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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R Lee, Circuit Court Judge

Case No 05-CP-40-0749

Dutch Fork Development Group II, LLC and
Dutch Fork Realty, LLC,

Respondents,

v

SEL Properties, LLC and Stephen E Lipscomb,
Defendants, of whom Stephen E Lipscomb is the,

Appellant

RECORD ON APPEAL
Vol I of VIII
(Pages 1 - 492)

A Camden Lewis
Keith M Babcock
Brady R Thomas
LEWIS & BABCOCK, L L P
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
Telephone (803) 771-8000
Facsimile (803) 733-3534

Glenn E Bowens, Esquire
Anthony S H Catone, Esquire
POPE & BOWENS, P A
Post Office Box 665
Blythewood, SC 29016
Telephone (803) 714-7766
Facsimile (803) 714-0775

ATTORNEYS FOR THE APPELLANT

ATTORNEYS FOR RESPONDENTS

ORIGINAL

Glenn E Bowens, Esquire
Post Office Box 665
Blythewood, SC 29016
803 714 7766
803 714 0775

Charles E Carpenter, Jr , Esquire
Carpenter Appeals & Trial Support, LLC
1201 Main Street, Suite 980
Columbia, SC 29201
803 758 2886

ATTORNEYS FOR RESPONDENTS

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN CIVIL CASE

CASE NO 2005-CP-40- 0749

Dutch Fork Development Group II, LLC
Dutch Fork Realty, LLC
PLAINTIFF(S)

SEL Properties, LLC
Stephen E Lipscomb
DEFENDANT(S)

CHECK ONE

- ☐ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON) ☐ Rule 12(b), SCRCP, ☐ Rule 41(a), SCRCP (Vol Nonsuit), ☐ Rule 43(k), SCRCP (Settled), ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON) ☐ Rule 40(j) SCRCP, ☐ Bankruptcy, ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award, ☐ Other

IT IS ORDERED AND ADJUDGED ☐ See attached order, ☒ Statement of Judgment by the Court

As to the Cause of Action for Tortious Interference with a Contract, Defendant Stephen E Lipscomb's Motion for Judgment Notwithstanding the Verdict, for Nisi Remittur or in the Alternative a New Trial Absolute, or a New Trial Upon the Facts is **DENIED**

Dated at Columbia, South Carolina, this 1 day of April, 2008



PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this 8th day of April 2008 to attorneys of record or to parties (when appearing pro se) as follows

Glen E Bowens
Tony S Catone
ATTORNEY(S) FOR THE PLAINTIFF(S)

Keith M Babcock
Brady R Thomas
ATTORNEY(S) FOR THE DEFENDANT(S)

SHARON A SCOTT

CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN CIVIL CASE

CASE NO 2005-CP-40- 749

Dutch Fork Development Group II, LLC
Dutch Fork Realty, LLC
PLAINTIFF(S)

SEL Properties, LLC
Stephen E Lipscomb
DEFENDANT(S)

CHECK ONE

- ☐ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON) ☐ Rule 12(b), SCRCP, ☐ Rule 41(a), SCRCP (Vol Nonsuit), ☐ Rule 43(k), SCRCP (Settled), ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON) ☐ Rule 40(j) SCRCP, ☐ Bankruptcy, ☐ Binding arbitration, subject to right to restore to confirm vacate or modify arbitration award, ☐ Other

IT IS ORDERED AND ADJUDGED ☐ See attached order, ☒ Statement of Judgment by the Court

As to the cause of action for Breach of Contract Accompanied by a Fraudulent Act, Defendant SEL Properties, LLC's motion for a Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is DENIED

Dated at Columbia, South Carolina, this 1st day of April, 2007

Alb. Bruce Lee
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this 8th day of April 2008 to attorneys of record or to parties (when appearing pro se) as follows

Glen E Bowens
Tony S Catone
ATTORNEY(S) FOR THE PLAINTIFF(S)

Keith M Babcock
Brady R Thomas
ATTORNEY(S) FOR THE DEFENDANT(S)

S/EPHIE A. SCOTT
CLERK OF COURT

SCRCP FORM 4 (Revised 5/00)

0000002

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Dutch Fork Development Group II, LLC)
and Dutch Fork Realty, LLC,)
Plaintiffs,)
vs)
SEL Properties, LLC and)
Stephen Lipscomb,)
Defendants)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Civil Action No 2005-CP-40 00749

VERDICT

07 NOV -8 AM 9 42
FILED
BARBARA A SCOTT
C C & GS

FOR THE BREACH OF CONTRACT CAUSE OF ACTION

We, the jury, unanimously find for the

✓ PLAINTIFFS,

Two Hundred Ninety Nine Thousand (\$ 299,144).00
Actual damages
one hundred forty-four dollars

FOR THE BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT
CAUSE OF ACTION

We, the jury, unanimously find for the

✓ PLAINTIFFS,

One million dollars (\$ 1,000,000) 00
Punitive damages

DEFENDANT SEL PROPERTIES, LLC

FOR THE TORTIOUS INTERFERENCE WITH CONTRACT CAUSE OF ACTION

We, the jury, unanimously find for the

✓ **PLAINTIFFS,**

Three million dollars (\$3,000,000)
Actual Damages

One million dollars (\$1,000,000)
Punitive damages

_____ **DEFENDANT STEPHEN LIPSCOMB**

— Carilyn B. Enos #66
Foreperson

Date November 7, 2007

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO 2005-CP-40-0749

Antech Fork Development
Group, LLC

Stephen E. Lepson, et al

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE

☒ **JURY VERDICT** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON)** ☐ Rule 12(b) SCRPC, ☐ Rule 41(a), SCRPC (Vol Nonsuit) ☐ Rule 43(k) SCRPC (Settled) ☐ Other _____

☐ **ACTION STRICKEN (CHECK REASON)** ☐ Rule 40(j) SCRPC ☐ Bankruptcy, ☐ Binding arbitration subject to right to restore to court firm vacate or modify arbitration award ☐ Other _____

IT IS ORDERED AND ADJUDGED ☐ See attached order ☐ Statement of Judgment by the Court

Verdict for Plaintiff as outlined in verdict form. Post trial review of punitive damages conducted. Defendants have 10 days to file post trial motions. Atty fee request to be filed within 10 days.

Dated at Columbia South Carolina this 7th day of November, 2007

Alfred Lee
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows

Glenn E. Bowens

Keith M. Babcock

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
Dutch Fork Development Group II,)
LL C & Dutch Fork Realty, L L C)
Plaintiffs,)
vs)
SEL Properties, L L C & Stephen)
E Lipscomb)
Defendant)
_____)

IN THE COURT OF COMMON PLFAS

Civil Action No _____

COMPLAINT
(Jury Trial Demanded)

FILED
CLC
CS
1
MAY 2 18

NOW COMES the Plaintiffs above-named, complaining of the Defendant, above-named, and does allege and show unto this Honorable Court as follows

- 1 That the Plaintiffs are corporations organized under the laws of South Carolina and are licensed to do business in South Carolina with their principle place of business in Richland County
- 2 That upon information and belief Defendant SEL Properties, L L C (SEL) is a citizen and resident of South Carolina with its principle place of business in Richland County
- 3 That upon information and belief the Defendant Stephen E Lipscomb (Lipscomb) is a citizen and resident of South Carolina and Richland County
- 4 That this Honorable Court has jurisdiction of the parties and the subject matter herein set forth and venue is proper in Richland County
- 5 Upon information and belief, on or about November 14, 2000, the Plaintiffs entered into a written contract with the Defendant SEL for the development, marketing, and sale of certain property, known as Rolling Creek Estates, a/k/a The Courtyards at Rolling Creek, a/ka/ Rolling Creek owned by the Defendant This contract covered Phases I, II, and III of the development Subsequently, the parties entered into a second contract on or about October 17, 2002 covering Phase IV of the development

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

6 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim

7 Under the terms of the contract and in exchange for the services of the Plaintiffs in the
marketing, development and sale of the Rolling Creek Estates a/k/a the Courtyards at Rolling
Creek, a/k/a Rolling Creek the Defendant SEL was to pay to the Plaintiff Dutch Fork
Development Group II ("DFDG") the sum of Nine Thousand and 00/100 (\$9,000 00) Dollars per
month for a six month period for a total payment of Fifty-Four Thousand and 00/100
(\$54,000 00) Dollars Upon the sale of 60% of the lots developed in Phase I and the letting of
the contract for Phase II, the Defendant SEL was to pay to the Plaintiff DFDG Nine Thousand
and 00/100 (\$9,000 00) Dollars per month for six months for a total of Fifty-Four Thousand and
00/100 (\$54,000 00) Dollars for services rendered regarding Phase II of the development Upon
the sale of 60% of the lots in Phase I and II and the letting of the contract for Phase III, the
Defendant SEL was to pay to the Plaintiff the sum of Nine Thousand and 00/100 (\$9,000 00)
Dollars per month for six months for a total of Fifty-Four Thousand and 00/100 (\$54,000 00)
Dollars for Phase III In addition to these amounts, the Defendant SEL was to pay the Plaintiffs
25% of the net profits received from the lots sold in Phases I, II, and III

8 Plaintiff Dutch Fork Realty was to have the exclusive right to sell the developed lots and
receive a 10% commission upon closing the sale

9 Upon information and belief all conditions for payment of the above referenced sums to the
Plaintiffs have been satisfied The Defendants, however, have repeatedly refused, without legal
justification, to pay the remaining balance of Seventy-One Thousand and 00/100 (\$71,000 00)
Dollars owed to the Plaintiffs

10 The Defendant SEL is in breach of its contract with the Plaintiffs As a result of the
Defendant SEL's refusal to pay for services performed by the Plaintiffs, the Plaintiffs have been

damaged

FOR A SECOND CAUSE OF ACTION
(Conversion)

11 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim

12 Upon information and belief Defendant Lipscomb has unjustifiably refused to turn over monies belonging to the Plaintiffs after repeated demands for those monies by the Plaintiffs. Instead, Defendant Lipscomb has retained these monies and converted the same to his own use.

13 Upon information and belief, Defendant Lipscomb knowing that he had possession of monies belonging to the Plaintiffs, and in an attempt to induce Plaintiffs to accept a lower amount, has offered to pay the sum of Fifty-Seven Thousand and 00/100 (\$57,000.00) Dollars provided the Plaintiffs will also terminate their relationship with SEL. Plaintiffs acceptance of this offer would deprive Plaintiffs of both future earnings they are due under the contract as well as monies currently in the possession of Defendant Lipscomb. Such an offer is not made in good faith and is calculated to permanently deprive the Plaintiffs of their property currently in the possession of Defendant Lipscomb and to deprive them of their present contractual rights and convert the same to the use of Defendant Lipscomb.

FOR A THIRD CAUSE OF ACTION
(Tortious Interference with Contract)

14 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim

15 Upon information and belief Defendant Lipscomb has personally and intentionally interfered with and prevented Defendant SEL from performing its obligations under its contract with the Plaintiffs by coercing, influencing and inducing SEL to breach its contract with the Plaintiffs by failing to tender payment to the Plaintiffs for services rendered and in accordance with the terms of the contract.

16 Upon information, and belief Defendant Lipscomb had actual or constructive knowledge of the contract as he signed the contract on behalf of SEL. Furthermore, Defendant Lipscomb has offered to pay the sum of Fifty Seven Thousand and 00/100 (\$57,000 00) Dollars to coerce and induce Plaintiffs to terminate their relationship with SEL and to cause and procure the present breach of this contract as described above in the Plaintiffs' First Cause of Action. Such an offer is not made in good faith and is calculated to permanently deprive the Plaintiffs of their property currently in the possession of Defendant Lipscomb and to deprive Plaintiffs of their present contractual rights and benefits under the contract, to terminate the relationship between the Plaintiffs and Defendant SEL and to deprive Defendant SEL of the substantial monetary and other benefits of its contract with the Plaintiffs. As a result of Defendant Lipscomb's unjustified interference with the contract between the Plaintiffs and Defendant SEL, the Plaintiffs have been damaged.

FOR A FOURTH CAUSE OF ACTION
(Attorney Fees and Costs)

17 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim.

18 Paragraph 11 of the contract provides that should litigation arise as a result of a dispute under the contract, the prevailing party shall be entitled to an award of reasonable attorney fees and costs.

19 Should the Plaintiffs prevail in this action they demand payment of their reasonable attorney fees and costs of litigation as may be proved at trial.

WHEREFORE, the Plaintiff prays for judgment against the Defendants, jointly and severally, in the amount to be proved at trial in actual damages, for punitive damages in an appropriate amount for the costs of this action, for attorney fees and for such other and further relief as this Court might deem just and proper.

RESPECTFULLY SUBMITTED

POPE & BOWENS, P A

A handwritten signature in cursive script, appearing to read "Glenn Bowens", written over a horizontal line.

Glenn E Bowens, Esq
M Turner Pope, Jr , Esq
P O Box 665
Blythewood, S C 29016
Attorneys for the Plaintiffs

Columbia S C
February 17, 2005

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No 05-CP-40-0749
	)	
Dutch Fort Development Group II,	)	
L L C & Dutch Fork Realty L L C	)	
	)	
Plaintiffs	)	ANSWER AND COUNTERCLAIM
vs	)	(Jury Trial Demanded)
	)	
SEL Properties, L L C & Stephen	)	
E Lipscomb	)	
	)	
Defendants	)	
	)	

MAR 18 11 04

Defendant SEL Properties, L L C and Defendant Stephen E Lipscomb, answering the Plaintiffs Complaint, and Defendant SEL Properties L L C Counterclaiming against Plaintiff Dutch Fork Development Group II, L L C and Plaintiff Dutch Forth Realty L L C (Plaintiffs) would respectfully show unto the Court that

FOR A FIRST DEFENSE

1 Each and every allegation in the Complaint not specifically admitted, qualified, or explained is denied and strict proof is demanded thereof

2 Upon information and belief, Defendants deny the allegations of paragraph 1 to the extent that it alleges that the Plaintiffs are corporations Defendants admit the remaining allegations in paragraph 1

3 Defendants admit the allegations of Paragraphs 2 , 3 and 4

4 Answering Paragraph 5, Defendants admit only so much of said paragraph that alleges or infers that Contracts were entered into between SEL Properties, LLC ("SEL Properties) and Plaintiffs Defendants crave reference to the terms of said Contracts and deny any and all

allegations inconsistent with such terms

5 Answering Paragraph 6, Defendants incorporate its responses contained above as if fully set forth verbatim

6 Answering Paragraphs 7 and 8, Defendants admit only so much of said paragraph that alleges or infers that Contracts were entered into between SEL Properties and Plaintiffs Defendants crave reference to the terms of said Contracts and deny any and all allegations inconsistent with such terms

7 Defendants deny the allegations in Paragraphs 9 and 10

8 Answering Paragraph 11, Defendants incorporate its responses contained above as if fully set forth verbatim

9 Defendants deny the allegations in Paragraphs 12 and 13

10 Answering Paragraph 14 Defendants incorporate its responses contained above as if fully set forth verbatim

11 Defendants deny the allegations in Paragraphs 15 and 16

12 Answering Paragraph 17, Defendants incorporate its responses contained above as if fully set forth verbatim

13 Answering Paragraphs 18 and 19, Defendants admit only so much of said paragraph that alleges or infers that a Contract was entered into between SEL Properties and Plaintiffs Defendants crave reference to the terms of said contracts and deny any and all allegations inconsistent with such terms

FOR A SECOND DEFENSE
(FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED)

14 The Complaint fails to state facts sufficient to state a claim upon which relief can be granted against Defendant Stephen E Lipscomb in both the second and third causes of action

15 Plaintiffs' cause of action for conversion fails to allege a specific identifiable fund that has been converted

16 Plaintiffs' cause of action for tortious interference with Contract fails to allege that Defendant Stephen E Lipscomb was acting outside the scope of his authority in his role as an agent of SEL Properties

FOR A THIRD DEFENSE
(CONDITIONS PRECEDENT)

17 Defendant SEL Properties would show that the Plaintiffs have failed to satisfy all conditions precedent to Defendant SEL Properties' performance under the alleged contracts including those enumerated in Paragraph 8 of the November 2000 Contract, therefore, Defendant S E L Properties is relieved of any obligation to perform and is entitled to withhold performance

FOR A FOURTH DEFENSE BY WAY OF COUNTERCLAIM
(BREACH OF CONTRACT)

18 The allegations set forth in paragraphs 1 through 17 above are incorporated herein as if set forth verbatim

19 Defendant SEL Properties had binding contracts with Plaintiffs whereby Plaintiffs promised to

- (a) be responsible for the development of property known as Rolling Creek,
- (b) devise design requirements, and
- (c) coordinate with builders and contractors

20 Plaintiffs development activities encompassed the planning and construction of roads and drainage systems

21 Plaintiffs owed a duty under the Contract to make sure the road and drainage systems were planning and constructed properly

22 Defendant SEL Properties performed all obligations under the contracts including making payments prior to Plaintiffs breaches

23 Plaintiffs unjustifiably breached contracts with Defendant SEL Properties by improperly designing, planning, overseeing developing and constructing the roads and drainage systems in Rolling Creek

24 As a result of Plaintiffs breaches, the roads are in poor condition with alligator cracking throughout the neighborhoods and are not fit for approval by the County as contemplated by the parties

25 Defendant SEL Properties sustained damages excess of \$135,000 as a proximate result of Plaintiffs breaches of contracts

FOR A FIFTH DEFENSE BY WAY OF SECOND COUNTERCLAIM
(UNJUST ENRICHMENT)

26 The allegations set forth in paragraphs 1 though 25 above are incorporated herein as if set forth verbatim

27 Plaintiffs were enriched by payments made by Defendant SEL Properties

28 Plaintiffs were aware that Defendant SEL Properties was making such payments

with an expectation that Plaintiffs would be responsible for the development of property known as Rolling Creek including overseeing, planning and constructing roadways and drainage systems

29 Defendant SEL Properties has been impoverished by making payments to Plaintiffs and not receiving adequate roads and drainage systems

30 Defendant SEL Properties did not make payments to Plaintiffs gratuitously and there is a direct connection between Defendant SEL Properties impoverishment and Plaintiffs' enrichment

31 It would be unjust under the circumstances for Plaintiffs to enjoy Defendant SEL Properties payments

32 As a direct and proximate result of Plaintiffs' unjust enrichment, Defendant SEL Properties has suffered damages in an amount exceeding \$100,000 00

FOR A SIXTH DEFENSE BY WAY OF THIRD COUNTERCLAIM
(NEGLIGENCE)

33 The allegations set forth in paragraphs 1 through 32 above are incorporated herein as if set forth verbatim

34 Plaintiffs oversaw the construction design and planning of road and drainage systems in Rolling Creek for Defendant SEL Properties

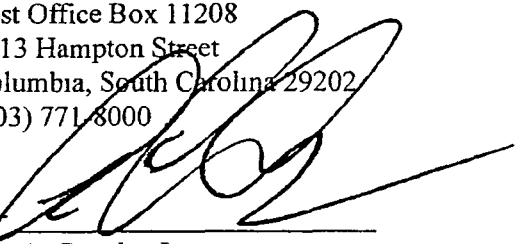
35 Plaintiffs owed a duty of care to Defendant SEL Properties to see that the roads and drainage systems were properly designed, constructed and planned

36 Plaintiffs negligently breached duties owed to Defendant SEL Properties by failing to properly design construct and plan road and drainage systems in Rolling Creek

37 As a direct and proximate result of Plaintiffs negligence Defendant SEL Properties has suffered damages in an amount exceeding \$135,000 00

WHEREFORE, having fully answered Plaintiffs Complaint Defendant Stephen E Lipscomb prays the cause of action for conversion and the cause of action for tortious interference with a contract be dismissed with prejudice Defendant SEL Properties prays for judgment against the Plaintiff Dutch Fork Development Group II, L L C and Dutch Forth Realty, L L C for actual and compensatory damages in excess of \$100 000 together with attorneys fees prejudgment interest and the costs of this action, and for such other and further relief as this Court may deem just and proper

A Camden Lewis
Brady R Thomas
LEWIS BABCOCK & HAWKINS
Post Office Box 11208
1513 Hampton Street
Columbia, South Carolina 29202
(803) 771-8000

By 

A Camden Lewis

ATTORNEYS FOR THE DEFENDANTS

March 17, 2005

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Dutch Fork Development Group II,)
L L C & Dutch Fork Realty, L L C)
)
Plaintiffs)
vs)
)
SEL Properties, L L C & Stephen)
E Lipscomb)
)
Defendant)
_____)

IN THE COURT OF COMMON PLEAS

Civil Action No 05 CP-400749

AMENDED COMPLAINT

(Jury Trial Demanded)

FILED
IN
CLERK'S
OFFICE
RICHMOND
SOUTH CAROLINA
OCT 11 2005

NOW COMES the Plaintiffs, above-named, complaining of the Defendant, above named,
and does allege and show unto this Honorable Court as follows

- 1 That the Plaintiffs are corporations organized under the laws of South Carolina and are
licensed to do business in South Carolina with their principle place of business in Richland County
- 2 That upon information and belief Defendant SEL Properties, L L C ("SEL") is a citizen and
resident of South Carolina with its principle place of business in Richland County
- 3 That upon information and belief the Defendant Stephen E Lipscomb ("Lipscomb") is a
citizen and resident of South Carolina and Richland County
- 4 That this Honorable Court has jurisdiction of the parties and the subject matter herein set
forth and venue is proper in Richland County
- 5 Upon information and belief, on or about November 14, 2000, the Plaintiffs entered into a
written contract with the Defendant SEL for the development marketing and sale of certain
property known as Rolling Creek Estates, a/k/a The Courtyards at Rolling Creek, a/ka/ Rolling
Creek owned by the Defendant This contract covered Phases I, II, and III of the development
Subsequently, the parties entered into a second contract on or about October 17, 2002 covering
Phase IV of the development

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

6 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim

7 Under the terms of the contract and in exchange for the services of the Plaintiffs in the
marketing, development and sale of the Rolling Creek Estates a/k/a the Courtyards at Rolling
Creek, a/k/a Rolling Creek the Defendant SEL was to pay to the Plaintiff Dutch Fork Development
Group II ("DFDG") the sum of Nine Thousand and 00/100 (\$9,000 00) Dollars per month for a six
month period for a total payment of Fifty-Four Thousand and 00/100 (\$54,000 00) Dollars Upon
the sale of 60% of the lots developed in Phase I and the letting of the contract for Phase II the
Defendant SEL was to pay to the Plaintiff DFDG Nine Thousand and 00/100 (\$9,000 00) Dollars
per month for six months for a total of Fifty-Four Thousand and 00/100 (\$54 000 00) Dollars for
services rendered regarding Phase II of the development Upon the sale of 60% of the lots in Phase
I and II and the letting of the contract for Phase III the Defendant SEL was to pay to the Plaintiff
the sum of Nine Thousand and 00/100 (\$9,000 00) Dollars per month for six months for a total of
Fifty-Four Thousand and 00/100 (\$54,000 00) Dollars for Phase III In addition to these amounts,
the Defendant SEL was to pay the Plaintiffs 25% of the net profits received from the lots sold in
Phases I, II, and III

8 Plaintiff Dutch Fork Realty was to have the exclusive right to sell the developed lots and
receive a 10% commission upon closing the sale

9 Upon information and belief all conditions for payment of the above referenced sums to the
Plaintiffs have been satisfied The Defendants, however, have repeatedly refused, without legal
justification to pay the remaining balance of Seventy-One Thousand and 00/100 (\$71,000 00)
Dollars owed to the Plaintiffs

10 The Defendant SEL is in breach of its contract with the Plaintiffs As a result of the
Defendant SEL's refusal to pay for services performed by the Plaintiffs, the Plaintiffs have been

damaged

FOR A SECOND CAUSE OF ACTION

(Breach of Contract Accompanied by a Fraudulent Act)

11 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim

12 The Defendants were obligated to pay the Plaintiff a total of \$54,000.00 for development fees in each Phase of the development. The development fee was to be paid in six (6) monthly installments of \$9,000.00. The first installment for Phase 1 was due on November 1, 2001. The Defendants did not pay the first installment. The Defendants' failure to pay the development fee is a breach of the terms of the contract.

13 The Defendants fraudulently and dishonestly represented to the Plaintiff that it was unable to pay the development fee and needed additional time until funds were available. At the time Defendants made these representations, the Defendants had sufficient funds with which to pay the Development fees. Moreover, when the Defendants obtained the development loan and when lots began selling, the Defendants did not pay the development fees.

14 The Defendants had no lawful justification or excuse for not making these payments. The Defendants dealt dishonestly and unfairly with the Plaintiffs in this matter and had the fraudulent intent of denying the Plaintiffs their development fees and to unlawfully appropriate \$54,000.00 rightfully owed to the Plaintiffs for their own purposes.

15 On May 28, 2004, the Defendants sent a letter to the Plaintiffs unlawfully terminating the contract between the parties. The letter asserted that Plaintiffs had breached the contract by not properly performing their obligations under paragraphs 4 and 8. The letter asserted three grounds for termination: (1) problems with the budget, (2) problems with the roads, and (3) failure to sell at least 20% of the available lots per year. The grounds asserted in the letter were false, and the Defendants knew or should have known them to be false and without any factual support at the time.

the letter was written. On the date of the termination letter the Plaintiffs had closed 31 of the 57 lots in Phase 1 and 15 of the 20 lots in Phase 4.

16 The Defendants dealt unfairly and dishonestly with the Plaintiffs in writing the termination letter and terminating the contract. The Defendants had no factual or legal basis for terminating the contract. The Defendants terminated the contract with the fraudulent intent to

- a Unlawfully appropriate and convert money owed to Plaintiffs from profit sharing and development fees from Phase 1 and 4 to the use of the Defendants
- b Prevent the Plaintiffs from earning development fees, profit sharing and commissions in Phase 2 and 3,
- c Avoid payment of commissions,
- d Cover up the mishandling of funds belonging to the Plaintiffs,
- e Appropriate all of the benefits of the three and one half (3 ½) years of performance by the Plaintiffs to the benefit of the Defendants

17 The Defendants contend that less than 20% of the available lots were sold per year based on their assertion that lots sold to K&L Contracting do not count toward the 20% requirement. K&L Contracting is a construction company that purchased lots and built homes in the Courtyards and Rolling Creek Phase 4. K&L Contracting is owned by the Defendant Lipscomb and Patrick Kirk. Defendants do not count lots sold to K&L Contracting in order to lower the number of lots sold to fewer than 20% of the available lots. The Defendants' bases that lots sold to K&L Contracting do not count are (1) that K&L Contracting had to purchase the lots because they were not selling to other purchasers, (2) that K&L Contracting lost money every year, and (3) that when K&L Contracting purchases a lot it is the same as the Defendant Lipscomb buying a lot from himself. These bases are false, made in bad faith, and the Defendants knew they were false at the time the termination letter was written.

18 The Defendants dealt unfairly and dishonestly with the Plaintiffs when the Defendants negotiated a construction loan with the National Bank of South Carolina in which they represented that two (2) lots per month would be sold. The Plaintiffs were not parties to the construction loan nor were they present when the representation was made. The Defendants did not include this term within the written and executed loan documents and did not inform the Plaintiffs of this representation. Subsequently Defendants terminated the contract claiming two (2) lots per month were not sold.

19 The Defendants allowed K&L Contracting to begin building houses on lots before the lot was closed thereby increasing the costs of interest to the detriment of the Plaintiffs resulting in a loss of profits to the Plaintiffs.

20 The Defendants were obligated to provide funding for the infrastructure and the costs of the development. The Defendants unjustifiably delayed providing funding for the repair of isolated road failures which resulted in the roads unnecessarily deteriorating and a repair bill of over \$170,000.00 which Defendants allege decreased the profits in Phase 1 and 4. The cost of road repair would have been minimal had the Defendants acted reasonably and timely to fund the cost of the repair. Defendants acted unfairly and dishonestly toward the Plaintiffs when they claimed there were no profits because of the cost of road repair when the cost was the fault of the Defendants.

21 The Defendants used money generated by lot sales in Phase 1 and money saved as a result of the Plaintiff having waived its right to a commission on lots sold to builders to pay off a loan that was secured by a mortgage on the land for Phase 1, 2, 3 and 4. The Plaintiffs had a twenty-five percent (25%) ownership interest in the funds used to purchase the land. Defendants fraudulently, dishonestly and unfairly attempted to divest Plaintiffs of their twenty-five percent (25%) ownership interest in the property by unlawfully terminating the contract. The use of these funds for this purpose depleted the cash generated by lot sales with which profits were to be paid and as a result

Defendants claimed that there were no profits in Phase 1

22 The Defendants misrepresented to the Plaintiffs that there were no profits in Phase 1 and misrepresented the amount of profits in Phase 4 The Defendants unfairly and with fraudulent intent denied Plaintiffs an accounting of the books and financial status of the project during Phase 1 and Phase 4 in order to mislead and deceive the Plaintiffs as to the amount of profits, income and costs generated by the sale of the lots and to cover up the mishandling and misappropriation of funds by the Defendants

23 The Defendants dishonestly and unfairly attempted to reduce or eliminate the profits attributable to Phase 1, 2, 3 and 4 by the improper use of funds in which the Plaintiff had a twenty-five percent (25%) ownership interest by

- a Misallocation of costs attributed to each phase
- b Improper use of funds,
- c Allowing K&L Contracting to purchase lots below the agreed fair market value,
- d Improperly increasing costs for engineering, road construction and repair,
- e Failing to deposit the full amount of the sales proceeds into the Courtyard account making the income from the project appear to be less than actually received

24 The Defendants unfairly attempted to sell the lots in Phase 2 and 3 in an effort to deny Plaintiffs their right to a commission on those lot sales and their share of the profits generated by the sale of lots

FOR A THIRD CAUSE OF ACTION

(Conversion)

25 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim

26 Plaintiffs have an interest in the \$54,000.00 development fee which money is in the possession of the Defendants. Plaintiffs have an interest in the land comprising Phase 1, 2, 3 and 4. Plaintiffs have an interest in the profits from the sale of lots and land in Phase 1, 2, 3 and 4. Plaintiffs have an interest in the real estate commission owed to them from the sale of lots in Phase 1, 2, 3 and 4. The Defendants have illegally detained, used and / or misused Plaintiffs' property without the permission of the Plaintiffs.

27 Upon information and belief the Defendants have unjustifiably refused to turn over monies belonging to the Plaintiffs in the form of development fees, profit sharing and commissions after repeated demands for those monies by the Plaintiffs. Instead, the Defendants have retained these monies and converted the same to their own use or the use of another.

28 The Defendants used Plaintiffs' money unlawfully retained for personal use and for the use of K&L Contracting. Defendants permitted K&L Contracting to purchase lots below fair market value in violation of the contract. Plaintiffs have a twenty-five percent (25%) ownership interest in the profits generated by the sale of lots which money was converted to the Defendants and K&L Contracting by allowing K&L Contracting to purchase lots below fair market value. Failure to require K&L Contracting to pay fair market value resulted in higher interests, costs and lower profits.

29 The lower price paid by K&L Contracting for its lots only benefited the Defendant Stephen Lipscomb. The Defendant Stephen Lipscomb was not acting as an agent of SEL, but rather as an agent for K&L Contracting and/or in his personal capacity, when he allowed K&L Contracting to pay less than fair market value for lots that it purchased. SEL has no interest nor is there any

business justification for allowing K&L Contracting to purchase lots below fair market value in violation of the contract

30 The Defendants converted money belonging to the Plaintiff by not depositing the full proceeds of the lot sales into the Courtyard account and then claiming there were no profits

31 The Defendants used funds belonging to the Plaintiffs to purchase the land in Phase 2, 3, and 4 As a result, the Plaintiffs have an ownership interest in that land By unlawfully terminating the contract Defendants converted the Plaintiff's ownership interest in the land to the Defendants' use

32 Upon information and belief the Defendants have sold the lots in Phase 2 and 3 and converted the Plaintiffs share of the profits to the benefit of the Defendants

33 Upon information and belief Defendants unfairly, dishonestly and in bad faith attempted to induce Plaintiffs to give up their rights in Phase 2 and 3 by offering to pay the past due development fees, which were already owed to the Plaintiffs and not in dispute Such offer was not made in good faith and was calculated to permanently deprive the Plaintiffs of their property and to deprive Plaintiffs of their contractual rights to profit sharing and convert the same to the use of the Defendants

FOR A FOURTH CAUSE OF ACTION
(Tortious Interference with Contract)

34 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim

35 Upon information and belief Defendant Lipscomb has personally and intentionally interfered with and prevented Defendant SEL from performing its obligations under its contract with the Plaintiffs by coercing, influencing and inducing SEL to breach its contract with the Plaintiffs by failing to tender payment to the Plaintiffs for services rendered and in accordance with the terms of the contract

36 Upon information, and belief Defendant Lipscomb had actual or constructive knowledge of the contract as he signed the contract on behalf of SEL. Furthermore Defendant Lipscomb has offered to pay the sum of Fifty-Seven Thousand and 00/100 (\$57 000 00) Dollars to coerce and induce Plaintiffs to terminate their relationship with SEL and to cause and procure the present breach of this contract as described above in the Plaintiffs' First Cause of Action. Such an offer is not made in good faith and is calculated to permanently deprive the Plaintiffs of their property currently in the possession of Defendant Lipscomb and to deprive Plaintiffs of their present contractual rights and benefits under the contract, to terminate the relationship between the Plaintiffs and Defendant SEL and to deprive Defendant SEL of the substantial monetary and other benefits of its contract with the Plaintiffs. As a result of Defendant Lipscomb's unjustified interference with the contract between the Plaintiffs and Defendant SEL, the Plaintiffs have been damaged.

FOR A FIFTH CAUSE OF ACTION
(Attorney Fees and Costs)

37 Plaintiffs incorporate the allegations contained above as if fully set forth verbatim.

38 Paragraph 11 of the contract provides that should litigation arise as a result of a dispute under the contract the prevailing party shall be entitled to an award of reasonable attorney fees and costs.

39 Should the Plaintiffs prevail in this action they demand payment of their reasonable attorney fees and costs of litigation as may be proved at trial.

WHEREFORE the Plaintiff prays for judgment against the Defendants, jointly and severally, in the amount to be proved at trial in actual damages for punitive damages in an appropriate amount, for the costs of this action, for attorney fees and for such other and further relief as this Court might deem just and proper.

RESPECTFULLY SUBMITTED

POPE & BOWENS, P A

A handwritten signature in dark ink, appearing to read "Glenn E. Bowens", is written over a horizontal line.

Glenn E Bowens Esq
Tony Catone , Esq
P O Box 665
Blythewood, S C 29016
Attorneys for the Plaintiffs

Columbia, S C
September 14 2005

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No 05-CP-40-0749
	)	
Dutch Fort Development Group II,	)	
L L C & Dutch Fork Realty, L L C	)	
	)	
Plaintiffs,	)	AMENDED ANSWER AND COUNTERCLAIM
vs	)	OF DEFENDANTS
	)	
SEL Properties, L L C & Stephen	)	(Jury Trial Demanded)
E Lipscomb	)	
	)	
Defendants	)	

REC'D MAR 29 AM 10 09
 BARBARA A. COLLINS
 CCC & GS

Defendant SEL Properties, L L C and Defendant Stephen E Lipscomb, answering the Plaintiffs' Complaint, and Defendant SEL Properties L L C Counterclaiming against Plaintiff Dutch Fork Development Group II L L C and Plaintiff Dutch Forth Realty, L L C ("Plaintiffs"), would respectfully show unto the Court that

FOR A FIRST DEFENSE

1 Each and every allegation in the Complaint not specifically admitted qualified, or explained is denied and strict proof is demanded thereof

2 Upon information and belief, Defendants deny the allegations of paragraph 1 to the extent that it alleges that the Plaintiffs are corporations Defendants admit the remaining allegations in paragraph 1

3 Defendants admit the allegations of Paragraphs 2 , 3, and 4

4 Answering Paragraph 5, Defendants admit only so much of said paragraph that alleges or infers that Contracts were entered into between SEL Properties, LLC ("SEL Properties) and Plaintiffs Defendants crave reference to the terms of said Contracts and deny any and all

allegations inconsistent with such terms

5 Answering Paragraph 6, Defendants incorporate its responses contained above as if fully set forth verbatim

6 Answering Paragraphs 7 and 8, Defendants admit only so much of said paragraph that alleges or infers that Contracts were entered into between SEL Properties and Plaintiffs Defendants crave reference to the terms of said Contracts and deny any and all allegations inconsistent with such terms

7 Defendants deny the allegations in Paragraphs 9 and 10

8 Answering Paragraph 11, Defendants incorporate its responses contained above as if fully set forth verbatim

9 Defendants deny the allegations in Paragraphs 12 and 13

10 Answering Paragraph 14, Defendants incorporate its responses contained above as if fully set forth verbatim

11 Defendants deny the allegations in Paragraphs 15 and 16

12 Answering Paragraph 17, Defendants incorporate its responses contained above as if fully set forth verbatim

13 Answering Paragraphs 18 and 19, Defendants admit only so much of said paragraph that alleges or infers that a Contract was entered into between SEL Properties and Plaintiffs Defendants crave reference to the terms of said contracts and deny any and all allegations inconsistent with such terms

FOR A SECOND DEFENSE
(FAILURE TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED)

14 The Complaint fails to state facts sufficient to state a claim upon which relief can be granted against Defendant Stephen E Lipscomb in both the second and third causes of action

15 Plaintiffs' cause of action for conversion fails to allege a specific identifiable fund that has been converted

16 Plaintiffs' cause of action for tortious interference with Contract fails to allege that Defendant Stephen E Lipscomb was acting outside the scope of his authority in his role as an agent of SEL Properties

FOR A THIRD DEFENSE
(CONDITIONS PRECEDENT)

17 Defendant SEL Properties would show that the Plaintiffs have failed to satisfy all conditions precedent to Defendant SEL Properties performance under the alleged contracts including those enumerated in Paragraph 8 of the November 2000 Contract and Plaintiffs failed to sell at least twenty (20%) percent of the available lots in multiple years, therefore, Defendant S E L Properties is relieved of any obligation to perform and is entitled to withhold performance

FOR A FOURTH DEFENSE BY WAY OF COUNTERCLAIM
(BREACH OF CONTRACT)

18 The allegations set forth in paragraphs 1 through 17 above are incorporated herein as if set forth verbatim

19 Defendant SEL Properties had binding contracts with Plaintiffs whereby

Plaintiffs promised, inter alia, to

- (a) be responsible for the development of property known as Rolling Creek,
- (b) devise design requirements,
- (c) coordinate with builders and contractors, and
- (d) sell at least twenty (20%) percent of the available lots in any one year period

20 Plaintiffs development activities encompassed the planning and construction of roads and drainage systems

21 Plaintiffs owed a duty under the Contract to make sure the road and drainage systems were planning and constructed properly

22 Defendant SEL Properties performed all obligations under the contracts including making payments prior to Plaintiffs' breaches

23 Plaintiffs unjustifiably breached contracts with Defendant SEL Properties by improperly designing, planning overseeing, developing and constructing the roads and drainage systems in Rolling Creek

24 As a result of Plaintiffs breaches the roads are in poor condition with alligator cracking throughout the neighborhoods and are not fit for approval by the County as contemplated by the parties

25 Plaintiffs unjustifiably breached contracts with Defendant SEL Properties by improperly designing, planning, overseeing, developing and constructing the roads and drainage systems in Rolling Creek

26 Plaintiffs unjustifiably breached contracts with Defendant SEL Properties by failing to sell at least twenty (20%) percent of the available lots in multiple years

27 Defendant SEL Properties sustained damages excess of \$135,000 as a proximate

result of Plaintiffs breaches of contracts

FOR A FIFTH DEFENSE BY WAY OF SECOND COUNTERCLAIM
(UNJUST ENRICHMENT)

28 The allegations set forth in paragraphs 1 though 27 above are incorporated herein as if set forth verbatim

29 Plaintiffs were enriched by payments made by Defendant SEL Properties

30 Plaintiffs were aware that Defendant SEL Properties was making such payments with an expectation that Plaintiffs would be responsible for the development of property known as Rolling Creek including overseeing, planning and constructing roadways and drainage systems

31 Defendant SEL Properties has been impoverished by making payments to Plaintiffs and not receiving adequate roads and drainage systems

32 Defendant SEL Properties did not make payments to Plaintiffs gratuitously and there is a direct connection between Defendant SEL Properties impoverishment and Plaintiffs' enrichment

33 It would be unjust under the circumstances for Plaintiffs to enjoy Defendant SEL Properties payments

34 As a direct and proximate result of Plaintiffs unjust enrichment, Defendant SEL Properties has suffered damages in an amount exceeding \$100,000 00

FOR A SIXTH DEFENSE BY WAY OF THIRD COUNTERCLAIM
(NEGLIGENCE)

35 The allegations set forth in paragraphs 1 though 34 above are incorporated herein as if set forth verbatim

36 Plaintiffs oversaw the construction, design and planning of road and drainage systems in Rolling Creek for Defendant SEL Properties

37 Plaintiffs owed a duty of care to Defendant SEL Properties to see that the roads and drainage systems were properly designed, constructed, and planned

38 Plaintiffs negligently breached duties owed to Defendant SEL Properties by failing to properly design, construct, and plan road and drainage systems in Rolling Creek

39 As a direct and proximate result of Plaintiffs' negligence, Defendant SEL Properties has suffered damages in an amount exceeding \$135 000 00

WHEREFORE, having fully answered Plaintiffs Complaint, Defendant Stephen E Lipscomb prays the cause of action for conversion and the cause of action for tortious interference with a contract be dismissed with prejudice Defendant SEL Properties prays for judgment against the Plaintiff Dutch Fork Development Group II, L L C and Dutch Forth Realty, L L C for actual and compensatory damages in excess of \$100,000, together with attorneys fees, prejudgment interest and the costs of this action, and for such other and further relief as this Court may deem just and proper

LEWIS & BABCOCK
A Camden Lewis
Brady R. Thomas
Post Office Box 11208
1513 Hampton Street
Columbia, South Carolina 29202
(803) 771-8000

By 
Brady R. Thomas

ATTORNEYS FOR THE DEFENDANTS

March 29, 2006

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20	P-18 C Lewis Fax 11 1 04		
21	P-19 Invoice, Newman Construction		
22	Company		318
23	P-20 Revised proposal for road		
24	repair 9 25 03		318
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4	P-28 Letter, Newman Construction		
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6	P-29 Fax, Newman Construction 8 2 02		318
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20	P-40 Letter, Newman Construction		
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22	P-41 Letts Fax 4 25 02		171
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6	P-48 Deed, Lot 57		151
7	P-63 Loan agreement dated 11 19 01		307
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13	1 1 04 to 12 31 04		
14	P-68 NBSC commitment letter of		
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16	P-69 NBSC Promissory Note of		
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19	P-71 Richland County Inspection		
20	Diary 12 11 01		318
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25	P-74 Newman Construction fax 1 29 02		318

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2			
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4	Diary 1 29 02		318
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6	Diary 2 13 02		318
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9	P-78 Richland County Inspection		
10	Diary 2 19 02		318
11	P-79 Richland County Inspection		
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16	P-82 Richland County Inspection		
17	Diary 4 17 02		318
18	P-83 Richland County Inspection		
19	Diary 4 23 02		318
20	P-84 Richland County Inspection		
21	Diary 4 30 02		318
22	P-85 Newman Construction Fax		
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24	P-86 Newman Construction Fax		
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		For ID	In EV
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2			
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4	Diary 5 8 02		318
5	P-88 Newman Construction Fax		
6	5 21 02		318
7	P-89 PSI Fax 5 24 02		318
8	P-90 Richland County Inspection		
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10	P-91 Richland County Engineering		
11	Inspection 5 13 02		318
12	P-92 Richland County Engineering		
13	Inspection 6 14 02		318
14	P-93 Letts Report of 6 6 02		318
15	P-94 Letter of Newman Construction		
16	Company 8 19 02		
17	P-95 Withdrawn		
18	P-96 Danny White letter 1 24 02		307
19	P-97 Danny White letter 3 18 02		307
20	P-98 Danny White letter 3 27 02		307
21	P-99 Danny White letter 6 21 02		307
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23	P-101 NBSC Memo 3 11 02		307
24	P-102 NBSC Construction Draw Check		
25	List 7 10 02		307

	EXHIBITS CONTINUED	For ID	In EV
1			
2			
3	P-103 M Simkins Memo 1 29 02		
4	P-104 M Simkins Memo 3 26 02		
5	P-105 M Simkins Memo 6 6 02		
6	P-106 M Simkins Memo 7 18 02		
7	P-107 M Simkins Memo 8 16 02		
8	P-108 M Simkins Memo undated		
9	P-109 MBSC Commitment letter		
10	11 12 04		307
11	P-110 AIA Document/Contract		
12	P-115 Richland County letter		
13	P-117 Change orders notebook		145
14	P-118 Pay applications		322
15	P-123 Essex Contract		354
16	P-124 Lot deeds, phases 1 and four		
17	P-125 Lot files, phase one		
18	P-126 Lot files, phase 4		
19	P-127 Accounting records		157
20	P-127 A Accounting records		157
21	P-127 B Accounting records		157
22	P-127 C Accounting records		157
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24	P-128 A Accounting records		171
25	P-128 B Accounting records		171

1 EXHIBITS CONTINUED

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4	P-128 D Accounting records		171
5	P-128 E Accounting records		171
6	P-128 F Accounting records		171
7	P-128 G Accounting records		171
8	P-128 H Accounting records		171
9	P-128 I Accounting records		171
10	P-128 J Accounting records		171
11	P-128 K Accounting records		171
12	P-128 L Accounting records		171
13	P-129 Accounting records		171
14	P-129 A Accounting records		171
15	P-129 B Accounting records		171
16	P-129 C Accounting records		171
17	P-129 D Accounting records		171
18	P-130 Letts finance charge documents		171
19	P-131 A K& L Contracting records		151
20	P-131 B K& L Contracting records		151
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23	P-132 Lewis-Babcock documents		
24	P-133 Personal expense documents		171
25	P-134 American Amusement documents		171

1	EXHIBITS CONTINUED		
2		For ID	In EV
3	P-135 John Deere records		171
4	P-136 Cash payment records		171
5	P-137 NBSC overdraft charge records		171
6	P-138 NBSC overdraft charge records		171
7	P-141 Cost analysis chart		422
8	P-142 DFR Commissions chart		426
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11	P-147 Lot sales chart		174
12	P-148 K & L purchases chart		
13	P-149 First year sales chart		173
14	P-151 Photo of entrance to Courtyards		95
15	P-152 Photo of team builder sign		
16	P-155 Photo of home		95
17	P-157 Lipscomb financial statement 3 20 06		
18	P-158 Lipscomb financial statement 9 3 04		
19	P-159 Lipscomb financial statement 9 18 03		
20	P-159 Lipscomb financial statement 12 31 05		
21	P-160 Phase four contract		
22			
23			
24			
25			

1	EXHIBITS CONTINUED		
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4	D-2	Budget document 1 8 02	101
5	D-3	Budget document undated	101
6	D-4	Letter June 2003, Maxheimer	101 341
7	D-5	CMLS Listings	
8	D-6	Courtyards at Rolling Creek	
9		Depiction	
10	D-7	Invoice Ron Spence	
11	D-8	Accounts chart	
12	D-9	Summary of costs chart	
13	D-10	Income phase one	
14			
15			
16			
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1 (The within matter came before the Court on
2 October 29, 2008, at 3 25 P M , outside the presence
3 of the jury panel)

4 THE COURT Good afternoon everyone, and please
5 be seated

6 COUNSEL Good afternoon, Your Honor

7 THE COURT I apologize for the delay in getting
8 in here I didn't realize I was going to have quite
9 the crowd I had I apologize for that

10 This is Docket Number 2005 CP 40 00749, Dutch
11 Fork Development Group, LLC, and Dutch Fork Realty,
12 LLC, versus Stephen Lipscomb and SEL Properties,
13 LLC

14 The Plaintiffs are represented by Glenn Bowens,
15 and the Defense is represented by Keith Babcock

16 Is there anything we need to take up at this
17 time? I believe we do have some pre-trial issues
18 Is that correct?

19 MR BOWENS Yes, Your Honor

20 THE COURT All right We have motions in lim-
21 ine from both sides Is that correct?

22 MR BOWENS Yes, Your Honor

23 THE COURT Why don't we take up the Plaintiffs'
24 motions first

25 MR BOWENS Thank you, Your Honor May it

1 please the Court?

2 We do have a motion in limine that was filed and
3 that basically comes under the Parol Evidence Rule

4 The Defendants are going to seek to enter some
5 evidence of a proforma that was prepared in advance
6 of the contract being signed that is at issue

7 The Defense is going to allege that Plaintiffs
8 promised to have sixty-six lots that were available
9 in the first phase and to have builders available
10 to take twenty-five of those lots immediately, and
11 that is information that is in the proforma, but the
12 proforma predated the contract by a fair amount of
13 time

14 The contract when it was signed was a completely
15 integrated contract, and it would exclude any terms
16 from this proforma document which are not incorpor-
17 ated into it

18 So we would ask that the evidence from the pro-
19 forma as to those two items specifically be excluded
20 from evidence

21 In addition, the Defendants have identified a
22 witness by the name of Ronnie Colson, who is a loan
23 officer with the National Bank of South Carolina
24 The National Bank of South Carolina financed the
25 development in this case with a Two Million Dollar

21

1 construction loan

2 Prior to that construction loan being closed and
3 the money available, Mr Lipscomb, one of the Defen-
4 dants in the case, allegedly made an oral representa-
5 tion to Mr Colson in a private meeting with just the
6 two of them present that two lots per month were to
7 be sold in the development

8 It is alleged by Mr Colson and Mr Lipscomb that
9 that is a requirement which was in place, that the
10 two lots would be sold per month

11 Subsequent to that conversation, the loan docu-
12 ments were executed, none of which had a reference to
13 the sale of two lots per month being a requirement of
14 the loan

15 Mr Colson's testimony in his deposition is that
16 the loan was not performing because the Plaintiffs
17 were not selling the two lots per month, while the
18 loan documents did not require two lots per month be
19 sold in the development

20 There is no reference anywhere in the promissory
21 note, in the mortgage, the loan agreement, guarantee
22 agreement -- there is nothing in there that says a
23 thing about two lots being sold per month

24 So that oral representation is parol evidence
25 barred as to the loan documents and as well it would

1 be parol evidence barred as applies to the contract,
2 as requiring the percentage of available lots to be
3 sold per year

4 Additionally, there was no consideration at all
5 that would support a modification or a change of the
6 loan documents, and for this reason as well we ask
7 that those things be excluded

8 Now, Ronnie Colson's testimony, which is going
9 to be offered by video deposition -- a majority of
10 that testimony is all about this requirement of the
11 two lots per month

12 We would ask that that be excluded

13 There is also going to be evidence offered by
14 the Defendants that it was the intent of the parties
15 that a construction company by the name of K & L
16 Contracting Company was not supposed to be buying
17 lots in the subdivision

18 K & L Contracting is a company that is owned
19 in part by Mr Lipscomb, and Mr Lipscomb also owns
20 a portion of SEL Properties, LLC

21 So he owns an interest in both of them

22 There is no reference in the contract to that
23 at all, and they are relying instead upon the intent
24 of the parties

25 That is not expressed anywhere in the agreement

1 and we would ask that that evidence also be excluded

2 Finally, as to this loan schedule, we were not
3 a party to this agreement There was no -- the loan
4 agreement was between Mr Lipscomb representing SEL
5 Properties and NBSC The Plaintiffs in the case were
6 not a party to this loan agreement

7 That is our motion

8 THE COURT Your response?

9 MR THOMAS Yes, maam Brady Thomas for the
10 Defendants

11 THE COURT Yes, sir

12 MR THOMAS For a starting point, the Plaintiffs
13 are making the motion pursuant to the Parol Evidence
14 Rule, claiming we seek to introduce evidence contrary
15 to the written contract and this contract covered
16 the development

17 There are actually two contracts The first con-
18 tract covered three phases of development and the
19 second contract covered development of phase four,
20 Your Honor

21 The motion pertains to the first contract for the
22 three phases, one phase which was built and two
23 phases were not built

24 Your Honor, this contract was entered into in
25 November of 2000, and three and a half years into the

24

1 contract our client, Steve Lipscomb, on behalf of the
2 Defendant, SEL Properties, terminated the plans and,
3 Your Honor, by the termination letter improperly did
4 state that the Plaintiffs had breached the contract
5 by failing to sell two lots per month

6 The evidence that has been discussed with refer-
7 ence to two lots per month in the deposition testimony
8 of the banker goes to our client's state of mind

9 Our client was mistaken and improperly cited a
10 two per month clause We are not seeking to introduce
11 evidence to contradict the contract or stating the
12 contract required sale of two lots per month

13 We are seeking to introduce this evidence to es-
14 tablish or to show our client's state of mind, which
15 is relevant to their cause of action for tortuous in-
16 terference with the contract with justifiable reli-
17 ance on a mistaken belief as to the two lots per month,
18 as well as their cause of action for breach of con-
19 tract accompanied by fraudulent act which requires an
20 element of fraudulent intent

21 We would seek to introduce this evidence by video
22 deposition testimony in our case, in that they have
23 already made allegations that our client terminated
24 them with fraudulent intent

25 Our client made a mistake and believed there was

1 the two lot per month requirement The deposition tes-
2 timony includes testimony about a meeting between the
3 -- where the Plaintiffs were present and where the two
4 lot requirement was discussed in some regard, so that
5 is also relevant to their claim where they are seeking
6 punitive damages from Mr Lipscomb

7 We simply reaffirm an awareness of it but we do
8 not seek to contradict the contract, just to show our
9 client's state of mind, and particularly with reference
10 to the representations

11 The discussion about the proforma comes back to
12 our client's mistaken belief as to what the terms of
13 the contract were as to phase one, which is the only
14 phase that was built

15 We are going to admit that money is owed on that
16 phase Development fees and profits are owed under
17 that phase, but we did not breach the contract with
18 fraud and we didn't commit any tortuous acts in that regard

19 Now, with regard to the Plaintiffs' argument on the
20 intent of the parties, that is a technical legal argu-
21 ment, the intent of the parties, and we are not making
22 that argument

23 The fact is that K and L was -- did buy a signi-
24 ficant number of the lots out there all comes back to
25 what our client believed and what was a requirement

26

1 of the contract

2 In short, we are not seeking to contradict the
3 contract but are seeking to show in our case that there
4 was no fraud but only what our client was thinking as
5 to what the facts were at that time

6 THE COURT Any reply, Mr Bowens?

7 MR BOWENS Just briefly, Your Honor

8 We have a copy of the termination notice that was
9 filed with the motion, and it does not refer to the two
10 lots but it refers to the actual contract provision of
11 twenty percent of the available lots per year

12 So he did not actually cite in the termination let-
13 ter that it was because we weren't meeting the two lot
14 requirement, but it was the twenty percent requirement
15 -- the termination letter did not cite that it was that
16 we were not meeting the two lot requirement but the
17 twenty percent

18 The breach of contract accompanied by fraudulent
19 act is not fraud itself It is any acts characterized
20 by dishonesty or unfair dealings We are not seeking to
21 put in elements of fraud in this case, but it just the
22 acts were dishonest or unfair to Plaintiffs The intro-
23 duction of that evidence would contradict the contract,
24 pure and simple

25 It would attempt to change the contract from the

27

1 twenty percent to the two lots, which at most would
2 be a valid point for calling for a greater number than
3 that under the proforma, which is about forty-three
4 percent per year, more than double what the contract
5 calls for

6 The mere introduction of that does vary the con-
7 tract

8 (Brief pause in the proceeding)

9 THE COURT Mr Bowers, do you have a copy of
10 your original motion that I can take a look at, with
11 the attachments?

12 MR BOWERS Yes, maam

13 THE COURT Thank you Let's hear the Defense
14 motions

15 (Colloquy between counsel and the Court concern-
16 ing documents being handed up)

17 MR THOMAS We do have a motion in limine that
18 we wish to raise today but we haven't filed the motion
19 in limine It has to do with the five year term of
20 contract

21 MR CATONE The Defense has previously filed
22 that motion, which was heard by Judge Culbertson and
23 denied

24 I believe the rules say that a motion that was
25 already heard would be void

1 THE COURT I have a motion that was filed on the
2 first of August of 2007 It has attachments to it
3 of A, B, -- it must be C and D, and I think that's
4 all of it

5 I'll tell you what We'll take some time and come
6 back to it My file is -- nothing in it is together
7 or stapled, and there are various pieces of paper
8 stuck in here so that I can't tell what attachments
9 go with what documents

10 It may be because when they micro-filmed it they
11 took it apart

12 I understand the argument the Plaintiffs have
13 made about the parol evidence, and I would ordinarily
14 agree with that However, as presently presented or
15 in the context it is in today, I don't have enough
16 information to make an intelligent decision as to
17 whether or not it should be excluded based upon the
18 Defense's response

19 So I am going to hold it in abeyance and ask
20 that you all raise it again once I have heard some evi-
21 dence to kind of put it in context, so I will be able
22 to make an intelligent decision

23 I would agree that it appears that the Defense
24 is not attempting to vary the terms of the contract,
25 but to explain the events that led to the causes as

1 have been alleged by the Plaintiffs There may be
2 some merit in your response, but I would need to be
3 able to put it in context

4 Are there other motions for the Plaintiffs?

5 MR CATONE Not for the Plaintiff

6 THE COURT Are there other motions by the De-
7 fense?

8 MR THOMAS Yes, Your Honor I actually have
9 two motions

10 THE COURT All right

11 MR THOMAS A motion that I would like to
12 file today in limine with regard to the five year
13 term of the contract, plus a motion to strike certain
14 paragraphs of the Plaintiffs' Complaint

15 THE COURT Yes, sir Let me hear you on those
16 Start with the motion to strike certain paragraphs
17 of the Plaintiffs' Complaint

18 MR THOMAS Yes, Your Honor The Plaintiffs --
19 we were ready to try this case a month ago and the
20 Plaintiffs moved to amend the Complaint at that time,
21 which Judge Culbertson granted, and he then set a
22 schedule for allowing amendments and allowing respon-
23 ses

24 This motion that is being raised here is in re-
25 sponse to their amended plea filed by the Plaintiffs

30

1 Your Honor, if I may, I have a copy of the
2 Amended Complaint to reference certain paragraphs

3 THE COURT That's fine

4 MR THOMAS At issue in our motion are para-
5 graphs Thirty-three and Thirty-six These paragraphs
6 relate to an attempted settlement letter presented
7 by our client to the Plaintiffs

8 Rule 12 F states that furnishing an offer of
9 valuable consideration of a compromise or an attempt
10 to compromise a claim -- that that evidence is inadmis-
11 sible

12 Plaintiffs allege that the Defendants unfairly,
13 dishonestly, in bad faith, attempted to induce Plain-
14 tiffs to give up their rights, and they claim the
15 offer was not made in good faith

16 Similarly, Paragraph Thirty-six provides the
17 Defense offered to pay some Fifty-seven Thousand Dol-
18 lars in an effort to coerce and induce Plaintiffs to
19 terminate their relationship

20 The letter itself is a draft letter that pro-
21 vides that acceptance of the enclosed check is in ac-
22 cord and satisfaction of the parties' disputes

23 The reason we raise this is because without our
24 raising it we would be waiving our right to challenge
25 it at trial as to the settlement offer

31

1 So we would request that the Court strike those
2 paragraphs regarding any settlement offer

3 THE COURT All right

4 (Brief pause in the proceeding)

5 THE COURT Yes, sir, Mr Bowens?

6 MR BOWENS They have always maintained it was
7 owed and according to their previous discovery they
8 have tried to pay it over the years, but it has always
9 been done with the Plaintiffs giving up the rest of
10 their rights

11 Under the contract, we will pay you what we al-
12 ready owe you It was made in bad faith and not in an
13 attempt to settle the claim The money was owed as
14 was undisputed

15 If you have to waive your rights under the con-
16 tract, that is not in good faith In terms of an
17 offer of settlement it was bad faith and that should
18 not be excluded

19 THE COURT Any response?

20 MR THOMAS Yes, Your Honor This letter is in
21 fact a settlement offer An offer was made in an at-
22 tempt to settle all claims, and this was thought to
23 be or was what they believed was a proper amount to
24 be paid in exchange for settling all claims

25 It is an offer or valuable consideration to

1 settle in what they thought was a proper amount to do
2 that

3 (Brief pause in the proceeding)

4 THE COURT Mr Bowens, you say that you want
5 to offer it to prove that they have engaged in unfair
6 trade practices Is that correct?

