

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge
DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2010-CP-40-3297
Appellate Case No. 2012-212687

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Appellant,

vs.

RICHARDSON PLOWDEN & ROBINSON, P.A. and
George Harold Hanlin, J.D... Respondents.

RECORD ON APPEAL - VOL 2 of 3; Pages 361 - 730

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1 August of 2007. We were very excited about this
2 project, a huge project, a very significant project
3 and so we went and discussed it with them and told
4 them what we had determined.

5 The report, do you want me to say what the
6 report indicates?

7 Q I was going to ask you what was the purpose
8 of the report?

9 A This was to give them a sense of the
10 magnitude of the potential project. Based upon
11 current market conditions in August, 2007, and the
12 number of credits we would anticipate generating,
13 the gross value was about \$63,000,000. The net we
14 projected was 45,000,000.

15 Q And, Mr. McLeod, how does the process operate
16 if a property that is available for mitigation, the
17 process begins, what is involved for the payment --
18 let me step back. Does the landowner receive a
19 payment if they do a mitigation project?

20 A Do you want me to kind of summarize how the
21 process works?

22 Q Briefly, yes.

23 A Okay. Under the Clean Water Act which is a
24 federal law, I think Dr. Hawkins mentioned -- well,
25 he mentioned Section 404 of the Clean Water Act,

1 but the Clean Water Act requires anyone or any
2 entity, Department of Transportation,
3 Stewart-Mongo, Centex, Pulte, developers, Walmart,
4 an individual, if they impact enough, a stream or
5 wetland, any entity or individual that impacts
6 jurisdictional wetland or streams is required under
7 that law to present to the District Corps of
8 Engineers office a plan to compensate the public
9 for the loss of those wetlands.

10 So if they put pipes in streams in a
11 subdivision or if D.O.T. is going to do that they
12 have to compensate for that loss. And so what we
13 do with landowners who have tracts of land that are
14 appropriate for mitigation is we show them the
15 potential, as we did with this analysis, and then
16 if they want to go forward we begin the design of
17 the plan to present to the Corps of Engineers and
18 what is known as the IRT group, interagency review
19 team, which is composed of the Corps, EPA, U.S.
20 Fish and Wildlife, DNR, DHEC and so forth, and we
21 prepare a perspectus, which is a conceptual plan to
22 get their tentative approval. The process from
23 start to finish to actually get a mitigation bank
24 permitted and credit released for sale takes a
25 couple years, eighteen months to two years.

1 Q So, if the landowner says let's proceed what
2 happens next?

3 A Then we start the process of working on the
4 perspectus. We have already done this work and so
5 we take the information, the due diligence we did
6 in connection with the analysis, preliminary
7 analysis, and we start work on the actual design
8 sufficient to get us to the perspectus stage.

9 Q And what was the value, the net value to Mr.
10 Justice presented in this feasibility report dated
11 August 1, 2007?

12 A \$45,276,870.

13 Q Did you present this to Mr. Justice?

14 A I did.

15 Q And did Mr. Justice instruct you to proceed
16 with this compensatory mitigation bank plan?

17 A Unfortunately he did not. He was very
18 excited about it but his son Jay started talking
19 about --

20 Q You can't say what was said, you can just
21 tell me how, what the results were of the
22 conversation.

23 A As a result of the conversation, it wasn't
24 that day but shortly thereafter, they decided not
25 to go forward with the mitigation project.

1 Q What was your understanding of why they
2 decided not to go forward with the mitigation?

3 A They wanted to continue the farming operation
4 that they had on that property for a long time.

5 Q Were you disappointed?

6 A I certainly was. It was a project beyond my
7 dreams and so -- but the landowner makes the
8 decision, so that is what he decided.

9 Q And did Natural Resource Protection and
10 Mitigation, LLC, your company that you formed with
11 Mr. Hawkins, submit an invoice to Mr. Justice for
12 services it rendered?

13 A I don't recall whether we did or not. If
14 Mary told me to I did.

15 Q I have your permission, I can call you
16 Yancey. Yancey, is this a copy of an email
17 transmitted to Mr. Justice in October of 2007 with
18 an invoice listing activities you had done and
19 requesting payment of \$15,000?

20 A It is.

21 Q Does this list out the different activities
22 you had begun or you and Mr. Lewis had done on the
23 property?

24 A It does.

25 Q Did Mr. Justice pay or his companies pay this

1 invoice?

2 A Yes, they did.

3 MR. PENDARVIS: Your Honor, we ask to move
4 this into evidence as Plaintiff's 29. Let me back
5 up and be sure. First off let me backtrack. We
6 move the mitigation bank feasibility report in
7 evidence.

8 MS. McWILLIAMS: No objection.

9 THE COURT: No objection. Make the
10 mitigation banking feasibility report 28.

11 (Mitigation bank report marked and received
12 in evidence as Plaintiff's Exhibit 29).

13 THE COURT: And the email 30?

14 MS. McWILLIAMS: No objection.

15 THE COURT: That will be Plaintiff's 30.

16 (October, 2007 email marked and received
17 in evidence as Plaintiff's Exhibit 30).

18 BY MR. PENDARVIS:

19 Q Mr. McLeod, this invoice, Exhibit 30,
20 contains some references to Justice Family Farms,
21 homeplace, August 4th, Jim and Yancey, Beckley,
22 West Virginia, tour homeplace for conservation
23 easement?

24 A Yes, sir.

25 Q Did you go to Beckley, West Virginia, Mr.

1 McLeod?

2 A I did.

3 Q What did you do?

4 A We spent a couple days on this 16,000 acre
5 homeplace. It blew me away. By the way, West
6 Virginia is very pretty and, wow, it was just an
7 incredible opportunity. He also is an avid small
8 mouth bass fisherman, he has several small mouth
9 bass lakes up there, he took us fishing and we just
10 had a great time. That is what we did, we looked
11 at it for his conservation easement potential.

12 Q Did Mr. Justice retain you or others, Jim
13 Lewis, to do a conservation easement project on his
14 homeplace in West Virginia?

15 A No, never got around to that.

16 Q After October of 2007 did anything change the
17 status of what was the mitigation bank project?

18 A Well, in a conversation, a telephone
19 conversation with Mr. Justice a couple months later
20 and him having made it very clear to us that, you
21 know, they loved their farm, I suggested to Mr.
22 Justice that under 170(H) of the Internal Revenue
23 Code that we could do a conservation easement on
24 the farm and protect it as a farm landscape and
25 active farming operation forever and and as a

1 result of that conversation he said, "Let's do it."

2 Q Did you discuss what was being considered for
3 the highest and best use value for the Clarendon
4 County property?

5 A Mitigation, we knew by then that the highest
6 and best use of the property obviously was
7 mitigation.

8 Q Okay. And once you got the go ahead to
9 proceed with the project what did you do next?

10 A Well, the first thing I did was assemble all
11 of our documentation and maps and work that we had
12 done in connection with the mitigation project and
13 I talked to Jim Lewis about the necessity of a base
14 line documentation report and a friend of mine
15 Clinton Epps was then with Multi-Engineering and we
16 had done a lot of work with them and I notified
17 Clinton Epps who is now the Blood Bank manager for
18 Richland County that we were going to be moving
19 forward on the conservation easement project and it
20 was a very large project and we were going to have
21 to all work diligently to get it all done.

22 And I called Hal Hanlin and talked to him
23 about it, told him that I would need a tax attorney
24 on the project, and I called Darroll Hawkins who I
25 felt was uniquely suitable as an appraiser to

1 appraise a project like this, and I also called
2 Henry Beckham, who is another appraiser in South
3 Carolina, Myrtle Beach, who I knew because on
4 another project I had worked with him, I knew Henry
5 Beckham had knowledge, expertise and experience
6 doing an appraisal where mitigation was the highest
7 and best use.

8 Q We may be looking at an email from Mr.
9 Beckham, but why did you need two appraisals?

10 A Well, it is a very large project, the IRS
11 doesn't like conservation easements and I felt like
12 one of this magnitude would certainly be audited
13 and the more professional advice and consultations
14 you have, the better prepared you are to defend
15 your work and protect the landowner's interest.

16 Q Was there a different type appraisal process
17 Mr. Beckham was doing, separate and apart from what
18 Dr. Hawkins would be doing?

19 A Henry Beckham would have done a traditional
20 appraisal but they both would have been using
21 mitigation as the highest and best use and
22 sometimes, though, we use another appraiser for
23 what we call a, you do an appraisal and you do
24 another appraisal to look at that appraisal and
25 make comment about the appropriateness and form and

1 methodology, comparables that they used and so
2 forth but in this case we probably would have
3 gotten Henry just to do another self contained
4 appraisal just because of the size of the project.

5 Q And before we move into the lawyer that is
6 going to be involved in this process, were there
7 any other professionals that were contacted as part
8 of the team that was going to do the project?

9 A Let's see. I had Hal Hanlin, I had Jim
10 Lewis, I had Clinton Epps, I had Darroll Hawkins, I
11 had Henry Beckham.

12 Q Were there any considerations about the
13 grantee organization that was being considered in
14 the early part -- let me step back. When was this
15 going on?

16 A Oh, late October, early November. I knew Hal
17 was chairman of the Board of Community Open Land
18 Trust and so I don't recall exactly when it was but
19 Hal and I talked about can Community Open Land
20 Trust serve as the donee organization to accept the
21 gift.

22 Q Had you worked on projects in which Mr.
23 Hanlin had been involved in prior to November,
24 2007?

25 A Yes.

1 Q Tell us a little bit about those, very brief.

2 A One I referred to Hal, I believe that was
3 Senator John Land and his wife Marie in Clarendon,
4 actually the county line ran right through the
5 property, and the other one was an island in
6 Beaufort that was owned by David Bryant, and Hal
7 referred that one to me.

8 Q Who did Mr. Hanlin represent in both of those
9 conservation easements?

10 A He represented Senator Land and Marie and
11 represented David Bryant.

12 Q Both of them were landowners?

13 A Yes.

14 Q So, when was your first conversation with Mr.
15 Hanlin about the Justice Farms property?

16 A It would have been probably toward the end of
17 October, I believe.

18 Q I'm going to ask you to pull out Exhibit 3
19 that has been previously marked, to your right.

20 You told us -- did you see a copy of what is
21 marked as Exhibit 3, this email from Mr. Hanlin?

22 A I did.

23 Q You told us you didn't do computers. Did
24 Mary print this out for you?

25 A She certainly did.

1 Q There had been some conversation with Mr.
2 Hanlin before this email?

3 A Yes.

4 Q Tell us about your discussion with Mr. Hanlin
5 about this project, what his role was going to be.

6 A Well, generally that I needed his expertise
7 and experience as a tax attorney to handle the
8 project and obviously on a project like this with
9 the complexities involved and the size of the
10 project and the client, I wanted, obviously I
11 wanted to do the very best job I can for all of my
12 clients but it is kind of a, kind of awe inspiring
13 to be working with Jim Justice, you know. I talked
14 to Hal about let's get it going, let's do the
15 project, and so he was, you know, by email just
16 gave me some of the things he was going to be
17 needing to put together.

18 Q And did you discuss the basis, the concept of
19 the highest and best use that would be part of this
20 conservation easement?

21 A Oh, absolutely. The first conversation I was
22 real excited about that. You know, I was saying
23 earlier I love fishing, teaching children of all
24 ages about natural resources, conservation, and I
25 didn't plan what I do, I intended to practice law

1 with my dad but he died and so my life, my
2 experience is pretty unique. I never will forget,
3 if you will bear with me for a second, James Henry
4 Bledsoe died last year, he was a contractor from
5 Saluda, and I was standing on a pond site with him
6 one day and he said, "Mr. McLeod, are you a
7 lawyer?"

8 MS. McWILLIAMS: Your Honor, I hate to
9 interrupt but I think we're getting a little bit
10 off course here.

11 Q We'll get to that, maybe.

12 A Okay.

13 Q Yancey, the last big paragraph, not the last
14 paragraph, next to last paragraph, the very last
15 portion discussing it, Mr. Hanlin says, "I
16 understand you contemplate a fee of perhaps
17 4,000,000 or so"?

18 A Uh-huh (Affirmative).

19 Q Do you see that part? Before we get to the
20 rest of that sentence, tell me about your
21 discussions with Mr. Hanlin about the value of the
22 conservation project and how your fee would be
23 calculated.

24 A Well, I think he must have misunderstood
25 anything I might have said about that because I

1 don't think I ever said that, but I knew it would
2 be a very substantial fee because of the size of
3 the project and, I mean, I felt like a reasonable
4 fee for me, for Yancey Environmental Solutions on a
5 project like this, given the complexities and the
6 unique approach and the valuation, highest and best
7 use concept and so forth, it was a project that I
8 could certainly very reasonably think that, you
9 know, five percent fee would be appropriate.

10 Q And how is the five percent, five percent of
11 what?

12 A It would be five percent of the appraised
13 value as reported, charitable gift value as
14 reported on the IRS form, which I already knew at
15 this point it was going to be, I mean, likely the
16 appraisal, although I don't do the appraisal, what
17 it looked like is the appraisal would be something
18 in the \$45,000,000 range because the highest and
19 best use was clearly mitigation and we had already
20 done the analysis and so, you know, give or take,
21 five percent of that.

22 Q Up until November, 2007, had you ever been
23 asked, had you been asked to be involved in a
24 conservation easement project that would have
25 generated fees in the nature of five percent of

1 \$45,000,000?

2 A No.

3 Q This was the largest easement you had worked
4 on, conservation easement?

5 A It wasn't the largest easement in terms of
6 the value I had ever worked on but all of my fees
7 prior to this had just been lump sum sort of fees
8 based on my best educated guess on time and effort
9 and so forth that I would have to put in. This was
10 the first time that I felt comfortable charging a
11 five percent fee on a project like this. I had
12 done a 67,000,000 conservation easement where my
13 fee was 40, 50 thousand dollars but those were just
14 straightforward easements that weren't complex.

15 The appraisal was, you know, subdivision
16 analysis, and in my life I have always tried very
17 hard to be fair and this was the first time in my
18 life that I felt like a deal like this was fully
19 justified and reasonable. I had had people for
20 years say, "Yancey, why in the world do you do work
21 for these people that have these tracts of land
22 with conservation easements and provide them
23 millions of dollars of tax benefit and you charge
24 30, 40, 50 thousand dollars?" I said, "Well, that
25 is what I feel comfortable doing."

1 Q Up until 2007 what would be the typical
2 annual income you had made? We heard a little bit
3 about that on cross-examination of Dr. Adams this
4 morning. What was your annual income in this time
5 period?

6 A I was shocked when I heard what I heard this
7 morning in court. I had no idea what I made. I
8 know that sounds silly, I'm 66 years old and I'm a
9 lawyer, educated, but I just don't know, you know.
10 I was trying to educate three children, make sure
11 Mary had food on the table. I would say that, you
12 know, average would be, you know, 75, 80 thousand
13 dollars, something like that. I don't know.

14 Q Who handles all those aspects of your life?

15 A Mary and Robin.

16 Q So let's get back to this project. When was
17 the first conversation with Mr. Hanlin about how
18 Mr. Hanlin was going to be paid for his work on
19 this project?

20 A I'm sorry, would you please --

21 Q When was the first conversation between
22 yourself and Mr. Hanlin about how Mr. Hal Hanlin
23 was going to be compensated for his legal services
24 on this project?

25 A Conversation?

1 Q Yes, sir.

2 A I think Hal and I talked generally about, a
3 little bit about that before this email. I don't
4 recall talking about two-thirds/one-third. I had
5 never done that with him before this, so I don't
6 know, but on the project I worked with him before
7 he was representing the landowner.

8 Q Without going into a whole lot of details,
9 were you working with Mr. Hanlin on another matter,
10 the Gastono matter?

11 A Yes.

12 Q Did you discuss any fees in that matter as
13 well, how he would be paid?

14 A Yes, I think so.

15 Q Did the Gastono project ever go forward?

16 A No, it did not.

17 Q Why was that, why did it not go forward?

18 A That was a gentleman from Ohio who with his
19 wife came and sat on --

20 Q Yancey, I hate, I want to just kind of get to
21 the, did the landowner decide to proceed?

22 A He decided not to go forward.

23 Q It had nothing to do with you?

24 A No, no.

25 Q So you had discussed fees, sharing fees in

1 the Gastono matter, am I correct?

2 A Yes.

3 Q This is the next time you were involved with
4 a matter with Mr. Hanlin?

5 A Yes, the Justice matter.

6 Q When you got this email that has this last
7 phrase, "I assume our usual two-thirds/one-third
8 arrangement would apply." The next sentence says,
9 "Please correct any error on my part," what did you
10 do?

11 A Mr. Pendarvis, the only way I know how to
12 answer that is that I had a high degree of respect
13 for Hal, I still do actually. We had worked
14 together before, we were friends, I had referred
15 business to him, he had referred business to me, I
16 really enjoyed working with him, he was one of the
17 only tax attorneys I know who speaks English and
18 can communicate very complex things to clients. I
19 really liked working with him.

20 And I'm just the kind of person that when I
21 get a letter like this from somebody like Hal
22 Hanlin I don't frankly pay much attention to it.
23 If Hal says this is what needs to be done, then
24 that's fine with me, I wouldn't ever question this,
25 I would never email him or call him and say, "Hal,

1 that's too much money for you." I mean, if he
2 thinks this is the right way to do it then that's
3 fine, that is why I'm hiring him, you know, to help
4 with these projects, he's a tax attorney, so
5 anyway, that's just the truth.

6 Q At this point in the process was there any
7 discussion between Mr. Hanlin and yourself as to
8 who was going to be the client for Mr. Hanlin?

9 A Mr. Pendarvis, again the only way I know how
10 to answer that is that I had to have a tax attorney
11 to be the lawyer in this very complex transaction
12 involving a whole lot of money and a strategic tax
13 planning for a very important man and when I called
14 Hal and talked to him about it he was very excited,
15 he should have been, he loves conservation and
16 appreciates conservation, he serves as chairman of
17 the Community Open Land Trust, so unlike most
18 attorneys, tax attorneys, he really does care and
19 he was excited about the project, too, protecting
20 this much land, and I just assumed that Hal would
21 be the tax attorney for the project and that's the
22 only way I know how to answer that. So, he would
23 be representing the transaction, he would be the
24 attorney to do whatever was necessary.

25 Q Did you have that conversation with Mr.

1 Hanlin where there was an agreement that he was
2 going to be the attorney for the transaction?

3 A I don't recall that specifically. It was
4 just an assumption I made when I talked to him
5 about helping me with the project, that is what he
6 would be.

7 Q Did Mr. Hanlin ever speak with you about
8 there needed to be some clarity as to exactly who
9 his client is going to be in this transaction?

10 A Sure, yes. I mean, you know, he talked
11 about, you know, representing me and Y.E.S., and
12 then I started seeing emails where, you know, he
13 was sending them to David Harrah and Justice
14 saying, "We represent Y.E.S., not you." It didn't
15 occur to me that there was anything amuck about
16 that. I mean, Hal, whatever is appropriate is what
17 we would do.

18 Q But you're a lawyer and you have been in
19 these 20 something conservation easements up to
20 this point. Did it concern you that you were going
21 to have a lawyer that is going to represent your
22 organization and not the landowner?

23 A Absolutely not. It was Hal Hanlin, I trusted
24 him explicitly to do the right thing for me, for
25 Mr. Justice, for the project, make it happen, make

1 sure it was all right, appropriate, consistent with
2 the terms of 170.(H) and Internal Revenue Code.

3 Golly, I worked with tax attorneys all over the
4 country, we did a project for Walmart folks out in
5 Arkansas, they had so many lawyers I can't remember
6 all their names, but Mr. Justice, you know, asked
7 me to do this project and he trusted me with it and
8 I was doing my very best to put together a group of
9 professionals to carry out his wishes.

10 Q Did you consult with Mr. Justice about which
11 particular professionals, whether he approved the
12 professionals you retained to do the project?

13 A When you work with Mr. Justice and he says 'go
14 you go. He's not the kind of person that you pick
15 up the phone and say, "Jim, what do you think about
16 this?" I mean, that is not just who he is, he
17 trusts me so I was just trying to do the project.

18 Q And there has been some discussion about the
19 consulting services agreement that was sent to Mr.
20 Justice. Do you remember that?

21 A Oh, sure.

22 Q Did Mary prepare the initial consulting
23 agreement and send it to Mr. Hanlin?

24 A Typically Yancey writes out on a legal pad,
25 you know, clauses and things like that and of

1 course I got out an existing services agreement and
2 modified it for this project and handed it to Mary
3 and she typed it up. Likely she sent it to Hal for
4 his review. That is how that was started.

5 Q I wonder whether or not I need to clutter up
6 all the exhibits with another one. Did Mary show
7 you copies of things before she sent them to Mr.
8 Hanlin?

9 A Sometime yes, sometimes no. Generally she
10 would show me something before she sent it to
11 somebody, yes. Her desk was literally in my
12 office, I don't use computers, I would be on the
13 phone, she would make it seem I was smart, computer
14 savvy.

15 Q Was there ever a time --

16 THE COURT: Mr. Pendarvis, can we take a
17 break?

18 MR. PENDARVIS: Sure.

19 THE COURT: The jury needs one. So, take a
20 short break, step in the jury room, stretch your
21 legs, use the restroom, whatever you need. I'll
22 have you back out here in a few minutes. Remember
23 you can't discuss the case.

24 (The jury was excused from the courtroom).

25 (Recessed at 4:44 p.m.).

1 (Resumed at 5 :05 p.m.).

2 (The jury returned to the courtroom).

3 BAILIFF: The jury is all present, Your
4 Honor.

5 THE COURT: Very well.

6 BY MR. PENDARVIS:

7 Q Mr. McLeod, we're into November in this
8 project and there is, we heard some references in
9 the testimony about a gentleman named David Harrah.
10 Who is Mr. Harrah?

11 A Mr. Harrah was Jim Justice's in house CPA,
12 accountant, bookkeeper, just financial guy.

13 Q And how did Mr. Harrah get into the picture
14 for this conservation easement?

15 A Jim Justice told me that David would be kind
16 of the point guy to, you know, deal with on the
17 project so that is what Hal and I did.

18 Q Did Mr. Justice or Mr. Harrah ever tell you
19 that they had a tax lawyer that will be involved in
20 the conservation project?

21 A No.

22 Q Did they tell you anything about the lawyers
23 that represent Mr. Justice?

24 A No. At some point in the process I knew
25 there was a gentleman named Steven Ball who was an

1 attorney up there that represented Jim in some
2 capacity but he didn't know much about conservation
3 easements.

4 Q I think Mr. Ball is the gentleman who signed
5 the cover letter.

6 Did you ever go visit the site -- let me back
7 up just a second before we get there. Was there a
8 determination that the Community Open Land Trust,
9 COLT, would be the donee organization?

10 A Yes. Sue Green was very excited and I had
11 worked with Sue before and so this was, you know,
12 my gosh, I think after, I don't know how many years
13 of existence, they only had a handful of easements,
14 you know, she was very excited about this easement.

15 Q Was there ever, did you ever do a site visit
16 involving COLT?

17 A Yes. We did a site visit with Sue Green and
18 Hal Hanlin was present and Randy the farm manager
19 was riding us around in a pickup truck and her
20 assistant, I never can remember her name, she's
21 really nice but I can't remember her name, I never
22 can.

23 Q And when was that site visit on the Clarendon
24 County property?

25 A November 16, 2007.

1 Q Prior to November 16, 2007, had you priced
2 your services for the project to Mr. Justice and
3 his people?

4 A Yes. Hal and I had a conversation and I told
5 Hal that I was going to be talking to David Harrah
6 about what our fee would be in the project and I
7 did talk to David and told him that I thought a
8 reasonable fee would be five percent and so, yes,
9 we had that conversation about that.

10 Q Did anything, anything unusual happen during
11 the site visit you want to tell the jury about?

12 A Yes. I was in the back of the pickup truck
13 with Hal and my cell phone rang, it was David
14 Harrah and --

15 MS. MCWILLIAMS: Your Honor, object, he is
16 eliciting hearsay.

17 MR. PENDARVIS: He's describing who he got
18 the phone call from, he is not saying what he said.

19 THE COURT: To the extent it is hearsay it is
20 sustained, to the extent it is not it's overruled.

21 BY MR. PENDARVIS:

22 Q What did you learn from that phone call?

23 A I learned that we --

24 MS. MCWILLIAMS: Objection, Your Honor. That
25 is the same thing, hearsay.

1 MR. PENDARVIS: That is not an out of court
2 statement offered for the truth of the matter
3 asserted, it is asking what this gentleman learned
4 from the conversation.

5 THE COURT: I think he is allowed to testify
6 what he learned.

7 THE WITNESS: I learned that we had an
8 agreement on the fee.

9 BY MR. PENDARVIS:

10 Q And what was the agreement?

11 A The agreement was four percent.

12 Q Instead of the five that you had proposed?

13 A That's correct.

14 Q Mr. McLeod, did you make any notes about your
15 conversation with Mr. Harrah?

16 A I did. I made a handwritten note.

17 Q Is this a copy of the handwritten note you
18 made after your conversation with Mr. Harrah?

19 A It is.

20 Q Would you read that to the jury?

21 MS. MCWILLIAMS: Give me time to find it.

22 MR. PENDARVIS: Certainly, I'm sorry.

23 MS. MCWILLIAMS: Your Honor, may it please
24 the Court.

25 THE COURT: Yes.

1 (Unrecorded bench conference) .

2 BY MR. PENDARVIS:

3 Q After your conversation what was the fee
4 Yancey Environmental Solutions was expecting to
5 earn after this conservation easement was moved
6 forward?

7 A Four percent of the amount of the appraised
8 value of the charitable gift.

9 Q Mr. McLeod, I would ask you to look in the
10 exhibit pile and see if you can retrieve Exhibit
11 Number 7, the letter dated November 26, 2007.

12 A Okay, I have it.

13 Q And that telephone call that led to your
14 agreement to accept the four percent fee for your
15 services instead of five took place in the pickup
16 truck on November 16th while you were on the
17 property?

18 A Right.

19 Q The jury has had a chance to look at this
20 cover letter for the consultant services agreement,
21 Mr. McLeod. The consultant services agreement has
22 a five percent number on the second page of the
23 agreement. Can you explain that?

24 A Obviously I failed to indicate to sister Mary
25 we had agreed to four and she and I inadvertently

1 sent the services agreement with the original five
2 percent.

3 Q No doubt in your mind it was the number four?

4 A Yes, it was four.

5 Q Now, did you talk with Mr. Hanlin -- let me
6 back up. This letter was sent to Mr. Justice, this
7 letter marked as Exhibit 7, is that correct?

8 A Yes, sir.

9 Q Did you speak with Mr. Hanlin about the
10 content of this letter before it was sent?

11 A The content of this letter?

12 Q Yes, sir.

13 A I don't remember.

14 Q In particular the paragraph number one, the
15 first sentence says -- well, the first sentence of
16 the first paragraph says, "I have taken the
17 following action"?

18 A Yes.

19 Q "-- to expedite the process in order to place
20 the easement in this calendar year," and the first
21 paragraph is what I want to ask you about. Your
22 conversations with Mr. Hanlin, did you speak with
23 Mr. Hanlin about what is in the first sentence?
24 The first numbered paragraph says, "Coordination
25 with my tax attorney, with Mr. Hanlin, Richardson

1 Plowden in Columbia about the various aspects of
2 this project"?

3 A Sure. At this point Hal and I were, you
4 know, in full gear, moving forward, we now had a
5 tentative preliminary acceptance or recommended
6 acceptance by Community Open Land Trust that had
7 recently done site visit with Sue Green.

8 Q Again, was there a specific conversation
9 about who Mr. Hanlin would be representing in this
10 transaction?

11 A Yancey, me, was still operating, with regard
12 to this project, as far as quarterback, Hal as tax
13 attorney for the project. It mattered not to me
14 whether he technically represented A or B, so --

15 Q He's copied on the letter, correct?

16 A Yes.

17 Q Now, farther down two more sentences down
18 that begins about midway on the righthand side,
19 "Since Hal is involved as attorney for the
20 project"?

21 A Right.

22 Q Is that what you're describing in terms of
23 the --

24 MS. MCWILLIAMS: Your Honor, objection,
25 leading.

1 MR. PENDARVIS: I am leading.

2 Q What was your understanding of Hal's role --
3 let me rephrase that. What did you mean by since
4 Hal is involved as the attorney in the project?

5 A I meant that Hal is the attorney in the
6 project and also I'm going on to say he's an
7 attorney representing and on the board of Community
8 Open Land Trust.

9 Q Thank you. Let's turn our attention to the
10 consultant services agreement again and let's go
11 back to page 2.

12 A I have just got the cover letter.

13 Q There should be another portion.

14 A Okay.

15 Q Could you describe for the jury generally the
16 types of payment obligations that this consulting
17 service agreement contemplates?

18 A Sure. You mean payment to us?

19 Q Yes, how were you to be paid?

20 A There is \$50,000 nonrefundable retainer and
21 then it says five percent but it should have said
22 four percent of the appraised value of the
23 charitable gift as reported on the 8283, so we
24 wouldn't get paid anything on that portion of it
25 unless he took the tax deduction.

1 Q Mr. McLeod, there has been reference in some
2 exhibit shown to the jury on a number of agreements
3 like this consulting services agreement and the
4 letter of intent from COLT that were submitted to
5 Mr. Justice and never were returned signed. Did
6 you have any conversations with any of the Justice
7 people about requiring the signing of an agreement
8 with Y.E.S. so you could proceed with this?

9 A Did I have any conversations?

10 Q Make any calls about that.

11 A I don't recall specifically. You know, I
12 just don't recall specifically having any
13 conversations about that but if I talked to David
14 Harrah I might would have mentioned it.

15 Q During November and early December what were
16 you doing for the project?

17 A During early November --

18 Q Of 2007, excuse me, late November 2007, early
19 December, 2007, what were you doing on the Justice
20 project?

21 A I was full speed trying to make sure that all
22 the parts got put together and all the
23 professionals that we had employed were hard at
24 work doing their respective part on the project and
25 the base line documentation report and, you know,

1 making sure everything -- I had three other
2 projects we were working on that calendar year as
3 well.

4 Q This is a good opportunity to talk about
5 that. Could you briefly describe the name, how you
6 named the three projects? What were the three
7 projects you were working on?

8 MS. McWILLIAMS: Could we approach? Excuse
9 me.

10 THE COURT: Yes.

11 (Unrecorded bench conditions).

12 THE COURT: All right, we'll make a short
13 record of this.

14 All right, Miss Meyer, does 9:00 o'clock in
15 the morning suit you all?

16 JUROR: Yes.

17 THE COURT: You all go for the evening, leave
18 your stuff in the seats, enjoy your evening. You
19 can't begin discussing the case. See you at 9:00
20 o'clock in the morning.

21 (The jury was excused from the courtroom).

22 THE COURT: Leave Mr. McLeod there for a
23 moment in case you want to proffer some testimony.

24 All right, for purposes of the record, Mr.
25 Pendarvis, go ahead and ask your next question,

1 then I want to hear the objection, I want to see
2 where this is going.

3 MR. PENDARVIS: The question would be, Mr.
4 McLeod, was Yancey Environmental Solutions working
5 on other conservation easement matters in the
6 November, December time period, 2007?

7 At a late point in the testimony, I'm trying
8 to keep this chronological for the jury, but at a
9 point in time in late December there is evidence
10 these other easements were recorded, the easements
11 went through and Mr. McLeod --

12 BY MR. PENDARVIS:

13 Q Let's fast forward to that point. Mr.
14 McLeod, you received, this is in context of after
15 having received the IRS letter, after Richardson
16 Plowden had withdrawn, Mr. Hanlin had withdrawn,
17 did you communicate to your other clients any
18 information about the IRS letter?

19 A I called all four clients with whom I was
20 working on conservation projects in the year 2007
21 after receiving the IRS letter and told each of
22 them about the letter.

23 Q Did any of those four easements close in the
24 year 2007?

25 A Three of them did.

1 Q And which easement did not close in the year
2 2007?

3 A Mr. Justice.

4 Q Did you relay the same information about the
5 IRS letter to all four of those landowners?

6 A I did.

7 Q And notwithstanding the information about the
8 IRS letter, did the other three easements close?

9 A Yes, sir.

10 Q I would like to show you a copy of, I have a
11 couple, the letters that memorialize recording or
12 recorded copies of the easements.

13 MR. PENDARVIS: And I will proffer those as
14 exhibits.

15 THE COURT: All right. Your objection was as
16 to the next question?

17 MS. MCWILLIAMS: Well, my objection is --

18 THE COURT: The first question was proper, I
19 believe.

20 MS. MCWILLIAMS: What prompted this, Your
21 Honor, we have been told that Mr. Justice, excuse
22 me, Mr. McLeod, I apologize, Mr. McLeod called all
23 of these four projects and told them about the IRS
24 investigation or notice he had gotten, we're not
25 sure what he told them but he told them, but then

1 with respect to the other three he said, "I told
2 them to keep going because there was a tax lawyer.
3 In this one I didn't have my tax lawyer so I did
4 not recommend it to Mr. Justice."

5 So what he is trying to suggest, though, is
6 that, "Had I had my tax lawyer I could have
7 recommended to Mr. Justice and he would have done
8 it because the other ones did it." So, in other
9 words, he is trying to prove the intent, some
10 decision of Mr. Justice based on the fact of the
11 other, the other three projects. I mean, he has
12 already, the plaintiff has already moved to exclude
13 any evidence of any other transactions, nothing
14 about the IRS, no other investigations, but now he
15 wants to bring in three different transactions that
16 were different pieces of property, that had been
17 going on for different length of time, different
18 landowners, all of whom had tax counsel, they are
19 completely different. It is hearsay.

20 I guess he can probably get an easement
21 that's been recorded, I guess the Court could take
22 record of that but it is not proof of anything.
23 Under 401 it has got to be relevant to an issue in
24 this case. In all of those cases those three
25 landowners or tax attorneys or whoever he talked

1 to, you know, for whatever reasons they may have
2 had, including they may have been done, their work
3 may have all been done, I don't know, but Mr.
4 Hanlin was not involved in any of those
5 transactions, so what the jury is being asked to
6 speculate about is, "Well, we know that three other
7 people in three separate deals with separate
8 lawyers, separate facts and circumstances made
9 their decision to go ahead and record, that means
10 Mr. Justice would have," and that is, you no, Your
11 HONor, that is not admissible to show what Mr.
12 Justice would have done.

13 The case we handed up for summary judgment,
14 Your Honor, on the lost opportunity, he can't prove
15 Mr. Justice's intent by what someone else did based
16 on a different project, different set of
17 circumstances, and we're basically opening up a
18 whole new case, I'm going to then have to cross
19 examine Mr. McLeod on every one of those
20 transactions. We have been given some of the
21 documents for them but that's it. It is not
22 admissible.

23 We have gone way far afield but I understand
24 he said he is suggesting to the Court, "Well if the
25 other people decided to do it, then Mr. Justice

1 probably would have, too, might have, too." They
2 are different circumstances. Mr. Hanlin wasn't
3 involved in them and we object to it. I think it
4 unnecessarily complicates and confuses the jury and
5 I think it is not relevant to the issue and it is
6 eliciting hearsay. I understood from Mr. Pendarvis
7 he has a few letters he wants to put in or emails
8 that talk about the fact that the deal was
9 recorded. Well, that's also hearsay.

10 MR. PENDARVIS: The document he received is
11 not hearsay. If he received it, a recorded
12 easement, it is not hearsay. There is a specific
13 exception, public record, to show that this
14 easement was recorded. She can challenge what was
15 said if she wants to open that door, but Mr. McLeod
16 is going to say, "Here is what I told them." It is
17 relevant to show whether the information in this
18 IRS letter had a causation effect on the other
19 landowners' decision to proceed on the same
20 information. In addition, there is going to be
21 testimony to the jury --

22 THE COURT: Isn't the distinguishing thing on
23 those three deals he didn't have the hesitation of
24 knowing his lawyer wasn't behind him because he
25 relied on their lawyer?

1 MR. PENDARVIS: Exactly, Your Honor, and the
2 reason, which is the total causation for this case,
3 he couldn't make that same recommendation to Mr.
4 Justice.

5 THE COURT: No, no, I'm saying he didn't make
6 the recommendation, he made disclosure, "There is
7 an IRS investigation and audit coming on me, you
8 know easements are not favored by the IRS, I got to
9 disclose that to you." What we can't get into or I
10 don't think we can get into is what that client did
11 in conversation with its lawyer making a decision
12 or how they came to that decision.

13 MR. PENDARVIS: Agreed, but with the
14 information, regardless of what other factors any
15 other landowner was thinking about, regardless of
16 that, the information about the IRS letter that
17 they want to say, they said to this jury was a
18 serious thing and it merits postponing the project
19 and that the landowner made the final decision.
20 Well, this serious thing that caused Mr. Justice to
21 postpone the project, that same information, the
22 same, Mr. McLeod says, "I could not make the
23 recommendation because I didn't have a tax lawyer
24 to proceed." Let's go through the process. All
25 four landowners got the information about the

1 serious IRS letter, all three landowners got it.
2 Mr. McLeod would say -- the next step is what
3 recommendations was Y.E.S., Mr. McLeod, able to
4 make after delivering, disclosing this IRS
5 investigation. Mr. McLeod is going to say, "I want
6 to recommend," his statement, not hearsay, why is
7 he able to recommend --

8 THE COURT: Why is he able to make the
9 recommendation without a lawyer in three cases, why
10 can't he make it in this case?

11 MR. PENDARVIS: Well, because there was --

12 THE COURT: He is without representation in
13 three, without representation in this one, that's
14 the same thing.

15 MR. PENDARVIS: Exactly, and the other three
16 landowners had sophisticated conservation easement
17 tax lawyers that could take the information from
18 Mr. McLeod about the severity of this IRS letter,
19 make their own decisions about whether to proceed
20 or not and they elected to proceed and whatever
21 that was, it was. The bottom line was this. Mr.
22 McLeod is going to say, "I couldn't make that
23 recommendation to Mr. Justice because I knew there
24 was no sophisticated tax counsel on the Justice end
25 of this deal, I knew that the sophisticated tax

1 counsel that was employed for the transaction," per
2 his testimony, had withdrawn and he could not
3 recommend to this landowner on the biggest
4 conservation easement that he had been involved in
5 proceed with this thing without a tax lawyer.

6 THE COURT: I understand that is what he is
7 thinking. What I'm telling you is doesn't it
8 create all kind of problems for us saying the
9 conduct, decision making in three other
10 transactions that are similar, the facts are a
11 little bit distinguishable, but why is that
12 relevant to the decision Justice made because he's
13 not here to say that is why he made the decision?

14 MR. PENDARVIS: There is going to be
15 testimony of Justice's people that says, the
16 Justice Companies say, "If Mr. McLeod had
17 recommended we proceed we would have done it." The
18 plan was to record the conservation easement, there
19 was a tax reason, this is all in the testimony,
20 there was a tax based reason to record it in 2007,
21 his income supported the whole decision, "We were
22 relying on Mr. McLeod," and because Mr. McLeod, and
23 the trust and the faith they had in Mr. McLeod,
24 when he recommended they not proceed they didn't.
25 Mr. McLeod was able to recommend to the other

1 landowners they proceed because they had tax
2 counsel, and the whole point --

3 THE COURT: Remind me, I'm not certain I have
4 heard Mr. McLeod made a recommendation to proceed,
5 I thought he made no recommendation.

6 MR. PENDARVIS: No, he recommended, there
7 will be testimony he recommended they not proceed.

8 THE COURT: Do what you want to do is
9 different than I don't think you should do this,
10 that is a total different statement.

11 MR. PENDARVIS: Well --

12 THE COURT: I mean, you all have got -- in
13 making my ruling, it is troubling because I get
14 characterizations of what was said in depositions,
15 I have read two or three you all gave me, I haven't
16 read them all, I'm working on --

17 MR. PENDARVIS: Your Honor, the real crux of
18 the defense's case is that Mr. McLeod did not say
19 after saying, or as part of saying, "I don't
20 recommend you proceed because I don't have a tax
21 attorney," that second phrase, Mr. McLeod is going
22 to testify he did not say that. Dr. Adams said on
23 the witness stand that he had, he was too civil to
24 say that about Mr. Hanlin.

25 THE COURT: You haven't answered my question

1 yet. What was said, "I recommend you not proceed,"
2 or, "You need to make a decision because I've got
3 to inform you --"

4 MR. PENDARVIS: Mr. McLeod said, "My
5 recommendation was you don't proceed but it's your
6 decision." Mr. Justice and his folks, upon
7 accepting Mr. McLeod's, or hearing Mr. McLeod's
8 recommendation that they not proceed, they elected
9 to agree with that and not proceed, called off the
10 dogs and he called the professionals and said it's
11 been postponed.

12 But the same recommendation, excuse me, the
13 same disclosure of the IRS letter was made and the
14 ability of Mr. McLeod to make a recommendation to
15 proceed was available in the other three because
16 they had tax counsel. Mr. McLeod couldn't make
17 that same recommendation to Mr. Justice because
18 there was no tax attorney so he said, "I recommend
19 you do not proceed," but he says, his testimony in
20 the deposition was, Your Honor, after making that
21 recommendation, you know, he said words to the
22 effect, again, words to the effect, "It's your
23 decision, now, Mr. Justice, if you want to proceed,
24 you know, we'll see."

25 THE COURT: All right. What do you all say?

1 MS. MCWILLIAMS: My point is, Your Honor,
2 this is the highlight of the proximate cause
3 argument that we have made throughout, the decision
4 to recommend or not recommend, that is what he's
5 going to testify. "I recommended to the other
6 three, I chose not to recommend to Mr. Justice
7 because of Mr. Hanlin withdrawing." If we had
8 evidence that he recommended to Mr. Justice even
9 without counsel and said, you know, "I think we
10 ought to go forward, I don't have my lawyer but I
11 think we ought to go forward, Mr. Hanlin has
12 withdrawn," or, "I don't have Mr. Hanlin anymore,"
13 whatever he says, and then if Mr. Justice had said,
14 "Oh, no, I'm not going forward now," then perhaps
15 Mr. McLeod might be able to say, "Look, I wanted
16 Mr. Justice to go forward and he wouldn't do it
17 because I didn't have Hal."

18 In those other three cases he told them to go
19 forward and they did. If he told Mr. Justice to go
20 forward, that he didn't have Hal and he refused,
21 then you have at least some proximate cause. In
22 this case he is trying to rely on decision making
23 of three other people to say, well, since three
24 went forward. He didn't even tell them the same
25 thing.

1 THE COURT: Well, here is the other thing
2 that is troubling for me. The other deals were
3 hundred dollars, thousand dollars, hundred thousand
4 dollars. Forty million, this is the big one, these
5 are small ones, the risk is a little different.

6 MR. PENDARVIS: Your Honor, can I defer to my
7 client?

8 He had a \$35,000,000 easement involving North
9 Carolina State University and a huge tract of
10 property in North Carolina that went down, those
11 with lawyers, a bunch of lawyers. With information
12 from Mr. McLeod that their conservation consultant
13 was being investigated by the IRS, they made
14 decisions.

15 The point of this whole position that Mr.
16 Hanlin put Mr. McLeod in, and Y.E.S., was Mr.
17 McLeod knew that there was no lawyer involved in
18 this transaction. As a conservation consultant
19 with duties to these people, to these conservation
20 easements and the way they need to be accomplished
21 to satisfy the objectives of a tax deduction and
22 the environmental objectives, he had an obligation
23 to make sure that there was going to be tax
24 attorneys available to make the decisions and
25 finish the papers.

1 Your Honor --

2 THE COURT: All right, stop.

3 MR. PENDARVIS: I'm sorry.

4 THE COURT: What bothers me is this whole
5 thing got put together by people other than
6 Justice, the arrangement of the parties. Justice
7 had lawyers, everybody has admitted that, Justice
8 didn't come across a billion dollars by being a
9 ding-a-ling, he got a lot of good advice, he had a
10 good bookkeeper. Why is that same assumption not
11 good, David Harrah or the other guy, Ball, are not
12 doing the exact same thing that three other lawyers
13 are doing in the other three deals?

14 MR. PENDARVIS: You're exactly right, Your
15 Honor, you're exactly right. There was competent
16 people and let's just assume Mr. Justice is at the
17 top of the peak of that competence on that side of
18 the transaction. They got a recommendation from
19 the environmental consultant they relied on to put
20 together this whole transaction, that it not
21 proceed, and with that information those smart
22 people decided, you know, "I'm going to follow his
23 recommendation, we're not going to do it."

24 THE COURT: What's bothering me is this, is
25 that Hanlin is giving advice on a conservation

1 easement, that advice won't change because it was a
2 good idea if you want a \$40,000,000 tax deduction.
3 What created the problem was not a bad idea. What
4 created the problem, there was a conflict of some
5 type and a big mess in the legal relationship of
6 the two. Not it wasn't good tax advice, it is
7 still good tax advice from what I understand, he
8 gave advice and he gave good advice, the
9 relationship between them is what caused the
10 problem.

11 MR. PENDARVIS: We have had an expert tell
12 the jury --

13 THE COURT: I need a break.

14 MR. PENDARVIS: Okay.

15 THE COURT: I've heard enough today, it's
16 been steady on, fiduciary, fiduciaries, I have
17 heard enough and I need to stop listening today,
18 okay, I cannot continue listening today. It is
19 late in the afternoon, I'm caffeine deficient, I'm
20 without a law clerk, I've been doing it all. I
21 just signed an order letting a girl out of jail in
22 Greenwood, the lawyer drove down here to get her
23 out tonight because she has a sick baby in the
24 hospital, that is what I did a minute ago. Let's
25 stop so I can listen appropriately in the morning

1 early. I mean, you all are beating on a very
2 narrow issue, it is probably the issue in the case,
3 I don't want to decide late in the afternoon, okay?

4 MS. McWILLIAMS: What time would you like us
5 to be here?

6 THE COURT: You all be here ready to go at
7 8:45, we'll start discussing this again. Okay? I
8 want to think about it. I don't want to decide it
9 in a hurry.

10 MS. McWILLIAMS: Thank you, Your Honor.

11 THE COURT: It is not a simple decision for
12 me either way.

13 MR. PENDARVIS: If I can say one thing, Your
14 Honor, to think about overnight. Legal malpractice
15 cases all hinge on things that didn't happen and
16 always having to prove, in a litigation matter, a
17 case within a case, and in a transaction matter,
18 "We would proceed if proper advise had been given,"
19 we're always in hypothetical land.

