THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

APPELLATE CASE NO.: 2019-000513

Brown Contractors, LLC under S.C. Residential Builders License No. 20378,
.....Appellant/Respondent,
v.
Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer,
.....Respondents/Appellants,

And

Andrew McMarlin and Amy Salzhauer,
.....Respondents/Appellants,
v.
James Brown IV and Brown-Meihaus Construction, LLC,
.....Third-Party Defendants.

RECORD ON APPEAL VOLUME I

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Brown Contractors, LLC, under S.C. Residential Builders License No. 20378 v. Andrew Joseph McMarlin a/ka/ Andrew Joseph McMarlin and Amy Salzhauer // and Andrew McMarlin and Amy Salzhauer v. James Brown IV and Brown-Meihaus Construction, LLC

APPELLATE CASE NO.: 2019-00513

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO: 2014-CP-10-3881

BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

Plaintiff,

vs.

ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER

Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

vs.

JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION, CO., LLC

Third-Party Defendants.

ORDER OF REFERENCE

FILED
2016 JUN 21 AM 11:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

This matter is before me upon the Defendants and Third-Party Plaintiffs' application, with the consent of all parties including the Plaintiff and Third-Party Defendants, for reference of all pending claims to a special referee. Whereas, all parties to this action have agreed to the terms of this order, according it is hereby ORDERED:

Pursuant to Rule 53 of the South Carolina Rules of Civil Procedure, all causes of action in this matter are hereby referred to Henry W. Brown, a member of the South Carolina Bar, who shall act as a special referee with all the power and authority, pursuant to Rule 53(c), allowed by

a circuit judge sitting without a jury in a similar matter.

AND IT IS SO ORDERED.

Chief Administrative Judge, Ninth Circuit

June 20th, 2016

WE CONSENT TO THE ORDER OF REFERENCE:

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378 Plaintiff, vs. ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER Defendants,	CASE NO: 2014-CP-10-3881 **ORDER**
ANDREW MCMARLIN AND AMY SALZHAUER, Third-Party Plaintiffs, vs. JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION CO., LLC, Third-Party Defendants.	

This matter comes before me, as Special Referee, by order of the court dated June 21, 2016. A trial was held from November 7, 2017 through November 10, 2017, and the parties supplemented the record with additional deposition excerpts and exhibits. All exhibits and supplemental testimony have been introduced into evidence without objection. All of my findings and conclusions are based upon my consideration of all of the evidence submitted by the parties.

Defendants (hereinafter referred to collectively as "McMarlins") were solicited by, and thereafter engaged Brown Contractors, LLC ("Plaintiff" or "Brown Contractors") to perform a

substantial renovation in connection with a home they purchased at 1850 Flag Street on Sullivan's Island, South Carolina (the "Project"). Brown Contractors, LLC was owned by James "Jay" Brown. Plaintiff instituted this matter with the filing of a Notice of Mechanic's Lien dated March 19, 2014 (the "Lien"). Suit to foreclose the Lien was filed on June 16, 2014. In its Complaint, Plaintiff alleged that the McMarlins did not pay Brown Contractors and, in addition to the Lien, brought claims for Breach of Contract and Unjust Enrichment. Plaintiff contends it is owed the sum of $206,428.59.

The McMarlins denied the claims, asserting various affirmative defenses, and counterclaimed asserting causes of action against both Plaintiff and Jay Brown personally[1]. The McMarlins asserted causes of action for Negligence, Breach of Implied Warranty of Workmanlike Service, Breach of Contract, Unfair Trade Practices ("SCUTPA") and Alter Ego/Amalgamation. The McMarlins claim Brown over-billed for the Project, failed to perform all of the work he contracted to perform and was paid to perform, and performed defective work, which either has been repaired or must be repaired. As of trial, the McMarlins' alleged damages total $669,280.98 in completion/repair costs and $58,080.58 for loss of use occasioned by the delay in completion of the project, for a total of $727,361.56. The McMarlins also claim an entitlement to punitive damages and relief under SCUTPA. Both parties seek an award of attorneys' fees under the Mechanics' Lien Act, and the McMarlins also seek an award under SCUTPA. Any award of attorneys' fees pursuant to the Mechanics Lien Act will be assessed after determination of the prevailing party as provided in the relevant statute.

[1] Unless otherwise noted, Plaintiff and Jay Brown will hereinafter be referred to collectively as "Brown".

PLAINTIFF'S CLAIM

Brown seeks payment totaling $206,428.59. This is reflected in Brown's Notice of Lien, dated March 19, 2014, which is Plaintiff's Exhibit 5. The parties do not have an executed written contract and Brown contends that the basis of the claim is that work at the McMarlin home was agreed to be on a cost-plus basis. In support, Brown points to pay applications that were submitted to the McMarlins and to the father of Mrs. McMarlin, Henry Salzhauer. (*See, e.g.* Defendants' Exhibits 78, 80, 82). Those pay applications are premised on costs incurred with an amount for profit and overhead. The McMarlins paid based on this billing format, but withheld $206,428.59 from Brown's billing for profit and overhead. All costs of construction were apparently paid.

