BEFORE THE IOWA REAL ESTATE COMMISSION
1918 SE HULSIZER
ANKENY, IOWA

IN RE:	)	
	)	CASE NUMBER: 92-029
DONALD E. KNUDSEN	)	
Broker (B01495)	))	STATEMENT OF CHARGES
	)	
201 S. Commercial	)	
Eagle Grove, Iowa	)	
	)	

The Iowa Real Estate Commission has jurisdiction of this matter pursuant to Iowa Code chapters 17A, 543B, and 272C (1995).

Licenses issued by the Commission are subject to the laws of the state of Iowa and to the administrative rules of the Commission.

DONALD E. KNUDSEN is, and was at all material times during the following events a licensed real estate broker. His license number is B01495. DONALD E. KNUDSEN is currently a licensed broker.

COUNT I

Respondent is charged with engaging in a practice harmful or detrimental to the public by marketing and selling real estate on behalf of an owner after a written listing agreement expired without securing a new written listing agreement, in violation of Iowa Code sections 117.29(3) (1989) [now 543B.29(3)] and 117.34(8) (1989) [now 543B.34(8)], and IAC 1.23 and 4.40(10).

COUNT II

Respondent is charged with engaging in a practice harmful and detrimental to the public by acting for more than one party in a real estate transaction without the knowledge and written consent of all parties, and failing to obtain written agency disclosure statements, in violation of Iowa Code sections 117.29(3) (1989) [now 543B.29(3)], 117.34(4) (1989) [now 543B.34(4)], and 117.34(8) (1989) [now 543B.34(8)] and IAC 1.37(1), 1.37(2), 1.37(4), 1.37(5), and 4.40(10).

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CIRCUMSTANCES OF THE COMPLAINT

1. The circumstances of the case are based on the Findings of Fact, Conclusions of Law, Order and Judgement Entries filed February 16, 1994, in the Iowa District Court for Franklin County, Case No. C1961-0791, entitled "A. C. Benton and Neva Benton v. Knudsen-King Management Company."

FINDING OF PROBABLE CAUSE

On June 12, 1996 the Iowa Real Estate Commission found probable cause to file this Statement of Charges and to order that a hearing be set in this case.

Dated this 11th day of July, 1996.

[redacted]

Roger L. Hansen, Executive Secretary
Iowa Real Estate Commission

cc Pam Griebel, Assistant Attorney General
James Sayre, Attorney for Respondent

BEFORE THE IOWA REAL ESTATE COMMISSION
1918 SE HULSIZER
ANKENY, IOWA

IN RE: DONALD E. KNUDSEN (B01495) Broker 201 S. Commercial Eagle Grove, Iowa 50533	CASE NUMBER: 92-029 STIPULATION AND CONSENT ORDER

On this 11th day of July, 1996, the Iowa Real Estate Commission and DONALD E. KNUDSEN, each hereby agree with the other and stipulate as follows:

1. The allegations specified in the Statement of Charges in this case shall be resolved without proceeding to hearing as the parties have agreed to the following Stipulation and Consent Order.

2. The Respondent was issued a broker license to practice real estate on the 13th. day of January, 1953, as evidenced by license number B01495 which is in full force and effect through December 31, 1996.

3. The Iowa Real Estate Commission has jurisdiction over the parties and subject matter jurisdiction over each allegation in the Statement of Charges.

4. A Statement of Charges will be filed against Respondent together with this Stipulation and Consent Order.

5. Respondent does not admit each and every allegation in the Statement of Charges, but agrees the Commission could find, upon hearing, one or more violations of law.

6. If this Stipulation and Consent Order is approved by the Commission it will be filed, along with the Statement of Charges, and upon filing both documents will become public records.

7. This Stipulation and Consent Order shall be made a part of the record of the Respondent and may be considered by the Commission in determining the nature and severity of any disciplinary action to be imposed on the Respondent for any future violations of the laws and rules governing the practice of real estate.

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8. Failure to comply with the terms of this Stipulation and Consent Order shall be prima facie evidence of a violation of Iowa Code sections 543B.29(3), 543B.34(2) and 272C.3(2)(a) (1995).

9. This Stipulation and Consent Order shall be presented to the Commission in closed session by the prosecuting attorney and/or Commission staff. Respondent waives any right of notice of this meeting or any right which the Respondent might have to participate in the discussion of this Stipulation and Consent Order among the Commission, the Commission staff and the prosecuting attorney.

10. This Stipulation and Consent Order is not binding on the Iowa Real Estate Commission until it has been formally approved by a majority of the Commission members. In the event that this Stipulation and Consent Order is rejected by the Commission it shall be of no force or effect to either party.

THEREFORE, IT IS HEREBY ORDERED that the Respondent shall take eight (8) hours of real estate continuing education in "Real Estate Law and Agency Law" and eight (8) hours in "Contract Law and Contract Writing." These hours may be used for real estate continuing education required by law for license renewal. The course must be approved as a "Broker Pre-License Course". Original certificate of attendance must be submitted to the Iowa Real Estate Commission within thirteen (13) months of the signing of this agreement by the Commission. The certificate of attendance must come under a cover letter addressed to the Commission's Executive Secretary and must refer to case 92-027.

IT IS FURTHER ORDERED that the Respondent shall pay a civil penalty in the amount of $ 500.00 to the Commission within thirty (30) days of acceptance of this Stipulation and Consent Order by the Commission.

IT IS FURTHER ORDERED AND AGREED that at all future times Respondent shall fully and promptly comply with all pertinent Orders of the Commission and the statutes and Commission rules regulating the practice of real estate.

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FOR THE RESPONDENT:

This Stipulation and Consent Order is voluntarily entered into by the Respondent on this 5th day of July, 1996.

[redacted]

DONALD E. KNUDSEN, Respondent

State of Iowa)

County of Wright)

Signed and sworn to before me on this 5th day of July, 1996, by [redacted]

VICKI JORGENSEN
MY COMMISSION EXPIRES

Notary Public, State of Iowa
Printed Name: Vicki Jorgensen
My Commission Expires: 11-12-96

FOR THE COMMISSION:

This Stipulation and Consent Order is accepted by the Iowa Real Estate Commission on the 11th day of July, 1996.

[redacted]

Evelyn Rank, Chairperson
Iowa Real Estate Commission

cc: Pam Griebel, Assistant Attorney General
James Sayre, Attorney for Respondent

IN THE IOWA DISTRICT COURT FOR FRANKLIN COUNTY

A.C. BENTON and NEVA C. BENTON Plaintiffs, vs. KNUDSEN-KING MANAGEMENT COMPANY, Defendant.	No. C1961-0791
KNUDSEN-KING MANAGEMENT COMPANY, Counterclaimant, vs. A.C. BENTON and NEVA C. BENTON Defendants to Counterclaim.	FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER, AND JUDGMENT ENTRIES

* * *

This civil action, filed July 19, 1991, was originally initiated by Daniel R. Watkins against A.C. and Neva C. Benton. It sought specific performance of a real estate contract between Watkins and Terry L. Lundell dated April 13, 1990, for the purchase of 5,381 acres in Franklin and Butler Counties. Watkins further asked for an injunction to enjoin Bentons from completion of a forfeiture of that real estate contract, as well as to set aside a subsequent sale to third parties.

As an affirmative defense, Benton alleged that Watkins' claim was barred for his failure to timely record his land contract, pursuant to sections 558.41-.44, estoppel,

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and laches. Benton asserted a counterclaim against Watkins to quiet title, tortious contractual interference and fraud.

Benton filed a third-party petition against Knudsen-King Management Company, the realty firm in the Lundell-Benton transaction, on September 11, 1991, for (1) negligence, (2) fraudulent misrepresentation, (3) negligent misrepresentation, (4) tortious interference with a contract (since withdrawn) and (5) breach of fiduciary duty.

Subsequently, Bentons moved for partial summary judgment against Watkins. Watkins' claim was summarily dismissed, in response thereto, by Judge Gilbert Bovard on October 3, 1991. Subsequently on February 20, 1992, dismissals with prejudice were swapped between Watkins and the Bentons.

Knudsen-King Management urged as affirmative defenses (1) mitigation, (2) election of remedies, (3) waiver, (4) estoppel, (5) accord and satisfaction, (6) claim and issue preclusion, (7) merger and bar, (8) contributory negligence, and (9) independent intervening cause.

Knudsen-King filed a counterclaim against Bentons for $200,000, the amount of the agreed commission, for (1) breach of the listing contract, (2) breach of a third-party beneficiary contract, and (3) quantum meruit.

In response to the counterclaim, Benton alleged, as affirmative defenses, (1) waiver, (2) estoppel, (3) unclean hands, (4) conflict of interest, (5) breach of contract, (6) breach of implied covenant of good faith and fair dealing, and (7) accord and satisfaction.

On January 12, 1993, supplemental affirmative defenses by Knudsen-King were urged, including (1) failure to use reasonable care to avoid injury and failure to

mitigate damages, (2) contributory fault, and (3) independent intervening cause.

* * *

Arnold C. Benton (Benton), 64, is a native of Guthrie County, Iowa, now residing in Hampton. He was employed by John Deere in its company story in Hampton in 1950. Benton acquired that dealership in 1954. He subsequently acquired the Iowa Falls and Geneva dealerships in 1970 and 1974 respectively.