20 THE COURT: All right, you've said enough.
21 All right, thank you all.

22 MS. McWILLIAMS: Thank you, Your Honor.

23 (Recessed at 5:40 p.m.).
24
25

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2
3
4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Richland County,
11 South Carolina, on the 28th day of February, 2012.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 October 8, 2012
15
16
17

18 Henry P. Young

19 Court Reporter
20
21
22
23
24
25

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2010-CP-40-3297

2 COUNTY OF RICHLAND

3
4 YANCEY ENVIRONMENTAL)
5 SOLUTIONS, LLC, ET AL,)

6 -vs-)
7)
8)

8 RICHARDSON PLOWDEN &)
9 ROBINSON, ET AL,)

9 Defendants.)
10

11 February 27-March 6, 2012

12
13 B E F O R E:

14 HONORABLE EUGENE GRIFFITH, JR.

15 A P P E A R A N C E S:

16 THOMAS A. PENDARVIS, Esquire
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18
19 SUSAN P. MCWILLIAMS, Esquire

20 DANIEL C. LEONARDI, Esquire

21 Attorneys for the Defendant
22
23

24 Henry P. Young

25 Court Reporter

VOLUME III of V

(Reconvened 8:45 a.m., March 1, 2012).

THE COURT: All right, folks. Are we ready to summarize our positions on these other three conservation easements that were about to be gone into by Mr. McLeod? Is he here?

MR. PENDARVIS: Yes.

THE COURT: Okay. Do you want him in here?

MR. PENDARVIS: It matters not.

THE COURT: Okay.

All right, I think I want to first hear from Miss McWilliams and then I will hear from Mr. Pendarvis.

MS. MCWILLIAMS: Thank you, Your Honor, if it please the Court.

THE COURT: Yes, ma'am

MS. MCWILLIAMS: The three other easements are being offered, as I understand it, as proof of the likelihood that had counsel, had the defendant not withdrawn in the Jim Justice transaction, proposed transaction, and Mr. McLeod had made the same disclosure he disclosed to all three, he supposedly spoke to all four, I don't mean supposedly, but his testimony is he disclosed to all four the existence of the IRS investigation.

1 His testimony has been that as to three that
2 are not part of this case, that have other
3 landowners, other counsel, other deadlines, other
4 facts and circumstances surrounding those
5 transactions, including the length of time it might
6 have been in the works, as to those three he
7 disclosed the existence of the IRS investigation
8 but recommended they go forward. With respect to
9 Mr. Justice his testimony is that he disclosed the
10 existence of the IRS investigation but made a
11 recommendation Mr. Justice not go forward.

12 His testimony further is that, "I would have
13 made the same recommendation that I made to the
14 other three if only I had Mr. Hanlin but I did not
15 disclose to Mr. Justice, I just said I recommend we
16 not go forward." So, the only information the
17 decision maker, that Mr. Justice had in this
18 transaction is, "There is the existence of an IRS
19 investigation and the consultant is telling me not
20 to go forward."

21 There is nothing that ties that in any way to
22 the withdrawal of Richardson Plowden and Mr.
23 Hanlin, and so as I understand it, Mr. McLeod wants
24 to offer the decisions of others who got different
25 information about differ projects to prove that

1 more likely, "It is more likely than not if I had
2 made that same recommendation to Mr. Justice he
3 would have gone forward."

4 There are several problems with this
5 proffered evidence. Number one, it is clearly
6 hearsay because what he's trying to prove is the
7 decisions of people who are not here and not
8 testifying. He can certainly say what he told them
9 but the problem is he wants not just to stop there
10 but to go ahead and introduce action or conduct
11 that was made on the basis of that recommendation.
12 Those people aren't here, we don't have any idea
13 what their decision making process was and so for
14 that reason they are just simply dissimilar.

15 The second problem is that if you believe,
16 and I don't mean to say we don't believe it, but
17 based on his testimony, his testimony now is, "All
18 I had to do was recommend to Mr. Justice and he and
19 I would have gone forward but I didn't feel
20 comfortable doing that." The problem with that is
21 he should have done that because the fact it didn't
22 close is at the basis of his own hand and yet he
23 now wants to come in and change the motivation and
24 say, "Well, it was because I didn't have Mr.
25 Hanlin."

1 There is nothing that links the failure to go
2 forward with withdrawl other than Mr. McLeod's own
3 motivation or personal decision making. If, for
4 example, he had made the same recommendation that
5 he did with the others, and as I said this last
6 night, Your Honor, this would be a different case
7 if he had also said, "Mr. Justice, I've got this
8 IRS investigation, I don't have Mr. Hanlin anymore
9 but I still recommend we go forward," and Mr.
10 Justice had said, "Oh, no, I'm not going forward if
11 Mr. Hanlin is not here," or, "I don't feel
12 comfortable going forward, Mr. McLeod, if you don't
13 have counsel," and that would be a different. Then
14 there would at least be some inference, the
15 defendants would still argue, look, the problem
16 with the IRS investigation, that is what the
17 evidence will show, Your Honor, we submit that that
18 is exactly what, at least until this lawsuit, that
19 is the motivation for which Mr. McLeod attributed,
20 that he had the IRS hanging over him and he just
21 couldn't recommend going forward.

22 We don't know why he recomended to other
23 people other than what he now says, that there were
24 tax lawyers. He didn't have counsel in those
25 transactions and didn't have counsel in this

1 transaction. So, the second argument is, or the
2 second reason that this evidence should not come
3 in, they are too dissimilar and the causal link is
4 simply broken by Mr. McLeod's decision not to
5 recommend that Mr. Justice go forward, because what
6 he says now is, "Oh, I feel certain he would have,"
7 and that brings me to the third point, and that
8 really doesn't have to go specifically to the other
9 three decision makers but it is almost like a
10 statistical argument.

11 He is saying, "Mr. Justice would have done
12 it, I feel certain," and they have offered the
13 testimony of some unrelated corporate designee to
14 try to prove that but the problem is we don't have
15 any testimony from Mr. Justice and he is the
16 decision maker, no testimony from Mr. Justice, we
17 really have no testimony from Mr. Justice, but it
18 is a separate corporation, someone that doesn't own
19 the property wants to testify, "That I feel certain
20 he would have gone forward if we had the
21 recommendation." That is hearsay.

22 If, for example Mr. Justice were to walk in
23 and --

24 MR. PENDARVIS: Excuse me, Your Honor. We're
25 getting a little far afield. We're dealing now

1 with the Justice Family Farms testimony. Can we
2 just go one at a time?

3 THE COURT: I understand the different
4 issues, I agree with you.

5 MS. MCWILLIAMS: All right. Those are my
6 points, Your Honor. I think this is so far afield
7 and so dissimilar it does not meet the definition
8 or the admissibility standard under Rule 401.

9 MR. PENDARVIS: Good morning, Your Honor, may
10 it please the Court.

11 THE COURT: Yes, sir.

12 MR. PENDARVIS: Let's start with what this
13 argument does not involve. This argument does not
14 involve an issue of relevancy. This evidence is
15 relevant to prove the causation issue in this case
16 and it is material. It is also not evidence of
17 hearsay because there is not one thing Mr. McLeod
18 is going to say is a statement by another person
19 out of court offered to prove what that person said
20 or did. Mr. McLeod is going to say only what he
21 said in his recommendations.

22 Number three, every, every name that I could
23 find in Mr. McLeod's notes that related in any
24 fashion to these three easements was disclosed in
25 discovery, the materials for these three easements,

1 every piece of paper we had in our possession was
2 produced and these issues as to the central point
3 of causation were available. The information that
4 led to this question was available to the
5 defendants the entire time.

6 They could have taken every deposition of
7 every party involved in those other three
8 easements, a substantial part of which were in
9 South Carolina or North Carolina. That information
10 was available. This issue of proximate cause and
11 material issue as to proximate cause is clearly
12 within the province of the jury, Eddy versus
13 Crouse, a case I had, that the issue that I lost on
14 was foreseeability and was it foreseeable. The
15 evidence to support the foreseeability issue, it is
16 a mandatory requirement in a legal malpractice case
17 much to my chagrin in that case, the issue of
18 foreseeability as to Mr. Hanlin and Richardson
19 Plowden's decision to terminate, as to whether this
20 would affect Mr. McLeod's handling of his
21 conservation easement matter, would it close or
22 would it not, because they were the only attorneys,
23 the issue is whether the other three easements this
24 company Y.E.S. was working on, the issue of whether
25 they closed with the same information, it was

1 foreseeable for this law firm when they made this
2 decision.

3 The argument, most of what you heard were
4 arguments counsel can make to the jury in closing
5 as to why there is no causal link, but the issue
6 that the facts, the truth of what happened, the
7 jury can decide all this. This is, this evidence
8 of similar acts, similar transactions to prove a
9 special relationship between the acts and facts
10 that are at issue in the case and similar instances
11 is admissible under the laws of this state.

12 JKT Company versus Hardwick, 265 Southeastern
13 2nd 510, it is a discretion call for the Court, as
14 you may know, but there are, the summary is similar
15 happenings or conditions of transactions
16 sufficiently similar have probative value as it
17 relates to the condition for facts in question.
18 They have, there is cases that allow evidence of,
19 again this is evidence that includes or shows a
20 party's knowledge of the foreseeability, citing
21 again the JKT case, evidence to show another
22 person's subsequent conduct. There is evidence,
23 that deals with real estate matters, Your Honor,
24 where the issue of value, condemnation matters and
25 real estate cases where tract A didn't close or it

1 was an issue on the price value of tract A. The
2 courts have allowed in evidence of similar
3 properties in the neighborhood and similar
4 conditions to prove the price of the contract or
5 the value of the property that didn't sell.

6 We have exactly that scenario here. We have
7 a conservation consultant providing consulting
8 services to four easement owners or landowners that
9 are considering conservation easements. We have
10 similar, I mean, statement from counsel, almost
11 identical statement --

12 THE COURT: Let me stop you there. Why is
13 Mr. McLeod, who I would deem to be an expert in
14 this field of environmental conservation and
15 conservation easement, his career over a period of
16 12, 13 years he has been doing conservations, he
17 has done 22, that is what he said.

18 MR. PENDARVIS: Yes, sir.

19 THE COURT: That's not very many, I mean,
20 your analysis about a similar lot nextdoor, I
21 closed thousands of real estate deals for houses.
22 I mean, to me, a conservation easement is a very,
23 very specialized deal, very particular. I mean,
24 I'm not certain he's the only one in the state
25 doing them.

1 Buying and selling houses, comparing the
2 value of a piece of property to the value of
3 another piece of property, that is a little more
4 simple in terms of because there is so much more of
5 it, transactions buying and selling houses happen
6 all the time, not recently in the real estate
7 market, but it used to be real estate lawyers would
8 close 50, 60, 70, some a 100 a week. This is 22 in
9 ten years.

10 MR. PENDARVIS: Well, Your Honor, you have
11 heard one of the top experts in the southeast, Mr.
12 Curtis Elliott has only done a handful himself.
13 What we're talking about is those people, the
14 decision makers in this process, the counsel that
15 handle these transactions were similarly situated,
16 knowledgeable about the IRS Code and conservation
17 easements, and the point being that this
18 information about the IRS investigation was
19 consistent that Mr. McLeod disclosed to all the
20 parties, all four.

21 There is no dispute and there is no
22 disagreement, or the testimony is that Mr. McLeod
23 said, as to the IRS letter, essentially the same
24 communications to all four parties, so we have
25 similar if not almost identical communications to

1 these four affected conservation easement project
2 clients of Y.E.S. As to whether there is a causal
3 link on the damage, the error, the mistake that
4 we're contending this law firm made when it
5 withdrew, with this information Mr. McLeod is going
6 to be able to say without saying one word about
7 what anybody on those other three transactions
8 said, not offering one out of court statement to
9 prove his point, he is going to show a recorded
10 deed, a letter, both of which meet the hearsay
11 exceptions, they are public records and business
12 records that have been available.

13 And again, if the defense wanted to depose
14 these people to ascertain the truth of what was in
15 those people's mind, which we're not offering,
16 we're not saying, well, this is what this person
17 thought, we're not saying one word except, "Here is
18 an easement, I gave this one this information and
19 this one closed, I gave the same recommendation to
20 Mr. Justice, the same information about this IRS
21 letter to Mr. Justice but I wasn't able to
22 recommend because there was no tax counsel."

23 Without saying, you know, he is going to be
24 able to testify. The recorded easement materials
25 or letters from these attorneys, they had their own

1 counsel, but that is not the point. This
2 information is relevant, this information is
3 material to the jurors' decision on whether there
4 is proximate cause and the proximate cause of the
5 entire issue, that is what this jury is here to do,
6 and to withhold information from them that might
7 influence their decision one way or the other is
8 improper. From what we have heard, there is no
9 evidentiary basis to exclude the evidence. It is
10 not hearsay, she admitted that, she acknowledged it
11 is not hearsay. She's just concerned it is not
12 helpful to her case.

13 THE COURT: You mean prejudicial.

14 MR. PENDARVIS: There you go, and 403, if
15 it's a 403 argument, how could this be prejudicial
16 when the withdrawal of this lawyer certainly as to
17 the Justice project was causally related. Our
18 contention is it was causally related to everything
19 in the process and the suggestion for closing
20 argument --

21 THE COURT: Let me ask you this. Why do you
22 need it? Why can't you say, "Mr. McLeod, what
23 would have been your recommendation if they're
24 still behind you?"

25 MR. PENDARVIS: I will say that.

1 THE COURT: I mean, why do you need that?

2 MR. PENDARVIS: Because this is more evidence
3 of proof that the IRS letter itself didn't stop
4 business at Y.E.S.. The IRS letter itself allowed
5 business to proceed with parties that were in the
6 circumstance, which I know Your Honor indicated you
7 were sort of concerned about the dynamics of the
8 relationship, but our contention was, as Mr.
9 Elliott told the jury, in the typical circumstance
10 if Mr. Hanlin had been representing Justice we
11 would contend it would be the same result. Mr.
12 Hanlin knows Mr. Justice, Mr. Hanlin knows Mr.
13 Justice doesn't promote. The whole issue, the
14 whole issue of what the IRS letter was about was
15 whether Mr. McLeod was a promoter.

16 Mr. Hanlin has experience, of all the
17 attorneys in these four projects that would have
18 known he was not a promoter, it was Mr. Hanlin, and
19 if Mr. Hanlin had been counsel for Justice our
20 contention is all four of these project would have
21 gone forward. So, the point being this information
22 shows the jury that the IRS letter itself, it
23 wasn't, "Everybody run for cover, get away from
24 Y.E.S., they are an illegal operation."

25 This goes to show the exact opposite, which

1 is so consistent with certainly my belief about Mr.
2 McLeod's character. With this knowledge of the IRS
3 letter, decisions were made by people with
4 sophisticated counsel that could make these kind of
5 decisions about the IRS and its impact on a 170(H)
6 deduction without using one bit of hearsay. I'm
7 using public records and no out of court statements
8 and we see this is clearly within the JKT Company
9 versus Hardwick analysis on similar transactions
10 that prove or disprove a causation issue that is in
11 dispute and this jury is smart enough they figure
12 this out.

13 THE COURT: All right. I want to bring the
14 jury in here, they're antsy.

15 MS. MCWILLIAMS: This is just a back door way
16 of trying to introduce speculation about what Mr.
17 Justice might have done. The reason these
18 transactions are not similar and shouldn't be
19 admissible is because they weren't Mr. Justice's
20 transactions and Mr. Hanlin was not involved in
21 them, and the only link apparently is Mr. McLeod,
22 and for the record, Your Honor, Mr. Mark Buyck is
23 one of the lawyers, we don't know about Mr. Knox,
24 he did one of the transactions, he is deceased, the
25 fact of the matter is, and the other is a lawyer

1 that I think it is Carol Hahn, she is not at the
2 firm where she was, but it is not our obligation to
3 try to make his hearsay admissible, so it's his job
4 to do that.

5 I understand he says he wants to offer a
6 deed. Well, the deed doesn't prove anything except
7 that someone who is not part of this transaction,
8 who is under different circumstances, different :
9 time constraint, different piece of property.
10 We're going to literally, I mean, this case will go
11 all the way through next week because if this comes
12 in I'm going to be entitled to introduce all of
13 these documents that came in extraneously, I'm not
14 required to go try to make things admissible
15 because they are not relevant.

16 Then I heard Mr. Pendarvis say he was going
17 to offer a letter. A letter, I don't know, a
18 letter from whom and to whom? But the fact of the
19 matter is if it involved my client and it's an
20 admission against interest it's hearsay. If he
21 wants to call Mr. Mark Buyck in here and Mark Buyck
22 were to say, "Yes, I heard it and my landowner who
23 I advised," you are talking about different legal
24 advice, Your Honor, he has admitted there are
25 different lawyers representing different

1 landowners. We don't have that here.

2 The only person who can testify about what
3 Jim Justice would have done, this is not disputed
4 he is the decision maker, is Jim Justice and if
5 they want to bring Jim Justice, we have heard every
6 day he might come, he might come. I'm still
7 waiting. I happen to know on the internet he
8 coaches his daughter's basketball team there in
9 Beckley. I'm not sure, maybe he's going to make it
10 down here.

11 But this is not evidence. The evidence of
12 other decision makers about other transactions is
13 simply not pertinent or relevant, it doesn't make
14 what Mr. Justice might have done more likely than
15 not. And, you know, it is interesting because the
16 other dissimilarities, he didn't tell them the same
17 thing, he did not tell them the same thing. He
18 said to those other three go forward. To Mr.
19 Justice he recommended don't go forward.

20 Okay, he's got to say, to prove his case he's
21 got to say, "I told Mr. Justice to go forward and I
22 told him that I didn't have any lawyers," and if we
23 had that similarity, "I told him to go forward and
24 he didn't go." But even then you've still got the
25 dissimilarity of the decision makers but there is

1 just no way that those other, what other people
2 did, unless of course everything is identical, and
3 it's not it's not, because in our case he told Mr.
4 Justice don't go forward.

5 Now, it just seems a little bit inequitable
6 to say, "I didn't tell him everything, I didn't
7 tell him I didn't have my lawyer," but now to come
8 back and say, "Well, what really was the case was I
9 know I told him it was the IRS but really what it
10 was, I didn't have a lawyer." That is just not
11 fair, but certainly it is not possible for us to
12 defend this case when we have now got three more
13 cases we're going to have to look at the decision
14 makers, what was said, and I hadn't put my case in
15 yet so I can assure you that if we are going to have
16 to defend those three decisions, you know, I guess
17 I will be issuing subpoenas at least to Mr. Buyck
18 and I said Mr. Knox from Augusta, our information
19 is that he's deceased and I don't know where Miss
20 Hahn is.

21 MR. PENDARVIS: Brief response. They had all
22 had similar deadlines, 2007. On top of that, Mr.
23 Buyck, I have spoken to Mr. Buyck, they called him,
24 he has told them exactly what was said, they know
25 about it, they can get him up here if they want him

1 here or they can at least go get his deposition, so
2 if they want to bring Mr. Buyck in here, they have
3 had, they have called him, they have called the
4 other people, we know they have called all these
5 people. They have called us back saying, "These
6 people are calling us and here is what we told
7 them."

8 They have had this information, this is a
9 little disingenuous to suggest they hadn't known
10 about it. It is a simple point, there is no
11 evidentiary objection, the probative value of this
12 is extreme, it shows exactly what this, the effect
13 this IRS letter had on people that had counsel and
14 it shows exactly what effect this IRS letter had on
15 people that didn't have counsel. That is what the
16 case is about, we think it is admissible all day
17 long. There is no evidentiary objection other than
18 relevance and this is, these are almost identical
19 transactions with identical deadlines, i.e.,
20 January 31, 2007.

21 MS. McWILLIAMS: I didn't say I didn't talk
22 with them. What I said was it is not my job to
23 make it admissible.

24 THE COURT: All right, this is what I think.
25 Understanding the peculiar or unique nature of the

1 conservation easements, and there is not a lot of
2 them out there, they are an uncommon animal. I
3 think that under Rule 403, that although relevant,
4 this is going to create confusion to the jury.
5 That is what I think. It is too much information.

6 Other deals, we're talking about this deal
7 with Justice, this relationship with Richardson
8 Plowden and Mr. McLeod. The motivation of the
9 other parties, having other counsel, the landowners
10 having counsel, the size of the easement, the time
11 of the easement, the preliminary work that had been
12 done, all that is unknown to me and to the jury as
13 to the timing of the other easement, the timing of
14 the other preliminary work or the base line studies
15 and all that sort of stuff, that seems to me to be,
16 I find that would be confusing to the jury on the
17 issue of this deal when Mr. McLeod has the ability
18 to say, "Had Richardson Plowden not backed out I
19 would have made a different recommendation." He
20 has that ability and I'm trusting or assuming that
21 is what he is going to say. I don't think, it is
22 my ruling that we not bring those other three deals
23 into this trial because of the, my belief is the
24 relevance would be outweighed by the confusion and
25 misleading the jury as to these decision makers

1 that had to make such an unusual type conservation
2 easement. I mean, they are very, very unusual, it
3 is not, they are not a common thing in our society.
4 I mean, they are very sophisticated and not
5 traditional in the sense of transactions, so
6 therefore --

7 MR. PENDARVIS: Can I take it to the next
8 step because I know what is coming in the defense
9 case. When this happened, when this IRS letter
10 came and when Richardson Plowden and Mr. Hanlin
11 quit Mr. McLeod retained Crosby Lewis and there is
12 going to be a substantial amount of evidence I
13 expect is going to be offered by the defense about
14 things that took place during the IRS investigation
15 and there is going to be, I mean, one of the very
16 first things, the focus of Mr. Crosby Lewis'
17 efforts to represent Y.E.S. in regards to this
18 easement, the work from the first days of the
19 representation dealt with advising all the clients
20 of Y.E.S., all four of them, Mr. Lewis was in on
21 the telephone call to Mr. Justice and Mr. Lewis
22 made instructions they developed to make sure Mr.
23 McLeod made full disclosure to all these easements,
24 and similar to a limine motion, we move that all
25 the evidence about the IRS investigation and what

1 happened as to their activities to defend the IRS
2 investigation be excluded from the defense case
3 because it is all involving these other easements
4 as well and that is the same confusing issue that
5 we will be dealing with here.

6 I think this case basically stops in
7 December, December 31. You know, there is an IRS
8 letter later when they discontinued the
9 investigation but all the activities that dealt
10 with all these different easements, what happens,
11 and they want to open the door, I would submit we
12 will be able to come back in rebuttal with this
13 very same evidence because what they had to submit
14 to the IRS was all the information from these
15 easements, I mean, bunches of it.

16 THE COURT: I have not heard very much
17 proffer from the lawyers about what the IRS
18 investigation was but the IRS believed Mr. McLeod
19 to be a promoter and advertising how to avoid tax
20 schemes on the internet or by advertising and he
21 doesn't advertise, doesn't have a business card,
22 has a cell phone and a yellow pad, so he is not
23 what they thought he was and he was cleared of it
24 eventually. Is that more or less --

25 MR. PENDARVIS: That is more or less it.

1 They were on a rampage. It wasn't just Mr. McLeod,
2 it was anybody near a conservation easement got
3 these same investigations, he was just in the
4 group. And my point, though, is all these other
5 clients, all these other prior conservation
6 easements which would include the ones that closed
7 in 2007 that I'm trying to get in evidence, I
8 understand Your Honor's ruling, my point is if they
9 go into all that in their case I submit they are
10 opening the door. I ask it not happen because we
11 have to streamline this trial and get this case to
12 the jury but if they go into that I'm going to, I'm
13 going to ask for the Court to exclude that evidence
14 but if they are allowed to present that evidence
15 I'm going to need to come back and present what
16 will include these easements because they can't
17 conveniently give the jury the bad part of what
18 they consider the bad part of what was given to the
19 IRS and not show them these easement, so --

20 MS. MCWILLIAMS: May I be heard on that?

21 THE COURT: Yes, ma'am.

22 MS. MCWILLIAMS: We don't intend to go into
23 these other transactions but just for the record,
24 we can tell from the IRS investigation, they did
25 not even look at the three, well, one of the three

1 he didn't disclose to the IRS, based on what we can
2 tell. We didn't intend to go into that. There are
3 a few post December 31, 2007, letters and emails
4 and that sort of thing and we will do our best, all
5 we want to prove is that after this happened Mr.
6 McLeod continued to take the position that they
7 postponed it because of the IRS investigation and
8 we have some documentation to that, and the Court,
9 the IRS did look at some other entities that Mr.
10 McLeod was involved in and I think they looked at a
11 number of things. They did not look at the
12 easements that Mr. McLeod is trying to offer and we
13 don't intend to go into that.

14 To the extent there is any extraneous
15 reference to, for example, NRB was the educational,
16 I mean, he has already testified about it
17 yesterday, he has already introduced to the jury,
18 "Oh, yes, I had this NRB," I may not use the right
19 initials, but he had one organization that hadn't
20 been active for a long time and the IRS looked at
21 that. We weren't planning to go into that, we
22 weren't planning to go into these other easements.
23 If the Court wanted to find out what the IRS looked
24 at, there is a great deal of information.

25 The only other thing we want to show Your

1 Honor is some of the correspondence goes to
2 damages. We are not trying to try any of those
3 other cases and we will make, if there is a
4 reference to an unrelated -- well, it is mostly all
5 Justice we want to put in. There is at least an
6 example letter from one of his counsel saying, "We
7 don't have to produce the, the easements that we're
8 abandoning. That would include blank, blank, and
9 Jim Justice." You know, obviously we don't think
10 that's relevant. He told his lawyer, "We abandoned
11 that." But we will be very careful about that if
12 we have to go there.

13 THE COURT: Well, we'll see how it plays out.
14 You all be anticipating, if we get close let me
15 know.

16 MS. McWILLIAMS: All right.

17 THE COURT: All right.

18 MR. PENDARVIS: The next one, with the
19 Court's permission, I might as well go into it, our
20 plan is to finish with Mr. McLeod and then play the
21 30(B)(6) deposition video for the jury and then
22 we'll be resting.

23 THE COURT: All right.

24 MR. PENDARVIS: We have already discussed
25 that.

1 THE COURT: That will be a good time for a
2 break, Mr. McLeod is not going to be a fifteen
3 minute witness to finish up.

4 MR. PENDARVIS: No.

5 THE COURT: We'll do that after Mr. McLeod.
6 I want to get the jury to working a little bit.
7 They are already complaining I don't have any
8 candy. Their question is, they are worried about
9 the weekend already.

10 MS. MCWILLIAMS: They are worried about what?

11 THE COURT: The weekend. Let's get the jury.

12 (The jury returned to the courtroom).

13 BAILIFF: The jury is all present.

14 THE COURT: All right, thank you. Sorry for
15 the delay, and for your information my law clerk is
16 back, you all haven't met her yet, she's on an
17 errand for your benefit and she will be back
18 shortly. As soon as she's back we'll pass it
19 around, and we'll discuss something with you at the
20 next break about schedule, I can answer those
21 questions also.

22 So, with those comments, Mr. McLeod is still
23 under oath and Mr. Pendarvis still has his witness.

24 MR. PENDARVIS: Thank you, Your Honor, if it
25 please the Court, ladies and gentlemen of the jury.

1 BY MR. PENDARVIS:

2 Q Mr. McLeod, we were finishing up with your
3 testimony, at the point we broke yesterday we were
4 putting together some pieces of the team you were
5 putting together for this appraisal. Do you
6 recall, I'm just trying to bring this back to where
7 we were, do you recall speaking about Mr. Henry
8 Beckham, the appraiser?

9 A Yes, sir.

10 Q Did you communicate with Mr. Beckham and
11 formally engage him to work on the project, the
12 Justice project?

13 A Well, I knew Henry and had done some work
14 with him before and I knew, as I said yesterday, I
15 mean, I testified that he was the only appraiser I
16 really knew who had actual experience and
17 understood compensatory mitigation as a highest and
18 best use of a tract of land, and so he was ideal as
19 a second appraiser and I did discuss the project
20 generally with Henry. Henry actually was familiar
21 with the property and so I didn't formally engage
22 him but he stood prepared to assist us with a
23 second appraisal.

24 Q I have passed up a letter dated November 28,
25 2007, from Beckham Appraisal Services, addressed to

1 you. Do you recall receiving this letter?

2 A Yes, sir.

3 MS. MCWILLIAMS: Excuse me, Mr. Pendarvis,
4 I'm looking for your exhibit.

5 Q While Miss McWilliams looks for the exhibit I
6 have a question for you. Would you remind the jury
7 about the concept that was being used for the
8 highest and best use value of the Justice property?

9 A Sure. With a conservation easement project
10 on any tract of land where you have determined that
11 the property will qualify and you can create one of
12 the federal conservation values, one of the
13 requirements of the easement process is to have an
14 appraisal, and the appraisal is very much like a
15 condemnation appraisal when the government, the
16 Highway Department, for instance, takes land for a
17 highway or some other purpose for public benefit
18 and use.

19 The appraisal methodology is for the
20 appraiser to appraise the property being taken
21 before the taking and then appraise the same tract
22 of land after the taking, and with an easement
23 project the methodology is exactly the same. The
24 appraiser appraises the property at its highest and
25 best use, whatever that is before the easement is

1 placed, and then the appraiser appraises the
2 property for its highest and best use after the
3 easement is placed. And so in this case the
4 highest and best use was obviously mitigation and
5 the after value best use would have been
6 agricultural.

7 Q In this letter that you received from Mr.
8 Beckham did he show you any other examples of
9 circumstances on conservation easements that uses
10 similar strategy?

11 A I'm sorry, I didn't follow that.

12 Q Did Mr. Beckham's letter show you an example
13 of other property where he had given appraisals
14 where they used a similar strategy, mitigation
15 value?

16 A Yes. Actually I was involved in that
17 project, too. There was a bottom land hardwood
18 tract in fairly close proximity to Mr. Justice's
19 farm in the Black River basin and it was a cut over
20 tract that the timber all had been cut, and Mr.
21 Larry Fortenbury owned the tract, as mentioned in
22 this letter from Mr. Beckham, and Larry had asked
23 me to help him with that project, actually, because
24 he owned the tract and the Highway Department
25 wanted to work with Larry to create a compensatory

1 mitigation bank on that subject tract which I
2 believe was 4,000 acres and Larry asked me to help
3 him with it. Mr. Beckham actually ended up doing
4 the appraisal for Mr. Fortenbury on that tract, so
5 that is the tract he was referring to in his
6 letter, Mr. Pendarvis.

7 Q And does this letter from Mr. Beckham reflect
8 any agreement with regard to the Justice project?

9 A Yes. He indicated that he can do, do an
10 appraisal for the Justice easement program for
11 \$5,500. I said yesterday a desk review would be
12 another appraiser looking at the appraisal of the
13 first appraiser and making sure that it was in
14 conformity with the IRS regulations and Appraisal
15 Institute guidelines and protocol.

16 Q Around this time of this November 28
17 letter --

18 MR. PENDARVIS: Before we do that, Your
19 Honor, I would like to move that letter into
20 evidence as Exhibit Number 31.

21 MS. MCWILLIAMS: No objection, Your Honor.

22 THE COURT: 31 admitted without objection.

23 (November 28, 2007, marked and received in
24 evidence as Plaintiff's Exhibit 31).

25 BY MR. PENDARVIS:

1 Q Mr. McLeod, we're in the time range here in
2 late November, early December of 2007. What was
3 your involvement with the conservation grant
4 organization that was going to accept this, COLT?
5 Late November, early December, were you involved in
6 the process to bring COLT into the project?

7 A Sure. We had had that site visit with Sue
8 Green and Hal Hanlin and Randy the farm manager and
9 myself and they were excited about the project and
10 accepting the gift of the easement.

11 Q What did COLT do after, as far as you know,
12 after the idea that they would accept this gift?

13 A --Sue notified me that she had presented the
14 project to her Board and that the Board had
15 approved the project and agreed to accept the gift.

16 Q Was there anything else COLT did after that,
17 after the Board had accepted it, as far as any type
18 of letter of intent or something like that to show
19 they were interested?

20 A She sent me a letter confirming that they
21 were excited and ready to accept the gifted
22 easement.

23 Q Are you aware of COLT submitting a letter of
24 intent to Mr. Justice?

25 A Yes.

1 Q Would you tell the jury a little bit about
2 that?

3 A That would be standard for the qualified
4 organization to send a letter of intent to the
5 landowner acknowledging that the qualified
6 organization had agreed to accept the gifted
7 easement.

8 Q And are you aware of a letter from COLT being
9 transmitted to Mr. Justice?

10 A Yes.

11 Q Was that letter ever signed?

12 A I don't think so.

13 Q Did the letter request Mr. Justice pay fees
14 or stewardship contribution?

15 A Oh, yes.

16 Q Things like that?

17 A Sure.

18 Q Did Mr. Justice ever pay those fees?

19 A No.

20 Q Mr. McLeod, I'm going to ask you to retrieve
21 Exhibit 10.

22 A Okay.

23 Q Do you recall receiving this letter from
24 Richardson Plowden?

25 A Yes.

1 Q Did you read it -- well, we can see on the
2 last page, that is your signature on the last page?

3 A Yes, it is.

4 Q Did you read the letter before you signed it?

5 A Yes, I read it.

6 Q Was there anything remarkable in it, when you
7 read it, that caused you any concern?

8 A Well, you know, splitting the fee
9 one-third/two-thirds is something we had never done
10 before but Hal and I talked about that and that was
11 fine with me. If he had wanted 50 percent of it it
12 was fine with me. I had asked Hal to help me with
13 the project and he agreed to help and it was his
14 letter and the informality of entering into a fee
15 agreement, I signed it when my secretary handed it
16 to me and sent it back to him.

17 Q We had this discussion a little bit about
18 the, one of the early November emails but this was
19 a little unusual that Mr. Hanlin was going to be
20 representing your organization, wasn't it?

21 A Yes, but you know, my commitment to Mr.
22 Justice was to make the project happen and I needed
23 a tax attorney and Hal and I were friends and had
24 done work together before and once Hal said he was
25 excited about working with me on it, it was fine

1 with me for him to handle the relationship any way
2 he wanted to as long as he was involved in the
3 project.

4 Q You didn't call Mr. Hanlin and ask him any
5 questions about it?

6 A No, sir.

7 Q Mr. McLeod, we have heard from Dr. Hawkins
8 who came yesterday and told us a little bit about
9 his activities.

10 A Right.

11 Q Who was handling interaction between Dr.
12 Hawkins, excuse me, and the project? Were you
13 involved in coordinating with Dr. Hawkins?

14 A Well, sure. I would have, originally, once
15 Mr. Justice asked me to go forward with the project
16 I would have been the one that had contacted Dr.
17 Hawkins and told him a little bit about the project
18 and he accepted the project and came down for a
19 site visit. Dr. Hawkins doesn't fly so he and his
20 wife always drive wherever they go. Hal and I
21 talked about anticipation of Dr. Hawkins arriving
22 for the site visit, you know, meeting him on the
23 site and introducing him to the folks on the farm,
24 and I don't know exactly how that came down but I
25 was the one that met Dr. Hawkins on the site. I

1 had given Dr. Hawkins our phase one mitigation
2 analysis project, I thought it would be helpful to
3 him, and also had given him the base line
4 documentation for Jim Lewis and Quinton Epps, which
5 would be helpful to him from the hydrological
6 analysis and so forth.

7 Q I would ask you if you could, please,
8 retrieve Exhibit 18.

9 A I don't have to look, that is the big one, I
10 can pull that out.

11 Q I know we remember your testimony yesterday
12 that Mary does the typing but is this an email you
13 sent to, you had Mary send for you to Mr. Hanlin?

14 A Yes, sir, it is.

15 Q And --

16 A I don't dictate, by the way, I just write
17 things out on a yellow pad.

18 Q And you received this base line report, this
19 attachment to the email, from Mr. Lewis the same
20 day you sent it to Mr. Hanlin?

21 A Correct.

22 Q Did you review the base line report?

23 A Sure.

24 Q Have you created base line reports in the
25 history of your work?

1 A I'm trained as a lawyer but I make my living
2 as a natural resource conservation and wildlife
3 consultant. Over many, many years, you know,
4 people like Jim Lewis and Dr. Batson have given me
5 my education related to what I do for a living and
6 so while I know a lot about natural resources and
7 wetland and land and soils and so forth, I'm not a
8 biologist but I do participate with Jim, Quinton,
9 whoever is doing base line and I'm very comfortable
10 on land, I spent my life on land, farming, doing
11 wildlife management, so he frequently will ask me
12 to do part of the base line documentation.

13 Frequently, for instance, I photograph the
14 site for the base line. That is one of the, the
15 language in 170(H) regarding the requirement of the
16 base line documentation report is what we call in
17 the law preparatory, it doesn't say you shall this,
18 this, it says may include, and of course what we
19 try to do with each base line report on every
20 project is to compile a report that is an accurate
21 representation of existing physical, biological and
22 scientific chemical conditions on site at the time
23 of the placement of the easement because this
24 document will become the benchmark from which to
25 measure any changes in condition in years going

1 forward. And so frequently Jim would ask me to
2 help him with those but I have never put a whole
3 base line together, I wouldn't feel competent to do
4 that. There is a lot of language in here that, you
5 know, I hardly understand.

6 Q Did you review this before you transmitted it
7 on to Mr. Hanlin?

8 A Yes, sure. And I do know that when Jim first
9 sent the draft to me he had the word hydrological
10 and natural resources report and, you know, I
11 wanted it to conform exactly with the language in
12 170(H) of the Internal Revenue Code and I later
13 asked Jim to correct that cover page to say base
14 line documentation report.

15 Q And that, I'm not sure, it is hard to tell
16 from this email, but if you go about halfway in the
17 document there is what appears to be a cover page
18 that says that?

19 A Right, yes.

20 Q Now, as to the content of the email to Mr.
21 Hanlin, is a lawyer's critique or review of a base
22 line report necessary?

23 A Sure. You know, a conservation easement is
24 very site inclined specific but with a conservation
25 easement you need to be sure that while, you know,

1 the appraisers and the biologists and me are out
2 there on the site doing the work necessary to do
3 the due diligence and put together the whole
4 project, once you get, you know, the scientific and
5 biological and physical characteristics of the
6 property reduced into the base line the lawyer has
7 to be sure that it conforms in all ways with the
8 technicalities of 170(H) and so this letter of
9 transmittal of the draft is simply, as I always
10 would do, to give the base line draft to the
11 attorney to be sure that it conforms in all
12 particulars with the law, the regulations, IRS
13 regulations.

14 Q Did you receive a response from Mr. Hanlin to
15 your email marked as Exhibit 18?

16 A No. No, I did not.

17 Q How about response by email, did you get an
18 email response to this email?

19 A I don't believe I got any kind of response
20 from Mr. Hanlin on the request to review the report
21 and be sure it was in conformity with the
22 regulation.

23 Q In circumstances in other matters where the
24 base line reports have been reviewed by the
25 attorney, what happens to the base line report

1 next?

2 A Then we put it in final form and it is then
3 transmitted to the grantor, the landowner, and a
4 grantee organization that is going to accept the
5 gift of the easement for them to review the
6 document to be sure that they both agree that it is
7 an accurate representation of existing conditions,
8 because they have to sign a form to acknowledge
9 that the base line documentation report is an
10 accurate representation.

11 Q Was that form ever signed for the Justice
12 project?

13 A No.

14 Q By the grantor?

15 A No.

16 Q Was it ever signed by the grantee, the
17 prospective grantee, COLT?

18 A No. I never got it back to put it in final
19 form to send it. This letter asked Hal once this
20 is in the proper form to give it to Sue for her
21 review.

22 Q Did you ever call Mr. Hanlin -- the jury has
23 all heard about what happened on the 20th of
24 December, between the 14th of December and December
25 20th. Did you ever call Mr. Hanlin to ask about

1 his review of this base line report?

2 A I don't recall calling him about it.

3 Q Mr. McLeod, if you don't mind, let's turn to
4 Exhibit, pull out Exhibit 23, please. During the
5 break I'm going to get them in numerical order
6 because somebody has messed them up.

7 A Okay.

8 Q Now, I'm passing to you another email. Take
9 a moment to look at that, we're going to talk about
10 this. On December 20 some big news came into
11 Yancey Environmental Solutions. The jury has seen
12 this Exhibit 23 letter, but you didn't see that --

13 A No.

14 Q -- when it came in. You didn't see the IRS
15 letter that morning?

16 A No.

17 Q The exhibit I have just passed to you is an
18 email later that morning. Exhibit 23 shows it to
19 be a 10:52 email from Mary to Mr. Hanlin.

20 A Uh-huh, yes.

21 Q And the second email that I passed to you is
22 an email from Mary to Mr. Hanlin setting up a
23 conference call.

24 A Right.

25 Q Describe for the jury what you were told,

1 what you learned about this IRS letter when you
2 first heard about it. You don't need to say what
3 you said but I want you to describe for them what
4 you heard, what information you got and your
5 reaction.

6 A I guess my first reaction was anger, how dare
7 they, how dare the government accuse me of being a
8 bad person. They ought to have me on the payroll.
9 I have counseled people that call me and spend my
10 time talking to them about their land and projects,
11 what they wanted to do and advised them not to do
12 something on a conservation project. So, it was, I
13 guess incredulous would be a fancy word, I was just
14 shocked that they would accuse me of wrongdoing. I
15 knew that I hadn't done anything wrong I knew of,
16 so long term I wasn't particularly, I wasn't scared
17 about it. I was just shocked.

18 Q Did Mary tell you anything about her
19 conversation with Mr. Hanlin?

20 A Well, she told me -- can I say this?

21 Q Well, what did you take from her phone call?

22 A That he considered it serious and we needed
23 to talk.

24 Q And the only copy of this exhibit we have has
25 a sticky note apparently right on the letter but

1 you apparently were on a conference call of some
2 sort?

3 A I was, yes, I called Hal after I got off the
4 conference call.

5 Q Before we get into that conversation I want
6 to turn back to Exhibit 23 and the email. The last
7 part of the first paragraph in that email says,
8 "We're not doing well financially, we are literally
9 at the end of the rope"?

10 A Right.

11 Q Can you describe -- was that accurate?

12 A If Mary says so. You know, my whole life has
13 been an absolute roller coaster of income. When I
14 told you all yesterday that I was surprised to hear
15 the testimony yesterday about my income in a couple
16 years, I had no clue what that was. You all might
17 think me kind of dumb to not know what my income is
18 but that is who I am, I just never think about
19 that. I did notice some testimony yesterday it
20 went from way up to way down consecutive years.

21 MS. McWILLIAMS: Your Honor, I move to strike
22 that. That is not responsive to the question.

23 MR. PENDARVIS: I asked him about his
24 financial circumstances.

25 MS. McWILLIAMS: I mean, he can testify, he

1 can answer the question but not testify about what
2 we heard yesterday and that sort of thing.

3 THE COURT: Rephrase your question.

4 BY MR. PENDARVIS:

5 Q This comment, to the best of your knowledge,
6 was accurate when it was made, when she said you
7 were not doing well financially?

8 A Yes, sir.

9 Q Now let's turn to the phone call. This one
10 you can tell the jury exactly what was said. I
11 want you to do the best you can, repeat the
12 conversation as best you remember it.

13 A Okay. I remember it well. I was just
14 shocked, my whole world was crashing around me with
15 this letter, I was furious to think they would
16 accuse me and I was getting ready to call Hal and I
17 thought I was getting ready to discuss what are we
18 going to do, how are we going to approach this and
19 explain to my clients what's happened, and I called
20 Hal and instead of discussing how we were going to
21 approach it and disclose the information about the
22 letter, obviously I needed to tell my clients,
23 particularly those I was working on projects for
24 that year, about the letter but instead of
25 discussing it and the strategy Hal said, "Yancey,

1 I'm sorry to tell you this but my law firm has
2 directed me to immediately terminate all
3 relationships with you." The conversation lasted
4 about 48 seconds. I mean, I could not believe what
5 he had told me. And so I hung up the phone -- do
6 you want me to go on?

7 Q Well, I mean, let me ask, did you say
8 anything in response?

9 A You know, I probably said, you know, "Hal I'm
10 so sorry," or something. I don't really recall
11 what I said.

12 Q How did you feel?

13 A I was, I was absolutely shattered. I could
14 not believe what he had just told me.

15 Q What did you do next?

16 A I turned to Mary, her desk is literally, my
17 office wasn't that big, about as big as the corner
18 of the jury box, and I said, "Mary, Hal just told
19 me that Richardson Plowden had terminated all
20 relationships with me immediately, I don't have any
21 choice but to call Jim Justice and recommend he
22 postpone this project." That's what I said.

23 Q Mr. McLeod, if you don't mind, pull Exhibit
24 25.

25 A I'm sorry?

1 Q Exhibit 25, I want to ask you about it.

2 MR. PENDARVIS: Before I get into that, Mr.
3 McLeod, I would like to move the email from Miss
4 Mohr to Mr. Hanlin that I just showed you that had
5 the note on it, Exhibit 32.

6 THE COURT: Any objection?

7 MS. MCWILLIAMS: May we approach, Your Honor?

8 THE COURT: You may.

9 (Unrecorded bench conference).

10 THE COURT: 32 is in.

11 (December 20, 2007 email marked and received
12 in evidence as Plaintiff's Exhibit 32).

13 BY MR. PENDARVIS:

14 Q Mr. McLeod, did you receive this letter from
15 Mr. Hanlin dated December 21, 2007?

16 A I did.

17 Q Did you do anything when you read it? I'm
18 sure you did that?

19 A Sure.

20 Q Did you, after you got the phone call the day
21 before, the phone call was December 20?

22 A Yes, sir.

23 Q What did you do after that, and after you,
24 you have already told us what you said to Mary but
25 what action, if anything, did you do after

1 receiving that phone call?

2 A Well, I set upon the task of figuring out how
3 to defend my integrity and reputation and I needed
4 to, you know, to think about my clients and what
5 was in their best interest and I called an old
6 friend, Crosby Lewis, who is an attorney, still is
7 an attorney, and I told him what had happened, I
8 told him I needed to see him, that I needed to talk
9 to him. I'm in a state of shock.

