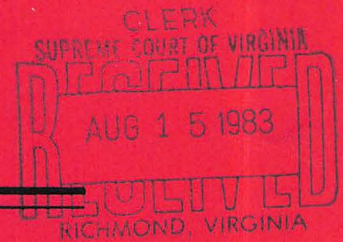


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IN THE
Supreme Court of Virginia
AT RICHMOND

RECORD NO. 821067

ADC FAIRWAYS CORPORATION,

Appellant,

v.

JOHN MARK CONSTRUCTION, INC.,

Appellee.

JOINT APPENDIX

Volume II

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1 changes are, because the document is in evidence, was there
2 a reason for changing the scope of work approximately 30
3 days after the inception of the contract?

4 A What I'm looking at here in this document just
5 represents some of the items were omitted and some were
6 included.

7 Q Okay, and was this, in fact, a -- a deletion in
8 the scope of work?

9 A To some degree; some items were deleted.

10 Q Okay, and there were -- in fact, there were
11 adjustments made in the contract price; is that not so,
12 per unit contract price?

13 A Yes, each item carried a price and it was adjusted
14 line by whichever item was in this agreement.

15 Q Was the adjustment a decrease in the unit price?

16 A Yes, it was.

17 Q Which reflected a decrease in the scope of work?

18 A Exactly, yes.

19 Q Now, that's -- that's all I need from that document.

20 Now, according to the schedule of delivery dates,
21 April 18th, 1980 became the date on which the first seven
22 units under the Ivy Mount contract were to be delivered; is
23 that correct?

1 A Yes.

2 Q And those were units 11 through 16?

3 A Yes.

4 Q And were they ready to be accepted on that date?

5 A No, they were not.

6 Q Then, there was -- the next delivery date was
7 April 25th and that was for delivery of a -- another group
8 of units: 41 through 45, 47 and 48; is that correct?

9 A That's correct.

10 Q And on that date, were those units presented for
11 acceptance?

12 A I believe they were, yes.

13 Q Well, were all of them, to your knowledge?

14 A Yes, I believe they were.

15 Q Well, is it not a fact that on that date, the
16 first group of units and a part of the units that were due
17 for the second delivery date were presented?

18 MR. REESE: If Your Honor please, that's a leading
19 question: is it not a fact.

20 THE COURT: Sustained.

21 BY MR. WEINER:

22 Q Mr. Dillon, I then take you to the date of May
23 the 2nd.

1 A Yes.

2 Q Now, do you recall Mr. Sauer testifying to a
3 meeting with you on May the 2nd?

4 A Yes, I do.

5 Q And you recall Mr. Sauer testifying to the fact
6 that there was a letter that you requested that he sign?

7 A Yes.

8 Q Now, with regard to this letter, could you recall
9 for His Honor the circumstances about the forming of that
10 letter, you putting that letter together?

11 THE COURT: What letter are you talking about,
12 counsel?

13 MR. WEINER: Your Honor --

14 THE COURT: The letter that did what?

15 MR. WEINER: The letter that Mr. Sauer testified
16 to that was presented to him for his signature. I believe
17 it's --

18 MR. REESE: Defendant's 1, if Your Honor please.
19 Correct.

20 MR. WEINER: Defendant's Exhibit No. 1.

21 THE COURT: It's a letter which has Sauer agreeing --

22 MR. WEINER: Yes.

23 THE COURT: -- that the units were not complete?

1 MR. WEINER: Yes.

2 THE COURT: Now I know what you're asking about.
3 Now, repeat your question because I didn't understand what
4 you're asking about that letter.

5 BY MR. WEINER:

6 Q Do you recall that letter?

7 A Yes, I do.

8 Q Is it not a fact that you --

9 THE COURT: Sustained. You're going to lead.
10 If you say it is not a fact, you're getting ready to state
11 the fact and ask him if he agrees with it, and that would
12 be leading.

13 BY MR. WEINER:

14 Q Do you recall that letter?

15 A Yes, I do.

16 Q And will you tell His Honor -- did you prepare
17 that letter?

18 A Yes, I prepared it for John Mark. He had come to
19 me --

20 THE COURT: Just wait for the question. You
21 answered: yes, you did prepare it.

22 BY MR. WEINER:

23 Q What was the reason that you prepared that letter?

1 A I prepared this letter for John Sauer because of
2 units that were not complete at the Heritage North property
3 and also Ivy Mount. He was requesting a payment for the
4 work that was done and our agreement was that until units
5 were completed, no payment would be made. So, he said to
6 me, "I have to have some money." And I said, "Well, if the
7 units are not complete, I cannot ask for any payment from
8 Mr. Daly." And I proceeded to say that I would inquire with
9 Mr. Daly on how we would handle it.

10 Q Now, did you, in fact, contact Mr. Daly about Mr.
11 Sauer's request for some money?

12 A Yes, I did.

13 Q And what was -- would you tell us about the
14 conversation you had with Mr. Daly about Mr. Sauer's request.

15 A I informed him that Mr. Sauer was in and he was
16 requesting money. He needed payroll, and whatever he needed
17 the money for, and Mr. Daly asked me: are the units
18 complete?

19 And I said, "No, there are still some outstanding
20 items." And he said to have John Sauer admit that they --

21 MR. REESE: If Your Honor please, I have a problem
22 at this point. We're dealing with --

23 THE COURT: You're objecting?

1 MR. REESE: Yes, I am.

2 THE COURT: To what?

3 MR. REESE: We're dealing with what Mr. Daly is
4 telling this gentleman, Mr. Dillon, which is number one,
5 a self --

6 THE COURT: Grounds for objection?

7 MR. REESE: -- self-serving and hearsay, Your
8 Honor.

9 THE COURT: Sustained.

10 MR. REESE: Thank you.

11 BY MR. WEINER:

12 Q After your conversation with Mr. Daly, what course
13 of action did you take?

14 THE COURT: He wound up giving him a check for
15 \$20,000 so long as he signed the letter agreeing the job
16 wasn't complete. Is that right?

17 THE WITNESS: Yes.

18 THE COURT: Okay.

19 BY MR. WEINER:

20 Q Now, after the May 2nd letter, there is a date
21 that comes up, May 9th, and that is another delivery date;
22 is it not, for units?

23 A Yes, I believe it is.

1 Q Now, taking you now to a point in time of June
2 the 26th, and bear with me, I -- Your Honor, mark this for
3 identification.

4 THE COURT: It'd be D 5.

5 (The document referred to was
6 marked as Defendant's Exhibit
7 No. 5 for identification.)

8 BY MR. WEINER:

9 Q Can you identify this (handing to witness)?

10 A Yes, it's a memorandum to me from Mr. Daly
11 authorizing me to accept units in Ivy Mount.

12 Q Okay. Now -- move this into evidence.

13 THE COURT: You're offering it?

14 MR. WEINER: Yes.

15 MR. REESE: Your Honor please, it's an unsigned
16 memorandum, carries absolutely no acceptance date. I don't
17 know of what it speaks, quite frankly, Your Honor. It's
18 not even on ADC stationery.

19 THE COURT: . You object?

20 MR. REESE: I object, Your Honor. It has nothing
21 authenticated --

22 THE COURT: It's sustained because this is Daly
23 speaking. What the witness can say, I heard him say, he did

1 receive authority from Daly to accept units.

2 When did you receive that authority?

3 THE WITNESS: On the 26th of June.

4 THE COURT: Okay.

5 BY MR. WEINER:

6 Q Now, prior to that date, you had no authority to
7 accept units; is that correct?

8 A No.

9 Q In fact, in your letter to Mr. Sauer, it was
10 specifically stated that only Mr. Daly could accept units.

11 A Yes.

12 THE COURT: So this is after that letter?

13 THE WITNESS: Yes.

14 THE COURT: All right. Go ahead.

15 BY MR. WEINER:

16 Q Now, we have the two letters -- we have the May
17 2nd letter and this June 26th time where you have authority.
18 In the intervening time period, June 18th comes about what's
19 known as a Modification Agreement?

20 A Yes.

21 Q And were you involved with the decision to enter
22 into a Modification Agreement with John Mark?

23 A Yes, I had been involved.

1 Q And what was the basis to entering into a Modifi-
2 cation Agreement of the Ivy Mount and Heritage Woods contract
3 on June 18th?

4 A Well, units to be delivered in both jobs, both
5 Heritage North and Ivy Mount, were delayed. They were not
6 being completed. An agreement from both sides was drawn
7 up to see if we could bring everything up to date, and from
8 that point on start turning out completed units.

9 Q Now, during this period of time, had you had
10 communication with suppliers, John Mark suppliers?

11 A They had called me, yes.

12 Q For what purpose?

13 MR. REESE: Objection, Your Honor. This will be
14 also hearsay.

15 MR. WEINER: He's saying that he received phone
16 calls from people.

17 MR. REESE: Now, the moment that -- the moment he
18 says for what purpose, that has to come in to what the
19 individual called in for.

20 THE COURT: The question is to elicit the phone
21 calls from suppliers to John Mark?

22 MR. WEINER: No, suppliers, John Mark suppliers,
23 that were calling him.

1 THE COURT: It would be hearsay.

2 MR. REESE: Whatever response he makes is hearsay.

3 MR. WEINER: I'm saying: did he receive phone
4 calls from John Mark suppliers?

5 MR. REESE: My objection was --

6 THE COURT: Assume he answers no, but if he answers
7 yes, you can't say what was the content because it's hearsay,
8 so where is it going?

9 MR. REESE: Your Honor --

10 THE COURT: Just a minute. Let me ask my question.

11 MR. WEINER: Well, Your Honor --

12 MR. REESE: He already asked him the question,
13 though.

14 MR. WEINER: -- I proffer to the Court that he was
15 receiving phone calls from suppliers of John Mark asking for
16 payment of funds, asking him for payment of funds.

17 THE COURT: You want to offer in Court as true, a
18 statement made out of Court by someone who is not here sworn
19 as a witness. Sustained, that's hearsay.

20 BY MR. WEINER:

21 Q Had you been receiving requests from John Mark for
22 payment of funds?

23 A Yes.

1 Q And were units being completed?

2 A No, they were not.

3 THE COURT: Did John Mark, did one of their people
4 tell you why they needed the money?

5 THE WITNESS: Yes, to continue on the job.

6 THE COURT: Did they discuss their suppliers with
7 you --

8 THE WITNESS: Oh, yes.

9 THE COURT: -- in terms of needing money? What
10 did they say about that?

11 THE WITNESS: That they weren't able to get any
12 more material because they couldn't pay the bill.

13 THE COURT: To?

14 THE WITNESS: To suppliers.

15 THE COURT: All right.

16 It's admissible from the Plaintiff's side.

17 BY MR. WEINER:

18 Q Now, in putting together the Modification Agreement,
19 there was a Schedule C. Are you aware of that?

20 A Yes.

21 Q And that is contained in the Modification Agreement
22 which is --

23 THE COURT: Yeah, we know about that. What's the

1 question?

2 BY MR. WEINER:

3 Q Okay, the question being: would you tell His
4 Honor what the purpose for Schedule C was.

5 A The purpose of Schedule C was to list all
6 suppliers that were supplying the two jobs, both Ivy Mount
7 and Heritage North and to make sure that they were paid and
8 supplies would continue.

9 Q And this list was supplied by John Mark?

10 A Yes.

11 Q Pursuant to that list, you folks agreed to --
12 you agreed to pay the suppliers?

13 A Yes.

14 Q Now, the idea being -- well, at June 18th, with
15 this Modification Agreement, the project would be proceeding;
16 is that correct?

17 A Yes.

18 Q And there was a new -- a modified delivery
19 schedule?

20 A Yes.

21 Q Under the Modification Agreement, did there come
22 a point in time when a group of units were to be ready, first
23 group of units?

1 MR. REESE: The agreement speaks for itself.

2 BY MR. WEINER:

3 Q July 3rd, first group?

4 A Yes.

5 Q And on July 3rd, did you, in fact, meet with Mr.
6 McCarty?

7 A Yes, I did.

8 Q And that was at the Ivy Mount project?

9 A Yes.

10 Q And did you request to review -- walk through
11 these July 3rd units?

12 A Yes, I did.

13 Q And would you tell His Honor what occurred when
14 you and Mr. McCarty met on July 3rd.

15 A I met Mr. McCarty at the Ivy Mount project and
16 inquired whether we were going to walk the first group due
17 per the Modification Agreement. He informed me that they
18 were not ready and there was no need to walk them.

19 Q Did he tell you why they weren't ready?

20 A He said they were not able to obtain several
21 materials. I said, "I thought we worked that all out" --

22 Q Now, when you say, "several materials", what -- can
23 you be more specific?

1 A Kitchen light, cove molding.

2 Q What was your reply to that?

3 A My response was: I thought we had worked that --
4 those problems all out and you were able to receive all
5 these materials.

6 Q Did he present you with any documentation on July
7 3rd that the materials were not ready?

8 A No, he did not.

9 Q Were you prepared to walk the units notwithstand-
10 ing those two items?

11 A Yes, I was.

12 Q Were you prepared to accept the units notwith-
13 standing those two items?

14 A Yes, I was.

15 Q Did you, in fact, walk the units?

16 A Yes, I did.

17 Q Now, with those units that you walked on July 3rd
18 which were 21 through 28, 32, 33 and 38?

19 A Yes.

20 Q Would you please describe for His Honor what the
21 condition of those units were?

22 THE COURT: Now, counsel, this is delay testimony.
23 In other words, it's testimony about something wasn't ready.

1 MR. WEINER: Yes, Your Honor.

2 THE COURT: Now, the issue in the case is not when
3 it was ready. It's: should -- is any money due now whether
4 it was on time or ready late? So why should I hear evidence
5 that there was lateness?

6 MR. WEINER: Well, Your Honor, part of the --
7 there is also involved in this a contract -- the document
8 that we're going to ask you to interpret to find out: one,
9 was there a breach? Two, if there was a breach --

10 THE COURT: You claim a breach and your opponents
11 have already admitted that from day one, they were a week
12 late and they stayed a week late through the whole job.

13 Now, if you want to show more than that by this
14 witness, then you may, but you don't have to give every
15 nail and bolt of why something wasn't ready.

16 MR. WEINER: Your Honor, I'm not intending to go --

17 THE COURT: If you want to show that it was worse
18 than what they already admitted in the trial --

19 MR. WEINER: Yes, sir.

20 THE COURT: -- then say: how long did the delays
21 run? What general units did they cover? Were any delays
22 longer than a week? How many units were involved? What was
23 the length of the delay?

1 You know, that's -- I certainly do want to hear
2 this part of your case.

3 MR. MAYS: Judge Brown, if I might just add,
4 however -- us being able to show that they were in breach
5 invoked certain rights in the contract that the developer
6 would have in reference to offset and cost of completion,
7 et cetera, so --

8 THE COURT: I don't understand you. What rights
9 and what offsets?

10 MR. MAYS: Well, part of this testimony is --

11 THE COURT: The contract says what, if you're --
12 over two weeks late you get no money? Is that what you're
13 saying, something like that?

14 MR. MAYS: Something to that effect, yes.

15 MR. WEINER: There's not necessarily dollar
16 penalties. The remedy's --

17 THE COURT: Call my attention to the section
18 number so that I can better rule on the issue.

19 MR. WEINER: Your Honor, paragraphs of the contract --
20 first of all, of course I point out to you paragraph 35 was
21 a Time of the Essence clause. Also, paragraph 5 --

22 THE COURT: 5? All right.

23 MR. WEINER: -- "Payments by Contractor"; paragraph

1 7, "Prosecution of Work".

2 THE COURT: Well, let's see. What has "Payments
3 by Contractor" got to do with what things were not ready
4 in unit 22, or whatever it is, on July 3rd, you see.

5 MR. WEINER: Your Honor, then I direct you to
6 paragraph number 7, "Prosecution of Work".

7 THE COURT: All right then, the contract in 7
8 basically provides that if the contractor's slow, the
9 developer can hire outside people to assist the contractor.
10 and the contractor agrees to hold the developer harmless.
11 Now, are you going to show that they hired outside help to
12 work alongside the contractor at the contractor's expense
13 under paragraph 7?

14 MR. REESE: Well, you're not going to show that.

15 MR. WEINER: Well, I'm going to show that another
16 contractor had to come in to finish the units.

17 THE COURT: You mean after they declared a breach
18 and put the contractor off the job?

19 MR. WEINER: Yes, Your Honor.

20 THE COURT: That's different than 7. 7 is --

21 MR. WEINER: Your Honor, I'm sorry to take this
22 time --

23 THE COURT: "The developer may obtain additional

1 equipment, provide additional men to assist contractor."
2 See, that's not replacing him. You're going under general
3 breech of contract rules, not under provision 7, I think.

4 MR. WEINER: Your Honor, I also direct you to
5 paragraph 15 which is called, "Delay of Work".

6 THE COURT: All right.

7 How is that applicable now to the need for me to
8 hear what items weren't ready in unit 22 on July 3?

9 MR. WEINER: Well, that's -- aside from the cove
10 molding and the light fixture, Mr. Dillon is prepared to
11 testify that he would have accepted the units, or they would
12 have been accepted but for those items, but, in fact, there
13 were other things.

14 MR. REESE: That paragraph doesn't deal with that.

15 THE COURT: What does this paragraph -- how does
16 this relate to it?

17 MR. WEINER: Your Honor, there's -- I have to tell
18 you, Your Honor, also to look at 25 and 29.

19 THE COURT: All right.

20 All right, on three days' written notice for a
21 breech, they can terminate.

22 (Pause)

23 THE COURT: Well, now that is your normal material

1 breach provision and it's the law without it being put in
2 the contract. I still don't understand why I'm hearing
3 about nuts and bolts instead of hearing him say: these
4 units were not ready and they were four weeks late and here's
5 the punch list that never was fixed.

6 Identify this punch list or something that's
7 generic about delay, you see?

8 MR. WEINER: Would Your Honor just also read 29?

9 THE COURT: All right.

10 (Pause)

11 THE COURT: Deficiencies are things improperly
12 done.

13 MR. WEINER: Correct.

14 THE COURT: So if your question is: all right,
15 under 29, did you call to their attention deficiencies which
16 were not fixed in 48 hours, what were the deficiencies?
17 What was improperly done that had to be redone, deficient?

18 Now, if they're not offered for acceptance, then
19 that's not a deficiency; it's just not ready. That goes
20 back to your other provisions of the contract where if you
21 don't perform, you can call it off. But you may ask that.
22 I just -- I feel like the case involves a forest. I'm not
23 getting testimony about the forest, not even about the trees.

1 I'm getting testimony about the pine needles and I have real
2 difficulty with that.

3 MR. WEINER: Okay, Your Honor.

4 THE COURT: All right, proceed.

5 BY MR. WEINER:

6 Q I can ask the witness if but for the -- those two
7 items: the cove molding and the lighting fixture, in your
8 walk of those units on July 3rd, were you prepared to accept
9 them?

10 A No, I was not.

11 Q Did you have a discussion as a result of your walk
12 through these units on July 3rd? Did you have a discussion
13 with Mr. McCarty?

14 A Yes, I did.

15 Q And --

16 THE COURT: Now, are these units you're talking
17 about the ones due under the Modification Agreement --

18 MR. WEINER: Yes, Your Honor.

19 THE COURT: -- or still due under a different set?

20 MR. WEINER: This is the first group under the
21 Modification Agreement.

22 THE COURT: All right. Well, he says McCarty said
23 they weren't ready.

1 BY MR. WEINER:

2 Q Did you have a conversation with Mr. McCarty as
3 a result of your walk through those units?

4 A Yes, I did.

5 Q And will you tell His Honor what you told Mr.
6 McCarty about the situation, about these units not being
7 completed?

8 A I was curious to know why he did not want to
9 present the units, and I believe we walked into one of the
10 units on the second floor and men were still working in the
11 units.

12 Q Now, did a point in time come when you walked back
13 to Mr. McCarty's office, or your office, and discussed that
14 situation?

15 A No -- well, walked -- yes, we walked --

16 THE COURT: Somewhere, did you talk to him about
17 it? It doesn't matter where.

18 THE WITNESS: Yes, in McCarty's office.

19 BY MR. WEINER:

20 Q Okay, and what did you tell him about the situation?

21 A I told him I was going to contact Mr. Daly and make
22 him aware of what the condition of the units are.

23 Q Did you then have a further conversation with

1 Mr. McCarty?

2 A Yes, I did.

3 Q And would you tell His Honor what you then told
4 Mr. McCarty?

5 A After speaking to Mr. Daly, I came back to Mr.
6 McCarty's office and told him to get off the job.

7 Q Did you have authority to say that to him?

8 A No, I did not.

9 Q Did Mr. McCarty ask for any writing, any written
10 document saying that you were terminating him?

11 A No, he did not.

12 Q On -- did Mr. McCarty reply to you about your
13 statement: get off the job?

14 A Yes. He asked me for -- if I would -- are we going
15 to pay him the fire job money.

16 Q And did you reply to that?

17 A Yes. I said: no.

18 Q And did, in fact, Mr. McCarty leave the job?

19 A Yes.

20 Q Did a point in time come when Mr. McCarty returned
21 to the job?

22 A Yes, I believe he did.

23 Q Would that have been around July 8th or 9th?

1 A Yes.

2 Q Now, on that date, weren't additional units to be
3 delivered?

4 A Yes, the next group.

5 Q And did you have the opportunity to review or
6 walk through any units that were supposed to be ready on
7 that date?

8 A Yes, I believe I did.

9 THE COURT: What would there be to see if they
10 hadn't been on the job?

11 THE WITNESS: No, they returned to the job.

12 THE COURT: Yeah, he returned on the 8th or 9th,
13 and on that day, did you walk the job with him was the
14 question.

15 THE WITNESS: No, I did not walk it with him, no.

16 THE COURT: Well, with somebody. What could you
17 expect them to do? They come back today and you go through;
18 whether you're alone or with somebody else, what would you
19 expect them to have done if they hadn't been around since
20 July 3rd? Why bother to walk it? I don't understand why
21 you made a walk then.

22 MR. REESE: Good question.

23 THE COURT: What was your purpose?

1 THE WITNESS: Other than the fact that I had been
2 told that the units were done.

3 THE COURT: By whom?

4 THE WITNESS: By Mr. McCarty.

5 THE COURT: On the 3rd, you said they're not done,
6 you said you're going to talk to Daly. After you talked
7 to Daly, you told McCarty to get off the job even though you
8 admit you had no authority to put him off the job.

9 He's gone then till the 8th or 9th, comes back,
10 then McCarty says, never been on the job: now I tell you
11 they're ready. Is that -- that's what my notes say.

12 MR. WEINER: Your Honor, perhaps I can refresh his
13 recollection. I misphrased the question.

14 BY MR. WEINER:

15 Q Did not Mara Ernestsons walk the units on July 9th?

16 A Yes.

17 Q Okay. She is an employee of ADC Fairways?

18 A Yes.

19 Q And she was to -- she was under you?

20 A Yes, I asked her to walk the units.

21 Q Now, was this -- what was the purpose of her walk?

22 Judge Brown just said, you know, the units weren't ready;
23 why would you walk again?

1 A To provide a punch list to complete the units for
2 the contractor.

3 Q So on your walk on July 3rd, you did not prepare
4 a punch list?

5 A No.

6 Q Mara Ernestsons prepared one on July the 9th?

7 A Yes.

8 Q Okay.

9 Did there come a point in time after July the 9th
10 when John Mark requested or would present additional units,
11 or those units, or any units that they claimed to be
12 completed and ready for acceptance?

13 A I don't recall.

14 Q On July 16th, did John Mark request a written
15 approval of cove molding?

16 A Yes, they did.

17 Q Well, did -- I have to actually rephrase that.

18 Did you send them a written approval for cove
19 molding on July 16th?

20 A No, they approached me.

21 Q And you did give them a letter for it?

22 A Yes.

23 Q With a number that could be put --

1 A A model number and color, yes.

2 MR. WEINER: Your Honor, Defendant's 3.

3 MR. REESE: If Your Honor please, I'm so confused
4 at this point. They're ordered off the job on July 3rd
5 and they came back July 8th or 9th. Is that what your
6 testimony is?

7 THE WITNESS: Yes.

8 THE COURT: That's what he said. And then on
9 July 19th they gave him a letter approving a particular
10 cove molding.

11 MR. REESE: So they're back on the job that entire
12 period after July 9th or 8th?

13 THE WITNESS: Yes.

14 THE COURT: All right, go ahead.

15 BY MR. WEINER:

16 Q Now, this has been admitted into evidence. This
17 is -- can you identify that?

18 A Yes.

19 THE COURT: What's the number?

20 THE WITNESS: D 3.

21 THE COURT: All right, it's already marked.

22 BY MR. WEINER:

23 Q You wrote that letter; is that correct?

1 A Yes, I did.

2 Q And what was the purpose of writing that letter,
3 sir?

4 A The purpose of writing the letter was to advise
5 them that the units were not complete on that date.

6 Q And in that letter, you're referring to Mara
7 Ernestsons' report?

8 A Yes.

9 THE COURT: May I see it?

10 THE WITNESS: Sure.

11 (The witness handed the document to the Judge.)

12 BY MR. WEINER:

13 Q Now, some time around on or about July 24th, John
14 Mark again left the -- left the job; is that correct?

15 A Yes.

16 Q And another contractor took over; is that correct?

17 A Yes.

18 Q Now --

19 THE COURT: Who was hired and when did they start?

20 THE WITNESS: Holdfast Builders.

21 THE COURT: What name?

22 THE WITNESS: Holdfast.

23 THE COURT: One word?

1 THE WITNESS: Yes.

2 THE COURT: And they took over when?

3 THE WITNESS: I believe on the July 25th.

4 THE COURT: Was that the date of their contract,
5 or did they have an earlier date?

6 THE WITNESS: No, it would be around July 25th,
7 the contract.

8 THE COURT: Did they start simultaneously, or --

9 THE WITNESS: Yes.

10 THE COURT: -- was there some delay?

11 THE WITNESS: No, they started walking the units.

12 THE COURT: All right.

13 BY MR. WEINER:

14 Q Now, they had been involved in another -- that
15 contractor had been involved in another building at the
16 Ivy Mount project, is that correct?

17 A Yes.

18 Q That had been -- that building had been taken out
19 of John -- John Mark had been relieved of this other
20 building prior to this date?

21 A Yes, they had.

22 Q Now, as a result of a new contractor coming on the
23 job, you had an opportunity to walk units that John Mark had

1 considered to be partially completed; is that correct?

2 A Yes, I did.

3 Q Now, I show you Plaintiff's Exhibit No. 11 --

4 MR. REESE: When did he do this walk? I'm sorry,
5 I didn't get the date.

6 THE WITNESS: I believe on the 25th of July.

7 MR. REESE: All right.

8 BY MR. WEINER:

9 Q Now, I'm going to refer you to units in building
10 4355, units B 1, B 4 and A 6.

11 A Yes.

12 Q Did you walk those units with Holdfast?

13 A Yes, I walked with Holdfast and determined the
14 work that was needed to complete the unit.

15 Q Did you -- do you recall the condition of those
16 units when you walked through them with Holdfast?

17 A Yes. There was absolutely -- well, there was
18 nothing done according to the scope of work that was needed
19 to be performed. There was some dry wall work, but the --
20 the apartment was raw; it was not painted. It was -- I was
21 starting from scratch.

22 THE COURT: Did you ever give John Mark a three
23 day written notice that you were cancelling the contract?

1 You or someone from your company that you know about?

2 THE WITNESS: I don't know, Your Honor.

3 MR. MAYS: Your Honor, notice was given. We'll
4 develop that through another witness.

5 MR. WEINER: Your Honor, I'd like these marked for
6 identification.

7 THE COURT: Are these of the same date and time?

8 MR. WEINER: Those are the --

9 THE COURT: Yes. Three papers to be stapled
10 together will be Defendant's 6, and it's a walk for extra
11 sheets.

12 MR. REESE: That's just for identification at this
13 time?

14 MR. WEINER: Yes.

15 THE COURT: That's right.

16 (The document referred to was
17 marked Defendant's Exhibit No.
18 6 for identification.)

19 MR. REESE: Do we have a 5?

20 THE COURT: Yes, for I.D. Daly to Dillon, author-
21 ity to receive units.

22 MR. REESE: I thought that was withdrawn?

23 THE COURT: He didn't withdraw it. He marked it

1 and marked it for I.D., and that's where it sits.

2 BY MR. WEINER:

3 Q Mr. Dillon, I hand you what's been marked for
4 identification as Defendant's Exhibit No. 6.

5 A Yes.

6 Q Can you identify those?

7 A Yes, these are the walk through sheets that I
8 accompanied the representative of Holdfast Builders and we
9 walked the units.

10 THE COURT: Do you say that what's on those sheets
11 you saw and they were not done as of that time?

12 THE WITNESS: I saw that what's on the sheets is
13 what has to be done, yes.

14 THE COURT: And then you saw that with your own
15 eyes?

16 THE WITNESS: Yes.

17 THE COURT: Okay, that's three pages of testimony
18 right there.

19 BY MR. WEINER:

20 Q Is that your handwriting?

21 A Yes.

22 MR. REESE: With one exception, Your Honor, and it
23 may be very well that, but there are some figures on that

1 that were, in fact, placed by Holdfast.

2 THE COURT: I didn't ask him that. I said the
3 work was not done.

4 MR. REESE: Yes, I just want to make that clear.

5 THE COURT: If you think about it gentlemen, this
6 case is much like trying a support case where we Judges just
7 about insist the first question is: are the facts on this
8 sheet true? Because then you don't have to prove every
9 little nit on the sheet; you just go to the things that are
10 more important even though you want the nits to be part of
11 the total case. So, we go on from there.

12 BY MR. WEINER:

13 Q So those facts are correct?

14 THE COURT: He says the work listed was not done.

15 MR. WEINER: Your Honor, I would -- I have no
16 other questions of Mr. Dillon, but I would ask the Court --
17 I'd like to move these Defendant's Exhibit No. 6 into
18 evidence.

19 THE COURT: In the sense that it's his testimony,
20 yes.

21 MR. REESE: In the sense that the figures are not
22 accepted.

23 THE COURT: There's been no reference to dollar

1 figures by the way.

2 MR. REESE: Yes.

3 THE COURT: So it's in.

4 (Defendant's Exhibit No. 6,
5 having been previously marked
6 for identification, was received
7 in evidence.)

8 CROSS EXAMINATION

9 BY MR. REESE:

10 Q Mr. Dillon, Ivy Mount, how old were those units?
11 Do you know, sir?

12 A Yes. I believe they were built in 1963, about
13 17 years old.

14 Q All right. Now, attached to Plaintiff's Exhibit
15 with reference to the invoices are what are known as extras
16 lists. Were those lists actually approved by you and/or
17 a June Dunn (phonetic)? Were you the one that would have
18 approved them?

19 A I would be the one that would determine them,
20 yes.

21 Q All right, sir. What had to be done?

22 A Yes.

23 Q And then you and the contractor would agree upon

1 a price or else it would be agreed --

2 A It was agreed prior to the contract or part of
3 the contract.

4 Q All right.

5 Now, you were on the Ivy Mount project, were you
6 not, during, oh, March and April of 1980, the Ivy Mount
7 project?

8 A Yeah, April.

9 Q All right. Do you remember building 4355 being
10 shut down for lack of power for a full week? Do you
11 remember that?

12 A No, I do not.

13 Q Do you remember a situation developing with
14 reference to the cabinets, the delay in the delivery of
15 cabinets?

16 A No, I do not.

17 Q Do you remember ADC insisting that rather than
18 having John Mark produce the cabinets, ADC was going to
19 produce the cabinets? Remember that?

20 A No, I do not.

21 Q All right. Do you remember part of 4355 being
22 flooded because the pipes burst?

23 A No, but I recall a lower unit flooding, yes.

1 Q Well, I said part of 4355, building 4355.

2 A A unit, yes.

3 Q All right, sir. I note in your original contract
4 that there really is no provision with reference to the
5 color -- actually, there's no provision in reference to
6 cove molding at all. Who made the original decision as to
7 the color of the cove molding, if you recall?

8 A When you say the original --

9 THE COURT: Did it begin under the contract as
10 being white?

11 THE WITNESS: No, there was no --

12 THE COURT: How was the original color selected?

13 THE WITNESS: I don't believe there was an original
14 cove molding.

15 THE COURT: Did something get installed without
16 an original decision?

17 THE WITNESS: Yes, I believe it was, yes.

18 THE COURT: Then it would be JM that picked it,
19 not you. Is that what you're saying?

20 THE WITNESS: Yes, yes.

21 THE COURT: Go ahead.

22 MR. WEINER: Your Honor, I would direct -- every
23 question Mr. Reese has just asked has to do with change

1 order that's addressed in the contract document, and I can
2 cite for the Court the paragraph with regard to changing
3 situations in the project.

4 THE COURT: The witness simply tells me in essence
5 that he's not aware of anything in the contract that
6 determined the color of cove molding until they came to an
7 amendment which said it would be Almond.

8 MR. WEINER: And there's also a time provision
9 with the extension of time --

10 THE COURT: You say there's something else in
11 there that does say the color of the cove molding?

12 MR. WEINER: Not color but it says change orders.

13 THE COURT: Yes, which one do you refer to?

14 MR. WEINER: Paragraph --

15 THE COURT: Which number additions to P 1?
16 Attachment 4 is undated, but both sides agree it was
17 attached.

18 MR. WEINER: Your Honor, check -- paragraph number
19 4 addresses change orders.

20 THE COURT: Paragraph 4 --

21 MR. WEINER: Yes.

22 THE COURT: -- of P 1, and what is in there about
23 the color of the --

1 MR. WEINER: It's silent as to color, but it had:
2 to do with changing -- changes in materials.

3 THE COURT: Yes, I've got a non sequitur here.

4 MR. WEINER: He said --

5 THE COURT: Your opponent says: when was a color
6 decided upon? He says: well, we didn't decide on a color.

7 So I asked: did the contractor pick it? He says:
8 yes. "Was there any change until the color Almond was
9 specified?" "No." And there seems to be no paper that
10 contradicts that. So it's simply something that was not in
11 the contract from what I hear your witness to say.

12 MR. WEINER: Well, I'm just trying to bring to the
13 Court's attention that the contract originally is silent as
14 to any type of molding, whether it be black, blue or anything.

15 THE COURT: That's what the witness --

16 MR. WEINER: But I'm referring Your Honor to that
17 change order paragraph to help you understand that whether
18 or not it was in the contract, they can change, deviate,
19 add or delete materials.

20 THE COURT: That wasn't the question of Mr. Reese.
21 His question was: when was the color picked? You see, not:
22 is there a right to change it?

23 He says: when was it picked?

1 MR. WEINER: I'm sorry, I'm anticipating again.

2 THE COURT: I guess you are.

3 All right, was any color picked before this
4 attachment 4, the color Almond?

5 THE WITNESS: No.

6 THE COURT: All right. Ride on!

7 BY MR. REESE:

8 Q Now -- however, cove molding had been installed
9 by John Mark, white cove molding; had it not?

10 A Yes.

11 Q All right, and on your ADC instruction, they had
12 to rip out all that white cove molding, didn't they, and
13 replace it with the Almond after you all made your decision?

14 A Yes.

15 Q All right, sir.

16 Now, moving along to the kitchen light situation.
17 In the original contract, there was a specified kitchen
18 light; is that correct?

19 A Yes.

20 Q All right, and then it turned out that that light
21 was unavailable?

22 A Yes.

23 Q And now there came a situation, as Mr. Weiner has

1 indicated, on changes, there's no question that you had the
2 right to change, just to perhaps serve them with what the
3 end result was?

4 THE COURT: Just a minute. I've got to get some
5 notes taken.

6 Before we come to this second point, how many units
7 did ADC order JM to tear out the installed white cove
8 molding?

9 THE WITNESS: I believe it was seven.

10 THE COURT: All right. Now, next question.

11 MR. REESE: All right, sir.

12 BY MR. REESE:

13 Q Now, when it turned out that the original light
14 was unavailable under the contract, did you all enter into
15 a situation whereby you were looking for another light to
16 replace that one?

17 A Yes.

18 Q And Mr. Kische was on the job at that time too,
19 wasn't he?

20 A Yes, he was.

21 Q And you remember you and Mr. Kische agreed on a
22 particular light and then asking that it be installed in the
23 units?

1 A No, I do not.

2 Q All right. Were you present when Mr. Kische
3 instructed John Mark to install a certain -- or certain
4 lights, and that instruction then was overturned by Mr. Daly,
5 but do you remember such a situation?

6 A No, I do not.

7 Q Do you remember then John Mark installing certain
8 lights in the units, kitchen lights in the units? Prior
9 to the Modification Agreement now.

10 A No, I do not recall.

11 Q All right.

12 You were walking these units; is that correct?

13 A No, I was walking them before any work was per-
14 formed.

15 Q Oh, I understand, and then after the work was
16 done, you didn't walk them then?

17 A Only when trouble came about.

18 Q All right. So if -- was there trouble as to each
19 and every unit?

20 A Was there trouble in each and every unit?

21 Q Yeah.

22 A Yes.

23 Q Well then, I guess you walked each and every unit

1 then, didn't you?

2 A When I was made aware there was problems, yes.

3 Q Well, let's talk about this. Before June 18, 1980,
4 John Mark had presented 19 units at Ivy Mount to you all; is
5 that correct?

6 A Right.

7 Q Had you walked those 19 units?

8 A Yes.

9 Q All right. Did they have kitchen lights in them?

10 A Yes, I believe they did.

11 Q Now, the truth of the matter is that there was no
12 determination made as to the -- final determination of
13 kitchen lights until June 18 and the Modification Agreement;
14 is that correct?

15 A Yes. In the Modification Agreement, another light
16 was selected.

17 Q All right, but there had been lights put in these
18 units before; isn't that correct?

19 A Yes.

20 Q Okay. Who approved those lights?

21 A That I cannot answer.

22 Q All right, sir, that's fine.

23 MR. WEINER: Your Honor, I think Mr. Reese is doing

1 what you admonished me not to do. The Modification Agree-
2 ment stands for itself. Even if there were lights in there,
3 they agreed to go back to 19 units and do the work that the
4 developer wanted to be done.

5 THE COURT: Do you accept that, Mr. Reese, the
6 Modification required a redoing of certain lights?

7 MR. REESE: No. I agree that the Modification
8 Agreement provided that we would have to go back and do some
9 touch ups in those particular units.

10 THE COURT: Where in the Agreement was the --

11 MR. WEINER: Your Honor, I cite just paragraph
12 number 1.

13 MR. REESE: That doesn't set that forth. And if
14 you look at the attachments, there's no where in the
15 attachments --

16 THE COURT: I can't listen, please.

17 (Pause while the Court reviewed the document.)

18 THE COURT: Paragraph number 1 simply requires
19 the contractor to build and complete certain units set forth
20 on this schedule.

21 Oh, this is Schedule A 1 here, excuse me. Each
22 schedule sets forth the nature and extent of the work, so
23 look to Schedule A 1.

1 MR. REESE: I don't think you'll find kitchen
2 lights mentioned on that schedule.

3 THE COURT: Pardon me?

4 MR. REESE: I don't think you'll find kitchen
5 lights mentioned on that schedule.

6 THE COURT: Well, we'll look.

7 Oh, my Schedule A 1 is many, many pages long,
8 isn't it?

9 MR. REESE: Yes, sir.

10 THE COURT: Well, Mr. Weiner, I have to ask you
11 with that many pages, to point out -- pull out a light
12 fixture and change order.

13 MR. REESE: I think if Your Honor will check,
14 you'll see that every mention of kitchen lights has been
15 struck through by the parties with reference to -- to
16 Schedule A.

17 THE COURT: Well, if you turn in the attachment
18 to -- let's see, just count the pages by hand. One, two,
19 three --

20 MR. REESE: Three, four, five --

21 THE COURT: No, no, not that many. I want you to
22 find the page.

23 MR. REESE: I did, page seven.

1 THE COURT: Three, four, five, six,-- well, seven.
2 It's seven or eight, at the bottom left it reads, "Kitchen" --
3 the illegible word and "Header above cab at left." And
4 then the word "New" is written above the illegible word.

5 Now, is that in reference to a fixture or some-
6 thing else?

7 MR. REESE: Well, let's take a look if we could --

8 THE COURT: Does anybody have the original of this?

9 MR. WEINER: That is --

10 THE COURT: Photocopies, you know, are made for
11 lawyers and files. Originals are made for the Court. That's
12 the only reason to have the original.

13 MR. MAYS: Unfortunately, neither one of us have
14 an original, Your Honor.

15 MR. WEINER: Your Honor, I'm sorry. If you would
16 look at paragraph number 2, I think that explains it.

17 THE COURT: Of the Modification Agreement?

18 MR. WEINER: Yes, it's at the bottom of the first
19 page.

20 THE COURT: It just doesn't say very much. The
21 items listed on Schedule D are approved for use with cross
22 changes.

23 MR. WEINER: And then there's one page, Schedule B.

1 that indicates --

2 THE COURT: Is that the last page on the whole
3 thing?

4 MR. WEINER: Yes, yes.

5 THE COURT: "Sparta Brook Homes, extras", page
6 six?

7 MR. WEINER: No, those -- that's the schedule that
8 we're in dispute with. There's two Schedule Bs.

9 THE COURT: Well, the one that's attached to the
10 paper I have -- no, that's Schedule C, it says: "Light
11 fixtures, replace kitchen light fixtures with comparable
12 unit, \$40.00." That's in Schedule C, I think.

13 MR. WEINER: No, Schedule C is the --

14 THE COURT: I'll go backwards. You want me to
15 look at a B?

16 MR. WEINER: Schedule B. Earlier on, Mr. Reese
17 offered that and --

18 THE COURT: First let's find it.

19 The pages have a schedule number at the beginning
20 and then my problem is to find when it changes to another
21 exhibit.

22 (Mr. Weiner handed the Court a document.)

23 THE COURT: I don't want loose paper. I want part

1 of what's offered.

2 MR. WEINER: Well, this was part of it.

3 THE COURT: That's an I.D. paper.

4 MR. WEINER: No, Your Honor.

5 THE COURT: Plaintiff's 2 for I.D. It was not
6 agreed --

7 MR. WEINER: I know. There were two Schedule Bs.
8 We had --

9 THE COURT: Let's find the one attached -- is there
10 one attached here to Plaintiff's 2 or was this pulled out?

11 MR. WEINER: That was pulled out as well as the --
12 this one was ours and they had one also.

13 THE COURT: Well --

14 MR. REESE: To facilitate matters --

15 THE COURT: You're asking me to consider an exhibit
16 which has not been approved. I cannot do that.

17 MR. REESE: To facilitate matters, if Your Honor
18 please, I'm referring to this page which begins with "Unit
19 34".

20 THE COURT: How many pages down in the attachment
21 is that?

22 MR. REESE: On my copy, if Your Honor please, it
23 was page eight of the whole thing beginning with this being

1 number one.

2 THE COURT: Well, how many pages is there of
3 Schedule A 1?

4 MR. REESE: My Schedule A 1 begins with a unit 13.

5 THE COURT: Yeah.

6 MR. REESE: Okay, and then the next page --

7 THE COURT: Is the one you read?

8 MR. REESE: The number 34.

9 THE COURT: It's page two of attachment A 1?

10 MR. REESE: Yes, and if Your Honor will note, under
11 "34" we have "Redo kitchen lights" struck out. "35, install
12 kitchen lights" struck out.

13 THE COURT: Wait a minute. It looks like
14 "Receive" it doesn't read "Redo" on mine.

15 MR. REESE: Well, whatever it is, the kitchen light
16 is struck out on that unit.

17 THE COURT: R-e-d -- or R something D.

18 MR. REESE: But if Your Honor will note, in each
19 and every one of the units wherein there is a reference to
20 the kitchen light, it has been struck out.

21 THE COURT: In 30 on that same page --

22 MR. REESE: Yes, 34.

23 THE COURT: "35, install kitchen lights" is struck

1 through.

2 MR. REESE: 36, 37.

3 THE COURT: I have no strike outs on 36.

4 MR. REESE: You sure?

5 THE COURT: There's no strike outs under unit 36.

6 MR. REESE: Right here, Your Honor (indicating).

7 THE COURT: Oh, the very -- I'm sorry. "Install
8 K light", all right.

9 Now, let's see, we've gone on for about ten minutes
10 and I've forgotten the objection.

11 MR. REESE: Well, his objection was that we were
12 going on to the situation that we were behind the Modifica-
13 tion Agreement, and my questions to Mr. Dillon are directed
14 at the fact that someone had approved the installation of
15 kitchen lights prior to the Modification Agreement; then
16 they have the Modification Agreement which applied to the
17 forthcoming units that were to be accepted.

18 THE COURT: Are you telling me that these unit
19 numbers you called my attention to are new ones where work
20 was to -- had not been done before?

21 MR. REESE: No, these are units that had previously
22 been submitted to the Defendant. See, if Your Honor please,
23 under the --

1 THE COURT: And you want to ask him about something
2 that's not in the Modification Agreement? Is that --

3 MR. REESE: No, my question was whether or not
4 kitchen lights had, in fact, been installed in some of these
5 19 units --

6 THE COURT: All right.

7 MR. REESE: -- prior to the Modification Agreement,
8 and his answer was yes.

9 THE WITNESS: Yes.

10 MR. REESE: All right. At that point, Mr. Weiner
11 raises and says: I object, you're going behind the
12 Modification Agreement, all right? So --

13 MR. WEINER: Well --

14 MR. REESE: -- saying that the Modification Agree-
15 ment required us to replace those kitchen lights.

16 MR. WEINER: Correct, correct.

17 MR. REESE: And then the colloquy began.

18 THE COURT: The question was received because the
19 question goes to: what was the fact situation, not: what
20 did the contract require.

21 MR. WEINER: Okay.

22 MR. REESE: All right, sir.
23

1 BY MR. REESE:

2 Q But you don't know who approved those kitchen
3 lights; that was your point? You don't recall who approved
4 the installation of the kitchen lights in some of those
5 19 units that were presented by John Mark prior to the
6 Modification Agreement?

7 A Do I know who?

8 Q Yes.

9 A I would believe it would be Mr. Kische.

10 Q All right, sir, very good.

11 THE COURT: Can you define your role as compared
12 to Mr. Kische's? Who's the boss?

13 THE WITNESS: Mr. Kische was in charge of the Ivy
14 Mount property.

15 THE COURT: All right. Now, there was another man
16 who used the same title for his work that you use.

17 MR. WEINER: Mr. Quatmann.

18 THE COURT: Quatmann, yeah. How was -- was there
19 any division of authority between you and him? Did you have
20 separate spheres? He didn't know really what you were
21 doing.

22 MR. WEINER: He was gone by that time, Your Honor.
23 Quatmann was off -- he left in April.

1 THE COURT: I see; all right. Then it's not
2 relevant to this line of questioning. All right.

3 BY MR. REESE:

4 Q All right, and a delivery schedule has been
5 presented through you. You indicated however, you did not
6 make that delivery schedule up; is that correct?

7 A No, I did not.

8 Q All right. And you indicated that the delivery
9 schedule matched the settlement or the sales of the particu-
10 lar units?

11 A That's how it was arrived at, yes.

12 Q All right, and is it your testimony that all of
13 the units on the delivery schedule had, in fact, been sold?

14 A I cannot answer that.

15 Q Oh, all right, sir.

16 Now, there did come a time at building 4355 when
17 ADC had to employ R.V. Mechanical for redoing a lot of
18 electrical wiring?

19 A They employed them to put the HVAC system in, yes.

20 Q All right, sir. Now, would you explain to the
21 Court what that is?

22 A The heating and air conditioning system for each
23 unit.

1 Q And they had to rip out a lot of the dry wall to
2 do that, didn't they?

3 A In some units, yes; I believe in three bedroom
4 units.

5 Q All right, and in those three bedroom units, if
6 John Mark had already finished his dry wall work in those
7 units, you required them to come back in and redo the dry
8 wall work, didn't you?

9 A As an extra, yes.

10 Q As an extra? Was it so stated upon the invoices,
11 as an extra?

12 A I have no idea.

13 Q You have no idea, all right, sir. But you did
14 require them to come back in and do that work, didn't you?

15 A I -- yes.

16 Q All right, sir.

17 Now, you indicated on April 18, 1980, that units
18 11 through 16 were not ready on that date at 4355. How do
19 you know that? Did you walk the units then?

20 A On what date are we talking about?

21 Q This would be April 18, 1980.

22 A Had I walked the units?

23 Q Yeah.

1 A Yes.

2 Q Did you have a punch out list with you?

3 A No, I did not.

4 Q Did you supply a punch out -- you didn't take a
5 list with you at all then; is that correct?

6 A No, I did not.

7 Q Were the units presented to you for acceptance
8 on that day, on April 18th?

9 A No, they were not.

10 Q You just on April 18th, deciding to walk them?

11 A Yes, I walked many units on that job, yeah.

12 Q But you remember specifically on April 18th
13 walking the units 11 through 16 at 4355?

14 A Yes, I do.

15 Q It sticks right in your mind?

16 A Yeah.

17 Q All right.

18 Now, the units were, however, presented one week
19 later; were they not?

20 A I believe so, yes.

21 Q And did you walk them then?

22 A I believe I walked through them, yes.

23 Q On that date?

1 A Yes.

2 Q On the 25th day of April, and did you develop a
3 punch list at that time?

4 A No, I did not.

5 Q Were the units ready at that time?

6 A No, they were not.

7 Q Do you recall specifically what was lacking?

8 A I believe it was the kitchen lights, the cove
9 molding.

10 Q Kitchen light and cove molding. It gets to be
11 a litany at that point, doesn't it?

12 A County inspections.

13 Q All right, sir. Anything else?

14 A Yeah. Work was still being performed in the units,
15 touch up work, caulking, adjusting doors, that type of work.

16 Q Very minor work; is that correct?

17 A I guess we're going to use the word "minor", yeah.

18 Q It's touch up kind of work?

19 A It's adjustment work, yes.

20 Q I understand.

21 THE COURT: I understand what it is. It's also
22 work where you can't put an occupant in until it's done.
23

1 BY MR. REESE:

2 Q Well, did you have a settlement date for those --
3 for those units on April 25th, 1980?

4 A I do not know that.

5 Q Do you know if they were sold by that date, by
6 April 25th, 1980? Do you personally know?

7 A No.

8 Q Okay.

9 Now, on June 26th, 1980, Mr. Weiner showed you a
10 document which has not been put into evidence but is there
11 for identification purposes by which you were authorized by
12 Mr. Daly to accept units.

13 Now, did you write a letter to John Mark informing
14 them that: henceforth, I'm the one you bring the units to?

15 A No, I don't recall.

16 Q As a matter of fact, thereafter, Mara Ernestsons,
17 your employee, was the one who walked the units.

18 A See, I believe this all went through an attorney,
19 their original attorney. That's why I cannot recall. I did
20 not write a letter to John Mark.

21 Q You did not write a letter?

22 A No.

23 Q All right. And Mara Ernestsons continued to be the

1 one who walked the units?

2 A Walk for the purpose of a punch list, yes.

3 Q All right. Who would walk them for the purpose
4 of final approval?

5 A The construction coordinator or project manager
6 on that job.

7 Q And who would that be?

4 8 (Mr. Daly entered the Courtroom.)

9 THE COURT: Is this a witness?

10 MR. WEINER: This is Mr. Daly.

11 THE COURT: Well, he'd be a witness then.

12 MR. WEINER: Well, he's the president of the
13 Corporation.

14 THE COURT: You're entitled to have one company
15 representative present. Now, you've been using Mr. Dillon.

16 MR. WEINER: Well, Mr. Dillon, Your Honor, is a
17 Defendant in the case.

18 MR. REESE: Not in the Count One he isn't.

19 THE COURT: Not in -- well, not in this count.
20 In other words, they -- your opponents have not been
21 permitted to keep two company people in the Courtroom --

22 MR. WEINER: Well, he's not --

23 THE COURT: -- only one. You will have to just

1 discuss the case with anyone until the trial is over. One
2 exception: you can talk to your lawyers out of the hearing
3 of other parties who are witnesses.

4 All right.

5 MR. WEINER: Your Honor, may I just speak to him
6 a minute before he goes in? He just arrived here; I
7 haven't seen him.

8 THE COURT: You mean --

9 MR. WEINER: Can I just talk to him for a moment?

10 THE COURT: Briefly, yeah.

11 (Mr. Weiner and Mr. Daly conferred in private for
12 a moment.)

13 CROSS EXAMINATION (Resuming)

14 BY MR. REESE:

15 Q Mr. Dillon, let me show you this document. It's
16 Plaintiff's No. 5 for identification purposes on the letter-
17 head of Sparta Brook.

18 I ask if you have seen that document before.

19 A Yes.

20 Q You have seen that document before?

21 A Yes.

22 Q What does it reflect?

23 A It reflects correspondence between John Mark on

1 both the Ivy Mount and Heritage Woods contracts, the amount
2 of units and the amount of units that had been accepted and
3 the money that's been paid.

4 Q That represents ADC's position with reference to
5 it; is that correct?

6 A Yes.

7 MR. WEINER: I object to that, Your Honor.

8 MR. REESE: I would move this into evidence.

9 THE COURT: Grounds?

10 MR. WEINER: Well, Your Honor, this was the
11 document that was unsigned. He asked him to merely read
12 what was on the page and --

13 THE COURT: That isn't the last question. He says:
14 does this represent ADC's position --

15 MR. WEINER: And I objected.

16 THE COURT: -- the witness says: yes.

17 MR. WEINER: But I objected.

18 THE COURT: Well now, do you have any voir dire
19 as regards the witness' knowledge of this page?

20 MR. WEINER: May I?

21 THE COURT: You may.
22
23

VOIR DIRE EXAMINATION

BY MR. WEINER:

Q Mr. Dillon, did you write this letter?

A No, I did not.

Q Do you know who did write this letter?

A No, I can't be sure.

Q Do you know of your own knowledge whether the statements on here are true or not?

THE COURT: Now, he's your witness and you cannot impeach his prior testimony.

MR. REESE: He just said it represents ADC's position on that date. I --

THE COURT: I understand. You can ask him how he knows it, but you can't ask him to deny it, see, because he's your witness.

How do you know that this represents ADC's position concerning the acceptance or the subject matter in it?

THE WITNESS: Well, I'm just looking at checks that I've seen, you know, in the course of -- I mean, I cannot swear that those are the amounts, but they just look familiar.

MR. WEINER: He testified that he didn't write it.

1 BY MR. WEINER:

2 Q Did you know -- do you know who wrote it?

3 A No, I don't know exactly who wrote it.

4 Q Do you know who Sandy is?

5 A Yes.

6 Q Who's Sandy?

7 A Sandy is an attorney for ADC.

8 THE COURT: Any other facts now before I rule?

9 MR. MAYS: Indulge us for a moment, Judge Brown.

10 MR. WEINER: Your Honor, I can only say to you --

11 THE COURT: Have you finished your facts?

12 MR. WEINER: Yes.

13 THE COURT: Now, your argument of law.

14 MR. WEINER: Your Honor, this letter states the
15 words that as of this date, meaning May 28th apparently,
16 that 14 units had been accepted. There's no identification
17 as to which units have been accepted. It just says 14 Ivy
18 Mount units.

19 THE COURT: Your objection is on the grounds that
20 the content of it is vague?

21 MR. WEINER: Is vague; it's not identified by who
22 wrote this letter.

23 MR. REESE: If Your Honor please, in response,

1 we're dealing with a business here, corporation of course,
2 ADC, and it can only speak through documents and its officers,
3 and I simply asked this gentleman whether or not this
4 document -- now remembering his position at ADC directly
5 under Tom Daly, who was the owner of ADC, whether or not
6 this accurately depicted the position of ADC on May 28th,
7 1980 with reference to --

8 THE COURT: I'm ready to rule. The witness says
9 he didn't write it, doesn't know who did. But it represents
10 the company's position; it's received for that purpose.

11 MR. WEINER: He's not an officer of the corporation,
12 Your Honor. I bring that to the Court's attention.

13 THE COURT: I'm aware of that.

14 CROSS EXAMINATION (Resuming)

15 BY MR. REESE:

16 Q Now, sir, let's come up if we can to on or about
17 July 3, 1980, with reference to the -- units 21 through 28,
18 32, 33 and 38. I believe you said you walked those units
19 and found them to be unacceptable; is that correct?

20 A Yes.

21 Q All right. Now, you then recited that to Mr.
22 McCarty; is that correct?

23 A Yes.

1 Q That they were unacceptable, and you went back and
2 talked with Tom Daly.

3 Did you make a telephone call to him?

4 A Yes.

5 Q And you then came out and without any authority,
6 without any authority, said to Mr. McCarty: you're off the
7 job.

8 THE COURT: He said that; duplication.

9 BY MR. REESE:

10 Q Right?

11 A Yeah.

12 Q All right. Did you then call Mr. Daly back and
13 ask for permission to have done that?

14 A No, I did not.

15 Q All right, so as of that date, as far as you were
16 concerned, John Mark was off the job. But they then -- they
17 came back, didn't they?