7 MR BOWENS That's correct

8 THE COURT That's one point you wish to offer
9 it for

10 MR BOWENS It is a part of the breach of the con-
11 tract or fraudulent acts of the Defendants -- an
12 unfair act by them, or they were dishonest toward my
13 clients

14 There is a 1993 Court of Appeals case that gives
15 a standard for fraudulent acts, and it essentially has
16 said that in an action for breach of contract accompan-
17 ied by fraudulent act, the element is met by any act
18 that rests on dishonesty or unfair dealings or when
19 the motive is prompted by dishonor

20 We believe that that letter is evidence of that
21 type of conduct

22 (Brief pause in the proceeding)

23 THE COURT Specifically, those two paragraphs
24 are under the causes of action for conversion and for
25 tortuous interference with a contract?

1 (Pause in proceeding continued)

2 THE COURT All right

3 MR BOWENS Your Honor, if you will look at Para-

4 graph 16, subparagraph A, of the Complaint

5 (Reading from Complaint)

6 That's that letter we are talking about

7 MR THOMAS Paragraph Thirty-three and Thirty-six

8 refer to the offer

9 THE COURT I don't believe that meets the elements

10 of conversion It doesn't appear that it does

11 MR BOWENS Your Honor, the actual Fifty-four

12 Thousand Dollars is a specific sum that was owed, and

13 the Defendants have unlawfully retained it

14 I think it makes out the element of unlawful re-

15 tention of funds, a specific sum of money owed to us

16 THE COURT But it is owed under the contract, so

17 isn't a remedy for your clients a claim for breach

18 of contract?

19 I mean, would it not be money that is right-

20 fully yours that they took away from you?

21 MR BOWENS That's right

22 THE COURT Then you are talking about -- you

23 are talking about the fact they would have owed you

24 money for whatever purpose under the contract, so it

25 does arise from the contract

1 So that is what you are talking about Right?
2 Your remedy would be breach of contract They failed
3 to pay you money that was due under the contract pur-
4 suant to the contract provisions

5 I mean, you can't have a tort -- it's either
6 one or the other

7 MR BOWENS That is only one aspect of a convers-
8 ion claim The Fifty-four Thousand Dollars is only
9 one part of that conversation claim

10 THE COURT. Well, assuming that the Court only
11 gives what -- it appears what you are conjuring up is
12 you were in a contract that called for money that
13 would have been due and owing, based upon contract

14 That you are owed money and they are trying to
15 convert it to their own use

16 MR BOWENS That's right

17 THE COURT But you are not suing them for the
18 breach of contract or are you

19 MR BOWENS We have a cause of action that pleads
20 that as well They did not pay that amount and upon
21 Mr Lipscomb's intervention it was converted to their
22 own use

23 The Defense is going to argue that there was no
24 breach of contract as to this Fifty-four Thousand Dol-
25 lars because it was agreed that -- that will be their

1 testimony, that this was admitted, so that there was
2 no breach of contract

3 MR THOMAS We have admitted that some money is
4 owed under the contract

5 I would cite the case of Dawkins versus National
6 Liberty Life When you have a contractual debt or
7 money is owed under a contract, you are in a position
8 of having a debt which is owed

9 THE COURT I think that goes to the breach of
10 contract

11 MR BOWENS That is a relevant point, that it is
12 a separate action, separate and apart

13 THE COURT I don't think it goes to a convers-
14 ion cause of action

15 MR BOWENS Your Honor, I said there were other
16 acts which also go to or amount to conversion

17 THE COURT If the Fifty-four Thousand is not
18 going to be a part of that, I am striking paragraph
19 33 C, and you may go into other conversion grounds

20 MR BOWENS Yes, Your Honor

21 THE COURT As to the letter itself and the evi-
22 dentiary value of that letter, that would be changed

23 Based upon the motion which relates to striking
24 paragraph 33, I would grant the motion

25 Now, to the tortuous interference of the contract,

1

2 MR BOWENS Your Honor, I think if you strike para-
3 graph 36, that should take care of that The letter
4 is still viable under another cause of action, and we
5 already had a motion for summary judgment on this
6 cause of action which was denied

7 It is the same paragraph we had before and since
8 it has been raised once before

9 MR THOMAS Your Honor, this issue has never
10 been raised before with respect to the settlement
11 offer and the letter, which we contend is inadmissible
12 under Rule 408, the paragraph 36

13 As relates to our settlement offer to settle all
14 claims and the letter

15 (Brief pause in the proceeding)

16 THE COURT Can you point to where it has been
17 ruled on or discussed before?

18 MR BOWENS There was a motion for summary judg-
19 ment some months ago for this cause of action, and it
20 is now in the same form as it was before, to dismiss
21 under summary judgment, but that motion was denied,
22 months ago

23 It's the same cause of action, same language, no-
24 thing changed

25 THE COURT Can you give me a date when that was

37

1 heard and ruled upon?

2 MR BOWENS Yes, I can, Your Honor, if you

3 will give me one second

4 (Brief pause in proceeding)

5 MR THOMAS A summary judgment motion was heard but

6 there was no discussion as to the settlement issue

7 It was on the grounds of no evidence

8 I think that was all it concerned There was no

9 discussion whatsoever of any settlement offers, one way

10 or the other

11 MR BOWENS On January 23rd of this year, Your

12 Honor

13 THE COURT What I want to address specifically

14 is Paragraph 36 of the Amended Complaint, the lang-

15 uage that talks about Lipscomb had offered to pay

16 the sum of Fifty-seven Thousand Dollars to coerce or to

17 induce the Plaintiffs to terminate their relationship

18 with SEL

19 (Reading from Amended Complaint) Such an offer

20 is not made in good faith and is calculated to perman-

21 ently defraud the parties of their property currently

22 in the possession of Mr Lipscomb, etcetera, etcetera

23 The motion I have before me is not for summary

24 judgment It is to strike the particular paragraph

25 based upon a settlement letter or a letter that is

38

1 purported to offer settlement

2 So that is what I am trying to decide

3 MR BOWENS This motion is untimely It should
4 have been brought a long time ago, earlier in the
5 litigation

6 This was not a settlement offer but it was made
7 in bad faith in order to induce the Plaintiffs to give
8 up their rights for money, which is not disputed, or
9 the amount, the Fifty-four Thousand Dollars is not
10 in dispute

11 THE COURT Can somebody explain to me how that
12 letter relates to your claim for interference with
13 the contractual relationship

14 MR BOWENS Mr Lipscomb had the letter sent in
15 order to cause or bring about the breach of contract
16 which was certainly interference with the contract

17 THE COURT Who was damaged by that?

18 MR BOWENS The Plaintiffs had rights under the
19 contract and procuring the breach by getting SEL to
20 breach the contract and not pay Plaintiffs their money
21 that was owed, the Fifty-four Thousand Dollars -- caus-
22 ing SEL not to pay that and terminating the contract

23 He was acting not on behalf of SEL or for the
24 benefit of SEL, but for himself

25 In doing so, he caused SEL to breach the contract

39

1 and that is the key point of this It benefitted
2 him personally and benefitted K & L It had no bene-
3 fit to SEL

4 THE COURT Let me see the letter, please
5 (Brief pause in the proceeding)

6 MR THOMAS If I may point out, it was faxed
7 in November of 2004, and the allegations of breach
8 were basically in May of 2004 when the termination
9 occurred

10 It was some six months after the termination
11 notice The contract was already breached

12 (Pause continuing)

13 THE COURT In this matter, I am going to deny
14 the motion to strike paragraph 36 under the tortuous
15 interference with contract

16 I will return the letter to you

17 Is there anything further?

18 MR THOMAS Yes, Your Honor There is a motion
19 in limine we would make at this time, if I may ap-
20 proach?

21 The motion is a motion in limine regarding the
22 five year term of the countract

23 The motion deals with phase one of the contract
24 which is a built-out phase, and the unbuilt phases
25 two and three

40

1 It is not impacted by the second contract at issue
2 in this case which is related to phase four

3 Here is a copy of our motion, and the basis of
4 this motion is that the parties entered into the con-
5 tract to develop property in November of 2000 That
6 contract has a specific paragraph which is set forth
7 on page one of our motion

8 The language in subparagraph C is the term of
9 the contract, from November 14, 2000, to November
10 14,2005

11 During this time period, only phase one of the
12 three phases was ever built

13 Your Honor, this case centers on a mistaken ter-
14 mination by our client on May 28, 2004, which was
15 three and a half year into the contract

16 After the work continued for three and a half
17 years, our client mistakenly terminated them on May 28,
18 2004

19 So the basis of the breach of contract allegations
20 at that time, again, three and a half years had gone
21 by -- the Plaintiffs seek to introduce evidence of
22 commissions on houses in phase one that were never
23 sold within the five year term

24 And so profits or splits on profits that would
25 have been earned during the five year term -- we seek

1 to let that testimony in evidence as to the five year
2 term of the contract

3 Under basic contract law, the purpose of an
4 award of damages for breach of contract is to give
5 the compensation to the plaintiff to put the plaintiff
6 in as good a position as he would have been in had
7 the contract performed

8 In this motion, we seek to limit testimony and
9 evidence to prove damages as to what could they have
10 done had we not terminated them and had we not breached
11 the contract on May 28, 2004

12 What could they have earned from that date, given
13 everything they had done -- the parties had done or not
14 done up to that point, if the contract had not been
15 voided until 2005

16 The evidence should be limited because under
17 the contract terms, DFDG and DFR would have no further
18 rights

19 Things that could have occurred up until 2005
20 are irrelevant because the basis of proving the breach
21 of contract is go where would the Plaintiffs have
22 been but for the breach They don't go to the basis
23 of proving damage in a breach of contract case

24 You cannot put the Plaintiffs in a better condi-
25 tion than they would have been in the absence of a

1 breach, and, Your Honor, we would respectfully ask
2 that the evidence introduced be limited to what the
3 Plaintiffs could have earned during the life of the
4 contract For the sixty months until the expiration
5 of the term

6 Thank you

7 THE COURT What paragraph under the contract
8 concerns the term of the agreement?

9 MR THOMAS Paragraph 8 of the contract Para-
10 graph 8 sets forth the term of the contract, the five
11 year term Paragraph 8 C

12 THE COURT Seven C?

13 MR THOMAS Eight C Seven C in the contract
14 relates to phase four

15 THE COURT Thank you Yes, sir, Mr Bowens?

16 MR BOWENS Your Honor, the termination of the
17 contract prevented the Plaintiffs from performing the
18 contract any further

19 The Plaintiffs are entitled to recover lost pro-
20 fits that would have been earned if the Defendants
21 had not terminated the contract

22 They don't get to breach the contract in May
23 and then try to run the clock out and let our clients
24 not earn any further profits

25 There was a five year time period in order to

1 complete the project, and it could have been done in
2 five years if the Defendants had not prevented us
3 from doing the work and completing the contract, as
4 would have been done

5 So the Defendants have prevented Plaintiffs from
6 performing, and they don't get the benefit from that
7 South Carolina case law is pretty clear on that

8 They are entitled to recover every penny of profits,
9 loss of profits, that were prevented

10 MR THOMAS This motion is to limit them to
11 what they could prove at the point of termination,
12 not what they could have earned in the eighteen month
13 period

14 As I understand it, they want to go prior to
15 the termination and bring in things that happened --
16 said where would the Plaintiffs have been had the
17 contract not been breached

18 What could they have earned between that point and
19 the end of the five years What could have been
20 earned during that time period, given that the parties
21 had already work three and a half years down the road
22 There are three and a half years worth of work

23 What the Plaintiffs are seeking to do here is
24 to get millions of dollars from phases two and three
25 which were never built, and the fact of the matter is

1 that the damages should start at the point of the
2 breach Given that factual prejudicate, what could
3 they have earned in the remaining months of the con-
4 tract?

5 Paragraph three of the contract has a sixty per-
6 cent figure as far as the lots in phase one being
7 sold, and that was an underlying fact leading up to
8 the May 28th, 2004 -- to what was done, but what they
9 should be allowed to do is put forth what they could
10 have done from that date forward, but not beyond the
11 November 2005 end date

12 Where would they have been if the contract had
13 not been terminated?

14 MR BOWENS Your Honor, the first breach occurred
15 in November of 2001 when the Defendants failed to pay
16 the Fifty-four Thousand Dollars in the development fees

17 The evidence from the expert is that the original
18 plans for this project which were on a five year plan
19 for the project -- when the plans were submitted, the
20 approval did not come until March of this year

21 If the plans had not been amended by Mr Lipscomb
22 in 2002, certainly there would have been time to com-
23 plete the project

24 This evidence will come from several different
25 witnesses who will say that on May 28th or before we

45

1 -- May 28th of 2004 or before we would have been on
2 track to complete the project, but they prevented phase
3 two from beginning They made it impossible by chang-
4 ing the plans

5 The Defendants are asking that damages be limited,
6 but if they had not committed the breach where would
7 the Plaintiffs be?

8 I also would refer the Court to our Answers to
9 Interrogatories that were filed Our response to in-
10 terrogatory number ten Phase two should have already
11 been under construction at the time of termination but
12 for their delaying tactics

13 So it was in their hands and those facts are
14 there, Your Honor

15 (Reading answer to interrogatory number ten
16 to the Court)

17 That delay was caused by Defendants who prevented
18 Plaintiffs from having this projected completed in the
19 five years

20 (Brief pause in the proceeding)

21 THE COURT Right now I will allow that testi-
22 mony I think that is another issue right now It
23 seems as if they met the requirements but I would need
24 -- you can raise it again when the testimony is put
25 up

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1 Is there anything else that we need to take up
2 at this time?

3 MR BABCOCK No, Your Honor

4 MR BOWENS No, Your Honor

5 THE COURT Please approach

6 (Conference at the bench between counsel and
7 the Court off the record)

8 THE COURT Do you have any voir dire?

9 MR BABCOCK Yes, Your Honor We have some
10 proposed voir dire and also have a hard copy of the
11 trial brief which was e-mailed

12 THE COURT I have a copy of it, and I also
13 have a witness list

14 THE COURT Is there any objection to Plaintiffs'
15 proposed voir dire?

16 MR BABCOCK No objection

17 THE COURT Hello, Ms Scott

18 CLERK How are you, Your Honor? I'm about to
19 call for the jury panel I just wanted to make sure
20 Your Honor was ready

21 THE COURT That's correct

22 You can go ahead and bring them up

23 MR BABCOCK I see on the strike sheet one of
24 the potential jurors, Number 242, number 17 on the
25 strike sheet -- Mr Wagner advised me that this juror

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1 was a CPA who previously worked for the Meltons' bus-
2 iness We have spoken about that and concur that she
3 would be someone who should be appropriately stricken
4 for cause,

5 MR BOWENS We have no objection to that, Your
6 Honor

7 CLERK We will just not send her up then

8 THE COURT That's fine

9 CLERK That was Juror 244, Barbara Wagoner

10 THE COURT All right, thank you

11 THE COURT We will wait for the jury panel to
12 get here then

13 Anything to take up before the selection of the
14 jury?

15 MR BOWENS No, Your Honor

16 MR BABCOCK We would have nothing at this
17 time, Your Honor

18 THE COURT Thank you Please give me your feel-
19 ing about selecting an alternate juror for the trial
20 of the case

21 Mr Babcock? Mr Bowens?

22

23

24

25

1 MR BABCOCK It would be a good idea to have
2 one alternate
3 MR BOWENS I would concur, yes
4 THE COURT So we will select one alternate and
5 both sides agree?
6 MR BABCOCK Yes, Your Honor
7 MR BOWENS Yes
8 THE COURT Would you approach, briefly?
9 (Conference at the bench between counsel and
10 the Court off the record)
11 THE COURT All right, please send for the jury
12 panel
13 MR BABCOCK May we approach again briefly?
14 THE COURT Yes
15 (Conference at the bench between counsel and
16 the Court off the record)
17 (The jury panel entered Courtroom at 4 45 P M)
18 BAILIFF All jurors are present, Your Honor
19 THE COURT Thank you Good afternoon, ladies
20 and gentlemen
21 My name is Allison Lee, and I am conducting this
22 term of the Richland County Common Pleas Court, and
23 the trial of the case of Dutch Fork Development Group
24 Two, LLC, and Dutch Fork Realty LLC versus SEL Prop-
25 erties LLC and Stephen E Lipscomb

1 I am going to ask you a series of questions,
2 ladies and gentlemen, to determine your qualifica-
3 tion to serve as jurors in this case

4 This case arises out of a contract for the de-
5 velopment, marketing and sale of property that is
6 known as Rolling Creek Estates and Courtyards at
7 Rolling Creek

8 Is there any member of the jury panel that has
9 any knowledge as to the facts and issues regarding
10 this particular case? If so, please stand

11 (No response from any juror)

12 The Plaintiffs in this case, ladies and gentle-
13 men, Dutch Fork Development Group LLC and Dutch Fork
14 Realty LLC -- is there any member of the jury panel
15 who is an officer, director or shareholder, or is
16 an employee, or has had business dealings with these
17 two corporations? If so, please stand

18 (No response)

19 The Plaintiffs in this case are represented by
20 Mr Glen Bowens of the law firm of Pope and
21 Bowens

22 Is there any member of the jury panel who is
23 related by blood, marriage or close personal rela-
24 tionship with these attorneys or who has ever been
25 represented by their law firms? If so, will you

1 please stand at this time?

2 (No response from any juror)

3 The Defendants in this case are SEL Properties
4 LLC and Stephen L Lipscomb

5 Is there any member of the jury panel who is
6 related by blood or marriage or is a close personal
7 friend of Mr Lipscomb? If so, please stand

8 (No response)

9 Is there any member of the jury panel who is
10 an officer, director or shareholder, or who is an
11 employee of or who has had business dealings with
12 SEL Properties LLC? If so, please stand

13 (No response)

14 The Defendants are represented in the case by
15 Keith Babcock and Brady Thomas -- please stand -- of
16 the Law Firm of Lewis & Babcock

17 Is there any member of the jury panel who is
18 related by blood or marriage to these attorneys, or
19 who is a close personal friend of them, or who has
20 ever been represented by their Law Firm? If so,
21 please stand

22 (No response)

23 Is there any member of the jury panel who has
24 had any business dealings with K & L Contracting LLC
25 or who has been employed by them? If so, if you will

1 please stand?

2 (No response)

3 Thank you

4 Is there any member of the jury panel who has
5 had any business dealings with American Amusement
6 or who has been employed by them? If so, please
7 stand

8 (No response)

9 Thank you

10 Now, there may be a number of witnesses who may
11 be called to testify in this case and this question
12 will apply to all who are named

13 Is there any member of the jury panel who is
14 related by blood or marriage to or is a close personal
15 friend of or who has had a business relationship
16 with these individuals, please stand?

17 D Melton -- no response

18 William Melton -- no response

19 Rick Maxheimer, Allen Wise, Lynn Richards, John
20 Quinn Richards and Quinn are CPAs

21 (No response to those names by any juror)

22 Marty Ouzts, also a CPA

23 (Juror standing)

24 JUROR I have had business involvement with
25 him

1 THE COURT Your name, please?
2 JUROR Linda Barr
3 THE COURT Would you be able to make a decis-
4 ion based upon the evidence presented in this case?
5 JUROR Yes
6 THE COURT And would you be able to reach a
7 fair and impartial decision both to the Plaintiffs
8 and to the Defendants in this case?
9 JUROR Yes
10 THE COURT Thank you You may be seated
11 (Juror being seated)
12 THE COURT Ladies and gentlemen of the jury
13 panel, some other persons who may be called as a
14 witness are as follows, and I would ask you to please
15 stand if the question applies to you
16 Ronnie Colson
17 Pat Kirk
18 Ron Spence
19 Carrie Howser
20 Stacy Fouche
21 Ron Hall
22 James Knight
23 Tom Quinn
24 Wilson Smoak
25 Robbie Milam

1 (No response from any juror as to those
2 names)
3 Is there any member of the jury panel who is
4 an owner or a former owner of property in Rolling
5 Creek at Courtyards? If so, I would ask you to please
6 stand
7 (No response)
8 Thank you
9 Is any member of the jury panel or any member
10 of your immediate family employed in the real estate
11 business or any business involved with real estate
12 or development? If so please stand
13 (Juror standing)
14 THE COURT Yes, your name?
15 JUROR I have a daughter who is employed in
16 real estate She's with Russell Jeffcoat
17 THE COURT And your name?
18 JUROR Corliss Sykes
19 THE COURT Do you know your number?
20 JUROR Number 236
21 THE COURT And the fact that you have a
22 daughter who is employed in real estate, Ms Sykes,
23 by Russell Jeffcoat, would that prevent you from
24 being able to listen to the evidence that is presented
25 in this case?

1 JUROR No, it wouldn't

2 THE COURT Would you be able to reach a fair
3 and impartial decision as to both the Plaintiffs and
4 the Defendants based on the evidence that you hear
5 in the case?

6 JUROR Yes

7 THE COURT Thank you You may be seated
8 (Juror being seated)

9 THE COURT Is any member of the jury panel em-
10 ployed as an accountant or a family member employed
11 as an accountant? If so, please stand
12 (Juror standing)

13 JUROR I am employed as an accountant

14 THE COURT And your name?

15 JUROR Roberta Dorsey Juror Number 57

16 THE COURT Would you be able to listen to the
17 evidence in this case and reach a fair and impartial
18 decision as to the Plaintiffs and the Defendants
19 from the evidence you hear?

20 JUROR- Yes

21 THE COURT Thank you You may be seated
22 (Juror being seated)

23 THE COURT Is there any member of the jury panel
24 who is conscious or aware of any bias or prejudice
25 for or against the Plaintiffs or the Defendants in

1 this case? If so, please stand
2 (No response from any juror)
3 Thank you
4 Has any member of the jury panel or any member
5 of your immediate family who has ever been an investor
6 in a large scale real estate development? If so,
7 please stand
8 (No response)
9 Is there any member of the jury panel who has
10 formed a personal opinion in regards to the facts of
11 this case? If so, please stand
12 (No response)
13 Is there any member of the jury panel that knows
14 of any reason why you could not serve as a fair and
15 impartial juror in the trial of this case? If so,
16 please stand
17 (No response)
18 Thank you
19 THE COURT Is there anything further from the
20 Plaintiffs?
21 MR BOWENS Nothing further
22 THE COURT Anything further from the Defendants
23 as to this?
24 MR BABCOCK No, Your Honor
25 (Whereupon, a jury strike sheet was prepared

1 for the attorneys, and there was a brief recess in
2 the matter)
3 (The jury was then struck by the parties as
4 follows
5 Plaintiffs struck Number 16
6 Defendants struck Number 10
7 Plaintiffs struck Number 8
8 Defendants struck Number 1
9 Plaintiffs struck Number 9
10 Defendants struck Number 21
11 Plaintiffs struck Number 13
12 Defendants struck Number 11)
13 (The strikes as to the alternate juror were
14 Plaintiffs struck Number 23
15 Defendants struck Number 24)
16 (NOTE Reporter's strike sheet shows that Juror
17 17, Barbara Wagner was struck for cause)
18 THE COURT Are there any motions with respect
19 to striking of the jury?
20 MR BOWENS No, Your Honor
21 MR BABCOCK Nothing from the Defendants
22 THE COURT Ladies and gentlemen, as your names
23 are called, please come forward and have a seat in
24 the jury box
25 (Whereupon, jurors were seated as follows

1 Clarence Fox, Number 78
2 Terrance Hughes, Number 121
3 Charles H Meehan, Number 160
4 Jeffrey V Yetter, Number 270
5 Beverly Washington, Number 249
6 Elizabeth Wright, Number 269
7 Carolyn Emeneker, Number 66
8 Beverly Conley, Number 46
9 Joseph Wider, Number 257
10 Dorothy Moore, Number 164
11 Marlene Reese, Number 190
12 Lori Sjoberg, Number 225
13 Alternate Corliss Sykes, Number 236)
14 THE COURT Ladies and gentlemen, if you will
15 please stand and raise your right hands to be placed
16 under oath
17 (Jurors as selected were sworn for the trial of
18 the case)
19 THE COURT Thank you Please have a seat
20 To the remaining members of the panel, I want
21 to thank you very much for your cooperation during
22 This process
23 (Whereupon, remaining members of panel not se-
24 lected for this case were excused by the Court)
25 THE COURT Ladies and gentlemen of the jury

1 who have been selected to serve as jurors for the
2 trial of this case, what I am going to do now is to
3 give you some instructions that I will ask you to
4 follow throughout the trial, and then I will excuse
5 you for the evening and ask that you return tomorrow
6 morning at nine thirty

7 When you return in the morning, we will begin
8 with the trial of the case, and I will give you a lit-
9 tle bit of an overview of how we will proceed

10 Now, ladies and gentlemen, you have been selected
11 as jurors in this matter, and as jurors you are sworn
12 to determine the facts of the case based upon the
13 evidence that will be presented to you during the
14 course of the trial

15 First of all, I will ask that you not discuss
16 this case among yourselves until it is time for you to
17 begin your deliberations The facts may not come in
18 on a chronological basis It may come to you on a piece-
19 meal basis

20 So until you have heard all of the evidence to-
21 gether with my instructions to you on the law, you
22 will not be able to reach any decision on the matter

23 I am going to ask that you as well keep an open
24 mind until it is time for you to begin your delibera-
25 tions

1 Secondly, I am going to ask that you not allow
2 anyone to come up to you and talk about this case
3 It is inappropriate for anyone to try to discuss the
4 case with you while you are seated as a juror

5 So out of an abundance of caution, and to make
6 sure that does not occur, we are going to ask that
7 you report any contact anyone may have with you while
8 you are serving We would like to have an opportuni-
9 ty to investigate should that occur, and the only way
10 to accomplish that is to ask that you report it to us

11 You can report it to the bailiff or to the clerk's
12 office or to me

13 So if anyone does attempt to discuss this case
14 with you, we ask that you report it as soon as it
15 occurs

16 Also, ladies and gentlemen, as you come and go
17 from the Courthouse, both this evening and tomorrow,
18 both when you leave and return and when you take your
19 lunch break, I would ask that you not listen to con-
20 versations that you may hear in the hallways

21 Oftentimes, the attorneys may be discussing things
22 with each other or with their clients, or with witnes-
23 ses The decision that you make must be made on the
24 evidence and testimony that is presented to you dur-
25 ing the course of this trial, and it should not be
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1 based on conversations you may overhear as you come
2 and go

3 So I would ask that you simply not listen to any
4 of those discussions, and I would also ask that you
5 turn off any telephones or beepers when you come in
6 tomorrow morning For that matter, the bailiffs will
7 collect your telephones from you

8 If for some reason you do not want to turn it
9 off because you want to be connected to your home or
10 office for some reason, if you would turn it on silent
11 and we will have people to take any messages for you
12 should any emergency occur

13 We want to make sure you are not influenced by
14 any outside things you may have and that you are not
15 distracted by any outside information So we ask that
16 you not keep your telephones or beepers with you while
17 you are in the jury room or while you are in the Court-
18 room

19 Also, if you have any reading materials I ask
20 that you leave those at home I will do my best to
21 make sure that the time you spend here will be spent
22 in the Courtroom, so do not keep those reading mate-
23 rials with you in the jury room

24 I never know when something you are reading will
25 have some impact upon a fact that is to be determined
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1 I do not screen your reading material nor do I wish
2 to screen it, so I would ask out of an abundance of
3 caution that you not have it with you You may leave
4 it in your car in case you wish to get them during
5 your lunch period and use them then Just do not
6 bring them in with you

7 I will do my best to make sure again that the
8 time you spend here in the Courthouse will be spent
9 listening to the evidence that is being presented dur-
10 ing the course of this trial

11 Now, ladies and gentlemen, again I'm going to give
12 you just some preliminary instructions for the even-
13 ing I am sure your family members or friends will
14 want to know what you are doing while you are on jury
15 duty

16 Certainly you can tell them that you have been
17 selected as a juror on a case At this particular
18 point you don't know anything about the case other than
19 the questions I have asked of you

20 So I ask that you just tell your family members
21 and friends that you have been selected as a juror to
22 serve on case that involves a real estate development,
23 but I ask that you not discuss it any further

24 I also ask that if they ask you questions or want
25 to talk to you about the case -- I ask that you please

1 tell them that you are not at liberty to do so, and
2 that the Judge has specifically asked you not to dis-
3 cuss it

4 I never know when something they may say or some
5 comment they may make to you, or some discussion you
6 may have, may influence you in some way

7 I want to avoid that at all costs, so I ask that
8 you not engage in those discussions It is the same
9 as allowing a stranger to come up and talk to you
10 about the case, even though it's a family member or
11 a friend

12 Just tell them that you cannot discuss it until
13 you have reached your verdict Once that occurs,
14 you will be free to discuss it with them You may then
15 discuss everything you have heard and seen during the
16 course of the trial

17 But until that occurs, we just ask that you not
18 discuss it with them

19 Now, I don't know that there would be any media
20 reports but to the extent there may be something that
21 is printed in the newspaper or perhaps something men-
22 tioned on television or over the radio, we ask that
23 you not listen to, watch or read any of those reports

24 That would be someone else's recitation of what
25 they heard during the course of the trial, what they

1 saw, and you must make your decision based on what you
2 hear, on what you see, throughout the course of this
3 trial

4 I do not want you to be influenced by what some-
5 one else's recitation of what those matters may be

6 Ladies and gentlemen, when you leave this even-
7 ing, I ask that you follow the bailiffs out so that
8 they may show you the room where you are to report to-
9 morrow morning

10 I will tell you that you will need to go downstairs
11 in the morning when you come in and scan your badges,
12 but do not stay downstairs Once you scan your badge,
13 please come upstairs to the third floor and someone
14 will direct you to the jury room

15 When you have all reported there, then I ask that
16 you select a Foreperson A Foreperson's job is to
17 communicate with me during the course of the trial,
18 and in particular in case there is some concern among
19 you that I need to be aware of in scheduling breaks or
20 the lunch hour The Foreperson should write me a
21 note about that

22 In case there are any scheduling issues, the
23 Foreperson should write me a note about that, but,
24 more importantly, when you begin your deliberations
25 it will be the Foreperson's duty to see that every one
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1 of you has a chance to express your opinions and to
2 coordinate those discussions

3 Then once the jury has reached its verdict, the
4 twelve of you, it will be the Foreperson's duty to
5 write the verdict on the form that will be provided
6 for that purpose

7 Now, the Foreperson must be one of the twelve of
8 you It cannot be the alternate

9 I ask that once you select that Foreperson, that
10 that person write your name on a piece of paper and
11 give it to the bailiff

12 Then when you come into the Courtroom tomorrow
13 morning, the Foreperson should take the first seat
14 there where the gentleman in the black sweater is
15 seated

16 The rest of you may take whatever seat you wish
17 as you come in and out of the Courtroom

18 Now, to the Alternate, your role is extremely
19 important If one of your fellow jurors is unable to
20 continue to serve through the remainder of the case,
21 you will step in and serve as juror for that person

22 I ask that you always take that seat there so
23 that I will always know your presence as well Only
24 the Alternate and the Foreperson have an assigned
25 seat

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1 Now, ladies and gentlemen, I hope that you have
2 a lovely evening I ask you now to follow the bail-
3 iff out so that you will know where to report in the
4 morning

5 I ask that you report tomorrow morning by nine
6 thirty, and when we begin I will explain to you
7 briefly the procedure that we will follow After that,
8 we will actually begin

9 Thank you all and have a good evening

10 (Jury excused from Courtroom)

11 THE COURT Is there anything we need to take
12 up before we adjourn for the day?

13 MR BABCOCK May we leave our things here in
14 the Courtroom?

15 CLERK Yes, and the Courtroom will be locked
16 up

17 MR BOWENS We have nothing, Your Honor

18 MR BABCOCK Nothing, Your Honor

19 THE COURT All right Thank you, gentlemen,
20 and we will continue with the case in the morning at
21 nine thirty

22 (Whereupon, the Court stood in recess for the
23 evening at 5 25 P M)

24 (The matter was continued on October 30 of
25 2007)

1 (Court resumes second day of trial)

2 THE COURT Our foreperson is Carolyn
3 Enemeker Juror number 66 Is there anything we
4 need to take up before we begin this morning?

5 MR BOWENS No, Your Honor

6 MR BABCOCK One matter from the
7 defense, Your Honor

8 THE COURT Yes, sir

9 MR BABCOCK And it's just to make sure
10 this inquiry is on the record As you know, Your
11 Honor, we argued motion in limine yesterday
12 concerning no damages beyond the five year term of
13 contract and if we could also include damages for
14 years two and three I imagine that may be
15 mentioned in the opening statements I just want
16 to make sure I reserve the right to raise that
17 objection

18 THE COURT All right I understand and
19 I understand that I think what I said yesterday
20 was that currently I would allow it to be in but
21 that is subject to change once the testimony
22 starts So it's noted for the record

23 MR BABCOCK Thank you, Your Honor

24 THE COURT If there is nothing else,
25 then we can ask the Jurors to come in please

1 (Jury enters the Courtroom at 9 46 AM)

2 THE COURT Good morning, ladies and
3 gentlemen Ms Enemeker, is that how you
4 pronounce it? Thank you I'm told that you've
5 been selected as Foreperson Is that correct?

6 FOREPERSON Yes

7 THE COURT I'd like to thank you very
8 much for serving in that capacity At this time,
9 ladies and gentlemen, we are about to begin the
10 trial in this case and I told you yesterday that I
11 would briefly explain to you the procedure that we
12 will follow throughout the course of the trial

13 The first thing that you will hear will be
14 the opening statements of the attorney Now,
15 their opening statements are not evidence but they
16 will talk to you a little bit more about what this
17 case is about and what they hope they will be able
18 to prove to you throughout the course of this
19 trial through the evidence that they hope to have
20 admitted

21 So, I'd ask that you listen very carefully to
22 those opening statements They kind of give you a
23 road map, if you will, of where they expect to go
24 and what you can expect to hear Now, once you've
25 heard those opening statements, then you will, in

1 fact, hear the evidence

2 The evidence may take many forms It may be
3 physical pieces of evidence that you'll be able to
4 take with you into the jury room when it's time
5 for you to begin your deliberations

6 Just as in any profession, there are certain
7 rules that govern In the legal profession, they
8 are what we call rules of evidence Those rules
9 of evidence are designed to make sure that what
10 you hear and what you can consider can assist you
11 in being able to determine the facts in this case
12 So that's your rule here You are to determine
13 the facts based upon the evidence

14 Now, whether or not that evidence is
15 admissible is a legal question which from time to
16 time I may be called onto to make a decision
17 about So sometimes you may hear the attorneys
18 objecting If I sustain an objection, then that
19 means that the evidence will not be allowed in and
20 I ask that you not speculate about what the
21 evidence might have been or the reasons for its
22 exclusion

23 I assure you that we're not trying to hide
24 anything or keep anything from you We're just
25 trying to make sure that what you hear and what

1 you see will be able to assist you in determining
2 the facts of this case

3 Now, on the other hand, if I over-rule the
4 objection then that means that the evidence will
5 be allowed in and you will be able to hear it and
6 see it Now, from time to time there may be some
7 other legal issues that we may need to take up
8 outside of your presence To the extent that we
9 can do that quickly here in the Courtroom, the
10 attorneys may come up to what we call the bench
11 and we may discuss it here

12 On other occasions, I may ask that you retire
13 to the jury room and at that time I'll tell you
14 not to speculate as to what we are discussing or
15 the reasons for our discussions We are just
16 trying to make sure that everyone's rights are
17 protected and the only way we can do that is to
18 fully discuss those legal issues but we need to do
19 that outside of your presence

20 Then once you've heard all the evidence that
21 has to be presented, then you will hear again from
22 the attorneys This time in the form of a closing
23 argument At that time, they will truly be making
24 arguments to you They will argue portions of the
25 evidence that you've heard in an effort to try to

1 sway you to find the facts in accordance with
2 their view of what happened

3 So, I'd ask that you listen very carefully to
4 those closing arguments They may cause you to
5 think about the evidence in a different light or
6 they may raise questions that you will want to
7 discuss among yourselves when it's time for you
8 all to begin your deliberations

9 Then once they have concluded those closing
10 arguments, then I will instruct you or what we
11 call charge you on the law and then you may begin
12 your deliberations at that point Now, ladies and
13 gentlemen, I'm fairly confident that we will not
14 finish today

15 The attorneys have told me that they estimate
16 that it will take several days to try this case so
17 I ask you to keep your attention to all the
18 evidence and to the attorneys as they make their
19 presentations

20 I do ask that you try not to take notes I
21 find that sometimes when people take notes, they
22 are busy writing down information and they are
23 missing something that is being presented
24 However, I do understand that given the length of
25 the trial, that some of you may need to take

1 notes to help you remember information If that
2 applies to you and you think you need to do that
3 at least let me know so I can accommodate you

4 But I'm hoping that by keeping your attention
5 to the attorneys and as they present the
6 information, you will be able to keep up with it
7 and follow along throughout the course of this
8 trial

9 Again, ladies and gentlemen, let me ask that
10 you give your full attention to the attorneys and
11 to the evidences as it is being presented Would
12 you like to make an opening statement, Mr Bowens
13 and Mr Catone?

14 MR CATONE Yes, Your Honor I would

15 THE COURT Yes, sir

16 MR CATONE Thank you, Your Honor May
17 it please the Court Good morning, ladies and
18 gentlemen, and thank you for being here to help us
19 resolve this dispute we've been unable to resolve
20 without you My name is Tony Catone and my law
21 partner, Glen Bowens, and I represent the
22 Plaintiffs in this case That's Dutch Fork
23 Development Group and Dutch Fork Realty

24 Those are small companies and their members
25 are here Billy Melton, D Melton, and Ann

1 Melton You're going to learn more about them
2 later on as the evidence comes in but folks, this
3 case is about greed The greed of the Defendants
4 specifically about grabbing more power and money
5 than what was due to him Trying to squeeze the
6 Plaintiffs out of what money was due to them
7 The case centers around a real estate
8 development known as the Courtyards at Rolling
9 Creek Like any real estate development, the land
10 was purchased The planning and the groundwork
11 was laid down It was subdivided It was sold in
12 lots and then homes were built on those lots and
13 sold to home buyers
14 There's going to be an agreement here
15 You're going to hear a lot about the agreement
16 The marketing and sale and development agreement
17 And you're going to hear the details of that
18 agreement from the stand and from the evidence
19 that's introduced
20 But for now, I'll suffice it to say that
21 there was an agreement and a plan and to complete
22 this project in five years The Plaintiffs were
23 to be paid for their work on the development of
24 the sale of the lots and the sale of homes
25 From the beginning, the Defendant breached

1 the agreement and he caused extensive and
2 irreparable delay after delay He even at one
3 point after his delay or breaching the contract
4 and causing that delay, he purported to terminate
5 the Plaintiffs eventually with this letter I'll
6 hold it up for you there

7 And he gives three reasons for terminating
8 the Plaintiffs The first two don't have anything
9 to do with us and the last one is absolutely false
10 and we're going to show you that

11 You're going to hear from several witnesses
12 in this case From our side, you are going to
13 hear from D Melton He's going to talk to you
14 about the contract He's going to talk to you
15 about the boots on the ground - the day to day
16 work by Derrick on the project's site

17 You're going to hear from Billy Melton, who's
18 going to talk to you about the contract, the
19 revisions of the agreement, and what was going on
20 as this contract was produced in writing You're
21 going to hear from Rick Maxheimer, who is an
22 expert engineer He was the site engineer on the
23 project and he's going to talk to you about some
24 of the things that were done and about this
25 timeframe

1 You're going to hear from Lynn Richards, an
2 expert accountant She's a CPA and she's going to
3 tell you that the Defendants caused the Plaintiffs
4 to lose about three million dollars on this
5 project but the Defendant's values breached the
6 agreement

7 Now, in terms of performance, the evidence
8 will show that from the beginning the Plaintiffs
9 were meeting their obligations They were
10 continually performing their duties On the other
11 hand, from the beginning, the Defendants were
12 shirking their obligations, being negligent with
13 their duties, and causing as a result of that
14 negligence and as a result of that shirking of
15 duties delay after delay after delay

16 Likewise, the evidence is going to show that
17 the Plaintiffs continuously made sacrifices for
18 the benefit of the project and its continued
19 success, however, the evidence is going to show
20 that the Defendants consistently put their own
21 interests ahead of the project

22 They took money and used it for their own
23 purpose and benefit, knelt behind the Plaintiff's
24 back and tried to squeeze the Plaintiffs out of
25 their fair share of profits

1 This caused cash shortfalls and further
2 delays Now, we've been involved in this case for
3 a while We expect that the defense is going to
4 try to justify the Defendant's actions by several
5 means One of those is by saying that we didn't
6 meet our obligations We're going to show you
7 that it's not true and the evidence is going to
8 prove that

9 We're going to talk about several things
10 here One of those is the requirement under
11 written agreement, the sales or to sell certain
12 amounts of lots and that sort of thing He wants
13 that applied unfairly and unreasonably and we want
14 it applied fairly and reasonably and you're going
15 to see that

16 We're going to talk about a time frame for
17 this project and the sales that occurred He
18 wants it applied unfairly and unreasonably and we
19 want it applied fairly and reasonably Now, there
20 are several things I want you to listen for All
21 of these things will be explained in further
22 detail but I wanted to just give you an overhead
23 about it

24 I want you to listen for how the events took
25 money I want you to listen for how they tried

1 to squeeze play us out of this deal to make more
2 money for themselves I want you to listen to how
3 they caused those repeated delays Listen
4 particularly for a few details

5 The land The land for all the phases The
6 land for phases one, two, and three was allocated
7 only to phase one and the purchase price of that
8 land with all phases and it was allocated only for
9 phase one when it should have been allocated
10 across the phases to give you a true number
11 concerning the profits in each phase

12 I want you to listen as much to how the
13 Defendants consistently failed to pay contractors
14 and that delayed the work on that project I want
15 you to listen for how the Defendants reworked the
16 set plans, without consulting the Plaintiffs,
17 costing time, ultimately preventing the project
18 from happening

19 I want you to listen and see how they
20 complain about things that actually turn out to be
21 their fault And the last thing, I want you to
22 listen for why wasn't the project completed in
23 five years

24 Now, I'll speak to you again and I'll have
25 the chance to discuss with you what we've all

1 heard Please listen carefully I am going
2 to be listening carefully and I can't wait to tell
3 you everything that happened in this case and what
4 we think should be done about it and I'll speak to
5 you later

6 MR BABCOCK May it please the Court

7 THE COURT Yes, sir

8 MR BABCOCK I would like to

9 reintroduce myself My name is Keith Babcock and
10 I'm one of the attorneys representing Steve
11 Lipscomb and SEL Properties Mr Lipscomb is the
12 gentleman with the mustache there He is the
13 Defendant individually and on behalf of SEL
14 Properties, LLC Now, LLC is simply a company
15 and that's a company owned by his family

16 Also seated with me at the counsel table is
17 Brady Thomas, another lawyer in my office, and he
18 also represents the Defendant in this case Right
19 behind us is Marian Nettles You'll see Marian
20 helping us during the course of the trial She's
21 a paralegal and she'll be helping us get exhibits
22 and witnesses for you so we can run that as
23 smoothly as possible

24 Now, ladies and gentlemen, this case is a
25 contract case And it's a hard contract case

1 And as in all contract cases, there are two issues
2 that need to be resolved by a jury Was there a
3 breach of contract and how much damages to award?

4 This case is a little bit different because
5 we're coming before you admitting that the
6 Defendant, SEL Properties, owes money to the
7 Plaintiffs in connection with the two contracts
8 And we're going to have testimony by Mr Marty
9 Ouzts Mr Ouzts is in the court room right now
10 and he'll be testifying later to show you from an
11 accounting standpoint approximately two hundred
12 and thirty thousand dollars is owed by the
13 Defendant to the Plaintiff

14 And we are here starting telling you that we
15 owe that money and that's what we believe we owe
16 The reason we're here, however, is because as you
17 heard, Dutch Fork wants a lot more money They
18 want millions of dollars And, you see, it's
19 because of that difference that we're coming
20 before you because they want so much money that we
21 object and that's why we're here today

22 Let me start right off by saying that this is
23 a contract case and what you will see here is that
24 the Defendants in good faith went forward to try
25 and achieve forward with the contract and

1 there was not wrong doing and we'll show that
2 there was not wrong doing by the defense and that
3 there was good faith efforts made by the defense,
4 and that anything that was done that was not
5 perfectly right is going to happen in the overall
6 big contract, that there might be some little
7 things that might go wrong so what we'll show you
8 is that there was no scheme or concept to try and
9 hurt the Plaintiffs in this case

10 Now, the case involves the Courtyards at
11 Rolling Creek and that's a residential subdivision
12 near Ballantine In 2000, the Meltons, who have
13 real estate companies and other companies,
14 approached Mr Lipscomb about the idea of
15 developing this residential subdivision And the
16 concept was fairly simple One company would be
17 the developer and one company would handle the
18 real estate sense

19 In exchange, Mr Lipscomb's company was to
20 buy the land and was also to provide the financing
21 to take care of building the road to the plans and
22 the studies and all that sort of thing In this
23 case there are two written contracts And any
24 time you have a case involving a contract, it's
25 obviously very important to look at specific

1 terms of the contract because that's what controls
2 the agreement between the parties

3 In this case, this one contract that you will
4 hear about involves phase four Let me explain
5 phase four Phase four is a contract that was
6 entered into on October of 2002 and that actually
7 was part of the Rolling Creek Subdivision It was
8 different That contract was for a five year term
9 from October of 2002

10 There is still one lot left out there so
11 until the contract term was completed we couldn't
12 figure out exactly what was owed That five year
13 period is now expired October 2007 and from an
14 accounting standpoint and you will hear testimony
15 from Mr Ouzts that one hundred thousand dollars
16 of that money I mentioned earlier is associated
17 with phase four and is owed to the Plaintiff

18 Now, phase four is not the primary contract
19 we talked about today during the trial because the
20 dispute between the parties is not that great with
21 regard to that contract Where it is great is
22 with regard to the first contract in this case
23 And that was the contract entered into November of
24 2000 and if you look at the first page of that
25 contract, you'll see that the contract was

1 entered into on November fourteen of 2000

2 Now, this contract, if you go to paragraph
3 eight, I want to call your attention to two parts
4 of paragraph eight That's the termination
5 portion of the contract As you can see under C,
6 the contract has a term of five years to the day
7 of the contract So that means it was to run if
8 it wasn't earlier terminated from November of 2000
9 to November of 2005

10 And what it also indicated was that once the
11 - let me say again it also indicated that
12 grounds for termination could be under B, failure
13 to sell at least twenty percent of the available
14 lots in one year, and DFDG and DFR

15 Let's go to paragraph nine That's on two
16 pages of the contract and if you look at paragraph
17 nine of the clause of termination It says,
18 Plaintiffs will have no further rights to
19 compensation and/or commissions and will
20 peacefully vacate the premises So, that means
21 once it's over it's over and no further
22 entitlement to any monies under the terms of the
23 contract itself

24 Now, under the contract, if we look at
25 paragraph two, SEL Properties' responsibility

1 had to do with the infrastructure and what it was
2 to do was to exercise its best efforts to secure
3 financing to pursue property, secure an
4 engineering studies survey, landscaping, and the
5 cost of the infrastructure and SEL had approval
6 for all cost pertaining to the development of the
7 property

8 Now, if you look at page one, at the first
9 whereas paragraph when it starts at SEL, the owner
10 of above described real estate, there are two
11 things that SEL and that's short for SEL
12 Properties, LLC , was to buy to land which was
13 done in time of the contract and to obtain the
14 financing for the infrastructure, which it did

15 So, contractually there were two things it
16 was supposed to do and it did Now, four, was to
17 handle the development of real estate and for that
18 it was to get development fees It was to get
19 commissions And it got a lot of commissions out
20 there You will hear testimony about hundreds and
21 thousands of dollars of commissions and also
22 twenty-five percent of the profit and that's where
23 the real dispute in this case will occur

24 Now, you'll hear this case in potentially
25 three phases to this development Phase one,

1 phase two, and phase three And phase one was to
2 have fifty-seven lots And you'll see also later
3 within the contract that phase two would not
4 commence until phase one had had sixty percent of
5 its lots sold and that's over on page three of the
6 contract - thirty-five

7 So, phase two should not commence until sixty
8 percent of the lots from phase one are sold and
9 phase three would not commence until no less than
10 sixty percent of the lots from phase one and two
11 were sold So, that's the contract in this case

12 What happened during the development? Well,
13 it started off The plans then were obtained
14 The approvals were obtained Construction started
15 and the water and sewer were constructed for the
16 various phases And the roads were built for
17 phase one because that would be the first phase
18 In August of 2002, those roads were complete The
19 plat had been approved and it was now time to
20 start selling lots

21 That's August of 2002 and the lots began
22 Unfortunately, the lot sales were a lot slower
23 than anticipated In fact, during the first year
24 only nine lots were sold As a result of that,
25 there was pressure being experienced by the bank

1 and you will also hear testimony from a company he
2 also had an ownership interest in - K&L
3 Construction - had to start purchasing a number of
4 lots and building a number of houses out there
5 himself through his company in order to keep
6 things moving

7 There were other problems There were
8 problems with roads There were problems with
9 budgets And ultimately, something happened in
10 May of 2004 That something was a letter that
11 counsel just showed you

12 But if you had gone to the subdivision in May
13 of 2004 what you would have seen was thirty-one of
14 fifty-seven lots had been sold out of phase one
15 You would have seen roads to phase one but you
16 would have seen no roads going to phase two or
17 three No bridges You needed bridges to get to
18 phase two and three None of that was in place at
19 that point in time

20 Now, by that time a long time ago we knew
21 something was wrong We are just saying he made a
22 mistake The May 28th letter referenced twenty
23 percent of the lots not being sold And that's
24 not correct Mr Lipscomb's understanding of what
25 twenty percent was in this contract was incorrect

1 So, when that letter was sent that was wrong
2 There was not - they met twenty percent but they
3 weren't selling as much as Mr Lipscomb thought
4 twenty percent to be

5 After that letter was sent, Dutch Fork
6 continued to do some work out there, continued to
7 sell houses out there, and ultimately in February
8 of 2005 they brought a suit

9 Now, you're going to have testimony from
10 various accounts concerning the profits on page
11 one and that's profits that accountants are going
12 to find It may not be what capital is but that's
13 their analysis of the numbers from an accounting
14 perspective

15 In this case, Plaintiffs are going to be
16 seeking not only profits with regards to phase one
17 but also phase two and three And that's how you
18 get to the millions of dollars Ladies and
19 gentlemen, if you were to go out You may even
20 go out to this site in November of 2005, what you
21 would have seen was pretty similar to what you
22 would have seen in March and May of 2004

23 In fact, fifty-one of the fifty-seven lots
24 have sold at that time But the roads weren't
25 constructed There were no bridges for phase

1 two so no lots were being sold for phase two In
2 fact, even today, the roadwork and the bridgework
3 is just underway right now so any sales for any
4 lots for phase two is down the road

5 Ladies and gentlemen, we talked about twenty-
6 five percent of the profits for the Plaintiff
7 Obviously seventy-five percent of the profits
8 would be for SEL Properties but in this case, SEL
9 Properties hasn't received seventy-five percent of
10 the profits It hasn't any of the profits

11 In fact, it has loaned money to the project
12 and it has borrowed money - over two million
13 dollars - for this project Money that has been
14 personally guaranteed as those kinds of loans are
15 by Mr Lipscomb So right now, SEL hasn't got any
16 money so there's no question about SEL having got
17 money and not given any to the Plaintiffs SEL
18 hasn't gotten that money

19 So, there's where the disputes are going to
20 be and that's generally what the case is about
21 Your role is very, very important as Her Honor
22 indicated Her Honor indicated that she gives you
23 the law but you decide the facts Anthropologists
24 tell us that one of the first thing man did was to
25 peacefully resolve disputes Otherwise,

1 people would have to hit themselves over the head
2 like cavemen So this is something while you are
3 all here that has gone back for centuries

4 It's a very important role and what you
5 bring, all twelve of you, to this process, is a
6 very important thing You bring common sense
7 You bring logic You bring reason That's what's
8 necessary to resolve this kind of dispute All
9 the things that you bring to the Courtroom

10 And this case as in all cases, the Plaintiff
11 presents his evidence first And we ask that you
12 listen to all the Plaintiff's evidence Then we
13 have our opportunity to present our witnesses and
14 we request that you listen to all of our evidence
15 too and analyze all of the evidence because at the
16 conclusion of that - at the conclusion of the
17 trial - your job is to render a verdict

18 Verdict comes from the Latin word which means
19 to speak the truth and that's all we ask of you in
20 this case Listen to all the evidence and render
21 a verdict which speaks the truth

22 THE COURT You may call your first
23 witness

24 MR BOWENS Thank you, Your Honor
25 We call D Melton

1 THE COURT Tell the court reporter your
2 name

3 A My name is Donald Owens Melton and I go by
4 the initial D

5 (Donald Melton, being duly sworn,
6 testified as follows)

7 DIRECT EXAMINATION

8 BY MR BOWENS

9 Q Mr Melton, tell us a little bit about your
10 education and training in your background?

11 A I was a high school graduate in 1983
12 Finished at the University of South Carolina
13 in 1990 with an Education degree and in 1992
14 received a real estate license

15 Q What is Dutch Fork Development Group?

16 A Dutch Fork Development Group is our
17 company that we go out and find property,
18 land for our intent~~ed~~ purpose to sub-divide into
19 residential subdivisions

20 Q And tell me who the members of Dutch Fork
21 are?

22 A Myself, Billy Melton, and Ann Melton

23 Q Now, what is Dutch Fork Realty?

24 A Dutch Fork Realty is our real estate
25 company

Donald Melton, Direct Examination

1 It works hand in hand with our development
2 company We primarily market in sales of
3 properties in our own subdivisions but we do
4 outside sales in the Columbia area also

5 Q What is SEL Properties?

6 A SEL Properties is an investment holding
7 company that finances real estate projects as its
8 primary operation

9 Q What was SEL's role with the Courtyards?

10 A SEL's role with the Courtyard was to come in,
11 purchase the property, and to provide all the
12 financing for the infrastructure roads and
13 things that needed to be in there to make it take
14 place

15 Q And who did you deal with at SEL Properties?

16 A Mr Steve Lipscomb

17 Q What is K&L Contracting?

18 A K&L Contracting is a building company owned
19 by Steve Lipscomb and Pat Kirk

20 Q And what kind of work does it do?

21 A They build homes, residential homes for
22 people to buy them, for them to make money

23 Q And what role did K&L Contracting play in the
24 Courtyards?

25 A They were a team builder of the

Donald Melton, Direct Examination

1 courtyards at Rolling Creek

2 So, I think we're talking about fifteen buildings

3 Q What's a team builder? Explain that in

4 concept of how that works

5 A A team builder is a builder that is approved

6 to come into the subdivision to take down lots and

7 build homes

8 We review their credentials and their status and

9 allow them to become what we call a team builder

10 Q What is a spec house?

11 A A spec house is when you build a home in a

12 subdivision and you don't have a buyer for it yet

13 The builder will bring his own plans and

14 specifications to build the house, put it on

15 the market for sale waiting for a buyer to come

16 along and buy it It's called a speculative

17 house

18 Q Are team builders expected to buy lots and

19 build those kind of speculative houses?

