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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 III of VIII
(Pages 985 - 1476)

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Mr Lipscomb, Cross Examination

1 going to try to question this witness on the
2 deposition and he's asked him a question and
3 picked out the answer from a phrase in the middle
4 of the answer

5 THE COURT Restart the question proving
6 the context

7 Q Let's back up to line number four

8 A Okay

9 Q The question I asked you was, any other land
10 plan changes that you recall you made with the
11 engineer and your answer on line six

12 A Line six as read - I'm sure there was some

13 Q And then I asked you, as far as the
14 supervision with Newman Construction, the
15 engineers were actually doing the supervision,
16 weren't they? And your answer?

17 A They were one of the ones doing the
18 supervision The other one would have been the
19 Meltons

20 Q And on line sixteen I asked you, who else was
21 supervising?

22 A Are we skipping over stuff or what?

23 Q Well, they were the ones doing the
24 supervision I'm sorry

25 A I said they were one of the ones I didn't

Mr Lipscomb, Cross Examination

1 say there were the only ones

2 Q I said, I'm sorry and you said?

3 A I said they were one of the people doing the
4 supervision

5 Q And I asked you who else was doing the
6 supervising on line seventeen and you said?

7 A LBA was overseeing the job The County and
8 the Meltons

9 Q And I asked you how were the Meltons
10 supervising Newman's work? And your answer on
11 line twenty-one

12 A As read - They were not supervising their
13 work They were the scope of their things as
14 developer is to make sure things run on time and
15 the work is being done properly but essentially,
16 from that on time point of view, from interest
17 running at the bank and stuff like that

18 Q Now, but especially from an on time point of
19 view, from interest running at the bank and stuff
20 like that?

21 A Yes Exactly

22 Q So was it Dutch Fork's responsibility to do
23 things right and on time

24 A But it never happened They never kept it
25 running on time

Mr Lipscomb, Cross Examination

1 Q And the reason it never happened was because
2 you interfered?

3 A No, sir It's not No, sir That is not a
4 true statement

5 Q How can you expect Dutch Fork to keep the
6 project running on time when you don't provide the
7 necessary funding?

8 A I provided all the funding that was required
9 of me by the contract I went to the bank in good
10 faith and got a loan They read - they knew what
11 the loan was Nobody ever objected to how the
12 loan was or the amount until this time or until
13 earlier this time

14 Q And you were supposed to personally guarantee
15 each shortfall, weren't you?

16 A No

17 Q You weren't?

18 A No, sir I was supposed to personally
19 guarantee the loan at the bank There's no
20 question about that They made me personally
21 guarantee it I wouldn't have guaranteed it
22 personally if they didn't SEL Properties got a
23 loan at the bank for all the Courtyards at Rolling
24 Creek

25 Q You did not agree to personally guarantee the

Mr Lipscomb, Cross Examination

1 shortfalls

2 A I personally guaranteed the loan at the bank

3 Q That wasn't my question, sir Did you

4 personally agree to guarantee any shortfalls?

5 A I did not personally agree to cover any

6 shortfalls

7 Q I'm going to hand you Exhibit number 32 and I

8 want to refer you to the fourth paragraph and ask

9 you to read the first sentence

10 Go ahead and address the Court please

11 A Which one?

12 Q The first sentence of the fourth paragraph

13 starts out saying, After the meeting

14 A As read - After the meeting disbursed, the

15 account officer discussed sources of income held

16 by the owner which could be used to cover costs

17 overruns

18 Q And I want you to turn to page seventy-five

19 of your deposition

20 A Okay

21 Q I'm going to read the question on line five

22 and you can read the answer on line seven

23 The question was - Did you ever agree to cover any

24 of the shortfalls or overruns to NBSC? And your

25 answer?

Mr Lipscomb, Cross Examination

- 1 A I had no choice
- 2 Q And there is another part
- 3 A So it is
- 4 Q No, on line seven
- 5 A Line seven I had no choice I had it
- 6 Q I had no choice I had to So you agreed to
- 7 cover any shortfalls or cost overruns?
- 8 A I did not
- 9 Q All right Did you have a plan in mind for
- 10 having this project completed in five years?
- 11 A Developments told me we'd sell right off the
- 12 bat, they told me we'd have a lot of builders
- 13 right off
- 14 Q I'm asking you your plan Did you have a
- 15 plan personally in mind for doing this project?
- 16 A No, I hoped it would happen but it didn't
- 17 happen
- 18 Q You ever let the Dutch Fork Development Group
- 19 plan
- 20 A I'd rely on what they told me but it didn't
- 21 happen It did not happen
- 22 Q This market that the Dutch Fork Development
- 23 group brought you into over with the Courtyards at
- 24 Rolling Creek over in the Irmo/ Chapin area
- 25 Right? That's where it is?

Mr Lipscomb, Cross Examination

1 A I think it's in Ballentine but

2 Q That was a very active market back in 2002,
3 2003, 2004 Wasn't it?

4 A The whole town was active

5 Q You would characterize it as a booming
6 market, wouldn't you?

7 A At that time the whole state market was
8 booming Yes

9 Q There was no reason for these lots not to
10 sell quickly

11 A I didn't think so but they didn't

12 Q And the reason that they didn't sell quickly
13 was why?

14 A I don't know I wasn't in charge of sales
15 I don't know why it didn't sell quickly but it was

16 I wish they had sold quickly I would have
17 made more money than anybody SEL Properties
18 would have made more money than but it didn't
19 happen I don't know the reason why it didn't
20 happen but they didn't sell enough lots for it to
21 happen It didn't happen

22 Q You can't think of any reason why it didn't
23 happen You can't come up with a cause of this is
24 what happened to make it not sell faster

25 A I can't say that I know the cause that the

Mr Lipscomb, Cross Examination

1 cause of why the lots didn't sell No, sir

2 Q Phase four you testified earlier had no
3 problem selling

4 A I said that and it had the same kind of road
5 problems The identical same We had to grind
6 the streets up and it did the same thing We had
7 good sales over there Nobody complained Nobody
8 ever complained about it so it couldn't have been
9 that Maybe it was the wrong kind of design of
10 houses that they were trying to do Maybe they
11 were too high in price I don't know the real
12 reason All I know is that it didn't sell and I'm
13 stuck with notes on the project

14 Q Well, you were satisfied with Dutch Fork
15 Realty's reputation and ability as salespeople,
16 weren't you?

17 A When we started I thought this project would
18 go but it didn't

19 Q You knew they were an award winning sales
20 team, weren't they?

21 A I didn't know they had an award winning sales
22 team Nobody ever told me that

23 Q You knew they won several of those Regal
24 awards for sales

25 A I don't know that I knew that but

Mr Lipscomb, Cross Examination

1 I mean if you say that they won them I'm not
2 doubting that I mean, a lot of people win those
3 awards

4 Q Well, the only thing that changed between
5 January of '02 and January of '04, those two sales
6 periods, was in January of '04 the roads had been
7 repaired and we had a bonded plat Is that right?

8 A Ask the question again?

9 Q The two major things that changed between
10 January '02 and January '04 was that January '04
11 we had a bonded plat in place and the roads had
12 been repaired

13 MR BABCOCK Your Honor, objection
14 This issue has been asked and answered three or
15 four times

16 THE COURT Overruled your objection

17 Q Those were the two major changes in 2004

18 A Okay Start over I can't get the timeframe
19 when you throw it out in the air like that and
20 stuff

21 Q January '02

22 A January '02 - we weren't selling lots

23 Q Right Exactly

24 A We didn't sell any lots until September

25 Okay

Mr Lipscomb, Cross Examination

1 Q January '03 comes along That's a whole
2 year January '02 to January '03 Now January
3 '04 Okay Follow me Now, the biggest
4 difference in those time periods is in January '04
5 you had your bonded plat in place and you had your
6 roads fixed Do you agree with that?

7 A Well, the roads were fixed the first year
8 too? There was nothing wrong with the roads the
9 first year we were there

10 Q In 2002?

11 A By the time the roads were finished to almost
12 a year later, there was no problems with the road
13 except there might have been something very minor
14 but nothing that a normal person would detect
15 riding through there

16 Q Mr Lipscomb, after we had the roads repaired
17 in October and then the late summer and early fall
18 of '03, the lot sales picked up tremendously,
19 didn't it? Right here on the chart you can see
20 it

21 A We didn't have the roads repaired in the
22 summer of '03, that's when Maxheimer said that
23 there was a problem They didn't get fixed then

24 Q Are you saying that the roads didn't get
25 fixed until late summer or early fall of '03?

Mr Lipscomb, Cross Examination

1 A Late fall of '03 Look He told us about it
2 in June Am I not right about this?
3 When did he tell us about it? In June, right?
4 He gave us the road thing in late June We had
5 the experts come out there, then we had to go to
6 the County, they approved, then the roads were
7 started to be fixed
8 Are you distorting the dates here? I'm having to
9 do this from memory so it's tough up here
10 Q I'm going to hand you Exhibit number 21
11 What is this?
12 A It's a revised proposal from Newman
13 Construction for phase one, Courtyard at Rolling
14 Creek
15 Q And it's for road repair Right?
16 A That's right
17 Q And what is Exhibit number 64?
18 A This is an inspection from the County saying
19 that this change order that Newman tried to fix
20 the road but afterwards when he couldn't we had to
21 get the specialists to make sure it was fixed
22 right because as well as I remember this didn't
23 work properly and more tests had to be done
24 Q Let me retrieve that from you This
25 inspection was dated August first, 2003

3
MR LIPSCOMB ON CROSS

1 A That's right

2 Q And that was late in the summer?

3 A The very end of the summer

4 Q And you had had people in to repair the roads?

5 A That didn't work He did fix it, but it didn't
6 work, and it had to be done again and it was not ap-
7 proved

8 It did not work after he tried to fix it, and
9 the county made us get professionals in there to once
10 and for all get this fixed

11 And that's what we did

12 Q This professional engineering report is July 28th
13 of '02?

14 A It is

15 Q Is it a proposal to repair the road?

16 A To get it fixed

17 Q Is that a proposal to repair the road is what
18 I'm asking

19 A It is

20 Q Now, this is dated when?

21 A It says 10 15 of 2003

22 Q Let me retrieve all of those from you

23 A All right

24 Q And in this engineer's inspection, they said all
25 areas of roadways had been inspected as noted on it?

MR LIPSCOMB ON CROSS

1 A Yes

2 Q And that a substantial amount of underdrain had
3 been installed, the area had been back-filled, com-
4 paction had been confirmed by the lab, and paving
5 had been done?

6 A Yes

7 Q So this confirms the work had been done, does
8 it not

9 A Yes They had to get more people out there to
10 get the process done, get it all completed, and we
11 have invoices that show that that work was done

12 Q Mr Lipscomb, you had it fixed before but it was
13 not fixed?

14 A It was fixed Okay?

15 Q Exactly It wasn't fixed and it was a temporary
16 fix?

17 A You'll have to ask the engineers about that
18 They are the ones working on it

19 Q You just said it didn't work, didn't you?

20 A Oh, I know it didn't work, but

21 Q It was a temporary fix?

22 A They didn't call it a temporary fix when they
23 did it

24 Q Of course not, but the work had to be done
25 again, right?

MR LIPSCOMB ON CROSS

1 A Yes

2 Q Because it had to be excavated, back-filled, compacted
3 and paved again, right?

4 A Right

5 Q And after that was done in October of 2003, what
6 was the effect on lot sales?

7 A The road immediately started failing again

8 Q Lot sales immediately picked up, didn't they?

9 A The road had to be redid again The county made
10 us redo it

11 Q But you would admit that the lot sales picked up
12 immediately?

13 A I wouldn't say that I know that K & L bought
14 ten of those lots

15 Q K & L bought one, two, three, four, five, and
16 that was in October of '03?

17 A They bought more than that

18 Q But I'm talking about in October, which was af-
19 ter the roads were repaired, that lot sales picked
20 up, and you satisfied the bank

21 A The bank was satisfied

22 Q Th the lots that K & L bought were resold
23 then again?

24 A That's right

25 Q Mr Lipscomb, are you disputing that after the

MR LIPSCOMB ON CROSS

1 roads were repaired in the fall of 2003 that the lot
2 sales did not pick up

3 A I'm not disputing that

4 Q Okay

5 THE COURT Let's take a break at this time
6 Ladies and gentlemen, this will be a good time
7 to take an afternoon break

8 Please remember my earlier instructions given
9 to you that you are not to begin any discussions
10 as to the case among yourselves

11 Let's take a break and we'll come back

12 (Jury excused from Courtroom at 4 02 P M)

13 THE COURT Anything we need to take up before
14 we take our break?

15 MR BOWENS Not from the Plaintiffs

16 MR BABCOCK No, Your Honor

17 THE COURT Mr Lipscomb, I remind you that you
18 are still under oath and you should not discuss your
19 testimony with anyone during the break

20 WITNESS Yes, Your Honor

21 (Whereupon, the Court took a recess after which
22 the matter resumed)

23 THE COURT Anything we need to take up before
24 bringing in the jury?

25 MR BOWENS No, Your Honor

MR LIPSCOMB ON CROSS

1 MR BABCOCK No, Your Honor

2 THE COURT Bring in our jury, please

3 (Jury returned to Courtroom)

4 (Witness Lipscomb resumed witness stand)

5 THE COURT You may continue

6 MR BOWENS Thank you, Your Honor

7 CROSS EXAMINATION CONTINUED

8 BY MR BOWENS

9 Q Mr Lipscomb, earlier in your testimony you had
10 said that Dutch Fork Realty had promised to have a
11 certain number of builders ready to buy lots?

12 A I said that they had told me on many occasions
13 that they would have seven or eight builders that
14 would at least take down two lots apiece and two lots
15 per month would be taken down, but that was just in
16 conversation It was not part of the contract

17 Q And it had nothing to do with the contract?

18 A No

19 Q Now, Dutch Fork did have a number of builders
20 lined up to take down lots, didn't they?

21 A Right away? There were five lots taken down,
22 and three of those were K & L I didn't see any --
23 I didn't see any builder taking down two lots imme-
24 diately, or any big scramble to sell them

25 That was a statement made by them to me, that

MR LIPSCOMB ON CROSS

1 they had seven or eight builders who would come and
2 buy two, and that this would create a cash flow, but
3 the sales did not happen

4 There were too many -- there never was any cash
5 flow

6 Q And even though that is not in the contract,

7

8 A It happened It wasn't two a month

9 Q but it is not in the contract?

10 A I understand that

11 Q Now, these builders, with the exception of K & L,
12 had a long standing relationship with Dutch Fork, did
13 they not?

14 A Well, I'm not sure about that

15 Q But they brought in builders, didn't they?

16 A They did provide some builders along with K & L,
17 yes, sir

18 Q Just answer the questions, please

19 They brought in builders, didn't they, that took
20 down more than one lot?

21 A When we first started, they did not take down
22 more than one lot No, sir

23 Q Please answer the question They brought in
24 builders who took down more than one lot?

25 A Over a period of time, yes, sir But not

MR LIPSCOMB ON CROSS

1 initially

2 Q But not initially, and that is your complaint,
3 is that right?

4 A When we first started, they did not

5 Q So not immediately then?

6 A You are changing it

7 Q Please answer my question

8 A

9 MR BABCOCK If he could finish his answer, Your
10 Honor

11 BY MR BOWENS

12 Q They brought in these builders over a period of
13 time?

14 A For cash flow reasons, we thought there was
15 going to be a take down of fourteen, sixteen lots as
16 the development started That did not occur

17 Q Why did it not occur?

18 A Why didn't it occur? Because they didn't have --
19 they didn't do it I don't know why they didn't do
20 it, as they said they would

21 Q And it is not the case that

22 A If they had builders for those fourteen or six-
23 teen lots, sixteen sales, we could have gotten sixteen
24 bank releases

25 Sixteen sales -- any amount of money and get the

MR LIPSCOMB ON CROSS

1 releases, and we would have gotten seventy-five per-
2 cent If engineering had prepared it and brought
3 it to me, I would have been stupid -- no, it did not
4 happen and that was not the reason

5 Q Is it not a fact that Dutch Fork had builders
6 lined up to buy the lots in the spring of '02 and
7 they weren't able to buy the lots because of the
8 plat?

9 A They told me they had -- even when we started,
10 they told it would start selling, but it didn't hap-
11 pen

12 Q Now, you testified earlier on direct that (por-
13 tion not audible), right above paragraph four See it?

14 A That's right Phase four shall not commence un-
15 til no less than sixty percent of the lots in phase
16 one are sold

17 Less than sixty percent of the lots in phase
18 one and phase three will not commence unless

19 Q Will not commence until no less than sixty per-
20 cent of the lots in phase one and two are sold?

21 A That's what it says

22 Q And that means that lot sales will not commence,
23 is that right?

24 A Re-ask the question

25 Q When it says will not commence, it means lot

MR LIPSCOMB ON CROSS

1 sales Correct?

2 A

3 Q Is that right?

4 A If you go back and read it, it says phase three
5 will not start until sixty percent of the lots are
6 sold

7 Q And you can't sell lots with no roads?

8 A You can sell lots without there being roads I
9 am aware of that now I wasn't aware of it then

10 Q But this is talking about commencing lot sales,
11 is that right?

12 A

13 Q Is it right or wrong?

14 A We're talking about section three, right?

15 Q Yes

16 A This is about the property being sold in phases
17 There will be three phases

18 It says phase two will not commence until no
19 less -- no less than sixty percent of the lots in
20 phase one are sold, and phase three will not commence
21 until no less than sixty percent of the lots in phase
22 two are sold

23 Q And lot sales is what the paragraph is talking
24 about?

25 A

MR LIPSCOMB ON CROSS

1 Q It's talking about when lot sales begin, is that
2 right?

3 A This was put in there to define that you could
4 not sell lots or start sales in one section until
5 sixty percent of lots in the last section were sold

6 We could not get the bonding -- this was put
7 in because there is no way to get the bonding without
8 sixty percent of the lots being sold and the roads
9 started

10 Q Mr Lipscomb, I've asked this question three
11 times Does this mean lot sales or does it mean the
12 construction of the infrastructure?

13 A It means both

14 Q Isn't it true that in phase two and in phase
15 ~~three~~ the infrastructure construction had already begun?

16 It's a yes or no question, and then you can ex-
17 plain

18 Had phases two and three already experienced
19 construction activity?

20 A Yes

21 Q Well,

22 MR BABCOCK Let him finish

23 A The only construction in phase two and phase
24 three was -- we have a diagram of all of this The
25 sewer was on the far end of the property and water

MR LIPSCOMB ON CROSS

1 was on the far end of the property There was no
2 lots, no infrastructure, no sewer lines, nothing to
3 do with any of that was ever done We were bringing
4 more or less the sewer to phase one, to be tapped in
5 at phase two and three, but it was not

6 Q Had there been any development work done to
7 phase two and three?

8 A Well, there was construction there If you take

9

10 Q Had there been any development work done on
11 phase two and three?

12 A We had plans and we had some sewing -- some
13 sewing and some planting did, yes, sir

14 Q So obviously this does not mean you can't start
15 construction work and you can't start development work
16 in phase two and three?

17 A I say it does mean you can't start it, sir It
18 means you can't start it

19 Q Even though the rest of the sentence that is
20 contained there is talking about lot sales?

21 A Haven't I answered that?

22 Q Now, you realize that you cannot wait until
23 sixty percent of the lots are sold to start any work
24 in phase two?

25 A I don't know that

EXCERPT OF TRANSCRIPT FROM DAY 5

BY MR BOWENS

Q But you realize you had to start that process The bidding process had to be started and it had to get worked up before you got to 60 percent You can't just wait till that day comes and then start thinking about getting work done in Phase 2

A I'm not sure if that's so or not That we did -- there was work done But I'm not saying at what point you have to start

Q Well ---

A I don't know that Okay?

Q Would you defer to the developers on that issue?

A If they wouldn't have put us in a financial difficulty I mean, I had the last say so in finance I could say whether we were going to do it or not going to do it

Q Well, it just -- isn't it just logical that you have to start the process before your -- get to that point so you'll have everything in place so you can start Phase 2 on time?

A I said it would be good to start

COURT REPORTER I'm sorry What did you say?

A It would be good to start

Q What prevented Phase 2 from being ready to go in May

1 or June of 2004?

2 A There was no way it could have been done We -- we
3 would never have been able to get the permitting, the
4 regulations had changed, the sales -- the sales weren't
5 there I don't even know if we even had a loan at that
6 time

7 Q The sales were there in May and June of '04, weren't
8 they? You'd already got 60 percent by that time

9 A Of '04?

10 Q Of '04

11 A Then we could have started, yes, sir Right there

12 Q Well, there ---

13 A There's no way that you could -- that you could -- in
14 '04, there's no way that I could go to the bank and get the
15 money prior to getting to that 60 percent to even start the
16 process

17 Q You already had -- you had a commitment letter in hand
18 later on, didn't you? Not far after this

19 A Not far after that That's true But if we wouldn't
20 have gotten the 60 percent, we didn't get a commitment
21 letter

22 Q But the only reason you couldn't start Phase 2 when
23 you got to 60 percent of Phase 1 was because you had
24 already thrown away the plans for Phase 2 and started over
25 again

1 A I had thrown away the plans

2 Q Isn't that right?

3 A We all agreed on the changes to go to Maxheimer and to
4 start new plans for Phase 4 Nobody ever complained about
5 that, not once, until we got to this -- to this --

6 Q All right My question for you is this Now, just
7 try to follow me The reason we couldn't start Phase 2 in
8 '04, was because the plans weren't ready Mr Maxheimer
9 hadn't gotten finished and they hadn't been approved Is
10 that right?

11 A The plans had not been complete, the regulations
12 changed, and they didn't have all the permitting

13 Q Now, back in 2002, the plans for Phase 2 and 3 had
14 already been approved, right?

15 A That's correct

16 Q And you already had the permits in place

17 A That's correct

18 Q And the reason we couldn't use those plans was because
19 you had abandoned them and gone on to new plans

20 A No We all ---

21 Q That's not true

22 A We all agreed to that We all agreed that Maxheimer
23 had to do more -- that's ---

24 Q You're ---

25 A --- I'm not the one that brought that up The Meltons

1 and I discussed that I did go to Maxheimer and he started
2 new plans, but that was agreed upon by everybody

3 Q Are you telling this Court that you and the Meltons
4 went into Mr Maxheimer together as a group and sat down
5 and said, "Look at here ---

6 A I didn't say -- I didn't say we went in together
7 They had already been to -- D Melton had already been
8 there He'd already talked to them the -- that we could
9 get more lots in that section He told me it sounded like
10 a good plan This is before we started sales, Glenn And
11 this is early on This is before sales ever started out
12 there I didn't know that -- weren't going to be great
13 sales there

14 Q You don't deny that in 2002, you went to Mr Maxheimer
15 and told him to start changing the plans and redesign Phase
16 2 and 3 Do you deny that?

17 A I went to Mr Maxheimer and told him to start changing
18 the plans That we -- me and the Meltons -- all agreed
19 upon and it's never been brought up that there was anything
20 wrong with that until this litigation started Nobody ever
21 said a word about it over time -- the prior couple of years
22 after that

23 Q And there were additional changes made to accommodate
24 potential buyers in Phase 2 and 3 after --

25 A After contract had expired

1 Q After --

2 A The contract had expired

3 Q After March and April of '02, when the first set of
4 revisions started, there were more changes made to
5 accommodate builders who wanted to buy Phase 2 and 3 Is
6 that right?

7 A I don't remember any changes prior to the contract be
8 anything, except when the Meltons and I agreed to start
9 some changes with Maxheimer, back before any sales started
10 in this whole project

11 Q You don't -- you don't -- you don't remember going to
12 Mr Maxheimer and telling him that you had potential
13 builders who wanted to buy Phase 2 and 3 ---

14 A That was after -- that was after -- that was after we
15 -- the Meltons had been released and their contract
16 expired

17 Q If the plans for Phase 2 and 3 had not been changed
18 back in 2002, they would have been ready to be implemented
19 in May or June of 2004, is that right?

20 A Glenn, if all that theory was right, that's probably
21 so But here again, the Meltons and I agreed to change
22 them They changed some Federal regulations in the
23 meantime So it wasn't my idea only to go change the
24 plans, and nobody ever said anything that they disagreed
25 with changing them

1 Q Those Federal regulations didn't change and didn't
2 affect the original plans though If you had gone forward
3 with the original plans, those Federal changes would have -
4 - would not have been -- would not have affected them,
5 right?

6 A I don't know

7 Q You already had the permits and the approved plans
8 They wouldn't ---

9 A I don't know that we had all the permits

10 Q But you agree that if the -- if the original plans had
11 not been changed, they would have been available to be
12 implemented in June of '04

13 A If the original plans had not been changed, that's so
14 But here again, it wasn't my idea alone to change the
15 plans This is before we start building -- built before
16 they even -- there's any lots sold Nobody ever said
17 anything about disagreeing about changing the plans
18 Everybody was for it

19 Q Now, if the -- if the plans had been -- that were
20 already approved by the planning commission -- had been
21 left alone, then Dutch Fork Realty would have had from 2002
22 on until November of '05, to work on Phase 2 and 3

23 A No, sir

24 Q They wouldn't have had that much time to work on it

25 A They could not have started it, because the contract

1 says that 60 percent of the lots have to be sold

2 Q All right Now, I'm not talking about selling them,
3 actually I'm talking about doing the brokering work, the
4 marketing, the pre-sales, the reservations All that kind
5 of thing that goes into the lead up to a -- to a phase
6 starting They couldn't have been doing all that kind of
7 work?

8 A They may have, but they agreed to change them with --
9 along with myself I didn't change them to hurt myself
10 You think I -- I'm going to get 75 percent of the money
11 Why would I do something before we even make a sale that
12 they hadn't advised me it was okay to -- to go to Maxheimer
13 and say I'd pay -- I went to Maxheimer -- when you say I
14 went to Maxheimer, I'm the one who has to go down there and
15 sign off on getting paid

16 Q Mr Lipscomb, would you agree that if the plans had
17 not been changed, then Dutch Fork would have been able to -
18 - marketed, done the reservations, the pre-sales, all that
19 kind of brokering work, from 2002 all the way through to
20 November, 2005 That's a true statement, isn't it? They
21 could have done that work

22 A I don't think they could have did it all But I just
23 don't think the sales were there to do it

24 Q Without a set of plans, you make it impossible for
25 Dutch Fork to go out and -- and try to sell Phase 2 and 3,

1 don't you?

2 A I'm not the one alone that decided to change the
3 plans, Glenn You -- I'm telling you that now

4 Q You can't expect Dutch Fork to go to a potential
5 builder with no set of plans that shows the lot layouts,
6 the lot sizes, how the project's going to look, and expect
7 them to be able to do any kind of brokering work on Phase 2
8 and 3, can you?

9 A Glenn, I don't -- I -- I don't think they could do
10 that without that But that's not the way it was They
11 are the ones that wanted it changed, because they thought
12 it would be easier to market it that way, to add lots there
13 and to change the sizes They suggested it to me I ---

14 Q Mr Lipscomb, all I'm ---

15 A I -- wait Just wait and let me finish They
16 suggested it to me I went to Maxheimer's and signed for
17 the -- signed for it, for the changes I'm not one that --
18 I didn't even know you could go back and change plans at
19 that time

20 Q I know that's your contention All I'm asking you is
21 a very simple question

22 A I'm -- I'm telling you my answer

23 Q Please -- please, try to confine your answer to this
24 one question If Dutch Fork had a set of plans that had
25 been approved by the planning commission and had been

1 permitted by the county, then they could have used all the
2 time from -- from that point on, 2002 on, to have done this
3 brokering work That's true, isn't it?

4 A If everything had worked perfect, they could have did
5 that Yes, sir

6 Q That was already done, wasn't it? You already had
7 approved plans

8 A But the sales hadn't happened We couldn't have put
9 the lots in We couldn't have sold to anybody If they
10 had tried to sell anybody, there wouldn't have been any way
11 to do any -- putting any infrastructure in there, Glenn

12 Q But they could have done the work, and had -- had
13 deals in place so when -- that when 60 percent got there,
14 they could have -- they could have been executed, right?

15 A If everything went perfectly, they might have could
16 have did that But that's in -- in a perfect world that's
17 not what happened

18 Q And the only thing that kept it from happening was
19 having the plans thrown out

20 A No, it wasn't The sales -- if we didn't do 60
21 percent sales, we couldn't borrow the money So we
22 couldn't do it, Glenn

23 Q Mr Lipscomb, you -- you would have -- if Dutch Fork
24 had come to you with a contract similar to this Essex
25 contract -- not identical, but one like it -- for a section

1 of lots in Phase 2 ---

2 A They never did it

3 Q I'm saying if they had

4 A They never did it

5 Q Would you listen to my question, please, sir I said,
6 "If they did "

7 A If they did, yes

8 Q You would have allowed it to go forward

9 A If they did

10 Q Right

11 A They never did it

12 Q And the reason they could not was because you had the
13 plans redesigned, over and over again

14 A I had the plans redesigned They were -- I'm not the
15 one that had the -- they the ones that told me that the --
16 they need to be redesigned because we could sell better in
17 Phase 2 I went over there to sign the thing I did go to
18 Maxheimer I signed the -- I signed the contract, and I
19 agreed to it I'm not saying I didn't agree to it, because
20 at that time I thought we were going to sell the lots and I
21 thought it was a good thing I never did anything to keep
22 my company from making money or their company from making
23 money I mean, I had 75 percent to lose, Glenn They had
24 25 percent to lose Plus I owed the bank note

25 Q I'm going to hand you Exhibit No 110 and see if you

1 can identify that for the Court, please

2 A Well, I recognize the form Is that what you mean?

3 Q What is the document?

4 A It's AIA Document No A101-1997

5 Q And is that the -- a construction contract for Phase
6 2?

7 A I don't know if it is or not Yes, it is This is
8 where we let a construction contract for Phase 2, in 2006 -
9 - 2000 -- the year 2005, February

10 Q February, 2005

11 A Uh-huh

12 Q You had let a construction contract for Phase 2

13 A Right

14 Q And that's within the term of the contract, isn't it?
15 That's within the -- the five year term of the contract
16 That's before November of '05, isn't it?

17 A It is

18 Q Now, you were supposed to start paying Phase 2
19 development fees the month after, which would be March of
20 '05, aren't you? For Phase 2?

21 A This is just letting the contract We didn't start
22 it This never ---

23 Q Mr Lipscomb ---

24 A This -- this never happened

25 Q The -- the contract says that you shall pay the second

1 round of development fees the month after you sign that
2 contract, doesn't it? Isn't that what it says?

3 A Let me read it Which one? Which -- which paragraph?

4 Q Paragraph 5

5 A Well, this never got started This never happened

6 Q You signed the contract, didn't you?

7 A I signed the contract, but it never happened

8 Q And -- well, it happened if you signed it, didn't it?

9 Did you or did you not sign that contract?

10 A I signed the contract

11 Q Now, according to your contract with the Meltons,
12 you're supposed to pay them the second round of Phase 2
13 development fees the next month after you sign that, right?

14 A This ---

15 Q Is that right? You can explain after ---

16 A Yes, it is

17 Q --- you answer my question And you -- did you start
18 paying them in the second -- the next month?

19 A No, sir This is to find out how much something was
20 going to cost to see if we could go forward with it

21 Q Mr Lipscomb ---

22 A And we could not go forward with it and we did not go
23 forward with it

24 Q You signed a contract to find out how much it was
25 going to cost?

1 A Yes

2 Q You didn't find out how much it was going to cost
3 before you signed the contract?

4 A Well, I mean, they showed it to me and I agreed to it
5 and I signed it

6 Q And then you signed it

7 A But -- but it didn't -- but the project did not work
8 out It did not go forward There was no roads, nobody --
9 and this sale did not happen

10 Q Well, that's not a sale That's to construct Phase 2,
11 right? That's not a sales contract That's to construct
12 Phase 2 infrastructure

13 A Yes, it is

14 Q And the reason that did not go forward was because the
15 potential buyer you had for Phase 2 changed their mind
16 Isn't that right?

17 A Yes I mean, we never went forward because they
18 couldn't agree on the -- the costs and stuff, right

19 Q The buyer -- that's one of those buyers who you had
20 negotiated with behind our backs, backed out on you And
21 that's why that contract fell through Is that right?

22 A I guess it is, yes, sir

23 Q Okay Thank you

24 MR BOWENS Your Honor, we'd offer Exhibit No 110
25 into evidence at this time

MR BOWENS CROSS-EXAMINATION OF STEVE LIPSCOMB

17

1 MR BABCOCK Without objection

2 THE COURT It's admitted

3
4 --- END OF TRANSCRIPT OF RECORD ---

MR LIPSCOMB ON CROSS

1 Q You don't know about the lead time situation in

2

3 A I do understand lead time, but the plan was
4 to sell the lots and we had to use

5 Q Did you have to sell sixty percent to do that?

6 A This was what was needed to start us up and with-
7 out the sales because of the finances we couldn't do
8 anything else

9 Q You say you couldn't go forward?

10 A It was impossible to go forward because they
11 hadn't sold sixty percent of the lots

12 Q But you realize you had to start that process

13 (NOTE Portion of record transcribed earlier
14 by Ms Kelly for counsel)

15 (Plaintiffs' Exhibit 110 was admitted in evidence,
16 being construction contract for phase two)

17 THE COURT It's admitted

18 MR BOWENS Your Honor, I have no further
19 questions

20 THE COURT Any Redirect?

21 MR BABCOCK Court's indulgence for a moment?

22 (Brief pause in proceeding)

23 MR BABCOCK Nothing further, Your Honor

24 THE COURT You may step down, Mr Lipscomb

25 (Witness excused from stand)

1 THE COURT Ladies and gentlemen of the jury,
2 I believe this would be a good time to break for the
3 evening
4 I'm going to excuse you now and ask that you
5 return in the morning at nine thirty
6 Please remember my earlier instructions to you
7 that you are not to begin to form any opinions on the
8 case until you have heard all of the evidence that
9 is to be presented
10 You are not to discuss the case among yourselves
11 or with anyone else, and you should not allow anyone
12 to discuss it with you
13 Should anyone come up to you and try to discuss
14 the case, tell them you are on the jury and that
15 you have been instructed not to discuss it Remem-
16 ber that you should report that when you return tomor-
17 row
18 (Jury excused from Courtroom at 5 03 P M)
19 THE COURT Anything we need to take up before
20 we take our evening recess?
21 MR BOWENS Nothing, Your Honor
22 MR BABCOCK Nothing from the Defense
23 THE COURT Have a good evening
24 (Court stood in recess, to resume on January 6,
25 2007)

Video Deposition of Ronnie Colson

1 THE COURT Good morning, people

2 Please be seated Is there anything we need to
3 take up before we bring the Jury back?

4 MR BOWENS No, Your Honor

5 MR BABCOCK Not from the Defense, Your
6 Honor

7 THE COURT Will you ask the Jury to
8 come in please?

9 (Jury entered the Courtroom)

10 THE COURT Good morning, ladies and
11 gentlemen We are ready to continue on You may
12 call your next witness

13 MR THOMAS Your Honor, the next
14 witness is the videotaped deposition of Ronnie
15 Colson

16 THE COURT Ladies and gentlemen, you
17 are about to hear the testimony of a witness by
18 means of a deposition A deposition is a document
19 that contains a sworn testimony of that witness
20 What occurs is that witness is brought before to
21 the attorney's office representing the various
22 parties and they are administered the oath before
23 a court reporter and there is also a court
24 reporter in this case and also a video so there is
25 also a videographer

Video Deposition of Ronnie Colson

1 And the person is asked questions about this
2 particular case Any objections have been
3 reserved until the time that the deposition is
4 read here in Court And you are to treat this
5 deposition just as if the witness were present
6 here in the Courtroom and offering testimony from
7 the witness stand

8 In this case you will have the benefit of
9 actually being able to see the witness because it
10 was videotaped and you should give the witness'
11 testimony the same weight you would give all the
12 other witness' testimony and it's up to you to
13 determine the value to be given that testimony but
14 you are to treat the testimony just as if the
15 witness were present in the Courtroom and
16 providing testimony from the witness stand

17 Do you have the original?

18 MR THOMAS The transcript was given

19 THE COURT That's right

20 (Video deposition of Ronnie Colson played at
21 9 44 AM)

22 (Video deposition ended at 11 05AM)

23 THE COURT Ladies and gentlemen, this
24 is a good time to take a morning break I want to
25 remind you of the instructions I've given

1 to you previously That is, not to begin to
2 discuss the matter among yourselves You still
3 have not heard all the evidence that has to be
4 presented Let's take a break and we'll come
5 back

6 (Jury exits the Courtroom for break)

7 THE COURT Is there anything we need to
8 take up before we bring the Jury back?

9 MR BOWENS No, Your Honor

10 MR BABCOCK Your Honor, we do have the
11 addition of the tape of the deposition

12 THE COURT That needs to be marked
13 Marked as 11 Let's take a break and we'll come
14 back

15 (Court exits for a break)

16 THE COURT Be seated please Is there
17 anything we need to take up before we bring the
18 Jury in?

19 MR BOWENS No, Your Honor

20 MR BABCOCK Not from the Defense, Your
21 Honor

22 (Jury enters the Courtroom)

23 THE COURT You may call your next
24 witness

25 MR BABCOCK If it please the

1 Court, the next witness for the Defendants is Mr
2 Marty Ouzts Stand right by me sir and face this
3 lady here

4 THE COURT Would you spell your last
5 name please?

6 Marty Ouzts, being duly sworn,
7 testified as follows

8 DIRECT EXAMINATION

9 BY MR BABCOCK

10 A O U Z T S

11 Q Good morning, Mr Ouzts How old are you
12 sir?

13 A Fifty-one

14 Q And where do you live?

15 A Columbia, South Carolina

16 Q And did you go to college?

17 A I attended Clemson University and graduated
18 in 1978

19 Q What was your degree in?

20 A Financial management with a concentration in
21 accounting

22 Q And what do you do for a living?

23 A I'm a Certified Public Accountant

24 Q And how long have you been a CPA?

25 A I've been a CPA since 1981

Mr Ouzts, Direct Examination

1 Q And where do you practice?

2 A I practice in Columbia, South Carolina

3 Q And do you have a firm?

4 A My firm's name is Ouzts, Ouzts, and Varn

5 Q And how long has that firm been in existence?

6 A Since 1983

7 Q Have you ever provided expert testimony in
8 court before?

9 A Quite frequently with the bankruptcy court
10 and I work through the bankruptcy court as
11 examiner Sometimes the accountant for the
12 creditors and do various reporting requirements
13 for the court and those bankruptcy court issues
14 generally have a lot of other issues to be
15 litigated so yes, I've testified in court
16 frequently

17 Q Have you been qualified as an expert in the
18 State Court here in the State of South Carolina?

19 A Yes

20 Q And in the field of Accounting?

21 A Yes

22 Q Prior to this case, had you done any work for
23 SEL Properties, LLC?

24 A No

25 Q Prior to this case, had you done

Mr Ouzts, Direct Examination

1 any work for Mr Lipscomb or his family?

2 A No

3 Q Prior to this case, had you done any

4 work for any of Mr Lipscomb's other businesses?

5 A No

6 Q Prior to this case, had you done any work for

7 Dutch Fork Development Company or Dutch Fork Real

8 Estate?

9 A No

10 Q And have you done any work for any

11 developments?

12 A No

13 MR BABCOCK Your Honor, at this point

14 we would offer Mr Ouzts as an expert in the field

15 of Accounting

16 THE COURT Any voir dire? Any

17 objection?

18 MR BOWENS No objection None

19 THE COURT Fine Qualified

20 Q All right Mr Ouzts, we're going to get

21 some opinions that you could give me in this case

22 and those opinions will be to a reasonable degree

23 of accounting sir

24 A To the extent that they can be Yes

25 Q Now, did you perform any study concerning

Mr Ouzts, Direct Examination

1 the Courtyard at Rolling Creek project?

2 A When I was first engaged I approached it the
3 same as I do in the cases in bankruptcy court when
4 I'm doing a report to the court and in that what
5 you are doing is you're outlining what has
6 happened during the course of the case or project
7 Often there are real estate developments in
8 bankruptcy court

9 You're looking at what has happened, what the
10 exact time periods are, the dollar amounts,
11 comparing what the projections if there are some
12 available, and looking at the actual results
13 versus what was anticipated and often they are
14 different than what was anticipated at the start

15 Q Did you do a study of cost and profits for
16 any phases at Rolling Creeks?

17 A When I was first engaged I looked at phase
18 one and the way I approached that is I first went
19 back with the employees of SEL Properties and got
20 an understanding of them, the process that they
21 went through and how they recorded it

22 They had set up a separate general ledger for
23 the Courtyards at Rolling Creek The invoices
24 came to the accounting office They were
25 usually approved by Mr Melton, D Melton

Mr Ouzts, Direct Examination

1 And he specified as to which phase - because
2 during the course of the construction of phase one
3 there was also work being done on phase four and
4 so there had to be distinctions made as to which
5 phase things were being paid for

6 I also went and met with Rick Maxheimer, the
7 engineer, and went over with him what the costs
8 that he understood to be for phase one, two,
9 three, and four He had presented a sheet of
10 paper that gave estimates of the amounts that
11 should have been allocated to phase two and three
12 for the sewer lines

13 I discussed with him how he did that and he
14 said it was a best estimate done on a per foot
15 basis and I asked him why it wasn't allocated when
16 the applications for his engineering firms bills
17 and for the contractor's bills and he said he had
18 never been asked to by anyone and since it was one
19 contract and one term it had not occurred to
20 anybody to break it down between phase one, two,
21 and three

22 But phase four was a separate contract,
23 separate engineering and it had always been
24 allocated correctly

25 Q So with this information obtained

Mr Ouzts, Direct Examination

1 as a part of the study, did you prepare a chart
2 concerning the costs and profits of phase one?

3 A Yes, I did

4 Q I show you a document which has been marked
5 as Defendant's Exhibit 8 Can you identify that
6 for us sir?

7 A Yes, that's the chart of the costs of phase
8 one and some of the allocations of expenses
9 subsequent to construction What happens in a
10 real estate development is that during the time
11 that it is under construction all of the costs
12 incurred, interest, everything is called
13 capitalized interest and expenses

14 That means that it goes into the costs of
15 that specific phase but once it's available and
16 ready for sale then the expenses to maintain and
17 support the interest costs are then expensed into
18 something called a Uniform Capitalization Rules
19 where you capture all the cost to construct in the
20 cost of goods sold

21 MR BABCOCK Your Honor, at this point
22 we would like to offer Defense Exhibit 8 into
23 evidence

24 MR BOWENS : No objection

25 THE COURT It's admitted

Mr Ouzts, Direct Examination

1 Q All right, Mr Ouzts If you would, please,
2 come down from the witness stand And we're going
3 to go around to the other side of the chart and
4 we're going to go through this chart and what I'd
5 like to do, Mr Ouzts, is to make sure the Jury
6 can see what you're pointing to but also the Court
7 reporter can hear you Okay? Now, looking at the
8 Defense Exhibit 8, what is shown - what is the
9 date shown at the top of the chart?

10 A November thirtieth, 2005

11 Q All right And why would you use that date?

12 A The contract expiration was during November
13 but what happens on the closeout of accounting
14 records is there not really usually closings that
15 happen at the end of the month Not during the
16 month So, the closest period that I could look
17 at that was the closest to the contract period
18 ending was the month after that so I looked at
19 11/30/2005

20 Q Now, you've got different columns for the
21 different phases Is that right?

22 A Yes

23 Q Let's start with phase one The first entry
24 What's your first entry?

25 A These are the gross sale prices

Mr Ouzts, Direct Examination

1 The lots that had closed during that period of
2 November thirty, 2005 Now, then there has been
3 testimony that there has been no allowances or
4 discounts given but there were allowances and
5 discounts on sales in that May and April of 2004
6 time period So that's what those represented
7 There were four thousand dollar allowances on four
8 lots during that period So, that's a reduction
9 of sales price
10 Q Where is says a total of sixteen thousand?
11 Is that right?
12 A Correct
13 Q And that reduced the sales price for your net
14 sale figure of
15 A Two million, twenty-eight thousand, two
16 hundred
17 Q Now, counting down, what's your next line
18 item?
19 A The next line item is cost of sales? And
20 what that's doing, we've talked about how you
21 capitalize all this cost During that
22 construction period I've taken all the cost and
23 capitalized them and then you divide them by per
24 lot cost and that's giving an estimate because you
25 haven't completely banished all the

Mr Ouzts, Direct Examination

1 costs that may be occurring in this project For
2 instance, I think you've already heard there's
3 going to be a pool, clubhouse and that kind of
4 stuff Now everything at this point because the
5 project isn't finished but what you should do is
6 you should try and estimate as best you can all of
7 your total cost of construction that you're going
8 to incur and you go ahead and recognize those
9 costs at least through that period based upon your
10 best estimate

11 Q Did you prepare a chart for those costs, Mr
12 Ouzts?

13 A Yes, I did

14 THE COURT Do you by chance happen to
15 have copies?

16 MR BABCOCK Yes, Your Honor

17 THE COURT Thank you

18 Q And Mr Ouzts, we put up a chart marked
19 Defendant's Exhibit 9 Is that chart showing the
20 cost for Rolling Creek?

21 A Well, this chart represents the per lot costs
22 for records that incurred through that period of
23 time The total per their general ledger and then
24 the reclassifications that we've been talking
25 about That, you know, have been estimated

Mr Ouzts, Direct Examination

1 Q Before you go with any specifics, we now
2 offer Defendant's Exhibit 9 into evidence

3 THE COURT Any objection?

4 MR BOWENS No objection

5 THE COURT Admitted

6 Q All right Let's start with phase one
7 What's the first entry?

8 A The first entry here is the amount that has
9 been recorded on the general ledger for Rolling
10 Creek, which is specific for this project and so
11 the total cost for phase one that had been
12 reported was one million, seven thirty-four, five
13 seventy-nine (1,734,579)

14 Okay The next entry concerns an allocation
15 The next entry was the estimate from Mr Maxheimer
16 as to the engineering cost associated specifically
17 with phase two and three and this is what he had
18 provided earlier but when I discussed it with him
19 and we were talking about it he said that he did
20 not take into account on-site supervision in that
21 he had probably at this point again done as an
22 estimate You can see it's a round dollar amount
23 That needed to be changed at that point in time

24 Q All right So the numbers that we are
25 talking about for the allocation The

Mr Ouzts, Direct Examination

1 reallocation for engineering costs is how much?

2 A Two hundred and six, four sixty-nine

3 (206,469)

4 Q And that's being reallocated between phases
5 one and two and three?

6 A Two and three collectively Two and three

7 Q And you just told us about this seven
8 thousand dollar figure What was that for?

9 A That was a part of his estimate here We
10 were talking about what he included that we
11 determined from our discussion he really hadn't
12 taken into account that they were actually on-site
13 and supervising and so then he made an estimate
14 based on this of the amount that really ought to
15 be allocated back to phase one from that

16 Q Are these estimates?

17 A He is doing it as best he can

18 Q So from that standpoint he's putting back
19 seven thousand Is that right?

20 A Yes

21 Q Okay The next entry is for water,
22 construction, and sewer Tell us about that

23 A The construction of water and sewer - I
24 believe we've already heard that the first phase,
25 the water and sewer lines, had to come through

Mr Ouzts, Direct Examination

1 phase two and three And what he did here
2 mathematically and it was just a mathematical
3 estimation is he took the number of lots
4 anticipated as you go along and took a
5 mathematical formula and allocated that pipeline
6 to those phases based on how many houses they'd be
7 servicing at that point So, it's an estimate and
8 he said he doesn't know what true construction
9 costs were but that's what he's just prorated the
10 cost based on that

11 Q And how much is that figure?

12 A That figure is a hundred and sixty-two
13 thousand, five forty-eight (162,548)

14 Q And that would be moved from a phase one
15 charge to a phase two charge?

16 A Yes, it is

17 Q Now, what's your next entry?

18 A The next entry was - and this was just
19 There were loan costs associated with the loan
20 that you have heard about with this development
21 and that wasn't improperly allocated but the
22 difference on that is as we talked about - if you
23 do construction loan interest for the period of
24 time it's under construction you don't expense
25 that interest you report it in the cost but

Mr Ouzts, Direct Examination

1 afterwards you expense it so I am moving that just
2 so I can handle interest and capitalize interest
3 and expense interest down below so I'm not really
4 saying that is incorrect I'm just saying it has to
5 be allocated in a different way

6 Q And you do that - you'll show that later

7 A I'm going to be covering that again

8 Q All right Your next line item is allocating
9 landscaping and fence signs Tell us about that

10 A They had all been allocated to phase one and,
11 you know, there is absolutely the benefit that
12 phase two and three are going to have from that so
13 I am going to just allocating that actually in the
14 same way that Ms Richards allocated that

15 Q How much is that?

16 A Seventy-one thousand, twenty-nine (71,029)

17 Q And you're moving that from phase one to
18 phases two and three?

19 A Yes

20 Q And what's the final entry you have before
21 you draw the lot?

22 A Well, you can't be sure that you're getting
23 the allocations here without making sure that the
24 phase four has been correctly recorded too so I
25 went over the phase four costs with Mr

Mr Ouzts, Direct Examination

1 Maxheimer also and he had a separate contract and
2 was doing separate engineering for that So I
3 went over these costs with him and he generally
4 agreed with them but there was a twenty-two
5 hundred dollar amount that needed to be actually
6 moved from phase one to phase four

7 Q Okay So that's what you are doing with that
8 twenty-two hundred dollars?

9 A Yes

10 Q Now, you were previously talking about
11 engineering costs and estimated engineering costs
12 You don't have any money for any engineering costs
13 for phase four Why is that?

14 A The engineering costs and the construction
15 and all the other costs are already included here
16 and so I'm not taking into account because it's
17 been correctly recorded by SEL

18 Q Right

19 A So I'm not subtracting it or adding because
20 no adjustments were needed except for the twenty-
21 two hundred

22 Q So what was your total figure for phase four
23 costs?

24 A Five hundred and fifty thousand, seven
25 hundred and sixty-one dollars (550,761)

Mr Ouzts, Direct Examination

1 Q All right Let's go back to phase one now
2 What's your - after you've done these mathematical
3 changes What was your total figure for phase one
4 for cost?

5 A Well we're not done yet though

6 Q I know I just needed the total

7 A Oh Okay This is just the construction and
8 the engineering but it's one million, two hundred
9 and forty-eight thousand and thirty-nine dollars
10 (1,248,039)

11 Q Now, did you make other changes or additions
12 to that number?

13 A Well, then in addition we have other costs
14 For instance, the clubhouse and pool That is an
15 amenity that is going to be available to everyone
16 but it hasn't been constructed yet so this amount
17 is an estimate that I got from the loan documents
18 from the development phase two so it's my best
19 estimate Now, that number may be higher It
20 probably won't be lower based on what we've heard
21 but it's my best estimate today

22 Q What have you done with that number?

23 A I have allocated it by the number of lots
24 over all four phases

25 Q All right And how much do you allocate

Mr Ouzts Direct Examination

1 to phase one?

2 A Fifty-two thousand, five hundred and eighty-
3 three dollars (52,583)

4 Q What's your next entry?

5 A The next entry is the additional road repairs
6 that still need to be done on phase one in order
7 to transmit an estimate for what's going to be
8 transferred when these roads are dedicated to the
9 County And I got that number from the loan
10 documents for the current development of phase
11 two

12 Q And how much is that?

13 A A hundred and seventy-two thousand, six
14 fifty-six (172,656) And then just like we talked
15 about, the property taxes and the interest
16 incurred during this development period goes in as
17 a cost and so I've reported the capitalized
18 interest first to NBSC

19 One of the things that you are probably tired
20 of hearing about is the contract between SEL and
21 the development group provided that interest was
22 due at prime plus one to either NBSC or if SEL was
23 providing that money then it was also to SEL and
24 was a cost to be deducted from the private
25 calculations

Mr Ouzts, Direct Examination

1 So I had gone in and taken the advances from
2 SEL during the development phase and recorded the
3 cost for the interest for both NBSC and SEL here
4 and allocated them on a pro-rata basis based upon
5 the amounts that had been recorded as a cost up
6 here and it's a pro-rata calculation

7 Q Now, you have one line item that you didn't
8 mention and that's the road line item What is
9 that, sir?

10 A Okay There could and would be costs
11 associated The good thing for us as taxpayers is
12 the County at least makes sure the roads are in
13 good shape before they accept them and even if
14 there is any cost that they come up with at that
15 time, it would need to be included but I don't
16 have a document or anything that would give me an
17 estimate I don't know what that would be but if
18 I did I would try to put it in here but I just
19 don't know Hopefully it would be taken care of
20 in advance but I just don't know

21 Q So, it's possible it may be out there but you
22 just don't know what it is?

23 A Yes

24 Q All right The final line on here is the
25 development fee How much is that?

Mr Ouzts, Direct Examination

1 A That's the fifty-four thousand dollars

2 provided for in the contract and

3 Q I'm sorry

4 A And that is also provided for in the contract

5 for phase four so I have those two separate

6 amounts

7 Q Phase four development was handled in a

8 different way

9 A Yes

10 Q Was it done on a lot by lot basis?

11 A Well, it was done and it was an amount for

12 fifteen lots Yes And I haven't included those

13 because a lot of costs from phases two and three

14 are still to be incurred so I just haven't

15 included one

16 Q We'll talk about two and three in a minute,

17 sir? What was your total figure for the cost for

18 phase one?

19 A Twenty-eight thousand, one hundred and

20 seventy-eight dollars (28,178) Which is what you

21 then see as a relationship on the chart that we

22 have outlining the incoming expenses I take the

23 number of lots sold and multiply it times twenty-

24 eight thousand, one hundred and seventy-eight

25 Q All right So, if we total before

Mr Ouzts, Direct Examination

1 you take the number of lots, what is the total?

2 A One million, six zero six, one twenty-six

3 Q And then for phase one What did you do with
4 that number?

5 A Divided it by fifty-seven lots

6 Q And that's the per line cost you show here?

7 A Yes

8 Q And how much is that again, sir?

9 A Twenty-eight thousand, one hundred and
10 seventy-eight dollars

11 Q Now, let's go back to Exhibit 8 I think we
12 left off with the cost of sales What is the cost
13 of sales you have showing there, sir?

14 A That's the number that we were just talking
15 about times the number of lots sold through that
16 November thirtieth, 2005

17 Q All right

18 A You saw a million and six over there but a
19 million four of that has been moved to cost of
20 goods sold The remaining is still in inventory
21 at that point in time

22 Q So we'll get the actual sales through
23 November of 2005?

24 A Yes

25 Q And what's your next line item there?

Mr Ouzts, Direct Examination

1 A The other cost of sales would be things that
2 appear on the closing statement for the sales
3 They would be the commissions that you'd be
4 dealing with if it was to a non-dealer and
5 recording costs and transfer deed stamps and all
6 the other associated costs that come with the
7 statements as well That comes down to a gross
8 profit of five hundred and forty-six thousand,
9 three hundred and eighty-three dollars (546,383)

10 Q Now, you've got a number of items below that
11 Tell me generally what those items are below that

12 A These are the items that are being incurred
13 and spent subsequent to the completion of
14 construction It's the taxes, the interest, the
15 maintenance that you've heard about in casual
16 labor, the ongoing landscaping, the costs
17 associated with maintaining or selling or anything
18 related to the Courtyards at Rolling Creek
19 subsequent to that completion of construction So
20 really through November thirty of 2005

21 Q All right And we won't go through each one
22 of these individually but the descriptions are
23 fairly self-explanatory as to what they are?

24 A Yes

25 Q I'd like for you to look at a couple

Mr Ouzts, Direct Examination

1 of them First off, casual labor Do you see
2 that entry, sir?

3 A Yes, I do

4 Q How much is your entry for casual labor?

5 A Sixteen thousand, eight hundred and thirty-
6 nine dollars (16,839)

7 Q And why do you have that number assigned
8 there?

9 A That's the amount that had been recorded in
10 the general ledger through November thirty, 2005
11 And I discussed these items with the employees
12 They have various entities and subdivisions that
13 you have probably already heard that they go
14 through and they allocate those based upon what
15 other employees tell them they did for these
16 specific projects

17 Q How about - would you go down to the interest
18 expense line? Point that out to the Jury

19 A That is the interest to pay to both NBSC and
20 that I have accrued to SEL Properties, LLC There
21 have been no interest, no payments, no anything as
22 far as interest recorded on the general ledgers
23 itself All that's been recorded on the general
24 ledger itself is the loan to Rolling Creek from
25 SEL and transactions back and forth as they

Mr Ouzts, Direct Examination

1 are allocating those expenses out It's possible
2 another project expenses that they allocated
3 through SEL back into this project too But those
4 totals are all included in these numbers

5 Q And what was your line item for interest
6 expense?

7 A Sixty-eight thousand, eighty-six dollars
8 (68,086)

9 Q Right under that, there's a line for
10 landscaping What is that sir?

11 A Landscaping includes amounts paid to I
12 believe it's already been testified to, Ron Smith
13 and some other people, who had provided
14 landscaping services to the property subsequent to
15 the original construction and it also includes
16 replacing the signs they had to replace from time
17 to time All the associated costs with
18 maintaining that common area from 2002 until
19 November thirty, 2005

20 Q Now, before I get to the bottom of your
21 chart, what was the gross profit?

22 A Five hundred and forty-six thousand, three
23 hundred and eighty-three dollars (546,383)

24 Q And if you would, what do you show of your
25 total expenses?

Mr Ouzts, Direct Examination

1 A Two hundred forty-five thousand, four fifty-
2 eight (245,458)

3 Q And what's your net right under that?

4 A Three hundred thousand, nine twenty-five
5 (300,925)

6 Q So is that a difference between the two
7 figures?

8 A Yes, it is

9 Q All right And what's your figure after
10 that?

11 A Then there's another income reported under
12 the general ledger which is actually interest
13 income generally on a money market account that
14 was required to be maintained for that reserve
15 that you heard discussed by the bank

16 Q And so you added that together What was the
17 total income?

18 A The total phase one profit through November
19 thirtieth is three hundred and three thousand,
20 four hundred and ten (303,410) Now, there's been
21 a lot of discussion you've heard about profit
22 versus cash flow and this profit isn't sitting in
23 the bank and if you fade back to that other chart
24 you saw that there have been costs incurred for
25 phases two and three, a million, six at that

Mr Ouzts, Direct Examination

1 point So, you know, that doesn't generate any
2 cash just sitting there because it's being paid to
3 the bank The bank had to defer a thirty-two
4 thousand dollar lot release for every one of those
5 sales Now, these costs of good sold as you've
6 heard were twenty-eight thousand but the bank's
7 taking thirty-two thousand with every lot sale and
8 so the difference between that thirty-two and
9 twenty-eight the bank is taking and applying it
10 against their loans It's not flowing into the
11 bank account for Courtyards at Rolling Creek

12 Q Now, Mr Ouzts, when you got that three
13 hundred and three thousand, four hundred and ten
14 dollar figure, what analysis did you in terms of
15 any profits that would be due to Dutch Fork under
16 contract?

17 A Well, under the contract there are due
18 twenty-five percent of that

19 Q What I'd like to do, Mr Ouzts, is have you
20 done that calculation?

21 A Yes, I have

22 Q Would you show twenty-five percent and what
23 the number would be?

24 A My writing may not be perfectly legible but
25 it's seventy-five thousand, eight hundred and

Mr Ouzts, Direct Examination

1 fifty-two dollars

2 Q And that is their share of the profits from
3 phase one?

4 A Yes

5 Q Now, was there three hundred and three
6 thousand, four hundred and ten dollars available
7 for profits as of November thirtieth, '05?

8 A Not sitting in the bank account No

9 Q Is that the difference you just told us
10 between the cash and the actual cash involved in
11 accounting?

12 A Yes Just to give you an idea, there's been
13 roughly three hundred an something dollars in
14 proceeds coming out of their sales but I've got
15 two hundred and forty-five thousand dollars of
16 expenses associated with that So, I mean there's
17 not And there's more over in the other section

18 Q Let's look at Defendant's Exhibit 9 Look at
19 column phases two and three Show us generally
20 what was done with what you had in the phases two
21 and three column

22 A I don't really understand

23 Q That's all right What's the line item on
24 here pertaining to?

25 A Okay This is eight hundred and forty-six

Mr Ouzts, Direct Examination

1 thousand has been reported as phase two costs by
2 SEL Properties

3 Q And you've done the reallocation that you've
4 just told us about and when you did the
5 reallocation, what were the numbers in phases two
6 and three?

7 A After dumping all of these numbers, the
8 totals for phase two and three were one million,
9 two hundred and eighty, three hundred and nine
10 (1,280,309) for the actual construction and
11 engineering And it's important for you to
12 remember the profits that we said were three
13 hundred and three thousand Remember everything
14 Mr Lipscomb had seen at this point still had this
15 206 and the 162 and the 171 and that's a total of
16 four hundred thousand dollars in cost on their
17 internal reports that they've been showing at that
18 point So, it did show on SEL's general ledger a
19 loss at that point through phase one

20 Q Did you also add in additional things like
21 the clubhouse, pool, property taxes, and interest?

22 A Yes

23 Q After you did that what was your total for
24 phases two and three?

25 A Their cost through that point was

Mr Ouzts, Direct Examination

1 one million, six hundred and two, four-0-eight
2 (1,602,408) And because it is still under
3 development, those costs are still being
4 accumulated into that

5 Q Now, going back to your first chart, Exhibit
6 8, why are those costs not shown on Exhibit 8?

7 A Because there have been no sales, no costs
8 Everything here - there are a few small items that
9 haven't been capitalized by SEL at this point on
10 that If you look, it's bank service charges and
11 some small little things but also there were the
12 plans of two hundred and six thousand dollars that
13 had been abandoned at that point because they were
14 doing the changes to those plans so that is all
15 that has been accrued through November of 2005

16 Q Mr Ouzts, if you could go back to the stand
17 please Mr Ouzts, there has been testimony
18 concerning the general ledger Can you tell us
19 generally what a general ledger is?

20 A A general ledger is an accounting term for
21 the record for all the transactions of an entity
22 It encompasses bank activity, payments by another
23 entity for it It is supposed to encompass
24 everything related to that project

25 Q How is it used to calculate income costs?

Mr Ouzts, Direct Examination

1 A Well, there are two components of a general
2 ledger There is the balance sheet account, which
3 are assets and liabilities and then the profit and
4 loss accounts, which are income and expenses So,
5 when it encompasses all of the transactions
6 whether it's an asset, liability or an income
7 expense item

8 Q Now, are you familiar with the checking
9 account that's used for the Courtyard project?

10 A Yes

11 Q And who owns that checking account?

12 A Well, all of this is owned by SEL Properties,
13 LLC

14 Q And were there other similar checking
15 accounts for SEL Properties?

16 A Yes

17 Q Now, there's been some testimony about monies
18 in the account In your opinion, is there
19 anything improper from making loans between those
20 SEL entities?

21 A Well, SEL was providing all of the financing
22 that was outside of the bank so there was
23 transactions where SEL was loaning money on a
24 constant basis and the answer is SEL was always
25 owed money by the Courtyards at Rolling

Mr Ouzts, Direct Examination

1 Creek At one point, SEL was owed one million and
2 one hundred and sixty-something thousand dollars
3 and during the period of 2002 which we've been
4 talking about a lot in court, they were loaning
5 around a hundred thousand dollars in one month
6 would not be unusual to seventy-five to eighty
7 thousand dollars throughout the development in
8 construction of this project

9 Q So from your standpoint in accounting, did
10 you have an opinion as to whether that was proper
11 from an accounting standpoint?

12 A Those entries were recorded correctly due to
13 SEL, LLC

14 Q Were there any loans from that account ever
15 shown as expenses on the general ledger?

16 A No

17 Q Now, in reviewing the records, did you ever
18 see any situations where any lot sales not
19 recorded and deposited in the Rolling Creek
20 checking?

21 A Yes, there were instances

22 Q Tell me about that

23 A Well, what you've got to remember is that SEL
24 Properties, LLC is the owner of the land and the
25 lots and if you look at the closing statements,

Mr Ouzts, Direct Examination

1 SEL Properties, LLC is the seller and there were a
2 few instances of proceeds being recorded that SEL
3 Properties, LLC got those amounts but the check
4 most likely was made out to SEL Properties, LLC
5 But there was a simultaneous entry into the
6 Courtyards at Rolling Creek saying that SEL
7 Properties had received that money So the sale
8 was recorded at that same time

9 Q So you said it was recorded In the general
10 ledger?

11 A In the general ledger up at the Courtyards at
12 Rolling Creek

13 Q Is there anything improper about that?

14 A No, it's actually proper

15 Q Now, do you have an opinion as to the manner
16 in which the checking account and the general
17 ledger were maintained in this case?

18 A From my review and discussions, they have
19 made the very best efforts employees can make to
20 record them correctly

21 Q Now, Mr Ouzts, there's been some questions
22 as to certain charges made in phase one Were you
23 present for most of the testimony in this case?

24 A A lot of it

25 Q There's been some testimony concerning

Mr Ouzts, Direct Examination

1 late fees Did you find any late fees when you
2 did your analysis of this project?

3 A Yes

4 Q Explain to us generally what those late fees
5 were

6 A Well, there were late fees from vendors and
7 bank charge fees for overdrafts and they had been
8 recorded as - the bookkeeper recorded the bank
9 statements and payments when they were late fees
10 and bank charges she recorded it for that bank
11 account and for that vendor and for Courtyards at
12 Rolling Creek

13 Q And in your opinion, is that proper in
14 expensing?

15 A There's no question it's an expense and it's
16 an expense for Courtyards at Rolling Creek

17 Q Now, you just heard some testimony by Mr
18 Colson concerning some bank proceeds being
19 provided on various draw requests Were you here
20 for that testimony?

21 A Yes, I was

22 Q In your study of the books, what happened
23 with those monies from the bank received by SEL?

24 A In most instances, the same day as the
25 proceeds were deposited, there was a check cut

Mr Ouzts, Direct Examination

1 to the contractor There was one instance it was
2 three days later But they say that the money
3 gave out on a draw - it actually gave out on draw
4 seven I believe they said it was an earlier draw
5 and on that draw there was a simultaneous deposit
6 from SEL Properties too

7 Q Now, reviewing the records for this matter,
8 did you analyze how much money the SEL entities
9 loaned to the project?