Benton's farm background spurred his interest in farm ownership. Through his dealerships, farm equipment was readily available to assist in his farm operations.

The 1970's saw a boom in grain prices caused, to some degree, by the initiation of grain sales to Russia. This contributed to Benton's amassing a considerable fortune in farm equity. The value of the farmland escalated to prices exceeding $3,000 per acre.

Benton and his wife, Neva, had acquired about 11,000 acres of Iowa farmland, situated in the counties of Clarke, Adams, Taylor (South Iowa farms), Butler and Franklin (North Iowa farms).

In addition, Benton, together with similarly endowed business partners, acquired several Iowa and Florida banks, together with savings and loan associations in North Carolina. Benton's portfolio was to monitor the farm loan files to appraise their values, the sufficiency of their security, and the borrower's potential to repay. Benton admits to not being "spooked" by legal or loan documents.

Benton was described by a longtime business associate and some employees as a sophisticated businessperson, quick to make decisions involving substantial sums, strong-willed, vocal, demonstrative, possessor of a

brilliant mind, and an independent thinker. Benton's past reflects considerable risk taking, including speculative investments in metals, as well as gambling jaunts to Nevada.

The advent of the '80's brought restricted farm credit and rapidly declining farm values. These events sought to victimize Benton's resources. The John Deere dealerships were sold in 1983. Benton had purchased six farms through Don Knudsen (Knudsen) in a financial collage including Allied Insurance and King Management of Des Moines. Benton suffered a $1.5 million loss in three months from that ill-advised venture.

Hawkeye Banks tied up a number of Benton's assets at a time when he was experiencing a cash crunch. On April 3, 1986, Benton and his wife, Neva, filed Chapter 11 bankruptcy, a reorganization petition. Their attorney was David Nelson of Mason City. Benton inventively converted substantial non-exempt assets into a $2 million exempt life insurance policy, which drew unsuccessful objections. Monies were borrowed against that policy, a substantial portion of which was used to settle with the unsecured creditors for sixty cents on the dollar. In December of 1988, the Chapter 11 proceeding was dismissed. Benton estimates his assets at that point to be worth $10 million with about a $6 million debt. Besides the southern and northern Iowa farms, his assets included an office building in Hampton, an apartment house, an industrial site in Mason City, his home, a condo at Clear Lake, a partial interest in an Iowa Falls motel, and a quarry. His net worth in 1990 had grown to about six million (Exhibit D-44).

In late 1983, extending into 1984-85, Benton suffered from major depression. He was treated as an outpatient with medication and electrotherapy. In 1988,

these symptoms exacerbated. Hospital admissions followed with more shock treatments (Exhibit D-12). Benton was diagnosed as being alcohol dependent with a bipolar disorder, a manic-depressive illness, in 1989. He was a patient in the alcohol and drug dependence unit in Rochester for a month in September of that year. In year 1990, Benton was being seen monthly in the aftercare clinic in Mason City. Prescribed medications were Lithium, Norpramin and Prozac.

Benton had known Don Knudsen, a real estate agent from Eagle Grove, both socially and professionally. Las Vegas was a favorite haunt for each. Knudsen had been a real estate agent for over thirty years.

Benton decided to sell the North Iowa farms, being 5492 acres in Franklin and Butler Counties. Relief from the stress of its operation and management was a major reason. A number of local brokers were authorized to sell these farms without any formal listing. Knudsen had appraised the farms for $7.5 million. On February 9, 1989, Benton signed a listing contract with Don Knudsen Realty (Exhibit 1) for three months for $7,553,500 cash. Paragraph 7 thereof provided Benton "[t]o pay Don Knudsen Realty a Commission of five (5) percent of the sale price. The commission shall be payable whether the real estate is sold by the Broker, by the owner, or any person during the period of this contract." No offers were obtained during the 90 day listing period, expiring May 11, 1989.

Knudsen was eventually doing business as defendant-counterclaimant, Knudsen-King Management Company. Because of the economic disaster Benton experienced in his previous contact with King Management, Benton avers that

he would not have entered into this agreement, or continued with it, were he aware of King's interest. This was not proven.

Benton admits to being involved in the sale/purchase of over 100 farms. He further admits to being a secured landlord on crops in "lots" of farm leases. Benton worked with financing statements in an auto dealersip for 1½ years in the mid-'80's. Secured transactions were not foreign to him. To the contrary, they were a familiar occurrence.

Benton had been custom farming the north Iowa farms. He concluded in most years he would gross from these arrangements $1,200,000, including government payments. That was moderately inflated. Input costs usually amounted to something over $600,000.

Knudsen found a potential buyer who wished to exchange an interest in a shopping center in Yuma, Arizona. Benton looked it over with his business adviser, John Dougan of Mason City, but no deal was struck.

Benton became motivated to sell these farms as 1990 rolled around. His son, David, was no longer interested in farming, having moved to the Twin Cities. The 1990 farming operating net income (4,000 acres of row crop, plus government payments, and bin rental), after crop expense, was projected at $584,000 (Exhibit D-16). The projected debt service, principal ($125,740) and interest ($281,053), totalled $406,793, on around a $3,000,000 debt (Exhibit D-17).

On March 1, 1990 Benton conducted an auction of the farm equipment theretofore used by him for custom farming the subject farms. The auction grossed about $740,000. Benton advertised the 29 farms for separate cash rental. The farms

comprised about 4,173 tillable acres, plus 522 acres under government CRP, plus another 686 acres (Exhibit D-94).

Terry F. Lundell, now 43, of Sacramento, California, read an ad placed by Knudsen in the High Plains Journal. Lundell was raised on a dairy farm in Utah. He was a 1974 graduate of Brigham Young University in agricultural economics. Lundell was a major in the Air Force Reserves, stationed at Travis AFB. Lundell was a custom harvester of wheat, corn, and different varieties of beans in states lying north of Texas up to North Dakota. He had six employees. Lundell had a trucking contract for tomatoes in California and was attempting in 1990 to purchase some elevators in Oklahoma. Lundell owned farmland in Pueblo County, Colorado, with little equity. It was planted to "dry land wheat." His financier had been Ag Services because it was willing to advance money in multiple states.

Lundell was interested in acquiring a substantial piece of agricultural real estate in one area. Lundell contacted Knudsen on February 13, 1990, to arrange an appointment (Exhibit D-15). Lundell travelled to Hampton on February 21. They made a field-by-field inspection. Lundell met and conversed with Benton. Inquiries were made as to yields, tenants, soil tests, corn base, government programs, tilling procedure, and similar issues. Lundell related to Benton his harvesting background. Lundell related his role in flying fuel tankers for the military. Lundell advised Benton that he did his ag-banking with Ag Services "down the road in Cedar Falls." Benton indicated his displeasure with Ag Services as a lender for himself, but said little more. Benton viewed Ag Services as a "lender of last resort." Seed, fertilizer, and herbicide are purchased through Ag Services when money is loaned. Lundell told Benton he

needed lots of information from him to pass on to Ag Services for their credit review. Benton related he needed the same sort of information from him.

Benton requested a financial statement from Lundell, as well as directing Knudsen to obtain one. Knudsen conveyed the strong impression that Lundell was financially able to complete this contract. Elevators, wheat farms, 5,000 acres of California tomatoes, and a stable of combines were among Lundell's assets. Everything was large scale. Benton concluded Lundell was wealthy. Knudsen promoted that impression.

Knudsen became a frequent visitor at Benton's office and home. Knudsen orchestrated the negotiations. Knudsen was advised and "in the loop" of Ag Services' involvement with Lundell's financing.

Knudsen's daughter lived in Oklahoma. He had planned to go visit her. Knudsen dovetailed that trip with a follow-up visit with Lundell at Oklahoma City on March 12. Knudsen inquired as to Benton's willingness to reduce the purchase price prior to his departure. Benton agreed to take $6.5 million with at least 30% down before he left.

Benton prepared Exhibit 5, a short form ISBA land contract, prior to leaving Hampton for Oklahoma. Knudsen unilaterally inserted a sales price of $6 million thereon. Benton was not shown it. It also provided for $1 million down, payable in $500,000 installments on execution and on September 15, 1990. Exhibit 5 further provided that the buyer could release land from the contract at the rate of $1,115 per acre, with Benton paying the buyer $35,000 for crop storage.

Knudsen called Benton from Oklahoma City about the terms. Knudsen leaned hard on Benton and orchestrated the negotiations. Lundell was on the line. Lundell offered $5.8

million. Benton agreed to reduce his asking price to $6 million. Benton was told that Lundell had plenty of assets but had a present short-term cash flow problem. Lundell wanted a smaller downpayment. Benton again asked for a financial statement for Lundell. Knudsen was to get him one. Handwritten changes were made to Exhibit 5 by Knudsen in response to those calls. Benton was asked, for the first time, to split the downpayment. He finally agreed to do so after considerable persuasion. Then Benton was asked to reduce the total downpayment to $800,000, with $400,000 due on execution and the same sum on 11-15-90. Knudsen stressed that $800,000 down, in that manner, would be more than the projected $600,000 cash rental. Knudsen admits that he considered the $400,000 11-15-90 payment as part of the downpayment. Benton tentatively agreed at that time subject to seeing it in approved contract form. Exhibit 5 was signed on 3-12-91 by Lundell in Oklahoma. Exhibit 5 was never signed by Benton.

