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Supreme Court of Texas.
Basic Capital Management, Inc., American Realty Trust, Inc., Transcontinental
Realty Investors, Inc., Continental Poydras Corp., Continental Common, Inc.,
and Continental Baronne, Inc., Petitioners,
v.
Dynex Commercial, Inc. and Dynex Capital, Inc., Respondents.
No. 08-0244.

September 10, 2009.

Appearances:
William V. Dorsaneo, III, Southern Methodist University Dedman School of Law, Dallas, TX, for the petitioners.
Deborah G. Hankinson, Hankinson Levinger LLP, Dallas, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-0244 Basic Capital Management v. Dynex.
MARSHALL: May it please the Court, Mr. Dorsaneo will present argument for the petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF WILLIAM V. DORSANEO, III ON BEHALF OF THE PETITIONER

ATTORNEY WILLIAM DORSANEO, III: May it please the Court, as the case reaches the Court today, there are two claims discussed in detail on the briefs on the merits. The New Orleans loan claims and the $106 million commitment claim. I am going to restrict my remarks to the $160 million claim so that we can reach the issues with respect to parties able to enforce that commitment during the oral submission. Basic Capital Management and Transcontinental Realty and American Realty sued Dynex Commercial for damages for breach of the $160 million commitment. The case was tried to a jury and the jury made favorable findings in support of a recovery for all of the plaintiffs. Post verdict, although the Court had ruled otherwise before verdict, the defendants moved the Court to preclude damage recovery on the part of Transcontinental and American Realty on the basis that they weren't parties or third-party beneficiaries of the $160 million commitment. The trial court granted that motion and the Court of Appeals affirmed. So the key issue with

respect to the parties' issue in this case is who can enforce the commitment and recover damages for its breach. Can Basic only do that as an available party or can the other two plaintiffs that are real estate investment trust representative in the negotiations and business dealings between the parties by Basic Capital recover too.

JUSTICE DAVID M. MEDINA: Are you going to talk about the third-party beneficiaries?

ATTORNEY WILLIAM DORSANEO, III: Yes, Your Honor, that's what I'm going to get to right now. There are two reasons, three in our brief, but two that I'm going to be able to reach today, I believe, why the REITs should be able to recover damages. One is that they are third-party beneficiaries under the commitment as a matter of law. The other is that under Rule 93(2) of the Texas Rules of Civil Procedure as a result of the way the case was litigated during the pretrial phase, Dynex Commercial was unable and should have been precluded from arguing about their ability to recovery.

JUSTICE DAVID M. MEDINA: That's the waiver issue. Are they, is the SABRE the acronym? Are they specifically identified in the contract as a beneficiary?

ATTORNEY WILLIAM DORSANEO, III: They are, Your Honor, and maybe the best way to get to this quickly is we've provided the bench book, both of us have, is to ask the Court to look at Tab 3 in the bench book, which explains quite a lot about the relationship of the plaintiffs to each other to these single-asset bankruptcy remote entities and to the transaction. The $160 million loan commitment, which is under Tab 2, does say in its first part dealing with the identity of the borrowers that the borrowers are single-asset bankruptcy remote entities acceptable to the lender. It doesn't say anything more about them or where they would come from or when they would be designated or anything like that. This case was tried, also the commitment does not mention the names of the real estate investment trusts, ART, TCI and earlier on, TCI's predecessor that merged with TCI/CMET. In the diagram, we get a pretty clear picture of the relationship of the parties. BCM is the advisor, agent and manager.

JUSTICE HARRIET O'NEILL: Well the agent is very much at issue.

ATTORNEY WILLIAM DORSANEO, III: Well I'm using agent in a broad sense. It's the advisor and manager of the REITs. What it does is everything for the REITs in terms of day-to-day operations. The REITs have no employees. They have officers and directors, but they have no employees. BCM is responsible for obtaining capital for the REITs so they can engage in their business of buying and selling real property for a profit.

JUSTICE NATHAN L. HECHT: Did BCM own part of the REITs?

ATTORNEY WILLIAM DORSANEO, III: It owned stock in the REITs, Your Honor, they're a public company that owns some percentage of the stock, but they're public companies. It doesn't compete with the REITs for the buying and selling of properties. That's what they do. It's perfectly clear from a lot of testimony in the case and I think it's absolutely undisputed that BCM was acting for the REITs when the loan commitment deal was made with Dynex Commercial. Even though they're not named, even though single-asset bankruptcy remote entities are named, those single-asset bankruptcy remote entities would have been formed as wholly owned subsidiaries of the REITs. Wholly owned subsidiaries formed at the very end of a drawdown transaction under the commitment in order to hold legal title to the property. They're called single-asset remote entities because the idea is that if something goes wrong financially or economically, it will be easier for the lender to

recover the property under those circumstances.