The McMarlins deny that the work was to be done on a cost-plus basis and point to several pieces of evidence supporting their position. First, Brown submitted proposals to accomplish the work for a stated sum, which expressly contained an agreed upon, fixed project management fee for Brown (Defendants' Exhibit 8). They also point to a proposed cost-plus contract that Brown sent them (Defendants' Exhibit 13) that they refused to sign. Finally, there are voluminous email communications between the parties that reflect an effort on the part of the McMarlins to identify the estimated cost to complete the project and also reference agreed upon adjustments to Brown's fee as part of those negotiations. (*See e.g.* Defendants' Exhibits 48, 50-53, 55-56).

There are numerous disputes between the parties relating to the accuracy of Brown's billing. The parties also dispute why the price of the work increased significantly. Brown's first proposal has an estimated price of $685,000.00 (Defendants' Exhibit 8). Brown's final pay

application shows a total project price of $1,357,528.22 (Defendants' Exhibit 116). Brown's total billings were $1,461,999. This amount was established through Roy Strickland ("Strickland") a CPA (Defendants' Exhibit 9). However, based upon the findings below, those issues need not be decided because the failure to comply with the Residential Licensing Statute precludes Plaintiff's recovery.

1. **A Failure to obtain statutorily required license precludes Plaintiff's recovery.**

Regardless of the basis of the payment, Plaintiff's claims for payment under all causes of action are denied. Section 40-59-30 of the South Carolina Code of Laws prohibits an unlicensed residential builder from filing a Mechanic's Lien or collecting on a contract or any other claim for residential services. This prohibition extends to actions at law or in equity. Section 40 of the South Carolina Code regulates Residential Builders as follows:

40-59-20. Definitions.

> As used in this chapter unless the context clearly indicates otherwise:
>
> (4) "Firm" means a business entity functioning as a sole proprietorship, partnership, limited liability partnership, professional association, professional corporation, business corporation, limited liability company, joint venture or other legally constituted organization which *practices or offers to practice residential building or residential specialty contracting.* [emphasis added]
>
> (6) "Residential builder" means one who constructs, superintends, or offers to construct or superintend the construction, repair, improvement, or reimprovement of a residential building or structure which is not over three floors in height and which does not have more than sixteen units in any single apartment building, when the cost of the undertaking exceeds five thousand dollars. *Anyone who engages or offers to engage in such undertaking in this State is considered to have engaged in the business of residential building.* [emphasis added]

40-59-30. License requirement; enforcement of contracts; restraining orders.

> (B) Notwithstanding Section 29-5-10, or another provision of law, a person or firm who first has not procured a license or registered with the commission and is required to do so by law may not file a mechanics' lien or bring an action at law or in equity to enforce the provisions of a contract for residential building or residential specialty contracting which the person or firm entered into in violation of this chapter.

This is also clearly expressed in numerous cases. *See Lenz v. Walsh*, 362 S.C. 603, 607, 608 S.E.2d 471, 473 (S.C. Ct. App. 2005) ("South Carolina courts have held that, pursuant to the statute, a builder who is not licensed ***at the time he enters into a contract*** for residential construction may not bring an action to enforce the provisions of the contract"); *see also C-Sculptures, LLC v. Brown*, 403 S.C. 53, 57, 742 S.E.2d 359, 361 (2013). [emphasis added]

Brown admits that he personally did not carry a license as a residential builder or a general contractor. He personally holds a license that allows him to perform carpentry only. Brown contends that his company, Brown Contractors, LLC, maintained a certificate of authorization that authorized Brown Contractors, LLC to engage in residential building through the use of an individual's license. The individual who dedicates his license to the use of a firm is often referred to as that firm's qualifier. A firm may contract for Residential Work and receive payment for such services, but must first obtain an individual qualifier who dedicates his employment and his time to that firm. A firm must then obtain a valid Certificate of Authority ("COA"), and the Firm must also comply with all aspects of the statute. Brown contends that his company was granted the COA through the use of the license of a subcontractor, Vuong Nguyen. Mr. Nguyen has held a builders license since October 14, 2004, bearing license number 20378.

Section 40-59-410, authorizes an individual residential home builder or specialty contractor to practice through a firm offering residential building services. However, to become "properly licensed" in this way requires that the following conditions be met:

(1) one or more of the corporate officers in the case of a corporation, or one or more of the *principal owners in the case of a firm, or one or more employees are designated as the resident licensee in responsible charge* of each principal or branch office for the building services regulated by the commission and are licensed under the provisions of this chapter;

(2) the firm has obtained an executed surety bond approved by the commission in the sum of fifteen thousand dollars initially and as subsequently provided by regulation; and

(3) the firm has been issued a residential business certificate of authorization by the commission. Nothing in this section may be construed to mean that a license or registration to practice residential home building, residential specialty contracting, or home inspecting may be held by a firm.

Section 40-59-410 (H) states the following:

Residential business certificate of authorization as requirement for firm to engage in residential home building, residential specialty contracting, and home inspecting.

* * *

(H) Residential home builders, residential specialty contractors, or home inspectors engaged in practice through firms involving the practice of residential building, residential specialty contracting, or home inspecting may maintain branch offices as well as a principal place of business.