Upon Knudsen's return and after a series of contacts, at the office and at the home, Benton finally agreed to reduce the $1 million downpayment to $800,000, with $400,000 due on execution and again on November 15, 1990, after the harvest.

Lundell returned to Hampton on March 14. Lundell gave his projected financing needs to Ag Services (Exhibit 26) that day. The downpayment and estimates for product for corn/beans totalled about $700,000, with income projections of about $950,000.

Benton conversed with his son, David, who had some ownership in three of the farms. David had moved to the Minneapolis area, which contributed to Benton's decision to sell. Knudsen met with Benton and David at Benton's house in

Hampton on March 15. David was in favor of acceptance. Benton agreed to pay $200,000 commission, payable on February 20, 1991, when a sizeable payment was due. The commission was not payable until the November 15 and February 20 payments were both actually paid.

At the meeting on March 15, Knudsen advised Benton that Ag Services was prepared to do the financing for Lundell. Lundell met with Benton and Knudsen. Lundell and Benton did more negotiating, led by Knudsen. Benton stressed the usual yields one could expect. David Benton knew Ag Services "were going to give him (Lundell) some money." (Exhibit D-93, p. 45) Knudsen faxed Exhibit 7 to Ag Services. Its contents were unknown, unapproved, and unauthorized by Benton. The language was selected and authored by Knudsen. Lundell stated he thought it would come from Benton and he was unaware that Knudsen was going to write it. It stated "Mr. A.C. Benton will subordinate any advance of credit tendered to Terry Lundell for a line of credit on 5380 acres in Franklin and Butler counties . . ." A letter followed (Exhibit 6). Knudsen drove to Cedar Falls that afternoon. In response, Ag Services directed a general memo (Exhibit 8) that Ag Services would finance Lundell subject to receipt of all required security and loan ratio requirements. Benton received this memo at his office. Benton was anxious either to close or scrap the contract, as it was getting closer to spring planting as well as the end of the government sign-up period. If it fell through, cash rental arrangements needed quick negotiation, preparation and completion. David Benton had started on some preliminary cash rental negotiations.

A real estate contract (Exhibit 3) was prepared by Duane Knoshaug, an attorney from Clarion, on March 20-21 for

5381 acres (111 acres had been excluded from the listing contract). Knoshaug was retained and paid by Knudsen. Knoshaug was given Exhibit 5 (with Knudsen's handwritten changes) to follow. Knoshaug put together the real estate descriptions. The sellers were A.C., Neva, David and Kathryn Benton, with Lundell as the buyer. The purchase price was $6 million, payable $400,000 on execution, $400,000 on November 15, 1990, $100,000 on March 15 of 1991, 1992, 1993, and 1994, with the unpaid balance of $4.8 million due on March 15, 1995. Interest was 9% from March 15, 1990, with possession immediately. There was no express agreement relating to commission in this contract. It was signed only by Terry F. Lundell. There is no date upon it.

On March 21, 1990, Lundell signed a security agreement on all crops with Ag Services (Exhibit 2) at Cedar Falls. Lundell executed a promissory note to Ag Services for $800,000 payable December 15, 1990, at 13.5% (Exhibit D-22). Knudsen was designated by Lundell as his resident farm manager, due to his non-residence and armed service obligations (Exhibit 22).

Benton dropped off Exhibit 3 to his lawyer, Art Cady, Sr. of Hampton. Benton had indicated he wished to use the Iowa State Bar Association form. Cady hurriedly inspected the contract. Cady saw a need for a lot of changes. He indicated this would take some time and could not be done immediately. Cady said these included a lack of personal liability for Lundell as foreclosure was waived; and there should be a crop lien provision in the contract. Other suggestions would follow once he had time to go over it more carefully. Benton was told to make an appointment.

This was followed by Exhibit 9, a contract on the long form. Exhibit 9 was not prepared by Knoshaug or Cady. Its scrivener is not known.

On March 26, Lundell gave Ag Services a financial statement (Exhibit 21). It reflected a present net worth of $616,280. His current assets were stated as exceeding his current liabilities by $300,000. Lundell's term assets included a combine with head ($96,000); vehicles ($138,000); oil wells ($85,000); building lot ($12,000); shop equipment ($12,000); and HHG ($22,000). These values were overstated. Some were exempt assets. Ag Services required crop insurance. It would not finance without a first and superior lien to the seller.

Subsequently, on March 26, 1990, the four Bentons met with Terry F. Lundell and Knudsen. Lundell had been in Cedar Falls that morning and gave Benton Exhibit 11, a letter from Ag Services. It states it "will provide the necessary financing for Terry Lundell . . . Funds will be available subject to the completion of securing all collateral, necessary through properly recorded liens and assignments." It stated nothing about the amount of their lien.

Exhibit 9 was executed by the Bentons and Lundell on March 26. No one knows the scrivener. It was not Knoshaug or Cady. Again, the purchase price was $6 million with $400,000 down; $400,000 on November 15, 1990; $100,000 on February 20, 1991, 1992, 1993; $300,000 in 1994; with the unpaid balance of $4.6 million on February 20, 1995. Interest accrued from March 15, 1990, payable on February 20 of each year, with complete right of prepayment. It further provided that if the buyer sold any of the ground, on Benton's receipt of $1,115 per acre, that land would be released from the terms of the contract. There was no agreement as to

commission. The $400,000 downpayment was not received, but promised. Benton inquired about a financial statement from Lundell. Benton also wished the contract changed to incorporate Cady's suggestions, conveyed or forthcoming.

Lundell told Benton that he needed to take the signed contract to Ag Services, so it could record its lien, before he would pay the $400,000. Lundell and Knudsen related that Ag Services was very careful and no crop financing would be forthcoming until their paperwork was complete. An Ag Services memo (Exhibit 22) confirms its need to "see a signed contract between Terry and Mr. A.C. Benton. . ." Lundell drove the contract to Ag Services at Cedar Falls. Upon his return to Hampton, Benton took Lundell to dinner at a Hampton restaurant.

Benton conferred with Cady on March 26. Benton was upset about not yet receiving any money. Cady needed more time to look it over and related he would render a written finding. He did not give Cady Exhibit 9. Neither did he tell Cady that it existed or was signed. Cady only advised on Exhibit 3 terms. Benton met with Tom Marsh of Iowa Falls, his CPA, on March 28. Cady and Marsh concluded that Dave and his wife should not be parties to the contract. Efforts were undertaken to exchange other assets of Benton's with his son to transfer the son's interest in the real estate.

Benton called Knoshaug on March 26 to relate some of Cady's initial impressions of the contract. Benton called Ag Services on March 27 (Exhibit D-99). Ag Services refused to give Benton the financial statement given it by Lundell or information from it.

Benton was aware that Ag Services was receiving the first lien on crops. But he knew little of the exact details due to its claimed confidentiality. Benton reasoned their

involvement was restricted to financing the crop inputs at this point.

On March 28, after receipt of Exhibit 9, Ag Services filed a financing statement signed by Lundell, with the Secretary of State at 1:56 p.m., covering all of Lundell's interest in "annual and perennial crops of whatever kind to be grown or presently growing and hereafter to be grown" on the subject real estate, which consisted of six pages of descriptions (Exhibit 17). Benton was unaware of this filing.

Cady prepared a letter on March 30, 1989 (Exhibit 12), which captured his earlier concerns, plus others. His directions were (1) to delete Dave and his wife as sellers; (2) to understand its tax consequences; (3) to obtain a written security interest, subject only to input costs, until the balloon payment was made on March 15, 1995, there being no present security interest provided; (4) to assure that the annual payments plus interest would be sufficient to make the required payments on Benton's indebtedness; (5) to execute a fixture filing for the bin sites; (6) to prohibit the buyer from selling or assigning without first obtaining Benton's written consent; (7) to assure that Benton had a right to prepay mortgages and contracts; (8) to assure that Benton's mortgages did not have acceleration clauses upon sale; (9) the default remedies should include the rights to accelerate, foreclose and forfeit, suggesting the use of an ISBA form #142; (10) contract provides the property be insured for its full insurable value, (11) to satisfy the financial responsibility of the buyer, to check credit references and to fully check the buyer out; (12) to obtain an assignment for all

government program payments with a proper financing statement; (13) to limit the acres to be released from the contract; and (14) to use the Iowa State Bar Association form for real estate installment contracts.

Benton had been continually demanding a financial statement for Lundell from Knudsen, as well as from Lundell. There was one or more times when Benton was on the phone with Knudsen to Lundell wherein its receipt was promised by Lundell.

Upon the receipt of the letter from Cady, Benton called Knudsen. Knudsen came to Hampton to obtain it. Benton gave it to Knudsen with the comment that "this is what my lawyer is requesting to insert in the contract." Efforts were being made to trade Dave and his wife out of their interest in their three farms.

Lundell met with Ag Services on Monday, April 9. Last minute financial details were discussed. Ag Services was again told that Knudsen was going to be Lundell's farm manager (Exhibit 24).