10 A Yes

11 Q And the largest amount What was the largest
12 amount?

13 A The largest amount was approximately one
14 million, one hundred and sixty thousand dollars

15 Q And in that regard, have you looked at the
16 situation in the first six months of 2002?

17 A Yes

18 Q Generally what was happening during the first
19 six months of 2002? In regard to loans?

20 A Well, every expense of this project that was
21 not a construction draw was being paid by advances
22 from SEL Properties so there were monthly deposits
23 into this bank account from SEL Properties

24 Q How much was the deposit say in January of
25 2002?

Mr Ouzts, Direct Examination

1 A In January I believe it was in excess of
2 ninety-seven thousand dollars

3 Q Now, let's shift to the conditions of phase
4 one Did you perform any analysis to the real
5 estate conditions with regards to phase one?

6 A Yes, I did

7 Q Generally, what did you do?

8 A From the HUD statements, I reported the
9 commissions that were paid from the sale of the
10 lots and the sale of the houses for phase one

11 Q Were any commissions paid after November of
12 2005?

13 A Well, there were commissions on every sale
14 There were commissions for Dutch Fork after
15 November of 2005 too But every sale to a
16 nonbuilder has a commission

17 Q Just so I'm clear There were commissions
18 paid to Dutch Fork after that date?

19 A Yes

20 Q And what did you find to be total commissions
21 paid to Dutch Fork Real Estate in this matter?

22 A Well, I didn't see all the payments for
23 commissions because there were some not paid on
24 the closing statement but I saw three hundred and
25 sixty-three thousand dollars in total

Mr Ouzts, Direct Examination

1 commissions paid (363,000)

2 Q And you were aware about Asset Realty also
3 having sales onsite?

4 A Yes

5 Q And how much commission was paid to Asset
6 Realty with regard to the Courtyard at Rolling
7 Creek?

8 A Asset Realty was paid in excess of two
9 hundred and forty-five thousand dollars and their
10 commission started in February of 2005 (245,000)

11 Q Now, Mr Ouzts, in your opinion, are any
12 commissions due to Dutch Fork Realty?

13 A Well, I actually noted that there were over-
14 payments They received commissions on contracts
15 to builders which were not supposed to have
16 commission But they were participating in
17 commissions on sales through October of 2006 so
18 if you look at a contract period ended in 2005,
19 it appears that there are no commissions due to
20 them that they have not received or had the
21 opportunity through listing agreements that they
22 continued to have on these houses still being
23 offered for sale

24 Q How many lots had this payment where
25 commission would not be due on the contract?

Mr Ouzts, Direct Examination

1 A What do you mean?

2 Q I'm asking What was your total figure for
3 commissions paid that would not be due?

4 A On a house sale?

5 Q On a lot sale

6 A On a lot sale There were 2,3,4,5 5 sales
7 to builders So that would be twenty thousand
8 dollars

9 Q Now, Mr Ouzts, during your analysis did you
10 find any expired Dutch Fork listing agreements?

11 A Yes

12 Q How many of those did you find?

13 A I found one that expired and I don't know the
14 status on several others but I'm unsure of how
15 many had expired

16 Q In looking at the contract, which of the
17 contract provides for real estate commissions?

18 A The contract provided for ten percent
19 commission on lot sales to nonbuilders and an
20 exclusive right to sell on the house one year from
21 construction

22 Q I'm looking at Plaintiff's Exhibit 1 under
23 the Exclusive Right To Sell section, paragraph
24 six Could you just read us that first sentence
25 in paragraph two?

Mr Ouzts, Direct Examination

1 A As read - This exclusive right to sell shall
2 be granted to DFR for a period of five years
3 provided that DFR sells and closes no less than
4 twenty percent of the lots available for sale per
5 year in each phase of the development

6 Q So if I understand your testimony, they would
7 have five years and they would also have one year
8 for any listing agreements

9 A Yes

10 Q So, again Mr Ouzts, in your opinion, are any
11 commissions owed in regard to phase one?

12 A No

13 Q All right Let's shift over to phase four
14 and did you prepare a similar chart to the first
15 chart you showed us for phase one?

16 A Yes, I did

17 Q I'll just get you to identify it first What
18 is Plaintiff's Exhibit 10?

19 A It's my schedule of the income and expenses
20 related to phase four through October seventeenth,
21 2007, which is the expiration date of that
22 contract

23 MR BABCOCK Your Honor, we offer
24 Defense Exhibit 10 as the next exhibit for the
25 Defense

Mr Ouzts, Direct Examination

1 MR BOWENS No objection

2 THE COURT It's admitted

3 Q All right, Mr Ouzts If you could come down
4 again so we could look at this chart

5 All right, now You used the date, October
6 seventeenth, 2007 Why is that?

7 A That's the expiration date of the contract
8 You may recall from a few minutes ago I said I
9 used the end of the month but at phase four there
10 is only one lot that is still for sale so I am
11 taking out anything related to that one lot from
12 the general ledger that could have been spent
13 during this October period so I really did cut it
14 off on the seventeenth because I could easily make
15 that determination

16 Q All right Let's just go through this chart
17 line item by item The first entry is for sale of
18 lots How much is the figure there?

19 A That's one million, two hundred thousand
20 nineteen which is the gross sales of the sale of
21 lots for phase four (1,219,000)

22 Q And how many lots were there in phase four?

23 A There were twenty lots in phase four One is
24 still left, nineteen have sold during this period

25 Q All right It's allowance What is that?

Mr Ouzts, Direct Examination

1 A There were allowances given to most of the
2 buyers of phase four. A lot of the allowances
3 were three thousand dollars but there were some
4 lower allowances that were given so those were
5 like rebates or landscaping allowances so that's
6 what's been reflected here

7 Q And how much is that?

8 A Thirty thousand dollars

9 Q And did you subtract that from the first
10 figure?

11 A Yes

12 Q And what is your figure for net sales?

13 A Net sales is one million, one hundred and
14 eighty-nine dollars (1,189,000)

15 Q Now, the next item is cost of sales and if we
16 go to Defense Exhibit 9, are those costs showing
17 in phase four?

18 A Yes As we discussed, I've taken the costs
19 and allocated based upon things that I found
20 needed to be reclassified and then I had five
21 hundred and fifty thousand, seven hundred and
22 sixty-one construction and engineering costs
23 associated with this and then I took also the
24 clubhouse and the pool that's going to be
25 available and the property taxes during

Mr Ouzts, Direct Examination

1 construction and the capitalized interest for NBSC
2 and SEL Now NBSC for phase four had two tract of
3 land purchases One as you may recall had
4 approximately ten acres that was purchased that
5 was the big purchase and that was the only thing
6 financed for phase four for NBSC The rest of
7 phase four was completely funded from SEL and so I
8 had a fairly small amount of NBSC interest because
9 it was only that land And then I have the SEL
10 interest provided during the development phase for
11 phase four and then the development fee that was
12 called for under the contract for a total cost of
13 six hundred and thirty-five thousand, six hundred
14 and fourteen dollars (635,614)

15 Q Going back to phase one, development fees
16 have not been paid

17 A That's correct

18 Q So, then what was your total for the cost?

19 A Six hundred and thirty-five thousand, six
20 hundred and fourteen dollars (635,614)

21 Q And if you divide that by lots, how much does
22 it cost per lot?

23 A Thirty-one thousand, seven hundred and
24 eighty-one per lot (31,781)

25 Q Do you know why the costs were higher

Mr Ouzts, Direct Examination

1 in phase four?

2 A Because the lots were bigger

3 Q And going back to Plaintiff's Exhibit 10,
4 what is your figure for cost of sales?

5 A It's six hundred and three thousand, eight
6 hundred and thirty-nine and that has the costs
7 associated with those nineteen sales of thirty-one
8 thousand (603,839). That's what that represents

9 Q So you took the cost per sale and multiplied
10 it by nineteen?

11 A Yes

12 Q What's your next line item there?

13 A The next item is other cost of sales and just
14 like we talked about it has the cost of the HUD
15 closing statement cost

16 Q So you then came down and had a gross profit
17 of what?

18 A Four hundred and ninety-one thousand, seven
19 hundred and thirty-two dollars (491,732)

20 Q Now, you had some additional charges here
21 In general what are these charges?

22 A These are the costs, as we've explained, once
23 the development construction is finished the rest
24 of the expenses associated with it are included
25 such as the operating expenses not required to

Mr Ouzts, Direct Examination

1 be capitalized And I think it's important to
2 realize that here in this cost of sales it hasn't
3 been discussed for phase four but there were road
4 construction issues in phase four also

5 And the cost to remediate this was actually
6 more in phase four than it was in phase one and
7 you want to spread those costs over all the lots
8 so they were included in this costs of sales also

9 Q Would the cost of sales include land cost?

10 A Yes

11 Q All right And how much did you include for
12 land cost?

13 A Well, it's too far to - I believe the total
14 was about a hundred and eighty thousand and that
15 was the allocated per acre amount of first
16 purchase and then the second purchase with closing
17 cost was about a hundred and thirty thousand
18 dollars

19 Q Now, going back to the part of your chart we
20 were just looking at Let's just take out a
21 couple of those items First of all, what is the
22 casual labor?

23 A Eighty-four hundred dollars (8,400)

24 Q And what was that for?

25 A Once again you're going to have landscaping

Mr Ouzts, Direct Examination

1 and casual labor that are both broken down
2 separately here but generally mean the same thing
3 done to maintain the property during that period

4 Q How much was the interest expense for phase
5 four?

6 A Interest expense was seventeen thousand,
7 eight hundred and sixty-five dollars (17,865)

8 Q And how about the landscapers?

9 A Landscaping was fifteen thousand, seven
10 hundred and twenty-nine dollars (15,729)

11 Q So what did you get for your total additional
12 expenses?

13 A Total additional expenses were ninety
14 thousand, eight hundred and sixty dollars
15 (90,860)

16 Q And did you subtract that from your gross
17 profit?

18 A Yes To give you ordinary income of four
19 hundred thousand, eight hundred and seventy-two
20 dollars and then other income, miscellaneous
21 amounts of two thousand, twenty-one dollars to
22 give you total profits on phase four of four
23 hundred and two thousand, eight hundred and
24 ninety-three dollars (402,893)

25 Q And have you also calculated what

Mr Ouzts, Direct Examination

1 twenty-five percent of that would be?

2 A Yes Twenty-five percent of that number is
3 one hundred thousand, seven hundred and twenty-
4 three dollars (100,723) So the total profit
5 split on phase four would be one hundred thousand,
6 seven hundred and twenty-three dollars (100,723)

7 Now, there have been payments to Dutch Fork
8 against this profit split and the general ledger
9 shows forty-one thousand, eight hundred and fifty-
10 eight dollars has been paid against this (41,858)

11 Q So what would be the net number?

12 A Approximately fifty-eight thousand dollars
13 I've run out of room and I haven't calculated
14 that

15 Q Approximately fifty-eight thousand? Just
16 write that at the bottom of that Can you write
17 that problem down?

18 A I can but I need a calculator or I'll
19 embarrass myself \$58,865

20 Q So it's fifty-eight thousand, eight hundred
21 and sixty-five dollars Mr Ouzts, if you could
22 take the stand

23 Mr Ouzts, as part of your study of this project,
24 did you analyze the sales velocity for phase one?

25 A Yes

Mr Ouzts, Direct Examination

1 Q For lots And what was the sales velocity

2 phase one September 2002 to May of 2004?

3 A There was approximately 1 5 lots sold per

4 month

5 Q What was the lot sales velocity for June of

6 2004 to November of 2005?

7 A You said June of 2004 through November of

8 '05?

9 Q Well, the end of May, 2005

10 A Okay It was approximately one per month and

11 the sales volume for phase four was less than one

12 per month

13 Q Now, using the sales volume cumulative for

14 phase one, how long would it take to sell both

15 lots in phases two and three at the same rate?

16 MR BOWENS Objection May we

17 approach?

18 THE COURT Yes

19 (Short conference at the bench)

20 Q Using the cumulative sales lot velocity in

21 phase one, how many months would it take to sell

22 all of the lots in phase two and three?

23 A Well, there is approximately 200 lots that

24 are going to be in phase two and three so that

25 would be approximately 200 months

Mr Ouzts, Direct Examination

1 Q How long is that?

2 A Probably eighteen years

3 Q Now, did you do an analysis on phase two and
4 three? Profit and commissions

5 A No, I did not

6 Q Why not?

7 A Well, I used the contract period which ended
8 in November of 2005 and phase two or a portion is
9 currently under construction so there was no
10 profit associated with phase two or three through
11 the expiration of the contract period

12 Q In general terms, Mr Ouzts, if you were
13 going to do an analysis of loss, profits, or other
14 damages for unbuilt phases of a real estate
15 project, how would you do it?

16 A You would take the expenses that are expenses
17 through November of 2005 for phase two and that's
18 net profit so far is the abandoned plans and the
19 few operating expenses that are not required to be
20 capitalized that are reflected on the chart that I
21 showed you earlier

22 Q Do you take anything else into account?

23 A No

24 Q Mr Ouzts, in your bankruptcy work do you
25 have occasion to evaluate projects that

Mr Ouzts, Direct Examination

1 don't perform as well as expected?

2 A Well, that's generally why they are in
3 bankruptcy because they didn't perform like they
4 were expected Yes

5 Q And you compare the real world with the
6 projections?

7 A That's correct

8 Q With the Court's indulgence Thank you, Mr
9 Ouzts

10 THE COURT This would be a good time to
11 take a lunch break Ladies and gentlemen, I want
12 to remind you of the instructions I've given to
13 you That is, you should not begin to discuss
14 this matter among yourselves as you have still not
15 heard all the evidence that has to be presented

16 Also, during this lunch break please do not
17 allow anyone to approach you to discuss this
18 matter In addition, please do not listen to any
19 discussions that you may hear in the hallways as
20 you come and go I ask that you come back to the
21 Jury room at 2 15 and when you have reported back
22 at that time then we will be ready to continue on
23 with the testimony Have a good lunch Thank
24 you

25 (Jury exits the Courtroom for lunch)

1 THE COURT Mr Ouzts, during this break
2 you should not discuss your testimony You have
3 not concluded it so it would be inappropriate for
4 you to discuss it during the break You may step
5 down

6 Is there anything we need to take up before
7 we leave for lunch?

8 MR BOWENS No, Your Honor

9 MR BABCOCK Nothing from the Defense,
10 Your Honor

11 THE COURT We'll see you all at 2 15

12 (The Court retired for lunch break)

13 (The Court returned from lunch)

14 THE COURT Is there anything we need to
15 take up before we bring the Jury back?

16 MR BOWENS No, Your Honor

17 MR BABCOCK Nothing from the Defense,
18 Your Honor

19 THE COURT Mr Ouzts, you may resume
20 the witness stand please

21 You may ask the Jury to come in please

22 (The Jury returns to the Courtroom)

23 THE COURT You may proceed, Mr Bowens

24 MR BOWENS Thank you

25 CROSS EXAMINATION

Mr Ouzts, Cross Examination

1 BY MR BOWENS

2 Q Mr Ouzts, you and Mrs Richards used the
3 same financial data in arriving at your opinions?

4 A I would assume so

5 Q The same financial general ledger?

6 A Yes

7 Q Is it not a true statement that there were no
8 profits in phase one? Is that right?

9 A That's correct

10 Q In your analysis that you went through
11 earlier today, it ended in November of '05
12 Right?

13 A Yes

14 Q Would you agree that Mrs Richard's analysis
15 is more complete and that she goes and
16 incorporates all the data through 2006?

17 MR BABCOCK Your Honor, he's pitting
18 one witness against another Objection

19 THE COURT Rephrase the question

20 Q Mrs Richard's financial data included all
21 the way to 2006, didn't it?

22 A We'd have to talk about the specific data
23 What exactly are you talking about?

24 Q You used the general ledger?

25 A Yes

Mr Ouzts, Cross Examination

1 Q And you ended it in November of '05?

2 A For phase one

3 Q Phase one, right

4 A Yes

5 Q And Mrs Richard's analysis went through

6 until '06

7 A I don't believe they had a date on it so I'm

8 not sure

9 Q Would going forward to '06 be more complete
10 in that you recover more income and more cost of
11 phase one?

12 A Going forward Well, it depends on whether
13 you're making money on your last sales that
14 happened afterwards or not so it may decrease
15 I'm not sure whether it would increase or decrease
16 profit

17 Q But it would be more complete, wouldn't it?
18 The analysis would be more complete if you went
19 all the way through to the end of the ledger so
20 that it was 2006?

21 A Well, her analysis of phase one did not
22 include a lot of costs that were still estimated
23 and we had information related to them like the
24 clubhouse and other things like that so it was
25 actually incomplete in those respects

Mr Ouzts, Cross Examination

1 Q My question though is that if you are doing
2 an analysis of profits and costs, if you use the
3 most financial data you have available through
4 2006 then it would be a more complete picture than
5 cutting it off in November of 2005 Isn't that
6 right?

7 A. I used information that was available in 2007
8 to come up with some of the information there so I
9 wouldn't say it's more complete, it's just cut off
10 at a different time

11 Q You agree that there were costs since
12 allocations in the Courtyards?

13 A I agree that there were costs for phase two
14 and three that no one thought should be allocated
15 to them from phase one

16 Q I think you testified on direct that it
17 didn't occur to anyone to allocate those phase one
18 at the time

19 A It didn't occur to them that there were costs
20 for phase two and three that were being incurred
21 and the construction contract and the engineering
22 for phase one Yes

23 Q Wouldn't the CFO, the Chief Financial
24 Officer, and the CPA in charge of this project
25 have the responsibility to make sure they

Mr Ouzts, Cross Examination

1 allocated those costs properly?

2 A He inquired of the personnel who thought they
3 had

4 Q But the CFO and the CPA in charge of the
5 project would have the responsibility to ensure
6 that the costs were properly allocated?

7 A They would but when they inquired of the
8 people who were giving their information from the
9 developers to the costs allocation, that's as far
10 as they would go

11 Q Would you agree that the CPA and the CFO and
12 someone with a business finance degree should know
13 how to properly allocate costs in a development
14 like this?

15 A Well, the issue here is just the water and
16 sewer which happened to cross phase two and three
17 That's an unusual instance You don't normally
18 come through the later phases with items but it
19 happened to be logistically where the tie in to
20 that was so it didn't occur to them that there
21 were infrastructure water and sewer in phases that
22 weren't even being built yet

23 Q Should the CPA in charge and the CFO and
24 someone with a business finance degree know how to
25 do that?

Mr Ouzts, Cross Examination

1 A They should know how to do it and they do
2 know how to do it, however, they can only get
3 their information from the people who should know
4 what's happening on the ground and they're not out
5 there on the ground to know that

6 Q It is a violation of IRS regulations to put
7 all the costs as were done here in phase one when
8 they should be attributed to phases two and three
9 Is that right?

10 A You are required to attribute the cost to the
11 proper phases but people do make mistakes But
12 there was no mistake on the part of the accounting
13 people They were doing what they were told

14 Q Did you approve of checks being made out to
15 cash in a business setting like this?

16 A It is not what you would want to do and I
17 discussed that with the employees who said that
18 was the most effective way - cost effective way
19 for them to get people to work for that And
20 that's how they made the checks out to cash to
21 give these laborers the cash

22 Q And when you do that, don't you also subvert
23 a number of IRS rules and regulations about taxes
24 and withholdings and reporting and legal work and
25 that sort of thing?

Mr. Ouzts, Cross Examination

1 A There is an IRS requirement to do a 1099 for
2 any individual that you pay over six hundred
3 dollars but they did not believe they paid over
4 six hundred dollars to an individual

5 Q But there's nothing to keep track of that
6 because of the lack of accounting records?

7 A No, but it wasn't the same people over and
8 over They never paid them six hundred dollars in
9 a day so they did not believe it was more than six
10 hundred to an individual

11 Q And you verified all that personally was paid
12 in all those days

13 A No I did not I only spoke to the employee
14 who was actually giving those people to do that
15 and paying that

16 Q When you do the things we just talked about,
17 not properly allocating expenses to the right
18 phase and violations of the IRS rules, writing
19 checks out to cash and that sort of thing I take
20 it there is nothing inherently wrong with that in
21 your opinion?

22 A The allocation as I said was their best
23 information at the time Any allocation of a
24 development is an estimate that goes along You
25 don't know the real answer until the end so

Mr Ouzts, Cross Examination

1 it is an estimate and when you find out you have
2 an error you adjust your estimate

3 Q And I think you said you also found an
4 instance where money from the closings for the lot
5 sales was not put in the Courtyard account

6 A That's correct

7 Q And you think that was okay?

8 A The seller of those lots was SEL Properties
9 and the money went in to SEL Properties SEL set
10 up this account to give itself an easy tracking of
11 this development

12 Q So you see no problem with

13 MR BABCOCK Let him finish the answer

14 A He recorded the sale at the time They did
15 everything they could and should do and remember
16 the checks may, nobody has copies of them, but may
17 have been made out to SEL So you would put it in
18 SEL and then transfer it to the other account

19 Q I'm assuming for this question that the
20 checks were all made out to SEL Properties for
21 purposes of my question but you don't see anything
22 wrong with him taking that check from the closings
23 on the different lots and putting that money not
24 into the Courtyard's account but into a different
25 SEL account

Mr Ouzts, Cross Examination

1 A No

2 Q Is there anything wrong with doing that and
3 the other things we've mentioned with the
4 allocations and the IRS issues and then after
5 doing all that claiming there is no profits in
6 phase one? Is there anything wrong with that?

7 A Nobody did that intentionally They were
8 going on the information provided to them as to
9 those phases

10 Q So is it proper to do that? To violate the
11 IRS rules, to not put the money in the checking
12 account where it can be identified and on top of
13 all that then claim as a basis that there is no
14 profits in phase one

15 MR BABCOCK Objection That's a
16 compound question and it's not an accounting
17 question

18 MR BOWENS It's the opinion of what
19 the non-accounting person did

20 THE COURT Rephrase the question and
21 break it down

22 Q You testified that there is nothing
23 inherently wrong with not allocating the costs
24 properly because it was a mistake Is that right?

25 A People remember They didn't make a

Mr Ouzts, Cross Examination

1 mistake Whoever was providing them the
2 information on the breakdown of development That
3 accounting person is just putting it where they
4 were told to put it so if there was a mistake
5 made, it was a mistake made by the person who was
6 telling them how to allocate that Now, what Mr
7 Maxheimer said is it was one contract was that
8 termed phase one and nobody asked him how to break
9 it down so that was not done the way we know it
10 should be done now but nobody made an intentional
11 error there

12 Q That's your assumption or how do you explain
13 that?

14 A That's from my discussion of the people who
15 were taking that information and recording it

16 Q You were here for Ms Hower's testimony, the
17 bookkeeper?

18 A No, I was not

19 Q She testified that she allocated these things
20 based on what her employers told her to do
21 Meaning K&L Contractors and SEL Properties

22 MR BABCOCK Objection, Your Honor
23 That mischaracterizes her testimony

24 THE COURT I'll sustain that objection

25 Q It was the CFO and the CPA's responsibility

Mr Ouzts, Cross Examination

1 as you said earlier to make sure these were

2 categorized properly

3 A Yes

4 Q So that's their responsibility? And they

5, didn't for whatever reason

6 A Well, remember all they do is discuss with

7 the people who are on the ground who know what's

8 going on how to allocate those between the costs

9 They are instructed which phase it is by other

10 people

11 Q You testified that there was interest owed to

12 SEL from advances that it made to the Courtyards

13 Do you recall that?

14 A Yes

15 Q Are you aware that eight hundred thousand

16 dollars was paid to SEL up front in this

17 development for the purchase of the three phases

18 of the land?

19 A I am aware that the eight hundred thousand

20 was repaid in the financing of the development

21 loan

22 Q And if those - if that eight hundred thousand

23 had been left in the account, those advances that

24 SEL made would not have been necessary, right?

25 A Well, at the point it was repaid SEL had

Mr Ouzts, Cross Examination

1 loan one million, one hundred and sixty something
2 thousand so there was eight hundred then SEL had
3 already then at that point advanced three hundred
4 and sixty-four more thousand for engineering and
5 other costs that had been incurred

6 Q The eight hundred thousand was repaid in
7 November of 2001

8 A Yes

9 Q That's before any construction began

10 A That's right

11 Q So, if we were to have left that eight
12 hundred thousand in the Courtyard's account in the
13 bank, we wouldn't have had to advance nearly as
14 much money as SEL had to advance Right?

15 A And you would have just been substituting the
16 interest to NBSC to SEL were correct

17 Q Now, your twenty-eight thousand dollar cost
18 per lot figure includes the money that was spent
19 to make the road repairs? Is that right?

20 A For phase one?

21 Q For phase one Defense Exhibit nine

22 A Yes

23 Q This twenty-eight thousand includes the road
24 repair cost?

25 A Yes, it does

Mr Ouzts, Cross Examination

1 Q And this one hundred and seventy-two
2 thousand, six-fifty-six (172,656) includes the
3 road repair cost? Is that right?

4 A That there are two components of road
5 repairs In their cost above, which is one
6 million, two forty-eight (1,248,000) There's
7 approximately a hundred thousand dollars of road
8 repair cost for phase one that have already been
9 incurred

10 Q And this is an additional one hundred and
11 seventy-two thousand that's going to be incurred?

12 A Yes

13 Q It has not been paid yet?

14 A I do not know if it's been paid in 2007
15 That number is coming from the development loan
16 for phase two

17 Q For phase two? But it's for the roads in
18 phase one?

19 A It's for the roads in phase one Yes

20 Q So, is it your testimony that a hundred and
21 seventy-two thousand dollars to be spent in road
22 repairs in phase one in addition to the hundred
23 and forty-seven thousand that's already been
24 spent?

25 A No The hundred and forty-seven is

Mr Ouzts, Cross Examination

1 not the real number The hundred and forty-seven
2 came from the deposition A hundred and forty-two
3 has been spent in phase one and four with forty-
4 two or forty-four thousand of that being phase
5 four

6 Q Okay

7 A So there's been approximately a hundred spent
8 on phase one so far

9 Q Okay So that's going to be two hundred and
10 seventy-some thousand dollars in road repairs for
11 phase one?

12 A Yes

13 Q Isn't that an exceptionally large number of
14 dollars to spend on road repair?

15 A I can't make a judgment as to that

16 Q Have you seen that in the past where it costs
17 that much to repair roads in one phase?

18 A I've seen that top coat and other repairs but
19 I don't know how much it is per linear foot or
20 relative to the number of lots When I look at
21 what's been spent already on phase one and what
22 was spent on phase four, more has been spent per
23 lot on phase four than has been spent on phase one
24 so far

25 Q That's because phase four has fewer lots

Mr Ouzts, Cross Examination

1 that phase one

2 A No, I said per lot So, fewer lots doesn't
3 make a difference on per lot I said per lot so
4 that means twenty-two hundred or twenty-three
5 hundred's been spent on phase four and it's less
6 than two thousand in phase one already

7 Q It's going to end up being somewhere in the
8 neighborhood of five thousand dollars per lot for
9 road repairs Is that right?

10 A It may wind up being two hundred and seventy
11 thousand dollars for phase one divided by fifty-
12 something lots Fifty-seven

13 Q Which could be nearly five thousand dollars a
14 lot

15 A Yes

16 Q Now, if it turns out that that expense could
17 have been avoided, should that be charged against
18 the developers who share the profits?

19 A Well, no matter what it's a cost that's been
20 incurred by this project so far and I believe the
21 contract says "any and all expenses"

22 Q Wouldn't you read that as "any and all
23 legitimate expenses"?

24 A It says "any and all expenses"

25 Q Do you think it's appropriate to hold the

Mr Ouzts, Cross Examination

1 Plaintiff's profit sharing down when the Defendant
2 could have avoided the entire expense by repairing
3 the roads timely for a few hundred dollars?

4 MR BABCOCK Objection, Your Honor
5 He's not asking an accounting question of this
6 witness He's asking for some kind of opinion and
7 also that's a question for the Jury

8 THE COURT Rephrase the question
9 Q Is it appropriate to charge that road repair
10 cost against the Dutch Fork's profits when that
11 expense could have been avoided entirely?

12 MR BABCOCK The same objection, Your
13 Honor

14 THE COURT It's

15 MR BOWENS His whole testimony has
16 been about cost allocation

17 THE COURT I understand I'll allow
18 him to answer the question

19 A I haven't reviewed any of these expenses as
20 to whether the developer or the owner should have
21 done it differently This is what's actually
22 happened and this is the profit that has incurred
23 through November thirtieth Obviously, from what
24 we've heard on the cost overruns and other things
25 maybe things would be done differently

Mr Ouzts, Cross Examination

1 if they were doing them today I am calculating
2 what happened and how it's been done on this
3 property through November thirtieth, 2005, of
4 phase one and through October seventeenth, 2007

5 Q I think you also testified earlier that there
6 were some commissions that were paid on houses
7 that were outside of 2005

8 A Yes

9 Q Did you find anything wrong with that?

10 A No

11 Q And that was the proper commission being
12 paid?

13 A That's right

14 Q The contract does not exclude that?

15 A No, it doesn't

16 Q And you also testified that there were some
17 lots that were sold to builders that had
18 commissions paid when they should not have been
19 paid

20 A The contract said there were no commissions
21 to be paid on builder lots

22 Q In your investigation in preparation, did you
23 discover that those five lots were actually
24 individuals who had contracts with the builders to
25 build a house and it was decided between the

Mr Ouzts, Cross Examination

1 two of them that the builder would go ahead and
2 buy the lot versus the individual buying the lot?

3 A No, I only had the HUD statements I didn't
4 have that information

5 Q If that were the case where you had an
6 individual who was going to build a house on a lot
7 and it was a custom home situation and the two
8 parties elected for the builder to go ahead and
9 buy the lot instead of the individual, then that
10 wouldn't be an improper commission to be paid,
11 would it?

12 MR BABCOCK Objection, Your Honor
13 He's asking the witness to change what the
14 contract says

15 MR BOWENS The contract authorizes the
16 payment of commission on a house and lot sold to a
17 non-builder and thus contemplates the custom home
18 situation

19 THE COURT Rephrase the question

20 Q If this were a custom home, if these five
21 lots were custom home situations where an
22 individual was actually buying a house before the
23 builder had bought the lot on his own for a spec
24 house Then the commission would be proper

25 MR BABCOCK Your Honor, the

Mr Ouzts, Cross Examination

1 same objection May we approach?

2 THE COURT Um-hmm

3 (Short conference at the bench)

4 Q Mr Ouzts, are you familiar with the custom
5 homes versus the spec homes arrangements that the
6 contract set forth?

7 A Yes, I understand the difference between the
8 spec homes and the custom homes

9 Q And custom homes condition is authorized on
10 the lot sale

11 A Sales to individuals are contemplated to have
12 commissions

13 Q And in a custom home arrangement, is it true
14 that sometimes the individuals buy the lot
15 themselves and in other cases the builder will buy
16 the lot?

17 A I'm not familiar enough to know which way
18 people do it but in the ones I'm familiar with on
19 a custom home, the individuals buy the lot ahead
20 of time

21 Q You are not aware of situations where the
22 builder will buy the lot on behalf of the
23 individual to build the house?

24 A No, I'm not

25 Q If you were to exclude the cost of

Mr Ouzts, Cross Examination

1 road repair from your analysis, isn't it true that
2 your bottom line proportionate to what Dutch Fork
3 is owed is very close to the number that Mrs
4 Richards came up with?

5 MR BABCOCK Objection Again he's
6 pitting one witness against another

7 THE COURT Rephrase the question

8 Q If you exclude the road repair cost from your
9 analysis, what would the Plaintiff's share of the
10 cost be?

11 A Are we talking about phase one or phase four?

12 Q Phase one

13 A I don't recall what her costs totaled

14 Q Well, you had a hundred and forty thousand
15 and your analysis was what the phase one road
16 repair had already been spent

17 A Well, now you're asking me about the twenty-
18 eight thousand and I don't remember what her total
19 is so divide it by fifty-seven to determine

20 Q Let me ask you this In your analysis, you
21 account for a hundred and forty thousand that had
22 already been spent in phase one

23 A No, as I explained to you earlier the hundred
24 and forty is spread over phase one and phase four

25 A hundred is in phase one

Mr Ouzts, Cross Examination

1 Q Yeah, a hundred is in phase one I'm sorry

2 A Approximately

3 Q If you exclude the hundred thousand from
4 phase one and exclude the one seventy-two, six
5 fifty-six that is to be spent to repair roads on
6 phase one, what would the Plaintiff's share of the
7 profits be in phase one then in that situation?

8 A Once again I would need a calculator Those
9 costs per lot would be about forty-seven hundred
10 dollars (4700)

11 Q Well, if you exclude those as if those never
12 happened, then what would the share be due to
13 Dutch Fork?

14 A Excluding that the profit would be about five
15 hundred and thirty thousand dollars (530,000)

16 Q And what would Dutch Fork's share be?

17 A It would be a hundred and thirty-two
18 thousand, five hundred (132, 500)

19 Q You don't have any opinions as to the costs
20 that it's going to take to finish out phase two
21 and three construction, do you?

22 A No

23 Q You don't have any problem with the
24 methodology used by Mrs Richards in her analysis,
25 do you?

Mr Ouzts Cross Examination

1 MR BABCOCK Again objection Pitting
2 one witness against another

3 THE COURT Rephrase the question

4 Q Is there any problem from an accounting/CPA
5 point of view from the methodology Mrs Richards
6 used in providing her analysis?

7 MR BABCOCK Objection, Your Honor
8 May we approach?

9 THE COURT Yes

10 (Short conference at the bench)

11 Q You had testified on direct that with the
12 rate of lot sales experienced in phase one it
13 would take approximately two hundred months to
14 complete the sales in phase two and three

15 A Yes, I believe so

16 Q Did that take into account the interference
17 that was experienced by the Defendants?

18 A I don't understand what you're talking about

19 Q The slow rate of lot sales in phase one Did
20 you factor in or out the delays caused by the
21 Defendants when you came up with the two hundred
22 months to complete phases two and three?

23 A If you will recall I used phase one and phase
24 four because phase four had less than one lot per
25 month sale also so I was using

Mr Ouzts, Cross Examination

1 both of them

2 Q Did you take into account when arriving at
3 that opinion the interference that was caused and
4 the delays that resulted from the Defendants in
5 phase one and phase four?

6 A No, because I saw no difference in the rate
7 In fact, phase four was even less per month on a
8 sale basis than phase one

9 Q. Again

10 A So I didn't take anything into account
11 Taking the experience of phase one and phase four
12 as they stand

13 Q If phase two and phase three are allowed to
14 proceed without any delay, would that change your
15 opinion as to how fast they would sell?

16 A Phase four had less than one lot per month
17 There's nothing that demonstrates based on history
18 that's going to be anything more than one lot or
19 less per month

20 Q But in accounting for your opinion for phase
21 two and three, did you take into account that the
22 lot sales rate in phase one and four were affected
23 by delays caused by the Defendants? Did you take
24 it into account?

25 A I didn't take anything other than the

Mr Ouzts, Cross Examination

1 sales per month for those two phases that exist
2 already

3 Q So your answer is no?

4 A My answer is that I used history

5 Q And that history was affected by delays
6 caused by the Defendants, right?

7 A That history is based on whatever happened
8 during those two phases

9 Q You are aware that the parties has
10 contemplated that this contract would be fully
11 performed in five years?

12 A I'm aware that the contract was a five year
13 contract

14 Q Are you saying that it was impossible to
15 complete the contract within five years?

16 A No, it wouldn't be impossible

17 Q Did you find any unforeseen events that
18 occurred outside of the parties control that
19 affected the lot sales in phase one and four?

20 A Well, from the discussions with the
21 employees, the construction delays were involved
22 because of funding Rock and other problems and
23 that as I understand it there was a construction
24 delay from that

25 Q Anything else that occurred that you found?

Mr Ouzts, Cross Examination

1 A No

2 Q Did the employees that you interviewed tell
3 you anything about delays in construction because
4 of not being paid on time?

5 A No

6 Q Did they tell you about any delays in the
7 construction because the engineers were not paid
8 on time?

9 A No

10 Q One of the line items you have on Exhibit
11 number 8 is two hundred and six thousand dollars
12 (206,469), abandoned plans

13 A Yes

14 Q Now, you arrived at that number from an
15 interview with Rick Maxheimer?

16 A No, that number was actually on a report
17 provided by Mrs Richards and I discussed that
18 number with Rick Maxheimer

19 Q And how did you decide to classify that as an
20 abandoned cost?

21 A Because in 2007, Mr Maxheimer says that the
22 plans that existed at that point had been replaced
23 with plans that he has done since

24 Q And those plans were replaced in 2002?

25 A He says he started working on those plans in

Mr Ouzts, Cross Examination

1 2002 Yes

2 Q They were revised plans

3 A They were revised plans He started on those
4 in January of 2002

5 Q And the revisions that were made to those
6 plans, in other words the new plans, had been so
7 improvised from the old plans that there was no
8 way to use any of the old existing plans

9 A Yes, that's what he told me

10 Q So, that whole subdivision of the plans

11 A Yes

12 Q In other words, it was not a tweaking of
13 phase two?

14 A He said he was changing the size of lots and
15 some of the roads were moving and so that is a
16 change

17 Q And because he couldn't use any of the old
18 plans as far as the new ones, that means they are
19 all abandoned?

20 A It means the cost that he had estimated for
21 those before was abandoned Yes

22 Q That's all the questions I have for you
23 Thank you

24 THE COURT Mr Babcock?

25 MR BABCOCK Briefly, Your Honor

1 REDIRECT EXAMINATION

2 BY MR BABCOCK

3 Q I'm going to hand you Plaintiff's Exhibit 1
4 if we can find it Plaintiff's Exhibit 1 And I
5 believe you had some questions asked of you of
6 some expenses that you took into account
7 developing your profit and loss analysis Do you
8 remember those questions from Mr Bowens?

9 A Yes

10 Q Let me direct your attention to section five
11 Compensation DFDG Does that section in the
12 contract set forth a profit formula?

13 A It's another formula but it's a narrative

14 Q Okay Fair enough And on the twenty-five
15 percent language which is the next to last
16 paragraph of that section, do you see that sir?

17 A Yes, sir

18 Q All right And what does that section say
19 about expenses?

20 A It says - in addition to the foregoing which
21 is a discussion of the development fee, SEL shall
22 pay to DFDG twenty-five percent of the net profits
23 received from the lots sold in phases one, two,
24 and three For purposes of this paragraph, net
25 profit shall be defined as the cost of the sale

Mr Ouzts, Redirect Examination

1 of the lots less any and all expenses and capital
2 contributions, sales commissions, the nine dollars
3 development fee, interest charges, including the
4 interest on capital contributions made by SEL
5 which interest shall be the amount as charged by
6 SEL's lender or at the prime rate as charged by
7 the National Bank of South Carolina plus one
8 percentage point whichever amount is lesser

9 Q All right And that's the section of the
10 contract that talks about how you look at profits
11 from the twenty-five percent Is that correct?

12 A Yes

13 Q All right And did you perform your analysis
14 in accordance with that paragraph?

15 A Yes

16 Q Did you perform your analysis with regards to
17 cost with regard to trace any and all expenses to
18 capital contributions?

19 A Yes

20 Q And Mr Ouzts, this contract -let me
21 rephrase You used your analysis of phase one
22 with damages as what period of time?

23 A For the five year period of contract ending
24 instead of the contract date of November
25 fourteenth, I went through November thirtieth

Mr Ouzts, Redirect Examination

1 Q And that was because that was when the ledger
2 was available?

3 A yes

4 Q All right And look over at paragraph nine
5 of the contract Can you read 'Upon termination'
6 to us?

7 A As read - Upon termination DFDG and DFR will
8 have no further rights to compensation and/or
9 commission and shall peacefully vacate the
10 premises

11 Q And did you take that paragraph into account
12 when you did your analysis?

13 A Yes

14 Q You had some questions asked of you
15 concerning the eight hundred thousand dollar
16 payment from the loan proceeds Do you remember
17 those questions, sir?

18 A Yes

19 Q All right Plaintiff's Exhibit 16 and that's
20 been previously identified as the borrower's
21 statement from the closing part of the proceeds
22 Do you remember that?

23 A Yes

24 Q All right And what does that document show
25 where the eight hundred thousand dollars was

Mr Ouzts, Redirect Examination

1 paid with regard to the land?

2 A Well, it shows it's included in the
3 development fee loan

4 Q All right And what does it say about the
5 payoff to NBSC?

6 A Intra-bank transfer

7 Q So what does that mean?

8 A It means they paid off one loan with another
9 loan

10 Q The money wouldn't be coming to SEL itself,
11 would it?

12 A No And there's no P&L or profit and loss
13 effect on Rolling Creek because the contract
14 provides for interest rates amounts to be the
15 second so there's no profit and loss difference
16 between SEL paying the money or borrowing it from
17 NBSC

18 Q You were asked a number of questions
19 regarding the allocation The MGM construction
20 cost for phase one and that sort of stuff and in
21 your investigation

22 A Yes

23 Q So in your investigation, who did you find
24 was the source of the information in terms of how
25 to allocate those costs?

Mr Ouzts, Redirect Examination

1 A D Melton

2 Q Thanks

3 THE COURT You may step down please

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1 THE COURT All right Are there further wit-
2 nesses for the Defense?

3 MR BABCOCK No, Your Honor

4 THE COURT Any witnesses in rebuttal, Mr
5 Bowens?

6 MR BOWENS No, Your Honor

7 THE COURT Okay, ladies and gentlemen of the
8 jury, I'm going to excuse you for the remainder of
9 the day

10 We do have some legal issues which we will need
11 to take up, and by the time we conclude that it will
12 be too late to begin closing arguments and charge

13 So I'm going to excuse you until in the morn-
14 ing, and in the morning when you return you will hear
15 the closing arguments by the attorneys as well as
16 my charge to you on the law that is to be applied to
17 the case You will then begin your deliberations at
18 that point

19 Again, I would ask that you not begin to engage
20 in any discussions among yourselves You have not
21 heard my instructions to you on the law, so it will
22 be totally inappropriate for you all to begin any
23 deliberations at this point

24 Please remember as you leave the Courthouse
25 the instructions I have given to you during the

1 course of the trial about not listening to any con-
2 versations you may overhear and do not allow anyone
3 to approach you to discuss the case with you

4 Again, the decisions that you will need to make
5 and that you will make tomorrow must be based upon
6 the evidence you have heard so far and must be based
7 upon the law as I charge it to you tomorrow

8 So what the attorneys tell you in closing must
9 be based upon the evidence, and your decision must not
10 be made on conversations you may overhear them hav-
11 ing or any discussions anyone may have with them

12 Thank you, and I hope you have a nice evening
13 Please remember to tell your family members and
14 friends that you cannot discuss the case and you are
15 not to do any investigation on your own

16 Again, you must make your decision based upon the
17 evidence and testimony that you heard in this Court-
18 room and upon no outside information

19 To the extent, again, that there may be any media
20 report about the case, you are not to listen to,
21 watch or read anything about the case Your decis-
22 ion will be made from your own specific recollections
23 of the evidence as well as any notes you may have
24 taken

25 We do not want you to be influence by any other

1 information

2 Ladies and gentlemen, I'm going to ask that you
3 report tomorrow morning at nine thirty, and at that
4 time we will be ready for you to hear the closing
5 arguments of the attorneys, as well as my instructions
6 to you. You will then begin your deliberations

7 I hope you have a nice evening, and we will see
8 you tomorrow. Thank you

9 (Jury excused for the evening)

10 THE COURT Are there any motions?

11 MR BOWENS Your Honor, the Plaintiffs would
12 move for a directed verdict on liability on the breach
13 of contract cause of action

14 THE COURT I would ask you to say more

15 MR BOWENS On the breach of contract, there
16 is no evidence for the jury to find that the con-
17 tract was not breached, and on that basis we would
18 move for a directed verdict on the issue of liabil-
19 ity

20 THE COURT And I guess the reason I asked you
21 for more is because you have made several claims re-
22 garding breach of the contract

23 I agree with you that there may be some portions
24 of it that I could direct a verdict on, but there
25 are still other portions at issue, just to say

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1 generically, where they would have to find a breach
2 in order to find damages

3 MR BOWENS Well, on the termination, obviously
4 there was termination on May 28th

5 He admitted yesterday to a breach in that he
6 was negotiating with builders and doing some work
7 secretly That also would be a breach

8 Changing the plan for two and three without in-
9 volving the Dutch Fork Development Group would be a
10 breach of paragraph five of the contract which is un-
11 disputed and clear from the testimony of Mr
12 Maxheimer and from Mr Melton

13 There was also revision of the plans that was
14 done without the Plaintiffs' knowledge or their in-
15 volvement, a wholesale revision of the plans

16 THE COURT I would deny that one What I heard
17 from the testimony was that there was involvement --
18 that all three had involvement with the plans being
19 changed

20 I mean, that would be a factual dispute

21 MR BOWENS Your Honor, the two other aspects
22 in the motion is that we have an uncontested termina-
23 tion and there are no facts to go to the jury as to
24 that

25 THE COURT Yes, sir

1 MR THOMAS Your Honor, first
2 THE COURT Are you standing in response to
3 MR THOMAS Yes, maam
4 THE COURT Okay
5 MR BOWENS Could I add one more thing before
6 he begins?
7 THE COURT Sure
8 MR BOWENS I think it is uncontested that
9 development fees were not paid which would also be a
10 breach of the contract
11 THE COURT All right
12 MR THOMAS Your Honor, the Defendant SEL Prop-
13 erties does not deny a breach of the contract with
14 regard to the May 28, 2004 termination
15 I want to be clear though that the cause of action
16 only named SEL Properties and did not name Mr Steve
17 Lipscomb
18 With regard to the exclusive right to sell, there
19 is a question of fact as to whether there was a breach
20 at all and a question of timing as to when those nego-
21 tiations occurred
22 The testimony from Mr Lipscomb was that the nego-
23 tiations occurred after the Plaintiffs were no longer
24 involved
25 Also, there is no evidence of any damages regarding

1 the alleged secret negotiations, not to mention fail-
2 ure to make out a cause of action for breach of the
3 contract due to any alleged secret negotiations

4 When the change of plans -- first, the develop-
5 ment fees There is no dispute that development fees
6 are owed on phase one only, by SEL Properties

7 However, there is clearly a dispute as to whe-
8 ther any development fees owed for phase two and for
9 phase three

10 THE COURT Any reply?

11 MR BOWENS Yes, Your Honor With regard to
12 the timing issue, the evidence yesterday from Mr
13 Lipscomb was that negotiations had gone on during
14 the term of the contract The testimony yesterday
15 was a date in February of 2005, so it is clear that
16 is prior to the end of the term of the contract

17 It is within the five years when they were wrongly
18 terminated

19 That was in violation of the contract

20 THE COURT Back up again, please I'm sorry
21 What are you claiming -- what was in February?

22 MR BOWENS Mr Thomas had said that the tim-
23 ing was after the termination As well he said it
24 was admitted the termination was improper So that
25 is an improper breach of the contract

1 The contract introduced yesterday was dated on
2 February 5th and

3 THE COURT What contract?

4 MR BOWENS The construction contract for phase
5 two

6 If the Court will recall, Mr Lipscomb denied
7 all day that he had been in negotiations with anyone
8 but when presented with that contract he then admit-
9 ted that he had been in negotiations with people dur-
10 ing the five year term of the contract

11 THE COURT Okay Can you -- are you talking
12 about the Essex contract?

13 MR BOWENS No, Your Honor The contract for
14 construction of phase two which was introduced yes-
15 terday

16 THE COURT So that is the contract to begin the
17 construction on the roads and all for phase two?

18 MR BOWENS Right That is February of 2005

19 THE COURT And so -- I'm missing how you are
20 claiming that is a breach How did that affect your
21 exclusive right to sell?

22 MR BOWENS When we presented Mr Lipscomb with
23 that contract, he then admitted that he acted in nego-
24 tiations with builders secretly which led to that
25 contract being executed

1 He then said the builder he had been nego-
2 tiating with backed out so that contract did not go
3 forward It is those secret negotiations that is the
4 breach of the Plaintiffs' right to sell

5 THE COURT Repeat that again

6 MR BOWENS Mr Lipscomb denied all day long
7 yesterday that he entered into

8 THE COURT I got that part

9 MR BOWENS any secret negotiations with
10 builders When I presented him with the construction
11 contract for phase two, he claimed, well, this con-
12 tract did not go forward

13 So I said that was one of the builders he had
14 negotiated with secretly, and he backed off and said,
15 yeah, that's right

16 So that is a breach right there in the terms
17 of the agreement, and it proves by his own admission
18 that he was involved in secret negotiations with
19 builders which violates the exclusive right to sell

20 THE COURT How did that violate the exclusive
21 right to sell?

22 I don't get that

23 MR BOWENS There was an exclusive right in DFF to
24 sell these lots, and he was doing these negotiations
25 during the term of the agreement, which is a breach

1 THE COURT But if those negotiations are about
2 the construction of the infrastructure, how does that
3 violate the right to sell -- I'm missing

4 MR BOWENS When I showed him the contract, he
5 testified the reason he had the contract to build the
6 infrastructure was because he was in negotiations
7 with a builder to buy it

8 So when he handled those negotiations secretly
9 it harmed us That was ongoing and he then had a
10 construction contract signed to build phase two but the
11 builder backed out and the construction contract did
12 not go forward

13 Those negotiations that didn't involve us makes
14 it a violation of the exclusive right to sell

15 THE COURT Okay

16 MR BOWENS When I presented him with the con-
17 tract, he then admitted that, yes, he had been doing
18 negotiations secretly and not involving us

19 THE COURT All right

20 (Brief pause, during which there was a conference
21 between the Court and Counsel at the bench off the
22 record)

23 THE COURT I'm going to deny that as well, sir
24 I'm going to deny the -- I will grant it as to the
25 termination on May 28, 2004, and I will grant it as

1 to the development fees on phase one
2 The remaining parts will be denied
3 MR THOMAS And that is as to SEL Properties?
4 THE COURT Yes It is only as to SEL Proper-
5 ties
6 (Pause in the proceedings)
7 THE COURT Anything else from the Plaintiffs,
8 Mr Bowen?
9 MR BOWENS No, Your Honor
10 THE COURT From the Defendants, any motions?
11 MR THOMAS Yes, Your Honor
12 THE COURT All right
13 MR THOMAS We would move for directed verdict
14 regarding phase four and the damages numbers presented
15 by Mr Bowens
16 The only testimony as to damages in phase four
17 in the record establishes damages of the professional
18 contractor
19 THE COURT Any response?
20 MR BOWENS That motion should be denied for
21 the same reasons it was denied previously
22 There is evidence as to the damages in phase four
23 that the jury could conclude were as Mr Richardson
24 opined to, and nothing has changed since this motion
25 was previously made

1 THE COURT Did I rule on phase four?
2 That is what we're talking about, isn't it? As
3 to phase four?
4 MR BOWENS I believe you did
5 Mr Melton testified as to gross sales and we
6 have the exhibit giving the costs
7 There is evidence from which the jury could con-
8 clude what the damages were, and it was denied previously
9 THE COURT I will deny that
10 I would deny it on the basis that it is a fact-
11 ual issue
12 All right
13 MR THOMAS Your Honor, the next motion would be
14 for directed verdict on the cause of action for tor-
15 tuous interference with the contract as to the Defen-
16 dant Mr Lipscomb
17 We would cite to the Court the case of Bradburn
18 versus Colonial found at 255 Southeast Second 453, and
19 this is at page 455
20 (Reading quickly from case)
21 Your Honor, the only evidence as to the scope of
22 Mr Lipscomb's authority for Defendant SEL Properties
23 is Mr Lipscomb's testimony
24 There is no testimony from the Plaintiffs as to
25 the scope of, or any limitations upon, his authority

1 with SEL Properties

2 Your Honor, Mr Lipscomb testified -- and it is
3 the only evidence in the record -- as the manager of
4 SEL Properties that he had authority to transact busi-
5 ness for SEL Properties, on their behalf, and there
6 is no evidence he acted outside of the scope of his
7 authority

8 There is no evidence that he intentionally or
9 otherwise caused SEL Properties to breach the contract

10 The cause of action is frivolous, Your Honor

11 THE COURT Response?

12 MR BOWENS Your Honor, the Court has previously
13 ruled on this motion and for the same reasons it was
14 denied previously it should again be denied

15 Whether he was acting as an agent for K & L or
16 as an agent for SEL is a fact for the jury to decide
17 There is evidence that goes to the fact that he acted
18 as agent for K & L

19 As far as acting within the scope of his employ-
20 ment, selling below contract value, the contract gives
21 SEL the right to set prices in advance It wasn't
22 to be below Forty Thousand, and he breached that by
23 selling to K & L below that

24 Whether he did that or not is a question of fact
25 for the jury to determine

1 The
2 THE COURT Who are the principals of K & L?
3 MR BOWENS Mr
4 THE COURT According to the testimony
5 MR BOWENS Okay, according to the testimony,
6 Mr Lipscomb
7 THE COURT Mr Lipscomb individually, or Mr
8 Lipscomb with someone else or as managing partner,
9 managing person?
10 Was Mr Lipscomb acting as managing partner on
11 behalf of SEL or
12 MR BOWENS It was Mr Lipscomb personally
13 There is no evidence that K & L is a fully owned
14 subsidiary of Essex It was always Kirk and
15 Lipscomb
16 If you recall the testimony, K & L was formed
17 to conflict SEL That was Mr Quinn's testimony It
18 was not wholly owned by him
19 THE COURT As I followed Mr Lipscomb's testi-
20 mony, K & L was Kirk and SEL Did I hear that in-
21 correctly?
22 MR BOWENS I don't recall testimony of Kirk and
23 SEL It was Kirk and Lipscomb
24 Mr Lipscomb acted on behalf of SEL
25 THE COURT Whatever you call it, K & L or whatever,

1 it doesn't exclude other parties, does it?

2 MR BOWENS Mr Lipscomb is the one who person-
3 ally put the money up It wasn't SEL that put the
4 money up Mr Lipscomb personally did that

5 So there isn't any evidence before the jury that
6 SEL put any money up or caused Mr Lipscomb to do it
7 personally

8 He also gave personal guarantees for the loans
9 as well I don't think SEL is sufficiently connected
10 to substitute SEL for Lipscomb

11 THE COURT Well, how can you substitute Lipscomb
12 just because -- if he's the person who is acting on
13 behalf of the corporation, acting on behalf of SEL,
14 and he's claiming -- from his own testimony he is
15 claiming that SEL is partnered with Kirk to form K & L
16 -- how do I jump that hoop?

17 I mean, just because he's putting up the funds
18 -- he has already testified SEL is a family-owned
19 corporation and he acted on behalf of SEL, that he's
20 the individual

21 (Brief pause in proceeding)

22 MR BOWENS Well, I don't think there is any
23 question Mr Lipscomb acts on behalf of SEL, and there
24 is no question also that he acted for K & L

25 You will remember Mr Kirk's testimony was that

1 Mr Lipscomb made all the decisions on behalf of the
2 company

3 He said Mr Lipscomb made all the decisions and
4 he ran the business and ran

5 THE COURT I'm talking about purely the corpor-
6 ate structure

7 If the corporate structure or business structure
8 of K & L is Kirk and SEL, then anything Mr Lipscomb
9 does on behalf of SEL is not on behalf of himself in-
10 dividually

11 MR BOWENS If the corporate structure were
12 that, it would be correct, but the corporate struc-
13 ture is not K & L -- it is not Kirk and SEL It is
14 Kirk and Lipscomb

15 That was admitted in the testimony from Mr
16 Lipscomb and Mr Kirk, that it was Mr Lipscomb who
17 -- of the parties, it was not SEL but Lipscomb, and
18 that Lipscomb is the one who put up all the moneys
19 to back K & L and not SEL

20 So you have K & L or some part of K & L inter-
21 fering in this contract between Dutch Fork and SEL,
22 and the actor for K & L is Mr Lipscomb

23 THE COURT Yes, sir?

24 MR THOMAS Your Honor, K & L is not a party
25 to this action If Mr Lipscomb was acting for

1 K & L then he has the corporate shield around him, and
2 he can't be held to be an interfering party

3 Mr Lipscomb had an interest in K & L which was
4 known from the beginning Mr Lipscomb had authority
5 to transact business on behalf of SEL, and that is the
6 only evidence

7 If SEL breached the contract then he was doing
8 something within the scope of his employment, and this
9 action is a frivolous action

10 The purpose of a corporate shield is so that busi-
11 ness can be done and the corporate entity will be re-
12 sponsible

13 MR BOWENS Under the tortuous interference with
14 contract, we don't have to sue K & L We can sue Mr
15 Lipscomb since he acted for K & L

16 He is the tortfeasor, the one who did the action,
17 and according to what we've heard he acts for K & L
18 As the person exclusively dealing with us, he is re-
19 sponsible for his own torts

20 I believe the Court has already said that the
21 tortuous interference is a fact for the jury to con-
22 sider

23 THE COURT Well, at the time the only evidence
24 I had was evidence that just said Mr Lipscomb, Mr
25 Lipscomb, Mr Lipscomb, but if in fact there is some

1 evidence as to the corporate structure, and there is
2 no evidence to refute that he's acting on behalf of
3 -- none of your witnesses testified to whether he was
4 acting in the course and scope or outside the course
5 and scope

6 I couldn't tell from their testimony whether he
7 was acting in his individual behalf or whether he was
8 acting in the corporate behalf

9 I gave you the benefit of the doubt at the time
10 those motions were made since I had to do it in the
11 light most favorable to the non-moving party

12 But if there is no evidence to show me what the
13 structure is or the capacity in which the person was
14 acting other than the testimony from the witness who
15 is acting,

16 MR BOWENS Mr Lipscomb did testify repeatedly
17 that he was the one, not SEL, that was funding money
18 for K & L

19 If the corporate structure was involved it would
20 be SEL funding the money

21 THE COURT I guess I'm having a problem just
22 because -- well, because he's putting up the money,
23 I don't understand how that changes anything

24 MR BOWENS There is evidence that he personally
25 is giving money and that makes it him alone, personally

1 involved, and not SEL

2 THE COURT What is he giving money for on be-
3 half of K & L?

4 MR BOWENS For funding -- guaranteeing the
5 loans and guaranteeing moneys for daily operations
6 All the money came from Steve Lipscomb personally It
7 was not SEL That was the evidence

8 MR THOMAS That Mr Lipscomb was acting individ-
9 ually and was manager individually is not in the evi-
10 dence

11 That is, that Mr Lipscomb's actions as manager
12 of SEL Properties in allowing sales is outside the
13 scope of what he did as manager for SEL Properties

14 Now, the only testimony is that he was acting as
15 an agent for SEL and he had authority to do so

16 Just because a corporate officer did something
17 and breached the contract later on doesn't mean that
18 person is personally responsible

19 There is no evidence that Mr Lipscomb was outside
20 the scope of his authority for SEL Properties and there-
21 fore his actions should be proper under the Bradburn
22 case

23 MR BOWENS That is not -- even if that's true
24 it is not the case here The person doing the act-
25 ing is not supposed to be the person who is interfering

1 The third party is K & L acting through Mr Lipscomb
2 He is the one doing the acting that interfered with the
3 contract

4 On behalf of K & L, he is acting for K & L when
5 he takes these actions, and not some third party

6 THE COURT Well, if he's acting for K & L then
7 why is K & L not a party to the lawsuit instead of him
8 individually

9 You can't have it both ways He's either acting
10 for himself and only for himself, or he's acting on be-
11 half of K & L, in which case K & L is a corporate en-
12 tity and can be sued in its corporate structure

13 And if he's acting on behalf of K & L, clearly
14 he is not -- while it ultimately may benefit himself,
15 the actions you claim benefitted K & L and K & L
16 therefore would be the entity interfering with the
17 contract

18 MR BOWENS But they were acting through Mr
19 Lipscomb

20 THE COURT Well, a corporation has to act cer-
21 tainly through somebody K & L can't come in here
22 and act on its own without somebody -- he is either
23 acting on behalf of K & L or he's acting on behalf
24 of SEL

25 MR BOWENS That's a question for the jury to

1 determine

2 THE COURT But not in his individual capacity,
3 and it would not be individual liability, because
4 that is what you are seeking -- you are seeking to
5 hold him personally responsible because he personally is
6 acting on nobody's interest but his own

7 Not for K & L or anybody else, but for himself,
8 which interfered with the contract, and if he's act-
9 ing on behalf of K & L, then it was K & L who was
10 interfering with the contract and K & L who should
11 be responsible, and it would be a jury question as to
12 whether K & L is the appropriate party

13 MR BOWENS I believe we can sue Mr Lipscomb
14 personally for his actions on behalf of K & L, for his
15 own tortuous conduct

16 But, in addition, he

17 THE COURT But that is the point His tortuous
18 conduct is as an agent on behalf of K & L

19 MR BOWENS And under the common law of this
20 State, when you are acting as the solicitation for
21 K & L or for an entity, you are personally liable
22 for your own torts

23 Under the case law, that is clear

24 THE COURT But the tort is the interference

25 MR BOWENS Right

1 THE COURT And the tort is in behalf of K & L
2 He is acting within the scope and course of his em-
3 ployment, in the scope and course of his agency, and
4 he can't be held personally liable It is one or the
5 other

6 MR BOWENS That is one argument, that he was
7 acting for K & L, but there is also another argument,
8 that he was acting personally, acting not for anyone
9 Your Honor, it cuts both ways

10 MR THOMAS Your Honor, there is no evidence
11 in the record that he acted outside the scope of his
12 authority with SEL Properties

13 MR BOWENS Your Honor, we would submit that
14 the case law in Jackson versus Speed stands for the
15 proposition that he can be held personally liable, as
16 well as liable as agent of the corporation

17 (Reading rapidly from case)

18 MR THOMAS But they have to show he acted out-
19 side the scope of his authority, as is set out in the
20 Bradburn case we have cited

21 Therefore, we are entitled to a directed ver-
22 dict as to this cause of action

23 (Brief pause in the proceeding)

24 THE COURT That was Jackson versus

25 MR BOWENS Speed, Your Honor

1 THE COURT All right

2 (Brief pause in the proceeding)

3 THE COURT I will consider that further before
4 I make my ruling

5 Are there any other motions?

6 MR THOMAS Yes, Your Honor At this time,
7 the Defense would move for directed verdict -- the
8 Defendant SEL Properties would move for directed ver-
9 dict on the cause of action for breach of contract
10 accompanied by fraudulent act

11 The Complaint alleges that the fraudulent act
12 is the offering of the settlement letter for Fifty-
13 seven Thousand Dollars in December of 2004, and after
14 the termination

15 That is not an issue for the jury to pass upon
16 because there is no evidence in this case that the
17 fraudulent act accompanied the breach

18 That letter, the settlement offer, has not been
19 put in evidence, and, therefore, there is no fraudu-
20 lent act accompanying the termination, as the Plain-
21 tiffs previously argued

22 It is not in evidence and no reasonable juror
23 could find that there is a breach of contract accom-
24 panied by a fraudulent act since the letter or the
25 settlement offer is not in evidence

1 This motion is made by Defendant SEL for directed
2 verdict in that the Defendant Lipscomb is not named
3 in this cause of action

4 In addition, Your Honor, there is clear and con-
5 vincing evidence that would warrant punitive damages
6 as to SEL Properties in this case of action

7 THE COURT Yes, 'sir, Mr Bowens

8 MR BOWENS Your Honor, the fraudulent act is
9 not only the letter There are a number of other
10 fraudulent acts by the Defendants that were referred
11 to

12 There was fraudulent action by dishonest and
13 unfair dealings, as testified to by a number of the
14 witnesses, which centered around the time of the breach
15 in May of 2004

16 There were secret negotiations, the changing of
17 the plans, the misrepresentation about the having of
18 profits

19 There was testimony about a mis-use of funds that
20 was testified to just a few moments ago The bookkeep-
21 ers testified that the CPA had the responsibility and
22 they should not have had to do these allocations

23 The problem is when you have all of these dif-
24 ferent items to cash on the Courtyards account, the
25 items deposited to the Courtyards account, not

1 allocating funds properly, using funds from the Court-
2 yard account for personal expenses related to Court-
3 yards -- when you have all of these things taken to-
4 gether, those are all acts that are characterized by
5 dishonesty and unfair dealings

6 You do not have to prove fraud There is evidence
7 sufficient for this cause of action to go to the jury
8 as I have just laid out for you

9 These acts are all close enough to the time of
10 the breach to accompany the breach

11 Further, Mr Lipscomb testified he was negotiat-
12 ing with a builder to buy phase two and three with-
13 out involving Dutch Fork Realty

14 Now, that didn't happen -- it didn't go forward,
15 but that is certainly a fraudulent act

16 Mr Maxheimer testified about Mr Lipscomb com-
17 ing to him about the change in plans when Dutch Fork
18 didn't know about it

19 All of those things are unfair and dishonest deal-
20 ings with the Plaintiffs and, as I said, are close
21 enough to the time of the breach to qualify to accom-
22 pany the breach

23 MR THOMAS Your Honor, I'll try to break it
24 down We have an isolated breach and now Mr Bowens
25 is throwing out all of these other things which were

1 brought up but they are all the same

2 There was a change in the plans but it was not
3 a fraudulent act The testimony was that was January
4 of 2002, almost two years prior to the termination

5 Surely the change in plans was not a fraudulent
6 act connected in character and time to the termination
7 in May of 2004

8 The allegation concerning the roadway construc-
9 tion occurred in May of 2001, three years prior to
10 the termination and was not connected in time or in
11 character

12 Again, they have to tie in a specific fraudulent
13 act In Hardy versus Penn Mutual, 53 Southeast Second
14 at 861, and pinpointing 865, (reading rapidly from
15 case)

16 They have to show by clear and convincing evi-
17 dence that the fraudulent act occurred No reasonable
18 jury can tie the isolated breach to the things Mr
19 Bowen has mentioned

20 As to the secret negotiations, it was February
21 of 2005, almost a year after the termination There
22 are no damages of any kind associated with that be-
23 cause it never went forward