Each principal place of business as well as each branch office must have a resident residential builder, residential specialty contractor, or home inspector in responsible charge of the field and office building work or services provided. A residential home builder must supervise the residential home building aspects of the principal or branch office and may also supervise the residential specialty contracting from that location. A residential specialty contractor may supervise residential specialty contracting services of the principal or branch office as long as the services are within the scope of residential specialty contracting in the classifications for which the individual is authorized to engage. A home inspector may supervise home inspecting services of the principal or branch office as long as the services are within the scope of home inspecting for which the individual is authorized to engage. ***The resident residential home builder, residential specialty contractor, or home inspector is considered in responsible charge of only one place of business at a given time.*** [emphasis added]

> For purposes of this subsection, ***"engaged in practice" means holding oneself out generally to the public as qualified and available*** to perform residential building, residential specialty contracting, or home inspecting services. [emphasis added]

The application submitted to the state office of Labor License and Regulation in support of Brown's request for a certificate of authorization is Defendant's Exhibit 5. In that exhibit, Brown and the license holder, Mr. Nguyen, both attest that Mr. Nguyen is an employee of Brown Contractors, LLC. The application lists license number 20738 (Nugyen's license) as the qualifying license, and the application is dated June 6, 2012. The COA was first issued in January 2013. Defendants' Exhibit 3 is a COA with an issue date of April 16, 2014. There is no suggestion that Brown Contractors, LLC had been issued a COA at the time work commenced on the McMarlin home, no later than August 2012. On Brown's pay applications the contract date is stated to be January 23, 2012, five (5) months before an application for a COA was submitted to the state's licensing board.

The record also establishes that Brown, if it did not have a contract as of June 2012, was negotiating with Amy McMarlin, and soliciting the residential project in April 2012 and earlier, also prior to the application being submitted. Section 40-59-10 defines a Residential Builder as one who "offers to construct or superintend . . . ." The solicitation of the project prior to even applying for the COA is an unequivocal violation of the licensing statute. Soliciting a contract without a license would be a violation of 40-50-30 (B).

In addition, Brown admitted at trial that Mr. Nguyen was a 1099 independent contractor and that his work at the McMarlins' home was controlled, at all times, by Brown. Brown, not Mr. Nugyen, was directing the building services to a successful completion, and Brown, not Mr.

Nugyen was the person in responsible charge. The testimony also establishes that Mr. Nugyen was not an employee of Brown LLC within the intent of the statute.

To be the qualifier for the COA, MR. Nguyen would have to be "the resident licensee in responsible charge." Mr. Nguyen does not meet the definitions of either role as set out in 40-59-400 (5) and (6). Specifically, Mr. Nguyen was not an employee with responsible charge.

Brown's bookkeeper, Deborah Wenner, was asked how many employees Brown Contractors, LLC had and she testified, "None." Mr. Nguyen was a subcontractor who billed as a subcontractor and who was, according to Brown, free to accept work, and did accept work, from other contractors while also working jobs for Brown Contractors. Mr. Nguyen, was not an employee of Brown Contractors, LLC. Even if he were to be considered an employee, he was not in full time responsible charge, and in particular did not have responsibility for the McMarlin project.

The application states that "The qualifying party may be in responsible charge of only one place of business at a given time." The last sentence of 50-410 (H) states the same limitation. "The resident residential home builder . . . is considered in responsible charge of only one place of business at a given time."

Mr. Nugyen executed the application representing he would be the qualifier in responsible charge for Brown while continuing to use the same license to support his separate subcontracting business. Mr. Nugyen was using one license for two places of business and this is a clear violation of the statute, rendering the statements in the application misrepresentations. Brown acquired no rights as the result of the COA issued in response to misrepresentations and false statements of fact.

Brown contends that *16 Jade Street, LLC v. R. Design Construction Co.*, 778 S.E.2d 448 (2012) salvages its right to enforce its claims. *Jade Street* did not repeal the provisions of the licensing statute. *Jade Street* ruled that the holder of a license is not personally liable for the defaults of the builder simply by being the qualifier or holding the license. The licensee's delicts related to the use of the license are a matter to be dealt with by the licensing body, unless there are omissions by the individual license holder that would subject the licensee to liability for claims by the firms wrongful conduct, independent of the license held. Nothing in the *Jade Street* holding would negate the statutory provisions and case law upon which the conclusions in this Order are based. While the qualifier may not be personally liable solely because he or she is the qualifier, the firm remains unable to enforce its contract or assert equitable claims if the firm fails to comply with the licensing statute. Nothing in *Jade Street* can be read to negate the prohibitions set forth in §40-59-30.

Based on the totality of the evidence, and the credibility of the witnesses, I find that Brown was not properly licensed at any time during the solicitation or performance of the McMarlin job. Because a license was required, and Brown was not properly licensed, Brown's claims, in their entirety, in law or in equity, are denied, and should be and are dismissed with prejudice.

2. Plaintiff's Mechanics Lien Is Invalid

For the reasons set forth above, Plaintiff's Mechanic's Lien is invalid. As an additional ground, the Mechanics Lien filed by Plaintiff did not comply with the filing requirements of the Mechanic's Lien statute, § 29-5-10, et seq., S.C. Code, Ann.

Section 29-5-15 requires that a contractor seeking to file a lien record his contractor's license number on the lien document when the lien is filed. Plaintiff used Nguyen's license number, and based on the findings above, this was not a valid license number for Brown Contractors and failed to satisfy the requirements of the statute.