JUSTICE HARRIET O'NEILL: But as I understand your argument, we don't really need to get into the question of whether BCM can assert claims on behalf of these others. Your main argument is if there was going to be an issue about that, it had to be put an issue by verified pleading.

ATTORNEY WILLIAM DORSANEO, III: Well that's the other part of the argument, Your Honor. We think that the lawyers in the case tried it on the basis that there wasn't a verified pleading and that's why there isn't a jury submission on third-party beneficiary with respect to ART and TCI/CMET, but quite frankly, we believe the record shows from top to bottom that it's undisputed that the third-party beneficiary test under Texas law for the REITs is satisfied because the loan commitment was a third-party beneficiary contract. It was not for BCM to borrow money. It was for these single-asset bankruptcy remote entities, nominees of the REITs to borrow the money.

JUSTICE DAVID M. MEDINA: It's clearly expressed in the contract?

ATTORNEY WILLIAM DORSANEO, III: Not clearly expressed in the contract. It's clearly expressed in the evidence in the case.

JUSTICE DAVID M. MEDINA: What is that evidence?

ATTORNEY WILLIAM DORSANEO, III: Six weeks of trial, during six weeks of trial during a substantial part of it, the relationship between the parties, plaintiffs was explained. It was explained that these single-asset bankruptcy remote entities are wholly owned subsidiaries and would be wholly owned subsidiaries of the REITs to hold the property for the REITs. That's the way the business is done. That's the normal way that it's conducted. To say under those circumstances that the REITs are not third-party beneficiaries makes very little sense. To say that only the single-asset bankruptcy remote entities are possible third-party beneficiaries and that ends the inquiry makes very little sense. It begins the inquiry. These third-party beneficiary SABREs if that's what you want to call them, were not formed.

JUSTICE DAVID M. MEDINA: Do you prevail because of that evidence or do you prevail because of that and the fact that there wasn't a verified denial.

ATTORNEY WILLIAM DORSANEO, III: That's an independent reason, Your Honor. Undisputed evidence establishes third-party beneficiary status as matter of law and.

CHIEF JUSTICE WALLACE B. JEFFERSON: And if it was a matter of fact, you're saying that the way the case was tried and the trial court's rulings, you were precluded from submission on that?

ATTORNEY WILLIAM DORSANEO, III: We were precluded for a submission, but we didn't request a submission. Perhaps I should go, let me finish my thought on the third-party beneficiary first. It doesn't end the inquiry that we have single-asset bankruptcy remote entities. It merely begins it. The reason why it merely begins is is that these single-asset bankruptcy remote entities except for one time, when there was one drawdown, were never formed. So even if the Court thinks that the REITs don't immediately step into third-party beneficiary status, it is also Texas law under Fish v. Tandy and other cases that an entity or a person who would form a company for a specific business purpose can sue on behalf of that company if it's not formed, particularly if it's not formed because of the other side's breach and that's what happened in this case.

JUSTICE DALE WAINWRIGHT: Normally, third-party beneficiaries will reach that conclusion by looking at the terms of the contract rather

than six weeks of evidence after a dispute breaks out.

ATTORNEY WILLIAM DORSANEO, III: The law is on the point that they don't need to be named in the contract as long as they're sufficiently identified.

JUSTICE DALE WAINWRIGHT: That's not what I said.

ATTORNEY WILLIAM DORSANEO, III: As long as they're sufficiently identified and our position they are more than sufficiently identified because when the relationship of the plaintiffs to the transaction is e explained, it's perfectly plain that those single-asset bankruptcy remote entities are under the REIT umbrella. Now our second argument, if I can proceed to that, our second argument under Rule 93(2) is a more straightforward procedural argument. During the pretrial phase of the case, the defendants never denied the capacity of these REITs to prosecute the claims as REITs and it was hotly contested during the trial as to whether there would need to be any kind of a submission during the charge conference of a liability claim on the part of the REITs. The trial judge overruled the defendant's objection to the charge on the basis that they hadn't filed a proper denial under Rule 93 and the case proceeded to verdict after that. The basic case upon which we place reliance in order to establish that, in effect, ownership of a claim is a waivable capacity defect and not an elemental problem with the claim is this Court's opinion 20 years ago in Pledger v. Schoellkopf. That opinion holds perhaps not in so many words, but it holds that ownership of the claim is a waivable capacity issue meaning that if you don't contest the capacity, the ownership of the claim by a verified denial during the pretrial phase of the litigation, you can't contest it later. Reliance upon Pledger v. Schoellkopf and a large number of cases that followed it led the trial lawyers to not make any submissions with respect to the third-party beneficiary status of these REITs.