10 Q Did you talk to him or meet with him?

11 A I did. That evening, and Crosby is a very
12 good attorney, 70ish, he was good friends with my
13 dad, Mary and I went to Crosby's office and sat
14 down with him and I told him what was going on.

15 Q Did you go see Mr. Lewis to take over the
16 Justice project?

17 A No, no. Crosby, it would take me six months
18 to fight the IRS, to get Crosby up to speed on
19 conservation.

20 Q He doesn't handle conservation easement
21 matters?

22 A No.

23 Q Did you start looking for an attorney to
24 replace Mr. Hanlin?

25 A No, sir.

1 Q Why not?

2 A Well, I have been in conservation projects a
3 long time and this is a \$45,000,000 conservation
4 easement, I just felt it would be pointless and
5 impossible to find a qualified competent attorney
6 to step in with ten days to go in the year. If I
7 had tried to find an attorney to step in with ten
8 days to go in the calendar year on a \$45,000,000
9 conservation easement with a very unique approach
10 to valuation, if one had said yes I wouldn't have
11 wanted him to represent me and Justice. I don't
12 believe a competent attorney would have, they
13 would have responded, "Yancey, have you lost your
14 mind?" I mean, that is what I really believe.

15 So, I did all that I could do, which was to
16 talk to Crosby about making calls to Jim Justice to
17 tell him what my recommendation was.

18 Q Did you in fact do that, did you all set up a
19 call and make a call too Mr. Justice?

20 A Certainly did, on Christmas Eve, 2007.

21 Q Do you remember that phone call?

22 A I was scared to death. I was humiliated, I
23 was mortified. I mean, my gosh, I'm dealing with
24 this Donald Trump kind of guy. For all I knew he
25 was going to be furious, and I didn't think so

1 because of our very good relationship but I was
2 scared, and he had Steven Ball, his attorney, and
3 Dave Harrah, the CPA, on the call. I just told
4 him, you know, about the IRS letter and I said,
5 "Jim, I think we need to postpone the project." Of
6 course the reason I told him that, I didn't, I was
7 mortified by having to tell him the IRS accused me
8 of being a bad person, I didn't see the need
9 ethically to tell him my attorney had quit, too.
10 That was embarrassing, I make my living on people
11 like Jim Justice referring people to me and I was
12 doing my very best to fulfill my duty, fiduciary
13 duty to, ethical duty to Mr. Justice by
14 recommending what I thought was the best course of
15 action. So, he could not have been nicer. I just,
16 I just melted, literally tears came to my eyes when
17 he said, "Yancey, don't worry about it."

18 MS. McWILLIAMS: Your Honor, I object.

19 A I'm sorry.

20 THE COURT: Sustained.

21 Q You where emotional during the phone call?

22 A Oh, my gosh.

23 Q Did you make any recommendations to Mr.
24 Justice?

25 A I recommended to him that we postpone the

1 easement project.

2 Q Were there any plans developed to restart it
3 2008 or a later date?

4 A No, not at that time. Over the ensuing
5 months of 2008 I wrote him several times over the
6 next year or two or three, you know, saying that,
7 you know, "I successfully defended myself against
8 the IRS and it opened my whole life up, they
9 humiliated me but after they looked at every square
10 inch of my professional life they decided I hadn't
11 done anything wrong."

12 Q Yancey, if Mr. Hanlin hadn't quit what
13 recommendation would you have made to Mr. Justice?

14 A To move forward with the project. I would
15 have made that recommendation. You know, when Hal
16 quit I just, as I said, I turned to Mary and said,
17 "I've got to recommend postponing the project, I
18 don't have any choice." If he hadn't quit I would
19 have been perfectly willing to move forward with
20 it, I knew I hadn't done anything wrong.

21 Q Let's rewind a little bit. Did Mr. Hanlin
22 ever tell you anything about COLT not intending to
23 proceed with the easement?

24 A No.

25 Q Did Mr. Hanlin tell you anything about

1 whether a surveyor was going to be needed to survey
2 Mr. Justice's project before the easement was
3 properly done?

4 A No. We had survey work done. Surveys aren't
5 required for 170(H)'s. The federal government had
6 done a survey on the 1,100 acre tract and we had
7 boundry surveys, we just needed a legal description
8 for the conservation easement, which would have
9 been, you know, taken from the deed of the various
10 parcels that were purchased to put the property
11 together, less the WRP portion of the property,
12 which would have been the easement property.

13 Q What did Mr. Hanlin tell you, if anything,
14 about whether COLT was not going to proceed with
15 the easement because Mr. Justice hadn't signed the
16 letter of intent?

17 A No, that was not unusual at all in
18 conservation easement projects, you know, not to
19 have documents actually signed. You know, the
20 truth is as complicated as easements can be and
21 this one certainly had some parts that were very
22 unusual and unique, you know, the conservation
23 easement document obviously is critical and you
24 have to have a base line documentation report but
25 you have to make sure the parties agree that

1 represents the existing conditions but that's
2 really all you have to have to close. The
3 appraisal actually doesn't even have to be finished
4 until 60 days after the gift.

5 Q What did Mr. Justice, excuse me, what did Mr.
6 Hanlin tell you, if anything, about whether COLT
7 would not accept the conservation easement gift
8 because Justice hadn't paid his stewardship fee?

9 A Nothing.

10 MS. MCWILLIAMS: I object to leading.

11 MR. PENDARVIS: I asked him, "What did he
12 tell you, if anything?"

13 THE COURT: Rephrase it. It was leading.

14 BY MR. PENDARVIS:

15 Q Did you have any conversations with Mr.
16 Hanlin about Justice's nonpayment of the
17 stewardship fee?

18 A No.

19 Q Did he ever discuss that with you?

20 A No.

21 Q What was Mr. Hanlin's relationship with COLT?
22 Just remind the jury what his relationship was.

23 A He was chairman of the Board of COLT.

24 Q Did you have any conversations with Mr.
25 Hanlin about concerns about the project going

1 forward because Mr. Justice hadn't signed the
2 consulting services agreement?

3 A No.

4 Q Did Mr. Hanlin ever discuss with you any
5 concerns about whether Mr. Justice intended to go
6 forward?

7 MS. MCWILLIAMS: Objection, Your Honor, calls
8 for speculation.

9 MR. PENDARVIS: I asked if Mr. Hanlin had
10 discussed this with him, it is not speculation.

11 THE COURT: You can answer that question.

12 A No.

13 Q Did Mr. Hanlin ever, did you discuss with Mr.
14 Hanlin the concept, this highest and best use
15 concept being mitigation value?

16 A Yes, I did.

17 Q Did Mr. Hanlin give you any advice about
18 whether that was an appropriate methodology to
19 calculate the value of this easement?

20 A Yes.

21 Q What did he tell you?

22 A Well, he had done some research and we
23 discussed it and felt like it was a perfectly
24 proper thing to do.

25 Q Did you ever, once you entered, I'm bouncing

1 around a little bit trying to clear up some issues
2 on the easement, after you introduced Dr. Hawkins
3 to the property were you involved in Dr. Hawkins'
4 evaluation process to reach his appraisal numbers?

5 A No.

6 Q Did you have any communications with Dr.
7 Hawkins about the values and issues he was
8 reaching, while he was in this appraisal process?

9 A No.

10 Q Did Mr. Hanlin discuss with you about
11 anything remotely related to converting a
12 contingency fee to an hourly fee?

13 A No.

14 Q Did Mr. Hanlin voice any concern that it was
15 anticipated if this easement closed it would be too
16 high or too much money?

17 A You mean too much for him?

18 Q Yes, sir.

19 A No.

20 Q Did Mr. Hanlin discuss with you any concerns
21 about whether this contemplated Justice
22 conservation project would create problems for Mr.
23 Justice or his companies as a reportable
24 transaction under the IRS code and regulations?

25 A No.

1 Q Did Mr. Hanlin discuss with you any concerns
2 about whether this Justice conservation easement
3 might be considered a, well, the report of
4 transaction may cause problems for Y.E.S.?

5 A No.

6 Q Did Mr. Hanlin discuss with you any concerns
7 about whether the Justice conservation project
8 would create problems for Mr. Justice or his
9 companies as a listed transaction?

10 A No.

11 Q The same question for Y.E.S., would it cause
12 problems to Y.E.S. as a listed transaction?

13 A No, no discussion whatsoever about any of
14 that.

15 Q I have to go through some of these things,
16 these are technical IRS terms. I'm going to ask
17 you again, did Mr. Hanlin ever discuss with you any
18 concerns about whether this Justice project would
19 create problems for Mr. Justice or his companies
20 about a loss transaction?

21 A No, sir.

22 Q The same question for Y.E.S., would this
23 project have created a loss transaction for Y.E.S.,
24 any problems about that?

25 A No, sir.

1 Q Bear with me. Did Mr. Hanlin ever discuss
2 with you whether this contemplated Justice project
3 would create any concerns or issues for Mr. Justice
4 or his companies as a transaction of interest under
5 the IRS laws and regulations?

6 A No, sir.

7 Q Same question for whether this project would
8 create a problem for Y.E.S. as a transaction of
9 interest under the IRS laws and regulations?

10 A No, never had any such conversation.

11 Q Did Mr. Hanlin ever tell you or discuss with
12 you anything, any concerns about whether this
13 Justice project would be considered as an IRS tax
14 shelter disclosure, subject to the IRS tax shelter
15 disclosure regulations?

16 A No, sir.

17 Q Did Mr. Hanlin ever discuss with you any
18 concerns about whether this contemplated Justice
19 conservation easement would create problems for
20 Y.E.S. as an aider and abettor under the IRS laws
21 and regulations?

22 A No, sir. Hal knew full well that Yancey
23 McLeod is not an aider or abettor or promoter.

24 Q Did Mr. Hanlin ever discuss with you any
25 concerns about whether Richardson, he or Richardson

1 Plowden would be subject to any of the concerns we
2 have discussed, including reportable transaction,
3 listed transaction, loss transaction, transaction
4 of interest or a transaction subject to the tax
5 shelter disclosure regulations?

6 A No, sir.

7 Q Did Mr. Hanlin ever discuss with you any
8 concerns about whether Y.E.S. or you, Yancey
9 McLeod, would be considered a material adviser, a
10 material adviser under the IRS laws and
11 regulations?

12 A No, sir.

13 Q Were you relying on Mr. Hanlin to advise you
14 on tax concerns and tax consequences of Y.E.S.'s
15 involvement in this conservation?

16 A Of course I was. It never occurred to me I
17 needed any such advice but he was the transaction
18 attorney so he was going to be doing all the tax
19 and legal work for the whole thing, including me,
20 keep us straight, make sure we were doing it
21 exactly right.

22 Q Were you relying on Mr. Hanlin and Richardson
23 Plowden to advise you about issues, tax issues as
24 they may concern Mr. Justice or any of Mr.
25 Justice's companies?

1 A Of course.

2 Q Did Mr. Hanlin ever speak with you or discuss
3 conversations and discussions he was having
4 internal about, discussions he was having about
5 this Justice matter that were going on inside
6 Richardson Plowden with the other attorneys that
7 were there?

8 A Not one word.

9 Q Did Mr. Hanlin or Richardson Plowden, I'm
10 really going to go back to the December 20 phone
11 call, did you ever receive, other than the letter
12 we looked at, did you ever receive any materials
13 from the file?

14 A No, nothing.

15 MR. PENDARVIS: Your Honor, this is a good
16 time for a break?

17 THE COURT: All right.

18 All right, Miss Meyer, you all step in the
19 jury room, take a few minute break, we'll have you
20 right back out here. Don't discuss the case.

21 (The jury was excused from the courtroom).

22 THE COURT: We'll stand at ease for a few
23 minutes.

24 (Recessed at 10:21 a.m.).

25 (Resumed at 10:41 a.m.).

1 THE COURT: What have we got?

2 MR. PENDARVIS: A few more, Your Honor.

3 THE COURT: Sorry, I thought there was
4 something --

5 MR. PENDARVIS: No, we're happy, I guess.

6 THE COURT: All right, get the jury, then.

7 MR. PENDARVIS: Unless you want to use this
8 break for the argument, I believe, or wait until
9 after Mr. McLeod is finished.

10 THE COURT: That will be perfect.

11 (The jury returned to the courtroom).

12 BAILIFF: The jury is all present, Your
13 Honor.

14 THE COURT: Very good.

15 All right, you may continue.

16 BY MR. PENDARVIS:

17 Q Mr. McLeod, a few housekeeping matters before
18 we get on what happened after December 24th. Was
19 there ever a closing date set for the Justice
20 project, where you sit down and sign papers?

21 A No.

22 Q Is that unusual?

23 A No, not at all. I have completed and
24 recorded 24 easement projects and until December,
25 2011, we had never had a closing, a formal closing

1 like you sit around the room and sign papers, both
2 the purchaser and, seller and buyer are sitting
3 around the room with the lawyer, I never had a
4 formal closing in a conservation easement project
5 until December, 2011, just sent the easement and
6 papers around to the parties and they signed them
7 and the lawyer gets them and records them.

8 Q Now, after the IRS letter arrives did you
9 communicate with any of your clients about the fact
10 that the IRS was going to be investigating Yancey
11 Environmental Solutions?

12 A All of them.

13 Q What did you tell them?

14 A I told them I had gotten a letter and that I
15 was furious and hurt and shocked, I hadn't done
16 anything wrong, I don't have any control over what
17 the IRS says.

18 Q Okay. Now, did you have any similar
19 communications with professionals involved in Mr.
20 Justice's project, the Justice Companies, about --

21 A Oh, yes, I did.

22 Q Mr. McLeod, is this an email I'm showing you
23 that you sent to Miss Green, representative for
24 COLT?

25 A Yes, sir, December 27. By the way, I see Sue

1 Green's assistant is Brenda. I can't think of her
2 name, I wrote her name down in this letter.

3 Q It's a short email. Would you mind reading
4 it to the jury?

5 A Sure. December 27, Thursday, December 27.

6 Sue. "Thanks to you, Brenda and Hal for taking
7 time for the site visit on the Justice Family Farms
8 tract on the Black River in Clarendon County, South
9 Carolina. Hal informed me that the Community Open
10 Land Trust Board approved receipt of the gift. I
11 am writing to inform you that Mr. Justice has
12 decided to postpone the project. I will keep you
13 advised as to decisions by Mr. Justice regarding
14 the project. Thanks so much, Yancey." Copies to
15 Jim Lewis, Mr. Justice -- Jim Lewis? Yes, I guess
16 that was Jim Lewis, Mr. Justice and Mr. David
17 Harrah. Maybe that is Crosby. That is what that
18 was, Crosby Lewis, my new attorney.

19 Q I know we started talking about this, would
20 you describe for the jury what this email I just
21 handed to you is?

22 A It's dated Thursday, December 27, apparently.
23 I spent a lot of time at my desk with my legal pad
24 that day. To Jim Justice and David Harrah. Do you
25 want me to read it?

1 Q This is important enough, let's read it, I
2 would like them to hear what you said to Mr.
3 Justice.

4 A Okay. "I cannot properly express my
5 gratitude and appreciation for your response to our
6 recent conversations regarding the IRS letter I
7 received. My attorney Crosby Lewis, Columbia,
8 South Carolina, commented to me that Jim Justice
9 and his advisers must be people of the highest
10 quality, you are very fortunate, Yancey, to have
11 clients of this caliber. All the work that has
12 been in progress on the Black River Farm tract will
13 be used in a conservation project at the
14 appropriate time. Following our conversations by
15 phone on December 24th I advised the appraiser Dr.
16 Darroll Hawkins and our biologist working on the
17 required base line report to cease work at this
18 time and forward statements for work to date. As
19 soon as I receive them I will forward to you. I
20 also am advising the qualified organization which
21 had received Board approval to receive the gift
22 that the project will not close this year. I have
23 attached our statement for the initial consulting
24 fee in connection with the project and appreciate
25 so much your commitment to pay this. As I

1 mentioned above, all of the work and work product
2 completed to date will be used when we recommence
3 the project. I hope you and your family have had a
4 wonderful Christmas. I will keep you informed as I
5 defend my honor, character and reputation. I can
6 assure you that I am very proud of each and every
7 conservation project in which I have been honored
8 to participate and I will defend the
9 appropriateness of each one they care to question
10 with every ounce of my heart and mind. Thank you
11 for your trust, confidence and friendship.

12 Sincerely, Yancey." Copies to Crosby Lewis.

13 Q And the second page, the attachment to this
14 email is what?

15 A It's a statement for professional services of
16 \$50,000.

17 MR. PENDARVIS: Your Honor, I would like to
18 move these last two emails in, email to Miss Green
19 as 33 and email to Mr. Justice would be 34.

20 MS. MCWILLIAMS: No objection, Your Honor.

21 THE COURT: 33, a one page email. And a two
22 page email, 34. Admitted without objection.

23 (Email to Sue Green marked and received in
24 evidence as Plaintiff's Exhibit 33).

25 (Email to Jim Justice marked and received in

1 evidence as Plaintiff's Exhibit 34).

2 BY MR. PENDARVIS:

3 Q For housekeeping here, Yancey, I passed you
4 two emails. Would you describe the first one I
5 handed you to the jury, please?

6 A Yes. It's dated Friday, December 28, Jim
7 Lewis and Clinton Epps. I was just following up on
8 a message I had left on their respective phones
9 advising them that Mr. Justice had decided to
10 postpone the project, please present me their
11 statement for services rendered. Actually I'm
12 asking that they send them directly to David
13 Harrah.

14 Do you want me to tell you what the second
15 one is?

16 Q Yes, sir, please.

17 A It is also dated December 28 and it is a
18 similar letter to Dr. Hawkins.

19 Q Asking that he --

20 A Asking him to, advising him what is going on
21 and advising him to send a statement.

22 MR. PENDARVIS: Your Honor, I move to have
23 these admitted at 35 and 36.

24 MS. MCWILLIAMS: No objection, Your Honor.

25 THE COURT: 35, which one is going to be 35?

1 MR. PENDARVIS: 35, Your Honor, will be the
2 one to Mr. Epps.

3 THE COURT: Okay.

4 MR. PENDARVIS: And 36 is the one to Dr.
5 Hawkins.

6 THE COURT: Very well, they're admitted
7 without objection.

8 (Email to Quinton Epps and Jim Lewis marked
9 and received as Plaintiff's Exhibit 35).

10 (Email to Darroll Hawkins marked and received
11 in evidence as Plaintiff's Exhibit 36).

12 BY MR. PENDARVIS:

13 Q Now, Mr. McLeod, to try to keep this as
14 chronological as I can, maybe you have them in
15 order, this is Number 26. I ask you to please pull
16 that out.

17 A Okay.

18 Q The jury has heard Dr. Hawkins describe his
19 email to you on the bottom of the first page of
20 Exhibit 26. Do you remember that?

21 A Correct.

22 Q Can you describe for them, why did you
23 forward this email? The top of it shows you
24 forwarded this to Mr. Justice. Is that correct?

25 A Correct.

1 Q And why did you do that?

2 A Well, I wanted Mr. Justice to see what the
3 preliminary numbers were from the appraiser,
4 hopefully to interest him, once everything settled
5 down, to resume the project.

6 Q Did you get a response from Mr. Justice to
7 this email?

8 A No, sir.

9 Q What would the fee to Y.E.S. have been if the
10 easement had closed and the values, Dr. Hawkins'
11 values had been used as the deduction value?

12 MS. MCWILLIAMS: Object to form, Your Honor.
13 This calls for speculation. He can't base it on
14 speculation. We would like to be heard, if we may.

15 THE COURT: All right. Miss Meyer, I need to
16 make a record of this, I will let you all step back
17 to the jury room. You all take a few minutes back
18 there, as soon as we get ready we'll call you back
19 out. Do not begin to discuss the case.

20 (The jury was excused from the courtroom).

21 THE COURT: All right, Miss McWilliams.

22 MS. MCWILLIAMS: Yes, Your Honor. Yesterday
23 Dr. Hawkins testified that this was one of these
24 rush, up in the air jobs and he gave a best guess
25 in the change in value for the 30,000, excuse me,

1 3,028 acres, loss value of over 45,000,000 but he
2 also testified that you have to back out of that
3 the cost of returning it to mitigation, and there
4 is no evidence regarding that, so, with all due
5 respect to Mr. McLeod, he has said, "I have nothing
6 to do with the appraisal, I don't have anything to
7 do with that," properly so, that is not his role.
8 There is not sufficient evidence in the record or I
9 would submit based on his very extensive background
10 for him to testify what his fee would have been
11 because in order to get his fee he has got to have
12 the conservation value that Mr. Justice might have
13 earned had he placed the easement. There is just
14 insufficient evidence, totally speculative and I
15 think it is improper.

16 Now, I know there is a lot of South Carolina
17 law about where an owner may testify about the
18 value of his own property. That is not what we're
19 talking about here and so we object to the attempt
20 here to back door some evidence of the value of the
21 conservation easement when it was never reached.
22 They could have asked Mr. Hawkins but he very
23 candidly said he had a best guess and he hadn't
24 even finished it. He said, "I determined there
25 were 15 unique wetlands and I had only gotten a

1 preliminary value on one," the bottom land
2 woodland. He said there were 14 more and he just
3 sort of estimated some of the farm land is going to
4 go down as low 7,700 or 7,500 an acre and the other
5 might be up to 11,000. We're even one step beyond
6 his testimony about value because now Mr. McLeod
7 has told the jury, "I don't have anything to do
8 with value," and the only way he could say what his
9 fee is if he knew the value of the conservation
10 easement. We never got a value and he can't
11 estimate it and we have no evidence of it.

12 MR. PENDARVIS: That ignores the mitigation
13 report that Mr. McLeod has testified he gave to Dr.
14 Hawkins that shows an 18,600, it shows a very
15 specific amount for the cost to mitigate the
16 property. This number is being very conservative.
17 He doesn't say -- by the way, in the second
18 sentence, best guess, then he says or a loss value
19 of over 45 million, and people could do the math,
20 we have the acreage. This is an absolute bottom
21 number that would be available to this jury.

22 On top of all that, during the discovery we
23 disclosed, I qualified Yancey McLeod as a
24 consultant, I have qualified Mr. McLeod on his
25 experience as a conservation expert, consulting

1 expert, so Mr. McLeod is certainly able to say at a
2 minimal, at a minimum. We're not asking him to
3 speculate over the 45,000,000 number, it stays, or
4 a loss value of over 45,000,000. Mr. McLeod is
5 going to be saying 45,000,000, and he can give the
6 number, and that is also based on his experience in
7 countless other conservation easements. He has
8 already told the jury the final completed appraisal
9 isn't due for 60 days after the closing per IRS
10 regulations, which would mean --

11 THE COURT: You all tie the two together.
12 There was a mitigation bank appraisal, highest and
13 best use. That's not this one, this is a separate
14 appraisal done by Dr. Hawkins.

15 MR. PENDARVIS: That's correct, but he was
16 basing it on the same concept, what would be the
17 mitigation value, and if you look at it, it is
18 awful interesting they are almost, very, very close
19 in numbers, they are both at 45,000,000. They
20 changed the values, they are a little different but
21 they both have a \$45,000,000 number and this is a
22 very conservative number. My anticipation is Mr.
23 McLeod is not going to say it would have been
24 45,790,000 or some number, it is going to be at
25 least 45,000,000, and he can give the number from

1 that point.

2 It is also no speculation as to the
3 calculation of the fees, it is a flat four percent,
4 based upon the testimony, so four percent of this
5 number, and the numbers available to Mr. McLeod are
6 certainly readily ascertainable in the record
7 already, it is a simple math equation. And number
8 two, if there is any concern I'm certainly able to
9 have Mr. McLeod qualified in front of the jury as
10 an expert on this.

11 THE COURT: Maybe I'm missing something.
12 Now, highest and best use, 45,000,000 is mitigation
13 value. The comparison number is property burdened
14 with the conservation easement, that you cannot
15 develop in the future?

16 MR. PENDARVIS: No, sir, that is what you
17 might be missing.

18 THE COURT: That is what I'm missing.

19 MR. PENDARVIS: What Yancey has told the jury
20 and what the concept was is that if this property
21 could have been developed as a shopping center,
22 let's say it had a \$220,000,000 value as a shopping
23 center but a mitigation bank, if the property had
24 been mitigated for wetlands, we know from the
25 feasibility study and the conversations and the

1 work that was done with the mitigation bank, to get
2 this number of what credit, actually a check, as
3 Mr. McLeod testified, it would take eighteen months
4 to do this giant project, filling in dips, there
5 would have been a check for \$45,000,000 written to
6 the owner of the property. So when the owner
7 decided not to do that, instead of making it a
8 swamp again, saving it as a farm and putting the
9 conservation easement on it, instead of getting a
10 \$45,000,000 check he was going to get a \$45,000,000
11 tax deduction.

12 So what they did --

13 THE COURT: Let me tell you my understanding.
14 The mitigation bank was the highest and best use,
15 45,000,000 less the burden value, it had to be
16 something deducted, it is not \$45,000,000, and the
17 property is worth less on a conservation easement.
18 It is worth something. I did a lot of condemnation
19 work for the D.O.T. I remember landowners would
20 profess that the property would be valueless after
21 the road came near it, but 45,000,000 is the
22 mitigation value. There has got to be another
23 value. The value can't be zero because 4,000 acres
24 of land is worth something. The difference in the
25 value is the deduction. Am I wrong on that? I

1 think I'm right.

2 MR. PENDARVIS: Your Honor, the numbers are
3 going to be greater than that because the
4 \$45,000,000 number in the mitigation feasibility
5 report is greater than 45, so we know there is
6 going to be a seven, eight, I don't have the math
7 in front me, there is going to be value. This is
8 the 45, not 45,700,000 or 45,900,000.

9 THE COURT: I'm with you on the highest and
10 best use is 45,000,000, but 45,000,000 is not the
11 tax deduction. The IRS is not going to let you use
12 45,000,000 potential value. There is something got
13 to be taken away, as I understand the concept, and
14 we're talking, my understanding of the deduction is
15 a landowner gets an incentive to donate the
16 property to the conservation, natural resources,
17 and the incentive is you get a tax deduction. To
18 calculate your tax deduction you need a good tax
19 lawyer, as everybody has been saying. Highest and
20 best use has got to be determined by the
21 appraisers. In this case the highest and best use
22 would be a \$45,000,000 wetland mitigation bank.

23 What is the worst case use, the property as
24 it sits, the burdened property after the imposition
25 or conservation easement, which means nothing can

1 be done to the property other than a hunting cabin
2 or fishing rights for the property. It will be
3 undisturbed from then on. You can't build houses,
4 you can't build a shopping center, you can't do
5 anything but hunting and fishing and enjoy it. It
6 is worth something in that state. That state may
7 be \$10,000,000. 45,000,000 less 10,000,000 is a
8 \$35,000,000 loss to the landowner.

9 Am I not right on that?

10 MR. PENDARVIS: I think you are. Your Honor,
11 if you will indulge us can I speak to my client
12 just a moment?

13 THE COURT: Yes. I think I understand it but
14 I don't think I'm hearing it.

15 MR. PENDARVIS: Your Honor, Mr. McLeod has
16 done this exact circumstance, he gave testimony for
17 the Faulkenbury tract, exactly there the same
18 thing, he is going to be able to say the number
19 based on his experience. We want to proffer him as
20 an expert consultant. He has done these things, he
21 is able to tell this number.

22 THE COURT: I don't know if he has been
23 deposed as an expert.

24 MR. PENDARVIS: He hasn't.

25 THE COURT: If he were you would have a

1 difficult time in not calling him as an expert
2 because I don't know anybody has done more than him
3 in this field. I have no idea if he was named in
4 that fashion.

5 MS. McWILLIAMS: He was not. He was
6 identified as an expert in hiring counsel at the
7 end of the year, how it would have been impossible.
8 I did ask him about that. But he specifically has
9 testified over and over, and if we're going down
10 this road one of the things the IRS wanted to know
11 was is Mr. McLeod involved in appraising, is he
12 involved, they asked all the customers they
13 contacted, "Do you know whether Mr. McLeod was
14 talking with the appraisers," no evidence that he
15 did, he is very adamant about that. "I don't have
16 anything to do with the appraisal," it is what it
17 is, is supposedly what Mr. McLeod always says when
18 it comes to value, and so for now to try to back
19 door in damages by now trying to qualify him and
20 saying, number one, he didn't produce the
21 feasibility report, it is not even a valuation they
22 are trying to base the 25,000,000 on, but in any
23 event, that is not the cost, that is not the value.
24 Even if we accept that is the value for the
25 mitigation bank, which was never, remember, Justice

1 never approved it, Justice didn't agree to do it.
2 He had to go get all the approvals from the federal
3 government --

4 THE COURT: As I understand it, they did the
5 feasibility study and said, "Let's create a
6 mitigation bank and we will have to recommit the
7 property to wetland," and they decided not to do it
8 but had they done it it would have generated a
9 \$45,000,000 asset to Mr. Justice to sell off over a
10 period of time.

11 MS. MCWILLIAMS: He had a pay-out, that's
12 correct, Your Honor.

13 THE COURT: He decided not to do that but
14 again they did a, "If we do a conservation
15 easement, what is the highest and best use? Guess
16 what we have already done, we already figured,
17 highest and best use is right here in mitigation
18 bank," they don't have to do it, he can say it
19 could be done.

20 MS. MCWILLIAMS: Then they've got to have the
21 other appraisal.

22 THE COURT: A burdened piece of property,
23 4,000 acres with an easement, conservation easement
24 is worth something. Mr. Justice retains ownership,
25 he can sell the burdened piece of property and the

1 appraiser can value that. Has that been done?

2 MR. PENDARVIS: It has, on the joint tract it
3 is \$1,500 an acre, this number is going to be the
4 45,000,000. The actual number would have been
5 north of that based on the numbers Dr. Hawkins
6 used, it would, similar to the Faulkenbury tract,
7 Mr. McLeod was identified as an expert with twenty
8 years experience in consulting and conservation
9 matters and handling, you know, consulting with all
10 these people, including the appraisers, he has
11 watched it happen, he has been involved in the
12 matters where the exact circumstance, where
13 mitigation value was placed on the property and a
14 residual agriculture value at 1,500 an acre
15 remained, the same expert, Henry Bekcham in this
16 case.

17 THE COURT: There is a difference in
18 donation.

19 MR. PENDARVIS: Right. The 1,500 was the
20 remainder. That is what he is going to testify, he
21 has been doing it 20 some years.

22 THE COURT: That is the whole concept this
23 thing is based on.

24 MR. PENDARVIS: And so that is essentially
25 what he's prepared to testify on, and the whole

1 point, I guess the essence of this is he is using
2 the bottom number, it actually would have been a
3 higher number had he based it on this estimate, a
4 preliminary appraisal had been used from the past,
5 he is well qualified to do it, I can put him up as
6 an expert, she is welcome to voir dire him on that
7 if she wants to.

8 MS. MCWILLIAMS: It would have been nice to
9 have a little notice about that, Your Honor. He
10 was not named for that purpose.

11 MR. PENDARVIS: I just read it, and it was
12 served December 21st and you took his deposition on
13 this, after you took his deposition in July you
14 took his deposition again in December based on the
15 disclosure of Mr. McLeod under interrogatory, the
16 same interrogatory identifies Dr. Adams;
17 interrogatory number one, their third set of
18 interrogatories, he is listed right behind Dr.
19 Adams and right ahead of Curtis Elliott.

20 MS. MCWILLIAMS: I don't deny he was named,
21 he was named as having an opinion regarding how
22 hard it would be to hire new counsel when the
23 lawyer withdraws, that is it, and it was based on
24 his experience in dealing with lawyers all over the
25 country. I did that, I deposed him, we went

1 through all that. There has never been, not one
2 word in this case until today that Mr. McLeod may
3 be offered as an expert to testify as to the value
4 of the 3,000 acre Jim Justice tract once it had
5 been burdened with a conservation easement, never,
6 and he has in fact testified as a 30(B)(6) designee
7 for Y.E.S. that he never gets involved with
8 valuation, that always has to be done by an
9 appraiser and it is true the appraisal doesn't have
10 to be finalized by 12/31. But he says the
11 landowner has got to have some idea of value before
12 they can decide whether or not to place the
13 easement on it.

14 We never got that far, no one has done that
15 valuation, and with all due respect, Mr. McLeod
16 cannot and has never done an appraisal of any
17 property, I would submit. That is exactly what he
18 says, he never gets involved in, he is not an
19 appraiser. If they wanted to call as an appraiser
20 they could have done that, they could have named an
21 expert and said, "Well, I wasn't hired to do it but
22 I have gone ahead and done it anyway and this is
23 what the appraised value of the conservation
24 easements would have been." They didn't do that.
25 He testified at length that he had Henry Beckham,

1 who is his good friend, is familiar with this other
2 property. Again, Mr. Beckham was never named as an
3 expert. To suggest now that I have to, to suggest
4 now that we're going to become qualified as an
5 expert on property, he testified --

6 MR. PENDARVIS: Your Honor, we're not
7 proffering him as an expert on property. We're
8 asking him to give a number of the value of his fee
9 out of this project based on the opinion of the
10 expert appraiser, and I have, I'm asking him to
11 give a value on his fee. I'm not asking him to
12 give an appraisal value on the property. He should
13 be able to correlate his fee based on his
14 experience and based on Dr. Hawkins' appraisal.
15 That is why he's not a promoter, that is why he
16 doesn't get in trouble on these easements, because
17 he doesn't get involved in the appraisal. He is
18 certainly qualified, with his experience, to take
19 the appraiser's value and his knowledge of how to
20 calculate the fee based on the agreement and get
21 out a calculator and give the jury a number.

22 MS. McWILLIAMS: May I read a question and
23 answer from the second deposition where Mr. McLeod
24 had been named as an expert on hiring counsel at
25 the end of the year? I asked him, "Do you have any

1 testimony you intend to offer with respect to the
2 preparation or consultation you may have had with
3 respect to property valuations?" "I don't have, I
4 don't, I have never had anything to do with
5 property valuation." I said, "How about
6 appraisal?" "No. I mean, I have recommended
7 appraisers to clients and I have met appraisers and
8 showed them around a tract of land but I have never
9 had anything to do with the appraisal."

10 I would be glad to hand that up. For the
11 record, that is the December 28, 2011, deposition
12 of Mr. McLeod, page 41, and if the Court would like
13 to see that page I will be happy to hand up our
14 copy of this.

15 MR. PENDARVIS: Your Honor, he's basing his
16 numbers off the appraiser's numbers, he's not
17 giving an appraisal, he is not involved in the
18 appraisal process, he can use a calculator, he
19 knows how his fee is to be calculated for his
20 company. I think he is certainly entitled to tell
21 the jury what would have been earned on the value
22 the appraiser developed that he sent on to Mr.
23 Justice for this man to consider about proceeding
24 with this easement, and in an effort to mitigate
25 his damages from the lawyer bailing out on him and

1 trying to get the easement closed in the next year,
2 this is a 2008 email, I think he is certainly well
3 qualified. If we need to qualify him as an expert
4 I'm happy to do that, he is certainly qualified and
5 I believe he is capable of putting a value on his,
6 what the fee would have been and if counsel wants
7 to argue that that wasn't an accurate number or
8 whatever that is certainly within their rights but
9 he is certainly capable of giving this jury a value
10 based on the number he sent on to his client Mr.

11 Justice to encourage him to proceed with this
12 easement. As a professional you have to believe
13 that with his experience and his integrity he's not
14 going to send a number to a billionaire Jim Justice
15 that isn't going to be at least available for --

16 THE COURT: That's closing argument. It's a
17 very interesting case. Off the record.

18 (Off-the-record discussion).

19 THE COURT: We're going to take a brief
20 break.

21 (Recessed at 11:15 a.m.).

22 (Resumed at 11:30 a.m.).

23 THE COURT: All right, you all be seated.

24 Question. The email summary from Dr. Hawkins --

25 MR. PENDARVIS: Yes, sir.

1 THE COURT: Will you proffer some testimony
2 from Mr. McLeod as to how that tells him and/or Mr.
3 Justice the after value, the residual value of the
4 property when it is burdened? Explain that to me,
5 I'm not certain I'm clear on that.

6 BY MR. PENDARVIS:

7 Q Mr. McLeod, in your experience in
8 conservation easements, after you received this
9 email marked Exhibit 26, December 27, 2007, you
10 forwarded it to Mr. Justice?

11 A Yes.

12 Q Give us testimony why you didn't give Mr.
13 Justice a value. Was this how you have calculated
14 the value to Mr. Justice for his tax deduction,
15 based on the value Dr. Hawkins published in the
16 email on December 27th?

17 A Well, two ways. One, Mr. Hawkins make it
18 clear that at a minimum the value will be
19 45,000,000. And secondly, of all the easements
20 that I have completed, that actually went to
21 recordation, where the after value was timberland
22 land and farm, agriculture and farm land and timber
23 land, without exception the after residual value
24 was approximately \$1,500 an acre and so it would be
25 fairly easy to calculate what the after value would

1 be, and I wouldn't, you know, tell Mr. Justice to
2 expect one penny more than the minimum that he
3 stated in his letter, although I think from
4 experience it would be more but I wouldn't
5 speculate on that.

6 Q Are you confident in your experience that the
7 170(H)) deduction Mr. Justice would have been able
8 to place on his tax return had the easement closed,
9 based on Dr. Hawkins' value, would have been at
10 least 45,000,000?

11 A Well, I feel like it would have been at least
12 45,000,000 but I would say that, you know, to err
13 on the side of caution we would multiply 3,000
14 acres times 1,500 and come up with whatever that is
15 and subtract that from the \$45,000,000.

16 Q So if we gave you a calculator you would take
17 the specific acreage shown in the feasibility
18 report marked Exhibit 29 -- let me rephrase it.
19 Would the information contained in Exhibit 29
20 assist you in calculating the final tax deduction
21 number from the appraised value Dr. Hawkins set
22 forth in his email?

23 A Which one is 29?

24 Q It's the compensation.

25 A Absolutely.

1 Q You should have a copy there.

2 A Sure. They were almost identical.

3 Q But the acreage, the specific acreage in
4 terms of the affected property are all set forth in
5 this mitigation feasibility report?

6 A That's correct.

7 Q And in conjunction with Dr. Hawkins' value
8 and all the work that had been done on the
9 mitigation report are you confident you can come to
10 an accurate number as to the deduction for Mr.
11 Justice?

12 A Very, very close.

13 Q And from that a four percent percentage for
14 the fee earned?

15 A Correct, yes, sir.

16 Q Is there anything further, Mr. McLeod, the
17 Court needs, anything that the Court needs to
18 understand how this value would be calculated?

19 A That is basically how it would work.

20 MS. MCWILLIAMS: Your Honor, may I ask
21 questions?

22 THE COURT: Yes, ma'am, I offer you free
23 opportunity

24 MS. MCWILLIAMS: All right.

25 BY MS. MCWILLIAMS:

1 Q Now, Mr. McLeod, you have testified
2 repeatedly you don't ever have anything to do with
3 value, correct?

4 A That's correct.

5 Q Valuation. And you have just testified that
6 the \$1,500 an acre that you came up with is based
7 on all the other farm land and timber land and all
8 the other easements you have ever done. Correct?

9 A Yes, ma'am.

10 Q And didn't you also tell this jury that the
11 Black River farm was a very unique piece of
12 property?

13 A Yes, ma'am.

14 Q All right. And so you have no experience in
15 valuing either that property or any of the property
16 in any easement you have been involved in, correct?

17 A Well, as far as the timber land value it
18 would be site related and fertility and soil, the
19 after value is adding, that is what it is.

20 Q But isn't it true that for every 170(H)
21 deduction, for every qualified easement,
22 conservation easement where a taxpayer is entitled
23 to take a 170(H) deduction there must be a final
24 appraisal from a qualified appraiser?

25 A Yes, ma'am. It's called self contained.

1 Q We have no self constained appraisal in this
2 case, correct?

3 A Because Hal Hanlin quit.

4 Q None was ever done, that was my question?

5 A That's correct.

6 Q All right. And you have absolutely no, we
7 didn't even get a preliminary appraisal other than
8 this email from Dr. Hawkins, correct?

9 A That's correct.

10 Q You didn't have Mr. Beckham do anything,
11 correct?

12 A That's correct.

13 Q All right. And so the only basis on which
14 you have just testified is that you simply multiply
15 3,000 times, I think you said 3,000 times 1,500?

16 A Well, it is a few more acres over 3,000 but
17 yes.

18 Q That would be, that would be what -- what
19 value would that be?

20 A Residual value, the after value.

21 Q All right. And then the top number, this
22 45,000,000, at least 45,000,000 that you're trying
23 to base this on, this is on a feasibility report
24 for a mitigation bank, correct?

25 A It is also Dr. Hawkins' opinion it would be

1 at least 45,000,000.

2 Q All right. Now, he didn't say it was his
3 opinion, did he?

4 A I'm sorry?

5 Q He didn't say it was his opinion, did he?

6 A I really don't recall exactly what he did say
7 yesterday.

8 Q Do you have Plaintiff's 26 in front of you?

9 A Yes, ma'am.

10 Q You see the email. What he said is best
11 guess is the change in value from existing to fully
12 mitigated will average at least 15,000 an acre,
13 right?

14 A Right, but he is also saying his best guess
15 is at least 45 million, so that indicates to me
16 that in his professional opinion it would be a
17 minimum.

18 Q Do you understand the difference between a
19 best guess and a professional opinion?

20 A Of course, I do, yes, ma'am.

21 Q And he didn't give his professional opinion,
22 did he?

23 A I think this is his professional opinion.

24 Q Well, didn't he testify yesterday that he
25 never finished, he was instructed to stop his work?

1 A Oh, yes, ma'am.

2 Q All right. And so he could, an appraiser
3 cannot give a self contained appraisal that has not
4 been finished?

5 A That's correct.

6 Q And with respect to the proposal, that
7 mitigation bank, I guess it is called a feasibility
8 study, right?

9 A Yes, ma'am.

10 Q All right. That also was never finalized,
11 that was a best guess, was it not?

12 A Yes, ma'am.

13 Q All right.

14 A Projected value.

15 Q It was just projected values, correct?

16 A Based on a lot of experience.

17 Q Granted that, Mr. McLeod, but the fact of the
18 matter, this was just a preliminary, you just
19 wanted to get, to see if Mr. Justice was
20 interested, that this was the projection of what
21 the project would take, I think you said it would
22 be a 15 to 18 month project to restore it to a
23 compensatory mitigation bank, correct?

24 A Yes, ma'am.

25 Q And from the 45,000,000 you have to, you have

1 to have some cost subtracted out. Remember Dr.
2 Hawkins testified to that?

3 A Yes, ma'am.

4 Q We don't know what those costs are, right?

5 MR. PENDARVIS: Yancey, could you back up a
6 little bit from the microphone, it is interfering
7 with the audio.

8 Go ahead, I'm sorry.

9 Q We don't know what those costs are?

10 A What I would have told Mr. Justice is based
11 on our experience with 100 percent of our
12 mitigation projects that our preliminary analysis
13 and projected values are always 20 to 30 percent
14 under what the actual values will turn out to be,
15 that is a fact. We did not exaggerate anything
16 with this analysis, we take our work very seriously
17 and we feel like this is a minimum type of
18 projection of realistic values based on the market
19 conditions for mitigation credit at that time.

20 Q But isn't it true, Mr. McLeod, that this is
21 just, the 45,276,000 figure that is in this
22 feasibility report is simply a projected net profit
23 to the landowner over some 20 years? Isn't that
24 right?

25 A Again, it is, it's 63 gross on our analysis.

1 Q But that's just a projected profit over,
2 excuse me, eight years?

3 A That's correct.

4 Q All right. So it is not a valuation of the
5 property?

6 A It is not intended to be an appraisal, no.

7 Q All right. But you did not prepare the
8 feasibility report, correct?

9 A Well, certainly I was involved with the
10 preparation of the feasibility report and it became
11 the basis of a professional projection of
12 mitigation and potential values that became the
13 basis of an appraisal because that would be the
14 highest and best use.

15 Q I guess my point is, is that correct, you
16 sent this, you and Mr. Lewis worked on this, right?

17 A That's correct.

18 Q You sent it along to Mr. Justice and it was
19 never accepted, right?

20 A Well, he determined not to go forward with
21 the mitigation project.

22 Q He determined not to go forward with it and
23 then you sent it to Dr. Hawkins to look at if he
24 wanted to use it, right?

25 A Sure.

1 Q But there is no testimony that he did use
2 this, right?

3 A Well, he did testify that his projected
4 values were based on mitigation potential.

5 Q Right. But he has a completely different
6 methodology, don't you remember his testimony that
7 he had the very unique way of doing it? He wasn't
8 basing it on that, was he?

9 A They are virtually identical, his values and
10 the mitigation potential, and the reason is because
11 the extrinsic value of wetlands and streams and the
12 natural functions they provide are reflected in the
13 market place of the mitigation market.

14 Q But isn't it true, Mr. McLeod, what Dr.
15 Hawkins says, "I have a very, very unique way of
16 valuing, valuing wetlands for mitigation." Didn't
17 he testify to that?

18 A Yes, ma'am.

19 Q And there is nothing in this best guess,
20 nothing, that he even looked at the compensatory
21 mitigation bank? I will grant you the two figures
22 come close but they aren't even based on each
23 other, are they?

24 A I don't know that.

25 Q All right. Well, he didn't say that, did he?

1 A I don't recall whether he said it or not. I
2 know that he had the information.

3 Q Well, what he said was, "I determined 15
4 unique wetlands, I had a preliminary value on one,
5 which is bottom land, hard wood." He did one of 15
6 and he had a preliminary value, right?

7 A Well, he has a lot of experience appraising
8 jurisdictional wetlands and streams and aquatic
9 resources and is basing his professional opinion of
10 his projected minimum value on that experience.

11 Q Well, he didn't say projected minimum value,
12 he said it was his best guess, didn't he, Mr.
13 McLeod?

14 A He said or loss value of over 45,000,000.

15 Q Based on best guess, right?

16 A Professional guess, professional estimate,
17 that is what our preliminary analysis is, based on
18 our professional opinion, based on our experience.

19 Q Right. And yet Dr. Hawkins was not
20 identified as an expert in this case, was he?

21 A I don't know the answer to that.

22 Q The only testimony he gave, it was his best
23 guess, right?

24 A Again, I don't recall exactly what words he
25 used, he just gave his opinion, professional

1 opinion to value.

