

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

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

Case No. 2010-CP-40-3297
Appellate Case No. 2012-212687
Unpublished Opinion No. 2015-UP-042

YANCEY ENVIRONMENTAL SOLUTIONS, LLC. Petitioner,

vs.

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

APPENDIX - VOL 2 OF 3

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

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

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

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

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

15 Q Based on best guess, right?

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

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

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

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

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

1 opinion to value.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 MS. McWILLIAMS: 1:30?

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

17 MS. McWILLIAMS: Okay.

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

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

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

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

1 issue of, I will call it valuation.

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

5 MR. PENDARVIS: Yes, sir.

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

12 MR. PENDARVIS: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. McWILLIAMS: That's true.

1 THE COURT: Sorry about that.

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

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

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

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

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

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

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

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

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

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

25 MR. PENDARVIS: Your Honor, Exhibit 26 is

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

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

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

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

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

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

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

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

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

16 THE COURT: All right. Give me the jury.
17 (The jury returned to the courtroom).

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

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

21 Mr. Pendarvis, you may continue.

22 BY MR. PENDARVIS:

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

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

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

5 THE COURT: All right.

6 MR. PENDARVIS: I will rephrase it.

7 BY MR. PENDARVIS:

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

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

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

19 MS. McWILLIAMS: Could we know which exhibit?

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

22 A I was attempting to, yes, sir.

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

25 THE COURT: Have you got it?

1 MS. McWILLIAMS: Yes.

2 THE COURT: Okay, go ahead.

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

5 A Yes, it is.

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

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

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

1 professionals, correct?

2 A Yes, sir.

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

5 A Yes.

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

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

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

19 A By when?

20 Q By September, 2008.

21 A I don't believe so.

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

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

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

4 Q I show you this document --

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

7 MS. McWILLIAMS: No objection, Your Honor.

8 THE COURT: Exhibit 37 admitted without
9 objection.

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

12 BY MR. PENDARVIS:

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

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

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

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

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

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

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

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

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

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

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

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

23 MS. McWILLIAMS: No objection.

24 THE COURT: Plaintiff's 38 without objection.

25 (September 30, 2008 memo marked and received

1 in evidence as Plaintiff's Exhibit 38).

2 BY MR. PENDARVIS:

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

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

14 Q Were you happy to receive this letter?

15 A Happy days.

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

18 A No, no. They better not.

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

21 MS. McWILLIAMS: No objection, Your Honor.

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

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

1 BY MR. PENDARVIS:

2 Q Mr. McLeod, did you communicate with Mr.

3 Justice about the news from the IRS?

4 A I did, I certainly did.

5 Q Can you describe this email I passed up to
6 you, to the jury, please?

7 A Well, it is an email to Mr. Justice saying
8 how much I appreciated his words of comfort and
9 support, his friendship at the moment in time when
10 this first happened. It is a letter advising him
11 that I finally heard from the IRS and they
12 discontinued the investigation, and it is also a
13 letter wherein I once again appealed to him to let
14 us utilize all the due diligence and hard work that
15 was done on the project, commence work again and
16 get going. That is basically what it's about.

17 Q Did you ever hear a follow-up or response
18 from Mr. Justice?

19 A No.

20 MR. PENDARVIS: Your Honor, we would offer to
21 move this in evidence as Plaintiff's Exhibit 40.

22 MS. McWILLIAMS: No objection, Your Honor.

23 THE COURT: Plaintiff's Exhibit 40 without
24 objection.

25 (November 7, 2008, letter marked and received

1 in evidence as Plaintiff's Exhibit 40).

2 BY MR. PENDARVIS:

3 Q We're getting to the end, Mr. McLeod.

4 Mr. McLeod, I passed you a two page exhibit,
5 copies of a check and check stub. Can you describe
6 to the jury what I passed up to you?

7 A Yes. These are copies of check stubs from
8 James C. Justice Companies, Inc., Justice Family
9 Farms, and a copy of a check dated November 13th,
10 2008, paying the agreed upon \$15,000 in connection
11 with the conservation easement project.

12 Q Was this in any way related to the agreement
13 that we have been talking about, the consulting
14 services agreement?

15 A Yes, this is --

16 MS. McWILLIAMS: Objection.

17 THE COURT: Rephrase that, please.

18 Q Yancey, what was, what was the basis for Mr.
19 Justice's payment of this invoice?

20 A That I had agreed to reduce the requested
21 \$50,000 to \$15,000.

22 Q The \$50,000 amount came from what document?

23 A From the original consulting services
24 agreement. Well, actually the one amended, it
25 should have been amended to four percent but --

1 Q And is there a reference in the check stub --
2 what does it say on the comment line, at the very
3 top of the second page?

4 A It says, it's got the date, got the invoice
5 number, it's got Justice Family Farms, 15,000.

6 Q Thank you very much.

7 MR. PENDARVIS: Your Honor, we would ask this
8 be presented as Exhibit 41.

9 MS. McWILLIAMS: No objection, Your Honor.

10 THE COURT: Plaintiff's 41 without objection,
11 admitted.

12 (Check stub marked and received in evidence
13 as Plaintiff's Exhibit Number 41).

14 MR. PENDARVIS: Excuse me one moment to
15 confer with my co-counsel.

16 Mr. McLeod, thank you for your testimony.
17 Please answer any questions Miss McWilliams has.

18 MS. McWILLIAMS: May it please the Court.

19 THE COURT: Yes, ma'am.

20 CROSS EXAMINATION BY MS. McWILLIAMS:

21 Q Good afternoon, Mr. McLeod.

22 A Good afternoon.

23 Q You just were asked, Mr. McLeod, about
24 subsequent contact with Mr. Justice about the
25 project. Correct?

1 A Yes, ma'am.

2 Q All right. And I believe one of the exhibits
3 that was just marked talks about an attorney, you
4 had a close attorney-friend that you had located.
5 Who was that person?

6 A Ken Wingate.

7 Q All right. Now, you didn't call Mr. Wingate
8 to assist at anytime between the 20th of December
9 and the 24th of December before you called Mr.
10 Justice, right?

11 A No, ma'am.

12 Q All right. In fact you didn't call anybody,
13 right?

14 A No, ma'am.

15 Q All right. Now, in fact you and Mr. Wingate
16 got on the phone at some point with Mr. Justice,
17 right?

18 A No, ma'am.

19 Q You never had a call with Mr. Wingate and Mr.
20 Justice?

21 A I don't recall a call with Mr. Wingate and
22 Mr. Justice.

23 Q All right. But we know Mr. Justice was not
24 interested, correct?

25 A Interested in what?

1 Q In reviving the project?

2 A Well, all my attempts since December, 2007,
3 he has not responded favorably.

4 Q All right. Now, you had several, also
5 several exchanges, additional exchanges with Mr.
6 Harrah or Mr. Justice about the bills, did you not,
7 more than what has just been marked, correct?

8 A I don't recall. I know that I fairly
9 regularly and routinely attempted to communicate
10 with Mr. Justice and Mr. Harrah on behalf of the
11 professionals who had participated in the project.
12 I was embarrassed, you know, for them, that I had
13 asked them to do this work for this project and I
14 was doing my best to get them compensated for their
15 time and effort that they put forth in good faith.

16 Q All right. Well, let me show you what has
17 been marked as a defendant's exhibit. Do you
18 recognize that, Mr. McLeod?

19 A Yes, ma'am.

20 Q This is an email dated February 15, 2008,
21 from you to Jim Justice. Correct, at the top?

22 A You know, since I don't use computers I
23 always have to remember it starts somewhere other
24 than the way I would normally start. Give me just
25 a moment.

1 Q You're exactly right, it starts at the bottom
2 with January 10th, from Y.E.S. to Mr. Harrah,
3 correct?

4 A Yes, ma'am, I see one from Mary to Mr. Harrah
5 just reminding him that, "We emailed to you and Jim
6 a statement for professional services rendered, see
7 past email. To date have not received payment.
8 Would you please let me know the status of
9 payment."

10 Q All right. Right above that, about eight
11 days later it's from Yancey to David Harrah,
12 "David, we have not received payment. Please call
13 to discuss." Correct?

14 A Correct.

15 Q All right. And then a month later, February
16 15th, "Jim, I have never heard --" actually from
17 you to Jim, right?

18 A Yes, ma'am.

19 Q Jim Justice?

20 A That's correct.

21 Q All right.

22 MS. McWILLIAMS: I would would move
23 Defendant's 103 in evidence.

24 MR. PENDARVIS: No objection.

25 THE COURT: Defendant's 103 admitted without

1 objection.

2 (Emails beginning 1/10/2008 marked and
3 received in evidence as Defendant's Exhibit
4 Number 103).

5 BY MS. McWILLIAMS:

6 Q So, there was a good bit of time between the
7 end of the year 2007 and when you ultimately
8 reached agreement and was paid some, but the
9 professionals also had, it took some doing in fact
10 to get paid. Right?

11 A Yes, ma'am.

12 Q All right. Now let me show you what has been
13 marked as Defendant's Exhibit 120. Can you
14 identify this email for the record, Mr. McLeod?

15 A Yes, ma'am.

16 Q All right. This is a letter -- do you
17 recognize this email from you to David Harrah,
18 October 2nd, 2008?

19 A Yes, ma'am.

20 Q All right. Attachment, statement for
21 professional services, do you see that, do you know
22 whether or not you actually attached the statement?

23 A I have no idea.

24 Q All right. It is referenced in there?

25 A Right.

1 Q It says statement for professional services,
2 12/27/07. Correct?

3 A Right.

4 Q Do you see that?

5 A Yes, ma'am.

6 MS. McWILLIAMS: We move Defendant's Exhibit
7 120 into evidence, Your Honor.

8 MR. PENDARVIS: No objection.

9 THE COURT: Defendants Exhibit 120 admitted
10 without objection.

11 (10/2/2008 McLeod to Harrah email marked and
12 received in evidence as Defendant's Exhibit
13 Number 120).

14 BY MS. McWILLIAMS:

15 Q And by this email you admit, don't you, Mr.
16 McLeod, that it was the IRS matter that caused you
17 to delay the conservation project on the farm?

18 A No, ma'am, I do not admit that.

19 Q All right. But that is what you wrote in
20 this email, isn't that right?

21 A That is because David Harrah and Jim Justice,
22 as far as they know Hal Hanlin never quit because I
23 didn't tell them that.

24 Q All right. But in fact Mr. Hanlin wasn't on
25 the phone on December 24 when you called Jim

1 Justice and Steve Ball and David Harrah, was he?

2 A You better believe he wasn't on the phone.

3 Q It was Mr. Crosby Lewis?

4 A That's correct.

5 Q Your new counsel, right?

6 A Right.

7 Q But in this communication with Mr. Harrah
8 what you said was, "While I have every indication
9 and expectation that the IRS matter that caused us
10 to delay the conservation project on the farm will
11 be favorably resolved soon, I would like to have
12 closure before suggesting to Jim that we move
13 forward with the project."

14 Is that right?

15 A The reason that I said what I said in this
16 email is because when I advised Jim Justice on
17 December 24th, 2007, to postpone the project I did
18 so because they had suddenly abandoned me and left
19 me in the position of having no attorney and I
20 could not in good conscience advise Mr. Justice to
21 move forward with the project, and at the time of
22 this email as far as they know the only reason that
23 I gave them was the IRS letter but the real reason
24 I made the recommendation was because they had
25 quit.

1 Q But, I understand your recommendation, that
2 is what you're saying is the rationale for the
3 24th, right?

4 A Right.

5 Q But as late as October of 2008, October 2nd,
6 2008, we just saw the exhibit, the IRS letter came
7 in maybe a couple weeks later, you had a lawyer
8 ready to go, this Mr. Ken Wingate, right?

9 A Right.

10 Q And you were prepared to go forward but you
11 didn't want to go forward because you had to have
12 closure on the IRS, isn't that right?

13 A No, ma'am.

14 Q Isn't that what it says, "I would like to
15 have closure before suggesting to Jim that we move
16 forward with the project," are we talking about
17 your bill or are you talking about --

18 A The question is in two parts. I wanted to go
19 forward, of course, you know, I communicatd with
20 Mr. Justice many times after 2007 encouraging him
21 to move forward and I would love for Jim Justice to
22 have picked up the phone and said, "Yancey, that
23 sounds great, let's meet at the farm and talk about
24 moving forward with the project." But when I say
25 in this email that the IRS matter caused us to

1 delay the conservation project, the truth is that
2 what caused us to delay the conservation project
3 was Hal Hanlin and Richardson Plowden quitting.

4 Q That is not what you wrote, is it?

5 A Well, I don't think that on October 2nd,
6 2008, if I had said in this email, "Oh, by the way,
7 I also want to tell you all that the reason that I
8 advised you all to postpone the project back in
9 December, 2007, was that Hal Hanlin and Richardson
10 Plowden quit," that wouldn't have been appropriate.
11 I was trying, you know, to be a gentleman and
12 professional about the whole thing, I didn't see at
13 the time, at the moment in time, keep in mind that
14 when Hal and Richardson Plowden quit they didn't
15 give me any advice whatsoever about how to go
16 forward and handle the matter, which was extremely
17 delicate. I mean, for all I knew Jim Justice was
18 going to jump all over me for failure to produce
19 the conservation easement that would have provided
20 a \$45,000,000 deduction and I was unable to do that
21 in good conscience at that time, so, no, I didn't
22 say anything about Hal Hanlin in this letter.

23 Q But isn't it true, Mr. McLeod, you did
24 subsequently disclose that to Mr. Justice when you
25 wanted him to give you an affidavit in this case,

1 isn't that right?

2 A By the time I'm involved in this litigation,
3 yes, ma'am.

4 Q And at that point you tell him, "The reason
5 we had to delay was Mr. Hanlin's withdrawing," is
6 that right?

7 A Well, Miss McWilliams, with all due respect,
8 I didn't know what was really going on internally
9 at Richardson Plowden during all this time, I had
10 no idea that they had concerns about this project
11 or about their fee arrangement or about any issues
12 or IRS regulations, I had no -- Mr. Hanlin didn't
13 communicate one word of that to me.

14 Q Didn't you just testify to the jury whatever
15 the fee agreement would have been you would have
16 been fine with it?

17 A Absolutely I would have been from a financial
18 standpoint because I don't tend to think about
19 projects in that light, I think about projects as a
20 conservation value and protecting God's resources.

21 Q But isn't it true, Mr. McLeod, no one, the
22 IRS never even looked at any of the documentation
23 with respect to the Jim Justice transaction, right,
24 because it wasn't even turned over to them?

25 A I have no idea what the IRS was getting ready

1 to do.

2 Q But you know you had control over what could
3 be disclosed, you and your lawyers, right?

4 A To the IRS?

5 Q To the IRS.

6 A We had to turn over my life to them.

7 Q Well, isn't it true, Mr. McLeod, you remember
8 that there was a decision made by you and Mr.
9 Crosby Lewis and Mr. Carey Hall that you only had
10 to turn over to the IRS, until they asked for
11 anything else, those projects that had actually
12 been closed, right?

13 A Gosh, Miss McWilliams, you know, that is why
14 I hired Crosby. I don't remember specifically what
15 they were doing for me, I just knew they were doing
16 things.

17 Q Isn't it true that you wrote, the first time
18 you disclosed to Mr. Justice in writing that the
19 reason you had to delay was because the defendant
20 had withdrawn was all the way in 2010, at that
21 point you wanted an affidavit from him, "Verifying
22 our agreement regarding the conservation easement
23 project," isn't that right?

24 A That is absolutely correct.

25 Q And he never gave it to you, did he?

1 A He certainly did.

2 Q He gave you an affidavit verifying the
3 conservation easement project, is that what you're
4 saying?

5 A No, no. He gave us -- yes, he gave us an
6 affidavit that they were, they considered that they
7 had an agreement and Mr. Justice was planning to
8 move forward from the moment that he said to Yancey
9 on the phone let's do it.

10 Q All right.

11 MS. McWILLIAMS: Your Honor, I think I have a
12 matter to bring up with the Court.

13 THE COURT: Very well. Miss Meyer, you all
14 step in the jury room, take a break, we'll get you
15 back in a few minutes. If you need more candy let
16 us know, I have more.

17 You are good on candy or need more?

18 JUROR: We need more.

19 (The jury was excused from the courtroom).

20 MS. McWILLIAMS: Your Honor, we have never
21 seen any affidavit from Mr. Justice that has just
22 been described.

23 THE COURT: That's simple enough. Have you
24 got the affidavit?

25 MR. PENDARVIS: I know what Mr. McLeod is

1 referring to and it might be good if Mr. McLeod
2 steps out, I don't want to educate him on this, it
3 is an honest thing.

4 MS. McWILLIAMS: Let's do --

5 THE COURT: Take him right there in front of
6 Judge Baxley's chambers right here in the back
7 hall, keep him on this end of the hall because the
8 jury is down here, are they not?

9 BAILIFF: No.

10 THE COURT: The jury is down here?

11 BAILIFF: Yes, sir.

12 THE COURT: They are secluded from him. Put
13 him right there in front of Judge Baxley's chambers
14 just for everybody's assurances.

15 (Witness excused from the courtroom).

16 MR. PENDARVIS: In August, Your Honor --

17 MS. McWILLIAMS: Wait, wait. May I make the
18 record, please?

19 MR. PENDARVIS: Well, you asked me.

20 MS. McWILLIAMS: No.

21 MR. PENDARVIS: The judge asked me.

22 MS. McWILLIAMS: Okay. Well, I apologize.

23 MR. PENDARVIS: Your Honor --

24 MS. McWILLIAMS: We did ask for all
25 communications between the plaintiffs and Mr.

1 Justice and their corporation and we have never
2 seen any affidavit of any kind.

3 MR. PENDARVIS: I will represent to Your
4 Honor if I had an affidavit from Jim Justice it
5 would be on the bulletin board. It is an affidavit
6 signed by the designee of the Black River Farms,
7 LLC, Miss Williams has a copy of it, I have no copy
8 of Mr. James C. Justice, II, with his signatures on
9 an affidavit, I haven't seen one, don't know about
10 it. I'm confident that is what Mr. McLeod is
11 referring to. We have an additional copy if you
12 would like to look at that affidavit.

13 MS. McWILLIAMS: I believe you if that is
14 what he's talking about.

15 THE COURT: That is not what the question
16 was.

17 MR. PENDARVIS: I understand that. I believe
18 that is what Mr. McLeod is thinking.

19 THE COURT: Well, Miss McWilliams, what do
20 you want?

21 MS. McWILLIAMS: Well, the only thing I know
22 to do is to ask, I guess I now am going to have to
23 ask Mr. -- I'm not going to ask Mr. McLeod about
24 the affidavit because I don't think it's admissible
25 to show anything. My question was, "You never got

1 the affidavit you asked for," and now he told the
2 jury he did, and there isn't one. I don't know if
3 there has to be a stipulation told the jury that
4 there is no affidavit.

5 MR. PENDARVIS: I don't have any problem
6 doing that. It is an honest mistake, I have not
7 seen an affidavit, he has not seen it, I have not
8 shown him an affidavit. Yes, that letter Miss
9 McWilliams is referring to asks Mr. Justice for an
10 affidavit. It took a lot to get what we got, we
11 got a Justice Family Farms affidavit.

12 THE COURT: That's all right.

13 MR. PENDARVIS: I'm confident that is what
14 he's talking about.

15 THE COURT: I'm confident you all are
16 agreeing that affidavit or that response exists but
17 that is not an affidavit of Mr. Justice.

18 MR. PENDARVIS: No, sir.

19 MS. MCWILLIAMS: I don't dispute there was an
20 affidavit provided during mediation at some point
21 in the case.

22 THE COURT: But not from Jim Justice.

23 MS. MCWILLIAMS: It is not from Jim Justice
24 and I'm not going to put it in this record, I want
25 to be able to say there most certainly is not, you

1 hadn't produced one.

2 MR. PENDARVIS: In this affidavit the affiant
3 is the deponent in the video. We'll stipulate Miss
4 McWilliams can ask Mr. McLeod if he might be
5 mistaken.

6 MS. MCWILLIAMS: No.

7 MR. PENDARVIS: I'm confident that what he is
8 referring to --

9 MS. MCWILLIAMS: I'm not going to do that
10 because that's not admissible, that doesn't
11 constitute anything. We object to anything with
12 respect to Justice Family Farms.

13 MR. PENDARVIS: I can handle that on
14 redirect, Your Honor.

15 THE COURT: Well, all right.

16 MS. MCWILLIAMS: He said on the stand he had
17 such an affidavit and there isn't one. I think the
18 only way is for the Court to instruct, you have
19 inquired and there is no such affidavit and then
20 Mr. Pendarvis, if he wants to say didn't we get
21 another affidavit on redirect, that is not Jim
22 Justice, that was the question.

23 THE COURT: I will give a curative
24 instruction to that extent. My instruction will be
25 clear and it will be in front of the jury. Do we

1 likewise need to bring Mr. McLeod back in and tell
2 him that is what I'm about to do so he doesn't
3 contradict what I'm now educated to, that there is
4 not one?

5 MR. PENDARVIS: I prefer that, Your Honor, it
6 is an honest mistake. I prefer that.

7 THE COURT: All right. Any objection to
8 that, Miss McWilliams?

9 MS. McWILLIAMS: No, Your Honor, I'm sorry.

10 THE COURT: All right.

11 (The witness returned to the courtroom).

12 THE COURT: I want to make a quick phone call
13 real quick to try to answer the jurors' question on
14 scheduling. I want to know what Court
15 Administration is going to do.

16 (Brief recess).

17 THE COURT: I spoke with Court
18 Administration, not the one I need to talk to but
19 it looks like everything will be fine for coming
20 back Monday and not working the weekend, which is
21 what I expected. I don't expect them to tell me
22 no, we can't do that.

23 Do you all have any issue with me, I
24 discussed it before, asking the jury what is their
25 preference for tomorrow? We can work a half day

1 tomorrow, I'm available, or if they would rather
2 not and come back Monday we'll do that. I would
3 offer that to them, not knowing what all their
4 circumstances are.

5 MR. PENDARVIS: No objection, whatever you
6 want to do, Your Honor, is fine.

7 MS. McWILLIAMS: Fine.

8 THE COURT: Mr. McLeod, we spoke outside your
9 presence, both lawyers agreed there was another
10 affidavit that came in, it was not from Mr.
11 Justice, so the lawyers' agree I'm going to tell
12 the jury that there was not an affidavit from Jim
13 Justice, by agreement of the lawyers, I'm going to
14 leave it at that, I didn't want you to
15 misunderstand that is what I'm being told.

16 THE WITNESS: Yes, sir.

17 THE COURT: All right, very well. Bring them
18 in.

19 (The jury returned to the courtroom).

20 BAILIFF: The jurors are all present.

21 THE COURT: All right. Miss Meyer, I got you
22 all's letter. I tried to get in touch with Court
23 Administration, I pretty well got them. Here is
24 the issue. I don't think we're going to get all
25 our testimony done this week, I'm unable to work

1 this Saturday. The next break, we'll take a little
2 break before we get done today, we'll get as far as
3 we can today, we can work in the morning for about
4 half a day or not. We're going to come back Monday
5 either way. I want you all as a group to decide
6 whether you all want to go on back to your life for
7 Friday, Saturday and Sunday for a half day tomorrow
8 and come back Monday, so the decision to work
9 tomorrow morning is going to be your decision. Do
10 you all want to work a half day if we're going to
11 work a half day? If you don't, if you want Friday
12 to go to work, whatever you have to deal with, come
13 back Monday, it is you all's decision, tomorrow yes
14 or no, about 9:00 to 12:30 or 1:00, knock off and
15 come back Monday and finish the case. That is you
16 all's decision next break, you don't have to do it
17 now. That is you all's call, okay, and I will have
18 more candy then.

19 As far as the water goes, if you all need
20 something, the bailiffs are for you all's
21 convenience and for our help and they are glad to
22 do, get you water and help you with stuff. They're
23 doing a lot of work back there, they're working on
24 this jury room down here and putting new walls up,
25 so anything we can do to make you all more

1 comfortable we'll be glad to do it. That is what
2 we're here for.

3 JUROR: Will we get through Monday?

4 THE COURT: I would guess we will go into
5 Tuesday. I was making sure Court Administration
6 agreed to come back next week. They have to, it
7 would be unfair to bring another judge, I'm here,
8 you all are here, we're going to get it done.

9 All right, now we're back on the record with
10 this case, Miss McWilliams.

11 MS. McWILLIAMS: Your Honor, the instruction.

12 THE COURT: Yes. We took a break a moment
13 ago and the lawyers and I spoke and it has been
14 stipulated, which is a legal word for agreed by the
15 parties, there is not an affidavit from Jim Justice
16 regarding the providing of the conservation issue,
17 he did not file an affidavit of any type regarding
18 his participation in that or changing his mind.

19 MS. McWILLIAMS: Thank you, Your Honor.

20 BY MS. McWILLIAMS:

21 Q Now, Mr. McLeod, if you could, I would like
22 to also clarify something you testified about
23 earlier today. You testified that you recommended
24 that Mr. Justice postpone the project. Is that
25 right?

1 A Yes, ma'am.

2 Q But you did not tell him on December 24th or
3 until, as we now know, later sometime in 2010 Mr.
4 Hanlin had withdrawn, right?

5 A That is my best recollection. I was in shock
6 at that moment in my life but I don't recall
7 telling him, it was embarrassing enough to tell him
8 the IRS had sent me a letter and I didn't think
9 ethically or professionally I needed to tell him,
10 it was a further embarrassment to me Richardson
11 Plowden had quit.

12 Q You also never gave him the opportunity to
13 know that and say, "Well, I've got lawyers, let's
14 keep going," you never gave him that opportunity?

15 A Miss McWilliams, Jim Justice made it clear to
16 me while he had lots of advisors and lawyers and
17 CPA's that --

18 MS. McWILLIAMS: Your Honor --

19 A -- he did not have anybody --

20 THE COURT: No, wait.

21 THE WITNESS: I'm sorry.

22 MR. PENDARVIS: He is answering the question,
23 Your Honor.

24 MS. McWILLIAMS: I asked him if he told --

25 THE COURT: Wait a minute.

1 MS. MCWILLIAMS: I'm sorry.

2 THE COURT: Rephrase your question. Answer
3 the question she asks you and if you need to
4 explain it you may, but answer the question, answer
5 the question she asks.

6 BY MS. MCWILLIAMS:

7 Q My question was, Mr. McLeod, you never
8 offered to Mr. Justice the opportunity to learn of
9 the fact there had been this sudden withdrawal and
10 give him the opportunity, you never said, "I don't
11 have lawyers, let's go forward anyway," or at least
12 let him make that decision that he wanted to go
13 forward, did you?

14 A And the reason that I did not is because he
15 had made it clear to me when he said to move
16 forward that while he had lots of advisers and
17 CPA's and others, that he didn't have anybody that
18 knew anything about conservation easements.

19 Q All right. And when was this conversation
20 you had with Mr. Justice?

21 A Back in, I guess it was October when we made
22 the decision, when he decided to go forward with
23 the conservation easement after having decided not
24 to go forward with the mitigation.

25 Q Isn't it true that you have previously

1 testified that what he said at the point when you
2 all were deciding between transitions from a
3 mitigation bank to a conservation easement, all he
4 said was, "Let's do it," isn't that what you
5 previously testified?

6 A Sure, but we were having a telephone
7 conversation and the bottom line was he said go
8 forward, do it.

9 Q All right. And there wasn't anything about,
10 "Oh, by the way, I'm relying on you for tax
11 advice," he didn't say that?

12 A His actual words to me, Miss McWilliams, when
13 I described to him what I was thinking to
14 accomplish his stated long and short term
15 objectives about the Black River Farm was, "Yancey,
16 that's brilliant, I don't have anybody who
17 understands these concepts and principles, let's do
18 it."

19 Q "Let's do it," all right, but not, "And I'm
20 going to be relying on your attorneys for tax
21 advice," he never said that, did he?

22 A That was certainly implied from what he was
23 telling me.

24 Q That's what you're saying now but he never
25 said it, did he, he never said that?

1 A Okay, never said, I'm sorry, never said what?

2 Q He never said, "And I don't have any tax
3 attorneys that can assist"?

4 A He said, "I don't have anybody."

5 Q He doesn't have anybody that understands
6 conservation easements, isn't that right, is that
7 what you're now saying?

8 A He thought that what I was telling him was a
9 splendid idea to enable them to protect this farm
10 in perpetuity and told me to go forward.

11 Q All right. Now, I also want to clarify a
12 couple other things. Just to be clear, you have
13 never said to him, "I don't have my attorney but
14 let's go forward anyway because this IRS deal
15 doesn't, I'm proud of what I did, I'll be able to
16 defend myself," right?

17 A It is my recollection that on the December 24
18 conference call with Jim Justice, Steven Ball,
19 David Harrah and Crosby Lewis, Crosby Lewis, in
20 Crosby's office, I did not tell Mr. Justice about
21 Richardson Plowden quitting because I did not want
22 to further embarrass myself, it was hard enough for
23 me to say the IRS had sent me this threatening
24 letter.

25 Q You're saying it's embarrassing that your

1 lawyer has a conflict, is that all you had to say?

2 A I don't think he had a conflict. I can't
3 believe they didn't help me cross the finish line
4 with this project after they promised me they
5 would.

6 Q You never gave Mr. Justice the chance to go
7 forward and get anybody else and you didn't get
8 anybody else, did you?

9 A I did not.

10 Q You didn't even try?

11 A I did not. I didn't think -- it was
12 pointless to do so at that time.

13 Q But you didn't even try, did you, Mr. McLeod?

14 A No, ma'am.

15 Q Yet you got Crosby Lewis on the same day?
16 You went down a few days after that and he had
17 Carey Hall?

18 A Right. Crosby Lewis knew about as much about
19 conservation easements as I do. I called him
20 because I was scared to death. I was scared to
21 death of what Jim Justice might say when I advised
22 him to postpone the easement and the reason I did
23 that were twofold. One, my first thought was
24 protect my client's interest. Secondly, not to
25 further embarrass myself. And so I was giving him

1 the best advice that I knew how under very adverse
2 circumstances, Hal and Richardson Plowden didn't
3 give me any advice how to proceed from that moment.

4 Q But you had Mr. Lewis by December 20, the
5 same day?

6 A I certainly did.

7 Q Met with him that night?

8 A I certainly did.

9 Q And within, by January 3rd you were in
10 Greenville meeting with Carey Hall who is a
11 certified tax specialist, right?

12 A I don't believe Carey Hall or anybody
13 competent or qualified to handle a conservation
14 easement of this magnitude and complexity would
15 even consider coming into the project and I could
16 have gotten ten lawyers by the evening of the 20th
17 to help me fight the IRS, I just happened to choose
18 Crosby.

19 Q Well, isn't it true, Mr. McLeod, that when
20 you wrote Mr. Justice and said you needed an
21 affidavit from him to confirm you had an agreement,
22 you also told him at the time all this happened,
23 "You will recall we had all the work on the project
24 completed and were only a few days before closing"?
25 Isn't that what you told him when you write Mr.

1 Justice?

2 A Well, Miss McWilliams, I have stated to you
3 on my deposition that people who --

4 Q Could I get an answer first, please, yes or
5 no, did you write that, Mr. McLeod?

6 A I did write that and the reason I wrote that
7 is that I'm a very simple person but when I deal
8 with these complex issues with these very important
9 people which I have been blessed to do in my
10 lifetime I'm humbled by the experience to do that,
11 it is extraordinarily important on a project of
12 this magnitude and complexity for me to have the
13 comfort and security of the tax attorney taking me
14 all the way to the finish line.

15 On the easements that Curtis talked about
16 last year in the last ten days of 2011 we had some
17 very complex issues come up that Curtis had to deal
18 with. I couldn't in good conscience recommend to
19 Jim Justice we move forward with the project
20 without the tax attorney involved in the project.
21 That is just how simple it is.

22 Q But you could have given Mr. Justice the
23 opportunity to have his own lawyer. Mr. Elliott
24 represented the landowner, right?

25 A Miss McWilliams, of course I could have given

1 Mr. Justice the opportunity but I don't think there
2 are any tax attorneys in Beckley, West Virginia
3 that would have jumped into the project that late
4 date either.

5 Q But we'll never know because you didn't call?

6 A I suppose not.

7 Q You didn't tell Mr. Justice that Mr. Hanlin
8 wasn't involved, did you?

9 A I did not.

10 Q Now, could we back up a little bit, Mr.
11 McLeod?

12 A Sure.

13 Q You testified yesterday you first met, maybe
14 I misunderstood you but I thought you said you
15 first met Mr. Justice in working on the WRP
16 easement. You didn't actually meet him face to
17 face until 2007, right?

18 A Yes. We talked and Randy and I talked, Mr.
19 Justice and I talked back in 2005.

20 Q But you didn't actually meet him until 2007,
21 right?

22 A Correct.

23 Q March, I think your testimony was, is that
24 right?

25 A Yes, ma'am.

1 Q You were on the site and I think you rode
2 around probably, that was in '07, right?

3 A Yes, ma'am.

4 Q So you really hadn't known Mr. Justice except
5 by virtue of the telephone calls in '05 and then
6 you met him on the property in '07. Right?

7 A Yes, ma'am.

8 Q March of '07. And you attempted, in
9 connection with the mitigation project, you sent
10 him two consulting services agreements, right, one
11 and then another one you hand delivered?

12 A In connection with the mitigation project?

13 Q Yes, sir.

14 A Two consulting services agreements?

15 Q One in July and then you sent him, took it
16 again in August?

17 A I don't recall two but if you say so.

18 Q All right. But he never signed either one of
19 them?

20 A No, ma'am.

21 Q All right. And then -- and he decided he
22 didn't want to do that project, right?

23 A That's correct.

24 Q All right. And your testimony earlier was
25 that you had a potential deal with Mr. Gastono and

1 he didn't want to do it, right?

2 A For totally different reasons.

3 Q Okay. But I'm just saying isn't it true that
4 lots of times landowners make the decision that
5 they don't want to go forward with projects, right?

6 A Well, gosh, I have already testified that I
7 have had hundreds of landowners call me and ask for
8 my assistance with conservation matters on their
9 real estate and after meeting with them and seeing
10 the land and doing a little preliminary due
11 diligence decided not to go forward.

12 Q All right. And in connection with the, right
13 after the mitigation bank visit in March, I think
14 you testified you ultimately went up to Beckley,
15 West Virginia to look at some Justice property up
16 there?

17 A Yes, ma'am.

18 Q And he decided he didn't want to do that
19 conservation easement either, didn't he?

20 A That's correct.

21 Q All right. And so you had actually talked
22 with him about conservation easements before you
23 ever got to the proposal with respect to Black
24 River Farms, right?

25 A Two totally different concepts but the same

1 170(H) type easement.

2 Q The conservation easement, if he had chosen
3 to do it and everything worked out he could
4 potentially take a charitable deduction, right?

5 A Sure.

6 Q He chose not to do that one either, didn't
7 he?

8 A Yes, ma'am.

9 Q And then you get to the fall of 2007 and
10 there is now another idea about Black River Farm.
11 Correct?

12 A Yes, ma'am.

13 Q All right. And that one, based on your
14 testimony, had a potential, if everything worked
15 out, might be a potential charitable contribution
16 for Mr. Justice as well. Right?

17 A Yes, ma'am.

18 Q And he didn't want to do that, did he?

19 A I don't agree with that. He did want to do
20 it.

21 Q Well, he certainly didn't ever take you up on
22 your offer to start it back up after the IRS
23 investigation was done, did he?

24 A Well, Miss McWilliams, let me explain that.
25 IRS tax code regulations fluctuate a lot and when

1 you are dealing with a gentleman like Jim Justice
2 who has more wealth and assets and income than are
3 comprehensible, I was told that in 2007 he had a
4 particular need.

5 MS. MCWILLIAMS: Your Honor --

6 THE COURT: Hold on.

7 Q I don't think you can repeat the hearsay.

8 A Okay.

9 Q But what I asked you was, he chose not to do
10 the transaction in '07 after your recommendation
11 that he not do it because of the IRS investigation
12 and he has never taken it back up with you, has he?

13 A Notwithstanding my efforts to mitigate
14 damages that we sustained, he has not decided to
15 move forward at least as far as I know.

16 Q All right. Now, he also, so the record is
17 clear, he didn't sign the services agreement you
18 testified about earlier today, did he?

19 A No, nor did that surprise me.

20 Q You would have liked to have had signed
21 agreements?

22 A It is better to have it than not but I
23 trusted him and he trusted me. I wasn't worried
24 about it.

25 Q All right. And he never ever agreed to the

1 nonrefundable retainer, he just ended up paying you
2 the 15,000 later in the year, right?

3 A And I certainly was grateful for that because
4 there were times while Robin and I were fighting
5 the IRS we didn't have enough gas money to come in
6 from the Wateree River to visit our grandchildren,
7 so, yes, I was delighted he agreed to pay part of
8 that 50,000 even though we didn't do the project.

9 Q And he never agreed to make it nonrefundable,
10 did he, that is what you wanted, you wanted a
11 nonrefundable up front, right?

12 A Yes. In a perfect world that would have been
13 wonderful.

14 Q That is what the terms you proposed were?

15 A Yes, ma'am.

16 Q All right. One other matter, Mr. McLeod.
17 Isn't it true that the original consulting services
18 agreement didn't come from Mr. Hanlin, it came from
19 Y.E.S. to Mr. Hanlin, right?

20 A Probably so.

21 Q The first draft, do you remember that?

22 A I don't remember it. I would have taken an
23 existing consulting services agreement from other
24 projects and I would have modified it in
25 handwriting on the copy Mary would have made for me

1 and Mary would have typed it up and I would have
2 looked at it and then I would have sent a proposed
3 draft of the consulting services agreement to Hal
4 for his review.

5 Q All right. Let's look at that. You had two
6 of them left over from the mitigation bank, right,
7 you already had two, right? Let me show you what
8 has been marked as Defendant's Exhibit 35, Mr.
9 McLeod. That is dated November 9, 2007, an email
10 signed by Mary but she sent out all your emails,
11 right?

12 A Yes, ma'am.

13 Q And it is from you to Hal, "I'm attaching a
14 first draft of the NRPM consulting service
15 agreement for the Jim Justice easement"?

16 A Yes, ma'am.

17 MS. McWILLIAMS: We move Defendant's Exhibit
18 35 into evidence, Your Honor.

19 MR. PENDARVIS: No objection, Your Honor.

20 THE COURT: Defendant 35 without objection.

21 (NRPM consulting service agreement marked
22 and received in evidence as Defendant's
23 Exhibit Number 35).

24 BY MS. McWILLIAMS:

25 Q So, when you first began your working on this

1 conservation easement project for Black River
2 Farms, you testified you started getting the
3 professionals together, I think you said, you first
4 sent a draft of what you wanted to deal with with
5 Mr. Justice, sent that to Mr. Hanlin, right?

6 A I did.

7 Q And thereafter on occasion Mr. Hanlin sent
8 various documents to Mr. Justice on behalf of the
9 project at your direction and approval, correct?

10 A Yes, ma'am.

11 Q Including the proposal from COLT, right?

12 A Yes, ma'am.

13 Q Mr. Justice never signed that, right?

14 A No, ma'am.

15 Q And he never signed a consulting service
16 agreement, I think your testimony has been that one
17 was updated and changed instead of saying -- the
18 first draft had NRPM, then it got updated, right?

19 A That's correct.

20 Q He didn't sign that, right?

21 A No, ma'am.

22 Q He also didn't sign or agree to the proposal
23 from Dr. Hawkins, the appraiser, did he?

24 A He did not. He paid it.

25 Q Ultimately -- let's be clear about that. He

1 ultimately paid after Mr. Harrah threatened to put
2 a lien on the property?

3 A Dr. Hawkins.

4 Q Dr. Hawkins, I'm sorry. Isn't that right?

5 A I can assure you Jim Justice was not
6 concerned about Darroll Hawkins threatening a lien
7 but he paid it, paid all the rest of them, nobody
8 else made any threat.

9 Q All right. But that's what it took, it took
10 a while, right?

11 A It took time, it didn't take a lot.

12 Q All right. There was a lot of emails where
13 you kept saying you had contact with Mr. Harrah
14 trying to get these bills paid, right?

15 A Yes, ma'am. I was trying to protect the
16 professionals' interest. Keep in mind that because
17 Richardson Plowden and Hal Hanlin suddenly quit on
18 me, as a lawyer thinking back to law school, I'm
19 thinking, gosh, Yancey, can you really protect
20 their interest since the agreement was never really
21 signed, is there a legal obligation to pay these
22 people who in good faith acted on my request to
23 conduct the necessary component parts of a very
24 complex, huge conservation easement project and now
25 because Richardson Plowden and Hal Hanlin quit I

1 had to recommend to Mr. Justice to postpone it, I
2 don't know if he will ever start it back up and I
3 am definitely trying to get these professionals
4 paid.

5 Q The fact of the matter is there is lots of
6 projects that you take a risk on, these
7 professionals, Multi-Engineering, didn't
8 Multi-Engineering take a risk on working on the
9 mitigation bank project, you might not get paid if
10 the deal doesn't go through, right?

11 A That is correct, there is a risk. I have
12 spent, you know, probably two-thirds of my
13 lifetime, you know, trying to help people for which
14 I received no compensation but that doesn't mean
15 I'm going to quit trying to help people.

16 Q Isn't it also true with respect to the
17 conservation easement that was proposed for the
18 Black River Farm Mr. Justice had no obligation,
19 even if he had signed one of your consulting
20 agreements he had no obligation to do it, isn't
21 that right?

22 A Sure.

23 Q He could, you wanted him to pay a
24 nonrefundable retainer of 50,000 but he didn't
25 actually have to do it, right?

1 A No, ma'am.

2 Q So there is also a risk that he might at the
3 very last minute just decide, "You know what, I
4 don't want to do it"?

5 A Absolutely, that would be a possibility.

6 Q That would have been his right under this
7 agreement, right?

8 A Of course.

9 Q Okay. That is something the landowner always
10 has an opportunity to decide, right?

11 A Yes, ma'am.

12 Q Just as you didn't give any guarantee to Mr.
13 Justice of what might be his actual charitable
14 deduction, right?

15 A Well, I wasn't expecting him to make the
16 final decision to execute these documents and
17 record it and place a permanent easement on his
18 property without having some idea what the expected
19 charitable gift would be. That is why Darroll
20 Hawkins, you know, provided us with his preliminary
21 estimate of value.

22 Q All right. Well, let's talk about that a
23 little bit. Do you have that in front of you, Mr.
24 McLeod?

25 A Which one is that, ma'am?

1 Q Well, I wish I could tell you. I believe --

2 MR. PENDARVIS: 26.

3 Q Plaintiff's 26.

4 A I had them all straight here, I swear. I've
5 got it.

6 Q Have you got it?

7 A Yes, ma'am.

8 Q In fact what Dr. Hawkins says is, "I had a
9 preliminary value on one of 15 different wetlands,
10 correct." Isn't that what he says?

11 A That is what it says.

12 Q All right. And so he -- and you directed him
13 to stop work, right, after the conversation with
14 Mr. Justice, not going to do any more work because
15 Mr. Justice has decided to postpone it?

16 A After Mr. Hanlin and Richardson Plowden quit
17 on me I recommended to Mr. Justice we postpone the
18 project, he agreed and I immediately or soon
19 thereafter notified all the professionals who had
20 been acting in good faith working on this project
21 to stop.

22 Q Right. And in fact Plaintiff's 26 is
23 basically Dr. Hawkins' best guess, isn't that
24 right?

25 A It is a professional opinion of a preliminary

1 value.

2 Q Well --

3 A Based upon his vast experience appraising
4 aquatic resources.

5 Q That is not what it says. You wouldn't have
6 recommended to Mr. Justice, "Yes, go ahead and put
7 this on your tax return"?

8 A Oh, I certainly would have.

9 Q A best guess?

10 A With a preliminary value provided by Dr.
11 Hawkins this would have been perfectly sufficient
12 for Mr. Justice to move forward with the
13 conservation easement because Dr. Hawkins, the
14 appraiser, is saying it will be at least
15 45,000,000.

16 Q But that is not what I asked you. What I
17 asked you, Mr. McLeod, you would not have
18 recommended to Mr. Justice that he could rely on a
19 best guess for purposes of his conservation
20 easement project, could you?

21 A He could rely on this professional opinion of
22 a preliminary value to place the easement and then
23 the self contained appraisal would be due within 60
24 days.

25 Q And that was never done because you told Dr.

1 Hawkins to stop work, properly so, because the
2 project had been postponed, right?

3 A Yes, ma'am, I did.

4 Q And in fact Dr. Hawkins' best guess here
5 doesn't even take into account what it would cost
6 to create a mitigation bank, you have got to have
7 both of them, we don't have a value of the
8 conservation easement, one is the property, one is
9 a conservation easement, we don't have that either,
10 do we?

11 A Well, if I had had this in my hand from Dr.
12 Hawkins and Hal and Richardson Plowden had not quit
13 I could have easily sat down with David Harrah and
14 Mr. Justice or anybody else he wanted there and
15 easily in 30 minutes explained to him the practical
16 application of the process and the before and after
17 appraisal methodology and what it would result in.

18 Q But you didn't have that appraisal
19 methodology done, did you?

20 A It wasn't done because they quit.

21 Q All right. But the point of the matter is
22 this is just a best guess, isn't that right?

23 A It is a professional preliminary estimate of
24 value.

25 Q But those words don't appear in this, it says

1 best guess in the change in value?

2 A That is just Dr. Hawkins, the way he talks.

3 Q All right. You heard Dr. Hawkins testify in
4 this courtroom you still have to subtract out the
5 cost, right?

6 A Well, sure, of course.

7 Q And we don't know what those are?

8 A We don't know what those are.

9 Q We don't know what those are because you
10 never did it, did you, you said, "He had this
11 unique way of valuing it and he never gave us any
12 idea of the costs"?

13 A Miss McWilliams, I have been doing
14 conservation easement work a long time and without
15 fail, 100 percent of the projects that we have
16 closed have a before and after appraisal.

17 MS. McWILLIAMS: Your Honor, I move to strike
18 that, it is not responsive.

19 THE COURT: All right.

20 MS. McWILLIAMS: I asked him --

21 THE COURT: I know what you asked and I have
22 the record up here, thanks to my court reporter.

23 MS. McWILLIAMS: Thank you.

24 THE COURT: You can ask questions, Mr. McLeod
25 can give the answers. If his answer requires an

1 explanation he can provide an explanation but not a
2 nonresponsive explanation, let's stay on task and
3 present evidence on this case.

4 BY MS. McWILLIAMS:

5 Q Mr. McLeod, you have testified some earlier
6 today about -- I want to show you a few more of
7 your correspondence with Mr. Harrah and Mr. Justice
8 about your fees but you have testified earlier
9 today there wasn't any deadline for the project
10 set, to closing date?

11 A December 31st.

12 Q All right. Oh, the closing date was December
13 31st?

14 A Everything was to be done by December 31st in
15 order for Mr. Justice to have the charitable gift
16 in the calendar year 2007.

17 Q Well, you produced a calendar in this case,
18 haven't you, for December?

19 A I don't know whether I have or not.

20 Q All right. Well, let's find it. We'll find
21 that for you. I'll find it in just a minute.

22 Mr. McLeod, not everybody in the deal thought
23 that there was a deadline or closing date of
24 December 31st, did they? Isn't it true that Jim
25 Lewis thought you had until January before you

1 would even do the prospectus, right?

2 A I think you're confusing the facts about what
3 Jim Lewis is talking about.

4 Q Well --

5 A I had --

6 Q Let me just show you the document.

7 A I'm sorry.

8 Q I hand you what has been marked as
9 Defendant's Exhibit 57. Do you see that, Mr.
10 McLeod?

11 A Excuse me, I'm just looking at it.

12 Okay.

13 Q All right. And there is, again this is one
14 of those documents that has two emails, the first
15 one at the bottom says, it is a string, it is dated
16 November 27th, 2007. Correct?

17 A Yes, ma'am.

18 Q From you to Mr. Lewis?

19 A I saw that Brenda's name -- I have a mental
20 block about looking at the bottom of the page to
21 read up.

22 Q So it is from you to Jim Lewis?

23 A Yes, ma'am.

24 Q That is your long time acquaintance and you
25 are in a corporation together?

1 A Uh-huh.

2 Q You copied Mr. Hanlin and you asked Mr. Lewis
3 to have the base line report ready by December 20
4 and then if possible it would be great to have the
5 prospectus, right?

6 A Right.

7 Q And what Mr. Lewis emails back is, "Well, I
8 may be able to get the base line by the 20th but
9 not the perspectus, I thought we had until January
10 on it"?

11 A Jim is confusing doing a mitigation project
12 versus a conservation easement and we decided we
13 didn't need to do the prospectus for the
14 conservation easement. A prospectus is a
15 conceptual plan of a mitigation project.

16 MS. McWILLIAMS: I would like to move
17 Defendant's Exhibit 57 in evidence.

18 MR. PENDARVIS: No objection.

19 THE COURT: 57 is admitted without objection.
20 (11/27/2007 email marked and received in
21 evidence as Defendant's Exhibit Number 57).

22 MS. McWILLIAMS: Thank you, Your Honor.

23 BY MS. McWILLIAMS:

24 Q Well, certainly by November 27th you weren't
25 still working on the mitigation bank, were you?

1 A No, but I had thought that if Jim could put
2 together a prospectus for a mitigation project
3 which I knew at this moment in time was not going
4 to happen, that it might be helpful to Henry
5 Beckham and Dr. Hawkins to have as much information
6 as they could concerning the projected values of
7 the mitigation project which would become the basis
8 of the highest and best use for their appraisals.

9 Q Okay. So point of fact, what Mr. Lewis says
10 is, "I thought we had until January on it"?

11 A Well, he thought wrong.

12 Q Okay. Now, I mentioned the calendar. Let me
13 show you what has been marked as defendant's 59,
14 Mr. McLeod.

15 A Thank you.

16 Q Now, you produced this in this litigation,
17 didn't you?

18 A I guess so.

19 Q You don't remember?

20 A No, I don't remember. I'm sure Mary did it.

21 Q All right. Now, it looks like it was printed
22 off January 15th, 2008. Do you see that?

23 A Yes, ma'am.

24 Q 2:50 p.m.?

25 A Yes, ma'am.

1 Q And it's got a meeting with Crosby Lewis on
2 the 21st. Right?

3 A Yes. I was meeting with him regularly about
4 that time.

5 Q All right, and the 22nd it shows Crosby
6 Lewis?

7 A Yes, 10:00 o'clock, yes, on a Saturday.

8 Q And then there is a conference call with Mr.
9 Justice shown on the 24th. Right?

10 A Yes.

11 Q All right. But there is no entry anywhere on
12 here of a closing date or Justice closing or
13 anything, is there?

14 A I had never had a closing for a conservation
15 easement on a calendar except one, the one in
16 December, 2011. Our client, a fourth generation
17 cattle farmer in Rock Hill was so excited about
18 what his family was getting ready to do, he
19 provided a thousand acres in the heart of the
20 Charlotte bedroom community in this very fast
21 growing area, was going to dedicate a conservation
22 easement to provide that farm landscape for the
23 benefit of the public forever and he was so excited
24 about it and the York Conservation District who had
25 agreed to serve as the qualified organization was

1 so excited about it they wanted to have a closing
2 and so Curtis and I did a closing.

3 Q You put that one on your calendar?

4 A Mary probably did.

5 Q You didn't put the one for Jim Justice?

6 A Until December, 2011, I had never had a
7 closing on a calendar because I have never had a
8 closing.

9 Q Okay. All right.

10 MS. McWILLIAMS: Your Honor, we move in
11 Defendant's Exhibit 59.

12 MR. PENDARVIS: No objection.

13 THE COURT: Defendant 59 is in evidence
14 without objection.

15 MS. McWILLIAMS: Thank you.

16 (Copy of December 2007 calendar marked and
17 received in evidence as Defendant Exhibit
18 Number 59).

19 THE WITNESS: Miss McWilliams, could I
20 clarify something, is that okay?

21 MS. McWILLIAMS: Certainly.

22 THE WITNESS: When I say we had never had a
23 closing, I mean a formal closing, sitting around a
24 table with lawyers signing papers. Obviously we
25 had a closing because you had to get the

1 conservation easement document executed and the
2 base line documentation accepted by the grantor and
3 the grantee, you had to file the conservation
4 easement, but we had never had a formal closing.

5 BY MS. MCWILLIAMS:

6 Q Okay. Well, certainly with respect to the
7 Justice closing, you just said it was December
8 31st, that is just a tax deadline, right, that is
9 certainly not a -- you had no scheduled closing?

10 A Yes, everybody had to get, we got to get
11 everything done and be able to record the easement
12 by December 31st.

13 Q All right. And wouldn't you agree with me,
14 Mr. McLeod, one of the things you would have had to
15 have gotten done was have a commitment from Mr.
16 Justice to go forward, right, to actually place the
17 easement, right?

18 A Would you, I'm sorry, would you repeat that?

19 Q In other words, before you can have this
20 mailing around of documents and then ultimately
21 getting it recorded the landowner has got to sign
22 on the dotted line saying, "Yes, I want to do it,"
23 right?

24 A Of course.

25 Q And even up until the 12/31 this is a deal

1 that just might not have gone forward, no matter
2 what, whether Mr. Hanlin was involved or anybody
3 else, right?

4 A Well, that would have been his call for sure.

5 Q It would have been Mr. Justice's call?

6 A Right.

7 Q Okay.

8 A I have had qualified organizations back out
9 at the last few days of the year, too.

10 Q All right.

11 A They've got to agree, too.

12 Q Excuse me, I didn't mean to interrupt you.
13 In fact, in this case COLT really needed to have a
14 commitment from Mr. Justice about paying a
15 stewardship fee, right, he had to commit to it as
16 well, right?

17 A He didn't have to commit to it before the
18 consummation of the easement project. I have had
19 many, many easements where there was no formal
20 commitment to the stewardship endowment
21 contribution to the qualified organization until
22 after the first of the year.

23 Q Well, but in order for the deal to close COLT
24 would have had to have had Mr. Justice commit to
25 make a contribution for purposes of the maintenance

1 of the conservation easement in perpetuity, right?

2 A Sue Green knew full well Mr. Justice would
3 fulfill his obligations to make a stewardship
4 contribution had the project closed.

5 Q But my question was, that was something he
6 had to agree to, right?

7 A You mean formally agree to before the
8 execution of the document and the recordation of
9 the document?

10 Q Correct?

11 A No.

12 Q He didn't have to, he didn't have to agree to
13 that?

14 A No, ma'am.

15 Q Before the recordation?

16 A No, ma'am.

17 Q Well, in order to record you've got to have a
18 contemporaneous acknowledgement of the gift, right?

19 A Yes, ma'am.

20 Q And so is it your testimony that COLT would
21 have given a contemporaneous acknowledgement of a
22 gift before Mr. Justice had made any commitment to
23 COLT to pay the stewardship fee?

24 A I don't think there is any question that if
25 Jim Justice through David Harrah or whoever, you

1 know, had told me that they were ready to execute
2 the document that Hal and I had sent up there, that
3 Sue Green would have gladly executed the document.
4 Hal Hanlin could have easily told her and would
5 have told her that Jim Justice is good for the
6 amount of the stewardship contribution. I mean, my
7 gosh. As a matter of fact, Miss McWilliams, we had
8 a project one time where a qualified organization
9 backed out at the last minute and I had a new
10 qualified organization step in the last few days of
11 the year.

12 Q Okay. That is not what happened here?

13 A No, no, I don't mean that.

14 Q It doesn't have anything to do with this
15 case, right?

16 A No, ma'am, no.

17 Q All right. Now, isn't it true, Mr. McLeod,
18 that you received an easement in this case or a
19 draft easement from your son in law school? Do you
20 remember that?

21 A Oh, yes. There was, Yancey was at Vermont
22 Law School pursuing his Master's of Environmental
23 Legal Studies and he wrote a paper while he was
24 there entitled The Alchemy of Federal Wetlands
25 Regulations. I didn't know what alchemy meant

1 until he told me what he was writing. It is a
2 really good paper, it has been picked up and
3 published nationally.

4 But I asked Yancey, since he had these
5 remarkable professors at Vermont Law School, if
6 they had any New England boilerplate conservation
7 easement documents because in New England, unlike a
8 lot of the other parts of the country, they place
9 easements on property all the time to ensure a farm
10 landscape forever, which necessitates an
11 affirmative duty on the grantor and their heirs and
12 successors, if you follow what I'm saying.

13 Q Well, I guess what I wanted to make clear is
14 that you got a draft easement in connection with
15 the Jim Justice project, that language you could
16 use, from your son?

17 A Oh, it didn't have anything to do with the
18 Jim Justice project. It had to do with the
19 concept. In a conservation easement, 170(H)
20 conservation easement, which is the subject of this
21 lawsuit, it is a negative document, it is a thou
22 shall not, thou shall not do this, this, and this
23 forever, and then there is always a section where
24 the grantor, the landowner, reserves certain
25 rights.