JUSTICE HARRIET O'NEILL: How would that have been submitted?

ATTORNEY WILLIAM DORSANEO, III: You could simply ask in question number one whether the REITs entered into the loan commitment.

JUSTICE HARRIET O'NEILL: And isn't that a problem. I mean it could have caused jury confusion couldn't it?

ATTORNEY WILLIAM DORSANEO, III: Or you could have a separate question asking I think whether you're a third-party beneficiary involves questions of law, but it's probably a mixed question of law and fact and it could be asked if they're a third-party beneficiary and the jury could have been told the definition.

JUSTICE HARRIET O'NEILL: Well that was my question. The premise is that it would have been easy to submit them, but I'm not so sure it would have been easy to submit them in the predicate questions, but you say it would be easy to have said.

ATTORNEY WILLIAM DORSANEO, III: I don't whether it would be easy, but it would have certainly been possible to do. The point is that it wasn't done because the objection to the charge was overruled and that had a devastating effect after because it was too late to fix the problem after the favorable verdict came back from the standpoint of damages for ART and TCI/CMET and then after verdict, to sustain a motion saying that there's a mismatch between the pudding and the proof because there's no liability finding for the REITs, there's no showing that they own these claims is, in effect, reversing ground by the trial judge when it's too late for anything to happen. If this Court doesn't want to approve Pledger v. Schoellkopf, the appropriate thing to do is to reverse and remand this case for another ground, but we think the third-party beneficiary argument would probably be sufficient without

Pledger v. Schoellkopf. The truth of the matter really appeared of record that these REITs were the third-party beneficiaries and the single-asset bankruptcy remote entities are part and parcel of the REITs. So with or without Fish v. Tandy, I think the third-party beneficiary argument should work. Either the REITs could bring the claim for the unformed subsidiaries or the REITs could simply bring the claims in their own behalf because in truth and in fact, they were the parties buying and selling these properties being financed by using the single-asset bankruptcy remote entities.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any questions? Thank you, counselor. The Court is no ready to hear argument from the respondents.

MARSHALL: May it please the Court, Ms. Hankinson will present argument for the respondent.

ORAL ARGUMENT OF DEBORAH G. HANKINSON ON BEHALF OF THE RESPONDENT

ATTORNEY DEBORAH HANKINSON: May it please the Court, there are multiple reasons why the trial courts granted a judgment notwithstanding the verdict and the Court of Appeals affirmance of that judgment are proper. Far too many reasons to be able to even discuss during the 20 minutes of this argument today and many of the reasons that the Court of Appeals did not even reach. None of these reasons are preempted by any of the arguments that you have heard today from counsel. Petition for review was directed towards capacity as opposed to all of the other issues that have to be decided for that issue to matter in this case. It's our position that capacity is not at issue, but even if it were, it does not change the disposition of the case.

JUSTICE HARRIET O'NEILL: Well it does seem to me that the trial court did switch in midstream, right or wrong? The standing issue was decided and then changed his mind after the verdict.

ATTORNEY DEBORAH HANKINSON: It did not, Your Honor.

JUSTICE HARRIET O'NEILL: Why?

ATTORNEY DEBORAH HANKINSON: That is not what the record reflects happened in this particular case. There were apparently some rejudgment motions filed with the question of standing. The trial court denied that. As this Court said of Lovato that standing concerns whether there's a.

JUSTICE HARRIET O'NEILL: I thought that they granted.

ATTORNEY DEBORAH HANKINSON: I'm sorry, they granted that there was standing.

JUSTICE HARRIET O'NEILL: Right.

ATTORNEY DEBORAH HANKINSON: Your Honor, I have no quarrel with that ruling. There was a pleading in this case that these two REITs were third-party beneficiaries. That pleading was sufficient to give them standing to pursue claims. There was no change in any of that and as they say in their brief, these issues were hotly contested at trial and tried.