24 As to that aspect of it, it is our belief that
25 the Plaintiffs failed to connect the breach to any

1 fraudulent act connected in time and character to
2 the breach

3 THE COURT I'm going to deny the motion as to
4 breach of contract accompanied by a fraudulent act
5 I believe there is enough to go to the jury

6 MR BOWENS Your Honor, just to be clear, is
7 that also with regard to submission of punitive dam-
8 ages to the jury?

9 THE COURT Yes, sir

10 MR THOMAS Your Honor, the Defendants have
11 another motion for directed verdict as to phase two
12 and phase three damages

13 These damages are improper because they are pred-
14 icated on alleged breaches of contract that are outside
15 the statute of limitations in the matter

16 This matter was filed on February 17, 2005
17 According to the Plaintiffs' own time line, the whole
18 basis for the damages in phase two and phase three
19 that we are charged with are, one, wrongful not bond-
20 ing of the plat change in January of 2002 -- three
21 years

22 Two, paying back the purchase price from the bank
23 loan, which was November of 2001

24 Contract delays in construction in November of
25 2001, and changing of the plans in 2002

1 There was testimony that the changes occurred in
2 January of 2002

3 In Meyer versus Tietex Corporation, found at
4 50 Southeast second 204, 208, (reading rapidly from
5 case)

6 So if they didn't take action within three years,
7 the statute of limitations has run Mr D Melton and
8 W Melton testified that they knew in January of 2002
9 that they were dissatisfied with Mr Lipscomb taking
10 the Eight Hundred Thousand Dollars and the wrongful
11 not bonding of the plat

12 The Plaintiffs are outside of the scope of the
13 three year statute by law as to phase two and phase
14 three damages

15 Another aspect of this motion is that the only
16 reasonable conclusion the jury can draw from the tes-
17 timony is that the Plaintiffs waived their right to
18 challenge any of these alleged acts

19 The Plaintiffs testified they were aware of all
20 of these alleged acts Mr Melton testified he was
21 aware in 2002 that the plat was not bonded and even
22 if he was dissatisfied he went along with it

23 They testified they were aware about the Eight
24 Hundred Thousand Dollars being taken from the proceeds
25 of the bank loan, and they went along with that

1 If these are things that they did, they are
2 things the Plaintiffs could have stood up and chal-
3 lenged, but they did not as to any of these things
4 within the three year statute of limitations

5 They didn't so they have waived their rights
6 to challenge anything They continued to work under
7 this contract for three and half years

8 There is no evidence from which a reasonable
9 juror could reach under the evidence a decision that
10 they were aware of these actions and continued to
11 work under the contract

12 The action is barred by the statute

13 MR BOWENS Not bonding the plat, that issue
14 first arose in January of 2002 but it was a continuing
15 breach each day and each month after that when they
16 did not bond the plat That is according to Mr
17 Colson's testimony

18 With respect to the 120 days from the time the
19 loan closed, Mr Melton testified it should have
20 been bonded in January As well, it was a continu-
21 ing breach, not bonding the plat, each time he doesn't
22 do it

23 As to plan changes, that happened according to
24 the testimony in March or April of 2002, according to
25 the testimony

1 This was a breach of the contract that prevented
2 us from going forward timely, which was clearly within
3 the statute time

4 As to the money taken out of the loan proceeds,
5 the Eight Hundred Thousand Dollars, that was taken
6 in November of 2001 However, the effects of that
7 go over and affect the work during the spring and
8 summer of 2002, when the shortfalls came about, which
9 is within the statute

10 After that occurred and they found it out, then
11 Mr Lipscomb didn't pay for the shortfalls, for which
12 he had given his personal guarantee He testified
13 about that That that didn't happen

14 While the action of taking out the money -- that
15 action by him occurred in November of 2001, the effects
16 of it, which is really the heart and soul of the prob-
17 lem, occurred in early 2002

18 As far as talking about our going along with it,
19 we didn't find out about of it until after it had al-
20 ready happened, until after the money had been taken,
21 until after the plans had been changed

22 You will recall the testimony was that the bud-
23 get for the Courtyards was dated January after it
24 had already been done, so we didn't know about it
25 until afterward

1 So it happened but the effects of it went on
2 until 2002

3 MR THOMAS Your Honor, very briefly, I would go
4 again to Mier versus Tietex, 500 SE Second 204,
5 (reading rapidly from case)

6 They did not take action within three years after
7 the dates that these things allegedly occurred, so
8 they are now barred All of these things occurred
9 outside of a three year time period

10 There was also testimony that the Plaintiffs did
11 continue to go along and work, so that would satisfy
12 the elements of waiver They didn't raise objections
13 and continued to work three and a half years

14 MR BOWENS I would just add that under the dis-
15 covery rules when the Plaintiffs either should have
16 discovered the act of taking out the Eight Hundred
17 Thousand Dollars or did discover it -- that in itself
18 is not a breach of the contract, but the problem comes
19 when he doesn't cover the shortfalls later on

20 All of that comes under the three year time per-
21 iod, as well as the failing to bond the plat which
22 continued on The change in the plans caused delays
23 which continued on

24 This idea that we are outside the statute of
25 limitations is completely without merit

1 The motion should be denied on that basis
2 THE COURT I am going to deny that motion as
3 well The jury can decide whether those actions by
4 the Defendants led to those damages
5 Anything further?
6 MR THOMAS Your Honor, the phase two and phase
7 three damages are speculative
8 I would point Your Honor to the case of Drews
9 Company versus Ledwith Wolfe, found at 634 S E Second
10 62
11 In this case, the Plaintiffs have taken the pos-
12 ition that the breach of contract is the wrongful
13 termination I believe Mr Bowens said the breach
14 is not the bonding in January of 2002, but also took
15 the position the breach is not the other acts which
16 we say are outside the statute of limitations
17 The key in any contract case is to first estab-
18 lish the breach and then you look to see what could
19 have been done in the absence of the breach
20 The phase two and phase three damages are not
21 a necessary result of the May 2004 breach because they
22 are predicated on acts that occurred before then, and
23 the proper analysis is to look at what would have
24 happened if the Defendant SEL had not terminated in May
25 of 2004 and if Defendant SEL had allowed them to finish

1 the contract

2 What could have been earned during this time per-
3 iod?

4 (Reading rapidly from Drew Company case)

5 The damages in phase two and phase three as purely
6 speculative, or are speculative theories

7 MR BOWENS Your Honor, the testimony is suffi-
8 cient to establish that the damages flow directly
9 from the breach

10 I believe the motion was made last week and was
11 denied then It should be denied again today for the
12 same reasons

13 MR THOMAS The damages do not flow from the
14 breach, Your Honor, and there must be proof that they
15 do to a reasonable degree of certainty

16 The motion should be granted

17 (Brief pause in the proceeding)

18 MR BOWENS Your Honor, it is a classic case
19 of the Plaintiffs being unable and being prevented
20 from performing their obligations under the contract,
21 thus preventing us from earning profits and commis-
22 sions in phases two and three

23 This is well within the statute of limitations
24 and for that reason the motion should be denied again

25 MR THOMAS Your Honor, there is no testimony

1 in the record to support what damages, what sales,
2 what commissions could have been earned from May 2004
3 forward

4 There is no record on that point whatsoever, as
5 well as there is nothing in the record as to what dam-
6 ages occurred or what could have been earned from the
7 failure to fix the roads which occurred in the summer
8 of 2003

9 The only damages as to phase two and three are
10 predicated on what was occurring during the two and
11 a half years prior to the termination

12 THE COURT I am going to deny that motion as
13 well I think they would flow from what may have been--
14 what was contemplated by the parties at the time the
15 contract was made

16 I think it becomes a jury question as to what
17 those numbers show and the basis for them, and I think
18 it becomes a jury question as to whether or not they
19 believe that those were a natural or probable conse-
20 quence of the breach

21 I'm going to allow it to go to the jury

22 Anything else?

23 MR THOMAS No, Your Honor

24 THE COURT All right Let's take a break at
25 this time

1 (Whereupon, the Court stood in recess from 4 09
2 P M until 4 34 P M , when the matter resumed on the
3 record)

4 THE COURT Okay, as to the directed verdict --
5 the motion as to directed verdict for tortuous inter-
6 ference with contract, I will deny that motion

7 I think that applicable case law provides that
8 someone acting in the scope and course of their agency
9 and there is a tort against them as a third person --
10 the fact that that person is acting in such capacity
11 does not affect the person's or the agent's liability
12 for damages

13 And so the question as to whether or not he was
14 acting in the capacity which was lawful or in his per-
15 sonal capacity I think is a jury issue

16 I will let it go to the jury

17 MR BOWENS Your Honor, there is one final mat-
18 ter we should probably take up before we start with
19 the charges, and that is the directed verdict on
20 liability on breach of the contract

21 There is no dispute that at least Fifty-four
22 Thousand Dollars was not paid That was admitted to

23 The contract does provide in the event of a dis-
24 pute for attorneys' fees and costs

25 THE COURT Let's go forward now I will ask

1 that you brief the issue and you may submit your af-
2 fidavit as to attorney fees and costs pursuant to
3 the requisite case law

4 MR BOWENS Thank you, Your Honor

5 THE COURT Brief that and submit an affidavit
6 with your bill itemizing costs after the trial has
7 been completed

8 MR BOWENS Yes, Your Honor

9 (Brief pause)

10 THE COURT Now, as I understand it, tortuous
11 interference with contract only refers to or relates
12 to an individual

13 MR BOWENS That's correct

14 (Whereupon, there was a brief break in the pro-
15 ceeding, after which there was a conference concern-
16 ing jury charges between counsel and the Court)

17 (The Court then stood in recess until the
18 matter was resumed on November 7, 2007)

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1 (The case was resumed and Court was called to
2 order on November 7, 2007, at 9 39 A M)
3 THE COURT I have shown you a copy of a two
4 page verdict form for the jury Are there any addi-
5 tions or changes, from the Plaintiffs?
6 MR BOWENS None from the Plaintiffs
7 THE COURT Changes or additions, from the Defen-
8 dants?
9 MR BABCOCK Just a moment No objection,
10 Your Honor
11 THE COURT Is there anything further we need
12 to take up before we bring in the jury?
13 MR BOWENS No, Your Honor
14 MR BABCOCK No, Your Honor
15 THE COURT Bring in the jury, please
16 (Jury returned to Courtroom)
17 THE COURT Good morning, ladies and gentlemen
18 At this time we are now ready to hear the closing
19 arguments from the attorneys
20 As I told you at the beginning of the trial,
21 these arguments are not evidence What they will do
22 is they will argue to you portions of the evidence
23 that you heard in an effort to try to sway you to
24 the facts in their view of what has occurred
25 So I ask that you listen very carefully to these

1 closing arguments They may cause you to think about
2 the evidence in a different way, or they may raise
3 questions that you will want to discuss yourselves
4 with the other jurors during your deliberations

5 I want to tell you, ladies and gentlemen, that
6 I have imposed a time for the arguments, and I have
7 done that because I think we all understand what this
8 case is about

9 I have asked the attorneys to compact their ar-
10 guments and to present them to you in a coherent
11 fashion

12 I have not told them this, that I never call
13 them exactly on a time limit, but I will stop them
14 if they go beyond what is reasonable

15 We may then take a short break, perhaps even a
16 bathroom break, and then I will proceed to give to
17 you my instruction as to the law that you are to
18 apply to the facts as you find them to be during
19 your deliberations

20 Following that charge or instruction on the law,
21 the matter will then be in your hands to begin your
22 discussions and deliberations

23 So I ask that you listen very carefully to the
24 attorneys as they are making their closing arguments
25 to you

1 (Whereupon, closing arguments were made to the
2 jury by Mr Catone for the Plaintiffs and by Mr
3 Babcock for the Defendants)

4 (This remaining portion of the record has pre-
5 viously been transcribed for counsel)

6 -----END OF REQUESTED TRANSCRIPT OF RECCRD-----

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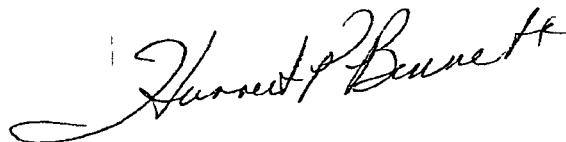
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CERTIFICATE

I, HARRIET P BENNETT, Official Court Reporter
for South Carolina Court Administration, do hereby
certify that the foregoing Transcript of Record was
prepared from the records of Bonnie Kelly to the
best of my ability, having been heard in the Court
of Common Pleas for Richland County beginning on
October 29, 2007, and ending on November 7, 2007

FURTHER, I certify that I am neither of kin nor
counsel to any party to this action, nor do I have
any interest in the outcome thereof

This 10th day of October, 2008

A handwritten signature in cursive script, reading "Harriet P. Bennett", with a small star or flourish at the end.

1 that you brief the issue and you may submit your af-
2 fidavit as to attorney fees and costs pursuant to
3 the requisite case law

4 MR BOWENS Thank you, Your Honor

5 THE COURT Brief that and submit an affidavit
6 with your bill itemizing costs after the trial has
7 been completed

8 MR BOWENS Yes, Your Honor

9 (Brief pause)

10 THE COURT Now, as I understand it, tortuous
11 interference with contract only refers to or relates
12 to an individual

13 MR BOWENS That's correct

14 (Whereupon, there was a brief break in the pro-
15 ceeding, after which there was a conference concern-
16 ing jury charges between counsel and the Court)

17 (The Court then stood in recess until the
18 matter was resumed on November 7, 2007)

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Dutch Fork Jury Charges

1 THE COURT I find that it is easier
2 for me to tell you what I will charge and then
3 we can discuss any specifics that you may wish to
4 request I will tell you that tomorrow I will
5 charge them in order of breach of contract
6 followed by breach, followed by fraudulent act
7 and followed by tortuous appearance I may not
8 talk about them in that order today

9 As a general rule I will charge them
10 generally as to all claims that they have to
11 make the decision based upon their view of the
12 evidence and based upon the facts that they will
13 have to judge the credibility and that would
14 include whether or not a witness' testimony has
15 been impeached and if a witness' testimony has
16 been impeached and they may give any of the
17 witness' present or prior testimony the weight
18 that they believe it deserves

19 I will also charge evidence to expert
20 witnesses I will charge them on the burden of
21 proof, which is by preponderance of the evidence

22 I will also charge them that a corporation
23 is to be treated no differently than individuals
24 There is the same standard of justice because
25 corporations are considered to be individuals

Dutch Fork Jury Charges

1 in the eyes of the law

2 As it relates to tortuous interference
3 with a contract, I will charge them that the
4 Plaintiff has to establish an action for
5 additional interference with an additional
6 contractual relationship sometimes referred to
7 as tortuous interference with an existing
8 contract

9 The Plaintiff must prove by a greater
10 preponderance of the evidence the existence of
11 a contract, the wrongdoers knowledge of the
12 contract, the intentional procurement of the
13 contract, the breach, the absence of
14 justification, and the resulting damages
15 That in this case the Plaintiff claims the
16 Defendant, Stephen Lipscomb, has interfered with
17 the existing contractual relationship between
18 SEL and the Plaintiffs

19 One who intentionally and improperly
20 interferes with the performance of a contract
21 between another and a third person by inducing
22 or causing a third person not to perform the
23 contract is liable for damages to the other
24 for failure to perform the contract

25 Known to the existence of the contract

Dutch Fork Jury Charges

1 is a condition of liability for interference
2 with it The Defendant cannot be liable for
3 interfering with the contract for which he is
4 unaware There is no liability where the party
5 charged with procuring the breach of contract
6 has acted in ignorance of the existence of any
7 contract It's not necessary to prove the
8 actual knowledge It's enough to show the
9 Defendant had knowledge of facts which are
10 followed by reasonable inquiry have led to a
11 complete disclosure of the actual relations
12 and the rights of the parties

13 For a cause of action to arise, a breach
14 must be intentionally procured The Plaintiff
15 must prove that the outsider intentionally
16 induced the third person not to perform the
17 contract with the Plaintiff The essential
18 element is the intent to cause the result
19 If the Defendant does not have this intent, his
20 conduct is not subject to liability

21 The Plaintiff must also prove that the
22 third parties interference - that the Defendant's
23 interference in fact procured the breach of the
24 contract The act of interference must
25 influence, induce, or coerce one of the

Dutch Fork Jury Charges

1 parties of the contract to abandon the
2 relationship or breach the contract The
3 Plaintiff must show that but for the
4 interference the contractual relationship
5 continued

6 In determining whether the Defendant's
7 conduct intentionally interfered with a
8 contract of another's property you may
9 consider the following factors the nature of
10 the Defendant's conduct, the Defendant's motive,
11 the interest of the other party with which the
12 Defendant interferes, the interest thought to
13 be advanced by the Defendant, the social
14 interest in protecting the freedom of action
15 of the Defendant and the contractual interest
16 of the other, the proximity or the remoteness
17 of the Defendant's conduct to the interference,
18 and the relations between the parties

19 The absence of justifications may be
20 inferred Interference of the contract is
21 justified by legitimate business purpose The
22 exercise and good faith of a legal right by a
23 party to the contract affords no basis for an
24 action by the second party for intentional
25 interference with a contract even though

Dutch Fork Jury Charges

1 the consequence of the legal right of the
2 first party is to cause the third party not to
3 perform another contract with the second party

4 The Plaintiff must also prove damages that
5 resulted from the breach In an action for
6 interference with a contract, a Plaintiff may
7 recover such damages as are a natural and
8 approximate consequence of the interference
9 These would include unforeseen expenses,
10 damage to reputation, damage for loss of
11 employees, damage for loss of customers,
12 damage for loss of goodwill

13 Where the damage is loss of profits the
14 Plaintiff must prove that it is reasonably
15 certain that the profits would have been realized
16 but for the Defendant's conduct and that such
17 lost profits can be ascertained and measured
18 from the evidence produced with reasonable
19 certainty

20 For aggravated, unjustified interference
21 with contractual rights and reckless disregard
22 of the rights of the contracting party would also
23 justify an award for' punitive damages

24 The Defendant claims that he is not liable to
25 the Plaintiff because the Defendant is a party

Dutch Fork Jury Charges

1 to the contract The cause of action for
2 interference with contractual relationship is
3 premised on behavior of a Defendant who is
4 not a party to the contract Therefore, it is a
5 defense to the action if the Defendant is a party
6 to the contract or an agent to the Defendant

7 Generally, a corporate officer or employee is
8 not liable for tortuous interfering with a
9 corporate contract because he is considered to be
10 a party to the contract as long as he is acting to
11 serve the corporate interest or unless his
12 activity involves separate tortuous acts However
13 a corporate officer or employee may be liable for
14 interfering, tortuously interfering, with a
15 corporate contract if he is interfering outside of
16 the scope of his authority, acting with malice, or
17 acting to serve his own interest

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1 THE COURT Is there anything further on
2 tortuous interference with the contract?

3 MR CATONE Not from the Plaintiff, Your
4 Honor

5 MR BABCOCK The Defense would
6 respectfully ask the Court to not charge the
7 Plaintiff with damages including unforeseen
8 expenses damages to the reputation, damages for
9 loss of employees damages for loss of customers,
10 and damages for good will

11 Other than that this case is just damages for
12 loss of profits and loss of commissions and loss
13 of development fees There isn't any evidence to
14 ask for a charge for reputation, loss of
15 employees customers and goodwill There is no
16 evidence

17 THE COURT Yes sir

18 MR CATONE Your Honor usually those
19 things are in issue There is evidence in the
20 record about Dutch Fork's reputation being on the
21 line That being part of the reason why they
22 stayed and tried to make the project work in the
23 absence of good faith at some point There is
24 some evidence of damage to loss of customers
25 because of real estate customers and there is

1 evidence to loss of good will because we claim
2 that we had an award winning brand in Rolling
3 Creek and that this project could in fact be
4 construed as damage to that good will

5 MR. BABCOCK: Your Honor, there's no
6 testimony as to damages for the loss of any of
7 those items. There is no way the jury could
8 calculate those damages within a reasonable
9 certainty. There's just no evidence. They're
10 generating intangible damages, Your Honor, that
11 the jury would have to determine an amount for
12 anyway. No way is the loss a real inference from
13 a reasonable inference from the evidence.

14 THE COURT: What specifically? Tell me
15 what evidence there is about how those damages
16 while they may be somewhat intangible, loss of
17 good will is not necessarily an intangible, neither
18 is damage for loss of customers. Those are things
19 that are capable of putting some dollar figure to
20 it. What evidence is there about those specific
21 damages?

22 MR. CATONE: Well, to determine the loss
23 of good will, Your Honor, I don't think that there
24 has to be a dollar figure put on it. I think that
25 there is always going to be an intangible

1 damage, no matter what. In terms of the loss of
2 customers that's practically the same thing as
3 the loss of commission. And if you lose the
4 ability to render a service in the future to a
5 potential client, then they lose the ability from
6 then on to render future services of that same
7 type again.

8 THE COURT I'll leave in I'll take
9 out the unforeseen expenses and I'll take out the
10 damages to reputation. I don't think there has
11 been any evidence about the damages to reputation.
12 I'll take out the damage for loss of employees.
13 I'll leave in the damage for loss of customers or
14 damages for loss of good will.

15 MR. CATONE Thank you.

16 THE COURT Anything else as it relates
17 to this particular thing?

18 MR. CATONE Nothing from the Plaintiff,
19 Your Honor.

20 MR. BABCOCK Nothing from the defense,
21 Your Honor.

22 THE COURT Turning to the breach of
23 contract. I will charge them to recover under a
24 breach of contract claiming that the Plaintiff has
25 established three essential elements per a

1 greater weight of the preponderance of the
2 evidence One, that the parties entered into a
3 binding contract Two, that the Defendant
4 breached or unjustifiably failed to perform the
5 contract Three that the Plaintiff suffered
6 damages as a direct result of the breach
7 Then the contract is an agreement between two
8 or more parties in which each person promises to
9 perform or not perform certain duties It is more
10 than a mere exchange of promises For a contract
11 to be legally binding and forceful parties must
12 have intended to enter into negotiations and
13 reached initial understanding of the terms of the
14 contract which is referred to as a meeting of the
15 minds
16 The contract must be supported by a valuable
17 consideration To constitute a valid and binding
18 contract, it is essential that both parties agree
19 to the same thing and the same sense The
20 contract is an obligation that arises from the
21 actual agreement of the parties that manifested by
22 words or written or by conduct
23 The contract relates to a variety of matters
24 Common to all contracts are the elements I have
25 explained to you In this case both the

1 Plaintiff and the Defendant agreed and a valid
2 contract was entered into. The Plaintiff claims
3 that the Defendant breached the contract, a claim
4 that the Defendant denies.

5 The word breached is the same as broken. It
6 is used to describe a failure of the party to
7 fulfill duties under the contract. To first
8 determine the terms of the contract, then decide
9 whether the parties fulfilled the terms.

10 To assist you in determining the terms of the
11 contract, there are certain guidelines to assist
12 you. The first thing is the paramount rule that
13 interpreting contracts, you have to ascertain the
14 intention of the parties and then put those
15 intentions into effect. When determining intent,
16 you may not consider any undisclosed or secret
17 intention, but rather you must be guided by the
18 parties' outward expressions and purposes.

19 The Plaintiff contends that the Defendant
20 prevented it from performing the requirements of
21 the contract. When two parties make a contract,
22 each member is required to allow each other to
23 perform their part of the contract without
24 interference. Each party must reasonably avoid
25 any action which would effectively prevent

1 the other party from doing what was agreed upon in
2 the contract

3 If you find that the Defendant prevented the
4 Plaintiff from performing the requirements of the
5 contract, you should return a verdict for the
6 Plaintiff

7 The Defendant claims that even if there was a
8 breach of contract, the Plaintiff by its actions
9 after the alleged breach waived the right to
10 enforce the contract By waived I mean
11 voluntarily gave up It is the law that the right
12 to prosecute a breach of contract action may be
13 waived if the party which has the right acts in
14 such a manner as to make the other side believe
15 that the right has been relinquished In other
16 words, once a breach of contract occurs, a
17 nonbreaching party must enforce his rights or lose
18 them

19 If you find that the Defendant has proven
20 that the Plaintiff acted in such a way that it
21 waived its rights to enforce a breach of contract
22 then your verdict must be for the Defendant on
23 that issue

24 Performance of the contract refers to the
25 doing of acts required by the agreement at the

1 time and place and in the manner stipulated For
2 a party to recover for nonperformance of the
3 other, he must establish his own performance or
4 his offer and ability to perform or a valid excuse
5 for the failure to perform That is to say one
6 who seeks to recover damages for breach of
contract to which he is a party must show that the
8 contract has been performed on his part or at
9 least at the appropriate time he was able, ready,
10 and willing to perform it

11 A party may not insist upon performance of a
12 contract where he himself is guilty of a material
13 or substantial breach of contract The party
14 first committing a substantial breach of contract
15 may not maintain an action against the other party
16 for an action of failure to perform if the
17 promises are dependent

18 It is an implied condition of every contract
19 that one party will not prevent the other
20 performance by the other party

21 Finally the Plaintiff must prove by a greater
22 preponderance of the evidence that it suffered
23 damages that were approximately caused by the
24 Defendant's breach of the contract Damages are
25 the actual losses and expenses that have been

1 suffered by the other parties failure to perform
2 under the contract And damages recoverable for
3 breach of contract must flow like a natural
4 consequence of the breach or must have reasonably
5 been within the contemplation of the parties at
6 the time that the contract was made

7 Damages under a breach of contract action
8 serve to place the non-breaching party in a
9 position that they would have enjoyed had the
10 contract been performed Generally a party who
11 was injured by a breach of contract is entitled to
12 recover the amount of his loss

13 This would include damages that would give
14 the non-breaching party the benefit of his bargain
15 and would include lost profits They are
16 recoverable if they were within the contemplation
17 of the parties at the time the contract was made
18 and they must have been suffered as a probable
19 breach of the contract

20 Lost profits must be established with
21 reasonable certainty but precise mathematical
22 certainty is not required The amount of damages
23 cannot be left to speculation or guess There
24 must be a certain standard or fixed method which
25 the loss may be estimated with a

1 degree of accuracy

2 Is there anything further on breach of
3 contract?

4 MR CATONE Very briefly A couple of
5 sentences to begin with In addition to Your
6 Honor's general definition of breach breach
7 includes the existence of the contract Doing
8 something inconsistent with the existence And
9 then secondly Your Honor the Plaintiffs request
10 in charge number two the possibility that is
11 nearly covered in discussions that if possible,
12 the statement that a party of the contract that is
13 excused for nonperformance be rendered impossible
14 by the other party or third party

15 THE COURT On that particular one, is
16 there anything from the defense I assume that's
17 related to phases two and three

18 MR CATONE Yes, ma'am

19 MR BABCOCK Yes Your Honor the
20 first one (inaudible) and the existence of the
21 contract

22 THE COURT That will be included
23 That's part of my standard charge I just didn't
24 read it

25 MR BABCOCK Okay Your Honor,

1 (inaudible) objection too

2 THE COURT Okay Is there anything
3 further?

4 MR CATONE Nothing from the Plaintiff,
5 Your Honor

6 THE COURT Anything from the Defendant?

7 MR BABCOCK Yes, Your Honor We would
8 reference the (inaudible - poor quality) gross
9 profits, the net profits would come out of gross
10 revenue and (inaudible - poor quality) the
11 Plaintiffs are only owed net profits rather than
12 expecting gross profits The net profits would
13 come out of gross revenue (inaudible)

14 THE COURT I would likely not charge
15 that because I think that's a charge of the facts
16 and I think the contract will have to govern what
17 is considered to be profits

18 MR BABCOCK Your Honor, if the
19 contract governs what is profits for the project
20 then the request for charges should be with
21 profits then the Plaintiffs would actually
22 receive That is, the Meltons testified as the
23 fifty thousand dollars They are only entitled to
24 recover what they would have gotten out of the
25 contract as their net profits not what their

1 gross profits would have been The profits under
2 the contract and under the project It's a
3 different concept (inaudible- poor quality) And
4 we respectfully request that they would only have
5 received net profits, that is, had they kept on
6 working what would they have done gotten out of
7 it

8 THE COURT Your exception is noted
9 Anything else?

10 MR CATONE Nothing from the Plaintiff,
11 Your Honor

12 MR BABCOCK Your Honor as your know
13 we have special damages resulting from phases two
14 and three and we are concerned that a general
15 verdict will be awarded and that's why we are
16 requesting that they be segregated in terms of
17 phases two and three

18 THE COURT I understand why you want
19 the special derogatory I guess I would concede
20 to a special derogatory that says in essence that
21 in making an award for a special breach of
22 contract cause of action Does the actual damages
23 award include an amount for actual damages for
24 phases two and three of the development? Yes or
25 not And the second question if the answer

1 is yes then how much of your actual award is for
2 phases two or three

3 MR BABCOCK Thank you, Your Honor

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1 (The case was resumed and Court was called to
2 order on November 7, 2007, at 9 39 A M)

3 THE COURT I have shown you a copy of a two
4 page verdict form for the jury Are there any addi-
5 tions or changes, from the Plaintiffs?

6 MR BOWENS None from the Plaintiffs

7 THE COURT Changes or additions, from the Defen-
8 dants?

9 MR BABCOCK Just a moment No objection,
10 Your Honor

11 THE COURT Is there anything further we need
12 to take up before we bring in the jury?

13 MR BOWENS No, Your Honor

14 MR BABCOCK No, Your Honor

15 THE COURT Bring in the jury, please

16 (Jury returned to Courtroom)

17 THE COURT Good morning, ladies and gentlemen
18 At this time we are now ready to hear the closing
19 arguments from the attorneys

20 As I told you at the beginning of the trial,
21 these arguments are not evidence What they will do
22 is they will argue to you portions of the evidence
23 that you heard in an effort to try to sway you to
24 the facts in their view of what has occurred

25 So I ask that you listen very carefully to these

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~~1104~~

1 closing arguments They may cause you to think about
2 the evidence in a different way, or they may raise
3 questions that you will want to discuss yourselves
4 with the other jurors during your deliberations

5 I want to tell you, ladies and gentlemen, that
6 I have imposed a time for the arguments, and I have
7 done that because I think we all understand what this
8 case is about

9 I have asked the attorneys to compact their ar-
10 guments and to present them to you in a coherent
11 fashion

12 I have not told them this, that I never call
13 them exactly on a time limit, but I will stop them
14 if they go beyond what is reasonable

15 We may then take a short break, perhaps even a
16 bathroom break, and then I will proceed to give to
17 you my instruction as to the law that you are to
18 apply to the facts as you find them to be during
19 your deliberations

20 Following that charge or instruction on the law,
21 the matter will then be in your hands to begin your
22 discussions and deliberations

23 So I ask that you listen very carefully to the
24 attorneys as they are making their closing arguments
25 to you

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Plaintiff's Closing Arguments

1 THE COURT Mr Bowens? Mr Catone?

2 MR CATONE Thank you, Your Honor

3 Good morning, ladies and gentlemen, and
4 thank you for being with us through this process
5 of resolving this dispute I'm very glad to have
6 you all helping us with it We appreciate your
7 help

8 I want to speak to you very briefly about
9 the standard of proof in a civil case which is
10 commonly called by the people in this field as
11 the preponderance of the evidence And the way
12 that that is ordinarily explained is more likely
13 than not - sometimes it's rated fifty-one percent
14 Sometimes it's rated tipping the scale ever so
15 slightly in favor of the Plaintiff

16 And so the questions and the issues that
17 we're going to deal with as we go through what
18 has occurred with this case should all be
19 considered in the context of what's most likely
20 What was it that was more likely that occurred?

21 Why did things go wrong with this
22 development? Why didn't the lots sell
23 faster? That's a key question We had it
24 fully marketable Ronnie Colson
25 testified to that Steve Lipscomb

Plaintiff's Closing Arguments

1 testified to that Remember - that's one
2 of the key reasons why he got into this
3 deal D Melton testified to that
4 Billy Melton testified to that

5 They got into this deal because there
6 was a booming market Let me read to you
7 exactly what Ronnie Colson said "It was a
8 booming market I mean, it was booming in that
9 market I mean, there were a lot of plans and
10 developments adjoining Rolling Creek development
11 which we based a lot of that off on too because it
12 was a premier development which had done so well
13 too So they were doing well and we just figured
14 that it was a direct indication it would do just
15 as well "

16 It was a great location according to
17 Ronnie A great location according to Steve
18 A great location according to Billy There was
19 a demand for this product and that's what Ronnie
20 was talking about A demand for this product

21 We had a history of success with Dutch
22 Fork Realty and with Dutch Fork Development
23 Group and that they were an award winning sales
24 team and Rolling Creek was an award winning
25 ground-breaker

Plaintiff's Closing Arguments

1 So, all the tools that were needed for
2 success were right there in place Now was the
3 reason it didn't succeed something that was
4 outside of the control of the parties or
5 was it something that the parties didn't
6 control?

7 There is no evidence in this case that the
8 reason that this development didn't succeed was
9 something that was outside of the control of the
10 parties The evidence is that it was something
11 that was within the control of the parties And
12 what evidence?

13 The Defendants prevented the Plaintiffs
14 from carrying through their tasks and obligations
15 under the contract and caused the project not to
16 be as successful as everyone thought that it would
17 be Everyone in this case has described the
18 project that could be and would be completed in
19 five years except for the Defendant's actions

20 Now, what did they do? Well, to start with,
21 they didn't want to spend the money Remember
22 we have heard lots of evidence about what the
23 roles were in this contract and the Defendants
24 were the financiers They were supposed to
25 bring the money and we were

Plaintiff's Closing Arguments

1 supposed to do the development work

2 Well, to start with they didn't want to
3 spend the money to bond the plat on time
4 Wanted to wait According to them, it's cheaper
5 if you wait and get more construction done But
6 we were trying to tell them to bond the plat so
7 that we could go ahead and start selling lots
8 Because we had a marketing plan We knew how to
9 do this We had done this before We tried to do
10 that but he wouldn't pay for it and that cost us

11 He tried to supersede the development work
12 instead of the financing work What you can see
13 from the intent of the parties from this contract
14 clearly and from this testimony that they were the
15 financiers and we were the developers

16 What does that mean? That means that you
17 spend the money when we tell you to spend it and
18 what we tell you to spend it on and we're going
19 to move it through the way we've done it in the
20 past Award-winning and successfully and that
21 didn't happen

22 Now, they also didn't want to spend the money
23 to fix the roads on time It started out as a
24 very small problem It doesn't take a genius to
25 know that if you have a little pothole in the

Plaintiff's Closing Arguments

1 road and three or four hundred dollars can fix

2 that Rick Maxheimer testified to that

3 He said he told Mr Lipscomb himself that he

4 emailed and he testified to that He said he had

5 seen it before and dealt with it before

6 He knows if you catch it in advance right there

7 at the beginning it's a very simple problem to

8 fix We're going to speak a little bit more about

9 it in a few minutes but two hundred and seventy-

10 two thousand dollars for road repairs in the first

11 phase Why? Because that was let go It wasn't

12 paid when we told him to pay it

13 He didn't want to pay the contractors

14 Remember Newman Construction We had an agent

15 from Newman Construction come up and testify and

16 she said that we continually didn't get paid We

17 had the engineer, Rick Maxheimer, that continually

18 didn't get paid In fact, months at a time went

19 by when work was not happening on this project by

20 the engineer and by the contractor simply because

21 of bills that weren't getting paid And I'm going

22 to address it a little more later on

23 Now, all this stuff prevented the lot sales

24 from occurring You can't sell the lots without

25 the roads fixed You can't sell the lots without

Plaintiff's Closing Arguments

1 the bonded plat After you've heard the evidence
2 in this case it really does just make common
3 sense

4 There's another reason why the Defendants
5 prevented the Plaintiffs from performing Because
6 Mr Lipscomb was trying to sell it to builders
7 on his own He changed the plans on phase two and
8 three Rick Maxheimer testified to that Rick
9 said that Steve came in there several times and
10 changed the plans Why? He was trying to
11 accommodate large scale builders who were going to
12 buy all of phase two or all of phase three and he
13 was doing that without us, Rick Maxheimer said
14 I had to be the one to tell the Meltons that the
15 plans had been changed by Mr Lipscomb He did
16 that behind their back and without their approval

17 It just didn't make sense really when you
18 think about it We had done all the work to get
19 those preapproved plans ready so that we could
20 move this project We knew what it took to get
21 those preapproved plans ready so why would we be
22 the ones who would end or throw them away

23 It doesn't make sense The person who does
24 all the work to get it ready knowing that it needs
25 to be ready in advance That's not the person who

Plaintiff's Closing Arguments

1 throws it away and starts over The person who
2 throws it away and starts over is the person who
3 didn't do any of that work to get it done

4 If those things had not happened or if the
5 Defendants had not prevented us - if those facts
6 just that I mentioned thus far then we could
7 have been working on premarketing and lot sales of
8 phase two and three since 2002 So that would
9 have put us back on track That would have put us
10 on track to get through this whole thing in five
11 years but the Defendant's actions kept that from
12 happening

13 But what's one of his motivations? Well, to
14 keep the profits to himself Think about the
15 timing of the termination letter The termination
16 letter that he admits was wrong The termination
17 letter that is based on things that he admits are
18 not true

19 What was the timing of the three lots away
20 from closing sixty percent of phase one? If he
21 can get rid of us before he's got the move-in of
22 phase two and phase three, then all of phase two
23 and phase three profits belong to him The timing
24 of that letter is suspicious, especially in light
25 of the fact that the basis of the letter he admits

Plaintiff's Closing Arguments

1 were wrong Now, he tries to say now - later on -
2 that he was mistaken about the basis for the
3 letter

4 let me talk to you a little bit about what's
5 not in dispute in this case because I think that's
6 an easy place to start They admit they breached
7 the contract That's easy Mr Babcock said in
8 his opening statement that they owe us about two
9 hundred and thirty thousand dollars I want to
10 tell you a little bit about where I think that
11 number comes from

12 You've got the fifty-four thousand dollar
13 development fee from phase one never paid plus you
14 got phase one and phase four profit sharing I've
15 put up here on this notepad some numbers that come
16 from the testimony that you heard yesterday from
17 Barney Ouzts, some from the testimony that you
18 heard from D Melton and Billy Melton, and some
19 from the testimony that you heard from Lynn
20 Richards Okay?

21 So these are the expert accountings of the
22 parties of the case We've got the key numbers up
23 here Those numbers are phase one profit sharing
24 Our number from Lynn Richards is 15758 Their
25 number from Marty Ouzts is 75852 \$54,000

Plaintiff's Closing Arguments

1 development fee was never paid and they admit it
2 was never paid

3 For phase four, Billy Melton testified about
4 the cost of phase four He testified about the
5 total sales of phase four and then Lynn Richards
6 testified about the cost of phase four
7 Marty Ouzts brought us a number that's 58865 and
8 we'll just go with his number so phase four profit
9 sharing we're going to use the same number What
10 does that come to? Our number is 263623 Their
11 number is 188717

12 Now the way you get to this number and that
13 is, phase one profit sharing and development and
14 phase four profit sharing There is no dispute
15 about this The dispute is about the number of
16 sales Okay? And why isn't this number identical
17 to that number? And the key to that is two
18 hundred and seventy-two thousand dollars worth of
19 road repairs

20 Now, he's taken the position that because
21 it's a cost under the contract it comes out of the
22 profits We say - wait a minute You've got to
23 be reasonable about what this cost is You can't
24 just go crazy and cause a bunch of cost and cost
25 us all this money

Plaintiff's Closing Arguments

1 An example might be if you had a contract
2 with your power company and your power meter is on
3 the side of the house and they say okay, you're
4 going to pay your bill each month for the amount
5 of power that's measured and you're going to keep
6 up the power meter Okay?

7 Well, you call them the first month and you
8 say, hey your power meter is messed up over here
9 and it's running a lot faster than it should It
10 looks like it's broken and they don't do anything
11 about it You pay it and next month it's running
12 a lot faster than it should It looks like it
13 might be broken and they don't do anything about
14 it Finally the repairman shows up a couple of
15 months later and he says, hey, your power meter
16 broke It ran out a bunch of bills and you owe
17 those two months and by the way, you've got to buy
18 a new power meter Well, your contract wasn't
19 paid the amount that was measured and it was to
20 keep up the power meter

21 So under the contract you owe it - right?
22 Well, that's not reasonable and that's what we
23 say Those road repairs were not reasonable
24 because we informed him in time to fix it at a
25 very low cost and at the end it cost so

Plaintiff's Closing Arguments

1 much and it took away from profits because he
2 didn't do what we told him to do as developers
3 He didn't want to spend the money

4 In the end we've got to figure out - we've
5 got to determine whose final number is right by
6 giving you the information that you need to
7 determine which number is the best one to go
8 with but I'm pretty sure that these numbers
9 will not be disputed and in addition to that we've
10 got fifty-four thousand dollars in development
11 fees on the phase two contract

12 Let me explain to you what that means
13 Exhibit 110, which I'll speak to you about a fair
14 amount later as well, is a contract for what they
15 call a letting, the infrastructure construction of
16 phase two Mr Lipscomb signed that contract
17 February fourth of 2005 That's within the
18 contract period

19 Paragraph five of the contract between Mr
20 Lipscomb and the Plaintiffs says that once this
21 contract is done he owes us development fees
22 starting the first day of the first month after
23 this and for six month thereafter So, starting
24 on March first of '05 and March, April, May,
25 June, July, August are all

Plaintiff's Closing Arguments

1 within the 2005 timeframe when the development
2 fees were due So, we've got between 317,623
3 and 242,717 that there shouldn't be serious
4 dispute about

5 In addition to that, there's no dispute
6 that an eight hundred thousand dollars was
7 misallocated to one portion or one phase of
8 the development rather than all three All of
9 the accountants say that and now Mr Lipscomb
10 admits that Now, the effect of this
11 misallocation was to make it look like there
12 were no profits in phase one That's the
13 effect

14 When we asked for phase one profits, they
15 told us there were none and made it look that
16 way by misallocating the eight hundred thousand
17 dollars that paid for phases one, two, and three
18 land They allocated it all to phase one All
19 the accountants agree that it should have been
20 allocated across the phases

21 Now, it's actually funny that all the
22 accountants agreed that there were actual profits
23 in phase one and phase four because if you believe
24 Mr Lipscomb you can't make any money in real
25 estate It's too hard

Plaintiff's Closing Arguments

1 Just like if you believe Mr Quinn having 32
2 million dollars in assets doesn't have anything to
3 do with your ability to pay or to get money to
4 pay I don't believe that Does anybody believe
5 that?

6 Why don't we start with the eight hundred
7 thousand dollars Let me explain a little bit
8 about why taking all that money out up front
9 like Mr Lipscomb did caused so much of a
10 problem What he did was acquired land for
11 eight hundred thousand dollars When he got the
12 development loan he basically paid himself back
13 for the eight hundred thousand dollars just in
14 the phase one Okay?

15 Now, what's equivalent to that is if you
16 have a mortgage payment and let's say your
17 mortgage payment is a thousand dollars a month
18 for the next year Now, if I make my payments in
19 due course and I have a thousand dollars a month
20 and I get my check I can make my mortgage payment
21 and I don't have a problem My cash flow is
22 fine but let's set aside and make my mortgage
23 payment twelve hundred dollars all this month
24 For the rest of the year I'm going to be behind

Plaintiff's Closing Arguments

1 I'm going to be catching up with cash flow and
2 that's exactly what happened right here
3 He took that money out up front and it was such a
4 big sum that we had to constantly try to catch up
5 He took too much money out too soon and that just
6 benefitted him and not the project

7 Let me talk a little bit more about what's
8 not disputed It's undisputed in this case that
9 everyone expected and intended this project to
10 be completed in five years Undisputed and
11 everybody says that The question is really
12 why it wasn't completed in five years

13 Let's talk about the expert opinion of Rick
14 Maxheimer Rick Maxheimer is an engineer, a
15 project engineer He was out there on site He
16 worked on it He had past experience in this
17 field The undisputed opinion of Rick Maxheimer
18 is that the development would have completed in
19 five years if it weren't for Mr Lipscomb's
20 actions

21 Failure to bond the plat in early 2002,
22 Ronnie Colson said that that was a problem
23 Ronnie Colson expected that to be done as early as
24 2002 Remember the loan was November of 2001 and
25 Ronnie said it was four months that

Plaintiff's Closing Arguments

1 interest was earned because you had to do that
2 infrastructure building before you were able to
3 bond the plat and start selling the lots and
4 Ronnie knew that you had to have to have that
5 bonded plat before you could start selling the
6 lots And he said that he expected it to be in
7 early 2002 Around March
8 Four months later

9 But that didn't happen because Mr Lipscomb
10 wouldn't spend the money when we told him to He
11 was the financier and we were the developers
12 We say when to spend it and he didn't do it

13 Rick also said that Mr Lipscomb also
14 failed to fix the roads when it would have cost a
15 few hundred dollars Rick testified about that
16 for several days It's only a few hundred dollars
17 when it's a small problem but it gets to be a huge
18 problem And Rick said that That's his expert
19 opinion and it's undisputed

20 He failed to pay the construction contractor
21 and the engineer on time like I said and Rick even
22 said he even went to Mr Lipscomb He said, look
23 we've got a substantial deal here and I'm about to
24 go in for open heart surgery We need that taken
25 care of for my company so I don't

Plaintiff's Closing Arguments

1 have to worry about it whenever I'm in there
2 When he came out of the surgery he had a bigger
3 bill The bill wasn't paid
4 Mr Lipscomb abandoned the preapproved
5 plans for phases two and three Mr Maxheimer
6 said that he abandoned them He said it was a
7 complete rework Not just a little change
8 A modification of a few lots here and there like
9 Mr Lipscomb tries to say but a complete reworking
10 of the plans That was verified yesterday by
11 Marty Ouzts He said it was a complete rework
12 so I called it abandoned plans Not a little
13 change but abandonment of the first set of plans
14 Rick said that he had to be the one to tell
15 the Meltons that the plans had been changed He
16 said the plans were changed three times to
17 accommodate potential home builders who were going
18 to buy phase two or phase three He said there
19 were discussions between Steve Lipscomb and
20 builders who would purchase phase two or phase
21 three several times and in the end Mr Lipscomb
22 confirmed that in his deposition testimony that
23 he was impeached with on the stand
24 He said over the years and his deposition was
25 in November of '06

Plaintiff's Closing Arguments

1 He said over the years I had a lot of
2 conversations Probably about ten with
3 different developers Excuse me, with different
4 builders who were going to buy phase two and
5 phase three and he was trying to change the plans
6 to suit them and all those changes of the plans to
7 suit these people he was dealing with ended up
8 slowing this project down irrevocably

9 Now, to the extent there were disagreements
10 between the Melton's testimony and Mr Lipscomb's
11 testimony about this plan issue and about these
12 conversations and negotiations behind their back,
13 Mr Lipscomb actually admitted and I'm going to
14 read you his testimony in just a little bit but
15 Rick Maxheimer is a relatively neutral witness
16 here and he just says, hey, it was Steve who
17 was working behind their back It was Steve who
18 was abandoning the plans and trying to rework
19 them

20 So the weight of the evidence is just start
21 to fall easily in favor of the Plaintiff Rick
22 Maxheimer's undisputed opinion is that Mr
23 Lipscomb of SEL and his actions caused this
24 project not to complete in five years
25 What else is undisputed?

Plaintiff's Closing Arguments

1 It's undisputed the lot sales were great
2 after the roads were fixed Every witness who
3 came to the stand said that Lot sales were good
4 after the roads were fixed Most of the
5 witnesses, including Ronnie Colson, including D
6 Melton, including Marty Ouzts, acknowledged the
7 fact that while the roads were in disrepair,
8 making it difficult to sell lots or sell houses
9 and really it's just common sense whenever we
10 told him to fix the roads when it was a small
11 problem he wouldn't do it It ended up
12 costing a lot more and it ended up
13 costing sales

14 And that's the only real difference As a
15 matter of fact, this is what many witnesses
16 said This is the only real difference between
17 the selling seasons of '03 and '04 were the roads
18 Relatively poor selling season in the spring and
19 summer of '03 versus the great one in the spring
20 and summer of '04 and it was the roads that was
21 making that difference and several witnesses
22 thought that

23 Let me tell you what else is undisputed in
24 this case Lynn Richards, expert accounting
25 opinions, on the amount that's

Plaintiff's Closing Arguments

1 due to Dutch Fork for phases two and three
2 Those opinions are undisputed Marty Ouzts
3 didn't offer opinions on the amount due to Dutch
4 Fork for phases two and three He talked about
5 some cost He said that sales have been hurt out
6 there but what we're talking about is estimates
7 and projections of the sales that he cost us We
8 lost it because of what he did and again that is
9 what this case is about Is what was lost because
10 of the actions of someone else

11 This is a schedule of the monies due
12 There are several exhibits I'm going to show you
13 from Lynn Richards but the bottom line here is
14 Lynn Richard's expert opinion calculates that
15 Dutch Fork is owed three million dollars
16 Approximately three million dollars Those are
17 undisputed in terms of what phase two and phase
18 three which is the bulk of those damages

19 It's not disputed that Mr Lipscomb went
20 behind our back and tried to sell the project
21 during the contract period We actually - excuse
22 me for one minute We actually had the court
23 reporter go back and produce the written record
24 of Mr Lipscomb's testimony and so we have here
25 exactly what he said at the end of Monday

Plaintiff's Closing Arguments

1 Mr Bowens asks a question and the reason
2 that it did not go forward he's talking about this
3 contract and the construction of phase two
4 infrastructure As read - The reason that it did
5 not go forward was because of a potential buyer
6 you had in mind for phase two changed their mind
7 Isn't that right? He's talking about this
8 contract and the infrastructure and a potential
9 buyer for phase two

10 Remember, this is in February of 2005
11 within the five year contract term period
12 Steve Lipscomb's answer yes, I mean We never
13 went forward because they couldn't agree on the
14 cost and stuff Question from Mr Bowens The
15 buyer That's one of those buyers who you had
16 negotiated with behind our backs backed
17 out on you and that's why this contract fell
18 through Is that right?

19 Mr Lipscomb - I guess it is Yes, sir He
20 admits to negotiating with buyers to buy phase
21 two and phase three behind our back

22 So what questions do you need to resolve?
23 All this is not in dispute Everything I've been
24 going through so far are issues that are not in
25 dispute so what questions do you

Plaintiff's Closing Arguments

1 need to resolve?

2 Is it more likely than not that SEL
3 breaching the contract prevented us from earning
4 commissions and profits in phase two and three?

5 Is it more likely than not that Steve's
6 unfair, dishonest, deceptive actions prevented us
7 from earning commissions in phases two and
8 three?

9 Is it more likely than not that Steve's
10 personal interference of the contract between the
11 parties when he was acting on behalf of K&L?
12 Remember taking those lots for less than fair
13 market value That only helped K&L and Mr
14 Lipscomb It didn't help this project It took
15 needed cash flow out of this project

16 Is it more likely than not that when he was
17 doing that - personally interfering with the
18 contract between SEL and the Plaintiffs causing
19 a breach of contract and preventing us from
20 earning commissions and profits in phases two and
21 three? The evidence in this case clearly shows
22 that the Defendant's interference and failure to
23 perform their obligation prevented us from
24 performing our part of the contract which we knew
25 we could do and we tried hard to do

Plaintiff's Closing Arguments

1 They interfered and prevented our performance
2 by not bonding the plat in phase one timely, by
3 not repairing the roads, by abandoning the plans
4 in phase two and three, by secretly negotiating
5 with large builders to buy lots in phase two and
6 three and we should have been in on those
7 negotiations

8 Remember, by doing it without us he was
9 acting like the contract didn't exist He was
10 acting like we didn't have the exclusive right to
11 sell to builders Those commissions were worth
12 about a hundred and eighty-eight thousand dollars
13 We gave that up for the exclusive right to sell
14 homes in phase two and three and he was acting
15 like that contract didn't exist at all going
16 behind our back and dealing with people

17 If a professional real estate broker had
18 been working on some of these deals to buy all
19 of phase two and phase three, award-winning
20 professional sales people, perhaps one of those
21 would have gone through instead of falling
22 through

23 Time was of the essence to get this project
24 complete It was a five year, three phase
25 development

Plaintiff's Closing Arguments

1 Every witness testified and told you that the
2 project would have been completed in five years
3 and there is no other evidence on that issue

4 Nothing happened out of the parties control
5 Mr Lipscomb testified it was Dutch Fork's job to
6 keep things on time Exactly right, but we can't
7 do it if he consistently interferes and will not
8 pick up the funding which is his job

9 It was unfair It was unreasonable to
10 prevent our performance, to interfere with our
11 performance You can't change our plans in the
12 middle of the project and expect to start over
13 There is no way to keep things on time if you do
14 that That's our job We wouldn't have agreed to
15 keep things on time We want the project to work

16 You can't begin marketing phase two and three
17 which must be done with lead time in order to keep
18 things on time if you abandon the plans and you
19 change them We know that You've heard
20 testimony about that from D Melton And so we
21 were not part of any changes to any plans The
22 testimony by D Melton was that he knew about it
23 after it had occurred Not that he knew about it
24 like Mr Lipscomb came to him and said, hey let's
25 go over to Rick and change the plans

Plaintiff's Closing Arguments

1 That's not what happened Testimony was, we found
2 out that he had changed the plans

3 Rick Maxheimer - his testimony was that he
4 had to be the one to tell the Meltons that the
5 plans had been changed so despite their
6 allegations that we were a part of that, I think a
7 clear wait of the evidence is that we wouldn't
8 have been We were not a star witness at
9 testimony and we wouldn't have been because it
10 makes no sense

11 The natural progression or flow of the
12 project is important and must be sustained and is
13 part of that same point We know that and we want
14 to keep it going We wouldn't have been a part of
15 the change in the plans We were always ready,
16 willing, and able to perform as we planned but
17 they were not They were not They were not
18 always ready, willing, and able to perform

19 Bonding the plat Fixing the roads Not
20 ready, able or willing to perform apparently
21 Because they wouldn't Start phase two marketing
22 on time Wouldn't do it Start phase two sale on
23 time That didn't happen either Remember you
24 saw in the contract with the construction for
25 phase two in early 2004

Plaintiff's Closing Arguments

1 Sales were starting

2 There's a lot of unfair and dishonest acts
3 that show Steve Lipscomb's fraudulent intent in
4 this case Keep in mind whenever you think about
5 fraudulent intent the timing of that termination
6 letter that doesn't have any phases
7 Keep in mind what that does is an attempt to
8 exclude us from profits and commissions in phases
9 two and three because he wanted them all for
10 himself

11 Keep in mind also that when he wrote that
12 termination letter he went back to the previous
13 year's sales leading up to the termination letter
14 in May of '04 Sales were fantastic Sales were
15 averaging two per month which happen to be what
16 Ronnie Colson was told by Mr Lipscomb would
17 happen Nobody told us that that was a
18 requirement Our requirement was twenty percent
19 and the undisputed testimonies is that we always
20 met it

21 So, sales were fantastic during that point
22 and that's when it expired Not when it was based
23 on the year leading up to this letter but the
24 previous year

25 Why did he go back to the previous

Plaintiff's Closing Arguments

1 year? Because he was looking for a reason to
2 fire somebody Not because they aren't
3 performing well but looking to start with a
4 premise -- I need to fire them before phases two
5 and three I want to keep that money for myself
6 But how do I do it? Sales have been fine so I
7 can't do it that way Maybe I should go to my
8 lawyer and ask how to fire them or we could go
9 back to year one and try that

10 Mr Lipscomb and SEL misrepresented to the
11 Plaintiffs the fact that there were no profits in
12 phase one All accounts agree there were profits
13 in phase one He did that to keep from giving us
14 our money That's unfair and that's dishonest

15 He said that he was not able to pay us the
16 development fees when they were due He told us
17 that That was dishonest What was the testimony
18 from John Penn, the Chief Financial Officer of
19 SEL? Oh, wait a minute, he is the Chief Financial
20 Officer of SEL What's his testimony? There's no
21 reason why SEL didn't pay those development
22 fees in time No reason I can think of And he
23 was the project accountant in addition to the CFO

24 We asked to see the financial books and
25 documents Wouldn't let us see them

Plaintiff's Closing Arguments

1 It turned out there was a misallocation of the
2 cost to make it look like there was no profits
3 That was dishonest That was deceptive

4 There was testimony from Mr Ouzts yesterday
5 that not all the money that came from the lot
6 sales or that came from the sales went into the
7 Courtyard's account That was dishonest and it
8 was deceptive too

9 Mr Lipscomb was dishonest with Ronnie
10 Colson and it demonstrates a little more of this
11 pattern His premise he says now for terminating
12 the contract was pressure from Ronnie Colson for
13 not selling two lots per month but the two lots
14 per month idea came from Mr Lipscomb in the first
15 place in his private meeting with Ronnie Colson
16 He didn't tell Ronnie Colson that the agreement
17 between Dutch Fork and SEL was twenty percent
18 Never told him that

19 He then terminates the contract because we
20 didn't sell two per month when we actually had
21 sold two per month on average the whole
22 year before that and he led Ronnie to believe that
23 lots would start selling within a hundred and
24 twenty days of the loan closing That's March of
25 2002 But he wouldn't bond the plat then

Plaintiff's Closing Arguments

1 So how were we going to sell lots? He was as
2 dishonest with Ronnie Colson as he was dishonest
3 with us

4 The first Ronnie Colson heard about all of
5 this - for one, he didn't know the lots couldn't
6 be sold until almost August of 2002 You saw
7 that from his deposition testimony He was
8 surprised that nothing could be sold or started to
9 be sold until August of 2002 and that framed his
10 mind for how he thought Mr Lipscomb's loan was
11 performing The first he heard about all of
12 that was at his deposition with Mr Bowens cross-
13 examining And you saw the expression on his
14 face He looked like he was surprised
15 He looked like he was embarrassed when he
16 realized that he had been lied to by Mr
17 Lipscomb

18 Now it's unfair also to sell lots to K&L
19 below fair market value I don't think anyone
20 would dispute it that the price of the lots was
21 forty thousand dollars and that was agreed to in
22 advance by SEL Per the contract, they give the
23 ability to approve the sales price in
24 advance Forty thousand dollars is what every
25 other lot sold for but the ones

Plaintiff's Closing Arguments

1 to K&L were going cheaper

2 He also acknowledged - Steve did - that K&L
3 began building without closing the lot first
4 What does that do? That's only an advantage to
5 K&L That's not an advantage to SEL That's not
6 an advantage to this project He began building
7 on the lot before he would do the closing and
8 guess what? He wouldn't tell us about it

9 He was waiting to do the closing because he
10 was the owner of the property so he had to do the
11 closing where he signs the deed over He would
12 wait to do that for his own company but he
13 wouldn't tell us that was happening so we thought
14 that thing was sold and he pops up and says, hey
15 where's the sale? It's not our fault if he
16 doesn't transfer the deed in a normal amount of
17 time like he's supposed to because that's up to
18 him to sign that paper They don't serve the
19 interest of the product for sure

20 Making loans to K&L Making loans to K&L
21 instead of paying things Important things Key
22 parts of this project We saw some checks out of
23 the Courtyards account that said, twenty-two
24 thousand dollars loan to K&L contract, and
25 at the same time he's talking about

Plaintiff's Closing Arguments

1 how he can't pay the engineer or won't pay Not
2 enough money to do this or that Fix the roads or
3 whatever it is that he's saying He gave loans to
4 his own company before he paid those Before he
5 paid Rick Maxheimer before Rick was about to go
6 into the hospital Before he paid the engineer on
7 the project or the contractor who ended up
8 stopping work for months at a time because he
9 wasn't getting paid yet K&L was getting loans
10 It's unfair and it's dishonest and Mr
11 Lipscomb didn't do anything to remedy the
12 situation so we told him that we had complied with
13 all the requirements and this termination letter
14 wasn't valid We told him, hey we met all of our
15 sales requirements What are you talking about?
16 Some things don't have anything to do with us
17 Well, now he admits that he was wrong about
18 that But what did he do to fix it? You know
19 what he did to fix it He went to his lawyer and
20 said, well then how do I fire these people?
21 That's what he said He was impeached with his
22 deposition testimony about this and about going
23 back to his lawyer after we told him, no these
24 reasons aren't valid And he says, well
25 then, how do I fire them?