Knudsen took a copy of Exhibit 9 to Knoshaug (Exhibit 10) on April 10. Knoshaug used a land contract form of the Iowa Bar Association, which is a later version of Exhibit 9. Knudsen also brought in three handwritten pages of notes. Some of those were incorporated into the contract terms. Cady's letter was not given Knoshaug. Knudsen did relate some of its contents. Knoshaug prepared the eventual contract and delivered it to Knudsen (Exhibit 13). Knoshaug also prepared a UCC-1 form for the requested grain bin fixture filing (Exhibit 15).

On April 13, Lundell, Knudsen, Neva, Benton and his secretary, Barbara Orr, met in Benton's office. Exhibit 13, the final contract, had been back-dated to March 26 by

Knoshaug to bear a similar date as Exhibit 9. No net worth statement was given by Lundell. Lundell called his secretary in Benton's presence to get one remitted. Benton received a check drawn on Knudsen's trust account in the sum of $400,000 (Exhibit 14). Benton admits reading and glancing at most of the terms of the contract. He did not detect the presence of the security interest, nor did he detect its absence. Benton did notice a new provision for the payment of the $200,000 commission, which called for $50,000 payable 11-15-90, and $150,000 on February 20, 1991. This was changed to $20,000-$180,000 respectively and initialed by the Bentons and Knudsen. Pursuant to Cady's suggestions, the final contract was on the Iowa State Bar Association form, contained an acceleration clause, deleted Dave and his wife's signatures to the contract, prohibited the sale or assignment by Lundell without first obtaining Benton's written consent, and provided for a security interest in the bin site. It did not contain any security interest in the crops. This contract was recorded on April 13 at 1:23 p.m. in the Franklin County Recorder's Office by Knudsen. The financing statement for the grain bin sites was recorded on April 17, 1990, in Franklin County, again by Knudsen.

As it turned out, Lundell had taken the $50,000 government deficiency payment, together with $350,000 borrowed from Ag Services of America, Inc., to assemble the $400,000 downpayment (Exhibit D-30). Knudsen knew these funds were the source of the $400,000. Benton did not.

Knudsen had said he had forgotten to bring a UCC-1 form. Orr typed out a UCC-1 form at the closing on April 13 to include the crops. It was dictated by Knudsen. Lundell signed it. Knudsen neglected to take the financing statement with him. Knudsen thought Benton would file it. Benton

thought Knudsen took it with him to file. Benton never came across it. It was left somewhere in Benton's office. It was not produced at trial.

Knudsen managed the farms for Lundell. He entered into custom farming contracts with several farmers (Exhibit D-31), as Don Knudsen Realty as agent for Terry Lundell. This was dated 4-25-90. 2214 acres of corn were planted and 1962 acres of soybeans. The harvesting was to be performed by Lundell, along with the trucking and selling of the grain. Lundell eventually did the fall tillage in November.

On April 26, Lundell assigned his interest in the contract with Benton to Ag Services, which was recorded in Franklin County on June 7, 1990 (Exhibit D-35). It references a promissory note dated 3-21-90 in the principal sum of $800,000.

Benton became suspicious of Lundell's financial integrity a short time later that spring. He learned the source of $350,000 of the downpayment was from Ag Services only after insistent inquisition of Knudsen. Loan proposals by Lundell showed a desperate need for funds by Lundell. The custom farmers were experiencing some difficulty in payment. Other rumors confirmed Lundell's shaky financial stature. Dougan advised that Midwest Soya had advanced money to Lundell (Exhibit 69).

Benton stopped taking his medication in late August. He entered into a manic phase of his bipolar affliction (Exhibit D-12). A confrontation ensued with Knudsen at Clear Lake that a UCC-1 had not been filed. Knudsen remitted one to Lundell to sign, which was returned in late September. It was misplaced by Benton's office and another one obtained, then recorded on October 18 (Exhibits D-15 and D-40) by Bill Miller, Benton's office manager. A

security agreement was never signed or requested. That financing statement (Exhibit 16) was subject to a UCC-1 filing by Ag Services. Miller had learned that Ag Services had filed on March 28. Benton's UCC-1 was recorded prior to the receipt of proceeds by Lundell for the 1990 crops.

Benton instituted a divorce action in September. It was soon dismissed. He purchased $1.6 million of farmland from Metropolitan Life at a series of auctions in mid-September. These were located in Franklin, Hardin, Buchanan, Black Hawk, and Cerro Gordo counties. Neva retained G.A. Cady, Sr., to institute an involuntary mental commitment. Upon discharge, Benton returned to his medication. Benton amassed about $587,500 to make the initial payments to Met Life (Exhibit D-54). But it created a need for over a million dollars in March, 1991.

Benton and Neva endorsed checks from Farmers Cooperative dated 11-13-90 payable to Lundell and Ag Services totalling about $334,000 (Exhibit 53). The only notice of lien remitted by Benton was a letter by Cady to Midwest Soya on 3-18-91 (Exhibit D-58). Benton eventually received $12,696.84 from Midwest Soya due to his belated UCC-1 filing.

Lundell failed to make the $400,000 payment due 11-15-90. He attempted to borrow this sum from Ag Services (Exhibit 31). Benton was then undergoing major mental treatments. Neva was pressed to decide things. A hostile confrontation occurred at an Eagle Grove motel between Benton, Lundell and Knudsen. Neva drove to Cedar Falls with Knudsen to a meeting with Ag Services. She was asked to discount the November 15 payment and rewrite the contract. Lundell said he could come up with $300,000 if she would take it and put $1,000,000 on a second mortgage. Neva tentatively

agreed to that arrangement (Exhibit 55). She talked to Dougan who discouraged it. Neva contacted Cady who absolutely advised against it. Neva withdrew the offer.

Shortly after closing, in late April, Daniel Watkins of Los Altos, California, responded to an ad placed in the San Francisco Chronicle by Lundell. Watkins, 37, designed computers. After a series of telephone calls, Lundell met with Watkins at the latter's home. The two journeyed to Iowa on May 12, 1990. On May 13, 1990, Knudsen prepared a contract (Exhibit 18), signed by each. Its sales price was $7,800,000, $200,000 down and the balance due 10-1-90. Possession was 5-15-90, with Watkins obtaining the crop but paying the crop input costs. It included a $20,000 management fee to Knudsen. It was subject to Watkins obtaining a $5.6 million loan. Lundell received a Ferrari from Watkins for the downpayment, which netted him $151,000. Watkins pursued financing. Knudsen told Watkins the contract need not be recorded. Knudsen recommended Watkins use Knoshaug as his lawyer. Knudsen met with Watkins in California. Lundell was called to active duty. Watkins never received an accounting from Knudsen or Lundell for crops.

Watkins was unaware of the $400,000 owed Benton by Lundell due 11-1-90. At some time, Knudsen advised Watkins that Benton and Lundell would be in litigation. In January 1991, Lundell contacted Watkins and relayed that Benton would carry back $1 million. Lundell disappeared again. On April 7, 1991, Knudsen came to Watkins' house to prepare a contract with Benton. Watkins concluded Knudsen was representing him. Watkins talked with Benton on the phone. Finally, on 4-20-91, Knudsen advised Watkins that Benton had sold to Goodenow-Gardner. Watkins believed he had $250,000 invested. Watkins consulted his California attorney. He recorded the

contracts on July 19, 1991 (Exhibit 18). Watkins obtained a $200,000 judgment against Lundell in California. It remains unsatisfied. This present suit was initiated by him against Benton. Watkins' claim was summarily dismissed in response to an I.R.C.P. 237 motion.

The crop input expense, including interest, advanced by Ag Services, less its discounts, was about $390,000 (Exhibit 53). Ag Services was paid in full, including the $350,000, by the end of November, 1990. It filed a lien waiver on 12-17-90 (Exhibit D-50). Ag Services received payments from Franklin ASC, Farmers Coop and Midwest Soya, purchasers; and hail insurance, all totalling about $740,000. Borrowed funds were paid back to Midwest Soya by Lundell. The Court concludes the gross income from the farms was around $1,100,000 (including Northrup King and ASC).

Benton decided to sell the south Iowa farms, consisting of 5408 acres. On August 31, 1990, a contract was signed with a buyer from Alaska (Exhibit 39). Knudsen and his brother, Rod, a realtor from Humboldt, were Benton's agents. The sales price was $2,310,000 with $50,000 payable down, a similar figure on 12-6-90, $300,000 on 2-1-91 and the remainder over a ten-year period. The contract did not contain a security agreement for crops. This contract was renegotiated with Benton for full payment by reducing its price $200,000 on March 5, 1991 (Exhibit D-56). Bentons received $737,680 which was used for their other contract obligations.

On January 18, 1991, Cady formally commenced forfeiture by requesting mediation. Mediation hearing was set for March 20. Notice of forfeiture was served by Benton upon Lundell on March 26, 1991 (Exhibit D-60). Prior thereto, on March 13, 1991, Benton filed an action in this

court (#C1930) to appoint a receiver. A hearing was scheduled for April 2, 1991. Lundell, through David J. Mansheim, a Parkersburg attorney, filed an application to stay and declaratory judgment. The stay application asserted that Lundell was a U.S.A.F. major on active service since August 6 piloting refueling tanker aircraft as a part of Operation Desert Shield and Desert Storm.