1 In this case the reservation of rights would
2 have been agricultural and recreation, period, and
3 all the other rights, landowner rights would have
4 been forfeited forever and it is unusual in a
5 conservation easement to impose affirmative duties
6 but we would have had to have done that with the
7 unique concept of this conservation easement
8 because to forfeit forever the right to do
9 compensatory stream and wetland mitigation we would
10 have had to prohibit dredging, filling,
11 topographical alteration, the very things that Dr.
12 Hawkins was describing yesterday.

13 Q So you needed some language regarding
14 agricultural protection, right?

15 A We needed some language. I thought that, you
16 know, and just by happenstance my son happened to
17 be at Vermont Law School and I had thought, he had
18 told me excitedly about, "Dad, you wouldn't believe
19 the kind of easements they do up here."

20 Q I hate to interrupt, I understand that, but
21 my question is, you needed some language regarding
22 agricultural protection for the Jim Justice
23 easement, correct?

24 A No, I didn't need that language. We had that
25 in plenty of easement documents. What I needed was

1 language that as a part of the gift of the easement
2 it required the grantor, including everybody who
3 owned the property forever to affirmatively agree
4 that they would maintain it as a farm landscape.
5 In other words, what if Jim Justice and Jay his son
6 had decided for whatever reason, "We don't want to
7 farm anymore," under the terms of the easement
8 document that we were going to have on Jim
9 Justice's farm they could not allow the farm to go
10 through successional growth and revert back to a
11 forested landscape, they would have been required
12 affirmatively to keep it as a farm.

13 Q Well, you already knew that is what they
14 wanted to do anyway?

15 A I know but, you know, they might have changed
16 their --

17 Q Let me now --

18 MR. PENDARVIS: Your Honor, if she would let
19 him finish.

20 Q I didn't mean to interrupt.

21 A I'm through.

22 Q I'm sorry.

23 THE COURT: Thank you very much. That's
24 good.

25 Q Defendant's Exhibit 46, let me just get you

1 to identify that, if you would, if you could, Mr.
2 McLeod. This is, what it is, this is the easement
3 that your son sent November 26th, 2007. Right?

4 A Yes, ma'am.

5 Q Just a model conservation easement, right,
6 and you wanted one from the New England area, right
7 and that is what this is?

8 A Yes. Yancey describes in his note -- can I
9 read that?

10 Q Absolutely.

11 A He says, "Mary, dad asked me to send him an
12 easement document from the New England area.
13 Specifically he wanted to know the language they
14 used concerning the agricultural protection. I am
15 studying for exams and didn't really go over this
16 to see if the language he wanted is in this
17 document but I think it probably is. Let me know
18 if he wants more."

19 What he is saying is that their documents up
20 there are drafted in such a way as to place this
21 affirmative duty on the grantor and their
22 successors in title to maintain it as a farm
23 landscape forever. I had the same discussion with
24 the, with Matt Ball of the Corps of Engineers
25 recently about mitigation easements where Matt

1 wanted grantors or landowners placing mitigation
2 banks on their property to have the affirmative
3 duty of maintaining fences to keep cattle out of
4 creeks and I thought that was very much like this
5 because how do you draft language in a document
6 that puts an affirmative duty on landowners forever
7 to maintain fences? What if he is 99 years old and
8 can't get out there to maintain the fence? That is
9 difficult to do.

10 Q You would agree with me, Mr. McLeod, this
11 easement that you requested and received from your
12 son is during the time when you were working on
13 this Jim Justice project, right?

14 A Oh, yes, ma'am.

15 Q All right. And in connection with any draft
16 easement that's got restrictions on the property,
17 would you agree that the landowner has to agree to
18 those restrictions, right, that is what you just
19 said?

20 A Oh, yes, ma'am.

21 Q All right. And so the landowner would have
22 to, or landowner's professionals would have to look
23 at those proposed restrictions if they came to them
24 in a draft easement and give approval before you
25 could ever finalize the project. Right?

1 A Oh, yes, ma'am. I thought this document
2 night help Hal in the drafting of the easement
3 because it would have language that he might not be
4 familiar with on traditional easements down here.

5 Q All right. And in any event, Mr. Justice
6 would have to have input into those draft
7 restrictions, right, or whatever restrictions you
8 put in the easement, right?

9 A Well, he would ultimately have to approve the
10 document but I think he trusted me to put in the
11 language on the reserve right to accomplish his
12 stated objective of keeping it as a farm.

13 Q You would have sent them to Mr. Justice for
14 review?

15 A Of course.

16 Q That was not done in this case, right?

17 A I never got the easement from Hal.

18 Q All right. You don't have any documents
19 where you discussed any proposed restrictions? I
20 mean, you could have sent that on to Mr. Justice,
21 couldn't you?

22 A Miss McWilliams, Hal agreed in October to
23 help me with this very complicated, very large
24 conservation easement project and it was my
25 assumption, reasonable, I think, that Hal was going

1 to be the transaction's attorney to do all things
2 necessary in the legal, tax and otherwise that
3 lawyers typically do with conservation easements,
4 including drafting the easement document. Now,
5 this one was so unusual that I was trying to help
6 Hal with perhaps some language that would be
7 particularly helpful in drafting the necessary
8 grantor reserve rights and prohibitions to ensure
9 that we accomplished the objective. So --

10 Q All right. And in addition to the
11 restriction that would have to be put in the
12 easement, you would have to have a property
13 description, right?

14 A We had that.

15 Q All right. You wouldn't have expected Mr.
16 Hanlin to come up with a property description of
17 Mr. Justice's property, would you?

18 A Well, it would be a simple matter of just
19 getting the real estate descriptions from the
20 various deeds off the tracts of land that were
21 purchased by Mr. Justice or some of his companies
22 to put together the 4,000 acres and then at the
23 bottom you put less the description of the WRP
24 easement, 1,100 acres, and that would be your
25 description.

1 Q Well, you had that but you hadn't prepared it
2 and it hadn't been approved or reviewed by Mr.
3 Justice, is that what you're saying?

4 A Well, gosh, he was telling me to place the
5 conservation easement on his whole tract of land,
6 so that wasn't hard to do. We probably would have,
7 I mean, obviously when I got it I would have sent
8 it to Mr. Justice for his review but it was
9 something that could have been done very easily.

10 Q Mr. McLeod, would you agree, though, that the
11 essential documents to the process are the
12 engagement agreement, the consulting services
13 agreement, a recorded easement document and you had
14 to have the IRS form 8283, right, base line
15 documentation report, you had to have an appraisal.
16 Right?

17 A Within 60 days of the gift.

18 Q All right. But all those were the essential
19 documents of the process, right?

20 A No. I would say the essential documents of
21 the process were the conservation easement document
22 and the base line documentation report. The 8283
23 is a form that is filed with the tax return
24 whenever the taxpayer files his return.

25 Q The landowner, that's the responsibility of

1 the landowner but is an essential part of the
2 process, isn't it?

3 A I'm sorry, I didn't understand.

4 Q That's one of the documents that is part of
5 this process of placing a conservation easement?

6 A Not placing the conservation easement but
7 enjoying the benefit of the charitable deduction,
8 the IRS requires the 8283 be filed.

9 Q You're not suggesting Mr. Justice would be
10 considering a \$45,000,000 conservation easement and
11 not take into consideration in some fashion a
12 charitable deduction, are you?

13 A I certainly would not think so.

14 MS. McWILLIAMS: Your Honor, may I have just
15 a quick break?

16 THE COURT: Sure.

17 All right, Miss Meyers, back to the jury room
18 a few minutes. You can't discuss the case.

19 (The jury was excused from the courtroom).

20 (Recessed at 3:25 p.m.).

21 (Resumed at 3:35 p.m.).

22 MS. McWILLIAMS: I would like to offer
23 Defendant's Exhibit 45.

24 THE COURT: I think on the record it was
25 called 46 but it is 45.

1 THE COURT: All right.

2 (Sample conservation easement marked and
3 received in evidence as Defendant's Exhibit
4 Number 45).

5 MS. McWILLIAMS: Your Honor, we want to take
6 up briefly the logistics, we need to get Mr. Harrah
7 on the stand because he has to drive back to West
8 Virginia tonight, a four and a half hour drive, and
9 we wondered if there would be any way the Court
10 could accommodate him and put him up out of order
11 before this 30(B)(6) issue that we still have to
12 argue anyway.

13 MR. PENDARVIS: Your Honor, candidly I really
14 need to have Mr. Harrah behind Justice Family
15 Farms, it is very important in our case and what we
16 have designated is about a 45 minute clip and when
17 Miss McWilliams finishes I have five minutes maybe
18 with Mr. Hanlin on redirect, Mr. McLeod, excuse me,
19 so I believe with a 45 minute clip of video we will
20 have time to do Mr. Harrah, I don't anticipate my
21 cross of Mr. Harrah might be very long at all.

22 MS. McWILLIAMS: We have counter-designations
23 if the Court makes the ruling it is going to allow
24 the playing of the Justice Family Farms and, you
25 know, it is not just 45 minutes.

1 MR. PENDARVIS: Your Honor, we're going to
2 have disagreement on that because we have not been
3 served counter-designations until about 15 minutes
4 ago. The rules require, we might have to deal with
5 their objection, I read the rule, we might have to
6 deal with their objection to what we designated but
7 we can't be given three pages of this during, while
8 she was doing the cross examination of Mr. McLeod
9 this was handed to us, there is no way the rules
10 permit that. I will be glad to direct Your Honor
11 to Rule 32, specifically Rule 32(5), excuse me,
12 (A)(5). It says one day before and not in the
13 middle of this case. We teed up our Power Point
14 and our whole video, I haven't read through this, I
15 haven't seen it, if I have objection, I haven't
16 seen if I have objection to this testimony. This
17 is absolutely unfair.

18 MR. LEONARDI: Your Honor, Mr. Pendarvis has
19 misstated Rule 5, Rule 32(A)(5). It requires the
20 original designations to be received one day before
21 and then it says when the deposition excerpt is
22 offered at trial counsel for the adverse party
23 shall furnish to the trial judge and at the same
24 time by the same means furnish to all opposing
25 counsel any objections to opposing counsel's

1 deposition excerpt and any additional excerpts from
2 the depositions, so it is proper for them to be
3 served today.

4 MR. PENDARVIS: Let me finish reading the
5 rule because what it says is with reasonable notice
6 to the trial judge and all counsel other excerpts
7 may be read, and I would contend, Your Honor, this
8 is not reasonable notice to you or to me and we
9 teed up this thing, it is going to take, in terms
10 of, we're into my case and I can object, I want to
11 accommodate Mr. Harrah as well and I have got a
12 plan to get this video up, this won't take long
13 with Mr. McLeod's last testimony and we can
14 accommodate Mr. Harrah but not with having to deal
15 with this right now. And, Your Honor, we sent our
16 designations a week ago. We gave them a week.

17 MS. MCWILLIAMS: We did the same, we gave --

18 MR. PENDARVIS: Correct, she did, we got it a
19 day later but they didn't include anything with
20 Justice Family Farms.

21 MR. LEONARDI: We're objecting to that, that
22 deposition, in its entirety.

23 THE COURT: I think you have to make a better
24 record of that. Let's go on and get done with
25 this, let me read the rule and I'll deal with this

1 in a moment.

2 MS. McWILLIAMS: All right.

3 (The jury returned to the courtroom).

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

6 THE COURT: All right.

7 Miss Williams, he is still your witness.

8 MS. McWILLIAMS: Thank you, Your Honor.

9 BY MS. McWILLIAMS:

10 Q Now, just to be clear, Mr. McLeod, I just
11 have a couple more questions, it is true, is it
12 not, that the timing of the IRS notice of
13 investigation dated the 17th, I think Y.E.S. got it
14 the 19th, it got sent to Mr. Hanlin, you don't
15 fault Mr. Hanlin, you don't blame Mr. Hanlin,
16 Richardson Plowden for the timing of that IRS
17 notification, do you?

18 A The timing of the IRS investigation?

19 Q When it comes in, when you first get notice
20 of it, you don't blame Mr. Hanlin for that, he
21 didn't have anything, he didn't engender it, he
22 didn't promote it, he didn't provoke it, it just
23 came, just the timing of the IRS, right?

24 A Are you asking me if I think Hal and
25 Richardson Plowden had something to do with the IRS

1 sending me a letter?

2 Q That's right.

3 A No, I do not. The IRS's choice to do it was
4 up to the IRS, right, absolutely.

5 Q And isn't it true that on numerous occasions,
6 I believe you testified passionately about the IRS
7 but you attributed the, it was the IRS
8 investigation that was impugning your honor and
9 ruining your life, they were the words you used,
10 did you not, integrity and reputation were being
11 questioned, right, by the IRS only?

12 A Well, the IRS certainly caused me great
13 embarrassment and to be put in a very awkward
14 situation, and for my whole professional life to be
15 unfolded and sent around to people and call my
16 clients and saying, "This is the IRS, we're
17 investigating Yancey McLeod." I mean, my gosh, I
18 make my living with referrals from people and so,
19 yes, the IRS letter certainly devastated me and, if
20 that is the question you're asking me, the IRS
21 letter was a living nightmare.

22 Q And Mr. Hanlin didn't cause that living
23 nightmare, did he?

24 A He caused the living nightmare to be greatly
25 exacerbated by quitting and abandoning me at a

1 moment in time when I desperately needed him and
2 Richardson Plowden.

3 Q You agree, don't you, Mr. McLeod, that after
4 this time period, on several occasions you wrote
5 Mr. Lewis and others and said, "We've got to stop
6 this IRS investigation," it was holding things up.
7 Isn't that right?

8 A Holding what up? I don't understand.

9 Q Your business, your ability to go forward, to
10 do what you wanted to do.

11 A Gosh, it wasn't holding me up. I'm still
12 Yancey McLeod and as far as I know I hadn't done
13 anything wrong so I'm desperately trying to make a
14 living while dealing with the IRS and dealing with
15 the abandonment of Richardson Plowden and Hal
16 Hanlin and by far the most, the largest fee I would
17 have ever earned and so, yes, my life was in
18 shambles during that period of time.

19 Q And you blame the IRS for that, don't you?

20 A Miss McWilliams, I blame the IRS and I blame
21 Richardson Plowden and Hal Hanlin for abandoning me
22 when I needed them.

23 Q You had Mr. Lewis right away. Isn't it true
24 you have written Mr. Lewis and told him
25 essentially, "The IRS is ruining my honor and

1 integrity and reputation I have worked for all my
2 life, the damage they have done to my reputation is
3 devastating and irreparable." Is that what you
4 wrote?

5 A Wrote to who?

6 Q Mr. Crosby Lewis.

7 A God, he knew that that evening but had I
8 revealed to my clients, including Jim Justice, that
9 oh, yes, in addition to the IRS letter, Hal Hanlin
10 and Richardson Plowden quit, that would have been
11 further, I can't curse in court, I was going to say
12 damning, I was very embarrassed, they put me in an
13 extraordinarily awkward situation and --

14 Q Let me just --

15 A I will never get over it.

16 Q Let me just mark this for the record, if I
17 could, Defendant's 18.

18 You remember seeing that? Do you remember
19 seeing that, Mr. McLeod?

20 A Yes, ma'am.

21 Q That will refresh your recollection?

22 A Do you want me to tell you about it?

23 Q No, I just wanted, I will let Mr. Pendarvis,
24 if you want to go into it a little bit further, all
25 right? I'm not going to offer it at this time.

1 A Oh, okay.

2 Q All right, thank you.

3 MS. McWILLIAMS: I don't have anything
4 further.

5 MR. PENDARVIS: A little redirect, Mr.
6 McLeod.

7 REDIRECT EXAMINATION BY MR. PENDARVIS:

8 Q I've got some questions about that affidavit
9 you testified about.

10 A Okay.

11 Q Regarding Mr. Justice.

12 A Sure.

13 Q And I want to say this for the Court and
14 everybody so we don't have any problems but I don't
15 want you to say when we got this, I know you will
16 remember, it is important you just talk about the
17 existence of the document.

18 MS. McWILLIAMS: Your Honor, may we approach
19 about this?

20 THE COURT: You may.

21 (Unrecorded bench conference).

22 THE COURT: I'll allow it.

23 BY MR. PENDARVIS:

24 Q With your fine character I want to make sure
25 we have things clear with the jury. Could you have

1 been mistaken about the affidavit of Mr. Justice,
2 could it have been this was an affidavit from, on
3 behalf of one of Mr. Justice's companies?

4 A It certainly could have been.

5 Q Okay. There was some questions asked about
6 effectively Mr. Justice's companies' motive to,
7 when to do this conservation easement. Was there a
8 reason, in your understanding of the tax laws, that
9 2007 was an important date for recording of the
10 conservation easement?

11 MS. MCWILLIAMS: Objection, foundation.

12 MR. PENDARVIS: I asked in his experience as
13 a conservation consultant.

14 THE COURT: I thought it was 2006. Is --

15 MR. PENDARVIS: The distinction between 2007
16 recording and 2008. Let me rephrase that.

17 THE COURT: I'll let you rephrase it but be
18 careful.

19 BY MR. PENDARVIS:

20 Q In your experience, Mr. McLeod, as a
21 conservation consultant were you aware of a reason
22 that the IRS laws and regulations, that an easement
23 would be beneficial, would be better to be recorded
24 in 2007 as compared to a later date?

25 A In 2007 --

1 MS. McWILLIAMS: Your Honor, can he answer
2 the question first, is he aware of that?

3 A I am, yes.

4 Q Could you explain that, please?

5 MS. McWILLIAMS: Your Honor, we object on the
6 ground of foundation. He is not a tax expert.

7 MR. PENDARVIS: Your Honor, may I respond?

8 THE COURT: No. To the extent that he has
9 knowledge of what the Tax Code or the conservation
10 is he can answer that.

11 A There have been wide fluctuations in the
12 benefits Congress provided to taxpayers and
13 landowners through the placement of 170(H)
14 conservation easements. Over the years and in the
15 year 2000 the benefits afforded taxpayers for
16 placement of 170(H) easements resulted in the
17 taxpayer being allowed to use the charitable
18 deduction to reduce their adjusted gross income by
19 50 percent in the year of the gift and 15 carry
20 forward years, a remarkable incentive, and those
21 provisions of 170(H) of the Internal Revenue Code
22 fluctuated widely and they were changed in 2008.

23 Q What year did you say?

24 A 2007.

25 Q Mr. McLeod --

1 A As Miss McWilliams pointed out, I don't
2 recall whether in the year 2008 the provisions --
3 the very generous provisions I just described were
4 scheduled to expire at the end of 2007 and revert
5 back to the 30 percent reduction in AGI and a five
6 year carry forward or not, but that has happened
7 frequently over the last several years. It
8 happened in 2011. Today the advantages of a 170(H)
9 easement are dramatically different than they were
10 in December, 2011.

11 Q Bouncing around a little bit to move the case
12 along --

13 A Sure.

14 Q There was some testimony about the \$15,000
15 payment.

16 A Uh-huh (Affirmative).

17 Q Did you consider that part of payment due
18 under the consulting service agreement?

19 A Yes, sir.

20 Q There was also some questions posed, Mr.
21 McLeod, Yancey, about whether you were embarrassed
22 at the moment you were discussing this IRS letter
23 with Mr. Justice in the December 24th phone call.
24 Do you remember that testimony?

25 A Sort of.

1 Q Well, just a little while ago. Explain why
2 you would have been embarrassed that your lawyer
3 quit on you, on Y.E.S.

4 A Gosh, the whole experience was humiliating,
5 embarrassing, extraordinarily awkward. I was
6 scared to death, quite frankly, and I make my
7 living with people referring business to me, that
8 is how I make my living, and I did not want to
9 disclose to Mr. Justice and I did not think
10 ethically and professionally I needed to disclose
11 about Hal Hanlin and Richardson Plowden quitting
12 because I could, I thought I could get Mr. Justice
13 to postpone the project without necessity of saying
14 that and it would have been very embarrassing to me
15 to have said, "Oh, by the way, this wonderful tax
16 attorney I recommended, that I worked with before
17 quit," so I didn't want to have to say that. It
18 would have been very embarrassing.

19 MR. PENDARVIS: Your Honor, I anticipate an
20 objection. Could we approach?

21 (Unrecorded bench conference).

22 BY MR. PENDARVIS:

23 Q Mr. McLeod, I want to ask you to pull out two
24 exhibits that are next to you, Exhibits 21 and 22.

25 A Okay.

1 Q Let's first look at the Exhibit 21, the
2 December 19th draft letter.

3 MS. McWILLIAMS: Your Honor, this goes beyond
4 the scope of my cross-examination.

5 MR. PENDARVIS: I will put it in context, not
6 at all.

7 BY MR. PENDARVIS:

8 Q Mr. McLeod, before we get into this exhibit
9 let me give you a minute to look at it, then I will
10 ask you some questions before you discuss it.

11 THE COURT: What exhibit?

12 MR. PENDARVIS: This is Exhibit 21.

13 A Okay, I mean, I hadn't read the whole letter.

14 Q I understand. We're not going to need to
15 have you discuss the content as much as the context
16 of this letter.

17 A Okay.

18 Q And that is my question. You were asked
19 about the types of things Mr. Hanlin was to be
20 doing in this easement.

21 MS. McWILLIAMS: Your Honor, I object. I did
22 not ask about that. I asked about a draft easement
23 document that -- I did not ask about that.

24 MR. PENDARVIS: He gave testimony --

25 THE COURT: Come back up here. I don't want

1 talking objections.

2 (Unrecorded bench conference).

3 BY MR. PENDARVIS:

4 Q Mr. McLeod, we had you take a look at the
5 letter. I'm asking you at the same time take a
6 look at this draft conservation easement. Are
7 these the type documents you were expecting from
8 the lawyer for the transaction, Mr. Hanlin and
9 Richardson Plowden?

10 A Yes, sir.

11 MR. PENDARVIS: Yancey, thank you very much.

12 No further questions.

13 THE WITNESS: Thank you.

14 MS. MCWILLIAMS: Nothing further, Your Honor.

15 THE COURT: You may step down.

16 (Witness excused).

17 THE COURT: All right.

18 MR. PENDARVIS: Before we get into into the
19 video, let me talk to my client a minute about some
20 strategy things.

21 THE COURT: All right.

22 MS. MCWILLIAMS: Your Honor, we have reached
23 an agreement about accomodating a witness, to take
24 him out of order, we appreciate it.

25 MR. PENDARVIS: Will you explain it to the

1 jury?

2 THE COURT: I will.

3 Ladies and gentlemen, we have a couple more
4 witnesses but one witness is from out of town and
5 he's not a witness for the plaintiff, or the
6 plaintiff could call him but doesn't have to, the
7 defense calls their witnesses normally after the
8 plaintiff calls all theirs but we have a gentleman
9 here from out of town, I want to get him back
10 heading home today so he doesn't have to either
11 come back tomorrow morning or Monday, whichever you
12 all decide, so I want to get him off the hook
13 because the plaintiff has some other witnesses that
14 we can see the videos of, depositions that were
15 taken and the video can be played anytime. A live
16 witness here, we want to accommodate him, so I'm
17 going to allow the parties to agree to take him out
18 of order, and so he will be called but understand
19 he will be called and the roles are kind of
20 reversed, Miss McWilliams will call him as her
21 witness, she goes first, and cross-examination will
22 happen by Mr. Pendarvis, so that's the explanation
23 why we take this witness out of order for
24 convenience of the witness.

25 All right.

1 MS. McWILLIAMS: Mr. Leonardi's witness.

2 THE COURT: Oh, Mr. Leonardi's witness. Mr.
3 Leonardi will be handling this, I said Miss
4 McWilliams. Fair enough, call your witness.

5 MR. LEONARDI: Your Honor, the defendant
6 calls Mr. David Harrah.

7 THE COURT: Mr. Harrah, please come forward
8 and be sworn.

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1 DAVID HARRAH, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Thank you. Have a seat in the
4 witness stand and state your name for the record,
5 please spell your last name.

6 THE WITNESS: Harrah, H-a-r-r-a-h.

7 DIRECT EXAMINATION BY MR. LEONARDI:

8 Q Mr. Harrah, introduce yourself to the jury,
9 please.

10 A My name is David Harrah, I'm from Beckley,
11 West Virginia and I work for a company called
12 Mechel Bluestone.

13 Q Tell the jury how Mechel Bluestone was
14 formed.

15 A That is the entity that bought the West
16 Virginia coal operations that were owned by the
17 Justice family. I had previously worked with the
18 Justice family prior to the transaction.

19 Q What is your position with Mechel Bluestone?

20 A I'm the chief financial and accounting
21 officer.

22 Q All right. Describe for the jury your
23 educational background.

24 A I may not should say this in South Carolina.
25 I went to West Virginia University and graduated in

1 1969, then I worked, received my original CPA
2 certificate in North Carolina, I worked in Raleigh,
3 North Carolina for about eight years and then moved
4 back to West Virginia.

5 Q And where, when you moved back to West
6 Virginia where did you begin working?

7 A When I moved back to West Virginia I began
8 working in Beckley, West Virginia and in private
9 industry and then reverted into public accounting
10 for several years.

11 Q And was it in public accounting that you
12 first came into contact with Mr. Justice's
13 companies?

14 A Yes.

15 Q And describe that.

16 A The firm that I worked for performed audits
17 and tax services and we received a call from the
18 Justice companies that they were replacing their
19 audit firm and that's I think in 2005, that is how
20 I became involved, because I was the lead audit
21 partner for that job.

22 Q And at what point in time did that role ever
23 change, your role with the Justice companies?

24 A In the spring, late spring of 2007 Jim
25 approached me and asked me to come to work for his

1 company in the capacity of chief financial officer,
2 a position I took in July of 2007.

3 Q Now, in your capacity as an outside auditor
4 before 2007 and then as chief financial officer in
5 2007 did you gain knowledge regarding Mr. Justice's
6 income?

7 A To some degree. Most of the corporate, most
8 of the corporate activities impacted his income to
9 some extent. There was, of course he had a salary
10 and then he had certain partnership interest within
11 that group of companies that he got a part of that
12 income. But he had personal investments and things
13 of that nature, real estate partnerships where he
14 may be receiving part of the rental income or
15 whatever that we did not necessarily track.

16 Q Did you track information regarding income
17 from mining?

18 A Yes.

19 Q And did you track information regarding
20 income from farming?

21 A Yes.

22 Q And describe for the jury the kind of
23 businesses that the Justice family was involved in.

24 A Well, at that time they had two principal
25 types of business. One was an agricultural

1 operation, they had corn, they have a cotton gin
2 not too far from here, they had two turf farms and
3 I think they also had at one time some soybeans,
4 whatever, but mostly crops.

5 Q And describe for the jury, if you would,
6 based on your experience working for the Justices
7 both as an outside auditor and inside as CFO the
8 range, if you can, of income associated with the
9 farming and the mining.

10 A The farming, the farming income in the mid
11 2000's generally, the farming operations generally
12 showed a loss. They could be from two to three
13 million dollars in that period of time. The income
14 from mining in 2006 and '07 had been a period of
15 time when coal prices were not that great and they
16 started to climb at the end of 2007, so his income
17 coming from the corporate side would not have been,
18 well, it's a lot more than most of us make but it
19 wasn't, you know, an astronomical sum of money.

20 Q Now, did there come a time in 2007 that you
21 heard the name Yancey McLeod?

22 A Yes. I don't recall exactly the timing but
23 it was probably shortly after I went to work and
24 took the position there. The way we operated at
25 that time was when Jim came in, Jim had an office

1 back in the corner and he would summon various of
2 us to discuss particular matters and in some of
3 those discussions he had brought up this
4 conservation easement idea and he had mentioned the
5 name of Yancey McLeod as being someone who he had
6 had some discussions with, my impression was there
7 had been some visits to different properties with
8 he and Yancey together.

9 Q And did you understand at this time that you
10 were being designated as point man for any
11 particular project?

12 A Well, I think that came a bit later, probably
13 in the fall. There continued to be conversations
14 as I understood it between the two of them and he
15 asked me, first of all he would ask us, "Do you
16 know anything about this type of thing," and
17 taxation is not my background, and so I said no, I
18 don't. He said, "Well, you probably can at least
19 understand what these concepts are, can you contact
20 Mr. McLeod and find out a little bit more about
21 this, he says it has some significant tax
22 advantages for us either now or in the future," and
23 so that is what I did and this initiated some of
24 these activities in the fourth quarter of 2007.

25 Q Mr. Harrah, I'm going to hand you a document

1 marked as Defendant's Exhibit 44. I want you to
2 take a look at it.

3 Mr. Harrah, do you recognize that document?

4 A Yes, I have seen that before.

5 Q And could you describe the document for --
6 well, describe the document, please.

7 A Well, initially the first page is a list that
8 I think based on some earlier discussions with Mr.
9 McLeod and maybe even some of the other parties
10 that he had working with him, I just put together
11 this letter, cover letter to give to Jim in regard
12 to this engagement letter that Mr. McLeod had sent
13 and also have talked to him about some of the
14 things Mr. McLeod had relayed to me about what
15 would be required to complete this type of project
16 and the various parties that would be involved.

17 Q Do you recall creating this list, then?

18 A Yes.

19 MR. LEONARDI: Your Honor, the defendants
20 move what has been marked Defendant's Exhibit 44
21 into evidence.

22 MR. PENDARVIS: No objection.

23 THE COURT: Defendant's Exhibit 44 is
24 admitted without objection.

25 (Conservation easement information marked

1 and received in evidence as Defendant's
2 Exhibit Number 44).

3 BY MR. LEONARDI:

4 Q So, was it the case, Mr. Harrah, this was an
5 executive summary of sorts that you were providing
6 to Mr. Justice?

7 A Well, I would say that it was that and maybe
8 an agenda for discussion with Jim about the project
9 or what would need to be done.

10 Q And do you see the first bullet point there
11 references engagement letter?

12 A Yes.

13 Q And the second, do you see it references a
14 stewardship agreement from Community Open Land
15 Trust?

16 A Yes.

17 Q And then finally the third bullet point
18 references an appraisal proposal?

19 A Yes.

20 Q As far as you know, Mr. Harrah, is it your
21 understanding that anyone from Justice's side, from
22 any Justice company ever signed the engagement
23 letter from Yancey?

24 A Not to my knowledge.

25 Q To your knowledge did Mr. Justice or anyone

1 from one of his companies agree to the terms of the
2 engagement letter from Yancey?

3 A We may have had general discussions but I
4 don't recall him ever informing me, "Yes, let's
5 proceed with this, I understand, agree to all these
6 terms," I don't recall that.

7 Q Did anyone, did Mr. Justice or anyone with
8 his companies pay the \$50,000 retainer?

9 A Not to my knowledge.

10 Q Do you see that there is a \$45,100
11 stewardship fee referenced in the second bullet
12 point?

13 A Yes.

14 Q And a stewardship agreement, do you see that?

15 A Yes.

16 Q To your knowledge did anyone from, did Jim
17 Justice or anyone from his companies ever agree to
18 the stewardship agreement with the Community Open
19 Land Trust?

20 A Not to my knowledge.

21 Q Did anyone from Jim Justice Companies or did
22 Jim Justice ever send any initial stewardship fee
23 to Community Open Land Trust?

24 A Not that I'm aware of.

25 Q And did Mr. Justice, as far as you know, ever

1 approve of any appraisal proposal?

2 A Not that I specifically remember, no, sir.

3 Q Now, to be clear, was it your understanding
4 that there was any deadline for completing the
5 conservation easement at the end of 2007?

6 A Well, I do know that once this process
7 started that I know that Mr. McLeod was obviously
8 moving to try to get this done before the end of
9 the year. On our side of it we were more babes in
10 the woods to try to figure it out what is we needed
11 to do and whether that was a reasonable day to
12 think we were going to get this done or not. I
13 don't recall that we had meetings about that or
14 there was an opinion about that.

15 Q So just to be clear, did you have any
16 understanding there was in fact a deadline
17 associated with this project?

18 A No.

19 Q You will see on the second half of this list
20 that you made, you see there are four things that
21 it says things necessary to complete. Do you see
22 that?

23 A Yes.

24 Q And would you read the four things, please?

25 A Signed agreements, deed, easements and maps,

1 et cetera.

2 Q To your knowledge was any of that information
3 ever provided to Yancey McLeod for Y.E.S.?

4 A No.

5 Q Was any of that information, to your
6 knowledge, provided to Community Open Land Trust?

7 A Not to my knowledge.

8 Q Or Mr. Hanlin?

9 A Not to my knowledge.

10 Q Mr. Harrah, I'm going to hand you what has
11 been marked as Defendant's Exhibit 54. Would you
12 please take a look at that. Let us know if you
13 recognize that document?

14 A Yes. This is an email from Mr. Hanlin to me
15 with an attachment to it.

16 Q And do you see there is a letter attached?

17 A Yes.

18 Q First of all do you recognize the document?
19 Is that the case?

20 A Well, I don't specifically recall, "Oh, yes,
21 I remember this particular email," but it was an
22 email to me, so I assume that that is an email that
23 I received.

24 Q Okay.

25 MR. LEONARDI: Your Honor, the defendant

1 moves Exhibit 54 into evidence.

2 MR. PENDARVIS: Even though he doesn't really
3 remember it, we're not going to object.

4 THE COURT: Without objection.

5 (Hanlin to Harrah email marked and received
6 in evidence as Defendant's Exhibit Number 54.

7 BY MR. LEONARDI:

8 Q Mr. Harrah, if you will, turn to the third
9 page of Exhibit Number 54.

10 A Yes.

11 Q Do you see that there is a line for Mr.
12 Justice to sign to accept the appraisal proposal
13 from Mr. Hawkins?

14 A Yes.

15 Q To your knowledge did Mr. Justice or anyone
16 from his companies ever agree to the proposal from
17 Mr. Hawkins?

18 A Not to my knowledge.

19 Q Mr. Harrah, I'm going to hand what has been
20 marked Defendant's Exhibit 58 to you. Take a look
21 at that and let us know if you would have received
22 that document?

23 A Yes. This is another email with a letter
24 attached that was in regard to the Community Open
25 Land Trust.

1 MR. LEONARDI: Your Honor, the defendants
2 move Exhibit 58 into evidence.

3 MR. PENDARVIS: He hasn't completely
4 identified it but we don't object.

5 THE COURT: Defense 58 admitted without
6 objection.

7 (Hanlin to Harrah email marked and received
8 in evidence as Defendant's Exhibit 58).

9 BY MR. LEONARDI:

10 Q Mr. Harrah, is this your email address at the
11 top?

12 A Yes.

13 Q Is that the email address where you received
14 emails when you were with Jim Justice?

15 A Yes.

16 Q If you will, look at the fourth page of
17 Exhibit Number 58, please.

18 A Yes.

19 Q Do you see there is a line for Mr. Justice to
20 sign or for someone to sign acknowledging receipt
21 and understanding --

22 A Yes.

23 Q -- of the letter of intent. As far as you
24 know did Mr. Justice or anyone associated with his
25 companies ever sign the letter of intent with COLT?

1 A Not as far as I know.

2 (Hanlin to Harrah letter marked Defendants'
3 Exhibit Number 63).

4 BY MR. LEONARDI:

5 Q Mr. Harrah, I'm going to hand you what has
6 been marked as Defendant's Exhibit 63. Would you
7 take a look at Exhibit 63 and let us know if you
8 recognize it?

9 A Yes.

10 Q Do you see the attachment to it?

11 A Yes, sir.

12 Q Do you remember receiving a letter from Mr.
13 Hanlin, do you remember receiving that letter from
14 Mr. Hanlin?

15 A Yes, I think I remember seeing something
16 similar to this. I guess this is the letter that
17 in the scheme of things is sort of what
18 professionals that is involved in a transaction
19 would kind of state what their limitations might be
20 in providing advice to Mr. Justice, is how I look
21 at this.

22 Q And did this letter make clear to you that
23 Mr. Hanlin was not representing Mr. Justice?

24 A What it made clear to me was they were not
25 providing tax advice to Mr. Justice in regard to

1 the outcome of this matter.

2 Q Okay. And do you see that the letter, before
3 the line with warmest personal regards, do you see
4 the last line before that?

5 A Yes.

6 Q It says, "If you have any questions about
7 this please do not hesitate to contact me"?

8 A Yes.

9 Q Do you see that?

10 A Yes.

11 Q And do you recall if Mr. Justice had any
12 questions about this letter?

13 A No, I do not recall.

14 Q Okay, Mr. Harrah. Can you describe for the
15 jury the work that you did on this particular task?
16 Generally how would you describe the work you did
17 on this task?

18 A Well, I would describe what I thought that
19 the charge to me by Jim was to try to find out a
20 little bit more about this, to look at, number one,
21 is it something that was feasible and did it make
22 sense, did it comply with the Tax Code and to find
23 out more about exactly the details and how it
24 worked.

25 Q And I know you mentioned tax considerations

1 of Mr. Justice before. Does Mr. Justice, to your
2 knowledge, have tax counsel?

3 A He has a CPA firm that did his, prepared his
4 return but I don't know at this time if he had a
5 separate tax counsel, I don't recall that being the
6 case.

7 Q Now, in the December, 2007, time frame do you
8 recall receiving a call from Mr. McLeod regarding
9 an IRS audit?

10 A Yes.

11 Q And do you recall who was on the call? Were
12 you on that call?

13 A Yes.

14 Q Do you recall who was on the phone with you?

15 A It was my recollection that Steve Ball was on
16 the call. I know he was on but I don't know who
17 else.

18 Q Was Mr. Justice on the call?

19 A I don't specifically recall that.

20 Q Okay. And do you remember what Mr. McLeod
21 said regarding the IRS notice?

22 A Well, he informed us that he had received an
23 IRS notice that had called into question some of
24 these types of transactions and that he couldn't in
25 good conscience move forward with this particular

1 transaction.

2 Q And did he say anything about attorney Hal
3 Hanlin?

4 A No, not as I recollect.

5 Q Did he say anything about the law firm
6 Richardson Plowden?

7 A No.

8 Q Now, Mr. Harrah, let's talk about for a
9 moment Jim Justice's income in 2007 compared to
10 2008. To begin with, were there any significant
11 transactions in the 2008 time frame that affected
12 Mr. Justice's income?

13 A In 2008?

14 Q Yes.

15 A Well, his whole, his family's entire personal
16 income, tax status and many other things changed
17 dramatically in 2008. Early in 2008 we began to
18 put together information to market these coal
19 companies in southern West Virginia and this
20 process, while it took several months, culminated
21 in the middle of the year, I think around the 1st
22 of July, where Jim received a letter of intent from
23 Mechel to buy his companies and with that letter of
24 intent he received, I believe it was a hundred
25 million dollars, it was either a hundred or 125,

1 because this arrangement was to have been concluded
2 within 90 days. Events unfurled and all this so
3 that it was extended and he received another 125
4 million but when he received the second 125 million
5 he basically had them designate the first hundred
6 million as nonrefundable, which would have meant
7 his family would have had income, I say his family,
8 because he was selling his interest and his
9 children also had interest, so a hundred million
10 dollar income bump would have been a huge
11 difference from where his income level was prior to
12 that.

13 Q And just so I understand, the first hundred,
14 the first big payment, hundred million, 125
15 million, that one initially was not, it was
16 refundable?

17 A That's correct.

18 Q So if the deal didn't go through with Mechel,
19 then what would happen?

20 A He would have to return the money.

21 Q And then he got the second hundred million
22 dollar payment?

23 A Yes.

24 Q And that somehow affected, are you saying
25 that somehow affected the first payment?

1 A Well, he only agreed to extend the deal if
2 they pay him another, pay him 125 million and if he
3 was entitled then to keep the first hundred
4 million, so that's the negotiation he made.

5 Q Now, all told do you have any idea what Mr.
6 Justice's income was from that transaction in 2008?

7 A They extended this agreement again in
8 December, as I recall, and he did the same thing by
9 saying, "Okay, the second payment that you pay is
10 now nonrefundable," so I'm guessing that that
11 family income was affected by 200 million plus of
12 proceeds from the sale at that particular point in
13 time.

14 Q We talked about income from the transaction,
15 around 250 million in 2008. Now I would like to
16 talk about income from mining interest of Mr.
17 Justice's. Describe for the jury the difference in
18 income for Mr. Justice in 2007 and 2008, income
19 from mining?

20 A Well, the income for the mining operations in
21 2008 was significantly higher, probably at a record
22 level for those particular companies principally
23 because of the worldwide market for the type of
24 coal that they mined, and I don't want to bore you
25 with a lot of details but there is steam coal that

1 we all know goes into utilities, and metallurgical
2 coal that goes into steel making. It is a
3 different product and these operations that he has
4 are centered, or he had, are centered in the best
5 metallurgical coal fields in this country, so that
6 coal is highly prized in the U. S. and overseas and
7 the market went from a price of \$55 a ton in the
8 middle of 2007 to over \$200 a ton in the middle of
9 2008.

10 Q And do you have, are you aware of a ballpark
11 figure for Mr. Justice's coal income in 2008?

12 A The net income from the coal operations in
13 2008 was 38 million dollars.

14 Q And was that greater than that income from
15 coal operations in 2007?

16 A Yes. I don't recall the exact number for
17 2007 but it was substantially greater.

18 Q Now, do you recall that after this
19 transaction did not go through did you receive any
20 contacts from Mr. McLeod or others about the
21 payment of certain fees?

22 A Yes, I received some, I think both telephone
23 calls and maybe emails from time to time addressing
24 some of these fees that had been incurred for this
25 transaction by the various professionals that had

1 been doing some work on it.

2 Q And do you recall that you received an
3 invoice from Mr. McLeod for \$50,000? Does that
4 ring a bell?

5 A I think that was shortly after the telephone
6 call in regard to the IRS issue.

7 Q And do you recall what you did with that
8 invoice or who you spoke to about it?

9 A I don't remember we did anything with it. As
10 far as, as far as our attitude toward it, I think
11 was the fact that we don't know what's going to
12 happen with this transaction, we're certainly not
13 going to pay a fee related to that transaction when
14 we have been told to stand down in effect, whatever
15 the reasons for standing down were. So, that's
16 kind of where we were with it.

17 Q And regarding the consulting services
18 agreement that Mr. McLeod forwarded to Mr. Justice,
19 you have testified -- well, let me ask it this way.
20 It's your understanding that Mr. Justice never
21 agreed to the terms in that agreement?

22 MR. PENDARVIS: Object to the form, calls for
23 speculation.

24 MR. LEONARDI: Is it the witness'
25 understanding.

1 MR. PENDARVIS: He called for what Mr.
2 Justice understood. I object.

3 MR. LEONARDI: He was Mr. Justice's point man
4 on this project.

5 THE COURT: You all come up here.

6 (Unrecorded bench conference).

7 BY MR. LEONARDI:

8 Q Mr. Harrah, did there come a time you had a
9 discussion regarding the percentage fee in the
10 consulting services agreement?

11 A Yes.

12 Q Okay. And describe that discussion.

13 A I had that draft of that agreement and I had
14 given it to Jim and said that I had gotten it from
15 Yancey and it had a five percent fee as part of the
16 remuneration to him and Jim said make it four.
17 That's just the way he would do it. So I did
18 contact Mr. McLeod and said Jim said that the fee
19 needs to be four instead of five and he said fine.

20 Q And was it your understanding he was then
21 agreeing to the rest of the terms or was that not
22 the case?

23 MR. PENDARVIS: Objection, Your Honor, same
24 objection.

25 MR. LEONARDI: Your Honor, he either has an

1 understanding of that or not based on his
2 discussions. If he doesn't have an understanding
3 he can say, "I don't have an understanding about
4 it."

5 MR. PENDARVIS: The same position I stated
6 side bar.

7 MR. LEONARDI: I can rephrase it, Your Honor.

8 THE COURT: Rephrase it in similar
9 phraseology with regard to --

10 BY MR. LEONARDI:

11 Q Mr. Harrah, as the person designated by Mr.
12 Justice to be the point contact with Mr. McLeod,
13 when you called Mr. McLeod about that percentage
14 term were you agreeing to the rest of the terms in
15 that consulting service agreement?

16 MR. PENDARVIS: Your Honor, one more
17 objection, legal conclusion.

18 MR. LEONARDI: Pardon?

19 MR. PENDARVIS: Legal conclusion as to
20 whether the agreement, one term makes the entire
21 contract enforceable.

22 MR. LEONARDI: I'm just asking if he agreed
23 to it.

24 THE COURT: Rephrase your question. I'll let
25 you ask that. I understand your objection. Ask it

1 again.

2 MR. LEONARDI: Okay.

3 BY MR. LEONARDI:

4 Q In your capacity as the point man for Mr.
5 Justice in dealing with Mr. McLeod, when you called
6 Mr. McLeod about that percentage fee were you
7 agreeing to the rest of the terms in the consulting
8 service agreement?

9 MR. PENDARVIS: Same objection, legal
10 conclusion.

11 THE COURT: Overruled. I will let him answer
12 it.

13 A We never discussed anything in that agreement
14 except that one provision. That is Jim and I.

15 Q Now, later in 2008 did you receive invoices
16 from some folks, we talked about the ones from Mr.
17 McLeod, but do you recall receiving one, for
18 example, from Clinton Epps?

19 A Yes, there were some other invoices, correct.

20 Q And do you recall if they were paid?

21 A Yes, I think they were paid in the fall of
22 2008.

23 Q And do you have any explanation for why they
24 were paid at that particular time?

25 A Well, they had been things that had been out

1 there for awhile and we had been in the process for
2 several months, involved in selling these companies
3 and as Jim and the family began to get this
4 additional income, a hundred million dollars, there
5 were several things like this that had been out
6 there and in an effort to sort of clean up some of
7 those things that might be problematic the longer
8 they stayed there, we took care of several things
9 of that nature.

10 Q And talking about Mr. Justice and doing
11 easements, are you aware if Mr. Justice did any
12 easements after this date?

13 MR. PENDARVIS: Objection, Your Honor.

14 THE COURT: Was he aware?

15 MR. PENDARVIS: Relevance.

16 THE COURT: Come up here.

17 (Unrecorded bench conference).

18 BY MR. LEONARDI:

19 Q Mr. Harrah, as far as you know has Mr.
20 Justice done any conservation easements in 2008 or
21 after?

22 A You know, I'm not, I'm honestly not sure. I
23 thought that they had completed one but I'm not
24 even sure where I heard that.

25 Q All right. Mr. Harrah, you're with Mechel

1 Bluestone, you say?

2 A Yes.

3 Q Describe for the jury how you came to work
4 for Mechel Bluestone after, after working for Mr.
5 Justice.

6 A Well, when the transaction was completed in
7 May of 2009 part of the agreement was that some of
8 those folks who were going to stay with Mechel to
9 try to acclimate them to the U. S., Mechel is based
10 in Russia, and so we were, there was a part of the
11 agreement, actually, that specified that those who
12 chose to stay or were obligated at least to some
13 moral extent to stay would not seek employment from
14 the Justices for a year if you were over 55 and
15 three years if you were under 55, and I fit the one
16 year category.

17 Q So you went to work for Mechel Bluestone at
18 that point?

19 A Correct.

20 Q Mr. Harrah, one last question. Well, I think
21 one last question. Do you know, besides you an Mr.
22 Justice, was anyone else directly involved in
23 consideration of the easement in 2007?

24 A If there was other than just a passing
25 conversation, but actually looking at documents or

1 reviewing things, to my knowledge I don't recall
2 anyone else being involved.

3 MR. LEONARDI: Your Honor, could I have just
4 a moment?

5 Your Honor I may have failed to move an
6 exhibit into evidence so I want to make sure I
7 have. Mr. Harrah, I mean.

8 Your Honor, I don't know if we moved Exhibit
9 63 in but if we haven't the defendant moves Exhibit
10 63 in.

11 THE COURT: Any objection? It was
12 identified.

13 MR. PENDARVIS: No objection.

14 THE COURT: 63 without objection.

15 (Lummer to Harrah email marked and received
16 in evidence as Defendant's Exhibit 63).

17 MR. LEONARDI: No further questions, Your
18 Honor.

19 THE COURT: Cross?

20 CROSS EXAMINATION BY MR. PENDARVIS:

21 Q Hi, Mr. Harrah, how you doing? We got to see
22 each other in Beckley back in December?

23 A It's a little warmer here.

24 Q A few questions on some of your testimony to
25 sort of make sure of everybody's understanding.

1 You weren't with Mr. Justice when he spoke with Mr.
2 McLeod about this whole project, were you?

3 A I was with the Justice Companies since the
4 1st of July, 2007. I don't know when their
5 conversations started. As I said, in some meetings
6 we had with Jim sometime after I went to work there
7 he brought up this subject to me.

8 Q I'm really getting to the point you weren't
9 with him at the farm in South Carolina?

10 A I was not.

11 Q So you're not really sure exactly what their
12 conversation was about and the plans that were made
13 in that meeting?

14 A I am not.

15 Q We looked at Exhibit 44 that has been
16 described as an executive summary. Except for the
17 signed agreement on that bottom part of the list,
18 did you know that Mr. McLeod had the easement and
19 maps for the properties?

20 A I was never provided those. I don't know
21 that he did or didn't.

22 Q Are you aware of any of the professionals
23 that Mr. Justice didn't pay, that were involved in
24 the Black River Farm conservation project?

25 A No, I'm not.

1 Q He paid all of them some money, right?

2 A To my knowledge.

3 Q Now, there was some discussion about that,
4 about the letter. Do you remember that December
5 5th letter from Mr. Hanlin? Did you actually
6 present that to Mr. Justice?

7 A I can't, I don't recall that I did or didn't.

8 Q You don't recall sitting down with Mr.
9 Justice and describing the details of this letter
10 from Mr. Hanlin, do you?

11 A No, but as I said, you know, we often, when I
12 was in public accounting, when we take on a matter
13 with somebody, it didn't strike me to be something
14 unusual in the nature of professional
15 relationships.

16 Q Can we translate that to mean you didn't need
17 to go to Mr. Justice, "Hey, we got one of those
18 qualifying letters"?

19 A Yes, I didn't see that was something unusual.

20 Q That's fair. Now, when we, you were telling
21 me back in your deposition in December that, and
22 you testified that you understood that the goal was
23 to finish this conservation easement by the end of
24 2007?

25 A Well, what I said, the goal that Mr. McLeod

1 was working on was to do that and for the various
2 reasons that he had, I'm just not sure that, I'm
3 not sure I understood that was a drop dead date for
4 Jim.

5 Q Let me, I'll read you the question from page
6 45 of your deposition, beginning on line 19. This
7 deposition was taken December 12 --

8 THE COURT: You need to show him the
9 deposition.

10 MR. PENDARVIS: I'll show him a copy.

11 THE COURT: Do I have the original up here?

12 MR. PENDARVIS: It was submitted.

13 THE COURT: I don't mind you using the
14 copies.

15 MR. PENDARVIS: Would you like a copy?

16 THE COURT: Is a copy okay?

17 MR. LEONARDI: A copy is okay with me.

18 THE COURT: Give him a copy.

19 Ladies and gentlemen, a deposition, so you
20 understand, a big box over here, the clerk keeps up
21 with those in Richland County, the lawyers don't,
22 this is the clerk's file, they have been filed in
23 that file, everybody has a copy, but the original
24 is sealed up and can't be tampered with and I can
25 pull it out but they agree to use a copy they have,

1 it is just as good, reads exactly the same. If we
2 find the oriignal I'll open it up and hand it to
3 Mr. Harrah, just so you all understand.

4 During a deposition the court reporter is
5 there, testimony is done just like on the witness
6 stand, it is done in a conference room in
7 somebody's office. In this case it was done in
8 Beckley, West Virginia.

9 MR. PENDARVIS: Your Honor, we're having a
10 little difficutly finding it.

11 MR. LEONARDI: You can use a copy.

12 THE COURT: Give him a copy.

13 BY MR. PENDARVIS:

14 Q Mr. Harrah, I opened it up to page 45. Right
15 around line 23, line 19, you were asked were any
16 instructions given to Mr. McLeod to proceed with
17 gathering the information to accomplish this
18 conservation easement by the end of 2007 and your
19 answer was, "Well, I don't know that, I don't
20 recall that specific date was cited but I think
21 that from reading those documents it certainly was
22 the goal to finish by the end of 2007 and I know
23 that we did not know all the details of what had to
24 be done in this process, so some of that was asking
25 him to proceed and tell us what needed to be done,

1 you know, to put such a thing in place because I
2 knew nothing about it."

3 Do you remember that?

4 A Yes, that's basically what I just said.

5 Q Okay. But it was the understanding for the
6 party, I think you limited it to Mr. McLeod?

7 A I didn't say party. I said it was my
8 understanding, how these documents were prepared,
9 that Mr. McLeod was moving toward that date and we
10 all understood the date that he was moving toward.
11 I didn't say that we provided the impetus for
12 that date. I just said from reading the documents
13 it's obvious that he was trying to accomplish that
14 by December 31, 2007.

15 Q Well, we went past that and after that
16 testimony I asked you about Mr. Justice and if he
17 had decided to terminate the project, whether he
18 would have communicated --

19 MR. LEONARDI: Objection, Your Honor. Can he
20 show him the transcript again?

21 MR. PENDARVIS: I'm on cross examination.

22 THE COURT: I know but ask the question.

23 MR. PENDARVIS: I'm getting there.

24 MR. LEONARDI: You're paraphrasing testimony.

25 THE COURT: Ask the question, let him answer.

1 BY MR. PENDARVIS:

2 Q If Mr. Justice decided to terminate this
3 project, you gave testimony he would have
4 communicated to Mr. McLeod and the others to stop.
5 Is that correct, essentially what you said?

6 A Well, I don't essentially know what I said in
7 December word for word but --

8 Q If you take a look on the same page we're on.

9 THE COURT: Let him answer, let him answer
10 your question.

11 MR. PENDARVIS: I'm sorry.

12 THE COURT: If he misstates it you've got
13 the --

14 MR. PENDARVIS: My apologies.

15 THE COURT: He was about to answer, I
16 thought.

17 THE WITNESS: I think, I guess the best thing
18 that I can say in that regard is, you know, it was
19 my understanding that these documents were being
20 prepared to close on December 31, okay? If on
21 December the 24th someone had come in like Mr.
22 McLeod did and said, "I don't think I can in good
23 conscience go forward with this," if he had said
24 there was some other reason, "I physically can't do
25 it, I have some kind of an issue," and Jim really

1 wanted to do that he would have closed that
2 transaction but in this particular case he cited,
3 he cited a reason that no, I think, reasonable
4 business guy would go, "Oh, don't worry about the
5 tax consequences, let's move ahead with this."
6 Really that is not going to happen.

7 BY MR. PENDARVIS:

8 Q But up until that point it is your
9 understanding Mr. Justice was continuing to proceed
10 with this transaction?

11 A Well, Mr. Justice saw the same documents that
12 I did and knew the dating that was put in those
13 documents but I don't know that we hadn't seen some
14 of these, what the easement meant, what the
15 restrictions meant in black and white, I guess, on
16 that particular property, so that would be a
17 decision that he would have made after he saw that
18 and understood what that really meant to him.

19 Q Thank you very much. But at no point until
20 the phone call was there any instruction to cease
21 action, "I don't really want to do this anymore,"
22 or, "I changed my mind," or anything like that?

23 A No.

24 Q And as for the tax consequences for
25 charitable deduction, are you familiar with, you're

1 not familiar with the tax consequences under
2 Section 170(H) of the IRS Code, are you?

3 A I don't know what 170(H) is. I don't
4 remember all the tax code. I know a little bit
5 about what these conservation easements are, there
6 was a large sum in the first year and then the
7 remainder would be deducted in later years, that is
8 the extent of my knowledge.

9 Q So, you're not sure about changes under the
10 tax code that may have occurred or not between 2007
11 and 2008, 2009 or things of that nature?

12 A No one ever mentioned that in the run-up to
13 12/31/07.

14 Q I understand maybe they might not have known
15 what it was in 2008 or certainly in 2009 but I'm
16 just asking for your familiarity as to the
17 distinctions between the changes year to year that
18 may happen on the tax regulations.

19 A I don't know anything about that, not as it
20 relates to that specific code section.

21 Q Mr. Harrah, I was just curious, you come
22 down, were you served a subpoena to come down here
23 today?

24 A No. You know, I was asked to give a
25 deposition and I was asked to come and testify in a

1 matter I knew something about. It's actually
2 inconvenient for me to do so but I thought that I
3 had information that may be important to whatever
4 the issue is between these parties.

5 Q Is someone paying your expenses for coming
6 down?

7 A No one has offered to pay anything.

8 Q Okay.

9 A I take that back. Mr. Leonardi did buy me
10 lunch today.

11 Q I hope it was a good one.

12 MR. PENDARVIS: We sure appreciate your
13 testimony. Good to see you again. Take care.

14 MR. LEONARDI: Your Honor, a couple redirect
15 questions.

16 REDIRECT EXAMINATION BY MR. LEONARDI:

17 Q Mr. Harrah, Mr. Pendarvis asked you if Jim
18 Justice had decided not to do this would he have
19 told somebody. Do you recall that question?