20 A Yes, they are It's one of their rights as a

21 team builder

22 Q Do customers or people who are going to buy

23 those lots in the subdivision - do they have to

24 use a team builder to build their house?

25 A They do have to use a team builder

Donald Melton, Direct Examination

1 Q If a customer comes to the courtyards and
2 wants to build a house on a particular lot, but
3 that lot hasn't been purchased by a team
4 builder yet, how does that work?

5 A If they comes to a lot that's not purchased
6 by a builder at that particular time an individual
7 comes in, for instance, you all say I want to
8 build on this lot We will get you with two or
9 three of the team builders and they will bid on
10 the project to build your house and sit down and
11 meet with you and you will choose between two or
12 three different builders They'll bid for your
13 job

14 Q Did all the team builders compete for these
15 kind of custom jobs?

16 A Yes, they did

17 Q Does that include K&L Contracting?

18 A That does include K&L

19 Q Who is Letts Engineering?

20 A Letts Engineering, which is also known as
21 PCEG, is the engineering company that designed the
22 entire Courtyards at Rolling Creek The lot
23 layouts, the land plans, and all the construction
24 joiners that go into it so that the contractors
25 can build the subdivision itself

Donald Melton, Direct Examination

1 Q Did they have any supervisory role in the
2 project?

3 A Yes, they did They would supervise work
4 as it was done on the project

5 Q And finally, who was Newman Construction?

6 A Newman Construction is the company that was
7 hired to do the infrastructure work Put in
8 roads, storm drains, that sort of thing They
9 were contracted to do that

10 Q As far as the developments go because as I
11 understand it, there were three different projects
12 that had the name Rolling Creek in it in some way
13 or another Is that correct?

14 A That's correct

15 Q Okay Explain to the Jury what the three
16 different developments were

17 A Okay We had the original subdivision we
18 started on our own and it was called Rolling
19 Creek Then we had the Courtyards at Rolling
20 Creek, which we talked about today the phases one,
21 two and three The Courtyards at Rolling Creek
22 There was a courtyard/ patio-type subdivision It
23 was a just a little bit smaller in lot size And
24 then we have phase four of Rolling Creek
25 subdivision, which Steve Lipscomb was a part of

Donald Melton, Direct Examination

1 that but not a part of the original Rolling Creek
2 subdivision SEL Properties was involved with
3 phase four

4 Q I want to show you a photograph that we've
5 marked as Exhibit 151 Do you recognize that
6 photograph?

7 A That is a picture of the entrance way coming
8 in to the Courtyards of Rolling Creek as you drive
9 in That's your main marquee sign coming in the
10 entrance way

11 Q Explain to the Jury what this logo is right
12 here in the center with the green background and
13 the RC with C around it What is that?

14 A The square portion with the RC on it is our
15 original logo for Rolling Creek subdivision and
16 the big C on top represents the Courtyards at
17 Rolling Creek We created that in order to link
18 it to our Rolling Creek subdivision

19 It was so successful We had a high quality
20 product there and it's well known throughout the
21 Columbia area Rolling Creek Subdivision
22 so we took that over because we are the same
23 developers and we're taking some of the similar
24 concepts over to that side so we wanted to keep
25 the name going

Donald Melton, Direct Examination

1 MR BOWENS Your Honor, this is
2 exhibit 151

3 MR BABCOCK Your Honor, I have
4 objection May we approach?

5 THE COURT Yes

6 (Short conference at the bench)

7 Q I'm going to show you what we've marked as
8 Exhibit 155 Do you recognize this photograph?

9 A Yes, I do It's one of the homes in the
10 Courtyards at Rolling Creek

11 Q Is that a sample of what the typical home
12 would look like in the Courtyards?

13 A Yes, it is

14 MR BOWENS Your Honor, I'd like to
15 offer Exhibit 155 into evidence

16 MR BABCOCK Without objection, Your
17 Honor

18 THE COURT Without objections
19 Admitted

20 Q Why was it you wanted to develop the
21 Courtyards at Rolling Creek?

22 A The Courtyards at Rolling Creek property was
23 adjacent borderline property line the we had
24 already brought in and established The Rolling
25 Creek Subdivision we established up front We

Donald Melton, Direct Examination

1 spent over a million dollars bringing in off-site
2 water and sewer We knew that SEL Properties
3 would not have been involved in this project We
4 knew the property was available next to us
5 borderline to our property line and we knew it to
6 be a great opportunity to recoup some of that cost
7 that we had spent bringing in water and sewer just
8 to the Rolling Creek Subdivision We could take
9 out of Rolling Creek Subdivision our water and
10 sewer lines and run it into this property and
11 develop this Courtyards of Rolling Creek Phases
12 one, two, and three by using the water and sewer
13 lines running through Rolling Creek

14 Q How long after Courtyards began did phase
15 four of Rolling Creek begin?

16 A That was two years

17 Q When you first started the Rolling Creek
18 subdivision, what did your lot sell for?

19 A The Rolling Creek lot sale initially got
20 started out for around thirty-six thousand dollars
21 per lot

22 Q And when you sold the phase four lots, what
23 did they sell for?

24 A We sold them up to seventy thousand dollars
25 in phase four of Rolling Creek

Donald Melton, Direct Examination

1 Q So over a period of time those lots had grown
2 in value to almost doubled?

3 A Yes, sir

4 Q I want you to take a moment to explain to the
5 Jury just the overall basic concept that was
6 behind the plan between Dutch Fork Development
7 Group and SEL Properties How was this going to
8 work? Just a generic overview How this was
9 going to take place

10 A Again, we knew the property was there and it
11 would be a great advantage to us to take it on in
12 there We had the idea and we took it to Steve at
13 SEL Properties of developing the Courtyards at
14 Rolling Creek phases one, two, and three and he
15 agreed upon it and he was to buy the land and to
16 provide the financing for all the infrastructure
17 to go in

18 We were in agreement that we
19 would be developers handling all the
20 development -- that we would handle developing
21 aspects of the project and also bring in
22 our real estate company, Dutch Fork Realty,
23 and do the sales and marketing of the project

24 Q Did SEL in fact purchase the property?

25 A Yes, he did

Donald Melton, Direct Examination

1 Q Who brokered the sale of that transaction
2 from the previous owner and then SEL Property as
3 the buyer?

4 A We, Dutch Fork Realty, brokered the land
5 deal Eight hundred thousand dollar land purchase
6 for 122 acres We did the brokering of the land
7 We didn't charge any commission because we knew we
8 were going into a partnership with him so we
9 forwent our commissions on those

10 Q I'm going to hand you over an Exhibit marked
11 number 1 and 2 Do you recognize?

12 A This is our development and marketing
13 agreement

14 Q I'm going to put it up on the easel here Is
15 this just a blow-up of that same document?

16 A Yes, it is

17 Q I'm going to show you what we've marked as
18 Exhibit number 2 Do you recognize this document?

19 A This is a sales and marketing agreement for
20 phase four of Rolling Creek

21 Q Now, are these two contracts substantially
22 the same as far as how it's written and just the
23 different property?

24 A Yes, sir

25 Q If you would please,

Donald Melton, Direct Examination

1 look at Exhibit or paragraph two of Exhibit number
2 1, page one

3 A Okay

4 Q What I want you to do is explain to the Jury
5 from the contract what was SEL Properties'
6 responsibilities

7 A To procure reasonable financing for the
8 purpose of the purchase of the property and
9 financing available for the entire project

10 Q I'm going to hand you what's been marked as
11 Exhibit number 3 What is this document?

12 A This document is the contract of sale for the
13 land when it was purchased

14 Q And when was that contract made?

15 A It was purchased the eighth day of August,
16 2000

17 Q I'm going to hand you Exhibit number 4 What
18 is that document?

19 A This document is the title to the real estate
20 that was purchased

21 Q And when was that deed made out?

22 A September the twenty-second of 2000

23 Q Did Mr Lipscomb or SEL Properties rather -
24 how was that property paid for?

25 A He brought a check to us

Donald Melton, Direct Examination

1 and had us deliver the check for the property to
2 the seller who was selling the property -the 122
3 acres - we took it down to the local and delivered
4 that check to him for the property

5 Q Was that purchase financed by a bank?

6 A No It was more or less a cash transaction

7 Q Did Mr Lipscomb or SEL Properties
8 subsequently take out a mortgage for that same
9 amount of money?

10 A Yes, he did in a month or two later I think
11 it was in October he took out a mortgage from NBSC
12 for eight hundred thousand dollars for that land

13 Q I hand you Exhibit number 5 Do you
14 recognize that document?

15 A This is a mortgage for the real estate
16 property Correct

17 Q Now, has that mortgage been satisfied?

18 A Yes, it has

19 Q How was that mortgage satisfied?

20 A Through the sales of property in phase one of
21 the Courtyards, the complete mortgage was
22 satisfied

23 Well, actually if you want to back up He - we
24 had a construction loan to put in the
25 infrastructure He took out eight hundred

Donald Melton, Direct Examination

1 thousand dollars of the construction loan and paid
2 off this mortgage

3 Q What is the day of satisfaction of that
4 mortgage? Do you have it on there?

5 A January 22, '01

6 Q And when was the construction loan obtained
7 for the phase one construction?

8 A Just prior to this

9 Q So, the lot sales had not all completed yet

10 A No, they hadn't

11 Q The funds to pay off that mortgage came out
12 of the development?

13 A Correct

14 MR BOWENS Your Honor, at this time I
15 move to offer Exhibits 2, 3, and 4 into evidence

16 MR BABCOCK Without objection, Your
17 Honor

18 THE COURT Admitted

19 Q Now, you've talked about this construction
20 loan that was obtained during the development that
21 was obtained from NBSC

22 A Yes, sir

23 Q And that's the National Bank of South
24 Carolina?

25 A Correct

Donald Melton, Direct Examination

1 Q How did that work? Once you got the loan -
2 how was the project funded? How did the mechanics
3 of that work? How did people get paid and money
4 get spent?

5 A Once we obtained the loan, work began with
6 Newman Construction putting in the infrastructure
7 and that sort of thing He would do a portion of
8 the work He would submit a pay application to
9 the engineer The engineers would go out and
10 verify that the work had been done The bank
11 would send out their inspector to verify that that
12 amount of work had been done and the engineer work
13 was properly done also and Richland County would
14 also send inspectors out Once that process had
15 taken place, our engineer verified once again that
16 it was done and properly done and placed that
17 amount and we would send that information to Mr
18 Lipscomb at SEL Properties through our engineer
19 and he would verify, sign off on it and write the
20 checks out

21 Q If you look at paragraph two of the contract,
22 the last sentence there says that SEL will have
23 final approval on cost and changes of the
24 property, how did that go about? How did that
25 work? How did SEL approve the cost?

Donald Melton, Direct Examination

1 A They would approve the costs sometimes if the
2 engineers would say, hey, this is right This is
3 correct The engineer would say it was done
4 properly The bank would say it was done properly
5 and then Mr Lipscomb would sign off on it We
6 were not allowed to as development to enter into
7 any contract or any payment thing that would alter
8 any thing that would obligate SEL Properties to
9 have to pay money He had final say so in all
10 costs that came up We could give bids on things
11 and give it to him Let's say the landscapers
12 were coming in to do the entranceway, he would
13 have final approval on all sales

14 Q What is a change order?

15 A A change order is a document produced when
16 the contractor comes in and runs in to a situation
17 that might not be on the scope of plans putting in
18 the infrastructure He may have to add an extra
19 section of pipe or two or do something a little
20 bit different than what the engineer had on the
21 initial plans He will write the change order,
22 submit it to the engineer The engineer will say,
23 correct, we think it needs to be done We'll get
24 with Steve and say our engineer thinks it's good
25 and we think it's got to be done to take care of

Donald Melton, Direct Examination

1 something they've left out and they move forward

2 But Steve is the only one that can sign off on

3 change orders

4 Q Do the engineers have to authorize the change
5 orders as well?

6 A Yes, the engineer did He would look at it
7 first

8 Q How were the lot sales process determined?

9 A According to the contract, we were to set the
10 fair market value We studied that area, did some
11 market analysis We got together with Steve and
12 we came up with a price of forty thousand dollars
13 that we all agreed upon as fair market value of
14 the lots over the project

15 Q If you look at paragraph number four on
16 Exhibit number 1 there on the Courtyards, what was
17 Dutch Fork's Development Group's responsibility
18 under the contract?

19 A Under paragraph four, as Dutch Fork's
20 Development company we were responsible for
21 helping to designing the project, getting
22 engineers hired, working on hiring, obtaining
23 permits through the County, working with the
24 fundamental agencies alongside with the engineer
25 himself, work on getting the property rezoned We

Donald Melton, Direct Examination

1 were the day to day coordinators for everything
2 happening in the project

3 Q I'm going to hand you what we've marked as
4 Exhibit 8 Do you recognize Exhibit 8?

5 A Yes, I do

6 Q What is that?

7 A This is a list of services provided by Dutch
8 Fork Development Group

9 Q Were those services performed at the
10 Courtyards?

11 A Yes, it was

12 Q Explain to the Jury what some of those
13 services were that you had

14 A I'm kind of running through the list Zoning
15 changes which I've previously mentioned, going to
16 the planning commission for approval for the
17 project, help obtaining water and sewer and storm
18 drainage permits from the County State and
19 highway, county motor approvals Environmental
20 studies, impact studies and that sort of thing

21 Q I hand you what we marked as Exhibit number
22 7 What is Exhibit number 7?

23 A This exhibit represents the permits which
24 were obtained in order for the project to go
25 forward

Donald Melton, Direct Examination

1 Q I'm handing you Exhibit number 6 What is
2 Exhibit 6?

3 A This Exhibit is stating that we did work
4 through for our re-zoning We were re-zoned RS
5 one clusters for our courtyard project This is
6 the letter verifying that

7 MR BOWENS Your Honor, at this time,
8 we'd like to offer Exhibits 6,7, and 8 into
9 evidence at this time

10 MR BABCOCK Your Honor, without
11 objection but may we approach

12 THE COURT Yes, sir

13 (Short conference at the bench)

14 Q Mr Melton, looking at paragraph five of the
15 contract on the easel here, how was Dutch Fork
16 supposed to be compensated for its work in the
17 Courtyard?

18 A Phases one, two, and three - each phase, we
19 were to receive a fifty-four thousand dollar
20 development fee for the project We were to
21 receive a nine thousand dollar payment each month
22 for six months in each phase
23 Phase one was started and we were to receive our
24 first payment of nine thousand dollars one month
25 after our

Donald Melton, Direct Examination

1 construction company - the very next month after
2 our construction company side-tracked

3 Q I'm going to hand you Exhibit number 9 What
4 is Exhibit number 9?

5 A This is the contract that was entered into
6 with the construction to put in place one of the
7 Courtyards

8 Q And what is the date of that construction
9 company?

10 A The date of this is October twenty-six, 2001

11 Q So, if it was entered into October twenty-
12 six, when would be the first month you would
13 expect to get your first nine thousand dollars
14 development fee payment?

15 A November

16 Q And then every month after that for - six
17 months?

18 A Correct

19 Q When would the last payment be due?

20 A April

21 Q On November the first of 2001, the first
22 payment was supposed to have been made, how long
23 had Dutch Fork Development Group been working on
24 this project?

25 A We'd probably been working on it for a year

Donald Melton, Direct Examination

1 Q Had your company received any compensation
2 for any of the work it had done up to that point?

3 A No, we hadn't

4 Q Did you ever receive that development fee
5 payment?

6 A No, we did not

7 Q Did you ever receive any of the subject six
8 months worth of payments?

9 A No, we did not

10 Q Did Mr Lipscomb or anyone from SEL
11 Properties ever give you an explanation as to why
12 they didn't make these payments?

13 A He mentioned at the beginning that lot sales
14 hadn't started and he didn't have the money to do
15 it and back then we were unaware of his financial
16 status and situations and we were in a partnership
17 with him so we just kind of took him at his word
18 for it right then and there and kept on

19 Q Was the development fee contingent in any way
20 on lot sales?

21 A No The development fee had no link to lot
22 sales whatsoever

23 Q When did lot sales ultimately begin?

24 A They actually began August twenty-second,
25 2002

Donald Melton, Direct Examination

1 Q Now by that time, how long had you been
2 working on that project?

3 A Two years

4 Q Had you received any compensation up to that
5 point?

6 A No, we hadn't

7 Q Did Dutch Fork Development Group perform all
8 the duties that it was required to perform as it
9 was developing the project?

10 A Yes, we did

11 Q Was there anything that needed to be done
12 that was not done?

13 A No way

14 Q Did you ever receive any kind of
15 communication from Mr Lipscomb? Letters or
16 anything like that saying that he was not
17 satisfied with your work that you were not
18 performing your job adequately?

19 A Not at all

20 Q We talked a little bit ago about the
21 development loan that you were going to receive
22 from NBSC I understand that there was an issue
23 with eight hundred thousand dollars being taken
24 out of that at the time of close Explain that to
25 the Jury What happened?

Donald Melton, Direct Examination

1 A Correct We got a - SEL got a loan of two
2 million dollars for project for phase one He
3 immediately took out eight hundred thousand
4 dollars to pay off the mortgage for the land that
5 was purchased for the project and when that
6 happened, it left us with a shortfall of monies to
7 do phase one We knew right then and there that
8 we were going to be short money on phase one
9 because the entire land purchase was taken out
10 and paid for

11 Q What was this eight hundred thousand dollars
12 taken out supposed to be used for?

13 A It was supposed to be used for construction

14 Q And that's the same as we talked earlier It
15 was used to pay off the mortgage

16 A It was used to pay off that mortgage that he
17 had gotten after he had initially paid for it by
18 cash

19 Q At this point in time when this money was
20 taken out, did Mr Lipscomb offer to pay your
21 development fees at that point?

22 A No, sir He did not

23 Q How was Mr Lipscomb supposed to get paid
24 back or SEL get paid back for
25 the land expenses?

Donald Melton, Direct Examination

1 A The cost of the land customary is to pay it
2 back phase by phase By contract also we were to
3 receive profit sharing phase by phase and you
4 can't pay land all off in one phase and expect to
5 have profit sharing in each phase but it should be
6 paid off phase by phase

7 Q I'm going to hand you Exhibits 15 and 16 Do
8 you recognize those two exhibits?

9 A Yes, I do

10 Q And what are those?

11 A These are borrower statements with the amount
12 of monies from the project to be taken care of

13 Q Is that what those exhibits show - from NBSC?

14 A Yes, they are

15 Q Does it indicate the eight hundred thousand
16 dollars has been taken out?

17 A It does show it here

18 Q And does it indicate on there how much money
19 is left that is available to be drawn for the push
20 on the project?

21 A It does leave the availability of money to be
22 withdrawn

23 Q Okay And how much is that left to be
24 withdrawn?

25 A 742, 276

Donald Melton, Direct Examination

1 Seven hundred, forty-two thousand, two hundred and
2 seventy-six dollars

3 Q Was that enough money to complete the
4 project?

5 A No, it was not

6 Q How was the money - the shortfall supposed to
7 be made up?

8 A NBSC required Steve or SEL Properties to

9 MR BABCOCK Objection, Your Honor

10 Testimony by a non party

11 THE COURT Sustained

12 Q There's an indication on there of a two
13 hundred and fifty thousand dollar interest
14 reserve Do you see that?

15 A Which item?

16 Q On Exhibit 15 I believe it is

17 A Um-hmm

18 Q The spread sheet

19 A Right

20 Q What was the interest reserve?

21 A The interest reserve is a category when
22 you put money in to when you open the project to
23 pay the interest along as you are doing the
24 project so you're not dipping into your pocket
25 having to pay

Donald Melton, Direct Examination

- 1 interest as you are moving along It's a reserve
2 fund strictly to pay the interest as you go
3 Q And how much does it indicate was withdrawn
4 on the day of the closing of the construction?
5 A Two hundred and fifty thousand dollars
6 Q Had you incurred two hundred and fifty
7 thousand dollars interest on that date?
8 A No, sir
9 Q How was the profit sharing? We haven't
10 talked about the profit sharing aspect How was
11 that supposed to be done?
12 A Profit sharing was supposed to be done
13 twenty-five percent That's Dutch Fork
14 Development Group and seventy-five percent to SEL
15 Properties, LLC, on a phase by phase basis
16 Q Did you ever receive any of the profit
17 sharing from phase one?
18 A No, we did not
19 Q And why not?
20 A We were told there were no profits in phase
21 one by Mr Lipscomb
22 Q Did Mr Lipscomb ever go over the books with
23 you to show you how there wasn't any profits?
24 A No, he did not
25 Q Did you ever ask him to do that?

Donald Melton, Direct Examination

1 A Yes, we asked for books many occasions and he
2 told us he didn't have them and the accountants
3 had them He would get them for us and he'd just
4 keep putting us off We never saw them

5 Q If you look at paragraph six of the
6 development marketing agreement, what were Dutch
7 Fork Realty's responsibilities in paragraph six?

8 A Our responsibility under paragraph six was to
9 - excuse me, I'm just reading through this to make
10 sure - we were to receive ten percent commission
11 on lots sold to individuals, not team builders
12 As team builders in the community we gave up
13 our right to commissions but we also had the
14 exclusive right to sell in the entire project lots
15 and homes in phases one, two, and three We were
16 the exclusive right to sell agency in the entire
17 project

18 Q Was there a sales quota or a sales
19 requirement that you had to comply with?

20 A There was We were to meet twenty percent of
21 the available lots per year

22 Q Explain to the Jury what the exclusive right
23 to sell was?

24 A The exclusive right to sell means we are the
25 exclusive agencies that could sell the properties

Donald Melton, Direct Examination

1 No one else could come in and sell the property
2 without going through our real estate companies to
3 sell the properties The owner foregoes his
4 rights to sell the property

5 We have spent money on advertising,
6 developing the project, getting it attractive to
7 people who want to come in there and we do all the
8 necessary things for that to happen so we are
9 given the exclusive rights to sell We do co-
10 broker with other agencies at the same time but we
11 had exclusive selling rights

12 Q What did you have to do to get exclusive
13 selling rights in this project?

14 A We had to give up commissions on lots sold to
15 builders Builders were all our team builders
16 We didn't get paid any commission on those lots

17 Q And why did you have to give up commission on
18 lots sold to builders?

19 A At the beginning of this project, we started
20 talking about - Steve was telling us that he
21 wanted to come in and be a builder within the
22 project He really liked the community, the
23 concept, and the idea

24 He didn't want to come in and pay a commission as
25 a builder so he put in

Donald Melton, Direct Examination

1 there just no builders would get paid commission
2 on the lots

3 So in exchange for that, we got the entire
4 subdivision phases one, two, and three lots and
5 homes exclusive rights to sell

6 Q Now, on paragraph six, down at the bottom
7 here, it says that should SEL purchase any lots in
8 the development, then no commission shall be
9 charged and no commission shall be payable Why
10 is that in there?

11 A That's in there - SEL will not be
12 commissioned SEL knows that if he is to get a
13 lot in the property he has to buy it Because
14 we're twenty-five percent of profit sharing He
15 can't come in there and just take a lot and say
16 it's mine and build on it

17 He thought maybe he could come in and invest
18 on a lot, build a home, and sell it for a profit
19 but he knew that he had to purchase it The
20 property From SEL It couldn't just be given
21 to him because we're twenty-five percent part of
22 the profit sharing

23 Q The profits that are randomly generated from
24 the sales of the lots, what was that being used
25 for besides split profits?

Donald Melton, Direct Examination

1 A Can you ask that question again?

2 Q The money that was generated from lot sales,
3 that was paid into profit sharing?

4 A Right It also pays the bank back Each
5 time a lot was closed, the bank receives money for
6 the loan to be taken out to start the project

7 Q How much money did SEL Properties save by you
8 giving up the right to commission on lots sold to
9 builders?

10 A He saved himself approximately one hundred
11 and eighty-eight thousand dollars by us not
12 receiving any commissions on lots sold to
13 builders

14 Q How does the exclusive right to sell work
15 with regard to the houses that are already
16 constructed by the team builders?

17 A Again, we also had the exclusive right to
18 sell the homes Builders - our team builders that
19 came in, they had to list their homes with our
20 real estate company We were there to market and
21 advertise the whole project
22 We had a one year listing on the homes
23 when they built what we called spec homes,
24 which I explained to you a little while
25 ago

Donald Melton, Direct Examination

1 Does that

2 Q And that's reflected on paragraph six on the
3 second page of that paragraph

4 A That's correct

5 Q So you were guaranteed to have the listing of
6 homes sold in phase two and three and phase one?

7 A That's correct

8 Q But to get that you had to give up the right
9 to commissions?

10 A Yes That's what we do

11 Q I'm showing you what we marked as Exhibit
12 number 17 Do you recognize that document?

13 A Yes, I recognize this

14 Q And is this what I referred to with the last
15 exhibit?

16 A Yes, it is

17 Q And what is that Exhibit?

18 A This is a letter of termination we received
19 on May twenty-eighth of 2004

20 Q I want you to describe the situation as it
21 existed there on the ground and in the Courtyards
22 in the months leading up to this termination
23 letter What was going on? What was happening?

24 A At that time, things were going extremely
25 well Homes were selling really well Lots were

Donald Melton, Direct Examination

1 selling really well As they had been the whole
2 time Mr Lipscomb was coming up to us saying,
3 you guys are doing great He used to tell me,
4 You're on fire You're doing really, really good
5 And he'd pat us on the back and be complimentary
6 Everybody was doing extremely well Market was
7 good

8 Q Was there any expectation on your side, Dutch
9 Fork Realty, that this letter was coming?

10 A We had no idea it was coming

11 Q How close were you to starting phase two lot
12 sales when you got this letter?

13 A We actually had sold enough lots to start
14 phase two We were at that point in time and we
15 had been talking, you know, we need to get moving
16 We need to get moving And we just got delay and
17 delay But we were at that point to start phase
18 two

19 Q And what was the response to this letter?

20 A Well, we read this letter and read the three
21 reasons and we said these accusations are
22 definitely not true We sent a letter back to Mr
23 Lipscomb and his attorney saying we disagreed with
24 him and we continued on with our obligations to
25 the community We had obligations of work and we

Donald Melton, Direct Examination

1 spent almost three and a half years on this
2 project and it was also our reputation on the
3 line It was our mainstay Our development
4 company We continued to perform our obligations
5 to contract

6 Q Had you received any of your profit sharing
7 amounts, as owed at this point, May twentieth of
8 '04?

9 A No, sir Not a penny

10 Q Now this letter outlines three different
11 reasons for termination of contract?

12 A Correct

13 Q And what were those reasons?

14 A Load problems, budget problems, and
15 failure to sell twenty percent of available lots

16 Q Have you, in fact, sold twenty percent of
17 available lots each year?

18 A Yes, sir We have

19 Q I hand you what we've marked as Exhibit
20 number 18 What is this, please?

21 MR BABCOCK Objection, Your Honor
22 May we approach?

23 (Short conference at the bench)

24 THE COURT Ladies and gentlemen, we
25 have a matter of law which we need to take up

Donald Melton, Direct Examination

1 outside of your presence So I'm going to ask
2 that you retire to the Jury room and not to
3 speculate on what we are discussing or the reasons
4 for our discussion We'll bring you back as soon
5 as we complete our conversation Thank you

6 (Jury retires to the Jury room)

7 THE COURT Yes, sir, Mr Babcock?

8 MR BABCOCK If it please the Court
9 Your Honor, Exhibit 18 is the letter that was
10 referenced yesterday specifically in the pleadings
11 in this case on motion to strike and at this point
12 being offered into evidence Your Honor, this
13 letter is a letter that clearly is a settlement
14 letter offering money in exchange for
15 releasement But accordingly at the bottom of the
16 page, it can be seen as being faxed in November of
17 2004

18 Now, the letter of termination that is May
19 twenty-eighth of 2004 Yesterday the argument was
20 made by counsel that this was relevant to their
21 cause of action with regard to breach of contract
22 accompanied by a fraudulent act

23 Now, to have that particular cause of action,
24 it's looked at the time of the breaching and here
25 the time of the breaching would be May of 2004 so

Donald Melton, Direct Examination

1 this act six months later wouldn't be
2 contemporaneous with that termination so at the
3 same time it is an offer to settle, and we would
4 move to have it excluded

5 THE COURT Mr Bowens?

6 MR BOWENS Your Honor, this is not too
7 remote in time to be considered an act that
8 accompanies the breach of contract The breach is
9 continually because of all the fees that have not
10 been paid, the promissories that have not been
11 paid, and the financial condition of the
12 properties is still ongoing

13 As Mr Melton has testified, there is no
14 dispute about the validity of the fifty-four
15 thousand dollars Counsel has already said there
16 is no dispute about it so this the obligation to
17 pay the fifty-four thousand was not in dispute so
18 it can not be settled They have offered nothing
19 for us to accept or reject in terms of getting the
20 rest of the rights of the contract

21 If they offered fifty-four thousand plus
22 something else there would be new consideration to
23 release them from any obligation of the contract
24 That might be an offer settlement for the disputed
25 part but fifty-four thousand was never disputed

Donald Melton, Direct Examination

1 and was also one of the first of a series of
2 dishonest attempts to induce us to give up future
3 rights in the contract in exchange for what we
4 were already owed

5 MR BABCOCK First, this letter is very
6 clear about two things, Your Honor Number one -
7 the first paragraph addresses a payment of two
8 thousand, nine hundred and thirty-three dollars
9 for the development fee for phase four Of
10 course, this is a draft letter that is printing
11 out a proposal so that's phase four money

12 The next paragraph says we've also enclosed a
13 check in the amount of fifty-seven thousand
14 dollars Now, the development fee for phase
15 one was not fifty-seven thousand dollars It was
16 fifty-four thousand dollars So there is
17 additional consideration being offered at that
18 point in time It's not fifty-four It's fifty-
19 seven

20 And again, in terms of the timing of the
21 document, Your Honor May of 2004 was when the
22 termination letter was sent by the Plaintiff In
23 ever case, if there was a continuing contract
24 dispute, you would have a continued dispute as to
25 monies being owed

1 That doesn't get to have the act go out six
2 months down the road and that's what they are
3 trying to advance here Six months down the road
4 you could have fraudulent acts that would make it
5 the cause of action where conceivably, Your Honor,
6 the money has been paid now two years down the
7 road It's not contemporaneous Contemporaneous
8 would be in the May time in the year 2004 This
9 was sent in November of that year - six months
10 later was just simply too late And the
11 additional consideration is being offered

12 MR BOWENS Your Honor, if I could just
13 be heard briefly on that one point The fifty-
14 seven thousand dollars that was referenced
15 in the letter is the development fee The
16 development fee was based on one thousand dollars
17 per lot At the time of the contract it was
18 expected to be fifty-four lots and that's why it
19 was fifty-four thousand in the contract But when
20 they got the plans and their final form and they
21 got started it was actually fifty-seven lots,
22 which is why it was fifty-seven thousand dollars
23 It was one thousand dollars per lot

24 MR BABCOCK Your Honor, we heard
25 parol evidence, parol evidence, parol evidence

Donald Melton, Direct Examination

1 yesterday What this contract is, is the
2 governing agreement between parties If, in fact,
3 based upon the ultimate number of lots it says
4 very clearly on page three, section five, it says
5 a monthly payment of nine thousand dollars per
6 month for a six year period of time totally fifty-
7 four thousand dollars That's what the parties
8 contracted to Not fifty-seven Fifty-four The
9 contract will control and what was offered in this
10 letter was more money than what the contract would
11 have required for that development

12 THE COURT Could you all give me a copy
13 of the letter because I don't think I have it
14 among all the documents up here?
15 And so what's the question you want to ask the
16 witness about the document?

17 MR BOWENS Your Honor, we want to
18 establish this letter in response to SEL
19 Properties asking for their money after the
20 termination letter had been sent This was the
21 response back saying that if you'll quit, just
22 leave and give up your rights of the contract, we
23 can rid you of the project and we'll pay you what
24 we already owe you and that by doing that it was
25 dealing unfairly with the Plaintiffs It was a

Donald Melton, Direct Examination

1 dishonest act that accompanies the breach It
2 doesn't have to be contemporaneous but at the same
3 time it was not too remote a time

4 THE COURT Say that for me one more
5 time, Mr Bowens

6 MR BOWENS Your Honor, this letter was
7 written in response to a demand for a payment of
8 development fees and the profit sharing

9 THE COURT Right

10 MR BOWENS And in response this letter
11 was sent saying we will pay you your development
12 fee that we owe you if you will leave the project
13 and forego all the rights to the contract It
14 even said in here, these are not disputed These
15 amounts are not disputed And that is a dishonest
16 act and that is dealing unfairly with the
17 Plaintiffs and it is an act that accompanies the
18 breach It's not at the same time as the breach
19 back in May but it's not too remote a time which
20 is, I believe, for the Jury to decide if it's too
21 remote or not But if it's not too remote it's
22 contemporaneous It's not contemporaneous at the
23 same time but it is within a reasonable time after
24 the breach and it's still ongoing They haven't
25 paid yet and the breach of contract is still

Donald Melton, Direct Examination

1 continuing As the letter was sent, it's been
2 ongoing now

3 THE COURT So basically you want to use
4 it to prove your breach of contract accompanied by
5 a fraudulent act

6 MR BOWENS Yes, Your Honor

7 THE COURT And in conjunction with that
8 also prove that they did, in fact, owe the money

9 MR BOWENS Correct

10 MR BABCOCK May it please the Court?

11 THE COURT Yes, sir

12 MR BABCOCK There are two bases for
13 our objection Number one, the letter indicates
14 that there are excluded liability concerning
15 developing marketing agreement as in the bottom
16 second paragraph This is clearly an offer in
17 compromise, as in rule 408 Whenever you
18 negotiate a settlement and they offer more than
19 what the Plaintiffs said was owed at the time, the
20 job was fifty-four thousand dollars, the purpose
21 behind protecting or compromising one self do
22 encourage parties to get into negotiations And
23 frequently it isn't the first offer that is
24 accepted It is something that goes back and
25 forth but the bottom line is - this letter

Donald Melton, Direct Examination

1 envisioned not only an offer with an new
2 development fee for phase four but also the
3 development fee for phase one The fifty-four
4 thousand dollars plus some additional money - the
5 three thousand dollars, so just under rule 408 we
6 would submit that the letter should be excluded

7 But the second ground and I think it's very
8 important I think with regard to the Plaintiffs'
9 intention for certain breach of contract
10 accompanied by a fraudulent act is six months down
11 the road and just because he hadn't gotten any
12 money yet is some kind of continuing breach theory
13 that he's advancing here and that's not what the
14 law looks at The law looks at the umbrella
15 point in time and we're six months down the road
16 That's way too late

17 THE COURT I think that it The
18 reason that the Plaintiff wants to use it is to
19 establish basically two things The fact that
20 they do, in fact, owe the fifty-four thousand
21 dollars and that it was an attempt to have them--
22 basically a course of act basically to have them
23 to withhold the payment of money that they claim
24 was lawfully due pending given up certain rights
25 under the contract

Donald Melton, Direct Examination

1 And I think rule four when it talks about
2 evidence of furnishing or offering to furnish
3 monies that may be disputed as to either validity
4 or amount. It's not admissible to prove the
5 reliability for that claim and evidence of conduct
6 or statements made in compromising negotiations
7 are also likewise not admissible. And I think
8 that this falls into this particular category.

9 Certainly I understand the Plaintiff's point
10 that it's an amount that was already due so there
11 was already a breach but it also went further and
12 in an effort to try and make them give up further
13 rights under their contract. I still think
14 that that is a disputed claim.

15 I still think that it is evidence of an
16 attempt to resolve the alleged breach of contract
17 and so for those reasons I would not admit it. As
18 it relates to whether it's contemporaneous or
19 timely, I think the case law is such that the acts
20 that they are claiming that are fraudulent and
21 accompanied the breach can either be before,
22 during, or after and I think that's why and at
23 some point may become a legal issue but I think
24 that's a factual issue as to whether or not it's
25 too remote.

Donald Melton, Direct Examination

1 In this particular case, it's only three or
2 four months There's case law that says that four
3 years is too long Whether four months is too
4 long, I plead that this particular point is
5 questionable enough I wouldn't say that it's so
6 far outside of the realm of what would fall within
7 the fraudulent acts that accompany the breach
8 And so I'm not going to exclude it on that base
9 But I will exclude it under 408

10 MR BABCOCK Thank you, Your Honor

11 THE COURT Before we bring the Jury
12 back, let's go ahead and take a brief break Mr
13 Melton, during this break do not discuss your
14 testimony with anyone You have not
15 concluded your testimony so it would be
16 inappropriate for you to discuss it with anyone at
17 this time

18 MR MELTON Yes, Your Honor

19 THE COURT Let's take a very brief
20 break and come back I would appreciate during
21 the break if you all would look up the exhibits to
22 what you agreed to the extent that you all have
23 copies of the exhibits It would be most helpful
24 to me if you have extra copies because I don't
25 have any of the exhibits I do have a list but

Donald Melton, Direct Examination

1 when we get to the situation I'm always going to
2 have to be asking you for the exhibits so I can
3 look at it This is not in our file so let's take
4 a break and then we'll come back

5 (Court took a short break)

6 (Court resumed - without the Jury)

7 THE COURT Be seated, please Yes, sir

8 MR BOWENS I would like to offer into
9 evidence Exhibits numbers 1, 5, 9, 15, 16, and 17
10 based on what we discussed

11 MR BABCOCK Our only objection is to
12 Exhibit 15 It's a bank document so it's hearsay
13 for this case

14 THE COURT That's the spreadsheet?

15 MR BOWENS Yes, Your Honor

16 THE COURT Any response to that?

17 MR BOWENS Yes This is a business
18 record

19 It's directly relating to the Courtyard project
20 which is an exception to the hearsay rule

21 MR BABCOCK Your Honor, it's a
22 business record perhaps to the bank and the bank
23 gives it to you to use as a bank document
24 It's not just a witness of a document
25 It's not just the subject of a document

Donald Melton, Direct Examination

1 THE COURT So, you're objecting to the
2 authenticity of the document?

3 MR BABCOCK I'm objecting to it The
4 authenticity is in question so the only reason
5 that has any grounds is not having the witness
6 here to examine it on that but also hearsay as
7 created by a non-party as a document that is not a
8 part of these proceedings

9 MR BOWENS Your Honor, we have Margie
10 Simpkins of NBSC who produced the documents
11 She's been subpoenaed She's been called over I
12 also have an affidavit from her

13 MR BABCOCK Your Honor, Ms Simpkins
14 has been listed as a witness in this case Mr
15 Bowens has objected to the video deposition
16 of Mr Colson who is the bank officer We went
17 and took the deposition of the bank officer, Mr
18 Colson, and that was

19 THE COURT Well, I don't need the
20 testimony of the bank officer who prepared the
21 document if it's kept in the normal course of
22 business All I need is the records custodian
23 So if you're going to produce the records
24 custodian, then you can defer the admission of
25 that particular part

Donald Melton, Direct Examination

1 Anything else before we bring the Jury back?

2 MR BABCOCK No, Your Honor

3 MR BOWENS No, Your Honor

4 THE COURT Ask the Jury to come in
5 please

6 (The Jury returned to the Courtroom)

7 THE COURT You may proceed

8 MR BOWENS Thank you, Your Honor

9 Q Mr Melton, before we had the break we were
10 discussing the termination letter you received on
11 May twenty-eighth, 2004 One of the allegations
12 in the letter was that Dutch Fork Development
13 Group did not properly perform it's function under
14 paragraph four Was that true?

15 A That was not true

16 Q Also, it references a problem with the roads
17 that you testified to earlier Were those
18 problems with the roads caused by Dutch Fork
19 Development Group or Dutch Fork Realty?

20 A Absolutely not

21 Q This turn to the road problems What was the
22 problem that you experienced with the roads?

23 A In our development we went with an
24 engineering process of putting down the first two
25 layers of asphalt throughout the roadways of the

Donald Melton, Direct Examination

1 subdivision We did that and came back at a later
2 date and put down the third layer and top layer so
3 it looks real pretty and smooth after the building
4 in the subdivision was done

5 You ought to expect when you do this process
6 to have some potential soft spots in the roads
7 when they first put them in that will show up and
8 they will have a small pothole You go in and
9 correct those potholes right away You can fix
10 them so they don't continue to spread and get
11 bigger but you are to expect a few in a certain
12 areas because it's not always totally perfect, but
13 the intent is to come back later and put the final
14 surface down after most people have built their
15 homes in there so you have a new looking
16 community even with all the construction traffic
17 going in

18 What happened out there was we had some
19 potholes to form which was expected It was
20 customary and showed up all the time like that
21 They were not fixed Mr Lipscomb - we sent the
22 information to our engineer that we started to see
23 these small potholes

24 We contacted SEL Properties to let them know
25 that we were sueing them and to come in

Donald Melton, Direct Examination

1 We contacted SEL Properties to let them know
2 that we were suing them and to come in and to
3 start taking care of them right away and
4 he would not provide the funds to get that done
5 and they continued For a pothole getting so deep
6 it had cracks in it

7 Water gets down in the cracks and up under
8 the asphalt and it starts getting in your
9 subsurface material and it just gets bigger and
10 bigger and bigger and bigger and that's what
11 happened and the roads got in pretty bad shape out
12 there

13 Q Now, who advised Mr Lipscomb that you needed
14 funding for the road repair?

15 A Dutch Fork Development Group and Letts &
16 Associates, the Engineering group

17 Q How much did the road repair end up costing?

18 A It ended up costing us about one hundred and
19 seventy thousand dollars

20 Q If the roads had been repaired when they
21 should have been repaired when you advised that
22 they be repaired, what would it have cost?

23 MR BABCOCK Objection, Your Honor
24 Not expert testimony

25 THE COURT I'll sustain the objection

Donald Melton, Direct Examination

1 Q Do you know what it would cost to repair the
2 roads that they do repair when they should have
3 been repaired?

4 MR BABCOCK Your Honor, same
5 objection That's not

6 THE COURT You need to lay a different
7 foundation

8 Q How long had the roads gone unrepaired from
9 the time that you first start noticing the
10 potholes?

11 A Approximately about a year We started
12 noticing the potholes showing up just after we
13 started some of the construction on some of the
14 first homes in the subdivision Some of these
15 areas starting showing up They occurred and got
16 larger and larger by the time we were hitting the
17 critical selling season of 2003

18 In the real estate market the spring and
19 summer is, you know, your largest selling time
20 in the real estate market By that time
21 our roads had severely deteriorated and were not
22 being corrected and we had that issue to deal
23 with, you know, with the home owners
24 complaining, the real estate agents asking us what
25 the problems were out there, what was going on out

Donald Melton, Direct Examination

1 there, potential customers that came in day to day
2 and we had to continuously explain

3 MR BABCOCK Objection, Your Honor
4 This is hearsay as to what other people were
5 saying

6 MR BOWENS He's just testifying that
7 he received complaints He's not testifying as to
8 what other people told him Receiving a complaint
9 is not within hearsay

10 MR BABCOCK If it is limited to that I
11 don't have an objection I just don't need what
12 other people told him specifically

13 THE COURT If it's general complaints
14 I'll allow it

15 MR BABCOCK I'm sorry, Your Honor
16 A Receiving general complaints and made it
17 really tough for us selling during the critical
18 selling season - spring and summer of 2003

19 Q Have you experienced in other developments
20 these kinds of potholes and had to repair them
21 before?

22 A Yes, we've experienced that

23 Q In your experience in doing this in the past,
24 how much does it cost to repair those if you catch
25 it in the early stage?

Donald Melton, Direct Examination

1 MR BABCOCK Objection, Your Honor

2 THE COURT I'll sustain the objection

3 Q How important is it to make these repairs
4 quickly after you first start to see the potholes?

5 A It's extremely important because you don't
6 want the water infiltrating the cracks in the
7 asphalt getting down to the subsurface because
8 your foundation is what it's all about So if the
9 foundation is in good shape, you'll be in good
10 shape

11 But if water gets down in there, it's going
12 to deteriorate even bigger and bigger and run
13 uphill I mean, not uphill but flood downhill or
14 whichever way the road is going and the pothole
15 will get bigger and bigger It's like a stitch in
16 time saves 99

17 Q Did you know the cost to repair a small
18 isolated pothole?

19 MR BABCOCK Your Honor, again the same
20 objection A person who makes repairs can do an
21 estimate of the cost but this is outside of his
22 area of expertise

23 MR BOWENS If he knows the cost to do
24 it I don't think that's an opinion He can
25 testify as to what he knows the cost to be

Donald Melton, Direct Examination

1 MR BABCOCK Your Honor, the
2 THE COURT I think he has to provide
3 some kind of foundation as to how he knows it to
4 the extent of his knowledge of it that comes
5 within the rules all about it

6 Q Do you have personal knowledge of what it
7 cost to repair a small isolated pothole in the
8 early stages of development?

9 A A small single

10 MR BABCOCK Your Honor?

11 THE COURT If you let him start the
12 answer so I can make a determination as to whether
13 or not he's capable of answering it

14 Q Have you had any experience with that in the
15 past?

16 A We have

17 Q Go ahead and answer

18 A If you are doing a small pothole, one or
19 two at a time, you're talking about a couple
20 hundred dollars

21 MR BABCOCK Your Honor, again he's
22 talking about amounts that have been quoted by
23 other people It's not his area of expertise

24 THE COURT To the extent that he's had
25 experience that he's been required to pay those

Donald Melton, Direct Examination

1 and that he's in the development business and he
2 can establish that's something that occurs in the
3 course of their business I'll allow him to testify
4 as to what he just stated

5 Q Did Dutch Fork Development Group have any
6 authority to write a check to have that repair
7 done?

8 A No, we did not

9 Q Did you have the authority to go into a
10 contract with a repair company to have the repair
11 done?

12 A No, we could not do that

13 Q Who had that authority?

14 A SEL Properties

15 Q And did they provide the funding to have
16 those repairs made?

17 A No, they did not

18 Q What effect, or impact, did it have on the
19 project?

20 A It was a devastating impact at the time
21 We had a brand new community with brand new lots,
22 roads
23 We had potential buyers and prospective clients
24 coming in daily and it was total devastation to
25 us

Donald Melton, Direct Examination

1 Q When you first starting to see these potholes
2 develop, how far into the selling of phase one had
3 you gotten?

4 A Only a few months into phase one when they
5 initially started to happen August twenty-second
6 of '02 and we noticed the potholes starting
7 cracking or alligatoring of the asphalt as we call
8 it in October or November So very early on in
9 the project

10 Q When did the funding finally come in for you
11 to repair these potholes and the problems with it?

12 A It was the early part of '04 The latter
13 part of '03 or the early part of '04

14 Q Over the spring and summer months of '03,
15 what was going on to try and get the roads
16 repaired during that period of time?

17 A We had conversations with the engineer We
18 had conversations with Mr Steve Lipscomb trying
19 to force him to get the roads repaired Our
20 engineer came out to visit the site several times
21 and he instructed Mr Steve

22 MR BABCOCK Objection Hearsay, Your
23 Honor

24 THE COURT To the extent that it calls
25 for a hearsay answer, I'll sustain the objection

Donald Melton, Direct Examination

1 Q What else was done to try and get the
2 roads repaired during the spring and summer of
3 2003?

4 A Nothing else was done at that time

5 Q What effect did that have on the
6 spring/summer of 2003 selling?

7 A Again, it was a devastating impact
8 We had an extremely hard time trying to
9 sell the property in the shape that it was looking
10 like

11 Q Did you obtain all of the required
12 certifications and approvals for the road to be
13 constructed up to that point?

14 A Yes, we did

15 Q I want to show you what we've marked as
16 Exhibit number 27 Do you recognize that
17 document?

18 A Yes, I do

19 Q What is that?

20 A This is a letter from Mr Gordon Green
21 that we were going through the process of having
22 phase one bonded

23 Q And if you turn to the second page of that
24 document and refer to the certification at the
25 bottom of the page

Donald Melton, Direct Examination

1 A The certification at the bottom of the page
2 This is by Johnny T Johnson, PE The engineer
3 with Letts & Associates

4 Q Was that something that was required to
5 be obtained?

6 A Yes, it was

7 Q And is that one of your obligations under
8 paragraph four to obtain that?

9 A Correct

10 Q And you obtained it?

11 A We did

12 MR BOWENS I would offer this as
13 Exhibit number 27, Your Honor

14 MR BABCOCK Without objection

15 THE COURT Admitted

16 Q I hand you what was marked as Exhibit's 96,
17 97, 98, and 99 What are these documents?

18 MR BABCOCK Your Honor, please What
19 exhibits and what numbers?

20 MR BOWENS 96, 97, 98, 99

21 MR BABCOCK Your Honor, we do
22 object to these documents May we approach?

23 THE COURT Yes, sir

24 (Short conference at the bench)

Donald Melton, Direct Examination

1 Q What was Dutch Fork's role with regard to the
2 budget?

3 A Our role was to go out and collect bids and
4 information and bring those bids in and discuss
5 them with SEL Properties
6 Our engineer, if we would use an engineer, and
7 other people we would use to come up with some of
8 these estimates that we used on the project

9 Q Now, were there some cost over runs that
10 ended up occurring in the project?

11 A Yes, there was

12 Q I hand you what we've marked as Exhibit
13 number 117 Would you take a look at that?
14 What is Exhibit number 117?

15 A These are change orders that we received
16 from Newman Construction Company

17 Q What was the Dutch Fork Development's rule
18 regarding change orders?

19 A We were a conduit of this information
20 We would discuss it with Steve and our
21 engineer
22 Our engineer had our total say so on this if he
23 thought it was legitimate and then Steve had final
24 say so as to whether to
25 pay these change orders

Donald Melton, Direct Examination

1 Q Did Dutch Fork Development Group handle
2 those documents during the course of the
3 project?

4 A Only as a conduit of information as a
5 multiple party to the other

6 Q These change orders What are they asking
7 for? Just in a general sense

8 A In a general sense they were asking for more
9 money for extra work that had been done on the
10 project

11 Q And what is it a change from? Why were you
12 changing the cost?

13 A It's a change from the original set of
14 instruction drawing that were prepared by the
15 engineer

16 MR BOWENS I would offer Exhibit 117
17 into evidence

18 MR BABCOCK Without objection, Your
19 Honor

20 THE COURT It's admitted

21 Q Did you have any cost over runs on
22 engineering?

23 A Yes, we did We had cost over runs in
24 engineering to the tune of over two hundred
25 thousand dollars

Donald Melton Direct Examination

1 Q How did you end up having a two hundred
2 thousand dollar over run in engineering?

3 A We had phases one, two, and three pre-
4 approved ready to go at the Courtyards at Rolling
5 Creek Mr Lipscomb went in behind our backs to
6 our engineer's office and abandoned phases two and
7 three that were pre-approved ready to go

8 He abandoned plans and starting redesigning
9 phases two and three without our knowledge at
10 Dutch Fork Development Group and he did multiple
11 designs of this project and ran the bill up over
12 two hundred thousand dollars in just engineering
13 costs

14 Q When did the first redesign start taking
15 place?

16 A April of '02

17 Q In April of '02, how far are you into the
18 five year plan that you've been talking about?

19 A We're two years into it

20 Q What impact did that have on your whole
21 project?

22 A It was a catastrophic impact It was
23 devastating to us

24 Once he went in and abandoned pre-approved plans
25 that were on track and

Donald Melton, Direct Examination

1 ready to go for us phases two and three, he just
2 totally blew it out of the water We were on a
3 five year timeframe to get a project done You
4 got phases one, two, and three You have to move
5 in continuing sequence throughout the project to
6 get things done Once this phase two and three
7 was abandoned by SEL, it totally destroyed the
8 project

9 Q Now, you talked earlier about this eight
10 hundred thousand dollars that was taken out of the
11 (inaudible) fund?

12 A Correct

13 Q What impact did that have on the budget and
14 the cash flow?

15 A It was a shortfall of money to finish the
16 project on phase one and that created a delay for
17 us getting phase two started and then possibly
18 getting phase three started Just created another
19 delay May I add something in?

20 MR BABCOCK Your Honor, unless he's
21 testifying to the question proposed

22 MR BOWENS He wants to finish the
23 answer

24 THE COURT If it's related to the
25 question that was asked and he's completing his

Donald Melton, Direct Examination

1 answer I'll allow it

2 MR BABCOCK If it's that question I
3 have no objection

4 A Actually, it's to the question prior to that
5 one About the phase two and three and what
6 happened to the plans He did multiple redesigns
7 and as he did multiple redesigns he was not paying
8 the engineer and it strung the project out
9 forever The engineer would quit working on the
10 project, payments wouldn't be made, work would not
11 be complete for months at a time The engineer
12 would put the project down and not work on it

13 Q Was there any impact on the other contract
14 that was signed by the other engineer for say one
15 hundred thousand dollars throughout the budget?

16 A Yes There was quite a few people that
17 wouldn't receive their monies on time and
18 everybody would slow down the work

19 Q I'm going to hand you what we've marked as
20 Exhibit number 34, 36, 37, 38, 39, 40, 41, and 43
21 Describe for the Jury what **those** documents are

22 MR BABCOCK 41 and what?

23 MR BOWENS 43

24 MR BABCOCK May we approach?

25 (Short conference at the bench)

Donald Melton, Direct Examination

1 Q With regard to Exhibit number 34, regarding
2 CR Jackson, how did you find out about that
3 problem?

4 A We received a copy of the letter and he was
5 stating that he

6 MR BABCOCK Objection, Your Honor

7 Q Just how you came to find out You said you
8 received a copy of the letter

9 A Correct

10 Q And the general nature of the problem was
11 what?

12 A His was not paid on time

13 THE COURT Okay

14 Q Was there a problem with Mr Newman of Newman
15 Construction releasing the liens from the
16 property?

17 A Yes He also - he sent us a letter about a
18 lien waiver That's in order for us to get final
19 water and sewer for everyone to be up and
20 functional and operating with water and sewer in
21 the subdivision That he would not release the
22 liens on the property until he was paid in full
23 and he sent a letter back saying he wasn't paid
24 and he was not going to release it

25 THE COURT Mr Melton, if you would

Donald Melton, Direct Examination

1 pull yourself a little closer to the microphone,
2 I'm having a difficult time hearing all of your
3 testimony

4 Q I'm going to hand you what is marked as
5 Exhibit number 45 What is it?

6 A This is a title to real estate

7 Q And to what lot is it?

8 A This is lot number 14 of the Courtyards at
9 Rolling Creek Phase one

10 Q And what does it show as the cash
11 consideration for that lot purchase?

12 A The consideration is the sum of no cash
13 consideration

14 Q I'm handing you Exhibit number 46 What is
15 Exhibit 46?

16 A 46 is a HUD statement for lot number 15,
17 phase one, Rolling Creek's Courtyards

18 Q And what does it show as the contract sales
19 price?

20 A The contract sales price reads zero

21 Q And I hand you Exhibit number 47 What is
22 that Exhibit?

23 MR BABCOCK I'm sorry What exhibit?

24 A 47 Exhibit 47 is lot number 57, Courtyards
25 at Rolling Creek, phase one

Donald Melton, Direct Examination

1 Q And what does it show as the contract sales
2 price?

3 A The contract sales price is 0

4 Q And this is Exhibit number 48 What is
5 Exhibit 48?

6 A Exhibit 48 is a title to real estate

7 Q And for what lot is that?

8 A This is for

9 Q You may have to look on the last page

10 A Lot 57

11 Q And what does it show as the cash
12 consideration for that purchase?

13 A Title real estate No cash consideration

14 Q Who are the purchasers of those lots?

15 A K&L Contracting

16 MR BOWENS Your Honor, at this time, I
17 would like to admit Exhibits 47, 48, 45 into
18 evidence

19 MR BABCOCK Without objection, Your
20 Honor

21 THE COURT 45, 47, and 48?

22 MR BOWENS Yes, ma'am 45, 47, 48,
23 and 46

24 THE COURT Without objection?

25 MR BABCOCK No objection

Donald Melton, Direct Examination

1 THE COURT You're admitted

2 Q What was the lot sales price for each of
3 those lots supposed to be?

4 A We set the fair market value on all lot sales
5 at forty thousand dollars

6 Q Were you aware that those lots had been
7 transferred with no cash consideration?

8 A No, sir We had no idea of that

9 Q And K&L Contracting was the buyer?

10 A K&L Contracting was the buyer

11 Q Is SEL Properties allowed to give lots away
12 to K&L without charging them a fair purchase
13 price?

14 A Absolutely not

15 Q Since commencing this litigation that we are
16 involved in today, have you been able to review
17 all the books and financial documents that pertain
18 to the Courtyards?