Lundell, under "hardship," returned to the U.S. in the fall of 1990 to harvest the crops from Benton's farms. Except for that period, his returns to stateside were only for brief durations subject to immediate recall. His flying locations were Saudi Arabia, Spain and Barksdale AFB in Louisiana. Judge Gilbert Bovard, by a ruling dated 4-4-91, stayed the appointment of a receiver, stayed Bentons from proceeding with forfeiture or foreclosure proceedings, and directed the disbursement of the 1991 ASC advance deficiency payment to Lundell (Exhibit D-63).

As a result, on 4-20-91, Benton and Lundell entered into an agreement (Exhibit D-66). Lundell conveyed the farmland to Benton by quit claim deed. Benton paid Lundell $70,000 cash. Lundell was permitted to retain the 1991 ASC advance payment of $50,000 besides. Benton was to receive the CRP payment due in the fall. In addition, Benton agreed to pay all delinquent taxes previously agreed to be paid by Lundell (about $68,000). Benton paid $1500 to Lundell's attorney for his services in flying to California to obtain Lundell's signature. Each party fully released the other (Exhibit D-67). It did not release Knudsen as it references matters arising from the land contract, not Knudsen's agency agreement with Benton.

In April, 1991, Rod Knudsen produced a buyer for the North Iowa farms. After entering into an agreement for a

$100,000 commission (Exhibit D-70), a contract was signed on April 19, 1991, with John E. Goodenow (a friend of Benton's) and James C. Gardner for $6,065,000 (Exhibit 36). $250,000 was paid down, $250,000 at closing, and the balance in installments. It did not include a security interest. Benton was aware of the excellent resources and credit rating of Goodenow and did not request one. The buyers opted to pay this contract balance in full on April 1, 1992 (Exhibit 37). The reduced commission was not a release of this claim by Benton, as suggested by Knudsen.

Benton expended considerable funds for attorney fees to Cady (and his son). He estimates these to be $88,638 (Exhibit 63). In addition, $15,000 was paid to resolve the Watkins matter.

Knudsen admitted that he was not to receive any commission until the "downpayment" was made. Further, he admits the $400,000 payment due November 1 was a part of the downpayment. Knudsen never demanded payment of the real estate commission from Benton, nor did he bill Benton for it. Knudsen states he may be entitled to a partial commission, but "never thought what that might be." Knudsen stated a good reason why he is not entitled to a full commission is "the deal never happened."

* * *

A realtor's relationship with a seller is that of agent and principal. The rules of agency apply, including the duty of undivided loyalty and disclosure. Miller v. Berkoski, 297 N.W.2d 334, 338 (Iowa 1980).

"Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to

have. . ." Restatement (2d) of Agency, section 381; Miller v. Berkoski, supra.

An agency relationship is confidential and fiduciary in character, requiring a high degree of honesty. Miller v. Berkoski, supra, at p. 339.

Real estate brokers and salespersons represent their clients in the capacity of an agent. This is a fiduciary relationship which requires a high degree of honesty and trust between the parties. Miller v. Iowa Real Estate Commission, 274 N.W.2d 288, 292 (Iowa 1979).

As a seller's agent, a real estate broker's duty is a full, fair and prompt disclosure of all facts within his knowledge which are or may be material. Swift v. White, 129 N.W.2d 748, 750 (Iowa 1964).

Because of the confidential relationship between them, it is the broker's duty to give the seller fully and frankly such information as he may have with respect to the purchaser's financial situation. There flows from this agency relationship the legal, ethical, and moral responsibility on the part of the listing broker to make, in all instances, a full, fair and timely disclosure to the principal of all facts which are, or may be, material in connection with the matter, which might affect the principal's rights and interests or influence his actions. It is the broker's duty to give the principal such information as he may have of the prospective purchaser's financial situation. Miller v. Berkoski, supra.

The duty exists if the agent has notice of facts which, in view of his relations with the principal, he should know may affect the desires of his principal as to his own conduct or the conduct of the principal. Miller v. Berkoski, supra.

Whenever the relations between the contracting parties appear . . . derived from a fiduciary relation, . . . it is incumbent upon the stronger party to show affirmatively . . . that all was fair, open, voluntary, and well understood. Dawson v. National Life Insurance Company, 157 N.W. 929, 941 (Iowa 1916).

Closely related to the duty not to engage in fraudulent or negligent misrepresentation is the broker's duty fully to disclose material facts to his client. A broker is under a duty to make full, fair and prompt disclosure to his client of all material facts within the broker's knowledge that might affect his client's rights, liabilities or course of action. Rohan, Real Estate Brokerage Law and Practice, section 3.05(4), p. 3-32 (Matthew-Bender 1986).

"It is not enough just to offer to disclose information. If that were the rule, then we fear that brokers, who are relied upon by the principals for their honesty and integrity, could evade their duty to disclose by taking advantage of the principals' faith in them. This means that it is the duty of a broker, like any other agent for pay, to advise his employer fully of all facts within his knowledge that could be reasonably calculated to influence the principals' actions." Hercules v. Robedeaux, Inc., 329 N.W.2d 240, 242 (Wis. App. 1982).

"Material information" is that which influences the principal in accepting or rejecting an offer or making a counter-offer. Hurney v. Locke, 308 N.W.2d 764, 769 (S.D. 1981).

The seller's acceptance of the purchaser and entering into a contract with him does not excuse the agent for withholding material information about the prospective

purchaser from the seller. R.A. Poff & Co. v. Ottaway, 62 S.E. 2d 865, 868 (Va. 1951).

It is important to note that these principles of law relating to disclosure do not turn upon damaged sellers, but upon the breach of the agent's duty to disclose material information. A finding of non-disclosure by the broker of a fact material to the sale would be sufficient to bar recovery of the commission without regard to whether loss to the seller resulted therefrom. A broker is a fiduciary who owes his principal the duties of disclosure, good faith and loyalty as to all matters within the scope of his employment. Concealment of facts or other breach of trust will preclude recovery of a fee by a broker for services rendered to that principal. It is of no consequence that the broker may be able to show that the breach of his duty of full disclosure and undivided loyalty did not involve intentional or deliberate fraud, or did not result in injury to the principal, or did not materially affect the principal's ultimate decision in the transaction. The duty of an agent to make full disclosure to his principal of all material facts relevant to the agency is fundamental to the fiduciary relationship of principal and agent. If it appears that an agent has been guilty of any concealment, the transactions will not be allowed to stand. To elect to make disclosure of all facts which might affect his principal's rights and interests or influence his action in relation to the subject matter of the employment precludes recovery of commissions for his services. Miller v. Berkoski, supra, pp. 341-342.

Broadly speaking, a real estate broker is a fiduciary, holding a position of trust and confidence. As such, a broker must exercise fidelity and utmost good faith toward his principal in all matters within the scope of his

employment. A broker's fiduciary position imposes upon him a legal obligation to fully, fairly and promptly disclose all information he may possess that is or might be material to his principal's interests or that might affect or influence his principal's course of conduct. Thus, where a principal proves, either affirmatively or defensively, that a real estate broker . . . concealed material information pertaining to the financial ability or capacity of a prospective purchaser, so as to induce the principal to accept such purchaser and enter into a contract with such purchaser, the courts generally have held or recognized that the principal is entitled to recover, at the least, the amount of commission paid to the broker and may recover other such damages caused by the broker's conduct, or that the broker, as a result of such flagrant conduct, forfeits any right to a commission. Where it has been urged that the principal's acceptance of the purchaser procured by the broker amounted to a waiver of the broker's responsibility with regard to the financial ability of the purchaser, the courts, although acknowleding that a broker generally becomes entitled to a commission upon production or a purchaser who is "ready, willing, and able" to consummate the transaction, irrespective of any subsequent default by the purchaser, have reasoned that a broker is bound to exercise the greatest care in his principal's interest and that any material misrepresentation of or concealment of financial information amounts to a breach of the broker's fiduciary duty and of the contract between the broker and principal. . . . 34 ALR (4), 194, 195, Summary and comment to annotation of Real Estate Broker's Rights and Liabilities (1984).

The term "able," as used in the broker's burden to produce a buyer ready, able and willing, ordinarily refers to

financial abilit,. Murphy v. Brown, 108 N.W.2d 353, 355 (Iowa 1961).

"To be able means that the purchaser must have the money at the time to make any cash payments that are required in order to meet the terms of the seller, and does not simply mean that the purchaser had property upon which he can raise the amount of money necessary; but, as stated, he must actually have the money to meet the cash payment and be in shape financially to meet any deferred payments." Reynor v. Mackrill, 164 N.W. 335, 337 (Iowa 1917); Jones v. Ford, 134 N.W. 571 (Iowa 1912).

The term "able" refers to a buyer's financial ability to make any initial payment required by the terms of the sale contract and also to complete the contract of purchase according to its terms, including the ability to make any deferred payments when due. . . . When a seller requests that a broker furnish him with financial information on the buyer, two things become necessary: (1) that the buyer be able and (2) that this fact be revealed to the seller in a manner such that a reasonably prudent person, in the management of his affairs, would act on the information. Gatlinburg Real Estate Co. v. Booth, 651 S.W.2d 203, 205-206 (Tenn. 1983).

* * *

Many circumstances contributed to this result. As Benjamin Cardozo once wrote, as Judge of the New York Court of Appeals, "the real estate broker is brought by his calling into a relation of trust and confidence. Constant are the opportunities by concealment and collusion to extract illicit gains. We know from our judicial records that the opportunities have not been lost." Roman v. Lobe, 152 N.E. 461, 462 (NY 1926).

