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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 II of VIII
(Pages 493 - 984)

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MS RICHARDS ON CROSS

1 provided -- let's look at that provision

2 A Which

3 Q Paragraph or section five, the second paragraph
4 -- I'm sorry, it's section three -- I should know that
5 by now

6 Section three -- if you would read that

7 A (Examining section from contract)

8 Q Are you familiar with this part of the contract?

9 A Yes

10 Q That says that phase two shall not commence --
11 shall not commence until sixty percent of lots in
12 phase one have been sold or no less than sixty percent
13 of the lots in phase one are sold, and I'll stop it
14 right there

15 Are you aware that phase one -- you told me in
16 your deposition that sixty percent mark occurred on
17 July 22, 2004?

18 A Right

19 Q And under the terms of the contract, phase two
20 was not to be commenced until after that time?

21 A I'm sorry State your first question again I
22 may have not understood you I'm not sure

23 Q Under the terms of the contract we just looked
24 at, phase two was not to commenced until no less than
25 sixty percent of lots in phase one were sold?

464

MS RICHARDS ON CROSS

1 A Correct

2 Q And that occurred in July of 2004?

3 A I think so

4 Q Now, in July of 2004 and November of 2005, there
5 were no contracts for roads or anything else of that
6 nature fixed?

7 A I don't know what contracts might have been in
8 place then

9 Q Are you aware of any work done during that time
10 period actually to start phase two?

11 A Well, the infrastructure for water and sewer, and
12 some grading

13 Q That had all been done initially?

14 A

15 Q That was all a part of the initial work that was
16 done out there Is that correct?

17 A I just don't know what work was done in what
18 time frame

19 Q I thought you had your little chart here that
20 show how the development was started?

21 A I do, but I would not be able to tell you whe-
22 ther that was before or after any lots were sold

23 Q Maam, that initial infrastructure for water and
24 sewer, that was done before any lots were sold?

25 A Sure, that had to be done

465

MS RICHARDS ON CROSS

1 Q And that is work that was done in phases two and
2 three, and that was the work that was done to get the
3 water and sewer to phase one?

4 A Right

5 Q And from that time until recently, there was no
6 further work done to actually put roads in so no lots
7 could possibly have been sold, is that correct, in phase
8 two?

9 A I told you that I don't know that

10 Q You don't know

11 A I know that there are roads in there now and
12 there is grading in there now but I don't know when
13 that occurred

14 That's what I'm telling you

15 Q You just don't know when that started?

16 A I don't know when that started

17 Q Despite not knowing when that was, you assigned
18 development fees of Fifty-four Thousand Dollars for
19 phase two?

20 A Correct

21 Q And you also looked at phase three?

22 A Yes

23 Q Let's look at the language for phase three

24 Phase three shall~will not commence until no
25 less than sixty percent of the lots in phases one and

MS RICHARDS ON CROSS

1 two are sold?

2 A That's correct

3 Q And you know that sixty percent of the lots in
4 phase one and two are not sold?

5 A I do know that

6 Q And yet you charged SEL Properties with that devel-
7 opment fee?

8 A The chart that I prepared that was a part of my
9 deposition goes to that

10 Q On your charts, you have the Fifty-four Thousand

11

12 A Yes

13 Q Even though the sixty percent of lots in phases
14 one and two weren't sold?

15 A Right

16 Q Now, let's move over to your profits

17 A Okay

18 Q All right, let's start with phases two and three
19 You have a total sales price of Forty-four Thousand
20 Dollars times a hundred ninety-four, and that starts
21 you out with that figure Correct?

22 A Yes

23 Q Now, not one of those sales has occurred as we
24 are here today Correct?

25 A Correct

467

MS RICHARDS ON CROSS

1 Q And in fact, the Forty-four Thousand Dollar figure
2 that you used is higher than the last six lot sales
3 in phase one, isn't it?

4 A I don't recall

5 Q And this is for today, meaning 2007?

6 A Correct

7 Q Not the listing price that was in 2005?

8 A No

9 Q That was a lower listing price?

10 A Right

11 Q But you didn't use that lower listing price?

12 A No, I didn't

13 Q Now, you have also in your analysis assumed that
14 every single one of the lots, all one ninety-four,
15 were sold?

16 A I have

17 Q All right You know, I assume, that there are
18 lots in phases one and four that are still unsold as
19 of today?

20 A I don't know anything about four but I know all
21 the lots in phase four have not sold

22 Q You didn't investigate the lots sold or unsold?

23 A No

24 Q And multiply that times the Forty-four Thous-
25 and?

468

MS RICHARDS ON CROSS

1 A No, I didn't

2 Q You didn't think that was something that should
3 be done in determining the profits?

4 A No

5 Q You didn't think it worthwhile to check on four
6 to see if there were unsold lots in doing your analy-
7 sis in this case?

8 A No

9 Q So even though you knew there were unsold lots
10 in phase one, you went ahead and used the full 194 lots,
11 is that right?

12 A Yes

13 Q Now, you come into Court and testify to that
14 total number, and that is assuming that all of that
15 happened Correct?

16 A Yes

17 Q You haven't looked at, for instance, how much
18 time it would take to make those sales or when those
19 sales might occur Right?

20 A No, I haven't

21 Q You didn't look to see anything in regard to
22 how lots are sold at various times in phase one, to
23 see how that progressed, did you?

24 A No, I didn't

25 Q In your analysis of phase one, did you see that
469

MS RICHARDS ON CROSS

1 the house sales were just a little bit more than one
2 per month, lot sales?

3 A From 2002 to 2006, four years or forty-eight
4 months That would be right

5 Q Okay, and if the lots were being sold at two a
6 month, it would take eight years to sell all those lots,
7 wouldn't it?

8 A

9 MR BOWENS Objection, Your Honor He is mis-
10 characterizing the evidence

11 MR BABCOCK This is cross examination

12 THE COURT Overruled

13 BY MR BABCOCK

14 Q Ms Richards, if there was one a month, it would
15 take sixteen years, wouldn't it?

16 A Yes

17 Q Did you do any kind of analysis with regard to
18 phases two and three in terms of how long it would
19 take to get various permits and approvals to be able
20 to start or to get authorization to start selling
21 lots?

22 A An analysis, I don't think I could say that, but
23 I did take all of that into consideration as well as
24 other things in forming my opinions

25 Q When you begin a real estate development there

470

MS RICHARDS ON CROSS

1 are holding costs that are associated with the pro-
2 ject, correct? Things like landscaping and taxes?

3 A Yes

4 Q And you did not take those things into account
5 in making your determination?

6 A That's correct

7 Q And you told us earlier today that in terms of
8 the clubhouse and pool, you did not take that into
9 consideration?

10 A Correct

11 Q Now, isn't it true that the grounds in the pro-
12 ject have to be maintained until they are turned over
13 to the homeowners' association?

14 A I believe so

15 Q And you didn't take that into account, did you?

16 A No

17 Q Now, on your chart for estimated costs, I notice
18 the land development costs came off the top of the
19 chart?

20 A

21 Q And for amount estimated to complete, you have
22 Two Million Dollars Correct?

23 A Correct

24 Q And I think you told me in deposition that that
25 was an estimate?

471

1 A Yes

2 Q And in analyzing these lots, you estimated the
3 estimated lot cost in phase one at Twenty-eight Thous-
4 and Dollars?

5 A Yes, I did

6 Q And in phase four you estimated the lots to cost
7 Thirty-one Thousand Dollars each?

8 A Yes, they were larger lots

9 Q Did you look to see what the average lot cost
10 was in phase one?

11 A Yes, I did

12 Q And did you likewise look to see what the aver-
13 age lot cost was in phase four?

14 A Yes Much larger lots

15 Q Did that surprise you?

16 A No, and the Twenty-eight Thousand doesn't surprise
17 me either

18 Q Did you look to see what the actual costs were
19 for phase four?

20 A No, I did not

21 Q And do you think that actual costs are something
22 that should be taken into account?

23 A Yes

24 Q But you did not do that?

25 A No

MS RICHARDS ON CROSS

1 Q Let's go on to the commissions for phases two
2 and three

3 Here again you have got phases two and three es-
4 timated?

5 A Yes

6 Q And the total earned commissions for phase one,
7 Three Hundred Eighty-four Thousand -- do you see that
8 figure?

9 A Yes

10 Q All right, and the number of sold properties, the
11 commission on phase one, you've got Forty-five Is
12 that correct?

13 A Correct

14 Q That would include lot sales?

15 A Yes

16 Q And you didn't break it down between lots and
17 sales?

18 A

19 Q I'm sorry-- lots and houses?

20 A No, I did not

21 Q You just lumped them together?

22 A Right

23 Q And did you find instances where there were
24 commissions on lots and houses on the same property?

25 A I don't think that I did

473

MS RICHARDS ON CROSS

1 Q You didn't break them down into different groups
2 then?

3 A No Again, I did as far as earned commissions
4 Those are broken down

5 Q They're broken down?

6 A Yes

7 Q I'm talking about your projections for phase two
8 and three

9 A Right

10 Q And for phases two and three, once again you
11 assumed that every single lot out there would sell?

12 A I did

13 Q And just as with the profits, you didn't take
14 into account any date of sale for those lots?

15 A Correct

16 Q And just as with profits, you didn't take into
17 account when the lots actually started selling after
18 the roads were constructed?

19 A Yes

20 Q For phases two and three?

21 A Uh hm

22 Q And again you didn't assign any present day value
23 to the lots sold? You just basically came up with
24 an average for total number of commissions, divided
25 it by the total lots that sold and came up with the

P Lynn Richards-Redirect Examination by
Glenn E Bowens

1 number, multiplied by one ninety-four?

2 A That's right

3 Q So what you did was just pretty much basic math
4 calculations, is that true?

5 A Yes, that's true

6 Q And you haven't taken into consideration the cost
7 that Dutch Fork had with regard to that, right?

8 A Right

9 Q Thank you, Ms Richards

10 THE COURT Any Redirect?

11 MR BOWENS Just briefly, Your Honor

12 REDIRECT EXAMINATION

13 BY MR BOWENS

14 Q With regard to the lost profits and commissions
15 in the development phase, did you assume that the
16 contract was fully performed within the terms of the
17 contract?

18 A Yes

19 Q And just as there had been no delays and the
20 contract was completed as expected?

21 A Yes

22 Q And the contract seemed to contemplate all
23 of it taking place within five years?

24 A Yes, it did

25 Q And when you did your analysis of the books or

475

1 what they call the general ledger, did you find inac-
2 curacies and errors?

3 A I did

4 Q Errors in the general ledger?

5 A Yes

6 Q And I think you were asked some questions on Cross
7 Examination about the construction costs in phase
8 four

9 A Yes

10 Q Do you recall that?

11 A Yes, sir

12 Q And you have broken down the cost figures for
13 the various phases into individual line items, is that
14 right?

15 A Yes, it is

16 Q And do these numbers include all of the construc-
17 tion costs?

18 A They do They do That is the purpose of this
19 schedule because the Three Million One Hundred Twenty-
20 nine Thousand Nine Thirteen that is on line one must
21 agree with the \$3,129,913 that is down there, and it
22 doesn't

23 I can't change their books and records I don't
24 have any basis for doing that I had to go by what
25 they say they spent

MS RICHARDS ON REDIRECT

1 They say they spent Three Million One Hundred and
2 Twenty-nine Thousand Nine Hundred Thirteen Dollars
3 Now, if I add the construction costs, the Two Hundred
4 Twenty-two Thousand Two Hundred Dollars, I would have
5 to take them out of phase one which would thus increase
6 the profits in phase one by Two Hundred Twenty-two
7 Thousand One Forty-two, Dutch Fork Development's share,
8 and that would be roughly an additional Fifty Thous-
9 and Dollars

10 So to be conservative and to give the benefit of
11 the doubt, I left those construction costs completely
12 off of phase four and allocated them to the phases
13 that I have an opinion about, thus reducing then the
14 overall profits, and thus reducing the amount due to
15 Dutch Fork Development Group

16 That is why I left those out

17 Q And how

18 A Another thing I wanted to say

19 Q Go ahead Go ahead with your answer

20 A The road repair figure presented here and as tes-
21 tified to by their accountants would be an additional
22 One Hundred Seventy-three Thousand Dollars, but that
23 is just another law suit because this is Three Hundred
24 Twenty-one Thousand Dollars worth of road repair or
25 roughly over Fifty-six Hundred Dollars a lot

MS RICHARDS ON REDIRECT

1 MR BABCOCK Objection, Your Honor Move to

2 strike

3 THE COURT I would ask the jury to disregard the

4 comments Sustained

5 BY MR BOWENS

6 Q Now, in phase four, that is a stand-alone phase?

7 A Yes

8 Q It is not connected to phase two and three?

9 A That's my understanding I did not do any ex-

10 tensive analysis as far as that, but it is my under-

11 standing that that started as a development part of

12 Courtyards at Rolling Creek but then it was subsequently

13 changed to be a part of the Rolling Creek Subdivision

14 A whole different ballgame with different streets,

15 different infrastructure

16 I mean, there is not construction in any subdivis-

17 ion I have seen where a piece of land was purchased

18 which adjoined a development and the developer had had

19 the foresight to put the road in right up next to the

20 adjoining piece of property

21 So literally no costs were associated with sub-

22 dividing those lots I had to put in what I thought

23 was reasonable, and what I did was try to be conserva-

24 tive

25 Q So you allocated to the other phases the costs

MS RICHARDS ON REDIRECT

1 you found on their books?

2 A Yes, I did

3 Q Phase four didn't share any costs with phases one,
4 two and three?

5 A

6 MR BABCOCK Objection to leading, Your Honor

7 THE COURT Rephrase the question

8 BY MR BOWENS

9 Q Did you show one, two and three all sharing the
10 construction costs in these exhibits?

11 A Yes

12 MR BABCOCK Leading

13 THE COURT Make sure your questions aren't lead-
14 ing, please

15 Q What does this diagram represent?

16 A That is a rough picture of the purchase of the
17 land and how it was divided into phases and how the
18 development was supposed to proceed

19 The water and sewer had to be brought in for
20 Rolling Creek Subdivision and into Courtyards at Roll-
21 ing Creek all the way up

22 Q And the cost for doing all of this was allocated
23 how?

24 A Mostly allocated by SEL to phase one

25 Q And to correct that, what did you do?

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MS RICHARDS ON REDIRECT

- 1 A I got actual costs from the engineer
- 2 Q And was that cost passed on through to phase four?
- 3 A Not to my knowledge
- 4 Q Does phase four share any of the costs going to the
- 5 water and sewer?
- 6 A Not to my knowledge
- 7 Q Do you know whether the phase four lots share
- 8 any of the amenities to other phases in Courtyards?
- 9 A I don't know Rolling Creek Subdivision which
- 10 they are part of has its own amenities, I believe
- 11 Q Would you expect to allocate part of that cost in
- 12 phase four?
- 13 A No No, you would not
- 14 Q You were asked some questions on cross examina-
- 15 tion about lots that had been sold to builders but
- 16 where a commission was paid to Dutch Fork Realty
- 17 A Yes The seller on those lots was SEL
- 18 Q Could you tell on those lots about the construc-
- 19 tion?
- 20 A Yes There are documents you look at and one is
- 21 a contract for construction, and that is where --
- 22 again that is called a contract home and that is when
- 23 a person approaches a builder to have them put a
- 24 house on a particular lot
- 25 In that case, sometimes the individual will buy
the lot

MS RICHARDS ON REDIRECT

1 Q Was a commission paid on those contract homes?

2 A No When a construction contract had been signed,
3 there would never be a commission paid to Dutch Fork
4 Realty because there is no real estate agent involved
5 in the last part where the builder built the home for
6 an individual No real estate agent is involved at
7 that point

8 So there would be no commission at all on these
9 lots and often the contract did not specifically spell
10 out that provision

11 I assumed when I did my analysis that that was
12 something that had been negotiated with the builders,
13 so that Dutch Fork did in fact get some sort of commis-
14 sion on those

15 Q You came up with Twenty Thousand per lot as far
16 as the cost to complete How did you come up with
17 that again?

18 A Well, in my experience -- and I do have other
19 real estate developers as a client -- the costs of lots
20 runs around Twenty Thousand Dollars for a lot that is
21 -- Twenty-two Thousand Dollars for a lot that is over
22 half an acre, and that includes interest and taxes
23 That's what it includes to develop those lots

24 Those lots sell for an average of Fifty or Sixty
25 Thousand Dollars, but what we have here are much

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MS RICHARDS ON REDIRECT

1 smaller lots These lots are in some cases under a
2 quarter of an acre Twenty Thousand a lot seemed a
3 reasonable cost based upon my professional experi-
4 ence

5 It is true that lots in phase one did run Twenty-
6 eight Thousand Dollars However, with the road repairs
7 and with a number of other snags that they incurred
8 I know they had considerable difficulty with having to
9 blast out rock which needed to be done

10 It is my understanding that that cost them almost
11 Two Hundred Thousand Dollars in cost override

12 So I can anticipate that would not re-occur It
13 was an unusual circumstance to be absorbed as a part
14 of the cost

15 Another reason costs are going to be higher in
16 phase one is because it is early in the development
17 That means you are carrying the cost of your interest
18 and everything is a lot higher in the first parts

19 After you got your infrastructure in, the water
20 and the sewer, the costs will generally go down

21 So, yes, Twenty-eight Thousand Dollars if the av-
22 erage cost of a lot in phase one, and I adjusted that
23 cost downward to accommodate for it being later in
24 the development, and for those unforeseen circumstances
25 not happening again, not re-occurring again

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1 In my opinion, I think Twenty-eight Thousand Dol-
2 lars a lot is a reasonable per lot figure

3 Q Thank you That's all the questions I have

4 THE COURT Recross

5 MR BABCOCK Thank you

6 RE CROSS EXAMINATION

7 BY MR BABCOCK

8 Q Let's talk about blasting costs on phase one they
9 were experiencing, the some Two Hundred Thousand Dol-
10 lars

11 It seems like to me it was under the Two Hundred
12 Thousand Dollar figure but I'm not quibbling about
13 that

14 But when you start a real estate project, you
15 never know what problems there will be Is that cor-
16 rect?

17 A That's correct

18 Q And so on project development, that happens, does
19 it not?

20 A Yes I don't know of any specific development
21 where that happened, but I m sure it's true

22 Q So is it a fair statement to say that some pro-
23 jects make a lot of money and some don't?

24 A Correct

25 Q Now, looking at the -- let me make sure I understand

MS RICHARDS ON RECROSS

1 this

2 On your phase four construction costs, there were
3 construction costs shown in the general ledger when
4 you reviewed it?

5 A Yes

6 Q And to start out with a number, Five Hundred
7 Fifty-four Thousand Four Hundred Thirty-two -- you
8 had this figure for engineering costs?

9 A That's because I got that allocation from some-
10 where or maybe it was in the general ledger

11 Q Looking at Mr Maxheimer's note, it doesn't say
12 anything about phase four?

13 A Okay

14 Q And you told us you did not do investigation
15 into the construction costs for phase four?

16 A I did not do any investigation other than the in-
17 formation that I had

18 Q You took what the books showed?

19 A Yes

20 Q And if that number was correct, it should be shown
21 here Right?

22 A Yes

23 Q And that would increase this number by Two Hun-
24 dred Twenty-two Thousand?

25 A Yes It would reduce the numbers

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MS RICHARDS ON RECROSS

1 Q And to get the math right, the engineering costs
2 have to be shown, don't they?

3 A Yes, whatever they are

4 Q And the construction costs you are going to show?

5 A Yes

6 Q I think you said that your analysis of costs have
7 been conservative as to phase one?

8 A I would say so, yes

9 Q And is it your opinion that what you have done
10 and your mathematical calculations is to the benefit
11 of the Defendants?

12 A No

13 Q Thank you No further questions

14 THE COURT You may step down

15 (Witness excused from stand)

16 THE COURT Ladies and gentlemen, we are at a
17 point now where we can adjourn for the day, and I am
18 going to remind you that you are not to engage in
19 any discussions among yourselves You still have not
20 heard all of the evidence that is to be presented

21 As you come and go to and from the Courthouse, do
22 not allow anyone to approach you and discuss this
23 matter with you

24 If someone attempts to do that, tell them you
25 are a juror and cannot discuss the case, but I ask you

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1 to report it as soon as possible when you return
2 Please do not listen to any conversations as you
3 come and go, and for the reasons I have given to you
4 throughout the trial
5 You have to make your decision based on the evi-
6 dence that is presented here in the Courtroom
7 I would ask that you report tomorrow morning a
8 little bit later Report tomorrow morning at ten
9 o'clock I have an appointment that I must keep in
10 the morning
11 So I ask you to report at ten, and I will tell
12 you that tomorrow -- I forgot it was Halloween today
13 and that some people have young children at home --
14 but we may need to work late tomorrow so we can try
15 to get as much of the case completed as we can
16 So tomorrow I will ask that you please be pre-
17 pared to work past five, and probably to six or six
18 thirty-- maybe as late as seven
19 I would like to get the testimony as nearly
20 completed tomorrow as it is possible to do
21 I also ask that this evening you do not engage
22 in any further inquiries or investigation into any
23 matters connected with this case
24 Please follow all of the instructions I have
25 given to you previously, and I would ask that you
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1 report tomorrow morning at ten o'clock When you are
2 here at ten o'clock, we will be ready to resume with
3 the testimony at that time

4 Have a good evening

5 (Jury excused at 5 00 P M)

6 THE COURT All right Is there anything that
7 we need to take up this evening before we leave for
8 the day?

9 For the Plaintiffs?

10 MR BOWENS No, Your Honor

11 THE COURT For the Defendants?

12 MR BABCOCK No, Your Honor

13 THE COURT Then I will see you all in the morn-
14 ing

15 Have a good evening

16 (Court stood in recess for the evening)

17

18

19

20

21

22

23

24

25

1 (The matter was resumed on November 1, 2007)

2 THE COURT Good morning Is there anything
3 that we need to take up before we begin?

4 MR BABCOCK Yes, Your Honor With reference
5 to some exhibits

6 Plaintiffs' 156, 157 and 158 are financial state-
7 ments for Mr Lipscomb The first one is from 2006,
8 3 20 of 2006 November 157 is dated November 3, 2004,
9 and Exhibit 158 is from September 18, 2003

10 Now, these Exhibits are being offered on Mr
11 Lipscomb personally for the issue of punitive damages

12 First of all, the only financial statement that
13 would be relevant is Exhibit 156 from March 20th of
14 2006

15 THE COURT You said 2006?

16 MR BABCOCK Yes, maam Procedurally, that is
17 only done -- the Defendant's net worth is held until
18 a determination is made as to whether a punitive dam-
19 ages charge against the Defendant will go to the
20 jury

21 In this case, there are two causes of action
22 involving Mr Lipscomb personally, and they involve
23 the conversion cause of action and tortuous inter-
24 ference with contract cause of action

25 So until a determination is made as to whether

1 those causes of action themselves are going to the
2 jury and whether punitive damages as to Mr Lipscomb
3 are going to the jury, those would not be relevant
4 and obviously would be highly prejudicial to give a
5 man's net worth until a determination on those is
6 made

7 We would ask that only 156 be used and we would
8 have no problem with that if a determination is made
9 that those causes of action are going to the jury or
10 punitive damages are going to the jury

11 Until that time, it would be highly prejudicial,
12 Your Honor

13 THE COURT Just to be clear, you are actually
14 saying they should not be used at all, and only if
15 tortuous interference with contract and conversion
16 go to the jury would Exhibit 156 be admissible?

17 MR BABCOCK And only if punitive damages go
18 to the jury too -- those two determinations

19 THE COURT Any response?

20 MR BOWENS Your Honor, the Exhibits are not
21 only offered for those purposes Stephen Lipscomb's
22 personal assets have already been put in issue by
23 the Defense It has been pointed out during the
24 course of the trial that he was personal guarantor
25 of these loans

1 His personal assets are relevant in that the
2 moneys could have been advanced to have the roads re-
3 paired His personal financial ability has been put
4 in issue by the Defense

5 It goes to show what he could do, and his net
6 worth and financial statements are relevant They
7 have already been put in issue

8 MR BABCOCK Your Honor, Mr Lipscomb's net
9 worth is not relevant at this point to those issues
10 because he was not a party to the contract

11 SEL Properties, LLC, is the entity in that re-
12 gard, and not Mr Lipscomb, personally

13 MR BOWENS Your Honor, there was testimony
14 yesterday or the day before that Eight Hundred Thou-
15 sand Dollars was taken that Mr Lipscomb personally
16 guaranteed to cover any shortfalls

17 I believe the testimony was that those short-
18 falls were not covered, and the response was that he
19 didn't have money to do it with

20 This evidence rebuts that assertion that he
21 didn't have any money to do it with, when he clearly
22 did have money to cover personally any shortfalls
23 That makes it relevant and it was put in evidence
24 by the Defense really

25 MR BABCOCK It was not put in issue by the

1 Defendants Nothing about his asset situation and
2 nothing about him putting money in personally during
3 this project It is SEL Properties that would be at
4 issue and not Mr Lipscomb

5 THE COURT Tell me about the 2006 financial
6 statement What is the purpose of that?

7 MR BOWENS Well, one purpose is for punitive
8 damages purposes and to show that he had the ability
9 and has the present continuing ability to cover the
10 shortfalls He still hasn't paid a lot of these
11 things There are still bills outstanding and it
12 shows his continuing ability to pay, as he promised
13 he would after the loan was taken out -- promised to
14 be personally responsible for shortfalls

15 MR BABCOCK Your Honor, again, Mr Lipscomb
16 personally did not, but SEL Properties

17 Furthermore, the contract terminated in 2005

18 THE COURT I will allow the Exhibits 157 and
19 158 There was testimony from Mr Melton that the
20 -- about the personal guarantee to cover shortfalls
21 and Two Hundred Thousand Dollar CD to cover the cost,
22 and to the extent that there is evidence that Mr
23 Lipscomb would be personally responsible I will allow
24 the testimony

25 The reason I am talking about these particular

1 exhibits is because these relate to the time period
2 in which the contract was in effect or shortly after,
3 I guess, the loans would have been taken out

4 Then as to the 9 3 04 one, that was shortly after
5 the contract was terminated by Defendants Had it
6 continued to run -- I will not allow Exhibits 156 at
7 this point In the event it should become appropriate
8 to do so, I will allow evidence as to net worth to be
9 presented at that particular point

10 I do not see it as relevant at this particular
11 point

12 MR BOWENS Looking at Exhibit 156, that is
13 wrong It covers -- this particular exhibit covers
14 through 12 31 05, so it covers a time period when
15 it was in force

16 THE COURT I would ask you to present that to
17 me so I can see all of it

18 (Brief pause in the proceeding)

19 MR BABCOCK Your Honor,

20 (Pause continuing)

21 MR BABCOCK Your Honor, in fairness to the
22 Court, the revision cover sheet is dated 3 20 06,
23 and it was prepared as of December 31, 2005

24 The cover sheet should be a part of Your Honor's
25 ruling, and we would note an objection as to all of

1 them I don't want to waive anything
2 THE COURT They will all be admitted
3 (Financial documents admitted over objection,
4 Plaintiffs' Exhibits 156, 157, 158, in evidence)
5 MR BABCOCK Let the record show that we do not
6 withdraw our objection
7 THE COURT I understand
8 MR BOWENS We would offer Exhibits 115 and 126
9 in evidence
10 MR BABCOCK Without objection, Your Honor
11 THE COURT They are admitted
12 (Plaintiffs' Exhibit 115, Richland County let-
13 ter dated 3 1 07, admitted in evidence without objec-
14 tion Plaintiffs' Exhibit 126, accounting records,
15 admitted in evidence without objection)
16 THE COURT Mr Babcock, you have an objection
17 to 156, 157 and 158
18 MR BABCOCK Yes, Your Honor
19 THE COURT Please have the jury come in at this
20 time
21 (Jury returning to Courtroom)
22 THE COURT Good morning, ladies and gentle-
23 men At this time we are ready to continue with the
24 testimony
25 Mr Bowens, if you would call your next witness

1 MR BOWENS We would call Ann Melton

2 May we approach?

3 THE COURT Yes, sir

4 (Conference at the bench between counsel and the
5 Court off the record)

6 MR BOWENS We would call Allen Wise

7 ALLEN WISE, being duly sworn,

8 testified as follows

9 DIRECT EXAMINATION

10 BY MR BOWENS

11 Q Mr Wise, where are you employed?

12 A I am an attorney in solo practice here in
13 Columbia

14 Q And do you know the Plaintiffs, Dutch Fork
15 Development Group and Dutch Fork Realty?

16 A I do I have represented them for many
17 years

18 Q Did you represent them in regard to a contract
19 for the development and construction and marketing
20 by Dutch Fork with regard to Rolling Creek?

21 A Yes, sir, I did

22 Q What was your role with regard to the draft-
23 ing of the contract?

24 A It began with a little draft of a contract that
25 they brought in, and then I prepared one and then

ALLEN WISE ON DIRECT

1 it went to the other side and they sent another one
2 with changes, so it went back and forth, and it was
3 signed later at the other attorney's office

4 Q I hand you what is marked as Exhibit 1 Did
5 you prepare that final version of the contract?

6 A Not this final one

7 Q Who prepared the final version?

8 A I would have to say the attorney for SEL would
9 have prepared the final one because it was not signed
10 in my office

11 Q Did you prepare the draft version that was the
12 one just before this one?

13 A I did

14 Q And did you review that version before it was
15 signed?

16 A I did There were very few minor changes be-
17 tween the two

18 Q And you prepared one before the final version
19 -- that one?

20 A I would say that is one that was prepared by
21 --I would have to say the Defendants in this case --
22 the Defendant's attorney

23 Q Was it provided by the Defendant's attorney?

24 A They provided it at some point but we had made
25 one or two suggested changes It was faxed back and

1 forth I faxed one according to my file that was
2 very similar to this contract

3 Like I say, there were a few changes between
4 the two I do not have in my file anything that is
5 showing any changes after that November 8th one

6 Q That's all the questions I have

7 THE COURT Cross examine

8 CROSS EXAMINATION

9 BY MR BABCOCK

10 Q Good morning, Mr Wise

11 A Good morning, Mr Babcock

12 Q Very briefly, Mr Wise It looks like you had
13 involvement in the preparation of the contract lead-
14 ing up to this one?

15 A Yes, I did I have seen various drafts and I
16 have helped with that

17 Q And there was an attorney, Tim Quinn, helping
18 the Defendants?

19 A My information shows that I have faxed something
20 to Jimmy Knight or to attorneys on the other side
21 who were preparing drafts

22 Q And both sides were involved with drafting the
23 documents?

24 A As far as I can see, yes, sir

25 Q Thank you, sir

1 THE COURT Any Redirect?
2 MR BOWENS No, Your Honor
3 THE COURT You may step down Thank you
4 (Witness excused from stand)
5 THE COURT You may call your next witness
6 MR BOWENS The Plaintiff calls John Quinn
7 JOHN QUINN, being duly
8 sworn, testified as follows
9 CLERK Have a seat, please, and give us your
10 full name
11 WITNESS John Quinn, Q U I N N
12 DIRECT EXAMINATION
13 BY MR BOWENS
14 Q Mr Quinn, where are you employed?
15 A I have a firm, a CPA firm, located in Ballentine,
16 South Carolina
17 Q And are you the CPA for Steve Lipscomb?
18 A I am a CPA I do a lot of work
19 Q Are you the CPA for SEL Properties?
20 A I do the accounting, tax work and consult on
21 some matters
22 Q And are you a financial officer for SEL Properties?
23 A I don't know if I've made any representations
24 as to financial officer It is possible that there
25 is a document that I would have ended up having done

JOHN QUINN ON DIRECT

1 in his behalf as financial officer, but I am not in
2 his employ It would be on a contract basis

3 Q So you are not chief financial officer for SEL
4 Properties?

5 A I do not act as chief financial officer for
6 SEL Properties, no I act as an independent CPA

7 Q But you have in the past acted as chief finan-
8 cial officer?

9 A I have signed as chief financial officer for
10 one firm that I'm aware of that Steve has invested
11 in I don't think I've ever signed for SEL Proper-
12 ties as chief financial officer

13 I just cannot recollect that but I do a lot of
14 things that chief financial officers do

15 Q What is the primary business of SEL Properties?

16 A The primary business of SEL Properties is real
17 estate investment

18 Q Are you familiar with SEL Properties' involve-
19 ment in Courtyards or Rolling Creek?

20 A I am

21 Q During the time periods of 2003, 2004, 2005 --
22 those three years -- was there ever a time during
23 that period of time that you know of that SEL Prop-
24 erties would not be able to pay for road repairs?

25 A I can't make a statement one way or the other

JOHN QUINN ON DIRECT

1 Q Was there ever a complaint during that period of
2 time that you know of that SEL Properties would not
3 have been financially able to pay for road repairs?

4 A I would have to look at financial statements
5 and look at the borrowings because there were some-
6 times two sources primarily

7 They came from borrowings and they came from in-
8 come, as far as sources go

9 So it is not like today there is money, tomorrow
10 there isn't It depends upon the ability for some
11 properties to borrow and it depends on factors going
12 on at the time

13 Q Do you recall giving a deposition in this case?

14 A Yes

15 Q Do you remember during the deposition my asking
16 the same question, whether there was any period of
17 time when SEL Properties would not be able to pay for
18 road repairs?

19 A Specifically, no

20 (The Court opening original deposition package)

21 BY MR BOWENS

22 Q I hand you a copy of the transcript of your
23 deposition so we can go over this If you would,
24 please turn to page 54

25 A All right

JOHN QUINN ON DIRECT

1 Q Are you at that place?

2 A Yes

3 Q I'm going to begin with the question on line
4 17 The question was, during the time period of
5 2003, 2004 -- those two calendar years -- did SEL,
6 LLC, have sufficient capital to have those roads
7 repaired? (Reading from deposition)

8 If you would, please go to line 22 and read
9 your response?

10 A I know of no reason that they wouldn't have
11 (Reading deposition answer)

12 Q Turn to page 55 at line one (Reading question
13 from deposition) Please go to line five and read
14 your response

15 A I know of no reason that they wouldn't be able
16 to (Reading answer from deposition)

17 Q Thank you, sir

18 A And let me state that at the time of the depo-
19 sition and today, right now, I don't have the finan-
20 cial information in front of me I cannot make a
21 positive nor a negative statement This is a state-
22 ment to the effect that I didn't know and today I do
23 not know

24 I didn't do accounting and finance on a day to
25 day basis and I didn't negotiate bank loans for SEL

JOHN QUINN ON DIRECT

1 Properties That was the function of Mr Lipscomb

2 MR BOWENS May I beg the Court's indulgence
3 for a moment?

4 (Brief pause in the proceedings for colloquy
5 between counsel off the record)

6 MR THOMAS Your Honor, may we approach the
7 bench)

8 THE COURT Yes

9 (Conference at the bench between counsel and
10 the Court off the record)

11 THE COURT Ladies and gentlemen of the jury,
12 I'm going to excuse you to your jury room for a brief
13 period

14 Please do not discuss the case

15 (Jury excused from Courtroom)

16 THE COURT Mr Quinn, I'm going to ask you to
17 step down Please do not discuss your testimony dur-
18 ing this time

19 (Witness excused from stand)

20 THE COURT Gentlemen, when you have located
21 the document, please let me know

22 (Whereupon, the Court stood in recess from 10 55
23 until 11 30 A M , when the matter was resumed)

24 THE COURT Is there anything we need to take
25 up before we continue?

JOHN QUINN ON DIRECT

1 MR BOWENS I'm just trying to get these last
2 exhibits remarked and ready to go They now have
3 the full document

4 (Brief pause)

5 MR THOMAS This is the full document

6 MR BOWENS We would ask that Ann Melton, the
7 next witness, be given the complete document to re-
8 view prior to her testimony

9 MR BABCOCK We have no objection

10 MR BOWENS To this Exhibit 156, we have added
11 the rest of the pages, and this is a copy for the
12 Court

13 We would mark this one, and mark these unused
14 pages as Exhibit 159, just for purposes of record keep-
15 ing

16 THE COURT And 159 will not be introduced, is
17 that correct?

18 MR BOWENS Correct

19 (Exhibit 156 redacted with additional pages,
20 and unused pages marked Exhibit 159 for identifica-
21 tion purposes)

22 MR THOMAS Of course, that would be subject
23 to our previous objection?

24 THE COURT That's correct

25 THE COURT Are you ready to proceed?

JOHN QUINN ON DIRECT

1 MR BOWENS Yes, Your Honor

2 THE COURT Please ask the jury to come in

3 Mr Quinn, if you would resume the witness

4 stand

5 (Witness John Quinn resuming the witness stand

6 Jury returning to Courtroom at 11 35 A M)

7 THE COURT You may continue

8 DIRECT EXAMINATION CONTINUED

9 BY MR BOWENS

10 Q I ask you to look at this document and identify
11 it for the Court

12 A I am familiar with the document It is a finan-
13 cial statement for Steve Lipscomb

14 Q Would you please turn to page 6 of 11 -- it is
15 numbered at the bottom

16 A Yes

17 Q Under Note T, are you indicated as the CFO, the
18 chief financial officer, of SEL Properties?

19 A Yes, I am I don't specifically remember this
20 but I definitely did use those terms I used the
21 term chief financial officer of SEL Properties

22 These were prepared by employees of SEL Prop-
23 erties under the supervision of John Quinn, CPA,
24 which I do oversee the bookkeepers

25 I see what they do, and if they've got technical

JOHN QUINN ON DIRECT

1 problems I assist them I do all of that and then I
2 have my own employees who work on the books that are
3 on my staff

4 They mainly do internal control, bank reconcil-
5 iations, tax work and so on

6 The term chief financial officer here was basic-
7 ally I am not in the mix but I do all the books, al-
8 though there are companies they have that I don't do

9 Q Mr Quinn, was there ever a time between Novem-
10 ber of 2001 that SEL Properties would not have been
11 financially able to pay Dutch Fork Nine Thousand Dol-
12 lars a month for a period of six months?

13 A I don't know and the reason I don't know is that
14 one of the capacities I did not do was control their
15 cash I wasn't in a banking relationship

16 I provided financial information and I did a lot
17 of the business side, but I didn't control their cash
18 flow

19 Q And you are not aware of any financial reason
20 that they could not -- why SEL could not have paid
21 Nine Thousand Dollars a month for a period of six
22 months?

23 A No, I do not know whether they could or they
24 could not During what time period?

25 A For the period of November 1 to March 28 of
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JOHN QUINN ON DIRECT

1 2004

2 A I know of no reason that they couldn't but I did
3 not watch the cash on a day to day basis at any par-
4 ticular point in time I did not control the cash

5 I mean, I don't have any records in front of me

6 Q And you have no recollection as to that?

7 A No As I said, I did not control their cash
8 flow

9 Q What I'm asking you as the chief financial offi-
10 cer is whether you know of any reason why SEL Prop-
11 erties couldn't have paid Nine Thousand Dollars per
12 month from November 1, 2006?

13 A I know of no reason

14 Q Thank you

15 A But I would say that I am not in a position
16 to be able to say whether they could or not I don't
17 know

18 It was up to Bookkeepers and Steve Lipscomb to
19 watch cash flow on a day to day basis I did not

20 Q Do you know the financial net worth of SEL Prop-
21 erties during any particular time?

22 A I have computed the net worth over a period of
23 time either on a book basis or a market basis, and you
24 have all of my documents

25 So, yes, if you give me a specific document to
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JOHN QUINN ON DIRECT

1 look at I will be able to tell you whether that's a
2 calculation that I did

3 Q Do you remember testifying at your deposition
4 that the net worth of SEL Properties was Three to
5 Five Million Dollars?

6 A The net worth of SEL Properties? I may well have
7 said that, but I don't recollect it

8 Q Turn to page 22 of your deposition

9 A Sure

10 Q I'm going to read the question on line 10 and
11 you read the answer

12 A Sure

13 MR THOMAS Objection, Your Honor May we
14 approach?

15 THE COURT Yes

16 (Conference at the bench between counsel and the
17 Court off the record)

18 BY MR BOWENS

19 Q I will continue on line 12 Would you have the
20 same type of opinion of a general nature as to what
21 SEL's net worth is? (reading question)

22 Read your answer on line 14

23 A (reading answer) I would think half of that

24 Q Next question, half of what? Three to Five Mil-
25 ion Dollar range? (reading question)

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JOHN QUINN ON DIRECT

1 A Yeah

2 Q Now,

3 A Without any papers in front of me to tell me or
4 SEL Properties' books in front of me, I can't give
5 an answer

6 Mr Lipscomb is one of my commercial clients,
7 and I have many tax clients Mr Lipscomb's SEL Prop-
8 erty is an important client of mine, but I don't keep the
9 figures in the top of my head I just don't keep
10 track of it that way

11 I don't want to answer questions like that with-
12 out documents in front of me

13 Q Are you familiar with Mr Lipscomb's SEL Proper-
14 ties real estate investments?

15 A Yes

16 Q And the cost allocations that were made by SEL
17 properties to determine which amounts of money would
18 go to different properties, was that done by your
19 office?

20 A That was done by me

21 Q You allocated the costs?

22 A That was me

23 Q Was there any input from Mr Lipscomb on that?

24 A I asked him questions and he gave me information
25 as to various phases of the project, as to various

JOHN QUINN ON DIRECT

1 costs Yes, there was input from Mr Lipscomb

2 Q How did you know how to allocate the costs?

3 A Well, I had the overall -- as far as the pur-
4 chase of the land, I had statistics as to that par-
5 ticular part goes

6 Phases two, three and four were not developed at
7 that particular time On Phase one I had actual
8 transactions going through I had the general ledger
9 and what things were being coded to where

10 My understanding was that Mr Lipscomb's SEL
11 Properties' contracted with the Meltons to oversee the
12 projects They had experience in doing just that,
13 and that is what I was told, and I instructed the
14 bookkeeper that the Meltons were in fact overseeing
15 and reviewing things and telling them where to put
16 the money

17 I didn't tell them that, so it was not a mat-
18 ter of allocation, but one of addition I did not
19 audit it, but I compiled the information, and those
20 things that needed to be allocated I allocated them

21 The coding was done in Mr Lipscomb's office
22 The coding was done by the bookkeeper, and when I say
23 the coding, the taking it and putting it into the
24 bookkeeping system

25 What we did is, the project started, Courtyards

JOHN QUINN ON DIRECT

1 and Rolling Creek, and everything was in the same
2 bucket, and then everything that related to this pro-
3 jects were going to be put into those buckets

4 Courtyards and Rolling Creek had four phases, and
5 each were sort of by itself, and from working with
6 the bookkeeper each was a little bit different be-
7 cause phase one was -- they were spending a lot of
8 money, and phase two and phase three were sort of sit-
9 ting there

10 I did not have the budget for the overall scope
11 of the project at any particular time No one told
12 me what the cost of the pool was going to be or where
13 it was going to be I didn't have the information as
14 to where there was going to be a bridge or not a
15 bridge

16 I didn't have the specific estimates as to all
17 of those things I would have liked to have that
18 information but it wasn't available to me, so I took
19 the facts that I had available to me and did the best
20 I could

21 At the end of -- very periodically I would look
22 back and say, okay, they told me this -- what really
23 happened?

24 I would see how the numbers came up and then I
25 would do a reallocation

JOHN QUINN ON DIRECT

1 There were a lot of costs involved with phase
2 one Phases two and three didn't appear to be hav-
3 ing any costs to speak of, and the Meltons were tell-
4 ing the bookkeepers where to put the costs

5 If the bookkeeper didn't know where the costs
6 were to be, they would go to the Meltons and the
7 Meltons signed all invoices

8 Q Are you aware that the approval of the costs
9 was up to SELL Properties?

10 A That's correct Approval of costs However,
11 it is my understanding as far as the project goes
12 the Meltons for the most part signed every invoice
13 and then they went to the bookkeeper If they did
14 not know what to do with it, they were to ask Steve
15 where it was supposed to be

16 I did not tell the bookkeeper where to put the
17 allocations The bookkeepers worked for Mr Lipscomb

18 Q Let me ask you this Are you aware that Mr
19 Lipscomb personally guaranteed to cover the short-
20 falls in phase one?

21 A I know Mr Lipscomb personally guaranteed loans
22 to the bank

23 Q But did you know he personally guaranteed to
24 cover shortfalls that occurred?

25 A I don't personally know

JOHN QUINN ON DIRECT

1 Q You don't know?

2 A If there is a contractual agreement between Mr
3 Lipscomb and anybody else other than the bank as to
4 personal guarantees, I don't know

5 Q Was there ever a point in time in 2002 when Mr
6 Lipscomb would not be personally financially able to
7 cover shortfalls?

8 A I don't know Mr Lipscomb owns lots of stuff
9 and uses lots of bank loans, along with sources of
10 income, to provide cash flow for things he's doing

11 I don't get in the middle of that I have to
12 keep up with what things I have to be aware of, but
13 I am not aware of that so I don't know that

14 Q I show you Exhibit 158 Could you just iden-
15 tify this for the Court?

16 A Okay

17 (Brief pause in the proceeding)

18 BY MR BOWENS

19 Q For the record, it is marked for ID

20 A This is a document that has no cover letter
21 but it is in the form

22 MR THOMAS We would renew our prior objection,
23 Your Honor

24 THE COURT And subject to the discussion we
25 had earlier, it can be discussed

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JOHN QUINN ON DIRECT

1 BY MR BOWENS

2 Q I show you a statement of financial condition as
3 of December 31, 2003

4 A Uh hm

5 Q Do you see there it has controlled assets on the
6 top?

7 A Yes

8 Q And based on that net worth and personal assets,
9 controlled assets, would it be reasonable to expect
10 that Mr Lipscomb would have had personal assets to
11 have covered the shortfall if one occurred in 2002?

12 A Well, that's the bottom line as far as personal
13 net worth The cash is Ten Thousand Four Hundred and
14 Thirty-three Dollars and so

15 Q I'm asking

16 A You were asking me about the net worth and so
17 far as coverage of shortfall Net worth has nothing
18 to do with cash availability Net worth has to do
19 with how much do I own and if I decide to sell it or
20 borrow against it can I borrow against it and can I
21 go get some cash for it

22 Q But that is not a part of the question Based
23 on that, would there be any -- do you know of any

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MR QUINN ON DIRECT

1 reason why Mr Lipscomb could not have exercised that
2 option and covered the shortfalls that occurred in
3 2002?

4 A Well, you know, I don't know, but if he had a
5 shortfall

6 Q I mean, is that the answer, that you don't know?

7 A Yeah I'm sorry but

8 Q Let me

9 A I'll give you some background Okay? If the
10 net number is ten and that's the market value -- okay?
11 And there is Thirty Million in loans and Forty Mil-
12 lion in assets, that means that he is seventy-five
13 percent borrowed out

14 And I don't know at that particular point in time
15 -- you're asking me about one number on a sheet of
16 paper and I don't know about his bankability as far
17 as borrowing money

18 Yeah, that's a big number but

19 Q I think you testified to a net worth with con-
20 trolled assets number of Ten Million Thirty Thousand
21 Seven Sixty-four, but if he went out and sold it or
22 borrowed against it he would have cash

23 Is that right?

24 A If he sold it -- if it sold it, okay,

25 Q Or borrowed against it

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MR QUINN ON DIRECT

1 A or borrowed against it

2 Q The shortfall

3 (Counsel and witness speaking at the same time)

4 THE COURT Hold on Let the witness fully an-
5 swer the question before you ask another one, and make
6 sure that everyone pays attention to what the ques-
7 tions are that are being asked and listen to those
8 answers that are being given

9 A I don't know if he had the ability to borrow
10 against it If he had the ability to borrow against
11 that surplus, if you will, then he should have been
12 able to cover it as cash, but I honestly do not know
13 about the banking situation he was in at this parti-
14 cular point in time

15 The answer is I don't know, and this type of
16 document is given to banks so they can make determin-
17 ations on borrowing

18 And they would look at his factors, SEL Proper-
19 ties, Mr Lipscomb himself, and he had guarantees on
20 lots and lots and lots of loans and he had good banking
21 arrangements

22 The reason he got into this deal is not that he
23 had a Million Dollars in cash sitting in a savings ac-
24 count and he was going to go do this

25 He had the ability to go to banks and borrow

MR QUINN ON DIRECT

1 money That was his asset, his ability to go borrow
2 money

3 And they relied on two things as far as this pro-
4 ject goes, and so did the Meltons They all wanted
5 to make money on this deal

6 Steve Lipscomb can go borrow money to be used
7 to fund the project initially and the Meltons are
8 going to sell the project and get a free cash flow to
9 do the project

10 You know, at this particular point in time, this
11 Ten Million Dollars could be a block of cement for
12 all I know All I do know is that when I got with Mr
13 Lipscomb and we added up all the numbers about what
14 he owed and what he owned, that we came down with
15 Ten Million Seven Hundred Fifty-three Thousand Dollars
16 as the marketable value of stuff he had in excess
17 of what he owed

18 Q Now, the shortfalls in 2002 never exceeded Ten
19 Million Dollars?

20 A Specific to your question, shortfalls of what?

21 Q The shortfalls that were required to fund and to
22 run the development never exceeded Ten Million Dol-
23 lars?

24 A No

25 Q The whole development loan itself was only Two
515

MR QUINN ON DIRECT

1 Million Dollars?

2 A Correct

3 Q If you will turn to page

4 A This is not a statement of Rolling Creek This
5 is a statement of -- this is a statement of not only
6 Steve Lipscomb but Steve Lipscomb's family All the
7 assets are controlled by the family

8 So, you know, you are making an isolated state-
9 ment about one specific project and you are refer-
10 ring to something that is a dual document

11 Q This is entitled the financial statement of Mr
12 Lipscomb, isn't it?

13 A Well, it doesn't have a cover sheet on it

14 Q Look at the very first page where the exhibit
15 label is

16 A Yes

17 Q And it says it is the financial statement of Mr
18 Lipscomb

19 A I understand that, but I don't have the cover
20 sheet, and without the cover sheet on this particular
21 document I cannot tell you exactly what -- even though
22 this thing says this, okay, as far as headings -- it
23 says -- it is a statement of controlled assets and
24 liabilities

25 Controlled assets and liabilities means what

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MR QUINN ON DIRECT

1 assets does he control He is a managing member of
2 SEL Properties

3 As a managing member of SEL Properties, it is not
4 his own personally but he controls those assets, because
5 other family members -- on this page two, it refers
6 statement of financial condition, controlled assets
7 and liabilities, and so I presume without the cover
8 letter that it includes all the assets of the family
9 -- the properties he either personally owns or some
10 family members

11 Q If you will turn to page three of the exhibit

12 A All right

13 Q You also do work for K & L Contracting?

14 A Yes

15 Q And according to note G -- you see note G there?

16 A Give me a second Yes

17 Q This is -- K & L Contracting was formed to com-
18 plement the business endeavors of SEL Properties Is
19 that right?

20 A That's correct

21 Q Okay

22 A When I used the word complement, K & L was formed
23 in order to create -- when you have a development
24 and you are not like a developer who builds all your
25 homes, you get the land ready, do your promotion,

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MR QUINN ON DIRECT

1 and you've got to get contractors involved

2 My discussion with Mr Lipscomb was that K & L
3 was formed to do just that To see property out there
4 and get one, two, three houses up, and that was the
5 original conversation I had with him when that par-
6 ticular business was formed

7 He had a couple of developments and he was look-
8 ing at some others Otherwise, he would have to go
9 and plead with a contractor to please come in and
10 build a house on this land, and he wanted to have
11 some advantage, to be able to start doing the process
12 of controlling it

13 Q I show you what we've marked as Exhibit 157
14 Do you have that?

15 A Well, it doesn't again have a cover letter on
16 it You have my documents, and the way I put my
17 documents together either in hard form or by computer,
18 since you have them all, but the cover letters --
19 these were normally done in a software program that
20 I use for number crunching

21 There would be a cover letter which would be in
22 Word, which would be attached to this

23 The cover letter and the financial document go
24 together

25 This document also -- I believe it is mine even

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MR QUINN ON DIRECT

1 though the cover letter is not there

2 These were compilations, and a compilation does
3 not mean certified It is me getting with Mr Lipscomb
4 and using the financial letter and coming up with an
5 estimate

6 I didn't test it I didn't review it I am a
7 licenced CPS

8 Those are big important things that I didn't do
9 What I did do is come and talk with Mr Lipscomb and
10 we put an estimate together

11 Then I put it down on paper and signed it

12 Q But you identified it

13 MR THOMAS Your Honor, we would renew our
14 objection to the use of these documents

15 THE COURT Noted

16 BY MR BOWENS

17 Q Would you identify this Exhibit for me?

18 A I'm sorry

19 Q Would you identify Exhibit 157?

20 A Exhibit 157 is a statement of financial condi-
21 tion of controlled assets and liabilities

22 Q And what dates does this cover?

23 A This is as of -- there is no cover period It
24 is as of December 31, 2003

25 Q What was the net worth or controlled asset figure
519

MR QUINN ON DIRECT

1 for this report

2 A Ten Million One Hundred Two Thousand Four Hun-
3 dred Seventy-eight

4 Q Is there any reason that for the year 2003 Mr
5 Lipscomb could not have personally covered the short-
6 falls in the development budget for phase one of Court-
7 yards at Rolling Creek?

8 A The cash on hand was Nine Thousand Eight Hundred
9 Five Dollars This statement down below is a whole
10 bunch of companies, and this whole bunch of companies
11 all had a checking account, and those whole bunch of
12 companies had assets and liabilities and loans, so I
13 don't know in the particular instance of Rolling Creek
14 which is part of SEL Properties that -- I'd have to
15 look at the base documents to come back with an opin-
16 ion

17 You're asking for an opinion You're asking for
18 an opinion if he'd be able to do that, and I'm sorry --
19 I didn't control his cash

20 So my ability to be able to say yes or no -- I
21 don't know that There was personal knowledge that
22 bills weren't being paid in a lot of companies because
23 he was running into difficulties as far as cash goes

24 But specifically as to this statement, Ten Mil-
25 lion One O Two Four Seventy-eight -- that is, you know --

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MR QUINN ON DIRECT

1 within that number I have personal knowledge that Six
2 Million on it, of that net worth, was not liquid at
3 all

4 It could not be borrowed against It was sitting
5 there and he was a minority holder of that particular
6 asset

7 Q But according to your estimation here, he con-
8 trolled personally over Ten Million Dollars?

9 A That's correct Net worth

10 Q And the shortfalls in Courtyards, phase one, in
11 2003 never exceeded Ten Million Dollars?

12 A That is absolutely true

13 Q All right

14 A But one has nothing to do with the other, and
15 if you are trying to put a linkage to net worth and
16 the ability to pay a bill, then you are in fact ask-
17 ing me a -- you are making -- you are trying to make
18 a statement that I can't abide by

19 Q Plaintiffs' Exhibit 156 I would ask if you can
20 identify that?

21 A Uh hm This has the cover letter on it, and it
22 is a document dated as of the period of 12 31 05

23 It is a restatement of a report dated 3 17 05
24 that contained an error, and I sent it -- I redid
25 the document when I became aware of the material error
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MR QUINN ON DIRECT

1 in the report and I had to go back and do a revised

2 That was -- I revised that on March 20, 2006

3 MR THOMAS Your Honor, at this time I would re-
4 new our objection

5 THE COURT Noted

6 BY MR BOWENS

7 Q Now, this is a cover letter such as you said with
8 the prior exhibits wasn't attached?

9 A This is similar I don't know if it's identi-
10 cal, but it is similar

11 Q But this is the type of cover letter you were
12 referring to?

13 A This is the type of cover letter that I would
14 normally attach to such a document

15 Q Now, according to this cover letter, you have
16 compiled this statement of the financial condition
17 of Mr Lipscomb as of December 31, 2005 Is that cor-
18 rect?

19 A Correct

20 Q And you did it in accordance with statements
21 (reading rapidly from cover letter to Exhibit 156) Is
22 that correct?

23 A That's also correct

24 Q You were saying a compilation is limited to a
25 representation of the individual's financial condition,

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MR QUINN ON DIRECT

1 so you were getting this information from Mr Lipscomb

2 Is that right?

3 A Correct

4 Q This is not an audited review of his financial
5 condition, so you are not stating an opinion but you
6 are simply repeating what Mr Lipscomb has told you
7 and helped you to formulate?

8 A I formulated it into a financial reporting for-
9 mat

10 Q Based on what he told you?

11 A Based on the information that he made available
12 to me

13 When you say he told me, that's a mis-statement
14 I had access to his books and records, so, therefore,
15 I take a lot of his books and records and compile and
16 base the information

17 So if a particular company has a net worth of a
18 Hundred Dollars but is worth a Million Dollars, I'll
19 do two things

20 I'll say it's a Hundred Dollars book, and a Mil-
21 lion Dollars market That's a pretty wide strain and
22 he doesn't have books like that, but that is basically
23 what I would tell you

24 So I prepared information and worked with him
25 in getting those things put together

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MR QUINN ON DIRECT

1 And there were some things I asked him about of
2 which I had no personal knowledge, such as value of
3 real estate holdings that I just don't have any in-
4 formation about

5 Or he may provide me with a bank estimate of
6 what a value was It's a compilation of things he
7 gives me or things he has and gives me access to

8 Okay, it takes me about twenty to twenty-four
9 hours of work to put this thing together and then I
10 try to review and get after it

11 Now, not in terms of his ability to pay an elec-
12 tric bill, but it does go to his net worth and I do
13 not talk in terms of his cash flow

14 I talk in terms of taking a snapshot and saying
15 let me look at the data If you sold your house today
16 and your house is worth Two Hundred Thousand Dollars,
17 that's what this says

18 Q But the banks use this to determine whether they
19 are going to grant Mr Lipscomb or SEL Properties a
20 loan?

21 A Banks use this among other things to determine
22 whether -- from the following point of view It is
23 a very important document Okay? It is his repre-
24 sentation of things that he owns in excess of things
25 that he owes

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MR QUINN ON DIRECT

1 Q Would you put something in here that you person-
2 ally knew was not true?

3 A I wouldn't put anything in here that -- if I
4 personally had knowledge of things that were wrong,
5 I would not do that

6 Q Okay Now, not long ago you said this was com-
7 piled based on what he told you Did he not -- if he
8 didn't orally tell you, he communicated it to you
9 through written documents?