MCMARLINS' CLAIM

I find that the McMarlins have been damaged by the deficient work by Brown Contractors LLC and are entitled to recover damages. Prior to identifying these damages, an explanation of the overall contractual relationship is necessary.

The McMarlins and Brown are each capable and experienced in construction and its management and methods. Despite their expertise, the parties proceeded with a complex residential renovation without first having adequately defined their agreement. Brown wanted a cost-plus, however, McMarlin rejected that format and made their rejection clear. McMarlin wanted a fixed price and Brown rejected that format. With each side having clearly stated their position contrary to that of the other side, the work proceeded and reached a less than satisfactory conclusion without the form of the contract ever having been decided by express agreement.

Although much of the testimony related to Brown's billings, and their reasonableness and necessity, McMarlin stated near the end of the testimony that they were not seeking recovery of any of the money paid to Brown. For that reason I have not considered any recovery by McMarlin of the amount they paid of Brown's billings. These claims will be dismissed.

McMarlin is asking for an award to compensate them for the costs necessary to correct defective, deficient, and incomplete work. In order to consider these claims, the contractual

obligations of Brown must be defined with sufficient clarity to establish where Brown did (or did not) breach its obligations. The project was a renovation of an existing structure and any and all problems with the home cannot be charged to Brown, as its responsibility is limited to those aspects of the residence that Brown agreed to correct or reconstruct.

In the absence of an executed agreement the parties' course of conduct would be a reasonable standard to define the agreement reached and Brown's scope of responsibility. The billings by Brown were clearly presented on a cost plus basis. There was a total cost number stated in each pay application, based on accumulated and identified costs, and costs were billed and paid generally as incurred. There was no apparent effort to establish a cap on costs.

As a result, the contract adopted between the parties by their conduct was cost-plus. That does not fully define the areas and components of the residence to be worked on by Brown, nor does it determine the obligations assumed. However, the line items in the schedule of values, the amount billed, together with the testimony, provides a reliable baseline to define the extent of the contractual obligations and the scope of the work assumed by Brown.

Roofing illustrates this approach outlined above. Defendants Exhibit 8 is an initial estimate of the cost of the work. This Exhibit lists, but does not price or set the scope of 5 V metal roofing. The early pay application included at Defendants Exhibit 29 lists membrane roofing at $600, with other line items that may or may not include roofing. By the time of pay application 2.11, dated December 9, 2013, Defendants Exhibit 116, the line item for membrane roofing for phase one is listed as $6,000, with the total billed costs having increased to $12,822.

HVAC has a scheduled value in Defendants Exhibit 29 of $4700. In Defendants Exhibit 116, HVAC is a two phase item, with the initial phase reaching $23,000 and phase two added

$5,800, totaling $28,800 as the estimated total. The actual billing is $43,147, indicating a significantly larger scope of work, encompassing a large part, if not all of the HVAC system.

Applicable case law does not require damages to be assessed with precision, only that there be a sufficient evidentiary basis to make a fair and reasonable assessment. I find that the record established by the testimony, exhibits, and the costs billed for the various aspects of the residence, establishes with sufficient accuracy Brown's contractual scope of work to allow a reasonably accurate assessment of the portions of the residence Brown assumed responsibility for and in relation to which Brown breached its obligations and is liable for damages. I find that the record is sufficient to make a reasonably accurate award of damages as noted hereinafter. I have made findings only as to those damages that are supported by sufficient evidence.

DAMAGES

Brown's final pay application is Exhibit D116, which reflects the value of the completed and stored to date labor and materials as $1,367,528. The balance to finish is a negative and unexplained ($357,583). The only items of work within the schedule of values not completed are the overhead door at $3,000, medicine cabinets and mirrors at $3,000, interior doors are 84% complete and windows 99% complete and flashing and water proofing at 34%. McMarlin paid all but $206,000 of this total, and the unpaid amount was created by deductions to profit and overhead. In effect, Brown has been paid for all labor and materials.

Based on the exhibits and testimony, I find that McMarlin has paid an amount sufficient to entitle them to full performance of the scope of work agreed to be performed for the items of work in the schedule of values (including punch list). The punch list allowance in Defendants Exhibit 116 is $15,000, and the amount billed and paid is $29,182. Accepting Brown's line items

as reasonable amounts to accomplish the work described in each line item, I conclude McMarlins' payment of these amounts entitles them to full performance of the scope of work undertaken, and as identified in the schedule of values.

I have reviewed the amended report of Brown Atlantic submitted after the conclusion of the testimony and found it to be an adequate basis to assess damages. Counsel for Brown examined Howard Brown of Brown Atlantic by deposition and the deposition testimony has been submitted, reviewed and is part of the record. I find that Brown is responsible for the scope of work addressed by Brown Atlantic.

REPAIRS AND COMPLETION COSTS NOW EXPENDED

Exhibit 1 to the Howard Brown testimony (given by deposition on January 24, 2018) reflects the items of work performed and the total payment of $174,695.04 to Howard Brown. The majority of the money spent was for HVAC and the roof, which were aspects of the work that Brown charged extensive amounts to perform and accepted liability for the adequacy of the results. Note VLN invoices for detailed HVAC work by Brown in exhibits 142, 143, and 144.

Glasgow put on a copper roof on the Project, but this was beyond the quality contracted for by Brown. Taking into consideration adjustments for copper and other differences, I find that McMarlin shall recover $132,500 for money paid to Brown Atlantic, as described in Exhibit 1.