19 A We have now been able to review the documents
20 but not all the records No Not at all

21 Q Well, what do you mean? What haven't you
22 been able to review?

23 A It took a Court Order for us to

24 MR BABCOCK Objection, Your Honor

25 May we approach?

Donald Melton, Direct Examination

1 THE COURT Yes

2 (Short conference at the bench)

3 MR BABCOCK I move to strike the last
4 comment, Your Honor

5 THE COURT I'll strike the comment as
6 it's been stated

7 MR BABCOCK Thank you, Your Honor

8 THE COURT I going to ask the Jury to
9 disregard the comment

10 Q Mr Melton, was Dutch Fork Development Group
11 entitled to see all the books that pertained to
12 Courtyards?

13 A We were entitled to see them all but some of
14 them were destroyed we were told

15 Q Were you ever given access or copies of any
16 of those financial documents or the books of the
17 company?

18 A No, we were not

19 Q How many times did you ask to see those
20 financial documents?

21 A Numerous times

22 Q And what was the response that you got when
23 you made the request?

24 A Again he would tell us that he didn't have
25 them, his accountant had them, and he would see

Donald Melton, Direct Examination

1 about getting them to us and he would just put us

2 off He was very good at that

3 Q How did you end up being able to see the

4 financial documents?

5 A We had to obtain a

6 MR BABCOCK Objection, Your Honor

7 A A court order

8 MR BABCOCK The same thing as before

9 THE COURT Rephrase your question

10 Q What was it that finally got you access to

11 these financial documents?

12 A This lawsuit

13 Q How did you end up getting access to them?

14 MR BABCOCK Your Honor, it's the same

15 point May we approach?

16 THE COURT Um-hmm

17 (Short conference at the bench)

18 Q Now, when you finally got access to the

19 documents that you wanted to see, were all of the

20 documents present or just a few?

21 A No, there were not We received a notice

22 that the first two years of the information had

23 been inadvertently or accidentally destroyed We

24 did not receive it

25 Q When you went through the - or did you go

Donald Melton, Direct Examination

1 through the financial documents that you
2 requested?

3 A Yes, I did

4 Q When you did that, did you discover anything
5 that was improper or amiss?

6 A I did notice some improper spending of money
7 from the Courtyards Things that were not related
8 to the Courtyards at all that may personally
9 benefit SEL Properties and other people but it
10 didn't pertain to our Courtyard project

11 Q I'm going to hand you Exhibit number 127 and
12 I want you to explain to the Jury what this
13 exhibit is

14 MR BABCOCK Your Honor, before Your
15 Honor, I object This exhibit is two different
16 things that are clipped together and if they were
17 separated they might not be a problem but they
18 need to be offered individually

19 MR BOWENS We just put them together
20 because they went together and to avoid having an
21 extraordinary number of separate exhibits being
22 formed and the convenience of the Court in
23 general These are all documents that were
24 produced by the Defendant during the course of the
25 litigation

Donald Melton, Direct Examination

1 MR BABCOCK Your Honor, may we
2 approach?

3 (Short conference at the bench)

4 THE COURT Go ahead You can take them
5 prior to giving them to the witness

6 Q Let me retrieve that exhibit from you for
7 just a moment

8 Mr Melton, I want to hand you what we've remarked
9 as Exhibit 127 with subparts A, B, C, and D When
10 you describe those, just refer to the exhibit
11 number 127 A, B, and so forth Explain to the
12 Jury what those documents are

13 A 127 and 127A is a check written from the
14 Courtyards at Rolling Creek paid to the order of
15 B&B Grading, which is a grading company in order
16 to clear lot number 2 in phase four of the Rolling
17 Creek Subdivision Lot 2 was built upon by K&L
18 Construction Mr Steve Lipscomb, the majority
19 owner of that company

20 And the lot clearing, which is typically paid
21 by all builders who pay their own lot clearing
22 We don't pay any lot clearing at the Courtyards
23 But the Courtyards at Rolling Creek paid for that
24 lot clearing to be regarded for one thousand, four
25 hundred, and twenty-five dollars

Donald Melton, Direct Examination

1 127B and D is an invoice from Gardner's Floor
2 Sanding billed to Pat Kirk at K&L Contracting
3 putting the finished coat of Polyurethane on
4 hardwood floors in one of his homes It says lot
5 14 at the Courtyards at Rolling Creek It's a K&L
6 owned home And 127D is a check payment of three
7 hundred and seventy-five dollars paying Gardner's
8 Floor Sanding for that particular job invoice

9 MR BOWENS Now I would like to offer
10 Exhibit 127 and A, B, C, and D into evidence

11 MR BABCOCK Without objection

12 THE COURT That's admitted

13 Q I hand you what we've marked as Exhibit
14 number 128 and then sub-parts A through F I ask
15 you to identify those and then explain to the Jury
16 what those are

17 MR BABCOCK I'm sorry What are those
18 again?

19 MR BOWENS 128 and 128 A through F
20 A 128 is a check paid to NW White and Company
21 It's six hundred and twenty-nine dollars and
22 seventy-nine cents for invoices Here's an
23 invoice billed to K&L Contracting That's Miss
24 Carrie Sabo, Saboni, or whatever her name is up
25 under that Jobs for lots 18 and 19, Courtyards

Donald Melton, Direct Examination

1 at Rolling Creek for masonry sand The next one
2 is masonry sand again for job for lot 18,
3 Courtyards at Rolling Creek

4 The next one is another bill from NW White to
5 K&L for masonry sand again for lot 18, Courtyards
6 at Rolling Creek Another one from NWW for lot
7 18 Masonry sand again for job for lot 18,
8 Courtyards at Rolling Creek

9 And then also we have one for Boral bricks
10 Now these jobs, lot 18 and 19 was owned by K&L
11 Contracting They were building a home on these
12 two lots The next bill is for Boral bricks It
13 says for Courtyards pump wall There's a pump and
14 there's a well and we build a wall around the well
15 and we have the well to irrigate the entranceway
16 which is a legitimate Courtyard expense

17 The next wall around the AC unit went on home
18 number 57 owned by Pat Kirk They built and paid
19 for the bricks for that particular wall around the
20 air conditioning unit on his K&L home and the
21 check was paid by the Courtyards at Rolling Creek

22 Q Is that the last one?

23 A Yes, sir

24 Q Okay I hand you Exhibit 128 G through M and
25 ask you to identify those for the Jury and

Donald Melton, Direct Examination

1 describe what they are

2 A Exhibit 128 G - Boral Bricks 128 H - Boral

3 Bricks These are all billed to K&L Contracting

4 This says Courtyard Walls Exhibit 128 I - billed

5 to K&L and handwritten on here is Courtyards 18

6 and 19 Walls, Pat Kirk initial This next one is

7 a check written to Hardway Concrete for one

8 thousand, four hundred and twenty-four dollars and

9 eighty-five cents That's 128 J That's in

10 reference to these previous bills We have 128 K

11 and it's verifying that check was used

12 Q I hand you what we've marked Exhibit's 131

13 and sub-parts A through D Would you identify

14 those and explain to the Jury what those documents

15 are?

16 A Exhibit 131 is a check written from the

17 Courtyards at Rolling Creek paid to the order of

18 K&L Contracting for the amount of twenty-two

19 thousand dollars In the memo line it has loan

20 I don't know why Courtyards at Rolling Creek would

21 be loaning K&L money to build these

22 131 A is just record of payment of this

23 check Exhibit 131 B is K&L Contracting invoice

24 billed to the Courtyards at Rolling Creek It's

25 billed as fencing, lot 13, Courtyards at

Donald Melton, Direct Examination

1 Rolling Creek These are brick privacy walls put
2 around the back of the courtyard homes Each
3 builder is responsible for their own privacy wall
4 in the back of their homes in the Courtyards at
5 Rolling Creek and K&L just built these two
6 courtyards at Rolling Creek

7 131 C is an invoice hand-written from Eduardo
8 Mareno There was a problem - not money to pay
9 this so K&L paid for lot 13 This is what it
10 reads

11 Exhibit 131 D - K&L Contracting was billing
12 the Courtyards at Rolling Creek for equipment for
13 clearing lots 41 and 42 and again, builders are
14 responsible for clearing their own lots by the
15 Courtyards at Rolling Creek We don't pay any of
16 the builder's fees for doing that

17 Q Was that the last one?

18 A Yes, sir

19 Q Okay I hand you now Exhibit 129 with sub-
20 parts A through D if you could identify those for
21 the Jury and explain what they are?

22 A Exhibit 129 is a check written to David
23 Suber for one thousand, five hundred dollars and
24 in the memo it says pipe work for lot 2, Rolling
25 Creek This is referencing phase four

Donald Melton, Direct Examination

1 Pat Kirk Realty built a home on lot number 2
2 There's a drainage ditch on the common lot between
3 lots 2 and 3 They went in and did some
4 improvement to it just to make it look better
5 because he was building a home on that particular
6 lot The contractors had already put it in
7 properly but they wanted to dress it up and this
8 was paid by Courtyards at Rolling Creek

9 The next check is for fifteen hundred dollars
10 also paid to Stephen E Lipscomb, Jr A memo that
11 says pipe work for lot 2, Rolling Creek Again
12 that's phase four Other builders in there put
13 some pipe work in their back yards to take care of
14 drainage ditches but the Courtyards didn't pay for
15 it They paid for it themselves That would be
16 Exhibit 129 A

17 Exhibit 129 B is a check paid to N&W White &
18 Company for six hundred and thirty-two dollars and
19 twelve cents Exhibit 129 C is an invoice for
20 that particular check billed to K&L Contracting
21 The job records was lot number 2, phase four at
22 Rolling Creek It says lot 2, Rolling Creek
23 That was for rip rafting to go on the pipe work in
24 between there

25 And the next invoice is Exhibit 129 D

Donald Melton, Direct Examination

1 again from NW White & Company Again Lot 2 for
2 additional materials there

3 Q Is that the last one?

4 A That's the last one

5 Q Were these expenses properly attributable to
6 the Courtyards?

7 A No, sir

8 Q What effects did that have on your overall
9 profits?

10 A It takes profits out of our pockets We're
11 25 percent profit sharing in this project and the
12 SEL Properties are 75 percent If he's spending
13 money on his building company which he's 85
14 percent ownership of then it definitely affects
15 us

16 Q Did any other builders get this same kind of
17 treatment?

18 A No, they did not I had some ask for some
19 stuff but they would never get it

20 Q I give you Exhibit number 132 and ask if you
21 will identify that for the Jury and explain what
22 it is

23 A Exhibit number 132 is a check written to
24 Louis, Babcock, and Hawkins in the amount of eight
25 hundred and eighty-five dollars paid on behalf

Donald Melton, Direct Examination

1 of Courtyards at Rolling Creek

2 Q Did that law firm represent the Courtyards at
3 Rolling Creek?

4 A No, sir

5 Q Who did they represent?

6 A SEL Properties and Steve Lipscomb

7 Q Was that charge appropriately attributable to
8 the Courtyard's account?

9 A No, sir Not at all

10 Q I show you Exhibit number 134 if you will
11 identify that for the Court and explain what this
12 is

13 A This is an invoice that says, LEE, Inc d/b/a
14 American Amusement billed to Courtyards at Rolling
15 Creek Under the description, it's got PR, dated
16 2/6/04 for fifty dollars The balance sheet
17 leaves sixty-six dollars and sixty-two cents for
18 auto expense for twenty-nine dollars and one
19 cents PR again dated 02/04 for fifty dollars
20 American Amusement The only thing I know about
21 it is Steve's amusement company and video poker
22 business he had but I have no idea why they would
23 be doing work for the Courtyards

24 Q I hand you Exhibit number 135 and if you will
25 identify that and explain what those are to

Donald Melton, Direct Examination

1 the Court

2 A Exhibit number 135 contains several pages

3 John Deere Equipment for 2003 John Deere

4 Equipment again These amounts are ninety-seven

5 dollars and thirty-four cents Another John Deere

6 for ninety-seven, thirty-four John Deere again

7 for ninety-seven, thirty-four The next invoice

8 and these are all billed to the Courtyards at

9 Rolling Creek This is billed from SEL Properties

10 to the Courtyards at Rolling Creek

11 Next is trailer walker 24HP mower for two

12 thousand, three hundred, twenty-nine dollars and

13 seven-seven cents John Deere tractor, full lift

14 attachments John Deere tractor Total

15 reimbursement That one bill alone was three

16 thousand, two hundred and eighteen dollars and

17 seventy-six cents

18 Again that has a very similar bill showing

19 that it had been paid This is a check written

20 from the Courtyards to SEL Properties for two

21 thousand, nine hundred and twenty-nine dollars and

22 ten cents On the memo line it says Dingo

23 payments August- December for Spence Irrigation

24 and Landscaping

25 We had no involvement with Spence

Donald Melton, Direct Examination

1 Irrigation and Landscaping They are a separate
2 landscaping company on their own Again, there is
3 another bill in here Principle Interest
4 Insurance and Software, Dingo owned by Spence
5 Irrigation and Landscaping

6 Q Why is the Courtyards paying for equipment
7 that are owned by somebody else? Not owned by the
8 Courtyards?

9 A We should not be doing that whatsoever I
10 have no earthly idea why that's happened

11 Q Did the Courtyards own this equipment at all?

12 A No The Courtyards didn't own this
13 equipment

14 Q Go ahead

15 A The Dingos The Dingos again And there's
16 another check here from the Courtyards to
17 Lipscomb, Steven E for nine hundred and eight
18 dollars and thirty -five cents

19 Q I hand you Exhibit number 133 If you will
20 identify what these exhibits are in general terms
21 for the Court and explain why they were important

22 A In general terms, this document here, Exhibit
23 133 is miscellaneous expenses paid for out of the
24 Courtyards at Rolling Creek I will go through
25 just to mention a few of them here Personal

Donald Melton, Direct Examination

1 items such as Tide, snacks, candy, greeting cards,
2 toothpaste, drinks, Toyota Avalon updates tire
3 company - Courtyards didn't own a Toyota Avalon
4 Toyota Sequoia work being done A lot of purchases
5 of gasoline on the other side of town Beltline,
6 Fair Road and that area Courtyards was in the
7 North West side of town A lot of these purchases
8 were done on the other side That's the over view
9 of this package

10 Q And who incurred those expenses?

11 A Courtyards at Rolling Creek incurred these
12 expenses

13 Q Courtyards paid for them?

14 A Correct

15 Q And who actually spent the money? Was it
16 Dutch Forks?

17 A No, sir Dutch Forks had nothing to do with
18 this

19 Q Who did?

20 A Steve Lipscomb as far as I know

21 Q I hand you what we've marked as Exhibit
22 number 136 and ask you to identify that for the
23 Court and describe what it is

24 A This packet, Exhibit 136, lists casual labor
25 right through here and as I flip through the

Donald Melton, Direct Examination

1 package there is check after check written out of
2 the Courtyards at Rolling Creek paid to the order
3 of cash It's quite a number of those all made to
4 the order of cash

5 Q And what do the checks say is the purpose of
6 the cash was for?

7 A It says casual labor

8 Q Have you had any way to trace that document
9 to see if that was what it was used for?

10 A This is a very bad practice for a business to
11 write checks out for cash There is no way to
12 track it No way to know where it went To say
13 casual labor, I have no idea In a business you
14 should write the check out to who it's going to
15 If there is casual labor you should write it to
16 that person

17 Q Who signed the checks made out to cash?

18 Who's signature is on the checks?

19 A Stephen Lipscomb

20 Q I'm going to hand you what we've marked as
21 Exhibit number 130 and ask you if you can identify
22 that for the Court and explain what that is

23 A This is another package, Exhibit number 130,
24 containing numerous pages of information Most
25 all of these pages are from - they're all

Donald Melton, Direct Examination

1 from Letts & Associates, the engineering firm that
2 did the work on the project This states finance
3 charge after finance charge after finance charge
4 for payments not paid on time and it just goes on
5 and on in this whole package

6 Q Why were those finance charges incurred?

7 A Due to lack of payments?

8 Q I hand you what we marked as Exhibit number
9 137 and ask you to identify and also 138 and ask
10 you to identify both of those exhibits and explain
11 what they are

12 A Exhibit 137 and is quite a big stack here
13 It's an accumulation of overdrafts and overdraft
14 fees and insufficient fund charges from the bank
15 That's what this whole stack is

16 Q And that's what number?

17 A Exhibit 137 I also have Exhibit 138 Again
18 this is copies of insufficient funds and
19 overdrafts listed in here for checks that were
20 evidently bounced

21 Q Do you know who had control of the checking
22 account?

23 A Steve Lipscomb

24 Q What problem is there with Mr Lipscomb
25 making these expenditures and paying for

Donald Melton, Direct Examination

1 them out of the Courtyard account?

2 A It takes away from our profit sharing at the
3 bottom line and it's not the way you're supposed
4 to do business

5 Q Are any of these for legitimate Courtyard or
6 Rolling Creek expenses?

7 A No, they're not

8 MR BOWENS Your Honor, may we
9 approach?

10 (Short conference at the bench)

11 THE COURT Ladies and gentlemen, we've
12 reached a good place to stop for lunch I'm going
13 to instruct you as I've done previously and that
14 is that you should not begin to discuss this
15 matter among yourselves as you have certainly not
16 heard all the evidence that has to be presented

17 Also I remind you that as you come and go
18 from the Courthouse during this lunch break that
19 you should not allow anyone to approach you to
20 discuss this case with you Again, if someone
21 attempts to do that if you would tell them that
22 you are a Juror and you cannot discuss it and I
23 ask that you report it as soon as possible

24 Also, please remember not to listen to
25 conversations in hallways as you come and

Donald Melton, Direct Examination

1 go again for the reasons that you will have to
2 make the decisions based upon the evidence here in
3 this Courtroom and not based upon conversations
4 and information that you may overhear I'm going
5 to ask that you report back to the Jury room at
6 2 15 and when you have reported back at that time
7 we will be ready to continue on with the trial in
8 this case Have a good lunch and we'll see you at
9 2 15

10 (The Jury is dismissed from the Courtroom)

11 THE COURT Is there anything we need to
12 take up before we leave for lunch? Then we'll see
13 you all back at 2 15

14 (The Court recessed for lunch)

15 THE COURT Good afternoon Be seated
16 please

17 MR BABCOCK Your Honor, if we could
18 consult on some exhibits

19 (Short conference at the bench)

20 MR BOWENS Your Honor, the Defense
21 objected to Exhibits number 96, 97, 98, 99 so
22 we're going to withdraw those this morning for
23 now I don't think there's any objection to the
24 Exhibits that we discussed beforehand but for
25 the record those are Exhibit's 34, 36, 37, 38,

Donald Melton, Direct Examination

1 39, 40, 41, 43, 128, 129, 130, 131, 132, 133, 134,

2 135, 136, 137, and 138

3 MR BABCOCK I don't think I have any

4 objections but if I could just see the documents

5 THE COURT That does not include 117

6 Is that correct? Which are the change orders

7 MR BOWENS I'm sorry 117's fine

8 The change orders

9 MR BABCOCK I have no objection to

10 that one, Your Honor

11 THE COURT Then without objection,

12 those will be admitted You may ask the Jury to

13 come in Is there anything else we need to take

14 up?

15 MR BABCOCK The only issue to take up

16 is a financial statement for Steve Lipscomb

17 Pertaining to this witness I don't have any

18 problem

19 THE COURT Ask the Jury to come in,

20 please

21 (The Jury returns to the Courtroom)

22 THE COURT You may continue on

23 MR BOWENS Thank you, Your Honor

24 DIRECT EXAMINATION continued

25 BY MR BOWENS

Donald Melton, Direct Examination

1 Q I'm going to hand you what we've marked as
2 Exhibit 124 If you will identify that for the
3 Court please

4 A Exhibit 124 is a title of real estate Deed
5 documents of land transfers - lot transfers

6 Q Is that from phase one?

7 A Is this for phase one? Correct

8 MR BOWENS I would like to offer
9 Exhibit 124 into evidence at this time

10 MR BABCOCK No objections, Your Honor

11 THE COURT No objections Admitted

12 Q I hand you what we've marked as Exhibit 125
13 Would you look at that stack of documents and
14 identify what those documents are in general
15 context for the Court

16 A This is Exhibit number 125 These are
17 documents in our files for each individual lot
18 transfer and lot ad for phase one at Rolling
19 Creek

20 Q I want to show you what we've marked as
21 Exhibit number 147 Are those documents
22 accurately summarized on this chart in front of
23 you?

24 A Yes, they are

25 Q Can you see that well?

Donald Melton, Direct Examination

1 A I think so Yes, sir

2 Q I show you what we've marked as Exhibit
3 number 149 What is number 149?

4 A Number 149 represents the first of year lot
5 sales and the second year of lot sales

6 Q Is this chart essentially a recapitulation of
7 what's on this chart over here - chart number 147?

8 A Yes, it is

9 MR BABCOCK Your Honor, may we
10 approach?

11 THE COURT Yes, sir

12 (Short conference at the bench)

13 MR BABCOCK There is no objection

14 THE COURT Admitted

15 Q Mr Melton, what does Exhibit 148
16 demonstrate?

17 A It demonstrates K&L lot purchases in the
18 Courtyards

19 Q And is it fair and accurate to summarize
20 the Exhibit 125?

21 A Yes

22 Q And what is the Exhibit number 152?

23 A That shows the amount of lots sold per year
24 periods of times that you have denoted their sales
25 of lots

Donald Melton, Direct Examination

1 Q And is it a fair and accurate summary of the
2 data contained in those documents in 125?

3 A Correct

4 MR BOWENS Your Honor, at this time, I
5 would like to offer Exhibit 125 into evidence
6 along with Exhibit 152, 147, 148, and 149

7 MR BABCOCK Your Honor, I'd like to
8 see 152 Your Honor, may we approach?

9 (Short conference at the bench)

10 Q Mr Melton, in paragraph eight of the
11 contract and paragraph six of the contract
12 relating to the lot sales requirement

13 A Correct

14 Q And you were required to sell twenty percent
15 of the lots that were available each year?

16 A Twenty percent of the available lots per
17 year Correct

18 Q And when did the first year of sales begin?

19 A August 22, 2002

20 Q And why was that the first year of sales?

21 A You had to have a bonded and recorded plat
22 with Richland County in order to begin selling
23 lots to individuals at the closing and that's when
24 we had our plat recorded was August 22, 2002

25 Q And why was the plat bonded in Court in

Donald Melton, Direct Examination

1 August of '02?

2 A Because we initially we wanted and we needed
3 it to be recorded back in January of '02 but Mr
4 Lipscomb refused to bond the plat He didn't want
5 to spend the money to have it bonded He wanted
6 to wait until the majority of the infrastructure
7 was in place so under that situation we were
8 forced to not bond it until August of '02

9 Q Did he ever give any explanation as to why he
10 didn't want to bond it until say January?

11 A Well, he said he didn't want to spend the
12 money on it at that time He wanted to get all
13 the infrastructure put in first

14 Q When was the infrastructure supposed to be
15 completed?

16 A It should have been completed in April of
17 '02

18 Q And it wasn't?

19 A No, it was not It was September of '02
20 before it was completed Our contractor signed a
21 six month contract to get it completed but it was
22 not completed with a six month time-frame

23 Q And what impact did that have on the overall
24 project?

25 A It delayed us severely because the contractor

Donald Melton, Direct Examination

1 didn't get finished on time and one reason was
2 because he wasn't getting paid on time by SEL
3 Properties Contractors, if they don't get paid,
4 they don't work It caused us to miss the spring
5 and summer selling season of 2002

6 We were brand new and getting ready to open
7 up and we were all the way through the spring and
8 summer without being able to sell our first lot
9 It had a big delay put on us That also delayed
10 us from planning to move on into phase two If
11 things had gone in natural sequence and order to
12 get the project done but that didn't happen

13 Q In the second year of the project, did you
14 make the twenty percent sales requirement?

15 A Yes, we did

16 Q Okay And how many lots were sold in the
17 second year of lot sales?

18 A The second year of lot sales was

19 Q Is it on this chart?

20 A It is

21 Q Would it be lot number 14 through 31

22 A Yes, I'm just verifying I'm just making
23 sure I don't make a mistake 18

24 Q Now, this only goes up through the
25 termination letter Is that correct?

Donald Melton, Direct Examination

1 A Correct It was not a full year

2 Q Did you sell lots to K&L Contracting?

3 A Yes, we did

4 Q This chart summarize the lots that were sold
5 to K&L Contracting from the beginning until the
6 termination letter?

7 A It does It's accurate

8 Q How many lots did K&L purchase that were -
9 that they already had a buyer for before they
10 bought the lot?

11 A Five Between four and five

12 Q And how long did it take Dutch Fork Realty to
13 sell the lot and the house, especially the house,
14 to a new home owner once K&L had bought the lot?

15 A As represented on the chart here on the next
16 to last column, the time to resell the house that
17 K&L has produced to a buyer was 7 months 0
18 represents a pre-sell, 3 months, 7 months, 7
19 months, 1 months, 5 days, 4 months, 4 months, 6
20 months, 11 months, and 12 months And then some
21 of those at the bottom three months and five
22 months

23 Q How much money was generated by the house
24 sales K&L built that Dutch Fork Realty was
25 involved in selling at the Courtyards?

Donald Melton, Direct Examination

1 A K&L was selling their homes at the Courtyards
2 at Rolling Creek generated five million, seven
3 hundred sixty-four thousand, seven hundred
4 seventy-five dollars and sixty-three cents --
5 \$5,764,775 63

6 Q Did Dutch Fork Realty receive a commission on
7 all of those sales?

8 A Not all of them No

9 Q The ones that had the termination letter on,
10 did you get commissions on those?

11 A Not all of them No

12 Q How much money did K&L Contracting take away
13 from the closings as far as the cash to K&L on
14 each of those lots? What was the total amount?

15 A The lot and house being sold together?

16 Q Right?

17 A About the sixth column says cash to K&L The
18 bottom of that That's every time they went to a
19 closing and the cash was distributed to them as a
20 builder totaled one million, six hundred seventy-
21 two thousand, ninety-one dollars, and four cents

22 Right

23 Q So there were some of these closings that K&L
24 sold the house that you did not get commission on?

25 A Correct

Donald Melton, Direct Examination

1 Q If you had been at the Courtyards still and
2 the termination had not occurred, would you have
3 received commission on those?

4 A Correct

5 Q Is that due to your exclusive right to sell?

6 A It's due to our exclusive right to sell that
7 was in our contract

8 Q Did Dutch Fork Realty have a sales and
9 marketing plan for Courtyards?

10 A We did

11 Q Was five years enough time to do the project
12 from start to finish

13 A Absolutely

14 Q Would all of the houses necessarily have been
15 built in that time?

16 A In the five year period?

17 Q Right

18 A No, sir Not necessarily all the houses
19 would have been built No

20 Q Well, then how would you get commission on a
21 house that was built after the five year time
22 expired?

23 A We had a one year listing for house sales so
24 once a builder started a house, we had a one year
25 period once we listed that house to complete the

Donald Melton, Direct Examination

1 sale of that particular home so if it was the last
2 day or the last few weeks of the contract if he
3 was building a house he listed it with us, we
4 would still have a one year extension to get that
5 house sold for him He would list it with us for
6 one year period

7 Q If a team builder bought a lot say in the
8 fourth year or say early in the fifth year, closed
9 on the lot but did start building the house-but
10 they started building the house in the sixth year
11 - the year after the five year ended, would you
12 still have more time under the contract to sell
13 their house for them?

14 A We'd still have more time because once they
15 purchased the lot they agreed to list the house
16 exclusively with us for a one year period

17 Q Why do they have to agree to exclusively list
18 the house with you?

19 A That's the way our contract was set up and
20 designed

21 Q Had Dutch Fork Realty fully done all the
22 requirements they were required to do, all the
23 conditions were met to receive that benefit of
24 having the exclusive right to sell the houses in
25 phase one?

Donald Melton, Direct Examination

1 A Yes, we did

2 Q What about phase two and phase three?

3 A Phase two and phase three we also did the
4 same thing We were to include phases two and
5 three altogether We gave up our rights at the
6 beginning to make any commissions on lots sold to
7 the builders, therefore, we were granted the
8 exclusive right to sell phases one, two, and three
9 lots and homes

10 Q Was it ever contemplated by Dutch Fork Realty
11 and SEL Properties that phase two and three would
12 not be built?

13 A Absolutely not

14 Q Why is that?

15 A It was written in the contract that it shall
16 be three phases We entered into the contract
17 We developed all three phases We had all three
18 phases planned, approved, and agreed upon It was
19 - the whole way through we knew we were going
20 through with phases one, two, and three We had
21 already started infrastructure in phases two and
22 three prior to the termination letter

23 Q What construction had been done in phase two
24 and three?

25 A We had water lines and sewer lines in phases

Donald Melton, Direct Examination

1 two and three We had land plans and we had

2 permits in place for phases two and three

3 Q Any other development work that had been done

4 in phases two and three besides what you've

5 already described?

6 A Permitting was in place, zoning approval was

7 done, permits were in place, water, sewer was in

8 place I think that's all If I could just think

9 about it for just a second

10 Q Were the market conditions that existed in

11 this area of the Courtyards sufficient to allow

12 you to complete this project in five years?

13 A Absolutely It was a great area It was off

14 the Peak exit Exit 97 In the Ballantine area.

15 It's a well sought after area that's up and

16 growing If the bank didn't think so they

17 wouldn't have loaned us the money on the project

18 for a five year project

19 Q When did you expect to begin the lot sales in

20 phase one? What was the plan for starting lot

21 sales?

22 A The plan was to start in January of '02 to

23 get started with lot sales

24 Q And why was that the plan date?

25 A That was the plan date because we had

Donald Melton, Direct Examination

1 already began construction We had been doing
2 premarketing for our community Marketing with
3 sales information Giving it out And the
4 contractors were there working and on a
5 chronological timeframe when you have a five year
6 project, you've got to do things in certain
7 sequences and steps You've got to continuously
8 be developing and moving forward You can't stop
9 and wait for certain things to get done because
10 you'll end up with another delay and another
11 delay Things just don't work that way

12 Q What is crucial about starting in January?
13 Why does it hurt to start in August?

14 A If you start in August which we did versus
15 January, we missed the entire spring and summer
16 selling season That's when people are out
17 shopping, buying, and selling homes That's in
18 the spring and the summer We missed a crucial,
19 crucial time in selling in '02

20 Q If you had been able to start sales in early
21 '02, when would you have expected to complete
22 sixty percent of phase one?

23 MR BABCOCK Objection to that It
24 calls for speculation on the part of the witness

25 THE COURT I'll allow the testimony

Donald Melton, Direct Examination

1 Q Go ahead

2 A Repeat the question please

3 Q If you had been able to start phase one say
4 on January as you had planned, when would have
5 projected you would be finished with sixty percent
6 of phase one?

7 A We were projected at sixty percent to be done
8 the latter part or toward the end of '02

9 Q Did that happen?

10 A No, it did not happen

11 Q And why not?

12 A Mr Lipscomb refused to bond the plat in
13 January And can I add to that? And had we
14 started on time in January, we would have hit the
15 ideal time in spring and summer of '02 We would
16 have gotten our sales, our sixty percent, going in
17 place And we would have also at that time been
18 moving forward with phase two

19 It's crucial to go ahead and get the bidding
20 process set up for your next phase, for your
21 engineer to get the packages together so you can
22 keep moving along so when you do get to sixty
23 percent you're moving right along into the next
24 phase

25 You don't want a time period where you're

Donald Melton, Direct Examination

1 stopped or at a lull in activity because then you
2 lose your momentum You lose your excitement and
3 you lose your builders that are out there building
4 with you

5 Q When would you have planned to start the
6 bidding process for phase two infrastructure?

7 MR BABCOCK Same objection, Your
8 Honor May we approach?

9 THE COURT Yes, sir

10 (Short conference at the bench)

11 MR BABCOCK Your Honor, if I may have
12 a continuing objection as to plans that the
13 witness may be testifying to similar to what he's
14 already testified to

15 THE COURT I've stated that I think
16 they can testify as to what their plans were for
17 the five year period and that would include the
18 projections as to what they expected would occur
19 and of course, what actually occurs would be
20 subject to further discussion

21 Q Resuming, when would you have planned to
22 begin the bidding process for the phase two
23 infrastructure?

24 A That would have been in the middle part of
25 '02

Donald Melton, Direct Examination

1 Q And why would you start it at that time?

2 A Again, you can't ever let anything really
3 stop you, continuously developing as developers as
4 you go You never really stop or put it to the
5 side or stop developing It's important to get
6 that bidding process out because it takes time for
7 the bids to get put together

8 It takes time for the contractors to bid on
9 them And then once the contractors are awarded
10 the bid, it takes time for him to immobilize to
11 the site and to get construction going so if you
12 start in mid '02 with that process, you're on
13 track for a contract to be awarded and a
14 contractor to come out of track by the time you
15 get your sixty percent

16 We sat down and went through all this when we
17 knew we had a five year timeline in the project
18 You've got to have a plan

19 Q When did you project that the construction
20 for phase two would begin?

21 A The very first part of '03 would be the
22 projection time for construction start

23 Q Why would you begin the infrastructure in
24 phase two before phase one had sold sixty percent?

25 A You wanted

Donald Melton, Direct Examination

1 Q Does the contract require you to commence
2 phase two when sixty percent had sold?

3 A The contract requires commencement of phase
4 two at sixty percent Commencement means no
5 selling of the lots in phase two You've got to
6 get the roads put in We had the water and sewer
7 put in Now you've got to put the roads in

8 We don't want to hit sixty percent in phase
9 one and not have any construction done in phase
10 two because you could very easily sell forty
11 percent out really quick as high as this market
12 was then so if that would have happened, then
13 you're sitting with no product

14 Construction work going on with nothing to
15 sell and you've got a five year timeline to work
16 with so it's very important to get that
17 construction underway so when you do hit that
18 sixty percent you can immediately begin selling
19 lots in phase two

20 Q Were you able to start the phase two bidding
21 process without an infrastructure contract?

22 A No, we were not

23 Q And why not?

24 A The phase two and three plans had been
25 abandoned

Donald Melton, Direct Examination

1 Q Explain to the Jury what you are talking
2 about these plans What are these plans exactly
3 that you are talking about that were abandoned?

4 A The Courtyard had three phases It had phase
5 one, phase two, and phase three We started with
6 phase one All three phases up front were pre-
7 planned, pre-designed, pre-engineered, and
8 approval was given on all three phases and agreed
9 upon with Mr Lipscomb and Dutch Fork Development
10 Group to move forward with

11 Mr Lipscomb went in sometime in April of '02
12 behind our backs and went into our engineer's
13 office and abandoned our pre-approved and pre-
14 agreed upon plans for phases two and three and he
15 started redesigning those phases When he started
16 that process, he failed to pay the engineer on
17 time and he never got the plans finished

18 So therefore we had no plans We had no
19 specifications We had no lot layouts to show the
20 people to sell phases two and three and it was
21 totally impossible to go out and sell those
22 phases

23 Q How does that affect the bidding process? If
24 you don't have the plans, how does it affect the
25 bidding process?

Donald Melton, Direct Examination

1 A Of course, if you don't have plans, we can't
2 take anything to the contractors to bid or the
3 engineers to prep to bid on for the contractor to
4 bid on because there is nothing to bid on

5 Q Did Mr Lipscomb or SEL Properties have any
6 right to go in and make these changes to the
7 plans?

8 A No, he did not We were the developers

9 Q When did you plan to start the marketing and
10 brokering sort of work for phase two?

11 A We would have started the marketing,
12 brokering for phase two the middle part of '02
13 We were to meet and talk to builders At this
14 point in time we would have been expected to find
15 a builder, a tract builder or large builder that
16 would come down and take bigger chunks of lots for
17 bigger sections

18 Possibly take down fifty lots at a time, you
19 know, buy a whole phase at one time The
20 subdivision was established, the integrity was
21 there with phase one We had been working on that
22 in the mid part of phase two because it takes a
23 little bit more time to deal with those people
24 They have bureaucracy and people in their offices
25 that they have to go through and they'll come

Donald Melton, Direct Examination

1 out and inspect all the information that we're
2 giving them and it takes them a little time to
3 make their decision and these are builders So we
4 want to start that early so when the sixty percent
5 hits we're still moving Nothing stopping It's
6 still a natural progression

7 Q At this point are you talking about actually
8 selling these lots in phase two? When you are
9 doing this program work?

10 A No, this is not actually selling the lot
11 This is a marketing tool, Arch builder or Tract
12 builder, or someone like that can buy It's doing
13 the pre-sell information to him Getting them
14 interested in it because they don't have a good
15 diligence period

16 They'll come out and look at the property and
17 that sort of thing and by the time we hit sixty
18 percent, that person or people or builders that
19 may be in line and ready to go but you've got to
20 do it ahead of time You can't procrastinate and
21 wait until that day and time Also, there's a
22 good chance we could have had a guy come in and
23 say, we want to buy

24 MR BABCOCK Your Honor, objection to
25 good chance of someone coming in That's not

Donald Melton, Direct Examination

1 the plan That's pure speculation

2 MR BOWENS Your Honor, he's testifying
3 as to what happens when these work in process
4 works and all this goes about and what normally
5 happens and what is expected to happen

6 THE COURT I think there needs to be a
7 separation between what is discussion on what's
8 common in the industry versus what occurs or what
9 potentially was envisioned for this particular

10 Q Is it common in the marketing world for a
11 residential subdivision of this size and time to
12 have larger builders come in and purchase larger
13 numbers of lots as opposed to ones and twos?

14 A Yes, it is

15 MR BABCOCK Objection, Your Honor
16 Leading

17 THE COURT Rephrase the question

18 Q Is it common in your industry in the sales
19 and marketing and brokering work of subdivisions
20 to have larger builders come in and buy larger
21 tracts of lots?

22 MR BABCOCK Same common objection,
23 Your Honor That's a leading question
24 Is something common as opposed to what is common?

25 THE COURT I'll let him answer

Donald Melton, Direct Examination

1 the question

2 A Not only is it common, it's necessary in the
3 industry to move in this natural progression So
4 it is very common and it is a natural progression
5 of the business to do it this way

6 Q What do you experience when you start a
7 multi-phase subdivision? What did you experience
8 in phase one? What kind of buyers do you have in
9 volume sales and things like that?

10 A Repeat the question

11 Q When you start a multi-phase subdivision like
12 this where you have three different phases and the
13 last two phases were bigger than the first one
14 Correct?

15 A Um-hmm Correct

16 Q What do you normally see in terms of how the
17 lots are marketed and so forth in the smaller
18 first phase as opposed to the larger second and
19 third phases?

20 A What happened here was we had a lot of
21 customer building going on and selling to builders
22 and it is customary within the industry and it's
23 typical that after you establish the credibility
24 of the subdivision and you've got the first phase
25 in and they can see what it's all about, you're

Donald Melton, Direct Examination

1 going to attract a larger and bigger builder that
2 can come in and buy you out or buy a whole section
3 at a time and really move out the property

4 That is, it's typical and normal and it
5 happens all the time

6 Q Would you have been able to have sold any
7 lots in phase two and three if you had been able
8 to put together a brokering deal for those lots
9 prior to sixty percent of phase one being sold?

10 A The contract requires for sales once
11 commencement of sales would start at sixty percent
12 sales in the previous phase but Steve had told us
13 many times and a lot of times he would sell the
14 project or all the project and

15 MR BABCOCK Objection, Your Honor
16 Now we're getting into the parol evidence We've
17 got a contract between the parties

18 MR BOWENS This is not an attempt to
19 vary the terms It's an attempt

20 THE COURT Counsel approach

21 (Short conference at the bench)

22 Q Were you able to start your marketing and
23 brokering work in 2002?

24 A No, sir

25 Q When did you plan to begin the bidding

Donald Melton, Direct Examination

1 process for the phase three construction?

2 A That would have been in the early part of
3 '03

4 Q And when would you have planned for the '03
5 construction to have actually began going into
6 phase three?

7 A The end of '03

8 Q When did the plans for phase two and three
9 finally get redesigned and get approved by
10 Richland County?

11 A They were not reapproved by Richland County
12 until March of 2007

13 Q Just a moment here I'm handing you what
14 we've marked as Exhibit number 123 If you would
15 identify that for the Court please

16 A Is it 123? It's a contract of sale

17 Q During the time and over the course of

18 MR BABCOCK Your Honor, may we
19 approach?

20 THE COURT Yes, sir

21 (Short conference at the bench)

22 Q During the time period that you were doing
23 sales work for phase one in 2003 in that timeframe
24 prior to you being terminated in May of '04, was
25 SEL Properties or Mr Lipscomb attempting to sell

Donald Melton, Direct Examination

1 phase two and three?

2 A Yes, he was

3 Q Tell the Jury about it

4 A We discovered this from our engineer who went
5 into a meeting with him one day and found out that
6 he

7 MR BABCOCK Objection, Your Honor

8 THE COURT To the extent that the calls
9 were hearsay, I sustain

10 MR BOWENS Yes, Your Honor

11 Q Who was Mr Lipscomb attempting to market and
12 sell phase two and three to?

13 MR BABCOCK Objection, Your Honor
14 He's trying to backdoor into the hearsay
15 objection

16 MR BOWENS The witness knows what went
17 on

18 THE COURT Then you need to establish a
19 foundation that establishes that he has personal
20 knowledge

21 Q Do you have personal knowledge of Mr
22 Lipscomb attempting to sell the lots of land
23 comprising of phase two and three?

24 A Yes, I do

25 Q Who was he attempting to sell that land

Donald Melton, Direct Examination

1 and lots to?

2 A It was several different builders

3 Q Who were they?

4 A McCarr, Essex Homes, and Galloway Homes

5 There's another one

6 Q Was Mr Lipscomb ultimately successful in

7 selling the land and the lots of phase two and

8 phase three?

9 A Yes, he was for a price of seven six million
10 dollars

11 Q And is that what's Exhibit number 123?

12 A This is This is a contract to sell the
13 remaining two phases, phases two and three, in big
14 groups of lots The contract price here - seven
15 million, six hundred, sixty-three thousand dollars
16 with Essex homes

17 Q Now, during the time that these attempts to
18 sell the property were going on, was Dutch Fork
19 Realty ever involved in those negotiations with
20 the different potential buyers?

21 A No, we were not

22 Q Why not?

23 A It was kept secret from us

24 Q Was that one of the Dutch Fork Realty duties
25 to negotiate broker and trusts?

1 A We had the exclusive rights to sell phases

2 one, two, and three lots and houses

3 Q That's all the questions I have at this time

4 MR BABCOCK If it pleases the Court

5 THE COURT Yes, sir

6 CROSS EXAMINATION

7 BY MR BABCOCK

8 Q Mr Melton, you just talked about Exhibit

9 123 Is that correct?

10 A Yes, sir

11 Q That's the contract between SEL Properties,

12 LLC and Essex Homes Is that correct?

13 A That is correct, sir

14 Q Do you have that in front of you, sir?

15 A Yes, sir

16 Q And that's dated September 15, 2006

17 A That is correct

18 Q And that's outside the five year time of the

19 contract between your company and SEL, isn't it?

20 A That is outside of my contract period that's

21 written on the contract Yes, sir

22 Q Now, there is a provision in - I believe it

23 was Exhibit 1 Do you have Exhibit 1 handy, sir?

24 A Okay I don't have it in front of me Maybe

25 I could get a copy of it from the table

Donald Melton, Cross Examination

1 Q That's a big stack and what I'm looking for
2 is the 2000 contract between SEL Properties and
3 the Dutch Fork Companies I've got it I hand
4 you what's marked as Plaintiff's Exhibit 1 and
5 just tell us a little bit about the concept of
6 bulk sales or selling big pieces of property Is
7 that correct?

8 A What paragraph are you referring to?

9 Q I'm talking about the contract now but I'm
10 going back to your testimony concerning the fact
11 that the discussions if I understood your
12 testimony between Mr Lipscomb and others about
13 potentially selling bulk sales of property

14 A Yes, sir

15 Q And the contract contemplates that it might
16 happen, that the property might be sold in gross
17 Didn't it?

18 A To an extent

19 Q All right If you go to section five of the
20 contract, do you see the last paragraph? You see
21 that, sir?

22 A Yes, sir

23 Q It says, in the event the development is not
24 sold in individual lots but is sold in gross prior
25 to the end of phase one and that's handwritten in

Donald Melton, Cross Examination

1 The sales price of the entire property at closing,
2 less the initial interest and less the land cost,
3 fees as charged, development costs, and
4 professional fees and charges shall be about sixty
5 percent SEL, forty percent DFDG Is that correct?

6 A That is correct but this contract is
7 referencing lot sales and not land and gross and
8 also this paragraph explains, it says, in the
9 event the development is not sold in individual
10 lots but is sold in gross prior to the end of
11 phase one This contract refers to individual lot
12 sales

13 Q The contract did, sir, but let's look at the
14 situation where something else would be done prior
15 to the end of phase one Isn't that what it says?

16 A No It's not what it's meaning No, sir
17 It's not what it says

18 Q Well, sales in the event that the development
19 is not sold in individual lots Do you see that?

20 A I see that Yes, sir

21 Q All right So, it's looking at situations
22 other than that which is sold in gross

23 A Correct

24 Q And then there would be division between the
25 parties Correct?

Donald Melton, Cross Examination

1 A That's correct

2 Q All right Now, let's look at what the
3 situation was in May of 2004 In May of 2004 was
4 about seventy percent of the five year contract?
5 Isn't it, sir?

6 A I'll take your word for it

7 Q In May of 2004 and the contract terminated in
8 November of 2005

9 A All right Okay

10 Q And at that point in time, the terms of what
11 actually happened in the project as your chart
12 showed there were thirty-one lots actually sold
13 that year Correct?

14 A That's correct

15 Q All right And phase one had fifty-seven
16 lots

17 A Correct

18 Q So, within phase one itself, there were
19 twenty-six still to go Correct?

20 A Yeah That's correct

21 Q And, in fact, as you see here today not all
22 the lots have been sold in phase one Have they?

23 A No, sir Not when we were terminated No,
24 sir

25 Q But you know that to be a fact today that

Donald Melton, Cross Examination

1 there are still a couple of lots

2 A I don't know that to be a fact today No,

3 sir

4 Q Okay You don't know one way or another?

5 Now, for the remaining phases if they were built

6 during this five year time period that you talked

7 about, there were one hundred and ninety-three

8 lots in phases two and three Weren't there?

9 A Correct

10 Q Now, you told us about some kind of plan or

11 timeline that you had for different dates You

12 testified to that

13 A Yes, sir

14 Q Where is that timeline written down?

15 A I don't have a document with it on here, of

16 course No, sir

17 Q Well, name one piece of paper that ya'll had

18 it on?

19 A Yes, sir We'd sit down and plan it all the

20 time

21 Q Mr Melton, you had the document in your

22 possession and it wasn't produced to us during

23 trial?

24 A Probably not No, sir

25 Q So there is no document now that shows

Donald Melton, Cross Examination

1 the timeline Is there?

2 A Correct

3 Q Just your testimony as to when you think
4 things could have been done

5 A The way things should have been done

6 Q Mr Melton, in fairness you would agree with
7 me, wouldn't you, that some projects go well and
8 some projects don't go well Is that fair?

9 A Sure

10 Q Not all projects proceed as expected Things
11 happen with construction projects and things do
12 happen Sometimes you get breaks and sometimes
13 you don't get breaks Fair?

14 A That's fair

15 Q Now, the concept for the Courtyards at
16 Rolling Creek, that was a concept that you all
17 approached Mr Lipscomb with, isn't it?

18 A That is correct We took the idea to Mr
19 Lipscomb

20 Q Pardon?

21 A We took the idea to him Yes

22 Q And you came to him because you've known him
23 for some period of time Correct?

24 A Correct

25 Q Right And you've known him from

Donald Melton, Cross Examination

1 the time when he had some video gaming instruments
2 and you had some convenience stores where he
3 placed those video games

4 A No, sir I didn't My brother did

5 Q Your brother

6 A Yes, sir

7 Q But you knew him from that time?

8 A Correct

9 Q And the concept that you had was for ya'll to
10 be the developer Correct?

11 A That is correct

12 Q That was for Dutch Fork Developing Company to
13 develop that

14 A Correct

15 Q And then Dutch Fork Real Estate Company would
16 be handling the real estate sales Correct?

17 A Correct

18 Q Now, Mr Lipscomb, through his company, was
19 the one who was going to get the bank loan

20 Correct?

21 A Correct

22 Q And you understood that he was going to have
23 to have as you would for that kind of loan a
24 personal guarantee You knew that, didn't you?

25 A Um, state that again please?

Donald Melton, Cross Examination

1 Q Sure, Mr Melton You'd agree with me,
2 wouldn't you, that when entities such as SEL
3 Properties get large loans from banks they
4 normally require personal guarantees from the
5 individuals associated with the loan?

6 A I wasn't totally aware of his financial total
7 situation Didn't know if he could pay cash or
8 would have a personal loan at that time I
9 honestly didn't know that

10 Q I didn't ask that question, sir

11 A Okay, I'm sorry

12 Q I asked a general question

13 A Okay

14 Q And I asked generally, normally when entities
15 go to the banks like LLCs, small companies, to get
16 big loans they require personal guarantees from at
17 least one person associated with the company

18 A Okay Correct Yes, sir

19 Q And you know that in this case, in fact,
20 that's what was required of Mr Lipscomb You
21 know that to be, don't you?

22 A Again, I don't know that it was required of
23 him because I didn't know if he had cash to pay
24 for all of this or not

25 Q That wasn't what I asked The question I

Donald Melton, Cross Examination

1 asked you was you know in this case he did, in
2 fact, sign a personal guarantee

3 A Oh, yes he did Correct

4 Q Now, for this particular project, there was
5 no requirement for Dutch Fork to put money into
6 the project Was there?

7 A No, sir There was not

8 Q Either Dutch Fork Development Company or
9 Dutch Fork Real Estate Company Correct?

10 A No, sir

11 Q In fact, you didn't actually put money into
12 the project itself, did you?

13 A No, sir Just the time and time is money to
14 us

15 Q I understand but no dollars

16 A No dollars

17 Q Now, let's look over at paragraph two of the
18 contract Before that, let's go to paragraph
19 twelve See paragraph twelve, sir?

20 A Yes, sir

21 Q All right What that says is the entire
22 agreement Do you see that section? Section
23 twelve

24 A Yes, sir

25 Q And that says, this represents the entire

Donald Melton, Cross Examination

1 agreement between the parties superseding all
2 prior verbal and written agreements and the same
3 shall not be modified, amended, or changed except
4 by a writing signed by all parties Do you see
5 that?

6 A Correct?

7 Q And his contract Exhibit 1 that you're
8 looking at is the only written contract in regards
9 to phases one, two, and three of the Courtyards at
10 Rolling Creek

11 A Yes, sir

12 Q Let's go over to paragraph two Do you see
13 paragraph two, sir?

14 A Yes, I do

15 Q And that says, in two parts - the first part
16 says SEL shall exercise its best efforts to
17 secure reasonable financing from a conventional
18 lending institution for the purpose of purchasing
19 the property, securing the engineering studies,
20 surveying, landscaping, and for the costs related
21 to the infrastructure Do you see that?

22 A That's correct

23 Q And next to that it says, SEL shall have
24 final approval of all costs pertaining to the
25 development of the property

Donald Melton, Cross Examination

- 1 A That's right
- 2 Q Now, what about that first sentence? It
- 3 says, SEL shall exercise it's best efforts to
- 4 secure reasonable financing from a conventional
- 5 lending institution SEL did that, didn't he?
- 6 A Correct
- 7 Q He got a loan from NBSC Didn't he?
- 8 A He did
- 9 Q And the purpose of that loan was to purchase
- 10 the property Correct?
- 11 A Correct
- 12 Q Secure engineering studies Correct?
- 13 A Um-hmm
- 14 Q That's a yes?
- 15 A Yes That's a yes
- 16 Q Surveying Landscaping and other costs
- 17 related to the infrastructure That was the
- 18 purpose of the loan Wasn't it?
- 19 A Correct
- 20 Q In fact and we'll see this in a minute, you
- 21 all put together a budget to help present to the
- 22 bank for that loan, didn't you?
- 23 A Correct Yes, sir
- 24 Q Now, it's a pretty self-evident thing when I
- 25 look at the paragraph in a minute but the contract

Donald Melton, Cross Examination

1 provided that from the profit division, you held
2 as much as twenty-five percent profit Is that
3 correct?

4 A That is correct

5 Q So definitionally, seventy-five percent of
6 the profits would stay with SEL Correct?

7 A Correct

8 Q Now, let's look over at section three, on
9 paragraph three where it begins or where it says
10 on that page, Phased Development Do you see
11 that?

12 A I see that Yes, sir

13 Q The first sentence says, the property is to
14 be developed in phases Do you see that?

15 A Correct

16 Q And then it says, there shall be three phases
17 of development See that?

18 A Correct

19 Q And then it says, phase two shall not
20 commence until no less than sixty percent of the
21 lots of phase one are sold See that?

22 A Correct

23 Q And phase three will not commence until no
24 less than sixty percent of the lots of phase one
25 and phase two are sold Do you see that?

Donald Melton, Cross Examination

1 A Correct

2 Q Now, in May of 2004, you were at the thirty-
3 one mark out of fifty-seven

4 A Correct

5 Q You hadn't hit the sixty percent mark Had
6 you?

7 A Yes, sir

8 Q Thirty-one is not sixty percent of fifty-
9 seven, sir

10 A We had additional lots that K&L had
11 supposedly purchased that were not closed

12 Q Which lots were those, sir?

13 A I'm going to have to review my chart

14 Q Come on up here and review your chart

15 A We received the termination letter May
16 twenty-eighth of '04

17 Q Yes, sir

18 A We were three lots away from sixty percent
19 but these lots had been already purchased by K&L
20 We didn't realize they hadn't closed Mr
21 Lipscomb was in charge of closing They closed
22 shortly after we got the termination letter We
23 didn't know these weren't closed We marked them
24 on the board as spec lots sold to K&L We didn't
25 know they weren't closed

Donald Melton, Cross Examination

1 Q So, those three lots closed One closed in
2 June, and the other two in July And with those
3 three Are you sure those are the right ones?
4 A Yes They were sold prior These, 1-2-3-4-5
5 prior to the termination letter K&L had
6 purchased to build lots on Either a building
7 permit or a survey with the house on it - it don't
8 mean nothing to me to show me that they're ready
9 to start the house I'm looking for a lot more at
10 the sales office to put a specs sticker on it
11 saying sold to builder We didn't know they
12 hadn't closed Steve was entirely up to the
13 closing on the house and, lo and behold, they
14 closed right after we got the termination letter
15 Q Let's go back and (inaudible - coughing in
16 the background) You've been in the real estate
17 business how long, sir?
18 A Since 1992
19 Q And during your time in real estate you know
20 that not all contracts close, do they?
21 A No, sir They don't
22 Q And until you had something close, they're
23 not sold, are they?
24 A Yes, sir You are sold
25 Q You

Donald Melton, Cross Examination

1 A We call it sold In our office when we have
2 a buyer willing to buy and a seller willing to
3 sell, you can consummate a contract, we called it
4 sold We always called it sold

5 Q If you're going to use that definition, then
6 that means as I understand your testimony then by
7 May at that time, you hit the sixty percent

8 A Correct

9 Q So May or July, it's the same time period

10 A Close Yes, sir

11 Q Now

12 A The reason I was stating that fact is it
13 closed right after the termination letter The
14 termination letter came at a point in time because
15 I was suspicious

16 Q You reached the sixty percent mark around
17 that time We're in agreement about that Aren't
18 we?

19 A Yes, sir

20 Q All right Now, let's go over as we
21 discussed the articles of termination clause
22 again It's a five year clause, term for this
23 contract and then paragraph nine deals with what
24 happens after termination Let's go to paragraph
25 nine, please All right Paragraph nine

Donald Melton, Cross Examination

1 starts out, upon termination DFDG & DFR will have
2 no further rights to compensation and/or
3 commissions and shall peacefully vacate the
4 premises That's what it says Right?

5 A That's correct either way it reads Yes,
6 sir

7 Q And that's the agreement that ya'll had going
8 in to the contract in November of 2000? Is that
9 correct?

10 A Absolutely That is correct

11 Q Now, let's talk a little bit about the
12 commission side of things The commissions were
13 handled differently as I understand between
14 selling lots to builders and selling to non-
15 builders Correct?

16 A That is correct

17 Q And that draws on contract under six,
18 exclusive rights to sell Correct?

19 A That is under six

20 Q All right We don't have to go through
21 sentence by sentence but the basic premise was, if
22 you sold to a non-builder - a regular person who
23 would build their own house - you would get
24 commission Correct?

25 A Correct

Donald Melton, Cross Examination

1 Q All right But if you sold to a builder you
2 wouldn't get any commission but what you would get
3 is the exclusive right to sell that house
4 Correct?