10 A He gave me access to his documents

11 Q So he didn't give you the information but
12

13 A Eighty percent of it is from access to documents
14 he has

15 Q And twenty percent is

16 A The other twenty percent is sitting down with
17 him and reviewing evaluations and going up and going
18 down, depending on what's happening

19 Q I don't want to mis-state anything, but either he
20 told you twenty percent of the information and the
21 other eighty percent was documents he provided or gave
22 you access to or

23 A Yes

24 Q And turning to the third page into this document
25 The total assets that are identified as of December

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MR QUINN ON DIRECT

1 31, 2005?

2 A Total assets -- the total value of assets

3 Q That's the first column?

4 A Correct It was Six Million Two Fifty-six Eight
5 Hundred Sixty-seven Dollars

6 Q You are on page three Look at page two in front
7 of that

8 A Yeah

9 Q The first column there, December 31, 2005, and
10 looking at the column of value of all entities

11 A Okay

12 Q What are the total assets there?

13 A Twenty-three Million One Hundred Sixty-six Thou-
14 sand Five Twenty-three

15 Q And you have an appreciated value column, is
16 that correct?

17 A Correct

18 Q What is the value of those assets?

19 A Thirty-two Million Six Hundred Twenty-nine Thou-
20 sand Five Sixty-one

21 Q Now, the shortfalls in Courtyards' budget to run
22 the project, pay the invoices, keep things going, it
23 never fell below Thirty-two Million Dollars during
24 2004-2005?

25 A No

MR QUINN ON DIRECT

1 Q Never did?

2 A Never, although one thing has nothing to do with
3 the other

4 You know, you keep on asking the same question
5 In this particular instance, this statement says that
6 there was liabilities, electric bills, of One Million
7 Three Hundred Sixty-eight Thousand Dollars There was
8 -- there was short term and long term debt of Nine
9 Million Dollars

10 Q I understand

11 A As far as the cash requirements go, all right, I
12 provide this as a statement and a snapshot, and at no
13 time did I say that he had -- that he could pay the
14 One Million Three Sixty-eight Thousand
15 Dollars

16 Q But the

17 A And that was information the bank looked at
18 Okay

19 Q But you said this was computed based on conversa-
20 tions with Mr Lipscomb and access to documents, and
21 his total assets on the books is Twenty-three Million
22 Dollars

23 A That's right

24 Q And that you appreciated those based on appreciation

25

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MR QUINN ON DIRECT

1 A Uh hm

2 Q And that is Thirty-two Million Six Twenty-nine
3 Five Sixty-one Is that right?

4 A Yes, sir, that's correct

5 Q Clearly he doesn't have all of that amount of
6 money in cash in a bank somewhere, does he?

7 A No

8 Q But that is the value of the assets?

9 A That is the value -- that is the calculated value
10 estimate of the value of the assets, yes

11 Q These are numbers banks look at in deciding whe-
12 ther to give loans to Mr Lipscomb or SEL Properties?

13 A It is one of the things they use to look at and
14 see will they loan him money

15 Q Now, if you'll turn now to page three of that
16 document

17 A Okay

18 Q There is a line for net worth, personal assets,
19 and you have a book value there and an appreciated value
20 What is the book value?

21 A The book value is Six Million Two Fifty-six
22 Rounded

23 Q And what is the appreciated value?

24 A Thirteen Million Four Forty-seven

25 Q This line takes into account the liabilities,

MR QUINN ON DIRECT

1 doesn't it?

2 A You'll have to bear with me just a second

3 These are net amounts, net liabilities Correct

4 Q And in 2005, the shortfalls at the Courtyards
5 never exceeded either Six Million or Thirteen Million
6 Dollars?

7 A Correct

8 MR BOWENS Your Honor, at this time we would of-
9 fer Exhibits 156, 157 and 158 as evidence

10 MR THOMAS Subject to our previous objections

11 THE COURT They are admitted

12 (Financial reports entered in evidence over ob-
13 jection as Plaintiffs' Exhibits 156, 157, 158)

14 A Once again, as mentioned-- I would reiterate that
15 you are quoting numbers that have nothing to do with
16 cash ability I own a home and if I sell my home,
17 I'll have Two Hundred Thousand Dollars cash, but I
18 don't have Two Hundred Thousand Dollars cash

19 I have a line of credit and I have the ability
20 to borrow of a Hundred Thousand Dollars, but I actually
21 have to liquidate the assets to have the cash

22 Q Mr Lipscomb could go to the bank and show them
23 this financial statement and get a loan for enough money
24 to cover the shortfalls?

25 A You are making a statement of fact that is not

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MR QUINN ON DIRECT

1 a fact You know, Mr Lipscomb is trying to constantly
2 borrow money to fund projects Pays them down and
3 borrows some more on them

4 So from a snapshot point of view, it depends on
5 what projects are going on and what the cash require-
6 ments are

7 This particular project was initially funded by
8 a substantial amount -- there was a substantial amount
9 of money advanced in the very beginning

10 Dutch Fork was supposed to sell lots and a cer-
11 tain amount of money would be paid by Dutch Fork, and
12 later on when the houses got built they would get money

13 Q You are

14 A So later on

15 (Witness and counsel speaking at the same time)

16 THE COURT Please hold on Hold on, please

17 WITNESS I'm sorry

18 MR BOWENS He is not responsive and he is way
19 off the answer or the question I asked him

20 WITNESS He asked about cash flow

21 THE COURT I ask that you listen to the question
22 that you are asked and respond to the question You
23 can certainly explain your answers, but the explana-
24 tion you give needs to relate to the question that is
25 asked

1 WITNESS I'm sorry, Your Honor

2 BY MR BOWENS

3 Q My question is, Mr Lipscomb can use this finan-
4 cial statement that was compiled with your assistance
5 to go to a bank and obtain a loan for enough money
6 to cover, for example, the road repairs of a Hundred
7 Forty-seven Thousand?

8 A He possibly could do that

9 Q Thank you

10 A He possibly may not be able to

11 Q Okay

12 MR BOWENS We'd offer Exhibits 156, 157, 158
13 in evidence

14 THE COURT You've already done that

15 MR BOWENS That's all the questions I have
16 Thank you, sir

17 THE COURT Cross examination

18 CROSS EXAMINATION

19 BY MR THOMAS

20 Q Mr Quinn, by whom are you employed?

21 A Myself

22 Q What is the name of your company?

23 A John J Quinn, CPA

24 Q And how many clients do you have?

25 A I've got -- in addition to Mr Lipscomb's various

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MR QUINN ON CROSS

1 companies, I've got approximately sixty commercial
2 clients and about four hundred tax clients

3 Q How do you know Steve Lipscomb?

4 A I was referred to Steve Lipscomb by the managing
5 partner, Larry Fritz, of Price-Waterhouse-Coopers about
6 ten years ago, to consult with him with regard to a
7 project

8 Q And what work do you do for Steve Lipscomb now?

9 A I provide accounting services for him, account-
10 ing services I over see personnel issues I assist
11 him with regard to his bookkeeper as far as problems
12 that she might have

13 I provide technical assistance His books are
14 kept in Quick Books I serve as adviser and am a spe-
15 cialist in that particular software

16 I do and keep track of his records for storing
17 and provide any number of services for him

18 Q And how many businesses do you work for?

19 A There are about thirteen what I would call com-
20 panies

21 Q And what Lipscomb-related businesses were in-
22 volved in this project?

23 A SEL Properties, Courtyards at Rolling Creek,
24 K & L

25 Q Who owns SEL Properties, LLC?

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MR QUINN ON CROSS

1 A SEL Properties is owned by family members Steve
2 Lipscomb, his wife and children

3 Q And what interests or what developments does SEL
4 Properties own?

5 A I am aware of no interests that they have

6 Q What is SEL Properties' role in this project?

7 A They were to provide financial support for the
8 project

9 Q Who owns the land of this project?

10 A SEL Properties, I believe, held the land in
11 title

12 Q And what interest did the developers have in the
13 land?

14 A From what I understand, none

15 Q What interest did Dutch Fork Development have in
16 the land?

17 A From what I understand, none

18 Q What interest did Dutch Fork Realty have in the
19 land?

20 A From what I understand, none

21 Q The other entity you mentioned was Courtyards
22 at Rolling Creek, LLC?

23 A Correct

24 Q Who owns Courtyards at Rolling Creek, LLC?

25 A It's a wholly owned LLC owned by SEL Properties

533

1 Q What interest of the Meltons is there in the
2 entity known as Courtyards at Rolling Creek?

3 A None

4 Q What is the role of Courtyards at Rolling Creek,
5 LLC, in this project?

6 A That entity was formed as the development company
7 to provide a shelf, an entity, so that we can do the
8 accounting for the project

9 Q And how did they control the money on the pro-
10 ject?

11 A We had a checking account established There
12 were certain transactions that SEL Properties ini-
13 tially made, and we transferred those transactions
14 over to the books and records of Courtyards at Roll-
15 ing Creek

16 From that point on, all the transactions -- when
17 I say all, the majority of the transactions were ac-
18 counted for using the checking account and a separate
19 set of books

20 And when I say a separate set of books, it is
21 how you would keep track of something In other words,
22 if it has to do with your -- with a lake house, okay,
23 you just have to indicate your home

24 So we kept track of the home We kept track
25 of this particular project by itself

MR QUINN ON CROSS

1 We did it the best we could I mean, there is
2 lots of people involved in this thing but we tried
3 to do the best we could to establish and structure,
4 and then try to keep everything within that structure,
5 and I think that based on Ms Richards saying we did
6 good journal entries -- I think we kept a good set
7 of books

8 We did bank reconciliations every month, and we
9 kept track of all accounting-related transactions

10 Q Whatever transactions were related to Courtyards,
11 you put them in a bank account?

12 A No It is possible that with the economic trans-
13 action that wouldn't affect the bank account itself
14 For instance, there were some transactions where there
15 was a debt, a lien on the property, and K & L needed
16 that particular piece of land

17 What they did at NBSC is they reduced the loan
18 amount on Rolling Creek and increased the loan on
19 K & L

20 So there was no cash involved It was strictly
21 paper It was a paper transaction

22 So what we would do is treat it as an intra-trans-
23 action The amount of the loan release was the sale
24 The purchase over at K & L was the amount of the
25 loan that they took, and then there were closing costs

535

MR QUINN ON CROSS

1 and everything else, but there wasn't a dime on the
2 transaction itself

3 So we had to take the documents that we had and
4 we would journalize those entries, and I say journa-
5 lize -- we would write it all down on a piece of paper
6 and do the debits and the credits

7 I know that sounds boring, but we do that for
8 a living

9 So we go ahead and balance that and make that
10 transaction on both sides of the books

11 Q And who owned the bank account that we're talking
12 about?

13 A Courtyards at Rolling Creek had its own checking
14 account

15 We had a federal ID However, SEL Properties
16 owned both of that because it was the controlling com-
17 pany

18 Q What rights did the Meltons have to money that
19 was deposited in the account?

20 A They had no rights specifically to the general ac-
21 count whatsoever

22 Q How many checking accounts did you have set up
23 for the different phases that were involved in the
24 development?

25 A One

MR QUINN ON CROSS

1 Q So you had one checking account and how did you
2 keep track of the money and assets related to the
3 different phases?

4 A Okay We set up -- the checking account is set
5 up in a couple of different boxes One is called
6 the assets

7 So when they bought the land and they did things
8 to improve the land, we put that in a different box
9 as an asset

10 As they started doing more things, we created
11 accounts to track those things We created it phase
12 by phase, and we tried to track and pull into these
13 particular assets as best we could

14 The instructions to bookkeepers were -- they
15 were given this chart of accounts, they were given Quick
16 Books, and they had access to the books and records
17 so they could actually key this stuff in

18 It was either coded black and white, or if it
19 wasn't coded black and white, they were given instruc-
20 tions to find out where it was supposed to go

21 Now, specifically I wasn't there, but that was
22 the general instructions to bookkeepers

23 Q How did that relate to the different phases?

24 A Well, if you had a particular bill -- let's
25 say for landscaping, and if the landscaping was done

MR QUINN ON CROSS

1 on phase one and phase two and phase three, that bill
2 would be broken up among phase one, phase two, phase
3 three

4 If it only had to do with phase one, it would be
5 phase one It depends upon that specific bill

6 Q And who did the breaking down of the specific
7 bills?

8 A Well, the breaking down of specific bills if it
9 was identified on the invoice, then the bookkeepers
10 would just do it

11 If it wasn't broken down, they were supposed to
12 ask All right? In that particular instance, it
13 depended on who had personal knowledge

14 There were a number of people involved with the
15 project who might have personal knowledge Pat Kirk
16 is a person who helped with the project some, and he
17 did some transactions

18 So if he had personal knowledge of what it was
19 for, they would ask him even though he wasn't work-
20 ing there and was in and out

21 If it was a bill that Steve had control over,
22 they would ask Steve, and if it dealt with the pro-
23 ject

24 All right My understanding is that -- and I
25 was not there, but my understanding was that D Melton

538

MR QUINN ON CROSS

1 initialized the invoices for the engineering and most
2 of the work and told the ladies where to put it I
3 relied on that, and I -- you know, I did not meet with
4 these folks I never had a sit-down meeting with them
5 as to exactly what happened, but that is my under-
6 standing and that was my reliance

7 Q And how many different companies were the book-
8 keepers coding bills for?

9 A There were coding for up to eleven different
10 companies at that time

11 Q And how many transactions in a given year would
12 the bookkeepers code?

13 A A given year? Thousands

14 Q And how many invoices did they code for this par-
15 ticular project?

16 A I honestly cannot tell you There were some
17 really, really big invoices, and tons of small ones
18 So there was over a thousand or maybe two thousand
19 I really don't know

20 Q How was the land paid for for this project?

21 A The land was originally paid out of SEL Prop-
22 erties, and the source of the funds I don't actually
23 know

24 If Mr Lipscomb borrowed some money or had some
25 money available -- the initial purchase was done by
539

MR QUINN ON CROSS

1 SEL Property

2 Q And how was the development paid for initially?

3 A The development initially was paid for by a loan
4 -- to my understanding now -- I wasn't there, but the
5 way it was looked at from a bookkeeping point of view
6 -- the development was to be financed via borrowings
7 from the bank All right?

8 And to be funded as far as all the improvements
9 to get the land ready for sale

10 Q And who was on the debt for that development
11 loan?

12 A SEL Property

13 Q And who was to give a personal guarantee?

14 A Steve Lipscomb

15 Q And what money did the Meltons put up toward the
16 development?

17 A I'm unaware of any money that wa sput up by
18 them

19 Q How much money did the Meltons put up toward the
20 land purchase?

21 A I'm unaware of any money that they put up for
22 that

23 Q Who owns the remaining land on this project out
24 there now?

25 A SEL Property

540

MR QUINN ON CROSS

1 Q And did the initial development loan cover all
2 the costs of the development?

3 A No There is a certain amount that had to be up-
4 fronted by SEL Property in order to keep the project
5 going

6 And I presumed that was going to be the case
7 Initially a bank doesn't cover a hundred percent of
8 the costs They may cover eighty percent, until the
9 project starts to generate its own cash flow

10 Q All right

11 A So at one point in time, I believe I showed about
12 Six Hundred Thousand advanced out of SEL Property to
13 Rolling Creek, and I talk in terms of them being dif-
14 ferent things because that's the way we looked at
15 it

16 Q Now, when you talk about an advance by SEL Prop-
17 erties of Six Hundred Thousand Dollars, was that an
18 additional Six Hundred Thousand Dollars that SEL
19 Properties put into the project in addition to the
20 the development loan?

21 A Well, no When I talk in terms of Six Hundred
22 Thousand Dollars, it's a fluid number It is like a
23 line of credit Okay?

24 We need the money and we try to put it in

25 In that particular project, there were a number

541

MR QUINN ON CROSS

1 of things going on

2 There was phase four over here Okay?

3 Q Okay

4 A And it started making money, and then there was
5 phase one and it was costing money All right

6 Earlier I think you talked about phase four making
7 money, and it did make some money

8 That money was used over on phase one to help to
9 pay for the costs So at that point in time in the
10 picture there might have been Two Hundred Thousand
11 Dollars made over in phase four and Six Hundred Thous-
12 and that was advanced by SEL

13 So there could have been Eight Hundred Thous-
14 and over on phase one at any point in time

15 Q Why would more money have to be put into the
16 project?

17 A Well, strictly from my perspective the project
18 got elongated The -- they talked in terms of a five
19 year time frame, but -- and I don't have intimate
20 knowledge of the project I have accounting knowledge
21 of the project

22 But periodically when I would review -- and I
23 would do that I would look at the allocations and
24 look at the books

25 I would have to make a decision and recommendation

542

MR QUINN ON CROSS

1 as to what to do about allocated costs

2 There was a point in time where the elongation
3 of the project on phase one reached a point that it
4 was a question mark as to what is going on in phase
5 two and phase three

6 Now, phase two and phase three was dirt Now,
7 there was some piping going out there and getting ready
8 to do something at some point in time

9 At some point in time the project was stalled
10 out and in my mind after three years, you know, if you
11 haven't started phase two and phase three, then, you
12 know, you have spent all this money

13 So I looked at it periodically, as I said, and
14

15 Q Why would SEL Properties have put more money into
16 the project?

17 A Timing and cash flow

18 Q And where was the cash investment going to come
19 from?

20 A Borrowing, getting cash from other sources, such
21 as phase four

22 At some point my understanding is that Steve had
23 used up his lines of credit as far as the project goes,
24 and he did not have the liquid cash available to be
25 able to put into the project, and the project was not

543

MR QUINN ON CROSS

1 generating cash

2 Q How was the project supposed to generate cash?

3 A By selling stuff

4 Q Selling what?

5 A Selling land and selling lots

6 Q Who were to be selling lots?

7 A The Meltons were responsible for the marketing
8 of the project and the selling

9 They were the listing agents

10 Q What happened when there was a problem with cash
11 not flowing in?

12 A Well, once we got -- once it was in a crunch,
13 once they got behind, it was a constant issue

14 Could Steve borrow some money and put it in?
15 Where was he going to get it from? How do you feed
16 a horse -- you know, the horse was eating a lot of
17 hay

18 Steve was constantly trying to find some money

19 Q Where was the expected source of the hay coming
20 in?

21 A

22 Q Where was the cash supposed to come from?

23 A Well, the hay after a period of time was sup-
24 posed to come from the project The -- it was --
25 at some point in time the lots get sold and the

544

MR QUINN ON CROSS

1 interest goes down You have some cash flow, and
2 if lots do not sell there is a lot of trouble

3 When a lot sold, there was no commission paid
4 If there was a spread between -- the bank had the
5 loan and they were taking -- I'm not positive -- I
6 think eighty percent, and the twenty percent was left
7 in the business to be able to pay for overhead and
8 costs and interest expense

9 Q Mr Quinn, I want to hand you what's previously
10 been marked as Plaintiffs' Exhibit 130 Do you recog-
11 nize this?

12 A Well, it's a listing without being tied into the
13 general ledger of -- it refers to things that I would
14 say are extracts

15 Q What does the document say at the very top?

16 A It says, Letts Associates, finance charges

17 Q And are you familiar with this?

18 A Yes, I am

19 Q Why was Letts charging finance charges?

20 A Because they were not being paid on a timely
21 basis

22 Q Why is that?

23 A Because there wasn't enough money in the bank to
24 pay them

25 Q Why wasn't the money available?

545

MR QUINN ON CROSS

1 A Well, there are a combination of sources The
2 borrower availability for Lipscomb to put cash in,
3 and cash generation on the project

4 Q And how was it expected that the project would
5 generate cash?

6 A Selling of lots

7 Q Mr Quinn, is this a proper charge to Courtyards
8 at Rolling Creek?

9 A Yes

10 Q Is this an expense with regards to Courtyards
11 at Rolling Creek?

12 A Yes

13 Q This is 137, an invoice What does this docu-
14 ment refer to?

15 A This document is again a listing of transactions
16 At the top it says NBSC overdraft, non-sufficient
17 funds, 2004

18 Q Were there times when the bank account we're talk-
19 ing about for Courtyards at Rolling Creek didn't have
20 sufficient cash?

21 A Yes

22 Q And why were there overdrafts on that account?

23 A SEL Properties, Steve Lipscomb and NBSC had had
24 a good relationship over a period of time They did
25 not have a specific agreement for overdraft protection
546

MR QUINN ON CROSS

1 for funding in-house checks They would charge these
2 and cover the checks

3 So in an effort to balance the paying of inter-
4 est versus the cash availability, they would inform us
5 that they're going to have a closing and they're going
6 to get the cash intact

7 So they were doing it slowly and there was an
8 agreement with NBSC that they would not bounce -- if
9 you write a check and you cannot cover it, that's bad
10 Okay?

11 If you write a check and it bounces, that is
12 worse The arrangement with NBSC was that they would
13 cover things for them

14 Q And you talked about when they would have a clos-
15 ing, but where were the moneys supposed to come from
16 to go into the account and pay costs?

17 A Well, the project should mature and it was really
18 to come from the sale of lots That was the goal

19 Initially, you finance it, you fund it, you
20 get it moving, and then it has to -- it is supposed
21 to have a life of its own It's supposed to have a
22 heartbeat, and that heartbeat is selling lots and
23 cash flow

24 Q Now, what is K & L Contracting, LLC?

25 A K & L Contracting, LLC, is a residential

547

MR QUINN ON CROSS

1 construction firm

2 Q What role did K & L Contracting or K & L Con-
3 struction have?

4 A K & L bought lots and built homes on the lots
5 at Courtyards at Rolling Creek

6 Q How much money did K & L make on phase one?

7 A I have yet to see them make any money

8 Q Are you familiar with the finances of K & L?

9 A Yes

10 Q And was it a profitable venture, K & L?

11 A Well, you know, K & L built homes at various
12 locations, but the overall program that Steve attempted
13 to do with K & L has not been a successful venture at
14 all

15 Q What about Courtyards at Rolling Creek?

16 A To my knowledge, no

17 Q Mr Quinn, I want to show you a document here
18 that is marked as Plaintiffs' Exhibit 48

19 Take a second and look at that document

20 A Sure

21 Q What is the document?

22 A This appears to be a transfer of deed, transfer-
23 ring property

24 A What property is that?

25 Q SEL Property is selling a lot Let's see if I

548

MR QUINN ON CROSS

1 can identify the specific lot here That refers to
2 Lot 57, Rolling Creek

3 Q Okay, and I hand you what's been marked as Exhibit
4 47

5 A Okay

6 Q What is this document?

7 A This is what is generically referred to as a HUD
8 statement

9 Q Okay, and what lot is the subject of that state-
10 ment?

11 A Lot 57

12 Q And take a look at the second page

13 A Uh hm

14 Q The part that reads NBSC partial release -- do
15 you see that?

16 A Yes

17 Q What does that have to do with Lot 57?

18 A This is a a non-cash transfer of assets Okay?
19 In other words, any cash that was passing reduced the
20 debt on Rolling Creek

21 So there was no cash transfer It could have
22 been done another way K & L could have borrowed the
23 money, put in a check for Thirty-two Thousand Dollars,
24 and that check for Thirty-two Thousand would have
25 paid the debt, but that's a little messy, so the way
549

MR QUINN ON CROSS

1 this actually worked was K & L ended up with the prop-
2 erty and they ended up with debt

3 Rolling Creek sold the property and ended up with
4 a reduction in debt

5 Q Mr Quinn, let's go back real quick to Exhibit
6 48

7 A I'm sorry?

8 Q Exhibit 48

9 A Okay

10 Q Top of the page There was no cash consideration
11 for Lot 57

12 A Correct

13 Q Does that mean that K & L got that lot for free?

14 A No, not at all

15 Q How was that lot paid for?

16 A That lot cost Thirty-two Thousand Dollars --
17 actually, it cost Thirty-two Thousand plus closing
18 costs

19 Q All right

20 A K & L ended up with a debt All right? So if
21 -- well, I try to comment in parallels

22 Q Okay

23 A If I bought a car from somebody and I took over
24 that debt, gave them a Hundred Dollars for the car,
25 Five Thousand Dollars for the loan, I bought that for

550

MR QUINN ON CROSS

1 Fifty-one Hundred Dollars

2 This is the same thing The loan was the same
3 as cash

4 Q Let's go to K & L's purchase of Lot 15, Court-
5 yards at Rolling Creek

6 A You know, specifically I would need some docu-
7 ments in front of me

8 Q Let me ask you about what is marked Exhibit 46

9 A Okay

10 Q Take a minute to look at that

11 A Okay

12 Q What is that document?

13 A This is a HUD statement similar to the other
14 document that I referred to It is for Lot 15

15 Q Okay, and look at the second page of this docu-
16 ment

17 A Yes Again, this was a release It was for,
18 I think, Thirty-one Thousand Six Hundred Dollars,
19 and -- in this and with my prior testimony, when we
20 got a document like this that came in, we treated it
21 just like any other sale

22 We booked the sale, took the costs against it,
23 and if there be a profit take the profit, reduce the
24 debt

25 You know, we fully treated this the same as if
551

MR QUINN ON CROSS

1 somebody had written a check

2 Q And did -- are you aware of any lot that K & L

3 Contracting got in Courtyards for free?

4 A No

5 Q And were all the purchases of lots by K & L prop-

6 erty reflected in the books?

7 A I believe they were

8 Q And I hand you what's been marked as Exhibit

9 131 Mr Quinn, are you familiar with this docu-

10 ment?

11 A I am

12 Q What is it?

13 A The top document is a check to K & L for Twenty-

14 two Thousand Dollars, and it is marked loan

15 Q Where did the check come from?

16 A The check came out of Courtyards at Rolling Creek,

17 LLC

18 Q Did the Meltons have a checking account?

19 A None that I'm aware of

20 Q Now, do you have personal knowledge as to whether

21 this loan was repaid?

22 A Well, specifically I'm not sure There was

23 Twenty-five Thousand Dollars put in by SEL Property

24 about seven days later

25 K & L, Rolling Creek and SEL Property had a -

552

MR QUINN ON CROSS

1 relationship K & L bought lots, and the reason --
2 and one of the reasons it bought lots of lots in my
3 estimation is

4 MR BOWENS Objection Speculation

5 WITNESS Well,

6 THE COURT Sustained, unless he has personal
7 knowledge

8 WITNESS I have personal knowledge I'm sorry,
9 Your Honor

10 In discussions with Steve Lipscomb as far as --
11 when the project was going through and talking about
12 K & L and forming K & L, the initial program was that
13 K & L would do seed bulding

14 Seed building means three, four, five The pres-
15 sure as far as moving this project along

16 MR BOWENS Objection

17 WITNESS from a cash flow point of view

18 THE COURT Hold on, please

19 MR BOWENS May we approach?

20 THE COURT Yes

21 (Conference at the bench between counsel and the
22 Court off the record)

23 THE COURT Continue

24 BY MR THOMAS

25 Q A moment ago you said that there was Twenty-five

553

MR QUINN ON CROSS

1 Dollars -- a Twenty-two Thousand Dollar check to K & L?

2 A Uh hm

3 Q What impact did the impact of Twenty-two Thous-
4 and Dollars coming out of the bank account have on
5 Dutch Fork's percentage of profits?

6 A None

7 Q And the Twenty-five Thousand Dollar cash infus-
8 ion within seven or eight days, how much impact did
9 it have on the cash flow?

10 A None

11 Q I'm going to move on to Exhibit 134 Are you
12 familiar with this document?

13 A Yes

14 Q And what is it?

15 A Number 134

16 Q What is the document?

17 A It is an invoice from a business known as Lee,
18 Inc d b a American Amusement

19 Q And what is it in regard to? Who is it billed to?

20 A Rolling Creek -- Courtyards at Rolling Creek

21 Q And what is the invoice for?

22 A For -- the majority of it is for accounting ser-
23 vices that were being performed for Courtyards at
24 Rolling Creek

25 Part of it was -- it says auto expenses, which

MR QUINN ON CROSS

1 is mileage

2 Q And why did the Courtyards at Rolling Creek pay
3 mileage?

4 A Well, the bookkeeper at that particular point in
5 time had -- this would have come from the bookkeeper
6 and not from anyone else -- would go -- I'm sorry

7 This could possibly be a bill that I charged,
8 but I presume the source is the bookkeeper, who would
9 go out to the sites using their personal automobile
10 -- go out on locations and would charge

11 Q There are two charges on there for P R dated
12 February 6 of '04 and February 20 of '04

13 A Yes

14 Q What is that?

15 A That is used for bookkeeping services, their
16 accountant This is the person who was doing the
17 bookkeeping back then and that person was being paid
18 out of Lee, Inc

19 Q Why would Courtyards at Rolling Creek be paying
20 for this?

21 A Because the set of books was being maintained

22 Q Was this a necessary cost to the project?

23 A Yes

24 Q Going back to the loan to K & L, was that booked
25 as an expense to the project?

555

MR QUINN ON CROSS

1 A No

2 Q And how come Lee, Inc is being paid on this in-
3 voice?

4 A This is Fifty Dollars, and as far as the period
5 of time it looks like Twenty-five Dollars a week, in
6 my estimation

7 Q And isn't it more cost effective to charge for
8 an internal bookkeeper and allocate costs or

9 A Well, I didn't -- the project itself -- they
10 tried to do things as inexpensively as possible

11 In this particular instance, they had a bookkeeper
12 that was doing books for lots of different entities
13 Therefore, they allocated charges across the various
14 companies, and everybody paid a little bit for the
15 services

16 Q Is it a proper cost of the project?

17 A Yes

18 Q Mr Quinn, I turn your attention to Exhibit 135,
19 and ask if you are familiar with this document?

20 A Yes

21 Q And what is it?

22 A It is an invoice from SEL Properties to Court-
23 yards at Rolling Creek, and it says John Deere equip-
24 ment for November of 2003

25 Q How much is it?

556

MR QUINN ON CROSS

1 A Ninety-seven Dollars and Thirty-four Cents

2 Q Why would Courtyards at Rolling Creek be paying
3 for John Deere equipment?

4 A Because they used the equipment

5 Q Where would they use it?

6 A In the common area The -- you have individual
7 lots and then you have entranceways, sign areas, that
8 are not part of individual lots

9 The homeowners' association eventually takes care
10 of that and the homeowners pay for that, but in the
11 development stage the developer takes care of those
12 costs until being relieved of that expense

13 Q And has Courtyards at Rolling Creek now been
14 relieved of paying for that, for maintaining the common
15 areas?

16 A They are continuing to have to pay for a certain
17 amount of care to common areas through the homeowners'
18 association now

19 The -- it's my understanding -- and I don't
20 know who agreed to this -- but it was that when a lot
21 got sold to a contractor -- until such time as that
22 house was sold to an individual, no homeowners' fee
23 was assessed

24 So for the unassessed homeowners' association fees,
25 yet today Courtyards at Rolling Creek is incurring

557

MR QUINN ON CROSS

1 an expense which they have to assume

2 Q Okay

3 A Also, work is being done out there in the common
4 area to keep costs down It is an ongoing cost that
5 not even the homeowners' association is picking up

6 They are just trying to get it done and it is
7 cheaper for them to just do it

8 Q Mr Quinn, is the charge for the John Deere
9 equipment a proper cost of the project?

10 A As far as the value goes, I can't make a judgment
11 But as far as the type of charge, absolutely

12 Q Can you buy a John Deere tractor for Ninety-
13 seven Dollars?

14 A No

15 Q Would you go to page 7 of Exhibit 135, please?

16 A Sure

17 Q And are you familiar with that document?

18 A Yes

19 Q What is it?

20 A This is a check written by Courtyards at Rolling
21 Creek, LLC, and it was paid to SEL Properties, and
22 it was a reimbursement of money, and it says, pay
23 Spence Irrigation for invoices 197, 198, 199 and

24 111

25 Q Now, does this

558

MR QUINN ON CROSS

1 A Recent invoices

2 Q And are those invoices part of the Exhibit?

3 A Yes

4 Q And what do the invoices relate to?

5 A They relate to the purchase of a Dingo, inter-
6 est, insurance and principal

7 Q And are you familiar with a Dingo?

8 A Yes

9 Q What is a Dingo used for?

10 A Well, specifically it was used for landscaping
11 work, for work in the common areas

12 Spence, according to these invoices -- it was an
13 arrangement to have them do landscaping work at Court-
14 yards at Rolling Creek

15 Q And was Courtyards at Rolling Creek eventually
16 reimbursed for the

17 A This was charged back I believe these are --
18 these were actual invoices that were submitted by Ron
19 Spence or Spence Irrigation to Courtyards at Rolling
20 Creek These were deducted

21 Q Okay

22 A But this transaction while in the development
23 stage was just trying to find some way to get the
24 job done, and Ron Spence didn't have the wherewithall
25 to go get the equipment

559

MR QUINN ON CROSS

1 So it was a benefit -- scratch your back situa-
2 tion Eventually it got charged back to him

3 Q And what effect does this Two Thouand Nine Dol-
4 lars for the Dingo have on Dutch Fork Development
5 Group's share of profits?

6 A It was not charged to expense No effect at all
7 on profit

8 Q Look at Exhibit 133

9 A Sure

10 Q What is that?

11 A The document is a listing of receipts Again,
12 that tied into the journal

13 It is just a listing but I would presume it was
14 taken from information provided to someone who calcu-
15 lated it

16 Q And looking at the top here, what does that
17 say?

18 A Pit Stop, and it is for two point eight five
19 gallons of gas

20 Q Why would Courtyards at Rolling Creek buy two
21 pot eight five gallons of gas?

22 A Because they were mowing lawns

23 Q And

24 A And running equipment that used gas

25 Q Where was it to be used?

560

MR QUINN ON CROSS

1 A Common areas at Rolling Creek

2 Q I'm going to hand you now what's marked Exhibit
3 136

4 A Okay

5 Q What is that document?

6 A This is a tabulation again It says cash and
7 miscellaneous checks

8 The identification is cash tickets, casual labor,
9 and there is one notation here for Larry Cook

10 Q Where is casual labor being used?

11 A In the -- it was used for the landscaping in
12 Courtyards, used in the common areas, and it would be
13 used for doing miscellaneous work in support of the
14 project

15 Q Why would you use casual labor to do maintenance
16 work for the project as opposed to going and hiring
17 people?

18 A Money

19 Q Okay

20 A And cost I mean, the -- I wasn't happy with
21 this at all, but to keep the costs down they would
22 literally go down to Oliver Gospel Mission and pick
23 up some people and then pay them in cash

24 They would come out and do landscaping work

25 Now, it was good for them and it was good for

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MR QUINN ON CROSS

1 the project, but I wasn't happy because of 1099s
2 and all that kind of thing

3 Casual labor -- but to keep the cost of the pro-
4 ject down and the cash flow in the project, they did
5 what they needed to do

6 Q Why pay in cash?

7 A

8 MR BOWENS Objection Calls for speculation

9 THE COURT Sustained

10 Let's take a break This will be a break for
11 lunch

12 Ladies and gentlemen, I'm going to remind you of
13 the instructions I have given to you previously, that
14 is, that you should not discuss this matter among your-
15 selves You have not heard all of the evidence

16 Also, as you come and go from the Courthouse that
17 you remember again not to engage in any discussions
18 with anyone who may approach you, which is inappro-
19 priate

20 Please do not listen to any conversations you
21 may hear in the hallways as you come and go

22 Remember all of the instructions I have given to
23 you previously

24 I would ask that you report back at 2 25, and
25 when you report back at that time, we will be ready

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1 to continue on with the trial of this case

2 Thank you

3 (Jury excused from Courtroom at 1 06 P M for
4 the lunch period)

5 THE COURT Mr Quinn, at this time you may
6 step down

7 I would instruct you that you should not discuss
8 your testimony with anyone during this break You have
9 not completed your testimony so it would be inappro-
10 priate for you to discuss it until that time

11 WITNESS Thank you

12 (Witness excused from witness stand)

13 THE COURT Gentlemen, my law clerk during the
14 break will try to obtain from you some estimate as to
15 how many witnesses we have left in this case and how
16 much longer it will take to try

17 Obviously, this is not a four day case or a three
18 day case

19 The Courthouse will not be available over the
20 weekend They will be doing mock trials in the Court-
21 house on Saturday and on Sunday, and every Courtroom
22 will be used for mock trial purposes

23 So if we don't finish the case tomorrow, we will
24 have to come back on Monday, and I think it is not
25 likely we will finish tomorrow

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1 I have not, of course, discussed any of that
2 with the jurors I think they may have figured it
3 out, but I think they are entitled to know that so
4 they can make appropriate plans

5 I need to find out from you all how many witnes-
6 ses we have left and how long you expect it to go on,
7 and how far into next week we may end up going

8 I hope you will discuss that, and I understand
9 there have been some negotiations but they have not
10 been fruitful I would suggest that you all continue
11 to try to discuss those matters for your own benefits

12 With that, I'll see you all at two twenty

13 Thank you

14 (Whereupon, the Court stood in recess)

15 (The matter resumed when Court was called to order
16 at 2 45 P M)

17 THE COURT Are we ready to continue at this
18 time?

19 MR THOMAS Yes, Your Honor

20 MR BOWENS Plaintiffs are ready to proceed,
21 Your Honor

22 THE COURT I think I mentioned in chambers that
23 one of the jurors has a matter we need to consider so
24 we can respond to him

25 MR THOMAS Yes, Your Honor

1 THE COURT I have a note from a juror who
2 has an issue I need to discuss with you His wife
3 is scheduled for surgery at six A M tomorrow, Fri-
4 day, and he needs to get her from home -- get her
5 home from the hospital and so on
6 The surgery is at seven thirty A M and will last
7 one hour He believes he can be here by twelve noon,
8 and we can call the doctor if need be
9 You have indicated that the testimony probably
10 would not be concluded until Monday sometime, and if
11 you would wish me to exclude the juror I can do that
12 I have not yet inquired of the jury about their
13 schedules next week, and perhaps before we make a
14 decision about excusing a juror I should make that
15 inquiry
16 I mean, I can either call them in and explain
17 that we anticipate that the case needs to go into
18 next week up until Tuesday that we can probably get
19 it to them so they can begin their deliberations on
20 Tuesday
21 I will tell them they need to consider that
22 and advise us if they have any schedule problems and
23 get back to me
24 MR BABCOCK That will be fine, Your Honor
25 THE COURT It would be a shame to release the

1 juror and then -- I'm concerned about having several
2 people that have a problem with next week So I don't
3 want to do anything with this particular juror un-
4 til we find that out

5 MR BOWENS We could start late tomorrow and
6 allow him to to continue

7 THE COURT We can do that I wouldn't have a
8 problem with that

9 MR BABCOCK I have no problem with that
10 either

11 THE COURT When I bring them in, I will just
12 tell them that after consultation with you all that
13 we will need to go at least two days into next week
14 and we believe we will be in a position to give it
15 to them to begin deliberations on Tuesday

16 I'll tell them that they need to consider that
17 and then at the break some of them may need to check
18 with their employers Certainly we'll make those
19 arrangements, and then they can advise me after the
20 break how they stand

21 Anything else we need to take up before we bring
22 back the jury?

23 MR BOWENS No, Your Honor

24 THE COURT Ask the jury to come in, please

25 (Jury returned to the Courtroom at 2 53 P M)

1 THE COURT Good afternoon, ladies and gentlemen

2 During our lunch break I had an opportunity to
3 discuss this case with the attorneys, and it appears
4 from information they have provided to me that the
5 case will need to go into next week

6 Hopefully, we will be in a situation where we
7 can get the case to you to begin deliberations by
8 Tuesday of next week

9 I say that because obviously your jury duty was
10 only for a week, and for us to continue into next
11 week I will need for you all to consult with your
12 employers or your business or whatever to determine
13 your availability to be able to come on Monday --
14 after tomorrow, of course, to come back on Monday to
15 continue with this matter

16 So I am going to ask that the next time we take
17 a break that you write me any notes about those --
18 about that matter

19 To the extent that you are able to make contact
20 with your employer or that you need to contact someone
21 to make those arrangements, please let me know so
22 that I can accommodate you in that regard

23 Of course, I apologize for having to carry it
24 on into next week, but you can tell by the testimony,
25 and we've had a number of witnesses -- you can tell

1 by the number of witnesses that we need to do that as
2 it is not something that could be done within a shorter
3 period of time

4 I ask your indulgence and your patience in that
5 regard Please give me that information after we
6 take our next break

7 Having said that, Mr Quinn, if you would resume
8 the stand I remind you that you are still under
9 oath

10 (Witness John Quinn resuming the witness stand
11 as instructed)

12 THE COURT Mr Thomas, you may continue
13 CROSS EXAMINATION CONTINUED

14 BY MR THOMAS

15 MR THOMAS Thank you, Your Honor

16 Q Mr Quinn, you were asked about Exhibit 133 pre-
17 viously?

18 A Yes, I was

19 Q And you have testified about gasoline and some
20 other expenses

21 A Yes

22 Q Were you aware that some documents were destroyed
23 that were in your possession?

24 A Yes

25 Q And was gasoline a common expense for Courtyards

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MR QUINN ON CROSS

1 to incur?

2 A Yes

3 Q Okay

4 A The way that they were operating it would be a
5 routine item

6 Q And we have had previously some testimony about
7 those documents that may have been destroyed?

8 A Yes

9 Q And what documents to your knowledge were de-
10 stroyed?

11 A Specifically, I don't have an inventory of those
12 documents but they were -- they were documents that
13 did not relate to this particular company

14 They were documents that didn't relate to SEL
15 Properties and didn't relate to Steve Lipscomb

16 They were some documents that I had had in my
17 possession, and those documents supported worksheets
18 and some things like hard copies

19 These -- what happened is that during two per-
20 iods of time as far as the office goes, we ended up
21 purging some documents, and I had Carrie, who worked
22 for Mr Lipscomb, and one of my staff, to get together
23 and to go through them

24 Inadvertently there were some cases that were
25 mis -- put together, mis-filed, and one of my ladies,
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JOHN QUINN ON CROSS

1 Amanda Barkel, who does a lot of the loan closings
2 -- she went looking for something prior to all of
3 this going on, and she could not find whatever it
4 was It was not found

5 I guess we wanted to look back as far as the
6 documents go, and we wanted to try to get rid of
7 documents from 1999 on

8 We had documents from 1994, 1995, 1996, 1997,
9 and there is no requirement to keep those documents
10 although my intent had been to keep them for a seven
11 year period My tax files I certainly keep for seven
12 years

13 That is good practice, and I am also guardian
14 of a number of companies for Steve as far as his
15 paperwork goes That is segregated and kept separ-
16 ate

17 Normally we wouldn't get rid of anything that
18 was active It just doesn't provide any benefit to
19 anyone

20 We do, however, as far as files go -- we use our
21 computers extensively as far as work files go

22 I was going back into 1991, 1992, 1993, 1994,
23 and I pulled two full cases of hard paper and I think
24 eight thousand -- no, two thousand counter files which
25 were provided by subpoena

MR QUINN ON CROSS

1 Those were my own work files, documents and
2 everything

3 As far as the general ledger, and the impact
4 on the general ledger, I don't think it had any or
5 should have had any effect on the ability to calcu-
6 late investment property The audit trail was not
7 hurt

8 We ended up having to go and get some additional
9 HUD closing -- copies of those closing documents
10 that were destroyed We did recover all of those
11 documents

12 So we may be missing some invoices but we had
13 who was paid, what was paid, and how much was paid
14 All of those records

15 I mean, if I had a journal on it, I could have a
16 good audit trail, and I don't think it jeopardizes
17 my ability

18 I advised when I was subpoenaed that certain
19 documents were shredded and I don't have exactly
20 what those documents were, and I wanted that to be
21 clear

22 Q Did you intentionally destroy documents?

23 A No

24 Q Were any other documents from that time period
25 for your other clients also destroyed?

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MR QUINN ON CROSS

1 A Yes

2 Q Do you know what the end of the day profits are
3 going to be for phase one?

4 A No

5 Q Why?

6 A Because there are unknowns still associated with
7 phase one

8 MR BOWENS Your Honor, may we approach?

9 THE COURT Yes

10 (Conference at the bench between counsel and
11 the Court off the record)

12 THE COURT You may continue

13 BY MR THOMAS

14 Q Mr Quinn, without telling me any numbers, are
15 the books closed on phase one?

16 A No

17 Q And without telling me any numbers, what expenses
18 do you expect to be incurred?

19 A We have overhead costs We would call it HOA-
20 related costs

21 Right now, all the lots are not completely sold

22 A determination has to be made as to whether one of

23 lots is going to be vacated and not sold It is

24 going to determine the lot cost of other lots

25 The beneficial value of the pool they're talking

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MR QUINN ON CROSS

1 about -- that needs to be calculated, and as phase
2 two, phase three become a reality, events may occur
3 that affect phase one

4 When it was just dirt, it was a little less im-
5 portant until phase two and phase three become a real-
6 ity

7 So you have to look at the reality, and we are
8 currently in the middle of a bridge being built that is,
9 to my understanding, three times more expensive than
10 agreed to or thought to be

11 That bridge crosses the road that goes to the
12 pool You have to cross the bridge to access the pool,
13 which is beneficial data, and phase one has to be al-
14 located Any inadvertent costs and unanticipated costs
15 with regard to actually moving into these areas, phase
16 one and two, the roads, because they could be released
17 and not all the burden of phase one In fact, you would
18 a bond or warranty that the roads will last, even if
19 they were released

20 Granted, that's going to cover over for another
21 year All of those things have costs, and it is going
22 to be a while before they are known I mean, it can
23 be estimated and it can be guessed at, but right now
24 what will be -- not until the fat lady sings will they
25 be known Plus or minus

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MR QUINN ON CROSS

1 Q Mr Quinn, with all of these categories and
2 exhibits of things that are alleged to be improper
3 expenses of Courtyards, has D Melton ever called
4 you about any of the charges?

5 A No, he hasn't

6 Q All right

7 A I have probably had one or two casual conversa-
8 tions with him, but I honestly would not know him if
9 I met him on the street as such

10 Q And did anybody on the Plaintiffs' behalf ever
11 call and inquire of you and say, is this really a
12 legitimate expense or a legitimate cost?

13 A No

14 Q All right

15 A All this work that was being done -- if I was
16 questioned such as that about allocations, etcetera,
17 -- I wasn't asked anything

18 Q And have you ever been asked by anyone at any
19 point to see the books for phase one?

20 A No

21 Q You have not?

22 A No

23 Q And, Mr Quinn, what income has been generated
24 from the selling of lots in phase two as of this time,
25 sir?

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MR QUINN ON CROSS

1 A None

2 Q And what expenses have been incurred for phase
3 two?

4 A Phase two is now being developed

5 Q Okay

6 A So from an expense point of view, I cannot tell
7 you specifically

8 Q All right

9 A Without numbers in front of me I would have
10 to have documents in front of me in order to be able
11 to answer

12 Q Yes, sir Are there expenses that have occurred
13 for phases two and three?

14 A Yes, sir

15 MR THOMAS Your Honor, may I have just a
16 moment?

17 THE COURT Yes

18 (Brief pause in the proceeding)

19 THE COURT Are you ready to proceed, Mr
20 Thomas?

21 MR THOMAS Thank you No further questions of
22 Mr Quinn

23 THE COURT All right Mr Bowens, will there
24 be anything on Redirect?

25 MR BOWENS Yes, Your Honor

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John Quinn – Redirect Examination by
Glenn E Bowens

1 REDIRECT EXAMINATION

2 BY MR BOWENS

3 Q Mr Quinn, I believe that you have previously
4 testified that nobody has ever called you about these
5 Exhibits?

6 A About the Exhibits?

7 A Yes, the invoices and allocation of these various
8 costs

9 A No I mean, I have not had any conversations
10 about costs

11 Q Okay

12 A I've not had any conversations at all, you know

13 Q Do you realize that we didn't get access to the
14 documents until a few months ago when we subpoenaed
15 them from you?

16 A Absolutely correct

17 Q So we didn't actually know these were here until
18 prior to a few months ago, and there is no way we could
19 know?

20 A

21 MR THOMAS Objection, Your Honor, to leading

22 THE COURT Rephrase your question

23 BY MR BOWENS

24 Q There was no way for us to know about these
25 costs until a couple of months ago when you provided
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MR QUINN ON REDIRECT

1 us these documents?

2 A

3 MR THOMAS Objection

4 THE COURT Rephrase the question

5 BY MR BOWENS

6 Q Was there any way for us to know about the costs
7 associated with these documents until a couple of
8 months ago?

9 A These deal with general ledger entries from
10 early on The general ledger was provided and I was
11 not subpoenaed as far as these documents, I don't
12 believe

13 So the general ledger entries you were aware
14 of and as far as these other documents, I cannot
15 respond

16 These are not mine, so this has nothing to do
17 with anything

18 Q You said that you voluntarily advised that these
19 documents had been destroyed?

20 A Again, there was a cover letter to you in which
21 I advised that there had been documents destroyed I
22 gave you a copy of certifications and I didn't know
23 specifically what had happened

24 Q These documents were destroyed after this litiga-
25 tion began, weren't they?

MR QUINN ON REDIRECT

1 A I don't know that I didn't know there was
2 litigation in process at that time I wasn't in the
3 main-stream as far as the litigation

4 Q So there were destroyed evidence when the dis-
5 pute between Dutch Fork Development Group and SEL
6 Properties arose, back in May of 2004?

7 A

8 MR THOMAS Objection, Your Honor He said
9 he didn't know there was litigation

10 MR BOWENS He's the CPA for SEL Properties and
11

12 MR THOMAS May we approach?

13 THE COURT Yes

14 (Conference at the bench between counsel and
15 the Court off the record)

16 BY MR BOWENS

17 Q These documents we are discussing that were
18 destroyed, they were destroyed after May of 2004?

19 A I don't have the date, but if that's the --
20 I would say so

21 Q And when we first asked you for these, what
22 was your response?

23 A My initial response when you asked me for these
24 -- not for these documents, but for my documents, my
25 tax returns, etcetera, my accounting records -- my

MR QUINN ON REDIRECT

1 initial response was that I did not want to give them
2 to you, and it was going to be a lot of work to go
3 ahead and get this all together

4 Q But I had to go to all kinds of lengths to get
5 those documents from you, to get you to give them up
6 to us?

7 A Yes, and what I was told -- at that point in
8 time I had co-engaged this law firm to represent me,
9 and when I found that they had in my mind agreed to
10 give my evidence away, my records, I hired my own
11 attorney to get it resolved

12 My own attorney contacted you and made arrange-
13 ments to provide you the documents

14 Q And in fact you refused some requests from the
15 Defendants?

16 A I refused on everybody Basically my position,
17 while it may not be legally correct, was that the
18 work documents that I produced, my court papers, my
19 internal papers, they were my documents, and I tried
20 to not release them

21 Whether it be legal or proper, absolutely I did,
22 and it was an independent decision on my part, and
23 not anyone else's

24 Q An independent decision on your part to produce
25 your documents?

MR QUINN ON REDIRECT

1 A An independent -- no, it was an independent de-
2 cision on my own part not to or to try not to

3 Q In fact, the Courts then ordered that you pro-
4 duce them?

5 A Absolutely

6 Q Basically, do you agree that Dutch Fork Develop-
7 ment Group has a twenty-five percent interest in the
8 profits from this project?

9 A I agree that Dutch Fork Development Group had
10 a contract that called for a twenty-five percent in-
11 terest in the profit from the project

12 Q Do you also agree that the money the project
13 earned or money that makes up the profit that Dutch
14 Fork would ultimately receive as a part of that con-
15 tract went into this Courtyards account?

16 A

17 MR THOMAS Objection to leading

18 THE COURT Rephrase the question

19 BY MR BOWENS

20 Q All the money that the Courtyards generated from
21 the sale of lots -- where did it go? Where did that
22 money go?

23 Where was it deposited?

24 A Ninety-eight percent of the money, the checks, the
25 deposits, went into Courtyards There were a few

MR QUINN ON REDIRECT

1 occasions I believe that they did deposit it into
2 SEL's operating account

3 Q Did Mr Lipscomb ever advise you that the Meltons
4 wanted to see the books, the accounting records?

5 A No

6 Q You testified a good bit on cross examination
7 about cash flow?

8 A Yes

9 Q And you told me on direct that you didn't man-
10 age the cash flow and really couldn't comment about
11 it?

12 A I -- yes, that's correct I couldn't comment on
13 cash flow

14 Q Do you know about that or not?

15 A I know about cash flow in the books and records
16 I don't know cash flow as far as on a day to day
17 basis I did not monitor it, know whether the ac-
18 counts were overdrawn One of my people actually
19 pulls balances and that is for information purposes
20 only That person gives it to Mr Lipscomb

21 I don't worry about Mr Lipscomb's cash flow
22 and I don't monitor it

23 Q If charges are being made on Courtyards' account,
24 you don't have any way of verifying whether it is
25 a proper charge or improper charge?

MR QUINN ON REDIRECT

1 A I'm sorry?

2 Q Do you have any way of verifying whether charges
3 being made on Courtyards' account or checks being
4 written as we saw on cross examination -- do you have
5 any way of verifying whether those are proper or not?

6 A Could I verify it?

7 Q Right

8 A That was not my position to verify or approve

9 Q What was your position?

10 A My position is to in fact relate and instruct the
11 bookkeepers how to properly process the deposits and
12 checks

13 I don't sit there and audit the books

14 Q Well, for example, when you saw the exhibits
15 about casual labor

16 A Uh hm

17 Q those checks were made out to cash?

18 A Correct

19 Q You don't have any knowledge really about what
20 that cash was used for?

21 A I was not there and I did not observe the trans-
22 action I know, however, that people worked from var-
23 ious positions, and I'm positive that happened, and
24 I am positive that they worked at Courtyards and
25 Rolling Stream doing work out there

1 They were doing work on the property but as to
2 individual transactions, no I have specific know-
3 ledge that occurred

4 Q A way to pay those people is to make a check
5 out for the individual labor?

6 A Absolutely That would be the perfect way to
7 do it

8 Q Now, the gas discussed on cross examination, do
9 you have any way of knowing that that was used for
10 lawn mowers?

11 A No, I don't, but considering the quantities --
12 one and a half gallons or two gallons -- I am sure it
13 wasn't for a vehicle

14 It could have been for some other piece of equip-
15 ment, but that is an assumption

16 Q Does the fact that it was purchased across town
17 where the corporation is located have any bearing on
18 what it was used for?

19 A If there was a purchase made across town, not
20 specifically As far as a specific bill, I never
21 look at that specific bill

22 The process was that the bills got turned in
23 and from what I understand they were identified as
24 to what project they belonged to or if they were
25 split

MR QUINN ON REDIRECT

1 But there is a certain amount of assumption that
2 people were doing their jobs

3 Q If you called a landscaping company right now,
4 isn't it customary for the landscaping contractor to
5 provide his own equipment and his own gasoline?

6 A Yes

7 Q Among the payments you testified to on cross
8 examination, do you have any way of knowing whether
9 charges made to Courtyards were monthly payments on
10 equipment?

11 A I don't specifically know I would have to look
12 at the original bill itself to be able to see I
13 don't have that original document, and I don't know
14 if it was equipment rental or a payment

15 Q Now, this Dingo that you referred to, that was
16 actually Ron Spence's landscaping company?

17 A Uh hm

18 Q Is that yes?

19 A That's correct, or that's what I understand My
20 understanding is that Ron Spence started a landscap-
21 ing business for Steve Lipscomb and they had a
22 longstanding relationship, and the main purpose of
23 that was to try to get the work done at that location

24 Steve felt by doing that -- there were two ways
25 to deal with it, and he could have done either one

MR QUINN ON REDIRECT

1 of them He wanted to keep costs down

2 He could have gotten another third party sub-
3 contractor but he decided to do this and rightfully
4 so

5 Q What do you have personal knowledge of concern-
6 ing that?

7 A I have knowledge that it was done to try to
8 keep costs down The cash flow

9 Q And it resulted in Ron Spence had a piece of
10 equipment that he got to keep to work every day?

11 A No That is not what that transaction was
12 about It was advanced by SEL It was charged to
13 Courtyards and then charged back to Ron

14 It was a bouncing ball that ended up in a
15 basket

16 Q The bridge that you referred to that was three
17 times more expensive -- do you recall that testimony?

18 A Yes The bridge I'm talking about and getting
19 more expensive -- maybe not three times, but it is
20 my understanding it was more expensive than it was
21 meant to be

22 Q Why is that?

23 A I don't actually know I think there were engi-
24 neering issues that may have raised the cost in that
25 area, but specifically I don't know

MR QUINN ON REDIRECT

1 All I know is that it wasn't anticipated that
2 it would be that expensive

3 Q Have you had any discussions with anyone, Mr
4 Lipscomb or the engineers, that it was because the
5 plans were changed from the original plans?