2 MS. McWILLIAMS: Your Honor, I will stop.

3 MR. PENDARVIS: Your Honor let me quantify
4 some things Mr. McLeod has said, some specifics
5 here. We know there was specifically 3,028 acres
6 per Dr. Hawkins' statement. If you took Dr.
7 Hawkins' values of it, he says 15,000 an acre, and
8 what I'm getting ready to explain to the Court,
9 Your Honor, is a number we're not going to use
10 because it does not, it is not based on the \$45,000
11 flat estimate. What I'm using here is Dr. Hawkins'
12 numbers specifically multiplied against the
13 specific acres. This is a number we're not going
14 to tell the jury, I'm getting ready to show you the
15 difference between what Mr. McLeod is going to say.

16 If you take the number of acres, multiply it
17 by a \$15,000 per acre minimum, he says it will
18 average at least 15,000, you will get a gross
19 number of \$45,420,000. From that, using the
20 experience of Mr. McLeod on a \$1,500 residual
21 aggregate value for agriculture, agricultural, that
22 is a \$4,542,000 residual value for the farm after
23 the easement goes on it, which would leave a number
24 for Mr. Justice's tax return of 40,878,000. Per
25 the four percent agreement with Mr. Justice, that

1 would result in a \$1,635,120 fee for Y.E.S.

2 Now, applying the same values but instead of
3 doing \$15,000 per 3,028 acres, we just substitute
4 the \$45,000,000 number and then deduct from the
5 flat \$45,000,000 from Dr. Hawkins, deduct the
6 \$4,542,000 agricultural value residual, that leaves
7 40,458,000. Taking four percent from that, would
8 be the fee, would be \$1,618,320. So, this is a
9 much more conservative number based on Mr. McLeod's
10 experience in this arena, he is not putting a value
11 on anything, he is basing this on other appraisers
12 having valued identical property, neighboring
13 property, including Mr. Beckham, who is involved in
14 this project. So, we aren't, Mr. McLeod is not
15 appraising anything. Mr. McLeod is using a
16 calculator and an appraiser's value to get the fee
17 his company would have earned and that is what
18 these guys do every day when they are making
19 estimates on what their fee is going to be so I
20 think he is well qualified to calculate his fee.

21 MS. McWILLIAMS: Well, it appears Mr.
22 Pendarvis can use a calculator but in any event,
23 what Dr. Hawkins said yesterday, I don't have the
24 transcript, but words to the effect do you have to
25 subtract from the 45,000,000 the cost of the

1 mitigation or have you included the cost of
2 mitigation? "Oh, no, I haven't done that."

3 So, the 45,000,000 is not the loss value
4 because you have got to also exclude the cost, at
5 least under Dr. Hawkins, and so the fact of the
6 matter is that what we are doing here is building a
7 guess upon a guess. It is clear, if they had
8 wanted to qualify Dr. Hawkins as an expert and say
9 he is going to testify as to damages in this case
10 that again would have been an option to the
11 plaintiff. The plaintiff didn't do that and I
12 cannot fill holes and I don't think it is
13 permissible for the Court, not appropriate for the
14 plaintiff to now ask the Court to skirt all the
15 rules about notice and disclosure, and had they
16 done that obviously I would have been entitled to
17 examine Dr. Hawkins as an expert about his
18 valuation for purposes of damages, they never did
19 that, Your Honor.

20 I understand Dr. Hawkins has a very unique
21 way of doing his mitigation, he testified yesterday
22 about it, but it is not this, it is coincidental
23 they came up with the same 45,000,000 at some
24 point, but we don't have enough evidence based on
25 what Dr. Hawkins said and to now say we're just

1 going to extrapolate some figures, when it is not
2 an appraised value that would satisfy 170(H). That
3 is what the contract called for in order for Mr.
4 Justice to be able to take the tax deduction. I
5 think the IRS would be very interested to know
6 that's now the way the taxpayer can calculate the
7 deduction is to simply take somebody's best guess
8 and extrapolate some other property that was
9 adjoining it and, Your Honor, we object, we think
10 that it is an improper attempt to, again, without
11 any, without meaning any disrespect to Mr. McLeod,
12 he is not an appraiser, this is not a qualified
13 appraisal and we object, not a self contained
14 appraisal and we object. If this is going to
15 happen, obviously I should be entitled to have an
16 expert on valuation and it is too late for that
17 now, here I am in trial, unable to do that.

18 MR. PENDARVIS: Your Honor, everything here
19 is absolutely consistent with the net numbers. If
20 you look at the feasibility report, compensatory
21 mitigation bank feasibility report, the gross
22 projected sales was 63,900,000, minus the
23 18,647,000 value for a net profit to the landowner
24 of 45,276,000. This number Dr. Hawkins gave on the
25 same issue is 45,420,000. They are 200, excuse me,

1 yes, not even \$200,000 apart.

2 I mean, these things are so consistent it's
3 amazing. So, to suggest, and by the way, a
4 professional, a company, excuse me, Mr. McLeod is
5 the owner but Yancey Environmental Solutions is a
6 client, it provides professional consulting
7 services, they base their services on a number of
8 professionals, as this case has been about, and
9 these professional relayed information to Y.E.S.
10 who in turn relayed it to their client, Jim Justice
11 type person with the confidence this number would
12 prevail and we are demonstrating to a certainty
13 that everything Dr. Hawkins said that was relayed
14 to Mr. Justice conforms to the numbers and
15 basically what Mr. McLeod is going to be doing is
16 giving a 20 something thousand dollar discount
17 because he is not going to ask the jury to give
18 anything more than the bottom \$45,000,000 number.

19 We think the fee would have been higher in
20 reality than what he is going to tell the jury
21 about, so it is not as though he is taking the last
22 stretch of an appraiser's top, top value that has
23 not been fully qualified as an appraisal, he is
24 using the conservative, least number, which is not
25 again qualified with a best guess, it says with a

1 loss value of over 45,000,000. The over part is of
2 course what the calculations demonstrate, this
3 number is a certainty.

4 MS. McWILLIAMS: Your Honor, we cannot get
5 around the fact that Dr. Hawkins said, "Oh, no, you
6 would have to subtract the cost of the
7 restorations." He was on the stand, he was their
8 witness and Mr. Leonardi said, "So that is like
9 moving the dirt around, putting in the planting?"
10 Dr. Hawkins said there would be certain trees that
11 hold the water better, this is of course what you
12 want to do when you return it, no evidence in the
13 record that the doctor said that was qualified at
14 all, and what it appears, they want to take the net
15 profit projected over eight years to the landowner
16 and forget about restoration cost, planting. There
17 is just no evidence in the record of that. This is
18 a feasibility study, this is a best guess and they
19 want to try to melt them together somehow and turn
20 it into an expert opinion of value. It is not
21 proper, the contract says appraised value and that
22 is not what we've got.

23 MR. PENDARVIS: One last comment, Your Honor.
24 He said, I asked him why he sent this email to Mr.
25 McLeod and he said so the people that were involved

1 might have, you know, have this information to
2 decide if they wanted to go forward in the future,
3 so why is this guy sending this number that didn't
4 have real professional ascertainable values? He's
5 an appraiser, he is qualified.

6 MS. McWILLIAMS: What he said was, "I never
7 got," I believe Dr. Hawkins testified, "I never got
8 what I needed to do an actual appraisal."

9 THE COURT: I'm thinking about going to lunch
10 now, it's getting close to 12:00. 1:30, is that
11 enough time, 1:30 for them, will that give us
12 enough time to get this done?

13 MS. McWILLIAMS: 1:30?

14 THE COURT: I want the jury to go until 1:30,
15 we'll start back then. I want to find this and I
16 want to talk to you all.

17 MS. McWILLIAMS: Okay.

18 THE COURT: Send the jury to lunch, I want
19 them to be back in the jury room at 1:30, offer my
20 apologies, I hope the candy will do it.

21 (Recessed at 11:50 a.m.).

22 (Resumed at 1:30 p.m.).

23 THE COURT: All right, are you all ready to
24 go on the record to talk about this other objection
25 we're going to have later? Let's go back to the

1 issue of, I will call it valuation.

2 Mr. Pendarvis, you were about to utilize, I
3 believe, Mr. Hawkins' exhibit, email, is that
4 right, Number 26?

5 MR. PENDARVIS: Yes, sir.

6 THE COURT: Tell me where, if \$45,000,000, I
7 understand Mr. Hawkins generated that number based
8 upon some estimates he made on the wetlands and
9 what not, then the feasibility report for the
10 wetlands mitigation bank was performed by the other
11 corporation owned by Mr. Lewis and Mr. McLeod.

12 MR. PENDARVIS: That's correct.

13 THE COURT: Tell me again, the mitigation
14 costs, where did they come from in Mr. Hawkins'
15 testimony, where did he get his numbers from?

16 MR. PENDARVIS: I'm not certain where.
17 Likely he would have been relying on the mitigation
18 feasibility report that Mr. McLeod and Mr. Lewis
19 had delivered to him. I'm not certain he developed
20 his own independent cost valuation or ever did it.

21 THE COURT: All right. Well, I mean, the
22 mitigation feasibility report has been presented
23 but how is the jury to understand this? Is it
24 \$45,000,000 of mitigation net value to the
25 landowner as he sells off the mitigation bank

1 shares to prospective developers over the years and
2 needs to have that for purposes of other projects
3 somewhere else? That is how I understand you do
4 it.

5 MR. PENDARVIS: There are two concepts going
6 on. I'm really not certain that applies to the
7 claim of value for conservation easement. The
8 mitigation bank program takes time to complete the
9 mitigation process over 18 month and there is a
10 projection of sales that would generate this
11 \$63,000,000 net number that is shown on either the
12 second or third page of Exhibit 29. It is the
13 total gross of 63,924,255 from which a projected
14 cost of \$18,647,385 was deducted to leave a net
15 projected landowner profit of 45,276,087. That
16 would have been the projection these professionals
17 made to Mr. Justice and his companies if they chose
18 to proceed with a mitigation project.

19 The mitigation concept transformed into a
20 conservation easement and the concept of the value
21 to the landowner of the net value to a landowner of
22 a mitigation project as the highest and best use
23 was the concept by which the top number for the
24 conservation easement was going to be based and
25 that number is reflected in the last sentence of

1 Dr. Hawkins' email marked Exhibit 26 when he
2 concludes that the professional appraiser retained
3 for the work on the conservation easement, that his
4 minimum number, as he says here, for a loss value
5 of over 45,000,000 for the easement.

6 He is not talking about the net value to the
7 landowner on mitigation project. This is this
8 expert appraiser's bottom line net number of a
9 minimum amount of a loss value of over 45,000,000,
10 so if he was telling the landowner your value for
11 the easement would have to include the net number,
12 so this is an opinion from the appraiser that is as
13 qualified or one of the only individuals uniquely
14 qualified to appraise wetland values, telling the
15 landowner this loss value for your easement is over
16 45,000,000, and we submit to the Court, Your Honor,
17 that with what we discussed before, the idea of
18 even crediting the \$1,500 per acre value is even a
19 more conservative approach because of the
20 appraiser's comments. I mean, candidly, I believe,
21 and we'll leave the Court to how it decides, but it
22 doesn't appear that the opinion from Dr. Hawkins, I
23 mean, it seems to me this is a net number because
24 he is giving a net value, but if there is going to
25 be credit, we've done the calculations, it doesn't

1 change the dynamics of the number a lot. It is a
2 \$4,542,000 further reduction from the 45,000,000
3 for the agricultural value of the land and Mr.
4 McLeod is certainly capable of doing that, I have
5 the calculator and have done it as it applies
6 specifically to this acreage, which would have left
7 the landowner with a net, net value of \$40,458,000,
8 four percent of which would have been the
9 consulting fee due to Yancey Environmental
10 Solutions of \$1,618,320.

11 If the net agricultural value is removed from
12 that equation, the net fee from the \$45,000,000
13 loss of value for the conservation easement would
14 have been 1.8 million dollars for Yancey
15 Environmental Solutions, so in our estimate, Your
16 Honor, the bottom numbers are between, we asked Mr.
17 Hanlin if 1.8 value was accurate and he said he
18 agreed, but if the Court feels like just in an
19 abundance of precaution that net agricultural value
20 that has been applied to the agricultural and the
21 easement Mr. McLeod's company has been involved in
22 should be deducted, so be it, he would have a
23 million six. But we have testimony from Mr. Hanlin
24 who has been involved in other conservation
25 easements that the numbers Dr. Hawkins generated

1 were consistent with the projection, consistent
2 with other evidence, consistent with the mitigation
3 qualified in the feasibility report from earlier
4 that year.

5 So we feel that certainly Mr. McLeod's
6 capable of testifying as to this is what he
7 believes the fee would have been at a minimum from
8 this project had it proceeded, whether it would
9 have been 2007 or 2008, whenever. We certainly
10 feel like he ought to be able to tell the jury what
11 it should have been, especially because this is,
12 this fee calculation isn't stretching it out to say
13 well, if you actually take that 15,000 an acre and
14 multiply it times 3,028 acres it would be
15 45,420,000 and our fee ought to be a little bit
16 higher. We're making sure this isn't any type of
17 over estimate whatsoever.

18 MS. MCWILLIAMS: Your Honor, this is Mr.
19 Leonardi's witness, he is just dying to address the
20 Court at this point. May I defer to him?

21 THE COURT: Absolutely. Any objection to
22 that? I mean, this is his witness we're talking
23 about. For purposes of this witness it would be
24 Miss McWilliams.

25 MS. MCWILLIAMS: That's true.

1 THE COURT: Sorry about that.

2 MS. MCWILLIAMS: Your Honor, the problem with
3 the entire premise is that regardless of whether
4 Mr. Hanlin in his deposition may have at one time
5 or other said, may have said, I think there is
6 testimony, he said I guess that's probably, he was
7 asked about what do you think the fee would have
8 been, but again what is the jury going to decide is
9 a completely different issue, because now we're
10 talking about damages in a trial where a jury is
11 making a determination and Mr. Hanlin wasn't asked
12 about any fees or anything else.

13 The fact of the matter is they have put up an
14 appraiser who has said this is a best guess and if
15 you read, he says the difference between existing
16 and mitigated, that means the costs of mitigation
17 have not been subtracted, and I thought that is
18 what the Court was asking just now, where in the
19 testimony is there anything about mitigation costs,
20 and in fact the record before this jury, there is
21 none, and what Dr. Hawkins testified is those would
22 have to be subtracted out. He described what would
23 be done but he never put any figures to it, and so
24 what we're extrapolating or suggesting to the jury
25 is you can take a feasibility report and you can

1 pick some figures out of there that will help and
2 then you can take this best guess and this is what
3 Mr. McLeod's fee would have been, and the problem
4 with that is, other than what I have already
5 stated, Your Honor, is this is a project that
6 didn't get done and if they had wanted to go ahead
7 and either prove out the damages or at least be
8 able to give something for the jury to hear from a
9 qualified expert about how these, and we did hear
10 for quite some time Dr. Hawkins talked about, "I'm
11 the only one does it this way, I have a unique
12 way," he was never tendered as an expert. Had I
13 been aware he was going to be offered as an expert
14 on damages obviously we would have done discovery
15 on it. He was never named as an expert, so now
16 we're basically converting a best guess email into
17 expert testimony and we had no opportunity to
18 explore it or respond to it.

19 Furthermore, as to the feasibility study,
20 Your Honor, I think the Court asked a question
21 about the projected sales. This is not a situation
22 where the landowner, once the mitigation bank is
23 done, gets a check for \$45,000,000. In fact, the
24 feasibility study says those are projections. We
25 think that if we do all this and they have some

1 costs they think it would take to make the
2 mitigation bank, and assuming they get all the
3 approvals, then over the next seven, eight or ten
4 years, if these things sell you subtract out your
5 cost and this is what you could have projected as
6 net profit to the landowner. That is just
7 completely different, apples and oranges, and there
8 is no testimony, none, that Dr. Hawkins relied on
9 this document at all.

10 We're trying, as I said, we're trying to sort
11 of piece this thing together and throw it to the
12 jury and say, you know, here you go. He could have
13 been asked that if they had wanted to name him as
14 an expert, say we want you to take this mitigation
15 feasibility study, Dr. Hawkins, and use these
16 assumptions, and we would have had some notice
17 about it.

18 In fact what it appears is he, you read the
19 whole document, Mr. McLeod called him on December
20 24th and told him to stop work. For whatever
21 reason he apparently had already come up with a
22 preliminary value, he tells him that on the 27th
23 and then sometime in January Mr. McLeod forwarded
24 it on to Justice. That is the extent of any
25 probative value, any relevance to this case, it

1 ultimately got sent to Mr. Justice to see if he
2 might still want to be involved in doing it. There
3 is nothing in the appraisals, there is nothing on
4 which to calculate the fee. To calculate the fee
5 you have got to have the figure that says four
6 percent, I think it says five percent, we all
7 agreed they agreed to four percent, of the figure
8 that goes on the tax form, the charitable
9 contribution.

10 THE COURT: In actuality what I understand is
11 if the easement would have been done and filed on
12 December 31st you wouldn't have known what to put
13 on his tax return until after that, because they
14 have to do the final appraisal and a couple other
15 things, then you finally reach a net number that
16 everybody is comfortable the easement is a
17 permanent easement.

18 MS. McWILLIAMS: And of course the taxpayer,
19 my understanding, I'm not holding myself out, my
20 understanding, the taxpayer's income and personal
21 situation also applies, affects what the charitable
22 contribution is, but the contract speaks in terms
23 of a conservation value. Until you get the final
24 appraisal you don't have it. We never had that.

25 MR. PENDARVIS: Your Honor, Exhibit 26 is

1 already in the evidence, the jury is going to see
2 it. Evidence of Mr. Hanlin's forecast of income
3 and fees and emails are already in evidence, the
4 calculation of the fee agreement, the consulting
5 services agreement with the four percent number is
6 already in evidence, they have heard testimony on
7 it. To allow Mr. McLeod to put some specifics in
8 it is just really a math equation. This is already
9 in evidence, this is not like -- Dr. Hawkins has
10 already given testimony on it, and the idea that
11 this is going to pollute the evidence, it is all
12 cross-examination, it is closing argument and
13 cross-examination for Mr. McLeod. I'm not really
14 understanding why we are having a big problem
15 letting Mr. McLeod to say what he anticipated his
16 company's fee to be. They could tear him apart on
17 cross-examination if they want to try to do that,
18 closing argument, but I just can't see how the
19 objection to an opinion from the owner of the
20 company as to what his company's fee would have
21 been based on an appraiser the company hired to
22 value this project, I mean, it is already in
23 evidence.

24 MS. MCWILLIAMS: But the appraiser, by the
25 owner's own testimony, did not finish, he was told

1 to stop before he finished and this is his best
2 guess and what we are now hearing is this is going
3 to be transformed into an opinion of value and he
4 has admitted that the cost of mitigation has to be
5 subtracted out and he hasn't done that.

6 THE COURT: All right, here is what I'm going
7 to do. I agree with you there is two things in.
8 The mitigation feasibility report is in, it is
9 45,000,000, this is in, it's 45,000,000. The
10 residual value has not been talked about very much,
11 something I have been listening for and haven't
12 heard it yet, but that's not my problem. I believe
13 Mr. McLeod can testify that, "I estimated my fee to
14 be, based upon numbers given to me by several
15 different people," the documents which are in
16 evidence. I don't think it would be proper, I
17 think it would be, thus far Mr. McLeod has not
18 presented himself as --

19 MR. PENDARVIS: Your Honor, Mr. McLeod heard
20 you, I will make sure he doesn't extrapolate
21 outside that. If I understand, Your Honor, you're
22 allowing his opinion on what he anticipated Yancey
23 Environmental Solutions' fee would be based on
24 information from these appraisals available in
25 2007?

1 THE COURT: As I understand it, in the course
2 of his doing business over the last twelve years
3 this is -- now, I can't say that. He can provide
4 testimony what he believes as the owner,
5 shareholder of Y.E.S., what his anticipated fee was
6 going to be. He will be cross-examined with
7 breadth, free latitude for cross-examination of how
8 his anticipated fee was going to be figured. All
9 right?

10 MR. PENDARVIS: Thank you very much, Your
11 Honor, we're ready.

12 THE COURT: Anything else? We're going to
13 deal with the 30(B)(6) after cross-examination.

14 MS. MCWILLIAMS: We have some objections to
15 the 30(B)(6).

16 THE COURT: All right. Give me the jury.

17 (The jury returned to the courtroom).

18 BAILIFF: All the jurors are present, Your
19 Honor.

20 THE COURT: Thank you. You may be seated.

21 Mr. Pendarvis, you may continue.

22 BY MR. PENDARVIS:

23 Q Before we broke, Mr. McLeod, you were at the
24 point of looking at Exhibit 26, which is the email
25 from Dr. Hawkins forwarded to Mr. Justice, showing

1 Dr. Hawkins' opinions, it says or a loss value of
2 over \$45,000,000.

3 MS. McWILLIAMS: Object to the form of the
4 question.

5 THE COURT: All right.

6 MR. PENDARVIS: I will rephrase it.

7 BY MR. PENDARVIS:

8 Q Mr. McLeod, based upon the contents of the
9 email you forwarded to Mr. Justice January 10th,
10 2008, as the owner and shareholder of Yancey
11 Environmental Solutions what fee did you anticipate
12 receiving had this easement gone forward with Mr.
13 Justice?

14 A I would have anticipated a fee for Y.E.S. in
15 the amount of approximately 1.6 million dollars.

16 Q Thank you. You testified earlier you were
17 going to keep in touch with Mr. Justice about your
18 desire to move forward with the project?

19 MS. McWILLIAMS: Could we know which exhibit?

20 Q Were you keeping in touch with Mr. Justice
21 about --

22 A I was attempting to, yes, sir.

23 Q I passed to you an email dated May 23rd,
24 2008.

25 THE COURT: Have you got it?

1 MS. MCWILLIAMS: Yes.

2 THE COURT: Okay, go ahead.

3 Q Is this a copy of the email you sent to Mr.
4 Justice?

5 A Yes, it is.

6 Q Could you just generally describe for the
7 jury what you're communicating with this email?

8 A Sure. I had, following the end of 2007 I had
9 talked to an attorney friend of mine, class
10 attorney who I knew very well, tax attorney who I
11 knew very well and just generally described the
12 project to him and what had happened and asked him
13 if he would be interested in working with me on the
14 project, asking him if he would be interested in
15 working with me on the project and in this
16 communication, this email I was telling Mr. Justice
17 that I had this conversation with this attorney and
18 that he was very experienced with conservation
19 easements and understood the basic theory of the
20 conservation easement project that had been stopped
21 in 2007 and trying to encourage him to move forward
22 with this project.

23 Q Thank you, Mr. McLeod. Now, there has been
24 some testimony about you submitted bills to Mr.
25 Justice for payment for services for the

1 professionals, correct?

2 A Yes, sir.

3 Q Are you aware -- for your services, excuse
4 me, you submitted a bill for Y.E.S.' services?

5 A Yes.

6 Q We have seen that email. Were you aware of
7 any other professionals involved in this project
8 submitting invoices to Mr. Justice?

9 A I had requested each of them in the
10 communications when I told them the process had
11 been stopped and Mr. Justice had decided not to go
12 forward, postpone it, that please send me -- no,
13 actually my recollection is I said in those
14 communications that I requested that they send
15 their statement to David Harrah, Mr. Justice's in
16 house CPA.

17 Q By September of 2008 had you been paid,
18 Yancey been paid for --

19 A By when?

20 Q By September, 2008.

21 A I don't believe so.

22 Q Were you communicating with anyone with
23 regard to payment of the invoice for Y.E.S.?

24 A You know, Thomas, I don't remember whether I
25 communicated on behalf of Y.E.S. I know I

1 communicated a number of times on behalf of the
2 other professionals. I probably communicated on
3 behalf of myself, Y.E.S., too.

4 Q I show you this document --

5 MR. PENDARVIS: I would like to move the May
6 23rd email in as Exhibit 37.

7 MS. McWILLIAMS: No objection, Your Honor.

8 THE COURT: Exhibit 37 admitted without
9 objection.

10 (May 23, 2008 email marked and received in
11 evidence as Plaintiff's Exhibit 37).

12 BY MR. PENDARVIS:

13 Q Mr. McLeod, can you describe for the jury
14 what is marked as Exhibit 38?

15 A Sure. To my delight in September of 2008 I
16 received a fax communication from David Harrah
17 saying that they had, "Misplaced some of the
18 statements from the professionals in connection
19 with the easement project and Jim Justice asked me
20 to forward the attached to you to assure it appears
21 okay. Please call me at this number," so forth, so
22 I was delighted because it would appear that they
23 were finally going to make payment on some of these
24 professionals' invoices.

25 Q Mr. McLeod, so we don't clutter up all the

1 exhibits sent back to the jury, were there ever any
2 adjustments to the invoices submitted agreed to by
3 Mr. Justice and his companies?

4 A Yes. You all might recall in the original
5 consulting services agreement I had requested a
6 \$50,000 nonrefundable retainer, and I don't
7 remember the details of the various proposals from
8 the other professionals but typically those kind of
9 proposals, they charge interest and so on, but I
10 know Mary and I agreed to reduce our nonrefundable
11 retainer to 15,000 from 50,000 and I remember that
12 Dr. Hawkins agreed not to have any carrying
13 charges, penalties or interest, just take the
14 amount of the original proposal.

15 Q Now, can you describe for the jury just in
16 general what was going on with regard to the IRS
17 investigation from January through the fall of
18 2008?

19 A It was a nightmare, is what it was. My whole
20 world crashed around me. You know, when I first
21 got the notice from the IRS as has been mentioned
22 in this trial my first reaction was are you kidding
23 me? How dare you? And I thought that eventually,
24 as soon as I sat down with a human being at the IRS
25 and tell them the truth it will all go away

1 quickly, but that is not how it worked. Boy, did I
2 get a lesson. Crosby Lewis met with me and Mary I
3 don't know how many times, at night for the most
4 part, going over, you know, just thousands of pages
5 of files for Crosby Lewis to get caught up on all
6 these projects they were asking for information
7 about, and after awhile, I don't remember if it was
8 weeks or what, he suggested that we employ the
9 services of Carey Hall who is a very fine tax
10 attorney out of Greenville, South Carolina, so I
11 found myself up in Greenville meeting with Crosby
12 and Carey Hall to talk about it. It just went on
13 and on and on. I never met with Phyllis Bingham,
14 wanted to but Crosby advised me not to.

15 Q Just so the jury knows, who is --

16 A She's the lady with the IRS that sent me the
17 notice and that said they were going to investigate
18 Y.E.S. Is that enough to say right now?

19 Q It is, because I'm going to show you --

20 MR. PENDARVIS: Before we get into this next
21 exhibit, I ask to move in the memorandum to Yancey,
22 I think Plaintiff's 38.

23 MS. McWILLIAMS: No objection.

24 THE COURT: Plaintiff's 38 without objection.

25 (September 30, 2008 memo marked and received

1 in evidence as Plaintiff's Exhibit 38).

2 BY MR. PENDARVIS:

3 Q Mr. McLeod, I guess you will be happy to tell
4 the jury about this one. Will you describe the
5 next exhibit I have handed to you?

6 A During the time of the investigation Mary and
7 I and Robin responded to Crosby's request for
8 whatever he needed to defend me, defend Y.E.S. It
9 was tough, it was really, really tough financially
10 and otherwise, emotionally, and this is a letter
11 from Phyllis Bingham October 16, 2008, almost a
12 year later, where she is saying they were
13 discontinuing the investigation.

14 Q Were you happy to receive this letter?

15 A Happy days.

16 Q Did the IRS ever contact you again about
17 resuming this investigation?

18 A No, no. They better not.

19 MR. PENDARVIS: Your Honor, we ask to move
20 this into evidence as Exhibit 39.

21 MS. McWILLIAMS: No objection, Your Honor.

22 THE COURT: 39, Plaintiff's Exhibit, without
23 objection.

24 (October 16, 2008 letter marked and received
25 in evidence as Plaintiff's Exhibit 39).

1 BY MR. PENDARVIS:

2 Q Mr. McLeod, did you communicate with Mr.
3 Justice about the news from the IRS?

4 A I did, I certainly did.

5 Q Can you describe this email I passed up to
6 you, to the jury, please?

7 A Well, it is an email to Mr. Justice saying
8 how much I appreciated his words of comfort and
9 support, his friendship at the moment in time when
10 this first happened. It is a letter advising him
11 that I finally heard from the IRS and they
12 discontinued the investigation, and it is also a
13 letter wherein I once again appealed to him to let
14 us utilize all the due diligence and hard work that
15 was done on the project, commence work again and
16 get going. That is basically what it's about.

17 Q Did you ever hear a follow-up or response
18 from Mr. Justice?

19 A No.

20 MR. PENDARVIS: Your Honor, we would offer to
21 move this in evidence as Plaintiff's Exhibit 40.

22 MS. MCWILLIAMS: No objection, Your Honor.

23 THE COURT: Plaintiff's Exhibit 40 without
24 objection.

25 (November 7, 2008, letter marked and received

1 in evidence as Plaintiff's Exhibit 40).

2 BY MR. PENDARVIS:

3 Q We're getting to the end, Mr. McLeod.

4 Mr. McLeod, I passed you a two page exhibit,
5 copies of a check and check stub. Can you describe
6 to the jury what I passed up to you?

7 A Yes. These are copies of check stubs from
8 James C. Justice Companies, Inc., Justice Family
9 Farms, and a copy of a check dated November 13th,
10 2008, paying the agreed upon \$15,000 in connection
11 with the conservation easement project.

12 Q Was this in any way related to the agreement
13 that we have been talking about, the consulting
14 services agreement?

15 A Yes, this is --

16 MS. McWILLIAMS: Objection.

17 THE COURT: Rephrase that, please.

18 Q Yancey, what was, what was the basis for Mr.
19 Justice's payment of this invoice?

20 A That I had agreed to reduce the requested
21 \$50,000 to \$15,000.

22 Q The \$50,000 amount came from what document?

23 A From the original consulting services
24 agreement. Well, actually the one amended, it
25 should have been amended to four percent but --

1 Q And is there a reference in the check stub --
2 what does it say on the comment line, at the very
3 top of the second page?

4 A It says, it's got the date, got the invoice
5 number, it's got Justice Family Farms, 15,000.

6 Q Thank you very much.

7 MR. PENDARVIS: Your Honor, we would ask this
8 be presented as Exhibit 41.

9 MS. MCWILLIAMS: No objection, Your Honor.

10 THE COURT: Plaintiff's 41 without objection,
11 admitted.

12 (Check stub marked and received in evidence
13 as Plaintiff's Exhibit Number 41).

14 MR. PENDARVIS: Excuse me one moment to
15 confer with my co-counsel.

16 Mr. McLeod, thank you for your testimony.
17 Please answer any questions Miss McWilliams has.

18 MS. MCWILLIAMS: May it please the Court.

19 THE COURT: Yes, ma'am.

20 CROSS EXAMINATION BY MS. MCWILLIAMS:

21 Q Good afternoon, Mr. McLeod.

22 A Good afternoon.

23 Q You just were asked, Mr. McLeod, about
24 subsequent contact with Mr. Justice about the
25 project. Correct?

1 A Yes, ma'am.

2 Q All right. And I believe one of the exhibits
3 that was just marked talks about an attorney, you
4 had a close attorney friend that you had located.
5 Who was that person?

6 A Ken Wingate.

7 Q All right. Now, you didn't call Mr. Wingate
8 to assist at anytime between the 20th of December
9 and the 24th of December before you called Mr.
10 Justice, right?

11 A No, ma'am.

12 Q All right. In fact you didn't call anybody,
13 right?

14 A No, ma'am.

15 Q All right. Now, in fact you and Mr. Wingate
16 got on the phone at some point with Mr. Justice,
17 right?

18 A No, ma'am.

19 Q You never had a call with Mr. Wingate and Mr.
20 Justice?

21 A I don't recall a call with Mr. Wingate and
22 Mr. Justice.

23 Q All right. But we know Mr. Justice was not
24 interested, correct?

25 A Interested in what?

1 Q In reviving the project?

2 A Well, all my attempts since December, 2007,
3 he has not responded favorably.

4 Q All right. Now, you had several, also
5 several exchanges, additional exchanges with Mr.
6 Harrah or Mr. Justice about the bills, did you not,
7 more than what has just been marked, correct?

8 A I don't recall. I know that I fairly
9 regularly and routinely attempted to communicate
10 with Mr. Justice and Mr. Harrah on behalf of the
11 professionals who had participated in the project.
12 I was embarrassed, you know, for them, that I had
13 asked them to do this work for this project and I
14 was doing my best to get them compensated for their
15 time and effort that they put forth in good faith.

16 Q All right. Well, let me show you what has
17 been marked as a defendant's exhibit. Do you
18 recognize that, Mr. McLeod?

19 A Yes, ma'am.

20 Q This is an email dated February 15, 2008,
21 from you to Jim Justice. Correct, at the top?

22 A You know, since I don't use computers I
23 always have to remember it starts somewhere other
24 than the way I would normally start. Give me just
25 a moment.

1 Q You're exactly right, it starts at the bottom
2 with January 10th, from Y.E.S. to Mr. Harrah,
3 correct?

4 A Yes, ma'am, I see one from Mary to Mr. Harrah
5 just reminding him that, "We emailed to you and Jim
6 a statement for professional services rendered, see
7 past email. To date have not received payment.
8 Would you please let me know the status of
9 payment."

10 Q All right. Right above that, about eight
11 days later it's from Yancey to David Harrah,
12 "David, we have not received payment. Please call
13 to discuss." Correct?

14 A Correct.

15 Q All right. And then a month later, February
16 15th, "Jim, I have never heard --" actually from
17 you to Jim, right?

18 A Yes, ma'am.

19 Q Jim Justice?

20 A That's correct.

21 Q All right.

22 MS. McWILLIAMS: I would would move
23 Defendant's 103 in evidence.

24 MR. PENDARVIS: No objection.

25 THE COURT: Defendant's 103 admitted without

1 objection.

2 (Emails beginning 1/10/2008 marked and
3 received in evidence as Defendant's Exhibit
4 Number 103).

5 BY MS. MCWILLIAMS:

6 Q So, there was a good bit of time between the
7 end of the year 2007 and when you ultimately
8 reached agreement and was paid some, but the
9 professionals also had, it took some doing in fact
10 to get paid. Right?

11 A Yes, ma'am.

12 Q All right. Now let me show you what has been
13 marked as Defendant's Exhibit 120. Can you
14 identify this email for the record, Mr. McLeod?

15 A Yes, ma'am.

16 Q All right. This is a letter -- do you
17 recognize this email from you to David Harrah,
18 October 2nd, 2008?

19 A Yes, ma'am.

20 Q All right. Attachment, statement for
21 professional services, do you see that, do you know
22 whether or not you actually attached the statement?

23 A I have no idea.

24 Q All right. It is referenced in there?

25 A Right.

1 Q It says statement for professional services,
2 12/27/07. Correct?

3 A Right.

4 Q Do you see that?

5 A Yes, ma'am.

6 MS. McWILLIAMS: We move Defendant's Exhibit
7 120 into evidence, Your Honor.

8 MR. PENDARVIS: No objection.

9 THE COURT: Defendants Exhibit 120 admitted
10 without objection.

11 (10/2/2008 McLeod to Harrah email marked and
12 received in evidence as Defendant's Exhibit
13 Number 120).

14 BY MS. McWILLIAMS:

15 Q And by this email you admit, don't you, Mr.
16 McLeod, that it was the IRS matter that caused you
17 to delay the conservation project on the farm?

18 A No, ma'am, I do not admit that.

19 Q All right. But that is what you wrote in
20 this email, isn't that right?

21 A That is because David Harrah and Jim Justice,
22 as far as they know Hal Hanlin never quit because I
23 didn't tell them that.

24 Q All right. But in fact Mr. Hanlin wasn't on
25 the phone on December 24 when you called Jim

1 Justice and Steve Ball and David Harrah, was he?

2 A You better believe he wasn't on the phone.

3 Q It was Mr. Crosby Lewis?

4 A That's correct.

5 Q Your new counsel, right?

6 A Right.

7 Q But in this communication with Mr. Harrah
8 what you said was, "While I have every indication
9 and expectation that the IRS matter that caused us
10 to delay the conservation project on the farm will
11 be favorably resolved soon, I would like to have
12 closure before suggesting to Jim that we move
13 forward with the project."

14 Is that right?

15 A The reason that I said what I said in this
16 email is because when I advised Jim Justice on
17 December 24th, 2007, to postpone the project I did
18 so because they had suddenly abandoned me and left
19 me in the position of having no attorney and I
20 could not in good conscience advise Mr. Justice to
21 move forward with the project, and at the time of
22 this email as far as they know the only reason that
23 I gave them was the IRS letter but the real reason
24 I made the recommendation was because they had
25 quit.

1 Q But, I understand your recommendation, that
2 is what you're saying is the rationale for the
3 24th, right?

4 A Right.

5 Q But as late as October of 2008, October 2nd,
6 2008, we just saw the exhibit, the IRS letter came
7 in maybe a couple weeks later, you had a lawyer
8 ready to go, this Mr. Ken Wingate, right?

9 A Right.

10 Q And you were prepared to go forward but you
11 didn't want to go forward because you had to have
12 closure on the IRS, isn't that right?

13 A No, ma'am.

14 Q Isn't that what it says, "I would like to
15 have closure before suggesting to Jim that we move
16 forward with the project," are we talking about
17 your bill or are you talking about --

18 A The question is in two parts. I wanted to go
19 forward, of course, you know, I communicatd with
20 Mr. Justice many times after 2007 encouraging him
21 to move forward and I would love for Jim Justice to
22 have picked up the phone and said, "Yancey, that
23 sounds great, let's meet at the farm and talk about
24 moving forward with the project." But when I say
25 in this email that the IRS matter caused us to

1 delay the conservation project, the truth is that
2 what caused us to delay the conservation project
3 was Hal Hanlin and Richardson Plowden quitting.

4 Q That is not what you wrote, is it?

5 A Well, I don't think that on October 2nd,
6 2008, if I had said in this email, "Oh, by the way,
7 I also want to tell you all that the reason that I
8 advised you all to postpone the project back in
9 December, 2007, was that Hal Hanlin and Richardson
10 Plowden quit," that wouldn't have been appropriate.

11 I was trying, you know, to be a gentleman and
12 professional about the whole thing, I didn't see at
13 the time, at the moment in time, keep in mind that
14 when Hal and Richardson Plowden quit they didn't
15 give me any advice whatsoever about how to go
16 forward and handle the matter, which was extremely
17 delicate. I mean, for all I knew Jim Justice was
18 going to jump all over me for failure to produce
19 the conservation easement that would have provided
20 a \$45,000,000 deduction and I was unable to do that
21 in good conscience at that time, so, no, I didn't
22 say anything about Hal Hanlin in this letter.

23 Q But isn't it true, Mr. McLeod, you did
24 subsequently disclose that to Mr. Justice when you
25 wanted him to give you an affidavit in this case,

1 isn't that right?

2 A By the time I'm involved in this litigation,
3 yes, ma'am.

4 Q And at that point you tell him, "The reason
5 we had to delay was Mr. Hanlin's withdrawing," is
6 that right?

7 A Well, Miss McWilliams, with all due respect,
8 I didn't know what was really going on internally
9 at Richardson Plowden during all this time, I had
10 no idea that they had concerns about this project
11 or about their fee arrangement or about any issues
12 or IRS regulations, I had no -- Mr. Hanlin didn't
13 communicate one word of that to me.

14 Q Didn't you just testify to the jury whatever
15 the fee agreement would have been you would have
16 been fine with it?

17 A Absolutely I would have been from a financial
18 standpoint because I don't tend to think about
19 projects in that light, I think about projects as a
20 conservation value and protecting God's resources.

21 Q But isn't it true, Mr. McLeod, no one, the
22 IRS never even looked at any of the documentation
23 with respect to the Jim Justice transaction, right,
24 because it wasn't even turned over to them?

25 A I have no idea what the IRS was getting ready

1 to do.

2 Q But you know you had control over what could
3 be disclosed, you and your lawyers, right?

4 A To the IRS?

5 Q To the IRS.

6 A We had to turn over my life to them.

7 Q Well, isn't it true, Mr. McLeod, you remember
8 that there was a decision made by you and Mr.
9 Crosby Lewis and Mr. Carey Hall that you only had
10 to turn over to the IRS, until they asked for
11 anything else, those projects that had actually
12 been closed, right?

13 A Gosh, Miss McWilliams, you know, that is why
14 I hired Crosby. I don't remember specifically what
15 they were doing for me, I just knew they were doing
16 things.

17 Q Isn't it true that you wrote, the first time
18 you disclosed to Mr. Justice in writing that the
19 reason you had to delay was because the defendant
20 had withdrawn was all the way in 2010, at that
21 point you wanted an affidavit from him, "Verifying
22 our agreement regarding the conservation easement
23 project," isn't that right?

24 A That is absolutely correct.

25 Q And he never gave it to you, did he?

1 A He certainly did.

2 Q He gave you an affidavit verifying the
3 conservation easement project, is that what you're
4 saying?

5 A No, no. He gave us -- yes, he gave us an
6 affidavit that they were, they considered that they
7 had an agreement and Mr. Justice was planning to
8 move forward from the moment that he said to Yancey
9 on the phone let's do it.

10 Q All right.

11 MS. McWILLIAMS: Your Honor, I think I have a
12 matter to bring up with the Court.

13 THE COURT: Very well. Miss Meyer, you all
14 step in the jury room, take a break, we'll get you
15 back in a few minutes. If you need more candy let
16 us know, I have more.

17 You are good on candy or need more?

18 JUROR: We need more.

19 (The jury was excused from the courtroom).

20 MS. McWILLIAMS: Your Honor, we have never
21 seen any affidavit from Mr. Justice that has just
22 been described.

23 THE COURT: That's simple enough. Have you
24 got the affidavit?

25 MR. PENDARVIS: I know what Mr. McLeod is

1 referring to and it might be good if Mr. McLeod
2 steps out, I don't want to educate him on this, it
3 is an honest thing.

4 MS. McWILLIAMS: Let's do --

5 THE COURT: Take him right there in front of
6 Judge Baxley's chambers right here in the back
7 hall, keep him on this end of the hall because the
8 jury is down here, are they not?

9 BAILIFF: No.

10 THE COURT: The jury is down here?

11 BAILIFF: Yes, sir.

12 THE COURT: They are secluded from him. Put
13 him right there in front of Judge Baxley's chambers
14 just for everybody's assurances.

15 (Witness excused from the courtroom).

16 MR. PENDARVIS: In August, Your Honor --

17 MS. McWILLIAMS: Wait, wait. May I make the
18 record, please?

19 MR. PENDARVIS: Well, you asked me.

20 MS. McWILLIAMS: No.

21 MR. PENDARVIS: The judge asked me.

22 MS. McWILLIAMS: Okay. Well, I apologize.

23 MR. PENDARVIS: Your Honor --

24 MS. McWILLIAMS: We did ask for all
25 communications between the plaintiffs and Mr.

1 Justice and their corporation and we have never
2 seen any affidavit of any kind.

3 MR. PENDARVIS: I will represent to Your
4 Honor if I had an affidavit from Jim Justice it
5 would be on the bulletin board. It is an affidavit
6 signed by the designee of the Black River Farms,
7 LLC, Miss Williams has a copy of it, I have no copy
8 of Mr. James C. Justice, II, with his signatures on
9 an affidavit, I haven't seen one, don't know about
10 it. I'm confident that is what Mr. McLeod is
11 referring to. We have an additional copy if you
12 would like to look at that affidavit.

13 MS. MCWILLIAMS: I believe you if that is
14 what he's talking about.

15 THE COURT: That is not what the question
16 was.

17 MR. PENDARVIS: I understand that. I believe
18 that is what Mr. McLeod is thinking.

19 THE COURT: Well, Miss McWilliams, what do
20 you want?

21 MS. MCWILLIAMS: Well, the only thing I know
22 to do is to ask, I guess I now am going to have to
23 ask Mr. -- I'm not going to ask Mr. McLeod about
24 the affidavit because I don't think it's admissible
25 to show anything. My question was, "You never got

1 the affidavit you asked for," and now he told the
2 jury he did, and there isn't one. I don't know if
3 there has to be a stipulation told the jury that
4 there is no affidavit.

5 MR. PENDARVIS: I don't have any problem
6 doing that. It is an honest mistake, I have not
7 seen an affidavit, he has not seen it, I have not
8 shown him an affidavit. Yes, that letter Miss
9 McWilliams is referring to asks Mr. Justice for an
10 affidavit. It took a lot to get what we got, we
11 got a Justice Family Farms affidavit.

12 THE COURT: That's all right.

13 MR. PENDARVIS: I'm confident that is what
14 he's talking about.

15 THE COURT: I'm confident you all are
16 agreeing that affidavit or that response exists but
17 that is not an affidavit of Mr. Justice.

18 MR. PENDARVIS: No, sir.

19 MS. MCWILLIAMS: I don't dispute there was an
20 affidavit provided during mediation at some point
21 in the case.

22 THE COURT: But not from Jim Justice.

23 MS. MCWILLIAMS: It is not from Jim Justice
24 and I'm not going to put it in this record, I want
25 to be able to say there most certainly is not, you

1 hadn't produced one.

2 MR. PENDARVIS: In this affidavit the affiant
3 is the deponent in the video. We'll stipulate Miss
4 McWilliams can ask Mr. McLeod if he might be
5 mistaken.

6 MS. MCWILLIAMS: No.

7 MR. PENDARVIS: I'm confident that what he is
8 referring to --

9 MS. MCWILLIAMS: I'm not going to do that
10 because that's not admissible, that doesn't
11 constitute anything. We object to anything with
12 respect to Justice Family Farms.

13 MR. PENDARVIS: I can handle that on
14 redirect, Your Honor.

15 THE COURT: Well, all right.

16 MS. MCWILLIAMS: He said on the stand he had
17 such an affidavit and there isn't one. I think the
18 only way is for the Court to instruct, you have
19 inquired and there is no such affidavit and then
20 Mr. Pendarvis, if he wants to say didn't we get
21 another affidavit on redirect, that is not Jim
22 Justice, that was the question.

23 THE COURT: I will give a curative
24 instruction to that extent. My instruction will be
25 clear and it will be in front of the jury. Do we

1 likewise need to bring Mr. McLeod back in and tell
2 him that is what I'm about to do so he doesn't
3 contradict what I'm now educated to, that there is
4 not one?