JUSTICE HARRIET O'NEILL: Was a piece of the standing summary judgment whether BCM could raise the REITs' claims?

ATTORNEY DEBORAH HANKINSON: No.

JUSTICE HARRIET O'NEILL: So the summary judgment was strictly that the REITs were standing.

ATTORNEY DEBORAH HANKINSON: Yes, they had standing to be able to pursue what the pled so it was not at issue. I think it's important and I think the issues can be put in context including the two that the

professor has addressed that I would like to talk with the Court about as well.

JUSTICE NATHAN L. HECHT: Just before you wish to follow up on Justice O'Neill's question, you say they have standing but no claim right? I mean, you have standing to pursue the claim they made, but since they weren't parties to their own commitment, they can't recover.

ATTORNEY DEBORAH HANKINSON: They pled, Your Honor, third-party beneficiary. That became an element of their claim that they were required to prove. If they could prove it, then they can recover, but as a matter of law, they are not third-party beneficiaries and so as a result, they cannot recover. That's what the pleading says. That's what was tried. It is as simple as that. There's no changes horses midstream. I think it's important understanding what we're dealing with and to put these issues in perspective to look at this transaction because that's been one of the issues, I think, in the case and if I could ask the Court to look at our bench materials, number 3, which is the $160 million commitment and go to the very back and start with the last pages of that. It's a letter of January 29, 1998. There were two transactions here that were intertwined. This letter shows in the first paragraph that what was happening here was Dynex was going to assist BCM in the first paragraph, first and foremost, the two transactions are intertwined. Unless Dynex receives the firm commitment to finance an acceptable dollar amount of stabilized apartments with permanent loans, we will be unable to fund your buildings in New Orleans. BCM, which is a privately held company by the Phillips Family Trust was needing help with some distressed buildings in New Orleans. It was outside Dynex's area. They agreed to do it.

JUSTICE NATHAN L. HECHT: But they weren't BCM's buildings right?

ATTORNEY DEBORAH HANKINSON: BCM, that point in time, Your Honor, I'm not sure whose buildings they were. I'm really not.

JUSTICE HARRIET O'NEILL: But there were separate entities that were sent up to carry the notes on this.

ATTORNEY DEBORAH HANKINSON: Well the separate, later on there were, Your Honor, that's correct. Later on there were as part of the finances. The point is.

JUSTICE NATHAN L. HECHT: And those entities were subsidiaries of ART and TCI?

ATTORNEY DEBORAH HANKINSON: No, just CMET.

JUSTICE NATHAN L. HECHT: Of CMET, right.

ATTORNEY DEBORAH HANKINSON: Ultimately they were set up to be part of CMET. But you have the New Orleans piece of it. The point that's important here. Yes, sir.

JUSTICE NATHAN L. HECHT: But just to make sure, one of the things that's confusing it says we will be unable to fund your buildings and there seems to be not much contest in the case that they're not BCM's buildings, that they're CMET's building or the SABREs [inaudible].

ATTORNEY DEBORAH HANKINSON: BCM, well at that point in time, I'm not sure whose buildings they were, Your Honor, but BCM provides management and advisory services to not just these REITs. The interesting thing about it is there are multiple other REITs as part of the Phillips, as part of this. There are multiple REITs. BCM provides management and advisory services and does things like this to go out in the market. It's a company with over $3 billion worth of assets. It's very difficult to keep track of ownership. The point of this is that if you look at that and see that what they were requiring was this commitment to $160 million in exchange for doing the funding for these three unstabilized buildings. You go on to the next letter and you see

in that letter it follows up with paragraph 8 of the first one and this one that there was a liquidated damages provision that was included in the event that Dynex did not get the $160 million. There was a $2 million liquidated damages provision. So then you go to the next document, which lists 10 apartment buildings.

JUSTICE DALE WAINWRIGHT: Which document are you on?

ATTORNEY DEBORAH HANKINSON: Now on the January 30 letter and you see 10 apartment buildings that they were agreeing to submit totaling $75 million, part of the $160 million.

JUSTICE NATHAN L. HECHT: Again, with respect to the liquidated damages provision, it may not be BCM's buildings. I mean, doesn't it reflect that they were third-party beneficiaries.

ATTORNEY DEBORAH HANKINSON: No, sir.

JUSTICE NATHAN L. HECHT: So we were talking about somebody's property that's not BCM's.

ATTORNEY DEBORAH HANKINSON: It does not, it does not.

JUSTICE NATHAN L. HECHT: Why not?