6 A I'm sorry

7 Q Have you had any discussions concerning the
8 change in the plans where the bridge was going to
9 be located?

10 A I have no knowledge of that

11 Q Are you aware that the Creek Crossing plans
12 were changed at Mr Lipscomb's direction?

13 A No Specifically I don't know about Creek Cross-
14 ing plans being changed

15 Q Do you know about the Two Hundred Six Thous-
16 and Dollars in engineering costs when the plans were
17 changed?

18 A Well, with regard to the engineering costs, and
19 I believe that was the term brought up -- I'm not
20 sure if -- that's your words

21 I know the project was engineered at one time,
22 at the very, very beginning, and then it was re-
23 engineered I don't understand why it was completely
24 engineered the first time when they knew it was to
25 be a five year project

1 In my experience as far as those type projects,
2 you spend the engineering money when you need to
3 spend it You don't spend it all up front, and you
4 do GAs -- general arrangements -- do pictures and
5 you may do topos and get some idea but do the de-
6 tailed engineering as a whole project, you know, in
7 front

8 Q As far as engineering, do you know how much it
9 was?

10 A Not the exact number but it was expensive

11 Q Over Two Hundred Thousand Dollars?

12 A But there was a lot more to that as I understand
13 it, as far as the re-engineering Specifically, I do
14 not know the total cost of engineering

15 It was re-engineering and I honestly don't
16 know that

17 Q There were several reasons for the cash flow
18 problems you talked about, is that right?

19 A There were a number of reasons, yes

20 Q If the -- you talked about lot sales as a
21 source of income for the project?

22 A The lot sales were sources of income for the
23 project

24 Q And if the plat had been bonded and the lot
25 sales allowed to start earlier, would that have then

MR QUINN ON REDIRECT

1 increased the income to the project?

2 A There should have been more cash flow if the
3 lots were actually sold

4 Q Would that have assisted with the cash flow
5 problems?

6 A I don't know I would presume that if lots
7 were sold earlier it would have assisted with cash
8 flow

9 Q If the roads had been repaired timely, in -- in
10 early 2003, would that not have again assisted with
11 lot sales and some of the cash flow problems?

12 A Well, if something has an adverse effect on
13 selling of lots, then again it would hinder that
14 cash flow But as to the specific issue, I would
15 say that if that was the circumstance and there was
16 the reason for lowered sales, then it would hinder
17 cash flow

18 Q I show you what we have previously marked as
19 Exhibit 147 This shows lots 14, 15 and 57 were
20 sold for Thirty-one Six -- you see that?

21 A Uh hm I'm sorry Yes

22 Q If they had been sold for the Forty Thousand Dol-
23 lars the remaining lots were sold for, would that
24 have increased cash flow?

25 A I would say that would have increased cash flow,

MR QUINN ON REDIRECT

1 yes

2 Q If SEL had deferred being paid back its land
3 acquisition costs, the Eight Hundred Thousand Dollars
4 expended to pay for the land, is it likely that money
5 in the account would have

6 MR THOMAS Objection to leading question

7 THE COURT Rephrase

8 BY MR BOWENS

9 Q Would SEL having deferred the \$800,000 in land
10 acquisition costs have affected the cash flow?

11 A If there was additional money -- if money was
12 left in or put in as far as SEL Properties was
13 concerned, then there would have been more cash with
14 which to pay the bills

15 Q Were you aware that Mr Lipscomb took the Eight
16 Hundred Thousand payment

17 A I can't understand what you're saying

18 Q Were you aware that Mr Lipscomb took \$800,000
19 out of the Phase One construction and development
20 money from NBSC, to pay back himself for the land
21 acquisition?

22 A I understand that NBSC when the loan was done
23 -- I think it was a Two Million Dollar loan -- I un-
24 derstand at that time the money that was advanced on
25 the project was paid

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MR QUINN ON REDIRECT

1 So, yeah, in your words, he took the advance
2 money out and then subsequently as needed he put
3 money back in I think Six Hundred Thousand Dol-
4 lars was put back at one time

5 Q You were aware that Mr Lipscomb had paid cash
6 for the land acquisition costs initially?

7 A When you say cash,

8 Q I mean he didn't use a bank loan

9 A I don't know that To be quite honest with
10 it, I thought he wrote a check, but I really haven't
11 looked at it

12 Q I hand you Exhibit 4 Do you know what that
13 is?

14 A Yes

15 Q What is that?

16 A The title

17 Q What was the purchase price at that time?

18 A Eight Hundred Thousand Dollars

19 Q What is the date of that transaction?

20 A The date of transaction was the 22nd day of
21 September of 2000

22 Q I'm going to have you examine Number 5 and ask
23 you what this document is?

24 A A mortgage to the National Bank on the prop-
25 erty

1 Q What's the amount?

2 A Eight Hundred Thousand Dollars

3 Q What is the date?

4 A Let's see It's October 24, 2000

5 Q I show you the next document which is a satis-
6 faction Is that right?

7 A Yes

8 Q What is the date of that satisfaction?

9 A That date is 12 6 of 2001

10 Q And was that after the construction loan had
11 been closed?

12 A I'm not sure

13 Q If it was 11 19 2001, was that satisfaction
14 after

15 A It would appear to be so

16 Q Do you agree that the date of the loan and the

17

18 A Excuse me for just a second Let's see

19 (Brief pause)

20 Yes, the date of the loan and the purchase date
21 are real close I do know this, that this land was
22 purchased and within a week or so this loan was made,
23 and that tells me that there really -- this is Octo-
24 ber 24th, and you're talking about September 22nd and
25 -- yes

MR QUINN ON REDIRECT

1 Q In the ordinary course of business, isn't it
2 customary that the loan for purchasing property is
3 acquired before it is transferred?

4 A In the normal course of business, I would say
5 yes

6 Q You go to the bank and borrow money and then you
7 buy your land?

8 A Mr Lipscomb has a number of loans with NBSC,
9 and there are financial arrangement with them, so I
10 am not sure about the chicken and the eggs I'd
11 have to look at his whole portfolio to see what was
12 going on I'm not sure of the timing

13 Stephen Lipscomb can have Eight Hundred Thous-
14 and in an account somewhere and just write a check
15 and the two not be related -- I wouldn't think it
16 would be a fact

17 Q Is it a normal thing to get title to land before
18 you get a loan for purchase of it?

19 A I'm not disagreeing with that I don't know
20 if there were other transactions

21 Q But after the land was acquired, a mortgage
22 was taken out for Eight Hundred Thousand Dollars
23 based on that land?

24 A Correct I would think that the land was trans-
25 ferred and a mortgage was taken out against that

MR QUINN ON REDIRECT

1 Q So do we know where the money came from to buy
2 the land initially?

3 A Well, if we had -- if I had a file on this
4 transaction here, I would be able to give you more
5 information

6 This does not identify the transaction This
7 is only a deed, and this is a mortgage There are
8 two transactions here, and I am missing part of it

9 There is this one here and this one here, but
10 there is nothing to -- I can't answer that, sir

11 Q Can we be certain this land was acquired on
12 September 22, 2000?

13 A By this document, yes That's what it says

14 Q And that would necessarily involve the pur-
15 chase price of the land being paid on or before Sep-
16 tember 22nd?

17 A I would think so

18 Q And subsequent to that on October 24th the Eight
19 Hundred Thousand Dollars was obtained through the
20 mortgage on that same property?

21 A Yes That is in evidence

22 Q Yes

23 A So, yes

24 Q Is it fair to say that Mr Lipscomb, if he had
25 wanted to, could get cash money based on his assets?

MR QUINN ON REDIRECT

1 A At this particular time of this particular
2 transaction, I would presume that somehow he managed
3 or he got the cash at that period of time It does
4 appear to me a rather short period of time

5 Q But he had the cash and the mortgage was sat-
6 isfied, didn't he?

7 A Well, you are presuming that he had Eight Hun-
8 dred Thousand laying around and then bought the land,
9 and then he had to do this

10 Q The date of the mortgage was October 24th?

11 A Yes

12 Q And what is the date of the satisfaction?

13 A The date on the satisfaction was -- let's see
14 here Bear with me I'm sorry, hold on a second
15 I have two sets of glasses

16 You'll have to point it out to me December
17 6 of 2001

18 Q So he had that money for at least that period
19 of time?

20 A Yes

21 Q Until the mortgage was satisfied?

22 A From the time he took the loan until the time
23 it was satisfied

24 Q He had the use and benefit of that money?

25 A Yes, that's correct

MR QUINN ON REDIRECT

1 Q You testified on cross examination about a num-
2 ber of exhibits, and if I recall your testimony cor-
3 rectly there are different receipts and bills that
4 SEL was being reimbursed for money it had advanced
5 or services it had performed?

6 A

7 Q Do you recall that?

8 A I -- yes What I said was that there were a
9 list of transactions and I looked at the specific back-
10 up, that these are entire transactions that would
11 be billed by one company and reimbursed Specific
12 bills I didn't really get into, but that transaction
13 occurred between SEL and Rolling Creek and other com-
14 panies and vice versa

15 Q Would you agree that SEL was careful to make
16 sure that it was reimbursed for all the costs that it
17 was incurring?

18 A I -- let's see Are you asking my opinion?

19 Q I am asking if you would agree that SEL

20 A No

21 Q was being careful that they were reimbursed
22 for everything

23 A No, I would not agree I don't think that is a
24 correct statement A bill comes in and you process
25 it and tack it to the project and bill it, and that

MR QUINN ON REDIRECT

1 -- there are a lot of work charges, and you must
2 identify the job properly

3 The system was placed there so that when the
4 bill comes in you can process the bill, tack it to
5 a project and then run the process through, bill it out

6 That is the system that I put in place, and
7 quick books allows

8 Q Are you saying that

9 A If you will let me finish?

10 Q Okay

11 A The system is that when a bill comes in, you
12 identify it from the information, whether it is a
13 cost of business or whether it should be billed out
14 at some later date

15 So that is captured and if that is done prop-
16 erly and you pay real good attention to it -- it is
17 rather detailed stuff

18 I don't want to disparage the bookkeepers, but
19 when they are dealing with a lot of transactions, you
20 know, something can slip through a crack There is
21 going to be that kind of stuff

22 Q If you are correct and these charges were for
23 what they say they were for -- say, for example, the
24 gasoline was for the lawn mower,

25 A Yes

MR QUINN ON REDIRECT

1 Q and the casual paper was for casual paper,
2 and the John Deere Tractor was for sales cost for
3 using that equipment, you mean

4 A The transactions trace to the fact that they
5 were set up to be able to do those things They
6 were processed and it appears that the end result is
7 SEL got those direct out of pocket costs The sys-
8 tem called for that, and SEL got those specific items
9 repaid

10 Q You say quick books is a good bookkeeping sys-
11 tem?

12 A Yes

13 Q Was that quick system able to get Dutch Fork
14 Development Group its development fees back? Was
15 that ever recaptured so that they were able to get
16 their development fees?

17 A Quick books captured all payments to Dutch Fork
18 Development

19 Q Did you find any other moneys were paid to any-
20 body else?

21 A The best effort was made to try to check the
22 system

23 Q But the answer is there was no interest in that
24 system for Dutch Fork Group to recapture its fees?

25 A I don't know that to be a fact off the top of

MR QUINN ON REDIRECT

1 my head

2 Q You don't recall there was any entry in quick
3 books for Dutch Fork to be repaid the amount of
4 their development fees?

5 A

6 MR THOMAS Objection to leading That has now
7 been asked over and over again, and he is skating
8 way beyond the scope of cross

9 THE COURT Rephrase your question

10 BY MR BOWENS

11 Q Are there any entries in quick books that re-
12 late to Dutch Fork Development Group being paid
13 their development fees?

14 A

15 MR THOMAS Objection, Your Honor, as being out-
16 side the scope of cross

17 THE COURT I would sustain the objection

18 BY MR BOWENS

19 Q You testified on cross examination that SEL
20 made some loans to K & L Contracting?

21 A SEL had made some loans? I don't think that
22 is -- I think it is reflected that Courtyards and
23 Rolling Creek were not treated as an entity, even
24 though for tax purposes Courtyards and Rolling Creek
25 wrote checks and they were worked in as loans

MR QUINN ON REDIRECT

1 So I would say yes

2 Q And does it seem fair to make loans such as
3 that but not to pay the development fees to Dutch
4 Fork?

5 A

6 MR THOMAS Objection, Your Honor Outside
7 the scope again

8 THE COURT Overruled

9 A The relationship of K & L to SEL to Courtyards
10 and Rolling Creek I would say was complimentary, or
11 it was supposed to be

12 K & L bought lots and those lots created cash
13 flow, of course, and K & L in turn built houses on
14 those lots

15 K & L during the process when things were going
16 on in Courtyards ended up having some -- I think it
17 was Five Million Dollars in outstanding loans

18 So the process broke down It was broken, and
19 the goal of K & L to generate cash

20 Q Was it correct though

21 MR THOMAS If he would let the witness finish
22 his answer

23 BY MR BOWENS

24 Q Let me ask you a question

25 MR THOMAS He has asked a question, and not

MR QUINN ON REDIRECT

1 letting him complete his answers

2 MR BOWENS I'm trying to ask him a question
3 and he can answer Again his answers need to be re-
4 sponsive to my questions

5 THE COURT Give him an opportunity to ask his
6 question and you give your answer You can then ex-
7 plain your answers

8 WITNESS I'm sorry, Your Honor

9 BY MR BOWENS

10 Q You testified it was not correct that K & L
11 ended up with loans when Dutch Fork had not been
12 paid the development fees by SEL?

13 A No, I did not say that What I said was that
14 K & L ended up with some loans, and that is a true
15 statement Why that happened, I am not sure

16 I am not sure whether it was appropriate or
17 not That was not an accounting decision

18 When K and L -- when I originally talked to Steve
19 Lipscomb, it started out that he would in fact start
20 out by building a few houses in each of the projects
21 that he had, and he was going to go slow

22 He did anything but that, but that is what the
23 early conversation was He wanted houses out there
24 on these properties so that when people came out there
25 they would see houses

MR QUINN ON REDIRECT

1 Q K & L was actually a team builder of Courtyards,
2 is that correct?

3 A A team builder? You would have to make me fa-
4 miliar with the term

5 Q Let me show you what has been marked as Exhibit
6 Number 152 Have you seen this before?

7 A I don't remember this specifically, you know
8 In going in and out I am sure the sign is there or
9 was there It was there at some point in time

10 I see the term team builder, which I presume is
11 a marketing term I'm not sure what team builder
12 means, other than being a marketing term

13 There was no contractual relationship that I'm
14 aware of between any of those folks there directly
15 in Courtyards and Rolling Creek, other than what I
16 would call arms length transaction folks

17 Q I show you Exhibit 148 You spoke a moment ago
18 about K & L having Five Million Dollars in loans
19 for houses

20 Let me show you this exhibit

21 A I'll have to change glasses I'm sorry but I
22 can't see

23 Q Did you say something about K & L having Five
24 Million Dollars in loans outstanding?

25 A Yes, I think I did say that

MR QUINN ON REDIRECT

1 Q How much did K & L actually generate in house
2 sales?

3 A I'm not sure exactly I mean, that particular
4 exhibit shows Five Million in sales, or Five Million
5 Seven Hundred Sixty-one Thousand, right? So they
6 had to have at least that much in house sales during
7 that period time I presume that is accurate

8 Q And the cash that K & L took away from those
9 house sales was what?

10 A I don't know

11 Q Was it at least One Million Six Hundred Thousand
12 Dollars?

13 A I would think that is totally incorrect

14 Q These numbers came from the Hud One statements
15 and this number coming from the cash -- K & L cash to
16 seller column Would you agree with that figure of
17 One Million Six Hundred some Thousand Dollars?

18 A That makes no sense to me I can't tell you
19 what it is

20 Q You've got one that says Three Hundred Forty-six
21 Thousand Dollars and the cash to K & L was Three Hun-
22 dred Fourteen Thousand?

23 A I'm not questioning your figures but I have not
24 audited that You're asking me to do a-- you know,
25 find errors on exhibits that I see

MR QUINN ON REDIRECT

1 Q If the sales price came from the Hud One state-
2 ments, you can assume that's accurate Right?

3 A

4 Q We can also assume the cash to seller is cor-
5 rect if it comes from the Hud One statement? Are
6 you familiar with that?

7 A I am very familiar with HUD

8 Q Do you see the number in the lower left hand
9 corner or right hand corner, cash to seller?

10 A Yes, I accept that number

11 Q Assuming these figures are correct, and we have
12 had testimony they are accurate,

13 A I don't know who testified to that

14 Q Well, assume for purposes of my question that
15 these are correct

16 A I'm sorry

17 Q K & L generated over Five Million Seven Hundred
18 Thousand Dollars in home sales? Would that be cor-
19 rect?

20 A That is the number, absolutely

21 Q And all told they took away over a Million Six
22 Hundred Thousand Dollars?

23 A That's what that schedule says

24 Q Do you consider that to be seed work?

25 A No, not at all

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MR QUINN ON REDIRECT

1 Q Why not?

2 A The number of lots that K & L ended up buying
3 on these projects accelerated I'm not sure specifical-
4 cally why, but I do know that the lots were not being
5 sold and K & L started buying lots

6 Q Okay Let's look at this in terms of that re-
7 sponse

8 Look at the column here called deed date Would
9 you read that with me? The dates the K & L closed
10 on the lots?

11 A

12 Q The time to re-sell -- I would represent to you
13 that that is the time it took for a new homeowner to
14 come along and buy the houses

15 A Okay

16 Q For K & L to build on that lot -- is that your
17 representation?

18 A I don't know that I don't have that informa-
19 tion

20 From a calculation point, if you are saying that
21 is what that statement says, based on the schedule
22 that is what that says

23 Q And if that buyer is going to have K & L build
24 them a house within -- prior to May 28th -- within
25 seven months, would you still say the lots were not

MR QUINN ON REDIRECT

1 selling?

2 A I didn't say the lots were not selling I did
3 not say K & L did not sell houses

4 Q Say on May 19, 2003, someone came in and bought
5 a lot and built a house on it, or had K & L build a
6 house

7 A Are you talking about -- could I see that a lit-
8 tle closer?

9 (Brief pause in proceeding)

10 A Okay, on that particular instance that was a
11 deed date of 9 30 02, and I would presume that that
12 is a spec house that K & L started building on, and I
13 presume on 5 19 03 the spec house was contracted for
14 -- that's what I presume I don't presume anything
15 else other than that, based on that information

16 Q These lots with the zero by them, a buyer had
17 already contracted with K & L prior to them buying
18 the lot Would you agree with that?

19 A

20 Q I'm asking you to assume that those types of
21 transactions did occur with K & L, and on a number
22 of these between the date K & L bought the lot and
23 the time a buyer contracted to build a house on the
24 lot was a relatively short time Would you agree with
25 that?

MR QUINN ON REDIRECT

- 1 A That's what the chart says Yes
- 2 Q And until the termination occurred, we have a
- 3 similar pattern? Zero, zero -- four months, six
- 4 months, seven months
- 5 A Yes, that was a very active period of time
- 6 Q Would you agree that the reason K & L was buy-
- 7 ing more lots was in order to do more business?
- 8 A I can't agree or disagree
- 9 Q As far as activity goes, that was a peak of
- 10 activity?
- 11 A I don't agree
- 12 Q I thought you testified to that
- 13 A The reason K & L was buying more lots was that
- 14 they weren't selling
- 15 Q Okay, so that was not your testimony?
- 16 A No
- 17 Q Okay
- 18 A Lots weren't being sold in the subdivision
- 19 Q If you exclude the loss of the pond during the
- 20 first year and a half,
- 21 A You know, I don't have the math in front of
- 22 me I don't know for sure what percent of the
- 23 lots were being sold
- 24 K & L bought lots I would agree They did
- 25 sell them -- I agree

MR QUINN ON REDIRECT

1 Q And did K & L build within a fairly short period
2 of time?

3 A I'm not disagreeing there, but if -- that was
4 not -- my understanding was that K & L was not a
5 part of the Triad Agreement between Dutch Fork or
6 Courtyards and K & L

7 It was Steve Lipscomb deciding they needed to
8 get some funds moved, and he took it and agreed to the
9 exposure to move this process along

10 He had a lot of money tied up and there were a
11 lot of things at risk, so I think he took some initia-
12 tive, but that is what I think, and I wish it had paid
13 off

14 The numbers that I look at as far as K & L though,
15 I was hoping that they would be better, but that did
16 happen

17 Q After you paid everybody, they didn't make money?

18 A I think everybody was paid Steve Lipscomb was
19 the backer to make sure they got paid Pat Kirk got
20 paid

21 Q Pat got paid?

22 A Yes

23 Q And Pat is the K in K & L?

24 A Yes

25 Q Is it your testimony that K & L took over One

MR QUINN ON REDIRECT

1 Million Six Hundred Thousand Dollars from the trans-
2 action and was not -- but didn't make any money off
3 of that?

4 A No You are showing as a percent of what I
5 would call an indication of margin or gross margin
6 That is not the transaction

7 You are missing the costs and, you know, just
8 because they got paid in cash doesn't mean there were
9 not bills to be paid

10 You are talking about a gross number, and the
11 gross number is one that doesn't have things subtracted
12 from it

13 You have a transaction in there where there is a
14 cash price and a transaction price for approximately
15 the same amount So, you know, I don't know how the
16 financials would stand

17 You have asked me about that schedule, but, I'm
18 sorry, I cannot say that number has anything to do
19 with reality

20 The sales price would include what it included
21 to build the house There are cases where the actual
22 cost was equal, I think, to the price of the house

23 The sales price of the house is what the will-
24 ing buyer was able to ^{buy the} house for from a willing seller,
25 and from that came commissions, costs, etcetera

1 You are presuming that all costs were covered
2 by that just because it's the sales price
3 Q Is that the cash to seller column?
4 A No Those are transactional costs or on
5 account of that specific transaction It doesn't have
6 a thing to do with the cost of the house That cost
7 that is financed by a construction loan
8 Q The construction loan you are saying K & L takes
9 out to build a house, that has to be paid off in the
10 course of the closing Right?
11 A That's correct
12 Q If there is anything left over, that is the pro-
13 fit Right?
14 A
15 Q Is there anything else that K & L put into the
16 house that has to come out of their cash to seller?
17 I mean, all of that comes out of the proceeds?
18 A That's correct
19 Q After the construction loan was paid off and the
20 costs were calculated, K & L took away One Million
21 Six Hundred Seventy Thousand Dollars after loans were
22 paid off?
23 A Okay
24 Q And I would assume the loans were eighty percent
25 of what the costs were?

MR QUINN ON REDIRECT

1 A They would have taken money out to pay the other
2 twenty percent Plus interest -- plus, plus, plus
3 It was eighty-twenty lending

4 Q That's what K & L got in the game?

5 A

6 MR THOMAS Objection, Your Honor He's lead-
7 ing the witness

8 THE COURT Sustained

9 A I'm not sure with all this fuzzy math

10 BY MR BOWENS

11 A You are pointing to that one basic thing, and I
12 honestly don't know what was left over to be paid
13 We have good documentation with those transactions
14 We capture all the costs that we have been able to
15 identify on that house, and then we take the expenses
16 off

17 You have to pay for overhead costs, all of the
18 costs as of the very end, and then you come up with
19 the profit

20 Q I show you Exhibit Number 66 Do you recognize
21 this document?

22 A Yes, I recognize the kind of document

23 Q These are documents you produced to us?

24 A This document probably was in my computer file,
25 yes

MR QUINN ON REDIRECT

1 Q And it was printed out for us?

2 A Yes

3 Q That shows a profit to K & L on projects across
4 the Courtyards and other developments it was working
5 in Correct?

6 A Correct Well, it shows the gross contribution, y
7 yes

8 Direct cost versus sales price, and that in-
9 cludes materials and everything else It is not include
10 necessarily all of the operating

11 Q What is the total of the difference between the
12 track cost and the actual cost?

13 A I'm sorry?

14 Q What is the total of the houses that K & L
15 built in Courtyards and the actual cost

16 A Two Hundred Forty-three Thousand is what that
17 shows

18 Q Between direct cost and actual cost?

19 A Uh hm I'm sorry -- yes

20 MR BOWENS We would offer Exhibit 66 into
21 evidence

22 THE COURT Any objection?

23 MR THOMAS No objection

24 THE COURT It's admitted

25 (K & L Profitibility chart entered in evidence

1 without objection as Plaintiffs' Exhibit 66)

2 MR BOWENS We'd also offer Exhibit 152 in evi-
3 dence, Your Honor

4 MR THOMAS No objection

5 THE COURT Admitted

6 (Photo of Courtyards sign admitted in evidence
7 without objection as Plaintiffs' Exhibit 152)

8 BY MR BOWENS

9 Q What is the date on Exhibit 66?

10 A January through December of 2004

11 Q And so Courtyards was the most profitable of
12 the projects going on for K & L?

13 A I'd have to look at the document again

14 (Brief pause in the proceeding)

15 A Well Arcadia was ten percent, and Courtyards
16 was roughly seven percent or maybe eight percent Then
17 Stonington was lower

18 Q Courtyards had the most volume, is that correct?

19 A But Arcadia was better

20 Q That's all the questions I have for you

21 THE COURT Anything on Recross?

22 RE CROSS EXAMINATION

23 BY MR THOMAS

24 Q Mr Quinn, what is the future status of K & L
25 Contracting?

MR QUINN ON RECROSS

1 A I'm sorry?

2 Q What is the future status of K & L Contracting?

3 A At this particular time there is no active con-
4 struction going on, and in discussions with Mr
5 Lipscomb it appears that we are going to downsize
6 down to zero

7 Q Why is K & L being downsized to zero?

8 A The money it is costing Lipscomb, since he is
9 the one who with K-ones He would have over One
10 Hundred Thousand Dollars

11 K & L Contracting didn't make a bunch of money off
12 of Courtyards and Rolling Creek They did not make
13 a bunch of money off their work there

14 Q Mr Quinn, I believe you testified that K & L
15 purchased a bunch of lots out at Courtyards and Roll-
16 ing Creek?

17 A Uh huh

18 Q And who was supposed to be selling the lots?

19 A The contract called for Dutch Fork to do the
20 marketing

21 Q To circle back, did K & L loans have any im-
22 pact on profit on this project?

23 A Actually, I don't think it had any impact on pro-
24 fit It was not treated as expenses It had some
25 impact on cash flow

1 Q When did the contract expire?
2 A I do not have the date before me
3 Q Do you know?
4 A The end of '06 -- I don't have the document
5 Q I have no further questions I appreciate it
6 THE COURT You may step down
7 (Witness excused from stand)
8 THE COURT You may call your next witness
9 MR BOWENS The Plaintiffs call Ann Melton to
10 the stand
11 ANN MELTON, being duly
12 sworn, testified as follows
13 CLERK Please have a seat on the witness stand
14 and give your full name
15 WITNESS Ann Frazier Melton
16 DIRECT EXAMINATION
17 BY MR BOWENS
18 Q Ms Melton, what is your position with Dutch
19 Fork Development Group, Dutch Fork Realty?
20 A Partner, member, developer I really keep up
21 with the books
22 Q Please explain for the jury the relationship
23 between Dutch Fork Development Group and Dutch Fork
24 Realty
25 A Yes We are a small family company Dutch Fork

MS MELTON ON DIRECT

1 Realty is our sales office, and Dutch Fork Develop-
2 ment Group is our development arm but under the same
3 auspices, same office

4 So we share the expenses of rent and so forth

5 Q Do you really need two different offices for
6 two different companies?

7 A Not at all

8 Q How much money did Dutch Fork Realty and Dutch
9 Fork Development Group spend in operating costs and
10 advertising, leading up to phase one?

11 A Approximately Fifty Thousand Dollars

12 Q If the contract had been allowed to run for the
13 course of the five years, how much money would Dutch
14 Fork have spent

15 A

16 MR THOMAS Objection

17 THE COURT Noted and overruled

18 WITNESS Approximately another Fifty Thousand
19 Dollars

20 MR BOWENS No further questions

21 THE COURT Cross examination

22 MR THOMAS No questions, Your Honor

23 THE COURT You may step down

24 (Witness excused from stand)

25 THE COURT Anything further? Any further

615

1 witnesses?

2 MR BOWENS Your Honor, the Plaintiff rests

3 THE COURT Ladies and gentlemen, at this time

4 we have some legal matters that we need to take up

5 outside of your presence

6 I'm going to ask you to go to the jury room and

7 ask again that you not engage in any discussions about

8 this case

9 You certainly have not heard all of the evidence

10 that is to be presented

11 As soon as we take care of these legal issues

12 we will bring you back in and continue on

13 Thank you

14 (Jury excused from Courtroom at 4 12 P M)

15 THE COURT All right, are there any motions

16 at this time?

17 MR BABCOCK Yes, Your Honor We would move

18 for a directed verdict on a number of different mat-

19 ters

20 First off, there are two contracts before the

21 Court One is breach of contract involving the 2000

22 and involving phases one, two and three

23 The other is a breach of contract involving

24 phase four, a 2002 contract

25 The last exhibit was the phase four contract, but

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1 there has been no evidence as to damages regarding
2 the phase four contract

3 Obviously damages is an element that is necessary
4 to be proven for breach of contract

5 Based upon that, we would move for directed ver-
6 dict as to the contract which is Plaintiffs' Exhibit
7 2

8 THE COURT Any response?

9 MR BOWENS Your Honor, Mr Melton testified
10 as to damages, gross of lot sales in phase four, loss
11 as to the cost of the land

12 Ms Richards testified as to the other costs

13 Ms Melton testified as to costs that would be
14 incurred by Dutch Fork Realty -- actually that was
15 for phase -- I take that back

16 Mr Melton also testified about the amount of
17 profit sharing that had not been paid in phase four

18 We have the contract which establishes the form-
19 ula and there was testimony as to how much was owed

20 There is sufficient evidence in the record from
21 which the jury could determine the damages for phase
22 four

23 THE COURT What are you claiming the damages
24 are for phase four?

25 MR BOWENS One Hundred Twenty-nine Thousand
617

1 Eight Hundred Eighty-four Dollars

2 THE COURT I'm sorry I don't mean the dol-
3 lar amount I mean , what do you claim as to the
4 profit sharing aspect?

5 MR BOWENS Twenty-five percent of profits
6 (Brief pause in the process)

7 THE COURT Any response?

8 MR BABCOCK Yes, Your Honor Not one person
9 has made that analysis

10 They had their expert witnesses who are fully
11 capable of doing a proper analysis of profits and the
12 costs and what not

13 Now, had they done that, we would have had issues
14 we could have taken up with regard to the costs for
15 that particular aspect

16 There were issues with regard to the costs of
17 that phase that the Defense talked to Ms Richards
18 about on cross examination

19 But one witness would have to talk to all of
20 the profits, all the costs, net and gross, and then
21 calculate the shares, and taking into account how
22 much they should be paid

23 But nobody has done that Your Honor, there
24 is no number to take to the jury at this point

25 Ms Richards put up some figures as to sales

1 and costs as to phase one, but no one has done that
2 as to phase four

3 THE COURT No one has put up any evidence about
4 the sales in phase four

5 Is that correct?

6 MR BOWENS Your Honor, there was testimony
7 as to that

8 There was testimony about the land costs as a
9 factor that is a kind of cost

10 MR BABCOCK Nobody has testified as to that,
11 Your Honor No one

12 If someone had testified to that, we would have
13 gone into that and taken that up with regard to that
14 aspect

15 They would have to put up the same evidence as
16 to profits, costs, expenses, in phase four as was
17 done by Ms Richards in the other phases

18 There is no number that the jury can consider
19 Nobody has given testimony concerning that, Your Honor,

20
21
22
23
24
25

1 nobody

2 MR BOWENS Excuse me

3 THE COURT Excuse me Did not Mr Melton talk
4 about what the cost of the land was?

5 MR BOWENS He did, Your Honor

6 MR BABCOCK Nobody has said this is all the
7 costs No one has said if you take Ms Richards'
8 costs and take the land costs and put them to gether,
9 that is all the costs you can take into account

10 Nobody has testified to that Somebody has to say
11 this is all of the money coming in and this is all
12 the proper costs coming out, and here is where your
13 profit is Here where the percentage comes and given
14 credit for this

15 Nobody has put that all together

16 MR BOWENS No one person has to do that The
17 jury is not bound to accept Ms Richards' number on
18 costs or Mr Melton's

19 They can arrive at their own determination on
20 the actual numbers

21 MR BABCOCK There has to be evidence regarding
22 gross sales and the costs

23 MR BOWENS Ms Richards testified to the gross
24 sales and the costs, and the two things you consider
25 in the methodology for determining profits

1 There is enough evidence for the jury to reach
2 a determination without one witness giving a number
3 that the jury doesn't even have to accept

4 From that witness, they may get a rough idea
5 Ms Richards did testify that her calculations were
6 weighted in favor of the Defendants, giving them
7 the benefit of every possible doubt

8 So no one witness is required to do that

9 THE COURT While I agree the jury has to make
10 that determination, I think what you are arguing to
11 me is argument for the jury

12 No one person has to testify as to all the costs,
13 the sales, and do the mathematics for the jury It
14 is purely a mathematical function and the jury is cer-
15 tainly capable of doing that

16 This is jury argument I am only concerned
17 with the existence of the evidence I have to look
18 at it as well in the light most favorable to the non-
19 moving party

20 I think there is evidence in the record from which
21 the jury can make a conclusion as to the amount of
22 lost profits

23 MR BABCOCK I understand Your Honor's ruling,
24 and my only issue was that nobody has put all of it
25 together, saying these are all the things and put them

1 all together

2 THE COURT I understand your position

3 MR BABCOCK Your Honor, the next phase of the
4 motion involves the cause of action for conversion

5 Insofar as the cause of action for conversion,
6 there are really two separate bases for this motion
7 The bases are cited in our trial brief

8 There can be no conversion where there is mere
9 obligation to pay a debt

10 What we have here is a breach of contract case
11 where there is moneys that Plaintiffs claim are owed
12 by the Defendants to the Plaintiffs

13 The testimony is very clear that the actual
14 checkbook for Courtyards at Rolling Creek checking
15 account was owned by SEL Properties, and it was not
16 money the Plaintiffs had an interest in It was cer-
17 tainly clear they didn't have an ownership interest
18 or any signator authority

19 There is a contract action where they claim they
20 are owed money but it is just like a bank You go
21 and put money in a bank

22 You put money in and you can get money back

23 There is a claim of debt to be owed and no mat-
24 ter where the money comes from that debt is an issue
25 and a focal point, if any If you had conversion in

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1 this case, you would have conversion in almost every
2 breach of contract because people would say, well,
3 you owed me money and we had money over there with
4 which you could pay me

5 Conversion is something different than that,
6 and the time you can have conversion with actual cash
7 is if you give somebody actual cash and they take it
8 That is conversion, and not if you have an account that
9 is your account and it is said that you owe money on
10 that account on that project

11 So this is simply not conversion, and conversion
12 is not a proper cause of action So we would move to
13 dismiss conversion in its entirety

14 MR BOWENS Your Honor, money can be the subject
15 of conversion The South Carolina cases are clear
16 on that point

17 There are any number of cases where money is
18 being held that was owed -- money is being held by
19 someone who is owed/a debt

20 This is simply an incorrect statement of the law
21 that money in this context cannot be the cause of
22 action for conversion

23 THE COURT So you are claiming that because
24 there was a right to obtain some of that money that
25 that is what gives rise to the conversion?

1 MR BOWENS That is one aspect, Your Honor
2 They are owed some of the money as a share of
3 profits, and that money was unlawfully retained or
4 converted to him, Mr Lipscomb personally, or one of
5 his interests such as K & L, giving them money
6 That is one aspect of the conversion
7 THE COURT How is that different from the breach
8 of contract action?
9 MR BOWENS It only benefits Mr Lipscomb then
10 as I said
11 As to the profit sharing, Plaintiffs are owed that
12 You owed me money and I'm entitled to be paid
13 You said you paid me money but you didn't pay it to
14 me Under the contract you owed me money and you
15 then took it and gave it to somebody else, being
16 K & L or yourself
17 It doesn't make any difference whether he kept
18 it or not
19 THE COURT You would still say it is a conversion
20 claim if he kept it for himself?
21 MR BOWENS Yes
22 THE COURT I would disagree There are a number
23 of examples that were testified to by Mr Melton and
24 spent on purposes not related to Courtyards by Mr
25 Lipscomb personally

1 You would have no right to that money until after
2 the profit sharing has been done and there has been an
3 accounting

4 You may have had a right to a specific sum of
5 money but he would have to pay money from anything that
6 came out of that particular development

7 He could have paid you cash that he borrowed
8 from someplace else but that has nothing to do with
9 the development So to say it is a possible source
10 of money from which you're entitled to be paid is
11 not--that is not the conversion Your only right is
12 pursuant to the contract and the contract is what
13 gives you the right to be able to go forward and to
14 try to make a claim as to any money

15 I think your remedy is under contract There
16 is no question that there is a contract

17 In the contract in this case to some extent you
18 agreed that there is at least a portion of funds that
19 are owed and have not been paid, but I don't think
20 that gives rise to a conversion cause of action

21 I don't think you can use your rights under a
22 contract to be able to recoup what was not paid un-
23 der breach of the contract

24 I will hear the rest of your argument You may
25 change my mind

1 MR BOWENS I would say that Mr Quinn testi-
2 fied that ninety-eight percent of the money was put
3 into Courtyards' account, so two percent of the money
4 was put somewhere else or diverted

5 There is on dispute that the Plaintiffs have an
6 interest in the money on the issues we talked about

7 The Defendant converted the money He retained
8 it for his own use or used it for something else, so
9 there is evidence of that, without the Plaintiffs'
10 permission

11 I think the evidence is clear from which a jury
12 could reach the conclusion that conversion occurred

13 THE COURT There is case law that says where
14 your remedy -- when there is a contract and your what
15 you are entitled to out of a contract that you are
16 not entitled to bring a claim under tort claims and
17 be able to recoup the same remedy

18 In other words, you can either bring a claim in
19 contract or bring a claim in tort

20 There may be other rights but you have the reme-
21 dies under the contract

22 MR BOWENS I would like to add to that, if I
23 may There were cases where a plaintiff was owed
24 money from a bank, had an account with the bank -- a
25 contractual relationship -- and the bank refused to

1 turn the money over

2 The cause of action for conversation was held
3 to be the law there, and the cite for that case is
4 265 South Carolina 490

5 In that case, as I said, the bank retained the
6 money

7 THE COURT There is not a separate contract
8 which was negotiated and signed by the parties which
9 give each specific rights, duties and benefits Is
10 that right?

11 MR BOWENS It arose out of the relationship
12 between the parties and not any specific contractual
13 -- in that particular case, the bank was refusing to
14 turn money over and using it as leverage to get the
15 wife to pay a debt that was owed by her husband to
16 the bank

17 That was very similar to this case and the con-
18 version cause of action was held to stand There
19 are very similar facts between the two

20 MR BABCOCK What is the cite again?

21 MR BOWENS It is 265 South Carolina 490, 220
22 Southeast Second 116, Owens versus Andrews, a 1975
23 case

24 A wife was the plaintiff and had a Christmas Club
25 account with the bank When it came time to be paid

1 that money, which was intermingled with the bank's other
2 money, the bank refused to turn the money over to the
3 wife because the plaintiff's husband owed the bank a
4 separate debt

5 A cause of action for conversion was brought and
6 the Court allowed conversion to stand because of the
7 bank's refusal to turn the money over until the plain-
8 tiff's husband paid the bank his debt There was
9 found to be a conversion

10 This is similar to our case We have this let-
11 ter saying we will pay you if you will give up your
12 rights under the contract

13 We refused to do that and I think it is very
14 similar to this case The cause of action for con-
15 version was allowed to stand They kept the money

16 THE COURT I think the principle in that case
17 was based upon the fact that the relationship was that
18 of creditor/debtor and was not based upon a contract

19 There is a serious distinction between that case
20 and this one

21 MR BOWENS We are in fact a creditor

22 THE COURT I don't think that changed your re-
23 lationship, just because they acknowledge that, the
24 fact they owe you money

25 Under my view of it, I don't believe when rights

1 arise out of a contract that the actions for which you
2 are seeking to be paid are enforcement of the contract

3 You are seeking to be paid pursuant to the con-
4 tractual provisions I think your rights are based
5 upon breach of contract and not based upon convers-
6 ion

7 MR BOWENS There was another case that was men-
8 tioned in the brief on the motion for summary judgment
9 In the case I'm thinking of, the -- and it was a med-
10 ical practice where doctors had paid money into a
11 medical practice and were supposed to be paid that
12 money back at a certain point in the future and the
13 money was not returned to the doctor when he left the
14 practice

15 The Court held the cause of action for convers-
16 ion would stand

17 I think in that cause it was a contractual ar-
18 rangement between the doctor and medical practice when
19 he became a partner and when he left they retained
20 the buy-in money which began as a contractual arrange-
21 ment, and the Court held the cause of action for con-
22 version stood as well

23 MR BABCOCK Your Honor, I think a distinction
24 can be found where people loaned money to someone else,
25 not actually giving them money

1 In this situation, Dutch Fork has given money
2 SEL Properties He simply has no argument as to a
3 debt in breach of contract

4 MR BOWENS To start with, we waived One Hundred
5 Eighty-eight Thousand Dollars worth of commissions that
6 we would otherwise get back which was never returned
7 to us either

8 THE COURT But that was a part of what you gave
9 up as a part of entering into the contract

10 MR BOWENS. Just like the doctor gave up when
11 going into the medical practice in order to get in,
12 and when she got out she was to get it back

13 THE COURT She also contributed money into the
14 practice, did she not?

15 MR BOWENS That's right, and we also gave ad-
16 vertising money, and marketing money, as Mr Melton
17 testified

18 The Defendants have continued to use the name,
19 the logo and promo work of Dutch Fork since the ter-
20 mination They've had the benefit of all of that

21 The specific promotion work, they continued to
22 use that, and they had brought that in with them

23 MR BOWENS The case I was citing, Your Honor,
24 was Mulbis versus Trident Emergency, 351 South
25 Carolina 503, 570 Southeast Second 549

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1 THE COURT Just a moment, please

2 (Brief pause in the process)

3 THE COURT All right Anything further?

4 MR BOWENS Your Honor, I would also point out
5 quickly that Mr Lipscomb in many of these transac-
6 tions and events that we've discussed has not always
7 acted as an agent for SEL Properties He is also a
8 principal of K & L, and when he diverts money --
9 when he personally diverts money away to K & L and
10 for himself that is a cause of action separate from SEL

11 THE COURT I will allow you one last argument
12 on this subject What was your last one again?

13 MR BOWENS Mr Lipscomb was not always acting
14 as agent for SEL Properties in the contracts with
15 SEL

16 Mr Lipscomb has also acted as agent for K & L,
17 and when he diverts money away from Courtyards to
18 the benefit of either himself personally or K & L Con-
19 tracting, that is an action by himself and that is not
20 an action attributable to SEL

21 When he allows K & L to purchase these lots,
22 there is no benefit to SEL from that It only bene-
23 fits himself personally

24 He is acting not as an agent for SEL but as an
25 agent for K & L or acting on his own behalf

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1 So the cause of action in conversion can lie
2 with himself personally and not necessarily in SEL
3 Where breach of contract can lie in SEL, Mr Lipscomb
4 is liable for his own actions

5 The case law or common law in South Carolina is
6 that an agent who deals exclusively with third part-
7 ies such as the Plaintiffs is liable for his own
8 conduct, and he is acting clearly on behalf of K & L
9 when he diverts money away from them to the detri-
10 ment of the Plaintiffs

11 MR BABCOCK The contract is with SEL and not
12 specifically with Mr Lipscomb

13 Your Honor, the checking account -- the money
14 in the checking account -- it's SEL's checking ac-
15 count

16 It is not money they put in but it is money that
17 is his money

18 The debt, if there is any, would go between SEL
19 and Dutch Fork They didn't have money in the ac-
20 count They never put money in the account, so
21 they have no right to that money

22 What they have is contractual, contractual is-
23 sues, but not a right to that money, and that is key
24 to conversion Control over the chattels or the
25 money, which they did not put in the account

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1 And so they don't have any right to conversion
2 MR BOWENS Your Honor, I would submit that it
3 is also conversion against SEL This money in the
4 Courtyards account does not belong to Mr Lipscomb
5 personally

6 It belongs to -- to the Plaintiffs in part and
7 to SEL but it does not belong to him personally, and
8 when he takes money -- he has access to the account
9 and when he takes money out of the account, as some
10 of the exhibits have demonstrated, he has no right
11 to do that It is not correct for him to do that

12 That is an action by Mr Lipscomb personally,
13 not an action by SEL

14 THE COURT Pursuant to the terms of the con-
15 tract, the Plaintiffs would have the right to be paid
16 The contract says the Plaintiffs have a right to
17 be paid certain moneys pursuant to the terms of the
18 contract

19 The contract says the Plaintiffs should be paid
20 -- the contract says that SEL would pay to Dutch Fork
21 Development Group the sum of Nine Thousand Dollars
22 a month for six months, for a total of Forty-four
23 Thousand Dollars during phase one of the development

24 Also, it says that would occur for phase two and
25 again in phase three

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1 It also says that in addition to the foregoing
2 SEL shall pay to Dutch Fork Development Group twenty-
3 five percent of the net profits received from the
4 lots sold in phases one, two and three

5 It defines what net profits are

6 Based upon that, I think that there is a contract-
7 ual right and obligation to the moneys as identified
8 in the contract

9 I don't believe that that gives a right to con-
10 version for moneys that may be diverted from the ac-
11 counts

12 While I understand the argument that the money
13 would have been placed in this account for the bene-
14 fit of Dutch Fork Development Group, but it is the
15 fund from which it was contemplated that the money
16 would be paid

17 There is nothing in the contract that requires
18 that the money must be paid from any particular ac-
19 count

20 There is nothing in the contract that specifies
21 that there is a right to any specific funds in any
22 specific account and under -- and on that basis, I
23 find that while money certainly is capable of being
24 diverted and the money need not be in a specifically
25 identifiable account, it does -- I think conversion

1 of money does require that there has to be money in a
2 particular fund that is identifiable as belonging speci-
3 fically to the individual that is claiming interest in
4 the funds

5 While that account would have been set up in SEL's
6 name for the benefit of the developer, there is no-
7 thing in case law or in common law, as I see it, that
8 says that Dutch Fork has the right to that money in
9 that account, that specific money in that specific ac-
10 count

11 Dutch Fork is doing nothing more than enforcing its
12 rights under the contract to recover the twenty-five
13 percent of profits and development fees

14 Those moneys and the right of anyone to any money
15 under the contract does not derive from any other
16 rights that it may have to moneys in the account gen-
17 erally

18 And I think that because that arises out of that
19 contractual relationship and that there is a remedy
20 available under the contract that that is -- that is
21 the mechanism by which Dutch Fork Development Group
22 and Dutch Fork Realty would be able to recover what is
23 rightfully owed to it

24 How that money is spent out of that account, while
25 it may very well go to your breach of contract accompanied
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1 by a fraudulent act, I don't think that in and of it-
2 self gives rise to a conversation cause of action

3 There is no independent right that allows you
4 to -- there is no independent right to make a claim
5 other than through the contract

6 I think in order for you to be able to recover
7 under tort you have to have some independent basis for
8 which to be able to make a recovery

9 I understand that you listed the cases related to
10 that -- the Mullis case first against Trident Emer-
11 gency Physicians

12 There was money taken pursuant to whatever agree-
13 ment out of her checks in that case, monthly pay checks,
14 and it should have been returned under that agreement
15 to her

16 I haven't read the entire case, but I just saw
17 there was money taken out of her account, and that
18 money is capable of conversion because it was money
19 that should have been returned to her I believe that
20 in that particular case it was not what was contract-
21 ually agreed to, and she claims there was additional
22 money taken that was not agreed to

23 Well, the additional ten percent -- there was ten
24 percent withheld from her check and there was an ad-
25 ditional ten percent that was withheld until all of

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1 the Twenty-five Thousand Dollars had been collected,
2 which would be used to buy her share of the partner-
3 ship

4 She requested the return of the money when they
5 did not make her a partner, and -- she requested the
6 return of the funds

7 (Brief pause in the proceeding)

8 MR BOWENS I think a part of that case was the
9 illegal detention or retention of her money, which is
10 what we have here

11 The contract said the money would be returned,
12 but it was not returned That is the unlawful de-
13 tention of the money, as well as the fact that the
14 money was commingled in one account

15 THE COURT I notice that she didn't sue for the
16 breach of contract, and I think she didn't sue for
17 breach of contract because there was no contract in
18 that case because she wasn't made a partner in the
19 firm

20 MR BOWENS I think it was agreed upon that this
21 money would be taken and returned later on, and that
22 is the contractual part of it That is what allowed
23 them to take the money out of the account

24 Certainly she did not sue for breach of contract
25 and there is no allegation that there was in fact a

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1 contract I think there was mention only to estab-
2 lish how the money was withheld from her check

3 And along those same lines, the contract in this
4 case is with SEL Properties and not with Steve
5 Lipscomb

6 To the extent he has acted on his own or on be-
7 half of K & L, then the cause of action for convers-
8 ion can lie against him personally

9 When he personally has access to the account and
10 he goes in and takes the money and converts it to him-
11 self, that is conversion for personal use

12 THE COURT Are you claiming all of those actions
13 were on behalf of himself and not for SEL?

14 MR BOWENS Not all of them but certainly a part
15 of it

16 THE COURT How do you distinguish that what
17 occurred under this particular situation was based on
18 his own personal conduct and not for SEL?

19 MR BOWENS When he takes money out and converts
20 it to his own behalf

21 THE COURT What evidence is there that he person-
22 ally did that? I mean, the checks that I saw were
23 written on an SEL account

24 MR BCWENS He signed all those -- he had access
25 to the account and signed all the checks

1 When the use of the money is not for the benefit
2 of SEL and it is not for the benefit of Courtyards and
3 not Courtyard-related expenses, things that are per-
4 sonal to him, and for his own benefit, that is convers-
5 ion against the Plaintiffs and against SEL

6 THE COURT I think that -- I guess you are mak-
7 ing the argumert that just because he signed the checks
8 that he is not acting on behalf of SEL

9 And again-- I guess my next question is are
10 you trying to pierce the corporate veil

11 MR BOWENS Well, when an agent deals exclus-
12 ively with the Plaintiffs as happened in this case,
13 then he is liable for his own conduct

14 Mr Lipscomb is liable for his own conduct sep-
15 arate and apart from SEL

16 SEL Properties may not be liable for conversion
17 but Mr Lipscomb personally can be When he does that
18 he is acting on his own behalf and he is acting for
19 the benefit of K & L and not SEL

20 THE COURT I'm sorry I'm totally missing it,
21 because if the only way there is going to be any action
22 by SEL is through Mr Lipscomb and if he is the only
23 one who has contact with Dutch Fork Development Group
24 and with the Meltons at what point is it not SEL but
25 his own act?

1 I mean, you have got to show -- just because he
2 is the person that is out front and he signed checks
3 on behalf of SEL, what conduct is there that speci-
4 fically was done for his own benefit?