20 A Yes.

21 Q How many times did Mr. Justice talk to you
22 about this project, would you estimate total?

23 A After the initial discussions we had had and
24 he told me about the whole type of idea of this and
25 he specifically asked me to contact Mr. McLeod, we

1 had very few discussions about -- I passed
2 information on to him just like the fee letter and
3 he made the comment, "Change it from five to four."
4 If Mr. McLeod had put four he would have said
5 change it from the four to three. That is just the
6 nature of the way it is, but we were involved in a
7 lot of different things, you know, it is a big
8 business and we really didn't have many discussions
9 that I know in great detail about this.

10 Q Mr. Pendarvis mentioned the December 24th
11 phone call. Describe for the jury how Mr. Justice
12 reacted when he was told that the easement was not
13 going to go forward?

14 A First of all I didn't recall that Mr. Justice
15 was part of the phone call but I think my
16 impression is -- well, it is not my impression,
17 it's the way it would be. If Jim wanted to go
18 through and have this done by 12/31/2007 he would
19 have done it regardless of what I thought, Mr.
20 McLeod thought, if he thought that is what he
21 wanted to do he would have done it.

22 Q And tell the jury why you believe that about
23 Mr. Justice.

24 A Well, I mean, he's the guy that makes the
25 decisions and whenever he sold his company he went

1 completely opposite of the advice of Goldman Sachs
2 and did it the way he wanted to do it. If he wants
3 to do it he'll do it, that is just the way Jim is.

4 Q And after the call and after he knew that the
5 easement was not going to go forward did he ever
6 express to you any disappointment?

7 A No.

8 Q Did he ever express to you any frustration
9 about the situation?

10 A No.

11 Q Okay. Mr. Pendarvis asked you about getting
12 a document. Did you hand this document to Mr.
13 Justice, did you get it from him, do you recall
14 that?

15 A I'm not sure. Is this the one that had to do
16 with the letter?

17 Q Yes.

18 A The letter from Mr. Hanlin?

19 Q Hanlin, correct. Describe for the jury how
20 easy it is to get documents or to get in touch with
21 Mr. Justice, based on your experience working for
22 Mr. Justice.

23 A Well, I mean, Jim was in the office several
24 times a week, he also had an executive secretary,
25 if you had something to get to Jim she could get it

1 to him. I mean, it wasn't like, it wasn't like a
2 restriction that you had to go through, you know,
3 hoops to get something to Jim, or you could pick up
4 the phone and tell him.

5 Q Would you describe his schedule as
6 unpredictable?

7 A I would.

8 Q And what about the hours that he kept?

9 MR. PENDARVIS: Your Honor, this is getting a
10 little outside of --

11 THE COURT: I will allow the question. It's
12 redirect.

13 A Well, Jim would often not show up until 3:00
14 o'clock because maybe he got up and come down in
15 the morning and would come back and be in the
16 office at 3:00. He also coaches, it is hard to
17 believe, but he also coaches the girls' basketball
18 team at the local high school. I say it is hard to
19 beleive, he sets aside time to do that and, I mean,
20 he puts his heart and soul into that. He now
21 coaches the boys' basketball team at the same high
22 school and the seasons parallel each other, so it
23 is unpredictable but it is, if you needed to get
24 something to Jim there were ways to do just that.

25 MR. LEONARDI: Thank you, Mr. Harrah.

1 MR. PENDARVIS: Briefly, Your Honor.

2 RECROSS EXAMINATION BY MR. PENDARVIS:

3 Q In communicating with Mr. Justice the subject
4 of this transaction, did you relay information to
5 Mr. Justice from Mr. Hanlin?

6 A Say that again.

7 Q As part of this point person for Mr. Justice
8 and you were disucssing just now some information
9 you got from Mr. Justice, were you communicating
10 with Mr. Hanlin?

11 A Yes, I had. Obviously there were some emails
12 and I think we had a telephone conversation or so
13 on the front end of this.

14 Q How many times did you communciate with Mr.
15 Hanlin?

16 A I cn't tell you that.

17 Q Do you recall a telephone conference on
18 November 20, 2007?

19 A No.

20 Q Do you recall a telephone conference with Mr.
21 Hanlin on November 26th, 2007?

22 MR. LEONARDI: Objection, Your Honor. This
23 is beyond the scope of redirect.

24 MR. PENDARVIS: He talked about
25 communication. I'm just following up on his

1 communications, about Mr. Justice's intent.

2 MR. LEONARDI: He's talking about
3 communications with Mr. Hanlin. He didn't say
4 anything about Mr. Justice.

5 MR. PENDARVIS: He asked about the letter.

6 THE COURT: Move on to something else. I'll
7 allow the question but --

8 BY MR. PENDARVIS:

9 Q I'm just trying, there are some telephone
10 bill records, I'm trying to reflect these billing
11 records with your communication with Mr. Hanlin.
12 Do you recall speaking with him twice on the 26th
13 of November?

14 A I don't recall specifically. I do know that
15 we had communications by email and I do think we
16 had, as I said, I think we did talk by phone but I
17 don't remember the dates.

18 Q What is the latest date you recall
19 communicating with Mr. Hanlin?

20 A In regard to this time frame?

21 Q Yes, sir.

22 A I really don't know.

23 Q Do you recall a conference on December 4th?

24 A You can list all the dates, you can list all
25 the dates from, you know, November 20, through

1 whatever, and I'm not going to recall having that
2 conference.

3 Q Do you recall leaving a message for Mr. Harrah
4 on December 18th?

5 A I am Mr. Harrah.

6 Q Excuse me, I'm reading Mr. Hanlin's record,
7 do you recall leaving a message for Mr. Hanlin on
8 the 18th of December?

9 MR. LEONARDI: Your Honor --

10 A No.

11 THE COURT: I think you have asked and
12 answered it. He doesn't have specific recollection
13 of particular phone calls other than the 24th?

14 MR. PENDARVIS: Fair enough. Thank you, no
15 further questions.

16 MR. LOENARDI: No further questions, Your
17 Honor.

18 THE COURT: Thank you, Mr. Harrah. You may
19 step down, and have a safe trip.

20 (Witness excused).

21 THE COURT: We're going to stand at ease and
22 I'm going to speak to Miss Meyer.

23 (Recessed at 5:10 p.m.).

24 (Resumed at 5:15 p.m.).

25 THE COURT: Come to order. We'll start 9:00

1 order.

2 MR. PENDARVIS: Your Honor, could I ask
3 permission for Mr. McLeod to leave?

4 THE COURT: Sure, absolutely, not a problem.

5 MR. LEONARDI: Ready, Your Honor?

6 THE COURT: Yes.

7 MR. LEONARDI: I just want to speak very
8 briefly about the title issue. As you know, the
9 witness that they have set up to testify is
10 testifying on behalf of Justice Family Farms, LLC,
11 and notwithstanding that name appears on some
12 proposed agreements, that is not the entity that
13 owns the land and there is nothing in the record
14 that suggests a connection between that entity and
15 Black River Farms that owns the land.

16 THE COURT: All right, just so I understand,
17 give me the three entities and who owns the farm
18 right now, just so I can have that as a premise to
19 work around or work with.

20 MR. LEONARDI: Well, we have looked at the
21 Secretary of State's website here and in West
22 Virginia and we have looked, really the records in
23 Clarendon County say Black River Farms, LLC, owns
24 the property. So, we look for Black River Farms.

25 THE COURT: Do you agree with that right now,

1 Black River Farms?

2 MR. PENDARVIS: As for as the records,
3 titles, but if you go to West Virginia, Black River
4 Farms is no longer an existing entity. Mr. Harrah
5 testified in his deposition it was a disregarded
6 entity.

7 THE COURT: He says Black River Farms, LLC,
8 doesn't exist. All right, go ahead.

9 MR. LEONARDI: He says Black River Farms,
10 LLC, the South Carolina Secretary of State website
11 has no record of Black River Farms, LLC. In West
12 Virginia the Secretary of State has record of two
13 Black River FARms, LLC. We have printouts for both
14 of them. One of them, both of them are single
15 member LLC's. Let me pull those records so I can
16 get it straight for you.

17 I'll hand them up.

18 THE COURT: All right, Mr. Leonardi, you may
19 continue, sir.

20 MR. LEONARDI: The first one I handed up was
21 the first Black River Farm entity in West Virginia.
22 I want to make sure I handed you the right one,
23 Your Honor. Does yours say Black River Farms?

24 THE COURT: It does.

25 MR. LEONARDI: And if you turn to the

1 section, this is the first entity, what he's termed
2 2009, single member LLC, the member is James C.
3 Justice Companies, LLC. So, we moved to James C,
4 LLC, I'm having trouble finding that one here but I
5 can represent to the Court that the James C.
6 Justice Companies, LLC, was in turn a single member
7 LLC and the only member of that single member LLC
8 was James C. Justice Coal Company. J.C.J. Coal
9 Company.

10 I will hand up the record for J.C.J. Coal
11 Company. And it is also a single owner LLC,
12 luckily this is the end of it because the single
13 member of J.C.J. Coal Company, LLC, is Mechel
14 Bluestone. That is the first Black River Farms
15 entity. It ends with a single member being Mechel
16 Bluestone.

17 The other single member LLC, the other single
18 LLC is, it has two members, one being James C.
19 Justice, II, Jim Justice, and the other one being a
20 gentleman named Brian Wright that we have never
21 heard of before, so both of the entities that could
22 possibly be the ones that own the land have no
23 connection that we can discern to Justice Family
24 Farms or Mr. Miller.

25 Now, Your Honor, I'm just talking now about

1 the confusion about the entity and whenever you're
2 ready I will address the hearsay issue.

3 THE COURT: All right. The deposition video
4 that is wished to be played is by whom?

5 MR. PENDARVIS: Justice Family Farms, LLC.

6 THE COURT: And what is his name?

7 MR. PENDARVIS: The designee was Terry
8 Miller.

9 THE COURT: All right.

10 MR. LEONARDI: And regarding the fact that
11 the gentleman that is testifying on behalf of the
12 entity is not the owner of the property, we brought
13 that to Mr. Pendarvis' attention at the summary
14 judgment stage, he had an opportunity to cure, he
15 indicated he was going to get the testimony from
16 the appropriate entity or perhaps Jim Justice would
17 be coming to trial and of course that has not
18 happened.

19 Are you ready to go to the hearsay argument
20 as well?

21 THE COURT: Sure, go ahead.

22 MR. LEONARDI: May it please the Court, this
23 we feel like is a critical issue on this piece of
24 evidence. This video is queued up, once it is shown
25 to the jury there is no way to unshow it to them.

1 and paid the full 50,000 Justice could walk away.

2 MR. PENDARVIS: Certainly.

3 THE COURT: December 30, December 31st,
4 anytime he wanted.

5 MR. PENDARVIS: And consistent with Yancey
6 Environmental's objective, Mr. Justice could have
7 not recorded the easement and taken a deduction and
8 they wouldn't get paid. This all surrounds let's
9 get to the point of closing.

10 THE COURT: Stop there. Go back and explain
11 to me, explain how all the way up the chain of
12 title there is every company mentioned except
13 Justice -- is it Justice Farms?

14 MR. LEONARDI: Justice Family Farms.

15 THE COURT: Everybody is mentioned but that
16 one.

17 MR. PENDARVIS: You mean in the chain of
18 title?

19 THE COURT: Yes.

20 MR. PENDARVIS: Well, that is the one that is
21 disregarded, Your Honor. I mean, the Black River
22 Farms has the dirt, Justice Family Farms, we
23 understand is over Black River Farms and the reason
24 you don't see this in the Secretary of State is it
25 is by private agreement, it doesn't require it to

1 typically do that, so I don't have any candy on me
2 today, so forgive me for that, but with that
3 understanding, then, we're going to let you return
4 to the jury room and then home for the weekend.
5 Have a good day. We'll remain where we are out of
6 respect for you as you depart the courtroom.

7 (The jury was excused from the courtroom).

8 THE COURT: Thank you. The jury has departed
9 the courtroom. Anything for the record before we
10 close the record in the case? First from the
11 plaintiff?

12 MR. PENDARVIS: No, Your Honor.

13 THE COURT: Anything from the defendant?

14 MS. MCWILLIAMS: Nothing from the defense.

15 THE COURT: All right, we'll be in recess,
16 back to Judge Griffith 9:30 Monday morning.

17 (Recessed at 9:45 a.m., March 2, 2012).

18 (Reconvened at 9:10 a.m., March 5, 2012).

19 THE COURT: All right, on the motion
20 regarding the admissibility of the 30(B)(6) witness
21 testimony as to hearsay, Mr. Leonardi, let me hear
22 you briefly again on your objection to the video.

23 MR. LEONARDI: Yes, Your Honor. As the Court
24 is aware, one of the material issues in this case
25 is what Mr. Justice intended regarding this

1 conservation easement. Now, he is right up the
2 road, right up 77 about four hours from here and
3 the plaintiffs could have preserved his testimony
4 before this trial.

5 The jury should hear from Mr. Justice himself
6 what he intended and that question, what he
7 intended is not necessarily a simple yes or no
8 answer. Did he intend just to explore the idea of
9 a conservation easement, was he committed to it,
10 did he agree to the terms of the consulting service
11 agreement? It is the plaintiff's burden to show he
12 intended to go forward.

13 Furthermore, on a call on the 24th, before
14 that call did he intend to go forward and what was
15 it on that call that, if he intended to go forward,
16 that caused him not to go forward? He was told a
17 couple things on that call. He was told first of
18 all Mr. McLeod was being investigated by the
19 Internal Revenue Service. He was also told,
20 according to Mr. McLeod, the plaintiff wanted to
21 postpone it so that he can resolve that before
22 moving forward.

23 So, there was the news about the IRS
24 investigation and there was also the recommendation
25 to postpone, according to Mr. McLeod. Now, which

1 one of of those, assuming Mr. Justice intended to
2 move forward when they got on that call that day,
3 which one of those convinced him not to go forward,
4 that is a material issue in this case.

5 The jury has not heard from Mr. Justice
6 because the plaintiffs did not preserve his
7 testimony for trial. They could have subpoenaed
8 him, there is no wealthy person exception to the
9 rule of subpoena, they could have served him with a
10 subpoena and he would have had to sit down and they
11 could videotape that deposition, we could be
12 playing that. A long time ago the defendants
13 intended to issue a subpoena up there and the
14 plaintiffs never took the steps to make that
15 happen.

16 We have been told from the very beginning
17 that Mr. Justice would be involved in this case.
18 He was listed as a witness in response to
19 defendants' interrogatories. From the very
20 beginning Mr. Justice was listed, Terry Miller was
21 never listed, Justice Family Farms was never
22 listed, Black River Farms, the company that owns
23 the dirt, was never listed, it was always Mr.
24 Justice. And in fact the plaintiff in this case
25 wrote to Mr. Justice and specifically asked for

1 help with this lawsuit.

2 I will go ahead and hand up this letter.

3 Miss McWilliams asked Mr. McLeod about it on
4 cross-examination. In this letter Mr. McLeod asked
5 for, quote, a simple act memorializing their
6 agreement, and of course Mr. Justice never
7 responded to this letter. Plaintiff's
8 interrogatory responses were supplemented, Mr.
9 Justice was always listed. Justice Family Farms,
10 Terry Miller, Black River Farms were never
11 mentioned.

12 During mediation, actually during that day
13 the plaintiffs obtained an affidavit from Justice
14 Family Farms stating, the day of the mediation, we
15 have never seen the affidavit before, and at the
16 beginning of the mediation there was no affidavit
17 but plaintiff indicated they were in the process of
18 getting one and in the middle of mediation they did
19 obtain an affidavit and that is the first that we
20 thought that they might seek to have Mr. Miller
21 testify on behalf of an entity associated with Mr.
22 Justice.

23 That is where we are today. We are standing
24 here, the question is whether or not this video
25 should be shown to the jury. Now, what Mr. Miller

1 purports to do in this video is describe the intent
2 of a company regarding this easement. Now, that is
3 really code. As we know, Mr. Justice makes the
4 decisions regarding these entities --

5 THE COURT: From an accumualtion of what the
6 testimony was presented to the jury, if they missed
7 that they have been asleep, Mr. Justice makes the
8 decisions.

9 MR. LEONARDI: I will hand up just, if you
10 have read the deposition you know he testified that
11 Mr. Justice is the ultimate decision maker so it is
12 clear what he says, Justice Family Farms intended
13 to go forward with the easement, that is code for
14 Mr. Justice intended to go forward with this
15 easement. Now, regarding, you know -- but it is
16 not, Mr. Justice is not here to be cross examined,
17 he has never been available to be cross examined.

18 Now, the defendant respectfully submits the
19 submission of this testimony from Mr. Miller would
20 be reversible error because of the specific
21 circumstances of this case. One, this testimony is
22 probative of an issue in the case and it is
23 incompetent, it is hearsay and so it is presumed to
24 be prejudicial to the defendants.

25 May I approach, Your Honor, to hand up a

1 couple cases regarding the admission of hearsay
2 evidence and it being reversible error under
3 specific circumstance where that evidence like here
4 is not cumulative, it is not background, it is
5 important to the case and it is incompetent and
6 both of those two things, it is prejudicial to the
7 defendant. It is just not proper, Your Honor, it
8 goes to a material issue, perhaps the most material
9 issue, so this is extraordinarily important, it
10 would be prejudicial to the defendants if it was
11 admitted.

12 Now, regarding the two prongs, that it's
13 probative and that it is incompetent, regarding the
14 first, as we have already discussed, there is no
15 question that he is the decision maker with respect
16 to these companies. And regarding hearsay, Your
17 Honor, there is no corporate designee exception to
18 the hearsay rule. Just because Mr. Miller purports
19 to be testifying on behalf of a company does not
20 mean that is a hearsay exception. The plaintiff
21 has argued that a 30(B)(6) designee can testify as
22 to the intent of an organization, and that is true
23 given that their testimony is based on something
24 other than hearsay. That doesn't amount to an
25 exception to the hearsay rule, they can testify as

1 to the intent as long as their testimony is not
2 hearsay testimony, and in this instance we have
3 statements from Mr. Miller, one, "Mr. Justice told
4 me this or that," those of course are hearsay and
5 the plaintiff has agreed they are hearsay and
6 shouldn't be shown to the jury.

7 The other category is that the company
8 intended to go forward. Well, based on a review of
9 the deposition it was made clear that that
10 testimony regarding the intent of the company is
11 based on the conversations with Mr. Justice. So,
12 those statements about the intent of the company
13 are just hearsay repackaged or hearsay with a bow
14 on it, it is dressed up to not be hearsay, to
15 appear to not be hearsay but of course it is
16 hearsay and there is no exception to the hearsay
17 rule for a corporate designee.

18 Now, we were just handed a supplemental brief
19 from the plaintiff, I quickly scanned it and I
20 would just like to make a couple comments regarding
21 it, Your Honor. First of all you will see it uses
22 a kind of code, refers to the corporations then
23 existing's intent, all about the corporation, never
24 a reference to Jim Justice but we know that is just
25 code for what Mr. Justice intended.

1 The first subsection of this brief is
2 dedicated to the fact that plaintiffs argue that
3 these statements from Mr. Miller are admissible
4 because they are statements of the then existing
5 state of mind and under rule 803(3) an exception to
6 the hearsay rule, a declarant can testify as to
7 existing statements, statements regarding an
8 existing state of mind.

9 Now, again let's apply it to this case here.
10 We're talking about Mr. Miller describing what Mr.
11 Justice told him. So, first of all it is not a
12 statement from Mr. Miller about what Mr. Miller
13 said about his existing state of mind. He is not
14 saying, "I was worried on this day back several
15 years ago and I said on that day because I was
16 worried that, that I was worried." He is talking
17 about a statement from Mr. Justice.

18 Furthermore, even if that was not the case,
19 if he was talking about his own statement, the
20 statements he is talking about were made before he
21 was deposed last December, years after the event
22 that happened here, so he asked Mr. Justice, "Did
23 you intend to go forward?" He says that Mr.
24 Justice said that he intended to go forward back in
25 2007. Well, he told Miller this past December or

1 thereabouts. So it is not a statement, Mr.
2 Justice's statement to Mr. Miller, to the extent it
3 was made, was not a statement of Mr. Justice's
4 existing state of mind, it was him telling Mr.
5 Miller about what he felt years ago.

6 The second subsection said that Mr. Miller's
7 testimony is a lay opinion. Well, it is not an
8 opinion, it is fact testimony. It's incompetent
9 fact testimony but just because it has that
10 vulnerability doesn't mean that can be mitigated by
11 labeling it opinion testimony. It was certainly
12 not presented during the deposition as opinion
13 testimony, it was fact testimony and is hearsay and
14 should not be admitted?

15 And finally, the last section is about,
16 essentially about the importance of this testimony.
17 The point the plaintiff is arguing, it is important
18 testimony, it goes to the issue in this case of
19 what Mr. Justice intended and that is, we agree,
20 one of the exact reasons it is prejudicial to the
21 defendants in this instance, it is incompetent
22 testimony, probative, prejudice is presumed and
23 admitting it here would be reversible error, Your
24 Honor.

25 THE COURT: All right, Mr. Pendarvis?

1 MR. PENDARVIS: The fundamental defect in
2 everything you heard, Your Honor, is the fact
3 Justice Family Farms, LLC, was a party to the
4 agreement with Y.E.S. This company was a party to
5 the contract that generated the need for the lawyer
6 that caused Y.E.S. to hire the defendants.
7 Everything you have heard today, this morning, goes
8 to the weight, not the admissibility. It is a
9 patently false statement you just heard. On the
10 very first, plaintiff's first response to
11 interrogatories October 8, 2010, page 22, plaintiff
12 listed both James C. Justice Companies,
13 Incorporated, and Justice Family Farms, LLC, as a
14 corporation with knowledge about facts relevant to
15 this case in response to their interrogatories, so
16 for counsel to suggest that this was some sort of
17 surprise is just false.

18 This corporation Justice Family Farms, LLC,
19 can only speak through designees and for the
20 defendants to suggest having to put plaintiff in
21 position to essentially breach a contract with Mr.
22 Justice and therefore we're not responsible to get
23 Mr. Justice down here to testify, it is just a
24 problem with the way circumstances were caused by
25 their withdrawal. This was a very sensitive

1 agreement to get Justice Family Farms to come
2 testify, it was, it took months to get together and
3 I made a request throughout the time to get Mr.
4 Justice to either testify in deposition or come
5 down here but he is only one part of the contract,
6 and for the law, the way the corporations are, the
7 parties are allowed to use corporate entities for
8 various purposes but we certainly have rights, as
9 to Justice Family Farms, number one, it was on the
10 contract, number two, as the Court has seen Exhibit
11 41, Justice Family Farms paid on the contract and
12 its intent to perform the remaining part of this
13 contract are clearly, number one, relevant. Number
14 two, admissible.

15 This is a sworn deposition, the defendant had
16 an opportunity to come to cross-examine the
17 designee for Justice Family Farms, and this memo,
18 Your Honor, was really submitted in response to
19 some specific objections, three specific objections
20 to deposition testimony that is found on pages 34
21 and 36 of the printed deposition, that is the focus
22 of this memorandum, but in total this entire
23 deposition outside of the specific objections is
24 admissible, as this was a party to the contract.
25 We have an obligation as the plaintiff to prove the

1 underlying transaction, the intent of the party to
2 proceed and that is precisely what this is. So we
3 believe it's admissible, as we argued all the week
4 last week, and specific to the objection to the
5 question, Your Honor, I will just read the question
6 to you and the objection and the answer.

7 THE COURT: What page?

8 MR. PENDARVIS: This is on page 34. We have
9 been provided with an objection beginning on line
10 2 through line 16.

11 MR. LEONARDI: 34?

12 MR. PENDARVIS: Yes, sir.

13 THE COURT: I'm there.

14 MR. PENDARVIS: Your Honor, the contract
15 didn't close, obviously the conservation easement
16 was not recorded. The assumptions this designee
17 was asked to assume was that for the purpose of the
18 question, the recommendation, if Mr. Hanlin had
19 stayed on board essentially and that the
20 recommendation Mr. Justice would have made in the
21 December 24th phone call was to move forward with
22 the easement and the question was, "If that had
23 been the recommendation what would you have done?"
24 Based on this designee's due diligence,
25 investigation, review of papers, discussions with

1 Mr. Harrah and Mr. Justice, the answer for the
2 corporation was yes, and we believe that Rule
3 803(3) and Rule 701, provisions in the rules of
4 evidence, provide for the admissibility of this
5 testimony and it is information that the jury will
6 need to better understand whether there was going
7 to be a contract or not and certainly everything
8 that the defendants are arguing to you goes to the
9 weight of the evidence, not the admissibility, and
10 if they can make those same arguments to the jury
11 and convince them, and they may convince them there
12 was no intent, that Mr. Justice didn't say, and who
13 knows, but this information will certainly assist
14 the jury in making that important decision on
15 whether there was an intent by Justice Family Farms
16 to proceed with performing under this contract.

17 The next objection, Your Honor, it is on page
18 36, and the question, there is a question about,
19 after the Harrah email on the 27th showing the
20 45,000,000, his opinion on the conservation value
21 of his appraisal, the question is posed that there
22 is an objection to, was there sufficient time if
23 they got this information on the 27th to close, and
24 this answer is based on the corporation's
25 experience, all the paperwork could have been done

1 in a short time and there was some testimony Mr.
2 Harrah gave in his deposition consistent with that,
3 but again this corporation's answer was based on
4 his experience in conservation easements.

5 THE COURT: Justice family farm experience in
6 conservation easements?

7 MR. PENDARVIS: Yes. They had been involved
8 with one between the time of the contemplated
9 easement in this case and the deposition that was
10 taken in 2011.

11 THE COURT: So that's contradictory, at the
12 time he withdrew they had one conservation easement
13 to base that answer on, you know that?

14 MR. PENDARVIS: I understand at the time that
15 question was asked they had experience to
16 sufficiently answer the question and it is
17 consistent with what the witness said in his
18 deposition.

19 THE COURT: December, '07, they had no
20 experience, and for him now to say, "Yes, now I
21 know how to do one, we had enough time," that's not
22 fair, that is not fair to either side. That was a
23 leading question, if you ask me, and you're asking
24 me. Think about it.

25 MR. PENDARVIS: Well, that is okay, we got

1 testimony from the defendants that will handle
2 that.

3 THE COURT: That is really, "Now that you
4 have seen how to do it could you have done it three
5 years ago?" That's confusing to the jury as to
6 how, they had never seen one, never heard of one,
7 knew people did them and then two years later they
8 do one, "Yes, we would have had enough time." You
9 know that.

10 MR. PENDARVIS: But as to --

11 THE COURT: He's being nice. I wouldn't let
12 that in.

13 MR. PENDARVIS: That is actually both those
14 questions on page 36, so that takes care of
15 everything from line 10 to line 23 if that is your
16 ruling, Your Honor.

17 THE COURT: I don't --

18 MR. PENDARVIS: So, you sustain that
19 objection.

20 Your Honor, it will take a few minutes to cut
21 that out but the rest is ready to go.

22 THE COURT: Only two spots? I thought there
23 was more than that.

24 MR. PENDARVIS: Your Honor, they have two
25 more. The next is on page 37.

1 THE COURT: Okay.

2 MR. PENDARVIS: I'm very sorry, Your Honor,
3 page 40, lines two through 21, and it goes to the
4 corporation, the value, whether the \$45,000,000
5 appraisal value would have been sufficient for the
6 decision to go forward and he says essentially yes.

7 THE COURT: All right, I will tell you what,
8 tell me, I think it would be better for Mr.
9 Leonardi to tell me why he objects. Assuming I let
10 it in what specific parts are specifically hearsay?

11 MR. PENDARVIS: Well, we have already agreed
12 in terms of hearsay to withdraw that statement Mr.
13 Miller made about Mr. Justice's statement to him.

14 THE COURT: All right.

15 MR. PENDARVIS: That is not in this what is
16 teed up for the video but the rest of it deals with
17 the corporation's intent. Basically our response
18 to the entire video is the designee did its due
19 diligence and and he answered on behalf of the
20 corporation, it is clearly admissible. I mean,
21 there is no other way the corporation can respond.

22 THE COURT: All right, Mr. Leonardi?

23 MR. LEONARDI: Your Honor, before I get to
24 the specific objections I would like to respond to
25 a couple of the arguments counsel made. First of

1 all regarding the agreement, the plaintiff is
2 insisting that Mr. Justice had signed onto the
3 terms of the consulting services agreement that was
4 given to him and that agreement specifically
5 prescribed how to accept it, you accept it by
6 signing and paying \$50,000 nonrefundable --

7 THE COURT: There is no question of fact he
8 didn't sign it.

9 MR. LEONARDI: No.

10 THE COURT: There is no signing of anything.

11 MR. LEONARDI: Right. So we would dispute
12 there was any agreement, consulting service
13 agreement with Justice Family Farms.

14 THE COURT: Where is that? I understand your
15 objection, I understand nobody provided a signed
16 copy and as far as every witness said Mr. Justice
17 didn't sign any of that stuff.

18 MR. LEONARDI: Well, that is the link, the
19 plaintiffs claim that is the link between Justice
20 Family Farms that otherwise has no discernible
21 connection to the land and this dispute. They are
22 saying, "Sure, they don't own the land and we can't
23 see that they are connected in any way with the
24 company that does own the land but we sent them an
25 agreement that had their name on it and they never

1 signed it," and so that's the connection.

2 MR. PENDARVIS: The check shows they
3 performed, Justice, James C. Justice Companies on
4 behalf of Justice Farms paid fees under the
5 contract. They -- it's a partial performance, they
6 agreed to modify the \$50,000 nonrefundable payment
7 down to a \$15,000 payment and they performed, there
8 is the contract. There is no reason this company
9 would have paid Yancey Environmental Solutions for
10 anything but the work they performed per the
11 agreement to do the easement. They performed.

12 MR. LEONARDI: Your Honor, that is an
13 unreasonable characterization of what happened
14 here. The \$15,000 payment was the settlement of a
15 claim. It was not somehow an after the fact
16 agreement to a contract. That is not the case.
17 Furthermore, this whole Justice Family Farms thing
18 is an illusion. Mr. McLeod was dealing with Mr.
19 Justice, he was never dealing with Justice Family
20 Farms, he was talking with Mr. Justice, he
21 testified that his agreement was made with Mr.
22 Justice and so the idea that Justice Family Farms
23 had any kind of real role in that purported
24 relationship is simply untrue.

25 And this raises an issue again, I have

1 already spoken to the Court about it but over the
2 weekend I wanted to get it clear and more organized
3 in our mind exactly what we knew about the Black
4 River Farm and Justice Family Farms. I have made
5 charts that actually specifically specify who the
6 members are of these entities. I will be happy to
7 hand those up.

8 THE COURT: I think that would be helpful.

9 MR. LEONARDI: And all of them end with
10 either James C. Justice Companies, Inc., and Mr.
11 Justice is the president and we believe majority
12 shareholder of that company, or they end with him.
13 This is the one I handed up for Justice Family
14 Farms. We looked at that one as well, even though
15 we can't see it's connected to the land in any way.
16 This is one of the Black River Farms entities.
17 This is the last of the Black River Farms entities.

18 MR. PENDARVIS: Your Honor, one last point in
19 rebuttal.

20 MS. McWILLIAMS: We're not finished.

21 MR. LEONARDI: I do have some additional
22 response.

23 THE COURT: Okay.

24 BAILIFF: The jurors are all here today, Your
25 Honor.

1 MR. PENDARVIS: If anybody calls Exxon
2 Corporation or BP or any corporation a person
3 answers the phone. There is no way that someone is
4 going to be talking to some, you know, entity other
5 than a person, and we know through the testimony,
6 in fact Mr. Justice and all his companies assigned
7 David Harrah to be the point person on this project
8 and in fact Mr. McLeod, Y.E.S., relayed, Y.E.S.
9 relayed that information to the defendant for their
10 role in coordinating all the effort and preparing
11 the tax documents for this transaction.

12 So, the idea that Yancey McLeod and Yancey
13 Environmental Solutions, LLC, were dealing with Mr.
14 Justice through this entire project is just simply
15 not consistent with the evidence. The evidence is
16 this gentleman that owns various corporations that
17 owned the dirt in Clarendon County, the corporation
18 side of his operation of these companies had him
19 assign David Harrah for this point person. So in
20 terms of dealing with a company's representative,
21 David Harrah, we have evidence from the witness
22 stand about that aspect of the performance of the
23 consulting services agreement through Justice
24 Family Farms.

25 Now, we have interplay between Harrah and

1 Justice, between Harrah and Mr. Hanlin, between
2 Yancey Environmental Solutions and Harrah. So, we
3 had corporate representatives from Justice Family
4 Farms --

5 THE COURT: I agree with you. What I don't
6 understand is why Harrah wasn't the 30(B)(6) guy
7 other than he wasn't employed there when you
8 started the lawsuit.

9 MR. PENDARVIS: And we don't get to make the
10 choice who the corporation designates. The
11 corporation designated its secretary.

12 THE COURT: Treasurer.

13 MR. PENDARVIS: Treasurer, excuse me, you're
14 right, I apologize, I stand corrected. So, the
15 treasurer, who has an office right next, or desk
16 right next to Mr. Harrah, who actually was aware of
17 it when it was going on, that same person who is an
18 officer of the Justice Family Farms, does his work,
19 this Rule (B)(6) obligates, gets us all this
20 information and he comes to speak on behalf of the
21 party to the contract. They received, they might
22 not like it but this is evidence it was partially
23 performed by this payment of the \$15,000 per an
24 invoice that was sent contemporaneous with the
25 withdrawal.

1 So, the idea that there is no argument is not
2 relevant. There is no argument that Justice Family
3 Farms is not a witness to events in this case,
4 Justice Family Farms, LLC, they were identified in
5 interrogatories. There is no argument that the
6 entirety of this deposition is inadmissible hearsay
7 because there is no other way a corporation can
8 express its intent. We believe the deposition is
9 admissible and the Court needs to rule on these
10 specific line by line items, objections, but
11 otherwise the deposition gets played to the jury.
12 I see no basis nor evidence, evidentiary basis on
13 its admissibility. It goes to the weight, whether
14 we would have gotten Justice or whatever else.

15 THE COURT: I understand. I want to hear
16 your position.

17 MR. LEONARDI: Just a couple comments
18 regarding the response. First of all, the
19 plaintiff is taking the position we could have
20 cross-examined Mr. Miller during the deposition.
21 Well, we did cross-examine Mr. Miller during the
22 deposition but we can't cross-examine Mr. Justice
23 through Mr. Miller and so when Mr. Miller says,
24 "Mr. Justice told me X," we can't say, "Well, why
25 did Mr. Justice want X, intend or not intend, when

1 he made the decision what was he thinking about,"
2 and that is the point and that is the handicap that
3 we face in that deposition and that deposition is
4 here and that shouldn't be testimony where that
5 handicap existed for the defendant, it shouldn't be
6 presented to the jury.

7 Now, touching on these objections, do you
8 want to turn to the transcript here? We have
9 already addressed the ones on page 36 but going
10 back to the one on page 34, that's the one where
11 opposing counsel presented a hypothetical to Mr.
12 Miller, it begins at page 34, line 2.

13 Now, this calls for the witness to speculate,
14 first of all, but what he is asking the witness to
15 speculate on is in fact not what happened, of
16 course. Here Mr. McLeod recommended that the deal
17 not go through and in this instance he is asking
18 the witness, he recommended to Justice, not Justice
19 Family Farms, but he recommended to Mr. Justice
20 that it not go forward and here the witness is
21 being asked to speculate what would have happened
22 had the plaintiff in this case recommended
23 something differently to Justice Family Farms.

24 Of course he wasn't speaking with Justice
25 Family Farms, he was speaking with Mr. Justice.

1 This whole time Mr. McLeod and the plaintiff only
2 dealt with Mr. Justice, they didn't deal with
3 Justice Family Farms, they were speaking with Mr.
4 Justice and it was never reported that anyone else
5 would be the decision maker. So, that is the
6 objection.

7 THE COURT: Well, was Miller on the phone
8 call? I don't remember.

9 MR. PENDARVIS: No, Your Honor, he was not.
10 It was Mr. Steven Ball, Mr. Harrah, Mr. Justice on
11 the call in West Virginia, and Crosby Lewis and Mr.
12 McLeod here in South Carolina.

13 THE COURT: All right. Here is my concern on
14 this question, page 34, lines 2 through 15, that
15 hypothetical, is that Mr. Miller wasn't the point
16 man, Mr. Harrah was. Mr. Harrah has testified.
17 Subject to that, Mr. Harrah stated when the coal
18 mine sold, if he was still working for Justice now
19 he perhaps could have been the 30(B)(6) witness, we
20 don't know that, that is not a fact before us, I'm
21 concerned that if Miller is not the point man how
22 does he have all that information relevant to what
23 Justice is thinking or doing in December of '07
24 like Harrah did. Harrah was the guy, he had the
25 point for Justice, "You watch that, you deal with

1 Mr. McLeod, tell me what's going on," that is what
2 was going on.

3 Now, how does Miller have competence, not
4 being the point man in '07, but he's the man, he's
5 the designee post trial filing, how does that come
6 in?

7 MR. PENDARVIS: Your Honor, first of all the
8 deposition notice, we're pulling it up, had that as
9 a topic and Mr. Miller testified in terms of his
10 due diligence he spoke with Mr. Justice about this
11 transaction, whether it would have gone forward.
12 That is how he knew. Now, whether that statement,
13 what Mr. Miller in his conversation with Mr.
14 Justice, those are the three, three statements,
15 whether those specific statements get to the jury,
16 we have already acknowledged that is a hearsay
17 issue. But to the 30(B) topic on whether this
18 witness was competent to testify of JFF's intent,
19 Justice Family Farms' intent to proceed with this
20 transaction, it was precisely what he was asked to
21 testify about in the deposition notice. He asked
22 Mr. Justice. He satisfied his due diligence
23 requirement to speak on behalf of the corporation
24 and by the way, Your Honor, once the defendants had
25 the benefit of this deposition they certainly had

1 the power to go serve their own subpoena on Mr.

2 Justice and find out if this really was true.

3 THE COURT: We're not going that far.

4 MR. PENDARVIS: I understand.

5 THE COURT: Mr. Justice isn't here and it
6 would be wonderful if he was here, and so --

7 MR. PENDARVIS: Your Honor, as far as the
8 admisibility, this designee did the due diligence
9 necessary to speak on behalf of the Justice Family
10 Farms, LLC, organization as to intent to proceed
11 with this project.

12 THE COURT: Stop. I want to go to the next
13 one, sit on that one.

14 MR. LEONARDI: May I respond briefly with
15 respect to --

16 THE COURT: No, go to the next one.

17 MR. LEONARDI: All right. We talked about
18 the ones on 36. The next one is 40.

19 THE COURT: All right, I'm there.

20 MR. LEONARDI: The question is, "Earlier you
21 had given some testimony about Mr. Justice's
22 environmental focus," the following question I
23 have, "Was the \$45,000,000 tax benefit number
24 identified by the appraiser in Exhibit 12 in
25 concert with Mr. Justice's and Justice Family

1 Farms' environmental desires such that it would
2 have confirmed their willingness to go forward with
3 this easement"?

4 Well, this one, I submit, I think it was a
5 slip-up to mention Mr. Justice here, they were only
6 asking questions usually in the form of Justice
7 Family Farms, but it is clearly a hypothetical
8 scenario calls for the witness to speculate about
9 what may have happened and when Mr. Justice made
10 the decision not to go forward he had not seen the
11 \$45,000,000 figure, it came later after the call on
12 the 24th.

13 MR. PENDARVIS: Your Honor, in response --

14 THE COURT: All right.

15 MR. PENDARVIS: Again, assuming the tax
16 lawyer hadn't quit and Mr. McLeod on behalf of
17 Y.E.S. would have been able to recommend Mr.
18 Justice and Justice Family Farms go forward with
19 the planned conservation easement like Mr. McLeod
20 made to the other three landowners, this question
21 deals with, and the corporation gave its answer,
22 this question deals with events that we know took
23 place after that. We know that the 2007, December
24 27th, 2007, email from, excuse me, Dr. Hawkins was
25 forwarded to Mr. Justice and this question asked

1 whether these two have confirmed their objectives
2 in terms of the financial value, or all the
3 witnesses that have experience in this matter say
4 that, you know, the final end of the equation for
5 all landowners involved in a conservation easement,
6 they want to know what the bottom number is and
7 this is what is being asked, was this \$45,000,000
8 value for the easement sufficient to meet the
9 objectives of the company to go forward, and the
10 answer, and he answered yes.

11 So, again, it is very material to the
12 decision to proceed, it's consistent with the
13 \$45,000,000 number that has been bantied about in
14 all the emails and discussions, it is consistent
15 with the \$45,000,000 number Mr. Justice and his
16 companies were given in the spring of 2007, mid
17 summer, 2007, on the mitigation value, which was
18 the while idea --

19 THE COURT: That's a different number, that
20 is \$45,000,000 potential income selling the shares
21 of the mitigation bank. That is \$45,000,000 I can
22 make, not \$45,000,000 --

23 MR. PENDARVIS: Agreed.

24 THE COURT: A whole different issue.

25 MR. PENDARVIS: I agree, but the \$45,000,000

1 number that is the value is consistent because that
2 is the mitigation value that is going to be a
3 deduction instead of income but it is consistent
4 there.

5 THE COURT: I got you, I understand. Go to
6 the next one, I'm going to think about that.

7 MR. LEONARDI: Is there another one after 40?

8 MR. PENDARVIS: Your Honor, 56. Part of what
9 opposing counsel and I are doing on these video
10 depositions, for instance, Sue Green has some
11 portion of our designations is going to be played
12 in their case, we're putting in some of the
13 designations for Justice Family Farms, if they lose
14 this notion we already have it keyed in. One of
15 the questions begins on page 56 and the defendants
16 wanted only lines 3 through 7 to come in and we
17 have in fairness asked, we want to put in all the
18 way through 14. Line 3 says, question, "Okay, and
19 Mr. Harrah was the one that had primary
20 responsibility for monitoring the work they were
21 doing and handling it in the Justice Family Farms'
22 end, so to speak? Answer. That's correct."

23 This is the part we want. It sounds from
24 that he is making all the decisions and we want to
25 get the next question and next answer in. It is

1 actually an objection I made I'm withdrawing. This
2 is Mr. Leonardi on cross examination. The question
3 is, 16 says, "JFF wanted to proceed with the
4 project. Who is the JFF referred to in that
5 sentence? Pendarvis: Object to the farm. Mr.
6 Leonardi. Answer: That would have been Mr. David
7 Harrah, myself on the financial end and Mr.
8 Justice."

9 We submit, Your Honor, to put in context who
10 was the JFF referenced in the question, the jury
11 gets to hear that in the next part. In fairness we
12 have a right to put that in. If they have asked
13 the first part to go in we want the second part.

14 MR. LEONARDI: Your Honor, the defendants
15 argue this is an apples and oranges comparison.
16 The portion we want in states Mr. Harrah was the
17 one who was tasked with being the point man on the
18 project, everyone agrees that is true. The
19 question at line 9, first of all it recites part of
20 a paragraph of an affidavit so it is hearsay.
21 There is a reference to --

22 THE COURT: Paragraph 16 from an affidavit?

23 MR. PENDARVIS: This man signed, the same
24 guy, it's not hearsay anymore when the guy talks
25 about it under oath, the hearsay goes out the

1 window.

2 THE COURT: I'm just asking what 16 was.

3 MR. LEONARDI: That would certainly be
4 confusing to the jury. But if the Court, I mean,
5 we can agree to take out both of these if that will
6 resolve the issue, in other words, line 3 to line
7 14.

8 MR. PENDARVIS: We're fine with that, Your
9 Honor.

10 THE COURT: Take them out, then, you all
11 agree, 3 through 14 on page 56 by agreement is now
12 not going to be played for certain. I like that.

13 MR. PENDARVIS: That's it, Your Honor.

14 THE COURT: All right. Did you all agree on
15 all the hearsay stuff, that has all been
16 eliminated, redacted from the video, it is clear
17 Mr. Justice told him?

18 MR. PENDARVIS: That part is out. The part,
19 "I'm in the boat," that little section is out, it's
20 not in the tape.

21 MR. LEONARDI: We had made objections to some
22 specifically, obvious hearsay instances but we take
23 the position that the whole deposition is hearsay.

24 THE COURT: I understand. I'm with you, I
25 understand both you all's positions.

1 MR. PENDARVIS: For a week now.

2 THE COURT: Yes, sir. All right, as for as
3 the 30(B)(6) deposition of Mr. Miller, I'm going to
4 allow it to be played. I understand the objection
5 made by the defense.

6 Also, just so I'm clear, the property at the
7 time the work was being done was owned by the
8 Justice Family Farms or Black River Farms?

9 MR. LEONARDI: Black River Farms. As for as
10 we know it has never been owned by Justice Family
11 Farms.

12 MR. PENDARVIS: Black River Farms was owned
13 by Justice Family Farms, which is owned by James C.
14 Justice.

15 MR. LEONARDI: There is nothing in the record
16 to that effect.

17 MR. PENDARVIS: Mr. Harrah's testimony.

18 MR. LEONARDI: Mr. Harrah's testimony is not
19 part of the record, his live testimony is but he is
20 referring to his deposition testimony. It was not
21 brought out.

22 THE COURT: All right. I'm going to allow
23 the deposition to come in as a 30(B)(6) witness.
24 I'm not going to allow, I have already ruled, page
25 36, lines 10 through 23, and I'm not going to allow

1 the question on page 34, 2 through 15, but I will
2 allow page 40, the renumerated lines, I believe I
3 have marked 2 through 21, I will allow those.

4 And on page 56, you all agreed not to let
5 those in. The reason being there is a question of
6 fact, I believe, for lawyers trying to discern who
7 owns the farm, there has never been any discussion
8 there was another piece of property, the piece of
9 property was owned by Mr. Justice or one of his
10 entities, and this is a 30(B)(6) witness of the
11 entity that owns the farm. That not a question for
12 the jury to decide, as to whether Justice owned the
13 property in South Carolina. He did by way of one
14 of these LLC's, there are many LLC's, I don't want
15 to create a question of fact as to which LLC he had
16 this property housed by. I don't want the jury
17 deciding that there was a piece of property in,
18 there was a piece of property in South Carolina,
19 Justice owned it through an LLC. Was there an
20 agreement, would he have gone forward, that is the
21 question of fact the jury has to decide. I don't
22 want which LLC.

23 Does that makes sense to you all?

24 MS. McWILLIAMS: Yes.

25 THE COURT: That's my ruling. You all

1 accommodate that on the video.

2 MR. PENDARVIS: Your Honor, one last
3 housekeeping matter separate and apart from this
4 whole video. There was some argument last week,
5 limine style arguments that I remember about the
6 other three easements that closed that year.

7 THE COURT: Right.

8 MR. PENDARVIS: I recall the Court ruling
9 over on the side bar that you were not going to
10 allow testimony on those other three easements and
11 I wanted that to be a matter of record, that you
12 sustained the objection to those other three
13 easement matters being introduced to the jury.

14 THE COURT: Right. I think they have been
15 tangently shown in some correspondence but we have
16 not discussed them, that is not a question for the
17 jury. No, I don't want direct discussion of those
18 three easements, and so that was my ruling.
19 Consistent with that those have not been mentioned
20 and it tangently corresponded to some emails or
21 some other matters McLeod might have had going on,
22 to that extent I don't think it is a violation of
23 my ruling, I just, I didn't want those touching,
24 correspondence or emails touching those three
25 easements delved into more vigorously. Thus far

1 damages, and this is not a future damages case, I'm
2 not sure if the Court is aware, but in Maness
3 versus Nelson Mullins case, one thing that is
4 really interesting, I'm glad this case was
5 presented to the Court, because the Maness versus
6 Nelson Mullins case is an example of two causes of
7 action going to the jury, professional negligence
8 and a breach of contract claim. The Court struck
9 the punitive damages claim for the contract action
10 but allowed the punitive damages to go forward on
11 the negligence action but it's important to note
12 that the jury was able, had two causes of action
13 submitted to it in the Maness case.

14 Now, in this case the focus of Dr. Adams'
15 testimony and the claims in the case deals with
16 breach of fiduciary duty. There is a case called
17 Smith versus Hasting, Court of Appeals case, 2005,
18 if I'm not mistaken, but when we looked at the,
19 even the negligence case and even if the Court were
20 to lump the belief of fiduciary duty case into the
21 professional negligence case, proximate cause has
22 two components. There is a causation in fact,
23 that's but for, and there is a second cause, the
24 legal cause, and the legal cause is foreseeability.

25 Going in progression from but for, to

1 those.

2 So, Your Honor, it is a gaping hole and it is
3 difficult but just because it's a difficult burden
4 doesn't mean, as I pointed out, that the plaintiff
5 doesn't have to have some evidence, and Mr.
6 Justice, we know right where he is, he's up there
7 at Greenbrier or basketball practice or wherever.
8 They could get him. He is who they dealt with,
9 that is who they had to have. We submit directed
10 verdict is proper.

11 MR. PENDARVIS: Your Honor, brief response?

12 THE COURT: You don't need to. I think there
13 is a question of fact to submit to the jury and I
14 respectfully deny the directed verdict motion but
15 it's close, I'm telling you that, the causation,
16 but I think there is enough there from the 30(B)(6)
17 witness and Mr. Harrah, all that combined together
18 is enough to get past this motion. That's my
19 ruling.

20 All right. Do you all need a few minutes,
21 or ready to roll?

22 MS. McWILLIAMS: Well, the next matter, Your
23 Honor, we actually do need to consult, the next
24 witness is a very short one but it is going to be
25 read in. I brought somebody from the office to

1 (The Designated portions of Kerry Hall's
2 deposition was read to the jury).

3 BY MS. McWILLIAMS:

4 Q "Good afternoon, Mr. Hall. Would you state
5 your name for the record, please?

6 A Kerry H. Hall, Jr.

7 Q Where do you reside?

8 A Greenville, South Carolina.

9 Q Mr. Hall, are you a practicing attorney?

10 A I am.

11 Q I think, unless anyone objects, we can
12 dispense with the instructions under the rules.

13 Where do you practice, Mr. Hall?

14 A In Greenville with the Wyche law firm.

15 Q And how long have you practiced with the
16 Wyche firm?

17 A 37 years.

18 Q That's the only firm you have been with?

19 A It is.

20 Q Since you got out of law school?

21 A It is.

22 Q Have you ever done anything aside from
23 practicing law for the Wyche firm?

24 A I do quite a bit of work with various
25 nonprofit groups and a lot of particularly

1 nonprofit organizations focused on conservation but
2 other than that I just practice law.

3 Q I guess my question was I just mean did you
4 ever hold any public office like a judgeship or
5 anything like that during your career?

6 A No.

7 Q And are you a certified specialist in
8 taxation law?

9 A I am.

10 Q How long have you been certified?

11 A Probably 25 years.

12 Q You mentioned your work in the conservation
13 area but does your practice have any particular
14 focus, understanding that you are a tax specialist?

15 A My practice is approximately half tax and
16 that would be principally partnership and corporate
17 tax, some state and local tax issues, property tax
18 issues, sales tax issues and about half just
19 general business representation, transactional law.

20 Q And your firm's website mentions you work
21 with conservation organizations and with
22 individuals who seek to place conservation
23 easements, and you mentioned that as something you
24 do as well. Is that correct?

25 A Yes.

1 Q And when you have worked on conservation
2 easements have you generally represented the
3 conservation organization or the landowner or both?

4 A Usually the landowner but occasionally I
5 represent the land trust.

6 Q All right. And can you give me a rough
7 estimate, if not I understand, of how many
8 conservation easements you have handled on behalf
9 of landowners over your numerous years?

10 A I would probably, I would say probably 30 or
11 40.

12 Q Can you give me a percentage of how many of
13 those -- did all those conservation easements
14 actually go on to record, actually be recorded, the
15 deed?

16 A Well, I have worked on deals that didn't
17 happen but most of the conservation easement
18 transactions that I have been retained to assist
19 with have happened, have resulted in a recorded
20 conservation.

21 Q Do you have any understanding based on your
22 role as a director of either the Palmetto
23 Conservation Foundation or a director of the
24 National Land Trust, how many proposed or
25 contemplated conservation easements don't actually

1 get completed and recorded?

2 A Well, it is very common for landowners to
3 hear about conservation easements and then make
4 inquiries about what would be involved, what would
5 be the benefits and detriments and a lot of times
6 they'll, having learned about it, they'll decide
7 that they are not interested or they're not
8 interested at the present time.

9 Q Have you ever been involved in working on a
10 proposed conservation easement and had the
11 landowner during the workup decide they were not
12 interested in going forward?

13 A Yes.

14 Q Now, Mr. Hall, do you know whether or not the
15 documents that you reviewed related to Mr. McLeod?

16 A I believe that I was sent a letter, a copy of
17 a letter which the IRS had sent to Yancey notifying
18 him that they considered him a promoter of abusive
19 tax shelters, a really alarming letter, and that is
20 when I was retained to assist with, dealing with
21 that letter, and the accusation that Yancey was a
22 promoter of abusive tax shelters.

23 Q When you say it was alarming, in the sense of
24 the language, the letter itself?

25 A Yes, it was a very threatening letter to the

1 effect they were going to tell the world that he
2 was a promoter of abusive tax shelters and impose
3 all sorts of penalties on him.

4 Q Had you ever been retained to assist a client
5 on a similar type of letter like this from the IRS?

6 A I have not.

7 Q Now, did you meet with Mr. Lewis and Mr.
8 McLeod, do you remember, about this matter?

9 A I did.

10 Q Was that the next day, the 3rd? Can you
11 tell?

12 A Yes, I think it was on January 3rd. I'm not
13 sure whether we met in person or by phone.

14 Q Let me see, I will show you Defendant's
15 Exhibit 6 and ask you if that refreshes your
16 recollection or is that your notes?

17 MS. McWILLIAMS: Your Honor, we have marked
18 it as Defendant's 87.

19 A This appears to be my notes from the meeting.

20 Q Now, who is Ken?

21 A Ken Driggers was the Director of the Palmetto
22 Conservation Foundation. He's a lawyer who is very
23 familiar with conservation easements.

24 Q Do you know whether or not he had been
25 retained by Mr. Lewis and Mr. McLeod?

1 A We were all -- well, we were all on board,
2 Crosby and I were on the Board of Palmetto
3 Conservation Foundation and each of us knew Mr.
4 Driggers very well but I can't remember whether we
5 retained him to assist with the transaction.

6 Q And I noted there is a reference to the left,
7 that is just your hourly rate, correct?

8 A Correct.

9 Q And who was supplying you the information
10 that you were writing down, do you remember? Was
11 it Mr. Lewis?

12 A I believe it was Yancey.

13 MS. McWILLIAMS: Your Honor, we would like to
14 publish this to the jury.

15 MR. PENDARVIS: No objection.

16 THE COURT: Without objection.

17 (Notes marked and received in evidence as
18 Defendant's Exhibit Number 87).

19 BY MS. McWILLIAMS:

20 Q And THE last line reads Jim Justice. Is that
21 conservation easement?

22 A Conservation easement abandoned because of
23 IRS letter.

24 Q And based on your conversations with Mr.
25 McLeod and Mr. Crosby Lewis it was your

1 understanding that the James C. Justice
2 conservation easement was abandoned because of the
3 IRS letter?

4 A Yep, that was my understanding.

5 MS. McWILLIAMS: That's all we have, Your
6 Honor.

7 THE COURT: Those are all the appropriate
8 portions?

9 MR. PENDARVIS: That is our understanding,
10 Your Honor.

11 THE COURT: Very good.

12 THE COURT: All right, you may step down.

13 MS. McWILLIAMS: I'm sorry, we did not
14 publish, is it Defendant's 87?

15 THE COURT: It is in without objection, the
16 jury has seen it.

17 MS. McWILLIAMS: I wanted to make sure they
18 saw it.

19 THE COURT: Very good.

20 MS. McWILLIAMS: The next witness, Your
21 Honor, is Hal Hanlin, we call Hal Hanlin.

1 GEORGE HAROLD HANLIN, after being first duly sworn,
2 testified as follows:

3 THE CLERK: Thank you. Have a seat on the
4 witness stand and state your name for the record
5 and spell your last name.

6 THE WITNESS: My full name is George Harold
7 Hanlin, last name is spelled H-a-n-l-i-n.

8 DIRECT EXAMINATION BY MS. MCWILLIAMS:

9 Q Good afternoon again.

10 A Good afternoon.

11 Q Where do you live, Mr. Hanlin?

12 A I live in Richland County, kind of behind the
13 Veterans Hospital area.

14 Q Where did you grow up?

15 A The same area, in that part of Richland
16 County.

17 Q All right. And you practice law, correct?

18 A I do.

19 Q All right. Are you, do you have a family?

20 A I do. I've got a wife, we're coming up on
21 our 28th anniversary, and two children.

22 Q All right. Is your wife employed?

23 A Yes. My wife is a schoolteacher in Richland
24 District One, she teaches orchestra at five of the
25 elementary schools there.