This was the largest land deal that Knudsen ever worked on. His commission was $200,000, a fortune to many. It would represent a life savings to many others. The view has been expressed that real estate negotiations, in which there may be significant broker participation, is probably one of the few areas in life where ends can justify means. Also at work may be a perception that real estate brokerage is an occupation in which the opportunities for fraud abound, in which malfeasance occurs, and which is fraught with serious conflicts of interest. Rohan, supra, at p. 3-5.

Benton was a difficult client. He was bulldoggish, refractory, obstinate and arrogant. But that was known to Knudsen before the deal. The potential reward to Knudsen for the sale tempted Knudsen into a course of action which shortcircuited his usual prudent course.

That A.C. Benton did not know about the involvement of Ag Services is folly. The denial on his part is selective memory. But A.C. Benton did not know the extent of Ag Services' involvement. Nor was he told, directly or indirectly. He was unaware that $50,000 of the $400,000 downpayment came from the government deficiency payment. Knudsen knew it, as the check was endorsed by him into his trust account. Nor did Benton know that $350,000 of the downpayment came from Ag Services. But Knudsen knew it, and he did not disclose it.

Knudsen had signed on as a farm manager quite some time before. He had a copy of Cady's March 30 letter which indicated concern about the credit of the potential buyer.

It takes no rocket scientist to understand the risk involved in receiving only $400,000 down on a $6 million sale, where the buyer's lendor is in first position for crops. The element of risk was exacerbated by the fact,

known to Knudsen, that $350,000 of the downpayment was being advanced by Ag Services.

Knudsen responds that he foresaw no potential financial crisis. His fee was not due till November and the following February. He asks that it be deduced from that fact that Lundell's financial situation was sound, in Knudsen's view, as his fee was not due until those payments.

Knudsen was aware that Lundell had designs to sell and convert this property. Knudsen prepared Exhibit 5, which contains an agreement by Benton to release tracts of real estate which are sold from the contract upon receipt of $1,115 per acre by Benton. Knudsen was aware of Lundell's desire to sell off tracts and foresaw these facts as a way to accomplish funding.

An interesting query is when Knudsen's duty to Benton was complete? "In the absence of an agreement to the contrary or unusual circumstances, a broker's agency of employment and authority terminates when the purpose for which it was created is accomplished." 12 AmJur2d Brokers, section 53, page 1813 (1964). Knudsen states that the November 15 $400,000 payment was part of the downpayment. The Court concludes that, under these special facts, Knudsen's duty to Benton did not conclude on April 13; rather because the November 15 payment of $400,000 was part of the downpayment (which Knudsen admits), Knudsen's responsibility to Benton continued through that date to February 20, 1991. Reynor is authority that the production of a ready, willing and able buyer means one seemingly financially capable of completing the deferred payments. The commission had not yet been earned. So long as the time for payment of the commission was forthcoming, the duty continued.

Knudsen was aware of the Watkins contract. He prepared it. The Watkins contract was for a sales price exceeding 30% of Benton's contract. Knudsen expected to receive compensation for his services in that matter (1% from Lundell). There was no disclosure to Benton of this "sale" by Knudsen. Knudsen was aware that the contract could be recorded by Watkins. This would directly affect Benton's ability to foreclose or forfeit. The Lundell contract provided for a release of acres upon a sale. That clause would have been activated by the Watkins contract. This Court concludes that Knudsen, during the course of negotiations with Watkins, had a duty to disclose those specific events in order to protect Benton's equity and interests.

Knudsen, together with Lundell, persuaded Benton to reduce his price to $6 million, with $1 million down. Knudsen sought to persuade Benton to divide that downpayment into two chunks, $500,000 on execution, and $500,000 on September 15, 1990 (before the crops were harvested), with three installments of $100,000 followed with the balance on March 15, 1994. This is corroborated by the original type on Exhibit 5 prepared by Knudsen, before he left for Oklahoma. From Oklahoma, Knudsen and Lundell persuaded Benton to further reduce the downpayment to $800,000 in the two parts, but to further delay the second part of the downpayment to November 15, with $100,000 installments for three more years, with the balance on March 15, 1997. Lundell and Knudsen admit that most of the "hard negotiations" occurred from Oklahoma.

A prudent realtor should immediately know that his client, the seller, needed to get into position for a crop lien, to assure the payment of the final $400,000. That

should have been uppermost in Knudsen's mind to work out protective measures for the second $400,000.

Then Knudsen authored a letter to Ag Services on March 15 which states "Mr. A.C. Benton will sub-ordinate any advance of credit tendered to Terry Lundell to or by Ag-Services for line of credit on 5,380 acres in Franklin and Butler counties, state of Iowa. If you need any additional confirmation, please let me know." (Exhibits 6 and 7).

That letter indicates "any advance of credit" without restriction, condition or reservation. At that point, Knudsen should have been working for the protection of his client. A projection of 1990 farm operating income, expenses, and net income had been prepared by Knudsen (D-16). It shows a projected net income, including all government payments and grain bin income, less expense, of $584,000. It included a management fee for Knudsen of $30,000. $50,000 government payment was included in those projections, so that the figure would be reduced to $534,000. Knudsen was aware that Lundell was not coming up with all of the $400,000 due on execution, but was borrowing part of it, at least, from Ag Services, by his own admission. If Lundell was borrowing something more than $134,000 of the original $400,000, according to Exhibit D-16, there was a high probability that his client was not going to be paid from the crops. Lundell needed other resources. March 26 rolls around. Benton signs that contract, but does not receive any money because Ag Services had to see a contract to confirm its financing. Knudsen made no inquiry about the UCC-1 to be filed by Ag Services, or the specific amount of its note with Lundell, even in light of the unbridled authority in Exhibit 7. Exhibit 9 did not contain any security interest. It was that

contract that Ag Services relied upon to place its UCC-1 of record.

Knudsen was so far into it at this point that he designed to do little more than to encourage signatures and an agreement. He needed to conclude this matter and transfer possession over to Lundell. He reasoned Lundell, being a resourceful person, would probably find some way to make the payments. Knudsen knew that Lundell was going to sell off some of the farms. He saw that as an additional resource. Too, the yield projections may have been understated. There could be 150 bushel corn and 45 bushel per acre beans. Knudsen foresaw a financial compromise by Benton as another possible out. Ordinarily, the buyer in a land contract is the one who takes the risk of losing his investment, subject to the seller's right to forfeit or foreclose. In this transaction, it was Benton who assumed the risk. Lundell had little to lose if the crop was anything but a total failure. Lundell got possession of 5,381 acres without any of his own dollars.

Knudsen was aware that Benton needed over $400,000 to carry his debt on the North and South Iowa farms. Knudsen also knew that Benton could obtain over $500,000 net cash rentals, including government payments.

Knudsen stated that he never saw a financial affidavit of Lundell's. He cannot profit or defend on that inattention to duty. The only thing that he could remember that Lundell had told him about his resources were the wheat lands in Colorado, custom harvesting, an interest in elevators in Oklahoma, some cattle, and his tomato truck gardening in California. Knudsen had little specifics, yet negotiated this six million dollar deal for his client under

these circumstances which he knew were volatile, grave, and shaky, at best.

Knudsen violated his fiduciary duty to Benton in a myriad of ways. The facts are bizarre. The personalities of the players may have had something to do with some of the freakish occurrences.

Firstly is Lundell. He is an Air Force Reservist in Sacramento. He has tomatoes in California, wheat in Colorado, elevators in Oklahoma, and combines in several states. But little money or equity. He wants to purchase over 5,000 acres of rich Iowa farmland. A real estate agent, negotiating with this man for his client, should have immediately perceived a red flag and applied the brakes until credentials, credit, and financial strengths were checked out. This was not the sale of a two bedroom bungalow in Geneva. This rivaled the sale of the decade in Iowa, as it pertains to non-commercial real estate. These farms required management, sound financing, initial resources, as well as other income to supplement its returns. Knudsen spent no time in Oklahoma inquiring about this stranger who was about to become one of the largest landowners in central Iowa. Lundell was the second Harold Hill, River City's Music Man. Lundell knew he needed Knudsen to complete the scam. Knudsen became putty in his hands, fully shortcutting his best judgments to make the sale of his lifetime with further rewards from Lundell for doing so (management fee and resale commissions). Not one credit reference was given, demanded, or solicited by Knudsen. Knudsen faults Benton, but the principal is justified in relying upon information received from the real estate agent without making an independent investigation. Phillips v. JCM Development Corp., 666 P.2d 876, 886 (Utah 1983). In an action by a real estate agent to

recover a commission, the court in Thompson v. Finch, 195 N.W. 744 (Iowa 1923), held that representations by the agent regarding the financial status of the prospective purchaser was more than a mere expression of an opinion, pointing out that the agent of the seller occupied a fiduciary relationship, the seller was not bound to investigate the truth of the facts stated by the agent as an inducement for his signature on the contract, "nor does it lie in the mouth of the agent to say that his statements should not have been believed by his principal."