5 Regardless of the fact that he -- I mean, I un-
6 derstand your argument that he has written these checks
7 on the SEL account that are going to K & L and that
8 because they go to K & L they have to be against SEL's
9 interest and they have to be against Dutch FORk's in-
10 terest

11 I am not taking that leap I'm not jumping there
12 without -- I mean, you've got to point to something
13 that shows specifically that that was what was going
14 on

15 MR BOWENS Well, let me

16 THE COURT You are asking me to assume that be-
17 cause he signed some checks that he is doing it for
18 his own benefit

19 I am asking you

20 MR BOWENS I think there are instances where
21 he signed checks and it is for -- legitimately for
22 SEL, but when he does things with the account that
23 is not SEL, takes money that belongs to SEL, gives it
24 to K & L or uses it for his own benefit, that is con-
25 version against SEL

1 I think if Mr Lipscomb hadn't done these things
2 that benefitted only himself that it would not have
3 caused harm to Courtyards I think it is a clear
4 case of conversion against SEL and by extension to the
5 Plaintiffs

6 Those actions were improper and he had no right
7 to be doing that, and Mr Quinn, the chief financial
8 officer for SEL, said specifically that that was cor-
9 rect

10 THE COURT But he said it was correct that he
11 could not identify where the money went to and that
12 money belongs in part to SEL and belongs in part to
13 Plaintiffs

14 MR BOWENS Mr Lipscomb clearly converted that
15 money away It was clearly conversion and that is
16 warranted going to the jury

17 MR BABCOCK Your Honor, my client's actions
18 clearly were done as agent for SEL

19 SEL is the one that owned the account There
20 has been no testimony that Mr Lipscomb acted out-
21 side of his capacity as the manager of SEL

22 That is who owned the account It is their money
23 and they could do with their money however they wanted

24 Now, the debt owed to the Plaintiffs is something
25 else, but there is actually no testimony that that

1 money which belonged to SEL --that they have the right
2 to the particular money in SEL's account

3 MR BOWENS Part of the case is a cause of action
4 for tortuous interference Mr Lipscomb let K & L
5 buy those three lots for less than the fair market
6 value In that way, he procured a breach of contract

7 That benefitted no one in this case but Mr
8 Lipscomb personally, because he is majority shareholder
9 in K & L

10 I mean, we are

11 THE COURT As I read the allegations of the
12 Complaint, there are no allegations that Mr Lipscomb
13 acted personally to your detriment to divert funds
14 There you go again to piercing the corporate veil
15 Everything is lawfully the Defendants', so you

16 MR BOWENS If I could just point out, the first
17 complaint before amendments had conversion by Mr
18 Lipscomb personally

19 THE COURT I'm looking at the amended complaint
20 and that is the only one available

21 MR BOWENS It is pled against both Defendants,
22 SEL and Mr Lipscomb

23 THE COURT They are grouped in there together
24 Everything refers to the Defendants, other than ^{paragraph} 29

25 MR BOWENS He converted property as well

1 Your Honor, that's what happened here Mr
2 Lipscomb had access personally to SEL's property
3 which was partly owned by the Plaintiffs, and he
4 diverted that money away to the benefit of himself
5 and SEL

6 It was illegal retention if not actual divers-
7 ion of the funds for his own benefit and/or K & L's

8 MR BABCOCK That's the whole problem, Your
9 Honor It was SEL's account, it was SEL's money, and
10 there is no right in them to that money

11 Obviously what you're got in the LLC, SEL had to
12 work through Steve Lipscomb It has no other ability

13 So the conversion cause of action is simply in-
14 appropriate in this case

15 THE COURT I agree with that The money you
16 are referring to and the way that you are trying to
17 identify the conversion is not correct in my view

18 That also meant that SEL would be responsible
19 -- the management would have been responsible for
20 determining and paying over the amounts that would
21 have been due

22 But that goes back to the contract issue There
23 is no right to the money in that account

24 While you may have a contractual interest in
25 what happens to the money, you personally have no

1 right to the money in the account, and there is no
2 right to be able -- be able to go and obtain the
3 money in the account

4 What you are able to enforce against the De-
5 fendants is purely a contractual obligation, and that
6 is how it arises

7 I am not convinced that you have established
8 that there is a personal liability in Mr Lipscomb
9 for conversion I still think the obligation arises
10 out of contract, and that would not give you any
11 right to claim any money in this account or someplace
12 else

13 MR BOWENS The last thing I would say, Your
14 Honor, is that Mr Lipscomb as you will recall did
15 personally guarantee the sum of money involved in
16 this case

17 THE COURT That is not the contract he had with
18 you It is the contract he had purely with the bank,
19 and his personal guarantee doesn't have anything
20 to do with this contract

21 There is nothing in this contract that would
22 require that he be personally obligated to pay any-
23 thing as it relates to the contract

24 MR BOWENS If you recall the testimony, he
25 personally guaranteed he would pay any shortfall

1 from the development loan when he took out the money
2 up front

3 So if he did, in that regard, personally obligate
4 himself to pay the Meltons, and there was not suffi-
5 cient money in there

6 THE COURT I think that is jury argument

7 You can argue that when you argue your contract,
8 that that is part of what you feel the contract is,
9 but I just don't think that that gives rise to the
10 conversion

11 MR BOWENS When he takes money out personally
12 or diverts it to K & L and gives his personal guar-
13 antee he cannot overlook his obligation to pay and it
14 doesn't have to be from that particular set of funds

15 He still has a contractual obligation to pay --
16 Mr Lipscomb has the obligation to pay it

17 THE COURT But it still arises out of contract
18 and not conversion I think that obligation would
19 arise out of the contract

20 MR BOWENS He personally guaranteed that he
21 would pay it He agreed to that when he got the money
22 up front He became a personal guarantor of that
23 money

24 THE COURT It still arises out of contract,
25 whether it is a written or oral contract

1 Let's take a break at this time I remind all
2 Court personnel that you need to move your vehicles
3 out of the garage and park elsewhere

4 (Brief colloquy between the Court and counsel)

5 THE COURT Let's take a break and come back

6 (Whereupon, the Court stood in recess from 5 10
7 P M until resuming at 5 30 P M , without the jury
8 being present)

9 THE COURT Okay, I have some notes from jurors
10 Let me read them

11 (Brief pause)

12 Some of them are present without question but
13 there are two jurors I believe that need to get in
14 contact with their employers They have not been
15 able to do that

16 I have one juror who is scheduled for job train-
17 ing for a new job and he will not be able to be em-
18 ployed until getting that new job training

19 The next available training date would be Decem-
20 ber So that would be a person who must have this
21 training before he can start employment

22 Then I have a third juror who is self employed
23 and would have to do this weeks work along with next
24 weeks work, and the person also helps to provide care
25 for two people That juror specifically said no,

1 but no one wants to work on Saturday or Sunday They
2 prefer to work next week

3 They are waiting to hear back

4 I guess we could not start back until Tuesday,
5 which would assist the one juror who has the training
6 on the one day

7 Before I did anything else, I wanted to find
8 out where you are or what you want to do If you want
9 to go with less than twelve, that is not a problem

10 (Brief pause in the proceeding)

11 MR BOWENS Your Honor, the Plaintiffs have no
12 objection to going with less than twelve

13 MR BABCOCK Likewise, we have no problem
14 going with less than twelve

15 THE COURT Is that the magic number or -- right
16 now I have one who -- one, two, three, four, five,
17 six, seven, eight, nine -- one just needs a statement
18 for the employer saying they have to be in Court next
19 week

20 One or two weren't able to talk with their bosses
21 at all Sorry, that is one who hasn't, so that would
22 be eleven, assuming one might be able to reach the
23 employer

24 Of course, there is still the problem with the
25 juror tomorrow, which means we are not going to start

1 until late tomorrow

2 So what I'm saying is that by Monday we may be
3 down to eleven

4 MR BOWENS We would have no objection to going
5 with eleven

6 MR BABCOCK No objection to eleven

7 THE COURT That is eleven, if the person is
8 able to get in touch with his or her employer Is
9 there is a problem with that, we could be down to
10 ten

11 I'm just giving you all the numbers

12 (Brief pause in the process)

13 MR BABCOCK Your Honor, we would go with ten

14 THE COURT Are both sides okay with ten?

15 MR BOWENS No objection, if we are cut down
16 to ten

17 MR BABCOCK No objection

18 THE COURT All right Do we have a lot more
19 motions to take up?

20 MR BABCOCK We do have other motions

21 THE COURT There is no reason to keep the jury
22 here so I am going to send them on their way

23 MR BABCOCK Your Honor, if the motion is granted
24 as to conversion, we would have a motion with regard
25 to tortuous interference with contract Also with

1 regard to breach of contract with fraudulent intent,
2 and as to the damages for phases two and three

3 I wish we could make it a little shorter

4 THE COURT Well, I just wanted to see how far
5 we could get

6 MR BABCOCK Just for the record, we under-
7 stand that the motion as to conversion was granted

8 With regard to the next motion, tortuous inter-
9 ference with contract, we would submit the case of
10 Bradburn versus Colonial

11 (Reading from case)

12 This cause of action obviously is directed just
13 at Mr Lipscomb because SEL cannot interfere with
14 SEL

15 So that the cause of action is directed just
16 as to Mr Lipscomb

17 In that regard, there is no evidence that Mr
18 Lipscomb did anything outside the scope of his
19 authority as manager of SEL

20 Now, with regard to the alleged breach of the
21 contract, Your Honor, we have had lots of incidents
22 and lots of things where the Defendants and the Plain-
23 tiffs disagree, but in terms of the actual breach of
24 the contract what is pled in the first cause of
25 action for breach of contract is that they were owed

1 development funds that they were not paid, and that
2 they were due to be paid for the profits, and they
3 were not paid

4 They also talked about the commissions, and
5 they demanded that those be paid, and that is what
6 is pled in the Complaint

7 And insofar as the tortuous interference with
8 the contract, which is a fourth cause of action, they
9 claim that breach of the contract occurred because of
10 interference by the Defendants in a number of aspects
11 which were gone into

12 That they breached the contract with the Plain-
13 tiffs by the failing to tender payments to the Plain-
14 tiffs for services which were rendered in the course
15 of the term of the contract

16 They also claim that there was a failure to pay
17 moneys for services that were rendered by others which
18 caused delays in the work and interfered with the
19 contract

20 Now, as well, Your Honor, there are under that
21 paragraph certain other allegations, but those are not
22 directed at the breach

23 To break down what is pled there, they are also
24

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1 pleading the offer to sell The letter was addressed
2 earlier

3 The offer was not made in good faith because it
4 was calculated to list the property and going back
5 to that letter it was written six months after the
6 breach itself, because that is where they say it
7 was not made in good faith

8 Now, clearly, Your Honor, while that letter may
9 come in with regard to the breach of contract accom-
10 panied by a fraudulent act, that is a separate issue,
11 given the tortuous interference

12 That letter has nothing to do with the breach it-
13 self The breach occurred before them being termin-
14 ated The letter was sent May 28, 2004, so that is
15 where they interpret it

16 They say they haven't gotten their money, and
17 that is what is pled here

18 Now, Your Honor, there simply is no evidence
19 that Mr Lipscomb's actions in either having the let-
20 ter sent of May 28, 2004, or the later letter offer-
21 ing to compromise the claim, were outside the scope
22 of his authority with SEL

23 There has to be action outside the scope of his
24 authority with SEL

25 On page four and five the Plaintiffs argue that

1 it was either that Mr Lipscomb was a member of SEL
2 and/or K & L, and, again, K & L is a separate entity
3 of which Mr Lipscomb is the managing member, and K & L
4 was not sued for tortuous interference

5 So anything K & L might have done is not a con-
6 cern Mr Lipscomb obviously has to be the individual
7 acting on behalf of SEL and the individual acting on
8 behalf of K & L They cannot act unless he acts, or
9 what are alleged to be the acts here

10 Again, this is not what the Complaint says but
11 they talk about, number one, allowing K & L to pur-
12 chase lots below fair market value in violation of
13 the contract

14 We need to go back to the agreement itself, and
15 the agreement itself as far as this, looking at sec-
16 tion four of the contract -- it is the intent of the
17 parties to develop the property and sell lots at a
18 fair market value

19 (Reading from contract)

20 There is absolutely nothing there that requires
21 all of the lots to be sold at either a specific price
22 or fair market value

23 In fact, in paragraph six it talks about -- par-
24 agraph two of that section -- it talks about grant-
25 ing to Dutch Fork Realty the exclusive right to sell

1 for five years but the next paragraph says the sales
2 price for each lot shall be approved in advance by
3 SEL

4 So SEL had the authority to establish the price
5 for each lot That's what the contract says, and it
6 is a contract that would be the subject of any tortu-
7 ous interference

8 There is no indication, no evidence, that Lipscomb
9 did that on behalf of SEL and that when he did it he
10 was acting outside the scope of his authority with
11 SEL

12 The next thing raised, next point raised, is the
13 allowing of K & L to delay closing on the lots pur-
14 chased for over a year That is not a breach of con-
15 tract that I'm aware of

16 I don't know of any requirement that closings
17 not be delayed or be held in any period of time from
18 the sale No beach of contract

19 Third, he allowed K & L to begin building on
20 lots before closing That is not addressed in the
21 contract

22 Lastly, I again go back to the fact that SEL had
23 owned the checking account when it was using funds
24 from Courtyards to pay for K & L Construction's ex-
25 penses

1 That is not a breach of contract Those were
2 SEL's moneys to use, and using funds from Courtyards
3 to pay personal expenses again is not a breach of
4 contract because the moneys in that account are
5 moneys that belonged to SEL

6 Now, Your Honor, again, the tortuous interfer-
7 ence with contract -- that's the special kind of tort,
8 because you always have corporations and LLCs that
9 have to act through individuals That is the only
10 way they can act

11 And a tortuous interference with contract takes
12 something where the person doing the act is acting
13 outside the scope of his authority and doing something
14 for improper personal means

15 There is no evidence in this case that the ac-
16 tions taken by Mr Lipscomb in this matter were any-
17 thing other than in his authority as a managing mem-
18 ber of SEL

19 As a result, tortuous interference with contract
20 should be dismissed -- that cause of action should be
21 dismissed at this point because there is no evidence
22 to establish the elements

23 MR BOWENS Your Honor, the question of what
24 the facts show as to how Mr Lipscomb was acting is
25 for the jury to decide

1 There is evidence of him acting out of the scope
2 of his authority when acting as an agent for SEL, and
3 the key to that is the fourth element, the absence
4 of a legitimate business test

5 Was Mr Lipscomb acting for himself personally
6 or as agent when he did all of the things we have
7 been discussing?

8 Was he acting for himself or for SEL when he
9 set the price as he did?

10 Was he in fact acting for K & L Contracting or
11 acting for himself personally

12 Was it a breach for him to have sold below market
13 value?

14 That paragraph six that Mr Babcock brought out,
15 Your Honor, where he said that SEL had the authority
16 to set the price for the lots, that is only a part
17 of what occurred

18 That is a part of what procured the breach of
19 contract because that led to a bunch of problems
20 that led to budget problems that led to the actual
21 fall

22 His actions with regard to the checking account
23 led to a bunch of shortfalls which were the cause of
24 various delays because bills were not being paid

25 Allowing K & L to not close for over a year and

1 some months led to a loss of funds that could have been
2 used to pay for various things in the development

3 They themselves breached the contract because
4 lots were being sold fast enough when Mr Lipscomb
5 acted in his own capacity with K & L, which allowed
6 it to occur

7 There was no legitimate business justification
8 for the way that Mr Lipscomb behaved, and it was com-
9 pletely for his own benefit and the benefit of K & L
10 as well

11 THE COURT Mr Bowens, where I have difficulty
12 is that Mr Lipscomb is a part of K & L and part of SEL

13 I understand the allegations you are making but
14 can you point to me specifically evidence-what evi-
15 dence it is that Mr Lipscomb personally allowed those
16 things to happen?

17 MR BOWENS Mr Lipscomb was acting simultan-
18 eously for SEL and K & L

19 THE COURT I understand your argument about
20 him allowing a reduced sales price and about the
21 loans not being closed

22 MR BOWENS Since he was acting simultaneously,
23 he must have allowed it

24 THE COURT I understand that argument, but I
25 am just trying to figure out how and what evidence

1 points to Mr Lipscomb acting on his own personal
2 behalf

3 MR BOWENS I think, first of all, it certainly
4 is inferrable from the facts, and there is no question
5 he acted for K & L That has been well established

6 There is a complete absence of any legitimate
7 justification on SEL's part for any of the actions that
8 occurred There was no benefit to SEL

9 THE COURT I understand, but are you saying it
10 is only SEL -- the sales of the lots, that Dutch Fork
11 Realty had no control over when those events occurred
12 and how?

13 I mean, Dutch Fork Realty was the marketing en-
14 tity, the entity responsible for making sure that
15 the lots were sold and working with the builders or
16 whoever was selling those lots, under the contract
17 How is it solely Mr Lipscomb who prevents the clos-
18 ings or allows them to not close for a year?

19 Now, it may be a different issue as to the
20 amount, but as it relates to the delay in closing,
21 how is that solely Mr Lipscomb and why did that
22 occur?

23 What evidence is it that it occurred because
24 of Mr Lipscomb's actions?

25 MR BOWENS Mr D Melton testified that closings
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1 were solely in Mr Lipscomb's province and he had no-
2 thing to do with them, that he coordinated those on
3 behalf of SEL, in behalf of K & L

4 Okay, so he was the sole person who signs for
5 K & L, signs for SEL, so he is acting for both of
6 them

7 So Dutch Fork Realty had nothing to do with those
8 transactions They may have sat in on some of the
9 closings or been there, but it was solely in Mr
10 Lipscomb's arena Dutch Fork Realty did not have a
11 role to play

12 THE COURT Well, say Dutch Fork has a buyer
13 for a lot, and we'll say you're the buyer

14 MR BOWENS Well, in this case I understand the
15 buyer representing Mr Lipscomb, or is a sales represen-
16 tative, and he allows this not to occur for over a
17 year

18 The Meltons had no idea and in fact they were
19 led to believe by Mr Lipscomb that it had occurred
20 They had no idea and they were not given access to
21 the books

22 The fact that the lot was marked sold does not
23 mean the closing had taken place The Meltons were
24 led to believe by Mr Lipscomb that it had taken
25 place

1 And in fact when those lots did not close, SEL
2 then said, you have not sold enough lots, therefore,
3 we're terminating the contract

4 In fact, it was Mr Lipscomb that prevented the
5 closings from taking place and then breached and
6 terminated the contract

7 THE COURT Whose testimony was that?

8 I'm talking specifically about your assertion
9 that the Meltons had no knowledge whatsoever that
10 the lots did not close, and, in fact, any closings
11 that were set up were done through the exclusive
12 discretion of Mr Lipscomb

13 MR BOWENS D Melton testified to that, Your
14 Honor

15 MR BABCCCK I don't have that in my notes,
16 Your Honor

17 THE COURT I'm not disputing it, but I am simply
18 saying that what you're telling me is that Dutch Fork
19 Realty had nothing to do with the transaction

20 MR BOWENS Not the closings Any closings
21 that were set up were done in the exclusive discre-
22 tion of SEL and/or Mr Lipscomb

23 D Melton testified to it specifically, and I
24 believe Billy Melton did as well

25 THE COURT You are telling me that Dutch Fork had

1 nothing to do with the closings They had no input,
2 no knowledge

3 They had no way to be able to determine whether
4 or not a closing was held, even though the normal
5 practice is that the broker participates in a clos-
6 ing of its sale

7 Dutch Fork procured the buyer for the lot and
8 was not involved in the closing is what you are tell-
9 ing me

10 MR BOWENS That's correct As I said, they
11 were led to believe that the closings had taken
12 place when they had not

13 THE COURT I'm not disputing that, and I un-
14 derstand that Mr Lipscomb in behalf of SEL was required
15 to sign and in behalf of the buyer

16 MR BOWENS They were led to believe closings
17 had taken place that didn't happen, as Mr Melton said

18 When that didn't happen and the loans didn't
19 close, they didn't have the income

20 Also, when they did close, there was no way for
21 them to know that it had closed Mr Lipscomb did
22 allow K & L to delay closings for over a year was
23 the testimony

24 That delay in the closings led to a breach by
25 SEL

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1 MR BABCOCK Your Honor, the Plaintiffs have
2 made a lot of assertions there but I don't have that
3 in my notes and I don't recall it

4 MR BOWENS Your Honor, again, that was inter-
5 ference, tortuous interference with the contract, and
6 that goes back to the contract itself

7 That is a part of the whole reason given for
8 the termination of the contract, that they had not
9 sold enough lots, and he concealed from them that
10 lots had been sold

11 Dutch Fork had the exclusive right to sell those
12 lots, and the Plaintiffs were interfered with by Mr
13 Lipscomb secretly trying to sell lots and excluding
14 Dutch Fork Realty from that process

15 There was testimony about that, and they were
16 prevented from selling lots which again led to breach
17 of the contract

18 Mr Lipscomb was personally doing this

19 MR BABCOCK Your Honor, the only selling he did
20 is what became the Essex Contract There was no
21 testimony at any time that he was secretly trying to
22 sell lots

23 MR BOWENS Again, Your Honor, there was testi-
24 mony that in 2002 Mr Lipscomb was running around,
25 doing this behind the Plaintiffs' backs and not letting
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1 telling them what was going on, what was really hap-
2 pening

3 It was Mr Maxheimer who told the Plaintiffs
4 what was happening

5 THE COURT Was that about the redesign of the
6 lots?

7 MR BABCOCK No, Your Honor, that was the ini-
8 tial change in 2002, and Mr Maxheimer did not do
9 that

10 MR BOWENS I believe he said he was doing the
11 redesign

12 MR BABCOCK Your Honor, I listened very care-
13 fully to that testimony and Mr Maxheimer did not
14 place it at that point in time

15 At any rate, that cannot possibly interfere with
16 sale of the lots in phase one, so that cannot possi-
17 bly be a tortuous interference with contract

18 THE COURT All right Let's go back for a sec-
19 ond

20 You are claiming that Mr Lipscomb interfered
21 with the ability of the parties to be able to complete
22 their contract

23 Now, are you claiming that he interfered by
24 these activities to get the Plaintiffs to breach his
25 end of the deal or the Defendants to breach their

1 end of the deal?

2 MR BOWENS Mr Lipscomb had interfered with
3 the contract in numerous ways First, he did not
4 bond the plat, and additionally he went and changed
5 the plans on phases two and three

6 Those two things were back to back Now, he
7 was spending all kinds of money on engineering plans,
8 spending money on things that were part of the devel-
9 opment work and which he had no right to be involved
10 in under the contract

11 He then goes and interferes with the right to
12 sell lots by entering into secret negotiations himself
13 without the Meltons' knowledge

14 THE COURT So you claim he interfered with
15 them by getting Defendants to breach the contract?
16 Is that

17 MR BOWENS Well, SEL terminated the contract,
18 and the termination letter outlined all of those is-
19 sues

20 THE COURT You are claiming he is doing all
21 of that in his individual capacity and not in behalf
22 of SEL or as an agent of SEL?

23 MR BOWENS That's correct There is simply
24 no justification for what he did First not bonding
25 the plot and then I believe the testimony was he spent
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1 over Two Hundred Thousand Dollars without their know-
2 ledge, the Meltons' knowledge, when there was nothing
3 wrong with the plans they had

4 Had they gone forward, the project would have
5 been completed on schedule, and it was through Mr
6 Lipscomb's personal actions and not on behalf of SEL
7 He is personally liable It was his personal agenda

8 MR BABCOCK Your Honor, that is absolutely
9 wrong

10 SEL Properties, LLC, like any LLC, can only act
11 through its agents and/or officers That's the only
12 way it could act

13 Mr Lipscomb was acting on behalf of SEL Prop-
14 erties, LLC, during all of these occurrences Mr
15 Bowens is talking about

16 SEL Properties, LLC, can only act through Stephen
17 Lipscomb, and there is nothing in the record, no evi-
18 dence whatsoever, that any of those actions were
19 wrong

20 The fact is that Dutch Fork did not sell the
21 lots as was contemplated, but even so that is a SEL
22 matter

23 Any action taken by Mr Lipscomb was on behalf
24 of SEL In a breach of contract situation, one party
25 does something that causes a breach

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1 If it's a corporation, if it's a LLC, it acts
2 through its officers, directors, agents, what have
3 you It is the only way they can act

4 A breach of contract is not a tortuous interfer-
5 ence with contract So, once again, we come back to
6 the elements of the contract, the written contract

7 We've got SEL which can only act through Steve
8 Lipscomb When he was acting on behalf of SEL, he
9 was acting in his capacity as the managing member of
10 SEL

11 MR BOWENS Your Honor, in some instances Mr
12 Lipscomb was acting on behalf of SEL, or on behalf
13 of K & L, and there were instances where he was act-
14 ing personally, and as such he is personally liable
15 for his own torts

16 All these things that have happened should be
17 examined closing, as to what he was doing, and it is
18 for the jury to decide

19 He is liable for his own torts, as I said, sep-
20 arate and apart from SEL

21 MR BABCOCK Your Honor, the tort here is tortu-
22 ous interference with contract That's what the tort
23 is, and there is no evidence that he was acting out-
24 side the scope of his authority

25 That is the key thing here

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1 THE COURT Hold on a second, please
2 (Conference at the bench between counsel and the
3 Court off the record)
4 THE COURT Mr Bowens, your position is that Mr
5 Lipscomb has acted outside the scope of his agency
6 because he benefitted personally
7 What evidence is there to show that -- I guess
8 I've answered my own question
9 I think it's a close question but I think it is
10 -- I think there is evidence from which the jury can
11 make that decision
12 They can make their own determination as to whe-
13 ther or not he was acting within his agency or his
14 authority, or whether he was acting in behalf of
15 K & L or SEL or personally
16 I think it's a jury question I find that the
17 lines are blurred and blended, but I still think there
18 is evidence sufficient to let it go to the jury on
19 that issue
20 Before we argue any further, I'm going to let
21 the jury go I don't think we will get to a point
22 of offering any testimony today
23 Do you -- should I excuse those persons we have
24 spoken about or have them come back tomorrow?
25 MR BABCOCK We would ask that they come back
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1 late tomorrow but we have no objection to excusing
2 those two persons

3 MR BOWENS We would agree, Your Honor

4 THE COURT I'm going to ask them to come back
5 tomorrow at one o'clock after they have had a lunch
6 break, and then we'll go forward with the case at that
7 time

8 That hopefully will be enough time for the juror
9 to take care of what he needs to take care of, and
10 I will go ahead and seat the alternate

11 If you would ask the jury to come in I will
12 tell you it is Juror 257 that needs to be excused be-
13 cause he is self employed, and Juror Number 249 needs
14 to be excused because she is training for a new job

15 Bring the jury, please

16 (Jury returned to Courtroom)

17 THE COURT Good evening, jurors I have re-
18 ceived your notes and I thank you very much for writing
19 and making me aware of your problems with service

20 Again, I cannot apologize to you enough for not
21 having had the foresight to be able to give you that
22 information at the beginning of the trial so that you
23 would have been able to make appropriate decisions
24 during our voir dire

25 I understand there are two jurors who have such

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1 conflicts for Monday and Tuesday of next week that
2 they would not be able to continue on, and so I want
3 to excuse those particular jurors

4 Again, I understand that there is also one juror
5 who has not yet been able to reach their employer, and
6 so I will ask that that person continue to try and
7 do so

8 If your employer should need to have a fact
9 statement from us we will take care of that tomorrow
10 when you return for next week

11 The logistics behind this case have resulted in
12 a number of things occurring I understand there is
13 also another juror who is having a conflict tomorrow
14 morning of a personal nature that will necessitate that
15 juror coming in late tomorrow morning

16 So in an effort to try to accommodate everyone
17 and still be able to go forward and not have to de-
18 clare a mistrial and start the case all over again,
19 and I'm sure the parties do not want to do that --
20 I certainly don't want to do that -- so we would like
21 to be able to go forward and finish the case, and we
22 will do that next week

23 For the juror that has the personal conflict in
24 the morning -- I want to thank you all for your pa-
25 tience while we've been taking care of motions for
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1 the last hour and a half or two hours -- I would
2 ask that you all report tomorrow at one o'clock We
3 are trying to hold on to as many jurors as we can
4 and so to be able to accommodate schedules I ask you
5 report at one o'clock tomorrow

6 I will, however, excuse Juror Number 249, Ms
7 Washington, for your job related issues and I will as
8 well excuse Juror Number 247, Mr Wider, for job related
9 issues

10 Having said that, Ms Sykes, you would then step
11 into the jury panel and become a part now of the
12 jury

13 I understand ladies and gentlemen, that we will
14 have less than twelve jurors, but the parties have
15 agreed to go forward with less than twelve of you so
16 as to finish this case

17 We are certainly hopeful that we will not lose
18 any additional jurors, but, having said that, I ask
19 that the rest of you return tomorrow at one o'clock,
20 and for Juror 160 -- I believe you will need to check
21 with your employer, and if you'd do that and report
22 tomorrow morning when you come in

23 That means that tomorrow we will not be taking
24 a lunch break We will start at one o'clock and we
25 will take our usual afternoon break

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1 We will try to go to a reasonable hour and I
2 wish again to thank you all very much for your pa-
3 tience and your understanding in these matters, as
4 well as for your indulgence and your hard work in
5 listening to what is being presented in this case

6 So with that I will excuse you for the evening,
7 and if you do need someone to walk you across the
8 street -- I don't believe it is dark outside yet but
9 if you need someone to do that please let our bailiff
10 know, so that we can accommodate you in that regard

11 I will see you tomorrow at one o'clock Have a
12 good evening

13 Thank you

14 (Jury excused at 6 17 P M)

15 THE COURT Do you wish to go ahead and continue
16 with the motions? There was a suggestion made that
17 we come in and do that in the morning

18 Frankly, if we can get the motions done this
19 afternoon that will give everybody a chance in the
20 morning to kind of recoup and to start fresh tomor-
21 row

22 If you are in agreement, we will continue, or
23 if you want to defer I will be happy to do that

24 MR BOWENS I personally would prefer to go for-
25 ward

1 THE COURT How much longer have we got? Let's
2 go on
3 I will deny your motion as to tortuous interfer-
4 ence with the contract
5 MR BABCOCK Yes, Your honor
6 Your Honor, our next motion goes to dismissing
7 the cause of action for breach of contract accompanied
8 by fraudulent act
9 Now, they have alleged or cited three elements,
10 of course, to this cause of action
11 One, breach of contract
12 Two, fraudulent intent related to the breach of
13 contract
14 Three, fraudulent act accompanying the breach
15 Now, there is no question but that there is
16 evidence of a breach of contract
17 The other two elements mentioned, fraudulent in-
18 tent related to the breach and fraudulent act accom-
19 panying the breach -- there is no evidence that there
20 was any fraudulent intent on the part of SEL in the
21 breach
22 There is no evidence to show fraudulent intent
23 and no evidence of a fraudulent act accompanying the
24 breach
25 The one document that was talked about previously
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1 previously in this trial came about some six months
2 after the termination

3 Now, as discussed before, there was considera-
4 tion beyond the -- I believe Fifty-four Thousand
5 Dollars was mentioned--Fifty-seven Thousand Dollars
6 was offered

7 The case law is clear that settlements are en-
8 couraged and parties are urged to try to settle cases
9 We tried to settle this case some six months later,
10 but there was no fraudulert act

11 It is called a settlement, but they rejected
12 the offer

13 There was no fraudulent act, and this cause of
14 action should be dismissed

15 THE COURT Mr Bowens

16 MR BOWENS Your Honor, the one thing that
17 counsel speaks about is only one of a number of acts
18 which were fraudulent

19 There was the misallocation of the costs

20 There were unfair dealings that accompanied the
21 breach

22 Improper use of funds, the failure to bond the
23 plat, other things that were brought out

24 Allowing K & L to purchase lots at below market
25 price and allowing K & L to delay closings -- that is

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1 certainly in the record

2 THE COURT Are those acts -- are those the
3 acts that you claim led to the breach, or are you
4 saying they are separate and distinct from the acts
5 that constitute the breach of the contract?

6 MR BOWENS Yes, they are all acts surrounding
7 the breach

8 Also, telling the Plaintiffs there were no pro-
9 fits when it was revealed that SEL had taken all the
10 money and taken money the Plaintiffs give up in com-
11 missions

12 There are numerous acts which were fraudulent,
13 and we believe the jury should be allowed to deter-
14 mine that

15 MR BABCOCK I do not believe there was evidence
16 of any dishonest or unfair dealing with the Plain-
17 tiffs

18 Certainly these things that have been talked
19 about are not all around surrounding the breach, but
20 they should all be about the breach

21 MR BOWENS Certainly there was testimony about
22 the claiming that there were no profits as well as
23 about misallocation of funds

24 Not paying commissions is a fraudulent act with
25 fraudulent intent The termination letter

673

1 THE COURT What is the breach?

2 MR BOWENS The unfair termination Termina-

3 tion of the contract

4 MR BABCOCK This case is about a breach of con-

5 tract situation, and they have failed to show fraud,

6 any fraudulent act accompanying the breach

7 MR BOWENS A fraudulent act is any act that

8 is unfair The dealing behind our backs and chang-

9 ing of the plans without our knowledge, secret nego-

10 tiations

11 It is a question for the jury to decide

12 MR BABCOCK Your Honor, in August of 2003

13

14 THE COURT You say the breach is the termination

15 of the contract but the breach cannot be too remote

16 in time and character

17 Tell me how it is not too remote, what you are

18 claiming

19 MR BOWENS Well, there is April, May, June,

20 July, during which time the Plaintiffs are asking

21 for accounting They are asking for development

22 fees, and Mr Lipscomb asks them to defer that, say-

23 ing there is no money

24 Then they cannot start phase two and it is all

25 in the evidence It revolves around May 28th of

674

1 2004 It all leads up to May 28, 2004

2 THE COURT And they were three and a half years

3 into the contract

4 MR BOWENS That's right

5 MR BABCOCK There has been no testimony in

6 the record of this case that there was any issue be-

7 tween the parties as far as selling of lots in Aug-

8 ust of 2003 or any misallocation of funds

9 The Plaintiffs never requested to see the books

10 and records There is no suggestion that they ever

11 asked and Mr Lipscomb said no

12 There were some allocation errors that have been

13 pointed out but no purposeful misallocation of any

14 funds

15 The testimony is very clear about the change

16 of plans in 2002 and that the Meltons were part of

17 that, and it was to increase the number of lots

18 For those reasons this cause of action should be

19 dismissed

20 THE COURT I will deny that motion I believe

21 it is a jury question, and I will allow it to go to

22 the jury

23 MR BABCOCK Your Honor, as to the breach of

24 contract, we would ask for a directed verdict as to

25 damages

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1 There has been no testimony -- and it is clear
2 that testimony is necessary on this issue -- as far
3 as what could have occurred in phases two and three
4 between May 28, 2004, and the end of the contract in
5 November of 2005

6 We submit that there can be no jury verdict as
7 to phase two and three damages, because the amount
8 would only be speculative

9 As far as what could have been done as far as
10 getting permits and what have you, what could have
11 been done to construct this road, that is speculative,
12 Your Honor

13 There can be no phase two and three analysis,
14 and so there is nothing from which the jury can de-
15 termine damages as to that

16 What the Plaintiffs have done is to go back in
17 time and say, gee, if everything had gone perfectly
18 and we could have gotten everything done in the con-
19 tract period, what would our profit have been

20 THE COURT What about the testimony that they
21 asked Mr Lipscomb to bond the plat and he refused
22 that he said it was too expensive?

23 MR BABCOCK Your Honor, I don't know that they
24 did ask him to do that

25 MR BOWENS That was the direct testimony of Mr

1 Melton, I believe

2 MR BABCOCK There may have been a disagreement
3 as to which was the best way to go as far as the bond
4 was concerned, but I don't know that he refused

5 I don't believe that he is required to do a bonded
6 plat

7 THE COURT That goes back to what would be a
8 part of going forward with the development, and so it
9 -- why would that not be a part of allowing then the
10 jury to make a decision as to whether or not those
11 things could have been done and whether or not it is
12 reasonable to believe that

13 MR BABCOCK That is not a part of the contract
14 between the parties

15 THE COURT The bonded plat is never a part of the
16 contract, but it is certainly a part of going forward
17 with the plan and certainly to the extent it may have
18 been beneficial to the development to be able to get
19 a bond earlier

20 Is that not information the jury can consider in
21 determining whether or not that affected the goals of
22 the development, to be able to sell the lots earlier
23 and make profits earlier and be able to move forward
24 earlier?

25 MR BABCOCK Your Honor, the normal way you

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1 would go about proving damages would be to look for-
2 ward to the remaining portion of the contract and do
3 that kind of analysis

4 It is not going back and recreating a perfect
5 situation where the development is completed within
6 the original term of the contract

7 Completing the development, selling lots, was
8 the intention of the parties certainly going in, but
9 what occurred was not that, but something different

10 THE COURT But isn't all of that something a
11 jury should consider?

12 Isn't it a matter of how the jury views whether
13 or not the plans could have been accomplished and whe-
14 ther or not in bringing their life experiences and
15 everything else we tell juries to consider -- those
16 types of factors -- that they could determine whether
17 or not these things could have been done within the five
18 year period of the contract?

19 Could they not make a decision that, no, it is
20 unreasonable, or, yes, it could be realized? Can't
21 they make that decision?

22 Based upon their view of what the contract was and
23 based upon what they feel could reasonably be accom-
24 plished?

25 MR BABCOCK The analysis that was given by the

1 Plaintiffs' expert is speculative and there is no basis
2 to support it

3 THE COURT Then in what scenario would future
4 profits be available or lost profits on a contract?

5 MR BABCOCK I'm sorry

6 THE COURT In what scenario would future profits
7 or lost profits be available in a contract similar to
8 this?

9 What is missing that should be there in order for
10 you to believe the information about damages is specula-
11 tive and without basis?

12 There is always a hope of what you want to achieve
13 and a certain portion of it is speculative as far as
14 the future

15 At what point is it too speculative to be

16 MR BABCOCK I think, as I said, the normal analy-
17 sis is looking forward in a contract/damages situation
18 A looking forward analysis

19 You want to put the party in the same position he
20 would have been in at the end of the contract period,
21 so starting forward from the date of the contract to
22 the end

23 In this case we've got a contract that was to run
24 for five years to November of 2005, but it actually runs
25 from November of 2000 to May of 2004

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1 So starting in June of 2004 and going forward and
2 determining this, this and this if the contract had
3 gone to completion

4 I don't see any other way to do it, and certainly
5 not going back and creating a fictional situation to
6 determine damages for the entire contract period

7 It is from June of 2004 to November of 2005 That
8 is

9 THE COURT Mr Bowens, are you claiming that the
10 breach occurred before May of 2004?

11 MR BOWENS There were breaches of the contract
12 that occurred before May 28, 2004, and Mr Lipscomb or
13 SEL Properties agreed to fund this project

14 When the Plaintiffs go to him and say, we need to
15 bond the plat, and he refuses to do so, he breached the
16 contract

17 When he was going to Mr Maxheimer to change the
18 plans, that was a breach of the contract

19 It is not one thing but all the things that hap-
20 pened in the natural progression of time All of these
21 things could have been prevented by SEL

22 THE COURT So the breach you claim is not only
23 the wrongful termination of the contract by the Defen-
24 dants

25 MR BOWENS That was a part of it, Your Honor, in
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1 things also that occurred with time

2 There was testimony that the five years was suf-
3 ficient time to complete this project, if it had got-
4 ten started in time without the delays

5 It should have been done in five years, but be-
6 cause of the delays my client lost or missed the spring
7 and summer selling periods

8 They could still have been able to catch the next
9 selling period had the roads been repaired, but they
10 were not

11 The plans for phase two and three had been thrown
12 away, and new plans had to be redrawn New permits had
13 to be obtained, new approvals

14 That is what the testimony has been The approval
15 was not obtained until February of 2005

16 Our claim for damages is not based upon every-
17 thing going perfectly Our claim for damages is based
18 on non-interference by the Defendants

19 If the Defendants had not interfered, things
20 would have proceeded according to plan, but Mr Lipscomb
21 did not fund the project

22 SEL Properties and Mr Lipscomb did not permit us
23 to complete and perform this contract, and that was the
24 testimony

25 There was improper interference and prevented

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1 our performing to completion

2 THE COURT I think I'm going to let it go to

3 the jury

4 I believe it is a jury question

5 Anything else on breach of contract?

6 MR BABCOCK With the Court's permission?

7 (Conference at the bench between counsel and the

8 Court)

9 MR BABCOCK Your Honor, one final point on dam-

10 ages

11 THE COURT Yes, sir

12 There were no damages proven in phases two and

13 threc, so the jury would have to speculate as to those

14 damages

15 MR BOWENS There was a schedule of costs that

16 was placed in evidence

17 THE COURT I will deny that I believe there

18 is evidence from which the jury can make a decision as

19 to that matter

20 If the evidence is deficient, I think that is

21 a jury argument

22 Anything else?

23 MF BABCOCK Nothing further, Your Honor

24 MR BOWENS No, Your Honor

25 (Court stood in recess at 6 57 P M)

1 (The matter came back before the Court on
2 November 2, 2007, at 1 35 P M)
3 THE COURT Is there anything we need to take
4 up before I bring the jury in?
5 MR BOWENS No, Your Honor
6 MR THOMAS No from the Defendants, Your
7 Honor
8 THE COURT Bring in the jury, please
9 (Jury returned to Courtroom)
10 THE COURT Good morning, ladies and gentle-
11 men
12 At this time, we will hear from the Defense
13 Mr Thomas, you may call your first witness
14 MR THOMAS Thank you, Your Honor The De-
15 fense would call Carrie Hower
16 CARRIE HOWFR, being duly sworn,
17 testified as follows
18 CLERK Please take a seat on the witness stand
19 and give us your full name, spelling your last
20 WITNESS Carrie Hower C A R R I E H O W E R
21 DIRECT EXAMINATION
22 BY MR THOMAS
23 Q Where are you from, Carrie?
24 A Arkansas
25 Q And where did you grow up?

MS HOWER ON DIRECT

1 A Calamine, Arkansas
2 Q And how old are you?
3 A I'm thirty-five
4 Q Where do you live now?
5 A South Carolina
6 Q How long have you lived in South Carolina?
7 A I have lived here approximately ten years
8 Q And what is your educational background?
9 A I have had two years in college I am a cer-
10 tified for quick books, and I am bookkeeper certi-
11 fied as well
12 Q And what are quick books?
13 A An accounting program to keep track of invoices
14 and information
15 Q And how do you know Steve Lipscomb?
16 A I do his bookkeeping
17 Q How long have you known him?
18 A Approximately four years
19 Q And what do you do for a living?
20 A I'm a bookkeeper I'm his bookkeeper
21 Q How long have you done that?
22 A Since approximately 2003
23 Q And what do you do as a bookkeeper?
24 A Process invoices for payment, review paperwork
25 to verify the charges are correct, code them

MS HOWER ON DIRECT

1 Q I believe you said you code them What is cod-
2 ing?

3 A Coding is a way for us to allocate each charge
4 to the proper general ledger account Also to the
5 proper job, customer job or phase

6 That's pretty much what coding is To make
7 sure it gets to the place it belongs

8 Q And how does that coding relate to the various
9 invoices?

10 A If the invoice -- take, for example, Arno Con-
11 sulting That would be an engineering charge which
12 is on the general ledger, which is a code, and you
13 would take it and try to apply it to the proper
14 phase and the proper job

15 Q You say apply it to the proper phase Where
16 would that be done?

17 A It would be done in quick books at the entry of
18 the invoice

19 Q So in quick books you would have

20 A Little boxes

21 Q Okay

22 A And the first box would be the engineering box,
23 and the second amount is your dollar amount, and the
24 third box is a little memo where you can put in a
25 little information or some type of note as to what

MS HOWER ON DIRECT

1 it is for The third box -- the fourth box is your
2 customer job, and that's where you set up different
3 jobs that you have, or phases, and then the third
4 box would be your class or it could also be your
5 phases
6 Q Okay, and how many -- approximately how many
7 phase related codes do you
8 A Approximately thirteen It varies Sometimes
9 the number will go up or go down
10 Q And approximately how many invoices would you
11 code per week?
12 A Weekly five to six hundred invoices
13 Q And are you familiar with the project that is
14 the subject of this lawsuit?
15 A Yes, I am
16 Q And what role did you have?
17 A Bookkeeper for the project
18 Q And how was the money tracked?
19 A Through quick books
20 Q Through the process you described?
21 A Yes
22 Q And how did you keep track of expenses?
23 A They all have their individual class set up
24 Say there was a charge for phase four, it would defi-
25 nitely go in there It is set up by class

MS HOWER ON DIRECT

1 Q Okay

2 A Whenever the invoice came it, if it was for
3 that phase, you would code it that

4 Q Well, if you had an invoice that had multiple
5 phases, how would you treat that?

6 A You would track the amounts as best that you
7 could if you had the information easily available to
8 you If not, you would need to call and get verifi-
9 cation of what it was, what it was for

10 Q Where was the actual cash kept?

11 A In the Courtyards at Rolling Creek banking ac-
12 count

13 Q What was the name of that account?

14 A Courtyards at Rolling Creek

15 Q And who owned that bank account?

16 A Courtyards at Rolling Creek

17 Q And who owned Courtyards at Rolling Creek?

18 A SEL Properties

19 Q I hand you what has been previously numbered as
20 128

21 A Okay

22 Q Have you seen this check before?

23 A I have seen this check before, yes

24 Q And what is this check for?

25 A It is to N W White for masonry sand

MS HOWER ON DIRECT

1 Q Do you know where that masonry sand was used?

2 A It was for the common wall facing the main high-
3 way and the entrance road up to the Courtyards at
4 Rolling Creek

5 Q And behind what lots does this common wall run?

6 A I believe lots 18 and 19 It was facing High-
7 way 176

8 Q Let me hand you Defendants' Exhibit 6 Have
9 you seen this document before?

10 A Yes, I have

11 Q What does this depict?

12 A It depicts Courtyards at Rolling Creek

13 Q This is a depiction of Courtyards at Rolling
14 Creek?

15 A Yes

16 MR THOMAS Your Honor, I would like to move to
17 enter this in evidence

18 THE COURT Is there any objection?

19 MR BOWENS Without objection

20 THE COURT It will be admitted

21 (Defense Exhibit 6 admitted into evidence with-
22 out objection)

23 BY MR THOMAS

24 Q Would you explain to the jury what you mean when
25 you refer to the common wall on Exhibit 6?

MS HOWER ON DIRECT

1 A Yes, sir It shows Lots 18 and 19 and the com-
2 mon area on the left, the left bottom Two pie-shaped

3

4 Q The far left hand corner?

5 A Yes

6 Q And the deeper common wall area on these lots?

7 A The common wall ran along Boyd Branch Crossing
8 and facing Highway 176

9 It looks more uniform and it was supposed to
10 help lot sales Gives it a crisper, clearer look

11 Q When you say looks more uniform, is there a dif-
12 ference between these lots, this kind of wall, as
13 to the breaker wall behind other lots?

14 A Yes

15 MR BOWENS I would object as going beyond her
16 knowledge She is a bookkeeper and this would be
17 beyond the scope of her employment

18 THE COURT I'll allow it if she has personal
19 knowledge of this

20 BY MR THOMAS

21 Q Do you know why this wall was constructed be-
22 hind Lots 18 and 19?

23 A Because it was requested to be built

24 Q And who requested the wall be built?

25 A D Melton

MS HOWER ON DIRECT

1 Q And is D Melton in the Courtroom today?

2 A Yes

3 Q And what is the difference between the common
4 wall -- do you know the difference between the com-
5 mon wall and the wall built behind other lots?

6 A Yes, I do

7 Q What is the difference?

8 A If you leave -- if we was to leave that to the
9 individual builders to build the walls, most of the
10 builders are building now with the same brick that
11 they are constructing the homes with

12 So we would have a hodge-podge effect facing
13 the main road and along Boyd Branch Crossing

14 Q And so how is that different from this common
15 wall?

16 A This was all made with the same brick

17 Q Why would the same brick be preferable?

18 A So there would be a uniform look at the en-
19 trance

20 Q Do you remember if the common wall behind 18
21 and 19 had white caps on it?

22 A No, they don't, I don't believe

23 Q Why not?

24 A Because we couldn't get them to match the others
25 at 17, 16, 15, 14 They did not match and we had

MS HOWER ON DIRECT

1 difficulties finding them

2 Q I'm going to ask you to look at the third page
3 of Exhibit 128

4 A Okay

5 Q Ms Hower, are you familiar with this document?

6 A Yes, I am

7 Q And by Carrie Sablotny

8 A That would be me I have been divorced and have
9 changed my name

10 Q Okay

11 A That was me

12 Q And what is this document?

13 A An invoice

14 Q And why does this invoice say it is billed to
15 K & L Contracting?

16 A Courtyards at Rolling Creek at the time was a
17 new company and did not have the credit set up or
18 the accounts

19 K & L Contracting had the accounts, and for our
20 convenience we simply utilized their accounts

21 Q And do you know what this invoice is for?

22 A Yes It's for masonry sand for the common wall

23 Q What lot?

24 A Lot 18

25 Q Why didn't K & L Contracting pay for this common

MS HOWER ON DIRECT

1 wall?

2 A Because they didn't own the lot at that time,
3 and it was being built for the common areas

4 Q And turn to page 10 of the exhibit

5 A Okay

6 Q What is this document?

7 A An invoice from Boral Bricks for the bricks for
8 the common wall, Lots 18 and 19

9 Q Why is the invoice say K & L Contracting?

10 A For the same reason, because Courtyards at Roll-
11 ing Creek was a young company and did not have the
12 accounts set up

13 For convenience, we just used K & L's accounts

14 Q All right I hand you what has been previously
15 marked as Exhibit 134

16 A Okay

17 Q Have you seen this document before?

18 A Yes, I have

19 Q And what is it?

20 A It's an invoice from Lee, Inc , to Courtyards
21 at Rolling Creek

22 Q And what is Lee, Inc ?

23 A Lee was American Amusement at one time It was
24 just a company that we processed for Steve Lipscomb
25 -- one of his companies

MS HOWER ON DIRECT

1 Q And what is the invoice for?

2 A It's for payrolls of day laborers, for auto ex-
3 pense

4 Q And do you know what this entry is for?

5 A Yes, sir, that's mileage

6 Q Why were you paying for mileage?

7 A Mileage for going to the banks for Courtyards
8 at Rolling Creek I would actually from time to time
9 go to the Oliver Gospel Mission and pick up day la-
10 borers and take them to Rolling Creek

11 Go to the stores and get what was needed for
12 the jobs, such as light bulbs, for Courtyards

13 Q Why would Courtyards need light bulbs?

14 A For the lighting and the landscaping

15 Q Who is Valan Shealy?

16 A A day laborer

17 Q And why were you paying her?

18 A She cleaned up some garbage for us in the common
19 areas

20 Q I hand you another document I hand you what
21 has been previously marked as Exhibit Number 135

22 A Yes

23 Q Are you familiar with this document?

24 A Yes, sir

25 Q And what is it?

MS HOWER ON DIRECT

1 A It's an invoice from SEL Properties to Courtyards
2 at Rolling Creek It is a portion of the November
3 payment to John Deere Tractor

4 Q And what do you mean, a portion of that?

5 A The John Deere tractor was used at several dif-
6 ferent subdivisions, so we divided the payment among
7 the subdivisions that used that

8 So they paid a small portion of that payment

9 Q What did John Deere Tractor have to do with
10 Courtyards at Rolling Creek?

11 A It used -- there is a piece of common area that
12 needs to be bushhogged on a regular basis It was
13 used at times for clearing and other things down for
14 the common areas

15 Q And if you will look at page 6 of that Exhibit

16 A Okay

17 Q Are you familiar with this document?

18 A Yes, I am

19 Q What is it?

20 A An invoice from SEL Properties to Courtyards at
21 Rolling Creek

22 It is a portion of the trailer, Walker Mower,
23 the John Deere payment, a portion of the fork lift
24 attachment

25 Q And why is that payment for the Walker Mower?

MS HOWER ON DIRECT

1 A It was used for lawn maintenance and to mow the
2 common areas

3 Q And is that the full Walker Mower price?

4 A No

5 Q What is the full price?

6 A I'm not sure of the full price, but each place
7 it got used at got a prorated amount

8 Q I show you now what has been marked Exhibit Num-
9 ber 133

10 A Okay

11 Q And have you reviewed this schedule?

12 A Yes, I have

13 Q And what is it?

14 A It is a list of receipts

15 Q And why these small payments for gasoline?

16 A It was to supply the equipment, the lawn mower,
17 the tractor, weed eaters, for blowers and other pieces
18 of equipments that were used on a regular basis, the
19 miscellaneous equipment

20 Q Why would Courtyards at Rolling Creek purchase
21 these things?

22 A These things are miscellaneous things that are
23 needed on a regular basis, to repair landscaping, small
24 weedeater trim, hacksaws -- all kinds of things for
25 repair you get at a hardware store

MS HOWER ON DIRECT

1 Q Look at the first page of the exhibit, Big Lots
2 A Big Lots -- you can get inexpensive tools and
3 miscellaneous items there You can buy nails, hammers,
4 wiring, wire cutters, knives and things at Big Lots
5 There is a well, they have irrigation, light-
6 ing, and all these things require repair from time
7 to time
8 Q Did your review of this schedule show you any
9 items on the schedule that should not be there?
10 A Yes
11 Q And why are those items on there?
12 A I made a mistake
13 Q All right Take a look at the Dollar General
14 portion, (portion of question not audible)
15 A That would be a mistake
16 Q What is that amount?
17 A Twenty-six Seventy-eight
18 Q Somewhere on that list is an entry for Charlotte
19 International Airport parking?
20 A Yes
21 Q And how much is that?
22 A It's for Sixteen Dollars
23 Q And should that be charged to Courtyards at
24 Rolling Creek?
25 A No

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MS HOWER ON DIRECT

1 Q And on page -- the second page the items for
2 (portion inaudible)
3 Are these proper charges to the Courtyards' ac-
4 count?
5 A No
6 Q And why did that occur?
7 A Probably just a simple mistake on my part
8 Q All right, and if you would turn to page 35 of
9 the exhibit
10 A Okay
11 Q You show -- what is this receipt for?
12 A For oversized plats
13 Q And if you look back to the first page,
14 A Okay
15 Q what is the corresponding entry you see on
16 there?
17 A (Reading entry) It refers to Kinko's, Atlanta,
18 Georgia, oversized 24 by 36
19 Q And is received by fax from Atlanta, Georgia?
20 A No, sir
21 Q What is the number?
22 A It's 803 799 3807, the service phone
23 Q How do you know it was not received from
24 Atlanta?
25 A Because 803 is South Carolina

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MS HOWER ON DIRECT

1 Q And what does the invoice say it's from?
2 A It says payments, P O Box 105522, Atlanta,
3 Georgia
4 Q What was received?
5 A Over sized plats
6 Q And what is the use of oversized plats?
7 A It's common We use them all the time We
8 need them
9 Q If you can, turn to the next page
10 A Okay
11 Q Page 36
12 A Okay
13 Q Similarly, where is this one from?
14 A South Carolina
15 Q And what is the date?
16 A February first
17 Q Is that the same date as the previous receipt?
18 A Yes, it is
19 Q Is that a proper charge to Courtyards?
20 A No It was just a simple mistake in process-
21 ing that
22 Q Take a look at the 30th page
23 A Okay
24 Q What does that say it's for?
25 A For gasoline and on-site meals

MS HOWER ON DIRECT

1 Q What is that about?

2 A A lot of times we would have homeless people
3 working for us to keep our costs down, and they simply
4 did not have food In order to keep them working
5 and somewhat productive, we would feed them from
6 time to time

7 Q And how about turning to page 25

8 A Okay

9 Q And what is that for?

10 A Postage, so I could mail invoices and mail out
11 payments

12 Q Turn to page 26

13 A Okay

14 Q What is that for?

15 A The 2005 weekly calendar

16 Q What was the purpose of the 2005 weekly calen-
17 dar?

18 A It was used in the office to keep track of
19 things

20 Q Okay I show you what's been marked as Exhibit
21 130 Have you had a chance to review this?

22 A I have

23 Q What is it?

24 A Finance charges from Letts

25 Q And why were there finance charges?

MS HOWER ON DIRECT

- 1 A Late payments
- 2 Q And why were there late payments?
- 3 A Lack of cash flow
- 4 Q Where was the cash money to come from?
- 5 A Lot sales
- 6 Q Who was the payment due to?
- 7 A Rick Maxheimer
- 8 Q What was the name of that company?
- 9 A Currently or at that time?
- 10 Q At that time what was it?
- 11 A Letts
- 12 Q What is it now?
- 13 A Palmetto Consulting Group
- 14 Q And how would you process the invoices?
- 15 A He would often fax them to us and we would code
- 16 them Either we'd have to call him or he would tell
- 17 us what they were
- 18 Q And did Mr Lipscomb come to tell you to change
- 19 the code or how to code things?
- 20 A No
- 21 Q Ms Hower, were there ever charges for non suf-
- 22 ficient funds checks?
- 23 A Yes
- 24 Q And why were there NSF charges?
- 25 A Lack of cash flow

MS HOWER ON DIRECT

1 Q Where was the cash flow supposed to come from?

2 A Lot sales

3 Q I hand you what was previously marked as Ex-
4 hibit 136 Have you had an opportunity to review
5 this?

6 A Yes, I have

7 Q And what does it relate to?

8 A Casual labor

9 Q And, Ms Hower, why was cash being paid for
10 casual labor?

11 A Most of our casual labor came from the Gospel
12 Mission, and these gentlemen do not have a bank ac-
13 count established, so there needed to be an arrangement
14 for cash payment to them

15 Q Do you know why casual labor from the Gospel
16 Mission was used?

17 A These gentlemen would work at a less expensive
18 wage to do the same work

19 Q Where did these casual laborers work?

20 A At several places, but in particular they
21 would work on the common areas

22 Q And there were payments of Fifty Dollars to
23 Larry Cooke?

24 A Yes

25 Q Why were there \$50 payments to Larry Cooke?

711

0000730

MS HOWER ON DIRECT

1 A He would go and represent us at our closings
2 on lot closings

3 Q And why was he asked to go to the closings?

4 A To sign the documents to make it a binding
5 closing

6 Q And would you look at page 4 of Exhibit 136?

7 A Yes

8 Q Look at the handwriting on that Whose hand-
9 writing is that?

10 A Mine

11 Q What does it say?

12 A See K & L

13 Q Why did you write see K & L?

14 A Because K & L had covered the charge for the
15 Courtyards, and Courtyards had to repay them at some
16 point

17 Q Did you ever allocate costs to K & L that were
18 supposed to go to Courtyards at Rolling Creek?

19 A Absolutely not

20 Q All right If I could get you to look at the
21 41st page of this exhibit

22 A Okay

23 Q What is this?

24 A It's a time sheet for day laborers

25 Q And who prepared it?

MS HOWER ON DIRECT

1 A I did
2 Q What does it show?
3 A It shows the hours the gentlemen turned in to
4 me, and where it was supposed to be allocated to
5 Q And I see put down on here the letters CRC?
6 A Yes
7 Q What is CRC?
8 A CRC is Courtyards at Rolling Creek
9 Q And I see the time and what is this figure?
10 A The hours
11 Q And that column is what?
12 A The total amount to each individual
13 Q And what is the total dollar amount shown as
14 charged to Courtyards at Rolling Creek?
15 A Three Hundred and Six Dollars
16 Q And how did you get that?
17 A Seventy-six Fifty times four
18 Q Please turn to page 39
19 A All right
20 Q What is this?
21 A It's a check
22 Q What is the amount of the check?
23 A Three O Six -- Three Hundred and Six Dollars
24 Q And what is the date of the check?
25 Can you read the date?

713

0000732

MS HOWER ON DIRECT

- 1 A May 18, 2004
- 2 Q For what time period is that check?
- 3 A It's 5 9 of 04 through 5 16 04
- 4 Q Ms Hower, does that check amount match the dol-
- 5 lar amount on this exhibit?
- 6 A Yes, it does
- 7 Q Were you ever told to process an invoice that
- 8 you did not think was properly attributable to the
- 9 project?
- 10 A No
- 11 Q Or to process any invoice that was not related
- 12 to Courtyards?
- 13 A No
- 14 Q Did C Melton ever call and inquire as to whether
- 15 the receipts were appropriate?
- 16 A No, sir
- 17 Q During the time you worked on this project, did
- 18 you know of anyone ever asking to see the books?
- 19 A No
- 20 Q Did anybody with Dutch Fork Development Group ask
- 21 you to see books?
- 22 A No
- 23 Q Did anybody with Dutch Fork Realty ever ask to
- 24 see the books?
- 25 A No

1 Q No further questions

2 THE COURT Cross examination

3 CROSS EXAMINATION

4 BY MR BOWENS

5 Q Ms Hower, you are also the bookkeeper for

6 K & L Contracting, aren't you?

7 A Yes

8 Q And you take direction from Mr Kirk and Mr

9 Lipscomb?

10 A Yes

11 Q You do not have personally have the authority

12 or discretion to decide which accounts and which

13 phases, which projects, to allocate the invoices to,

14 do you?

15 A No

16 Q It is all tied to the direction of your em-

17 ployers?

18 A Yes

19 Q Do you know whether or not all money that was

20 generated from the lot sales actually went in the

21 Courtyards account?

22 A Yes, I do know

23 Q And did it all go in there?

24 A Yes

25 Q Did you personally track the HUD statements that

MS HOWER ON CROSS

1 showed the cash that was paid to the seller with the
2 invoices as they went to the bank or into the ac-
3 count?

4 A What do you mean?

5 Q Did you compare the HUD statement that shows
6 the cash to seller with the bank statements that
7 showed the deposits?

8 A The HUD statements and the deposits were all
9 one, so, yes, I did identify the deposit made on that
10 sale

11 Q The HUD statement is not a part of the bank de-
12 posit, is it?

13 A That's the way I look at it It's the backup
14 for it

15 Q So you would look at each HUD statement and get
16 the cash to seller, to make sure that amount was de-
17 posited?

18 A Yes

19 Q Now, Lots 18 and 19 that you talked about in
20 direct examination

21 A Yes, sir

22 Q those lots are owned by K & L Contracting,
23 aren't they?

24 A Currently

25 Q And they purchased the lots

MS HOWER ON CROSS

- 1 A Not during the time the wall was built
- 2 Q And the green area -- do you have that exhibit
- 3 in front of you?
- 4 A Yes
- 5 Q The green areas of Lot 17 and Lot 18 -- do you
- 6 see that?
- 7 A Yes
- 8 Q All that green area separates Lots 17 and 18,
- 9 correct?
- 10 A Yes
- 11 Q And Lot 17, as you go forward toward the traffic
- 12 circle, and Lots 16, 15 and 14 -- do you see those?
- 13 A Yes, that's right
- 14 Q That is part of the entrance way?
- 15 A That's right
- 16 Q Now, Lots 18, 19 and 20 are around the corner?
- 17 A But they are facing the main highway
- 18 Q And they are all also separated by trees,
- 19 aren't they?
- 20 A No
- 21 Q No trees between the highway and those lots?
- 22 A There's trees but down where you can have a --
- 23 it is grubbed down where you can have a nice sight
- 24 of the common areas there
- 25 Q But the entranceway to Courtyards ends with

MS HOWER ON CROSS

1 Lot 17?

2 A It looks like to me the entranceway starts with
3 18

4 Q You testified earlier that you had them build
5 a wall from Lots 18 and 19 because if the Courtyards
6 didn't build it, you'd have a hodge-podge of bricks
7 and it wouldn't match and that would be a problem

8 Is that right?

9 A Yes

10 Q But that's not really true, is it?

11 A Yes, it is

12 Q The builders who build on Lots 18 and 19 have
13 to build on what's called architectural review board
14 guidelines, don't they?

15 A Currently

16 Q All the time

17 A Currently There was not an architectural re-
18 view -- there was not a HOA

19 Q Ms Hower, there was no HOA but architectural
20 review and HOA are separate things

21 Is that correct?

22 A Okay If you say so

23 Q Well, do you know?

24 A No

25 Q But you do know there are architectural review

MS HOWER ON CROSS

1 guidelines or standards that the builders have to
2 follow?

3 A Yes

4 Q And they would have to build the wall in ac-
5 cordance with those review guidelines?

6 A

7 Q Right?

8 A I don't know

9 Q So there wouldn't be a hodge-podge of bricks?

10 A I don't know

11 Q How can you tell the difference between an in-
12 voice for masonry sand that is for a common wall and
13 an invoice for masonry sand that is for a builder
14 going onto their lot?

15 A Well, the builder didn't own the lot, and he was
16 doing it as a favor to Courtyards at Rolling Creek
17 at D 's request

18 Q And you know that from the builder?

19 A I know it from processing and from overhearing
20 conversations and being present at the time

21 Q Now, you testified that these items are billed
22 to K & L because K & L had the accounts and Courtyards
23 was too new to have the credit?

