GUARANTY COMPANY.

General Order No. 2.

Re Protection of Trustees  
in Cases of Withdrawals  
of Mortgages and Proper-  
ties Where Trustees Have  
Subordinate Interests.

Filed April 16, 1935.

Maja Leon Berry, V.C.

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Application for this order coming on in the presence of Merritt Lane, Esq. and Herbert J. Hannoeh, Esq., of counsel with William H. Kelly, Commissioner of Banking and Insurance, and J. Ashley Brown, Trustees of the Fidelity Union Title and Mortgage Guaranty Company, Louis J. Cohen, Esq., of counsel with William H. Kelly, Commissioner of Banking and Insurance, Hood, Lafferty & Campbell, Esqs., of counsel with Fidelity Union Trust Company, individually and

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in its several fiduciary capacities; James E. M. Tams, Esq., of Lindabury, Depue & Faulks, of counsel with the Protective Committee for Investors in Fidelity Union Title and Mortgage Guaranty Company Guaranteed First Mortgages and Guaranteed First Mortgage Participation Certificates; Frederick J. Waltzinger, Esq., Runyon Colie, Esq., Auguste C. Roche, Esq., Lum, Tamblyn & Fairlie, Alfred R. Becker, Esq., of counsel with certain investors; Fred W. Ruge,

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Esq., representing J. Fisher Anderson, Esq., of

*General Order No. 2.*

counsel with Commercial Trust Company of New Jersey;

And it appearing that numerous applications are now pending and will be hereafter made for the privilege of withdrawing bonds and mortgages and properties under the terms of the order of April 24, 1934, and that in such cases the Trustees are entitled to be secured, after the claims of the investor or investors shall be satisfied, for certain amounts, in such manner as the Trustees and the investors may agree, or, in the event of the failure to agree, as the Court may prescribe, and that the said Trustees are not obliged to assign any mortgage or to convey any property upon withdrawal in cases in which the Trustees, Fidelity Union Title and Mortgage Guaranty Company or its subsidiaries have interests by way of second mortgage or the like if they conceive that the fair value of the property is substantially greater than the amount due to the investors unless an agreement is made satisfactory to the Trustees which shall protect the interest of the Trustees, the Company or its subsidiaries, or as may be determined by the Court in the event of failure to agree, and the Trustees now presenting to the Court their views as to the measure of protection to which they are entitled in all cases of the same general nature, subject to variations in particular cases; and the Court having heard counsel and considered the matter;

It is, on this Sixteenth day of April, 1935, ORDERED that, whenever an order shall hereafter be made directing William H. Kelly, Commissioner of Banking and Insurance, and J. Ashley Brown, as Trustees (hereinafter called the "Trustees") of Fidelity Union Title and Mort-

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*General Order No. 2.*

gage Guaranty Company (hereinafter called the "Guaranty Company") or their successors in the trust to assign and deliver or cause to be assigned and delivered to a trustee (hereinafter called the "Trustee") a mortgage and the bond intended to be secured thereby, or directing the

10 Trustees to transfer or cause to be transferred properties to a Trustee, in cases in which the Trustees are entitled to the protection of their subordinate interests (excluding cases in which the Trustees conceive that they have an equity in the property over and above any interest then determinable) such order permitting withdrawal, if therein so provided, shall be deemed to include, as if fully incorporated therein, such of the following provisions of this order applicable to the

20 specific case as shall be specifically referred to therein:

*First: Cases in which the trustees are entitled to the protection of their subordinate interests in a bond and mortgage assigned.*

1. The Trustee shall hold the mortgage investment as trustee as well for the Trustees, the Guaranty Company and its subsidiaries, to the

30 extent of their subordinate interest as fixed by this order, as for the investors.

2. All payments made on account of the mortgage investment by the mortgagor shall be first applied to the reduction of the amount due investors until the amount due investors, calculated in the manner hereinafter provided, shall have been liquidated, the Trustees being subrogated to the rights of the investors to the extent of any moneys paid by the mortgagor on account of any

40 indebtedness represented in the subordinate in-

*General Order No. 2.*

terest of the Trustees; if any interest paid by the mortgagor or income received by the Trustee, shall exceed the amount of interest due the investors, such excess of interest, as between the Trustee, the investors and the Trustees, shall be applied to the reduction of the principal of the amount due to the investors and the Trustees shall be subrogated to the rights of the investors with respect to such principal so liquidated as between the Trustee, the investors and the Trustees; when the amount due the investors, calculated as hereinafter provided, shall have been liquidated the Trustees shall be entitled to the proceeds of the said mortgage investment until the amount due upon their subordinate interest with interest shall have been liquidated.

3. No sale or other disposal of the bond and mortgage or any satisfaction or release of the mortgage or of any party liable on the indebtedness shall be made except bona fide nor unless the subordinate interest of the Trustees is liquidated in full, or unless, upon the approval of the court given upon 15 days written notice to the Trustees; and the court, upon such application for approval, may make such order or decree touching the said sale, other disposal, satisfaction or release aforesaid and as to the rights and interests of the Trustees and the investors as to it shall seem equitable and just; the provisions of this paragraph shall not be deemed to modify or limit the powers conferred upon the Trustee under the provisions of paragraph 9 of General Order No. 1 if made a part hereof; any amount realized from any sale or other disposal, or any release or satisfaction, of said mortgage and bond over the amount due investors, calculated as here-

*General Order No. 2.*

inafter provided, shall be paid to the Trustees on account of their subordinate interest until such subordinate interest be liquidated.

10 4. In the event of foreclosure, the Trustees shall be made parties defendants but their interest shall not cease except as hereinafter provided; if at a foreclosure sale a property shall be sold to a bona fide purchaser in no wise connected with the Trustee or the investors at a bona fide price the interest of the Trustees in the mortgage and land shall cease; if at a sale under foreclosure an amount shall be realized more than sufficient to liquidate the amount due the investors, calculated in the manner hereinafter provided, the Trustees shall be paid the surplus or the amount  
20 which may be due to them with interest whichever be the lesser; if the property shall be acquired on foreclosure by the Trustee, the investors or on their behalf or if title shall come to them or either of them by means of a conveyance by the mortgagor or otherwise, then, notwithstanding the fact that the Trustees shall have been made parties to the foreclosure proceedings, the Trustee or the investors, as the case may be, shall hold the title for the use and benefit of the investors and of the  
30 Trustees in the same manner as they shall hold the title where property is conveyed by the Trustees in cases in which the Trustees or the Guaranty Company or its subsidiaries shall have second mortgages or other subordinate liens, and the rights of the parties shall be as provided in paragraphs 6 to 12, both inclusive, of General Order No. 2.

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*General Order No. 2.*

*Second: Cases in which the trustees are entitled to protection for the interest of the guaranty company or of the trustees as second mortgagees where bonds and mortgages are assigned.*

5. No foreclosure sale shall be held without the consent of the Trustees within six months from the date withdrawal is consummated or upon order of the Court made on fifteen days notice to the Trustees. If the property be bought in at a foreclosure sale by the Trustee or the investors or on behalf of either of them, then, notwithstanding the fact that the Trustees shall have been made parties to the foreclosure proceedings and their interest foreclosed, the Trustee or the investors as the case may be, shall hold the title for the use and benefit of the investors and of the Trustees in the same manner as they shall hold the title where properties are conveyed to the Trustee by the Trustees in cases in which the Trustees or the Guaranty Company shall have second mortgages or other subordinate liens and the rights of the parties shall be as provided in paragraphs six or twelve both inclusive of General Order No. 2.

*Third: Cases in which the trustees are entitled to the protection of subordinate interests in properties excluding cases in which the trustees conceive that they are entitled to the protection of an equity over and above a determinable amount.*

6. If the Trustees or the Guaranty Company or its subsidiaries shall hold a mortgage or other lien upon the property withdrawn, securing a subordinate interest, the Trustees shall assign, can-

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*General Order No. 2.*

cel or discharge, or cause to be assigned, canceled or discharged, the same of record and the Trustee shall hold title to said property not only in trust for the investors but likewise for the Guaranty Company or its subsidiaries or the Trustees as the case may be.

10 7. The Trustee or the investors shall hold title to said property not only for the benefit of the investors therein (in which term shall be included the interest of the Guaranty Company or the Trustees to the extent that they are recognized by this order as investors) but also for the benefit of the Guaranty Company or the Trustees for any interest either may have represented by the second mortgage or other lien discharged or canceled  
20 of record or other subordinate interest to which the Trustees may be entitled which interest of the Guaranty Company or the Trustees shall be subsequent and subordinate to the rights of the investors.

30 8. No sale or other disposal of the property shall be made by the Trustee for an amount less than sufficient to satisfy the amount due to the Guaranty Company or the Trustees except bona fide and upon fifteen days notice to the Trustees of an application to the court to approve such  
40 sale and, upon such application, the court may make such order touching the said sale or other disposal aforesaid and as to the rights and interests of the Trustees and the investors as to it shall seem equitable and just; if the court shall approve such sale or other disposal and it shall be consummated, then the Trustees shall have no further interest in the trust except that, if the proceeds of such sale or other disposal shall be in excess of the amount due the investors calcu-

*General Order No. 2.*

lated in the manner hereinafter provided, the Trustees shall be paid such excess or the amount which may be due to them upon their subordinate interest with interest, whichever be the lesser; if the contemplated sale or other disposal be not consummated the rights of the parties shall be the same as before notice was given to the Trustees. 10

9. If there shall be realized from the property by sale or otherwise more than sufficient to pay the investors the amount due them including interest, then there shall be paid to the Trustees, from the surplus money, the amount due on the subordinate interest of the Guaranty Company or the Trustees with legal interest thereon or the amount of such surplus whichever shall be the lesser sum, and, should there be more than sufficient to pay the amount due the Trustees or the Guaranty Company, the balance of such moneys shall be distributed among the parties having investment interests in the property, pro rata. 20

10. Should the property be sold partly for cash and partly secured by a mortgage on the property so sold, the Trustees or the Guaranty Company shall not be entitled to payment on account of the amount due on their subordinate interest until there shall be actual funds in hand to pay the amount due them or on account thereof and after payment of all amounts due investors calculated in the manner provided by this order. 30

11. The Trustees in their capacity as holders of a subordinate interest shall not be entitled to question the bona fides of any expenditures made by the Trustee or the investors with respect to the operation of the property except only that they shall be entitled to the same notice as an 40

*General Order No. 2.*

investor is entitled to where notice to investors is required under the terms of this order.

10 12. All net income and all net avails of the said property shall be first applied to the reduction of the amount due investors, calculated in the manner hereinafter provided, until the amount due investors shall have been liquidated; if there shall remain a balance of income or net avails after the amount due investors shall have been satisfied then the Trustees shall be entitled to the net income or net avails until the amount due upon their subordinate interest with interest shall have been liquidated; if there shall still be a balance the moneys shall be distributed among the parties having investment interests in the property pro rata.

20 *Fourth: Calculation of amounts due investors in all cases.*

30 13. (a) In all cases in which the Guaranty Company or the Trustees have a subordinate interest in a mortgage or have second mortgages or any other lien, so long as the mortgage investment has not been translated into property, the amount due investors shall be the amount which they have not been repaid on account of the principal and interest of their investment including, as a part of the amount due them, any amount of moneys paid to the Trustees upon withdrawal, or which have been advanced or expanded by them or on their behalf which, as between the mortgagor and mortgagee, may be considered as a part of the mortgage debt remaining unpaid; but they shall not be entitled to include as a part of the amount due them, any amount of moneys  
40 which may have been paid to the Trustees on

*General Order No. 2.*

withdrawal, or paid as commissions to the Trustee except to the extent that such moneys may be considered, as between the mortgagee and mortgagor, as a part of the mortgage debt remaining unpaid.

(b) In cases in which the mortgage investment has been translated into property the amount due the investor shall be: (1) the amount due as provided by paragraph (a); (2) the amount advanced or expended by or for them for all expenses pertaining to the trust property, including capital expenditures, except the commissions of the Trustee; (3) legal interest on all advances made as designated in subdivision (2) of this subparagraph from the date of such advances. In the amount due investors shall be included all foreclosure costs paid by the Trustee or withdrawing investors to the Trustees upon withdrawal whether taxed or untaxed. The investors shall give credit on the amounts due them for all net income or net avails received by them.

*Generally.*

14. No third party shall be required to inquire into the power of the Trustee or into any purchasing investors' power to dispose of the property purchased and any act of the Trustee shall be conclusive evidence of his power to act as to third parties. No third party shall be required to look to the application of the purchase money.

15. The word "investor" shall be deemed to include all holders of participation certificates, including the Guaranty Company and the Trustees, recognized by this order as investors; the term "Trustees" shall be deemed to include the present Trustees of the Fidelity Union Title and

*General Order No. 2.*

Mortgage Guaranty Company and its subsidiaries appointed under an order of this Court in this cause, their successors in office and assigns and said Company and its subsidiaries wherever applicable; the term "Trustee" shall be deemed to include the Trustee appointed by this order and  
10 any successor Trustee; the words "Guaranty Company" and "Company" shall be deemed to include the Trustees and any subsidiary of the Guaranty Company wherever applicable; the masculine gender of the personal pronoun used herein shall be construed to include the feminine or neuter gender thereof, and the singular number of the personal pronoun shall be construed as including the plural numbers thereof, and the word "person" and "investor" and "investors"  
20 shall include corporations.

16. One or more investors may be bona fide purchasers at a bona fide price at any foreclosure or other sale and if at such sale the property shall be purchased by one or more investors bona fide and at a bona fide price and for their individual account with such effect as that the trust and the interests of the investors in the investment as a class shall cease and determine, such sale shall  
30 have the same effect upon the subordinate interests of the Trustees as any other sale to a bona fide purchaser at a bona fide price.

17. In any case in which, upon application for the approval of a bona fide sale or other disposal for less than an amount which may be sufficient to satisfy the amount due to the investors and to the Trustees upon their subordinate interest, the court shall permit the Trustees to take the trust  
40 res upon payment to the investors of the amount which they would have received had such sale

*General Order No. 2.*

been consummated, the Trustees shall pay or cause to be paid the amount which may be due for commissions to any real estate broker or for other proper expenses incurred by the trustee or the investors in procuring the offer for sale submitted to the court, if such commissions and other expenses be approved by the court. 10

18. The amount due to the Trustees upon their subordinate interest shall be determined as of the date of withdrawal; interest upon such advances as it is proper that the trustees should have interest upon shall be computed to the date of withdrawal and interest thereafter shall run on the sum fixed on withdrawal at the legal rate.

19. The Trustees shall receive notice from the Trustee of all matters of which investors are entitled to notice, and within the same time, but the rights of the trustees shall be only as herein provided. The Trustee shall give notice to the Trustees of any matter or of any action which may be taken by the Trustee which shall affect the subordinate interest of the trustees. 20

20. The court may, upon application of any party in interest and upon fifteen days notice to the Trustees, but without notice to any other person interested in the trust being administered by the Trustees, reduce or limit the rights of the Trustees, but shall in no case increase the rights of the Trustees. No right is created in the Trustee or the investors by this paragraph and the Court may act in its absolute discretion. 30

21. That whenever, as herein provided, an act to be performed by the Trustee requires the approval of the Court upon notice to the Trustees the Trustee shall have power to act without such 40

*General Order No. 2.*

approval unless within ten days after receipt of notice the Trustees shall advise the Trustee by mail directed to his principal place of business that the Trustees dissent from the proposed act or that they require the matter to be brought to the attention of the Court: all notices to the Trustees may be by mail and shall advise the Trustees of the contemplated action of the Trustee and the reasons therefor.

22. In all cases in which the Trustee by the terms of this order is directed or authorized to make the Trustees parties to any legal proceedings, the Trustee may make such Trustees parties without a special order granting leave so to do.

Respectfully advised.

MAJA LEON BERRY,

LUTHER A. CAMPBELL,

v. c.

c.

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**Order Approving Plan of Withdrawal,  
Appointing Trustee and Granting  
Other Relief.**

(Filed September 13, 1935.)

IN CHANCERY OF NEW JERSEY.

99-590.

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<p style="text-align: center;">IN THE MATTER</p> <p style="text-align: center;"><i>of</i></p> <p>Proceedings under the Mortgage Guaranty Corporations' Re- habilitation Act affecting the FIDELITY UNION TITLE AND MORTGAGE GUARANTY COMPANY.</p>	}	<p>On Petition for Withdrawal of Mortgage No. M-64178.</p> <p>Order Approving Plan of Withdrawal, Appointing Trustee and Granting Other Relief.</p>	<p>20</p>
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This matter coming on to be heard in the presence of Hood, Lafferty & Campbell, of counsel with petitioners (whose names appear and are designated as "Petitioners" in paragraph VI of the decretal part of this order) for withdrawal under the terms of an order entered in the above entitled cause on April 24, 1934 of a mortgage investment identified on the books of the Fidelity Union Title and Mortgage Guaranty Company (hereinafter called the "Guaranty Company") as mortgage investment No. M64178; and Merritt Lane, Esquire, and Herbert J. Hamnoch, of counsel with Carl K. Withers, Commissioner of Banking and Insurance, and J. Ashley Brown, Trustees of the Guaranty Company and its subsidiaries, the Broadbank Corporation and Asbury Park Garage Corporation, (hereinafter called the

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*Order Approving Plan of Withdrawal, etc.*

“Trustees”); and it appearing that the party designated in paragraph VI of the decretal part of this order as a “Non Contesting Respondent” did not appear or make objections to the application for withdrawal;

10 And it further appearing to the Court that the notice hereinafter mentioned was mailed to the following investor with incorrect address either as to name or place, but that said investor has consented to the withdrawal of this mortgage and her consent is on file in this cause;

(Miss Pearl Pansin or Evelyn Pansin,  
either or survivor,

20 And it appearing to the court (a) that the petitioners are the holders of twenty-five per cent. or more in face value of the participation certificates issued and outstanding against said mortgage investment, and that the application to withdraw is now made or approved by more than two-thirds in interest in the aforesaid mortgage investment; (b) that, pursuant to and in compliance with the terms of said order of April 24, 1934, notice of petitioners' application to withdraw said mortgage investment was served upon the Trustees of the Guaranty Company and the Protective Committee  
30 for Investors in Fidelity Union Title and Mortgage Guaranty Company at least ten days prior to said application; and was served upon or mailed to each other party having a participation interest in said mortgagor investment at least ten days prior to said application, and when mailed, was mailed in a sealed envelope with first class postage fully prepaid thereon addressed to such party at his, her, or its post office address as appeared upon the books and records of the Guaranty Com-  
40 pany; (c) that in compliance with Paragraph 17

*Order Approving Plan of Withdrawal, etc.*

of Chapter 3 of the Laws of 1934 said notice set forth a suggested plan for the administration of the trust in the event this Court should authorize the withdrawal of said mortgage; (d) that the investors in said mortgage upon whom said notice was served personally or by mail are the parties named in paragraph VI of the decretal part of this order as "Respondents", and that the parties so designated as "Consenting Respondents" have consented to and approve of the withdrawal of said mortgage and the bond intended to be secured thereby and the appointment of the Fidelity Union Trust Company as Trustee thereof; (e) that the Trustees of the Guaranty Company make no objection to the entry of an order of this Court directing the assignment of said mortgage and bond, provided they and the estate be protected and the said Trustees and the estate receive all the benefits of said order of April 24, 1934 upon said withdrawal; (f) that the plan proposed by the applicants for withdrawal, as herein modified, including those provisions of General Order Number One and Number Two heretofore entered herein respecting withdrawal of mortgage investments as are made a part of this order, is just and equitable and within the purview of Paragraph 17 of Chapter 3 of the Laws of 1934 and of the order of April 24, 1934; (g) that this Court has authority likewise under its inherent jurisdiction to make this order; and (h) that the interests of the respective parties in said mortgage and bond are correctly stated in paragraph VI of the decretal part of this order.

And the Court having considered the original pleadings in this cause; the Trustees' petitions and reports; the transcript of the testimony taken upon the hearings; the proof of service and mail-

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*Order Approving Plan of Withdrawal, etc.*

ing of notice with respect to this application; and all other proceedings in this cause:

IT IS, on this 17th day of September, Nineteen Hundred and Thirty-five (1935), by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, ADJUDGED and ORDERED:

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I. That the plan proposed for the withdrawal of mortgage investment, as herein modified, identified on the books and records of the Guaranty Company as mortgage investment No. M64178 which mortgage was made by Belle Meade Sales Corporation to said Guaranty Company, and was recorded in the office of the Register of Hudson County in Book 1366 of Mortgages for said County, page 502, is fair and equitable and such plan comes within the purview of Paragraph 17 of Chapter 3 of the Laws of 1934 and the order of April 24, 1934 and is approved.

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II. That the Fidelity Union Trust Company, a corporation of the State of New Jersey with its principal office located at No. 755 Broad Street, Newark, New Jersey, (hereinafter called the "Trustee") be and is hereby appointed Trustee of the above described mortgage and the bond intended to be secured thereby.

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III. That the Trustee enter into bond to the Chancellor of the State of New Jersey, his successors and assigns, in the sum of \$136,000.00.

IV. That upon the Trustee complying with the terms and conditions of said order of April 24, 1934 and of this order, the Trustees of the Guaranty Company shall assign or cause to be assigned to the Trustee, as "Trustee", the above described bond and mortgage; which assignment shall be

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deemed to be and shall be for the use and benefit

*Order Approving Plan of Withdrawal, etc.*

of the parties named in paragraph VI and VIII hereof.

V. That the Trustee is hereby authorized to deduct and retain as and for its services and commissions five per cent. of the income collected on said mortgage; or if it be in possession of the mortgaged premises as mortgagee or as the holder of the legal title thereto, to deduct and retain as and for its commissions five per cent. of the gross rentals, unless said property shall be rented or managed by an agent, in which event the Trustee may deduct and retain as and for its commissions only five per cent. of the net rentals received by it after deducting from the gross rentals agent's commissions and all carrying charges except taxes. Such commissions are subject to the approval of the Court on accounting, unless accounting is waived.

VI. That all the provisions of "General Order Number One Re Withdrawal of Mortgages" entered in this cause on November 21, 1934, and paragraphs 1 to 4, both inclusive, and 13 to 22, both inclusive, of "General Order Number Two Re Protection of Trustees in Cases of Withdrawals of Mortgages and Properties where the Trustees have Subordinate Interests" entered in this cause on April 16, 1935, shall be deemed to be included in this order as if fully incorporated herein; and the Trustees shall hold and administer said mortgage and the bond intended to be secured thereby pursuant to and in compliance with the terms and conditions of said "General Order Number One Re Withdrawal of Mortgages" and paragraphs 1 to 4, both inclusive, and 13 to 22, both inclusive, of "General Order Number Two Re Protection of Trustees in Cases of Withdrawals of Mortgages and Properties where the Trus-

*Order Approving Plan of Withdrawal, etc.*

tees have Subordinate Interests'' for the use and benefit of the parties in this paragraph and paragraph VIII hereof named; and that the principal investments of the parties having priority interests and their respective address (which are the amounts of the principal investments, the names of the parties and their addresses as they appear on the books and records of the Guaranty Company as of the date of the mailing of the notice of application for the withdrawal of mortgage investment No. M-64178) except as to those names marked with an asterisk, which appear in the name of the Fidelity Union Trust Company, and that name marked with two asterisks, which appears in the name of the Fidelity Union Trust Company as Trustee, are set opposite their respective names in this paragraph:

VIII. That the amount of the interest for which the Trustees are entitled to the protection of a subordinate interest is the sum of \$3,325.15 principal, to which shall be added interest upon the respective sums making up the principal from the dates of the respective advances or charges to the date of the actual withdrawal, and interest as of the date of the actual withdrawal, or on unpaid balances thereof, to the date of payment; the rights of the Trustees of the Guaranty Company with respect thereto being fixed and determined by those provisions of "General Order Number Two Re Protection of Trustees in Cases of Withdrawals of Mortgages and Properties where the Trustees have Subordinate Interests" as are made a part hereof.

IX. That the petitioners recover against said mortgage investment the taxed costs of this proceeding to be paid by the Trustee out of the avails

*Order Approving Plan of Withdrawal, etc.*

of said mortgage investment, income and principal.

Respectfully advised,

MAJA LEON BERRY,  
V.-C.

LUTHER A. CAMPBELL,  
C.

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The foregoing order is approved.

HERBERT J. HANNOCH,  
Of Counsel with Trustees.

The foregoing order has been checked.

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HARRY W. HOWERTER, JR.,  
For the Trustees.

Consent to the entry of the foregoing order is hereby given on this 21st day of August, 1935.

HOOD, LAFFERTY & CAMPBELL,  
Solicitors for Fidelity Union  
Trust Company, as Depositary.

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This Order is approved and Bond filed  
Date Sep 28 1935 Wm. P. Mason

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**General Order No. Nine Affecting General  
Orders Nos. Two, Four, Five.**

(Filed June 20, 1937.)

IN CHANCERY OF NEW JERSEY.

99-590.

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IN THE MATTER

*of*

Proceedings under the Mortgage  
Guaranty Corporations' Re-  
habilitation Act affecting the  
FIDELITY UNION TITLE AND  
MORTGAGE GUARANTY COMPANY.

General Order  
No. Nine  
Affecting  
General Orders  
Nos. Two, Four,  
Five.

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This matter being opened to the Court by Mer-  
ritt Lane, Esq., and Herbert J. Hannoeh, Esq.,  
of counsel with the Trustees, in the presence of  
Arthur F. Egner, of counsel with the Stockhold-  
ers' Reorganization Committee, and New Jersey  
Realty Company; and it appearing that general  
order No. 2, made on the 16th day of April, 1935,  
provides for the protection of the trustees in  
cases of withdrawal of mortgages and properties  
where the trustees have subordinate interests, and  
that general order No. 4 provides for the protec-  
tion of the Trustees in cases of conveyances or  
releases of mortgages or property, or releases of  
interests of trustees where trustees have sub-  
ordinate interests, and where conveyances and the  
like are made directly to investors or someone  
designated by investors, and that general order  
No. 5 is an order having reference to 100% with-  
drawals and giving leave to the trustees to enter  
into agreements by reference to provisions of  
various general orders and permitting the trus-  
tees to enter into certain types of agreements

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*General Order No. Nine, etc.*

with new trustees designated either by orders of the court or by agreements of the parties, and directing the trustees as to what protection to require for subordinate interests; and it further appearing that under The Plan of reorganization directed to be made effective by the decree of this Court of June 22, 1937, as defined by said decree, and hereafter when the term "The Plan" is employed, it shall be deemed to have reference to "The Plan" as so defined, New Jersey Realty Company is entitled to rights previously accorded to the Trustees, and that the general orders heretofore mentioned should be made to apply to cases of withdrawals under "The Plan" to the extent applicable; 10

It is, on this 29th day of June, 1937, ORDERED that general order No. 2, dated April 16, 1935, general order No. 4, dated April 30, 1935, and general order No. 5, dated April 30, 1935, be deemed to be applicable to all cases of withdrawal under "The Plan", and that, wherever the Trustees are mentioned in said orders, there be also included the New Jersey Realty Company, or the New Jersey Realty Company be substituted for the Trustees, as may be necessary to carry out the provisions of the plan, and that wherever the order of April 24, 1934 is mentioned the Term "The Plan" shall be substituted therefor, and that wherever general orders Nos. 1 and 3 are mentioned in said general order No. 5 there shall be deemed to be substituted therefor general orders Nos. 1-A and 3-A, and that wherever general orders Nos. 2 and 4 are referred to such orders shall be deemed to be modified by the provisions of this order in all cases of withdrawals under "The Plan". 20 30 40

Respectfully advised:

MAJA LEON BERRY,  
V.-C.

LUTHER A. CAMPBELL,  
C.

**Petition.**

(Filed December 19, 1944.)

IN CHANCERY OF NEW JERSEY.

99-590.

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IN THE MATTER

*of*

Proceedings under the Mortgage  
 Guaranty Corporations' Re-  
 habilitation Act affecting the  
 FIDELITY UNION TITLE AND  
 MORTGAGE GUARANTY COMPANY.

Re: Mortgage  
 Investment  
 No. M-64178.  
 Petition.

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*To the Honorable Luther A. Campbell,  
 Chancellor of the State of New Jersey:*

Your petitioner, Fidelity Union Trust Com-  
 pany, a corporation of the State of New Jersey,  
 with its principal office in the City of Newark, in  
 the County of Essex and State of New Jersey, as  
 Trustee of Mortgage Investment No. M-64178 ap-  
 pointed by an order of this Court in the above  
 entitled cause made on September 17, 1935 (here-  
 inafter called "Trustee"), respectfully shows  
 that:

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1. On September 17, 1935, by the aforemen-  
 tioned order, Fidelity Union Trust Company was  
 appointed Trustee of Mortgage Investment No.  
 M-64178, which then consisted of a mortgage given  
 by Belle Meade Sales Corporation, a corporation  
 of the State of New Jersey, to Fidelity Union  
 Title and Mortgage Guaranty Company, recorded  
 in the Register's office of Hudson County in Book

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*Petition.*

1366 of Mortgages for said County, page 502, the bond intended to be secured thereby, dated May 1, 1926, made by the said Belle Meade Sales Corporation and John F. Conners and Frank Cowan of Jersey City, New Jersey, to Fidelity Union Title and Mortgage Guaranty Company, a mortgage extension agreement between Fidelity Union Title and Mortgage Guaranty Company and Belle Meade Garage Corporation, recorded in the Register's Office of Hudson County in Book 95 of Mortgages for said County, page 25, and the bond accompanying the same, dated June 17, 1932, made by the said Belle Meade Garage Corporation, and J. F. Conners and Mary C. Burt to Fidelity Union Title and Mortgage Guaranty Company.