ATTORNEY DEBORAH HANKINSON: It does not because you need to go to the last document as well to see what the nature of the commitment was. What I'm laying is the groundwork. The $160 million commitment was for Dynex's benefit. It was the consideration to Dynex for doing the funding on the New Orleans' loans. This document, which is the last one, the one on top in Section 2, is a unilateral option contract in Dynex Commercial's favor. It is not a loan document.

JUSTICE NATHAN L. HECHT: But I suppose once it was accepted.

ATTORNEY DEBORAH HANKINSON: No, sir.

JUSTICE NATHAN L. HECHT: Mine's both sides.

ATTORNEY DEBORAH HANKINSON: No, when it was accepted by BCM and it was only accepted by BCM, it established BCM's obligation to bring to Dynex $160 million worth of loans that met the parameters of these pages, but these parameters were not definite loan terms. They don't meat the T.O. Stanley Boot requirement. You don't have maturity dates. You don't have amounts. You don't even have the entities who are the borrowers.

JUSTICE HARRIET O'NEILL: Wasn't all that decided in the breach of contract question?

ATTORNEY DEBORAH HANKINSON: No.

JUSTICE HARRIET O'NEILL: Because I know it was hotly disputed who breached.

ATTORNEY DEBORAH HANKINSON: There is a contract. There's no question, but it is a unilateral option contract, okay? Dynex has the, they couldn't just submit anything and Dynex had to fund it. You will notice all the terms in here that are within Dynex's discretion. It was binding. There's no question.

JUSTICE NATHAN L. HECHT: There must have to be, there must be some requirement reasonableness or it wouldn't even be enforceable.

ATTORNEY DEBORAH HANKINSON: Correct, but it's not reasonableness. Note that we have to approve the entities. Note that there are all these terms. The point is.

JUSTICE NATHAN L. HECHT: But you could have just said no, no, no, no, no, give us $2 million.

ATTORNEY DEBORAH HANKINSON: We could have. What would have happened is there are parameters here and certainly yes, there's a reasonableness requirement and had they submitted something.

JUSTICE NATHAN L. HECHT: That's what I asked earlier and you said there was more than that. It seemed to me the most you could, the most Dynex could ever say is well this is not reasonably acceptable to us.

ATTORNEY DEBORAH HANKINSON: That's correct, Your Honor, and it.

JUSTICE NATHAN L. HECHT: They couldn't just say no, no, give us $2 million.

ATTORNEY DEBORAH HANKINSON: That's correct. It is, but it is a unilateral option contract that gave Dynex the ability to say yes, this one meets the requirements or no, it does not meet the requirements.

JUSTICE NATHAN L. HECHT: So what legal point does that relate to? I hear you that they didn't bring qualifying loans, but where do I plug that in to the legal issues here?

ATTORNEY DEBORAH HANKINSON: The reason I plugged into the legal issues, Your Honor, is because it goes to multiple issues whether there was tender of performance, which there was not because they gave us one loan under this and never another one.

JUSTICE HARRIET O'NEILL: So this relates to a no-evidence point. I mean, I understand breach of contract was submitted.

ATTORNEY DEBORAH HANKINSON: It relates to understanding what the transaction. The transaction, they have set up a third-party beneficiary. This was done for the benefit of the REITs and, therefore, for the parents. Now how they pick these two particular two REITs, I'm not sure because it's not in the record anywhere because there are multiple, I'm sorry multiple REITs that are in this set of companies.

JUSTICE NATHAN L. HECHT: I'm sorry, when you said this was done for the benefit of the REITs, what did you mean "this?"

ATTORNEY DEBORAH HANKINSON: Well, this document, the commitment was not done for the benefit of the REITs.

JUSTICE NATHAN L. HECHT: What done?

ATTORNEY DEBORAH HANKINSON: It was done for Dynex's benefit as consideration for funding the New Orleans loans. That's what these documents show. And that is very clear from the language of these documents and that's what the evidence in this trial shows and that is critical, Justice O'Neill, to the question of third-party beneficiary. So if we look at the question of third-party beneficiary, in the context of that, we know that as Justice Wainwright said, the documents control. We have both the Stein opinion and the MCI opinion that showed the parameters for deciding what is a third-party beneficiary. The fact that a contract is intended to benefit someone must be clearly spelled out in the document itself and it must indicate the party's intent to benefit that third party directly. That's why it's important to understanding the transaction.