24 A They had not set up all the accounts, Courtyards
25 being a brand new company

MS HOWER ON CROSS

1 It was just more convenient for us to run it
2 through K & L

3 Q Actually, K & L is newer, younger than Court-
4 yards, isn't it?

5 A But the accounts were set up

6 Q Well, how did the entranceway get billed with
7 charges to K & L accounts?

8 A I don't know

9 Q So apparently the Courtyard could have built
10 things without using K & L's accounts?

11 A I do not know

12 Q But you do know for sure that these two lots
13 were not K & L's?

14 A I do know that for a fact

15 Q Even though K & L owns them now?

16 A Currently

17 Q And it was billed to them?

18 A Yes We used the accounts as a convenience

19 Q You said that you were certified with Quick
20 Books?

21 A Yes

22 Q And is the term technician?

23 A I used Quick Books certified

24 Q And in your use of the Quick Books, did you ever
25 run across any entries that showed development fees

MS HOWER ON CROSS

1 being paid to Dutch Fork Development?

2 A I'm not sure

3 Q Did Mr Lipscomb ever ask you to make any en-
4 tries or payments for development fees?

5 A I believe I have processed a few payments to
6 the Meltons I'm not sure what they were for

7 Q You would agree that on the invoices there are
8 things related to items that would be development?

9 A You would have to be more specific

10 Q Well, this thing for the laborers, and all the
11 things -- Big Lots and what not -- those are all
12 developer types of expenses, aren't they?

13 A I'm not sure what you're asking me

14 Q Well, those items

15 A What do you mean by developer types of expenses?

16 Q Expenses that were a part of Courtyards' deve-
17 lopment to bring Courtyards into existence

18 A Yes

19 Q Would you think that the developers -- would
20 you think it strange that the developers had no idea
21 these things were being spent?

22 A I would find that hard to believe

23 Q I have no further questions

24 THE COURT Any Redirect?

25 MR THOMAS Yes, Your Honor

Carrie Hower – Redirect Examination by
Brady R Thomas

1 REDIRECT EXAMINATION
2 BY MR THOMAS
3 Q Ms Hower, on cross examination you were asked
4 questions with reference to the common walls, Lots 14
5 to Lot 17 or 17 through 19
6 A Yes
7 Q Where are Lots 14 through 17?
8 A The first lots on the bottom left
9 Q And the common walls ran from what lot?
10 A Lots 14 through 19
11 Q The wall is connected?
12 A Yes
13 Q I believe you testified the payment for the John
14 Deere Tractor were prorated What does that mean?
15 A That means the each of the developments it was
16 used at paid a portion of the payment
17 Q I have no further questions
18 THE COURT You may step down
19 (Witness excused from stand)
20 THE COURT Call your next witness
21 MR THOMAS Your Honor, the Defense would call
22 Patrick Kirk
23 PATRICK KIRK, being duly
24 sworn, testified as follows
25 CLERK Have a seat on the witness stand and

1 your name for the record

2 WITNESS Patrick Kirk

3 DIRECT EXAMINATION

4 BY MR THOMAS

5 Q Mr Kirk, where are you from?

6 A Columbia, South Carolina

7 Q Where did you grow up?

8 A Columbia

9 Q And where did you go to high school?

10 A A C Flora

11 Q And where do you live now?

12 A In Columbia in the Forest Acres area

13 Q Are you married?

14 A I am

15 Q Do you have any children?

16 A I have a three year old son

17 Q What do you do for a living?

18 A I build houses under the name K & L Contract-

19 ing, LLC

20 Q How long have you been doing that?

21 A K & L has been in business for about seven years

22 now

23 THE COURT Would you move closer to that micro-
24 phone?

25 WITNESS Yes, maam

MR KIRK ON DIRECT

1 THE COURT Thank you

2 BY MR THOMAS

3 Q Where did you work before you went to work for
4 K & L?

5 A I was working for Centex Homes in Myrtle Beach,
6 South Carolina

7 Q What did you do for them?

8 A I was working as a field manager

9 Q And what do the letters stand for in K & L Con-
10 tracting?

11 A The K stands for Kirk and the L stands for
12 Lipscomb Steve Lipscomb, my partner

13 Q What does K & L do?

14 A K & L builds houses They do new construction
15 of houses and develop lots and build in lots, and
16 put up projects for sale, as well as build some con-
17 tract homes

18 Q And what connection did K & L have with Court-
19 yards at Rolling Creek?

20 A K & L was the first builder in Courtyards and
21 Rolling Creek We went out and tried, I guess, to
22 set the standard for the neighborhood and build some
23 houses for folks to look at and see what the neigh-
24 borhood was going to look like, as well as we
25 helped

MR KIRK ON DIRECT

1 THE COURT Mr Kirk, I think the jury is hav-
2 ing trouble hearing you If you would try to speak
3 up

4 Thank you

5 WITNESS Yes, maam

6 BY MR THOMAS

7 Q How many lots in Courtyards at Rolling Creek
8 did K & L buy?

9 A I believe it was in the range of twenty-five,
10 twenty-seven I don't have the exact number

11 Q How many lots were there?

12 A In phase one were fifty-seven lots

13 Q What did Dutch Fork Realty have to do with you
14 buying lots in Courtyards at Rolling Creek?

15 A They -- Dutch Fork Realty sold the lots and the
16 homes that we built on them In terms of us buy-
17 ing lots, I can't say they had any

18 Q Why did you buy lots in Courtyards at Rolling
19 Creek?

20 A It was a neighborhood that Steve Lipscomb, my
21 partner, was working on developing, and he brought us
22 in there to build houses in the neighborhood

23 Once the lots were bought I would go in and do
24 all the field work and build the houses

25 Q How many houses did K & L build in Rolling Creek?

/

MR KIRK ON DIRECT

- 1 A I believe it was twenty-eight
- 2 Q And were all these homes sold?
- 3 A No, not
- 4 Q How many of them were not sold?
- 5 A We had three in phase one, Courtyards at Roll-
- 6 ing Creek, and we still have one that's for sale in
- 7 Rolling Creek, phase four
- 8 Q How was the real estate company to deal with
- 9 the lots that weren't sold?
- 10 A Originally, Dutch Fork Development or Dutch Fork
- 11 Realty -- excuse me -- had those houses listed orig-
- 12 inally
- 13 Q And how long did they list those lots for --
- 14 Dutch Fork
- 15 A All of them were at least for a year, and I
- 16 want to say some of the contracts were extended, but
- 17 I couldn't tell you for how long or which ones
- 18 All of them were for at least a year
- 19 Q Are you familiar with the model home at Court-
- 20 yards at Rolling Creek?
- 21 A Yes, Lot 14
- 22 Q How long was that lot used for a model home?
- 23 A I would say around a year until the house was
- 24 sold
- 25 Q Let me hand you -- if I can find it -- what is

MR KIRK ON DIRECT

1 marked as Exhibit 127 Do you recognize that?

2 A Yes

3 Q What was the model home used for?

4 A The model home was actually furnished for a
5 period of time and it was used to bring potential
6 buyers in the neighborhood to look at it to see the
7 area as well as the interior of the house

8 There was actually a desk set up in there for,
9 I guess, developers and realtors to use

10 I believe there was a phone line and cable run
11 to that model home for the use of the realtors and
12 developers

13 The builders would go through the houses to see
14 what was going to go into the houses Get a gen-
15 eral idea from the show house for anyone who was in-
16 terested in buying in Courtyards or building in
17 Courtyards

18 Q I show you what's marked as Exhibit 128 Would
19 you look at the third page of this Exhibit?

20 A I'm there

21 Q What is that?

22 A It is an invoice from N W White Company billed
23 to K & L Contracting It has my shorthand code on
24 it Brick wall Courtyards, and I initialled it on
25 March third

MR KIRK ON DIRECT

1 Q And is that your handwriting?

2 A It is

3 Q Do you know what this invoice was for?

4 A Masonry sand

5 Q And do you know where the masonry sand was used?

6 A The only thing in looking at this invoice is Lot
7 18, Courtyards You really can't see it there, but
8 it is in the black box

9 Common brick wall, Lot 18, Courtyards

10 Q What did you have to do with the construction of
11 the wall behind Lot 18?

12 A I was asked -- the subcontractor built the
13 wall -- to order sand, material, brick for the wall

14 Q And why were you constructing that wall?

15 A I believe we all were working as a team I
16 was helping I was out there on site and it was a
17 lot of times easier for me to coordinate, and so I
18 was basically there to help out

19 Q Who asked you?

20 A I can't say for certain on which project Steve
21 Lipscomb would ask me to do some work, D Melton would
22 ask me to do various things, and I would just do it
23 with no questions asked, to help out

24 Q At the time you did that work do you know who
25 owned Lot 18 and 19?

MR KIRK ON DIRECT

1 A They were in development Lots 18 and 19 ran
2 along the main highway and there was actually a slow
3 down ramp coming into the neighborhood, so that was
4 really the first thing you'd see at the actual en-
5 trance to the neighborhood

6 Q I hand you what's been marked as Defense Exhi-
7 bit 6

8 A Yes

9 Q Is this the wall you've been talking about?

10 A It comes off the main highway just behind Lots
11 18 and 19, going to Boyd Branch Crossing

12 On that map it would be just to the bottom left
13 hand side where the common area is shown

14 Q And if you can, what is that? The tenth page

15 A This is an invoice from Boral Bricks

16 Q Okay

17 A Again, it's got my shorthand code of C 18 and
18 19, the Courtyards account, CRC 18 19 That is
19 shortyard for Courtyards at Rolling Creek and 18
20 and 19 would be the lots, and I initialled it on
21 March 19th The walls

22 Q What kind of walls?

23 A The same brick as to match all the other Court-
24 yard walls

25 Q What is the difference in those walls and the

MR KIRK ON DIRECT

1 walls built by builders in that location?

2 A Well, generally when a builder would buy a lot
3 they would put the house on the lot and then the walls
4 Every house had courtyard walls on the back of the
5 house, across the back of the lot, and it would gen-
6 erally tie in with the house and wall next door

7 All the walls on all the interior lots were done
8 in the same brick as the house, so that when you
9 drive along the backs of the walls you have a dif-
10 ferent color brick for each house, because the builder
11 used the same brick in building the house

12 But these main entrance walls, the main Court-
13 yard walls, were all the same brick, coming in the
14 main entrance there

15 Q Where any white caps put on the walls?

16 A There was actually white caps ordered but they
17 were never delivered and they just never made it onto
18 the walls

19 Q Mr Kirk, I want to show you Exhibit 127

20 A Okay

21 Q Go to the second page of 127 B -- that's 127

22 B there Can you explain that invoice?

23 A Yes, it's an invoice from Gardner's Floor Sand-
24 ing, the subcontractor I used at the time to finish
25 hgardwood floors for me

MR KIRK ON DIRECT

1 Q Does your handwriting appear on that exhibit?

2 A It does with my coding, and this is for the
3 Courtyards account, and I initialled it

4 Q And what lot was that for?

5 A It was Lot 14, the house used as a model, and
6 we wanted to show the house so it was furnished as
7 a show house until it was sold I'm not sure if it
8 was Dutch Fork Realty or who actually decided to fur-
9 nish the home

10 The floors got scratched from people walking
11 through When we used it as a show house, the floors
12 got worn

13 Q Mr Kirk, are you familiar with this document
14 which is marked Exhibit 128?

15 A Yes, it's an invoice again, to K & L from
16 Boral Bricks It's got my handwriting and it indi-
17 cates it was for Courtyards, the pump well wall and
18 the air conditioning units, the AC units

19 Q And, Mr Kirk, why did Boral Bricks address the
20 invoice to K & L Contracting?

21 A It was just another small project and to get
22 it done, the scheduling and work materials to go on
23 the project

24 Q And I show you Defense Exhibit 6, the map?

25 A Yes

MR KIRK ON DIRECT

1 Q Using that map as a reference, where was that
2 work done?

3 A It's on Lot 57 which is -- that invoice actually
4 was for 57

5 Q And where is that on the map?

6 A The far right of the traffic circle here

7 Q Okay

8 A It's on the far left there

9 Q And you can find where the work was done on the
10 pumphouse?

11 A That is here The developers wanted to con-
12 trol the irrigation system in the common areas, and
13 the pump was exposed and needed to be covered by
14 something

15 Q And where is that in relation to lot 57?

16 A It was to the side of the lot in the green space
17 to the left of the lot

18 Q Why would you need to cover it?

19 A Just because it was an eyesore Also on lot 57
20 -- that was a lot I had built on, and we had set the
21 air conditioning units to the right side of the lot
22 We didn't have any guidelines as to where the units
23 should be set on any of the lots

24 So I placed it on the right side and it is my
25 understanding that Dutch Fork had placed them on the

MR KIRK ON DIRECT

1 left, and on two houses I was asked to move them
2 to the other side of the house

3 I moved the units at my expense and added a
4 wall that went around the units

5 Q And let me ask you to look at the 11th page of
6 Exhibit 128

7 A Okay

8 Q Mr Kirk, who is that check made out to?

9 A It's made out to Hardaway Concrete Company

10 Q And what were you paying Hardaway Concrete Com-
11 pany?

12 A Hardaway had supplied ready-mix concrete for
13 in general the footings for the common walls

14 Q And what was your involvement with the construc-
15 tion of the common wall?

16 A Again, I was asked to help out with small pro-
17 jects since I was on site and the agreement was to
18 help in subcontracting the materials being delivered
19 Hardaway was another account that K & L had and they
20 supplied the concrete for the footings for the Court-
21 yard common walls

22 Q I show you what's marked as Plaintiff's Exhibit
23 129, and if you'd turn to the fourth page of the ex-
24 hibit

25 A All right

MR KIRK ON DIRECT

1 Q What is that?

2 A It's an invoice from N W White on the K & L
3 Contracting account It's got my shorthard on the
4 bottom

5 This was for Lot 2, Rolling Creek, for the
6 stormwater drains between Lots 2 and 3

7 Q And where is Lot 2? In what phase?

8 A Lot 2 is in phase four, a lot K & L purchased
9 to build a home on

10 Q And where is the stormwater drains you talked
11 about?

12 A If you look at Lot 2, it's just to the right
13 There is a drainage easement between Lots 2 and 3

14 Q Who owned Lot 3?

15 A I do not know

16 Q Did you own Lot 3?

17 A No

18 Q And did K & L install the stormwater drains?

19 A No, we did not We didn't have anything to
20 do with the drains

21 Q Who would have done the storm water drains?

22 A I would assume the developer

23 Q Mr Kirk, I'm going to hand to you what is Ex-
24 hibit 131, and ask you to look at the third page

25 A All right

MR KIRK ON DIRECT

1 Q What is that document?

2 A It appears to be an invoice from K & L Contract-
3 ing to Courtyards at Rolling Creek It says fencing
4 and it has Lot 13 CRC, which is shorthand for Court-
5 yards at Rolling Creek

6 Q Are you familiar with that invoice?

7 A I've seen this invoice just for a review It
8 is not an invoice that I prepared It is in reference
9 to fencing which would have been -- the fencing in the
10 Courtyards is all brick wall, so I'd have to assume
11 this was one of the brick walls Lot 13

12 Q What can you tell us about Lot 13?

13 A Lot 13 again is a lot that K & L purchased and
14 put a house on After we had a house built on Lot
15 13 -- the other brick walls in the neighborhood
16 would have following property lines or gone down and
17 followed the back of the lot

18 Instead the developers asked me to follow the
19 curve of the landscaping to make it, they said, more
20 esthetically pleasing when you drive out Summer Branch
21 Lane

22 So I had to extend that wall from the property
23 at 13 and made the wall curve to accommodate the
24 way they wanted that corner to look

25 Q And into what did the curved wall go?

MF KIRK ON DIRECT

1 A It went into the green space, the common area
2 that's shown

3 Q And did you bill the entire wall to Courtyards?

4 A No, just the curved portion

5 Q And who asked you to do that, if you recall?

6 A Again, it would have been Steve Lipscomb or D
7 Melton I can't recall

8 Q Would you go to the fifth page of Exhibit 13?

9 A All right

10 Q What are those?

11 A Again, it appears to be an invoice from K & L
12 Contracting to Courtyards at Rolling Creek, and it
13 refers to Lots 41 and 42 Forty Dollars and Seventy-
14 nine Cents

15 Q And who owned Lots 41 and 42?

16 A The developer at the time

17 Q Did K & L ever buy Lots 41 and 42?

18 A No The only thing I can say is that K & L
19 had equipment to clear the lots Other than that, I
20 can't tell you

21 Q I hand you Exhibit 136 Mr Kirk, if you'd
22 look at page 44

23 A All right

24 Q What is this?

25 A It looks to be a water bill from the City of

MR KIRK ON DIRECT

1 Columbia

2 Q And what lot is this?

3 A It's 2 Whetstone Creek Court, so it would be
4 Lot 14

5 Q Was that a model house?

6 A Yes, it was

7 Q How would this have been paid?

8 A I would have to say that that the developers
9 slash realtors would use the home and use the water,
10 so they would be responsible for the water bill on
11 the home

12 Q What is the current status of K & L Contract-
13 ing, LLC?

14 A K & L Contracting has decided to suspend all
15 operations and in fact not continuing building be-
16 cause we have too many houses unsold and just sit-
17 ting

18 Q Where do you have houses sitting?

19 A We have five houses that were built as spec
20 homes to be sold and the houses have not been sold,
21 and we have to make payments on them every month,
22 and paying ourselves, paying the girl in the office,
23 we just decided to stop all operations or shut down
24 all operations basically

25 Q And do you know how many houses you have just

1 sitting in this project?

2 A Yes, four of them

3 Q And who was supposed to market those homes?

4 A Dutch Fork Realty had the listing for all the
5 houses we had out there

6 Q I believe that's all I have Thank you

7 THE COURT Cross examine

8 CROSS EXAMINATION

9 BY MR BOWENS

10 Q Good afternoon, Mr Kirk How are you?

11 A I'm good

12 Q I just have a few questions for you, sir

13 A Yes, sir

14 Q You testified that when lots were bought that
15 K & L Contracting would do the on the ground work
16 on the houses?

17 A What work?

18 Q The on the ground work construction of the
19 houses?

20 A The field work, yes, sir

21 Q And what percentage of ownership did you have
22 in K & L?

23 A I have a twenty percent -- twenty percent pro-
24 fit sharing

25 Q And Mr Lipscomb has eighty percent?

MR KIRK ON CROSS

1 A Yes, sir, that's correct
2 Q So he made all the big decisions?
3 A Yes Well, the big decisions in terms of what?
4 Q You did construction work and work in the field
5 and he handled the operations?
6 A Generally so
7 Q You said you had four houses in Courtyards that
8 have not sold yet?
9 A Yes
10 Q I show you what we have marked previously as
11 Exhibit 148 Do you recognize that?
12 A Yes
13 Q And the houses that haven't sold and belong to
14 K & L would be these homes down here, sir?
15 A Lot 9 has been sold
16 Q Oh, it has? Okay
17 A Seven is still there, 6 has been sold Lot
18 3 has not been sold
19 Q Lot 2?
20 A Lot 2 is a lot that K & L has not built on
21 Also Lot 18 right above that, and Lot 11 in Phase
22 Four
23 Phase four is not on here
24 Q Actually, the houses that haven't sold, they
25 were built after the termination of Dutch Fork

MR KIRK ON CROSS

1 Realty and Dutch Fork Development?

2 A I don't know that

3 Q And that occurred on May 20th of 2004?

4 A If that's what you say I can't remember the
5 date

6 Q Did you ever change the building permits and
7 the closing on those four lots, even those who don't
8 have a house?

9 A I don't know

10 Q It was after May 20th -- 6 9 04, 7 20 04, 7 22
11 04 and so on, so they were all bought by K & L and
12 closed by K & L after termination of Dutch Fork Do
13 you agree with that?

14 A That's probably right

15 Q Okay Now, prior to the termination letter,
16 prior to the termination of Dutch Fork Development
17 and Dutch Fork Realty, with the exception of the
18 model home and the home on Lot 15, every other house
19 you built sold relatively quickly, or within approx-
20 imately seven months Is that right?

21 A I'm sure your chart is correct

22 Q Well, I'll just tell you these numbers come from
23 the HUD statements and

24 A Like I said, I wouldn't dispute your numbers,
25 but I wouldn't rely on my memory I don't keep all

MR KIRK ON CROSS

1 those things in my memory

2 Q You say you wouldn't dispute those numbers
3 though?

4 A Probably not, no, sir

5 Q All right

6 A I would have to say though in terms of -- okay

7 Q Now, the white caps that are on the walls at
8 the

9 A Uh hm

10 Q those white caps demark the entrance walls,
11 is that correct?

12 A That's right

13 Q And any other walls that are a part of the en-
14 trance walls don't have white caps, is that right?

15 A Generally speaking, the other walls did not,
16 as I said We were supposed to have the white caps
17 but they never came

18 Q But 18 and 19 are not part of the entrance wall,
19 are they?

20 A They are on the main road, the first lots you
21 saw when you pulled into that area off the main high-
22 way

23 Q But they are not part of the entrance ways?

24 A I would say they are

25 Q The green area, the green common area between

MR KIRK ON CROSS

1 Lots 18 and 17 separate where the entrance way be-
2 gins and the rest of the subdivision?

3 A No, the space is for a sewer easement

4 Q But is that a demarcation between the entrance-
5 way and the rest of the subdivision?

6 A I would -- like I say, I would consider the
7 area behind 18 and 19 as a part of the entrance way
8 I don't know that it's a specific demarcation of
9 where that is, where it begins and ends

10 Q And lots 18 and 19 are owned by K & L Contract-
11 ing are they not?

12 A Lot 18 still is, I believe

13 Q And Lot 19 has been sold?

14 A Nineteen has

15 Q With a number of

16 (Portion inaudible Counsel and witness speak-
17 ing at the same time)

18 BY MR BOWENS

19 Q The reason you build a model home -- was that
20 your idea or Mr Lipscomb's idea?

21 A You use a model home -- I would say it was D
22 Melton and Steve Lipscomb's idea

23 Q The purpose of a model home is to try to garner
24 or generate interest in a home?

25 A I would say it was to build interest in the entire

MR KIRK ON CROSS

1 neighborhood, because all the -- the plans came from
2 D Melton They are all the same -- same interiors,
3 you know, and a lot of the same features that are
4 out in the neighborhood

5 So I would say that

6 Q But a model home is put there so a person can
7 walk through and see nice the home is, how it's built,
8 and then it develops more homes, more builders on
9 other lots, encourage development Is that the gen-
10 eral idea?

11 A That's true, the same as any spec house I had
12 in any other neighborhood, to show the quality of my
13 work, the quality of the neighborhood

14 Q And would you say Lot 14 is a particularly spe-
15 cial lot?

16 A Yes

17 Q It's right there when you first come in the sub-
18 division?

19 A That's right

20 Q The first house you come to?

21 A It's not the first house you come to

22 Q But if you come in -- look at this exhibit
23 If you come in the entrance way, Lot 14 is the first
24 one

25 A That's right

MR KIRK ON CROSS

1 Q and it's highly visible?

2 A That's right

3 Q And that is the ideal place to put the model
4 home?

5 A It was a good lot but we paid a good price for
6 it, to show

7 Q And if you were going to pick a lot to build a
8 model home on, you wouldn't pick Lot 45, would you?

9 A

10 Q If you had your choice of all these lots, you
11 would not pick Lot

12 A No, I wouldn't put it back in there

13 Q You wouldn't put it on Lot 27, would you?

14 A Probably not

15 Q You probably would pick Lot 1?

16 A Possibly so Lots 1 and 13 are also on the
17 main roads

18 Q But you'd have to go down a little ways to get
19 to those lots? These two are right on the main

20 A You would have to make turns to get to it, whereas
21 the other ones -- I mean, I don't understand what
22 you're asking me

23 Q Well, those are just two -- 14 and 57 are two
24 prime lots if you want houses built to show?

25 A I would say all lots in the neighborhood were

MR KIRK ON CROSS

1 equal

2 Q And you own -- K & L did buy Lots 14 and 57?

3 A Yes

4 Q And those were two of the first three lots you
5 purchased?

6 A Yes, sir

7 Q Are you aware of any other builders in the Court-
8 yards who did any kind of buliding projects on their
9 lots that were paid for or billed to Courtyards?

10 A I kept up with the accounts and I tried to make
11 sure it was done correctly

12 Q Why did you have these common wall invoices billed
13 directly to the Courtyards?

14 A I was asked to see that the work was properly
15 done and I put them on my account for easy use I
16 don't know if any other developers had accounts set
17 up on their behalf I just ordered the materials
18 and billed them too, and all the bookkeeping was done
19 in the same office The invoices were coded to
20 distinguish the two

21 Q And the building projects we're talking about,
22 you were told to do them by Mr Lipscomb?

23 A Yes, by Mr Lipscomb or Mr Melton They would
24 get together and make decisions and I didn't ask any
25 questions

MR KIRK ON CROSS

1 Q All the builders had the responsibility of pre-
2 paring their lots on their own, didn't they?

3 A For the most part, I would say yes

4 Q Builders didn't clear the lots and

5 A Excuse me

6 Q Builders don't clear the lots and send that
7 bill to Courtyards?

8 A No, I wouldn't say so

9 Q That is the builder's expense?

10 A Yes

11 Q And did D Melton help you with selecting the
12 lots and selecting house plans for the lots?

13 A House plans, yes, in Courtyards at Rolling
14 Creek

15 Q Were you aware that Mr Lipscomb had not closed
16 on some of the K & L for over a year?

17 A No, I was not

18 Q Did you know that Mr Lipscomb allowed K & L to
19 purchase lots at below price?

20 A No, I did not

21 Q Did you know how Mr Lipscomb was running the
22 Courtyards' account?

23 A I had no idea

24 Q During the time you worked at Courtyards, did
25 you receive a salary?

MR KIRK ON CROSS

1 A From who?

2 Q From anyone?

3 A I was salaried by K & L Contracting

4 Q You received a pay check every month?

5 A Yes

6 Q Again, I understand you haven't reviewed all of
7 the documents to date, but assuming this chart is
8 correct, and we have had testimony that it is accu-
9 ate -- apparently you didn't get some documents on
10 some sales that were later on -- assuming all of this
11 is correct, would you agree that K & L Contracting
12 generated Five Million Seven Hundred Sixty-four Thous-
13 and -- at least that much in assets?

14 Would you agree that K & L Contracting generated
15 at least that amount in lot sales?

16 A If those figures are correct

17 Q I say at least that amount

18 A I couldn't say I haven't reviewed that chart
19 in detail or some of the documents I have to assume
20 that is correct

21 Q Is it your testimony that K & L Contracting's
22 work at Courtyards was not profitable?

23 A I would say it was not

24 Q Would you have liked to see phase two of Court-
25 yards begin?

MR KIRK ON CROSS

1 A Phase two has begun

2 Q Back in 2003, 2002?

3 A I -- it would not have made a difference to me
4 I had work there and in another neighborhood at the
5 time

6 Q Is it correct that interest in Courtyards died
7 off after Dutch Fork Development did not go forward
8 with phase two?

9 A I can't speak to that I mean,

10 Q Did other builders hang around waiting for phase
11 two to begin?

12 A Hang around? I can't say I mean, I don't know
13 what that means

14 Q Well, did they stay mobilized to buy lots in
15 Courtyards to build more houses after phase two

16 A Mobilized -- I don't understand what that means
17 either

18 Mobilized in Courtyards? I mean, you buy lots
19 and you build homes You don't keep crews on site
20 after you've finished That would be what I would
21 consider mobilized

22 Q That's all the questions I have for you Thank
23 you

24 THE COURT Any Redirect?

25 REDIRECT EXAMINATION

1 BY MR KIRK

2 Q Mr Kirk, you were asked some questions about
3 Lot 14

4 A Yes

5 Q And the model home?

6 A Yes

7 Q Are there any other model homes out there that
8 you built?

9 A No, there's not That's the only one that I'm
10 aware of

11 Q Anybody else use the model home besides K & L?

12 A There were meetings in the model home and it
13 was used for prospective clients, prospective builders
14 as well

15 K & L was the first builders in the neighbor-
16 hood I believe there was Black Construction in
17 one house in the beginning

18 A building team was trying to get established
19 in the neighborhood, so builders were being brought
20 in to look at the neighborhood, and they would go
21 in that house to see if they wanted to build in the
22 neighborhood, if it was the kind of neighborhood
23 they wanted to come build in

24 Q And was that house furnished?

25 A It was

MR KIRK ON REDIRECT

1 Q Was it your idea to furnish the model home?

2 A No

3 Q That's all I have

4 THE COURT You can step down

5 (Witness excused from stand)

6 THE COURT Ladies and gentlemen, this is a good
7 time to give you a break Please remember the instruc-
8 tions that I've given to you previously You are not
9 to discuss the case or the testimony among yourselves

10 You still have not been given all the evidence
11 in the case

12 Let's take a break and then we'll come back

13 (Jury excused from Courtroom)

14 THE COURT Is there anything we need to take
15 up before we take a break?

16 MR BOWENS Nothing from the Plaintiffs

17 MR BABCOCK Just one thing We plan to put
18 up the testimony today of Ron Spence and also the
19 video deposition of Ron Colson

20 There was a matter that was raised earlier as
21 to a portion of Mr Colson's deposition -- he is a
22 banker with NBSC, and there was reference to the two
23 lots per month and some objection raised It is a
24 different situation now than it was before the trial
25 commenced

1 At the beginning of the trial we discussed that
2 briefly and we have a different situation now

3 A witness was asked if he had told Mr Lipscomb
4 anything that could mislead him or what not about
5 the sales out there

6 I asked on cross examination whether he had
7 ever said two lots per month and he denied ever hav-
8 ing said anything about the two lots per month

9 So this is now a part of this case and they have
10 directly opened the door to the matter of the two
11 lots per month

12 The situation has now changed, and we believe
13 this testimony of Mr Colson should come in

14 MR BOWENS The situation has not changed at
15 all, Your Honor

16 What this concerns is the bank loan and the
17 best evidence concerning that would be the bank loan
18 documents

19 There is simply no reference in any of those
20 documents at all to the two lots and the testimony
21 should be excluded

22 THE COURT Just a moment, please

23 MR BABCOCK The Court has already ruled that
24 Mr Lipscomb can testify as to what they thought the
25 lot requirement was

1 THE COURT So you are saying the testimony
2 should not be allowed in at all?
3 MR BOWENS At all
4 THE COURT Let's take our break now and then
5 we'll continue
6 (Court took brief recess and the matter was
7 resumed)
8 THE COURT All right
9 MR BABCOCK May I be heard?
10 THE COURT Well, I don't need to hear a lot of
11 further discussion about it I will be happy to
12 hear the live witness Then we will break for the
13 day and come back on Monday
14 MR BABCOCK Your Honor, I have one more short
15 argument
16 THE COURT I just said I will hear your witness
17 and then we will adjourn for the day
18 MR BABCOCK Thank you
19 THE COURT I will give you an answer on Monday
20 morning concerning the video deposition
21 Is there anything else we need to take up before
22 bringing the jury back?
23 MR BOWENS No, Your Honor
24 MR BABCOCK No, Your Honor
25 THE COURT Bring in the jury, please

1 (Jury returned to the Courtroom)
2 THE COURT All right, you may call your next
3 witness
4 MR THOMAS The Defense would call Ron Spence
5 RON SPENCE, being
6 duly sworn testified as follows
7 DIRECT EXAMINATION
8 BY MR THOMAS
9 Q Mr Spence, how do you know Steve?
10 A I've known Steve for thirty years In fact,
11 I worked for him for some time
12 Q Is he a friend of yours?
13 A He is
14 Q How do you know Mr Melton?
15 A He's also a friend of mine
16 Q Mr Spence, where do you live?
17 A At 101 Savannah Branch Trail, Irmo
18 Q And what neighborhood is that in?
19 A Courtyards at Rolling Creek
20 Q I hand you what has been marked as Defendants'
21 Exhibit 6
22 A All right
23 Q What lot number is your house?
24 A Well, I don't own the home My wife does, but
25 it is Lot 57

MR SPENCE ON DIRECT

1 Q And Lot 57 is a corner lot shown on that ex-
2 hibit?

3 A Yes, that's correct

4 Q And I would hand you what's marked as Defense
5 Exhibit 128

6 A Okay

7 Q If you would turn to the seventh page of Exhibit
8 128 What lot does that reference?

9 A Lot 57

10 Q And who built your house?

11 A K & L Contracting

12 Q And Lot 57 has a wall around it?

13 A Yes When we first built the house, the air
14 conditioning units were on the right hand side be-
15 tween 57 and 56, I guess, but Steve stopped by one
16 day and asked me if I would mind moving the air con-
17 ditioner units from the right hand side of the house
18 over to the left hand side because the people who were
19 buying Lot 56 didn't want the AC unit sitting there

20 What I mean is their air conditioning unit was
21 sitting beside their house over on that side, and so
22 they were moved out there

23 And then I asked that a wall be put up so you
24 couldn't -- well, you could see when you first come
25 in that area to the left that was an eyesore, and

MR SPENCE ON DIRECT

1 it would have been the first thing you would see as
2 far as my house, you know, would be the air condi-
3 tioning units sitting there exposed

4 So I asked if they would to build a building
5 and if they would put the wall up They came in
6 and I paid the -- I wrote a check for Two Hundred
7 Dollars to put up a brick column on either end of
8 the wall

9 Q And, Mr Spence, what is Spence Irrigation?

10 A We install irrigation systems, sod We do
11 landscaping work We did quite a bit of work out
12 there

13 We did landscaping all over the homes or a big
14 portion of the homes for K & L Contracting, and we
15 did work -- all of the landscaping or much of the land-
16 scaping in the common areas had already been done,
17 and we began doing work on the common areas that
18 wasn't done

19 Q And tell the jury where the common areas are
20 you did work?

21 A Yes, if you go on down-- come in there and go
22 all the way down to the end, the common area of the
23 very centr at the end of Summer Branch, back --that
24 area there did not have work done on it, so Steve
25 called me

MR SPENCE ON DIRECT

1 Q In this area?

2 A Yeah, right there That area didn't have sod,
3 so we sodded that We put the -- it did have some
4 irrigation, but we made changes to the irrigation
5 there

6 We did some work on the common area in front of
7 what is -- it's there in front of my house That is--
8 land there or

9 Q Here?

10 A Yes, it's right there Right there We did some
11 work in there on the common area and at the entrance
12 out front

13 We built a bed and put in shrubbery and stuff in
14 around the brick in there

15 We also put in palm trees and some plants --
16 what you see in that first entrance there -- put in
17 palm trees there and back this way we put in palm
18 and oleanders there

19 Q What work did you do, if any, on the individual
20 lots?

21 A Well, we put irrigation and some shrubbery
22 Other than that, it would be clean-up, you know
23 Sometimes if it was needed we'd go back there and
24 clean it up

25 Q Did you ever do any work on lots for the

MR SPENCE ON DIRECT

1 developers?

2 A We did some but not much It would be clean-
3 up work for one of the builders who had left out
4 You know, I lived there and sometimes I would go back
5 there and clean up

6 Q Did you ever use a John Deere tractor?

7 A We did

8 Q Did you ever use a walker mower in working out
9 there?

10 A I did

11 Q All right I hand you what is marked as Exhibit
12 135

13 A Okay

14 Q If you'd look at page nine

15 A Okay

16 Q What is that invoice?

17 A Well, you want me to tell you the whole story,
18 the whole thing, or just

19 Q What is it?

20 A This is an invoice for a Dingo

21 Q What's a Dingo?

22 A A small excavator, somewhat like a -- some peo-
23 ple would refer to it as a Bobcat, being a smaller
24 version of that

25 Q What did you use the Dingo for?

MR SPENCE ON DIRECT

1 A Well, I used it all over for whatever needed
2 doing Mostly when we were doing the yards and work-
3 ing in the common areas We used it for whatever
4 we needed at the time -- whatever needed to be done

5 Q Why was there an invoice for the Dingo?

6 A Well, when I first started, I rented equipment
7 and it got to be where, you know, I -- when you rent
8 equipment and you don't get it back the day you are
9 supposed to get it back they charge you extra for
10 another day or whatever

11 Say I needed to get the Dingo back today and a
12 ~~little~~ sod would be coming in or something I needed
13 to do with it, I'd keep it and get charged for the
14 next day

15 Anyway, I went to Steve Lipscomb and said, look,
16 it would be a lot cheaper if you could make arrange-
17 ments or help me buy it, and then I would use the
18 Dingo for work here It would be much cheaper because
19 I could use it for days I needed to use it

20 So that's what we did He made arrangements for
21 me to buy the Dingo

22 Q And look at Exhibit 135, the next page

23 A Okay The same thing That's the same thing as
24 the previous one

25 Q For the Dingo?

MR SPENCE ON DIRECT

1 A Yes
2 Q And page 11 and 12?
3 A The same thing They are all the same
4 Q Exhibit 135?
5 A Yes
6 Q And go to the eighth page of the exhibit What
7 is the number on that?
8 A Number 33
9 Q And what is the dollar amount shown on that
10 record?
11 A Twenty-nine Twenty-nine Ten Two Thousand Nine
12 Hundred Twenty-nine Dollars and Ten Cent
13 Q And what is the purpose of this document?
14 A I'm sorry This is Ten Ninety-seven and
15 Q What was the purpose of this document?
16 A It says here Spence Irrigation, invoice -- it
17 is an invoice I submitted for payment
18 Q All right
19 A I mean, I don't know how they do their bookkeep-
20 ing, but -- what was the question? I'm not sure
21 what the question was
22 Q Let me show you another document here
23 A All right
24 Q I hand you another document Have you seen
25 this document before?

MR SPENCE ON DIRECT

1 A Yes, this is my record here

2 Q What is the document?

3 A It's a bill I submitted to Courtyards at Rolling
4 Creek for payment

5 MR THOMAS I would move this document in as
6 Defense Exhibit 7

7 THE COURT Show it to counsel

8 MR BOWENS No objection

9 THE COURT Admitted

10 (Spence invoice admitted without objection as
11 Defense Exhibit 7)

12 BY MR THOMAS

13 Q What is this for?

14 A It's for things that I bought that were for
15 the common areas, work for the common areas, some
16 sprinkler heads for the common areas, pinestraw, a
17 couple of lights at the entrance, a timer, irrigation
18 system, more pinestraw, sod for the area I showed you
19 a minute ago

20 Q And would payment for that come from K & L Con-
21 tracting?

22 A Beg pardon?

23 Q Why bill K & L Contracting?

24 A Oh, well, they made -- I say they -- I think
25 Kay or somebody in John Quinn's office -- they made

Ron Spence – Cross Examination by
Glenn E Bowens

1 up these documents so when I got ready to submit in-
2 voices I could just make them out He made some out
3 for Courtyards and he made some out to K & L I did
4 work for both of them

5 Q All right

6 A And I guess I ran out of Courtyards invoices and
7 I just submitted -- I mean I did that several times,
8 but I would cross out K & L and write Courtyards in
9 and say what it was

10 Q And what is the amount of that?

11 A Five Thousand Three Hundred Twenty-seven Dol-
12 lars and Fifty-one Cent

13 Q Did you receive payment from Courtyards

14 A Well, on this document here, what I would have
15 to say is that I received -- they just took the Dingo
16 payments out of the Fifty-three Twenty-seven -- took
17 the total amount of the Dingo payments out and gave
18 me the balance -- wrote me a check for the balance of
19 it

20 Q I have no further questions Thank you, Mr
21 Spence

22 THE COURT Cross examine

23 CROSS EXAMINATION

24 BY MR BOWENS

25 Q Mr Spence, who owns the Dingo right now?

MR SPENCE ON CROSS

1 A Come again

2 Q Who owns the Dingo right now?

3 A I do

4 Q That's all I have

5 THE COURT You can step down, please

6 (Witness excused from stand)

7 THE COURT Ladies and gentlemen, we are going
8 to let you go for the day We have some legal issues
9 to take up

10 Please don't talk about the case with anyone or
11 allow anyone to talk about it with you We still
12 have not completed the testimony

13 I am going to call it a week as far as you are
14 concerned and we haven't gotten as far as I would
15 have liked to today, but I need to review some in-
16 formation before we go forward

17 I understand that you all are available to return
18 on Monday morning I am going to ask you to come in
19 a little bit earlier Monday morning I am sure you
20 know that Mondays are a little bit chaotic, so if I
21 can get you in a little earlier and we can get started
22 earlier then we can get through with the testimony,
23 hopefully, on Monday

24 We would like to be able to give the case to
25 you to begin your deliberations on Tuesday, so I ask you

1 to report Monday morning at nine A M When you come
2 in, come straight up from the first floor and we will
3 make arrangements so your badges can get scanned
4 here We will need a little time to get the com-
5 puters set up for the jurors for the week

6 Hopefully, we will get started and when we take a
7 break they will have gotten that done For those of
8 you who need additional work excuses, we will give you
9 those to take back to your employers

10 We will make sure that we take care of you in
11 that regard so we can go ahead

12 I am asking that you remember all the instructions
13 I have given to you during the course of the
14 trial, and tell your family members and friends you
15 have not concluded your jury service if they ask you,
16 and that you cannot discuss the matter with them

17 The reason for this is that if you begin to
18 talk about the evidence you may begin to make up your
19 minds as to what the conclusion should be, and we need
20 to make sure you have heard everything before you be-
21 gin to form your opinions

22 Also, please remember the instructions that if
23 anyone approaches you to begin to discuss the case
24 to tell them that you cannot do so and get their names
25 to report that to the Court when you return

1 Also, please do not pay attention to any con-
2 versations you may hear out in the hallway It may
3 be information that is not appropriate for you to
4 hear Your decision must be based upon what you hear
5 in this Courtroom from this witness stand and any ex-
6 hibits that are introduced during the trial of the
7 case

8 Ladies and gentlemen, I thank you again for your
9 service this week I appreciate your hard work and
10 your diligence this week and for the coming week

11 I hope you have a very good weekend, and I look
12 forward to seeing you Monday morning at nine o'clock
13 Please bring your badges with you on Monday Try not
14 to leave them at home

15 Have a good weekend, and we'll see you on Monday
16 Morning

17 (Jury excused from Courtroom at 3 40 P M)

18
19
20
21
22
23
24
25

1 (Court resumes the sixth day of trial)

2 THE COURT Good morning Be seated
3 please I hope everybody had a good weekend I
4 reviewed the deposition of Ronnie Colson and I
5 know that the objections about the testimony
6 related to the parole evidence to the ability to
7 testify related to the two sales per month

8 I read the deposition with that in mind and I
9 also referred to - I think there was a case that
10 Mr Bowens had referred me to I am still going
11 to allow the deposition I think the deposition,
12 while it does talk about two sales per month, it
13 does indicate that that information came from Mr
14 Lipscomb and that he never met with Dutch Fork
15 Realty or Dutch Fork Development Group until after
16 the contracts had been signed and after the
17 construction loan was in place

18 He also indicated that the reasons why he
19 thought the loan - why he thought there wasn't a
20 repayment of the principal amount of the loan and
21 how he viewed that He also talked extensively
22 about documents that were within his underwriting
23 file that had not been shared with either the
24 Plaintiffs or the Defendant and that he used those
25 documents to formulate the underwriting

1 for the project and that while I did understand
2 that he did rely on two sales per month, I don't
3 believe that that is changing the terms or being
4 introduced to change the terms of the contract
5 between the Plaintiffs and the Defendant and, in
6 fact, I will not allow such argument to be made
7 It certainly is relevant because it goes on
8 to explain part of the defense in this case,
9 perhaps as to why there was not funding available
10 or what the problem was I know that the loan was
11 extended - based upon his testimony - the loan was
12 extended for another year and it talks about the
13 progress with relates to the sales
14 There was also a little cross examination A
15 good deal of discussion about the bonded plat
16 There was also testimony about the market
17 conditions There was also other testimony
18 related to the personal guarantee of Mr Lipscomb
19 and at what point under the construction loan he
20 would have been required to pay the expenses for
21 the project personally or who through SEL
22 Properties So I think all of that is relevant
23 and related to both of the claims as well as the
24 defenses in this matter so I m going to allow the
25 testimony

1 Let me be perfectly clear however Any
2 information related to two sales per month cannot
3 be used to vary the terms of the contract and it's
4 not being admitted for that purpose I think the
5 contract is very clear It's clear from the
6 testimony what the parties agreed to and I think
7 that the two sales per month - lot sales per month
8 is relevant as it relates to the construction loan
9 and the obligations of SEL under that construction
10 loan and how that construction loan progressed and
11 what effect that it had on the project itself but
12 not to vary the terms of the contract between the
13 Plaintiff and the Defendant and I will not allow
14 the parties to argue any about it

15 Any questions?

16 MR BOWENS Yes, Your Honor Might
17 Your Honor with the Court consider giving
18 instruction to the Jury that the terms of the
19 contract was twenty percent per year and that the
20 two per month was only applicable to the loan
21 itself?

22 THE COURT I think in the testimony
23 through your cross examination that that became
24 abundantly clear I know you spent a lot of time
25 asking questions about that to make it clear

1 and that it was only as it related to the
2 construction loan and I think during the end of
3 his testimony it became apparent that if he wasn't
4 aware of it before he was certainly aware of it by
5 the end of his testimony and he was able to answer
6 his questions in light of the contract versus the
7 contract between the Plaintiff and the Defendant
8 versus the contract between the bank and Defendant
9 and so I would not at this particular point
10 Whether or not it may be appropriate later on I'd
11 have to consider because I want to make sure I
12 don't give a charge on the law I'm sorry I
13 don't give a charge on the facts I'm sorry
14 Anything else?

15 MR BABCOCK No, Your Honor Court's
16 indulgence Thank you, Your Honor

17 THE COURT So is that going to be the
18 first witness that you propose to put up

19 MR BABCOCK Well, actually we're
20 prepared to make a change We'll start with Mr
21 Lipscomb We'll use that deposition of testimony
22 after Mr Lipscomb

23 THE COURT All right Will you ask the
24 Jury to come in please

25 (Jury enters the Courtroom)

1 THE COURT Good morning ladies and
2 gentlemen That door right there is open If you
3 could just close it for me please I hope that
4 you all had a pleasant weekend We are now ready
5 to continue on with the trial in this case and you
6 may call your next witness, Mr Babcock and Mr
7 Thomas

8 MR BABCOCK Thank you, Your Honor
9 The defense calls Steve Lipscomb

10 Steve Lipscomb, being duly sworn,
11 testified as follows

12 DIRECT EXAMINATION

13 BY MR BABCOCK

14 A My name is Steven E Lipscomb

15 Q Good morning, Mr Lipscomb How old are you
16 sir?

17 A 57

18 Q And where do you live?

19 A I live in Columbia, South Carolina on
20 Kilbourne Road

21 Q Are you married sir?

22 A Yes, sir I have a wife Diane Lipscomb

23 Q And do you have any children?

24 A I have three boys Sel, Lance, and Hunter

25 Q Now, Mr Lipscomb, did you go to college?

Mr Lipscomb, Direct Examination

1 A Yes, sir I went to the University of South
2 Carolina

3 Q And did you graduate?

4 A Yes, sir

5 Q What did you get your degree in?

6 A I got my degree in Business Finance

7 Q And when did you graduate from Carolina?

8 A 1973

9 Q Did you play football when you were there?

10 A Yes, sir I played football for three years
11 and we had the ACC Championship when I was there

12 Q Football players were a little smaller in
13 those days?

14 A A lot smaller

15 Q Now, Mr Lipscomb, after you finished at
16 Carolina, what did you do?

17 A I immediately and while I was at Carolina I
18 was in business for myself doing - I started an
19 amusement business A friend of mine had told me
20 about a thing called (inaudible) foosball table
21 had come back from some sailors from France and he
22 had lived there and he thought it would be a great
23 opportunity to bring them down and I said I didn't
24 know anything about it but I had a little money
25 from working during the summer and I was on

Mr Lipscomb, Direct Examination

1 a full scholarship so I bought one of those
2 machines for three hundred dollars and put it into
3 the University of South Carolina Russell House
4 That was our first location so I started an
5 amusement company based on that machine and it was
6 a game that when we bought it I didn't know what
7 it was Later finding out that what it was and it
8 was very profitable

9 Q And where did you go with that business after
10 you graduated?

11 A Well, I continued that business We put
12 those machines in a lot of restaurants, bars, in
13 where ever we could put them and as we put those
14 machines out in the locations other machines came
15 along such as electronic palm machines, which are
16 the first generation of Pac Man and video machines
17 and we would only put these into bars,
18 restaurants

19 There would also be other equipment in there
20 such as pool tables, juke boxes, pinball machines
21 that we didn't own and at a later point in time
22 when our machines started generating more money
23 that the pool tables and the pinball machines
24 Sometimes the operators would say,
25 if they don't take their machines out

Mr Lipscomb, Direct Examination

1 then we're going to take ours out, so, in fact, we
2 bought all the machines and had them in the bars
3 and restaurants

4 Started the company called American Amusement
5 which later on had all type of machines That
6 business has ceased now but had went on through
7 poker machine business that was in South Carolina
8 We had many clients

9 The Meltons were some of our clients but
10 there were many clients We had - when I say
11 clients I mean profit-sharing We had locations,
12 actually more in South Carolina but all over the
13 Southeast at one time

14 Q You said the Meltons were clients What do
15 you mean by that?

16 A Well, they had convenience stores Mother
17 Melton had a convenience store and Mr Bill
18 Melton, Sr had a convenience store in Winnsboro
19 and William (inaudible) in that location and they
20 were profit sharing with us

21 Q You split the profits with the machines?

22 A Yes, sir And another son, Bill Melton, was
23 actually somewhat in the business with us in the
24 Winnsboro area during this time

25 Q Now, there's been testimony concerning

Mr Lipscomb, Direct Examination

1 SEL Properties, LLC What's an LLC?

2 A It's a limited liability corporation It's
3 nothing but a piece of paper that somebody has to
4 run and I was the managing partner of that
5 particular entity

6 Q You said piece of paper It is a company
7 Is it?

8 A I mean it's - that's what I mean It's a
9 different entity but it has to have to have a live
10 manager

11 Q And who was the live manager?

12 A I was

13 Q And are you still for SEL Properties?

14 A I am

15 Q Who owns SEL Properties, LLC?

16 A That's owned by my family My self, my wife,
17 my three children

18 Q And who was SEL Properties named for?

19 A My oldest son That's his initials Steven
20 Earl Lipscomb

21 Q And whose money is invested in SEL
22 Properties?

23 A The family's money

24 Q Now, when SEL Properties, LLC, was formed,
25 what did you start doing?

Mr Lipscomb, Direct Examination

1 A Well, I started - first I started with rental
2 houses and buying houses and ending investing to
3 some small developments

4 Q And when did SEL Properties start?

5 A I can't remember the year

6 Q It was some time ago?

7 A Some time ago

8 Q And what does SEL Properties do now?

9 A It basically does the same thing It invests
10 into real estate primarily Projects

11 Q Now, when did SEL Properties first get
12 involved in real estate developments?

13 A Probably on Rosewood Drive we had a small
14 development that we did with Brian South and I
15 would think that would be around 1999 or 1998
16 Maybe the year before I'm not exactly positive
17 about the date Maybe it's two years before but I
18 think it's one year

19 Q After that development did SEL Properties get
20 involved in some other developments?

21 A Yes, we did

22 Q All right Can you identify those?

23 A Well, at that time we had gotten involved in
24 two Once was Stonington over at the Rifle area
25 and the ones that the Meltons brought to me

Mr Lipscomb, Direct Examination

1 and asked me to be a partner in out at Rolling
2 Creek which is out at the Ballantine area so it's
3 at exit 97 off to the right about a mile near the
4 Whale's Tail Restaurant I don't know if people
5 know where that is or not That's my best
6 description
7 Q We'll talk about Rolling Creek in a minute
8 But just for time's standpoint, did you get into
9 the Stonington and the Rolling Creek projects
10 about the same time?
11 A Yes, sir
12 Q And just generally, what was the role of SEL
13 Properties in those kinds of real estate
14 developments?
15 A Trying to obtain the financing for the
16 construction
17 Q Did Sel Properties act as the developer?
18 A No, sir
19 Q Who were the developers in those other
20 projects? Other folk?
21 A Yes, sir
22 Q Now, let's look at the project we heard about
23 last week - the Courtyards at Rolling Creek Who
24 first contacted you with regard to that project?
25 A Mr William Melton, Sr

Mr Lipscomb, Direct Examination

1 Q And in regard to that project, what is SEL
2 Properties role?

3 A Obtaining the financing for the development

4 Q We'll talk about that a little more
5 specifically in a minute but again the Courtyards
6 at Rolling Creek project, SEL Properties was
7 acting Isn't that right?

8 A Yes, sir SEL Properties was the entity
9 involved there

10 Q All right And who was the managing member?

11 A I was the managing member of SEL Properties
12 I've always been the managing member

13 Q When you acted on behalf of SEL Properties,
14 were you active in regard to this project? Who
15 were you acting on behalf of? SEL Properties or
16 yourself?

17 A SEL Properties

18 Q Were you ever acting individually for
19 yourself?

20 A No, sir Not acting individually for myself

21 Q SEL Properties is a party of the contract of
22 properties, is that right?

23 A Can you repeat that?

24 Q SEL Properties is a party of the contract
25 when we look at the contract?

Mr Lipscomb, Direct Examination

1 A Yes, sir SEL Properties and Dutchfork

2 Q Why was SEL Properties a part of the contract
3 rather than yourself?

4 A Because I didn't want to deal in real estate
5 transactions That's what we set it up for

6 Q Now, moving back, exactly where is this
7 project located?

8 A If you go out at the Interstate 26 towards
9 Spartanburg, it's exit 97 It's doesn't say that
10 way but it's the Ballantine exit As you go off
11 the ramp, it's a mile and a half or a mile down on
12 the right Right past where the old Whales Tail
13 Restaurant used to be It has a brick entrance
14 just like they showed in the exhibit out front
15 here It's very attractive

16 Q Now, just in generally Mr Lipscomb, how many
17 were there in the Courtyards?

18 A The Courtyards at Rolling Creek There was
19 going to be three phases

20 Q And the phase four was separate?

21 A Yes, sir

22 Q As far as the first three phases were set up,
23 how many lots were sold for phase one?

24 A For phase one, fifty-five out of fifty-seven
25 lots were sold

Mr Lipscomb, Direct Examination

- 1 Q And for phases two and three, have any lots
2 been sold for those phases?
- 3 A No, sir There have been no lots sold for
4 those phases
- 5 Q What, if anything, is currently going on with
6 regard with phases two and three?
- 7 A Well, phase two is currently having roads put
8 in Thus far they have built the bridge across
9 the creek, put the piping across the creek and put
10 the curving in, and of course I haven't been out
11 there in the last week but it should be at the
12 point where they should be starting to fill the
13 roadway but I haven't been there They put the
14 sewer and water and the electric company is out
15 there and is starting to put some of the lines in
16 - some of the underground electrical lines in
17 And phase three - nothing has started
- 18 Q And sales in phases two and three?
- 19 A No, sir
- 20 Q Now, let's - I'm going to hand you a document
21 which we've marked as Defendant's Exhibit six last
22 week It was a map of the Courtyard at Rolling
23 Creek Now, looking at the map, where would the
24 highway be on '76?
- 25 A Can I say something? I left my glasses

Mr Lipscomb, Direct Examination

1 over there on

2 Q Sure I'll get your glasses

3 A Thank you Ask the question again

4 Q Sure The highway you use to get to Rolling
5 Creek, where would that be on that diagram?

6 A All right Highway 176 runs in front of the
7 - to the left side of the drawing where the road
8 is wider and is split and it comes straight down
9 and under where the white line is and there is a
10 decelerating lane as you approach on the right

11 Q Now, in entering the project, would you enter
12 on this half in the left hand side?

13 A Yes, sir

14 Q All right Is that Boyd Branch Crossing?

15 A Yes, sir

16 Q So if you come in, is that how you get into
17 the subdivision?

18 A It is

19 Q This small circle when you first get in?

20 A Yes, sir

21 Q And if you go to the left on that and come
22 down into Is that Savannah Branch Trail?

23 A I believe you go to the right

24 Q I'm sorry All right You go to the right
25 and end up on Savannah Branch Trail?

Mr Lipscomb, Direct Examination

1 A Yes, sir

2 Q And if you go straight, then is that Savannah
3 Branch Arena at the top? To the left?

4 A Savannah Branch Lane at the top to the left
5 Yes, sir That's right

6 Q All right And what would happen if you go
7 down that main road, Boyd Branch Crossing? If you
8 go down Boyd Branch Crossing, where would that
9 take you?

10 A That would take you to phase two

11 Q So if that road continues on, you would
12 continue on to phase two Is that right?

13 A Yes, sir

14 Q And generally, what's the terrain like as you
15 get past where Boyd Branch Crossing ends?

16 A The reason this phase stops at this
17 particular point is there is a creek that crosses
18 through the property right beyond that point and
19 the cost of crossing that creek The reason this
20 was phase one and phase two was to make enough
21 money to do phase two to cross this water It
22 doesn't carry that much water but the engineering
23 required quite a bit of to meet the County codes
24 quite a bit of cost to cross it

25 Q To put a bridge in?

Mr Lipscomb, Direct Examination

1 A Yes, sir

2 Q Now, going back to the start of the Rolling
3 Creek project, did you say the Meltons approached
4 you?

5 A The Meltons brought me a piece of property
6 that they said that they had a chance to buy and
7 they could get the permeating and the developing
8 from the Cribbs family which I knew because they
9 were in the same business as all the others, the
10 convenience store business and the machine
11 business They had there own machines I believe
12 So I knew them and they said they had a good deal
13 on a piece of property and it would be a good
14 investment if we could get along and make this
15 happen

16 Q And what did they tell you their role would
17 be?

18 A They said that they would be the developers
19 and I was to go out and get the funds to do the
20 project and project assisted land, the roads, I
21 guess everything else like the walls and the
22 infrastructure

23 Q And you said you are SEL Properties?

24 A Yes When I speak, as I said I am the
25 managing partner for SEL Properties so I do

Mr Lipscomb, Direct Examination

1 say SEL Properties at all times I was the person
2 involved here at the Courtyards

3 Q Let me hand you documents marked as
4 Plaintiff's Exhibit 1 Are you familiar with that
5 document sir?

6 A I am familiar with it

7 Q I need you to look at the first paragraph on
8 that document It's a contract between SEL
9 Properties and Dutch Fork Realty and Dutch Fork
10 Development Is that right?