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2. The Fidelity Union Trust Company qualified as such Trustee and withdrew said mortgage investment from the control of the Trustees of the Fidelity Union Title and Mortgage Guranty Company on or about October 31, 1935.

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3. Default having occurred in the terms of the aforesaid bonds, mortgage and mortgage extension agreement, the Trustee instituted proceedings in this Court to foreclose the said mortgages in a cause entitled "Between Fidelity Union Trust Company, a corporation of the State of New Jersey, as Trustee, etc., et al., Complainants, and Belle Meade Garage Corporation, a New Jersey corporation, et als., Defendants" (Docket 113-537). Such proceedings were had in said foreclosure cause that on November 23, 1936 a final decree was entered which ordered, adjudged and decreed the sum of \$187,971.38 to be due the Trustee, with lawful interest thereon from November 7, 1936; costs were taxed at \$1,419.55, with law-

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*Petition.*

ful interest thereon from November 23, 1936, and a writ of *feri facias* issued in said cause commanding the Sheriff of Hudson County to make sale of the mortgaged premises to satisfy said decree and costs.

10 4. At the Sheriff's sale in the said foreclosure proceedings held on January 28, 1937, the Trustee bought in the property for the sum of \$100.00, it being the highest and best bid therefore. Sheriff's fees amounted to approximately \$154.63.

20 5. Objections to the confirmation of the aforesaid Sheriff's sale were filed by Belle Meade Garage Corporation, a New Jersey corporation, Mary C. Burt, Cecelia H. Conners, widow of J. F. Conners, and Frank Cowan, on the grounds among  
 30 other things that the price obtained at the sale was insufficient and grossly inadequate, the premises were sold to complainant at a nominal bid due to the absence of competitive bidding, and due to the existing economic emergency the defendants were unable to protect themselves. Such proceedings were had that by order of the Court of Chancery dated November 16, 1937, Trustee consented to the crediting of the sum of \$174,344.18 on account of the amount due on its decree at the time  
 30 of the aforesaid Sheriff's sale; the objections to the confirmation of the aforesaid Sheriff's sale were then removed, and the sale was confirmed by an order of the Court of Chancery dated November 23, 1937; and there resulted from the aforesaid Sheriff's sale a deficiency of approximately \$17,685.94.

40 6. By notice dated January 14, 1938, Trustee informed all the investors in Mortgage Invest-

*Petition.*

ment No. M-64178 that it had investigated the financial responsibility of the bondsmen, Belle Meade Sales Corporation, Belle Meade Garage Corporation, Frank Cowan, Mary C. Burt and Cecelia H. Conners, and Trustee's investigation disclosed that there was little likelihood of collecting anything from said persons so liable on account of said deficiency other than the moneys then coming into the hands of Frank Cowan as compensation for his services as receiver. Fidelity Union Trust Company, as Trustee, therefore concluded to settle the aforesaid claim for deficiency with Frank Cowan for the sum of \$2,000.00, the sum allowed by the Court of Chancery for his services as receiver, and not to institute suit for deficiency against the other persons liable for the payment of same, namely Belle Meade Sales Corporation, Belle Meade Garage Corporation, Mary C. Burt and Cecelia H. Conners. No investor objected to the proposal contained in Trustee's notice dated January 14, 1938, and the same was consummated.

7. The premises described in the aforesaid mortgage are commonly known as 2395-2401 Hudson Boulevard, Jersey City, New Jersey, and consist of an irregular plot of ground having a frontage of approximately 123 feet on Hudson Boulevard, approximately 118 feet on Communipaw Avenue, and extending through to Harrison Avenue with a frontage of approximately 40 feet thereon, upon which are erected 3 buildings. Of the three buildings, one is a 2-story and basement, brick, steel and concrete building, located at 2395-2401 Hudson Boulevard, containing an automobile show room, sales room and service station; the second, connected with the first, and

*Petition.*

located at 726-8 Communipaw Avenue, is a 3-story garage building of brick and steel construction; and the third a 2½-story brick and frame building, on the Harrison Avenue frontage. was originally used as a residence, the entire first floor has been cleared out and a cement floor put in, and the second floor contains living quarters. which are not being used as such. The property is leased to Holsey Auto Sales, Inc., to January 31, 1947, under a three-year lease. The present rental is \$14,000.00 per annum; on February 1, 1945, the rent is to be increased to \$15,000.00 per annum; and on February 1, 1946, the rent is to be increased to \$16,000.00 per annum. The actual gross income for the year 1941 was \$13,916.70; in 1942, it was \$10,726.64; in 1943. it was \$14,000.04; and the actual gross income for the period from January 1, 1944 to November 15, 1944 was \$12,833.37. The estimated normal annual expenses for taxes and maintenance, including a 10% vacancy allowance, but with no allowance for depreciation or obsolescence, are \$8,955.55. The buildings are approximately 23 years old. The City of Jersey City had assessed the said property for taxation purposes at a valuation of \$175,000.00 for the year 1944. Your Trustee appealed from this assessment to the County Board of Tax Appeals which reduced the assessment to \$100,000.00; however, the City of Jersey City is appealing from this reduction to the State Board of Tax Appeals. The New Jersey Realty Company, a New Jersey corporation, is the holder of a subordinate interest in the amount of \$3,325.15. plus interest, in the premises.

8. On January 4, 1944, Louis Schlesinger. Inc., real estate appraisers of Newark, New Jersey.

*Petition.*

appraised the property at a present day value of \$80,000.00 as of that date, and a reproduction value of \$91,594.00 as of that date, and a value of \$76,940.00 on a capitalization basis. A true copy of said appraisal, marked Schedule "A", is annexed hereto and made a part hereof as if set forth verbatim herein.

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9. The following is an account of the gross rentals and disbursements from the premises for the period from January 1, 1938 to November 15, 1944, during which period the Trustee held legal title to the aforesaid premises:

STATEMENT OF ACCOUNT JANUARY 1, 1938  
TO DECEMBER 31, 1938

RECEIPTS

20

Gross Receipts..... \$13,115.50

DISBURSEMENTS

Fuel .....	\$ 2,042.04	
Repairs .....	973.66	
Painting and Decorating.....	973.00	
Maintenance, (Including Electricity, Gas, Water, Extermination, Supplies and Wages) .....	95.23	
Miscellaneous Including Commissions (In- cluding Advertising, Check Service Charge, etc.) .....	1,011.75	
Insurance .....	2,180.61	30
Taxes and/or Assessments (a/c 1936 and a/c 1938) .....	5,663.12	
Income to Investors.....	176.09	13,115.50

Balance in Account December 31, 1938..... \$ 0.00

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*Petition.*STATEMENT OF ACCOUNT JANUARY 1, 1939  
TO DECEMBER 31, 1939

## RECEIPTS

Gross Receipts..... \$12,929.94

## DISBURSEMENTS

10	Fuel .....	\$	696.20	
	Repairs .....		670.85	
	Maintenance (Including Electricity, Gas, Water, Extermination, Supplies and Wages) .....		32.07	
	Miscellaneous Including Commissions (In- cluding Advertising, Check Service Charge, etc.) .....		225.25	
	Insurance .....		388.87	
	Taxes and/or Assessments (Bal. 1938; a/c 1939) .....		8,413.66	
	Income to Investors.....		2,503.04	12,929.94
				<hr/>
20	Balance in Account December 31, 1939.....	\$		0.00

STATEMENT OF ACCOUNT JANUARY 1, 1940  
TO DECEMBER 31, 1940

## RECEIPTS

Gross Receipts ..... \$13,499.96

## DISBURSEMENTS

	Repairs (Including \$222.00 for share of new roof) .....	\$	278.80	
30	Miscellaneous Including Commissions (In- cluding Advertising, Check Service Charge, etc.) .....		11.30	
	Insurance .....		1,790.91	
	Taxes and/or Assessments (1940).....		9,271.50	
	Unusual Expense Items:			
	State Board Increase 1936 Taxes.....		765.04	
	State Board Increase 1938 Taxes.....		475.40	
	Services in Securing 1936 Tax Reduction		48.12	
	Income to Investors.....		858.89	13,499.96
				<hr/>
	Balance in Account December 31, 1940.....	\$		0.00

*Petition.*STATEMENT OF ACCOUNT JANUARY 1, 1941  
TO DECEMBER 31, 1941

## RECEIPTS

Gross Receipts ..... \$13,916.70

## DISBURSEMENTS

Repairs .....	\$ 109.20		
Insurance .....	309.49		10
Taxes and/or Assessments (1941).....	9,155.44		
Income to Investors.....	4,342.57	13,916.70	
Balance in Account December 31, 1941.....	\$	0.00	

STATEMENT OF ACCOUNT JANUARY 1, 1942  
TO DECEMBER 31, 1942

## RECEIPTS

Gross Receipts .....	\$10,726.64		20
Miscellaneous Receipts:			
Net 1939 Tax Remission.....	281.93		
Net 1940 Tax Remission.....	529.80		
Total .....	\$11,538.37		

## DISBURSEMENTS

Repairs .....	\$ 52.95		
Maintenance (Including Electricity, Gas, Water, Extermination, Supplies and Wages) .....	90.00		
Miscellaneous Including Commissions (In- cluding Advertising, Check Service Charge, etc.) .....	2.00		30
Insurance .....	449.49		
Taxes and/or Assessments (Bal. 1939; all 1942) .....	9,517.49		
Income to Investors.....	1,426.44	11,538.37	
Balance in Account December 31, 1942.....	\$	0.00	

*Petition.*STATEMENT OF ACCOUNT JANUARY 1, 1943  
TO DECEMBER 31, 1943

## RECEIPTS

	Gross Receipts .....	\$14,000.04
	Miscellaneous Receipts:	
10	Rent Arrears Claim—Royal Motors—Lease Dated February 3, 1938.....	2,700.00
	Total .....	<u>\$16,700.04</u>

## DISBURSEMENTS

	Repairs .....	\$ 2,736.85
	(Carpenter Work .....	\$ 171.85)
	(Installing Smoke Pipe.....	\$ 215.00)
	(Repairs to Boiler.....	\$2,350.00)
	Miscellaneous Including Commissions (In- cluding Advertising, Check Service Charge, etc.) .....	420.05
	Insurance .....	1,240.51
20	Taxes and/or Assessments (All 1943).....	5,745.00
	Income to Investors.....	6,557.63
		<u>16,700.04</u>
	Balance in Account December 31, 1943.....	\$ 0.00

STATEMENT OF ACCOUNT JANUARY 1, 1944  
TO NOVEMBER 15, 1944

## RECEIPTS

	Gross Receipts .....	\$12,833.37
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## DISBURSEMENTS

30	Repairs .....	\$ 768.32
	Painting and Decorating.....	225.00
	Insurance .....	289.56
	Taxes and/or Assessments (All 1944).....	6,169.18
	Income to Investors.....	3,003.53
		<u>10,455.59</u>
	Balance in Account November 15, 1944.....	\$ 2,377.78

*Petition.*

10. Shortly after the acquisition of legal title to the aforesaid premises by the Trustee, Trustee began to list the same for sale and ultimately it was listed with 25 brokers in Bergen, Essex and Hudson Counties, all of whom do a general real estate business.

11. On September 17, 1941, Trustee received an offer for the purchase of the aforesaid property from Joseph J. Harris, Inc., on behalf of the Holsey Motor Car Company, in the amount of \$75,000.00, subject to \$3,000.00 brokerage commission. The terms of this offer were \$25,000.00 cash and \$50,000.00 secured by a purchase money mortgage for an unstated term with interest at 5% per annum and annual amortization of 10%, both payable quarterly. This offer was declined by Trustee as inadequate.

12. On June 19, 1943, Trustee received a tentative offer for the purchase of the aforesaid property from Thomas A. Ryer, on behalf of an unnamed client, in the amount of \$50,000.00, subject to \$2,125.00 brokerage commission. The terms of this offer were \$12,500.00 cash and \$37,500.00 secured by a purchase money mortgage for 15 years with interest at 4% per annum and annual amortization of 2%. This offer was declined by Trustee as inadequate.

13. On July 14, 1943, the aforesaid offer from Thomas A. Ryer, dated June 19, 1943, was increased to \$70,000.00, subject to \$2,825.00 brokerage commission. The terms of this offer were \$17,500.00 cash and \$52,500 secured by purchase money mortgage for 15 years with interest at 4% per annum and annual amortization of 2%. This offer was declined by Trustee as inadequate.

*Petition.*

14. On August 6, 1943, Trustee received a tentative offer for the purchase of the aforesaid property from Everett and Carbin, Inc., on behalf of an unnamed client, in the amount of \$75,000.00, subject to \$3,000.00 brokerage commission. The terms of this offer were \$20,000 cash and  
10 \$55,000.00 secured by purchase money mortgage for 10 years with interest at 4% per annum and annual amortization of 2%. This offer was declined by Trustee as inadequate.

15. On September 29, 1943, Trustee received a tentative offer from Ben Schlossberg, on behalf of an unnamed client, in the amount of \$65,000.00, subject to \$2,650.00 brokerage commission. The terms of this offer were \$16,250.00 cash and \$48,750.00 secured by purchase money mortgage for  
20 10 years with interest at 4% per annum and annual amortization of 2%. This offer was negotiated to the following:

On October 13, 1943. Trustee received an offer for the purchase of the aforesaid property from Ben Schlossberg. on behalf of the Twenty Three Hundred Ninety Five Boulevard Corporation, in the amount of \$80,000.00, subject to \$3,175.00 brokerage commission. The terms of this offer  
30 were \$20,000.00 cash and \$60,000.00 secured by purchase money mortgage for 10 years with interest at 4% per annum and annual amortization of 1% for the first two years and 2% for the remaining eight years, both payable monthly together with one-twelfth of the annual tax. This offer was declined by Trustee as inadequate.

16. On October 26, 1943, Trustee received an offer for the purchase of the aforesaid property  
40 from Thomas A. Ryer, on behalf of an unnamed

*Petition.*

client, in the amount of \$72,000.00, subject to \$2,895.00 brokerage commission. The terms of this offer were \$15,000.00 cash and \$57,000.00 secured by purchase money mortgage for 10 years with interest at 4% per annum and annual amortization of 2%. This offer was declined by Trustee as inadequate. 10

17. On November 9, 1943, Trustee received an offer for the purchase of the aforesaid property from New Jersey Realty Company, on behalf of the Brook-Kip Auto Sales Co., in the amount of \$70,000.00, subject to \$2,825.00 brokerage commission. The terms of this offer were \$17,500.00 cash and \$52,500.00 secured by purchase money mortgage for 10 years with interest at 4% per annum and annual amortization of 2%. This offer was declined by Trustee as inadequate. 20

18. On November 23, 1943, Trustee received a tentative offer from Ben Schlossberg, on behalf of an unnamed client, in the amount of \$85,000.00, subject to \$3,350.00 brokerage commission. The terms of this offer were \$21,250.00 cash and \$63,750.00 secured by purchase money mortgage for 10 years on unstated terms. This offer was declined by Trustee as inadequate. 30

19. On January 6, 1944, Trustee received an offer from Harold Kaplan, Inc., on behalf of an unnamed client, in the amount of \$75,000.00, subject to \$2,575.00 brokerage commission. The terms of this offer were \$15,000.00 cash and \$60,000.00 secured by purchase money mortgage for 8 years with interest at 4½% per annum and annual amortization of 2½%. This offer was declined by Trustee as inadequate. 40

*Petition.*

20. Because of the difficulty your Trustee had in procuring an offer commensurate with the value of the property through general listings with real estate agents over a period of years. your Trustee conceived it to be to the advantage of the trust and the investors having an interest therein to create an exclusive sales agency so that special effort would be made by the exclusive sales agent to sell this property. Consequently on or about July 13, 1944 your petitioner granted an exclusive sales agency to J. I. Kislak, Inc., effective on July 13, 1944 and expiring on January 15, 1945. A true copy of said exclusive sales agency agreement, marked Schedule "B", is annexed hereto and made a part hereof as if set forth verbatim herein.

20  
21. On October 30, 1944, Trustee received a tentative offer for the purchase of the aforesaid property from J. I. Kislak, Inc., the exclusive sales agent, on behalf of an unnamed client, in the amount of \$90,000.00, subject to \$3,525.00 brokerage commission. The terms of this offer were \$22,500.00 cash and \$67,500.00 secured by purchase money mortgage for 10 years with interest at 4% per annum and annual amortization of 2%, both payable quarterly. This offer was declined by Trustee as inadequate.

30  
22. On November 1, 1944, Trustee received an offer for the purchase of the aforesaid property from J. I. Kislak, Inc., the exclusive sales agent, on behalf of Carl Bernstein, in the amount of \$93,000.00, subject to \$4,650.00 brokerage commission. The terms of this offer were \$25,000.00 cash and \$68,000.00 secured by purchase money mortgage for 8 years, with constant payments of \$4,760.00 (7%), from which interest is to be de-

*Petition.*

ducted at the rate of 4% per annum and the balance applied to principal, both payable quarterly.

23. On November 8, 1944, the aforesaid offer of \$93,000.00, on the terms aforementioned, was submitted to the Mortgage Committee of the Trustee in accordance with the requirements of its corporate routine. The said Mortgage Committee, consisting of Leslie G. McDouall, Vice President, Trust Officer and Director, Cedric L. Bush, Assistant Secretary-Treasurer, and Jesse H. Saul, Second Vice President, approved the said offer and recommended its acceptance to the Trust Committee, subject to the approval of this Court. 10

24. On November 9, 1944, the aforesaid offer of \$93,000.00, on the terms aforementioned, was submitted to the Trust Committee of the Trustee. The said Trust Committee, consisting of Horace K. Corbin, President and Director, C. Edwin Young, Director, Ralph E. Lum, Director, Frederic W. Smith, Director, George M. Bodman, Director, Ludolph H. Conklin, Director, Leslie G. McDouall, Vice President, Trust Officer and Director, John J. Brown, Director, and Edward F. Weston, Director, approved the said offer and recommended its acceptance to the Executive Committee, subject to the approval of this Court. 20 30

25. On November 13, 1944, the aforesaid offer of \$93,000.00, on the terms aforementioned, was submitted to the Executive Committee of the Trustee. The said Executive Committee, consisting of Thomas N. McCarter, Chairman of the Board of Directors, Horace K. Corbin, President and Director, John J. Brown, Director, Carl H. Lester, Director, Percy S. Young, Director, Martin F. 40

*Petition.*

Tiernan, Director, Roy F. Duke, Vice President and Director, Leslie G. McDouall, Vice President, Trust Officer and Director, Daniel A. Leary, Vice President and Director, Ralph E. Lum, Director, and Frederic W. Smith, Director, approved the said offer and recommended its acceptance, subject to the approval of this Court.

26. On November 24, 1944, Fidelity Union Trust Company, as Trustee as aforesaid, entered into a contract for the sale of the aforesaid premises to Carl Bernstein, of the City of Bayonne, County of Hudson and State of New Jersey, for the sum of \$93,000.00, payable \$25,000.00 cash and \$68,000.00 secured by purchase money mortgage due in 8 years, with quarter-annual installments of \$1,190.00 each, to be applied first toward interest on the unpaid principal sum of the mortgage at the rate of 4% per annum and the balance on account of the unpaid principal. The mortgagor shall have the right on any interest date to pay the entire balance of the principal secured by said mortgage, together with accrued interest thereon, or to make additional payments on account of said principal sum in multiples of \$500.00, together with interest accrued thereon. Rents, taxes, water rents and fire insurance premiums are to be apportioned between the parties as of the date of closing of title. The Vendee reserves the right to assign the contract to any corporation, in which case the assignee alone shall execute the proposed note and mortgage. The contract of sale also provides that the Trustee shall have the right and privilege to submit to the Court of Chancery for its approval or disapproval at any time prior to the court's decision on this application any other offer or proposal for the purchase of the premises which it may receive

*Petition.*

from and after the delivery of the aforesaid contract. At the date of the execution of the verifying affidavit attached hereto, Trustee has received no other offer or proposal for the sale of the said property, except as hereinafter mentioned. A true copy of said contract, marked Schedule "C", is annexed hereto and made a part hereof as if set forth verbatim herein. 10

27. On November 24, 1944, your petitioner entered into a contract with J. I. Kislak, Inc., Broker, for the payment of brokerage commission in the amount of \$4,650.00. A true copy of said contract, marked Schedule "D", is annexed hereto and made a part hereof as if set forth verbatim herein. 20

28. If the aforesaid sale for \$93,000.00, on the terms aforementioned, is approved by this Court, then the purchase money mortgage of \$68,000.00, less the cash deficit of \$3,124.06, will yield the investors a return of 49.15% of \$132,000.00 due for original principal or 30.74% of \$211,013.20 due for original principal and interest. These percentages are based on the calculations that appear in the notice to investors dated December 8, 1944, filed in this cause, and depend upon the adjustments that are made at the time of closing of title and the accuracy of the estimates appearing therein. These percentages are subject to further variation in the event Trustee must pay an income tax. 30

29. Under the provisions of Chapter 247 of the Laws of 1944, taxes are made a lien on the lands on which they are assessed on and after the first day of January in the year for which such taxes are assessed. Taxes are payable in installments 40

*Petition.*

on the first days of February, May, August and November and no installment of tax is delinquent until the date for payment of the same has passed. The mortgage hereinbefore referred to (if the sale to Carl Bernstein, or his assignee, on the aforesaid term basis, is approved by the Court of Chancery) will be subject to the lien of the taxes levied against the premises for the year 1944 but there will be no delinquency existing at the time such mortgage is taken.

30. Trustee believes that the aforesaid offer of \$93,000.00, comprised of \$25,000.00 cash and \$68,000.00 secured by purchase money mortgage on the terms aforesaid, is the best price that can be presently obtained for the property. Said offer is \$13,000.00 in excess of the valuation placed upon the property in the appraisal by Louis Schlesinger, Inc., made on January 4, 1944, as aforementioned. In view of said appraisal and the property's present and future income potentialities, your petitioner is of the opinion that the present offer of purchase represents the cash value of the property and that it is for the best interests of the investors to sell said property upon the terms and conditions above set forth. It is, therefore, your petitioner's considered judgment that the said offer of \$93,000.00, on the terms aforementioned, be approved by this court.

31. On or about December 9, 1944, J. I. Kislak, Inc., the aforesaid exclusive sales agent, received an offer for the purchase of the premises from Ben Schlossberg, real estate broker, on behalf of Herman Garfunkel, president of the Square Electric Supply and Fixture Company of Jersey City, New Jersey, in the amount of \$85,000.00, payable \$25,000.00 cash and \$60,000.00 secured by purchase

*Petition.*

money mortgage for 10 years with interest at 5% per annum and annual amortization of 5%. Your Trustee informed said Ben Schlossberg that it had a better offer which it was submitting to the Court and that your Trustee hoped said Ben Schlossberg would be able to persuade his prospective purchaser to pay a greater amount. 10

32. Pursuant to the applicable provisions of "General Order Number One", your petitioner advanced the sum of \$18,878.39 for taxes on January 16, 1936; the sum of \$175.00 for foreclosure costs on January 27, 1936; the sum of \$325.00 for foreclosure costs on August 6, 1937; and the sum of \$175.00 for foreclosure costs on December 10, 1937, and charged interest thereon at the rate of 3% per annum from the date of such advance to March 1, 1945, the estimated date of closing. The amount due your petitioner for such advances, with interest aforesaid, will be \$24,879.23. Some, but not all, investors have reimbursed your petitioner for these advances. There is still due from investors who have not paid their proportionate share of such advances the sum of \$6,317.21. The proportionate share of the net cash proceeds of the sale that these non-contributing investors will receive, if the abovementioned sale is approved by this Court, will be insufficient to reimburse your petitioner for its advances, with interest thereon at the rate aforesaid. Your petitioner is entitled to a continuance of the lien it is given by the terms of the aforesaid "General Order Number One" against the share in the purchase money mortgage to which investors who have not reimbursed it may be entitled. 20 30

33. The aforesaid order of September 17, 1935, incorporated therein, by reference thereto, the 40

*Petition.*

terms and provisions of "General Order Number One Re Withdrawal of Mortgages" entered in the above entitled cause on November 21, 1934. Paragraph "6" of said "General Order Number One" provides as follows:

- 10           "6. That the Trustee may apply to this Court for instructions or for approval of any act contemplated by him by petition entitled in this cause and upon ten days' notice (unless the Court shall direct otherwise) by mail to the parties holding interests in said mortgage or mortgaged property, addressed to them at their addresses as furnished by the Guaranty Company at the date of the assignment of said mortgage to the Trustee unless
- 20           subsequently advised by such holders of a new address."

Your petitioner has given notice of this application in accordance with the provisions of said paragraph "6" and paragraph "21" of said "General Order Number One."

34. Your petitioner is in doubt as to its rights and duties in the premises and therefore prays that this Court may instruct and direct it whether
- 30           it, as such Trustee, should:

- (1) Consummate the sale of the premises known as 2395-2401 Hudson Boulevard, Jersey City, New Jersey, to Carl Bernstein, or his assignee, of the City of Bayonne, County of Hudson and State of New Jersey, for the sum of \$93,000.00, on the terms aforementioned, in accordance with the terms and provisions of the contract of sale, a copy of which is attached hereto and marked
- 40           Schedule "C".

*Petition.*

(2) Consummate the sale of the above described premises to Herman Garfunkel, of the City of Jersey City and State of New Jersey, for the sum of \$85,000.00, on the terms aforementioned.

(3) Cancel the aforesaid contract of sale.

(4) Pay commissions to J. I. Kislak, Inc., the exclusive sales agent, and, if commissions are to be paid, the amount thereof. 10

(5) Continue against the share of the purchase money mortgage (in the event a sale for \$93,000.00 on the aforesaid terms is approved) to which investors may be entitled who have not reimbursed your petitioner for the aforementioned advances the lien your petitioner has under the terms and provisions of "General Order Number One". 20

(6) Retain the premises hereinbefore described until such time as an offer is received at a price that may be fixed by an order of this Court.

(7) Take such other course or action as this Court may direct.

AND YOUR PETITIONER, AS IN DUTY BOUND,  
WILL EVER PRAY, ETC.

HOOD, LAFFERTY & EMERSON, 30  
Hood, Lafferty & Emerson,  
Solicitors of Petitioner.

CHARLES DANZIG,  
Charles Danzig,  
Of Counsel.

40

**Affidavit of Charles F. Ellery.**

IN CHANCERY OF NEW JERSEY.

99-590.

10

IN THE MATTER

*of*

Proceedings under the Mortgage  
 Guaranty Corporations' Re-  
 habilitation Act affecting the  
 FIDELITY UNION TITLE AND  
 MORTGAGE GUARANTY COMPANY.

Re: Mortgage  
 Investment  
 No. M-64178.  
 Affidavit.

20

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.:

I, CHARLES F. ELLERY, of full age, being duly sworn according to law, upon my oath depose and say:

30

1. I am Vice President of the Fidelity Union Trust Company, which, as Trustee of Mortgage Investment No. M-64178, appointed by an order of this Court in the above entitled cause on September 17, 1935, is the petitioner herein and I am its duly authorized agent for the purpose of making this affidavit.

40

2. I am the officer in charge of the real estate and mortgage division of the Fidelity Union Trust Company (the department of the said Fidelity Union Trust Company that administers the aforesaid Mortgage Investment No. M-64178), and am personally familiar with the administration of the trust established by the aforesaid order.

*Affidavit of Charles F. Ellery.*

3. I have read the foregoing petition for instructions, and all statements of fact appearing therein are correct and true.

4. Statements of opinion have been arrived at by Fidelity Union Trust Company, as Trustee as aforesaid, after an examination of the facts and a consideration of the circumstances appearing more fully in the petition pertaining to the question presented by the offer of sale and purchase. 10

CHARLES F. ELLERY  
Charles F. Ellery

Sworn and Subscribed to before me }  
this 18th day of December, 1944. } 20

EDGAR G. LINNETT,  
Notary Public of N. J.

(Seal)

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**Schedule "A".**

Appraisal of premises by Louis Schlesinger, Inc. dated January 4, 1944. 30

Printing omitted by agreement of counsel.

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**Schedule "B."**

FIDELTY UNION TRUST COMPANY  
Newark, N. J.  
Zone #1

Trust Department,  
July 13, 1944.

10

*Re: Exclusive Sales Listing*

J. I. Kislak, Inc.  
32 Journal Square,  
Jersey City, N. J.

Gentlemen:

20 In consideration of your efforts to sell the property listed herein, we hereby grant you an exclusive sales agency on the following basis:

1. Agency to be effective immediately and to expire on January 15, 1945.

30 2. Total brokerage or commission in event of sale is to be as established by the Jersey City Real Estate Board, same not to be deemed earned or payable until the deed to said property has been delivered and accepted and the full purchase price paid.

3. Conveyance is to be made by Bargain and Sale Deed.

40 4. The list price is not firm and is subject to ratification or change, either more or less, by the Executive Committee of this Company and subject also to the approval of the Court of Chancery.

Schedule "B".

We are primarily interested in an all cash sale, but will consider a term sale to a responsible part.