Even greater caution should have been taken when only about 6½% of the purchase price was paid, before possession was taken, on a 5,380 acre purchase. One can talk about $800,000 being paid down, but in reality, that is a subterfuge, particularly when one considers that the remainder of the "downpayment" is not secured by a first lien on the crops. That arrangement was orchestrated by Knudsen to make this contractual "marriage." Exhibit 5 shows Knudsen's intent to have a split downpayment. Lundell admits that the hard negotiations occurred from Oklahoma over the phone. They were intended to persuade Benton to split the downpayment. It had not been approved with Benton before his departure, yet Knudsen blazed this path by preparing a contract with those terms and hand-carrying it to Oklahoma. Benton's insecure position was manifest. This was a time for Knudsen to have set down with Benton, his client, and carefully weigh the circumstances. Rather, his purposes became making an attractive deal for Lundell which adds up to an unattractive deal for his client.

Knudsen was fully aware of Benton's mental affliction. Although Benton was brusque and haughty, Knudsen had a duty to take his client in the mental state he found

or misunderstanding, the facts surrounding the failure to disclose the financial ability of Lundell is overwhelming. Some of the occurrences are mind-boggling.

Query: If Benton was aware of Lundell's financing of the original $350,000, why wasn't there some time that Knudsen sat down with Benton and plainly stated it, from where they could have made some projections and jointly deduced whether Lundell could make the required payments? The Court concludes that Knudsen knew Lundell was putting little of his own money into the purchase of the 29 farms. When he received the funds at closing, why didn't Knudsen then relate to Benton that this sale is a risky one, and, specifically inquire from Lundell as to how he proposed to make the November 15 payment, followed by a projected payment of $586,000 for February 20, 1991? The choice should have been given to Benton under the circumstances, where he could intelligently weigh all the circumstances, and then decide to do it or not to do it. If he plunged thereafter, he would have done so after being fully informed. Why, under these circumstances, didn't Knudsen assure that a security interest and UCC-1, the primary instruments needed to protect Benton, was executed and recorded? Nothing should have been more important. Knudsen recorded the contracts the same day. Why didn't he do the same for his client's protective instrument?

Benton did not know the extent of Ag Services' lien before he signed the contract on April 13. Knudsen did in general. Knudsen had a duty to disclose that information at that time. True, there was the March 26 agreement, but Benton treated it as preliminary as no money was paid. Lundell and Knudsen did not as Ag Services used it for its security. Lundell and Ag Services were served by Knudsen, to the detriment of his client.

For such a momentous transaction, there appeared to be a shroud of silence surrounding it accompanied by some real sloppy handling of it. There was a garden variety of contracts (Exhibit D-89). Knudsen drew some. Knudsen's attorney, Knoshaug, prepared Exhibits 3 and 13. No one, including Knudsen, knows who prepared Exhibit 9, which was signed by all the parties on March 26. There are several other phantom, but unsigned, contracts whose genesis or authorship is unexplained. Knudsen shows up at closing without a UCC-1 for Benton's lien. Then, no one knows its eventual whereabouts. Knudsen records the contracts that day to protect Lundell and Ag Services -- Knudsen does not record or even know the whereabouts of the UCC-1 to protect his client. No one obtains a financial statement from the purchaser.

Another peculiarity was Knoshaug preparing Exhibit 3 on March 21. It was given to Cady, Benton's lawyer. Suddenly, Exhibit 9 appears. On March 26 it was signed by the parties, before Cady even responds in writing to Exhibit 3, which was already moot. Cady is not given a copy of the final contract, nor does he attend the settlement conference. Yet Knudsen was aware that there was no security interest in the contract. Knudsen knew of Cady's representation. Knudsen made no effort to advise him, when his lawyer drew the contract without its insertion. Nor does Knudsen request or inquire about the terms of Ag Services' security agreement and UCC-1 filing. Knudsen knew this occurred, or should have known it. Knudsen responds by saying that Benton went ahead and signed the agreement, without a financial statement, without the presence of his attorney, and without knowing the exact extent of Ag Services' UCC-1 and their lien. Why was Knudsen going to be paid $200,000? It was not for the

purpose of being Lundell's farm manager. It was not for the purpose of obtaining additional fees when Lundell sold portions or all of this real estate. It was for the purpose of bringing an able buyer to contract who had the financial strength to pay pursuant to its terms, the circumstances of which were fully explained and disclosed to his principal.

There was no followup to see that Benton's UCC-1, given by Lundell on April 13, was recorded. Knudsen says he believes that Benton was to file it. Benton says that Knudsen took it with him. It is not around. Notwithstanding, under these circumstances, Knudsen should have been vigilent in assuring that his client's protective lien was activated of record. It becomes increasingly important when Knudsen became aware of Lundell's shaky financial posture. The "downpayment" still had not been paid. His obligations to Benton remained. Knudsen did nothing.

Then comes the Watkins disaster. Steven Speilberg could not have written a better script. A young computer designer from Silicone Valley responded to an ad in the San Francisco Chronicle in late April 1990 placed by Lundell. They met and journeyed to Iowa in mid-May 1990. Knudsen was represented as Lundell's farm manager. Soon, Knudsen was back on his typewriter (Exhibit 18). This contract was for $8.2 million with $200,000 down, and the balance on October 1, 1990, with immediate possession. A red Ferrarri was its downpayment.

Knudsen never relayed this information to Benton. Yet, Exhibit 13, the Benton/Lundell contract, provided that the "Buyer shall not sell or assign his interests in this Contract without having first obtained written consent from Sellers, which shall not be unreasonably withheld." This

Watkins contract had some real consequences, in various ways, to Benton had it been carried out. There is another individual, another stranger, who now has an interest in the real estate, with rights to the crops after Ag Services, but before Benton. That the contract was not recorded and Watkins was eventually forfeited out offers no excuse for Knudsen's participation in it without disclosure. The contract could have been recorded -- it eventually was. Knudsen notarized it, which is usually for recording purposes.

Then the final twist was Lundell's service in Desert Storm and the imposition of the relief afforded by the Soldiers and Sailors Act, together with the surprise experienced by the recording of the contract by Watkins after its sale to Goodenow/Gardner.

The Court will not penalize Knudsen for his acceptance of the position of Lundell's farm manager. Benton approved of his being the farm manager. Dual agency is okay if approved. Benton did not approve the Watkins sale, though. It is the generally accepted rule that a real estate agent may not represent adverse parties in the same transaction, absent the consent of both parties. These principles were stated with great clarity in Nahn-Heberer Realty Co. v. Schrader, 89 S.W.2d 142, 144 (Mo. App. 1936):

> "The interests of the buyer and the seller are naturally antagonistic to each other. The broker, in undertaking to arrange terms between them, if he favors the buyer, is necessarily disregarding the interest of the seller, and, if he favors the seller, is necessarily disregarding the interest of the buyer. A circus rider may ride two horses at once around the ring, if they are going in the same direction, but he would meet with disaster if the horses were going in different directions. In Holy Writ it is said: 'Ye cannot serve God and mammon . . .'"

A broker who undertakes to represent both parties is held to a high standard of care. Another Missouri court stated:

> "A broker so unwise as to place himself in the anomalous position of representing adverse parties must scrupulously observe and fulfill his duties to both. And, among other duties which a broker owes to his principal is that of keeping his customer fully informed of all facts pertinent to the transaction."

Knudsen is personable. A lot of what he said was credible, with some exceptions. He acted without malice. But he was playing hardball in the big leagues. Knudsen donned far too many hats. He was Benton's agent; Lundell's farm manager; Lundell's agent to sell three of the farms; the scrivener of some "contracts" with Lundell; collector of financing information for Ag Services; Lundell's agent with Watkins; Benton's agent to resell the real estate; and Watkins' agent in the latter's eye. He eventually forgot who was his original client and disregarded that duty.

Some of the personalities seemed cut from some of Damon Runyon's works. Knudsen became so smitten with the sale's income potential to him, past and future, including the annual management royalties, that he failed in his duty to his client. Knudsen violated his duty to be loyal and his duty to fully disclose and inform.

Nor does the Court find that Benton waived performance by Knudsen. The essential elements of the existence of a right, knowledge of that right, and intention to give it up, was not proven. Nor was there any accord and satisfaction or release arising from the reduced commission agreed to on the Goodenow/Gardner deal.

* * *

There is a clear distinction between the theories of recovery in tort and contract. Damages, not even anticipated, are recoverable in tort, while only such damages as were reasonably contemplated by the parties at the time of entering into the agreement are recoverable for a breach thereof.. R.E.T. Corp. v. Paxton Co. Inc., 329 N.W.2d 416, 420 (Iowa 1983). Damages for breach of contract are limited to "those injuries which may reasonably be considered as arising naturally from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of the parties, at the time of contracting, as a probable result of the breach. Meyer v. Nottger, 241 N.W.2d 911, 920 (Iowa 1976).

The principle underlying allowance of damages is to place the injured party in the same position, so far as money can do it, as he would have been had there been no breach of duty, that is, to compensate him for the injury actually sustained. Schiltz v. Cullen-Schiltz & Associates, Inc., 228 N.W.2d 10, 20 (Iowa 1975). The ultimate purpose is to place the injured party in as favorable position as though the contract had been performed. Golden Sun Feeds v. Clark, 140 N.W.2d 158, 161 (Iowa 1916).