11 A Yes, sir

12 Q And what's the date on the agreement, sir?

13 A Fourteenth of November, 2000

14 Q And if you would sir, take a look at the
15 paragraph number two marked Infrastructure

16 A Yes, sir

17 Q And just read that paragraph to us, sir

18 A SEL shall exercise it's best efforts to
19 secure reasonable financing from a conventional
20 lending institution for the purpose of purchasing
21 the property, securing the engineering studies,
22 surveying, landscaping, and the costs related to
23 infrastructure SEL shall have the final approval
24 of all costs pertaining to the development of the
25 property

Mr Lipscomb, Direct Examination

1 Q And did you comply with that paragraph, sir?

2 A Yes, I did

3 Q Now, I want to direct your attention to the

4 next section which is section three, Phased

5 Development And that starts on the bottom of one

6 page and goes to the top of the next Could you

7 just read that paragraph for us, sir?

8 A Phased Development The property is to be

9 developed in phases There shall be three phases

10 of development Phase two shall not commence

11 until no less than sixty percent of the lots in

12 phase one are sold and phase three will not

13 commence until sixty percent of the lots in phase

14 one and two are sold

15 Q There have been some testimony earlier during

16 the trial concerning words here What did you

17 understood commence meant in that paragraph?

18 A Well, my understanding is that at least, no

19 less than sixty percent of the houses had to be

20 sold before the roads could start in phase two

21 Q So before the roads could commence

22 A Yes, sir

23 Q And how about the word sold What did you

24 understand the word, sold, to mean?

25 A Well, sold to me is when cash changes

Mr Lipscomb, Direct Examination

1 hands and you purchase something What I mean by
2 cash is check but the title changes hands

3 Q Now, why was this kind of thing included in
4 the contract?

5 A This was included in the contract because the
6 development business is one of the riskiest
7 businesses you could be in If we didn't have at
8 least sixty percent of the lots or more than sixty
9 percents of the lots sold to lower the bank debt,
10 there was no way we could get the financing but we
11 were not going to put ourselves in more risk
12 financially and raise the amount of money being
13 spent before we get the first phase sum of money
14 paid back

15 Q Now, Mr Lipscomb, if you go on through the
16 record to section five of the contract,
17 Compensation For DFDG Okay Let's look at the
18 first paragraph first We looked at this
19 paragraph last week How much is the development
20 fee for phase one?

21 A Fifty-four thousand dollars

22 Q And was that paid to Dutch Fork?

23 A No, sir It wasn't

24 Q And why wasn't it?

25 A It wasn't paid because they knew that

Mr Lipscomb, Direct Examination

1 sales weren't being made There was no cash flow
2 and they many times told me that they could get
3 their money later when we got things going better
4 but I/we had not paid them

5 Q Do you owe it?

6 A Yes, sir I owe the people

7 Q Let's look down at the next paragraph Read
8 that next paragraph sir

9 A Upon the sale of sixty percent of the lots
10 developed in phase one, the first month following
11 the letter of the contract or construction of
12 phase two, SEL shall pay DFDG nine thousand
13 dollars per month for six months for a total of
14 fifty-four thousands for their services rendered
15 regarded phase two development

16 Q Mr Lipscomb, during the five years of this
17 contract, did you ever let SEL or ever let
18 contract construction of phase two?

19 A The roads were never started until much after
20 the contract had ended Five years was over

21 Q The main construction for the roads?

22 A Yes, sir

23 Q And when was that done, sir?

24 A After the contract was over

25 Q So early this year?

Mr Lipscomb, Direct Examination

1 A Yes, sir It was done in 2006

2 Q And Mr Lipscomb, do you owe any development
3 fee for phase two?

4 A No, sir I don't

5 Q And why is that?

6 A Because there was no development in phase two
7 during the length of the contract

8 Q And let's just look at the last paragraph
9 there Can you put the last paragraph up?

10 A Are we still on five?

11 Q Yes, sir Now, if you would just read that
12 to us

13 A I'm not sure what paragraph you're looking
14 at

15 Q The third paragraph on section five

16 A Third paragraph Upon the sale of sixty
17 percent of the lots developed in phase one and
18 phase two, SEL shall pay DFDG nine thousand
19 dollars per month for a total of six months or a
20 total of fifty-four thousand dollars for their
21 services rendered regarding phase three
22 development

23 Q Have you paid a development fee for phase
24 three?

25 A I have not paid a development fee for

Mr Lipscomb, Direct Examination

1 phase three We do not owe it We have not

2 started any roads or did anything on phase three

3 Q And have you reached sixty percent of the lot

4 sales in phase one and two?

5 A We have not We have not sold any lots

6 Q Mr Lipscomb, I ask you if you owed any

7 development fee on phase two Did you pay any

8 development fee on phase two?

9 A No, sir

10 Q For the reasons you told us?

11 A Yes, sir

12 Q Now, let's look over at paragraph eight

13 Looking at paragraph eight seeing references made

14 to the term of five years to the date of the

15 execution of the contract Do you see that, sir?

16 A The term of the contract?

17 Q Yes

18 A Yes, I see

19 Q All right And this contract was entered

20 into on November of 2000, is that right?

21 A Yes, sir It was entered into on November of

22 2000

23 Q So that five year period would have ended in

24 what?

25 A November of 2005

Mr Lipscomb Direct Examination

1 Q Now, when this contract was started, did you
2 believe that all three phases would be done in
3 five years?

4 A Well, when it started I was hoping it would
5 be and but I wasn't sure whether it would be or
6 not but I was hoping it would be That was the
7 plan That would have been if everything went
8 perfect

9 Q Did everything go perfectly?

10 A Everything did not go perfectly It did not
11 even go halfway perfectly There was no sales,
12 lack of sales There were sales but there just
13 wasn't enough sales coming in to reach the It
14 would have taken thirteen - twenty years to sell
15 this project out

16 Q All phases

17 A All phases

18 Q And let's just look at section nine That's
19 the section that gives termination Could you
20 read that to us please?

21 A It says, upon termination of DFDG and DFR, it
22 will have no further rights to compensation or
23 commissions and shall peaceably vacate the
24 premises

25 Q Now, Mr Lipscomb, I'd like you to

Mr Lipscomb, Direct Examination

1 direct your attention to the land itself for
2 Rolling Creek Did SEL Properties purchase that
3 land?

4 A Yes, sir We did

5 Q And how much was paid for the land?

6 A Approximately eight hundred thousand dollars

7 Q And let's go through the sequence of events
8 in terms of how that actually came to be How did
9 you pay that money?

10 A Well, Mr Melton came to me with the project
11 and said here again I'll say again that he said he
12 had a good project and a good piece for loan and I
13 had no reason to doubt it Then he said, I'm not
14 sure I want to do it or not but he countered back
15 and said if we don't buy it somebody's going to
16 buy it and it's going to get away and he wanted me
17 to do it quickly so I took from credit lines and
18 borrowed money on CD or short term bridge loans or
19 loans to get to the next level and we gave them a
20 check and purchased the property

21 Q So you as SEL Properties~

22 A SEL Properties gave them the check and
23 purchased the property

24 Q Before you actually got to the closing for
25 the big loan, did you have a mortgage for

Mr Lipscomb, Direct Examination

1 that property?

2 A Yes, sir

3 Q And who was that mortgage with?

4 A NBSC National Bank of South Carolina

5 Q And when was that mortgage paid off?

6 A It was paid off when we got the loan to buy
7 the property back - to pay for the property and to
8 do the infrastructure and whatever else was in the
9 budget When we got the infrastructure loan
10 They called it an infrastructure loan

11 Q We'll talk about the loan in a minute Tell
12 me what was happening in the project from the time
13 of the agreement in November of 2000 to November
14 of 2001 Tell us generally what was happening
15 during that first year

16 A Well, I was working on banks trying to see
17 which banks would loan us money and just give us
18 the best deal Trying to get a loan and also they
19 were drawing The engineers were drawing
20 structure drawings Then they would be trying to
21 get various people to bid on the contract to get
22 the best price and I guess all the permitting was
23 being done Or I thought it was being done

24 Q Now, Mr Lipscomb, with regard to the loan
25 for the project, was there a commitment letter

Mr Lipscomb, Direct Examination

1 issued by NBSC?

2 A Yes, sir There was

3 Q So I hand you a document marked as

4 Plaintiff's Exhibit 68 Mr Lipscomb, if you

5 would, explain to us how a lot of this works with

6 regard to the commitment letter and the closing

7 Does the commitment letter happen with it closes

8 or beforehand?

9 A Well, it happens before then because you go

10 to the bank and you ask them You may go to

11 several banks but you get a bank to say they'll do

12 the loan and once they say they're going to do the

13 loan, they'll give you the terms as to how they

14 will do the loan and that might vary from bank to

15 bank or the way the economy is or whatever but

16 they will write it out specifically Now, the

17 reason they don't close the loan at the time is

18 they have to get appraisals and they have to get

19 various legal documents done but - and I'm not

20 saying banks don't have outs - but usually they

21 already have commitment from the credit department

22 as to how long they will be handling it

23 Q And, Mr Lipscomb, just to orientate

24 ourselves time wise, this document is dated what

25 day?

Mr Lipscomb, Direct Examination

1 A August first, 2001

2 Q And just from a time standpoint, I'm going to
3 hand you Plaintiff's Exhibit 16, which we'll talk
4 about in a minute What is that document?

5 A This is a Borrower's Statement from the bank
6 How they handle the funds

7 Q And what is that date?

8 A November nineteenth, 2001

9 Q So, is that when the loan actually became
10 available?

11 A That's when the loan became available

12 Q All right Let's look back at the commitment
13 letter itself and take the first few paragraphs
14 The borrower is listed as SEL Properties, LLC Is
15 that right?

16 A Yes, sir

17 Q And what's the amount of the loan?

18 A Two million, one thousand, three hundred and
19 seventy-five dollars real estate development line
20 of credit

21 Q Tell me what that means Real estate
22 development line of credit

23 A Well, they don't give you this money They
24 might take some of their fees when they do it and
25 they may put some money in reserves and stuff

Mr Lipscomb, Direct Examination

1 but what it means is, you get the money as needed
2 and for whatever part of the budget is needed
3 Like, when the guys were building roads, he would
4 have a draw and then they would go out and look at
5 that draw and they'd say if Tim said the work's
6 done and the infrastructure cost is seventy-five
7 thousand dollars, you'd get seventy thousand The
8 engineers and their people decide on it I'm not
9 the one They have the final say so on what he
10 gets paid

11 Also, there are certain line items that would
12 have been in the borrower statement that you can't
13 - that are given explicitly for those reasons and
14 it would be in the budget

15 Q We'll look at the budget statement in a
16 minute but getting back at the commitment letter
17 itself, paragraph three The purpose of this was
18 - well, what was the purpose?

19 A The purpose of this was to provide funds for
20 the development of the lots for the Courtyards at
21 Rolling Creek phase one

22 Q Now, Mr Lipscomb, there was testimony
23 earlier concerning an interest reserve Would you
24 look at paragraph five please?

25 A Yes, sir

Mr Lipscomb, Direct Examination

1 Q And just read that paragraph to us, sir

2 A Terms Interest only for two years with a
3 final payment of all sums due on the second
4 anniversary of the note dated The loan amount
5 includes an interest reserve of two hundred and
6 fifty thousand dollars, however, such interest may
7 not be used to pay for the first four monthly
8 interest payments which payments shall be made
9 from the borrower's own funds

10 Q So what was the purpose of that interest
11 reserve?

12 A Well, that was to pay the interest on the
13 loan

14 Q Now, take a look back at paragraph number
15 six

16 A Okay

17 Q How was the bank to get paid back on this
18 loan?

19 A Do you want me to read it or do you want me
20 to say?

21 Q Go ahead and read it and then you can say

22 A The borrower shall pay the lender a lease
23 payment to be applied to an outstanding principal
24 balance of the loan in an amount equal to eighty
25 percent of the gross proceeds from the loan

Mr Lipscomb, Direct Examination

1 Q Explain to us how that works

2 A Well, how that works is when a lot is closed,
3 they would take eighty percent of that closing
4 whatever we sell it for - ten thousand, twenty
5 thousand, hundred thousand - they get eighty and
6 the other twenty is used to operate the other
7 ongoing operations of the project

8 I mean, you take care of the people working
9 there, take care of the bills I mean, just
10 everything and that's a common number I mean
11 sometimes it's eighty-five that they take but
12 eighty is more common

13 Q And going down to the collateral

14 A Yes, sir

15 Q I think that's going back to paragraph six
16 You said eighty percent What does paragraph six
17 say?

18 A It says eighty percent to me

19 Q Yes Yes, sir All right So looking at
20 paragraph seven, collateral What does collateral
21 mean?

22 A Collateral means the bank not only wants you
23 to sign a personal in your name but they want you
24 to put up whatever assets are there such as if you
25 get a car loan they want you to put the car

Mr Lipscomb, Direct Examination

1 up for collateral but in this case it was the
2 roads, the land That would have been the assets
3 of Courtyards at Rolling Creek The land and
4 whatever however we made it better such as roads
5 and walls Whatever made it more valuable

6 Q Mr Lipscomb, what does it say about a first
7 mortgage?

8 A Number seven?

9 Q Yes, sir

10 A The title and insurance for real estate
11 mortgage owned 138 130 37 acres

12 Q Okay You can stop there So, it's the
13 first mortgage?

14 A Yes, sir

15 Q Was the land currently mortgaged at that
16 time?

17 A It was mortgaged to them All they were
18 doing is paying it off so they could have first
19 mortgage Yes, sir

20 Q The mortgage existed at NBSC that had to be
21 paid off?

22 A Yes, sir

23 Q And that was for the eight hundred thousand
24 dollars?

25 A All they were doing was moving it into

Mr Lipscomb, Direct Examination

1 the main loan from a little satellite loan

2 Q And finally, Mr Lipscomb, paragraph number
3 eight

4 A Number eight Guarantees?

5 Q Yes, sir

6 A Unconditionally, joint, and several
7 guarantees of Steve Lipscomb That meant beyond
8 SEL Property guaranteeing the first mortgage in a
9 CD which it says up there at the top, they also
10 wanted me personally to guarantee it in case
11 everything went bad

12 Q And did you sign a personal guarantee?

13 A Yes, sir I did

14 Q Now, let's turn your attention please to
15 Plaintiff's Exhibit 16 What's the date of the
16 disbursement for this loan?

17 A November nineteenth, 2001

18 Q All right I'd like you to look at the line
19 items that says Pay Off to NBSC Do you see that?

20 A Yes, sir I see it It says Interbank
21 transaction

22 Q How much money?

23 A It was Interbank Transfer of eight hundred
24 and three thousand, four hundred and seventy-seven
25 dollars and seventy-six cents and that just

Mr Lipscomb, Direct Examination

1 shows that they have the loan there prior to this
2 one and they transferred it over to pay that loan
3 off to incorporate it into this loan

4 Q Now let's look back and then we'll on Let's
5 look back at Plaintiff's Exhibit 1, paragraph two

6 A Paragraph two Okay

7 Q And that paragraph makes reference to
8 securing reasonable financing from conventional
9 lending institutions Is the moneys that were
10 obtained in Exhibit 16, are those funds that you
11 obtained for this project?

12 A Yes, they are

13 Q Mr Lipscomb, at the time that Exhibit 16,
14 Plaintiff's Exhibit 16 was signed and monies were
15 disbursed, did you have any knowledge of any
16 potential shortfall in regard to the project?

17 A Not at this time Not in November I didn't
18 think there was any shortfall

19 Q Now was there any additional collateral
20 provided to the bank in connection with this loan
21 other than the note you signed and the guarantees
22 and the mortgage?

23 A Yes, sir Under collateral Exhibit 68 -
24 there was a two hundred thousand dollar CD put up
25 as additional collateral

Mr Lipscomb, Direct Examination

1 Q Paragraph seven of Exhibit 68 - and that's
2 number three of the assign of the NBSC Certificate
3 of Deposit and that's the two hundred thousand
4 dollars?

5 A Yes, sir

6 Q Now, were the budgets prepared in regard to
7 phase one of the project?

8 A Yes, sir

9 Q And who prepared the budgets?

10 A The Meltons of Dutch Fork Development

11 Q And why would they be responsible for
12 preparing the budget?

13 A Well, I was going to get the financing but I
14 had never did a development of this magnitude and
15 I'm not a developer and I had no idea what the
16 costs were going to be They told me in the
17 budget what the costs were going to be and that's
18 what we went to the bank to try to obtain

19 Q I hand you a document marked as Defendant's
20 Exhibit 2 Do you see that document, sir?

21 A Yes, sir This is the budget and at the
22 bottom it says submitted by W P Melton, Developer
23 and

24 Q What's the date of that budget?

25 A January something It's covered up with

Mr Lipscomb, Direct Examination

1 a stamp January something

2 Q January 2002?

3 A Yes The stamp is over the top of it but I

4 see January

5 Q So this would have actually have the funding

6 for the bank loan?

7 A Yes, sir

8 Q All right And would there have been budgets

9 before this one?

10 A Yes, sir

11 Q Now, this particular budget What does it

12 show for land acquisition?

13 A Eight hundred thousand dollars

14 Q There's been some testimony earlier in this

15 trial about the eight hundred thousand dollars

16 Did anybody ever object to you paying off that

17 eight hundred thousand dollars with regard to the

18 phase one funds?

19 A Nobody ever objected Nobody ever said there

20 was anything wrong with paying the land off for

21 the project

22 Q When was the first time you heard any

23 objections to paying off the eight hundred

24 thousand dollars in connection with phase one?

25 A Not until we got into this litigation

Mr Lipscomb, Direct Examination

1 Q Mr Lipscomb, I'd like to take you back to
2 look at the chronology of the development of the
3 Courtyards after you got the November, 2001 loans
4 proceeds Generally, what happened on the project
5 from November of 2001 to September to 2002?

6 A The roads were being put in during this time
7 Ongoing permits were being obtained and things
8 were going along pretty bad because there was a
9 lot of change orders Extra rock, I mean it
10 started out at seven hundred something thousand
11 and went up to almost eight hundred and eventually
12 went way beyond the scope of this budget

13 Q Tell me - you made reference to change
14 orders Explain generally what a change order is

15 A When you have a contract with the road
16 builder to do the infrastructure, he bids it out
17 to a lot of other people and the engineers have it
18 bid out and the developers and they come up with a
19 cost Now, they have to live by that cost but at
20 certain places and there are things that they can
21 adjust that for such as rock That would be a big
22 one here If the County changes something in the
23 middle of the project then they have to do that
24 and they may have some soft places or they call it
25 mulking They charge you if they dig them out

Mr Lipscomb, Direct Examination

1 by the yard but there are numerous things A
2 change order is not created by the finance person
3 I mean, it's created by the guy doing the roads
4 He says this needs to be done Well, what happens
5 is

6 Q So a change order is an extra type of
7 payment?

8 A It's an extra type of payment It's
9 something extra being done But it can't be done
10 until the engineer agrees it needs to be done
11 Sometimes accounting has to agree But the
12 developer would have to agree and finally to get
13 the money before it would even get started, I
14 would have to sign the change order to allow them
15 to turn it into the bank

16 Q The exhibit we have here showing various
17 change orders has your signatures Did you start
18 any of those change orders?

19 A I didn't start any of those change orders I
20 don't know why some of them were done I know
21 they needed to be done There's no question about
22 that because the engineer said they needed to be
23 done The road man said they needed to be done
24 and the Meltons said they needed to be done I
25 have no qualms about they needed to be done

Mr Lipscomb, Direct Examination

1 but I didn't initiated them No, that's for sure
2 I signed them to send them on to the bank That's
3 when I signed them

4 Q Mr Lipscomb, with regard to the start of
5 sales, when did the sales start out at the
6 Courtyards?

7 A 2002, sometimes around August or September
8 Something like that

9 Q And did sales start after the bonded plat was
10 filed?

11 A Yes, sir

12 Q In testimony about the bonded plat, was that
13 filed sometime in the summer of 2002?

14 A Yes, sir

15 Q When the bonded plat was filed, had the roads
16 been constructed?

17 A The roads had been constructed at that time
18 Yes, sir

19 Q Who handled the bonded plat?

20 A Well, the bonded plat would have been handled
21 by the engineer and the Meltons simply because the
22 County tended to do it by the plat each year has
23 put the amount of money that has to be bonded on
24 it so if you finish the roads you may still need
25 to do some minor work such as I don't know

Mr Lipscomb, Direct Examination

1 what but whatever the bond is for is whatever is
2 not completed times 125 so anytime there would
3 have been a bonded plat the first process would
4 have been for the engineer to decide how much it
5 needed to be for and then fill it out and the
6 Meltons would then take it and bond it

7 Q Bond it Did you have anything to do with
8 bonding the plat?

9 A I had nothing to do with bonding the plat

10 Q Were there any discussions concerning doing
11 the bonded plat before the construction of the
12 roads?

13 A No, sir Never

14 Q Was there any objection by Dutch Fork or the
15 Meltons to doing the bonded plat after the
16 construction of the roads?

17 A No, sir

18 Q When was the first time you heard any
19 objection to the timing of the bonded plat after
20 the roads were constructed as opposed to before?

21 A When this litigation started

22 Q Now, Mr Lipscomb, if somebody had brought
23 that to your attention at the start of the
24 project, the idea of bonding the plat before the
25 roads were being constructed, would you have

Mr Lipscomb, Direct Examination

1 considered that?

2 A I certainly would have

3 Q Why?

4 A Because if it helps them, it helps me It
5 would have helped everybody Sales I mean, if
6 it would have helped sales I would have definitely
7 did it I would have considered it but nobody
8 ever brought it to me Nobody ever brought it to
9 my attention I didn't even know you could do it
10 until after I did not know you could do it
11 until after some of the roads were in

12 Q Now, Mr Lipscomb, we're going to talk about
13 phase four in a little bit But with regard to
14 phase four, was the bonded plat on there before or
15 after the roads were constructed?

16 A It was there after the roads were done The
17 same as we did it in phase one in the exact same
18 way

19 Q Who handled the bonded plat in phase four?

20 A The Meltons and the engineers

21 Q And was there any objection to the timing of
22 the bonded plat in phase four?

23 A There was no objection Now, I still say
24 that I might have to sign just like I have to sign
25 change orders but that's all I did was sign

Mr Lipscomb, Direct Examination

1 when they brought them to me I'm not even sure I
2 had to sign it

3 Q Now, Mr Lipscomb, let's go back to the
4 situation at Rolling Creek in the fall of 2002
5 How did the sales go during that first year from
6 the fall or September of 2002 to August of 2003?

7 A Well, the way I see a sale is when money
8 changes hands and we had nine sales Three of
9 which were K&L, six were other builders

10 Q We're going to talk about K&L in a minute but
11 K&L is a company that you have an interest in?

12 A Yes, sir

13 Q So, there were only six sales of lots to
14 people with companies that you don't have an
15 interest in?

16 A That's correct

17 Q Now, let's talk about K&L What is K&L
18 Contracting, LLC?

19 A It's a limited liability corporation which
20 myself and Pat Kirk, but when I say myself I'm
21 always referring to SEL Properties and Pat Kirk
22 have an ownership

23 Q And what is SEL's role in K&L?

24 A We obtained financing for homes that he might
25 build

Mr Lipscomb, Direct Examination

1 Q And is K&L the manager for K&L?

2 A Pat Kirk is the manager I'm the manager for
3 SEL Properties and I'm the manager for K&L Yes,
4 sir

5 Q And what is Mr Kirk's role in K&L?

6 A He's the same as the developer He was in
7 charge of all the operations The building,
8 terminating, whatever is involved in it

9 Q Was K&L formed in October of 2001?

10 A Yes, sir

11 Q And when K&L was formed, what was the purpose
12 of forming K&L Construction?

13 A Well, we had this project over on Blythewood
14 and

15 Q By 'this project' you mean the Courtyards at
16 Rolling Creek?

17 A Yes, sir The Courtyards at Rolling Creek
18 project and Blythewood

19 Q What's that other project's name?

20 A Stoneton

21 COURT REPORTER Can you spell that for
22 me please?

23 A S T O N E T O N But the reason we started
24 K&L was I thought at that time I thought
25 everything was positive, real positive, so any

Mr Lipscomb, Direct Examination

1 subdivision I started I had dreams of starting
2 lots of subdivisions which didn't go real far
3 You know, they didn't bring builders They didn't
4 have home buyers at the first and we wanted to do
5 a few model seed type things so people would at
6 least see the builders People could at least see
7 what the property was going to look like and kind
8 of make it look like something was happening
9 there Really to make it look like something was
10 happening and such things and to set the stage

11 Q At the beginning of the project, how many
12 homes did you intend to build in the Courtyards?

13 A Well, I didn't intend to build any if we had
14 had builders come in there and take down - if we
15 had had seven or eight builders come in there and
16 take two lots and we would have had fifteen houses
17 were going up, I wouldn't have built any but that
18 didn't happen

19 There was no sales There was a lack of
20 sales and so we came over and built them and went
21 out and went to a couple of different banks I
22 had to sign for them personally SEL Properties
23 probably had to sign for them but anyway, K&L
24 didn't have a name and we went out and got three
25 construction loans from different banks so we

Mr Lipscomb, Direct Examination

1 could start three houses on the corner there

2 so it would look like something was happening

3 And they were to be - one of them was going

4 to be for the model Well, actually two of them

5 was going to be for the model at first but then

6 one of them got put under contract before it got

7 to be a model for the location

8 Q And how many homes did K&L also build at the

9 Courtyards at Rolling Creek?

10 A They built nearly half of them I think they

11 built twenty-eight Twenty-five or twenty-eight

12 Somewhere along there They built about half the

13 houses at the Courtyards at Rolling Creek

14 Q And why did K&L end up building so many?

15 A Because the bank pressure I was under

16 constant pressure from the bank As we took a lot

17 down, they reduced the debt to the bank We were

18 under constant pressure to reduce that debt and

19 nobody else was hardly buying lots out there so we

20 had to buy lots in order to keep the bank halfway

21 happy because as we took a lot down, it reduced

22 the debt to the NBSC loan and we continued to

23 build houses out there until a time when we got

24 stifled with ten houses sitting at one time at a

25 later period

Mr Lipscomb, Direct Examination

1 Q What do you mean by that?

2 A I mean, after a while it caught up with us
3 We had loans with about six different banks
4 BB&T, First Citizens, Security Federal, the bank
5 out of Camden, the bank out of Ridgeway So we
6 were getting loans out everywhere we could so we
7 could buy a lot and start a house

8 Q Okay Let me stop you right there The
9 homes that you were building Were they spec
10 homes?

11 A Yes, sir

12 Q All right Please explain to us what a spec
13 homes is?

14 A A spec home - here again the development
15 business is very risky If you don't have a sale
16 - custom homes - when you start it You have a
17 buyer It takes a lot of the risk out of it A
18 spec home is just you somebody comes along and
19 buys it because if they don't you are stuck with
20 it and he built a couple of custom houses

21 Q Who's he?

22 A K&L Contracting Pat Kirk

23 Q You're saying he built a couple of custom
24 jobs

25 A I would say twenty-five of them That's

Mr Lipscomb, Direct Examination

1 the reason I said there may be more than twenty-
2 five of them But he bought twenty-five lots
3 That's what I think the board said and they were
4 all for spec houses but he did build two or three
5 custom houses also that were very risky I can't
6 set this one Tract builders There are not many
7 builders who have ten houses under construction at
8 one time in a fifty-seven lot development But we
9 had to do it to get some of the debt off of NBSC

10 Q Now, Mr Lipscomb, does K&L currently have
11 any spec houses that are unsold at Rolling Creek?

12 A We still have - at Rolling Creek we have one
13 and at Courtyards at Rolling Creek we have three
14 spec houses and one lot One of the houses was
15 started in 2000 The lot was gone in 2003 and
16 started in 2003 and today it's still sitting there
17 not selling

18 The Meltons at Dutch Fork Realty had it under
19 their contract for two years Every house we did
20 and we're paying interest on those houses as I
21 speak now, I mean, to the tune of and we've got
22 four houses over there so it's probably twelve to
23 fifteen thousand dollars a month in interest

24 Q So, it's three houses in Courtyards?

25 A Three in Courtyards plus a lot then one

Mr Lipscomb, Direct Examination

1 house at Rolling Creek

2 Q Phase four?

3 A Phase four

4 Q All right Now, was K&L's involvement in
5 Courtyards at Rolling Creek project profitable for
6 him?

7 A No

8 Q Explain why not?

9 A Why not?

10 Q Explain why not?

11 A The reason was probably because we never made
12 any money We sold houses at Rolling Creek We
13 never K&L is being shut down now We would
14 completely shut it down Pat Kirk is leaving
15 because he's a Clemson graduate and he wanted to
16 make some money His salary is not very much and
17 he was always looking for a big bonus

18 We never made any profit with K&L It lost
19 money every year and at the present time the
20 reason we can't shut the corporation down is we've
21 got these houses that are borrowed under K&L's
22 name and we can't shut the corporation down but we
23 are ceasing operations at the end of this month
24 But we can't shut it down until we get rid of
25 these four houses There's actually one

Mr Lipscomb, Direct Examination

1 other house too in another development One But
2 it's leased We do have it leased so the lease is
3 paying payments and we would lease any of these if
4 we could or we'd sell them just to take the load
5 off the burden

6 Q Mr Lipscomb, did SEL ever allow K&L to
7 purchase lots for less than forty thousand
8 dollars?

9 A Yes, sir There's three of them

10 Q Tell me about them

11 A Well, there was - we started this company
12 just to try to make the development go Nobody
13 had purchased a lot over there We went to either
14 two or three different banks over there to try to
15 get these loans It wasn't a lot of them We
16 ended up getting them from two or three Well,
17 the banks said that they would loan us eighty
18 percent of the appraised value of the house and
19 the lot and that's what they did

20 And we paid what they allowed us to pay on
21 those lots from the appraisers and that's the
22 first ones before there could be any precedent set
23 of any higher scale just as D Melton testified in
24 phase four He started out selling lots at
25 thirty-five thousand but he ended up selling

Mr Lipscomb, Direct Examination

1 them at seventy thousand at the end over at
2 Rolling Creek

3 At first, that's all they were appraised for
4 and that's exactly what we did it for because we
5 needed those houses to get something going in
6 Rolling Creek

7 Q After you got those first houses going, did
8 SEL ever allow K&L to purchase other lots for less
9 than forty thousand dollars?

10 A No They actually never purchased one for
11 less than forty thousand dollars They purchased
12 for more than forty thousand dollars

13 Q And just looking briefly at the contract
14 provisions, if you would look at Exhibit 1, I
15 believe is the contract And if you will look at
16 section six, Exclusive Right to Sell And if you
17 will look at the second paragraph Do you see the
18 second paragraph, Mr Lipscomb?

19 A Yes, sir

20 Q What was the second sentence there on the
21 sale price? Can you just read that to us?

22 A The second paragraph

23 Q The second sentence of the second paragraph

24 A The sales price for each lot shall be
25 approved in advance by SEL

Mr Lipscomb, Direct Examination

1 Q So who had the authority to set the final
2 sales price?

3 A We had the final authority to set the final
4 sales price

5 Q Now, you mentioned some pressure from the
6 bank a minute ago Who was the loan officer with
7 regard to this loan?

8 A Ronnie Colson

9 Q He's with NBSC?

10 A Yes, sir

11 Q What was the situation with the bank during
12 the first year of sales?

13 A Well, they were pretty good to us The
14 Meltons and me had talked a lot about it as far as
15 they said that they had sales when we finished the
16 road that they would be able to bring to the
17 table I mean lots of them like six or eight
18 builders times two lots apiece Sixteen or so
19 That didn't happen We had no sales That's the
20 reason K&L built those three houses

21 Q Did you have any conversations with them at
22 all about how many lots per month?

23 A Yes, sir It's not in the contract but they
24 told me they would have at least two sales per
25 month I mean, they told me on many occasions

Mr Lipscomb, Direct Examination

1 we would have two sales per month and that they
2 had builders ready to buy the lots at Courtyard at
3 Rolling Creek quick as the roads were finished I
4 realize it's not a part of the contract but that's
5 what I was told so

6 Q Now, what - I'm sorry

7 A That's all right

8 Q And what was your arrangement with the bank?

9 A that we were going to sell at least two a
10 month because I figured with a jump of at least
11 sixteen or so lots off the bat and they said we
12 were going to sell two then what happened

13 Q Now, Mr Lipscomb, the two sales per month,
14 was that discussed on one occasion or more than
15 one?

16 A On many occasions

17 Q And who did you have that conversation with?

18 A With D Melton and Mr Melton

19 Q And you said that's not part of the contract
20 but were those discussions before or after the
21 contract was signed?

22 A Before the contract was signed and during the
23 contract

24 Q Now, what - you mentioned pressure from the
25 bank Which kind of pressure were you having

Mr Lipscomb, Direct Examination

1 from the bank? How did you feel pressure from the
2 bank?

3 A Pressure from the bank that, you know, that
4 this loan was somewhat in default because we
5 weren't meeting our obligations

6 Q Meeting your obligations in terms of paying
7 the lot sales The lot releases

8 A Paying the lot releases Yes, sir

9 Q And did you ever have any meetings with the
10 bank concerning that situation?

11 A Yes I had lots of meetings They came out
12 there Even the Meltons were there on many
13 occasions D Melton especially Also at the
14 bank

15 Q And what was the purpose at the bank meeting?

16 A To try to straighten it out with the bank
17 To talk to them why we weren't selling two a
18 month

19 Q Now, besides the lot sales, were there any
20 other problems on the project during that
21 timeframe?

22 A There were lots of problems

23 Q Were there any problems with the budget?

24 A That was the biggest problem The roads and
25 lawn was over the budget given me by Mr Melton

Mr Lipscomb, Direct Examination

1 was two hundred and twenty-six thousand dollars

2 And that wasn't all of it I mean, the

3 landscaping was over it The walls was over it

4 Everything was over it

5 Q What did the impact of the overages do to the
6 project?

7 A That plus the lack of sales caused it not to
8 ever have any money and I had - SEL Property had
9 to go out and get money to put in to keep this
10 project even afloat or it would have went
11 bankrupt

12 Q And how much money did you put into this
13 project over time?

14 A We put in over six hundred thousand above
15 what was borrowed at the bank That's how much
16 overages there were I mean, this thing was not
17 only slightly out of budget It was totally out
18 of budget When the infrastructure at the very
19 first was around seven hundred and fifty or eight
20 hundred thousand dollars and it goes six hundred
21 thousand dollars out of budget

22 Q How did SEL get that was six hundred
23 thousand dollars - was that it's high point?

24 A That was the high point but still owed a
25 hundred thousand Around a hundred thousand

Mr Lipscomb, Direct Examination

1 dollars

2 Q How did SEL Properties get the money to put
3 into the Courtyards project?

4 A We borrowed it and scrimped Anyway we
5 could We borrowed it out of other companies
6 credit lines We borrowed money from them to give
7 to this project There was times I took money off
8 of my credit cards to put into this thing but
9 mainly we borrowed from other companies They
10 ended up with bank charges too because we were
11 sucking money away from them for this project

12 Q We'll talk about bank charges in a minute but
13 let's shift to road repairs There was testimony
14 earlier in this case on road repairs Can you
15 explain to me what the road problems were out
16 there?

17 A The road problems were that the - well, I'm
18 not an engineer and I'm not a developer but as I
19 understand it that the soil under the roads
20 wouldn't take water Well, roads initially

21 MR BOWENS I'm going to object to
22 this He's not able to explain from his personal
23 knowledge then he shouldn't be giving testimony as
24 to the source of the road problem

25 A Well, I was told this in a letter

Mr Lipscomb, Direct Examination

1 from Rick Metts saying

2 THE COURT One moment

3 MR BABCOCK This comes from the
4 witness' understanding and it's already discussed
5 and I'm happy to give the witness the next exhibit
6 which is Plaintiff's Exhibit 4 which talks about
7 it Already in evidence by the Plaintiff

8 THE COURT I think he can talk about
9 what he has knowledge of but not what somebody
10 told unless it was relating to what the Plaintiffs
11 may have had discussions with him about

12 Q I'm going to hand you Defendant's Exhibit 4

13 Mr Lipscomb, who is this letter written by?

14 A The engineer Maxheimer

15 Q That was the engineer that testified last
16 week

17 A Yes, sir

18 Q And who is the letter written to?

19 A Mr D Melton

20 Q And did you receive a copy of it? Do you see
21 the post it note?

22 A I believe I did Yes, sir

23 Q Okay And if you would, Mr Lipscomb Just
24 read the first two paragraphs to the Jury

25 A Dear Mr Melton I am writing this

Mr Lipscomb, Direct Examination

1 letter to keep you informed as to our observations
2 regarding our pavement failures in the above
3 records project in Courtyards at Rolling Creek
4 The pavement failure has occurred at the
5 Courtyards at Rolling Creek on Boyd Branch
6 Crossing near the traffic circle It was observed
7 that an irrigation system has been installed
8 adjacent to the back of the curve It was
9 observed that the pavement failures coincided with
10 the areas that the irrigation system has been
11 installed It was observed that the trench that
12 the irrigation system has in place has not been
13 thoroughly compacted

14 Q Now, Mr Lipscomb, let me stop you there
15 Tell the Jury during the June of the 2003 period
16 what the roads looked like out at phase one?

17 A Phase one?

18 Q Yes, sir

19 A Well, on the entranceway they looked pretty
20 bad because I mean they were starting to look
21 pretty bad there because as he's written here
22 evidently the water seeped under the road The
23 landscaping people who put water down under the
24 road and caused the roads to deteriorate

25 Q Now, Mr Lipscomb, after receiving this

Mr Lipscomb, Direct Examination

1 letter, what did you and the Meltons do?

2 A This was on June tenth of 2002 After that
3 we had to get specialists I think they tested
4 about two or three outside engineering companies
5 to do it that specialized in how to deal with the
6 soil

7 Q When did that happen?

8 A That happened within the next month or so?

9 Q Okay

10 A I mean, quickly These are specialists
11 They would not come out that day but it was not
12 long It's on the exhibits But they came out
13 and they analyzed it and it was about three
14 different ones and here again what they analyzed
15 and stuff I don't exactly understand it but I saw
16 it I looked at it

17 The engineers understand it but to fix the
18 roads they also had to go to the County once the
19 engineers decided on a fix they had to go to the
20 County Gordon green Who would say whether that
21 was the proper way of doing it and the County
22 always takes twenty/thirty days You know what I
23 mean

24 Q Were the Meltons involved with the process of
25 the other engineers coming in looking at

Mr Lipscomb, Direct Examination

1 this problem in the summer of 2003?

2 A Yes D Melton's name is on here I mean he
3 was a main player They were the developers
4 They definitely knew about it

5 Q And when did the road repairs actually start?

6 A They started about - we were first notified
7 in June so I would say it took a month for the
8 people to decide so probably around September or
9 October of that same year The road repairs
10 started

11 Q Okay Now, were there also road problems in
12 phase four?

13 A Yes, sir

14 Q All right And if you look down at the fifth
15 paragraph of the Defendant's Exhibit 4 Could you
16 read that, sir?

17 A Pavement failures have occurred in Rolling
18 Creek, phase four, on Dutch Creek Trail In an
19 attempt to determine an approximate cause of the
20 pavement failure a small diagram, small diameter
21 classic pipe, was inserted into the four inch
22 diameter under the drain and used as a probe to
23 determine if the under drain pipe was clogged

24 Q All right So were there problems in phase
25 four on the roadways?

Mr Lipscomb, Direct Examination

1 A Yes, sir

2 Q All right And had they taken care of the
3 problems in phase one?

4 A They were the same and they had to be fixed
5 the same way

6 Q And who did the repair work in phase one for
7 you?

8 A Well, the way they wanted to do it was a
9 process that I had never - I'm not an engineer but
10 I don't think it's happened too often - they had a
11 specialist come out of Florence and what they did
12 is they actually tilled it Not with a garden
13 tiller but with a huge machine and they put dry
14 cement in it and they mixed it with the soil to
15 make the soil much harder because it had a certain
16 amount of cement in it

17 Then they put it back and that was the
18 process and they didn't have anybody - Gore Marine
19 I believe was the one who recommended the person
20 in Columbia at the time who did that and these
21 people were pretty busy but they came as quick as
22 they could Ultimately it took them a little
23 longer than they thought They had to leave the
24 job for a short period of time Not for funding
25 but they had to leave the job for a week maybe

Mr Lipscomb, Direct Examination

1 and then come back

2 Q Why did they have to leave the job?

3 A Because they already had another commitment
4 at another location that they had to meet and they
5 had to leave

6 Q Now, we're going to talk about phase four a
7 little bit later but was there any problem with
8 the lot sales of phase four?

9 A I never heard a complaint from the There
10 was no complaint from me and I never heard a
11 complaint from the Meltons

12 Q Okay Mr Lipscomb, a minute ago you
13 mentioned late payments Were there any late
14 payments in this project?

15 A Yes, sir There were late payments There
16 was no sales We didn't have money to operate
17 with The budget had gone over tremendously
18 Yes, sir There was late payments

19 Q And were there any finance charges with
20 regard to this project?

21 A Yes, sir We didn't have funding from lack
22 of sales and we had incurred financial charges
23 just like a credit card If you don't pay, you
24 owe it But we ultimately paid these

25 Q How about late fees?

Mr Lipscomb, Direct Examination

1 A Yes, sir There were late fees for the same
2 reasons

3 Q Would you have made these payments on time if
4 there had been money?

5 A I certainly would have I mean, it didn't
6 hurt the Melton's credit It hurt my credit

7 Q Again, SEL Properties is what you're talking
8 about

9 A Yes, sir I'm talking about SEL Properties

10 Q Now, you told me earlier about some escrow
11 expenses and you said something about rock

12 A Yes, sir There was a lot of rock in phase
13 four Excuse me, not phase four - phase one at
14 Rolling Creek

15 Q Okay And what did it have to do to the
16 budget?

17 A It really cost us

18 Q Why so?

19 A Because in the contract, they had allowances
20 for the amount of rock that would be removed at a
21 certain cost and the more there would The
22 engineer would estimate the amount of rock he
23 thought they would encounter because below that we
24 would see a credit and if it was above that we
25 would have to pay Now, the contract

Mr Lipscomb, Direct Examination

1 could have went down If they had any rock, it's
2 possible the contract would have been less because
3 they do some kind of estimating or guessing more
4 or less how much rock they're going to encounter

5 Q Now, Mr Lipscomb, you told us about SEL
6 having put extra money into the Rolling Creek
7 account How much was the most that SEL put in?

8 A The most that SEL put in was six hundred
9 thousand

10 Q And let's take a look at the contracts Now
11 under the contract, was it your understanding that
12 SEL had to put additional money in - the six
13 hundred thousand?

14 A No Under the contract and under the loan
15 from the bank we were not required to put extra
16 money in

17 Q So why did you put the extra money in?

18 A Because I personally and SEL has guaranteed a
19 loan that's about to go into default and if we
20 don't put money in we're the only ones that's
21 going to be out of here We're the ones that are
22 liable ultimately for SEL Properties, myself
23 personally, ultimately liable to the bank if we
24 don't pay it we're up the creek I mean, they
25 would come after us

Mr Lipscomb, Direct Examination

1 MR BABCOCK Your Honor, may we
2 approach?

3 THE COURT Yes

4 (Short discussion at the bench)

5 THE COURT Ladies and gentlemen, this
6 would be a good time to take a morning break I'm
7 going to remind you the instructions I've given to
8 you previously That is not to begin to discuss
9 this matter among yourselves because you still
10 haven't heard all the testimony and it still has
11 to be presented Let's take a break and we'll
12 come back

13 (The Jury is dismissed for a morning break)

14 THE COURT Mr Lipscomb, I'm going to
15 instruct you that you are not to discuss your
16 testimony with anyone as you haven't concluded it
17 Let's take a break and we'll come back

18 (The Court is adjourned for a morning break)

19 (The Court has returned from break)

20 THE COURT Is there anything we need to
21 take up before we bring the Jury back?

22 MR BABCOCK Not from the Defense, Your
23 Honor

24 MR BOWENS No, Your Honor

25 THE COURT Will you ask the Jury to

Mr Lipscomb, Direct Examination

1 come in please?

2 (The Jury is brought into the Courtroom)

3 THE COURT You may continue

4 MR BABCOCK Thank you, Your Honor

5 Q Mr Lipscomb, there's been some testimony
6 about the way your bookkeepers handled some
7 invoices and things for the Courtyard Can you
8 tell us generally what your bookkeeping situation
9 was for the Courtyard project?

10 A The books were kept at an office in
11 Ballantine that's approximately about from the
12 Courtyard maybe two miles across You come back
13 to the bridge, cross the interstate, and it's on
14 the other side at the Ballantine Post Office which
15 is on Highway 176 John Glenn was the CPA and I
16 had a girl or some girls hired that did the
17 posting Is that what you're asking?

18 Q Yes, sir

19 A Okay

20 Q They handled the invoices themselves

21 A Yes, sir

22 Q All right Were you involved with any
23 allocations of construction costs between phases
24 one, two, and three?

25 A No, I was not

Mr Lipscomb, Direct Examination

1 Q Were you ever involved in any allocation for
2 any engineering costs between phases one, two, and
3 three?

4 A No, I was not

5 Q Now, let's go back to the early 2004 time
6 period What generally was happening in the early
7 to spring period of 2004 project?

8 A 2004?

9 Q Yes, sir

10 A We're still out there struggling Trying to
11 sell the lots and I was frustrated and the bank
12 was at this time more and more they were also
13 getting more and more frustrated because we had
14 low sales Sales just weren't happening and I
15 think 2004 is when I instructed the attorney to
16 write a letter to the Meltons dismissing them
17 because I didn't think they were meeting the sales
18 contract Since then I've learned that they had
19 met them

20 Q Let me show you Plaintiff's Exhibit 17 and is
21 this the letter that you were just referencing,
22 Mr Lipscomb?

23 A Yes, sir This is between SEL Properties and
24 Dutch Fork Realty and Dutch Fork Development

25 Q And it was written by Ed Camden Louis

Mr Lipscomb, Direct Examination

- 1 Is that right?
- 2 A Yes, sir
- 3 Q Was he your lawyer?
- 4 A Yes, sir
- 5 Q And did you direct him to write this letter?
- 6 A I did
- 7 Q Now, the letter Let's look at the first
- 8 paragraph
- 9 A Okay
- 10 Q That letter makes reference to the road
- 11 problems and the budget problems Do you see
- 12 that?
- 13 A Yes, sir
- 14 Q Are those the same problems you talked to us
- 15 about earlier?
- 16 A Yes, sir They are
- 17 Q And would that have been a basis for
- 18 terminating the contract?
- 19 A Well, at the time I definitely thought it was
- 20 a basis for terminating the contract Yes, sir
- 21 Q How about now?
- 22 A Well, no
- 23 Q You understand that's not in the contract
- 24 itself Correct?
- 25 A Yes, sir That's not in the contract

Mr Lipscomb, Direct Examination

1 Directly in the contract

2 Q And let's also look at the quoted language
3 about twenty percent Do you see where it says
4 the failure of DFDG and DFR to sell these twenty
5 percent of available lots in any one year period?
6 Do you see that sir?

7 A Yes, sir

8 Q All right Now, you said, you know now that
9 the termination was incorrect Why is that?

10 A Well, I know it's incorrect because they did
11 meet twenty percent at the time of the letter

12 Q Well, what's twenty percent?

13 A Twenty percent of fifty-seven would be
14 approximately one sale per month which would be
15 over a period of time would be one sale per month,
16 yes, sir, would be eleven something

17 Q And did they hit that?

18 A Well, my understanding is that they did hit
19 that according to the contract but I'd like to
20 explain that My understanding as SEL

21 MR BOWENS Your Honor, I'd like to
22 object on that point we discussed earlier

23 MR BABCOCK Your Honor, he's just
24 talking about selling right now

25 THE COURT Rephrase the question

Mr Lipscomb, Direct Examination

1 Q Let's go back, Mr Lipscomb Under the
2 contract itself, how much would twenty percent be?

3 A It would be approximately one per month

4 Q And did Dutch Fork hit that for the first
5 year?

6 A No, sir Sales

7 MR BOWENS May we approach?

8 THE COURT Yes

9 (Short conference at the bench)

10 Q Mr Lipscomb, maybe we should go back to the
11 twenty percent With fifty-seven lots,
12 approximately how many lots were to be sold in one
13 year?

14 A The way it is now, by contract it would have
15 been one per month

16 Q No Total for that year sir

17 A Total Twelve

18 Q And during the first year from September 2002
19 to August 2003, how many lots were actually sold?

20 A There was nine lots paid for, three of which
21 were K&L and six of which were other builders In
22 my mind that was not twenty percent I mean, nine
23 is not twelve and I made a mistake according to
24 the contract law and how it is but that doesn't
25 make sense to me

Mr Lipscomb, Direct Examination

1 Q All right Now, I was looking at that year
2 period at the end of August 2003 How about May
3 of 2004?

4 A Now, May of 2004, they had not sold as I had
5 discussed that particular month but if you include
6 K&L's lots who they didn't go out and get those
7 sales, they would have been one per month

8 Q Now, in retrospect, do you believe this
9 letter of termination was incorrect on the twenty
10 percent issue?

11 A What I thought twenty percent was at the time
12 but now according to the contract they're entitled
13 to any sales, that of SEL and K&L and of other
14 people which I didn't think because they didn't
15 make any effort to go out and do it so that it
16 counted but according to the contract anything
17 that changed hands and changed money is a joint
18 sale and that was a mistake

19 Q And this provision here, the twenty percent,
20 is not two per month, is it?

21 A No, sir

22 Q All right So, as you sit here today, should
23 this letter have been sent?

24 A No, not the way that the contract reads that
25 you interpret how many lots are sold at this time

Mr Lipscomb, Direct Examination

1 Q All right Now, Mr Lipscomb, let's shift to
2 after the letter was sent What happened to the
3 remainder of 2004 on the project? Did the Meltons
4 continue out at the project?

5 A They stayed out there trying to sell houses
6 and I was glad for anybody to try to sell houses
7 We had tons of houses to sell and later on they
8 sent us this litigation lawsuit

9 Q Now, there's been some testimony about
10 another company selling lots out there - Asset
11 Realty Can you tell us about that, please sir?

12 A Asset Realty is a nice guy named Ronnie Mylan
13 who the Meltons hired to come out and help sell
14 lots and I wish they'd have hired ten people
15 because he did a much better job at selling than
16 they did

17 Q And did he stay on site after the May of 2004
18 letter was written?

19 A Yes, sir

20 Q And Mr Lipscomb, ultimately of course, this
21 litigation commenced in February 2005 Is that
22 right?

23 A Yes, sir

24 Q Now, let's look at phases two and three
25 What's the current situation with regards to

Mr Lipscomb, Direct Examination

1 phases two and three?

2 A Phase two in 2006 - in the summer of 2006 we
3 started the roads and infrastructure and as I
4 stated earlier I know the curbs are in and they
5 are working on the roads but I haven't been out
6 there in about ten days

7 Q Mr Lipscomb, just so we're clear, we're here
8 in November of 2007 When did the roadwork begin
9 in phase two?

10 A It began this year Excuse me

11 Q Okay

12 A It began about three months ago Sorry I
13 forgot what year we were in The roadwork began
14 in 2007 It's just now being done

15 Q And how long will it be before you are in a
16 position - SEL is in a position to actually sell
17 lots in phase two?

18 A I don't know Sometime early next year

19 Q I'm going to hand you a document that's been
20 marked as Plaintiff's Exhibit 123 Are you
21 familiar with that document?

22 A Yes, sir

23 Q All right And let's look at the very first
24 paragraph there and what is the date of that
25 contract?

Mr Lipscomb, Direct Examination

1 The date of this contract is the fifteenth day of
2 September, 2006

3 Q And who is the seller in this contract?

4 A SEL Properties?

5 Q And who is the purchaser or buyer?

6 A Essex Homes, SE Inc

7 Q All right And does this contract involve
8 lots in phase two?

9 A Yes, sir

10 Q Does it also involve lots in phase three?

11 A Yes, sir

12 Q Generally, how would the lots sales go with
13 regards to this contract?

14 A This contract we will develop phase two and
15 if everything goes right, they would take down
16 part of phase two

17 Q What do you mean take down?

18 A That means, they would purchase part of the
19 lots in phase two I'm sorry They would
20 purchase a certain number of the lots in phase
21 two

22 Q And then at a later point purchase more lots

23 A Yes, sir If things go well

24 Q Now, this contract dated September fifteenth,
25 2006, when did you start negotiating with

Mr Lipscomb, Direct Examination

1 Essex for this contract?

2 A I'm not exactly sure of the date but a couple
3 of months before this probably

4 Q Sometime in 2006?

5 A Yes, sir

6 Q Mr Lipscomb, with regard to the different
7 phases of Rolling Creek, where have those monies
8 been placed?

9 A Different phases of Rolling Creek? Where
10 have they been put?

11 Q Yes, sir Monies say from the checking
12 account

13 A Well, it's put in Rolling Creek does have
14 a checking account but it's all handled through a
15 general ledger ,

16 Q All right But in the checking account, is
17 that where phase one monies went?

18 A Yes, sir

19 Q And phase four?

20 A Yes, sir

21 Q You didn't have separate checking accounts
22 for different phases?

23 A No, sir

24 Q All right Now, insofar as the Essex
25 contract is concerned, do you know whether

Mr Lipscomb, Direct Examination

1 there will be any profit for phase two?

2 A I know there won't be any profit for phase
3 two

4 Q Well, how do you know that?

5 A Because I can multiply the number of lots in
6 phase two by what they say they are going to pay
7 for them and I know what's still owed at just the
8 bank and not counting to SEL Properties or the
9 Meltons

10 Q And what's owed to the bank?

11 A 2 8 million dollars

12 Q Does that also include part of the phase one
13 loan that was not paid off?

14 A Yes, sir Phase one did not make money
15 Cash flow - from an accounting point of view when
16 they move stuff around for tax reasons they made
17 sure but they didn't make any cash flow

18 Q And did you know whether there would be any
19 profits on phase three?

20 A No, sir

21 Q When will you begin building and marketing
22 for phase three? Do you know?

23 A I don't know if it's even going to happen or
24 not They've got to buy these lots in phase two
25 before I can get the money together for phase

Mr Lipscomb, Direct Examination

1 three to build it

2 Q All right Will there be additional
3 borrowing that you'll need to have for phase
4 three?

5 A I mean, this section right here has sixty-six
6 lots The next phase has like a hundred to a
7 hundred and thirty lots so it's going to be more
8 for the infrastructure there

9 Q Is it your expectation at the end that there
10 will be some profit?

11 A I'm hoping there will be some profit I
12 mean, I put my family at risk I put everything
13 at risk and you know, ten years later, I hope
14 there would be some profit But I don't know

15 Q Now, you've talked about the construction of
16 the road to get from phase one to phase two and we
17 saw early on in the map where the road was Just
18 tell us again how you get from phase one to phase
19 two

20 A There's a creek that had to have a bridge put
21 in, piping put in to go from phase one to phase
22 two and you go down Boyd Branch Road Boyd Branch
23 Road

24 Q Hold that map up and show where Boyd Branch
25 Crossing is

Mr Lipscomb, Direct Examination

1 Q Thank you All right Go ahead and explain,

2 Mr Lipscomb

3 A Well, you continue down Boyd Branch Road and

4 you cross over the creek and you continue down

5 towards what is now there is being a we promise

6 there is being a swimming pool and a pavilion

7 Not really a club house but a pavilion put in

8 phase two

9 Q And will that be available for all phases?

10 A It's for phase one and for phase two and if

11 there is ever a phase three it will be for it

12 Q Now, is there any additional repairs to the

13 roads that are needed in phase one?

14 A All that section that is not being used by

15 the people right now on Boyd Branch Road from

16 Summer Branch Lane down to where the new

17 construction starts has to be completely taken up

18 and redone

19 Q All right And just so all the other parcels

20 face out on the other streets Is that correct?