In Exhibit 2 to the Brown Atlantic deposition, an estimate is given of $43,593 to correct structural inadequacies caused by an undersized beam used by Brown. The necessity for such a beam was not noted by the architect in his plans; however, Brown recognized the need for support and determined the size and characteristics of the needed bean. Brown was incorrect

and used an undersized beam. Brown accepted the responsibility to properly size the beam but failed to do so. McMarlin shall recover $43,593.

Exhibit 2 of the Brown Atlantic testimony includes an estimate for paint, flooring and punch list items in the amount of $152,117.00. I conclude a portion of these costs, subject to adjustments, should be recovered. I find that McMarlin should recover $133,100 of this total.

Exhibit 2 includes a claim of $298,875 to rewire the entire house. A substantial rewire was alleged necessary because of the absence of nail guards and the discovery of a nail penetrating a wire. I find that Brown did perform improper work in regard to the nail, but I do not find that the scope of the claim is supported.

Brown submitted evidence that the dimensions of the walls did not implicate the code requirement for nail guards. Absent any contrary testimony, I accept their position. The McMarlins' claim is premised not exclusively on the code, but on the uncertainty of the frequency of nails into wires.

This leads to the McMarlins' conclusion that the entire house must be rewired. Exhibit 74 contains a number of photos of exposed interior walls without protector plates, but without any nails penetrating. Repairs were made to the damaged areas and the McMarlins are entitled to recover some measure of damages. In the absence of a code violation, an award sufficient to require removal and replacement of all drywall, cabinets, trim and electrical wire is not supported by the evidence. The record does not show sufficiently repetitive instances of incorrectly nailed wires to support the McMarlins damage claim in its entirety. In fact, the photos show repetitive instances of undamaged wire that do not require replacement. I find the McMarlins are entitled to recover $25,000 for rewires and a reasonable investigation.

The McMarlins also seek to recover for loss of use. I cannot conclude that all delays and loss of use are the responsibility of Brown. Brown does bear some reasonable responsibility for loss of use, given the extended time period to perform repairs and conclude the punch list. Brown's contribution would include any loss of use due to the performance of repairs. I find the McMarlins are entitled to recover $12,500.

The McMarlins should recover as follows:

Expended money	$132,500
Structural repairs	$43,593
Paint flooring and punch list	$133,100
Electrical	$25,000
Loss of Use	$12,500
Total Award	**$346,693**

CAUSES OF ACTION

I conclude, as a matter of law, that the McMarlins are entitled to recover against Brown Contractors, LLC on their causes of action for Breach of Contract and Breach of Implied Warranty of Workmanlike Service. Although there was no executed contract, the course of conduct created a contract between Brown and McMarlin. Brown was obligated to perform its work in compliance with code, industry standard, and according to the documents and correspondence defining the scope of work on the Project. Furthermore, a warranty of Workmanlike Service arose out this relationship.

Brown Contractors, LLC also undertook a duty, independent of the contract, to adhere to code and industry standard, and undertook a duty in tort/negligence owed to McMarlin that also supports the recovery awarded against Brown Contractors, LLC.

The facts found herein create a breach of these three causes of action.

I conclude that this action involves a contract between two private parties and does not have the requisite public interest or possibility of repetition to support an action under the Unfair Trade Practices Act. I conclude this cause of action should be dismissed.

JAMES BROWN PERSONAL LIABILITY

The McMarlins contend Jay Brown should be held liable for the damages caused by the work performed by Brown Contractors, LLC. I do not believe the record supports the imposition of personal liability as to the specific damages awarded here.

The record shows that Jay Brown indicated during the negotiations and through the work that Brown Contractors, LLC was to be the contracting party. The proposed contracts sent to Mr. Salzhauer (Defendants Exhibits 13 and 14) both stated the contracting party was Brown Contracting and not Mr. Brown personally. Mr. Salzhauer noted his objection to the cost plus format, but not Brown Contractors, LLC as the contracting party. Numerous exhibits reflect messages and emails exchanged with the signature as Jay Brown for Brown Contractors, LLC.

Jay Brown clearly acted on behalf of Brown Contractors, LLC. However, Jay Brown could be personally liable if negligent conduct as to the portions of the residence addressed in the Brown Atlantic report is shown by Mr. Brown personally. As to the specific items of damage found herein, there is not sufficient evidence of Jay Brown's personal negligence to impose liability on Mr. Brown individually.

The claims against Mr. James Brown IV should be dismissed with prejudice.

CONCLUSIONS

NOW THEREFORE, based on the findings of fact and conclusions of law expressed herein,

IT IS HEREBY ORDERED THAT

1) All of Plaintiff Brown Contractors, LLC's claims and causes of action are dismissed with prejudice;

2) The Mechanics Lien and Lis Pendens filed by Brown Contractors, LLC is dismissed and the RMC is authorized and directed to cancel and dismiss such documents in the real estate records for Charleston County;

3) Andrew Joseph McMarlin and Amy Salzhauer are entitled to recover, and are awarded judgment against Brown Contractors, LLC on their causes of action for Breach of Contract, Breach of Warranty of Workmanlike Service and Negligence in the amount of $346,693, with the right to recover this amount on any cause of action but for only one recovery;

4) All other claims and causes of action asserted by Andrew Joseph McMarlin and Amy Salzhauer are dismissed with prejudice;

5) All claims against James Brown, IV personally are dismissed with prejudice; and

6) I retain jurisdiction over this case to review and rule on any subsequent applications for attorney's fees.