Plaintiff's Closing Arguments

1 How do I get rid of them? Why? Because I need
2 to I don't want to lose profits in phase two and
3 three for myself That's why

4 On Monday I'll tell you something else On
5 Monday, Mr Lipscomb sat all day on the stand
6 denying repeated questions about his negotiations
7 behind our back with builders who were going to
8 buy all of phase two and all of phase three He
9 repeatedly denied those questions and right at the
10 end of the day when he was confronted with this
11 contract, he said, question - has one of those
12 buyers you negotiated with behind our backs backed
13 out on you

14 That's why that contract fell through Is
15 that right? I guess it is Yes, sir I guess I
16 did negotiate behind their back Yes, sir And
17 the sale fell through and that's why the
18 construction contract fell through as well And
19 so, that's dishonest And that's not fair to us

20 THE COURT You need to wrap up, Mr
21 Catone

22 I want to speak to you very briefly folks
23 about damages The Plaintiffs are only seeking
24 what they would have received had the
25 contract been fully performed as

Plaintiff's Closing Arguments

1 planned without the Defendant's interference and
2 without him from preventing us from doing our job
3 That's all we are asking for

4 SEL has been given projections of how the
5 project would sell out phase by phase You don't
6 go into this scale of a project without a plan to
7 get it done He was given the projections He
8 admitted that in his testimony It was
9 contemplated by the parties the entire time and it
10 is expected that Dutch Fork Realty and Dutch Fork
11 Development Group would earn commissions and
12 profit sharing in phase two and phase three

13 Dutch Fork Realty had waived one hundred and
14 eighty-eight thousand in commissions on lot sales
15 to builders to get that exclusive right to sell in
16 phase two and three to get those commissions
17 Now, Mr Lipscomb wants to keep all the profits in
18 phase two and three for himself He has phase two
19 and three sold to Essex Homes for 7 6 million
20 dollars

21 We didn't get the benefit of our bargain SO
22 we didn't get what we bargained for We didn't
23 bargain for SEL not honoring it's obligations and
24 preventing our performance and interfering
25 with this contract

Plaintiff's Closing Arguments

1 Let me speak to you very briefly about the
2 issue of punitive damages. The evidence is clear
3 in this case but Mr. Lipscomb treats everyone this
4 way. Nobody gets paid except for SEL. They
5 recoup every cent they are owed down to the gas
6 for the lawn mower but they wouldn't pay key
7 people like the developer, us, the engineer, the
8 contractor, who ended up having to stop work.
9 They selected the best lots and delayed the
10 closing and started building before the closing.
11 None of that's fair. SEL Properties needs
12 to be taught that it can't do business that way.
13 Mr. Lipscomb needs to be taught that he can't do
14 business that way. Part of the consideration you
15 are awarding as damages is the Defendant's wealth
16 and the ability to pay. He's got thirty-two
17 million dollars in assets and that's in
18 evidence.
19 Let me explain why. Let's say a citizen
20 walks in and doesn't like the color of my tie and
21 they punch me in the face so I have to go and see
22 the doctor and they treat me and it's three
23 hundred dollars in medical bills. So, I need
24 these three hundred dollars in medical bills paid
25 for because I can't afford it. I end

Plaintiff's Closing Arguments

1 up taking him taking him to court and after
2 months or years being out of pocket those three
3 hundred dollars, I finally take him to court and
4 the judge says, okay three hundred dollars for you
5 and he says, you know what Now I can punch you
6 even more because it looks like I can afford this
7 I can afford three hundred dollars a pop Well,
8 what punitive damages does is it keeps someone
9 from making a economic decision that they can
10 afford to treat you however they want to treat
11 you

12 Folks, whether it's CNN, FOX news or MTV, the
13 idea that you should get out and vote and you can
14 make a difference is prevalent these days in our
15 society as Americans and that's when you are one
16 in a couple of hundred million people voting for
17 President I submit to you folks that you and a
18 lot of people could change the way Steve Lipscomb
19 does business and could change the way people like
20 him do business in the future

21 Sometimes making things right may not be easy
22 but it's necessary to have an orderly society
23 where people can expect to pay for bad conduct
24 rather than get away with bad conduct Thank you
25 for listening

Defendant's Closing Arguments

1 Sure SEL Properties didn't bond the plat
2 Had to bond the plat to hurt the project Sure
3 SEL Properties had bad roads to hurt the project
4 Sure SEL Properties didn't pay people on time to
5 hurt the project Sure SEL Properties had
6 planned (inaudible)to hurt the project To hurt
7 the project that SEL Properties had a seventy-five
8 percent profit interest in

9 What they are suggesting to you is that SEL
10 Properties did all these things so that it
11 couldn't have three times that - really millions
12 of dollars that they claim for phase one so that
13 SEL Properties couldn't have three million dollars
14 back in November of '05

15 They did all of those things so that couldn't
16 have that profit and instead ended up millions of
17 dollars in debt because that's realty SEL
18 Property owes millions of dollars at this point
19 It's up to 2 8 million So why would SEL
20 Properties do all those bad things to put
21 themselves in debt for the chance of maybe making
22 them some profits down the road on phase three

23 Ladies and gentlemen, the beauty of the jury
24 system is that it brings people together to use
25 logic and common sense and reason The

Defendant's Closing Arguments

1 reason it works is for the cumulative effect of
2 bringing folks together and bringing their world
3 views out so that they can access the testimony
4 and they can access what makes sense

5 Let me start by thanking you on behalf of SEL
6 and the lawyers for SEL because we do appreciate
7 the time you've spent a week and a half here with
8 us listening to a lot of evidence and we
9 appreciate the time you've spent doing that and we
10 appreciate the time you are spending here today
11 making a determination of what the verdict should
12 be in this case

13 But as you look at the testimony and you look
14 at the evidence you really have to look at a
15 couple of things and the key to this case is the
16 contract The contract, Plaintiff's Exhibit one,
17 you've heard a lot of talk about this and this is
18 a breach of contract case So what you've got to
19 look at is, what's a contract and what really
20 happened out there Not some speculative rule
21 about what could have happened but what really
22 happened and any breaches of contract and any
23 breaches of this document

24 We're talking about a lot of issues here
25 but those are not breaches of this document

Defendant's Closing Arguments

1 because those allocations have to be in this
2 document itself And what we do know is there was
3 a five year term for this contract And yeah,
4 people hoped they might be further along or done
5 but nobody knew for sure but we did know for sure
6 that a five year term and they had that five year
7 term and once it was terminated DFDG and DFR would
8 have no further rights to compensation That's as
9 of November of '05 and that's why Mr Ouzts did
10 his calculations as of November of '05 That's
11 the end of the five year period

12 So, whether it was going good, bad, or
13 indifferent in five years it was over either way
14 Either party could leave You could make a new
15 deal or whatever but five years was the term of
16 that contract

17 Now, what you do know also is what actually
18 happened out there We know that the land lot
19 sales were slow We know that there were a lot of
20 problems with the project and problems with
21 projects, that's something that happens Some
22 projects go all the way under Ouzts testified
23 that in his bankruptcy work he'd seen real estate
24 developments end up in bankruptcy So, all
25 projects when they start hope to do well

Defendant's Closing Arguments

1 All projects hope to make profits All projects
2 hope to make certain time schedules but not all of
3 them do Problems occur and when problems occur
4 sometimes those projects get into problems

5 You heard testimony about the bank pressure
6 that was going on for SEL because of the lot sales
7 that were slow from the very, very start And we
8 came to you at the very beginning and admitted
9 that this was a case about how much SEL owed No
10 question about it The termination letter was
11 Now you heard Mr Lipscomb's explanation and you
12 were able to see him and hear him and judge him
13 But what he talked to you about very clearly was a
14 combination of things that made him think that
15 twenty percent had not been reached

16 The first year there were nine sales
17 December of '02 through August of '03 and of those
18 nine, three were K&L sales His own company So
19 in his mind K&L shouldn't be counted in because
20 that's his company

21 So he knew that for the first year He never
22 knew that for the second and about half a year
23 later when this letter was written and he's
24 thinking in his mind about two sales per month
25 Now why is he thinking about two sales per

Defendant's Closing Arguments

1 month? He's thinking about two sales per month
2 because we've got a disagreement on this point
3 Mr Lipscomb says that he was told two sales per
4 month by the Meltons and the Meltons denied that
5 but clearly two sales a month was in Mr
6 Lipscomb's head and it was in his head when he
7 went to the banker and that was what the banker
8 understood

9 It was very important for Mr Colson's
10 testimony You heard his testimony the other day
11 He said he had meetings with Melton and during one
12 of the meetings the two sales per month figure was
13 discussed And they didn't say anything Now,
14 ladies and gentlemen, if two sales per month had
15 been the projection that they made and had given
16 to Mr Lipscomb, they would have jumped up and
17 said, what are you talking about? They didn't do
18 it They didn't do that because that was what
19 they told Mr Lipscomb of the projections That
20 was what they told Mr Lipscomb of the
21 projections

22 We wouldn't have had the slow lot sales we
23 had and if we hadn't had the slow lot sales this
24 project wouldn't have had the problems it did
25 The problems in this project were directly

Defendant's Closing Arguments

1 related to slow lot sales and what we've got to
2 look at is in the contract is the real rule of
3 what happened during that three and a half years
4 and this remaining year and a half

5 Because what we know is during that first
6 three and a half years seventy percent of the
7 project, thirty-one lot sales occurred That's
8 what we know That's real world That's what
9 happened in this contract That's reality and
10 what the Plaintiff's are entitled to when you have
11 a breach of contract and the termination letter
12 was a breach is to be put in the same position as
13 though the contract had been properly performed

14 That's the last year and a half That's
15 what's being talked about here The last year and
16 a half because the three and a half years is
17 reality We know what happened there

18 The Plaintiffs want to go back and recreate
19 the whole contract Want to go back to day one
20 Have a do-over You don't get do-overs This
21 contract went three and a half years before the
22 breach occurred so you look at what happened the
23 last year and a half and what we know is in the
24 last year if things had gone forward with phase
25 two and you had to wait for sixty percent of

Defendant's Closing Arguments

1 the lot sales to occur and that was hit in the
2 June or July time period It took another year to
3 have the final plans and construction The
4 construction takes at least seven months and then
5 the approval at the end Phase two lots the
6 approval started toward the summer of '05

7 So any lot sales would have been lost there
8 for a couple of months there at the summer of '05
9 to November of '05 And nobody from the
10 Plaintiffs side had done that kind of calculation

11 Let's look at some of these issues they
12 talked about First, the eight hundred thousand
13 dollar one Well, first Mr Melton's budget
14 January of '02 The budget he signed he knew the
15 full eight hundred thousand dollars was in use at
16 that time The reason nobody had any problem or
17 checked into it at that point in time was that we
18 showed you under paragraph two of the contract
19 The provision was for SEL to provide financing
20 Let's pull up the paragraph two SEL to provide
21 financing to include paying for land so everybody
22 knew that that was going to happen

23 And as we talk about these different issues,
24 ladies and gentlemen, be clear about one thing
25 You've got to look at when the issue happens Is

Defendant's Closing Arguments

1 it a breach of the document? Is it something that
2 was within the document saying you couldn't do it?
3 And if it was what did they do about it? Because
4 you can't just go along with something and allow
5 the project to continue without allowing objecting
6 and making a serious objection and trying to stop
7 things to make people know that you think they're
8 breaching the contract

9 Here on all these different instances, they
10 went along with the situation and didn't object
11 Didn't stop and say, you're breaching the contract
12 and you can't do that

13 Now, the bonded plat issue Ladies and
14 gentlemen, Mr Lipscomb said nobody came to him on
15 it In January of 2002, SEL put approximately
16 ninety-two thousand dollars into this project
17 That was testimony Does it make sense that for a
18 few more thousand he wouldn't have gone forward
19 with a bonded plat at that point in time if he
20 would have been told that? Of course not That
21 would have happened But he didn't know about it

22 It doesn't make sense that if it was so quick
23 and if there were time projections for all of
24 these woulda/ coulda numbers, it's all based on
25 having that bonded plat right at the beginning

Defendant's Closing Arguments

1 of '02 If they were on it, wouldn't they have
2 written and come to Mr Lipscomb's or called on
3 his mobile and said this is going to kill the
4 project and we won't be able to make the land
5 sales and we're going to miss our projections
6 They didn't do that No testimony to that It
7 doesn't make sense No, everybody went forward
8 with the bonded plat the way you frequently do it
9 which is normal to do it which is get your roads
10 in and then do the bonded plat and that's why
11 there was no objection earlier on that

12 The road repairs The road repairs testimony
13 was that in the spring period of 2002 I'm sorry,
14 the spring period of 2003, Mr Maxheimer called to
15 everybody's attention to the problem and yes,
16 obviously it's one thing to have small potholes
17 but it got to be a big pothole in the spring of
18 '03 But what did everybody do? Everybody went
19 out and looked at it Lots of developers
20 Everybody got new engineers to come and look at
21 different fixes and everybody went forward and was
22 actually doing the fix in the fall of '03 It
23 made sense that you would do it at that pace
24 That's what's sensible That's what's logical
25 Phase two plans Now, phase two plans

Defendant's Closing Arguments

1 testimony has been that plans originally that
2 there were changes made but the dispute is to how
3 much the Meltons were involved in the initial
4 knowledge But they knew about them in '02 They
5 knew about them early on Did they object to
6 these new plans? No Really it was because there
7 were going to be more lot sales in phase two
8 Think of that

9 If it was so critical to moving forward,
10 wouldn't they have come forward and said, wait a
11 minute Look at phase two we got We've got old
12 plans We can go forward with the old plans Old
13 plans were always available before Just because
14 you had new plans doesn't mean you can't use the
15 old plans Now, we pushed that back Nobody was
16 going to start phase two because they were focused
17 on phase one and once they got done with phase one
18 they would really be focused on phase two That's
19 what happened

20 Now, we had the payment delays Simply there
21 wasn't money You've heard the testimony At one
22 point over a million dollars was loaned by SEL
23 Properties to this project Despite the fact that
24 this contract only required SEL to go get that
25 financing from the bank but that's what SEL

Defendant's Closing Arguments

1 was required to do There was no provision in the
2 contract that says SEL had to keep shelling out
3 money after money after month That's not in the
4 contract SEL Properties had to because it had to
5 make payments with the bank and it had to keep the
6 project going as best it could but that was not a
7 contractual responsibility When you get back,
8 look at what the contract actually says We went
9 over and over it in terms of what the contact
10 requires

11 K&L lot sales Let's touch briefly on that
12 June and July lot sales were beginning to get the
13 project going A model home and a couple of other
14 sales to get the project going Mr Lipscomb
15 talked about the appraisement of the property -
16 those first couple of properties That didn't
17 continue to happen throughout the project That
18 was just to get the project going

19 The whole project benefitted by him getting
20 those first few lot sales going and they knew
21 about it They wanted to get the project going
22 Any of these construction issues The faster the
23 construction was going remember, the sooner the
24 spec houses may be available for who to sell?
25 The Plaintiffs They sold They made over

Defendant's Closing Arguments

1 three hundred thousand in commissions in this
2 project

3 Let's talk about the allocation Allocations
4 is the books And the bookkeepers as you heard in
5 testimony did their best to put the proper charges
6 in and allocate them They allocated them based
7 upon what they are told and what was the testimony
8 very clearly? D Melton told them how to allocate
9 the engineering costs He was out there and he
10 was the one involved That made sense I'm sure
11 they were not doing it purposely wrong because
12 look at phase one but that's not a breach of
13 contract

14 Where we come down now to figure out where
15 the contract is and now we've got to figure out
16 exactly how to allocate and that's when that
17 timely situation gets fixed and the accounts gets
18 handled, fixed, and get it done properly And
19 that's what's happened in this case Bookkeeping
20 entries - that's when it's clear that the
21 bookkeepers tried to make the entries as best they
22 could

23 Now, let's talk a little bit about this
24 Exhibit 110 Exhibit 110 is dated February of
25 2005 and is the most important thing there is

Defendant's Closing Arguments

1 That's long after Mr Lipscomb on behalf of SEL
2 has terminated their rights That happened in May
3 of '04 It also happens in February of '05 at the
4 very time that the Plaintiffs are suing the
5 Defendant February of '05 is when the lawsuit
6 started so it is not surprising that SEL
7 Properties would be trying forward although on
8 this contract it didn't go forward

9 The Plaintiffs have been pointing out to you
10 is in the contract itself in section five - in
11 section five, Everybody knew that there might be a
12 sale on the property after phase one It says,
13 and if that development is not sold in individual
14 lots for so many gross product beginning with
15 phase one the sales price of the entire property
16 and it goes to show how it could be divided
17 between the parties

18 That was in this contract from the very
19 start Everybody knew that could happen so
20 talking with people and negotiating with people
21 there's nothing wrong with that Nothing wrong
22 with talking Nothing wrong with talking to begin
23 with Talking's not a breach of contract But
24 the concept of selling was in there from the
25 start

Defendant's Closing Arguments

1 Now, the key thing with regard to the books
2 and Mr Ouzts was very clear on this Two final
3 things here In terms of loans There were never
4 any loans charged or expensed to this project
5 Remember the difference between the checking
6 account and the general ledger Nothing is ever
7 charged there and, furthermore, at all times SEL
8 Properties had much more money into this project
9 than was ever logged into any other company A
10 million dollars at one point in time Testimony
11 also was that twenty thousand dollar loan but a
12 few days after that there was money put into the
13 account from SEL worth more than that so at all
14 times SEL had more into this project and was
15 always owed money

16 Ladies and gentlemen, all those different
17 things aren't breaches in the contract and they
18 aren't bad acts, which happen and you think, gee
19 if I had done this differently at this point then
20 something else would have happened here It's
21 that would/ coulda/ shoulda thing

22 You've got to look at what actually happened
23 here and it's too bad this project didn't go well
24 and it's too bad that it wasn't a huge success
25 but the reality is that it didn't go well and

Defendant's Closing Arguments

1 the Meltons participated in it not going well and
2 that's not their fault They didn't breach the
3 contract but they were the ones who were out there
4 marketing it and it was the project that didn't go
5 well It's not due to SEL Properties It was not
6 due to anybody It was the project that just
7 didn't go well because the lot sales weren't what
8 was anticipated and hoped for

9 Ladies and gentlemen, let's look at the
10 damages themselves and there is no dispute as to
11 phase four damages so Mr Ouzts here, they've
12 accepted his figure He calculated it and they
13 accepted his figure because he was right and the
14 reason Ms Richards didn't give you a figure on it
15 was because as you saw the examination of her -
16 she hadn't taken into account the construction
17 cost for phase four when she was doing her
18 analysis So whenever she tried to give a loss/
19 profit figure for phase four, it would have been
20 (inaudible) and that's why she didn't try to do it
21 and that's why she couldn't have done it and
22 that's why they are accepting Mr Ouzts' figures

23 And so now we have to look at the actual
24 damages here We have Mr Ouzts' analysis versus
25 Ms Richard's analysis and they are absolutely

Defendant's Closing Arguments

1 right All the fees are owed There are no
2 questions about that Mr Ouzts had profit
3 sharing at seventy-five thousand, three hundred
4 and fifty-two which is about half of Ms Richards
5 so you need to look at why Mr Ouzts was at that
6 amount

7 We went through with Mr Ouzts, his whole
8 analysis, and what you will recall is that there
9 were a number of expenses that Ms Richards didn't
10 take into account She didn't look at this whole
11 line-up of things which were additional costs
12 which were on the books which need to be analyzed
13 and that line-up included things like landscaping,
14 interest, sizeable expenses that she did not take
15 into account

16 She also did not take into account or she did
17 but she wanted to take it right back out She had
18 the road repair cost in here and she took it right
19 back out there Well, ladies and gentlemen, the
20 road repair cost is a cost of the project And
21 she testified that the reason that she took it out
22 was because the Meltons told her to take it out
23 That's not what the contract says The contract
24 says any and all expenses That's an expense of
25 the project And that was properly included

Defendant's Closing Arguments

1 as an expense of the project And Ms Richards
2 did not do that So when you look at what she
3 didn't include that's why you've got the
4 differences

5 And so the proper figure for phase one
6 damages is a hundred and twenty-nine thousand,
7 eight hundred and fifty-two dollars If you add
8 in phase four damages it's a hundred and eighty-
9 eight thousand, seven hundred and seventeen
10 dollars and the fees are also the development fee
11 for phase two - fifty-four thousand dollars They
12 are entitled to that too They are entitled to
13 that too And the reason is that contract Even
14 though it was entered into after they were
15 terminated Even though it was entered into after
16 they were suing, it was still during the five year
17 period Even though this contract never went
18 forward, under the terms of the contract, it had
19 been "let" therefore they are entitled to a
20 development fee for that

21 Now ladies and gentlemen, that's all they are
22 entitled to because phases two and three were not
23 to commence until certain sales levels had been
24 met and we'd seen the paragraph on that We've
25 gone over it many, many times It said phase

Defendant's Closing Arguments

1 two was not to commence until sixty percent of the
2 lots had been sold in phase one Now, the
3 Plaintiffs had come argument about when commence
4 was but if you look at paragraph five when they
5 would get their development fees it says it very
6 clearly

7 Upon the sale of sixty percent of the lots in
8 phase one, the first one following the letting of
9 the contract That's when phase two would
10 commence So the letting of the contract That's
11 when it commences That's when it makes sense
12 Because that's exactly how you get your
13 development fee paid in this case

14 So, again, phase two couldn't start before
15 you reached that sixty percent mark That was the
16 point at which the contract could be available to
17 be matched with the construction of the roads and
18 the reason clearly you don't get it before that is
19 you have loans for phase two before you had
20 reached appropriate level of phase one

21 We had to go back again and look at what the
22 real world situation is in May of 2004 when this
23 contract was terminated thirty-one lot sales had
24 occurred out there That's reality That's what
25 happened out there in this project

Defendant's Closing Arguments

1 The Plaintiffs want to go back and say, gee
2 when we started this project we had this nice
3 projections about how it could be done in five
4 years No one knew whether that could happen
5 That's what people hoped When you start a
6 project you hope things go well but things didn't
7 go well here That's the reality Thirty-one
8 sales is what really happened

9 And it wasn't until termination occurred by
10 the Defendant that the Plaintiff had any arguments
11 about anything that occurred before then There
12 were no letters complaining about any of these
13 things that come before you today Phase two
14 plans, none of that before they were terminated
15 And why? Because up to that point in time
16 everybody was trying to work together on a project
17 that was doing poorly but people were hoping at
18 least during the last year and a half that it
19 would continue to move forward And again, the
20 most that could happen on phase two would have
21 been a few lot sales the end of that November
22 That's what reality is here

23 What's happened here with regard to Ms
24 Richards is she's just running numbers and I think
25 it's really very interesting If you look

Defendant's Closing Arguments

1 at her detailed projections on phase one they look
2 a lot like Mr Ouzts' detail When you look at
3 her projections for commissions, her projections
4 for commissions simply say well here is the
5 commissions for phase one And then I've got to
6 multiply that and figure out what it is per and
7 then I've simply got to take that figure and
8 multiply by all the lots in phase two and three to
9 come up with this big number

10 And she's made no analysis of how long that
11 would take No analysis of all the work that
12 would need to take into account Nothing with
13 regard to the cost associated with that She's
14 hasn't taken that into account properly with the
15 commissions All she did and I think somewhere
16 she may have just offered up the forty or fifty
17 thousand dollar cost they had in phase one and not
18 looking at a clear way of how to do phases two and
19 three

20 And again, not looking at how much time and
21 not looking at how much work and all sorts of
22 things All this is is just a math number No
23 showing No showing that could have been done in
24 the last year and a half and they have not come
25 before you with a speculative formula and

Defendant's Closing Arguments

1 showed you exactly how do we get from phase one to
2 phase two to phase three Exactly how many sales
3 would be a current win

4 And the reason is that there is no such
5 document Everybody went forward and hoped that
6 that would happen And it's the same problem with
7 the lost profit figure of almost a million
8 dollars She hasn't included in the real world
9 cost associated per lot Mr Ouzts showed that it
10 was twenty-eight thousand dollars a lot She only
11 had twenty thousand dollars She putting in these
12 round numbers here but again, she's got no
13 projection in terms of how long it would take,
14 when this would occur It's just simple multiply
15 to get a big number Those are speculative
16 damages just to get a big number

17 Ladies and gentlemen, you know what a big
18 number is? A big number is this number right
19 here A quarter of a million dollars We're
20 coming before you saying we owe nearly a quarter
21 of a million dollars That's a lot of money
22 We're aren't coming in here saying five or six
23 hundred dollars or something silly like that
24 This is a real number This was really owed for
25 this project based upon where the project was

Defendant's Closing Arguments

1 at the time the termination occurred

2 Ladies and gentlemen, you've heard a lot of
3 testimony and right now you're going to have to
4 decide among other things what kind of case this
5 is Because the contract we're talking about and
6 the breach of that contract, that's a breach of
7 contract case and that's what this case should be
8 about It should be about the fact that the
9 termination occurred and it should be about the
10 fact that SEL Properties owes the Plaintiffs two
11 hundred and forty-two thousand, seven hundred and
12 seventeen dollars That's what this case should
13 be about

14 But the Plaintiffs want it to be about more
15 than just that So, you are going to have to
16 analyze two other causes of action in addition to
17 the breach of contract action You're going to
18 have to look at a cause of action called tortious
19 interference of contract and that cause of action
20 plays on intending that Mr Lipscomb individually
21 interfered with the contract between SEL and the
22 Plaintiffs

23 Now, remember SEL is an LLC It can only
24 operate through Mr Lipscomb That's the only way
25 it can act

Defendant's Closing Arguments

1 It's the same with K&L K&L is a company
2 And Mr Lipscomb can only act as a manager of
3 those two companies but they are asserting that
4 Mr Lipscomb somehow in individually interfered
5 with SEL's contract And you've got to bring your
6 common sense and your logic and your reason to try
7 to figure out What? Mr Lipscomb individually
8 interfering with SEL's contract That doesn't
9 make any sense SEL may be in breach of it's
10 contract SEL may owe damages But Mr Lipscomb
11 didn't individually do anything to interfere with
12 that contract

13 Talk about K&L lot sales K&L lot sales were
14 those early sales that benefited the project by
15 getting some homes going out there There may
16 have been some residual benefit to K&L because it
17 didn't pay as much but again it did appraise for
18 as much so where was this money going to come
19 from But even so, that's no benefit to Mr
20 Lipscomb

21 There is simply no evidence that Mr Lipscomb
22 individually interfered with this contract It
23 doesn't make sense He's the manager for SEL and
24 he's trying to have this contract go as well as it
25 did but it didn't work and why? Slow lot sales

Defendant's Closing Arguments

1 Slow lot sales Slow lot sales That simply
2 doesn't make sense

3 The other cause of action you are going to
4 have to look at is breach of contract accompanied
5 by fraudulent act That's a very serious
6 allegation That SEL Properties breached this
7 with some fraudulent act To find that Her Honor
8 is going to charge you with a little different
9 standard of proof there to clear, convincing
10 evidence of proof and not just a preponderance but
11 a clear, convincing even of the mind that these
12 acts were fraud, bad, horrible things

13 You've already seen and we've gone over
14 these They would never be able to hurt this
15 project Mr Lipscomb through SEL Properties put
16 in over a million dollars at one point in time for
17 this project so there simply is no breach of
18 contract by fraud and that's what this case is
19 about

20 Now, the reason those other two causes of
21 action are in here by the Plaintiffs is because
22 they want you to bring back punitive damages
23 They want you to punish SEL Properties They want
24 you to punish Mr Lipscomb That's what they are
25 asking you to do They're asking you for bad

Defendant's Closing Arguments

1 conduct on SEL's hard effort Bad conduct on Mr
2 Lipscomb's part And how do you show it again at
3 the clear and convincing evidence stage? That
4 they were clearly doing bad acts They want
5 punitive damages Ladies and gentlemen, the acts
6 here - they weren't bad acts, they weren't
7 intended to hurt things

8 We'll go back over the various lists before
9 Mr Lipscomb and SEL tried everything they could
10 to make this project perform The one thing you
11 can say is they weren't cheap They put a little
12 money and more money in Two issues there They
13 put an awful lot of money in Mr Lipscomb
14 testified that he put in as much as they could
15 because other assets were pledged for other things
16 and other pockets , There were not thirty-two
17 million dollars sitting around in a bank

18 But SEL did this in spite of the fact that
19 under the contract that I read to you and this is
20 a key here SEL got that initial loan with NBSC
21 based upon the budget that was provided by the
22 Meltons and you saw that budget The budget was
23 signed It was Defense Exhibit two Mr Melton
24 signed the budget' They had everything at that
25 point in time - January 8th - just after

Defendant's Closing Arguments

1 the funding occurred and it would be a little
2 fifty thousand dollar shortfall and that could
3 have been handled

4 There was no requirement for SEL to keep
5 putting money in up to the tune of a million
6 dollars at one point to keep this project going
7 No, that was SEL doing everything it could to make
8 ends meet and keep the project going That's not
9 bad acts That's doing everything you can And I
10 think to criticize SEL Properties when it loaned
11 this project over a million dollars and then said
12 that's a bad act Well, you've got to decide
13 whether that makes any sense whatsoever

14 Ladies and gentlemen, I think you really need
15 to focus on two things Focus on this contract
16 and all the terms of this contract because this is
17 a breach of contract That's what it's all about
18 Look and see what the terms of this contract

19 And focus on Mr Lipscomb You heard him
20 testify You had a chance to hear him over the
21 course of the day He was on the stand a long
22 time So you had the chance to see Mr Lipscomb
23 turn a long period of time to judge what kind
24 of guy he is and you've got to make a decision
25 as to whether this is a bad act or somebody

Defendant's Closing Arguments

1 who made a mistake Somebody who admitted he made
2 a mistake and I don't know how many times he was
3 asked the question and he kept saying, I was
4 wrong I decided that it is nice to have somebody
5 step up and say, I'm wrong, because two often
6 people try to point fingers and blame somebody
7 else

8 Mr Lipscomb did what my father told me to do
9 many years ago If you make a mistake, own up to
10 it, acknowledge it, and pay for whatever
11 consequences it has Mr Lipscomb on behalf of
12 SEL comes before you today to do just that

13 Folks, the jury system works because logic,
14 common sense, and reason and all that you bring to
15 the process And when you analyze this process
16 you need to look at what actually happened because
17 this is what actually happened out there Thirty-
18 one lot sales over three and a half years That's
19 reality

20 You need to look at reality and not some
21 speculative and yes, not some do-over Not what
22 some people had hoped for the contract but what
23 actually happened at the end of the title
24 termination If you do those things and look at
25 where those things stood at termination, and at

Defendant's Closing Arguments

1 the last year and a half because that's the whole
2 time period that was left It would put the
3 Plaintiffs back in the same position they would
4 have been in had they not been breached We'll
5 look at a verdict that speaks the truth and that's
6 what verdict comes from in Latin To speak the
7 truth And the truth is, that the total damage in
8 this case should total two hundred and forty-two
9 thousand, seven hundred and seventeen dollars
10 Nearly a quarter of a million dollars

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Plaintiff's Closing Arguments 2

1 Ladies and gentlemen, apparently Mr Lipscomb
2 missed the part where Mr Babcock's father said
3 that you admitted it after three years of
4 litigation and you come in the first day of court
5 and say you owe something and say you'll give it
6 them and you still haven't given it to them
7 Maybe I missed that part

8 In addition there are two acts of contrition
9 If anything, that's a problem and they are making
10 it right That's what we're really talking about
11 here today As we sit here today he hasn't even
12 made that Not funding this contract is a breach
13 of contract Not funding this development is a
14 breach All that they have different is bond the
15 plat to start phase one, pay the contractors and
16 the engineers, and repair the roads on time and
17 keep the agreed upon plans That's all they had
18 to do And they didn't do those things And
19 those were breaches of the contract

20 It's funny to me that Mr Babcock didn't
21 deny He just said we didn't make a big enough
22 objection about it at the time We're team
23 players We tried hard to make this thing work
24 We got a fresh start at seven and as soon as we
25 got the roads fixed look at what we did We

Plaintiff's Closing Arguments 2

1 pumped it up We sold like crazy as soon as we
2 got those roads fixed And so we were trying to
3 get this thing back on track to the extent we
4 could It wasn't until later that we realized
5 that he took it He took it so far off track
6 whenever he first did those things that we
7 couldn't We weren't able to do it after he
8 breached Mr Babcock seemed to want to point to
9 the termination as the only breach whenever we're
10 up there discussing breach after breach after
11 breach by the Defendants

12 Now, in the end what's going to happen here
13 The Defendant's have taken Dutch Fork's project,
14 the Courtyards at Rolling Creek Rolling Creek is
15 our brand They have taken our product They
16 have taken our brand, our idea, our concept, and
17 they sold it to Essex Homes for 7 6 million
18 dollars We spent three and a half years of our
19 lives working on this project trying to make up
20 for what he did wrong

21 If Mr Lipscomb would only had listened to
22 us, then everyone would have done very well
23 That's coming from an expert opinion Undisputed
24 From the engineer, Rick Maxheimer, with true
25 business experience

Plaintiff's Closing Arguments 2

1 Also, the undisputed expert opinion regarding
2 phase two and three commissions and profits and
3 all that by Lynn Richards Mr Babcock wants to
4 speak about Lynn Richard's calculations She took
5 her big calculations Her big calculations from
6 phases one and four, where she basically hid the
7 overall detail by a lot and then she came up with
8 her three million dollar number by taking per lot
9 of what occurred in phases one and four and
10 projecting it into phases two and three so it
11 accounts for all expenses

12 Mr Ouzts and Ms Richards basically agree on
13 phase one and four just about every way you turn
14 except the one disagreement is Mr Ouzts doesn't
15 want to take out the unreasonable expenses and Ms
16 Richards says, hey, you're right That is an
17 unreasonable expense and it was your fault so if
18 you're that kind of person who admits that
19 something is your fault You admit that it is an
20 unreasonable expense So that's the disagreement
21 between the two But her tabulations took into
22 account all of the costs of the project just like
23 Mr Ouzts did

24 The facts of the case we are to show that the
25 Defendants planned to use Dutch Fork to get

Plaintiff's Closing Arguments 2

1 this thing going at the beginning and then get rid
2 of them if he could get rid of them before the
3 bigger money came in from phases two and three
4 That's what the facts show based on his own
5 admissions Dealing behind our backs Based on
6 Rick Maxheimer and that was occurring in 2002
7 Way before the termination letter came 2002
8 Changing the plans to accommodate builders that he
9 was negotiate with behind our back

10 Folks, the terms of this contract during the
11 time period that we're talking about from the
12 termination to the five year end of the contract
13 term, Mr Lipscomb and SEL Properties don't get to
14 breach the contract and then run out the clock
15 And then benefit from their breach That's like
16 making a foul in basketball and then the clock
17 runs to zero and not getting your free throw
18 shots That's not the way it works You can't
19 commit a foul and then run out the clock That's
20 not the way it works That's not fair

21 I want to talk to you a little bit about K&L
22 K&L is a building company They build houses for
23 a profit You don't go into the home building
24 business to not make money What we have here was
25 Dutch Fork Development Group, the developer,

Plaintiff's Closing Arguments 2

1 and Dutch Fork Realty, a real estate seller, go in
2 with SEL Properties to finance the project and
3 then Mr Lipscomb also have a building company,
4 K&L So they could do the development and get
5 paid for that and get paid for it and do the real
6 estate sales and they're going to get paid for
7 that

8 SEL is going to finance this project and then
9 we didn't have to deal with him but he has a K&L
10 builder and K&L was coming in to this project
11 because it had access and it was going to build
12 homes and make money And with the 5 6 million
13 dollars or so that they made building homes for
14 this project

15 Does anybody remember that we sold every
16 house that they built within seven months? Three
17 months Two months Sometimes two days
18 Sometimes sold it before they even built it We
19 were helping him make money out there We were
20 selling like crazy We talked to several
21 witnesses about selling his places within two or
22 three days, a few months until may of '04 when he
23 fired us Then what happened He used K&L as
24 the star He said that his inventory was not
25 getting sold because we were not there to take

Plaintiff's Closing Arguments 2

1 care of it

2 Now, you can't go forward with the old plans,
3 testimony from Rick Maxheimer was, because the
4 Federal regulations changed The Federal
5 regulations had changed from the time the
6 preapproved plans were in place and then they
7 changed them and well, now he can't go forward
8 He lost that opportunity for those preapproved
9 plans Mr Babcock wants to act like he can go
10 back to those old plans and he always can It
11 doesn't work that way and it is senseless

12 Speaking about shortfalls Mr Lipscomb made
13 a personal guarantee to pay up those shortfalls
14 when he took out the eight hundred thousand
15 That's part of him taking out the eight hundred
16 thousand by making a personal guarantee to make up
17 the shortfalls Now they want to say that SEL
18 went back and invested another million but that
19 eight hundred thousand was still part of that
20 million and he probably invested another two or
21 three hundred thousand but they are making it
22 sound bigger than it was Eight hundred thousand
23 but let's say it was a million back in but the
24 eight hundred thousand counts against that
25 They want to blame Mr D Melton for

Plaintiff's Closing Arguments 2

1 misallocation by the CPA, John Quinn, who is the
2 CFO of SEL. I guess at income tax time they'll
3 call D Melton and ask how to allocate all of their
4 money over their various projects. Mr. Melton
5 doesn't know how to do tax allocations. He
6 doesn't know how to do in line Federal
7 regulations. The way they told him violated
8 Federal regulations. It's not his job or his
9 responsibility to allocate the money. That was
10 the CFO and the accountant's job.

11 Mr. Babcock mentioned the provision in the
12 contract about selling in gross. That was not a
13 play on words. But it was supposed to involve us.
14 Within the contract term, he was negotiating to
15 sell it in gross without us and then terminated us
16 wrongfully and tried to say he didn't. I think
17 it's clear.

18 In terms of tortious interference with
19 contract, what we're talking about is Mr. Lipscomb
20 individually for his conduct on his behalf of K&L.
21 He owns eighty percent of K&L. That building
22 company that made 5 6 million dollars out here
23 with us selling all those houses. He owns eighty
24 percent of that. It's in his personal interest
25 that K&L benefit so that he benefits from

Plaintiff's Closing Arguments 2

1 K&L receiving a lot of discount prices K&L not
2 having to have bids like a lot of other builders
3 do He benefits personally from that and it's a
4 detriment to the project

5 The definition of fraudulent and the judge is
6 going to instruct you on this The definition of
7 fraudulent for breach of contract accompanied by a
8 fraudulent act is an act that's dishonest, unfair,
9 or deceptive We've shown countless acts by the
10 Defendant that were unfair, that were dishonest,
11 and that were deceptive So he did breach this
12 contract with a fraudulent act

13 Speaking of timeframe, let me mention this to
14 you This contract was terminated in '04 The
15 end of the contract term that Mr Babcock keeps
16 harping on was November of '05 That's an
17 eighteen month period, a year and a half He took
18 from us that year and a half He took from us
19 that year and a half and he owes us a year and a
20 half

21 Let's take November of '05 and let's tack on
22 a year and a half until about April of '07 What
23 happened between there? He owes us back this year
24 and a half What happened between November of '05
25 and April of '07? Essex We would have had the

Plaintiff's Closing Arguments 2

1 exclusive rights to sell for a year and a half
2 That's what he owes us Essex \$7 6 million
3 dollars That's a big number The Defendant is
4 going to get it all to his own despite all the
5 work that we did'

6 Now, I'll tell you and Mr Babcock might say
7 well, you know what, what Steve really owes is
8 from May of '04 to November of '05 The original
9 contract term But you can't give time back It
10 doesn't pass like that He knows us in a
11 different year and let me tell you why

12 Let's say that your boss comes to you last
13 week and last Friday and says, I need you to work
14 four hours over and you say okay I'll do that
15 Comes this week Wednesday coming up on Friday and
16 you say, Mr Boss, remember that last week I
17 worked four hours over You owe me four hours and
18 he says, okay you can have last week's four hours
19 back That last Friday's four hours that you
20 worked you can take it back Go ahead No, no,
21 no He doesn't owe us back that same four hours
22 but this time doesn't work that way He owes a
23 different four hours

24 If you add a year and a half that he really
25 does owe us because he terminated us,

Plaintiff's Closing Arguments 2

1 admittedly wrongfully, the Essex contract happened
2 right there and we would have had exclusive right
3 to sell We would have gotten profit sharing and
4 commissions on each and every house that gets sold
5 or built under that contract From the time it
6 starts getting built we get a listing for a year
7 and in all fairness, Mr Ouzts did find one
8 listing agreement that had expired without us
9 selling a house and so I'd like for you to
10 consider that as you consider the profits and the
11 commissions that we lost and that he owes us We
12 thank you We ask you to please return the
13 verdict for the Plaintiffs for their actual and
14 punitive damages in accordance with what you
15 believe is right in this situation We've had a
16 wrong here They admit at least that the
17 termination was wrong We have given you examples
18 of the other wrongs and all we are asking is that
19 someone make it right Thank you

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FIFTH JUDICIAL CIRCUIT
2005-CP-40-0749

DUTCH FORK DEVELOPMENT)
GROUP, II, LLC, AND DUTCH)
FORK REALTY, LLC,)

PLAINTIFFS,)

VS)

SEL PROPERTIES, LLC, AND)
STEPHEN E LIPSCOMB)
DEFENDANTS)

TRANSCRIPT OF RECORD
EXCERPT FROM
NOVEMBER 7, 2007

OCTOBER 29, 2007
COLUMBIA, SOUTH CAROLINA

B E F O R E

THE HONORABLE ALISON R LEE, JUDGE

A P P E A R A N C E S

GLENN E BOWENS, ESQUIRE
TONY S CATONE, ESQUIRE

KEITH M BABCOCK, ESQUIRE
BRADY R THOMAS, ESQUIRE

BONNIE H KELLY
CIRCUIT COURT REPORTER

I N D E X

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E X H I B I T S

<u>NO</u>	<u>DESCRIPTION</u>	<u>I D</u>	<u>EV</u>

No exhibits were offered during this part of the trial

1 **EXCERPT OF TRANSCRIPT, WEDNESDAY, NOVEMBER 5, 2007**

2 THE COURT Be seated, please Is there anything we
3 need to take up before we bring the jury back?

4 MR BOWEN No, Your Honor

5 MR BABCOCK Nothing from the defense, Your Honor

6 THE COURT You may ask the jury to come in, please

7 (The jury enters at 11 38 a m)

8 THE BAILIFF Jury's seated, Your Honor

9 THE COURT During this trial, ladies and gentlemen,
10 you and I have certain duties to perform As the trial
11 judge, it's my responsibility to preside over the trial of
12 this case and to rule upon or pass upon the admissibility
13 of evidence that's been presented throughout the course of
14 this trial and you are to accept only the competent
15 evidence which is before you To any evidence to which
16 there was an objection sustained, you must not speculate as
17 to what that evidence might have been or the reasons for
18 the objection You -- again you should consider only the
19 evidence along with any of the exhibits that have been made
20 a part of the record in this case

21 Now, I have the additional duty and responsibility to
22 charge you the law that applies in this case, and as the
23 trial judge, I am the sole judge of the law that applies
24 If you have any preconceived ideas as to what the law is or
25 what the law should be or your interpretation of the law,

1 you must set all of that aside, for under your oath as
2 jurors, you are sworn to accept the law as I charge it to
3 you Now, if by chance I make some error in that charge,
4 then there's another court at another time that can correct
5 those errors of law But for purposes of this trial, right
6 now this moment, you must accept the law as I charge it to
7 you as being the correct statement of the law

8 Now, in every case tried before a jury, you the
9 jurists become the sole and exclusive judges of the facts
10 of this case No one can tell you what the facts of this
11 case are, and if I've done anything throughout the -- the
12 course of this trial that I've -- that's given you any
13 impression that I'm commenting on the facts or that I'm
14 telling you what facts to find, or I'm giving an opinion
15 about the facts, I ask that you set that aside as well, for
16 I assure you I don't have any opinion about the facts of
17 this case That's not my job here, that's not my role or
18 my responsibility That's your duty, your responsibility
19 as jurists to determine the facts of this case

20 Now, in order to do that, you will have to analyze and
21 to evaluate the evidence and determine what evidence
22 convinces you of its truth In order to do that, you will
23 have to judge the credibility or believability of the
24 witnesses who have testified, and credibility is merely a
25 legalistic term meaning believability

1 In order to determine the credibility or believability
2 of the witnesses, you may consider the following factors
3 What was the manner and appearance of the witness who
4 testified? Was he or she hesitant or straightforward in
5 answering the questions? Was the testimony of a witness
6 consistent or inconsistent? How did the witness come to
7 know the facts that he or she testified to, or what was his
8 or her ability to know these facts? Is there some reason
9 that a witness would want to give testimony that would help
10 or hurt one side or the other? In other words, was the
11 witness's testimony biased or prejudiced in some manner?
12 And was the testimony of a witness strengthened or weakened
13 by other testimony or other evidence?

14 Now, ladies and gentlemen, in determining the
15 credibility or believability of the witnesses, you may
16 believe one witness against several witnesses, or you may
17 believe several witnesses against one witness. You may
18 believe a portion of a witness's testimony and disregard
19 other portions of that same witness's testimony, and if you
20 have a good and sufficient reason for doing so, you may
21 accept the witness's testimony in its entirety or you may
22 reject it in its entirety. You may also consider whether
23 or not a witness's testimony has been impeached or
24 challenged by prior inconsistent statements. And if you
25 find that a witness's testimony has been impeached, you may

1 give any or all of the witness's present or prior testimony
2 the weight that you think it deserves These factors you
3 should not exercise arbitrarily, but if in your good
4 judgement there's reason for you to consider these things,
5 then you should do so

6 Your objective, ladies and gentlemen, is to seek the
7 truth, and whether it comes from a witness or witnesses for
8 the plaintiff or witness or witnesses for the defendant,
9 you don't determine the truthfulness of the testimony by
10 counting the number of witnesses who've testified for one
11 side or the other The truth is not determined by counting
12 witnesses What the law simply requires is that when you
13 exercise your mental processes in determining what you
14 consider to be true, that you should use your good common
15 sense, your sense of logic and reason, and you use your
16 experiences in life You apply these attributes to the
17 evidence and then determine what you the jury consider to
18 be truthful evidence, and then, to those true statements of
19 fact as determined by you, you apply the law as I will
20 charge it to you, and then you will be able to arrive at
21 your verdict

22 Ladies and gentlemen, your verdict should not be based
23 upon sympathy, passion, or prejudice By your verdict you
24 have no friends to reward and you have no enemies to
25 punish Your verdict should simply speak the truth

1 Now, ladies and gentlemen, in every case that's --
2 because there are -- ordinarily, our rules of evidence do
3 not allow for the individuals to testify about opinions or
4 conclusions. An exception that exists is those that we
5 call "expert witnesses." Those are witnesses who --
6 because of their education or training or experiences, they
7 may profess to be an expert in some art or science. And
8 they may -- may state an opinion and give the reasons for
9 their opinion and they can state that opinion in the area
10 in which they profess to be an expert. You should give any
11 and every expert's opinion in considering -- give it the
12 weight that you think that it deserves.

13 If you should find that an expert's opinion is not
14 based upon sufficient education or training, or if you
15 should find that the reasons that are given to support the
16 opinion are not sound, or that that opinion is outweighed
17 by other evidence, then you may disregard the opinion in
18 its entirety. You are not required to except an expert's
19 opinion even though it may be uncontradicted, and an
20 expert's opinion is entitled to no greater weight than that
21 of any other witness simply because that person professes
22 to be an expert. Now, when an expert renders an opinion,
23 the opinion must be stated in -- in a -- within a
24 reasonable degree of professional certainty.

25 Now, ladies and gentlemen, in every case that's

1 brought in court by the person who's filing the lawsuit, or
2 the plaintiff, the plaintiff would have the burden of
3 proving each and every element of their claim by what we
4 call a "greater weight or preponderance of the evidence "

5 And what we mean by greater weight or preponderance of the
6 evidence is typically illustrated by a set of traditional
7 scales where at the beginning of the trial the scales are
8 even But throughout the course of the trial as the -- as
9 the evidence is presented, the scales may tip back and
10 forth If after all of the evidence is presented the
11 scales remain even or if they tip ever so slightly in the
12 favor of the defendant, then the plaintiff would not have
13 satisfied that burden of proof, and therefore, your verdict
14 must be for the defendant If, on the other hand, after
15 all of the evidence has been presented the scale should tip
16 ever so slightly in the favor of the plaintiff, then that
17 means that the plaintiff has satisfied that burden of proof
18 and your verdict must be for the plaintiff

19 Now, of course, there's no way to physically weigh the
20 evidence It's entirely a mental process and the evidence
21 to which you assign the most weight should be the evidence
22 that convinces you of its truth, regardless of from whom or
23 from what source it comes

24 Now, ladies and gentlemen, in this case it involves
25 corporate individuals In our courts there is no

1 distinction between the corporation and individual persons
2 A corporation is a -- is a person in the eyes of the law
3 And the corporation is entitled to the same fair and
4 impartial consideration and entitled to the same standards
5 of justice as an individual person who is in court

6 In this case, ladies and gentlemen, the plaintiffs
7 have brought three causes of action and I'll go over each
8 one with you

9 The first cause of action is a breach of contract
10 Now, as a preliminary matter, ladies and gentlemen, let me
11 tell you that the Court has ruled as a matter of law that
12 the defendant SEL Properties breached the contract in
13 failing to pay the development fee of \$54,000 for Phase 1
14 However, that does not end the inquiry The remaining
15 claims that are made by the defendant -- I'm sorry, that
16 are made by the plaintiff are in dispute, and they must be
17 resolved based upon the facts that are determined by you
18 from the evidence that's been presented So let me talk
19 about the breach of contract claim

20 In order to recover under a breach of contract cause
21 of action the plaintiff must establish three essential
22 elements by the greater weight or preponderance of the
23 evidence First, the plaintiff must prove that the parties
24 entered into a binding contract Second, the plaintiff
25 must prove that the defendant breached, or unjustifiably

1 failed to perform the contract And three, the plaintiff
2 must prove they suffered damages as a direct and proximate
3 result of the breach

4 Now, ladies and gentlemen, the breach of contract
5 claim is addressed solely against SEL Properties In the
6 law, a contract is an agreement that's entered into by two
7 or more parties in which each party promises to perform or
8 not to perform certain duties But the contract is more
9 than a mere exchange of promises For an agreement to be
10 legally binding and enforceable, the parties must have
11 intended to enter into the contract and through their
12 negotiations they must have reached a mutual understanding
13 of the terms of that contract, and that's sometimes
14 referred to as "a meeting of the minds "

15 Finally, the contract must be supported by some
16 valuable consideration which is simply just another way of
17 saying that there must be some benefits to each party to
18 the contract To constitute a valid and binding contract
19 it is essential that the -- that the parties assent to the
20 same thing in the same sense A contract is an obligation
21 that arises from the actual agreement of the parties that's
22 manifested by words, whether they're oral or written or by
23 conduct

24 Now, contracts can relate to a variety of matters
25 There are contracts for employment, there are contracts for

1 the sale of goods or the construction of a house, or
2 contracts for performances -- services to be performed
3 But common to all of these contracts, including the
4 contract in this particular case, are the elements that
5 I've explained to you

6 Now, in this case both the plaintiff and the defendant
7 agree that a valid contract was entered into However, the
8 plaintiff claims that the defendant breached the contract
9 and that's a claim that the defendant denies The word
10 "breach" is the -- means the same as broken It's used to
11 describe the failure of a party to perform the terms and
12 duties under the contract

13 Now, to arrive at your verdict, ladies and gentlemen,
14 you first have to determine the terms of the contract and -
15 - and then decide whether the parties fulfilled those
16 terms And to assist you in determining the terms of the
17 contract there are certain guidelines which I will go over
18 with you

19 The first thing, ladies and gentlemen, that you should
20 know is that it's the paramount rule that in interpreting
21 contracts, that you have to ascertain the intentions of the
22 parties and then to put those intentions into effect In
23 determining the intent of the parties you may not consider
24 any undisclosed or secret intentions of the parties, but
25 rather you must be guided only by the parties outward

1 expressions of their purposes Furthermore, as you
2 interpret the contract, you are not restricted to a literal
3 meaning of any term if you decide that such an
4 interpretation would defeat the true intentions of the
5 parties Now, it's the law that contracts should be
6 literally construed so as to give them effect and to carry
7 out the intentions of the parties And you cannot alter or
8 amend the terms in such a way as to re-write it Words
9 cannot be read into the contract to provide a meaning
10 that's not intended when the contract was formed

11 Now, a contract does not have to be in writing
12 However, when a contract is put into writing, you should
13 gather the intention and meaning of the parties primarily
14 from the contents of the written document itself And when
15 this written agreement is clear and unequivocal, it's
16 meaning must be determined by its contents alone When the
17 language is clear and unambiguous, that language alone
18 determines the force and effect of the contract

19 Now, if a term of the contract can be given two
20 meanings, one of these meanings would make the contract
21 unusual or extraordinary while the other one would make the
22 contract reasonable, fair, and just, then in that instance
23 you would apply the reasonable construction, the one that
24 would make the contract fair and just Where a term of a
25 contract can be given more than one meaning, you should

1 resolve any doubts by using the meaning that's least
2 favorable that drafted the contract And where two clauses
3 are in conflict, you should accept the one that's stated
4 first and reject the second if you find that the first
5 clause is in harmony with the rest of the contract Now,
6 terms that do not contradict the express portions of the
7 contract may be implied in order to carry out the expressed
8 intentions of the -- of the parties when the circumstances
9 warrant it

10 There exists in every contract an unspoken but legally
11 enforceable promise that the contract will be performed in
12 good faith and with fair dealing Where the language of
13 the contract is ambiguous, that is it has more than one
14 meaning, you are permitted to consider the circumstances
15 which surround the making of the contract to help you
16 determine the real intentions of the parties But you may
17 not use such circumstances to give the contract a meaning
18 that is not apparent on its face

19 Now, where the parties have agreed in the contract
20 that performance is to be made within a specified time,
21 then in that event, time is of the essence of the
22 contractual agreement That means that the performance by
23 one party within the time specified in the contract is
24 essential in order that he may require performance from the
25 other party Time may be made of the essence by the

1 expressed stipulations of the parties in the contract, but
2 it need not be stated in exact language The provision
3 that time is of the essence may be inferred from the
4 language of the contract and the conduct of the parties
5 Now, in trying to determine from the language in the -- the
6 language of the contract and the conduct of the parties
7 whether time is of the essence, you must look to the intent
8 of the parties There must be something connected with the
9 purpose of the contract and the circumstances surrounding
10 it to make it apparent that the parties intended the
11 contract to be performed within the time stated

12 Now, if you find that from all of the evidence that
13 time was of the essence of the contract, then your inquiry
14 must go further Where time is of the essence and there
15 has been a delay the other party would have the right to
16 rescind or terminate or end the contract and where time is
17 of the essence and one of the parties has not performed and
18 that party is not ready and is not able to perform its part
19 of the agreement at the specified time, then the other
20 party may elect to consider the contract at -- at end

21 Ladies and gentlemen, once you have decided the exact
22 terms of the contract, then it will be your duty to
23 determine whether or not the defendant breached the
24 contract The word "breach" as it applies to the contract
25 is just -- is defined as "the failure without legal excuse

1 to perform any promise which forms a whole or a part of the
2 contract, including the refusal of a party to recognize the
3 existence of the contract or the doing of something that's
4 inconsistent with its -- its -- with its existence " The
5 breach occurs where one party fails to carry out a term,
6 promise, or condition of the contract In other words, a
7 breach occurs when a party does not perform as he's agreed
8 to perform under the contract Performance of a contract
9 refers to the doing of acts required by the agreement at
10 the time and place and in the manner stipulated For a
11 party to recover under a contract for non-performance by
12 the other party he must establish his own performance or
13 his offer and ability to perform or a valid excuse for the
14 failure to perform That is -- that is to say that one who
15 seeks to recover damages for breach of the contract to
16 which he's a party must show that the contract has been
17 performed on his part or at least that it was at the
18 appropriate time able, ready, and willing to perform the
19 contract Furthermore, a party may not insist upon the
20 performance of the contract or its provisions where he
21 himself is guilty of a material or substantial breach of
22 the contract or a provision of the contract The -- the
23 party first committing a substantial breach of the contract
24 cannot maintain an action against the other contracting
25 party for the subsequent failure to perform if the promises

1 are -- are dependent And it's an implied condition of
2 every contract that one -- one party will not prevent
3 performance by another party A contracting party who
4 prevents the other party from performing under the contract
5 cannot purge or avail himself of the non-performance which
6 he himself has brought about Stated differently, non-
7 performance of a promise in accordance with its term is
8 excused if performance is prevented by the conduct of the
9 adverse party Here the plaintiff claims that the
10 defendant prevented him -- prevented it from performing the
11 requirements of the contract When two parties make a
12 contract, each one is required to allow the other to
13 perform their part of the contract without interference
14 Each party must reasonably avoid any action which would
15 effectively prevent the other party from doing what was
16 agreed to under the contract A party to a contract is
17 excused from non -- for non-performance if it's performance
18 is rendered impossible by the other party or by a third
19 party

20 Now, if you find that the defendant has prevented the
21 plaintiff from performing the requirements of the contract,
22 then your verdict would be for the plaintiff in that case
23 Now, the defendant claims that even if there's been a
24 breach of the contract, the plaintiff by its actions after
25 the alleged breach waived the right to enforce the

1 contract, and by waive I mean voluntarily give up And it
2 is the law that the right to prosecute a breach of contract
3 action may be waived if the party that has the right acts
4 in such a manner to lead the other side to believe that the
5 right has been relinquished In other words, once a breach
6 of contract occurs the non-breaching party must enforce the
7 rights or lose them If you find that the plaintiff acted
8 in such a way that it waived the rights to enforce the
9 breach of contract then your verdict would be for the
10 defendant on that particular issue

11 Once you've determined, ladies and gentlemen, the
12 terms of the contract and whether there's been a breach,
13 then you may arrive at the issue of damages The measure
14 of -- if -- if the plaintiff establishes that the -- the
15 contract was breached by the defendant, then the plaintiff
16 would be entitled to -- to actual damages Actual damages
17 are intended to compensate the injured party and put them
18 in the same position had they been in had the contract been
19 fulfilled And the measure of contract damages would be
20 the actual damages that the injured party has suffered that
21 may be reasonably incurred

22 Damages recoverable for breach of contract either must
23 flow as a natural consequence of the breach or must have
24 been reasonably within the parties contemplation at the
25 time that the contract was made In a breach of contract

1 action, damages serve to place the non-breaching party in
2 the same position that they would have been in had the
3 contract been performed Generally, a party who is injured
4 in a breach of contract action is entitled to recover the
5 amount of the loss, and that would include loss profits
6 Generally, profits are the net income over expenditures
7 during a given period Profits refer to the gross proceeds
8 of a business transaction less the cost of the transaction
9 Lost profits are recoverable in an action for breach of
10 contract First, the profits must have been prevented or
11 lost as a natural consequence of the breach of contract
12 Secondly, it must reasonably have been within the
13 contemplation of the parties at the time that the contract
14 was made that lost profits would be a probable result of
15 the breach of contract When lost profits are contemplated
16 as a measure of damages for the breach of contract they
17 should be established with reasonable certainty since
18 recovery cannot be had for profits which are conjectural or
19 speculative While proof need not be made to a precise
20 mathematical certainty, the -- the amount of actual damages
21 cannot be left to conjecture or guess or speculation
22 There must be a certain standard or fixed method by which
23 the loss must be determined with a fair degree of accuracy
24 Now, ladies and gentlemen, once you have considered
25 the breach of contract action, then you're -- the second

1 claim that the plaintiff has brought would -- is the breach
2 of contract accompanied by a fraudulent act Now, the
3 plaintiff claims that the -- the -- that the breach of the
4 contract was accompanied by a fraudulent act by the
5 defendant SEL Properties Again, this claim is only
6 against SEL Properties To establish a breach of contract
7 accompanied by a fraudulent act the plaintiff must first
8 show that there was a -- that the defendant breached the
9 contract

10 Next the plaintiff must show that the defendant had
11 fraudulent intent as to the breach of contract Now, the
12 fraudulent intent does not relate to the making of the
13 contract, and that's not sufficient The fraudulent intent
14 is usually proven by examining the circumstances relating
15 to and surrounding the breach of the contract And
16 finally, the plaintiff must prove that there was a
17 fraudulent act that accompanied the breach of the contract
18 So there's fraudulent intent and a fraudulent act that
19 accompanies the breach

20 A fraudulent act is any act that's characterized by
21 dishonesty in fact, unfair dealing, or the unlawful taking
22 of another's property intentionally The breach and the
23 fraudulent act need not be the same, although it may be
24 The fraudulent act may be prior to or at the same time as
25 or after the breach of the contract However, it must be

1 connected with the breach of the contract itself The
2 fraudulent act cannot be too remote in time or in character
3 from the breach of the contract It must be logically
4 connected, that is the two being attendant to each other

5 In a breach of contract accompanied by a fraudulent
6 act the plaintiff is seeking punitive damages In an
7 action for the breach of contract the motives of the
8 wrongdoer are -- are not to be considered in arriving at
9 the amount of damages And the fact that a contract is
10 breached with willful or fraudulent intent doesn't change
11 the rule that the wrongdoer's only liable for those actual
12 damages, that is those damages that are the natural or
13 proximate result of the wrongful act The mere fact that
14 the contract is breached does not carry with it the stigma
15 of bad faith or willfulness or wantonness And punitive
16 damages cannot be recovered for breach of contract unless
17 that breach of contract is accompanied by a fraudulent act
18 that is distinguished from fraudulent intent The mere
19 breach of a contract even if willful and with fraudulent
20 purpose is not sufficient to entitle the plaintiff to
21 recover for punitive damages It is the accompanying
22 fraudulent act that allows recovery for punitive damages

23 To recover those punitive damages for the breach of
24 contract accompanied by a fraudulent act the plaintiff must
25 prove by clear and convincing evidence the fraudulent act

1 that accompanies the breach of contract Now, clear and
2 convincing is a legal term that means more than a
3 preponderance of the evidence We mean evidence that's not
4 ambiguous or doubtful or equivocal or contradictory It is
5 proof that establishes in your mind not only that the fact
6 at issue was probably, but that it was highly probable
7 And I will discuss punitive damages in more detail in just
8 a few moments

9 The third claim that's been brought by the plaintiff
10 has been brought against the defendant Stephen Lipscomb
11 individually for what we call "tortious interference with
12 contract " One who intentionally and improperly interferes
13 with the performance of a contract between another and a
14 third person by inducing or otherwise causing that third
15 person not to perform the contract is liable for damages
16 for the failure of the third person to perform the
17 contract And the theory here is that the parties to a
18 contract have a property right in the contract and the
19 third party -- the third person has no more right
20 maliciously to deprive them or to injure them than he would
21 have to injure their property generally So such an injury
22 without sufficient justification amounts to a tort or
23 amounts to a claim for which the injured party may seek
24 damages To establish an action for intentional
25 interference with an existing contract, also referred to as

1 "tortious interference with an existing contract," the
2 plaintiff has to prove by a greater weight or preponderance
3 of the evidence the existence of a contract, the
4 wrongdoer's knowledge of the contract, the intentional
5 procurement of the contract's breach, the absence of
6 justification, and resulting damages

7 Now, knowledge of the existence of the contract is a
8 condition for liability for interference with it
9 Therefore, the defendant Lipscomb cannot be liable for
10 interfering with the contract for which he is unaware
11 There is no liability where the party who is charged with
12 procuring the breach of the contract has acted in ignorance
13 of the existence of the contract And it is not necessary
14 to prove actual knowledge It's enough to show that the
15 defendant had knowledge of facts which if followed to a
16 reasonable inquiry, would have led to a complete disclosure
17 of the contractual relationships between the plaintiff and
18 SEL Properties For a cause of action to arise, the breach
19 must have been intentionally procured The plaintiff must
20 prove that the defendant Lipscomb intentionally induced the
21 other person to the contract, SEL Properties, not to
22 perform the contract with the plaintiff The essential
23 element is the intent to cause the result If the
24 defendant Lipscomb does not have this intent, then his
25 conduct does not subject him to liability The tort of

1 intentional interference with the contractual relationship
2 requires that defendant's interference in fact procured the
3 breach of the contract complained of The alleged act of
4 interference must influence, induce, or coerce one of the
5 parties to the contract to abandon the relationship or to
6 breach the contract The plaintiff must show that but for
7 the interference, the contractual relationship would have
8 continued

9 In determining whether the defendant Lipscomb's
10 conduct in intentionally interfering with a contract is
11 improper you should consider the following factors The
12 nature of the defendant's conduct the defendant's motive,
13 the interest of the other party which the defendant's
14 conduct -- with which the defendant's conduct interferes
15 the interest sought to be advanced by the defendant the
16 social interest in protecting the freedom of action of the
17 defendant and the contractual interest of the other, the
18 proximity or remoteness of the defendant's conduct to the
19 interference and the relations between the parties

20 The plaintiff must prove the absence of justification
21 The absence of justification may be inferred Interference
22 with a contract is justified, however, when it is motivated
23 by a legitimate business purpose The exercise in good
24 faith of a legal right by a party to a contract affords no
25 basis for an action for interference with a contract

1 despite the fact that it causes a third party not to
2 perform the contract with the plaintiff

3 Now, the plaintiff must also prove damages The
4 plaintiff may recover those damages that are sustained by
5 him that are a natural and proximate consequence of the
6 interference Those damages would include damage for
7 lost of -- loss of customers, damage for loss of good will,
8 and damages for loss of profits Where the damages alleged
9 are lost profits, the plaintiff must prove that it is
10 reasonably certain that the profits would have been
11 realized but for the defendant's conduct and that such lost
12 profits can be ascertained and measured from the evidence
13 that's produced with reasonable certainty

14 The defendant Mr Lipscomb claims that he is not
15 liable to the plaintiff because the defendant is a party to
16 the contract A cause of action for interference with a
17 contractual relationship is premised on the tortious
18 behavior of the defendant who is not a party to the
19 contract The plaintiff is not protected from the actions
20 of the other -- of the other party to the contract
21 therefore, it is a defense to the action if the defendant
22 is a party to the contract or an agent of the defendant
23 Generally, a corporate officer or employee is not liable
24 for interfering with a corporate contract because he's
25 considered a party to the contract, as long as he's acting

1 to serve the corporate interest or -- or unless his
2 activity involves individual, separate tortious acts
3 However, a corporate officer or employee may be liable for
4 tortiously interfering with a corporate contract if he's
5 acted outside the scope of his authority or he's acting
6 with malice, that is evil intent, or acting to serve his
7 own interest

8 Now, any aggravated, unjustified interference with
9 contractual rights that's in reckless disregard of the
10 rights of the contracting party justifies an award of
11 punitive damages The plaintiff has to prove by clear and
12 convincing evidence that the defendant Lipscomb acted in
13 reckless disregard of the rights of the parties to the
14 contract And as I stated to you earlier, clear and
15 convincing is more than just a preponderance of the
16 evidence It's -- it's evidence that's -- that leaves no
17 substantial doubt in your mind It's not ambiguous or
18 doubtful or equivocal or contradictory

19 Now, ladies and gentlemen, as to two of these claims,
20 the breach of contract accompanied by a fraudulent act as
21 well as the tortious interference with contract, you may
22 award punitive damages Punitive damages may be awarded
23 only if you make an award for actual damages Punitive
24 damages are intended to punish the wrongdoer for conduct --
25 conduct that's extraordinary or outrageous and it serves as

1 a -- as a deterrent to the defendant and to others Again,
2 it's designed to -- to punish or to deter or vindicate the
3 rights of the plaintiff when the conduct on the part of the
4 defendant is willful, wanton, or reckless In order to
5 support an award for punitive damages the plaintiff has to
6 prove that the conduct complained of included a
7 consciousness of wrongdoing at the time that the conduct
8 occurred Conduct is willful, wanton, or reckless when it
9 is committed with a deliberate intention under such
10 circumstances that a person of ordinary reason and prudence
11 would be conscious of it as an invasion of another's
12 rights Again, this must be -- punitive damages must be
13 proven by clear and convincing evidence as I've described
14 that to you before And punitive damages are for the
15 benefit of society and for the public interest, not as
16 actual damages, but in addition to actual damages

17 Before making an award of punitive damages, ladies and
18 gentlemen, you may consider certain factors or elements
19 that may be pertinent in this case First of all, you must
20 consider the character of the wrong Any penalty that's
21 imposed should take into account the reprehensibility of
22 the conduct, the harm caused, the defendant's awareness of
23 the conduct's wrongfulness, the duration of the conduct,
24 and any concealment Thus, any penalty imposed should bear
25 a relationship to the nature and extent of the conduct and

1 the harm caused, including any actual damage award that's
2 made by you

3 Next you should consider whether the award and the
4 amount of any punitive damages may deprive the defendant of
5 any profits derived from the improper conduct and whether
6 the ill-gotten profit should be properly awarded to the
7 plaintiff

8 And finally, any award for punitive damages must be
9 limited to punishment, and thus must not effect economic
10 bankruptcy To this end then, the defendant's ability to
11 pay any punitive damages award should be considered or may
12 be considered by you However, economic bankruptcy is not
13 an absolute bar to an award of punitive damages

14 Now, ladies and gentlemen, once you have considered
15 all of the evidence and you've considered the law as I've
16 charged it to you, then you will arrive at your verdict
17 And it will then be time for your foreperson to complete
18 the verdict form, and I will go over the form with you at
19 this time It is a two-page form It says -- starts out
20 (as read) For the breach of contract action, we the jury
21 unanimously find for the plaintiff And then it says
22 "actual damages " There's a line followed by a dollar sign
23 in parenthesis In this particular cause of action, ladies
24 and gentlemen, remember that, as a matter of law, I have
25 already determined that the defendant SEL Properties

1 breached the contract by failing to pay the development fee
2 of \$54,000 So that's why there's no line here for the
3 defendant, because as a matter of law, there -- there
4 should be some damages awarded -- there should be damages
5 awarded to the plaintiff in at -- in at least the amount of
6 \$54,000 As to the remaining claims that have been made by
7 the plaintiff, that is your determination You have to
8 determine whether or not -- you have to first determine the
9 terms of the contract, and whether or not the defendant SEL
10 Properties breached the contract in the other manner --
11 ways and manner that the plaintiff has claimed If you
12 find that the plaintiff has not satisfied that burden by
13 proving by greater weight or preponderance of the evidence
14 that the defendant SEL Properties breached the contract in
15 other manners, then in this case your verdict would be in
16 the amount of \$54,000 for the development fee If,
17 however, you find that the plaintiff has met that burden of
18 proving by a greater weight or preponderance of the
19 evidence that the defendant SEL Properties violated or
20 breached the contract, then you must determine the amount
21 of damages Once you have determined the amount of
22 damages, then you would complete this like you would a
23 check The words go on the line with the numbers behind
24 the dollar sign

25 Once you have considered that particular point, then

1 you go to the second cause of action It says (as read)
2 For the breach of contract accompanied by a fraudulent act
3 cause of action, we the jury unanimously find for --
4 there's a line for plaintiff and it says "punitive
5 damages," or "We find for SEL Properties " As you will
6 recall, the breach of contract accompanied by a fraudulent
7 act requires that there be a breach of contract So -- and
8 the damages would have already been awarded for the breach
9 of contract You must then consider whether or not the
10 plaintiff has proven by clear and convincing evidence that
11 there was a fraudulent act that accompanied the breach If
12 you determine that there has been or there has not been --
13 the plaintiff has not met the burden of proving by clear
14 and convincing evidence that there was a fraudulent act
15 that accompanied the breach, then you would check "for the
16 defendant SEL Properties " If, however, you find that the
17 plaintiff has proven by clear and convincing evidence that
18 there was a fraudulent act that accompanied the breach,
19 then you would go on to -- to award punitive damages in an
20 amount to be determined by you as I've charged it to you
21 Once you have considered that particular claim, then
22 you would go on to the third claim The third claim says
23 (as read) For the tortious interference with contract
24 cause of action, we the jury unanimously find for the
25 plaintiff " There's a line for actual damages and then

1 there's -- followed by the dollar sign, and then there's a
2 line for punitive damages followed by the dollar sign And
3 then there's a space for the -- (as read) "We find for the
4 defendant Stephen Lipscomb "

5 As you will recall, this is a claim made strictly
6 against the defendant Stephen Lipscomb And your inquiry
7 there would be whether or not the plaintiff has proven by a
8 preponderance of the evidence that the defendant Lipscomb
9 interfered with the contract between SEL Properties and the
10 plaintiffs And based upon the law as I've charged on
11 those elements if you find that the plaintiff has not met
12 that burden, then your verdict would be for the defendant
13 Stephen Lipscomb If, however, you find that the plaintiff
14 has proven by a the greater weight or preponderance of the
15 evidence that the defendant Stephen Lipscomb interfered
16 with the contract between SEL Properties and the plaintiff,
17 then you would go on to determine those damages which are
18 caused by the -- by the defendant's interference You
19 would write that on the line for actual damages

20 If and only if you make an award for actual damages do
21 you get to consider the punitive damages In the punitive
22 damages question your inquiry should be this Did the
23 plaintiff prove by clear and convincing evidence that the
24 defendant Lipscomb's conduct was willful, reckless, or
25 wanton? If you find that the plaintiff did not meet that

1 burden then you would not complete anything on the punitive
2 damages line If, however, you find that the plaintiff has
3 proven by clear and convincing evidence that the defendant
4 Lipscomb's conduct was willful, wanton, reckless, done with
5 disregard for the rights of the parties to the contract,
6 then you would determine an amount of punitive damages
7 based upon the factors that I've provided to you And then
8 you would complete the verdict form in that regard

9 Once you have completed the form, Madam Foreperson, no
10 matter what your verdict is then you would need to sign
11 your name and place today's date In addition, ladies and
12 gentlemen, there is one additional form that you will be
13 required to complete and this is as it relates -- this is
14 what we call "special interrogatories " These are
15 questions that will need to be answered that will assist
16 the Court and the parties after a verdict has been reached
17 The question is For the breach of contract cause of
18 action, does the amount of actual damages include an award
19 for Phase 2 and/or Phase 3? Your choices are "yes" or
20 "no " In other words, what we're asking here is that if
21 you determine -- when you -- when you determine the amount
22 of damages or -- that you would complete on this line for
23 the breach of contract action, you need to tell me whether
24 those damages would include an amount that would cover
25 damages rising out of Phase 2 and Phase 3 as discussed

1 throughout the course of this trial If, of course, you've
2 checked "no," then your inquiry would end there And while
3 it's not reflected on the sheet, I'll make sure that you
4 get one that if you check "no," then just at that time,
5 Madam Foreperson, if you'd just sign your name and place
6 today's date If, however, you answer "yes," then question
7 no 2 says If you answer question -- if the answer to
8 question 1 is "yes," how much of your actual damage award
9 is attributable to Phase 1 and/or Phase -- I'm sorry Let
10 me repeat the question If the answer to question 1 is
11 "yes," how much of your actual damage award is attributable
12 to Phase 2 and/or Phase 3? This question is simply asking
13 for you to tell me out of the damages that you've decided
14 to award for the breach of contract how much relates to
15 Phase 2 and Phase 3 And you complete it again like you
16 would a check if it applies, and then at the end, if you'd
17 sign your name again and put today's date

18 Now, ladies and gentlemen, your verdict must be
19 unanimous It must be the verdict of all 11 of you You
20 have been sworn as fair and impartial jurors to determine
21 the facts of this case, based upon the evidence that was
22 presented to you throughout the course of this trial, and
23 based upon my -- my charge of the law to you When you
24 have done that, you -- you will arrive at your verdict and
25 no one will be able to complain about the verdict that you

1 have reached and you would have fully discharged your duty
2 and your responsibility as jurists in this matter

3 Again, ladies and gentlemen, your verdict should not
4 be based upon sympathy, passion, or prejudice Your
5 verdict should simply speak the truth

6 Now, ladies and gentlemen, throughout the course of
7 your deliberations there may be certain questions that may
8 come up Madam Foreperson, any questions that arise, if
9 you will write the question on the yellow legal pad, make
10 sure you sign your name, knock on the door, and give it to
11 the bailiff and we'll try to answer it If you have no
12 questions, then once you have completed the verdict form as
13 well as the special interrogatory form, then you can knock
14 on the door at that time and let them know that you have
15 concluded your -- you have reached a verdict and you're
16 ready to come back into court so that we can receive your
17 verdict in this matter

18 Ladies and gentlemen, lunch has -- has been ordered
19 It may very well be waiting for you or be arriving shortly
20 I ask that during your deliberations you -- you can eat
21 lunch and continue to do that I ask if it's not yet
22 arrived, when it comes, they'll knock on the door, they'll
23 tell you to stop your deliberations, and they'll bring your
24 lunch in Once they have left then you can resume your
25 deliberations at that point

1 Now, ladies and gentlemen, I'm going to ask that you
2 retire to the jury room, but I ask that you not begin
3 deliberations just yet. The law requires that I consult
4 with the attorneys to see if I have omitted anything from
5 my charge. If I have not omitted anything then all the
6 exhibits, as well as the forms, will come into you and you
7 may begin your deliberations at that particular point. But
8 I ask that you wait until you are given further
9 instructions. I ask that you retire to the jury room at
10 this time. Thank you.