18 A Yes, they did.

19 Q And they came back in response to a telephone call
20 from you; isn't that correct?

21 A I don't recall.

22 Q Don't you recall telephoning Mr. McCarty and saying
23 that: we have learned that it was all Kische's fault; we want

1 you back on the job?

2 A No, I don't recall.

3 Q You don't recall ever doing that?

4 A No.

5 Q Okay.

6 So in response to no telephone call from you --
7 did you write him a letter asking him to come back?

8 A No. I believe there were attorney involved at
9 this time and that's how correspondence went back and forth.

10 Q They came back on the job??

11 A I believe their attorney told them, you know,
12 that they were not legally put off the job; go back and
13 continue the contract.

14 Q You had told them to get off the job --

15 A I had told them that out of pure frustration, yes,
16 for units not being done.

17 Q You didn't telephone them and say: hey, I'm sorry,
18 total frustration, I didn't have the authority?

19 THE COURT: He said he didn't write or call them.

20 BY MR. REESE:

21 Q Okay. Now, they came back on the job?

22 A Yes.

23 Q On the 8th or 9th of July?

1 A Yes.

2 Q Having been off from the 3rd; is that correct?

3 A Yes, I believe it was a couple of days.

4 Q All right. Now, it was your position at that time
5 then that having put them off the job from the 3rd to the
6 8th, they were to turn over to you the next day not only the
7 7 units of the 3rd but an additional 7 units?

8 A Yes.

9 Q That was your position?

10 A Yes.

11 Q Okay, I just wanted to make sure of that.

12 All right, now, did you -- did Mara then, on your
13 instructions, walk the units 21 through 28, 32, 33 and 38?

14 A Yes, I had her walk to see what degree was
15 completed.

16 Q And did you walk them with her?

17 A No, I did not.

18 Q Now, do you remember on what date she walked them
19 the first time? In this date frame now, we're talking
20 about. We're talking about the 8th, 9th, 10th.

21 A I'd say about the 9th of July.

22 Q On the 9th, okay. And did she come back to you
23 and report that they were finished accept for some touch up

1 items?

2 A I don't know if it was that day, but yes, I was
3 shown some walk through punch lists --

4 Q Okay.

5 A -- that she had made.

6 Q And did she then walk the units again?

7 A On the 9th?

8 Q No, on the 10th. I'm sorry.

9 A I don't recall.

10 Q Do you recall her walking the units again on the
11 9th or 10th or 11th and reporting back to you?

12 A No, I do not.

13 Q She did not report back to you concerning the units
14 after the 9th day of July?

15 A I don't recall.

16 Q All right, sir. Did you see any updated punch
17 lists after the 9th day of July showing that the work had
18 been done?

19 A No, I don't recall.

20 Q Of your own memory now, were these units 21 through
21 28, 32, 33 and 38 completed on the 10th or 11th of July?

22 A No, I believe the minor items were still left:
23 plumbing leaks, gas smells in the apartment, touch up, doors

1 not closing.

2 Q All right.

3 A That's what I can remember.

4 Q That's your recollection?

5 A Yes.

6 Q Okay.

7 You worked directly for Mr. Dillon, didn't you?

8 THE COURT: For who?

9 BY MR. REESE:

10 Q For Mr. Daly, I'm sorry.

11 A I worked for Mr. Daly, yes.

12 Q Directly?

13 A Yes.

14 Q Did you report directly to him?

15 A Yes, I do.

16 Q Do you remember when the extras price list was
17 authorized on this Ivy Mount project?

18 A For John Mark?

19 Q Yes.

20 A I would assume before the contract was signed, yes,
21 sir.

22 Q All right.

23 During the -- I note in the -- well, bear with me,

1 I'll get back to that on another witness.

2 You indicated to me that you had no recollection of
3 them having to turn the power off at --

4 THE COURT: He said that, yes, he said that.

5 MR. REESE: Yes, I just wanted to ask him specifi-
6 cally the question.

7 BY MR. REESE:

8 Q But you've also indicated to us that R.V. Mechani-
9 cal had to come in and install new furnace areas?

10 THE COURT: In three bedroom units which caused
11 some damage and it was an extra.

12 BY MR. REESE:

13 Q They also had to turn the power off in order to
14 put those furnace units in, didn't they?

15 A Yes, that would be the proper procedure.

16 Q So the power was off. Was it off for the entire
17 building or just for those units, if you recall?

18 A I can recall power in some units not being there
19 even on my original walk with John Mark.

20 MR. REESE: No further questions at this time, sir.
21 Thank you, Mr. Dillon.

22 MR. WEINER: Very briefly, Your Honor.
23

REDIRECT EXAMINATION

BY MR. WEINER:

Q Mr. Dillon, you've mentioned numerous times from the stand that --

THE COURT: I've heard what is numerous, numerous times. Just ask the question.

BY MR. WEINER:

Q Okay, the question being this: these minor items that you're talking about, these touch up items that were missing in units that gave you the concern, units had scope of work areas done, they were in there; is that correct?

A Yes, they were in place.

Q What was the condition of the work that was in place? Was it workman like?

A That was the problem. The material was put in place but it was not a good installation; caulking was just actually thrown in or just placed in with no workmanship manner. Cabinets were installed with gaps between them; plumbing leaks under the sinks. This is the type of --

Q When you conduct your walk and you pick out these items, these minor cosmetic items --

A Yes.

Q -- why are you not accepting the units?

1 A Because these cannot be turned over to the
2 perspective purchasers. I mean, a list -- a walk through
3 list from the customer in settlement will not take place.
4 There are no outstanding items on a walk sheet. Settlement
5 will not take place unless all items are completed.

6 Q But even when you sell a unit, even if you accept
7 a unit and you consider workmanship 100 percent, the unit a
8 100 percent, don't you still get a work up punch out list
9 from a purchaser?

10 A Oh, yes, yes.

11 Q I mean, you're not trying to say that the purchaser
12 doesn't give you a punch out list anyway?

13 A No, but they have to be taken care of before
14 settlement.

15 MR. WEINER: I have no other questions.

16 MR. REESE: Just one if I might.

17 THE COURT: You're back on recross? Normally,
18 that's not the case.

19 MR. REESE: I'm sorry, I'm sorry.

20 THE COURT: If you have good cause, I'll do it.

21 MR. REESE: No, that's all right. The point is
22 not --

23 THE COURT: You may step down. Next?

1 MR. WEINER: My next witness would be Mr. Daly.
2 Now, Your Honor, if -- would I be able to excuse Mr. Dillon
3 if that's --

4 MR. REESE: I'd have no objection to him being
5 excused.

6 MR. WEINER: Would Mr. Daly be able to remain
7 and hear the rest of the proceedings?

8 MR. REESE: I would object to that.

9 MR. WEINER: After his testimony?

10 MR. REESE: After Mr. Daly's testimony?

11 MR. WEINER: Right.

12 MR. REESE: Oh, I have no objection to that.

13 THE COURT: Probably, we'll decide after.

14 Whereupon,

15 THOMAS F. DALY,

16 a Witness herein, was called for examination by counsel for
17 the Defendants, and having been previously duly sworn, was
18 examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. WEINER:

21 Q Would you please state your name.

22 A Thomas Daly, D-a-l-y.

23 Q Could you move a little forward, sir, because --

1 THE COURT: The mike can pick it up.

2 BY MR. WEINER:

3 Q You said your name is Thomas Daly?

4 A That's correct.

5 Q And what relationship, if any, do you have to ADC
6 Fairways Corporation?

7 A President.

8 Q And as president of that corporation, you have
9 personal knowledge that the corporation entered into -- an
10 agreement for construction of Ivy Mount Condominiums in
11 Fairfax, Virginia?

12 A Yes, sir.

13 Q And that document --

14 THE COURT: It's here; it's already in.

15 BY MR. WEINER:

16 Q -- was signed by an individual named Mates; is
17 that correct?

18 A That's correct, Barry Mates'.

19 Q And did he sign that with your authority, authority
20 of the corporation?

21 A Yes, sir.

22 Q I also show you -- Your Honor, I'd like this marked
23 for identification. I guess it would be Defendant's 7.

1 THE COURT: That's right. D 7 for I.D. labeled
2 "Loan Agreements" dated as of August 15, 1979. It reads
3 that way.

4 (The document referred to was
5 marked Defendant's Exhibit No.
6 7 for identification.)

7 BY MR. WEINER:

8 Q Mr. Daly, I show you a document. Can you identify
9 that document?

10 A Yes.

11 Q What is it?

12 A It's a -- basically a construction loan agreement
13 between ADC Fairways and the Continental Illinois Bank.

14 Q And who has personally guaranteed that?

15 A I have.

16 Q And the proceeds of that loan were used for what
17 purpose, sir?

18 A For the acquisition and construction of the Fairfax
19 Heritage Condominiums of which Ivy Mount was a part.

20 Q And pursuant to the loan agreement, you, the
21 corporation, incurred various expenses, interest expenses;
22 is that correct?

23 A That's correct.

1 Q Various terms and provisions of that agreement
2 call for you to keep the project lien free?

3 A That's correct.

4 MR. WEINER: Now, Your Honor, I move Defendant's
5 Exhibit No. 7 into evidence.

6 MR. REESE: No objection.

7 THE COURT: It's received though I pray you not
8 ask me to read it all, just call pertinent provisions to my
9 attention out of the perhaps 30 pages or so.

10 MR. WEINER: We will, Your Honor.

11 (Defendant's Exhibit No. 7,
12 having been previously marked
13 for identification, was received
14 in evidence.)

15 BY MR. WEINER:

16 Q Now, Mr. Daly, the contract, the construction
17 contract for March 12 -- for the Ivy Mount Condominium
18 project is dated March 12th, 19 -- 1980. Under that project,
19 there is a procedure that was set forth for the acceptance
20 of units; is that correct?

21 A That is correct.

22 Q And the project manager is the individual at that
23 time who could approve invoices submitted by John Mark?

1 A That's correct, that's part of the contract.

2 Q Did a point in time come when, at your direction,
3 a letter was written by Mr. Dillon for signature by Mr.
4 Sauer informing further acceptance of units would only be
5 with your approve -- to your satisfaction?

6 A That's correct.

7 MR. WEINER: Defendant's -- this was marked for
8 identification, Your Honor. That's the --

9 BY MR. WEINER:

10 Q Can you identify that document, sir?

11 A That's correct. I did sign that.

12 MR. WEINER: Your Honor, I would move this into
13 evidence. This was only for identification.

14 THE COURT: Exhibit 5, D 5, it's received.

15 (Defendant's Exhibit No. 5,
16 having been previously marked for
17 identification, was received in
18 evidence.)

5 19 BY MR. WEINER:

20 Q Now, on May 2nd, Mr. Dillon has testified that he
21 had a conversation with you with regard to monies to be
22 advanced -- John Mark wanting additional funds for work at
23 Ivy Mount Condominiums. Do you recall that conversation, sir?

1 A We're talking May 2nd?

2 Q Yes, sir.

3 A There were things that led up to May 2nd. What
4 I'm saying is the --

5 THE COURT: Do you remember a conversation of that
6 date is the question.

7 THE WITNESS: There was a conversation --

8 THE COURT: Just yes or no.

9 THE WITNESS: Yes.

10 BY MR. WEINER:

11 Q All right, now, you mentioned that there were
12 things that led up to the May 2nd conversation. There was
13 a delivery schedule that was prepared at the inception of
14 the contract?

15 A It was part of the contract.

16 Q It was part of the contract. Back in March?

17 A That's correct.

18 Q And was the delivery schedule adhered to by the
19 contractor?

20 A No.

21 Q Was there a -- would you tell His Honor what events
22 led up to your May conversation with Mr. Dillon?

23 A Well, I remember it was with Mr. Dillon and

1 Mr. Sauer, okay?

2 What led up to that conversation is that the --
3 John Mark, as a construction company, John Sauer specifi-
4 cally I had most of my dealings with, was supposed to be
5 delivering units in April at the rate of seven a week.
6 Most of these units were sold and scheduled for delivery
7 with the purchasers within a week to two weeks after that
8 proposed delivery date.

9 There were certain units that were presented
10 within seven to ten days of that date for acceptance by ADC
11 Fairways. Simultaneously with those units being presented
12 for delivery, it had come to my attention that certain
13 people in my organization and certain people in the
14 construction company's organization were accepting units
15 that were not totally complete.

16 At that point, I called John Sauer in and he and
17 I hashed it out, both the Ivy Mount units and the balance of
18 the Heritage Woods North units which was a previous job, that
19 they were doing for me. Sauer and I discussed it and we
20 came to the conclusion that not to his knowledge and not to
21 my knowledge that people had been accepting units that were
22 not totally complete; were not acceptable for the home-
23 owners and were not in accordance with the contract as we had

1 agreed that the units would be made ready for the people.

2 At that time, John and I said -- John Sauer and I
3 sat down and figured out what we should do, and he agreed that
4 the units were not done and he would rectify those
5 units.

6 Q. Now, then May 2nd comes along.

7 A. That was at that -- that was leading up to the
8 writing of May 2nd that they were not complete.

9 Q. Now, May 2nd, sir, you were not present when John
10 Sauer signed that letter. He sent the letter to you?

11 A. I'm not saying whether it was May 1st or May 2nd.
12 I'm saying there were discussions between John Sauer and I.
13 We had an agreement what he would do and that letter was the
14 culmination of that agreement.

15 Q. Now, would you please tell His Honor why the
16 policy of your company with regard to units' acceptance,
17 why the -- the significance of the 100 percent completion?
18 We've heard -- 100 percent completion. What is the -- your
19 stringent requirement that a unit be a 100 percent, not 99,
20 but a 100?

21 A. The condominium business, the condominium rehabili-
22 tation business, is not that old a business. It's only been
23 here for about five years, I think, at the present. It's

1 dependent upon basically beginning a job, selling it out
2 quickly at a reasonable price, completing the unit, turning
3 it over to people on a single walk through. The rehabilita-
4 tion contract, including appliances, it's about a total work
5 of about anywhere from \$24 to 2800 depending upon the extras
6 in the units of which materials represent about \$1,000. So
7 we're dealing in \$1500 worth of work. It's a situation
8 whereby we endeavor to do volume on each individual job
9 from anywhere from 25 to 30 units a month, and because of
10 that type of volume, we do not have time to go back and do
11 what is in normal, single family building business considered
12 punch out work. You do far smaller volume with a great --
13 much more construction.

14 In addition to which, because this is rehabilita-
15 tion of older units and there is a lot of equipment that
16 is salvaged that is existing equipment, it is imperative
17 that the homeowners sign off immediately upon walking through
18 the units because the sale is basically -- it's a no warranty
19 situation and the longer -- if we would allow a situation
20 whereby you would keep coming back and do warranty work,
21 a warranty list traditionally that started out with two
22 items after a month would have eight items and it would be
23 a totally negative operation to continue going back and

1 handling the warranty claims.

2 The theory of condominiums is that it's sold at
3 a reasonable price because it is existing housing; it's not
4 new housing, and that is part of the pricing; and it's
5 imperative to get in and out at the time of title of the
6 unit to the homeowner.

7 Q You mentioned get in and out. Do you have any --
8 do you or do your company have any interest in prolonging
9 the period of acceptance of units or even the fact that
10 you're staying in the project?

11 THE COURT: That enables him to pay more interest
12 to the bank. I think I understand the answer to that
13 question.

14 MR. WEINER: Thank you, Your Honor.

15 THE WITNESS: Only the bank has an interest in it.

16 BY MR. WEINER:

17 Q Thank you.

18 Now, can you tell His Honor -- Your Honor, I will
19 have to pick out for you the exact items in the Loan
20 Agreement regarding repayment --

21 THE COURT: No, let's ask him.

22 What was your loan interest rate with --

23 THE WITNESS: Prime plus two.

1 THE COURT: -- Illinois Bank? Which came out
2 what? Does that vary from month to month?

3 THE WITNESS: As prime went up and down, the
4 interest rate went up and down.

5 THE COURT: Okay, so it remained what, 16 -- no,
6 18, 20 percent?

7 THE WITNESS: Much to my shock going through it,
8 at the time, 13 to 15 at that time.

9 THE COURT: Okay, all right.

10 BY MR. WEINER:

11 Q Now, we have the -- I took you up to the May 2nd
12 letter of John Sauer. From -- from May 2nd then forward,
13 you were of the opinion that things had been somewhat
14 resolved, a meeting of the minds, rectification of the
15 situation. You were hoping for that; is that correct?

16 A Well, I had done business with John Sauer for a
17 couple of years and he had done two different jobs for me,
18 and I had faith that we agreed in principle what a unit was
19 supposed to look like, what needed to be done and that the
20 principles of the company were in agreement as to what a
21 complete unit was and that going forward, that units would
22 be completed and done in a timely fashion.

23 Q So subsequent to May 2nd, was there a -- was

1 John Mark performing satisfactorily?

2 A John Mark, because of all of the work that had been
3 skipped over in both the units that we discussed in the May
4 2nd letter and other units where they agreed with people
5 that if anyone made any complaints, they would go back and
6 work on those units, they fell behind in the schedule in
7 accordance with the contract.

8 Q Okay.

9 A Because they were doing what I eluded to before
10 which was spending too much of their time going back and
11 making repairs that they had not made in the first place.

12 Q Now, we move on to a situation on June 18th where
13 apparently there is what's called a Modification Agreement.
14 Had the situation gotten better or worse with John Mark?
15 Just prior to the Modification Agreement.

16 A The reason we entered into the Modification Agree-
17 ment was in a mutual effort to do two things. At the time,
18 John Mark was represented by counsel and their counsel was
19 insistent upon the old bills submitted up to that date, which
20 specifically reference 19 units in Ivy Mount, should be paid
21 in full in order to give them the needed capital they need
22 and to pay their vendors in order that they could go forward.

23 On my side, I was interested in giving clarity.

1 Obviously --

2 Q Giving what, sir?

3 A In giving clarity to the situation. Obviously in
4 accordance with the contract, beginning in April they were
5 supposed to deliver seven units a week.

6 By that point in time, I'm not sure what the
7 number would be but if recollection serves me, somewhere
8 between 50 and 55 units should have been delivered by that
9 point in time. Obviously, there was no way they were ever
10 going to catch up. All I was interested in doing --

11 Q Well, let me just stop you there. You -- what
12 was the reason that you went into a Modification Agreement
13 as opposed to just throwing them off the job then at that
14 point in time?

15 A I made a business decision that I was better off
16 with the devil I had than to go out and look for another
17 contractor at that point.

18 In order to rebid the job and look for another
19 contractor early in June, it would take me 30 to 60 days to
20 get somebody else cleared up.

21 I made a business decision that they could complete
22 the units in Ivy Mount in a quicker period of time, even
23 taking into consideration the Modification Agreement, than

1 if I had to go out and look for another contractor at that
2 time.

3 Q I'm sorry.

4 A What I felt is that John Mark Construction and
5 John Sauer were responsible people. They had performed in
6 the past; they had capacity if given sufficient working
7 capital to proceed and complete the job in a timely fashion.

8 To give clarity to that situation and to stop
9 talking about how late they were and everything else, we
10 entered into a Modification Agreement basically stating that
11 on June 16th, or June 18th, I don't remember the date, okay,
12 but beginning in July, they would deliver the seven units;
13 that they would, number one, finish the 19 units; number two,
14 as part of the Agreement on that date, we paid them for the
15 19 units even though there was anywhere from eight to ten
16 punch out items on each unit that they agreed to at that
17 time, and that beginning in early July, that they would
18 deliver seven units a week which would then allow me to
19 close the units and pay off the construction loan.

20 Q Okay. Now, there's also a provision within the
21 Modification Agreement that's been known, as we call it,
22 Schedule C.

23 A That's correct.

1 Q And that was a listing of John Mark's sub-contractors and suppliers who were owed in excess of \$1,000 as of
2 May the 10th, 1980.
3

4 What was -- and it was classified as the listing
5 of those subs and suppliers being a material inducement
6 for you to enter into this Modification Agreement.

7 A Um-hmm.

8 Q Why is it so material? Why is it such an
9 important item for you to have this schedule as provided
10 by John Mark within this Modification Agreement?

11 A The Modification Agreement provided for payment for
12 100 percent of all units completed or the 19 units which
13 were agreed that they were not complete subject to certain
14 punch out items.

15 It was important to understand at that point the
16 financial condition of John Mark to assure that they would
17 have sufficient money and working capital and payroll to go
18 forward and complete the job, to make all the necessary
19 repairs. The \$61,000/62,000 that we put with the title
20 company subject to Schedule C, gave them \$19,000 to make
21 payroll and to go forward and to buy the necessary materials
22 that they said that they needed at that time to complete the
23 units that would be done -- that would be due to be delivered

1 in July.

2 Q So as of June 18th then, according to the Modifi-
3 cation Agreement, John Mark was paid in full as of that
4 date; is that correct?

5 A That's correct.

6 Q And there -- in your opinion, you had done --
7 you had put forward the money to clean the slate as far as
8 back bills and to pay them for work they had done?

9 MR. REESE: I object, Your Honor. I think this is
10 leading; it's a summation.

11 THE COURT: Leading, that's sustained.

12 MR. REESE: Thank you.

13 BY MR. WEINER:

14 Q What did you accomplish, or what did you attempt
15 to accomplish?

16 A Do you have a copy of the Agreement?

17 Q It's in evidence. Was.

18 (The document was handed to the witness.)

19 THE WITNESS: Paragraph 5, page two of the
20 Agreement, one of the things that John Mark's attorney
21 insisted upon is that as part of that Modification Agreement
22 that we'd reconcile all prior outstanding billings up to and
23 including the 19 units which were in discussion in subsequent

1 parts of this Agreement.

2 I call your attention to paragraph 5 whereby they
3 reference that -- there were two figures: \$87,463.11 and
4 \$54,577.16. I don't have an adding machine, but if you add
5 those two figures together, subtract the \$80,150.95 that it
6 referenced that I previously paid, the difference is
7 \$61,889.32 which at that time, as part of that Agreement,
8 was paid to the title company.

9 Q Now, at that point in time when this was put
10 together, you were -- you weren't -- the \$61,000 was a
11 figure that basically was supplied by John Mark.

12 A That's correct. It represented what their attorney
13 presented as, to quote the first page -- first line of
14 paragraph 5, "The contractor has heretofor billed the
15 developer \$87,463.11 for 40 units including extras and
16 purchase orders in Heritage Woods North, and \$54,577.16 for
17 19 units including all extras and purchase orders in Ivy
18 Mount. That was the figures submitted by their attorney
19 as all outstanding invoices at that time.

20 Q And that included the vendors and subs that they
21 owed?

22 A That's correct, that would have paid them in full
23 including the 19 units which still had punch out work which

1 is subsequently provided for in this Agreement.

2 Q Did Schedule C that they provided, somewhat tend
3 vendors, you didn't limit the number of vendors that could
4 be put on there? It could have been a 100 vendors if they
5 owed them the money?

6 A The provision was that we should start with a
7 clean slate and all bills, I believe without going through
8 this, prior to May 10th, all people that as of May 10th
9 they owed in excess of a number; I believe it's \$1,000,
10 would be scheduled so that there would be no unknowns, no
11 liens filed against the job that they know about and to
12 assure the lender that as part of financing funds, that
13 everyone would be taken care of.

14 THE COURT: When you say they would be paid in
15 full, you should have said: by turning that sum of money
16 over to the title company to pay their subs and suppliers
17 first, and then give them the balance.

18 THE WITNESS: That's correct. The title company
19 made the disbursements.

20 THE COURT: I've seen that sheet, what they did.
21 I don't want to see what they did. I want to know if there
22 was other money in the pot besides. There was not?

23 THE WITNESS: No, that was 100 percent of all the

1 money submitted and requested by them at that time.

2 BY MR. WEINER:

3 Q Now, under the Modification Agreement, Mr. Daly --
4 I'm finished with that Modifi--- under that Modification
5 Agreement, the first -- first delivery date of units would
6 be July the 3rd; is that correct?

7 A That's correct.

8 Q Do you recall what occurred on or about July 3rd?

9 A On or about, and I cannot speak specifically again
10 whether it was the 2nd or the 4th or the 5th of May, John
11 Mark, through their attorney, submitted -- in accordance
12 with this, if certain -- in this Modification Agreement,
13 it provided for: if certain materials were not available,
14 that -- that the contractor did not have to deliver the
15 units if they could demonstrate that certain materials were
16 not available.

17 On or about July 3rd, certain representations were
18 made by John Mark which were subsequently documented and
19 two items were not available: cove molding and kitchen lights.

20 I took the approach that even without these two
21 items, because it would only entail approximately 30 minutes
22 to install these, that I was willing to accept the units
23 without the cove mold and without the kitchen lights under

1 the theory that if I received the seven units and they were
2 accepted and completed, that in a period of three or four
3 hours, that they -- the missing materials could be thrown
4 in and the unit would be good for delivery.

5 John Mark at that time refused to present the
6 units for delivery because there was some representation
7 that because he didn't have certain things, he didn't have
8 to deliver the units at all.

9 Q Now, by this time, Mr. Dillon now has the authority,
10 your authority, to accept units?

11 A That's correct. In the Agreement it was provided
12 that only I could do it, and they asked me to allow Dillon
13 to do it and I gave them the memo that you showed me before,
14 in July.

15 Q Now, you were not at the project on July 3rd.

16 A That's entirely possible. I am generally only on
17 the project one to two days a week.

18 THE COURT: Was your office in this area or in
19 Chicago or where?

20 THE WITNESS: No, I had an office.

21 THE COURT: Did you live in this area at the time?

22 THE WITNESS: No, I lived in New York.

23 THE COURT: In New York?

1 THE WITNESS: Wait a minute, let me not give you
2 the wrong answer.

3 THE COURT: Well, during the period of April
4 through July, where did you spend most of your nights?

5 THE WITNESS: With my wife.

6 THE COURT: Was it in New York, Chicago, Fairfax,
7 D. C.? I mean, just where were you?

8 THE WITNESS: I don't mean to be hesitant, okay,
9 and I don't want to give you the wrong answer.

10 At a point in time, I moved from North Carolina
11 to New York. My family moved, all right? So generally
12 from Friday through Monday morning, I would spend with my
13 family.

14 THE COURT: But of the five normal week days for
15 work, where were you? Did you stay here, or did you commute --
16 come here part of the time?

17 THE WITNESS: No, I generally spent about three
18 days a week here and the balance of time working on ADC
19 Fairways' business, but that would take me to other parts of
20 the country.

21 THE COURT: All right.

22 BY MR. WEINER:

23 Q On July 3rd, you had a conversation with Mr. Dillon

1 about the fact the units, according to the Modification
2 Agreement, had not been delivered. Do you recall that?

3 A. Not specifically, but generally that the units
4 were not ready.

5 Q. Okay.

6 A. That was when I did what I said before which was
7 told them to accept them without the cove molding and the
8 lights.

9 Q. But didn't Mr. Dillon tell you but for that they
10 were still not complete?

11 A. That's correct.

12 MR. REESE: Objection, Your Honor, leading.

13 THE COURT: Sustained and struck.

14 BY MR. WEINER:

15 Q. What were you informed? What did Mr. Dillon
16 inform you as to --

17 A. That they -- that they'd -- that he had walked them
18 even though they did not present them, just to check out
19 what the status of the units was and that they were not
20 complete.

21 Q. Okay.

22 A. Also that they refused to deliver them in the
23 status that we requested.

1 Q Did you authorize Mr. Dillon to tell John Mark
2 to go -- get off the job?

3 A No.

4 Q Did you --

5 A My only interest was in units to be completed.

6 Q Did you instruct Mr. Dillon not to pay them for
7 work they had done in the past? Did you instruct him not
8 to pay them for the fire job?

9 A My recollection was that at the time, the only
10 outstanding invoice, and why it was not part of the Modifica-
11 tion Agreement I honestly don't recall, was an invoice in
12 approximately \$14 to 15,000 for a fire job.

13 There was some discussion about it that day; I
14 remembered them telling me that they needed money for payroll
15 and we advance \$14,000 on that bill.

16 Q Now --

17 A There seems to be, and just to lay it all on the
18 table, there seems to be --

19 MR. REESE: I don't think there's a question
20 pending, if Your Honor please.

21 THE WITNESS: Okay.

22 BY MR. WEINER:

23 Q Now, subsequent to July the 3rd, John Mark -- well,

1 July 3rd, John Mark walked off the job. Do you recall that?

2 A Yes.

3 Q What course of conduct did you take?

4 MR. REESE: If Your Honor please, I hate to nit
5 at this point, but the word on the site is they were told
6 to get off the job.

7 THE COURT: Sustained. Your own witness said that.

8 BY MR. WEINER:

9 Q To your knowledge, did Mr. Dillon tell them to get
10 off the job? Do you recollect that on July 3rd?

11 A By hearsay that I was said that he said that?
12 Yes. Was I there? No.

13 Q You said you didn't authorize him to say that.

14 A Not at all. I was interested only in receiving
15 units -- completed units.

16 Q Now, in fact, John Mark walked off the job.

17 A John Mark was no longer working at that time --

18 MR. REESE: There's no question pending.

19 BY MR. WEINER:

20 Q What occurred from July 3rd until July 9th, if you
21 recall?

22 A No work was done on the job. There was some --
23 there was some communication; specifically, if I get the file

1 out I could tell you, between my attorney and their attorney
2 as to what had transpired.

3 Q Do you recall John Mark coming back to the job?

4 A I believe on July 9th I remember seeing a letter
5 from their attorney that they would come back on July 9th.

6 Q Okay. From that point onward until the 24th of
7 July, do you know of your own personal knowledge whether
8 any units were accepted by ADC Fairways?

9 A To the best of my recollection, there were no
10 units accepted.

11 Q Okay.

12 Now, did a point in time come when another
13 contractor came on to finish up John Mark's work?

14 A Yes..

15 Q And that would have -- do you recall when that was?

16 A Not specifically. Early in August.

17 Q Now, as part of the break up between John Mark
18 and ADC, you had a situation where you owed them money; is
19 that correct, after they left the job? There were bills?

20 A Well, I'm --

21 Q Is that just correct? Is that correct?

22 THE COURT: Well, there's two different questions.
23 One is: did they present a bill? The other one is: do you

1 agree you owed it?

2 BY MR. WEINER:

3 Q Did they present bills after they left the job?

4 A Yes.

5 Q Now, we've heard a -- you had an employee by the
6 name of a Walter Quatmann that worked for you. Do you know
7 Mr. Quatmann?

8 A He -- I met him several times. He worked for us
9 for a period of two or three months at the time this contract
10 began.

11 Q Did -- Mr. Quatmann said that -- did you discuss
12 the relationship with John Mark and ADC in the presence of
13 Mr. Quatmann?

14 A It's entirely possible.

15 Q Did you tell Mr. Quatmann that you were going to
16 string John Mark out as long as you could?

17 A No, 'cause I didn't do that.

18 Q Did you tell Mr. Quatmann or say in his presence
19 that you were going to ruin them?

20 A Not at all. I liked John Sauer. All I wanted
21 was units.

22 Q Did you tell John Sauer that if he ever had a
23 problem at the job to come and see you personally?

1 A Yes.

2 Q Did he ever come and see you personally about a
3 problem?

4 A Many of the cash advances that we made, even though
5 the units weren't done, were because John needed money for
6 materials or for payroll.

7 THE COURT: The question is: did Quatmann --

8 THE WITNESS: No.

9 THE COURT: -- no, did Sauer, I'm sorry, person-
10 ally --

11 THE WITNESS: Did Sauer, John Sauer? Yes. John
12 Sauer came to me --

13 THE COURT: He did come. The answer's: Yes, he
14 did.

15 THE WITNESS: Yes.

16 B
17 ollows

1 BY MR. WEINER:

2 Q Now, did a point in time come that you became
3 aware either the accuracy or inaccuracy of Schedule C to
4 the Modification Agreement?

5 A Yes, when vendors would call up looking for money
6 that was not scheduled on the list.

7 Q And in fact, Mr. Daly, did there come a point in
8 time when liens began to be filed on the project?

9 A That's correct.

10 Q Have you -- has the corporation hired counsel to
11 defend the liens?

12 THE COURT: ADC?

13 MR. WEINER: Yes.

14 BY MR. WEINER:

15 Q Or remove the liens?

16 A Substantially what we did is we posted a bond to
17 remove the liens from the property in accordance with the
18 Condominium Agreement.

19 Q Has ADC employed attorneys to represent the
20 interests of the corporation with regard to the John Mark
21 Construction Contract?

22 A That's correct.

23 Q And have you incurred expense with regard to legal

1 representation?

2 A Yes.

3 Q Do you approximately know how much legal expense
4 you have incurred?

5 MR. REESE: Now we get to the point if Your Honor
6 please --

7 THE COURT: Legal expense for what?

8 MR. WEINER: To represent the corporation in the
9 action with John Mark.

10 THE COURT: Is it in the contract?

11 MR. WEINER: Yes, it is, Your Honor.

12 MR. REESE: Only in one --

13 MR. MAYS: Several places.

14 MR. REESE: Only in one degree.

15 THE COURT: Just a minute. Amount of attorney
16 fees in connection with liens?

17 MR. WEINER: With the liens and the dispute -- and
18 the contractual differences with John Mark.

19 MR. MAYS: And delays, Your Honor.

20 MR. REESE: Well, there's nowhere in here where it
21 says my client has to pay if there's a dispute between the
22 parties.

23 THE COURT: Yeah, I think there's something in

1 this representing ADC. There's the --

2 THE COURT: That doesn't bother me. All I'm
3 saying is have your witness distinguish between fees for
4 bonding off liens, fees for delay of work, you see?

5 MR. WEINER: I don't think that he's in a position

6 --

7 THE COURT: If you don't know, put it on the best
8 you can and if it's applicable, I'll hear it and if it
9 doesn't help me later, then I just won't consider it.

10 BY MR. WEINER:

11 Q With regard to the bonding off of liens and the
12 legal representation afforded ADC Fairways with regard to
13 the contract breach and subsequent termination or removal
14 of John Mark from the Ivy Mount job, law firms of Weissbard
15 & Fields, Boothe, Prichard & Dudley, and my firm have been
16 representing your company, your corporation; is that correct?

17 A That's correct.

18 Q Are you able to give us your best recollection of
19 the legal fees that you have incurred, ADC has incurred with
20 regard to the lien problem as well as the contract situation
21 with these three firms?

22 A As to the lien situation and the Modification
23 Agreement, no, I don't have the figures with me. They can

1 easily be gotten as to Weissbard & Field. And Boothe,
2 Prichard & Dudley sent very specific bills outlining each
3 lien that they handled, any amount of time they spent on it
4 and the bill attributable thereto.

5 As to yours -- Weiner & Weiner's fees on the
6 contract, my recollection is that through last month but
7 prior to the trial starting, it was in the vicinity of
8 \$20,000.

9 Q Mr. Daly --

10 MR. WEINER: I have no other questions of Mr.
11 Daly at this time.

12 CROSS EXAMINATION

13 BY MR. REESE:

14 Q Mr. Daly, I have just a series of questions
15 perhaps to go over with you.

16 I have heard your testimony concerning the fact
17 that you have to have these units turned over because you
18 had ready purchasers for the units and that you wanted to
19 go to settlement on these units then a week or two after
20 the acceptance of the units in accordance with the deli-
21 very schedule that has been admitted into evidence. Is that
22 a fair statement of what you said?

23 A That's correct.

1 Q All right, sir. Do you know when you went to
2 settlement on Units 11, 12, 13, 14, 15, 16, at Ivy Mount?

3 A Those units were part of the Model Complex so it
4 was not needed to settle. They were planned for display
5 units and we never -- rarely settle units on the model floor.

6 THE COURT: Let me interrupt with a question
7 because I'm just as curious as I can be. Did ADC own these
8 apartments or was it contracting with owners to have it
9 ready for those owners?

10 THE WITNESS: No, sir, it owned the building.

11 THE COURT: It bought the building?

12 THE WITNESS: It owned the building in total.

13 THE COURT: Ivy Mount and the other?

14 THE WITNESS: And it contracted with prospective
15 purchasers.

16 THE COURT: Yeah, all right. Go ahead.

17 BY MR. REESE:

18 Q Now, with reference to, for example, Units 42, 43,
19 44 and 45 of Ivy Mount and Building 4355, do you know when
20 you went to settlement approximately on those?

21 A Specifically, no. I can give you an entire
22 schedule.

23 During the period of time, several things were

1 happening that were caused by the delay. The interest rate
2 was rising for home mortgages. Because of the delays, we
3 had to resell several units. Units were sold at the time
4 anticipating delivery. Because of rising interest rates and
5 an inability to deliver, those units ofentimes had to be
6 resold two or three times.

7 Q I understand, sir, but the answer is: You don't
8 recall when these went to settlement?

9 A That's correct.

10 Q Would the period of September through December,
11 1980, be approximately right?

12 A The preponderance of the units in Ivy Mount were
13 settled during that time period, yes, sir.

14 THE COURT: In what time period?

15 THE WITNESS: From September to December.

16 THE COURT: Okay.

17 BY MR. REESE:

18 Q Now, sir, I also note that you have stated that
19 your principal interest was to -- of course, to turn these
20 units over, and to that end, of course you wanted to pay
21 John Mark as soon as these units were accepted, correct?

22 A That's correct, in accordance with the contract.

23 Q In accordance with the contract.

1 Would it surprise you to learn that Mr. Dillon has
2 indicated that the position of ADC was that by May 28th,
3 1980, 200 and -- 207 out of 211 units at Heritage Woods had
4 been accepted and 14 units at Ivy Mount had been accepted?
5 Would that surprise you?

6 A I'm confused what you're saying.

7 Q I thought it was pretty clear, but I'll try it
8 again.

9 Would it surprise you that Mr. Dillon stated from
10 the stand that the position of ADC, of which you were pre-
11 sent, was that by May 28th, 1980, 207 out of 211 units at
12 Heritage Woods --

13 MR. WEINER: Your Honor, I think that that is an
14 improper -- improper description of what was said from the
15 stand. Mr. Dillon was shown a document --

16 THE COURT: Just a minute. Show the witness the
17 paper.

18 MR. REESE: It would be Plaintiff's Exhibit Five,
19 if Your Honor please.

20 BY MR. REESE:

21 Q All right, sir, your first name is Thomas; is it
22 not?..

23 A That's correct.

1 Q Called Tom?

2 A Yes, sir.

3 Q All right. I show you this document dated May
4 28th, 1980 and ask if you would examine it.

5 A Um-hmm.

6 Q All right, sir. Now, having examined that docu-
7 ment, would it surprise you that Mr. Dillon --

8 THE COURT: Well, the issue's not: Is he
9 surprised.

10 Was that the company's position at a certain time?

11 THE WITNESS: That was an interpretation. That
12 was an internal memo sent to an attorney.

13 THE COURT: Do you know who wrote this?

14 THE WITNESS: It was probably at my direction.
15 Whether I specifically authored it or not, it was.

16 THE COURT: All right, and then you may continue
17 with your answer. Was it the company's position, and you
18 started to answer.

19 THE WITNESS: It was the company's position in
20 that to the following extent: There was some confusion
21 regarding the first 14 units in Ivy Mount as to whether or
22 not they were or were not accepted. What the intent was
23 here was to present, eliminating all gray area, to my

1 attorney what the situation was.

2 THE COURT: Sandy is your lawyer?

3 THE WITNESS: Sandy Weissbard.

4 THE COURT: And he's the lawyer?

5 THE WITNESS: That's correct, that's correct.

6 THE COURT: All right.

7 THE WITNESS: The reason the approach was taken
8 is that the 14 units in Ivy Mount were not completed; how-
9 ever, due to some employees that have subsequently left my
10 employ, they were accepted technically, conditionally.

11 To avoid any confusion, I acceded to the fact that
12 they were accepted even though in subsequent negotiations
13 in correspondence in the Modification Agreement, John Mark
14 agreed that they were not completed in accordance with the
15 contract.

16 What I tried to do was present to the attorney
17 that if all of the questionable items were to go John Mark's
18 way, that is how many could be conceived to be accepted even
19 though they -- we contended that they were not complete and
20 Mr. Sauer on May 2nd agreed they were not complete and Mr.
21 McCarty on June 18th agreed they were not complete. It was
22 the worst case of presentation there to the attorney of what
23 it was intended to be.

1 BY MR. REESE:

2 Q Mr. Daly, that's not what you say there and that's
3 not what that last line says, is it? to the Court the witness,

4 THE COURT: Sustained, that's argument.

5 MR. REESE: I'll ask him what that last line says.

6 BY MR. REESE:

7 Q Read that last line.

8 A It says that "The contractor is in default on both
9 jobs."

10 Q It says Tom. Is that you?

11 A That's me.

12 Q Once a telegram -- or telegrams were sent on both
13 jobs being in default?

14 A That's correct.

15 Q All right, and that's what you were communicating
16 to your attorney, right?

17 A That's correct.

18 Q Now, anywhere in there does it say that this is
19 a worse case scenario that we -- of 14 units?

20 MR. WEINER: Your Honor, he's arguing something.

21 THE COURT: It will speak for itself. All right,
22 next question.

23

1 BY MR. REESE:

2 Q Did you pay for those 14 units on May 28, 1980,
3 the 14 units at Ivy Mount which that document says had been
4 accepted?

5 A No.

6 Q Did you pay by May 28, 1980, for 207 of 211 units
7 at Heritage Woods?

8 A No.

9 THE COURT: Why do you pick that date, counsel?

10 MR. REESE: Because that's the date of the letter.

11 THE COURT: All right.

12 THE WITNESS: Because as of that date, they were
13 in default under the contract.

14 BY MR. REESE:

15 Q Now, how many units at Ivy Mount did you personally
16 walk?

17 A None.

18 Q How many units at Ivy Mount did you personally
19 approve?

20 A None. I was in units, but I did not walk them for
21 acceptance.

22 Q Even though you wrote a letter, or had Mr. Sauer
23 endorse a letter, on May 2nd to the effect that you were the

1 only ones who could approve the units --

2 MR. WEINER: Your Honor, that letter of May 2nd,
3 is clear on the record, was Mr. Dillon's authorship.

4 THE COURT: The question is simply this: Did you
5 ever walk any units for acceptance? And his answer is no.
6 You can argue the merits of it later, I think.

7 BY MR. REESE:

8 Q At Ivy Mount, you had Mr. Dillon reporting to
9 you; is that correct?

10 A That's correct.

11 Q You had, at one time, a June Dunn reporting to
12 you?

13 A That's correct.

14 Q Okay, and you had a Mr. Quatmann reporting to you?

15 A Mr. Quatmann basically reported to the project
16 manager.

17 Q Who was who at that time?

18 A Kische.

19 Q Mr. Kische?

20 A (The witness indicated in the affirmative.)

21 Q You had Mr. Kische reporting to you?

22 A (The witness indicated in the affirmative.)

23 Q The answer is yes --

1 A Yes.

2 Q -- for the record?

3 Did these individuals also report to you that they
4 had lost power for a period of time in some of the units or
5 some of the buildings at Ivy Mount during March of 1980?

6 A I don't recall at this time.

7 MR. WEINER: Your Honor, I don't understand the
8 relevance of that. They're there to report to him in regard
9 to acceptance of units, the condition of units.

10 THE COURT: But if someone told this witness, if
11 he hears, it becomes an admission that the power, for
12 example, was off in the whole building and he would instruct
13 the you know -- who is using the electric, or whatever.

14 BY MR. REESE:

15 Q Now, under the original contract, John Mark was to
16 supply the cabinets in the original contract at Ivy Mount;
17 is that correct?

18 A I believe so.

19 Q And there came a time, however, when ADC said it
20 wanted to supply the cabinets; isn't that correct?

21 MR. WEINER: I think if it's in a document that in
22 fairness to the witness, he should be shown the --

23 MR. REESE: I'm just asking his recollection right

1 now.

2 THE WITNESS: I don't recall.

3 BY MR. REESE:

4 Q You don't recall?

5 A (The witness indicated in the negative.)

6 Q All right, sir.

7 Were you advised by any of your representatives at
8 Ivy Mount that they had problems with flooding units because
9 the pipes had frozen?

10 A No, sir.

11 Q You weren't kept advised of things?

12 A (The witness indicated in the negative.)

13 Q Who was the day-to-day manager there? Was your
14 project manager, Mr, Kische, was he the day-to-day manager
15 there?

16 A Yes, that's correct.

17 Q All right. Now, I note on the loan document that
18 your bank didn't give you a check for umpteen million
19 dollars. You had a draw schedule with them, didn't you?

20 A That's correct.

21 Q And that draw schedule was based upon -- and this
22 is a question, not a statement, sir -- was based upon
23 contracts presented?

1 THE COURT: What is the question then?

2 MR. REESE: That was the question.

3 THE COURT: What was it?

4 MR. REESE: As I said, that's a question I've
5 stated.

6 MR. WEINER: Doesn't the document speak for itself?

7 There are some terms of the draw that are in there.

8 THE COURT: I'm going to permit a little latitude
9 so I don't really have to read that much.

10 MR. WEINER: Okay, I understand.

11 THE COURT: Aren't the draws under this contract
12 authorized based on presenting certain contracts -- copies
13 of contracts to the bank? Is that what you're asking?

14 MR. REESE: Yes.

15 THE WITNESS: The bank's inspector basically
16 reviewed the contracts. I'm not certain, though it may be
17 called for, that we ever physically sent the contracts to
7 18 the bank.

19 BY MR. REESE:

20 Q So the answer was that that was part of the things
21 that went into your draw?

22 A The contracts?

23 Q Contracts, the purchase of the units.

1 A No, we -- the bank inspected the units on a per-
2 centage issue basis.

3 Q All right, so the bank would come down and would
4 inspect the units --

5 A The bank inspector.

6 Q The bank inspector would come and he'd come into
7 the units and look at the units to see how much of the work
8 was done, right? Is that what --

9 MR. WEINER: I don't think he can answer that. If
10 he knows if the bank inspector was there.

11 MR. REESE: This is the Agreement. I'm asking
12 about the Agreement he had with the bank.

13 THE COURT: He just said that, and on that point,
14 we'll break for lunch. Today we'll only take 45 minutes.

15 (Whereupon, at 12:30 o'clock p.m., a luncheon
16 recess was taken, the proceedings to be reconvened at 1:15
17 o'clock p.m.)

18 THE COURT: Before the witness -- the witness may
19 stay down there for a minute. I want a bench conference
20 with the lawyers on the record.

21 (A short bench conference was had on the record
22 out of the hearing of the witnesses.)

23 THE COURT: An incident which affects a witness

1 and which is known to me, as trier of the fact, needs to
2 come to your attention. There is a mental condition, the
3 Special Justice has a Commitment Order ready for a witness
4 Quatmann obtained on the request of Mr. Quatmann's wife and
5 supported by the phone call of evidence of a doctor in
6 Reston who has treated Mr. Quatmann in the past. Apparently,
7 Mr. Quatmann has had a voluntary hospitalization in Fairfax
8 last year, I think it was. I didn't want to get into too
9 much detail because he is a witness before me. On the other
10 hand, it's been brought to my attention by the Sheriff's
11 Office because of a potential security problem, and the
12 security problem is this: It is stated by his former
13 treating, or not former, I guess treating physician that he
14 has at times been suicidal and they are concerned whether
15 he might have a gun and do himself harm.

16 At this point, and in analyzing the case, I figure:
17 Well, the defense isn't going to call him because he has
18 been the Plaintiff's witness and his need here really's
19 going to come from the Plaintiff's side of the case.

20 MR. REESE: On rebuttal, that's correct.

21 THE COURT: And I don't want to upset the witness,
22 who was perfectly calm yesterday, who has been calm in the
23 jury room because I asked the bailiff. So at the moment, I

1 him to be checked with weapons when he comes into the
2 Courtroom? I mean, that --

3 THE COURT: If it concerns you, I'll have it done.

4 MR. WEINER: Well, my -- some of my clients --
5 well --

6 THE COURT: I'm personally concerned so I'm going
7 to have a security man or deputy right beside him who knows
8 what the problem is.

9 MR. HASLEY: We'll be close enough so if anything
10 happens, we'll be there.

11 MR. WEINER: Okay, fine.

12 Oh, and Your Honor, there are those witnesses that
13 have not been sworn.

14 THE COURT: Stand and be sworn.

15 (Whereupon, the Clerk swore the witnesses who had
16 not been previously sworn.)

17 THE COURT: All right, there is a rule on witness-
18 ses. That means you go with the bailiff and wait in the
19 witness room until you are called to testify. From this
20 point on, you're not permitted to discuss the case with
21 anyone until the trial is over. One exception: if you talk
22 to the lawyers in the case out of the hearing of any other
23 party or witness in the case.

1 You may retire.

2 (The witnesses were excused to the witness room.)

3 CROSS EXAMINATION (Resuming)

4 BY MR. REESE:

5 Q Mr. Daly, when we recessed for lunch, I was examin-
6 ing you with reference to the draw schedules. And I was
7 about to ask you, sir, whether or not you also had, as a
8 part -- partial of that draw schedule, when an investigator
9 or inspector from the bank would come down and certify that
10 X percentage of the work had been done, would you get a draw
11 based upon X percentage of the work having been done?

12 A That's correct.

13 Q All right, so if \$100,000 worth of work was in
14 place, you would get a certain --

15 MR. WEINER: Your Honor, we understand what's --
16 what the draw schedule is based on percentage of work.

17 THE COURT: Yeah, the summary would not be indi-
18 cated.

19 MR. REESE: All right.

20 BY MR. REESE:

21 Q Now, were you informed by, oh, Mr. Dillon or other
22 representatives of ADC, that they had, in fact, accepted
23 what has been known in this particular trial as the Fire Job

1 work as of June 26, 1980? Were you informed of that?

2 MR. WEINER: Your Honor, I think that's objection-
3 able. We have stipulated with regard to that \$1,331 on the
4 Fire Job. That was done early on in the beginning of this.

5 THE COURT: How does it remain an issue?

6 MR. REESE: It remains an issue, if Your Honor
7 please, because this man has been telling us all along that
8 immediately upon the work being completed he was going to
9 pay John Mark. Well, if he had -- if he was advised on June
10 26th that the work had been completed, but as of today,
11 \$1,331 remains to be paid on that bill, it becomes an issue.

12 MR. WEINER: Well, there are back charges that are
13 involved in that and he's trying the other counts, Your
14 Honor.

15 THE COURT: Objection sustained. The amounts'
16 already known.

17 MR. REESE: Exception noted.

18 BY MR, REESE:

19 Q Now, sir, on July 3, 1980, the testimony has been
20 that Mr. Dillon told John Mark it was off the job. Did Mr.
21 Dillon then telephone you and tell you what he had instructed
22 John Mark?

23 A Specifically I don't recall.

1 Q All right..Let's deal with a little more detail
2 specifically.

3 Between July 3rd when Mr. Dillon told John Mark
4 to get off the job and July the 8th when John Mark came back
5 on the job, did Tom Dillon telephone you and tell you that
6 he had kicked him off the job?

7 A I don't remember that Mr. Dillon had kicked him
8 off the job. I remember that they left the job and that
9 they -- specifically that they refused to deliver the units
10 because they did not have the missing materials.

11 Q Well, if I were to tell you today that Mr. Dillon
12 testified from that very stand, just --

13 MR. MAYS: Objection, Your Honor.

14 BY MR. REESE:

15 Q -- a matter of hours ago and said that he kicked
16 him off the job.

17 MR. MAYS: Your Honor, I think it's objectionable
18 for him to repeat and recite evidence that other witnesses
19 have given. Can't he just ask the question?

20 THE COURT: Under these circumstances, it's
21 permitted. Overruled.

22 BY MR. REESE:

23 Q If he testified that he kicked John Mark off the

1 job on that date, would that surprise you?

2 A Well, he had no authority to do it, and subsequent
3 to that, if that was the fact, then we got back involved in
4 discussions and they came back on the job.

5 Q All right, so they came back on the job on June
6 8th -- strike that, July 8th. Now, was it your position
7 that Mr. Dillon, having without authority from you, kicked
8 them off the job on July 3rd such that they couldn't -- or
9 couldn't or did not come back until July 8th, that on July
10 9th, they were to produce for you another seven units? Was
11 that your position?

12 A What day of the week was July the 3rd?

13 MR. WEINER: Your Honor, the schedule, the construc-
14 tion schedule, is in evidence. There were units that were
15 due on the day that John Mark was supposed to come back on
16 the job pursuant to a schedule.

17 THE COURT: It's agreed. You don't have to go --

18 MR. REESE: If Your Honor please, if that's the
19 position of the defense that having kicked us off the job,
20 even when we weren't on the job --

21 THE COURT: You're asking this witness when were some
22 more units due and it's already agreed when they were due.

23 MR. REESE: I'd like to address this witness,

1 reference his position having now known, or having been
2 informed that on July 3 John Mark was off the job, whether
3 or not he expected them to produce seven more units the
4 next week.

5 THE COURT: You may ask that question.

6 MR. REESE: All right.

7 BY MR. REESE:

8 Q Mr. Daly, the question was --

9 THE COURT: As of July 8th or 9th, did you expect
10 them to have an additional seven or other units ready?

11 THE WITNESS: Might I -- do we have a calendar
12 available? Or what day of the week was July the 3rd?

13 MR. MAYS: Your Honor, I have a calendar.

14 THE COURT: Any calendar's all right.

15 MR. MAYS: It was a Thursday.

16 THE COURT: The 3rd was a Thursday, all right. In
17 1980?

18 MR. WEINER: Yes, Your Honor.

19 THE COURT: All right.

20 BY MR. REESE:

21 Q Your answer, sir?

22 A Strictly in accordance with the contract date, we
23 were permitted to deliver X number of units and we had to

1 change that several times. Okay? If they came to me and
2 they were a few days late, I probably would not object.

3 Q All right. Now, I believe you had, or ADC had,
4 prior to July 24th, 1980, entered into a contract with a
5 company by the name of Holdfast. Does that name ring a bell
6 with you, sir?

7 A That's correct.

8 Q All right, you had entered into a contract for the
9 rehabilitation of Building 7753 at Ivy Mount, had you not?

10 A I don't remember the exact date.

11 Q Do you remember doing it before July 24th?

12 A Are you asking me if there were negotiations going
13 on with your client during that period prior to July 24th?

14 A No, sir, I'm asking you whether or not you entered
15 into a contract with Holdfast for the rehabilitation of that
16 building prior to July 24th.

17 THE COURT: What was the date of the Agreement?

18 MR. REESE: The Holdfast Agreement?

19 THE COURT: That's what I'm asking the witness.
20 That's all you're asking him.

21 THE WITNESS: I don't know the date of the Agree-
22 ment.
23

1 BY MR. REESE:

2 Q But I'm really asking if it was before July 24th.

3 A I don't know the date of the Holdfast Agreement.

4 Q All right.

5 Prior to July 24th, 1980, had John Mark agreed to
6 release Building 7753 from the contract with you all?

7 A In principal but not in writing.

8 Q In principal but not in writing?

9 A That's correct.

10 Q With whom in principal?

11 A John Sauer and I had agreed.

12 Q The two of you had?

13 A Yes.

14 Q All right. Now, did you know who was the president
15 of John Mark?

16 A Not at that time, no.

17 Q You mean in July of 1980 you didn't know who was
18 president of John Mark?

19 A I did not know.

20 Q All right, thank you.

21 Now, let's go back if we can to May 2nd, 1980, the
22 letter which is in evidence from the Defendant's point of
23 view.

1 MR. WEINER: Could the witness have the letter,
2 Your Honor?

3 MR. REESE: Most certainly.

4 THE COURT: Well, it's up to the questioner, I
5 think.

6 MR. REESE: I have no objection if he uses the
7 letter.

8 MR. WEINER: He's referring to the letter. July
9 2nd letter this is.

10 THE WITNESS: May 2nd?

11 MR. WEINER: May 2nd letter, right?

12 MR. REESE: May 2nd, that's correct.

13 BY MR. REESE:

14 Q Do you have the letter before you?

15 A Yes, sir.

16 Q All right. Now, you indicated in prior testimony
17 that you had had a discussion with John Sauer before that
18 letter was drafted?

19 A That's correct.

20 Q And at that particular discussion, you all had
21 discussed the Heritage Woods Units as not being fully
22 complete?

23 A That's correct.

1 Q All right, sir. Now, is it not true that in that
2 discussion you told John Sauer that you weren't going to
3 pay him another cent unless he agreed to go back into those
4 units? Isn't that what you told him?

5 A We agreed that the units were not completed.

6 Q That's trying to avoid the question. Isn't it
7 true that you told him you weren't going to pay him another
8 cent unless they would -- they meaning John Mark would go
9 back into those Heritage Woods Apartment Units?