AND IT IS SO ORDERED!

Henry Brown as Special Referee

May 1, 2018

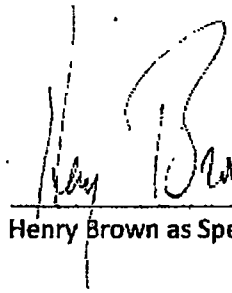
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378 Plaintiff, vs. ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER Defendants,	CASE NO: 2014-CP-10-3881 **ORDER DENYING RULE 59 MOTIONS TO ALTER OR AMEND**
ANDREW MCMARLIN AND AMY SALZHAUER, Third-Party Plaintiffs, vs. JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION CO., LLC, Third-Party Defendants.	

This matter comes before me, as Special Referee, by order of the court dated June 21, 2016. A trial was held from November 7, 2017 through November 10, 2017, and the parties supplemented the record with additional deposition excerpts and exhibits. All exhibits and supplemental testimony were introduced into evidence without objection.

Subsequent to the issuance and filing of the Final Order dated May 1, 2018 both parties filed Rule 59 Motions to Alter or Amend. I have reviewed these motions along with the evidence presented during the trial and am denying both Rule 59 motions.

IT IS THEREFORE ORDERED, that the Plaintiff's Motion to Alter, Amend or Reconsider and Defendants' Motion to Alter or Amend Trial Order Pursuant to SCRCP 59 are denied.

AND IT IS SO ORDERED!



Henry Brown as Special Referee

February 22, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CASE NUMBER: 2014-CP-10-3881
Brown Contractors, LLC, under S.C. Residential Builders License No. 20378, Plaintiff, vs. Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer, Defendants.	)	**ORDER AWARDING ATTORNEY'S FEES**
Andrew McMarlin and Amy Salzhauer, Third-Party Plaintiffs, vs. James Brown, IV and Brown-Meihaus Construction Co., LLC, Third-Party Defendants.	)	

In the Final Order submitted on May 1, 2018, I retained jurisdiction over this matter to review and rule on subsequent applications for attorney's fees. On May 25, 2018, Defendants, Andrew Joseph McMarlin a/k/a Andrew Joseph Mc Marlin and Amy Salzhauer ("Defendants"), filed *Defendants' Motion for Attorney's Fees and Costs*. In its motion, Defendants requested attorney's fees in the amount of $158,169.29. A hearing was held by telephone on August 22, 2018 and counsel for both sides presented their arguments relative to this motion. After considering all of the evidence submitted at trial, the memorandum of counsel and the Affidavit of Robert Lyles in support of *Defendants' Motion for Attorney's Fees and Costs*, I hereby award the Defendants attorney's fees and costs in the amount of $133,161.00.

1. Defendants Are the Prevailing Party

In the trial of this matter involving a mechanic's lien, the Defendants were the prevailing party and the claims of Brown Contractors, including its claim under the Mechanic's Lien Statute. I also awarded Defendants the sum of $346,693.00 on their counterclaim. Defendants were, therefore, clearly the prevailing party and are, therefore, entitled to attorney's fees. The party defending against a mechanic's lien that is ultimately dismissed is the prevailing party for the purposes of the attorney's fee award under § 29-5-10(a). *Cedar Creek Properties v. Cantelou Associates, Inc.*, 320 S.C. 483, 486, 465 S.E.2d 774, 775-776 (Ct. App. 1995); *Seckinger v. The Vessel, Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 777 (Ct. App. 1997). Alternatively, § 29-5-10(b) entitles the Defendants to an award of attorney's fees as the prevailing party whose offer of settlement was closer to the verdict reached. Under § 29-5-10(b), when both parties make an offer of settlement, the prevailing party is determined by the offer that is closer to the verdict reached, a verdict that is inclusive of counterclaims. The court ordered a judgment of $346,693.00 in favor of the Defendants' counterclaims and dismissed the Plaintiff's mechanic's lien. The parties exchanged offers pursuant to the statute, with Plaintiff offering to accept the sum of $75,000.00 in exchange for settlement and the Defendants offering to accept $150,000.00 in exchange for settlement. Therefore, the Defendants' offer was closer to the verdict of $346,693.00, rendering the Defendants the prevailing party under § 29-5-10(b).

S.C. Code Ann. § 29-5-10(a) allows the prevailing party to recover costs, including attorney's fees, associated with defending against the lien. In fact, I **must** award reasonable attorney's fees to the prevailing party. *T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994) (holding that "may" in § 29-5-10(a) should be interpreted as "must").

2. *Award of Attorney's Fees and Costs*

In their motion, Defendants request fees and costs associated with all of the claims asserted against them and for those associated with their counterclaims, under *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992). *Taylor* contemplates a situation in which nonstatutory causes of action are joined with the statutory cause of action that entitles the prevailing party to the award of attorney's fees. *Id.* Furthermore, the nonstatutory causes of action are related and intertwined with the statutory claim. *Id.* *Taylor* holds the following:

> [W]hen an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding. This approach requires the party asserting the right to attorney fees to produce an itemized affidavit of their fees that they believe are related to the statutory claim. The opposing party then has the burden of showing which of the fees are clearly unrelated.