2395 Hudson Boulevard, Jersey City, N. J.  
List Price: \$200,000.

A copy of this authorization is enclosed and if its terms are satisfactory to you, please sign it and return it at your earliest convenience. Further information will be given upon request. 10

Very truly yours,

C. L. BUSH,  
Assistant Secretary,

Accepted:

J. I. KISLAK, INC.  
By J. I. Kislak. 20

Date: July 14, 1944.

30

40

## Schedule "C."

AGREEMENT, made this 24th day of November,  
Nineteen Hundred and Forty-four,

10 BETWEEN FIDELITY UNION TRUST COMPANY, a  
New Jersey corporation, with its principal office in  
the City of Newark, in the County of Essex and  
State of New Jersey, AS TRUSTEE APPOINTED BY  
THE COURT OF CHANCERY BY AN ORDER DATED SEP-  
TEMBER 17, 1935, MADE "IN THE MATTER OF PRO-  
CEEDINGS UNDER THE MORTGAGE GUARANTY COR-  
PORATIONS REHABILITATION ACT AFFECTING THE  
FIDELITY UNION TITLE AND MORTGAGE GUARANTY  
COMPANY" (MORTGAGE INVESTMENT No. 64178)  
(DOCKET 99/590), herein called the "Vendor";

20 AND CARL BERNSTEIN of the City of Bayonne,  
County of Hudson and State of New Jersey,  
herein called the "Vendee";

## WITNESSETH:

30 WHEREAS, the Vendor holds title to the lands  
and premises hereinafter described, as Trustee  
under the above mentioned order of the Court of  
Chancery, which order incorporated therein by  
reference thereto an order made by said Court in  
the above quoted cause on November 21, 1934,  
designated as "General Order Number One Re  
Withdrawal of Mortgages" hereinafter desig-  
nated as "General Order Number One", and  
paragraphs 1 to 4 both inclusive and paragraphs  
13 to 22, both inclusive, of an order entered in  
said cause on April 16, 1935, designated as "Gen-  
eral Order Number Two Re Protection of Trus-  
tees in Cases of Withdrawals of Mortgages and  
Properties Where Trustees Have Subordinate  
Interests", hereinafter called "General Order  
40 Number Two"; and

*Schedule "C".*

WHEREAS, paragraphs 13, 21 and 6 of General Order Number One are as follows:

"13. That the Trustee is authorized if he acquires title to the mortgage property by foreclosure of said mortgage or otherwise, (a) to sell such property for cash for a sum sufficient to satisfy in full the investment of all parties having an interest therein, (b) to pay all carrying charges thereon, current or accrued; (c) upon notice to sell such property, or any part thereof, at such price and upon such terms and conditions as the Trustee may deem advisable; (d) upon such sale to convey to, and by such conveyance vest in the purchaser thereof, the legal and equitable title to said property. The deed of the Trustee shall be conclusive evidence of his power to convey the lands therein described.

"21. That whenever notice is herein required, such notice shall advise the parties having beneficial interests in said mortgage or mortgaged property of the contemplated action of the Trustee and the reasons therefor, and shall be mailed to such parties in the manner prescribed by paragraph 6 hereof; and if, at the expiration of ten days from the mailing of such notice, no written objections to the proposed action be filed in this court, and notice thereof given to the Trustee, as hereinafter provided, he shall have power to act. Such objections shall be in writing and shall state the ground upon which based, and the notice thereof shall provide that the argument thereon will be moved before the court at Chancery Chambers, Newark, N. J., on the next regular motion day not less than three days distant and the matter will be considered on the day indicated in such notice.

*Schedule "C".*

10 "6. That the Trustee may apply to this Court for instructions or for approval of any act contemplated by him by petition entitle in this cause and upon ten days' notice (unless the court shall direct otherwise) by mail to the parties holding interests in said mortgage or mortgaged property, addressed to them at their addresses as furnished by the Guaranty Company at the date of the assignment of said mortgage to the Trustee unless subsequently advised by such holders of a new address;"

and

WHEREAS, paragraphs 7, 8, 14, 17, 19, 20 and 21 of said General Order Number Two are as follows:

20 "7. The Trustee or the investor shall hold title to said property not only for the benefit of the investors therein (in which term shall be included the interest of the Guaranty Company or the Trustees to the extent that they are recognized by this order as investors) but also for the benefit of the Guaranty Company or the Trustees for any interest either may have represented by the second mortgage or other lien discharged or canceled of record or other subordinate interest to which the Trustees may be entitled which interest of the Guaranty Company or Trustees shall be subsequent and subordinate to the rights of the investors.

30  
40 "8. No sale or other disposal of the property shall be made by the Trustee for an amount less than sufficient to satisfy the amount due to the Guaranty Company or the Trustees except bona fide and upon fifteen days' notice to the Trustees of an application to the Court to approve such sale, and upon such application, the court

*Schedule "C".*

may make such order touching the said sale or other disposal aforesaid and as to the rights and interests of the Trustees and the investors as to it shall seem equitable and just; if the court shall approve such sale or other disposal and it shall be consummated, then the Trustees shall have no further interest in the trust except that, if the proceeds of such sale or other disposal shall be in excess of the amount due the investors calculated in the manner hereinafter provided, the Trustees shall be paid such excess or the amount which may be due to them upon their subordinate interest with interest, whichever be the lesser; if the contemplated sale or other disposal be not consummated the rights of the parties shall be the same as before notice was given to the Trustees.

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"14. No third party shall be required to inquire into the power of the Trustee or into any purchasing investor's power to dispose of the property purchased and any act of the Trustee shall be conclusive evidence of his power to act as to third parties. No third party shall be required to look to the application of the purchase money.

"17. In any case in which, upon application for the approval of a bona fide sale or other disposal for less than an amount which may be sufficient to satisfy the amount due to the investors and to the Trustees upon their subordinate interest, the court shall permit the Trustees to take the trust res upon payment to the investors of the amount which they would have received had such sale been consummated, the Trustees shall pay or cause to be paid the amount which may be due for commissions to any real estate broker or for other proper expenses incurred by the

30

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*Schedule "C".*

Trustee or the investors in procuring the offer for sale submitted to the court, if such commissions and other expenses be approved by the court.

10       “19. The Trustees shall receive notice from the Trustee of all matters of which investors are entitle to notice, and within the same time, but the rights of the trustees shall be only as herein provided. The trustee shall give notice to the Trustees of any matter or of any action which may be taken by the Trustees which shall affect the subordinate interest of the Trustees.

20       “20. The court may, upon application of any party in interest and upon fifteen days' notice to the Trustees but without notice to any other persons interested in the trust being administered by the Trustees, reduce or limit the rights of the Trustees, but shall in no case increase the rights of the Trustees. No right is created in the

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Trustee or the investors by this paragraph and the Court may act in its absolute discretion.

30       “21. That whenever, as herein provided, an act to be performed by the Trustee requires the approval of the Court upon notice to the Trustees the Trustee shall have power to act without such approval unless within ten days after receipt of notice the Trustees shall advise the Trustee by mail directed to his principal place of business that the Trustees dissent from the proposed act or that they require the matter to be brought to the attention of the Court; all notices to the Trustees may be by mail and shall advise the Trustees of the contemplated action of the Trustee and the reasons therefor;” and

40

*Schedule "C".*

WHEREAS, all the right title and interest conferred upon the Trustees of said Fidelity Union Title and Mortgage Guaranty Company by the aforesaid General Order Number Two has passed to the New Jersey Realty Company by operation of a decree entered in the above mentioned cause on June 22, 1937; and 10

WHEREAS, the Vendor desires to sell the premises hereinafter described upon the terms hereinafter set forth, provided that the Court of Chancery shall authorize the Vendor to make such sale, and further provided that the New Jersey Realty Company, as successor to the Fidelity Union Title and Mortgage Guaranty Company does not exercise the rights conferred upon it by virtue of said General Order Number Two: 20

Now, THEREFORE, the Vendor and the Vendee hereby covenant and agree to and with each other as follows:

1. That the Trustee shall and will apply to the Court of Chancery for instructions as to whether it should make the sale of and convey the property hereinafter described upon the terms and conditions herein set forth, and shall and will give each holder of an interest in said lands and premises, including the New Jersey Realty Company, written notice thereof in the manner required by General Order Number One and General Order Number Two. 30

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2. That if the Court of Chancery should approve of said sale upon the terms and conditions herein described and authorize the Vendor herein to make a conveyance thereof, and if the New Jersey Realty Company does not elect to purchase 40

*Schedule "C".*

the property on the terms hereinafter stated in accordance with the provisions of said General Order Number Two, then and in such event the Vendor agrees to sell and convey and the Vendee agrees to purchase—subject to the terms set forth in paragraph 3 hereof—ALL the following tract  
 10 or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey:

BEGINNING at the corner formed by the intersection of the northwesterly line of the Hudson Boulevard with the northeasterly line of Communipaw Avenue; thence (1)  
 20 northeasterly along the northwesterly line of the Hudson Boulevard one hundred and twenty-three feet and fifty-eight hundredths of a foot to a point which is also distant one hundred and twelve feet and fifty-nine hundredths of a foot southwesterly from the southwesterly line of Harrison Avenue; thence (2) northwesterly and nearly parallel with Harrison Avenue sixty feet and nineteen hundredths of a foot to a point in the southeasterly line of lot #22 on map of property  
 30 of Henry Flaacke, which point is distant along said lot line one hundred and twelve feet and fifty-six hundredths of a foot from the southwesterly line of Harrison Avenue; thence (3) Northeasterly along the southeasterly line of lot #22 and at right angles to Harrison Avenue one hundred and twelve feet and fifty-six hundredths of a foot to the southwesterly line of Harrison Avenue; thence (4) northwesterly along the southwesterly line of Harrison Avenue forty feet  
 40 to a point in the northwesterly line of lot

*Schedule "C".*

#21 on said map; thence (5) southwesterly along the northwesterly line of lot #21 and at right angles to Harrison Avenue one hundred and thirty-seven feet and sixty-seven hundredths of a foot to the rear line of lot #34-A, fronting on Communipaw Avenue; thence (6) northwesterly along the rear line of lot #34-A and nearly parallel with Harrison Avenue twenty-nine feet and thirty hundredths of a foot to the northwesterly line of lot #34-A; thence (7) southwesterly along the

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northwesterly line of lot #34-A and at right angles to Communipaw Avenue one hundred and six feet and thirty-one hundredths of a foot to the northeasterly line of Communipaw Avenue; thence (8) southeasterly along the northeasterly line of Communipaw Avenue one hundred and eighteen feet and fifty-four hundredths of a foot to the northwesterly line of the Hudson Boulevard and place of Beginning.

20

Being the same premises conveyed to the Vendor by deed from Hugh F. Parle, Sheriff of Hudson County, dated December 4, 1937 and recorded in the Hudson County Register's Office in 1914 Liber of Deeds, on page 187 &c.

30

3. That the Vendor and the Vendee agree that the terms and conditions upon which this sale is made are as follows:

(a) The purchase price of said property is the sum of Ninety-three Thousand Dollars (\$93,000), payable as follows:

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*Schedule "C".*

Five Thousand Dollars (\$5,000) in cash to be paid by the Vendee to the Vendor upon the execution and delivery of the within agreement, the receipt whereof is hereby acknowledged;

10 Twenty Thousand Dollars (\$20,000) in cash to be paid by the Vendee to the Vendor on the delivery of the deed as hereinafter mentioned;

And the balance of the purchase price, to wit, the sum of Sixty-eight Thousand Dollars (\$68,000) to be secured by the Vendee delivering to the Vendor note and mortgage in said sum, which note and mortgage shall be delivered simultaneously with the delivery of the above deed covering the above described premises and the principal and interest of said mortgage shall be paid as follows: The note and mortgage shall provide

20 that the mortgagor shall pay successive quarterly instalments of \$1,190. each for a term of eight years from the date thereof, the first installment to be paid three months from the date thereof and at the expiration of the term of eight years from the date of said note and mortgage the balance of principal and accrued interest shall be paid; each installment shall consist first of interest at the rate of 4% per annum upon unpaid

30 principal and the balance shall be applied to unpaid principal. Said note and mortgage shall be payable without credit or deduction for taxes assessed against the mortgaged premises. Said note and mortgage shall contain thirty-day interest and principal installment and sixty-day insurance, tax and assessment default clauses, and shall provide that, in the event of default in the terms thereof, the mortgagee shall have the right to enter into possession thereof and receive all the rents, issues and profits from the mortgaged

40 premises which are assigned to the mortgagee as

*Schedule "C".*

additional security, and that in case of default as aforesaid, the mortgagee shall have the right to apply for a receiver of said rents, issues and profits without proof of the adequacy of the security or of the solvency of any

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person or party liable for the payment of said note and mortgage. The mortgagor shall have the right on any interest date to pay the entire balance of the principal secured by said mortgage, together with accrued interest thereon, or to make additional payments on account of said principal sum in multiples of \$500.00, together with interest accrued thereon.

10

(b) The deed to said property shall be a bargain and sale deed with the proper United States Internal Revenue Stamps affixed and shall be delivered at the office of Hood, Lafferty & Emerson, 744 Broad Street, Newark, New Jersey, at which time the balance of the purchase price shall be paid and the note and mortgage delivered. Unless subsequently agreed otherwise, no closing shall take place until thirty-five days have elapsed from the date of the entry of an order approving the sale on the terms herein set forth, provided no appeal has been taken from such order. If an appeal has been taken from such order, then no closing shall take place until the appeal is disposed of by the affirmance of the order approving the sale.

20

30

(c) The following items of fixtures and equipment which are on the above premises and are not owned by the Vendor are not included in the within sale. The same are presumed to be owned by the tenants as specified in the following sched-

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*Schedule "C".*

ule, but the statement of ownership is for the purpose of information only and the Vendor assumes no responsibility for the accuracy of said schedule.

- 10 Refrigerator East apartment—#209  
 Venetian blinds Harrison Street  
 Fire equipment (small hand extinguishers  
 and sand pails)  
 Electrical fixtures (stores only)  
 Detachable closets and cabinets  
 Office partitions, furniture, fixtures and  
 signs  
 All shop equipment, including piping for  
 compressed air lines  
 Electric overhead door (Harrison Ave-  
 nue side)  
 20 Two 550-gallon gasoline tanks and pumps  
 —Richfield Oil Co.

(d) It is agreed that all rents, taxes and water rent shall be apportioned between the parties as of the date of closing title. The Vendee agrees to assume all existing policies of fire insurance covering said premises and to pay to the Vendor the premiums for the unexpired term thereof, apportioned as of the date of closing title.

- 30 (e) If, at the time of closing title, any rents for the current month should be due and uncollected, then all collected rents shall be apportioned as of said time and the Vendee shall give the Vendor credit for all uncollected rents apportioned as aforesaid, except that the Vendee, at his option may, in lieu of crediting the Vendor with such

—7—

- 40 uncollected rents, withhold such credit and authorize the Vendor to collect the entire monthly rents, in which case no apportionment for the

*Schedule "C."*

same shall be made at said time and the Vendor shall be accountable to the Vendee for his pro-rated share only to the extent that such rents are actually collected by the Vendor.

(f) The 1943 and 1944 municipal taxes were paid on the assessments as made and revised by the Hudson County Board of Tax Appeals, from which assessments appeals have been taken by the City of Jersey City and are pending. The Vendor agrees to set aside from the consideration payable hereunder a sum of money which shall be sufficient to pay the tax without interest on the excess of the assessments originally made by the City of Jersey City over the assessments as revised by the said County Board. And, if, as a result of such appeals, the original assessments shall be restored in whole or in part, said fund shall be used to satisfy the excess tax or so much thereof which shall be so ascertained on appeals to the State Board.

(g) It is agreed that title of said premises is not derived from proceedings under the Martin Act so-called or from any sale for nonpayment of taxes or from adverse possession.

(h) Said premises shall be conveyed subject to the rights of the tenants as created by their existing tenancies and all rights which may have accrued or which may in the future accrue to them by reason of the Federal Emergency Price Control Act and the Directives, Regulations and Amendments thereto and any future legislation and regulations thereunder of the United States of America and State of New Jersey.

(i) Risk of loss or damage by fire or from the elements is assumed by the Vendor until the passing of title.

*Schedule "C."*

(j) The Vandee represents that he has inspected said premises and will accept same in their present condition.

(k) The Vendee agrees to pay the cost of recording the deed and purchase money mortgage.

10 (l) The Vendee agrees to take title to said premises subject to restrictions, if any, which are of record and in force and effect, and to the effect, if any, of municipal ordinances and zoning regulations.

20 (m) The Vendee agrees to take title to said premises subject to such facts as an accurate survey may disclose, provided (except as hereinafter particularly specified and set forth) such survey shows that the buildings on said premises are wholly within the boundary lines and that no structures on adjoining lands encroach over and upon said premises. Vendee agrees, however, that the following encroachments, if in fact they do exist, shall not constitute an objection to title, to wit:

1. Possible encroachment of coping of building on the above described premises over and upon land adjoining the above described premises at two points.
- 30 2. Possible encroachment of coping of building adjoining Lot 21-A over and upon part of the above described premises.

(n) The Vendor agrees to pay all confirmed assessments, and to pay all unconfirmed assessments where the work which is the subject of such assessment or assessments shall be completed at the time of the execution of this

40 agreement, provided written notice of any such unconfirmed assessment shall be given to the

*Schedule "C."*

Vendor by the Vendee prior to the closing of title; the Vendor, however, has and retains the right to contest in good faith any of such confirmed or unconfirmed assessments in its own name or in the name of the Vendee.

(o) It is understood and agreed that title to said property is marketable subject to a survey as aforesaid, and that the same is not subject to any lien or encumbrance not specifically mentioned or provided for, and if an examination of title to said premises before the delivery of the deed herein contemplated shall disclose that said title is not marketable, or is derived from tax sale proceedings, or that said property is subject to a lien or encumbrance not specifically mentioned herein which the Vendor shall not promptly remove or shall be unwilling to remove, then and in any of these events, all moneys paid hereunder by the Vendee to the Vendor shall be returned to the Vendee and this contract shall be delivered up and canceled without further liability of either party to the other. 10 20

4. The right is reserved to the Vendor to submit to the Court of Chancery any offers for the purchase of the above described premises, which may be made to the Vendor from and after the delivery of this contract, and to ask the Court for instructions as to same. 30

5. The Vendor and the Vendee agree that if the Court of Chancery should refuse to approve this sale, or should enter an order restraining the Vendor from making the same or if it should authorize and direct the Vendor to accept any other offer which may be made for said premises, or if the New Jersey Realty Company should exercise the option conferred upon it by General Order Number Two, or if an order approving this sale should be set aside on appeal, the the Vendor 40

*Schedule "C."*

shall return the moneys received hereunder to the Vendee and the rights of the Vendor and the Vendee herein shall cease and terminate.

6. The Vendee hereby represents to the Vendor as an inducement to the Vendor to enter into the within agreement that he has not resided outside  
10 the United States,

-9-

nor has been a citizen of a country other than the United States, at any time since January 1, 1940, nor has Vendee acted as agent, directly or indirectly, for the benefit of any foreign country or citizen or corporation of any foreign country since that date, and that Vendee in entering into the within agreement is not acting as agent, directly  
20 or indirectly, for the benefit of any foreign country or citizen or corporation of any foreign country.

7. In the event Vendor is prohibited from conveying the above described premises to Vendee or any assignee or Vendee by reason of any executive order of the President of the United States, Act of Congress, or other regulation pertaining to the control of foreign funds, then the Vendor may, at its option, cancel this contract and return the moneys deposited hereunder, and the rights of  
30 the parties hereunder shall thereupon cease and terminate.

8. Vendee, provided he is not in default under the terms of this agreement, may assign the same to any corporation, and upon such assignment, the assignee alone shall be required to execute and deliver the note and mortgage provided for herein; nothing herein contained, however, shall relieve the Vendee from liability hereunder in the  
40 event that title is not closed with the assignee, pursuant to the terms hereof.

*Schedule "C."*

9. And the Vendee, for himself, his heirs, executors, administrators and assigns, does hereby covenant and agree that he will purchase the property above described upon the terms herein set forth.

IN WITNESS WHEREOF, the Vendor has caused these presents to be executed by its proper corporate 10

-10-

officers and its corporate seal to be hereunto affixed and duly attested, and the Vendee has hereunto set his hand and seal, all the day and year first above written.

FIDELITY UNION TRUST COMPANY

By JESSE H. SAUL

Vice President

20

As Trustee appointed by the Court of Chancery by an Order dated September 17, 1935, made "In the Matter of Proceedings under the Mortgage Guaranty Corporations Rehabilitation Act affecting the Fidelity Union Title and Mortgage Guaranty Company" (Mortgage Investment No. 64178) (Docket 99/590)

30

ATTEST:

CEDRIC L. BUSH

Assistant Secretary

(Seal)

Signed, Sealed and Delivered }  
in the Presence of: }

I. KABAKOW

CARL BERNSTEIN (L. S.)

Carl Bernstein

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## Schedule "D."

MEMORANDUM OF AGREEMENT made the 24th day  
of November 1944,

BETWEEN

10 FIDELITY UNION TRUST COMPANY, TRUSTEE  
hereinafter referred to as Owner, and

J. I. KISLAK, INC.,  
hereinafter referred to as Broker,

WITNESSETH:

In respect to the negotiations now pending and  
being conducted by the above named Broker for  
the sale of premises 2395/2401 Hudson Boulevard,  
Jersey City, N. J.

20 to Carl Bernstein of Bayonne, N. J., or corporate  
assignee,

it is MUTUALLY COVENANTED AND AGREED that no  
commission or brokerage shall be, or shall be  
deemed to be, due or earned, unless and until the  
Court approves the sale to the purchaser herein  
named and the deed in respect to said property  
shall be delivered and accepted and the balance of  
the purchase price paid.

30 In the event that the Court approves the sale to  
the purchaser herein named and such deed shall be  
so delivered and accepted and balance of purchase  
price paid, Owner agrees to pay to Broker above  
named the sum of

Four Thousand, six hundred and fifty  
dollars and no/100  
— (\$4,650.00) —

40 Dollars, in full for said Broker's commission on  
such transaction. The Broker above named hereby  
represents that it is the Broker in the transaction

## Schedule "D."

above referred to: the purchaser of same being Carl Bernstein of Bayonne, N. J., or corporate assignee.

In the event the New Jersey Realty Company exercises its rights to take over the property pursuant to the General Orders referred to in the contract of sale, then the broker shall not be entitled to any commissions whatsoever from owner and agrees to be bound by any decree that may be entered by the Court of Chancery in connection with such commissions as if he were a party to the proceedings more particularly referred to in the contract of sale. 10

WITNESS the signatures and seals of the above parties.

FIDELITY UNION TRUST COMPANY, 20  
TRUSTEE

By JESSE H. SAUL  
Vice President

J. I. KISLAK, INC.  
By J. I. KISLAK  
President

ATTEST:

CEDRIC L. BUSH 30  
Assistant Secretary

ATTEST:

MURRAY R. SIEGEL  
Secretary

(Seal)

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**Notice.**

IN CHANCERY OF NEW JERSEY.

99-590.

10

IN THE MATTER

of

Proceedings under the Mortgage  
 Guaranty Corporations' Re-  
 habilitation Act affecting the  
 FIDELITY UNION TITLE AND  
 MORTGAGE GUARANTY COMPANY.

Re: Mortgage  
 Investment  
 No. M-64178.  
 Notice.

20 *To Fidelity Union Trust Company,*  
*Trustee of Mortgage Investment No. M-64178*

30 PLEASE TAKE NOTICE that New Jersey Realty  
 Company, being the holder of a pari passu in-  
 terest and a subordinate interest in Mortgage In-  
 vestment No. M-64178, and having been served  
 with notice that on Tuesday, December 19, 1944,  
 application will be made to the Honorable Alfred  
 A. Stein, Vice-Chancellor of the State of New  
 Jersey (or such other Vice-Chancellor as may be  
 sitting on motions in the event the aforesaid Hon-  
 orable Alfred A. Stein is not present) at Chan-  
 cery Chambers, 1060 Broad Street, Newark, New  
 Jersey, at 10:00 o'clock in the forenoon for in-  
 structions whether Fidelity Union Trust Com-  
 pany, as Trustee, should sell premises known as  
 2395-2401 Hudson Boulevard, Jersey City, New  
 Jersey to Carl Bernstein for the sum of \$93,000.00  
 on terms set forth in the notice, New Jersey Realty  
 Company does therefore require that the matter  
 40 be brought to the attention of the Court on the

*Notice.*

said 19th day of December, 1944 at Chancery Chambers in the City of Newark, at 10:00 o'clock in the forenoon to the end that if the Court approves of the sale of said property an order may be made, if requested by the undersigned, permitting New Jersey Realty Company to take the trust *res* upon payment to the investors of the amount which they would have received had the said sale been consummated, in accordance with the applicable provisions of the General Orders of the Court of Chancery made in this cause. 10

JAMES J. McCARTHY,  
James J. McCarthy,  
Solicitor for and of Counsel  
with New Jersey Realty  
Company. 20

Service of the within Notice is hereby acknowledged this 18th day of December, 1944.

HOOD, LAFFERTY & EMERSON,  
Hood, Lafferty & Emerson,  
Solicitors of Fidelity Union  
Trust Company, as Trustee of  
Mortgage Investment No. 30  
M-64178.

**Decree Authorizing Sale.**

(Filed January 23, 1945.)

IN CHANCERY OF NEW JERSEY.

99-590.

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IN THE MATTER  
*of*  
 Proceedings under the Mortgage  
 Guaranty Corporations' Re-  
 habilitation Act affecting the  
 FIDELITY UNION TITLE AND  
 MORTGAGE GUARANTY COMPANY.

Re: Mortgage  
 Investment  
 No. M-64178.  
 Decree  
 Authorizing  
 Sale.

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This matter being opened to the Court in the presence of Hood, Lafferty & Emerson, Esqs., appearing by Charles Danzig, Esq., solicitors for petitioner, Fidelity Union Trust Company, as Trustee of Mortgage Investment No. M-64178 appointed by an order of the Court of Chancery entered in the above entitled cause on September 17, 1935, herein called "Trustee"; James R. E. Ozias, Esq., solicitor for New Jersey Realty Company, the holder of a subordinate interest in said Mortgage Investment No. M-64178 as defined and determined by paragraphs 1 to 4, both inclusive, and 13 to 22, both inclusive of "General Order Number Two Re Protection of Trustees in Cases of Withdrawals of Mortgages and Properties where the Trustees have Subordinate Interests" entered in the within cause on April 16, 1935, herein called "General Order Number Two", incorporated in said order of September 17, 1935

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by reference thereto; and Samuel Kaufman, Esq.,

*Decree Authorizing Sale.*

solicitor for J. I. Kislak, Inc.; and it appearing that pursuant to the aforesaid order of September 17, 1935 and "General Order Number One Re Withdrawal of Mortgages" entered in the within cause on November 21, 1934, herein called "General Order Number One", incorporated in said order of September 17, 1935 by reference thereto, and the applicable provisions of the aforesaid "General Order Number Two", Trustee gave notice to all persons entitled thereto under the terms of the aforesaid orders of its application to this Court for instructions whether it, as such Trustee, should sell premises known as 2395-2401 Hudson Boulevard, Jersey City, New Jersey, to Carl Bernstein for the sum of \$93,000.00, payable \$25,000.00 cash and \$68,000.00 secured by a purchase money mortgage on terms more fully stated in the notice hereinafter mentioned and in the contract attached to the petition and marked Schedule "C"; and it further appearing that because of the difficulty Trustee had in procuring an offer commensurate with the value of the property through general listings with real estate agents, Trustee conceived it advantageous to the investors and the trust estate to create an exclusive sales agency with J. I. Kislak, Inc. for the sale of the aforesaid property so that special effort would be made to sell said property; that the aforesaid offer by Carl Bernstein of \$93,000.00 on terms was procured by said J. I. Kislak, Inc. and submitted to this Court on December 19, 1944; that on December 19, 1944 Trustee moved for a continuance of its application for instructions because it appeared that another offer may be submitted for the purchase of the aforesaid property; that on December 26, 1944, Trustee submitted to this Court a contract subject to the approval of

*Decree Authorizing Sale.*

10 this Court between Trustee and J. R. Holsey Sales Company for the purchase of the aforesaid property for the sum of \$95,000.00, payable \$30,000.00 cash and \$65,000.00 secured by purchase money mortgage and on other terms and conditions stated in said contract which contract was admitted in evidence and marked Exhibit P-1; that on December 26, 1944 the aforesaid application for instructions was adjourned to January 2, 1945; that prior to January 2, 1945 the aforesaid exclusive sales agent, J. I. Kislak, Inc. procured and submitted an offer for the purchase of the aforesaid property by Louis Drogin for the sum of \$100,500.00, payable \$30,500.00 cash and \$70,000.00 secured by purchase money mortgage due in 8 years, with quarter-annual installments of \$1,400.00 each, to be applied first toward interest on the unpaid principal sum of the mortgage at the rate of 4% per annum and the balance on account of the unpaid principal; the mortgagor to have the right on any interest date to pay the entire balance of the principal secured by said mortgage, together with accrued interest thereon, or to make additional payments on account of said principal sum in multiples of \$500.00, together with interest accrued thereon; rents, taxes, water rents and fire insurance premiums to be apportioned between the parties as of the date of closing of title; and vendee to have the right to assign the contract to any corporation, in which case the assignee alone is to execute the proposed note and mortgage, which offer was reduced to contract and submitted to this Court on January 2, 1945 and admitted in evidence and marked Exhibit P-3; that the New Jersey Realty Company served notice upon Trustee requiring that the application for leave to sell the aforesaid property be sub-

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*Decree Authorizing Sale.*

mitted to this Court to the end that if the Court approves the sale, an order may be made if requested by New Jersey Realty Company, permitting said New Jersey Realty Company to take the trust res upon payment to the investors of the amount which they would have received had the sale been consummated in accordance with the applicable provisions of the General Orders of the Court of Chancery made in the within cause; and it further appearing that at the time said application for instructions was moved the New Jersey Realty Company requested that it be permitted to take the property on the same terms and conditions contained in the contract between Trustee and Louis Drogin, marked Exhibit P-3, but that it be permitted to deduct from the purchase price the commissions that would have been payable to J. I. Kislak, Inc., had the sale to Louis Drogin been approved and consummated, and that said New Jersey Realty Company further requested that the payment of commissions by Trustee be disapproved for the reason that the said J. I. Kislak, Inc. is not legally entitled to the payment of any commissions in the event New Jersey Realty Company takes title to the said premises, and the Court having considered the petition of Fidelity Union Trust Company, as Trustee as aforesaid, the appraisal of Louis Schlesinger Company dated January 4, 1944, the agreement dated November 24, 1944 between Trustee and Carl Bernstein, a copy of which is attached to the petition filed herein and marked Schedule "C", the agreement between Trustee and J. I. Kislak, Inc., dated November 24, 1944, a copy of which is attached to the petition filed herein and marked Schedule "D", the agreement between Trustee and J. R. Holsey Sales Company marked Exhibit

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*Decree Authorizing Sale.*

10 P-1, the agreement dated December 30, 1944 between Trustee and Louis Drogin marked Exhibit P-3, letter dated December 29, 1944 of J. I. Kislak, Inc. submitting the offer of Louis Drogin, marked Exhibit P-2, the exclusive sales agency dated July 13, 1944 between Trustee and J. I. Kislak, Inc., a copy of which is attached to the petition filed herein and marked Schedule "B", the notice to investors dated December 8, 1944 and the affidavit of mailing, the notice of New Jersey Realty Company addressed to Trustee, and being of the opinion that the sale of the aforesaid premises for the sum of \$100,500.00, payable \$30,500.00 cash and \$70,000.00 secured by purchase money mortgage and on other terms and conditions contained in the contract marked Exhibit P-3, is advisable and is of advantage to the investors and the trust estate; that the aforesaid offer represents the fair and reasonable market value of the premises and that the retention thereof for a possibly higher offer in the future is unwarranted, and that it was necessary and proper for the Trustee to create an exclusive sales agency with J. I. Kislak, Inc. for the purpose of procuring an offer commensurate with the value of said property, and that in view of the services rendered by said exclusive sales agent it is entitled to the payment of commissions and that the payment of such commissions should be approved by the Court, and no investor appearing or objecting to said sale, and good cause appearing for the entry of this order:

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IT IS, THEREUPON, on this 23rd day of January, 1945, by His Honor, Luther A. Campbell, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED:

*Decree Authorizing Sale.*

1. That it is to the advantage of the investors and the trust estate that the premises known as 2395-2401 Hudson Boulevard, Jersey City, New Jersey, more particularly described in a mortgage given by Belle Meade Sales Corporation, a corporation of the State of New Jersey, to Fidelity Union Title and Mortgage Guaranty Company, recorded in the Register's Office of Hudson County in Book 1366 of Mortgages for said County, page 502, be sold at this time for the sum of \$100,500.00, payable \$30,500.00 cash and \$70,000.00 secured by purchase money mortgage and on the terms contained in the contract between Trustee and Louis Drogin marked Exhibit P-3, that the said offer represents the fair and reasonable market value of the property and that the retention thereof for a possibly higher offer in the future is unwarranted.