5 A No, sir

6 Q That's not what you got?

7 A No, sir That's not what we agreed We
8 would get the exclusive right to sell to phases
9 one, two, and three all lots and all homes I
10 think you kind of said that house or one house or
11 something

12 Q I'm sorry

13 A Okay I guess I misunderstood you

14 Q I wasn't asking I was asking you a
15 procedural question in terms of how the process
16 worked Let's try it again

17 A Okay Let's try it again

18 Q You sell to Joe Smith who wants to build a
19 house

20 A Correct

21 Q And he comes and you're the agent and you
22 sell it and you get a commission

23 A Off the lot Yes, sir

24 Q Off the lot Because now he would be
25 involved in the building of his own house

Donald Melton, Cross Examination

1 Correct?

2 A With a team builder Yes, sir

3 Q That's what I'm But you're not going to be
4 doing any more sales because that person owns his
5 house

6 A No, sir It's a sale involving with our
7 builders even if they do a custom home it's listed
8 within our company Even the new construction is
9 a listing so to speak They - the builder pays
10 the commission at that point in time Not SEL or
11 anybody else It's paid by the builder on the
12 home itself

13 Q So there's a resell on the home to the person
14 who just bought the lot?

15 A It's not a resell The home is not there
16 yet We're involved in putting together the
17 construction project with the buyers Say one of
18 these ladies and gentlemen came to us We
19 represent the builder to build your custom home
20 for you so we're involved in the whole process in
21 getting the contract signed with the builder, with
22 the individual for their new custom home to be
23 built

24 Q Well, regardless, you got the commission on
25 the saleable lot to the regular person But

Donald Melton, Cross Examination

1 when you're dealing with the builder, you've got

2 no commission at that stage Did you?

3 A Yes, sir

4 Q You got a commission when you sold a lot to a

5 builder?

6 A No, sir

7 Q That's the question I'm giving to you When

8 you sell a lot to a builder, there's no commission

9 in that transaction Is there?

10 A No, it's not

11 Q All right The builder builds a 'spec'

12 house

13 A Correct

14 Q And then you are able to sell that 'spec'

15 house

16 A Correct

17 Q And you've got a commission when that 'spec'

18 house was sold

19 A Correct

20 Q And (inaudible - coughing in the background)

21 was one that for twelve months after the house was

22 finished, you had the exclusive right to sell that

23 house

24 A Not totally correct No, sir Twelve months

25 from the time we signed the listing -- the listing

Donald Melton, Cross Examination

1 agreement Not necessarily if the house is
2 finished

3 Q That's fair enough

4 A Okay

5 Q And normally he would want you to sell the
6 listed agreement as soon as he was done or pretty
7 close to being done with the house, wouldn't he?

8 A Typically, they start with various phases
9 Some builders will want to do it when most of the
10 house is framed and they have all of their numbers
11 in and some don't have their numbers until the
12 sheetrock is up and they'll list it at that point
13 in time They all vary a little bit

14 Q Regardless, one year period for a listing
15 agreement

16 A Correct

17 Q And that's what you agreed to with regard to
18 this contract, isn't it?

19 A That is correct

20 Q Now, in terms of selling houses out there for
21 a period of time, you and your company would have
22 gone out there and sold houses Wouldn't you?

23 A Repeat that again, sir

24 Q For a period of time, up until about the
25 spring of 2000, and before you all were

Donald Melton, Cross Examination

1 involved in actually handling the sale of houses
2 out there but didn't you make an arrangement with
3 another company to handle sales out there?

4 A We made an arrangement with another company,
5 ARI Asset Realty They were on site as a buyer's
6 agent We wanted to give the public both ends of
7 the spectrum that could deal directly with listing
8 agents We represent the builders We added a
9 little twist to it Mr Lipscomb really liked the
10 idea too Asset liked the idea

11 It was a great thing and we didn't get to do
12 it a whole lot but we would do it more these days
13 We put a buyer's agent on site so you walk in the
14 door and Mr Myler would say, hey I can represent
15 you and they would feel even more comfortable so
16 we gave them even both options out there

17 Q People don't have to have buyer's agents, do
18 they?

19 A They do not have to have them No, sir

20 Q And if you were the only company involved in
21 the sale, there would be no split the commission
22 Correct?

23 A Correct

24 Q But once Mr Myler was involved, there was a
25 split in the commission Correct?

Donald Melton, Cross Examination

1 A Yes, sir We didn't mind that at all

2 Q Now, there's no question but that Mr

3 Lipscomb's company, SEL Properties, was the one

4 who had to approve the price for a sale Is that

5 right? On a lot?

6 A Per the contract we agreed on a fair market

7 value We agreed on a fair market value of forty

8 thousand dollars

9 Q Now, let's look at that The first sentence

10 of paragraph four talks about fair market value

11 doesn't it? Let's look at that

12 A Yes, sir

13 Q It's the intent of the parties to develop the

14 property as a residential subdivision and to sell

15 the lots at a fair market value to the general

16 public That's what it says Right?

17 A That's what it says

18 Q Then if you go over to paragraph six, the

19 second paragraph part way down It says the sale

20 price for each lot shall be approved in advance by

21 myself

22 A Correct

23 Q So they had the ultimate control over the

24 sale price, didn't they?

25 A Ultimate control Yes, sir

Donald Melton, Cross Examination

1 Q Yes, sir And in terms of ultimately
2 establishing the value that that lot would be sold
3 for That would be SEL Correct?

4 A Repeat that, please?

5 Q In terms of ultimately establishing the value
6 of the individual lots that would be SEL
7 Correct?

8 A I don't totally agree with that due to the
9 contract we would sell it at fair market value
10 that we had all agreed upon and if you look at our
11 charts, they all sold for a constant price all the
12 way down throughout

13 We had one lot that was negotiated It was
14 for Mr Robby Myler and it was on-site He wanted
15 to build in Courtyards and he was working there
16 and he wanted to put an office in the front of it
17 I myself along with Mr Robby Myler went to Steve
18 and he says, look I want to be able to put my
19 office in the front of it My wife is handicapped
20 and I'd like to buy this lot I'd like to pay
21 thirty-five or thirty-six thousand We agreed
22 upon it

23 Dutch Fork Realty and Dutch Fork Development
24 Group and SEL Properties accepted that price and
25 we moved forward with it and that's the only

Donald Melton, Cross Examination

1 one that happened that way

2 Q So with that one exception from your
3 standpoint, all the lots were sold at the proper
4 price?

5 A No, they were not all sold at the right
6 price

7 Q Which ones weren't?

8 A K&L had bought some lots for no consideration
9 and they bought some below fair market value

10 Q Which ones (coughing - background)

11 A May I?

12 Q Sure, get up again

13 A Lot number 14 at thirty-two thousand

14 Lot number 15 at thirty-one thousand, six hundred

15 Lot number 57 at thirty-one thousand, six hundred

16 That was a release given to the bank because I
17 earlier read the deeds and the things with the
18 zero consideration

19 Q We'll talk about that in a minute But lot
20 14 was June of '02, wasn't it? That's the building
21 permit

22 A Building permit Yes, sir

23 Q And you don't have the contract date on this
24 one?

25 A No That's the building permit also We

Donald Melton, Cross Examination

1 couldn't find those HUD statements

2 Q But you don't have the contracts?

3 A No, sir

4 Q For 14, 15, and 57 You don't have the dates

5 or the contracts But they were all early on and

6 you don't know whether or not that was to get

7 things going out there, do you?

8 A Yes, I do know the answer to that question

9 Q And what is it?

10 A And it was not just to get things going out

11 there No, sir You know, mainly this was a

12 model home He wanted K&L to build that model

13 home so he could get the most presence and

14 hopefully the most custom jobs out of the

15 community He wanted to showcase his product,

16 showcase his house

17 Steve asked me to pick out three lots in

18 prime locations in the subdivision I picked out

19 57, 14, and I think 25 It was as you come in

20 everybody passed 14 very first You could see 25

21 straight ahead and then as you come out 57 is on

22 your left

23 Q You don't know what any of these appraised

24 for, do you?

25 A Appraised

Donald Melton, Cross Examination

1 Q Appraised for when they went to get the loan
2 A The house or the lot?
3 Q The lot
4 A I don't have any idea All the other ones
5 have appraised for forty thousand at least
6 Q That's after things get started Sometimes
7 when you
8 A If you look right here Lot 20 right here,
9 David Blackman It was same time Forty-five
10 thousand (Inaudible)
11 Q So these are all the first three Lot 20 was
12 in that same time period but you don't know what
13 14, 15, and 57 were appraised for, do you?
14 A The fair market value is forty thousand
15 Q That wasn't what I asked, sir When you go
16 let me see something
17 A It's my
18 Q Let me ask the question and you can give me
19 the answer Someone goes to the bank to get a
20 loan to buy a lot and get an appraisal done
21 A Correct
22 Q And frequently in new subdivisions, you've
23 got a period of time before the appraisals can
24 really figure out what the lot should be at
25 Correct?

Donald Melton, Cross Examination

1 A I disagree with that

2 Q Are you telling me that in all subdivisions
3 in every town the first lot that's sold it would
4 be the same price as the house that's down the
5 road?

6 A Yes, sir A lot of times in starting a
7 subdivision when following a price of forty
8 thousand, the appraisal price is forty thousand
9 Absolutely

10 Q But you don't know what these were appraised
11 for, do you?

12 A No, sir I didn't order an appraisal If
13 Mr Lipscomb has signed this and my contract had
14 said thirty-two thousand, the appraiser should put
15 thirty-two thousand There's an appraisal for
16 every situation

17 Q So again, answer my question You don't know
18 what the appraisal is?

19 A No, sir But I do know that the fair market
20 value of those lots were forty thousand dollars

21 Q My question was simply, you don't know the
22 appraisal, do you?

23 A Okay Yes, sir

24 THE COURT Let's take a break at this
25 time I want to remind you of the instructions

Donald Melton, Cross Examination

1 that I have given you That is, not to discuss
2 this matter among yourselves as you've still not
3 heard all the evidence Let's take a break and
4 come back

5 (Jury is dismissed for a break)

6 THE COURT Mr Melton, I want to remind
7 you again that you are still under oath and you
8 must not discuss your testimony with anyone during
9 this break as you have not concluded your
10 testimony so let's take a brief break and then
11 we'll come back

12 (The Court takes a break)

13 (The Court resumes)

14 THE COURT Be seated, please Is there
15 anything we need to take up before we bring the
16 jury back?

17 MR BOWENS No, Your Honor

18 MR BABCOCK No, Your Honor

19 THE COURT Bring in the jury please

20 (The jury returns to the courtroom)

21 THE COURT You may proceed

22 CROSS EXAMINATION cont

23 BY MR BABCOCK

24 Q Before we broke, we went over the issues of
25 the real estate company with regard to the

Donald Melton, Cross Examination

1 phase one of the Courtyards and Rolling Creek
2 With regards to phase one before this project,
3 your real estate company only made sizeable
4 amounts of commissions Didn't they?

5 A Can you define sizeable?

6 Q Over three hundred thousand dollars

7 A I would have to verify that with our
8 accounting I don't have the figure in my head
9 honestly right now

10 Q You don't know about how much commissions you
11 made?

12 A Not right here to state it No, sir

13 Q You've come here to testify in this case but
14 you need to go back and check those kinds of
15 things?

16 A I would have to look at a document I don't
17 like just guessing at numbers

18 Q So it's your testimony that you don't have
19 any idea how much commission

20 A Yes, we do I just don't have it in my head
21 right this second the amount of commission we
22 received on phase four

23 Q And that's why

24 A We do have a document I'm sure produced

25 Q As you sit here right now, sir,

Donald Melton, Cross Examination

1 testifying you don't have any concept as to how
2 much commissions your real estate company made in
3 phase one Is that true?

4 A Let me run it through my head real quick In
5 a ballpark of two hundred and seventy-eight
6 thousand dollars

7 Q All right So around three hundred thousand
8 dollars?

9 A That's a ballpark

10 Q All right Now

11 A That was paid on behalf of the builders

12 Q Paid on behalf of the builders You also got
13 lot commissions too

14 A I think there was five to six Yes, sir

15 Q And you got paid just like it?

16 A We did Yes, sir

17 Q Now, Mr Melton, with regard to the selling
18 of lots, I believe you testified Let's first go
19 back to the price of the lots There was nothing
20 in the contract that required the lots to be sold
21 at forty thousand dollars Was there?

22 A Yes, sir In the contract it states, fair
23 market and that's what fair market value was It
24 was forty thousand dollars

25 Q Let me be a little more specific then,

Donald Melton, Cross Examination

1 Mr Melton Is there anything in the contract
2 that says the lots will be sold for forty thousand
3 dollars?

4 A It does by stating the fair market value

5 Q Mr Melton, I don't want to quibble with you
6 Do the numbers 40,000 dollars appear in this
7 contract? Do those numbers appear in this
8 contract?

9 A Those numbers do not appear in the contract

10 Q Now, insofar as the timing of the sale of
11 lots, I believe you indicated that in phase one
12 the lots began selling in September of 2003 2002
13 five years Is that correct?

14 A The end of August Yes, sir

15 Q All right And that was when the bonded plat
16 was proof of sale Correct?

17 A August 22, 2002

18 Q That was when the bonded plat was approved?

19 A Correct

20 Q And it was after that sometime that you began
21 selling lots Correct?

22 A Correct

23 Q And I believe you were critical of yourself
24 for having not done it in some other way Is that
25 right?

Donald Melton, Cross Examination

1 A What do you mean by "some other way"?

2 Q Obtaining the bonded plat in an earlier time

3 A Yes, sir We needed to obtain that thing in

4 a much earlier time to incorporate the spring and

5 summer selling season of '02

6 Q Yes, sir But in order to get and buy the

7 plat before the roads are constructed, you've got

8 to pay a lot more for the bond Don't you?

9 A A lot is not What's a lot to you? What do

10 you mean by a lot? How much?

11 Q It's based upon a percentage of the contract

12 for construction, isn't it?

13 A It's based upon one percent of the remaining

14 work to be done on the contract The contract was

15 around eight hundred thousand because the work had

16 been done so it's basically one percent of the

17 work left to be done It's not a large figure

18 No, sir

19 Q Well, it would have been a greater expense

20 Correct?

21 A No, sir It would have been an expense that

22 would have definitely paid off over the time If

23 you miss the 2002 season - spring and summer -

24 that's costly

25 Q Mr Melton, going back in time, you

Donald Melton, Cross Examination

1 never wrote Mr Lipscomb and said you need to bond
2 this plat off early so we can have these early
3 sales

4 A No, sir I emailed him, sir, by voice and
5 conversations many times

6 Q I'm asking for letters or emails or any piece
7 of paper in writing

8 A No, sir

9 Q Now, there is no requirement in the contract
10 that Mr Lipscomb proceed that way Is there?

11 A No, sir

12 Q And for your testimony with regard to phases
13 two or three, there would be no requirement that
14 he have this bonded plat at an earlier date before
15 the roads are built Correct?

16 A It's on a five year term Things have to be
17 done in a natural progression He can't delay and
18 manipulate the timeframe to his advantage No, he
19 can't do that It has to go accordingly through
20 developer's natural stream of progression,

21 Q Mr Melton, let's come back to my question
22 You already told me earlier this afternoon that
23 this timeline is not in writing at any place
24 today, is it?

25 A No, sir

Donald Melton, Cross Examination

1 Q All right Now, let's go back to phase two
2 and the contract It says, phase two shall not
3 prevent - shall not commence until no less than
4 sixty percent of all lots in phase one are sold
5 and phase three will not commence until sixty
6 percent of all lots in phase one and phase two are
7 sold There is no requirement in that contract
8 concerning how you do your bonded plat, is there?

9 A Bonded plat - no Commencement means
10 commencement of sales in those spaces The
11 infrastructure had already been underway

12 Q Wait a minute, Mr Melton Let's be real
13 clear on that Let's help understand what the
14 project looked like out there Phase one was on
15 higher ground To get to phase two and three you
16 had to go over some streams or whatnot, didn't
17 you?

18 A There is a creek also Yes, sir

19 Q And if you keep going out that way you
20 actually get to Rolling Creek Subdivision
21 Correct?

22 A That is correct

23 Q All right And then the infrastructure
24 you're talking about was the water and sewer that
25 was brought in before all three phases began

Donald Melton, Cross Examination

1 Correct?

2 A That is correct It's called Rolling Creek
3 Subdivision through phases two and three and
4 through phase one

5 Q But other than that, phase two hasn't
6 commenced, has it?

7 A Yes, sir Land plans were approved, permits
8 were in place, the concept and all of our
9 agreements were in place to move forward Yes,
10 sir Everything was in place Everything was
11 ready It had commenced

12 Q There were no contracts for the construction
13 of the roadways, were there?

14 A No contracts for the construction of roadways
15 is correct

16 Q And no requirement in this document which is
17 a contract between the parties which bonds the
18 plat in any certain way?

19 A No, it's not bonded plat regulation in the
20 contract No, it's not Many things develop
21 which are not listed in a contract When you had
22 to have your sewer permit in hand When you had
23 to have your water permit in hand That stuff is
24 not in there either

25 Q Mr Melton, I'm asking what's in the

Donald Melton, Cross Examination

1 document because that's the document that
2 determines the agreement between the parties

3 A Correct

4 Q The only document signed Right?

5 A That is right

6 MR BOWENS Your Honor, may we
7 approach?

8 (Short conference at the bench)

9 Q Mr Melton, let's talk about the sales that
10 occurred during the first year from late August of
11 '02 to late August of '03

12 A Yes, sir

13 Q You are aware that there were nine lots that
14 were sold during that time period?

15 A Yes, sir

16 Q And of those nine

17 A Let me back up Thirteen

18 Q Thirteen were sold during that first year
19 contract?

20 A Yes, sir

21 Q All right Have you got that on a chart here
22 somewhere?

23 A Yes, sir August 22nd '02 to August 21st of
24 '03 That's the first one year sales period for
25 the purchase of lots Thirteen

Donald Melton, Cross Examination

1 Q What you are doing here is distinguishing
2 your work as sold when the contract is signed
3 Correct?

4 A Correct

5 Q All right But the lot closing is when the
6 deal actually finishes, isn't it?

7 A Closing is when they close at the particular
8 attorney's office

9 Q Closing is when they actually come and pay
10 the money Up to that point the sale may fall
11 through Correct?

12 A Possibility

13 Q So closing, in terms of actual closings,
14 there were only nine in that first year Correct?

15 A Well, actually, what happened again here
16 Lots 56 was an empty nester and this older couple
17 and Steve agreed to allow them to close it after
18 the first year He gave them an extension on the
19 contract Usually people have thirty and sixty
20 days to close the contract Steve agreed for
21 their closing to have it at that later date He
22 signed the contract but they didn't buy the lot
23 It was refunded

24 Q So you agree it was after the first year?

25 A Yes, I do agree

Donald Melton, Cross Examination

1 Q And

2 A And 17 and 25 you notice they were purchased
3 but not closed until a year later We had no
4 earthly idea until this case happened that K&L had
5 not closed these lots and Mr Lipscomb did not
6 form the closing process until this case happened
7 so these two that were marked sold on our board we
8 had no idea these had happened

9 Q To answer my question though, sir, in terms
10 of closings, you only had nine that were actually
11 closed during that one year?

12 A Correct

13 Q And even looking at your chart here, sir, if
14 you want to talk about thirteen How many are
15 K&L?

16 A 1-2-3, 4-5-6

17 Q So, under your analysis six of the thirteen
18 were sales involving K&L K&L means Mr
19 Lipscomb's involved Correct?

20 A That's correct

21 Q So that means that only seven purchases were
22 found by your company Correct?

23 A No, sir

24 Q That's not correct?

25 A Our company created Courtyards Created

Donald Melton, Cross Examination

1 the desire Created the community that attracted
2 K&L into the community

3 Q So you want to take credit for Mr Lipscomb
4 who is the same Steve Lipscomb who is in this deal
5 for having had to buy the lots at

6 A We will definitely take credit for K&L buying
7 into Courtyards at Rolling Creek because it is
8 such an attractive subdivision Absolutely We
9 talked about it early on That they wanted to
10 come in and do homes It is a very attractive
11 place to be

12 Q Mr Melton, in fairness, the only reason
13 there was a Courtyards at Rolling Creek was
14 because of SEL Properties and your company doing
15 this deal

16 A The two of us together doing a deal
17 Correct

18 Q And so Mr Lipscomb knew very well about the
19 Courtyards at Rolling Creek

20 A Yes, he did

21 Q Now, Mr Melton, you told us a little bit
22 about the problem with the roads out in Rolling
23 Creek earlier today Didn't you?

24 A Correct

25 Q All right And there was substantial

Donald Melton, Cross Examination

1 extra cost to adequately fix those roads, wasn't
2 there?

3 A Correct

4 Q And there was a process when the roads had
5 problems of having various engineers come out and
6 analyze what the problems were, weren't there?

7 A That's not correct

8 Q You didn't have various companies come out
9 and look at what the problems were?

10 A We did once it got to the point to where it
11 was a pretty big problem The initial
12 notification of the problem - the small potholes -
13 was directed directly to our one and only
14 engineer, Letts & Assoc They identified the
15 problem and even directed Mr Lipscomb of SEL
16 Properties at his offices to fix them and it
17 didn't happen Then they had to bring in once it
18 got so bad and deteriorated so far that we had to
19 bring in an addition of engineers to evaluate it,
20 to find out what was going on here

21 Q So in answer to my question, you did bring in
22 various engineers to check it out?

23 A Correct

24 Q And you brought in companies such as GS2
25 Engineering Correct?

Donald Melton, Cross Examination

1 A That is correct

2 Q And that was in July of 2002, wasn't it?

3 A That's probably correct I'll have to look
4 at the documents

5 Q Actually it was July 2003

6 A I'd have to see the documents

7 Q The road analysis wasn't before you started
8 selling lots, was it?

9 A No, sir

10 Q And that was we already established in late
11 August/ early September

12 A This was in '03

13 Q And ultimately after the various engineering
14 companies like DSI and AFA, they came out there
15 too, didn't they?

16 A They did

17 Q And ultimately the problem was fixed, wasn't
18 it?

19 A Correct

20 Q All right Now, obviously we need to go to the
21 profit situation We talked earlier It's a 25-
22 75 split Right?

23 A Correct

24 Q So, the more profits there are, the better
25 for both of you?

Donald Melton, Cross Examination

1 A Absolutely

2 Q So, trying to keep down costs would be a
3 worthwhile venture, wouldn't it?

4 A Yes, sir On both ends

5 Q Now, Mr Lipscomb and SEL obtained the loan
6 from NBSC Ya'll helped to put together a budget,
7 didn't you?

8 A Yes, sir

9 Q I'm going to hand you a copy of the document,
10 Defendant's Exhibit two Do you recognize that as
11 the budget that you all put together for the loan?

12 A If I could review it for one second please
13 sir

14 Q Surely

15 A Is it number two?

16 Q Yes, sir

17 A Yes, sir It's prepared by the female, Ms
18 Billie Melton

19 Q That's right And it's signed by him, isn't
20 it?

21 A It is

22 Q And it's dated January eighth, 2002 Isn't
23 it?

24 A

25 Q Last line

Donald Melton, Cross Examination

1 A Yes, sir

2 Q And that loan by NBSC was the one that
3 provided the initial two million dollars for the
4 various costs we talked about earlier today The
5 infrastructure, the engineering, and all that sort
6 of thing Correct?

7 A Yes, sir

8 Q All right Now, let's look at the discussion
9 earlier today about the eight hundred thousand and
10 that's something used for land acquisition

11 A Yes, sir

12 Q Land acquisition is shown at eight hundred
13 thousand dollars on your budget, isn't it?

14 A That's correct

15 Q And so you knew that at the time that Mr
16 Lipscomb got that loan from NBSC - eight hundred
17 thousand dollars - that it would be used for the
18 land cost, didn't you?

19 A Correct To be distributed over all three
20 phases It's not to pay off all the land in phase
21 one

22 Q The eight hundred thousand dollars is going
23 to be paying off all the land though, isn't it?

24 A It is for all the land Yes, sir

25 Q And that happened that one time, didn't

Donald Melton, Cross Examination

1 it?

2 A ..

3 Q All the land was paid off The eight hundred
4 thousand dollars was used for that

5 A It was paid off up front It was supposed to
6 be paid off as we go phase by phase Yeah, it got
7 all paid off at one time but that wasn't the
8 intent of when you paid the land off in the
9 project You pay it off as you go phase by phase

10 Q And the bank had a loan; we looked earlier
11 today at the mortgage that NBSC had on that
12 property The bank had a loan on that property
13 Correct?

14 A They did

15 Q And NBSC required that that loan be taken
16 out, didn't it?

17 A I don't know that I don't know that they
18 would have required Steve to pay for it by cash
19 first We delivered a check to the buyers Then
20 a month later he mortgaged it Then with this, he
21 took out eight hundred thousand dollars and paid
22 off the mortgage that he had taken out to pay
23 himself back for the land

24 Q And you knew that that eight hundred thousand
25 dollars was going to be spent for the land?

Donald Melton, Cross Examination

1 A Was going to be spent for the land Yes,
2 sir

3 Q I'm going to hand you a document, marked
4 Defendant's Exhibit 3, and that's also a budget
5 for phase one Isn't it?

6 A Exhibit 3 states the Courtyards at Rolling
7 Creek budget phase one

8 Q Yes, sir That's the budget that ya'll

9 THE COURT Excuse me Could you repeat
10 that?

11 Q That was the budget that your company's
12 prepared

13 A I do not know that we prepared this No,
14 sir

15 Q But you've seen it before Haven't you?

16 A I do not recall seeing this one

17 Q You don't recall seeing this budget before?

18 A Not at the present I do not

19 Q That budget has a specific amount for the
20 payoff for the land acquisition

21 A It has a total at the bottom of two million,
22 one hundred and forty-four thousand, nine hundred
23 and forty-two dollars

24 Q And it shows eight hundred and three
25 thousand, four hundred and seventy-seven dollars

Donald Melton, Cross Examination

1 to be used for the land acquisition, doesn't it?

2 A Correct

3 Q Now, as you testified earlier, I believe, the

4 money obtained from the NBSC loan wasn't

5 sufficient to take care of all the costs

6 associated with developing Rolling Creek, was it?

7 A Correct

8 Q And, in fact, you went beyond budget at the

9 time by the seventh draw, didn't you?

10 A We did go over budget I'm not sure which

11 draw it was

12 Q And after that time, the moneys for the

13 project were advanced by SEL Properties, weren't

14 they?

15 A SEL was to fund the shortfall so the bank

16 required him to put up a personal CD of

17 approximately, I think, two hundred thousand

18 dollars and take care of any of the shortfalls

19 once all that land, that eight hundred thousand

20 dollar loan, that was briefly done was taken care

21 of out of that 2 2 million, one thousand dollar

22 loan

23 They knew it was going to be short and they

24 required him to secure a CD and take care of the

25 shortfalls They knew that we knew that there

Donald Melton, Cross Examination

1 was going to be a shortfall

2 Q That was between the bank and Mr Lipscomb,
3 isn't it?

4 A Correct

5 Q When we looked at the contract before there
6 was no contract requirement for SEL Properties to
7 put additional funds in, was there?

8 A Yes, sir Yes, there was He used to get
9 financing for the project

10 Q Let's look back at the contract Paragraph
11 two It says, SEL should exercise it's best
12 efforts to secure reasonable financing from
13 conventional lending institutions And you told
14 me earlier today that SEL did that when it got the
15 NBSC loan, didn't you?

16 A Yes, he did that but he's got to secure
17 reasonable financing That doesn't mean you do it
18 one time and what's right is right and what's
19 wrong is wrong and you're done

20 Q There is no contractual requirement for him
21 to continue to get additional financing, is there?

22 A Yes, sir You've got to secure reasonable
23 financing to get the project done Period

24 Q Now, is there anywhere in this document that
25 requires him to go back and get additional

Donald Melton, Cross Examination

1 financing for a loan from the bank after he got
2 the first financing?

3 A I think so He's got to exercise his best
4 efforts to secure reasonable financing It
5 doesn't say one time or two times in there I
6 don't see anywhere it says how many times you do
7 it You've got to provide financing for it
8 Reasonable financing

9 Q You're not aware of an institution, however,
10 that once you've got problems with a project that
11 you going to give money to that same project

12 A Yes, I am

13 Q Did you ever go to NBSC to try to get a

14 A We went back to them and they supply us with
15 money all the time

16 Q You never requested SEL Properties to get
17 additional financing, did you?

18 A The bank - he pledged himself that he would
19 take care of shortfalls By securing a CD and
20 saying that he would take care of payment
21 applications One of our exhibits

22 Q I'm sorry

23 A I said one of our exhibits

24 Q Mr Melton, I'm going to ask the question
25 again

Donald Melton, Cross Examination

1 A Sure

2 Q I didn't say the bank I said you You and
3 your company never asked him to get additional
4 financing, did you?

5 A I can't recall that at this time

6 Q And there certainly is no writing indicating
7 that you asked for additional financing from Mr
8 Lipscomb, is there?

9 A No writing No, sir

10 Q Now, let's check over the discussion this
11 morning about the development fee for phase one
12 The development fee for phase one was fifty-four
13 thousand dollars Correct?

14 A That is correct

15 Q And under the contract that was to be paid as
16 of paragraph five, that was to be paid at the rate
17 of nine thousand dollars per month for a six month
18 period of time Correct?

19 A Correct

20 Q You testified earlier today that that
21 development fee for the first month would have
22 been due in November of 2001 Is that correct?

23 A That's correct

24 Q All right So that development fee at nine
25 thousand dollars per month for six months

Donald Melton, Cross Examination

1 would have been for November, December, January,
2 February, March, and April

3 A Correct

4 Q And you didn't get the development fee in any
5 of those months, did you?

6 A No, sir

7 Q And you agreed to help this project along to
8 deferring the development payments until later in
9 the project, didn't you?

10 A No, sir

11 Q You didn't?

12 A No, sir You inferred that we agreed to help
13 the project along and assume the circumstance of
14 helping

15 Q You were entitled to it but you didn't demand
16 it, did you?

17 A We're not forceful people We did ask for
18 it He's very good at putting you off and he said
19 he was slow in some other areas also We had
20 trust in him We continued to ask him for it and
21 he'd ask to trade a lot for it

22 Q Let's get back to my question

23 A Sure

24 Q My question is that you never demanded the
25 development money until after the March of

Donald Melton, Cross Examination

1 2004 letter?

2 A Yes, sir We demanded it verbally before
3 that He said he wanted to swap me a lot instead

4 Q Let me finish my question You never made
5 any written demand for that money until after the
6 termination letter of May of '04

7 A Correct

8 MR BABCOCK Your Honor, may we
9 approach?

10 THE COURT Yes, sir

11 (Short conference at the bench)

12 Q Mr Melton, in 2003, you were aware that NBSC
13 was putting some pressure on Mr Lipscomb

14 A Only through this trial

15 Q You didn't attend a meeting with NBSC and an
16 individual named Ronnie Colson concerning the
17 difficulties with the project?

18 A He came to the site He was concerned with
19 some areas of slowness Wanted to see faster lot
20 sales I had no idea he was meeting with Mr
21 Lipscomb until the deposition

22 Q Do you have any idea why your father attended
23 that meeting at Mr Colson's office?

24 A I have no idea You'd have to ask him

25 Q Now, Mr Melton, I believe earlier you

MR D MELTON ON CROSS

1 were asked earlier and you said you were not aware
2 the plans were redone, is that right?

3 A

4 Q You are denying that you participated in that
5 process?

6 A Let me say again I didn't know they were changed
7 when they originally got changed We were made aware
8 of that at a later date

9 Q So you deny you were part of that process?

10 A Yes Mr Lipscomb continuously would not pay
11 the engineer and did want more changes to the plans
12 He was meeting with different potential buyers and
13 builders but, no, we didn't know about it until we
14 were informed by the engineer

15 To make a long story short, Mr Lipscomb didn't
16 get plans approved himself until March of 2007

17 Q Mr Melton, please give your attention to what
18 I'm asking you

19 A Sorry

20 Q As far as the phase two plans, they were changed
21 for greater density or more lots in phase two?

22 A Ihe plans

23 Q That's a yes or no Thank you

24 A Yes

25 Q You may explain

MR D MELTON ON CROSS

1 A Certainly He spent approximately Two Hundred
2 Thousand Dollars and got seven or eight additional
3 lots

4 Q Did you ever go to Mr Lipscomb and say, let's
5 get the plan completed so we can go forward with phase
6 two?

7 A I was at the engineer's office many times when
8 Mr Lipscomb was talking back and forth to them on
9 the phone

10 Q Did you ever check to see if it was permitted
11 yet?

12 A Let me tell you something I

13 MR BABCOCK Objection

14 BY MR BABCOCK

15 Q If you would keep yourself to the question I've
16 asked

17 A Okay

18 Q Do you agree that the change in plans increased
19 the density?

20 A Yes, sir

21 Q And you had never gotten new approvals or the
22 permits?

23 A No, sir During this time, Mr Lipscomb was --
24 they were not obtainable

25 Q And if phase two had gone forward, you would

MR D MELTON ON CROSS

1 have gotten twenty-five percent of the profits and
2 Mr Lipcomb's company would have gotten seventy-five
3 percent profit

4 Is that correct?

5 A Well, they were to get seventy-five percent of
6 the profits, yes, sir

7 Q So he had every incentive to try to get the
8 plans completed as soon as he could, didn't he?

9 A But by dragging everything out and not having
10 us involved in the project, he gets a hundred percent
11 of it

12 Q Mr Melton, if things had gone forward, as you
13 testified, you all would have gotten your percentage
14 of the profits

15 Is that correct?

16 A There is not a single lot that has been sold out
17 of phase two, so, yes, sir

18 Q How many lots have been sold in phase two?

19 A All of phase two and three have been sold, and
20 I have the contract right here in front of me, for
21 the sum of some Seven Million Six Hundred Sixty-three
22 Thousand Dollars

23 Q Let me rephrase my question I understand there
24 is a contract for the sale of those lots, but has it
25 closed?

250

MR D MELTON ON CROSS

1 A It has not closed

2 Q But no money has come to Mr Lipscomb's company,
3 has it, to this date?

4 A (No oral response)

5 Q In the contract itself, there is no prohibition
6 against changing plans, is there?

7 A Yes, sir

8 Q There was? Let me ask my question again Is
9 there any prohibition about changing plans?

10 A

11 Q There is no prohibition, is there?

12 A No, sir

13 MR BOWENS Objection, Your Honor He is entit-
14 led to explain or to complete his answer

15 THE COURT If it calls for an explanation, he
16 can explain it

17 WITNESS I'll pass at this time

18 BY MR BABCOCK

19 Q Mr Melton, on phase four -- let's look at that
20 contract

21 A I need a copy of that, please, sir

22 Q I hand you Plaintiffs' Exhibit 2 Looking at
23 that contract, is it stated -- that is dated October
24 17, 2002?

25 A Correct

MR D MELTON ON CROSS

1 Q It contains a five year term, doesn't it?

2 A A five year term, yes

3 Q Expiring October 17 of this year?

4 A Yes, sir

5 Q And there is one lot still in phase four that
6 is unsold?

7 A I'm not sure if it has or not It had a for
8 sale by owner sign up

9 Q Did you write him a letter when you saw that?

10 A No, sir We had started the Court case and so
11 we

12 Q Do you know that phase four went smoother than
13 earlier phases in terms of getting the project done?

14 A There were a lot of delays with it, I understand,
15 as well, and it is still not finished today

16 Q But they have sold most of the lots in phase
17 four?

18 A I'd have to look at my time charts Phase four
19 consists of twenty lots

20 Phase four was also a part of the Rolling Creek
21 Subdivision that we established at Dutch Fork

22 Q But it is a part of Courtyards, correct?

23 A Sir, but it was a part of the existing Rolling
24 Creek Subdivision and not a part of Courtyards

25 Q Now, you testified earlier today that the lots

MR D MELTON ON CROSS

1 in phases one and four had a great deal of differ-
2 ence in price Correct?

3 A

4 Q You testified earlier that Rolling Creek Subdi-
5 vision had lots as low as Thirty-six Thousand Dollars
6 per lot?

7 A Yes, sir

8 Q And in phase four the lots went up to Seventy
9 Thousand Dollars per lot?

10 A Correct In phase four the lots were bigger
11 Some were half an acre and some a little under half
12 an acre

13 Q Mr Melton, let me take you back to Exhibit 1
14 The Rolling Creek phase one through three agreement

15 A Okay

16 Q I direct you to paragraph six, the right to
17 sell provision Do you see it?

18 A Yes, sir

19 Q And paragraph six and the second paragraph, the
20 last sentence of the second paragraph, says that --
21 you can read it

22 A

23 (Brief pause in proceeding)

24 Q And it says no commission will be charged
25 or payable to SEL, so SEL would never be selling to

1 itself, would it?

2 A The reason this is in there is so that SEL can't
3 just take a lot but they have to buy it They can't
4 just take it and say, this is mine

5 Then it is twenty-five percent profit to us and
6 seventy-five to them They can't just take a lot off
7 the shelf and say this is mine

8 That's why this

9 Q SEL already owned the land, isn't that correct?

10 A

11 Q I think we went over all of this as far as the
12 books and records this morning, and you know Mr Quinn,
13 don't you?

14 A Personally, no, sir I just know his name He
15 was there along with various bookkeepers that worked
16 with Mr Lipscomb

17 Q And you knew the bookkeepers?

18 A I know two of them, I think

19 Q What are their names?

20 A Stacy -- I know Stacy was one, and Carrie was --
21 I'm not sure what her role is

22 Q You know that the bookkeepers most of the time
23 were located with Mr Quinn Correct?

24 A I did not know that

25 Q All right

MR D MELTON ON CROSS

- 1 A Stacy did most of the day to day paperwork,
2 I believe I'm not sure where the books were being
3 kept
4 Q Did you ever call and ask her to see the books?
5 A No, sir
6 Q The money for that project was kept in what was a
7 SEL account, correct?
8 A I think so, but a lot of checks were like
9 Courtyards at Rolling Creek
10 Q The account was set up under Courtyards at Roll-
11 ing Creek?
12 A I believe so, yes
13 Q And Mr Lipscomb had authority on that account,
14 correct?
15 A I believe so
16 Q And you had no signature authority on that ac-
17 count?
18 A No, sir
19 Q So the money in the account was SEL's money,
20 correct?
21 A And twenty-five percent of ours with the profits,
22 but minus the cost of the project
23 Q But the account itself was not an account that
24 you had title ownership to, was it?
25 A Aside from the profit, no, but I'm not an accountant

MR D MELTON ON CROSS

- 1 or a CPA I'm not sure how that
- 2 Q You didn't open the account with Mr Lipscomb,
- 3 did you?
- 4 A No, sir
- 5 Q You are not a signator?
- 6 A No, sir, as I said
- 7 Q So as far as you know, you wouldn't have any
- 8 ownership in it?
- 9 A I would think we would, yes I'm not a CPA
- 10 Q So you don't know?
- 11 A I would have to be a CPA to answer that We
- 12 were entitled to the twenty-five percent profit
- 13 Q I'm not talking about that yet, what you allege
- 14 was owed to you, Mr Melton I'm talking about the
- 15 moneys in the account
- 16 A I don't know the terms, CPA-wise
- 17 Q Now, did you ever write Mr Lipscomb and tell
- 18 him we want to go see the financial records for the
- 19 project?
- 20 A Not in writing, no, sir
- 21 Q I'm asking about in writing, sir Did you write
- 22 any letters asking to see the financial records for
- 23 the project?
- 24 A No, sir Not before the lawsuit started
- 25 Q When you started this case, this lawsuit?

MR D MELTON ON CROSS

- 1 A Yes, sir
- 2 Q Did you ever put it in writing?
- 3 A Yes, we did, in the lawsuit
- 4 Q I'm asking before the lawsuit?
- 5 A Not in writing, no, sir
- 6 Q I want to ask about some of the documents you
- 7 were questioned on this morning You were questioned
- 8 about a couple of lots, 57 and 15
- 9 A Yes
- 10 Q I hand you Plaintiffs' Exhibits 46 and 47 I
- 11 want to be clear on this in terms of these
- 12 These are HUD statements with regard to two lots,
- 13 correct?
- 14 A Lot 57 at Courtyards and Lot 15
- 15 Q Let's take a look first at Exhibit 47
- 16 A Yes, sir
- 17 Q You have that?
- 18 A Yes, sir
- 19 Q All right, and there is no seller shown on that
- 20 HUD -- the name and address of the seller is not
- 21 typed in
- 22 These boxes on the forms usually show the seller
- 23 and the purchaser, correct?
- 24 A Typically, yes
- 25 Q This doesn't show a seller?

1 A No, it does not

2 Q It is on the closing of a construction loan,
3 isn't it?

4 A No, sir

5 Q You don't think this was on the closing of a
6 construction loan?

7 A Let me look at it a little further

8 (Brief pause in the proceeding)

9 Q Would this be a construction loan?

10 A It would be, yes

11 Q And if you look on page two, there is a partial
12 lot release to NBSC of Thirty-one Thousand Six Hun-
13 dred Dollars?

14 A Correct

15 Q And would you agree with regard to the journal
16 that was kept

17 A I'm sorry What's the question

18 Q Are you familiar with the journal that was main-
19 tained with reference to income and expenses at Court-
20 yards?

21 A No, sir

22 Q So you don't know

23 A No

24 Q that when a journal entry is done, it is
25 to show an ultimate sale?

MR D MELTON ON CROSS

1 A I do know there are some journal entries, but
2 not what it is off the top of my head

3 Once we got the information from the accountant
4

5 Q So you don't know whether there is a journal
6 entry for Lot 57?

7 A I can't tell you right this second

8 Q Okay

9 A This is talking about Lot 15, Exhibit 46

10 Q And that document also shows no seller?

11 A It does not

12 Q And this also would have been a construction loan,
13 correct?

14 A Yes

15 Q And do you see the partial release to NBSC of
16 Thirty-one Thousand Six Hundred Dollars?

17 A I see that, yes, sir

18 A But you don't know again whether there would be
19 a journal entry for the ultimate sale of that lot?

20 A I can't say, no, sir, right this second

21 Q Let's look over Exhibit 127

22 A Yes, sir

23 Q That is a document that was introduced earlier
24 today

25 A I believe so

MR D MELTON ON CROSS

1 Q On the first page it shows about the middle of
2 the page CRC four, lot 2, clearing That's shown
3 at the bottom of the check, isn't it?

4 A Yes

5 Q Are you aware of the fact that in phase four
6 there were landscaping allowances?

7 A

8 Q You're aware of that, aren't you?

9 A No, sir We didn't give landscaping allowances
10 for phase four I think we cut those out

11 Q Do you deny you ever gave landscaping allowances
12

13 A We cut them out at some point in time I don't
14 remember exactly what time I would have to check
15 back to see that

16 Q Do you know whether fourteen out of nineteen
17 got allowances?

18 A I can check the statements and see

19 Q If you don't know, just say you don't know

20 A I'm not sure I know that some did but Steve
21 said at some point no more landscaping allowances,
22 so

23 Q But you did have some?

24 A Correct

25 Q Are you finished with that document?

MR D MELTON ON CROSS

1 A Yes

2 Q We're going to Exhibit 127 B This invoice has
3 a description that says put finish coat of polyure-
4thane and on the bottom it says Courtyards model
5 home?

6 A Yes, sir

7 Q What was happening here is that the model home
8 was being prepared to be sold?

9 A All builders have to put a final coat of poly-
10urethane on hardwood floors

11 Q Is this a natural progression then?

12 A Yes

13 Q And you had put polyurethane down before?

14 A No, sir They put different coats on at times,
15 and this is when it was ready to put the final coat-
16ing on

17 There are construction people in and out of the
18 house, hanging lights and all of this, and so they
19 come back and do a final coat on, so it is ready for
20 the homeowner

21 Q Mr Melton, let me ask a question

22 A Okay

23 Q Is that an expense for the Courtyards project,
24 putting a coat of polyurethane on the hardwood floors
25 of the model home that has been used throughout the

MR D MELTON ON CROSS

1 entire project?

2 A No, sir

3 Q You don't think that would be a proper expense?

4 A No, sir

5 Q Let's go to Exhibit 128 This is a packet of
6 material, N W White and Company Sand Company?

7 A Yes, sir

8 Q Sand?

9 A Yes, sir

10 Q And this sand was used with regard to a brick
11 wall that was constructed in Courthouse, is that cor-
12 rect?

13 A That's correct

14 Q Lots 14 through 17?

15 A A common wall that went from lots 14 to 19

16 Q Lots 14 through 17 or 14 through 19?

17 A It's part of the entrance way

18 Q Part of the entrance way?

19 A It's got caps on some of them

20 Q The walls on 18 and 19 don't have caps on them?

21 A No We were not required to put the stud caps
22 on them When you come into the subdivision, there
23 is a natural tree buffer

24 Q And what about lots 18 and 19?

25 A They don't have caps on them Those are typical

MR D MELTON ON CROSS

1 builders' walls in that situation

2 Q So we're clear, if the expenses were used for
3 a common wall, that would be an appropriate expense
4 for Courtyards, correct?

5 A If they were, it would

6 Q All right, going to Exhibit 131 -- on Exhibit 131
7 were any of the expenses there associated with the
8 common wall, that would be an appropriate expense, is
9 that correct?

10 A This says Lot 13 so it was not part of the com-
11 mon wall

12 Q I'm sorry Look at 131B

13 A Lot 13 was definitely not part of the common
14 wall It says common wall but it was not

15 Q Let me ask you about that loan Do you know
16 whether that loan was ever charged as an expense to
17 Rolling Creek?

18 A No, sir I know nothing about the loan

19 Q If it wasn't charged as an expense you don't
20 have a problem with it, do you?

21 A I don't know I'm not sure what that means
22 exactly

23 Q Was it paid back with interest?

24 A I don't know

25 Q We'll come back to that

MR D MELTON ON CROSS

1 Let's go back to the account itself You don't
2 know whether you have any ownership interest in that
3 account?

4 A Yes, we've got a checking account and then we've
5 got journals The journals deal with the income and
6 expenses I leave that up to the CPAs

7 Q Did I show you Exhibit 129?

8 A You sure did

9 Q This one?

10 A Yes

11 Q This involved a storm water drain that was be-
12 tween two lots?

13 A Between lots 2 and 3

14 Q That would be an appropriate development cost, is
15 that right?

16 A The contractor and Mr Lipscomb had already put
17 it in place It was additional work that was done

18 Q It would be an appropriate expense, would it
19 not?

20 A It wasn't totally necessary They did it be-
21 cause they built a house on lot 2, a spec home, and
22 they wanted to improve it or make sure it didn't de-
23 ter from the sale of that home

24 So they opted to have the work done He had
25 to put a drain pipe in the spec yard and had to pay

MR D MELTON ON CROSS

1 for it himself

2 He had to put that in to make his spec house
3 more appealing and more pleasing

4 Q Just so we are clear, there is a water drain be-
5 tween the two lots, correct?

6 A But it's on the property line, sir

7 Q Now, Mr Melton, when you do a development, you
8 have to keep the common areas up, is that correct?

9 A Yes, you do

10 Q You do this until it is ultimately turned over
11 to the homeowners' association, is that correct?

12 A Correct

13 Q At the time you were talking about, there was work
14 that needed to be done on the common areas?

15 A Yes, sir, continuously

16 Q I'm going to hand you a document that is marked
17 as Exhibit 135 Do you see that document, sir?

18 A Yes

19 Q With various invoices, and the first of them,
20 John Deere Equipment Do you see that?

21 A Yes, sir

22 Q And that equipment was used for common area at
23 Rolling Creek?

24 A As well as other subdivisions of Mr Lipscomb's

25 Q There would be no problem allocating the equipment

1 to the work that was done at Rolling Creek, would
2 there, sir?

3 A Possibly it wouldn't be a problem I just
4 don't know

5 Q Do we need to go through the rest of the docu-
6 ment

7 A If you would ask your question

8 Q Sure Look at page 133 Any time there is work
9 being done on the common areas, that would be an ap-
10 propriate expense?

11 A If it needed to be done, yes, sir It would be
12 appropriate

13 Q And you have indicated that the equipment would
14 be spread among the various subdivisions, is that cor-
15 rect?

16 A The use of that equipment -- it's possible

17 Q Let's look over 133 These involve various re-
18 cepts that you reviewed Correct?

19 A Yes, sir

20 Q Do you see where there was ever any payment with
21 regard to these receipts to you?

22 A No, sir We understand some documents were de-
23 stroyed before we could get our hands on them

24 Q Sure

25 A We did not know if we got everything

MR D MELTON ON CROSS

1 Q Are you talking about John Quinn's documents?

2 A Yes, sir

3 Q So you are not talking about SEL Properties, but
4 you are talking about Mr Quinn?

5 A Yes, sir

6 Q You are talking in terms of documents that were
7 lost Correct?

8 A As far as I know, yes, sir

9 Q There are various gas charges here If it was
10 charged and was used to get and bring laborers to
11 Rolling Creek, that would be an appropriate expense,
12 wouldn't it?

13 A It's suspicious It says three point six I
14 don't understand why you would buy three gallons to
15 get workers to the development

16 Q But it would be an appropriate expense?

17 A Correct

18 Q And feeding them?

19 A Yes, sir Laborers need to eat

20 Q I would agree with you there

21 You also referenced Exhibit 136, and, again,
22 the cover sheet here has casual labor that were util-
23 ized for the common area, and it would be an appro-
24 priate expense?

25 A It would be if it was used totally for that sole

MR D MELTON ON CROSS

- 1 purpose?
- 2 Q And the checks that you referenced, they had Mr
- 3 Lipscomb's signature?
- 4 A Payable to cash
- 5 Q And it is actually a stamp of Mr Lipscomb's
- 6 signature and not his actual signature?
- 7 A I'd have to look at them I mean, these are
- 8 copies
- 9 Q Okay
- 10 A I don't see any difference in them It is pos-
- 11 sibly a stamp
- 12 Q There are a couple more here
- 13 A Okay Possibly a stamp
- 14 Q Let's look at Exhibit 130 This is regarding
- 15 finance charges concerning Letts Associates, is that
- 16 correct?
- 17 A Yes, that portion is, sir
- 18 Q Mr Letts, who already has testified, was in-
- 19 volved with the project, correct?
- 20 A Correct
- 21 Q And the finance charges were appropriately made,
- 22 correct?
- 23 A Made to who?
- 24 Q Mr Letts' company
- 25 A What do you mean by made to them?

MR D MELTON ON CROSS

1 Q An expense to the project

2 A No, sir, it is not appropriate If you didn't
3 have money

4 Q Sometimes when people don't have money, they have
5 a finance charge, whether it's with a credit card or
6 anybody else?

7 A I disagree that it is a charge made in the normal
8 course of business It is poor bookkeeping

9 If there wasn't money available, you should have
10 foregone the charge

11 Q Let's go to Exhibits 137 and 138

12 A Okay

13 Q Both of these involve NBSC?

14 A Yes, sir

15 Q That is overdraft protection for checks that
16 have problems, correct?

17 A Yes, sir

18 Q Not having sufficient money to pay or cover the
19 check?

20 A Yes

21 Q NBSC paid it and charged back for paying it?

22 A Correct

23 MR BABCOCK Court's indulgence

24 (Brief pause in the proceeding)

25 MR BABCOCK I don't know whether I actually

1 offered these exhibits in evidence, but I would of-
2 fer Exhibits 2 and 3 into evidence at this time
3 THE COURT Any objection?
4 MR BOWENS No objection
5 THE COURT They are admitted
6 (Defense Exhibits 2 and 3 admitted into evidence
7 without objection, being budget document of 1 8 02
8 and undated budget document for phase one)
9 BY MR BABCOCK
10 Q Thank you, Mr Melton
11 A Thank you, Mr Babcock
12 THE COURT Any Redirect?
13 MR BOWENS Yes, Your Honor
14 REDIRECT EXAMINATION
15 BY MR BOWENS
16 Q Mr Melton, you were asked on cross examination
17 about the Essex contract
18 A Yes, sir
19 Q And it was pointed out to you that it was made
20 outside of the five years?
21 A The marketing agreement was signed after that
22 term, yes, sir
23 Q When did the efforts to try to sell that prop-
24 erty begin?
25 A It began back in 2002

MR D MELTON ON REDIRECT

1 Q Was there any reason that Dutch Fork Realty would
2 not have been able to do a similar contract if you
3 had not been delayed as you testified to earlier?

4 A Absolutely not We would probably have done a
5 much better job Our plans were set and ready to go
6 forward

7 SEL was to be a financial backer and not the
8 developer

9 Q You were also asked some questions about this
10 portion of paragraph five referring to twenty percent
11 being payable to Dutch Fork if the property was sold
12 in gross and not lots Correct?

13 A

14 Q You gave that testimony on cross examination,
15 correct?

16 A Yes, sir

17 Q Was the property sold in gross prior to the end
18 of phase one?

19 A No, sir

20 Q Has Mr Lipscomb indicated he is going to pay
21 you a percent of the gross price of the sale?

22 A No, sir

23 Q So you were going to sell lot by lot the differ-
24 ent phases?

25 A Yes

MR D MELTON ON REDIRECT

1 Q Did this portion of the contract intend to give
2 Mr Lipscomb the ability not to do phase two and
3 three?

4 A There was a provision put in the contract that
5 if something totally unforeseen happened and the prop-
6 erty needed to be turned around and sold in gross, for
7 some unknown reason -- say another nine eleven or some-
8 thing unforeseen -- that is why that provision was
9 put in the contract

10 Q Look at the bottom of paragraph three What
11 was the parties'

12 MR BABCOCK Objection The document speaks
13 for itself

14 THE COURT I would sustain the objection
15 BY MR BOWENS

16 Q The contract provides for three phases?

17 A Yes

18 Q Paragraph 4 refers to development work -- if
19 you look at the second sentence and read that

20 Is that financing work or is it development
21 work?

22 A It is development work, planning, all sorts
23 of things

24 Q If plans are going to be changed, who should
25 be involved in the changing of those plans?

MR D MELTON ON REDIRECT

1 A According to the contract, Dutch Fork Development
2 Group

3 Q Should there be involvement by SEL Properties
4 if those plans are changed?

5 A SEL was not involved

6 Q And you have testified in cross examination
7 that there is no place in the contract that says
8 the plans cannot be changed

9 Do you remember that?

10 A Yes

11 Q How many times in a five year contract can you
12 change the plans and start over again and get the
13 contract done on time?

14 A You cannot You establish all three phases
15 Everything was agreed upon

16 Q You also testified on cross examination that
17 SEL Properties put up the money and that Dutch Fork
18 Development Group and Dutch Fork Realty did not have
19 to put up any money?

20 A Correct

21 Q Look at paragraph six, the last part of it
22 there

23 A

24 Q So Dutch Fork Realty didn't put any money up?

25 A When you waive your commission on a sale, you

MR D MELTON ON REDIRECT

1 certainly are giving up money

2 Q And how much in commissions did you waive?

3 A One Hundred Eighty-eight Thousand Dollars It
4 was money left in the project

5 Q How much on phase four?

6 A Forty Thousand Dollars, approximately, I think

7 Q So it's fair to say that Dutch Fork Development
8 Group did have some money that they sacrificed on the
9 project?

10 A Money and an awful lot of time and work

11 Q Did SEL Properties have any authority to allow
12 any of the lots to be sold below market value?

13 A No, they did not Again, we only sold one lot
14 below Forty Thousand which all agreed upon for Thirty-
15 six Thousand for Mr Rombry and his wife to build in
16 the subdivision

17 Q Did Mr Lipscomb consult with you on allowing
18 K & L Contracting to purchase three lots for these
19 different amounts, Thirty-two Thousand, Thirty-one
20 Six and Thirty-one Six?

21 A We did not know that until we got into this
22 trial

23 Q But did he consult with you on -- Smoak was the
24 builder -- did he consult with you on that?

25 A The roads were not repaired until 2003 I think

MR D MELTON ON REDIRECT

1 spec sales and lot sales went well into 2004

2 MR BABCOCK I would object That is specula-
3 tion on the part of this witness

4 WITNESS That's what happened

5 THE COURT Rephrase the question

6 BY MR BOWENS

7 Q Was there any affect on the sales in 2004, the
8 repair of the roads?

9 A Yes, I would say

10 MR BABCOCK Objection Pure speculation,
11 Your Honor

12 Those things don't necessarily follow one another
13 If you say A caused B, it would be pure speculation
14 for this witness to say

15 THE COURT You need to lay a foundation

16 BY MR BOWENS

17 Q In the spring of 2003, what was the condition
18 of the roads?

19 A They were in very bad condition They looked
20 very bad for a new subdivision

21 Q And in the spring of 2003, how many lots were
22 sold?

23 A I think it was five

24 Q In the fall of 2003, the roads were repaired?

25 A Yes

1 Q And in the spring and summer of 2004, how many
2 lots were sold?

3 A Twenty-eight, approximately, if I'm counting right

4 Q Was there any change in the market conditions be-
5 tween the spring of 2003 and spring of 2004?

6 A No, sir Those were some of the best years

7 Q Except for the road conditions, was there any ex-
8 ceptional differences between the condition of the
9 Courtyards between the spring of 2003 and the spring
10 of 2004?

11 A The biggest difference was the roads were re-
12 paired

13 Q I show you what has been marked as Exhibit 16

14 A Okay

15 Q Do you remember seeing that during Direct Exam-
16 ination this morning?

17 A Yes, I did

18 Q And do you still have Defense Exhibits 2 and 3?

19 A Yes, sir

20 Q Will you compare the payoff for the land acquisi-
21 tion on Exhibit 16 with the payoff figure on Defense
22 Exhibits 2 and 3?