10 A John Sauer and I and John Sauer's --

11 THE COURT: Answer yes or no and then explain.

12 THE WITNESS: Yes.

13 BY MR. REESE:

14 Q All right.

15 A John Sauer and I -- I made the deal with John
16 Sauer and I held John to be the principal of the corporation.

17 Q All right.

8 18 A I took the man at his word.
19
20
21
22
23

9 1 BY MR. REESE:

IG:jvs 2 Q But you made this deal on the basis that even
3 though these units had been accepted --

4 A No. We agreed first that they were not completed.

5 Q All right. Now, do you recall telling -- first,
6 Mara Ernestsons, who is she?

7 A She was an employee of ADC Fairways.

8 Q All right, and in June or July of 1980, what was
9 her role?

10 A Her role was to assist John Mark Construction in
11 helping them punch out the units.

12 Q All right, she walked the units?

13 A To assist them in completing them, that's correct.

14 Q Do you recall instructing her to find something,
15 anything, wrong with those units so that they couldn't --
16 they wouldn't have to be paid for?

17 A Not at all.

18 Q You never instructed her of that fact?

19 A No.

20 Q All right.

21 A To what end?

22 Q Now, Mr. Quatmann's testimony. He had testified
23 and it was on direct, it was indicated that Mr. Quatmann had

1 said that you had told him that you were going to string out
2 your sub-contractors and never pay them in full. Do you
3 remember telling him that?

4 A No.

5 MR. MAYS: Objection, Your Honor. This is -- he's
6 trying Counts Two and Three. I don't think it's relevant
7 to Count One at all.

8 MR. REESE: It's relevant to the direct. He was
9 asked that.

10 THE COURT: Go ahead and answer. Overruled.

11 BY MR. REESE:

12 Q Your answer, please.

13 A I'm sorry, what was your question again?

14 Q I think we've already got it on the record.

15 A That's fine; go ahead.

16 Q The question was --

17 THE COURT: I don't listen to answers when the
18 word "objection" comes out.

19 MR. REESE: No, the question is what he was
20 indicating.

21 THE COURT: Yeah, if he didn't hear the question
22 and wants it repeated, regardless of whether it's on the
23 record or not, please repeat it so he'll know what to answer.

1 BY MR. REESE:

2 Q Do you recall telling Mr. Quatmann in discussions
3 about John Mark and other contractors that it was your
4 position to always string along the contractors and never to
5 pay them in full? That's the question.

6 A No, I do not remember saying that.

7 Q All right. I note in your Loan Agreement it calls
8 for mass closings. Would you be kind enough to tell me what
9 you mean by -- or what that Loan Agreement recited in
10 reference to mass closings?

11 A It referenced a mass closing, and I don't remember
12 the specific term -- the specific guidelines set down in the
13 Loan Agreement, but what it meant was X number of units
14 should be prepared to close before the bank released the
15 first units.

16 Q Before the bank would release the first units from
17 what, the lien?

18 A From the lien, that's correct.

19 Q All right. Was Mr. Kische authorized to accept
20 units in oh, June, July, 1980?

21 A I'm only trying to sort out the chronology in my
22 own mind.

23 Not in June or July.

1 Q How about in May?

2 A In accordance with the contract, the project
3 manager was authorized to accept units.

4 Q And he was the project manager?

5 A That's correct.

6 Q All right, so he was in May. I just want to make
7 sure of that.

8 A I'm sorry. Again, it was the chronology.

9 In accordance with this letter prior to May 2nd
10 I guess it would be specifically that he was.

11 Q All right, sir.

12 Now, you have testified previously to owing Mr.
13 Weiner's firm approximately \$20,000.

14 A I did not say that, sir.

15 THE COURT: Just ask the question without reference
16 to what he's already said. Just --

17 MR. REESE: Surely; all right.

18 BY MR. REESE:

19 Q Are the attorney fees that are owed to Mr. Weiner's
20 firm, do they arise as a result of the release of any
21 mechanic's lien?

22 A No, I stated that Mr. Weiner's --

23 Q The answer was no?

1 A Well, first of all, I don't owe Mr. Weiner any
2 fees, so let's start with that.

3 Q All right. The amount of monies that you either
4 owe him or you have paid him.

5 THE COURT: For this case?

6 MR. REESE: For this case or for any case, really.

7 MR. WEINER: That's not -- for any case?

8 MR. REESE: I'll be very specific if you'll give
9 me a chance.

10 THE COURT: Sustained. Not in any case.

11 BY MR. REESE:

12 Q Do you owe or have you paid Mr. Weiner's law firm
13 any monies as a result of mechanic's liens arising from the
14 Ivy Mount project and ADC - John Mark debts?

15 Is that specific enough?

16 MR. WEINER: Yes.

17 MR. REESE: Thank you.

18 BY MR. REESE:

19 Q And your answer, sir?

20 A Specifically I cannot answer the question.

21 Q All right, sir.

22 A Because I treated attorneys' fees as one.

23 Q Have you paid or do you owe Mr. Weiner's law firm

1 any monies arising out of a situation wherein ADC as the
2 developer hired additional workers to work alongside of
3 John Mark with reference to the Ivy Mount project; these
4 additional workers having not been paid and seeking compen-
5 sation from ADC?

6 THE COURT: I've lost the question. Repeat it.

7 MR. REESE: Unfortunately, I'm trying to do it
8 by the contract and that contract loses me too, if Your
9 Honor please.

10 BY MR. REESE:

11 Q But have you paid or do you owe any monies to
12 Mr. Weiner's law firm as a result of a situation whereby
13 ADC, as the developer, hired additional workers on the
14 Ivy Mount project to work alongside John Mark not paying
15 these additional workers and then being sued by them?

16 THE COURT: Sustained. There's no way to answer
17 that question.

18 MR. REESE: Unfortunately, Your Honor's going to
19 have to answer it 'cause --

20 THE COURT: The contract doesn't provide that for
21 attorneys' fees. That's part of it but it's not the --

22 MR. REESE: Well, I'm going down it part by part,
23 if Your Honor please.

1 THE COURT: It begins by reason of the contractor's
2 delays. Do you have the section number?

3 MR. REESE: Yes, I do, Your Honor. It was Section
4 6.

5 THE COURT: 26.

6 MR. REESE: Section 6. Strike that, Section 7.

7 THE COURT: It begins, "If the contractor delays
8 the project -- progress of the project, it shall" thus and
9 so.

10 MR. REESE: All right, let me --

11 THE COURT: "It shall indemnify and hold the
12 developer harmless from and against any loss arising out of
13 such delay." Just ignore the parens for a minute. They
14 simply add to the phrase "arising out of such delays".

15 So the question is, in short: had he paid Mr.
16 Weiner's firm any -- can you segregate any sums paid any
17 attorney firm because of the contractor's delay as disting-
18 uished from removing liens?

19 THE WITNESS: Can I attempt to paraphrase that?

20 THE COURT: Did one firm remove the liens and a
21 different firm deal with JM for you?

22 THE WITNESS: That's correct, sir.

23 THE COURT: Yeah, all right.

1 THE WITNESS: Boothe, Prichard & Dudley handled
2 most of the lien work and title work on the property.

3 THE COURT: Was the Weiner work firm all related
4 to delays of JM?

5 THE WITNESS: That's correct.

6 THE COURT: All right.

7 BY MR. REESE:

8 Q Did the Weiner firm on your behalf, initiate any
9 suit against John Mark as a result of the delays?

10 A No, sir.

11 Q Has the Weiners' firm work for you with reference
12 to John Mark been solely dedicated to the case that is on-
13 going, this case?

14 A To the extent when we discuss a suit for the
15 deficiencies in the contract, they said that because they
16 had brought an action, it would be part of the same action.

17 Q All right, sir.

18 Has the Weiner law firm, or any other law firm
19 that represented ADC, and at this point, I'm turning to
20 paragraph 17 of the contract, if Your Honor please, repre-
21 sented ADC as a result of any claims by persons or other
22 corporations for damage to property or persons resulting
23 from the work of John Mark?

1 A. I would find it much easier to tell you what we
2 did pay attorneys to do rather than try and answer that
3 question.

4 Q Well, were you sued by anybody for injuries or
5 damages as a result of John Mark's work?

6 A I don't know if damages means that I get sued by
7 vendors for money and that they file liens.

8 Q The question was: was anybody injured on the
9 property?

10 A Physically injured?

11 Q Yes.

12 A No.

13 Q All right. Was there any damage to the property
14 itself such as kicking in doors --

15 A No.

16 Q -- or these kinds of things?

17 A No.

18 Q No. All right, sir.

19 Who made the decision as to the color of that cove
20 molding, the Almond at Ivy Mount?

21 A I did.

22 Q And do you remember when you made that decision?

23 A Specifically, no. It was -- I can tell you the

1 circumstances. We were inspecting the first units that
2 John Mark was preparing to turn over in a few days. We were
3 walking in there and there was white cove molding in there.

4 THE COURT: What was the wall color and what was
5 the floor color?

6 THE WITNESS: The floor color was Beige and the
7 wall color was the off-white paint.

8 BY MR. REESE:

9 Q And the cove molding was white?

10 A The cove molding was stark white, that's correct.
11 I requested of John Sauer at the time we were there, I said
12 that looked ridiculous. It was inappropriate. He said:
13 well, he didn't know what color; there was no color speci-
14 fied in the contract.

15 I asked him to please change it. I offered to pay
16 him to change it and to purchase all the white cove mold
17 that he had in stock at the time so he would not be hurt by
18 that.

19 Q And did you then specify that it was going to be
20 an Almond color?

21 A That's correct.

22 Q And do you remember the date now? April? May?
23 June?

1 A No, sequentially, it would have been early April.

2 Q Early April?

3 A That's correct.

4 Q And were samples brought to you?

5 A No.

6 Q Of the cove molding?

7 A No.

8 Q Never brought to you?

9 A No.

10 Q Were they brought to your representatives who
11 reported to you that they had been?

12 A I can't say that.

13 Q All right.

14 A To my knowledge, there's only one Almond cove mold
15 made.

16 Q Kitchen lights.

17 A Yes.

18 Q The contract called for one kind of kitchen light
19 and that was an obsolete kind, wasn't it?

20 A They said that they could not get the kind that
21 was called for in the contract.

22 Q When did you make the decision as to the kind of
23 kitchen lights, the particular model that you wanted?

1 A At the same time when I looked at the white cove
2 mold when I was in the units inspecting and going over them.
3 I said that the light that they had put in was unacceptable
4 and asked that they submit another light that was available,
5 pictures of that light, and I would select it upon receipt
6 of those cuts, as we call them in the industry.

7 Q And when did you do that? That was the question,
8 sir. When?

9 A I don't remember specifically when I did it.

10 Q Do you remember ADC specified that it would order
11 cabinets from a Jim Turner?

12 A I don't recognize the name Turner.

13 Q You don't recognize the name?

14 A (Indicating in the negative.)

15 Q Well then, the next question is: do you recall
16 informing John Mark that ADC would get the cabinets rather
17 than John Mark?

18 A I don't remember Turner. That's what I'm saying.
19 You might have another name that we got cabinets from --

20 Q I'm onto another question, sir. I'm not talking
21 about Mr. Turner now. The question is: do you recall making
22 the decision that ADC was to buy the cabinets rather than
23 John Mark? Simple enough.

1 MR. WEINER: Your Honor, certainly Mr. Reese has
2 a right to ask that question, but I bring to the Court's
3 attention: you've cautioned both attorneys about trying to
4 narrow the issues. There hasn't been one witness that's
5 testified that a lack of kitchen cabinets has been a cause
6 for rejection or delay in any units.

7 MR. REESE: Oh, but there has. Two witnesses
8 testified to that: Mr. McCarty and Mr. Sauer already, and
9 there will be others, but those two are together.

10 THE COURT: You may answer.

11 BY MR. REESE:

12 Q Can we try it again?

13 A No, no.

14 Q What's the answer then?

15 A I don't recall the kitchen cabinet issue.

16 Q All right, sir.

17 This contract, the Construction Agreement,
18 Plaintiff's Exhibit No. 1, the one that we just -- make sure
19 you've seen it. We'll see it here today.

20 This Agreement, sir, who prepared this Agreement?

21 A You're saying: who prepared it? I'm not quite
22 sure I understand the question.

23 THE COURT: Which side of the case?

1 THE WITNESS: Oh, it was a form contract that we
2 use.

3 BY MR. REESE:

4 Q Form contract that ADC used?

5 A That's correct.

6 Q All right, thank you.

7 Now, sir, your attorneys have eluded to you having
8 to hire additional contractors to come in and finish the
9 work that John Mark has started. Would that basically be
10 the Holdfast Company?

11 A That's correct.

12 Q Has ADC paid Holdfast 100 percent of what its
13 invoice --

14 MR. WEINER: Objection, objection.

15 THE COURT: Grounds?

16 MR. WEINER: Totally irrelevant to this case.

17 MR. REESE: If Your Honor please, I think it's very
18 relevant to this particular case. He says that they had to
19 bring other people in and pay them to do the work that John
20 Mark did. My question is: if you brought them in, did you
21 pay them?

22 THE COURT: They didn't say to do the work that
23 John Mark did.

1 MR. REESE: Didn't do, I'm sorry.

2 THE COURT: It might be irrelevant. They might
3 have charged twice as much. There's no counter-claim for
4 damage so --

5 MR. REESE: All right, as long as the Court's
6 taking that position, I'll certainly --

7 THE COURT: I don't take positions. I make
8 rulings.

9 MR. WEINER: Your Honor, I want to bring this to
10 the Court's attention. We will, perhaps through another
11 witness, present some back charge or material that would
12 indicate additional monies paid. I think that if Mr. Reese
13 wants to question it --

14 THE COURT: Additional monies paid to John Mark?

15 MR. WEINER: No, to another contractor.

16 THE COURT: You don't have any offsets in here,
17 do you?

18 MR. MAYS: Yes, we do.

19 THE COURT: In the pleadings?

20 MR. MAYS: In our amended answer.

21 MR. WEINER: There's an amended answer, Your Honor.

22 THE COURT: Let me see if I can find it.

23 MR. REESE: They filed an amended answer, if Your

1 MR. REESE: If Your Honor please, while Your Honor
2 has that defense in front of Him, I would like to address
3 another issue momentarily.

4 It is obvious from the direct examination that the
5 Defendant is attempting to recover attorney fees. I mean,
6 I think that's pretty plain.

7 THE COURT: Um-hmm.

8 MR. REESE: And yet, I do not find anywhere in
9 this answer and grounds for defense a claim for attorney
10 fees. I look at --

11 THE COURT: Well, we'll take that up when somebody
12 asks another question about attorney fees.

13 Let's finish this question.

14 MR. REESE: All right.

15 BY MR. REESE:

16 Q The question then, sir, is: has ADC paid 100
17 percent of the work invoice at Ivy Mount by Holdfast?

18 MR. WEINER: Your Honor, I think -- now, that's
19 an improper question because we are only involved with one
20 particular -- our claim is not totally to the rest of the
21 job. With regard to what we are claiming to offset against
22 John Mark, if that would be a limitation on the question, I
23 would have no objection. Just as to the partial units; that

1 is all I want -- if he's -- as to those partial units.

2 THE COURT: He's just asking him: what did you
3 pay? He's defending against your defense before your defense
4 is made.

5 MR. WEINER: Correct.

6 THE COURT: I've complained about that repeatedly
7 to both sides, but I'm not real sure the Virginia Supreme
8 Court would let me absolutely bar the question, so all I can
9 do is ask you to avoid it. So the witness may answer over
10 objection.

11 Do you know how much was paid Holdfast all together
12 on this project at Ivy Mount?

13 THE WITNESS: In excess of \$200,000

14 THE COURT: Do you know how much they were paid
15 for particular units or groups of units?

16 THE WITNESS: I'm assuming there are records for
17 that.

18 THE COURT: Are those records Mr. Kische would have?

19 MR. WEINER: I have --

20 MR. MAYS: Your Honor --

21 THE COURT: Do you know who would have the records?

22 THE WITNESS: They'd be -- they were either done
23 in discovery -- I'm not sure where they are today. They

1 would be in the corporate offices. I'm not sure who
2 physically has them.

3 MR. REESE: If Your Honor please, the other ques-
4 tion is whether that was the amount that was invoiced by
5 Holdfast.

6 THE COURT: That's the second question. I'm just
7 trying to find out if he has any knowledge at all because
8 it's my suspicion, he spends his time in New York or North
9 Carolina, that just coming here partially, he looks at
10 something, dabbles in it, gives an order and goes away.
11 Somebody else really knows the answer. That's my guess.

12 MR. REESE: He said he paid them \$200,000. Do you
13 know how much was invoiced is the next question.

14 THE COURT: Let him answer. Go right ahead with
15 your questions.

16 BY MR. REESE:

17 Q How much?

18 A I'm -- we paid -- we agreed with Holdfast and paid
19 Holdfast an agreed upon amount for the conclusion of the job.

20 Q You pay them for the invoice or less?

21 A We paid them -- when the accountants were done
22 discussing it, we paid them an agreed upon amount based on
23 the invoices they submitted.

1 Q Was it less than what the invoices added up to,
2 sir? That's the question. I think you can answer it.

3 A There were errors in the invoices. There were
4 back charges against those credits.

5 MR. REESE: No further questions of this witness
6 at this time, Your Honor.

7 THE COURT: I've forgotten something. The Loan
8 Agreement at one time I marked D 7 for identification. I
9 think I did rule it is in.

10 MR. REESE: It is in, Your Honor.

11 THE COURT: Yeah. Keep my notes straight.

12 REDIRECT EXAMINATION

13 BY MR. WEINER:

14 Q Mr. Daly -- Your Honor, could we have this marked
15 for identification?

16 THE COURT: Defendant's 8 for identification.
17 That's another photocopy.

18 MR. WEINER: It's a check. I have the --

19 THE COURT: Let's see what it is. It's not a
20 check. Well, it's two papers. It looks to me like an
21 account on Holdfast Builders.

22 MR. WEINER: Your Honor, this is the -- I showed
23 Mr. Reese the original document. Those are the --

1 THE COURT: Well, here, take this carbon back then.

2 MR. WEINER: I don't know if we can put --

3 THE COURT: You don't put in copies when the
4 originals are available. That's what Courts are all about.

5 MR. WEINER: Thank you.

6 THE COURT: Then we'll mark these two papers.
7 Defendant's 8 for I.D. is a check, payment by ADC Fairways
8 Corp. by an illegible signature to Holdfast Builders for --
9 well, it has \$9,312. And Defendant's 9 for I.D. looks like
10 a bill from Holdfast Builders to Tony Quapagnya, Q-h-a-p-a-g-
11 n-y-a, for Ivy Mount from one Stuart McKennic (phonetic).

12 (The documents referred to were
13 marked Defendant's Exhibit Nos.
14 8 and 9 respectively for
15 identification.)

16 BY MR. WEINER:

17 Q Mr. Daly, can you identify what's been marked
18 Defendant's --

19 THE COURT: 8 and 9.

20 BY MR. WEINER:

21 Q -- 8 and 9?

22 A It is a bill from Holdfast Builders for corrective
23 work for approximately --

1 MR. REESE: Objection, Your Honor.

2 THE COURT: Overruled.

3 MR. REESE: You haven't heard my objection yet.

4 THE COURT: I know, but he hasn't said what it is
5 yet. He's just going to say what the piece of paper is and
6 he can say that before you can even be heard because other-
7 wise, I don't know what to rule on it.

8 MR. REESE: I thought he had gotten far enough
9 into that.

10 THE COURT: He said it's a bill of Holdfast for
11 corrective work and his voice was up in the air like he was
12 going to finish his sentence.

13 THE WITNESS: It was a bill from Holdfast Builders
14 to correct specified units at building 4355 Ivy Mount Court,
15 to complete the units and make them acceptable for turn over
16 and sale to condominium -- prospective condominium purchasers
17 in the amount of \$9,312.

18 THE COURT: That's what it is. Now, the objection
19 is?

20 MR. REESE: Yes, if Your Honor please, the objection
21 is, of course, where's Holdfast? I don't know. If he says
22 it's corrective work --

23 MR. MAYS: He's just identifying a document at this

1 point, Your Honor.

2 MR. REESE: I'll withhold my objection, Your Honor,
3 until they try to put it in.

4 THE COURT: More prematureness.

5 MR. REESE: I know. Until they try to put it in.

6 THE COURT: What's D 8?

7 MR. WEINER: That was my next question.

8 BY MR. WEINER:

9 Q D 8.

10 A D 8 is a check in payment of that invoice.

11 Q And can you identify the signature?

12 A That illegible signature's mine.

13 Q Now, Mr. Daly --

14 THE COURT: As long as the bank honors it, that's
15 all that counts.

16 THE WITNESS: It matches the one on the Loan
17 document. That's how they keep score.

18 BY MR. WEINER:

19 Q Are these the -- the units that are listed on this
20 Holdfast invoice, are those the units to which you are
21 claiming monies were paid to Holdfast for work done to
22 complete units in building 4355?

23 A That's correct.

1 MR. REESE: If Your Honor please, this gentleman
2 has indicated that he never walked these units. This
3 gentleman has indicated that as far as he's concerned --

4 MR. WEINER: That goes to the weight, Your Honor.

5 MR. REESE: What do you mean, it goes to the
6 weight?

7 THE COURT: Well, I haven't heard the objection
8 yet.

9 MR. REESE: This gentleman has indicated he never
10 walked the units. We have no testimony indicating what
11 things were done under these particular units. We don't
12 know what --

13 MR. MAYS: It's coming, Your Honor. It's coming.

14 MR. REESE: Where was that?

15 We don't know whether or not this was a reasonable
16 charge, a charge that was, in fact, incurred under the
17 contract. And I have to object to this gentleman's
18 testimony. He has no -- he's laid no foundation that he
19 knows anything about it.

20 THE COURT: The president of the company is asked.
21 He says: this is our claim. It's received.

22 MR. REESE: What is received?

23 THE COURT: His answer to the question.

1 MR. REESE: All right then.

2 THE COURT: Do you claim this? And he says: yes,
3 we do.

4 BY MR. WEINER:

5 Q Mr. Daly, there was -- I'm taking you back to the
6 May situation, the May 2nd letter.

7 MR. WEINER: Your Honor, I'm just having these
8 marked for identification. I'm not asking to move them
9 into evidence at this time.

10 BY MR. WEINER:

11 Q There was a -- May of 1980, you gave Mr. Dillon --
12 strike that.

13 At a point in time, it came to your attention
14 you were not pleased with the quality of units that
15 apparently were being accepted at Ivy Mount; is that correct?

16 A Ivy Mount and Heritage Woods North.

17 Q And at that point in time, Mr. Kische was the one
18 that had the authority to accept units?

19 A That is correct.

20 Q Did you -- did information come to your attention --
21 and you discussed with Mr. Sauer about monies being paid to
22 your employee by an employee of you -- of yours to an
23 employee of John Mark's?

1 A. The discussion between Mr. Sauer and I went around
2 the following: it came to my attention we were accepting
3 units that were substantially uncomplete. It came to my
4 attention specifically one day that a unit was accepted
5 where a window frame was missing and there was a piece of
6 paper or cardboard or something over it and people were
7 asked to settle on that unit, which is how it came to my
8 attention.

9 Upon investigation of that, I found out that Mr.
10 Kische, who was in my employ, and several of Mr. Sauer's
11 people had agreed in order to get -- to keep everything
12 moving, to accept units that were not complete, and in any
13 event, the homeowners had a problem, they would take care
14 of the items work subsequent to that agreement.

15 Q Was this scheme working out?

16 A Absolutely not.

17 Q And as a result of this information, you took the
18 action of giving Mr. Dillon the authority -- or taking the
19 authority away from Mr. Kische --

20 A Initially, I took the authority away from every-
21 body and placed it with myself that Sauer and I should agree
22 the unit was done.

23 MR. WEINER: I have no other questions of this

1 witness.

2 THE COURT: All right. You may return to the
3 witness room.

4 MR. WEINER: Can he be excuse, Your Honor?

5 THE COURT: If neither side's going to recall him.

6 MR. MAY: We're not going to recall him, Your
7 Honor.

8 MR. REESE: He may.

9 THE COURT: You think he's going to prove part of
10 your case?

11 MR. REESE: I said he may be excused.

12 THE COURT: You may be excused.

13 THE WITNESS: Thank you.

14 (Witness excused.)
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1 THE COURT: Take the short ones, please, if at
2 all possible.

3 MR. MAYS: Tom Farasy.

4 MR. WEINER: Thomas Farasy.

5 THE COURT: Spell the last name for me.

6 MR. MAYS: F-a-r-a-s-y, I believe, Your Honor.
7 Whereupon,

8 THOMAS MORGAN FARASY,
9 was called as a witness by and on behalf of the Defendant,
10 having been previously duly sworn by the Clerk of the
11 Court, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. MAYS:

14 Q Would you state your full name, please.

15 A Thomas Morgan Farasy.

16 Q By whom are you employed?

17 A Residential Resource Group.

18 Q Mr. Farasy, did you, at my request, prepare a
19 worksheet of information in reference to the Ivy Mount
20 project in Annandale, Virginia?

21 A Yes, I did.

22 Q Sir, I just -- may we have this marked for
23 identification at this point, Your Honor?

1 THE COURT: Defendant's 10 for Id, a group of
2 accounting pages, photocopies.

3 (The document referred to
4 was marked Defendant's Exhibit
5 No. 10 for identification.)

6 BY MR. MAYS:

7 Q Mr. Farasy, I show you what's been marked as
8 Defendant's Exhibit No. 10 and ask you if you can identify
9 that.

10 A Yes, that was prepared under my supervision.

11 Q Is that the worksheet I asked you to prepare?

12 A Yes, it is.

13 THE COURT: What's your title with the company,
14 please?

15 THE WITNESS: I'm a vice president with the
16 company.

17 BY MR. MAYS:

18 Q And will you state, please, where you obtained
19 the information that's contained in the worksheets?
20 From what sources?

21 A I obtained it from the sales reports. I
22 obtained the original dates of when the units were to be
23 delivered from certain construction schedules and I

1 obtained the interest rates based upon the prime rate in
2 existence for that period of time.

3 Q All right. Let's take those one at a time.

4 THE COURT: What does the document purport to
5 produce when you've finished reading it?

6 MR. MAYES: Your Honor, this is -- I'm laying the
7 groundwork for a calculation of lost in added interest
8 charges which the developer suffered in this case.

9 MR. REESE: May I please, there's no claim for
10 it.

11 MR. WEINER: It's a cross, Your Honor.

12 MR. MAYES: It's a cross, Your Honor. There's
13 a paragraph --

14 THE COURT: I need one attorney on one side at
15 a time.

16 MR. REESE: If Your Honor please --

17 THE COURT: You say it's non-suited?

18 MR. REESE: That's correct.

19 MR. MAYES: Your Honor, it would be included in
20 our claim as an offset, any moneys owing.

21 THE COURT: Paragraph?

22 MR. MAYES: It would be in Count 1 included
23 within the fourth defense.

1 MR. MAYS: Well, Your Honor, do I understand
2 the Plaintiff to be asking for a continuance?

3 THE COURT: Put it in and then if you want to
4 find further authorities and want to make further argument
5 on why I should rule it back out, I'll hear you later.

6 Now, I know that we're not going to finish more
7 than one or two more witnesses today, so I know we're not
8 going to reach Witness Quatmann and you may govern yourself
9 accordingly.

10 MR. REESE: Is Your Honor ruling -- I just want
11 to make the ruling clear. Is Your Honor ruling that --

12 THE COURT: First I said that I'd hear it
13 conditionally. The more I look at it, I'm going to allow
14 it.

15 MR. REESE: You're going to find that incurred
16 certain additional costs to complete the work which he
17 claims as an offset to moneys includes interest?

18 THE COURT: The direct attention of interest,
19 uh-huh.

20 MR. REESE: All right. Note my exception. I
21 have claimed surprise, but the question's --

22 MR. MAYS: Is this a request for a non-suit?

23 THE COURT: No, no, just ask your witness the

1 next question.

2 MR. MAYS: All right.

3 DIRECT EXAMINATION (Resuming)

4 BY MR. MAYS:

5 Q Mr. Farasy, I believe we're at the point where
6 I had asked you if you prepared this document at my
7 request.

8 A Uh-huh.

9 Q Your answer's yes?

10 THE COURT: He said he got information from
11 sales reports, original dates, construction schedules, and
12 then he started to say interest rate for the subject time
13 but I don't know what he means by that.

14 MR. MAYS: All right. Let's take these one at
15 a time.

16 THE COURT: He better tie it right back to the
17 interest rate provided in D-7, where ever it is in there.

18 MR. MAYS: All right.

19 BY MR. MAYS:

20 Q Mr. Farasy, let me ask you about the interest
21 rates, and for that I'd asked this document be marked
22 as Defendant's No. 11 for identification.

23 THE COURT: Eleven for Id is another photocopy

1 labeled "Ivy Mount Interest Rates Used."

2 (The documents referred to above
3 was marked Defendant's Exhibit
4 No. 11 for identification.)

5 BY MR. MAYS:

6 Q Mr. Farasy, I refer you to what's been marked
7 Defendant's No. 11 for identification, and would you tell
8 me what that is, please.

9 A It's a schedule of interest rates which is
10 prime -- the prime rate in existence during that calendar
11 month plus 2 percent.

12 Q And can you tell me where you got those interest
13 rates?

14 THE COURT: Are they separately listed on it?

15 THE WITNESS: The prime rates are listed by
16 calendar month.

17 THE COURT: Did you list separately the prime and
18 then show plus 2 percent equals?

19 THE WITNESS: No, sir.

20 THE COURT: How is it written on there?

21 THE WITNESS: This is written as the total
22 rate --

23 THE COURT: The total?

1 THE WITNESS: -- which is the prime plus two.

2 THE COURT: Where did you get that from?

3 THE WITNESS: The prime rate was obtained from
4 loan statements principally, and in cases where --

5 THE COURT: Whose loan statements?

6 THE WITNESS: Our loan statements, the company's
7 loan statements.

8 THE COURT: But how would your company -- do you
9 mean what the bank was charging you?

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. Now, show me in this
12 agreement where it sets the rate for the prime plus two,
13 to save an objection. Page? There are a number of pages.

14 MR. WEINER: Page 3, Your Honor, fifth line.
15 "Interest ought to be computed to the actual number of
16 days."

17 THE COURT: I'm referred to Page 3 of the
18 exhibit, loan terms will bear interest payable monthly at
19 the prime rate as defined in Section 3.1 in affect from
20 time to time plus 2 percent until maturity, and then after
21 maturity, the prime rate is 4 percent. Now, what was the
22 maturity dates?

23 MR. WEINER: January 30 -- it's on the same page,

1 Your Honor, Page 2.

2 THE COURT: I'm on Page 3.

3 MR. MAYS: Page 3, Paragraph D.

4 THE COURT: What date does it say?

5 MR. MAYS: January 31st, 1981 is the maturity
6 date.

7 THE COURT: Where on the page is it?

8 MR. WEINER: Under date, same thing, on Page --

9 MR. MAYS: It's in the same sentence that we
10 just looked at.

11 THE COURT: All right.

12 MR. MAYS: And there is a definition --

13 THE COURT: Section 3.1 is --

14 MR. MAYS: Contains a definition of the prime rate,
15 Your Honor. On Page 10.

16 THE COURT: "As used herein, the term prime
17 rate shall mean the rate per annum charged by the bank
18 for 90-day unsecured loans made by it at Chicago, Illinois,
19 to commercial customers of the highest credit standing.
20 Changes in the rate of interest herein are due to changes
21 in the prime rate shall be effective on the date as of
22 which the bank charges the prime rate."

23 All right, you may continue your questions.

1 BY MR. MAYS:

2 Q All right, Mr. Farasy, I believe you stated you
3 got statements from Continental Bank regarding the prime
4 rate and that's what you put down on this Exhibit No. 11?

5 A That was the principal source, yes.

6 Q All right. Were there any other sources?

7 A Yes.

8 Q What were they?

9 A Phone calls to a bank to obtain prime rates.

10 MR. REESE: Objection; hearsay.

11 THE COURT: He's answering where he got it. I'm
12 going to hear the answer as to where he got it.

13 MR. REESE: He said by telephone calls to other
14 banks.

15 THE COURT: If I don't permit the answer, you
16 can't even object to it.

17 MR. REESE: But the answer was already in, Your
18 Honor.

19 Go ahead.

20 BY MR. MAYS:

21 Q You obtained the information from other lenders?

22 A In certain periods of time where I did not have
23 loan statements, I called a bank and obtained the prime

1 rate for that period of time.

2 THE COURT: Called what bank?

3 THE WITNESS: A bank in North Carolina.

4 BY MR. MAYS:

5 Q Do you recall the name of the bank?

6 THE COURT: I'll tell you now I'm going to
7 sustain the objection because the definition, it's not
8 North Carolina's bank's prime; it's this bank in Chicago
9 and its rate for its 90-day unsecured loans and --

10 MR. MAYS: All right.

11 THE COURT: -- of course, then if he produces
12 a bill from them where they charged them, that's all
13 right because that's what they paid, paid out on. But
14 if he has gaps in it, then he just can't testify.

15 MR. MAYS: All right.

16 BY MR. MAYS:

17 Q Well, how many months on here did you obtain from
18 Continental Bank?

19 A I do not know the specific number of months.
20 My recollection is that the majority of the months were
21 obtained from loan statements.

22 Q All right. Now, the worksheet which has been
23 identified as No. 10, that has a column which states "date

1 promised"; is that right?

2 A That's correct.

3 Q And could you state for us where you obtained
4 those dates to put in that column?

5 A I obtained that from the construction delivery
6 date.

7 Q I show you what's been marked as Defendant's
8 No. 4, and can you tell me if that's where you obtained
9 the dates?

10 A Yes, it is.

11 Q Now, your worksheet also has a column which
12 says -- several columns: "building number," "unit
13 number," "sales price," "date loan approved." Can you
14 tell me where you got that information?

15 A On my worksheet, the "date approved" was
16 obtained from the sales report.

17 Q All right, and we'll have to get this one
18 marked, Your Honor, for Id.

19 THE COURT: Defendant's 12 for Id is -- again
20 it's a photocopy only. It looks like a calendar of
21 events with relation to the units sold with the name of
22 a purchaser.

23 MR. MAYS: We call that a sales report, Your

1 Honor.

2 THE COURT: Well, it isn't labeled that way.
3 It's labeled "week ending project in."

4 It does have columns of construction acceptance,
5 proposed closing date and actual closing date, among many
6 other things. All right.

7 (The document referred to
8 above was marked Defendant's
9 Exhibit No. 12 for identifica-
10 tion.)

11 BY MR. MAYS:

12 Q Mr. Farasy, I show you what's been marked as
13 Defendant's No. 12 and ask you: is that the sales report
14 from which you obtained the date of loan approval for each
15 unit?

16 A Yes, it is.

17 THE COURT: Now, which date did you take from
18 it?

19 THE WITNESS: I took from it the date of loan
20 approval.

21 THE COURT: But that's the borrower's loan, not
22 your loan, right?

23 THE WITNESS: That's correct, that is correct.

1 THE COURT: What's that got to do with this?

2 THE WITNESS: The purpose of the report is to
3 show a calendar -- a running calendar of the history of
4 each unit in terms of its delivery.

5 THE COURT: Let me ask counsel, why am I concerned
6 to know when the borrower borrowed money?

7 MR. MAYS: Your Honor, I'm laying the ground work
8 from which a calculation of added interest costs are
9 going to be calculated from another witness. And one of
10 the variables in the calculation is the date that the
11 purchaser's loan was approved. This will be developed with
12 another witness. This is just getting the essential --

13 THE COURT: You've got to tell me more.

14 MR. MAYS: All right, Your Honor. The other
15 witness will take the date that the units were due
16 according to the construction schedules. He'll look at
17 the date of the contract; this is a -- you know, the date
18 it was contracted for sale to a purchaser. Then we take
19 the date of that purchaser's loan approval, since there
20 can -- there could be no settlement without a loan
21 approval; and we -- then we look at the date of
22 settlement, and from those variables, the other witness
23 will testify that the number of days in excess of 30 from

1 the date of loan approval and the date of settlement is --
2 would be an additional period of time, a delay. As
3 interest is running on the construction loan during that
4 period.

5 THE COURT: Well, suppose --

6 MR. MAYS: I'm just laying the groundwork.

7 THE COURT: -- one unit purchaser gets his loan
8 the first day, the same day he signs the contract. The
9 next one dilly dally arounds and your clients almost
10 cancel. Then he finally says: well, I'll go apply for
11 a loan agreement, and he's two months late in applying.
12 How is that relevant to what you bill John Mark for?

13 MR. MAYS: Your Honor, we're only going to be
14 dealing with certain units where we can show that the --
15 the date of loan approval was prior to the date that the
16 unit was delivered. And our point's going to be -- that
17 had these units been completed on time, the developer would
18 have been able to settle them sooner. And the other
19 variable is --

20 THE COURT: You're going to show that --
21 were settlement dates established in each purchase agree-
22 ment? Let me ask you that?

23 MR. MAYS: Well, we have the settlement dates.

1 THE COURT: When a person contracted to buy,
2 did the contract to buy have a settlement date in it?

3 MR. MAYS: No, because it was contingent upon
4 the loan approval, the purchaser's loan being approved.
5 That's why we're using that date. That's a fixed date.
6 See, the date of the --

7 THE COURT: The contract, you're saying you're
8 going to show hereafter with unit purchasers was they agree
9 at time of purchase to settle so many days after their own
10 loan is approved?

11 MR. WEINER: The commitment is only good for so
12 long, Your Honor.

13 MR. REESE: You've got the banks coming in for
14 that reason?

15 THE COURT: You talking about a bank commitment
16 obtained for the seller for the benefit of buyers?

17 MR. MAYS: The purchaser's own loan commitment.

18 THE COURT: His or her bank?

19 MR. MAYS: Right, from his or her own lender.
20 That is the date that we have here for date of loan
21 approval, which is a fixed date.

22 THE COURT: Well, I can see a possible way for
23 you to prove it, and I'll let you go ahead and make the

1 effort. I just wanted to get a little peek down the road
2 because it sounded irrelevant to me.

3 MR. MAYS: All right.

4 BY MR. MAYS:

5 Q Mr. Farasy, the sales reports which I asked you
6 to look at, are they prepared in the normal course of
7 business in your office?

8 A They are prepared at the project site.

9 THE COURT: Write the word "sales report" on
10 it because it isn't on there, so we can understand it.
11 It's an inside terminology.

12 MR. REESE: This is solely for identification
13 purposes right now?

14 MR. MAYS: That's right.

15 THE COURT: That's right. He may have to put
16 on three or four witnesses and then say: Now, I offer it.
17 I mean, a lot of things are proved that way.

18 MR. REESE: I realize that. I just wanted to
19 make sure what the purpose was at this point.

20 BY MR. MAYS:

21 Q I ask you again on Defendant's No. 12, are those
22 maintained as normal business records in your office?

23 A They are maintained at the project site for the

1 purpose of monitoring the completion and the eventual
2 sale as settlement of each unit.

3 Q All right. Is a copy also maintained in --
4 well, let me ask you --

5 THE COURT: Is your office -- where is your
6 office?

7 THE WITNESS: We have a central office and
8 then we have --

9 THE COURT: Where is your office?

10 THE WITNESS: Our office physically is in
11 Adelphi, Maryland.

12 THE COURT: All right.
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1 BY MR. MAYS:

2 Q Are a copy of these reports also maintained in
3 that office?

4 A Yes, they are.

5 Q I'm not sure if I asked you this, Mr. Farasy, but
6 looking at the sales reports, is -- is the date settled per
7 unit also contained in the sales reports?

8 A Yes, it is.

9 Q All right, and that would be -- you got that
10 information also from this report (indicating)?

11 A That's correct.

12 Q And the worksheets also contained the sales price
13 per unit?

14 A Yes.

15 MR. MAYS: I have no further questions, Your Honor,
16 of this witness.

17 THE COURT: Before you pick up new questions, Mr.
18 Reese, Mr. Farasy, did you use D 12, what you call a sales
19 report, for any reason other than the dates of the borrower's
20 loan in terms of your making up D 11 or D 10?

21 THE WITNESS: Yes, I used it for purposes of
22 identifying date delivered.

23 THE COURT: All right.

1 THE WITNESS: And the date the loan approved.

2 THE COURT: Anything else?

3 THE WITNESS: I also obtained the schedule list
4 with additional information such as mortgage amount.

5 That would be it, Your Honor.

6 CROSS EXAMINATION

7 BY MR. REESE:

8 Q Now, sir, you were not the individual who
9 originally put these figures down, were you, on -- I'm
10 addressing D 12?

11 A No, sir, I was not.

12 Q Somebody else did that?

13 A Yes.

14 Q Do you know who that was?

15 A No, I do not.

16 Q All right. Do you know where the original of
17 this record was kept?

18 A No, I do not.

19 Q You had a copy?

20 A Yes, I did.

21 Q Is that correct?

22 A That's correct.

23 Q So you don't know where the original was kept; all

1 right, sir.

2 Now, let's turn out attention to D 10 for a moment
3 if we may. I see 4355-11, a date of loan approval of
4 September 16, a date promised of 4/18/80. What was your
5 interpretation as to the date of settlement if the date
6 promised was 4/18/80? How did you get this figure over
7 here of --

8 THE COURT: One question at a time.

9 MR. REESE: All right.

10 THE COURT: Were you reading perhaps a buiding
11 number?

12 MR. REESE: Yes.

13 BY MR. REESE:

14 Q 4355 is the building number, unit 11.

15 A Um-hmm.

16 Q All right, sir, read it across. Date of loan
17 approval was September 16, correct?

18 A Correct.

19 Q All right. Date delivered was August 15th?

20 A Right.

21 Q Date settled was October 14th. Your sales price --
22 your mortgage amount showed -- what does this SP stand for?

23 A Selling price.

1 Q Selling price, all right; and interest on delay?

2 A Correct.

3 Q Okay. Now, if I may take a look at this interest
4 on delay figure, how was that derived from the rest of the
5 figures that you've given me?

6 MR. MAYS: I object. I didn't ask him that and
7 this is not my witness to prove that point, Your Honor.

8 BY MR. REESE:

9 Q Where did you get these figures from then on D 10?

10 MR. MAYS: I only asked about certain columns.
11 I was laying a ground work.

12 THE COURT: He says they were prepared under his
13 supervision. If he knows where the material for a certain
14 column was obtained within their something or other research
15 group -- I forgot the name now -- then he may answer it.

16 MR. REESE: All right.

17 BY MR. REESE:

18 Q Where was this figure obtained from?

19 A That figure was obtained by determining the amount
20 of calendar days from the date the unit was originally
21 supposed to be delivered.

22 Q Which is 4/18/80?

23 A Up to August 15th, which is the date it was

1 delivered.

2 Q Yes, sir.

3 A Times 90 percent of the selling price, since that's
4 the amount of proceeds that would have gone to the bank to
5 reduce the loan, times the interest rate in existence for
6 that particular time meaning April 18th through August 15th.

7 Q Did you know that this was a model unit, number 11
8 was a model unit?

9 THE COURT: Now, which column were you just
10 describing? You say it represents the calendar days. What
11 is the "it" because I don't have the paper in front of me?

12 THE WITNESS: I was describing column number nine.

13 THE COURT: All right.

14 BY MR. REESE:

15 Q Did you know when this sheet was made up that that
16 was a model unit, 11?

17 A No, I did not.

18 Q Did you know that 12 was a model unit?

19 A No, I do not.

20 Q 13, 14, 15, 16, 17, do you know those are model
21 units?

22 A No, I do not.

23 THE COURT: You want me to remember those dates,

1 counsel?

2 MR. REESE: Yes.

3 THE COURT: You better find some way to develop
4 it so I'll know to take up notes, because I'll forget it
5 next week.

6 BY MR. REESE:

7 Q Do you know that units 11 through 17 were model
8 units when you made this sheet?

9 A No, I do not.

10 Q Who else participated in compiling this particular
11 document?

12 A An individual who works in my accounting department.

13 Q And who would that be?

14 A Donna Donnelly.

15 Q Donna Donnelly, so you and Donna Donnelly were the
16 only ones who put this document together?

17 A You mean in terms of preparation of this document?

18 Q Yes, sir.

19 A Yes.

20 Q Now, from whom did you get the information to
21 derive this document?

22 A I've described that.

23 Q You obviously got it from D 12.

1 A And the sales report, D 12.

2 Q All right, and you obviously got it from D 11?

3 A D 11.

4 Q All right. Now, from whom else?

5 A And from the construction delivery dates; I don't
6 know what the exhibit number is.

7 Q All right, and that's all the information that came
8 to bear upon this?

9 A That total schedule?

10 Q Yes.

11 A We also reviewed the individual sales contracts
12 for each of the units.

13 Q All right, do you have those with you today?

14 A No, I do not.

15 Q All right. Okay, anything else?

16 A No.

17 Q So all -- that's all the information and you and
18 your assistant were the ones who got that information,
19 compiled it and put it onto this sheet?

20 A Correct.

21 Q Okay.

22 Where did you get the delivery dates from?

23 A From the sales report.

1 Q From this sales report here (indicating)?

2 A Correct.

3 Q Okay, and do you know -- you don't know who
4 compiled this (indicating)? That's what your testimony was.

5 A No, I don't; that's correct.

6 Q All right, okay.

7 MR. REESE: I think everything's simply for I.D.
8 at this point. No further questions of the witness at this
9 time, Your Honor.

10 THE COURT: Is that sales delivery date the day
11 the purchaser got the key?

12 THE WITNESS: No.

13 THE COURT: What is it?

14 THE WITNESS: The terminology is meant to imply the
15 date that the unit was completed for construction purposes.

16 THE COURT: It really has nothing to do with
17 settling or turning it over to the buyer?

18 THE WITNESS: It does because the unit has to be
19 ready.

20 THE COURT: It proceeds it but --

21 THE WITNESS: That's correct.

22 THE COURT: So the sales delivery date is -- means
23 reconstruction complete; is that it?

1 THE WITNESS: Construction is complete.

2 THE COURT: I call it reconstruction, same thing.

3 THE WITNESS: Yeah.

4 THE COURT: All right.

5 THE WITNESS: Ready to be moved into.

6 THE COURT: All right.

7 MR. MAYS: Your Honor, we call Tony Guadagnino.

8 THE COURT: All right, just return to the witness
9 room, sir; wait.

10 (Witness excused.)

11 THE COURT: While we're waiting for this witness
12 to be located, I'm going to suggest to you that if you
13 assume that the temporary commitment which, even on weekends,
14 can't last more than 72 hours, is followed by some other
15 commitment, presumatively it would be in the Arlington area,
16 whether habeas corpus ad testificandum, which is literally to
17 bring the body back to the Court to testify. Just because
18 somebody is under study by doctors does not mean that they
19 are not competent to give evidence, and I just point this
20 out so that each side may govern itself accordingly.

21 MR. WEINER: May I just say something, Your Honor?
22 With regard to that, we -- it's our position that we certain-
23 ly sympathize with this gentleman's condition, if, in fact,

1 there is a condition. But I think that it would be
2 appropriate, and I'm sure Mr. Reese would have no objection,
3 if we would be allowed to have an opinion as to his --
4 opinion of his treating physician as to his condition,
5 possible competency.

6 THE COURT: Well, I'm going to let you all worry
7 about that, you know, hereafter.

8 Whereupon,

9 ANTHONY GUADAGNINO,
10 a Witness herein, called for examination by counsel for the
11 Defendant, having been first duly sworn by the Clerk of the
12 Court, was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. MAYS:

15 Q Will you state your full name, please?

16 A Anthony Guadagnino.

17 THE COURT: Spell your last name.

18 THE WITNESS: G-u-a-d-a-g-n-i-n-o.

19 BY MR. MAYS:

20 Q Where do you reside?

21 A 8137 Loving Forest Court, Springfield, Virginia.

22 Q By whom are you employed?

23 A Caldwell Banker/Routh Robbins Realtors.

1 Q How long have you been employed with them?

2 A About 15 months.

3 Q And prior to being employed with Caldwell Banker,
4 by whom were you employed?

5 A ADC Fairways.

6 Q And can you give us the dates of your employment
7 with ADC Fairways?

8 A May, '79 to August, '80.

9 Q What was your position with ADC Fairways?

10 A I was a comptroller.

11 Q And as comptroller, could you tell us what your
12 duties were?

13 A Basically keep the books of record, to administer
14 the loaning documents, pay the bills.

15 Q And prior to working with ADC Fairways, had you
16 done that type of work before?

17 A Yes, I worked with Arlen Realty and Development --

18 Q What?

19 A Arlen Realty, A-r-l-e-n.

20 Q In what capacity?

21 A I was a -- in a number of capacities, but most
22 recently the comptroller for the condo division in Washington.

23 Q Mr. Guadagnino, I'd like to show you what's been

1 marked for identification as Defendant's No. 7.

2 THE COURT: It's in. It's not for I.D.

3 MR. MAYS: Okay.

4 BY MR. MAYS:

5 Q Which has been admitted into evidence as Defendant's
6 No. 7, and ask you if you've ever seen that.

7 A Yes, I have.

8 Q Can you tell us what that is?

9 A This is the Loan Agreement between Continental
10 Bank and ADC Fairways for the Fairfax/Heritage complex.

11 Q In your capacity as comptroller for ADC Fairways,
12 did you work with this document?

13 A Yes, I did.

14 Q In fact, did you -- did your responsibilities
15 include making payments to the lender, Continental Bank?

16 A Well, the payments actually went to -- from the
17 title company as the units closed, but I would draw on the
18 Loan Agreement, and when the units closed, they were paid
19 directly by the title company to Continental, which I would
20 administer.

21 Q Under the Loan Agreement, when would repayment to
22 the lender take -- well, to the title company take place?
23 What point?

1 A. Okay. As units settled, within 48 hours money
2 would be wired from the title company to Continental to
3 pay off the original.

4 Q. And how much -- what determined that figure?

5 A. It was 90 percent of the contract price at
6 settlement.

7 Q. 90 percent of the contract price per each unit?

8 A. Each unit, yes.

9 Q. And that is, in fact, stated in the Loan Agreement,
10 is it not?

11 A. Yes, it is.

12 Q. Now, Mr. Guadagnino, I'd like to show you what's
13 been marked for identification as Defendant's No. 10 and ask
14 if you can identify that document.

15 A. Yes, it is -- yes, I have. I have seen it and it's
16 a work-up of interest due for delay on units.

17 Q. Now, did you make some calculations using the
18 figures on that document at my request?

19 A. Yes, I did.

20 Q. And would you describe, please, what variables
21 you used and what method you used to calculate the interest?

22 A. I used a very conservative criteria in calculating
23 this interest. Basically -- the first criteria was date of

1 loan approval as compared to the date that the units was
2 promised by the contractor. If the date of loan approval
3 was prior to the date -- was subsequent to the date promised,
4 then I did not calculate any interest because there was --
5 the unit was ready at the time the purchaser could occupy.

6 If the date of loan approval was prior to the date
7 promised, then it was considered for interest calculation.

8 We then went to the next step of criteria which
9 was the fact that, again, using a conservative method, saying
10 that 30 days after loan approval is when a unit could be
11 occupied and settled. So therefore, the interest was
12 calculated based on this 30 days after loan approval. From
13 that point, if the unit was not delivered, I calculated
14 interest from the date 30 days after loan approval until the
15 time the unit actually settled, and I calculated this inter-
16 est based on this sheet given me which was the prime rate at
17 the time.

18 Q All right, that's been marked as Defendant's No. 11?
19 Is that what you're referring to?

20 A Yes. And I calculated from -- again, from 30 days
21 after loan approval till the date of settlement, interest at
22 the prime rate.

23 Q And what figure did you come up with?

1 THE COURT: The previous witness said they used
2 the prime rate out of North Carolina. Your client contracted
3 for a prime rate out of a specific bank for a particular
4 kind of loan.

5 MR. MAYS: Now, Your Honor, he said that he got
6 most of the interest rates there from Continental Bank. He
7 states it's --

8 THE COURT: Yeah, but we don't know which one and
9 how much. It just shoots a hole in it.

10 BY MR. MAYS:

11 Q Mr. Guadagnino, didn't you use the lowest interest
12 rate on that sheet?

13 A Yes, and again, for a conservative factor, I took
14 the lowest interest rate on the sheet, it was 13 percent,
15 and I used that percentage for the most part throughout this
16 calculation.

17 MR. REESE: If Your Honor please, I don't -- I
18 have to object at this time because we don't know if the
19 interest rate of that particular bank was actually lower than
20 the interest rate indicated on here (indicating).

21 THE COURT: I understand. If subsequent testimony --
22 so if someone from the bank comes here and says: the interest
23 rate is never below 13 percent, then this witness' testimony

1 becomes quite relevant because then it would be a computation
2 based upon a proved factor.

3 MR. MAYS: But Your Honor, it would have to be --
4 Continental would have to -- their prime rate would have
5 to have been 13 percent if Mr. Farasy says that he took
6 these figures from statements he received from Continental
7 and the lowest figure on this list is 13 percent, then that
8 would have to be the rate --

9 THE COURT: He has some periods he doesn't know
10 what the loan interest was. It might have been 10 percent.
11 There was a period that I recall, read it in the newspapers,
12 when primes went down and noticeably down.

13 MR. MAYS: But Your Honor, on Defendant's No. 11,
14 it's covered every month from April to November of 1980.

15 THE COURT: Yes, but the witness who says he got
16 those rates, says he got some of them out of North Carolina,
17 an irrelevant rate.

18 MR. MAYS: But he also got most of them from the
19 Continental Bank.

20 THE COURT: Most is not good enough.

21 MR. MAYS: But, Your Honor, if you just think
22 about this for a moment, if he got one from Continental
23 during the period, and we're using the lowest interest rate

1 that -- that's on that sheet, then that would clearly show
2 that that's the rate Continental was charging.

3 THE COURT: What was the interest rate in your
4 bank in Chicago for the months that aren't known?

5 MR. MAYS: Okay, I see your point.

6 THE COURT: Now, you say you took the lowest
7 interest rate, and so you didn't take a variable from time
8 to time?

9 THE WITNESS: No.

10 THE COURT: And you used what figure?

11 THE WITNESS: 13 percent which is two above prime.

12 THE COURT: Then you used -- you used 11 plus two
13 percent to get 13; is that it?

14 THE WITNESS: That's correct, yes.

15 THE COURT: Well, it's conditional to tying it in
16 and later proving it.

14 17 BY MR. MAYS:

18 Q Mr. Guadagnino, during the period of April '80 to
19 November '80, do you have knowledge that the prime rate was
20 ever lower than 11 percent? That is, the prime rate that
21 Continental Bank charged.

22 MR. REESE: Objection, Your Honor. He has no
23 standing to testify to that.

1 MR. MAYS: Well, let me lay a foundation.

2 THE COURT: I don't know; I think it'd be for the
3 witness to say. We had a witness here once in a case who
4 knew about the condition of drinking water in a particular
5 town, in a particular province, or whatever it is, in India
6 because he had been there during World War II and his job
7 was a sanitary officer. So it never ceases to amaze me what
8 witnesses might know.

9 BY MR. MAYS:

10 Q Mr. Guadagnino, during the period April of '80 to
11 November of '80, did you ever receive statements or documents
12 of any type from Continental Bank indicating what their prime
13 rate was at that time?

14 A Yes, I used to get an update constantly based --
15 whenever their prime rate changed, I would get a notification
16 of that.

17 Q And it was your responsibility to know what the
18 prime rate was as comptroller for ADC Fairways?

19 A Yes.

20 Q And during that period of time, to your knowledge,
21 was the prime rate that Continental Bank was charging ever
22 lower than 11 percent?

23 MR. REESE: Objection, Your Honor. This witness is

1 not from Continental Bank.

2 MR. MAYS: Just based on his own knowledge, Your
3 Honor.

4 MR. REESE: It has to be hearsay documents to
5 begin with.

6 THE COURT: Well, it's hearsay just as asked. I
7 indicated earlier that if his company had paid a bill, for
8 example, received from Continental of -- that I would permit
9 him to say what the prime rate rate was that he paid.

10 It's -- I pay \$100 to get my car fixed. Now, I
11 got an estimate from Joe the mechanic of \$100; that's
12 different.

13 MR. MAYS: All right, Your Honor, may we then make
14 a proffer subject to further proof of what the prime rate
15 actually was from paid bills?

16 THE COURT: It's -- that's right, it's all -- the
17 exhibit is still for I.D., but I will hear his testimony.

18 BY MR. MAYS:

19 Q Okay, Mr. Guadagnino, from the information you
20 had using 13 percent, what figure did you come up with?

21 A \$75,669.

22 Q All right, thank you very much.

23 THE COURT: Representing what?

1 THE WITNESS: That represents interest lost due
2 to delay on units delivered.

3 THE COURT: Does that paper give the building and
4 unit numbers?

5 THE WITNESS: Yes, the calculation was done by
6 unit.

7 THE COURT: When was the last unit to deliver
8 according to that sheet for settlement? Was it by December,
9 19 -- I'll let you answer that date first.