JUSTICE HARRIET O'NEILL: You'd agree that the SABRE's were intended beneficiaries.

ATTORNEY DEBORAH HANKINSON: I do not agree with that. I believe that they are incidental beneficiaries of this. They are not intended beneficiaries of this. If anybody is it's them, but I don't think they are because of the nature of the transaction. It was consideration for doing the New Orleans loans that Dynex would never have done so that they could get properties that met their business model.

JUSTICE HARRIET O'NEILL: Here's why I'm confused. Okay, it doesn't matter if it's consideration. It's an agreement.

ATTORNEY DEBORAH HANKINSON: That's correct, but.

JUSTICE HARRIET O'NEILL: It's a contract and we've go to apply it.

ATTORNEY DEBORAH HANKINSON: That's right and the terms of the contract indicate the intent to benefit Dynex. That is my point. There is no intent indicated in here to benefit any third-party beneficiaries. There are two kinds under the law. There is a creditor beneficiary as this Court looked at in Stein where there is a legal duty owed to someone that the contract then satisfies. We certainly

don't have that. There was no legal duty owed to a REIT. Then there is a donor beneficiary, which means it's purely a donation that you get to benefit from this contract.

JUSTICE NATHAN L. HECHT: Let me ask you, Transcontinental 4400 got a loan, $6 million right? Under this agreement.

ATTORNEY DEBORAH HANKINSON: Correct, that was the only one they submitted to us.

JUSTICE NATHAN L. HECHT: Right and if they had come in and they had said if Dynex had said oh well yes, they're acceptable, but we're just not going to do it anymore, the market's not favorable to us and we just decided even though it falls within the agreement, we're not going to do it. Would that have been a breach?

ATTORNEY DEBORAH HANKINSON: I think it could have been, Your Honor, because it is a contract.

JUSTICE NATHAN L. HECHT: So it has some benefit.

ATTORNEY DEBORAH HANKINSON: But it is not, the intended beneficiary has to be on the face of the document and intent in the contract and it is not here. They are not a creditor beneficiary. They are not a donor. There's not anything on the face of this that indicates which of these REITs that BCM is advising because there are other ones besides these two were "intended" beneficiaries of it, but there's absolutely no duty.

JUSTICE HARRIET O'NEILL: The SABREs are though. The loan commitment specifically refers to money going to the SABREs. So it seems to me if you buy the premise that they are intended beneficiaries of the loans, then the question is can the REITs assert those claims on their behalf.

ATTORNEY DEBORAH HANKINSON: They cannot, Your Honor. The REIT, these SABREs were never formed and not because we didn't do anything, but because they never submitted the loans to us. Remember, the document before that shows 10 documents? It shows 10 loans. One of them was submitted. None of the rest were ever submitted. They were required upon signing this commitment to submit this $160 million to us. There's a timing requirement in here. They did not do it.

JUSTICE HARRIET O'NEILL: But isn't that what the jury found though? The jury found that they did.

ATTORNEY DEBORAH HANKINSON: That they did what?

JUSTICE HARRIET O'NEILL: That they did bring projects that weren't funded.

ATTORNEY DEBORAH HANKINSON: Oh that's in, they did not. That is one of the other legal points that's a subject of the judgment notwithstanding the verdict that they did not tender performance. There are five witnesses from the other side who testified in this case that they never submitted anything else to us beyond the one that Justice Hecht mentioned and that there was not anything that they did not fund that they wanted to do as a result of that. They took their business elsewhere because they got a better interest rate someplace else so they never tendered. That's another JNOV ground, Your Honor, is the failure to tender.

JUSTICE HARRIET O'NEILL: But that's not before us. That would be.

ATTORNEY DEBORAH HANKINSON: It's in the briefing, Your Honor. We raised it in the briefing and it was another matter in the Court of Appeals.

JUSTICE HARRIET O'NEILL: Well that's what I'm saying. I mean, that would be an evidentiary point for the Court of Appeals right?

ATTORNEY DEBORAH HANKINSON: But here's what happened, Your Honor, the other thing that is also before you. So we go through the summer

and in the fall, the interest rates change and then there's a conversation between Dynex and BCM about going forward and BCM, Dynex at this point says we don't want to do business with you all anymore so they spend the next couple of months negotiating out another deal and you will find it in number 4 in your materials and this is an important fact too because what happened here was, there are two letters in here that reflect the agreement. They negotiated additional funding on the Denver Merchandise Mart transaction. They also agreed that they would sign a commitment to fund the Hickory Center transaction, which they hadn't done before. That's Dynex. And as a result of that, more consideration, if you look at page 2 of the January 7 letter, you see cancellation of the $160 million DCI commitment. Simultaneously with the completion of the two merchandise mart transactions referenced above in execution by DCI and BCM of the letter agreement of even date regarding the financing, BCM will release DCI from the $160 million commitment with a current balance on this date of $154 dated February 16. We never had.