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2. That it was necessary and proper for Trustee to create an exclusive sales agency with J. I. Kislak, Inc. for the purpose of procuring an offer commensurate with the value of the aforesaid premises, and the payment of commissions to J. I. Kislak, Inc. for procuring the offers aforesaid and approved by this Court be, and is hereby approved;

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3. That unless the New Jersey Realty Company serves notice upon Trustee within 5 days from the date hereof that it will take title to the aforesaid premises and pay to Trustee the sum of \$100,500.00, payable \$30,500.00 cash and \$70,000.00 secured by purchase money mortgage, and comply with all other terms and conditions contained in the contract between Trustee and Louis Drogin marked Exhibit P-3, the Fidelity Union

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*Decree Authorizing Sale.*

Trust Company, as Trustee as aforesaid, be and is hereby authorized and directed to sell and convey to Louis Drogin, or his assignee, the aforesaid premises on the aforesaid terms as contained in said Exhibit P-3;

10     4. In the event New Jersey Realty Company serves the notice required by this order as aforesaid, then Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby authorized and directed to sell and convey to said New Jersey Realty Company the aforesaid premises on the terms and conditions contained in said Exhibit P-3, and in such event said Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby directed to cancel the agreement between it and said Louis Drogin marked Exhibit P-3 and return the down-money deposited thereunder;

30     5. That the payment of commissions to J. I. Kislak, Inc. be and is hereby approved and said J. I. Kislak, Inc. is entitled to commissions in the event New Jersey Realty Company takes title to the property, or Louis Drogin, or his assignee takes title to the property; no commissions, however, shall be paid or shall be deemed to be due or earned by the aforesaid J. I. Kislak, Inc. unless and until the deed in respect to the aforesaid property shall be delivered and accepted and the balance of the purchase price paid as required by the aforesaid agreement marked Exhibit P-3.

40     6. That Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby directed to cancel the agreement between it and the aforesaid Carl Bernstein dated November 24, 1944, a copy

*Decree Authorizing Sale.*

of which is attached to the petition filed herein and marked Schedule "C", and return the down money deposited thereunder.

7. That Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby directed to cancel the agreement between it and the aforesaid J. R. Holsey Sales Company, a New Jersey Corporation, which contract was admitted in evidence and marked Exhibit P-1, and return the down money deposited thereunder. 10

8. That the Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby authorized and directed to execute such deeds and instruments as may be necessary to consummate the directions contained in this order. 20

Respectfully advised,

ALFRED A. STEIN,  
V.C.

LUTHER C. CAMPBELL,  
C.

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**Transcript of Proceedings  
January 2 and 9, 1945.**

IN CHANCERY OF NEW JERSEY.

10	<p style="text-align: center;">IN THE MATTER <i>of</i> Proceedings under the Mortgage Guaranty Corporations' Re- habilitation Act affecting the FIDELITY UNION TITLE AND MORTGAGE GUARANTY COMPANY.</p>	<p>Mortgage Investment M-64178, Premises Known as 2395-2401 Hudson Boulevard, Jersey City, New Jersey.</p>
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JANUARY 2, 1945.

20 Transcript of shorthand notes of proceedings taken in the above entitled cause before his Honor, Alfred A. Stein, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. Hood, Lafferty & Emerson (by Charles Danzig, Esq.) for Fidelity; James J. McCarthy, Esq., for New Jersey Realty Company; Samuel Kaufman, Esq., for J. I. Kislak, Inc.

30 Mr. Danzig: If your Honor please, I should like to move mortgage investment No. M-64178 on premises known as 2395 Hudson Boulevard, Jersey City.

I do not believe there is any investor in court on that proposition. There has not been the last two times we were in court with this matter.

40 Briefly, I want to say to your Honor I do not think there is much occasion for me to describe the property, anything that is material to the advisability of the sale, because there is no one

*Transcript of Proceedings January 2, 1945.*

in objection present, so that, apparently, everybody is in favor of the sale.

We came in at first with an offer of \$95,000, which had been procured for us by J. I. Kislak, Incorporated, a brokerage concern with whom we created an exclusive sales agency, back in July, and it is to run to January 15th. And they procured that offer and submitted it. And, subsequently, we received an offer of \$95,000 from J. R. Holsey Sales, Inc. and that was for \$95,000. And we have submitted that offer to the court, and Vice-Chancellor Bigelow, who sat on the matter last week, has marked that contract P-1. 10

Now, this morning, the exclusive sales agent delivered to me a contract, with a check to bind it, that I prepared at the close of the old year, on the basis of this requisition that he submitted, dated December 29, 1944, for the purchase of this property on behalf of Louis Drogan, which is an entirely new buyer, for \$100,500, payable \$30,500 cash and the balance by purchase money mortgage for eight years, with constant payments of eight per cent, of which four per cent is to be applied on account of interest and the balance on account of principal. 20

And, I should like this to be marked, with the court's permission. 30

(Requisition above referred to marked Exhibit P-2.)

Mr. Danzig: And, this morning, I received a contract prepared on the basis of P-2, executed by Louis Drogan.

And I should like to have that marked P-3.

(Contract above referred to marked Exhibit P-3.) 40

*Transcript of Proceedings January 2, 1945.*

Mr. Danzig: And I have a check here for \$5,000, which was submitted in connection with this P-3, that I would like to have marked P-4.

(Check above referred to marked Exhibit P-4.)

10 Mr. Danzig: Now, it appears from the record, if your honor please, that we have had this property for a number of years and made some general listings, which produced no results that the trustee regarded as beneficial, and the trustee is being confronted with this property, which consists of a building which was originally constructed for an automobile sales room and garage.

20 Then there is another building that was connected with this building and converted to the same type of use.

Then there was a third building, which at one time was used as a residence, but because of its greater utility in connection with the operation of this sales room and garage, that, too, was brought into the general ensemble and used, and is being presently used, in connection with this automobile sales room, repair place and service station and garage.

30 Now, it being a special purpose property, naturally, its market was limited, and general listings did not produce any offer which, in the trustee's opinion, approached anywhere near its value. And the trustee's concern with general listings went over, I think, a period of three years, and, finally, it decided that the best way of obtaining a price commensurate with the real value of this property, was to create an exclusive sales agency, which it did on July 13, 1944.

40 And that exclusive sales agency is attached to the petition, so that your honor can see that it is

*Transcript of Proceedings January 2, 1945.*

just an ordinary exclusive which would bind the trustee to pay commission to this agent no matter who bought the property or no matter who might have procured the buyer for this property.

Now, the exclusive sales agent is represented here by Mr. Kaufman, and I dare say Mr. Kaufman can tell you the special efforts that the exclusive sales agent expended in order to procure a purchaser, if that is in any way necessary.

10

I think it is purely a matter of contract and the trustee is either bound or is not bound, and we conceive that it is.

Now, this offer of \$93,000—the first offer the exclusive sales agent procured was \$93,000, and that was made on behalf of Carl Bernstein, and at that time the exclusive sales agent and the Fidelity executed another commission agreement. It has always been a puzzle to me why that was done, but it was, and that is attached to the papers. This commission agreement has reference only to the Carl Bernstein offer, which was the ninety-three thousand dollar offer. Of course, it contains the usual provisions that, if the New Jersey Realty Company exercises its option, no commissions are payable.

20

That commission agreement, I emphasize, is executed in connection with the Carl Bernstein offer of \$93,000, and it is so worded, and so it is not a matter of my construing it that way; the papers say so.

30

This morning, as I have told your honor, I received Exhibit P-3, which is for the purchase of this property for \$100,500 on terms, which is some \$7,500 in excess of the Carl Bernstein agreement with the same agent as broker. The J. R. Holsey Sales had come in at \$95,000. I have been trying to get some statement from them.

40

*Transcript of Proceedings January 2, 1945.*

Now, mind you, there, the Holsey Sales is the tenant here and they, of course, are very much interested in this property, and they have executed an agreement to buy this property for \$95,000, and the exclusive sales agent has tried to get them to increase their offer as soon as he got this hundred thousand some odd dollars offer, and he has reported to me and to the Fidelity that they are not interested and, not that I do not take the exclusive sales agent's word, but I feel I am, in a sense, the court's agent and I have got to satisfy myself they are not interested, after having signed a document wherein they agreed to pay \$95,000, and bearing in mind the other circumstances, so I called Mr. Armstrong, who represents them, and he was not in, so I called his home and he had just left for his office. At half-past ten I called his office. Again he was not in, so I decided I would go directly to the principal, the vendee under this contract, and he was not in. I talked with his son, who, I believe, is an officer of the corporation, too, and his son, Mr. Holsey's son, told me his father was not interested in bidding more than \$95,000.

Now I am told that the New Jersey Realty Company desires to exercise its option and take over. They have a perfect right to take this property over at the contract price. The only thing that is open, and it is the one your honor will have to decide, is whether they can take over under these circumstances and deduct from the contract price the agent's commission, which has been the custom, the practice, the law of the case—call it what you like—up until this time.

I think this particular case is a special thing, that we have in this case an exclusive sales agency that we did not have in any of the other

*Transcript of Proceedings January 2, 1945.*

cases, and the trustee by the terms of the document, that is signed all in the interest of this trust, if your honor please, not in the trustee's individual interest, would be bound and would have to pay the exclusive sales agent his commission no matter who bought the property or who procured the purchaser. And we submit to your honor that in the things that we have done in this particular case, we have acted with regard only for the interest of the certificate holders, and I submit that the course we have pursued has proved that the trustee's position in the matter was altogether correct and to the benefit of the certificate holders, because, if your honor looks over the offerings that we received from the general listing, they range anywheres from fifty thousand to sixty to seventy thousand; they fell off to fifty-five thousand; they went up to eighty thousand, all on terms. They were one-third less satisfactory than the terms of this offer, and here we are with at least fifteen thousand in excess of the very highest offer, and under the circumstances I move on behalf of the trustee for the approval of this sale to the contract purchaser, Louis Drogan, on the basis of Exhibit P-3, and if the New Jersey Realty Company desires to exercise its option, on behalf of the trustee I move that it be permitted to do so, that they take over at the full contract price without any deduction on account of the commission.

Mr. McCarthy: If your honor please, I represent the New Jersey Realty Company. We came into court this morning to consider the contract on the basis of a purchase price of \$93,000, and I have not seen the other contract that Mr. Danzig speaks of, but, assuming that the only difference of the two contracts is the purchaser and

*Transcript of Proceedings January 2, 1945.*

the different purchase price, the New Jersey Realty does exercise its option to take the property under its subordinated interest rights. I would respectfully ask your honor to reserve, if you will, the disposition of the matter of brokerage until we can present a memorandum on that, after we have had a chance to study the new brokerage agreement, or the brokerage agreement that is different from the one that was submitted to us, in which it was stated that in the event New Jersey Realty Company exercises its right to take over the property, the broker shall not be entitled to any commissions whatsoever from the owner.

The Court: You are reading from the exclusive?

20 Mr. McCarthy: I am reading from the only commission agreement that was submitted to us, the one in connection with the proposed sale—

The Court: That you had.

Mr. McCarthy: —for \$93,000; the matter of brokerage and the liability to pay it, of course, is a matter of great concern to the New Jersey Realty; and it has been a long established precedent that New Jersey Realty, in exercising their subordinated interest rights, had the right to deduct the amount of the brokerage that would have been paid had the sale been consummated.

30 I am respectfully asking your honor to reserve the disposition of that brokerage.

The Court: That is all covered by the general order, isn't it?

Mr. McCarthy: It is. The general order provides that the New Jersey Realty Company shall not be obliged to pay the commission in the event that the trustee is not obligated.

40 The Court: Well, here the obligation is on the trustee.

*Transcript of Proceedings January 2, 1945.*

Mr. McCarthy: Well, under the commission agreement submitted us there is none.

The Court: I have had any number of these heretofore. Of course, this is a case where the trustee is under obligation to pay the commission.

Mr. McCarthy: Yes. And it might very well be that New Jersey Realty Company is obligated to pay the commission, too. I am only asking your Honor, if you will, to reserve disposition of this for one week until we can examine the exclusive listing, or whatever it is, under which the obligation exists. 10

The Court: The only question reserved being whether the New Jersey Realty shall pay a commission.

Mr. Danzig: I think that the question that he asks to reserve is so intimately connected with the question of sale that the two should go together. They either should be decided now or postponed together, because the minute your Honor approves the sale, as I conceive this agreement to mean, the trustee is obligated to pay commissions. As soon as your Honor approves the sale, we are obligated to pay commissions, under this agreement, as I read it. Of course, I am not the court. The court may disagree with me, but I cannot see it any other way. 20 30

And then, if your Honor decides that they are to have the property and still be permitted to deduct commissions, we say, the total commission here we have got to pay him is \$5,000, and he is allowed to deduct \$5,000.

The Court: I don't follow you. I don't follow you at all on that. As I understand the representative of the New Jersey Realty Company, through counsel, they now do elect to take the property.

Mr. Danzig: And the question of commissions to be decided later? 40

*Transcript of Proceedings January 2, 1945.*

The Court: And the question of commissions to be decided later. I don't know why there is any necessity for laying over. I will grant it to them.

Mr. Danzig: If you grant the request, will you grant me one, that the whole thing should be laid over one week? I think the estate would certainly be benefited.

10 The Court: I will lay the whole thing over one week, but it is very clear to me, and I have no hesitation in saying, if you take over, it is clear to me you have to pay the commission, under the general order. Under the general order, I couldn't make any other order. You may take under a general order. As I remember it, although it is some time ago, ordinarily the trustee is not obliged to pay a commission, but under this arrangement the trustee made, the trustee is bound.

20 Mr. McCarthy: It may be that we will have to poy, your Honor, but we have not had an opportunity to study the other agreement.

The Court: I tell you frankly now, if you take, you will pay. You cannot hold this up. If you decide to take, you will pay. I will lay the whole thing over.

Mr. Kaufman: Then, there is no confirmation of sale?

30 Mr. Kaufman: And that does not preclude us from bringing in a better offer?

The Court: Not at all. I am always out for a better offer.

Court stands adjourned.

*Transcript of Proceedings January 9, 1945.*

IN CHANCERY OF NEW JERSEY.

JANUARY 9, 1945.

Transcript of shorthand notes of proceedings taken in the above entitled cause before his Honor, Alfred A. Stein, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Messrs. Hood, Lafferty & Emerson (by Charles Danzig, Esq.) for Fidelity; James R. E. Ozias, Esq., for New Jersey Realty Company. 10

Mr. Danzig: Last week we presented to your Honor the question of the sale of premises in Jersey City, Hudson Boulevard, and I then presented a situation to you, which, briefly, was something like this: that the trustee had been administering this property and had listed it for general sale with a number of brokers, but such general listing did not produce any offers that the trustee regarded as commensurate with the value of the property and, thinking that special efforts were needed to effect the sale— 20

The Court: You gave an exclusive.

Mr. Danzig: —we gave an exclusive agency.

The Court: Yes.

Mr. Danzig: Then the exclusive agent produced a buyer and they entered into another commission agreement with respect to that particular buyer, which, as I said last week, I cannot explain why they did it, but it was done. And we have always presented everything to this court whatever the outcome may be. But, since that agreement was entered into with respect to that particular buyer, whose name is Carl Bernstein, the exclusive agent procured another buyer who offered, I believe, some \$7,500 in excess of what Bernstein had of- 30 40

*Transcript of Proceedings January 9, 1945.*

ferred, and at this particular time no other agreement was entered into; that the only thing that we regard as operative would be the agreement by which the exclusive agency was created, and this other offer is one hundred thousand five hundred dollars on terms, which I fully presented last  
10 week.

Now, as I said last week, the New Jersey Realty Company has an undeniable right to take over this property at the purchase price that is contained in this last contract, at one hundred thousand five hundred dollars; that, if they wish to take that, I think, in view of the fact that the trustee is under a legal obligation to pay commission, they should be permitted to take over only on condition that they pay the full purchase  
20 price, and that the trustee has the wherewithal to pay the commissions.

Mr. Ozias: If your Honor please, representing the New Jersey Realty Company, I agree with Mr. Danzig that if the trustee is under a legal obligation to pay the brokerage commission, then, of course, the New Jersey Realty must assume that obligation to pay the commission, but that is just the point, and I have gone over the papers very carefully and—

30 The Court: You mean the parties are not obliged under the law to pay commissions?

Mr. Ozias: They are not under a legal obligation to pay the brokerage commission. And I will refer to the sales listing agreement that the Fidelity entered into with the broker. And this agreement is similar to a number of other brokerage commissions that have been entered into by the trustees in cases of this nature, where the court has always held that the New Jersey Realty  
40 is not under obligation to pay any brokerage commission.

*Transcript of Proceedings January 9, 1945.*

The agreement reads: In consideration of your efforts to sell the property listed herein, we grant you an exclusive sales agency to be effective immediately and to expire on January 15, 1945, total brokerage for commission in event sale is to be as established by the Jersey City Real Estate Board, same not to be deemed earned or payable until the deed to said property has been delivered and accepted and the full purchase price paid. And then it says: conveyance to be by bargain and sale deed, the list price if not confirmed and subject to ratification or change either more or less by the executive committee of this company, and subject also to the approval of the Court of Chancery. And then it goes on with respect to the list price. I don't think the rest of it is material.

Now, this is not the first time this question has come before the court, and it has always been the ruling of this court that where the New Jersey Realty Company takes over property, it is not a sale, but it is exercising its preemptive right under the orders of the court. And, of course, there is a very good reason why that should be so.

When this company was organized the trustees of the Fidelity Union Title and Mortgage Guaranty Company, and now the New Jersey Realty Company, had subordinate interests in these mortgages and properties in excess of two million dollars, and the court felt that the New Jersey Realty Company should be granted the most possible protection and given the greatest advantage to realize something on these subordinate interests.

The General Order Number 2 provides that in any case on the question of a sale—

The Court: Why do you say, under the agreement which you have, that the Fidelity is not legally obliged, if I approve this sale, to pay commission?

*Transcript of Proceedings January 9, 1945.*

Mr. Ozias: Because the sale will not be approved to this purchaser.

The Court: It won't be approved until I say so. If I approve of this purchase, why won't Fidelity have to pay commission?

10 Mr. Ozias: If you approve the sale to the purchaser, the Fidelity would have to pay the commission, but the New Jersey Realty Company has come and exercised its right to take over the property at the same price.

The Court: Not the same price, at a price less than, but you want——

Mr. Ozias: The amount net.

The Court: But you won't pay commission.

Mr. Ozias: If your Honor please——

20 The Court: In other words, where the Fidelity, after considerable experience, in trying to dispose of a piece of property, having it listed with a lot of agents, finds that it cannot even get a bid on it, and the proper thing to do is to list it with one agent, who will then set forth the best efforts, expend his money advertising and so forth and so on, and they see fit to give that agent an exclusive agency, you take the position that after the exclusive agent produces a buyer, that you can come in and take the property for a price less the commissions which this man earned in finding a buyer.  
30 Where is there any equity in that?

Mr. Ozias: I say this, if your Honor please: this exclusive agency——

The Court: I mean, if you concede what you must concede under the order, that the Fidelity is bound in law to pay commissions, then you cannot take the property without paying the commissions.

40 Mr. Ozias: Yes, I concede that, if your Honor please, but we say the Fidelity is not bound, because the very agreement provides that they shall

*Transcript of Proceedings January 9, 1945.*

not be obliged to pay the commission unless the sale is confirmed.

The Court: That is true. And, if I confirm it in the buyer?

Mr. Ozias: If you confirm it in the buyer, that means that the Fidelity will convey to the buyer, which will be in derogation of the right of the New Jersey Realty Company to come and take over the property. 10

The Court: No. You can take it by paying the commission.

Mr. Ozias: May I refer—

The Court: Where there is an exclusive agency, I am not disposed to act otherwise. And where the situation is one where the trustee is trying to get rid of this property for a long time and listed with a number of agents and found that that was not successful, I think you will agree with me, in many instances, the listing of property with an agent exclusively is a business-like thing to do. It brings results. 20

Mr. Ozias: If your Honor please, there is no magic—

The Court: Upon the theory that everybody's business is nobody's business.

Mr. Ozias: But there is no magic in the word "exclusive". 30

The Court: No, but there is a law protecting the party where it is exclusive.

Mr. Ozias: I know, but the point is this, the exclusiveness of an agency merely prevents the owner from listing it with other brokers.

The Court: I don't know about that. I don't know whether that is so or not. If I have an exclusive agency and the owner sees fit to sell it to somebody without first giving me the first chance, I think I am entitled to my commission: being exclusive, it is just that. 40

*Transcript of Proceedings January 9, 1945.*

Mr. Ozias: There is a distinction under the New Jersey law between an exclusive agency and an exclusive right. Where the owners grant an exclusive agency, the cases definitely say that merely precludes the owner from engaging other brokers, but it doesn't preclude him from conveying himself. If he grants the agent an exclusive right, that is a different matter; he cannot convey himself without paying a brokerage commission.

10

The Court: In this instance I will not allow you to exercise your right.

Mr. Ozias: If your Honor please, may I refer to some previous decisions?

The Court: You may take an appeal, if you want to, from my ruling.

Mr. Ozias: There have been other— This question has come up before.

20

The Court: Well, I say, you may take an appeal from my ruling, if you want to, but that is what I am going to do in this case.

Mr. Ozias: Well, now, it seems to me—

The Court: Let the Court of Errors and Appeals pass on that question.

Mr. Ozias: If your Honor insists, I will be obliged to do so, but I don't want to.

The Court: In this case an exclusive agent can be much more effective. In prior cases the Fidelity—

30

Mr. Ozias: May I say this, if your Honor please? It is not being unfair to the broker. I will tell you why.

The Court: Don't tell me why. I have already ruled. Now, you take an appeal—

Mr. Ozias: Well, then, there is nothing further to say.

The Court: —and let the upper court straighten me out.

40

*Exhibit P-1.*

Mr. Ozias: What is your Honor's ruling?

The Court: I am holding that in *this* particular case, in *this* particular instance, I will confirm the sale unless you agree to pay the commission; I will confirm the sale to the buyer in *this* case—

Mr. Danzig: I will put that in order form.

The Court:—which may or may not be a precedent, but in this case that is what is going to be done. 10

Mr. Ozias: There were many offers on this property when it was generally listed. There was a great deal of activity on it.

The Court: There is no other like this. If you think I am wrong, you take an appeal.

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**Exhibit P-1.**

Contract between Fidelity Union Trust Company, as Trustee etc. and J. R. Holsey Sales Company for purchase of property for \$95,000. etc. Printing omitted by agreement of counsel.

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**Exhibit P-2.**

J. I. KISLAK, INC.  
Kislak Building, Journal Square,  
Jersey City, N. J.

December 29, 1944

10 Messrs. Hood, Lafferty & Emerson  
744 Broad Street  
Newark, New Jersey

*Att: Mr. Charles Danzig  
Re: 2395 Hudson Boulevard, Jersey City*

Gentlemen:

20 Pursuant to the exclusive agency granted us by  
the Fidelity Union Trust Company on July 13,  
1944, we are pleased to submit the following offer  
for the captioned premises on behalf of Louis  
Drogin, purchaser:

Purchase price .....\$100,500.  
Cash .....\$ 30,500.  
Balance of the purchase price on pur-  
chase money mortgage, \$70,000, to be for  
a term of eight years and to bear constant  
payments of 8% per annum, of which 4%  
is to be applied to interest.

30 Will you please prepare your customary con-  
tract so that we may have same executed in time  
for submission to the Court of Chancery on Tues-  
day morning next.

Very truly yours,

J. I. KISLAK, INC.  
M. R. Siegel  
Treasurer

40 MRS:mea

**Exhibit P-3.**

AGREEMENT, made this 30th day of December,  
Nineteen Hundred Forty-four

BETWEEN FIDELITY UNION TRUST COMPANY, a New Jersey corporation, with its principal office in the City of Newark, in the County of Essex and State of New Jersey, AS TRUSTEE APPOINTED BY THE COURT OF CHANCERY BY AN ORDER DATED SEPTEMBER 17, 1935, MADE "IN THE MATTER OF PROCEEDINGS UNDER THE MORTGAGE GUARANTY CORPORATIONS REHABILITATION ACT AFFECTING THE FIDELITY UNION TITLE AND MORTGAGE GUARANTY COMPANY" (MORTGAGE INVESTMENT No. 64178) (DOCKET 99/590) herein called the "Vendor", 10

AND LOUIS DROGAN of the City of Bayonne, in the County of Hudson and State of New Jersey, herein called the "Vendee": 20

## WITNESSETH:

WHEREAS, the Vendor holds title to the lands and premises hereinafter described, as Trustee under the above mentioned order of the Court of Chancery, which order incorporated therein by reference thereto an order made by said Court in the above quoted cause on November 21, 1934, designated as "General Order Number One Re Withdrawal of Mortgages", hereinafter designated as "General Order Number One", and paragraphs 1 to 4, both inclusive and paragraphs 13 to 22, both inclusive, of an order entered in said cause on April 16, 1935, designated as "General Order Number Two Re Protection of Trustees in Cases of Withdrawals of Mortgages and properties Where Trustees Have Subordinate Interests", hereinafter called "General Order Number Two"; and 30 40

*Exhibit P-3.*

WHEREAS, paragraphs 13, 21 and 6 of General Order Number One are as follows:

10       “13. That the Trustee is authorized if he ac-  
quires title to the mortgaged property by fore-  
closure of said mortgage or otherwise, (a) to sell  
such property for cash for a sum sufficient to  
20       satisfy in full the investment of all parties having  
an interest therein; (b) to pay all carrying charges  
thereon, current or accrued; (c) upon notice to  
sell such property, or any part thereof, at such  
price and upon such terms and conditions as the  
Trustee may deem advisable; (d) upon such sale  
to convey to, and by such conveyance vest in the  
purchaser thereof, the legal and equitable title to  
said property. The deed of the Trustee shall be  
conclusive evidence of his power to convey the  
lands therein described.