11 (Jury exits at 12 30 p m)

12 THE COURT Are there any exceptions to the charge by
13 the plaintiff?

14 MR BOWENS No, Your Honor

15 THE COURT Are there any exceptions to the charge by
16 the defendant?

17 MR BABCOCK Yes, Your Honor. As to the charge for
18 tortious interference with the contract, we talked about
19 that charge last night. I had raised a concern about the
20 damages for breach of contract such as lost profits
21 morphing into that cause of action. And I understood there
22 would be portions of the charge saying that the contract
23 damages were not for the tortious interference. That was
24 separate lost profits.

25 THE COURT And what I tried to do was to tell them

1 specifically -- I didn't go so far as to say they're two
2 separate lost profits, but what I tried to say is that the
3 damages had to arise from the defendant's interference with
4 the contract, those -- those damages that resulted from his
5 interference

6 MR BABCOCK I understand I just find -- I'm still
7 concerned about the lost profits issue, because there was
8 no testimony as to lost profits beyond the contract lost
9 profits That's the only testimony as to any lost profits
10 in this case are the contract lost profits

11 (Sotto voce discussion between Mr Bowens and Mr
12 Catone)

13 MR BOWENS Your Honor, I think if the jury finds
14 that Mr Lipscomb procured a breach of contract, if it was
15 interference, then the damages that flow from that are --
16 if lost profits are found to flow from that then that would
17 be appropriate as the -- as the Court has already charged

18 MR BABCOCK But they've got to be separate lost
19 profits from the contract Those -- any lost profits for
20 the contract award is going to be in the first cause of
21 action

22 MR BOWENS Not necessarily Not necessarily They
23 could -- they could find \$54,000 for the breach of
24 contract, and then find that the interference caused lost
25 profits And that would be the result I think the

1 Court's charge is an accurate statement of law

2 THE COURT I think it's correct I think what you're
3 concerned about is whether or not they're getting a double
4 recovery

5 MR BABCOCK That's exactly right, Your Honor

6 THE COURT But I think -- from my understanding is
7 that there's --they're separate and apart, that any
8 interference, if there is any, relates solely to the
9 defendant in this individual capacity, and that those lost
10 profits may very well -- if -- if it's interference with
11 the contract caused those lost profits, then I think Mr
12 Bowens is correct They would be entitled to -- to render
13 those lost profits even -- because -- because the contract
14 was not able to be performed And the -- and the defendant
15 procured the breach of the contract that prevent the --
16 prevented it from being performed

17 MR BABCOCK ' But they only get the lost profits one
18 time They don't get them twice

19 THE COURT Well, in this case they do They get them
20 twice in my view because one is -- is strictly for the --
21 the breach of contract as it relates to the parties of the
22 contract, and the other one is separate and apart from any
23 contractual obligations With SEL, Lipscomb interfered
24 with the contract

25 MR BABCOCK I don't see how you can get -- if the

1 jury were to award -- I don't think the jury can award the
2 same lost profits in the two causes of action That would
3 be double dip, because the same lost profits

4 MR BOWENS Your Honor, there -- there are two
5 potential lost profits there's lost profits from Phase 1,
6 which is in dispute That could be part of the contract
7 breach Then there's lost profits from Phase 2 and 3 which
8 -- which could be part of the tortious interference cause
9 of action So there are two ways they could award lost
10 profits under both causes of action

11 THE COURT In other words, to me it's not -- they can
12 be -- they can be awarded the same -- the same profits
13 twice because they're against two totally different
14 entities It's not -- it's not a question of election of
15 remedies in this case because it's a -- a completely
16 separate and distinct acts that were done by Lipscomb,
17 that's separate and apart from anything with SEL And --
18 and that's -- and that's the whole point about the tortious
19 interference is that it has to be against the individual
20 and not arising out of any actions that he took as it
21 related to the profits on behalf of SEL -- I mean, what he
22 did on behalf of SEL So I -- I -- I think that's -- I
23 think I've -- I've made the correct statement of the law
24 and I think you're just going to have to take that one up

25 MR BABCOCK If you could just show my exception ---

1 THE COURT Yes

2 MR BABCOCK --- to that charge, Your Honor

3 THE COURT I -- and I -- I -- I understand what your
4 question is, but let's put it this way The plaintiff
5 could have had a cause of action against SEL on the breach
6 of contract and then turned around and filed a separate
7 lawsuit against Mr Lipscomb individually for the tortious
8 interference and would have been entitled to recover the
9 same -- the same lost profits

10 MR BABCOCK I understand Your Honor's ruling We're
11 in a little different situation here where Your Honor's
12 already ruled -- I agree with Her Honor's ruling as a
13 matter of the law that they are toward damages for the
14 breach of contract That's been -- you told them that So
15 we're not in a situation where they might or might not
16 award contract damages They're going to award whatever
17 they think the contract damages are

18 THE COURT Sure

19 MR BABCOCK And that makes the situation a little
20 bit different because we know in that first cause of action
21 all of the lost -- losses with regard to contract ---

22 THE COURT The only -- the only thing that's
23 complicated this situation is that this particular
24 defendant, Mr Lipscomb, is intertwined and interrelated in
25 the contractual relationship And if he had been a third

1 party that was not part -- not a member of SEL, not a --
2 you know, in any way, it would not be an issue And so
3 that's -- and that -- and that's what I'm looking at in
4 terms of whether or not there's -- they're entitled to
5 bring the claim

6 MR BABCOCK I understand If you'll just put my --
7 just for the record, show my exception And also, Your
8 Honor, obviously, we would take exception to any of the
9 charges -- and this is just for the record -- inconsistent
10 with our directed verdict motions That we don't waive
11 anything on that

12 THE COURT There -- it's noted What's been pointed
13 out to me on the verdict form is that it only says
14 "Plaintiff" individually Guess I need to put an "s" on
15 Plaintiffs, and so we'll change that And then on the
16 special interrogatory there'll be a -- a place for the
17 foreperson to sign And as soon as those get printed, I'll
18 -- I'll give you a chance to look at it again just to make
19 sure it's correct And then -- and please, in the interim,
20 double check to make sure we've got all the exhibits up
21 here, that they didn't get -- didn't walk away during the
22 break after the closing arguments

23 Counsel, we'll just stand in recess till we hear from
24 them I would say hang around for a couple of minutes I
25 usually get questions immediately and then after that if --

1 I'm sure you all will want go and get something to eat If
2 you'll just leave your numbers how I can reach you in the
3 event they have a question I need to get a hold of you
4 Thank you

5 MR BOWENS Thank you

6 MR BABCOCK Thank you, Your Honor

7 (Off the record at 12 47 p m)

8 (On the record at 12 56 p m)

9 THE COURT I received a note from the jury It says
10 (as read) "Your Honor, please provide us with a copy of
11 your charge We would also like to have a calculator "

12 I generally don't give them copies of my charge
13 Matter of fact, my charge is not in a condition that I can
14 let them have it What I told them is I do not have a copy
15 of the charge available for them, but if they need to re-
16 hear a portion of the charge, to please tell me what part
17 And we've got a calculator to send back to them If there
18 are any changes or any exceptions to that or --

19 MR BOWENS No, Your Honor

20 MR BABCOCK No, Your Honor

21 THE COURT Okay Thank you

22 (Off the record at 12 56 p m)

23 (On the record at 4 13 p m)

24 THE COURT Be seated, please I understand that the
25 jury has reached a verdict Is there anything that we need

1 to take up before we bring them in?

2 MR BOWENS No, Your Honor

3 MR BABCOCK Nothing from the defense, Your Honor

4 THE COURT You may ask them to come in, please

5 THE BAILIFF Yes, ma'am

6 (Jury enters at 4 22 p m)

7 THE BAILIFF Jury's seated, Your Honor

8 THE COURT Madam Foreperson, I understand that you
9 all have reached a verdict Is that correct?

10 FOREPERSON Yes, ma'am

11 THE COURT If you'd pass the forms to the bailiff,
12 please

13 FOREPERSON (Complies)

14 THE COURT Madam Clerk, if you would, please, read
15 the verdict form and the special interrogatories

16 DEPUTY CLERK The State of South Carolina, County of
17 Richland, for the Court of Common Pleas in the Fifth
18 Judicial Circuit, Civil -- Civil Action No 2005-CP-40-
19 00749, in the matter of Dutch Fork Development Group, LLC
20 and Dutch Fork Realty, LLC vs SEL Properties, LLC and
21 Stephen Lipscomb, we -- for the breach of contract cause of
22 action, we the jury unanimously find for the plaintiffs
23 \$299,000 -- \$299,144 For the breach of contract
24 accompanied by fraudulent act cause of action, we the jury
25 unanimously find for the plaintiffs \$1,000,000 For the

1 tortious interference with contract cause of action, we the
2 jury unanimously find for the plaintiffs \$3,000,000 in
3 actual damages, \$1,000,000 punitive damages Signed, the
4 foreperson

5 Madam Foreperson, is this your verdict and the verdict
6 from the entire jury?

7 FOREPERSON Yes, ma'am

8 DEPUTY CLERK Thank you

9 THE COURT You need to read the special
10 interrogatories, please

11 DEPUTY CLERK Special Interrogatories For the
12 breach of contract cause of action, does the amount of
13 actual damages include an award for Phase 2 or Phase 3?
14 "Yes " If the answer to question 1 is yes, how much of
15 your actual damage award is attributable to Phase 2?
16 "\$54,000 "

17 THE COURT Do the parties wish to poll the jurors?

18 MR BOWENS No, Your Honor

19 MR BABCOCK Yes, Your Honor

20 THE COURT Ladies and gentlemen, the clerk will ask
21 you two questions Those questions will be Was this your
22 verdict, and is it still your verdict? And I ask that you
23 answer according to your conscious She will call your
24 names individually and ask you those questions

25 DEPUTY CLERK Carolyn Emeneker, was this your

1 verdict?
2 JUROR EMENEKER Yes
3 DEPUTY CLERK Is it still your verdict?
4 JUROR EMENEKER Yes
5 DEPUTY CLERK Clarence Fox
6 JUROR FOX Yes
7 DEPUTY CLERK Was this your verdict?
8 JUROR FOX Yes
9 DEPUTY CLERK Is it still your verdict?
10 JUROR FOX Yes
11 DEPUTY CLERK Terrance Hughes
12 JUROR HUGHES Yes
13 DEPUTY CLERK Was this your verdict?
14 JUROR HUGHES Yes
15 DEPUTY CLERK Is it still your verdict?
16 JUROR HUGHES Yes
17 DEPUTY CLERK Charles Meehan, was this your verdict?
18 JUROR MEEHAN Yes
19 DEPUTY CLERK Is it still your verdict?
20 JUROR MEEHAN Yes
21 DEPUTY CLERK Jeffrey Yetter
22 JUROR YETTER Yes
23 DEPUTY CLERK Was this your verdict?
24 JUROR YETTER Yes
25 DEPUTY CLERK Is it still your verdict?

1 JUROR YETTER Yes
2 DEPUTY CLERK Elizabeth Wright
3 JUROR WRIGHT Yes
4 DEPUTY CLERK Was this your verdict?
5 JUROR WRIGHT Yes
6 DEPUTY CLERK Is it still your verdict?
7 JUROR WRIGHT Yes
8 DEPUTY CLERK Beverly Conley
9 JUROR CONLEY Yes
10 DEPUTY CLERK Was this your verdict?
11 JUROR CONLEY Yes
12 DEPUTY CLERK Is it still your verdict?
13 JUROR CONLEY Yes
14 DEPUTY CLERK Dorothy Moore
15 JUROR MOORE Yes
16 DEPUTY CLERK Was this your verdict?
17 JUROR MOORE Yes
18 DEPUTY CLERK Is it still your verdict?
19 JUROR MOORE Yes
20 DEPUTY CLERK Marlene Reese
21 JUROR REESE Yes
22 DEPUTY CLERK Was this your verdict?
23 JUROR REESE Yes
24 DEPUTY CLERK Is it still your verdict?
25 JUROR REESE Yes

1 DEPUTY CLERK Lori K Sjoberg, I'm sorry Was this
2 your verdict?

3 JUROR SJOBERG Yes

4 DEPUTY CLERK Is it still your verdict?

5 JUROR SJOBERG Yes

6 DEPUTY CLERK Corliss Sykes

7 JUROR SYKES Yes

8 DEPUTY CLERK Was this your verdict?

9 JUROR SYKES Yes

10 DEPUTY CLERK Is it still your verdict?

11 JUROR SYKES Yes

12 DEPUTY CLERK Jury's been polled, Your Honor

13 THE COURT Ladies and gentlemen, the Court is not
14 concerned with your verdict so much as I'm concerned with
15 the basis and the manner in which you reached your verdict
16 You listened to the evidence as it was presented to you
17 throughout the course of this trial You also listened to
18 my instructions as to the law You then determined the
19 facts in accordance with your view of what that evidence
20 showed and you applied the law as I charged it to you and
21 then you arrived at your verdict And having done so then
22 no one can complain about the verdict that you've reached
23 and you have fully discharged your duty and your
24 responsibility as jurors in this matter

25 On behalf of the State of South Carolina and Richland

1 County, I'd like to thank you very much for your service in
2 this matter And I will say for your extraordinary service
3 in coming to -- to finish out the trial after it continued
4 over for a week I will tell you that I have discussed
5 your jury service compensation with Ms Scott and she's
6 indicated that there is -- there are funds in the budget
7 So I've authorized her to double your payment for your
8 service in this particular trial so you will be given a
9 little bit extra in your checks from her I ask that you
10 return to the jury room and the clerk will come and if you
11 need any return to work forms or anything else, then she
12 can provide those to you If you will leave us with the
13 plastic portion of your badge and the orange portion is
14 your souvenir for your services Thank you all very much
15 I appreciate it

16 (Jury exits at 4 28 p m)

17 THE COURT Are there any motions at this time?

18 MR BOWENS None from the plaintiff, Your Honor

19 MR BABCOCK Your Honor, we respectfully request 10
20 days to file our post-trial motions, Your Honor

21 THE COURT I will grant you the opportunity to -- to
22 do that

23 (Sotto voce discussion between the Court and law
24 clerk)

25 THE COURT Pursuant to the provisions of *Gamble vs*

1 *Stephenson and James vs Horace Mann Insurance Company*, I'm
2 required to conduct a post -- post-trial review of any
3 reward for punitive damages that's been awarded by the
4 jury In this case, the jury awarded actual damages of
5 \$299,144 on the breach of contract, and awarded punitive
6 damages arising out of the breach of contract accompanied
7 by a fraudulent act in the amount of \$1,000,000 Further,
8 as it relates to the claim against Mr Lipscomb
9 individually, the jury made an award of \$3,000,000 actual
10 damages and \$1,000,000 in punitive damages

11 The factors that are to be considered in determining
12 if a punitive damage award comports with the due process
13 requirements are the defendant's degree of culpability,
14 the duration of the conduct, the defendant's awareness or
15 concealment, the existence of similar past conduct, the
16 likelihood the award will deter the defendant or others
17 from like conduct, and whether the -- whether the award is
18 reasonably related to the harm likely to result from the
19 conduct, the defendant's ability to pay, and other factors
20 that may be appropriate to consider

21 While I'm required to make a review based upon all
22 these factors, I do not have to make specific findings as
23 to each particular element Therefore, I find that based
24 upon the evidence that was presented in this particular
25 case, that there was evidence for the -- the jury to make a

1 determination as to the award of punitive damages The
2 conduct had to be clear and convincing evidence of a
3 fraudulent act I find that -- that that, of course, was a
4 jury question and in regarding the defendant's awareness of
5 the concealment, the defendant's agree -- degree of
6 culpability and the duration of the conduct and the
7 awareness of -- or concealment, I find that -- that the
8 evidence basically is that throughout the course of the
9 contract period that there was knowledge -- at least there
10 was an attempt to conceal some conduct that the -- the
11 defendant was engaging in activities with disregard for the
12 -- the contract, specifically as it relates to the sale --
13 potential sale of the Phases 2 and 3 to an outside buyer
14 without the knowledge of the plaintiffs In addition, the
15 changing of the plans, there is evidence there that the
16 plans were changed without the knowledge of the plaintiffs
17 and that that caused considerable delay It also caused
18 problems with respect to being able to go forward The
19 information relating to the -- the plat and the bonded
20 plat, that that also would delay the activity That those
21 were all factors that the jury could have considered and
22 that there's evidence to support that And that that
23 conduct would have been fraudulent acts in conjunction with
24 the breach of the contract

25 I find that the punitive damages awards of \$1,000,000

1 in the two causes of action certainly would be likely to
2 deter the defendant and others from similar conduct While
3 I believe that the -- what was sought in the terms of
4 actual damages, at least for the breach of contract, I
5 believe was significantly more than what was actually
6 awarded, I think that it -- it was within the -- the realm
7 of what the -- of the damages that were set forth by the --
8 or produced by the plaintiff for the jury to be able to
9 make that determination, and that the -- the award of
10 \$1,000,000 would be sufficient to deter someone like the
11 defendants from engaging in further conduct, particularly
12 with respect to the fact that the defendants would have
13 been the persons or the entity responsible for providing
14 the financing And so, therefore, I find that as a factor
15 of their ability to pay that they have in the past been
16 able to obtain financing and while there might be cash flow
17 difficulties, I think that that was -- that it is not
18 unreasonable under the circumstances I think also that
19 there is evidence that the award is reasonably related to
20 the harm that resulted from -- that was likely to result
21 from the conduct in view of the evidence relating to the
22 damages that were sustained, the lost profits in
23 particularly in -- in the manner in which the -- the
24 contract was fulfilled or attempted to be fulfilled by the
25 parties I think that the \$1,000,000 would have been

1 reasonable under the circumstances, considering also that
2 the funding for the project would have been far in excess
3 of \$1,000,000, and that is was related to the -- the
4 conduct in the -- in the preventing of the plaintiffs from
5 being able to -- to fulfill its bargain or in its -- duty
6 and responsibilities under that contract

7 In looking at whether or not the punitive damages
8 comports with due process in terms of the amount and
9 whether the amount is grossly excessive, if I -- if I round
10 off the actual damages to \$300,000 which is a -- not --
11 it's not far off from \$300,000, that \$1,000,000 in relation
12 to that is -- is basically three times the actual damages
13 I don't find that that is outrageous It is not -- it
14 doesn't shock the conscious It's not excessive and the
15 same as it relates to the tortious interference with
16 contract claim in which there was a \$3,000,000 in actual
17 damages and -- and \$1,000,000 in punitive damages The
18 punitive damages is just a third of -- of what the actual
19 damages are I don't find that that is outrageous or
20 excessive and nor does it shock the conscious under the
21 circumstances

22 As always with damages, the amount of damages, whether
23 they were actual or punitive, remain largely within the
24 discretion of the jury ' And the -- in this particular
25 case, the jury made the determination that Mr Lipscomb was

1 -- was acting in his individual capacity, that he was not
2 acting on behalf of SEL at the time that he engaged in --
3 in conduct relating to the -- both the sale of lots and the
4 commissions and that his conduct was such that he engaged
5 in activities to benefit himself and -- and given the fact
6 that we had the discussion yesterday about whether or not
7 he would also be personally liable in light -- even if he
8 were representing the interest of K & L, having decided
9 that the case law supports the claim that a person can be
10 personally liable even if -- even if acting in the course
11 an scope of employment and in the course and scope of the
12 agency as it relates to K & L That became a jury
13 determination and the jury made such a finding as evidence
14 by its verdict in this particular matter

15 I am sure that I did not list all of the basis by
16 which -- I -- I did not list all of the -- the claims made
17 by the plaintiff as to the fraud or the fraudulent acts,
18 and to the extent that I omitted any, I will say that those
19 -- all those issues were raised during the course of
20 various motions throughout the course of the trial And to
21 the extent that I allowed those issues to go to the jury,
22 the jury ultimately made factual findings relating to those
23 issues and basically found in favor of the plaintiff such
24 that I think that is sufficient evidence in the record to
25 be able to support the claims along -- in those regards

1 If there are specific factual issues that you feel that I
2 need to address, if you will please point them out to me
3 and I'll be happy to consider those individually or if I've
4 omitted anything in particular

5 Is there anything further as it relates to the post-
6 trial punitive damages review?

7 MR BOWENS Not from the plaintiff, Your Honor

8 MR BABCOCK No, Your Honor I understand the --
9 Your Honor's findings and conclusions are just involving
10 the punitive damages post-trial review is that correct?

11 THE COURT At this particular point, yes, sir And
12 you still have the opportunity to raise whatever issues you
13 need to raise in your post-trial motions

14 MR BABCOCK Thank you, Your Honor

15 THE COURT In conjunction with that also I believe we
16 -- it was decided that the plaintiffs would submit separate
17 information as it relates to attorney's fees, is that
18 correct?

19 MR BOWENS That's correct, Your Honor

20 THE COURT And that that should also be filed within
21 10 days providing a copy to the defense, and I will give
22 the defense five days to respond to that accordingly And
23 of course the plaintiff will have an opportunity to respond
24 to any post-trial motions that are made by the defense I
25 will remind you all that in addition to filing them with

1 the Clerk's Office, you need to provide a copy of those to
2 me so that I know that they've been filed and so that I can
3 address them as quickly as possible

4 Any other issues at this point?

5 MR BOWENS Just briefly, Your Honor During the
6 course of the litigation, one of the lots in Phase 4, I
7 believe, was sold, and \$17,500 was placed with our law
8 firm's escrow account to hold in -- in escrow until the
9 trial was concluded Given that the defense has admitted
10 liability in -- in excess of that amount and at least
11 \$54,000, we would like the Court's permission to go ahead
12 and disburse those funds as part of the damages in the
13 case I don't think there's any dispute that we are
14 entitled to at least \$54,000 and we have those funds that
15 all in our escrow and should be allowed to be disbursed at
16 this time

17 THE COURT Anything from the defendant? You said it
18 was \$14,000?

19 MR BOWENS \$17,500

20 MR BABCOCK Your Honor, beg the Court's indulgence
21 for one minute

22 Your Honor, there doesn't need to be a Court ruling on
23 that We -- we'll agree to release the funds from the
24 escrow account

25 THE COURT REPORTER Say -- say that one more time for

1 me, Mr Babcock

2 MR BABCOCK I'm sorry It doesn't need to be a
3 ruling by the Court We'll agree to release the money from
4 the escrow account

5 THE COURT Okay And so the defendant's basically
6 agree to release the funds

7 (Sotto voce discussion between Mr Babcock and Mr
8 Bowens)

9 THE COURT Is there anything further?

10 MR BOWENS Not from the plaintiff, Your Honor

11 MR BABCOCK Not from the defendants, Your Honor

12 THE COURT Thank you all very much

13 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED BONNIE H KELLY, OFFICIAL COURT REPORTER FOR THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE EXCERPT OF A TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 7TH DAY OF NOVEMBER, 2007

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO

BONNIE H KELLY

COLUMBIA, SOUTH CAROLINA

NOVEMBER 14, 2007

11/1/07

I have been scheduled for training
for a new job on Monday, 11/5/2007.

The next available training dates are
from 11/5/07 to 11/12/07. I have
no training dates. I have been
told I cannot be a pilot.

Tuesday, 11/6/07 I have a doctor
appt. at 2:15pm which took me
two hours to get there.

Juan 249



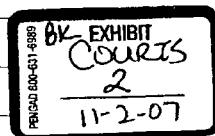
I WON'T BE ABLE TO
CONTINUE TO SERVE NEXT WEEK.

I AM SELF-EMPLOYED & HAVE
THIS CURRENT WEEK'S WORK TO
COMPLETE NEXT WEEK.

I ALSO STATED ON MY REPORT
ON MY GREEN SUPPLEMENT(?)
THAT I CARE FOR TWO MEN
IN THEIR 80'S WHO RELY
ON ME FOR THEIR DAY-TO-
DAY SUSTENANCE. I ASKED
IN THAT NOTE NOT TO BE
INVOLVED IN A LONG-RUNNING
CASE, OR ONE THAT WOULD
RUN LATE IN THE EVENING.

SO "NO" FOR ME, PLEASE!

JUROR '257



Garber Reporting Service



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ORAL DEPOSITION OF
RONNIE O. COLSON

AUGUST 24, 2007

DUTCH FORK DEVELOPMENT GROUP, II LLC AND DUTCH FORK REALTY
LLC

VS

SEL PROPERTIES, LLC AND STEPHEN E LIPSCOMB

C A NO 05-CP-40-0749

REPORTER LAURA S DECILLIS

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STATE OF SOUTH CAROLINA	THE COURT OF COMMON PLEAS
	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	C A NO 05-CP-40-0749
DUTCH FORK DEVELOPMENT GROUP,)	
II, LLC AND DUTCH FORK)	
REALTY, LLC,)	
	) DEPOSITION OF
PLAINTIFFS,)	RONNIE O COLSON
	) AUGUST 24, 2007
VS)	
	)
SEL PROPERTIES, LLC AND)	
STEPHEN E LIPSCOMB,)	
	)
DEFENDANTS)	
- - - - -)	

Deposition on oral examination of Ronnie O Colson, reported by Laura S DeCillis, Certified Court Reporter and Notary Public in and for the State of South Carolina, said deposition taken pursuant to notice and in accordance with the South Carolina Rules of Civil Procedure, at the Law Offices of Lewis & Babcock, LLP, 1513 Hampton Street, Columbia, South Carolina, on Friday, the 24th day of August 2007, scheduled for 8 30 a m and commencing at the hour of 8 52 a m

RONNIE O COLSON

APPEARANCES

Representing the Plaintiff

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Columbia, South Carolina 29201

Also Attending

Billy Melton

D Melton

Michael M Arrison, Videographer

RONNIE O COLSON

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RONNIE O COLSON

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RONNIE O COLSON

1 This deposition is taken in accordance
2 with the South Carolina Rules of Civil
3 Procedure

4 It is agreed and stipulated by the
5 deponent and respective counsel that the reading
6 and signing of the deposition by the deponent is
7 expressly waived

8 VIDEOGRAPHER This is the videotaped
9 deposition of Mr Ronnie Colson, taken by the
10 defendants in the matter of Dutch Fork Development
11 Group, II, LLC, et al , plaintiffs, versus SEL
12 Properties, LLC, et al , defendants, filed in the
13 Court of Common Pleas, State of South Carolina,
14 Richland County, Case Number 05-CP-40-0749

15 This deposition is being held at the law
16 office of Lewis & Babcock, 1513 Hampton Street,
17 Columbia, South Carolina, on Friday, August 24th,
18 2007 My name is Mike Arrison from the firm of
19 Carolina Legal Video Services The court reporter is
20 Laura DeCillis from Garber Reporting Service

21 We're going on the record at 8 52 a m
22 Counsel will now state their appearance for the
23 record

24 MR THOMAS Brady Thomas I'm the
25 attorney for the defendant, SEL Properties and Stephen

Garber Reporting Service
803-256-4500

0001297

RONNIE O COLSON

1 E Lipscomb

2 MR BOWENS Glenn Bowens, counsel for the
3 plaintiffs, Dutch Fork Development Group, II, and
4 Dutch Fork Realty

5 RONNIE O COLSON, having been duly
6 sworn, testified as follows

7 EXAMINATION

8 BY MR THOMAS

9 Q Mr Colson, we've met previously I'm
10 Brady Thomas I'm going to be the lawyer taking your
11 deposition today

12 A Okay

13 Q Under the Rules of Civil Procedure, I'm
14 required at the beginning to tell you a couple of
15 things First, if you have any questions about the
16 questions that I ask today or if you have any
17 questions about any terms I use, I'd appreciate it if
18 you could direct your questions to me and I'll do the
19 best I can to answer them for you

20 Also, at any time, if you wish to take a
21 break for any reason, just let me know and we'll
22 gladly accommodate you

23 A Okay

24 Q Mr Colson, how old are you?

25 A 41

RONNIE O COLSON

1 Q And where do you live?

2 A Greenville, South Carolina

3 Q What do you do for a living?

4 A I'm a banker, National Bank of South
5 Carolina

6 Q And how long have you worked there?

7 A 14 years

8 Q What is your job at NBSC?

9 A I'm the City Exec of Greenville

10 Q And what did you do at NBSC before that?

11 A I was -- I ran half the city's --
12 basically, it's the same thing here in Columbia

13 Q And as a City Exec, what do you do?

14 A You know, have relationships, commercial
15 lending, coaching, you know Responsibilities of all
16 the branches fall under me and all the commercial
17 lenders

18 Q Are you familiar with a development named
19 Courtyards of Rolling Creek?

20 A Yes

21 Q And what do you know about that
22 development?

23 A That's a development that I lent money on
24 back in 2000 to Steve Lipscomb to start -- to purchase
25 the land, to acquire the land, and then the

RONNIE O COLSON

1 development loan was in '01 the following year, within
2 a year

3 Q And who was the development loan to?

4 A SEL -- no Yeah SEL Properties

5 Q And when you say that you lent money, what
6 process was involved in lending that money?

7 A It was a development loan which we set up
8 for approximately \$2,133,775, and a portion of that
9 was to pay out the land loan which was about 800, and
10 the difference was for the development of the first
11 phase of the property which turned out to be 57 lots
12 Originally, it was going to be 60 With some changes
13 made, it ended up being 57 lots, which would put in
14 the infrastructure and everything for the loan

15 Q And you said that 800,000 was used to pay
16 off another loan?

17 A Approximately

18 Q Was that the 2000 loan that you had --

19 A It's for the land, to buy the land That
20 and the land was the -- all the acreage, I believe,
21 was 122 acres

22 Q And in connection with the decision to
23 grant the loan, did you hold any meetings?

24 A To grant the loan -- with Steve Lipscomb,
25 yes

RONNIE O COLSON

1 Q And what were you told was the purpose for
2 the loan?

3 A To, originally -- in reference to the
4 development loan or the land loan?

5 Q The development loan

6 A The development loan? To develop the
7 loan -- develop the first phase of the property, which
8 would be approximately 57 to 60 lots, and would sell
9 out those lots and then start -- potentially start
10 phase II depends on -- depending on that It would
11 take approximately two years to sell out those lots

12 Q And what was the term of the loan, the
13 length?

14 A Two years It's a two-year development
15 loan, which is interest only for two years It's
16 really a line where they draw on it as they need it
17 for the requirements for the draws of the contractor
18 that puts in the infrastructure At that point in
19 time, there was an interest reserve that was set up
20 for the first four months And, really, the first
21 four months was really the -- what it would have taken
22 to set up the -- to put in the infrastructure And
23 then at that point forward, the sales of the lots
24 would have, you know, acquired -- covered the rest of
25 the interest expense over the time period

RONNIE O COLSON

1 Q And laymen, like myself, can you explain
2 to me, when you say it's a line that they draw on,
3 what does that mean?

4 A It's a line of commitment, which it's not
5 a revolving line What happens is, it's like -- well,
6 it's like if you want to build your house, you have a
7 construction line and you draw on it as requests are
8 made for draws of completion, and that's how that
9 works

10 Q So it would be fair to say then, for this
11 development loan, there was two million in change made
12 available to SEL Properties, and then as they would
13 need it, they would come to --

14 A They would request it, AIA documentation
15 request, which is a form That's the generic form for
16 all contractors And what happens is, we get the draw
17 request We get a project inspector to go out there
18 and review and make sure everything is done, and then
19 we advance on the line to cover the expense for that
20 contractor

21 Q Okay And how did you all come up with
22 the duration, the length of the loan?

23 A Two years That's kind of the norm for
24 development loans That, at least, it -- most of the
25 time in development loans, they could be within two to

RONNIE O COLSON

1 three years Two years is kind of the generic norm
2 that you would set for different phases In this
3 aspect, we set it for two years for phase I, because
4 that's what was displayed that we would be able to
5 reduce the debt to little to nil within the first 24
6 months by the sale of lots of approximately two per
7 month, and that's how we underwrite -- that's how I
8 underwrote the loan, two lots per month for the sale
9 which would -- does not equate to 57, but it equates
10 to 48

11 Which, at that point in time at the end of
12 the two years, it would have been reduced to about 500
13 and some odd thousand dollars which, therefore, would
14 have been sufficient because we had residual land
15 there, which is the remaining land that has not
16 been -- the infrastructure has not been put in and
17 has not been platted for lots

18 As well as, we took a \$232,000 certificate
19 of deposit, which is cash, as collateral So,
20 therefore, we would have had sufficient funds to cover
21 the residual amount So we were okay to start that
22 and then in reference to having a majority of the
23 property sold or lots sold within the first two years
24 And then as that time when he brings in phase II
25 request, then what we would have done was roll over

RONNIE O COLSON

1 the balance in the phase II loan and still have the
2 collateral and whatever remaining lots are on the
3 phrase I loan and start the phase II

4 Q Okay And you mentioned a moment ago a
5 two-lot per month projection Where did you get that
6 number from?

7 A That was communicated to me that this is
8 what it would take -- this is what they would sell,
9 two per month, to pay out -- not to pay out the loan,
10 but this was what is the protection of what was
11 displayed to me And that's how I underwrote it If
12 they'd have come to me and said, well, we could only
13 sell one per lot, well, that would not cut it

14 Q What do you mean, it would not cut it?

15 A Well, I mean, one lot per month wouldn't
16 even have, you know, 24 months wouldn't even put a
17 dent in the loan

18 Q Does that mean that you --

19 A Yeah I mean, in other words, you
20 wouldn't have had a two-year development loan You
21 may have had a four-year development loan, which
22 you're developing property and you don't want a loan
23 on the property like that out for that long It's
24 specifically for that development It's specifically
25 supposed to be repaid by the sale of those lots

RONNIE O COLSON

1 Q And the two lots per month projection, who
2 communicated that to you?

3 A It was originally communicated to me from
4 Steve Lipscomb

5 Q And did you ever, prior to granting a
6 loan, have an opportunity to meet anybody from Dutch
7 Fork Development Group?

8 A You know, I remember sitting in two
9 meetings, but I believe they were after we closed the
10 loan

11 Q Okay And what year did you all grant the
12 loan?

13 A November of '01 November 19th was
14 actually when it closed

15 Q And how did the loan perform?

16 A It -- I mean, the interest was being paid,
17 but Steve was having to pull out of pocket to pay the
18 interest after the four months interest coverage The
19 lot sales of the first approximately 20 months had
20 only sold eight lots at that point in time Which,
21 therefore, had a significant balance still on the loan
22 with four months left

23 I met with Steve and talked with him about
24 it and said, you know, basically, you know, what's
25 happening, what's transpiring out there, why aren't

RONNIE O COLSON

1 they -- the reason why we did the initial loan was,
2 one, Steve is a customer, but also with everything
3 that's going out in that market, everything, with new
4 schools being planned, you have the Dutch Fork High
5 School

6 Also, the adjoining property was Rolling
7 Creek, which was very successful in the first phase
8 and the demand there seemed to be, you know, it would
9 not take long to sell out the first phase and start
10 the next phases And so I was really -- you know,
11 when you're sitting there -- out there and almost two
12 years on the loan, which is approximately 20 months
13 and you've only sold eight lots, there was a concern
14 because the loan was still out there

15 Q And did you express this concern to
16 Mr Lipscomb?

17 A Yes

18 Q And --

19 A And he said he was going to be meeting
20 with Dutch Fork Realty and I said, I would like to
21 come along because I'd like to sit in and listen to
22 what's going on, because that has to help me justify
23 why they haven't sold it and what's going to transpire
24 in the future, how are they going to catch up, how are
25 they going to make things happen in order to follow

RONNIE O COLSON

1 what was agreed upon by the bank and SEL Properties

2 Q And did you in fact attend such a meeting?

3 A Yes, I did

4 Q And what occurred at that meeting?

5 A Basically, you know, the response and
6 everything was slow and that, you know, they'd only
7 sold eight, but everything was happening, everything
8 was turning better and doing better They were trying
9 to do some different type of marketing I believe
10 that they introduced at that point in time, or SEL
11 Properties introduced, and I think it was from Dutch
12 Fork, was to do a smaller home, a patio home which was
13 about 1700 to 2,000 square feet And those are the
14 type things that I can recall that was in that
15 meeting So, basically, that was what was justifying
16 to me of, it was just slow

17 Q Okay Did you make any suggestions to
18 Mr Lipscomb as to what he needed to do?

19 A Sell more lots No Other than, you
20 know, look, you're paying -- we've got a big balance,
21 we're paying a lot of the interest, he's having to pay
22 it out of his pocket We're not selling -- the lots
23 are not being sold, you know, in a market that, you
24 know, that I felt was in a great market, one of the
25 reasons why we did this, and -- or a great market, a

RONNIE O COLSON

1 great location And, you know, we've got to sell more
2 lots because, you know, it's coming to maturity, and I
3 think it was about three to four months at that point
4 in time, and we've got to, you know, go from there
5 because we can't -- certainly can't start any other
6 phases until we have some production

7 Q And at what point in time was, approximate
8 point in time were these conversations held?

9 A I believe it was in September of '03, and
10 I cannot give you the exact date

11 Q And you mentioned a minute ago interest
12 Did SEL Properties have to pay more interest due to
13 the lack of sales than they otherwise would have had
14 to?

15 A Oh, yeah I mean, just simple
16 calculation Even if you do two per month, and that's
17 48 for the term of the loan, then, you know, and you
18 do -- well, compared to only selling eight within the
19 first 20 months, there's a considerable amount of
20 difference, over a million dollars

21 Even if you -- within the final 24 months,
22 I believe, or first 24 months, there was 18 that had
23 been sold And if you look at it, that equates to
24 about not even one per month At the ending -- and
25 you look at the ending balance of where it should have

RONNIE O COLSON

1 been compared to what the balance was, there was a
2 little -- about a million dollars left on the loan at
3 that point in time for the renewal of -- or for the
4 maturity of that first phase

5 Q And would it be fair to say then that the
6 slow number of sales cost Mr Lipscomb money?

7 A Yes You know, when you've got to pay the
8 interest on an extra amount of dollars, yes

9 Q Can you give me an approximation of how
10 much interest we're talking about?

11 A I don't know You take a million dollars
12 and whatever the rate was at that point in time and do
13 the calculations of, you know, multiply it times the
14 rate and divide it by 360 and multiple how many days
15 and that's how you'd accumulate how much interest

16 Q Would it be probably over ten thousand
17 dollars?

18 A Oh, yeah Easily, yeah

19 Q And what happened at the expiration of the
20 original loan?

21 A The first development loan? At that point
22 in time, you know, they had sold 18 lots Sales had
23 picked up some within the last three months, they had
24 sold 18 lots The lots were being purchased, not
25 mainly by individuals, but were being purchased by

RONNIE O COLSON

1 builders The first ten, Steve's company purchased
2 two of the first ten I think one of them was for a
3 model home, though And then at that point in time,
4 we had the remaining still -- the remaining balance of
5 approximately a million -- almost a million, four
6 still on the loan 18 lots sold out of 57

7 So you had that remaining left, and what
8 we had to do was renew it for another year And,
9 hopefully, you know, sales would pick up and it would
10 be repaid down to the original, where it should have
11 been at that point in time So they were behind

12 Q And when you say there was 1 4 million
13 dollars still on the loan, where should they have been
14 at that time?

15 A Somewhere around five, six hundred
16 thousand

17 Q And you mentioned a minute ago that a
18 construction company owned by Mr Lipscomb had
19 purchased lots Did you ever have any conversations
20 about K&L Construction?

21 A I knew that it was a develop -- or a
22 construction company that he started, and he was going
23 to -- he explained to me he was going to have to buy
24 some lots in there and build because of my pressure on
25 him to say, why weren't we selling any lots And he

RONNIE O COLSON

1 was going to purchase some lots in there from K&L
2 And he was going to build some spec homes, which would
3 help with the development Because, normally, when
4 you look at a development like that and you're selling
5 lots, when you have infrastructure, as far as the
6 vertical structures going up, people seem to like that
7 and sales usually picks up, from my experience

8 Q And in connection with the loan renewal,
9 how did the terms compare with the loan renewal when
10 we're talking about 1 4 million dollars to be paid off
11 as opposed to 500,000? Were they as favorable as they
12 otherwise would have been?

13 A Explain that to me again?

14 Q Let me try to re-ask that one again On
15 the loan renewal, how did the terms on the renewal for
16 the 1 4 compare to or would have had to have been to
17 pay off 500,000?

18 A Well, if everything would have gone as
19 agreed, then what would have happened was, there would
20 have been a remaining, some residual -- the residual
21 land So you've got a small balance there of -
22 approximately about 500,000 So at that point in
23 time, we probably would have rolled it over into
24 another note until phase II was ready to start
25 That's what probably would have happened And this,

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RONNIE O COLSON

1 we had to extend it for another year in order to --

2 Q And in connection with that renewal, did
3 you have to take more collateral than you otherwise
4 would have had to?

5 A No We had all the existing collateral,
6 all the property and the certificate of deposit So
7 we still had sufficient collateral as far as the land
8 was concerned and the developed lots It's just, the
9 loan was not being repaid

10 Q And how did the original loan compare to
11 your expectations?

12 A How did the original loan compare to --

13 Q Performance

14 A Performance? Well, the performance wasn't
15 good the first two years It started picking up As
16 far as the sales, I was -- I was shocked, to an
17 extent, because of what has happened in that market
18 area, as well as what happened in the next -- or the
19 adjoining development, Rolling Creek I would assume
20 that this loan would have been really -- I mean, these
21 lots would have sold real quick and -- but they
22 didn't, and so we had to make the adjustments at that
23 point in time

24 Q And I've gone over it a little bit
25 already, but what went wrong with the loan

RONNIE O COLSON

1 performance?

2 A The lots weren't selling I mean, to sell
3 the lots was the reason why the loan was made, to
4 develop the lots and infrastructure and sell them and
5 then we get a certain percentage of release and it
6 pays down our loan

7 Q And how would you describe the sales
8 performance by Dutch Fork Realty?

9 A Well, I mean, they were marketing and
10 selling the lots, and which I would have thought the
11 first 20 months was not very good Like I said, the
12 last four months within that three to four months, the
13 sales had picked up But, I mean, 18 within the first
14 24 months is -- lots is not -- compared to what they
15 were supposed to be selling was not very good, no
16 That's what shocked me

17 Q Okay

18 MR THOMAS Could we take a quick break?

19 VIDEOGRAPHER Off the record at 9 14 a m

20 (Recess from 9 14 a m to 9 19a m)

21 VIDEOGRAPHER On the record at 9 19 a m

22 BY MR THOMAS

23 Q Mr Colson, I have a couple more follow-up
24 questions for you and I'll let you go

25 A minute ago, you described the pressure

RONNIE O COLSON

1 that you were placing on Steve Lipscomb Was it your
2 understanding that Steve used K&L to purchase lots
3 because of pressure you were putting on him?

4 A Possibly I mean, you know, I asked, you
5 know -- I know that K&L had purchased one lot in there
6 and SEL Properties purchased a lot, the existing
7 developer, and that one was for the model home When
8 all this happened and, you know, we were behind and
9 everything, I was, you know, really telling Steve,
10 we've got to get this thing going and, you know, we've
11 got to have some type of -- get this loan paid down
12 He could have taken that, as far as me asking him that
13 K&L needs to, I never asked him that, no

14 MR THOMAS I have no further questions

15 EXAMINATION

16 BY MR BOWENS

17 Q Mr Colson, my name is Glenn Bowens I
18 represent the plaintiffs in this case I have a few
19 questions for you

20 A Okay

21 Q You had testified earlier that you
22 extended a loan to Mr Lipscomb to acquire the land?

23 A Uh-huh

24 Q Were you aware that that land had already
25 been acquired before you extended that \$800,000 loan,

RONNIE O COLSON

1 that he already actually owned it?

2 MR THOMAS Object to the form

3 BY MR BOWENS

4 A He may have and I may have just loaned him
5 the money on it after refinancing it, but --

6 Q Because you're aware that that loan that
7 you extended to him was not for a purchase, it was for
8 a refinance, is that --

9 MR THOMAS Object to the form of the
10 question

11 BY MR BOWENS

12 A I just -- I would have to go back and
13 review the purchase of the land I don't recall the
14 purchase of the land I just know that in my
15 underwriting that I had, it was a refinance

16 Q Okay You've testified that you had
17 expected the lots to be sold at a rate of two per
18 month?

19 A Uh-huh

20 Q Okay

21 (PLF EXH 1, Memo 5/2/03, previously
22 having been marked for identification)

23 BY MR BOWENS

24 Q I want to hand you what we've marked as
25 Exhibit 1 to your deposition This is an email from

RONNIE O COLSON

1 Margie Simkins to yourself?

2 A Uh-huh

3 Q And in this, it indicates that lot
4 releases were project at two per month, and it says
5 the loan is 17 months old and to date, we have 6 lot
6 releases leaving us short by 11, and 6 plus 11 is 17
7 That seems like it's one per month Is it one per
8 month or two per month?

9 A It was two per month As you see, we're
10 projecting --

11 Q Yeah I saw that Why is she saying that
12 we're only short by 11? Because that would make it
13 one per month, it seems

14 A I have -- I do not recall why she
15 mentioned that, why she said that

16 Q So your understanding was, it was two per
17 month?

18 A It was two per month

19 Q And that --

20 A If she looked at my underwriting, it's in
21 there

22 Q What is the underwriting that you're
23 talking about?

24 A Our credit memorandum forms

25 Q What is that called? A credit memorandum

RONNIE O COLSON

1 form?

2 A Every bank has these Every bank takes a
3 loan request and if there's a request, especially a
4 commercial loan, they have to underwrite that
5 commercial loan And it's what they -- every bank
6 calls it something different, but our bank calls it a
7 credit memorandum or a CL-1 And what we do is, we
8 underwrite our loan based on the performance of what
9 we -- not the performance, but based on the request of
10 what we see as far as how the loan will be prepaid

11 Q Okay Now, you testified that
12 Mr Lipscomb told you that it would be two per month?

13 A That's the way it was communicated to me
14 and that's how (pauses) --

15 Q And your testimony that over the first 20
16 months of the loan, it didn't perform as you expected
17 it to perform?

18 A Right

19 Q And that's based on the loan date of
20 November 19th, 2001?

21 A Right

22 Q Were you aware that the lots at the
23 Courtyards didn't become available for sale to the
24 public until August of '02?

25 A I don't remember that, no

RONNIE O COLSON

1 Q Well, if we take off from November of '01
2 until August of '02, that takes out a sizable chunk of
3 that time that you characterize as not performing
4 well, wouldn't it?

5 A I believe it would, but if it wasn't
6 available But I'd have to go back and review all
7 my (pauses) --

8 Q Well, if it turns out that August 22nd,
9 2002 was the first day that lots could be sold to the
10 public --

11 A Uh-huh

12 Q -- then that would change your opinion of
13 how well the loan performed over the first 20 months?

14 A Well, if you take from August to August,
15 that's still 12 months

16 Q Right?

17 A And two per month is 24 and they only sold
18 8 within that time period, it's still not performing

19 Q Do you have any reason -- was any reason
20 ever given as to why they didn't sell more than what
21 they did sell in that first 12 months?

22 A What I can recall in the meeting was, it
23 was, you know, the market was slow It's three, four
24 years ago since I've been --

25 Q All right Well, we'll come back around

RONNIE O COLSON

1 to that

2 NBSC never actually required lots to be
3 sold at two per month, did they? That was not a
4 requirement of the loan

5 MR THOMAS Object to the form
6 BY MR BOWENS

7 A Yes, it was It's in my underwriting as a
8 requirement of the loan

9 Q You understood, though, that Dutch Fork
10 Realty had agreed that they would sell, promised to
11 sell 20 percent per year

12 MR THOMAS Object to the form of the
13 question

14 BY MR BOWENS

15 A (Shakes head)

16 Q You didn't know that?

17 A No I did not know that

18 (PLF EXH 2, Commitment, previously
19 having been marked for identification)

20 BY MR BOWENS

21 Q Let me hand you Exhibit Number 2 to your
22 deposition Do you recognize that document?

23 A Uh-huh

24 Q What is that?

25 A It's a commitment letter

RONNIE O COLSON

1 Q Okay Would you turn to page two of
2 that?

3 A (Complies)

4 Q Is that your signature on the back -- I'm
5 sorry Page three Is that your signature on the
6 back?

7 A It sure is

8 Q And Mr Lipscomb's down below?

9 A Yes, sir

10 Q I want you to turn to page two, paragraph
11 14 of that letter

12 A Okay

13 Q It says, this commitment shall be
14 contingent upon a review by the lender and the
15 lender's counsel of all contracts between the borrower
16 and the developers for the development of Courtyards
17 at Rolling Creek, right?

18 A Yes, uh-huh

19 (PLF EXH 3, Agreement, previously having
20 been marked for identification)

21 BY MR BOWENS

22 Q I'm going to hand you Exhibit Number 3 to
23 your deposition I want you to turn to paragraph 8
24 It's the next to the last page

25 A Uh-huh

RONNIE O COLSON

1 Q Look at 8b It requires DFDG and DFR to
2 sell at least 20 percent of the lots per year

3 A Okay

4 Q Is that right?

5 A That's what it says, 20 percent

6 Q So is it fair to say then you, or the
7 bank, was aware that the contract required 20 percent
8 per year, not two per month?

9 A This number 14 does not have any relevance
10 to that This number 14 talks about the review of the
11 contracts as they come in, that they're satisfactory
12 contracts It does not have performance in there
13 That's not this condition or that condition

14 Q Let's look at the condition Of all
15 contracts between the borrower and the developer
16 Now, who was the developer for this project?

17 A Dutch Fork Realty, I believe

18 Q Okay Do you know of any other contracts
19 between the borrower and the developer other than this
20 one?

21 A No

22 Q And you understand that this contract
23 required 20 percent per year, not two per month?

24 MR THOMAS Object to the form of the
25 question

RONNIE O COLSON

1 BY MR BOWENS

2 A That's what it says in there

3 Q But you didn't know that going into this?

4 A To tell you the truth, no, sir, I did not

5 Q Mr Lipscomb didn't provide you a copy of
6 this?

7 A We do have a copy of that, but I reviewed
8 it as, this is what was explained to me, that it was
9 going to be two sold per month And I sat in a
10 meeting that, in that September, that was asked, why
11 was it not selling two per month And that's when
12 they were talking about how slow it was So, to me,
13 they responded to me that, yes, it was being -- they
14 were supposed to be two per month

15 Q No one from Dutch Fork Development Group
16 or Dutch Fork Realty ever told you they had agreed to
17 two per month?

18 A No It was not communicated to me that
19 way

20 Q I'm going to have another exhibit marked
21 to your deposition

22 (PLF EXH 4, New Loan, was marked for
23 identification)

24 BY MR BOWENS

25 Q There was no monthly payment requirement

RONNIE O COLSON

1 by SEL Properties on this loan, was there? It was all
2 due at maturity?

3 A It's interest monthly

4 Q Okay What is Exhibit Number 4?

5 A I don't know I've never seen it before

6 Q Well, at the top, it says A/L New Loan?

7 A Okay

8 Q What does A/L stand for?

9 A To tell you the truth, I've never seen
10 this document before

11 Q In the corner, the top corner there, it
12 says prepared by M Simkins

13 A Margie Simkins

14 Q And who is she?

15 A She helps me, as well as other real estate
16 lenders, monitor loans and --

17 Q But according to this, about halfway down
18 the page, it says principal due at maturity is
19 checked, right?

20 A Yes

21 Q And there's options for monthly or
22 quarterly or semi, is that right?

23 A Right

24 Q So the only payments that were required on
25 the principal were at maturity?

RONNIE O COLSON

1 A Like all development loans, they are

2 Q Other than in your underwriting document,
3 the CL-1 that you referred to --

4 A Uh-huh

5 Q -- is there any other place where anybody
6 agreed that it would be two per month? Anyplace in
7 writing? Anyplace it's required?

8 A Yes My underwriting says it

9 Q Anyplace besides that? Any document that
10 anybody signed or agreed to?

11 A In my underwriting? No I don't --

12 Q Nobody signed your underwriting except
13 you That's your --

14 A No It's approved by -- my underwriting
15 -- when we get credits approved, basically, I approve
16 it and then it's within loan authorities So, yes,
17 someone approved it

18 Q Did Mr Lipscomb or anybody from Dutch
19 Fork agree or approve of your underwriting?

20 A They don't review our underwriting
21 That's an internal document that we have It's not
22 for the --

23 Q Did anybody from Dutch Fork ever see
24 that?

25 A It's an internal document

RONNIE O COLSON

1 Q So nobody from Dutch Fork Development or
2 Dutch Fork Realty ever saw this document?

3 MR THOMAS Object to the form of the
4 question

5 BY MR BOWENS

6 A Like I said, it's an internal document
7 Nobody from outside the bank would ever see this
8 document

9 Q I want to go through a few documents
10 fairly quickly here

11 (PLF EXH 5, Promissory Note, was marked
12 for identification)

13 BY MR BOWENS

14 Q This is the promissory note, is that
15 correct?

16 A Yes, sir

17 Q Anywhere in this document where it says
18 that two lots per month are required to be sold?

19 A That's a promissory note to be repaid
20 back It sets up the structure of the loan

21 Q Anywhere in there where it says that two
22 lots per month has to be sold?

23 A No, sir

24 (PLF EXH 6, Mortgage, was marked for
25 identification)

RONNIE O COLSON

1 BY MR BOWENS

2 Q I'm going to hand you Exhibit Number 6
3 This is the mortgage that you took out that was given
4 to you for this development loan?

5 A Yes, sir

6 Q Anywhere in this document where it says

7 --

8 A No, sir

9 Q -- that two lots will have to be sold?

10 A No, sir

11 (PLF EXH 7, Loan Agreement, was marked
12 for identification)

13 BY MR BOWENS

14 Q And this is Exhibit Number 7 This is the
15 loan agreement Anywhere in this document where it
16 says that two lots per month have to be sold?

17 A No, sir I don't believe so, but -- no,
18 sir It was just stated that it was just a two-year
19 loan

20 Q Would you agree that if the requirement
21 for sales was 20 percent per year, that as far as the
22 bank would be concerned, it would not matter whether
23 the 20 percent were sold in the first month, in the
24 last month, or anywhere in between the first and last
25 month in that year?

RONNIE O COLSON

1 MR THOMAS Object to the form of the
2 question

3 BY MR BOWENS

4 A No It would matter

5 Q Why would it matter to the bank?

6 A Because when you sell -- a development
7 loan, when you sell lots, lots are sold over a period
8 of time In other words, as you have the -- if they
9 had not sold any within the first 20 months of a loan,
10 then there would be a major concern, a very major
11 concern

12 Q That's not my question If the
13 requirement is 20 percent per year, you know, you've
14 got from January to December as a year, would it
15 matter whether they sold 20 percent of those lots in
16 January all the way, or at any point during the year,
17 or in December, they've still sold 20 percent, they've
18 complied with the contract?

19 MR THOMAS Object to the form of the
20 question

21 BY MR BOWENS

22 A Like I said, the bank would not have seen
23 it that way

24 Q You weren't expecting any monthly
25 payments, though, were you?

RONNIE O COLSON

1 A Monthly pre-payment -- monthly payments
2 from the sale of the lots, yes That's the reason why
3 we have release prices And when you sell a lot,
4 there's a certain percentage that we release it for
5 and the difference goes to pay down the principal

6 Q Right But NBSC did not require monthly
7 payments on the principal

8 A No

9 Q So you weren't expecting to get any
10 principal payments until maturity

11 A From the sale of the lots, yes, we were
12 So where -- when you have a development, that's
13 where -- this is not a bullet note which would be a
14 single payment loan, okay? It's a development loan
15 which, therefore, when you develop and put
16 infrastructure in and you sell lots, there's release
17 prices on it To sell those lots, you reduce your
18 principal So any bank would see that and say, okay,
19 you've got to -- you release based on the sales This
20 is what a development loan is This is not a
21 single-pay loan

22 Q Why didn't you require in the loan
23 documents a monthly payment, then?

24 A Like I said, it comes from the sale of the
25 lots There was not put in there that there was a

RONNIE O COLSON

1 requirement of X number of lots placed for each month
2 But any developer that you talk with that, when you
3 put in a development loan or you do a developmental
4 loan, that once the infrastructure is in, well, you're
5 not going to sit there and let it, just the inventory
6 sit there, you're going to sell the inventory

7 So, therefore, there is a release price
8 that's set and you release it based on net or gross
9 proceeds and the difference goes down to pay the
10 principal loan That is how it is repaid And it
11 doesn't go put into escrow somewhere and wait till the
12 maturity

13 Q But there's no requirement I understand
14 what you're saying, that's how the lots are released
15 and the buyer gets clear title to the property and
16 that's how this loan was set up But it was not set
17 up for there to be any particular number of lots paid
18 per month in any of the loan documents, other than
19 your CL-1

20 MR THOMAS Objection to the form of the
21 question

22 BY MR BOWENS

23 A If it's in the commitment letter, then
24 that's the way it says it, yes

25 Q Well, it doesn't say two per month in the

RONNIE O COLSON

1 commitment letter, does it?

2 A I don't believe it does I'm going to
3 have to look, but I don't think it does (Views
4 document) No

5 Q So is it fair to say, then, that out of
6 the commitment letter, the promissory note, the
7 mortgage, and the loan agreement, those four loan
8 documents, none of those require two lots per month to
9 be sold, and the only document that does say two lots
10 per month is this internal CL-1 that nobody saw?

11 MR THOMAS Object to the form of the
12 question

13 BY MR BOWENS

14 A That's correct But that's what was
15 communicated to me

16 Q By Mr Lipscomb?

17 A By Mr Lipscomb and in a -- well, like I
18 said, we had a meeting and it was not -- when I sat in
19 that meeting, somebody did not tell me from the Dutch
20 Fork Realty side that, no, it's not -- we're not
21 selling two per month That's not what the agreement
22 was

23 Q No one didn't tell you that?

24 A (Shakes head)

25 Q I want you to turn to paragraph number

RONNIE O COLSON

1 four on page three of the loan agreement

2 A (Complies)

3 Q Toward the end of that paragraph, 4(A),
4 there's a sentence that reads Borrower will, within
5 15 days after borrower obtains knowledge thereof,
6 correct any material defect in the improvements Do
7 you see that?

8 A Uh-huh

9 Q What does that mean?

10 A That means the construction, if there --
11 that means during the development stage of it, if the
12 construction is not properly done or anything, that it
13 has to be corrected within a certain period of time

14 Q And if it's not done within 15 days, that
15 violates this loan agreement?

16 A Exactly If the landscaping is not done
17 when it should have been done, then, correct

18 Q Okay Were you aware that there were some
19 road difficulties at the Courtyards?

20 A Yes

21 Q The roads had some failures and in some
22 places, it was impassable to get from one part of the
23 development to another?

24 A I do remember that there were road
25 problems, yes

RONNIE O COLSON

1 Q Did you know that the engineers and Dutch
2 Fork Development Group advised Steve Lipscomb that
3 that needed to be fixed?

4 MR THOMAS Object to the form of the
5 question

6 BY MR BOWENS

7 A I know that from communication from Steve
8 me that, because when I went out there, that it was
9 being fixed And that wasn't from the project, our
10 project inspector also to be fixed, but --

11 Q But it wasn't repaired within 15 days, was
12 it?

13 A I can't recall I can't answer that
14 question because I don't recall

15 Q If it wasn't repaired within 15 days of
16 him being made aware, of him, Steve Lipscomb, being
17 made aware of the problem --

18 A Right

19 Q -- he would be in violation of his loan
20 agreement?

21 MR THOMAS Object to the form of the
22 question

23 BY MR BOWENS

24 A He would be in violation, but he would
25 have to make it good In other words, he would have

RONNIE O COLSON

1 to make sure that it was done within a reasonable
2 amount of time

3 Q Do you think that the condition of the
4 roads had any impact on the lot sales?

5 A That's -- I can't answer that question
6 It's hard to say whether it would not because,
7 usually, that's the first cap

8 Q What do you mean?

9 A The first layer of paving to go in
10 Usually, the final paving does not go in until the
11 development is almost done

12 Q Would you agree that if, during the year
13 2003, the roads were in this failed condition that you
14 observed and you couldn't get from one part of the
15 development to another because of the road failures,
16 it makes it hard to sell lots that you can't get to
17 show people the lots, it does have an adverse impact
18 on the ability to sell lots?

19 A Well, common sense will tell you that

20 Q Could that be what explains why, in a very
21 hot market, lots weren't being sold in this
22 development?

23 A No

24 Q You don't think so?

25 A No That wouldn't stop -- not -- I was

RONNIE O COLSON

1 out there and I saw the roads And there was problems
2 with the roads, but I've never seen where it was
3 impassable So unless something happened during that
4 time and it was fixed before I saw it again, but there
5 were problems with the roads, yes

6 Q So you're not aware of it being impassable
7 in different places?

8 A No Because it went back and, if I
9 remember right, it made a circle, so I'm not (pauses)
10 --

11 Q Okay But you would agree, though, that
12 if you can't get to one part of the development
13 because the roads --

14 A Oh, yeah I mean --

15 Q -- that does have an adverse impact on
16 being able to sell those lots?

17 A It could have an adverse impact to sell
18 those lots, yes

19 Q And, again, your complaint about lot sales
20 is based on the assumption that lot sales began in
21 November of '01, is that right?