10 THE WITNESS: November sometime was the last unit.
11 I see November 30th was the latest.

12 THE COURT: What was the balance due to the bank
13 in Illinois on November 30th?

14 THE WITNESS: I really don't know.

15 THE COURT: Was there any?

16 THE WITNESS: I'm not sure. I would assume so,
17 but I really couldn't say.

18 THE COURT: Well, if the bank was getting 90
19 percent of the proceeds, your company was figuring on making
20 more than 10 percent of the condos sold, weren't they?

21 THE WITNESS: Yes.

22 THE COURT: So then the bank loan would be paid
23 off before all settlements were held?

1 THE WITNESS: Yes, true.

2 THE COURT: And those settlements would be degraded?

3 THE WITNESS: True, but we were drawing out of
4 construction money at that time, so we were paying it off
5 plus it was going back up to draws to pay off construction
6 costs.

7 THE COURT: All limited to this one project?

8 THE WITNESS: Yes.

9 THE COURT: Was there ever any mixing of money of
10 this D 7 except for Ivy Mount and the other Fairfax project
11 just before it?

12 THE WITNESS: No. Money was drawn specifically
13 for this project.

14 THE COURT: And there was no further -- yeah,
15 all right. Your witness.

16 CROSS EXAMINATION

17 BY MR. REESE:

18 Q When you say specifically for this project, sir,
19 this is actually for what is known as Fairfax Heritage
20 Condominiums 3, 4, 5, 6 and 8, and undeveloped areas in
21 Annandale, Virginia; is that correct?

22 A That's correct.

23 Q Now, Ivy Mount was not all Fairfax Heritage

1 Condominiums 3, 4, 5, 6, and 8, was it?

2 A No, it wasn't.

3 Q It was actually only one part of that and that
4 was Fairfax Heritage Condominiums 4?

5 A Ivy Mount was 4 and 8, I believe.

6 Q Well, I think it would speak for itself, but I
7 believe you'll find it here that it says here that: Ivy
8 Mount Court, Section 4, which may be expanded to include
9 Section 8 --

10 A Right.

11 Q -- but originally it was only Section 4; is that
12 right?

13 A Um-hmm.

14 Q So when you're talking about a co-mingling of
15 monies, there was a co-mingling of monies. This wasn't just
16 4. This was not just 4, Ivy Mount, was it?

17 A No.

18 Q No, this was for 1, 2, 3, 4, 5 apartment complexes.

19 A That's correct.

20 THE COURT: What were their names?

21 BY MR. REESE:

22 Q Yes, what were their names?

23 A Section 3, I believe was Heritage Woods North.

1 Section 4, it was Ivy Mount, Section 5, I think that was
2 Briarwood Court; and Section 6 was also Briarwood; and
3 Section 8 was --

4 THE COURT: What name?

5 THE WITNESS: Briarwood Court.

6 THE COURT: Yeah.

7 THE WITNESS: And Section 8 was -- also became
8 part of Ivy Mount, I believe later.

9 BY MR. REESE:

10 Q Later?

11 A Yes.

12 Q That's correct.

13 All right, sir, so when the Judge asked if there
14 was any co-mingling with reference to this project, and if
15 he limited that question to Ivy Mount, there certainly was
16 a co-mingling, wasn't it?

17 A Yes, I understood this project to be those five
18 sections.

19 Q Yes; well, I understand.

20 Now, let's take a look at this sheet if we can for
21 a moment here. Now, this particular sheet addresses not only
22 building 4355, but additional buildings; isn't that correct?

23 A That's correct.

1 Q As a matter of fact, it's all of Ivy Mount, isn't
2 it?

3 A That's correct.

4 Q All right. And this was -- did you know that there
5 were -- that Holdfast came on the job after -- after my
6 client came on the job for the rest -- for Ivy Mount?

7 A I was aware that they were in on it, yes, about
8 the time I left the company.

9 Q And did you experience delays through them?

10 A Again, I left the company right at the time that
11 they were there so I really wouldn't know.

12 Q And what about -- let's see, I think there was
13 another one. Condo-Ops, was that on this project too, if
14 you know?

15 A I believe they were, yes.

16 Q Okay, so actually -- and this is all Ivy Mount,
17 isn't it?

18 A That's Ivy Mount, yes.

19 MR. MAYS: Your Honor, I think Mr. Reese will admit
20 that his client's contact covered all of Ivy Mount. We're
21 talking about four buildings and those are the four builders
22 that are addressed in that sheet.

23 THE COURT: Let me ask a question of my own then:

1 Have you computed the interest by the unit and
2 shown it on the exhibit?

3 THE WITNESS: Yes, I have.

4 THE COURT: So then it's possible to take speci-
5 fied units and compute a total from there?

6 THE WITNESS: Yes.

7 THE COURT: All right.

8 BY MR. REESE:

9 Q But now, directing your attention -- this included
10 not only -- let's make sure of this, this included not only
11 my client which, of course, is John Mark, but also included
12 the operations under Condo-Ops and the operations under
13 Holdfast, this bulk sheet?

14 A I'm not sure if this includes every unit in Ivy
15 Mount, so I really couldn't say if that was a fact or not.

16 Q All right.

17 A I'm not sure there's 121 units on that sheet. I
18 didn't count them up.

19 Q All right, sir.

20 Now, are you familiar with the units in building
21 4355?

22 A Yes.

23 Q Are you familiar that unit 11 there in building

1 4355 was a model unit? Did you know that?

2 A Yes.

3 Q Okay. Did you know that 12 -- well, actually 11
4 through 17 were for model units?

5 A Yes.

6 Q All right, and you show on here the date promised
7 for them was April 18th, 1980; is that correct?

8 A That's what was given to me, yes.

9 Q And do you know of your own knowledge whether or
10 not they were used as models prior to August 15th, 1980?

11 A They were, yeah.

12 Q They were. As a matter of fact, you had an open
13 house there, didn't you?

14 A Yes, I believe so.

15 Q Okay, and as a matter of fact, you sold the models
16 much later because you wouldn't normally sell models until
17 the very end -- the tail end of the project; isn't that
18 correct?

19 A I presume so. I'm not sure.

20 Q Okay. Now, I note here, for example, we have 4355-
21 12, date of approval, June 27th; I guess it's the loan
22 approval; is that correct?

23 A Um-hmm.

1 Q All right, date promised: April 18th, 1980, and
2 you show an interest charge to my client of \$2,369. Is that
3 correct?

4 A That's correct.

5 Q Even though it was a model unit; is that correct?

6 A Yes.

7 Q Even though it had been used as a model?

8 A Um-hmm.

9 Q All right.

10 Do you, of your own knowledge, know when these
11 particular units were accepted by your --

12 A No.

13 Q -- former employer?

14 A Not off hand, no.

15 Q Did you go through the invoices to see when they
16 were accepted by representatives of the company?

17 A Before they were paid, yes, they would have to be
18 approved.

19 Q Okay, and did you find acceptances in there?

20 A If it was approved, there would be an acceptance.

21 Q Okay. On some of these units, 11 through 17, did
22 you find an acceptance dated April 25, 1980?

23 A Off hand, I couldn't say.

1 Q Couldn't say?

2 A No.

3 Q Would that have made any difference to you in your
4 computations?

5 A If the unit was accepted?

6 Q Yeah.

7 A I would say so, um-hmm.

8 Q Okay. Now, how about the -- the 40 units and the
9 30 units. Did you find any acceptances in there in May of
10 1980 signed by a Dick Kische? Did you find any of those?

11 A Again, I did not prepare this schedule so I didn't
12 go back and see if --

13 Q Oh, I understand.

14 A I just prepared the interest.

15 Q Now, this \$75,000 you came up with is a total of
16 all of these units, isn't it?

17 A That's correct.

18 Q Every one, okay.

19 MR. REESE: No further questions of this witness.

20 MR. MAYS: Your Honor, may I ask the witness some-
21 thing I forgot to ask on direct?

22 THE COURT: All right.
23

REDIRECT EXAMINATION

BY MR. MAYS:

Q Mr. Guadagnino -- Your Honor, I'd like this to be marked as Defendant's No. 13 I think we're up to.

THE COURT: Defendant's 13, a photocopy, a letter from the witness to McCarty dated July 24, '80.

(The document referred to was marked as Defendant's Exhibit No. 13 for identification.)

BY MR. MAYS:

Q Mr. Guadagnino, I show you what's been marked for I.D. as Defendant's 13. Can you identify that?

A It's a letter I sent to Mr. McCarty that he was in default in his contract.

Q And who asked you to sent that letter?

A I presume Mr. Daly.

Q And did you mail it, or do you recall how it was sent out?

A It says hand delivered. I presume it was hand delivered.

Q You don't recall?

A Off hand, no.

MR. MAYS: I'd offer this, Your Honor.

1 MR. REESE: No objection.

2 THE COURT: It's received.

3 (Defendant's Exhibit No. 13,
4 having been previously marked
5 for identification, was received
6 in evidence.)

7 MR. MAYSE: I don't have any other questions.

8 MR. REESE: I do.

9 RECROSS EXAMINATION

10 BY MR. REESE:

11 Q Wasn't that in response to a letter from John Mark
12 saying you all were in default, ADC?

13 A Off hand, I -- I really can't remember.

14 Q Was that Mr. Dillon's instruction or Mr. Daly's
15 instruction?

16 A I presume Mr. Daly.

17 Q I don't want presumptions, sir. Do you remember
18 whose instruction it was?

19 A No, I don't.

20 Q You don't know who it came from, you don't know
21 whether it was in response to a letter of default by John
22 Mark? You just prepared that letter and had it on its way?

23 A As it was two years ago, I really don't remember

1 the circumstances exactly.

2 Q All right, sir.

3 MR. REESE: No further questions.

4 MR. MAYS: Nothing further, Your Honor.

5 THE COURT: Nobody read this letter.

6 MR. WEINER: Are you referring to the breech?

7 THE COURT: "This is to advise that you in default."

8 A breech is a breech. Just to add a little humor now for
9 all of us.

10 Return to the witness room.

11 MR. MAYS: He can be excused on our part, Your
12 Honor.

13 MR. REESE: I have no reason to recall him.

14 THE COURT: They both agree; you're excused. Just
15 don't talk about the case to the other witnesses till it's
16 over.

17 You know, even the short witnesses are taking a
18 good while, and as I intimated the other day, tomorrow's
19 criminal motions' day. I have a large number of matters
20 scheduled. That means that we continue on Monday, March 1.

21 MR. MAYS: Your Honor, may we just call one more
22 witness today?

23 THE COURT: Oh, yeah, we're going to go longer

1 Whereupon,

2 THOMAS M. FARASY,

3 was called as a witness by and on behalf of counsel for
4 the Defendant, having been first duly sworn by the Clerk of
5 the Court, was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MAYS:

8 Q Mr. Farasy, you've been sworn already; is that
9 right?

10 A That is correct.

11 Q In the last hour, have you had an opportunity to
12 make an inquiry as to what the Continental Bank of Chicago
13 was charging, what prime rate they were charging during the
14 period of April to November, 1980?

15 A Yes.

16 Q And did your inquiry reveal that at anytime
17 during that period the prime rate was less than 11 percent?

18 MR. REESE: Objection, Your Honor. This has got
19 to be straight hearsay at this point. We're not dealing
20 with invoices right now. We're dealing with an inquiry and
21 I have no basis for the inquiry.

22 MR. MAYS: It's the best evidence we have at this
23 point, Your Honor.

1 THE COURT: All right, return Monday.

2 THE WITNESS: a.m., or p.m.?

3 THE COURT: a.m., ten. Thank you.

4 MR. WEINER: Thank you, Your Honor.

5 (The witness was excused from the Courtroom.)

6 MR. MAYS: Your Honor, we would call Richard
7 Kische.

8 Whereupon,

9 RICHARD J. KISCHE,

10 was called as a witness by and on behalf of counsel for the
11 Defendants, having been previously sworn by the Clerk of the
12 Court, was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. MAYS:

15 Q State your full name, please.

16 A Richard J. Kische, K-i-s-c-h-e.

17 Q Where do you reside, sir?

18 A 4343 Americana Drive.

19 Q And by whom are you employed?

20 THE COURT: In what community?

21 THE WITNESS: Annandale:

22 THE COURT: Oh, Virginia, all right.

23

1 BY MR. MAYS:

2 Q By whom are you employed?

3 A Condominium Brokers Corporation.

4 Q Prior to working for them by whom were you
5 employed?

6 A ADC Fairways.

7 Q In what capacity?

8 A As a project director.

9 Q Now, would that be the same thing as a project
10 manager?

11 A Project manager, same thing.

12 Q Could you state the dates of your employment with
13 ADC Fairways?

14 A I believe they were about two of '79 to March of
15 '81.

16 Q Prior to working for ADC Fairways, could you give
17 us the chronology of your experience in the construction
18 business? And in particular, if you would focus upon rental
19 apartment units or condominium units.

20 A Worked for a company called The Great Southwest
21 Corporation approximately 1969 through 1973, and as their
22 assistant projects director in that capacity, worked with
23 6,000 apartment units. The rehabilitation as well as the

1 leasing of those units. Also in that capacity, worked with
2 construction of retail buildings.

3 Worked for another company called Continental
4 Mortgage Investors and with their apartment projects in
5 Atlanta, Georgia and resort projects in Panama City, Florida
6 and Boone, North Carolina, the rehabilitation of those
7 projects.

8 When I went to school here in the Washington area,
9 worked with a company called Edmond J. Bennett Associates.
10 We didn't build apartments at that time but we built houses
11 and communities; Cataract Springs was a community that I
12 worked on in Potomac, Maryland. Construction of houses as
13 well as improvements of land.

14 Q All right. Would that bring us up to the time you
15 started working for ADC Fairways?

16 A There were -- one gap in there. I did not work
17 in construction work in the sale of condominiums from about
18 1977 'til the employment at ADC Fairways.

19 Q In that connection, sir, was it part of your
20 responsibility to walk condominium units with prospective
21 purchasers?

22 A In the capacity as a seller of condominiums, yes.

23 Q All right. Do you hold any degrees?

1 A Yeah. I have a Bachelor's Degree from American
2 University in Real Estate; I have an MBA from same, MBA in
3 International Business.

4 Q All right.

5 During the time you were employed with ADC
6 Fairways, did there come a time when you became involved in
7 the Ivy Mount Project?

8 A Yeah.

9 Q Do you recall about when that was?

10 A I was indirectly involved in, I think it was
11 March of -- of 1980.

12 Q Could you state what your duties were in March,
13 1980, until say the end of July, 1980? In reference to
14 Ivy Mount.

15 A Yes. It was to -- there was another project
16 manager, I've forgotten her name, pick up and absorb her
17 duties, and her duties which eventually became mine were to
18 oversee the contracts, the various contractors that we had
19 on the -- on the site, rehabilitating Ivy Mount for the
20 purposes of becoming a condominium, seeing to it that the
21 units got sold and delivered to purchasers and helping
22 arrange for financing for those purchasers.

23 THE COURT: You were in charge of the sales force?

1 THE WITNESS: Yes.

2 THE COURT: When you say -- all right.

3 THE WITNESS: As well as the construction end, in-
4 loan financing in some instances.

5 BY MR. MAYS:

6 Q In your capacity as project manager of Ivy mount,
7 could you describe for us the procedures involved in accept-
8 ing units for payment and approving of invoices?

9 A At Ivy Mount, we had a contract. The contract
10 stated that certain delivery dates were to be met, that
11 certain things were to be done to the units and those --
12 when the -- when the contractor said that the units were
13 ready, they were walked; and if they were in compliance with
14 the contract, they were accepted and okay'd.

15 Q All right. Mr. Kische, let me show you what's
16 been admitted into evidence as Plaintiff's Exhibit Number
17 One, and can you identify that?

18 A Yes, it's a contract that we had with John Mark
19 Construction Company regarding the improvements of units at
20 Ivy Mount.

21 Q All right. Have you read the contract?

22 A I read it in the past, right.

23 Q Did you read what's known as the Scope of Work

1 Section of the contract as to what was required of the
2 contractor?

3 A Right.

4 Q All right.

5 Did there come a time in reference to Ivy Mount
6 when you submitted some invoices for payment which were
7 contingent upon certain items? Do you recall that situation?

8 A There were -- don't recall submitting any of the
9 invoices directly for payment. There were times when I was
10 asked to go up there and review -- review units to see if
11 they were substantially complete.

12 Q All right, in that connection, did you ever
13 initial invoices or indicate that they were okay, or any-
14 thing of that nature?

15 A I initialed invoices at the request of ADC Fairways
16 to -- again, to verify those that were partially or substan-
17 tially complete, not necessarily entirely complete.

18 Q And what was the purpose for that?

19 A The -- at various times, the contractor here, John
20 Mark, was having some monetary problems and he had requested
21 some payments or he was going to go broke. So I was
22 requested to -- even though the units weren't 100 percent
23 complete, to go and review the units and determine which

1 ones were substantially complete so we could give him some
2 money.

3 Q So you're saying it was a basis upon which to
4 advance the contractor monies?

5 A Right.

6 MR. MAYS: Your Honor, I would like to write some
7 Unit Numbers on the board. May I get the marker?

8 THE COURT: Um-hmm. You can even put tape on it.

9 BY MR. MAYS:

10 Q Mr. Kische, I'd like to ask you about 11 units in
11 Ivy Mount. I'll write them on the board so we'll know which
12 ones we're talking about.

13 Can you see this board?

14 A Need to move it over just a little to my left.

15 (The board was moved.)

16 THE WITNESS: Got it.

17 BY MR. MAYS:

18 Q All right. I'm talking about Building 4355, Units
19 -- for the record, this would be Building 4355, Units 21,
20 22, 23, 24 --

21 THE COURT: Through 27.

22 MR. MAYS: Through 27; just want to make it clear
23 for the record, Your Honor.

1 THE COURT: It's clear enough. I am sick to
2 death of things dragged out. Now, gentlemen, I'm going to
3 get a real whip out and make you all hurry.

4 MR. MAYS: Your Honor, I'm just trying to make it
5 clear.

6 THE COURT: It's clear enough if you say 21
7 through 27 inclusive.

8 BY MR. MAYS:

9 Q 28, 32, 33 and 38. Do you recall this building,
10 Mr. Kische, in Ivy Mount?

11 A Yes, our office was in that building.

12 Q All right, and do you recall where these units
13 are in the building?

14 A Yes, I do.

1

1 Q Now, I'd like to direct your attention to on or
2 about July -- after July 3rd, 1980. After that day, did
3 you have an opportunity or occasion to inspect these
4 units?

5 A Yes, I did.

6 Q And what was the purpose of your inspection?

7 A The purpose was to see what needed to be done
8 to complete the units.

9 Q Now, were you -- who was present with you when
10 you walked these units?

11 A Mr. -- well, there were, I think, the specific
12 time that you're referring to, it was probably Ramono,
13 Mr. Ramono of Holdfast Builders.

14 Q Okay. Could you tell the Judge who Mr. Ramono
15 is?

16 A He's the president of Holdfast Builders,
17 another construction company that specialized in the
18 rehabilitation of apartment buildings, conversion --
19 converting them into condominiums.

20 Q Is Holdfast the builder who took over John
21 Mark's work?

22 A Yes. On this particular building, yes.

23 MR. MAYS: All right, Your Honor, I'd ask that

1 this group of documents be marked for identification.
2 We're now finally to the area where I've prepared these
3 sheets on each unit for the Court. Your Honor has a copy
4 of the sheets I prepared, documents below those are. But
5 I'd like the Witness to refer to both sets.

6 THE COURT: Oh, yeah. As items in evidence?
7 Is that -- or are you going to have him say: Did you
8 find things leading to them and what were they?

9 MR. MAYES: Right.

10 THE COURT: Now, you have a little bit more than
11 the Court lists. Here's a photocopy of some kind of
12 extra sheet.

13 MR. MAYES: Right, the walk sheet I'm going to
14 have the Witness refer to. The top sheets I really made
15 for Court and counsel's benefit, but I want the Witness
16 to see those two as a reference.

17 THE COURT: Does the sheet labeled "walk for
18 extra" sheet cover the same things in the same sequence?

19 MR. MAYES: Your Honor, the "walk for extra"
20 sheet has certain items listed there. On the sheets I
21 made for the Court --

22 THE COURT: Are they the same?

23 MR. MAYES: They're not exactly the same because

1 the items on the sheets that compare to your request
2 are the only items which we're claiming John Mark did not
3 complete as per their contract.

4 The Holdfast walk sheets have other items which
5 may not have been part of John Mark's responsibility and
6 therefore, we're not claiming anything in reference to those
7 items.

8 THE COURT: Maybe there's a simple way. These
9 numbers begin at 21 and they go up. Why don't we just
10 let them be exhibit numbers with the same unit number.

11 MR. MAYS: All right.

12 THE COURT: Then, if you're looking at -- they're
13 all in Building 4355.

14 MR. MAYS: They're these units, Your Honor.

15 THE COURT: So when you refer to Unit 21, just
16 call it Defendant's 21 which will also be the apartment
17 number.

18 MR. MAYS: All right.

19 THE COURT: And then I'll mark them later as
20 the Defendant's as you hand them to me.

21 MR. MAYS: All right.

22 (The documents referred to were
23 marked Defendant's Exhibits
No. 21 through 38 for
identification.)

1 MR. REESE: If Your Honor please, it's my
2 understanding that these are being offered for
3 identification purposes at this time. Are they going to
4 be used by the Witness --

5 THE COURT: If he offers some into evidence,
6 he'll say so. They're going to be used by the Witness --

7 MR. REESE: That's another question.

8 THE COURT: Huh?

9 MR. REESE: I think the question --

10 THE COURT: He can identify them.

11 MR. REESE: Surely, I have no problem with him
12 identifying them, but then using them for the basis of
13 his testimony is a different question.

14 THE COURT: Just a minute till I pull them out
15 of the stack I have. I'm almost ready.

16 Proceed.

17 BY MR. MAYS:

18 Q Mr. Kische, before I show you these sheets,
19 can you testify from memory when you walked these units
20 in July of 1980, what their condition was, as you recall?

21 A They were again substantially complete.
22 That doesn't mean they were a hundred percent complete.

23 Q What do you mean by that? Could you amplify

1 that?

2 A Yeah. The -- there were portions of the units
3 that -- that were painted that made the -- dirt from under-
4 neath may have bled through. There were imperfections in
5 the service of the wall. In other words, a nail was
6 driven -- may have been driven into the wall wasn't spackled,
7 painted. There's still an indentation on the wall. Some
8 of the grills on the heating and air conditioning were
9 not properly cleaned; the heating and air conditioning
10 grills were not properly cleaned off before they were
11 painted.

12 Q What about cleaning in general? Do you recall
13 just from memory whether or not these units were clean?

14 A Most of them needed to be clean.

15 Q Mr. Kische, how did you enter these units?
16 By what means?

17 A I had to, in most cases, get a locksmith to
18 open the doors up.

19 Q To your knowledge, had anyone entered these
20 units from July 24th, 1980, to the date that you went in?
21 To your knowledge, had anyone else gone in the units?

22 A Not to my knowledge.

23 Q Now, I ask you to look at this group of

6
1 exhibits. We'll take them one at a time, I guess, would
2 be the best way. I show you what's been marked as
3 Defendant's No. 21, ask if you can identify this second
4 page?

5 A Yeah, I can identify that.

6 Q Tell us what that is, please.

7 A It's a list of items that Mr. Ramono and myself
8 noted needed to be done to complete the unit. In this
9 case, No. 21.

10 Q Was the scope of work in the Holdfast contract
11 the same as in the John Mark contract?

12 A A little different but essentially the same.

13 Q How was it different? Do you know?

14 A It's a little different. I can't really remember
15 what the differences were.

16 Q What about in reference to exactly what work
17 was required to be done in the unit? Was that the same or
18 different?

19 A Just about the same.

20 Q All right.

21 Now, you earlier read the John Mark contract and
22 you have an understanding of what was required of John
23 Mark?

1 A Right.

2 Q Now, could you state please for the Court --
3 well, before I ask you that, does this document bear your
4 signature?

5 A Yes, it does.

6 Q And is the document dated?

7 A Yes, it is. 7/25/80.

8 Q And would that be the date you walked these
9 units?

10 A Right.

11 Q Now, could you state, please, what items were
12 noted on that document that were within John Mark's
13 contract that were not complete?

14 MR. REESE: If Your Honor please, I have to
15 object at this particular time. I would have no
16 difficulty with him saying what items were within John --
17 on that list were within John Mark's province, but now,
18 for him to say that those items were incomplete, I think
19 we're going to have to have him be able to testify from
20 his own knowledge that those items were, in fact, incomplete.

21 THE COURT: Well, first is: Do you remember?
22 Then: Did you make a record? Then, the past recollection --
23 recollection refreshed is the next one.

1 MR. REESE: Well, I haven't heard that --

2 THE COURT: And the fourth stage is past knowledge
3 recorded.

4 MR. REESE: But I haven't heard that foundation
5 laid.

6 THE COURT: I sustain it.

7 BY MR. MAYS:

8 Q I asked you generally what you recalled about
9 the units, Mr. Kische.

10 THE COURT: Turning the paper face down so that
11 you don't see it. That's on 21, is it?

12 MR. MAYS: Yes, Your Honor.

13 THE COURT: Can you list from memory what was
14 wrong in 21?

15 THE WITNESS: I can't list all the items.

16 THE COURT: Did you make a record at the time
17 known as a walk-through sheet?

18 THE WITNESS: Yes, sir.

19 THE COURT: If you see it, do you think it
20 would bring it back to your memory?

21 THE WITNESS: Yes, sir.

22 THE COURT: Well, look at it and see and tell me
23 if it brings each item back to your memory or whether it

1 simply: I know it was right then, but I don't know now,
2 you know, what -- the degree of recollection.

3 THE WITNESS: The items that I can recall in
4 this -- this unit are the final clean and the paint, the
5 items that related to paint: paint touchup throughout,
6 paint -- there are some specific items; I'm not sure
7 whether they applied to this specific unit, but I --
8 there's one here that says paint the door. Paint touchup
9 throughout and final clean up, I recall.

10 THE COURT: Whose handwriting is on 21?

11 THE WITNESS: That's Mr. Ramono's handwriting.

12 THE COURT: All right. Did you look at it
13 after you made the writing?

14 THE WITNESS: Yes, sir.

15 THE COURT: Do you know today whether it was
16 accurate when he finished writing it?

17 THE COURT: Yes, sir. We reviewed it at the
18 end of each inspection.

19 THE COURT: Each inspection. Did you mark it in
20 any way yourself?

21 THE WITNESS: Yes, sir. I put my signature on
22 the bottom of each list.

23 THE COURT: And what was the purpose of doing that?

1 THE WITNESS: To show that I concurred that this
2 was what needed to be done to that specific unit.

3 THE COURT: Go ahead.

4 BY MR. MAYS:

5 Q In the normal course of your business,
6 Mr. Kische, after the document was prepared and the units
7 had been walked, what was done with the document by
8 you or A.D.C. Fairways?

9 A The document was -- was priced out. The price
10 was attached to each individual item that needed to be
11 done.

12 Q Who submitted the price?

13 A Mr. Ramono submitted the price at which he
14 did these for.

15 Q Okay, what was done with the document in terms
16 of where was it kept, stored, et cetera?

17 A Okay. This document was kept on file in my
18 office here at 4355 Ivy Mount Court.

19 Q Were these documents kept in the ordinary course
20 of business, the business that A.D.C. Fairways was doing
21 at that time?

22 A Yes. We had a file for every building and every
23 unit in that building.

1 Q And you've probably said this, but the purpose
2 of this walk was to list the items that were not
3 complete and the units that -- that you wanted Holdfast
4 Builders to do; is that correct?

5 A Right.

6 Q And Mr. Kische, based on your past experience
7 in the construction field, have you -- do you have
8 knowledge of what contractors such as Holdfast and John
9 Mark charge for this type of work in Northern Virginia,
10 what they were charging in July of 19-, --

11 A At that juncture in time, yes.

12 Q All right, and do these figures appear to be
13 comparable, reasonable compared to what other contractors
14 were charging at the time?

15 A Yes, sir, they're in the -- in the range of
16 what was being charged by others.

17 Q Okay, and could you state then what -- well,
18 state again what was not done, what was incomplete that
19 should have been completed by John Mark.

20 A We have a final clean that was to have been
21 completed by him. We have paint touchup; we have caulking
22 in the hall bath. We had touchup in the closet in the
23 master bedroom. We had repaint sills in Bedroom No. 2.

1 We had paint closet in Bedroom No. 3. We had some tests
2 that needed to be done in the electronic switches and plugs.

3 Q All right. Do those items appear on this cover
4 sheet?

5 A Yes.

6 Q All right, and what is the total of the figures
7 supplied by Holdfast for those items?

8 A \$145.10 on this particular unit.

9 MR. MAYS: All right, Your Honor, I would
10 offer this as -- either under past recollection recorded
11 or present memory refreshed. Probably it's more accurate
12 under past recollection recorded and under Defendant's
13 Records.

14 THE COURT: Well, the top sheet, it's this
15 one (indicating)?

16 MR. MAYS: That's correct.

17 MR. REESE: Well, the difficulty I have with that,
18 if Your Honor please, you say the top sheet he doesn't
19 need and yet the top sheet reflects his claim.

20 THE COURT: Well, they're the same.

21 MR. REESE: I don't know that they are the same,
22 Your Honor.

23 THE COURT: Looks like it to me. Same sequence

1 remembered., That's the beauty of court orders; they
2 demoralize it.

3 All right, therefore, the \$44 item goes off.

4 MR. REESE: Thank you, Your Honor.

5 THE COURT: But otherwise, the exhibits in.
6 What's next?

7 (Defendant's Exhibit No. 21
8 was received into evidence.)

9 MR. MAYS: So I can understand what's happening
10 here, why does the \$44 item go off? It's on the --

11 THE COURT: Just read what I've marked on my
12 court order.

13 MR. MAYS: But Your Honor, the cleaning item
14 is on the sheet that I've prepared. I'm not amending
15 it.

16 THE COURT: Where does it say "repair sliding
17 glass door frame and lock"?

18 MR. WEINER: This is what we prepared pursuant
19 to the pretrial order is what Mr. Mays is saying.

20 MR. MAYS: Oh, that's correct, Your Honor.
21 We're not asking for that -- for the sliding glass door,
22 so you're correct in striking that off, yes.

23 MR. WEINER: But you said the cleaning.

1 THE COURT: I agree with you, Mr. Reese.

2 MR. REESE: It's about time, Your Honor. It's
3 about time.

4 THE COURT: Next question.

5 BY MR. MAYS:

6 Q All right, Mr. Kische, moving along, I show you
7 what's been marked for identification as Defendant's No. 22
8 and ask you if you can identify that.

9 A Yes, it's a -- same set of circumstances, a
10 review of the unit. Items that needed to be done to
11 complete the unit were noted. My signature and that of
12 Mr. Ramono on the sheet of paper and prices were attached
13 to the unit, comparable items that needed to be done.

14 Q All right. I ask you this now: would you read
15 the items on that exhibit and the figures that conform to
16 this top cover sheet when they're the same?

17 THE COURT: Well, I'll do it on this one.

18 BY MR. MAYS:

19 Q All right, let me ask you this: do the items
20 and the figures on the top sheet, do they also appear
21 on the bottom sheet?

22 A Yes.

23 Q On the actual exhibit?

1 A Yes.

2 Q All right. I think that's a quicker way.

3 A Okay.

4 MR. MAYS: And I'd offer this, Your Honor.

5 THE COURT: Now, while we're talking, you go
6 look at the sheets that go on up through the other
7 numbers on the board. Just look at them to yourself.

8 BY MR. MAYS:

9 Q Okay, Mr. Kische, look at these and tell me if
10 these are all the same situation.

11 THE COURT: Now, on D-22, you seem to have an
12 extra item, counselor: repair and repayment mechanical
13 room, something door and jam, \$24. It's not on this one..

14 MR. MAYS: Then it should be crossed off like
15 you did on the other one.

16 THE COURT: Therefore, you're not offering it
17 for that?

18 MR. MAYS: That's right. See, we'll have to go
19 through these one by one.

20 THE COURT: I'll show you how to do it.

21 MR. MAYS: No, I know how to do it. Go ahead.

22 THE COURT: Mr. Kische, have you now looked at
23 the "walk for extra" sheets for Units 23 through 28 plus

1 32, 33 and 38?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: All right. Is your testimony the
4 same for those as it was for 21 and 22?

5 THE WITNESS: Yes.

6 THE COURT: All right. Then why don't you offer
7 them and we'll do the comparison right now so that an
8 objection can be made to exceed the amounts under the
9 pretrial --

10 MR. MAYS: All right, I'd offer them, Your Honor.

11 THE COURT: All right, hand them up.

12 MR. MAYS: And the -- off the record.

13 (Short conference was held off the record.)

14 THE COURT: You want to come up Mr. Reese so
15 you can compare them?

16 MR. REESE: The Court Reporter would note a
17 continuing objection because of the lateness of the
18 presentation of these documents.

19 MR. MAYS: Mr. Reese, you were provided --

20 THE COURT: I don't understand what you mean
21 by "late presentation."

22 MR. REESE: At the very beginning of the
23 trial, the issue was raised --

1 THE COURT: Whatever you're going to "x" off
2 at the top.

3 MR. REESE: But I have to total that to do it.
4 That's all I'm saying.

5 MR. MAYS: That's what I understood, Your
6 Honor.

7 THE COURT: Let me show you once more what I want
8 you to do. Somebody can do the adding machine work later.

9 MR. REESE: That works fine, Your Honor, if
10 you've got one figure; but when you've got more than one
11 figure --

12 THE COURT: Then you put minus those several
13 amounts at the bottom.

14 MR. MAYS: Oh, okay.

15 THE COURT: Just leave tracks, that's all, and
16 let somebody do the math after I've gone home.

17 Off the record.

18 (A conference was had off the record.)

19 THE COURT: The remaining work for extra sheets
20 are received in evidence in accordance with the numbers
21 on the board and heretofore given in evidence.

22 (Previously marked Defendant's
23 22 through 28, 32, 33, and
38 were received into
evidence.)

1 MR. REESE: Note the Plaintiff's objection.

2 THE COURT: The deletions have been noted here
3 and the total counsel computed, \$1,-,--

4 MR. REESE: Fifteen 37 was the figure.

5 THE COURT: -- \$537.

6 DIRECT EXAMINATION (Resuming)

7 BY MR. MAYS:

8 Q Mr. Kische, to your knowledge, did Holdfast
9 Builders, in fact, complete the items which were just
10 discussed?

11 A Yes, they did.

12 Q Mr. Kische, after May 2nd, 1980, did you accept
13 any units in Ivy Mount?

14 A No.

15 THE COURT: After what date?

16 MR. MAYS: May 2nd, 1980.

17 BY MR. MAYS:

18 Q And I believe you testified earlier you had
19 approved some invoices as a basis for advancing the
20 contractor money; is that correct?

21 A Right.

22 Q And didn't you also approve some invoices
23 contingent upon the contractor furnishing missing items?

1 A Right.

2 Q Now, in that situation, would you make a notation
3 on the invoice that it was a contingent acceptance?

4 A Usually made a notation on the invoice, or
5 wherever. Primarily on the invoice.

6 Q Would you make it on some other document?

7 A Maybe on a walk sheet, another walk sheet.
8 There were several of those floating around.

9 Q Mr. Kische, I wanted to show you another exhibit,
10 Defendant's Exhibit No. 12. Can you identify that?

11 A Yes.

12 Q What are those documents?

13 A It's a sales report for Ivy Mount, lists the
14 name of the purchaser and other information such as
15 when the units were walked, what the prices were of other
16 units.

17 Q As project manager in Ivy Mount, did you have
18 any responsibilities in connection with these sales
19 report?

20 A Yes. This was something that I had to prepare
21 at least once a week and was used daily in the operation
22 of our business on the site.

23 Q All right.

1 Mr. Kische, in the ordinary course of events,
2 if a unit was completed and the purchaser's loan was approved,
3 about how long after that would settlement take place?

4 A Within -- usually within 30 days. That was
5 a part of their contract, we could give them notice to
6 proceed within that period of time.

7 Q All right. Do you remember a situation where
8 you walked a unit with a purchaser and a punch list was
9 made where the contractor or another crew would have to
10 come in and do certain punch-out work? Did that ever
11 happen?

12 A It happened.

13 Q And what was the attitude of A.D.C. Fairways
14 in reference to that type of situation?

15 A The policy was to have the -- the units 100
16 percent complete so that we didn't have any of those lists
17 with customers -- purchasers.

18 Q I forgot to ask you something in connection with
19 Defendant's Exhibit 12, Mr. Kische. Are those sales reports
20 maintained as business records, or were they maintained on
21 the Ivy Mount project during April, July, 1980?

22 A Yes.

23 Q And do you know whether a copy

1 was also maintained in the A.D.C. office in Adelphi,
2 Maryland?

3 A Yes, these were sent to the main office weekly,
4 usually on a Monday.

5 Q All right.

6 MR. MAYS: Your Honor, no further questions.

7 MR. REESE: Recross?

8 THE COURT: Just let me ask -- off the record.

9 (A short discussion was had off the record.)

10 THE COURT: Break till Monday.

11 (Whereupon, the proceedings concluded at 5:15
12 o'clock p.m.)

1 Whereupon,

2 RICHARD KISCHE

3 resumed the stand, and having been previously duly sworn
4 by the Clerk of the Court, was further examined and
5 testified as follows:

6 DIRECT EXAMINATION (Resumed)

7 BY MR. MAYS:

8 Q Mr. Kische, I'd like to take you back to July,
9 August 1980, after JohnMark Construction left the Ivy Mount
10 job site.

11 Now, did there come a time when you took an
12 inventory of JohnMark supplies?

13 A Yes.

14 Q Do you recall about when that was?

15 A Beginning of August.

16 MR. MAYS: Your Honor, I ask that this document
17 be marked as Defendants' No. 13, I believe is what we're
18 up to.

19 THE COURT: There is a group of exhibits which
20 began with D-21, so we can use 13 through 20.

21 MR. MAYS: This will be Defendants' 13.

22 THE COURT: Defendants' 13 for I.D. will be --
23 somebody's written on top of it in different color ink

1 JohnMark Inventory. So, I'll call it that.

2 (The document referred to was marked
3 Exhibit D-13 for identification.)

4 BY MR. MAYS:

5 Q Mr. Kische, where did you find the JohnMark
6 material and supplies which you inventoried?

7 A They were in the 4345 building on the first
8 floor, units of the first floor.

9 Q How did you obtain entry into those units?

10 A I believe it was through a locksmith. Lock-
11 smith unlocked the doors.

12 Q To your knowledge, from the time that JohnMark
13 left the Ivy Mount job until you entered these units with
14 the locksmith, to your knowledge had anybody else entered
15 the units?

16 A Not to my knowledge.

17 Q I show you what's been marked as Defendants'
18 13 for identification; ask if you can identify it?

19 A Yeah. This is the inventory sheet that we
20 worked on.

21 Q Who is we?

22 A Myself and one of my employees, Dennis Wolfe.

23 Q Did you include on that list all of the material

1 and supplies that were in the two units?

2 A All of them that we saw at the time. Right.

3 Q Did you place a value as to what those items
4 were worth on that sheet?

5 A We went down through the list and placed a
6 value on each one of them.

7 Q Upon what basis did you arrive at the value for
8 the material?

9 A Values were obtained from suppliers and from
10 invoices that we had in the office.

11 Q What is the total value of the inventory which
12 you took?

13 A Nine thousand -- 9,144.70. \$9,144.70.

14 Q Start over.

15 A \$9,144.70.

16 Q Mr. Kische, prior to taking this inventory, did
17 you request JohnMark to remove the -- its material from
18 these units?

19 A Yes.

20 Q Do you recall who you -- whom you made this
21 request of?

22 A I believe it was John Sauer.

23 Q All right. Your Honor, I'd offer this into

1 evidence.

2 THE COURT: Mr. Reese.

3 MR. REESE: No objection at this time, Your
4 Honor.

5 THE COURT: It's received.

6 (The document referred to, having
7 been previously marked Exhibit D-13
8 for identification, was received
9 in evidence.)

10 MR. MAYS: No further questions.

11 CROSS EXAMINATION

12 BY MR. REESE:

13 Q. Mr. Kische, did you perform this inventory on
14 the very same day the locks were picked in building 4345?

15 A. Yes.

16 Q. The inventory carries a date, does it not, of
17 August 8, 1980?

18 A. Right.

19 Q. It's in your handwriting?

20 A. I believe that's my handwriting.

21 Q. Did you ask that the locks be picked?

22 A. Yes.

23 Q. Do you recall Brown's Lock and Key Service?

1 A I believe it was Brown's Lock and Key. It may
2 have been another service.

3 Q Now, this is -- make it very certain this is
4 building 4345; right? Is that the building we were talking
5 about?

6 A 4345, right.

7 Q Let me show you this invoice which was obtained
8 from ADC's records on a Motion to Produce, and ask you if
9 you can take a look at this invoice number 12273 from
10 Brown's Lock and Key Service.

11 A Okay.

12 Q All right, sir.

13 A 4345 --

14 Q All right, sir.

15 A -- pick open all locked doors in the building.

16 Q It carries your writing, does it not? Says
17 okay?

18 A Uh-huh.

19 Q Isn't that not your writing in here?

20 A Yes.

21 Q All right, sir.

22 Now, take a look at the date that it says the
23 job was completed.

1 THE COURT: What job?

2 MR. REESE: The picking open of the locks at
3 4345.

4 BY MR. REESE:

5 Q Have you had a chance to look at that date?

6 A Yeah, it says 7/30/80.

7 Q Now, that says pick open all the locks in
8 building 4345; doesn't it?

9 A That's what it says.

10 Q All right, sir. And you signed that invoice;
11 didn't you?

12 A Uh-huh.

13 Q Doesn't that tell you, then, that all the
14 locks in 4345 were opened on July 30, 1980?

15 A That's what it says.

16 Q And you performed this inventory on August 8,
17 1980; is that correct?

18 A Uh-huh.

19 Q Now, let me take you back to a deposition that
20 was held Monday, December 21, 1981 in my office -- and
21 counsel, I'll be looking at page -- pages 24, 25 beginning
22 at the bottom of page 24 at line 21. All right, sir.

23 Now, you've indicated that you took the

1 inventory on August 8th.

2 A Yeah.

3 Q Which was immediately after the doors had been
4 unlocked?

5 A Yes.

6 Q Do you want to change that testimony in view
7 of this invoice, sir?

8 A This invoice says that he opened all the locked
9 doors. I think he's missing a little phrase in there that
10 says all locked doors that will be directed to open up.
11 But I mean that's -- I know what it says there, but we
12 didn't direct him to open up the offices.

13 Q I also note your okay.

14 A Okay. Yeah.

15 Q Now, let me turn your attention to this deposi-
16 tion, and ask you if you would, beginning on line 21 at the
17 bottom of page 24 and coming over to line 4 on page 25, if
18 you will review that deposition.

19 (Pause.)

20 A Okay.

21 Q All right, sir. Now, directing your attention
22 to the following question I ask you, JohnMark was off the
23 job on July 24, 1980; is that correct?

1 A. I don't know the exact date, but I know it was
2 sometime after the end of July.

3 Q. And you performed the inventory a considerable
4 period of time after they went off the job; is that not
5 correct, sir?

6 A. Yeah.

7 Q. Now, did you mean by "considerable period of
8 time" the distance from July 24th to August 8th?

9 A. It's -- it could have been. Right.

10 Q. I mean that's what you considered to be a
11 considerable period of time?

12 A. I think that's enough time.

13 Q. That's considerable?

14 A. Yeah.

15 MR. REESE: If Your Honor please, I'd like to
16 have this Brown's Lock and Key Service invoice number
17 12273 admitted into evidence, if Your Honor please.

18 THE COURT: Plaintiff's 17. Wish to be heard
19 on it?

20 MR. MAYS: No objection.

21 THE COURT: Into evidence. Just one minute
22 while I look at it.

23 MR. REESE: Sure.

1 with reference to the number of items and the figure as
2 to their worth?

3 THE COURT: Here's the copy that you talked
4 from because that's the Court copy.

5 THE WITNESS: Okay.

6 THE COURT: One's pencil; one's ink. One's
7 blue ink at the top, and the basic sheet's a photocopy to
8 start with.

9 BY MR. REESE:

10 Q I note here it says JohnMark Inventory --
11 very top it says this -- which is in blue ink --

12 A Right.

13 Q -- is that correct?

14 Was that on there at the time that you did the
15 inventory?

16 A I took the original back to the office and
17 made Xerox copies of it and identified it.

18 Q But is this the original here? What you have
19 in your hand, sir, the exhibit, is that the original?

20 A Yeah. It's a copy, but as far as the prices
21 and so forth carried out, it's the most complete original --
22 if that's the word -- that there is.

23 THE COURT: It's a photocopy that you say was

1 made at the same time. It says the same information as
2 the original; is that right?

3 THE WITNESS: Right.

4 THE COURT: Then somebody added the prices to
5 this copy.

6 THE WITNESS: Right.

7 THE COURT: Okay.

8 BY MR. REESE:

9 Q Did the original have the blue ink at the top?

10 A No.

11 Q So, it's not the same.

12 THE COURT: He says that after it was photo-
13 copied, then he identified it, i.e., wrote on the top
14 JohnMark: Inventory.

15 MR. REESE: I realize that.

16 THE COURT: He's answered that.

17 BY MR. REESE:

18 Q Was it on August 8th that you added this date;
19 if you recall?

20 A I believe it was.

21 Q The answer is yes, all right.

22 Now, who put the pencil writing down the side?

23 A When we got back to the office --

1 THE COURT: The question is who, sir?

2 BY MR. REESE:

3 Q Who?

4 A I believe who did it, I believe it was Dennis
5 Wolfe.

6 Q Dennis Wolfe of -- all right. Who put these
7 quantity numbers down there?

8 A This is all in Dennis' handwriting.

9 Q Everything's in Dennis' handwriting including
10 the figures down the side; is that correct?

11 A (The witness indicated in the affirmative.) I
12 believe so.

13 Q Did you give Dennis Wolfe permission to take
14 items out of the inventory?

15 A After we made the inventory, yeah.

16 Q And you made it on August 8th; is that correct?

17 A I believe -- yeah.

18 Q Did he have permission prior to then to do it?

19 A No.

20 Q All right, sir. When did you leave the Ivy Mount
21 project?

22 A Pardon me?

23 Q When did you leave the Ivy Mount project?

1 A I guess when I left the employment of ADC
2 Fairways. You mean physically when did I leave?

3 Q You went from the Ivy Mount project to another
4 project; did you not?

5 A Yeah. Valley Park.

6 Q So, my question is when did you leave the
7 Ivy Mount project?

8 A I believe it was September or October.

9 Q Of what year?

10 A 1980.

11 Q September, October of 1980; is that correct?

12 A Yeah. I may even have been there November.
13 I don't know.

14 Q No later than November 1980, however?

15 A I don't believe so. No.

16 Q Okay. Wouldn't have been any later than that.
17 All right. Very good.

18 Now, you were questioned were you at the Ivy
19 Mount project in March of 1980?

20 A Physically with offices, no.

21 Q All right, sir.

22 Did you go over to the unit -- to the Ivy Mount?

23 A Yes.

1 Q Were you Project Manager at that time?

2 A Was being transferred into Project Manager at
3 that time; state of transition.

4 Q Now, in that state of transition, were you
5 familiar with the situation having to do with ADC's
6 insistence that they order all the cabinets for Ivy Mount?

7 A No.

8 Q You didn't know that they did that?

9 A That they ordered them themselves?

10 Q That's right. That ADC ordered the cabinets
11 themselves.

12 A No.

13 Q Okay. Does the name Jim Turner wring a bell
14 with you?

15 THE COURT: What name?

16 MR. REESE: Jim Turner, T-u-r-n-e-r.

17 THE WITNESS: I believe he was the salesman at
18 Marbletop Company.

19 BY MR. REESE:

20 Q That's from whom the cabinets were ordered;
21 isn't that true?

22 A I didn't know whether they were ordered. I
23 know that Turner was in the employ of this Chesapeake

1 Marble Company.

2 Q Do you know when the cabinets were delivered?
3 Now, we're talking about cabinets for all of Ivy Mount?
4 Now, do you know when they were -- the first increment of
5 cabinets for Ivy Mount came in?

6 A Not positive when they were delivered, no.

7 Q Would the date of April 20th ring a bell with
8 you?

9 A Not really. No, not as far as the cabinets
10 are concerned. I know they were delivered. I don't know
11 when they were delivered.

12 Q Do you know of your own knowledge that they
13 were delivered after the first date that the units were
14 supposed to be ready on April 18th?

15 A I don't know that.

16 Q You don't have any recollection of that?

17 A I don't have a recollection of that, no.

18 Q You were Project Manager at that time; weren't
19 you?

20 A There were a lot of things coming in. I don't
21 remember that. What do you want me to say?

22 Q I think you have said enough as far as that.

23 A Okay.

1 Q Fine.

2 Now, do you remember power having to be turned
3 off at some of the buildings, specifically 4355? Do you
4 remember that during March of 19 -- March and April of 1980?

5 A There were moments when it had to be turned off,
6 but not days.

7 Q All right. But it had to be turned off in the
8 entire building?

9 A Yeah. It had to be turned off.

10 Q Do you remember floods caused by bursting
11 pipes in building 4355 in March of 1980?

12 A No.

13 Q All right. Turning to the Defendants' exhibit
14 having to do with Holdfast, if I might, I believe it's
15 identified as Defendants' -- I don't see a number, but
16 let's deal with it.

17 THE COURT: It's not in evidence, then. May
18 I see the paper you're referring to?

19 (Handing document to the Court.)

20 THE COURT: We agreed that on these walk-
21 through sheets we would use the apartment number as the
22 exhibit number. Therefore, for apartment 21, it's Exhibit
23 D-21 and so forth.

1 MR. REESE: All right. Then that's what I will
2 use. Thank you.

3 BY MR. REESE:

4 Q Directing your attention to these exhibits having
5 to do with the walk-through sheets of Holdfast, this is
6 Mr. Romano, is it not, that you were working with?

7 A Yes. Uh-huh.

8 Q All right, sir. Now, I note that on each and
9 every one of these that there are two items that are
10 consistently named, and two items that are consistently
11 contained on the claim sheet of ADC. The first has to do
12 with electrical tests of switches and plugs.

13 A Uh-huh.

14 Q Now, did you put this down, or did Mr. Romano?

15 A That's his handwriting.

16 Q But you agreed to pay that; is that correct?

17 A Right.

18 Q All right, sir. Did you contact Barry Mates
19 of BT Electrical to find out whether or not they had, in
20 fact, done the electrical checks?

21 A No.

22 Q All right. Did you know, sir -- now, you were
23 once again Project Manager, did you know that Mr. Mates

1 at BT Electrical had, in fact, finalized all of these units
2 that are listed here on the walk-through sheets?

3 THE COURT: Use another word besides finalized.
4 Done what?

5 BY MR. REESE:

6 Q Had completed all of the work?

7 A They may have.

8 THE COURT: Their work? Something they con-
9 tracted to do?

10 BY MR. REESE:

11 Q Had completed all of the work in preparation
12 for any inspections, electrical inspections; did you know
13 that?

14 A They may -- they may have said that they did,
15 but the electrical inspector had come up behind them and
16 found various irregularities with them. So -- with the
17 switches and plugs. So, I wasn't sure whether he completed
18 it, or he didn't complete it.

19 Q Did you contact Mr. Mates?

20 A I didn't have to. The building inspector found
21 various plugs and so forth that weren't working. Why
22 should I --

23 Q Mr. Mates was on the job at this time; wasn't he?

1 Working in the same building that you were walking through.

2 A I don't know that he was there that specific
3 day or not.

4 Q He certainly was there in the weeks following
5 that; wasn't he?

6 A Yeah, but again the building inspector takes
7 me along and shows me, says, "Dick, this isn't working and
8 that's not working, and I'm going to reject it."

9 Q All right. But for that you had each and
10 every unit electrically tested; is that correct?

11 A Well, if the number that the building inspector
12 finds that were wrong, I have to go back and look at all
13 of them.

14 Q All right, sir. Now, going through these walk
15 sheets here, the only indication that I find of problems
16 in the electrical hookups, and bear with me here, is that
17 in certain of these particular units there was no power
18 period. But other than that, there doesn't appear to be
19 any reference to electrical problems, sir. Were there
20 some units where there was no power?

21 A In this batch, I don't recall. I don't think
22 there was a problem with power at the time that Mr. Romano
23 and I walked through these units.

1 Q So, if the sheets reflect that, then they're
2 inaccurate to that degree?

3 A I don't recall.

4 Q All right. Now, I also note there's a final
5 claim down here. And each and every unit, of course, has
6 a final clean charge of \$44; right? Want to take a look
7 at it? Talk to each one.

8 (Pause.)

9 A Okay. There is a \$44 charge for final cleaning.

10 Q All right. Final clean comes after the carpet-
11 ing is put in; does it not?

12 A No. If we -- no.

13 Q This is not the charge, Mr. Kische, wherein
14 they come back and vacuum the apartment to make sure that
15 the rug has been cleaned, and you don't have any fluff
16 hanging about the carpeting and do a final wash of windows?
17 That's not what this is?

18 A No. That reflects unclean countertops, unclean
19 tubs, unclean ceramic tile, unclean countertops, unclean
20 sinks, sinks that had the paint brushes washed out in them;
21 that's what that reflects.

22 Q Each and every unit had that in it? Each and
23 every unit?

1 A Had to a vast degree that. Some were worse
2 than others. Some of them had cardboard boxes laying all
3 over the place. Some of them had newspapers. Some of
4 them had buckets of unclean water sitting in them. Some
5 of them had dust on the floor from the drywall that was --
6 they constantly kept playing with. So, that's what that
7 is right there.

8 Q Taking a look at this particular chart, I
9 note the final clean, and please feel free to check up on
10 me on this, but I don't see any other charge in here
11 whatsoever for cleaning. When you looked at these units,
12 did they have carpeting in them?

13 A No.

14 Q Carpeting was put in normally I assume after
15 the units were turned over to ADC; is that correct?

16 A Uh-huh.

17 Q All right. Then you'd come in and put the
18 carpeting in?

19 A Yeah.

20 Q Then you have somebody come in and clean again;
21 wouldn't you?

22 A (The witness indicated in the affirmative.)
23 Have them do a touchup. Touchup was the word.

1 Q There's a touchup cleaning now? Is that what
2 we're talking about?

3 A Yeah. It's a vacuum, you go through and you
4 vacuum the carpets. You don't pick up boxes and so forth.
5 You touch it up.

6 Q When you say final clean, you don't mean final,
7 you mean the one before the touchup cleaning; is that what
8 you're saying?

9 A I mean a final clean of the ceramic tile and
10 the windows. I had to pay -- I had to go and pay \$6,000
11 extra. Spend \$6,000 extra of the company's money to clean
12 the windows.

13 Q Mr. Kische, do you find anywhere on those sheets
14 where there is a delineated charge for the cleaning up after
15 the carpeting was put in? Take a look at those.

16 A No. We didn't even charge them for that.

17 Q Holdfast didn't charge you for that? I mean
18 they came in and did that work for nothing?

19 THE COURT: That's a non sequitur. He said he
20 didn't charge them and your question is somebody else
21 didn't charge you? Rephrase.

22 BY MR. REESE:

23 Q If Your Honor please, these are the sheets by

1 which Mr. Romano agreed to do work for ADC, the ones I
2 showed you right here, Defendants' 21, et al. These are
3 the sheets that you and Mr. Romano walked those units and
4 decided what had to be done, and what you'd pay Mr. Romano
5 for it; right?

6 A Uh-huh.

7 Q What you're telling me now is Mr. Romano then
8 came back, did a touchup clean and didn't charge for it;
9 right?

10 A No. He charged me to pick up the paper boxes
11 and to clean this paint out of the sinks. That's what the
12 \$44 charge is for.

13 Q But he didn't charge you for, as you call it,
14 the touchup clean; is that right? That's all I'm asking.
15 It's a pretty simple question.

16 A I think in many cases I just had Dennis go in
17 and do the little touchup clean after Romano was finished.
18 I didn't have to send him in there.

19 Q If Your Honor please, I'd like to have you
20 turn, sir, to Plaintiff's Exhibit 14 which is a number of
21 invoices, and specifically let us take a look at the
22 following invoices. Let's take a look at Invoice 0548,
23 the copy; and I ask you if your signature is on there or

1 if your initials are on that particular document?

2 THE COURT: These are invoices for what,
3 counsel?

4 MR. REESE: These are invoices, if Your Honor
5 please, for the first eleven units.

6 THE COURT: Whose bill?

7 MR. REESE: I'm sorry?

8 THE COURT: Whose bill?

9 MR. REESE: This is JohnMark Construction's
10 invoice to ADC dated April 25, 1980. The first one I'm
11 asking him to look at deals with unit number 11 in building
12 4355.