JUSTICE NATHAN L. HECHT: But the question I have about that is that it seems to cut against your argument that this is not for BCM's benefit and it binds Dynex because they're saying you want off the hook.

ATTORNEY DEBORAH HANKINSON: Your Honor, I don't disagree that it's a contract. I'm just saying there are different kinds of contracts and it's an option contract. It was not a contract to "loan money" with all the terms. It was a contract that required them to submit $160 million and for us to consider those requests within the terms of the commitment and if they met the terms, we would go forward with the financing. That's my point. I'm not saying there's not a contract, Your Honor. When I say it was for their benefit, it was because they were intertwined transactions and that was the piece that Dynex was going to benefit from, not from the New Orleans loan transactions. So we go through the whole.

JUSTICE NATHAN L. HECHT: Also, I'm having a little trouble with the timing. You fault BCM for not bringing applications earlier, but, of course, they didn't have any reason to because they were getting good or better terms someplace else.

ATTORNEY DEBORAH HANKINSON: They were required under this commitment to submit those 10 as part of the agreement.

JUSTICE NATHAN L. HECHT: Within two years.

ATTORNEY DEBORAH HANKINSON: No, sir. That's why I showed you all those documents. It references the other letters. There are 10 properties listed on here that they were required to submit right away. Look at Paragraph 10 of the letter commitment and look at the attachment that lists the 10 properties. They were required to do it right away and they did not.

JUSTICE NATHAN L. HECHT: But the jury didn't find a breach.

ATTORNEY DEBORAH HANKINSON: The jury found that we breached the contract, that we had challenged on JNOV grounds is one of the points. I would like to spend just a minute on the capacity question because of the fact that it was in the petition for review. It is not an issue in the case. I don't know of any place where third-party beneficiary is something that must be challenged by verified denial. Never seen a case from this Court. It is an element of the cause of action. Without any question, it is an element. This Court made clear in Lovato what capacity is. Capacity involves the legal authority to act regardless of whether someone has a justiciable interest in the [inaudible]. It is a procedural issue. This Court said in White v. Wilson, capacity does not

relate to the merits of a claim. That's what is at issue here. The merits of the claim and their failure to prove that. Now there is absolutely no question that in Lovato, this Court straightened out what I thought what the law is, but Pledger is still out there. Pledger is a procurium opinion that I think conflicts with Lovato with respect to what it looks like at what it says capacity is. My view is that Justice Hecht was right in his Pledger opinion when he was on the Court of Appeals back a long time ago, and it's Pledger's progeny.

JUSTICE NATHAN L. HECHT: Just the other day.

ATTORNEY DEBORAH HANKINSON: That it's Pledger's progeny that creates the confusion, but putting aside that confusion even, which I think is something that would be good to clear up, it still is of no import here because if you look at, we're dealing with the merits and whether they're a third-party beneficiary.

JUSTICE DAVID M. MEDINA: It's a part of the confusion created by the Honorable Justice Brewster's opinion in Houston v. Henderson.

ATTORNEY DEBORAH HANKINSON: I think what he's saying in here is that I'm confused too and that the law is not clear.

JUSTICE DAVID M. MEDINA: That can't be right.

ATTORNEY DEBORAH HANKINSON: Well, it seems to me he was inviting the Court to be able to look at this, but if you read the Pledger opinion, it doesn't deal with the issue that Justice Hecht dealt with in his opinion. It sees the language about representative capacity out of context that wasn't the dispositive issue in the case and it did create some confusion, but rule 93 only applies, if I can just finish this in answer to your question, only applies if the matter, the truth of the matter's if they appear of record, no verified denial. I don't think one's required here, but if one was required, the truth of the matters here are evident in the documents that determine third-party beneficiary or that determine under the New Orleans notes who can recover and, finally, they have admitted they tried these issues. All during the trial, they were at issue. In their reply brief, they say they were hotly contested. There was not any question they tried them. I don't know what other proof there would have been. I don't know what it is that they claim that we were supposed to deny and at the end of the day, they had their full trial, 99 volumes of it and it has multiple problems.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions?