22 MR THOMAS Object to the form of the
23 question

24 BY MR BOWENS

25 A No It was supposed to be -- right,

RONNIE O COLSON

1 exactly Lot sales, start from the beginning, you
2 could market your lots while you're developing it It
3 took, if I remember right, approximately -- the
4 infrastructure was supposed to take 120 days for the
5 first -- a portion of it That's the reason why we --
6 there was a four-month interest reserve in there

7 Q Do you know why Mr Lipscomb didn't start
8 selling lots before August of '02?

9 A I don't recall I mean, I don't

10 Q You know that a recorded bonded plat is
11 required to begin selling lots in a development like
12 this?

13 A Yes

14 Q And I'll just represent to you that the
15 bonded plat was not recorded until August 22nd, 2002

16 A Okay

17 Q And you don't have any idea why it wasn't
18 recorded before then so lots could start selling
19 sooner?

20 A No I don't recall that, no, I don't

21 Q Did you ever have any conversations with
22 Mr Lipscomb about that?

23 A About why we haven't got a bonded plat
24 yet?

25 Q Yeah Why lots hadn't started --

RONNIE O COLSON

1 A Oh Why they hadn't been selling yet?

2 Q Yes

3 A If I remember right, possibly, it could
4 have been he could have communicated to me that there
5 were delays, but I don't recall that conversation

6 Q I think you testified you first started
7 putting pressure on Mr Lipscomb to start selling lots
8 in September of '03?

9 A Well, I wanted to know why it wasn't I
10 mean, they had only sold eight lots

11 Q Why weren't you raising questions back in
12 2002 when lots weren't being sold in '02?

13 A Well, it was a young development It had
14 not been out there that long

15 Q So you expect when they first start
16 selling, it may take a little while to gear up and get
17 into a full sales swing?

18 A Sometimes it does, yes

19 Q Okay And that's why you didn't complain
20 in '02 because you weren't concerned then because you
21 thought, well, it's a new development, it's just
22 starting to sell, it may take --

23 A Well, August of '02 and it was only what,
24 nine months old, ten months old, at that point in
25 time

RONNIE O COLSON

1 Q Well, actually, in August of '02, it would
2 be new born because they could only start selling lots
3 in August of '02 That would be the first day of
4 sales

5 MR THOMAS Object to the form of the
6 question

7 BY MR BOWENS

8 A But the loan was not closed till November
9 19th And even if they started mobilization, you
10 know, you take four months, five months, December, and
11 you've got through March, you'd start -- if the
12 infrastructure and everything hits timely, then you
13 start April/May, as far as actual development or sales
14 of those lots because you have -- you're going to be
15 able to sell the lots Now, you're telling me that
16 the bonded plat wasn't done until August Well,
17 that's another what, four months later So it was
18 behind as far as what you're telling me But, still,
19 you've got from August to August You still had 12
20 months and there were still only eight sold within
21 that 12 months, if that's what you're telling me

22 Q Okay Let me ask it this way From
23 November 19th of '01 until, you said, May of '02,
24 giving enough time for the infrastructure to go in and
25 things to get going, from May of '02 until August of

RONNIE O COLSON

1 '02, how many lots would you expect to be sold in that
2 space of time? From the time they could start selling
3 lots --

4 A Two times per month

5 Q So about six lots?

6 A Well, it would be eight lots

7 Q Eight lots?

8 A Uh-huh Between May of '02 to August of
9 '02, eight lots

10 Q But you weren't aware until today that
11 lots could not be sold in the Courtyards until August
12 22nd of '02?

13 MR THOMAS Object to the form of the
14 question

15 BY MR BOWENS

16 Q Is this the first time you've heard of
17 that?

18 A Like I said, that conversation, I don't
19 recall It could have been, but I don't recall it I
20 would have to go back and look and refresh everything
21 I mean, that was four years ago

22 Q Were you aware that during the course of
23 the construction of phase I that Mr Lipscomb was not
24 paying the contractors timely?

25 MR THOMAS Object to the form of the

RONNIE O COLSON

1 question

2 BY MR BOWENS

3 A No I mean, I don't control his paying of
4 the contractors I control his distribution and the
5 performance that the infrastructure was being put in
6 and it was being approved by project inspectors

7 Q You would release money from the bank unto
8 and he would then pay the contractors?

9 MR THOMAS Object to the form of the
10 question

11 BY MR BOWENS

12 Q Is that how it worked?

13 A That's how it works, yes

14 Q So you weren't aware that he wasn't paying
15 the construction company and the engineers and the
16 surveyors and the landscapers and those kind of
17 people? You didn't know he wasn't paying them on
18 time?

19 MR THOMAS Object to the form of the
20 question

21 BY MR BOWENS

22 A Like I said, you know, it was being
23 distributed to him to pay those --

24 Q You expected him to pay them, whether he
25 did or not?

RONNIE O COLSON

1 A Yeah Like any developer, yes

2 Q But you don't know whether he did or not
3 in a timely manner?

4 A In a timely manner? No, I could not I
5 assume that that was the case

6 Q You understand that if contractors of that
7 sort are working on a development and not paid,
8 they're going to not work?

9 MR THOMAS Object to the form of the
10 question

11 BY MR BOWENS

12 A Sometimes they do, yeah They'll walk off
13 the job, yeah

14 Q And that could slow down the development?

15 A That could slow down the development, yes

16 Q And that could delay the start of sales?

17 A That could delay -- yes

18 Q Okay

19 A That could delay the start of sales, but
20 sales can -- I just -- I want to clarify, because you
21 don't have to have the infrastructure in to have
22 sales

23 Q You're exactly right All you have to
24 have is a bonded recorded plat, right?

25 A Well, you could take reservations, too

RONNIE O COLSON

1 And then once you have the bonded recorded plat, you
2 could go ahead and engage those contracts, yes

3 Q But you agree, you cannot sell a lot to
4 the public?

5 A Unless you have a bonded contract

6 Q A bonded recorded --

7 A A bonded plat, yes

8 Q And recorded plat, right?

9 A Right

10 Q And Mr Lipscomb could have bonded the
11 plat and recorded it any time he wanted to in 2003 or
12 2002?

13 A I can't answer that question You'd have
14 to ask him that

15 Q Well, in other words, you don't have to
16 wait for the infrastructure to be in place You can
17 go ahead and bond and record your plat before you put
18 in the infrastructure

19 A Exactly

20 Q And Mr Lipscomb, in this case, apparently
21 chose not to do that?

22 A I can't answer that question You'd have
23 to ask him that question

24 Q Well, kind of see if we can --

25 A You're asking me what he chooses to do and

RONNIE O COLSON

1 I can't answer --

2 Q Well, ask what happened When did
3 construction begin on this development?

4 A Well, we closed on November 19th, so I'm
5 assuming construction started at that point in time
6 shortly thereafter

7 Q Sometime in November/December of 2001?

8 A Probably 2000

9 Q Okay And so at that point, the plat
10 could have been bonded and recorded then?

11 A Yes

12 Q But it wasn't bonded and recorded until
13 August 22nd of '02?

14 A Right It could have been bonded before,
15 it could be bonded afterwards, yes

16 Q But it wasn't done until August of '02

17 A Well, if that's what you're telling me

18 Q Well, if the little sticker on the bonded
19 plat, if that's the date on it, you'd agree that
20 that's when it was --

21 A If that's the date on it, then I would
22 agree

23 Q So let's just make it clear before we move
24 to another topic, then If Mr Lipscomb would have
25 bonded and recorded the plat in November of '01 or

RONNIE O COLSON

1 December of '01 right after the loan was extended,
2 then Dutch Fork Realty could have started selling lots
3 to the public at that time

4 A It could have started closing on the lots,
5 engaging the contracts and closing on the lots, yes

6 Q And sending in the lot releases to NBSC?

7 A Yes, at that point in time

8 Q That whole, let's see, nine or ten months
9 earlier than they were able to?

10 A Uh-huh

11 Q Did Mr Lipscomb ever show you any
12 performas?

13 A I don't recall I mean, I know that I've
14 got the -- there is a marketing of sales of what the
15 cost is, the infrastructure and things like that But
16 I don't -- you know, the performas, I don't remember
17 Performas, I can't remember I don't recall

18 Q Now, NBSC has extended the phase II
19 development loan to Mr Lipscomb, is that right?

20 A Yes I believe we closed on it some time
21 ago

22 (PLF EXH 8, Promissory Note, was marked
23 for identification)

24 BY MR BOWENS

25 Q I'll hand you Exhibit Number 8 to your

RONNIE O COLSON

1 deposition Do you recognize that document?

2 A Yes

3 Q And what is that?

4 A It's a million eight -- \$1,816,852 note

5 Q And what's the date on the promissory
6 note?

7 A February 15th, 2005

8 (PLF EXH 9, Commitment Letter, was
9 marked for identification)

10 BY MR BOWENS

11 Q I'm going to hand you Exhibit Number 9
12 What is this document?

13 A A commitment letter

14 Q And is that the commitment for the phase
15 II development loan?

16 A That's what it says

17 Q And when was that sent by you by Mr
18 Lipscomb?

19 A It says November 12th, 2004

20 Q So on November 12th, 2004, Mr Lipscomb
21 knew that he had the funds available to him that he
22 would need to build phase II?

23 A Well, it was committed to him, yes It's
24 in here as a commitment, yes Until you close it, you
25 know, no You don't have available funds until the

RONNIE O COLSON

1 loan is closed

2 Q But you were willing to extend the loan at
3 that point?

4 A Well, you have to get appraisals, you have
5 to do all the certain pre-requirements before you
6 close on a loan, which could take anywhere from 30,
7 60, it just depends, 90 days

8 Q But you had already had appraisals done
9 before, hadn't you, on this property?

10 A The appraisals were done on the residual
11 land And phase II would have been the residual land,
12 which is basically as market as, you know Just
13 vacant land, not with infrastructure in, if I recall
14 (PLF EXH 10, Summary, was marked for
15 identification)

16 BY MR BOWENS

17 Q I hand you Exhibit Number 10 to your
18 deposition

19 A Okay

20 Q Do you recognize this document?

21 A This is phase II It's a summary sheet

22 Q Someone from your appraiser?

23 A Right

24 Q And it gives the value of the land
25 anywhere from 1,088,000 to \$2,130,400?

RONNIE O COLSON

1 A Right It says, as is valued of residual
2 acreage of a 1,088,000 Yeah, that's the remaining --
3 yes, it was

4 Q And then the final perspective market
5 value once it's completed is 2,130,400?

6 A Right

7 Q So that was satisfactory to extend the
8 loan?

9 A (Pauses)

10 Q The appraisal was satisfactory to the bank
11 to extend the loan?

12 A Yes As far as the appraisal is
13 concerned, then you have all the other aspects of it
14 (PLE EXH 11, Project Income, was marked
15 for identification)

16 BY MR BOWENS

17 Q I hand you Exhibit Number 11 Do you
18 recognize that from your underwriting?

19 A It looks familiar, yes

20 Q So you were projecting the total sales --
21 I'm sorry The total cost at the bottom there of
22 1,816,851 90?

23 A Right That's what it says

24 Q That's what --

25 A One 816, yes

RONNIE O COLSON

1 Q To build out phase II?

2 A Yes That's what it says

3 Q And then at the top there, you were
4 expecting \$2,840,000 in lot sales?

5 A It's 71 lots at 40,000 per lot That's --
6 yes, sir That's what it says

7 Q And the bank used this to base their
8 decision to extend the loan?

9 MR THOMAS Object to the form of the
10 question

11 BY MR BOWENS

12 A It's not the whole decision on

13 Q It was part --

14 A It was part of the decision, yes

15 Q Okay Let me jump back to the phase I
16 development loan quickly NBSC knew from the
17 beginning that there was not going to be enough money
18 in the development loan to complete the development?

19 A For phase I?

20 Q Right

21 A Yes We had the residual land and the
22 certificate of deposit cash that he put up knowing
23 that there was going to be a small portion, yes

24 Q And the reason that there was not going to
25 be enough money in the development budget to cover all

RONNIE O COLSON

1 the cost of the development was because of the
2 pay-back of the \$800,000 land acquisition money?

3 MR THOMAS Object to the form of the
4 question

5 BY MR BOWENS

6 A In all -- in my experience with
7 developments, because there's a land acquisition acts
8 as a whole dollar amount The phase I does not pay
9 out the initial development loan for the first phase
10 because of that It's really incorporated over a
11 whole pro rata for the whole thing So, no, we knew
12 that it would not pay out the whole loan, but -- and
13 you're asking -- make sure you explain that

14 Q And Mr Lipscomb was responsible for
15 making up the difference and when the development loan
16 ran out, I think it was after about pay application
17 number five or six, he was responsible for paying
18 those construction draws from that point on?

19 A For phase I?

20 Q Right

21 A I don't recall that, the number of the
22 draws I don't

23 (PLF EXH 12, Construction Draw
24 Checklist, was marked for identification)

25 BY MR BOWENS

RONNIE O COLSON

1 Q Let me show you Exhibit Number 12 to your
2 deposition This is a construction draw checklist, is
3 that right?

4 A (Views document) Yeah That's what it
5 looks like

6 Q And this is for draw request number one,
7 correct?

8 A I've never seen this before, so I have no
9 idea It says draw request number one at the top,
10 yes

11 Q Well, this was produced by your bank in
12 the course of discovery, just so you'll know

13 A Like I said, I don't cover all aspects of
14 the loan I have assistance, though

15 Q If you'll look down there just above the
16 printed text, additional comments? There's this
17 little asterisk It says, budget will be short
18 Borrower to put equity into loan at the end of the
19 project Do you see that?

20 A Yeah, I do

21 Q Is that what we're talking about when we
22 say that Mr Lipscomb was supposed to be paying those
23 additional draw requests after the loan funds ran out?

24 MR THOMAS Object to the form of the
25 question

RONNIE O COLSON

1 BY MR BOWENS

2 A It could be I mean, like I said, I would
3 have to go back and look at each draw and look at that
4 as far as the requirements I know there was a
5 requirement of equity portion and that's one of the
6 reasons why we took a \$232,000 C D And I would have
7 to look at the contracts and everything else

8 Q What contracts would you need to look at?

9 A Well, the development contract, the
10 contractor's contract I mean, what the total cost
11 was, I'd have to go back and look at all of that

12 (PLF EXH 13, Memo from Margie Simkins,
13 was marked for identification)

14 BY MR BOWENS

15 Q Let me hand you Exhibit Number 13 to your
16 deposition

17 A Okay

18 Q This is a memo from Margie Simkins to
19 yourself And the fourth paragraph down says, so
20 there's a good possibility that beginning next month,
21 we will need to determine and clarify another source
22 of funds to cover the remaining AIA balance \$244,086
23 What are we talking about in this email?

24 A Let me read the whole email, please
25 (Views document) That's -- let me see (Continues

RONNIE O COLSON

1 to view document The line item that was set for --
2 every development loan has a setup for line items So
3 X amount goes to -- like landscaping has an X dollar
4 amount and when the AIA requests come in and it's
5 listing, okay, this is the reason what it's being
6 drawn upon, then those dollars are allocated to deduct
7 from that, what dollars are allocated for that And
8 that's the way I'm understanding this

9 Q The AIA is --

10 A Well, that's the first three paragraphs
11 Let's see (Views document) Okay Possibly, this
12 is where there were equity requirements

13 Q Okay The AIA we keep talking about, just
14 for the benefit of the record, that's the pay
15 application, is that right?

16 A Yes The contractor issues that based
17 on -- and then he usually has attachments on what line
18 items have been done

19 Q Okay Down at the bottom, it's
20 handwritten in, it says, do not fund any more without
21 talking to Ronnie Why was that requirement put in
22 place?

23 MR THOMAS Object to the form of the
24 question

25 BY MR BOWENS

RONNIE O COLSON

1 A Probably because I need to sit down and
2 find out what, you know -- need to probably sit with
3 Steve Lipscomb and ask him, you know, where we need to
4 fund for the rest, or the requests coming in, it
5 probably refers to that third paragraph or that fourth
6 paragraph there. There must be some overage because
7 as you see in the fourth paragraph, it says there's
8 been \$183,000 in change orders, so which means it
9 would have been over the contract or over a certain
10 amount that we had to increase. And that's what it
11 says, the loan has been increased.

12 (PLF EXH 14, Memo 3/11/02, was marked
13 for identification)

14 BY MR BOWENS

15 Q Let me show you Exhibit Number 14. This
16 is another email from Margie Simkins to you dated
17 March 11th, 2002. And what I want to direct your
18 attention to is the three paragraphs up from the
19 bottom, it says. Finally, if we pay draw number four
20 as requested, the balance to finish the budget will be
21 \$140,651, less whatever the project inspector's bill
22 is for March. At this pace, after the fifth draw,
23 Mr Lipscomb will need to begin paying the remaining
24 draw requests.

25 A Then from this paragraph, it tells me that

RONNIE O COLSON

1 Steve Lipscomb, there was probably equity that he was
2 going to put in at the end to finalize the draw
3 requests

4 Q So when these AIAs come in, these draw
5 applications from the contractor, after number five,
6 after the fifth draw request, Mr Lipscomb was
7 responsible for paying those?

8 A Right Right He was responsible for
9 paying those

10 Q And you understand that as the date of
11 this email, March 11th of '02, the bonded plat had not
12 yet been recorded?

13 A No I don't remember that So, no I
14 don't know

15 Q Well, March 11th is before August 22nd,
16 isn't it?

17 A Oh, I know Yeah

18 Q And you understand then that if, after the
19 fifth draw request, the bank was not involved in
20 paying the contractors, because now it's Mr
21 Lipscomb's responsibility to pay them, if he's not
22 paying the contractors, that's going to slow matters
23 down, isn't it?

24 A The one thing that I don't know and I
25 don't remember is if -- and I go back -- and what

RONNIE O COLSON

1 you're saying is, after the fifth draw, then you've
2 got the fifth and sixth or whatever remaining left for
3 him to complete the thing, so, yes To answer your
4 question, yes

5 Q Do you know how many draw requests there
6 were from the contractor, from Newman Construction?

7 A No, I don't

8 Q I'm going to represent to you there were
9 11 --

10 A Okay

11 Q -- AIA draw requests, payment applications
12 that were certified by the engineer that were for
13 payment

14 A Okay

15 Q And according to this email, after the
16 fifth one, that Mr Lipscomb was on his own to pay
17 those The bank wasn't funding those after that

18 A Right The loan must have been used up at
19 that point in time, is what this is saying

20 (PLF EXH 15, Memo 1/30/02, was marked
21 for identification)

22 BY MR BOWEN

23 Q Let me hand you Exhibit Number 15

24 A Okay

25 Q This is a memo from Margie Simkins The

RONNIE O COLSON

1 next to the last paragraph, there's a sentence that
2 reads, lot releases are expected to begin as soon as
3 construction is completed

4 A Okay

5 Q Now, do you know when construction was
6 completed?

7 A Like I said, I would have to go -- I don't
8 know No I would have to --

9 Q Well, what I want to ask you about is, did
10 you expect lot releases to begin right after November
11 of 2001?

12 A No Like I said, it was going to be a --
13 it would take approximately 120 days to put in the
14 infrastructure for the first phase If I remember
15 right, and just by reading this one about the rock, I
16 think they -- it ended up taking a little longer
17 because they had to see the 117,000 in change orders
18 for blasting rock They found more rock than what
19 they had allocated for, so it probably took a little
20 bit longer time, so -- but, no So, I mean, that's a
21 correct statement there

22 Q So we're not basing our -- you're not
23 basing your opinion on how fast lots were sold based
24 on November of '01 being the start date It should be
25 based on when construction was completed when lot

RONNIE O COLSON

1 sales could begin based on this email, is that right?

2 MR THOMAS Object to the form of the
3 question

4 BY MR BOWENS

5 A Yes If it says that in here, then that's
6 what, you know -- because you can't sell without a
7 plat, so --

8 Q So it would be incorrect to base our
9 opinion on lot sales performance based on November of
10 2001 as the start date?

11 MR THOMAS Object to the form of the
12 question

13 BY MR BOWENS

14 A As far as the start of the sales?

15 Q Right

16 A As far as signing contracts and closing
17 the loans, yes Or closing on lots

18 Q So the projection that you were talking
19 about when you were speaking with Mr Thomas, that
20 over the first 20 months, they didn't sell as
21 expected That's really not accurate It's really
22 from the time lots could be sold?

23 MR THOMAS Object to the form of the
24 question

25 BY MR BOWENS

RONNIE O COLSON

1 A Well, if that's in there that lots could
2 be sold and if they couldn't be sold until August,
3 then that would be a correct statement

4 Q Okay

5 A But I still go back Even if it was
6 August, August to August, it's still 12 months and
7 I'll still be looking at approximately 24 sales So
8 therefore -- and I only had eight

9 Q So that's --

10 A I'd still go back to that

11 Q Right

12 A I understand what you're saying, that you
13 can't sell But you also have to understand that --
14 where the bank's point of view is, too

15 Q But that's based on your CL-1 projection
16 based on what Mr Lipscomb told you in your meetings
17 with him before you extended the loan?

18 A Right Communication --

19 MR THOMAS Object to the form of the
20 question

21 BY MR BOWENS

22 Q And you understand, though, that the
23 contract that Mr Lipscomb signed with Dutch Fork
24 Realty to sell the lots only required 20 percent per
25 year?

RONNIE O COLSON

1 A If that's in that contract

2 Q So Mr Lipscomb agreed with one thing with
3 the development company and the real estate company
4 and told you something different?

5 MR THOMAS Object to the form of the
6 question

7 A (Views document) That's what it says
8 20 percent per year, per each phase

9 Q So you agree then that Mr Lipscomb agreed
10 with the plaintiffs on one rate of lot sales and told
11 you something different?

12 MR THOMAS Object to the form of the
13 question

14 BY MR BOWENS

15 A Like I said, I was in a meeting with the
16 same --

17 Q Well, let's answer that question first, if
18 you don't mind

19 A Okay

20 Q Mr Lipscomb told you it would be two per
21 month, but the agreement he made with the plaintiffs
22 was 20 percent per year?

23 MR THOMAS Object to the form of the
24 question

25 BY MR BOWENS

RONNIE O COLSON

1 A That's what was communicated, yes

2 Q Now, in this meeting that you had in
3 September of '03, no one from Dutch Fork Realty told
4 you, yes, we agreed to two lots per month, that was
5 what we promised and we didn't make it?

6 MR THOMAS Object to the form of the
7 question

8 BY MR BOWENS

9 A Nobody explicitly said that, no

10 Q They explained what they were doing to try
11 to make lot sales go faster?

12 MR THOMAS Object to the form of the
13 question

14 BY MR BOWENS

15 A Yeah They had to change their marketing
16 strategy, their marketing plans, to say, we've got to
17 do things differently --

18 Q Well, the only thing --

19 A -- to change a sale But I did, you
20 know -- I mean, that -- you know, we were expecting a
21 lot more sales and that's the reason why

22 Q The only thing that was changed was going
23 from the larger size homes to these smaller 1700 to
24 2,000 square foot homes That was really the only
25 change --

RONNIE O COLSON

1 MR THOMAS Objection to the form of the
2 question

3 BY MR BOWENS

4 Q -- that was made

5 A I don't remember what their -- the whole
6 deal of the changing of the marketing -- I just
7 remember that one aspect because they were going to
8 look at a smaller home because they felt that that
9 would, you know, that smaller patio home would sell or
10 create more interest or --

11 MR BOWENS Now, let's take a short
12 break I think we're almost finished

13 VIDEOGRAPHER Off the record at 10 13
14 a m

15 (Recess from 10 13 a m to 10 17 a m)

16 VIDEOGRAPHER On the record at 10 17
17 a m

18 BY MR BOWENS

19 Q Mr Colson, that's all the questions I
20 have for you Mr Thomas may have some follow-up
21 questions

22 REEXAMINATION

23 BY MR THOMAS

24 Q Mr Colson, I only have a couple more
25 You've talked about sales from August '02 to August

RONNIE O COLSON

1 '03 Did SEL Properties sufficiently perform and live
2 up to its end of the deal from August '02 to August
3 '03?

4 A It made the interest payments, yes

5 Q And how about with relation to sales? How
6 were the sales during the period of August of '02 to
7 August of '03?

8 A They had sold -- eight lots were sold We
9 released eight lots at that point in time, but they
10 had sold eight lots between that one year, 12-month
11 period

12 Q And were you, as the lender, pleased with
13 eight land sales from, lot sales from August '02 to
14 August '03?

15 A Not really

16 Q And is eight lot sales from August '02 to
17 August '03 20 percent of the 57 lots?

18 A That would be close It was a little
19 less, but that would be close

20 Q And you discussed earlier the meeting with
21 the Meltons Why were the Meltons talking about
22 changing their sales strategy and their marketing
23 strategy?

24 A Just basically that, you know, everything
25 in the market was slow, I do recall that, you know, to

RONNIE O COLSON

1 generate the sales, you know One was, they felt that
2 they needed to change the size I think the patio
3 homes, there were some big patio homes where the plans
4 were big or the requirements and they were changing
5 those down to a smaller which would help prompt the
6 sales Those are the only things that I can recall in
7 that

8 Q And how did the sales in the Courtyards of
9 Rolling Creek compare to the surrounding area for that
10 time period?

11 A It was booming in that market I mean,
12 there were a lot of plans/development You know, like
13 I said, there was a new Dutch Fork High School, they
14 had just built either a middle or elementary school,
15 there was another planned school, you know There was
16 a lot of -- as a matter of fact, you know, the
17 adjoining Rolling Creek development, which we based a
18 lot of that off on, too, because that was a -- it was
19 a premier development, had done so well, too So they
20 were doing well, then we figured this was a great
21 location It would do just as well

22 Q And how was it doing?

23 A The Rolling -- the next one?

24 Q No The Courtyards

25 A Oh The Courtyards? Within that 12-month

RONNIE O COLSON

1 time period or that time period? Well, the sales
2 weren't there

3 Q So would it be fair to say that the sales
4 of the Courtyards were poor compared to what was
5 happening in the surrounding market?

6 A Yes

7 Q And we talked a little bit earlier about
8 the number of sales to pay off the loan At the rate
9 of, at the sales rate from August '02 to August '03,
10 was that in line with the number of sales needed for
11 SEL Properties to pay off the loan?

12 A No They would have been behind

13 Q And, in fact, would that rate have ended
14 up costing SEL Properties money in additional interest
15 payments?

16 A Yes

17 Q And do you believe that SEL Properties
18 made the right decision in looking to find somebody
19 else to be the --

20 MR BOWENS Object to the form

21 BY MR THOMAS

22 Q -- real estate agent?

23 MR BOWENS Object to the form

24 BY MR THOMAS

25 A I can't answer -- I don't -- I mean, I

RONNIE O COLSON

1 can't answer That's -- of what the developer made
2 that -- I mean, the decision was, we need the lot
3 sales, we need to bring -- I mean, it was not
4 performing So the loan wasn't performing which,
5 therefore, you know, the sales were not -- we weren't
6 getting in the sales which comes from that You know,
7 the developer or the owner, Steve Lipscomb, SEL
8 Properties made a decision to not -- or discontinue
9 the contract Because of that, you know, he could
10 have

11 I mean, I just -- I can't -- I mean, I
12 can't sit here and say, because I'm not the developer,
13 I'm not the one paying the interest I am the one
14 saying, hey, you know, it's not performing, what's
15 going on? We have to get this thing back, you know --
16 what are you doing to get this thing back online

17 Q And let me try to re-ask this question

18 Did you ever suggest to SEL Properties
19 that they needed to find somebody else to do these
20 sales?

21 A No Not as I recall, no

22 Q And at the meeting in September of '03,
23 did Dutch Fork Realty or the Meltons ever stand up and
24 say, hey, we're doing a great job, these sales are
25 going good?

RONNIE O COLSON

1 A No No I mean, they admitted that sales
2 were slow Well, I mean, the sales were slow and that
3 was their response was, the sales had been slow and
4 they were changing their marketing and changing the
5 size, so they were changing focus

6 Q Okay

7 MR THOMAS No further questions

8 MR BOWENS That's all I don't have
9 anything further

10 VIDEOGRAPHER This concludes the
11 deposition of Mr Ronnie Colson Off the record at
12 10 22 a m

13 (The deposition concluded at 10 22 a m)

14

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RONNIE O COLSON

1 CERTIFICATE OF REPORTER

2
3
4 I, Laura S DeCillis, Certified Court
Reporter and Notary Public for the State of South
5 Carolina at Large, do hereby certify

6 That the foregoing Statement was transcribed
from a recorded tape by me, and not taken by same, and
7 that the foregoing Statement as typed is a true,
accurate, and complete record of all audible testimony
8 to the best of my ability

9 I further certify that I am neither related
to nor counsel for any party to the cause pending or
10 interested in the events thereof

11 Witness my hand, I have hereunto affixed my
official seal this 24th day of August 2007, at
12 Columbia, Richland County, South Carolina

13
14 

15 Laura S DeCillis,
Certified Court Reporter
16 State of South Carolina at Large
My Commission expires
17 August 10, 2015
18
19
20
21
22
23
24
25

Garber Reporting Service
803-256-4500

0001366

From Margie Simkins
To Ronnie Colson
Subject Re SEL

Ronnie

5/2/03

I spoke with an attorney's office yesterday and they are sending one lot release in on this project but that's all I've heard of. So this is my monthly reminder to you to please see where we are on the other lot releases since we are off schedule by quite a few lots.

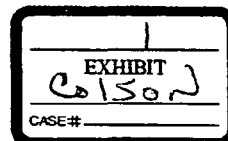
Thanks for your help
Margie

>>> Ronnie Colson 04/03/03 01:30PM >>>
I have to talk to Steve about the sell.

>>> Margie Simkins 04/03/03 01:07PM >>>

Any word on the lot releases we spoke about a few weeks back? In reading through the CL-1 lot releases were projected at 2 per month. The loan is 17 months old and to date we have 6 lot releases leaving us short by 11 lot releases. If we close on 10 lots as you indicated we would be back in line with the projections.

CC Wade King



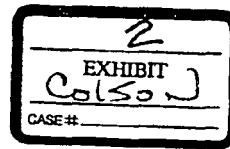
10694

0001367



August 1 2001

Mr Stephen E Lipscomb
SEL Properties, L L C
1105 Pulaski Street
Columbia SC 29201



Dear Mr Lipscomb

The National Bank of South Carolina (Lender") is pleased to commit and extend to SEL Properties L L C (Borrower") the following credit facility (the "Loan")

- 1 Borrower SEL Properties L L C
- 2 Amount \$2 001 375 00 Real Estate Development Line of Credit
- 3 Purpose To provide funds for the development of lots for The Courtyards at Rolling Creek Phase I
- 4 Pricing NBSC Prime floating plus 1 %
- 5 Terms Interest monthly only for two years with a final payment of all sums due on the second anniversary of the note date The loan amount includes an interest reserve of \$250 000 00 however such interest reserve may not be used to pay the first four monthly interest payments which payments shall be made from Borrower's own funds
- 6 Release Payments The Borrower shall pay to Lender a release payment to be applied to the outstanding principal balance of the Loan in an amount equal to the 80% of the gross proceeds of the lot sale
- 7 Collateral (i) Title insured first real estate mortgage on 130 37 acres located on the Northeast side of U S Highway 176 near Irmo South Carolina (ii) and all improvements to 30 acres of Phase I of the Courtyards at Rolling Creek, (iii) and assignment of NBSC Certificate of Deposit Number 4553982733 in the amount of \$200,000 00
- 8 Guaranties Unconditional joint and several guaranty of Stephen E Lipscomb
- 9 Pre-Payment Penalty None

Post Office Box 1457 / Columbia, South Carolina 29202 1457 / (803) 929 2145
www.NationalBankSC.com
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10695

0001368

Mr. Stephen E. Lipscomb
August 13, 2001
Page 2

10 Commitment Fee \$12,013.75 (1% of new funds advanced) shall be fully earned and due and payable to NBSC upon closing of this Loan.

11 Approval of Loan Documents All the loan documents and other requirements for the consummation of the Loan must be acceptable to NBSC in form and substance. The loan documents will be NBSC's standard documents and will include material obligations and requirements of the Borrowers in addition to, but not inconsistent with the terms of this commitment.

12 Appraisal The Commitment is subject to receipt and approval of an acceptable appraisal, which appraisal shall be conducted by an appraiser satisfactory to Lender.

13 Costs and Expenses All costs incurred by Lender in making the Loan available to the Borrower shall be paid by Borrower regardless of whether the Loan closes, unless failure to close is the fault of Lender. The law firm of Ellis, Lawhorne & Sims, P.A., Columbia, South Carolina, will represent Lender in this transaction and reasonable fees will be determined on the basis of time and efforts expended in connection with the Loan, however such fees not to exceed \$2,000.00. Ellis, Lawhorne & Sims, P.A. will not represent the Borrower in any capacity in connection with the Loan except as specifically set forth in writing and as approved by Lender.

14 Conditions This Commitment shall be contingent upon review by Lender and Lender's counsel of all contracts between Borrower and developers for the development of The Courtyards at Rolling Creek.

15 Authority Borrower shall provide Lender with corporate and company documents, resolutions and such other information, certificates and affidavits as Lender may require evidencing the parties' authority and capacity to consummate the transactions contemplated herein. Borrower shall also provide Lender an opinion letter prepared by Borrower's counsel in a form acceptable to Lender and Lender's counsel.

16 Administration The loan will be administered by the NBSC Real Estate Department. The development will be monitored by periodic inspections by an engineer chosen by NBSC. Any costs and expenses associated with the inspections shall be the responsibility of the Borrower.

17 Survival To the extent not otherwise provided by the loan documents, the terms and conditions of this commitment letter shall survive the closing of the Loan.

18 Time Limitations The Loan shall be closed as soon as all the requirements and conditions of the commitment have been met, provided, however, this commitment will expire unless accepted by August 10, 2001 and closed by September 15, 2001.

Mr Stephen E Lipscomb
August 13 2001
Page 3

19 South Carolina Law This Commitment and the rights and obligations of the parties hereunder and any other instruments or documents issued hereunder shall be construed and interpreted in accordance with the laws of the State of South Carolina and shall be binding upon and more to the benefit of the successors and assigns of the parties hereto

The undersigned acknowledge that Borrower Guarantors and any other party liable for the Loan will be required to execute a waiver of appraisal rights at closing, containing the following or similar language The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty (30) days after the sale of the mortgage property apply to the court for an order of appraisal The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction THE UNDERSIGNED HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY.

I hope you find this commitment on this financing package acceptable and of benefit to your Company We are excited about the opportunity to provide this credit facility To accept our commitment please signify by signing below

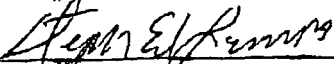
Sincerely



Ronnie Colson
Senior Vice President

WE HEREBY ACCEPT THIS COMMITMENT THIS ____ DAY OF _____ 2001
AND AGREE TO CLOSE THE LOAN IN ACCORDANCE WITH THE ABOVE TERMS

SEL Properties L L C

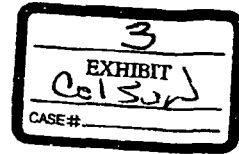
By 
Its 

Guarantor

Stephen E Lipscomb

10697

0001370



STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

DEVELOPMENT & MARKETING
AGREEMENT

14 This Development and Marketing Agreement (Agreement) is made and entered into this
day of November 2000 by and between SEL Properties LLC (SEL) Dutch Fork Realty
LLC (DFR) and Dutch Fork Development Group II LLC (DFDG)

WHEREAS, SEL is the owner of the following described real estate

All that certain piece parcel of tract of land situate lying and being on the northern side
of US Highway #176 about 16 miles northwest of the City of Columbia, School District #5 of
Richland County near the Town of Peak, in the State of South Carolina, being shown and
delineated as tract "A" containing 122.28 acres on plat prepared for Michael J Mungo by Belter
and Smith, Inc Engineers and surveyors, dated November 1 1972 recorded in the Office of the
Clerk of Court for Richland County in Plat book X at page 2151 said plat being expressly
incorporated herein by reference Being more particularly shown and delineated on a plat
prepared by Cox & Dinkins Inc for SEL Properties LLC dated September 22 2000 to be
recorded in the Richland County ROD

TMS# 2600-4-2

This property is known as Rolling Creek Estates (hereinafter referred to as the Property)
and

WHEREAS, DFDG has experience in obtaining regulatory approvals developing
coordinating the development of and preparation by way of fair market value sales real estate
with and without the improvements thereon DFR has experience in the actual marketing and sale
of real estate with and without improvements thereon and

WHEREAS, SEL desires to enter into an Agreement with DFDG and DFR which will
provide for the development and sale of the property

NEW THEREFORE, for valuable consideration in the form of mutual promises and covenants the parties do agree as follows

1 The Parties

SEL is a South Carolina Limited Liability Company with Stephen E Lipscomb as member/manager DFDG is a South Carolina Limited Liability Company with Ann F Melton William P Melton, Sr and Donald Owen D Melton as members/managers and DFR is a South Carolina Limited Liability Company with Ann F Melton, William P Melton, Sr and Donald Owen D Melton as members/managers

This Agreement is based upon certain personal experience and ability of the named individual members/managers of the respective Limited Liability Companies and should Stephen E Lipscomb cease, for any reason, being actively associated with SEL or should he be no longer able physically and/or mentally to participate in the development as planned either DFR or DFDG may declare this Agreement to be null void and of no effect. For the foregoing reasons should more than one member of DFR and DFDG (namely Ann F Melton William P Melton, Sr and Donald Owen "D" Melton) cease, for any reason, being actively associated with DFR and DFDG or should they be no longer able physically and/or mentally to participate in the development as planned, SEL may declare this Agreement to be null void and of no effect

2 Infrastructure

SEL shall exercise its best efforts to secure reasonable financing from a conventional lending institution for the purpose of purchasing the property securing engineering studies surveying landscaping and for the costs related to the infrastructure SEL shall have final approval of all costs pertaining to the development of the property

3 Phased Development

The property is to be developed in phases There shall be three (3) Phases of



Development Phase II shall not commence until no less than sixty (60%) percent of the lots in Phase I are sold and Phase III will not commence until no less than sixty (60%) percent of the lots in Phase I and Phase II are sold

4 Development.

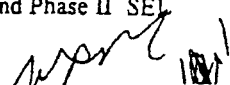
It is the intent of the parties to develop the property as a residential subdivision and to sell the lots at fair market value to the general public. In this regard DFDG will be responsible for the development of the property, which responsibilities include, but are not limited to obtaining all regulatory permits, devising architectural and design requirements, coordinating with builders and contractors and coordinating and cooperating with DFR in the sale of the proposed residential lots.

5 Compensation for DFDG.

For so long as DFDG is adequately performing under the terms of this Agreement and in accordance with the intent of the parties, SEL shall pay to DFDG the sum of Nine Thousand and no/100 (\$9000 00) dollars per month for a six (6 month period) for a total payment of Fifty-Four Thousand and no/100 (\$54 000 00) dollars during Phase I of the development. The first such monthly payment shall be due and payable the first day of the first month following the letting of the contract for the construction of Phase I and on the first day of each succeeding month for the remaining five (5) months.

Upon the sale of sixty (60%) percent of the lots developed in Phase I, the first month following the letting of the contract for the construction of Phase II, SEL shall pay DFDG Nine Thousand and no/100 (\$9000 00) dollars per month for a total of Six months or a total of Fifty-Four Thousand and no/100 (\$54 000 00) dollars for services rendered regarding the Phase II development.

Upon the sale of sixty (60%) percent of the lots developed in Phase I and Phase II, SEL



shall similarly pay DFDG Nine Thousand and no/100 (\$9000 00) dollars per month for a total of Six months or a total of Fifty Four Thousand and no/100 (\$54 000 00) dollars for services rendered regarding the Phase III development

In addition to the foregoing SEL shall pay to DFDG twenty-five (25%) percent of the net profits received from the lots sold in Phases I II and III For purposes of this paragraph, net profits shall be defined as The costs of the sale of the lots less any and all expenses and capital contributions sales commissions the Nine Thousand and no/100 (\$9000 00) dollars development fee interest charges including interest on capital contributions made by SEL (which interest shall be that amount as charged by SEL's lender or the prime rate as charged by the National Bank of South Carolina, plus one percentage point whichever amount is lesser

over
(in) **END**
In the event the development is not sold in individual lots but is sold "in gross" prior to the ~~beginning~~ of Phase I, the sales price of the entire property upon closing less the initial land costs interest charged development costs, and professional fees and charges shall be divided sixty (60%) percent SEL and forty (40%) percent DFDG

6 Exclusive Right to Sell

For so long as DFR is adequately performing under the terms of this Agreement and in accordance with the intent of the parties DFR shall be entitled to a real estate commission of ten (10%) percent upon the closing of the sale of developed lots to non-builders DFR shall receive no commission for any lot sale to builders

This exclusive right to sell shall be granted to DFR for a period of five (5) years provided that DFR sells & closes no less than twenty (20%) percent of the lots available for sale per year in each Phase of the development The sale price for each lot shall be approved in advance by SEL Should SEL purchase any one or more lots in the development not commission shall be charged not shall any commission be payable



DFR shall also have the exclusive right to sell new homes constructed in the development at a sales commission not to exceed seven (7) percent, This exclusive right to sell shall be for a period of twelve (12) months after construction is commenced on the home

Upon the expiration of the exclusive right to sell period for either unimproved or improved lots SEL and /or the owner of the lot or lots shall be free to list the same with any realtor of their choice

All costs of sales advertusing, listing promotion and sale marketing offices and agents shall be the responsibility of DFR

7 Contracts

No contracts leases or other binding agreements may be entered into by DFDG or DFR which would bind SEL or create any lien or other encumbrance upon the property

8 Termination

This Agreement shall terminate and be rendered null, void and of no effect upon the earlier occurrence of any one or more of the following events

- a) The bankruptcy insolvency or composition of creditors being created for any one or more of the parties hereto, *AT THE OPTION OF THE OTHER PARTY*
- b) The failure of DFDG and DFR to sell at least twenty (20%) percent of the available lots in any one year period
- c) The term of 5 years from the date of execution of this contract or
- d) The failure of any party to comply with the terms of this Agreement and/or comply with the intent of the parties
- e) Upon written notification of any one party to the other

9 Upon Termination

Upon termination DFDG and DFR will have no further rights to compensation and/or

commission and shall peacefully vacate the premises

10 Arbitration

Any disputes arising between the parties which cannot be resolved among themselves shall be submitted to binding arbitration in accordance with the South Carolina Uniform Arbitration Act

11 Attorneys Fees and Costs

Should disputes arising under this Agreement result in litigation, judicial or quasi judicial proceedings the party prevailing shall be entitled to an award of reasonable attorneys fees and costs

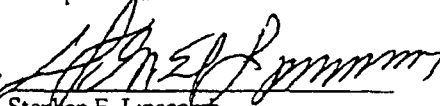
12 Entire Agreement

This represents the entire Agreement between the parties superceding all prior verbal or written agreements and the same shall not be modified amended or changed except by a writing signed by all parties hereto

IN WITNESS WHEREOF we affix our hands and seals the year and date first set forth above

SEL Properties, LLC

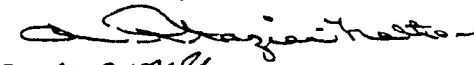
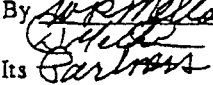
By


Stephen E. Lipscomb

Its

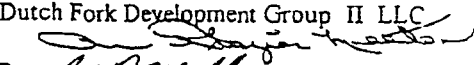
Dutch Fork Realty LLC

By


Its 

Dutch Fork Development Group II, LLC

By




Date 11/19/01

AIR NEW LOAN

I prepared by msimkins

Account Name SEL Properties, LLC Off Int W/K Off No 797
Branch 49 Account No. (Renue) 505

Date of Note 11/19/01 Maturity Date 11/19/03 Note Number 004

Note Term Number of ☐ Days ☐ Months ☐ Years

Note Type: ☐ Time (Single-Pmt) ☐ Term (Amortized) ☒ Other Construction / Interim

☐ Line of Credit } Line Amount \$ 2,001,375.00 Line Expiration Date 11/19/03
☒ Line of Commitment } Line Type

AML Financed \$ 2,001,375.00 (Amount) 00 } Proceeds \$ - Doc. Stamps \$ -
Cr Life \$ - 00 \$ -
Other \$ - Fees & Repaid ☐

INTEREST

☐ Fixed Rate % ☐ Tax exempt Rate Sensitivity Code

☐ Tied to Prime ☒ NBSC ☐ Other (Specify Bank)

1.00 % Over Prime Minimum Rate % Maximum Rate %

Rate to Adjust: ☒ Daily ☐ Monthly ☐ Quarterly Beginning

Accrual Method ☐ 365/365 766 ☒ Act SEL ☐ 360/360 ☐ 360/365 366

Interest Due: ☐ Maturity ☒ Monthly ☐ Quarterly ☐ S

First Interest Due Date 12/5/01

PRINCIPAL

Principal Due: ☒ Maturity ☐ Monthly ☐ Quarterly ☐ Semi

First Principal Due Date: 11/19/03

If Term (Amortized) Regular Payment Amount \$

Officer Memo (20 Pos. max)

Class Code Risk Code TA (Loan Credit)

TAX ID # 57-1639150

ACCOMMODATION ACCOUNT NUMBER ACCOUNT NAME

☐ GUARANTOR

☐ ENDORSER

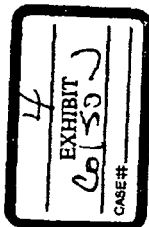
☐ CO-MAKER

Date Account to be Reviewed: Month Day Year UCC Expiration Date Month Day Year

Frequency of Review ☐ Monthly ☐ Quarterly ☐ Semi-Annually ☐ Annually

Automatic Payment Account Number (DDA or Savings)

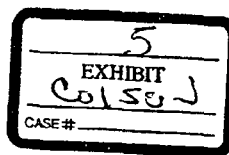
NBSC (M 10704)



10704

0001377

11/19



PROMISSORY NOTE

Columbia, South Carolina

November 19 2001

FOR VALUE RECEIVED SEL PROPERTIES LLC a South Carolina limited liability company (the Borrower) promises to pay to the order of THE NATIONAL BANK OF SOUTH CAROLINA (the "Lender ") at Post Office Box 1457 Columbia South Carolina 29202 the principal sum of up to TWO MILLION ONE THOUSAND THREE HUNDRED SEVENTY FIVE AND 00/100 (\$2 001 375 00) DOLLARS or so much thereof as may be advanced, with interest thereon computed from date of each advance at the floating rate of The National Bank of South Carolina prime rate ("NBSC Prime") plus one (1%) percent to change as NBSC Prime changes The loan amount includes \$250 000 00 which shall be advanced at closing and held by Lender in a NBSC premium money market account However such interest reserve may not be used to pay the first four monthly interest only payments Interest shall be computed on the actual number of days elapsed divided by a 360-day year and shall be payable monthly on the fifth day of each month on those sums actually advanced beginning with the fifth day of the first month following the first advance under this Note and continuing on the fifth day of each month thereafter At the option of Lender it may collect interest due by deducting on the fifth day of each month the amount of interest for the preceding month from any interest reserve established or credited (other than provided for in this Note) and by adding the same to the outstanding principal balance or it may deduct the amount of such interest from any advance of this Note After the entire principal amount of this Note has been advanced or earlier at the option of Lender interest may be billed by it directly to Borrower

The entire outstanding principal balance of this Note and any outstanding accrued interest shall be due and payable in full on November 19 2003 (the Maturity Date")

All payments under this Note shall be applied first to accrued interest then to principal if applicable and then to late charges if any All installments of principal if applicable and all interest are payable in lawful money of the United States of America which shall be legal tender in payment of all debts and dues public and private at the time of payment and in the event of (a) failure to pay this Note in full on the Maturity Date or (b) default in the payment of any other installment of principal if applicable or interest or any other sum payable pursuant to the terms of this Note or any lien document securing this Note not cured within ten (10) days after written notice from Lender or (c) an Event of Default as such term is defined in the mortgage executed of even date (the "Mortgage") then or at any time thereafter at the option of Lender the whole of the principal sum then remaining unpaid hereunder together with all interest accrued thereon shall immediately become due and payable without further notice and the lien given to secure the payment of this Note may be foreclosed From and after the maturity of this Note either according to its terms or as the result of a declaration of maturity the entire principal remaining unpaid hereunder shall bear interest at a rate of three (3%) percent per annum above the rate otherwise in effect hereunder (the Default Rate) or the highest applicable lawful rate whichever is the lesser provided that there shall be no automatic reduction to the highest lawful rate as to Borrower or any endorser or guarantor barred by law from availing itself in any action or

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proceeding of the defense of usury or Borrower or any endorser or guarantor barred or exempted from the operation of any law limiting the amount of interest that may be paid for the loan or use of money or in the event this transaction because of its amount or purpose or for any other reason is exempt from the operation of any statute limiting the amount of interest that may be paid for the loan or use of money Failure to exercise such option or any other rights Lender may in the event of any such default be entitled to shall not constitute a waiver of the right to exercise such option or any other rights in the event of any subsequent default whether of the same or different nature

If this Note is placed in the hands of an attorney for collection or is collected through any legal proceedings Borrower promises to pay all reasonable expenses of collection and reasonable attorney's fees incurred by Lender

In the event the interest provisions hereof or any exactions provided for herein or in the lien documents or any other instruments securing this Note shall result because of the monthly deduction of principal or any other reason related or unrelated to the interest provisions at any time during the life of the loan in an effective rate of interest which for any period of time transcends the limit of the usury or any other law applicable to the loan evidenced hereby all sums in excess of those lawfully collectible as interest for the period in question shall without further agreement or notice between or by any party hereto be applied to principal immediately upon receipt of such monies by Lender with the same force and effect as though the payor had specifically designated such and agreed to accept such extra payment(s) as a premium free payment Notwithstanding the foregoing however Lender may at any time and from time to time elect by notice in writing to the owners of the property affected by the lien document securing this Note to reduce or limit the collection of any interest to such sums which when added to the said first stated interest shall not result in any payments toward principal in accordance with the requirement of the preceding sentence In no event shall any agreed to or actual exaction as consideration for this loan transcend the limits imposed or provided by the law applicable to this transaction or Borrower in the jurisdiction in which the land is located for the use or detention of money or for forbearance in seeking its collection

This Note is secured by that certain Mortgage and Security Agreement of even date herewith (the Mortgage) to which reference is made from the terms thereof and the same are made a part of this Note

Lender may collect a late charge of five (5%) percent of any regular installment of principal or interest which is not paid within twenty (20) days of the due date thereof to cover the extra time and expense involved in handling delinquent payments Such late charge shall apply only to late payments prior to maturity or acceleration Upon maturity or acceleration no further late charges shall be assessed but Borrower shall pay the Default Rate of interest on all amounts due from the date of maturity or acceleration until the Note is paid in full The collection of the late charge shall not be deemed a waiver by Lender of interest accruing after the due date of any installment or of any of Lender's other rights under this Note

Borrower agrees that the late charge provided above is fair and reasonable compensation to Lender for the additional administrative time and effort incurred in collecting and processing delinquent payments. Borrower further agrees that the Default Rate is a fair and reasonable rate of interest to be charged after maturity or acceleration of this Note in light of the increased risks to Lender inherent in a past due loan and the administrative time and effort incurred in collecting a past due loan.

Borrower and all endorsers, guarantors and all persons liable or to become liable on this Note waive presentment, protest and demand, notice of protest, demand and dishonor and nonpayment of this Note and consent to any and all renewals and extensions of the time of payment hereof, and agree further that at any time and from time to time without notice, the terms of payment herein may be modified or the security described in the lien document securing the Note released in whole or in part or increased, changed or exchanged by agreement between Lender and any owner of premises affected by said lien document securing this Note without in anywise affecting the liability of any party to this instrument or any person liable with respect to any indebtedness evidenced hereby.

Lender is not required to rely on the collateral for the payment of the Note in the event of default by the maker but may proceed directly against the maker, endorsers or guarantors if any in such manner as it deems desirable. None of the rights and remedies of Lender hereunder is to be waived or affected by failure or delay to exercise them. All remedies conferred on Lender by this Note or any other instrument or agreement shall be cumulative and none is exclusive. Such remedies may be exercised concurrently or consecutively at Lender's option.

This Note may be prepaid in whole or in part at any time without penalty.

This Note shall be governed as to validity, interpretation, construction, effect and in all other respects by the laws and decisions of the State of South Carolina.

Wherever possible each provision of this Note shall be interpreted in such manner as to be effective and valid under applicable law but if any provision of this Note or portion thereof shall be prohibited by or be invalid under such law such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Note.

This Note may be assigned by Lender with or without recourse.

Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower agrees that any action concerning this Note or any instrument securing this Note whether initiated by Lender, Borrower or any other party shall be tried only in a court of competent jurisdiction within the State of South Carolina and Borrower waives all objections to venue. All matters arising hereunder shall be determined in accordance with the law and practice of such South Carolina court. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of

process may be accomplished by in addition to any other lawful means certified mail return receipt requested

WAIVER OF JURY TRIAL BY THE EXECUTION HEREOF BORROWER KNOWINGLY VOLUNTARILY AND INTENTIONALLY HEREBY AGREES THAT

(A) NEITHER BORROWER NOR LENDER NOR ANY ASSIGNEE SUCCESSOR HEIR OR LEGAL REPRESENTATIVE OF BORROWER OR LENDER SHALL SEEK A JURY TRIAL IN ANY LAWSUIT PROCEEDING COUNTERCLAIM OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THIS NOTE THE MORTGAGE THE LOAN AGREEMENT (IF ANY) OR ANY OF THE LOAN DOCUMENTS EVIDENCING SECURING OR RELATING TO THE LOAN EVIDENCED HEREBY OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES HERETO

(B) NEITHER BORROWER NOR LENDER WILL SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED

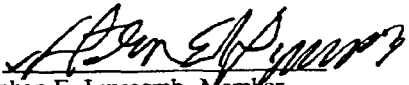
(C) THE PROVISIONS OF THIS PARAGRAPH HAVE BEEN FULLY NEGOTIATED BY THE PARTIES HERETO AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS

(D) NEITHER BORROWER NOR LENDER HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS PARAGRAPH WILL NOT BE FULLY ENFORCED IN ALL INSTANCES AND

(E) THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN EVIDENCED BY THIS NOTE

IN WITNESS WHEREOF Maker has executed this Note under seal as of the date first above written

SEL PROPERTIES L L C a South Carolina
limited liability company

By 
Stephen E. Lipscomb Member

Tax ID 57-1039150

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Book 00591-1867
2001090394 11/19/2001 16 31 52 18 Mortgage
Fee \$20.00 County Tax \$0.00 State Tax \$0.00



STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

MORTGAGE OF REAL ESTATE
AND SECURITY AGREEMENT

THIS MORTGAGE AND SECURITY AGREEMENT is made this 19th day of November 2001 by SEL PROPERTIES L L C a South Carolina limited liability company whose address is 3913 Kilbourne Road, Columbia, South Carolina 29205 (hereinafter referred to as Mortgagor) and given to THE NATIONAL BANK OF SOUTH CAROLINA (hereinafter referred to as Mortgagee) whose address is Post Office Box 1457 Columbia, South Carolina 29202

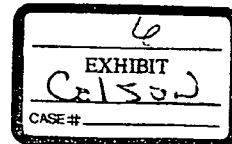
WITNESSETH

THAT WHEREAS Mortgagor is indebted to Mortgagee in the maximum principal sum of \$2,001,375.00 which indebtedness is evidenced by the Note made by Mortgagor dated of even date, said principal (plus interest thereon) being payable as provided for in said Note (having a final maturity of November 19, 2003) the terms of said Note and any agreement modifying it are incorporated herein by reference

NOW, THEREFORE KNOW ALL MEN BY THESE PRESENTS that the said Mortgagor for and in consideration of the aforesaid indebtedness and in order to secure the payment thereof together with any renewals or extensions or modifications thereof upon the same or different terms or at the same or different rate of interest and also to secure in accordance with Section 29-3-50, as amended, Code of Laws of South Carolina (1976) (i) all future advances and re advances that may subsequently be made to Mortgagor by Mortgagee evidenced by the aforesaid Note or by other promissory notes, and all modifications renewals and extensions thereof, and (ii) all other indebtedness of Mortgagor to Mortgagee now or hereafter existing whether direct or indirect the maximum amount of all indebtedness outstanding at any one time secured hereby not to exceed \$4,000,000.00 plus interest thereon, all charges and expenses of collection incurred by Mortgagee including court costs and reasonable attorney's fees has granted, bargained, sold, released and by

TO THE EXTENT IF ANY PROVIDED IN THE NOTE INTEREST OR DISCOUNT WILL BE DEFERRED ACCRUED OR CAPITALIZED

THIS MORTGAGE COVERS GOODS WHICH ARE OR ARE TO BECOME FIXTURES ON THE REAL PROPERTY DESCRIBED HEREIN AND CONSTITUTES A FIXTURE FINANCING STATEMENT GRANTOR IS THE RECORD OWNER OF THE FOREGOING REAL PROPERTY



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these presents does grant, bargain, sell and release unto the Mortgagee its successors and assigns the following described property (collectively hereinafter referred to as the "Property" or "Land")

SEE ATTACHED EXHIBIT A FOR LEGAL DESCRIPTION

TOGETHER WITH

(a) all singular rights, members, hereditaments and appurtenances belonging or in any way incident or appertaining thereto

(b) all buildings and improvements of every kind and description now or hereafter erected or placed on the Land (the "Improvements") and all materials intended for construction, reconstruction, alteration and repair of such improvements now or hereafter erected thereon, all of which materials shall be deemed to be included within the premises hereby conveyed immediately upon the delivery thereof to the aforesaid Land, and all fixtures and articles of personal property now or hereafter owned by the Mortgagor and attached to or contained in and used in connection with the aforesaid Land and Improvements or any part thereof or derived from or acquired by any proceeds of the Land or Improvements or any part thereof including but not limited to all goods, furniture, appliances, furnishings, apparatus, machinery, equipment, motors, elevators, fittings, radiators, ranges, refrigerators, awnings, shades, screens, blinds, carpeting, office equipment and other furnishings and all plumbing, heating, lighting, cooking, laundry, ventilating, refrigerating, incinerating, air conditioning and sprinkler equipment, telephone systems, televisions and television systems, computer systems and fixtures and appurtenances thereto and all renewals or replacements thereof or articles in substitution thereof, whether or not the same are or shall be attached to the Land and Improvements in any manner (the "Tangible Personalty")

(c) all easements, rights of way, gores of land, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights and powers and all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments and appurtenances whatsoever in any way belonging, relating or appertaining to any of the property hereinabove described, or which hereafter shall in any way belong, relate or be appurtenant thereto whether now owned or hereafter acquired by Mortgagor and the reversion and reversions, remainder and remainders, rents, issues and profits thereof and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law as well as in equity of Mortgagor of in and to the same, including but not limited to all judgments, awards of damages and settlements hereafter made resulting from condemnation proceedings or the taking of the property described in paragraphs (a) and (b) hereof or any part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the property described in paragraphs (a) and (b) hereof or any part hereof, or to any rights appurtenant thereto (together the "Easements and Other Interests")

(d) as additional collateral and further security for the indebtedness the Mortgagor hereby conditionally assigns to the Mortgagee all the security deposits rents issues profits revenues accounts accounts receivable contract rights rights to payments for goods sold or leased or services rendered checks notes drafts acceptances instruments deposit accounts, chattel paper documents securities rentals receivables installment payment obligations, book debts, actions choses in action, judgments awards, money general intangibles, other forms of obligations and receivables, all monies due or to become due and all returned or repossessed goods now or hereafter pertaining to or resulting from the Property or any part hereof or constituting or derived from or acquired by any proceeds of the Property or any part thereof (the "Rents and Profits ") reserving only the right to the Mortgagor to collect the same as long as there shall exist no Default (as hereinafter defined) Together with all proceeds including cash proceeds noncash proceeds insurance proceeds products replacements additions, substitutions, renewals and accessions of the Rents and Profits or any part hereof and all replacements modifications renewals and substitutions thereof or therefore

(e) as additional collateral and further security for the indebtedness, the Mortgagor does hereby assign to the Mortgagee and grants to the Mortgagee a security interest in all of the right, title and the interest of the Mortgagor in and to any and all leases (including equipment leases) rental agreements management contracts franchise agreements construction contracts, architect's contracts, technical services agreements, licenses and permits now or hereafter affecting the Property (the Intangible Personalty) or any part hereof and the Mortgagor agrees to execute and deliver to the Mortgagee such additional instruments in form and substance satisfactory to the Mortgagee as may hereafter be requested by the Mortgagee to evidence and confirm said assignment provided however the acceptance of any such assignment shall not be construed as a consent by the Mortgagee to any lease rental agreement, management contract, franchise agreement construction contract, technical services agreement or other contract, license or permit, or to impose upon the Mortgagee any obligation with respect hereto

(f) any proceeds of any sales or other dispositions of the property described in paragraphs (a) (b) (c) (d) and (e) hereof or any part hereof including cash proceeds noncash proceeds insurance proceeds products replacements additions substitutions renewals and accessions of any of the foregoing (Proceeds) and

(g) all the Tangible Personalty which compnse a part of the Property shall as far as permitted by law be deemed to be affixed to the aforesaid land and conveyed therewith. As to the balance of the Tangible Personalty and the Intangible Personalty this Mortgage shall be considered to be a security agreement which creates a security interest in such items for the benefit of the Mortgagor In that regard, the Mortgagor grants to the Mortgagee a security interest in the Tangible Personalty the Intangible Personalty and the Rents and Profits and grants to Mortgagee all of the rights and remedies of a secured party under the South Carolina Uniform Commercial Code

TO HAVE AND TO HOLD all and singular the Property unto Mortgagee and the successors or assigns of Mortgagee forever

MORTGAGOR covenants that Mortgagor is lawfully seized of the Property in fee simple absolute that Mortgagor has good right and is lawfully authorized to sell convey or encumber the same, and that the Property is free and clear of all encumbrances except as expressly disclosed to Mortgagee Mortgagor further covenants to warrant and forever defend all and singular the Property unto Mortgagee and the successors or assigns of Mortgagee from and against Mortgagor and all persons whomsoever lawfully claiming the same or any part thereof

PROVIDED ALWAYS nevertheless and it is the true intent and meaning of Mortgagor and Mortgagee, that if Mortgagor pays or causes to be paid to Mortgagee the debt secured hereby the estate hereby granted shall cease determine and be utterly null and void otherwise said estate shall remain in full force and effect

----- IT IS AGREED that ~~Mortgagor shall be entitled to hold and enjoy the Property until a~~ Default has occurred -----

MORTGAGOR further covenants and agrees with Mortgagee as follows

1 Assignment of Rents and Profits As further security for all sums secured by this Mortgage Mortgagor absolutely and unconditionally assigns to Mortgagee all Rents and Profits arising from the Property provided however that so long as no Default has occurred, Mortgagor shall be entitled, as trustee for the use and benefit of the Mortgagee, to collect and retain all such Rents and Profits as they become due and payable (but in no event for more than two (2) months in advance) provided however that if the Rents and Profits exceed the payments due under the Note Mortgagor may use such excess, first, for the operation and benefit of the Property and, second, for the general benefit of Mortgagor Upon the occurrence of a Default, Mortgagee may at its option, remove the Mortgagor as trustee for the collection of the Rents and Profits and appoint any other person including but not limited to itself as a substitute trustee to collect, receive accept and use all such Rents and Profits in payment of the obligations secured by this Mortgage in such order as Mortgagee shall elect in its sole and absolute discretion, whether or not Mortgagee takes possession of the Property Mortgagor hereby directs each of the respective tenants under all leases of any part of the Property now and hereafter existing (the Leases) and any rental agent, to pay to Mortgagee all such Rents and Profits as may now be due or shall hereafter become due upon demand for payment thereof by Mortgagee without any obligation on the part of any such tenant or rental agent to determine whether or not a Default has in fact occurred. Upon a Default, the permission hereby given to Mortgagor to collect, receive and accept such Rents and Profits as trustee shall terminate and such permission shall not be reinstated upon a cure of the Default without Mortgagee's specific written consent. Further upon a Default, Mortgagor shall immediately turn over to Mortgagee all Rents and Profits in the actual or constructive possession of Mortgagor, its affiliates contractors or its agents together with an accounting thereof Exercise of Mortgagee's rights under this Section, and the application of any such Rents and Profits to the obligations secured by this Mortgage shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant hereto but shall be cumulative and in addition to all other rights and remedies of Mortgagee

2 Maintenance Mortgagor will maintain the Property in good condition and repair normal wear and tear excepted, and will neither permit nor allow waste thereof. Mortgagor will promptly repair or restore any portion of the Property which is damaged or destroyed by any cause whatsoever and will promptly pay when due all costs and expenses of such repair or restoration. Mortgagor will not remove or demolish any improvement or fixture which is now or hereafter part of the Property other than in the ordinary course of business without the express written consent of Mortgagee. Mortgagee shall be entitled to specific performance of the provisions of this paragraph.