23 A Yes

24 Q Are they the same?

25 A Yes, sir, they are the same

MR D MELTON ON REDIRECT

1 Q The only difference in the two is the Three
2 Thousand Four Hundred Seventy-seven Dollar figure?

3 A Would you restate that, please?

4 Q The land acquisition, the payoff -- what does the
5 Thirty-four Seventy-seven represent?

6 A

7 Q Is that the interest?

8 A Yeah, that

9 MR BABCOCK Objection to leading

10 THE COURT Sustained

11 BY MR BOWENS

12 Q Are the payoffs the same?

13 A They are the same numbers

14 Q And is this the borrower's statement for the
15 closing of the loan?

16 A Yes

17 Q Defense Exhibit 2 -- when was this document pre-
18 pared?

19 A Exhibit 2 was prepared on October 17 of 2002

20 Q This is -- I'm sorry, this is a Plaintiffs' Ex-
21 hibit Is that right?

22 A Yes

23 Q The question was when was it prepared? This one?

24 A January 8, 2002

25 Q When did the development loan close?

1 A Just give me a second November of 2002
2 Q What is the date of Exhibit 16?
3 A November 19, 2001
4 Q So this document that you were shown on Cross
5 Examination was prepared after the loan closing?
6 A Yes, sir, it was
7 Q Was it ever planned ahead that the money be taken
8 out of the development loan to pay for the land acquisi-
9 tion?
10 A No, it was not planned that way
11 Q Did you budget for that prior to the loan being
12 closed?
13 A No, we didn't
14 Q You were asked some questions on cross examina-
15 tion about the timing of the development and the chang-
16 ing of the plans?
17 A Yes
18 Q If Mr Lipscomb had allowed the original plans
19 to go forward and not be revised, is there any doubt
20 in your mind that this project would have been com-
21 pleted in the five years allowed under the contract
22 document?
23 A I have no doubt whatsoever
24 Q What would have been the effect on the amount
25 of money and interest payments if you had been able

MR D MELTON ON REDIRECT

1 to start selling lots in January 2002?

2 A If we had been able to start selling lots in
3 January of 2002, we could have sold them faster and
4 taken down the interest Taken down the interest
5 amounts that were due, or keep down interest costs

6 Q All the functions that needed to be performed
7 on Courtyards -- in other words, all the things that
8 had to be done to make this project work, were they
9 all contained in that development marketing agreement
10 that you had?

11 A Absolutely not You couldn't possibly write
12 down all the things that have to be done

13 Q And the bonding of the plat, whose function is
14 that?

15 A The developers, to get it prepared and ready
16 for the engineer The engineer helps with that

17 Q Who has to decide to actually spend the money to
18 bond it?

19 A Steve Lipscomb, SEL Properties

20 Q You were asked some questions on cross examina-
21 tion about lots that K & L purchased

22 A Yes

23 Q Let me show you Exhibit Number 148 You've seen
24 that, correct?

25 A Correct

1 Q Was it for the benefit of the whole Courtyards?

2 A Primarily for the benefit of K & L Builders to
3 showcase their building quality

4 Q Why would a building company build -- why do
5 builders build model homes?

6 A To show off their ability to build and showcase
7 their product

8 It creates a tremendous amount of additional
9 sales for them down the road

10 Q And Lot 15 to K & L -- they obtained a building
11 permit?

12 A Yes, they did

13 Q According to the books, that was transferred
14 on 9 30 02 or that was when the money was paid?

15 A Correct

16 Q When would that lot have been sold to an indi-
17 vidual home buyer?

18 A Fourteen months later

19 Q Do you know why it took them fourteen months
20 to sell that particular house?

21 A Not a particular reason It was a little differ-
22 ent plan that was maybe not as desirable to every-
23 body

24 Q Let's go to Lot 57 It indicates that K & L
25 paid Thirty-one Six for the lot?

MR D MELTON ON REDIRECT

1 A Yes, that's correct

2 Q On 9 30 02?

3 A Yes

4 Q If K & L had not done that on 9 30 02, how long
5 was it until someone came along to buy that lot?

6 A Seven months

7 Q Go to Lot 47 How long was it from October 8,
8 2003, before someone came along and bought that one?

9 A Zero -- pre-sold

10 Q So K & L didn't have to buy that lot?

11 A No, sir

12 Q On Lot 17, the deed date is October 8th, and
13 how long after that had they not done that -- had they
14 not bought the lot before someone came along and
15 wanted to buy it?

16 A Three months

17 Q And on Lot 16?

18 A Seven months

19 Q Lot 25?

20 A Seven months

21 Q Lot 26?

22 A One month

23 Q Lot 22?

24 A Five days

25 Q Lots 21 and 19?

MR D MELTON ON REDIRECT

1 A They were pre-sold

2 Q When K & L bought the lots, they already had a
3 buyer?

4 A They had a buyer before they bought the lots

5 Q If K & L had not bought any lots at all, is it
6 fair to say they would have resold within seven months?

7 A Yes, except Lot 15

8 Q That is fourteen months?

9 A Correct

10 Q You were also asked some questions about the
11 finance charges and the cost of the engineering

12 A Yes

13 Q Would those finance charges and costs have been
14 incurred if these plans had not been revised?

15 A

16 MR BABCOCK Objection, Your Honor Calls for
17 speculation

18 THE COURT Rephrase the question

19 BY MR BOWENS

20 Q Would these extra costs for engineering and the
21 interest that were applied, would they have been in-
22 curred if they were not redesigned the plans?

23 A They would not

24 Q Did you ever have to go to Mr Lipscomb and ask
25 him to approve or provide additional moneys for work

MR D MELTON ON REDIRECT

1 that had to be done at Courtyards?

2 A Repeat that, please?

3 Q Did you ever have to go to Mr Lipscomb and ask
4 for approval or to provide you with additional moneys
5 for work at Courtyards that had to be done?

6 A We went to him and let him know we needed the
7 bills to be paid to different contractors or people
8 who were working on the project when they would come and
9 say, where is our money

10 We said to him that we needed to get these bills
11 paid

12 Q On the agreement you have with Mr Lipscomb and
13 SEL Properties, does that require you to communicate
14 with him only in writing?

15 A No, it does not

16 Q You were asked a lot of questions about why the
17 different things were not put in writing How would
18 you communicate with Mr Lipscomb?

19 A I would see Mr Lipscomb, I would talk to him
20 quite frequently, mostly by cel phone, and sometimes I
21 would trail him around all over the place

22 He may be in New York or he may be in various
23 portions of the State or he may be out on the site at
24 Courtyards

25 It was mostly by cel phone

MR D MELTON ON REDIRECT

1 Q Was that the easiest way for you to talk to him
2 then?

3 A Yes, by making phone calls, and he would call me
4 all the time also

5 Q You were asked some questions on cross examina-
6 tion about the landscaping allowances

7 A Yes

8 Q Were landscaping allowances normally paid out
9 of the developer's account?

10 A They would come off the HUD statement at clos-
11 ing as a credit It was not a check that was written
12 to them

13 Q So it was on the line as a credit?

14 A Yes

15 Q And no check was written?

16 A Never

17 Q You were asked some questions about the common
18 walls as well Do you remember that?

19 A Yes

20 Q And after reviewing the documents, are you famil-
21 iar with the expenses for the common walls?

22 A Not for common walls, no, sir

23 Q You were also asked some questions about loans
24 that SEL gave to K & L

25 A Yes

MR D MELTON ON REDIRECT

1 Q When SEL was giving these loans to K & L, did
2 Mr Lipscomb offer you to pay you the development fees
3 at that time?

4 A No, he did not

5 Q Did he offer to pay you any real profit sharing
6 at the time he was making loans to K & L?

7 A No, he did not

8 Q Do you know why he made those loans to K & L in-
9 stead of paying you the development fees and profit
10 sharing?

11 A I have no idea why he would do that That was
12 his choice

13 Q You were also asked some questions on cross exam-
14 ination about checks that were made to cash for what
15 was called casual labor Do you recall those?

16 A Yes

17 Q Are you able to identify what that money was
18 spent for?

19 A No, I'm not It is not proper to pay casual
20 laborers in cash To my knowledge, you don't do
21 that, or pay anything else to cash

22 Q If you hire casual laborers to work, who should
23 the check be made out to?

24 A Made to that individual person or to the person
25 who in charge of that group of laborers

1 Q That's all the questions I have Thank you

2 THE COURT Any Recross?

3 MR BABCOCK Very, very briefly, Your Honor

4 RECCROSS EXAMINATION

5 BY MR BABCOCK

6 Q You were asked some questions about the model
7 home?

8 A Yes

9 Q There is only one model home on the site?

10 A Only one

11 Q Thank you, sir

12 THE COURT You may step down

13 (Witness excused from stand)

14 THE COURT Ladies and gentlemen, at this time
15 we are going to break for the evening

16 I would remind you of the instructions that I
17 have given to you throughout the course of this trial,
18 and that is that you are not to begin discussing the
19 case or deliberating among yourselves

20 You have not heard all of the testimony that is
21 to be presented

22 I remind you as you come and go to and from the
23 Courthouse that you are not to engage in any discus-
24 sions with anyone, your fellow jurors or with anyone
25 about this particular case

1 If anyone approaches you to discuss the case,
2 you are to report this to us as soon as possible
3 Please remember also as you come and go not to
4 listen to any conversations you might overhear
5 Again, this is for the reason that you will have
6 to base your decision on what is presented here
7 I'm going to ask that you follow the same in-
8 structions given to you yesterday, that you are not
9 to discuss the case with your family members Tell
10 them the Judge said for you not to discuss it
11 Also, do not listen to any media coverage or
12 reports to the extent there may be any and do not read
13 or listen to any reports although I doubt there will
14 be any
15 Also, ladies and gentlemen, do not conduct any
16 independent investigation into any of these matters
17 You may only rely on information that came to you
18 through the testimony and the evidence in the case
19 So do not conduct any research, whether in books or
20 from persons or other resources you may have access
21 to
22 It would really be the same as allowing a stranger
23 to come up to you and talk to you about this case It
24 would not be appropriate, and it would not be evidence
25 that has been admitted in this case

1 Do not engage in any of those activities and,
2 ladies and gentlemen, I would ask that you report to
3 your jury room again at nine thirty in the morning
4 -- the same jury room

5 We will then continue with the trial, and I ask
6 that you be prepared tomorrow to stay even a tad
7 later So be prepared for that, and I hope you all
8 have a pleasant evening

9 I'll look forward to seeing you tomorrow morning
10 at nine thirty

11 (Jury excused at 6 07 P M)

12 THE COURT Is there anything we need to take
13 up before we leave for the evening?

14 MR BOWENS Your Honor, there is one thing
15 Mr Babcock and I need to discuss the two lots per
16 month Do we need to do that now or in the morning?

17 We will surely have it with the deposition of
18 Ronnie Colson A motion was filed but you deferred
19 ruling on it

20 I think the letter that was written by Mr
21 Lipscomb indicated that the reason for termination
22 was not selling twenty percent of lots per year and
23 it was not because of failure to sell any other num-
24 ber of lots, or two lots per month

25 So I think that goes to, again, what is ex-
 pressed in his letter Mr Colson's deposition is

1 completely about or ninety percent of it at least is
2 about the two lots per month issue

3 We are going to ask that the Court either review
4 the deposition before it is shown to the jury and
5 make a determination on it, or we can resolve it at
6 that time

7 MR BABCOCK Your Honor, just for the record,
8 as indicated, we have requested the opportunity to
9 question the witness about his conversations with
10 Mr Lipscomb concerning the sale of two lots per
11 month

12 We requested that because -- for the simple rea-
13 sons, number one, it went to the state of mind of
14 Mr Lipscomb and his understanding of the twenty per-
15 cent requirement when the letter was written

16 We have already conceded that the twenty per-
17 cent was incorrect, and his state of mind was import-
18 ant, particularly insofar as the breach of contract
19 accompanied by fraudulent act

20 It is important, I think, to understand why he
21 did what he did, and this twenty percent per month
22 is in fact referenced in the Amended Complaint, in
23 paragraph 18, in terms of the conversations with --
24 the alleged conversations between Mr Lipscomb and
25 the loan officer

1 The Defendants -- excuse me The Plaintiffs were
2 unaware of that, and the reason for offering the tes-
3 timony is that the conversations occurred between the
4 Meltons and Mr Lipscomb concerning two lots per
5 month, and that is important as far as the process
6 and what he told the bank

7 So that is the basis for our request to question
8 that area because we do think it is very important in-
9 sofar as Mr Lipscomb and what he understood and when
10 he understood it

11 THE COURT That would be a basis for question-
12 ing Mr Lipscomb when he comes to testify later in
13 the trial, and I think what I said in our previous
14 conversation was that I would not allow the Plain-
15 tiffs to discuss the provisions of paragraph eight

16 The contract is very clear as the contract re-
17 lates to the lots available for sale within the year
18 Let me be sure to look at the correct language

19 (Brief pause in the proceeding)

20 I've looked at that, Plaintiff's Exhibit 1,
21 the contract, and Plaintiff's Exhibit 17, the letter
22 of termination, and the failure of DFR and DFDG to
23 sell twenty percent of the available lots in each
24 one year period That appears to be the basis for
25 the termination

1 Since it is not -- since the basis of selling two
2 lots per month is not the basis for the termination
3 of the contract, and it is not contained in the par-
4 ticular contract, it is of no importance as it re-
5 lates to breach of contract by fraudulent act, so,
6 therefore, I would not allow the Plaintiffs to use
7 as a basis for breach of contract

8 I don't find any damages to the Plaintiffs for
9 whatever discussions Mr Lipscomb may have had with
10 the bank relating to the two lots per month

11 There have been no damages to the Plaintiffs in
12 that regard and so I would not allow testimony and see
13 no reason to allow testimony to vary or change either
14 the termination letter or the terms of the contract,
15 or even to discuss the state of mind of Mr Lipscomb,
16 because it does not appear to be relevant to this
17 case

18 MR BABCOCK Your Honor, I understand Your
19 Honor's ruling, but just to clarify, his state of
20 mind goes to the fraudulent intent with regard to the
21 breach of contract accompanied by fraudulent act

22 His state of mind is relevant to that and his
23 understanding

24 Your Honor, we are not looking to vary the terms
25 of the letter or the contract, but it simply goes to

1 what Mr Lipscomb understood the twenty percent to
2 mean

3 He was wrong, but that was his understanding
4 of what it meant or his state of mind

5 I guess I'm still not understanding how that
6 relates to breach of contract

7 THE COURT It is not -- what I'm saying is that
8 it is not an element, whatever his state of mind was
9 at the time Whatever his misconception or misinter-
10 pretation, I'm not going to allow the Plaintiffs to
11 use that as their basis to make the claim for breach
12 of contract by fraudulent act

13 MR BABCOCK Your Honor, they would have to show
14 fraudulent intent, and Mr Lipscomb has to show what
15 his intent was when he did the act

16 That was the reason for offering the testimony
17 on that point When that was written, what was his
18 understanding, his thought process I think it is
19 very important that that go to the jury

20 MR BOWENS Your Honor, we did not intend to use
21 it or bring it up but we merely were countering their
22 arguments as to why he terminated when he terminated

23 MR BABCOCK It is important since the twenty
24 percent is wrong and Mr Lipscomb has to be able to
25 explain why he was wrong, what he was doing

1 I think Your Honor's interpretation of the let-
2 ter is accurate

3 When he wrote the letter he didn't say you are
4 being terminated because you didn't sell twenty per-
5 cent of the lots per year He said you are being ter-
6 minated because you didn't sell two lots per month,
7 and that indicates a mistake

8 THE COURT I don't think there needs to be any
9 additional testimony to come in to talk about the two
10 lots per month

11 The fact that he may have had discussions about
12 it with the bank is not a basis for the contract --
13 not what was agreed upon

14 He may have erroneously used that as a basis to
15 terminate, and he admits that, but that does not allow
16 you to come in and bring in all the documents related
17 to that particular discussion

18 MR BOWENS Your Honor, it was about questions
19 to the witness rather than documents per se, but I
20 understand Your Honor's ruling

21 It is only offered with regard to fraudulent in-
22 tent -- that element of that particular cause of
23 action

24 THE COURT Your position is noted and preserved
25 Is there anything further?

1 MR BOWENS No, Your Honor
2 THE COURT Then we will see you at nine
3 thirty in the morning
4 I'm sorry I received a note from the jury I
5 forgot that tomorrow is Halloween I don't have
6 little kids at home so I don't remember about trick
7 or treating
8 I have two people who apparently have children
9 small enough that they want to go trick or treating,
10 so we have to break early tomorrow, but on Thursday
11 morning I have the second part of an interview for
12 the screening for my reelection
13 (Discussion between counsel and the Court con-
14 cerning scheduling)
15 THE COURT I'm throwing that out there for you
16 to talk about
17 I understand the realities but you don't want
18 angry jurors
19 Halloween will have to be preserved and they
20 will need to tell me what time they need to leave
21 (Whereupon, the Court stood in recess at 6 20
22 P M)
23 (The case was resumed on October 31st of
24 2007)
25

1 (Court resumes the third day of trial)

2 THE COURT Good morning Be seated,
3 please I received a note from the foreperson
4 asking about taking notes I don't have any
5 problem with them taking notes I just have to
6 instruct them at the time that they begin their
7 deliberations that the notes should only be used
8 by them They should not be taken as fact I
9 mean, everyone's notes have to assist them and it
10 should only be used to assist them in their
11 recollection and the notes should not control over
12 anyone else's so it's really up to you all

13 MR BOWENS We have no objection, Your
14 Honor

15 MR BABCOCK No objection, Your Honor

16 THE COURT Well, I think the Bailiff
17 has gone to find some notepads and some pens Is
18 there anything that we need to take up before we
19 begin this morning?

20 MR BOWENS Not from the Plaintiff,
21 Your Honor

22 MR BABCOCK Two things from the
23 Defense, Your Honor First, just to make sure we
24 are covered on the record Yesterday during Mr
25 Melton's testimony, there was testimony

1 concerning certain plans and time tables as to when
2 things could have been done, and I raised some objec-
3 tions to that testimony and requested, hopefully, a
4 continuing objection to that line of inquiry with re-
5 gard to the plans and in terms of how things could
6 have been done faster

7 I believe we had the discussion at side bar,
8 and I just wanted to make sure on the record that the
9 objection had been made when Mr Melton began his
10 testimony and we objected to the testimony as it was
11 not a part of the contract and therefore was parol
12 evidence

13 It was also leading and speculative

14 Issues in speculative damages in terms of what
15 could have been done if things were handled in a dif-
16 ferent way Again, I had a continuing objection to
17 that as he continued to talk on the various plans

18 I just want to make sure that was clear on the
19 record

20 MR BOWENS Your Honor, just a brief response
21 to that

22 The claim that Mr Melton was testifying about
23 was not to err in terms of the contract It was to
24 get the construction work done

25 Any time you have a case involving lost profits

1 you have to show what happened to cause the profits
2 to be lost In the failure to implement that plan,
3 that was caused by delays from the Defendants It is
4 a part of that proof of law of lost profits

5 MR BABCOCK Your Honor, of course, this goes
6 back to the issue of the five year contract Three
7 and a half years were performed that there was no con-
8 tractual responsibility to do things differently during
9 that three and a half years

10 Therefore, they are trying to recreate the con-
11 tractual relationship between the parties when there
12 was no breach from what happened before that three
13 and a half years

14 So that is why we objected to the plans and felt
15 that would lead to speculative damages in that regard,
16 Your Honor

17 We did have in that regard a memorandum with re-
18 gard to the expert who will ultimately testify, and
19 we want to submit to the Court at this point -- Lynn
20 Richards, and we will have an objection before she
21 testifies but not at this point in time

22 MR BOWENS Again, briefly, there is a contractual
23 responsibility Paragraph four, he has some develop-
24 ment responsibility to Dutch Fork Development Group,
25 Your Honor

1 The Defense claimed all day yesterday that Mr
2 Lipscomb and SEL Properties was just there to purchase
3 the land and do the filings, that he had no respon-
4 sibility and no right to interfere in the development

5 The contract specifically imposes that responsi-
6 bility on the Plaintiffs, and his interference with
7 that responsibility is what produced the loss of the
8 profits

9 MR BABCOCK Your Honor did not rule yesterday,
10 but the issue in the first three and a half years
11 is what is in the contract

12 There was an issue in phase one of having the
13 plat bonded in January of 2002 to allow earlier sales
14 That was the whole basis for that time line, and it
15 would enable them to reach the sixty sale mark and
16 to allow phase two to begin

17 And, in fact, what happened? The testimony is
18 quite clear

19 The bond did not occur until August 2002, and
20 nobody objected at the time Everybody went forward
21 with that basis, and the sales proceeded and the
22 sixty percent sales mark was not reached until in
23 either May or July of 2004, depending on how you are
24 looking at the numbers

25 The point is they're trying to recreate when

1 phase one sales would begun occurring well beyond
2 what it did That's not contractually required
3 and that was the sole basis for their stream of
4 how they could have done this in five years
5 That's for our objection

6 THE COURT I don't find that it's
7 parol evidence to talk about what the plan would
8 have been for the implementation of the contract
9 and what was the division to have occurred from
10 the developer's point of view during the five year
11 period That's why I allowed the evidence on that
12 point and all the rest of it's jury argument

13 MR BOWENS Just for the Court's
14 information We're going to have two very short
15 witnesses up first Margie Simpkins from National
16 Bank of South Carolina and Darlene Ivey for the
17 sole purpose of authenticating two sets of
18 documents that they provided to us and during the
19 course of discovery it's the sole basis of her
20 testimony just to authenticate those

21 THE COURT Margie Simpkins and who?

22 MR BOWENS Darlene Ivey

23 THE COURT And then who will your
24 witness be after that?

1 MR BOWENS That will be Rick
2 Maxheimer

3 MR BABCOCK Your Honor, please, if I
4 could just clarify one point Is it the
5 Defendant's contention that the failure to have
6 the bonded plat in January of 2002 is a breach of
7 the contract? Because that's not being pled and
8 that's nowhere in this case and if this is a
9 contractual obligation to begin the phase one in
10 January of '02 there is no breach of contract

11 MR BOWENS I believe this was pled and
12 whether it is or not it goes to our damages The
13 defensive argument is that we can't recover
14 damages in phase (inaudible - coughing) and we're
15 showing that it could happen Once we come
16 forward with that evidence, we might have a case a
17 lot stronger for the jury

18 MR BABCOCK Your Honor, it's not an
19 amended complaint and that is a big difference
20 There is no contractual responsibility You have
21 the bonded plat in January of '02 and that's not
22 in the contract

23 THE COURT I don't view that as the way
24 in the context in which it was argued yesterday
25 I did not view that as being in breach of the

1 contract What I viewed that was as being part of
2 how the course of dealings and the relationship as
3 such that the Defendant prevented the Plaintiff
4 from being able to go forward and to do
5 things on time and so that the contract could be
6 met in the five year period which is, I guess,
7 part of the reasons why the Defendant claimed that
8 there was a breach and why they terminated the
9 contract or why they terminated the contract may
10 not be a breach and so, I did not look at the
11 amended complaint to see when it's a part of the
12 amended complaint Mr Hollis, you can bring the
13 jury in, please

14 (Bring the Jury in please)

15 (The Jury returns to the Courtroom)

16 THE COURT Good morning, ladies and
17 gentlemen I received a note asking about taking
18 some notes and I believe if they had not made them
19 available to you we have them available Some
20 notepads and pens They look kind of small, we'll
21 see if we can get you some larger ones I know
22 that they do have some available somewhere so
23 we'll see if we can get some larger ones maybe
24 during the break I will remind you, however,
25 that your notes are strictly for your benefit

1 You should not use them to compare with others
2 relating to the testimony They are to be used only
3 to refresh your particular recollection of what has
4 occurred in the testimony throughout the course of
5 the trial

6 So I ask you to hold onto your notes and keep
7 up with your own notes

8 We are now ready to proceed You may call your
9 witness

10 MR BOWENS May it please the Court? The Plain-
11 tiffs call Margie Simkins

12 MARGIE SIMKINS, being duly sworn,
13 testified as follows

14 DIRECT EXAMINATION

15 BY MR BOWENS

16 Q Please state your name

17 A My name is Margie Simkins

18 Q Ms Simkins, where are you employed?

19 A National Bank of South Carolina NBSC

20 Q What is your position with the bank?

21 A I'm a real estate

22 THE COURT I'm sorry I didn't hear a word you
23 said Please speak up a little bit and into the
24 microphone

25 A I do real estate construction and loan

MS SIMKINS ON DIRECT

1 administration

2 Q And how long have you been employed with
3 the bank?

4 A Eleven and a half years

5 Q Were you involved in the development of phase
6 one of the Courtyards at Rolling Greens involving
7 Steve Lipscomb and SEL Properties and listings?

8 A Yes

9 Q I'm going to be handing you a series of
10 documents and I want you to take a look at those
11 and I'll have some questions for each and are they
12 the same and what I'm going to ask you is, are you
13 familiar with these documents as I've shown them
14 to you and were they generated and maintained by
15 the bank in the ordinary course of its business,
16 as the loan institution in connection with the
17 loan that we've talked about for the development
18 of phase one

19 The first exhibit is number 30, 31, 32, 33,
20 16, 109, 70, 69, 68, 63, 15, 99, 96, 97, 98, 101,
21 102, and that's all

22 Have you had a chance to review those at all
23 before today?

24 (Brief conference at the bench)

25 Q Ms Simkins, if you would identify for the

MS SIMKINS ON DIRECT

- 1 Court what exhibit number 32 is You don't have
2 to read the whole thing to the Court, just
3 identify what type of document it is?
4 A Just a memo to the file
5 Q And who prepared it?
6 A I did
7 Q Exhibit 33?
8 A Same thing
9 Q Who prepared that?
10 A I did
11 Q Exhibit number 16?
12 A Loan Closing Statement
13 Q Exhibit number 70?
14 A (Inaudible)
15 THE COURT I'm sorry I'm still having
16 difficulty hearing you
17 A It's the Mortgage of Real Estate and
18 Security
19 Q Number 69?
20 A It's the Promissory note
21 Q Number 68?
22 A Commitment letter
23 Q Number 63?
24 A Loan agreement
25 Q Number 15?

MS SIMKINS ON DIRECT

- 1 A Budget
- 2 Q Number 96?
- 3 A It's the Project Inspection Report
- 4 Q What is the Project Inspection Report for?
- 5 A To inspect the property and to let us know to
- 6 what degree it's been completed at that point
- 7 Q Is that required before the bank will release
- 8 payment for the construction work?
- 9 A Yes
- 10 Q Number 97?
- 11 A Another Progress Inspection Report
- 12 Q Number 98?
- 13 A The same
- 14 Q Number 99?
- 15 A The same
- 16 Q 101?
- 17 A It's a memo to the file
- 18 Q Who prepared it?
- 19 A I did
- 20 Q 102?
- 21 A Just a check sheet that we keep up with that
- 22 represents where we are with other legal documents
- 23 in the file
- 24 Q 31?
- 25 A It's the same

MS SIMKINS ON DIRECT

1 Q Number 30?

2 A It's the same as the last one

3 Q And number 109?

4 A It's a commit letter for the next phase

5 Q Isn't it a regular practice of NBSC to create
6 and maintain these documents in the order of the
7 ordinary course of business of a financial
8 institution?

9 A Yes

10 Q Were each of these documents made at or near
11 the time at which the events describing the
12 documents are referenced?

13 A Yes

14 Q Are the individuals that prepared these
15 documents under an obligation by the bank to
16 report what happened in those documents?

17 A I believe so

18 MR BOWENS Your Honor, at this time,
19 I'd like to offer those exhibits into evidence

20 MR BABCOCK Without objection, Your
21 Honor

22 THE COURT No objection They are
23 admitted

24 Q Thank you I have no further questions for
25 you

MS SIMKINS ON DIRECT

1 (Following Plaintiffs' Exhibits entered in evi-
2 dence without objection

3 Number 30, Check sheet, Number 31, check sheet,
4 Number 32, memo to file, Number 33, memo to file

5 Number 15, Budget, Number 109, commitment let-
6 ter, Number 68, commitment letter, Number 69, promis-
7 sory note, Number 70, mortgage

8 Number 99, progress inspection report, Number
9 96, progress inspection report Number 97, progress
10 inspection report, Number 98, progress inspection re-
11 port

12 Number 101, Memo to file of the bank

13 Number 102, check sheet kept by the bank, Number
14 15, budget)

15
16
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25

1 CROSS EXAMINATION

2 BY MR BABCOCK

3 Q I just have a couple of questions for you
4 pertaining to the - I think you said that exhibit
5 69 was a Promissory note for this project Was
6 that right?

7 A Yes

8 Q A Promissory note in the amount of two
9 million, one thousand, three hundred and seventy-
10 five dollars Is that correct?

11 A Yes

12 Q And that was to SEL Properties, LLC Is that
13 correct?

14 A Yes

15 Q And you are familiar that that was for phase
16 one for Courtyards at Rolling Creek?

17 A Yes

18 Q And in conjunction with that Promissory note
19 by SEL Properties, LLC, did Mr Lipscomb also have
20 to give you a guarantee?

21 A I don't see one here and I don't recall

22 Q Look at the commitment letter Exhibit 68
23 It required a guarantee, didn't it?

24 A

25 Q Looking down at paragraph eight

MS SIMKINS ON CROSS

1 A Yes

2 Q And that would be typical of this kind
3 of a situation, wouldn't it?

4 A Yes

5 Q And if you look over at Exhibit 63 Loan
6 agreement, sub 1-g requires a guarantee

7 A Yes, it does

8 Q And Exhibit 16 That's the borrower's
9 statement Is that correct?

10 A Yes, it is

11 Q And that - does that represent the money that
12 was actually out there tied up in funding for
13 them?

14 A Typically with these - these are the funds
15 that are disbursed at that time

16 Q And the total disbursement at closing was two
17 hundred and five thousand, six hundred and twenty
18 dollars and ninety-four cents

19 A That's right

20 Q There's also an interest reserve of two
21 hundred and fifty thousand dollars What's that?

22 A At the time that they closed this loan, they
23 took two hundred and fifty thousand and advanced
24 it on the loan and put it in a separate interest
25 checking account and then each month you

1 withdraw off that account to pay the monthly
2 interest on the loan going forward

3 Q Because this account had to pay interest on
4 the loan itself Right?

5 A Right

6 Q And to maintain the payments

7 A That's right

8 Q And that's also the interest observed which
9 is showing on Exhibit 15 Correct?

10 A That's a budget?

11 Q Yes

12 A Then yes

13 Q I just wanted to verify that that was the
14 budget Correct?

15 A Yes

16 Q So, interest reserve is something that the
17 bank requires to have the money to pay the
18 interest as the loan goes out for a period of
19 time

20 A That's right

21 Q And the borrower has to use that for the
22 interest Correct?

23 A That's right

24 Q Thank you now

25 THE COURT Any redirect?

1 MR BOWENS No, Your Honor
2 THE COURT You may step down
3 Thank you
4 THE COURT Call your next witness
5 MR BOWENS I'd like to call Darlene
6 Ivey
7 Darlene Ivey, being duly sworn,
8 testified as follows
9 DIRECT EXAMINATION
10 BY MR BOWENS
11 A My name is Darlene Ivey I V E Y
12 Q Ms Ivey, where are you employed?
13 A Newman Construction
14 Q And how long have you been employed with
15 Newman Construction?
16 A Just over nineteen years
17 Q And what is your role with Newman
18 Construction?
19 A I work as Controller
20 Q Are you familiar with the construction work
21 that is done at Newman Construction with regard to
22 phase one infrastructure at the Courtyards at
23 Rolling Creek?
24 A Yes, sir
25 Q I'm going to be showing you a

MS IVEY ON DIRECT

1 series of documents and I'm going to ask you to
2 identify these I'll call out the exhibit number
3 and the first one is Exhibit number 34 and if you
4 can identify what it is and we'll take it from
5 there

6 What is Exhibit number 34?

7 A (inaudible - speaking too low)

8 THE COURT I'm sorry You're going to
9 have to speak up just a little bit more please

10 A This is a letter to Jimmy Newman from CR
11 Jackson regarding the Courtyards at Rolling Creek

12 Q What was the subject of that letter?

13 A It states that CR Jackson had submitted an
14 invoice for the asphalt paving on the project and
15 had not been paid It was past due

16 Q I'm going to hand you Exhibit number 28?

17 A This is a letter to Mr Steve Lipscomb from
18 Jimmy Newman

19 Q What's the general subject of that letter?

20 A Offering suggestions to lower the cost of the
21 project in amounts that would be possible

22 Q And the date of the letter?

23 A October twenty-second, 2001

24 Q I hand you Exhibit 29? Can you identify that
25 for the Court?

MS IVEY ON DIRECT

- 1 A This is a change order for Rolling Creek
- 2 Q What is the amount of the change order?
- 3 A Forty-four thousand, four hundred and
- 4 seven dollars and forty cents
- 5 Q And can you tell from that what the subject
- 6 of the change order was for?
- 7 A It was for a full tenth asphalt in lieu of
- 8 SABC which is one and one half ash
- 9 Q What is Exhibit number 19?
- 10 A Exhibit 19 is an invoice for forty-five
- 11 thousand, seven hundred and sixty-six dollars and
- 12 fifty cents
- 13 Q And the date on that?
- 14 A October thirty-first, 2003
- 15 Q Can you tell on that what the invoice
- 16 pertains to?
- 17 A It's for under drain, removing and disposing
- 18 of existing asphalt, cutting and disposing some
- 19 soil and replacing with pressure rod and replacing
- 20 asphalt
- 21 Q Is that a road repair?
- 22 A It would appear that it is Yes, sir
- 23 Q Exhibit number 20?
- 24 A This is a proposal for street repair
- 25 Q And Exhibit 21?

MS IVEY ON DIRECT

1 A This is also a proposal for street repair

2 Q And what's the date on that? Is that a
3 revised proposal?

4 A It is

5 Q What's the date on it?

6 A August first, 2003

7 Q Exhibit number 64?

8 A This is a Richland County Inspection Report

9 Q Is that a report that Newman Construction
10 receives during the ordinary course of it's
11 business?

12 A Yes, sir

13 Q All right Exhibit 65?

14 A This is a letter of transmittal to Richland
15 County with compaction test results for the sub
16 grade

17 Q Exhibit 71?

18 A This is another Richland County Inspection
19 Report

20 Q 72?

21 A The same

22 Q 73?

23 A The same?

24 Q 74?

25 A This is a letter of transmittal to

MS IVEY ON DIRECT

1 Richland County with compaction test results on
2 sewer road crossings
3 Q 75?
4 A Richland County Inspection Report
5 Q 76?
6 A Another Inspection Report
7 Q 77?
8 A The same
9 Q 78?
10 A The same
11 Q 79?
12 A The same
13 Q 80?
14 A This is a highway road transmittal to
15 Richland County with compaction test results
16 Q 81?
17 A Richland County Inspection Report
18 Q 82?
19 A Also an inspection report
20 Q 83?
21 A The same
22 Q 84?
23 A The same
24 Q 85?
25 A It's a letter transmittal to

315

0000344

MS IVEY ON DIRECT

1 Richland County with compaction test results

2 Q 86?

3 A The same

4 Q 87?

5 A Richland County Inspection Report

6 Q 88?

7 A Letter transmittal to Richland County with
8 compaction results

9 Q 89?

10 A This is a letter of transmittal from PSI to
11 Newman Construction with compaction test results
12 attached

13 Q Number 90?

14 A Richland County Inspection Report

15 Q Number 91?

16 A This is also a Richland County Inspection
17 Report

18 Q 92?

19 A The same

20 Q 93?

21 A This is a statement signed by David and Chad
22 I can't pronounce the last name but I think
23 he's with the engineering firm They've been to do
24 onsite inspection There are five additional that
25 were acceptable and in finished condition Chad

MS IVEY ON DIRECT

1 noted that both were approved except these three
2 areas in the cul-de-sac where the shoulders are at
3 twelve to one are only three feet and this is
4 a letter to Mr Melton from me enclosing from
5 Richland County regarding the inspection of the
6 rest of the storm drain system for their records
7 with the records from Richland County attached
8 This is a letter stating that the inspector made
9 an inspection on the Courtyards at Rolling Creek
10 and found the pavement and curving in good
11 condition The shoulders are sloped

12 Q Are these documents that we've just
13 identified made and maintained by Newman
14 Construction in the ordinary course of it's
15 business as a construction company?

16 A Yes, they are

17 Q Is it a regular practice of Newman
18 Construction to make and maintain these documents?

19 A Yes

20 Q Are the individuals who prepared these
21 documents under an obligation to report and record
22 the information obtained in any of those
23 documents?

24 A Yes, sir

25 MR BOWENS Your Honor, at this

MS IVEY ON DIRECT

1 time I would like to offer these exhibits as have been
2 identified into evidence

3 THE COURT Any objection?

4 MR BABCOCK No objection

5 THE COURT They are admitted

6 (Whereupon, the following exhibits were admit-
7 ted into evidence without objection by Plaintiffs

8 Number 28, letter Lipscomb to Newman, Number 29,
9 change order, Number 34, Letter Jackson to Newman

10 Number 19, invoices for road repair Number 20,
11 Number 21, proposals for street repair

12 Number 64, inspection report, Number 65, letter
13 to Richland County

14 Number 71, inspection report, Number 72, inspec-
15 tion report, Number 73, inspection report, Number 74,
16 inspection report

17 Numbers 75, 76, 77, 78 and 79, inspection re-
18 ports

19 Number 80, letter to Richland County, Numbers
20 81, 82, 83, 84, inspection reports

21 Number 85, letter to Richland County, Numbers
22 86, 87, 88, 89, inspection reports

23 Numbers 90, 91, 92, inspection reports

24 Number 93, engineering firm report on onsite
25 inspection)

Rick Maxheimer – Direct Examination by
Glenn E Bowens

1 MR BOWENS That's all the questions I have
2 for you at this time

3 Please answer any questions counsel may have on
4 cross examination

5 MR BABCOCK We have no cross examination, Your
6 Honor

7 THE COURT You may step down Thank you
8 (Witness excused from stand)

9 THE COURT You may call your next witness

10 MR BOWENS The Plaintiffs call Rick Maxheimer
11 to the stand

12 RICK MAXHEIMER, being duly
13 sworn, testified as follows

14 DIRECT EXAMINATION

15 BY MR BOWENS

16 CLERK Please have a seat on the witness stand
17 and state your full name

18 WITNESS My name is Rick Maxheimer, M A X H
19 E I M E R

20 Q Mr Maxheimer, where are you employed?

21 A I'm employed at Palmetto Construction

22 Q Did your company have a prior name that was dif-
23 ferent?

24 A The company was known as Letts and Associates

25 Q So if we refer to Letts and Associations that

MR MAXHEIMER ON DIRECT

1 is the same company?

2 A Yes

3 Q Were you employed by Letts when you were work-
4 ing at the Courtyards?

5 A I was

6 Q Can you give the Court and jury an idea of your
7 background and training?

8 A Okay, I initially went to school locally at
9 Midland Tech and I studied industrial engineering

10 I went and at Clemson I studied hydraulics and
11 hydrology, and for about thirty years I've been tak-
12 ing refresher courses in project management and the
13 basic engineering courses

14 Q What is your function at Letts and Associates?

15 A An owner and run the individual projects

16 Q Give the Court and jury an idea of what is in-
17 volved with running a project?

18 A What I do initially is I will meet with the po-
19 tential client and I will give them some background
20 about our company

21 I will also at our initial meeting discuss with
22 the client what is proposed to do with their property
23 We would normally at that point offer them some sug-
24 gestions on what they can do with their property
25 If our firm lands the project we would do full service

MR MAXHEIMER ON DIRECT

1 engineering for them, the entire project

2 Q What was your role with regard to Courtyards at
3 Rolling Creek?

4 A Our role at Courtyards was initially a prelimin-
5 ary land plan that had been provided by a different
6 engineering firm

7 That land plan contained about a hundred and
8 forty lots and we redesigned that land plan to con-
9 tain about two hundred hundred and fifty-two to two
10 hundred fifty-four lots and greatly reduced the con-
11 struction costs

12 Q Did your office have any role in the administra-
13 tion of the infrastructure contract?

14 A Our office's responsibility -- yes Our office
15 would go out there and perform construction observa-
16 tion on the site

17 Q Was your office involved in the approval of the
18 applications for the construction work?

19 A We were

20 MR BOWENS Your Honor, we would offer Mr
21 Maxheimer as an expert in residential land planning,
22 engineering.

22 THE COURT Any voir dire?

23 MR THOMAS No, Your Honor

24 THE COURT Any objection

25 MR THOMAS No objection

MR MAXHEIMER ON DIRECT

1 THE COURT I find he is so qualified

2 BY MR BOWENS

3 Q I hand you what what is marked as Exhibit 118
4 Can you identify what these are for the Court, please?
5 Thank you

6 A It is a group of -- they are monthly pay appli-
7 cations, a thirty day period They are prepared by
8 the contractor for a particular work that is completed
9 and then submitted for approval

10 The bank inspectors will go out and confirm that
11 this amount of work has been done and sign off on it
12 for processing of payment to the contractor

13 MR BOWENS We would offer Exhibit 118 into
14 evidence

15 MR THOMAS No objection

16 THE COURT Admitted

17 (Plaintiffs' Exhibit 118, monthly pay applica-
18 tions, admitted into evidence without objection)

19 BY MR BOWENS

20 Q I hand you what is marked as Plaintiffs' Exhibit
21 117 Can you identify this?

22 A Yes, sir Change orders to the contract is what
23 it appears to be

24 Q And is that to phase one of the contract?

25 A Yes, sir, it is

MR MAXHEIMER ON DIRECT

1 Q Did your office have any role in the change order
2 process?

3 A Yes, sir We, just like everything else, moni-
4 tored the construction site to make sure that any
5 change order was valid, and then mainly helped the
6 contractor to initiate the change order

7 We would sign off on the initial change order
8 requests and as the work would done we would confirm
9 the work was done

10 Then we would sign off on the change order for
11 payment to the contractor Each of the change orders
12 involved

13 Q Were each of those change order necessary in
14 your opinion?

15 A Yes, sir

16 Q And you approved the work to be done?

17 A Yes, sir

18 Q Did Mr Lipscomb approve the work that was done,
19 approve the change orders?

20 A In looking at the change orders, there is a
21 place for the contractor, Mr Lipscomb, to sign, and
22 he signed them all, it appears

23 Q Is there any indication on those change orders
24 that Dutch Fork Development or Dutch Fork Realty ap-
25 proved of the change orders?

MR MAXHEIMER ON DIRECT

1 A No, sir

2 Q I will retrieve that from you You may need
3 the room

4 Was was your role or your office's role in the
5 bidding process for the infrastructure?

6 A Our office designed the project, and when that
7 was done we prepared a contract for bid purposes

8 Basically, what our office does is we determine
9 from the construction how much infrastructure -- the
10 amount of work, and that is in the contract, and the
11 contractors bid on line items

12 Q You know the amount of work from designing the
13 project?

14 A Yes

15 Q And a set of plans or drawings is prepared?

16 A Yes

17 Q If you don't have a complete set of engineering
18 drawings you cannot start the bid process?

19 A Correct

20 Q And is that a part of the bid process as well?

21 A Correct

22 Q How did it come about that Newman Construction
23 Company was selected as the construction company
24 for this project? For the first phase?

25 A They submitted bids and there were competitive

MR MAXHEIMER ON DIRECT

1 bids They were the low bidder

2 Q How did they end up being the low bidder?

3 A Basically they -- basically they really were not
4 the low bidder but they were the apparent low bidder

5 There was an offer or proposal from the construc-
6 tion company through Mr Lipscomb which reduced the
7 amount of payment down the road

8 Q I hand you Exhibit Number 28 Is that the pro-
9 posal that you were referring to?

10 A Yes, it is

11 Q Was the proposal or offer of reduction something
12 that could have been done at Courtyards at Rolling
13 Creek?

14 A No, sir That would have never been allowed
15 The offer of reduction was not accepted It could not
16 ever happen

17 Q So were you able to stop that from happening?

18 A Yes When that was caught, the amount of the
19 money that should have been in the original contract
20 for the original pavement design was added back to the
21 contract

22 Q So that proposal was stopped and was there a
23 change order that was created because of that reduc-
24 tion?

25 A Yes

MR MAXHEIMER ON DIRECT

1 Q I show you Exhibit 29 Is that

2 A This is the change order that added that money
3 back in, yes

4 Q If Mr Newman had bid on the correct payment
5 specifications, his bid would have been Forty-four
6 Thousand Dollars more than it was?

7 A Yes, and he would not have been the low bidder

8 Q Did Mr Lipscomb approve of that change order?

9 A Yes, he did

10 Q Was that a change order that really had to be ap-
11 proved to change the proposed reduction?

12 A Yes, it was That would not have been allowed
13 on site due to the soil conditions

14 Q Describe for the Court how the roads are in-
15 stalled? What is the process for doing that?

16 A

17 Q In a residential subdivision such as Rolling
18 Creek?

19 A First they are designed and approved by the var-
20 ious regulatory agencies There are three regulatory
21 agencies

22 In the process, of course, the center lines of
23 the roads are surveyed, the trees are cut away, and
24 the road is rough-graded

25 Once the utilities are put in, the rough-graded

MR MAXHEIMER ON DIRECT

1 roads are set for the finish-grading The curbs are
2 added, the stone is put down, and you complete the
3 entire road process at that time It is paved.

4 The process is completed at one time The de-
5 sign for the road section was a full depth asphalt
6 which allowed the asphalt to be installed initially
7 and in case there were any asphalt failures due to
8 construction they could be addressed

9 Just prior to -- let me rephrase

10 It allows a large number of the houses to be
11 finished and then basically the last layer of asphalt
12 is installed to get a pristine looking surface on the
13 roads

14 Q You mentioned there could be road failures dur-
15 ing the construction of the houses with the construc-
16 tion traffic?

17 A Right

18 Q And why is that?

19 A Road construction is not a perfect science If
20 there are any failures or subgrade failures and soft
21 spots in the road, the running of the construction
22 equipment would allow you to see that so that it can
23 be repaired prior to putting your final layer of
24 asphalt down

25 There are compaction tests done to make sure

MR MAXHEIMER ON DIRECT

1 that the road is constructed properly

2 Q Can you have soft spots result if you have a per-
3 fectly done compaction tests?

4 A You can, absolutely

5 Q Is it customary to hold off on the last layer
6 of asphalt as you described until a later period of
7 time?

8 A That is done Right

9 Q Thank you, and describe a road failure?

10 A Initially we had -- our firm had actually fin-
11 ished our work on phase one with the exception of
12 coming back out and certifying the final layer of
13 asphalt had been installed for the bank for payment

14 Mr D Melton five or six months after we essen-
15 tially left the site said there was a small failure
16 of the asphalt by one of the catch basins on the en-
17 trance road coming into the project

18 I went out and looked at it and there was defi-
19 nitely a small failure It was probably no bigger
20 than four by four

21 I did notice that in addition to the small fail-
22 ure the irrigation system had been installed down the
23 backs of the curbs in the entrance road on phase one
24 where Richland County does not allow the irrigation
25 system to be put there

MR MAXHEIMER ON DIRECT

1 The irrigation system that was installed was not
2 properly back filled and there is no compaction of
3 the pipe when it is installed on the back of the
4 curb

5 So we could see at that point that when it was
6 raining the water was actually entering into the road
7 from the -- from where the drain was installed and
8 the irrigation system was contributing to the road
9 failure

10 Q Then what did you do concerning the isolated road
11 failure?

12 A We notified Mr D Melton that there needed to
13 be -- that it needed to be fixed

14 Q And was that fixed?

15 A No

16 Q If repairs had been made, what would it have
17 cost to do that four by four failure? To repair that?

18 A Around Three to Four Hundred Dollars

19 Q What resulted from that?

20 A With asphalt especially if the roads are allowed
21 to crack and water is allowed to get under the surface,
22 the failure just increases with time and weather

23 Q Were there failures in any of the other roads
24 beside this one?

25 A Other failures occurred over time and they were

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MR MAXHEIMER ON DIRECT

1 from

2 Q I'm sorry Go ahead

3 A They were from the irrigation system being in-
4 stalled in back of the curb, to allow water from the
5 irrigation system as well as rain water to collect
6 and drain into the roadway

7 Q Are you talking about that happening all around
8 the subdivision?

9 A No

10 Q So how much of that did you experience?

11 A Well, the majority of the road failures happened
12 in the entrance road There were several throughout
13 the primarily low areas, but the entire entrance road
14 had to be replaced

15 Q Was there anything that Dutch Fork Development
16 Group did to cause that road failure?

17 A No, nothing I can think of

18 Q If the road repair had been made, would we have
19 seen the serious road failure problem with the en-
20 tranceway?

21 Q The road failure we observed was a small isolated
22 failure The irrigation system that we suggested in a
23 letter and also the County Engineer said needed to be
24 moved was not moved, which created additional fail-
25 ures

MR MAXHEIMER ON DIRECT

1 Q That was not done?

2 A Correct

3 Q Based on your experience with these types of pro-
4 jects -- it is a three phase project?

5 A Yes, it is

6 Q And the approval process we talked about and the
7 construction work, could it have been completed within
8 the five year period of the contract from the initial
9 date of construction?

10 A Yes, it could have been

11 Q Had the Planning Commission approved the plans
12 for all three phases?

13 A Yes, they had

14 Q What permits did you have for phases two and
15 three?

16 A We had the water system permits, and we also had
17 permits from FEMA for the Major Creek Crossing, and
18 that was for phases two and three The Corps of en-
19 gineers permits and those from Richland County

20 Q And were the plans then redesigned for phases
21 two and three?

22 A Yes, they were

23 Q How did that come about?

24 A Mr Lipscomb asked us to transfer some density
25 from phase three and phase two

1 Q Transfer some density?

2 A Lot intensity from phase three to phase two

3 Q How many lots were affected?

4 A I think numbers 11, 12

5 Q And after changing the phase two and phase three
6 plans or redesigning them, did you have to go back
7 through the approval process?

8 A They did

9 Q How long did you take to do the redesign and
10 get it back for the approval process?

11 A That's a loaded question There were a lot of
12 things that influenced that

13 We were in -- actually, on June of 2002 I had
14 to go in the hospital for open heart surgery, and
15 prior to being in the hospital for open heart surgery
16 we had a meeting with Mr Lipscomb about past invoices
17 from phase two

18 At that time, there was about Seventeen Thous-
19 and Dollars that had not been paid, and then I was
20 in the hospital and it was up to Forty Thousand Dol-
21 lars, and it was not paid for another eight months
22 after that and some is still not paid

23 Q Your engineering invoices?

24 A Absolutely

25 Q When did you start the redesign?

MR MAXHEIMER ON DIRECT

1 A Probably in March of 2002

2 Q I show you what is marked Exhibit 115, and can
3 you identify that for the Court, please?

4 A Yes, this is the approval of the revised con-
5 struction for phase two, phase three of Rolling
6 Creek

7 Q When was that letter written?

8 A March first of 2007

9 Q What revised sets of plans were done for phase
10 two and three?

11 A Initial changes, changes in density, and then
12 there were other changes for specific things -- they
13 were changed three times

14 Q Is that three times after the initial approval
15 of the plans?

16 A Yes

17 Q What is the current situation with regard to
18 phase two and three? Where are you?

19 A Our firm is still working with Mr Lipscomb on
20 phase two Phase two is well under way and being
21 constructed as we speak

22 Q What is the cost of the revised plans that you
23 have done, revised engineering plans?

24 A Somewhere around Two Hundred Thousand

25 Q Was anything wrong with the initial plan that

1 was commissioned?

2 A No

3 Q Is it fair to say that Mr Lipscomb authorized
4 the expenditure of the Two Hundred Thousand to get
5 basically eleven lots added?

6 A No, that is not correct The original change
7 for density was a revision of the plan and then there
8 were some additional changes as result of making some
9 changes to other things as well

10 Q What did the cost come to for just that first
11 initial change to have the extra lots added?

12 A I think our original engineering estimate was
13 Forty-seven Thousand

14 Q And the rest of that Two Hundred Thousand would
15 have been for different changes?

16 A Yes, to accommodate builders and various other things

17 Q Can lots be sold to the general public prior to
18 construction of the infrastructure?

19 A Yes, they can

20 Q And what do you have to do in order to do that?

21 A Well, the infrastructure, water and sewer, has to
22 be approved, and once that is approved a value of the
23 construction has to be developed, and there has to
24 be a bond Once that is bonded, then a bonded plat is
25 actually recorded on the lots

1 Then the individual lots can be sold to a second
2 builder, second party

3 Q Were there problems that you experienced with the
4 contractor being paid timely?

5 A We had several conversations and several letters
6 during phase one from Newman Construction stating they
7 had not been paid and they were stopping work several
8 times

9 Q How did that affect the progression of the project?

10 A It delayed it at times

11 Q That's all the questions I have for you Thank
12 you

13 THE COURT Cross examination

14 CROSS EXAMINATION

15 BY MR THOMAS

16 Q My name is Brady Thomas, and I want to ask you
17 some questions about some things you have testified to
18 on direct

19 Now Mr Bowens asked you about bonding on the
20 project at phase two and phase three a minute ago

21 A Yes

22 Q Is there downside to bonding to phase two and
23 three before the infrastructure was put in?

24 A I was asked a general question about bonding,
25 but the downside is that the general contractor is

MR MAXHEIMER ON DIRECT

1 on the site at the same time trying to build homes
2 and driving down roads you are trying to build, and
3 there are logistic problems

4 Q How would the homebuilder be able to access the
5 lots without being on roads being built?

6 A Well, what normally is done is that a temporary
7 road is laid down with gravel and it just has to be
8 wide enough to get past basically

9 Q Is it more expensive to proceed with clearing
10 of the road, clearing of trees and temporary gravel?

11 A Well, basically to get the road passable Yes,
12 it probably would

13 Q What about additional payment for the cost of put-
14 ting up a bond before the infrastructure is put in?

15 A The more infrastructure that is there, the bond
16 is less and the amount of the bond would be less
17 as well

18 Q Did anybody ever tell Mr Steve Lipscomb that
19 the bond for phases two and three needed to be in
20 place in order to go forward?

21 A There did not have to be a bond for phase two
22 and three to go forward Only phase one

23 Q Did you ever tell Mr Lipscomb that we need to
24 bond phase one?

25 Did you have conversations with him about that?

MR MAXHEIMER ON CROSS

1 A We never go to that point We never got approved
2 plans

3 Q When you talked about the change in plans, you
4 mentioned that the change in plans was in March of
5 2002?

6 A Yes, sir

7 Q To increase lot density?

8 A Uh hm

9 Q And what that change allowed the developers to
10 do was speed along profits, the profits from phase
11 two sales?

12 A Yes, sir

13 Q And originally there was promise of phase three?

14 A Right

15 Q And that would actually help the developer?

16 A Uh hm

17 Q Allowing the building to go forward, and when, if
18 you know, was the developer aware of the changed plans?

19 A I can't say when they were aware

20 Q And there was a meeting in your office to dis-
21 cuss the addition?

22 A Right

23 Q And no one stood up in the meeting and said they
24 were opposed to these changes?

25 A Not as I recall

MR MAXHEIMER ON CROSS

1 Q Would you recall if someone had stood up and
2 said they were opposed?

3 A Uh hm

4 Q Do you know when the contract with SEL Proper-
5 ties was acquired?

6 A No, I was not aware of the details of the con-
7 tract between SEL Properties and Dutch Fork

8 Q If the contract said that phase two wouldn't
9 commence until sixty percent of the lots in phase
10 one were sold, you are not aware of that?

11 A I am not aware of that

12 Q Okay

13 A Let me correct that I am aware of that because
14 I have been told since this litigation started

15 Q All right

16 A But I wasn't aware at the time

17 Q Right Mr Maxheimer, Mr Bowens mentioned some-
18 thing about an increase in the bid from the Newman
19 Construction Company?

20 A Yes, sir

21 Q When was that?

22 A That actually happened almost immediately

23 I'm sorry Could you ask a more specific ques-
24 tion?

25 Q I apologize When did the road construction

1 begin?

2 A The road construction would be one of the very
3 first things after clearing the site, which is the
4 first thing to commence

5 Q Did road construction begin in November of 2001?

6 A Yes, I believe it did

7 Q Now, Mr Bowens referred to the Newman bid?

8 A Yes

9 Q The Newman alternative was cheaper than what
10 was eventually done?

11 A No The original construction drawing had a
12 thicker, heavier asphalt design Mr Newman's bid
13 only suggested that^f if it was approved it would reduce
14 the payment down the road, would be cheaper than the
15 alternative

16 Q Now, the original design of the roads was ap-
17 proximately a Hundred Thousand Dollars but cost a
18 Hundred Hundred and Forty-five Thousand Dollars in
19 the alternative Is that approximately right, Mr
20 Maxheimer?

21 A I can't really remember

22 Q Is it true the Meltons and Mr Lipscomb came to you
23 and they wanted to have the more expensive alterna-
24 tive even than the original design?

25 A There was a meeting that we attended where the

MR MAXHEIMER ON CROSS

1 design that was discussed was heavier than the Newman
2 alternative but neither of those were ultimately used

3 It was decided to use three lifts of asphalt and
4 to install the initial two and then install the initial
5 third afterward

6 Q And that was more expensive to build than the
7 Newman alternative?

8 A Yes

9 Q So that is what Newman was instructed to do?

10 A Yes

11 Q And was Dutch Fork Development Group as the
12 developer of the project aware of the change orders
13 as they were processed?

14 A I would think they would be, but I don't know
15 if they actually went to them

16 Q So the plan was to go back at the end and to
17 add another lift of asphalt?

18 A Right

19 Q And that was to cover up any repairs that needed
20 to be made and, in addition, to make the project look
21 pristine when it opened up?