30       “21. That whenever notice is herein required,  
such notice shall advise the parties having bene-  
ficial interests in said mortgage or mortgaged  
property of the contemplated action of the Trus-  
tee and the reasons therefor and shall be mailed  
to such parties in the manner prescribed by para-  
graph 6 hereof; and if, at the expiration of ten  
days from the mailing of such notice, no written  
objections to the proposed action be filed in this  
court, and notice thereof given to the Trustee, as  
hereinafter provided, he shall have power to act.  
Such objections shall be in writing and shall state  
the ground upon which based, and the notice there-  
of shall provide that the argument thereon will be  
moved before the court at Chancery Chambers,  
Newark, N. J., on the next regular motion day not  
less than three days distant and the matter will be  
considered on the day indicated in such notice.

40       “6. That the Trustee may apply to this Court  
for instructions or for approval of any act con-

*Exhibit P-3.*

templated by him by petition entitled in this cause and upon ten days' notice (unless the court shall direct otherwise) by mail to the parties holding interests in said mortgage or mortgaged property, addressed to them at their addresses as furnished by the Guaranty Company at the date of the assignment of said mortgage to the Trustee unless subsequently advised by such holders of a new address;" 10

and

WHEREAS, paragraphs 7, 8, 14, 17, 19, 20 and 21 of said General Order Number Two are as follows:

"7. The Trustee or the investors shall hold title to said property not only for the benefit of the investors therein (in which term shall be included the interest of the Guaranty Company or the Trustees to the extent that they are recognized by this order as investors) but also for the benefit of the Guaranty Company or the Trustees for any interest either may have represented by the second mortgage or other lien discharged or canceled of record or other subordinate interest to which the Trustees may be entitled which interest of the Guaranty Company or the Trustees shall be subsequent and subordinate to the rights of the investors. 20 30

"8. No sale or other disposal of the property shall be made by the Trustee for an amount less than sufficient to satisfy the amount due to the Guaranty Company or the Trustees except bona fide and upon fifteen days' notice to the Trustees of an application to the Court to approve such sale, and upon such application, the court may make such order touching the said sale or other disposal aforesaid and as to the rights and inter- 40

*Exhibit P-3.*

ests of the Trustees and the investors as to it shall seem equitable and just; if the court shall approve such sale or other disposal and it shall be consummated, then the Trustees shall have no further interest in the trust except that, if the proceeds of such sale or other disposal shall be in  
10 excess of the amount due the investors calculated in the manner hereinafter provided, the Trustees shall be paid such excess or the amount which may be due to them upon their subordinate interest with interest, whichever be the lesser; if the contemplated sale or other disposal be not consummated the rights of the parties shall be the same as before notice was given to the Trustees.

“14. No third party shall be required to inquire into the power of the Trustee or into any  
20 purchasing investor’s power to dispose of the property purchased and any act of the Trustee shall be conclusive evidence of his power to act as to third parties. No third party shall be required to look to the application of the purchase money.

“17. In any case in which, upon application for the approval of a bona fide sale or other disposal for less than an amount which may be sufficient to satisfy the amount due to the investors and to the Trustees upon their subordinate interest, the court shall permit the Trustees to take  
30 the trust res upon payment to the investors of the amount which they would have received had such sale been consummated, the Trustees shall pay or cause to be paid the amount which may be due for commissions to any real estate broker or for other proper expenses incurred by the Trustee or the investors in procuring the offer for sale submitted to the court, if such commissions and  
40 other expenses be approved by the court.

*Exhibit P-3.*

“19. The Trustees shall receive notice from the Trustee of all matters of which investors are entitled to notice, and within the same time, but the rights of the trustees shall be only as herein provided. The Trustee shall give notice to the Trustees of any matter or of any action which may be taken by the Trustee which shall affect the subordinate interest of the Trustees. 10

“20. The court may, upon application of any party in interest and upon fifteen days' notice to the Trustees but without notice to any other person interested in the trust being administered by the Trustees, reduce or limit the rights of the Trustees, but shall in no case increase the rights of the Trustees. No right is created in the Trustee or the investors by this paragraph and the Court may act in its absolute discretion. 20

“21. That whenever, as herein provided an act to be performed by the Trustee requires the approval of the Court upon notice to the Trustees the Trustee shall have power to act without such approval unless within ten days after receipt of notice the Trustees shall advise the Trustee by mail directed to his principal place of business that the Trustees dissent from the proposed act or that they require the matter to be brought to the attention of the Court; all notices to the Trustees may be by mail and shall advise the Trustees of the contemplated action of the Trustee and the reasons therefor;” and 30

WHEREAS, all the right, title and interest conferred upon the Trustees of said Fidelity Union Title and Mortgage Guaranty Company by the aforesaid General Order Number Two has passed to the New Jersey Realty Company by operation of a decree entered in the above mentioned cause on June 22, 1937; and 40

*Exhibit P-3.*

WHEREAS, the Vendor has entered into a contract for the sale of said premises to Carl Bernstein, and has also entered into a contract for the sale of said premises to J. R. Holsey Sales Company, which contracts have been submitted to the Court of Chancery for instructions as hereinafter set forth; and

WHEREAS, the Vendor desires to sell the premises hereinafter described provided that the Court of Chancery shall authorize the Vendor to make sale thereof and further provided that the New Jersey Realty Company, as successor to the Fidelity Union Title and Mortgage Guaranty Company does not exercise the rights conferred upon it by virtue of said General Order Number Two:

NOW, THEREFORE, the Vendor and the Vendee hereby covenant and agree to and with each other as follows:

1. That the Trustee shall and will apply to the Court of Chancery for instructions as to whether it should make the sale of and convey the property hereinafter described upon the terms and conditions herein set forth and shall also apply for instructions as to whether it should make the sale thereof pursuant to the terms and conditions set forth in the contract of Carl Bernstein, or any modification thereof, or pursuant to the terms and conditions set forth in the contract of J. R. Holsey Sales Company.

2. That if the Court of Chancery should approve of said sale upon the terms and conditions herein described and authorize the Vendor herein to make conveyance thereof, and if the New Jersey Realty Company does not elect to purchase the property on the terms hereinafter stated in accordance with the provisions of said General

*Exhibit P-3.*

Order Number Two, then and in such event the Vendor agrees to sell and convey and the Vendee agrees to purchase—subject to the terms set forth in paragraph 3 hereof—ALL the following tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey: 10

BEGINNING at the corner formed by the intersection of the northwesterly line of the Hudson Boulevard with the northeasterly line of Communipaw Avenue; thence (1) northeasterly along the northwesterly line of the Hudson Boulevard one hundred and twenty-three feet and fifty-eight hundredths of a foot to a point which is also distant one hundred and twelve feet and fifty-nine hundredths of a foot southwesterly from the southwesterly line of Harrison Avenue; thence (2) northwesterly and nearly parallel with Harrison Avenue sixty feet and nineteen hundredths of a foot to a point in the southeasterly line of lot No. 22 on map of property of Henry Flaacke, which point is distant along said lot line one hundred and twelve feet and fifty-six hundredths of a foot from the southwesterly line of Harrison Avenue; thence (3) northeasterly along the southeasterly line of lot No. 22 and at right angles to Harrison Avenue one hundred and twelve feet and fifty-six hundredths of a foot to the southwesterly line of Harrison Avenue; thence (4) northwesterly along the southwesterly line of Harrison Avenue forty feet to a point in the northwesterly line of lot No. 21 on said map; thence (5) southwesterly along the northwesterly line of lot No. 21 and at right angles to Harrison Ave- 20  
30  
40

*Exhibit P-3.*

10 nue one hundred and thirty-seven feet and  
 sixty-seven hundredths of a foot to the rear  
 line of lot No. 34-A, fronting on Communipaw  
 Avenue; thence (6) northwesterly along the  
 rear line of lot No. 34-A and nearly parallel  
 with Harrison Avenue twenty-nine feet and  
 thirty hundredths of a foot to the northwest-  
 20 erly line of lot No. 34-A; thence (7) south-  
 westerly along the northwesterly line of lot  
 No. 34-A and at right angles to Communipaw  
 Avenue one hundred and six feet and thirty-  
 one hundredths of a foot to the northeasterly  
 line of Communipaw Avenue; thence (8)  
 southeasterly along the northeasterly line of  
 Communipaw Avenue one hundred and eight-  
 teen feet and fifty-four hundredths of a foot  
 to the northwesterly line of the Hudson Boul-  
 evard and place of Beginning.

Being the same premises conveyed to the  
 Vendor by deed from Hugh F. Parle, Sheriff  
 of Hudson County, dated December 4, 1937  
 and recorded in the Hudson County Regis-  
 ter's Office in 1914 Liber of Deeds, on page  
 187 &c.

30 3. That the Vendor and the Vendee agree that  
 the terms and conditions upon which this sale is  
 made are as follows:

(a) The purchase price of said property is the  
 sum of One Hundred Thousand Five Hundred  
 Dollars (\$100,500) payable as follows:

40 Five Thousand Dollars (\$5,000) in cash to be  
 paid by the Vendee to the Vendor upon the execu-  
 tion and delivery of the within agreement, the re-  
 ceipt whereof is hereby acknowledged;

*Exhibit P-3.*

Twenty-five Thousand Five Hundred Dollars (\$25,500) in cash to be paid by the Vendee to the Vendor on the delivery of the deed as hereinafter mentioned;

And the balance of the purchase price, to wit, the sum of Seventy Thousand Dollars (\$70,000) to be secured by the Vendee delivering to the Vendor note and mortgage in said sum, which note and mortgage shall be delivered simultaneously with the delivery of the above deed covering the above described premises and the principal and interest of said mortgage shall be paid as follows: The note and mortgage shall provide that the mortgagor shall pay successive quarter-annual instalments of \$1,400 each for a term of eight years from the date thereof, the first instalment to be paid three months from the date thereof and at the expiration of the term of eight years from the date of said note and mortgage the balance of principal and accrued interest shall be paid; each instalment shall consist first of interest at the rate of 4% per annum upon unpaid principal and the balance shall be applied to unpaid principal. Said note and mortgage shall be payable without credit or deduction for taxes assessed against the mortgaged premises. Said note and mortgage shall contain thirty-day interest and principal instalment and sixty-day insurance, tax and assessment default clauses, and shall provide that, in the event of default in the terms thereof, the mortgagee shall have the right to enter into possession thereof and receive all the rents, issues and profits from the mortgaged premises which are assigned to the mortgagee as additional security, and that in case of default as aforesaid, the mortgagee shall have the right to apply for a receiver of said rents, issues and profits without proof of the adequacy

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*Exhibit P-3.*

of the security or of the solvency of any person or party liable for the payment of said note and mortgage. The mortgagor shall have the right on any interest date to pay the entire balance of the principal secured by said mortgage, together with accrued interest thereon, or to make additional  
 10 payments on account of said principal sum in multiples of \$500.00, together with interest accrued thereon.

(b) The deed to said property shall be a bargain and sale deed with the proper United States Internal Revenue Stamps affixed and shall be delivered at the office of Hood, Lafferty & Emerson, 744 Broad Street, Newark, New Jersey, at which  
 20 time the balance of the purchase price shall be paid and the note and mortgage delivered. Unless subsequently agreed otherwise, no closing shall take place until thirty-five days have elapsed from the date of the entry of an order approving the sale on the terms herein set forth, provided no appeal has been taken from such order. If an appeal has been taken from such order, then no closing shall take place until the appeal is disposed of by the affirmance of the order approving the sale.

(c) The following items of fixtures and equipment which are on the above premises and are not owned by the Vendor are not included in the within  
 30 sale. The same are presumed to be owned by the tenants as specified in the following schedule, but the Vendor assumes no responsibility for the accuracy of said schedule.

Refrigerator—East apartment — No. 209  
 Harrison Street.  
 Venetian blinds.  
 40 Fire equipment (small hand extinguishers and sand pails).

*Exhibit P-3.*

Electrical fixtures (stores only).  
 Detachable closets and cabinets.  
 Office partitions, furniture, fixtures and signs.  
 All shop equipment, including piping for compressed air lines.  
 Electric overhead door (Harrison Avenue side) 10  
 Two 550-gallon gasoline tanks and pumps  
 —Richfield Oil Co.

(d) It is agreed that all rents, taxes and water rents shall be apportioned between the parties as of the date of closing title. The Vendee agrees to assume all existing policies of fire insurance covering said premises and to pay to the Vendor the premiums for the unexpired term thereof, apportioned as of the date of closing title. 20

(e) If, at the time of closing title, any rents for the current month should be due and uncollected, then all collected rents shall be apportioned as of said time and the Vendee shall give the Vendor credit for all uncollected rents apportioned as aforesaid, except that the Vendee, at his option may, in lieu of crediting the Vendor with such uncollected rents, withhold such credit and authorize the Vendor to collect the entire monthly rents, in which case no apportionment for the same shall be made at said time and the Vendor shall be accountable to the Vendee for his pro-rated share only to the extent that such rents are actually collected by the Vendor. 30

(f) The 1943 and 1944 municipal taxes were paid on the assessments as made and revised by the Hudson County Board of Tax Appeals, from which assessments appeals have been taken by the City of Jersey City and are pend- 40

*Exhibit P-3.*

ing. The Vendor agrees to set aside from the consideration payable hereunder a sum of money which shall be sufficient to pay the tax without interest on the excess of the assessments originally made by the City of Jersey City over the assessments as revised by the said County Board. And, if, as a result of such appeals, the original assessments shall be restored in whole or in part, said fund shall be used to satisfy the excess tax, or so much thereof which shall be so ascertained on appeals to the State Board.

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(g) It is agreed that title to said premises is not derived from proceedings under the Martin-Act so-called or from any sale for non-payment of taxes or from adverse possession.

20

(h) Said premises shall be conveyed subject to the rights of the tenants as created by their existing tenancies and all rights which may have accrued or which may in the future accrue to them by reason of the Federal Emergency Price Control Act and the Directives, Regulations and Amendments thereto and any future legislation and regulations thereunder of the United States of America and State of New Jersey.

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(i) Risk of loss or damage by fire or from the elements is assumed by the Vendor until the passing of title.

(j) The Vendee represents that he has inspected said premises and will accept same in their present condition.

(k) The Vendee agrees to pay the cost of recording the deed and purchase money mortgage.

(l) The Vendee agrees to take title to said premises subject to restrictions, if any, which are

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*Exhibit P-3.*

of record and in force and effect, and to the effect, if any, of municipal ordinances and zoning regulations.

(m) The Vendee agrees to take title to said premises subject to such facts as an accurate survey may disclose, provided (except as hereinafter particularly specified and set forth) such survey shows that the buildings on said premises are wholly within the boundary lines and that no structures on adjoining lands encroach over and upon said premises. Vendee agrees, however, that the following encroachments, if in fact they do exist, shall not constitute an objection to title, to wit:

1. Possible encroachment of coping of building on the above described premises over and upon land adjoining the above described premises at two points.

2. Possible encroachment of coping of building adjoining Lot 21-A over and upon part of the above described premises.

(n) The Vendor agrees to pay all confirmed assessments, and to pay all confirmed assessments where the work which is the subject of such assessment or assessments shall be completed at the time of the execution of this agreement, provided written notice of any such unconfirmed assessment shall be given to the Vendor by the Vendee prior to the closing of title; the Vendor, however, has and retains the right to contest in good faith any of such confirmed or unconfirmed assessments in its own name or in the name of the Vendee.

(o) It is understood and agreed that title to said property is marketable subject to a survey as aforesaid and that the same is not subject to

*Exhibit P-3.*

any lien or encumbrance not specifically mentioned or provided for, and if an examination of title to said premises before the delivery of the deed herein contemplated shall disclose that said title is not marketable, or is derived from tax sale proceedings, or that said property is subject to a lien or  
10 encumbrance not specifically mentioned herein which the Vendor shall not promptly remove or shall be unwilling to remove, then and in any of these events, all moneys paid hereunder by the Vendee to the Vendor shall be returned to the Vendee and this contract shall be delivered up and canceled without further liability of either party to the other.

20 4. The right is reserved to the Vendor to submit to the Court of Chancery any offers for the purchase of the above described premises, which may be made to the Vendor from and after the delivery of this contract, and to ask the Court for instructions as to same.

30 5. The Vendor and the Vendee agree that if the Court of Chancery should refuse to approve this sale, or should enter an order restraining the Vendor from making the same, or if it should authorize and direct the Vendor to accept the offer contained in the contract of Carl Bernstein or the offer contained in the contract of J. R. Holsey Sales Company, or any other offer which may be made for said premises, or if the New Jersey Realty Company should exercise the option conferred upon it by General Order Number Two, or if an order approving this sale should be set aside on appeal, then the Vendor shall return the moneys received hereunder to the Vendee and  
40 the rights of the Vendor and the Vendee herein shall cease and terminate.

*Exhibit P-3.*

6. The Vendee hereby represents to the Vendor as an inducement to the Vendor to enter into the within agreement that he has not resided outside the United States, nor has been a citizen of a country other than the United States, at any time since January 1, 1940, nor has Vendee acted as agent, directly or indirectly, for the benefit of any foreign country or citizen or corporation of any foreign country since that date, and that Vendee in entering into the within agreement is not acting as agent, directly or indirectly, for the benefit of any foreign country or citizen or corporation of any foreign country. 10

7. In the event Vendor is prohibited from conveying the above described premises to Vendee or any assignee of Vendee by reason of any executive order of the President of the United States, Act of Congress, or other regulation pertaining to the control of foreign funds, then the Vendor may, at its option, cancel this contract and return the moneys deposited hereunder, and the rights of the parties hereunder shall thereupon cease and terminate. 20

8. Vendee, provided he is not in default under the terms of this agreement, may assign the same to any corporation, and upon such assignment, the assignee alone shall be required to execute and deliver the note and mortgage provided for herein; nothing herein contained, however, shall relieve the Vendee from liability hereunder in the event that title is not closed with the assignee, pursuant to the terms hereof. 30

9. And the Vendee, for himself, his heirs, executors and administrators and assigns, does hereby covenant and agree that he will purchase the 40

*Exhibit P-3.*

property above described upon the terms herein set forth.

10 IN WITNESS WHEREOF, the Vendor has caused these presents to be executed by its proper corporate officers and its corporate seal to be hereunto affixed and duly attested, and the Vendee has hereunto set his hand and seal, all the day and year first above written.

FIDELITY UNION TRUST COMPANY

By .....  
Vice President

20 As Trustee appointed by the Court of Chancery by an Order Dated September 17, 1935, made "In the Matter of Proceedings Under the Mortgage Guaranty Corporations Rehabilitation Act Affecting the Fidelity Union Title and Mortgage Guaranty Company" (Mortgage Investment No. 64178) (Docket 99/590)

ATTEST:

.....  
Assistant Secretary

30 Signed, Sealed and Delivered }  
in the Presence of: }

I. KABAKOW

LOUIS DROGAN (L. S.)

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**Letter to Fidelity Union Trust Company.**

McCARTER, ENGLISH & EGNER  
COUNSELLORS AT LAW  
Newark, New Jersey

January 26, 1945.

Re: Mortgage Investment No. M-64178, 10  
2395 Hudson Boulevard, Jersey City, New  
Jersey.

Fidelity Union Trust Company,  
As Trustee of Mortgage Invest-  
ment No. M-64178,  
755 Broad Street,  
Newark 2, New Jersey.

Gentlemen:

In proceedings entitled "In the Matter of Pro- 20  
ceedings under the Mortgage Guaranty Corpora-  
tions' Rehabilitation Act affecting the Fidelity  
Union Title and Mortgage Guaranty Company"  
in the Court of Chancery (Docket 99/590) the  
Court of Chancery on the advice of the Honorable  
Vice Chancellor Alfred A. Stein entered a decree  
with respect to the sale by you as Trustee of Mort-  
gage Investment No. M-64178, of premises No.  
2395 Hudson Boulevard, Jersey City, New Jer-  
sey, which decree and in particular Paragraph 3 30  
thereof orders, among other things, as follows:

"3. That unless the New Jersey Realty  
Company serves notice upon Trustee within  
5 days from the date hereof that it will take  
title to the aforesaid premises and pay to  
Trustee the sum of \$100,500.00, payable \$30,-  
500.00 cash and \$70,000.00 secured by pur-  
chase money mortgage, and comply with all  
other terms and conditions contained in the 40

*Letter to Fidelity Union Trust Company.*

10 contract between Trustee and Louis Drogin marked Exhibit P-3, the Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby authorized and directed to sell and convey to Louis Drogin, or his assignee, the aforesaid premises on the aforesaid terms as contained in said Exhibit P-3;"

20 The New Jersey Realty Company has this day instituted an appeal to the Court of Errors and Appeals of the State of New Jersey from the aforesaid portion of the said decree of the Court of Chancery as well as other parts or portions of said decree, pursuant to and as more particularly set forth in a notice of appeal which has been served upon your solicitors, Hood, Lafferty & Emerson, and is being filed with the Clerk in Chancery.

30 In order to avoid any possible forfeiture of the right of the New Jersey Realty Company to take the said premises under the terms and conditions contained in the contract between you and Louis Drogin (marked Exhibit P-3 in said proceedings) and under the order or decree of the Court of Chancery as finally determined by the Court of Errors and Appeals, and entirely without prejudice to the rights of the New Jersey Realty Company on the appeal from the aforesaid decree of the Court of Chancery, please be advised that the New Jersey Realty Company does hereby notify you that it will take title to the aforesaid premises and pay to you as Trustee the sum of \$100,500.00, payable \$30,500.00 cash and \$70,000.00 secured by a purchase money mortgage, and that it will comply with all other terms and conditions contained in the contract between you and Louis Drogin, 40 marked Exhibit P-3, at such time as the Court of

*Letter to Fidelity Union Trust Company.*

Errors and Appeals may affirm the aforesaid decree of the Court of Chancery authorizing the sale of said premises (assuming for the purposes of this notice that the said Court of Errors and Appeals does affirm said decree of the Court of Chancery).

In the event, however, that the aforesaid decree is reversed in any particular by the Court of Errors and Appeals then the rights and obligations of the New Jersey Realty Company shall be governed and determined by such further orders or decrees as may be entered in said cause. 10

Very truly yours,

New Jersey Realty Company

By: James J. McCarthy 20  
Vice President

James R. E. Ozias  
Of Counsel

Z:W

(Seal)

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**Letter to New Jersey Realty Company.**

HOOD, LAFFERTY & EMERSON  
 COUNSELLORS AT LAW  
 744 Broad Street,  
 Newark 2, New Jersey

10 January 27, 1945.

New Jersey Realty Company,  
 830 Broad Street,  
 Newark, New Jersey.

Gentlemen:

Attention: Mr. James J. McCarthy  
 Re: Mortgage Investment No. M-64178  
 Premises: 2395 Hudson Boulevard,  
 20 Jersey City, New Jersey

I acknowledge receipt of your letter of January 26, 1945, in connection with the above-mentioned mortgage investment addressed to the Fidelity Union Trust Company, as Trustee.

30 On behalf of the Fidelity Union Trust Company, as Trustee, I deny that you have the right to serve the notice you purport to serve by your letter of January 26, 1945, and at the same time prosecute an appeal from the decree. It seems to me that you are acting under the decree and appealing therefrom at the same time, a course which I do not understand the law to permit.

40 Needless to say, the statement in your letter of January 26, 1945, that "in order to avoid possible forfeiture of the right of the New Jersey Realty Company to take the said premises under the terms and conditions contained in the contract between you and Louis Drogin (marked Exhibit P-3 in said proceedings) and under the order or

*Letter to New Jersey Realty Company.*

decree of the Court of Chancery as finally determined by the Court of Errors and Appeals, and entirely without prejudice to the rights of the New Jersey Realty Company on the appeal from the aforesaid decree of the Court of Chancery," is unilateral on your part and is not consented to or acquiesced in by the Fidelity. 10

Very truly yours,

CHARLES DANZIG (S).

CD:DMD

CC: Mr. Ozias

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Letter to New Jersey Realty Company  
The Court of Chancery as finally deter-  
mined by the Court of Appeals and Appellate, and  
entirely without prejudice to the rights of the  
New Jersey Realty Company on the appeal from  
the aforesaid decree of the Court of Chancery,  
is unilateral on your part and is not consented to  
or approved in by the Fidelity.

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Very truly yours,  
Charles D. Davis (S)

CC: Mr. Quinn  
CD: DMD

Respectfully,  
[Signature]

Mr. James J. Quinn, Jr.  
8746 N. 1st Street  
Philadelphia, PA 19120  
Jersey City, New Jersey

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It is to be noted that the Fidelity  
Trust Company, as trustee of the  
Trust, is not a party to this  
action and is not bound by the  
decree of the Court of Chancery.

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On this day the Fidelity Trust Company,  
as trustee of the Trust, has filed with  
the Court of Chancery a copy of the  
decree of the Court of Appeals and Appellate,  
and a copy of the decree of the Court of  
Chancery, and has requested the Court  
to enter an order directing the Fidelity  
Trust Company to comply with the  
decree of the Court of Appeals and Appellate  
and the Court of Chancery.

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The Fidelity Trust Company, as trustee  
of the Trust, is not a party to this  
action and is not bound by the  
decree of the Court of Chancery.  
The Fidelity Trust Company, as trustee  
of the Trust, is not a party to this  
action and is not bound by the  
decree of the Court of Chancery.

## Memorandum.

(Not for print in any Report.)

### In Chancery of New Jersey

IN THE MATTER of THE MORTGAGE GUARANTY CORPORATIONS' REHABILITATION ACT, affecting the FIDELITY UNION TITLE AND MORTGAGE GUARANTY COMPANY.	Re: Mortgage Investment No. M-64178. Docket 99, page 590. Memorandum.	10
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Appearances:		20
MESSRS. HOOD, LAFFERTY & EMERSON (MR. CHARLES DANZIG, appearing), solicitors for Fidelity Union Trust Company, Trustee.		
MESSRS. McCARTER, ENGLISH & EGNER (MR. JAMES R. E. OZIAS, appearing), solicitors for New Jersey Realty Company.		
MR. SAMUEL KAUFMAN, solicitor for J. I. Kislak, Inc.		30

STEIN, V.-C.

This memorandum is filed because of an appeal by the New Jersey Realty Co. from a decree authorizing the sale of a parcel of real estate by the Fidelity Union Trust Company as Trustee. The New Jersey Realty Company is the purchaser of the property under the decree and appeals from that part of the decree which orders

*Memorandum.*

the appellant to pay commissions to J. I. Kislak, Inc., the broker in the transaction.

10 Fidelity Union Trust Company holds title to the property as Trustee for certificate holders under certain orders of the Court. Under the terms of these orders, Fidelity Union Trust Com-  
pany is empowered to sell the property with the approval of the Court upon application. Para-  
graph seventeen of the General Order No. 2 pro-  
vides however that this power of sale is encum-  
bered by an outstanding option to purchase the  
property, which option is in favor of the New  
Jersey Realty Company, the appellant herein.

20 When the Fidelity Union Trust Company makes application to the Court for approval of a sale to an outside purchaser, the option may be asserted. Thus it is provided that if the Fidelity Union Trust Company has an offer and seeks approval of a sale, New Jersey Realty Company may come in and buy the property for the same price and upon the same terms offered by the outside purchaser. In granting this option to the appellant, the Court at the same time provided in paragraph seventeen, General Order No. 2 that if the option be exercised at any time, then the  
30 New Jersey Realty Company "shall pay or cause to be paid the amount which may be due for commissions to any real estate broker or for other proper expenses incurred by the trustee or the investors in procuring the offer for sale submitted to the court, if such commissions and other expenses be approved by the court."

40 Therefore, although the New Jersey Realty Company receives an option to purchase the property and take it away from an outside bidder, its exercise of that option is coupled with the obligation of paying commissions to the broker.

*Memorandum.*

Obviously, there can be no broker as between the Fidelity Union Trust Company and the New Jersey Realty Company because the latter already knows of the property and has an option on it. Therefore it is clear that the broker to which General Order No. 2 refers is the broker who furnishes the highest outside bidder; the commissions involved are the commissions earned by that broker in bringing about the sale by supplying an outside bidder whose offer is approved by the Court. 10

J. I. Kislak, Inc. the broker received an exclusive agency for the sale of this property from the Fidelity Union Trust Company on July 13, 1944, and obtained three separate offers for the property. The first buyer's offer was rejected by the Fidelity Union Trust Company as inadequate. The second buyer, one Bernstein, submitted an offer which was approved by the Fidelity Union Trust Company, subject, however, to the approval of the Court. Bernstein and the Fidelity Union Trust Company entered into a separate brokerage agreement with J. I. Kislak, Inc. This separate agreement was unnecessary because J. I. Kislak, Inc. already had an exclusive agency on the property. It was made without consideration to or from J. I. Kislak, Inc. and was used by the Fidelity Union Trust Company to exact from J. I. Kislak, Inc. a waiver of commissions in the event the New Jersey Realty Company exercised its option to buy the property on the same terms as the Bernstein offer. This waiver, made without consideration, referred only to the Bernstein bid and even if the waiver was valid as to the Bernstein offer, it did not and does not affect any other offers or bids obtained by J. I. Kislak, Inc. for the property. 20 30 40

*Memorandum.*

The Bernstein offer was not approved by the Court and the question as to the legality of the waiver of commissions became academic. The Fidelity Union Trust Company procured a bid from one Holsey higher in price than the Bernstein offer and submitted that bid for approval by the Court. The Bernstein offer was dropped and Holsey became the top bidder. J. I. Kislak, Inc. succeeded in obtain a third and final buyer, one Louis Drogin, who submitted a much higher price for the property. Upon application by the Fidelity Union Trust Company to the Court for approval of the sale to Drogin, the New Jersey Realty Company gave notice of its desire to exercise the option upon the same terms as had been offered by Drogin, the highest bidder. The Court approved the sale to Drogin, subject to the right of the New Jersey Realty Company to exercise its option within five days, which it did, and so became the purchaser of the property.