Judicial remedies for breach of contract serve to protect one or more of the following interests of the promisee:

(a) "Expectation interest" in having the benefit of the bargain, placing the promisee in as good a position as if the contract had been fully performed;

(b) "Reliance interest" in reimbursement for the loss caused by reliance on the contract, placing the promisee in as good a position as if the contract had not been made; or

(c) "Restitution interest" in having restored to the promisee the benefit conferred upon the party in breach.

Each remedy tailors the reimbursement to the loss sustained. Recovery based on expectation interest may include lost profit because the promisee is reimbursed for the actual value of the contract had it been performed. Reimbursement based on reliance interest includes expenses of preparation, performance, or lost opportunities to make other contracts. Potter v. Oster, 426 N.W.2d 148, 150 (Iowa 1988).

Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made. Loss may be foreseeable as a probable result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know. Restatement (2d) of Contracts, section 351.

Specific rules for damages are subordinate to the general rule that compensatory damages are designed to put the injured party in as good a position as he would have been if performance had been rendered as promised; a given formula is improvidently invoked if it defeats a commonsense solution. . . . Of course recovery of the injured party is limited to the loss he actually suffers by reason of the breach; he should not be placed in a better position than he would be in if the contract had not been broken. DeWaay v. Muhr, 160 N.W.2d 454, 458-459 (Iowa 1968).

If Knudsen would have performed his duty with loyalty and full disclosure, the contract with Lundell would not have occurred. As Benton puts it, "I would not have done the deal." Benton would not have taken the gamble. A disclosure of Lundell's assets and financial background,

together with the disclosure that $350,000 of the original $400,000 was being advanced by Ag Services, would have sunk the contract.

Benton could have realized $531,000 in net cash rentals in the crop year 1990, including government payments less expense and any defaults in payment. That is less than the $600,000 figure used by Knudsen to persuade Benton that a $800,000 downpayment was financially advantageous. It is less than Benton proposes. The Court concludes the appraisal by Wearda represents a fair cash rental ($460,000, farmland; $7,000, house and outbuildings; $59,000, grain storage; $50,000, CRP) of $576,000 gross for 1991. Using 3% for inflation, this is reduced to $559,000 for 1990. The Court further reduces that sum by 5% for management, bin and building repair and non-collectibility, leaving $531,000 net cash rentals. As it was, he received $400,000 from Lundell and Ag Services on April 13, 1990. In addition, Benton eventually received $12,696.84 from Midwest Soya. Benton also received $1978.05 (Simons-Lowery; Kjarsten). Benton paid out $35,000 for bin rental to Lundell, which diluted what he received from the sale and which he would not have done (some of this was paid by machinery exchange), absent the contract. At the close of the plaintiff's evidence, this Court granted the defendant's motion to restrict the plaintiff to the five items of damage set forth in Exhibit 46. It did not include the $35,000 bin rental as a reduction of the $400,000 credit paid by Lundell.

Knudsen claims he was prejudiced by the failure of Benton to supplement his answers to Interrogatory No. 4 which relates to an itemization of damages. That interrogatory set forth $1,850,000 in damages. None specifically references the expected 1990 net cash rentals less the sums paid by

Lundell. The answers were more tailored to a combination of the expectation and reliance interest. Net cash rentals less monies actually paid is more in line with the reliance theory. But the failure to provide financial information on Lundell and to disclose was rampant throughout the trial and previous discovery. The defendant secured information on the rentals from attorney Cady's files and introduced it as probative evidence (Exhibit D-94). This is not like White v. Citizens National Bank of Boone, 262 N.W.2d 812 (Iowa 1978), as the plaintiff is not asking for more damages than set forth in the answer. Having substantially failed on its expectation theory, it did succeed on a reliance theory which is within its pleadings of breach of fiduciary duty. Exhibit 46 sets forth the plaintiff's estimate of their damages. With the multitude of discovery which occurred in this matter, the defendant cannot say he was prejudiced or ambushed. Failure to be loyal and to disclose loomed everpresent at all times.

Further, the Court concludes that Benton failed to mitigate his damages by staying on top of things and getting a UCC-1 filed earlier. He knew about the need to record it. He had a lot of experience with them in his dealerships. Lundell was willing to sign a UCC-1 at any time, so long as it was inferior to Ag Services. Benton could have advised all potential purchasers of his UCC-1 position well before the harvest. No one can complain that he did not have a security interest, except some other lienholder or Lundell.

A plaintiff seeking recovery for the cost of damage caused by another has a duty to minimize his damages. The duty of proving plaintiff's failure to mitigate is on the defendant, which must be pled. It was proven, with limitations, and pled. Iowa Power & Light Co. v. Board of

Water Works, 281 N.W.2d 827, 833 (Iowa 1979). The need to mitigate exists in contract as well as tort. Harmsen v. Dr. McDonald's, Inc., 403 N.W.2d 48, 51 (Iowa App. 1987); DeWaay v. Muhr, supra.

Although Knudsen breached his duty, Benton did not have his ear to the ground and did not act reasonably to minimize his damages. In fact, he exacerbated them by buying more farm ground from Metropolitan. He could have gotten Cady involved much earlier. Benton admits he had serious concerns about Lundell soon after April 13. Yet, he did little but to scold and ridicule in a couple confrontations. Rather, he should have circled the wagons and prudently minimized the effect of the breach. He could have done so without compromising his position and with relative small expense. The Court concludes that an additional $12,000 could have been obtained by little diligence on Benton's part, after being aware of the lack of the UCC-1 filing for him. Lundell admits to "netting" that sum.

Lastly, there is the matter of attorney fees. The Court concludes that the charge by Cady for the Watkins quite title matter ($15,000) is a direct result of Knudsen's breach, surely in contemplation of the parties, when Knudsen, combined with Lundell, undertook to sell the properties to Watkins for Lundell (Exhibit 63). That fee was reasonable under the circumstances. Knudsen had a continuing duty until the "downpayment" was due. Benton did not approve of the dual representation in the Watkins matter.

As it pertains to the Soldiers and Sailors Act, its arising in the Lundell matter was not contemplated by Knudsen (or by Benton, for that matter). It was not within that contemplation that the contract would not be capable of being forfeited due to Desert Storm. Saddam Hussein was not in

Kuwait at that time. War is typically not treated as foreseeable. Bishop v. U.S., 308 F. Supp. 228 (E.D. La. 1969). Some of the title work needed to be done in any event for the Goodenow/Gardner transaction.

Art Cady, Sr., stated he believes that $5,000 for the attorney fees for the forfeiture of the Lundell contract is too low, yet offers no itemization. A reasonable attorney fee for the forfeiture of the Lundell contract is $8,750.

Neither does the Court award any damages as it relates to the discounts on the South Iowa farms or the need to sell the farms acquired from Met Life. Benton entered into the Met Life contracts, which severely reduced his cash flow and increased his need for funds, after being aware of problems with Lundell. It was done while on one of his buying sprees. The discount and sale would have been necessary, in any event, with or without the $400,000 payment. Ronald Nielson's testimony on this issue was credible. The proximate cause of the discount on the South Iowa farms was prompted because of those needs, more so than the fact that the additional $350,000 was advanced by Ag Services, which was undisclosed to Benton. Nor does the Court award any damages for the amounts Benton paid to Lundell for his release as these were not foreseeable. It was paid to obtain possession in order to avoid the stay and to obtain funds from the resale to Goodenow/Gardner.

The severe dearth of liquidity was prompted by the purchase of the Met farms at a time when Benton was aware of Lundell's shaky financial posture. Those purchases were the result of Benton's bullish approach to financial ventures. These purchases were not a natural result of Knudsen's failure or the contract. It was an independent decision on Benton's part at a time he knew the Lundell contract would

Lastly, and more important, this Court has found Knudsen violated his duty to Benton. He cannot benefit from that failure.

* * *

Knudsen-King Management Company asserts it was not in existence until August 21, 1990, and Knudsen was not an employee until November 9, 1990. It contends the plaintiffs failed to prove its liability for the debts of Don Knudsen or King Management Co.

Firstly, some of the breached occurred after November 9, 1990; secondly, the Lundell contract was not defaulted until November 15 when the last part of the downpayment was due; thirdly, the full commission would not have been earned until February 20, 1991; fourthly, Knudsen-King maintained the counterclaim and cannot be said to not have assumed any liabilities attaching to services performed in which the requested commission inhered; and lastly, this issue, raised at the conclusion of trial, was not an issue framed by the defendant in its pretrial statement of issues or in its extensive motion for summary judgment.

This defense is totally without merit.

* * *

Judgment is entered in favor of A.C. Benton and Neva C. Benton against Knudsen-King Management Company in the sum of $128,075, plus interest at ten (10) percent from September 11, 1991. Punitive damages are DENIED.

The counterclaim urged by Knudsen-King Management Company against the plaintiffs, A.C. Benton and Neva C. Benton is DISMISSED.

Judgment for court costs should be entered against the defendant, Knudsen-King Management Company, Clerk to assess.

Included in those costs shall be the original transcription costs for the depositions of David Benton and William Miller.

Expert witness fees of $150.00 shall be assessed for the witness G.B. Evans.

Dated this 16th day of February, 1994.

BY THE COURT:

[redacted]

RONALD H. SCHECHTMAN,
Judge of District Court

Clerk to mail/provide copies to:
Lawrence Marcucci
James Sayre
Hayward Draper