5 MR. PENDARVIS: I prefer that, Your Honor, it
6 is an honest mistake. I prefer that.

7 THE COURT: All right. Any objection to
8 that, Miss McWilliams?

9 MS. MCWILLIAMS: No, Your Honor, I'm sorry.

10 THE COURT: All right.

11 (The witness returned to the courtroom).

12 THE COURT: I want to make a quick phone call
13 real quick to try to answer the jurors' question on
14 scheduling. I want to know what Court
15 Administration is going to do.

16 (Brief recess).

17 THE COURT: I spoke with Court
18 Administration, not the one I need to talk to but
19 it looks like everything will be fine for coming
20 back Monday and not working the weekend, which is
21 what I expected. I don't expect them to tell me
22 no, we can't do that.

23 Do you all have any issue with me, I
24 discussed it before, asking the jury what is their
25 preference for tomorrow? We can work a half day

1 tomorrow, I'm available, or if they would rather
2 not and come back Monday we'll do that. I would
3 offer that to them, not knowing what all their
4 circumstances are.

5 MR. PENDARVIS: No objection, whatever you
6 want to do, Your Honor, is fine.

7 MS. MCWILLIAMS: Fine.

8 THE COURT: Mr. McLeod, we spoke outside your
9 presence, both lawyers agreed there was another
10 affidavit that came in, it was not from Mr.
11 Justice, so the lawyers' agree I'm going to tell
12 the jury that there was not an affidavit from Jim
13 Justice, by agreement of the lawyers, I'm going to
14 leave it at that, I didn't want you to
15 misunderstand that is what I'm being told.

16 THE WITNESS: Yes, sir.

17 THE COURT: All right, very well. Bring them
18 in.

19 (The jury returned to the courtroom).

20 BAILIFF: The jurors are all present.

21 THE COURT: All right. Miss Meyer, I got you
22 all's letter. I tried to get in touch with Court
23 Administration, I pretty well got them. Here is
24 the issue. I don't think we're going to get all
25 our testimony done this week, I'm unable to work

1 this Saturday. The next break, we'll take a little
2 break before we get done today, we'll get as far as
3 we can today, we can work in the morning for about
4 half a day or not. We're going to come back Monday
5 either way. I want you all as a group to decide
6 whether you all want to go on back to your life for
7 Friday, Saturday and Sunday for a half day tomorrow
8 and come back Monday, so the decision to work
9 tomorrow morning is going to be your decision. Do
10 you all want to work a half day if we're going to
11 work a half day? If you don't, if you want Friday
12 to go to work, whatever you have to deal with, come
13 back Monday, it is you all's decision, tomorrow yes
14 or no, about 9:00 to 12:30 or 1:00, knock off and
15 come back Monday and finish the case. That is you
16 all's decision next break, you don't have to do it
17 now. That is you all's call, okay, and I will have
18 more candy then.

19 As far as the water goes, if you all need
20 something, the bailiffs are for you all's
21 convenience and for our help and they are glad to
22 do, get you water and help you with stuff. They're
23 doing a lot of work back there, they're working on
24 this jury room down here and putting new walls up,
25 so anything we can do to make you all more

1 comfortable we'll be glad to do it. That is what
2 we're here for.

3 JUROR: Will we get through Monday?

4 THE COURT: I would guess we will go into
5 Tuesday. I was making sure Court Administration
6 agreed to come back next week. They have to, it
7 would be unfair to bring another judge, I'm here,
8 you all are here, we're going to get it done.

9 All right, now we're back on the record with
10 this case, Miss McWilliams.

11 MS. MCWILLIAMS: Your Honor, the instruction.

12 THE COURT: Yes. We took a break a moment
13 ago and the lawyers and I spoke and it has been
14 stipulated, which is a legal word for agreed by the
15 parties, there is not an affidavit from Jim Justice
16 regarding the providing of the conservation issue,
17 he did not file an affidavit of any type regarding
18 his participation in that or changing his mind.

19 MS. MCWILLIAMS: Thank you, Your Honor.

20 BY MS. MCWILLIAMS:

21 Q Now, Mr. McLeod, if you could, I would like
22 to also clarify something you testified about
23 earlier today. You testified that you recommended
24 that Mr. Justice postpone the project. Is that
25 right?

1 A Yes, ma'am.

2 Q But you did not tell him on December 24th or
3 until, as we now know, later sometime in 2010 Mr.
4 Hanlin had withdrawn, right?

5 A That is my best recollection. I was in shock
6 at that moment in my life but I don't recall
7 telling him, it was embarrassing enough to tell him
8 the IRS had sent me a letter and I didn't think
9 ethically or professionally I needed to tell him,
10 it was a further embarrassment to me Richardson
11 Plowden had quit.

12 Q You also never gave him the opportunity to
13 know that and say, "Well, I've got lawyers, let's
14 keep going," you never gave him that opportunity?

15 A Miss McWilliams, Jim Justice made it clear to
16 me while he had lots of advisors and lawyers and
17 CPA's that --

18 MS. McWILLIAMS: Your Honor --

19 A -- he did not have anybody --

20 THE COURT: No, wait.

21 THE WITNESS: I'm sorry.

22 MR. PENDARVIS: He is answering the question,
23 Your Honor.

24 MS. McWILLIAMS: I asked him if he told --

25 THE COURT: Wait a minute.

1 MS. MCWILLIAMS: I'm sorry.

2 THE COURT: Rephrase your question. Answer
3 the question she asks you and if you need to
4 explain it you may, but answer the question, answer
5 the question she asks.

6 BY MS. MCWILLIAMS:

7 Q My question was, Mr. McLeod, you never
8 offered to Mr. Justice the opportunity to learn of
9 the fact there had been this sudden withdrawal and
10 give him the opportunity, you never said, "I don't
11 have lawyers, let's go forward anyway," or at least
12 let him make that decision that he wanted to go
13 forward, did you?

14 A And the reason that I did not is because he
15 had made it clear to me when he said to move
16 forward that while he had lots of advisers and
17 CPA's and others, that he didn't have anybody that
18 knew anything about conservation easements.

19 Q All right. And when was this conversation
20 you had with Mr. Justice?

21 A Back in, I guess it was October when we made
22 the decision, when he decided to go forward with
23 the conservation easement after having decided not
24 to go forward with the mitigation.

25 Q Isn't it true that you have previously

1 testified that what he said at the point when you
2 all were deciding between transitions from a
3 mitigation bank to a conservation easement, all he
4 said was, "Let's do it," isn't that what you
5 previously testified?

6 A Sure, but we were having a telephone
7 conversation and the bottom line was he said go
8 forward, do it.

9 Q All right. And there wasn't anything about,
10 "Oh, by the way, I'm relying on you for tax
11 advice," he didn't say that?

12 A His actual words to me, Miss McWilliams, when
13 I described to him what I was thinking to
14 accomplish his stated long and short term
15 objectives about the Black River Farm was, "Yancey,
16 that's brilliant, I don't have anybody who
17 understands these concepts and principles, let's do
18 it."

19 Q "Let's do it," all right, but not, "And I'm
20 going to be relying on your attorneys for tax
21 advice," he never said that, did he?

22 A That was certainly implied from what he was
23 telling me.

24 Q That's what you're saying now but he never
25 said it, did he, he never said that?

1 A Okay, never said, I'm sorry, never said what?

2 Q He never said, "And I don't have any tax
3 attorneys that can assist"?

4 A He said, "I don't have anybody."

5 Q He doesn't have anybody that understands
6 conservation easements, isn't that right, is that
7 what you're now saying?

8 A He thought that what I was telling him was a
9 splendid idea to enable them to protect this farm
10 in perpetuity and told me to go forward.

11 Q All right. Now, I also want to clarify a
12 couple other things. Just to be clear, you have
13 never said to him, "I don't have my attorney but
14 let's go forward anyway because this IRS deal
15 doesn't, I'm proud of what I did, I'll be able to
16 defend myself," right?

17 A It is my recollection that on the December 24
18 conference call with Jim Justice, Steven Ball,
19 David Harrah and Crosby Lewis, Crosby Lewis, in
20 Crosby's office, I did not tell Mr. Justice about
21 Richardson Plowden quitting because I did not want
22 to further embarrass myself, it was hard enough for
23 me to say the IRS had sent me this threatening
24 letter.

25 Q You're saying it's embarrassing that your

1 lawyer has a conflict, is that all you had to say?

2 A I don't think he had a conflict. I can't
3 believe they didn't help me cross the finish line
4 with this project after they promised me they
5 would.

6 Q You never gave Mr. Justice the chance to go
7 forward and get anybody else and you didn't get
8 anybody else, did you?

9 A I did not.

10 Q You didn't even try?

11 A I did not. I didn't think -- it was
12 pointless to do so at that time.

13 Q But you didn't even try, did you, Mr. McLeod?

14 A No, ma'am.

15 Q Yet you got Crosby Lewis on the same day?
16 You went down a few days after that and he had
17 Carey Hall?

18 A Right. Crosby Lewis knew about as much about
19 conservation easements as I do. I called him
20 because I was scared to death. I was scared to
21 death of what Jim Justice might say when I advised
22 him to postpone the easement and the reason I did
23 that were twofold. One, my first thought was
24 protect my client's interest. Secondly, not to
25 further embarrass myself. And so I was giving him

1 the best advice that I knew how under very adverse
2 circumstances, Hal and Richardson Plowden didn't
3 give me any advice how to proceed from that moment.

4 Q But you had Mr. Lewis by December 20, the
5 same day?

6 A I certainly did.

7 Q Met with him that night?

8 A I certainly did.

9 Q And within, by January 3rd you were in
10 Greenville meeting with Carey Hall who is a
11 certified tax specialist, right?

12 A I don't believe Carey Hall or anybody
13 competent or qualified to handle a conservation
14 easement of this magnitude and complexity would
15 even consider coming into the project and I could
16 have gotten ten lawyers by the evening of the 20th
17 to help me fight the IRS, I just happened to choose
18 Crosby.

19 Q Well, isn't it true, Mr. McLeod, that when
20 you wrote Mr. Justice and said you needed an
21 affidavit from him to confirm you had an agreement,
22 you also told him at the time all this happened,
23 "You will recall we had all the work on the project
24 completed and were only a few days before closing"?
25 Isn't that what you told him when you write Mr.

1 Justice?

2 A Well, Miss McWilliams, I have stated to you
3 on my deposition that people who --

4 Q Could I get an answer first, please, yes or
5 no, did you write that, Mr. McLeod?

6 A I did write that and the reason I wrote that
7 is that I'm a very simple person but when I deal
8 with these complex issues with these very important
9 people which I have been blessed to do in my
10 lifetime I'm humbled by the experience to do that,
11 it is extraordinarily important on a project of
12 this magnitude and complexity for me to have the
13 comfort and security of the tax attorney taking me
14 all the way to the finish line.

15 On the easements that Curtis talked about
16 last year in the last ten days of 2011 we had some
17 very complex issues come up that Curtis had to deal
18 with. I couldn't in good conscience recommend to
19 Jim Justice we move forward with the project
20 without the tax attorney involved in the project.
21 That is just how simple it is.

22 Q But you could have given Mr. Justice the
23 opportunity to have his own lawyer. Mr. Elliott
24 represented the landowner, right?

25 A Miss McWilliams, of course I could have given

1 Mr. Justice the opportunity but I don't think there
2 are any tax attorneys in Beckley, West Virginia
3 that would have jumped into the project that late
4 date either.

5 Q But we'll never know because you didn't call?

6 A I suppose not.

7 Q You didn't tell Mr. Justice that Mr. Hanlin
8 wasn't involved, did you?

9 A I did not.

10 Q Now, could we back up a little bit, Mr.
11 McLeod?

12 A Sure.

13 Q You testified yesterday you first met, maybe
14 I misunderstood you but I thought you said you
15 first met Mr. Justice in working on the WRP
16 easement. You didn't actually meet him face to
17 face until 2007, right?

18 A Yes. We talked and Randy and I talked, Mr.
19 Justice and I talked back in 2005.

20 Q But you didn't actually meet him until 2007,
21 right?

22 A Correct.

23 Q March, I think your testimony was, is that
24 right?

25 A Yes, ma'am.

1 Q You were on the site and I think you rode
2 around probably, that was in '07, right?

3 A Yes, ma'am.

4 Q So you really hadn't known Mr. Justice except
5 by virtue of the telephone calls in '05 and then
6 you met him on the property in '07. Right?

7 A Yes, ma'am.

8 Q March of '07: And you attempted, in
9 connection with the mitigation project, you sent
10 him two consulting services agreements, right, one
11 and then another one you hand delivered?

12 A In connection with the mitigation project?

13 Q Yes, sir.

14 A Two consulting services agreements?

15 Q One in July and then you sent him, took it
16 again in August?

17 A I don't recall two but if you say so.

18 Q All right. But he never signed either one of
19 them?

20 A No, ma'am.

21 Q All right. And then -- and he decided he
22 didn't want to do that project, right?

23 A That's correct.

24 Q All right. And your testimony earlier was
25 that you had a potential deal with Mr. Gastono and

1 he didn't want to do it, right?

2 A For totally different reasons.

3 Q Okay. But I'm just saying isn't it true that
4 lots of times landowners make the decision that
5 they don't want to go forward with projects, right?

6 A Well, gosh, I have already testified that I
7 have had hundreds of landowners call me and ask for
8 my assistance with conservation matters on their
9 real estate and after meeting with them and seeing
10 the land and doing a little preliminary due
11 diligence decided not to go forward.

12 Q All right. And in connection with the, right
13 after the mitigation bank visit in March, I think
14 you testified you ultimately went up to Beckley,
15 West Virginia to look at some Justice property up
16 there?

17 A Yes, ma'am.

18 Q And he decided he didn't want to do that
19 conservation easement either, didn't he?

20 A That's correct.

21 Q All right. And so you had actually talked
22 with him about conservation easements before you
23 ever got to the proposal with respect to Black
24 River Farms, right?

25 A Two totally different concepts but the same

1 170(H) type easement.

2 Q The conservation easement, if he had chosen
3 to do it and everything worked out he could
4 potentially take a charitable deduction, right?

5 A Sure.

6 Q He chose not to do that one either, didn't
7 he?

8 A Yes, ma'am.

9 Q And then you get to the fall of 2007 and
10 there is now another idea about Black River Farm.
11 Correct?

12 A Yes, ma'am.

13 Q All right. And that one, based on your
14 testimony, had a potential, if everything worked
15 out, might be a potential charitable contribution
16 for Mr. Justice as well. Right?

17 A Yes, ma'am.

18 Q And he didn't want to do that, did he?

19 A I don't agree with that. He did want to do
20 it.

21 Q Well, he certainly didn't ever take you up on
22 your offer to start it back up after the IRS
23 investigation was done, did he?

24 A Well, Miss McWilliams, let me explain that.
25 IRS tax code regulations fluctuate a lot and when

1 you are dealing with a gentleman like Jim Justice
2 who has more wealth and assets and income than are
3 comprehensible, I was told that in 2007 he had a
4 particular need.

5 MS. McWILLIAMS: Your Honor --

6 THE COURT: Hold on.

7 Q I don't think you can repeat the hearsay.

8 A Okay.

9 Q But what I asked you was, he chose not to do
10 the transaction in '07 after your recommendation
11 that he not do it because of the IRS investigation
12 and he has never taken it back up with you, has he?

13 A Notwithstanding my efforts to mitigate
14 damages that we sustained, he has not decided to
15 move forward at least as far as I know.

16 Q All right. Now, he also, so the record is
17 clear, he didn't sign the services agreement you
18 testified about earlier today, did he?

19 A No, nor did that surprise me.

20 Q You would have liked to have had signed
21 agreements?

22 A It is better to have it than not but I
23 trusted him and he trusted me. I wasn't worried
24 about it.

25 Q All right. And he never ever agreed to the

1 nonrefundable retainer, he just ended up paying you
2 the 15,000 later in the year, right?

3 A And I certainly was grateful for that because
4 there were times while Robin and I were fighting
5 the IRS we didn't have enough gas money to come in
6 from the Wateree River to visit our grandchildren,
7 so, yes, I was delighted he agreed to pay part of
8 that 50,000 even though we didn't do the project.

9 Q And he never agreed to make it nonrefundable,
10 did he, that is what you wanted, you wanted a
11 nonrefundable up front, right?

12 A Yes. In a perfect world that would have been
13 wonderful.

14 Q That is what the terms you proposed were?

15 A Yes, ma'am.

16 Q All right. One other matter, Mr. McLeod.
17 Isn't it true that the original consulting services
18 agreement didn't come from Mr. Hanlin, it came from
19 Y.E.S. to Mr. Hanlin, right?

20 A Probably so.

21 Q The first draft, do you remember that?

22 A I don't remember it. I would have taken an
23 existing consulting services agreement from other
24 projects and I would have modified it in
25 handwriting on the copy Mary would have made for me

1 and Mary would have typed it up and I would have
2 looked at it and then I would have sent a proposed
3 draft of the consulting services agreement to Hal
4 for his review.

5 Q All right. Let's look at that. You had two
6 of them left over from the mitigation bank, right,
7 you already had two, right? Let me show you what
8 has been marked as Defendant's Exhibit 35, Mr.
9 McLeod. That is dated November 9, 2007, an email
10 signed by Mary but she sent out all your emails,
11 right?

12 A Yes, ma'am.

13 Q And it is from you to Hal; "I'm attaching a
14 first draft of the NRPM consulting service
15 agreement for the Jim Justice easement"?

16 A Yes, ma'am.

17 MS. MCWILLIAMS: We move Defendant's Exhibit
18 35 into evidence, Your Honor.

19 MR. PENDARVIS: No objection, Your Honor.

20 THE COURT: Defendant 35 without objection.

21 (NRPM consulting service agreement marked
22 and received in evidence as Defendant's
23 Exhibit Number 35).

24 BY MS. MCWILLIAMS:

25 Q So, when you first began your working on this

1 conservation easement project for Black River
2 Farms, you testified you started getting the
3 professionals together, I think you said, you first
4 sent a draft of what you wanted to deal with with
5 Mr. Justice, sent that to Mr. Hanlin, right?

6 A I did.

7 Q And thereafter on occasion Mr. Hanlin sent
8 various documents to Mr. Justice on behalf of the
9 project at your direction and approval, correct?

10 A Yes, ma'am.

11 Q Including the proposal from COLT, right?

12 A Yes, ma'am.

13 Q Mr. Justice never signed that, right?

14 A No, ma'am.

15 Q And he never signed a consulting service
16 agreement, I think your testimony has been that one
17 was updated and changed instead of saying -- the
18 first draft had NRPM, then it got updated, right?

19 A That's correct.

20 Q He didn't sign that, right?

21 A No, ma'am.

22 Q He also didn't sign or agree to the proposal
23 from Dr. Hawkins, the appraiser, did he?

24 A He did not. He paid it.

25 Q Ultimately -- let's be clear about that. He

1 ultimately paid after Mr. Harrah threatened to put
2 a lien on the property?

3 A Dr. Hawkins.

4 Q Dr. Hawkins, I'm sorry. Isn't that right?

5 A I can assure you Jim Justice was not
6 concerned about Darroll Hawkins threatening a lien
7 but he paid it, paid all the rest of them, nobody
8 else made any threat.

9 Q All right. But that's what it took, it took
10 a while, right?

11 A It took time, it didn't take a lot.

12 Q All right. There was a lot of emails where
13 you kept saying you had contact with Mr. Harrah
14 trying to get these bills paid, right?

15 A Yes, ma'am. I was trying to protect the
16 professionals' interest. Keep in mind that because
17 Richardson Plowden and Hal Hanlin suddenly quit on
18 me, as a lawyer thinking back to law school, I'm
19 thinking, gosh, Yancey, can you really protect
20 their interest since the agreement was never really
21 signed, is there a legal obligation to pay these
22 people who in good faith acted on my request to
23 conduct the necessary component parts of a very
24 complex, huge conservation easement project and now
25 because Richardson Plowden and Hal Hanlin quit I

1 had to recommend to Mr. Justice to postpone it, I
2 don't know if he will ever start it back up and I
3 am definitely trying to get these professionals
4 paid.

5 Q The fact of the matter is there is lots of
6 projects that you take a risk on, these
7 professionals, Multi-Engineering, didn't
8 Multi-Engineering take a risk on working on the
9 mitigation bank project, you might not get paid if
10 the deal doesn't go through, right?

11 A That is correct, there is a risk. I have
12 spent, you know, probably two-thirds of my
13 lifetime, you know, trying to help people for which
14 I received no compensation but that doesn't mean
15 I'm going to quit trying to help people.

16 Q Isn't it also true with respect to the
17 conservation easement that was proposed for the
18 Black River Farm Mr. Justice had no obligation,
19 even if he had signed one of your consulting
20 agreements he had no obligation to do it, isn't
21 that right?

22 A Sure.

23 Q He could, you wanted him to pay a
24 nonrefundable retainer of 50,000 but he didn't
25 actually have to do it, right?

1 A No, ma'am.

2 Q So there is also a risk that he might at the
3 very last minute just decide, "You know what, I
4 don't want to do it"?

5 A Absolutely, that would be a possibility.

6 Q That would have been his right under this
7 agreement, right?

8 A Of course.

9 Q Okay. That is something the landowner always
10 has an opportunity to decide, right?

11 A Yes, ma'am.

12 Q Just as you didn't give any guarantee to Mr.
13 Justice of what might be his actual charitable
14 deduction, right?

15 A Well, I wasn't expecting him to make the
16 final decision to execute these documents and
17 record it and place a permanent easement on his
18 property without having some idea what the expected
19 charitable gift would be. That is why Darroll
20 Hawkins, you know, provided us with his preliminary
21 estimate of value.

22 Q All right. Well, let's talk about that a
23 little bit. Do you have that in front of you, Mr.
24 McLeod?

25 A Which one is that, ma'am?

1 Q Well, I wish I could tell you. I believe --

2 MR. PENDARVIS: 26.

3 Q Plaintiff's 26.

4 A I had them all straight here, I swear. I've
5 got it.

6 Q Have you got it?

7 A Yes, ma'am.

8 Q In fact what Dr. Hawkins says is, "I had a
9 preliminary value on one of 15 different wetlands,
10 correct." Isn't that what he says?

11 A That is what it says.

12 Q All right. And so he -- and you directed him
13 to stop work, right, after the conversation with
14 Mr. Justice, not going to do any more work because
15 Mr. Justice has decided to postpone it?

16 A After Mr. Hanlin and Richardson Plowden quit
17 on me I recommended to Mr. Justice we postpone the
18 project, he agreed and I immediately or soon
19 thereafter notified all the professionals who had
20 been acting in good faith working on this project
21 to stop.

22 Q Right. And in fact Plaintiff's 26 is
23 basically Dr. Hawkins' best guess, isn't that
24 right?

25 A It is a professional opinion of a preliminary

1 value.

2 Q Well --

3 A Based upon his vast experience appraising
4 aquatic resources.

5 Q That is not what it says. You wouldn't have
6 recommended to Mr. Justice, "Yes, go ahead and put
7 this on your tax return"?

8 A Oh, I certainly would have.

9 Q A best guess?

10 A With a preliminary value provided by Dr.
11 Hawkins this would have been perfectly sufficient
12 for Mr. Justice to move forward with the
13 conservation easement because Dr. Hawkins, the
14 appraiser, is saying it will be at least
15 45,000,000.

16 Q But that is not what I asked you. What I
17 asked you, Mr. McLeod, you would not have
18 recommended to Mr. Justice that he could rely on a
19 best guess for purposes of his conservation
20 easement project, could you?

21 A He could rely on this professional opinion of
22 a preliminary value to place the easement and then
23 the self contained appraisal would be due within 60
24 days.

25 Q And that was never done because you told Dr.

1 Hawkins to stop work, properly so, because the
2 project had been postponed, right?

3 A Yes, ma'am, I did.

4 Q And in fact Dr. Hawkins' best guess here
5 doesn't even take into account what it would cost
6 to create a mitigation bank, you have got to have
7 both of them, we don't have a value of the
8 conservation easement, one is the property, one is
9 a conservation easement, we don't have that either,
10 do we?

11 A Well, if I had had this in my hand from Dr.
12 Hawkins and Hal and Richardson Plowden had not quit
13 I could have easily sat down with David Harrah and
14 Mr. Justice or anybody else he wanted there and
15 easily in 30 minutes explained to him the practical
16 application of the process and the before and after
17 appraisal methodology and what it would result in.

18 Q But you didn't have that appraisal
19 methodology done, did you?

20 A It wasn't done because they quit.

21 Q All right. But the point of the matter is
22 this is just a best guess, isn't that right?

23 A It is a professional preliminary estimate of
24 value.

25 Q But those words don't appear in this, it says

1 best guess in the change in value?

2 A That is just Dr. Hawkins, the way he talks.

3 Q All right. You heard Dr. Hawkins testify in
4 this courtroom you still have to subtract out the
5 cost, right?

6 A Well, sure, of course.

7 Q And we don't know what those are?

8 A We don't know what those are.

9 Q We don't know what those are because you
10 never did it, did you, you said, "He had this
11 unique way of valuing it and he never gave us any
12 idea of the costs"?

13 A Miss McWilliams, I have been doing
14 conservation easement work a long time and without
15 fail, 100 percent of the projects that we have
16 closed have a before and after appraisal.

17 MS. McWILLIAMS: Your Honor, I move to strike
18 that, it is not responsive.

19 THE COURT: All right.

20 MS. McWILLIAMS: I asked him --

21 THE COURT: I know what you asked and I have
22 the record up here, thanks to my court reporter.

23 MS. McWILLIAMS: Thank you.

24 THE COURT: You can ask questions, Mr. McLeod
25 can give the answers. If his answer requires an

1 explanation he can provide an explanation but not a
2 nonresponsive explanation, let's stay on task and
3 present evidence on this case.

4 BY MS. MCWILLIAMS:

5 Q Mr. McLeod, you have testified some earlier
6 today about -- I want to show you a few more of
7 your correspondence with Mr. Harrah and Mr. Justice
8 about your fees but you have testified earlier
9 today there wasn't any deadline for the project
10 set, to closing date?

11 A December 31st.

12 Q All right. Oh, the closing date was December
13 31st?

14 A Everything was to be done by December 31st in
15 order for Mr. Justice to have the charitable gift
16 in the calendar year 2007.

17 Q Well, you produced a calendar in this case,
18 haven't you, for December?

19 A I don't know whether I have or not.

20 Q All right. Well, let's find it. We'll find
21 that for you. I'll find it in just a minute.

22 Mr. McLeod, not everybody in the deal thought
23 that there was a deadline or closing date of
24 December 31st, did they? Isn't it true that Jim
25 Lewis thought you had until January before you

1 would even do the prospectus, right?

2 A I think you're confusing the facts about what
3 Jim Lewis is talking about.

4 Q Well --

5 A I had --

6 Q Let me just show you the document.

7 A I'm sorry.

8 Q I hand you what has been marked as
9 Defendant's Exhibit 57. Do you see that, Mr.
10 McLeod?

11 A Excuse me, I'm just looking at it.

12 Okay.

13 Q All right. And there is, again this is one
14 of those documents that has two emails, the first
15 one at the bottom says, it is a string, it is dated
16 November 27th, 2007. Correct?

17 A Yes, ma'am.

18 Q From you to Mr. Lewis?

19 A I saw that Brenda's name -- I have a mental
20 block about looking at the bottom of the page to
21 read up.

22 Q So it is from you to Jim Lewis?

23 A Yes, ma'am.

24 Q That is your long time acquaintance and you
25 are in a corporation together?

1 A Uh-huh.

2 Q You copied Mr. Hanlin and you asked Mr. Lewis
3 to have the base line report ready by December 20
4 and then if possible it would be great to have the
5 prospectus, right?

6 A Right.

7 Q And what Mr. Lewis emails back is, "Well, I
8 may be able to get the base line by the 20th but
9 not the prospectus, I thought we had until January
10 on it"?

11 A Jim is confusing doing a mitigation project
12 versus a conservation easement and we decided we
13 didn't need to do the prospectus for the
14 conservation easement. A prospectus is a
15 conceptual plan of a mitigation project.

16 MS. McWILLIAMS: I would like to move
17 Defendant's Exhibit 57 in evidence.

18 MR. PENDARVIS: No objection.

19 THE COURT: 57 is admitted without objection.

20 (11/27/2007 email marked and received in
21 evidence as Defendant's Exhibit Number 57).

22 MS. McWILLIAMS: Thank you, Your Honor.

23 BY MS. McWILLIAMS:

24 Q Well, certainly by November 27th you weren't
25 still working on the mitigation bank, were you?

1 A No, but I had thought that if Jim could put
2 together a prospectus for a mitigation project
3 which I knew at this moment in time was not going
4 to happen, that it might be helpful to Henry
5 Beckham and Dr. Hawkins to have as much information
6 as they could concerning the projected values of
7 the mitigation project which would become the basis
8 of the highest and best use for their appraisals.

9 Q Okay. So point of fact, what Mr. Lewis says
10 is, "I thought we had until January on it"?

11 A Well, he thought wrong.

12 Q Okay. Now, I mentioned the calendar. Let me
13 show you what has been marked as defendant's 59,
14 Mr. McLeod.

15 A Thank you.

16 Q Now, you produced this in this litigation,
17 didn't you?

18 A I guess so.

19 Q You don't remember?

20 A No, I don't remember. I'm sure Mary did it.

21 Q All right. Now, it looks like it was printed
22 off January 15th, 2008. Do you see that?

23 A Yes, ma'am.

24 Q 2:50 p.m.?

25 A Yes, ma'am.

1 Q And it's got a meeting with Crosby Lewis on
2 the 21st. Right?

3 A Yes. I was meeting with him regularly about
4 that time.

5 Q All right, and the 22nd it shows Crosby
6 Lewis?

7 A Yes, 10:00 o'clock, yes, on a Saturday.

8 Q And then there is a conference call with Mr.
9 Justice shown on the 24th. Right?

10 A Yes.

11 Q All right. But there is no entry anywhere on
12 here of a closing date or Justice closing or
13 anything, is there?

14 A I had never had a closing for a conservation
15 easement on a calendar except one, the one in
16 December, 2011. Our client, a fourth generation
17 cattle farmer in Rock Hill was so excited about
18 what his family was getting ready to do, he
19 provided a thousand acres in the heart of the
20 Charlotte bedroom community in this very fast
21 growing area, was going to dedicate a conservation
22 easement to provide that farm landscape for the
23 benefit of the public forever and he was so excited
24 about it and the York Conservation District who had
25 agreed to serve as the qualified organization was

1 so excited about it they wanted to have a closing
2 and so Curtis and I did a closing.

3 Q You put that one on your calendar?

4 A Mary probably did.

5 Q You didn't put the one for Jim Justice?

6 A Until December, 2011, I had never had a
7 closing on a calendar because I have never had a
8 closing.

9 Q Okay. All right.

10 MS. McWILLIAMS: Your Honor, we move in
11 Defendant's Exhibit 59.

12 MR. PENDARVIS: No objection.

13 THE COURT: Defendant 59 is in evidence
14 without objection.

15 MS. McWILLIAMS: Thank you.

16 (Copy of December 2007 calendar marked and
17 received in evidence as Defendant Exhibit
18 Number 59).

19 THE WITNESS: Miss McWilliams, could I
20 clarify something, is that okay?

21 MS. McWILLIAMS: Certainly.

22 THE WITNESS: When I say we had never had a
23 closing, I mean a formal closing, sitting around a
24 table with lawyers signing papers. Obviously we
25 had a closing because you had to get the

1 conservation easement document executed and the
2 base line documentation accepted by the grantor and
3 the grantee, you had to file the conservation
4 easement, but we had never had a formal closing.

5 BY MS. MCWILLIAMS:

6 Q Okay. Well, certainly with respect to the
7 Justice closing, you just said it was December
8 31st, that is just a tax deadline, right, that is
9 certainly not a -- you had no scheduled closing?

10 A Yes, everybody had to get, we got to get
11 everything done and be able to record the easement
12 by December 31st.

13 Q All right. And wouldn't you agree with me,
14 Mr. McLeod, one of the things you would have had to
15 have gotten done was have a commitment from Mr.
16 Justice to go forward, right, to actually place the
17 easement, right?

18 A Would you, I'm sorry, would you repeat that?

19 Q In other words, before you can have this
20 mailing around of documents and then ultimately
21 getting it recorded the landowner has got to sign
22 on the dotted line saying, "Yes, I want to do it,"
23 right?

24 A Of course.

25 Q And even up until the 12/31 this is a deal

1 that just might not have gone forward, no matter
2 what, whether Mr. Hanlin was involved or anybody
3 else, right?

4 A Well, that would have been his call for sure.

5 Q It would have been Mr. Justice's call?

6 A Right.

7 Q Okay.

8 A I have had qualified organizations back out
9 at the last few days of the year, too.

10 Q All right.

11 A They've got to agree, too.

12 Q Excuse me, I didn't mean to interrupt you.

13 In fact, in this case COLT really needed to have a
14 commitment from Mr. Justice about paying a
15 stewardship fee, right, he had to commit to it as
16 well, right?

17 A He didn't have to commit to it before the
18 consummation of the easement project. I have had
19 many, many easements where there was no formal
20 commitment to the stewardship endowment
21 contribution to the qualified organization until
22 after the first of the year.

23 Q Well, but in order for the deal to close COLT
24 would have had to have had Mr. Justice commit to
25 make a contribution for purposes of the maintenance

1 of the conservation easement in perpetuity, right?

2 A Sue Green knew full well Mr. Justice would
3 fulfill his obligations to make a stewardship
4 contribution had the project closed.

5 Q But my question was, that was something he
6 had to agree to, right?

7 A You mean formally agree to before the
8 execution of the document and the recordation of
9 the document?

10 Q Correct?

11 A No.

12 Q He didn't have to, he didn't have to agree to
13 that?

14 A No, ma'am.

15 Q Before the recordation?

16 A No, ma'am.

17 Q Well, in order to record you've got to have a
18 contemporaneous acknowledgement of the gift, right?

19 A Yes, ma'am.

20 Q And so is it your testimony that COLT would
21 have given a contemporaneous acknowledgement of a
22 gift before Mr. Justice had made any commitment to
23 COLT to pay the stewardship fee?

24 A I don't think there is any question that if
25 Jim Justice through David Harrah or whoever, you

1 know, had told me that they were ready to execute . .
2 the document that Hal and I had sent up there, that
3 Sue Green would have gladly executed the document.
4 Hal Hanlin could have easily told her and would
5 have told her that Jim Justice is good for the
6 amount of the stewardship contribution. I mean, my
7 gosh. As a matter of fact, Miss McWilliams, we had
8 a project one time where a qualified organization
9 backed out at the last minute and I had a new
10 qualified organization step in the last few days of
11 the year.

12 Q Okay. That is not what happened here?

13 A - No, no, I don't mean that.

14 Q It doesn't have anything to do with this
15 case, right?

16 A No, ma'am, no.

17 Q All right. Now, isn't it true, Mr. McLeod,
18 that you received an easement in this case or a
19 draft easement from your son in law school? Do you
20 remember that?

21 A Oh, yes. There was, Yancey was at Vermont
22 Law School pursuing his Master's of Environmental
23 Legal Studies and he wrote a paper while he was
24 there entitled The Alchemy of Federal Wetlands
25 Regulations. I didn't know what alchemy meant

1 until he told me what he was writing. It is a
2 really good paper, it has been picked up and
3 published nationally.

4 But I asked Yancey, since he had these
5 remarkable professors at Vermont Law School, if
6 they had any New England boilerplate conservation
7 easement documents because in New England, unlike a
8 lot of the other parts of the country, they place
9 easements on property all the time to ensure a farm
10 landscape forever, which necessitates an
11 affirmative duty on the grantor and their heirs and
12 successors, if you follow what I'm saying.

13 Q Well, I guess what I wanted to make clear is
14 that you got a draft easement in connection with
15 the Jim Justice project, that language you could
16 use, from your son?

17 A Oh, it didn't have anything to do with the
18 Jim Justice project. It had to do with the
19 concept. In a conservation easement, 170(H)
20 conservation easement, which is the subject of this
21 lawsuit, it is a negative document, it is a thou
22 shall not, thou shall not do this, this, and this
23 forever, and then there is always a section where
24 the grantor, the landowner, reserves certain
25 rights.

1 In this case the reservation of rights would
2 have been agricultural and recreation, period, and
3 all the other rights, landowner rights would have
4 been forfeited forever and it is unusual in a
5 conservation easement to impose affirmative duties
6 but we would have had to have done that with the
7 unique concept of this conservation easement
8 because to forfeit forever the right to do
9 compensatory stream and wetland mitigation we would
10 have had to prohibit dredging, filling,
11 topographical alteration, the very things that Dr.
12 Hawkins was describing yesterday.

13 Q So you needed some language regarding
14 agricultural protection, right?

15 A We needed some language. I thought that, you
16 know, and just by happenstance my son happened to
17 be at Vermont Law School and I had thought, he had
18 told me excitedly about, "Dad, you wouldn't believe
19 the kind of easements they do up here."

20 Q I hate to interrupt, I understand that, but
21 my question is, you needed some language regarding
22 agricultural protection for the Jim Justice
23 easement, correct?

24 A No, I didn't need that language. We had that
25 in plenty of easement documents. What I needed was

1 language that as a part of the gift of the easement
2 it required the grantor, including everybody who
3 owned the property forever to affirmatively agree
4 that they would maintain it as a farm landscape.
5 In other words, what if Jim Justice and Jay his son
6 had decided for whatever reason, "We don't want to
7 farm anymore," under the terms of the easement
8 document that we were going to have on Jim
9 Justice's farm they could not allow the farm to go
10 through successional growth and revert back to a
11 forested landscape, they would have been required
12 affirmatively to keep it as a farm.

13 Q Well, you already knew that is what they
14 wanted to do anyway?

15 A I know but, you know, they might have changed
16 their --

17 Q Let me now --

18 MR. PENDARVIS: Your Honor, if she would let
19 him finish.

20 Q I didn't mean to interrupt.

21 A I'm through.

22 Q I'm sorry.

23 THE COURT: Thank you very much. That's
24 good.

25 Q Defendant's Exhibit 46, let me just get you

1 to identify that, if you would, if you could, Mr.
2 McLeod. This is, what it is, this is the easement
3 that your son sent November 26th, 2007. Right?

4 A Yes, ma'am.

5 Q Just a model conservation easement, right,
6 and you wanted one from the New England area, right
7 and that is what this is?

8 A Yes. Yancey describes in his note -- can I
9 read that?

10 Q Absolutely.

11 A He says, "Mary, dad asked me to send him an
12 easement document from the New England area.
13 Specifically he wanted to know the language they
14 used concerning the agricultural protection. I am
15 studying for exams and didn't really go over this
16 to see if the language he wanted is in this
17 document but I think it probably is. Let me know
18 if he wants more."

19 What he is saying is that their documents up
20 there are drafted in such a way as to place this
21 affirmative duty on the grantor and their
22 successors in title to maintain it as a farm
23 landscape forever. I had the same discussion with
24 the, with Matt Ball of the Corps of Engineers
25 recently about mitigation easements where Matt

1 wanted grantors or landowners placing mitigation
2 banks on their property to have the affirmative
3 duty of maintaining fences to keep cattle out of
4 creeks and I thought that was very much like this
5 because how do you draft language in a document
6 that puts an affirmative duty on landowners forever
7 to maintain fences? What if he is 99 years old and
8 can't get out there to maintain the fence? That is
9 difficult to do.

10 Q You would agree with me, Mr. McLeod, this
11 easement that you requested and received from your
12 son is during the time when you were working on
13 this Jim Justice project, right?

14 A Oh, yes, ma'am.

15 Q All right. And in connection with any draft
16 easement that's got restrictions on the property,
17 would you agree that the landowner has to agree to
18 those restrictions, right, that is what you just
19 said?

20 A Oh, yes, ma'am.

21 Q All right. And so the landowner would have
22 to, or landowner's professionals would have to look
23 at those proposed restrictions if they came to them
24 in a draft easement and give approval before you
25 could ever finalize the project. Right?

1 A Oh, yes, ma'am. I thought this document
2 night help Hal in the drafting of the easement
3 because it would have language that he might not be
4 familiar with on traditional easements down here.

5 Q All right. And in any event, Mr. Justice
6 would have to have input into those draft
7 restrictions, right, or whatever restrictions you
8 put in the easement, right?

9 A Well, he would ultimately have to approve the
10 document but I think he trusted me to put in the
11 language on the reserve right to accomplish his
12 stated objective of keeping it as a farm.

13 Q You would have sent them to Mr. Justice for
14 review?

15 A Of course.

16 Q That was not done in this case, right?

17 A I never got the easement from Hal.

18 Q All right. You don't have any documents
19 where you discussed any proposed restrictions? I
20 mean, you could have sent that on to Mr. Justice,
21 couldn't you?

22 A Miss McWilliams, Hal agreed in October to
23 help me with this very complicated, very large
24 conservation easement project and it was my
25 assumption, reasonable, I think, that Hal was going

1 to be the transaction's attorney to do all things
2 necessary in the legal, tax and otherwise that
3 lawyers typically do with conservation easements,
4 including drafting the easement document. Now,
5 this one was so unusual that I was trying to help
6 Hal with perhaps some language that would be
7 particularly helpful in drafting the necessary
8 grantor reserve rights and prohibitions to ensure
9 that we accomplished the objective. So --

10 Q All right. And in addition to the
11 restriction that would have to be put in the
12 easement, you would have to have a property
13 description; right?

14 A We had that.

15 Q All right. You wouldn't have expected Mr.
16 Hanlin to come up with a property description of
17 Mr. Justice's property, would you?

18 A Well, it would be a simple matter of just
19 getting the real estate descriptions from the
20 various deeds off the tracts of land that were
21 purchased by Mr. Justice or some of his companies
22 to put together the 4,000 acres and then at the
23 bottom you put less the description of the WRP
24 easement, 1,100 acres, and that would be your
25 description.

1 Q Well, you had that but you hadn't prepared it
2 and it hadn't been approved or reviewed by Mr.
3 Justice, is that what you're saying?

4 A Well, gosh, he was telling me to place the
5 conservation easement on his whole tract of land,
6 so that wasn't hard to do. We probably would have,
7 I mean, obviously when I got it I would have sent
8 it to Mr. Justice for his review but it was
9 something that could have been done very easily.

10 Q Mr. McLeod, would you agree, though, that the
11 essential documents to the process are the
12 engagement agreement, the consulting services
13 agreement, a recorded easement document and you had
14 to have the IRS form 8283, right, base line
15 documentation report, you had to have an appraisal.
16 Right?

17 A Within 60 days of the gift.

18 Q All right. But all those were the essential
19 documents of the process, right?

20 A No. I would say the essential documents of
21 the process were the conservation easement document
22 and the base line documentation report. The 8283
23 is a form that is filed with the tax return
24 whenever the taxpayer files his return.

25 Q The landowner, that's the responsibility of

1 the landowner but is an essential part of the
2 process, isn't it?

3 A I'm sorry, I didn't understand.

4 Q That's one of the documents that is part of
5 this process of placing a conservation easement?

6 A Not placing the conservation easement but
7 enjoying the benefit of the charitable deduction,
8 the IRS requires the 8283 be filed.

9 Q You're not suggesting Mr. Justice would be
10 considering a \$45,000,000 conservation easement and
11 not take into consideration in some fashion a
12 charitable deduction, are you?

13 A I certainly would not think so.

14 MS. MCWILLIAMS: Your Honor, may I have just
15 a quick break?

16 THE COURT: Sure.

17 All right, Miss Meyers, back to the jury room
18 a few minutes. You can't discuss the case.

19 (The jury was excused from the courtroom).

20 (Recessed at 3:25 p.m.).

21 (Resumed at 3:35 p.m.).

22 MS. MCWILLIAMS: I would like to offer
23 Defendant's Exhibit 45.

24 THE COURT: I think on the record it was
25 called 46 but it is 45.

1 THE COURT: All right.

2 (Sample conservation easement marked and
3 received in evidence as Defendant's Exhibit
4 Number 45).

5 MS. McWILLIAMS: Your Honor, we want to take
6 up briefly the logistics, we need to get Mr. Harrah
7 on the stand because he has to drive back to West
8 Virginia tonight, a four and a half hour drive, and
9 we wondered if there would be any way the Court
10 could accommodate him and put him up out of order
11 before this 30(B)(6) issue that we still have to
12 argue anyway.

13 MR. PENDARVIS: Your Honor, candidly I really
14 need to have Mr. Harrah behind Justice Family
15 Farms, it is very important in our case and what we
16 have designated is about a 45 minute clip and when
17 Miss McWilliams finishes I have five minutes maybe
18 with Mr. Hanlin on redirect, Mr. McLeod, excuse me,
19 so I believe with a 45 minute clip of video we will
20 have time to do Mr. Harrah, I don't anticipate my
21 cross of Mr. Harrah might be very long at all.

22 MS. McWILLIAMS: We have counter-designations
23 if the Court makes the ruling it is going to allow
24 the playing of the Justice Family Farms and, you
25 know, it is not just 45 minutes.

1 MR. PENDARVIS: Your Honor, we're going to
2 have disagreement on that because we have not been
3 served counter-designations until about 15 minutes
4 ago. The rules require, we might have to deal with
5 their objection, I read the rule, we might have to
6 deal with their objection to what we designated but
7 we can't be given three pages of this during, while
8 she was doing the cross examination of Mr. McLeod
9 this was handed to us, there is no way the rules
10 permit that. I will be glad to direct Your Honor
11 to Rule 32, specifically Rule 32(5), excuse me,
12 (A) (5). It says one day before and not in the
13 middle of this case. We teed up our Power Point
14 and our whole video, I haven't read through this, I
15 haven't seen it, if I have objection, I haven't
16 seen if I have objection to this testimony. This
17 is absolutely unfair.

18 MR. LEONARDI: Your Honor, Mr. Pendarvis has
19 misstated Rule 5, Rule 32(A) (5). It requires the
20 original designations to be received one day before
21 and then it says when the deposition excerpt is
22 offered at trial counsel for the adverse party
23 shall furnish to the trial judge and at the same
24 time by the same means furnish to all opposing
25 counsel any objections to opposing counsel's

1 deposition excerpt and any additional excerpts from
2 the depositions, so it is proper for them to be
3 served today.