1 Q And how about your children, how old are
2 they?

3 A One has just turned 13 and he's a student in
4 middle school. And the other is 20 years old and
5 he has been to Vanderbilt, he had mononucleosis, he
6 is home on break right now.

7 Q All right. Mr. Hanlin, were you, you said
8 you grew up in the Columbia area, were you educated
9 here in Columbia?

10 A Yes, in the public schools, graduated from
11 lower Richland High School.

12 Q I won't ask you what year.

13 A Okay.

14 Q But did you go, did you go to further your
15 education beyond high school?

16 A Yes, I did, and graduated from Furman
17 University, graduated in 1981.

18 Q And what did you do after you got out of
19 Furman?

20 A I worked a couple different manufacturing
21 jobs and I lived in a couple different areas, lived
22 in Columbia, lived in Greenville, lived in
23 Greensboro, North Carolina, and the company I
24 worked for in Greensboro started talking about
25 moving me to Tupelo, Mississippi and I said I think

1 law school would be more fun.

2 Q And so where did you go to law school?

3 A I went to law school back home here in
4 Columbia.

5 Q All right. When did you graduate?

6 A I graduated from law school in 1989.

7 Q Did you, did you start a practice or what did
8 you do when you got out of law school?

9 A I had been clerking for a law firm named
10 Cooper, Beard and Dipple here in Richland County,
11 and continued to work with them as a law clerk
12 until I was admitted to the Bar in the fall of
13 1989.

14 Q After you passed the Bar, then describe for
15 the jury what your practice was like.

16 A Well, as a young associate I did whatever I
17 was told to do and initially I was hired to do
18 workers compensation cases, mostly defense work,
19 some plaintiffs work. But I also was told that
20 nobody at the firm wanted to do wills and that was
21 my job, too, and so I started doing wills and
22 probate work as soon as I finished law school.

23 Q Did your practice change at some point after
24 you had gotten out of law school and practiced a
25 while?

1 A It did. I practiced at Cooper Beard and
2 Dipple about two years, then I went to Callison
3 Hoye in 1991 and over that time I continued to
4 become more involved in estate planning and probate
5 matters and in 2001, late summer of 2001 I moved to
6 New York City for a little while to get a graduate
7 degree in taxation at NYU.

8 Q All right. What is that degree called?

9 A Well, the degree is called a Master of Laws,
10 it is abbreviated LLM, and my Master of Laws is in
11 taxation.

12 Q How long does it take to obtain that degree?

13 A It's a one calendar year, one academic year
14 program, you do a fall semester and then do a
15 spring semester.

16 Q All right. Did you stay in New York City
17 after you finished or what did you do?

18 A No, I didn't, I was glad to get back home to
19 Columbia.

20 Q And where did you practice after you
21 graduated?

22 A I went back to work for Callison, Hoye and
23 Robinson.

24 Q All right. And how long did you stay there?

25 A I was there I think until about 2005 and then

1 I received a job offer from Richardson Plowden and
2 went to work for Richardson Plowden.

3 Q So you were at Richardson Plowden in 2007,
4 the time period we're talking about in this case?

5 A That's correct.

6 Q All right. Before we reach that let me back
7 up a little bit. Have you spoken on CLE's, at
8 continuing legal education on taxation and issues
9 like that?

10 A I have. I have spoken at a number of CLE's,
11 I have spoken to the labor and employment section
12 of the South Carolina Bar at the South Carolina Bar
13 convention, I have spoken on national programs,
14 programs that were broadcast nationally in the
15 areas that I practice, a couple national broadcasts
16 of CLE's.

17 Q Besides practicing law did you have any other
18 areas of interest, volunteer work, that sort of
19 thing?

20 A Primarily with my church.

21 Q And how about with respect to, there has been
22 some testimony about Community Open Land Trust, can
23 you explain to the jury how you got involved in
24 that?

25 A I will be glad to. I had conversations with

1 both Sue Green and I believe Mr. McLeod here, it
2 would have been in 2002, not long after I got back
3 from New York, and Sue asked me to be chairman of
4 the trustees of that organization and so I did
5 that, I did that for eight years, until the end of
6 2010.

7 Q And had you had any interest in the
8 environment, conservation, before that?

9 A I did. I had grown up in the outdoors to a
10 large extent and had been in Scouting, doing
11 camping and things like that throughout my life.

12 Q How far did you go in Scouting?

13 A I'm an Eagle Scout.

14 Q So, as the chairman of the trustees of the
15 Community Open Land Trust can you give the jury an
16 idea what your, how your volunteer work, how that
17 work, what it consisted of?

18 A Well, the biggest part of it was considering
19 conservation easement donations and every year from
20 time to time we would receive some proposals from
21 landowners who wanted to contract land to the open
22 area land trust. The Board would meet, we would
23 consider one of those and we would decide whether
24 we wanted to accept certain contributions or not
25 accept certain contributions, and that was the

1 biggest part of that.

2 Q Was conservation easement or taxation and
3 conservation easement something that was covered
4 when you were studying for your LLM?

5 A To some degree it was.

6 Q All right. Now, can you describe for the
7 jury what your practice consisted of when you were
8 at Richardson Plowden in 2007, right in that area
9 of time?

10 A Sure. Well, it was a variety of things. I
11 did a lot of estate planning work, wills and
12 probate administration, that kind of thing. We had
13 some business transactions where we would hammer
14 out partnership agreements, LLC agreements, that
15 kind of thing. We did some probate administration,
16 of course, and that kind of thing, and then the
17 biggest part of, some of my time was devoted to
18 volunteer work for Community Open Land Trust.

19 Q Mr. Hanlin, do you as an attorney have
20 continuing education obligations?

21 A I do. Like every attorney has certain number
22 of hours, I have to be in seminars and get
23 refreshed on the law. Some of that consists of
24 professional ethics requirements and of course I
25 have taught some of that.

1 Q And have you maintained yearly, annually your
2 continuing education requirement?

3 A I have.

4 Q Now, let me ask you, Mr. Hanlin, do you
5 believe that a lawyer should not needlessly
6 endanger his or her client?

7 A Generally speaking I agree with that.
8 Lawyers are governed by the rules of professional
9 conduct and that's the highest authority that an
10 attorney has to answer to and an attorney has to
11 abide by those rules of professional conduct.

12 Q And are those rules contained in the rules of
13 court that every lawyer gets?

14 A They are.

15 Q All right. And you were here in the
16 courtroom when I talked with Dr. Adams, he said he
17 had them on his computer, I think?

18 A Uh-huh (Affirmative).

19 Q Do you believe that a law firm, that those
20 same rules apply to a law firm?

21 A Certainly as a general proposition I think
22 that is true. Again, you have to refer to the
23 rules to understand fully the obligation.

24 Q And do you agree that a client has a right to
25 expect good care in the handling of his or her

1 case?

2 A I think that's true but lawyers have
3 limitations in what they can do for clients and the
4 limitations are set forth in the rules of
5 professional conduct.

6 Q Do you believe lawyers are guarantors of the
7 result of any transaction?

8 A No, certainly not. I mean, professionals,
9 doctors, lawyers, they are hired to do certain
10 things if they agree to do those things but there
11 is not a guarantee. In fact I would be stretched
12 to think of a circumstance where there is a
13 guarantee.

14 Q Do you believe that any risk of loss is
15 unacceptable if reasonable means could be used to
16 minimize or eliminate the risk?

17 A Well, I think generally that's true but then
18 again we all have to look at our rules of
19 professional conduct and be governed by those.

20 Q Do you believe the first priority for a
21 lawyer should be to protect the client's case?

22 A No, actually an attorney has obligations
23 under the rules, for instance, candor to a
24 tribunal, candor to a court, it doesn't matter if a
25 lie would be better for the client, an attorney

1 cannot lie in the courtroom, they have to be guided
2 by those rules of professional conduct and in some
3 cases those rules supersede the lawyer's obligation
4 to help a client.

5 Q Do you believe the greater the risk of injury
6 the greater the duty to provide due care?

7 A Well, I think an attorney has an obligation
8 to provide due care regardless of the size of the
9 matter. For instance, sometimes we get, or are
10 appointed to represent indigent clients and we have
11 to take that duty just as seriously as any other
12 matter.

13 Q Do you agree that if a lawyer is not prepared
14 to handle legal claims that a plaintiff might bring
15 to a lawyer the lawyer should not accept the case?

16 A I think generally that's true. Sometimes
17 problems are found after the initial consultation
18 with the client and so you don't always know all
19 those things in advance.

20 Q All right. Do you think that a lawyer's
21 obligations to provide competent representation is
22 related to the size of the fee that he might, he or
23 she might have in the fee agreement?

24 A No, I think a lawyer has an obligation to do
25 his best in any case, regardless of the size fee.

1 Q So, does a lawyer's responsibility change
2 with the magnitude of the transaction or fee?

3 A I don't think that the lawyer's approach or
4 the lawyer's responsibility and what he does
5 necessarily changes with the size of the fee.

6 Q In your practice, Mr. Hanlin, have you ever,
7 setting aside right now this case, have you ever
8 had to deal with a situation where two clients or
9 you perceived two clients had a conflict?

10 A Well, a lot of what I do is drafting wills
11 for people and a potential conflict comes up almost
12 every week in the office and one simple example of
13 that is when we have clients come in to draft a
14 will, what the client needs to understand when they
15 come in initially is whether the representation
16 that we have for them is going to be a joint
17 representation or not and if it's a joint
18 representation what I explain to them is that I can
19 have no secrets between them, so none of them can
20 tell me something that they want to keep a secret
21 from the other person.

22 Another thing that I have to tell them is
23 that a conflict can develop between them and if it
24 does, then I might have to withdraw from any
25 representation whatsoever and whenever we have two

1 people who want us to represent them jointly then
2 we put that in the fee agreement so that they
3 understand that it's a joint representation and we
4 give them a consent to multiple representations
5 which reiterate those things, it says if something,
6 a dispute arises between them that I can't, I might
7 not be able to handle it, I might very well have to
8 withdraw, probably will have to withdraw, and then
9 I can have no secrets between them. So, that is a
10 common thing.

11 And I have had circumstances where that has
12 come up. I have done estate planning for a couple
13 and then I have had one spouse call me up after the
14 fact and say, "Now that we have our wills done can
15 you change just my will," and I have had to say,
16 "No, I can't. If you want that done you will have
17 to go to another lawyer because our representation
18 of you is joint with your husband and so I can't
19 have any secrets between you and your husband."

20 Q Now, you mentioned, when I asked you about
21 your involvement in the Community Open Land Trust,
22 that you had actually been contacted about that
23 from Sue Green and from Mr. McLeod. Tell the jury
24 how you came to know Mr. McLeod.

25 A Well, I'm not sure that I recall precisely

1 but I have been interested in conservation issues
2 for some time, certainly the outdoors, and Mr.
3 McLeod is well known in those circles and I believe
4 that he and I worked on an easement together for
5 some people that we were both acquainted with and
6 got to know each other personally through that
7 work.

8 Q All right. And specifically did you ever
9 have any problems in working with Mr. McLeod, did
10 you all work well together?

11 A Oh, I thought we did. I liked Mr. McLeod,
12 even today, he is a wonderful gentleman, just a
13 delight to be around, I got along with Yancey very
14 well.

15 Q All right. What was your understanding of
16 his level of sophistication in conservation
17 matters, specifically conservation easements?

18 A Well, Mr. McLeod is kind of a guru about that
19 kind of thing in South Carolina. I know I have
20 been to occasions where he has spoken, I don't know
21 if he has been to any of them where I have spoken
22 but he is an attorney. As I recall he was on the
23 Law Review when he was in law school, he has been
24 involved in conservation issues just about his
25 whole career, as I understand it. I think he knows

1 as much about conservation as anybody I know.

2 Q All right. Now, did you have occasion to be
3 involved in any conservation easements with Mr.
4 McLeod before the proposed Jim Justice transaction?

5 A Yes, I did.

6 Q And when were those conservation easements?

7 A There was one --

8 Q Generally, if you recall?

9 A There was one that I believe was in 2002 and
10 I think that was the first one where we actually
11 worked together, and then we had worked together on
12 two in 2006 and then we had had some discussion
13 about some others but none that had been recorded
14 or anything.

15 Q All right. And in connection with the
16 conservation easement in 2002 and the two in 2006,
17 did those actually go all the way and get recorded
18 and become donated property to a qualified
19 organization?

20 A They did, yes.

21 Q All right. And who did you represent in
22 those transactions?

23 A I represented the landowner in each of those
24 transactions.

25 Q All right. Now, in connection with the

1 proposed Justice transaction, when do you recall or
2 what do you recall of how you were first contacted
3 about that transaction?

4 A It was later in the year I think I got a call
5 from Mr. McLeod, probably October, 2007.

6 Q All right. And what, describe for the jury
7 what Mr. McLeod asked you to do.

8 A Well, Mr. McLeod had a tax question and he
9 wanted some advice about whether a conservation
10 easement could be valued the way that he wanted to
11 value it and what he wanted to do was to consider
12 the mitigation value of the land and develop the
13 conservation easement value from the mitigation
14 value, which was a little bit unusual and not a
15 question I had considered before.

16 Q And did you -- what did you do in response to
17 that?

18 A I researched the question, I did some on line
19 research under Tax Code 170(H) which I think has
20 been mentioned here before, and looked to see if
21 there was any reason why the conservation easement
22 could not be valued on the basis of the mitigation
23 project that had been considered and I came to the
24 conclusion that there was no reason that that could
25 not be done.

1 Q All right. Now, when you were first
2 contacted by Mr. McLeod did you consider Mr. McLeod
3 or Y.E.S. to be your client?

4 A I did.

5 Q And did you understand that there would be a
6 landowner involved in this transaction, Jim
7 Justice?

8 A Well, I knew there would be a landowner
9 involved, there is always a landowner involved.
10 When you contract a conservation easement you've
11 got to have property that has some conservation
12 value and you have to contract it to a qualified
13 conservation organization, so the landowner is a
14 given.

15 Q And why -- did you consider whether or not
16 you could represent both Y.E.S. and Mr. Justice?

17 A Well, that question did not come up
18 initially. I was never asked by Mr. Justice to
19 represent him, I was never asked by any of his
20 representatives to represent Mr. Justice and I'm
21 sure that my law firm would have been glad if I had
22 been able to acquire a billionaire as a client but
23 I don't believe I ever had that opportunity and
24 certainly not initially. Initially when Yancey and
25 I talked it was about whether this easement could

1 be valued based on the mitigation value of the
2 property.

3 Q Did you ever actually speak with Jim Justice
4 directly?

5 A No, I have never had any direct contact with
6 Jim Justice.

7 Q All right. Did you have any contact with
8 anybody else associated with Jim Justice?

9 A Yes. I did talk to Mr. David Harrah, and Mr.
10 Harrah, Mr. Harrah I think testified earlier in
11 this matter, he is a CPA and one of Mr. Justice's
12 tax advisers as I understand it.

13 Q And what was your understanding of Mr.
14 Harrah's role, if any?

15 A Well, he was the contact we were given so I
16 didn't have any access to Mr. Justice himself but I
17 got word through Mr. McLeod that we were to talk to
18 Mr. Harrah about things.

19 Q All right. Now, let me ask you, Mr. Hanlin,
20 I'm looking for an exhibit that is already in
21 evidence, it is Plaintiff's Exhibit 10, do you have
22 that there?

23 MS. MCWILLIAMS: Beg the Court's indulgence.

24 Q Now, this is already in evidence. Mr.
25 Hanlin, do you recognize this fee agreement between

1 Y.E.S. and Richardson Plowden?

2 A I do.

3 Q All right. It is dated December 5th. Now,
4 is there any reason why or can you explain for the
5 jury why the fee agreement is dated December 5th,
6 2007, when you had apparently already undertaken to
7 do some research for Mr. McLeod?

8 A Well, my practice, and I think it is common
9 practice, is that we don't always send out the fee
10 agreement first thing. Sometimes we talk to the
11 client about how we're going to arrange our fees
12 and then if they have something pressing that needs
13 doing we'll go ahead and take care of the pressing
14 matter with the understanding that the fee
15 agreement will be along.

16 Q All right. Did you ever have, did Richardson
17 Plowden ever have any agreement with Y.E.S., other
18 than this fee agreement that has been marked as
19 Plaintiff's Exhibit 10?

20 A No, ma'am.

21 Q In connection with this conservation easement
22 for the Black River Farms?

23 A No, ma'am.

24 Q All right. Now, could you have represented
25 both, in your opinion, Mr. Justice and Y.E.S.

1 jointly?

2 A No.

3 Q And why is that? Can you explain that to the
4 jury?

5 A Well, we had started out the representation
6 of just Y.E.S. and if you add a client you have to
7 give a lot of careful consideration to whether you
8 can add, whether there is a conflict, whether
9 that's the right thing to do, and my belief to this
10 day is that we could not have represented Mr.
11 Justice because we had already given tax advice to
12 Mr. McLeod and my opinion was that Mr. Justice
13 needed to retain his own tax advisers and not rely
14 on any tax information that I had supplied to Mr.
15 McLeod.

16 Q All right. And did you in fact write a
17 letter to Mr. Justice to that effect?

18 A I did.

19 Q I want to show you Plaintiff's Exhibit 11,
20 Mr. Hanlin. Is that the letter you just testified
21 you sent?

22 A It is.

23 Q All right. Now, could you explain for the
24 jury, referring back to Plaintiff's Exhibit 10, Mr.
25 Hanlin, the fee for services rendered is specified

1 in paragraph three. Right?

2 A Correct.

3 Q All right. And could you explain to the jury
4 how that was arrived at with Mr. McLeod?

5 A Well, Mr. McLeod and I had been talking about
6 that for some months. As I recall, there is a memo
7 to him dated June 1st, I think it is, 2007,
8 discussing similar arrangements in another matter,
9 so Mr. McLeod and I had been discussing it for a
10 number of months.

11 Q At anytime did you attempt to deceive or
12 trick Mr. McLeod into signing this fee agreement?

13 A Certainly not.

14 Q All right. Did you believe that based on the
15 transaction and the work that was being done that
16 it was an appropriate fee?

17 A I did and still do.

18 Q Did Mr. McLeod, I may have cut off your
19 answer, I apologize, did Mr. McLeod express his
20 satisfaction or agreement with --

21 MR. PENDARVIS: Your Honor, excuse me.

22 THE COURT: Yes.

23 MR. PENDARVIS: She's leading a good bit. I
24 have been a little liberal, I ask she ask direct
25 questions.

1 THE COURT: Sustained as to leading.

2 BY MS. McWILLIAMS:

3 Q Mr. Hanlin, what if anything did Mr. McLeod
4 express to you regarding the fee arrangement that
5 he, that Y.E.S. entered into with Richardson
6 Plowden?

7 A Well, as I said, we had been discussing this
8 type arrangement for some months but I didn't
9 receive any comment from him about this fee
10 agreement I sent on December 5th.

11 Q Did you undertake any other research for Mr.
12 McLeod in connection, or for Y.E.S., rather, in
13 connection with your representation of Y.E.S.?

14 A Well, researched a variety of topics, some of
15 which had to do of course with the valuation of the
16 easement, some of which had to do with other tax
17 topics.

18 Q All right. And how did you and Mr. McLeod
19 communicate about this matter?

20 A Well, we communicated a couple ways. We had
21 telephone conversations back and forth of course
22 and also sent emails and received emails from
23 Y.E.S.?

24 A All right.

25 Q And also copied Mr. McLeod on correspondence

1 to others involved in the transaction, the Justice
2 group up in West Virginia.

3 Q Let me show you what has been marked as
4 Defendant's Exhibit 34, Mr. Hanlin, and ask if you
5 can identify that for the jury?

6 A I can.

7 Q And what is it?

8 A Well, it looks like two emails. The first at
9 the bottom of this exhibit is an email to Brenda
10 Davis who is a staffer at Community Open Land Trust
11 we have been referring to as COLT, and it is also
12 an email to Mr. McLeod and both those pertain to
13 the tax treatment that farmers and ranchers receive
14 for conservation easements.

15 Q All right. And can you identify, is this
16 the, the top one, the email directed to Mr. McLeod,
17 can you tell the jury from the language whether or
18 not this was in response to a request from Mr.
19 McLeod, or can you tell?

20 A It was. Interestingly, I got the same
21 question from Miss Davis at COLT and Mr. McLeod
22 about the same time and the question was what tax
23 benefits were available to farmers and ranchers and
24 I see that I forwarded the more detailed email that
25 I had sent to Miss Davis, that I forwarded to Mr.

1 McLeod in addition to adding some other
2 information.

3 Q Now, this is November 8th, 2007, is that
4 correct?

5 A Both of the emails were November 8th, 2007.
6 One appears to be 9:44 a.m., the other one appears
7 to be 10:00 o'clock a.m.

8 MS. McWILLIAMS: We would offer Defendant's
9 Exhibit 34 in evidence, Your Honor.

10 MR. PENDARVIS: No objection.

11 THE COURT: Defendant Exhibit 34 is admitted
12 without objection.

13 (November 8, 2007, emails marked and received
14 in evidence as Defendant's Exhibit 34).

15 BY MS. McWILLIAMS:

16 Q Now, do you recall when COLT became involved
17 in the project? Does the mail refresh your
18 recollection or do you know?

19 A I don't recall specifically off the top of my
20 head. It would have been somewhere in the fall of
21 2007.

22 Q All right. Attached to this email is an
23 actual statute but it appears you were actually
24 discussing Tax Code Section 170(H) with Miss Davis,
25 is that correct?

1 A That's correct.

2 Q Does she have a specific role at COLT?

3 A Well, she's a staffer there. She works
4 part-time for COLT, I think she assisted Sue Green
5 in producing base line studies and doing some of
6 the administrative work of the organization.

7 Q All right. As of November 8th, 2007, do you
8 know whether or not it was already envisioned what,
9 if any, role COLT might play?

10 A Well, I think by that time Mr. McLeod and I
11 had discussed whether Community Open Land Trust,
12 COLT, may be interested in receiving a conservation
13 contribution from the farm near Manning.

14 Q Mr. Hanlin, at some point did COLT actually
15 approve the acceptance of the conservation easement
16 if Mr. Justice had continued to place it?

17 A Yes, it did.

18 Q And in connection with the Board vote, did
19 you vote to approve the acceptance of the
20 conservation easement as had been made?

21 A No, ma'am. My role was to make COLT and the
22 other Board members aware of the possibility of
23 this conservation contribution but I abstained from
24 voting since I had other involvement with the
25 matter.

1 Q Is that maybe another example of a conflict?

2 A Yes. I mean, I certainly had some
3 professional involvement so I didn't want my
4 professional involvement in any way influence the
5 vote on the matter, so I abstained from voting.

6 Q All right. And let me just, if I could, ask
7 you to identify a couple documents, Mr. Hanlin,
8 that are not in the chain. Let me show you what
9 has been marked as Defendant's Exhibit 47 and see
10 if you can identify that?

11 A Yes, I can.

12 Q And what is Defendant's Exhibit 47?

13 A That's an email sent from me to Mary Mohr at
14 Yancey Environmental Solutions asking about the
15 consultation agreement in this matter.

16 Q All right.

17 MS. McWILLIAMS: Your Honor, we would offer
18 Defendant's Exhibit 47 into evidence.

19 MR. PENDARVIS: No objection.

20 THE COURT: 47 is admitted admitted without
21 objection.

22 MS. McWILLIAMS: Thank you, Your Honor.

23 (November 27, 2007 Mohr to Y.E.S. email
24 marked and received in evidence as
25 Defendant's Exhibit Number 47).

1 BY MS. MCWILLIAMS:

2 Q Now, what is the date of the email from you?

3 A It is dated, excuse me, dated November 27,
4 2007.

5 Q All right. As of that date what were you
6 trying to find out from Miss Mohr or Y.E.S.?

7 A Well, it appears from the exhibit that Dr.
8 Hawkins had been contacted about an appraisal but
9 we still hadn't received the signed consultation
10 agreement from Mr. Justice, so we were kind of
11 pressing to get that consultation agreement signed.

12 Q All right. But notwithstanding that, you
13 didn't have an actual signed one but were you still
14 attempting to respond to matters that you were
15 asked to do?

16 A It looks like we were still trying to press
17 forward on the assumption that Mr. Justice would
18 sign the consultation agreement.

19 Q All right. Did there come a point in time,
20 let's go right to this, Mr. Hanlin, when you found
21 out about this IRS investigation?

22 A Yes.

23 Q Can you explain for the jury how you --

24 THE COURT: Let me talk to the lawyers.

25 (Unrecorded bench conference).

1 THE COURT: We're going to break for the day.

2 You all put your stuff away, don't discuss the
3 case, 9:00 o'clock in the morning, Miss Meyer.

4 JUROR: Yes.

5 THE COURT: We'll start at 9:00 o'clock. We
6 don't have anything like the videos, getting those
7 videos organized is difficult, so I apologize for
8 that, that will be my fault, but you all have a
9 good evening, see you in the morning.

10 (Jury excused from the courtroom).

11 THE COURT: All right, what time would you
12 like us here? I drop my son off and pick Megan up
13 about 7:30, I will be here 8:30, a quarter until
14 9:00.

15 You can step down, Mr. Hanlin. You
16 understand your limitations conversing with your
17 lawyers tonight, you can talk about the weather,
18 that's it.

19 THE WITNESS: Okay.

20 THE COURT: All right. Not having a video or
21 something, admissibility of something, I don't
22 anticipate any motions beforehand. I'll be here
23 early anyway, so we'll start 9:00 o'clock sharp.

24 MS. McWILLIAMS: Thank you, Your Honor.

25 THE COURT: Okay, thank you.

(Recessed at 4:48 p.m., March 5, 2012).

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

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

14 October 8, 2012
15
16
17

18 Henry P. Young

19 Court Reporter
20
21
22
23
24
25

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS
2010-CP-40-3297

2 COUNTY OF RICHLAND

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

6)
7 -vs-)

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

10 Defendants.)

11 February 27-March 6, 2012

12 B E F O R E:

13 HONORABLE EUGENE GRIFFITH, JR.

14
15 A P P E A R A N C E S:

16 THOMAS A. PENDARVIS, Esquire
17 CAREY KERNEY, Esquire
Attorneys for the Plaintiffs

18 SUSAN P. McWILLIAMS, Esquire
19 DANIEL C. LEONARDI, Esquire
Attorneys for the Defendant

20
21 Henry P. Young

22 Court Reporter

23
24
25 VOLUME V of V

1 (Reconvened at 9:07 a.m., March 6, 2012).

2 THE COURT: Are you all ready to go?

3 MS. McWILLIAMS: Just one second.

4 THE COURT: Go get them for me, please.

5 BAILIFF: All right.

6 (The jury returned to the courtroom).

7 BAILIFF: The jury is all present, Your
8 Honor.

9 THE COURT: Thank you very much.

10 Miss Meyer, we're ready to continue.

11 Miss McWilliams, still your witness.

12 MS. McWILLIAMS: Thank you, Your Honor.

13 BY MS. McWILLIAMS:

14 Q Good morning, Mr. Hanlin. I believe when we
15 broke yesterday I had posed a question about the
16 IRS notice. I would like to back up, if I could,
17 and ask you a couple questions just for
18 clarification. Were you involved as counsel for
19 Y.E.S. or anybody in connection with the proposed
20 mitigation bank that there has been some testimony
21 about in the summer of 2007?

22 A No, ma'am.

23 Q When did you first become aware that that
24 had, there had been some study of that or some look
25 at that?

1 A It would have, excuse me, been when Mr.
2 McLeod called me in the fall, which I think was
3 maybe late October, something like that.

4 Q All right. I will show you a couple more
5 documents. I hand you what has been marked as
6 Defendant's Exhibit 48 and ask you if you can
7 identify that?

8 A It's an email mail from me to Dr. Hawkins.

9 Q What is the date of that?

10 A November 27th, 2007.

11 MS. McWILLIAMS: We offer Defendant's Exhibit
12 48 in evidence.

13 MR. PENDARVIS: No objection.

14 THE COURT: Defendant's 48 in without
15 objection.

16 (November 27th, 2007, email marked and
17 received in evidence as Defendant's Exhibit
18 Number 48).

19 BY MS. McWILLIAMS:

20 Q Now, Mr. McLeod, why were you sending this
21 email to Dr. Hawkins?

22 A Mr. Hanlin, I assume you meant?

23 Q Mr. Hanlin, I'm sorry, I apologize. Mr.
24 Hanlin, why were you sending this email to Dr.
25 Hawkins?

1 A Well, let me look real quick. It looks like
2 we needed Dr. Hawkins to do the appraisal at that
3 point. At that point we were trying to keep that
4 moving forward, and it also says that we expected
5 our consultation agreement to be signed that day.

6 Q That's right. In the second paragraph, is
7 this -- was your email in response to anything?

8 A If it was, I do not recall.

9 Q Do you see the email right below it where Mr.
10 Hawkins has emailed you?

11 A Yes, I do, I'm sorry. Of course that would
12 have come first. It said, "Had not heard from you
13 since I sent proposal, should I still plan on being
14 there on the 11th of December?"

15 Q What was the 11th of December?

16 A I don't know what day of the week that was.

17 Q I mean what was going to occur?

18 A I think he was planning to come down to the
19 site and make a site visit and look at the property
20 so that he could then proceed to do this appraisal
21 work.

22 Q And it says in there, you actually tell him
23 to still plan to come, correct?

24 A That's right. I mean, we hadn't had any
25 indication to the negative that his proposal would

1 not be signed nor any of the other proposals would
2 not be signed.

3 Q All right. Who did you copy on your email?

4 A I copied Yancey Environmental Solutions, Mr.
5 McLeod.

6 Q Did you hear anything from Mr. McLeod after
7 you sent this email to Dr. Hawkins and cc'd Yancey
8 Environmental Solutions about timing or concern or
9 rescheduling the site visit? Do you remember
10 anything like that?

11 A If I did I don't recall. I knew that Mr.
12 McLeod and I were in regular communication along
13 this time and I copied him on my emails, we had
14 phone calls, we talked about -- I don't know if we
15 talked about this specifically or not.

16 Q All right. I'm going to show you what, Mr.
17 Hanlin, has been marked as Defendant's Exhibit 52
18 and ask you if you can identify that for the jury
19 and the Court?

20 A It's an email also dated November 27th from
21 me to Yancey Environmental Solutions.

22 Q All right. Is that your handwriting on the
23 no suggested changes, do you recognize whose
24 handwriting that is?

25 A I don't believe that is my handwriting. It

1 appears -- I'm not sure. It could be Mr. McLeod's
2 handwriting or someone else's but I couldn't say.

3 Q All right.

4 MS. McWILLIAMS: Your Honor, we would offer
5 Defendant's Exhibit 52 in evidence.

6 MR. PENDARVIS: No objection, Your Honor.

7 THE COURT: Defendant's 52 without objection.

8 (November 27, 2007 email marked and received
9 in evidence as Defendant's Exhibit 52).

10 BY MS. McWILLIAMS:

11 Q Now, Mr. Hanlin, you asked Mr. -- it is
12 actually addressed to Mary, is that correct, Mr.
13 McLeod's sister?

14 A Well, yes, actually all the emails that I
15 sent to Mr. McLeod would have gone through Mary.
16 Mr. McLeod doesn't use a computer, as we heard him
17 say earlier, so this one in particular was
18 addressed to Mary.

19 Q All right. And you asked her to get Yancey
20 to review this letter and if they needed any
21 changes, to tell you?

22 A That's correct.

23 Q Now, what was the purpose of this letter to
24 Mr. Justice which is the attachment? It says care
25 of David Harrah, do you see that?

1 A I do. Give me a second to read it, if you
2 would.

3 Q Sure.

4 A It looks like the letter was to attempt to
5 prompt Mr. Justice to sign Dr. Hawkins' proposal
6 and of course that would have been a proposal to do
7 an appraisal on the property and it mentions that
8 Dr. Hawkins is very busy that time of year and we
9 need to act quickly if we want Dr. Hawkins to work
10 with us on this project.

11 Q All right. Are you aware of whether or not
12 that agreement that you have prompted Mr. Harrah to
13 get Mr. Justice to sign was ever signed?

14 A To my knowledge it was never signed.

15 Q I will show you what has been marked as
16 Defendant's Exhibit 55, Mr. Hanlin.

17 A Yes, ma'am, I see that.

18 Q All right. Can you identify what 55 is?

19 A Well, it's two emails. The first one is from
20 me to my assistant Sandra Lummer on November 8,
21 2007, talking about a fee agreement with Wyche and
22 Guest. The second is a reply email from Sandra to
23 me talking about the fee agreement or setting up a
24 file, yes, fee agreement and setting up a file.

25 MS. McWILLIAMS: Your Honor, the defendants

1 would offer Exhibit 55 into evidence.

2 MR. PENDARVIS: No objection, Your Honor.

3 THE COURT: Defendant's 55 in without
4 objection.

5 (November 8, 2007 email marked and received
6 in evidence as Defendant's Exhibit 55).

7 BY MS. MCWILLIAMS:

8 Q Now let me ask you some questions about this,
9 Mr. Hanlin. There has been some exhibits marked
10 previously through Professor Adams, do you remember
11 that?

12 A Yes, I remember some exhibits being
13 introduced.

14 Q All right. And we looked at the fee
15 agreement yesterday. Do you have, do you need that
16 in front of you or do you know what, do you
17 understand your agreement?

18 A I understand the agreement.

19 Q All right. Now, under the agreement did
20 Y.E.S. have to pay anything to RPR, and if so,
21 when?

22 A Well, it was not obligated to pay anything to
23 RPR that I recall. Well, it says one-third of any
24 fees paid to Yancey Environmental Solutions. Maybe
25 I should get that agreement in front of me just to

1 make sure I recall the particulars.

2 Q Plaintiff's 10, Mr. Hanlin.

3 A Okay. I'm sorry, what was your question?

4 Q My question is, is the payment to RPR
5 dependent on anything?

6 A Well, it depends on what is paid to Y.E.S.
7 and so if Y.E.S. isn't paid anything, then
8 Richardson Plowden, the other party to the
9 agreement, isn't paid anything.

10 Q All right. Would you describe that as -- let
11 me back that up. If the agreement had been an
12 hourly one, your typical hourly one as you said you
13 had with the other landowners that you represented
14 before --

15 A Right.

16 Q -- What if anything would Y.E.S. have had to
17 pay if you had an hourly agreement with Y.E.S.?

18 A Well, if we had an hourly agreement, then we
19 would have billed Y.E.S. probably on a montly basis
20 and they would have had to pay as we worked along
21 on the project rather than when they got paid.

22 Q All right. And if, as I understand your
23 testimony, if Y.E.S. does not get paid he does not
24 owe Richardson Plowden anything?

25 A That's correct.

1 Q Now let me show you, there was some testimony
2 about Plaintiff's Exhibit 2. Let me ask you just
3 very quickly about Plaintiff's Exhibit 2.

4 A Yes, ma'am, I see it.

5 Q What is Plaintiff's Exhibit 2? It says it's
6 a new client matter form. What is that?

7 A Well, it is simply a form that Richardson
8 Plowden would have used internally to create a new
9 file and it would have been a trigger to open a
10 file on the computer, assign a number to it so that
11 things could be tracked, my time could have been
12 tracked, the work that I did on the matter could
13 have been tracked. It was for internal purposes.

14 Q All right. Now look, calling your attention
15 to Defendant's Exhibit 55 which we just marked,
16 which is your email to Miss Lummer about the fee
17 agreement?

18 A Yes, ma'am.

19 Q Did you instruct her to set it up as an
20 hourly arrangement?

21 A No. It looks like I instructed her on the
22 second sentence on that lower email, "Please
23 prepare a fee agreement. The fee will be one-third
24 of any fees paid to Yancey Environmental Solutions
25 by Justice."

1 Q All right. Now looking again, I apologize
2 for jumping back and forth, Mr. Hanlin, but looking
3 at Plaintiff's 2, can you tell by that, any date or
4 anything on the document, exactly when this file,
5 new client matter form was first filled out?

6 A Well, the document itself, I'm not sure I can
7 tell. There is a date indicated in the upper
8 left-hand corner that says 10/27 but I don't know
9 if that's the date this was created or if that's
10 the last date the form was revised or just what
11 that is, but it appears this was done in response
12 to my email of November 28th.

13 Q And in fact is this a document, Plaintiff's
14 Exhibit 2, is this something that you review and
15 approve or who handles setting this up?

16 A No, Sandra, my assistant, would have set this
17 up and I don't recall that I ever saw this until
18 this action.

19 Q All right. But in any event, was Y.E.S. ever
20 sent a bill either montly or otherwise in
21 connection with your work in this matter?

22 A No, ma'am. And if I could, I would add there
23 was never any agreement to bill them hourly. The
24 problem with an hourly billing is that has to be
25 paid concurrently and, you know, that would have

1 been, I think, problematical for Y.E.S.

2 Q All right. Did Y.E.S. -- let me ask you
3 about one more document just to make sure.

4 Let me ask you to look at Plaintiff's Exhibit
5 7, Mr. Hanlin.

6 A Yes, ma'am.

7 Q This is the letter that Mr. McLeod has
8 testified about he sent to Mr. Justice. Correct?

9 A It appears to be, yes, ma'am.

10 Q And it has the proposed consulting agreement
11 attached, correct?

12 A Yes, ma'am.

13 Q All right. Now, under the proposed
14 consulting agreement did Y.E.S. have a guarantee of
15 payment?

16 A Well, I think the consulting agreement
17 contemplates two things. One thing it contemplates
18 is a nonrefundable retainer of \$50,000 and then it
19 also contemplates payment based on the value of an
20 easement if in fact an easement is recorded.

21 Q Under the proposed consulting agreement if
22 Mr. Justice had signed it would he have been
23 obligated to place the conservation easement?

24 A No, ma'am. He could have decided whatever he
25 wanted to decide at any stage.

1 Q All right. Do you have any explanation for
2 why the Plaintiff's Exhibit 2, the new client
3 matter form, doesn't say contingent, the box isn't
4 checked contingent, do you know why?

5 A I don't know why. I know that I did not use
6 the word contingent in reference to this matter and
7 the reason is because contingent fees have a
8 particular meaning under the tax code and so I
9 never used the word contingent in describing this
10 representation.

11 Q But in fairness the one-third/two-thirds
12 split is akin to a contingent fee, is that fair?

13 A I called it a percentage. There are issues
14 with that in the tax code but it is not an hourly
15 fee, it is not a flat fee.

16 Q All right. And did you satisfy yourself
17 there were no issues with this agreement under the
18 tax code or otherwise?

19 A I did.

20 Q All right. Now let me hand you Plaintiff's
21 Exhibit 6 which there was some testimony yesterday
22 by someone.

23 A Yes, ma'am.

24 Q Do you recognize this email, Mr. Hanlin?

25 A I do. Give me just a second to look it over,

1 if you don't mind. Yes, ma'am, it's an email sent
2 by me to Yancey Environmental Solutions on November
3 21st, 2007.

4 Q And the subject is farm land conservation
5 easements, correct?

6 A That's correct. And there is also some
7 analysis of S corporations versus other
8 corporations and what the deductions could be in
9 those circumstances.

10 Q Now, the next to last sentence you said, "I
11 want to be sure that I'm thinking about this
12 correctly and that we get the right language in our
13 documents. When you have a chance could you give
14 me a call and help me think this through?" Do you
15 see that?

16 A I do.

17 Q All right. To what documents were you
18 referring?

19 A Well, I don't know that we were talking about
20 any specific document at that time. We would have
21 wanted to incorporate the thoughts expressed here
22 into the conservation easement itself at some point
23 and the question was is the fact that this property
24 is being preserved for farm land by itself enough
25 to qualify as a conservation easement, and I was

1 expressing to Mr. McLeod that it looked like there
2 needed to be some other public benefit, not just
3 preservation of farm land.

4 One of the nice things about this property,
5 though, it is bisected by a highway, so that the
6 farm land that was preserved would have been
7 available for viewing by the public and that kind
8 of thing, so I think we resolved that question to
9 my satisfaction.

10 Q Do you recall talking with Mr. McLeod after
11 the 21st about these issues with respect to the
12 preservation of farm land?

13 A I don't know that I have independent
14 recollection of a conversation with Mr. McLeod but
15 this email suggests that we did have that
16 conversation.

17 Q All right. And I'm handing you what has
18 previously been entered as Defendant's Exhibit 45.
19 Do you recall ever receiving that model easement
20 language that Mr. McLeod had?

21 A This is an email directed to me from Mr.
22 McLeod but to be honest, I do not remember
23 receiving it.

24 Q All right. Actually you're not on this, Mr.
25 Hanlin. Please look at it carefully. You're not

1 on there.

2 A I'm sorry. It looks like Yancey McLeod, I'm
3 sorry, to Yancey at Mindspring.dot com, and just
4 guessing, but it looks like it was sent by Yancey's
5 son to Yancey.

6 Q I'm just asking if you ever got it. You do
7 you recall getting it?

8 A I don't recall. I just don't recall whether
9 I did or not.

10 Q All right. But you see it is dealing with
11 some of these farm land issues?

12 A I do.

13 Q Now, one of the other issues that is
14 mentioned in Plaintiff's Exhibit 6, before we leave
15 that, Mr. Hanlin, in the first paragraph, it's the
16 tax advantages. Do you see that?

17 A First paragraph or second paragraph?

18 Q Well, there are some discussions of
19 deductions first.

20 A Well, it is all talking about tax. Let's
21 see.

22 Q Do you see that?

23 A Tax advantages?

24 Q No, I'm just asking in general.

25 A Oh, yes, sure. Is that what you were talking

1 about?

2 A That's right.

3 Q Now, there has been some testimony in the
4 case about a change of law, in the laws regarding
5 conservation easements between 2006 and 2007. Is
6 that right?

7 A Well, there was, yes, it talks about --

8 Q I'm sorry, 2007 and 2008, I'm sorry.

9 A Yes, it talks about the carry forward and the
10 maximum deduction as compared to for 2006 and 2007.
11 And what occurred was that there were very
12 favorable, generally very favorable tax laws for
13 2006 and 2007 dealing with conservation easements.
14 And just to put it in a nutshell, in 2006 and 2007
15 a landowner, taxpayer could deduct up to 50 percent
16 off his adjusted gross income, if he made a
17 contribution in the first year he could deduct that
18 amount, and if he still had some deduction left he
19 could carry that forward for up to fifteen years.
20 And that was better than it had been. Prior to
21 2006 and 2007 a taxpayer could deduct only up to 30
22 percent off his adjusted gross income and could
23 only carry forward the deduction for five years,
24 and so the tax law generally was more favorable in
25 years 2006 and 2007 but as applied to a particular

1 taxpayer, it just depended on what their
2 circumstances were, so even though the law was
3 different in 2007 than, say, it was in 2008, for a
4 particular individual it might not make any
5 difference at all. And so we knew that the
6 favorable tax situation was going to expire at the
7 end of 2007 but even then there was pending
8 legislation to make those tax changes permanent and
9 in fact those tax changes were made permanent, as I
10 recall, in the farm bill that was passed in May of
11 2008. So, these tax benefits that we thought might
12 expire at the end of 2007, or might not, eventually
13 were made permanent, as permanent as anything is in
14 the tax code. In 2008, May of 2008, I think is
15 when that was passed.

16 Q All right. Now, a couple more subjects
17 before we go back to our chronology. Now, there
18 has been some emails, Mr. Hanlin, entered in this
19 case. Let me show you first Plaintiff's Exhibit 8
20 and ask if you could take a look at that?

21 A Yes, ma'am, I see it.

22 Q All right. And do you remember getting this
23 email from Mr. Rebollo?

24 A I do.

25 Q And who is Tony Rebollo?

1 A Tony Rebollo is a tax attorney at Richardson
2 Plowden.

3 Q Is he, do you know whether or not he handles
4 conservation easement transactions?

5 A He does not.

6 Q All right. Now, did you have any further
7 discussions and followup with Mr. Rebollo?

8 A I think there were several emails actually,
9 and I think that Mr. Rebollo and I talked in the
10 hallway, that kind of thing.

11 Q And did you satisfy yourself with respect to
12 who the client was and who the firm did represent
13 and who it didn't represent?

14 A Well, we had some discussion in the firm
15 about that and, yes, we decided that it wouldn't be
16 proper for us to represent anybody in the
17 transaction other than Y.E.S.

18 Q And then we have already looked at,
19 yesterday, the letter to Mr. Justice that you sent.
20 Correct?

21 A Yes, right.

22 Q And let me show you -- let me back up before
23 I leave that. Did Mr. Harrah ever ask you for any
24 tax advice on behalf of Mr. Justice?

25 A No. Initially, after I got his contact

1 information from Mr. McLeod I called Mr. Harrah and
2 just talked to him generally about conservation
3 easements and how they worked and the tax benefits
4 and that kind of thing, and he seemed very passive,
5 very disinterested.

6 Q Did he ask you to represent Mr. Justice?

7 A No, absolutely not.

8 Q Would you have represented Mr. Justice?

9 A I couldn't have. There would have been a
10 conflict between representing Mr. Justice and
11 representing Y.E.S. at that point. We had already
12 given tax advice to Y.E.S. from virtually the
13 commencement of the representation, so for me to be
14 a tax adviser to Mr. Justice would have been
15 improper.

16 But the first conversation I had with Mr.
17 Harrah, I don't remember exactly how long it
18 lasted, 30 minutes, half an hour, maybe something
19 like that, and I laid all this out and, I mean, he
20 had no questions, which is very unusual.

21 Q Now let me show you what has been marked as
22 Plaintiff's Exhibit 20. It's another email string
23 between you and Mr. Rebollo.

24 A Yes, ma'am, I see that.

25 Q Now, Mr. Rebollo has sent this to you and to

1 Mr. Mack. Correct?

2 A Yes.

3 Q All right. And what was Mr. Mack's role at
4 the firm at the time?

5 A Mr. Mack was the managing shareholder at the
6 time.

7 Q All right. Now, Mr. Rebollo said, "I still
8 don't fully understand RPR's role. I realize I
9 haven't worked on any of this and that transactions
10 like the one under consideration are not my area so
11 if I am way off base with respect to the following
12 questions and concerns that may be why."

13 Now, had Mr. Rebollo been involved in
14 connection with the proposed transaction for the
15 Black River Farms?

16 A Not involved. We occasionally bounced
17 questions off each other in the law firm and so he
18 knew about the transaction but he was not involved
19 in the transaction.

20 Q And it is, is Plaintiff's Exhibit 20, does he
21 raise a series of questions?

22 A He does.

23 Q All right. And did you respond to him in
24 connection with these questions?

25 A Well, I believe I did. I don't see the

1 response here but we did, I believe we talked about
2 it at some point or might have sent him an email.
3 I'm sure if I did it's available. But I looked at
4 each of these concerns and I was satisfied that we
5 did not run afoul of any of the things that he
6 brought up.

7 Q All right. Now, why didn't you send all
8 these emails or copy Mr. McLeod on all these emails
9 or talk to him about them?

10 A Well, I didn't think that any material issues
11 were raised. For instance, Mr. Rebollo talks about
12 whether this is a reportable transaction, and
13 reportable transactions are an area that need
14 cautious proceeding but generally reportable
15 transactions fit in several categories. One is if
16 the attorney says to the client, "This is
17 confidential information that I'm giving you, you
18 cannot reveal it to any other person." In other
19 words, the attorney tries to keep it proprietary.

20 Another category would be a listed
21 transaction. The IRS maintains a list of
22 transactions and those listed transaction generally
23 are when someone purchases an interest in a
24 business or partnership and then tries to take
25 deductions that are either equal to or

1 approximately equal to or even greater than their
2 investment in the transaction. In other words,
3 what they are trying to do is purchase a deduction
4 and the IRS frowns on that.

5 So the issues that he raised were not issues
6 in this case. For instance, when you're talking
7 about a reportable transaction, usually a
8 reportable transaction has both a purchase and a
9 deduction. In this case we only had a deduction.
10 There was no purchase, there was no purchase by
11 anybody on behalf of Jim Justice who swoops in,
12 grabs a tax deduction and leaves, which is what the
13 reportable transactions typically are.

14 So, all we had was the donation of a
15 conservation easement and a conservation easement
16 is a program established by the United States
17 government, it's established by Congress, so if
18 someone wants to make a conservation contribution
19 it's certainly not a reportable transaction in that
20 context and it's something that is sanctioned by
21 Congress. I mean, this is not a reportable
22 transaction.

23 So, that is just an example, you know. He
24 raises other questions but I was satisfied those
25 questions didn't pertain to this transaction.

1 Q All right. Now, also marked earlier in
2 Professor Adams' testimony were Plaintiff's 13, 16
3 and 17 and I ask you, Mr. Hanlin, if you could
4 explain what those documents are?

5 A Well, these are apparently draft documents of
6 some type dealing with Mr. McLeod or Mr. McLeod's
7 client, Y.E.S.' client and as I testified in my
8 deposition I don't have an independent recollection
9 of these. I don't know precisely what they are
10 for.

11 In looking at some of the additional
12 correspondence pertaining to these, it looks like
13 these were done in contemplation of representing
14 other clients of Y.E.S. or representing Y.E.S. in
15 reference to other clients.

16 Q In other deals?

17 A Yes, ma'am.

18 Q Now, there are a couple minutes of the
19 executive committee. Were you on the executive
20 committee, Mr. Hanlin?

21 A No, ma'am.

22 Q Let me show you Plaintiff's Exhibits 12 and
23 14, I think.

24 A Yes, ma'am.

25 Q Did you attend either of those meetings, if

1 you recall?

2 A I remember that I did attend one meeting of
3 the executive committee. I don't see on Exhibit 14
4 from December 12th that I was present. There is a
5 reference to me, GHH, on the minutes of the
6 December 6 meeting.

7 Q That is Plaintiff's 12?

8 A That's Plaintiff's 12.

9 Q All right. Now, the Plaintiff's 12 states
10 that FMM was going to work with GHH. Is GHH you?

11 A That's correct.

12 Q And who again is the FMM?

13 A FMM would have been Mr. Frank Mack.

14 Q The entire sentence of these minutes say EC
15 reviewed information regarding potential cases
16 relating to conservation easements

17 Do you recall discussing that subject matter
18 with EC?

19 A I do.

20 Q Concerns were raised regarding fee
21 arrangements and documentation of legal issues and
22 advice. Do you see that?

23 A Yes, ma'am, I do.

24 Q And do you recall discussing that with the
25 executive committee?

1 A I do. I don't remember if this meeting or
2 some other meeting but I did talk with the
3 executive committee about these conservation
4 easements and making sure that our fee agreement
5 was proper.

6 Q All right. Was there a concern that Mr.
7 Justice might think that the firm represented him
8 as well?

9 A Well, I think --

10 MR. PENDARVIS: Your Honor, I object,
11 leading.

12 MS. McWILLIAMS: I'll rephrase it, Your
13 Honor.

14 THE COURT: Rephrase it. Sustained as to
15 leading.

16 BY MS. McWILLIAMS:

17 Q Do you recall specifically what the executive
18 committee's concern was with respect to the
19 documentation of legal issues and advice?

20 A Well, I think the EC was concerned that we do
21 this properly and that we knew who our client was
22 and they wanted it done the right way.

23 Q All right. As far as you know were you
24 satisfied or was the executive committee satisfied
25 when you left the meeting that you were going to

1 address those issues with Mr. Mack?

2 A Well, I really couldn't say about the EC, I'm
3 sorry. I don't know if they continued to meet
4 after I left or if they adjourned at that point, I
5 really don't know. But Mr. Mack and I did have
6 some follow-up discussions about the arrangements.

7 Q All right. And in connection with the
8 letters that were sent to, the fee agreement that
9 was sent to Mr. McLeod and the letter that was sent
10 to Mr. Justice, both dated December 5th, did anyone
11 else in the firm review those before they went?

12 A I believe that Mr. Mack would have reviewed
13 those.

14 Q All right. And after those were sent did you
15 ever get any questions from your client Y.E.S.
16 about either document, either the fee agreement or
17 the letter to Mr. Justice?

18 A No, ma'am.

19 Q Let me show you one more, two more.
20 Plaintiff's Exhibit 22, I ask you, Mr. Hanlin, if
21 you recognize that?

22 A I recognize this from these proceedings, yes,
23 ma'am.

24 Q All right. And does that appear to be the
25 conservation easement in connection with this

1 matter?

2 A Let's see. It says County of Clarendon, let
3 me see who is on the signature pages. It refers to
4 3,000 acres. I believe that does pertain to that.

5 Q Do you recall Miss Green's testimony she
6 recalls discussing with you the conservation
7 easement, do you recall that?

8 A I remember her saying that she prepared a
9 conservation easement. Whether we discussed it, I
10 don't recall.

11 Q Does it appear that document that was on the
12 Richardson Plowden server, there has been any
13 changes made to it?

14 A I see a couple editorial ticks, if you would.
15 There are a couple lines on the left margin of this
16 exhibit and that could and probably does indicate
17 that a change was made.

18 Q Do you know, as we sit here today do you
19 recall what the changes are?

20 A I don't recall what the changes are. I see
21 that there is two formatting changes but I don't
22 know, three or four formatting changes. All I know
23 is what I see, I don't recall making any changes to
24 this document.

25 Q All right. You don't recall working on the

1 conservation easement for Mr. Justice's easement?

2 A I don't.

3 Q All right. Now, one more. Let me show you
4 Plaintiff's Exhibit 21 which appears to be a draft.
5 Well, let me ask you is that a draft letter you
6 sent?

7 A Yes, ma'am, I see that.

8 Q And I'm handing you back Plaintiff's Exhibit
9 15, Mr. Hanlin. In that email is there any
10 indication that you're preparing a letter to Mr.
11 McLeod? I want to call your attention to the next
12 to last paragraph.

13 A Yes. Let me take a second to read here.
14 Yes, ma'am, I see that.

15 Q All right. It says, "I am working, Sandra
16 and I are also working on a letter memorializing
17 our discussion with Yancey about various
18 considerations pertaining to the project"?

19 A Yes, ma'am, I see that.

20 Q That is December 13th.

21 A The email from me to Mr. Mack is written on
22 December 13, yes, ma'am.

23 Q All right. And do you know whether or not
24 the document that I have handed you, the letter
25 that is dated December 19th, do you know whether

1 that's the letter you were working on?

2 A It appears so. To be honest, I have no
3 independent recollection of whether these go
4 together but that certainly seems to be what the
5 document suggests.

6 Q Do you recall working on the letter to Mr.
7 McLeod?

8 A I do. I do recall working on a letter to Mr.
9 McLeod.

10 Q And do you know why that was not sent to Mr.
11 McLeod?

12 A I don't know. It looks to me like if I were
13 going to send that it would have required some
14 additional revisions. I don't know that there was
15 any discussion to send it, in any case.

16 Q All right. What happened on the 20th of
17 December, the next day after that document?

18 A On the 20th of December we got an email from
19 Miss Mohr about a letter from the IRS to Mr.
20 McLeod.

21 Q Okay. Let me show you Plaintiff's Exhibit
22 23. Is that the document you just made reference
23 to?

24 A Yes, ma'am, it is.

25 Q Do you remember that day?

1 A I do.

2 Q All right. And when you -- the email is from
3 Mary to you, is that correct?

4 A It's from Yancey Environmental Solutions to
5 me and it's addressed, concludes, Mary Mohr, yes,
6 so it was sent by Mary to me.

7 Q All right. And what was your first thought
8 when you saw that email that had the letter
9 attached?

10 A Well, I thought it was a very serious matter,
11 and the letter from the IRS is dated December 17
12 and it was like there is a 30 day response time and
13 by the time I got the letter it was Thursday,
14 December 20.

15 Q All right. Now, what did Miss Mohr say she
16 was going to do with the letter with respect to Mr.
17 McLeod?

18 A The email says that they received this notice
19 yesterday from the IRS and that she and another
20 staffer have reviewed it and it's important but
21 they haven't shown it to Yancey and said they
22 weren't going to, unless I told them otherwise,
23 until after Christmas.

24 Q All right. Did you tell, did you give any
25 instruction to Miss Mohr in that regard?

1 A Well, my recollection is that we needed to
2 take immediate action, that Yancey needed to know
3 about it right away.

4 Q And did you tell her she should tell him
5 about it?

6 A I believe I did. I don't remember if it was
7 by email or just by telephone but I believe I did.

8 Q All right. Now, why is the IRS notice
9 serious?

10 A Well, it's different from any IRS notice I
11 have ever seen and it delves into all, it looks
12 like all conservation matters, conservation
13 easement matters within the statute of limitations
14 and I don't remember ever seeing anything like this
15 before.

16 Q All right. What was the scope of the letter?

17 A Well, it is asking for all documentation for
18 Mr. McLeod, Y.E.S., and other related, and some
19 other related entities, I'm paraphrasing, and let
20 me look. It asks for all documentations
21 specifically pertaining to conservation easement
22 transactions that he's organized or assisted in
23 organization of, all manuals, operations handbooks,
24 prospectuses, all documents and records used to
25 promote, market or advertise, all books, all

1 publications, all legal, accounting and other
2 opinions, list of seminars organized. It just goes
3 on and on about all the things that are required,
4 beginning on January 1st, 2004, through the
5 present.