13 BY MR. REESE:

14 Q Would you take a look at this copy, sir.

15 A Okay.

16 Q Does it have your signature on there, or your
17 initials on there?

18 A Uh-huh.

19 Q And there's an okay next to them?

20 A Uh-huh.

21 Q Dated May 9, 1980?

22 A Right.

23 Q Is that correct?

1 A Uh-huh.

2 Q Did you after the -- this signature has been
3 identified by Mr. Quatmann as his.

4 THE COURT: Referring to something on a different
5 page. The record won't reflect that.

6 MR. REESE: Referring to the yellow sheet.

7 THE COURT: With red ink.

8 MR. REESE: And also referring to the copy
9 sheet, here.

10 THE COURT: Counsel, let me interrupt you.
11 We've had testimony before, I think, from people who had
12 identified the bill that this is not a carbon on the photo-
13 copy of the bill. That it's a different writing. They
14 don't always match.

15 MR. REESE: I thought I said copy, if Your Honor
16 please. I said carbon and corrected myself to copy.

17 THE COURT: You missed the point. The black
18 on the copy is not of the red on the yellow sheet on top.
19 They are written at different times by the testimony.

20 BY MR. REESE:

21 Q Let's deal with this copy of Invoice No. 0548
22 referring specifically to the photocopy with reference to
23 Unit No. 11, it does have an "okay" with your signature on

1 it and is dated 5/9/80; is that correct?

2 A Right.

3 Q And it also has Mr. Quatmann's signature dated
4 4/25/80; is that correct?

5 A Uh-huh.

6 Q Did you review Unit 4355-11 after Mr. Quatmann
7 had put his signature on it on April 25, 1980?

8 THE COURT: Review it, how?

9 THE WITNESS: Yes.

10 BY MR. REESE:

11 Q Did you go to the unit?

12 A Yes.

13 Q You then wrote in "okay", your initial dated
14 5/9/80; is that correct?

15 A Uh-huh.

16 Q After you reviewed it?

17 A Right.

18 Q Okay. Let's come to the next one. Once again
19 we are dealing with the photocopy --

20 THE COURT: The white copy.

21 BY MR. REESE:

22 Q The white copy under Invoice No. 0398 for Unit
23 4355-12. Once again, it carries Mr. Quatmann's signature

1 dated 4/25/80, and has an "okay" with your initials; is
2 that correct, sir?

3 A Yeah.

4 Q Dated May 6, 1980.

5 A Right.

6 Q So, you went in -- is it correct that you went
7 in after April 25, 1980, reviewed the work in this unit,
8 and put an "okay" with your signature, with your initial?

9 A I reviewed the work and put a note there.

10 Q Okay.

11 Now, let's -- moving right along. The white
12 copy of 4355-13 once again carries Mr. Quatmann's signature
13 dated April 25, 1980, and then there is an "okay" that is
14 struck through; is that correct --

15 A Yeah.

16 Q -- apparently? And above that, then, there's
17 another okay with your initials, 5/9/1980; is that correct?

18 A Uh-huh.

19 Q All right, sir.

20 THE COURT: To just ask him what the record
21 shows, the record already shows it; doesn't it? I don't
22 understand where we're going.

23 MR. REESE: Where we are going is I have to

1 MR. MAYS: We don't argue with the fact that
2 that money was paid, and that that represented payment in
3 full based upon the contractor's own invoices. We don't
4 deny that.

5 THE COURT: I made a rule. I understand Mr.
6 Reese's point, and apparently it's a good one. I overrule
7 the objection. We proceed unit-by-unit.

8 What does the writing say on the paper?

9 BY MR. REESE:

10 Q Referring your attention, if I may, to Unit
11 4355-11 -- henceforth, whenever we give a unit, sir, we'll
12 just omit 4355 because they're all in that building; are
13 they not?

14 A I believe so.

15 Q Henceforth, 11, 12, whatever would be in that
16 building.

17 THE COURT: If you can say do you agree that
18 this job was ultimately done satisfactorily, because then
19 I don't have to know any of the antecedents, did Quatmann
20 give a partial approval and you later give a final. If
21 he admits that that was done satisfactorily, then you've
22 covered the point, you see.

23 MR. REESE: I don't know that he's going to

1 admit that, Your Honor.

2 THE COURT: I'm asking you to ask your questions
3 that way. Instead of assuming the worst, assume the best.

4 MR. REESE: All right.

5 MR. MAYS: Your Honor, we object to this on
6 another ground, and that is as of May 2, 1980, the plain-
7 tiff admitted that he was on notice that Mr. Daly was the
8 only one that could approve invoices through the May 2nd
9 letter; and so, therefore, it's irrelevant if the dates of
10 these invoices and Mr. Kische's signature came after that
11 date.

12 THE COURT: Mr. Daly is not God. If one of
13 his subordinates says today I saw that job, it was done
14 right, then that is an admission against interest even
15 though Daly may have been the one to give an approval.
16 It's highly probative as to what occurred in fact. So,
17 it's obviously admissible.

18 All right. From looking at that paper, Mr.
19 Kische, can you tell was Unit 11 finished by the plaintiff
20 in a correct manner, approximately?

21 THE WITNESS: No, sir.

22 THE COURT: It was not.

23 THE WITNESS: I can't -- I requested --

1 THE COURT: I don't need to know why. Just say
2 no, I do not agree. Go ahead, now, Mr. Reese.

3 BY MR. REESE:

4 Q I knew that's where we're going. All right.
5 This "okay" is dated May 9, 1980; is that
6 correct?

7 A Yes.

8 Q Did you give what has been described as a --
9 what has it been described as -- punchlist?

10 THE COURT: Limited approval.

11 BY MR. REESE:

12 Q Yes. Did you give a punchlist on this day,
13 May 9, 1980 to JohnMark?

14 A I don't know if I gave them a punchlist.

15 Q But you did endorse this as "okay" May 9, 1980;
16 right?

17 A I okayed it for payment.

18 Q You okayed it for payment. All right, sir.
19 Now, if we turn to Unit No. 12, you okayed it
20 for payment on May 6, 1980; didn't you?

21 A Right.

22 Q Do you remember giving a punchlist for Unit
23 No. 12?

1 A No.

2 Q All right. No. 13 you okayed it for payment
3 on May 9, 1980; is that correct?

4 THE COURT: Let me stop and go back and get
5 the dates. Is that going to be important for me in terms
6 of approvals? I guess they would --

7 MR. REESE: I assume they would.

8 THE COURT: -- somewhere along the line. The
9 first one was May 6th?

10 MR. REESE: The first one was May 9th; that's
11 11. Number 12 was May 6th -- correct me if I'm wrong,
12 Mr. Kische. Number 13 was May 9; is that correct?

13 THE WITNESS: (The witness indicated in the
14 affirmative.).

15 THE COURT: Was okayed for payment. Mr. Kische
16 said he does not remember whether there was a punchlist?

17 MR. REESE: That's correct.

18 THE COURT: This is an area where I have to
19 almost take verbatim notes or else you don't have any of
20 the benefit of the testimony.

21 MR. REESE: I understand.

22 BY MR. REESE:

23 Q Let's turn to Unit No. 14.

1 Now, number 14, did you approve number 14 for
2 payment, sir?

3 A I don't see my initials on that one.

4 Q All right. Let's pass on to number 15. Did
5 you approve number 15 for payment on May 6, 1980?

6 THE COURT: Just a minute. Stop. 15, May
7 what?

8 MR. REESE: May 6, 1980.

9 THE COURT: All right. You may answer.

10 THE WITNESS: Approved it for payment; doesn't
11 necessarily mean that any of these are done. They were
12 completed.

13 MR. REESE: Did you give a punchlist?

14 THE COURT: You haven't answered the question.
15 The question was did you approve it for payment on May 6th?

16 THE WITNESS: I approved it for payment. Again,
17 that doesn't necessarily mean the unit was completed.

18 BY MR. REESE:

19 Q Did you give a punchlist?

20 A Again, I don't know on this specific date
21 whether I gave a punchlist. These okays were made at the
22 request of --

23 Q If you'll bear with me, sir. I'm sure your

1 counsel's most able to ask questions. If you will just
2 answer mine and the Judge's right now.

3 A All right. I'll answer yours.

4 Q Thank you. Number 16, did you give an approval
5 on -- is that May 9?

6 A Yeah.

7 Q All right, sir. Punchlist? Did you give a
8 punchlist on that date?

9 THE COURT: When you say approval, do you mean
10 as work totally done? Or simply for payment?

11 THE WITNESS: Your Honor, it's just simply for
12 payment.

13 THE COURT: All right. Next question.

14 BY MR. REESE:

15 Q Did you give a punchlist on May 9, 1980?

16 A Again, I don't know. There may be some in the
17 records.

18 Q All right, sir. Unit number 17, did you give
19 approval for payment on May 9, 1980?

20 A For payment, yeah.

21 Q Did you give a punchlist?

22 A I don't know.

23 Q All right, sir. Now, that has to do with

1 Plaintiff's Exhibit No. 14.

2 May I direct your attention, at this time, to
3 Plaintiff's Exhibit No. 15, which has been attached to it,
4 a walk-through checklist dated ostensibly May 16th, 1980;
5 and I ask you if you could review this document, and first
6 tell the Court whether or not it carries your signature
7 after you review it, of course.

8 (Pause.)

9 A Carries my signature.

10 Q All right, sir. Now, down at the bottom --
11 first, this is a walk-through sheet. It identifies itself
12 as a walk-through checklist.

13 THE COURT: For what, please, sir?

14 BY MR. REESE:

15 Q Is this for -- well, it was attached, If Your
16 Honor, to Unit 41. Walk-through checklist for Unit 41.

17 A Yeah.

18 Q All right.

19 Now, sir, down at the bottom --

20 THE COURT: Let's see. Partial approval Unit
21 41. He paid for that on June 18th.

22 MR. REESE: I'm not quite sure what it is,
23 yet, if Your Honor please.

1 THE COURT: So said witness -- I'm just trying
2 to identify what exhibit it is so I'll know what it looks
3 like. That was Mr. McCarty's testimony. All right.

4 BY MR. REESE:

5 Q All right, sir. May I direct your attention
6 to the bottom of the second page of that sheet, and it says
7 down here there's a star. Is that in your handwriting?

8 A Uh-huh.

9 Q What does it say?

10 A Contingent upon cove molding, light fixtures,
11 and scribe molding. And anything else on there that was
12 noted as not being complete.

13 Q You starred this, did you not, and signed it?

14 A Uh-huh.

15 Q All right, sir. And the star relates to your
16 signature; doesn't it?

17 A Yes.

18 Q Okay. Now, that's on May 16, 1980 with reference
19 to Unit 4355-41.

20 THE COURT: Stop, please. All right.

21 BY MR. REESE:

22 Q Now, I show you an invoice dated -- or a white
23 sheet of an invoice dated May 9, 1981 (sic) and ask you if you

1 could take a look at this document. Now, that relates to
2 the very unit we were discussing; isn't it? Number 41.

3 A Uh-huh. Yes, sir.

4 Q Does it contain your okay?

5 A Contains an okay for payment. Again, doesn't
6 necessarily mean the units were complete.

7 Q I realize that. And it's dated May 16, 1980;
8 is that right?

9 A Right.

10 Q That's your initial; isn't it?

11 A Right.

12 MR. REESE: If Your Honor please, I'd like to
13 have this marked as Plaintiff's Exhibit. If Your Honor
14 please, Plaintiff's 18, I think.

15 MR. WEINER: No objection, Your Honor.

16 THE COURT: P-18 is a photocopy -- I see it's
17 on an estimate form, but it's labeled invoice. It's
18 received.

19 (The document referred to was marked
20 Plaintiff's Exhibit P-18 for
21 identification, and was received
22 in evidence.)

23 THE COURT: Now, I didn't hear the witness

1 finish his answer. He said it has an okay for payment.

2 Again, that's not necessarily, what?

3 THE WITNESS: It's not an indication the unit
4 was necessarily complete. There are other items on that
5 sheet other than the ones I've been asked to read that were
6 not completed.

7 BY MR. REESE:

8 Q Now, drawing your attention to the next walk-
9 through checklist which has to do with Unit No. 37, I ask
10 you if you've had an opportunity to review that?

11 A Yes.

12 Q All right. Turning to the second page, again,
13 does it contain your signature?

14 A Yes.

15 Q And a star?

16 A Yes.

17 Q All right. And the star relates to what
18 language on the document?

19 A There is no attached -- there is no reference
20 on this one.

21 Q All right. And below your signature there's
22 a date?

23 A Uh-huh.

1 Q May 28th.

2 A 5/28/80.

3 Q And below that there is what?

4 A Sentence, "Contingent upon kitchen light
5 fixture, kitchen light base, and scribe molding."

6 Q All right, sir. Now, looking at this checklist,
7 it's dated, however, May 16, 1980; isn't it?

8 A Uh-huh.

9 Q But your signature is on there on May 28, 1980;
10 is it not?

11 A Right.

12 Q What is the significance between the date of
13 the checklist and the date of your signature?

14 A In this case, I probably went through it and
15 found something that was wrong and went through it again,
16 and I just -- I have noted on here that there's no paint
17 on the closet pole, and the foyer closet. The ceiling
18 needed to be spackled. The -- we needed a light in the
19 mechanical room. We needed caulking around the edge of
20 the trim. We needed to spackle the windowsills.

21 Q All right, sir.

22 A All sort of things needed to be done.

23 Q I understand. That was on May 16, 1980?

1 A It may have been done on May 16, 1980 that --
2 I dated that before I got down through this whole list.

3 Q Let me ask you --

4 A I may have walked through on 5/28 and noted
5 those items. When items are complete, they were marked as
6 complete.

7 Q All right, sir. Dealing with May 16, 1980,
8 that's the date on this walk-through checklist; is that
9 correct?

10 A Right.

11 Q And apparently you came back on May 28, 1980;
12 is that correct?

13 A Right.

14 Q Why didn't you sign this on May 16th then?

15 A I probably -- I had a thing with these people
16 that if I got in and I saw items that weren't complete,
17 I didn't go through and do it.

18 Q All right. So, then, you came back on May 28,
19 1980 and you signed this?

20 A I signed it contingent on items that needed to
21 be done. Those were some of the items that needed to be
22 done. There were some other items that needed to be done
23 on that.

1 Q Would you indicate to me where in it it states
2 that on May 28, 1980 that your signature is contingent upon
3 anything else other than kitchen light, base and scribe?

4 A Well, there's no star on that -- on those
5 particular items. We could include these other items in
6 there which were included in there. I would have
7 crossed the other items out if they were done. That whole
8 sheet is contingent upon all the undone items in there;
9 not just the ones on the bottom.

10 THE COURT: Is that a paper which is already
11 in evidence?

12 MR. REESE: It is not, Your Honor.

13 MR. WEINER: No objection.

14 MR. REESE: If Your Honor please --

15 THE COURT: This will be Plaintiff's 19. Let's
16 stop. That's for Unit 37 without objection. It's in.
17 Just a minute, please.

18 (The document referred to was marked
19 Plaintiff's Exhibit P-19 for
20 identification, and was received
21 in evidence.)

22 THE COURT: All right.

23 MR. REESE: I'm trying to find a way to

1 facilitate, Your Honor, in this particular matter; but so
2 far I haven't because each one appears to be slightly
3 different.

4 THE COURT: I have the impression the witness
5 is going to say all of my signatures on all of these units
6 were contingent on finishing the job the way it should have
7 been done. And some sheets will show you what needs to
8 be done, and others don't.

9 If you feel you can get a better admission,
10 then you need to go one-by-one, but cases seldom get
11 proved by admissions of the opponents. That doesn't mean
12 you shouldn't try.

13 MR. REESE: All right, sir. Let's deal with
14 number 34 if we can.

15 THE COURT: Could a page be identified so I
16 know it's going to be an exhibit later?

17 MR. REESE: Is that a walk-through sheet, sir?

18 THE WITNESS: It's a walk-through sheet.

19 THE COURT: Let me mark it. It will be known
20 as P-20 since you propose to offer it. Now, after this
21 number, we have to remember to jump to higher numbers.
22 It's a walk-through sheet for unit what?

23 THE WITNESS: Thirty-four.

(The document referred to was marked Plaintiff's Exhibit P-20 for identification.)

BY MR. REESE:

Q Contains your signature on the second page?

A Yes.

Q All right, sir. Now, you walked that on May 28th?

A Right.

Q All right. And once again, we have a star, do we not, down at the bottom?

A Right.

Q And the star is related to what at the bottom?

A It's related to light, base, scribe. Once again, we have other items on here that aren't complete.

Q I understand that, but once again harping back to your testimony, the star here relates to the star at the bottom; is that correct?

A Uh-huh.

Q The star next to your name relates to the star at the bottom which says "contingent upon kitchen light, base, and scribe"?

THE COURT: You say those words, this time you

1 paused. Is the base something different than the kitchen
2 light? Or is it the base to the kitchen light?

3 MR. REESE: It's the base to the cove molding?

4 THE WITNESS: Base is the cove molding.

5 THE COURT: The base is what? Cove molding.
6 Then I saw one with a comma after base and before -- the
7 base is the cove. I understand the cove curves down. What
8 is a scribe molding? You know, I'm hearing about it all
9 this time but I don't know what one is.

10 THE WITNESS: It's a little piece of wood that
11 borders the kitchen cabinets; hides the cracks.

12 THE COURT: Between the cabinet and the wall?
13 It's a border around or something like that?

14 THE WITNESS: In this case, it was a flat
15 piece of wood.

16 THE COURT: All right.

17 BY MR. REESE:

18 Q While we're at it, sir, let me show you this
19 white sheet invoice and ask you if that was referenced to
20 once again Unit 24 (sic), shows an okay dated May 30, 1980; is
21 that correct?

22 A. (The witness indicated in the affirmative.)

23 Q With your initials; right?

1 A Right.

2 Q And it says contingent upon what?

3 A Light fixture, cove, base, and scribe molding.

4 Q That was on May 30th, not May 28th?

5 A Right.

6 Q All right, sir.

7 MR. WEINER: No objection, Your Honor.

8 MR. REESE: Thank you.

9 THE COURT: Now, a second page is added.

10 MR. REESE: That's what he just identified as
11 the invoice.

12 THE COURT: For this same unit?

13 MR. REESE: For that same unit. That's correct,
14 sir. However, that's dated May 30th.

15 THE COURT: 20 is in.

16 Now, let's see what was the highest number of
17 those several? I think it was 38; wasn't it?

18 MR. REESE: If Your Honor please, that was
19 Defendants' Exhibit, if Your Honor please.

20 MR. MAYS: That's correct, Your Honor. We
21 only have to jump on Defendants' exhibits.

22 THE COURT: P-21 will be the bill.
23

1 (The document referred to, having
2 been previously marked Plaintiff's
3 Exhibit P-20 for identification,
4 was received in evidence.)

5 (The document referred to was marked
6 Plaintiff's Exhibit P-21 for
7 identification, and was received
8 in evidence.)

9 BY MR. REESE:

10 Q All right, sir. Now, these particular ones
11 I'm going to just ask you to identify them and put them
12 in evidence as a whole dealing with Unit 36 and 35 and 42.
13 In each of these instances, have you not endorsed them,
14 starred them, and indicated contingent upon after a sub-
15 sequent walk-through? Just take a look at each one.

16 A Yes. But the star, there's no -- again, on
17 number 36 there is no attachment of the star to the verbage
18 written below it. There are several items in 36 other
19 than what's written below that needed to be done.

20 Same thing with number 35. There's no direct
21 correlation between the star and anything I have written
22 below it. There are several items that need to be done
23 over and above what I have written below in my signature.

1 Forty-two --

2 Q The star's in both places; isn't it?

3 A Forty-two, the star's in both places.

4 THE COURT: Could you go back and tell me what
5 you intended the star to mean?

6 THE WITNESS: These sheets are lists of items,
7 and there is --

8 THE COURT: I intended the star to mean --

9 THE WITNESS: There is no category in kitchens
10 for base, for example; and there is no word in the list
11 for scribe. Those -- that's primarily what I meant it to
12 mean, as an addition to the list.

13 THE COURT: So that sometimes you put a star
14 on and you didn't record what the addition was, and other
15 times you put a star on and wrote underneath some things;
16 but then I've heard you say that even the somethings you've
17 added still weren't the total amount approved; is that
18 right?

19 THE WITNESS: Yes, sir. They were --

20 THE COURT: If you would, kitchen light and
21 cove and below a star, you still say that even so there
22 are other things that should have been done.

23 THE WITNESS: There are other items that are

1 noted on the list that were not completed. Over and above
2 the -- I meant that these were contingent upon items not
3 being done, and I added the items that were not noted on
4 the list to the list by putting them down below my signature.
5 Items that were noted on the list were there on their own
6 face.

7 BY MR. REESE:

8 Q If we can, you identified the signature and
9 your document; is that correct?

10 A Yes.

11 MR. MAYS: No objection.

12 MR. REESE: There are three there.

13 THE COURT: Thirty-six will be P-22. Thirty-
14 five, going backwards, that is the way they came up, will
15 be referred to as P-23, and Unit 42 is P-24.

16 They're in evidence.

17 (The documents referred to were marked
18 Plaintiff's Exhibits P-22, P-23,
19 and P-24 for identification, and
20 were received in evidence.)

21 BY MR. REESE:

22 Q Turning to unit 43, I show you an invoice,
23 and I also show you a walk-through list carrying the

1 signature purportedly yours. Would you examine both of
2 those documents.

3 A Okay. They're both my signature and initials.

4 Q All right, sir. You walked this unit on May 16,
5 1980; is that correct?

6 A Yes.

7 Q And then you okayed the invoice; is that also
8 correct? Or May 16, 1980.

9 A (The witness indicated in the affirmative.)
10 I okayed it for payment.

11 Q Sure.

12 MR. MAYS: No objection.

13 MR. REESE: Plaintiff's.

14 THE COURT: P-25 is a walk-through sheet for
15 Unit 43. P-26 is a bill for the same unit.

16 (The document referred to were marked
17 Plaintiff's Exhibits P-25 and P-26
18 for identification, and were
19 received in evidence.)

20 THE COURT: Let me ask the witness a question,
21 here. Now, this is your initial on 26; right?

22 THE WITNESS: Yes, sir.

23 THE COURT: You don't have an initial on 43;

1 do you?

2 THE WITNESS: It's my signature. That scrawl
3 down there is my signature.

4 THE COURT: All right. On the pad, would you
5 put your signature and your initials so that when I go
6 through the exhibits, I can note whose I was reading.

7 (Witness complying.)

8 THE COURT: You've joined a lot of lawyers.
9 I didn't say Judges.

10 MR. REESE: All right, sir. Bear with me for
11 one moment, Your Honor. I may have a duplicate here.

12 All right, sir. Now, moving along we have a
13 similar situation with reference to Exhibit No. 40, No. 46.

14 THE COURT: You mean unit?

15 BY MR. REESE:

16 Q Unit. I show you -- it will be up there soon --
17 an invoice and a checklist.

18 A Yes, my signature's on both of these.

19 Q You approved it for payment on May 16, 1980,
20 that unit; is that correct?

21 A Right.

22 MR. MAYS: No objection.

23 THE COURT: Walk-through for unit 46 is P-27,

1 and the bill is P-28.

2 (The documents referred to were
3 marked Plaintiff's Exhibits P-27
4 and P-28 for identification, and
5 were received in evidence.)

6 THE COURT: Same unit.

7 THE WITNESS: My signature's on both of these.

8 BY MR. REESE:

9 Q All right, sir. And once again this time I'm
10 drawing the witness' attention to Unit 47, an invoice and
11 a walk-through. He's indicated his signature on both, and
12 we have an okay for payment on May 9, 1980 with reference
13 to Unit 47; is that correct, sir?

14 A Yeah. But again on this walk-through sheet
15 we have several items that are noted as not being done.
16 I walked it on -- first time on 5/3/81 (sic). I came back on
17 5/6. I noted some of the items that were deficient on
18 5/3/80 were completed on 5/6; and then I walked it again
19 on 5/9, and there were still some items that are outstanding.

20 Q And you then approved it for payment on May 9?

21 A Approved it for payment on May 9.

22 MR. MAYS: No objection.

23 THE COURT: Walk-through is Plaintiff's 29 for

1 Unit 47, and the bill for the same is Plaintiff's 30.

2 (The documents referred to were
3 marked Plaintiff's Exhibits P-29
4 and P-30 for identification, and
5 were received in evidence.)

6 BY MR. REESE:

7 Q All right, sir. If you will take a look at
8 an invoice and walk-through for Unit 48, does the same
9 situation that we've been discussing prevail?

10 A Yes.

11 Q Your signature, and you noted this for payment
12 on May 9, 1980; is that correct?

13 A Yes.

14 MR. MAYS: No objection.

15 THE COURT: Other times if you gentlemen have
16 long trials before me, prenumber everything you have and
17 type up a list triple-spaced of each exhibit number so that
18 we can make notes about them. It would speed it up.

19 Unit 48, the walk-through sheet is P-31. The
20 bill is P-32. Same -- well, nothing.
21
22
23

1 (The documents referred to were
2 marked Plaintiff's Exhibits P-31
3 and P-32 for identification, and
4 were received in evidence.)

5 BY MR. REESE:

6 Q Take a look, if you can, sir, at an invoice --
7 quite invoice for Unit 44. Does that not carry an okay
8 for payment by you on May 9, 1980?

9 A Yes.

10 Q All right, sir.

11 THE COURT: A bill is Plaintiff's 33 in evidence
12 for Unit 44.

13 (The document referred to was marked
14 Plaintiff's Exhibit P-33 for
15 identification, and was received
16 in evidence.)

17 THE COURT: This word sub what to price check?

18 THE WITNESS: Yes. Subject to price check.

19 THE COURT: All right.

20 BY MR. REESE:

21 Q Now, let me draw your attention to a walk-
22 through list for Unit 45 dated May 16, 1980. Does it carry
23 your signature, sir?

1 A Yes.

2 Q Same language, "contingent upon" starred in
3 both places; is that correct?

4 A Yes.

5 MR. MAYS: No objection.

6 THE COURT: Is that the one you just spoke of?

7 THE WITNESS: Yes, sir.

8 MR. REESE: At the time --

9 THE COURT: Just a moment, please. Walk-through
10 for Unit 45 is Plaintiff's 34. All right.

11 Now, you say you walked through that May 2, is
12 the question, but the paper reads May 16. Can you tell me
13 why the difference?

14 THE WITNESS: I'm sorry, Your Honor. What was
15 the question?

16 THE COURT: I wrote in my notes that for this
17 unit you answered the question "did you walk through this
18 on May 2, 1980", and you said "yes", but the paper reads
19 May 16. Can you tell me when it occurred?

20 THE WITNESS: It was May 16. I'm sorry.

21 THE COURT: You answered. The date was
22 suggested in the question.

23 THE WITNESS: Yes, sir.

1 (The document referred to was marked
2 Plaintiff's Exhibit P-34 for
3 identification, and was received
4 in evidence.)

5 BY MR. REESE:

6 Q Now, after you signed those invoices and the
7 final signature on those walk-through sheets, were the
8 keys turned over to you or a representative of ADC for
9 those units?

10 A I don't know on those specific units whether
11 or not they were turned over.

12 Q If the testimony was that they had been turned
13 over, would you be in a position to deny that?

14 A No.

15 Q All right, sir.

16 THE COURT: This would be after what point
17 would the keys come back to you?

18 MR. REESE: My question was related directly
19 to after the signature on the sheet.

20 THE COURT: Which sheet?

21 MR. REESE: The walk-through sheet.

22 THE COURT: For all of them, for all units in
23 the case?

1 MR. REESE: For the units that we've just
2 looked at, if Your Honor please.

3 THE COURT: Only for the units 35, is it,
4 through 45? They are not in sequence. You mean, as soon
5 as you signed, you got the key back so JohnMark couldn't
6 get in there again; is that what you said?

7 THE WITNESS: I don't think that's what he's
8 asking me.

9 THE COURT: I want -- I understand the
10 question itself.

11 THE WITNESS: He may have spare keys so they
12 may be able to go back in.

13 MR. REESE: All right. Did the carpetlayers --

14 THE COURT: I still don't understand it. What
15 was the routine on JohnMark giving up its ability to enter
16 apartments? Was there an established routine on this job?

17 THE WITNESS: Yes, sir. When they was finished
18 with the unit, he would give us the keys; but sometimes
19 prior to finishing the unit, he would give us the keys.

20 THE COURT: Then he'd have to come back and get
21 the key and go in and finish it?

22 THE WITNESS: He may have kept a copy of the
23 keys also to let himself in. The key situation is not a

1 great symbol in this case.

2 THE COURT: But normally they turned the key in
3 as you marked the bill approved, even though you may have
4 marked it approved contingent; is that right?

5 THE WITNESS: Right.

6 BY MR. REESE:

7 Q Now, sir, after you marked those bills approved,
8 approved for payment, carpet people came in and laid carpet
9 in these units; didn't they?

10 A Yes. Some of them.

11 Q Arby? Does that ring a bell with you, the
12 name Arby?

13 A Yes. He was one of the mechanical contractors.

14 Q Do you remember having to have Arby come in and
15 redo a lot of the mechanical work even after the drywall,
16 the painting had been done by JohnMark?

17 A Not a lot. What they did was work on the units.
18 The heating and air conditioning units were external to the
19 finish. They were out on the balcony.

20 Q Didn't they have to come in and redo the duct-
21 work?

22 A No. Not the ductwork.

23 Q They didn't have to punch holes through any of

1 the drywall to do their work?

2 A Maybe on one unit they had to do that.

3 Q Just one unit. All right. That would be a
4 Project Manager nightmare to get the unit finished and to
5 have to come in and do that; right?

6 A Yeah.

7 Q So, you would remember that; wouldn't you?

8 A I think there were one or two or three corner
9 units that you had to do that.

10 Q You just said one. Which is it? One or two
11 or three or four or five? How many are we dealing with,
12 now?

13 A We're dealing with a thousand units. I can't
14 remember all the exact numbers.

15 Q Could it have been three units that Arby had
16 to work on?

17 A Maybe three.

18 Q Maybe four?

19 A Could have been four, but I do remember it was
20 the corner units and it was not all the units.

21 Q And they had to come in and punch holes in that
22 drywall; didn't they?

23 A In the corner units.

1 Q In the corner units, right. That was after the
2 units -- all the drywall and all the paint had been done in
3 those units by JohnMark; isn't that right?

4 A Right.

5 Q And you required JohnMark to come back in and
6 redo the whole blessed work that had been punched in; hadn't
7 you?

8 A I don't know. I don't think so in this case.

9 Q Who did it then? You mean the hole's still
10 there? Who did it?

11 A Some of those cases I think were Romano did
12 that work.

13 Q That would be Holdfast?

14 A Holdfast.

15 Q Speaking of which, when did Holdfast begin
16 work on the Ivy Mount project?

17 A I believe it was some time down towards the
18 end of July, beginning of August.

19 Q Would July 18th sound about right to you?

20 A Could have been that day. Again --

21 THE COURT: Stop right there. Back when you
22 said would you make JM redo the wall on these one to four
23 corner units, your answer was in some cases. What was the

1 name of the person who did do it other than JM in your
2 answer?

3 THE WITNESS: It was Romano, Holdfast Builders.

4 THE COURT: All right. Now, you asked another
5 question and answer, and I was back trying to take notes.

6 See, this case is beautiful on the record. I
7 think somebody could go back with sufficient time to find
8 all kinds of testimony on each unit, but it's just murder
9 on the trier of the facts to remember, to recall it. So,
10 I have to stop you while I take notes.

11 BY MR. REESE:

12 Q Let's talk about Holdfast for a moment, if we
13 can. They started out, did they not, in Building 7753?

14 A Yes.

15 Q And does the date July 18th ring a bell with you?

16 A Not -- it's not significant in my mind.

17 Q Did they start out in Building 7753 before John-
18 Mark was off this project?

19 A I believe so.

20 Q All right. And 7753 was under JohnMark's
21 contract, wasn't it?

22 A I'm not positive. There was some discrepancy
23 there about 7753.

1 Q So, there was 171 units at Ivy Mount; were there
2 not?

3 A Yes.

4 Q And the contract between JohnMark and ADC
5 provided for 171 units at Ivy Mount. That would be all;
6 wouldn't it?

7 A Yeah.

8 Q And 7753 was at Ivy Mount; wasn't it?

9 A Yes.

0 Q Okay. Did you ever get approval from JohnMark
1 to let Holdfast do work on Building 7753?

2 A Again, I'm not --

3 Q Don't recall?

4 A No.

15 Q All right, sir. July 24 was not the first date
16 that JohnMark had gone off the job; is that correct? At
17 Ivy Mount?

18 A No. I think they delayed going off the job
19 other times. There were people that just left. I think
20 that was the thing.

21 Q Let's deal with June of 1980. Did they go off
22 the job in June 1980; and if so, what date?

23 A There may have been a time in June when they did

1 go off the job. For what reason, I don't know. It was
2 usually because people weren't getting paid.

3 Q All right, sir. But you don't recall the date?

4 A I don't recall.

5 Q How about beginning of June? End of June?
6 Middle of June? Can't recall?

7 A I don't know. They had people coming and going
8 on this job. After a while, I didn't know who was supposed
9 to be there and when. It wasn't in my purview to supervise
10 their people.

11 MR. REESE: I understand. No further questions
12 at this time.

13 THE COURT: Mr. Kische, as regards Exhibit D-13,
14 the inventory of August 8th, bottom of the first page in
15 red ink it reads 18 kitchen light fixtures, thousand some
16 dollars and probably a unit price, six seven eight. Below
17 that there's written subtract Heritage North supplies.
18 Are those lines that I've just read related to each other?
19 Were there 18 light fixtures part of Heritage North's
20 supplies?

21 THE WITNESS: No, sir. Those 18 light fixtures
22 I think pertain to Ivy Mount.

23 THE COURT: All right. Now, the prices are all

1 in pencil and the total in pencil is this 9,100 and some
2 dollars, but there's no pencil figure for the 18 kitchen
3 light fixtures. Is that a mistake in the addition?

4 THE WITNESS: I think the Xerox machine just
5 didn't pick up that portion for some reason or another.

6 THE COURT: Isn't this pencil? I think it
7 smears. Isn't that fresh pencil added to a Xerox page
8 for prices?

9 THE WITNESS: Yeah. I don't recall what it is.

10 THE COURT: Let me ask you, does the \$9,100
11 figure include a value for these 18 kitchen light fixtures
12 or not?

13 THE WITNESS: Without going back and adding it
14 up, I don't know.

15 THE COURT: All right. I'll leave that problem
16 with counsel.

17 MR. MAYS: Redirect, if Your Honor please.

18 THE COURT: All right. Let's take a break for
19 a few minutes.

20 (Whereupon, a short recess was taken.)

21 REDIRECT EXAMINATION

22 BY MR. MAYS:

23 Q Mr. Kische, will you explain to the Court,

1 please, why you approved some of these invoices for payment?

2 A I was asked by Tom Dillon and Mr. Daly to go
3 and review these units. Review the invoices, those that
4 were substantially complete, not 100 percent complete, go
5 ahead and approve them because this particular contractor,
6 JohnMark, was having a hard time meeting their payroll.
7 They were having a hard time finishing the job, and if we
8 gave them some money, hopefully they would go on and they
9 would be able to complete the work.

10 Q Now, in reference to the situation where another
11 contractor, subcontractor, came into a unit after JohnMark
12 had finished and done damage of some type, are you aware of
13 a procedure regarding purchase orders that would apply to
14 such situations?

15 A Yes.

16 Q Would you explain to the Court what that was?

17 A If additional work needed to be done above the
18 contract, the contractor could submit a price and gain a
19 purchase order to do the work.

20 MR. MAYS: Thank you. No further questions,
21 Your Honor.

22 THE COURT: You may step down.

23 (Witness excused.)

1 THE COURT: You want him to remain, I assume?
2 Or not?

3 MR. MAYS: No, Your Honor.

4 THE COURT: Excuse him from the case?

5 MR. MAYS: As far as we're concerned.

6 MR. REESE: Excuse him.

7 THE COURT: You're excused from the case, sir.

8 MR. MAYS: We call Tony Guadagnino.

9 Your Honor, this witness was sworn on a previous
10 day. Would you like him --

11 THE COURT: One oath is enough. It lasts the
12 whole case.

13 Whereupon,

14 ANTHONY GUADAGNINO

15 resumed the stand, and having been previously duly sworn,
16 was further examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. MAYS:

19 Q Mr. Guadagnino, you told us earlier you were at
20 one time Controller for ADC Fairways Corporation; is that
21 correct?

22 A That's correct.

23 Q And as Controller of ADC Fairways, you had

1 responsibilities in making payments on the construction
2 loans with Continental Bank?

3 A That's correct.

4 MR. MAYS: Your Honor, I have a group of papers
5 which we'd ask be marked as Defendants' No. 14, I believe.

6 THE COURT: D-14 is a six loan payment notice.

7 (The documents referred to were
8 marked Defendants' Exhibit D-14
9 for identification.)

10 BY MR. MAYS:

11 Q Mr. Guadagnino, I show you what's been marked
12 as Defendants' No. 14, and ask you if you can identify
13 those group of papers.

14 A Yes, these are the loan payment notices on the
15 construction loan with Continental Bank.

16 Q Now, as Controller of ADC Fairways --

17 THE COURT: That's for this case, this project?

18 THE WITNESS: Yes.

19 Well, it's for all five sections.

20 BY MR. MAYS:

21 Q Okay. Explain what you mean by that, by five
22 sections.

23 A There was one loan on the five sections of

1 Fairfax Heritage.

2 Q One of those five sections was Ivy Mount Court;
3 is that right?

4 A Yes, it was.

5 Q As Controller of ADC Fairways, did you prepare
6 checks for payment of these bills?

7 A Yes. Once a month when we did the construction
8 draw, we'd also pay the interest.

9 Q Do these bills reflect what the Continental's
10 prime rate was at the time?

11 A Yes, sir. It reflects the interest rate on them.

12 Q What period of time do those bills cover?

13 A They cover from April 1st up until August 1st.

14 Q Of 1980?

15 A 1980, yes, sir.

16 Q And I -- did you not testify on a previous day
17 that when you worked up your figures on the worksheet, you
18 used --

19 Well, tell us, again, what figure did you use?

20 THE COURT: Are the interest rates shown on
21 Exhibit D-14 the same ones that you used when you computed
22 Exhibit D-10, which was cost of interest?

23 THE WITNESS: Interest rates on the loan papers

1 varies. They constantly change.

2 THE COURT: Did you use that same interest when
3 you -- show him Exhibit D-10.

4 THE WITNESS: I used the lowest. I used 13
5 percent, which was the lowest interest rate.

6 THE COURT: You used a figure lower, i.e., more
7 favorable to JohnMark??

8 THE WITNESS: Yes.

9 THE COURT: All right.

10 BY MR. MAYS:

11 Q You used 13 percent to do all your calculations
12 on Defendants' No. 10?

13 A Uh-huh.

14 Q From the bills you have there that's been
15 identified as Defendants' No. 14, from those records and
16 from your own knowledge, was the prime rate -- Continental's
17 prime rate of interest ever lower than 11 percent?

18 MR. REESE: Objection, Your Honor. There has
19 been no foundation with reference to his own knowledge. I
20 object to his using those documents to testify from, but
21 Your Honor has prior to this date ruled that he would be
22 able to testify; but -- and my objection I assume was noted
23 to that, but with reference --

1 THE COURT: The question now rates to the
2 witness' personal knowledge, but it's objectionable if you
3 just say the prime rate. It has to be the prime rate for
4 what is it 90-day bills charged by Continental Bank,
5 whatever is in the contract. And I think he already said
6 he didn't have personal knowledge of that.

7 MR. REESE: I don't know how he can have it, now.

8 BY MR. MAYS:

9 Q Mr. Guadagnino, are these documents, which have
10 been identified as Defendants' No. 14 -- in the ordinary
11 course of business, where are they received by ADC Fairways?

12 A They were received at the corporate office in
13 Annandale.

14 Q All right. Where was your office?

15 A I was at the corporate office in Annandale.

16 Q Were these bills maintained in that office in
17 the normal course of business?

18 A Yes, they were.

19 MR. MAYS: Your Honor, then I would offer these,
20 then, as -- under the business records exception.

21 MR. REESE: Your Honor, these -- that's not the
22 shop-book rule foundation that he has to lay. He has to
23 lay the rule that he was the one who originally got these

1 figures, or he was the one who originally entered them.
2 Then he will be able to testify as to whether or not they
3 are, in fact, authentic business records. That's not --
4 simply saying was your office at the same place as the office
5 of the Defendant, yes. Well, here they come.

6 THE COURT: He also said he was the Controller,
7 and he approved payment of the bills when they came in.

8 MR. REESE: If Your Honor please, that doesn't --

9 THE COURT: So, that would have to include these
10 bills. The thing I am concerned about is the bills are not
11 evidence in themselves. It's the fact that having received
12 the bill and having acted upon it in the course of business,
13 that his company chose to pay out that money. That's what
14 gives it the validity.

15 So, they remain for identification as the source
16 of his knowledge but --

17 MR. MAYS: But they're also an exception to the
18 hearsay rule, Your Honor, which means they can be admitted
19 into evidence in the case as proof of what they say.

20 THE COURT: Not as coming from a third party.
21 It's only coming from a third party where he acts upon it,
22 and he as a principal pays out money on it.

23 It's not, "I offer you the estimate of Joe the

1 garageman." It's, "Here is my cancelled check where I paid
2 Joe the garageman." The cancelled check is testimony that
3 so many dollars was paid is admissible where the estimate
4 is not. So, this D-14 is like the estimate. It's the
5 fact that payment which gives the figures validity. So,
6 they remain for I.D.

7 BY MR. MAYS:

8 Q Mr. Guadagnino, were these bills, in fact, paid
9 by ADC Fairways?

10 A Yes, they were.

11 Q Would you tell the Court exactly what was paid?
12 Whether it was principle, interest or --

13 A The checks that were drawn by ADC Fairways
14 were for interest on the loan. The principle payments were
15 made by Real Title as units closed.

16 Q All right. And do these documents reflect
17 what Continental's prime rate was at the time?

18 A During this period, yes, it does.

19 Q All right. What was the prime rate?

20 A Prime rate fluctuated.

21 MR. REESE: They will reflect what they paid.

22 THE COURT: What did you pay?

23 MR. MAYS: What was the --

1 MR. REESE: Not what the prime rate was, but
2 what they paid.

3 THE COURT: What prime rate did you pay
4 Continental Bank?

5 THE WITNESS: The lowest prime rate was 11 percent,
6 and it ranged up to a high of 22 percent -- I'm sorry, 20
7 percent.

8 BY MR. MAYS:

9 Q This is during the period April --

10 A April 1, 1980 to August 1, 1980.

11 Q All right. Thank you, sir.

12 MR. MAYS: Your Honor, based upon the testimony,
13 we now offer these into evidence.

14 THE COURT: Testimony comes in, the papers do
15 not.

16 MR. MAYS: Okay. No further questions.

17 CROSS EXAMINATION

18 BY MR. REESE:

19 Q Mr. Guadagnino, did you prepare a per diem on the
20 interest that was paid? That 13 percent?

21 A Yes.

22 Q Did you -- is it contained in this?

23 A Per diem? No, I didn't. I'm sorry.

1 Q You didn't do that? Okay.

2 Now, I note on this particular sheet here
3 they have date of loan approval; is that correct?

4 A That's correct.

5 Q Did you put that there?

6 A No, I did not.

7 Q Somebody else prepared that information; is
8 that correct?

9 A Yes.

10 Q You had absolutely no idea, yourself, as to
11 whether or not there were contracts existing on these units,
12 or whether or not there were loan approvals or whatever?
13 You don't have any knowledge of that; do you?

14 A I knew that they were loan approvals and
15 contracts on the units. I can't testify these are the
16 specific dates of those.

17 Q All right. I understand.

18 You also don't know -- the question is you do
19 not know whether or not there were one or two purchasers
20 on these? In other words, one fell through and another
21 came along?

22 A It's a possibility, but I don't know for each
23 unit.

1 Q I understand. Now, I also note down here that --
2 well, did you do the computation on the interest as a result
3 of the delay?

4 A Yes, I did.

5 Q Did you make up a separate computation with
6 reference to the modification agreement?

7 A No, I did not.

8 Q You did know there was one?

9 A Yes.

10 Q All right. Now, you did also know that John
11 Mark was off the job for two weeks in June 1980; didn't you?

12 A I recollect that, yes.

13 Q Did you take that into account when you did this
14 interest computation?

15 A No, I did not.

16 Q Did you know that the first units you've got
17 down here as April 18, 1980, did you know that the cabinets
18 weren't even delivered until April 20, 1980? Did you know
19 that?

20 A I wasn't aware of that.

21 Q You weren't aware of that?

22 A No.

23 Q So, you weren't aware of a delay in the delivery

1 of the cabinets? You were not aware of the -- you didn't
2 take into account the two weeks time that JohnMark was off
3 the job in June; right?

4 A That's right.

5 Q Okay.

6 MR. REESE: No further questions.

7 THE COURT: Excuse him from the case?

8 MR. REESE: Sure.

9 MR. MAYS: Yes, Your Honor.

10 THE COURT: All right. You may leave.

11 (Witness excused.)

12 MR. MAYS: Your Honor, I call Thomas Farasy.

13 Whereupon,

14 THOMAS FARASY

15 was called as a witness by counsel for the defendants, and
16 having been previously duly sworn by the Clerk of the Court,
17 was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. MAYS:

20 Q Mr. Farasy, you've been previously sworn.

21 Your Honor, I have three additional documents
22 that I would ask to be marked for identification. This
23 will be the first one, Defendants' 15.

1 THE COURT: Defendants' 15 is a letter from --
2 dated August 1, 1980 from Continental of Illinois to
3 Corporate Investments, Inc.

4 MR. MAYS: This will be the next one. There's
5 three documents I intend to ask the witness about.

6 THE COURT: Defendants' 16 for I.D., promissory
7 note, August 1, 1980, 4.8 million. A photocopy note of
8 Corporate Investments, Inc. by illegible President.

9 D-17 for I.D. looks like a computer printout
10 of -- well, I can't tell what it is from the label. It
11 says commercial loan transaction history, margin president.
12 It includes the name Corporate Fast Investments, Inc.;
13 and says, "Accounts/Note 2149797 5882774."

14 MR. MAYS: Thank you, Your Honor.

15 (The documents referred to were
16 marked Defendants' Exhibits Nos.
17 D-15, D-16, and D-17 for identifica-
18 tion.)

19 THE COURT: Did I put a number on it after all
20 that talk?

21 MR. MAYS: No, you didn't. That would be 17.

22 BY MR. MAYS:

23 Q Mr. Farasy, I show you, now, three documents

1 which have been identified as Defendants' Exhibits 15, 16,
2 and 17; and ask you if you can identify those?

3 A Yes. The document marked 15 is a loan commit-
4 ment to a company which is a sister corporation. It's a
5 loan commitment between that company and the Continental
6 Illinois National Bank calling for a loan of 4.8 million
7 with the interest rate to be Continental prime rate plus
8 two percent floating, payable monthly.

9 The exhibit marked No. 16 is the promissory
10 note for that \$4.8 million; and the exhibit marked 17 is
11 a document that we received in our accounting department
12 showing the historical analysis of this particular loan
13 from the first day through a given period of time.

14 MR. REESE: If Your Honor please, I have to
15 object.

16 THE COURT: Wait until he's offered it.

17 MR. REESE: Well, as far as this description
18 itself, there has been no foundation laid as to this man's
19 ability. He says it's a sister corporation. I thought he
20 worked for ADC and resource --

21 THE COURT: We'll come to that when it's
22 offered, and when you cross examine.

23 BY MR. MAYS:

1 Q Mr. Farasy, as part of your job with Residential
2 Resources Group, do you have responsibilities in connection
3 with this loan that you just described?

4 A Yes. I am also the financial officer for this
5 Corporate Investments.

6 Q And is part of your job responsibilities to
7 make sure that these loan documents are complied with?

8 A Yes, it is.

9 Q That would include making the interest payments?

10 A Yes, it would.

11 Q And, to your knowledge, were interest payments
12 made on this loan from the period of August 1980 through
13 December 1980?

14 A Yes, they were.

15 Q At what rate, sir?

16 A They fluctuated. The rate -- the low, I believe,
17 was 13 percent as stated in the summary and went up to a
18 high of 23 and a half percent for the period up through
19 December 31, 1980.

20 Q Would you explain the sister corporation that
21 you mentioned? Would you explain its relationship to ADC
22 Fairways?

23 A The company -- the sister corporation entitled

1 Corporate Investments is owned by Thomas F. Daly.

2 Q All right. Are these documents, 15, 16, and 17
3 for identification, are they maintained in ADC Fairways
4 office in the ordinary course of business?

5 A Yes, they are.

6 Q In fact, is that where you obtained these
7 documents to bring to Court today?

8 A Yes, it was.

9 MR. MAYS: Your Honor, we would ask that these
10 exhibits be moved into evidence.

11 THE COURT: Do you have any voir dire on the
12 three items?

13 MR. REESE: I don't think I need any, Your Honor.

14 THE COURT: Do you wish to be heard?

15 MR. REESE: Yes, I do, if Your Honor please.

16 THE COURT: They have not shown any connection
17 except that Daly owns another corporation. Sustained.

18 MR. REESE: Thank you. That would be my
19 argument exactly.

20 THE COURT: That's what he paid in that corpora-
21 tion.

22 MR. MAYS: Your Honor, the lender is the same
23 bank, and it's during --

1 MR. MAYS: All right.

2 BY MR. MAYS:

3 Q What is your relationship with Corporate
4 Investors, Mr. Farasy?

5 A I function as the chief financial officer for
6 that corporation.

7 Q All right. And your testimony is that this
8 loan, which we've been talking about identified through
9 Exhibits 15, 16, and 17, was made through the Continental
10 Bank of Chicago, Illinois; is that correct?

11 A That's correct.

12 Q And that the interest rate in this loan is
13 their prime rate plus two?

14 A That's correct.

15 THE COURT: For what kind of loans by them?
16 They have more than one prime rate. The agreement with
17 ADC said their prime rate for 90 days something or other.
18 So, that's going to be different than a prime rate for
19 six months something or other. You've got to show it's
20 identical.

21 BY MR. MAYS:

22 Q Mr. Farasy, is the prime rate in this particular
23 loan, Continental, the same as the loan -- the other loan

1 with Continental regarding the Heritage Woods property,
2 the Ivy Mount property?

3 A The prime rate as stipulated in Exhibit 15 is
4 the prime rate announced by the bank for 90-day unsecured
5 loans made by Eptach (phonetic), Chicago, Illinois.

6 Q Which is the same prime rate as in the other
7 loan which has been --

8 MR. REESE: Objection. Leading.

9 BY MR. MAYS:

10 Q It's the same prime rate, is it not, as in
11 the others? As in the other loan which we discussed the
12 other day in Court?

13 A Yes.

14 Q And Mr. Farasy, you may have stated this, but
15 were interest payments, in fact, made on the loan identi-
16 fied as Defendants' No. 17 -- I'm sorry, No. 15 during the
17 period of August 1980 through December 31, 1980?

18 A Yes, they were.

19 MR. MAYS: No further questions, Your Honor.

20 CROSS EXAMINATION

21 BY MR. REESE:

22 Q Mr. Farasy, I note this document labeled
23 Commercial Loan Transaction History that has been proffered

1 into evidence as Defendants' 17. Where did you obtain
2 this document from?

3 A. From the Accounting Department.

4 Q. Is that from your Accounting Department? ADC's?
5 Residential Resource Group?

6 A. You mean the eventual group that prepared this
7 document?

8 THE COURT: From whose Accounting Department did
9 you receive it?

10 THE WITNESS: I received it from my central
11 offices in Adelphi, Maryland.

12 MR. REESE: From whose central offices?

13 THE COURT: Which company had it in its files?

14 THE WITNESS: Corporate Investments.

15 BY MR. REESE:

16 Q. So, you got this from Corporate Investments, Inc.?

17 A. Correct.

18 Q. All right, sir. Do you know from where they got
19 this information?

20 A. That's a document received from Continental
21 Illinois National Bank.

22 Q. I understand, now. Did this document --

23 THE COURT: He said earlier received in our

1 Accounting Department. He didn't say generally.

2 MR. REESE: I'm going to get into that.

3 THE COURT: All right. You seemed to be
4 surprised.

5 BY MR. REESE:

6 Q This was sent to you all by Continental; is that
7 correct?

8 A That's correct.

9 Q It was not prepared by you all?

10 A That's correct.

11 Q And all of the information on this was supplied
12 by Continental?

13 A Correct.

14 Q All right.

15 MR. REESE: No further questions.

16 THE COURT: All right.

17 MR. MAY: Your Honor, does Your Honor still want
18 to address the evidenciary point after lunch?

19 THE COURT: After you've had a chance to bring me
20 something that an authority in principle has to say, not
21 necessarily better than you gentlemen, but they expose
22 their work to public view.

23 MR. WEINER: Your Honor, I would like --

1 MR. WEINER: We do have some witnesses, Your
2 Honor; but I feel confident that our case will close before
3 the end of the day.

4 THE COURT: When you finish your other witnesses,
5 then tell me you want to ask to present something. You
6 want -- then Mr. Farasy I take it you want to remain. So,
7 do you have other questions of him?

8 MR. MAYS: Your Honor, I believe we're ready for
9 our next witness.

10 THE COURT: All right. Just tell Mr. Farasy he
11 remains, and who's next?

12 (Witness excused.)

13 MR. MAYS: Your Honor, we would call Paula Hall.

14 THE COURT: This omits cross examination of
15 Mr. Farasy, but I assume with the ruling cross examination
16 is not sought?

17 MR. REESE: You are correct.

18 THE COURT: All right.

19 Whereupon,

20 PAULA HALL

21 was called as a witness by counsel for the Defendants, and
22 having been first duly sworn by the Clerk of the Court, was
23 examined and testified as follows:

DIRECT EXAMINATION

BY MR. MAYS:

Q Would you state your full name, please?

A Paula Hall.

Q Where do you reside?

A Dale City, Virginia.

Q By whom are you employed?

A Residential Resource Group.

Q Was Residential Resource Group formerly ADC Fairways Corporation?

A Yes, it was.

Q When did you begin working for ADC Fairways?

A September 10, 1979.

Q All right. In what capacity are you employed by ADC Fairways?

A As a bookkeeper.

Q Would you describe what your duties are as a bookkeeper for that company?

A To maintain their books, to process invoices for payment, pay out checks.

Q In the Fall months of 1979, did you have occasion to receive invoices from a JohnMark Construction --

A Yes.

1 Q -- Inc.?

2 And would you -- or did you at that time prepare
3 checks in payment of those invoices?

4 A Yes, I did.

5 Q And you prepared those for Mr. Daly's signature;
6 is that correct?

7 A Yes.

8 Q Did there come a time when all the invoices
9 relating to Heritage Woods North were paid?

10 A Yes.

11 Q Are you aware of any invoices relating to Heritage
12 Woods North that are not paid at the present time?

13 A Not to my knowledge.

14 Q Would you tell the Court, please, how much money
15 was paid to JohnMark Construction, Inc. during the period
16 September 1979 through the end of July 1980?

17 A It was \$456,653.45.

18 THE COURT: Until what date? You said from when
19 she started her employment in 1979, September 10th until
20 when?

21 MR. MAYS: Until the end of July 1980.

22 THE COURT: All right.

23 BY MR. MAYS:

1 Q Were any of the monies paid in payment for
2 invoices relating to Ivy Mount?

3 A Yes, they were.

4 Q Would you tell the Court, please, how much of the
5 total monies paid was allocated to the Ivy Mount project?

6 A \$51,492.21.

7 THE COURT: Repeat.

8 THE WITNESS: \$51,492.21.

9 BY MR. MAYS:

10 Q Would you explain, please, the procedure you used
11 to allocate or to relate payments to invoices?

12 A Well, when the invoices came in, we applied --
13 we made payments. Sometimes those payments were made --
14 Mr. Daly would say we would pay so much. Give us a round
15 figure. We would then go back, pull those invoices and pay
16 the oldest invoices and apply them to that check.

17 Q Were you aware of monies being paid into Real
18 Title --

19 A Yes.

20 Q -- Corporation?

21 And did you, as a bookkeeper for ADC Fairways,
22 allocate those monies to certain units at Ivy Mount?

23 A Yes, we did.

1 Q Would you state, please, which units in Ivy Mount
2 you allocated those monies to?

3 A I have Building 4355-11, 17, 44, 48, 16, 34, 35,
4 36, 37, 14, 12, 15, 47, 13, 46, 43, 42, 41, 45.

5 THE COURT: What do those numbers mean?

6 THE WITNESS: Those are the unit numbers.

7 THE COURT: For what?

8 THE WITNESS: For Building 4355.

9 THE COURT: What about those unit numbers?
10 That's what I'm trying to get to.

11 THE WITNESS: Those are the invoices we had in
12 the house at the time we paid Real Title.

13 THE COURT: Are you saying that those were --
14 made up, then, the 51,492 you paid?

15 THE WITNESS: Yes, sir.

16 THE COURT: When you say you paid this company
17 the 51,492.21, it was by routing it through Real Title
18 Company?

19 THE WITNESS: Yes. We sent a check to Title for
20 \$61,000. Out of that \$61,000, we allocated. We had bills
21 in-house on Ivy Mount, and we paid those bills through that
22 check.