It should be noted that Fidelity listed this property for sale with twenty-five brokers from September 1941 to July 1944, during which time it received ten offers ranging from \$50,000 on terms to \$85,000 on terms. Then in the exercise of what the Court deemed wise administration, it concluded that an exclusive agency would produce more advantageous results for the investors. It has been the experience of the trustee and of the Court in a number of similar cases coming before the Court for the approval of sales, that where an exclusive agency was granted, the broker was not only willing to expend greater effort but also money to obtain the highest price possible, and that such exclusive agencies had resulted in greater benefit to investors. After all, the interests of the investors are entitled to paramount

*Memorandum.*

consideration. The results here produced by the granting of the exclusive agency was the offer which was approved of \$100,500 submitted on December 29, 1944. The sale of the property was brought about solely through the efforts of J. I. Kislak, Inc. except for which the property would not have been sold even to the New Jersey Realty Company, since in the absence of offers to purchase from strangers no sale could be effected even to it. And so, in the exercise of the discretion reposed in the Court in view of all the foregoing, the Court directed the New Jersey Realty Company to pay the commissions. 10

General Order No. 2 in which order the rights of investors and the New Jersey Realty Company as successor to the Fidelity Union Title and Mortgage Guaranty Company are set forth, in paragraph seventeen, provides for the payment of commissions to any real estate broker, "if such commissions and other expenses be approved by the court." Having concluded that the commissions were earned and justly due the broker, the commissions were allowed. 20

No right is enjoyed by the New Jersey Realty Company except such as is set forth in General Order No. 2 from which it clearly appears that investors are entitled to payment in full before the New Jersey Realty Company is entitled to anything because of its subordinate interest. Having in mind the protection of investors' rights, the Court retained to itself the right to reduce or limit the rights of both, when in said order it said "No right is created in the Trustee or the investors by this paragraph (20) and the Court may act in its absolute discretion." The order does not confer upon the New Jersey Realty Company as the holder of a subordinate interest 30 40

*Memorandum.*

an absolute right to take over the property since and under paragraph eight it is provided that no sale of property shall be made for an amount less than sufficient to satisfy the amount due thereon except on application to the Court for approval, when the Court "may make such order touching the said sale or other disposal afore-  
10 said and as to the rights and interests of the Trustees and the investors as to it shall seem equitable and just."

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## New Jersey Court of Errors and Appeals

IN THE MATTER

*of*

The Mortgage Guaranty Corporations' Rehabilitation Act affecting the FIDELITY UNION TITLE AND MORTGAGE GUARANTY COMPANY.

Re: Mortgage  
Investment  
No. M-64178.

On Appeal from  
the Court of  
Chancery.

### APPELLANT'S BRIEF.

#### Statement of Facts.

The principal question on this appeal is whether the Court of Chancery committed error in approving the payment of a brokerage commission to J. I. Kislak, Inc., in connection with the approval of a conveyance to the Appellant of premises commonly known as No. 2395 Hudson Boulevard, Jersey City, New Jersey, the title to which property is held by the Fidelity Union Trust Company, as trustee, under orders of the court in this cause.

Of necessity, we must consider to some extent various orders of the Court of Chancery which were entered in the course of the administration by the court of the affairs of the Fidelity Union Title and Mortgage Guaranty Company.

The investment in the property in question was originally represented by a bond and mortgage made by the Belle-Meade Sales Corporation to the Fidelity Union Title and Mortgage Guaranty Company. On April 24, 1934, the Court of Chancery, on the advice of Vice-Chancellor Berry, en-

tered an order providing for the withdrawal of bonds and mortgages from the control of the Trustees of the Fidelity Union Title and Mortgage Guaranty Company, (hereinafter referred to as the Trustees), provided, however, that arrangements were made with the Trustees for securing to the Trustees the repayment of all amounts which had been advanced by the Fidelity Union Title and Mortgage Guaranty Company on account of the investment. (Case pp. 7-13)

Numerous applications for withdrawals of investments were made to the court, and as a result thereof the Court of Chancery, on the advice of Vice-Chancellor Berry, entered an order on April 16, 1935, which is commonly referred to as "General Order No. 2." The preamble to that order recites that numerous applications have been made for the privilege of withdrawing bonds and mortgages, (Case, p. 15, ll. 6-9), and "that in such cases the Trustees are entitled to be secured, after the claims of the investor or investors shall be satisfied, for certain amounts," (subordinate interest in the bond and mortgage), in such manner as may be agreed upon or as may be prescribed by the court. (Case, p. 15, ll. 10-16). The order then provides, among other things, that in the cases in which the Trustees are entitled to the protection of such subordinate interest in a bond and mortgage, the Trustee to whom the investment is assigned "shall hold the mortgage investment as Trustee as well for the Trustees, the Guaranty Company and its subsidiaries, to the extent of their subordinate interest as fixed by this order, as for the investors." (Case, p. 16, ll. 27-31). The order also provides that where the Trustee forecloses the mortgage and acquires title to the property, the Trustee in such case should hold the title to said property not only for the benefit of the investors therein, but also for the benefit of the

Guaranty Company or the Trustees for any subordinate interest to which the Trustees may be entitled. (Case, p. 20, ll 11-24). Said order further provides that the trustee should not sell the property for any amount which would not be sufficient to satisfy the amount due to the Trustees, except upon application to the court (Case, p. 20, ll 25-31), and upon such application provision was made for the Trustees to take over the property by paying to the investors the amount which they would have received had the proposed sale by the Trustee been consummated. This provision is Paragraph 17 of General Order No. 2, and reads as follows:

“In any case in which, upon application for the approval of a bona fide sale or other disposal for less than an amount which may be sufficient to satisfy the amount due to the investors and to the Trustees upon their subordinate interest, the court shall permit the Trustees to take the trust res upon payment to the investors of the amount which they would have received had such sale been consummated, the Trustees shall pay or cause to be paid the amount which may be due for commissions to any real estate broker or for other proper expenses incurred by the Trustee or the investors in procuring the offer for sale submitted to the court, if such commissions and other expenses be approved by the court.” (Case, p. 24, l. 32-p. 25, l. 10).

(After the entry of this order, Vice-Chancellor Berry ruled that it was not the intention of the court to impose the payment of commissions upon the Trustees unless it was a legal obligation on the part of the vendor to pay commissions. This will be considered in more detail hereinafter.)

Thereafter application was made to the Court of Chancery for the privilege of withdrawing the bond and mortgage covering premises No. 2395

Hudson Boulevard, Jersey City, New Jersey, and arrangements having been made with the Trustees for the protection of their subordinate interest in the property, the Court of Chancery, by order dated September 17, 1935, on the advice of Vice Chancellor Berry, appointed the Fidelity Union Trust Company as trustee of the bond and mortgage, (Case, p. 33, ll. 24-29), and ordered the Trustees to assign the bond and mortgage to the Fidelity Union Trust Company as Trustee (hereinafter referred to as the Bank) (Case, p. 30, ll. 35-39). The order further provided that the Bank should hold and administer said bond and mortgage for the use and benefit of the investors and for the use and benefit of the Trustees for the protection of their subordinate interest.

Thereafter a plan for the reorganization of the Fidelity Union Title and Mortgage Guaranty Company was submitted to and approved by the court. The plan provided for the formation of a new corporation to be known as the New Jersey Realty Company. By order dated June 29, 1937, (Case, pp. 34 and 35), the Court of Chancery in effect ordered that the New Jersey Realty Company should be substituted for the Trustees wherever the Trustees were referred to under the prior orders of the court.

Default having occurred in the terms of the said bond and mortgage, the Bank instituted foreclosure proceedings, and in due course acquired title to the property in its name at the Sheriff's sale of said premises, which was held on January 28, 1937. (Case, p. 37, l. 26-p. 38, l. 14).

Shortly after acquiring legal title to the premises the Bank listed the same for sale with numerous brokers, and between September 17, 1941, and January 6, 1944, received approximately nine offers for the purchase of said premises at prices

ranging from \$50,000.00 to \$85,000.00, all of which were on terms and which offers were rejected by the Bank as inadequate.

The Bank then conceived that it would be of advantage to the investors to create an exclusive sales agency, and consequently, by letter dated July 13, 1944, it granted an exclusive sales agency to J. I. Kislak, Inc. (Case, p. 48, ll. 1-19 and pp. 58 and 59). The agency agreement will be considered in more detail hereinafter.

On November 1, 1944, J. I. Kislak, Inc., (hereinafter referred to as Kislak), produced an offer from Carl Bernstein for \$93,000.00 on terms. This offer was approved by the Bank, (Case, p. 49, l. 8-p. 50, l. 10), subject to the approval of the Court of Chancery.

The Bank thereupon entered into an agreement with Carl Bernstein for the sale of said premises. (Case, pp. 60-75). The preamble to the agreement, among other things, recites that the Bank desires to sell the property to Mr. Bernstein provided the Court of Chancery shall authorize such sale, and "*further provided that the New Jersey Realty Company, as successor to the Fidelity Union Title and Mortgage Guaranty Company does not exercise the rights conferred upon it by virtue of said General Order Number Two.*" (Italics ours) (Case, p. 65, ll. 15-19)

In Paragraph 5 of the Bernstein agreement, it is agreed that if the Court of Chancery should refuse to approve the sale "*or if the New Jersey Realty Company should exercise the option conferred upon it by General Order Number Two,*" (Italics ours) then the Bank shall return the moneys to Mr. Bernstein and the rights of the parties shall cease and terminate. (Case p. 73, l. 32-p. 74, l. 6).

On the same day on which the Bernstein agreement was executed, the Bank entered into a brokerage agreement with Kislak, (Case, pp. 76 and 77), for the payment of a commission to Kislak upon the approval by the court of the sale to Bernstein. The agreement also contained the following provision:

*“In the event the New Jersey Realty Company exercises its rights to take over the property pursuant to the General Orders referred to in the contract of sale, then the broker shall not be entitled to any commissions whatsoever from owner and agrees to be bound by any decree that may be entered by the Court of Chancery in connection with such commissions as if he were a party to the proceedings more particularly referred to in the contract of sale.”* (Italics ours). (Case, p. 77, ll. 7-16)

The Bank presented the Bernstein offer to the Court of Chancery by petition in accordance with the customary procedure under the General Orders of the court. When the matter came before the court, the hearing was adjourned pending the submission by Kislak of a possibly higher offer. Prior to the adjourned return date, Kislak submitted a new offer from Louis Drogin for the purchase of said premises for \$100,500.00, also on terms. This offer was submitted by letter dated December 29, 1944, and addressed to Hood, Lafferty & Emerson, the Attorneys for the Bank. (Case, p. 104). The broker requested counsel for the Bank to prepare “their customary contract” so that it might be executed in time for submission to the Court of Chancery the following Tuesday. Under date of December 30, 1944, an agreement was entered into between the Bank and Louis Drogin for the sale of said premises, subject, however, to the approval of the Court of Chancery, (Case, pp. 105-120). This contract was similar in form to the Bernstein contract and likewise provided

that if the New Jersey Realty Company should exercise the rights conferred upon it to take the property under General Order No. 2, then the deposit would be returned to Mr. Drogin and the rights of the parties under the agreement should cease and terminate.

When the parties again appeared before the Court of Chancery, the New Jersey Realty Company, through its counsel, stated in open court that it would exercise its option to take over the property by paying to the investors the amount which they would have received had the sale to Louis Drogin been consummated, in accordance with Paragraph 17 of General Order No. 2. The New Jersey Realty Company maintained that it should not be obliged to pay any commission to Kislak for the reason that the Bank was not legally obliged to pay any such commission. However, Vice Chancellor Stein, who was hearing this matter, concluded that the Trustee was legally obliged to pay a commission to Kislak because it had granted to Kislak an exclusive agency, and over objection of counsel for the appellant, entered the decree from which this appeal is taken.

## ARGUMENT.

### POINT I.

**Contrary to General Order Number Two, the decree imposes upon New Jersey Realty Company the payment of commissions to the broker, J. I. Kislak, notwithstanding that said commissions were not due and the bank was not legally obligated to pay any such commissions.**

At the time of the reorganization of the Fidelity Union Title and Mortgage Guaranty Company

that Company had subordinate interests in mortgages and properties in excess of the sum of \$2,000,000.00. (Case, p. 99, ll. 27-32). It is common knowledge that during the depression which ensued after the stock market crash in 1929 real estate values had shrunk to a marked degree and the market for real estate was still in a depressed condition. The Court of Chancery undoubtedly recognized the fact that in most instances the mortgages and properties could not then be sold at a price which would pay the investors in full, and would also allow the Trustees to realize something on their subordinate interests. The court was of the opinion that the Trustees or the New Jersey Realty Company, which succeeded to the rights of the Trustees, should be given the maximum protection and greatest advantage to realize something on the substantial investment represented in the subordinate interests in mortgages and properties. (Case, p. 99, ll. 32-35). Consequently, the Court of Chancery, at the suggestion of counsel to the Trustees, provided under General Order No. 2 that where a Trustee proposes to sell property for less than an amount which would be sufficient to pay in full the investors and the Trustees, the court would permit the Trustees, (now New Jersey Realty Company), to take over the property upon payment to the investors of the amount which they would have received had the proposed sale by the Trustees been consummated. In this way the New Jersey Realty Company would acquire the trust *res* and could hold it for possible improvement in the mortgage and with the hope of selling it at a higher price and thereby realize a payment on its subordinate interest in the particular property or mortgage.

The right given to the New Jersey Realty Company, under Paragraph 17 of General Order No. 2, to take over the property and pay to the in-

vestors the amount they would have received if the proposed sale by the Trustee had been consummated, created an equity in the Trustees which inured to the benefit of the New Jersey Realty Company when that Company came into existence as a result of the approval by the court of the plan of reorganization.

However, in order to protect the Trustee, who was administering the trust *res* for the joint benefit of the investors and the Trustees, the court provided in Paragraph 17 of General Order No. 2 that the Trustees should pay any amount which may be *due* for commissions to any real estate broker, if such commissions were approved by the court. Now this provision was inserted to protect the Trustee and not for the benefit of any brokers.

There can be no question whatever that when the court said that the Trustees should pay the amount which may be "due" for commissions to any real estate broker, it meant legally due, i.e., that the Trustee was under a legal obligation to pay a brokerage commission in connection with the proposed sale.

This fact is made very clear by reference to an application in this very proceeding which was made with respect to *Mortgage Investment No. 86544* affecting premises No. 635 High Street, Newark, New Jersey, (docket 99/590). In that matter the National State Bank, as Trustee, sent out a listing of the property to the broker, Pinnaas and Pinnaas Co., which stated:

"In the case of sales it is understood and agreed by all brokers who accept this listing that the selling commissions shall be due and payable if, as and when the title is closed and the full purchase price has been paid, and that all such commissions shall be computed at the rate customary in the locality where the property is situated."

The broker in due course submitted an offer by Fairview Properties, Inc. to purchase said premises for \$50,000.00 cash.

The offer was submitted to the court and upon such application the New Jersey Realty Company exercised its option to take over the property, and the question arose whether the New Jersey Realty Company should be obliged to pay any commission to the broker. After considering the matter, Vice-Chancellor Berry rendered an opinion. In view of the fact that this opinion is not officially reported, we have printed it in full and have attached it to this brief as Exhibit A. In that opinion Vice-Chancellor Berry said:

“I think that the policy of the court in connection with claims for commissions under circumstances such as those attending this sale should be entirely uniform and the right to commissions is more a matter of policy than of law. \* \* \* Aside from that, however, I have carefully considered the arguments of counsel touching the right to commissions under circumstances such as were here presented, and the intention of the court in promulgating the provisions of paragraph 17 of General Order No. 2, and *I have reached the conclusion that it was not the court's intention to impose the payment of commissions upon the trustees (or in this case, the New Jersey Realty Company, which stands in their stead) unless the vendor had obligated itself to the payment of such commissions, and unless there is a legal obligation on the part of the vendor to pay commissions, the trustees, or the New Jersey Realty Company, on taking over the property under the terms of paragraph 17 of General Order No. 2, assume no obligation for the payment of such commissions. As stated by me in the Ridgewood case, if the substituted trustee (the vendor) is obligated to pay, then the trustees (the Realty Company) would be obligated to pay such commissions, otherwise not.*” (Italics ours.)

It, therefore, definitely appears that the Court of Chancery, in promulgating General Order No. 2 did not intend to impose upon the New Jersey Realty Company the payment of commissions to brokers for services and assistance rendered by them in procuring offers for the purchase of the trust *res*, unless the broker had a legally enforceable claim against the particular Trustee for the payment of such commission.

In the case at bar the transcript of the hearing before Vice-Chancellor Stein clearly shows that the Vice-Chancellor was of the opinion that the Bank was under a legal obligation to pay Kislak a commission. However, the decree from which this appeal is taken is not so clear. It approves the payment of a commission to Kislak for procuring the offers which were before the court, (Case, p. 85, ll. 27 and 28), and it adjudges and decrees that Kislak "is entitled to commissions" in the event the New Jersey Realty Company takes title to the property. If these portions of the decree are based upon the proposition that because of the services rendered by J. I. Kislak, Inc. it is equitably entitled to the payment of a commission, then we sincerely submit that the decree is erroneous and should be reversed because it is in contradiction to Paragraph 17 of General Order No. 2 and is in derogation of the rights and equities acquired by the New Jersey Realty Company under the General Orders of the court in this cause.

On the other hand, if the decree is predicated on the conclusion that the broker was legally entitled to a commission, then it is erroneous for the reason that

**The Bank Was Not Legally Obligated to Pay  
Kislak a Commission.**

In the first place, as we have already pointed out, the right of the New Jersey Realty Company to take over the property was inherent at the time the Bank became the Trustee of the investment, and indeed, the Bank took the legal title to this property subject to the rights of the Appellant. The New Jersey Realty Company, therefore, had an interest in the property which would enable that Company to acquire legal title upon payment to the Bank of a certain sum of money, i.e. the amount for which the Bank could sell the property in the open market with the approval of the Court of Chancery.

This right of the New Jersey Realty Company to prevent a sale of the property in which it had a subordinate interest has existed for the past ten years (since April 16, 1935) and has become generally known to real estate brokers.

Indeed, the Court of Chancery has consistently recognized the right of the Appellant to take over the property at the net amount, that is to say, the contract price less the amount the broker would have been entitled to by way of commission. It has become the established and uniform practice in this case. Mr. Danzig, counsel to the Bank, recognized this when he presented the matter to the Vice Chancellor. He said:

“Now I am told that the New Jersey Realty Company desires to exercise its option and take over. *They have a perfect right to take this property over at the contract price.* The only thing that is open, and it is the one your honor will have to decide, is whether they can take over under these circumstances *and deduct from the contract price the agent's commission, which has been the custom, the prac-*

*tice, the law of the case—call it what you like—up until this time. (Italics ours.) (Case, p. 92, ll. 23-38)*

The right of the appellant to take over a property in which it had a subordinate interest and thereby prevent a sale to a customer produced by a broker was a generally recognized and accepted fact, and it is reasonable to assume that it was known to Kislak at the time the Bank gave Kislak the exclusive agency, for the agreement itself provided that the "list price is not firm and is subject to ratification or change, either more or less, by the Executive Committee of this Company and *subject also to the approval of the Court of Chancery*" (Case, p. 58, ll. 35-39).

The reference in the exclusive agency agreement that the approval of the Court of Chancery was necessary is evidential that the Bank and Kislak contemplated that a sale to any customer produced by Kislak was subject to the application of the applicable orders in this cause. This is borne out by the fact that when Kislak produced the offer on behalf of Carl Bernstein for \$93,000.00 the Bank and Kislak entered into a brokerage agreement which specifically provided that no commissions would be paid to Kislak if the New Jersey Realty Company exercised its rights to take over the property pursuant to the General Orders of the court. (Case, pp. 76 and 77). The brokerage agreement on the Bernstein offer was entered into *before the Bank and Kislak knew that the New Jersey Realty Company intended to exercise its right to take over the property*. There can be no question that in the exclusive agency there is substantial doubt and uncertainty whether the word "sale" was intended by the parties to include a conveyance by the Bank to the New Jersey Realty Company pur-

suant to General Order No. 2. We submit that the brokerage agreement on the Bernstein offer was a joint written declaration by both parties of their mutual understanding when they made their original agreement that a conveyance to the Appellant was not a "sale" which would entitle the broker to a commission. For cases see page 22 of this brief.

Furthermore, the sales agency agreement of July 13, 1944, provides that the brokerage or commission "*in the event of sale is to be as established by the Jersey City Real Estate Board, same not to be deemed, earned or payable until the deed to said property has been delivered and accepted and the full purchase price paid.*" (Italics ours.)

Quite obviously this provision was inserted to prevent the operation of the well settled rule of law that a broker earns his commission when he produces a purchaser who is ready, willing and able to buy the property on terms satisfactory to the owner. *Hinds v. Henry*, 36 N. J. L. 328 Sup. 1873); *Leschziner v. Bauman*, 83 N. J. L. 743 (Ct. of E. & A. 1912); *Feldman v. Holden*, 7 N. J. Misc. 751 (Sup. 1926). The agreement definitely contemplated that there had to be a sale and that the commission would not be earned until the deed was delivered and the full purchase price paid. As we have pointed out before, a conveyance by the Bank to the New Jersey Realty Company pursuant to the exercise by the latter of its right to take over the property under Paragraph 17 of General Order No. 2 is not a sale of the property to the Appellant and consequently there would be no sale upon which the broker would be entitled to a commission under its agreement.

The conveyance of the property by the Bank to the New Jersey Realty Company under such circumstances would be pursuant to a prior equity

and under an order of the Court of Chancery, and could not be deemed a violation or breach by the Bank of any agreement it entered into with the broker in connection with the payment of a commission on the sale of the property.

There are two cases in New Jersey which are to some degree analogous to the situation at bar.

In *Sientz v. Spottiswoode-Cusack Co.*, 21 N. J. Mis. R. 479 (Essex County Cir. Ct. 1943), the broker brought suit on the following writing:

“Exclusive Contract, M. I. Sientz, 360 Main Street, East Orange, N. J., September 8, 1942.

“In consideration of your listing and undertaking to sell the property herein described, the undersigned hereby authorizes you to sell said property at the price and upon the terms set forth, or at any other price or terms the undersigned may agree to accept therefor, and upon your procuring a purchaser agrees to pay you a commission of 5% of the purchase price.

“Your authority hereunder shall be sole and exclusive for the period of six months from the date hereof, and shall not terminate at the expiration of said period unless you are notified in writing to that effect.

“Your commission shall also be considered earned in the event said property is sold, contracted to be sold, by any one before the termination of your exclusive authority hereunder.”

It appeared that after the execution of this agency agreement the owner conveyed the property to the mortgagee in lieu of foreclosure.

The court, per Caffrey, C.C.J., in holding for the defendant, said at pages 481 and 482:

“It seems to me that from the nature of the contract the parties contemplated a binding obligation on the part of the defendant to pay commissions would only arise in the *usual*

*and ordinary sale or contract to sell of real property.* I do not believe the defendant obligated itself to pay commissions to the broker in the event that the property would be conveyed to the mortgagee to avoid the consequence of a foreclosure. (Italics ours.)

“Furthermore, in the light of the statement by counsel for the plaintiff that this was a contract classified as an exclusive agency, the case of *Ettinger v. Loux*, 96 N. J. L. 522; 115 Atl. Rep. 384, might be pertinent.

“However, I am resting my determination on the theory that a transfer of property by deed by the defendant to its mortgagee *was not such a sale as contemplated by the parties as would justify the collection of commissions from the defendant.*” (Italics ours.)

In *Martin Realty Co. v. Fletcher*, 103 N. J. L. 294 (Sup. 1926), suit was brought to recover a commission from the owner who gave the plaintiff the following agreement:

“I hereby authorize exclusively the Martin Realty Company to sell or exchange the property described on the reverse side of this card, and, in the event of said property being sold or exchanged, agree to pay them a commission of one-half per cent. for improved property, and five per cent. for unimproved property.”

Defendant sometime later conveyed the property to his partner in settlement of a partnership debt for an agreed price of \$8,500.00. The trial court denied a motion to non-suit and directed a verdict for the plaintiff. On appeal the verdict was reversed. The court, per Katzenbach, J. stated at pages 295 and 296:

“\* \* \* No sale was made by reason of any advertising which the plaintiff did. If the writing set forth gave the plaintiff an exclusive right to sell the property the judgment was properly rendered. Where an exclusive

right to sell property is given to a real estate broker, the broker is entitled to a commission on any sale thereof made by the principal within the time specified in the contract. 9 C.J. 622. Where, however, the broker is given merely an exclusive agency, as distinguished from an exclusive right to sell, *it merely precludes the principal from employing another broker and does not preclude the principal from making a sale himself without the broker's aid.* In such a case he will not be liable to the broker for commissions, unless there is a special contract to this effect, or unless he sells through another broker. *Ibid.* 622, 623. (Italics ours.)

"In the present case we construe the writing in question as an exclusive agency and not as an exclusive right to sell the property."

Of course in the Fletcher case the broker produced no customer but that fact was not the basis of the court's decision.

Perhaps the leading case in New Jersey on the distinction between an exclusive agency and an exclusive right is *Ettinger v. Loux*, 96 N. J. L. 522 (E. & A. 1921). There the plaintiff, a real estate broker, obtained a judgment against the owner upon the following writing:

"Phillip Ettinger, Agent.

"I hereby authorize the above to sell my property at 189 16th Ave., at a 3½ per cent. rate, for \$11,000.00, or any price above \$11,000.00; provided said property is sold by Mr. Phillip Ettinger within (30) days from this date in accordance with my provisions of sale mortgage \$4,000.

HARRY A. LOUX.

Dated 9/8/1919."

A few days after this agreement was made the owner sold the property to a buyer unknown to the agent. Thereafter the broker produced a

buyer but the defendant declined to sell on the grounds that the property was already sold.

On reversing the decision below, the court, per Black, J., stated at pages 524 and 525:

“A general rule which is supported by the weight of authority is to the effect that when the owner of real estate places it in the hands of a real estate broker for sale, he does not thereby relinquish his right to sell the property himself independent of the broker (4 *R. C. L.* 318 par. 56; 9 *Corp. Jur.* 622); so, it is said, that when the broker is given an exclusive agency, as distinguished from an exclusive right to sell, it merely precludes the owner from employing another broker and does not preclude the owner from making a sale himself, without the broker's aid, and in such a case the owner will not be liable to the broker for commissions (9 *Corp. Jur.* 622), unless there is a special contract giving a right to commissions regardless of who makes the sale, as in *Kruse v. Ferber*, 91 N. J. L. 470; *Stevenson Co. v. Oppenheimer*, Id. 479; or unless the owner does not notify the broker of the sale, as in *Payne v. Twitchell*, 81 Id. 193.

“Those cases, which make the owner liable for a broker's commissions, when the sale is made by himself within the time limit, are put upon the ground that the written authorization is a contract, that it implies an exclusive right to sell within the time named, without the right of the principal to revoke the agency, unless there is a reservation to the contrary, as in *Blumenthal v. Bridges*, 91 Ark. 212, 215; 24 L. R. A. (N. S.) 282.

“The revocation of the agency, either directly or by making a sale of the property, is a breach of the contract on the part of the principal, and renders him liable to the agent for damages which the latter sustains thereby.

“The revocation of the agency, either directly or by making a sale of the property, is a breach of the contract on the part of the principal, and renders him liable to the agent for damages which the latter sustains thereby.

“On the other hand, that class of cases which maintain the opposite doctrine hold that as the broker paid nothing, incurred no expense or loss, and entered into no obligation on his part, the broker was at liberty to act or not as he pleased; and would incur no liability by failing to do anything, as the court said in *Goward v. Waters*, 98 Mass. 596, the authorization to sell is simply a naked revocable power. It is not a contract, either express or implied.

“There is no mutual obligation to constitute a contract. Nor is there a consideration. So, the writing in this case is simply a naked revocable power. It did not preclude the owner from making a sale of the property himself, without the broker's aid, and did not subject the owner to liability to the broker for commissions. In this case there is no suggestion that the owner did not act in good faith toward the broker by selling his own property to a buyer independent of the broker.”

Cases in other jurisdictions to the same effect are: *O'Neal v. Southland Lumber Co.*, 168 La. 235, 121 So. 755 (Sup. Ct. of La. 1929); *Des Rivières v. Sullivan*, 247 Mass. 443, 142 N. E. (Sup. Jud. Ct. of Mass. 1924); *Donahue v. Reiner Co.*, 46 R. I. 302, 127 Atl. 359 (Sup. Ct. of R. I. 1925); *Alley v. Griffin*, 215 S. W. 479 (Ct. of Civil App. of Texas 1919).

In *O'Neal v. Southland* (*supra*), the defendant gave to the plaintiff the following commission agreement:

“ ‘In consideration of a reasonable effort to be made by you to sell the property de-

scribed on the reverse side of this card, to which I hold title in my own name, at prices and terms therein given, I hereby appoint you my exclusive agent, for a period of six months, and authorize you to accept a deposit on the purchase price.'