6 Q Did you believe that you could --

7 MR. PENDARVIS: Your Honor, I object, it's
8 leading.

9 THE COURT: She hadn't quite asked. Let her
10 rephrase it.

11 Q How did you interpret Miss Mohr's email which
12 says, "Deborah and I are most concerned about the
13 cover letter"? What, if anything, did you think
14 she was asking you?

15 A Well, first of all I think she was asking me
16 for advice on this particular matter and I think
17 she was trying to break this to Mr. McLeod gently
18 but I think that was misguided, I think he needed
19 to know about it immediately.

20 Q Did you provide any legal advice with respect
21 to Y.E.S. or its response to the IRS investigation?

22 A No, I didn't.

23 Q And why not?

24 A Well, because it would have been a conflict
25 of interest. I had worked with Mr. McLeod on some

1 of the transactions that would have been
2 encompassed by this notice and so it would have
3 been improper for me to try to give Mr. McLeod
4 advice about this notice when my clients,
5 landowners in separate transactions, expected me to
6 be loyal to them, so there could easily have been
7 some conflict between their interest and Mr.
8 McLeod's interest, I just couldn't do it.

9 Q Did you have a duty of loyalty to Mr. McLeod?

10 A Well, I did have a duty of loyalty to Mr.
11 McLeod but that only takes us as far as the ethical
12 restrictions go and if I have a duty to a client
13 but my ethical requirements tell me I have to do
14 something else, then I have to abide by my ethical
15 requirement.

16 Q Did you have a duty of loyalty to these other
17 clients? Who were they, by the way?

18 A I did have a duty of loyalty to those clients
19 and I have a duty that continues even after the
20 representation is completed. The clients that
21 would have been affected by this were one who had
22 an island off Beaufort and another one who had some
23 property in Clarendon and Sumter counties.

24 Q All right. Now, what did you do after
25 receiving this from Miss Mohr?

1 A Well, I let her know that we needed to make
2 Yancey aware of this immediately rather than later.
3 He only had a 30 day window to answer, according to
4 the terms of the letter, so he needed to be aware
5 of it as soon as possible. And I considered my
6 ethical obligations, considered what I had to do,
7 what I could do, looked at the rule book about
8 ethics and thought about it for a couple hours and
9 then after that I sent an email to Mr. Mack who is
10 managing shareholder of the firm and talked with
11 him about what we should do.

12 Q Let me show you what has been marked as
13 Plaintiff's Exhibit 24. Is that the email you just
14 referenced?

15 A It is.

16 Q All right. Now, Mr. Hanlin -- I will let you
17 read that.

18 A I've seen it.

19 Q Did you want to withdraw from representing
20 Y.E.S.?

21 A No. I was very, very disappointed that I had
22 to withdraw. I thought this was a great project, I
23 wanted to be involved with it, I had been very
24 enthusiastic about it, was delighted to present it
25 to the Community Open Land Trust and I hated to

1 withdraw.

2 Q Now, you heard Professor Adams' testimony
3 that you, all you had to do was convert your fee
4 from a percentage or contingent fee to hourly and
5 you could continue. Do you agree with that?

6 A I do not agree with that.

7 Q Why? Could you explain it?

8 A Changing the fee agreement doesn't change the
9 duties that you have to the client and former
10 client, and I was in a position of conflict. I
11 could not, I could not see that I could give Mr.
12 McLeod my full and undivided attention and loyalty
13 and abide by my obligations to my other client.

14 Q Did Mr. Mack agree with you?

15 A He did.

16 Q Now, Plaintiff's 24, I believe is the email
17 from you to Mr. Mack. Is that right?

18 A Yes.

19 Q And it says you have four recommendations.
20 Do you see that?

21 A I do.

22 Q All right. And the first one was -- can you
23 explain for the jury what that first recommendation
24 was?

25 A Will, the first recommendation apparently

1 already occurred, it says, "I called Mary Mohr and
2 told her Yancey should be advised as soon as
3 possible."

4 Q So you had already called Mary Mohr, is that
5 correct?

6 A I believe that's correct.

7 Q And number two, what did you say?

8 A I said, "Since I have some involvement in
9 some of the transactions being reviewed, Yancey is
10 to retain other counsel to assist him with this. I
11 may be conflicted out at some point. Yancey would
12 be better served to have other counsel from the
13 beginning and I have advised Mary of this."

14 Q And number three?

15 A Number three, "We should terminate any
16 involvement in these projects, with these
17 projects."

18 Q So, that means -- what did that mean in terms
19 of your ability to collect a fee?

20 A Well, I think I had concluded we would not
21 collect any fee at all for this project.

22 Q All right. What was the firm's position with
23 respect to your working and collecting a fee?

24 A Generally or in respect to this?

25 Q Generally.

1 A Well, generally, I mean, all of the attorneys
2 are expected to work hard and be productive and
3 bring in fees.

4 Q Had you had any issues prior to this time
5 that had affected your ability to work and produce
6 fees?

7 A I had had some health issues, I think in
8 2006, so I was not as productive in that year as I
9 wanted to be.

10 Q And had this transaction eventually been
11 consumated did you have any expectation that that
12 would be a good fee for the firm?

13 A Yes, it would be a good fee and of course the
14 fee agreement was with the firm, Richardson
15 Plowden, not me specifically. The firm is not, I
16 guess maybe medium sized firm by Columbia
17 standards, not the largest, not the smallest, but
18 at that time they had I think about a hundred
19 employees and they paid their employees
20 competitively, the healthcare for them and all that
21 and, you know, they do pro bono work, I bet
22 probably a week doesn't go by when they are not
23 representing somebody in court who can't afford to
24 pay for it, so it would have been a nice fee for
25 them but, you know, at a firm like that you get

1 paid on an hourly basis sometimes, part of the time
2 you don't get paid at all and every now and then
3 you get a good fee that makes a good deal that
4 makes up for the time you don't get paid. It would
5 have been a good fee for them but I think their
6 primary concern was do this the right way and make
7 sure we complied with our obligations.

8 Q Did you consider -- well, let me ask it this
9 way. Do you know, based on your withdrawal, did
10 you know what Mr. McLeod planned to do? Let me
11 back up just a minute. Did you have any
12 conversation with Mr. McLeod on the 20th about the
13 IRS letter?

14 A I believe that was the day that he and I
15 talked and I let him know that we would have to
16 withdraw from this and all other representation.

17 Q And during that conversation did Mr. McLeod
18 discuss with you alternate plans for the Justice
19 transaction?

20 A He did not.

21 Q Did he tell you, did he make any statement
22 with respect to whether or not that would affect
23 the Justice transaction going forward?

24 A He did not.

25 Q And before we leave Plaintiff's Exhibit 24,

1 Mr. Hanlin, the fourth recommendation was, "I
2 should inform any of my clients who might be
3 affected by this notice." Do you see that?

4 A I do.

5 Q All right. And do you know whether or not
6 you did that?

7 A I did not do that. I considered that and
8 decided that would be a violation of my duties to
9 Mr. McLeod. I still had a duty of confidentiality
10 to him, whether it be as a client or former client,
11 and I concluded I could not inform my other
12 clients.

13 Q And if the other clients had asked you for
14 representation in connection with the IRS could you
15 have represented them?

16 A Well, no. I already knew a lot about Mr.
17 McLeod and his operation. I hadn't been involved
18 in every conservation easement that he had ever
19 done but I had been involved in some so I still had
20 a duty of confidentiality to Mr. McLeod on some
21 issues and I had a duty of confidentiality to these
22 other clients.

23 Q Basically you were out?

24 A I was out all around.

25 Q Let me show you what has been previously

1 marked as Plaintiff's Exhibit 25. I'm kind of
2 papering you in, Mr. Hanlin, I apologize. Do you
3 recognize that document?

4 A I do. It is dated December 21st, 2007, and
5 it says that we're withdrawing as to all matters
6 with Mr. McLeod.

7 Q All right. But Mr. McLeod knew before that,
8 is that correct?

9 A Yes, ma'am. He knew as a result of our
10 conversation on the day previous.

11 Q All right. Now, I believe you have already
12 testified -- well, let me ask you this. At the
13 point of withdrawal on December 20 did you send a
14 partial bill or a bill for the work that had been
15 done thus far?

16 A No, ma'am.

17 Q No bill was ever sent?

18 A No, ma'am, not to my knowledge.

19 Q And as of December 20 had a closing date been
20 set for the Justice transaction?

21 A No, ma'am.

22 Q Had you received any instructions from Mr.
23 Harrah with respect to finalizing any documents for
24 Mr. Justice?

25 A No, ma'am.

1 Q Well, what did you think that Mr. -- back
2 that up. Did you know what would happen with
3 respect to the IRS investigation or the Justice
4 project, from Mr. McLeod's standpoint?

5 A No, ma'am.

6 Q And after you withdrew were you ever asked
7 for any input with respect to, "What do we do about
8 the IRS investigation or the Justice project?"

9 A No, ma'am.

10 Q Now, there has been some testimony from
11 Professor Adams you did not immediately turn over
12 your file to Mr. McLeod.

13 A That's true.

14 Q Do you recall that?

15 A Yes.

16 Q Why did you not do that?

17 A Well, a lot of the file had already been
18 copied to Mr. McLeod in the form of emails and that
19 kind of thing but I never received any request from
20 Mr. McLeod, I didn't know where he wanted me to
21 send the file.

22 Q All right. Would you have been willing to do
23 that?

24 A Certainly.

25 Q Have you ever had a situation where you have

1 had to send a file out on behalf of a client where
2 you were conflicted out?

3 A I don't recall.

4 Q Now, were you aware at anytime after December
5 20 -- strike that. Did Mr. McLeod ever tell you
6 that he was going to make any recommendations to
7 Mr. Justice?

8 A No, ma'am.

9 Q After December 20, Mr. Hanlin, did you
10 attempt to influence Mr. McLeod in connection with
11 what he disclosed to the IRS?

12 A No, ma'am.

13 Q Did Mr. McLeod ask for any assistance in
14 finding substitute counsel?

15 A No, ma'am.

16 Q And did Mr. McLeod's new lawyers, there has
17 been some testimony regarding Crosby Lewis and
18 Carey Hall, did either of those ever contact you
19 and stated they needed anything from your files?

20 A No, ma'am.

21 Q How would you describe your feelings after
22 you had to withdraw?

23 A I was pretty low and stayed that way for a
24 long time. I wanted to be part of the transaction
25 but I couldn't and it was very frustrating for me,

1 very disappointing for me.

2 Q Were you disappointed for Mr. McLeod?

3 A I was. You know, I didn't know what would
4 occur but I just didn't have the opportunity to
5 assist him any further.

6 Q At any point, Mr. Hanlin, from December 20,
7 2007, until you were served this lawsuit did Mr.
8 McLeod ever inform you, call you, write you, tell
9 you that he blamed you for the transaction not
10 going forward with Mr. Justice?

11 A No, ma'am.

12 MR. PENDARVIS: I object.

13 THE COURT: I'm going to allow that question.

14 Q Did he?

15 A No, ma'am.

16 MS. MCWILLIAMS: Beg the Court's indulgence
17 just a minute.

18 Q Now, Mr. Hanlin, are you aware of any reason
19 that this proposed Justice transaction could not
20 have closed in 2008?

21 A In 2008, no, ma'am, I'm not aware of any
22 reason. In fact, the testimony from Mr. Harrah
23 seemed to indicate that Mr. Justice's income was
24 even greater in 2008 than it was in 2007.

25 Q As we sit here today do you recall Professor

1 Adams telling the jury all you had to do was stay
2 in, finish the transaction, get the fee and worry
3 about the IRS later because the IRS investigation
4 wasn't until January 17th? Did you hear that
5 testimony?

6 A I heard it.

7 Q Do you agree that was an option for you?

8 A No, ma'am.

9 Q And could you explain to the jury why?

10 A Well, there are several considerations. One
11 is that the IRS had given Mr. McLeod a 30 day
12 deadline and a couple of those days had already
13 ticked by so I thought he needed to focus on that
14 pretty immediately, which was why even though Miss
15 Mohr had suggested that we wait until after
16 Christmas to inform Mr. McLeod, I insisted that she
17 inform him right away. They were asking for
18 volumes of documents and thirty days was a short
19 time in which to comply with that kind of request.

20 I'm sorry, your question again?

21 Q Well, as we sit here today was there anything
22 that you think you could have done differently to
23 allow Mr. McLeod to get his fee and you to get your
24 fee and then worry about the conflict later?

25 A Well, it doesn't matter what the fee is. It

1 could have been \$600,000, it could have been
2 \$6,000,000, we can only do the right thing and I
3 just didn't see that it was the right thing to
4 continue to represent Mr. McLeod and, you know,
5 part of that was the confidentiality issues that we
6 had already discussed. I mean, part of it is that
7 if you continue to represent someone you learn
8 things about that person and then if at some other
9 point you're compelled to testify by another
10 person, then I have done the client a disservice by
11 learning more about them and things that go on.

12 So, it just wasn't the right thing for me to
13 do and generally, of course, all these
14 relationships are subject to attorney-client
15 privilege. In other words, under normal
16 circumstances I can't be compelled to reveal what
17 transpired between a client and myself but there is
18 an exception under the rules of professional
19 conduct and if I'm commanded by a judge to testify
20 about these things I have to testify.

21 Q Well, at the point in December, December 20,
22 2007, did you have any reason to believe that Mr.
23 McLeod was a promoter, an illegal promoter?

24 A Well, I had been to Mr. McLeod's office, I
25 had seen some materials pertaining to at least one

1 land transaction where the possibility of a
2 conservation easement was mentioned and so even
3 though in my heart of hearts I do not believe and
4 did not believe that Mr. McLeod had ever promoted
5 any forbidden transaction, I didn't know that. I
6 had been involved in a couple of the transactions
7 that Mr. McLeod has participated in. I had not
8 been involved in all. Part of the problem, if you
9 continue to represent someone I think you have to
10 do it wholeheartedly and if you're afraid to ask
11 questions because of what it might, what the
12 consequences might be in other circumstances, then
13 you're hobbling yourself and not being fair to the
14 client. The client is entitled to the undivided
15 loyalty of his attorney.

16 Q Did you have the other circumstances, meaning
17 the other clients?

18 A I did.

19 MS. McWILLIAMS: One moment, Your Honor.

20 Q I asked you about were you aware of any
21 reason it couldn't close in '08. Would that be
22 true for every year since '08, until now, or do you
23 know?

24 A Well, I think that the law has reverted again
25 in 2011. I'm not sure about exactly when it

1 reverted.

2 As far as the contribution and the tax
3 benefits, my recollection is the tax benefits ended
4 up being the same in 2008 as they were in 2007,
5 they were the same in 2009 and they were the same
6 in 2010 and so there was a change in 2011 but the
7 favorable tax benefit existed for all that time.
8 But as I said earlier, you have to look at an
9 individual's own tax situation and it might not
10 have made any difference at all to an individual
11 taxpayer, so if we're talking about Mr. Justice, he
12 might have had more incentive in 2008 than 2007.

13 I understand that his transaction that we had
14 been concerned about in 2007 actually closed, if I
15 recall correctly, in 2009 so certainly from the
16 testimony of Mr. Harrah it appeared that he had
17 more incentive in 2008 than 2007 and he might have
18 had even more incentive in 2009. I don't know his
19 circumstances but just from what I have heard from
20 the testimony, that is what I believe to be true.

21 Q As we sit here today you're not aware of any
22 reason why the transaction couldn't, if Mr. Justice
23 wanted to, have been done in other years?

24 A I'm not aware of any reason that couldn't be
25 done.

1 MS. MCWILLIAMS: Thank you. I have no
2 further questions.

3 THE COURT: All right.

4 Ladies and gentlemen, this is a good time to
5 take a break. Miss Meyer, you all step back in the
6 jury room. You can't discuss the case. Step back
7 there, we'll have you back shortly.

8 (The jury was excused from the courtroom).

9 (Recessed at 10:20 a.m.).

10 (Resumed at 10:36 a.m.).

11 MR. PENDARVIS: Before we call the jury in, I
12 have some questions involving discovery, things I
13 didn't want to ask, some matters I would like to
14 make sure I'm clear so I don't step afoul, haven't
15 gotten a ruling yet, I don't want to run afoul of
16 what the Court is thinking about that. I want to
17 ask the Court if there is going to be a ruling
18 before I question the witness.

19 THE COURT: Give me a hypothetical what you
20 are thinking about.

21 MR. PENDARVIS: After the second deposition
22 of Mr. Hanlin we got new conservation documents
23 that have different information on them from what
24 had been produced from COLT and I was unable to ask
25 Mr. Hanlin about that, I didn't have the documents

1 when I took his deposition the second time. That
2 is one example. There are just some other things,
3 that is the easiest example to give you.

4 THE COURT: Why can't you characterize this
5 in your deposition, "I didn't have this document in
6 your deposition, can you answer this question for
7 me now," just phrase it this way?

8 MR. PENDARVIS: I could. I could also say,
9 "You all decided not to give me this document."
10 There is a lot of ways I could do that. I'm asking
11 for guidance.

12 THE COURT: I just think your
13 characterization about, "You all failed to do this,
14 I didn't have this when I asked at the deposition,
15 so I ask you that today," you didn't have it, not
16 that, "You all failed to give it to me."

17 MR. PENDARVIS: Okay.

18 THE COURT: All right. You can handle it
19 that way.

20 MR. PENDARVIS: I can handle it a lot of
21 ways, Your Honor, to the best advantage of my
22 client I think it is only fair, I will state on the
23 record I think it is only fair I be able to, you
24 know, delve into the fact they didn't look, they
25 didn't produce it, they didn't ask, they chose not

1 to let me have it and I get to say at least I have
2 taken his deposition twice. I guess I'm asking.

3 MS. McWILLIAMS: Your Honor, may I be heard?

4 THE COURT: Yes, ma'am.

5 MS. McWILLIAMS: In the first place, I
6 thought the Court had already ruled this was not to
7 be injected into the trial of the case. I think it
8 is confusing for the jury and given that Mr. Hanlin
9 was not at Richardson Plowden at the time, it is
10 inherently unfair and that clearly implicates the
11 conduct of the lawyers and as I said before, we're
12 talking about duties of loyalty. The conduct of
13 who failed to look for what and this wasn't
14 provided, that clearly implicates both Nexsen Pruet
15 and the defendant and I just don't think that's
16 fair. I think that we, I have been on record that
17 as soon as the documents were discovered after Miss
18 Lummer's deposition and I stated at the summary
19 judgment hearing on January 27th we will make the
20 witnesses available if need be, I think I stated,
21 "I'll come to Beaufort if I need to," and none of
22 that was taken advantage of. And of course as I
23 said, Nexsen Pruet already paid for additional
24 depositions during which, frankly, the only main
25 subject with the exception of two witnesses was

1 Circular 230, and so the suggestion that a lawyer
2 that is no longer at the firm could somehow be
3 impeached or made to look sloppy by the discovery
4 that went on in the case implicates issues that are
5 not in the case, I think it is improper, I think
6 it's not relevant and certainly is unduly
7 prejudicial under 403 and frankly, Your Honor, at
8 this stage, as I said, I will have to examine my
9 ethical obligations at that point and I think it is
10 improper.

11 MR. PENDARVIS: Your Honor, brief response?
12 She chose to ask him about this conservation
13 document. It sounds as if they recommended every
14 bit of it. He is the guy drafted and gave
15 testimony on what changes to make. To suggest we
16 get it Monday the week before trial --

17 THE COURT: I don't think he testified to
18 that.

19 MR. PENDARVIS: To the extent he made
20 changes, edited the format.

21 THE COURT: I don't think he testified he
22 remembered making the marks, I think was his
23 characterization. I'm going to let you ask the
24 question, "I wasn't provided it, I didn't have an
25 opportunity to ask you about this document when I

1 took your deposition," that way. All the other I
2 think would be patently prejudicial and so I don't
3 want that to become an issue for the jury.

4 MR. PENDARVIS: I'll make sure that doesn't
5 happen, Your Honor.

6 Next question?

7 THE COURT: All right.

8 MR. PENDARVIS: There were discovery requests
9 made for both defendant Hanlin and defendant
10 Richardson Plowden to produce information related
11 to their assets for punitive damages issues. That
12 was denied, trial court said it wasn't ripe and,
13 you know, that is Judge Benajmin's ruling.

14 THE COURT: I didn't say that.

15 MR. PENDARVIS: Judge Benjamin made a ruling,
16 we dealt with it. I'm at this point now where it
17 is ripe and I'm asking the Court, what I had
18 suggested in a proposed order to Judge Benjamin,
19 her discussion of this before she ruled that the
20 motion wasn't ripe, she said, "Well, the way I have
21 seen it dealt with, Mr. Pendarvis," words to this
22 effect were, "The defendant would put some type of
23 statement of their net worth in a sealed envelope,
24 it would be submitted to the trial judge and if and
25 when that conduct triggered the question for

1 punitive damages to the jury became known that
2 would be produced to you during the trial."

3 I'm at this point where I've got the witness
4 on the stand and I need to ask these questions.
5 The testimony of Dr. Adams and Mr. McLeod in the
6 case, we suggest for breach of fiduciary duty and
7 the law of South Carolina does trigger the jurors'
8 decision on whether to award punitive damages and I
9 need to know, under the Gambel case, their ability
10 to pay.

11 MS. McWILLIAMS: Your Honor, first of all we
12 have still pending defendant's motion to bifurcate
13 and what Judge Benjamin described is exactly what,
14 her experience with it was ours and if at the point
15 the Court determined that it will be submitting the
16 issue of punitive damages to the jury and the jury
17 indicates that it is willing to consider a punitive
18 damage, they have to find by clear and convincing
19 evidence, that sort of thing, then at that point
20 Judge Benjamin said, "What I have seen done in
21 other cases, the Court publishes to the jury the
22 statement of net worth."

23 I can't imagine, I mean, that is why in a
24 motion to bifurcate when you're on the liability
25 side you don't go into it otherwise, and as the

1 Court is aware that is now by statute. It doesn't
2 apply specifically to this case because it was
3 filed in 2010, but the statute specifically says
4 the defendant is entitled to a bifurcation, so we
5 will have over the lunch break, if the Court wants
6 to have those sealed, that has not been directed
7 but we'll get them and give them to the judge, but
8 I don't think Mr. Pendarvis now gets to inject it
9 into this case, what Mr. Hanlin's net worth is. I
10 think it is still premature and I don't think under
11 our bifurcation motion that it's appropriate to
12 inject it here.

13 MR. PENDARVIS: Response?

14 THE COURT: Yes, sir.

15 MR. PENDARVIS: If they are willing to
16 provide the Court sealed envelopes with net worth
17 statements for Mr. Hanlin and Richardson Plowden I
18 don't need to go there, we can deal with that.

19 THE COURT: They said they would do that.
20 Whether it gets to the jury or not --

21 MR. PENDARVIS: I understand that, that is
22 why I'm dealing with this now, Your Honor, rather
23 than --

24 THE COURT: All right.

25 MR. PENDARVIS: But if I don't, if that's the

1 agreement, that there will be these sealed
2 envelopes submitted to the Court, then I'm happy,
3 let's get into this cross exam, let's get going.

4 THE COURT: All right. Let's get this
5 cross-examination done, that is probably what I'm
6 going to do in light of hearing the rest of the
7 testimony. That seems appropriate, that seems like
8 it's appropriate under the law, it's appropriate
9 they can do that and that will accomplish
10 everyone's goals.

11 MR. PENDARVIS: If the information is
12 available and if we get to that point that is the
13 concern I've got, I have my witness on the stand
14 for that issue.

15 THE COURT: Okay. Very well. Anything else?

16 MR. PENDARVIS: Nothing, Your Honor.

17 THE COURT: Bring the jury.

18 MR. PENDARVIS: Just for your benefit, I'm
19 going to be asking some questions right off the bat
20 with transcript from depositions of Mr. Hanlin, so
21 we might as well get those out to keep things
22 moving smoothly.

23 (The jury returned to the courtroom).

24 MR. PENDARVIS: Your Honor, I have a copy for
25 you.

1 THE COURT: Is a copy okay?

2 MS. McWILLIAMS: Sure.

3 THE COURT: Okay.

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

6 THE COURT: Very well, we'll continue.

7 Mr. Pendarvis.

8 MR. PENDARVIS: May it please the Court,
9 ladies and gentlemen of the jury.

10 Before we get started, there will be some
11 questions coming up about Exhibit 1. I have made
12 some copies, Madam Forelady, of Exhibit 1 for the
13 jurors' benefit.

14 CROSS EXAMINATION BY MR. PENDARVIS:

15 Q Mr. Hanlin.

16 A Yes, sir.

17 Q You didn't tell the truth in your deposition
18 when you testified repeatedly that you only had one
19 telephone conversation with Mr. Harrah, isn't that
20 true?

21 MS. McWILLIAMS: Objection, Your Honor, that
22 is not -- no foundation.

23 A No, sir.

24 THE COURT: Rephrase that question, I don't
25 think that --

1 Q Did you testify in your deposition that you
2 spoke to Mr. David Harrah only one time?

3 A I testified to talking to him one time and to
4 this day that's the only conversation I remember
5 having with Mr. Harrah. I know that we have looked
6 at time records and they indicate that there were
7 additional communications but I only remember one
8 telephone conversation.

9 Q But your time records show that you
10 communicated with Mr. Harrah, including emails and
11 messages and telephone calls, nine times. Isn't
12 that correct?

13 A Well, I don't have my time record in front of
14 me but I don't doubt that's true. We did have
15 emails back and forth on occasion, I did leave
16 messages for him, so I don't know exactly what
17 those communications consisted of but as I said, I
18 remember talking to him one time.

19 Q Let's take a look at Exhibit 1 which should
20 be in front of you. Mr. Hanlin, let me know when
21 you find Exhibit 1.

22 A I don't see it. Mr. Pendarvis, I'm not
23 seeing it. I would be glad to look at a copy of it
24 if you have one.

25 Q I have one but it has my note in the

1 corner -- here it is right here.

2 A Thank you, sir.

3 Q To speed things along, Mr. Harrah, Mr.

4 Hanlin, I suggest on page three of Exhibit 1 --

5 A Yes, sir.

6 Q Midway through the page it shows a telephone

7 conference, it says with Mr. Justice's CPA David

8 Harrah, November 20, do you see that?

9 A Yes, sir, I do.

10 Q And then below that, down toward the bottom

11 of the page, beginning on November 26, it shows

12 telephone conference with David Harrah, doesn't it?

13 A Yes, sir, it does.

14 Q .3 hours?

15 A That's correct.

16 Q Farther down it shows a third telephone call

17 conference with Mr. Harrah. Do you see that?

18 A On the same page?

19 Q Same page.

20 A Yes, sir.

21 Q And right below that is another, references a

22 second conference with David Harrah, brief revised

23 consulting agent, do you see that?

24 A I see that. I think it should have been

25 brief revised consulting agreement or something, I

1 don't think agent is correct but yes, sir, I see
2 that.

3 Q And then if you turn to the next page, page
4 4, probably two-thirds of the way down the page, do
5 you see email letter, proposal to Jim Justice, copy
6 to David Harrah, CPA?

7 A Yes, sir, I do.

8 Q If we turn to page 5, December 1, about
9 halfway through the page, last entry on December
10 1st, email to David Harrah, CPA, and to Mary Mohr,
11 do you see that?

12 A Yes, sir, I see that.

13 Q Farther down the page, probably two-thirds of
14 the way down, December 4th, telephone conference
15 with David Harrah, CPA, to Mr. Justice, .3 hours,
16 do you see that?

17 A Yes, sir, I do.

18 Q Turning to the sixth page, about two-thirds
19 of the way down, December 18, receipt and review of
20 message from David Harrah, CPA?

21 A Yes, sir, I see that.

22 Q Do you see that?

23 A Yes, sir.

24 Q And below that, the next day, December 19th,
25 almost, the last entry before the last at the

1 bottom on page six, the day before you quit, right,
2 the 19th?

3 A December 19th, yes, sir.

4 Q It references telephone call to David Harrah,
5 CPA, regarding payment of the retainers, signature,
6 and left detailed message?

7 A Yes, sir, I see that.

8 Q So, when you stated in your deposition
9 several times that you had, and if you would like
10 to look at your deposition transcript, Mr. Hanlin,
11 this was a deposition that was taken of you on
12 February 8th, 2011.

13 A Yes, sir.

14 Q You've got a copy of the transcript in front
15 of you?

16 A Uh-huh (Affirmative).

17 Q Page 73, beginning on line 16, you testified,
18 "To be honest," it is actually on the 17th line,
19 "To be honest, I had one conversation with Mr.
20 Harrah, couldn't get him to respond to anything,
21 that, dash, any telephone calls except for that
22 one." Do you remember testifying like that?

23 A Yes, sir, I do, and to this day I remember
24 only one conversation with Mr. Harrah and I know
25 that on several occasions we tried to get him or

1 Mr. Justice to sign the proposal for Y.E.S. and to
2 sign the proposal for Community Open Land Trust and
3 to sign the proposal for the appraiser and they
4 never would, they never signed those things.

5 Q You testified that because of this lack of
6 communication, we're looking at page 120 of your
7 deposition, you felt that that was indicative of a
8 lack of interest on his part?

9 A Yes, sir.

10 Q They had called you back the day before you
11 quit?

12 A Well, we had left messages from time to time
13 and like I say, I remember talking to him one time.
14 My time record indicates I talked to him maybe more
15 than one time but I never got a signed engagement
16 for Y.E.S., I never got a signed engagement for
17 Community Open Land Trust, never got a signed
18 engagement for the appraiser. I think that
19 indicates disinterest.

20 Q And you spent, according to your time record,
21 2.5 hours of time communicating back and forth with
22 Mr. Harrah?

23 MS. McWILLIAMS: Object to form.

24 Q Is that correct?

25 A I don't know. I haven't totaled up the time

1 but I can tell you a lot of that was messages back
2 and forth but the object of all that was to see if
3 they wouldn't proceed, see if they would not sign
4 the consulting services agreement with Y.E.S., to
5 sign the commitment with Community Open Land Trust
6 and to sign the commitment for the appraiser and
7 they never would do any of those things.

8 Q Let's talk a little bit about the
9 conservation easement document itself.

10 A Yes, sir.

11 Q Do you remember in your deposition -- well,
12 let's back up a second. Before your deposition was
13 taken we didn't have copies of these conservation
14 easement documents, did we?

15 MS. MCWILLIAMS: Object to the form, Your
16 Honor. The Court has already ruled on that.

17 MR. PENDARVIS: Foundation for the question.

18 THE COURT: Stick within my ruling, I will
19 let you ask the question.

20 THE WITNESS: Just to clarify, I had left
21 Richardson Plowden at the end of 2008. What was
22 produced to you, I wouldn't have the vaguest
23 notion, by Richardson Plowden. In other words, I
24 wasn't looking through their electronic records, to
25 be honest, Mr. Pendarvis, I don't know what they

1 gave you and what they didn't.

2 BY MR. PENDARVIS:

3 Q We know I didn't show you a copy of the
4 conservation easement document during your
5 deposition on February 8, 2011, did I?

6 A I believe that's correct, yes, sir.

7 Q I just need to put in context why we're
8 asking these questions now.

9 A I understand.

10 Q You were asked, and if you would like to look
11 at your deposition, page 125 --

12 MS. McWILLIAMS: Your Honor, I have to object
13 to that. It is improper use of deposition
14 testimony. He has got to ask a question first.

15 THE COURT: Yes, he does.

16 MR. PENDARVIS: Sure.

17 BY MR. PENDARVIS:

18 Q Mr. Hanlin, you remember being asked about
19 preparation of documents led to this conservation
20 easement?

21 A Yes, sir.

22 Q And do you remember testifying that the
23 development of the entire project hadn't gotten to
24 the point where creation of a conservation easement
25 document was necessary?

1 A I might very well have said that. I don't
2 remember saying that but I might very well have.

3 Q If you would like to take a look at page 78
4 of your deposition, please, sir.

5 MS. McWILLIAMS: Your Honor, same objection,
6 this is not proper cross-examination.

7 THE COURT: All right. You all come here.

8 (Unrecorded bench conference).

9 BY MR. PENDARVIS:

10 Q Mr. Hanlin, do you have a copy of Exhibit 42?

11 A I'll take a look. No, sir.

12 Q Mr. Hanlin, I believe you've got a copy now.
13 Your attorney had a copy of it. I'm also going to
14 pass up to you another version of the document that
15 was marked as Exhibit 22.

16 A Yes, sir, I see those.

17 Q Now, with those two documents in mind I would
18 like to turn back to Exhibit 1, your time and
19 billing record, in particular page 6.

20 A I've got it, yes, sir. Yes, sir, I've got
21 it.

22 Q Now, the general topic we're talking about,
23 Mr. Hanlin, is preparation of documents for the
24 conservation easement.

25 A Yes, sir.

1 Q And you have given some testimony earlier
2 from the email that is marked as Exhibit 6 dated
3 November 21, where you're discussing with Yancey
4 and Y.E.S. --

5 A I'm sorry, you're referring to --

6 Q Referring to Exhibit 6 in your testimony,
7 about, "Getting the right language in our
8 documents." Do you remember that?

9 A Yes, sir.

10 Q That email?

11 A I remember that testimony. I'm looking for
12 the email, I'm sorry.

13 Q That's generally the topic. You remember the
14 testimony about, "Getting the right language in our
15 documents"?

16 A Yes, sir, I do.

17 MS. McWILLIAMS: Your Honor, I think the
18 witness is entitled, if he is going to ask him
19 about the document, I know it is up there --

20 THE COURT: We've got plenty of documents and
21 time to locate it. I'm trying to keep up with it
22 myself.

23 A Is this Number 6?

24 Q Yes, sir, the email from November 21st, 2007.

25 A Yes, sir. I've got what appears to be

1 Exhibit 6, an email from me to Y.E.S. dated
2 November 21st.

3 Q Now, is it your position that for this
4 conservation easement document you weren't
5 obligated to help craft the conservation easement
6 document that would be recorded for this Justice
7 project?

8 A Yes, sir.

9 Q But you did help craft this document, did you
10 not?

11 A Well, I did several things that weren't
12 required by my engagement agreement. For instance,
13 I think the engagement agreement referred to giving
14 tax advice to Mr. McLeod or Yancey Environmental
15 Solutions, but when he needed some assistance
16 coordinating with David Harrah, the appraiser, I
17 was happy to do that, happy to set up a meeting and
18 also happy to set up a meeting at the farm with Sue
19 Green and Brenda Davis and Mr. McLeod. So, I did
20 some things that my engagement agreement did not
21 require me to do.

22 Q Did you transmit an email copy of this
23 conservation easement document to Sue Green?

24 A I didn't recall transmitting an easement
25 document to Sue Green.

1 Q Let's take a look at page 6 of your time and
2 billing record.

3 A Yes, sir.

4 Q And does it not reflect an entry on December
5 18th, says, "Emailed easement document to Sue
6 Green"?

7 A Yes, sir, but as I testified in my deposition
8 we were working, Sue Green and I were working on
9 more than one thing at that time and we need to
10 establish, I think, to everybody's satisfaction
11 that not all the time entries on this document,
12 this draft bill, were accurate or belonged on this
13 draft bill and as we discussed in my deposition I
14 don't know that I ever saw this draft bill. As far
15 as I know all this time was kept in this computer
16 program and was printed out sometime after the fact
17 and I have not gone back through to make sure all
18 these things were accurate. For instance, I think
19 we established in my deposition that another entry
20 on 12/18, an email to Frank Cooper regarding
21 document completion schedule, et cetera, had
22 nothing to do with this. I think that we just
23 decided there are other entries, there was at least
24 one that pertains to drafting of a will that didn't
25 have anything to do with this and what I said in my

1 deposition and I maintain now still is that Sue
2 Green and I were working on other things. Whether
3 this entry on 12/18 related to conservation
4 easement or Justice properties, I do not know. I
5 do not recall emailing a document to Sue Green, an
6 easement document to Sue Green for this matter.

7 Q Do you have that Sue Green's document that is
8 marked Exhibit 42, Sue Green's is 42, is this the
9 final version after you made edits?

10 MS. McWILLIAMS: Object to form.

11 A Well, I don't know that I made any edits.

12 THE COURT: Well, rephrase that question.
13 I'm not certain I understood it.

14 Q Mr. Hanlin, is Exhibit 42 the final version
15 of the conservation easement document, as compared
16 to Exhibit 22 that was your draft?

17 A Well, I'm not sure. I think there are
18 several questions in that question. Would you
19 break it down for me, please, sir?

20 Q Comparing the draft copy of this conservation
21 document that was on your, Richardson Plowden's
22 file server marked as Exhibit 22 --

23 A Yes, sir.

24 Q Comparing that document to Exhibit 42 that
25 was obtained from Sue Green --

1 A Yes, sir.

2 Q My question is, is Miss Green's version the
3 final version of the conservation document?

4 A Miss Green's version being Exhibit Number --

5 Q 42.

6 A 42? Well, I don't think either one of them
7 is a final version of the conservation document.

8 Q Let me ask it a different way.

9 A Yes, sir.

10 Q Is COLT's version, Miss Green's version, 42,
11 a later draft of an earlier version that was on
12 your server, Richardson Plowden server marked as
13 Exhibit 42?

14 A I don't know that for sure but I will say
15 that if we look on, what is the, not page numbers
16 on this, but if we look under section 3.2 I see
17 that there are some formatting changes on Exhibit
18 Number 22 that appear to be consistent with
19 formatting changes incorporated into Exhibit Number
20 42 but I don't know in which order those formatting
21 changes happened.

22 Q Well, Exhibit 22, your reference to
23 subsection 3, if you look at page 4 of Exhibit 22,
24 subsection 3 was originally numbered, the last
25 paragraph at the bottom of the page was originally

1 numbered 3.6, and Exhibit 22 shows a change of that
2 3.6 number to 3.2, subparagraph A.

3 Do you see that?

4 A Yes, sir, I see that.

5 Q And if we look at page 4 of Exhibit 42,
6 and -- I'm sorry, let me back up. That section was
7 entitled educational uses. Do you see that?

8 A I'm trying to catch up with you.

9 Q I'm sorry.

10 A All right, sir, what paragraph were you
11 talking about?

12 Q The paragraph that is entitled educational
13 uses, toward the bottom of page 4 of Exhibit 42.

14 A Yes, sir, I see that.

15 Q Do you see it has the final number 3.2,
16 subparagraph 8 ?

17 A I see a number, looks like 3.8 or 3.6 that
18 has been stricken and looks like 3.2, parenthesis
19 8, is the new number.

20 Q So, Exhibit 42 is a later draft of Exhibit
21 22, correct?

22 A Well, I would only be guessing. I mean, that
23 could be right. I just don't know.

24 Q Now let's go back to the point in time where
25 you get a call from Mr. McLeod about the Justice

1 project, at the very beginning of your involvement.

2 A Yes, sir.

3 Q You knew from the very beginning that Y.E.S.
4 didn't own the Black River farm property, correct?

5 A Yes, sir.

6 Q You knew from the beginning that Y.E.S. was
7 not going to be taking a charitable deduction for
8 any conservation easement placed on the Black River
9 Farms property, didn't you?

10 A Yes, sir.

11 Q And you knew Y.E.S. didn't need any tax
12 advice about charitable contributions for its own
13 benefit, correct?

14 A No, sir. Mr. McLeod was interested in
15 knowing whether his methodology for valuing this
16 easement was a proper way to do it so that he could
17 then talk to Mr. Justice about the possibility of
18 doing that. So I think he did need tax advice on
19 his own account in order to determine whether he
20 had a viable idea to propose to Mr. Justice.

21 Q That was in his role as a consultant to Mr.
22 Justice, correct?

23 A Well, I don't know he had a consulting
24 agreement at that point. I think that was a way
25 that he wanted to try to conserve the property but

1 I don't know that he was an agent for Mr. Justice
2 at that point.

3 Q You knew if the Justice easement had gone
4 forward the only tax effect on Y.E.S. was going to
5 be income tax that any H and R block agent could
6 handle on a tax return, right?

7 A The only tax effect? Would you repeat that
8 question.

9 Q If the Justice easement had gone forward and
10 Justice had paid consulting fees to Y.E.S., the
11 only tax effect on Y.E.S. from the conservation
12 easement would have been income tax, right?

13 A If the methodology that Mr. McLeod were
14 suggesting resulted in a conservation easement for
15 Mr. Justice, then Mr. McLeod's entity, Y.E.S.,
16 would have had income and I don't know who would
17 have filled out the income tax returns.

18 Q And you knew that Mr. Justice and his company
19 were clearly the intended beneficiaries of the
20 advice, tax issues that Yancey and Y.E.S. were
21 consulting with you about, correct?

22 A No. I think my intended beneficiary of my
23 tax advise was Yancey and Yancey Environmental
24 Solutions so Mr. McLeod could then go to Mr.
25 Justice with a viable proposal for a conservation

1 easement.

2 Q You never told Yancey, did you, that when you
3 started giving advice about the mitigation value,
4 the highest and best use, you were going to take a
5 position that would create a conflict of interest
6 that prevented you from representing Justice, did
7 you?

8 A When we first started talking the only
9 conversation that we had was whether this was a
10 viable methodology for valuing the property. I
11 don't think I was ever asked to represent Jim
12 Justice, certainly not by Jim Justice.

13 Q I understand that but at the point in time
14 when Mr. McLeod is calling you to ask about this
15 concept you never said, "Well, hold on, Yancey,
16 before I give you advice on this, if you're
17 thinking about using me for this Justice project
18 I'm going to be in a conflict position"? You never
19 said that, did you?

20 A No, sir. I'm afraid my crystal ball is not
21 quite that good.

22 Q But you testified you knew that Y.E.S. wasn't
23 going to be taking a tax deduction for a charitable
24 contribution on the Black River conservation
25 easement, right?

1 A I knew Mr. McLeod was wanting to conserve
2 this property and he was looking for a viable way
3 to convince Mr. Justice that should be done and
4 what he asked me was to supply him tax advice about
5 whether mitigation value could be used to value the
6 property and I gave him that advice.

7 Q When do you think you gave the first advice
8 to Mr. McLeod about the mitigation concept?

9 A Well, I remember that we talked about it
10 probably at the end of October sometime. I think I
11 had done some research. I don't remember exactly
12 when I advised Mr. McLeod about that but it would
13 have probably been sometime a week or two later,
14 maybe in October.

15 Q In the prior projects you have worked on with
16 Mr. McLeod, the island near Beaufort and the pond
17 property in Sumter county, I think?

18 A Yes, sir.

19 Q Was Mr. McLeod -- Mr. McLeod was talking to
20 you during that project about various aspects of
21 things like the conservation easement document or
22 the fees, the fee simple documents that were used
23 in those transactions, wasn't he?

24 A Yes, sir, but my role in the transaction was
25 different. I was retained by the landowner in

1 those cases to represent them. In one case I had
2 known the landowner almost twenty years, since I
3 had started practicing law, and the other case I
4 knew the landowner because we had been in third
5 grade together.

6 Q In early November, 2007, you never pulled out
7 the rules of professional conduct and reviewed the
8 conflict of interest provisions when you were
9 making the decision -- excuse me, let me restate
10 that. In November, 2007, you started the process
11 of giving advice to Mr. McLeod, October or
12 November?

13 A Yes.

14 Q You never pulled out the rules of conduct to
15 check the conflict rules as to whether that advice
16 was going to create a conflict with your
17 representation of the landowner in that matter, did
18 you?

19 A Well --

20 MS. McWILLIAMS: Object to form, Your Honor.

21 THE COURT: Go ahead, answer that question.

22 A Again, I had never been asked to represent
23 the landowner and so that situation didn't present
24 itself. At that point, no, I had not pulled it
25 out.

1 Q You had never consulted a conservation
2 easement consultant until this?

3 A No, sir.

4 Q Did Mr. McLeod represent to you, "Mr. Hanlin,
5 I need you to represent Y.E.S. in this matter"?

6 A Well, he asked me for tax advice and when he
7 asked me for tax advice I took that as a request to
8 represent him in providing tax advice.

9 Q So the answer is no, Yancey never
10 specifically said, "I want to hire you to represent
11 Y.E.S. in this matter," did he?

12 A Well, I don't recall that he did. He did ask
13 me to provide him with tax advice and that is what
14 I did.

15 Q Let's fast forward all the way to December
16 20.

17 A Yes, sir.

18 Q You knew when you called Yancey to terminate
19 the relationship that was going to kill the deal,
20 didn't you?

21 A No, sir.

22 Q And your testimony to this jury is that you
23 believed Yancey would be able to find a lawyer to
24 step in with ten days left on a \$45,000,000
25 conservation easement? Is that your testimony?

1 A Well, I think that it depended on the
2 commitment of the landowner and we hadn't been
3 successful in getting the landowner to sign
4 anything at that point in time. I think if Mr.
5 Justice had all of a sudden woken up and said, "I
6 want this transaction to go forward," it could have
7 gone forward.

8 Q We're off base here, now, because your
9 testimony is about whether Mr. McLeod and Y.E.S.
10 could have found another lawyer December 21 to take
11 over this easement and you're conditioning that on
12 Justice being willing, we'll get to that in a
13 minute but I want to get to the question. Is it
14 your testimony Mr. McLeod could have found a
15 competent lawyer with knowledge of how to handle
16 conservation easement of \$45,000,000 magnitude
17 between December 20 and January 1?

18 A Well, I think that from the limited scope of
19 my engagement, yes, he could have found someone who
20 could have looked at the situation to determine
21 whether a mitigation bank would serve as a basis
22 for deciding on the value of the conservation
23 easement. I think he could have found somebody to
24 give him competent tax advice in that time frame,
25 yes, sir, I do.

1 Q And back to the question on Mr. Justice, I
2 mean, the day before David Harrah called you and
3 you didn't call him back to find out what their
4 status was before you decided to quit Y.E.S., isn't
5 that true?

6 A Well, when I got the notice pertaining to
7 Yancey I thought immediate action on several fronts
8 was necessary and contacting Mr. Harrah was not the
9 first priority.

10 Q How were you going to decide whether your
11 withdrawal was going to have a material adverse
12 effect on your client without finding out, as you
13 said, whether Mr. Justice had woken up?

14 A Well, I don't think Mr. Justice in fact ever
15 did wake up but I hadn't received any communication
16 over the month or two that we worked on this that
17 Mr. Justice was interested in proceeding.

18 Q That is not responsive to my question. How
19 were you going to find out your withdrawal wasn't
20 going to cause material adverse harm on your
21 client? You're contemplating, let's put this in
22 context, you're contemplating withdrawal from the
23 representation, correct?

24 A Yes, sir.

25 Q You meet with other members in your law firm

1 about what do in this letter, correct?

2 A Yes, sir.

3 Q Before you could make a decision whether this
4 withdrawal you all were thinking about is going to
5 harm your client you had to call Harrah back to
6 find out, didn't you?

7 A No, sir.

8 Q How were you going to find out if Justice was
9 ready to go, without making a phone call, to return
10 Mr. Harrah's call?

11 A Well, I thought that Mr. McLeod's letter from
12 the IRS deserved immediate attention and so we
13 devoted ourselves to that. But as I have
14 testified, I don't think that it would have been
15 impossible to find another tax attorney to opine on
16 the issues that Mr. McLeod had asked me to opine
17 about. So I think that another attorney could have
18 been found to do that and that if Mr. Justice had
19 wanted to close the transaction, as Mr. Harrah
20 testified, I think he would have.

21 Q But you hadn't finished all your own work
22 that Mr. McLeod had asked you to do, had you?

23 A Well, I had answered his questions.

24 Q Really? Let's take a look at the December
25 14th email that has been marked as Exhibit 18.

1 A Yes, sir.

2 Q Mr. McLeod is asking you to give your legal
3 advice on whether this base line document report is
4 in conformity of 170(H) of the Internal Revenue
5 Code, isn't he?

6 A Yes, sir.

7 Q Did you ever respond to that email?

8 A I believe I did. I believe I called Mr.
9 McLeod to talk to him about it.

10 Q Did you make any changes or suggestions to
11 this base line report?

12 A I don't recall that I did. It looked very
13 thorough and complete to me.

14 Q You never responded by email and gave him
15 anything in writing that confirmed this base line
16 report was in compliance with 170(H), did you?

17 A I don't recall that I did, no, sir.

18 Q In fact, if we want to take a look at your
19 deposition, I asked you in your deposition --

20 MS. MCWILLIAMS: Your Honor, I object. This
21 is not the proper use of a deposition. He has to
22 get the question and answer first.

23 MR. PENDARVIS: Very good.

24 THE COURT: I sustain your objection. Ask
25 the question, he responds and then you can go to

1 the deposition.

2 BY MR. PENDARVIS:

3 Q Mr. Hanlin, didn't you state in your
4 deposition --

5 MS. McWILLIAMS: Same objection.

6 Q Did you respond --

7 THE COURT: Wait a minute. Let's take a
8 break. You all step back in the jury room. We'll
9 take a break, I've got a phone call I need to
10 respond to, then we'll address this also.

11 (The jury was excused from the courtroom).

12 THE COURT: All right. Let's deal with the
13 deposition first. Mr. Hanlin, you can step down.

14 THE WITNESS: Thank you, sir.

15 THE COURT: As I understand it, Miss
16 McWilliams, your objection is use of the
17 deposition. Just to be clear, ask the question,
18 let him answer. I kind of lost track of whether or
19 not he had answered and you were in the step of
20 that question.

21 MR. PENDARVIS: I will make sure it is clear.
22 He gave testimony he had called Mr. McLeod to
23 respond to the request for information about the
24 base line report. In his deposition he said, "I
25 don't think I did."

1 THE COURT: All right. That will be proper.
2 I lost track, what was the original question?

3 MR. PENDARVIS: I'll clear it up.

4 MS. McWILLIAMS: Just for the record, the way
5 it is supposed to be done is, "Isn't it true, Mr.
6 Hanlin, you did not call Mr. McLeod about that to
7 give him your opinion," and if he says, "No, I
8 think I did call him," then he gets to pull out the
9 deposition. He can't do it that way, you can't get
10 an answer and then say well, that is not what you
11 said before, he has to give inconsistent answer.

12 MR. PENDARVIS: He did. I asked him did he
13 respond to the email, he said, "I called him." I
14 asked him in his deposition, "Did you make any
15 comments about this base line report?" "I don't
16 think I did."

17 THE COURT: That's inconsistent, you called
18 him or didn't.

19 MS. McWILLIAMS: I think it has to be an
20 inconsistent statement. I understand. He
21 certainly can't pick up the deposition first and
22 say, "Didn't you tell me this?" He has got to have
23 a --

24 MR. PENDARVIS: You objected, I clarified it.

25 THE COURT: You can't just use the

1 deposition, "Please read your deposition to the
2 jury." Anyway, you all know the rules so I'm going
3 to allow you to proceed with the cross-examination
4 that is proper.

5 I have to make a quick phone call.

6 (Recessed at 11:32).

7 (Resumed at 11:42).

8 THE COURT: All right, Mr. Hopkins, go ahead
9 and get the jury.

10 BAILIFF: I'll be glad to, Your Honor.

11 (The jury returned to the courtroom).

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

14 THE COURT: Thank you very much.

15 Mr. Pendarvis, you may proceed.

16 BY MR. PENDARVIS:

17 Q Mr. Hanlin, at no point in time before
18 December 20 did you tell Yancey or anyone at Yancey
19 Environmental Solutions that it didn't look like to
20 you there was going to be enough time to finish the
21 easement, that, "We have stopped"?

22 A No, sir. Yancey and I and Sue Green were in
23 regular communication about trying to get the
24 document signed, consulting services agreement, the
25 commitment to COLT, and Yancey and I had also been

1 in communication, I think, about the appraiser, Mr.
2 Harrah, so we were in constant communication about
3 that, not constant, not every day, but certainly
4 every few days.

5 Q Well, I'm not really talking about the
6 documents that memorialized the fees people would
7 earn. I'm really talking about the documents
8 necessary and the professional work necessary for
9 the conservation easement. Let me restate my
10 question.

11 With regard to all the professionals working,
12 the appraisers, wildlife biologist, the lawyer and
13 everybody else that was necessary to develop the
14 documents necessary to record the easement and get
15 a tax deduction, at no point in time did you call
16 Yancey Environmental Solutions or Yancey McLeod and
17 say, "We're not going to be able to get this done"?

18 A No, sir.

19 Q And in fact with a billionaire that we have
20 heard Mr. Justice is, no one really needed a signed
21 agreement, if the conservation easement was
22 acceptable to Mr. Justice and he signed it you
23 didn't have any doubt you would get paid, did you?

24 A Yes, sir.

25 Q You did?

1 A Yes, sir.

2 Q And what doubt would you have that you
3 wouldn't get paid if the billionaire Jim Justice
4 and his companies recorded the conservation
5 easement?

6 A Well, I think I was more concerned actually
7 for COLT than for myself. COLT was being squeezed
8 into the position either declining to accept the
9 conservation easement because they hadn't been
10 given the money in their proposal and then being
11 left without the funds necessary to service the
12 easement and the problem that a conservation
13 organization has is that they take on an obligation
14 to monitor the property in perpetuity, forever, and
15 so what they require in order to accept a
16 conservation easement is they require a stewardship
17 contribution and that stewardship contribution was
18 indicated on the letter of intent that Community
19 Open Land Trust sent to Mr. Justice. The Justice
20 organization, Mr. Justice never sent the initial
21 4,000 or 5,000 dollar installment that was required
22 under that agreement and there was no indication to
23 Community Open Land Trust that he was willing to
24 pay any of the rest of the money either, which
25 would have been about \$50,000, \$45,000, \$50,000.

1 And the reason that money is needed is because the
2 land trust has to go out every year and make sure
3 that the land is being kept the way that the
4 landowner has promised to keep the land and so they
5 have to do an annual assessment, they have to make
6 sure the land is being kept that way, so that is
7 part of what that money is used for.

8 The other part of the money is there in case
9 the landowner violates his agreement to keep the
10 land in a certain way and in this case the
11 landowner would have been promising to keep the
12 land in farm land forever, so if he had at some
13 point or some subsequent owner decided to stop
14 farming, then Community Open Land Trust would have
15 had the obligation to bring legal action against
16 them to compel them to comply with the terms of the
17 conservation easement.

18 So, did we have concerns about being paid?
19 Absolutely, and probably more on behalf of
20 Community Open Land Trust than me but certainly
21 whether I would be paid a fee was a big question
22 and, you know, I would like to think that Mr.
23 Justice, if he had decided to proceed with the
24 conservation easement, would have done everything
25 that we were asking him to do but he hadn't signed

1 anything that he said he would and so it puts
2 everybody kind of in a pickle when you've got
3 someone like that that won't sign an agreement, and
4 the problem, too, is that, you know, talking about
5 Community Open Land Trust, you know, if they accept
6 the easement without having received that
7 conservation contribution in advance what do they
8 do then? Do they have to chase after a billionaire
9 to get the money that they need to maintain the
10 easement? It's a real pickle.

11 Q And you want this jury to believe you had a
12 serious doubt that Jim Justice and his companies
13 weren't going to pay at closing or before closing a
14 \$45,000 endowment fee for the easement when he was
15 getting a \$45,000,000 tax deduction?

16 A Yes, sir, that is my testimony, and I tell
17 you, you know, if somebody has that much money, the
18 question comes up, well, why should we be fronting
19 this money for a billionaire? If he really is who
20 we have been told he is and he has all that much
21 money why is it that he won't pay \$4,000 to
22 Community Open Land Trust to do this conservation
23 easement, why is it he hasn't already written a
24 check for \$50,000 for this conservation easement if
25 that is what he wants to do, why is it that he

1 won't pay the appraiser that is necessary for this
2 and why is it that he won't pay the \$50,000 that
3 Mr. McLeod had asked for as a nonrefundable
4 retainer? If he is so awash in money why is it
5 that he hasn't done those things?

6 Q But you were working on that very project
7 with that circumstance right up until the day
8 before you quit, on December 19th you were
9 finishing a letter, correct?

10 A We were working on it with growing unease,
11 and if you follow the correspondence between Yancey
12 and us and Community Open Land Trust there are,
13 there is correspondence, there is emails going back
14 and forth about getting the commitment signed, when
15 are these things going to be signed, and so as time
16 went by our uneasiness about that was growing.
17 Yes, we had, I had understood from Mr. McLeod that
18 Mr. Justice was on board with this but I hadn't
19 seen any independent verification of that.

20 Q But you knew Mr. McLeod had a prior
21 relationship with Mr. Justice, didn't you?

22 A I didn't know exactly what the prior
23 relationship was. I think that Mr. McLeod had
24 indicated that he had done a WPA easement on some
25 other property that belonged to Mr. Justice. I

1 didn't know the circumstances of that and I think
2 he had talked at some point to Mr. Justice about
3 the mitigation bank which Mr. Justice decided not
4 to do. I think that at some point he also talked
5 to Mr. Justice about a conservation easement on Mr.
6 Justice's homeplace, which Mr. Justice decided not
7 to do, so I didn't know what Mr. Justice, his
8 position on this was.