3 Insurance If applicable, Mortgagor will keep all improvements and fixtures which are now or hereafter part of the Property insured by such company or companies as Mortgagee may reasonably approve for the full insurable value thereof against all risks including, if coverage is available, flood and earthquake. Such insurance will be payable to Mortgagee as the interest of Mortgagee may appear pursuant to the New York standard form of mortgagee clause or such other form of mortgagee clause as may be required by the Mortgagee and will not be cancelable by either the insurer or the insured without at least thirty (30) days prior written notice to Mortgagee. Mortgagor hereby assigns to Mortgagee the right to collect and receive any indemnity payment otherwise owed to Mortgagor upon any policy of insurance insuring any portion of the Property regardless of whether Mortgagee is named in such policy as a person entitled to collect upon the same. Any indemnity payment received by Mortgagee from any such policy of insurance may, at the option of Mortgagee, (i) be applied by Mortgagee to payment of any sum secured by this Mortgage in such order as Mortgagee may determine or (ii) be applied in a manner determined by Mortgagee to the replacement, repair or restoration to the portion of the Property damaged or destroyed, or (iii) be released to Mortgagor upon such conditions as Mortgagee may determine or (iv) be used for any combination of the foregoing purposes. *The previous sentence notwithstanding, any such indemnity payment shall, at the option of the Mortgagor, be applied to the replacement, repair or restoration of the Property provided that (a) no Default has occurred and is continuing, and (b) Mortgagor provides Mortgagee reasonable evidence that such indemnity payment (together with additional funds provided by Mortgagor, if necessary) are sufficient to restore, repair and/or replace the Property to the extent and condition existing prior to the casualty.* No portion of any indemnity payment which is applied to replacement, repair or restoration to any portion of the Property or which is released to Mortgagor shall be deemed a payment against any sums secured by this Mortgage. Mortgagor will keep the Property continuously insured as herein required and will deliver to Mortgagee the original of each policy of insurance required hereby. Mortgagor will pay each premium coming due on any such policy of insurance and will deliver to Mortgagee proof of such payment at least ten (10) days prior to the date such premium would become overdue or delinquent. Upon the expiration or termination of any such policy of insurance, Mortgagor will furnish to Mortgagee at least ten (10) days prior to such expiration or termination the original of a renewal or replacement policy of insurance meeting the requirements hereof. If Mortgagor fails to insure the Property as herein required, Mortgagee may, after giving (10) days written notice to Mortgagor, so insure the Property in the name of Mortgagor or in the name of Mortgagee or both, and the premiums for any such insurance obtained by Mortgagee shall be the obligation of Mortgagor. Upon foreclosure to this Mortgage, all right, title and interest of Mortgagor in and to

any policy of insurance upon the Property which is in the custody of Mortgagee, including the right to unearned premiums, shall vest in the purchaser of the Property at foreclosure and Mortgagor hereby appoints Mortgagee as the attorney in fact of Mortgagor to assign all right, title and interest of Mortgagor in and to any such policy of insurance to such purchaser. This appointment is coupled with an interest and shall be irrevocable.

4 Taxes and Assessments Mortgagor will pay all taxes, assessments and other charges which constitute or are secured by a lien upon the Property which is superior to the lien of this Mortgage and will deliver to Mortgagee proof of payment of the same not less than ten (10) days prior to the date the same becomes delinquent, provided, however, that Mortgagor shall be entitled by appropriate proceedings to contest the amount or validity of such tax, assessment or charge so long as the collector of the same by foreclosure of the lien upon the Property is stayed during the pendency of such proceedings and Mortgagor deposits with the authority to which such tax assessment or charge is payable or with Mortgagee appropriate security for payment of the same together with any applicable interest and penalties should the same be determined due and owing.

5 Environmental Site Assessment The Mortgagor shall pay when due the reasonable cost of providing to Mortgagee, at Mortgagee's request from time to time a then-current environmental site assessment, audit, or survey ('Assessment') of the Property which Assessment shall be prepared by an environmental auditor acceptable to Mortgagee in Mortgagee's sole discretion provided, however, that Mortgagee shall make such request no more frequently than once every two (2) years, or in the Mortgagee's reasonable discretion, if the Note is being renewed, extended, modified or accelerated, or unless Mortgagee is required by any law, regulation, order, or other directive from any regulatory agency having jurisdiction over Mortgagee to obtain any such Assessment more frequently than once every (2) years. Notwithstanding anything herein to the contrary, Mortgagee may require an Assessment upon each renewal, extension or modification of the Note or upon the occurrence of any Default under the Note or upon the commencement of any foreclosure proceedings against or acceptance of any deed in lieu of foreclosure on the Property. If Mortgagor fails to pay the cost of any Assessment or the cost of any remediation to the Property to correct deficiencies highlighted in the Assessment, when due, Mortgagee may pay such cost on Mortgagor's behalf and the same shall constitute principal under the Note and be secured by the Property, and shall be due and payable on demand. Borrower's failure to pay such amount (with all accrued interest) in full within ten (10) days of the date of such demand shall constitute an event of Default entitling the Mortgagee to accelerate the maturity of the Note.

6 Appraisal Mortgagor shall pay when due the reasonable cost of providing to Mortgagee at its request from time to time a then-current appraisal of the market value of the Property prepared by an appraiser or by another appraiser acceptable to Mortgagee in its discretion provided, however, that Mortgagee shall make such request no more frequently than once every third year unless Mortgagee is required by any law, regulation, order or other directive from any regulatory agency having jurisdiction over Mortgagee to obtain any such appraisal more frequently than every third year. If Mortgagor fails to pay such cost when due, Mortgagee may pay such cost on Mortgagor's behalf and the same shall constitute principal under the Note shall bear interest at

the applicable rate provided in the Note and shall be due and payable on demand. Mortgagor's failure to pay such amount (with all accrued interest) in full within ten (10) days of the date of such demand shall constitute an event of Default entitling the Mortgagee to accelerate the maturity of the Note

7 Expenditures by Mortgagee If Mortgagor fails to make payment for restoration or repair to the Property for insurance premiums or for taxes assessments or other charges as required in this Mortgage Mortgagee may but shall not be obligated to pay for the same, and any such payment by Mortgagee will be secured by this Mortgage and have the same rank and priority as the principal debt secured hereby and bear interest from the date of payment at the legal rate Payments made for taxes by Mortgagee shall be a first lien on the Property to the extent of the taxes so paid with interest from the date of payment, regardless of the rank and priority of this Mortgage Mortgagor shall pay to Mortgagee in cash on demand an amount equal to any payment made by Mortgagee pursuant to this paragraph plus interest thereon as herein provided. - - - - -

8 After Acquired Property The lien of this Mortgage will automatically attach, without further act to all fixtures now or hereafter located in or on, or attached to or used or intended to be used in connection with or with the operation of the Property or any part thereof

9 Condemnation Mortgagee shall be entitled to be made a party to and to participate in any proceeding whether formal or informal for condemnation or acquisition pursuant to power or eminent domain of any portion of the Property Mortgagor hereby assigns to Mortgagee the right to collect and receive any payment or award to which Mortgagor would otherwise be entitled by reason of condemnation or acquisition pursuant to power of eminent domain of any portion of the Property Any such payment or award received by Mortgagee may, at the option of Mortgagee (i) be applied by Mortgagee to payment to any sums secured by this Mortgage in such order as Mortgagee may determine or (ii) be applied in a manner determined by Mortgagee to the replacement of the portion of the Property taken and to the repair or restoration of the remaining portion of the Property or (iii) be released to Mortgagor upon such conditions as Mortgagee may determine or (iv) be used for any combination of the foregoing purposes *The previous sentence notwithstanding any such payment shall at the option of the Mortgagor be applied to the replacement repair or restoration of the Property provided that (a) no Default has occurred and is continuing and (b) Mortgagor provides Mortgagee reasonable evidence that such payment (together with additional funds provided by Mortgagor if necessary) are sufficient to restore repair and/or replace the Property to the extent and condition existing prior to the condemnation* No portion of an indemnity payment which is applied to replacement, repair or restoration to any portion to the Property or which is released to Mortgagor shall be deemed a payment against any sums secured by this Mortgage

10 Transfer At the option of the Mortgagee the indebtedness secured by this Mortgage shall become due and payable if without the written consent to the Mortgagee, the Mortgagor shall convey away the mortgaged premises or if the title shall become vested in any other person in any manner whatsoever other than by death to the Mortgagor It is understood and agreed that in

consideration for the consent to the Mortgagee to any transfer of title to the mortgaged premises, the Mortgagee at its option may charge a loan transfer fee and/or require changes in the rate of interest, term of loan, monthly payments to principal and interest and other terms and conditions of this Mortgage and/or the Note secured hereby

11 Default A Default shall be the occurrence or existence of any of the events listed in the Note or the Loan Agreement ("Loan Agreement" being hereafter defined as that loan agreement between SEL Properties L L C and The National Bank of South Carolina of even date herewith) including any grace and/or cure periods provided for therein

12 Remedies In addition to the remedies set forth in the Note or the Loan Agreement, upon the occurrence of a Default, Mortgagee may without notice to Mortgagor declare all sums secured by this Mortgage immediately due and payable and may commence proceedings to collect such sums foreclose this Mortgage and sell the Property If default shall be made in the payment of any amount due under the Note the Mortgage or any other instrument securing the Note then, if such default is not cured within ten (10) days after written notice from Mortgagee Mortgagor will pay to Mortgagee the whole amount due and payable under the Note and all other sums secured hereby and if Mortgagor shall fail to pay the same forthwith upon such demand, Mortgagee shall be entitled to sue for and to recover judgment for the whole amount so due and unpaid together with costs and expenses including the reasonable compensation, expenses and disbursements of Mortgagee's agents and attorneys incurred in connection with such suit and any appeal in connection therewith Mortgagee shall be entitled to sue and recover judgment as aforesaid either before after or during the pendency of any proceedings for the enforcement of this Mortgage and the right of Mortgagee to recover such judgment shall not be affected by any taking possession or foreclosure sale hereunder or by the exercise of any other right, power or remedy for the enforcement of the terms of this Mortgage or the foreclosure of the lien hereof At the foreclosure Mortgagee shall be entitled to bid and to purchase the Property and shall be entitled to apply the debt secured hereby or any portion thereof in payment for the Property In case of a foreclosure sale of all or any part of the Property and of the application of the proceeds of sale to the payment of the sums secured hereby Mortgagee shall be entitled to enforce payment of and to receive all amounts then remaining due and unpaid and to recover judgment for any portion thereof remaining unpaid with interest The remedies provided to Mortgagee in this paragraph shall be in addition to and not in lieu of any other rights and remedies provided in this Mortgage or by law all of which rights and remedies may be exercised by Mortgagee independently simultaneously or consecutively in any order without being deemed to have waived any right or remedy previously or not yet exercised. Without in any way limiting the generality of the foregoing Mortgagee shall also have the following specific rights and remedies

(a) To make any repairs to the collateral which Mortgagee deems necessary or desirable for the purposes of sale

(b) To exercise any and all rights of set off which Mortgagee may have against any account, fund, or property of any kind tangible or intangible, belonging to Mortgagor which shall be in Mortgagee's possession or under its control

(c) To cure such defaults with the result that all reasonable costs and expenses incurred or paid by Mortgagee in effecting such cure shall be additional charges on the Note which bear interest at the interest rate of the Note and are payable upon demand

(d) If the Note is secured by a lien on any real property to foreclose on such real property and to pursue any and all remedies available to Mortgagee at law or in equity and in any order Mortgagee may desire in Mortgagee's sole discretion.

13 No Waiver of One Default to Affect Another No waiver of Default hereunder shall extend to or affect any subsequent or any other Default then existing or impair any rights powers or remedies consequent thereon. If Mortgagee (a) grants forbearance or an extension of time for the payment of any sums secured hereby (b) takes other or additional security for the payment thereof (c) waives or does not exercise any right granted in the Note this Mortgage or any other instrument securing the Note, (d) releases any part of the Property from the lien of this Mortgage or any other instrument securing the Note or (e) makes or consents to any agreement changing the terms of this Mortgage or subordinating the lien or any charge hereof, no such act or omission shall release, discharge modify change or affect the original liability under the Note the Mortgage or otherwise of Mortgagor or any subsequent purchaser of the Property or any part thereof or any maker cosigner endorser surety or guarantor No such act or omission shall preclude Mortgagee from exercising any right, power or privilege herein granted or intended to be granted in case of any event of Default then existing or of any subsequent event of Default nor except as otherwise expressly provided in an instrument or instruments executed by Mortgagee shall the lien of this Mortgage be altered thereby

14 Appointment of Receiver Upon the occurrence of a Default, Mortgagee shall be entitled to the appointment of a receiver to enter upon and take and maintain full control of the Property in order to perform all acts necessary and appropriate for the operation and maintenance thereof including, but not limited to the execution cancellation or modification of leases the making of repairs to the Property and the execution or termination of contracts providing for the management or maintenance of the Property all on such terms as are deemed best to protect the security of this Mortgage The receiver shall be entitled to receive a reasonable fee for so managing the Property All rents collected pursuant to this paragraph shall be applied first to the costs of taking control of and managing the Property and collecting the rents including but not limited to reasonable attorney's fees receiver's fees premiums on receiver's bonds costs of repairs to the Property premiums in insurance policies taxes assessments and other charges on the Property and the costs of discharging any obligation or liability of Mortgagor as lessor or landlord of the Property and then to the sums secured by this Mortgage Mortgagee or the receiver shall have access to the books and records used in the operation and maintenance of the Property and shall be liable to account only for those rents actually received Mortgagee shall not be liable to Mortgagor anyone claiming

under or through Mortgagor or anyone having an interest in the Property by reason of anything done or left undone by Mortgagor under this paragraph. If the rents of the Property are not sufficient to meet the costs of taking control of and managing the Property and collecting the rents Mortgagee at its sole option, may advance moneys to meet the costs. Any funds expended by Mortgagee for such purposes shall become indebtedness of Mortgagor to Mortgagee secured by this Mortgage. Unless Mortgagee and Mortgagor agree in writing to other terms of payment, such amounts shall be payable upon notice from Mortgagee to Mortgagor requesting payment thereof and shall bear interest from the date of disbursement at the rate stated in the Note unless payment of interest at such rate would be contrary to applicable law in which event such amounts shall bear interest at the highest rate which may be collected from Mortgagor under applicable law. The entering upon and taking and maintaining of control of the Property by Mortgagee or the receiver and the application of rents as provided herein shall not cure or waive any Default hereunder or invalidate any other right or remedy of Mortgagee hereunder.

15 Waiver by Mortgagee Mortgagee may in the sole discretion of Mortgagee from time to time waive or forbear from enforcing any provision of this Mortgage, and no such waiver or forbearance shall be deemed a waiver by Mortgagee of any other right or remedy provided herein or by law or be deemed a waiver of the right at any later time to enforce strictly all provisions of this Mortgage and to exercise any and all remedies provided herein and by law.

16 Notices Any notice given by either party hereto to the other party shall be in writing and shall be signed by the party giving notice. Any notice or other document to be delivered to either party hereto by the other party shall be deemed delivered if mailed postage prepaid by U.S. Mail, certified mail, return receipt requested to the party to whom directed to the address stated above or to the latest address of such party known to the party sending the same. Rejection or other refusal to accept or the inability to deliver because of changed address of which no notice was given shall be deemed to be receipt of the notice demand or request sent. This paragraph shall not be deemed to prohibit any other manner of delivering a notice or other document.

17 Greater Estate In the event that Mortgagor is the owner of a leasehold estate with respect to any portion of the Property and, prior to the satisfaction of the indebtedness and the cancellation of this Mortgage of record, Mortgagor obtains a fee estate in such portion of the Property then such fee estate shall automatically and without further action of any kind on the part of Mortgagor be and become subject to the security lien of this Mortgage.

18 Imposition of Tax In the event of the passage of any state, federal, municipal or other governmental law, order, rule or regulation, in any manner changing or modifying the laws now in force governing the taxation of debts secured by mortgages or the manner of collecting taxes so as to affect adversely the Mortgagee, the Mortgagor will promptly pay any such tax on or before the due date thereof and if the Mortgagor fails to make such prompt payment or if any such state, federal, municipal or other governmental law, order, rule or regulation prohibits Mortgagor from making such payment or would penalize Mortgagee if Mortgagor makes such payment then the entire balance of the Loan shall become due and payable upon demand at the option of the

Mortgagee, unless Mortgagor agrees in writing to indemnify Mortgagee against any loss or damage associated with such payment or penalty

19 Changes etc Neither the Mortgage nor any term hereof may be changed, waived discharged or terminated orally or by any action or inaction, but only by an instrument in writing signed by the party against which enforcement of the change waiver discharge or termination is sought. Any agreement hereafter made by Mortgagor and Mortgagee relating to the Mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance

20 Partial Foreclosure In the event the Property is comprised of more than one parcel of real property Mortgagor hereby waives any right to require Mortgagee to foreclose or exercise any of its other remedies against all of the Property as a whole or to require Mortgagee to foreclose or exercise such remedies against one portion of the Property prior to the foreclosure or exercise of said remedies against other portions of the Property

21 Security Agreement, Financing Statement This Mortgage constitutes a security agreement within the meaning of and shall create a security interest under the Uniform Commercial Code as adopted by the State of South Carolina and as amended from time to time. The addresses for the Mortgagor as debtor and the Mortgagee as secured party are set forth in the introductory paragraph to this Mortgage. Some of the items of property described herein are goods that are or are to become fixtures related to the real estate described herein and it is intended that as to those goods this Mortgage and Security Agreement shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the city in which the Land is located. Information concerning the security interest created by this instrument may be obtained from the Mortgagee as secured party or the Mortgagor as debtor at the address first shown above

22 Lot Release Mortgagee shall release each lot upon the receipt of an amount equal to 80% of the gross proceeds received from the sale of each lot, but such release amount shall not be less than \$ 32,000 for each lot. As the request of Mortgagor Mortgagee shall release the portions of the Property intended for the common use and enjoyment of the owners of dwellings to be constructed on the Property from the Mortgage upon the release of the first lot

40000
14000
32000

23 Miscellaneous

(a) It is understood and agreed that all indebtedness of Mortgagor to Mortgagee at any time hereafter existing resulting from advances and readvances heretofore now or hereafter made by Mortgagee to Mortgagor regardless of whether such advances and readvances are made at the option of the Mortgagee or otherwise will be secured by this instrument up to the maximum principal amount hereinabove set forth plus interest thereon, court costs and attorney's fees until all of said indebtedness has been satisfied in full

(b) The agreements herein shall inure to the benefit of Mortgagee, its successors and assigns, and any successor or assign of Mortgagee may make advances hereunder, and all advances and all other indebtedness of Mortgagor to such successor or assign shall be secured hereby

(c) Whenever in this Mortgage one of the parties hereto is named or referred to the heirs legal representatives, successors and assigns of such parties shall be included and all covenants and agreements contained in this Mortgage by or on behalf of the Mortgagor or by or on behalf of the Mortgagee shall bind and inure to the benefit of their representatives heirs, successors and assigns, whether so expressed or not

(d) The headings of the sections paragraphs and subdivisions of this Mortgage are for the convenience of reference only are not to be considered a part hereof and shall not limit or otherwise affect any of the terms hereof

(e) If fulfillment of any provision hereof or any transaction related hereto or to the Note at the time performance of such provisions shall be due, shall involve transcending the limit of validity prescribed by law, then ipso facto, the obligation to be fulfilled shall be reduced to the limit of such validity and if such clause or provision herein contained operates or would prospectively operate to invalidate this Mortgage in whole or in part, then such clause or provision only shall be held for naught, as though not herein contained, and the remainder of this Mortgage shall remain operative and in full force and effect.

(f) This Mortgage shall be construed and enforced in accordance with the laws of South Carolina.

(Signatures on the following page)

(g) Waiver by Mortgagor Mortgagor understands that upon default hereunder, among other remedies set out herein and in the Note, the Mortgagee may foreclose upon the mortgaged premises and ask for a deficiency judgment pursuant to Section 29-3-660 South Carolina Code of Laws (1976) The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. THE MORTGAGOR HEREBY WAIVES AND RELINQUISHES THE STATUTORY APPRAISAL RIGHTS WHICH MEANS THE HIGH BID AT THE JUDICIAL FORECLOSURE SALE WILL BE APPLIED TO THE DEBT REGARDLESS OF ANY APPRAISED VALUE OF THE MORTGAGED PROPERTY

IN WITNESS WHEREOF Mortgagor has executed this Mortgage under seal the day and year first above written.

Witnesses

MORTGAGOR

SEL PROPERTIES L L C a South Carolina
limited liability company

Rose G. Koca
[Signature]
STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

By [Signature]
Stephen E Lipscomb Member

ACKNOWLEDGEMENT

I Thomas E. Lipscomb do hereby certify that SEL Properties, L L C by Stephen E Lipscomb its member personally appeared before me this day and acknowledged the due execution of the foregoing instrument

Witness my hand and seal this the 19th day of November 2001

[Signature]
Notary Public for South Carolina
My Commission expires 2/25/04

LEGAL DESCRIPTION

EXHIBIT "A"

All that certain piece, parcel or tract of land, situate, lying and being on the northern side of US Highway #176 about 16 miles northwest of the City of Columbia, School District #6 of Richland County near the Town of Peak, in the State of South Carolina, being shown and delineated as tract "A" containing 122.28 acres on plat prepared for Michael J Mungo by Belter and Smith, Inc., Engineers and surveyors, dated November 1st, 1972, recorded in Office of the Clerk of Court for Richland County in Plat Book X at Page 2151 said plat being expressly incorporated herein by reference.

THIS AGREEMENT IS SUBJECT TO ARBITRATION PURSUANT TO THE UNIFORM ARBITRATION ACT, SECTION 15-48-10, ET SEQ., CODE OF LAWS OF SOUTH CAROLINA, 1976 (AS AMENDED)

LOAN AGREEMENT

This Agreement is dated as of the 19 day of ~~NOVEMBER~~ 2001 by and between SEL Properties L L C a South Carolina limited liability company ("Borrower") having an address at 1105 Pulaski Street Columbia South Carolina 29201 and THE NATIONAL BANK OF SOUTH CAROLINA a national banking association (Bank") having an address at Post Office Box 1457 Columbia South Carolina 29202-1457

In consideration of the Loan described below and the mutual covenants and agreements contained herein and intending to be legally bound hereby Bank and Borrower agree as follows

1 Definitions and Reference Terms In addition to any other terms defined herein the following terms shall have the meanings set forth with respect thereto

(a) Agent to Request Disbursements Stephen E Lipscomb or his designee

(b) Budget The budget attached hereto as Exhibit A setting forth in detail all direct and indirect costs for the construction of the Improvements

(c) Completion Date With regard to the Loan the date specified by the Contractor as the anticipated date that the Improvements will be substantially completed

(d) Commitment Letter The agreement between Borrower and Bank dated August 1 2001

(e) Contractor DUTCH FORK DEVELOPMENT GROUP

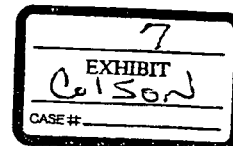
(f) Force Majeure Labor strikes riots Acts of God or other causes which are beyond the control of the parties and which could not be avoided by exercise of due care

(g) Guarantor Stephen E Lipscomb

(h) Hazardous Materials All materials defined as hazardous wastes or substances under any local state or federal environmental laws rules or regulations and petroleum petroleum products oil and asbestos

(i) Interest Reserve The Loan amount contains an interest reserve of \$250 000 00 which amount shall be advanced and deposited at closing into a NBSC premium money market account The interest reserve may only be used to pay accrued interest as required

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under the Note and may not be used to pay the first four monthly interest payments under the Note

(j) Improvements The infrastructure and other improvements constructed or to be constructed on the Land

(k) Land Approximately 130.37 acres located on the Northeast side of U S Highway 176 near Irmo South Carolina as more particularly described in the Mortgage

(l) Loan The \$2,001,375.00 Real Estate Development Line of Credit The Loan shall be secured by (i) a title insured first priority mortgage lien on each Property and (ii) an assignment of NBSC Certificate of Deposit Number _____

(m) Loan Documents This Agreement and the Commitment Letter (and all items and documents required therein) the Note the Mortgage and all other instruments documents and agreements required by Bank which evidence secure or otherwise relate to the Loan including without limitation any guaranties financing statements assignments of lessor's interest in leases rents and profits and assignments of construction documents together with any amendments renewals and extensions thereof all of which are incorporated herein by reference and made a part hereof References herein to the Loan Documents shall include all such documents instruments and other agreements collectively except that any such reference shall mean the appropriate individual document instrument or agreement if the context shall so require

(n) Mortgage The first lien mortgage and security agreements securing the Loan and the performance of Borrower's obligations with respect to the Loan, and all amendments renewals and extensions thereof

(o) Note The promissory note and other instruments documents or agreements evidencing Borrower's indebtedness for the Loan and all amendments renewals and extensions thereof

(p) Obligors The Borrower and all other makers co-makers endorers guarantors and others obligated primarily or secondarily for the payment of the indebtedness evidenced by the Note or performance of Borrower's obligations under the Loan Documents

(q) Plans The plans and specifications entitled ~~THE COURTYARDS AT~~ BILLING CREEK ARMS I prepared by the Engineer and dated Sept 14, 2001 2001 and all amendments thereto approved by Bank

(r) Premises ~~The Land and the Improvements~~ _____

2 Loan Subject to the terms and conditions of this Agreement and the Loan Documents Bank agrees to extend to Borrower (in periodic disbursements) up to the principal sums set forth herein the Loan The Loan shall bear interest at the rate or rates set forth in the Note

3 Representatives and Warranties of Borrower As an inducement to Bank to enter into this Agreement and to make the Loan Borrower represents and warrants to Bank as follows

(a) The financial information furnished to Bank in connection with its application for the Loan and in the financial statements submitted to Bank is complete and accurate and Borrower has no undisclosed direct or contingent liabilities There has been no material adverse change in Borrower's financial conditions since the preparation of this information

(b) Borrower has no pending or threatened litigation actions or proceedings which involve the possibility of materially and adversely affecting its business assets operations condition or prospects financial or otherwise

(c) Borrower has been issued all required federal state or local licenses certificates or permits relating to all applicable environmental laws

(d) Borrower shall provide Bank with a legal opinion from Borrower's counsel stating among other matters that (i) Borrower and Guarantor have the capacity and power to borrow as contemplated hereby and to perform their obligations under the respective loan documents (ii) the execution and delivery of and performance by the Borrower and Guarantor of their obligations pursuant to the terms of the Loan will not conflict with or violate or constitute a default under any existing statute rule or regulation applicable to or the terms or conditions or provisions of any agreement or instrument to which the Borrower or the Guarantor is a party or by which their assets are bound or affected

4 Construction Covenants of Borrower Borrower covenants and agrees with Bank as follows

(a) Progress of Work Lien-Free Completion Borrower will continually prosecute the work and complete the Improvements on or before the Completion Date subject to Force Majeure all in conformity with the approved Plans and the Budget and in compliance with all legal requirements and restrictions Borrower will not permit cessation of work on the Improvements for a period in excess of ten (10) business days (whether or not consecutive but excluding federal holidays and days on which work cannot be performed because of inclement weather or Force Majeure) without Bank's prior written consent Borrower will within fifteen (15) days after Borrower obtains knowledge thereof correct any material defect in the Improvements any material departure from the Plans legal requirements or good construction practices and any encroachment by the Improvements on any property line set back line easement or other restricted area Borrower will keep the Improvements free at all times from all

liens for services labor materials or indebtedness (other than the Loan and the liens securing the Loan) Provided however that Borrower shall have thirty (30) days in which to dispose of or bond any mechanic's liens or materialman's liens after the filing thereof On the Completion Date the Improvements will be fully equipped and ready for use for its intended purposes

(b) Plans Contracts and Budget Approval Assignment of Contracts Borrower will submit all contracts for construction and other services to the Improvements the Plans the Budget surveys of the Land and all other items required by the Loan Documents to Bank for its approval and Bank shall have no obligation to make any disbursement hereunder until it has approved those items Borrower agrees that the approved construction contract will not be terminated and that it and the Plans and Budget will not be modified or otherwise changed in any material manner without the prior written consent of Bank (Provided however Borrower may make changes to the Plans without Bank's consent as long as the aggregate amount of such changes does not exceed \$25 000 00) Borrower further agrees to perform all of its obligations under the approved construction contracts in a timely manner Borrower hereby assigns to Bank and grants Bank a security interest in all Borrower's rights and interests but not the obligations in and to the Plans and all construction and architectural contracts related to the Improvements

(c) Insurance Bank must be provided with satisfactory evidence of extended coverage hazard if applicable and casualty and liability insurance on the Premises as well as builder's risk insurance if applicable with Bank appearing as first mortgagee loss payee The coverage types and amounts of all required insurance must be satisfactory to Bank Bank reserves the right to require flood insurance if any of the Improvements are to be located in a flood hazard area All policies must be from companies satisfactory to Bank must be in an amount satisfactory to Bank and sufficient to avoid the application of any co-insurance provisions and must include provisions for a minimum 30-day advance written notice to Bank of any intended policy cancellation or non renewal Satisfactory evidence of premium payments must be provided along with an appropriate binder or commitment (in advance of the policy) at the closing of the Loan and prior to each anniversary thereof

(d) Survey Prior to closing Borrower will promptly provide to Bank a subdivision survey showing the location of the lots and all infrastructure for the development and any set back lines easements and other restricted areas

(e) Environmental Compliance An Environmental Audit of the Land must be completed The form and content of the report must be reasonably acceptable to Bank and any costs associated therewith shall be borne by the Borrower

(f) Appraisal Borrower shall pay when due the cost of providing to Bank at its request from time to time a then-current appraisal of the market value of the Property prepared by an MAI appraiser or by another appraiser acceptable to Mortgagee in its discretion provided however that Bank shall make such request no more frequently than once every third year unless Bank is required by any law regulation order or other directive from any regulatory

agency having jurisdiction over Bank to obtain any such appraisal more frequently than every third year. If Borrower fails to pay such cost when due, Bank may pay such cost on Borrower's behalf and the same shall constitute principal under the Note, shall bear interest at the applicable rate provided in the Note, and shall be due and payable on demand. Borrower's failure to pay such amount (with all accrued interest) in full within ten (10) days of the date of such demand shall constitute an event of default entitling the Bank to accelerate the maturity of the Note.

(g) Title Instruments. Borrower will submit all proposed easements, permits, licenses and other instruments which would or may affect title to the Premises to Bank for approval prior to the execution thereof by Borrower.

(h) Consent to Leases. Borrower will not enter into any leases or occupancy agreements affecting the Land, or any amendments or renewals thereof, without the prior written consent of Bank.

(i) Use of Proceeds. Borrower will use the proceeds of the Loan solely for the purpose of paying for the costs of construction of the Improvements in accordance with the Plans and the Budget and as set forth in the requests for disbursements required herein and for such other purposes associated therewith as Bank shall have specifically approved in writing.

(j) Sufficient Funding. Borrower's Equity Investment Obligation. If the undisbursed portion of the Loan and any sums deposited by Borrower with Bank hereunder are at any time insufficient, in Bank's reasonable judgment, to fully complete the Improvements in accordance with the Plans and to pay all other sums under the Loan Documents when due, Borrower will, within seven (7) days after written notice thereof from Bank, deposit with Bank such sums of money in cash as Bank may reasonably require to remedy such condition and to pay any liens for services and materials alleged to be due and payable at that time. At Bank's option, no further disbursements of such Loan proceeds shall be made until Borrower has fully complied with this requirement. All deposited sums shall stand as additional security for Borrower's obligations under this Agreement and may be disbursed at Bank's option before any further Loan disbursements.

(k) Environmental Inspections. Inspection of Improvements. Borrower agrees to permit Bank, its agents, contractors and employees to enter and inspect the Premises at any reasonable time during normal business hours upon three (3) days prior notice for the purposes of conducting an environmental investigation and audit (including taking physical samples) to insure that Borrower is complying with the provisions hereof. Such inspections shall be conducted so as to cause minimal interference with Borrower's business. Subject to the limitations stated in the Mortgage, Borrower shall reimburse Bank on demand for the costs of any such environmental investigations and audit. Borrower shall provide Bank, its agents, contractors, employees and representative with access to and copies of any and all data and documents relating to or dealing with any Hazardous Materials used, generated, manufactured, stored or disposed on the Premises within five (5) days of the request thereof.

Borrower will permit Bank and its representatives to enter upon the Premises and to inspect the Improvements and all materials used in the construction thereof during normal business hours. Bank shall have the right to reject and require Borrower to replace any material or work which does not comply with the Plans (except as provided above) or good construction practices.

It is understood and agreed that Bank's rights under this provision are solely for Bank's loan administration purposes and do not impose any duty of care of Bank to Borrower or to any other person or entity. Bank shall have no liability, obligation or responsibility whatsoever with respect to the construction of the Improvements except to disburse the Construction/Permanent Loan proceeds pursuant to this Agreement. Bank shall not be obligated to cause to be performed any environmental audit or investigation or inspect the Premises or the construction of the Improvements. Bank shall not be liable for any defect in the Improvements by reason of inspecting or not inspecting the same. Bank shall not be liable for the performance or default of Borrower, any architect, engineer, contractor, construction consultant or any other party, nor for any failure to construct, complete, protect or insure the improvements, nor for the payment of the costs of labor, materials or services supplied for the construction of the Improvements, nor for the performance of any obligation of Borrower.

5 Disbursements

(a) Loan Disbursement Conditions. Bank shall not be obligated at any time to disburse any proceeds of a Construction/Permanent Loan unless the following conditions have been satisfied:

i. Bank receives a copy of fully executed guaranteed maximum and fixed price AIA form construction contract in an amount and in form and content acceptable to Bank related to the Improvements.

ii. Bank receives a copy of the fully executed Engineer's contract in form and content acceptable to Bank related to the Improvements.

iii. Bank receives an appropriate assignment for the benefit of Bank of all Borrower's development rights and contracts for the development of the Land.

iv. Bank receives a copy of the building permit for the Improvements.

v. Bank receives evidence of the availability of utilities for the Improvements and evidence of appropriate zoning for the Improvements.

vi. Bank receives evidence in form and content acceptable to Bank that all applicable laws have been and will be complied with as they relate to the

construction of the Improvements including any and all laws or regulations for facilities for the handicapped

vii Bank receives a copy of all plans and specifications for the Improvements

viii If required in Bank's title insurance policy or if otherwise required by Bank Bank shall have received an endorsement to such policy advancing the effective date of its coverage to the date of the disbursement increasing the amount of coverage to include such disbursement and indicating no liens encumbrances and other matters not previously approved by Bank The costs of such endorsements shall be borne by Borrower

ix Bank receives a cost breakdown and Budget for the Improvements

x Bank receives geotechnical investigation engineer's certificate construction schedule development budget wetlands delineation evidence that developer and contractor are bonded

xi Prior to the final Loan disbursement with respect to construction work on the Improvements Borrower shall have satisfied all requirements of this Agreement and shall have delivered to Bank such certificates documents and other evidence of completion of the Improvements required by the Commitment Letter or as Bank may reasonably require including but not limited to evidence that all sums due for construction costs have been paid or will be paid out of the final disbursement.

(b) Loan Disbursement Procedures At the closing of the Loan Bank will disburse proceeds of the Loan for the purpose of paying the current indebtedness on the Land and the costs of all budgeted site preparation work Closing costs shall be borne by the parties pursuant to the terms of the Commitment Letter So long as all the requirements of the Loan are satisfied Bank will make disbursements during the Loan term with five (5) banking days notice for requests in a form and substance acceptable to Bank Requests for advances shall be submitted on AIA application for payment forms signed by the Borrower the contractor and certified by the engineer for the Improvements showing the percentage of completion of the Improvements and setting forth in detail the amounts expended or costs incurred for work done and materials incorporated in the Improvements The Borrower shall not make more than one request for an advance per calendar month

6 Prepayment Borrower shall have the option of prepaying the principal outstanding under the Loan in whole or in part at any time provided that any such prepayment shall be applied by Bank against principal in the inverse order of maturity

7 Financial Information During the terms of the Loan Borrower will be required to furnish to Bank (i) within one hundred and twenty (120) days from the end of Borrowers fiscal year current CPA reviewed fiscal year-end consolidating financial statements for the Borrower, (ii) within forty-five (45) days of the end of each calendar quarter internally prepared consolidating financial statements for the Borrower (iii) not later than May 31 of each year furnish to Bank copies of Borrower s and Guarantor s tax returns and (iv) on an annual basis Guarantor s current financial statements All financial statements must be in accordance with generally accepted accounting principles consistently applied and must include balance sheets income information and a list of contingent liabilities and must otherwise be in form and content reasonably acceptable to Bank

8 Financial Covenants and Other Conditions During the terms of the Loan Borrower will be required to comply with certain financial covenants and other conditions including without limitation the following

(a) Borrower will not without the prior consent of Bank effect a change in its management or ownership enter into any merger or consolidation lend money or credit to or make or permit to be made outstanding loans or advances to any person firm or corporation or change the basic character of its business

(b) Borrower shall comply with all regulatory requirements reserve and keep in force all licenses permits and franchises necessary for the proper conduct of its business and duly pay and discharge all taxes assessments and governmental charges upon Borrower or against the Property before the date on which penalties attached thereto unless and to the extent only that the same shall be contested in good faith and by appropriate proceedings

(c) Borrower shall promptly notify Bank of all actual or contingent liabilities of Borrower

(d) Bank must be provided with satisfactory evidence of builder s risk insurance if applicable (during the construction period) extended coverage hazard if applicable and casualty insurance (throughout the remainder of the term of the Loan) and liability insurance on the Land with Bank appearing as first mortgagee loss payee The coverage types and amounts of all required insurance must be reasonably satisfactory to Bank Bank reserves the right to require flood insurance if any of the improvements are to be located in a flood hazard area All policies must be from companies reasonably satisfactory to Bank, must be in an amount reasonably satisfactory to Bank and sufficient to avoid the application of any co-insurance provisions and must include provisions for a minimum 30-day advance written notice to Bank of any intended policy cancellation or non-renewal Satisfactory evidence of premium payments must be provided along with an appropriate binder or commitment (in advance of the policy) prior to the intended date of the loan closing - - - - -

9 Defaults and Remedies

(a) Defaults An event of default under this Loan Agreement shall be the occurrence of any one of the following events or conditions and the continuance thereof for either (i) the specific period of time if any herein specified with respect to such event or condition (ii) a period of ten (10) days after written notice thereof to the Borrower from the Bank if no period is specified and the event or condition is a failure to pay money to the Bank as and when due (iii) a period of thirty (30) days after written notice thereof to Borrower if no period is specified and the event or condition is not a failure to pay money (each a default)

i Any voluntary or involuntary Bankruptcy reorganization insolvency arrangement receivership or similar proceeding is commenced by or against Borrower under any federal or state law or Borrower makes any assignment for the benefit of creditors

ii Borrower fails to make a payment of principal or interest on any of the Loan and fails to cure such default within any cure period provided by the loan documents

iii Any warranty representation or statement made or furnished by Borrower in connection with the Loan and the commitment letter (including any warranty representation or statement in the Borrower's or any Guarantor's financial statements) or to induce Bank to make the Loan, is untrue or misleading in any material adverse respect

iv Borrower violates any of the financial covenants contained herein

If such default is not a monetary default the Borrower shall have a period of thirty (30) days within which to cure such default Each of the cure periods herein set forth shall commence on the date of the mailing of such notice by the Bank to the Borrower

(b) Remedies In the event of any default hereunder Bank may at its option exercise any or all of the rights options privileges and remedies provided by this Agreement or by the other Loan Documents (including without limitation the right to accelerate the indebtedness evidenced by the Note and to commence foreclosure proceedings) or otherwise available to Bank at law in equity or under any other contract In addition Bank may at its option and at the risk cost and expense of Borrower (i) enter upon and take possession of the Premises and the materials and equipment being used in the construction of the Improvements (ii) take such action as Bank shall deem appropriate to protect the Premises and (iii) take such action as Bank shall deem appropriate to continue construction of the Improvements with such changes therein as Bank may elect to make

If Bank shall elect to continue construction Bank may (i) assume or reject any construction or other contracts made by Borrower in connection with the construction or operation of the Improvements (ii) engage or employ contractors subcontractors architects engineers and others for the construction of the Improvements (iii) pay settle or compromise existing or future bills or claims relating to the construction of the Improvements or the Premises or affecting title thereto (iv) and take or refrain from taking such other action (including without limitation discontinuing construction) in its name or in the name of Borrower as Bank may determine

All costs and expenses incurred by Bank in taking and protecting the Premises and in constructing the Improvements shall be paid by Borrower to Bank upon demand with interest at the rate provided in the Note from the date of disbursement to the date of payment to Bank and the payment of such sums shall be secured by the Mortgage and the other Loan Documents Bank shall have no obligation to take any of the foregoing actions and if Bank should do so it shall have no liability to Borrower or any other Obligor for the sufficiency of any such actions or otherwise

(c) Set Off Bank shall also have a continuing security interest in lien on and right of set-off against all property and deposit accounts belonging to Borrower or any other Obligor which are at or under the control of Bank

(d) Cumulative Rights and Remedies All rights options privileges and remedies provided by this Agreement and the other Loan Documents and otherwise available to Bank at law in equity or under any other contract shall be cumulative and no such right option privilege or remedy shall be deemed to be exclusive or alternative

10 General Conditions

(a) Bank Approvals All surveys appraisals insurance policies construction contracts and subcontracts leases plans and specifications legal opinions requests for disbursement and other Loan Documents and items required for the Loan shall be reasonably satisfactory to Bank in all respects

(b) Appraisal Bank shall engage a certified appraiser to perform an appraisal of the Property The fees charged by the appraiser shall be paid by the Borrower

(c) Costs and Expenses Borrower will pay when due and if paid by Bank reimburse Bank on demand for all reasonable costs and expenses (including without limitation the costs and expense for insurance premiums appraisals surveys recording documents environmental assessments title insurance taxes due on Loan Documents and legal counsel for Bank) in connection with the preparation administration after a default modification or enforcement of this Agreement and the other Loan Documents

(d) No Third Party Beneficiaries This Agreement is for the sole protection and benefit of Bank and Borrower and no other person or entity shall have any right as a third party beneficiary hereunder or any right to bring an action hereon or claim the proceeds of the Loan hereunder

(e) No Waiver No failure on the part of Bank to exercise any right option privilege or remedy available to Bank shall operate as a waiver thereof nor shall any single or partial exercise or waiver of any such right option privilege or remedy preclude any other or further exercise thereof to its fullest extent or the exercise of any other right option privilege or remedy

(f) Notices Notices requests demands and other communications which any party is required or may desire to give to any other party under any provision of this Agreement must be in writing and delivered to the other party at the address set forth in the first paragraph of this Agreement (or to such other address as any party may designate by written notice to the other party) Each such notice request demand or other communication shall be deemed given or made as follows If sent by mail upon the earlier of the date of receipt or five (5) days after deposit in the U S Mail certified with first class postage prepaid and return receipt requested or sent by any other means upon delivery

(g) Transfer of Rights Borrower shall not assign or otherwise transfer this Agreement or the Loan Documents in whole or in part without the prior written consent of Bank Bank may create and sell participation interests in the Loan or otherwise assign or transfer this Agreement and the Loan Documents in whole or in part at any time and in the event of an assignment or transfer by Bank the term "Bank" shall include any such assignee or transferee to the extent of the interest assigned or transferred This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs successors personal representatives and assigns

(h) Indemnification Borrower shall indemnify defend and hold Bank and its successors and assigns harmless from and against any and all actual out-of-pocket claims demands suits losses damages assessments fines penalties costs or other expenses (including reasonable attorneys fees and court costs) arising from or in any way related to actual or threatened damage to the environment agency costs of investigation personal injury or death or property damage due to a release or alleged release of Hazardous Materials on or under the Premises or arising from any other conditions existing on or under the Premises or from any business operations conducted thereon resulting from the use or existence of Hazardous Materials (except for claims resulting from the release or storage of Hazardous Materials on or under the Premises subsequent to payment of the Loan in full and Borrower's conveyance of the Premises to a third party) whether such claim proves to be true or false Borrower further agrees that its indemnity obligations shall include but are not limited to liability for damages resulting from the personal injury or death of an employee of the Borrower regardless of whether the Borrower has paid the employee under the worker's compensation laws of any state or other similar federal or

state legislation for the protection of employees. The term "property damage" as used in this paragraph includes but is not limited to damage to any real or personal property of Borrower Bank and of any third parties. Borrower's obligations under this paragraph shall survive the repayment of the Loan and any deed in lieu of foreclosure or foreclosure of the Mortgage and/or any security agreement securing the Loan.

(i) Joint and Several Obligations. If more than one person or entity is named as Borrower herein, this Agreement shall be binding upon all such persons and entities jointly and severally.

(j) Severability. The unenforceability or invalidity of any provision of this Agreement shall not affect the enforceability or validity of any other provision herein, and the invalidity or unenforceability of any provision of any Loan Document to any person or circumstance shall not affect the enforceability or validity of such provision as it may apply to other persons or circumstances.

(k) Advertising. Bank shall have the right to erect one or more signs on the Premises advertising its financing of the Improvements.

(l) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of South Carolina and applicable laws of the United States of America.

(m) Release. Lender agrees to release lots under the terms set forth in the Mortgage of even date hereof.

11 Exhibits/Additional Provisions. This Agreement includes any exhibits and attachments referred to herein. The terms of such exhibits and attachments are made a part hereof, whether actually attached hereto or not. If any additional provision contained in any such exhibit or attachment is in conflict with another term or condition of this Agreement, the additional provision shall control.

12 ARBITRATION. ANY CONTROVERSY OR CLAIM BETWEEN OR AMONG THE PARTIES HERETO INCLUDING BUT NOT LIMITED TO THOSE ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY RELATED AGREEMENTS OR INSTRUMENTS INCLUDING ANY CLAIM BASED ON OR ARISING FROM AN ALLEGED TORT SHALL BE DETERMINED BY BINDING ARBITRATION IN ACCORDANCE WITH THE FEDERAL ARBITRATION ACT (OR IF NOT APPLICABLE, THE APPLICABLE STATE LAW), THE RULES OF PRACTICE AND PROCEDURE FOR THE ARBITRATION OF COMMERCIAL DISPUTES OF JUDICIAL ARBITRATION AND MEDIATION SERVICES, INC. (JAMS), AND THE SPECIAL RULES SET FORTH BELOW. IN THE EVENT OF ANY INCONSISTENCY, THE SPECIAL RULES SHALL CONTROL. JUDGMENT UPON ANY ARBITRATION AWARD MAY BE ENTERED IN

ANY COURT HAVING JURISDICTION ANY PARTY TO THIS AGREEMENT MAY BRING AN ACTION INCLUDING A SUMMARY OR EXPEDITED PROCEEDING TO COMPEL ARBITRATION OF ANY CONTROVERSY OR CLAIM TO WHICH THIS AGREEMENT APPLIES IN ANY COURT HAVING JURISDICTION OVER SUCH ACTION

SPECIAL RULES THE ARBITRATION SHALL BE CONDUCTED IN THE CITY OF THE BORROWER'S DOMICILE AT THE TIME OF THIS AGREEMENT'S EXECUTION AND ADMINISTERED BY JAMS WHICH WILL APPOINT AN ARBITRATOR IF JAMS IS UNABLE OR LEGALLY PRECLUDED FROM ADMINISTERING THE ARBITRATION THEN THE AMERICAN ARBITRATION ASSOCIATION WILL SERVE ALL ARBITRATION HEARINGS WILL BE COMMENCED WITHIN 90 DAYS OF THE DEMAND FOR ARBITRATION FURTHER THE ARBITRATOR SHALL ONLY UPON A SHOWING OF CAUSE BE PERMITTED TO EXTEND THE COMMENCEMENT OF SUCH HEARING FOR UP TO AN ADDITIONAL 60 DAYS

RESERVATION OF RIGHTS NOTHING IN THIS AGREEMENT SHALL BE DEEMED TO (I) LIMIT THE APPLICABILITY OF ANY OTHERWISE APPLICABLE STATUTES OF LIMITATION OR REPOSE AND ANY WAIVERS CONTAINED IN THIS AGREEMENT OR (II) BE A WAIVER BY BANK OF THE PROTECTION AFFORDED TO IT BY 12 U.S.C. SEC. 91 OR ANY SUBSTANTIALLY EQUIVALENT STATE LAW OR (III) LIMIT THE RIGHT OF THE BANK HERETO (A) TO EXERCISE SELF-HELP REMEDIES SUCH AS (BUT NOT LIMITED TO) SETOFF OR (B) TO FORECLOSE AGAINST ANY REAL OR PERSONAL PROPERTY COLLATERAL OR (C) TO OBTAIN FROM A COURT PROVISIONAL OR ANCILLARY REMEDIES SUCH AS (BUT NOT LIMITED TO) INJUNCTIVE RELIEF WRIT OF POSSESSION OR THE APPOINTMENT OF A RECEIVER BANK MAY EXERCISE SUCH SELF-HELP RIGHTS FORECLOSE UPON SUCH PROPERTY OR OBTAIN SUCH PROVISIONAL OR ANCILLARY REMEDIES BEFORE DURING OR AFTER THE PENDENCY OF ANY ARBITRATION PROCEEDING BROUGHT PURSUANT TO THIS AGREEMENT NEITHER THIS EXERCISE OF SELF-HELP REMEDIES NOR THE INSTITUTION OR MAINTENANCE OF AN ACTION FOR FORECLOSURE OR PROVISIONAL OR ANCILLARY REMEDIES SHALL CONSTITUTE A WAIVER OF THE RIGHT OF ANY PARTY INCLUDING THE CLAIMANT IN ANY SUCH ACTION TO ARBITRATE THE MERITS OF THE CONTROVERSY OR CLAIM OCCASIONING RESORT TO SUCH REMEDIES

13 NO ORAL AGREEMENT THIS WRITTEN LOAN AGREEMENT AND THE OTHER LOAN DOCUMENTS REPRESENT THE FINAL AGREEMENT BETWEEN THE PARTIES AND MAY NOT BE CONTRADICTED BY EVIDENCE OF PRIOR CONTEMPORANEOUS OR SUBSEQUENT ORAL AGREEMENTS OF THE PARTIES THERE ARE NO UNWRITTEN ORAL AGREEMENTS BETWEEN THE PARTIES

In Witness Whereof the parties have duly executed this Agreement under seal as of the day and year first above written

Witnesses

SEL PROPERTIES L L C

Rose A. Kocer
[Signature]

By [Signature]
Stephen E Libpscomb

THE NATIONAL BANK OF SOUTH
CAROLINA

Rose A. Kocer
[Signature]

By [Signature]
Its Authorized Officer

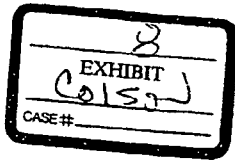
LEGAL DESCRIPTION

EXHIBIT A

All that certain piece parcel or tract of land, situate lying and being on the northern side of US Highway #176 about 16 miles northwest of the City of Columbia, School District #6 of Richland County near the Town of Peak, in the State of South Carolina, being shown and delineated as tract "A" containing 122.28 acres on plat prepared for Michael J Mungo by Belter and Smith, Inc Engineers and surveyors, dated November 1 1972, recorded in Office of the Clerk of Court for Richland County in Plat Book X at Page 2151, said plat being expressly incorporated herein by reference

10737

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PROMISSORY NOTE

Columbia South Carolina
February 15 2005

FOR VALUE RECEIVED SEL PROPERTIES L L C a South Carolina limited liability company (the Borrower) promises to pay to the order of THE NATIONAL BANK OF SOUTH CAROLINA (the Lender) at Post Office Box 1457 Columbia South Carolina 29202 the principal sum of up to ONE MILLION EIGHT HUNDRED SIXTEEN THOUSAND EIGHT HUNDRED FIFTY TWO AND 00/100 (\$1 816 852 00) DOLLARS or so much thereof as may be advanced with interest thereon computed from date of each advance at the floating rate of The National Bank of South Carolina prime rate ("NBSC Prime") plus one (1%) percent to change as NBSC Prime changes The loan amount includes \$50 000 00 which shall be advanced at closing and held by Lender in a NBSC premium money market account However such interest reserve may not be used to pay the first four monthly interest only payments Interest shall be computed on the actual number of days elapsed divided by a 360-day year and shall be payable monthly on the fifth day of each month on those sums actually advanced beginning with the fifth day of the first month following the first advance under this Note and continuing on the fifth day of each month thereafter At the option of Lender it may collect interest due by deducting on the fifth day of each month the amount of interest for the preceding month from any interest reserve established or credited (other than provided for in this Note) and by adding the same to the outstanding principal balance or it may deduct the amount of such interest from any advance of this Note After the entire principal amount of this Note has been advanced or earlier at the option of Lender interest may be billed by it directly to Borrower

The entire outstanding principal balance of this Note and any outstanding accrued interest shall be due and payable in full on February 15 2007 (the Maturity Date")

All payments under this Note shall be applied first to accrued interest then to principal if applicable and then to late charges if any All installments of principal if applicable and all interest are payable in lawful money of the United States of America which shall be legal tender in payment of all debts and dues public and private at the time of payment and in the event of (a) failure to pay this Note in full on the Maturity Date or (b) default in the payment of any other installment of principal if applicable or interest or any other sum payable pursuant to the terms of this Note or any lien document securing this Note not cured within ten (10) days after written notice from Lender or (c) an Event of Default as such term is defined in the mortgage executed of even date (the "Mortgage") then or at any time thereafter at the option of Lender the whole of the principal sum then remaining unpaid hereunder together with all interest accrued thereon shall immediately become due and payable without further notice and the lien given to secure the payment of this Note may be foreclosed From and after the maturity of this Note either according to its terms or as the result of a declaration of maturity the entire principal remaining unpaid hereunder shall bear interest at a rate of three (3%) percent per annum above the rate otherwise in effect hereunder (the Default Rate) or the highest applicable lawful rate whichever is the lesser provided that there shall be no automatic reduction to the highest lawful rate as to Borrower or any endorser or guarantor barred by law from availing itself in any action or

proceeding of the defense of usury or Borrower or any endorser or guarantor barred or exempted from the operation of any law limiting the amount of interest that may be paid for the loan or use of money or in the event this transaction because of its amount or purpose or for any other reason is exempt from the operation of any statute limiting the amount of interest that may be paid for the loan or use of money Failure to exercise such option or any other rights Lender may in the event of any such default be entitled to shall not constitute a waiver of the right to exercise such option or any other rights in the event of any subsequent default whether of the same or different nature

If this Note is placed in the hands of an attorney for collection or is collected through any legal proceedings Borrower promises to pay all reasonable expenses of collection and reasonable attorney's fees incurred by Lender

In the event the interest provisions hereof or any exactions provided for herein or in the lien documents or any other instruments securing this Note shall result because of the monthly deduction of principal or any other reason related or unrelated to the interest provisions at any time during the life of the loan in an effective rate of interest which for any period of time transcends the limit of the usury or any other law applicable to the loan evidenced hereby all sums in excess of those lawfully collectible as interest for the period in question shall without further agreement or notice between or by any party hereto be applied to principal immediately upon receipt of such monies by Lender with the same force and effect as though the payor had specifically designated such and agreed to accept such extra payment(s) as a premium free payment Notwithstanding the foregoing however Lender may at any time and from time to time elect by notice in writing to the owners of the property affected by the lien document securing this Note to reduce or limit the collection of any interest to such sums which when added to the said first stated interest shall not result in any payments toward principal in accordance with the requirement of the preceding sentence In no event shall any agreed to or actual exaction as consideration for this loan transcend the limits imposed or provided by the law applicable to this transaction or Borrower in the jurisdiction in which the land is located for the use or detention of money or for forbearance in seeking its collection

This Note is secured by that certain Mortgage and Security Agreement of even date herewith (the Mortgage) to which reference is made from the terms thereof and the same are made a part of this Note

Lender may collect a late charge of five (5%) percent of any regular installment of principal or interest which is not paid within twenty (20) days of the due date thereof to cover the extra time and expense involved in handling delinquent payments Such late charge shall apply only to late payments prior to maturity or acceleration Upon maturity or acceleration no further late charges shall be assessed but Borrower shall pay the Default Rate of interest on all amounts due from the date of maturity or acceleration until the Note is paid in full The collection of the late charge shall not be deemed a waiver by Lender of interest accruing after the due date of any installment or of any of Lender's other rights under this Note

Borrower agrees that the late charge provided above is fair and reasonable compensation to Lender for the additional administrative time and effort incurred in collecting and processing delinquent payments. Borrower further agrees that the Default Rate is a fair and reasonable rate of interest to be charged after maturity or acceleration of this Note in light of the increased risks to Lender inherent in a past due loan and the administrative time and effort incurred in collecting a past due loan.

Borrower and all endorsers, guarantors and all persons liable or to become liable on this Note waive presentment, protest and demand, notice of protest, demand and dishonor and nonpayment of this Note and consent to any and all renewals and extensions of the time of payment hereof and agree further that at any time and from time to time without notice the terms of payment herein may be modified or the security described in the lien document securing the Note released in whole or in part or increased, changed or exchanged by agreement between Lender and any owner of premises affected by said lien document securing this Note without in anywise affecting the liability of any party to this instrument or any person liable with respect to any indebtedness evidenced hereby.

Lender is not required to rely on the collateral for the payment of the Note in the event of default by the maker but may proceed directly against the maker, endorsers or guarantors if any in such manner as it deems desirable. None of the rights and remedies of Lender hereunder is to be waived or affected by failure or delay to exercise them. All remedies conferred on Lender by this Note or any other instrument or agreement shall be cumulative and none is exclusive. Such remedies may be exercised concurrently or consecutively at Lender's option.

This Note may be prepaid in whole or in part at any time without penalty.

This Note shall be governed as to validity, interpretation, construction, effect and in all other respects by the laws and decisions of the State of South Carolina.

Wherever possible each provision of this Note shall be interpreted in such manner as to be effective and valid under applicable law but if any provision of this Note or portion thereof shall be prohibited by or be invalid under such law such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Note.

This Note may be assigned by Lender with or without recourse.

Borrower submits to the jurisdiction of any court of competent jurisdiction within the State of South Carolina. Borrower agrees that any action concerning this Note or any instrument securing this Note whether initiated by Lender, Borrower or any other party shall be tried only in a court of competent jurisdiction within the State of South Carolina and Borrower waives all objections to venue. All matters arising hereunder shall be determined in accordance with the law and practice of such South Carolina court. Borrower further agrees to comply with all requirements necessary to give such court in personam jurisdiction and agrees that service of

process may be accomplished by in addition to any other lawful means certified mail return receipt requested

WAIVER OF JURY TRIAL BY THE EXECUTION HEREOF BORROWER KNOWINGLY VOLUNTARILY AND INTENTIONALLY HEREBY AGREES THAT

(A) NEITHER BORROWER NOR LENDER NOR ANY ASSIGNEE SUCCESSOR HEIR OR LEGAL REPRESENTATIVE OF BORROWER OR LENDER SHALL SEEK A JURY TRIAL IN ANY LAWSUIT PROCEEDING COUNTERCLAIM OR ANY OTHER LITIGATION PROCEDURE ARISING FROM OR BASED UPON THIS NOTE THE MORTGAGE THE LOAN AGREEMENT (IF ANY) OR ANY OF THE LOAN DOCUMENTS EVIDENCING SECURING OR RELATING TO THE LOAN EVIDENCED HEREBY OR TO THE DEALINGS OR RELATIONSHIP BETWEEN OR AMONG THE PARTIES HERETO

(B) NEITHER BORROWER NOR LENDER WILL SEEK TO CONSOLIDATE ANY SUCH ACTION IN WHICH A JURY TRIAL HAS BEEN WAIVED WITH ANY OTHER ACTION IN WHICH A JURY TRIAL HAS NOT BEEN OR CANNOT BE WAIVED

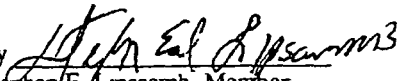
(C) THE PROVISIONS OF THIS PARAGRAPH HAVE BEEN FULLY NEGOTIATED BY THE PARTIES HERETO AND THESE PROVISIONS SHALL BE SUBJECT TO NO EXCEPTIONS

(D) NEITHER BORROWER NOR LENDER HAS IN ANY WAY AGREED WITH OR REPRESENTED TO ANY OTHER PARTY THAT THE PROVISIONS OF THIS PARAGRAPH WILL NOT BE FULLY ENFORCED IN ALL INSTANCES AND

(E) THIS PROVISION IS A MATERIAL INDUCEMENT FOR LENDER TO MAKE THE LOAN EVIDENCED BY THIS NOTE

IN WITNESS WHEREOF Maker has executed this Note under seal as of the date first above written

SEL PROPERTIES L L C a South Carolina
limited liability company

By 
Stephen E Lipscomb Member

Tax ID 57-1039150

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2/14

GUARANTY AGREEMENT

THIS GUARANTY AGREEMENT dated as of this 15th day of June 2005 (the Guaranty) is given by STEPHEN E LIPSCOMB (the Guarantor) and extended to the National Bank of South Carolina a national banking association with its offices located in Columbia South Carolina (the Bank) for the benefit of SEL Properties L.L.C. a South Carolina limited liability company (the Borrower)

RECITALS

1 The Bank has agreed to make a development loan of up to \$1 816 852 00 to the Borrower pursuant to the terms and conditions of a Lot Acquisition and Construction Loan Agreement of even date herewith (the "Loan Agreement") and evidenced by a revolving line of credit Promissory Note of the Borrower dated as of the date hereof in the aggregate principal amount of up to \$1 816 852 00 (the Note). All of the terms conditions provisions and definitions of the Loan Agreement are hereby incorporated herein by reference

2 The Guarantor is affiliated with the Borrower and benefits from the extension of credit from Bank to Borrower

3 Without this Guaranty the Bank would be unwilling to make the loan to the Borrower evidenced by the Note

4 Because of the direct benefit to the Guarantor from the loan to the Borrower the Guarantor agrees to guarantee to the Bank the obligations of the Borrower as set forth herein

NOW THEREFORE in consideration of the Bank entering into the Loan Agreement and making the loan to the Borrower

1 Guaranty of Payment The Guarantor hereby jointly and severally unconditionally guarantees to the Bank the payment when due by acceleration or otherwise of the indebtedness For the purposes hereof the term indebtedness shall include any and all indebtedness of the Borrower to the Bank including without limitation all principal interest and fees evidenced by the Note and the Loan Agreement plus any and all other indebtedness of the Borrower to the Bank howsoever evidenced whether existing now or arising hereafter as such indebtedness may be modified extended or renewed from time to time The guaranty of the Guarantor as set forth in this section is a guaranty of payment and not of collection

2 Guaranty of Performance The Guarantor additionally unconditionally guarantees to the Bank the timely performance of all Other obligations of the Borrower under all of the Loan Documents (as defined in the Loan Agreement) including without limiting the generality of the foregoing that

(a) the Improvements (as defined in the Loan Agreement) will be constructed upon the Land (as defined in the Loan Agreement) in accordance with the Loan Agreement and with the Plans (as defined in the Loan Agreement) and

(b) the Improvements will be completed including delivery of any certificates required by law or the Loan Agreement on or before the date required in the Loan Agreement.

In the event the foregoing conditions are not complied with in any respect whatsoever and without the necessity of any notice from the Bank to the Guarantor the Guarantor agrees to (i) assume all responsibility for the completion of the Improvements and at the Guarantor's own cost and expense to cause the Improvements to be fully completed in accordance with the Plans and in accordance with the Loan Agreement; (ii) pay all bills in connection with the construction of the Improvements and (iii) indemnify and hold the Bank harmless from any and all loss cost liability or expense the Bank may suffer by reason of any such event. The Bank shall accept

performance by the Guarantor of the Borrower's obligations under the Loan Documents and so long as all of said obligations are being performed by the Borrower or the Guarantor the Bank will make its loan proceeds available under the terms of the Loan Agreement. If after the occurrence of an Event of Default (as defined in the Loan Documents) the Bank in its sole discretion is dissatisfied with the progress of construction by the Borrower and/or the Guarantor the Bank may at its option after first having given notice to the Guarantor at the address set forth below in the manner prescribed herein for giving notice complete the Improvements either before or after commencement of foreclosure proceedings or before or after any other remedy of the Bank against the Borrower or the Guarantor with such changes or modifications in the Plans which the Bank reasonably deems necessary and expend such sums as the Bank in its discretion reasonably deems necessary and proper in order to so complete the Improvements and the Guarantor hereby waives any right to contest any such reasonably necessary expenditures. The amount of any and all expenditures made by the Bank for the foregoing purposes shall be immediately due and payable to the Bank and accrue interest at the Default Rate as that term is defined in the Note. The obligations and liability of the Guarantor under this Section 2 shall not be limited or restricted by the existence of (or any limitation on) the guaranty of payment under Section 1.

3 Subordination

(a) Any indebtedness of the Borrower to the Guarantor now or hereafter existing together with any Interest thereon shall be and such indebtedness is hereby deferred postponed and subordinated to the Indebtedness.

(b) Any lien or charge on the Premises (as defined in the Loan Agreement) the personal property located thereon all rights therein and thereto and on the revenue and income to be realized therefrom which the Guarantor may have or obtain as security for any loans advances or costs in connection with the construction and completion of the Improvements shall be and such lien or charge hereby is subordinated to the Mortgage (as defined in the Loan Agreement) and all other Loan Documents and to the Indebtedness.

4 Release of Collateral Parties Liable, etc. The Guarantor agrees that the whole or any part of the security now or hereafter held for the Indebtedness may be exchanged compromised or surrendered from time to time that the Bank shall have no obligation to protect perfect, secure or insure any such security interests liens or encumbrances now or hereafter held for the Indebtedness or the properties subject thereto that the time or place of payment of the Indebtedness may be changed or extended in whole or in part to a time certain or otherwise and may be renewed or accelerated in whole or in part that the Borrower may be granted indulgences generally that any of the provisions of the Loan Agreement, the Note or any other documents executed in connection with this transaction may be modified amended or waived that any party (including any co-guarantor) liable for the payment thereof may be granted indulgences or released and that any deposit balance for the credit of the Borrower or any other party liable for the payment of the Indebtedness or liable upon any security therefor may be released in whole or in part at before and/or after the stated extended or accelerated maturity of the Indebtedness all without notice to or further assent by the Guarantor who shall remain bound thereon notwithstanding any such exchange compromise surrender extension renewal acceleration modification indulgence or release.