Id. (citation omitted). Whereas Taylor holds that an attorney need not discount his fees incurred in a related and intertwined nonstatutory claim presented as an alternative theory of recovery based on the same transaction, the instant case presents a procedural history even more compelling. Here, the Defendants defended against the mechanic's lien claim by counterclaiming with nonstatutory causes of action.

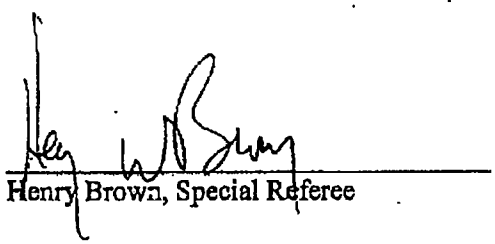
I find that Defendants' counterclaims were related to and intertwined with the statutory claim prosecuted by Plaintiff and that, other than as noted below, there were no claimed fees that were either "unrelated" to the statutory claim or that were clearly "beyond the scope" of the statutory proceeding.

In determining a reasonable attorney's fee, I am directed by law to assess the following six factors: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) beneficial results

obtained; and 6) customary legal fees for similar services. *Glassock v. Glassock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). I have reviewed the Affidavit of Robert Lyles submitted in this matter and am familiar with the pleadings and discovery in this matter, the pre-trial motions that were filed, the claims and defenses of both sides, and the evidence that was submitted as part of these proceedings, and have applied each of the *Glassock* factors noted above to the fee request made by Defendants in rendering this award.

In *Defendants' Motion for Attorney's Fees and Costs*, Defendants included the *Affidavit of Robert T. Lyles*, which provides the basis for the Defendants' requested amount for attorney's fees. The amount requested totaled $158,169.29. Pursuant to § 29-5-10(a), however, it lies within the province of the court to determine the attorney's fees provided they do not exceed the amount of the lien. Based upon the totality of the evidence before me, the materials submitted by the parties and the arguments of counsel, I hereby award Defendants the sum of $133,161.00 in attorney's fees and costs which will be added to my award dated May 1, 2018.

AND IT IS SO ORDERED!



Henry Brown, Special Referee

Columbia, South Carolina

February 22nd, 2019

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS CASE NO.: 2014-CP-10-_____
BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378, Plaintiff, v. ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN and AMY SALZHAUER, Defendants.	))))))))))))	**COMPLAINT** (Foreclosure of Mechanic's Lien/Breach of Contract/Action on an Open Account/Quasi-Contract/Quantum Meruit/Unjust Enrichment) **(Jury Trial Demanded)**

FILED
2014 JUN 18 PM 4:32
CLERK OF COURT

TO: THE ABOVE-NAMED DEFENDANTS:

COMES NOW THE above-named Plaintiff, Brown Contractors, LLC, (hereafter referred to as "Plaintiff" or "Brown"), which by and through his undersigned attorney and pursuant to the South Carolina Rules of Civil Procedure would complain of the Defendants Andrew Joseph McMarlin a/k/a Andrew Joseph Mc Marlin and Amy Salzhauer (referred to jointly as "Defendants") and would allege and show to this Honorable Court as follows.

PARTIES AND JURISDICTION

1. Plaintiff, Brown Contractors, LLC, is a South Carolina Limited Liability Company in good standing, licensed to do business in South Carolina, which at all relevant times herein has conducted business within Charleston County.

2. Defendants Andrew Joseph McMarlin a/k/a Andrew Joseph Mc Marlin and Amy Salzhauer are the record-owners of the real property commonly known as 1850 Flag Street, Sullivan's Island, South Carolina, 29482 with TMS #s 529-09-00-074, located in Charleston County, South Carolina (referred to as "Property").

3. This lawsuit arises out of the failure of Defendants to pay Plaintiff for Materials and Services provided by Plaintiff and used by Defendants in the construction, renovation or re-modeling of the Property.

4. Based on the foregoing, this Court has personal jurisdiction over the parties and subject-matter jurisdiction over the causes of action pleaded herein. Venue is proper within Charleston County.

FOR A FIRST CAUSE OF ACTION
(Foreclosure of Mechanic's Lien as to 2300 Palm Blvd.)

5. Plaintiff restates and re-alleges each of the foregoing allegations as if fully set forth herein verbatim.

6. Brown Contractors is a private company that provides general contracting services.

7. At the expressed direction of Defendants, Plaintiff furnished and delivered valuable supplies, materials and services to 1850 Flag Street, for the improvement of the Property.

8. The supplies, materials and services furnished by Plaintiff were actually used in the improvement, alteration and/or repair of the Property.

9. At all relevant times, Defendants are the record owners of the Property dated March 26, 2012 and recorded in the RMC Office for Charleston County in Book 0242, at Page 411 (Attached herewith as Exhibit "A").

10. That there is justly and now due and owing from Defendants to Plaintiff the amount of Two Hundred Six Thousand Four Hundred Twenty Eight and 59/100 ($206,428.59) Dollars plus interest, costs and reasonable attorneys' fees at the legal rate (collectively the "Amount Due") as indebtedness for the supplies, materials and/or services furnished by Plaintiff for the improvement, alteration and/or repair of the Property.