9 Q In the fall of 2007 values about projected
10 mitigation, highest and best use values were
11 suggesting that the -- let me get it right -- the
12 conservation easement value, the mitigation value
13 was going to be about the same, somewhere in the 45
14 to 50 million dollar range, wasn't it?

15 A Well, we were contemplating something on that
16 order. I don't -- of course all that would have
17 depended ultimately on the appraisals that we
18 received and when you do a conservation easement
19 what you do is really two appraisals in one. First
20 of all you have to decide what the value of the
21 property is at its highest and best use and then
22 you have to take the property before it's
23 restricted to determine that highest and best use,
24 highest and best use in that value. Then what you
25 do, you decide through an appraisal what the value

1 of the property is after the easement has been
2 imposed and then you find the difference, and so in
3 order to arrive at a number there would have had to
4 have been an appraisal of the property before the
5 easement was imposed and after the easement was
6 imposed, then you could determine what the
7 conservation value of the property was.

8 Q I wasn't clear, Mr. Hanlin, that isn't why I
9 was using the word projected range, we all know in
10 the fall of 2007, November, October, November,
11 2007, no appraisals had been done?

12 A Correct.

13 Q That's correct?

14 A Correct.

15 Q And you and Mr. McLeod and others were
16 working on projected values, correct?

17 A Well, I'm not sure what you mean by working
18 on. We made some assumptions and we knew that at
19 some point the appraisals would come back and give
20 us definitive numbers but we did know that there
21 would be considerable conservation value to this
22 property.

23 Q And per your emails to Mr. Crawford and
24 others that range was in the 45 to 50 million
25 dollar range, correct?

1 A That was what we estimated, yes, sir.

2 Q Thank you. Now, under the consulting
3 services agreement that Mr. McLeod sent to Mr.
4 Justice his fee after negotiations was going to be
5 four percent, correct?

6 A Well, I think that Mr. McLeod had originally
7 proposed five percent and as I recall Mr. Harrah
8 came back and said four percent. I don't know
9 whether there would have been any further
10 negotiation on that.

11 Q Let's assume four percent is the number.

12 A All right, sir.

13 Q And we'll use the bottom end of the range,
14 45,000,000, four percent of 45,000,000 is 1.8
15 million dollars, correct?

16 A That's approximately correct, yes, sir.

17 Q And based on the December 5th engagement
18 letter from you and Richardson Plowden to Y.E.S.
19 the terms of compensation for Y.E.S. was going to
20 be a third of whatever was paid by Jim Justice or
21 the owner or operator of Black River Farms to
22 Y.E.S., is that correct?

23 A No, sir. It would have been two-thirds.

24 Q You were going to be paid two-thirds?

25 A No, sir. You asked about Y.E.S.

1 Q I'm sorry, Richardson Plowden's compensation
2 would have been one-third of what Jim Justice or
3 owner or operator of Black River Farms paid to
4 Y.E.S., correct?

5 A Yes, sir.

6 Q And in the assumption that \$45,000,000 number
7 was in range, the fee that Richardson Plowden would
8 have gotten was about 600,000, correct?

9 A Assuming that those numbers proved correct,
10 yes, sir.

11 Q And again everybody is working with
12 assumptions on range of value in the fall of 2007
13 when all these fee agreements and consulting
14 service agreements were being exchanged, correct?

15 A Yes, sir. We assumed the numbers would be in
16 that range but, again, we were waiting for
17 appraisals.

18 Q And the other partners and members of the
19 executive committee, Richardson Plowden, were
20 concerned, very concerned about the size of the fee
21 in relation to the amount of services you were
22 providing, weren't they?

23 A Well, they expressed that we should make sure
24 that we did this the right way and that we
25 represented, we knew who we represented. I think

1 that they were certainly concerned that we do this
2 the right way and they had raised questions about
3 what we were doing and what the fee was and that
4 kind of thing, yes, sir.

5 Q This morning you gave some testimony about
6 Exhibit 16, it may still be in front of you, this
7 draft hourly fee agreement. Do you remember that
8 testimony?

9 A Yes, sir, I do.

10 Q And I wrote this down when you testified
11 because I was a little surprised. You testified
12 that this document was being, this draft, hourly
13 fee agreement was being prepared in contemplation
14 of representing clients of Y.E.S. in other matters.
15 Do you remember that testimony?

16 A Yes, sir, I do, and as I testified in my
17 deposition I didn't recall at that time what the
18 purpose of these documents were but as these have
19 been brought to my attention I have gone back and
20 thought about them and as I said earlier my
21 recollection is that these were to be used as some
22 type of templets or documents for additional
23 representation of Y.E.S.' client in similar
24 circumstances.

25 Q Mr. Hanlin, do you have Exhibit 15 in front

1 of you? I will be happy to look.

2 A Yes, sir, I do.

3 Q The truth is this draft document marked
4 Exhibit 16 was the attachment to the email that is
5 marked as Exhibit 15, isn't that correct?

6 A I don't recall.

7 Q Well, Exhibit 15 is an email from you to,
8 dated December 13th, to Mr. Mack. Isn't that
9 correct?

10 A Yes, sir.

11 Q And the first line reads, "Please find
12 attached a new proposed fee agreement for Yancey
13 Environmental Solutions." Do you see that?

14 A Yes, sir, I do.

15 Q And it's your testimony that this document,
16 this draft hourly fee agreement was not being
17 considered to substitute for the fee agreement in
18 place for the Justice project?

19 A It was not being considered by me for that
20 purpose, I don't think. I don't recall if that was
21 the purpose at all, no, sir.

22 Q And is it your testimony that the firm was
23 concerned the \$600,000 fee on this matter was going
24 to be unreasonable or unconscionable or too high?

25 A Well, I can't speak for the firm, I'm not

1 authorized to do that, I don't know exactly what
2 their intentions or concerns were but I know that
3 we did discuss the fee and they just wanted to make
4 sure this was done the right way.

5 Q And in the discussions about the fee there
6 was concern about the size of the fee, in the
7 discussions in which you participated there were
8 concerns about the size of the fee, weren't there?

9 A Well, that was a topic of discussion, yes,
10 sir.

11 Q Is that why Mr. Mack directed you to prepare
12 a revised hourly fee agreement?

13 A Well, I don't recall exactly what Mr. Mack
14 directed me to do at that point in 2007 but we did
15 have some discussions about it. My understanding
16 was that these were for use in the future, which I
17 think is why they are in blank. I think if we had
18 intended that those would be used specifically with
19 Mr. Justice I think the blanks would have been
20 filled in.

21 Q Let's focus in on the withdrawal.

22 A Yes, sir.

23 Q You would agree with me no actual conflict of
24 interest existed on December 20, 2007, wouldn't
25 you?

1 A Well, I don't know that I would agree with
2 that. I mean, I think that, I think that to the
3 extent that you're able you have to consider what
4 could happen in deciding whether a conflict exists.
5 I could frame that as an actual conflict or
6 potential conflict, I think, but either way, the
7 concern was could I give undivided loyalty to Mr.
8 McLeod in proceeding forward when I already had
9 clients that would have been subject to the
10 investigation as indicated by the letter from the
11 IRS. So, I think actually the rules refer to that
12 as a concurrent conflict. I think if you have a
13 conflict, excuse me, where one client's interest
14 might be adversely affected by another, I think
15 some of the rules refer to that as a concurrent
16 conflict.

17 Q But you used the phrase in your testimony
18 just now it could have been a conflict, might be,
19 and I'm asking you is this an actual existing
20 conflict of interest, where your representation of
21 Y.E.S. was materially limited on December 20th,
22 with regard to your representation of former
23 clients in matters from years before? That is not
24 an actual conflict, is it?

25 A Well, I believe it is, because the question

1 is how does a lawyer proceed when he knows that the
2 interests of one client could conflict with the
3 interest of another and you could call that a
4 future conflict but really it affects how the
5 attorney conducts himself from that moment forward
6 and so in that sense I think it's a concurrent
7 conflict.

8 I think that the question is I have these
9 other clients, I have represented them, at some
10 point it might be advantageous for them if I were
11 to testify against Mr. McLeod, it also could be it
12 would be advantageous for Mr. McLeod if I were to
13 testify against them, then how do I conduct myself
14 from that point forward, and part of the problem is
15 if I could be compelled to testify for those
16 earlier clients might something that I learned
17 about Mr. McLeod from that point forward be
18 beneficial to those clients or adverse to Mr.
19 McLeod or vice versa.

20 So, being I think that this is addressed in
21 Rule 1.7 where it talks about a concurrent conflict
22 and whether the attorney believes that he can
23 continue to represent all of the clients properly,
24 and I didn't think I could do that from that point
25 forward.

1 Q Well, we know you were no longer representing
2 the landowners that had recorded easements years
3 before, correct?

4 A It doesn't matter, I still have an obligation
5 to them.

6 Q And that hadn't changed from the first minute
7 when you had, sent a fee agreement to Mr. McLeod,
8 did it?

9 A I still had an obligation to those prior
10 clients ever since I represented them.

11 Q And that obligation existed on the day you
12 sent the fee agreement December 5 to Y.E.S., didn't
13 it?

14 A It did.

15 Q And on December 20th, unlike the work you
16 have done for the other landowners whose easements
17 have been recorded, on December 20 you were ten or
18 eleven days away from recording an easement that
19 would have been the one moment of financial success
20 for Yancey Environmental Solutions, is that
21 correct?

22 A I'm not sure which question you want me to
23 answer.

24 Q You knew on December 20th that in the next
25 ten to eleven days an easement was going to be

1 recorded that would have resulted in a fee to
2 Yancey Environmental Solutions larger than it had
3 ever earned in its history, correct?

4 A No, sir.

5 Q Okay.

6 A I didn't have any commitment from Mr.
7 Justice, I didn't have, COLT didn't have a
8 commitment from him, the appraiser didn't have a
9 commitment from him, I didn't know if that was
10 going to happen at all.

11 Q And you didn't bother to call Mr. Harrah to
12 verify that, did you?

13 A Well, I heard you ask about a phone call that
14 I received from Mr. Harrah on the 19th and I have
15 gone back and looked at the time record, you know,
16 we have agreed that the time record is not
17 completely accurate but what I see on the time
18 record is that I called and left a message for Mr.
19 Harrah, not the other way around.

20 Q And he was calling you back, correct?

21 A I don't see that.

22 Q He had called you, excuse me, on the 18th he
23 had called you back, receipt and review of message
24 from David Harrah, do you see that?

25 A Let me find the document. On the 18th?

1 Q Yes, sir.

2 A Let's see.

3 Q About two-thirds of the way down the page.

4 A Yes, sir, receipt and review message from
5 David Harrah, CPA.

6 Q So you knew he was calling and responding to
7 your calls at least as of December 18th, correct?

8 A He had called, yes, sir.

9 Q And between December 20th and December 31st
10 there was no chance the IRS was going to ask you to
11 give testimony on its investigation when the first
12 meeting wasn't set up until January 17th. Isn't
13 that correct?

14 A I can't assume that, no, sir.

15 Q Okay. The real concern was the termination,
16 in you all's view the concern, if this easement was
17 closed and you were paid a \$600,000 fee on a
18 contingent basis the IRS might consider that to be
19 a violation of some of its rules, isn't that
20 correct?

21 A No, sir. The real concern was to make sure
22 this was done properly, that we only represented
23 those clients that we could represent and that we
24 complied with our ethical obligations.

25 Q If we take, if we take Exhibit 1 reflecting

1 the hours billed on this matter all the way to
2 December 19th, which shows you having worked
3 approximately 73.6 hours, give or take, I
4 understand your testimony is some of these entries
5 aren't correct, I think you testified it is
6 approximately 70 hours, is that correct?

7 A Approximately, yes, sir.

8 Q If you double that and it's assumed from
9 December 20th you worked another 70 hours before
10 December 31, double that, that would be 140 hours
11 and at your typical hourly rate you have testified
12 of 250, that would have been a \$35,000 fee,
13 wouldn't it?

14 A That sounds about right, yes, sir.

15 Q If we take that 140 hours and divided it into
16 600,000, the fee you would have gotten, that would
17 have been \$4,285 an hour. Isn't that correct?

18 A I don't know, sir, I haven't done that math.

19 Q I will represent to you that a calculator did
20 the math for me as well.

21 A Okay.

22 Q If you divide 140 into 600,000 that is
23 \$4,285. In that context you were concerned the IRS
24 might have called this fee unconscionable, weren't
25 you?

1 A No, sir.

2 Q And you never told Yancey or anybody else at
3 Yancey Environmental Solutions that Richardson
4 Plowden had some concerns over the size of the fee,
5 did you?

6 A Well, there were a number of tax related
7 issues raised by different people in the firm and
8 I'm satisfied that those were material risks that
9 you could assert the same concerns in any
10 transaction but it doesn't mean that they're valid
11 or significant and I had reached the conclusion
12 that some of the concerns, that some of the
13 concerns that were raised were not material.

14 Q I was asking about the size of the fee.

15 A Yes, sir.

16 Q Did you ever tell Yancey McLeod or anyone at
17 Yancey Environmental Solutions that you or anyone
18 else at Richardson Plowden had concerns over the
19 size of your fee for the Justice project?

20 A No, sir.

21 Q You knew from the email that Yancey
22 Environmental Solutions was in dire financial shape
23 on December 20, didn't you?

24 A I saw that from the email from Miss Mohr,
25 yes, sir.

1 Q Do you have any reason to doubt it?

2 A No, sir. I mean, I don't know what she
3 considers dire, I don't know what the circumstances
4 were.

5 Q You knew Yancey McLeod was counting on you to
6 be the lawyer for this transaction, didn't you?

7 A No, sir. He asked me to provide him with
8 some tax advice and that's what I did.

9 Q Well, you knew Mr. Justice or Mr. Harrah or
10 any people on the Justice side of this project
11 didn't have tax counsel competent in conservation
12 easement matters as of December 20, 2007, didn't
13 you?

14 A No, sir.

15 Q You had been communicating with a tax lawyer
16 we didn't know about, for Mr. Justice?

17 A No, sir, I didn't say I had communications
18 with any of those. What I said was I didn't know
19 who, what he had in terms of advisers. I was
20 confident that someone of his stature, if they were
21 correct, had advisers that he talked to on a pretty
22 constant basis.

23 Q Well, you knew that as of December 20th,
24 2007, you were the only lawyer actively involved in
25 the Justice conservation project for South

1 Carolina, didn't you?

2 A That would have been an assumption on my
3 part. I did not know that.

4 Q Had you seen any evidence otherwise?

5 A No, sir, I hadn't seen any communications
6 except perhaps with Mr. Ball. I don't remember
7 when I first became aware of Mr. Ball.

8 Q And you knew as of December 20, 2007 -- you
9 were the chairman of the Board for COLT, weren't
10 you?

11 A Yes, sir, I was.

12 Q And you were very familiar with COLT's
13 language that it would accept in a conservation
14 easement, weren't you?

15 A I was familiar with that language, yes, sir.

16 Q And so really you were the only -- were there
17 any other lawyers on the Board of COLT that were
18 involved in the Justice project?

19 A No, sir.

20 Q So you were really unique in this situation,
21 you were the only lawyer that had active
22 involvement in this Justice project and who also
23 had familiarity with the grantee's needs, desires
24 and wishes, isn't that true?

25 A No, sir. Mr. McLeod is an attorney, he was

1 familiar with those things as well.

2 Q Familiar but not a member of the Board of
3 COLT who knew intimately what COLT wanted and would
4 accept as part of a conservation easement, isn't
5 that true?

6 A Well, I think I had a better perspective on
7 COLT probably than Mr. McLeod but I think that Mr.
8 McLeod had been involved in the negotiation of far
9 more conservation easements than I had.

10 Q And negotiation being the key word, you would
11 have been in a unique position to be advising
12 parties to this transaction in terms of negotiating
13 terms between COLT and Justice because you knew
14 everything about COLT, correct?

15 A Well, I'm not sure I could properly advise
16 COLT or Mr. Justice regarding the terms of this
17 easement. I think that what I heard from Miss
18 Green is that she intended to work out this
19 easement but I didn't have a lawyer-client
20 relationship with COLT so I didn't have authority
21 to negotiate an easement from their standpoint and
22 I also did not have a lawyer-attorney relationship
23 with Mr. Justice or anybody in his organization so
24 I didn't have the authority to negotiate it on
25 behalf of Mr. Justice either, so I'm not sure how

1 much I could have done.

2 A There has been testimony in this case there
3 were discussions between you and other members of
4 Richardson Plowden's executive committee about the
5 consequences your withdrawal would have on Yancey
6 Environmental Solutions, weren't there?

7 A There were discussions about the withdrawal,
8 yes, sir.

9 Q I know there were discussions about the
10 withdrawal, I want to make sure the jury is clear,
11 there were not only discussions about the
12 withdrawal, but the effect it was going to have on
13 Yancey Environmental Solutions, weren't there?

14 A Well, in certain senses, yes, there was. One
15 of my concerns was that Mr. McLeod needed to focus
16 on the IRS investigation quickly and one of the
17 reasons for the quick withdrawal, in my mind, was
18 so that Mr. McLeod would have the maximum
19 opportunity to retain other counsel for that
20 purpose.

21 Q And I think you have heard Dr. Adams and
22 others testify that was good advice, I mean, I
23 don't think there is any dispute in this case that
24 the decision and the recommendation you made to
25 Yancey Environmental Solutions to get other

1 attorneys involved to handle the IRS matter was
2 proper, prudent, very good advice. Let's make sure
3 we don't mix things up here. What we're talking
4 about now is completing the Justice project and
5 what I want you to focus on is that you were
6 involved, weren't you, with discussions of
7 Richardson Plowden executive committee members
8 about the effect of your withdrawal from the
9 Justice project, the effect it would have on Yancey
10 Environmental Solutions, weren't there?

11 A I don't recall specific discussions with the
12 executive committee about that.

13 Q How about have you had those discussions with
14 Mr. Mack, didn't you?

15 A We talked about the withdrawal, we talked
16 about the necessity of doing that quickly. I don't
17 remember specific discussions beyond that.

18 Q So it is your testimony that there were no
19 discussions about the effect of the withdrawal on
20 your representation of Yancey -- let me restate
21 that. I want to make sure this is crystal clear.
22 Is it your testimony that you had no discussions
23 with Mr. Mack or anyone else at Richardson Plowden
24 about the effect of your withdrawal, the effect
25 your withdrawal would have on Yancey Environmental

1 Solutions concerning the Justice project?

2 A I don't recall specific discussions of that,
3 no, sir.

4 Q You're not saying it didn't happen, you just
5 don't recall?

6 A I don't recall.

7 Q And the senior lawyers at Richardson Plowden
8 asked you to quit, didn't they?

9 A I think it is more accurate to say we reached
10 that conclusion together.

11 Q And you didn't stop and say, "No, I've got a
12 responsibility because if I withdraw it's going to
13 have a material adverse effect on my client and I
14 can't do that"?

15 A No, sir, I didn't because I didn't believe
16 that to be true, for one thing but, you know, as I
17 have testified, I think that the limited scope of
18 my engagement to give tax advice, I think I had
19 already given Mr. McLeod the tax advice that he
20 needed but if he needed somebody else to come
21 behind I think under the scope of that they could
22 have gone and gotten somebody. I'm not at all
23 convinced the transaction would have occurred
24 anyway. We have gotten no confirmation from Mr.
25 Justice in the form of signed consulting services

1 agreement or a signed agreement with Community Open
2 Land Trust or signed commitment to the appraiser.

3 Q But you said you were sorry when you called
4 Yancey and told him the news that you were
5 terminating all the relations on all matters,
6 didn't you?

7 A I did, and I was and I still am. Yancey is,
8 I think he's a very nice person, I enjoyed working
9 with him.

10 Q You said you were sorry because you knew when
11 you withdrew and quit the project was going to
12 fail, didn't you?

13 A No, sir. You know, I think the project could
14 have been completed in 2007 but even if not, I
15 think it could have been completed in 2008 or later
16 and the information I have from listening to Mr.
17 Harrah here the other day is that Mr. Justice had
18 at least as much financial incentive to complete it
19 in 2008 as did he in 2007.

20 Q You know, I heard that testimony, too, and in
21 December, December 20, 2007, you didn't know that,
22 did you?

23 A Well, I didn't know all those things. I had
24 gotten an indication either from Mr. McLeod or Mr.
25 Harrah that coal prices had been rising in 2007,

1 the latter part of 2007 and I think we also became
2 aware sometime during 2007 that the transaction,
3 the big transaction that Mr. Justice contemplated
4 with his coal company was not going to happen in
5 2007, it was going to happen probably in 2008.

6 Q I'm not talking about Mr. Justice's income.
7 I'm talking about the changes in the tax law that
8 didn't become known to the world, under your
9 testimony, until May of 2008. As of December,
10 2007, you didn't know that that change was going to
11 happen, the understanding and the tax laws you knew
12 at that time was, the great benefits that you
13 described to this jury this morning were going to
14 end on December 31, 2007, did you know that?

15 A Well, the most favorable benefits were going
16 to end on December 31st, 2007, but as I also
17 testified, whether it would have made any
18 difference to the particular individual depended on
19 that particular individual's tax situation and if a
20 person has sufficient income, then those changes
21 wouldn't have made any different to them
22 whatsoever.

23 Q But those are things we don't know. What we
24 do know from the testimony in this case is the plan
25 was Mr. Justice and all the professionals involved

1 was to get this easement recorded by December 31,
2 2007, isn't that correct?

3 A That was our plan but I never saw any
4 movement on Mr. Justice's part to make that happen.

5 Q And after this fiasco, after this termination
6 and this project didn't go forward you didn't get
7 any raises on your salary, bonuses from Richardson
8 Plowden for months and months after that, did you?

9 A Well --

10 Q Yes or no, then you can explain.

11 A Okay. Well, no, my compensation did not
12 change. I left Richardson Plowden about a year
13 later.

14 Q Remember when you testified to this jury that
15 no lawyer should needlessly endanger a client?

16 A Yes, sir, generally I think that's true, I
17 think we also have to be governed by our ethical
18 obligations and they supersede any other
19 obligations we might have.

20 Q On a possible conflict, maybe in the future,
21 correct?

22 A Well, I think we covered this ground but I
23 think there is a definition of concurrent conflict
24 and one of the provisions under that definition is
25 whether the attorney reasonably believes that he

1 can fully represent the current client in light of
2 his past representation of other clients. So, I
3 mean, I think it goes to what the attorney is able
4 to do even from that moment forward.

5 Q And you chose your old clients over your
6 existing client Y.E.S., didn't you?

7 A No, sir. I did the only thing I could do to
8 avoid any further conflict between the two, I
9 withdrew from representation of Yancey so that I
10 would not learn anything that I might later be
11 compelled to divulge. I also withdrew because I
12 had these earlier clients and I didn't know, I
13 didn't believe that I would be able to adequately
14 represent Mr. McLeod, having these other clients
15 that were in, could be in an adverse situation to
16 him.

17 Q But on December 20, 2007, you were already in
18 that circumstance, correct?

19 A Well, I'm not sure that was the case. If I
20 was I certainly didn't appreciate it until the
21 notice from the IRS came and said, "We're
22 investigating all these conservation transactions,"
23 and up until that point I believed that I could
24 represent Mr. McLeod without a conflict with these
25 other clients.

1 Q After you received the IRS notice, you
2 testified you had already had confidential
3 information about Yancey Environmental Solutions,
4 correct?

5 A I'm sorry, what date?

6 Q On December 20, 2007, when you opened that
7 email and you had the IRS letter and you were
8 considering what to do, you knew several things.
9 I'm going go through a few of them. One, you
10 already knew you had confidential information about
11 Yancey Environmental Solutions?

12 A That's correct.

13 Q You had information about easements from
14 other clients?

15 A That's correct.

16 Q You have testified you couldn't represent
17 those clients because of the position you put
18 yourself in with Y.E.S., do you remember that?

19 A That I wasn't going to be able to represent,
20 yes, I could not represent those clients in, for
21 instance, the IRS investigation, that's true.

22 Q So you were already in circumstances, the
23 only variable left was whether to finish the
24 project for Yancey Environmental Solutions and you
25 chose to abandon them, didn't you?

1 A I didn't choose to abandon them, I chose to
2 withdraw from the representation because I did not
3 think that I could give Mr. McLeod the loyalty as
4 an attorney that I thought he deserved and I
5 thought that he needed immediate other counsel to
6 deal with the IRS investigation. The only -- I
7 only saw downside to Mr. McLeod if I continued to
8 represent him.

9 Q I've got a few more questions for you and I
10 want to make sure we're clear. None of them have
11 to do with your representation of Y.E.S. on the IRS
12 investigation. To make sure we're clear, these
13 next few questions have nothing to do with that.

14 A All right, sir.

15 Q With regard to the Justice matter you chose
16 to break the client safety rule, cause no harm to
17 your client, didn't you?

18 A I didn't choose to do that. I did the
19 withdrawal based on my ethical obligations.

20 Q All you cared about was keeping Richardson
21 Plowden out, from getting sanctioned by the IRS,
22 isn't that true?

23 A No, sir, not true at all.

24 Q And you didn't care about Yancey or Y.E.S. or
25 what fees they would have earned if the project had

1 been preserved?

2 A That's not true. As I have testified, I knew
3 of no reason why this couldn't have been done and
4 completed in 2007. I certainly didn't know of any
5 reason it couldn't be completed later. Every
6 indication I had was that Mr. Justice would have at
7 least as much incentive to do it later as he did in
8 2007.

9 MR. PENDARVIS: No further questions.

10 MS. McWILLIAMS: Briefly, Your Honor.

11 REDIRECT EXAMINATION BY MS. McWILLIAMS:

12 Q Mr. Hanlin, Mr. McLeod never raised any
13 questions about the size of your fee or his fee
14 under the consultant services agreement?

15 A No, ma'am.

16 Q And when you had your call with Mr. McLeod on
17 December 20 and advised him of your withdrawal did
18 he ask you to reconsider?

19 A No, ma'am.

20 Q Did he at any point after December 20 call
21 and say, "Hal, could you please just reconsider?"

22 A No, ma'am.

23 Q Did he ever call and say, "Can you help me
24 find another lawyer?"

25 A No, ma'am.

1 Q And did he ever ask you to just stick in just
2 for this transaction?

3 A No, ma'am.

4 MS. McWILLIAMS: I have no further questions.

5 THE COURT: Any recross?

6 MR. PENDARVIS: No.

7 THE COURT: Very well. You may step down,
8 Mr. Hanlin.

9 THE WITNESS: Thank you, Your Honor.

10 (Witness excused).

11 THE COURT: Miss Meyer, 1:45 or 2:00? Do you
12 want 1:45 or 2:00 o'clock? It is 12:30 right now.

13 JUROR: 2:00.

14 THE COURT: 2:00 o'clock is fine, see you
15 back in the jury room at 2:00 o'clock. You can't
16 discuss the case. See you all after lunch.

17 (Jury excused from the courtroom).

18 THE COURT: All right, we'll stand at ease
19 until 2:00 o'clock.

20 (Recessed at 12:36 p.m.).

21 (Reconvened at 2:01 p.m.).

22 THE COURT: All right, are you ready?

23 MS. McWILLIAMS: Yes, Your Honor.

24 THE COURT: All right; Mr. Hopkins, get the
25 jury.

1 begin to discuss the case, even though you have
2 heard all the evidence, because you haven't heard
3 the closing summaries or my instructions so you're
4 still prohibited from discussing the case. See you
5 first thing in the morning. 9:00 o'clock?

6 All right, see you at 9:00.

7 (The jury was excused from the courtroom).

8 THE COURT: All right, have a seat.

9 Do you have motions?

10 MS. McWILLIAMS: Yes, Your Honor.

11 THE COURT: Very well. Hang on one second,
12 let me find a notebook.

13 All right. Do you all need a break?

14 MS. McWILLIAMS: We'll go ahead.

15 THE COURT: All right, go ahead.

16 MS. McWILLIAMS: Pursuant to Rule 50 of the
17 South Carolina Rules of Civil Procedure the
18 defendants move for a directed verdict, renew their
19 motion for directed verdict now at the end of all
20 of the testimony, Your Honor, on the ground that
21 now taking all of the testimony in a light still
22 most favorable to Yancey Environmental Solutions,
23 LLC, that there is no genuine issue of material
24 fact to be submitted to the jury, therefore the
25 defendant is entitled to a judgment as a matter of

1 law.

2 I understand from the prior motion of
3 directed verdict at the end of the plaintiff's case
4 the Court thought that there was a question, some
5 question of fact as to proximate cause and of
6 course that was a subject of much argument at that
7 time, Your Honor. That was Monday morning, this
8 week and, Your Honor, even after the Court has
9 admitted the, and reviewed, played the testimony of
10 Justice Family Farms' designee, now we have the
11 Defendant's side of the story and so as to, there
12 is certainly not any dispute as to the existence of
13 the attorney-client relationship but with respect
14 to the breach of duty by the defendant we submit
15 that now with the testimony of Professor Crystal
16 and Mr. Hanlin that the plaintiffs have, the
17 plaintiff has failed to produce even a cintilla of
18 evidence that the defendant law firm and Mr. Hanlin
19 failed to follow generally recognized practices and
20 procedures applicable to the legal profession under
21 the circumstances which were existing at that time
22 and then furthermore, that their act or omissions
23 proximately caused Y.E.S. to suffer damages.

24 Now, we in no way waive our continuing
25 objection to what Mr. Miller said purporting to be

1 on behalf of Justice Family Farms but what we do
2 know now, based on what Mr. Hanlin has testified,
3 is that when presented with the circumstances of
4 the IRS notice, the Court has now heard Mr.
5 Hanlin's deliberation and there is, I don't believe
6 there is any dispute between what Professor Adams
7 and what Professor Crystal said, which was it is a
8 lawyer's obligation under the rules of professional
9 conduct to analyze whether or not there is a
10 conflict or whether or not under the circumstances
11 the lawyer can continue to represent his or her or
12 its client without being materially limited either
13 in respect to the obligations to that client, to a
14 former client, to a third-party.

15 In this case that is exactly the
16 circumstances that Mr. Hanlin has testified to.
17 What he said was, "I knew that I had these other
18 transactions and I did not reasonably believe I
19 could continue to represent Mr. McLeod or Y.E.S.
20 under those circumstances," and so the second
21 prong, which is whether or not their conduct was,
22 met the standard of care, we submit, Your Honor,
23 that now has been resolved because what Mr. Adams,
24 what Professor Adams said was that there was a lot
25 of criticism about the fee agreement and as we

1 noted earlier, Mr. Hanlin has now explained how
2 they entered into the fee agreement and the
3 plaintiff's own testimony was, "I thought it was
4 unusual but I didn't care," so all of that
5 testimony has been proffered.

6 With respect to either the breach of contract
7 or breach of fiduciary duty, that has been negated
8 by both the testimony of the plaintiff and the
9 explanation given by Mr. Hanlin regarding his
10 thought process with respect to the fee, and
11 respectfully now, Your Honor, that we're near the
12 end of the case, given that the defendant received
13 no fee, there is no evidence they got any fee,
14 there is some evidence obviously that Mr. McLeod
15 and Mr. Justice reached some agreement with respect
16 to payment, I believe the famous check is \$15,000,
17 but there is no evidence that this law firm
18 received any fee, so any of the allegations that
19 are premised here on breach of fiduciary duty or
20 breach of contract with respect to this
21 unconscionable fee or this unreasonable fee under
22 Rule 1.5 simply don't matter, they are not part of
23 the case because we didn't receive a fee, we didn't
24 take a fee and, you know, there is a fairly
25 deceptive argument could have been made by the law

1 firm that given that it's the plaintiff's position
2 that it had a contract with Mr. Justice and in fact
3 I believe the words partial performance has been
4 thrown around in this lawsuit, that the defendant
5 might have said, "We don't care what you got but
6 whatever you got our deal was one-third,
7 two-thirds," but there is simply no evidence, no
8 issue to the jury with respect to the fee.

9 So, what we're then left with, Your Honor, is
10 the fact that it didn't close in general and we're
11 back again to the argument which has been suggested
12 to this jury that if Mr. Justice had, if it had
13 been recommended to Mr. Justice by Mr. McLeod on
14 December 24th in this conference call they got on
15 Christmas Eve, "You know what, I've got the IRS
16 investigation, I'm going to be vindicated, this
17 doesn't have any basis whatsoever, let's go
18 forward," and there was some evidence that most
19 probably Mr. Justice would have done that, then
20 they might have an issue of fact for the jury. But
21 there is no evidence on that.

22 Even taking the testimony from what Mr.
23 Miller testified as the 30(B)(6) for Justice Family
24 Farms, "It was our intent to go forward, we wanted
25 to get the tax deduction, we didn't get the tax

1 deduction because Mr. McLeod told us not to go
2 forward," of course they are not parties here so
3 that doesn't have anything to do with anything but
4 the fact of the matter is Mr. Miller never
5 testified, "Oh, well," Mr. Miller couldn't because
6 he doesn't have personal knowledge, but he never
7 asked, even if you want to go back to the whole
8 issue of what was the foundation for his
9 deposition, he never even asked Mr. Justice, "Hey,
10 Jim, if you had been told by Yancey, rather than
11 stop; you had been told go, would you have done
12 that?" We would still be objecting like crazy
13 because that is hearsay but he didn't ask that
14 question and that testimony was never given in this
15 court, so what the jury has to surmise is that,
16 well, and that is basically what they have to do,
17 they have to speculate as to what was the reason
18 Mr. Justice agreed with the recommendation, because
19 as I said before, I don't want to be a broken
20 record here, Your Honor, but the record is clear
21 Mr. McLeod said, "I told him two things, I told him
22 about the IRS investigation," entirely proper, we
23 agree with that, and he said without any input from
24 the defendants and no disclosure the defendants
25 were no longer there, he said, "I think you need to

1 postpone it," and that's the testimony, that's it.

2 So what did Mr. Justice, what did he decide?

3 And we keep coming back, Judge, Your Honor, you

4 have noted this a number of times, if the

5 disclosure was to Mr. Justice and the decision was

6 by Mr. Justice, and we can't listen to some

7 videotape LLC designee tell us because in fact even

8 if you wanted to look at it he didn't get asked

9 that question, he didn't find out, didn't find out

10 from Mr. Justice and he didn't tell this jury, but

11 why did Mr. Justice accept that recommendation?

12 We'll never know. We could know but we don't know.

13 But what we do know is that on the basis of

14 that recommendation by Mr. McLeod without the

15 disclosure of the, "That I don't have my lawyers,"

16 Mr. Justice agreed and said okay, and of course

17 there was some payment later on and that still

18 doesn't have bearing on whether or not the

19 withdrawal proximately caused the transaction not

20 to go forward. In fact, as we have said, it can't

21 possibly have had any direct cause because he never

22 told Mr. Justice about it. Mr. McLeod has

23 admitted, "I didn't even tell Mr. Justice until

24 sometime in April of 2010," when he wrote him and

25 said, "I need your help." And at that point, and,

1 Your Honor, we have not argued prior to, in the
2 plaintiff's case in chief, but now that all the
3 evidence has come in and Mr. Hanlin has testified
4 and our expert has testified, as difficult as it is
5 to face, the fact of the matter is there is, there
6 are two different stories being told by Mr. McLeod.

7 He tells Mr. Justice the reason he has got to
8 postpone it he has the IRS investigation, now he
9 wants to come in and tell the jury, "No, the real
10 reason I told him that is that my lawyers had
11 withdrawn, and if he gave Mr. Justice the
12 opportunity to evaluate all the evidence, all the
13 facts, "Which there is an IRS investigation and my
14 lawyers have quit," or, "My lawyers have dumped me,
15 my lawyers have withdrawn," then in that event, if
16 there was some cintilla of evidence that Mr.
17 Justice had said, "Wait a minute, you don't have
18 your lawyer here, I'm not going forward," if there
19 was just something to tie it to the lawyer, and it
20 simply isn't.

21 They could have produced that evidence. They
22 didn't produce that evidence even with Terry Miller
23 who came in having given an affidavit and then
24 testifying, they didn't ask the right question. We
25 would still be objecting that it was hearsay but

1 they didn't ask him the right question and it is
2 fundamental under a legal malpractice action the
3 plaintiff has got to show that if the conduct had
4 been otherwise, not as the defendants acted, but as
5 the plaintiff maintains the result would have been
6 different, and there is no evidence of that.

7 And furthermore, Your Honor, we renew our
8 motion for directed verdict on the issue of
9 damages. As we said, even if the Court thought
10 there was a cintilla of evidence to send the case
11 to the jury on the issue of liability, on the issue
12 of damages we just renew that it is entirely
13 speculative for the jury to attempt to base a
14 verdict on a best guess and, Your Honor, we have
15 now been able to review the testimony although it
16 is not the official transcript but it is pretty
17 close, from the court reporter, of Dr. Hawkins and
18 it is clear in two places Dr. Hawkins says that
19 \$45,000 best bet, up in the air, "Rush job that I'm
20 sending you via email, did not include, from which
21 would have to be subtracted the cost of the
22 mitigation." He says that and under that basis,
23 Your Honor, and if the Court would like for me to
24 hand it up, he was asked with respect to his email,
25 which was in evidence as Plaintiff's Exhibit 26,

1 let me hand that up, "Dr. Hawkins, I want to
2 confirm this email here does not contain any
3 information regarding the cost of mitigation,
4 correct? That's correct. So, is there any
5 evidence with respect to what it would cost?" And
6 the answer is no. There is nothing in the record
7 regarding what those costs would be.

8 And he was asked earlier, Your Honor, right
9 at the beginning of the cross-examination,
10 regarding the \$45,000,000 number on the email, "Can
11 you tell me whether, that number does not include
12 cost of mitigation, correct? Answer. That's
13 correct, it is, would be what I would perceive to
14 be the functional value of that piece of property
15 for those eleven characteristics of a wetland if it
16 had been fully mitigated, which it was not."

17 And of course we previously argued, Your
18 Honor, and I don't want to unnecessarily repeat
19 what the Court is already aware of, but one of the
20 arguments that we made at the directed verdict
21 stage was that the patchwork of a foundation, it is
22 really more, we submit it is a house of cards, we
23 want the jury to look at a feasibility study for a
24 mitigation bank that was never done in July of '07
25 and pick some figures out of there, "Jury, we want

1 you to take maybe the cost of actually making it a
2 mitigation bank and then let's come over and apply
3 it to the best guess of Professor Hawkins, Dr.
4 Hawkins, even though he never finished it, and that
5 way you can come up with a value of a conservation
6 easement that Mr. Justice would have put on his tax
7 return."

8 We submit, Your Honor, that is simply not
9 competent evidence on which a jury, they can do
10 nothing but speculate. If there had even been some
11 expert testimony on damages, which there was not,
12 it simply wasn't offered and we would submit that
13 in this type transaction it simply couldn't be
14 offered because Dr. Hawkins got told to stop.

15 Now, he came up with a best guess on one of
16 the wetlands and he said there were numbers and he
17 gave some. As I said, it is a guesstimate, best
18 guess, so we would submit, Your Honor, we just
19 renew that even now at the end of the case nothing
20 has changed which would permit the jury to
21 speculate as to damages.

22 We also, Your Honor, believe at the end of
23 the case now is the appropriate time for the
24 defendant to move for a directed verdict as to the
25 plaintiff's claim for punitive damages. As the

1 Court is well aware, the standard for punitive
2 damages, there must be evidence of willful, wanton,
3 reckless conduct, or I think it it is described
4 sometimes as the defendant just exercises slight
5 care.

6 We would submit, Your Honor, that while Mr.
7 McLeod may not have liked the fact of the
8 withdrawal, that the evidence in the record is the
9 defendant at all times attempted, you know, with
10 benefit of hindsight someone may say well, you
11 should have deliberated more, you should have spent
12 more time. In fact that is what Professor Adams
13 said, you know, you should have more deliberations
14 as to it, but the fact there might have been more
15 deliberations does not change the fact there is no
16 evidence this was a willful, wanton, reckless
17 conduct.

18 In fact Mr. Hanlin has testified on direct
19 and through cross that he did deliberate, he did
20 think about it and he had the dilemma that lawyers
21 have, which is, "I have represented somebody in the
22 past, it might have implications now, given the IRS
23 has sent in this notice," there is nothing in the
24 record that the defendant had any control or
25 otherwise, we didn't have anything to do with the

1 fact the IRS investigation landed on everybody, in
2 everybody's lap December 19th or 20th and then
3 people took action with respect to it.

4 This is simply not a case where the jury
5 should be permitted to consider that this is
6 reckless, willful, wanton, even slight care. You
7 have, this is a case where you have law experts to
8 come in and debate whether or not how this rule
9 applies, demonstrate that the defendant exercised
10 at least slight care and we would submit they did
11 exactly the prudent thing and in fact much of what
12 Professor Adams said, he did not have any criticism
13 of the defendant's decision not to be able to
14 represent Mr. McLeod in the IRS investigation and
15 so, you know, this is simply not a case where there
16 is even any evidence that the conduct of the
17 defendant or the alleged commissions of the
18 defendant represented a lack of or willful, wanton
19 or lack of even slight care. I think to the
20 contrary there is certainly evidence that they
21 called Mr. McLeod, they then wrote Mr. McLeod and
22 beyond that there is no evidence that he asked for
23 the file or any documents caused the transaction
24 not to close.

25 Now, finally, Your Honor, this is really --

1 I apologize, I don't want to overlook, if I may
2 back up actually to the actual damage, Your Honor.
3 We have a provision of a contract that the
4 plaintiff is seeking to enforce, that was not
5 signed, it was not, as far as we know it was not
6 agreed to by Mr. Justice but if it was it was going
7 to be four percent of something. The only aspect
8 of that contract for which there was any reasonable
9 expectation was the \$50,000 nonrefundable retainer
10 and we know that in fact Mr. McLeod has already
11 received a portion of that. So, even if this case
12 were to be submitted to the jury and which we say
13 it should not and the issue of actual damages when
14 considered, we would submit that the evidence
15 establishes that the plaintiff should be limited to
16 the difference between \$50,000 nonrefundable and
17 the amount that the plaintiff has admitted it
18 received. And that is true not only because of the
19 contract but also because of the speculative nature
20 of the rest of the conservation easement valuation
21 which was never made and never submitted. And then
22 finally, Your Honor, to the extent that the jury
23 considers, is permitted to consider damages, which
24 we submit they should not, we think that punitive
25 damages should not be a part of the case.

1 Furthermore, Your Honor, with respect to
2 damages, this is something I know we have pled but
3 I have not argued, that is that now that we're at
4 the end of the case and all the evidence is in
5 there is no evidence that the plaintiff attempted
6 to mitigate his damages. In fact, the only
7 evidence is that the plaintiff simply deemed it
8 impossible and did nothing. However, we have
9 evidence proffered by the plaintiff through Mr.
10 Miller that Justice Family Farms or whatever one of
11 the companies did a conservation easement in 2009
12 and did it in a week. That is what he said, did it
13 in a week, pulled it together, did it in a week.
14 That is assuming of course Mr. Justice wanted to do
15 it.

16 But with that evidence in the case and the
17 evidence that Mr. McLeod admitted that when he
18 wrote Mr. Justice in April of 2010, or August of
19 2010, asking for an affidavit he said, "You will
20 recall everything was done and we were days from
21 closing," under that, taking that evidence, Your
22 Honor, we submit that the plaintiff has failed to
23 mitigate its damages and had an obligation to do so
24 and all that evidence together can only presume
25 that the transaction could have been done and he

1 did nothing, he did not attempt to replace the
2 lawyers and therefore under that, under that basis
3 the plaintiff should not be permitted to argue to
4 the jury that it suffered these damages.

5 MR. PENDARVIS: My turn?

6 THE COURT: Yes, sir.

7 MR. PENDARVIS: Your Honor, may it please the
8 Court.

9 THE COURT: Yes

10 MR. PENDARVIS: The bottom line, the bottom
11 line is the motion under Rule 50 would require the
12 Court determine the jury, whether they believe Dr.
13 Adams versus Professor Crystal, whether they
14 believe Yancey McLeod or Mr. Hanlin, whether they
15 believe Justice Family Farms' designee Mr. Miller
16 over Mr. Harrah who no longer is employed, those
17 factual disputes, who believes what is certainly in
18 the jurors' province, not for the Court. It is not
19 an undisputed matter of law, a decision the Court
20 is able to make.

21 One thing in particular and I was really
22 careful to listen to Professor Crystal. Professor
23 Crystal's opinions, he specifically said in
24 response to, "Have you developed opinions," he
25 said, "Yes, I've developed opinions on the breach

1 of fiduciary duty and the professional negligence
2 claim." He made no statement whatsoever as to the
3 breach of contract and in particular, Your Honor,
4 the contract, the breach of contract claim is
5 focused on Exhibit 10, and Exhibit 10 has a right
6 of withdrawal provision in it and it says, "It is
7 understood and agreed that this law firm has the
8 right to terminate our representation of you in
9 this matter pursuant to Rule 1.16 of the rules of
10 professional conduct," and it goes on to elaborate
11 under 1.6, 1.5, which deals with the client fails
12 to substantially fulfill an obligation to the
13 lawyer.

14 So, certainly with Dr. Adams opinion 1.6
15 requirements were not satisfied and specifically
16 the 1.5 issue, there is no evidence whatsoever in
17 this case that Yancey McLeod, Yancey Environmental
18 Solutions failed to substantially fulfill an
19 obligation to the lawyer regarding the lawyers'
20 service or payment therefore and we submit that
21 given that Professor Adams' opinions, excuse me,
22 Professor Crystal's opinions were specifically
23 limited to the professional negligence and breach
24 of fiduciary duty claims, at a minimum the breach
25 of contract claim goes to the jury. But we submit

1 all of it goes to the jury, given the testimony on
2 both sides of the case.

3 The suggestion, by the way, that the
4 plaintiffs just simply didn't ask the right
5 questions, well -- endeavoring to be nice, not
6 consistent with the argument of this Court
7 regarding the testimony in the written transcript
8 from Mr. Miller, questions posed on paragraph, page
9 34, page 36 where we asked, we respectfully request
10 to submit to the jury the questions that were posed
11 to Mr. Miller in his deposition as the designee for
12 Justice Family Farms that if Mr. McLeod had
13 represented, advised about the lawyer and
14 recommended it to proceed what would they do? The
15 jury didn't get that because of the defendant's
16 suggestion, to suggest it wasn't asked is not
17 consistent with the evidence that has been
18 presented to the Court, might not have gone to the
19 jury, but that is just not consistent.

20 In addition, the suggestion, the argument was
21 made that now that the Court has heard Mr. Hanlin's
22 explanations about his deliberations and what have
23 you after he got the IRS letter, now as a matter of
24 law the Court should take this away from the jury,
25 well, the jury did hear testimony that Professor

1 Adams had reviewed both deposition transcripts of
2 Mr. Hanlin and in his opinion, his testimony, Dr.
3 Adams' testimony nonetheless was that in his
4 opinion Mr. Hanlin and Richardson Plowden had
5 indeed breached duties, professional duties,
6 fiduciary duty and contractual duties, so the idea
7 that the testimony from, former testimony from Mr.
8 Hanlin, not that the deposition testimony somehow
9 defeats Dr. Adams' opinions as a matter of law, and
10 we contend this case should go to the jury. There
11 has never been any dispute that the defendant
12 didn't receive a fee. There has never been a
13 contention that they should have gotten a fee or
14 they got some fee, that is just not really part of
15 this case. In fact we say they weren't entitled to
16 any credit for the fee based on their breach of
17 fiduciary duty. I'm not certain where that came
18 from.

19 And I also want to make clear on this,
20 Professor Adams in his opinions never said that
21 there was a proximate link between his opinions on
22 the impropriety of the fee and unreasonable nature,
23 unconscionable nature of the fee had any proximate
24 relation to the claims by the plaintiff. What he
25 said was and what we're going to argue to the jury

1 is that it explains the motive on why this law
2 firm, this lawyer would have withdrawn on the eve
3 of the completion of this conservation easement,
4 but there has never been any argument that the fee
5 issue proximately caused injury to Yancey
6 Environmental Solutions. What caused the injury
7 was the sudden, abrupt termination of their
8 representation of Yancey Environmental Solutions in
9 this transaction that was anticipated and everyone
10 else was planning to close in 2007.

11 Now, there was also some argument that Yancey
12 had, Mr. McLeod had told Mr. Justice in that
13 December 24th phone call that he recommended that
14 Mr. Justice proceed with the easement in light of
15 the IRS letter. The jury may have disagreed with
16 the circumstances, the jury may have remembered
17 Curtis Elliott's opinion as a competent tax lawyer
18 that handles conservation easements. Other than
19 Mr. Hanlin, he is the only expert on this point.
20 Professor Crystal acknowledged he wasn't involved
21 in those matters and Mr. Elliott, in his expert
22 opinion told the jury no competent lawyer would,
23 with skills in conservation easements would have
24 touched this case on December 10th, notwithstanding
25 the due diligence requirement, any lawyer getting

1 involved, certainly any conservation easement
2 manifested by the size of this easement and the
3 likelihood of audit by the IRS, that no competent
4 lawyer would have done it.

5 So, what the defense is suggesting to the
6 Court to rule as a matter of law is that Mr. McLeod
7 should have given this advice and recommended Mr.
8 Justice proceed and then have to scramble to find a
9 lawyer when he knows that he's not going to be able
10 to find a competent lawyer. The jury may agree
11 with Mr. McLeod's testimony that he wouldn't have
12 hired a lawyer that said he would have taken the
13 case because Mr. McLeod is familiar enough with the
14 complexity of this transaction to realize that he
15 couldn't have gotten it done and not done in a
16 fashion that would have satisfied all the specific
17 details for a conservation easement.

18 The jury could also agree with Mr. McLeod's
19 explanation of exactly why he didn't tell Mr.
20 Justice about his lawyer withdrawing from this
21 case. The jury heard from Professor Adams, Dr.
22 Adams, that he had read the testimony from Justice
23 Family Farms' designee and Dr. Adams as an expert
24 told the jury that Mr. Justice said, "We're in the
25 boat," and the jury could have believed that, that

1 Mr. Justice knew that the idea was we're going to
2 do this easement and that is absolutely consistent
3 with everything Terry Miller said in his deposition
4 on behalf of Justice Family Farms, so the jury has
5 heard two sources related to companies and Mr.
6 Justice, one source from testimony about what Mr.
7 Justice said and the other from the companies of
8 which Mr. Justice has the controlling interest. In
9 context the jury will know, Mr. McLeod was asked
10 about the April 10th, 2010 letter that Mr. McLeod
11 decided without consulting with his counsel he was
12 going to write Mr. Justice and the jury is going to
13 hear or will be able to conclude that Mr. Justice
14 knew in 2011 when his designee from his company was
15 going to be deposed about this case exactly what
16 happened and that, "Mr. McLeod didn't tell me about
17 the lawyer," but Mr. Justice allowed, you know,
18 cooperated with the easement.

19 For the record, in the clerk of court's
20 office there is no commission for subpoenas to be
21 issued in West Virginia and there was no subpoena
22 issued out of a West Virginia court honoring full
23 faith and credit of South Carolina's directions for
24 issuance of a subpoena. Mr. Justice and his people
25 knew about the reason this easement didn't go

1 forward and that nonetheless the testimony was
2 given from Mr. Miller.

3 And also in terms of causation, the jury also
4 heard, I said this in the first part, I will just
5 repeat it here, the jury also heard Mr. McLeod
6 testify from the witness stand that when he hung up
7 the phone after Mr. Hanlin had told him he was
8 terminating all relationships he turned to Mary
9 Mohr and said, "We've got to call Jim Justice and
10 postpone the project," and if that isn't a causal
11 relationship I don't know what could be more
12 causally related. They did just that. They called
13 Mr. Justice and postponed the relationship.

14 In terms of damages, Your Honor, the jury
15 heard testimony again today from an expert in
16 conservation consulting, a lawyer, Mr. Hanlin, who
17 again today confirmed the \$45,000,000 value range,
18 that the dollars part they were working with, he
19 confirmed the 1.8 million dollar fee earned and the
20 \$600,000 fee that the law firm would have earned,
21 so in addition to the other evidence that's been
22 presented on damages and Dr. Hawkins' professional
23 opinion that we discussed at the first directed
24 verdict motion, there was sufficient clarity on
25 damages.

1 As the Court is aware, plaintiffs are not
2 required to prove damages to an absolute certainty.
3 The reasonable value of Yancey Environmental
4 Solutions' fee from this for their services
5 rendered if this case would have gone forward but
6 for the law firm withdrawal are certainly available
7 to the jury. The other thing that makes this a
8 much easier case than let's just say the whole
9 transaction was Mr. McLeod hiring this law firm to
10 help develop a subdivision, a shopping center,
11 excuse me, and it was going to be his first
12 development. In that circumstance, to develop
13 future profit from a deal that never developed.
14 That's the whole new business damages and the
15 certainty that is required in that circumstances is
16 greater than we have here where we have a specific
17 amount that was sent to Mr. Justice as the minimum
18 amount of conservation easement value that would
19 have been available to the government, we have a
20 very specific four percent fee calculation, they
21 might need a calculator but we're going to show it
22 to them in closing if this case gets to the jury,
23 as we believe it should, so it's going to be a very
24 easy method for the jury to calculate damages.

25 And on top of all that, to the suggestion

1 that there might have been a need to have an
2 agricultural reserve value, Mr. McLeod gave that to
3 the jury in his testimony and his experience, he
4 said, "Well, it would be approximately 200,000 and
5 instead of a 1.8 million dollar fee it would be a
6 1.6 million dollar fee, and that will be up to the
7 jury to determine, notwithstanding the statement in
8 Mr. Hawkins' email that maybe they need to give
9 credit for that amount and Mr. McLeod with his
10 experience in conservation consulting has given
11 that information to the jury.

12 And also we would suggest the jury heard Dr.
13 Hawkins' testimony and it was in the context of a
14 mitigation plan and having gone all the way through
15 the mitigation process and what would be involved
16 and we are not, the plaintiff is not picking from a
17 mitigation value to a conservation easement value.
18 The testimony was, Dr. Hawkins, Mr. McLeod, he
19 testified that the mitigation feasibility report
20 and that information was delivered to Dr. Hawkins
21 because it was relevant to his inquiry and that was
22 the very thing he was there to evaluate, the
23 wetland value of the property and it was certainly
24 appropriate to provide that resource to this expert
25 but the only number that is going to be offered to

1 the jury on value for the easement calculation is
2 the number from Dr. Hawkins' preliminary appraisal.

3 And the jury also heard from Mr. Elliott, Mr.
4 McLeod and from Mr. Hanlin that preliminary values
5 are part of the process. The landowner makes
6 decisions to close on the easement based on a
7 preliminary opinion from the appraiser that the
8 self contained appraisal is not due for 60 days
9 later. It is rare if ever that the self contained
10 appraisal, fully developed appraisal opinion is
11 provided to the landowner at the time of closing.

12 And, Your Honor, if we need to submit some case law
13 we will be happy to.

14 There was some argument there was no evidence
15 on plaintiff's attempt to mitigate. There we
16 disagree. There were letters and emails that are
17 in evidence where Mr. McLeod did his best to
18 convince Mr. Justice to please reconsider this
19 project, emails about the IRS letter, the IRS
20 resolved its investigation, let's proceed, when can
21 we meet, we have a new lawyer, Mr. Wingate. All
22 that was submitted. We easily believe that
23 satisfies our duty to mitigate. As the Court is
24 aware, the burden to establish that plaintiffs
25 failed to mitigate is on the defendant. The

1 defendant didn't offer a single lawyer on this
2 witness stand to say, "I do conservation easement
3 work and if Yancey had only called me, sure, I
4 would have taken this thing, man, heck yes, I would
5 have been happy to earn that fee on December 20 or
6 21st when that phone call came in." So, if there
7 is a suggestion that Mr. McLeod, Yancey
8 Environmental Solutions failed to mitigate, the
9 defendant failed to offer evidence to satisfy their
10 burden of proof in that regard.

11 Now, as to punitive damages, we are once
12 again in the scenario where this whole issue on
13 recklessness, I am quite confident the jury has
14 heard testimony from Professor Adams on the
15 reckless and intentional nature of this withdrawal
16 and if the jury believes Dr. Adams' assessment of
17 the defendant's conduct in light of the
18 circumstances that the parties faced, including the
19 defendants, on December 20 when this letter came,
20 the IRS letter came in, the jury is well within
21 their right to believe this was reckless, willful
22 and wanton, that they made a decision to abandon
23 their client at a time of most critical need and
24 that if they believe Dr. Adams that's certainly
25 reckless conduct supported by expert testimony from

1 a law professor that teaches ethics. So, it is
2 just a matter of a jury assessment of which expert
3 they believe, the plaintiff's or the defendant's.