5 Waiver of Rights The Guarantor expressly waives (a) notice of acceptance of this Guaranty by the Bank and of all extensions of credit to the Borrower by the Bank (b) presentment and demand for payment of any of the Indebtedness (c) protest and notice of dishonor or of default to the Guarantor or to any other party with respect to the Indebtedness or with respect to any security therefor (d) notice of the Bank obtaining amending substituting for releasing waiving or modifying any security interest liens or encumbrances now or hereafter securing the Indebtedness or the Bank's subordinating compromising discharging or releasing such security interests liens or encumbrances (e) all other notices to which the Guarantor might otherwise be entitled (f) demand for payment under this Guaranty and (g) any right to assert against the Bank as a defense counterclaim set-off or cross claim any defense (legal or equitable) set-off.

counterclaim or claim which the Guarantor may now or hereafter have against the Bank or the Borrower but such waiver shall not prevent the Guarantor from asserting against the Bank in a separate action any claim action cause of action or demand that the Guarantor might have whether or not arising out of this Guaranty In addition the Guarantor agrees that in the case of an Event of Default neither the Guarantor nor anyone claiming through or under the Guarantor shall or will set up claim or seek to take advantage of any valuation stay extension or redemption laws now or hereafter in force in order to prevent or hinder the enforcement or foreclosure of the Mortgage or the absolute sale of the Premises or the final and absolute putting into possession thereof immediately after such sale of the purchasers thereof and the Guarantor for themselves and all who may at any time claim through or under any of them hereby waive the benefit of all such laws and any and all rights to have the assets comprising the Premises marshalled upon any foreclosure of the Mortgage

6 Primary Liability of the Guarantor The Guarantor agrees that this Guaranty may be enforced by the Bank without the necessity at any time of resorting to or exhausting any other security or collateral and without the necessity at any time of having recourse to the Note or the Property through foreclosure proceedings under the Mortgage or otherwise and the Guarantor hereby waives the right to require the Bank to proceed against the Borrower or any co-guarantor or to require the Bank to pursue any other remedy or enforce any other right The Guarantor further agrees that the Guarantor shall have no right of subrogation reimbursement or indemnity whatsoever nor any right of recourse to security for the debts and obligations of the Borrower to the Bank unless and until all of the debts and obligations of the Borrower to the Bank have been paid in full The Guarantor further agrees that nothing contained herein shall prevent the Bank from suing on the Note or foreclosing the Mortgage or from exercising any other rights available to it under the Note the Mortgage or the Loan Agreement or any other instrument of security if neither the Borrower nor the Guarantor timely perform the obligations of the Borrower thereunder and the exercise of any of the aforesaid rights and the completion of any foreclosure proceedings shall not constitute a discharge of any of the Guarantor's obligations hereunder it being the purpose and intent of the Guarantor that the Guarantor's obligations hereunder shall be absolute independent and unconditional under any and all circumstances Neither the Guarantor's obligations under this Guaranty nor any remedy for the enforcement thereof shall be impaired modified changed or released in any manner whatsoever by an impairment modification change release or limitation of the liability of the Borrower or any co-guarantor or by reason of the Borrower's or any co-guarantor's bankruptcy or insolvency The Guarantor acknowledges that the term Indebtedness as used herein includes any payments made by the Borrower to the Bank and subsequently recovered by the Borrower or a trustee for the Borrower pursuant to the Borrower's bankruptcy or insolvency At any time the Bank is entitled to exercise its remedies hereunder it may in its discretion elect to demand payment or performance In the event the Bank elects to demand performance it shall at all times thereafter have the right to demand payment until all of the Indebtedness has been paid in full In the event the Bank elects to demand performance, it shall at all times thereafter have the right to demand performance until all of the Indebtedness has been paid in full

7 Subrogation and Subordination The Guarantor hereby waives and renounces any and all rights it have or may have for subrogation indemnity reimbursement or contribution against the Borrower for amounts paid under this Guaranty This waiver is expressly intended to prevent the existence of any claim in respect to such reimbursement by the Guarantor against the estate of the Borrower within the meaning of Section 101 of the Bankruptcy Code and to prevent the Guarantor from constituting creditors of the Borrower in respect of such reimbursement within the meaning of Section 547(b) of the Bankruptcy Code in the event of a subsequent case involving the Borrower

8 Attorneys Fees and Costs of Collection If at any time or times hereafter the Bank employs counsel to pursue collection to intervene to sue for enforcement of the terms hereof or of the Note or to file a petition complaint answer motion or other pleading in any suit or proceeding relating to this Guaranty or the Note then in such event all of the reasonable

attorneys fees relating thereto shall be an additional liability of the Guarantor to the Bank payable on demand

9 Security Interests and Setoff As security for the Guarantor's obligations hereunder the Guarantor agrees that (a) in the event the Guarantor fails to pay its obligations hereunder when due and payable under this Guaranty any of the Guarantor's assets of any kind nature or description (including without limitation deposit accounts) in the possession control or custody of the Bank may without notice to the Guarantor be reduced to cash or the like and applied by the Bank in reduction or payment of the Guarantor's obligations hereunder (b) all security interests liens and encumbrances heretofore now and at any time or times hereafter granted by the Guarantor to the Bank shall also secure the Guarantor's obligations hereunder and (c) the Bank shall have the right, immediately and without further action by it to set off against the indebtedness all money owed by the Bank in any capacity as Guarantor whether or not due and the Bank shall be deemed to have made a charge against any such money immediately upon the occurrence of such obligation becoming due even though such charge is made or entered on the books of the Bank subsequent thereto

10 Term of Guaranty, Warranties This Guaranty shall continue in full force and effect until the indebtedness is fully paid performed and discharged This Guaranty covers the indebtedness whether presently outstanding or arising subsequent to the date hereof including all amounts advanced by the Bank in stages or installments The Guarantor warrants and represents to the Bank, (i) that the Guarantor has full power and lawful authority to execute this Guaranty (ii) that the execution and delivery of this Guaranty does not and will not violate constitute a breach of or result in the acceleration of any obligation under any mortgage lien lease agreement, instrument, arbitration award judgment or decree to which Guarantor is a party or by which Guarantor is bound will not violate or cause a breach of any applicable laws and will not violate or conflict with any other restriction of any kind or character to which Guarantor is subject (iii) that neither Guarantor nor any corporation partnership or other legal entity in which Guarantor is a principal is now in default on any of Guarantor's or its obligations and agreements and no condition exists which if continued would constitute such default (iv) that the Guarantor will immediately give notice in writing to the Bank of any action suits and proceedings before any court or governmental department, commission board bureau agency or instrumentality (domestic or foreign) directly or indirectly relating to or affecting Guarantor which would have an adverse impact either on Guarantor or the Premises or Guarantor's ability to perform under this Guaranty (v) that any amounts due Guarantor or to any entities in which Guarantor may have an interest from Borrower or any claims by Guarantor or such entities against Borrower shall be subordinated to all amounts due Bank from Borrower as to the Loan and the right of the Bank to be paid in full whether as scheduled or as a result of collection actions including but not limited to foreclosure (vi) that this Guaranty is binding upon and enforceable against the Guarantor in accordance with its terms (vii) that there is no litigation claims action or proceeding pending or to the best knowledge of the Guarantor threatened against Guarantor or any corporation partnership or other legal entity in which Guarantor is a principal or against the Premises pledged to secure the Loan which would materially adversely affect the financial condition of the Guarantor or its ability to fulfill their obligations hereunder nor are there any known suits or proceedings pending or threatened against any properties adjacent to the Premises which might materially affect the Premises (viii) that the financial statement of the Guarantor most recently provided to Bank is true and accurate as of the date hereof and disclose all liabilities including contingent liabilities of the Guarantor and there have been no material changes from the date of this statement to the date hereof and (ix) that the Guarantor will furnish financial information to the Bank from time to time at the request of the Bank and as may be required under the Loan Agreement This Guaranty is binding on and enforceable against the Guarantor its heirs personal representatives executors and assigns

11 Further Representations and Warranties The Guarantor further represents to the Bank that the Guarantor has knowledge of the Borrowers financial condition and affairs and represents and agrees that it will keep so informed while this Guaranty is in force The Guarantor

agrees that the Bank will have no obligation to investigate the financial condition or affairs of the Borrower for the benefit of the Guarantor nor to advise the Guarantor of any fact -expecting or any change in the financial condition or affairs of the Borrower which might come to the knowledge of the Bank at any time whether or not the Bank knows or believes or has reason to know or believe that any such fact or change is unknown to the Guarantor or might (or does) materially increase the risk of the Guarantor as guarantor or might (or would) affect the willingness of the Guarantor to continue as guarantor with respect to the Indebtedness

12 Additional Liability of the Guarantor If the Guarantor is or becomes liable for any indebtedness owing by the Borrower to the Bank by endorsement or otherwise than under this Guaranty such liability shall not be in any manner impaired or reduced hereby but shall have all and the same force and effect it would have had if this Guaranty had not existed and the Guarantor's liability hereunder shall not be in any manner impaired or reduced thereby

13 Cumulative Rights All rights of the Bank hereunder or otherwise arising under any documents executed in connection with or as security for the Indebtedness are separate and cumulative and may be pursued separately successively or concurrently or not pursued without affecting or limiting any other right of the Bank and without affecting or impairing the liability of the Guarantor

14 Usury Notwithstanding any other provisions herein contained no provision of this Guaranty shall require or permit the collection from the Guarantor of interest in excess of the maximum rate or amount that the Guarantor may be required or permitted to pay pursuant to any applicable law

15 Multiple Counterparts, Pronouns, Captions, Severability This Guaranty may be executed in multiple counterparts each of which shall be deemed an original but all of which shall constitute but one and the same document. The pronouns used in this instrument shall be construed as masculine feminine or neuter as the occasion may require Captions are for reference only and in no way limit the terms of this Guaranty Invalidation of any one or more of the provisions of this Guaranty shall in no way affect any of the other provisions hereof which shall remain in full force and effect

16 Bank Assigns This Guaranty is intended for and shall inure to the benefit of the Bank and each and every person who shall from time to time be or become the owner or holder of any of the Indebtedness and each and every reference herein to the Bank shall include and refer to each and every successor or assignee of the Bank at any time holding or owning any part of or interest in any part of the Indebtedness This Guaranty shall be transferable and negotiable with the same force and effect and to the same extent, that the Indebtedness is transferable and negotiable it being understood and stipulated that upon assignment or transfer by the Bank of any or the Indebtedness the legal holder or owner of said Indebtedness (or a part thereof or interest therein thus transferred or assigned by the Bank) shall (except as otherwise stipulated by the Bank in its assignment) have and may exercise all of the rights granted to the Bank under this Guaranty to the extent of that part of or interest in the Indebtedness thus assigned or transferred to said person The Guarantor expressly waives notice of transfer or assignment of the Indebtedness or any part thereof or of the rights of the Bank hereunder Failure to give notice will not affect the liabilities of the Guarantor hereunder

17 Application of Payments The Bank may apply any payments received by it from any source against that portion of the Indebtedness (principal interest court costs attorneys fees or other) in such priority and fashion as it may deem appropriate

18 Indemnification The Guarantor agrees that it will reimburse the Bank for and hold the Bank harmless from all fines or penalties made or levied against the Bank by any governmental agency or authority as a result of or in connection with the following events prior to or during the term of the Borrower's ownership of the Premises (i) the use of the Premises (ii) the use of the

facilities thereon or (iii) the use generation storage transportation discharge release or handling of any hazardous or toxic materials wastes or substances (as such terms are defined by any applicable federal state or local law) or any other material the use generation storage transportation discharge release or handling of which is regulated by any federal state or local statute law rule regulation ordinance or order at any time or as a result of any release of any nature onto the ground or into the water or air from or upon the Premises at any time The Guarantor also agrees that it will reimburse the Bank for and indemnify and hold the Bank harmless from any and all costs expenses (including reasonable attorneys fees) and for all civil judgments or penalties incurred entered assessed or levied against the Bank as a result of the Borrower's use of the Premises or as a result of any release of any nature onto the ground or into the water or air by the Borrower from or upon the Premises Such reimbursement or indemnification shall include but not be limited to any and all judgments or penalties to recover the cost of cleanup of any such release by the Borrower from or upon the Premises and all expenses incurred by the Bank as a result of such a civil action including but not limited to reasonable attorneys fees This indemnification shall survive and continue in full force and effect subsequent to any repayment of the Loan or any foreclosure or satisfaction of the Mortgage or any deed in lieu thereof or any foreclosure or realization as to any other collateral securing the Loan

19 Notices Any notice shall be conclusively deemed to have been received by either party hereto and be effective on the day on which delivered to such party at the address set forth below or such other address as such party shall specify to the other party in writing or if sent prepaid by certified or registered mail at the earlier of (i) receipt or (ii) seventy two (72) hours after deposit addressed to such party at such address

If to the Guarantor

Stephen E Lipscomb
3913 Kilbourne Road
Columbia South Carolina 29205

If to the Bank

National Bank of South Carolina
1241 Main Street Columbia South Carolina 29201

This section shall not be construed in any way to affect or impair any waiver of notice or demand herein provided or to require giving of notice or demand to or upon the Guarantor in any situation or for any reason

20 Governing Law This Guaranty shall be deemed to be a contract made under and for all purposes shall be construed in accordance with the internal laws and judicial decisions of the State of South Carolina The Guarantor and the Bank agree that any dispute arising out of this Guaranty shall be subject to the jurisdiction of both the state and federal courts in South Carolina For that purpose the Guarantor hereby submits to the jurisdiction of the state and federal courts of South Carolina The Guarantor further agrees to accept service of process out of any of the before mentioned courts in any such dispute by registered or certified mail addressed to the Guarantor

IN WITNESS WHEREOF the Guarantor has executed this Guaranty under seal as of the day and year first above written

WITNESSES

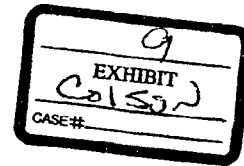
GUARANTOR

Stephen E Lipscomb



November 12 2004

Mr Stephen E Lipscomb
SEL Properties L L C
1105 Pulaski Street
Columbia, SC 29201



Dear Mr Lipscomb

The National Bank of South Carolina (Lender) is pleased to commit and extend to SEL Properties L L C (Borrower) the following credit facility (the Loan)

- 1 Borrower SEL Properties L L C
1,816,852 *200* *(Signature)*
- 2 Amount Up to \$1,816,852 (but no greater than 85% of the appraised value of the property and residual property) for a Real Estate Development Line of Credit
- 3 Purpose To provide funds for the development of lots for The Courtvaras at Rolling Creek Phase II
- 4 Pricing NBSC Prime floating plus 1% *1.00* *(Signature)*
- 5 Terms Interest monthly only for ~~one~~ *1.00* year with a final payment of all sums due on the first anniversary of the note date The loan amount includes an interest reserve of \$50 000 00 however
- 6 Release Payments The Borrower shall pay to Lender a release payment to be applied to the outstanding principal balance of the Loan in an amount equal to the 80% of the gross proceeds of the lot sale
- 7 Collateral (i) Title insured first real estate mortgage on the remaining undeveloped 52 acres located on the Northeast side of US Highway 176 near Irmo South Carolina and approximately 35 acres (and all improvements thereto) of Phase II of the Courtyards at Rolling Creek (estimated to be 71 lots) and (ii) and the cross collateralization of NBSC Certificate of Deposit Number _____ in the amount of \$232 000 00
- 8 Guaranties Uncondinonal joint and several guaranty of Stephen E Lipscomb
- 9 Pre Payment Penalty *None*

Post Office Box 1-57 / Columbia South Carolina 29201 477 (803) 970 145

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0001421

Mr Stephen E Lipscomb
November 12 2004
Page 2

10 Commitment Fee 1% of new funds advanced and shall be fully earned and due and payable to NBSC upon closing of this Loan

11 Approval of Loan Documents All the loan documents and other requirements for the consummation of the Loan must be acceptable to NBSC in form and substance. The loan documents will be NBSC's standard documents and will include material obligations and requirements of the Borrowers in addition to, but not inconsistent with, the terms of this commitment.

12 Appraisal The Commitment is subject to receipt and approval of an acceptable appraisal which appraisal shall be conducted by an appraiser satisfactory to Lender.

13 Costs and Expenses All costs incurred by Lender in making the Loan available to the Borrower shall be paid by Borrower regardless of whether the Loan closes unless failure to close is the fault of Lender. The law firm of Ellis Lawhorne & Sims, P A Columbia, South Carolina, will represent Lender in this transaction and reasonable fees will be determined on the basis of time and efforts expended in connection with the Loan. Ellis Lawhorne & Sims P A will not represent the Borrower in any capacity in connection with the Loan except as specifically set forth in writing and as approved by Lender.

14 Conditions This Commitment shall be contingent upon review by Lender and Lender's counsel of all contracts between Borrower and developers for the development of The Courtyards at Rolling Creek.

15 Authority Borrower shall provide Lender with corporate and company documents, resolutions and such other information, certificates and affidavits as Lender may require evidencing the parties' authority and capacity to consummate the transactions contemplated herein. Borrower shall also provide Lender an opinion letter prepared by Borrower's counsel in a form acceptable to Lender and Lender's counsel.

16 Administration The loan will be administered by the NBSC Real Estate Department. The development will be monitored by periodic inspections by an engineer chosen by NBSC. Any costs and expenses associated with the inspections shall be the responsibility of the Borrower.

17 Survival To the extent not otherwise provided by the loan documents, the terms and conditions of this commitment letter shall survive the closing of the Loan.

18 Time Limitations The Loan shall be closed as soon as all the requirements and conditions of the commitment have been met provided, however, this commitment will expire unless accepted by November 19, 2004 and closed by December 31, 2004.

19 South Carolina Law This Commitment and the rights and obligations of the

SUMMARY OF SALIENT FACTS AND CONCLUSIONS**SUBJECT PROPERTY**

The proposed Phase II of The Courtyards at Rolling Creek to contain 73 residential lots and the residual 60.43 acres located on the northeast side of S.C. Highway 176 (Broad River Road) and adjacent to the existing Rolling Creek Development Irmo, Richland County, South Carolina 29063

TAX MAP NUMBER(s)

02600-04-02

SITE SIZE

Phase II of The Courtyards at Rolling Creek Subdivision comprising 42.29 acres and the residual 60.43 acres totaling 102.72 acres

ZONING

RS 1 Cluster Single Family

HIGHEST AND BEST USE

Single-Family Residential Developmental Usage

EFFECTIVE DATE OF THE APPRAISAL

November 22nd 2004

FLOOD HAZARD IDENTIFICATION NUMBER

450170 0025 H Date February 20th 2002

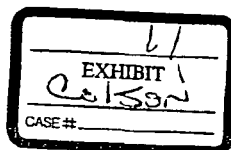
VALUE CONCLUSIONS

AS IS VALUE OF PHASE II SITE	\$ 930 400 00
DEVELOPMENTAL COST APPROACH	\$2 279 100 00
INCOME APPROACH	\$2 130 400 00
FINAL PROSPECTIVE MARKET VALUE AT COMPLETION OF PHASE II THE COURTYARDS AT ROLLING CREEK ESTIMATED AS OF March 15th 2005	\$2,130 400 00
AS IS VALUE OF RESIDUAL ACREAGE	\$1 088 000 00



NET	\$40 000 00	Per Lot
	71	Lots
	<u>\$2 840 000 00</u>	Average
RETAIL	\$44 000 00	
PRE-SALES	\$35 000 00	Average
Min	21x 36 000 00 = \$756 000 00	
Balance sold over 12 months		
Loan 2 yrs	80% of Net Sales to Bank	
Net Sales Price not less than \$32 000 00		

		Increase in Prices	Totals Extended
Tax		\$20 000 00	\$0 00
Insurance Bond		\$10 000 00	\$10 000 00
Amenity Pool & Pavilion		\$250 000 00	\$250 000 00
Infrastructure		\$1 200 000 00	\$36 193 90
Survey	\$394 37 per lot 71 Lots	\$21 300 00	\$6 700 00
Engineering Pre Paid		\$70 000 00	\$70 000 00
Interest Reserve		\$50 000 00	\$50 000 00
Paving Phase I			\$87 658 00
TOTAL		\$1 621 300 00	\$1 731 851 90
Repair old Road		\$60 000 00	\$25 000 00
TOTAL		\$1 681 300 00	\$1 816 851 90



CONSTRUCTION DRAW CHECKLIST 'Inspect B 693 00'

LOAN NAME SEL Properties
 DRAW REQUEST # 1
 DATE RECEIVED 1/7/02 - Revised AIA #1
 LOAN AMOUNT \$ 2,001,375 11/3/01

FUNDED TO CUSTOMER \$69,651.77
 FUNDED TO PAY INTEREST 0
 TOTAL FUNDED \$69,651.77
 DATE FUNDED 1/23/02

ITE	DRAW ITEMS	DATE	POST CLOSING ITEMS
1/7/02	Fax AIA to Project inspector with last month's spread		Foundation Survey
N/A	Title endorsement received from last month?		
1/7/02	Order Title Update Jimmy Knight's office		
	Any exceptions needed before funding?		
X	AIA "Are the remaining funds in NBSC's construction/site work budgets sufficient to pay the AIA balances?"		
✓	"Signature of General Contractor		
✓	"Signature of Architect		
✓	"Lien Waivers?		
100%	"Retainage %		
	"Change Orders		
✓	X "Copy of Change Order(s) #1 533,137.50		
	"Payment & Performance Bond(s)		
	(Get it change accordingly)		
✓	Is insurance in place? 4-1-02 - Dutch Fork Dev		
	General Liability 10-1-02 - Newman Const		
	Builder's Risk		
	Property		
	Flood		



	DRAW ITEMS	FINAL DRAW ITEMS
1/23	Interest paid current or being advanced? - NBSC does not pay until 4/02 - then it comes from a separate account w/ \$20,000 in it advanced on 1/23/02	As Built Survey
1/16	Received project inspection approval?	Permanent Insurance
	Project inspection memo to file?	Final Lien Waivers
1/16	Title Update received?	Certificate of Occupancy
	Title memo to file?	Final Title Endorsement
✓	Check 226 screen for sufficient funds and expiration 1/1/05	Post Construction Estoppels & SNDAs
	of commitment	
✓	Proper Loan Officer approval (signed ticket)	
✓	Upload advance	
✓	Inform Customer of loan being funded	
✓	Update draw spread	

X Budget will be short - borrower to put equity into loan at the end of the project
 fax credit to Mr Mullen once draw is funded

ADDITIONAL COMMENTS

iron soil boring not before funding - received 1/18/02

✓ AIA's need to be signed by Architect

copies of APPROVED change orders 1+2 w/ 11/3/01

used lien waiver - Need revision of w/ for #5 off site sewer mag #2
 signature 1/23/02

From Margie Simkins
To Ronnie Colson
Subject SEL

I have the curent draw and am working on getting it funded The amount requested is \$27 966 29 We have used all the funds budgeted for construction and have begun using rock contingency

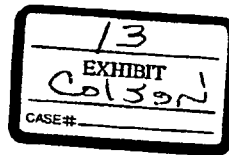
In order to fund this draw from the loan funds I need to use the rest of the rock contingency and begin using landscaping

This will leave a loan balance of \$27 740 24 (before we pay the project inspection bill associated with this draw request) The balance to fund on the AIA after funding this draw is \$271 826 69

So there is a good possibility that beginning next month we will need to determine and clarify another source of funds to cover the remaining AIA balance of \$244 086 Please think about this and let me know where you want to get the funds from

Also our title policy is for \$2 001 375 The loan has been increased so far by \$183 255 in change orders I'll check with Wade to see if we need to get the title policy increased

CC Wade King



4/102 \$ 243,388.19
226,057.59

Spoke to Ronnie 6/14/02 about bal on AIA

DO NOT
FUND Any more
w/out talking to
Ronnie

10754

From Margie Simkins
To Ronnie Colson
Date 3/11/02 2:19PM
Subject SEL Properties

Hi Ronnie

This is your monthly update on SEL. We funded the 3rd draw request today in the amount of \$171,696.25. I have the 4th draw from the contractor but it has not gone through proper channels yet. However, I wanted to bring to your attention that the 4th draw shows \$59,882 in NEW change orders bringing the total change order amount to \$157,775. The contract sum is now \$956,785.

\$117,000 in change orders is for blasted/ripped rock. The other change orders are for various items. The change orders extend the project completion time by 38 days as of this draw.

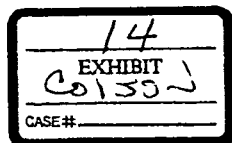
Also, this is the last month that the borrower pays interest. We will begin using the interest reserve category to pay the April 1, 2002 invoice.

Finally, if we pay draw #4 as requested, the balance to finish in the budget will be \$140,651 (less whatever the project inspectors bill is for March). At this pace, after the 5th draw, Mr. Lupscomb will need begin paying the remaining draw requests.

Let me know if you have any questions. Thanks, Margie

Wade, do I need to hold funds to pay the project inspector?

CC Wade King



10755

0001428

Memo

NBSC

Date 1/30/02
To File
From Margie Simkins *MS*
Subject SEL Properties
Loan # 04553982750 Note # 004

This memo is to document the meeting held on January 14 2002 between the owner, Mr Steve Lipscomb the developer Mr Billy Melton the account officer, Ronnie Colson the project inspector Mr Danny White and myself

- During this meeting, it was discussed that applications # 1 and # 2 of the AIA were both submitted with errors NBSC and our project inspector requested that revised AIAs be submitted prior to funding The revised AIA #1 was received corrected and that application was paid in the amount of \$68 067 97 on January 23 2002 However pay application #2 was still incorrect and another revision was requested. The corrected, revised AIA #2 was received on January 29 2002 and once appropriate lien waivers are signed, this AIA will be funded in the amount of \$154,513 15

During the January 14, 2002 meeting, it was determined by the account officer and the owner that, once the budget for the AIA contract is fully funded, the owner will begin to pay the remaining funds due on the contract

After the meeting disbursed, the account officer discussed sources of income held by the owner which could be used to cover the cost overruns Subsequently a hold was put on account # 49 which has a balance of approximately \$23 000 available for funding on the SEL Properties loan In addition, it appears that the \$250 000 interest reserve may have excess funds which could also be used to cover cost overruns If the loan was fully funded over a 24-month period at a rate of 5 75% (the current rate) then \$230 000 would be sufficient to cover the interest Lot releases are expected to begin as soon as the construction is completed, thus reducing the principal balance well before the two year maturity date In addition, the borrower is in the process of selling a portion of the undeveloped acreage. The proceeds from this sale would be applied directly to the principal balance of the loan.

After funding the second AIA, the amount of funds left to fund on the construction contract is \$622,496 98 and the balance left in the loan budget is \$562 925 33, for a shortfall of \$59 571 65 As of today, the sources outlined above should be sufficient to cover the cost overruns without the borrower having to come out of pocket for additional expenses

To Document the File

MJS/mm



10756

0001429

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ORAL DEPOSITION OF
STEPHEN E. LIPSCOMB

NOVEMBER 21, 2006

DUTCH FORK DEVELOPMENT GROUP II, LLC & DUTCH FORK REALTY, LLC

VS

SEL PROPERTIES, LLC & STEPHEN E. LIPSCOMB

C.A. NO. 05-CP-40-0749

REPORTER: PATRICIA G. BACHAND

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) CA NO 05-CP-40-0749

COPY

Dutch Fork Development Group II,)
LLC, & Dutch Fork Realty, LLC,) DEPOSITION OF
)
) STEPHEN E LIPSCOMB
Plaintiffs,)
)
) NOVEMBER 21, 2006
)
vs)
)
)
SEL Properties, LLC & Stephen E)
Lipscomb,)
)
)
Defendants)
_____)

Deposition on oral examination of Stephen E Lipscomb,
reported by Patricia G Bachand, Court Reporter and Notary
Public in and for the State of South Carolina, pursuant to
Rule 30 of the South Carolina Rules of Civil Procedure,
said deposition taken at the law offices of Pope & Bowens,
PA, 158 Langford Road, Blythewood, South Carolina, on
Tuesday, the 21st day of November, 2006, scheduled for
11 30 a m and commencing at the hour of 11 33 a m

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Columbia South Carolina 29211

(803) 256 4500

0001431

APPEARANCES

Representing
the Plaintiffs

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Blythewood, South Carolina 29016

Representing
the Defendants

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Lewis & Babcock, LLP
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211

Also Present

Turner Pope, Esquire
Ann Melton
William Melton
"D" Melton

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(Deposition of Stephen E Lipscomb)

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* * * * *

EXHIBIT INDEX

EXHIBITS	IDENTIFIED AT PAGE
(Copy of exhibit attached to transcript)	
Plaintiff's Exhibit No 1 (1 page) - American Amusement Facsimile Transmittal Sheet dated 8/16/01	19
Plaintiff's Exhibit No 2 (1 page) - American Amusement Facsimile Transmittal Sheet dated 10/8/02	20
Plaintiff's Exhibit No 3 (1 page) - National Bank of South Carolina Loan Approval/Loan Review Memorandum dated 12/8/2003	21
Plaintiff's Exhibit No 4 (7 pages) - Newman Construction, Inc Change Order dated November 30, 2001	33
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Plaintiff's Exhibit No 6 (5 pages)	35
- Letts Associates, Inc Engineering/Survey Proposal dated December 5, 2000	
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- Application and Certificate for Payment dated 1/29/02	
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- Letts Associates, Inc Memorandum dated January 29, 2002	
Plaintiff's Exhibit No 9 (1 page)	44
- Palmetto Consulting Engineering Group, Inc Invoice dated 7/19/2003	
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- AIA Document A107-1997, Abbreviated Standard Form of Agreement Between Owner and Contractor For Construction Projects of Limited Scope	
Plaintiff's Exhibit No 11 (1 page)	49
- SEL Properties, LLC Authorization for Survey dated March 7, 2001	
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- The LPA Group Incorporated Memorandum dated May 13, 2002	
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- State of South Carolina, County of Richland, Development & Marketing Agreement dated November 14, 2000	
Plaintiff's Exhibit No 14 (1 page)	62
- Secretary of State Search Information for Dutch Development Group, II, LLC	
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- Dutch Fork Development Group List of Services To Be Provided	

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- Letter of Correspondence from A Camden Lewis, Esquire to Dutch Fork Realty, LLC and Dutch Fork Development Group II, LLC dated May 29, 2004	
Plaintiff's Exhibit No 18 (1 page)	71
- E-mail from Ronnie Colson to Margie Simkins dated 8/19/03	
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- Newman Construction, Inc Memorandum to Mr Stephen Lipscomb dated October 22, 2001	
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- NBSC Memo From Margie Simkins dated January 11, 2002	
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- Borrower Statement, SEL Properties, LLC dated November 19, 2001	
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- The Courtyards at Rolling Creek Budget Phase One	
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- NBSC Memo from Margie Simkins dated 1/30/02	
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- Construction Draw Checklist dated 1/23/02	
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- Newman Construction, Inc Memorandum to Mr W P Melton dated August 19, 2002, Richland County Department of Public Works Inspection Letter from Stevan L Amick dated August 7, 2002	
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- GS2 Engineering & Environmental Consultants, Inc Report dated October 10, 2001	
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- Letter from Palmetto Consulting Engineering Group, Inc to Mr Steve Lipscomb dated June 2, 2004	
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- Letter from Tim Ray, P E , PSI, to Mr W P Melton dated July 29, 2003	
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- Letter from Allen Folline Associates to Dutch Fork Development Group dated September 17, 2003	

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Plaintiff's Exhibit No 40 (16 pages)	129
- GS2 Engineering & Environmental Constants, Inc Letter of Pavement Remediation Recommendations dated July 1, 2003	
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- Letter from Richland County, South Carolina, Planning & Development Services Department To Mr W P Melton dated July 31, 2002	
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- Memorandum from Margin Simkins to Ronnie Colson	
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- Letter from Associated E&S, Inc To Mr D Melton dated September 19, 2002	
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- Courtyard Phase I Lot Sales	
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- Palmetto Consulting Engineering Group, Inc Invoice dated 7/19/2003	
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- Dutch Fork Development Group Agreement dated 1/20/2005	
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- Letter from S&ME to Mr Stephen Lipscomb dated August 13, 2004	
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- Letter from Dutch Fork Development Group dated September 13, 2004	

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Plaintiff's Exhibit No 53 (1 page)	178
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- Asphalt Paving & Maintenance Company, Inc	
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Plaintiff's Exhibit No 55 (1 page)	187
- Letts Associates, Inc Fax Memorandum	
dated April 25, 2002	
Plaintiff's Exhibit No 56 (1 page)	187
- Letts Associates, Inc Memorandum to	
Billy Melton dated October 17, 2002	

* * * * *

Court Reporter's note

-- indicates interruption, incomplete phrases, trailing
off, unfinished sentences

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1 This deposition is taken in accordance with
2 the South Carolina Rules of Civil Procedure

3 It is agreed and stipulated by the deponent
4 and respective counsel that the reading and
5 signing of the deposition by the deponent is
6 expressly waived

7 WHEREUPON

8 STEPHEN E LIPSCOMB, being duly sworn and
9 cautioned to speak the truth, the whole truth and
10 nothing but the truth, testifies as follows

11 DIRECT EXAMINATION

12 BY MR BOWENS

13 Q Good morning, Mr Lipscomb My name is
14 Glenn Bowens And I represent the Plaintiffs in this
15 case, Dutch Fork Development Group and Dutch Fork
16 Realty What we're going to do today is take your
17 deposition Have you ever given a deposition before?

18 A Yes, sir

19 Q All right Well, you know what the rules
20 are then, I'll be asking questions and then you'll
21 answer, and then when we're finished, Mr Thomas will
22 have a chance to ask you some questions

23 If you don't understand any question that I ask,
24 please just ask me to rephrase it or tell me you don't
25 understand and I'll re-word the question for you

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1 If you answer a question, the law presumes you
2 understood it and gave a full, complete and truthful
3 answer, okay?

4 A Yes, sir

5 Q Do try to answer all questions verbally
6 It's difficult for the court reporter to transcribe head
7 nods and "uh-huhs "

8 A Yes, sir

9 Q If you need to take a break for any reason,
10 just let me know and we'll be happy to stop for you

11 A Okay

12 Q What we're going to do first off is get a
13 little background information from you Could we get
14 your full name for the record, please?

15 A Stephen Earl Lipscomb

16 Q Have you been known by any other names or
17 any nicknames?

18 A In high school

19 Q What was your nickname?

20 A Big Daddy

21 Q Big Daddy?

22 A Right

23 Q And are you married?

24 A Yes

25 Q And your wife's full name?

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1 A Diane Elliott Lipscomb
2 Q And her maiden?
3 A Elliott
4 Q And your current address?
5 A ----- Columbia, South
6 Carolina 29205
7 Q And how long have you lived there?
8 A Approximately, twelve years
9 Q And your date of birth?
10 A 3/4/50
11 Q And you have any relatives in Richland
12 County with the last name other than Lipscomb or
13 Elliott?
14 A No
15 Q And your educational background What
16 education do you have?
17 A I've got a degree from the University of
18 South Carolina High school degree from Gaffney High
19 I have a post-graduate degree from Notre Dame And
20 that's it
21 Q What's your post-graduate degree in?
22 A Executive development
23 Q Is that a masters?
24 A It's just one of those two-year programs
25 where you -- yeah, there is a -- I don't really know

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1 what you call it, to tell you the truth

2 Q What was your degree from USC in?

3 A Finance

4 Q Other than this post-graduate training, do
5 you have any other special training?

6 A Special training?

7 Q Specialized training

8 A Not really

9 Q These next few questions we ask everybody
10 that has a deposition, so please don't be offended by
11 them Have you ever had any criminal convictions?

12 A No

13 Q Any prior lawsuits you've been involved in?

14 A Yes

15 Q What were those?

16 A Well --

17 Q Was there a number of them or just --

18 A A number of them

19 Q Okay What was the last one you were
20 involved in besides this one?

21 A Hollis She said that -- she said that one
22 of our developments put silt into her pond, that would
23 be the essence of it I can't tell you the legal thing
24 Then --

25 Q Was that in Richland County?

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1 A Richland County

2 Q Has that been resolved yet?

3 A No

4 Q Okay

5 A Then there's one where some lady said that
6 her house wasn't built right I can't -- I don't know
7 her name, so

8 Q And is that Richland County also?

9 A Yes Then there's one where a guy fell out
10 of a house and broke his arm Richland County

11 Q Has that been resolved? Or is it --

12 A That one was resolved

13 Q What was the result?

14 A Sir?

15 Q What was the result of that case?

16 A It's between him and the insurance company
17 I really don't know the result

18 Q You weren't sued as a plaintiff or a
19 defendant in that?

20 A No It's -- the Stonington Development was
21 He got some money, but I really don't know the amount

22 Q On that case, it was the Stonington
23 Development and not you, personally?

24 A Well, they usually name me, personally, on
25 all of them

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1 Q Okay

2 A My name may have been on there But that's
3 a -- that's a --

4 Q Okay Was he a construction worker or
5 something?

6 A No Somebody looking at the house

7 Q That must have been an interesting fact
8 item The case where the home wasn't built right, has
9 that been resolved?

10 A No

11 Q What other lawsuits have you been involved
12 in?

13 A Over the years? I can't remember all of the
14 lawsuits I've been involved in over the years

15 Q When was -- these -- two of these are still
16 pending Are there any others that are still pending?

17 A That's the only two I can right now remember
18 is still pending, except for the one we're here today
19 for

20 Q But would you agree to -- we won't dwell on
21 it now -- but give your attorneys a list of lawsuits
22 that you've been involved in, the plaintiffs and
23 defendants, and what the result's been?

24 A I don't have a record of that But I got
25 records of the ones we got right now But that -- I

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1 don't have a record of over the years

2 Q Are these all that you remember right now?

3 A Well, I had the video poker lawsuit But, I
4 mean, I don't even remember the name of it It was a
5 more -- a class action suit It wasn't against me -- it
6 was against me, I guess It was a class action

7 Q Were you the plaintiff in that or the --

8 A I don't know -- I don't know that I mean,
9 it was a class action lawsuit I don't know whether I'm
10 a plaintiff or not No, I don't think I was the
11 plaintiff They picked somebody else I don't
12 remember I couldn't --

13 Q What was the result of that suit?

14 A I don't know the result of it It's over
15 with But were you saying --

16 Q Did you have to pay --

17 (Talking over one another)

18 Q -- money or did you get money out of that?

19 A I didn't get no money No, I did not get no
20 money from it

21 Q Did you pay any money?

22 A I paid a lot of attorney fees

23 Q Did you get any judgement from the other --

24 A No

25 Q -- other side? Okay Is there anything

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1 today that would prevent you from answering our
2 questions or understand -- understanding the questions
3 we're asking?

4 A Not to my -- not to my knowledge

5 Q Any kind of medication you're taking? Any
6 kind of illness that would --

7 A No, sir

8 Q -- prevent that? We'll then talk a little
9 bit about -- we may have found some of this already -- a
10 little bit of your employment background I understand
11 you're essentially self-employed most of the time is
12 that right?

13 A Yes, sir

14 Q Have you ever been employed by anyone?

15 A Not in the last thirty years

16 Q What businesses have you been involved in?

17 A What businesses? Amusement business, sign
18 business, associated with the building business off-
19 shore gambling, bowling business, amusement park
20 business, commercial real estate, that's all I can think
21 of right now

22 Q These are kind of general categories of
23 businesses Was there any particular -- like, with the
24 bowling business, was there a bowling alley that you
25 owned?

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1 A I owned more than one

2 Q Owned more than one? So you owned bowling
3 alleys Are you still actively involved in all of
4 these?

5 A Actively involved? What does that mean?

6 Q Do you still own any kind of --

7 A I own --

8 (Talking over one another)

9 A -- like a stockholder I don't run them on
10 a day-to-day basis, if that's -- I don't -- I don't -- I
11 don't understand the question The question -- is the
12 question that if I'm involved on a daily basis? no

13 Q So you own stock in it You're not an
14 active participant in them on a day-to-day basis

15 A Not on a day-to-day, no

16 Q What do you do day-to-day? What's your --
17 you just invest money? Or --

18 A What I do from day-to-day? I take a look at
19 all of these businesses one, one day, maybe one the next
20 week might visit -- visit them two times a week might
21 look at reports from them, look for future deals
22 That's what I do

23 Q Are you, primarily, an investor as opposed
24 to a -- actually running a business on a day-to-day --

25 A That's correct

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1 Q There was a publication that was put out as
2 part of the Rolling Creek Development project, it says
3 it's produced by SEL Properties, LLC And in this, it
4 indicates that you have successfully operated several
5 corporations Is that any different than what you've
6 just told me that, as opposed to just investing, it says
7 you successfully operated them

8 A I never operated any of them except from the
9 top I didn't operate them on a daily basis You asked
10 me did I operate them on a daily basis, the answer is
11 no

12 Q When this book says you have created and
13 successfully operated several corporations, what did you
14 mean by that?

15 A Created --

16 Q -- and successfully operated

17 A Well, one at a time "Created" means that I
18 came up with -- maybe found the deal and put the money
19 up Or, "operated," maybe choose the right people to
20 run them, managers That's what it means

21 Q It also goes on to say that you were a
22 financial investor in real estate developments as well
23 as developing them completely yourself Are you -- do
24 you consider yourself a real estate developer?

25 A Well, I would say, that if you talk about

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1 buying land? yes To an extent Yes, sir

2 Q Okay Well, this says you -- as well as

3 developing them completely himself, such as, the

4 Rosewood Development in Columbia What was your

5 involvement with the Rosewood Development?

6 A I put the money up

7 Q Just -- okay Is that all you did?

8 A That's all I did Brian South ran the

9 operation

10 Q Do you have the development company come in

11 and --

12 A Brian South

13 Q Brian South?

14 A Yeah

15 Q What's the name of his company?

16 A I can't think of the name of it right now,

17 but I'll be glad to get it for you

18 Q What is American Amusements?

19 A American Amusements was a group of amusement

20 companies

21 Q It's not just one?

22 A Not just one, no

23 Q I'm going to hand you some exhibits that

24 we're going to have marked here

25 (Plaintiff's Exhibit No 1 was marked for

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1 identification purposes (1 page) - American
2 Amusement Facsimile Transmittal Sheet dated
3 8/16/01)

4 (Plaintiff's Exhibit No 2 was marked for
5 identification purposes (1 page) - American
6 Amusement Facsimile Transmittal Sheet dated
7 10/8/02)

8 Q These first two are -- it looks like to be -
9 - looks to be fax cover sheets coming in from American
10 Amusements to various people Do you recognize those?

11 A Yes

12 MR THOMAS Do you have a copy for me?

13 MR BOWENS You'll just have to share with
14 him

15 Q How is American Amusements involved with the
16 Rolling Creek Courtyards community?

17 A They weren't

18 Q They weren't involved at all?

19 A That's where I was going to fax a message to
20 them

21 Q You just happened to be at these locations
22 when you -- and used their cover sheets when you sent
23 faxes?

24 A I -- yeah I told you I visited them I
25 was there day-to-day

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1 Q It's just that the only thing we had in our
2 files were these two And they're both from the same --

3 A That was the office I went to most often
4 It was closest to my house

5 (Plaintiff's Exhibit No 3 was marked for
6 identification purposes (1 page) - National Bank
7 of South Carolina Loan Approval/Loan Review
8 Memorandum dated 12/8/2003)

9 Q I'm going to hand you what we've marked here
10 as Exhibit No 3 This is a loan approval memorandum
11 from National Bank of South Carolina And on the top --
12 well, we'll wait for you there On the top section
13 there, there's a block near the end of the first
14 paragraph that says Name of Related Interests, and it
15 has Amusement Games Is that American Amusements that
16 you're talking about here?

17 A Probably is

18 Q Were they an investor putting up the money
19 for the Rolling Creek --

20 A No, sir

21 Q -- The Courtyards project?

22 A No, sir

23 Q How did they end up being on this loan --

24 A It said, "related businesses " It's one of
25 my related businesses I have -- like I just told you,

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1 I have a bunch of related businesses As a matter of
2 fact, I have, like, twenty-something amusement
3 companies

4 Q How is it related to Courtyards at Rolling
5 Creek is what I'm getting at

6 A I have no idea It's one of the places --
7 one of the businesses I own to make money at If that's
8 -- if that's related, then that's the way it's related

9 Q Well, that's what I'm trying to find out,
10 how it's related I don't know how it's --

11 A It's not --

12 Q -- related

13 A It's not related to it, okay?

14 Q Okay Do you know how it came to be on this
15 loan memorandum, loan approval as being --

16 (Talking over one another)

17 A It says, "related businesses " It's one of
18 my related businesses

19 Q Did you indicate to the bank as part of the
20 loan application process, that some of your income came
21 from American Amusements --

22 A Sure I did And a bunch of other companies,
23 all of those other ones listed there

24 Q Well, that's the one that I -- that's
25 listed It's just your name and then --

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1 A Well, that's because --

2 Q -- American Amusement --

3 A -- NBSC was one of the banks for that
4 company

5 COURT REPORTER If I could get you two to
6 talk one at a time

7 MR BOWENS Sure

8 THE WITNESS Excuse me I'll wait till he
9 finishes

10 Q American Amusements was part of the -- what
11 were you saying?

12 A I was saying that NBSC was one of American
13 Amusements' banks

14 Q Okay I see At the time that the
15 Courtyards project got started, were you involved in the
16 start-up of any other businesses or interests or
17 investments at the same -- or near the same time as The
18 Courtyards?

19 A I mean, without a timeline I couldn't
20 truthfully answer that question But it seems as though
21 that we were involved in doing a amusement park in
22 Augusta around that time

23 Q November of 2001?

24 A Seems to be, yeah I'm sure we were doing a
25 lot of other things at the same time But I can't

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1 truthfully tell you what other businesses we were
2 involved in at that time But we --

3 Q Well, what I'm interested in new ones that
4 were just starting up at that same time The Courtyards
5 got started in November of '01 is when the Agreement was
6 made Any other things start at the same time? Any new
7 --

8 A Exact same --

9 Q -- venture?

10 A -- time or --

11 Q Well, within the same timeframe that the --

12 A What -- what -- what's the thing --
13 timeline?

14 Q Well, let's say November of '01 to November
15 of '02, in that year, did anything new start --

16 A '01 to '02 there was a lot of stuff started
17 up I don't -- at this time I can't answer that, but
18 would be glad to get stuff for you

19 Q Anything that started up or that you had to
20 divert any substantial amount of resources to?

21 A Not to my knowledge

22 Q Other than the Stonington and the Rosewood
23 Development, have you been involved in any other real
24 estate development projects prior to The Courtyards?

25 A Prior? No

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1 Q Have you been involved in -- with some since
2 The Courtyards?

3 A Oh, wait a minute Real estate projects
4 Yeah, I bought a lot of buildings and --

5 Q Well, I mean -- let me rephrase that I'm
6 talking a real estate, residential subdivisions --

7 A No

8 Q -- like The Courtyards, Stonington --

9 A Uh-uh

10 Q -- and Rosewood

11 A That was the second one, yes

12 Q When did Rosewood and Stonington come up?

13 A Stonginton was later Rosewood was before
14 I don't know the exact dates

15 Q Courtyards was in between the two?

16 A Yes

17 Q Who is William Smoak?

18 A He's the guy that managed and was a partner
19 at Stonington, and he also managed other projects

20 Q What other projects besides Stonington did
21 he work on?

22 A Summer Valley

23 Q What's Summer Valley?

24 A A subdivision

25 Q And where is that located?

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1 A Hardscrabble Road

2 Q What does that fall in between The
3 Courtyards? Was it after or --

4 A I'm not sure I didn't start that one I
5 just bought in, bought some people out But I -- I'm
6 not sure when it started

7 Q Any others besides the ones we've just
8 mentioned that he's been involved in running?

9 A For me? Not for me, but for other people,
10 I'm sure he's did a bunch He's doing one right now,
11 but I don't know the name of it

12 Q Did he ever have any interaction with Dutch
13 Fork Development Group or The Courtyards?

14 A Not to my knowledge He might have went by
15 and saw them But I don't know that Not that I know
16 of, okay?

17 Q Did you ever send him out to look at the
18 operation at Rolling Creek, and indicate to handle
19 Stonington in a similar manner as Rolling Creek had been
20 done?

21 A I don't recall that

22 Q Other than William Smoak, any other partners
23 in the Stonington Development?

24 A Yes

25 Q Who else did you have as partners?

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1 A Trey Harrell, Larry Cook, Ron Safko, and SEL
2 Properties

3 Q Are these people all still partners with you
4 at Stonginton?

5 A No

6 Q Which ones have dropped out?

7 A Smoak and Cook

8 Q How did you come to meet the Melton's?

9 A I've known the Melton's for many years, had
10 games in their locations in Winnsboro

11 Q How did the -- how did you meet them in
12 regard to those -- The Courtyards as being a project?
13 How did that meeting come about?

14 A I can't remember who it was, but one of the
15 Melton's -- probably Bill -- called me and said he had a
16 piece of land that was a good price and would be good to
17 probably develop And that's to my recollection We're
18 talking about six years ago I'm not exactly positive
19 It sounds --

20 Q What do you consider the role of the
21 development company or the developer to be in a real
22 estate subdivision project like The Courtyards?

23 A Well, we had an agreement that told what it
24 was to be, a written agreement

25 Q Well, I'm not -- I want to get what your --

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1 what your thoughts are on it, though, apart from what
2 the Agreement says

3 A The developer he would get all the permits,
4 proper county permits, federal permits He would, you
5 know, I guess hire an engineer, like they did The next
6 thing, I guess, they would find people to do the work

7 Q What kind of work are they going to find
8 people to do?

9 A Well, you had to put -- you have to do
10 landscaping You've got to do lighting You've got to
11 put -- what do you say -- the front of the -- the
12 entrance in You've got to do the sewer, water, road
13 work, signage The next thing I expect them to do would
14 be to manage the -- of course, oversee all of these --
15 but manage the sales And whoever's doing the work
16 there, make sure that they do it in the proper manner
17 That's what I expect

18 Q You had seen the Rolling Creek development
19 prior to getting involved with The Courtyards?

20 A Yes

21 Q What was your thoughts about the Rolling
22 Creek development?

23 A Thought it was a good development

24 Q Did the -- did the bank, NBSC, consider that
25 as part of the reason they extended the development

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1 loan? The work they had done at Rolling Creek

2 A I never asked the bank that So you'll have
3 to ask them

4 Q So you don't know one way or the other?

5 A No

6 Q Would it surprise you they had considered
7 that as a factor?

8 A Would it surprise me? I don't know if they
9 ever went out there I don't believe they ever went out
10 there

11 Q Okay

12 A I think prior to us doing the --

13 Q Right I mean, in the loan application
14 process, would it surprise you to learn that they had
15 actually considered the Rolling Creek project --

16 A It wouldn't surprise me, no

17 Q Did you want The Courtyards to have a
18 similar quality the nature as the Rolling Creek
19 development had?

20 A (The witness pauses)

21 Q I know it was going to be different kind of
22 style homes But you wanted the same quality and level
23 of neighborhood, didn't you?

24 A It was to be different But some -- we
25 wanted good quality, yes

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1 Q Did their prior success at the Rolling Creek
2 make it -- was that part of the decision process you
3 went through to decided to invest in The Courtyards
4 project?

5 A My real reason I went through with it was
6 because of the projections of what it would make and how
7 it would sell out and how much money it would make
8 That's always my reason for doing business

9 Q Well, that's a good reason

10 A Well, that's my answer

11 Q Did their -- did their experience with --
12 the Melton's and Dutch Fork Development Group have at
13 Rolling Creek, did that influence you at all as to going
14 forward with the project?

15 A I'm not sure whether it did or not

16 Q Were you able to branch off of the Rolling
17 Creek utilities and part of their infrastructure to tie
18 in The Courtyards?

19 A That's -- the County, yeah The County --
20 that's just like Mungo branched off of Courtyards
21 That's the way it always works

22 Q Beside The Courtyards, they -- The
23 Courtyards being near to the -- Rolling Creek was a
24 benefit to The Courtyards

25 A I don't know whether it was or wasn't

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1 Q Well, you able to tie off of their utility
2 They didn't have to start all --

3 A Sure Just like the next development next
4 to me tied off of mine

5 Q Right You agree it was a benefit having
6 that?

7 A To be able to tie -- I suppose it was

8 Q Did you use any of their restrictions and
9 covenants that The Courtyards -- at The Courtyards had
10 at Rolling Creek? Did you adopt similar -- or use their
11 restrictions and covenants as a template for the ones at
12 Rolling -- at The Courtyards?

13 A I am not sure I -- we may have started out
14 with them They got changed a couple of times I'm not
15 sure who's they were I know the MJS and Jimmy Knight
16 changed them I don't know whether they were The
17 Courtyards or that were the Rolling Creek or some other
18 subdivision I'm not sure about where they came from

19 Q What do you consider the role of the owner
20 to be in residential development? What was your role?

21 A To try to get -- to try to make a good
22 decision how things are to come out, see if they're
23 going well, and to try to pay the bank back

24 Q Your role -- you purchased the land That
25 was one of the things that you did, right?

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1 A Yes

2 Q How much was the land?

3 A I don't remember the total price I think
4 it was 6800 dollars a acre or something like that, or
5 6500 Somewhere in that range

6 Q \$800,000 sound --

7 A Sounds --

8 Q -- sound right?

9 A Sounds probably right

10 Q Where did the money come to purchase the
11 land? How did you get the funding for the --

12 A I think I borrowed it from the bank

13 Q You borrowed it from the bank?

14 A I believe I did

15 Q You didn't pay cash for it?

16 A Well, I don't know if I paid cash for it or
17 not

18 Q What is a --

19 A I had credit lines at the bank So if I
20 borrowed off of a credit line, I guess I wrote a check
21 But I still got it through the bank

22 Q Okay What is a change order?

23 A A change -- when you change something

24 Q Do you have to approve change orders?

25 A Usually, if there's any financial documents

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1 to be signed -- to be did, Bill or -- or one of them
2 brought it to me and I signed it If it was financial,
3 they always wanted me to sign it

4 Q This is a --

5 MR BOWENS We're just going to mark this
6 as one exhibit It's got several pages to it
7 But we'll just mark it as one

8 (Plaintiff's Exhibit No 4 was marked for
9 identification purposes (7 pages) - Newman
10 Construction, Inc Change Order dated November
11 30, 2001)

12 Q Do you recognize -- recognize that?

13 A (The witness reviews the document)

14 A It looks like Newman's change orders to me

15 Q Do you recognize your signature on those?

16 A Yeah Sure do

17 Q Okay You were required to approve all of
18 those change orders

19 A Anything financial, they made me sign This
20 is a -- money, they always made me sign They wasn't
21 about to sign I don't blame them either

22 (Off-the-record discussion)

23 Q Did NBSC have a requirement that you sign
24 those? Did that -- when you were talking about "they
25 made me sign them," is that NBSC that's making you?

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1 A No They had me to sign (the witness
2 indicates), the Melton's
3 Q Did NBSC ever require that you sign these as
4 well?
5 A I don't know They --
6 (Plaintiff's Exhibit No 5 was marked for
7 identification purposes (1 page) - NBSC
8 Memorandum dated July 10, 2002)
9 Q Take a look at Exhibit No 6 --
10 COURT REPORTER Five
11 Q -- five
12 A (The witness reviews the document)
13 A "Please have change order executed by the
14 owner " That's me Yes, sir
15 Q NBSC had a requirement that you do that as
16 well
17 A Right
18 Q How did you -- how did you decide whether to
19 sign or approve one of those change orders? And I don't
20 suppose you just sign everything that comes in front of
21 you You have to have some kind of a method to sign --
22 A I used the Melton's judgement to -- whether
23 to sign it or not
24 Q You used the --
25 A If they said we needed to do it and it

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1 looked financially what we needed to do to make
2 something happen, then I signed it

3 Q Did you rely upon the engineer as well to --
4 for their input?

5 A Sure

6 Q What is the role of an engineer on the
7 project?

8 A To design the project I would -- we have
9 an agreement with him, and it's all written out You're
10 welcome to a copy of it

11 Q Did you sign an agreement with the engineer?

12 A If it was financial, I'm sure I did Yes,
13 sir

14 (Plaintiff's Exhibit No 6 was marked for
15 identification purposes (5 pages) - Letts
16 Associates, Inc Engineering/Survey Proposal
17 dated December 5, 2000)

18 Q I'm going to show you what we've marked as
19 Exhibit No 6 I want you to take -- and this is not
20 signed, by the way But it's a -- it looks to be a
21 proposal or something that should have been accepted
22 See if you've ever seen that before or recognize what
23 that is

24 A (The witness reviews the document)

25 A It looks like a proposal from the engineers

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1 Q According to this, they were going to design
2 all phases the roads, the grading, the draining, the
3 water and the sewer Is that what they did?

4 A That's what they were supposed to do

5 Q They prepared the final plat for Phase I?

6 A I suppose they did I mean, I can't be
7 positive about it

8 Q I'm reading off of what this --

9 A Well, then --

10 Q -- the proposal says they were supposed to
11 do I'm just trying to get you to verify that

12 A No I mean, if it -- if it says they were
13 supposed to do it, I'm sure they did it They didn't do
14 everything, I can tell you that

15 Q What didn't they do that they were supposed
16 to do?

17 A Well, I have to look through there to see

18 A (The witness reviews the document)

19 A Well, naturally, when you get to this that
20 says, "All phases - 262 lots" -- design the roads,
21 grading and a drainage system They ain't even did that
22 yet So they haven't even did it yet to my knowledge,
23 you know what I'm saying?

24 Q For the future phases They've done it for
25 Phase I, haven't they?

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1 A It says they're going to do it, right? in
2 this contract

3 Q Are they -- they've done it for the first
4 phase is that right?

5 A They did it for the first phase, yes But
6 is that as far as you want me to go? the first phase

7 Q Have you-all gone past the first phase yet?

8 A No But they hadn't -- they hadn't finished
9 designing the stuff in the second phase You just asked
10 me what they didn't do I just was telling --

11 Q Well, let's limit it to the first phase

12 A Okay

13 Q What in the first phase --

14 A For the first phase, as far as I can tell,
15 they did everything

16 Q Just put it right there, if you don't mind

17 A (The witness complies)

18 Q One of their responsibilities besides what's
19 in here is to sign off on the change orders as well

20 A Okay

21 Q Is that right?

22 A I didn't read that But if you say they're
23 supposed to If it says that --

24 Q Well, if you look at the prior exhibit, they
25 did sign off on them

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1 A Okay I agree with you

2 Q One of their -- was one of their duties to
3 certify to you that the work had been done by the
4 contractors, and had been done in accordance with the
5 say it was supposed to be done?

6 A The bank required that, I think

7 Q The bank required that?

8 A I believe so

9 Q Did you -- you required that as well?

10 A I didn't -- I don't know that I required it
11 (Plaintiff's Exhibit No 7 was marked for
12 identification purposes (1 page) - Application
13 and Certificate for Payment dated 1/29/02)

14 Q You ever seen one of these applications and
15 stipulation for payment before?

16 A This is a draw sheet

17 Q You seen down here on the lower left-handed
18 corner, "Architect's Certificate for Payment"?

19 A Right

20 Q Okay Just to summarize this says that the
21 architect's cert -- and the architect's Johnny Johnson,
22 the engineer

23 A Okay

24 Q -- "certifies as to the owner" -- that's to
25 you You're the owner, right?

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1 A Right

2 Q -- " that to the best of the Architect's
3 knowledge, the information and belief the Work has
4 progressed as indicated, the quality of the Work is in
5 accordance with the Contract Documents, and the
6 Contractor is entitled to payment of the AMOUNT
7 CERTIFIED "

8 So that's something he gives to you

9 A Right

10 Q Is that right?

11 A To the bank, I think I believe they send
12 them to the bank Then I -- I'm not sure, but I believe
13 they send them to the bank But I don't believe they
14 send them straight to me, if that's what you're asking

15 MR BOWENS Go ahead and mark this one
16 (Plaintiff's Exhibit No 8 was marked for
17 identification purposes - Letts Associates, Inc
18 Memorandum dated January 29, 2002)

19 Q I'm showing you Exhibit No 8 there Do you
20 -- have you ever seen that -- a letter like that before
21 -- or that particular letter?

22 A (The witness reviews the document)

23 A I don't know if I've seen this one before
24 I mean, I don't know

25 Q Well, this is a letter from Johnny Johnson,

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1 the engineer at Letts, to Ronnie Colson

2 A Uh-huh

3 Q Who's Ronnie Colson?

4 A He's the NBSC banker

5 Q And, basically, this letter tells him is
6 "Enclosed is this pay application Please process " Is
7 that right?

8 A What you say it said?

9 Q It -- Johnny Johnson is telling Mr Colson
10 "Enclosed is a pay application for Phase I, the second
11 pay application Please process this as soon as
12 possible "

13 It appears that the engineer transmits this
14 document to the bank, and then the bank -- what's the
15 bank do once they get the document?

16 A They pay it, I guess

17 Q Do they pay it? Or do you pay it?

18 A They put the money in our account and we
19 write the check

20 Q So if the bank said it was okay to write the
21 check, then you'd write the check and pay --

22 A Right

23 Q -- whoever it was supposed to pay? In this
24 case, Newman Construction

25 A Right

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1 Q Is it fair to say that the bank was relying
2 upon the engineer to certify that the work had been done
3 and been done right?

4 A I think so

5 Q And you relied upon the bank to tell you
6 that it was okay to pay

7 A Right

8 Q Would you agree that you also, then, if
9 that's the case, relied upon the engineer to tell you
10 that the work had been done and been done in accordance
11 with the Contract?

12 A Yes

13 Q So you weren't relying then upon Dutch Fork
14 Development Group, or any of its officers, for the
15 amount that's to tell you that

16 MR THOMAS Object to the form You can
17 answer

18 A Well, I mean, their -- in their scope of the
19 work, they supposed to make sure that it's done But
20 they did hire an engineer to oversee the payment and to
21 produce the plans and make sure that the plans were
22 followed right

23 Q Well, I'm talking about now what actually
24 happened The bank relied upon the engineer to tell
25 them that the work had been done and been done right,

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1 based on this pay certification

2 A Right

3 Q And you relied on what the bank told you to
4 do when you wrote the checks

5 A I assume the work had been done, yes The
6 bank gives the money, yes

7 Q The bank had to authorize the funding of
8 each of these pay applications

9 A Yes, sir

10 Q How was the engineer selected in this -- for
11 this development?

12 A The Melton's had -- had used them before, or
13 something, prior to me being involved

14 Q Did they recommend and you agreed? Or how
15 did it -- how did it come about that they -- Letts got
16 hired?

17 A I think he had already did some drawings
18 before I got there -- I'm not sure about that -- some
19 preliminary drawings, preliminary stuff, but I'm not
20 positive about that

21 Q Did you look into the background of Letts
22 before you agreed to --

23 A No

24 Q -- continue on?

25 A The Melton's recommended him, so I figured

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1 he was a pretty good guy

2 Q Who were the -- who were the people from the
3 engineering company that did the work?

4 A I don't know all their names But one I
5 know that did the most was Rick Maxheimer

6 Q Did you ever know Johnny Johnson?

7 A I think I met Johnny Johnson, but I'm not
8 sure

9 Q So the Melton's recommended this company and
10 you agreed to hire them

11 A Yes

12 Q And you knew they were doing the work that
13 was in that exhibit we looked at earlier, the proposal
14 for scope of work?

15 A Yes

16 Q Did Letts develop the land plan for The
17 Courtyards?

18 A I'm not sure I think they did

19 Q What is the land plan?

20 A How the lots are, how the roads would go and
21 how the sewer would go and how the, you know, all the
22 infrastructure would go

23 Q Did you ever go to any meetings where the
24 land plan was discussed?

25 A I mean, over four of five years, I probably

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1 did go to some meetings, but I don't remember exactly
2 which ones But I did go -- I know I went with "D" a
3 couple of times

4 Q Well, that's all I'm asking Did you
5 approve the final land plan?

6 A I don't know if I approve it or -- I don't
7 know if I approved it All I was looking at was one and
8 something -- about two-hundred-and-something lots and
9 the amount of money it was -- I don't know if I approved
10 the final land plan or not If you ask me was I fine
11 with it, yes But I don't know if I approved it

12 Q You were happy with the final version of it?

13 A Yeah

14 Q Do you recall making any changes to the land
15 plan after it was --

16 A I've never made any changes that I know of

17 Q Was there ever a section of The Courtyards
18 that you wanted to have redesigned at one point?

19 A I don't remember

20 (Plaintiff's Exhibit No 9 was marked for
21 identification purposes (1 page) - Palmetto
22 Consulting Engineering Group, Inc Invoice dated
23 7/19/2003)

24 Q This is exhibit No 9 This is a bill from
25 Palmetto Engineering Group, formerly known as Letts

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1 And if you'll just take a moment and read over the
2 little description

3 A (The witness reviews the document)

4 Q It refers to a 13-lot grading plan, on-site
5 visit and meeting and telephone conversations What was
6 that -- what was that about?

7 A I have no idea I don't know

8 Q You don't know? And this is dated July of
9 '03, which is -- it seems like it's well after the
10 project had gotten started and the plan should have
11 already been done, just based on the timeframe Would
12 you agree with that?

13 A I'm not sure about the timeframe One thing
14 I'm sure of, is I don't know what that is

15 Q Okay Well, let me ask you this When did
16 the lots start -- first start being sold?

17 A Seems like in July, we got our thing from
18 the County to sell lots I'm not -- exactly when the
19 first lot was sold Maybe the -- maybe the ninth month
20 of the year, or something like that

21 Q Okay Well, if you got the go ahead in
22 July, maybe they were starting to be sold in September,
23 the land plans would have already would have had to have
24 been done by then, wouldn't they?

25 A I would think so

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1 Q Okay Do you know why, then, a year later
2 in '03, we were still working on plans?

3 A I have no idea

4 Q What is the role of the construction company
5 in a development?

6 A Say that again

7 Q What's the role of the construction company?

8 A Put the infrastructure in, or do the front
9 of the entrance, or to put the landscaping in

10 (Plaintiff's Exhibit No 10 was marked for
11 identification purposes (19 pages) - AIA Document
12 A107-1997, Abbreviated Standard Form of Agreement
13 Between Owner and Contractor For Construction
14 Projects of Limited Scope)

15 Q Let me show you what we've marked as Exhibit
16 No 10, and ask you if you recognize this

17 A (The witness reviews the document)

18 A This looks like the contract between SEL
19 Properties and Newman Construction

20 Q Would you turn to the last page there See
21 if you can find the signature page on there

22 A (The witness complies)

23 Q It may not be the very last page

24 A Yes, sir

25 Q Is that your signature there?

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