23 THE COURT: Was it the title company's check or

1 your check that went to J & M to total this 51,492?

2 THE WITNESS: The title company's check. We sent
3 our check directly to Real Title Company.

4 MR. REESE: I hate to interrupt. We have a
5 witness, Mr. Turner, who just entered the Courtroom.

6 THE COURT: Just go with the Bailiff and wait in
7 the witness room until you are called.

8 BY MR. MAYS:

9 Q Ms. Hall, did you state that the allocation of
10 monies to Ivy Mount was based upon invoices that had been
11 submitted previous to that?

12 A Yes, sir.

13 Q To your knowledge, were -- when the allocation
14 was made, were there invoices relating to any other unit
15 in Ivy Mount at that time?

16 A Well, there are some various -- some small bills
17 that we also applied.

18 THE COURT: What were the last two unit numbers
19 you read?

20 THE WITNESS: 41 --

21 THE COURT: 43, 42.

22 THE WITNESS: 41, 45.

23 BY MR. MAYS:

1 Q Ms. Hall, I show you what's been marked Defendants'
2 Exhibit No. 9. Can you identify that?

3 A That's a Holdfast bill limited invoice.

4 Q Did you receive --

5 THE COURT: Whose invoice?

6 THE WITNESS: Holdfast.

7 MR. REESE: If Your Honor please, I am now in a
8 position to stipulate as to that check and that invoice to
9 speed things up.

10 MR. MAYS: That the invoice was paid in full, and
11 that this was the check?

12 MR. REESE: Mr. Romano is here today, and he had
13 indicated that they did receive that payment, yes.

14 MR.. MAYS: With that stipulation, then, Your Honor,
15 then we'd offer these two into evidence.

16 MR. REESE: No objection.

17 MR. MAYS: As being payments for the units listed
18 in the invoice.

19 MR. REESE: That's correct.

20 THE COURT: D-9 is now in evidence, and D-8.

21 (The documents referred to were marked
22 Defendants' Exhibits Nos. D-9 and D-8
23 for identification, and were received

1 MR. REESE: But they're only using it for the
2 1,537.

3 MR. MAYS: This check -- the 1,537 is a part of
4 this check. This shows that that 1,537 was paid for in
5 full although it was payment for other units which we're
6 not going to develop.

7 MR. REESE: Mike, does it make things easier,
8 I'll stipulate that you all paid Holdfast \$1,537 for the
9 units that were in question, and the work that was indi-
10 cated upon --

11 THE COURT: This is not a stipulation made at the
12 beginning of the case?

13 MR. REESE: No. I'm willing to make it now just
14 to clarify the issue. See, Mr. Romano was not here --

15 THE COURT: Let me record it. Stipulate -- what
16 is the stipulation?

17 MR. REESE: That ADC paid Holdfast 1,000 --

18 THE COURT: And the dollar amount?

19 MR. REESE: \$537. \$1,537.

20 THE COURT: For what?

21 MR. REESE: For the work that was done on units

22 21 --

23 THE COURT: Is this going to be a long list?

1 MR. REESE: No, I'm going to cut it. 21 through
2 28, 32, 33, and 38.

3 MR. MAYS: Right.

4 MR. REESE: I --

5 THE COURT: All right. The stipulation is noted.

6 MR. MAYS: In view of the stipulation, Your
7 Honor, there's no need to formally offer the exhibit into
8 evidence.

9 THE COURT: I already marked them in. It doesn't
10 matter.

11 MR. MAYS: I believe that's all the questions I
12 have, Your Honor. However, we would request that the
13 witness remain subject to recall.

14 THE COURT: First get the cross examination.

15 MR. REESE: No questions.

16 THE COURT: No cross. Let me ask you, as regards
17 Ivy Mount, the only way -- do I understand you to say that
18 the only way JohnMark got monies from ADC was when you all
19 sent checks to the title company, and they paid JohnMark?

20 THE WITNESS: That's correct.

21 THE COURT: All right. If you will return to
22 the witness room.

23 MR. MAYS: Call Dan Boone.

1 Whereupon,

2 WILFRED H. BOONE

3 was called for examination by counsel for the Defendants,
4 and having been first duly sworn by the Clerk of the Court,
5 was examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. MAYS:

8 Q State your full name, sir?

9 A Wilfred H. Boone, Jr.

10 Q How are you employed?

11 A I am Credit Manager for St. Clair Appliance
12 Distributors.

13 Q How long have you been so employed?

14 A Two and a half years.

15 Q Briefly, what are your duties as Credit Manager?

16 A I accept credit applications, approve the credit,
17 take care of the general day-to-day approval of sales
18 tickets.

19 THE COURT: You're a Credit Manager for what?

20 THE WITNESS: St. Clair Appliance Distributors.

21 THE COURT: St. Clair?

22 THE WITNESS: Yes.

23 THE COURT: All right.

1 BY MR. MAYS:

2 Q Did there come a time when St. Clair opened an
3 account for JohnMark Construction, Inc.?

4 A Yes, sir.

5 Q Do you recall about when that was?

6 A I have the papers. I can look. I don't know
7 offhand.

8 Q Do you have your records with you?

9 A Yes.

10 MR. REESE: I have no objection to him referring
11 to them.

12 BY MR. MAYS:

13 Q Would you please refer to your records.

14 A First sale on this account was October 3, 1979.

15 Q Would you state, please, what JohnMark Construc-
16 tion, Inc. owed St. Clair Appliances as of May 10, 1980?

17 A \$5,152.83.

18 Q Is that balance -- is that still due and owing?

19 A Yes. It has been written off our books as
20 uncollectable account, but we have currently liens against
21 the property, and we expect to be paid.

22 Q What property do you have a lien against?

23 A These are some condominiums in Annandale.

1 Exactly which ones, I can't tell you.

2 Q Would that be the Ivy Mount Court Condominium?

3 A Yes.

4 Q Did you place the account with your attorney to
5 file a lien?

6 A Yes.

7 MR. MAYS: No further questions, Your Honor.

8 MR. REESE: Very short.

9 CROSS EXAMINATION

10 BY MR. REESE:

11 Q When was your lien perfected?

12 A I don't know.

13 MR. WEINER: Your Honor, I don't think -- that's
14 a legal question. Calls for a legal conclusion. He
15 doesn't -- he's a lay witness. He doesn't know -- certainly
16 wouldn't know when a lien's perfected.

17 THE COURT: To me perfecting the lien means when
18 the suit was filed within the time deadline after the lien
19 was placed on record; is that what you meant?

20 MR. REESE: Exactly.

21 THE COURT: How will that help me to know -- to
22 judge the case, here?

23 MR. REESE: I think the testimony may be that the

1 lien's an imperfect lien.

2 THE COURT: But I'm not trying that issue. So,
3 I --

4 MR. REESE: They're claiming prejudice because of
5 a lien being placed against the property. My point is --

6 THE COURT: In another count?

7 MR. REESE: No. In this one, in this count. And
8 if it is an imperfect lien -- we were supposed to keep the
9 property, under their interpretation, lien-free. If the
10 lien is imperfect, as our contention, it is lien-free.

11 THE COURT: I see.

12 MR. MAYS: Your Honor --

13 THE COURT: I thought this was one of those debts
14 over \$1,000 questions.

15 MR. MAYS: Yes, Your Honor.

16 THE COURT: But in the course of it, the witness
17 was asked about the lien. So, therefore, you convinced me
18 it's relevant.

19 Do you know if suit has been filed to follow up on
20 the lien?

21 THE WITNESS: I don't think so. I really don't
22 know.

23 MR. REESE: If Your Honor please, by definition

1 A No, sir. I'm not aware of it at all.

2 MR. WEINER: I have no other questions of this
3 witness, Your Honor.

4 MR. REESE: I have no questions of the witness at
5 this time. However, we do desire to retain her for rebuttal.

6 THE COURT: You may return to the witness room.

7 MR. WEINER: Your Honor, I'd like to call Mr.
8 McCarty, please.

9 Whereupon,

10 RICHARD E. McCARTY

11 was called as a witness by counsel for the defendants, and
12 having been first duly sworn by the Clerk of the Court, was
13 examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. WEINER:

16 Q Mr. McCarty, with regard to your withholding
17 payroll taxes, is it not a fact that you or JohnMark --
18 strike that, make it JohnMark did not pay Federal with-
19 holding taxes and State withholding taxes during the period
20 of '79 and 1980?

21 A Some of it. Partially true.

22 Q Well, would you tell me what part is true and
23 what part is not true?

1 A. As I said before, I paid \$5,000 -- a \$5,000
2 amount. Went to IRS --

3 MR. REESE: If Your Honor please, he's already
4 answered these questions on cross of our case. He answered
5 they paid \$5,000 at that time; made another \$5,000 check
6 that bounced.

7 MR. WEINER: That's \$5,000. The fact the check
8 bounced is irrelevant. I'm asking him how much he owes
9 and he went into this story --

10 THE COURT: Well, rephrase that question then,

11 MR. WEINER: How much money did you owe both to
12 the State of Virginia and the Federal Government with
13 regard to withholding taxes for employees for 1979 and 1980?

14 MR. REESE: If Your Honor please, I think that
15 question is ill-phrased because of the following: Johnmark
16 might very well have owed money in 1979, but not as a result
17 of a contract with ADC. It may, then, have owed money in
18 1980 as a result of a contract with ADC and have paid \$5,000
19 whatever. I would ask him to rephrase the question whether
20 or not they owed money under the Ivy Mount contract with
21 reference to withholding. That is the question we are
22 really looking at. Not whether or not two or three years
23 back taxes are owed, but whether or not it was on that

1 contract.

2 MR. WEINER: I have no objection at all to
3 asking the question that way.

4 THE COURT: All right. Do so.

5 BY MR. WEINER:

6 Q Under the Ivy Mount contract, do you know if you
7 owe any money to State and Federal Governments? Not whether
8 do you, but do you know?

9 A I paid \$5,000 --

10 THE COURT: Yes or no. Yes I know or no, I don't
11 know. Just one of those two answers.

12 THE WITNESS: Could I have the question again,
13 please?

14 BY MR. WEINER:

15 Q Do you know whether or not monies are owed to the
16 State of Virginia and to the Federal Government with regard
17 to payroll deductions as a result of the Ivy Mount contract?

18 A Yes, sir, I do.

19 Q You do know that you owe money?

20 A Yes, sir.

21 THE COURT: Question is whether he knows?

22 MR. WEINER: Yes. He said he does know.

23 THE COURT: Yes he knows whether. Now, how much

1 do you owe as regards Ivy Mount?

2 BY MR. WEINER:

3 Q Do you know how much you do owe?

4 A I do not know exactly.

5 Q You are the President of the company --

6 THE COURT: Do you have a reasonable close figure?
7 Is it a dollar? Is it \$100,000? Do you have any --

8 THE WITNESS: I would imagine around \$10,000.

9 THE COURT: I see.

10 BY MR. WEINER:

11 Q Now, what do you base that \$10,000 figure on, sir?

12 A A guess.

13 Q Are you not -- you're the President of the company;
14 is that correct?

15 A Stated that, yes.

16 Q You are still the President of the Company today?

17 A Yes.

18 Q The company is licensed -- is fully chartered to
19 do business both in Maryland and Virginia?

20 A Right.

21 Q You do not know the exact figure as of this
22 moment?

23 A No.

1 Q Pursuant to the Ivy Mount contract of March 12,
2 1980, did you ever give written requests for an extension
3 of time in delivering units to ADC Fairways?

4 A I didn't feel it was necessary. No.

5 Q Excuse me?

6 A I didn't feel it was necessary. No.

7 Q You did not?

8 A No.

9 Q You have testified that you were running into
10 problems in getting materials, in ADC changes, and failure
11 to approve items for you, and you were blaming the changes --
12 your delay on ADC Fairways; is that correct?

13 A Absolutely.

14 Q And pursuant to the terms of the contract, you
15 did not feel it was necessary to ask for extensions of
16 time; is that correct?

17 A I felt they were making the changes so they would
18 automatically extend the time.

19 Q Do you know if that's the terms of the contract,
20 sir?

21 A I know what the terms of the contract are. Yes.

22 Q You do know?

23 A Yes.

1 MR. REESE: If Your Honor please, I think the
2 contract does speak for itself. If he wants to draw your
3 attention to a term in the contract, but to argue with the
4 witness --

5 THE COURT: Let's hear the general approach.
6 Once in a while a witness can lead us to the section.

7 MR. WEINER: Your Honor, I would like the witness
8 to look at Plaintiff's Exhibit No. 1, the contract.

9 BY MR. WEINER:

10 Q Mr. McCarty, would you please turn to paragraph
11 number 15.

12 A May I get my glasses, Your Honor?

13 THE COURT: Yes.

14 If it's something in the contract, you can read
15 it to me, counsel, without having the witness do it.

16 MR. WEINER: Very well, sir. Paragraph 15 of the
17 contract is entitled "Delay in the Work", and states, first
18 paragraph, "In the event contractor is obstructed or delayed
19 in commencement or prosecution of the work because of
20 conditions beyond its control, contractor shall, within 48
21 hours thereof, make any claim for an extension of time in
22 writing, and the developer shall award and certify the
23 amount of the additional time to be allowed, if any."

1 BY MR. WEINER:

2 Q Did you ever exercise this provision, sir?

3 A I said no.

4 Q And you said you never saw reason to exercise
5 it?

6 A Not when the delays were caused by them.

7 Q Directing your attention to what has been known
8 as Schedule C of the Modification Agreement, is it correct
9 that you omitted St. Clair Appliances, Laurel Building
10 Supply, General Electric at a time when you owed -- that
11 you owed them in excess of \$1,000? You intentionally
12 omitted them?

13 A Not at the time I knew. No.

14 Q Well, could you tell us why you omitted them?

15 A I didn't realize at the time that I owed them
16 more than \$1,000.

17 Q Were you not keeping the books and records up to
18 date?

19 A I've already answered that I did not make entries
20 day-to-day.

21 Q Do you know how long you owed these monies?

22 A My records would show, but I don't know right
23 now, no.

1 Q You don't know how long a period you owed them?

2 A No.

3 Q Could you find out for us?

4 A In my books. If I may refer to my books.

5 Q Fine with me.

6 MR. WEINER: Your Honor, the point I want to
7 proffer to the Court the reason I'm bringing this testimony
8 forward is not -- is to show that these were not existing
9 for a day's period of time. These were long existing on
10 the books, and he is saying that he did not keep a daily
11 record leaving us to believe that these may have been
12 omitted as an oversight.

13 MR. REESE: I would point out to the Court, of
14 course, this is not new matter that he's going into. This
15 is the second time he raised it. He raised it on cross
16 examination at that time, and it's certainly not by way
17 of new matter for defense.

18 MR. WEINER: This is on --

19 THE WITNESS: Which one you wanted?

20 BY MR. WEINER:

21 Q Well, I'd like to know how long you owed Laurel
22 Building Supply \$6,836.70? We know it was as of May 10th.

23 A Yes. I owed on April 3rd \$7,025.37. On April

1 17th I made a payment of \$3,651.55. More invoices came
2 in to add to the remaining balance until May 10th, a balance
3 of \$6,836.70 was owed.

4 THE COURT: To whom?

5 MR. WEINER: So, you knew that as of May 10th?

6 THE WITNESS: Your Honor?

7 THE COURT: Owed to whom?

8 MR. WEINER: Laurel Building Supplies.

9 THE WITNESS: Laurel Building Supplies.

10 BY MR. WEINER:

11 Q So, the last payment that you made that Laurel
12 Building Supply was April 17th?

13 A That's correct.

14 Q And you were aware on April 17th that there was
15 an outstanding balance in excess of \$1,000?

16 A This Schedule C was made up, as you can see by
17 the attachments --

18 Q I'm just asking you the questions, sir. Just --
19 you knew as of April 17th there was in excess of \$1,000
20 owed to Laurel Building Supplies?

21 A I did not realize it at the time Schedule C was
22 made out.

23 Q You just told us that you paid certain money.

1 A I said my book reflects that.

2 Q Didn't you sign the checks, sir?

3 A (The witness indicated in the affirmative.)

4 Q Didn't you know what you were signing?

5 A Absolutely.

6 Q That was the last payment that you made to them
7 on April 17th?

8 A That's correct.

9 Q What about General Electric? When did you owe
10 them -- you owed them \$3,265.48.

11 A On May 4th, I owed \$6,047.29. On May 7th, I made
12 a payment of \$2,781.81. On May 11th, I made a payment of
13 \$1,904.40. On May 11th, I also made a payment of \$1,361.08.

14 Q So you knew --

15 THE COURT: This is to whom, now? What account
16 are you talking about, now?

17 THE WITNESS: General Electric, Your Honor.

18 BY MR. WEINER:

19 Q So, then, Mr. McCarty, you knew on May 10th that
20 you owed them in excess of \$1,000? You made payment on
21 May 7th and another payment on May 11th.

22 A Two on May 11th.

23 Q So, you knew on May 10th you owed them in excess

1 of \$1,000.

2 THE COURT: It comes out less than that if you
3 do the math, I think, counsel.

4 MR. WEINER: Your Honor, I think Mr. McCarty's
5 telling us about another bounced check.

6 THE COURT: Comes out to about \$200 due.

7 BY MR. WEINER:

8 Q Your Honor, I think he's talking about another
9 bounced check. Is that right, Mr. McCarty?

10 A No.

11 Q You are not talking about a bounced check?

12 A No.

13 Q So, you're telling me that you don't owe General
14 Electric --

15 A As of now?

16 Q As of May 10, 1980, you did not owe them money?

17 A I'm saying I made two payments on May 11th,
18 which is after the 10th. So, therefore, before that on
19 the 10th, technically, I owed them \$3,265.48.

20 Q Thank you.

21 A Which I paid off on the 11th.

22 Q So, that was the same type of situation you did
23 with the Sears bill? You didn't list Sears on the

1 Schedule C. Then when you got that \$19,000 as a result of
2 Schedule C, you went out and paid them.

3 MR. REESE: Objection, Your Honor. He testified
4 on May 11th he paid them off; not on June 18th.

5 MR. WEINER: Is that -- you did that with Sears?

6 THE COURT: You haven't phrased the question.
7 You made a statement. So, there is nothing for the witness
8 to answer yes.

9 BY MR. WEINER:

10 Q Okay, Your Honor. With regard to St. Clair
11 Appliances, you heard Mr. Boone just testify?

12 A Yes, sir.

13 Q What did you know the balance to be on the 10th?

14 MR. REESE: What did he know on May 10th about
15 the balance? Or what did he know the day he got Schedule C?

16 MR. WEINER: As of May 10th.

17 MR. REESE: May 10th, what did he know the
18 balance was?

19 MR. WEINER: I don't know when he prepared the
20 Schedule C. So, it was as of May 10th.

21 MR. REESE: It was May 10th he prepared Schedule C.

22 MR. WEINER: What did he owe them as of May 10th?

23 MR. REESE: All right. That question I think

1 he can answer.

2 THE WITNESS: On April -- I owed them \$5,337 --

3 THE COURT: Not April. May 10th.

4 THE WITNESS: On May 10th I owed them \$5,152.83.

5 BY MR. WEINER:

6 Q Now --

7 A Because of a bounced check.

8 Q Mr. McCarty, -- well, I'm not going to argue with
9 you about the bounced checks.

10 Mr. McCarty, with regard to the cove molding
11 that we've heard so much about during the process of this
12 case, you have -- we've heard you say about your attempt
13 to get ADC to accept various samples of almond cove molding;
14 is that correct?

15 A Correct.

16 Q In fact, Mr. McCarty, how many almond cove
17 moldings are there?

18 A I have no idea.

19 Q Well, then, how many samples did you -- of almond
20 cove molding did you present for the consideration of ADC
21 Fairways?

22 A I did not do it. You'll have to ask Mr. Sauer
23 or Ms. Jean Summey. I don't know which one did it, but

1 one of them presented the examples to Mr. Kische.

2 Q Presented them to Mr. Kische.

3 Did you hear Mrs. Brothers testify about the cove
4 molding being standard, sir? Mrs. Brothers from Brothers
5 and Justice or Justice and Brothers, the supplier?

6 A I don't believe I heard that, no.

7 MR. REESE: If Your Honor please, I think he's
8 playing with terms on standards. She did testify it was
9 unavailable, but whether or not it's standard or unavailable
10 is another question.

11 THE COURT: It doesn't matter what he heard.
12 It's a matter of what you all point out to me at the end of
13 the case.

14 MR. REESE: I would think so.

15 BY MR. WEINER:

16 Q So, it's your testimony, then, that to your
17 knowledge there's only one -- there are several different
18 shades of almond cove molding?

19 A I don't know whether it's one or whether it's a
20 dozen. You'll have to ask --

21 Q You don't know?

22 A You will have to ask -- well, ask Mr. Sauer or
23 Ms. Summey who checked on it for me.

1 Q Okay. Mr. McCarty, you also heard Mr. Purdy --
2 you heard Mr. Purdy testify that when he came on board
3 with JohnMark in July -- in June of 1980, the status of
4 the job was of great confusion. Everything was mixed up,
5 and there was confusion on the project. Do you recall that?

6 A That was his opinion.

7 Q What's your opinion, sir?

8 A Had it under control.

9 Q You said you had it under control?

10 A Yeah. We'd been off the job, and naturally we
11 had to get back on and get things going again.

12 Q Mr. Reese mentioned that also this morning that
13 you were off the job in June?

14 A Yes, sir.

15 Q When were you off the job in June?

16 A Prior to the modification.

17 Q So, you walked off the job in June?

18 A We were put off the job in June.

19 Q What date in June, sir?

20 A I don't recall.

21 Q Then, there was the July 3rd that you were off
22 the job, also?

23 A That we were put off the job. Yes.

1 Q Then, July 24th that you went off the job?

2 A That we went off the job. Yeah.

3 Q So, there were three times that you went off the
4 job and kept coming back?

5 A Twice and --

6 Q Went off three times and came back twice?

7 A Yes, sir.

8 MR. WEINER: With the Court's indulgence.

9 (Pause.)

10 BY MR. WEINER:

11 Q Mr. McCarty, were you the individual that
12 entered the contract, the March 12th contract? You were
13 the individual that signed this for JohnMark?

14 A Yes, sir.

15 Q And you are aware of a term, paragraph 35 that
16 says "Time is of the essence of this agreement for each
17 provision."

18 A It was to us, also.

19 Q Do you know what "time of the essence" means?

20 A Yes, sir.

21 Q What does it mean, sir?

22 A It means it's imperative to get it done as soon
23 as possible.

1 Q As soon as possible?

2 THE COURT: You are asking a question of law,
3 counsel.

4 MR. WEINER: Your Honor, he entered this agreement --

5 THE COURT: Doesn't matter. The Court can
6 interpret the words.

7 MR. WEINER: Your Honor, I have no other questions
8 of this witness.

9 MR. REESE: No questions of the witness at this
10 time. Reserve for rebuttal.

11 MR. WEINER: I'd just like to ask Mr. Sauer to
12 take the stand.

13 (Witness excused.)

14 Whereupon,

15 JOHN SAUER

16 was called as a witness by counsel for the defendants, and
17 having been first duly sworn by the Clerk of the Court, was
18 examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MR. WEINER:

21 Q Mr. Sauer, just a brief question that I have for
22 you, that's do you know how many different types, if any,
23 are there of almond cove molding, sir?

1 A Of the almond?

2 Q Yes, sir. We're not talking about size, now, sir.
3 I'm talking about color. The color almond cove molding.

4 MR. REESE: Now, wait a minute, if Your Honor
5 please --

6 THE COURT: There is a difference between type
7 and color.

8 MR. WEINER: Your Honor, I'll rephrase the
9 question, then.

10 THE COURT: How many shades of almond are there?

11 BY MR. WEINER:

12 Q How many different shades of color are there of
13 almond cove?

14 A I really couldn't tell you.

15 Q How many samples, if any, of different shades
16 of almond did you or any JohnMark representative show to
17 an ADC representative?

18 A We had four or five different samples. I believe
19 only one almond.

20 Q Only one almond?

21 A I believe so.

22 Q The others were called different names; is that
23 correct?

1 A Yes, I think so.

2 MR. WEINER: I have no other questions of this
3 witness, Your Honor.

4 MR. REESE: Reserve for rebuttal. No questions.

5 THE COURT: Return to the witness room.

6 (Witness excused.)

7 MR. WEINER: Your Honor, I have to say this to the
8 Court, now. We have no other witnesses that we would be
9 calling on our behalf. However, I will bring this up now,
10 we do have Mr. Farasy and Ms. Hall who are still here for
11 the purpose of testifying to documentary evidence that we
12 hope will be here before the close of the day today.

13 THE COURT: Under the lost evidence rule?

14 MR. WEINER: Unavailable. It's in Chicago --
15 well, there's some evidence, I believe, that's being
16 brought over in the form of a ledger sheet from the
17 corporate office in Adelphi, Maryland; and if Your Honor --
18 I can check to see if -- it's being brought here by
19 messenger. I can check to see if it has arrived here, yet.
20 It is a ledger sheet as to the interest payments that were
21 paid by ADC on the loan. That doesn't go -- I don't care
22 what -- that would negate necessarily the need for the
23 interest rate. We'll tell you what we paid.

1 MR. WEINER: I left the Courtroom and Your
2 Honor was sitting on the Bench, and I don't like leaving
3 a Courtroom with a Judge waiting on me.

4 THE COURT: Let's see about how long it's going
5 to be. If it's another five, six minutes, we'll wait.

6 (Whereupon, a short recess was taken.)

7 MR. WEINER: Your Honor, this is the ledger.
8 I'm just going to have her read figures from this.

9 THE COURT: Who's next?

10 MR. WEINER: Paula Hall.

11 Whereupon,

12 PAULA HALL

13 resumed the stand, and was further examined and testified
14 as follows:

15 DIRECT EXAMINATION

16 BY MR. WEINER:

17 Q You're Paula Hall?

18 A Yes.

19 Q What is your position with ADC Fairways?

20 A Bookkeeper.

21 Q Could you identify the document?

22 A It's a Fairways Accounting General Ledger.

23 Q Do you keep that?

1 A Yes.

2 Q Do you prepare that in the ordinary course of
3 your business?

4 A Yes.

5 Q Does that ledger that you have before you
6 indicate the interest payments from ADC Fairways to
7 Continental Bank in Chicago based on the \$12 million loan?

8 (Whereupon, a short recess was taken.)

9 BY MR. WEINER:

10 Q Miss Hall, you have before you a document that's
11 titled what, now?

12 A Fairways Accounting General Ledger.

13 Q Did you prepare that?

14 A Yes, I did.

15 Q What did you use to prepare that?

16 A Regular journal entries, ledger receipts, cash
17 disbursements, that type of thing, made up the general
18 ledger.

19 For the purpose of the interest and the loan
20 basically what happened was when we sent our draw to
21 Continental, at that time we received a draw; we called
22 them; they gave us the interest figure on the phone, and
23 that's how we recorded it.

1 Q When you say they gave you, are you saying they
2 gave us? Are they saying you were the one that made this
3 call?

4 A Yes.

5 THE COURT: And that as a result of getting that
6 figure, is that something you wound up paying your company?

7 THE WITNESS: Yes. It was added on to the
8 principal portion of the draw.

9 BY MR. WEINER:

10 Q Do you have entries within your journal there?

11 A Yes.

12 Q That would reflect those figures?

13 A Yes.

14 Q Could you please open your journal to the months --
15 commencing with the month of, when the payments started,
16 and would you give us the interest figures that were paid.
17 I guess we would be starting -- is the first one in April
18 or March?

19 A This particular book starts with June.

20 Q Okay.

21 A I think you have the loan statements for the other
22 ones.

23 MR. REESE: If Your Honor please, if Mr. Weiner

1 from Bill Smith who either said verbally or put in a time
2 slip for so many hours.

3 MR. REESE: You will have to note my objection.
4 I don't know of any such exceptions to the hearsay rule,
5 if Your Honor please.

6 THE COURT: What it's offered for is to show
7 what they paid and what the derivation of payment was.
8 All right.

9 BY MR. WEINER:

10 Q Ms. Hall, you say that those records you have
11 before you commence in June of 1980?

12 A Actually they start in August.

13 Q August of 1980?

14 A Yes.

15 Q Could you please read for the months that you
16 have there the interest that was paid on this loan?

17 A In August of 1980, it was \$73,802.92.

18 THE COURT: Wait. \$73,000 --

19 THE WITNESS: Eight oh two, ninety-two cents.
20 September, \$54,295.32; October, \$35,166.04. That's it.

21 THE COURT: You say that's all you have?

22 THE WITNESS: Yes, sir.

23 MR. WEINER: With regard to the -- this, Your

1 Honor, these have been admitted; is that correct?

2 THE COURT: Yes.

3 MR. WEINER: Ms. Hall, with regard to these
4 documents, is there --

5 THE COURT: D-14.

6 BY MR. WEINER:

7 Q D-14, these are loan payments notes; is that
8 correct?

9 A That's correct.

10 Q And did you place any journal figures that
11 correspond to the interest due on the loan corresponding
12 with the figure on these documents?

13 A Yes, sir.

14 Q You did?

15 A (The witness indicated in the affirmative.)

16 Q Would you look through them. Those documents
17 run from April; is that right, April 1980?

18 A Yes.

19 Q Could you please read those figures?

20 A All of them?

21 Q No. The figures -- the interest figures from
22 April to August.

23 A On 5/5, there's \$43,500.

1 THE COURT: On May 5th, not April. He wanted
2 you to begin in April. Do you have that?

3 THE WITNESS: No.

4 THE COURT: All right.

5 THE WITNESS: Statement's dated May 5.

6 THE COURT: So you begin May 5 and the amount is?

7 THE WITNESS: \$43,500.

8 THE COURT: All right.

9 THE WITNESS: 6/11, \$33,768.46; 7/25, \$44,566.67.
10 Looks like another payment on 7/24 for \$65,920 --

11 THE COURT: 7/24, \$65,900 --

12 THE WITNESS: Nine twenty forty-six.

13 MR. WEINER: Would you repeat that for me.

14 THE WITNESS: On 7/24, 65,920.46.

15 BY MR. WEINER:

16 Q These figures, the ones that you gave us out of
17 your journal and the figures you just read us, now, are the
18 interest figures paid by ADC -- your personal knowledge of
19 interest figures paid to Continental Bank by ADC as a
20 result of a \$12 million loan?

21 A Yes.

22 Q And that's Defendants' Exhibit --

23 THE COURT: 10 from the other witness.

1 MR. WEINER: The loan document that said 12
2 million on the front page.

3 MR. MAYS: Seven.

4 BY MR. WEINER:

5 Q Paid on Defendants' Exhibit -- on this loan; is
6 that --

7 A Yes.

8 THE COURT: You're not, shall I say, pretending
9 to give any record of the interest cost by a particular
10 unit or number of units?

11 THE WITNESS: No.

12 MR. WEINER: We couldn't do that.

13 I have no other questions of this witness.

14 MR. REESE: Subject to my continuing objection,
15 no questions.

16 THE COURT: All right.

17 MR. WEINER: I have not asked this to be identi-
18 fied. May she take this with her?

19 THE COURT: Yes.

20 (Witness excused.)

21 MR. WEINER: Your Honor, that's the Defendants'
22 case.

23 MR. REESE: Defendant rests?

1 notes? Does Your Honor have --

2 THE COURT: He gave it in gross. That's right.
3 Without Exhibit D-12, you're right, there is nothing there.

4 MR. REESE: There is nothing there and that's the
5 whole point of the matter.

6 THE COURT: What's your comment on the fact that
7 he was permitted to testify without objection; That there
8 was \$75,669 interest loss due to delay, and he took a
9 conservative figure and the company's figures about loan
10 dates and settlement dates.

11 Now, you cross examined, said well, he didn't
12 know about certain model units; and there is some witness
13 to the fundamental evidence. What's your comment on that?

14 MR. REESE: As to the fundamental evidence? My
15 cross examination. Number one, I objected to his use of
16 that document and Your Honor said don't worry, not until
17 I put it in evidence. Number two, as to the use of that
18 document, that's when I went back and asked him if he was
19 the one who prepared it. Did he have individual knowledge
20 of these particular units or of these particular figures
21 on this sheet to which his answer was no in both instances.

22 I was obviously addressing the shop-book rule at
23 that point to see if he did have any information if they

1 attempted to put that particular item into evidence, and
2 the answer to that question is no. He did not have any of
3 that information. Mr. Farasy did not have any personal
4 knowledge of this information; nor did he indicate as to
5 who prepared that information; nor did he have any personal
6 knowledge of Exhibit No. 10.

7 So, if Your Honor please, at that particular
8 point all he was doing was stating a claim, but Your Honor
9 has no evidence of the claim. None whatsoever.

10 THE COURT: I understand your point.

11 MR. REESE: I do have an additional objection to
12 an additional item.

13 THE COURT: We'll stay on the interest. The
14 interest claim stays in. It is anomalous. The witness
15 gave a total figure of interest caused by delay. He gave
16 his justification for it. He said he took it from company
17 records. A particular company record was objected to
18 prematurely, and it would have given me the witness' break-
19 down of this \$75,000 figure; and it never came in, and I
20 never have had a breakdown of that figure.

21 There was some chipping away of the validity of
22 the \$75,000 figure, which I think goes to its weight. For
23 example, did you know that certain units were used as model

1 units? Well, he said, "No, I didn't." Now, I haven't
2 had evidence from somebody else that said the units were
3 used as model units. But what I know is that this is a
4 possible factor the witness could have overlooked. See?
5 I don't know that he did overlook it. I don't know that
6 certain units were used as models.

7 But I think the evidence is in in gross. He just
8 gave a gross figure as company Controller of -- and even
9 where he says I relied on other company records, loan dates,
10 and closings, that is enough to permit his testimony; not
11 the exhibits.

12 All right. Another ground on your motion.

13 MR. REESE: If Your Honor please, I would have
14 another motion actually.

15 THE COURT: All right.

16 MR. REESE: That motion has to do with attorney
17 fees. If Your Honor please, there has been precious little
18 evidence on attorney fees in this particular case, and yet
19 Mr. Weiner continues to claim them. The only amount that I
20 have heard is the sum of \$20,000 which has supposedly been
21 billed or paid to Mr. Weiner's firm.

22 Now, they are claiming attorney fees for the
23 release of liens. Well, there's no evidence of that, if

1 change.

2 DIRECT EXAMINATION

3 BY MR. REESE:

4 Q Mr. Turner, what is your full name, sir?

5 A James Lee Turner.

6 Q How are you employed, now?

7 A I'm President of Potomac Kitchens.

8 Q Taking you back to 1980 in the period say of March
9 and April of 1980, how were you employed, then?

10 A I was President of Chesapeake Marble Manufacturers,
11 also traded as Chesapeake Kitchen and Bath.

12 Q Were you a supplier of cabinets back then?

13 A Yes.

14 Q Did there come a time when a Gary Wates of ADC
15 contacted you?

16 A Yes.

17 Q Was that with reference to supplying cabinets for
18 Ivy Mount?

19 A Yes, it was.

20 Q Did you enter into negotiations with him?

21 THE COURT: With whom?

22 MR. REESE: Gary Wates.

23 THE COURT: Representing whom?

1 MR. REESE: ADC. The testimony, if Your Honor
2 please, the testimony of Mr. Daly --

3 THE COURT: I just didn't place who Mr. Wates was,
4 of ADC. All right.

5 BY MR. REESE:

6 Q Did you enter into negotiations with him for the
7 supply of cabinets at Ivy Mount?

8 A Yes, sir.

9 Q What was the culmination of those negotiations?

10 A They agreed to purchase cabinets from Evans
11 Cabinet Corporation through us as representatives of Evans
12 Cabinet Corporation.

13 Q They being ADC?

14 A Right.

15 Q Did you place an order for the cabinets?

16 A I did.

17 Q When was that order of cabinets placed on behalf
18 of ADC accomplished? When did the first cabinets arrive?

19 A I checked on that last week, and although they
20 have signed delivery tickets, the only thing that they can
21 assure me is that the cabinets were received the week
22 ending April 20th.

23 Q The week ending April 20th --

1 A That's correct.

2 Q -- is that correct?

3 A I don't know what April 20th is, whether it's a
4 Friday, Saturday or Sunday.

5 Q Do you remember how many cabinets?

6 A A truckload.

7 Q A truckload of cabinets were delivered at that
8 time?

9 A Enough to do one building.

10 Q For one building.

11 MR. WEINER: Your Honor, I would object to this.
12 This is -- he's testified -- this witness has testified to
13 the fact that he was advised by someone else that cabinets
14 arrived on such-and-such a date, and here we go right back
15 to Mr. -- and I stand on my learned colleague's excellent
16 dissertation on hearsay which I earned grievance on it this
17 morning.

18 THE COURT: All right. Mr. Lincoln, were you
19 wrong a few minutes ago?

20 MR. REESE: As Mr. Lincoln would say, you're only
21 wrong when you're caught.

22 If I might address that question of the witness,
23 if Your Honor please.

1 BY MR. REESE:

2 Q Did you represent Evans Cabinet?

3 A Yes.

4 Q Did you check your records on when the orders were
5 placed for the cabinets?

6 A I didn't check when they were placed. I checked
7 when the cabinets were delivered.

8 Q All right. You checked your records on delivery,
9 also?

10 A We don't have records.

11 Q All right, sir.

12 A The manufacturer has delivery tickets. He has
13 the records and I checked with him.

14 Q Do you represent Evans Cabinettree?

15 A That's true.

16 Q Did you check with the records -- were the records
17 that you checked compiled in the normal course of business?

18 A Yes.

19 Q All right. Does Evans Cabinettree issue delivery
20 tickets; is that what they're called?

21 A Yes, sir.

22 Q When they deliver cabinets, are the delivery
23 tickets signed by the individual who's taking them up?

1 A That's correct.

2 Q Are the delivery tickets then kept in the normal
3 course of business?

4 A Yes, sir.

5 THE COURT: By whom?

6 BY MR. REESE:

7 Q By Evans Cabinet?

8 A Correct.

9 Q All right, sir.

10 Was it these delivery tickets that you referred
11 to with reference to when the units were delivered?

12 A Yes.

13 Q The delivery dates were indicated to you it was
14 the week of the 20th of April?

15 A That's correct.

16 Q Would that have been 1980?

17 A That's correct.

18 Q All right, sir. Now, was there a subsequent
19 delivery of cabinets to --

20 THE COURT: You're getting onto further evidence.
21 Anything else before I rule?

22 MR. REESE: No.

23 THE COURT: Hearsay is not shop-book either

1 because it's not employees making a record under him. And
2 you leave that rule, which is an exception to hearsay, then
3 you -- he's offering in Court for the truth what somebody
4 told him out of Court.

5 MR. REESE: All right, sir.

6 BY MR. REESE:

7 Q Who did you deal with at ADC?

8 A Gary Wates.

9 Q How many cabinets did you -- did ADC order?

10 A They ordered two truckloads.

11 Q All right, sir.

12 MR. WEINER: Your Honor, I'm not so sure that we
13 know what two truckloads trickles down to as far as -- we
14 are not talking about pounds. Cabinets are in numbers.

15 THE COURT: A minute ago he said one truckload
16 was enough for one building, and I have a rather unique
17 degree of knowledge of the interior of 4355 or 35 or what-
18 ever it is.

19 MR. WEINER: I was just wondering if we have a
20 number as opposed to truckloads. They could be big cabinets
21 or small cabinets. How many pounds of cabinets? Or how
22 many numbers of cabinets? Or how many sets of cabinets?

23 THE COURT: I will treat your request as having

1 been addressed to your opponent. Let him proceed.

2 BY MR. REESE:

3 Q How many cabinets would two truckloads contain?

4 A I can't tell you exactly. I can tell you approxi-
5 mately.

6 Q Sure.

7 A It's roughly between 270 and 290 cabinets per
8 truckload.

9 Q All right, sir.

10 Now, when were you paid for these cabinets by
11 ADC?

12 MR. WEINER: Objection, Your Honor.

13 THE COURT: Ground?

14 MR. WEINER: Relevancy.

15 THE COURT: You're going to tie it in?

16 MR. REESE: Sure, if Your Honor please.

17 THE COURT: All right.

18 MR. REESE: I'll make a proffer, if Your Honor
19 please. If they were not paid, then subsequent deliveries
20 would be conditioned upon being paid for the others. It
21 would be delayed.

22 MR. WEINER: That's --

23 MR. REESE: I'll tie that in with the testimony

1 from Mr. McCarty and Mr. Sauer later.

2 THE COURT: We'll see. The witness might have
3 the knowledge when he paid. Whether he paid before or
4 after the delivery and so forth.

5 Overruled.

6 BY MR. REESE:

7 Q When were you paid by ADC?

8 A Without checking my records, I can't tell you.
9 I didn't check. I know we had a little difficulty getting
10 paid. It was a little late.

11 Q All right, sir. I understand.

12 MR. REESE: No further questions of this witness.
13 Your witness.

14 CROSS EXAMINATION

15 BY MR. WEINER:

16 Q Mr. Turner, we heard you testify to -- attempt
17 to testify to, as to a delivery date, and you were not sure
18 about that -- on these cabinets.

19 When did you receive an order for the cabinets?
20 In other words, when were the cabinets ordered by Mr. Wates?
21 Or when did that contract agreement get entered into between --

22 A I can't testify to the exact date.

23 Q Was there anything in your record or recollection

1 of a cause of delay in delivery from the date of the order?

2 A No.

3 Q Do you know what is -- what was the time span
4 between the delivery dates -- the order date and delivery
5 date?

6 A I just stated I can't testify as to the order date.
7 So, I can't give you an accurate length of time.

8 Q Had you received an order from JohnMark or Mr.
9 McCarty on behalf of JohnMark, or Mr. Sauer on behalf of
10 JohnMark, or Ms. Jean Summey on behalf of JohnMark, or
11 anyone on behalf of JohnMark prior to Mr. Wates' order?

12 A No.

13 Q Had you ever dealt with JohnMark?

14 A Not prior to this.

15 Q Did Mr. McCarty or anybody from JohnMark call you
16 or write to you requesting your delivery date of the
17 cabinets? Or what's holding them up? Or inquiry as to
18 why they're not on the site?

19 A To be honest, I don't recall whether there was a
20 call or not. It's not unusual.

21 Q Do you recall whether there was any kind of
22 notification as to where the heck are my cabinets? I'm
23 just paraphrasing.

1 A I don't recall if there was.

2 MR. WEINER: I have nothing.

3 MR. REESE: If Your Honor please, with reference
4 to the cross examination if I might.

5 REDIRECT EXAMINATION

6 BY MR. REESE:

7 Q I show you this document, sir; and ask you if you
8 recall receiving such a letter from John C. Sauer?

9 A Yes.

10 Q All right, sir. Was that the letter that author-
11 ized you to go ahead and order the kitchen?

12 A That's correct.

13 MR. WEINER: Where are you --

14 MR. REESE: That's for the date upon authorization
15 by JohnMark which was your --

16 MR. WEINER: I object to that.

17 MR. REESE: If you would, we would offer that into
18 evidence.

19 THE COURT: Grounds?

20 MR. WEINER: Your Honor, that purports to be some
21 type of authorization for two -- some type of authorization
22 for ordering cabinets for Ivy Mount. It doesn't say how
23 many. It doesn't say when. What quantity. What number.

1 When they're to be delivered.

2 THE COURT: I think it goes to the weight, not
3 the admissibility. Next Plaintiff's number is 36.

4 MR. REESE: Nothing further of this witness.

5 THE COURT: What was 35?

6 THE CLERK: Bill on lawsuit, Judge. Walk-
7 through number 45. Bill for unit number 44 is 33.

8 THE COURT: I thought that's one where there was
9 no bill of 45. What do your counsel records show on a
10 walk-through?

11 MR. REESE: On 45, there was an invoice attached.

12 THE COURT: It's unit 45.

13 MR. REESE: I recollect there was an invoice
14 attached.

15 THE COURT: Let's do this for right now. The
16 new sheet will be P-36. I don't like to disagree with the
17 Court. I'm not sure there is a 35. So, put a questionmark
18 by that.

19 (The document referred to was marked
20 Plaintiff's Exhibit P-36 for identifica-
21 tion, and was received in evidence.)

22 THE COURT: Any other questions in chief?

23 MR. REESE: No.

1 THE COURT: That was redirect. Now, you want to
2 recross on the letter?

3 MR. WEINER: I wanted to ask Mr. Turner if he was
4 ever paid by anybody other than ADC Fairways for cabinets.

5 MR. REESE: The cabinets at Ivy Mount, I assume.

6 MR. WEINER: Yes.

7 THE WITNESS: The check I received I picked up
8 from JohnMark. I don't remember exactly, now, who wrote
9 the check. I assume it was JohnMark.

10 RECROSS EXAMINATION

11 BY MR. WEINER:

12 Q Did you receive payment from a title company?

13 A On the second building. I'm not sure who the
14 check came from on the first building.

15 Q Did you receive --do you recall receiving anything
16 other than a \$14,708 check?

17 A There were two buildings, and I don't recall
18 whether that was for the first one or the second one that
19 you're referring to.

20 Q Do you know how much the second check was?

21 A Approximately -- both buildings were approximately
22 the same. There wasn't a whole lot of difference. It
23 would have been for roughly the same amount or close to it.

1 Q So, there should either be a check from JohnMark
2 or from ADC --

3 A There's another check.

4 Q -- or Real Title Company?

5 A There's another check.

6 Q Are you owed any money at this date?

7 A Not on these two buildings.

8 MR. WEINER: I have no other questions.

9 MR. REESE: Nothing further.

10 THE COURT: Excuse him from the case?

11 MR. REESE: Your Honor, thanks.

12 MR. WEINER: Yes.

13 THE COURT: You may leave.

14 (Witness excused.)

15 MR. REESE: I call Ms. Summey.

16 Whereupon,

17 JEAN SUMMEY

18 was recalled, and having been previously duly sworn by the
19 Clerk of the Court, was further examined and testified as
20 follows:

21 DIRECT EXAMINATION

22 BY MR. REESE:

23 Q Ms. Summey, let me take you back, if I can, to

1 the Ivy Mount -- the beginnings of the work on Ivy Mount.
2 Were you on a day-to-day association with representatives
3 of ADC?

4 A Yes.

5 Q Beginning with the time that you all started the
6 Ivy Mount units, would you indicate to his Honor what, if
7 any, delays you know that were experienced by JohnMark due
8 due to ADC?

9 MR. WEINER: Objection.

10 MR. MAYS: Calls for a conclusion the delay was
11 caused by ADC. I think you have to develop this, Your
12 Honor. You have to show what a delay, then -- I mean the
13 question assumes that the delays were caused by ADC
14 Fairways. That's objectionable.

15 MR. REESE: Would you indicate --

16 THE COURT: So long as the next question is, since
17 she says there were some named delay and why you say it
18 should be laid to ADC's door.

19 MR. REESE: I have no problem with that at all.

20 BY MR. REESE:

21 Q Would you answer His Honor's question. Name
22 the delay and indicate why you're --

23 A The kitchen cabinets, number one.

1 Q Why do you say that was ADC's difficulty?

2 A Because they got the kitchen cabinet place. We
3 was going to St. Clair and then they decided they wanted
4 this other cabinet, Jim Turner, to come in; and they asked
5 him.

6 THE COURT: Who got him?

7 THE WITNESS: They met him up there.

8 THE COURT: No. Who made the contract with him?

9 THE WITNESS: The contract, I do not know who
10 made 'cause I did not see that.

11 THE COURT: All right.

12 MR. REESE: Now, why did that result in a delay?

13 THE COURT: How much delay?

14 THE WITNESS: It was a couple weeks or so because
15 we had to wait for the cabinets. Then, some of the counter-
16 tops were wrong. Then, the light fixtures in the kitchen.

17 THE COURT: You got one thing at a time. Some
18 countertops were wrong?

19 THE WITNESS: Right.

20 THE COURT: Now, that's a delay. How long? Why
21 is it ADC's fault?

22 THE WITNESS: Because word had come in 'cause they
23 recommended this Jim Turner, get the cabinets from him.

1 THE COURT: Turner supplied countertops in
2 addition to cabinets?

3 THE WITNESS: Yes.

4 THE COURT: How long was the delay for the wrong
5 countertops?

6 THE WITNESS: I guess a couple of days to a week
7 on the countertops, after the cabinets went in.

8 THE COURT: Why? Did you say --

9 THE WITNESS: They were the wrong size and it
10 wasn't the right ones for the cabinet.

11 BY MR. REESE:

12 Q Did the first cabinets come in after the 18th of
13 April?

14 A I think they did, yes.

15 Q All right. April 18th?

16 MR. WEINER: Your Honor, she's got to be more
17 sure about whether she thinks or she knows.

18 MR. REESE: Perhaps I could --

19 THE COURT: Perhaps you could what?

20 BY MR. REESE:

21 Q Did the first cabinets come in after the first
22 seven units were due under the ADC contract?

23 A Yes.

1 Q They did. Okay. Now, we had the kitchen
2 cabinets. We had the countertops. All right.

3 Now, was there another delay?

4 A The kitchen light fixtures.

5 Q All right. Explain to His Honor why that created
6 the delay, and why it was ADC's responsibility.

7 A They had wanted one type of light fixtures. We
8 ordered those, and they were out. Then, we had another
9 one put up, and they okayed it. Kische did.

10 Q Mr. Kische?

11 A Yes. Then comes -- Daly comes along, said no,
12 he wanted taken down.

13 Q You had to take them all down?

14 A Had to take them down.

15 Q About how long a delay did that amount to?

16 A That was around a couple weeks because you have
17 to call to get these 'cause suppliers do not keep them in
18 hand, what they wanted.

19 Q I understand. So, we had those three things,
20 the cabinets, the countertops, the kitchen lights. Were
21 there any other things --

22 A The electricity. The power being cut off.

23 Q Power was cut off?

1 A Yes.

2 Q How did that come about, and whose responsibility
3 was it?

4 A I don't -- it was just cut off, just certain
5 sections. Not permits and things, I guess.

6 Q Now, you say the power was cut off. Was it cut
7 off for a building? A unit? Or what?

8 A It was cut off building.

9 Q Was that 4355, the building you all were working
10 in at that time?

11 A Yes.

12 Q How long a period of time was the power cut off?

13 A Truthfully I cannot remember how long that was
14 because we did have problems with electricity off and on.

15 Q Was there any other delays caused by ADC?

16 A Water -- your floods in your apartments, you have
17 water floods.

18 Q Floods in the apartments?

19 A Yes.

20 Q How did that come about?

21 A From the pipes.

22 Q What would happen to the pipes --

23 THE COURT: What units?

1 THE WITNESS: In different units.

2 THE COURT: More than one flood?

3 THE WITNESS: Yes.

4 BY MR. REESE:

5 Q What would cause the pipes to flood?

6 A That I don't know. I don't -- wasn't a plumber.

7 Q I understand.

8 THE COURT: How do you know that your company's
9 employees didn't cause the floods by banging on a pipe or
10 something?

11 THE WITNESS: Well, at the time we hadn't been
12 into the units, different ones just were flooded.

13 THE COURT: I see. Flooding before you got in
14 there to work?

15 THE WITNESS: Yes.

16 BY MR. REESE:

17 Q Cove molding. Was there a dispute as to cove
18 molding?

19 A Yes.

20 Q Describe for His Honor how that dispute arose?

21 A At first they wanted the almond color. We could
22 not get it. Then Kische said we could get the white. He
23 okayed the white cove.

1 Q All right. Mr. Kische after approving the white,
2 what occurred then?

3 A They did not want it. They wanted the almond
4 color.

5 THE COURT: Who's they?

6 THE WITNESS: Tom Daly.

7 BY MR. REESE:

8 Q Okay. You put the white into the units?

9 A Yes. The white had gone into some units. Yes.

10 Q Then what occurred?

11 A We had to take it out and get the almond colors
12 to go in.

13 Q Was there any delay in getting the almond cove
14 colors?

15 A Oh, yes.

16 Q How did that delay come about?

17 A Because they -- when we called, they only had
18 like one or two boxes, and then they had to order it; and
19 she told us it would be like a couple weeks to get it in.

20 Q That was Brothers and Justice; is that correct?

21 A Yes.

22 Q Were there any other things that delayed JohnMark
23 in these particular units? At 4355, I should say.

1 A Not to my knowledge. There could have been. It's
2 been so long I can't remember them all.

3 Q Did there come a time when JohnMark was put off
4 the job in June of 1980?

5 A Yes.

6 Q For how long a period of time were you all off
7 the job at that point?

8 A About two weeks.

9 Q Then when you came back on the job, did you all
10 start in the units again?

11 A Yes, we did.

12 Q What was the reason you all were off the job in
13 June of 1980, if you know?

14 A To my understanding, they were not paid.

15 Q JohnMark was not paid?

16 A Yes.

17 Q Okay. With reference when Mr. Kische would walk
18 a unit -- he did walk a lot of units; didn't he?

19 A Yes, sir.

20 Q When Mr. Kische would walk a unit and sign the
21 walk-through list --

22 A Yes.

23 Q -- what would happen to the key?

1 A I would turn the keys over to him.

2 Q All right. How many such units did you turn the
3 keys over to him before June 18?

4 A I can't quite remember the exact number, but I
5 know all that we ever walked and he signed, the keys were
6 turned over right then and there 'cause we did not want the
7 responsibility.

8 Q Didn't want the responsibility of the keys.

9 A Uh-huh.

10 THE COURT: Is that true for units where the
11 kitchen light and the almond molding were not yet installed?

12 MR. REESE: Would you answer.

13 THE COURT: Did you give the key up when you
14 still had the light fixture and cove molding --

15 THE WITNESS: They accepted it with the under-
16 standing when they came in -- yes, we would put it in.

17 THE COURT: So, yes, you did give up the keys?

18 THE WITNESS: Yes.

19 THE COURT: So, then, when they did come, you'd
20 have to go get the keys back?

21 THE WITNESS: Yes.

22 THE COURT: Did you ever keep a second set of keys?

23 THE WITNESS: No, sir.

1 BY MR. REESE:

2 Q Directing your attention to Plaintiff's Exhibit
3 No. 34, is this the kind of walk-through checklist you were
4 talking about?

5 A Yes. Uh-huh.

6 Q Taking a look at it, it's signed by Mr. Kische.

7 A Right.

8 Q Upon his signature there, would you give him the
9 keys at that point?

10 A We would hand it over right there and then. We'd
11 never walk another unit with a key in our hand.

12 Q All right. I note down here it says, "Contingent
13 upon cove base, kitchen light and scribe molding." All
14 right. When you -- is this one unit you were involved in
15 or somebody else?

16 A No. One of the other guys.

17 Q Let's take a look at one of the units you were
18 involved in.

19 I draw your attention to Plaintiff's Exhibit No.
20 31. Were you involved in that particular unit?

21 A Yes.

22 Q All right. Now, I note down here there's a
23 star next to Mr. Kische's name, and then there's a star

1 down here that says, "Contingent upon replacing the light
2 fixture." All right.

3 Now, what was Mr. Kische's position with reference
4 to the unit at that point?

5 A. At the time he was walking to accept them, I was
6 to turn them over to him.

7 Q Was that an acceptance contingent upon this, or
8 was it something else?

9 A No. It was accepted. Then we were to put the
10 light fixture in when they came in because we did not have
11 them.

12 Q That's under Unit 31 -- strike that, on Plaintiff's
13 Exhibit 31. Let me show you this which is Plaintiff's
14 Exhibit --

15 THE COURT: Excuse me. Is this a list of apart-
16 ments you're going to go through for me to record something?
17 Or are you going to establish a principle?

18 MR. REESE: I'm just establishing a principle
19 at this point, if Your Honor please.

20 BY MR. REESE:

21 Q Looking at Plaintiff's No. 29, does it bear your
22 signature?

23 A Yes.

1 Q Mr. Kische's signature, also?

2 A Right.

3 Q I notice it says contingent upon light replacement
4 in this instance?

5 A Yes.

6 Q Same situation?

7 A Same.

8 Q Let's do this just one more time if we can.

9 Did you walk the units with Mr. Quatmann also?

10 A Yes, I did.

11 Q When he signed off as according to Plaintiff's
12 Exhibit No. 14, did you turn the keys over to him at that
13 time, also?

14 A Yes, I did. I certainly did.

15 Q All right. Now, would you tell me what in the
16 terms of this -- of your dealings with ADC the terms final
17 cleaning, or final clean meant?

18 A Final clean, when they -- before the customer went
19 in?

20 Q Well, what does final clean --

21 THE COURT: For \$44, was it?

22 MR. REESE: Yes.

23 THE WITNESS: That was the vacuum and doing the

1 dusting. Make sure that everything was in place for the
2 customer.