4 And the last part of the, on the contract
5 terms and the payment of the four percent, the jury
6 heard Mr. Miller testify that they would have paid
7 the fees, they were in agreement, they heard Mr.
8 Miller testify on behalf of Justice Family Farms,
9 five percent or four percent, really I don't think
10 there is any dispute as that was the percent value.
11 There was testimony from the grantor organizations
12 that the companies were prepared to pay the fee for
13 all professionals and four percent was the value.

14 Mr. Miller also testified that if Mr. McLeod
15 had recommended to Mr. Justice to move forward
16 notwithstanding the IRS letter, that they would
17 have done so and in other words, you know, Mr.
18 McLeod had the trust and faith of Mr. Justice and
19 if Mr. McLeod had his lawyer at his side, tax and
20 conservation easement lawyer, Mr. Hanlin of the
21 Richardson Plowden law firm when the phone call
22 came, the recommendation on the 24th, the
23 recommendation would have been let's proceed, let's
24 go forward.

25 We submit, Your Honor, there are facts and

1 inferences from the facts taken in a light most
2 favorable to the plaintiff per Rule 50 and the case
3 law interpreting Rule 50 that this entire case,
4 including the claim for punitive damages, I got
5 that in reverse, claim for breach of fiduciary
6 duty, breach of contract and claim for punitive
7 damages is all appropriate for the jurors'
8 determination.

9 Thank you, Your Honor.

10 MS. McWILLIAMS: Just briefly. No one, not
11 Adams, not Crystal, not McLeod, not Hanlin, not
12 Miller, not Harrah has testified as to why Mr.
13 Justice postponed the transaction, why did he
14 accept the recommendation? Was it because of the
15 recommendation or was it because of the
16 investigation? We don't have, there is no
17 evidence, so there is no way, Mr. McLeod says,
18 "Well, it's because of my recommendation, I
19 recommended it." But we are going, the fact of the
20 matter is there is nothing that ties Mr. Justice's
21 decision to withdraw to the defendant.

22 Secondly, Your Honor, Professor Crystal did
23 testify that he held his opinions to a reasonable
24 degree of professional responsibility, certainty,
25 professional responsibility, professional ethics,

1 that the withdrawal was consistent with the facts
2 of the case and with 1.16 and therefore under the
3 terms of the engagement there was no breach of
4 contract.

5 Your Honor, this case is not about what
6 caused Mr. McLeod to make this recommendation to
7 postpone, it's about what caused Mr. Justice to
8 postpone and there is no evidence regarding that.

9 Now, I heard again that Dr. Hawkins had given
10 a preliminary opinion of value. I want to repeat
11 for the record, go back and look at that,
12 Plaintiff's 26, it is a best guess and there is
13 absolutely no authority that I'm aware of where a
14 best guess gets to qualify as an opinion of value.
15 In fact they are routinely excluded. Had he been
16 named as an expert and proffered that we would have
17 had the opportunity to point that out to the Court.

18 Your Honor, there is simply also nothing in
19 the record as to why Mr. Justice couldn't have done
20 the easement in '08, or '09 or '10. We understand
21 it is the plaintiff's position, "I tried to get him
22 to do it but he wouldn't do it. The fact of the
23 matter is he didn't do it, and in any of those
24 years he hasn't done it to the present and the
25 answer is he didn't want to do it. And so there is

1 just a dirth of evidence that in fact Mr. Justice
2 was committed to do it and the plaintiff could have
3 subpoenaed, I don't want to be a broken record but
4 where is Mr. Justice, bring him in, and they didn't
5 do that. This is the first we have heard that when
6 Mr. Miller said that he had a subpoena he received,
7 that it was all by agreement. It is not all that
8 surprising that it is by agreement but all that
9 does is underscore my argument, Your Honor, they
10 could have brought in Mr. Justice, they apparently
11 are all in agreement, "We need to work on this."
12 Okay, where is Mr. Justice? That's the competent
13 evidence that is missing in the case and we would
14 renew our motion, Your Honor.

15 THE COURT: You all rest easy one second. I
16 will be right back.

17 (Recessed at 5:15 p.m.).

18 (Resumed at 5:29 p.m.).

19 THE COURT: All right, folks, I have, I
20 walked a path back there in the hall. I think I
21 have wrestled with this whole thing since summary
22 judgment motions but I don't believe, looking at
23 the facts, there is a question of fact to submit to
24 the jury about what Justice would have done or
25 didn't do, I don't see it. I think his failure to

1 present an affidavit, his failure to testify,
2 present a deposition, as to what he would have done
3 or wouldn't have done, it isn't here and that is
4 breaking the causal link, the proximate cause to
5 the breach, the damages. I can't tie it together
6 and for that reason I'm going to grant the directed
7 verdict. And I'm telling you, I'm struggling with
8 this, I don't see, it is just right there and for
9 the record I'm making a gesture with my hand, it is
10 very close for me, but I see a break there, it is
11 not there, I don't see that link, I don't see it.
12 There is not a link, in my opinion. It's a humble
13 opinion.

14 MR. PENDARVIS: May I respond, Your Honor?

15 THE COURT: Yes, you may.

16 MR. PENDARVIS: In the nature of
17 reconsideration?

18 THE COURT: Yes, sir.

19 MR. PENDARVIS: Your Honor, Mr. Jim Justice
20 was not the only party to the contract. Justice
21 Family Farms was the other party to the consulting
22 services agreement. Justice Family Farms' designee
23 gave testimony to this jury about the intent of the
24 companies and also Dr. Adams in his expert opinion
25 having reviewed the Justice Family Farms testimony

1 said Jim Justice said, "We were in the boat."

2 THE COURT: And I will represent to everyone
3 here, my law clerk and I discussed that exact
4 testimony moments ago. I mean, I am with you on,
5 yes, I agree that's what we heard but what was
6 consistently said by the Justice people, whether
7 Harrah or Miller, Jim Justice makes all the
8 decisions, Jim Justice makes all the decisions, the
9 buck stops with Jim Justice, and yes, the 30(B)(6)
10 guy said, "We were prepared to go forward, we were
11 going forward, we were in the boat," all those sort
12 of things. Justice makes the final decision,
13 consistently that was presented by them and I don't
14 find a question of fact as to that. I mean, there
15 is nobody disputed that Justice makes the
16 decisions.

17 MR. PENDARVIS: Respectfully, Your Honor, the
18 testimony that the Court excluded said after
19 Justice Family Farms' designee said, "If asked,
20 have you been told in light of the lawyer
21 withdrawal, would the transaction have proceeded
22 after discussing with Mr. Justice and doing his due
23 diligence on behalf of the corporation, that was a
24 party to the contract, they would have proceeded,"
25 and I think the flaw in the Court's analysis is,

1 Your Honor, the fact is Mr. Justice as the owner
2 took advantage of a corporate organization, a
3 corporate organization that was a party to a
4 contract, the corporate organization with its
5 proper due diligence responded on behalf of the
6 corporation that it would have proceeded.

7 THE COURT: Well, and I keep coming to that,
8 that flips, you're exactly right, from what you're
9 saying but consistently Jim Justice does exactly
10 what Jim Justice wants to do or intends to do and
11 there is nothing for me, before me from Jim Justice
12 to say, "We would have done the deal." I can't
13 figure out, I didn't figure out why he wasn't asked
14 something or wasn't provided, I can't figure that
15 out. That is not my problem, not my duty. But
16 Justice never said what he would have done and I
17 can't get away from that and I understand the
18 corporate analysis because it is kind of a, it's a
19 riddle, corporation 30(B)(6), corporation 30(B)(6)
20 here but it's Yancey McLeod and Jim Justice that
21 are doing the deal.

22 MR. PENDARVIS: Yancey McLeod just like Mr.
23 Justice and his companies is not the plaintiff
24 because the plaintiff is the company that had the
25 contract and the company that had the contract on

1 the plaintiff's side is Yancey Environmental
2 Solutions and it had a contract with two parties,
3 Justice Family Farms being one of them, Justice
4 Family Farms is a party to the contract, a party
5 which by the way is on the check that paid a
6 portion of the consulting services fee. I
7 respectfully disagree with the Court, Your Honor.
8 Mr. Miller said, "I said to Jim, I'm going to be
9 doing a deposition on the Yancey McLeod issue from
10 2007, you're familiar with that?" Mr. Miller is
11 quoting Mr. Justice, he says yes. "Mr. Miller. Do
12 you feel that, do you feel that that thing would
13 have worked out and played out to the end, and he
14 said absolutely." And that was my only question to
15 him because that was the concern I had, they would
16 have moved forward, and I said to him, excuse me,
17 "That was a concern I had, would they have moved
18 forward," and he said, "We were in the boat."

19 So that is the intent of Mr. Justice, that is
20 what Dr. Adams told this jury. If that isn't the
21 intent of Mr. Justice to move forward with this
22 transaction I really don't know what could be
23 better said. Now, this is a designee of a
24 corporation who has been asked and obligated under
25 Rule 30 to do due diligence in order to come and

1 respond on behalf of the interest of the
2 corporation, he went to the source and we provided
3 the Court the other things he did, researched,
4 looked at documents and letters, but he is down to
5 the source that said it, Your Honor. I think the
6 Court is not taking into consideration what Dr.
7 Adams told and what was presented to this jury on a
8 question of fact and that is why we mentioned it in
9 response to their motion, that the jury heard Dr.
10 Adams say, testify he is an expert, they heard from
11 Adams a statement, statement from Jim Justice, the
12 source, the individual for the contract, that they
13 were in the boat and absolutely would proceed and
14 on top of that the company that is the other party
15 to the contract gave abundant testimony on its
16 intent.

17 THE COURT: All right. I mean, I understand
18 your position, you have been very consistent in
19 that, I understand that and I respectfully don't
20 believe there the causal connection has been met.
21 I don't think there is evidence received of that.
22 So, that is my ruling.

23 MR. PENDARVIS: Your Honor, one last thing.
24 You don't think there is the weight the evidence
25 carries but there is evidence and I think the Court

1 might want to take a look, our response would be,
2 Your Honor, on a directed verdict it is not the
3 weight of the evidence, it's the existence of it.

4 THE COURT: That is what I'm saying, there is
5 the existence of no evidence of what Jim Justice,
6 everything is consistent with what, there is an
7 absence of evidence what Jim Justice would do, an
8 sabsence.

9 MR. PENDARVIS: Except that he was absolute
10 that he was on board with it, he absolutely, it
11 would have worked out had it played out to the end
12 and he said absolutely. I think that is evidence,
13 Your Honor.

14 THE COURT: I'm sorry, I don't think the link
15 is there. You all have done a wonderful job of
16 presenting this but I don't think it's there.

17 All right.

18 MR. PENDARVIS: Your Honor, would you take a
19 motion to reconsider, a formal motion under
20 advisement, or --

21 THE COURT: Let's do a written order, you
22 make a motion to reconsider and I'll do that, I
23 think that would be good for your record,
24 considering everything that is here. Let's do it
25 appropriately, let's do a written order, you file

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL DISTRICT,
COUNTY OF RICHLAND

YANCEY ENVIRONMENTAL)
SOLUTIONS, LLC,)
Plaintiff,)

VS:)

CIVIL ACTION NO. 2010-CP-3297

RICHARDSON PLOWDEN &)
ROBINSON, P.A., and)
GEORGE HAROLD HANLIN, J.D.,)
Defendants.)

The videotape deposition of JAMES TERRY MILLER in the above-styled matter was taken pursuant to notice for discovery and/or evidentiary purposes, before H. David Stanley, a Notary Public within and for the State of West Virginia at Large, on the 13th day of December, 2011, commencing at 9:18 A..M., EST, at Brown Reporting Agency, 117 Main Street, Beckley, West Virginia.

BROWN REPORTING AGENCY

P.O. Box 5473
Beckley, West Virginia 25801-7508
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I N D E XPlaintiff's Witness:DirectCross

James Terry Miller

5
10441 (Leonardi)
108 (Leonardi)Plaintiff's Exhibits:Marked

Miller Dep. Exhibit No. 1	6
Miller Dep. Exhibit No. 2	7
Miller Dep. Exhibit No. 3	12
Miller Dep. Exhibit No. 4	14
Miller Dep. Exhibit No. 5	15
Miller Dep. Exhibit No. 6	18
Miller Dep. Exhibit No. 7	20
Miller Dep. Exhibit No. 8	21
Miller Dep. Exhibit No. 9	24
Miller Dep. Exhibit No. 10	28
Miller Dep. Exhibit No. 11	34
Miller Dep. Exhibit No. 12	35
Miller Dep. Exhibit No. 13	37
Miller Dep. Exhibit No. 14	38
Miller Dep. Exhibit No. 15	84
Miller Dep. Exhibit No. 16	86
Miller Dep. Exhibit No. 17	87
Miller Dep. Exhibit No. 18	88
Miller Dep. Exhibit No. 19	98
Miller Dep. Exhibit No. 20	102

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 Signature Sheet -- Page 113
 Errata Sheet -- Page 114

B.R.A.

1 VIDEOGRAPHER: We are now on the video
2 record in the matter of Yancey Environmental
3 Solutions, LLC., plaintiffs, versus Richardson,
4 Plowden & Robinson, P.A., and George Harold
5 Hamlin, J.D., defendants, being Civil Action
6 No. 2010-CP-40-3297. My name is Aaron Mann, I
7 am a legal video specialist with Katz Consulting
8 Group located at 179 Summers Street, Suite
9 213, in Charleston, West Virginia. I am not
10 related to any of the parties to this action or
11 to counsel of record, nor do I have a financial
12 interest in this action. Today is December
13 13th, 2011, the time is 9:18 A.M. This
14 deposition is taking place at Brown Reporting
15 Agency, 117 Main Street, in Beckley, West
16 Virginia. This is the 30(b)(6) deposition of
17 James T. Miller. Would counsel please identify
18 themselves for the record?

19 MR. PENDARVIS: I am Thomas Pendarvis,
20 counsel for the plaintiff, Yancey Environmental
21 Solutions, LLC.

22 MR. LEONARDI: My name is Daniel
23 Leonardi, I represent the defendant, Richardson,

B.R.A.

1 Plowden & Robinson, P.A., and George Harold
2 Hamlin, Esquire.

3 MR. HUNTER: I am Roger Hunter, I am
4 general counsel for James C. Justice Companies,
5 Inc., and it's sub, Justice Family Farms, and
6 I'm here to represent our corporate represen-
7 tatives, Mr. James T. Miller, who is known as
8 Terry Miller.

9 VIDEOGRAPHER: Will the court reporter
10 please identify himself and swear the witness,
11 please?

12 COURT REPORTER: David Stanley, Brown
13 Reporting Agency.

14 (Witness Sworn)

15 THEREUPON came,

16 J A M E S T E R R Y M I L L E R
17 called as a witness on behalf of the Plaintiff herein,
18 who, having been first duly sworn according to law,
19 testified as follows:

20 DIRECT EXAMINATION

21 BY MR. PENDARVIS:

22 Q Good morning, Mr. Miller.

23 A Good morning.

1 Q We're here to take the deposition of
2 the designee for Justice Family Farms and I understand
3 that you've accepted that designation. Is that correct?

4 A That's correct.

5 (WHEREUPON, Miller Deposition
6 Exhibit No. 1 was marked for
7 identification purposes)

8 BY MR. PENDARVIS:

9 Q In front of you is a composite exhibit,
10 including an Amended Notice of Videotaped Deposition Rule
11 30(b)(6), the deposition of Justice Family Farms, and
12 also a subpoena duces tecum. And am I correct in
13 understanding that you-all have voluntarily accepted the
14 subpoena and agreed to appear for this deposition today?

15 A That is correct.

16 Q What is your position with Justice
17 Family Farms?

18 A I'm treasurer of the company.

19 Q And did you do anything to prepare for
20 this deposition today?

21 A I reviewed the records that we had. I
22 spoke to our company representatives involved in the
23 action and prepared myself for the affidavit that I

Direct

7

1 signed and also for the deposition today by doing these
2 things.

3 MR. LEONARDI: What was that, by doing
4 what?

5 THE WITNESS: By doing those things, I
6 prepared myself for this.

7 (WHEREUPON, Miller Deposition
8 Exhibit No. 2 was marked for
9 identification purposes)

10 BY MR. PENDARVIS:

11 Q And in that regard, I am passing to you
12 a copy of your affidavit marked Exhibit 2. Take a moment
13 and review that, Mr. Miller, and my question for you is
14 can you verify that this is a true and correct copy of
15 the affidavit you signed on August 30, 2011, as designee
16 for Justice Family Farms?

17 A Yes, it is.

18 Q Thank you very much. You may want
19 to keep that close to you during the day, you may need to
20 refer to that for some of the questions. Mr. Miller,
21 part of what is involved in this lawsuit involves some
22 property that we understand is owned by Justice Family
23 Farms. Does Justice Family Farms own property in South

B.R.A.

1 Carolina?

2 A Yes, they do.

3 Q And where is it located?

4 A They own farms and property primarily
5 in the Clarendon County around Gable and Manning, South
6 Carolina.

7 Q As referenced in Exhibit 2, can we refer
8 to this property as the Black River Farms property?

9 A That's how we refer to it.

10 Q Can you describe for the jury just the
11 nature of the property?

12 A This is primarily farm property. The
13 family bought it in 1989 to farm corn, wheat and soybeans
14 there.

15 Q And for the jury's benefit, Mr. Miller,
16 what family bought this property?

17 A I'm sorry, that's the Justice family.

18 Q And who's the principal shareholder in
19 Justice Family Farms?

20 A The principal shareholder is James C.
21 Justice Companies, Inc. James C. Justice Companies,
22 Inc., is owned by James C. Justice, II, majority owner.

23 Q And is he referred to commonly as Jim

1 Justice?

2 A That's correct.

3 Q And how is the property being used,
4 the Black River Farm property?

5 A It's still being farmed, corn, wheat
6 and soybeans.

7 Q Did Justice Family Farms place any
8 easements on this property in the year 2003?

9 A There was a 1,000-acre easement that was
10 -- I'm not sure of the exact term, the exact --

11 Q Would it refresh your recollection if I
12 would describe it as a wetlands resource --

13 A Yes.

14 Q -- protection easement?

15 A Yes.

16 Q WRP?

17 A I'm not sure of the exact -- that's
18 what it was called, yes.

19 Q Was anyone in South Carolina involved
20 with Justice Family Farms placement of the WRP easement?

21 A Mr. McLeod assisted in that, Mr. Yancey
22 McLeod, of YES, Environmental Solutions.

23 Q And Yancey Environment Solutions'

1 initials spell YES, so --

2 A I'm sorry.

3 Q That's okay. Can we refer to that
4 today as YES?

5 A That would be easier, yes.

6 Q All right. And would you describe the
7 relationship between YES, Mr. McLeod and Mr. Justice?

8 VIDEOGRAPHER: Pardon me, sir. I lost
9 my audio again, I need to go off the record.

10 (WHEREUPON, a short recess
11 was taken)

12 VIDEOGRAPHER: We are now back on the
13 video record. The time is 9:47 A.M.

14 BY MR. PENDARVIS:

15 Q Mr. Miller, after a short technical
16 difficulties moment, let's get back into the questions.
17 Flowing from the WRP easement in 2003, would you describe
18 Justice Family Farms' relationship with YES?

19 VIDEOGRAPHER: Hold on, sir. I'm sorry,
20 I'm sorry, I can't hear you.

21 (WHEREUPON, there was a
22 discussion off the record)

23 VIDEOGRAPHER: We are now back on the

1 video record. The time is 9:52 A.M.

2 BY MR. PENDARVIS:

3 Q Mr. Miller, again, we had another
4 little short technical difficulty break and we -- you had
5 discussed a wetlands resource protection, WRP, easement
6 that Justice Family Farms placed on the property in 2003
7 and you had also mentioned that YES had been involved
8 with the placement of that easement. Would you describe
9 the relationship between YES and Justice Family Farms
10 flowing from that 2003 easement?

11 A Mr. McLeod and Mr. Justice became
12 close friends because of the relationship in 2003,
13 developed a working relationship in -- and respect for
14 each other in their different areas. They both --
15 according to Mr. Justice, they both were very interested
16 in the environment and conservation and because of that
17 connection, that established a bond between them and
18 Mr. Justice relied on Mr. McLeod for advice on conser-
19 vation easements and wetland protection easements, things
20 of that nature.

21 Q By the spring of 2007, what did
22 Justice Family Farms do, if anything, with regard to
23 exploring the possibility of a stream and wetlands

1 restoration project for the Black Farms property?

2 A They explored the possibility of a
3 mitigation bank on the Black River Farm property and
4 Mr. Justice discussed this with Mr. McLeod and asked
5 him to investigate that and Mr. McLeod began the process
6 of doing that.

7 (WHEREUPON, Miller Deposition
8 Exhibit No. 3 was marked for
9 identification purposes)

10 BY MR. PENDARVIS:

11 Q Mr. Miller, I'm passing to you a
12 document marked as Exhibit 3 to your deposition. Is
13 this a copy of a letter that was sent back to Yancey
14 Environmental Solutions enclosing a signed Letter of
15 Intent, signed by Mr. Justice, for this wetlands
16 restoration project?

17 A Yes, it is.

18 Q And the cover letter shows it being
19 sent by a gentleman named Stephen Ball. Who is Mr. Ball?

20 A Mr. Ball is -- at this point, he was
21 general counsel of our companies. He is now Chief
22 Operating Officer of our operations, Mr. Hunter is now
23 the general counsel.

1 Q Were the -- was Mr. McLeod, through
2 YES, evaluating whether a mitigation bank could be placed
3 on the property, Black River Farms property?

4 A That's correct, that was his
5 instructions, to investigate that.

6 Q And in 19 -- excuse me -- by May of
7 2007, what was Justice Family Farms' general plans for
8 the Black River Farms property?

9 A I think the plan was to establish a
10 mitigation bank there. There was still some interest in
11 farming the property, but they wanted to explore all the
12 options as to what they could do with the property as far
13 as a mitigation bank, farming. They had other farms in
14 the area, but Black River Farms adjacent to the Black
15 River, there were opportunities for federal tax credits
16 and mitigation credits and they wanted to explore that
17 possibility.

18 Q During the 2007 year, did Mr. McLeod
19 become involved in any -- looking at any other properties
20 Mr. Justice owned?

21 A I'm not aware of that. Mr. Justice
22 relied on Mr. McLeod in the conservation areas, as I
23 mentioned, so I'm sure there were other discussions.

1 Q Were you aware that Mr. McLeod visited
2 some of Mr. Justice's properties in Union, West Virginia?

3 A At one point -- that's our home farm in
4 Monroe County, West Virginia, at Union, and I know there
5 was a visit there with Mr. Justice and Mr. McLeod because
6 of the -- Mr. Justice wanted to establish the study --
7 it's called Stoney Brook Plantation. He wanted to
8 continue developing that for wildlife.

9 (WHEREUPON, Miller Deposition
10 Exhibit No. 4 was marked for
11 identification purposes)

12 BY MR. PENDARVIS:

13 Q In that regard, I'm going to pass
14 Exhibit 4 to you, an e-mail with some materials attached.
15 Does this reflect your recollection on -- or the
16 company's position on Mr. McLeod's visit to West
17 Virginia?

18 A Yes. This involved the stream that
19 flows through there, it's called Second Creek, and Jim
20 was interested in what he could do with Second Creek, and
21 as far as the low areas and the wetlands areas of Stoney
22 Brook Plantation. And Jim also -- Mr. McLeod also met
23 with Brad Lambert, Brad was our farm manager at the time.

1 (WHEREUPON, Miller Deposition
2 Exhibit No. 5 was marked for
3 identification purposes)

4 BY MR. PENDARVIS:

5 Q Now, there have been some questions
6 raised in this case about Justice Family Farms and
7 Mr. Justice paying invoices for professional services and
8 I'm going -- in that regard, I'm going to pass to you a
9 document marked Exhibit 5 to your deposition and I'm
10 going to represent to you this is an invoice. Have you
11 seen this invoice before today?

12 A Yes, I have.

13 Q And the third page back shows -- and
14 fourth page back show copies of checks written to pay
15 this invoice. Are these last two pages reflecting a
16 check from Justice Family Farms to the company to pay
17 this invoice?

18 A Yes, it is.

19 Q Are you aware of Mr. McLeod's
20 involvement with Natural Resource Protection &
21 Mitigation, LLC?

22 A At one point, I recall that being the
23 company that he was involved with. I don't know the

1 exact structure of it or anything like that, but I do
2 know that he was involved with that at one point.

3 Q And the front page refers to the various
4 projects that Mr. McLeod and his companies were working
5 on, the Clarendon County property and the homeplace
6 property?

7 A Yes. The home farm, yes.

8 Q In general, what's the general method
9 by which Mr. Justice and his companies pay invoices?

10 A Typically, in the normal course of
11 business, Mr. Justice or his son, Mr. Justice, III, James
12 Justice, III, will authorize work with professionals,
13 attorneys, accountants, legal representatives, consul-
14 tants of all types. They will authorize that work, the
15 contractor will submit an invoice, that's placed in our
16 accounts payable system, and then at some point within
17 30 to 90 days, that invoice is paid based on when we're
18 instructed to pay those by the Justices.

19 Q Why did Justice Family Farms pay this
20 invoice from National Resource when there was no signed
21 consulting agreement, only a Letter of Intent?

22 A Mr. Justice -- you have to understand,
23 he typically operates on a handshake with most of the

B.R.A.

1 consultants and professionals that he deals with. He's
2 done many coal deals and land deals on a handshake and
3 this was one of those situations. He's very old-school
4 and his word is his bond and that's -- I've worked for
5 them for 27 years and that's the way he's always been.
6 That's the way his father was and that's the way his son
7 is. And that was -- his arrangement with Mr. McLeod was
8 he had a handshake and that was good enough for him. And
9 he knew at some point there would be an invoice submitted
10 and he would pay it and we would move on.

11 Q By the fall of 2007, October-November,
12 2007, did Justice Family Farms' plans for the Black River
13 Farm property change with regard to the wetlands
14 mitigation project?

15 A Mr. McLeod came back to Mr. Justice
16 and recommended that it may be better to establish a
17 conservation easement on the Black River property.
18 Because of certain tax advantages, it may be more
19 beneficial to do the easement instead of a mitigation
20 bank. After consideration, Mr. Justice decided that was
21 the way to go and he asked Mr. McLeod to continue
22 pursuing that process as far as a easement, take whatever
23 steps necessary to move towards that in place of a

Direct

18

1 mitigation bank because of the tax advantages and the
2 values established of the property.

3 Q Inside the Justice companies, was
4 someone assigned to be the contact person for Yancey
5 Environmental Solutions?

6 A My recollection was David Harrah, our
7 Chief Financial Officer at the time, made contact direct
8 with Mr. McLeod. And I'm sure Jim spoke to Mr. McLeod
9 from time to time as to how it was progressing, but David
10 was the immediate contact with Mr. McLeod.

11 (WHEREUPON, Miller Deposition
12 Exhibit No. 6 was marked for
13 identification purposes)

14 BY MR. PENDARVIS:

15 Q Mr. Miller, I'm passing to you now a
16 document marked as Exhibit 6 to the JFF deposition and
17 I'm going to ask if you've had a chance to see and review
18 Mr. McLeod's November 26th letter to Mr. Justice that
19 enclosed a Consulting Services Agreement that was
20 proposed for the Black River Farms conservation easement
21 project?

22 A Yes, I'm familiar with this.

23 Q Now, there's been some suggestion in

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1 this lawsuit that there really was no agreement to move
2 forward with investigating a conservation easement and my
3 question for you is, how did Justice Family Farms take
4 the receipt of this proposed Consulting Services
5 Agreement with regard to this project?

6 A The way I understand it, Mr. Justice
7 -- this was the agreement that he had with Mr. McLeod
8 and he was under the impression that Mr. McLeod was
9 moving forward with this and he was in agreement with the
10 process moving forward towards establishing a conserva-
11 tion easement, so that we could have the tax advantages
12 in the year 2007, by 12-31 of that year.

13 Q And was there any subsequent discussions
14 about the terms of compensation that were set forth in
15 the proposed Consulting Services Agreement?

16 A Mr. Justice reviewed the agreement and
17 his only comment was that he thought maybe that the fee
18 that Mr. McLeod had proposed, the 5 percent fee, was
19 a little high, so he asked David Harrah to go back to
20 Mr. McLeod and propose a 4 percent fee. And Mr. Harrah
21 did that and Mr. McLeod agreed to that and they continued
22 to move forward on the project based on the revised fee
23 structure.

1 Q And just so I'm clear on this, was there
2 a general date by which Justice Family Farms desired to
3 have the conservation easement recorded?

4 A It would have had to been in place by
5 December 31st for us to take tax advantages of the
6 easement being recorded and in place.

7 Q Can you describe for me Justice Family
8 Farms awareness, if anything, about what the various
9 professionals associated with this project would have
10 been doing between November and December 31, 2007?

11 A We were relying on Mr. McLeod to keep
12 the project moving. It was our understanding that the
13 project was continuing to move forward. We had not heard
14 any issues that the project was not moving forward, so we
15 were under the impression that it was -- everything was
16 in place and we were using that easement as part of our
17 tax calculations for 2007 as to our tax liability and it
18 was our understanding that everything was on track.

19 (WHEREUPON, Miller Deposition
20 Exhibit No. 7 was marked for
21 identification purposes)

22 BY MR. PENDARVIS:

23 Q Mr. Miller, I'm passing to you now a

1 document marked Exhibit 7, it appears to be an e-mail
2 from defendant Hamlin to Yancey Environment Solutions
3 looking at a proposed letter to Mr. Justice and I want
4 to represent to you that that letter was sent to
5 Mr. Justice, the second page, care of David Harrah. Was
6 Justice Family Farms -- well, first off, did it receive
7 this proposal of an appraisal from Dr. Hawkins, the
8 appraiser?

9 A Yes, that is correct.

10 MR. PENDARVIS: Actually, it would be
11 better if I copied four.

12 MR. LEONARDI: That was Exhibit 6?

13 MR. PENDARVIS: That was Exhibit 7 and
14 really this is about the same thing.

15 (WHEREUPON, Miller Deposition
16 Exhibit No. 8 was marked for
17 identification purposes)

18 BY MR. PENDARVIS:

19 Q Let me pass to you a document marked
20 Exhibit 8, that is the e-mail from defendant Hamlin to
21 Mr. Harrah enclosing the letter we just looked at and
22 behind that letter is the proposal from Dr. Hawkins.
23 Take a moment and look over that for me, please.

1 A Yes.

2 Q As a matter of background for this
3 exhibit, was Justice Family Farms in touch with the --
4 let me back up. What was Justice Family Farms'
5 understanding of defendant Hamlin and defendant
6 Richardson and Plowden's role as lawyers in this case,
7 in this matter?

8 A Mr. McLeod had brought them into
9 the entire process to handle the legal aspects of the
10 conservation easement. There are numerous facets to
11 the easement. With the appraisals and the consultants
12 involved, there has to be a legal team in the process and
13 Mr. Hamlin and his firm was brought in to handle all
14 legal aspects of the entire conservation easement
15 transaction.

16 Q Was Justice Family Farms aware of the
17 conservation easement expertise that defendant Hamlin and
18 defendant Richardson Plowden had with regard to those
19 type matters?

20 A Mr. McLeod represented that they were
21 tops in the field and that he would recommend them to
22 Mr. Justice. Based on that, Mr. Justice agreed to move
23 forward with that.

1 Q Did Justice Family Farms and
2 Mr. Justice accept the representations such as on --
3 those made by defendant Hamlin on the second page of
4 Exhibit 8 with regard to the quality of Dr. Hawkins'
5 skills as an appraiser for this project?

6 A There again, Mr. Justice relied on
7 Mr. McLeod's representation of this individual and he
8 was acceptable to handle the appraisal process of the
9 easement.

10 Q Did Justice Family Farms have any
11 objections to the proposals from the appraiser about his
12 compensation and the work he was going to be doing on
13 this project?

14 A No.

15 Q Did anyone ever contact Justice
16 Family Farms about any difficulties in locating any
17 deeds or deed restrictions, easement, or environmental
18 covenants as requested by Dr. Hawkins?

19 A Not that I'm aware of.

20 Q So it's fair to say that Yancey
21 Environmental Solutions or someone on that side of the
22 arrangement was taking care of materials requested by
23 Dr. Hawkins?

1 MR. LEONARDI: Object to the form.

2 BY MR. PENDARVIS:

3 A There again, Mr. Justice relied on
4 Mr. McLeod to move forward with the process. Any issues
5 that would have come up, Mr. McLeod would have resolved
6 those as far as deeds or anything like that. We relied
7 on Mr. McLeod to move forward.

8 Q In addition to the appraisal required
9 for conservation easement, obviously, the easement is
10 given to someone and is -- does Justice Family Farms
11 recall who it was or what entity it was that was going to
12 accept the conservation easement if it had gone forward?

13 A We have -- we've been informed that
14 there was an organization, the Community Open Land Trust,
15 COLT, that Mr. McLeod contacted as far as accepting -- as
16 being the donee for the easement and this was acceptable
17 to us based on representations.

18 (WHEREUPON, Miller Deposition
19 Exhibit No. 9 was marked for
20 identification purposes)

21 BY MR. PENDARVIS:

22 Q I'm going to pass to you now a document
23 marked Exhibit 9 to your deposition. This appears to be

1 an e-mail transmittal to -- from defendant Hamlin to
2 Mr. Harrah enclosing a letter from Community Open Land
3 Trust and a -- a Letter of Intent from Community Open
4 Land Trust. And did Justice Family Farms receive this
5 proposal from COLT?

6 A Yes.

7 Q Did Justice Family Farms have any
8 objections to the terms of the proposed Letter of
9 Intent from COLT?

10 A No, they did not. They understood
11 the annual fee or the fee that would be to maintain the
12 easement and everything else was in agreement.

13 Q And the date of this e-mail
14 transmittal is November 30, 2007. And if you refer to
15 the second paragraph of defendant Hamlin's cover e-mail
16 message, was there any -- take a moment and look at
17 that, please.

18 A I see that.

19 Q Were there any concerns or anything
20 inconsistent with the plan that's referenced by Mr. --
21 excuse me, defendant Hamlin's statement that everyone
22 would be, quote, "-- stretched to get this done before
23 the end of the year,"?

1 A There was no concern on our end.
2 This is -- there's a push in all businesses to get
3 transactions done by the end of the year for tax
4 purposes. It's fairly common in business for that to
5 happen today. Mr. McLeod represented that everything was
6 on track and there shouldn't be any issues and we were
7 not concerned about it happening.

8 Q Did defendant Hamlin relay any
9 communications to Justice Family Farms otherwise, that
10 there may be some problems with getting the project
11 completed by December 31, 2007?

12 A No, sir.

13 Q Has Justice Family Farms had any
14 experience on other conservation easements?

15 A The one that we talked about in 2003,
16 the wetlands protection transaction. In 2009, we did a
17 large conservation easement here in Raleigh County, West
18 Virginia. It involved roughly 1,000 acres not far from
19 here and that was the largest easement we've done. Right
20 after this one was proposed in 2007, this one was done.
21 The most recent was 2009 right at the end of the year.

22 Q What part of the year did the easement
23 close, the 2009 easement?

1 A My recollection, it closed mid-December,
2 mid to third week of December, 2009.

3 Q Can you describe the activities during
4 the week or so preceding the closing of that easement?

5 A It was a -- just a flurry of activity
6 to get all the paperwork done, which took, at the most,
7 probably two to three days. Everyone was on board, the
8 appraisal was done, the legal team had all their ducks in
9 a row, the land trust that was accepting the property,
10 they had done their inspections, everything was put
11 together and then at the -- right at the end, all the
12 documents were prepared and they brought them to our
13 Beckley office and we signed them and everything was
14 filed by the end of the year, 2009.

15 Q Was there a single meeting where
16 everybody involved all sat down and signed papers all
17 at the same time?

18 A That's correct.

19 (WHEREUPON, Miller Deposition
20 Exhibit No. 10 was marked for
21 identification purposes)

22 BY MR. PENDARVIS:

23 Q Mr. Miller, I'm passing you another

1 document, this one has been marked Exhibit 10 to Justice
2 Family Farms deposition. Take a moment and look over
3 this e-mail, transmittal e-mail and the attached letter.

4 A Okay.

5 Q Did Justice Family Farms receive this
6 e-mail and cover letter of December 6, 2007?

7 A Yes.

8 Q Was Justice Family Farms made aware
9 anywhere in this communication, either the e-mail
10 transmittal or the letter, itself, of any concerns that
11 the Black River Farms easement project would not be able
12 to go forward and be recorded in the 2007 year?

13 A No.

14 Q This letter, the second page of
15 Exhibit 10, essentially makes clear that defendant Hamlin
16 and defendant Richardson, Plowden & Robinson was
17 representing Yancey Environment Solutions as its tax
18 consultant for this easement and was not representing
19 Justice Family Farms. Is that a fair characterization?

20 A Yes.

21 Q Did receiving this letter cause any
22 concern to Justice Family Farms?

23 A No. It's my understanding that that

1 was presented to us earlier, that that was the
2 arrangement that the firm that Mr. Hamlin worked for and
3 Mr. Hamlin were being paid out of Mr. McLeod's proceeds
4 from this, his fee, so we had always assumed they were
5 working for Mr. McLeod.

6 Q There's been testimony in this case,
7 and we're going to talk about this in a minute, about a
8 telephone call that took place on December 24th, 2007.
9 And we just looked at Exhibit 10 that references
10 communications on December 6, sending a letter dated
11 December 5. Now, my question for you is, between receipt
12 of the -- on December 6, 2007, of Exhibit 10 and the
13 phone call on December 24, during that time period did
14 Justice Family Farms have any other communications
15 concerning the Black River Farms property from -- with
16 defendant Hamlin?

17 A No.

18 Q Did anyone from Richardson, Plowden &
19 Robinson call during December 6th to, in particular,
20 December 20 to inquire n the status of this project?

21 A No.

22 Q How about e-mails, were any e-mails
23 received inquiring -- received from defendant Hamlin or

1 defendant Richardson Plowden inquiring into the status of
2 this Black River Farms project?

3 A No.

4 Q In early-December, 2007, what did
5 Justice Family Farms believe it needed to do finish this
6 easement?

7 A We believed that at some point we
8 would get a phone call that all the documents were ready
9 and we would have a meeting of everyone involved, we
10 would sign the documents and the documents would then be
11 recorded in the court and it would be official. We would
12 send these documents to our tax preparers and they would
13 move forward with preparing our tax returns for 2007.

14 Q How about was Justice Family Farms
15 planning to do anything in terms -- on the financial end,
16 paying the stewardship fees and other fees associated
17 with the project?

18 A Absolutely. Back to the agreement that
19 you showed me with COLT, we were in agreement with the
20 fees that they proposed. These were fees -- this was a
21 donation to COLT that they had to have to maintain their
22 inspection of the properties. And it was a donation to
23 them, but it was -- in our mind it was a fee for the

1 easement and we were in agreement to that and we would
2 have paid that.

3 Q The same response for other fees
4 associated with the conservation easement project?

5 A That is correct. And, in fact, we
6 did pay fees for the work on the project.

7 Q Let's talk a little bit now -- and I
8 made a representation to you there was a December 24,
9 2007, conference call. Are you aware of that conference
10 call?

11 A Yes, I am.

12 Q Who participated in that conference
13 call?

14 A That was Mr. James Justice, II,
15 Mr. David Harrah and Mr. McLeod had an attorney on the
16 call also and I don't recall his name right now.

17 Q If I said Crosby Lewis, would that
18 refresh your recollection?

19 A Let me see. Yes, Crosby Lewis, yes.

20 Q And you're referring now to your
21 affidavit?

22 A And to the best of my recollection,
23 yes, Mr. Steve Ball, our general counsel at the time,

1 was in on the conversation.

2 Q Please tell the jury generally what
3 was discussed during this conference call.

4 A Basically, it was a call from Mr. McLeod
5 to our group that said I have -- Mr. McLeod speaking, I
6 have been contacted by the IRS requesting information on
7 conservation easements I've assisted in in the past and I
8 will be providing this information timely, but it's my
9 recommendation that you-all postpone this easement right
10 now, I feel that some of the easements I've done may be
11 questioned, but I'm going to provide the proper infor-
12 mation and I feel that in time this will all work out,
13 but I recommend that you postpone this easement right
14 now.

15 Q Was there any mention of defendant
16 Hamlin or defendant Richardson, Plowden & Robinson in
17 that conversation?

18 A No, sir.

19 Q Now, I want to summarize some things
20 as we're getting to the real point of this deposition.
21 Prior to the telephone call on December 24, 2007, what
22 was Justice Family Farms intent, if anything, with regard
23 to executing a conservation easement on the Black River

1 Farms property?

2 A It was fully our intent to move forward
3 with this easement based on the information that we had,
4 the proposed value of the property, and it was our intent
5 to have it done by the end of the year for tax advantage.

6 Q Prior to the telephone call on
7 December 24, 2007, what was Justice Family Farms intent,
8 if anything, with regard to satisfying the terms of the
9 Letter of Intent from COLT?

10 A There's no question we would have had
11 to satisfy that to make everything official and we had
12 every intention of paying their fee as a donation to
13 COLT and move forward with the relationship with COLT
14 and perhaps do other easements in the future with them.

15 Q Prior to the telephone call on
16 December 24th, 2007, what was Justice Family Farms
17 intent, if anything, with regard to satisfying the terms
18 of the consulting services agreement with YES to pay all
19 the professional fees in the event the conservation
20 easement was recorded?

21 A There again, if Yancey McLeod put the
22 entire easement together and he would have earned his
23 fee, it was our intention to pay his fee had the easement

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1 moved forward and been recorded in time.

2 Q Thank you. Now, I want you to make
3 an assumption to answer the next question I'm going to
4 ask you and the assumption is this, assume for the
5 purposes of this coming question that -- notwithstanding
6 the IRS letter, that during the call on December 24th,
7 2007, Yancey McLeod recommended that Justice Family Farms
8 move forward with the easement, assume that, and he made
9 a recommendation to move forward with the easement.
10 Using that assumption, was it more likely than not that
11 Justice Family Farms would have proceeded with the
12 conservation easement?

13 MR. LEONARDI: Object to form.

14 BY MR. PENDARVIS:

15 A Yes.

16 (WHEREUPON, Miller Deposition
17 Exhibit No. 11 was marked for
18 identification purposes)

19 BY MR. PENDARVIS:

20 Q Mr. Miller, I'm passing to you a
21 document marked as Exhibit 11 that is an e-mail from
22 Yancey Environmental Solutions to Mr. Justice and
23 Mr. Harrah dated December 27, 2007. Did Justice

1 Family Farms receive this e-mail with the statement for
2 services rendered?

3 A Yes, we did.

4 Q And at some point, did Justice Family
5 Farms pay the professionals who had performed services
6 for the plans for this conservation easement?

7 A Yes, we did.

8 Q We're going to look at some materials
9 on that before we finish today, but I do have one more
10 topic I'd like to address in this deposition. Did
11 Justice Family Farms receive any information on what
12 the appraiser -- on the appraiser's determination of
13 the tax value of the conservation easement in 2007?

14 A We received at some point an estimate
15 that it would be in the \$45 million range and that would
16 be followed up with a formal appraisal document as part
17 of the final documentation of the easement.

18 (WHEREUPON, Miller Deposition
19 Exhibit No. 12 was marked for
20 identification purposes)

21 BY MR. PENDARVIS:

22 Q And I'm passing to you now an e-mail
23 marked as Exhibit 12. And does this e-mail reflect the

1 value that was later communicated to Justice Family Farms
2 on this -- the tax value of this easement?

3 A Yes.

4 Q And that's essentially the last
5 sentence of the third full paragraph?

6 A That is correct.

7 Q And what was the date of this e-mail?

8 A This e-mail is dated December 27th,
9 2007.

10 Q And based on Justice Family Farms'
11 understanding, would that have been sufficient time to
12 accomplish the easement in the 2007 calendar year?

13 MR. LEONARDI: Object to form.

14 BY MR. PENDARVIS:

15 A Yes. Based on our experience, all
16 the paperwork could have been done in a short time and
17 we still had four days to get everything signed and
18 recorded. Recording would take a very short time to do.

19 Q Notwithstanding the opinion, did
20 Justice Family Farms believe that receiving this
21 information on December 27th gave sufficient time for it
22 to decide whether to finish the easement plans?

23 A Yes.

1 Q Okay. I want to go back to the topic
2 we were discussing on payment of the invoices. So by the
3 end of December, 2007, am I correct in stating there was
4 no easement recorded on the Black River Farms property?

5 A That's correct.

6 Q Has an easement been recorded since
7 that time?

8 A Not on that property.

9 (WHEREUPON, Miller Deposition
10 Exhibit No. 13 was marked for
11 identification purposes)

12 BY MR. PENDARVIS:

13 I'm going to pass to you now a document
14 marked Exhibit 13 to your deposition. It appears to be
15 an e-mail from David Harrah to Yancey Environmental
16 Solutions. Take a moment and look over that e-mail and
17 describe for the jury essentially what this message --
18 the message from this e-mail.

19 A Okay.

20 Q In essence, what is this e-mail
21 telling Yancey Environmental Solutions?

22 A Mr. David Harrah is telling Mr. McLeod
23 that Jim, Jim Justice, has approved he billings for the

1 other parties involved in the easement transaction, he's
2 going to pay the fee that's due them, if there's any late
3 charges in payment, he's not going to pay those, and he's
4 going to pay Mr. McLeod \$15,000 towards his fees on this
5 and if at some point we would move forward with this
6 easement, he will provide Mr. McLeod additional fees
7 based on how things work out with an easement in the
8 future.

9 Q Thank you.

10 (WHEREUPON, Miller Deposition
11 Exhibit No. 14 was marked for
12 identification purposes)

13 BY MR. PENDARVIS:

14 Q I'm going to pass to you now what we
15 call a compilation exhibit. There are multiple documents
16 stapled together as part of Exhibit 14. Take a moment
17 and look over that, then I've got a question or two for
18 you and we're just about finished.

19 A Okay.

20 Q Are these the invoices from the
21 professionals that were paid by Justice Family Farms?

22 A Yes, they are.

23 Q Okay. And the fourth page back, is

1 that a memorandum from Mr. Harrah about -- to Yancey
2 Environmental Solutions about this payment for
3 professionals issued?

4 A Yes, from David Harrah to Mr. McLeod.

5 Q And from the very beginning of this
6 project, did Justice Family Farms have the financial
7 wherewithal to pay the fees and costs associated with
8 this easement?

9 A Absolutely.

10 MR. PENDARVIS: Let me please take a
11 moment break and we may be finished with direct
12 examination. Go off the record.

13 VIDEOGRAPHER: Going off the video
14 record. The time is 10:32 A.M.

15 (WHEREUPON, a short recess
16 was taken)

17 VIDEOGRAPHER: We are now back on the
18 video record. The time is 10:45 A.M. This
19 begins Tape 2.

20 BY MR. PENDARVIS:

21 Q Mr. Miller, one last set of questions
22 and could you pull out Exhibit 12, the e-mail from the
23 appraiser, please, sir?

1 A I have it.

2 Q Earlier you had given some testimony
3 about Mr. Justice's environmental focus and the follow-up
4 question I have on this Exhibit 12, was the \$45 million
5 tax benefit number identified by the appraiser in Exhibit
6 12, in concert with Mr. Justice's and Justice Family
7 Farms' environmental desires, such that it would have
8 confirmed their willingness to go forward with this
9 easement?

10 MR. LEONARDI: Object to form.

11 BY MR. PENDARVIS:

12 Q Answer if you can.

13 A Yes. The value would have been
14 beneficial to us taxwise, plus it would have allowed
15 the property to have been placed in lifetime easement --
16 or not lifetime, but forever easement and that was in
17 line with Mr. Justice's feeling on conservation and the
18 properties he owns and how careful he is about all of his
19 properties. It also relates back to his relationship
20 with Mr. McLeod as far as conserving the assets that the
21 family has, the Justice family has.

22 MR. PENDARVIS: Thank you very much
23 for your time today. We have no further

1 questions at this point.

2 CROSS-EXAMINATION

3 BY MR. LEONARDI:

4 Q Good morning, Mr. Miller. My name is
5 Dan Leonardi. As I said at the beginning, I represent
6 Richardson, Plowden & Robinson, P.A., and George Harold
7 Hamlin, who is here with me today. I know that you said
8 that you are currently the CFO, is it, of the James C.
9 Justice Companies?

10 A That is correct.

11 Q And what was your position back in
12 December of 2007?

13 A I was the treasurer of the companies.

14 Q Treasurer?

15 A Treasurer, yes.

16 Q And in your capacity as treasurer
17 of the company, did you have any responsibility for
18 exploring this proposed easement, conservation easement
19 transaction?

20 A My primary responsibility was the
21 financial end of the business, the financial reporting
22 and paying bills and cash management.

23 Q If you would get -- take out

1 Exhibit 2 to your deposition.

2 A Yes, sir.

3 Q Would you tell me the date that this
4 affidavit is signed?

5 A It was signed on August 30th, 2011.

6 Q And when were you first contacted about
7 signing an affidavit in this case?

8 A I don't recall when it was.

9 Q Can you do your best? In a general
10 sense, was it days before this, weeks before this?

11 A It was weeks before.

12 Q It was weeks before?

13 A Yes.

14 Q Okay. And you didn't draft this
15 affidavit, did you?

16 A I did not draft this.

17 Q Okay. Who drafted the affidavit?

18 A I'm not sure who drafted this, I don't
19 know.

20 Q Okay. When you were first contacted
21 about signing an affidavit in this case, who contacted
22 you?

23 A I believe it was Mr. Hunter at his

1 previous firm and --

2 MR. HUNTER: Let me just caution you
3 there. I'm going to object to the extent this
4 question and others of a similar nature might
5 impinge upon attorney-client privilege. And I
6 will instruct Mr. Miller not to reveal any
7 conversations he had with either me or Mr. Steve
8 Ball, as general counsel for the companies for
9 which Mr. Miller works, because of the attorney-
10 client privilege, as well as work product
11 privileges.

12 BY MR. LEONARDI:

13 Q And going forward, to the extent one of
14 my questions could possibly be answered with information
15 such that Mr. Hunter has directed his comments to, I do
16 not want to know what you spoke to Mr. Hunter about. So
17 that's an appropriate objection and so I'm not asking for
18 that kind of communication, but -- so to the extent that
19 there's a question -- that there's a question that could
20 be answered with that sort of information, I don't want
21 to hear that. Do you understand?

22 A Yes, sir, I do.

23 Q Okay. Now, I understand that you were

B.R.A.

1 contacted at some point by Mr. Hunter about signing an
2 affidavit in this case?

3 A Yes, sir.

4 Q Okay. And then at some point later on,
5 was a draft affidavit presented to you?

6 A Yes, it was.

7 Q Okay. And did you read over the draft
8 affidavit?

9 A I read over the draft affidavit and
10 I satisfied myself that all the answers I was giving was
11 in agreement to what the corporation understood or the
12 LLC understood as part of the transaction.

13 Q All right. Let's take it step-by-step.
14 When you reviewed the draft affidavit, did you make any
15 changes to it?

16 A I think there were some punctuation
17 and wording changes that I made as far as names and
18 things like that. Not to the facts, no.

19 Q Okay. So you did not make any
20 substantive changes to it?

21 A That is correct, yes.

22 Q Okay. And the information contained
23 in the affidavit, it is not based on your personal

B.R.A.

1 knowledge, is it?

2 A It's based on the knowledge of the LLC,
3 Justice Family Farms, LLC.

4 Q All right. How did you satisfy yourself
5 that the affidavit was accurate? What did you do, what
6 steps did you take to verify the information that is in
7 the affidavit?

8 MR. PENDARVIS: Object to the form.

9 BY MR. LEONARDI:

10 Q You can answer.

11 A I spoke to individuals involved in
12 this transaction and I reviewed documents that we had
13 in our files.

14 Q All right. Who did you speak to?

15 A I spoke to Mr. David Harrah
16 primarily and I asked Mr Justice questions about how we
17 -- how he felt about us proceeding with this transaction.

18 Q You spoke to Mr. David Harrah about
19 this affidavit or about this case?

20 A I spoke to him -- let me back up.
21 I was in contact with Mr. Harrah while this was going on.
22 We were in a small office prior to where we are now. I
23 was aware that Mr. -- the conversation on December 24th

B.R.A.

1 and I asked Mr. Harrah what was going on there and he
2 explained that to me and I remember that conversation.
3 I did not speak to him before I signed this, but I did
4 speak to him --

5 Q Years ago?

6 A -- four years ago, yes, when it was
7 all going on.

8 Q All right. But since you were
9 presented with this affidavit, the draft affidavit that
10 you signed --

11 A Right.

12 Q -- you never spoke to Mr. Harrah about
13 the contents?

14 A No. I'm sorry, that was prior to when
15 the transaction was going on.

16 Q Okay. Who else did you speak to
17 recently after being presented with the draft affidavit?

18 A I asked Mr. Jim Justice what his
19 feeling was toward this, about this transaction, and he
20 gave me a brief synopsis of what he thought was going on
21 and how it would have ended up. And that was the only
22 individual I talked to, the rest of it was just looking
23 through the documents that we had in our files.

B.R.A.

1 Q Okay. Tell me exactly what Jim Justice
2 told you. You said it was a brief synopsis, what did he
3 tell you?

4 A I said, Jim, I'm going to be doing a
5 deposition on the Yancey McLeod issue from 2007, you're
6 familiar with that? Yes. Do you feel that that thing
7 would have worked out had it played out to the end and he
8 said absolutely. And that was my only question to him
9 because that was a concern that I had, would this have
10 moved forward, and he said, We were in the boat. That
11 was his exact words, We were in the boat on this and it
12 would have worked out.

13 Q Okay. Let's take a look at the
14 affidavit, Exhibit 2, or is it Exhibit 3?

15 MR. PENDARVIS: Two.

16 MR. LEONARDI: Two.

17 BY MR. LEONARDI:

18 Q There are several references in the
19 affidavit to, for example, JFF representatives or JFF
20 officials and what I'd like to do is go through and have
21 you tell me who those individuals are, okay, and I'll
22 refer you to specific instances. Are you ready?

23 A Yes, go ahead.

1 Q Okay. In Paragraph 4, it says, "In
2 March of 2007, JFF representatives spoke with Mr. Yancey
3 A. McLeod." Do you see that?

4 A I'm sorry, in No. 4?

5 Q Paragraph 4.

6 A Yes, okay, I see that.

7 Q Can you tell me, in that sentence,
8 who JFF representatives refers to?

9 A It was my understanding that it was
10 Mr. Justice, himself, spoke with Mr. McLeod.

11 Q Now, in Paragraph 5, it says, "At the
12 time of these initial project discussions in March, 2007,
13 JFF officials were familiar with Mr. McLeod and YES." To
14 whom does the term JFF officials there in Paragraph No. 5
15 refer?

16 A Mr. Justice, Mr. James Justice, II.

17 Q If you'll turn the page, Paragraph 6,
18 of course, has a reference that says that JFF executed
19 and returned a Letter of Intent. We know that that was
20 Mr. Justice from the exhibit earlier today. Correct?

21 A That's correct.

22 Q And in Paragraph 7, there's a reference
23 to subsequent discussions in July, 2007, between JFF

1 officials and Mr. McLeod and his colleague, Dr. James
2 Lewis. In that sentence, who did you understand JFF
3 officials to refer to?

4 A I understand that to be Mr. Justice
5 and Mr. David Harrah.

6 Q All right. Paragraph 8 says, "Based on
7 their due diligence, Mr. McLeod and YES indicated to JFF
8 in the late-summer and early-fall of 2007 --". Who do
9 you understand JFF to refer to in Paragraph 8 of your
10 affidavit?

11 A David Harrah.

12 Q All right. In Paragraph 9, it says,
13 "Based on feedback from Mr. McLeod and YES, JFF
14 understood --". Do you see that?

15 A Yes.

16 Q And who there, is it your understanding,
17 is referred to as JFF in Paragraph 9?

18 MR. HUNTER: Let me just interject an
19 objection as to form. I mean, to the extent
20 that the affidavit is written with JFF, it
21 speaks for itself and I don't want to say much
22 more than that.

23 MR. LEONARDI: Okay. Well, I would

1 like to note, at least, for the record that this
2 deposition is being taken pursuant to the Rules
3 of Civil Procedure in South Carolina and in
4 South Carolina -- I certainly don't want to get
5 crosswise with you, but in South Carolina, you
6 can object to the form and you really can't say
7 anything beyond that, okay, but your objection I
8 understand. I understand your objection. Some
9 of these answers have -- some of these reference
10 have different individuals and so to the extent
11 the witness knows who is referred to, I would
12 like to go through and continue to figure out
13 who -- what individuals are being referred to
14 here.

15 BY MR. LEONARDI:

16 Q So Paragraph 9, "-- JFF understood that
17 an independent appraisal would be necessary --". Who
18 would that refer to?