22 A Right

23 Q You are always going to anticipate some pot
24 holes on a project Is that correct?

25 A Right

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MR MAXHEIMER ON CROSS

1 Q Now, I believe a minute ago Mr Bowens asked
2 you about road failure, and that it came about after
3 Mr Melton pointed something out to you

4 Do you know when that occurred?

5 A It occurred basically at the same time frame as
6 they released two other areas of the project We act-
7 ually wrote letters to Mr Lipscomb to inform him
8 that there were two failures, initially small ones

9 Q Mr Maxheimer, I'm going to hand you a document
10 which is concerning what we were talking about

11 Do you recognize that?

12 A Yes

13 Q Is that a letter that you wrote?

14 A Yes

15 MR THOMAS I would like to move this into evi-
16 dence

17 THE COURT Any objection?

18 MR BOWENS No objection

19 (Maxheimer letter to Melton entered in evidence
20 without objection as Defendants' Exhibit Number 4)

21 BY MR THOMAS

22 Q And this letter was in June of 2003, and about
23 three quarters of the way down the page does the let-
24 ter say you recently observed a small failure?

25 A Yes Recently observed the irrigation system had

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MR MAXHEIMER ON CROSS

1 not been relocated and it was still being used for
2 irrigation

3 Is that what you're talking about?

4 Q Yes, sir

5 A All right

6 Q And does this letter establish a time frame for
7 when these road failure were first observed?

8 A What this is saying is that I had been out earl-
9 ier prior to this with the County engineers in a sep-
10 arate meeting -- there were actually two meetings be-
11 fore this letter

12 Then there was a meeting in our office

13 Q Did the Meltons attend that meeting?

14 A Yes, and Mr Lipscomb, and we discussed relo-
15 cating the irrigation system

16 What this is saying basically is that the irri-
17 gation system is still not relocated after the initial
18 observations, and it was continuing to get worse

19 The Meltons and Mr Lipscomb attended that meet-
20 ing

21 Q And you said you wrote this letter?

22 A Yes, sir

23 Q And can you give us the date that you wrote the
24 letter?

25 A I believe it is June of 2003

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MR MAXHEIMER ON CROSS

1 Q And the problems were first noted in May of 2003,
2 is that correct?

3 A I think that's correct

4 Q Isn't it also true that in July of 2003 that
5 several geotechnical firms were brought out to the
6 site?

7 A We actually discussed it with two geotechnical
8 firms on Mr Lipscomb's behalf that came out

9 Q And what firms were those?

10 A One was G S two That was the initial firm,
11 I believe, and then SMNE or David Follen

12 Q Isn't it true that David Follen submitted a
13 report?

14 A He did Yes, he did

15 Q Is it true road repairs were initiated in October?

16 A The initial repairs

17 Q So from the point of first finding the problem
18 in May of 2003 and diagnosing it in July, the repairs
19 started in October?

20 A They did

21 Q Mr Maxheimer, to circle back on the changes in
22 the plans, Mr Bowens talked about a Two Hundred
23 Thousand Dollar number in reference to some changes
24 in the plan Did that include changes to the pool area?

25 A Yes The pool area and cabana

1 Q Are you aware of whether Mr Melton was aware of
2 these changes?

3 A At that point, yes

4 Q Mr Maxheimer, I want to ask you about a specific
5 point in time

6 A Okay

7 Q May 28th, 2004 -- what needed to be done at that
8 point? Give us the status of the plans at that point
9 in order to begin sale of the lots in phase two?

10 A A Corps of Engineers permit and the crossing at
11 Point Branch

12 Q How long would -- on May 28, 2004, how long
13 would be necessary before construction on the roads
14 could begin?

15 A The permit from the Corps of Engineers obtained
16 and a permit from the City of Columbia, although
17 the plan approval had already been obtained So DHEC
18 and Richland County Sewer, as best I recall

19 Q All right

20 A Talking about the changed plans with the lot
21 density, those plans were already approved at that
22 point We made some calls to the various agencies
23 and the degree of the changes basically -- they
24 are considered major changes -- changes in the road
25 were considered major

1 If you look at the original plan and the plan
2 with the changes, you would realize the changes would
3 be made as were made

4 Q And would it have taken some time for the changes
5 to be approved by DHEC and the City of Columbia?

6 A Yeah Right, for Richland County

7 Q For Richland County, what

8 A The grading changes were the major changes on
9 the project

10 Q All right So you have got a time period

11 A At least three months

12 Q to get approval from DHEC and the City of
13 Columbia

14 And is it true that after you got that approval,
15 it would take approximately seven months to construct
16 the roads and put them in place?

17 A Yes

18 Q And that is after the process to obtain bids
19 and award a contract?

20 A Yes

21 Q So is it more cost effective to have a longer bid
22 out period?

23 A Yes

24 Q And then isn't it true you would need another ten
25 months to close it out and get those approvals for the

MR MAXHEIMER ON CROSS

1 roads?

2 A You would need approvals, yes

3 Q So at least a one year period before lots could
4 be sold in phase two, is that correct?

5 A If you don't bond, that's correct

6 Q Was the project bonded on phase one?

7 A The project was bonded after we basically had re-
8 ceived water and sewer permits

9 Q So if you bonded like you did in phase one, isn't
10 it true you would have a one year time period before
11 lots could be sold?

12 A No, not if you bond

13 Q If you bonded at the same level as in phase one,
14

15 A Yes

16 Q And did the Meltons ever object to the way phase
17 one was bonded?

18 A I don't recall them objecting

19 Q If they had objected, would you recall that?

20 A Yes, I believe I would

21 Q Now, I believe we've established that you would
22 have a one year period just like you did in phase two
23 Do you recall how many lots there were in phase two?

24 A I believe sixty-five to seventy Something like
25 that

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MR MAXHEIMER ON CROSS

1 Q And the vast majority of the lots were unsold in
2 May of 2004?

3 A Yes

4 Q And with reference to phase three, isn't it true
5 it would take, after the one year period before phase
6 two could begin and with whatever time period it
7 would take to sell sixty percent of the lots, that
8 it would take another seven months to construct the
9 roads in phase three?

10 A Yes

11 Q And then another two month period to close out
12 the project?

13 A With the times you are suggesting, correct

14 Q So if you start in May of 2004 and you bond the
15 project as was done in phase one, you have a year
16 period before phase two sells?

17 A

18 Q Then after you sell sixty percent of phase two,
19 you would have another ten month period before phase
20 three, correct?

21 A Taking your time intervals

22 Q So isn't it true that that could not have oc-
23 curred prior to 2005?

24 A (No audible answer)

25 Q I appreciate it, Mr Maxheimer Please answer

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Rick Maxheimer-Redirect Examination by
Glenn E Bowens

1 any questions Mr Bowens might have

2 A Yes, sir

3 THE COURT Any redirect?

4 MR MAXHEIMER Yes, Your Honor

5 REDIRECT EXAMINATION

6 BY MR BOWENS

7 Q Now, Mr Maxheimer, if you want to start selling
8 lots in phase two, when phase one reaches sixty per-
9 cent sales, isn't it true you have to start on the
10 process you just discuss with Mr Thomas in advance
11 so that all that work is done, so that when sixty
12 percent is sold you can start?

13 A Would you please ask that one more time

14 Q You have been through a lot of discussion with
15 Mr Thomas just now about what has to be done before
16 selling lots?

17 A Yes

18 Q And at the point of sixty percent of lots being
19 sold in phase one, whenever that happened to be,

20 A Uh hm

21 Q isn't it true that you would have to start
22 that process early enough, all the approvals and per-
23 mits and what not?

24 I mean, is it normal to wait until all the lots
25 are sold before you start the process?

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MR MAXHEIMER ON REDIRECT

1 A

2 Q Before you start the process for the second phase
3 or third phase?

4 A

5 Q There is a lead time to get all of that in the
6 works, right?

7 A Yes

8 Q If the phase two and three plans had not been
9 changed back in March and April of 2002, is there any
10 reason why phase two and three wouldn't be ready to
11 begin selling when sixty percent of phase one was
12 sold in May of 2004?

13 A No

14 Q If the plans had not been changed, when would
15 phase two and phase three have been ready for bonding
16 and construction to begin on those phases?

17 A If they hadn't been changed, approximately four
18 months after the original contract was signed The
19 contract with Newman Construction

20 Q Do you remember when that was?

21 A Goodness -- November of 2001, I believe

22 Q So four months after November of 2001 phases
23 two and three would have been ready to go?

24 A If all the approval work was done you could go
25 ahead and submit phase two and phase three in the

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MR MAXHEIMER ON REDIRECT

1 early part of 2002

2 Basically the changes in the plans stopped that,
3 and we went in another direction

4 Q Let's make sure we're clear on this If the
5 phase two and phase three plans had not been changed,
6 in March or April of 2002 or shortly thereafter phase
7 two and three would have been ready for construction
8 and sale?

9 A That's true

10 Q As far as the approval process, that was already
11 done?

12 A Yes

13 Q Were you the one who told the Meltons that the
14 plans for phase two and three had been changed?

15 A I think ultimately I did, yes

16 Q And they didn't call Mr Lipscomb and say we want
17 to make these changes?

18 A No, they did not

19 Q Is it necessary either to have the construction
20 completed or bond the plans before you can start sell-
21 ing to the public?

22 A Correct

23 Q If you want to start selling as soon as possible,
24 you would want to bond the plat?

25 A That's correct

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MR MAXHEIMER ON REDIRECT

1 Q Now, if you bond a plat today -- let's say in
2 November of 2001 or even in January of 2002, do you
3 or does that give Newman several months of construc-
4 tion time?

5 A That's correct

6 Q Do builders in your experience buy a lot today
7 and start building tomorrow?

8 A No I mean, some of them may, but it is not
9 usual

10 Q How long do they usually take? I mean, what is
11 customary?

12 A I would be guessing I don't know

13 Q So is it practical for us to believe that if
14 you bond the plat and start selling lots it may be
15 a few weeks to a few months before you actually start
16 the building?

17 A Yes

18 Q At least?

19 A Uh hm

20 Q That would also aid the logistics problem you
21 discussed with Mr Thomas?

22 A It probably would

23 Q And so the contractor would be further along with
24 his work?

25 A Yes

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Rick Maxheimer--Recross Examination by
Brady R. Thomas

1 Q You talked earlier about the subsequent changes
2 to the phase two and three plans being for others
3 Was that for builders who were going to be buying
4 major sections of phase two and three or was it one
5 or two lot builders?

6 A No, sir It was builders who were going to pur-
7 chase -- a builder who was going to purchase phase
8 two and a builder who was going to purchase phase
9 three All the lots

10 Q That's all the questions I have for you

11 THE COURT Any Redirect?

12 MR THOMAS Briefly, Your Honor

13 RECROSS EXAMINATION

14 BY MR THOMAS

15 Q Mr Maxheimer, a few more questions

16 Again, if you bond a project, just like you did
17 in phase one, isn't it true that you again have a time
18 period before -- a one year time period before lots
19 can begin to be sold?

20 A No You can sell lots immediately upon bonding
21 the plat

22 Q I'm sorry If you did the bond just like you
23 did in phase one, where you wait for the infrastructure
24 to be in place?

25 A Yes

MR MAXHEIMER ON RECROSS

1 Q If you start in the May 2004 time period, you
2 have a year before you can do anything?

3 A If you wait that long, yes, that's exactly
4 right

5 Q And are you aware of any requirement that phase
6 two be started before sixty percent of the lots are
7 sold?

8 A I'm not aware of any of the conditions of the
9 contract

10 Q But you are not aware of any objections made by
11 Dutch Fork Development Group, Dutch Fork Realty or
12 the Meltons to the plan changes?

13 A None were made to me

14 Q And are you aware of any objection by the
15 Meltons as to how the bonding was done, are you?

16 A No

17 Q That's all that I have Thank you

18 THE COURT You may step down

19 (Witness excused from stand)

20 THE COURT Ladies and gentlemen, we are going
21 to take a break at this time, ladies and gentlemen,
22 and allow you to go to your jury room

23 I would again remind you of my earlier instruc-
24 tions to you

25 You are not to begin forming any conclusions

353

1 about the case or having any discussions among your-
2 selves about it

3 Please remember that you have not heard all of
4 the evidence that will be presented to you in the
5 case

6 We will bring you back in after this break and
7 resume

8 (Jury excused from Courtroom at 11 10 A M)

9 THE COURT Let's go ahead and take a break at
10 this time

11 (The Court stood in recess for a brief period
12 and the matter then resumed)

13 THE COURT Thank you Be seated

14 Is there anything that you need to take up at
15 this time?

16 MR BOWENS Yes, Your Honor I think on yes-
17 terday we talked about Exhibit 123, and I think I
18 did not offer it in evidence

19 I would offer it at this time

20 MR THOMAS No objection

21 THE COURT Admitted

22 (Plaintiffs' Exhibit 123 admitted into evidence
23 without objection, being the Essex Contract)

24 THE COURT Thank you Is there anything further
25 that we need to take up?

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1 MR BOWENS We have had a lot of discussion in
2 this case and in discovery about Paragraph 8, and spe-
3 cifically Paragraph 8 E of the contract

4 The Defendant at one point asserted during the
5 course of discovery that Paragraph 8 E allowed the
6 contract to be terminated at will for no reason at
7 all

8 In discussion with Defense Counsel during --
9 since the trial began, it appears that they have now
10 decided to abandon that position

11 If that is the case, I want the record to note
12 it, and I will note on the record that I will not go
13 into that area with regard to termination of the con-
14 tract

15 Perhaps that will save a lot of time with witnes-
16 ses if we can actually stipulate to that and put it
17 on the record

18 We will not be going into it and it will not
19 be an issue in the trial of the case

20 MR BABCOCK May it please the Court?

21 THE COURT Yes, sir

22 MR BOWENS What Mr Bowens is referencing is in
23 reference to paragraph 8 E of the contract, if I can
24 just go to it

25 There is some written notification and a technical
355

1 construction of the document

2 We are not alleging as we have that the con-
3 tract is terminable at will

4 We take the position the letter referenced the
5 twenty percent of lots which was incorrect, but we
6 are not arguing that it is terminable at will

7 THE COURT All right, and is there anything else
8 we need to go into at this time?

9 MR BABCOCK No, Your Honor

10 MR BOWENS I believe that's all, Your Honor,
11 and so since we have that on the record that will
12 negate a large portion of the next witness' testimony
13 in the case

14 We will go forward with Billy Melton's testimony
15 at this time and it should go fairly quickly, I'd
16 expect

17 Our next witnesses we had planned for after lunch,
18 so we might end up being finished, depending on how
19 many more witnesses we need to call

20 THE COURT We'll see where we are then

21 MR BOWENS Thank you, Your Honor I wanted
22 to get that on the record before we called Billy
23 Melton

24 That would be all that we have from the Plain-
25 tiffs

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1 THE COURT Anything else before we bring in the
2 jury?
3 MR BOWENS That's all, Your Honor
4 THE COURT Please bring in our jury
5 (Jury returned to Courtroom)
6 THE COURT Call your next witness
7 MR BOWENS Billy Melton
8 WILLIAM P MELTON, being duly
9 sworn, testified as follows
10 DIRECT EXAMINATION
11 BY MR BOWENS
12 CLERK Please take a seat on the witness stand
13 and state your full name
14 WITNESS William Paul Melton
15 Q Mr Melton, where are you employed?
16 A I'm self employed as a real estate broker and
17 land developer
18 Q What is the name of your company?
19 A Dutch Fork Development Group Two LLC and Dutch
20 Fork Realty LLC
21 Q Why did you decide to start the Rolling Creek
22 project? The Courtyards at Rolling Creek project?
23 A We had done a project that was adjacent to the
24 Courtyards called Rolling Creek, and we had been some-
25 what successful with it It had a good reputation

MR MELTON ON DIRECT

1 The land became available next to Rolling Creek
2 and the potential for a development was there, and
3 we had spent over a Million Dollars bringing water
4 and sewer to Rolling Creek, and we saw an opportu-
5 nity to continue the water and sewer over into this
6 other property if we could obtain it

7 So we decided to approach Mr Lipscomb and see
8 if we could obtain it and we would do the development
9 and sales in the development, and obtain his partici-
10 pation in the finance part of it, and come to some
11 agreement as far as splitting of profits

12 Q So were you the primary negotiator with Mr
13 Lipscomb?

14 A Yes, I was

15 Q What was your role in the land transaction to
16 acquire the acreage that became the Courtyards at
17 Rolling Creek?

18 A My wife and partner and I co-brokered the land
19 transaction for Mr Lipscomb from the Cripps Family,
20 and we were able to buy the land, the one hundred
21 and twenty-two acres for Mr Lipscomb for the price
22 of Eight Hundred Thousand Dollars

23 We did not charge him any commission since we
24 were going into partnership with him

25 Q What is the broker's commission?

MR MELTON ON DIRECT

1 A Up to ten percent which would have been Eighty
2 Thousand Dollars, but we did not charge Mr Lipscomb
3 for that We forewent that commission

4 Q Did you enter into an agreement with Mr
5 Lipscomb?

6 A Yes, we did

7 Q And one of the things in that agreement was to
8 sell twenty percent of available lots per year?

9 A That's correct

10 Q Was that specifically negotiated between you and
11 Mr Lipscomb?

12 A Yes

13 Q One of the terms you all discussed?

14 A Yes, it was

15 Q Did you ever have any discussion with Mr
16 Lipscomb that the sale of twenty percent of available
17 lots per year be changed to some other requirement?

18 A No No

19 Q Was there any talk or discussion to that extent?

20 A No

21 Q Did you ever do anything to lead him to any be-
22 lief as to anything other than twenty percent per
23 year?

24 A No There was no other discussion at all We
25 certainly did not discuss anything else as to that

MR MELTON ON DIRECT

1 Q Did you ever sign any agreement or document to
2 indicate you were changing the sales requirement?

3 A No, no None

4 Q Make any representation whatsoever as to changing
5 that?

6 A Nothing

7 Q When you got to the point where you were ready
8 to make the construction loan for the development
9 of phase one, put in the infrastructure, did you
10 prepare a budget to give to the bank to determine how much
11 money was needed to construct phase one?

12 A We prepared a budget or an estimate of what it
13 was going to cost for the construction Yes, we
14 did that

15 Q I am going to hand you what has been previously
16 marked as Defense Exhibit 2 Do you recall seeing
17 that exhibit in Court yesterday?

18 A I saw it in Court yesterday Yes, I did

19 Q Is this the original budget that you prepared?

20 A Definitely not This is dated January third
21 of 2002, and I believe the construction loan was
22 closed in October of 2001

23 So this is definitely not the original docu-
24 ment

25 Q Does that eliminate the line item for the land

MR MELTON ON DIRECT

1 acquisition?

2 A Yes, it does

3 Q Did your original budget for development include
4 a line item for land acquisition?

5 A The original estimate for the infrastructure did
6 not did not have a line item for land acquisition

7 Q Why is that?

8 A The reason for that is that we negotiated the
9 land transaction deal with the Cripps and Mr Lipscomb
10 gave us a check to pay for the loan, a personal check
11 or from SEL, his company, and I delivered it

12 I remember seeing the Cripps to consummate the
13 deal and handing it to them ourselves So we then
14 assumed that the land had been paid for and was not
15 a part of the borrowing process or the loan

16 Q When did you find out the land acquisition was
17 going to be paid back from the construction loan?

18 A When we went to a meeting with Mr Lipscomb at
19 NBSC Bank to discuss the loan and discovered we would
20 be Eight Hundred Thousand Dollars short, that Mr
21 Lipscomb was taking Eight Hundred Thousand Dollars
22 to pay himself

23 The bottom line was that Mr Lipscomb was put-
24 ting money back in his pocket for the land acquisi-
25 tion, taking it from the construction loan

MR MELTON ON DIRECT

1 Q How did that affect your construction project or
2 your plans for the construction of phase one?

3 A We had to go back and make another estimate or
4 budget request and cut out some things, and it greatly
5 depleted our funds to carry out the construction

6 The bank realized this, and Mr Lipscomb signed
7 a personal guarantee, as I was told, to cover any short-
8 falls in construction and also put up a Two Hundred
9 Thousand Dollar CD to help with the guarantee

10 Q And as construction began, what kind of problems
11 did you experience in getting people paid on time?

12 A As construction of phase one began, we were con-
13 stantly looking for money to pay people, and Mr
14 Lipscomb was slow about paying the bills

15 There are documents that have been admitted into
16 evidence about overdrafts and interest charges, et-
17 cetera

18 Newman Construction in particular was slowed
19 down and they put a lien on the property at one time,
20 refusing to work until they could be paid

21 Letts Engineering had some problems with Mr
22 Lipscomb's paying and they stopped working several
23 times This considerably delayed the project

24 Q Were you entitled to get paid development fees?

25 A Yes, we were

MR MELTON ON DIRECT

1 Q Did you ever receive any of those during the
2 course of phase one?

3 A We never received any development fees in the
4 course of phase one or at any time

5 Q Was there ever any discussion that phases two
6 and three would not be done? In other words, was
7 it ever considered to be optional, or that phases two
8 and three might not go forward?

9 A No, never Three phases would be developed and,
10 in fact, the contract there shall be three phases

11 Q Was work had Dutch Fork Development done to get
12 phase two and three ready to be sold?

13 A Dutch Fork Development Group in the course of
14 getting phase one ready had done quite a bit of work
15 getting it ready for sales

16 The water and sewer had been installed in phase
17 two and three The design work was done by the engi-
18 neer on the infrastructure for lot layouts for phase
19 two and three

20 The permitting had already been obtained on phase
21 two and three We had done quite a bit during phase
22 one which was really a model community to help to
23 sell the remaining part, which was a larger part of
24 the project, phase two and three

25 We had done a gorgeous entrance, I think, and

MR MELTON ON DIRECT

1 there were to be upscale houses

2 This gave a picture to any future builders or
3 developers or individuals who might be interested in
4 phase two

5 This was not our model house but our model devel-
6 opment to promote phase two and phase three Also,
7 we spent quite a bit of money, between Forty and Fifty
8 Thousand Dollars, promoting phase two and three, and
9 that was out of our pocket

10 Q Was there ever any discussion among yourself and
11 members of Dutch Fork Development Group with Mr
12 Lipscomb, or with anyone, during your various meet-
13 ings with them that five years might not be enough
14 time to get this project completed?

15 A No, there was never any discussion that five
16 years was not enough time In fact, several groups
17 connected with this project agreed that five years
18 was enough time and Letts Engineering agreed that it
19 was enough time

20 NBSC, the bank that was loaning us

21 MR THOMAS Objection

22 REPORTER I didn't hear the rest of what he
23 said

24 THE COURT Sustained

25 BY MR BOWENS

MR MELTON ON DIRECT

1 Q Were you present at any meetings when there was
2 a discussion about the timing?

3 A I was present when they approved the loan

4 Q And was

5 A And let me add that the bank always had copies
6 of the operating agreements which specified five years

7 They always reviewed that so that my understand-
8 ing is that they approved

9 Q The bank never raised an objection that five
10 years was not enough time to complete the project?

11 A No Never

12 Q Was there discussion concerning the five year
13 term with Mr Lipscomb?

14 A I don't ever remember Mr Lipscomb mentioning
15 that it had to be five years or whatever

16 Q The contract or the loan agreement for Courtyards
17 refers to not commencing phase two until sixty percent
18 of lots were sold in phase one Do you recall that?

19 A Yes, I do

20 Q There has been no specific mention of a start
21 date other than the sixty percent, is that right?

22 A No mention of a start time, I don't believe,
23 but if you waited until you finished one phase to
24 start a second phase, you would be forever, and in fact
25 you would probably lose your customers

MR MELTON ON DIRECT

1 You would lose builders while you were starting
2 over again You would lose all of the momentum you
3 have generated, and you would lose the effect you bene-
4 fitted from, so you had to keep the project going

5 You had to begin infrastructure and design early
6 on to have phase two ready to move into it without
7 any lag between phases

8 Q Was it ever contemplated that you would not be-
9 gin work on phase two until you reached the sixty
10 percent point of phase one?

11 MR THOMAS Objection, Your Honor

12 WITNESS No, it was not

13 THE COURT Repeat the question

14 MR BOWENS Was it ever discussed with Mr
15 Lipscomb or in your plan that you would not begin

16 MR THOMAS Same objection, Your Honor

17 MR BOWENS phase two until you reached that?

18 THE COURT I will allow the testimony

19 BY MR BOWENS

20 Q Do you remember my question?

21 A If you'd repeat it

22 Q Was it ever discussed among the parties and Mr
23 Lipscomb, SEL Properties, the engineers, that you
24 would not begin the work in phase two until you got
25 to the sixty percent point of sales in phase one?

MR MELTON ON DIRECT

1 A It definitely was not discussed because we be-
2 gan some work on phases two and three from day one

3 Q What kind of work was that?

4 A Design work and engineering work Some of the
5 advertising and what not

6 Q Would it be possible to complete this contract
7 in five years if you were to wait until you sold sixty
8 percent of the lots in phase one before starting phase
9 two and phase three?

10 A It would not The process is lengthy, as we
11 have already been through, and we got that behind us
12 for the most part It would be very difficult to do
13 it that way if we had to wait until phase one was sixty
14 percent completed before we could start the next phase
15 of it

16 Q There was testimony earlier from Mr Maxheimer
17 about redesigning phases two and three to accommodate
18 builders Do you recall?

19 A Yes

20 Q And were you aware of that at the time?

21 A No, I was not aware until Mr Maxheimer testi-
22 fied today that phase two was redesigned to accommo-
23 date the wishes of a potential buyer of phase two and
24 that phase three was redesigned to accommodate the
25 wishes of a buyer for all of phase three

MR MELTON ON DIRECT

1 They were going to sell all of phase two and
2 phase three to two different builders

3 Q You were not aware of this?

4 A No, sir, and we were the sales agent and we
5 should have been the ones to negotiate for the prop-
6 erty

7 Mr Lipscomb didn't have any right to negotiate
8 without involvement of Dutch Fork Realty He had no
9 right at all

10 Q When or how did you find out that the plans for
11 phase two and three had been changed or redesigned by
12 Mr Maxheimer?

13 A We went to a meeting at Letts Engineering office
14 with Mr Maxheimer, and we were checking on some
15 final permits, and he mentioned the fact that Mr
16 Lipscomb had started redesigning the project, and
17 that's how we found out

18 Q Was anything done about it at the time?

19 A No, there was nothing we could do because Mr
20 Lipscomb controlled the pocketbook

21 Q The design and planning, the land planning and
22 approval of the project we have been talking about,
23 is that a development function or a finance func-
24 tion?

25 A It's a development function but the prices are

MR MELTON ON DIRECT

1 approved by Mr Lipscomb

2 Q Did Mr Lipscomb have a right under the contract
3 to go ahead and have the plan redesigned after it had
4 already been approved?

5 A No, he did not have the right at all The plans
6 had been approved by regulatory agencies, and Mr
7 Lipscomb had agreed

8 He apparently got greedy

9 MR THOMAS Objection Speculation

10 THE COURT Sustained

11 BY MR BOWENS

12 Q At some point did Asset Realty and Robbie Milum
13 enter into the work at Courtyards?

14 A Yes, they did

15 Q And describe that for the Court?

16 A We brought in Asset Realty and Robbie Milum to
17 expose Courtyards at Rolling Green to the client base
18 of Asset Realty, as well as bring them as an agent

19 We felt that it would be advantageous if we had
20 a buyer's agent to represent the customer when they
21 came in

22 The buyer's agent would represent the buyer and
23 we as the listing agent represented the seller We
24 felt in that way that it would be more comfortable
25 for the buyer, and we would split the commissions

MR MELTON ON DIRECT

1 with them We had no problem doing that

2 Q Are you making a claim for commissions that you
3 would have earned had these phases gone forward but
4 did not earn?

5 A That's correct, yes

6 Q If Asset Realty had not been involved in the
7 project, you would have gotten six percent commis-
8 sion on the sales, is that correct?

9 A That is correct

10 Q And with Asset Realty's involvement the commis-
11 sions would have been split, so it would have been
12 three percent?

13 A That's correct

14 Q So you have a claim for damages of three percent,
15 is that right?

16 A That's right A claim for damages of three per-
17 cent That is what we're claiming

18 Q Was the decision to bring in Robbie Milum and Asset
19 Realty in any way related -- what was it related to?

20 A We brought in Robbie Milum to bring the clients
21 in and make the clients more comfortable and hopefully
22 to enhance sales and growth

23 Q I hand you what is marked as Exhibit Number 116,
24 Mr Melton I'm also handing you Exhibit 126

25 What is Exhibit 126?

MR MELTON ON DIRECT

1 A HUD statements and settlement statements for
2 the sale of lots

3 MR THOMAS Your Honor, if we might approach?

4 THE COURT Come up

5 (Conference at the bench between counsel and the
6 Court off the record)

7 (Exhibit 126 retrieved from witness)

8 (Conference at the bench continued)

9 (Colloquy off the record between Mr Bowens and
10 Mr Thomas)

11 DIRECT EXAMINATION CONTINUED

12 BY MR BOWENS

13 Q Mr Melton what is Exhibit 126?

14 A Exhibit 126 is a copy of the originals of the
15 HUD statements and closing statements for sale of prop-
16 erty in phase four, Rolling Creek

17 Q Did you broker the land purchase for phase four?

18 A Yes, we did

19 Q What was the land purchase price?

20 A A Hundred Thousand Dollars

21 Q And does Exhibit 116 summarize the gross sales
22 of phase four?

23 A Yes

24 Q And the gross sales figure was that?

25 A One Million Two Hundred Nineteen Thousand Dollars

MR MELTON ON DIRECT

1 Q How much money would Dutch Fork Realty have spent
2 to complete that project?

3 A It would probably have cost us another Fifty
4 Thousand to complete it that we would have had to
5 spend from Dutch Fork Realty along with the Fifty
6 Thousand or close to Fifty Thousand Dollars we had
7 to expend for office expenses, advertising expenses,
8 clerical help sometimes, accounting help

9 Q So you had already spent close to Fifty Thous-
10 and Dollars?

11 A Yes

12 Q Have you been paid your profit sharing from
13 phase four?

14 A A very small amount

15 Q And what did you receive so far?

16 A Fifty-five Thousand Five Hundred and Eighteen
17 Dollars

18 Q Have you requested that Mr Lipscomb pay you the
19 rest of the profit sharing from phase four?

20 A I think I did, but I'm not sure because they
21 hung up on me when I started into that on the tele-
22 phone

23 Q Have you received any of your profit sharing of
24 phase one of Courtyards?

25 A Not to my knowledge, no

1 Q Were you given any explanation as to why you
2 were not paid any profit sharing for phase one?

3 A No reason why that I remember He kept promis-
4 ing payments

5 Q Were you ever allowed to see the financial docu-
6 ments and books that pertain to Courtyards?

7 A No, we were not We asked for an accounting
8 but never got it He said sometime we'll get it to-
9 gether in two weeks or something of that nature

10 Q That's all the questions I have for you, sir
11 Thank you

12 THE COURT You may cross examine

13 CROSS EXAMINATION

14 BY MR BABCOCK

15 Q Good morning, Mr Melton

16 A Good morning

17 Q Mr Melton, you were just asked some questions
18 about the land in phase four

19 A Yes

20 Q So that we understand, phase four was a por-
21 tion of the project that was part of the Rolling Creek
22 Subdivision, is that correct?

23 A It was made a part of the -- it was made a part
24 of Rolling Creek Subdivision It was not originally
25 though

MR MELTON ON CROSS

1 Q Well, you talked about earlier the water and
2 sewer work that you did in phase three You brought
3 it from Rolling Creek through what became phase four,
4 through two and three, and it got to one, is that
5 correct?

6 A That's correct

7 Q The land that was acquired for phase four that
8 is in Rolling Creek now, that was acquired in two
9 parts, and the original part -- part of the origi-
10 nal land was a part of the Eight Hundred Thousand
11 Dollar acquisition, correct?

12 A That's correct

13 Q About ten acres of that land was for that?

14 A Right I don't know the exact acreage, but that
15 sounds correct

16 Q There was an additional acquisition where some-
17 one was making a charitable donation to the YMCA, is
18 that correct?

19 A That was some of the additional acreage

20 Q Do you recall that acquisition cost was a Hun-
21 dred Thousand Dollars?

22 A A ~~Hundred~~ Hundred Thousand Dollars

23 Q But in addition to that Hundred Thousand Dollars,
24 the original acquisition price of Eight Hundred Thou-
25 sand -- part of that \$800,000 went to phase two and

MR MELTON ON CROSS

1 three, isn't that right?

2 A Ask that again

3 Q Of the original acquisition price of \$800,000, a
4 part of that went to phase one, phase two and phase
5 three?

6 A Yes

7 Q And part of that \$800,000 went to phase four,
8 didn't it?

9 A Part of it did

10 Q So your Hundred Thousand doesn't take into account
11 a portion of the \$800,000 that went to phase four, is
12 that correct?

13 A To my knowledge, it does not

14 Q Okay Now,

15 A Let me amend that by saying that we may need
16 to check with the bookkeeper on that part of the job

17 Q But you gave an amount of a Hundred Thousand Is
18 that incorrect?

19 A I actually don't know the total cost of that
20 land

21 Q Okay, so you recognize -- I know you're not an ac-
22 countant, but if you're going to figure out how much
23 the cost of the land for phase four is, you'd have to
24 attribute some of that money, the \$800,000?

25 A I agree

MR MELTON ON CROSS

1 Q You just don't know how much, would that be cor-
2 rect?

3 A That's fair enough

4 Q Now, with regard to the commission for that
5 \$800,000 purchase, the normal procedure is that you
6 have a purchase of property and there is a commission
7 Correct?

8 A Correct

9 Q And normally that commission is paid for by the
10 seller?

11 A Correct

12 Q All right In this case, the \$800,000 purchase
13 of land was by SEL Properties, correct?

14 A By SEL Properties?

15 Q They are the purchaser and not the seller, is
16 that right? Who was the seller on that?

17 A The seller was (inaudible)

18 Q And so no commission was charged to him on that
19 sale?

20 A Correct

21 Q And you were asked by counsel whether you had
22 ever said anything that could mislead Mr Lipscomb
23 concerning the sales price

24 Do you recall that question?

25 A No Could you explain that a little better,

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MR MELTON ON CROSS

1 please?

2 Q Sure Let me go back

3 Counsel asked you a series of questions concern-
4 ing the -- let's look at the termination clause in
5 the contract

6 A

7 Q There we looked at this paragraph four and C, and
8 paragraph C doesn't define any term of the contract,
9 but paragraph B or subparagraph B talks about the fail-
10 ure of DFDG or DFR to sell at least twenty percent
11 of the available lots

12 You see that, don't you, sir?

13 A Yes, I do

14 Q And you will remember that counsel asked you some
15 questions about that twenty percent of lots Do you
16 recall that?

17 A I'm not sure He asked me so many questions Do
18 you want to repeat

19 Q Okay, I'll ask you some questions generally in
20 that area

21 Because after he asked you those questions about
22 the twenty percent, he asked whether you had ever said
23 anything to Mr Lipscomb to mislead him concerning
24 the sales price

25 Do you remember that?

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MR MELTON ON CROSS

1 A I think so

2 Q And you said you hadn't Correct?

3 A Yes, that's correct

4 Q But you did tell Mr Lipscomb -- did you tell him
5 that you were looking to have two lots for sale per
6 month in phases one, two and three, didn't you?

7 A No, I did not

8 Q You deny having told him that?

9 A Yes, sir

10 Q All right Are you aware of anybody else with
11 Dutch Fork having told Mr Lipscomb two lots per
12 month?

13 A No, sir

14 Q So you deny that that was said?

15 A I re-deny it Yes, sir

16 Q Now, let's look at -- you were shown Exhibit
17 2, Defense Exhibit 2

18 Do you remember that?

19 A I've got a lot of exhibits up here

20 Q Do you have it?

21 A I have 16 here and -- oh, yes, here it is

22 Q And that is for the land acquisition for Eight
23 Hundred Thousand Dollars?

24 A Yes

25 Q Correct?

MR MELTON ON CROSS

1 A Correct

2 Q And you say you were not aware or you had not
3 intended for the \$800,000 of the bank loan to pay
4 off Mr Lipscomb's loan to buy the land

5 Is that correct?

6 A Correct

7 Q Now, you were aware, however -- let's go over
8 to paragraph -- to paragraph two of the contract,
9 and that says, SEL shall exercise its best effort
10 to secure reasonable financing at a conventional lend-
11 ing institution for the purchase -- for the purpose
12 of purchasing the property

13 Do you see that?

14 A Yes, I do

15 Q So you knew that at the time you signed the
16 contract that it was a part of the contract, didn't
17 you?

18 A Obviously, yes

19 Q Sure, and you never objected to the fact that the
20 \$800,000 per the contract was taken from the financ-
21 ing to buy the land, did you?

22 A No, I didn't object

23 Q All right

24 A I did not object because he had already bought
25 the land I didn't think it was an issue at that

MR MELTON ON CROSS

1 time I didn't think it was an issue

2 Q You didn't object when you knew the money had
3 been spent from the loan?

4 A I was taken back and I had to go back and rework
5 the budget estimate

6 Q Mr Melton, I'm sorry What I asked you was
7 whether you objected

8 You never objected to that, did you?

9 A I didn't object, no

10 Q Let's talk about the changes in the plans for
11 phase two and three I understood your testimony
12 to be that you didn't know about the changes with
13 regard to that

14 A

15 Q Did I understand correctly that you were not
16 aware of any plans to change the property for large
17 purchases for phase two and three?

18 A That was my testimony

19 Q You were shown Exhibit 123, I believe, which is
20 the Essex Contract Do you have that in front of
21 you, sir?

22 A No, I don't

23 Q Let me hand you what has been marked as Defen-
24 dant's Exhibit 123, the Essex Contract

25 A Okay

MR MELTON ON CROSS

1 Q This is dated September 15, 2006, and your ter-
2 mination letter was May 28, 2004 Is that correct?

3 A Yes, I believe so

4 Q So isn't it fair to say that you didn't know
5 what plans were changed after you got the termination
6 letter?

7 A Would you repeat that?

8 Q- You don't know what changed after the May 2004
9 termination letter in terms of what ultimately became
10 the Essex Contract?

11 A

12 Q You don't know of any changes after that time,
13 do you?

14 A No, sir

15 Q All right You don't know whether -- you said
16 you heard about it in conjunction with the law suit
17 but that happened after the May 2004 letter Right?

18 A After the May 2004 letter, I do not know

19 Q You did know before the May 2004 letter about
20 changes to the plans, the first change in plans?

21 A Correct, I knew there were changes in the plan

22 Q And the original plan had been discarded? You
23 knew that?

24 A Yes, I knew that there were changes to some of
25 the lots in phase two Correct

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MR MELTON ON CROSS

1 Q All right There would be more lots in phase
2 two?

3 A They took some lots from phase three and put them
4 in phase two, as well as I remember

5 Q So the number of lots increased in phase two?

6 A Yes

7 Q And by doing that, the thinking was that phase
8 two might be sold faster?

9 A It's possible

10 Q And you never objected to that change, did you?

11 A No, I did not, but let me say I did object to
12 discarding the original plan

13 Q You didn't object to that and you also never got
14 a permit for the new plans, did you?

15 A Well, I would think objecting to discarding the
16 original plans is the same as objecting to the new
17 plan Yes, sir

18 Q Please answer my question You knew there were
19 new plans You never pursued the new plans in terms
20 of getting any permits for the new plans, did you,
21 sir?

22 A They weren't ready for that

23 Q Did you ever ask whether you should get permits?

24 A I did not because Mr Lipscomb had taken over the
25 development evidently, and he has usurped our authority

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MR MELTON ON CROSS

1 Q Mr Melton, I understand what you're saying but
2 in fairness -- I understand you think Mr Lipscomb
3 should not have come in and changed the original plans,
4 but once that happened you had the responsibility for
5 obtaining all permits, didn't you?

6 A No, I did not We were not involved with it

7 Q Let's look

8 A We were not involved

9 Q Pardon

10 A We were not involved with the new plans Mr
11 Lipscomb was doing It was his

12 Q Let's look at section four

13 A All right

14 Q The second sentence of section four DFDG will
15 be responsible for development of property, which re-
16 sponsibilities include but are not limited to obtain-
17 ing all regulatory permits

18 Correct?

19 A That's correct but that applies to this contract

20 Q And involving phases one, two and three?

21 A Correct

22 Q So after there were new plans for phase two --
23 my question is very simple -- you never went forward
24 to obtain permits for phase two under the new plan,
25 did you?

MR MELTON ON CROSS

1 A You've asked me this
2 Q I want you to answer yes or no
3 A I have answered
4 Q Sir, if you would answer yes or no, then you can
5 give your explanation
6 A Okay
7 Q You didn't obtain -- you didn't try to obtain
8 permits under the new plans for phase two, did you?
9 A No, I did not
10 (Brief pause in the proceeding)
11 BY MR THOMAS
12 Q Let's go back briefly and look at paragraph three
13 of the contract
14 A All right
15 Q The property shall be developed in phases There
16 shall be three phases
17 A Yes
18 Q Phase two shall not commence until no less than
19 sixty percent of lots in phase one are sold, and
20 phase three shall not commence -- will not commence
21 until no less than sixty percent of lots in phase
22 one and phase two are sold
23 Correct, sir?
24 A That's what it says
25 Q All right, and there is nothing in this section

MR MELTON ON CROSS

1 of the contract -- this section of the contract is
2 talking about when a bonded plat would be filed for
3 phases two and three, correct?

4 A It is

5 Q And there is nothing if you look at the rest of
6 the contract that talks about when a bonded plat
7 would be filed for phase one is there?

8 A No, there is not

9 Q And there has been testimony earlier about dif-
10 ferent times that a bonded plat can be filed

11 Did you hear that testimony, sir?

12 A Yes, I did

13 Q All right, and with your experience in the real
14 estate field, you are aware that it is possible to
15 file a bonded plat before you put the roads in, but
16 you have to pay more money to insure that the contract
17 is performed for the roads

18 Is that correct?

19 A You have to pay for a larger bond

20 Q A larger bond?

21 A Yes

22 Q And that's to make -- if you're going to sell --
23 the reason is pretty simple, isn't it?

24 If you're going to be selling lots in a subdivi-
25 sions then people have to have security that the

- 1 roads will ultimately be built
- 2 That's the reason for it, isn't it?
- 3 A Sure That is exactly right
- 4 Q Sure, and if you wait until after the roads are
- 5 put in, the cost goes down as the roads are put in,
- 6 correct?
- 7 A Yes, sir
- 8 Q And that is why the bonding is less at that
- 9 point, because you don't have to give security that
- 10 the roads will be built
- 11 Correct?
- 12 A That is right, yes, sir
- 13 Q Now, in this case, for phase one a bonded plat
- 14 was prepared and filed after the roads were con-
- 15 structed Correct?
- 16 A I think that's correct Construction was not
- 17 completed until September 2002
- 18 Q What part of the construction was not completed?
- 19 A I'm not sure about that right now
- 20 Q But it was certainly nearly complete?
- 21 A Yes, sir
- 22 Q Certainly no one with Dutch Fork objected to doing
- 23 the bonded plat in that fashion, did they?
- 24 A No, but we had hoped it could be bonded earlier
- 25 Q But you did not object?

W P Melton – Redirect Examination by
Glenn E Bowens

1 A We did not object at that time, no

2 Q The objections have come later in this court
3 proceeding, haven't they?

4 A They definitely have come in this court proceed-
5 ing

6 Q Thank you, sir

7 THE COURT Any Redirect?

8 MR BOWENS Yes, Your Honor

9 REDIRECT EXAMINATION

10 BY MR BOWENS

11 Q Mr Melton, when should phase one have been
12 bonded?

13 A

14 MR BABCOCK Objection, Your Honor Again, the
15 contract does not have a requirement

16 THE COURT Rephrase your question

17 BY MR BOWENS

18 Q You were asked on cross examination did you ob-
19 ject to the plat being bonded in 2002?

20 A Yes, I was

21 Q Did you object to it being bonded then?

22 A No, I did not

23 Q Why not?

24 A I was glad to get it bonded since it was not
25 bonded earlier

MR MELTON ON REDIRECT

1 Q If you want to sell lots quickly, is it neces-
2 sary to bond the plat sooner rather than wait until
3 later?

4 A Yes It is very necessary Government regula-
5 tions

6 Q What percentage of the cost of construction is
7 used to determine how much the bond will be?

8 A The amount of construction, basically the dollar
9 amount, is multiplied by one point two five That
10 is the value of the lot, and the bond is normally
11 one percent of that figure

12 Q The construction contract in this case -- what
13 was it going to cost? What was the value of the contract?

14 A Well, for the infrastructure, Eight Hundred
15 Thousand Dollars

16 Q So if you add one point two five percent to that
17 you could be bonded immediately?

18 A Yes

19 Q And then it would be one percent of that number?

20 A That's correct

21 Q So in the range of Eight to Ten Thousand Dol-
22 lar range to bond the plat?

23 A Yes

24 Q It would be no more than that, wouldn't it? One per-
25 cent of Eight Hundred Thousand?

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MR MELTON ON REDIRECT

1 A That's correct

2 Q And if the work had been done it would be less
3 than that?

4 A Some of the work -- as the project progresses
5 the amount to bond would go down

6 Q The cost of the bond goes down?

7 A Yes

8 Q So if the plat had bonded in January of 2002,
9 after construction had been commenced, the bond would
10 have been lower

11 A Much lower, yes

12 Q Would that have been sufficient time for you to
13 have made the spring and summer of 2003 sales?

14 A Yes

15 MR BABCOCK Objection on issues that were
16 raised earlier, Your Honor We object to this tes-
17 timony

18 THE COURT I overrule your objection

19 BY MR BOWENS

20 Q If the broker or the agent in a land contract
21 does not charge a commission -- if you waive your com-
22 mission, does that mean the benefit to the buyer is
23 waived? Is there benefit to the buyer?

24 A It depends on the contract The buyer pays
25 -- in some contracts sometimes a buyer will pay

MR MELTON ON REDIRECT

1 a commission It is not always the seller who pays

2 a commission

3 Q Do you find that the sales price is usually
4 higher or lower if the broker waives the commission?

5 A Lower

6 Q So any benefit Mr Lipscomb -- was there any bene-
7 fit to Mr Lipscomb for you waiving the commission on
8 the land acquisition and the phase four acquisition?

9 A If he had had to pay a commission--the price of
10 the land I'm sure would have been higher or we would
11 not have been able to buy it if the seller paid commissions

12 Q If you had not waived your commission, the sales
13 price would have been larger?

14 A Yes, it would have been Eight Hundred Thous-
15 and was his bottom line No doubt about it

16 Q You were asked some questions about whether you
17 objected to Mr Lipscomb taking the Eight Hundred
18 Thousand Dollars from the loan?

19 A Yes

20 Q Did you object to him taking that loan out in
21 2002 for \$800,000 after he paid for the land origin-
22 ally? Did you object to that?

23 A I didn't know where the money came from when he
24 gave us the check to pay for the land We carried
25 it to the Cripps I don't know where he got the

MR MELTON ON REDIRECT

1 money from

2 Q All right He later borrowed money, as I under-
3 stand it, to pay himself back Did you object to
4 that?

5 A No

6 Q Did you object to him taking the money out of
7 the development loan to pay the Eight Hundred Thous-
8 and mortgage that he got?

9 A Don't know^Ihorribly objected but I was really
10 dissatisfied with that

11 Q What kind of problem did that cause you?

12 A Mr Lipscomb assured the bank he would make up
13 any shortfall and he put up a personal guarantee but
14 that didn't work out very well evidently because we
15 were constantly short of funds

16 Also, it involved going back and redoing the
17 budget We had to cut out some things from the orig-
18 inal budget

19 Q Was there a problem with his guarantee to make
20 up the shortfall?

21 A I don't think he made up the shortfall timely

22 Q You were also asked some questions about the
23 Dutch Fork Development Group's responsibility to
24 get the regulatory permits for phases two and three,
25 correct?

MR MELTON ON REDIRECT

1 A Yes

2 Q Walk us through the steps that must be done be-
3 fore you can do that

4 A Well, you have to get the permits

5 Q Did you have to have the plans redesigned first?

6 A Yes, we did They won't give you a permit for
7 plans that don't exist or are not complete

8 Then the plans must be approved by the Planning
9 Commission before you can get the permits

10 Q What prevented the plan from being redesigned
11 and then approved by the Planning Commission?

12 A The plans weren't completed They were changed
13 time after time by Mr Lipscomb, so we had no plans

14 Q And did Mr Lipscomb not pay the engineer during
15 that process?

16 A That's right

17 Q And they shut down their work?

18 A Yes, they did Time after time as I understand
19 it he was slow with his payments, and that caused
20 finance charges when he was late paying, and the engi-
21 neer refused to continue the work until they got
22 money

23 Q You did not pursue taking regulatory permits
24 until the plans had been completed and approved by
25 the planning commission?

1 A Yes

2 Q So the plans were completed so that the permits
3 could be taken?

4 A Yes, but the plans were not completed until 2007

5 Q That's all the questions I have for you

6 THE COURT Recross

7 MR BABCOCK Yes, Your Honor

8 RECROSS EXAMINATION

9 BY MR BABCOCK

10 Q You have testified you knew the plans had been
11 changed well before you got your May 2004 letter, is
12 that correct?

13 A Let me -- I think that's true

14 Q And you knew for phase two to go forward, you
15 would need to have the complete plans to get the
16 permits

17 Is that correct?

18 A That's correct

19 Q And you never pushed and inquired and requested
20 that the plans be completed in order that you could
21 get the permits, did you?

22 A They were constantly being checked on

23 Q But you never said we need the plans to get permits?

24 A I don't believe I said that

25 Q Thank you, sir

1 THE COURT You may step down

2 (Witness excused from stand)

3 THE COURT Ladies and gentlemen, I think this
4 would be a good time to take our lunch break

5 I again remind you of the instructions that I
6 gave you previously, that you should not discuss the
7 matter among yourselves and that you also should not
8 as you come and go from the Courthouse pay attention
9 to discussions you may hear in the hallway

10 Again, you must make your decision solely from
11 the evidence that is presented here in the Courtroom

12 Please also remember not to allow anyone to ap-
13 proach you about this matter when you are away from
14 this Courtroom If someone attempts to do that, tell
15 them that you are a juror and you cannot discuss the
16 matter

17 If something like that should occur, you should
18 report that incident as soon as possible

19 I would ask that you report back to the jury
20 room at two o'clock, and when you have reported back
21 at two we can continue on with this particular trial

22 I hope you have a good lunch You may be excused
23 at this time

24 (Jury excused from the Courtroom at 12 48 P M
25 for the lunch period)

1 THE COURT Is there anything we need to take
2 up before we break for lunch?

3 MR BOWENS Nothing from the Plaintiffs

4 MR BABCOCK Nor from the Defendants, Your
5 Honor

6 THE COURT Who will your witnesses be after
7 lunch?

8 MR BOWENS We have two planned, Your Honor
9 John Quinn and Lynn Richards

10 THE COURT Who do you plan to call first?

11 MR BOWENS I plan to call Lynn Richards first,
12 Your Honor

13 THE COURT Is there any objection to her testi-
14 mony?

15 MR BABCOCK Yes, Your Honor

16 THE COURT What is your objection to her testi-
17 mony?

18 MR BABCOCK Our objection to her testimony in-
19 volves phases two and three of the project

20 As indicated in our memo, Your Honor, we believe
21 that the testimony of Ms Richards -- with respect
22 to phases two and three the testimony is clear

23 We have a five year contract which was seventy
24 percent complete with eighteen months remaining, and
25 on the basis of contract law damages must necessarily

1 have resulted from that breach

2 Instead of looking at the remaining eighteen
3 months of that contract to determine what could be
4 done with regard to phases two and three, that eight-
5 een months, the Plaintiffs are attempting to go back
6 in time and recreate what happened from the start of
7 the contract, and then have Ms Richards testify as
8 to profits and sales for the project in toto, not
9 considering how long it would take, the time it would
10 take, and it is just a very basic principle that for
11 her to go -- she is acting like there was no contract

12 She is just starting out from day one and has
13 a total -- for every part of the process, she has
14 taken out totals on everything in the past -- during
15 the five year period

16 We know what happened in three and a half years,
17 and we know where the project stood in three and a
18 half years, and she has gone back and made a new world
19 where everything started anew and everything went per-
20 fectly

21 There is simply no factual basis in terms of what
22 happened out there to support that

23 Your Honor, we cited the Drews case for the fact
24 that the owner's expectations unsupported by any par-
25 ticular standard for establishing net profits (reading

1 rapidly from case)

2 All she is taking is an estimate by Mr Melton,
3 and this estimate by the way is just -- we just got
4 this sheet from Ms Richards today We didn't have
5 it before now

6 But she has not looked carefully to calculate
7 what the cost would be to perform the contract So
8 basically she is giving them a gross profits minus this
9 little bit of money

10 That is not a proper analysis from an account-
11 ing standpoint in terms of what the costs should be

12 THE COURT But that just goes to the weight of
13 the testimony, doesn't it?

14 It just goes to weight and not admissibility?

15 MR BABCOCK I think it is still speculative,
16 Your Honor

17 When you look at it, she's going back and creat-
18 ing a fictional situation for what could have hap-
19 pened out there and that is not testimony The tes-
20 timony shows what did happen out there

21 So from that standpoint it is speculative, be-
22 cause there is no testimony as to what could have
23 been done during the last eighteen months

24 She is assuming that all of those lots and houses
25 would be sold -- all of it would be sold, and that

1 is speculation

2 THE COURT Any response?

3 MR BOWENS Yes, Your Honor Number one, the
4 contract within its terms defines what the net pro-
5 fits are Ms Richards in her deposition testified
6 that she used that formula to calculate the lost profits,
7 and that's the same formula that

8 THE COURT What is that formula?

9 MR BOWENS In paragraph -- I think in paragraph
10 five, it says for this purpose net profits shall be
11 defined as, and it lists the formula for net profits

12 (Whereupon, there was a brief pause in the pro-
13 ceeding)

14 MR BOWENS This new document that the defense
15 is referring to this morning is the same document we
16 had before The net profits are defined in the contract
17 so this is nothing new

18 It's the same chart as before with one element
19 of damages taken out with nothing for that

20 Additionally, the Supreme Court has held that in
21 a case for lost profits you have to bear in mind that
22 -- it says that profits are prospective in nature and
23 must be to some extent asserted in a cause of action,
24 and because of that there must be (reading rapidly
25 from case)

1 THE COURT And what case is that?

2 MR BOWENS That is Sturkie versus Anderson-
3 Westside, a Supreme Court case, and I'll give you a
4 cite

5 The cite is 236 South Carolina 109, 113 South-
6 east Second 329

7 THE COURT All right

8 MR BOWENS I think that is all, but if you
9 would give me a moment

10 (Brief pause in the proceeding)

11 THE COURT Anything further?

12 MR BABCOCK Your Honor, three things First
13 off, in looking at the case law -- and we looked very
14 hard -- and I am not aware of any cases which would
15 have you go backwards in time and recreate a contract

16 The lost profit cases look at going forward and
17 determining what the profits would have been in the
18 future, not going back in time to recreate the con-
19 tract

20 That is what that language goes to, with not hav-
21 ing to have it to a mathematical certainty

22 So what you have in that situation is you have
23 a track record and you have some basis for looking at
24 how you go forward

25 In fact, it wasn't that -- it wasn't that long

1 ago in a lost profit situation for a business that
2 the Supreme Court wouldn't have allowed that

3 You are always going forward, not looking back
4 and recreating That's how they allow it now

5 This case again is a basic contract analysis where
6 you look at damages from the standpoint of what the
7 necessary and direct damage would be from the breach
8 You have to look forward in this case

9 You cannot look at gross profits You have to
10 draw an analysis of net profits in terms of time,
11 money and all the other evaluations that go into this,
12 and this analysis hasn't been done

13 It is much more important to be going forward,
14 not looking backward, recreating, which is speculative

15 MR BOWENS Judge, we do have a basis in this
16 case for going and determining damages We have a
17 phase four We have phase one which has been com-
18 pleted

19 Dutch Fork Development Group and Dutch Fork
20 Realty have been in business a good while and have
21 a good track record

22 The case law is clear that plaintiffs have a
23 right to recover loss of profits, and when you have
24 lost profits you use whatever is the subject of those
25 profits to generate them

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1 There has been plenty of testimony in the case
2 that the five year term of the contract was sufficient
3 time for this project to have been completed, and it
4 would have been but for the Defendants' interference
5 and then preventing us from carrying out our duties
6 under the contract

7 The expert for the Defense testified in deposi-
8 tion that the methodology used by our expert witness
9 was accurate and correct He had some issues with
10 the numbers used, but the methodology used was accur-
11 ate

12 MR BABCOCK That is not true, Your Honor Mr
13 Ouzts testified he looked at phases one and four and
14 did not look at phases two and three which is different

15 In terms of the remaining eighteen months of
16 the contract, that is what they were presented from
17 witnesses who testified about lost commissions Lost
18 profits would be from that eighteen months alone

19 That is what they should be entitled to receive,
20 but they haven't done any analysis of what portion
21 of phases two and three could have been done during
22 that time

23 Nobody has done any analysis from that standpoint
24 at all They are going back in time to redo the con-
25 tract and have it be perfect, which is what Ms Richards

1 did, Your Honor

2 She took every lot and every sale, with everything
3 being perfectly done

4 She didn't take into consideration when those
5 numbers would have been seen She just came up with
6 straight numbers and did it in a simple manner, and
7 from that aspect, for the damages

8 MR BOWENS Your Honor, I don't believe Ms
9 Richards has recreated the contract She used those
10 terms in the contract and the formula in the contract

11 The contract contemplated that the project would
12 be built in five years and it was contemplated by the
13 parties that there would be profits and commissions
14 in phase two and three

15 I would also point out that Dutch Fork Realty did
16 waive their commissions on lots bought by home builders,
17 and it is to the tune of over a Hundred Thousand Dol-
18 lars that they gave up there

19 Plus, they had already performed under the con-
20 tract to get that profit and the value of that profit
21 is what the commissions would have been on those
22 houses in phase two and three which was prevented from
23 being realized by the Defendants

24 It is a very clear case of lost profits as we
25 have said, Your Honor

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1 THE COURT I will look at it over the break
2 and rule on it after lunch

3 MR BABCOCK Thank you, Your Honor

4 (The Court stood in recess for the lunch period
5 from 1 02 P M until 2 22 P M , when the matter was
6 resumed)

7 THE COURT I have had the opportunity to re-
8 view the memorandum with regard to the testimony of
9 Ms Richards and to review some of the cases that
10 were discussed

11 I have also reviewed the Amended Complaint, and
12 from the information and law that I have read I'm
13 going to allow ~~the~~ testimony

14 I will allow the testimony of Lynn Richards The
15 Amended Complaint sets forth claims or allegations
16 that the Defendants breached the contract and did so
17 with dishonesty and unfairness, and intentionally pre-
18 vented attempts to be able to go forward with funding
19 and being able to fully develop phases two and three

20 Their claims include this allegation of costs,
21 improper use of funds, improperly increasing the costs
22 of engineering and road construction repair

23 So in addition to their claim that they were en-
24 titled to commissions for phases one and four and the
25 development fee for those phases, they are also claiming

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1 that the Defendants intentionally engaged in conduct
2 that prevented them from being able to complete the
3 contract and to pursue and receive both the profits
4 that were owed as well as the development fees and
5 commissions

6 And so based upon the allegations and the testi-
7 mony that has also been presented thus far throughout
8 the course of the trial, I think that it would be ap-
9 propriate to allow the testimony of Ms Richards or Mr
10 Richards, as the case may be -- whichever it is

11 On the profits that would have been realized --
12 the profits that would have been realized had the con-
13 tract been performed as it was intended to be performed,
14 and without the undue interference from the Defendants

15 So I will allow her testimony

16 Is there anything else we need to take up before
17 we begin?

18 MR BOWENS No, Your Honor

19 MR BABCOCK Nothing from the Defense, Your
20 Honor

21

22

23

24

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P Lynn Richards – Direct Examination by
Glenn E Bowens

1 THE COURT You may ask the jury to come in,
2 please
3 (Jury returned to Courtroom at 2 26 P M)
4 THE COURT You may call your next witness
5 MR BOWENS Lynn Richards
6 P LYNN RICHARDS, duly sworn,
7 testified as follows
8 CLERK Please have a seat on the witness stand
9 and state your name for the record
10 WITNESS Lynn Richards
11 DIRECT EXAMINATION
12 BY MR BOWENS
13 Q Ms Richards, where are you employed?
14 A I'm self-employed Lynn Richards, CPA
15 Q Where is your office?
16 A At 2519 Devine Street in Columbia
17 Q Give us a little information about your back-
18 ground, education and training
19 A I have a college degree in fine arts and sculp-
20 ture that I earned in 1976, I believe I went back
21 to school at UCLA to take accounting course work I
22 passed the CPA exam in 1985 and became certified in
23 1986 as a CPA I think that's all
24 Q Tell us about your practice, the scope of it?
25 A My practice is limited to business management

MS RICHARDS ON DIRECT

1 I also have been a witness and given trial testimony
2 Q Have you testified as an expert in South Carolina
3 Common Pleas Courts in the past?
4 A I have
5 MR BOWENS Your Honor, at this time I would
6 offer Ms Richards as a CPA
7 THE COURT Any voir dire?
8 MR BABCOCK No, Your Honor
9 THE COURT Any objection?
10 MR BABCOCK No, Your Honor
11 THE COURT I find her so qualified You may
12 continue
13 BY MR BOWENS
14 Q Have you examined financial documents and given
15 testimony concerning them in Court?
16 A I have
17 Q And were you retained in this case as an expert
18 witness for the Plaintiff?
19 A I was
20 Q And have you reviewed the contract that was
21 signed between SEL and Dutch Fork Development Group
22 and Dutch Fork Realty to determine what kinds of
23 compensation Dutch Fork Development Group and DFR --
24 what amounts were due, and what exactly the compensa-
25 tion would entail?