4 MR. PENDARVIS: Let me finish reading the
5 rule because what it says is with reasonable notice
6 to the trial judge and all counsel other excerpts
7 may be read, and I would contend, Your Honor, this
8 is not reasonable notice to you or to me and we
9 teed up this thing, it is going to take, in terms
10 of, we're into my case and I can object, I want to
11 accommodate Mr. Harrah as well and I have got a
12 plan to get this video up, this won't take long
13 with Mr. McLeod's last testimony and we can
14 accommodate Mr. Harrah but not with having to deal
15 with this right now. And, Your Honor, we sent our
16 designations a week ago. We gave them a week.

17 MS. MCWILLIAMS: We did the same, we gave --

18 MR. PENDARVIS: Correct, she did, we got it a
19 day later but they didn't include anything with
20 Justice Family Farms.

21 MR. LEONARDI: We're objecting to that, that
22 deposition, in its entirety.

23 THE COURT: I think you have to make a better
24 record of that. Let's go on and get done with
25 this, let me read the rule and I'll deal with this

1 in a moment.

2 MS. MCWILLIAMS: All right.

3 (The jury returned to the courtroom).

4 BAILIFF: The jury is all present, Your
5 Honor.

6 THE COURT: All right.

7 Miss Williams, he is still your witness.

8 MS. MCWILLIAMS: Thank you, Your Honor.

9 BY MS. MCWILLIAMS:

10 Q Now, just to be clear, Mr. McLeod, I just
11 have a couple more questions, it is true, is it
12 not, that the timing of the IRS notice of
13 investigation dated the 17th, I think Y.E.S. got it
14 the 19th, it got sent to Mr. Hanlin, you don't
15 fault Mr. Hanlin, you don't blame Mr. Hanlin,
16 Richardson Plowden for the timing of that IRS
17 notification, do you?

18 A The timing of the IRS investigation?

19 Q When it comes in, when you first get notice
20 of it, you don't blame Mr. Hanlin for that, he
21 didn't have anything, he didn't engender it, he
22 didn't promote it, he didn't provoke it, it just
23 came, just the timing of the IRS, right?

24 A Are you asking me if I think Hal and
25 Richardson Plowden had something to do with the IRS

1 sending me a letter?

2 Q That's right.

3 A No, I do not. The IRS's choice to do it was
4 up to the IRS, right, absolutely.

5 Q And isn't it true that on numerous occasions,
6 I believe you testified passionately about the IRS
7 but you attributed the, it was the IRS
8 investigation that was impugning your honor and
9 ruining your life, they were the words you used,
10 did you not, integrity and reputation were being
11 questioned, right, by the IRS only?

12 A Well, the IRS certainly caused me great
13 embarrassment and to be put in a very awkward
14 situation, and for my whole professional life to be
15 unfolded and sent around to people and call my
16 clients and saying, "This is the IRS, we're
17 investigating Yancey McLeod." I mean, my gosh, I
18 make my living with referrals from people and so,
19 yes, the IRS letter certainly devastated me and, if
20 that is the question you're asking me, the IRS
21 letter was a living nightmare.

22 Q And Mr. Hanlin didn't cause that living
23 nightmare, did he?

24 A He caused the living nightmare to be greatly
25 exacerbated by quitting and abandoning me at a

1 moment in time when I desperately needed him and
2 Richardson Plowden.

3 Q You agree, don't you, Mr. McLeod, that after
4 this time period, on several occasions you wrote
5 Mr. Lewis and others and said, "We've got to stop
6 this IRS investigation," it was holding things up.
7 Isn't that right?

8 A Holding what up? I don't understand.

9 Q Your business, your ability to go forward, to
10 do what you wanted to do.

11 A Gosh, it wasn't holding me up. I'm still
12 Yancey McLeod and as far as I know I hadn't done
13 anything wrong so I'm desperately trying to make a
14 living while dealing with the IRS and dealing with
15 the abandonment of Richardson Plowden and Hal
16 Hanlin and by far the most, the largest fee I would
17 have ever earned and so, yes, my life was in
18 shambles during that period of time.

19 Q And you blame the IRS for that, don't you?

20 A Miss McWilliams, I blame the IRS and I blame
21 Richardson Plowden and Hal Hanlin for abandoning me
22 when I needed them.

23 Q You had Mr. Lewis right away. Isn't it true
24 you have written Mr. Lewis and told him
25 essentially, "The IRS is ruining my honor and

1 integrity and reputation I have worked for all my
2 life, the damage they have done to my reputation is
3 devastating and irreparable." Is that what you
4 wrote?

5 A Wrote to who?

6 Q Mr. Crosby Lewis.

7 A God, he knew that that evening but had I
8 revealed to my clients, including Jim Justice, that
9 oh, yes, in addition to the IRS letter, Hal Hanlin
10 and Richardson Plowden quit, that would have been
11 further, I can't curse in court, I was going to say
12 damning, I was very embarrassed, they put me in an
13 extraordinarily awkward situation and --

14 Q Let me just --

15 A I will never get over it.

16 Q Let me just mark this for the record, if I
17 could, Defendant's 18.

18 You remember seeing that? Do you remember
19 seeing that, Mr. McLeod?

20 A Yes, ma'am.

21 Q That will refresh your recollection?

22 A Do you want me to tell you about it?

23 Q No, I just wanted, I will let Mr. Pendarvis,
24 if you want to go into it a little bit further, all
25 right? I'm not going to offer it at this time.

1 A Oh, okay.

2 Q All right, thank you.

3 MS. McWILLIAMS: I don't have anything
4 further.

5 MR. PENDARVIS: A little redirect, Mr.
6 McLeod.

7 REDIRECT EXAMINATION BY MR. PENDARVIS:

8 Q I've got some questions about that affidavit
9 you testified about.

10 A Okay.

11 Q Regarding Mr. Justice.

12 A Sure.

13 Q And I want to say this for the Court and
14 everybody so we don't have any problems but I don't
15 want you to say when we got this, I know you will
16 remember, it is important you just talk about the
17 existence of the document.

18 MS. McWILLIAMS: Your Honor, may we approach
19 about this?

20 THE COURT: You may.

21 (Unrecorded bench conference).

22 THE COURT: I'll allow it.

23 BY MR. PENDARVIS:

24 Q With your fine character I want to make sure
25 we have things clear with the jury. Could you have

1 been mistaken about the affidavit of Mr. Justice,
2 could it have been this was an affidavit from, on
3 behalf of one of Mr. Justice's companies?

4 A It certainly could have been.

5 Q Okay. There was some questions asked about
6 effectively Mr. Justice's companies' motive to,
7 when to do this conservation easement. Was there a
8 reason, in your understanding of the tax laws, that
9 2007 was an important date for recording of the
10 conservation easement?

11 MS. MCWILLIAMS: Objection, foundation.

12 MR. PENDARVIS: I asked in his experience as
13 a conservation consultant.

14 THE COURT: I thought it was 2006. Is --

15 MR. PENDARVIS: The distinction between 2007
16 recording and 2008. Let me rephrase that.

17 THE COURT: I'll let you rephrase it but be
18 careful.

19 BY MR. PENDARVIS:

20 Q In your experience, Mr. McLeod, as a
21 conservation consultant were you aware of a reason
22 that the IRS laws and regulations, that an easement
23 would be beneficial, would be better to be recorded
24 in 2007 as compared to a later date?

25 A In 2007 --

1 MS. McWILLIAMS: Your Honor, can he answer
2 the question first, is he aware of that?

3 A I am, yes.

4 Q Could you explain that, please?

5 MS. McWILLIAMS: Your Honor, we object on the
6 ground of foundation. He is not a tax expert.

7 MR. PENDARVIS: Your Honor, may I respond?

8 THE COURT: No. To the extent that he has
9 knowledge of what the Tax Code or the conservation
10 is he can answer that.

11 A There have been wide fluctuations in the
12 benefits Congress provided to taxpayers and
13 landowners through the placement of 170(H)
14 conservation easements. Over the years and in the
15 year 2000 the benefits afforded taxpayers for
16 placement of 170(H) easements resulted in the
17 taxpayer being allowed to use the charitable
18 deduction to reduce their adjusted gross income by
19 50 percent in the year of the gift and 15 carry
20 forward years, a remarkable incentive, and those
21 provisions of 170(H) of the Internal Revenue Code
22 fluctuated widely and they were changed in 2008.

23 Q What year did you say?

24 A 2007.

25 Q Mr. McLeod --

1 A As Miss McWilliams pointed out, I don't
2 recall whether in the year 2008 the provisions --
3 the very generous provisions I just described were
4 scheduled to expire at the end of 2007 and revert
5 back to the 30 percent reduction in AGI and a five
6 year carry forward or not, but that has happened
7 frequently over the last several years. It
8 happened in 2011. Today the advantages of a 170(H)
9 easement are dramatically different than they were
10 in December, 2011.

11 Q Bouncing around a little bit to move the case
12 along --

13 A Sure.

14 Q There was some testimony about the \$15,000
15 payment.

16 A Uh-huh (Affirmative).

17 Q Did you consider that part of payment due
18 under the consulting service agreement?

19 A Yes, sir.

20 Q There was also some questions posed, Mr.
21 McLeod, Yancey, about whether you were embarrassed
22 at the moment you were discussing this IRS letter
23 with Mr. Justice in the December 24th phone call.
24 Do you remember that testimony?

25 A Sort of.

1 Q Well, just a little while ago. Explain why
2 you would have been embarrassed that your lawyer
3 quit on you, on Y.E.S.

4 A Gosh, the whole experience was humiliating,
5 embarrassing, extraordinarily awkward. I was
6 scared to death, quite frankly, and I make my
7 living with people referring business to me, that
8 is how I make my living, and I did not want to
9 disclose to Mr. Justice and I did not think
10 ethically and professionally I needed to disclose
11 about Hal Hanlin and Richardson Plowden quitting
12 because I could, I thought I could get Mr. Justice
13 to postpone the project without necessity of saying
14 that and it would have been very embarrassing to me
15 to have said, "Oh, by the way, this wonderful tax
16 attorney I recommended, that I worked with before
17 quit," so I didn't want to have to say that. It
18 would have been very embarrassing.

19 MR. PENDARVIS: Your Honor, I anticipate an
20 objection. Could we approach?

21 (Unrecorded bench conference).

22 BY MR. PENDARVIS:

23 Q Mr. McLeod, I want to ask you to pull out two
24 exhibits that are next to you, Exhibits 21 and 22.

25 A Okay.

1 Q Let's first look at the Exhibit 21, the
2 December 19th draft letter.

3 MS. McWILLIAMS: Your Honor, this goes beyond
4 the scope of my cross-examination.

5 MR. PENDARVIS: I will put it in context, not
6 at all.

7 BY MR. PENDARVIS:

8 Q Mr. McLeod, before we get into this exhibit
9 let me give you a minute to look at it, then I will
10 ask you some questions before you discuss it.

11 THE COURT: What exhibit?

12 MR. PENDARVIS: This is Exhibit 21.

13 A Okay, I mean, I hadn't read the whole letter.

14 Q I understand. We're not going to need to
15 have you discuss the content as much as the context
16 of this letter.

17 A Okay.

18 Q And that is my question. You were asked
19 about the types of things Mr. Hanlin was to be
20 doing in this easement.

21 MS. McWILLIAMS: Your Honor, I object. I did
22 not ask about that. I asked about a draft easement
23 document that -- I did not ask about that.

24 MR. PENDARVIS: He gave testimony --

25 THE COURT: Come back up here. I don't want

1 talking objections.

2 (Unrecorded bench conference).

3 BY MR. PENDARVIS:

4 Q Mr. McLeod, we had you take a look at the
5 letter. I'm asking you at the same time take a
6 look at this draft conservation easement. Are
7 these the type documents you were expecting from
8 the lawyer for the transaction, Mr. Hanlin and
9 Richardson Plowden?

10 A Yes, sir.

11 MR. PENDARVIS: Yancey, thank you very much.

12 No further questions.

13 THE WITNESS: Thank you.

14 MS. McWILLIAMS: Nothing further, Your Honor.

15 THE COURT: You may step down.

16 (Witness excused).

17 THE COURT: All right.

18 MR. PENDARVIS: Before we get into into the
19 video, let me talk to my client a minute about some
20 strategy things.

21 THE COURT: All right.

22 MS. McWILLIAMS: Your Honor, we have reached
23 an agreement about accomodating a witness, to take
24 him out of order, we appreciate it.

25 MR. PENDARVIS: Will you explain it to the

1 jury?

2 THE COURT: I will.

3 Ladies and gentlemen, we have a couple more
4 witnesses but one witness is from out of town and
5 he's not a witness for the plaintiff, or the
6 plaintiff could call him but doesn't have to, the
7 defense calls their witnesses normally after the
8 plaintiff calls all theirs but we have a gentleman
9 here from out of town, I want to get him back
10 heading home today so he doesn't have to either
11 come back tomorrow morning or Monday, whichever you
12 all decide, so I want to get him off the hook
13 because the plaintiff has some other witnesses that
14 we can see the videos of, depositions that were
15 taken and the video can be played anytime. A live
16 witness here, we want to accommodate him, so I'm
17 going to allow the parties to agree to take him out
18 of order, and so he will be called but understand
19 he will be called and the roles are kind of
20 reversed, Miss McWilliams will call him as her
21 witness, she goes first, and cross-examination will
22 happen by Mr. Pendarvis, so that's the explanation
23 why we take this witness out of order for
24 convenience of the witness.

25 All right.

1 MS. McWILLIAMS: Mr. Leonardi's witness.

2 THE COURT: Oh, Mr. Leonardi's witness. Mr.
3 Leonardi will be handling this, I said Miss
4 McWilliams. Fair enough, call your witness.

5 MR. LEONARDI: Your Honor, the defendant
6 calls Mr. David Harrah.

7 THE COURT: Mr. Harrah, please come forward
8 and be sworn.

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1 DAVID HARRAH, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Thank you. Have a seat in the
4 witness stand and state your name for the record,
5 please spell your last name.

6 THE WITNESS: Harrah, H-a-r-r-a-h.

7 DIRECT EXAMINATION BY MR. LEONARDI:

8 Q Mr. Harrah, introduce yourself to the jury,
9 please.

10 A My name is David Harrah, I'm from Beckley,
11 West Virginia and I work for a company called
12 Mechel Bluestone.

13 Q Tell the jury how Mechel Bluestone was
14 formed.

15 A That is the entity that bought the West
16 Virginia coal operations that were owned by the
17 Justice family. I had previously worked with the
18 Justice family prior to the transaction.

19 Q What is your position with Mechel Bluestone?

20 A I'm the chief financial and accounting
21 officer.

22 Q All right. Describe for the jury your
23 educational background.

24 A I may not should say this in South Carolina.
25 I went to West Virginia University and graduated in

1 1969, then I worked, received my original CPA
2 certificate in North Carolina, I worked in Raleigh,
3 North Carolina for about eight years and then moved
4 back to West Virginia.

5 Q And where, when you moved back to West
6 Virginia where did you begin working?

7 A When I moved back to West Virginia I began
8 working in Beckley, West Virginia and in private
9 industry and then reverted into public accounting
10 for several years.

11 Q And was it in public accounting that you
12 first came into contact with Mr. Justice's
13 companies?

14 A Yes.

15 Q And describe that.

16 A The firm that I worked for performed audits
17 and tax services and we received a call from the
18 Justice companies that they were replacing their
19 audit firm and that's I think in 2005, that is how
20 I became involved, because I was the lead audit
21 partner for that job.

22 Q And at what point in time did that role ever
23 change, your role with the Justice companies?

24 A In the spring, late spring of 2007 Jim
25 approached me and asked me to come to work for his

1 company in the capacity of chief financial officer,
2 a position I took in July of 2007.

3 Q Now, in your capacity as an outside auditor
4 before 2007 and then as chief financial officer in
5 2007 did you gain knowledge regarding Mr. Justice's
6 income?

7 A To some degree. Most of the corporate, most
8 of the corporate activities impacted his income to
9 some extent. There was, of course he had a salary
10 and then he had certain partnership interest within
11 that group of companies that he got a part of that
12 income. But he had personal investments and things
13 of that nature, real estate partnerships where he
14 may be receiving part of the rental income or
15 whatever that we did not necessarily track.

16 Q Did you track information regarding income
17 from mining?

18 A Yes.

19 Q And did you track information regarding
20 income from farming?

21 A Yes.

22 Q And describe for the jury the kind of
23 businesses that the Justice family was involved in.

24 A Well, at that time they had two principal
25 types of business. One was an agricultural

1 operation, they had corn, they have a cotton gin
2 not too far from here, they had two turf farms and
3 I think they also had at one time some soybeans,
4 whatever, but mostly crops.

5 Q And describe for the jury, if you would,
6 based on your experience working for the Justices
7 both as an outside auditor and inside as CFO the
8 range, if you can, of income associated with the
9 farming and the mining.

10 A The farming, the farming income in the mid
11 2000's generally, the farming operations generally
12 showed a loss. They could be from two to three
13 million dollars in that period of time. The income
14 from mining in 2006 and '07 had been a period of
15 time when coal prices were not that great and they
16 started to climb at the end of 2007, so his income
17 coming from the corporate side would not have been,
18 well, it's a lot more than most of us make but it
19 wasn't, you know, an astronomical sum of money.

20 Q Now, did there come a time in 2007 that you
21 heard the name Yancey McLeod?

22 A Yes. I don't recall exactly the timing but
23 it was probably shortly after I went to work and
24 took the position there. The way we operated at
25 that time was when Jim came in, Jim had an office

1 back in the corner and he would summon various of
2 us to discuss particular matters and in some of
3 those discussions he had brought up this
4 conservation easement idea and he had mentioned the
5 name of Yancey McLeod as being someone who he had
6 had some discussions with, my impression was there
7 had been some visits to different properties with
8 he and Yancey together.

9 Q And did you understand at this time that you
10 were being designated as point man for any
11 particular project?

12 A Well, I think that came a bit later, probably
13 in the fall. There continued to be conversations
14 as I understood it between the two of them and he
15 asked me, first of all he would ask us, "Do you
16 know anything about this type of thing," and
17 taxation is not my background, and so I said no, I
18 don't. He said, "Well, you probably can at least
19 understand what these concepts are, can you contact
20 Mr. McLeod and find out a little bit more about
21 this, he says it has some significant tax
22 advantages for us either now or in the future," and
23 so that is what I did and this initiated some of
24 these activities in the fourth quarter of 2007.

25 Q Mr. Harrah, I'm going to hand you a document

1 marked as Defendant's Exhibit 44. I want you to
2 take a look at it.

3 Mr. Harrah, do you recognize that document?

4 A Yes, I have seen that before.

5 Q And could you describe the document for --
6 well, describe the document, please.

7 A Well, initially the first page is a list that
8 I think based on some earlier discussions with Mr.
9 McLeod and maybe even some of the other parties
10 that he had working with him, I just put together
11 this letter, cover letter to give to Jim in regard
12 to this engagement letter that Mr. McLeod had sent
13 and also have talked to him about some of the
14 things Mr. McLeod had relayed to me about what
15 would be required to complete this type of project
16 and the various parties that would be involved.

17 Q Do you recall creating this list, then?

18 A Yes.

19 MR. LEONARDI: Your Honor, the defendants
20 move what has been marked Defendant's Exhibit 44
21 into evidence.

22 MR. PENDARVIS: No objection.

23 THE COURT: Defendant's Exhibit 44 is
24 admitted without objection.

25 (Conservation easement information marked

1 and received in evidence as Defendant's
2 Exhibit Number 44).

3 BY MR. LEONARDI:

4 Q So, was it the case, Mr. Harrah, this was an
5 executive summary of sorts that you were providing
6 to Mr. Justice?

7 A Well, I would say that it was that and maybe
8 an agenda for discussion with Jim about the project
9 or what would need to be done.

10 Q And do you see the first bullet point there
11 references engagement letter?

12 A Yes.

13 Q And the second, do you see it references a
14 stewardship agreement from Community Open Land
15 Trust?

16 A Yes.

17 Q And then finally the third bullet point
18 references an appraisal proposal?

19 A Yes.

20 Q As far as you know, Mr. Harrah, is it your
21 understanding that anyone from Justice's side, from
22 any Justice company ever signed the engagement
23 letter from Yancey?

24 A Not to my knowledge.

25 Q To your knowledge did Mr. Justice or anyone

1 from one of his companies agree to the terms of the
2 engagement letter from Yancey?

3 A We may have had general discussions but I
4 don't recall him ever informing me, "Yes, let's
5 proceed with this, I understand, agree to all these
6 terms," I don't recall that.

7 Q Did anyone, did Mr. Justice or anyone with
8 his companies pay the \$50,000 retainer?

9 A Not to my knowledge.

10 Q Do you see that there is a \$45,100
11 stewardship fee referenced in the second bullet
12 point?

13 A Yes.

14 Q And a stewardship agreement, do you see that?

15 A Yes.

16 Q To your knowledge did anyone from, did Jim
17 Justice or anyone from his companies ever agree to
18 the stewardship agreement with the Community Open
19 Land Trust?

20 A Not to my knowledge.

21 Q Did anyone from Jim Justice Companies or did
22 Jim Justice ever send any initial stewardship fee
23 to Community Open Land Trust?

24 A Not that I'm aware of.

25 Q And did Mr. Justice, as far as you know, ever

1 approve of any appraisal proposal?

2 A Not that I specifically remember, no, sir.

3 Q Now, to be clear, was it your understanding
4 that there was any deadline for completing the
5 conservation easement at the end of 2007?

6 A Well, I do know that once this process
7 started that I know that Mr. McLeod was obviously
8 moving to try to get this done before the end of
9 the year. On our side of it we were more babes in
10 the woods to try to figure it out what is we needed
11 to do and whether that was a reasonable day to
12 think we were going to get this done or not. I
13 don't recall that we had meetings about that or
14 there was an opinion about that.

15 Q So just to be clear, did you have any
16 understanding there was in fact a deadline
17 associated with this project?

18 A No.

19 Q You will see on the second half of this list
20 that you made, you see there are four things that
21 it says things necessary to complete. Do you see
22 that?

23 A Yes.

24 Q And would you read the four things, please?

25 A Signed agreements, deed, easements and maps,

1 et cetera.

2 Q To your knowledge was any of that information
3 ever provided to Yancey McLeod for Y.E.S.?

4 A No.

5 Q Was any of that information, to your
6 knowledge, provided to Community Open Land Trust?

7 A Not to my knowledge.

8 Q Or Mr. Hanlin?

9 A Not to my knowledge.

10 Q Mr. Harrah, I'm going to hand you what has
11 been marked as Defendant's Exhibit 54.. Would you
12 please take a look at that. Let us know if you
13 recognize that document?

14 A Yes. This is an email from Mr. Hanlin to me
15 with an attachment to it.

16 Q And do you see there is a letter attached?

17 A Yes.

18 Q First of all do you recognize the document?
19 Is that the case?

20 A Well, I don't specifically recall, "Oh, yes,
21 I remember this particular email," but it was an
22 email to me, so I assume that that is an email that
23 I received.

24 Q Okay.

25 MR. LEONARDI: Your Honor, the defendant

1 moves Exhibit 54 into evidence.

2 MR. PENDARVIS: Even though he doesn't really
3 remember it, we're not going to object.

4 THE COURT: Without objection.

5 (Hanlin to Harrah email marked and received
6 in evidence as Defendant's Exhibit Number 54.

7 BY MR. LEONARDI:

8 Q Mr. Harrah, if you will, turn to the third
9 page of Exhibit Number 54.

10 A Yes.

11 Q Do you see that there is a line for Mr.
12 Justice to sign to accept the appraisal proposal
13 from Mr. Hawkins?

14 A Yes.

15 Q To your knowledge did Mr. Justice or anyone
16 from his companies ever agree to the proposal from
17 Mr. Hawkins?

18 A Not to my knowledge.

19 Q Mr. Harrah, I'm going to hand what has been
20 marked Defendant's Exhibit 58 to you. Take a look
21 at that and let us know if you would have received
22 that document?

23 A Yes. This is another email with a letter
24 attached that was in regard to the Community Open
25 Land Trust.

1 MR. LEONARDI: Your Honor, the defendants
2 move Exhibit 58 into evidence.

3 MR. PENDARVIS: He hasn't completely
4 identified it but we don't object.

5 THE COURT: Defense 58 admitted without
6 objection.

7 (Hanlin to Harrah email marked and received
8 in evidence as Defendant's Exhibit 58).

9 BY MR. LEONARDI:

10 Q Mr. Harrah, is this your email address at the
11 top?

12 A Yes.

13 Q Is that the email address where you received
14 emails when you were with Jim Justice?

15 A Yes.

16 Q If you will, look at the fourth page of
17 Exhibit Number 58, please.

18 A Yes.

19 Q Do you see there is a line for Mr. Justice to
20 sign or for someone to sign acknowledging receipt
21 and understanding --

22 A Yes.

23 Q -- of the letter of intent. As far as you
24 know did Mr. Justice or anyone associated with his
25 companies ever sign the letter of intent with COLT?

1 A Not as far as I know.

2 (Hanlin to Harrah letter marked Defendants'
3 Exhibit Number 63).

4 BY MR. LEONARDI:

5 Q Mr. Harrah, I'm going to hand you what has
6 been marked as Defendant's Exhibit 63. Would you
7 take a look at Exhibit 63 and let us know if you
8 recognize it?

9 A Yes.

10 Q Do you see the attachment to it?

11 A Yes, sir.

12 Q Do you remember receiving a letter from Mr.
13 Hanlin, do you remember receiving that letter from
14 Mr. Hanlin?

15 A Yes, I think I remember seeing something
16 similar to this. I guess this is the letter that
17 in the scheme of things is sort of what
18 professionals that is involved in a transaction
19 would kind of state what their limitations might be
20 in providing advice to Mr. Justice, is how I look
21 at this.

22 Q And did this letter make clear to you that
23 Mr. Hanlin was not representing Mr. Justice?

24 A What it made clear to me was they were not
25 providing tax advice to Mr. Justice in regard to

1 the outcome of this matter.

2 Q Okay. And do you see that the letter, before
3 the line with warmest personal regards, do you see
4 the last line before that?

5 A Yes.

6 Q It says, "If you have any questions about
7 this please do not hesitate to contact me"?

8 A Yes.

9 Q Do you see that?

10 A Yes.

11 Q And do you recall if Mr. Justice had any
12 questions about this letter?

13 A No, I do not recall.

14 Q Okay, Mr. Harrah. Can you describe for the
15 jury the work that you did on this particular task?
16 Generally how would you describe the work you did
17 on this task?

18 A Well, I would describe what I thought that
19 the charge to me by Jim was to try to find out a
20 little bit more about this, to look at, number one,
21 is it something that was feasible and did it make
22 sense, did it comply with the Tax Code and to find
23 out more about exactly the details and how it
24 worked.

25 Q And I know you mentioned tax considerations

1 of Mr. Justice before. Does Mr. Justice, to your
2 knowledge, have tax counsel?

3 A He has a CPA firm that did his, prepared his
4 return but I don't know at this time if he had a
5 separate tax counsel, I don't recall that being the
6 case.

7 Q Now, in the December, 2007, time frame do you
8 recall receiving a call from Mr. McLeod regarding
9 an IRS audit?

10 A Yes.

11 Q And do you recall who was on the call? Were
12 you on that call?

13 A Yes.

14 Q Do you recall who was on the phone with you?

15 A It was my recollection that Steve Ball was on
16 the call. I know he was on but I don't know who
17 else.

18 Q Was Mr. Justice on the call?

19 A I don't specifically recall that.

20 Q Okay. And do you remember what Mr. McLeod
21 said regarding the IRS notice?

22 A Well, he informed us that he had received an
23 IRS notice that had called into question some of
24 these types of transactions and that he couldn't in
25 good conscience move forward with this particular

1 transaction.

2 Q And did he say anything about attorney Hal
3 Hanlin?

4 A No, not as I recollect.

5 Q Did he say anything about the law firm
6 Richardson Plowden?

7 A No.

8 Q Now, Mr. Harrah, let's talk about for a
9 moment Jim Justice's income in 2007 compared to
10 2008. To begin with, were there any significant
11 transactions in the 2008 time frame that affected
12 Mr. Justice's income?

13 A In 2008?

14 Q Yes.

15 A Well, his whole, his family's entire personal
16 income, tax status and many other things changed
17 dramatically in 2008. Early in 2008 we began to
18 put together information to market these coal
19 companies in southern West Virginia and this
20 process, while it took several months, culminated
21 in the middle of the year, I think around the 1st
22 of July, where Jim received a letter of intent from
23 Mechel to buy his companies and with that letter of
24 intent he received, I believe it was a hundred
25 million dollars, it was either a hundred or 125,

1 because this arrangement was to have been concluded
2 within 90 days. Events unfurled and all this so
3 that it was extended and he received another 125
4 million but when he received the second 125 million
5 he basically had them designate the first hundred
6 million as nonrefundable, which would have meant
7 his family would have had income, I say his family,
8 because he was selling his interest and his
9 children also had interest, so a hundred million
10 dollar income bump would have been a huge
11 difference from where his income level was prior to
12 that.

13 Q And just so I understand, the first hundred,
14 the first big payment, hundred million, 125
15 million, that one initially was not, it was
16 refundable?

17 A That's correct.

18 Q So if the deal didn't go through with Mechel,
19 then what would happen?

20 A He would have to return the money.

21 Q And then he got the second hundred million
22 dollar payment?

23 A Yes.

24 Q And that somehow affected, are you saying
25 that somehow affected the first payment?

1 A Well, he only agreed to extend the deal if
2 they pay him another, pay him 125 million and if he
3 was entitled then to keep the first hundred
4 million, so that's the negotiation he made.

5 Q Now, all told do you have any idea what Mr.
6 Justice's income was from that transaction in 2008?

7 A They extended this agreement again in
8 December, as I recall, and he did the same thing by
9 saying, "Okay, the second payment that you pay is
10 now nonrefundable," so I'm guessing that that
11 family income was affected by 200 million plus of
12 proceeds from the sale at that particular point in
13 time.

14 Q We talked about income from the transaction,
15 around 250 million in 2008. Now I would like to
16 talk about income from mining interest of Mr.
17 Justice's. Describe for the jury the difference in
18 income for Mr. Justice in 2007 and 2008, income
19 from mining?

20 A Well, the income for the mining operations in
21 2008 was significantly higher, probably at a record
22 level for those particular companies principally
23 because of the worldwide market for the type of
24 coal that they mined, and I don't want to bore you
25 with a lot of details but there is steam coal that

1 we all know goes into utilities, and metallurgical
2 coal that goes into steel making. It is a
3 different product and these operations that he has
4 are centered, or he had, are centered in the best
5 metallurgical coal fields in this country, so that
6 coal is highly prized in the U. S. and overseas and
7 the market went from a price of \$55 a ton in the
8 middle of 2007 to over \$200 a ton in the middle of
9 2008.

10 Q And do you have, are you aware of a ballpark
11 figure for Mr. Justice's coal income in 2008?

12 A The net income from the coal operations in
13 2008 was 38 million dollars.

14 Q And was that greater than that income from
15 coal operations in 2007?

16 A Yes. I don't recall the exact number for
17 2007 but it was substantially greater.

18 Q Now, do you recall that after this
19 transaction did not go through did you receive any
20 contacts from Mr. McLeod or others about the
21 payment of certain fees?

22 A Yes, I received some, I think both telephone
23 calls and maybe emails from time to time addressing
24 some of these fees that had been incurred for this
25 transaction by the various professionals that had

1 been doing some work on it.

2 Q And do you recall that you received an
3 invoice from Mr. McLeod for \$50,000? Does that
4 ring a bell?

5 A I think that was shortly after the telephone
6 call in regard to the IRS issue.

7 Q And do you recall what you did with that
8 invoice or who you spoke to about it?

9 A I don't remember we did anything with it. As
10 far as, as far as our attitude toward it, I think
11 was the fact that we don't know what's going to
12 happen with this transaction, we're certainly not
13 going to pay a fee related to that transaction when
14 we have been told to stand down in effect, whatever
15 the reasons for standing down were. So, that's
16 kind of where we were with it.

17 Q And regarding the consulting services
18 agreement that Mr. McLeod forwarded to Mr. Justice,
19 you have testified -- well, let me ask it this way.
20 It's your understanding that Mr. Justice never
21 agreed to the terms in that agreement?

22 MR. PENDARVIS: Object to the form, calls for
23 speculation.

24 MR. LEONARDI: Is it the witness'
25 understanding.

1 MR. PENDARVIS: He called for what Mr.

2 Justice understood. I object.

3 MR. LEONARDI: He was Mr. Justice's point man
4 on this project.

5 THE COURT: You all come up here.

6 (Unrecorded bench conference).

7 BY MR. LEONARDI:

8 Q Mr. Harrah, did there come a time you had a
9 discussion regarding the percentage fee in the
10 consulting services agreement?

11 A Yes.

12 Q Okay. And describe that discussion.

13 A I had that draft of that agreement and I had
14 given it to Jim and said that I had gotten it from
15 Yancey and it had a five percent fee as part of the
16 remuneration to him and Jim said make it four.
17 That's just the way he would do it. So I did
18 contact Mr. McLeod and said Jim said that the fee
19 needs to be four instead of five and he said fine.

20 Q And was it your understanding he was then
21 agreeing to the rest of the terms or was that not
22 the case?

23 MR. PENDARVIS: Objection, Your Honor, same
24 objection.

25 MR. LEONARDI: Your Honor, he either has an

1 understanding of that or not based on his
2 discussions. If he doesn't have an understanding
3 he can say, "I don't have an understanding about
4 it."

5 MR. PENDARVIS: The same position I stated
6 side bar.

7 MR. LEONARDI: I can rephrase it, Your Honor.

8 THE COURT: Rephrase it in similar
9 phraseology with regard to --

10 BY MR. LEONARDI:

11 Q Mr. Harrah, as the person designated by Mr.
12 Justice to be the point contact with Mr. McLeod,
13 when you called Mr. McLeod about that percentage
14 term were you agreeing to the rest of the terms in
15 that consulting service agreement?

16 MR. PENDARVIS: Your Honor, one more
17 objection, legal conclusion.

18 MR. LEONARDI: Pardon?

19 MR. PENDARVIS: Legal conclusion as to
20 whether the agreement, one term makes the entire
21 contract enforceable.

22 MR. LEONARDI: I'm just asking if he agreed
23 to it.

24 THE COURT: Rephrase your question. I'll let
25 you ask that. I understand your objection. Ask it

1 again.

2 MR. LEONARDI: Okay.

3 BY MR. LEONARDI:

4 Q In your capacity as the point man for Mr.
5 Justice in dealing with Mr. McLeod, when you called
6 Mr. McLeod about that percentage fee were you
7 agreeing to the rest of the terms in the consulting
8 service agreement?

9 MR. PENDARVIS: Same objection, legal
10 conclusion.

11 THE COURT: Overruled. I will let him answer
12 it.

13 A We never discussed anything in that agreement
14 except that one provision. That is Jim and I.

15 Q Now, later in 2008 did you receive invoices
16 from some folks, we talked about the ones from Mr.
17 McLeod, but do you recall receiving one, for
18 example, from Clinton Epps?

19 A Yes, there were some other invoices, correct.

20 Q And do you recall if they were paid?

21 A Yes, I think they were paid in the fall of
22 2008.

23 Q And do you have any explanation for why they
24 were paid at that particular time?

25 A Well, they had been things that had been out

1 there for awhile and we had been in the process for
2 several months, involved in selling these companies
3 and as Jim and the family began to get this
4 additional income, a hundred million dollars, there
5 were several things like this that had been out
6 there and in an effort to sort of clean up some of
7 those things that might be problematic the longer
8 they stayed there, we took care of several things
9 of that nature.

10 Q And talking about Mr. Justice and doing
11 easements, are you aware if Mr. Justice did any
12 easements after this date?

13 MR. PENDARVIS: Objection, Your Honor.

14 THE COURT: Was he aware?

15 MR. PENDARVIS: Relevance.

16 THE COURT: Come up here.

17 (Unrecorded bench conference).

18 BY MR. LEONARDI:

19 Q Mr. Harrah, as far as you know has Mr.
20 Justice done any conservation easements in 2008 or
21 after?

22 A You know, I'm not, I'm honestly not sure. I
23 thought that they had completed one but I'm not
24 even sure where I heard that.

25 Q All right. Mr. Harrah, you're with Mechel

1 Bluestone, you say?

2 A Yes.

3 Q Describe for the jury how you came to work
4 for Mechel Bluestone after, after working for Mr.
5 Justice.

6 A Well, when the transaction was completed in
7 May of 2009 part of the agreement was that some of
8 those folks who were going to stay with Mechel to
9 try to acclimate them to the U. S., Mechel is based
10 in Russia, and so we were, there was a part of the
11 agreement, actually, that specified that those who
12 chose to stay or were obligated at least to some
13 moral extent to stay would not seek employment from
14 the Justices for a year if you were over 55 and
15 three years if you were under 55, and I fit the one
16 year category.

17 Q So you went to work for Mechel Bluestone at
18 that point?

19 A Correct.

20 Q Mr. Harrah, one last question. Well, I think
21 one last question. Do you know, besides you an Mr.
22 Justice, was anyone else directly involved in
23 consideration of the easement in 2007?

24 A If there was other than just a passing
25 conversation, but actually looking at documents or

1 reviewing things, to my knowledge I don't recall
2 anyone else being involved.

3 MR. LEONARDI: Your Honor, could I have just
4 a moment?

5 Your Honor I may have failed to move an
6 exhibit into evidence so I want to make sure I
7 have. Mr. Harrah, I mean.

8 Your Honor, I don't know if we moved Exhibit
9 63 in but if we haven't the defendant moves Exhibit
10 63 in.

11 THE COURT: Any objection? It was
12 identified.

13 MR. PENDARVIS: No objection.

14 THE COURT: 63 without objection.

15 (Lummer to Harrah email marked and received
16 in evidence as Defendant's Exhibit 63).

17 MR. LEONARDI: No further questions, Your
18 Honor.

19 THE COURT: Cross?

20 CROSS EXAMINATION BY MR. PENDARVIS:

21 Q Hi, Mr. Harrah, how you doing? We got to see
22 each other in Beckley back in December?

23 A It's a little warmer here.

24 Q A few questions on some of your testimony to
25 sort of make sure of everybody's understanding.

1 You weren't with Mr. Justice when he spoke with Mr.
2 McLeod about this whole project, were you?

3 A I was with the Justice Companies since the
4 1st of July, 2007. I don't know when their
5 conversations started. As I said, in some meetings
6 we had with Jim sometime after I went to work there
7 he brought up this subject to me.

8 Q I'm really getting to the point you weren't
9 with him at the farm in South Carolina?

10 A I was not.

11 Q So you're not really sure exactly what their
12 conversation was about and the plans that were made
13 in that meeting?

14 A I am not.

15 Q We looked at Exhibit 44 that has been
16 described as an executive summary. Except for the
17 signed agreement on that bottom part of the list,
18 did you know that Mr. McLeod had the easement and
19 maps for the properties?

20 A I was never provided those. I don't know
21 that he did or didn't.

22 Q Are you aware of any of the professionals
23 that Mr. Justice didn't pay, that were involved in
24 the Black River Farm conservation project?

25 A No, I'm not.

1 Q He paid all of them some money, right?

2 A To my knowledge.

3 Q Now, there was some discussion about that,
4 about the letter. Do you remember that December
5 5th letter from Mr. Hanlin? Did you actually
6 present that to Mr. Justice?

7 A I can't, I don't recall that I did or didn't.

8 Q You don't recall sitting down with Mr.
9 Justice and describing the details of this letter
10 from Mr. Hanlin, do you?

11 A No, but as I said, you know, we often, when I
12 was in public accounting, when we take on a matter
13 with somebody, it didn't strike me to be something
14 unusual in the nature of professional
15 relationships.

16 Q Can we translate that to mean you didn't need
17 to go to Mr. Justice, "Hey, we got one of those
18 qualifying letters"?

19 A Yes, I didn't see that was something unusual.

20 Q That's fair. Now, when we, you were telling
21 me back in your deposition in December that, and
22 you testified that you understood that the goal was
23 to finish this conservation easement by the end of
24 2007?

25 A Well, what I said, the goal that Mr. McLeod

1 was working on was to do that and for the various
2 reasons that he had, I'm just not sure that, I'm
3 not sure I understood that was a drop dead date for
4 Jim.

5 Q Let me, I'll read you the question from page
6 45 of your deposition, beginning on line 19. This
7 deposition was taken December 12 --

8 THE COURT: You need to show him the
9 deposition.

10 MR. PENDARVIS: I'll show him a copy.

11 THE COURT: Do I have the original up here?

12 MR. PENDARVIS: It was submitted.

13 THE COURT: I don't mind you using the
14 copies.

15 MR. PENDARVIS: Would you like a copy?

16 THE COURT: Is a copy okay?

17 MR. LEONARDI: A copy is okay with me.

18 THE COURT: Give him a copy.

19 Ladies and gentlemen, a deposition, so you
20 understand, a big box over here, the clerk keeps up
21 with those in Richland County, the lawyers don't,
22 this is the clerk's file, they have been filed in
23 that file, everybody has a copy, but the original
24 is sealed up and can't be tampered with and I can
25 pull it out but they agree to use a copy they have,

1 it is just as good, reads exactly the same. If we
2 find the oriignal I'll open it up and hand it to
3 Mr. Harrah, just so you all understand.

4 During a deposition the court reporter is
5 there, testimony is done just like on the witness
6 stand, it is done in a conference room in
7 somebody's office. In this case it was done in
8 Beckley, West Virginia.

9 MR. PENDARVIS: Your Honor, we're having a
10 little difficulty finding it.

11 MR. LEONARDI: You can use a copy.

12 THE COURT: Give him a copy.

13 BY MR. PENDARVIS:

14 Q Mr. Harrah, I opened it up to page 45. Right
15 around line 23, line 19, you were asked were any
16 instructions given to Mr. McLeod to proceed with
17 gathering the information to accomplish this
18 conservation easement by the end of 2007 and your
19 answer was, "Well, I don't know that, I don't
20 recall that specific date was cited but I think
21 that from reading those documents it certainly was
22 the goal to finish by the end of 2007 and I know
23 that we did not know all the details of what had to
24 be done in this process, so some of that was asking
25 him to proceed and tell us what needed to be done,

1 you know, to put such a thing in place because I
2 knew nothing about it."

3 Do you remember that?

4 A Yes, that's basically what I just said.

5 Q Okay. But it was the understanding for the
6 party, I think you limited it to Mr. McLeod?

7 A I didn't say party. I said it was my
8 understanding, how these documents were prepared,
9 that Mr. McLeod was moving toward that date and we
10 all understood the date that he was moving toward.
11 I didn't say that we provided the impetuous for
12 that date. I just said from reading the documents
13 it's obvious that he was trying to accomplish that
14 by December 31, 2007.

15 Q Well, we went past that and after that
16 testimony I asked you about Mr. Justice and if he
17 had decided to terminate the project, whether he
18 would have communicated --

19 MR. LEONARDI: Objection, Your Honor. Can he
20 show him the transcript again?

21 MR. PENDARVIS: I'm on cross examination.

22 THE COURT: I know but ask the question.

23 MR. PENDARVIS: I'm getting there.

24 MR. LEONARDI: You're paraphrasing testimony.

25 THE COURT: Ask the question, let him answer.

1 BY MR. PENDARVIS:

2 Q If Mr. Justice decided to terminate this
3 project, you gave testimony he would have
4 communicated to Mr. McLeod and the others to stop.
5 Is that correct, essentially what you said?

6 A Well, I don't essentially know what I said in
7 December word for word but --

8 Q If you take a look on the same page we're on.

9 THE COURT: Let him answer, let him answer
10 your question.

11 MR. PENDARVIS: I'm sorry.

12 THE COURT: If he misstates it you've got
13 the --

14 MR. PENDARVIS: My apologies.

15 THE COURT: He was about to answer, I
16 thought.

17 THE WITNESS: I think, I guess the best thing
18 that I can say in that regard is, you know, it was
19 my understanding that these documents were being
20 prepared to close on December 31, okay? If on
21 December the 24th someone had come in like Mr.
22 McLeod did and said, "I don't think I can in good
23 conscience go forward with this," if he had said
24 there was some other reason, "I physically can't do
25 it, I have some kind of an issue," and Jim really

1 wanted to do that he would have closed that
2 transaction but in this particular case he cited,
3 he cited a reason that no, I think, reasonable
4 business guy would go, "Oh, don't worry about the
5 tax consequences, let's move ahead with this."
6 Really that is not going to happen.

7 BY MR. PENDARVIS:

8 Q But up until that point it is your
9 understanding Mr. Justice was continuing to proceed
10 with this transaction?

11 A Well, Mr. Justice saw the same documents that
12 I did and knew the dating that was put in those
13 documents but I don't know that we hadn't seen some
14 of these, what the easement meant, what the
15 restrictions meant in black and white, I guess, on
16 that particular property, so that would be a
17 decision that he would have made after he saw that
18 and understood what that really meant to him.

19 Q Thank you very much. But at no point until
20 the phone call was there any instruction to cease
21 action, "I don't really want to do this anymore,"
22 or, "I changed my mind," or anything like that?

23 A No.

24 Q And as for the tax consequences for
25 charitable deduction, are you familiar with, you're

1 not familiar with the tax consequences under
2 Section 170(H) of the IRS Code, are you?

3 A I don't know what 170(H) is. I don't
4 remember all the tax code. I know a little bit
5 about what these conservation easements are, there
6 was a large sum in the first year and then the
7 remainder would be deducted in later years, that is
8 the extent of my knowledge.

9 Q So, you're not sure about changes under the
10 tax code that may have occurred or not between 2007
11 and 2008, 2009 or things of that nature?

12 A No one ever mentioned that in the run-up to
13 12/31/07.

14 Q I understand maybe they might not have known
15 what it was in 2008 or certainly in 2009 but I'm
16 just asking for your familiarity as to the
17 distinctions between the changes year to year that
18 may happen on the tax regulations.

19 A I don't know anything about that, not as it
20 relates to that specific code section.

21 Q Mr. Harrah, I was just curious, you come
22 down, were you served a subpoena to come down here
23 today?

24 A - No. You know, I was asked to give a
25 deposition and I was asked to come and testify in a

1 matter I knew something about. It's actually
2 inconvenient for me to do so but I thought that I
3 had information that may be important to whatever
4 the issue is between these parties.