19 MR. HUNTER: Objection to form.

20 MR. LEONARDI: Now, if you want to make
21 a continuing objection, you can do that.

22 MR. HUNTER: Anytime the affidavit
23 doesn't use JFF officials, I would object as

B.R.A.

1 to form if that type of question was made.

2 MR. LEONARDI: All right.

3 BY MR. LEONARDI:

4 A Do I answer?

5 Q Yes, you do. Yes.

6 A I do not know in that respect.

7 Q Okay. So you don't know who it is
8 that understood that an independent appraisal would be
9 necessary?

10 A I do not know for a fact, no.

11 Q Okay. The next -- Paragraph 10 says,
12 "Mr. McLeod and YES likewise indicated to JFF, based on
13 YES's preliminary due diligence work --," and you can
14 read the rest of that paragraph to yourself for the
15 context. Who do you understand JFF in that paragraph to
16 refer to?

17 A That was David Harrah.

18 Q All right. Skipping to Paragraph 12,
19 it states that, "They further explained to JFF that in
20 addition to paying professional fees, the donor typically
21 also would need to donate to the donee organization a
22 stewardship fee." To whom does JFF in that sentence
23 refer?

1 A David Harrah.

2 Q You know, I forgot to ask you one
3 question. You were describing the work that you did to
4 assure yourself that the information in this affidavit
5 was correct and you said that the only person you spoke
6 to was Jim Justice. Correct?

7 A Yes.

8 Q And you answered that you reviewed
9 some documents, though, and describe those documents
10 for me.

11 A Primarily the exhibits that have been
12 presented here, things that Mr. Harrah -- that were in
13 the files we had in our office regarding this
14 transaction.

15 Q So you had those documents at your
16 office?

17 A Some of these we did, the invoices,
18 the check copies, things like that.

19 Q Okay. And --

20 A I think we had some of the e-mails
21 in our files also.

22 Do you have more documents than
23 what has --

1 A I just --

2 Q -- what's been marked as exhibits
3 here today?

4 A As Mr. Pendarvis asked me, some of
5 these I have seen, so we do have those, yes.

6 Q Okay. And I guess just to be clear,
7 is it your understanding based on the exhibits you've
8 seen today, that in Justice Family Farms files or in the
9 files of the Justice companies, there are more documents
10 than just the ones that have been marked as exhibits
11 here?

12 A No. What I'm saying is that I have the
13 -- anything that we've seen here today are things I have
14 seen previously. Some of these --

15 Q Okay.

16 A -- are in the files that we have.

17 Q Okay. But there are no documents that
18 are not presented here today that you have in your files?

19 A Not that I know of, no.

20 Q Okay. And where are those files
21 maintained?

22 A I think they're at -- still at our
23 corporate office here in -- actually, it's called Beaver,

1 West Virginia. Now, we were in Beckley, we're in Beaver
2 now.

3 Q In Paragraph 13, you can read it to
4 yourself, there is a reference to JFF at the end. The
5 last sentence says, "These were acceptable to JFF." And
6 do you know to whom JFF refers to in Paragraph 13?

7 MR. PENDARVIS: Same objection.

8 MR. HUNTER: Same objection. I object
9 to the form.

10 BY MR. LEONARDI:

11 A I am not -- no, I do not know on that,
12 no.

13 Q In Paragraph 14, it says that, "The
14 potential value of mitigation bank project, it appeared
15 to JFF." Do you understand who JFF in that paragraph
16 refers to?

17 MR. HUNTER: Object to the form.

18 MR. PENDARVIS: Same objection.

19 MR. LEONARDI: I mean, it's a stand-
20 ing objection, do you need to say it every time?

21 MR. HUNTER: I don't know your rules,
22 but if you represent to me I don't need to,
23 then if he understands it as the court reporter,

1 that it's a standing objection, that's fine.

2 BY MR. LEONARDI:

3 A There again, David Harrah was our tax
4 adviser, it would have been David Harrah.

5 Q Okay. So David Harrah was the tax
6 adviser at that time?

7 A He was the Chief Financial Officer
8 and tax adviser to the Justice family.

9 Q And was there any additional counsel
10 that served as tax advisers on this project for --

11 A Not that I know of. Mr. Harrah was
12 a CPA, so I don't know anyone else.

13 Q Paragraph 15 says, "In the fall of
14 2007 and into December of that year, JFF understood
15 that Mr. McLeod, YES, COLT, and Dr. Lewis, his wildlife
16 consultant," et cetera, et cetera, you can read the rest
17 of the paragraph. Do you understand to whom JFF refers
18 to in Paragraph 15?

19 MR. PENDARVIS: Object to the form.

20 BY MR. LEONARDI:

21 A That would have been Mr. Harrah and
22 myself. I knew that this was all taking place in my
23 position as treasurer. I knew this was all taking place

1 during that time so I did know that everyone was working
2 on this and I had heard some -- I had heard these names.

3 Q Okay. And Mr. Harrah was the one that
4 had primary responsibility for monitoring the work that
5 they were doing and handling it from the Justice Family
6 Farms end, so to speak?

7 A That's correct.

8 Q Now, 16 says JFF wanted to proceed
9 with the project, who is the JFF referred to in that
10 sentence?

11 MR. PENDARVIS: Object to the form.

12 BY MR. LEONARDI:

13 A That would have been Mr. David Harrah,
14 myself on the financial end, and Mr. Justice.

15 Q In Paragraph 19, there's a reference
16 to Mr. Harrah reporting something to JFF officials and
17 owners, who would that be a reference to?

18 A That would have been Mr. Harrah
19 talking direct to Mr. Justice, II.

20 Q Paragraph 21 says JFF proceeded in
21 good faith, who does JFF refer to there?

22 MR. PENDARVIS: Object to the form.

23 MR. HUNTER: Object to the form.

1 BY MR. LEONARDI:

2 A That would have been JFF the LLC
3 proceeded in good faith toward completion of the
4 conservation easement project.

5 Q Let's talk for just a moment about
6 what JFF did to further the conservation easement
7 project. What were the steps taken that JFF took to
8 further the conservation easement project?

9 A Back in the beginning, they
10 contacted Mr. McLeod, asked him to investigate this and
11 proceed with whatever was necessary to get this done.
12 They instructed him to hire the professionals that were
13 necessary to document the easement and Mr. Harrah was
14 the point man with Mr. McLeod for this. Any questions,
15 Mr. McLeod was to talk to Mr. Harrah and if there were
16 any issues, Mr. McLeod would have brought those to
17 Mr. Harrah, they would have been resolved, that was our
18 role in this. We had no expertise in doing these things,
19 Mr. McLeod was instructed to hire the proper expertise
20 to move this forward.

21 Q Okay. In Paragraph 22, there's a
22 reference to, "-- JFF understood that it would then have
23 been obligated to pay a 4 percent fee --." In that

B.R.A.

1 sentence, who do you understand JFF to refer to?

2 A That would have been me because I was
3 handling the cash management and I would have -- that
4 would have needed to have been figured into our cash
5 management plan. Mr. Harrah told me what was going on
6 with that and that would have been how the entire -- the
7 proceeds we got out of the entire process, we would have
8 had to deduct 4 percent fee to Mr. McLeod.

9 Q And the last sentence there, "JFF
10 understood that legal fees of Mr. Hamlin and his firm
11 would have been paid out of the fee to YES." Who had
12 that understanding? Was that, again, you?

13 A That was me because that would have been
14 -- that would have been involving the treasury function
15 of the business.

16 Q And in Paragraph 23, JFF officials
17 there, who does that refer to?

18 A That would have been everyone in
19 the -- involved in this. We were all operating on the
20 assumption that it would be recorded. We were all aware
21 of this and we were operating as though it was going to
22 happen.

23 Q And when you say everyone, you mean --

B.R.A.

1 A I'm sorry.

2 Q -- Harrah and who else?

3 A I'm sorry, that would have been
4 myself, Mr. Harry, I'm sure Steve Ball was aware of this,
5 Mr. Justice, II, Mr. Justice, III.

6 Q You have already described, referring
7 to Paragraph 24, the individuals that were on the
8 December 24th, 2007, telephone call. So that reference
9 to JFF officials, I assume, just refers to the indi-
10 viduals that you named that are associated with Justice
11 Family Farms or James C. Justice. Is that correct?

12 A That's correct.

13 Q And in Paragraph 26, it says, "JFF
14 accepted that recommendation --". Who accepted the
15 recommendation?

16 MR. PENDARVIS: Object to the form.

17 BY MR. LEONARDI:

18 A Mr. Justice, II, would have made that
19 decision.

20 Q Mr. Justice, II, is the ultimate
21 decisionmaker in these companies. Correct?

22 A He's the majority owner, that's correct,
23 and the ultimate decisionmaker.

B.R.A.

1 Q The buck stops with him, so to speak?

2 A That's correct.

3 Q And then 27, it says, "-- because JFF
4 believed that the professionals had worked in good
5 faith --", et cetera. Do you know who believed that the
6 professionals had worked in good faith? Who does that
7 refer to?

8 MR. PENDARVIS: Object to the form.

9 BY MR. LEONARDI:

10 A Mr. Justice, II.

11 Q And then there's another reference
12 to JFF later on in Paragraph 27 that says JFF caused
13 professional fees to be paid. Who would that be?

14 A That would have been Mr. Justice
15 authorizing us to pay the bills.

16 Q All right. And then it says, "Regarding
17 the fees paid to Mulkey, JFF understood those included
18 fees for Dr. James Lewis' wildlife consulting work on the
19 project." Who is JFF referred to there?

20 A I do not know in that instance.

21 Q Okay. Now, when you spoke with
22 Mr. Justice, did he explain to you -- recently when
23 you were discussing with him that you were going to

1 testify today, he didn't describe to you that regarding
2 the fees paid to Mulkey, JFF understood those included
3 fees for Dr. James Lewis' wildlife consulting work on the
4 project, did he?

5 A No, huh-uh.

6 Q And that information is, in fact, not
7 in the documents that you reviewed before you signed the
8 affidavit, is it?

9 MR. HUNTER: Objection to form.

10 BY MR. LEONARDI:

11 A I don't recall seeing that, no.

12 Q Okay. And, finally, in Paragraph 28,
13 there's a reference to, "-- JFF had believed that the
14 various professionals --", et cetera, et cetera. Who
15 would that be?

16 A That goes back to the previous
17 question. That would have been everyone involved in
18 this, Mr. Justice, II, Mr. Justice, III, David Harrah,
19 myself, Steve Ball.

20 Q Okay. If you take a look at
21 Paragraph 5 real quick before we change, I believe at
22 the beginning of the deposition, you specified that the,
23 this is, again, in Paragraph 5 of Exhibit No. 2, that

1 the wetland reserve program easement was on 1,000 acres.
2 In the affidavit, it says 2,000 acres. Do you know
3 which is correct?

4 A It was my understanding that it was
5 1,000 acres. Well, it was in excess of 1,000 acres. I
6 didn't realize it was closer to 2,000 acres, but it was
7 in excess of 1,000 acres and I think I said 1,000
8 previously.

9 Q Okay. And was there a tax benefit
10 associated with the wetland reserve program easement?

11 A I am not familiar with that to state
12 whether there was or not.

13 Q If you'll take a look at Exhibit 3,
14 this is the Letter of Intent and Agency Agreement.

15 A Okay. I have that.

16 Q If you'll take a look at this, the
17 Letter of Intent and Agency Agreement, do you see any
18 reference to this transaction being completed by 2007?

19 A No, I do not.

20 Q And this document did not obligate
21 Mr. Justice or any of his companies to pay anyone any
22 money. Correct?

23 A There's no payment obligations in here

1 that I see.

2 Q Can you look at Exhibit 5 for a second,
3 please?

4 A Okay. I have No. 5.

5 Q All right. This is a statement of
6 services rendered by Yancey Environment Solutions to
7 Justice Family Farms. Do you see that?

8 A Yes.

9 Q And as Mr. Pendarvis asked you about
10 earlier, this invoice was paid. Correct?

11 A Yes.

12 Q Mr. Justice had asked Yancey
13 Environmental Solutions to investigate the conservation
14 easement, they had done some work in doing that, and
15 Mr. Justice paid him for investigating it. Correct?

16 MR. PENDARVIS: Object to the form.

17 BY MR. LEONARDI:

18 A This was -- yes, that's correct. Yes.

19 Q And this is actually -- and you may
20 have been about to speak about this, but this is actually
21 for more than just the Black River Farm project.
22 Correct?

23 A That is correct, yes.

1 Q And, of course, as we know, that
2 easement did not close. Correct?

3 A Correct.

4 Q And the easement that is mentioned
5 in Beckley, West Virginia, on Page 2, that also did not
6 close as far as you know. Correct?

7 A Where you see homeplace and Davis
8 Station, is that what you're talking about?

9 Q That's correct. Well, I don't think
10 the Davis Station one is a conservation easement --

11 A Okay.

12 Q -- but homeplace one.

13 A That was just -- that was just easement
14 potential, that wasn't even an easement in process, but
15 it did not close as an easement.

16 Q You used the terms easement potential
17 and process, when does a transaction go from potential to
18 process in your opinion?

19 MR. PENDARVIS: Objection, outside
20 the scope of the deposition notice and the
21 qualifications of this witness.

22 MR. HUNTER: Same objection.

23 THE WITNESS: I'm sorry, do I answer?

B.R.A.

1 MR. LEONARDI: Yeah. The only -- just
2 to make it clear, the only time you don't answer
3 is like when Mr. Hunter told you not to divulge
4 something that's privileged, but there will be
5 objections and you just answer anyway.

6 MR. HUNTER: Yes, I should have said
7 that you should answer after we object.

8 BY MR. LEONARDI:

9 A It's my understanding that once the
10 process started and you bring in professionals, you
11 bring in an appraiser, you bring in the legal team,
12 you bring in the environmental and wildlife consultants,
13 the easement process is started.

14 Q Okay.

15 A If you just ask someone for their
16 opinion, that's just an opinion.

17 Q Okay. Now, when you say bring in these
18 folks, do you mean have some sort of agreement with them?

19 A Bring them into the transaction, either
20 a verbal or written agreement. If you tell someone to
21 move forward with establishing an easement --

22 Q Okay.

23 A -- and that consultant brings in a

B.R.A.

1 team, whoever he needs necessary to make it happen.

2 Q And if you haven't told these various
3 entities that you want them to move forward, then the
4 process hasn't really begun, has it?

5 A You tell the consultant to tell them
6 to move forward and the consultant is your point man
7 in the process and he tells everyone to move forward
8 with it.

9 Q If you'll go ahead and find Exhibit 6
10 to your deposition, please.

11 A Okay. I have six.

12 Q Do you see that Exhibit 6 has attached
13 to it the proposed Consulting Services Agreement?

14 A Yes, I do.

15 Q And as you mentioned, Mr. Justice
16 and no one from Justice Family Farms ever signed this
17 Consulting Services Agreement, did they?

18 A Not to my recollection that they did,
19 no.

20 Q And if you'll turn to Page 2 of this
21 Consulting Services Agreement --

22 A Okay.

23 Q -- you'll see that the second paragraph

B.R.A.

1 at the very top there begins, quote, "Now, therefore, in
2 consideration of the services to be performed by YES for
3 Owner as set forth herein, Owner agrees to pay YES the
4 sum of \$50,000 as a nonrefundable retainer, ("the
5 Retainer," hereafter) upon execution of the Agreement."
6 Neither Jim Justice nor anyone with Justice Family Farms
7 ever paid the \$50,000 retainer to YES, did it?

8 A Not that I'm aware of, no.

9 Q If you'll turn to Exhibit 8 of your
10 deposition, please.

11 A Okay. I have eight.

12 Q And this is the e-mail that attaches
13 a proposal from the appraiser, Darroll Hawkins of
14 Highview Engineering. Is that correct?

15 A That is correct, yes.

16 Q Okay. And if you'll look on the page
17 that is Bates stamped, and by Bates stamped, I just mean
18 it has that serial number, so to speak, on the bottom
19 right-hand corner, the one that says RPCR 0061.

20 A Yes, sir.

21 Q Do you see that it says, "The attached
22 proposal of Highview Engineering for appraisal of
23 approximately 3,000 acres (referred to as "the Jim

1 Justice Black River Farm near Manning, South Carolina"),
2 dated September 16, 2007, is hereby accepted and agreed."
3 Do you see that?

4 A Yes, I do.

5 Q And neither Jim Justice nor anyone else
6 at Justice Family Farms ever signed this and returned it
7 to Mr. Darroll Hawkins of Highview Engineering, did they?

8 A That is correct.

9 Q Is it your contention as you sit here
10 today that Justice Family Farms intended to go through
11 with this project?

12 A Yes, sir, it is.

13 Q And when did Justice Family Farms
14 make the decision to go forward with the project?

15 MR. HUNTER: Objection to form.

16 BY MR. LEONARDI:

17 A When it was recommended by Mr. McLeod
18 that they postpone the easement on the December -- after
19 the December 24th phone call.

20 Q I'm not sure I understand your answer.
21 When did Jim Justice decide that he wanted to do --

22 A Oh, I'm sorry, I

23 Q -- the conservation easement?

1 A I misunderstood the question. I'm
2 sorry. When did he decide that he wanted to do the
3 easement?

4 Q Yes.

5 A When Mr. McLeod recommended that we
6 should move from a conservation -- from a wetlands
7 mitigation bank to a conservation easement, that's when
8 he decided to change to a conservation easement.

9 Q Okay.

10 A And I don't have the date of when that
11 was.

12 Q Okay. Well, I can represent to you that
13 there are documents that reflect that it was in the mid-
14 summer, mid to late-summer of 2007.

15 A Okay.

16 Q If you would look at Exhibit 9 to your
17 deposition, please.

18 A I have nine.

19 Q Okay. As we discussed earlier in your
20 deposition, this is an e-mail from Hal Hamlin to David
21 Harrah, copied on Yancey Environmental Solutions, and it
22 includes a Letter of Intent from Community Open Land
23 Trust. Do you see that?

B.R.A.

1 A Yes, I do.

2 Q And do you see that Mr. Hamlin
3 explains, "The land trust is spending scant resources
4 to investigate the property, and will be stretched to
5 get this done before the end of the year, as any land
6 trust would be at this time of year. Kindly encourage
7 Mr. Justice to decide how he would like to proceed as
8 soon as that can be done." Do you see that?

9 A Yes, I do.

10 Q And does that confirm for you that
11 Mr. Justice at this point had not made a decision, a
12 final decision, regarding the conservation easement?

13 MR. HUNTER: Objection, asked and
14 answered.

15 BY MR. LEONARDI:

16 A Mr. Justice may not have decided that
17 COLT was the final recipient of this, but he had decided
18 to go forward with the easement. That was decided
19 sometime prior to this.

20 Q So he decided to go forward with it not
21 knowing who would take -- who would receive the easement?

22 A There would have been a doner, I don't
23 know that he had made the decision that COLT was the

1 final recipient of it. It was my understanding that it
2 was going forward, but maybe the decision was not -- had
3 not been made that it would be COLT at that point.

4 Q Okay. If you'll take a look at the
5 Letter of Intent that's attached --

6 A Okay. I have the letter.

7 Q -- do you see that there is -- on the
8 page Bates labeled COLT 00025 --

9 A Yes, I have 25.

10 Q -- the paragraph reads, "Upon receipt of
11 an initial contribution of \$5,000 and this signed letter,
12 we can get started immediately with the conservation
13 easement process. The remaining contribution is
14 requested before or at closing of conservation easement.
15 We look forward to working with you in the conservation
16 of the Justice Black River Farm." Do you see that?

17 A Yes, I do.

18 Q And do you see that there is a space for
19 acknowledgement of receipt and understanding?

20 A Yes, I do.

21 Q Okay. And no one from Justice Family
22 Farms and Mr. Jim Justice, they did not sign this and
23 return it to COLT or Sue Green, did they?

1 A As far as I know, they did not.

2 Q Okay. And no one from Justice Family
3 Farms ever forwarded to Sue Green or Yancey McLeod to
4 forward to Sue Green, the \$5,000 initial contribution?

5 A Not that I'm aware of.

6 Q Not November 30th when this was sent and
7 not at anytime in the future?

8 A Not that I'm aware of.

9 Q Now, you said -- you described that in
10 connection with the closing of an easement, there would
11 be documents that are signed. Correct?

12 A Correct.

13 Q All right. And one of those documents
14 would be the conservation easement, itself, the legal
15 document. Isn't that correct?

16 A That's correct.

17 Q All right. Now, what work had Justice
18 Family Farms done on the conservation easement document,
19 itself?

20 A None that I'm aware of.

21 Q Okay. None?

22 A I don't know that it was our position
23 to prepare the documents.

1 Q Well, wouldn't Justice Family Farms be
2 interested in the terms of the easement?

3 A Absolutely.

4 Q All right. And so my question to you
5 is, what work had they done to craft the terms of the
6 easement?

7 MR. HUNTER: Objection, asked and
8 answered.

9 BY MR. LEONARDI:

10 A There would have been a document
11 submitted for Mr. Justice's review from Mr. McLeod and
12 he would have said yes or no to the terms, present any
13 questions, they would have revised the terms and he would
14 have signed it.

15 Q And you understand that the qualified
16 organization is also very interested in the terms of the
17 conservation easement, don't you?

18 A I'm sure they would be, yes.

19 Q And in this case, Mr. Justice had not
20 seen any proposed terms for the conservation easement,
21 had he?

22 A Not that I'm aware of, no.

23 MR. HUNTER: Objection as to form and

1 time period..

2 BY MR. LEONARDI:

3 Q And to the extent that -- well, as
4 far as you know, Justice Family Farms and Mr. Justice
5 never saw -- have never seen at anytime any proposed
6 easement terms for this proposed easement transaction?

7 A Not that I'm aware of.

8 Q Okay. And, in fact, if Mr. Justice
9 had wanted to make revisions to that easement, and, of
10 course, the easement would be governing the use of his
11 land forever, if he had wanted to make revisions to it,
12 those revisions would have to be approved by COLT if
13 COLT was going to continue to serve as the qualified
14 organization. Isn't that correct?

15 MR. PENDARVIS: Object to the form.

16 MR. HUNTER: Object to the form.

17 BY MR. LEONARDI:

18 A I can't speak for COLT. I would assume
19 they would have to make -- they would have to approve
20 that, but I can't speak for their processes.

21 Q And the process of negotiating the terms
22 of the conservation easement between Mr. Justice and COLT
23 never began, did it?

1 MR. PENDARVIS: Object to form.

2 MR. HUNTER: Object to form.

3 BY MR. LEONARDI:

4 A I don't know what discussions Mr. McLeod
5 had with COLT. I don't know.

6 Q Did Mr. McLeod ever forward to you or
7 anyone else at Justice Family Farms proposed conservation
8 easement terms?

9 A Not that I'm aware of.

10 Q Did he ever mention to you-all, we need
11 to get that sorted out?

12 A Not that I'm aware of.

13 Q Now, you mentioned Mr. Justice's
14 affection for land and conservation of land earlier in
15 the deposition. Correct?

16 A Yes.

17 Q And does that apply specifically -- not
18 only all land, I understand that he owns a good bit of
19 land, but also to the homestead here in West Virginia and
20 the farm down in South Carolina?

21 MR. HUNTER: Objection to form, the
22 homestead isn't in West Virginia.

23 MR. PENDARVIS: Objection.

1 BY MR. LEONARDI:

2 A Are you talking about the home farm or
3 the Homestead resort?

4 Q Well, I'm talking about his homeplace
5 here in West Virginia.

6 A That's called the home farm. Yes, it's
7 in West Virginia, that's correct.

8 Q Okay. Now, has Mr. Justice ever placed
9 a conservation easement on the land in South Carolina
10 since 2007?

11 A No.

12 Q Let's talk about the phone call on
13 December 24th, 2007. Let's talk about why this conser-
14 vation easement did not get placed in 2007. Isn't it
15 true that Yancey McLeod initiated a call to Jim and
16 others to discuss an IRS notice?

17 A Yes, that's correct.

18 Q And he explained that this notice, he
19 was taking it very seriously and he wanted some time to
20 resolve the issues presented by this notice?

21 A That was my understanding of the phone
22 call, yes.

23 Q And because of that -- for that reason,

B.R.A.

1 he wanted to postpone the easement. Correct?

2 A That's how I understood it, yes.

3 Q Okay. And he did not mention that his
4 attorney had withdrawn, did he?

5 A No, sir.

6 Q And, in fact, he had an attorney with
7 him there, Crosby Lewis. Correct?

8 A He represented Mr. Lewis to be his
9 attorney, yes.

10 Q All right. And during that phone call,
11 he explained that the work that had been done on the
12 easement could be used at a later date when the easement
13 went forward. Correct?

14 A That's what I understand, yes.

15 VIDEOGRAPHER: Going off the video
16 record. The time is 11:38 A.M. This concludes
17 Tape 2.

18 (WHEREUPON, a short recess
19 was taken)

20 VIDEOGRAPHER: We're now back on the
21 video record. The time is 11:47 A.M. This
22 begins Tape 3.

1 BY MR. LEONARDI:

2 Q All right. Mr. Miller, referring
3 back to Exhibit 11 to your deposition, this again is the
4 e-mail. I'll let you find it.

5 A I have 11.

6 Q Okay. An e-mail from Yancey
7 Environmental Solutions to Jim Justice and David Harrah
8 and it's dated just after the December 24th phone call.
9 Do you see that?

10 A Yes.

11 Q And do you see at the top of the --
12 the first sentence of the second paragraph is, "All of
13 the work that has been in progress on the Black River
14 Farm tract will be used in a conservation project at the
15 appropriate time." Do you see that?

16 A Yes, I do.

17 Q And then in the third paragraph, the
18 last sentence says, "As I mentioned above, all of the
19 work and work-product completed to date will be used when
20 we recommence the project." Correct?

21 A (No response)

22 Q The third paragraph.

23 A I'm sorry, third.

B.R.A.

1 Q Last sentence.

2 A All the work and work product completed
3 -- yes, I see that.

4 Q Okay. And that reconfirms for you that
5 the December 24th phone call, the decision was made to
6 postpone the easement. Correct?

7 A Yes.

8 Q And that that was fine with Mr. Justice.
9 Correct?

10 A Well, it was not fine, we would lose the
11 tax deduction, but --

12 Q For 2007?

13 A Yes.

14 Q Okay. But he told Yancey during that
15 call that they would consider going forward in the future
16 and that the work could be used then?

17 A That's my understanding.

18 Q Okay. And, in fact, Mr. Justice
19 wanted Yancey to sort out this IRS issue before
20 proceeding with this particular project and that's what
21 Yancey indicated to Mr. Justice as well. Correct?

22 MR. PENDARVIS: Object.

23 MR. HUNTER: Object to the form.

1 BY MR. LEONARDI:

2 A That was my understanding that -- yes.

3 Q Okay. That was a compound question, so
4 I'm going to ask it in the appropriate parts.

5 A Okay.

6 Q Mr. McLeod told Mr. Justice that he
7 wanted to postpone the transaction because he had gotten
8 a notice from the IRS and wanted to clear up the issues
9 associated with that notice. Correct?

10 MR. PENDARVIS: Form, objection.

11 BY MR. LEONARDI:

12 A Yes.

13 Q And, in fact, Mr. Justice was okay
14 with Mr. McLeod clearing up these issues with the IRS
15 before going forward with this transaction. Correct?

16 A As far as I know, that's correct, yes.

17 Q Now, do you know if any other qualified
18 organization was considered for receipt of this proposed
19 easement transaction?

20 A I do not know.

21 Q Have you ever heard of another one aside
22 from COLT?

23 A No, sir, I haven't.

1 Q And are you aware of any problems that
2 Justice Family Farms had with COLT or the terms proposed
3 by COLT?

4 A No, sir.

5 Q Now, I'd like you to take a look at
6 Exhibit 14, please.

7 A I have 14.

8 Q Let's start with 13, Exhibit 13, please.

9 A I have 13.

10 Q Okay. Now, very soon after the
11 December 24th call, YES submitted an invoice to Justice
12 Family Farms, isn't that correct, and, in fact, it is
13 Exhibit 14?

14 A Yes, I see that.

15 Q Now, you testified earlier that
16 typically Justice Family Farms pays its bills in 30 to
17 90 days. Isn't that correct?

18 A Typically, yes.

19 Q All right. In this instance, do you see
20 that the e-mail marked as Exhibit 13 to your deposition
21 wherein Jim Justice agrees to pay \$15,000 of the \$50,000
22 invoice from YES is dated October 3rd, 2008. Do you see
23 that?

1 A I see that, yes.

2 Q So it took almost a year in this
3 instance for Justice Family Farms to pay a portion of
4 YES's bill. Isn't that correct?

5 A That's correct, yes.

6 Q And this e-mail states, Exhibit 13, and
7 this is from David Harrah to YES, "The remainder of the
8 fee will be taken up later when and if we go forward."
9 Do you see that?

10 A Yes.

11 Q And does that make it clear to you that
12 Justice Family Farms was still considering whether to do
13 the transaction and when to do it?

14 A It says when and if.

15 Q Okay. If you'll turn to Exhibit 14.

16 A I have 14.

17 Q Do you see that one of the documents in
18 Exhibit 14 is an invoice from Highview Engineering and it
19 is on the page Bates labeled, again, that's the number at
20 the bottom of the right-hand corner, McLeod 3993?

21 A I see that.

22 Q Okay. And do you see the date of that
23 invoice, December 31st, 2007?

1 A Yes.

2 Q Okay. Now, if you turn to the
3 last page of this exhibit, you'll see an e-mail from
4 Mr. Hawkins indicating to Yancey that he received a
5 check for the invoiced amount. Do you see that?

6 A Yes, I see that.

7 Q And do you see that that e-mail is dated
8 April 28th, 2009?

9 A Yes.

10 Q So it took well over a year for Justice
11 Family Farms to pay Mr. Hawkins for his services.
12 Correct?

13 A That's correct. Well, let's back up, I
14 don't know when the check was received. It doesn't say
15 it was received on that date.

16 Q Okay. Well, let me get another document
17 real quick.

18 MR. LEONARDI: Let's go off the record
19 so I can find a document real quick.

20 VIDEOGRAPHER: Going off the video
21 record. The time is 11:54.

22 (WHEREUPON, a short recess
23 was taken)

1 VIDEOPHOTOGRAPHER: We're now back on the
2 video record. The time is 11:59 A.M.

3 BY MR. LEONARDI:

4 Q Mr. Miller, we were looking at
5 Exhibit 14, which is a composite exhibit of invoices
6 that were sent to Justice Family Farms, and then some
7 documents reflecting when they were paid or at least when
8 they had been paid at some point in the past. So I
9 mentioned to you that the last page there indicates --
10 is indication from Bill Hawkins, the appraiser, that he
11 received a check and the e-mail is dated well over a year
12 after his invoice date. Do you recall us discussing
13 that?

14 A Yes, sir.

15 Q Okay. And you said, well, perhaps he
16 was paid earlier than that and so I'd like to let you
17 take a look at a couple more documents.

18 MR. LEONARDI: I'd like to have this
19 marked as Exhibit 15.

20 (WHEREUPON, Miller Deposition
21 Exhibit No. 15 was marked for
22 identification purposes)

1 BY MR. LEONARDI:

2 Q Do you see this is an e-mail from Yancey
3 Environmental Solutions to David Harrah?

4 A Yes, sir.

5 Q Okay. And do you see that it's dated
6 October 2nd, 2008?

7 A Yes, sir.

8 Q And you can go ahead and read it to
9 yourself, but do you see that it reflects that the bills
10 from the professionals have not been paid?

11 A Yes, sir, I see that.

12 Q So some ten months later, it reflects
13 that not only has the professionals not been paid, but
14 also do you see there that it states that YES has not
15 been paid?

16 A (No response)

17 Q In the first paragraph there.

18 A Yes, I see that now. Okay.

19 Q And you see the middle of the second
20 paragraph, it states, "In anticipation of moving forward,
21 I would like to set up a meeting with Jim, me, and a
22 long-time friend and tax attorney, Ken Wingate, to
23 discuss the proper course of action at such time that we

B.R.A.

1 do move forward with the project." Do you see that?

2 A Yes, I do.

3 Q And does that indicate to you that
4 Yancey was suggesting that Ken Wingate is qualified to
5 handle the conservation easement from Yancey's end, from
6 the YES end of things?

7 A I'm not going to speculate on that.

8 MR. LEONARDI: I'd like to have this
9 marked as Exhibit 16.

10 (WHEREUPON, Miller Deposition
11 Exhibit No. 16 was marked for
12 identification purposes)

13 BY MR. LEONARDI:

14 Q All right. Do you see that this e-mail
15 -- what's the date on this e-mail?

16 A This e-mail is dated Wednesday, October
17 22nd, 2008.

18 Q And do you see that it indicates that
19 Mr. Hawkins has not been paid yet?

20 A Darroll Hawkins, yes, I see that.

21 Q Okay.

22 MR. LEONARDI: All right. I'd like to
23 have marked as Exhibit 17 this --.

1 (WHEREUPON, Miller Deposition
2 Exhibit No. 17 was marked for
3 identification purposes)

4 BY MR. LEONARDI:

5 Q Take a look at Exhibit -- what's been
6 marked as Exhibit 17 to your deposition and let me know
7 when you've had a chance to take a look at it.

8 A I see 17, I've read it. Okay.

9 Q Okay. And do you see that the e-mail
10 on the bottom half is from Darroll Hawkins, he's the
11 appraiser, to Yancey McLeod and it's dated November 12th,
12 2008. Do you see that?

13 A I see that, yes.

14 Q And do you see that Mr. Hawkins
15 indicates to Yancey, "It has been a month since they
16 indicated they would pay." referring to Justice Family
17 Farms. Correct?

18 A Yes. Yes.

19 Q "I have received nothing." the e-mail
20 continues. "My attorney has suggested filing a lien on
21 the property, which would include the invoice amount,
22 reasonable attorney fees, and the highest interest rate
23 allowed under local law. Any thoughts?" Do you see

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1 that?

2 A Yes, I do.

3 Q In an e-mail in return, Yancey
4 Environmental Solutions explains to Mr. Hawkins, quote,
5 "I emailed Jim Justice's CPA last Friday but did not hear
6 back from him." Do you see that?

7 A Yes, sir.

8 MR. LEONARDI: All right. I'd like to
9 have marked as Exhibit 18 to follow that.

10 (WHEREUPON, Miller Deposition
11 Exhibit No. 18 was marked for
12 identification purposes)

13 BY MR. LEONARDI:

14 Q Do you see that Exhibit 18 is an e-mail
15 addressed to Jim Justice and copied on David Harrah from
16 Yancey Environmental Solutions?

17 A I see that, yes.

18 Q And do you see that it's dated
19 November 13th, 2008, almost a year after the --

20 A Yes.

21 Q -- transaction was explored in 2007.
22 Do you see that?

23 A I see that.

1 Q And do you see that Mr. McLeod indicates
2 to Jim Justice that Dr. Hawkins has spoken with his
3 attorney and the attorney is, quote, "-- apparently ready
4 to move forward if he does not receive payment." Do you
5 see that?

6 A I see that, yes.

7 Q Okay. So does this refresh your
8 recollection that Mr. Hawkins and the other professionals
9 were not paid until Mr. Hawkins had threatened through
10 Yancey McLeod to file a lien on the property. Isn't that
11 the case?

12 MR. PENDARVIS: Object to the form.

13 MR. HUNTER: Object to form.

14 MR. PENDARVIS: It doesn't say that.

15 MR. LEONARDI: Mr. Pendarvis --

16 MR. PENDARVIS: I know. I'm sorry,
17 I'm losing the flow here. Now, what --

18 MR. LEONARDI: I'll ask the question
19 again.

20 BY MR. LEONARDI:

21 Q Does this refresh your recollection
22 that the professionals -- that at the time the
23 professionals were paid, which was apparently after

1 November 13th, 2008. Correct?

2 A Yes, sir.

3 Q That it had been made clear to Justice
4 Family Farms that Mr. Hawkins' attorney was going to move
5 forward with legal action against the property in South
6 Carolina?

7 MR. PENDARVIS: Object to the form.

8 MR. HUNTER: Objection to form.

9 BY MR. LEONARDI:

10 A And we're referring back to No. 18 where
11 Mr. McLeod is saying to Jim Justice and David Harrah, his
12 attorney is apparently ready to move forward if he does
13 not receive payment?

14 Q Right.

15 A That's what we're talking about?

16 Q Right.

17 A I don't know that we were ever informed
18 that there was going to be a lien filed.

19 Q Okay. But you were informed that
20 someone's attorney was ready to move forward if you
21 didn't pay up?

22 A And that could have meant any number
23 of things. That could have meant a letter from the

1 attorney saying pay the bill.

2 Q Okay. In any event, it worked because
3 the bills were paid after this was communicated to
4 Justice Family Farms. Isn't that the case?

5 A Yes, it was paid sometime after that.
6 I do not know exactly when it was paid, though.

7 Q Okay. If you would turn back to
8 Exhibit 9 to your deposition, please.

9 A Okay. I have nine.

10 Q Okay. And, again, this is the e-mail
11 from Al Hamlin to David Harrah that attached the Letter
12 of Intent from COLT. Do you see that?

13 A I see that, yes.

14 Q And if you would, turn to the second
15 page of the Letter of Intent. And do you see -- or let
16 me know when you've found that page, it's COLT 24.

17 A Yes, sir, I see that.

18 Q Okay. And do you see towards the bottom
19 of the page there's a bolded section just under the
20 Steward Contribution Range that begins, "Costs associated
21 with the following services and documents are contracted
22 through and paid directly by the property owner." Do you
23 see that?

1 A I see that.

2 Q Okay. Now, Justice Family Farms never
3 contracted with anyone to have a formal survey done, did
4 they?

5 MR. PENDARVIS: Object to the form.

6 MR. HUNTER: Object to the form.

7 BY MR. LEONARDI:

8 A That would have been left up to
9 Mr. McLeod as part of his duties in the process.

10 Q Do you know whether Mr. McLeod ever
11 contacted anyone to have a survey done?

12 A I do not know.

13 Q Now, the fourth one states Property
14 Title Research and Title Insurance Premium, dash,
15 Property Owner's Attorney. Do you see that?

16 A Yes, I do.

17 Q Okay. And do you know if the property
18 owner's attorney, that is Mr. Justice's attorney, that
19 would be Steve Ball, wouldn't it?

20 MR. PENDARVIS: Object to the form.

21 MR. HUNTER: Object to form.

22 BY MR. LEONARDI:

23 A Mr. Ball does not do that work, we

1 always contract that out.

2 Q Okay. And who do you contract with?

3 A We use a number of different people. We
4 would use someone in the area that was familiar with our
5 properties.

6 Q Okay. And, in fact, in this case, no
7 agreement or contact with anyone had been made to have
8 property title research and the title insurance premium
9 worked on. Correct?

10 A Not that I know of.

11 Q And the last bullet point is Closing
12 and Recording of CE, conservation easement. Do you see
13 that?

14 A Yes, sir, I do.

15 Q Again, it says Property Owner's
16 Attorney. Do you see that?

17 A Yes, sir.

18 Q And as we spoke about earlier, there
19 was no one at Justice Family Farms that was working on
20 any conservation easement documents. Correct?

21 A Not that I know of, no.

22 Q And the next line says, "COLT will
23 endeavor to complete the conservation easement process

B.R.A.

1 prior to December 31st, 2007. This schedule is subject
2 to client's attorney, appraiser and surveyor's schedule."
3 Now, the client's attorney here, who do you understand
4 that to be? That's not Mr. Hamlin. Correct?

5 A No.

6 MR. LEONARDI: We can go off the record.

7 VIDEOGRAPHER: Going off the video
8 record. The time is 12:32 P.M.

9 (WHEREUPON, a short recess
10 was taken)

11 VIDEOGRAPHER: We're now back on the
12 video record. The time is 12:16 P.M.

13 BY MR. LEONARDI:

14 Q Mr. Miller, we spoke earlier about
15 the work that you did to verify that the information in
16 your affidavit was accurate and I recall you mentioning
17 that you spoke with Mr. Justice. Correct?

18 A Yes.

19 Q About how long did that conversation
20 last?

21 A It was just briefly one question as
22 to what his intentions were with this easement.

23 Q After that conversation, did you ever

1 speak with Mr. Justice about this deposition today?

2 A No, sir.

3 Q Did you speak with anyone else about
4 the deposition today in preparation for it?

5 A Besides attorneys?

6 Q Right.

7 A No, sir.

8 Q Just to be clear, when you say
9 attorneys, are you referring to anyone in addition to
10 Mr. Hunter, your attorney?

11 A I'm sorry, no, Mr. Hunter. No,
12 Mr. Hunter.

13 Q Okay. Have you had any conversations
14 with Mr. Pendarvis?

15 A Mr. Pendarvis? Yes, I did with
16 Mr. Pendarvis.

17 Q When did you have those conversations?

18 A That was yesterday.

19 Q And where did those conversations take
20 place?

21 A In our corporate office.

22 Q So Mr. Pendarvis came over to your
23 corporate office yesterday?

B.R.A.

1 A Yes, sir.

2 Q And met with you about this deposition?

3 A Yes, sir.

4 Q And what time did he meet you there?

5 A I don't recall the exact time. It was
6 sometime yesterday afternoon, evening. I don't recall
7 the exact time.

8 Q It was yesterday, I mean, was it at 2:00
9 or 5:00 or --

10 A Afternoon or evening, 5:00. I don't
11 recall the exact time.

12 Q Okay. And did you look at any documents
13 with Mr. Pendarvis?

14 A No, sir.

15 Q How long did that meeting last?

16 A Twenty minutes probably.

17 Q And I want you to tell me as best you
18 can and tell the jury what Mr. Pendarvis told you during
19 that conversation.

20 A He told me who would be here, the
21 names of everyone involved. He told me that Mr. Hunter
22 would be there along with me and Mr. Hunter may object on
23 some areas as far as attorney-client privilege and things

1 like that. He told me where it was going to be and he
2 confirmed that I did sign this document, the affidavit,
3 and that I did do some investigation as to what was in
4 the document and that was basically the extent of it.

5 Q So you told him that you talked to
6 Mr. Justice and you looked at a few documents. Correct?

7 A I looked at some documents. I said that
8 I did sign this affidavit, that is my signature, yes, I
9 did.

10 Q And is it your understanding that
11 Mr. Pendarvis drafted the affidavit?

12 MR. HUNTER: Objection.

13 BY MR. LEONARDI:

14 A No, I don't recall who drafted the
15 affidavit. I mentioned that earlier, I don't think I
16 recall who drafted it.

17 Q Okay. Do you remember speaking about
18 anything else with Mr. Pendarvis?

19 A We talked about where he lived and I've
20 been on vacation there. That's all I recall talking
21 about.

22 Q Was anyone else with you when you were
23 speaking to him?

1 A Mr. Hunter was in the room for half of
2 the time.

3 Q Did Mr. Pendarvis suggest that you
4 review any documents in preparation for the deposition or
5 otherwise?

6 A He asked that I be familiar with the
7 affidavit that I signed.

8 Q Okay. Did he suggest that you review
9 anything else?

10 A No, sir.

11 Q No other documents in the case or
12 deposition transcriptions?

13 A I've never seen deposition transcripts.

14 Q Any other affidavits?

15 A No, sir.

16 MR. LEONARDI: Let me have marked as
17 exhibit -- is this 19, I believe?

18 (WHEREUPON, Hunter Deposition
19 Exhibit No. 19 was marked for
20 identification purposes)

21 BY MR. LEONARDI:

22 Q Take a look at this and let me know when
23 you've had a chance to look it over.

1 MR. PENDARVIS: I'm going to object
2 to any line of questioning on this document,
3 it's outside the scope of the deposition
4 notice.

5 MR. HUNTER: I will likewise object.
6 And I have some other things to say about it at
7 the appropriate time, which may be now or later.
8 I don't know your rules on these things, but I
9 would have some comments on this at the
10 appropriate time.

11 MR. LEONARDI: Okay. You're welcome to
12 put them on the record now while he's reviewing
13 the document if you want to go ahead and address
14 the subpoena.

15 MR. PENDARVIS: I'd like to make a
16 record objection to the notice.

17 MR. LEONARDI: Okay.

18 MR. PENDARVIS: It's our position
19 this --

20 MR. LEONARDI: Okay. Can we have the
21 witness step out?

22 MR. HUNTER: Sure.

23 MR. PENDARVIS: Sure.

1 (WHEREUPON, the witness was
2 advised to leave the room)

3 MR. PENDARVIS: The plaintiff's
4 position, this effort to serve the subpoena was
5 ineffective, it was never properly served.

6 MR. LEONARDI: Okay. And what was
7 ineffective about it?

8 MR. PENDARVIS: The Rules of Civil
9 Procedure require service by registered mail or
10 personal service, neither of which were
11 accomplished in this case, this subpoena is
12 defective.

13 MR. LEONARDI: Okay.

14 MR. HUNTER: And for the record, West
15 Law Next suggests that under your Civil
16 Procedure Rules 45 and five, that that would be
17 correct and so I have the same concern and
18 objection.

19 MR. LEONARDI: Okay.

20 MR. PENDARVIS: And can we get a
21 stipulation that it was not served registered
22 mail, return receipt requested, and you don't
23 have a green card signed by Mr. Tom Floyd?

1 MR. LEONARDI: No, but I will introduce
2 just after this, the Affidavit of Personal
3 Service.

4 MR. HUNTER: I'll go get him.

5 MR. PENDARVIS: One -- just a split
6 second, one last thing.

7 MR. HUNTER: One last thing.

8 MR. PENDARVIS: And the Affidavit of
9 Personal Service was not filed with the clerk of
10 the Court, per Rule 5 and Rule 6.

11 MR. LEONARDI: I don't know.

12 MR. PENDARVIS: Is that correct? Would
13 I be served with a copy of it if it had been?

14 MR. LEONARDI: Would you be?

15 MR. PENDARVIS: Would I have been served
16 with a copy if the defendants had filed an
17 Affidavit of Service?

18 MR. LEONARDI: I do not know,
19 Mr. Pendarvis, and I'm not the one being deposed
20 here. I can answer that we have an Affidavit of
21 Service and that it was served on the proper
22 person.

23 MR. PENDARVIS: Thank you.

1 MR. LEONARDI: Terry, you can come on
2 in.

3 (WHEREUPON, the witness
4 reentered the room)

5 BY MR. LEONARDI:

6 Q Mr. Miller, have you had a chance to
7 look at look at Exhibit 19?

8 A No, I haven't.

9 Q Okay. Please do.

10 A Okay.

11 Q Okay. And do you see that this is a
12 subpoena to Justice Family Farms?

13 A I see that, yes.

14 Q All right.

15 MR. LEONARDI: Can I get this marked as
16 Exhibit 20, please?

17 (WHEREUPON, Miller Deposition
18 Exhibit No. 20 was marked for
19 identification purposes)

20 BY MR. LEONARDI:

21 Q As you take a look at Exhibit 20, do
22 you see that it is an Affidavit of Service?

23 A Yes, sir.

1 Q Indicating that the subpoena was served
2 on Mr. Tom Floyd, the registered agent for Justice Family
3 Farms in South Carolina. Do you see that?

4 A I see that, yes.

5 Q Okay. And referring back to
6 Exhibit 19, if you'll look at the -- there's a cover
7 letter, of course, but then the first page of the
8 subpoena has State of South Carolina at the top. Do
9 you see that?

10 A Yes, sir.

11 Q And do you see there it says, "You Are
12 Commanded to produce and permit inspection and copying of
13 the following documents or objects in your possession,
14 custody or control at the place, date and time specified
15 below." And then it says, "See Exhibit A attached
16 hereto." Do you see that?

17 A Yes, sir.

18 Q And the place and time is my office
19 in Columbia, South Carolina, by December 9th, 2011.

20 MR. PENDARVIS: Objection, form.

21 BY MR. LEONARDI:

22 A I do see that, yes.

23 Q And if you'll turn to Exhibit A, please.

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1 You have to turn a few pages.

2 A I see Exhibit A.

3 Q And do you see that there is -- Exhibit
4 A contains a description of certain documents?

5 A I see that.

6 Q Okay. Do you have in your possession
7 any documents that are responsive to that? I mean, do
8 you know of any documents that are responsive to that
9 that have not been discussed today, of course?

10 A No, sir.

11 Q Okay. Do you know if anyone has looked
12 for any documents as a result of receiving this subpoena?

13 A I do not know.

14 Q Okay. So do you know the names of
15 anyone that has looked for documents, I guess, is my
16 question?

17 A No, I don't. I've never seen this
18 document.

19 MR. LEONARDI: Okay. That's it.

20 REDIRECT EXAMINATION

21 BY MR. PENDARVIS:

22 Q Mr. Miller, just a few things before
23 we finish up today and I'm going to go in reverse order.

1 Looking at the purported subpoena that was attached with
2 the cover letter that is Exhibit 19 to this deposition --

3 A Yes, sir.

4 Q -- can you help me on how you would
5 appear at a post office drawer? If you look at the place
6 for the deposition, if a Justice Family Farms designee
7 intended to appear, how would you appear at a post office
8 box -- post office drawer, excuse me?

9 A I do not know.

10 Q Okay. And also going --

11 MR. LEONARDI: Objection.

12 MR. PENDARVIS: Okay. Objection

13 noted.

14 BY MR. PENDARVIS:

15 Q There was some testimony at the very
16 beginning of the cross-examination of Justice Family
17 Farms for this deposition taking apparently some of your
18 testimony out of context. And the testimony I'm
19 referring to is testimony appearing on the last page of
20 your affidavit that was marked as Exhibit 2. If you
21 will, please pull out Exhibit 2 and Exhibit 14.

22 MR. LEONARDI: I'm trying to get 14,

23 hold on.

1 BY MR. PENDARVIS:

2 Q Turn to the last page of your affidavit
3 and the third page of Exhibit 14. And there was some
4 testimony, I believe, taken out of context and I wanted
5 you to have a moment to look over Exhibit 14. The testi-
6 mony that was elicited was that there was a statement in
7 Paragraph 27 on your affidavit, last sentence, regarding
8 fees paid to Mulkey. You were being questioned about
9 what JFF understood that those included pa -- fees to
10 James lewis.

11 A Yes, I see that.

12 Q And the question then had -- the cross-
13 examination question then had you look at Exhibit 14 and
14 you testified that you weren't sure how that Lewis wild-
15 life statement got in the affidavit. Would you look at
16 exhibit -- Page 3 of Exhibit 14, about one-third of the
17 way down the page, and see if you see any reference to
18 Lewis wildlife and wetland?

19 A This is the one that says Page 2?

20 Q Yes, sir, it says Page 2, but it's
21 actually the third page of the exhibit.

22 A Yes, sir, I do see that.

23 Q Okay. So apparently there was -- and

B.R.A.

1 you testified, did you not, that you looked at invoices
2 and such --

3 A Yes.

4 Q -- as part of your process --

5 A I did --

6 Q -- in preparing this affidavit?

7 A Yes, sir, I did misspeak on that.

8 Q Okay.

9 A This is included in that, in that
10 invoice.

11 Q So your testimony in the affidavit was
12 truthful?

13 A That is correct, yes.

14 Q One last thing. There was some
15 suggestions in several of the cross-examination questions
16 that would lead someone to believe maybe that in creating
17 a conservation easement, that a significant amount of
18 time is required to finalize the details and the various
19 documents that relate to the conservation easement that's
20 being put together. Do you --

21 A Yes, sir, I do.

22 Q -- recall those questions?

23 A Yes, sir.

1 Q And I want to use the Justice Family
2 Farms 2009 easement as an example for the jury. How long
3 in advance of the final recording of the 2009 easement
4 were all of the terms for the easement papers completed?

5 A That was -- my recollection of that,
6 it was all done n a very short period of time towards
7 the end of the easement. The terms were presented to
8 Mr. Justice, he agreed, and the documents were prepared.
9 That was done fairly fairly quickly at the end of the
10 process.

11 Q Are we talking months or weeks?

12 A Oh, no, this was all done within a week.

13 MR. PENDARVIS: Thank you. No further
14 questions.

15 RECROSS-EXAMINATION

16 BY MR. LEONARDI:

17 Q I have a couple of follow-up questions.

18 A Yes, sir.

19 Q Regarding the 2009 easement, when was
20 that easement closed specifically in 2009?

21 A My recollection, it was mid-December to
22 the end of -- maybe in the third week of December.

23 Q And with respect to the conservation

1 easement that we've been talking about, not the 2009, but
2 the 2007 --

3 A Yes, sir.

4 Q -- was Justice Family Farms ever made
5 aware of a specific day or two days that, for example,
6 documents were going to be exchanged by overnight to
7 close the document -- or to close the easement? Were
8 they ever made aware of a closing date?

9 MR. PENDARVIS: Objection, outside the
10 scope of redirect.

11 MR. HUNTER: Objection, same.

12 BY MR. LEONARDI:

13 A Not that I'm aware of.

14 Q Finally, and this is -- if you would,
15 please pick up Exhibit 19.

16 A Yes, sir.

17 Q I just want to make it clear that if you
18 look at the first page of the subpoena --

19 A Yes, sir.

20 Q -- do you see that it does not say that
21 you are commanded to appear anywhere? In fact, the
22 portion on there at about a third of the way down, it
23 says you are commanded to appear, you see that box is not

1 checked, but the box that's checked is you are commanded
2 to produce and permit inspection, in other words, please
3 send us some documents. Do you understand that?

4 A Yes, sir, I see that.

5 Q Okay. So you appreciate that this was
6 not asking you or anyone else from Justice Family Farms
7 to appear anywhere. Do you understand that?

8 A Yes, sir, I do.

9 MR. LEONARDI: Okay. I don't have any
10 further questions.

11 MR. PENDARVIS: No further questions.
12 Mr. Miller, thank you for your time.

13 MR. HUNTER: I have an additional
14 comment. You may be excused for just a second.

15 (WHEREUPON, the witness
16 was advised to leave the room)

17 MR. HUNTER: In addition to other
18 objections to this subpoena, I wanted to note
19 that I think it's defective for the following
20 additional reason, it has a purported return
21 date which is within the 14-day objection period
22 allowed to a recipient and I think on its face,
23 it's defective for that additional reason.

1 That's the only other thing I wanted to add.

2 MR. PENDARVIS: And there may be some
3 -- I'd add an additional objection, there may be
4 some work product materials inclusive in the
5 requested documents.

6 MR. HUNTER: I would join in that.

7 VIDEOGRAPHER: Going off the video
8 record. The time is 12:35 P.M. This concludes
9 the deposition.

10 (Witness Excused)

11 (WHEREUPON, the deposition
12 was concluded)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA

COUNTY OF RALEIGH, to-wit:

I, H. DAVID STANLEY, a Notary Public within and for the State aforesaid, duly commissioned and qualified, do hereby certify that the foregoing deposition of JAMES TERRY MILLER was duly taken by and before me at the time and place and for the purpose specified in the caption thereof, the said witness having been first duly sworn by me to testify the whole truth and nothing but the truth concerning the matter in controversy.

I do further certify that the said deposition was taken by means of a Stenomask and transcribed on a computer under my supervision.

I further certify that I am not connected by blood or marriage with any of the parties to this action, am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, or financially

B.R.A.

1 decision, and my choice was Curtis Elliott, and so
2 I called Curtis and set up an appointment, and
3 Mr. Harper and his son-in-law and I met with Curtis
4 and one of Curtis's associates the first week in
5 December.

6 Q. All right. But insofar as your
7 experience for yourself, you said you have never
8 had to retain counsel for yourself at the last
9 minute --

10 Is that fair?

11 A. Yes, ma'am, and I --

12 Q. -- other than this case.

13 A. Right, I have been involved with a lot
14 of conservation projects and other projects. I
15 even mentioned the one back when I was in law
16 school with my dad and your firm, and I had been
17 around a lot of tax attorneys late in December and
18 heard them talk about how slammed against the wall
19 and frantically they were trying to finish projects
20 at year's end.

21 So I had a lot on my plate at that
22 moment when Hal Hanlin and Richardson Plowden quit.
23 And, as I said, my first priority was my client.

24 Q. And that's Mr. Justice?

25 A. That's correct. And that's what I was

1 concentrating on. And I felt that it would be
2 futile to try to get a Curtis Elliott, or a
3 competent -- or another competent tax attorney to
4 step in at that late date.

5 Q. All right. Well, what did you have on
6 your plate? You said: I had a lot on my plate.

7 A. I had four conservation projects I was
8 trying to close that year. And I had just received
9 the shock of this letter from the IRS, which I
10 found preposterous, and I had advised all four of
11 my clients, on whose projects I was working to
12 close year's end in '07, about the IRS letter, and,
13 um, I advised all of them, after we discussed the
14 letter and what it meant, that we should move
15 forward to close the projects, because I had not
16 done anything wrong, and the other three projects
17 closed.

18 The attorneys involved in those
19 projects, after our discussion, decided to move
20 forward to close those projects. I made the same
21 disclosure to Mr. Justice.

22 And it would have been extraordinarily
23 embarrassing, to me, to have to tell anybody,
24 including finding a new tax attorney, if I thought
25 that I could find one that could step in at that