MS RICHARDS ON DIRECT

1 What forms the compensation would take?

2 A Basically, the contract spells out three ways
3 that DFDG and DFR were intended to be paid

4 The first way they were to be paid was by get-
5 ting a fee, a development fee, for their work in
6 development, coordinating builders, bringing builders
7 into the project, getting permits and coordinating
8 with the engineers, and sort of setting the conditions
9 for the piece of property

10 The second area of compensation would be commis-
11 sions that were between DFR and SEL

12 Dutch Fork Realty was to get a commission on
13 each lot that was sold

14 If the lot was sold to a builder, they would
15 only earn a commission where there was a contract
16 for a spec home in place -- excuse me, a contract home
17 A contract home is where someone might come in and
18 say, I have a vision of this house I want someone
19 to build it, and I am going to choose KG Builders to
20 build this home

21 I know what plans I want, and then KG Builders
22 would buy the lot and build the house There would
23 have been a commission due to Dutch Fork Realty be-
24 cause there was no back end commission due

25 A spec house is where there is no intended

MS RICHARDS ON DIRECT

1 customer in mind A builder simply buys a lot to put
2 a home on it and then hopes for a buyer to come along
3 at a later point

4 Q Okay

5 A A third way that there would be compensation was
6 to be earned through sharing profits at the end of
7 the phases, like I said, with twenty-five percent
8 going to DFR/DFDG and seventy-five percent to SEL

9 Q Have you analyzed the receipts and the expenses
10 from the accounting records on the project to deter-
11 mine what the profits were based on, to a reasonable
12 degree of accounting certainty?

13 A I have

14 Q All right I hand you what's marked as Exhibit
15 141

16 Can you tell the Court what this is?

17 A That is a schedule that I have prepared in order
18 to ascertain what profits would be due on the different
19 phases of the project because, again, the third area
20 that there was supposed to be compensation was in the
21 profits split between SEL and Dutch Fork Development
22 Group

23 And so I decided to create this schedule to try
24 and get to some reasonable estimate of what those num-
25 bers might have been

MS RICHARDS ON DIRECT

1 MR BABCOCK Your Honor, if I might object at
2 this point for the record to this document which has
3 not been moved into evidence yet It does show informa-
4 tion on it concerning phases two and three

5 As stated earlier, we would renew our objection
6 as to any testimony concerning phases two and three

7 THE COURT Your objection is noted and for the
8 reasons given for allowing the testimony, as well as
9 allowing the amendments

10 MR BABCOCK Yes, Your Honor, and we would ask
11 for a continuing objection to be noted as to that

12 THE COURT Yes, sir

13 You may continue

14 BY MR BOWENS

15 Q Ms Richards, what have you arrived at for loss
16 of profits for phase one? Tell us about that

17 A Sure

18 Q That is what is shown in this first column?

19 A That's correct The first one is phase costs
20 per SEL, so I have looked at the books and records of
21 SEL to determine what costs have been charged and
22 what I wanted to do was establish a trail so that you
23 can kind of come back and kind of trace the numbers
24 and I thought that was the best way to start

25 So that is what that first line is

MS RICHARDS ON DIRECT

1 These are costs that they have assigned, they
2 being SEL, or John Quinn or SEL bookkeepers

3 So the first line is what I came up with there,
4 and you can see that the total for all of the costs
5 that were assigned amounted to Three Million One Hun-
6 dred Twenty-nine Thousand Nine Hundred and Thirteen
7 Dollars

8 Then they are broken down according to phases
9 Phase one would have been One point Seven Million
10 Phases two and three were Eight Hundred Forty-two
11 Thousand Dollars, and the development costs of phase
12 four were Five Hundred Fifty-four Thousand Dollars

13 THE COURT Do you have an extra copy of that?

14 (Brief pause in the proceeding)

15 THE COURT Go ahead

16 WITNESS Are you ready, Mr Bowens?

17 MR BOWENS Just one moment, please I apologize
18 for the delay

19 BY MR BOWENS

20 Q So these were the costs that were allocated by
21 SEL to phase one?

22 A Correct

23 Q And were these costs correct?

24 A No There were improper allocations made in the
25 SEL books

MS RICHARDS ON DIRECT

1 Q How did you determine that?

2 A I determined that by actually looking at the books
3 and finding bookkeeping errors where something had
4 not been charged to phase one and was indicated as
5 Dutch Fork and phase four that should have been in one
6 there would be things like that and I could then
7 begin to see that the phase one costs of One Point
8 Seven Million Dollars -- so quite a bit of the costs
9 had gone into phase one

10 When you have a project like this, generally ac-
11 cepted accounting principles and tax rules require you
12 to make an allocation as to that so that your dollars
13 are assigned to the physical assets as you are moving on
14 with it I'm not sure that was true

15 In addition, we learned that almost all of the
16 engineering costs had been charged to phase one, and
17 some of the engineering costs should have gone to
18 phase two and three

19 And there were a lot of improper allocations The
20 biggest thing was construction, which is the fourth
21 line on here

22 The construction figure could not possibly have
23 been right All the construction costs have been
24 assigned to phase one

25 Q Is it your testimony

MS RICHARDS ON DIRECT

1 A We have heard testimony already that water and
2 sewer lines came up through phase four, up from phase
3 three and phase two, rather than just to phase one

4 So it wasn't fair to allocate all of those costs
5 back to phase one They should be allocated back to
6 the phases which got benefit from that

7 So I prepared this little chart to show you that
8 and how it worked The total costs assigned were as
9 shown, Three Million One Hundred Twenty-nine Thousand
10 Nine Hundred Thirteen Dollars

11 Phase one is One point Seven Million, and it is
12 roughly sold out Phase two and three are ones that
13 are in process

14 The water and sewer came from Rolling Creek, as
15 you heard, so the dollar amounts have to be assigned to
16 the area to which they flow

17 Q Are you referring to Exhibit 144?

18 A Yes

19 MR BOWENS Your Honor, we would offer Exhibit
20 144 in evidence

21 THE COURT Any objection?

22 MR BABCOCK Without objection

23 THE COURT Admitted

24 (Chart prepared by Ms Richards admitted into
25 evidence without objection as Plaintiffs' Exhibit 144)

MS RICHARDS ON DIRECT

1 BY MR BOWENS

2 Q The construction costs you were talking about a
3 few minutes ago is shown on Exhibit 144?

4 A Yes

5 Q So that is what is shown here?

6 A Correct

7 Q And if you had not reallocated those in a proper
8 way, what would have been the results to the profits
9 in phase one?

10 A They would have been severely diminished to say
11 the least, if not completely eliminated

12 Q You were saying that the dollars had to be tied
13 to the physical assets?

14 A That's correct

15 Q And where do you get that information?

16 A Well, it is generally accepted accounting prin-
17 ciples and also the tax rules, called Uniform Capi-
18 talization Rules

19 You are required to make cost allocations to
20 the project or area that is enhanced, such as these
21 costs I spoke of that should have gone to sections two
22 and three

23 Q All right, and if you would just go on with the
24 matter of the cost allocations that you were referring
25 to

413

MS RICHARDS ON DIRECT

1 A Sure

2 Q What other things did you find?

3 A I also found that all of the landscaping and
4 bricks and frontage of the project had been charged
5 against phase one That is incorrect because this is
6 the main entrance to the subdivision and phases two
7 and three benefit as those lots are going to be sold
8 based on the appearance of that entrance way They
9 will all be a part of that subdivision

10 So a benefit goes with that frontage that is
11 out there on the road and really the entire subdivis-
12 ion gains from that frontage, although maybe not as
13 much as phase one does

14 So I have split that cost between phase one and
15 all the remaining phases

16 I felt that that was a fair allocation or to me
17 it was reasonable

18 Q So you split those costs between the phases?

19 A And based on that, you can see the cost to phase
20 one is One Million Three Hundred Ninety-five Thousand
21 Six Hundred Ninety-eight Dollars, and you can also
22 see that the total cost was still Three Million One
23 Hundred Twenty-nine Thousand Nine Hundred Thirteen Dol-
24 lars I did not increase the costs

25 So I simply put this amount where it should be

1 Now, in seeing that, I realized that there were
2 development fees that were also a part of the cost
3 of creating this development So that development fee
4 is Fifty-four Thousand Dollars for phase one, and
5 Fifty-four Thousand for phase two and Fifty-four Thous-
6 and for phase three I added those in

7 The contract says that Dutch Fork Development
8 Group was entitled to a development fee of Nine Thous-
9 and Dollars a month for six months which was Fifty-four
10 Thousand for each phase

11 Q That would be Fifty-four Thousand for each phase?

12 A Yes

13 Q All right

14 A The books and records of SEL showed that there
15 had been a lot of interest paid to NBSC on the develop-
16 ment loan There had been property tax -- property
17 taxes, insurances on the property and a lot of other
18 costs that I felt like should be considered costs for
19 the entire project

20 So I added those costs in by percentages

21 Those are required to be considered a part of the
22 project costs and then used there by each phase, and
23 that is shown here

24 The percentages of land allocation entered into
25 it and based upon those calculations I came up with

MS RICHARDS ON DIRECT

1 a dollar value of One Million Six Hundred Forty-eight
2 Thousand Eight Hundred Forty-three

3 Q What was your next step in determining the pro-
4 fits to Dutch Fork?

5 A The next step was to ascertain, using the formula
6 that is contained in the contract, what profits were
7 derived

8 So I then took -- I created another schedule and
9 I don't believe that is in evidence I traced all of
10 the HUD closing statements that we had on the project
11 and added up -- simply added up every single lot as
12 was sold

13 In doing that, I got Two Million Two Hundred Eight
14 Thousand Six Hundred Dollars They had that much in
15 sales

16 Now, on those HUD statements are commissions that
17 were paid to Dutch Fork Development Group, as well
18 as other small costs, such as stamps, attorneys' fees,
19 real estate taxes, all of those things

20 Those were deducted in order to determine profits
21 So I added up all of those which appeared on those HUD
22 statements which came to One Hundred Four Thousand
23 Five Hundred Fifty-six Dollars in costs

24 Then from that I deducted One Million Six Hundred
25 Forty-eight Thousand Eight Hundred Forty-three Dollars

1 in costs that I brought down, and came to Four Hundred
2 Fifty-five Thousand Two Hundred One Dollars in pro-
3 fit

4 Now, the next thing I did was add back the cost
5 of the road repairs, and I got that number, a Hundred
6 Forty-seven Thousand Eight Hundred Thirty Dollars, from
7 the deposition of John Quinn, the CPA for SEL Prop-
8 erties

9 I added those back in because I think previous
10 testimony has shown that those were costs that should
11 not be shared with Dutch Fork Development Group

12 Based upon that, I came up with a net profit of
13 Six Hundred Three Thousand Thirty-one Dollars I
14 multiplied that by the percentage to Dutch Fork Devel-
15 opment Group under the terms of the contract and came
16 up with net profit to them on phase one of a Hundred
17 and Fifty Thousand Dollars

18 Q And did you use generally accepted accounting
19 principles to come up with this number?

20 A I did

21 Q Now, have you determined the profits connected
22 with phases two and three?

23 A I was able to estimate that, yes, and the costs

24 Q Can you explain how you went about estimating
25 those costs and profits?

MS RICHARDS ON DIRECT

1 A I can In association with phases two and three,
2 I took the total sales price of Forty-four Thousand
3 Dollars per lot and I got that from the current list
4 price of the lots that are in the depositions

5 Q That is shown down in this lower section here?

6 A That's right If you take the Forty-four Thous-
7 and Dollars and multiply it by the one hundred ninety-
8 four lots remaining, it gives you Eight Million Five
9 Hundred Thirty-six Thousand Dollars for those lot
10 sales

11 Then from that, you have to get your costs of
12 sale, and I had to estimate that and I used what I
13 think is a very conservative estimate I used eleven
14 percent, and I arrived at eleven percent because if
15 all the lots had been sold to non-builders there
16 would have been a commission due to Dutch Fork Realty
17 of ten percent plus the other remaining costs I told
18 you about earlier, which are taxes, stamps, other
19 things

20 So I deducted that from the sales figure, and the
21 next thing I did was to apply the land development
22 costs as you see them up in the top part of the chart
23 for phase two and phase three,

24 Q The One point Seven Million Dollars?

25 A One point seven Million Dollars

MS RICHARDS ON DIRECT

1 Q All right

2 A Then I added in an estimate of what it would
3 cost to finish out the rest of the development, and
4 I picked the number of Two Million

5 The reason I picked that number was because
6 the cost of one lot was roughly Twenty Thousand Dol-
7 lars per lot These are very small lots Some of
8 them are less than a quarter of an acre

9 Based upon my experience in real estate develop-
10 ment, and working with real estate developers over
11 my career in accounting, that is a reasonable cost
12 of the lots

13 So that gave me a total cost of Three Million
14 Eight Hundred Eighty-four Thousand Seven Hundred Sixty-
15 eight Dollars Again, I just multiplied that by the
16 twenty-five percent that would have been due under
17 the terms of the contract, and came up with Nine Hun-
18 dred Seventy-one Thousand One Hundred Ninety-two Dol-
19 lars

20 Then the last number is just adding phases one
21 together with phases two and three to come up with One
22 Million One Hundred Twenty-one Thousand Nine Hundred
23 Fifty Dollars total that would be due Dutch Fork De-
24 velopment Group under the profit sharing split

25 Q The next thing over here is phase four What
419

MS RICHARDS ON DIRECT

1 did you determine with regard to phase four as far as
2 costs go?

3 A In phase four I determined that there were some
4 incorrect construction costs allocated there Again,
5 the total cost was exactly right, Three Hundred and
6 Seventy-seven Thousand Three Hundred Eighty-eight Dol-
7 lars That was exactly right

8 And then they had put some bricks and landscaping
9 and signage, and that was one of the bookkeeping er-
10 rors that I told you about

11 So it was -- it really should have been for the
12 entire project, rather than just for phase four

13 The same thing with property taxes and the miscel-
14 laneous costs I came up with those by using the
15 amounts from the general ledger and I used a percent-
16 age based upon the land

17 So the total cost of Three Seventy-seven Three
18 Ninety

19 Q If you take the gross sales from phase four and
20 subtract that amount you have determined to be the
21 costs, along with the cost of the land purchase for
22 phase four, would that result in the net profits for
23 phase four?

24 A

25 MR BABCOCK Objection, Your Honor May we

420

MS RICHARDS ON DIRECT

1 approach?

2 THE COURT Approach

3 (Conference at the bench between counsel and
4 the Court off the record)

5 THE COURT You may continue

6 MR BOWENS Thank you, Your Honor

7 DIRECT EXAMINATION CONTINUED

8 BY MR BOWENS

9 Q Ms Richards, the methodology that you have de-
10 scribed for the Court,

11 A Yes, sir

12 Q as to how you arrived at the profits in the
13 different phases of the project, the taking of the
14 sales price of the lots purchased, less the costs as
15 you have determined,

16 A Yes, sir

17 Q and doing the addition and the subtraction
18 by proper methodology to determine any kind of net
19 profits

20 MR BABCOCK Your Honor, I would object to
21 the question

22 He's leading the witness

23 THE COURT I don't believe he completed his
24 question

25 Rephrase the question

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MS RICHARDS ON DIRECT

1 BY MR BOWENS

2 Q The methodology you described this afternoon as
3 to how you determined the lost profits -- I'm sorry,
4 the profits for phase one, is that the proper method-
5 ology that an accountant would use or anyone would
6 use in trying to determine the profits

7 MR BABCOCK The same question, Your Honor It's
8 leading

9 THE COURT I will overrule the objection
10 You can answer

11 A The profits are -- it is not a hard formula If
12 you sell anything, minus what it costs you, you make
13 that amount of profit

14 It is just simple math, putting in a sales price
15 and subtracting out the costs That is the net pro-
16 fit

17 Q Have you been able to determine to a reasonable
18 degree of accounting certainty the commissions that
19 were due to DFR?

20 A Yes

21 Q I show you Exhibit 142

22 A

23 MR BOWENS Your Honor, I would offer at this
24 time in evidence Exhibit 141

25 THE COURT Any objection?

MS RICHARDS ON DIRECT

1 MR BABCOCK No objection

2 THE COURT Admitted

3 (Richards chart admitted in evidence without ob-
4 jection as Plaintiffs' Exhibit 141)

5 BY MR BOWENS

6 Q If you would go ahead and explain to the jury
7 Exhibit 142

8 A This is a schedule that outlines the commissions
9 that were due to Dutch Fork Realty

10 In phase one we had one odd sale to a non-builder
11 and one closing statement that has no required commis-
12 sion

13 I don't know what happened there but on this one
14 particular lot that did not happen It may have been
15 an oversight

16 The average price of the homes sold in phase one
17 -- the average price is Three Hundred Three Thousand
18 and there are ten remaining homes that hadn't sold, and
19 I used the three percent rate that would have been
20 Dutch Fork Realty's commission, and I came up with
21 Ninety Thousand Nine Hundred Eleven Dollars in sales
22 commissions or real estate commissions for phase one

23 I did the same thing then for phases two and
24 three, and what I did there is I took the total earned
25 commissions for phase one that we have here today

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1 Again, some of those commissions are commissions
2 on home sales and some are on lot sales, and they vary
3 widely as to amount, so you have to kind of average
4 it from historical data to get the number that you
5 can use

6 Q When you say they are varied, what is the var-
7 iable that causes the difference in commissions?

8 A Well, the variable in the lot sales is a flat
9 ten percent, so the maximum that could be earned is
10 Four Thousand Four Hundred Dollars

11 If I have a home that sells for Three Hundred Thous-
12 and, three percent is Nine Thousand

13 Then if Dutch Fork Realty had acted as both the
14 seller's agent and the buyer's agent, they would be
15 entitled to a six percent commission, which on a
16 Three Hundred Thousand Dollar house would be Eighteen
17 Thousand Dollars

18 So on phase one, if you take the average commis-
19 sion earned per lot -- if you took the average commission
20 per lot and there are one hundred ninety-four houses
21 in phase one, so that totals the amount earned in
22 commissions as One Million Six Hundred Fifty-five
23 Thousand Eight Hundred Five Dollars and Ninety Cents
24 That would be the total commission due taking an aver-
25 age commission of Eight Thousand Five Hundred Thirty-

MS RICHARDS ON DIRECT

1 five Dollars times the 194 lots

2 Q Thank you

3 MR BOWENS We would offer Exhibit 142 into evi-
4 dence

5 MR BABCOCK Without objection

6 THE COURT Admitted

7 (Richards chart admitted as Plaintiffs' Exhibit
8 142 in evidence)

9 BY MR BOWENS

10 Q You spoke about the development fees

11 A Yes I spoke of the total development fees of
12 One Hundred Sixty-two Thousand Dollars, or Fifty-four
13 Thousand for phase one, Fifty-four Thousand for phase
14 two, Fifty-four Thousand for phase three

15 Q What is Exhibit 143?

16 A That is just a summary comprising all of the
17 money that would be due DRDG and DFR on the exhibits
18 we have just talked about

19 First would be the development fees of One Hundred
20 Sixty-two Thousand Then the profit split of One Mil-
21 lion One Hundred Twenty-one Thousand Nine Hundred and
22 Fifty Dollars, and the real estate commissions due
23 for phases one, two and three of One Million Seven
24 Hundred Forty-six Thousand Seven Hundred Seventeen,
25 giving a total due Dutch Fork Development Group and

1 Dutch Fork Realty combined of Three Million Thirty
2 Thousand Six Hundred Sixty-seven Dollars

3 MR BOWENS We would offer Exhibit 143 in evi-
4 dence

5 MR BABCOCK No objection

6 THE COURT Without objection, it's admitted
7 (Summary of amounts due entered in evidence with-
8 out objection as Plaintiffs' Exhibit 143)

9 MR BOWENS I have no further questions of Ms
10 Richards

11 THE COURT Cross examination

12 CROSS EXAMINATION

13 BY MR BABCOCK

14 Q Ms Richards, as I understand your testimony,
15 you have offered an opinion as to the development fee
16 for all three phases of Rolling Creek -- Courtyards
17 at Rolling Creek?

18 A That is correct

19 Q And you have offered a profit figure for all three
20 phases or profit split?

21 A That's correct

22 Q And going to your profit figures, that is One
23 Hundred Fifty Thousand Dollars for phase one, is
24 that correct?

25 A Yes

MS RICHARDS ON CROSS

1 A Yes

2 Q I believe Dutch Fork Realty was a client of
3 yours?

4 A Yes, they were

5 Q For a number of yours, the Meltons have been ac-
6 quaintances of yours?

7 A In various entities they were involved in, yes

8 Q They were all your clients?

9 A That's correct

10 Q Now, this contract we are here on today, you
11 have seen that contract, haven't you?

12 A Oh, yes

13 Q And you are aware that it was a five year contract
14 starting in November of 2000, and that five year mark
15 came in 2005?

16 A Yes, sir Correct

17 Q Now, you have used as your critical date or in
18 your opinions have you

19 A For which opinion?

20 Q Your opinion as to phase one, and we realize for
21 two and three you were projecting

22 A Right

23 Q And you are projecting

24 A I'm not sure how to answer that I'm sorry

25 Q Let me rephrase it

MS RICHARDS ON CROSS

1 Q And for phases two and three, you have Nine Hun-
2 dred Seventy-one Thousand One Hundred Ninety-two, is
3 that correct?

4 A Correct

5 Q Those are phases that haven't been done You are
6 aware of that, right?

7 A I am aware of that, yes

8 Q And we will do the math in a minute, but isn't
9 that a projection you made for those phases, correct?

10 A Yes

11 Q The phase one figure was based on the actual data,
12 is that correct?

13 A That's correct

14 Q And the same situation would be true for your
15 commission figures?

16 A Yes

17 Q Phase one you are looking at commissions that act-
18 ually had been received but projected amounts in two and three
19 Is that correct?

20 A Correct

21 Q And is it true that you have previously done work
22 for a number of clients, is that correct?

23 A I did, for bookkeeping purposes

24 Q And for a number of years Dutch Fork Development
25 Group was a client of yours?

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MS RICHARDS ON CROSS

1 A Okay

2 Q In phase one, you used the actual data, is that
3 right?

4 A Yes

5 Q Now, the question I've got for you as to your
6 analysis of phase one, was it as of November of 2000
7 or after that?

8 A I did take into consideration data after that
9 time

10 Q You took the sales information from June of
11 2006, correct?

12 A It may have been later than that

13 Q Okay, you took it later Now, in that regard,
14 and talking about paragraph eight, paragraph eight had
15 the five year clause

16 You're familiar with that?

17 A I am

18 Q Going to paragraph nine, (reading from contract)
19 Are you with me?

20 A I am

21 Q Let's go back to Exhibit 141 Exhibit 141 -- you
22 put in the costs for phase one as a proper charge to
23 the project Correct?

24 A Yes

25 Q And the cost for road repairs, correct?

MS RICHARDS ON CROSS

1 A

2 Q And when you started to arrive at the actual
3 profits, you deducted that out?

4 A Correct

5 Q So One Hundred Forty-seven Thousand Eight Hundred
6 Forty Dollars was an expense on phase one?

7 A It was an expense that was recorded on the books,
8 yes

9 Q And the reason you've taken it out is because
10 the Meltons indicated to you that this is a cost that
11 they thought could have been mitigated?

12 A That's correct

13 Q So you took it out?

14 A That's correct

15 Q And if you hadn't taken it out, the number would
16 have been Four Hundred Fifty-five Thousand Two O One?

17 A Correct

18 Q That's what the books actually show when you did
19 your analysis for the part regarding profits?

20 A Correct

21 Q Now, you are familiar with construction projects,
22 aren't you?

23 A I am

24 Q And, Ms Richards, you know that after construc-
25 tion begins there are expenses associated with the

MS RICHARDS ON CROSS

1 project?

2 A I am

3 Q And in this case there were some expenses con-
4 nected with the project after the project was complete,
5 such as interest expense?

6 A I would not be able to recall that exactly off
7 the top of my head

8 Q You didn't include any interest expense during
9 that time that the project was maintaining the prop-
10 erty at Courtyards, did you?

11 A I don't think that's correct I think interest
12 was included

13 Q Where is interest included?

14 A There is a line item that says interest, taxes,
15 insurance

16 Q Now, is it your testimony that that included all
17 of the interest?

18 A All of the interest that was booked on the books,
19 yes

20 Q To that point in time?

21 A I believe that is true

22 Q Where is the landscaping?

23 A Landscaping is also included there The second
24 line from the bottom where it says incorrect brick and
25 signs I've added it back in as corrected

431

MS RICHARDS ON CROSS

- 1 Bricks, landscaping, signage
- 2 Q Did you include all the landscaping through the
- 3 end of your cost period?
- 4 A Yes, I did
- 5 Q All right, and did you also include all the taxes
- 6 to the end of your tax period?
- 7 A I did
- 8 Q Let me ask a question about the reallocation of
- 9 the engineering construction costs You see that?
- 10 A Yes
- 11 Q You received some information from Mr Maxheimer
- 12 on the costs to do this reallocation?
- 13 A I received it actually from Mr Bowens who told
- 14 me he received it from Mr Melton who received it
- 15 from Mr Maxheimer
- 16 Q But it came from Mr Maxheimer?
- 17 A Yes
- 18 Q And were you aware that what Mr Maxheimer did
- 19 was to make an estimate of the allocation of the cost?
- 20 Is that correct?
- 21 A You know, I honestly have no knowledge of how he
- 22 prepared those numbers
- 23 Q All right, so you just don't know?
- 24 A I really don't
- 25 Q Now, what he did indicate was that while there

432

MS RICHARDS ON CROSS

1 were some changes that should be made for phases one,
2 two and three, that phase four was correct?

3 A That is correct

4 Q And so if we are looking at the total dollars
5 that were incorrectly spent for engineering, that
6 should represent the amount of dollars for the cor-
7 rect allocation Is that correct?

8 A No, not exactly because there were some engi-
9 neering costs that Mr Maxheimer did not allocate

10 There was another firm called GS Two, I believe,
11 that was not included in the numbers There were
12 other miscellaneous costs for engineering firms that
13 were included in Mr Maxheimer's analysis

14 Q And actually those were small amounts, is that
15 right?

16 A Yes

17 Q And for phase four, his numbers were correct?

18 A Yes

19 Q And that was true for most of the construction,
20 correct?

21 A I'm not sure

22 Q But when we look at what you did -- let's look
23 at what you said as far as engineering that was wrong

24 You would have subtracted that out Is that
25 what those brackets indicate?

433

MS RICHARDS ON CROSS

1 A Yes

2 Q And so the numbers not in brackets you have put
3 back in?

4 A Correct

5 Q Now, on phase four, is it correct that you took
6 out the incorrect construction costs and didn't put
7 any back in?

8 A Correct

9 Q All right, so that number down here should be
10 Two Hundred Twenty-two Thousand Two Hundred Forty-two
11 Dollars, shouldn't it?

12 A No

13 Q Are you saying there were no construction costs
14 for phase four?

15 A There were none given to me None were given
16 to me by Mr Maxheimer

17 Q But there were some construction costs?

18 A How would I know that?

19 Q The analysis for the entire project, and you know
20 there is engineering for all the phases Right?

21 A Correct

22 Q You know that phase four has now been built? Are
23 you aware of that?

24 A I really don't know that I am aware of that

25 No, sir

MS RICHARDS ON CROSS

1 Q All right

2 A Honestly, I don't know where the demarcation be-
3 tween phase four and phases two and three end I
4 haven't been out to the project as I told you earl-
5 ier, and, you know, I relied upon what the engineer
6 told me on the construction costs, and he did not give
7 me construction costs for phase four

8 Q Let's go over that Did you get information from
9 the accountant that caused you to question some things
10 before further analysis?

11 A. Yes

12 Q This is a construction case? You know that?

13 A Yes, sir

14 Q And you know that construction has been going
15 on in phase four?

16 A Correct

17 Q And it's your testimony today that you don't
18 know whether there have been any construction costs
19 associated with phase four?

20 A I believe that my testimony to you in my depo-
21 sition was that I had no opinion about phase four
22 but what I was told

23 Q I'm not asking about the deposition I'm asking
24 about -- there has been testimony here about phase
25 four and sales in phase four

MS RICHARDS ON CROSS

1 Were you here for any testimony concerning sales
2 in phase four?

3 A I was here for Mr Melton's testimony here today
4 about phase four, I believe

5 Q He talked about the sales?

6 A I believe so

7 Q And you were in the Courtroom at that time?

8 A Yes I was here from sometime after twelve

9 Q And if I represent to you that he did testify as
10 to sales in phase four of One Million Two Hundred and
11 Nineteen Thousand Dollars, there has got to be construc-
12 tion in phase four?

13 A Absolutely

14 Q So if you have sales like that in phase four,
15 there have got to be construction in phase four, does
16 there not?

17 A Absolutely

18 Q And construction costs?

19 A Absolutely

20 Q So as you sit here today, there should be some
21 number on your chart for phase four construction costs
22 Right?

23 A There probably should be, yes

24 Q And would you have any reason to think it should
25 be the same figure if the engineer was the same?

436

MS RICHARDS ON CROSS

1 A

2 Q Mr Maxheimer didn't change that, did he?

3 A No, he didn't

4 Q Do you have any reason to doubt that the construc-
5 tion should be the same?

6 A I don't

7 Q Do you have any reason to doubt that the construc-
8 tion should be the same?

9 A Yes, I believe there would be doubts Some of
10 the things on the other phases were wrong so I can't
11 say that just because you say the engineering costs
12 were the same -- I believe that's what you said

13 I could not give you an opinion that the construc-
14 tion costs should be the same, therefore

15 Q Did you ever talk to Mr Maxheimer?

16 A No

17 Q You got a piece of paper from Mr Maxheimer,
18 didn't you?

19 A I did

20 Q And that piece of paper only talks about phases
21 one, two and three, doesn't it?

22 A I -- probably so I don't have that before me

23 Q Do you want to see it?

24 A Okay

25 (Brief pause in the process)

437

MS RICHARDS ON CROSS

1 Q Nothing about the engineering costs in phase four
2 being correct?

3 A No, it doesn't

4 Q Doesn't say anything about construction costs
5 being correct or incorrect, does it?

6 A No, sir

7 Q It is totally silent as to phase four?

8 A Yes, it is silent

9 Q And yet that was sufficient for you totally to
10 decide the engineering costs should be the same Is
11 that correct?

12 A Yes

13 Q And yet it assigned nothing for construction?

14 A Yes, that's correct

15 (Brief pause in the proceeding)

16 BY MR BABCOCK

17 Q Now, when you were looking at phase one -- let's
18 talk now about the phase one profits

19 A Okay

20 Q First, you are aware there is a club house and
21 pool that were to be constructed for all phases, is
22 that correct?

23 A That's correct

24 Q And that is going to be an expense that is going
25 to be shared by all the phases Correct?

MS RICHARDS ON CROSS

1 A I don't know how the expense is going to be
2 borne for that

3 Q From the standpoint of accounting, what you are
4 trying to do with the various phases is to spread
5 the expenses among the phases as incurred by each
6 phase

7 Is that correct?

8 A That's correct

9 Q And that is why you have this reallocation, be-
10 cause you felt that when you looked at it that the
11 allocations were wrong

12 A Yes

13 Q And so you got this information from Mr
14 Maxheimer through Mr Melton and Mr Bowens, didn't
15 you?

16 A Yes

17 Q Because you are trying to spread the expenses
18 properly among all four phases Correct?

19 A Yes

20 Q And if you have a future expense that you know
21 is going to be incurred, you've got estimates with
22 regard to that expense

23 So you need to spread that expense over the four
24 phases too, don't you?

25 A Yes, you do

439

*

MS RICHARDS ON CROSS

1 Q And in this case you didn't spread the clubhouse
2 and pool over the four phases, did you?

3 A No

4 Q And if you had, for phase one it would have been
5 about Forty-three Thousand Dollars?

6 A

7 Q Just talking about what is associated with phase
8 one

9 A I have no knowledge of how you get that Forty-
10 three Thousand figure

11 Q Let me ask you this You don't know -- you
12 know there should be some number but you don't know
13 what the number is?

14 A Correct

15 Q All right So you would have no reason to agree
16 or disagree with the Forty-three Thousand Dollars in
17 phase one?

18 A Uh, I don't know that I would be able

19 Q I understand that you can't agree, but you cannot
20 really disagree with it either, can you?

21 A

22 Q You just don't know?

23 A Well, I can disagree with it because I have an
24 estimate of costs to complete phase one, phases two
25 and three

440

MS RICHARDS ON CROSS

1 And for all I know, the cost of the swimming pool
2 and the clubhouse could be included already Again,
3 the Two Million Dollars is based upon the lot costs
4 of Twenty Thousand Dollars and my experience with other
5 subdivisions that do have a pool and clubhouse

6 Q All right You just told me about phases two
7 and three,

8 A Right

9 Q and I'll ask you to come back with me to
10 phase one

11 A If you put it in phase one, take it out of phases
12 two and three, and then I'll agree to it

13 Q All right You don't know if -- this is your
14 number, and it is a round number, Two Million Dollars

15

16 A That's right

17 Q number -- I think that was an estimate on
18 your part, and I think -- I know the answer is that
19 you didn't spread the specific clubhouse and pool
20 issue among the four phases

21 A I did not try to break that down, to break that
22 cost down

23 Q And as you said, and I won't belabor this point,
24 but you don't know what -- there should be some cost
25 but you don't know what it is, for phase one?

441

MS RICHARDS ON CROSS

1 A

2 Q That's what you said, correct?

3 A I would think you would have to do that with
4 any subdivision that you do in phases, but you can
5 only capitalize costs you have incurred

6 You cannot estimate what it is going to cost
7 you to complete that

8 Q There are still two lots out there in phase one,
9 aren't there?

10 A Yeah

11 Q So that phase really isn't complete as we sit
12 here today?

13 A I would call it nearly complete, ninety-five
14 per cent

15 Q Sure, but from an accounting standpoint until
16 you have all of the expenses and what not, you don't
17 know what your income is or what your full expenses
18 are, as we sit here now?

19 A And actually that same logic could be applied
20 to add back the cost of those two remaining and un-
21 sold lots

22 Q Still unsold and you don't know whether they
23 are going to sell?

24 A They can't be deducted because they are still
25 in inventory and still have value

442

MS RICHARDS ON CROSS

1 Q You don't know whether they are going to sell or
2 not, do you?

3 A Right

4 Q And as you sit here today you can't agree or
5 disagree with the Forty-three Thousand Dollars num-
6 ber Correct?

7 A As I said, I will agree to that number if you
8 will take that as to two and three also

9 Q I'm not going to belabor the point as to phase one,
10 but you didn't put it specifically in phases two and
11 three, did you?

12 A No

13 Q You just had the general

14 A I had the general ledger

15 Q Any expenses on the barren spaces you said are
16 to be spread among the four phases, and future expense
17 to be incurred should also be spread over the four
18 phases?

19 A Yes

20 Q But you did not spread the club house and pool
21 over the four phases, did you?

22 A I did not, no

23 Q All right Just a moment, please

24 (Brief pause in proceeding)

25 BY MR BABCOCK

443

1 Q Now, let's move on to the road repairs, and you
2 are aware there were road repairs in phase one, aren't
3 you, that were needed to complete the phase?

4 A As I have said, I've been out to the subdivis-
5 ion and there is a stretch of road that is probably
6 thirty yards long that have not been repaired, but I
7 don't see any homes or lots that are in front of that
8 section of the road

9 So, to me that would indicate the road is a part
10 of phase two or three

11 Q The road is in phase one, or at least a part of
12 phase one?

13 A Well, the road is in phase one but it then goes
14 to phase two

15 Q That's right It goes into phase two in the
16 process of construction, but do you know whether the
17 portion of the roadway is in phase one that is going
18 to need repair work?

19 A I do not know that

20 Q But if there are, it would be a proper expense,
21 wouldn't it?

22 A You know, I don't know I really don't

23 Q Okay

24 A I mean, at what point does the road get turned
25 over to the County? I don't know

MS RICHARDS ON CROSS

1 Q Has it been turned over to the county, as far
2 as you know?

3 A I don't know

4 Q There hasn't been any turning over yet, has there
5 been?

6 A Not to my knowledge

7 Q So if they haven't been turned over, it is an
8 expense that would be appropriate to be considered
9 for phase one Is that correct?

10 A I guess so, yes

11 Q And if I represent to you that that cost is esti-
12 mated at One Hundred Seventy-three Dollars, that
13 would be included in here too? If that's correct,
14 and I understand you don't know that that's correct

15 A I don't know

16 Q Whatever the number is, you

17 A I would agree

18 Q Now, did you include in your calculations any
19 interest on sums advanced by SEL Properties?

20 A No, sir, I did not

21 Q That would be appropriate to consider as an ex-
22 pense, wouldn't it?

23 A Well, SEL Properties shows that as being repaid
24 at some point in early 2002 There is a loan on the
25 books from SEL to Courtyards at Rolling Creek and it

445

MS RICHARDS ON CROSS

1 goes in the general ledger

2 It goes back down to a zero balance and back to
3 money actually advanced to them in 2002

4 So I would say that certainly after 2002 there
5 is no interest due to them certainly

6 Q You think 2002 is the time period, but how about
7 2005? Do you know what happened between 2002 and
8 2005?

9 A I do know there was some moneys advanced I
10 also do know that there were illegitimate expenses
11 as well on the books

12 Q But moneys were advanced -- let's just be clear
13 on this

14 When you are analyzing expenses and income, you
15 used the general ledger or journal for the project,
16 is that correct?

17 A Correct

18 Q And that is something where there are entries
19 made for expenses Correct?

20 A Sure

21 Q And entries made for income Correct?

22 A That's correct

23 Q All right, and that is something separate from
24 the checking account for Courtyards at Rolling Creek?
25 That's a new step, right?

446

MS RICHARDS ON CROSS

1 A

2 Q So there will be money in there that might be
3 shown on the journal, but there might be money there
4 that might not be shown on the journal if it was not
5 a proper expense or income for this project?

6 A I don't understand the question

7 Q Let me ask you this way When you make your
8 analysis as to profits and costs, you are looking at
9 the journal for this project?

10 A That would be in what is called the general led-
11 ger

12 Q I'm sorry The general ledger

13 A Right

14 Q That is what you looked at initially?

15 A I did

16 Q And that was where the records were maintained
17 concerning income and costs for this project, correct?

18 A That is correct

19 Q That is distinguished from the checking account?

20 A Not different from the checking account, but it
21 encompasses the activity of the checking account

22 Q Sure, but if there was something in the checking
23 account that -- let's say an expense paid that should
24 not have been charged to the project, then you would
25 not show it as an expense to the project?

447

MS RICHARDS ON CROSS

1 A I'm sorry

2 Q The general ledger is where you are supposed to
3 have your expenses?

4 A Right

5 Q And if there was something written from the check-
6 book and it wasn't to be an expense, then it should
7 not be charged against the general ledger?

8 A Okay

9 Q I mean, a checkbook is just a checkbook It is
10 just the money, but the only thing that can be shown
11 as income or expenses are things shown on the gen-
12 eral ledger?

13 A That is correct

14 Q All right You indicated that you had not shown
15 any interest for moneys advanced

16 A Actually, the main reason -- that is one of the
17 reasons that I did not show any interest The other
18 reason I didn't show any interest for SEL is because
19 with regard to Courtyards at Rolling Creek it was
20 simply a checking account that was open

21 It was operating under the federal license num-
22 ber and reported under the federal license number of
23 SEL Properties

24 SEL Properties is LLC and it does many, many
25 activities of Mr Lipscomb

448

MS RICHARDS ON CROSS

1 Moneys are transferred back and forth between
2 his various real estate projects and other business
3 interests

4 And so, in my mind, SEL was transferring money
5 into the Rolling Creek-Courtyards account but there
6 is no evidence to me that that was money borrowed

7 It could have been an income venture from some
8 other business interest accompanying SEL

9 There were any number of sources that that money
10 could have come from other than a loan

11 Q But you just indicated that the checkbook was
12 owned by SEL

13 A BY SEL, and there is no reason for SEL to pay
14 interest to itself

15 Q But money that is being used on the project --
16 if you saw evidence of that fact, you would want to
17 charge interest to them, wouldn't you?

18 A I don't know I may not actually I mean, it
19 is charging itself interest

20 Q With respect to the project, SEL is putting
21 money in, isn't it?

22 A

23 Q They were always having to put money in for

24 A No, they were not

25 Q But SEL was putting money in?

449

MS RICHARDS ON CROSS

1 A Right

2 Q And if that expense was Twenty-five Thousand
3 Dollars, that would have been an appropriate expense
4 Correct?

5 A I guess so They could have charged themself interest
6 MR BABCOCK Your Honor, may we approach?

7 THE COURT Approach

8 (Conference at the bench between counsel and the
9 Court off the record)

10 THE COURT Ladies and gentlemen, we are going to
11 take a break at this time

12 I would remind you that you should not begin to
13 discuss this matter among yourselves as you still have
14 not heard all of the testimony that has to be pre-
15 sented

16 Let's take a break and then we will continue on
17 with the trial

18 (Jury excused from Courtroom at 3 33 P M)

19 THE COURT Ms Richards, I'm going to tell you
20 that during this break you have not concluded your
21 testimony so you are not at liberty to discuss it
22 with anyone

23 I ask you not discuss your testimony with anyone
24 during the break

25 WITNESS I understand

450

1 THE COURT Let's take a break and then we'll
2 come back
3 (Court stood in recess until 4 03 P M)
4 THE COURT Is there anything we need to take up
5 before we bring the jury in?
6 MR BABCOCK No, Your Honor
7 MR BOWENS Not from the Plaintiffs
8 THE COURT Ms Richards, you may resume the wit-
9 ness stand
10 (Witness Richards resuming stand)
11 THE COURT Apparently some on the jury has some
12 sensitivity to magic markers so I asked about sharpies
13 instead
14 It wasn't the sound but the smell
15 You may bring in our jury
16 (Jury returned to the Courtroom at 4 03 P M)
17 THE COURT You may continue
18 MR BABCOCK May it please the Court?
19 THE COURT Yes, sir
20 CROSS EXAMINATION CONTINUED
21 BY MR BABCOCK
22 Q Ms Richards, I want to finish this phase and
23 move on to another phase
24 We were talking, of course, about profits in phase
25 one and I know you may not agree with these numbers,
451

MS RICHARDS ON CROSS

1 but if you take the Four Fifty-five O One and subtract
2 out the Forty-three Thousand One Seventy-three, the
3 Twenty-five Thousand, you get Two Fourteen Two O One

4 Does that look right to you?

5 A If you say so

6 Q And if that amount was correct and you then take
7 that and divide it by the percent of profit, the twen-
8 ty-five percent, you'd get around Fifty-three or Fifty-
9 four Thousand Dollars

10 A That sounds right

11 Q Let's go over to

12 A I do want to say why I disagree with those num-
13 bers

14 Q I didn't ask you about that

15 A Okay

16 Q If I can go over to your commissions, you looked
17 at the commissions in terms of the unsold houses in
18 phase one Correct?

19 A Yes

20 Q As I understand your analysis that we saw on
21 Plaintiffs' Exhibit 142, you had unsold houses for
22 phase one and took an average price of sold homes,
23 Three Hundred and Three Thousand Three Hundred Six
24 Dollars

25 You took the number of homes and took the three

452

MS RICHARDS ON CROSS

1 percent and came up with Ninety Thousand Nine Hundred
2 some Dollars

3 A That's right

4 Q And so your analysis was additional commissions
5 that should be paid Correct?

6 A Correct

7 Q And in doing your analysis of commissions, did
8 you look to see whether there were any instances where
9 commissions were paid when they shouldn't have been
10 paid?

11 A I don't think -- without the work paper right in
12 front of me, I don't think I found any instance that
13 -- actually, the correct answer to that is I did not
14 find any instances where there were commissions paid
15 that shouldn't have been paid

16 Q So you looked at that?

17 A I did

18 Q And you didn't find any instances where that
19 was true?

20 A No, I didn't

21 Q Okay Let's look at one of the work papers that
22 was an exhibit to your deposition, 19 M

23 I'll put that up If you look at the top of the
24 page -- do you recognize this as one of the documents
25 you prepared?

453

MR RICHARDS ON CROSS

1 A I do

2 Q And this was something we discussed at your de-
3 position?

4 A Correct

5 Q Looking at the top of the page there is a de-
6 scription of the document It says Dutch Fork
7 Development Group Two LLC, Dutch Fork Realty, analysis
8 of lot sales, phase one

9 A Yes

10 Q Now, you are aware from the contract that under
11 paragraphs or section six, exclusive right to sell,
12 that Dutch Fork had one situation where it was selling
13 some to a builder and another where they were sell-
14 ing to a buyer?

15 A Right

16 Q And if they were selling to a builder, they didn't
17 get a commission Correct?

18 A With one caveat, yes

19 Q What caveat?

20 A That would be a situation of a contract home
21 If it's a contract home, there were commissions paid
22 when the builder bought the lot

23 The reason for that is because a builder would
24 buy a lot in connection with a home purchaser and he
25 already had a contract for the new construction

MS RICHARDS ON CROSS

1 And a commission was payable at that point so
2 that Dutch Fork Realty got some sort of commission on
3 the deal

4 In other words, if I was in construction and
5 I contracted to build a house for you, and you agreed
6 to pay Three Hundred Thousand as the total purchase
7 price for the home

8 You would not then go out and -- you may go out
9 individually and purchase your lot but you may not
10 individually purchase your lot

11 In that case, what would it take if there were
12 a ten percent commission on the lot to Dutch Fork
13 Realty, but there was no commission at the end because
14 there was no sale at the end

15 Q Let's look at what the contract says Let's
16 look at section six, the exclusive right to sell

17 A Okay

18 Q The first paragraph says (reading rapidly from
19 contract)

20 A Correct

21 Q (Continuing to read section six from contract)
22 Is that correct?

23 A That's what it says

24 Q And it also says DFR shall receive no commission
25 for any sale to builders?

455

MS RICHARDS ON CROSS

1 A Yes

2 Q That's what it says, correct, in the document?

3 A Correct

4 Q And the explanation you gave us is not in that
5 document, is it?

6 A The explanation would be that ordinarily that
7 lot would be purchased by an individual, so

8 Q I didn't ask that The explanation you just
9 gave isn't in that document?

10 A No, it's not, but can I explain?

11 Q It says, DFR shall no receive no commission for
12 any sale -- any lot sale to builders

13 Now, let's go further On the analysis of lot
14 sales there are several instances where builders pur-
15 chased lots and commissions were paid to Dutch Fork
16 Realty?

17 A There are some, yes, not several

18 Q Well, let's start Lot 27 on this page

19 A All right

20 Q Lot 27, Blackburn Construction as builder, is
21 that right?

22 A Right

23 Q And it shows a commission due DFT -- Four Thousand
24 commission paid to DFR -- in the last column, the
25 commission paid?

MS RICHARDS ON CROSS

1 A Yes, it is

2 Q So that is one instance Let's go to the next
3 page on that document Let's look at Lot 38 and 39
4 Here both of those lots to K&G Builders, so that was
5 obviously a builder Correct?

6 A Correct

7 Q And again a commission was paid to DFR of Four
8 Thousand?

9 A Correct

10 Q And then going down to Lot 43, KG Builders, and
11 a Four Thousand Dollar commission once again

12 A That's correct

13 Q And lot 48 to Dutch Fork Development Group?

14 A Yes

15 Q A sale to Dutch Fork Development Group?

16 A Yes, it is

17 Q And here Dutch Fork Development Group paid itself
18 a Four Thousand Dollar commission?

19 A Yes

20 Q Now, there were ten unsold homes With regard
21 to that, what period of time are you looking at that,
22 the unsold homes?

23 Are you looking at the current time?

24 A I guess it would have been as of the end of the
25 date of the general ledger, which I believe was in

457

MS RICHARDS ON CROSS

1 September of 2006

2 Q Two and a half years from March of 2004?

3 A

4 Q I'm sorry -- May of 2004?

5 A Yes

6 Q Okay, and during that time are you aware that
7 Dutch Fork continued to sell lots and houses in phase
8 one?

9 A Yes

10 Q And in your analysis, you simply take the average
11 price to determine commissions? That's what you
12 used, the average price?

13 A Yes

14 Q But we also know there can be variances in the
15 price?

16 A

17 Q We know that sometimes lots don't sell?

18 A That's true

19 Q And in this case, lots 1 and 42 never did sell?

20 A Okay

21 Q You know that?

22 A I don't remember the lot numbers exactly but I
23 do know there were two unsold lots

24 Q Do you know there were other lots where contracts
25 to sell the houses had expired?

458

MS RICHARDS ON CROSS

1 A No, I do not know that

2 Q You are aware that Dutch Fork by the agreement
3 had a one year period of time -- right to sell shall
4 be for a period of twelve months after construction
5 commenced

6 Is that correct?

7 A If you are reading from the contract, yes

8 Q That was after construction commenced?

9 A Correct

10 Q That was a window of exclusivity under the con-
11 tract?

12 A Okay

13 Q And you also know that typically listing agree-
14 ments have expirations?

15 A Yes

16 Q You know that?

17 A Yeah

18 Q And once the expiration -- once the listing agree-
19 ment has expired, the agreement is up Correct?

20 A Yes

21 Q Did you look to see whether lot 3 had a listing
22 agreement that had expired?

23 A No, I did not

24 Q You didn't do any kind of analysis to see whe-
25 ther lot three had had the expiration?

459

MS RICHARDS ON CROSS

1 A No, I did not

2 Q How about on lot 5?

3 A No

4 Q Do you know -- how about lot 6?

5 A No

6 Q How about lot 7?

7 A No

8 Q How about lot 9?

9 A No I did not do that analysis for any lot,
10 sir

11 Q Lot 18?

12 A No, and I have answered Asked and answered

13 Q Are you making your own objection?

14 A

15 Q Lot 31?

16 A I did not

17 Q You didn't check that one out either?

18 A No, I did not

19 Q Now, if the contracts for those different lots had
20 expired, which means Dutch Fork Realty had had a per-
21 iod of time to sell the house and couldn't sell that
22 house, and the contract expired on its own terms,
23 then that is not -- SEL

24 MR BOWENS Your Honor, I would make an objection
25 at this point The question -- Lot 3 was sold after
460

MS RICHARDS ON CROSS

1 termination had already taken place, so there was no
2 opportunity for Dutch Fork to have an opportunity to
3 list the house

4 I believe he is unfairly mischaracterizing the
5 evidence

6 Some of these may have been after termination
7 occurred This one is dated May 6, 2005, which is
8 after termination Dutch Fork would have no ability to
9 have worked on this

10 BY MR BABCOCK

11 Q I can show you the listing agreement Does
12 that -- this has 105 Summer Branch Lane address Do
13 you have your chart there with lot numbers?

14 A I don't have it up here

15 (Brief pause in the proceeding)

16 Q Is this the listing agreement for lot 3?

17 A Yes

18 Q And did you prepare this chart?

19 A No, I didn't prepare that one

20 Q Okay Do you see lot 3 there?

21 A Yes

22 Q And do you see that is 105 Summer Branch Lane?

23 A Yes

24 Q And so that is lot 3, 105 Summer Branch Lane?

25 A Okay

461

MS RICHARDS ON CROSS

1 Q And on that CMLS listing agreement, it shows a
2 listing date of 3 18 2006 Do you see that?

3 A

4 Q Bottom right hand

5 A Yes

6 Q And the listing agent on the left shows as D
7 Melton?

8 A Yes

9 Q And the expiration date is 3 18 2007?

10 A Yes

11 Q All right, so the expiration on that lot had
12 expired?

13 A Yes

14 MR BABCOCK Your Honor, we would move to intro-
15 duce this listing agreement as our next exhibit

16 MR BOWENS No objection

17 THE COURT It's admitted

18 (Listing agreement admitted without objection into
19 evidence as Defense Exhibit5)

20 THE COURT You may continue

21 BY MR BABCOCK

22 Q And you said you did not investigate whether that
23 listing agreement had expired?

24 A I did not

25 (Brief pause in proceeding)

462

MS RICHARDS ON CROSS

1 Q So would it be fair to say that your Ninety
2 Thousand Dollar figure should be reduced by any of
3 those properties where Dutch Fork had the opportun-
4 ity to sell and the contract expired and it didn't
5 sell?

6 A I don't know it would be fair to say that, because
7 I think a part of this case is that there were con-
8 siderable delays, and I think that one thing that
9 called that into question in my mind is whether or
10 not the five year expiration date would be out or it
11 would not

12 Q Well, in this case everybody has agreed we have
13 a five year contract So that is for you to decide
14 You have charged commissions, and if there is
15 some amount of commissions that Dutch Fork had a
16 chance to win and a chance to get, and

17 A And they

18 Q they failed to make the sale,

19 A If they failed to make the sale

20 Q that should be deducted?

21 A It should be deducted Correct

22 Q Let's shift over to phases two and three, and
23 let's talk about the development fees

24 A All right

25 Q Are you aware that the provisions of the contract

463