3 BY MR. REESE:

4 Q For the customer?

5 A Yes. After the carpeting went in, we vacuumed.
6 Then we did the dusting. Make sure the blinds were all
7 clean and all.

8 Q Now, the carpeting went in after you all turned
9 the unit over to ADC; is that right?

10 A Yes.

11 Q And then you would come back in and do a final
12 clean?

13 A Yes.

14 MR.. REESE: I don't think I have any further
15 questions of this witness, Your Honor. Your cross.

16 CROSS EXAMINATION

17 BY MR. WEINER:

18 Q Ms. Summey, just picking up where Mr. Reese left
19 off, when you did this final clean, how did you get into
20 the unit?

21 A We went and got a key. We signed a key out from
22 Kische or whoever was in the office. One of the secretaries
23 who was also sitting there. We had to sign for the keys.

1 Q Now, you were -- you personally know about all
2 these delays ADC caused; right?

3 A Yes. I was there, yes.

4 Q And you also were the lady that wrote letters to
5 ADC advising them about the delays; isn't that right?

6 A No.

7 Q You didn't? Who did?

8 A The other secretary at the other office.

9 Q In your office?

10 A I did none of the typing.

11 Q In your office? In the JohnMark office?

12 A The one in Oxon Hill, the girl over there did the
13 typing. We had one girl, Nancy, that would type.

14 Q So, then, when the delays that ADC caused you all
15 because of the cabinets, you got on the phone or Mr.
16 McCarty got on the phone and said send a letter over to
17 ADC and tell those people they're causing us a delay; isn't
18 that so?

19 MR. REESE: If she knows.

20 THE WITNESS: I don't know that to be a fact, no.
21 I do not know what he called and told her.

22 BY MR. WEINER:

23 Q Did you ever call?

1 A. No.

2 Q. You never called --

3 A. To my knowledge, no.

4 Q. Let me ask the question, first.

5 A. Okay.

6 Q. You never made any request, yourself or through
7 a secretary of JohnMark, to communicate to ADC that a delay
8 has been caused, we need more time?

9 THE COURT: By ADC.

10 MR. WEINER: By ADC.

11 THE COURT: Complaining of their delay and to
12 ask for more time because of it.

13 THE WITNESS: Not to my knowledge. I never
14 asked for more time, no.

15 BY MR. WEINER:

16 Q. Well, Mr. McCarty is your boss -- or was your
17 boss; isn't that right?

18 A. Yes.

19 Q. And he wasn't always on the job. You were
20 there approving units.

21 A. Right.

22 Q. And you said --

23 A. If I cannot get them, then I would let Dick

1 know or John Sauer know that we could not get them.

2 Q Was there any course of conduct that you folks
3 took that you're aware of to advise ADC that the job is
4 being delayed?

5 MR. REESE: In writing or otherwise?

6 THE WITNESS: Yes.

7 BY MR. WEINER:

8 Q Thank you, Mr. Reese. In writing. All right.
9 Let's start in writing.

10 A I don't know about writing. I did not write,
11 but as far as phone calls, I had talked to Mr. Dillon
12 about light fixtures.

13 Q Did you ever ask for more time?

14 A I never asked it personally, no.

15 Q Were you present when Mr. McCarty asked for more
16 time?

17 A No. I did not listen in on his conversations.

18 Q I didn't ask you --

19 A No, sir. I was not in his office.

20 Q Were you ever present when Mr. Sauer asked for
21 more time?

22 A No, sir.

23 Q Now, did you -- you've been on the stand a

1 couple of times. So, I don't remember whether I or Mr.
2 Reese or anybody else asked you about the contract. Did
3 you ever read the contract for Ivy Mount? Are you familiar
4 with it?

5 A. Yes.

6 Q. You did?

7 A. I did read it before I went over, yes; and I
8 referred to it a couple times when we were on the job.

9 Q. Do you remember what you -- the reason why you
10 referred to it?

11 A. Different things like the hardware would come
12 off on the screen doors or the door stoppers or different
13 things.

14 Q. Could I ask you -- well, paragraph four of the
15 contract -- paragraph four, the last sentence in the first
16 paragraph of Section 4, change orders. No increase in the --
17 "No increase in the cost of work shall result from changes
18 ordered or extensions of time for performance of the work
19 allowed unless written claim for such increase in cost or
20 extension of time is made when changes are ordered and
21 authorized in writing by developer."

22 Do you remember ever seeing that before?

23 A. No. I've never seen this part before, no.

1 Q But if that was there, you certainly would have
2 written something?

3 A No. I did not see this part, no. This is not
4 the one I've seen, no.

5 Q Is there another contract for Ivy Mount?

6 A There was a smaller version that I had to look at
7 is what we went by.

8 Q That was the scope of work you're talking about,
9 not the contract; right?

10 A No. I've never seen the full contract, no.

11 Q I'm sorry, Ms. Summey. If you didn't see the
12 contract, you certainly wouldn't know about it.

13 Now, you talked about some water pipes breaking,
14 some flooding apartments; isn't that right?

15 A Yes.

16 Q That caused a delay; didn't you?

17 A We had to go back in and do some work, yes.

18 Q And that didn't cause any written notice to be
19 sent to the developer; did it?

20 A I think they talked on the phone about it.

21 Q You think or you know?

22 A I'm sure there was a phone call made.

23 Q Did you call?

1 A There was a phone call made from the office.

2 Q By whom?

3 A I think John made the phone call.

4 Q You think or you know?

5 A All right. John made the phone call.

6 Q Were you present?

7 A I was there. He made the call, and then went
8 out of the office.

9 Q So, you don't know what he talked about, then?

10 A No.

11 Q Did you know that JohnMark in signing this
12 contract assumed responsibility for any delays for unfore-
13 seen risks?

14 A No, I did not.

15 Q When Mr. -- you said when Mr. Kische went around
16 with units with you, do you remember when that was?

17 A It was about the end of April, May, somewhere in
18 there.

19 Q End of April --

20 A You mean at Ivy Mount?

21 Q Yes. Ivy Mount. That's all we're talking about
22 is Ivy Mount.

23 A Somewhere around in May.

1 Q And was it your understanding that he was
2 accepting units?

3 A Yes.

4 Q Were you aware that on May 2nd he lost his
5 authority to accept units?

6 A No, sir.

7 Q You were never aware of that?

8 A No, sir.

9 Q Did you know that Mr. Daly was the only one that
10 could accept units in May -- starting May 2nd?

11 A No. There was some man would walk them, Tom
12 Dillon walked them, there was always different ones.

13 Q But did you know who had the authority to accept
14 units --

15 A No.

16 Q You never knew?

17 Now, you turned over keys, you say. Would you
18 turn over keys before you invoiced?

19 A Yes. The invoice -- like when we walked this
20 unit, the invoice was already attached to the bill. It's
21 already there when we walked the unit. I had it in my hand,
22 the bill.

23 Q Ms. Summey, you didn't walk all those units,

1 though; did you?

2 A I'm saying, sir, when the apartment is walked,
3 the invoices are already made up to go with the unit when
4 it's walked.

5 Q Did you make up the invoices?

6 A Yes.

7 Q Did you attach them to the sheets?

8 A Yes.

9 Q But you didn't walk all the units?

10 A No. Not them all, no. At Ivy Mount, I did not
11 walk them all, no.

12 Q Ms. Summey, all we're talking about is Ivy Mount,
13 now.

14 A Okay.

15 Q Were you the one that actually prepared the
16 invoices?

17 A Yes.

18 Q And you are the one that attached them to the
19 bills?

20 A Yes.

21 Q To the sheets?

22 A The sheet that the -- walk-through. Where they
23 had walked through the apartment before to turn it over to

1 us to put down everything that had to be done.

2 Q All right. Let's talk about cove molding. We've
3 talked quite a bit about it. Just a little bit more.

4 We heard you testify with Mr. Reese that Mr.
5 Kische said you could put white cove molding in, and some
6 units had white cove molding; but then we had to get almond
7 cove molding; right?

8 A Right.

9 Q And Mr. McCarty said to you, Ms. Summey, Jean,
10 call up and get us some cove molding; right?

11 A Yes, sir.

12 Q What did you do?

13 A I got on the phone, and I called everybody that's
14 in the book; went down the list and called them. And we
15 found Justin Brothers who had some and could get more later.

16 Q They had some and could get more?

17 A Yes. But there would be a delay.

18 Q Now, you said they had some --

19 THE COURT: How much did they have?

20 THE WITNESS: I think we ended up getting two
21 boxes.

22 BY MR. WEINER:

23 Q So, on what date?

1 A I do not remember the date, sir.

2 Q Do you remember --

3 A That's almost two years ago.

4 Q Do you remember when the decision was made to get
5 cove molding -- to get the almond cove molding?

6 A Say that again?

7 Q When was the decision made to get the almond
8 cove molding?

9 A It was the first decided at the very beginning
10 but was not being gotten, and we got the white and Dick
11 said okay, and when Mr. Daly seen it, he said no, the
12 almond had to go with the appliances.

13 Q Ms. Justice said -- testified that on June 30th,
14 she got the order on the almond cove; does that sound right?

15 A It could be right.

16 Q That was the -- and you say as a result of that
17 order, you did get two boxes?

18 A I think we got two boxes.

19 Q On what date?

20 A I do not know the date, sir.

21 Q Well, they weren't there on July 3rd; was it?
22 Because there --

23 A No.

1 Q -- there was no cove molding in; is that right?

2 A No.

3 Q There was?

4 A No. I didn't say there was.

5 Q Now, wasn't it you that took the samples of the
6 different color almond cove molding?

7 A No.

8 Q Who did?

9 A One of our guys did. It was not me.

10 Q Remember you had Mr. McCarty was very, very
11 concerned that we're going to show them the samples to
12 make sure they get the right color.

13 A Right. Mr. Kische brought the cove over, the color
14 they wanted.

15 Q So, there were several different almond cove
16 moldings; is that right?

17 A Right.

18 Q And it was not you?

19 A No.

20 Q And it was not Mr. McCarty?

21 A It could have been Mr. McCarty. I don't know
22 who went to look for. I --

23 Q I think you misunderstood my question. It's been

1 testified that several different samples of almond cove
2 molding was presented by JohnMark to ADC people --

3 A Right.

4 Q -- for their approval. Were you the JohnMark
5 individual who presented the various samples?

6 A No.

7 Q Okay. Now, with regard to this light fixture --
8 with regard to this light fixture, isn't it a fact you were
9 on the job when this Modification Agreement came about?

10 A I was on the job when it closed down, yes.

11 Q Wasn't it a fact that there was concern, and
12 rightfully so, that we are -- JohnMark is going to make
13 sure that they can get the light fixture before we're going
14 to sign this Modification Agreement? Do you remember that?

15 A They called and said they could have it, yes.
16 They could get it.

17 Q What happened?

18 A There was a wait period on getting them. They
19 only had so many in stock, and you had to wait to get the
20 rest.

21 Q So, before he signed the Modification, he believed
22 that he could get it? Isn't that so? Isn't that -- or your
23 understanding?

1 A My understanding.

2 Q Now, it didn't come about; is that right? It was
3 a delay.

4 A It was a delay, yes, sir.

5 Q And once again, to your knowledge, was a letter
6 written with regard to the delay in the light requesting
7 more time?

8 A Like I say, sir, I did not. It could come from
9 the other secretary or Mr. McCarty.

10 Q Were any units that you walked, or supposedly to
11 be delivered on April 18th -- did you walk any units on
12 April 18th?

13 A Yes.

14 Q Did they have cabinets in them? Kitchen cabinets?

15 A The 18th? They were not ready.

16 Q What was the matter with them?

17 A All the cabinets were not there. I don't know
18 the exact date that we walked them.

19 Q Do you have any of your punchout lists or any
20 lists indicating units were not ready because there were no
21 cabinets?

22 A I do not have nothing with me, no.

23 Q Do you have any lists that indicate units were not

1 ready because there were no countertops?

2 A I do not have the list, no. I have none of the
3 JohnMark papers.

4 MR. WEINER: Nothing else of this witness, Your
5 Honor.

6 REDIRECT EXAMINATION

7 BY MR. REESE:

8 Q Ms. Summey, where were representatives of ADC?
9 Were they working alongside of you?

10 A Yes, sir. They were just about a block down --
11 right down the hill. The foot of the hill from where we
12 were.

13 Q And they were in and out of the building?

14 A Yes, sir. Daly and Kische and Dillon all were
15 in and out of it.

16 Q And they knew about the delay of the kitchen
17 cabinets?

18 A Yes.

19 Q And they knew about the delay of the cove molding?

20 A Yes.

21 Q They knew about the delay on the kitchen lights?

22 A Yes.

23 Q They knew about all these delays; didn't they?

1 A Yes, sir. They sure did.

2 Q Actually they were sitting there hand-in-glove
3 with you; right?

4 A Yes, sir.

5 Q There's not a question in your mind that they
6 knew of these delays?

7 A Yes. Mr. Dillon and Mr. Kische and all knew
8 very well.

9 MR. REESE: No further questions.

10 THE COURT: Nine-thirty tomorrow morning.

11 Witness excused from the case.

12 (Witness excused.)

13 (Whereupon, at 5:10 o'clock p.m., the hearing in
14 the above-entitled matter was adjourned.)

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P R O C E E D I N G S

THE COURT: All right.

MR. REESE: Carroll MacAbee.

Whereupon,

CARROLL JASPER MACABEE

was called as a witness by counsel for the Plaintiff, and having been previously duly sworn by the Clerk of the Court, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. REESE:

Q Good morning, Mr. MacAbee. Mr. MacAbee, would you state your full name for the record?

A Carroll Jasper MacAbee.

Q Mr. MacAbee, you were the painting contractor on the Ivy Mount contract for Johnmark; is that correct?

A Yes, sir, painting and drywall.

Q And that was from the very beginning of the work, through July --

A Yes, sir.

Q -- 1981; is that correct?

A Yes, sir.

Q All right. During that period of time, did you experience or notice any delays in the work which appeared

1 to be created by A.D.C.?

2 THE COURT: Just answer yes or no.

3 THE WITNESS: Yes, sir.

4 THE COURT: Objection?

5 MR. WEINER: Yes, Your Honor.

6 THE COURT: Grounds?

7 MR. WEINER: I think the question asks for an
8 opinion rather than witnessing --

9 THE COURT: He said the first question was whether
10 he has one because it would be pointless if he has no
11 opinion. The next question will be, as yesterday, name the
12 delay and tell what facts you know to indicate who caused
13 it.

14 BY MR. REESE:

15 Q Now, sir, would you please be kind enough to tell
16 Judge Brown the delays that you witnessed and why you lay
17 these at the feet of A.D.C.?

18 A All right. One delay would be light fixtures.
19 They kept changing the light fixtures on us; medicine
20 cabinets --

21 MR. WEINER: Your Honor, I think the witness --
22 this is an area -- he was the drywall contractor. Unless
23 he knows, of his own personal knowledge --

1 THE COURT: It did develop that he doesn't know
2 of his own knowledge, it will be stricken.

3 BY MR. REESE:

4 Q You have indicated that they kept changing the
5 light fixtures, who would, "they" be?

6 A A.D.C. Corporation.

7 Q All right. What effects did their changing light
8 fixtures have on your work?

9 A Well, just with the light fixtures now, like they
10 would have a light fixture that was maybe four feet long.
11 They would change it to one two feet long that would leave
12 an extra hole in the ceiling to be repaired.

13 MR. WEINER: Your Honor, is that an example he's
14 giving us or the actual facts?

15 THE COURT: That's what cross examination is for.

16 THE WITNESS: Facts.

17 BY MR. REESE:

18 Q All right, sir, and who would have to do the
19 repair work?

20 A I did.

21 Q You did all the repair work?

22 A Yes, sir.

23 Q All right. Now, what other examples of delays

1 did you experience and that you believe were at the feet
2 of A.D.C., and why do you believe they were at the feet of
3 A.D.C.?

4 A All right. As I said, there was the light
5 fixtures; there was bathroom medicine cabinets.

6 Q What happened with reference to those?

7 A They couldn't decide what kind of cabinet they
8 wanted. We have one in there and we had to take it out and
9 they wanted another one. They got a much smaller one and
10 we had to restud the walls to fix it and then replace the
11 sheet rock and paint the wall again.

12 Q All right. "They" decided. Who was the they
13 you are talking about?

14 A That was Mr. Kische.

15 Q Mr. Kische, employed by A.D.C.?

16 A Yes, sir.

17 Q So, you had to restud the walls?

18 A Yes, sir.

19 Q Who had to do all of that work?

20 A My drywall people.

21 Q Were you there --

22 A Yes, sir.

23 Q All right, sir. Did that create a delay in the

1 finished product?

2 A Yes, sir.

3 Q What other examples do you have in mind of your
4 own personal recollection, now?

5 A Pipes, there was something to do with some pipes
6 in the wall in the kitchens because we would have to repair
7 the -- like holes in the wall. They had to -- just a line,
8 more or less, down the wall, following the pipe -- the
9 shortened pipe and that was -- I think that had to do with
10 the stone -- I'm not sure what it had to do with, but they
11 had to remove a pipe, shorten it so we would have to go back
12 in and repair that wall.

13 Q All right, sir.

14 A Okay?

15 Q Now, according to the contract, the first units
16 were to be delivered on April 18th, 1980. On that date,
17 were the cabinets there, had the cabinets been installed on
18 April 18th?

19 A Yes, sir.

20 Q The cabinets had been?

21 A Yes, sir.

22 Q All right, sir. Would this have been the Evans
23 Cabinet?

1 MR. WEINER: Your Honor, he's a drywall sub --

2 THE COURT: But if he knows something, he might
3 know what time the 10 o'clock train left, knowledge is
4 knowledge.

5 BY MR. REESE:

6 Q All right. Now, were there any other delays inci-
7 dent to this contract that you witnessed?

8 A I am trying to think, to make sure. I know there
9 was but I can't remember -- appliances at one time.

10 Q They changed appliances?

11 A If I remember, we had some in there and we had
12 to change them, put a different color in or something, I
13 believe it was.

14 Q Okay. Was there a problem with the cove moulding?

15 A Oh, yes. There was a problem with the cove
16 moulding.

17 MR. WEINER: I object to that, Your Honor. That's
18 a leading question. The man is trying to think about mis-
19 takes --

20 THE COURT: Wigmore said that it's proper leading,
21 and not objectionable, to direct a witness' attention to a
22 particular topic as long as you don't suggest to this
23 witness what the answer about that topic may be.

1 BY MR. REESE:

2 Q Would you inform the Court as to what, if any
3 problem, there was with reference to the cove moulding?

4 A Well, there was cove moulding to begin with; one
5 particular color was chosen and I believe it was white
6 at the beginning and then that was changed and that was
7 changed, I believe, to an almond.

8 THE COURT: And how did that affect your work,
9 Mr. MacAbee?

10 THE WITNESS: Well, sir, when you put down all the
11 cove moulding around everything, you have to -- if you have
12 cove moulding already down and you take it out and you
13 replace it, you more or less have to touch up lines where
14 the moulding is at, from the original painting.

15 THE COURT: All right.

16 BY MR. REESE:

17 Q All right, sir. Were there any other delays that
18 you noticed that effected your work?

19 A Yes, sir. At one time -- there were the cabinets --

20 Q The what?

21 A The kitchen cabinets.

22 (Off the record)

23

1 BY MR. REESE:

2 Q In response to my question you said there was a
3 delay with the kitchen cabinets?

4 A Yes, sir. There was a delay in kitchen cabinets?
5 at one time. There was a delay in all the power that was
6 turned off in the building. I guess it would be when
7 Pepco turned off all the electricity -- that held us up
8 because we would have to go out there and we'd have to get
9 long drop lights and try to figure out ways to get light
10 into these, more or less, bathrooms because you couldn't
11 see to get them done.

12 Q How did the kitchen cabinets delay come about,
13 and what effects, if any, did it have on your work?

14 A There was some kind of discrepancy on the changes
15 of the cabinets or changing companies, I'm not sure what it
16 was but there was changing of cabinets and the kitchens
17 could be prime coated, okay, before the cabinets and stuff
18 went in but before the finished coat, the cabinets and
19 everything had to be in because if they went in afterwards,
20 I would have to go back in again.

21 Q So, you had to wait until the cabinets came in?

22 A Yes, sir.

23 Q All right, sir, and on the power situation, how

1 long a delay did that mean to you?

2 A I have no idea, I can't remember that.

3 Q Okay. I understand, sir.

4 Now, sir, did you walk the units with representa-
5 tives of A.D.C. when they were doing their walk-throughs?

6 A Yes, sir.

7 Q Tell us who walked the units with representatives
8 of A.D.C. at the time of these walk-throughs --

9 THE COURT: That you saw.

10 THE WITNESS: Well, Your Honor, when Johnmark
11 started at Donnybrook --

12 MR. REESE: That's not what we are talking about --

13 THE WITNESS: I walked everything.

14 BY MR. REESE:

15 Q You did it at Heritage Woods and Ivy Mount?

16 A Yes, sir. We had a setup as to where, like they
17 had one inspector -- I don't know his last name, but his
18 first name was Bruce -- they had Walter, Mr. Kische --

19 Q Bruce Warren, does that ring a bell?

20 A Warren, that's it.

21 Q Walter, Walter Kische -- I mean Quatmann?

22 A Yes, sir.

23 Q Dick Kische?

1 A Mr. Kische and Miss -- a tall lady -- Mara.

2 Q Mara Ernestones?

3 A I'm sorry, I can't pronounce the name.

4 Q I understand.

5 A Well, at the time, every one of these, we always
6 had a particular setup which we had started years ago on
7 another job, whereas I would, myself, and another one of my
8 men, the plumber would have -- not every time, but the
9 majority of the time the plumber would have one of his
10 people with us; Johnmark would have their maintenance people
11 with us and we would go through the units all with the
12 inspector because the majority of the time if they found
13 some little item that we could do right there and then we
14 did and it was over with, no problems; and we just had kept
15 that same setup.

16 Q All right. Now, did you do the walk-throughs
17 with Walter Quatmann?

18 A Yes, sir.

19 Q And as a result of those walk-throughs, were keys
20 turned over to A.D.C.?

21 A Yes, sir. They were, after we had a couple things
22 to touch up and do and we done it and the keys were turned
23 over and they were accepted.

1 Q Okay. Now, in May of 1980, Dick Kische began
2 walking some units; is that correct?

3 A Yes, sir. Mr. Kische walked Ivy Mount, yes, sir.

4 Q He walked Ive Mount after Walter Quatmann left;
5 right?

6 A Yes, sir.

7 Q Now, after walking the units with Dick Kische,
8 did you all do some touch-up work and this type of stuff?

9 A Yes, sir.

10 Q And were the keys turned over to Dick Kische?

11 A Yes, sir.

12 Q All right. Did he indicate that the units were
13 acceptable or unacceptable at that time?

14 A Accepted.

15 Q Accepted?

16 A Yes, sir. He had to sign the papers -- you know,
17 we all had papers and Mrs. Jean Summey walked with us;
18 that was one of her main jobs, she was coordinator and she
19 would walk all these units before they were inspected and
20 we could go down everything on the list, you know, work
21 to be done.

22 Q Yes.

23 A And we would try to make sure everything was done

1 and then when the units were walked with Mr. Kische or
2 whoever was the inspector at the time, she would be right
3 with us, she would have her list and Mr. Kische or, you
4 know, whoever, would have a list. Their lists, you know,
5 we would have to go down to the units and that's how they
6 inspected them.

7 Q All right, sir. You all were off the job begin-
8 ning about the 13th of June until June 18th; is that correct?

9 A The first week -- yes, around, I think, the
10 3rd or 5th, right around in there.

11 Q All right, sir. Prior to that, certain units had
12 been, in fact, presented to A.D.C. by Johnmark and Ivy
13 Mount for acceptance?

14 A Oh, yes, sir.

15 Q Had those units been accepted?

16 A Yes, sir.

17 Q All right. When you went through the units
18 finally, were they acceptable as far as you were concerned?

19 MR. WEINER: Objection, Your Honor. I mean, a
20 unit acceptable as far as he was concerned, it's just
21 totally irrelevant.

22 MR. REESE: He's the painter.

23 THE COURT: But it's an opinion which really runs

1 to the ultimate issue in the case. I would distinguish
2 that from the kind of question, did you have any work left
3 to be done --

4 MR. REESE: All right, I will ask this question,
5 then.

6 THE COURT: But an opinion on the end itself is
7 really for the factfinder.

8 BY MR. REESE:

9 Q After the units had been accepted by A.D.C.,
10 as you have indicated through this procedure, you indicated --

11 A Yes, sir.

12 Q Did you feel you had any more work to do in those
13 units?

14 A Are you speaking of a whole thing or up until
15 what you just said, May --

16 Q Up until you all went off the job, the first time,
17 in the beginning of June.

18 A The work was completed.

19 Q All right, sir. Now, you all were off the job
20 for about, as you said, the 4th or 5th of June until the
21 18th of June?

22 A Well -- I believe we went back on the job around
23 the 19th or the 20th of June.

1 Q All right, sir. Now, the work that was done after
2 that, did you do all the painting and drywall work?

3 A Yes, sir.

4 Q The units that you performed on, when the units
5 were turned over to A.D.C., did you feel you had any
6 additional work to do?

7 A No, sir, not on our part.

8 Q Now, let's just deal with particular units, if
9 we might. The second floor units at 4355.

10 A That was completely done.

11 Q That was completely done?

12 A Yes, sir.

13 Q Did you walk those units?

14 A Yes, sir.

15 Q The same procedure?

16 A Yes, sir.

17 Q Was that Mara Ernestones who was walking them at
18 that time with you?

19 A On the second floor, yes, sir.

20 Q All right, sir. Now, let's direct your attention
21 for a moment, if we can, to the basement unit and that
22 would be one through five -- I think that would be -- no,
23 one through four, which is the B level.

1 A The B level and then the A level.

2 Q The A level is five through ten?

3 A Yes, sir.

4 Q Okay. On those particular units, did you find
5 any problems with doing the drywall work down there?

6 A Yes, sir.

7 Q What kind of problems did you run across?

8 A One unit, I believe is -- I believe that would be
9 B-1.

10 Q All right, sir.

11 A All right. That unit was completely flooded out.

12 Q Completed flooded?

13 A And we had to go in and we had to replace sheet
14 rock. Now, using this wall, for example, just like the
15 moulding there, our sheet rock -- we had to replace the
16 sheet rock that high, all the way around this apartment.
17 (Indicating on the courtroom wall)

18 We had to put in a section of the hallway ceiling.
19 We had to put in a closet ceiling and that was just in that
20 one unit.

21 Q All right, sir. Now, after you walked the 20
22 units, the second floor units, were the keys turned over to
23 A.D.C.?

1 A Yes, sir. That was -- yes, sir.

2 Q All right, sir. After you would complete your
3 work and the units were turned over to A.D.C., was the
4 carpeting then put in at that point?

5 A Yes, sir.

6 Q All right, and would you then be called back for
7 touch-up work after that?

8 A Yes, sir.

9 Q After the carpeting was put in?

10 A Yes, sir.

11 Q All right, sir. I understand.

12 MR. REESE: I don't think I have any further
13 questions of this witness.

14 CROSS EXAMINATION

15 BY MR. WEINER:

16 Q Mr. MacAbee, you had worked for Johnmark prior to
17 the Ivy Mount contract; is that right?

18 A Yes, sir.

19 Q Now, when it came to working on Ivy Mount, did you
20 enter into another contract with Johnmark?

21 A Yes.

22 Q A separate contract?

23 A Yes, sir.

1 Q A separate contract?

2 A Yes, sir.

3 Q Do you remember when you entered into the contract?

4 A Well, the contract was wrote up somewhere around
5 the end -- have to be around somewhere around the first of
6 March.

7 Q Okay.

8 A When you say it was wrote up, what do you mean
9 by that?

10 A Well, I wrote up a statement agreeing -- you know,
11 as to what I was supposed to do in each unit.

12 Q The price that you were going to charge them?

13 A Yes, sir.

14 Q And when -- then you turned over that contract to
15 McCarty?

16 A Yes, sir.

17 Q Mr. McCarty. And when did that come back to you,
18 signed that they accepted it?

19 A Right then.

20 Q Same day?

21 A Yes, sir.

22 Q Okay. So, certainly by March the 12th you had a
23 contract?

1 A Oh, yes.

2 Q Now, Mr. Reese asked you questions about the delays
3 that you experienced or heard about that were caused by
4 A.D.C. That's what you were talking about just moments ago?

5 A Yes, sir.

6 Q And you mentioned a number of items?

7 A Yes, sir.

8 Q You said there was a situation with a delay that
9 was caused by light fixtures?

10 A Yes, sir.

11 Q Now, apparently -- are you saying that your work
12 was delayed because light fixtures weren't available to be
13 put in?

14 A Well, light fixtures were in, okay? Mr. Dillon,
15 Mr. Kische, whoever has the control --

16 Q I am just asking you was work delayed as a result
17 of changing the light fixtures?

18 A Yes, sir.

19 Q Now, if I can, you were on the job and your work
20 was delayed, you can't move along with your work because of
21 a problem either putting in light fixtures or taking out
22 light fixtures? What did you do?

23 A I was doing more work in the building, painting,

1 you know, painting the other apartments.

2 Q So, you weren't sitting around?

3 A No, no, sir. I wasn't sitting around. I had more
4 work to do, that was just delaying, you know, getting these
5 units for our end to have it -- to have them be inspected.

6 Q Well, is your -- when you finished the drywall
7 in the units and the painting in the units and the spackling
8 and prep work, your job is done in the unit; isn't that
9 right, except for coming back for the little touch-up items?

10 A Doing touch-up and everything and plus I had to
11 come back in and I had caulking around the cove moulding,
12 around the bathtubs, after, you know, they were cleaned.

13 Q So, are you saying that your work was -- your
14 part of the contract, your part of getting a unit together,
15 was delayed?

16 A Yes.

17 Q Is that correct?

18 A Yes, sir.

19 Q Now, what did you do -- as far as that delay, did
20 you go over to Mr. McCarty and say, "Hey, Mr. McCarty, I'm
21 being delayed". Did you complain about it?

22 A Oh, yes. Yes, sir.

23 Q That's what I want to know. Who did you complain to?

1 A I complained to Mr. Kische, I complained, you
2 know -- I didn't have to complain to Mr. McCarty because
3 they were right there with us, they were with me, you know,
4 it was just, you know -- the only way I can say this in my
5 way is when you completed your job, all right, the units
6 have to be turned over. Okay?

7 They would not accept -- they wanted to change
8 the light fixtures and different things that would put more
9 holes in the ceiling for us, you know, to have to redo those
10 holes and get them real fast, as quick as we could, and
11 get them fixed up and repainted. We were working with
12 enamel paint, you don't touch up a spot.

13 Q But what I am asking you, sir, who were you
14 working for?

15 A I was working for Johnmark.

16 Q Your agreement, your contract, was with Johnmark?

17 A Yes, sir.

18 Q Now, if you had a problem on the job, who did you
19 go to?

20 A Johnmark.

21 Q You have a delay, who do you go to?

22 A Johnmark.

23 Q Now, when you had any delay at all, for any reason,

1 whether be lights or cove moulding or medicine cabinets,
2 whatever, did you go to Johnmark and say, "Hey, Johnmark,
3 I am being delayed?"

4 A Well, yes.

5 Q You did?

6 A Um-hum.

7 Q How did you do that? What did you do?

8 A I would just say, you know, they can't make up
9 their mind, how can I get these things finished?

10 Q What did Johnmark say to you about a delay?

11 A Well, actual work, I can't remember what was said.
12 It was delaying them, too.

13 Q Excuse me, sir?

14 A I said, actual work, I can't remember, you know,
15 what was said every time.

16 Q Mr. MacAbee, I am not trying to trick you. You
17 were delayed in progressing with the contract work that you
18 have with them.

19 A Right.

20 Q You complained to them.

21 A Yes, sir.

22 Q Now, what relief did you get? Did they tell you
23 anything? Did they say don't worry about it, we'll talk to

1 A.D.C. or we'll take care of the delay -- did they make any
2 kind of assurance to you?

3 A Oh, yes, sir. They were trying to get it straight
4 with them to see, you know, what they wanted now, what kind
5 of lights do they want now. As soon as they get these
6 straightened out, we can get back in there and get it done.

7 Q Was there ever a point in time that you said,
8 "Look, this is going to cost me three more days of work,
9 this is going to cost me five more days of work, another week
10 or two of work"? Did you ever say that to them?

11 A No, sir.

12 Q Did they ever say to you, "Look, Carroll, don't
13 worry about things, we're going to have another week to
14 deliver these units. We're going to have another two weeks
15 to deliver these units?"

16 A No, sir. I was never given no time like that,
17 no, sir.

18 Q Did Mr. McCarty or did Mr. Sauer or did anybody
19 from Johnmark show you the construction contract for Ivy
20 Mount?

21 A The --

22 Q Not the scope of work, now, the construction contract.

23 A You are referring to the contract with A.D.C. on

1 what Johnmark was required to do?

2 Q And the contract, yes, and the terms of the
3 contract?

4 A All I was ever shown on, you know, was what was
5 required -- what I had to more or less bid on as far as the
6 painting, the drywall, so much footage and different things
7 of that nature.

8 Q So, then it would be fair for me to say that you
9 never agreed to abide by the terms of the contract,
10 Johnmark's contract with A.D.C.?

11 A That I never agreed to abide by their contract?

12 Q Yes.

13 A What was written in the contract that I bidded on,
14 I agreed to abide by, yes, sir.

15 Q You had no knowledge of the various time restraints,
16 that they had to ask for permission for more time if there
17 was a delay, did you know that?

18 A Did I know that they were asking for more time?

19 Q Did you know that if there was a delay in work
20 that Johnmark, according to their contract, had to make a
21 written request for an extension of time to deliver units?

22 A No, sir. I don't know.

23 Q Did anybody ever tell you that?

1 A That they had to make a written request for more --

2 Q Yes, sir.

3 A No, sir, not to my knowledge.

4 Q Now, you told Mr. Reese about a lot of situations
5 that occurred, but can you tell me, of your own personal
6 knowledge, how many, in numbers, were there units where
7 lights had to be taken out? How many, number-wise?

8 A No, sir. I can't remember, to give you an honest
9 answer. I cannot say.

10 Q And, would it be -- was it only in the model
11 units?

12 A No, sir. Huh-uh.

13 Q You don't know that?

14 A No. Wait, are you saying was it just in the
15 model?

16 Q Yes, sir.

17 A It was in more units than the model units, but
18 how many, I cannot definitely tell you, you know.

19 Q Now, you also said that after walks of units with
20 various persons from A.D.C. and Johnmark, you said, quite
21 emphatically, that the keys were turned over?

22 A Yes, sir.

23 Q How do you know?

1 A I had a box of keys right there, they would check
2 the units, the keys were put in their hands.

3 Q You were there every time a key was turned over?

4 A On the walk-throughs that I was on, the keys were
5 turned over to -- keys were -- in those particular units,
6 the keys were put into Mr. Kische's hands.

7 Q You were there when somebody --

8 A Yes, sir.

9 Q And were two keys always given or was one key
10 held back because you had to go back in to do work --

11 A No, I believe all the keys were because I had to
12 go back and get keys from Mr. Kische's office.

13 Q Now, was that on every unit that you had to go
14 back in on?

15 A After they were accepted, yes, sir.

16 Q You mentioned -- you said at one time in your
17 direct examination by Mr. Reese that there was -- there
18 were units where cabinets were in and then you said that
19 there was a delay in cabinets, kitchen cabinets?

20 A Yes, sir.

21 Q I don't quite understand -- can you clear that up
22 for me? The first time they asked you about cabinets you
23 said they were in the units, and then you said there was a

1 delay because cabinets were not there on the job.

2 A No, I didn't say they weren't on the job, either.
3 But, anyway, the first time I was asked the question about
4 painting, were the cabinets up, right. My answer was yes,
5 and they were.

6 Q Now, on the question you -- I was asked awhile
7 ago on anything that was delayed, there was a delay in the
8 cabinets. There was, you know, I'm not partners with
9 Johnmark or anything so the actual, you know, words said,
10 I don't know, but I know it was a delay, you know, they
11 apparently didn't like the look of the cabinets as they
12 wanted them replaced.

13 Q Now, with -- we have been hearing today in, day
14 out about the cove moulding. Do you know what almond cove
15 moulding is?

16 A I sure do.

17 Q You sure do?

18 A Yes, sir.

19 Q Now, are there more than one shade of almond cove
20 moulding?

21 A Yes, sir.

22 Q Shades of almond cove moulding --

23 A Cove moulding?

1 Q Almond cove moulding.

2 A Okay. There is different shades of almond. Now,
3 to be completely honest with you, the different shades of
4 cove moulding, to my knowledge, there are only two.

5 Q Two different what, sir?

6 A Two different shades.

7 Q Two different types?

8 A Yes.

9 Q And was there a change in the -- besides the white
10 and almond, were there two different kinds of almond?

11 A There was only one kind that was -- it was on the
12 sample thing.

13 THE COURT: He's not talking about what was
14 installed, he's asking about, for sale by manufacturers.

15 THE WITNESS: I don't know, I don't know, on the
16 sample --

17 THE COURT: If you ask him how many different
18 kinds of paint there are, he's probably going to say as
19 many as there are manufacturers.

20 MR. WEINER: Right.

21 THE COURT: Well, the question is, how many kinds
22 of almond cove moulding are out there in the market, if you
23 know?

1 THE WITNESS: I would not know that.

2 BY MR. WEINER:

3 Q Okay. Now, you said there was a change in
4 medicine cabinets.

5 A Yes, sir.

6 Q You mean there was a medicine cabinet that was put
7 in and then taken out?

8 A There was -- it was medicine cabinets in, they
9 were -- Mr. Kische had them removed, didn't like them, and
10 the ones that were put in were smaller cabinets.

11 THE COURT: How would the smaller cabinet require
12 you to move the stone?

13 THE WITNESS: Your Honor, the cabinets were a
14 little bit narrower and, you know, the length and the width
15 were different and your studs are already setting there so
16 we would have to restud to make the cabinets fit in there.

17 THE COURT: Even though it was smaller, you still
18 fixed one dimension to fix the studs?

19 THE WITNESS: Yes, sir, plus, we had a gap like
20 that (indicating) and we had to put a piece in to cover up
21 that hole.

22 THE COURT: All right.

23

1 BY MR. WEINER:

2 Q Now, with regard to the painting, isn't it a fact
3 that because of the nature and age of these units, it's
4 paint a unit within a week's time, in some instances, a
5 stain would bleed through on a wall or window sill; isn't
6 that true?

7 A Yes, sir, that can happen, yes, sir.

8 Q And did it happen?

9 A On a couple occasions it did, yes.

10 Q And there wouldn't be any problem, if you had to
11 go back in there and redo that, that stain that had bled
12 through?

13 A That would be no problem, that would be my respon-
14 sibility.

15 Q But that would be a -- something that you would
16 have to go back in to a unit and do. You couldn't just
17 touch up on a situation like that, could you?

18 A Well, it depends on the type surface, sometimes
19 it's just a touch-up.

20 Q Wasn't there a lot of trouble with the window sills,
21 stains on the window sills?

22 A There was, at one point, there was.

23 Q At what point was that?

1 A Well, you know, when you first go into the units
2 and we tried to scrape them down, get the old paint off of
3 them, a lot of them -- you have leaks from the windows and
4 things and there was just old stains in them. We put a
5 sealer over that before we painted it and a lot of the time,
6 you know, we would have a little spot here or a spot there
7 still come through it.

8 Q Now, you were using a certain kind of vinyl paint;
9 isn't that right?

10 A Yes, sir.

11 Q And that paint would be mixed with water; isn't
12 that right?

13 A Well, your flat paint would, not your enamels.

14 Q And sometimes, perhaps, there was a situation
15 when the paint was a little bit too watered down; wasn't it?

16 A No, it would work.

17 Q And that's why some of this bleeding through came
18 about?

19 A No, sir. I can take -- just for example, you
20 see the commercials on TV, one coat guaranteed, one coat
21 of paint. You can take that -- I can put a little water
22 spot on that wall and you can paint it and that water spot
23 will still come through.

1 Q But wasn't the -- towards the end of June, begin-
2 ning of July, paint was being a little bit more diluted;
3 wasn't it?

4 A There was more paint being used.

5 Q Because there was more work -- the units weren't --

6 A No, we had units. Now, you can take your basement
7 units, for example, a lot of them were just, you know, they
8 were ridiculous. They were filthy.

9 Q Now, during the course of the project, you were
10 taking your directions from -- who were you looking to for
11 your directions about how to do certain things; not your
12 particular work, but your order of things to be done?

13 Who was the --

14 A Mr. Sauer.

15 Q Was Mr. McCarty around to direct you around?

16 A Yes, sir. Mr. McCarty, Mr. Sauer, Johnmark --

17 Q Well, who was the individual that you looked to
18 if you had a problem?

19 A Well, whichever one of them I saw first, I would
20 discuss it with them.

21 Q Was there an individual who you felt would get the
22 answers out of and had more knowledge of the job than
23 another?

1 A No, not particularly.

2 Q You mean you could go to Jean Summey and get the
3 same kind of satisfaction that you could from John Sauer?

4 A That would depend on the situation but, see, we
5 had a work-up board tacked up on a wall; every apartment
6 was listed on that thing; everything individually had its
7 own section of what had to be done and all Ms. Summey would
8 have to do is just open her eyes and look right in front of
9 her eyes -- I could just walk in the door and more or less
10 know what it was that needed done.

11 MR. WEINER: I have no further questions.

12 MR. REESE: Just a few, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. REESE:

15 Q We have heard about the model units, Mr. MacAbee,
16 and 4355 -- would the model units have been 11 through 17
17 on that first floor?

18 A Yes, sir.

19 Q All right, sir. Did A.D.C. hold an open house in
20 those units in there?

21 A Yes, they did, 200 and some odd people.

22 Q And would that have been in, oh -- June of 1980?

23 A Around in that period.

1 Q What happened after the open house with reference
2 to your work?

3 A 'Well, we were asked to -- Mr. Kische asked that
4 we go back in; the cleaning people did some vacuuming and
5 dusting and I was to go back in and patch up -- people were --
6 a lot of inconsiderate people standing with their feet
7 against the wall or hands -- and their hands would be
8 sweaty or something -- against the wall, we had handprints --
9 there were numerous cigarette butts thrown in the sinks
10 and stuff like that.

11 MR. WEINER: Your Honor, this is a drywall man.
12 He has nothing to do with the cleaning or cigarette butts
13 in the sinks --

14 MR.. REESE: Well, my question was directed towards
15 the work that he had to do.

16 THE COURT: Save it for cross -- recross.

17 THE WITNESS: All I can say is we worked together.

18 MR. REESE: I understand. No further questions.

19 RECROSS EXAMINATION

20 BY MR. WEINER:

21 Q You talked about the open house, were you at the
22 open house?

23 A Was I at it?

1 Q Were you a guest?

2 A I was not invited.

3 Q Were you there?

4 A Yes, sir.

5 Q You crashed?

6 A No, I didn't go in the open house, no, sir.

7 Q Well, you gave us over 200 people were there,
8 how do you know that?

9 A I was on the project.

10 Q And you were counting?

11 A Well, I am just saying a rough estimate, over
12 200, you know.

13 MR. WEINER: I have no other questions of this
14 witness.

15 MR. REESE: No further questions.

16 THE COURT: All right. May he be excused from
17 the case now?

18 MR. REESE: Yes.

19 MR. WEINER: Yes, Your Honor.

20 THE COURT: You may leave.

21 (Witness excused)

22 MR. REESE: We call Mr. Sauer, John Sauer.

23

1 Whereupon,

2 JOHN SAUER

3 was called as a witness by counsel for the Plaintiff, and
4 having been previously duly sworn by the Clerk of the Court,
5 was examined further and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. REESE:

8 Q Mr. Sauer, again, your name, sir?

9 A John Calvin Sauer.

10 Q Mr. Sauer, taking you back to March, April, May,
11 June, July of 1980 and directing your attention to the work
12 at Ivy Mount, would you describe for His Honor any delays --
13 of your own knowledge, now -- which you believe were created
14 by A.D.C. and the work that you did and explain to His Honor
15 why you believe these delays were in fact created by A.D.C.

16 MR. WEINER: Your Honor, my objection continues.
17 It is not a belief, it's knowledge. I think --

18 THE COURT: The last part of the question was the
19 facts that support it; so, overruled.

20 THE WITNESS: The cove moulding, which you know of,
21 and the lights, the kitchen lights; the medicine cabinets,
22 they changed two or three times; the kitchen floor changed
23 color; all the appliances, they changed color; the stove,

1 they actually changed the stove to a different model; the
2 kitchen floor they changed --

3 BY MR. REESE:

4 Q All right, sir. Now, let's talk about these, if
5 we can. The -- you indicated they changed the kitchen
6 light?

7 A Yes, sir.

8 Q Who is, "they?" Who would that be, would that be
9 A.D.C.?

10 A Yes, sir.

11 Q Would you tell us how that change came about and
12 what effect it had on Johnmark's work schedule?

13 A Well, the contract called for one specific light
14 and we put quite a few of them up in the -- and Mr. Kische
15 come out one time and he didn't like that particular light
16 and I think Mr. Dillon come in one time and he didn't like
17 the light that Kische had ordered and then Mr. Daly didn't
18 like any of them and we had to keep on changing, ordering,
19 reordering, changing.

20 Q And what did that do to your work schedule?

21 A It slowed us up when we have to keep on changing
22 lights; the drywall man had to go in and paint and touch up
23 the whole -- repaint.

1 Q All right. Now, you indicated they changed the
2 medicine cabinets also?

3 A Yes, sir, two or three times.

4 Q Describe to His Honor the circumstances surround-
5 ing that change and, what if any, effect that had on John-
6 mark's schedule.

7 A Well, I believe the first one didn't have a light
8 on it and then they changed it and they wanted one with a
9 light on it and then they changed it again to a smaller one
10 and we had the hole in the wall and we had to repatch the
11 drywall and the paint and just -- hold up, we had to keep
12 going back in and doing the same thing over and over again.

13 Q All right, sir. Now, you indicated they changed
14 the color of the kitchen flooring?

15 A Yes, sir.

16 Q Would you describe to His Honor the circumstances
17 surrounding the effect on Johnmark's work schedule?

18 A In order to get a decent price we had to guarantee
19 the floor man so many units. He would come in and do 10
20 or 20 at a time in order to get the price and we had so many
21 floor coverings down and they came in and didn't like it,
22 they didn't think it looked like it should be so they changed
23 the color of it and we had to reorder the floor coverings,

1 redo the ones we had already did.

2 Q And was that an added expense to you also?

3 A Oh, yes, sir.

4 Q And did that delay the unit?

5 A The delay was the biggest thing, they compensated
6 or supposedly, were going to compensate for the difference
7 in the price of the coloring of the flooring.

8 Q Now, you indicated that they changed the stove
9 and they changed the appliances on you?

10 A Yes, sir. They changed the color.

11 Q Describe for His Honor how that came about and
12 what effect it had on Johnmark's work schedule.

13 A Well, they changed the floor -- they wanted to
14 coordinate the appliances with the same color of the floor
15 or visa versa and the kitchen tops had changed, the color.
16 The stove itself, which they changed completely from one
17 brand -- from one unit to another; the kitchen tops, their
18 people, they told us to get the kitchens from their people
19 and there was a delay in the kitchen cabinets.

20 Q All right. Let's deal with that for a minute.
21 They told you to get the kitchen cabinets and tops from
22 their people?

23 A Yes, sir. We had a company picked out to get the

1 cabinets and they come in to us and told us -- they wanted
2 us to get it from their people.

3 Q And, "they" being A.D.C.?

4 A Yes, sir.

5 Q And did that create a delay for you all?

6 A Yes, there was a delay in getting the cabinets
7 and then once we got them we got them they had the wrong
8 top which, again, was another delay. We had to wait for them
9 to get the right top.

10 Q Would that have been Jim Turner at Chesapeake
11 Marble and whatever?

12 A Yes, sir.

13 Q All right, sir. Do you recall that the first
14 units under the contract were to be delivered on the 18th
15 day of April; do you recall that?

16 A I'm not sure about the date.

17 Q All right. You do remember, however, that there
18 was a schedule that said that they had to be delivered by
19 such and such a date, the first units?

20 A Yes, sir.

21 Q Were the cabinets in on that date? Had they been
22 delivered by --

23 A No, sir.

1 Q Were they delivered after that date?

2 A Yes, sir.

3 Q All right, sir. Let's -- I know His Honor is
4 probably getting tired of this and if he's not, I know I am.
5 The cove moulding situation, who was it that made the
6 initial determination as to the color of the cove moulding
7 to be used in the units?

8 A Well, the original was in the contract, white.

9 Q All right, sir, and who made -- who instructed you
10 as to which one to use?

11 A Well, they didn't want the white, and I took them
12 some samples down to the office and Mr. Kische picked out
13 a brown.

14 Q He picked out a brown?

15 A I took three different colors down there and he
16 picked a brown and then he changed his mind and it got to be
17 an almond after that.

18 Q All right, sir. Had you installed any of the white
19 cove moulding by the time you took down the samples of the
20 brown?

21 A Yes, sir.

22 Q Did you install brown and then --

23 A I don't think we installed any brown, they just

1 told us that they wanted brown and we got some on the job,
2 but I don't think we installed any.

3 Q All right. It was you who, however, took the
4 samples down to Dick Kische?

5 A Yes, sir.

6 Q And Mr. Kische works for A.D.C.?

7 A Yes, sir.

8 Q All right, sir. Now, you all -- well, bear with
9 me for a minute. On the construction schedule, were there
10 units that A.D.C. came along and said they wanted done
11 regardless of the construction schedule?

12 A Yes, sir.

13 Q When would that have been and what units?

14 A Well, quite often they would -- if somebody bought
15 a unit and they had a time table and wanted to get it done
16 in a hurry, they would change our schedule and get us to go
17 into another unit and then they had two storage rooms and
18 two laundry rooms and an efficiency up at Ivy Mount that had
19 to be done in ten days and they told us, as us being the
20 prime contractor, they wanted us to do it.

21 Q Who was the, "they" that you are talking about,
22 "they" told us?"

23 A Well, Mr. Kische and Mr. Dillon had talked about

1 it.

2 Q Now, these storage rooms and laundry rooms at
3 the efficiency unit was not on the construction schedule
4 to be delivered at that time?

5 A No, sir.

6 Q They wanted them delivered ahead of schedule?

7 A Yes, sir. They wanted them done very quickly.

8 Q Did you all try to accommodate them?

9 A Yes.

10 Q Did that create a delay for you?

11 A It created a delay in the units, yes, sir.

12 Q All right, sir.

13 A We had to pull men off to do it.

14 Q Now, coming forward to the first week in June of
15 1980, did there come a time when you all were no longer on
16 the job in June of 1980?

17 A Yes, the 3rd of June.

18 Q The 3rd of June, and you were off until the 18th;
19 or 19th of June; is that correct?

20 A Fifteenth, eighteenth, somewhere around there,
21 about two weeks.

22 Q Why were you off the job beginning around June 3rd?

23 A That's the time that -- well, they wouldn't pay

1 us the money for one thing and they wanted us off the job;
2 they told us they wanted us off the job.

3 Q They told you to get off the job?

4 A Yes, sir.

5 Q Who told you to get off the job?

6 A Mr. Dillon.

7 Q And as a result of that, you left the job?

8 A Yes, sir.

9 Q After the 3rd of June, did you have a conversa-
10 tion with Mr. Dillon revolving around why he had ordered you
11 off the job on June 3rd?

12 A Well, they said some of the units wasn't done.

13 Q All right.

14 A Mr. Quatmann, I believe I've got the name right,
15 Walter, I called him -- he had walked the units and okayed
16 them and returned the keys over, which we were supposed to
17 do only when they were accepted, to turn the keys over to
18 them and now they say there's some flaws, Mr. Kische walked
19 them and then he okayed them and then they come back again
20 and still they still say it wasn't right and I'd deal with
21 them, a few little things, anybody overlooked when the buyer
22 went through and they found anything or wanted anything done,
23 we would go back in and do it for them.

1 Q All right, sir. Now, did there come a time when
2 Mr. Dillon indicated that the root of the problem might be
3 Mr. Kische?

4 A I got a phone call from him. We had an office
5 over in Camp Springs.

6 Q Now, would this be before you went back on the
7 job?

8 A Yes, sir.

9 Q So, between June 3rd and June 18th?

10 A In that area.

11 Q You got a phone call from whom?

12 A I got a phone call from Mr. Dillon that him and
13 Mr. Kische had had an argument and he had thrown him to the
14 ground and it was decided that it was his fault.

15 Q "They" meaning whom?

16 A A.D.C.

17 THE COURT: Whose fault?

18 THE WITNESS: Mr. Kische's fault of all the
19 troubles.

20 BY MR. REESE:

21 Q All the troubles revolving around your leaving
22 the job?

23 A Yes, sir.

1 Q All right, sir. Was Dick Kische's office in the
2 same building as you all were working on?

3 A At Ivy Mount, yes. They moved from the other
4 section.

5 Q Did you walk some of the units with Dick Kische
6 and Walter Quatmann?

7 A I walked with all of them, yes.

8 Q All right, sir. Did Dick Kische approve the
9 units?

10 A Oh, yes, sir.

11 Q Did Walter Quatmann approve the units?

12 A Yes, sir.

13 Q And I am talking about before June 3rd.

14 A Yes, sir.

15 Q The units that had been approved by Walter Quatmann,
16 the units that had been approved by Dick Kische, what
17 happened to the keys upon their approval?

18 A Once -- when Mr. Quatmann walked them the first
19 time we automatically -- when he okayed them, we auto-
20 matically turned the keys over to them. From that point
21 on, the units belonged to them.

22 Q All right. Now, what about Dick Kische?

23 A Well, he had said it was -- they already had the

1 keys when we walked with Mr. Kische. He had the keys and
2 he had to open the unit up. We no longer had any keys.

3 Q All right. Now, you have indicated that there
4 were delays because of A.D.C.'s actions. Did Mr. Dillon
5 or Mr. Daly or Mr. Kische know about these particular delays?

6 A Yes, sir. They -- yes. They knew everything that
7 was going on.

8 Q Did they verbally extend the delivery dates
9 accordingly?

10 MR. WEINER: Objection. I don't know how this
11 witness can testify as to these individuals' knowledge
12 about delays unless he gives us a better foundation, whether
13 he spoke to them --

14 THE COURT: No, it's to his personal knowledge.

15 BY MR. REESE:

16 Q What is the basis for your statement that Dillon
17 and Kische and Daly knew about the delays?

18 A Well, for one thing, I called Mr. Dillon up there
19 to look at them, that we couldn't keep on changing the
20 medicine cabinets because we was -- every time we'd order,
21 we'd order a bunch at a time and we was filling up one of
22 the units with medicine cabinets, three different types of
23 medicine cabinets.

1 Q All right. What about the other incidences of
2 delay that you have indicated?

3 THE COURT: Well, what was his response about
4 what you said?

5 THE WITNESS: Well, at that time he said that he --
6 they would get together and pick out a particular medicine
7 cabinet that we could use.

8 THE COURT: Did they do it?

9 THE WITNESS: Finally, yes, sir.

10 THE COURT: All right.

11 BY MR. REESE:

12 Q All right, sir. The other items of delay that
13 you have indicated here, such as the appliances, the kitchen
14 cabinets, the floor that you have indicated that they
15 changed, the stove that they changed, did Mr. Dillon or
16 Mr. Daly or Mr. Kische know about these changes?

17 A Well, me and Mr. Dillon was talking fairly
18 friendly and we used to talk about all of it, yes, sir.

19 Q All right. Now, in these conversations you would
20 have with them, did they verbally extend the delivery
21 dates, if you know?

22 A Yes, sir.

23 Q How did they do that?

1 A Well, for the reason of the changes and the
2 cabinets not being there, they said, "Don't worry about it."

3 Q That's what they indicated to you?

4 A Yes, sir.

5 Q All right. Who said that?

6 A Mr. Dillon.

7 Q All right.

8 MR. REESE: No further questions of this witness,
9 Your Honor.

10 CROSS EXAMINATION

11 BY MR. WEINER:

12 Q You were saying, Mr. Sauer, that there were
13 changes done that caused you problems; isn't that right?

14 A Yes, sir.

15 THE COURT: He said that and I heard him.

16 BY MR. WEINER:

17 Q Now, do you recall the contract, the March 12th
18 contract, and then there were attachments to the contract
19 that you all agreed on; isn't that right?