21 A Yes, sir No houses face that street so it

22 didn't need to be repaired until we went to phase

23 two because the trucks just would have messed it

24 up anyway

25 Q So, you waited until you went to phase

Mr Lipscomb, Direct Examination

1 two to construct it Is that right?
2 A That's right
3 Q Now, there's been some testimony concerning
4 the plans for phase two Originally with regard
5 to the project, how many - were there plans for
6 all phases?
7 A Originally there were for all the phases
8 Q Tell me about the first change with regard to
9 the plans for phase two How did that come about?
10 A Well, there was changes This - you have to
11 put this in timeframe I want to put this in a
12 timeframe This was before any lots were sold
13 Q Any lots in phase one were sold?
14 A Any lots in phase one Of course D
15 Melton, myself, and I can't be sure who else but
16 D Melton said, listen, we only got fifty-seven
17 lots We got eight buildings that's going to take
18 another piece That's sixteen and we're going to
19 be selling two a month I mean, we're going to be
20 out of lots here within a year and you know it
21 takes a year to build roads along there so he says
22 and I'm agreeing with him because I'm on board
23 because I'm thinking we're going to sell a lot of
24 stuff too
25 Then he says that our conversation is

Mr Lipscomb, Direct Examination

1 that if we could add more we could have some
2 profits to share because at that time we weren't
3 sure that even phase one so naturally I was on
4 board I'm the only one that can go an tell the
5 engineer that we were going to pay him to do
6 something different so yes, and I went to
7 Maxheimer and they were all fully aware that I
8 went to Maxheimer

9 They were the ones that insisted on doing
10 this but listen, I was all for this too
11 Maxheimer said, you can make changes that will
12 help us in phase two then yes, we'll do it And
13 that's the way it got started but this was before
14 the wheel ran off and before all these overages
15 occurred at that time The sales were only
16 projections

17 None of them had happened and, you know, I
18 was excited I mean, I thought it was going to
19 happen the way the story went and I wish it had
20 happened that way It didn't happen that way I
21 wish it had happened for the Meltons I wish it
22 had happened for me I wouldn't be in the jam I
23 am in today owing banks all this money

24 When I say that SEL Property and I am
25 personally guaranteed and I'm the only one

Mr Lipscomb, Direct Examination

1 stuck with it When I say I, legally I should say
2 SEL Properties and my personal guarantee But I'm
3 basically paying

4 Q Mr Lipscomb, so to understand, the initial
5 changes to the phase two lots got more lots in
6 phase two Is that right?

7 A Yes That's right

8 Q And at any point in time did the Meltons ask
9 to go forward or backward and use the original
10 plans instead of the new plans?

11 A They never - until this litigation came
12 around It's a way of destructive Anyway
13 Excuse me

14 Q Prior to the termination of the letter of
15 May, 2004, did you have any other changes to phase
16 two?

17 A Not at that time, no

18 Q When did you? Did you at some point later
19 on?

20 A Yes, sir

21 Q All right When was that?

22 A Sometime in 2006 I believe We had them
23 re-engineered

24 Q All right And who did that?

25 A The same engineering company LETTS

Mr Lipscomb, Direct Examination

1 They changed their name to something but I'm still
2 going to call them LETTS

3 Q And does that engineering company do any work
4 with the Meltons aside from the Courtyards?

5 A I'm not sure about that

6 Q Did you have any conversation with Mr
7 Maxheimer about not saying anything to the Meltons
8 about the new (inaudible)?

9 A Only after their contract had been gone way
10 over five years I never told them while their
11 contract was going on Any of those earlier
12 changes - you're talking about those earlier
13 changes Absolutely not Now, I told them it
14 wasn't any of their business after five years had
15 run out and we were in 2006

16 Q All right So, you're talking about changes
17 with what, the Essex contract?

18 A Yes, sir I said that was none of their
19 business but never on the first ones They went
20 to the engineers all the time to pick up the
21 change orders and everything I didn't do that
22 They were there on a constant basis

23 Q All right Mr Lipscomb, let's look back at
24 phase one with regard to the profits Before this
25 lawsuit started, did you think there were any

Mr Lipscomb, Direct Examination

- 1 profits with regard to phase one?
- 2 A Absolutely No profits
- 3 Q Why do you say that?
- 4 A Because there just wasn't any There was no
- 5 money There was lots of money owed to us The
- 6 Meltons were owed the fifty-four thousand although
- 7 they said that I could defer it We knew there
- 8 wasn't any profits I knew there wasn't any
- 9 profits for that point of view and until this
- 10 litigation came around and until later that I
- 11 found out that because of the way things are
- 12 allocated it creates a book profit, but not
- 13 dollars Book profits are like depreciation
- 14 That's the profits that are shown No cash
- 15 profits
- 16 Q With regard to the checkbook itself, has that
- 17 ever been in a positive position with regard to
- 18 the Courtyard sales?
- 19 A No
- 20 Q Now, at the present time, does SEL Properties
- 21 still owe money with regard to Rolling Creek?
- 22 A Yes, sir
- 23 Q How much?
- 24 A Approximately a hundred thousand dollars
- 25 Q In connection with this lawsuit, Mr

Mr Lipscomb, Direct Examination

1 Lipscomb, did you retain Marty Outs to calculate
2 whether there are any profits?

3 A Yes, sir I did

4 Q And do you know whether he has done so?

5 A Yes, sir He has

6 Q And are you willing to accept Mr Outs'
7 calculations?

8 A Yes, sir

9 Q And based on Mr Outs' calculations which
10 he'll testify to, do you agree you owe whatever
11 he's calculated to Dutch Fork?

12 A Yes, sir

13 Q And we talked about this earlier, do you
14 believe that SEL Properties owes Dutch Fork a
15 development fee for phase one?

16 A Yes, sir I do According to the contract
17 now

18 Q That's the fifty-four thousand dollars?

19 A Yes, sir

20 Q Now, does SEL Properties owe any commissions
21 on phase one?

22 A No, sir

23 Q Why not?

24 A There weren't any commissions

25 Q Yes, sir Are there any unpaid

Mr Lipscomb, Direct Examination

1 commissions?

2 A No, sir

3 Q Now, let's look at phases two and three

4 Does SEL Properties owe any commissions or profits
5 on phase two?

6 A No, sir

7 Q Why not?

8 A There was no infrastructure started in phase
9 two prior to their termination

10 Q And so does SEL Properties owe any
11 commissions or profits on phase three?

12 A No, sir

13 Q Phase three hasn't even begun yet Has it?

14 A No, sir It hasn't

15 Q Now, let's go back to the other phase in this
16 contract with a separate contract, phase four
17 There was a separate contract for phase four,
18 wasn't there?

19 A Yes, sir

20 Q I'm going to hand you document marked as
21 Plaintiff's Exhibit 2 and is this the contract for
22 phase four?

23 A Yes, sir

24 Q All right Let's just look at the first
25 paragraph there and this document is dated

Mr Lipscomb, Direct Examination

1 October seventeenth, 2002 Is that right?

2 A Yes, sir

3 Q And that's between SEL Properties, Dutch Fork
4 Realty, and Dutch Fork Development Group. Is that
5 right?

6 A Yes, sir

7 Q Now, how did phase four go?

8 A It went along fine

9 Q Did you have any road problems with phase
10 four?

11 A Yes, sir We had road problems with phase
12 four

13 Q Did it cause extra money to fix those
14 problems?

15 A Yes, sir It did

16 Q All right Did it have any impact on the
17 sales for phase four?

18 A Not to my knowledge

19 Q How big was phase four?

20 A It was a small section that was across the
21 creek You could enter it better from the other
22 side It was only twenty lots

23 Q And was that part of Rolling Creek
24 Subdivision?

25 A Yes, sir It was

Mr Lipscomb, Direct Examination

1 Q What if - if we went out and looked at the
2 phase four houses and then went over to phase one
3 and looked at the Courtyard houses, would we see
4 any differences between the houses and the lots?

5 A No, the only differences is the lots are
6 smaller and they had brick walls around the
7 Courtyards

8 Q You're talking about the Courtyards now

9 A Yes, sir And in Rolling Creek, there were
10 just like all the Rolling Creek houses which did
11 not have the lots were a little larger and they
12 did not have walls around them

13 Q Phase four would have looked like a regular
14 subdivision with lots and houses on the lots

15 A Yes, sir

16 Q Now, on phase four are there any unsold lots
17 still out at phase four?

18 A There is one lot that's a small corner lot
19 It's the smallest lot there and it's been for sale
20 since day one but it just hasn't sold and I
21 suppose because it's small and corner and not
22 quite as big as the rest of them

23 Q And that's the last unsold lot out there?

24 A Yes, sir

25 Q All right Now, under the contract for phase

Mr Lipscomb, Direct Examination

1 two, let's look at the termination section

2 Section 7C And if you could Mr Lipscomb just

3 read 7C to us

4 A The term of five years from the date of the

5 execution of the contract

6 Q And we looked earlier at the execution of the

7 contract was October seventeenth, 2002?

8 A Yes, sir

9 Q So, that five year period would have just

10 expired?

11 A It just expired last month

12 Q Now, with regard to that stage of Rolling

13 Creek, have you requested that Mr Outz make

14 calculations regarding profits for phase four?

15 A Yes, sir I have

16 Q All right And do you accept Mr Outz'

17 figures with regard to phase four?

18 A I accept it

19 Q And is that amount of money that SEL

20 Properties owes to Dutch Fork with regard to phase

21 four?

22 A It is

23 Q Mr Lipscomb, as you sit here today has SEL

24 Properties received any profits with regard to

25 phase one?

Mr Lipscomb, Direct Examination

- 1 A No, sir
- 2 Q Why not?
- 3 A There's not been any money They owe us
- 4 money but we have not received any profits
- 5 Q And if there have been profits in phase one,
- 6 how much would SEL Properties give profit wise
- 7 What percentage?
- 8 A Seventy-five percent
- 9 Q And the twenty-five percent is for Dutch
- 10 Fork Correct?
- 11 A Yes, sir
- 12 Q Now, as you sit here today, has SEL
- 13 Properties received any profits from phase four?
- 14 A No, sir
- 15 Q Why not?
- 16 A Because there hasn't been any money
- 17 Q And again, if there were any profits in phase
- 18 four, how much would SEL Properties be entitled
- 19 to?
- 20 A Seventy-five percent
- 21 Q And the remaining twenty-five percent for
- 22 Dutch Fork?
- 23 A Yes, sir
- 24 Q With the Court's indulgence, one final
- 25 question How many lots were there originally

1 planned for phases two and three?

2 A I think it was 196 or 195

3 Q. Thank you sir

4 THE COURT Mr Bowens?

5 MR BOWENS Thank you, Your Honor

6 CROSS EXAMINATION

7 BY MR BOWENS

8 Q Mr Lipscomb, we agree on a couple of things

9 I guess. We agree that Dutch Fork Development was
10 improperly terminated from this contract Is that
11 right?

12 A The terms of the contract That's correct

13 Q And we agree that the lots did not sell as
14 fast as we all would have liked in phase one

15 A. That's definitely right

16 Q So we agree on those two things

17 A Yes

18 Q I want to make sure that I understand why it
19 was that you were confused or mistaken about this
20 termination Were you confused about the actual
21 lot sales requirement or were you confused about
22 how to calculate it?

23 A. Repeat the question.

24 Q Were you confused about what the lot sales
25 requirement was or about how you calculate how

Mr Lipscomb, Cross Examination

1 many lots needed to be sold to meet the lots sales
2 requirement?

3 A. I was confused about the way to calculate it
4 for one thing I'll explain that

5 Q Okay

6 A When nine lots sold the first year, I didn't
7 think that that met the amount of one per month
8 I didn't think that the ones that they didn't go
9 out and sell themselves, such as K&L's, counted
10 even but even the nine I didn't think met the one
11 per month, but I was confused in thinking that we
12 were supposed to sell two per month also but
13 mathematically

14 Now, later on when we terminated I understand
15 that they did make one per month but my
16 understanding but all along I didn't know that
17 K&L's was going to count and I definitely had in
18 my mind that it was two per month so on those
19 reasons it was the reasons I sent the letter

20 I mean, that could lead to confusion with
21 anyone when only nine lots are sold in the first
22 year but claiming that it's twenty I mean that's
23 twenty percent

24 Q But you didn't terminate the contract in the
25 first year, did you?

Mr Lipscomb, Cross Examination

1 A I did not terminate the contract in the first
2 year

3 Q You waited nine more months

4 A Yes, sir

5 Q. Before you terminated the contract

6 A That's right And you know, over those nine
7 months frustration from the bank and from the lack
8 of sales and from what I was told even though it
9 was not in the contract that there would be lots
10 sold to builders at seven or eight builders at two
11 apiece and there would be two apiece and that
12 there would be two a month and we were so far
13 behind and there was no cash flow The roads were
14 messing up from things. There was no cash flow
15 and we owed the bank and overages were
16 unbelievable outside of budget.

17 Q. Now, you testified that you didn't think the
18 lots sold to K&L counted Is that right?

19 A I just said that but I tell you I know that
20 the contract says that all lots sell but at the
21 time I didn't think that but I agreed with the
22 contract I told you now I've already stated that
23 I understand that my calculations were wrong when
24 I sent that out if you're trying to make a point
25 about that I will tell you that I've already said

Mr Lipscomb, Cross Examination

1 that on the stand

2 Q I just wanted to make sure that you were ,
3 clear about it

4 A I'm very clear about it because I do
5 understand that, I made a mistake by sending out
6 wrong according to the way you calculate in the
7 contract at the time you send it not at any
8 period, not after one year but at the time you
9 send it I mean, I know a good bit about things
10 but I didn't think that we, I mean, wouldn't you
11 think if somebody didn't sell but one a month for
12 the first year that that's less than twenty
13 percent

14 Q But what I'm asking you ..

15 A It says in any year during the contract You
16 know, so what's the point? I'm telling you I
17 understand that according to what contract law
18 that's not the way you figure it out but if you're
19 looking at it from my side

20 Q I just want to make sure that I am clear and
21 the Jury is clear about this one point You would
22 agree now, today that K&L lots counted toward
23 twenty percent ,

24 A I do

25 Q But before you thought they didn't count?

Mr Lipscomb, Cross Examination

1 That's all I'm asking

2 A I want to explain myself I thought they
3 didn't count but it didn't matter There was only
4 nine lots sold even if you include K&Ls the first
5 year so I didn't think it did Okay?

6 Q Well what I want to ask you now though is in
7 paragraph six

8 A Paragraph six Wait a minute let me look

9 Q Exhibit number 1

10 A Is this from the contract?

11 Q Right Have you got that in front of you?

12 A Well, I'd like to have it in front of me so
13 I'll know what you are talking about I can't
14 read that over there I'm sorry All right

15 Q Look at paragraph six and it says that for so
16 long as Dutch Fork Realty is adequately performing
17 as to the terms of this agreement in the course of
18 the two parties, DFR shall be entitled to a real
19 estate commission of ten percent by the closing of
20 the sale of the developed lots to nonbuilders
21 Do you see that?

22 A I see Would you read that one more time
23 please?

24 Q DFR - Dutch Fork Realty shall be entitled to
25 a commission of ten percent upon the closing

Mr Lipscomb, Cross Examination

1 of the sale of developed lots to non builders
2 DFR shall receive no commission for any lots sales
3 to builders

4 A I see it

5 Q Mr Lipscomb, the reason that that was put in
6 there was because you knew that K&L was going to
7 be buying lots and building houses in phase one,
8 in phase two, and phase three and you didn't want
9 to pay a lot commission on lots sold to K&L?

10 A No, sir I disagree and I'll tell you why I
11 disagree I didn't want the Meltons doing what I
12 call double-dipping I didn't want them charging
13 the builders ten cents then sell the price and
14 charge the total six percent and put the lot price
15 back in there and run the price of housing up to
16 buyers causing a lack or slow sales and that's not
17 the only project This is done in all projects or
18 mostly all projects

19 Q As the owner of the property when a lot is
20 sold you would ordinarily expect to pay a
21 commission on the lot sale

22 A No, sir

23 Q You'd expect a real estate

24 A We don't in subdivisions that I've dealt
25 with and I know about the developer does not

Mr Lipscomb, Cross Examination

- 1 give a commission on the lots to builders
- 2 Q So, when Dutch Fork Realty goes out and finds
- 3 a builder to come in and buy a lot
- 4 A Yes, sir
- 5 Q You don't expect to pay a commission?
- 6 A I don't
- 7 Q Are you saying that you didn't want Dutch
- 8 Fork Realty double dipping right?
- 9 A That's what I said
- 10 Q But it was okay for you to double dip
- 11 A How did I double dip?
- 12 Q Well, when you asked K&L as your building
- 13 company Right?
- 14 A
- 15 Q K&L is your building company?
- 16 A Yes, sir
- 17 Q You own eighty percent of it
- 18 A It think that's right Yes, sir
- 19 Q Well, if K&L buys a lot in the Courtyards,
- 20 then SEL benefits from that sale, doesn't it?
- 21 From that purchase? You made money from K&L
- 22 buying the lot
- 23 A I make money
- 24 Q You
- 25 A let me answer the question Okay?

Mr Lipscomb, Cross Examination

1 A Courtyards at Rolling Creek It doesn't
2 matter what builder buys K&L or any of the other
3 builders We would make money Yes, sir

4 Q And then you make money again when K&L sells
5 the house?

6 A I make money again when K&L sell the house
7 How do I make money again when K&L?

8 Q When K&L sells the house they build to a
9 purchaser, K&L makes money on that house sale

10 A They may make money on that house sale but we
11 didn't create an extra expense to run the price of
12 the house up

13 Q When the

14 A I answered the question

15 Q Well, again, you made money Well, SEL made
16 money when the lots are first Is that right?

17 A Dutch Fork, SEL Properties, Courtyards at
18 Rolling Creek, every time we sold a lot we were
19 reducing debt and trying to make money Yes, sir

20 Q And then when K&L or any builder for that
21 matter built sales or spec houses, did they make
22 money on the sale or spec house?

23 A I can't say whether they do or not because I
24 know K&L never made any money but that is the
25 intent to try to make money when they sell their

Mr Lipscomb, Cross Examination

1 spec house
2 Q That's the (inaudible)
3 A But that has nothing to do with what you're
4 talking about
5 Q But what I'm saying is you've made money both
6 ways
7 A I've made money both ways?
8 Q Right You've made money on the lot sales
9 and on the house sales or at least you have
10 potential to, don't you?
11 A I have the potential to make money with every
12 company I run but
13 Q And in this context, you indicate that you
14 wouldn't make money when SEL sells the lots and
15 K&L sells the house
16 A Well, if everything - yes, sir
17 Q So, you have two ways to make money there
18 A I have two ways to make money there Yes,
19 sir
20 Q Somebody will call that double dipping
21 A I don't think that is in the same context as
22 what we just talked about We talked about
23 Q We're through with what we just talked about
24 MR BABCOCK Can he finish his answer,
25 Your Honor?

Mr Lipscomb, Cross Examination

1 THE COURT Let him finish his answer
2 before you ask him another

3 MR BABCOCK Go ahead and finish your
4 answer

5 A It's actually helping if K&L keeps the price
6 down so they can sell houses when they move so
7 that SEL Properties, Dutch Fork, and the Courtyard
8 at Rolling Creek can buy another lot and take down
9 these lots in a timely fashion instead of adding
10 an extra burden and an extra expense on them and
11 the other builders

12 Q K&L was not doing anything to keep the prices
13 down

14 A No But we are at Dutch Fork Dutch Fork,
15 myself, Courtyards at Rolling Creek are by putting
16 this in the contract to K&L Properties and every
17 other builder there

18 Q So, you think it's okay for SEL Properties
19 and by extension yourself to make money on the lot
20 sale and it's okay for K&L and by extension
21 yourself to make money on the house sale but it's
22 not okay for Dutch Fork to make money when they
23 sell a lot and then again when they sell a house
24 That's not okay Is that your testimony?

25 A It's in the agreement that they are not

Mr Lipscomb, Cross Examination

1 supposed to receive a commission on the lot from
2 the builder whereas K&L or any other builder, they
3 are not supposed to receive It's in the
4 contract

5 Q I know it's in there

6 A It's in the contract It's in the contract
7 Yes, sir

8 Q I know it's in there And what I'm asking
9 you is the reason it's in there

10 A The reason is to keep them from getting
11 double commission and keeping the prices of the
12 homes down so we can sell And the builders, not
13 just K&L, all builders, can sell houses and move
14 loans to take down another lot so this project can
15 move forward

16 Q Well, basically you gave up that right in
17 order to give them the exclusive right to sell

18 A I wouldn't have signed the contract with him
19 if they hadn't did it, that's true Because
20 that's the way it's normally done in other
21 subdivisions

22 Q Real estate companies are in the business to
23 make commissions off of properties when they are
24 sold Right?

25 A Real estate companies in general are trying

Mr Lipscomb, Cross Examination

1 to make money No question That's what you're
2 asking

3 Q Now, for all the work that Dutch Fork
4 Development Group and Dutch Fork Realty did in
5 this project, they had to do that no matter who
6 bought the properties Right?

7 A

8 Q In other words, they did all the work They
9 did the advertising They did all the development
10 work They made the place attractive They did
11 all the work the developer in a real estate
12 company does whether K&L bought a lot or somebody
13 else bought a lot

14 A Explain that again Let's go back

15 Q Dutch Fork Realty and Dutch Fork Development
16 Group did all the work that they were supposed to
17 do in terms of marketing the lots and developing
18 the property regardless of who bought it whether
19 it was K&L or anybody else Do you agree with
20 that?

21 A I'd like to answer that question but I'd like
22 to give it some explanations Okay?

23 Q Okay

24 A First of all, any real estate company would
25 have took this property if you tried to sell

Mr Lipscomb, Cross Examination

1 it They love to list property Anyone would
2 have took it They - and anyone would have spent
3 much more money on advertising than over a three
4 and a half year period fifty thousand dollars I
5 can promise you that So, if you are asking me if
6 they had to do it, any real estate company does
7 that They do that to try to generate sales but
8 they weren't doing anything special there

9 Q I didn't say anything special

10 A You inferred that they did something special

11 Q I'm just saying that they did what they were
12 supposed to do and they didn't get any breaks off
13 of that just because K&L bought the lots

14 A They didn't get the breaks off of anybody who
15 bought the lots Any builder who bought the lots

16 Q All right So is it fair to say, Mr
17 Lipscomb, and if it's not fair just say so that
18 you didn't want to pay any commission to Dutch
19 Fork Realty when K&L purchased a lot and then
20 turned around and paid another commission to Dutch
21 Fork Realty when K&L sold the house You just
22 wanted to pay one commission?

23 A I want to answer that by saying I didn't want
24 any of the builders to have to pay double
25 commission to Dutch Fork Realty or any other

Mr Lipscomb, Cross Examination

1 real estate company and we wouldn't do that at any
2 subdivision that I've been associated with or that
3 I know about

4 Q You saved approximately one hundred and
5 eighty-eight thousand dollars in commissions on
6 lots sold and builders didn't

7 A Listen That is customary not to charge a
8 commission on a lot when they get the listing for
9 it But it is a hundred and eighty-eight thousand
10 dollars less if you want to take a hypothetical
11 statement but if they had been doing it for
12 anybody else they would have been doing the same
13 thing

14 Q Well, the testimony in the case has been so
15 far that if you take the number of lots sold to
16 non builders based on what the commissions would
17 have been and that's a hundred and eighty-eight
18 thousand dollars, isn't it?

19 A They weren't entitled to that It says that
20 they don't get commissions from They don't get
21 commissions from

22 Q But you did save that much money?

23 A No, I didn't It was in the contract that
24 they were not never going to get that money

25 Q And the result of that was you say

Mr Lipscomb, Cross Examination

1 that you didn't have to pay it

2 A I've already answered that question a number
3 of times and I'm going to say again they were not
4 owed that money That was part of the contract
5 That they not get that money

6 Q Well, you're right They weren't supposed to
7 get it

8 A Okay Thank you Thank you

9 Q But what they were supposed was the exclusive
10 right to sell in phases two and three

11 A They weren't supposed to get the exclusive
12 right in two and three until we finished and
13 started those phases after sixty percent or more
14 of lots in phase one were completed and I believe
15 it says that in the contract and I don't mind
16 reading it if you'd like me to read it Would you
17 like for me to read it?

18 Q Well, you don't have to read it but you agree
19 that they had the exclusive right to sell in all
20 three phases?

21 A If they did certain things in the contract
22 Those things were never accomplished

23 Q We'll come to that in just a moment Now,
24 you testified on the record that you have a
25 Business Finance Degree from the University

Mr Lipscomb, Cross Examination

1 of South Carolina

2 A That's correct

3 Q And you have a Master's from Notre Dame,
4 don't you?

5 A No, sir

6 Q You don't?

7 A I told you I didn't in the deposition

8 Q You have a two year degree from Notre Dame?

9 A That's correct

10 Q Okay And it's your testimony that you were
11 confused on how to calculate twenty percent?

12 A I told you I was confused and I told you why
13 I was confused and I'd like to go back over it
14 again In the first year of contract, there was
15 only nine lots sold Money exchanged hands Put
16 the board up there and I'd like to show that there
17 was nine lots sold

18 There was three that was under contract
19 That would be like somebody going to a grocery
20 store and putting something in their buggy and not
21 going up to the cashier and paying for it He may
22 take it back and put it back down and that happens
23 a lot of times and it happened a lot of times out
24 here There were a lot of sales that were going
25 to happen but they didn't happen

Mr Lipscomb, Cross Examination

1 Q Well

2 A Nine lots closed the first year and three of
3 them were from K&L and six of them were from other
4 companies The other ones were not closed and we
5 did not delay them That's for sure There were
6 other builders

7 Q All right Let's talk about that

8 A Yeah

9 Q These last four lots on here 10, 11, 12,
10 and 13 These were all sold within the first
11 year

12 A They weren't sold in the first year Oh,
13 let's see

14 Q They didn't close until the second year
15 They sold

16 A The definition of sold is when somebody pays
17 for something in a good, timely exchange Just
18 because somebody says they're going to buy
19 something or assumed to have a contract on it does
20 not mean it's sold I mean, this is I mean, it
21 does not mean it is sold until under my
22 understanding until it's sold Okay You can say
23 that but that's not true

24 Q You agreed for these four lots to close
25 outside of the first year

Mr Lipscomb, Cross Examination

1 A I agreed?

2 Q Right

3 A No, I did not

4 Q You had to agree on the closing date, didn't
5 you?

6 A No, I didn't I might have signed a sales
7 contract that they brought over there but they
8 brought a lot of sales contracts over there to me
9 that never closed

10 Q But these last four did close though?

11 A Well, then they have them but I didn't agree
12 on the closing date

13 Q You didn't agree to allow the Wheelers to
14 close on 9/11 when they had the contract on 8/6?
15 You didn't agree on that in the sales contract?

16 A Well, that's like less than a month I
17 probably would have agreed within thirty days
18 All contracts state that you have a certain time
19 to close on it

20 Q And you agreed for this one to close on 9/11,
21 and not within thirty days So you knew that this
22 one was in the works

23 A This was within thirty days, isn't it?

24 Q You knew that lot 56 was in the works before
25 the end of the first year

Mr Lipscomb, Cross Examination

1 A Well, from the board it says that there was a
2 lot sold but it didn't sell during that time I
3 didn't know it was in the works or not I don't
4 have the paperwork in front of me but I know that
5 that lot sold If you ask me if I know it sold,
6 yes

7 Q And lot number 47 This was a customer
8 contract, wasn't it for K&L? They already had a
9 customer for that house back in July

10 A I don't know that I mean, maybe they did
11 I'm just saying I don't know

12 Q And your lot closed on October the eighth
13 That's three months later

14 A I don't know if they had a customer contract
15 I don't know if the drawings were being adjusted
16 The architectural drawings took that long before
17 they could close them because they couldn't close
18 them unless they agreed on the final price I
19 don't know that I'm just telling you I don't
20 know it and we never and I never I wanted to
21 watch the closes as quickly as they could and the
22 bank was on me to get money to them I pushed as
23 hard as I could I made K&L go get permits early
24 so they could close lots so we could pay down our
25 loan at the bank so if it didn't close

Mr Lipscomb, Cross Examination

1 earlier it wasn't my intention I tried every way
2 to get every lot closed as quickly as possible
3 because that phone was ringing constantly from
4 NBSC saying Steve, this is not what we agreed on
5 This is horrible This is nine lots in the first
6 year that actually closed so I had no reason to
7 delay a closing

8 Q (Inaudible) to delay closing on these two

9 A I didn't allow K&L to delay closing

10 Q For over a year

11 A That's not so That is not simply not the
12 truth

13 Q You brought a plot plan to D Melton on
14 October the second

15 A I brought a plot plan to D Melton on October
16 the second

17 Q K&L did Your eighty percent of K&L

18 A I did not bring a plot plan to D Melton and I
19 don't have any knowledge of that but if they did
20 bring a plot plan to him, they were probably
21 seeing if it was one that he wanted to put there
22 and it was probably a spec house and they probably
23 had to go see if it had to be permeated but I did
24 not bring it to him

25 Q I want to hand you Exhibit number 58 and 60

Mr Lipscomb, Cross Examination

- 1 Do you recognize those exhibits?
- 2 A Yes, sir
- 3 Q What are those?
- 4 A Those are plot plans
- 5 Q And what's the date on them?
- 6 A Where's the date at? Do you know?
- 7 Q Lower, left-hand corner
- 8 A This one says October ten, 2000 Both of
- 9 these say October ten, 2000
- 10 Q October second, 2002, doesn't it?
- 11 A It says, October tenth on these I mean I'm
- 12 just reading it
- 13 Q October 2002
- 14 A October tenth, 2002
- 15 Q Okay And they didn't close until October
- 16 2003
- 17 A Well, I have no knowledge of that and I sure
- 18 didn't delay it What benefit would it be to me
- 19 or the bank on my bank to delay a closing on a
- 20 lot
- 21 Q That's the question we're asking
- 22 A Well, I'm telling you that was never done and
- 23 that's my answer
- 24 Q K&L's not going to have the plot plans in
- 25 here and go to that expense and trouble if

Mr Lipscomb, Cross Examination

1 they don't believe they have that lot If they
2 haven't bought the lot

3 A When they believe they have a buyer, they
4 often went over the plans with them and did plot
5 plans and then the buyer would walk away That
6 happens not only to K&L but to all the builders,
7 ever builder

8 Q So, do you deny that K&L came to Dutch Fork
9 Realty and told them they were buying lots 17 and
10 25 in October of '02?

11 A I will They might have said they probably
12 had a customer and that they wanted to put a plot
13 plan on there and see if a customer would do it
14 but I don't know it to be a fact and I have no
15 more knowledge of it other than what I just told
16 you

17 Q So, you dispute these last four lots as being
18 as counting in the first years sales

19 A How many are up there?

20 Q 47, 56, 17, and 25

21 A Wait a minute

22 Q 10, 11, 12, and 13 You dispute that those
23 should count the first year

24 A I said that nine should count the first year
25 because that's the amount that closed

Mr Lipscomb, Cross Examination

1 Q And nine ends right here with Holliday

2 Right?

3 A 1,2,3,4,5,6,7,8,9 Not lot numbers Nine

4 lots

5 Q Right That's what we This is the order

6 of the first along this far column so nine lots

7 they closed by July thirtieth, 2003

8 A In my mind as a finance major and to the best

9 of my knowledge from all my businesses, nine lots

10 closed that's the ones the money came from Later

11 on at a point two years later they had caught up

12 and they had done one a month At that time I

13 didn't think they had met their duty in the first

14 year

15 Q You knew that these last four - lots 47, 56,

16 17, and 25 - you knew that these were in the

17 works?

18 A I'm not sure that I knew that they were in

19 the works or not

20 Q Okay All right Well, at the end of the

21 first year

22 A I'd had to see your chart but I'm not sure

23 You tell me that I know about then but no, I don't

24 know that I knew about then I don't know if I

25 knew it or not so I'm not going to answer that

Mr Lipscomb, Cross Examination

1 because I don't know

2 Q You don't know whether you knew it or not

3 Well, you agree that the first year of sales ended

4 August twenty-first, 2003

5 A I don't know when the first year ended or the

6 first year started without you giving me some

7 documentation

8 Q Well, you know the bonded plat was recorded

9 on August twenty-second, 2002, don't you?

10 A It was recorded then but I don't know if we

11 could sell lots then or not because there was some

12 other issue going on But if you want to go with

13 Union Information I'll be glad to look at it and

14 read it to you

15 Q So, you don't know when the first year of lot

16 sales began?

17 A Not without having a document in front of me

18 I don't really know the time You know, if you

19 want to provide me the documents, I'll be glad to

20 read it to you I mean, I can't remember the date

21 something started five years ago I'm not

22 disputing I'm just saying you're telling that

23 and you're probably saying it starting a week

24 later or a week earlier I don't know

25 Q I'm saying to you that the first year of

Mr Lipscomb, Cross Examination

1 lot sales began August twenty-second, 2002

2 A If you say that, I will agree But that's
3 the only way

4 Q I'm not trying to trick you and tell you that
5 it started a week earlier

6 A We'll all agree that on that charge you said
7 it started that day

8 Q We can take a vote of you wanted me to do
9 that I thought you would have remembered when
10 that happened because you testified about that
11 earlier

12 A I knew it happened in August or September or
13 sometime in that area but I'm not sure about the
14 exact date But if you say August the twenty-
15 second, I'll go along with you saying that

16 Q I don't want you to go along with it I want
17 you to be sure I'm going to have my assistant
18 look for that while we go on ahead with the
19 examination while she's finding that We'll come
20 back to prove to you

21 A I'm not doubting you I just don't have the
22 document in front of me

23 Q I understand you don't have the document in
24 front of you We'll pull out the copy and show
25 you a certified copy from the Clerk of

Mr Lipscomb, Cross Examination

1 Court the date the bond applied
2 We agreed that at the end of the first year's
3 sales, assuming it was August twenty-first, 2003,
4 you did terminate the contract
5 A I did not
6 Q Now, you did terminate the contract on May
7 twenty-eighth
8 A Yes, sir
9 Q All right And by the time you terminated
10 the contract, thirty-one lots had closed
11 A Thirty-one lots I mean, I'm assuming they
12 closed I don't know if you've got them up there
13 like before that they were under contract but if
14 they were actually cash exchange hands, I would
15 have agreed to that Did cash exchange hands?
16 I don't know that but if you say that cash
17 exchanged hands then I will agree to it Okay?
18 Q Well, this is the closing This column here
19 is the lot closing date So that's the day that
20 cash exchanged hands All right Would you agree
21 with that?
22 A Yes Could you give me a copy of that over
23 here because I can't see it as good over there?
24 Don't you have a copy of it?
25 Q No, we just have this one Can you

Mr Lipscomb, Cross Examination

1 see it from there?

2 A Okay Lots sold That is the date the lot
3 was closed Lot closing All right

4 Q If you look we have 2002 These are all
5 2002 2003 Again 2003 Here we come with 2004
6 with lot 35 and these are all closed in 2004
7 This one got closed May twenty-eighth, 2004, so
8 thirty-one closed before the termination letter
9 was sent Do you agree with that?

10 A Yes, sir

11 Q Now, you said earlier that twenty percent of
12 fifty-seven is twelve Is that right?

13 A Yes, sir

14 Q Well, if twenty percent of fifty-seven is
15 twelve, it's actually 11 4 Isn't it?

16 A 11 4

17 Q But we'll go with twelve

18 A That's all right

19 Q Well, twelve plus twelve is twenty-four

20 A Right

21 Q Thirty-one is more than twenty-four

22 A That's correct

23 Q So where's the confusion about lots and not
24 having enough sold?

25 A I told you earlier in my earlier

Mr Lipscomb, Cross Examination

1 statement that I read that my interpretation of
2 the contract was not correct I didn't think
3 K&L's at the time I've already stated this but I
4 didn't think K&L's counted because the Meltons
5 didn't go out and get them although they were
6 involved but they didn't go out and get those and
7 I understand what the facts are and I do agree
8 with the contract now There is not an argument
9 over it I made a mistake I'm telling you that
10 I know I made a mistake the way the contract reads
11 at this point

12 Q What is sixty percent of fifty-seven?

13 A Do you have a calculator?

14 Q No

15 A It says a minimum of sixty percent That
16 number could be greater but I don't have a
17 calculator I'm sorry I could figure it out if
18 you gave me a minute but if I had a calculator I'd
19 be glad to do it

20 Q Does thirty-three sound about right?

21 A Sounds close

22 Q Well, if you go over the termination letter,
23 we were only a couple of lots away from having
24 sold sixty percent of the entirety of phase one
25 Isn't that right?

Mr Lipscomb, Cross Examination

1 A That's correct

2 Q And if you look at the ones that were already
3 under contract that we have already identified,
4 sixty percent have already been sold or at least
5 committed to long before May twenty-eighth

6 A They weren't closed

7 Q They weren't closed Right

8 A They weren't closed The definition of a
9 sale is the exchange of dollars not just to say
10 over the phone I'm going to buy it

11 Q I understand that

12 A Okay

13 Q But what I'm asking you is, you knew before
14 you wrote the termination letter that there were a
15 number of lots that had been - that there were
16 sales processes ongoing and they were proceeding
17 towards closing and you knew that they were going
18 to end up closing

19 A No, I did not

20 Q You didn't know that

21 A No, sir

22 Q Even though several of those were K&L lots

23 A We were constantly trying to go to banks and
24 create new sales to satisfy the bank We borrowed
25 every penny we could to try to get these lots,

Mr Lipscomb, Cross Examination

1 move these lots through Whenever a house sold,
2 we could get another loan, or whenever we could
3 get a new bank involved we could get a new loan so
4 that was somewhat in control and somewhat wasn't
5 because of how the lot get sold If a house got
6 sold we could start a new house That's the way
7 it works

8 Q When Dutch Fork Realty and Dutch Fork
9 Development Group got this letter on May twenty-
10 eighth that you wrote they got it a couple of days
11 later and they got a hold of you and objected to
12 this letter Didn't they?

13 A They did object to it I don't know if they
14 got a hold of me and objected to it but they sent
15 a letter back to our attorney and objected to it
16 That's the way I knew about it

17 Q Well and they claimed that they had sold
18 enough lots

19 A I don't have the letter in front of me but
20 that was probably one of their They sent the
21 letter so

22 Q And when that was brought to your attention
23 and did you try to verify that your lot numbers
24 were correct?

25 A All the way through the deposition

Mr Lipscomb, Cross Examination

1 I said that they didn't sell enough because I
2 didn't think that they did sell enough even after
3 the litigation started but then my lawyer told me
4 that all the lots

5 MR BABCOCK Objection, Your Honor
6 Conversation with Counsel

7 THE COURT Sustained

8 MR BOWENS The witness is privileged
9 He was asked a question and he started to
10 volunteer

11 THE COURT He can waive his privilege
12 if he wishes

13 MR BABCOCK Your Honor, he has to be
14 aware that he has the privilege itself I
15 (inaudible) myself as Counsel

16 THE COURT I'm going to put on notice
17 that he is not under privilege

18 MR BABCOCK Thank you, Your Honor

19 Q When this mistake was brought to your
20 attention that Dutch Fork had, in fact, sold
21 enough lots did you try to verify that your
22 numbers were accurate?

23 A I did

24 Q You verified that your numbers were accurate?

25 A I verified No, I tried to find out

Mr Lipscomb, Cross Examination

1 if they were

2 Q How did you try to find out if they were
3 accurate?

4 A I read the contract

5 Q Anything else that you did?

6 A That's about it

7 Q And you concluded again that they were
8 accurate from your side?

9 A I thought they were accurate all the way
10 through my deposition It was not until later
11 that I read the contract thoroughly and seen they
12 were entitled to all the lot sales

13 Q You think - you knew that what exclusive
14 right to sell meant, didn't you?

15 A Say that again?

16 Q You knew that exclusive right to sell meant
17 that they got credit for all the lot sales All
18 the sales had to go through them

19 A Early on I did not think in accounting that
20 if we brought a building company in here to help
21 start the lots I thought that building company was
22 going to leave and I thought everything was going
23 to go good but, in fact, we had to keep going
24 there because we had to keep lots going

25 Q What I'm asking you, sir, is

Mr Lipscomb, Cross Examination

1 A I answered the question No, at that time I
2 did not know that

3 Q When they brought it to your attention that
4 you were wrong and that they had sold enough, you
5 didn't remedy the situation, did you?

6 A Because I didn't think it was right because
7 at that time I thought - still thought that they
8 had to sell two a month and that they hadn't
9 reached the twenty percent in one year

10 Q But you know - we just went over this You
11 knew by the time you wrote the letter that they
12 had sold thirty-one

13 A No, I didn't I did not know that the first
14 year didn't count when they didn't make it

15 Q Are you saying you were basing your
16 termination letter in May on what happened the
17 very first year?

18 A That's one of the years and they didn't make
19 it It says in any one year It says in this
20 contract in any one year that they don't meet it
21 then they violated the contract That's what the
22 contract says

23 Q Do you think it's fair for them to go on
24 working and performing for nine more months and
25 then terminate them for what happened nine

Mr Lipscomb, Cross Examination

1 months ago? Is that a way to treat your partner?

2 A Well, I thought it was a probable cause

3 Q And when it was brought to your attention
4 that you were wrong

5 A I know I'm wrong

6 Q When it was brought to your attention that
7 you were wrong about this and that they had sold
8 enough, you did nothing to fix the situation?

9 A Because I still didn't think at the time that
10 they did It was only later after my deposition I
11 understood that it was the point in time when you
12 fired that it counted not that any point in time
13 that the contract said that they didn't do it

14 Q And you had a whole staff of bookkeepers
15 working for you at then?

16 A I had one bookkeeper working for me

17 Q One bookkeeper You had John Quinn working
18 for you

19 A Yes, sir He's an Accountant You have to
20 have an Accountant

21 Q And you had Camden Lewis working for you

22 A I only had Camden Lewis working for me when I
23 sent the letter

24 Q And with all that help and with your degree
25 in Business Finance, you still thought at

Mr Lipscomb, Cross Examination

1 that time that

2 A It reads right here in the contract that in
3 any one year In any one year Listen, I'm a
4 college grad and I'm pretty smart or at least I
5 thought I was I read this thing and it says that
6 in any one year that they don't meet that If
7 they don't meet that then they are in violation of
8 this contract I mean, it's in black and white in
9 here But you know, after being told by a number
10 of people and reading this contract over and over
11 again, I understand now it's when you write the
12 letter not if they did it like the contract says
13 according to business law and I'm not a lawyer so
14 I don't know to know that and I'm not an
15 accountant and I don't go into knowing that but I
16 simply read This is a pretty simple document and
17 that's the way I read it Okay That's the way I
18 read it and that's my answer

19 Q When they brought this to your attention back
20 in June of '04, all you did to verify that you
21 were correct was to reread the contract?

22 A I reread the contract and it said that it
23 said that if they didn't sell twenty percent in
24 any one given year then they were in violation
25 Now, I do understand that I do owe them the

Mr Lipscomb, Cross Examination

1 money that they weren't in violation when I sent
2 the letter but I didn't interpret it to read that
3 way and they had told me over and over and I guess
4 it was in my mind we were going to sell two a
5 month but to me mathematically I thought it was
6 right

7 Q When you got this letter you went back to
8 your advisors and consulted them about this,
9 didn't you?

10 A No, I didn't go back to my advisors

11 Q You didn't talk to Cam Lewis again?

12 A No, sir I went back and talked to Cam Lewis
13 later on but not right after this

14 MR BABCOCK Your Honor, enter an
15 objection over communication with counsel

16 THE COURT I think that the existence
17 of communication is not privileged but certainly
18 the content could be so I'll overrule your
19 objection

20 Q After you went back to Cam Lewis after you
21 got the letter from Dutch Fork and you asked him,
22 how do I file?

23 A No, sir

24 Q You didn't ask him?

25 A After I got the letter

Mr Lipscomb, Cross Examination

1 Q Right

2 A They got the letter after Cam Lewis sent them
3 the letter

4 Q Right but then once you got the rejection
5 letter, you went back to Camden Lewis and said,
6 well how do I file a dispute?

7 A That's just not so, sir You weren't there
8 How do you know that?

9 Q Because you told us in the deposition

10 A I did not I told Mr Lewis what the problem
11 was that they hadn't done twenty percent and I
12 think they did and I told him

13 Q I hand you a copy of your deposition
14 transcript

15 A One second

16 Q Look at line number eleven Have you found
17 page 171?

18 A Yes, sir

19 Q Line number eleven Your answer is no They
20 sent the letter back and said he wasn't there I
21 asked Cam, "Well, how do you fire anybody ' and he
22 said and that's when you stopped Do you see
23 that?

24 A Yes, sir

25 Q So, after you got the letter from

Mr Lipscomb, Cross Examination

1 Dutch Fork saying they objected to being
2 terminated, you went back to your lawyer and asked
3 him well, how do I fire him

4 A That's out of context I asked him if I
5 thought that they didn't sell twenty percent of
6 the lots and I sent it to them and they said that
7 you can't fire them - that they weren't fired
8 And I said, well, how do you fire and I think it's
9 twenty percent and they say that I can't fire
10 them

11 Q At the time you sent the termination letter,
12 from the beginning of the lot sales, August of '02
13 until May twenty-eighth

14 A State the dates again please

15 Q August 2002 until May twenty-eight, 2004

16 A Okay

17 Q That's the period of time we're talking about
18 from lot sales beginning from the termination
19 letter, were lot sales at their highest or their
20 lowest when you sent the termination letter?

21 A They might have been - well, it looks like it
22 might have been more that year than there were in
23 the first year but that's let's see I'm just
24 looking at your chart

25 Q If you look at the closing dates being

Mr Lipscomb, Cross Examination

1 right here, this is lot 9 or the ninth lot to
2 close That ends the first year These lots were
3 all closed in the second year

4 A There were more lots in the second year

5 Yes, sir

6 Q So when you sent the termination letter lot
7 sales were at their highest not their lowest?

8 A They were at their highest but still wasn't
9 what I expected from the Meltons telling me two a
10 month and that they would be I understand
11 that's not part of the contract

12 Q Well, I know that If you look at what
13 happened You terminated the contract May
14 twenty-eighth Right?

15 A May twenty-eighth

16 Q If we go back a year in time to May of '03
17 That one year period between May of '03 and May of
18 '04

19 A Right

20 Q Right here is May first, 2003 Can you see
21 that?

22 A Yes, sir

23 Q That's lot number 36 The Fritz bought that
24 lot Right

25 A Yes, sir

Mr Lipscomb, Cross Examination

1 Q If you count down to May twenty-eight, we
2 have thirty-one lots sold If you take away six,
3 what's 31-6?
4 A I thought you sold nine the first year
5 Q Well, this is for May The year preceding
6 the termination letter What is - six had already
7 been sold before May of '03 Before May of '03
8 six lots had been sold What 31 -6?
9 A 31 -6 would be 25
10 Q And how many would two lots per month be?
11 Over a year period?
12 A Twenty-four
13 Q So they sold more than two lots per month in
14 the year immediately preceding the termination
15 letter Do you agree with that?
16 A That's your chart I agree with what the
17 chart says
18 Q I ask you to assume for purposes of this
19 question that these closing dates are correct and
20 the HUD closing dates Okay Assume they are
21 correct
22 A I understand this
23 Q Assume that's correct Then from May of '03
24 until May of '04 when you sent the termination
25 letter, 25 lots were sold

Mr Lipscomb, Cross Examination

1 A Understand this At the time, I personally
2 wasn't and I know the contract says now that
3 you're supposed to but I was not counting K&Ls as
4 part of and I understand now that all lot sales
5 But when I sent the contract - the notice of
6 dismissal, I was counting the first year as a
7 failure and you can take the whole project and it
8 didn't do two per month and that's what I thought
9 in my mind was supposed to do but, in fact, if K&L
10 hadn't been involved in the sale here it would
11 have taken us thirty years to sell this project
12 Q Let's talk about K&L's lot purchases?
13 Lot 14 was a model home Wasn't it?
14 A That was the model home for Courtyards at
15 Rolling Creek that K&L built and the Meltons used
16 to show plans in, to show people in, to have
17 builders there, to try to get builders in, and it
18 was a house built by Pat but it was used by the
19 Courtyards at Rolling Creek and also for other
20 builders
21 Q Other builders used it?
22 A Yeah They would come in there for meetings
23 We had - the Meltons had builders that they
24 invited and have drinks while they showed them the
25 plans and tried to sell them lots It

Mr Lipscomb, Cross Examination

1 didn't work too good but they did it on several
2 occasions

3 Q So, your testimony is that the model home
4 built by K&L was not for the purpose of drumming
5 up more business for K&L

6 A It was for the purpose of drumming up more
7 business for K&L, Courtyards at Rolling Creek, and
8 SEL Properties, Dutch Fork Realty combined

9 Q So we agree that it was for the purpose of
10 drumming up business for K&L and then you add on
11 Dutch Fork and the Courtyards as well I mean, to
12 showcase

13 A Listen, it was for all the builders It was
14 for any builders I tried to

15 Q How does K&L's house plans benefit any other
16 builder?

17 A They weren't K&L's house plans They were
18 Dutch Forks If you notice on the front of the
19 closing statement there was house plans paid for
20 by Courtyards at Rolling Creek They had certain
21 house plans that they would let people use

22 Q I'm going to propose this to you and see if
23 you agree The purpose of a model home is so that
24 the public can come in and see the quality of the
25 work and craftsmanship and the building

Mr Lipscomb, Cross Examination

1 skills of the builder who built the home Do you
2 agree with that?

3 A Not entirely

4 Q That's one of the purposes

5 A That's one of the purposes

6 Q Now, K&L obtained the building permit in June
7 of '02 Is that right?

8 A Yes, sir If you say so

9 Q Well, let's look at the building permit

10 A Okay I agree with you

11 Q And the deed wasn't transferred until '04

12 Right? You didn't transfer the deed to K&L until
13 '04

14 A That's only because the loan - K&L had no
15 credit and the loan I can't answer that but I
16 think that's because SEL Properties has I can't
17 answer that question

18 Q Well, on your general ledger you have it down
19 on 9/16 as you received thirty-two thousand
20 dollars

21 A No, the bank received the thirty-two thousand
22 dollars

23 Q SEL didn't receive that On your general
24 ledger it's got you receiving thirty-two thousand
25 dollars on 9/16

Mr Lipscomb, Cross Examination

1 A But the money goes to the bank to pay down
2 the debt We don't get the money

3 Q Yeah but

4 A That's just on the books as entered as a pay
5 down I mean, you're acting like we got that We
6 didn't get it

7 Q I mean, you get it and give it to the bank

8 A No, we don't even get it They take it
9 Wells & Fargo sends it to the bank We never
10 touch it

11 Q Well, you are right about that The closing
12 attorney when they close the loan sends the bank
13 the funds but you recorded that lot sold on your
14 books on 9/16

15 A I don't do the bookkeeping I don't know
16 what day it's recording If that's what it says
17 on the chart

18 Q If that's what it says on your books would
19 you agree with that?

20 A Yes, I would

21 Q And then the lot release from NBSC was issued
22 on 9/17/02

23 A So that means that the lot was paid for then

24 Q Right And you paid thirty-two thousand
25 dollars

Mr Lipscomb, Cross Examination

- 1 A K&L
- 2 Q K&L did
- 3 A Yeah
- 4 Q And then there was a contract issued on March
- 5 sixteenth of 2004 to sell the lot Is that right?
- 6 A That's what it says
- 7 Q And the deed transferred the property to K&L
- 8 was transferred just before or just after that
- 9 contract was entered into
- 10 A Seems that way
- 11 Q And the same thing happened here with lot 15
- 12 You take the building permit on June tenth Got
- 13 the payment on 9/30 and got the lot release came
- 14 on 10/2/02
- 15 A That's right
- 16 Q And then with lot 57 You got the building
- 17 permit on October twenty-second of '02 You got
- 18 the money on 9/30/02 and the lot release on
- 19 10/2/02
- 20 A That's about how long it takes the lawyers to
- 21 get it there
- 22 Q Right Okay So we agree with that?
- 23 A Yes, sir
- 24 Q And then the deed was transferred to K&L on
- 25 June twentieth of 2003

Mr Lipscomb, Cross Examination

1 A That's what it says

2 Q And then K&L transferred the property to the
3 new buyer who had the contract on the property on
4 July nineteenth '03 So that was just within a
5 month of them getting the contract

6 A Yes, sir

7 Q Now, from the time that K&L - I'm going to
8 look at the K&L purchases from here to the
9 termination letter Okay? From the time that K&L
10 bought the lot to the time a contractor had been
11 signed with a new home buyer who was going to
12 build a new home on that lot with regard to 57, 7
13 lots passed Is that right?

14 A That's correct

15 Q So, and with regard to lot 47, no contest
16 They already had a buyer for that house before
17 they even bought the lot

18 A That's correct

19 Q Right? And so with regard to lot 17, three
20 months passed

21 A That's correct

22 Q And with regard to lot 16, seven months
23 passed

24 A That's correct

25 Q And with regard to lot 25, seven months

Mr Lipscomb, Cross Examination

1 passed With regard to lot 6, one month passed
2 A That's correct
3 Q And with regard to lot 21, twenty-two days
4 passed
5 A That's correct
6 Q And then with regard to lot 21 and 19, those
7 were already pre-sold, no contest
8 A That's correct
9 Q So, certainly you would agree with regard to
10 at least these three lots here that have zeros
11 that K&L did not have to buy those lots They had
12 already been sold to a homebuyer
13 A The homebuyer wouldn't buy them unless
14 somebody had built the house on them
15 Q Mr Lipscomb, the date of the contract to
16 build the house was July the eighth and the
17 contract for the lot wasn't purchased by K&L until
18 10/8 The house hadn't been built yet, had it?
19 A That's because it was a custom house
20 Q Right, so someone would have bought this lot
21 The buyer who contracted on May nineteenth would
22 have bought that lot if K&L had it
23 A They wouldn't have unless the pre-agreed
24 price of the house some builder would build it for
25 that cost and the Meltons always took it

Mr Lipscomb, Cross Examination

1 to some builders and they went with that customer
2 and decided on a price on building a house and lot
3 and if that price was agreed upon and the plans
4 were agreed upon it was pre-sold

5 Q Exactly But before K&L

6 A But if some builder hadn't met that then no
7 They wouldn't Unless there was another builder
8 that could have did it for that price or something
9 they would have not done so I disagree

10 Q Well, let's see if we can agree on this

11 A L Bonner came along on July the eight and
12 signed a contract with K&L Right?

13 A I don't know if they signed it with K&L or
14 they signed it with Dutch Fork Realty but
15 evidently it was a contract signed because you've
16 got contract down there

17 Q Well, you know, we can go through every one
18 of these documents if you want to

19 A No, I see that and I'm saying evidently there
20 was a contract signed

21 Q Well, let me just make sure you understand

22 All of these documents right here - those are all
23 the closing box That's summarized up here Now,
24 we can use this or we can use this

25 A Okay

Mr Lipscomb, Cross Examination

1 Q Which one do you want to do?

2 A Use the chart

3 Q It's just easier this way So, if on July

4 the eighth, 2003, the customer came along and

5 wanted to buy him a lot and build a house on it

6 Right?

7 A Right

8 Q He decided to come to K&L to do that

9 A Right

10 Q Then in October, K&L buys the lot and builds

11 the house

12 A That wouldn't involve the lot until the final

13 architectural things and the permitting and all

14 that If you talking about

15 Q But I'm serious, the purchase of K&L's lot

16 occurred after he already had a buyer for that

17 lot

18 A Of course, they had to go to the bank to get

19 the loan approved to build the house after they

20 had the contract They don't have the money in

21 their pocket to go pay for it They've got to go

22 to a lending institution, show them the design,

23 tell them what they are going to build it for the

24 person and they have to get the loan to build the

25 house Then they build the house and the

Mr Lipscomb, Cross Examination

1 owner pays them for it

2 Q Mr Lipscomb, it was your testimony if I
3 remember right, that K&L was buying lots because
4 they weren't selling to anybody else

5 A That's right

6 Q And what I am trying to point out to you is
7 that is not true The lots that K&L bought, it
8 only took a few months, seven months at most and
9 in some cases five days before somebody would have
10 bought that lot and built a house on it

11 A How does that point that out?

12 Q Well, for example, I'll give you an example
13 The buyer who signed this contract on January the
14 ninth Okay Do you see that?

15 A Yes, sir

16 Q K&L purchased the lot 10/8/03

17 A I disagree that that points that out First
18 of all, nobody else is speculating they built a
19 house in there Nobody else may have had that
20 price How do you know that somebody else was
21 going to buy that lot? I don't understand your
22 theory I disagree with it totally

23 Q Well, let me explain it to you and see if you
24 agree

25 A You already have but I disagree

Mr Lipscomb, Cross Examination

1 Q K&L bought this lot on October the eighth,
2 2003 Do you agree with that? That's the date
3 they closed on?

4 A That's the day they closed on

5 Q That's lot 17

6 A Yes, sir

7 Q All right Three months down the road a
8 buyer came along on January the ninth and put a
9 contract down to buy the house and the lot too

10 A That's correct

11 Q So, if K&L had not bought the lot here, this
12 person on January the ninth

13 A No They were buying what was being built on
14 that If it hadn't started being built on that,
15 they probably wouldn't have ever bought it I
16 disagree with your theory It's not so Simply
17 not so You're trying to say if a lot was sitting
18 here it was be the same as a guy who was building
19 a spec house and taking a risk They see it
20 It's already started They want to get in on a
21 house in a less period of time They may have
22 been moving from somewhere They wouldn't have
23 bought that lot They may not have bought that
24 lot Your theory is just a theory It's a theory
25 only

Mr Lipscomb, Cross Examination

1 Q What happens as a theory though

2 A You're doing all kinds of hypothetical things
3 here and saying that just because it's seven
4 months later and there is a house built upon the
5 lot and it's not just a lot with weeds standing on
6 it It would have sold either way That is
7 simply not true It's simply not true

8 Q Mr Lipscomb, wasn't it K&L's main purpose to
9 build spec houses and sell them?

10 A There whole purpose was to be a seed company
11 and come here to try to get this little case
12 started When we had other builders, they'd build
13 additional houses to try to help the community get
14 going and get other builders in but to say that
15 another person would have bought that lot if
16 somebody wouldn't have come and started a plan on
17 there is just some hypothetical thing that you've
18 come up with

19 Q Well, let's keep it under reality then

20 A Let's get down to reality

21 Q Every one of the lots that K&L purchased,
22 Dutch Fork Realty resold to a homeowner before the
23 termination letter was sent

24 A Before the termination letter was sent to
25 Dutch Fork for not selling two a month

Mr Lipscomb, Cross Examination

1 Yes, sir

2 Q Every single lot that K&L purchased had been
3 resold to a homeowner who had built a house before
4 the termination letter was sent Well, I take
5 that back Except for one Lot number 16 sold
6 May twenty-ninth and closed the day after

7 A Okay

8 Q Do you agree with that?

9 A I agree with it

10 Q And is it still your testimony that things
11 weren't happening over at Dutch Fork at Rolling
12 Creek?

13 A No, sir They did not happen in the timely
14 fashion they were supposed to happen

15 Q You're not unhappy with the pace of lot sales
16 for May of '03 through May of '04 Are you?

17 A I was unhappy with the overall pace of the
18 lot sales

19 Q Well, you said your confusion was that you
20 thought it was supposed to be two per month

21 A Yes, sir

22 Q And so from May of '03 to May of '04, it was
23 more than two per month It was twenty-five

24 A I see that now but I didn't know that at the
25 time

Mr Lipscomb, Cross Examination

1 Q If you'd taken the time to look at the chart
2 and consult with your bookkeeper and your CPA and
3 your attorney, you don't think you'd figure that
4 out now?