ATTORNEY DEBORAH HANKINSON: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counselor.

REBUTTAL ARGUMENT OF WILLIAM V. DORSANEO, III ON BEHALF OF PETITIONER

ATTORNEY WILLIAM DORSANEO, III: May it please the Court, I'm not entirely sure where to start about 25 things brought up there. Let me start out by saying there was absolutely as Justice O'Neill had mentioned, a change in direction by the trial court. The charge conference volume makes it perfectly plain that the objections to the charge with respect to not including the REITs in the liability part of the $160 million question were overruled. Counsel for DCI said I don't know how you can put them in the damage questions if you're not going to put them in the liability questions. There was a big discussion of all of the Pledger cases on both sides of the argument and the Court said well, we'll just leave it the way it is. Leave question one the way it is. Don't add anything else about submitting third-party

beneficiary.

JUSTICE HARRIET O'NEILL: Well here's where I'm confused and I haven't looked at the motions for summary judgment and I haven't read the transcript for the hearing, but what I heard your opposite counsel say was that there was no challenge to their standing to raise their status as third-party beneficiaries and that that's all that was dealt with in the summary judgment motions, not whether BCM.

ATTORNEY WILLIAM DORSANEO, III: This came up a number of times. Sometimes referred to as standing. Sometimes referred to as by the defense as an element of the claim. My point is at the two points that were pivotal at the directed verdict stage.

JUSTICE HARRIET O'NEILL: Yeah, but here's my question, was the standing as to the REITs' ability to assert third-party beneficiary status or was the standing argument as to whether BCM could assert their claims, the REITs' claims?

ATTORNEY WILLIAM DORSANEO, III: I think it was third-party beneficiary status or any status, any way to be a claimant.

JUSTICE HARRIET O'NEILL: But aren't those two different things? The REITs have to establish they do have standing to assert third-party beneficiary status. Separate question whether BCM has the capacity or the standing to assert claim to what we have.

ATTORNEY WILLIAM DORSANEO, III: Well, BCM wasn't asserting claims in their behalf. BCM was their manager and they were asserting their own claims as plaintiffs as third-party beneficiaries, yes, but the ultimate way the case was tried since there was no sworn denial of capacity, by the time it got down to preparing the charge, no third-party beneficiary question got included. The reason why it didn't get included is because it wasn't needed. If Pledger v. Schoellkopf and 93(2) precludes the defendants from saying you don't own the claim ART and TCI, you can't be plaintiffs. That was argued at directed verdict. That was argued at the charge conference. Both times Judge Stoke said it doesn't have to be submitted. You can proceed. You can proceed to prosecute the claim, particularly the charge conference makes it plain and then after verdict, really the same argument is made recast as a mismatch between liability findings and damage findings and then Judge Stokes goes to the opposite direction and we move for a new trial and they say, well, it's just, you know, that's too bad.

JUSTICE DAVID M. MEDINA: Help me with these, were these entities actually established. There's some discussion by Ms. Hankinson that some of these entities weren't established.

ATTORNEY WILLIAM DORSANEO, III: I'm not sure I'm following you, Your Honor.

JUSTICE DAVID M. MEDINA: I misunderstood what you said.

ATTORNEY WILLIAM DORSANEO, III: I did her say that there were five, there was more than the three REITs mentioned in my tab 3 and that's true. There were five of them that BCM managed. Now the commitment itself is a generic commitment which doesn't identify any of the REITs. It just talks about.

JUSTICE DAVID M. MEDINA: Doesn't that create a problem?

ATTORNEY WILLIAM DORSANEO, III: I don't think it does, Your Honor, because the nature of this business is that those REITs could be selected or self-select themselves in connection with BCA later.

JUSTICE DAVID M. MEDINA: So now we look to the practice of the industry as opposed to the contract?

ATTORNEY WILLIAM DORSANEO, III: Yes, that's how it's done. BCM opens up this line of credit for its managed entities and they take advantage of it as they will. Now what happened here is there was

repudiation before any of that happened and if I can make one last comment, with the Court's permission, on the contract interpretation issue with respect to who was obligated to do what, it is our interpretation of the contract that it was no obligation of the part of BCM or on the part of any of the REITs to submit 10 properties in April, March or April. It was a 24-month commitment they repudiated. That releases us from the obligation to do anything. Thank you very much.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? The cause is then submitted and that concludes the arguments for this morning and the Marshall will now adjourn the Court.