20 THE COURT: It speaks for itself, whether he says
21 so or not.

22 THE WITNESS: Yes, sir. I guess so.
23

1 BY MR. WEINER:

2 Q Now, can you tell us did the -- you said appliances
3 were changed and bathroom --

4 THE COURT: One item at a time, please.

5 BY MR. WEINER:

6 Q You said appliances were changed. Did you recall
7 when that happened, caused you a delay?

8 A I don't remember the date, but it was in the area
9 of the delivery date.

10 Q Well, didn't you agree to change, on April 1st,
11 1980, you signed an agreement that you were going to change
12 this?

13 A I don't know if we signed an agreement or not,
14 and I don't remember the date, but we did agree to change
15 them.

16 Q Well, let me show you Attachment No. 4, and would
17 you tell us if that's not what was changed.

18 (Document referred to was handed to the witness.)

19 A Yes, I remember this.

20 Q And didn't you sign it?

21 A Yes, sir.

22 Q So, are you all saying -- are you saying now that
23 because of that agreement, that you agreed to change certain

1 things, that now you are saying that that caused you a
2 problem?

3 A Any changes caused a problem. Yes, sir.

4 Q Even if you agreed to do it?

5 A We had to agree to do it; when they wanted some-
6 thing changed, we had to go along and change it.

7 Q Now, did you ever file -- did you ever write a
8 letter or a notice to A.D.C. requesting additional time to
9 complete units?

10 A I really don't remember whether we wrote a letter
11 or not.

12 Q Now, at this time, back in April -- March, April,
13 May, June -- you and Mr. McCarty were partners in Johnmark's
14 construction?

15 A Yes, sir.

16 Q Did you all --

17 THE COURT: I have been advised it was a corporation --

18 MR. WEINER: Excuse me, Your Honor.

19 THE COURT: I have been advised it was a corporation,
20 not a partnership.

21 MR. WEINER: Well, they were the two stockholders
22 in the corporation, excuse me.

23 THE COURT: Since you're an attorney, use the term

1 of the art. Co-owners --

2 MR. WEINER: Co-owners.

3 BY MR. WEINER:

4 Q So, you were co-owners of the corporation; is
5 that right?

6 A Yes, sir.

7 Q Now, did you all get together and say, "What are
8 we going to do with these changes, what are we going to do
9 about the delays?"

10 A Well, like I said, the changes we had to make,
11 we had to go along with the changes. We felt -- we talked
12 many times about the delays we was having, yes.

13 Q And did you, you know, you signed a contract to
14 do the construction here, with A.D.C.; isn't that right?

15 A Yes, sir.

16 Q Did you seek any kind of -- did you go to the
17 document, the contract document, and see what kind of
18 relief you could get?

19 A Most of it was verbal, like I said, me and
20 Mr. Dillon was on pretty good terms and a lot of the stuff
21 we just done verbally.

22 Q You were the one with the construction background
23 between you and Mr. McCarty; isn't that right; and he

1 supposedly had the business background?

2 A Yes, sir.

3 Q Isn't that right?

4 A Yes, sir.

5 Q And were you two in touch with each other every
6 day about these situations, the day-to-day situations, the
7 delays that were being caused?

8 A Pretty much so, yes.

9 Q Well, when additional work had to be done because
10 of a change, what did you two decide to do, what course of
11 conduct did you take?

12 A Sometimes I did it on my own, like I say, they
13 was the developer and we pretty much had to do what they
14 wanted us to do.

15 Q Back in -- you say you all went on the job around
16 June and then you came back and entered into what was known
17 as a modification agreement; isn't that right?

18 A Yes, sir.

19 Q So, that was when you all -- we used that term,
20 "kissed and made up" and went forward; isn't that right?

21 A Hopefully, yes.

22 Q Now, back in June and July, things were a little
23 confused at the project, things weren't getting done properly;

1 isn't that so?

2 A No, there was no confusion.

3 Q Well, you remember when Mr. Purdy came on,
4 Mr. Purdy came on the stand --

5 A Yes.

6 Q Well, he testified that there was mass confusion
7 at the project; isn't that right?

8 A There was no mass confusion as far as I am concerned.

9 Q Well, were you at the Ivy Mount or were you up at
10 Heritage Woods?

11 A No, it was at Ivy Mount, mostly, at that time
12 and then the last -- I think three to four weeks before we
13 left the job, the last week, I believe, I wasn't on the job
14 every day. I went to Maryland, had another job.

15 Q That was the last three weeks in June or --

16 A July.

17 Q Okay.

18 A Just before we closed the job down, I came back
19 just before we closed the job down and we discussed closing
20 the job down for lack of funds.

21 MR. WEINER: No further questions, Your Honor.

22 MR. REESE: No further questions, Your Honor.

23 THE COURT: May he be excused from the case?

1 MR. REESE: He may be.

2 THE COURT: You are excused from the case.

3 You may sit in the courtroom or leave, as you wish.

4 (Witness excused)

5 MR. WEINER: Your Honor, could I be excused --

6 THE COURT: We will recess for five minutes.

7 (Whereupon, a brief recess was had.)

8 MR. REESE: Mr. Leonard Ramono.

9 Whereupon,

10 LEONARD RAMONO

11 a witness, was called by counsel for the Plaintiff, and
12 having been first duly sworn by the Clerk of the Court, was
13 examined and testified as follows:

14 DIRECT EXAMINATION

15 BY MR. REESE:

16 Q Mr. Ramono, what is your full name, sir?

17 A Leonard B. Ramono.

18 Q And how are you employed?

19 A I am president of Nardi Construction, formerly
20 trading as Hold-fast Builders.

21 THE COURT: Say that again, slowly. President of --

22 THE WITNESS: -- Nardi, N-a-r-d-i, construction.

23 THE COURT: Trading as --

1 THE WITNESS: Trading as Nardi, formerly it was
2 Holdfast Builders, Limited.

3 BY MR. REESE:

4 Q All right, sir, and were you so trading back in
5 August, September, October, November, December of 1980, as
6 Holdfast Buildings?

7 A Yes, sir. I was.

8 Q Did there come a time when you came on to the
9 units or the buildings at Ivy Mount?

10 A Yes, sir.

11 Q And was that at the request of A.D.C. Fairways?

12 A Yes, sir.

13 Q Had you been negotiating with them to come to that
14 particular project?

15 A Yes.

16 Q Now, let's be very certain about what we are
17 talking about, now. Now, Ivy Mount is a project in
18 Annandale; is it not?

19 A That's correct.

20 Q And the building that you were involved in is 4355,
21 4345 and 7753, as far as the building numbers are concerned?

22 A That's correct.

23 Q All right, sir. When did you begin negotiation

1 with A.D.C. for the purposes of coming on to the project?

2 A January.

3 Q January of 19 --

4 A -- 80.

5 Q All right, sir. Did you have an opportunity to
6 follow the advertisements of A.D.C. for contractors at Ivy
7 Mount?

8 A I did.

9 Q And for how long a period of time were the adver-
10 tising for contractors to do the rehabilitation work at
11 Ivy Mount?

12 A To the best of my recollection, there were ads
13 running from January sporadically through the summer. We
14 picked it up out of the Dodge Reports, we picked it up out
15 of the Blue Reports and we also picked it up out of the
16 newspaper.

17 Q Did the ads indicate that they were already under
18 contract to Johnmark?

19 A No, they were seeking a general contractor.

20 Q They were seeking a general contractor?

21 A That is correct.

22 Q For these buildings that we are talking about?

23 A That's correct.

1 Q All right, sir. Now, you indicated -- well, when
2 did you come on the job, what month?

3 A July.

4 Q Of 1980?

5 A That's correct.

6 Q Did you start out in building 7753?

7 A That's correct.

8 Q And on what date did you all start out in that
9 building?

10 A Between July 18th and the 20th.

11 Q And did A.D.C. indicate to you that that building
12 was already under contract to Johnmark at that point?

13 A They did indicate that it was under contract,
14 that they had the right to take any portion of the units
15 out of their contract, that they wanted to and they decided
16 to pull that one building out of the contract and give it
17 to us.

18 THE COURT: What building number?

19 THE WITNESS: 7753.

20 BY MR. REESE:

21 Q All right, sir. Now, did there come a time when
22 you walked the units at 4355, Building 4355?

23 A Yes.

1 up, was, I would imagine, in the 40 percent range and it
2 went from there.

3 Q All right, sir. Let me draw your attention, if
4 I can, to a term that has been used in this particular
5 trial and that is the term, "final cleaning."

6 Are you familiar with that term as it applies to
7 this particular contract?

8 A Yes, I am.

9 Q All right, sir. Were you in charge of the --
10 did Holdfast also have to do final cleaning under their
11 contract?

12 A Yes, sir.

13 Q Would you describe for His Honor what, "final
14 cleaning" means?

15 A Under the cleaning contract, it was broken down
16 into two stages, a rough cleaning and a final clean. The
17 final cleaning was after the carpet was laid, we would go
18 in and do vacuuming, removal of any scraps that weren't
19 removed prior to the carpet contractor leaving, spot clean
20 any areas, windows, countertops, bathrooms, where there may
21 have been some debris left from the carpet contractor and
22 turn it over for final acceptance.

23 Q Now, on your walk-throughs you listed an item

1 known as final cleaning and put a charge next to it of
2 \$44; is that correct?

3 A Yes.

4 Q Is that what we are talking about here?

5 A Yes, sir.

6 Q Now, sir, you indicated that you began working at
7 Ivy Mount then in July of 1980. How long a period of time
8 did you work at Ivy Mount?

9 A We worked July, August, September and October.

10 Q All right, sir. During that period of time, did
11 you experience any delays that you --

12 MR. WEINER: Your Honor, I object as to any work
13 beyond the period of time that Johnmark was on the job.
14 In other words, anything beyond July 24th -- it's just
15 totally irrelevant to the case. We are talking -- he's --
16 there is an overlap of perhaps --

17 THE COURT: What do you wish to show and why?

18 MR. REESE: If Your Honor please, Your Honor is
19 still considering, over my most vehement objection, of
20 course, this interest situation and the interest situation
21 that Your Honor is considering is for buildings as per
22 Mr. Guadagnino's -- I hope I pronounced his name correctly --
23 his testimony was that building 4355, 4345 and 7753; if you

1 will recall, that was his testimony, that the figures he
2 gave you were for all of these buildings. If Your Honor
3 please, what I am going to show by this witness is that if
4 there were delays in 7753 and 7745, there were delays
5 caused by A.D.C. to this man who came on the contract after
6 my client had been kicked off the job.

7 THE COURT: Because your client didn't even do the
8 building that begins with 77 --

9 MR. REESE: That's right, 7753 or 4345.

10 MR. WEINER: Your Honor, this witness has just
11 testified that in 4355 there was no unit that was more than
12 90 percent finished. They -- he said, from 10 to 90 percent,
13 which slows the entire schedule back. Now, Mr. Reese is
14 trying to bring in a time period when this man was on the
15 job and Johnmark was off the job.

16 THE COURT: How is any of Mr. Quadagnino's interest
17 testimony any good if I don't know how big a third of it,
18 is what he said the 77 something or whatever it was -- if
19 it never was even started by Johnmark?

20 MR. WEINER: It was originally under contract to
21 Johnmark, Your Honor. It became -- they were relieved of
22 that building.

23 THE COURT: The contract says with 15 days notice

1 they can -- essentially, terminate the contract.

2 MR. WEINER: Correct, and they were relieved of
3 that building, 7753.

4 THE COURT: But, as your opponent points out,
5 your damage witness, on interest damages, including it in
6 his lump sum; they want to show that Johnmark never had any-
7 thing to do with it, that you are trying to bill them for
8 interest on the delays in the building that they never even
9 started.

10 MR. WEINER: They were originally, Your Honor,
11 under contract for that. We experienced a problem with
12 delivery of completed units in 4355.

13 THE COURT: Are you saying they caused delays
14 without even starting the work on 77 something or whatever
15 it was?

16 MR. WEINER: Oh, absolutely, Your Honor, absolutely.
17 If it wasn't for the delays, 4355, they would still have been
18 on the job. Here's a man --

19 THE COURT: I wish I had heard about this in the
20 opening statements, four and a half days ago, because I
21 would have known to look for it and known that there were
22 three buildings involved and what to look for as to each
23 one.

1 MR. WEINER: Well, basically, Johnmark's involve-
2 ment is to the one building.

3 THE COURT: I think probably the safest thing is
4 to overrule the objection and just hear this evidence and
5 then we'll clear it all up in the final arguments.

6 BY MR. REESE:

7 Q Now, my question --

8 THE COURT: The question was: Building 7753 --

9 BY MR. REESE:

10 Q With reference to Building 7753 and 4345 -- not --
11 55, which would have been the building that Johnmark was
12 involved in -- with reference to those two buildings, did
13 you experience any delays on the part -- which you believe
14 would be on the part of A.D.C., and then would you recite
15 to His Honor why you believe these delays were caused by
16 A.D.C.

17 A Yes. There were delays.

18 Q All right, sir.

19 A Specifically, we were receiving appliances which
20 were purchased through A.D.C. Fairways to be delivered to
21 the job site for installation; on a number of occasions,
22 they weren't there on time to effect our turnovers. There
23 were changes in our original contract scope on floor selections,

1 kitchen floor selections. We had one particular type of
2 tile installed, it was changed --

3 THE COURT: Wait a minute -- changes in the con-
4 tract scope on the kitchen floor --

5 THE WITNESS: Tile.

6 THE COURT: It was a tile floor?

7 THE WITNESS: Sheet bed floor.

8 THE COURT: Then, you started to say about another
9 one --

10 THE WITNESS: Light fixtures.

11 THE COURT: I thought you said something else
12 about tile but --

13 THE WITNESS: We had one type of tile installed
14 and they changed it to a different type.

15 THE COURT: When you say, "tile", are you talking
16 about sheet goods, you are not talking about ceramic tile?

17 THE WITNESS: We are talking about a roll of sheet
18 goods.

19 THE COURT: And that's called tile in the industry?

20 THE WITNESS: Well, there are several different
21 ways of describing it, it's just vinyl sheet goods.

22 THE COURT: All right.

23 THE WITNESS: Floor coverings --

1 BY MR. REESE:

2 Q So, we've got a delay in appliances, a delay in
3 floor coverings, you indicated; lighting fixtures --

4 A Yes.

5 Q What lights are you talking about here?

6 A There were light fixtures in the kitchen that
7 were originally spec'd as a four foot fluorescent 2-tube,
8 that were changed to a two foot fluorescent 2-tube; this
9 was a special item that we found difficulty in finding.
10 We changed several of the existing ones in Building 4355
11 when we went to the site from the four foot, 2-tube, to the
12 two foot, 2-tube. Another problem that we encountered was
13 on acceptance of units. We would turn a unit over to one
14 of their representatives. While we would be working on
15 other units, to effect their move-ins, they would come
16 after our personnel to take care of last minute punch items
17 that were relating to the actual acceptance of the units
18 by their prospective purchasers.

19 Q All right, sir.

20 A We did that as a courtesy to them.

21 Q Did you have any problems with electricity?

22 A The electricity was turned off in 7753 for two
23 or three-day period of time.

1 Q Did you have a problem with them moving their
2 sales office?

3 A The construction office, 4355 -- there was a
4 two or three day lag time in there vacating that office and
5 also in Building 7753 where their corporate offices were,
6 as well as their accounting offices, they were supposed to
7 have them turned over by a certain date and it didn't
8 happen.

9 Under our contract, we were to complete the job
10 by a certain date, October the 18th, and because these units
11 were still occupied, we couldn't do it. Additionally, there
12 were -- in 7753, there were several units that had, either,
13 people living in them or furniture stored in them so that
14 on the normal sequence of production from the top floor to
15 the bottom floor, we had to skip units to allow for them to
16 have time to vacate, to move into another unit.

17 Q And did all of these things delay you in completion
18 of the units?

19 A Yes.

20 Q All right, sir. Now, going back to 4355, for a
21 moment, if we can. There were models on the first floor
22 there, were there not?

23 A Yes, sir.

1 Q When did they vacate those models?

2 A To the best of my recollection, they weren't
3 vacated during the entire construction process that we
4 were there, that those models were still available, they
5 were still selling out of these units.

6 Q They were still being used as models, then?

7 A Yes.

8 Q Now, did there come a time when -- you submitted --
9 let's back up a minute. You submitted a bill for doing some
10 work in 4355; is that correct?

11 A Correct.

12 Q And you received a payment for that; did you not?

13 A That's correct.

14 Q Now, did you -- and was that payment in September
15 of 1980, if you recall?

16 A It was September 23rd, 1980, is the day I signed
17 a release of lien.

18 Q All right, sir. Well, directing your attention
19 to this document, dated October 24, 1980, I will ask you if
20 you recognize it, first?

21 (Handing document to the witness)

22 A Yes.

23 Q All right, and would you tell His Honor what that

1 Whereupon,

2 RICHARD McCARTY

3 a witness was called by counsel for the Plaintiff, having
4 been previously duly sworn by the Clerk of the Court, was
5 examined and testified further as follows:

6 DIRECT EXAMINATION

7 BY MR. REESE:

8 Q Mr. McCarty, for the record, your full name again?

9 A Richard Eugene McCarty.

10 Q Mr. McCarty, taking you back to March 1980, did there
11 come a time when you entered into negotiations with A.D.C.
12 for the Ivy Mount contract?

13 A Yes, I did.

14 Q All right, sir. And did there come a time when
15 you entered into a contract with reference to Ivy Mount?

16 A Yes, I did.

17 Q Which is Plaintiff's Exhibit No. 1; is that correct?

18 A Yes.

19 Q Would you describe to His Honor the course of
20 negotiations leading up to that contract.

21 MR. WEINER: Your Honor, that's objectionable.
22 It's irrelevant. We have a signed contract.

23 THE COURT: Normally it's objectionable, is there

1 any special reason to show --

2 MR. REESE: Yes, Your Honor. The proffer would be
3 that at the time of the entry into the contract, Mr. Adashek,
4 who has been well identified as the gentleman directly under
5 Mr. Daly informed my client that that --

6 THE COURT: Adashek? I don't think I have heard
7 that name until today. Anyway --

8 MR. REESE: If Your Honor please, Your Honor
9 asked Mr. Dillon to outline the individuals --

10 THE COURT: Who the people were, he's one of those
11 in a chain of command and what is it now that you want to
12 show?

13 MR. REESE: I wish to show that at the time they
14 entered into the contract, Mr. Adashek, who it has been
15 indicated was directly under Mr. Daly, what he informed my
16 client as to what they would be, A.D.C., would be looking
17 for as far as performance under the contract.

18 THE COURT: Oh, sustained, because that would
19 vary the terms of the contract.

20 MR. REESE: I note my exception, of course.

21 BY MR. REESE:

22 Q Following entry into the contract, did you all
23 experience certain difficulties with reference to carrying

1 out the contract that was caused by A.D.C.?

2 A Definitely.

3 Q Would you explain to His Honor what happened in
4 the course of these events, number one. Number two, why you
5 believe any delays were the responsibility of A.D.C., giving
6 facts to substantiate those.

7 THE COURT: Didn't you put him on for this before?

8 MR. REESE: No, I did not, Your Honor. Your Honor
9 wouldn't let me do it. Your Honor said I was anticipating.

10 THE COURT: Well, you did start into it, that's
11 why it stuck in my memory. All right.

12 Answer the question.

13 THE WITNESS: I --

14 THE COURT: The same question that the last two
15 or three witnesses have been asked, what delays were caused
16 by A.D.C. and how do you say you know that of your own
17 knowledge?

18 THE WITNESS: I know it of my own knowledge because
19 right after we signed the contract, they -- A.D.C., Mr. Gary
20 Wake called me in his office, said that they had another
21 cabinet, another company who would furnish cabinets and they
22 wanted these cabinets. I talked to Mr. Daly, Mr. Daly said
23 he wanted these cabinets in and he said he was going to

1 order them for all of his projects, some 2,000 units. I
2 said, well, you know, if you're going to do that -- in fact,
3 he quoted me saying I can get a much better price out of it
4 for you and why don't you get me to become your purchasing
5 agent. I said, listen Mr. Daly, if I could order 2,000
6 at a time, I could get them at a much better price, too.

7 So, anyway, he insisted that we order these
8 cabinets. We were working, at that time, this was the time
9 of negotiation for the contract.

10 THE COURT: The delays first and then name the
11 item. Tell what the length of the delay was and then why
12 you say it's of A.D.C.'s doing.

13 THE WITNESS: Kitchen cabinets.

14 THE COURT: Cabinets. How long --

15 THE WITNESS: The kitchen cabinets did not come
16 in until the 20th.

17 THE COURT: Caused you how much of a delay?

18 THE WITNESS: Approximately a month or about the
19 20th of April; and we signed the contract on the 12th.

20 THE COURT: It caused you how much delay?

21 THE WITNESS: Well, it caused us from the 12th of
22 March to the 18th of April which is a month and a few days
23 before they got there, then we had to install them. I would

1 approximate about two months, Your Honor.

2 THE COURT: You are saying that you would have had
3 them on the site before the contract was even signed?

4 THE WITNESS: We had been working with St. Clair
5 appliances, Your Honor, and were receiving cabinets all the
6 time. Mr. Daly insisted that he purchase the cabinets
7 because they were the ones he wanted. When they got there,
8 the countertops were not the right size or the right color.
9 They had neglected --

10 BY MR. REESE:

11 Q Mr. McCarty, just one second. You indicated that
12 you were ordering them all the time. Was that for Heritage
13 Woods?

14 A Yes, Heritage Woods.

15 Q You already had that project going and your con-
16 tractors --

17 A St. Clair appliances had looked over the Ivy Mount
18 project, had given us an okay on cabinets for Ivy Mount and
19 we were all set to go on the Ivy Mount contract.

20 Q I understand. Then he says he's not going to use
21 your people?

22 A He insisted. He said he was going to use -- for
23 the rest of his project, which numbered some 2,000 units at

1 the time -- and that's the way it would be.

2 Q All right, sir. Now, when the cabinets finally
3 came in, did you experience any difficulties with them?

4 A Definitely.

5 Q What kind of problems?

6 A As I said, the countertops were not the right
7 length or, later on, it proved to be they were not the
8 right color. They neglected -- now, all of the dimensions
9 on everything, to put in the cabinets for ordering, were
10 done by Mr. Jim Turner and Mr. Gary Wake of A.D.C.

11 Q All right, sir.

12 A When they came in, they were the wrong size, the
13 countertops were the wrong size.

14 Q What did you have to do?

15 A Not only that, but they neglected to order base
16 cabinets. We didn't have any base cabinets to put in.
17 Therefore, we had to Jerry-rig something to keep the top
18 of the counter out; otherwise, the cabinets would collapse.

19 We experienced difficulty with doing that through-
20 out the rest of the time we were there.

21 Q All right, sir. Did you experience any other
22 delays and difficulties due to A.D.C.?

23 A Absolutely.

1 Q Give us another one, if you would be kind enough.

2 A First of all, they were working on putting new
3 furnaces in. I believe it was Arbee Mechanics who were
4 doing that. They shut down our whole building for a week
5 at a time and there was no power and no water.

6 Q That was 4355?

7 A 4355. They were doing it to all the buildings
8 but they were doing it at the time we were trying to get our
9 work done.

10 Q You weren't responsible for the furnaces and the
11 air conditioning in those units; were you?

12 A I had nothing to do with it at all.

13 Q All right, sir. So, this would be a separate
14 contractor hired by A.D.C.?

15 A Yes, sir.

16 Q Shut down for a full week?

17 A Shut down for a week and then at different periods
18 while they were pulling wires and so forth and punching
19 holes in the ceilings of our finished apartments, et cetera.
20 There was also electricity -- it was off in a lot of the
21 units. Again, not our responsibility because when the
22 people moved out, if they didn't pay their electric bill,
23 the electric company would come down and put a bar across

1 the meter; so, therefore, we had no electricity in the
2 apartments.

3 I have walk sheets here where they turned down
4 an apartment because after we had finished, there was still
5 no electricity in them.

6 Q All right, sir. Other difficulties?

7 A There were the cabinets, then there was the
8 flooring, the floors in the kitchens, the linoleum, that
9 went in. Mr. Daly wanted that changed. He didn't like it
10 and he wanted it changed.

11 Q Was that after you put some down?

12 A Oh, yes. We put some down.

13 THE COURT: How many?

14 THE WITNESS: All the models, I believe, were
15 down, Your Honor.

16 BY MR. REESE:

17 Q That would have been 11 through 17?

18 A Eleven through seventeen.

19 Q All right, sir. Now, you had the floor down,
20 Daly comes in and says I don't like it, what do you have to
21 do?

22 A We have to rip it up. We have to find out what
23 he wants, he even offered to order that for us until he

1 called North Carolina and found out that we were getting as
2 good a price as he could get it at, even for 2,000 units.

3 Q Did that delay you, then?

4 A Absolutely.

5 Q And for how long?

6 A I would say a few days, that part. It's not how
7 long it delays you, it's a combination of all this stuff,
8 that went on.

9 Q I understand. All right. Now, you have indicated
10 to us -- we have the cabinet situation, we have the flooring
11 situation, we have the electricity situation; were there
12 other problems with A.D.C. that led to delays?

13 A There was the cove moulding.

14 Q All right, sir. We have heard a lot about the
15 cove moulding.

16 A Yes, absolutely. So did we, at the time.

17 Q So did you at the time. Would you tell His Honor,
18 again, but put it in context, of course, the problems with
19 reference to the cove moulding.

20 A Yes. At the time we entered the contract that was
21 supposed to be like that at Heritage Woods, white appliances
22 in the units. They soon decided that they wanted almond.
23 They called in Sears. We were ordering our stuff from General

1 Electric and getting good service -- they called in Sears,
2 A.D.C. called in Sears, negotiated a price with them and --
3 which included the possibility of 2,000 units -- then sent
4 a representative up to me, which was just a block away from
5 their offices, sent a representative up to me, told me to
6 Jerry-rig something up there, that they wanted almond
7 appliances, they were changing it and they could offer them
8 for this price to us and, upon questioning, he said he could
9 hold the price, he thought, for six months and he would try
10 to get that approved for us.

11 Q Had you already put some white appliances in at
12 that time?

13 A I don't believe so, no.

14 Q Now, with reference to the cove moulding, now,
15 what effect did it have on the cove moulding when they
16 changed the color of the appliances?

17 A Well, when they changed the color of the appliances,
18 then we have -- you know, what cove moulding do we put down?

19 Q So, the original white was based upon the appliances?

20 A Yes, absolutely.

21 Q I understand. Then they changed it to almond?

22 A Yes.

23 Q Then what occurred, sir, with reference to the cove

1 moulding?

2 A Then they tried to say, you know, what cove
3 moulding do you have down? Mr. Kische is the one who said,
4 we used white at Heritage Woods, we have white on hand, put
5 white in it.

6 Q All right. Then what occurred?

7 A Then on the next infrequent visit of Mr. Daly,
8 Mr. Daly did not like the white with the almond.

9 Q So, you had to change it?

10 A I had to change it.

11 Q All right. Now, there has been placed in evidence
12 a letter of July 16, 1980 from Mr. Dillon authorizing, in
13 writing, a particular kind of cove moulding?

14 A Yes, sir.

15 Q What had been determined prior to that date as to
16 the size of the cove moulding, the color of the cove
17 moulding, the manufacturer of the cove moulding -- what
18 determinations had been made before that?

19 A Prior to that I had talked to my attorney -- well,
20 you have heard testimony that Mr. Sauer took several samples
21 down to Mr. Kische to choose what he wanted. There was a
22 question of beige, brown, almond which were close, and we
23 wanted to make sure that that was exactly what they wanted,

1 not only that but they were different sizes. You have a
2 narrow one, a wide one, and a narrow one wouldn't do us any
3 good but we wanted to make sure that whatever we put in
4 there this time, we would not have to change.

5 So, therefore, Mr. Sauer got the samples, took
6 them down to Mr. Kische, Mr. Kische then chose one. Okay.
7 He brought the one that he chose back, however -- in the
8 meantime, I had called my lawyer at the time and my lawyer
9 advised me --

10 Q Now, let's not deal with what your lawyer advised
11 you.

12 Is this in July?

13 A This is in July, yes, sir.

14 Q All right. Prior to July, however, you indicated
15 they changed to almond, the white and then to almond. What
16 happened at that time?

17 A Well, we tried to get -- I think it was brown
18 that we got and they didn't like that, so we were going
19 ahead to finish the units without cove moulding until they
20 could decide on what they wanted in.

21 Q I understand. After the model units?

22 A Yes, sir.

23 Q Okay. Now, if -- we have the cove moulding

1 situation, then?

2 A Yes, sir.

3 Q What other problems developed that created delays?

4 A The kitchen lighting.

5 Q All right. Would you explain to His Honor how
6 that came about and what effect it had on your all's delivery
7 schedule?

8 A Yes, sir. We couldn't get the light that was
9 specified in the contract. We asked someone, "We can't
10 get that, it's impossible. It's an old -- last year's
11 model that is not being made anymore. Would you choose
12 another light?" And they said, "Yes, you go and get the
13 samples, bring them in and we'll take a look at them and
14 choose the light."

15 So, we did, we got samples, we brought them in
16 and Mr. Kische liked one light so we put it up. He took a
17 look at it and it -- he didn't like that one.

18 Q Who didn't like that one?

19 A Mr. Kische. So, then we went back, got some more,
20 brought them over -- at that time, they said it didn't give
21 enough light. I think we were using a four foot one-bulb
22 lamp, that's what they wanted, four foot at the time.

23 So, we brought it back and it didn't give enough

1 light so then they said, you get a two foot with two lamps
2 in it and it will give more light. So, we went and got
3 that back -- this is what Mr. MacAbee was talking about --
4 we took the four foot down, we put the two foot up and they
5 liked that, they approved that. Well, Kische approved that.
6 We kept asking him and insisting, with all of these changes
7 and everything, who does have the responsibility of telling
8 us what we can put up and leave up? They said, "Well,
9 Mr. Daly is not here so Mr. Adashek will have to do that."

10 Okay. We took -- Mr. Adashek came up and he
11 didn't like the two foot lamp with the two bulbs, he wanted
12 a big four foot light with two bulbs. So, we went and got
13 some more, got the four foot with two bulbs, brought it back.
14 Mr. Adashek finally came up to see it and he said, "I can't
15 tell until you put it up."

16 Okay. So we took the two foot one down and put
17 the four foot one up. He came back and he fell in love with
18 it. In fact, he said I like that so much, it gives a lot
19 of light, that I want one installed in my own apartment in
20 Briarwood and we were issued a purchase order to install
21 one of those lights in his apartment in Briarwood, which was
22 a previous section in the same complex.

23 Q Then what occurred? Now, you got approval from

1 Adashek for the four foot light?

2 A That's right.

3 Q Is that the light you finally went with?

4 A No.

5 Q What happened?

6 A We order some of them and we started putting them
7 out and again, on one of the infrequent trips of Mr. Daly,
8 he didn't like it.

9 Q So, what did you have to do?

10 A We finally came down to the modification agree-
11 ment. At this time, we just had had enough, enough is
12 enough. Okay? We said, "Either we get this straightened
13 out and you approve something and you put it in writing and
14 stop causing us -- stop changing it, stop causing us delays,"
15 okay,"or we cannot go ahead with this project."

16 Q I understand. All right. Now, that takes us up
17 to June?

18 A That takes us up to June.

19 THE COURT: Well, nothing happened just because
20 Daly came, you say you started the installation and then
21 Adashek approved and then Daly came --

22 THE WITNESS: Well, this was at the time we left
23 the job.

1 THE COURT: But it was not changed after that?

2 THE WITNESS: Yes, it was, Your Honor.

3 THE COURT: We haven't gotten to that, yet.

4 BY MR. REESE:

5 Q Did Mr. Daly approve that light?

6 A This is the one Mr. Adashek approved?

7 Q Yes.

8 A No.

9 Q Did he require you to take them down?

10 A Yes, at a later time.

11 Q All right, sir. Now, what other problems did you
12 have -- now, we've gone over quite a few --

13 THE COURT: Finish the light thing -- please go
14 right ahead.

15 THE WITNESS: So, about that time is when we left
16 the job, in early June. Then, when we came back to the job
17 with a modification agreement, I insisted a modification
18 agreement be signed and all of this stuff be put an end to
19 before we would come back, so, Mr. Daly said, all right,
20 you bring me the star lights in progress, the light list --
21 I will look through it, I will choose a light, I will choose
22 the light and that's the one we'll put in the modification
23 agreement, by model number, and that will be the light and

1 that's what he did, Your Honor.

2 THE COURT: And what size light was that?

3 THE WITNESS: I think it was a little two foot
4 double bulb with butcher block trim.

5 THE COURT: But it was two feet in length, not
6 the four?

7 THE WITNESS: I believe so, Your Honor.

8 BY MR. REESE:

9 Q You're back and forth from the four-foot to the
10 two-foot, again?

11 A Yes, sir.

12 Q All right, sir. What other difficulties did you
13 experience with this contract, delays?

14 A We were asked to do the efficiency apartment,
15 which we did not want to do. We were asked to do the
16 storage rooms -- probably one of our biggest delays was the
17 rewalks.

18 Q All right. We'll get to that in just a minute.
19 You said you didn't want to do the storage rooms and the
20 laundry rooms and the efficiency?

21 A They had to be done and they asked us to do them.

22 THE COURT: I don't understand, what's that got
23 to do with delays, were they in the contract or weren't they?

1 THE WITNESS: They were not in our contract but
2 we --

3 THE COURT: You were asked to do an extra which
4 took time from the contract time; is that what you are try-
5 ing to get out?

6 THE WITNESS: Yes, Your Honor.

7 THE COURT: Just stop on that, for a minute.
8 How many storage rooms were involved?

9 THE WITNESS: There was a contract of 1100 and
10 some dollars.

11 THE COURT: No, no. How many storage rooms were
12 involved -- essentially, repainting and doing the hardware?

13 THE WITNESS: No, it's fixing them up, the drywall
14 work and painting --

15 THE COURT: I see. All right. How many laundry
16 rooms were involved?

17 THE WITNESS: I believe it was all in the building,
18 the Building 4355.

19 THE COURT: One?

20 THE WITNESS: Down in the basement there were
21 storage rooms and laundry room.

22 THE COURT: One laundry room?

23 THE WITNESS: Yes, Your Honor.

1 THE COURT: How many efficiencies?

2 THE WITNESS: At that time, one, Your Honor.

3 THE COURT: All right. So, it was basically three
4 additional rooms or extras --

5 THE WITNESS: Units, yes.

6 THE COURT: So, it took time from the regular
7 contract. All right. Now, go ahead, counsel.

8 BY MR. REESE:

9 Q Did you have problems with changing of appliances
10 other than the colors?

11 A Changing of appliances?

12 Q Did they change any appliances other than the
13 colors?

14 A Well, they changed the manufacturer.

15 Q Oh, all right. All right, sir. You have indi-
16 cated to us that you also had a problem on the rewalks?

17 A Definitely.

18 Q Describe to His Honor how that problem developed
19 and what effect it had on this contract and any delays.

20 A They would walk units, as has been testified
21 before --

22 MR. WEINER: Your Honor, I am -- I have to object
23 to the certain generalities; when he says they would walk,

1 we have to know what we are talking about. Who is "they?"
2 Was he present on those walks or not? Or is this just his
3 overall scenario of the Ivy Mount saga?

4 THE COURT: Well --

5 MR. WEINER: I mean, some particularity, I think,
6 would be in order.

7 THE COURT: The witness hasn't really gotten into
8 it for me to know whether it is going to be objectionable
9 or not, so I'm going to let him proceed.

10 THE WITNESS: As I started to say, Your Honor,
11 Mr. Quatmann -- I would walk the units with my maintenance
12 man, punch-out man, or maintenance man, whatever; with
13 Mr. MacAbee, the painter; with Mr. Gary Sturgill or his
14 representative, the plumber; with a cleaning person, to fix
15 up these little things which might have been overlooked.

16 First of all, Your Honor, these units were 17
17 years old. They were sold, "as is" per the unit model and
18 we did the unit model, Your Honor. So, therefore, any
19 little imperfections that might be in the units would most
20 probably correspond to something in the model unit also.
21 However, we would walk the units with Mr. Quatmann or
22 Mara Ernestones or Mr. Kische. We would walk in there with
23 the papers, with the invoice, with the keys, we would walk

1 through with them and they would point out what was wrong.
2 If we could fix it right then, we would; if there was some-
3 thing that could not be done exactly then, then we were
4 allowed until the next day to call them back the next day
5 to approve these. Anyway, they would walk them and they
6 would approve them on the walk sheets.

7 At that time, we would turn the keys over to them
8 and, theoretically, as far as I know, other than in the
9 contract, called us back to vacuum after the carpet layers
10 laid the carpet, but, other than that, no callbacks except
11 it would really affect the workmanship if the appliances
12 were bad. We had to get service contracts for warranties
13 with Sears, with G.E. for the garbage disposals, these
14 kinds of things and we had told them that we would go back
15 and touch up and do these little things that they wanted,
16 just to continue to cooperate and get the job done.

17 So, we would walk -- I say that Walter approved
18 them. Okay. We would give him the keys; theoretically,
19 the apartment was no longer ours, no longer our responsi-
20 bility, because, in the initial walks, you see, in the
21 initial walks for extras, we would then put our own locks
22 on the door and we would keep the keys and we would be
23 responsible, and they insisted that all of the units, all

1 171 units, be walked immediately after we took the contract,
2 which was not the procedure in any other job that we had
3 done.

4 BY MR. REESE:

5 Q All right, sir. You would walk the units with
6 Mr. Quatmann?

7 A I would walk the unit with Mr. Quatmann or
8 Mr. Kische or Mara Ernestones. Mara Ernestones is an
9 exception because she never accepted any apartment. Let
10 us say Mr. Quatmann and Mr. Kische.

11 Q Now, sir,

12 A We would walk these units with them, touch up what
13 we could, take care of everything; they would then sign
14 as indicated on the walk sheets when they accepted the
15 units. We would turn the keys over to them and that,
16 theoretically, would be the end of our responsibility.

17 But, Qs But, as it turned out, the story --

18 A As it turned out, they would come back and they
19 would walk them, now, sometimes Mr. Kische would say, "Hey,
20 we're going to walk it again." So, we would go walk it
21 again with him but most of the time we were not even advised.
22 They would walk it on a Saturday or Sunday or some other
23 time, walk it all by themselves without us present and just

1 say it was unacceptable.

2 Now, some of these times would be months after we
3 turned it over to them; when they had open houses in it;
4 when these models had been opened and, to this day, I do
5 not have an approval of the units in the modification
6 agreement that were supposed to be going back and touching
7 up and we were going back and touching up, which Mr. Dillon
8 admitted was done and was going to give me a signed state-
9 ment and called me and told me that I didn't need a signed
10 statement.

11 Q All right, sir. Now, what happened to your work
12 schedule because of these -- they accepted the units and then
13 they come back and walked them again. What happened?

14 A We have to go back in. I mean, they wouldn't pay
15 us for them. So, therefore, we would have to go back in
16 and do these in order to try and get paid. As it turned out,
17 it didn't matter how much we did, we still didn't get paid,
18 but we tried.

19 Q And that delayed you also; didn't it?

20 A Certainly. We would have to put our men off to
21 go back into these units and check these things, and most of
22 the time they were trivial or nothing. One instance is the
23 windows, dirty windows.

1 Q All right.

2 A Dirty windows. These are units 17 years old; they
3 were cement buildings. The rain comes down, it washes the
4 lime off the cement, off the windows, and etches the windows.
5 Okay. There is practically nothing you can do about those
6 windows. We have called in everybody to try to do something
7 about these windows and the only thing you can do is polish
8 the windows, call a professional in to polish the windows
9 or replace the windows.

10 Now, no amount of cleaning -- and we even tried
11 Muriatic acid on it -- no amount of cleaning can take this
12 off. They already knew about the problem, they were in
13 Briarwood, they had the same problem with Briarwood but they
14 wouldn't tell us and we kept trying to clean those windows,
15 it was impossible.

16 Q All right, sir. Now, were -- in addition to the
17 walk-throughs, were there other difficulties that you
18 experienced with A.D.C., personally, that caused these kinds
19 of delays?

20 A Well, as I said, these people were working with
21 us all of the time.

22 Q Did they know that employees of A.D.C, Tom Dillon,
23 for example -- did he know about the effect that all of these

1 things was having --

2 MR. WEINER: Objection, Your Honor.

3 THE WITNESS: Absolutely.

4 THE COURT: Grounds?

5 MR. WEINER: I don't think this witness can testi-
6 fy whether someone knew something or not unless they told
7 him.

8 THE COURT: If the next question is, "How do you
9 know" and the answer is, "I told him," then it's accepted.
10 You have got to let them present it their own way.

11 BY MR. REESE:

12 Q Did Mr. Dillon know what was happening?

13 A Absolutely. He was up there all the time.

14 Mr. Kische had his office --

15 THE COURT: Wait for the question.

16 BY MR. REESE:

17 Q Why would he know?

18 A Because I told him, I and Mr. Sauer together,
19 told him what was happening and that we --

20 THE COURT: About the windows?

21 THE WITNESS: About the windows, oh, yes. He
22 knew about that.

23 THE COURT: Is that what you are talking about?

1 THE WITNESS: I am talking about all of the delays,
2 everything.

3 THE COURT: Everything?

4 THE WITNESS: Everything, everything.

5 BY MR. REESE:

6 Q Mr. Dillon was there on the job almost every day;
7 wasn't he?

8 A I would say most days, yes.

9 Q All right. What about Mr. Kische, did you inform
10 Mr. Kische of the problems?

11 A Absolutely. He had his office right in the
12 building we were working in and Mr. Quatmann was in the
13 office, also.

14 Q So, all these people knew about the problems and
15 knew about the delays?

16 A Well, surely. They were in constant touch every
17 day; in fact, almost hourly. They were walking the units
18 to find out how the progress was going and so forth.

19 Q All right. Now, June comes up. Did there come a
20 time when you all were off the job in June of 1980?

21 A Yes, sir.

22 Q All right. Why did that come about?

23 A It came about because of all these delays. We

1 couldn't get the thing done and Mr. Dillon told us that
2 Mr. Daly wanted us off the job.

3 Q So, you left the job, you were ordered off the job?

4 A We were ordered off the job, yes, sir.

5 Q And you came back after the 18th of June; is that
6 correct?

7 A After the modification agreement was signed, yes.

8 Q All right, sir. Now, after the modification
9 agreement was signed, did you enter into the second floor --
10 the second floor rooms that you were talking about, those
11 units? Is that when you started working on those?

12 A Yes.

13 Q I notice on the modification agreement it calls
14 for you to do some rework of some of the units at Ivy Mount
15 that had already been accepted; is that correct?

16 A Yes.

17 Q Did you all do that work?

18 A Absolutely.

19 Q And was it accepted by Mr. Dillon?

20 A It was accepted by Mr. Dillon.

21 Q All right.

22 A Verbally.

23 Q There is some work in there for Heritage Woods

1 project that you all were supposed to do; was that work
2 completed?

3 A Under the modification agreement, we had agreed
4 that we didn't need to go back into those, so it was struck
5 out on the modification agreement. We considered it com-
6 pleted to start with, but they used it as one of their
7 compromising tools on the modification agreement.

8 MR. WEINER: Objection.

9 THE COURT: I don't understand you. Your attorney
10 suggests that you promised in the modification agreement
11 to do something in Heritage. Is it in here or isn't it?

12 THE WITNESS: No, it's crossed out, Your Honor.

13 THE COURT: All right. Then it's settled.

14 BY MR. REESE:

15 Q Now, sir, the fire units have already been
16 stipulated to so we shan't go over it.

17 Did you experience some difficulties with Mara
18 Ernestones on the walk that you performed with her?

19 A Yes, we certainly did.

20 Q Tell His Honor about those difficulties.

21 A She came up to the units to walk, and again we
22 had our full crew walking with us. We would walk into the
23 apartment and she would immediately start looking for small

1 flaws.

2 MR. WEINER: Your Honor, I would ask the Court
3 to instruct the witness unless he's talking about a specific
4 unit, I think he's trying to give us a whole conceptual
5 type of situation --

6 THE COURT: Overruled, that's what cross is for.

7 THE WITNESS: She would walk into the unit and
8 immediately start looking for small things and those small
9 things we would almost always correct on the spot, a touch-up
10 here, a touch-up there; the inside of the closets hadn't
11 been painted on -- we would touch those up. However, she
12 would come to certain things which were not in our scope of
13 the contract, like the sliding glass doors, they had been
14 deleted from our contract. They were old doors, we could
15 not get the hardware from them, we had discussions with
16 Mr. Daly and we agreed to eliminate any work on the sliding
17 glass doors.

18 She would come up in there and immediately go to
19 the sliding glass doors and say they don't work properly,
20 they don't close properly, or they don't lock properly and
21 immediately write it down on our -- her report.

22 She would go out on the balcony -- and the balconies,
23 our only responsibility on the balcony was to sweep it clean

1 when we left -- she would immediately find something wrong
2 on the balcony or the mechanical room. In the mechanical
3 room, the only thing we had to do was, at a later time
4 we agreed to put in new locks on the mechanical doors;
5 otherwise, the mechanical room was not our responsibility.
6 She immediately went to them and then she would come back
7 and try to find -- if she couldn't find anything wrong
8 there, she would try to find something else.

9 Q All right, sir. Did there come a time when --
10 you tell me what happened.

11 A She never approved a unit.

12 Q I understand.

13 A Well, yes, she did, right at the last --

14 Q At the very last?

15 A Um-hum.

16 Q How did that come about, sir?

17 A Well, that's after we had walked it several times,
18 we had come back and actually done work that was not required
19 of us, that we should have been paid extra for, but she
20 would not approve these units unless we did it.

21 Q Now, these would be the second floor units, 21,
22 22, 23 --

23 A Right.

1 Q Plus 33, 31 and 38?

2 A Correct.

3 Q Those are the last units?

4 A Correct.

5 THE COURT: Three is on the second floor --

6 MR. REESE: No, I said plus.

7 THE COURT: And third floor?

8 MR. REESE: Yes.

9 BY MR. REESE:

10 Q Now, these were the last units that were presented
11 by you all?

12 A Yes.

13 Q They totaled 11 units?

14 A Yes.

15 Q These were submitted to her for her walk-through?

16 A Yes.

17 Q On the final walk-through, what happened?

18 A On the very last walk-through --

19 Q Would that be about the 10th of July? Earlier
20 in the trial, you will recall that Mr. Purdy's testimony
21 was that --

22 A It would be around that, I can't recall the exact
23 date.

1 Q All right, sir. What happened on that final
2 walk-through?

3 A On that final walk-through we had finally gotten
4 the kitchen lights for those units; we had finally gotten
5 the cove moulding; we had installed both and we called her
6 for an inspection and she came up, inspected them, went
7 through, found all the deficiencies that she had noted in
8 the previous walk-through to be okay, she okayed them, she
9 said they were fine --

10 THE COURT: Okayed what?

11 THE WITNESS: She okayed all of those units,
12 Your Honor.

13 THE COURT: All eleven?

14 THE WITNESS: All 11 units.

15 BY MR. REESE:

16 Q This wasn't the first walk-through on these units?

17 A Oh, no, this was the 4th or 5th or 6th or 7th or
18 10th or 20th, I don't know.

19 Q I understand. What did she tell you?

20 A She said they were okay. She said, however, she
21 didn't have the authority to accept them. I said, well,
22 just mark okay on them and give me a copy that you okayed
23 them. No, I can't do that, she said. I have got to take

1 them down to Mr. Dillon. Mr. Dillon is the only one who
2 can approve units, can actually accept them. Well, I said,
3 you have accepted them, they were okay. He hasn't been up
4 to check them. He hasn't walked them, right? She said,
5 "Yes, but he's the only one that can sign them." So, I
6 said, "Okay, you go down and ask him to sign them, run a
7 copy and bring it back to me because I would like to keep
8 a copy of that."

9 Needless to say, as any other written document
10 that I requested from them, I never got anything back from
11 them.

12 Q All right, sir. Now, sir, it has been indicated
13 that -- well, bear with me --

14 Did there come a time when you left the job on
15 or about July 24th?

16 A Yes, I instructed my attorney on the 23rd to have
17 a default notice in their office by the morning of the 24th.

18 Q Why did you do that?

19 A Because from the way they were acting, I knew they
20 were not going to approve any units. Mr. Dillon had come
21 down earlier that morning, had gone through the units and
22 said, "How many units are you going to turn over?" And I
23 said, you know, "I've got these units, they're almost complete --

1 Q This is on what date, now?

2 THE COURT: You mean after this woman approved
3 them you told Dillon they were almost complete?

4 THE WITNESS: No, no. I thought we went up to the
5 point -- 24th --

6 MR. REESE: July 23rd --

7 THE WITNESS: Oh, July 23rd. I'm sorry.

8 THE COURT: What units are you talking about,
9 counsel?

10 BY MR. REESE:

11 Q On the 24th of July, did Mr. Dillon come into your
12 office?

13 A No.

14 Q Was it on the 3rd that he came into your office?

15 A Yes.

16 THE COURT: July 3?

17 MR. REESE: July 3.

18 THE WITNESS: Approximately, I don't know the
19 exact date.

20 BY MR. REESE:

21 Q And that's what you were about to recite, sir?

22 All right, what happened? You say he came into
23 your office and said how many units are you going to turn

1 over?

2 A Right.

3 THE COURT: This is before -- we are going back
4 in time, this is all before Ernestones looks at some units;
5 is that right?

6 THE WITNESS: This is --

7 THE COURT: This is different units, not the
8 second and third floor units?

9 THE WITNESS: No, this is when we came back on
10 the modification agreement, Your Honor.

11 THE COURT: Are you getting ready to talk about
12 the same work that Ernestones looked at, or different
13 apartments? Which ballpark am I in?

14 THE WITNESS: These are the same ones, only before
15 she looks at them.

16 THE COURT: The same ones, only before?

17 THE WITNESS: Yes.

18 THE COURT: It's a flashback show?

19 THE WITNESS: Yes.

20 THE COURT: I just -- all right, as long as I
21 know what's happening -- all right.

22 MR. REESE: I was asking about the July 24th and
23 he went back to the 3rd.

1 BY MR. REESE:

2 Q Why don't you explain to His Honor what happened
3 on July 3rd.

4 A Well, on the 3rd, Mr. Dillon was up there and we
5 were supposed to turn over units and he was up there trying
6 to find out how many we were going to turn over and all of
7 this. So, he came up, looks around and he sent Mr. Kische --
8 Mr. Kische and Ernestones -- up to look around and report
9 back to him how we were going to turn them over. He called
10 me and said that someone reported to him that they weren't
11 going to be ready, they didn't look like they were going
12 to be ready in time; they were supposed to be turned over
13 by noon on Thursday. I told him that they were approximately
14 complete, that our punch-out men were fixing up small items
15 now and they should be ready by noon.

16 He said, well, he was told they wouldn't be ready.
17 I said, listen Mr. Dillon, I would like you to come up and
18 walk these things with me and go through them and see. So,
19 he came up, we walked a few of the units, he looked at them
20 and he said, yes, they were approximately complete, you
21 should have them all finished within a couple of hours, and
22 I said, that is right, Mr. Dillon. I plan to have them
23 ready in a couple of hours.

1 So, he said, well, I will go down and tell Mr. Daly
2 that. So, we went down to his office in 7753, we -- he
3 went into another office and later on he came back and
4 said that Mr. Daly said that they must be 100 percent com-
5 plete except for the cove moulding and the lights, otherwise
6 he wanted us off the job.

7 Q All right, and did Mr. Dillon then order you off
8 the job?

9 A No -- well, yes, later.

10 Q Later that day?

11 A Right.

12 Q Bring us up to that, how did that occur?

13 A He said that -- yes, he said that Mr. Daly -- if
14 they were not 100 percent complete and he said, the way it
15 looked to me, it will take you another week to complete those
16 things -- and he said Mr. Daly, unless they are 100 percent
17 complete, Mr. Daly wants you off the job now and would very much
18 like it if you can take the root that you said yesterday.

19 Q Meaning --

20 A Meaning -- I said, you know, if we can't get this
21 thing straightened out, I've got to go seek legal advice.

22 Q Then what occurred, sir?

23 A When, on the 3rd?

1 Q Yes.

2 A We left the job on the 3rd.

3 Q All right. Now, did you then come back on to the
4 job?

5 A Yes, we came back.

6 Q And that would be about on the 8th or 9th?

7 A Approximately the 8th, yes.

8 Q And at that time you obtained the cove moulding
9 and kitchen lights and put those in?

10 A Well, we didn't get them until a little after that.
11 It was the 10th or 11th by the time we got the cove mould-
12 ing, which was the last thing.

13 Q And then you presented them for inspection to
14 Mara Ernestones at that point?

15 A Right.

16 Q All right. Come forward, if you would, to the
17 24th of July. On that day, you defaulted -- you used that
18 term -- you told A.D.C. that they were in default?

19 A Yes.

20 Q By letter; is that correct?

21 A Correct.

22 Q Why did you take that action?

23 A Because they weren't paying us, they told us that

1 they were not going to pay us. They told us that the second
2 load of cabinets that came in would be deducted from any
3 payment even if it would -- Mr. Daly -- or Mr. Dillon told
4 us that Mr. Daly said that every payment we got could go
5 through Real Title and all of the bills would be paid for.
6 We had no control over it, all of the bills would be paid
7 for us and he would see that we, meaning John and I, had no
8 money left by the end of the project.

9 Q So, you defaulted because of that?

10 A Absolutely.

11 Q I understand.

12 THE COURT: That last quote was of whom?

13 THE WITNESS: That was a quote that Mr. Dillon
14 told me that Mr. Daly said.

15 THE COURT: All right.

16 BY MR. REESE:

17 Q All right. Now, let me show you, for His Honor's
18 assistance more than anything else, this particular sheet,
19 and ask you if this sheet indicates the amount and breakdown
20 of your claim, except for the claim of loss of profit.

21 (Handing to the witness)

22 A I have reviewed this and yes, it does.

23 MR. REESE: If Your Honor please, I will only

1 submit this for identification purposes.

2 (Document handed to Court)

3 BY MR. REESE:

4 Q Now, Mr. McCarty, before submitting this to the
5 Court, I notice on here that it reflects Gary Sturgill's
6 add-ons as per his testimony; reflects the back-charges for
7 Holdfast that have been submitted into evidence, less the
8 1650 electrical check charge which Mr. Mates testified that
9 had already been done, and less the \$30 per unit for the
10 hookup of the stove as per Mr. Sturgill and also reflects,
11 does it not, a 15 percent profit rather than a 20 percent
12 profit on the partial units; is that right, sir?

13 A Yes.

14 THE COURT: If it's not an item of evidence then --

15 MR. REESE: Just mark it for identification.

16 THE COURT: Well, what's the name, next number?

17 THE CLERK: 38, Your Honor.

18 THE COURT: All right.

19 (The document previously referred
20 to was marked Plaintiff's Exhibit
21 No. 38 for identification and
22 received into evidence.)

23 THE COURT: If it's not in the record -- what you

1 want is for me to have a writing of his testimony, tell me
2 what you claim, just go from the top to the bottom, don't
3 make any additions. In other words, read it.

4 THE WITNESS: This is in Mr. Reese's handwriting
5 and it's difficult to read, Your Honor.

6 MR. REESE: Now, wait a minute --

7 THE WITNESS: Modification agreement as of 6/18/80
8 for the unit -- what does it say, Mr. Reese -- 40 units --

9 MR. REESE: You try to make things easier --
10 40 units invoiced at Heritage Woods North --

11 THE WITNESS: Heritage Woods North, \$87,463.11.
12 As of 6/18/80, 19 units invoiced at Ivy Mount,
13 \$54,577.16.

14 Units invoiced after 6/18/80 at Ivy Mount,
15 completed units \$29,659.15.

16 Fire damaged unit, \$16,111.48.

17 Inventory, \$16,021.30.

18 Partial units, \$24,851.97.

19 Purchase orders, \$4,293.95.

20 Add-ons per Gary Sturgill, \$2,647.21.

21 Total, \$2,000 -- 235,625.33.

22 Payments made: \$156,790.27.

23 Backcharges (Holdfast) less \$1650 -- oh, less

1 \$16.50 per unit for electrical check.

2 MR. MAYS: Your Honor, should we have Mr. Reese
3 read it?

4 THE WITNESS: \$1,355.50, less \$30 per unit for
5 hookup of stove (11 units) minus \$330.

6 Total owed: \$77,149.56.

7 THE COURT: When you say certain units, previously
8 invoiced, tell me what the unit numbers were so I can tie
9 them in to my notes.

10 THE WITNESS: I would have to go to -- first of
11 all, Your Honor, there is a problem because I do not know
12 exactly -- I did not know up until recently when we got
13 some information from their lawyer, what the monies had
14 been assigned to; there was a question that they were
15 giving us --

16 THE COURT: Well, if you billed for 40 units,
17 just tell me what you billed for; if you say you billed so
18 much for incomplete units, write them down so I know what
19 you are talking about.

20 THE WITNESS: I would have to refer to my --
21 I have notes on this, Your Honor.

22 THE COURT: All right. Off the record, for a
23 minute.