5 A I may have and I may not

6 Q You didn't make the effort though

7 A I looked at the sales myself and I tried to
8 figure it out the best I could and I thought with
9 the bank pressure - I was under pressure from the
10 bank The roads were failing The money wasn't
11 there The cash flow from Sett Alliance was
12 supposed to be there There was never money I
13 was dissatisfied with the management of Courtyards
14 at Rolling Creek

15 Q And prior to the termination letter, if you
16 took out the K&L lots enough were sold if you
17 exclude those

18 A Not under the two per month but under the one
19 per month

20 Q Under the twenty percent per year

21 A I didn't take them out I mean, you can
22 count them out if you want to I'll be glad to
23 count them and see Well, there's thirty-one
24 One, two, three, four, five, six, seven, eight,
25 nine, ten, that would leave twenty-one

Mr Lipscomb, Cross Examination

1 Yes, sir

2 Q And so if we exclude K&L we sold enough

3 A Twenty-one

4 Q Right That's more than twelve

5 A That's more than one year too That's two

6 years

7 Q Twenty-one is what you have if you exclude

8 K&L

9 A That's right That's what we were just

10 talking about

11 Q So, twenty-one, twenty-two, twenty-three

12 Twenty-three lots shy of

13 A Twenty-three lots shy of meeting one per

14 month Yes, sir Meeting one per month

15 Q Well, if you've got two years

16 A Two years Twenty-one Twenty-four months

17 in two years They didn't and that was in my mind

18 at the time I sent the letter I've tried - I've

19 told you I was wrong about it but that's what I

20 sent

21 Q And it had nothing to do with them being only

22 three lots away from having closed sixty percent?

23 A Absolutely not

24 Q And it had nothing to do with you having been

25 negotiating secretly with other builders to

Mr Lipscomb, Cross Examination

1 buy the lots in phase two and three?

2 A At that time I never negotiated with any
3 builders unless they came by and I was out there
4 and they asked me would I sell lots and I told
5 them I would sell them the whole place or whatever
6 but I didn't ever negotiate any sales There's no
7 contracts of negotiating any sales with any
8 builders

9 Q You were trying to do that, weren't you?

10 A No, sir If somebody had told me they'd buy
11 the whole place, I'd have loved to have walked
12 away from this place because it was a disaster

13 Q Mr Lipscomb, you have met over the years
14 with a number of builders who wanted to buy lots
15 in phase two and three Isn't that right?

16 A I don't remember meeting any that wanted to
17 buy lots in phase two and three prior to the end
18 of this contract

19 Q Mr Maxheimer testified last week that he had
20 redesigned lots in phase two and three, those
21 plans, to accommodate other buyers

22 A That was after the termination of the
23 contract and that was after the end of the
24 contract That was in 2006

25 Q Well, in 2006 you had already been but

Mr Lipscomb, Cross Examination

1 even before that you had been in negotiation with
2 builders, hadn't you?

3 A I had not

4 Q Turn to page 189 of your deposition

5 A 189

6 Q Have you found page 189?

7 A Yes, sir

8 Q The question starts on line four Did you
9 ever have a meeting with Rick Maxheimer about
10 anybody buying the property And what's your
11 answer?

12 A My answer is yes but this

13 Q Well

14 A This is later This is not during the time
15 during the contract

16 Q Read your answer from the deposition please

17 A Okay Line four

18 Q Your answer starts on line six

19 A Okay Probably had five or six or seven of
20 them

21 Q Then I asked you about other developers and
22 what's your answer on line nine?

23 A Line nine Over the years Yes

24 Q Continue on

25 A Over the years I'd say I probably talked

Mr Lipscomb, Cross Examination

1 to ten of them

2 Q Over the years I'd say probably ten times

3 A Yes

4 Q Well, when was your deposition made?

5 A 2006 or 2007

6 Q 2006 And your testimony was over the years
7 prior to 2006 you had done this

8 A No, I never talked to anybody about selling
9 phase two and three or having contract with
10 anybody I'm not saying in general if somebody
11 came by and said would you sell me a subdivision
12 just passing by on the road that I didn't say,
13 yeah we'd love to sell you a subdivision but doing
14 any negotiation or work to sell a lot in phase two
15 or three the answer is no

16 Q If you look on the very front cover of that
17 deposition what's the date on that?

18 A November, 2006

19 Q Right And on November of 2006, you said
20 over the years which has to be before 2006

21 A I never negotiated a sale People came by
22 all the time and said they wanted to buy a lot but
23 they never did it People came buy and said
24 they'd like to buy the whole place The Meltons
25 knew about it but we never negotiated a

Mr Lipscomb, Cross Examination

1 sale but if they had of come way back then, I'm
2 sure me and the Meltons would have wanted to sell
3 it because we didn't have sales

4 Q And these conversations went far enough for
5 you to have between five and seven meetings with
6 Rick Maxheimer about it?

7 A That is after All the meetings he's talking
8 about was when we started dealing with Essex later
9 on after the contract in 2007/ 2006 Much later
10 dates

11 Q We're talking about what you said in your
12 deposition on November 2006 when you said we had
13 meetings with Rick Maxheimer five, six, or seven
14 times

15 A 2006 Yes

16 Q And so those meetings were before November of
17 2006?

18 A On or about 2006 but not during the time of
19 the contract

20 Q The lot sales were supposed to begin in the
21 early part of 2002 Is that right?

22 A They were supposed to begin when the roads
23 were finished and the bonded plat was issued and
24 that, I believe, was in late summer of 2002

25 Q That's when it happened but it was

Mr Lipscomb, Cross Examination

1 supposed to begin in early 2002

2 A It was supposed to begin but the roads
3 weren't finished because they had multi-problems
4 with the infrastructure so they weren't finished
5 until September of that year and that's when we
6 could start selling lots when the bonded plat was
7 there

8 Q Didn't you tell Ronnie Colson that lot sales
9 would begin shortly after the loan was closed in
10 November of 2001?

11 A Oh, yeah But I was told that the
12 infrastructure planning and the infrastructure
13 could all be done in that amount of time I was
14 advised of that by the Meltons so I did tell him
15 that Yes, sir

16 Q So, everybody believed going into 2001 that
17 the lot sales were going to begin in early 2002?

18 A We might have believed that but it didn't
19 happen

20 Q That was the plan though Right?

21 A That was the plan at the time but the delays
22 from the rock and the other things that had to
23 have change orders Construction was not finished
24 until August or September of that year

25 Q The reason lot sales did not begin

Mr Lipscomb, Cross Examination

1 in early 2002 was not because of construction
2 delays, it was because the plat was not bonded
3 A Well, if the plat was not bonded it would
4 have been the engineers or the Meltons that would
5 have had the plat bonded and they never came to me
6 and asked me to go and have early bonding of the
7 plat Not once And the first time I heard of
8 that was in this litigation to try to scheme up
9 some way that this thing could have been finished
10 in five years so that's simply not true They
11 never came to me Let me say this I'll tell you
12 this These they never complained about It was
13 done exactly the same way The bonded plat was
14 done after the roads were finished Nobody ever
15 mentioned this until we got here in litigation I
16 was a finance person and I didn't know you could
17 bond it until the roads were finished And
18 nobody told me about that I could bond the plat
19 early

20 Q But you agree that it was the plan for lot
21 sales to start in early '02?

22 A There was no plan in writing but everybody
23 out there, I would never have gotten into this
24 deal if I didn't think the things we talked about
25 earlier on couldn't be done but it didn't

Mr Lipscomb, Cross Examination

1 happen It simply didn't happen

2 Q Is it your testimony that D Melton never sat
3 down with you and gave you the projections of how
4 the project was going to develop and how it was
5 going to sell out and how all it was going to
6 happen?

7 A D Melton told me that he would have twenty -
8 this is what he told me I'm going to be honest
9 with you He told me that he had eight builders
10 at least to take down two apiece and we were going
11 to sell two a month He had me all excited He
12 had me jumping out of my pants None of that
13 happened People will tell you stuff and I'm not
14 saying that he meant to deceive but he told me
15 that and it did not happen It didn't happen even
16 when we got the roads finished It never
17 happened

18 Q Mr

19 A Do you think that I didn't want to sell the
20 lots? I get seventy-five percent of the profits
21 Why would not want to sell the lots They never
22 asked me to put up a bonded plat early and they
23 never had any They just was telling me they had
24 people who was going to come take down these lots
25 because it never happened

Mr Lipscomb, Cross Examination

1 Q Mr Lipscomb, you sat down before you decided
2 to go forward with this project to invest in it
3 You sat down with Mr Melton and he outlined what
4 he told the Court last week about how this was
5 going to be done and how this was going to be
6 phased, when things had to start, when things
7 would begin selling Do you deny that he told you
8 all that?

9 A He never went through the whole scenario He
10 told me that we - he never told me exactly how
11 long it would We had a five year contract He
12 never told me that it was going to take five years
13 to sell this thing out He never told me it was
14 going to take two years I thought it was going
15 to be sold out in five years from the projections
16 that he gave me but it didn't happen It did not
17 happen It didn't happen

18 Q So answer my question please Has Mr Melton
19 sat down with you and told you the same thing he
20 told the Court last week about how this was all
21 going to work?

22 A He had a theory as to how it was all going to
23 work but I don't remember him telling me exactly
24 what he told the Court but he had a theory and
25 everybody has a theory but it didn't

Mr Lipscomb, Cross Examination

1 happen that way

2 Q And the reason it didn't happen that way is
3 because you didn't bond the plat when you were
4 supposed to

5 A I was never asked - first of all, I'm not the
6 developer I'm not the engineer A bonded plat
7 has to be done by the engineers, signed off by an
8 engineer It has to be - the developer would have
9 to know about it It has to be brought to me and
10 I would have to sign it and they would take it to
11 - I wouldn't be the one that take's it to the
12 County After I signed it, it would be the
13 developer's responsibility to take it to the
14 County Listen, I'm not the one who would know
15 how to do the bonded plat

16 Q You're ..

17 A Let me finish Let me finish You're making
18 it look like I'm the one that didn't do the bonded
19 plat I don't think it would have done any good
20 I don't think it would have sold early but I had
21 nothing to do with it They never asked me to do
22 it They never showed one bit of proof that the
23 engineer ever repaired it nor did they show it to
24 me that it was ever taken to the County for me to
25 sign off on and that's a fictitious

Mr Lipscomb, Cross Examination

1 story

2 Q You left one step out of that, didn't you?

3 A What step was that?

4 Q Paying for the bonded plat That was your

5 A You don't think I wouldn't pay for it if I

6 was going to get sixteen lots sold earlier or

7 twenty-five lots sold earlier but I was never

8 asked to pay for it I was never brought a piece

9 of paper about a bonded plat It was never

10 prepared It was never prepared There was never

11 anything submitted to the County for me to go try

12 to get bonding until later when the roads were

13 finished and when that happened, we did just that

14 Q I'm not suggesting that it was your

15 responsibility to prepare the plat and go get the

16 County work done I'm not saying that at all

17 What I'm saying is that it was your job to pay for

18 the bond To pay for the bond

19 A I was never asked to pay for it to begin with

20 but it would have been mine if they had brought it

21 and took it and why wouldn't I if I was going to

22 receive seventy-five percent of the profits and

23 they're going to get twenty-five I mean, that

24 never happened So, early on this is 2000 and

25 four lots sold so I'm scheming up something

Mr Lipscomb, Cross Examination

1 to slow down stuff for five years later No way

2 I'm not that smart believe me

3 Q Stay with me for just a second What I was

4 asking you first was, did Mr Melton ever sit down

5 with you back in 2000 before you got into this

6 investment and lay out projections like he did

7 last week as to when things had to happen to get

8 it done in five years?

9 A No, he did not He went over some of that

10 stuff He said, look we buy this land We got

11 sewer running over here to the county that makes

12 you run it to the next line but we brought it to

13 our county, to our property and we can put this in

14 and we've got builders lined up and we can make

15 sales but it didn't happen None of this ever

16 happened If he had told me that, it's fine But

17 it didn't happen and he didn't tell me that in

18 detail as you had him describe He did say that

19 we'd have good sales and I believed him I really

20 believed him too I really thought it was going

21 to happen but it didn't happen It didn't happen

22 and I was never brought a bonded plat to put in

23 If I had and they had sales, I would have been

24 glad to sign the paperwork It's not that much

25 money but nobody asked me and I didn't even

Mr Lipscomb, Cross Examination

1 know you could do it early to tell you the truth

2 THE COURT I was just going to say this

3 might be a good time to take a lunch break

4 Ladies and gentlemen, this is a good time to take

5 a lunch break I'm going to remind you of the

6 instructions that I've given to you throughout the

7 course of this trial That is, not to discuss

8 this matter as you have not heard all of the

9 evidence that has to be presented

10 Also, I remind you not to allow anyone to

11 approach you to discuss this case with you

12 Again, if someone attempts to do that, please tell

13 them that you are a juror and you cannot discuss

14 it I remind you also not to listen to

15 conversation that you may hear in the hallways as

16 you come and go again for the reasons that you

17 will have to make decisions based on the evidence

18 that is being presented here in the courtroom and

19 not based upon those other conversations

20 Ladies and gentlemen, I'm going to ask that

21 you report again to the Jury room at 2 25 and when

22 you have reported at 2 25 we will be ready to

23 continue on with the trial of this particular

24 case Have a good lunch and we'll see you then

25 (Jury left the Courtroom for lunch)

Mr Lipscomb, Cross Examination

1 THE COURT Is there anything we need to
2 take up before we get a lunch break?

3 MR BABCOCK No, Your Honor

4 MR BOWENS No, Your Honor

5 THE COURT Then we'll see you at 2 25
6 and not by that clock Oh, I'm sorry Mr
7 Lipscomb, during the lunch break I want to remind
8 you again that you should not discuss your
9 testimony as you have not concluded it Thank
10 you

11 (Court adjourned for lunch break)

12 (Court resumes)

13 THE COURT Is there anything that we
14 need to take up before we get started?

15 MR BABCOCK No, Your Honor

16 MR BOWENS Nothing, Your Honor

17 THE COURT Mr Lipscomb, I'll ask that
18 you retake the witness stand and then you can ask
19 the Jury to come in please

20 (Jury enters the Courtroom)

21 THE COURT You may proceed

22 MR BOWENS Thank you, Your Honor

23 CROSS EXAMINATION contd

24 BY MR BOWENS

25 Q Mr Lipscomb, when was it that

Mr Lipscomb, Cross Examination

1 you determined that you finally determined that
2 you were mistaken about the lot sales issue?

3 A It was after my deposition I'm not sure of
4 the exact date It would have been after the
5 deposition so

6 Q Was it in 2007 of this year?

7 A No Probably last year sometime

8 THE COURT I'm sorry Mr Lipscomb, if
9 you could speak a little louder please

10 A I'm sorry I'm not exactly sure of the date
11 that it happened I can't testify to the date
12 that I understood

13 Q But it was after the litigation started?

14 A Yes, sir

15 Q We've been in litigation now for almost three
16 years now Right?

17 A Served with papers in 2004 I don't know the
18 exact date 2005 2006 Two years I don't
19 know the exact time

20 Q But it was after we started the litigation
21 that you finally determined you were mistaken?

22 A Yes I didn't look into it until Mr Melton
23 sent a letter back saying he wasn't fired so I
24 started looking at it and I understand that Yes,
25 sir I do understand that Yes, sir

Mr Lipscomb, Cross Examination

1 Q How was it you were able to determine that
2 you were mistaken? What did you do that led you
3 to figure that out?
4 A I read the contract more closely than I had
5 ever previously read it I might have read it a
6 couple of times over a seven year period
7 Q So all you did was reread the contract?
8 A I reread the contract Yes, sir
9 Q And that's the extent of
10 A That's my answer
11 Q That's the extent of it
12 A Yes, sir
13 Q You had testified on direct examination that
14 Ronnie Colson was putting pressure on you because
15 of the lot sales situation
16 A The bank was Ronnie as the loan officer at
17 NBSC was putting pressure on me because we weren't
18 making sales as anticipated
19 Q And when did that pressure begin to be
20 applied on you?
21 A I don't remember when it started 2000-2003
22 I don't know the exact date but we were behind
23 maybe the start of 2003
24 Q Okay Now, the lots did not become available
25 for sale until August 2002 Right?

Mr Lipscomb, Cross Examination

1 A Yes, sir

2 Q So, the reason you were behind in 2002 was
3 because you weren't able to sell lots during 2002
4 up until August Right?

5 A No I mean, he was looking at the months
6 that we were able to sell after the bonded plat
7 and we weren't doing two a month

8 Q Mr Colson was putting pressure on you
9 because you hadn't sold any lots in 2002 Is that
10 right?

11 A We had three months in 2002 to sell lots

12 Q I mean the other

13 A He didn't put pressure on me when we couldn't
14 sell them He knew we couldn't sell them He
15 knew we couldn't sell them until we had the roads
16 finished and everything

17 Q You had Ronnie Colson to believe that we
18 would be starting to sell lots in early 2002

19 A I never told him that except when we first
20 went and got the money I didn't know the roads
21 weren't going to be finished then

22 Q But you agree that it was everybody's plan
23 and the plan that everyone was operating under was
24 to start selling in early 2002

25 A Yeah, that was our plan but it

Mr Lipscomb, Cross Examination

1 didn't happen The roads weren't finished The
2 bonded plat hadn't been done So, there was no
3 way to sell prior to when the roads were finished

4 Q You could have bonded the plat before the
5 roads were finished

6 A Here again, I'm going to answer that question
7 again I was not asked to bond the plat Never
8 asked to bond the plat Early on the engineers
9 would have did that and they would have given it
10 to Mr Melton or they would have brought it to me
11 They never did that Nobody has done that The
12 only time I heard about that was when this
13 litigation started or sometime during the
14 deposition Somewhere along there

15 Q All right You're saying that Mr Melton
16 D Melton never sat down with you and told you
17 that we needed to bond the plat in early 2002 to
18 make this plan work

19 A That's exactly what I'm telling you

20 Q If you would please turn to page 30 of your
21 deposition

22 A Okay What line?

23 Q We're going to start with line number 1 I'm
24 going to read the question and I want you to read
25 the answer

Mr Lipscomb, Cross Examination

1 Your answer begins on line five The question was
2 and this was during your deposition Did
3 (inaudible) promise success at the Rolling Creek
4 make it, was that part of the decision process you
5 went through to decide to invest in the Courtyards
6 project and your answer was?

7 A Line five - my real reason I went through
8 with it was because of the projections of what it
9 would make and how it would sell out and how much
10 money it could make

11 Q Right Because of the projections and what
12 it would make

13 MR BABCOCK Objection There's one
14 more line

15 Q Okay Read line eight

16 A That's always been my reason for doing
17 business

18 Q Now, the real reason you went through with
19 this project was because of the projections of
20 what it would make and how it would sell out
21 That's what

22 A As I stated earlier, I went into this project
23 because they told me that they would have certain
24 sales and certain things would happen and they did
25 not happen

Mr Lipscomb, Cross Examination

1 Q So, you're telling us today that the
2 projections of how they would sell out, how much
3 was going to sell, how the project was
4 going to move forward was never told to you?

5 A Not throughout They told me when we first
6 started that they had and here we go over it
7 again They had seven or eight builders who would
8 take down two lots and that would be sixteen lots
9 and they would at least have two sales per month
10 That's what I was told Okay

11 Q You did not provide funding for the bonded
12 plat until August of 2002 Right?

13 A I provided the funding when I was asked to
14 provide the funding

15 Q Now, you were asked to provide funding for
16 the development fee that was owed to Dutch Fork in
17 the amount of the first payment of nine thousand
18 dollars in November of 2001, weren't you?

19 A I'll answer that by saying

20 Q Well, answer that with a yes or no and then
21 you can explain all you want to Were you asked
22 to pay the development fee in November 2001?

23 A I don't know if I was asked in November or
24 not I'm not sure about that I was asked at
25 some time and we talked about - WE talked

Mr Lipscomb, Cross Examination

1 about the cash flow problems and they said, we'll
2 just extend it until we get some sales going here
3 and we've got some cash flow and that was said to
4 me more than once I'm not denying that we owe
5 than money now but that was the case at the time
6 because everybody - they were trying to help this
7 project going too because it was about to go under
8 because there was so much money being brought from
9 outside by me, my family, SEL Properties, that it
10 was about to go under

11 Q Mr Lipscomb, how was it about to go under in
12 November of '01 when it had not gotten started?

13 A I'm not saying November of '01

14 Q I'm talking about November of '01 Let's
15 stay right there In November of '01 you were
16 supposed to pay the first nine thousand dollar
17 payment Right?

18 A Yes, sir

19 Q And you didn't do it

20 A It wasn't in the budget and we didn't have
21 any outside money

22 Q You had just gotten a two million dollar
23 construction loan

24 A This line item loan You can't take money
25 for things like that There's not a line

Mr Lipscomb, Cross Examination

1 item in there to pay them

2 Q Mr Lipscomb, the contract does not combine
3 the development fee with the lot sales, does it?

4 A No, it doesn't

5 Q The contract says in fairly clear terms that
6 it is to be paid the first of such monthly
7 payments - can you see where you are from where
8 you are - the first of such monthly payments shall
9 be due and payable the first day of the first
10 month following the construction of phase one

11 A I agree with it

12 Q And that was November first of 2001

13 A Yes, sir

14 Q When that was due Lot sales couldn't even
15 begin at that point

16 A That's right

17 Q So, it was not timely lot sales generating
18 money, was it?

19 A No, sir

20 Q You just didn't have the money to pay it is
21 what you're telling us

22 A That's right

23 Q And then in December of 2001 the next month,
24 what was the next nine thousand dollars and you
25 didn't pay it either, did you?

Mr Lipscomb, Cross Examination

1 A No, sir

2 Q And for the same reason?

3 A That's right

4 Q Now we come to January, 2002 That's the
5 third month that you would owe them nine thousand
6 dollars You didn't pay it then either

7 A No, sir

8 Q And the reason was why?

9 A Here again, we didn't have the funding They
10 offered to let the payments come later

11 Q Now, in January of 2002, the same month that
12 you didn't have money to pay the development fee,
13 it's your testimony today that you would have paid
14 to have the plat bonded You had money for that

15 A I would have went to the bank and tried to
16 get the money to get the plat I don't know if
17 they would have done it You said earlier or on
18 time Excuse me, what period of time are you
19 talking about?

20 Q I'm talking about January of 2002

21 A We did not have the money then but they never
22 did ask First of all, we would never asked to
23 do it so you can't do something you not asked
24 Nobody prepared any papers Nobody I'm
25 answering the question I have a right to

Mr Lipscomb, Cross Examination

1 answer the question

2 Q Go ahead

3 A And I'm going to answer it the same way I've

4 answered it fifteen times We were not asked

5 They did not bring a bond, They didn't have to

6 take a bond to the County The engineer never

7 prepared one

8 Q And my answer for that was what? Why did

9 that not happen?

10 A Because they never asked me to do it

11 Q What you're saying

12 A What I'm telling you is they never asked me

13 to do a bonded plat early That's my answer

14 Q Mr Melton testified last week that he did

15 ask you to do that Do you remember him asking

16 you?

17 A No, he did not I don't remember him ever

18 telling me that So, you not funding the bonded

19 plat in January was because nobody asked you to

20 MR BABCOCK Your Honor, the bonded

21 plat has been asked and answered many times before

22 lunch and now

23 THE COURT I would have to agree that

24 it's been asked several times Unless you can tie

25 this into something new

Mr Lipscomb, Cross Examination

1 Q It had nothing to do with you not having the
2 funds to pay for the bonded plat?

3 A It was never asked Look, if it would have
4 made money for us and it would have had any way of
5 making money for us and they had come to me and
6 asked, I would have received seventy-five percent
7 of the money so why would I be turning down
8 something that would help out with the funding, I
9 mean, with selling lots There was no - nobody
10 ever came to me and asked me to do a bonded plat
11 and nobody showed me sales that they had in
12 writing to do anything like that early on or
13 anything of that sort but I was never ever asked
14 to do a bonded plat early and that's my answer

15 Q But you had the money to do it with if you'd
16 been asked?

17 A I wasn't asked

18 Q Did you have the money to do it?

19 A I'm not sure What period of time?

20 Q January

21 A I don't know But I know I was not asked to
22 do it early because I would have remembered and if
23 we would have had the lots that would have been
24 great if it had worked

25 Q Do you know that lot sales cannot

Mr Lipscomb, Cross Examination

1 begin until you have the bonded plat in place?

2 MR BABCOCK Your Honor, we're back at
3 the same - still with the bonded plat over and
4 over Asked and answered

5 THE COURT I'll sustain the objection

6 Q Was it a mistake not to do the bonded plat in
7 January?

8 A I was never asked to do the bonded plat in
9 January and I don't see what was a mistake about
10 it The roads weren't finished They couldn't
11 sell anything until after the roads were finished
12 They didn't have the sales they said they had at
13 any time

14 Q Do you know agree that the other two reasons
15 you stated in your termination letter about budget
16 problems and road problems were not the fault of
17 Dutch Fork Development Group?

18 A Do I have that?

19 Q It's the letter that you have that came from
20 Camden Lewis

21 A I'll say this It was not the direct fault
22 of the Meltons, although they were the developers
23 and they should have overseen things such as how
24 the roads were built I have no knowledge of how
25 the roads should be built I do blame them

Mr Lipscomb, Cross Examination

1 in an indirect way They did not design the
2 roads They did not build the roads but, in fact,
3 they were the managers of the project

4 In a sense I thought they had a
5 responsibility to know what kind of roads we
6 needed in this place I didn't know I'm a
7 finance person I had to try to get finance for
8 this thing I was not a developer I don't know
9 what kind of roads we need so, yes, in that sense
10 I think they were responsible I don't think in a
11 sense that they did the design as I said in my
12 deposition I don't think in the sense that they
13 were the engineers but as the overall managers of
14 the property, I would think that the developers of
15 the property should know what kind of roads should
16 go in a place

17 Although this was an unusual circumstance and
18 we had to hire an outside engineers to come and
19 figure out what was wrong with the roads So, I
20 cannot directly say that it was their fault but I
21 do think that they should have had enough
22 knowledge to put down the right surfaces

23 Q Do you now agree that the reason you gave in
24 the letter of May twenty-eighth were not Dutch
25 Fork's fault?

Mr Lipscomb, Cross Examination

1 A Directly the way the roads were built by the
2 engineer was not their fault

3 Q And the problems with the budget Do you now
4 agree that those were not their fault?

5 A Here again, the budget The Meltons prepared
6 the budget They gave it to me They gave it to
7 the bank when we went and got the money Nobody
8 could foresee that there was going to be some rock
9 edit but I would have thought that somebody that
10 was the developer - the guy doing the budget -
11 would have been able to come a little closer As
12 a matter of fact a lot closer than the end
13 results

14 Q Do you blame today Mr Melton and Dutch Fork
15 Development Group for the budget problems?

16 A They are the ones that prepared the budget
17 and it got totally out of whack and I'm not saying
18 it was all their fault but I think some further
19 study should have been on the amount of rock that
20 was there Maybe nobody could have foreseen it
21 but there was a lot of other things that happened
22 such as the road surfaces Maybe that should have
23 been studied before I'm not blaming them I
24 know they are not engineers but I would have
25 thought they would have checked into some

Mr Lipscomb, Cross Examination

1 of this stuff prior to

2 Q Mr Lipscomb, isn't it a fact that there was
3 a budget for rock contingency, rock excavation
4 contingency that had to be cut because of your
5 taking out the eight hundred thousand dollars?

6 A No Not because I took out the eight hundred
7 thousand dollars That wasn't the reason it was
8 cut out The eight hundred thousand dollars was
9 always going to be taken out of the bank And
10 their letter said that

11 Q That commitment letter said that the
12 construction loan was for the development of the
13 lots Not for payment of the land acquisition
14 Right? Look at that paragraph number three and
15 four where it says purpose

16 A What you said before Where are you talking
17 about? The commitment letter

18 Q Let me retrieve that from you for a moment
19 and I'll point out the exact paragraph I'm
20 referring to If you'll read paragraph number
21 three

22 A Purpose is to provide funding for the
23 development at the Courtyards at Rolling Creek,
24 Phase one I would like to speak about that for a
25 minute

Mr Lipscomb, Cross Examination

1 Q Is there anything in there about paying off
2 the land acquisition for phases two and three in
3 the first paragraph?

4 A The first paragraph is about funding for the
5 development of the lots at the Courtyard for phase
6 one

7 Q It says nothing about paying off the land for
8 phases two and three, does it?

9 A There's other paragraphs in here that says
10 that the land has to be used as collateral and has
11 to be paid off

12 Q Where does it say the land has to be paid
13 off?

14 A It says it has to have a first mortgage and
15 in anybody's mind you know a first mortgage means
16 a property is clear, has a clear title, has no
17 liens, and has no mortgages against it

18 Q Mr Lipscomb, isn't it true that NBSC already
19 had a first mortgage on that property?

20 A It was a bridge loan to be moved into this
21 one

22 Q It says nowhere in that letter that a bridge
23 loan had been moved in, does it? All it says is
24 one of the requirements is

25 A It says that you have to have a clear

Mr Lipscomb, Cross Examination

1 title to 130 37 acres of land which is the entire
2 land at Courtyards at Rolling Creek

3 Q Point out to us where it says you have to
4 have a clear title

5 A It says, title ensured first mortgage on
6 130 37 acres located at East side of US Highway
7 76, Irmo, South Carolina

8 Q And according to Exhibit number 5, they
9 already had that, didn't they? They already had a
10 first mortgage on that same acreage from your
11 prior loan for the land purchase Isn't that
12 correct?

13 A They had it on another loan but for this loan
14 it had to be cleared This is a different loan
15 This loan required it cleared

16 Q You knew from the very beginning that there
17 was not going to be enough money leftover to fund
18 the development after you took out that money,
19 didn't you?

20 A I knew in January that the loan was going to
21 be approximately fifty thousand dollars short
22 after some change

23 Q I'm talking about from the very beginning
24 You knew it was going to be short From November
25 '01, you knew it was going to be short

Mr Lipscomb, Cross Examination

1 A November '01, I knew it was going to be short
2 - I mean that was after the commitment letter had
3 been given to us and those kind of changes
4 couldn't be made after that along with those
5 funding but the commitment letter had already been
6 given in August of '01 I found out afterwards

7 Q You have the borrower's statement there?

8 A Yes, sir I have the borrower's statement
9 right here

10 Q How much does it say is left to draw?

11 A Okay One second All right I don't see a
12 date on here Oh, November the nineteenth
13 There's seven hundred and forty-two thousand
14 dollars left to draw That's on November the
15 nineteenth and in January I received a budget from
16 Mr Melton that says the changes in budget says he
17 needs seven hundred and ninety-nine thousand
18 dollars so in January, yes, I knew that it was
19 short

20 Q You knew before that, didn't you? You knew
21 before January that it was going to be short?

22 A If there was going to be a shortage, it was
23 going to be fifty thousand dollars, not six
24 hundred thousand dollars

25 Q You knew from Newman's Construction contract

Mr Lipscomb, Cross Examination

1 what the price was back in October of '01, didn't
2 you?

3 A I went to the meeting where all the bidders
4 were placed at the engineering office and I knew
5 what Newman's bid was Yes

6 Q You knew that Newman's bid was seven hundred
7 and ninety-nine thousand and eleven dollars
8 Right?

9 A The later bid was reduced

10 Q That's the amount that was on the bank's
11 spreadsheet 799,011

12 A Where's the spreadsheet?

13 Q I handed it to you Exhibit number 15

14 A I don't see a date on here Does it say a
15 date on here? Do you see a date on this?

16 Q I don't see a date on this

17 A Well, I can tell you This - do you want to
18 show it to me? The date?

19 Q I don't think there is a date on here

20 A Well, after Mr Melton submitted his new
21 bill, I would say that the bank did put a
22 spreadsheet out like that He submitted a new
23 budget

24 Q Mr Lipscomb?

25 A Yes, sir

Mr Lipscomb, Cross Examination

1 Q You signed the construction contract with Mr
2 Newman in October of 2001 Is that right?
3 October twenty-six, 2001 You signed that
4 contract

5 A I don't know the exact date I don't have
6 the contract in front of me but if you say that
7 was the date then I agree

8 Q And that contract told you how much it was
9 going to cost to build phase one, didn't it? Is
10 that right?

11 A It came back That was the original bid He
12 came back with a lower bid

13 Q And you know from the cost of the contract
14 and how much you had left to draw in November of
15 '01 that that was not going to be enough money to
16 fully fund the project

17 A I knew it in January

18 Q Do you have the budget that Mr Melton
19 submitted on January the eighth? That budget was
20 submitted after the loan closed Right?

21 A Yes, sir

22 Q And that is after it was disclosed to him
23 that you were taking out the eight hundred
24 thousand dollars

25 A Listen Early in the budget, this budget

Mr Lipscomb, Cross Examination

1 shows that there is going to be eight hundred
2 thousand dollars taken out He must have known it
3 because he prepared it I don't know when he
4 prepared it but I know when he submitted it but I
5 don't know when he prepared it but he has in here
6 the eight hundred and three thousand, four hundred
7 and seventy-seven dollars and seventy-six cents

8 Q The original document that was prepared has
9 extra money in there for other line items like
10 rock contingencies and other issues that came when
11 the development had to be cut and that's why he
12 did the new budget January the eighth Isn't that
13 right?

14 A It may so have been but it was not prepared
15 by Mr Melton

16 Q Well, who prepared the earlier budget?

17 A I don't know who prepared the earlier budget
18 Do you have a copy of it? Let me see it so I can
19 see it and let's look at it

20 Q Do you recall a meeting with Mr Melton,
21 yourself, and Mr Colson?

22 A I do recall a meeting with Mr Melton, Mr
23 Colson, and myself on more than one as a matter of
24 fact I've have three or four or five

25 Q I'm talking about where Mr Melton was

Mr Lipscomb, Cross Examination

1 presenting the budget to Mr Colson and it didn't
2 have eight hundred thousand for land requisition
3 added and during that meeting you told him that
4 you were taking out the eight hundred thousand
5 Do you recall that meeting?

6 A Listen It was never said to Mr Melton that
7 we were taking the eight hundred thousand dollars
8 out If he put it in an earlier budget and he
9 wasn't dealing with the bank The bank put
10 Listen, if we were only taking two hundred
11 thousand dollars out for - if that were so, the
12 bank would not give us no eight hundred thousand
13 dollars It would only give us what we were
14 paying off They wouldn't give us extra money to
15 sit there for other reasons The reason that it
16 went wrong with the two hundred thousand was
17 because we needed eight hundred and, in fact, the
18 whole story was true which it's not they would've
19 only give us the amount we were paying off There
20 wouldn't have been no more money that there was
21 The money for the infrastructure was totally
22 different from the land You're trying to confuse
23 the Jury

24 Q Mr Lipscomb, the early budgets did not
25 include the eight hundred thousand dollars

Mr Lipscomb, Cross Examination

1 for the land Do you remember that or not?

2 A Let me say this It was always my
3 understanding It was always my deal that we were
4 going to pay the land off If it was put in
5 there, it was put in there wrong

6 Q You were supposed to be paid back for the
7 land or you as SEL Properties was supposed to be
8 paid back for the land on a phase by phase basis

9 A Absolutely not The bank would not have done
10 the loan and it couldn't have been done that way
11 because they had to have a first lien Listen
12 If that was so, then Mr Melton could have stopped
13 this project any time he wanted to and said we're
14 not going to do it

15 Q Paragraph five of the contract - doesn't it
16 say that you were to be paid back the cost of
17 capital contributions on a phase by phase basis?
18 Isn't that what that paragraph reads on the second
19 page of paragraph five?

20 A Second page of paragraph five Contract
21 What paragraph are you referring to?

22 Q Well it starts off, In addition to the
23 foregoing, SEL shall pay Dutch Fork Development
24 Group twenty-five percent of the net profits
25 received from the lots sold in phase

Mr Lipscomb, Cross Examination

1 one, two, and three Do you see that?

2 A Yes, sir

3 Q Okay So, you're supposed to split profits
4 in each phase Right?

5 A I don't think you're supposed to split them
6 in each phase It says profits from all the
7 phases I don't read it that way at all I don't
8 read it that way and I don't think anybody else
9 would but I'll read it again Can I read it
10 again?

11 Q Okay

12 A In addition to the foregoing, SEL shall pay
13 DFDR twenty-five percent of the net profits
14 received from lots sold in phase one, two, and
15 three That's what you read Right?

16 Q Right

17 A So I definitely don't see it that way

18 Q And the next line goes, For purposes of this
19 paragraph, net profits shall be defined as the
20 cost of the sale of the lots less any and all
21 expenses or capital contributions Do you see
22 that?

23 A Capital contributions is the money that I put
24 in That SEL Property puts in That is the
25 capital contribution And the total

Mr Lipscomb, Cross Examination

1 amount of money for that loan was a capital
2 contribution because we were responsible for it
3 We owed the total amount, not some bookkeeping
4 Q The capital contribution includes the land
5 acquisition Right?

6 A Includes everything in the loan The capital
7 contribution is the amount of money we put in

8 Q You know if you used all the money from phase
9 one to buy the land from phase two and three,
10 there's no profits left in phase one, are there?

11 A I assure you not and it's always going to be
12 that way That's the reason they were in a hurry
13 to get going and that's the reason I was in a
14 hurry to get going Nobody makes money in
15 development It's hard to make money in
16 development

17 Q That's why it's important to get started
18 early Right?

19 A No, sir It is important to start early and
20 we tried every way we could to get started early

21 Q Every way except bonding the plat in January

22 A Nobody asked me to bond the plat in January
23 We're back to that same - I'm going to answer that
24 question again Nobody ever - prepared and took
25 one to the County and asked them to

Mr Lipscomb, Cross Examination

1 approve so they can get a bond or brought one to
2 me or asked me to do it

3 Q So, you disputed that this means that you're
4 supposed to split profits at each phase?

5 A I'm saying what this says right here Okay,
6 I'm going to read it again I'll read exactly
7 what it says, In addition to the foregoing, SEL
8 shall pay to DFDG twenty-five percent of the net
9 profits from phases one, two, and three That's
10 in addition to the other things in this contract
11 that I have to apply You can't just take it out
12 of context and

13 Q So, the foregoing is versus the development
14 fees Isn't that right? It's in addition to the
15 foregoing development fees

16 A I'm not denying that we owe the development
17 fees I've already said that

18 Q Yeah, but that's what this is talking about
19 In addition to the foregoing which is the
20 development fees, the other compensation, they
21 also get this compensation and it's supposed to be
22 on a phase by phase basis

23 A Due to the term of the contract The
24 contract is for five years Either that or any of
25 the exclusions of the contract Yes, sir

Mr Lipscomb, Cross Examination

1 Q I want to ask you one more time and I just
2 Please try to answer the question Do you dispute
3 that you were supposed to split profits in each
4 phase? It's a simple yes or no then you can
5 explain if you want to but do you dispute today
6 that you were supposed to split

7 A There have been topics at the time when I
8 would know when to split them in phase one Now I
9 know yes, that we should have split them in phase
10 one

11 Q And the primary reason there was no profits
12 in phase one from your point of view was because
13 all the money was spent from phase one went to pay
14 for the land from phase two and three

15 A No, it was not That money was set aside for
16 the land in the bank loan I disagree That's my
17 answer

18 Q That's all I wanted to know The road repair
19 that we talked about earlier A hundred and
20 seventy thousand dollars in road repairs, is that
21 right?

22 A I don't have it in front of me but it was
23 somewhere in that neighborhood Yes, sir
24 Because the process they had to go through was a
25 very unusual process They had to dry the road

Mr Lipscomb Cross Examination

1 up This happened only in Columbia, I believe,
2 once or twice before this Then pump dry cement
3 into it so it was a very expensive process Yes,
4 sir And nobody could have foreseen that We had
5 to bring in three extra specialists for them to
6 say and then the County approved it and then it
7 happened

8 Q Did you say nobody foresaw that?

9 A Well, evidently they didn't They paved the
10 roads and didn't fix it But if they would have
11 did it right the first time If they would have
12 had a plan the first time they did it, it surely
13 wouldn't have happened

14 Q You don't have any evidence that the roads
15 were constructed improperly, do you?

16 A I just told you that they were constructed by
17 the way the engineers designed them but evidently
18 that design was not what it needed to be to
19 survive the heavy trucks on the road

20 Q Mr Lipscomb, you had four engineering firms
21 come in and talk about the road problems, right?
22 You had GS2, PSI, and SM&E

23 A Yes, sir The outside engineer called them
24 I never made any of those myself I don't think but
25 the engineers and maybe Dutch Fork Development

Mr Lipscomb, Cross Examination

1 I think it was the engineers that called the
2 outside people to try to figure out what was going
3 on

4 Q Were you here for Mr Maxheimer's testimony?

5 A I was

6 Q He was your private engineer for this
7 project

8 A He was

9 Q And he's testified that there was no
10 construction defect and no design defect Right?

11 A Well, according to all four of them it had to
12 be changed and it had to be fixed another way and
13 it couldn't be the way it was and if any water
14 seeped under it wouldn't hold up

15 Q None of those reports say that there was a
16 design or construction defect, did it?

17 A They were there to say what it would take to
18 fix it They weren't there to point fingers at
19 what was done wrong to begin with

20 Q In fact, they said that it was constructed
21 and designed properly, don't they?

22 A I don't remember reading that I didn't
23 reading the ones in depth but I don't believe they
24 said that I don't know if they said that or not

25 Q I want to hand you over what we've

Mr Lipscomb, Cross Examination

1 marked as Exhibit 21 and ask you to refer to the
2 paragraph marked just below Paragraph number
3 four

4 A As read - My final observation is that all
5 elements of the pavement and drain structure were
6 as specified in the plans It was did like the
7 plans told it to be done The sub drain was
8 compacted according to specifications The
9 pavement was constructed as specified The cores
10 delivered to our office indicated insufficient
11 thickness of the two layers of asphalt To me,
12 right there, it says that that wasn't good enough
13 That it wasn't enough

14 Q Of course And do you know why that wasn't
15 good enough?

16 A Why?

17 Q Because it was just the first two layers
18 You know that you just wait until the last two
19 until the last two until the construction is done,
20 don't you?

21 A Yeah, but the construction wasn't done this
22 time

23 Q Right And so what does that mean when you
24 have a road and little potholes develop?

25 A You fix it and that's what we did

Mr Lipscomb, Cross Examination

1 Q You fix it immediately, don't you?

2 A As quick as they brought this to us
3 Maxheimer's letter came about a month before this
4 or two and we had these people out there and we
5 had to fix it as quick as possible

6 Q You have - Mr Melton and Mr Maxheimer
7 identified those cracks and potholes long before
8 that letter

9 A The first time I knew about it was when Mr
10 Maxheimer had is out there and then gave us a
11 letter about it

12 Q Mr Maxheimer testified that that letter came
13 after several observations, didn't he?

14 A Well, he may have observed it but he sure
15 didn't tell me about it

16 Q Mr Melton didn't come and tell you about it
17 when he saw cracks and potholes start to develop?

18 A Yes, about the time we started to get it
19 fixed

20 Q These things started happening right after
21 the construction began on the first houses
22 Right?

23 A Those roads for the first almost year - I
24 don't know the exact time - eight or nine months
25 I don't know the exact time but nothing

Mr Lipscomb, Cross Examination

1 happened Nothing happened because there was no
2 business out there I can tell you there was only
3 a few cars going in and out but when heavy trucks
4 started delivering materials, it was a different
5 story but that was about Let me say this
6 Before it started messing up like they are talking
7 about, it was at least a year
8 Q Exactly It was A year from the time of
9 construction The construction on the roads was
10 in '02
11 A A year from the time I'm talking about
12 from the first lot was sold It's about a year
13 before anything showed up Okay
14 Q Mr Lipscomb, the first lots were being built
15 on in August, September, October of '02, right?
16 A September - August of '02 And '03 was when
17 Maxheimer sent me the letter
18 Q Yeah, but that was in June
19 A June?
20 Q June of '02 or June of '03
21 A June of '03 Right That's what I said A
22 year later
23 Q That's not a year later
24 A Well, how much - what is it? Eleven months?
25 Q Do you have that letter right there?

Mr Lipscomb, Cross Examination

1 Mr Maxheimer's letter?

2 A What Exhibit number is it?

3 Q I'm going to trade that with you for just a
4 minute This letter is dated June tenth of '03
5 Right?

6 A That's correct

7 Q And it starts out, I'm writing this letter to
8 keep you informed as to our observations regarding
9 the pavement base Right? Is that what it says?

10 A Yes, sir

11 Q That was not your very first information that
12 there had been a problem with the roads

13 A This is the first time that the engineer had
14 discussed this with me and talked to me about it

15 Q Okay

16 A And not after he got out there I'm not
17 saying he didn't maybe a week or so some thing
18 happened earlier then but this was the first major
19 time that there was an observation brought to my
20 attention that we needed to get outside help to
21 fix this

22 Q I'm talking about when you first found out
23 that the potholes and the cracks were beginning
24 When was that?

25 A I just told you There was no traffic

Mr Lipscomb, Cross Examination

1 The roads were finished The construction
2 started There was very light construction
3 Nobody was out there building Pat was building
4 like three houses and there was few deliveries
5 When heavy trucks and when peak time when there
6 was more houses built, maybe ten houses at one
7 time out there and lots of construction and trucks
8 were delivering stuff, that's when the roads
9 starting totally failing in the front In the
10 front when we all went in They didn't fail so
11 much in other places Do you know why? Not many
12 big trucks went back there And that's the same
13 reason it didn't happen early on out there
14 Q Mr Melton Mr D Melton never came to you
15 in the late part of '02 and the early part of '03
16 and told you that we were having cracking and
17 potholes?
18 A He came to me a little bit before the letter
19 and said, look I observed it myself but we still
20 had to find out a way to do it and that's the
21 reason Maxheimer went and looked at it and sent us
22 this letter
23 Q You don't need to hire four engineers to come
24 in and tell you about fixing a pothole, do you?
25 A Sir, at that time the front roads were

Mr Lipscomb, Cross Examination

1 messed up totally It didn't take long once the
2 trucks got on them Those heavy trucks got on
3 them and it started putting ruts in them and so we
4 got there and Mr Maxheimer came out there himself
5 and he hired these people throughout what to do
6 about it All right We may have paid them but
7 he was the one that I don't know the name of
8 these kinds of specialists people He's the one
9 that

10 Q Mr Maxheimer told us last week that if you
11 would have had the roads repaired - paid for the
12 roads to be repaired when he advised you to have
13 it done it would have only been a few hundred
14 dollars Do you remember that?

15 MR BABCOCK Objection Pitting one
16 witness against another

17 THE COURT Rephrase the question

18 MR BOWENS It goes with the timing,
19 Your Honor

20 Q Do you recall Mr Maxheimer saying that if
21 you would have fixed the road- paid for the
22 repairs when he advised them to be repaired that
23 it would have only been a few hundred dollars?

24 MR BABCOCK Same objection, Your
25 Honor Pitting one witness' testimony in

Mr Lipscomb, Cross Examination

1 the trial against another

2 MR BOWENS This goes to the timing of
3 when we found out about the potholes and Mr
4 Maxheimer testified that if he would have repaired
5 them when he was told to it would have been a few
6 hundred dollars This is much later when the
7 roads were much more badly deteriorated

8 THE COURT Rephrase the question

9 Q When you got this letter, it was after the
10 roads had already gotten into a severe state of
11 disrepair?

12 A This was when they were getting in it
13 Getting into a state of disrepair and it didn't
14 take long Like I said and Mr Maxheimer said, he
15 said that the irrigation guy put the ditch too
16 close and the water got in there but if any water
17 had ever got under there it would have been the
18 same thing

19 Q I hand you Exhibit number 63 Do you
20 recognize this?

21 A It says, loan agreement - November the
22 nineteenth, 2001

23 Q Is that the loan agreement you made with NBSC
24 for the development loan for phase one?

25 A I'm assuming it is It's the date we

Mr Lipscomb Cross Examination

1 closed Would you go to page three and find
2 paragraph four? I want you to read the
3 highlighted portion please

4 A As read - within fifteen days pertains the
5 knowledge therefore correcting any material defect
6 in improvements in material defects from the
7 plants

8 Q Did you correct road problems within fifteen
9 days of being notified about them?

10 A Absolutely not I did not fix them within
11 fifteen days because I didn't know the problems
12 and that would be a project of the developer and
13 the engineer I'm not the guy that fixes the
14 roads

15 MR BABCOCK Your Honor, may we
16 approach?

17 THE COURT Yes

18 (Short conference at the bench)

19 Q Do you recall last Friday all the exhibits
20 that were shown to Ms Hower about all the
21 expenses that were being recouped by SEL
22 Properties?

23 A I don't remember all of them but I know there
24 was a lot of them

25 Q Different things that SEL was being

Mr Lipscomb, Cross Examination

1 reversed for

2 A Yes, sir

3 Q Do you believe that those were all legitimate
4 expenses that the Courtyard owed itself?

5 A Well, I don't have them but there may have
6 been some clerical errors but there was never any
7 attempt to make anything a charge to - I don't
8 think the girls at any time would intentionally
9 try to put a bill in the wrong place If that's
10 what you're asking me That's the answer

11 Q No, that's not what I'm asking you What I'm
12 asking you is SEL was making an effort to try to
13 recover all the items that it believed were
14 legitimate expenses

15 A SEL was trying to - yeah, of course

16 Q You didn't make a similar effort to try and
17 make sure that everybody else was being paid
18 though, did you?

19 A You're asking two different questions You
20 asked me this, to remember the invoices Were
21 they being coded right? Was that what you asked
22 me?

23 Q No That's not what I'm asking you

24 A Well, then I'm confused Let's start over

25 Q Okay SEL made an effort through it's

Mr Lipscomb, Cross Examination

1 bookkeeping and accounting to try and recover for
2 itself all of the items of expense that it was out
3 in terms of mileage for the bookkeepers, gas for
4 the lawn mowers, rental equipment for the John
5 Deere tractor You were trying to recover all
6 those items that you believed were legitimate
7 expenses

8 A I'll answer that by saying this Understand
9 that we were putting the cash in to try to keep
10 the place going If you don't pay for the gas in
11 the lawn mower, the grass can't get cut If
12 you're asking about daily operation stuff and
13 things like that, yes we were We never got our
14 money back We're up to six hundred thousand We
15 still owe a hundred thousand We never got our
16 money back

17 Q Mr Lipscomb, I'm not suggesting right now
18 that you were doing something wrong I'm just
19 saying you were trying to do that

20 A I'm telling you we tried to keep the place
21 running as best we could and we paid what was
22 necessary the things we thought would keep the
23 place looking good, promote sales to keep the
24 place from falling apart, to keep the place from
25 going in bankruptcy Yes, we did that

Mr Lipscomb, Cross Examination

1 Q And then you were trying to recoup those
2 expenses when the money came in for the lot sales?

3 A We tried to pay them Yes, sir

4 Q But what I'm asking you now is a new
5 question You didn't make a similar effort to try
6 to make sure that Mr Maxheimer was paid, that Mr
7 C R Jackson was paid, that Mr Newman was paid
8 over the people at Dutch Fork were paid

9 A I very much so did We spent every penny we
10 could borrow Every penny we could get from our
11 other companies Every penny NBSC put in We
12 paid every dime that was available There was no
13 time that Courtyards at Rolling Creek had any cash
14 flow other than what we spent on the place

15 Q Do you think it's fair to treat your business
16 partners in this manner? Where you make sure you
17 get all of your money back or all of your expenses
18 but you don't pay them anything Do you think
19 that's fair?

20 A I didn't get all my money back or my
21 expenses I don't understand where you - why you
22 are saying that

23 Q Well, we saw a bunch of exhibits where you

24 A You saw a bunch and there's a lot more of
25 them I've never been paid all my money back

Mr Lipscomb, Cross Examination

1 That's simply not true You've fabricated

2 something that didn't happen

3 Q You didn't try and recover That's what I

4 was asking

5 A We most certainly tried to recover We keep

6 our operations going out there and they try to

7 book it and we try to get the money back but we

8 never even got our cash flow back

9 Q Isn't it - you don't think it's strange that

10 the six hundred thousand you say you are out

11 A I didn't say I was out six hundred thousand

12 I said at least we put in six hundred thousand and

13 that was borrowed from our other businesses It

14 was borrowed from banks It was borrowed from

15 credit cards It was borrowed from whatever It

16 had to be put back as best we could put it back

17 We have not got it all back yet We still haven't

18 got money that we've put in the project We still

19 owe bank loans

20 Q What was the land in phase one? Just the

21 phase one land What was it valued at? What was

22 it worth?

23 A I have no idea

24 Q Was it about two hundred thousand dollars?

25 A I have no idea

Mr Lipscomb, Cross Examination

1 Q All right If you take the six hundred
2 thousand dollars you had to put in that's pretty
3 close to eight hundred thousand That's two
4 hundred thousand dollars shy of eight hundred
5 thousand

6 A Sir, I put this money in after the roads come
7 up two hundred and twenty-three thousand dollars
8 short, we owed expenses on the landscaping, and
9 interest carries that we didn't expect because we
10 thought we were going to have sales on the first
11 and we thought there was going to be but it never
12 happened that was told to me that was going to
13 happen by Dutch Fork Development Group You're
14 changing

15 Q What I'm asking you is - eight hundred
16 thousand dollars was taken out up front in
17 November of '01

18 A I didn't get the eight hundred thousand
19 dollars The bank simply moved it from one charge
20 - from one loan or one charge account to the other
21 one I didn't get the money You're trying to
22 say that I got eight hundred thousand There was
23 a bank loan, NBSC - short term, and it was paid
24 for in the bank I never touched the money I
25 never got a penny of it I never got a penny

Mr Lipscomb, Cross Examination

1 of it SEL Properties never got a penny of it

2 Q But you had to put another six hundred
3 thousand dollars back in?

4 A Borrowing from our different companies, from
5 their credit lines, scrounging up small loans at
6 banks, mortgaging other pieces of property -
7 whatever we had That's all we could get and we
8 were lucky to even get it that high I mean, our
9 other companies were suffering from taking money
10 from them and we owed loans everywhere

11 Q Mr Lipscomb, why was SEL Properties and Ms
12 Hower and everybody running around doing this kind
13 of work Wasn't that Dutch Fork's job to be doing
14 all this work you're talking about?

15 A Well, they didn't do it That's for sure

16 Q So you did

17 A We did Yes

18 Q By doing so you interfered with the
19 development

20 A Wait a minute We were out there doing this
21 all these years and they were always appreciative
22 They wanted us to do it It's not like that
23 you're trying to create like they were out there
24 trying to stop the lawn mowers from cutting the
25 grass They didn't want the grass cut They

Mr Lipscomb, Cross Examination

1 didn't want the trees felled or moved or
2 they didn't want trash cleaned up from a
3 developer's lot I mean, it's not that it wasn't
4 good for the project first of all It was good
5 for the scope of the project It was good for
6 them selling It was good for everybody and
7 nobody ever said don't do this stuff That's my
8 answer

9 Q What I'm asking you is - that was Dutch
10 Fork's responsibility to do that and not yours?

11 A I don't know if the maintenance stuff is
12 theirs or not but the development is definitely
13 theirs This is maintenance stuff that we were
14 doing when I mean cutting the grass and cleaning
15 up the common areas It had nothing to do with
16 putting the roads in, putting the sewer lines in
17 and the water, curbing, getting permits

18 Q Dutch Fork Realty was supposed to be in
19 charge of sales and marketing Right?

20 A That's correct

21 Q Did you ever interfere in any of that?

22 A I never did anything that wouldn't help the
23 project If I did anything it was only to help
24 the project

25 Q It was Dutch Fork's responsibility to

Mr Lipscomb, Cross Examination

1 keep things on time? Wasn't it?

2 A I don't know if it was their responsibility
3 to keep things on time or not I never saw that
4 in the contract

5 Q Well, that's what you testified to in your
6 deposition, wasn't it? Do you remember telling me
7 that?

8 A I might have told you that All I said was,
9 it's not in the contract I may have said was
10 that it was possibly their responsibility to keep
11 things on time but they sure as hell didn't keep
12 it on time The sales were behind The roads
13 weren't finished on time

14 Q Turn to page one hundred and twenty of your
15 deposition

16 A I'd love to

17 Q I'm referring you down to line number twenty-
18 two Do you see where it says, The scope of
19 everything as developers is to make sure
20 everything is on time

21 A Number twenty-two Line twenty-two

22 Q Do you see that? Where it says, the scope of
23 everything

24 MR BABCOCK Your Honor, he's picking
25 it up in the middle of an answer He's