" 'In the event of the sale of the property during the life of this contract, I agree to pay you a commission, based on the sale price of the property, at the rate of 5 per cent on the first \$10,000.00 and 2½ per cent on all over that amount.'

" 'In the event I should sell the property after the expiration of this contract within a period of six months to anyone to whom you have previously offered it, I agree to pay to you the above stipulated commission.' "

Before the time limit had expired, the defendant sold the property himself. In holding for the defendant, the court stated at page 756:

"There is nothing in the contract which would convey the idea that the defendant was giving to the plaintiff the exclusive right to sell the property and surrendering its own right to do so. *The meaning, and only meaning, that could be given to the procurement, is that the plaintiff was to be the exclusive agent or broker, and that the defendant would not appoint any other agent or broker during the life of the contract.* (Italics ours.)

"There is a marked difference between the appointment of an exclusive agent to sell real estate and the granting of the exclusive right to such agent to sell during a fixed period."

In *Donahue v. Reiner Co.* (*supra*), the material portion of the brokerage agreement given by the defendant was as follows:

" 'You are hereby granted the exclusive agency for the sale of the above' (stores) 'for a period of six months from this date and we hereby agree to pay you a commission of 10% for securing a customer.' "

The plaintiff was to secure a buyer for the defendant's drug stores. However, within the six month period the defendant sold directly to the Liggett Company. The court, in its opinion, per Rathbun, *J.*, stated at pages 360 and 361:

“It will be noted that the language used is ‘the exclusive agency,’ and not ‘the exclusive right to sell.’ Courts have frequently declared that the giving of an exclusive agency to sell does not preclude the owner from selling to a customer not procured through the efforts of a broker. \* \* \*

“\* \* \*

“As the plaintiff had only an exclusive agency and not the exclusive right to sell, the defendant had the right to sell the stores provided no assistance was obtained from another broker.”

Quite obviously, under the foregoing cases, the New Jersey Realty Company was not procured by or through any efforts of Kislak or any other broker, nor with the aid or assistance of Kislak or any other broker.

The agency agreement of July 13, 1944 is as it says, “an exclusive sale agency,” as distinguished, in the light of the foregoing cases, from an exclusive right to sell. Consequently a conveyance of the property by the Bank to the appellant under the circumstances, as herein set forth, would not entitle the broker to the payment of a commission.

Referring again to the exclusive agency agreement (Case, pp. 58 and 59), it was agreed that the broker was not to receive payment of the commission except “in the event of sale”, and also that the price was subject to the “approval of the Court of Chancery”. The question in issue is the meaning of the word “sale”. When the construction of a contract becomes an issue, the court will usually adopt the significance which has been

ascribed by the parties to the mooted language or which is clearly inferred by the conduct of the parties after the agreement has been entered into. *Lippincott v. Content*, 123 N. J. L. 277 (Ct. of E. & A. 1939); *I. Tannenbaum Son & Co. v. Taglareni*, 115 N. J. L. 299 (Sup. 1935); *Corn Exchange Nat'l Bank and Trust Co. of Philadelphia v. Taubel*, 113 N. J. L. 605 (Ct. of E. & A. 1934); *Naughton v. Elliott*, 68 N. J. Eq. 259 (Chancery 1904).

In the case at bar, before the Bank and Kislak knew that the New Jersey Realty Company would exercise its right to take over the property, they entered into a written agreement to the effect that Kislak would not be entitled to any commission in connection with the Bernstein offer if the New Jersey Realty Company exercised its right to take over the property.

When the Bank served notice on the New Jersey Realty Company that it was considering this offer, the latter served notice, in the customary manner, that it required the Bank to bring the matter to the attention of the court so that the court might, if requested by the appellant, permit the appellant to take over the property under the applicable orders (Case, pp. 78 and 79). Quite obviously if the New Jersey Realty Company had no intention of taking over the property it would not have served this notice on the Bank. On December 19, 1944, which was the date noticed for hearing, the matter was adjourned, pending receipt of a higher offer. Thereafter, Kislak submitted the higher offer on behalf of Louis Drogin by letter addressed to the attention of Mr. Danzig (Case, p. 104). By this time, however, Kislak realized that in all probability the New Jersey Realty Company would take over the property. At the request of Kislak (Case, p. 104, ll. 32-34),

counsel for the Bank prepared its "customary contract" with Louis Drogin. But this time the usual and customary brokerage agreement (in the form executed in connection with the Bernstein offer) was not apparently submitted to or executed by Kislak.

We submit that the conduct of the parties, when they executed the brokerage agreement with respect to the Bernstein offer which was done (Case, pp. 76 and 77), before they knew that the appellant would exercise its right to take over the property, placed a practical construction on their original agency agreement which is binding upon them and clearly shows that they did not consider nor intend that a conveyance to the appellant would constitute a "sale."

In *Lippincott v. Content*, (*supra*), the owner agreed to pay the broker a commission for services rendered in consummating the sale, "said commission to become due and payable upon closing title". The sale was never consummated. In an action to collect the commission, the court directed a verdict for the defendant. On appeal the judgment was affirmed. The court, in its opinion, delivered by Judge WolfsKiel, says at page 279:

"\* \* \* Contractees are necessarily bound by the express conditions they themselves choose to incorporate in a contract. When construction becomes an issue, the significance ascribed by the parties to the mooted language, or plainly to be inferred from their conduct, is strongly influential in determining the meaning which was intended between them, and that course is usually adopted by the court to be binding on the parties, since of their own accord they have made it obligatory on themselves. *Albert v. Ford Motor Co.*, 112 Id. 597; *Corn Exchange National Bank v. Taubel*, 113 Id. 605; *Thomsen v. Riedel*, 114 Id. 379."

And further says on page 280:

“By the specific clauses of the contract in the present case the closing of title was made not simply a chronological marking, but constituted a part of requisite performance. That this is the interpretation which the parties themselves placed on the agreement was evidenced by correspondence between them, and by their acts and attitude. Their conduct and the wording of the agreement suffice for the conclusion that the parties intended the commission to be payable only if there were transfer of title to the purchaser.  
\* \* \*”

The term “sale” has no fixed or precise meaning. The court in *Hardwick v. American Can Co.*, 88 S. W. 797 (Sup. Ct. of Tenn. 1905), said at page 802:

“As pointed out by Mechem in his work on Sales, there is in the authorities a want of precision in the use of the term ‘sale.’ ‘It seems impossible,’ says this author, ‘for courts and textwriters to agree either as to the meaning of the word, or as to the essential elements of the idea which it represents.’ \* \* \*”

## POINT II.

**The Court of Chancery should not have undertaken to approve the payment of commissions to the broker, J. I. Kislak, Inc., for the reason that the broker had an adequate remedy at law to enforce the payment of any commissions which may have been due to it.**

As we have pointed out before, under Paragraph 17 of General Order No. 2, the Court of Chancery ordered and directed the New Jersey Realty Company to pay or cause to be paid the

amount which may be due for commissions to any real estate broker. This provision was inserted to protect the Trustee in the event that it was legally obligated to pay a commission to a broker and created a definite legal obligation on the appellant to reimburse the Trustee for any commissions which it was legally obligated to pay, or to pay such commissions as might be due.

However, whether any commission is due and payable to Kislak is a legal question for which Kislak has an adequate remedy at law.

In view of the fact that the New Jersey Realty Company actively disputed the right of the broker to the commission when the matter came before the Court of Chancery for hearing, and in view of the fact that the right of the broker to the payment of a commission was not clearly evident as a matter of law, and in view of the fact that the New Jersey Realty Company is one of the *cestuis que* trust whose rights should have been protected by the Bank as Trustee as well as by the court against the payment of any commission which is not legally due and payable, and in view of the fact that there were substantial questions of fact as to which further evidence should have been received before any final determination was made that the broker was legally entitled to a commission, the Court of Chancery should have, under all of these circumstances, refused to decide the issue of law and should have insisted that the broker establish his right to the commission in the proper forum.

It is, of course, elementary that where a party has an adequate remedy at law the Court of Chancery has no jurisdiction to determine the issues. *Stein v. Elizabeth Trust Co.*, 126 N. J. Eq. 399 (Ct. of E. & A. 1939); *Schweitzer v. National House & Farm Ass'n*, 43 N. J. Eq. 644 (Ct. of

E. & A. 1922); *Bennett v. Bennett*, 63 N. J. Eq. 306 (Ct. of E. & A. 1901); *Commonwealth Roofing Co. v. Riccio*, 81 N. J. Eq. 486 (Ct. of E. & A. 1913).

To require the broker to establish his right at law would be no hardship upon the Trustee, because if judgment was recovered against the Trustee at law, the New Jersey Realty Company was already obligated to reimburse the Bank under the provisions of Paragraph 17 of General Order No. 2.

The Court of Chancery should, therefore, have refused to decide the legal question against the appellant in a summary manner in this action to which the broker was not a party and did not ask to be made a party. If the court was not disposed to disallow the payment of commissions to the broker, then at most the court should have entered an order in keeping with Paragraph 17 of General Order No. 2, namely, that the New Jersey Realty Company be permitted to take over the property upon paying to the Trustee the amount which the Trustee would have received had the sale to Louis Drogin been consummated, and that the New Jersey Realty Company pay to the Trustee in addition thereto the amount of any commissions which the Trustee may be legally obligated to pay to the broker.

### Conclusion.

We therefore respectfully submit that the decree of the Court of Chancery is erroneous and should be reversed for the reasons that:

(1) The Bank was not legally obligated to pay Kislak a commission, and consequently the Court of Chancery should not have approved payment of

such commission and imposed such payment upon appellant.

(2) It was at least doubtful whether Kislak was legally entitled to payment of the commission, and the court should have therefore required Kislak to establish his right at law.

Respectfully submitted,

MCCARTER, ENGLISH & EGNER,  
Solicitors for Appellant, New  
Jersey Realty Company.

JAMES R. E. OZIAS,  
Of Counsel.

To be argued orally by:  
JAMES R. E. OZIAS.

## "EXHIBIT A."

## COURT OF CHANCERY OF NEW JERSEY

Chambers of  
MAJA LEON BERRY  
Vice-Chancellor

Toms River, N. J.  
March 11, 1940

McCarter, English & Egner  
13 Commerce Street,  
Newark, New Jersey

Sorg & Sorg  
744 Broad Street,  
Newark, N. J.

Gentlemen:

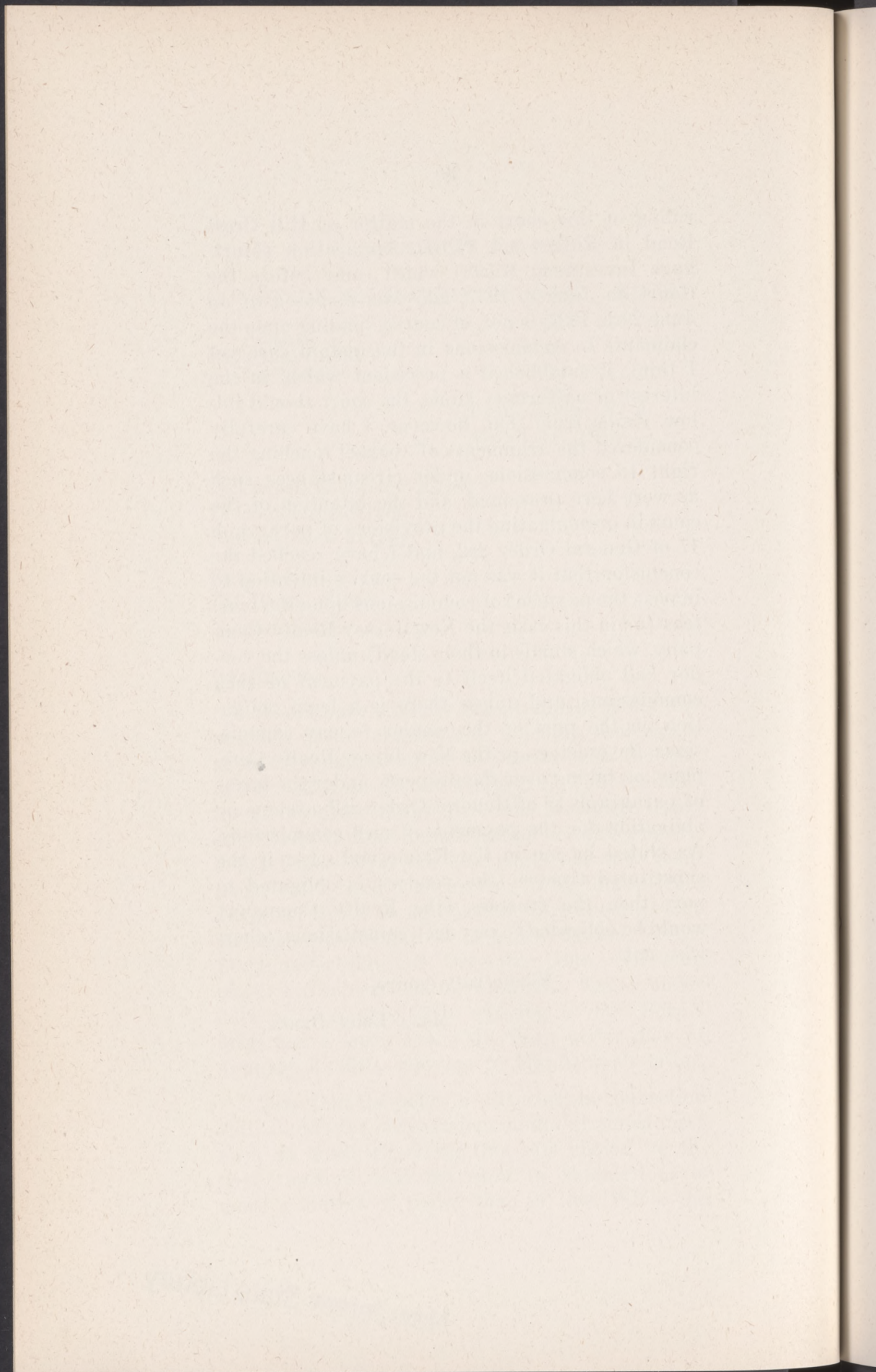
I should have advised you promptly of my disposition of the controversy touching real estate agents's commissions in connection with the sale of No. 635 High Street, Newark, N. J. in the matter of the proceedings under the Mortgage Guaranty Corporations Rehabilitation act affecting Fidelity Union Title and Mortgage Guaranty Company, but I have been prevented by illness from doing so. Briefs in this matter were submitted by Mr. Egner under date of December 12, and by Mr. Sorg under date of December 19th, following which I received a letter from Mr. Egner under date of December 27th replying to Mr. Sorg's brief and a letter from Mr. Sorg under date of January 3, 1940, replying to Mr. Egner's letter.

I think that the policy of the court in connection with claims for commissions under circumstances such as those attending this sale should be entirely uniform and the right to commissions is more a matter of policy than of law. While the

ruling of this court in the matter of Hill Crest Road in Ridgewood, N. J., Application (Mortgage Investment 85598) which came before the Court on June 8, 1937, and was disposed of on June 29th, 1937, is not, of course, binding upon the claimants to commissions in the instant case yet I think it established a precedent which, in the interest of uniformity alone, the court should follow. Aside from that, however, I have carefully considered the arguments of counsel touching the right to commissions under circumstances such as were here presented, and the intention of the court in promulgating the provisions of paragraph 17 of General Order #2, and I have reached the conclusion that it was not the court's intention to impose the payment of commissions upon the trustees (or in this case, the New Jersey Realty Company, which stands in their stead) unless the vendor had obligated itself to the payment of such commissions, and unless there is a legal obligation on the part of the vendor to pay commissions, the trustees, or the New Jersey Realty Company, on taking over the property under the terms of paragraph 17 of General Order #2, assume no obligation for the payment of such commissions. As stated by me in the Ridgewood case, if the substituted trustee (the vendor) is obligated to pay, then the trustees (the Realty Company) would be obligated to pay such commissions, otherwise not.

Very truly yours,

MAJA LEON BERRY.



## New Jersey Court of Errors and Appeals

IN THE MATTER

*of*

THE MORTGAGE GUARANTY CORPORATIONS' REHABILITATION ACT affecting the FIDELITY UNION TITLE AND MORTGAGE GUARANTY COMPANY.

Re: Mortgage Investment No. M-64178.

On Appeal from the Court of Chancery.

### BRIEF ON BEHALF OF RESPONDENT, J. I. KISLAK, INC.

#### I.

This is an appeal by the New Jersey Realty Co. from a decree of the Chancellor authorizing the sale of a parcel of real estate by the Fidelity Union Trust Company as Trustee (S. C., p. 80). The New Jersey Realty Company is the purchaser of the property under the decree and does not appeal from that portion of the decree which authorizes the sale. This appeal is only from that part of the decree which orders the appellant to pay commissions to J. I. Kislak, Inc., the broker in the transaction.

Although the facts in this case are unusual, they may be simply stated. Fidelity Union Trust Company holds title to the property as Trustee for certificate holders under certain orders of the Chancellor which are set out in the State of Case (pp. 7, 14, 27, 34). Under the terms of these orders, Fidelity Union Trust Company is empowered to

sell the property with the approval of the Court of Chancery upon due application. Paragraph seventeen of the General Order No. 2 (S. C., pp. 24-25) provides however that this power of sale is encumbered by an outstanding option to purchase the property, which option is in favor of the New Jersey Realty Company, the appellant herein.

This option comes into play only when the Fidelity Union Trust Company makes application to the Chancellor for approval of a sale to an outside purchaser. Thus it is provided that if the Fidelity Union Trust Company has an offer from a stranger and seeks approval of a sale to that stranger, New Jersey Realty Company may come in and buy the property for the same price and upon the same terms offered by the outside purchaser. In granting this option to the appellant, the Chancellor at the same time provided that if the option be exercised at any time, then the New Jersey Realty Company

“shall pay or cause to be paid the amount which may be due for commissions to any real estate broker or for other proper expenses incurred by the trustee or the investors in procuring the offer for sale submitted to the court, if such commissions and other expenses be approved by the court” (S. C., p. 25, General Order No. 2, par. 17 end).

Thus, although the New Jersey Realty Company receives an option to purchase the property and take it away from an outside bidder, its exercise of that option is coupled with the obligation of paying commissions to the broker. Obviously, there can be no broker as between the Fidelity Union Trust Company and the New Jersey Realty Company because the latter already knows of the property and has an option on it. Therefore it is clear that the broker to which General Order

No. 2 refers is the broker who furnishes the highest outside bidder; the commissions involved are the commissions earned by that broker in bringing about the sale by supplying an outside bidder whose offer is approved by the Court.

In this case, J. I. Kislak, Inc. is the broker. It received an *exclusive agency* for the sale of this property from the Fidelity Union Trust Company on July 13, 1944 (S. C., p. 58, Schedule "B" to Petition). Pursuant to that exclusive agency, J. I. Kislak, Inc. obtained three separate buyers for the property. The first buyer's offer was rejected by the Fidelity Union Trust Company as inadequate (S. C., p. 48, Par. 21). The second buyer, one Bernstein, submitted an offer which was approved by the Fidelity Union Trust Company, subject, however, to the approval of the Court (S. C., p. 60, Schedule "C"). As to this second buyer, Bernstein, the Fidelity Union Trust Company entered into a separate brokerage agreement with J. I. Kislak, Inc. (S. C., p. 76, Schedule "D"). This separate brokerage agreement was entirely unnecessary because J. I. Kislak, Inc. already had an exclusive agency on the property (S. C., p. 58, Schedule "B"). It was made without consideration to or from J. I. Kislak, Inc. and was used by the Fidelity Union Trust Company to exact from J. I. Kislak, Inc. a waiver of commissions in the event the New Jersey Realty Company exercised its option to buy the property on the same terms as the Bernstein offer (S. C., p. 77). This waiver, made without consideration, referred only to the Bernstein bid and even if the waiver was valid as to the Bernstein offer, it did not and does not affect any other offers or bids obtained by J. I. Kislak, Inc. for the property (S. C., p. 76).

In fact, the Bernstein offer was never approved by the Court and the question as to the legality of

the waiver of commissions became academic (S. C., p. 86, Par. 6). The Fidelity Union Trust Company procured the Holsey bid, higher in price than the Bernstein offer and submitted that bid for approval by the court. The Bernstein offer was dropped and Holsey at that moment became the top bidder. J. I. Kislak, Inc. then succeeded in obtaining a third and final buyer, one Louis Drogin, who submitted a much higher price for the property. Upon application by the Fidelity Union Trust Company to the Chancellor for approval of the sale to Drogin, the New Jersey Realty Company came in and gave notice of its desire to exercise the option upon the same terms as had been offered by Drogin, the highest bidder. Accordingly, the Court approved the sale to Drogin (S. C., pp. 85-86, Pars. 1 and 3), subject to the right of the New Jersey Realty Company to exercise its option within five days. In fact, New Jersey Realty Company did exercise the option within five days (S. C., p. 121) and thus became the purchaser of the property.

The decree authorizing the sale to Drogin is the decree from which this appeal has been taken. It provides that J. I. Kislak, Inc. has earned its commissions, approved the allowance thereof, and ordered that they are to be paid by the New Jersey Realty Company if the latter exercises its option to take the property away from Drogin (S. C., p. 86, Par. 5). It is that portion of the decree from which New Jersey Realty Company now appeals, seeking to avoid the payment of commissions earned by the respondent, J. I. Kislak, Inc. The position of appellant in resisting the payment of commissions earned by the broker is inequitable.

## II.

As appears from a reading of the facts stated above, or even as stated by the appellant in its brief, the sale of the property in question was brought about solely through the acts of J. I. Kislak, Inc. But for the efforts of J. I. Kislak, Inc. the property would not have been sold even to the New Jersey Realty Company. Moreover, these efforts expended by J. I. Kislak, Inc. were not the efforts of a stranger or an inter-meddler. J. I. Kislak, Inc. was acting under an exclusive agency for the sale of the property. In recognition of this agency and of the successful efforts of this broker in obtaining the highest offer, the Chancellor provided in the decree below that J. I. Kislak, Inc. was entitled to a commission on the sale.

Since the New Jersey Realty Company had previously obligated itself to pay all commissions, the Chancellor directed it to pay the commission to J. I. Kislak, Inc. The New Jersey Realty Company now elects to take the property under the decree but appeals from that portion of the decree requiring it to pay commissions.

The appellant is thus seeking to obtain the benefit of the decree below and at the same time to avoid the burden or the condition of the decree. These two positions are repugnant. The acceptance of the property under the decree is inconsistent with this appeal.

This Court has held that an appeal must be consistent.

*Krauss v. Krauss*, 74 N. J. Eq. 417 (1908);  
*Kinney v. Fidelity Union Trust Co.*, 129 N. J. Eq. 80 (1941).

In the *Krauss* case, this court pointed out that:

“It is a well-settled rule that where a party recovers a judgment or decree and accepts the benefits thereof voluntarily and knowing the facts, he is estopped to afterwards reverse the judgment or decree on error. The acceptance operates as and may be pleaded as a release of error. 2 Cycl. Pl. and Pr. 174, 175; 2 Cyc. 651; Ell. App. Pro. sec. 165.

“The language of the text in these books of authority is sustained by a great array of cases. From this rule springs the difference between the position of a party who pays a judgment against him and a party who accepts the payment of a sum awarded to him by the judgment. The former was his right of appeal because he receives no benefit from the judgment, while he who accepts the fruits of the judgment is estopped from appealing. Ell. App. Pro. sec. 152.

“From this rule, that when he accepts the benefit awarded to him by the judgment or decree, flows the corollary that where the award of a benefit is coupled with the imposition of conditions to be performed by the person benefited, and he accepts the benefits, he is precluded from afterward challenging the validity of the conditions by an appeal.

“\* \* \*

“*A party cannot avail himself of that portion of the decree which is favorable to him and secure its fruits while prosecuting an appeal to reverse such portion as mitigates against him. Moore v. Williams, 29 Ill. App. 597*” (P. 421; italics added).

The attempt by the New Jersey Realty Company to accept the benefits of the decree below and by this appeal to avoid the payment of commissions should be dismissed on this ground alone. The order to pay commissions is a part and a condition of the main portion of the decree. The ac-

ceptance of the property estops the appellant from challenging the right to commissions on appeal. To permit this appeal would violate the law of the state, as established by this Court in the cited cases; it would do away with the requirement that an appeal must be consistent.

### III.

As appears from the record, the commissions which were approved by the Chancellor below, were earned by the broker. Title to this property was held by the Fidelity Union Trust Company as Trustee. Its right to sell was encumbered by an outstanding option in favor of the appellant to purchase the property upon the best terms available to the Trustee from willing purchasers in the market, subject to the Court's approval. In the absence of offers to purchase from strangers, no sale could be effected even to the appellant. Accordingly, the Fidelity Union Trust Company as Trustee gave J. I. Kislak, Inc. an exclusive agency for the sale of this property.

The broker obtained several purchasers including the last one, Drogin, who offered the highest price. Upon application to the Chancellor for approval of the sale to Drogin, the appellant gave notice of its intention to exercise its option to purchase at the highest price bid. The sale to Drogin was approved, the commissions were earned and ordered to be paid, and the appellant exercised its option.

It may be seen therefore, that the efforts of J. I. Kislak, Inc. in obtaining the highest offer under its exclusive agency was tantamount to arranging a sale to the appellant. It was only by this method that such a sale to appellant could be brought about. Accordingly, the Chancellor considered that

the commissions had been earned and should be paid.

As a condition of its option, the appellant had undertaken the obligation to pay all commissions approved by the Court (S. C., p. 24, Gen. Order No. 2). This commission has been approved by the Court. Appellant now seeks, by this appeal, to evade its obligation as to the commission. It exercised the option, it took under the decree, but it refuses to pay what it has promised, and what it has been ordered to pay.

#### IV.

Counsel for the appellant points to the special agreement between the Trustee and the broker which was drawn with reference to Bernstein, a previous bidder whose offer was rejected since he was outbid by Holsey and Drogin (S. C., p. 76, Schedule "D"). That special agreement waived the payment of commissions *on that offer only* in the event of the exercise by appellant of its option to purchase.

The appellant now argues that by this agreement the broker waived his commissions in connection with any other purchaser whom he might obtain. The broker limited the waiver (assuming it was a valid waiver) to the Bernstein offer. The appellant reads into the waiver language that absolutely does not appear therein.

The waiver is limited to the Bernstein offer and limits the commission of \$4,650.00 to the Bernstein offer (S. C., p. 76). As a matter of fact the commission on the Drogin offer is approximately \$5,000.00 (S. C., p. 95). The appellant now says that notwithstanding the limitation the Court should extend the "waiver" to any offer that might be submitted by Kislak.

It is significant, however, that the waiver itself referred only to a single purchaser, Bernstein; that in the case of Drogen, the last purchaser who submitted the highest bid, the broker executed no waiver whatsoever. It thus becomes apparent that the Trustee was bound to pay commissions in the absence of a special agreement to the contrary. In the single instance where commissions were waived, the parties so expressly provided. The existence of this special waiver executed by the broker as to the Bernstein offer strengthens his position as to the last purchaser. In the absence of a special waiver, the broker was entitled to his commissions. He did the work; he earned the commissions; the Chancellor properly ordered that they be paid.

**For all of the foregoing reasons, it is respectfully submitted that this appeal should be dismissed and the decree below in all respects affirmed.**

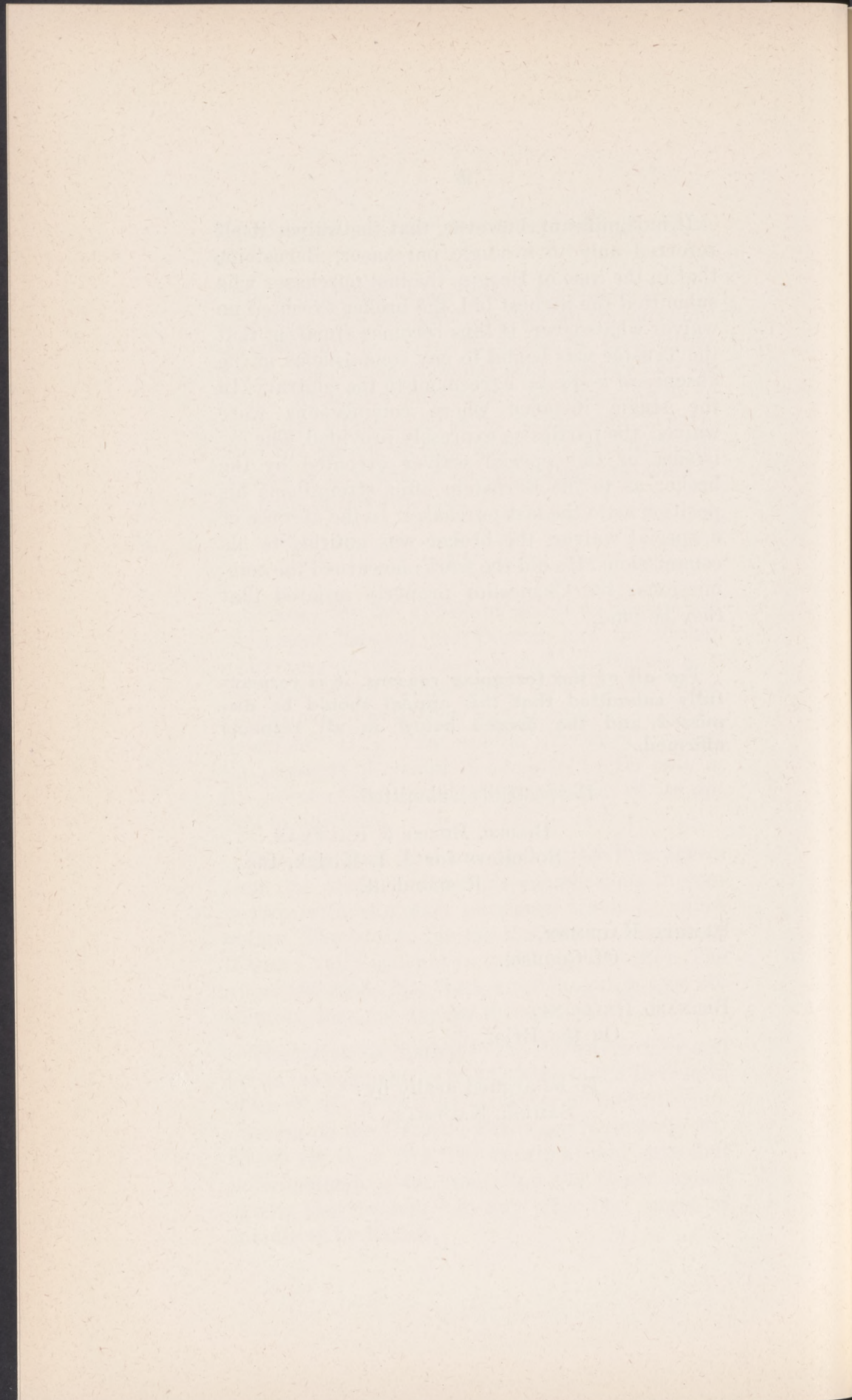
Respectfully submitted,

BILDER, BILDER & KAUFMAN,  
Solicitors for J. I. Kislak, Inc.,  
Respondent.