5 Q Is someone paying your expenses for coming
6 down?

7 A No one has offered to pay anything.

8 Q Okay.

9 A I take that back. Mr. Leonardi did buy me
10 lunch today.

11 Q I hope it was a good one.

12 MR. PENDARVIS: We sure appreciate your
13 testimony. Good to see you again. Take care.

14 MR. LEONARDI: Your Honor, a couple redirect
15 questions.

16 REDIRECT EXAMINATION BY MR. LEONARDI:

17 Q Mr. Harrah, Mr. Pendarvis asked you if Jim
18 Justice had decided not to do this would he have
19 told somebody. Do you recall that question?

20 A Yes.

21 Q How many times did Mr. Justice talk to you
22 about this project, would you estimate total?

23 A After the initial discussions we had had and
24 he told me about the whole type of idea of this and
25 he specifically asked me to contact Mr. McLeod, we

1 had very few discussions about -- I passed
2 information on to him just like the fee letter and
3 he made the comment, "Change it from five to four."
4 If Mr. McLeod had put four he would have said
5 change it from the four to three. That is just the
6 nature of the way it is, but we were involved in a
7 lot of different things, you know, it is a big
8 business and we really didn't have many discussions
9 that I know in great detail about this.

10 Q Mr. Pendarvis mentioned the December 24th
11 phone call. Describe for the jury how Mr. Justice
12 reacted when he was told that the easement was not
13 going to go forward?

14 A First of all I didn't recall that Mr. Justice
15 was part of the phone call but I think my
16 impression is -- well, it is not my impression,
17 it's the way it would be. If Jim wanted to go
18 through and have this done by 12/31/2007 he would
19 have done it regardless of what I thought, Mr.
20 McLeod thought, if he thought that is what he
21 wanted to do he would have done it.

22 Q And tell the jury why you believe that about
23 Mr. Justice.

24 A Well, I mean, he's the guy that makes the
25 decisions and whenever he sold his company he went

1 completely opposite of the advice of Goldman Sachs
2 and did it the way he wanted to do it. If he wants
3 to do it he'll do it, that is just the way Jim is.

4 Q And after the call and after he knew that the
5 easement was not going to go forward did he ever
6 express to you any disappointment?

7 A No.

8 Q Did he ever express to you any frustration
9 about the situation?

10 A No.

11 Q Okay. Mr. Pendarvis asked you about getting
12 a document. Did you hand this document to Mr.
13 Justice, did you get it from him, do you recall
14 that?

15 A I'm not sure. Is this the one that had to do
16 with the letter?

17 Q Yes.

18 A The letter from Mr. Hanlin?

19 Q Hanlin, correct. Describe for the jury how
20 easy it is to get documents or to get in touch with
21 Mr. Justice, based on your experience working for
22 Mr. Justice.

23 A Well, I mean, Jim was in the office several
24 times a week, he also had an executive secretary,
25 if you had something to get to Jim she could get it

1 to him. I mean, it wasn't like, it wasn't like a
2 restriction that you had to go through, you know,
3 hoops to get something to Jim, or you could pick up
4 the phone and tell him.

5 Q Would you describe his schedule as
6 unpredictable?

7 A I would.

8 Q And what about the hours that he kept?

9 MR. PENDARVIS: Your Honor, this is getting a
10 little outside of --

11 THE COURT: I will allow the question. It's
12 redirect.

13 A Well, Jim would often not show up until 3:00
14 o'clock because maybe he got up and come down in
15 the morning and would come back and be in the
16 office at 3:00. He also coaches, it is hard to
17 believe, but he also coaches the girls' basketball
18 team at the local high school. I say it is hard to
19 beleive, he sets aside time to do that and, I mean,
20 he puts his heart and soul into that. He now
21 coaches the boys' basketball team at the same high
22 school and the seasons parallel each other, so it
23 is unpredictable but it is, if you needed to get
24 something to Jim there were ways to do just that.

25 MR. LEONARDI: Thank you, Mr. Harrah.

1 MR. PENDARVIS: Briefly, Your Honor.

2 RECROSS EXAMINATION BY MR. PENDARVIS:

3 Q In communicating with Mr. Justice the subject
4 of this transaction, did you relay information to
5 Mr. Justice from Mr. Hanlin?

6 A Say that again.

7 Q As part of this point person for Mr. Justice
8 and you were discussing just now some information
9 you got from Mr. Justice, were you communicating
10 with Mr. Hanlin?

11 A Yes, I had. Obviously there were some emails
12 and I think we had a telephone conversation or so
13 on the front end of this.

14 Q How many times did you communicate with Mr.
15 Hanlin?

16 A I can't tell you that.

17 Q Do you recall a telephone conference on
18 November 20, 2007?

19 A No.

20 Q Do you recall a telephone conference with Mr.
21 Hanlin on November 26th, 2007?

22 MR. LEONARDI: Objection, Your Honor. This
23 is beyond the scope of redirect.

24 MR. PENDARVIS: He talked about
25 communication. I'm just following up on his

1 communications, about Mr. Justice's intent.

2 MR. LEONARDI: He's talking about
3 communications with Mr. Hanlin. He didn't say
4 anything about Mr. Justice.

5 MR. PENDARVIS: He asked about the letter.

6 THE COURT: Move on to something else. I'll
7 allow the question but --

8 BY MR. PENDARVIS:

9 Q I'm just trying, there are some telephone
10 bill records, I'm trying to reflect these billing
11 records with your communication with Mr. Hanlin.
12 Do you recall speaking with him twice on the 26th
13 of November?

14 A I don't recall specifically. I do know that
15 we had communications by email and I do think we
16 had, as I said, I think we did talk by phone but I
17 don't remember the dates.

18 Q What is the latest date you recall
19 communicating with Mr. Hanlin?

20 A In regard to this time frame?

21 Q Yes, sir.

22 A I really don't know.

23 Q Do you recall a conference on December 4th?

24 A You can list all the dates, you can list all
25 the dates from, you know, November 20, through

1 whatever, and I'm not going to recall having that
2 conference.

3 Q Do you recall leaving a message for Mr. Harrah
4 on December 18th?

5 A I am Mr. Harrah.

6 Q Excuse me, I'm reading Mr. Hanlin's record,
7 do you recall leaving a message for Mr. Hanlin on
8 the 18th of December?

9 MR. LEONARDI: Your Honor --

10 A No.

11 THE COURT: I think you have asked and
12 answered it. He doesn't have specific recollection
13 of particular phone calls other than the 24th?

14 MR. PENDARVIS: Fair enough. Thank you, no
15 further questions.

16 MR. LOENARDI: No further questions, Your
17 Honor.

18 THE COURT: Thank you, Mr. Harrah. You may
19 step down, and have a safe trip.

20 (Witness excused).

21 THE COURT: We're going to stand at ease and
22 I'm going to speak to Miss Meyer.

23 (Recessed at 5:10 p.m.).

24 (Resumed at 5:15 p.m.).

25 THE COURT: Come to order. We'll start 9:00

1 order.

2 MR. PENDARVIS: Your Honor, could I ask
3 permission for Mr. McLeod to leave?

4 THE COURT: Sure, absolutely, not a problem.

5 MR. LEONARDI: Ready, Your Honor?

6 THE COURT: Yes.

7 MR. LEONARDI: I just want to speak very
8 briefly about the title issue. As you know, the
9 witness that they have set up to testify is
10 testifying on behalf of Justice Family Farms, LLC,
11 and notwithstanding that name appears on some
12 proposed agreements, that is not the entity that
13 owns the land and there is nothing in the record
14 that suggests a connection between that entity and
15 Black River Farms that owns the land.

16 THE COURT: All right, just so I understand,
17 give me the three entities and who owns the farm
18 right now, just so I can have that as a premise to
19 work around or work with.

20 MR. LEONARDI: Well, we have looked at the
21 Secretary of State's website here and in West
22 Virginia and we have looked, really the records in
23 Clarendon County say Black River Farms, LLC, owns
24 the property. So, we look for Black River Farms.

25 THE COURT: Do you agree with that right now,

1 Black River Farms?

2 MR. PENDARVIS: As for as the records,
3 titles, but if you go to West Virginia, Black River
4 Farms is no longer an existing entity. Mr. Harrah
5 testified in his deposition it was a disregarded
6 entity.

7 THE COURT: He says Black River Farms, LLC,
8 doesn't exist. All right, go ahead.

9 MR. LEONARDI: He says Black River Farms,
10 LLC, the South Carolina Secretary of State website
11 has no record of Black River Farms, LLC. In West
12 Virginia the Secretary of State has record of two
13 Black River Farms, LLC. We have printouts for both
14 of them. One of them, both of them are single
15 member LLC's. Let me pull those records so I can
16 get it straight for you.

17 I'll hand them up.

18 THE COURT: All right, Mr. Leonardi, you may
19 continue, sir.

20 MR. LEONARDI: The first one I handed up was
21 the first Black River Farm entity in West Virginia.
22 I want to make sure I handed you the right one,
23 Your Honor. Does yours say Black River Farms?

24 THE COURT: It does.

25 MR. LEONARDI: And if you turn to the

1 section, this is the first entity, what he's termed
2 2009, single member LLC, the member is James C.
3 Justice Companies, LLC. So, we moved to James C,
4 LLC, I'm having trouble finding that one here but I
5 can represent to the Court that the James C.
6 Justice Companies, LLC, was in turn a single member
7 LLC and the only member of that single member LLC
8 was James C. Justice Coal Company. J.C.J. Coal
9 Company.

10 I will hand up the record for J.C.J. Coal
11 Company. And it is also a single owner LLC,
12 luckily this is the end of it because the single
13 member of J.C.J. Coal Company, LLC, is Mechel
14 Bluestone. That is the first Black River Farms
15 entity. It ends with a single member being Mechel
16 Bluestone.

17 The other single member LLC, the other single
18 LLC is, it has two members, one being James C.
19 Justice, II, Jim Justice, and the other one being a
20 gentleman named Brian Wright that we have never
21 heard of before, so both of the entities that could
22 possibly be the ones that own the land have no
23 connection that we can discern to Justice Family
24 Farms or Mr. Miller.

25 Now, Your Honor, I'm just talking now about

1 the confusion about the entity and whenever you're
2 ready I will address the hearsay issue.

3 THE COURT: All right. The deposition video
4 that is wished to be played is by whom?

5 MR. PENDARVIS: Justice Family Farms, LLC.

6 THE COURT: And what is his name?

7 MR. PENDARVIS: The designee was Terry
8 Miller.

9 THE COURT: All right.

10 MR. LEONARDI: And regarding the fact that
11 the gentleman that is testifying on behalf of the
12 entity is not the owner of the property, we brought
13 that to Mr. Pendarvis' attention at the summary
14 judgment stage, he had an opportunity to cure, he
15 indicated he was going to get the testimony from
16 the appropriate entity or perhaps Jim Justice would
17 be coming to trial and of course that has not
18 happened.

19 Are you ready to go to the hearsay argument
20 as well?

21 THE COURT: Sure, go ahead.

22 MR. LEONARDI: May it please the Court, this
23 we feel like is a critical issue on this piece of
24 evidence. This video is queued up, once it is shown
25 to the jury there is no way to unshow it to them.

1 and paid the full 50,000 Justice could walk away.

2 MR. PENDARVIS: Certainly.

3 THE COURT: December 30, December 31st,
4 anytime he wanted.

5 MR. PENDARVIS: And consistent with Yancey
6 Environmental's objective, Mr. Justice could have
7 not recorded the easement and taken a deduction and
8 they wouldn't get paid. This all surrounds let's
9 get to the point of closing.

10 THE COURT: Stop there. Go back and explain
11 to me, explain how all the way up the chain of
12 title there is every company mentioned except
13 Justice -- is it Justice Farms?

14 MR. LEONARDI: Justice Family Farms.

15 THE COURT: Everybody is mentioned but that
16 one.

17 MR. PENDARVIS: You mean in the chain of
18 title?

19 THE COURT: Yes.

20 MR. PENDARVIS: Well, that is the one that is
21 disregarded, Your Honor. I mean, the Black River
22 Farms has the dirt, Justice Family Farms, we
23 understand is over Black River Farms and the reason
24 you don't see this in the Secretary of State is it
25 is by private agreement, it doesn't require it to

1 typically do that, so I don't have any candy on me
2 today, so forgive me for that, but with that
3 understanding, then, we're going to let you return
4 to the jury room and then home for the weekend.
5 Have a good day. We'll remain where we are out of
6 respect for you as you depart the courtroom.

7 (The jury was excused from the courtroom).

8 THE COURT: Thank you. The jury has departed
9 the courtroom. Anything for the record before we
10 close the record in the case? First from the
11 plaintiff?

12 MR. PENDARVIS: No, Your Honor.

13 THE COURT: Anything from the defendant?

14 MS. MCWILLIAMS: Nothing from the defense.

15 THE COURT: All right, we'll be in recess,
16 back to Judge Griffith 9:30 Monday morning.

17 (Recessed at 9:45 a.m., March 2, 2012).

18 (Reconvened at 9:10 a.m., March 5, 2012).

19 THE COURT: All right, on the motion
20 regarding the admissibility of the 30(B)(6) witness
21 testimony as to hearsay, Mr. Leonardi, let me hear
22 you briefly again on your objection to the video.

23 MR. LEONARDI: Yes, Your Honor. As the Court
24 is aware, one of the material issues in this case
25 is what Mr. Justice intended regarding this

1 conservation easement. Now, he is right up the
2 road, right up 77 about four hours from here and
3 the plaintiffs could have preserved his testimony
4 before this trial.

5 The jury should hear from Mr. Justice himself
6 what he intended and that question, what he
7 intended is not necessarily a simple yes or no
8 answer. Did he intend just to explore the idea of
9 a conservation easement, was he committed to it,
10 did he agree to the terms of the consulting service
11 agreement? It is the plaintiff's burden to show he
12 intended to go forward.

13 Furthermore, on a call on the 24th, before
14 that call did he intend to go forward and what was
15 it on that call that, if he intended to go forward,
16 that caused him not to go forward? He was told a
17 couple things on that call. He was told first of
18 all Mr. McLeod was being investigated by the
19 Internal Revenue Service. He was also told,
20 according to Mr. McLeod, the plaintiff wanted to
21 postpone it so that he can resolve that before
22 moving forward.

23 So, there was the news about the IRS
24 investigation and there was also the recommendation
25 to postpone, according to Mr. McLeod. Now, which

1 one of of those, assuming Mr. Justice intended to
2 move forward when they got on that call that day,
3 which one of those convinced him not to go forward,
4 that is a material issue in this case.

5 The jury has not heard from Mr. Justice
6 because the plaintiffs did not preserve his
7 testimony for trial. They could have subpoenaed
8 him, there is no wealthy person exception to the
9 rule of subpoena, they could have served him with a
10 subpoena and he would have had to sit down and they
11 could videotape that deposition, we could be
12 playing that. A long time ago the defendants
13 intended to issue a subpoena up there and the
14 plaintiffs never took the steps to make that
15 happen.

16 We have been told from the very beginning
17 that Mr. Justice would be involved in this case.
18 He was listed as a witness in response to
19 defendants' interrogatories. From the very
20 beginning Mr. Justice was listed, Terry Miller was
21 never listed, Justice Family Farms was never
22 listed, Black River Farms, the company that owns
23 the dirt, was never listed, it was always Mr.
24 Justice. And in fact the plaintiff in this case
25 wrote to Mr. Justice and specifically asked for

1 help with this lawsuit.

2 I will go ahead and hand up this letter.

3 Miss McWilliams asked Mr. McLeod about it on
4 cross-examination. In this letter Mr. McLeod asked
5 for, quote, a simple act memorializing their
6 agreement, and of course Mr. Justice never
7 responded to this letter. Plaintiff's
8 interrogatory responses were supplemented, Mr.
9 Justice was always listed. Justice Family Farms,
10 Terry Miller, Black River Farms were never
11 mentioned.

12 During mediation, actually during that day
13 the plaintiffs obtained an affidavit from Justice
14 Family Farms stating, the day of the mediation, we
15 have never seen the affidavit before, and at the
16 beginning of the mediation there was no affidavit
17 but plaintiff indicated they were in the process of
18 getting one and in the middle of mediation they did
19 obtain an affidavit and that is the first that we
20 thought that they might seek to have Mr. Miller
21 testify on behalf of an entity associated with Mr.
22 Justice.

23 That is where we are today. We are standing
24 here, the question is whether or not this video
25 should be shown to the jury. Now, what Mr. Miller

1 purports to do in this video is describe the intent
2 of a company regarding this easement. Now, that is
3 really code. As we know, Mr. Justice makes the
4 decisions regarding these entities --

5 THE COURT: From an accumulation of what the
6 testimony was presented to the jury, if they missed
7 that they have been asleep, Mr. Justice makes the
8 decisions.

9 MR. LEONARDI: I will hand up just, if you
10 have read the deposition you know he testified that
11 Mr. Justice is the ultimate decision maker so it is
12 clear what he says, Justice Family Farms intended
13 to go forward with the easement, that is code for
14 Mr. Justice intended to go forward with this
15 easement. Now, regarding, you know -- but it is
16 not, Mr. Justice is not here to be cross examined,
17 he has never been available to be cross examined.

18 Now, the defendant respectfully submits the
19 submission of this testimony from Mr. Miller would
20 be reversible error because of the specific
21 circumstances of this case. One, this testimony is
22 probative of an issue in the case and it is
23 incompetent, it is hearsay and so it is presumed to
24 be prejudicial to the defendants.

25 May I approach, Your Honor, to hand up a

1 couple cases regarding the admission of hearsay
2 evidence and it being reversible error under
3 specific circumstance where that evidence like here
4 is not cumulative, it is not background, it is
5 important to the case and it is incompetent and
6 both of those two things, it is prejudicial to the
7 defendant. It is just not proper, Your Honor, it
8 goes to a material issue, perhaps the most material
9 issue, so this is extraordinarily important, it
10 would be prejudicial to the defendants if it was
11 admitted.

12 Now, regarding the two prongs, that it's
13 probative and that it is incompetent, regarding the
14 first, as we have already discussed, there is no
15 question that he is the decision maker with respect
16 to these companies. And regarding hearsay, Your
17 Honor, there is no corporate designee exception to
18 the hearsay rule. Just because Mr. Miller purports
19 to be testifying on behalf of a company does not
20 mean that is a hearsay exception. The plaintiff
21 has argued that a 30(B)(6) designee can testify as
22 to the intent of an organization, and that is true
23 given that their testimony is based on something
24 other than hearsay. That doesn't amount to an
25 exception to the hearsay rule, they can testify as

1 to the intent as long as their testimony is not
2 hearsay testimony, and in this instance we have
3 statements from Mr. Miller, one, "Mr. Justice told
4 me this or that," those of course are hearsay and
5 the plaintiff has agreed they are hearsay and
6 shouldn't be shown to the jury.

7 The other category is that the company
8 intended to go forward. Well, based on a review of
9 the deposition it was made clear that that
10 testimony regarding the intent of the company is
11 based on the conversations with Mr. Justice. So,
12 those statements about the intent of the company
13 are just hearsay repackaged or hearsay with a bow
14 on it, it is dressed up to not be hearsay, to
15 appear to not be hearsay but of course it is
16 hearsay and there is no exception to the hearsay
17 rule for a corporate designee.

18 Now, we were just handed a supplemental brief
19 from the plaintiff, I quickly scanned it and I
20 would just like to make a couple comments regarding
21 it, Your Honor. First of all you will see it uses
22 a kind of code, refers to the corporations then
23 existing's intent, all about the corporation, never
24 a reference to Jim Justice but we know that is just
25 code for what Mr. Justice intended.

1 The first subsection of this brief is
2 dedicated to the fact that plaintiffs argue that
3 these statements from Mr. Miller are admissible
4 because they are statements of the then existing
5 state of mind and under rule 803(3) an exception to
6 the hearsay rule, a declarant can testify as to
7 existing statements, statements regarding an
8 existing state of mind.

9 Now, again let's apply it to this case here.
10 We're talking about Mr. Miller describing what Mr.
11 Justice told him. So, first of all it is not a
12 statement from Mr. Miller about what Mr. Miller
13 said about his existing state of mind. He is not
14 saying, "I was worried on this day back several
15 years ago and I said on that day because I was
16 worried that, that I was worried." He is talking
17 about a statement from Mr. Justice.

18 Furthermore, even if that was not the case,
19 if he was talking about his own statement, the
20 statements he is talking about were made before he
21 was deposed last December, years after the event
22 that happened here, so he asked Mr. Justice, "Did
23 you intend to go forward?" He says that Mr.
24 Justice said that he intended to go forward back in
25 2007. Well, he told Miller this past December or

1 thereabouts. So it is not a statement, Mr.
2 Justice's statement to Mr. Miller, to the extent it
3 was made, was not a statement of Mr. Justice's
4 existing state of mind, it was him telling Mr.
5 Miller about what he felt years ago.

6 The second subsection said that Mr. Miller's
7 testimony is a lay opinion. Well, it is not an
8 opinion, it is fact testimony. It's incompetent
9 fact testimony but just because it has that
10 vulnerability doesn't mean that can be mitigated by
11 labeling it opinion testimony. It was certainly
12 not presented during the deposition as opinion
13 testimony, it was fact testimony and is hearsay and
14 should not be admitted?

15 And finally, the last section is about,
16 essentially about the importance of this testimony.
17 The point the plaintiff is arguing, it is important
18 testimony, it goes to the issue in this case of
19 what Mr. Justice intended and that is, we agree,
20 one of the exact reasons it is prejudicial to the
21 defendants in this instance, it is incompetent
22 testimony, probative, prejudice is presumed and
23 admitting it here would be reversible error, Your
24 Honor.

25 THE COURT: All right, Mr. Pendarvis?

1 MR. PENDARVIS: The fundamental defect in
2 everything you heard, Your Honor, is the fact
3 Justice Family Farms, LLC, was a party to the
4 agreement with Y.E.S. This company was a party to
5 the contract that generated the need for the lawyer
6 that caused Y.E.S. to hire the defendants.
7 Everything you have heard today, this morning, goes
8 to the weight, not the admissibility. It is a
9 patently false statement you just heard. On the
10 very first, plaintiff's first response to
11 interrogatories October 8, 2010, page 22, plaintiff
12 listed both James C. Justice Companies,
13 Incorporated, and Justice Family Farms, LLC, as a
14 corporation with knowledge about facts relevant to
15 this case in response to their interrogatories, so
16 for counsel to suggest that this was some sort of
17 surprise is just false.

18 This corporation Justice Family Farms, LLC,
19 can only speak through designees and for the
20 defendants to suggest having to put plaintiff in
21 position to essentially breach a contract with Mr.
22 Justice and therefore we're not responsible to get
23 Mr. Justice down here to testify, it is just a
24 problem with the way circumstances were caused by
25 their withdrawal. This was a very sensitive

1 agreement to get Justice Family Farms to come
2 testify, it was, it took months to get together and
3 I made a request throughout the time to get Mr.
4 Justice to either testify in deposition or come
5 down here but he is only one part of the contract,
6 and for the law, the way the corporations are, the
7 parties are allowed to use corporate entities for
8 various purposes but we certainly have rights, as
9 to Justice Family Farms, number one, it was on the
10 contract, number two, as the Court has seen Exhibit
11 41, Justice Family Farms paid on the contract and
12 its intent to perform the remaining part of this
13 contract are clearly, number one, relevant. Number
14 two, admissible.

15 This is a sworn deposition, the defendant had
16 an opportunity to come to cross-examine the
17 designee for Justice Family Farms, and this memo,
18 Your Honor, was really submitted in response to
19 some specific objections, three specific objections
20 to deposition testimony that is found on pages 34
21 and 36 of the printed deposition, that is the focus
22 of this memorandum, but in total this entire
23 deposition outside of the specific objections is
24 admissible, as this was a party to the contract.
25 We have an obligation as the plaintiff to prove the

1 underlying transaction, the intent of the party to
2 proceed and that is precisely what this is. So we
3 believe it's admissible, as we argued all the week
4 last week, and specific to the objection to the
5 question, Your Honor, I will just read the question
6 to you and the objection and the answer.

7 THE COURT: What page?

8 MR. PENDARVIS: This is on page 34. We have
9 been provided with an objection beginning on line
10 2 through line 16.

11 MR. LEONARDI: 34?

12 MR. PENDARVIS: Yes, sir.

13 THE COURT: I'm there.

14 MR. PENDARVIS: Your Honor, the contract
15 didn't close, obviously the conservation easement
16 was not recorded. The assumptions this designee
17 was asked to assume was that for the purpose of the
18 question, the recommendation, if Mr. Hanlin had
19 stayed on board essentially and that the
20 recommendation Mr. Justice would have made in the
21 December 24th phone call was to move forward with
22 the easement and the question was, "If that had
23 been the recommendation what would you have done?"
24 Based on this designee's due diligence,
25 investigation, review of papers, discussions with

1 Mr. Harrah and Mr. Justice, the answer for the
2 corporation was yes, and we believe that Rule
3 803(3) and Rule 701, provisions in the rules of
4 evidence, provide for the admissibility of this
5 testimony and it is information that the jury will
6 need to better understand whether there was going
7 to be a contract or not and certainly everything
8 that the defendants are arguing to you goes to the
9 weight of the evidence, not the admissibility, and
10 if they can make those same arguments to the jury
11 and convince them, and they may convince them there
12 was no intent, that Mr. Justice didn't say, and who
13 knows, but this information will certainly assist
14 the jury in making that important decision on
15 whether there was an intent by Justice Family Farms
16 to proceed with performing under this contract.

17 The next objection, Your Honor, it is on page
18 36, and the question, there is a question about,
19 after the Harrah email on the 27th showing the
20 45,000,000, his opinion on the conservation value
21 of his appraisal, the question is posed that there
22 is an objection to, was there sufficient time if
23 they got this information on the 27th to close, and
24 this answer is based on the corporation's
25 experience, all the paperwork could have been done

1 in a short time and there was some testimony Mr.
2 Harrah gave in his deposition consistent with that,
3 but again this corporation's answer was based on
4 his experience in conservation easements.

5 THE COURT: Justice family farm experience in
6 conservation easements?

7 MR. PENDARVIS: Yes. They had been involved
8 with one between the time of the contemplated
9 easement in this case and the deposition that was
10 taken in 2011.

11 THE COURT: So that's contradictory, at the
12 time he withdrew they had one conservation easement
13 to base that answer on, you know that?

14 MR. PENDARVIS: I understand at the time that
15 question was asked they had experience to
16 sufficiently answer the question and it is
17 consistent with what the witness said in his
18 deposition.

19 THE COURT: December, '07, they had no
20 experience, and for him now to say, "Yes, now I
21 know how to do one, we had enough time," that's not
22 fair, that is not fair to either side. That was a
23 leading question, if you ask me, and you're asking
24 me. Think about it.

25 MR. PENDARVIS: Well, that is okay, we got

1 testimony from the defendants that will handle
2 that.

3 THE COURT: That is really, "Now that you
4 have seen how to do it could you have done it three
5 years ago?" That's confusing to the jury as to
6 how, they had never seen one, never heard of one,
7 knew people did them and then two years later they
8 do one, "Yes, we would have had enough time." You
9 know that.

10 MR. PENDARVIS: But as to --

11 THE COURT: He's being nice. I wouldn't let
12 that in.

13 MR. PENDARVIS: That is actually both those
14 questions on page 36, so that takes care of
15 everything from line 10 to line 23 if that is your
16 ruling, Your Honor.

17 THE COURT: I don't --

18 MR. PENDARVIS: So, you sustain that
19 objection.

20 Your Honor, it will take a few minutes to cut
21 that out but the rest is ready to go.

22 THE COURT: Only two spots? I thought there
23 was more than that.

24 MR. PENDARVIS: Your Honor, they have two
25 more. The next is on page 37.

1 THE COURT: Okay.

2 MR. PENDARVIS: I'm very sorry, Your Honor,
3 page 40, lines two through 21, and it goes to the
4 corporation, the value, whether the \$45,000,000
5 appraisal value would have been sufficient for the
6 decision to go forward and he says essentially yes.

7 THE COURT: All right, I will tell you what,
8 tell me, I think it would be better for Mr.
9 Leonardi to tell me why he objects. Assuming I let
10 it in what specific parts are specifically hearsay?

11 MR. PENDARVIS: Well, we have already agreed
12 in terms of hearsay to withdraw that statement Mr.
13 Miller made about Mr. Justice's statement to him.

14 THE COURT: All right.

15 MR. PENDARVIS: That is not in this what is
16 teed up for the video but the rest of it deals with
17 the corporation's intent. Basically our response
18 to the entire video is the designee did its due
19 diligence and and he answered on behalf of the
20 corporation, it is clearly admissible. I mean,
21 there is no other way the corporation can respond.

22 THE COURT: All right, Mr. Leonardi?

23 MR. LEONARDI: Your Honor, before I get to
24 the specific objections I would like to respond to
25 a couple of the arguments counsel made. First of

1 all regarding the agreement, the plaintiff is
2 insisting that Mr. Justice had signed onto the
3 terms of the consulting services agreement that was
4 given to him and that agreement specifically
5 prescribed how to accept it, you accept it by
6 signing and paying \$50,000 nonrefundable --

7 THE COURT: There is no question of fact he
8 didn't sign it.

9 MR. LEONARDI: No.

10 THE COURT: There is no signing of anything.

11 MR. LEONARDI: Right. So we would dispute
12 there was any agreement, consulting service
13 agreement with Justice Family Farms.

14 THE COURT: Where is that? I understand your
15 objection, I understand nobody provided a signed
16 copy and as far as every witness said Mr. Justice
17 didn't sign any of that stuff.

18 MR. LEONARDI: Well, that is the link, the
19 plaintiffs claim that is the link between Justice
20 Family Farms that otherwise has no discernible
21 connection to the land and this dispute. They are
22 saying, "Sure, they don't own the land and we can't
23 see that they are connected in any way with the
24 company that does own the land but we sent them an
25 agreement that had their name on it and they never

1 signed it," and so that's the connection.

2 MR. PENDARVIS: The check shows they
3 performed, Justice, James C. Justice Companies on
4 behalf of Justice Farms paid fees under the
5 contract. They -- it's a partial performance, they
6 agreed to modify the \$50,000 nonrefundable payment
7 down to a \$15,000 payment and they performed, there
8 is the contract. There is no reason this company
9 would have paid Yancey Environmental Solutions for
10 anything but the work they performed per the
11 agreement to do the easement. They performed.

12 MR. LEONARDI: Your Honor, that is an
13 unreasonable characterization of what happened
14 here. The \$15,000 payment was the settlement of a
15 claim. It was not somehow an after the fact
16 agreement to a contract. That is not the case.
17 Furthermore, this whole Justice Family Farms thing
18 is an illusion. Mr. McLeod was dealing with Mr.
19 Justice, he was never dealing with Justice Family
20 Farms, he was talking with Mr. Justice, he
21 testified that his agreement was made with Mr.
22 Justice and so the idea that Justice Family Farms
23 had any kind of real role in that purported
24 relationship is simply untrue.

25 And this raises an issue again, I have

1 already spoken to the Court about it but over the
2 weekend I wanted to get it clear and more organized
3 in our mind exactly what we knew about the Black
4 River Farm and Justice Family Farms. I have made
5 charts that actually specifically specify who the
6 members are of these entities. I will be happy to
7 hand those up.

8 THE COURT: I think that would be helpful.

9 MR. LEONARDI: And all of them end with
10 either James C. Justice Companies, Inc., and Mr.
11 Justice is the president and we believe majority
12 shareholder of that company, or they end with him.
13 This is the one I handed up for Justice Family
14 Farms. We looked at that one as well, even though
15 we can't see it's connected to the land in any way.
16 This is one of the Black River Farms entities.
17 This is the last of the Black River Farms entities.

18 MR. PENDARVIS: Your Honor, one last point in
19 rebuttal.

20 MS. MCWILLIAMS: We're not finished.

21 MR. LEONARDI: I do have some additional
22 response.

23 THE COURT: Okay.

24 BAILIFF: The jurors are all here today, Your
25 Honor.

1 MR. PENDARVIS: If anybody calls Exxon
2 Corporation or BP or any corporation a person
3 answers the phone. There is no way that someone is
4 going to be talking to some, you know, entity other
5 than a person, and we know through the testimony,
6 in fact Mr. Justice and all his companies assigned
7 David Harrah to be the point person on this project
8 and in fact Mr. McLeod, Y.E.S., relayed, Y.E.S.
9 relayed that information to the defendant for their
10 role in coordinating all the effort and preparing
11 the tax documents for this transaction.

12 So, the idea that Yancey McLeod and Yancey
13 Environmental Solutions, LLC, were dealing with Mr.
14 Justice through this entire project is just simply
15 not consistent with the evidence. The evidence is
16 this gentleman that owns various corporations that
17 owned the dirt in Clarendon County, the corporation
18 side of his operation of these companies had him
19 assign David Harrah for this point person. So in
20 terms of dealing with a company's representative,
21 David Harrah, we have evidence from the witness
22 stand about that aspect of the performance of the
23 consulting services agreement through Justice
24 Family Farms.

25 Now, we have interplay between Harrah and

1 Justice, between Harrah and Mr. Hanlin, between
2 Yancey Environmental Solutions and Harrah. So, we
3 had corporate representatives from Justice Family
4 Farms --

5 THE COURT: I agree with you. What I don't
6 understand is why Harrah wasn't the 30(B)(6) guy
7 other than he wasn't employed there when you
8 started the lawsuit.

9 MR. PENDARVIS: And we don't get to make the
10 choice who the corporation designates. The
11 corporation designated its secretary.

12 THE COURT: Treasurer.

13 MR. PENDARVIS: Treasurer, excuse me, you're
14 right, I apologize, I stand corrected. So, the
15 treasurer, who has an office right next, or desk
16 right next to Mr. Harrah, who actually was aware of
17 it when it was going on, that same person who is an
18 officer of the Justice Family Farms, does his work,
19 this Rule (B)(6) obligates, gets us all this
20 information and he comes to speak on behalf of the
21 party to the contract. They received, they might
22 not like it but this is evidence it was partially
23 performed by this payment of the \$15,000 per an
24 invoice that was sent contemporaneous with the
25 withdrawal.

1 So, the idea that there is no argument is not
2 relevant. There is no argument that Justice Family
3 Farms is not a witness to events in this case,
4 Justice Family Farms, LLC, they were identified in
5 interrogatories. There is no argument that the
6 entirety of this deposition is inadmissible hearsay
7 because there is no other way a corporation can
8 express its intent. We believe the deposition is
9 admissible and the Court needs to rule on these
10 specific line by line items, objections, but
11 otherwise the deposition gets played to the jury.
12 I see no basis nor evidence, evidentiary basis on
13 its admissibility. It goes to the weight, whether
14 we would have gotten Justice or whatever else.

15 THE COURT: I understand. I want to hear
16 your position.

17 MR. LEONARDI: Just a couple comments
18 regarding the response. First of all, the
19 plaintiff is taking the position we could have
20 cross-examined Mr. Miller during the deposition.
21 Well, we did cross-examine Mr. Miller during the
22 deposition but we can't cross-examine Mr. Justice
23 through Mr. Miller and so when Mr. Miller says,
24 "Mr. Justice told me X," we can't say, "Well, why
25 did Mr. Justice want X, intend or not intend, when

1 he made the decision what was he thinking about,"
2 and that is the point and that is the handicap that
3 we face in that deposition and that deposition is
4 here and that shouldn't be testimony where that
5 handicap existed for the defendant, it shouldn't be
6 presented to the jury.

7 Now, touching on these objections, do you
8 want to turn to the transcript here? We have
9 already addressed the ones on page 36 but going
10 back to the one on page 34, that's the one where
11 opposing counsel presented a hypothetical to Mr.
12 Miller, it begins at page 34, line 2.

13 Now, this calls for the witness to speculate,
14 first of all, but what he is asking the witness to
15 speculate on is in fact not what happened, of
16 course.. Here Mr. McLeod recommended that the deal
17 not go through and in this instance he is asking
18 the witness, he recommended to Justice, not Justice
19 Family Farms, but he recommended to Mr. Justice
20 that it not go forward and here the witness is
21 being asked to speculate what would have happened
22 had the plaintiff in this case recommended
23 something differently to Justice Family Farms.

24 Of course he wasn't speaking with Justice
25 Family Farms, he was speaking with Mr. Justice.

1 This whole time Mr. McLeod and the plaintiff only
2 dealt with Mr. Justice, they didn't deal with
3 Justice Family Farms, they were speaking with Mr.
4 Justice and it was never reported that anyone else
5 would be the decision maker. So, that is the
6 objection.

7 THE COURT: Well, was Miller on the phone
8 call? I don't remember.

9 MR. PENDARVIS: No, Your Honor, he was not.
10 It was Mr. Steven Ball, Mr. Harrah, Mr. Justice on
11 the call in West Virginia, and Crosby Lewis and Mr.
12 McLeod here in South Carolina.

13 THE COURT: All right. Here is my concern on
14 this question, page 34, lines 2 through 15, that
15 hypothetical, is that Mr. Miller wasn't the point
16 man, Mr. Harrah was. Mr. Harrah has testified.
17 Subject to that, Mr. Harrah stated when the coal
18 mine sold, if he was still working for Justice now
19 he perhaps could have been the 30(B)(6) witness, we
20 don't know that, that is not a fact before us, I'm
21 concerned that if Miller is not the point man how
22 does he have all that information relevant to what
23 Justice is thinking or doing in December of '07
24 like Harrah did. Harrah was the guy, he had the
25 point for Justice, "You watch that, you deal with

1 Mr. McLeod, tell me what's going on," that is what
2 was going on.

3 Now, how does Miller have competence, not
4 being the point man in '07, but he's the man, he's
5 the designee post trial filing, how does that come
6 in?

7 MR. PENDARVIS: Your Honor, first of all the
8 deposition notice, we're pulling it up, had that as
9 a topic and Mr. Miller testified in terms of his
10 due diligence he spoke with Mr. Justice about this
11 transaction, whether it would have gone forward.
12 That is how he knew. Now, whether that statement,
13 what Mr. Miller in his conversation with Mr.
14 Justice, those are the three, three statements,
15 whether those specific statements get to the jury,
16 we have already acknowledged that is a hearsay
17 issue. But to the 30(B) topic on whether this
18 witness was competent to testify of JFF's intent,
19 Justice Family Farms' intent to proceed with this
20 transaction, it was precisely what he was asked to
21 testify about in the deposition notice. He asked
22 Mr. Justice. He satisfied his due diligence
23 requirement to speak on behalf of the corporation
24 and by the way, Your Honor, once the defendants had
25 the benefit of this deposition they certainly had

1 the power to go serve their own subpoena on Mr.
2 Justice and find out if this really was true.

3 THE COURT: We're not going that far.

4 MR. PENDARVIS: I understand.

5 THE COURT: Mr. Justice isn't here and it
6 would be wonderful if he was here, and so --

7 MR. PENDARVIS: Your Honor, as far as the
8 admisibility, this designee did the due diligence
9 necessary to speak on behalf of the Justice Family
10 Farms, LLC, organization as to intent to proceed
11 with this project.

12 THE COURT: Stop. I want to go to the next
13 one, sit on that one.

14 MR. LEONARDI: May I respond briefly with
15 respect to --

16 THE COURT: No, go to the next one.

17 MR. LEONARDI: All right. We talked about
18 the ones on 36. The next one is 40.

19 THE COURT: All right, I'm there.

20 MR. LEONARDI: The question is, "Earlier you
21 had given some testimony about Mr. Justice's
22 environmental focus," the following question I
23 have, "Was the \$45,000,000 tax benefit number
24 identified by the appraiser in Exhibit 12 in
25 concert with Mr. Justice's and Justice Family

1 Farms' environmental desires such that it would
2 have confirmed their willingness to go forward with
3 this easement"?

4 Well, this one, I submit, I think it was a
5 slip-up to mention Mr. Justice here, they were only
6 asking questions usually in the form of Justice
7 Family Farms, but it is clearly a hypothetical
8 scenario calls for the witness to speculate about
9 what may have happened and when Mr. Justice made
10 the decision not to go forward he had not seen the
11 \$45,000,000 figure, it came later after the call on
12 the 24th.

13 MR. PENDARVIS: Your Honor, in response --

14 THE COURT: All right.

15 MR. PENDARVIS: Again, assuming the tax
16 lawyer hadn't quit and Mr. McLeod on behalf of
17 Y.E.S. would have been able to recommend Mr.
18 Justice and Justice Family Farms go forward with
19 the planned conservation easement like Mr. McLeod
20 made to the other three landowners, this question
21 deals with, and the corporation gave its answer,
22 this question deals with events that we know took
23 place after that. We know that the 2007, December
24 27th, 2007, email from, excuse me, Dr. Hawkins was
25 forwarded to Mr. Justice and this question asked

1 whether these two have confirmed their objectives
2 in terms of the financial value, or all the
3 witnesses that have experience in this matter say
4 that, you know, the final end of the equation for
5 all landowners involved in a conservation easement,
6 they want to know what the bottom number is and
7 this is what is being asked, was this \$45,000,000
8 value for the easement sufficient to meet the
9 objectives of the company to go forward, and the
10 answer, and he answered yes.

11 So, again, it is very material to the
12 decision to proceed, it's consistent with the
13 \$45,000,000 number that has been bantied about in
14 all the emails and discussions, it is consistent
15 with the \$45,000,000 number Mr. Justice and his
16 companies were given in the spring of 2007, mid
17 summer, 2007, on the mitigation value, which was
18 the while idea --

19 THE COURT: That's a different number, that
20 is \$45,000,000 potential income selling the shares
21 of the mitigation bank. That is \$45,000,000 I can
22 make, not \$45,000,000 --

23 MR. PENDARVIS: Agreed.

24 THE COURT: A whole different issue.

25 MR. PENDARVIS: I agree, but the \$45,000,000

1 number that is the value is consistent because that
2 is the mitigation value that is going to be a
3 deduction instead of income but it is consistent
4 there.

5 THE COURT: I got you, I understand. Go to
6 the next one, I'm going to think about that.

7 MR. LEONARDI: Is there another one after 40?

8 MR. PENDARVIS: Your Honor, 56. Part of what
9 opposing counsel and I are doing on these video
10 depositions, for instance, Sue Green has some
11 portion of our designations is going to be played
12 in their case, we're putting in some of the
13 designations for Justice Family Farms, if they lose
14 this notion we already have it keyed in. One of
15 the questions begins on page 56 and the defendants
16 wanted only lines 3 through 7 to come in and we
17 have in fairness asked, we want to put in all the
18 way through 14. Line 3 says, question, "Okay, and
19 Mr. Harrah was the one that had primary
20 responsibility for monitoring the work they were
21 doing and handling it in the Justice Family Farms'
22 end, so to speak? Answer. That's correct."

23 This is the part we want. It sounds from
24 that he is making all the decisions and we want to
25 get the next question and next answer in. It is

1 actually an objection I made I'm withdrawing. This
2 is Mr. Leonardi on cross examination. The question
3 is, 16 says, "JFF wanted to proceed with the
4 project. Who is the JFF referred to in that
5 sentence? Pendarvis: Object to the farm. Mr.
6 Leonardi. Answer: That would have been Mr. David
7 Harrah, myself on the financial end and Mr.
8 Justice."

9 We submit, Your Honor, to put in context who
10 was the JFF referenced in the question, the jury
11 gets to hear that in the next part. In fairness we
12 have a right to put that in. If they have asked
13 the first part to go in we want the second part.

14 MR. LEONARDI: Your Honor, the defendants
15 argue this is an apples and oranges comparison.
16 The portion we want in states Mr. Harrah was the
17 one who was tasked with being the point man on the
18 project, everyone agrees that is true. The
19 question at line 9, first of all it recites part of
20 a paragraph of an affidavit so it is hearsay.
21 There is a reference to --

22 THE COURT: Paragraph 16 from an affidavit?

23 MR. PENDARVIS: This man signed, the same
24 guy, it's not hearsay anymore when the guy talks
25 about it under oath, the hearsay goes out the

1 window.

2 THE COURT: I'm just asking what 16 was.

3 MR. LEONARDI: That would certainly be
4 confusing to the jury. But if the Court, I mean,
5 we can agree to take out both of these if that will
6 resolve the issue, in other words, line 3 to line
7 14.

8 MR. PENDARVIS: We're fine with that, Your
9 Honor.

10 THE COURT: Take them out, then, you all
11 agree, 3 through 14 on page 56 by agreement is now
12 not going to be played for certain. I like that.

13 MR. PENDARVIS: That's it, Your Honor.

14 THE COURT: All right. Did you all agree on
15 all the hearsay stuff, that has all been
16 eliminated, redacted from the video, it is clear
17 Mr. Justice told him?

18 MR. PENDARVIS: That part is out. The part,
19 "I'm in the boat," that little section is out, it's
20 not in the tape.

21 MR. LEONARDI: We had made objections to some
22 specifically, obvious hearsay instances but we take
23 the position that the whole deposition is hearsay.

24 THE COURT: I understand. I'm with you, I
25 understand both you all's positions.

1 MR. PENDARVIS: For a week now.

2 THE COURT: Yes, sir. All right, as for as
3 the 30(B)(6) deposition of Mr. Miller, I'm going to
4 allow it to be played. I understand the objection
5 made by the defense.

6 Also, just so I'm clear, the property at the
7 time the work was being done was owned by the
8 Justice Family Farms or Black River Farms?

9 MR. LEONARDI: Black River Farms. As for as
10 we know it has never been owned by Justice Family
11 Farms.

12 MR. PENDARVIS: Black River Farms was owned
13 by Justice Family Farms, which is owned by James C.
14 Justice.

15 MR. LEONARDI: There is nothing in the record
16 to that effect.

17 MR. PENDARVIS: Mr. Harrah's testimony.

18 MR. LEONARDI: Mr. Harrah's testimony is not
19 part of the record, his live testimony is but he is
20 referring to his deposition testimony. It was not
21 brought out.

22 THE COURT: All right. I'm going to allow
23 the deposition to come in as a 30(B)(6) witness.
24 I'm not going to allow, I have already ruled, page
25 36, lines 10 through 23, and I'm not going to allow

1 the question on page 34, 2 through 15, but I will
2 allow page 40, the renumbered lines, I believe I
3 have marked 2 through 21, I will allow those.

4 And on page 56, you all agreed not to let
5 those in. The reason being there is a question of
6 fact, I believe, for lawyers trying to discern who
7 owns the farm, there has never been any discussion
8 there was another piece of property, the piece of
9 property was owned by Mr. Justice or one of his
10 entities, and this is a 30(B)(6) witness of the
11 entity that owns the farm. That not a question for
12 the jury to decide, as to whether Justice owned the
13 property in South Carolina. He did by way of one
14 of these LLC's, there are many LLC's, I don't want
15 to create a question of fact as to which LLC he had
16 this property housed by. I don't want the jury
17 deciding that there was a piece of property in,
18 there was a piece of property in South Carolina,
19 Justice owned it through an LLC. Was there an
20 agreement, would he have gone forward, that is the
21 question of fact the jury has to decide. I don't
22 want which LLC.

23 Does that makes sense to you all?

24 MS. McWILLIAMS: Yes.

25 THE COURT: That's my ruling. You all

1 accommodate that on the video.

2 MR. PENDARVIS: Your Honor, one last
3 housekeeping matter separate and apart from this
4 whole video. There was some argument last week,
5 limine style arguments that I remember about the
6 other three easements that closed that year.

7 THE COURT: Right.

8 MR. PENDARVIS: I recall the Court ruling
9 over on the side bar that you were not going to
10 allow testimony on those other three easements and
11 I wanted that to be a matter of record, that you
12 sustained the objection to those other three
13 easement matters being introduced to the jury.

14 THE COURT: Right. I think they have been
15 tangently shown in some correspondence but we have
16 not discussed them, that is not a question for the
17 jury. No, I don't want direct discussion of those
18 three easements, and so that was my ruling.
19 Consistent with that those have not been mentioned
20 and it tangently corresponded to some emails or
21 some other matters McLeod might have had going on,
22 to that extent I don't think it is a violation of
23 my ruling, I just, I didn't want those touching,
24 correspondence or emails touching those three
25 easements delved into more vigorously. Thus far

1 damages, and this is not a future damages case, I'm
2 not sure if the Court is aware, but in Maness
3 versus Nelson Mullins case, one thing that is
4 really interesting, I'm glad this case was
5 presented to the Court, because the Maness versus
6 Nelson Mullins case is an example of two causes of
7 action going to the jury, professional negligence
8 and a breach of contract claim. The Court struck
9 the punitive damages claim for the contract action
10 but allowed the punitive damages to go forward on
11 the negligence action but it's important to note
12 that the jury was able, had two causes of action
13 submitted to it in the Maness case..

14 Now, in this case the focus of Dr. Adams'
15 testimony and the claims in the case deals with
16 breach of fiduciary duty. There is a case called
17 Smith versus Hasting, Court of Appeals case, 2005,
18 if I'm not mistaken, but when we looked at the,
19 even the negligence case and even if the Court were
20 to lump the belief of fiduciary duty case into the
21 professional negligence case, proximate cause has
22 two components. There is a causation in fact,
23 that's but for, and there is a second cause, the
24 legal cause, and the legal cause is foreseeability.

25 Going in progression from but for, to

1 those.

2 So, Your Honor, it is a gaping hole and it is
3 difficult but just because it's a difficult burden
4 doesn't mean, as I pointed out, that the plaintiff
5 doesn't have to have some evidence, and Mr.
6 Justice, we know right where he is, he's up there
7 at Greenbrier or basketball practice or wherever.
8 They could get him. He is who they dealt with,
9 that is who they had to have. We submit directed
10 verdict is proper.

11 MR. PENDARVIS: Your Honor, brief response?

12 THE COURT: You don't need to. I think there
13 is a question of fact to submit to the jury and I
14 respectfully deny the directed verdict motion but
15 it's close, I'm telling you that, the causation,
16 but I think there is enough there from the 30(B)(6)
17 witness and Mr. Harrah, all that combined together
18 is enough to get past this motion. That's my
19 ruling.

20 All right. Do you all need a few minutes,
21 or ready to roll?

22 MS. McWILLIAMS: Well, the next matter, Your
23 Honor, we actually do need to consult, the next
24 witness is a very short one but it is going to be
25 read in. I brought somebody from the office to

1 (The Designated portions of Kerry Hall's
2 deposition was read to the jury).

3 BY MS. McWILLIAMS:

4 Q "Good afternoon, Mr. Hall. Would you state
5 your name for the record, please?

6 A Kerry H. Hall, Jr.

7 Q Where do you reside?

8 A Greenville, South Carolina.

9 Q Mr. Hall, are you a practicing attorney?

10 A I am.

11 Q I think, unless anyone objects, we can
12 dispense with the instructions under the rules.

13 Where do you practice, Mr. Hall?

14 A In Greenville with the Wyche law firm.

15 Q And how long have you practiced with the
16 Wyche firm?

17 A 37 years.

18 Q That's the only firm you have been with?

19 A It is.

20 Q Since you got out of law school?

21 A It is.

22 Q Have you ever done anything aside from
23 practicing law for the Wyche firm?

24 A I do quite a bit of work with various
25 nonprofit groups and a lot of particularly

1 nonprofit organizations focused on conservation but
2 other than that I just practice law.

3 Q I guess my question was I just mean did you
4 ever hold any public office like a judgeship or
5 anything like that during your career?

6 A No.

7 Q And are you a certified specialist in
8 taxation law?

9 A I am.

10 Q How long have you been certified?

11 A Probably 25 years.

12 Q You mentioned your work in the conservation
13 area but does your practice have any particular
14 focus, understanding that you are a tax specialist?

15 A My practice is approximately half tax and
16 that would be principally partnership and corporate
17 tax, some state and local tax issues, property tax
18 issues, sales tax issues and about half just
19 general business representation, transactional law.

20 Q And your firm's website mentions you work
21 with conservation organizations and with
22 individuals who seek to place conservation
23 easements, and you mentioned that as something you
24 do as well. Is that correct?

25 A Yes.

1 Q And when you have worked on conservation
2 easements have you generally represented the
3 conservation organization or the landowner or both?

4 A Usually the landowner but occasionally I
5 represent the land trust.

6 Q All right. And can you give me a rough
7 estimate, if not I understand, of how many
8 conservation easements you have handled on behalf
9 of landowners over your numerous years?

10 A I would probably, I would say probably 30 or
11 40.

12 Q Can you give me a percentage of how many of
13 those -- did all those conservation easements
14 actually go on to record, actually be recorded, the
15 deed?

16 A Well, I have worked on deals that didn't
17 happen but most of the conservation easement
18 transactions that I have been retained to assist
19 with have happened, have resulted in a recorded
20 conservation.

21 Q Do you have any understanding based on your
22 role as a director of either the Palmetto
23 Conservation Foundation or a director of the
24 National Land Trust, how many proposed or
25 contemplated conservation easements don't actually

1 get completed and recorded?

2 A Well, it is very common for landowners to
3 hear about conservation easements and then make
4 inquiries about what would be involved, what would
5 be the benefits and detriments and a lot of times
6 they'll, having learned about it, they'll decide
7 that they are not interested or they're not
8 interested at the present time.

9 Q Have you ever been involved in working on a
10 proposed conservation easement and had the
11 landowner during the workup decide they were not
12 interested in going forward?

13 A Yes.

14 Q Now, Mr. Hall, do you know whether or not the
15 documents that you reviewed related to Mr. McLeod?

16 A I believe that I was sent a letter, a copy of
17 a letter which the IRS had sent to Yancey notifying
18 him that they considered him a promoter of abusive
19 tax shelters, a really alarming letter, and that is
20 when I was retained to assist with, dealing with
21 that letter, and the accusation that Yancey was a
22 promoter of abusive tax shelters.

23 Q When you say it was alarming, in the sense of
24 the language, the letter itself?

25 A Yes, it was a very threatening letter to the

1 effect they were going to tell the world that he
2 was a promoter of abusive tax shelters and impose
3 all sorts of penalties on him.

4 Q Had you ever been retained to assist a client
5 on a similar type of letter like this from the IRS?

6 A I have not.

7 Q Now, did you meet with Mr. Lewis and Mr.
8 McLeod, do you remember, about this matter?

9 A I did.

10 Q Was that the next day, the 3rd? Can you
11 tell?

12 A Yes, I think it was on January 3rd. I'm not
13 sure whether we met in person or by phone.

14 Q Let me see, I will show you Defendant's
15 Exhibit 6 and ask you if that refreshes your
16 recollection or is that your notes?

17 MS. MCWILLIAMS: Your Honor, we have marked
18 it as Defendant's 87.

19 A This appears to be my notes from the meeting.

20 Q Now, who is Ken?

21 A Ken Driggers was the Director of the Palmetto
22 Conservation Foundation. He's a lawyer who is very
23 familiar with conservation easements.

24 Q Do you know whether or not he had been
25 retained by Mr. Lewis and Mr. McLeod?

1 A We were all -- well, we were all on board,
2 Crosby and I were on the Board of Palmetto
3 Conservation Foundation and each of us knew Mr.
4 Driggers very well but I can't remember whether we
5 retained him to assist with the transaction.

6 Q And I noted there is a reference to the left,
7 that is just your hourly rate, correct?

8 A Correct.

9 Q And who was supplying you the information
10 that you were writing down, do you remember? Was
11 it Mr. Lewis?

12 A I believe it was Yancey.

13 MS. McWILLIAMS: Your Honor, we would like to
14 publish this to the jury.

15 MR. PENDARVIS: No objection.

16 THE COURT: Without objection.

17 (Notes marked and received in evidence as
18 Defendant's Exhibit Number 87).

19 BY MS. McWILLIAMS:

20 Q And THE last line reads Jim Justice. Is that
21 conservation easement?

22 A Conservation easement abandoned because of
23 IRS letter.

24 Q And based on your conversations with Mr.
25 McLeod and Mr. Crosby Lewis it was your

1 understanding that the James C. Justice
2 conservation easement was abandoned because of the
3 IRS letter?

4 A Yep, that was my understanding.

5 MS. McWILLIAMS: That's all we have, Your
6 Honor.

7 THE COURT: Those are all the appropriate
8 portions?

9 MR. PENDARVIS: That is our understanding,
10 Your Honor.

11 THE COURT: Very good.

12 THE COURT: All right, you may step down.

13 MS. McWILLIAMS: I'm sorry, we did not
14 publish, is it Defendant's 87?

15 THE COURT: It is in without objection, the
16 jury has seen it.

17 MS. McWILLIAMS: I wanted to make sure they
18 saw it.

19 THE COURT: Very good.

20 MS. McWILLIAMS: The next witness, Your
21 Honor, is Hal Hanlin, we call Hal Hanlin.

22

23

24

25

1 GEORGE HAROLD HANLIN, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Thank you. Have a seat on the
4 witness stand and state your name for the record
5 and spell your last name.

6 THE WITNESS: My full name is George Harold
7 Hanlin, last name is spelled H-a-n-l-i-n.

8 DIRECT EXAMINATION BY MS. McWILLIAMS:

9 Q Good afternoon again.

10 A Good afternoon.

11 Q Where do you live, Mr. Hanlin?

12 A I live in Richland County, kind of behind the
13 Veterans Hospital area.

14 Q Where did you grow up?

15 A The same area, in that part of Richland
16 County.

17 Q All right. And you practice law, correct?

18 A I do.

19 Q All right. Are you, do you have a family?

20 A I do. I've got a wife, we're coming up on
21 our 28th anniversary, and two children.

22 Q All right. Is your wife employed?

23 A Yes. My wife is a schoolteacher in Richland
24 District One, she teaches orchestra at five of the
25 elementary schools there.

1 Q And how about your children, how old are
2 they?

3 A One has just turned 13 and he's a student in
4 middle school. And the other is 20 years old and
5 he has been to Vanderbilt, he had mononucleosis, he
6 is home on break right now.

7 Q All right. Mr. Hanlin, were you, you said
8 you grew up in the Columbia area, were you educated
9 here in Columbia?

10 A Yes, in the public schools, graduated from
11 lower Richland High School.

12 Q I won't ask you what year.

13 A Okay.

14 Q But did you go, did you go to further your
15 education beyond high school?

16 A Yes, I did, and graduated from Furman
17 University, graduated in 1981.

18 Q And what did you do after you got out of
19 Furman?

20 A I worked a couple different manufacturing
21 jobs and I lived in a couple different areas, lived
22 in Columbia, lived in Greenville, lived in
23 Greensboro, North Carolina, and the company I
24 worked for in Greensboro started talking about
25 moving me to Tupelo, Mississippi and I said I think

1 law school would be more fun.

2 Q And so where did you go to law school?

3 A I went to law school back home here in
4 Columbia.

5 Q All right. When did you graduate?

6 A I graduated from law school in 1989.

7 Q Did you, did you start a practice or what did
8 you do when you got out of law school?

9 A I had been clerking for a law firm named
10 Cooper, Beard and Dipple here in Richland County,
11 and continued to work with them as a law clerk
12 until I was admitted to the Bar in the fall of
13 1989.

14 Q After you passed the Bar, then describe for
15 the jury what your practice was like.

16 A Well, as a young associate I did whatever I
17 was told to do and initially I was hired to do
18 workers compensation cases, mostly defense work,
19 some plaintiffs work. But I also was told that
20 nobody at the firm wanted to do wills and that was
21 my job, too, and so I started doing wills and
22 probate work as soon as I finished law school.

23 Q Did your practice change at some point after
24 you had gotten out of law school and practiced a
25 while?

1 A It did. I practiced at Cooper Beard and
2 Dipple about two years, then I went to Callison
3 Hoye in 1991 and over that time I continued to
4 become more involved in estate planning and probate
5 matters and in 2001, late summer of 2001 I moved to
6 New York City for a little while to get a graduate
7 degree in taxation at NYU.

8 Q All right. What is that degree called?

9 A Well, the degree is called a Master of Laws,
10 it is abbreviated LLM, and my Master of Laws is in
11 taxation.

12 Q How long does it take to obtain that degree?

13 A It's a one calendar year, one academic year
14 program, you do a fall semester and then do a
15 spring semester.

16 Q All right. Did you stay in New York City
17 after you finished or what did you do?

18 A No, I didn't, I was glad to get back home to
19 Columbia.

20 Q And where did you practice after you
21 graduated?

22 A I went back to work for Callison, Hoye and
23 Robinson.

24 Q All right. And how long did you stay there?

25 A I was there I think until about 2005 and then

1 I received a job offer from Richardson Plowden and
2 went to work for Richardson Plowden.

3 Q So you were at Richardson Plowden in 2007,
4 the time period we're talking about in this case?

5 A That's correct.

6 Q All right. Before we reach that let me back
7 up a little bit. Have you spoken on CLE's, at
8 continuing legal education on taxation and issues
9 like that?

10 A I have. I have spoken at a number of CLE's,
11 I have spoken to the labor and employment section
12 of the South Carolina Bar at the South Carolina Bar
13 convention, I have spoken on national programs,
14 programs that were broadcast nationally in the
15 areas that I practice, a couple national broadcasts
16 of CLE's.

17 Q Besides practicing law did you have any other
18 areas of interest, volunteer work, that sort of
19 thing?

20 A Primarily with my church.

21 Q And how about with respect to, there has been
22 some testimony about Community Open Land Trust, can
23 you explain to the jury how you got involved in
24 that?

25 A I will be glad to. I had conversations with

1 both Sue Green and I believe Mr. McLeod here, it
2 would have been in 2002, not long after I got back
3 from New York, and Sue asked me to be chairman of
4 the trustees of that organization and so I did
5 that, I did that for eight years, until the end of
6 2010.

7 Q And had you had any interest in the
8 environment, conservation, before that?

9 A I did. I had grown up in the outdoors to a
10 large extent and had been in Scouting, doing
11 camping and things like that throughout my life.

12 Q How far did you go in Scouting?

13 A I'm an Eagle Scout.

14 Q So, as the chairman of the trustees of the
15 Community Open Land Trust can you give the jury an
16 idea what your, how your volunteer work, how that
17 work, what it consisted of?

18 A Well, the biggest part of it was considering
19 conservation easement donations and every year from
20 time to time we would receive some proposals from
21 landowners who wanted to contract land to the open
22 area land trust. The Board would meet, we would
23 consider one of those and we would decide whether
24 we wanted to accept certain contributions or not
25 accept certain contributions, and that was the

1 biggest part of that.

2 Q Was conservation easement or taxation and
3 conservation easement something that was covered
4 when you were studying for your LLM?

5 A To some degree it was.

6 Q All right. Now, can you describe for the
7 jury what your practice consisted of when you were
8 at Richardson Plowden in 2007, right in that area
9 of time?

10 A Sure. Well, it was a variety of things. I
11 did a lot of estate planning work, wills and
12 probate administration, that kind of thing. We had
13 some business transactions where we would hammer
14 out partnership agreements, LLC agreements, that
15 kind of thing. We did some probate administration,
16 of course, and that kind of thing, and then the
17 biggest part of, some of my time was devoted to
18 volunteer work for Community Open Land Trust.

19 Q Mr. Hanlin, do you as an attorney have
20 continuing education obligations?

21 A I do. Like every attorney has certain number
22 of hours, I have to be in seminars and get
23 refreshed on the law. Some of that consists of
24 professional ethics requirements and of course I
25 have taught some of that.

1 Q And have you maintained yearly, annually your
2 continuing education requirement?

3 A I have.

4 Q Now, let me ask you, Mr. Hanlin, do you
5 believe that a lawyer should not needlessly
6 endanger his or her client?

7 A Generally speaking I agree with that.
8 Lawyers are governed by the rules of professional
9 conduct and that's the highest authority that an
10 attorney has to answer to and an attorney has to
11 abide by those rules of professional conduct.

12 Q And are those rules contained in the rules of
13 court that every lawyer gets?

14 A They are.

15 Q All right. And you were here in the
16 courtroom when I talked with Dr. Adams, he said he
17 had them on his computer, I think?

18 A Uh-huh (Affirmative).

19 Q Do you believe that a law firm, that those
20 same rules apply to a law firm?

21 A Certainly as a general proposition I think
22 that is true. Again, you have to refer to the
23 rules to understand fully the obligation.

24 Q And do you agree that a client has a right to
25 expect good care in the handling of his or her

1 case?

2 A I think that's true but lawyers have
3 limitations in what they can do for clients and the
4 limitations are set forth in the rules of
5 professional conduct.

6 Q Do you believe lawyers are guarantors of the
7 result of any transaction?

8 A No, certainly not. I mean, professionals,
9 doctors, lawyers, they are hired to do certain
10 things if they agree to do those things but there
11 is not a guarantee. In fact I would be stretched
12 to think of a circumstance where there is a
13 guarantee.

14 Q Do you believe that any risk of loss is
15 unacceptable if reasonable means could be used to
16 minimize or eliminate the risk?

17 A Well, I think generally that's true but then
18 again we all have to look at our rules of
19 professional conduct and be governed by those.

20 Q Do you believe the first priority for a
21 lawyer should be to protect the client's case?

22 A No, actually an attorney has obligations
23 under the rules, for instance, candor to a
24 tribunal, candor to a court, it doesn't matter if a
25 lie would be better for the client, an attorney

1 cannot lie in the courtroom, they have to be guided
2 by those rules of professional conduct and in some
3 cases those rules supersede the lawyer's obligation
4 to help a client.

5 Q Do you believe the greater the risk of injury
6 the greater the duty to provide due care?

7 A Well, I think an attorney has an obligation
8 to provide due care regardless of the size of the
9 matter. For instance, sometimes we get, or are
10 appointed to represent indigent clients and we have
11 to take that duty just as seriously as any other
12 matter.

13 Q Do you agree that if a lawyer is not prepared
14 to handle legal claims that a plaintiff might bring
15 to a lawyer the lawyer should not accept the case?

16 A I think generally that's true. Sometimes
17 problems are found after the initial consultation
18 with the client and so you don't always know all
19 those things in advance.

20 Q All right. Do you think that a lawyer's
21 obligations to provide competent representation is
22 related to the size of the fee that he might, he or
23 she might have in the fee agreement?

24 A No, I think a lawyer has an obligation to do
25 his best in any case, regardless of the size fee.

1 Q So, does a lawyer's responsibility change
2 with the magnitude of the transaction or fee?

3 A I don't think that the lawyer's approach or
4 the lawyer's responsibility and what he does
5 necessarily changes with the size of the fee.

6 Q In your practice, Mr. Hanlin, have you ever,
7 setting aside right now this case, have you ever
8 had to deal with a situation where two clients or
9 you perceived two clients had a conflict?

10 A Well, a lot of what I do is drafting wills
11 for people and a potential conflict comes up almost
12 every week in the office and one simple example of
13 that is when we have clients come in to draft a
14 will, what the client needs to understand when they
15 come in initially is whether the representation
16 that we have for them is going to be a joint
17 representation or not and if it's a joint
18 representation what I explain to them is that I can
19 have no secrets between them, so none of them can
20 tell me something that they want to keep a secret
21 from the other person.

22 Another thing that I have to tell them is
23 that a conflict can develop between them and if it
24 does, then I might have to withdraw from any
25 representation whatsoever and whenever we have two

1 people who want us to represent them jointly then
2 we put that in the fee agreement so that they
3 understand that it's a joint representation and we
4 give them a consent to multiple representations
5 which reiterate those things, it says if something,
6 a dispute arises between them that I can't, I might
7 not be able to handle it, I might very well have to
8 withdraw, probably will have to withdraw, and then
9 I can have no secrets between them. So, that is a
10 common thing.

11 And I have had circumstances where that has
12 come up. I have done estate planning for a couple
13 and then I have had one spouse call me up after the
14 fact and say, "Now that we have our wills done can
15 you change just my will," and I have had to say,
16 "No, I can't. If you want that done you will have
17 to go to another lawyer because our representation
18 of you is joint with your husband and so I can't
19 have any secrets between you and your husband."

20 Q Now, you mentioned, when I asked you about
21 your involvement in the Community Open Land Trust,
22 that you had actually been contacted about that
23 from Sue Green and from Mr. McLeod. Tell the jury
24 how you came to know Mr. McLeod.

25 A Well, I'm not sure that I recall precisely

1 but I have been interested in conservation issues
2 for some time, certainly the outdoors, and Mr.
3 McLeod is well known in those circles and I believe
4 that he and I worked on an easement together for
5 some people that we were both acquainted with and
6 got to know each other personally through that
7 work.

8 Q All right. And specifically did you ever
9 have any problems in working with Mr. McLeod, did
10 you all work well together?

11 A Oh, I thought we did. I liked Mr. McLeod,
12 even today, he is a wonderful gentleman, just a
13 delight to be around, I got along with Yancey very
14 well.

15 Q All right. What was your understanding of
16 his level of sophistication in conservation
17 matters, specifically conservation easements?

18 A Well, Mr. McLeod is kind of a guru about that
19 kind of thing in South Carolina. I know I have
20 been to occasions where he has spoken, I don't know
21 if he has been to any of them where I have spoken
22 but he is an attorney. As I recall he was on the
23 Law Review when he was in law school, he has been
24 involved in conservation issues just about his
25 whole career, as I understand it. I think he knows

1 as much about conservation as anybody I know.

2 Q All right. Now; did you have occasion to be
3 involved in any conservation easements with Mr.
4 McLeod before the proposed Jim Justice transaction?

5 A Yes, I did.

6 Q And when were those conservation easements?

7 A There was one --

8 Q Generally, if you recall?

9 A There was one that I believe was in 2002 and
10 I think that was the first one where we actually
11 worked together, and then we had worked together on
12 two in 2006 and then we had had some discussion
13 about some others but none that had been recorded
14 or anything.

15 Q All right. And in connection with the
16 conservation easement in 2002 and the two in 2006,
17 did those actually go all the way and get recorded
18 and become donated property to a qualified
19 organization?

20 A They did, yes.

21 Q All right. And who did you represent in
22 those transactions?

23 A I represented the landowner in each of those
24 transactions.

25 Q All right. Now, in connection with the

1 proposed Justice transaction, when do you recall or
2 what do you recall of how you were first contacted
3 about that transaction?

4 A It was later in the year I think I got a call
5 from Mr. McLeod, probably October, 2007.

6 Q All right. And what, describe for the jury
7 what Mr. McLeod asked you to do.

8 A Well, Mr. McLeod had a tax question and he
9 wanted some advice about whether a conservation
10 easement could be valued the way that he wanted to
11 value it and what he wanted to do was to consider
12 the mitigation value of the land and develop the
13 conservation easement value from the mitigation
14 value, which was a little bit unusual and not a
15 question I had considered before.

16 Q And did you -- what did you do in response to
17 that?

18 A I researched the question, I did some on line
19 research under Tax Code 170(H) which I think has
20 been mentioned here before, and looked to see if
21 there was any reason why the conservation easement
22 could not be valued on the basis of the mitigation
23 project that had been considered and I came to the
24 conclusion that there was no reason that that could
25 not be done.

1 Q All right. Now, when you were first
2 contacted by Mr. McLeod did you consider Mr. McLeod
3 or Y.E.S. to be your client?

4 A I did.

5 Q And did you understand that there would be a
6 landowner involved in this transaction, Jim
7 Justice?

8 A Well, I knew there would be a landowner
9 involved, there is always a landowner involved.
10 When you contract a conservation easement you've
11 got to have property that has some conservation
12 value and you have to contract it to a qualified
13 conservation organization, so the landowner is a
14 given.

15 Q And why -- did you consider whether or not
16 you could represent both Y.E.S. and Mr. Justice?

17 A Well, that question did not come up
18 initially. I was never asked by Mr. Justice to
19 represent him, I was never asked by any of his
20 representatives to represent Mr. Justice and I'm
21 sure that my law firm would have been glad if I had
22 been able to acquire a billionaire as a client but
23 I don't believe I ever had that opportunity and
24 certainly not initially. Initially when Yancey and
25 I talked it was about whether this easement could

1 be valued based on the mitigation value of the
2 property.

3 Q Did you ever actually speak with Jim Justice
4 directly?

5 A No, I have never had any direct contact with
6 Jim Justice.

7 Q All right. Did you have any contact with
8 anybody else associated with Jim Justice?

9 A Yes. I did talk to Mr. David Harrah, and Mr.
10 Harrah, Mr. Harrah I think testified earlier in
11 this matter, he is a CPA and one of Mr. Justice's
12 tax advisers as I understand it.

13 Q And what was your understanding of Mr.
14 Harrah's role, if any?

15 A Well, he was the contact we were given so I
16 didn't have any access to Mr. Justice himself but I
17 got word through Mr. McLeod that we were to talk to
18 Mr. Harrah about things.

19 Q All right. Now, let me ask you, Mr. Hanlin,
20 I'm looking for an exhibit that is already in
21 evidence, it is Plaintiff's Exhibit 10, do you have
22 that there?

23 MS. McWILLIAMS: Beg the Court's indulgence.

24 Q Now, this is already in evidence. Mr.
25 Hanlin, do you recognize this fee agreement between

1 Y.E.S. and Richardson Plowden?

2 A I do.

3 Q All right. It is dated December 5th. Now,
4 is there any reason why or can you explain for the
5 jury why the fee agreement is dated December 5th,
6 2007, when you had apparently already undertaken to
7 do some research for Mr. McLeod?

8 A Well, my practice, and I think it is common
9 practice, is that we don't always send out the fee
10 agreement first thing. Sometimes we talk to the
11 client about how we're going to arrange our fees
12 and then if they have something pressing that needs
13 doing we'll go ahead and take care of the pressing
14 matter with the understanding that the fee
15 agreement will be along.

16 Q All right. Did you ever have, did Richardson
17 Plowden ever have any agreement with Y.E.S., other
18 than this fee agreement that has been marked as
19 Plaintiff's Exhibit 10?

20 A No, ma'am.

21 Q In connection with this conservation easement
22 for the Black River Farms?

23 A No, ma'am.

24 Q All right. Now, could you have represented
25 both, in your opinion, Mr. Justice and Y.E.S.

1 jointly?

2 A No.

3 Q And why is that? Can you explain that to the
4 jury?

5 A Well, we had started out the representation
6 of just Y.E.S. and if you add a client you have to
7 give a lot of careful consideration to whether you
8 can add, whether there is a conflict, whether
9 that's the right thing to do, and my belief to this
10 day is that we could not have represented Mr.
11 Justice because we had already given tax advice to
12 Mr. McLeod and my opinion was that Mr. Justice
13 needed to retain his own tax advisers and not rely
14 on any tax information that I had supplied to Mr.
15 McLeod.

16 Q All right. And did you in fact write a
17 letter to Mr. Justice to that effect?

18 A I did.

19 Q I want to show you Plaintiff's Exhibit 11,
20 Mr. Hanlin. Is that the letter you just testified
21 you sent?

22 A It is.

23 Q All right. Now, could you explain for the
24 jury, referring back to Plaintiff's Exhibit 10, Mr.
25 Hanlin, the fee for services rendered is specified

1 in paragraph three. Right?

2 A Correct.

3 Q All right. And could you explain to the jury
4 how that was arrived at with Mr. McLeod?

5 A Well, Mr. McLeod and I had been talking about
6 that for some months. As I recall, there is a memo
7 to him dated June 1st, I think it is, 2007,
8 discussing similar arrangements in another matter,
9 so Mr. McLeod and I had been discussing it for a
10 number of months.

11 Q At anytime did you attempt to deceive or
12 trick Mr. McLeod into signing this fee agreement?

13 A Certainly not.

14 Q All right. Did you believe that based on the
15 transaction and the work that was being done that
16 it was an appropriate fee?

17 A I did and still do.

18 Q Did Mr. McLeod, I may have cut off your
19 answer, I apologize, did Mr. McLeod express his
20 satisfaction or agreement with --

21 MR. PENDARVIS: Your Honor, excuse me.

22 THE COURT: Yes.

23 MR. PENDARVIS: She's leading a good bit. I
24 have been a little liberal, I ask she ask direct
25 questions.

1 THE COURT: Sustained as to leading.

2 BY MS. McWILLIAMS:

3 Q Mr. Hanlin, what if anything did Mr. McLeod
4 express to you regarding the fee arrangement that
5 he, that Y.E.S. entered into with Richardson
6 Plowden?

7 A Well, as I said, we had been discussing this
8 type arrangement for some months but I didn't
9 receive any comment from him about this fee
10 agreement I sent on December 5th.

11 Q Did you undertake any other research for Mr.
12 McLeod in connection, or for Y.E.S., rather, in
13 connection with your representation of Y.E.S.?

14 A Well, researched a variety of topics, some of
15 which had to do of course with the valuation of the
16 easement, some of which had to do with other tax
17 topics.

18 Q All right. And how did you and Mr. McLeod
19 communicate about this matter?

20 A Well, we communicated a couple ways. We had
21 telephone conversations back and forth of course
22 and also sent emails and received emails from
23 Y.E.S.?

24 A All right.

25 Q And also copied Mr. McLeod on correspondence

1 to others involved in the transaction, the Justice
2 group up in West Virginia.

3 Q Let me show you what has been marked as
4 Defendant's Exhibit 34, Mr. Hanlin, and ask if you
5 can identify that for the jury?

6 A I can.

7 Q And what is it?

8 A Well, it looks like two emails. The first at
9 the bottom of this exhibit is an email to Brenda
10 Davis who is a staffer at Community Open Land Trust
11 we have been referring to as COLT, and it is also
12 an email to Mr. McLeod and both those pertain to
13 the tax treatment that farmers and ranchers receive
14 for conservation easements.

15 Q All right. And can you identify, is this
16 the, the top one, the email directed to Mr. McLeod,
17 can you tell the jury from the language whether or
18 not this was in response to a request from Mr.
19 McLeod, or can you tell?

20 A It was. Interestingly, I got the same
21 question from Miss Davis at COLT and Mr. McLeod
22 about the same time and the question was what tax
23 benefits were available to farmers and ranchers and
24 I see that I forwarded the more detailed email that
25 I had sent to Miss Davis, that I forwarded to Mr.

1 McLeod in addition to adding some other
2 information.

3 Q Now, this is November 8th, 2007, is that
4 correct?

5 A Both of the emails were November 8th, 2007.
6 One appears to be 9:44 a.m., the other one appears
7 to be 10:00 o'clock a.m.

8 MS. McWILLIAMS: We would offer Defendant's
9 Exhibit 34 in evidence, Your Honor.

10 MR. PENDARVIS: No objection.

11 THE COURT: Defendant Exhibit 34 is admitted
12 without objection.

13 (November 8, 2007, emails marked and received
14 in evidence as Defendant's Exhibit 34).

15 BY MS. McWILLIAMS:

16 Q Now, do you recall when COLT became involved
17 in the project? Does the mail refresh your
18 recollection or do you know?

19 A I don't recall specifically off the top of my
20 head. It would have been somewhere in the fall of
21 2007.

22 Q All right. Attached to this email is an
23 actual statute but it appears you were actually
24 discussing Tax Code Section 170(H) with Miss Davis,
25 is that correct?

1 A That's correct.

2 Q Does she have a specific role at COLT?

3 A Well, she's a staffer there. She works
4 part-time for COLT, I think she assisted Sue Green
5 in producing base line studies and doing some of
6 the administrative work of the organization.

7 Q All right. As of November 8th, 2007, do you
8 know whether or not it was already envisioned what,
9 if any, role COLT might play?

10 A Well, I think by that time Mr. McLeod and I
11 had discussed whether Community Open Land Trust,
12 COLT, may be interested in receiving a conservation
13 contribution from the farm near Manning.

14 Q Mr. Hanlin, at some point did COLT actually
15 approve the acceptance of the conservation easement
16 if Mr. Justice had continued to place it?

17 A Yes, it did.

18 Q And in connection with the Board vote, did
19 you vote to approve the acceptance of the
20 conservation easement as had been made?

21 A No, ma'am. My role was to make COLT and the
22 other Board members aware of the possibility of
23 this conservation contribution but I abstained from
24 voting since I had other involvement with the
25 matter.

1 Q Is that maybe another example of a conflict?

2 A Yes. I mean, I certainly had some
3 professional involvement so I didn't want my
4 professional involvement in any way influence the
5 vote on the matter, so I abstained from voting.

6 Q All right. And let me just, if I could, ask
7 you to identify a couple documents, Mr. Hanlin,
8 that are not in the chain. Let me show you what
9 has been marked as Defendant's Exhibit 47 and see
10 if you can identify that?

11 A Yes, I can.

12 Q And what is Defendant's Exhibit 47?

13 A That's an email sent from me to Mary Mohr at
14 Yancey Environmental Solutions asking about the
15 consultation agreement in this matter.

16 Q All right.

17 MS. McWILLIAMS: Your Honor, we would offer
18 Defendant's Exhibit 47 into evidence.

19 MR. PENDARVIS: No objection.

20 THE COURT: 47 is admitted admitted without
21 objection.

22 MS. McWILLIAMS: Thank you, Your Honor.

23 (November 27, 2007 Mohr to Y.E.S. email

24 marked and received in evidence as

25 Defendant's Exhibit Number 47).

1 BY MS. McWILLIAMS:

2 Q Now, what is the date of the email from you?

3 A It is dated, excuse me, dated November 27,
4 2007.

5 Q All right. As of that date what were you
6 trying to find out from Miss Mohr or Y.E.S.?

7 A Well, it appears from the exhibit that Dr.
8 Hawkins had been contacted about an appraisal but
9 we still hadn't received the signed consultation
10 agreement from Mr. Justice, so we were kind of
11 pressing to get that consultation agreement signed.

12 Q All right. But notwithstanding that, you
13 didn't have an actual signed one but were you still
14 attempting to respond to matters that you were
15 asked to do?

16 A It looks like we were still trying to press
17 forward on the assumption that Mr. Justice would
18 sign the consultation agreement.

19 Q All right. Did there come a point in time,
20 let's go right to this, Mr. Hanlin, when you found
21 out about this IRS investigation?

22 A Yes.

23 Q Can you explain for the jury how you --

24 THE COURT: Let me talk to the lawyers.

25 (Unrecorded bench conference).

1 THE COURT: We're going to break for the day.
2 You all put your stuff away, don't discuss the
3 case, 9:00 o'clock in the morning, Miss Meyer.

4 JUROR: Yes.

5 THE COURT: We'll start at 9:00 o'clock. We
6 don't have anything like the videos, getting those
7 videos organized is difficult, so I apologize for
8 that, that will be my fault, but you all have a
9 good evening, see you in the morning.

10 (Jury excused from the courtroom).

11 THE COURT: All right, what time would you
12 like us here? I drop my son off and pick Megan up
13 about 7:30, I will be here 8:30, a quarter until
14 9:00.

15 You can step down, Mr. Hanlin. You
16 understand your limitations conversing with your
17 lawyers tonight, you can talk about the weather,
18 that's it.

19 THE WITNESS: Okay.

20 THE COURT: All right. Not having a video or
21 something, admissibility of something, I don't
22 anticipate any motions beforehand. I'll be here
23 early anyway, so we'll start 9:00 o'clock sharp.

24 MS. McWILLIAMS: Thank you, Your Honor.

25 THE COURT: Okay, thank you.

(Recessed at 4:48 p.m., March 5, 2012).

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4 I, the undersigned Henry P. Young, Official
5 Court Reporter for the Eighth Judicial Circuit of
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 transcript of record of all the proceedings had and
9 evidence introduced in the trial of the captioned
10 case in the Circuit Court for Richland County,
11 South Carolina, on the 28th day of February, 2012.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14 October 8, 2012
15
16
17

18 Henry P. Young

19 Court Reporter
20
21
22
23
24
25

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2010-CP-40-3297

2 COUNTY OF RICHLAND

3
4 YANCEY ENVIRONMENTAL)
5 SOLUTIONS, LLC, ET AL,)

6 -vs-)
7)

8 RICHARDSON PLOWDEN &)
9 ROBINSON, ET AL,)

Defendants.)

10
11 February 27-March 6, 2012

12 B E F O R E:

13 HONORABLE EUGENE GRIFFITH, JR.
14

15 A P P E A R A N C E S:

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Attorneys for the Defendant

20
21 Henry P. Young

22 Court Reporter
23
24

25 VOLUME V of V

1 (Reconvened at 9:07 a.m., March 6, 2012).

2 THE COURT: Are you all ready to go?

3 MS. McWILLIAMS: Just one second.

4 THE COURT: Go get them for me, please.

5 BAILIFF: All right.

6 (The jury returned to the courtroom).

7 BAILIFF: The jury is all present, Your
8 Honor.

9 THE COURT: Thank you very much.

10 Miss Meyer, we're ready to continue.

11 Miss McWilliams, still your witness.

12 MS. McWILLIAMS: Thank you, Your Honor.

13 BY MS. McWILLIAMS:

14 Q Good morning, Mr. Hanlin. I believe when we
15 broke yesterday I had posed a question about the
16 IRS notice. I would like to back up, if I could,
17 and ask you a couple questions just for
18 clarification. Were you involved as counsel for
19 Y.E.S. or anybody in connection with the proposed
20 mitigation bank that there has been some testimony
21 about in the summer of 2007?

22 A No, ma'am.

23 Q When did you first become aware that that
24 had, there had been some study of that or some look
25 at that?

1 A It would have, excuse me, been when Mr.
2 McLeod called me in the fall, which I think was
3 maybe late October, something like that.

4 Q All right. I will show you a couple more
5 documents. I hand you what has been marked as
6 Defendant's Exhibit 48 and ask you if you can
7 identify that?

8 A It's an email mail from me to Dr. Hawkins.

9 Q What is the date of that?

10 A November 27th, 2007.

11 MS. MCWILLIAMS: We offer Defendant's Exhibit
12 48 in evidence.

13 MR. PENDARVIS: No objection.

14 THE COURT: Defendant's 48 in without
15 objection.

16 (November 27th, 2007, email marked and
17 received in evidence as Defendant's Exhibit
18 Number 48).

19 BY MS. MCWILLIAMS:

20 Q Now, Mr. McLeod, why were you sending this
21 email to Dr. Hawkins?

22 A Mr. Hanlin, I assume you meant?

23 Q Mr. Hanlin, I'm sorry, I apologize. Mr.
24 Hanlin, why were you sending this email to Dr.
25 Hawkins?

1 A Well, let me look real quick. It looks like
2 we needed Dr. Hawkins to do the appraisal at that
3 point. At that point we were trying to keep that
4 moving forward, and it also says that we expected
5 our consultation agreement to be signed that day.

6 Q That's right. In the second paragraph, is
7 this -- was your email in response to anything?

8 A If it was, I do not recall.

9 Q Do you see the email right below it where Mr.
10 Hawkins has emailed you?

11 A Yes, I do, I'm sorry. Of course that would
12 have come first. It said, "Had not heard from you
13 since I sent proposal, should I still plan on being
14 there on the 11th of December?"

15 Q What was the 11th of December?

16 A I don't know what day of the week that was.

17 Q I mean what was going to occur?

18 A I think he was planning to come down to the
19 site and make a site visit and look at the property
20 so that he could then proceed to do this appraisal
21 work.

22 Q And it says in there, you actually tell him
23 to still plan to come, correct?

24 A That's right. I mean, we hadn't had any
25 indication to the negative that his proposal would

1 not be signed nor any of the other proposals would
2 not be signed.

3 Q All right. Who did you copy on your email?

4 A I copied Yancey Environmental Solutions, Mr.
5 McLeod.

6 Q Did you hear anything from Mr. McLeod after
7 you sent this email to Dr. Hawkins and cc'd Yancey
8 Environmental Solutions about timing or concern or
9 rescheduling the site visit? Do you remember
10 anything like that?

11 A If I did I don't recall. I knew that Mr.
12 McLeod and I were in regular communication along
13 this time and I copied him on my emails, we had
14 phone calls, we talked about -- I don't know if we
15 talked about this specifically or not.

16 Q All right. I'm going to show you what, Mr.
17 Hanlin, has been marked as Defendant's Exhibit 52
18 and ask you if you can identify that for the jury
19 and the Court?

20 A It's an email also dated November 27th from
21 me to Yancey Environmental Solutions.

22 Q All right. Is that your handwriting on the
23 no suggested changes, do you recognize whose
24 handwriting that is?

25 A I don't believe that is my handwriting. It

1 appears -- I'm not sure. It could be Mr. McLeod's
2 handwriting or someone else's but I couldn't say.

3 Q All right.

4 MS. MCWILLIAMS: Your Honor, we would offer
5 Defendant's Exhibit 52 in evidence.

6 MR. PENDARVIS: No objection, Your Honor.

7 THE COURT: Defendant's 52 without objection.

8 (November 27, 2007 email marked and received
9 in evidence as Defendant's Exhibit 52).

10 BY MS. MCWILLIAMS:

11 Q Now, Mr. Hanlin, you asked Mr. -- it is
12 actually addressed to Mary, is that correct, Mr.
13 McLeod's sister?

14 A Well, yes, actually all the emails that I
15 sent to Mr. McLeod would have gone through Mary.
16 Mr. McLeod doesn't use a computer, as we heard him
17 say earlier, so this one in particular was
18 addressed to Mary.

19 Q All right. And you asked her to get Yancey
20 to review this letter and if they needed any
21 changes, to tell you?

22 A That's correct.

23 Q Now, what was the purpose of this letter to
24 Mr. Justice which is the attachment? It says care
25 of David Harrah, do you see that?

1 A I do. Give me a second to read it, if you
2 would.

3 Q Sure.

4 A It looks like the letter was to attempt to
5 prompt Mr. Justice to sign Dr. Hawkins' proposal
6 and of course that would have been a proposal to do
7 an appraisal on the property and it mentions that
8 Dr. Hawkins is very busy that time of year and we
9 need to act quickly if we want Dr. Hawkins to work
10 with us on this project.

11 Q All right. Are you aware of whether or not
12 that agreement that you have prompted Mr. Harrah to
13 get Mr. Justice to sign was ever signed?

14 A To my knowledge it was never signed.

15 Q I will show you what has been marked as
16 Defendant's Exhibit 55, Mr. Hanlin.

17 A Yes, ma'am, I see that.

18 Q All right. Can you identify what 55 is?

19 A Well, it's two emails. The first one is from
20 me to my assistant Sandra Lummer on November 8,
21 2007, talking about a fee agreement with Wyche and
22 Guest. The second is a reply email from Sandra to
23 me talking about the fee agreement or setting up a
24 file, yes, fee agreement and setting up a file.

25 MS. MCWILLIAMS: Your Honor, the defendants

1 would offer Exhibit 55 into evidence.

2 MR. PENDARVIS: No objection, Your Honor.

3 THE COURT: Defendant's 55 in without
4 objection.

5 (November 8, 2007 email marked and received
6 in evidence as Defendant's Exhibit 55).

7 BY MS. MCWILLIAMS:

8 Q Now let me ask you some questions about this,
9 Mr. Hanlin. There has been some exhibits marked
10 previously through Professor Adams, do you remember
11 that?

12 A Yes, I remember some exhibits being
13 introduced.

14 Q All right. And we looked at the fee
15 agreement yesterday. Do you have, do you need that
16 in front of you or do you know what, do you
17 understand your agreement?

18 A I understand the agreement.

19 Q All right. Now, under the agreement did
20 Y.E.S. have to pay anything to RPR, and if so,
21 when?

22 A Well, it was not obligated to pay anything to
23 RPR that I recall. Well, it says one-third of any
24 fees paid to Yancey Environmental Solutions. Maybe
25 I should get that agreement in front of me just to

1 make sure I recall the particulars.

2 Q Plaintiff's 10, Mr. Hanlin.

3 A Okay. I'm sorry, what was your question?

4 Q My question is, is the payment to RPR
5 dependent on anything?

6 A Well, it depends on what is paid to Y.E.S.
7 and so if Y.E.S. isn't paid anything, then
8 Richardson Plowden, the other party to the
9 agreement, isn't paid anything.

10 Q All right. Would you describe that as -- let
11 me back that up. If the agreement had been an
12 hourly one, your typical hourly one as you said you
13 had with the other landowners that you represented
14 before --

15 A Right.

16 Q -- What if anything would Y.E.S. have had to
17 pay if you had an hourly agreement with Y.E.S.?

18 A Well, if we had an hourly agreement, then we
19 would have billed Y.E.S. probably on a montly basis
20 and they would have had to pay as we worked along
21 on the project rather than when they got paid.

22 Q All right. And if, as I understand your
23 testimony, if Y.E.S. does not get paid he does not
24 owe Richardson Plowden anything?

25 A That's correct.