SAMUEL KAUFMAN,  
Of Counsel.

BERNARD HELLRING,  
On the Brief.

To be argued orally by:  
SAMUEL KAUFMAN.



# New Jersey Court of Errors and Appeals

IN THE MATTER

of

Proceedings under the Mortgage  
Guaranty Corporations' Re-  
habilitation Act affecting the  
FIDELITY UNION TITLE AND  
MORTGAGE GUARANTY COMPANY.

On Petition, etc.

Re: Mortgage  
Investment  
No. M-64178.

On Appeal from the  
Court of Chancery.

Sat Below:  
Campbell, C.  
Stein, V. C.

## BRIEF ON BEHALF OF TRUSTEE- RESPONDENT.

### The Background of This Appeal.

By order dated September 17, 1935, the Court of Chancery appointed Fidelity Union Trust Company as Trustee of Mortgage Investment No. M-64178 (hereinafter called "Trustee"). This order effectuated a plan promulgated by the Court of Chancery under date of April 24, 1934 (S. C., pp. 7-13) which permitted investors in participation certificates issued by Fidelity Union Title and Mortgage Guaranty Company, hereinafter called "Title Company", to withdraw their investments from the control of the trustees of the Title Company, and at the same time accorded to said trustees the equities the court conceived to be their due. One of the equities, the order of April 24, 1934 accorded to said trustees, was security for the repayment to the trustees, after the claim of the investor or investors shall be satisfied, of all amounts which had been advanced by the Title Company or its subsidiaries prior to March 21,

1933 for foreclosure costs and disbursements, as taxed, insurance premiums, taxes and assessments, principal or interest, or other sums for the special benefit of the investment (S. C., pp. 9-10). The extent and nature of the security accorded to the trustees was defined as a subordinate interest by the Court of Chancery by General Order No. 2 (S. C., pp. 14-26), and said General Order No. 2 was incorporated in the aforementioned order of September 17, 1935 by reference thereto. Said order of September 17, 1935 not only constituted Fidelity Union Trust Company as Trustee for the investors but also for the trustees of the Title Company, to the extent of their subordinate interest of \$3,325.15 principal. The rights of the trustees of the Title Company to the aforesaid subordinate interest eventually passed to the appellant, New Jersey Realty Company.

At the time of the entry of the aforesaid order of September 17, 1935, Mortgage Investment No. M-64178 consisted of a bond and mortgage encumbering premises known as 2395-2401 Hudson Boulevard, Jersey City (S. C., pp. 36-37). Eventually, the mortgage was foreclosed and Fidelity Union Trust Company acquired title to the real estate in November, 1937 (S. C., p. 38). The real estate consisted of three buildings arranged for an automobile showroom and service station (S. C., pp. 39-40).

Shortly after the acquisition of title, the Fidelity Union Trust Company began to list the same generally for sale, ultimately listing it with twenty-five brokers (S. C., p. 45). Such general listings produced ten offers between September, 1941 and July, 1944. The offers ranged from a low of \$50,000.00 on terms to a high of \$85,000.00 on terms (S. C., pp 45-48), none of which the Trustee regarded as commensurate with the value of the

property. The Trustee, believing that an exclusive sales agency would produce a more advantageous offer than any yet received, granted an exclusive agency to J. I. Kislak, Inc., effective July 13, 1944 and expiring on January 15, 1945 (S. C., p. 48 and Schedule B, p. 58). On October 30, 1944 the exclusive sales agent submitted an offer of \$90,000.00 on terms which the Trustee declined as inadequate. On November 1, 1944 the exclusive sales agent submitted an offer on behalf of one Carl Bernstein in the sum of \$93,000.00 on terms, and a contract for the sale of the property on these terms, subject to the approval of the court, was executed by the Trustee and Bernstein. In connection with the Bernstein contract, a commission agreement was executed between the Trustee and the exclusive sales agent disentitling the agent from commissions if the appellant took the property (S. C., pp. 76-77). A petition submitting the aforesaid offer of \$93,000.00 was duly filed with the Court of Chancery and while the matter was pending, the exclusive sales agent procured an offer from one Louis Drogin in the sum of \$100,500.00 on terms. This last offer the exclusive sales agent submitted on December 29, 1944 pursuant to the exclusive sales agency granted on July 13, 1944 within the time limited by the exclusive sales agency (Exhibit P-2, S. C., p. 104 and Schedule B, S. C., p. 58). A contract incorporating the offer of \$100,500.00 was duly drawn and submitted to the court (Exhibit P-3, S. C., pp. 105-120). It is to be noted that in connection with the Drogin contract, no new commission agreement was executed as in the case of the Bernstein offer but that the exclusive agent and the Trustee operated under the original exclusive sales agency (S. C., p. 104, Exhibit P-2).

The appellant, New Jersey Realty Company, pursuant to notice duly given to the Trustee,

electd to exercise the rights accruing to it under the aforesaid General Order No. 2 and conceiving that it was entitled to take over the property at \$100,500.00 contained in the Drogin contract, requested the court to direct the Trustee to convey the property to it for this sum, less commissions, on the theory that the exclusive sales agent was not legally entitled to commissions (S. C., pp. 93-96; 98-101). The right of the New Jersey Realty Company to take the property at the contract price has not been denied to it and the contract with Drogin was made subject to this right. It is only the assertion of the appellant that it has the right to deduct commissions from the contract price that has been denied and is debated on this appeal.

## ARGUMENT.

### POINT I.

**Appellant's claims under its subordinate interest rest in the discretion of the court and no abuse of discretion has been alleged or shown.**

The rights of the New Jersey Realty Company are defined by General Order No. 2 incorporated in the order of September 17, 1935, by reference thereto, and it is not contended by the appellant that it has any rights other than as defined and determined by said General Order No. 2. It appears clearly from General Order No. 2 that the investors are entitled to payment in full before the New Jersey Realty Company is entitled to anything on account of its subordinate interest (S. C., pp. 14-26). As further protection to the investors, the very order creating and defining said subordinate interest vested in the absolute

discretion of the court the right to reduce or limit the rights of appellant under said General Order No. 2, for paragraph 20 of said order says (S. C., p. 25):

“20. The court may, upon application of any party in interest and upon fifteen days notice to the Trustees, but without notice to any other person interested in the trust being administered by the Trustees, reduce or limit the rights of the Trustees, but shall in no case increase the rights of the Trustees. No right is created in the Trustee or the investors by this paragraph and the Court may act in its absolute discretion.”

That the court did not intend to confer upon the holder of the subordinate interest an absolute right to take over the property not only appears from the aforequoted paragraph 20 which left the matter in the absolute discretion of the court, but also from the provisions of paragraph 8 which in part reads as follows (S. C., p. 20):

“8. No sale or other disposal of the property shall be made by the Trustee for an amount less than sufficient to satisfy the amount due to the Guaranty Company or the Trustees except bona fide and upon fifteen days notice to the Trustees of an application to the court to approve such sale, and, upon such application, the court may make such order touching the said sale or other disposal aforesaid and as to the rights and interests of the Trustees and the investors as to it shall seem equitable and just. \* \* \*”

It is also apparent from General Order No. 2 that a sale of the trust *res* can be made, as was done here, at a price inadequate to pay the investors in full and leave nothing for the appellant's subordinate interest. To protect appellant against such a contingency, General Order

No. 2 permits appellant to take over the property on certain conditions which appear from paragraph 17 of General Order No. 2 (S. C., pp. 24-25) :

“17. In any case in which, upon application for the approval of a bona fide sale or other disposal for less than an amount which may be sufficient to satisfy the amount due to the investors and to the Trustees upon their subordinate interest, the court shall permit the Trustees to take the trust res upon payment to the investors of the amount which they would have received had such sale been consummated, the Trustees shall pay or cause to be paid the amount which may be due for commissions to any real estate broker or for other proper expenses incurred by the trustee or the investors in procuring the offer for sale submitted to the court, *if such commissions and other expenses be approved by the court.*” (Italics ours.)

We respectfully submit that the clear import of these provisions ground the claim of the appellant in judicial discretion if not as stated in paragraph 20 “absolute discretion”. The appellant, however, does not charge the court with having abused its discretion in permitting the appellant to take over the property at the contract price without deducting therefrom the agent’s commissions, but rather rests its case upon the proposition that it has an absolute right to take over the property after first deducting from the purchase price the commissions payable to the broker, unless as a matter of law the broker is entitled to commissions. Appellant’s position is not sustained by the order on which it relies, for it is clear under said order that it must pay to the Trustee for “the investors the amount which they would have received had the sale been consummated” with the contract purchaser and must pay the amount due for commissions to any broker or for other ex-

penses incurred by the Trustee or the investors in procuring the offer for sale submitted to the court, "if such commissions and other expenses be approved by the court" (Paragraph 17, General Order No. 2, S. C., pp. 24-25). We think it sufficient to say that the commissions having been approved by the court, the appellant cannot deduct them.

Appellant, however, relies upon a letter of Vice Chancellor Berry dated March 11, 1940 attached to its brief as "Exhibit A" wherein the Vice Chancellor stated, "I have reached the conclusion that it was not the court's intention to impose the payment of commissions upon the trustees (or in this case the New Jersey Realty Company which stands in their stead) unless the vendor had obligated itself to the payment of such commissions, and unless there is a legal obligation on the part of the vendor to pay commissions, the trustees of the New Jersey Realty Company on taking over the property under the terms of paragraph 17 of General Order No. 2 assume no obligation for the payment of such commissions."

Now, if it was the court's intention not to impose an obligation on the holder of the subordinate interest to pay commissions unless such commissions were legally payable by the vendor, it is difficult to understand why such intention was not clearly expressed in General Order No. 2. The import of General Order No. 2 is to the contrary and under this order the rights of the New Jersey Realty Company, with respect to its subordinate interest, were clearly relegated to the court's "absolute discretion". Moreover, the sale that Vice Chancellor Berry had before him that brought forth the aforementioned ruling was not a sale procured by an exclusive agent, as happened in the case at bar. In that case there had been listings with several agents and the broker who pro-

cured the purchaser was deprived of his commissions as a result of that decision. Although it has been the opinion of the Trustee that the ruling Vice Chancellor Berry made in 1940 was wrong, the Trustee did not deem it proper for it to question the policy the Vice Chancellor announced but followed it despite the difficulty such a policy created in the administration of these trusts, for many brokers have refused to try to sell properties in which appellant had a subordinate interest—a result clearly injurious to the investors whose rights were superior to the appellant's as defined by the Court of Chancery. Nevertheless, where the appellant had a subordinate interest, the commission agreement that the broker obtained from the Trustee, in cases where the property was listed with several brokers and no exclusive agent was employed, was similar to the commission agreement appearing at pages 76 and 77 of the State of Case, which commission agreement expressly disentitles a broker from commissions if New Jersey Realty Company takes the property. Such a commission agreement was actually signed in the instant case by the Trustee and the broker only in connection with the Bernstein offer, but no such agreement was signed in connection with the Drogin offer that was approved by the court. The execution of such a commission agreement in connection with the Bernstein offer must be ascribed in the instant case to inadvertence, for a contract of employment constituting the broker the exclusive agent was already in existence. When the Drogin offer was submitted by the exclusive agent, he and the Trustee did not sign such a commission agreement, but both the broker and the Trustee relied on the exclusive sales agreement dated July 13, 1944 (S. C., pp. 58-59), and this agreement contained no provision disentitling the broker from commissions if appellant took the property.

It is therefore submitted that the rights of the appellant in the enforcement of its subordinate interest having been left in the court's discretion by the very order creating the subordinate interest, such discretion cannot be questioned unless an abuse thereof is shown. It is well settled that the exercise of a discretionary authority will not be reviewed unless it has been clearly abused. This principle has been applied to a large variety of circumstances involving judicial discretion of which the following cases are illustrative rather than exhaustive: *In re Boury*, 124 N. J. Eq. 608 (order dismissing appeal for failure to comply with the rules of court); *Williams, Jr. v. Lowe*, 79 N. J. Eq. 173 (order refusing to open a final decree); *Bothwell v. Godfrey*, 114 N. J. Eq. 45 (order refusing to set aside a sale).

No abuse of discretion being alleged or shown, this court should not substitute its discretion for that of the Court of Chancery.

## POINT II.

**The equities of the situation are not in favor of the Appellant but rather in favor of the broker.**

The appellant's insistence upon taking the property at the contract price, less commissions, would leave the investors in the position of having procured a sale through a broker who may establish his right to commissions in an action at law but yields to them the sales price with commissions already deducted. They are thus exposed to the risk of receiving from appellant the sales price, less commissions, and perhaps paying and, for certain, litigating the broker's claims for these same commissions. The Court

of Chancery did not intend to expose investors to the hazard of receiving the sale price, less commissions, and having the moneys thus received exposed to a further deduction, either by the expense of litigation or payment of commissions or both. Appellant's position at the hearing was unfair: it did not offer to take the property at the sales price, less commissions, and indemnify the investors against the broker's claims. Appellant insisted at the hearing that the broker, as a matter of law, was not entitled to commissions and, therefore, it had a right to take over the property at the sales price, less commissions. Appellant's position is without support in the very order on which it relies and is certainly contrary to equity and good conscience.

In its brief to this court, however, the appellant states (at pp. 25-27) that the court below should have permitted appellant to take over the property upon paying the amount which the investors would have received had the sale to Louis Drogin been consummated and that the "Court should have, therefore, required Kislak to establish his right at law" and that the appellant was "already obligated to reimburse the Bank under the provisions of paragraph 17 of General Order No. 2". It is in these pages of its brief that appellant first mentions anything approaching indemnity. Such an offer was not made in the court below.

But be that as it may, we submit that the order below was correct, especially when we see that the broker in this case was the procuring and efficient cause of the sale, *Cf. Vreeland v. Vetterlein*, 33 N. J. L. 247; that he had submitted three offers, one for \$90,000.00; one for \$93,000.00 and the final offer at \$100,500.00; that his services extended over a period from July 13, 1944 to December 29, 1944; that the investors would not have had the

benefit of a sale of this property if not for the broker's efforts; that the submission of offers procured by the broker set into operation the machinery that enabled the appellant to step into the shoes of Drogin, the highest offeror.

The cases cited by the appellant in its brief, we submit, have no application to the case at bar. In *Sientz v. Spottswode-Cusack Co.*, 21 N. J. Misc. R. 479, the court found that the word "sale" did not include a conveyance to a mortgagee in satisfaction of the mortgage; in *Martin Realty Co. v. Fletcher*, 103 N. J. L. 294, the owner conveyed the property in satisfaction of a debt, but it is to be observed, the broker produced no purchaser; in *Ettinger v. Loux*, 96 N. J. L. 522, the authority given the agent was not exclusive. In main, the appellant relies on the distinction between an exclusive right and an exclusive agency, a distinction recognized by our cases. But this distinction is not determinative as was said by Mr. Justice Black in *Ettinger v. Loux*, 96 N. J. L. 525, at pages 524-525:

"It is an accepted rule of construction that a contract of employment does not give the broker an exclusive agency, unless it is so specified, either expressly or by implication. 19 *Cyc.* 265; 9 *C. J.* 623.

"A general rule which is supported by the weight of authority is to the effect that when the owner of real estate places it in the hands of a real estate broker for sale, he does not thereby relinquish his right to sell the property himself independent of the broker (4 *R. C. L.* 318, *Para.* 56; 9 *Corp. Jur.* 622); so, it is said, that when the broker is given an exclusive agency, as distinguished from an exclusive right to sell, it merely precludes the owner from employing another broker and does not preclude the owner from making a sale himself, without the broker's aid, and in such a case the owner will not be liable to

the broker for commissions (9 *Corp. Jur.* 622), unless there is a special contract giving a right to commissions regardless of who makes the sale, as in *Kruse v. Ferber*, 91 *N. J. L.* 470; *Stevenson Co. v. Oppenheimer*, *Id.* 479; or unless the owner does not notify the broker of the sale, as in *Payne v. Twitchell*, 81 *Id.* 193.

“The authorities, however, on this vexed question, in the various jurisdictions, are not altogether in harmony. They will be found collected and compared in the notes in 19 *L. R. A. (N. S.)* 599; 24 *Id.* 280; 38 *Id.* 370, and 49 *Id.* 999.

“*The conflict may, perhaps, be more apparent than real, when the different wordings in the broker’s written authorization to sell in the reported cases are compared and considered.* (Italics ours.)

“Those cases, which make the owner liable for a broker’s commissions, when the sale is made by himself within the time limit, are put upon the ground that the written authorization is a contract, that it implies an exclusive right to sell within the time named, without the right of the principal to revoke the agency, unless there is a reservation to the contrary, as in *Blumenthal v. Bridges*, 91 *Ark.* 212, 215; 24 *L. R. A. (N. S.)* 282.

“The revocation of the agency, either directly or by making a sale of the property, is a breach of the contract on the part of the principal, and renders him liable to the agent for damages which the latter sustains thereby.”

We submit that the contract in the case at bar created an exclusive authority in the broker to sell and that it “implies an exclusive right to sell within the time named”. *Ettinger v. Loux*, *supra*.

Furthermore, even if the contract created an exclusive agency as distinguished from an exclusive right, the sale to the appellant which the court approved was not made through the efforts

of another broker or directly by the owner. On the contrary, it was a sale that came about as a result of a series of events which were initiated by the broker and without whose efforts no sale at all would have resulted because the right of the appellant to take over the property under General Order No. 2 is a right that comes to it only upon the submission of a sale to the court, and the Court of Chancery recognizing the efforts of the broker and the important part he played in the liquidation of this security merely gave expression to the principle that the "laborer is worthy of his hire" and rewarded him accordingly.

### POINT III.

**The Appellant is accepting the benefits of the order submitted to this court for review and appealing therefrom at the same time.**

The decree appealed (S. C., p. 87) provides among other things as follows:

"3. That unless the New Jersey Realty Company serves notice upon Trustee within 5 days from the date hereof that it will take title to the aforesaid premises and pay to Trustee the sum of \$100,500.00, payable \$30,500.00 cash and \$70,000.00 secured by purchase money mortgage, and comply with all other terms and conditions contained in the contract between Trustee and Louis Drogin marked Exhibit P-3, the Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby authorized and directed to sell and convey to Louis Drogin, or his assignee, the aforesaid premises on the aforesaid terms as contained in said Exhibit P-3;

"4. In the event New Jersey Realty Company serves the notice required by this order

as aforesaid, then Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby authorized and directed to sell and convey to said New Jersey Realty Company the aforesaid premises on the terms and conditions contained in said Exhibit P-3, and in such event said Fidelity Union Trust Company, as Trustee as aforesaid, be and is hereby directed to cancel the agreement between it and said Louis Drogin marked Exhibit P-3 and return the down-money deposited thereunder;”

The appellant, by letter dated January 26, 1945 (S. C., pp. 121-123), notified the trustee-respondent that it will take title to the premises and pay the trustee-respondent the sum of \$100,500.00. While it is true that this notification was made in a manner designed to preserve to the appellant the right to take the property under the decree and at the same time appeal therefrom, this inconsistency was pointed out to the appellant by letter dated January 27, 1945 (S. C., pp. 124-125), and was not acquiesced in or consented to by the trustee-respondent.

We submit that by taking the benefit of the decree appealed from in this manner, the appellant cannot attack the decree by appeal. In *Kinney v. Fidelity Union Trust Co.*, 129 N. J. Eq. 80, this court said:

“It is incongruous for a litigant to accept the benefits of an order and contemporaneously to attack the associated decision from which the order emanates. This court has held that an appeal must be consistent.”

In *Krauss v. Krauss*, 74 N. J. Eq. 417, this court said at page 421:

“From this rule, that when he accepts the benefit awarded to him by the judgment or decree, flows the corollary that where the

award of a benefit is coupled with the imposition of conditions to be performed by the person benefited, and he accepts the benefits, he is precluded from afterward challenging the validity of the conditions by an appeal.

“The rule is stated in the text of *2 Cyc*, 645 in this language:

‘If a trial court imposes terms as a condition upon which a continuance or amendment will be allowed, or upon which an order will be granted, or other thing will be done or not done, and the party upon which the terms are imposed accepts them, he will be deemed to have acquiesced in the ruling and he cannot afterward question its validity in the appellate courts.’

“A party cannot avail himself of that portion of the decree which is favorable to him and secure its fruits while prosecuting an appeal to reverse such portion as mitigates against him. *Moore v. Williams*, 29 Ill. App. 597.”

The appellant having served notice under the order appealed from that it will take title to the premises and pay the sum of \$100,500.00, it is not in a position to attack the condition imposed by the order appealed from, to wit, that the broker is entitled to commissions in the event appellant or Louis Drogin or his assignee takes title to the property.

### Conclusion.

In conclusion, it is respectfully submitted that the decree below should be affirmed for the following reasons:

(1) The rights of appellant rest in the discretion of the court and no abuse thereof has been alleged or shown.

(2) The appellant, by the very order creating its rights, must pay commissions if such commissions are approved by the court. Commissions having been approved, the appellant cannot question its obligation to pay the same.

(3) The broker has rendered a valuable service and is entitled to payment, either as a matter of law or as a matter of equity and good conscience, or both.

(4) The appellant having accepted the benefits of the order appealed from cannot question it by appeal to this court.

Respectfully submitted,

HOOD, LAFFERTY & EMERSON,  
Solicitors for Respondent-  
Trustee, Fidelity Union  
Trust Company.

CHARLES DANZIG,  
of Counsel.

To be argued orally by:  
CHARLES DANZIG.

New Jersey Court of Errors and Appeals

IN THE MATTER

of

The Mortgage Guaranty Corporations' Rehabilitation Act affecting the FIDELITY UNION TITLE AND MORTGAGE GUARANTY COMPANY.

Re: Mortgage Investment No. M-64178.

On Appeal from the Court of Chancery.

APPELLANT'S REPLY BRIEF.

Counsel for the Trustee-respondent in Point III of his brief, and counsel for the respondent, J. I. Kislak, Inc. under Point II of his brief, argue that the appellant accepted the benefits of the decree and at the same time is attempting to appeal therefrom, a course which is inconsistent and not permitted by law.

Inasmuch as this argument appears for the first time in the briefs of the respondents and was not anticipated by the appellant in its brief, we consider that a reply to the argument is appropriate.

Counsel for the respondents rely on *Krauss v. Krauss*, 74 N. J. Eq. 417 (Ct. of E. & A.) and *Kinney v. Fidelity Union Trust Co.*, 129 N. J. Eq. 80 (Ct. of E. & A.). Both of these cases are readily distinguishable from the facts of the case at bar.

In the *Krauss* case the defendant-husband had refused to pay his wife alimony and counsel fees awarded to her by the Court of Chancery in this State and left the State and secured a divorce

against his wife in South Dakota. Thereafter he was extradited and brought back to New Jersey on a charge of malpractice. While in New Jersey he was detained in jail for his contempt of the court's order. On his application, however, the court allowed him to be relieved and purged of his contempt on condition that he pay the alimony and counsel fees and that he execute an agreement with his wife that he would not use the South Dakota decree in any proceedings between him and his wife. He complied with these conditions, and accordingly obtained his discharge. *Thereafter* he appealed from the order granting his discharge, complaining against the conditions imposed therein. The court dismissed the appeal and stated at page 421:

“It is a settled rule that where a party *recovers* a judgment or decree and *accepts the benefits thereof* voluntarily and knowing the facts, he is estopped to *afterwards* reverse the judgment or decree on error. The acceptance operates as and may be pleaded as a release of error. 2 Cycl. Pl. & Pr. 174, 175; 2 Cyc. 651; Ell. App. Pro. § 162.” (Italics ours.)

All of the cases relied on by this court in its opinion were cases where, as in the *Krauss* case, the party *accepted* the benefits of the decree and *thereafter* appealed from the decision of the court.

In the *Kinney* case the Court of Chancery, on motion of the complainant, struck out certain portions of the defendant's answer and then entered two orders permitting the defendant to amend its answer. Defendant accordingly amended its answer and then appealed from the order striking the original answer. This court relied on the *Krauss* case and dismissed the appeal on the ground that the defendant having accepted the

benefits of the order cannot at the same time appeal therefrom.

In the case at bar the decree appealed from was entered by the Court of Chancery on January 23, 1945. Three days thereafter appellant instituted this appeal. *Thereafter* it served on the Trustee-respondent the letter which is the basis of respondents' argument (State of Case, pp. 121 and 122). This letter clearly recites that the appellant had already instituted an appeal to this court from the decree of the Court of Chancery, and clearly states that the letter is written "*entirely without prejudice to the rights of the New Jersey Realty Company on the appeal from the aforesaid decree of the Court of Chancery.*" It further states it is being served on the Bank in order to avoid any possible forfeiture of the right of the appellant to take the premises under the order or decree of the Court of Chancery "*as finally determined by the Court of Errors and Appeals*". The letter further states that the appellant will pay the Trustee the sum of \$100,500.00 and will comply with the other terms and conditions contained in the Louis Drogin contract "*at such time as the Court of Errors and Appeals may affirm the aforesaid decree of the Court of Chancery*", but in the event that the "*aforesaid decree is reversed in any particular by the Court of Errors and Appeals then the rights and obligations of the New Jersey Realty Company shall be governed and determined by such further orders or decrees as may be entered in said cause.*"

It is quite obvious that by this letter the appellant cannot be said to have taken any step or done any act which is inconsistent with its right to submit to this court the portion of the decree of the Court of Chancery directing it to pay to the Trustee a sum in excess of the net amount which the

investors would have received had the sale to Louis Drogin been consummated. (See General Order No. 2, State of Case, p. 24, l. 38—p. 25, l. 1.)

It should further be noted that in the *Krauss* and *Kinney* cases and in all of the cases cited by the court in the *Krauss* case the defendant who was benefited by the order entered did not have any right whatsoever to such an order, but the order was made purely as a matter of grace. The defendant in each case therefore was receiving a benefit to which he was not entitled as a matter of law. In the case at bar, however, the appellant had the right under the General Orders of the court to take over this property by paying to the Trustee the net amount which the investors would have received had the sale to Louis Drogin been consummated, that is to say, the contract price less the amount which the Trustee would have been obliged to pay to Kislak as a commission.

Furthermore, the appellant by serving such notice was merely preserving the status quo pending the determination by the court of the question which the Vice-Chancellor definitely stated to counsel for the appellant should be passed on by this court, as appears by reference to the transcript of the proceedings before the court on January 9, 1945 (State of Case, p. 102, ll. 15-40), as follows:

“Mr. Ozias: If your Honor please, may I refer to some previous decisions?”

“The Court: You may take an appeal, if you want to, from my ruling.”

\* \* \* \* \*

“Mr. Ozias: May I say this, if your Honor please? It is not being unfair to the broker. I will tell you why.

The Court: Don't tell me why. I have already ruled. Now, you take an appeal—

Mr. Ozias: Well, then, there is nothing further to say.

The Court: —and let the upper court straighten me out.”

We submit that since both the court and counsel for the Trustee admitted that the appellant had the right to take over the property and the only question was whether the appellant should be obliged to pay the brokerage commission, the course adopted by the appellant was the only course which the appellant could take in view of the wording of the decree, in order to preserve the status pending the appeal.

It is accordingly respectfully submitted that the principles laid down by this court in the *Krauss* and *Kinney* cases are not applicable to the case at bar and that the appellant's letter to the Trustee of January 26, 1945 is not inconsistent in any respect with the right to have this court pass upon the aforesaid decree of the Court of Chancery.

Respectfully submitted,

McCARTER, ENGLISH & EGNER,  
Solicitors for Appellant,  
New Jersey Realty Company.

JAMES R. E. OZIAS,  
Of Counsel.

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