11. The Amount Due is a true and just amount due from Defendants to Plaintiff over and above any discount(s), without deduction or set-off, and with all just credits given, for the materials, supplies and/or services delivered, furnished and actually used in the construction, repair and/or improvement of the Property located at 1850 Flag Street.

12. The Amount Due represents the reasonable worth and value of the materials, supplies and/or services furnished by Plaintiff.

13. That Plaintiff has not, directly or indirectly, received any part of the said Amount Due or received any security or satisfaction for which credit has not already been given.

14. Plaintiff timely recorded a valid and enforceable mechanic's lien for the Amount Due (attached herewith as Exhibit "B") on 1850 Flag Street., recorded March 19, 2014 at the Charleston County RMC Office at Book 0394 Page 478 which was timely served on the Defendants, by a process server on March 22, 2014.

15. Based on the foregoing, Plaintiff respectfully requests that this Honorable Court assume jurisdiction over the subject matter herein and the parties hereto and determine the priority and amount of Plaintiffs' mechanic's lien and, in satisfaction of the amount owed to Plaintiff, order the foreclosure of 1850 Flag Street in order to pay the proceeds due and owing to Plaintiff in the amount not less than **Two Hundred Six Thousand Four Hundred Twenty Eight and 59/100 ($206,428.59) Dollars**, plus interest, costs and reasonable attorneys' fees at the legal rate, or such other amount as the Court may award in accordance with the South Carolina Mechanic's Lien Statute, S.C. Code Ann. § 29-5-10 *et seq*.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract / Action on Open Account)

16. Plaintiff restates and re-alleges each of the foregoing allegations as if fully set forth herein verbatim.

17. By virtue of a Service Agreement, Defendants created an open account with Plaintiff, which constitutes a binding contract between Plaintiff and Defendants.

18. Based on the foregoing Service Agreement, Plaintiff delivered to Defendants, and/or allowed Defendants to order supplies and materials which were actually used in the improvement, alteration and/or repair of the Property.

19. Defendants owe Plaintiff the sum of Two Hundred Six Thousand Four Hundred Twenty Eight and 59/100 ($206,428.59) Dollars in past-due invoices over ninety (90) days old, for materials and services ordered by Defendants and delivered to the Property located at 2300 Palm Blvd.

20. At no time did Defendants or anyone acting on their behalf, notify Plaintiff that the materials and services for the Property were undelivered, non-conforming, defective or otherwise unsuitable for use by Defendants.

21. Based on the foregoing, a valid and enforceable contract for the delivery of goods on credit exists between Plaintiff and Defendants secured by good and valuable consideration, on terms memorialized in the Service Agreement.

22. Despite due demand, however, Defendants have refused to furnish payment due and owing to Plaintiff for the materials and services ordered and received by it for use at the Property.

23. Defendants are in breach of its contractual obligations to pay Plaintiff, as well as in breach of the covenant of good faith and fair dealing implicit in every contract, causing Plaintiff to be damaged in the amount of Two Hundred Six Thousand Four Hundred Twenty Eight and 59/100 ($206,428.59) Dollars, plus interest and attorneys' fees and costs, less any set-off from funds, if any, received from the foreclosure of Plaintiff's mechanic's lien on if said lien is enforced

by the Court and the Property located at 1850 Flag Street.

24. Alternatively, a valid and enforceable open account exists between Plaintiff and Defendants, whereby Defendants are lawfully indebted to Plaintiff in the amount of Two Hundred Six Thousand Four Hundred Twenty Eight and 59/100 ($206,428.59) Dollars representing the value of the goods delivered on account to Defendants, plus interest and attorneys' fees and costs, less any set-off from funds, if any, received from the foreclosure of Plaintiff' s mechanic's lien if said lien is enforced by the Court at the Property located at 1850 Flag Street.

25. Defendants have failed to comply with relevant provisions of the Credit Application and/or the applicable Uniform Commercial Code in reasonably rejecting any non-conforming products or services, and/or have failed to identify any errors in connection with the invoices and/or Defendants' rationale for refusing payment are pre-textual and based on false or incorrect information. Plaintiff has not, directly or indirectly, received any part of the money or goods charged herein a due or received any security or satisfaction for which credit has not already been given.

26. Based on the foregoing, Plaintiff is entitled to judgment against Defendants in the amount of **Two Hundred Six Thousand Four Hundred Twenty Eight and 59/100 ($206,428.59) Dollars**, representing the value of the goods delivered to the Property on account to Defendants, plus interest and attorneys' fees and costs, less any set-off from fund, if any, received from the foreclosure of Plaintiff's mechanic's lien if said lien is enforced by the Court, or in such amount or in other such amount as the trier of fact may decide.

FOR A THIRD CAUSE OF ACTION
(Quasi-Contract / *Quantum Meruit* / Unjust Enrichment)

27. Plaintiff restates and re-alleges each of the foregoing allegations as if fully set forth herein verbatim.

28. Plaintiff has contributed to Defendants a valuable commercial benefit by furnishing supplies for the Property, which is of direct benefit to the Defendants, and each of them.

29. In failing to pay Plaintiff for the full value of the supplies, despite due demand, Defendants, and each of them, have realized and retained the benefit of Plaintiff's contributions.

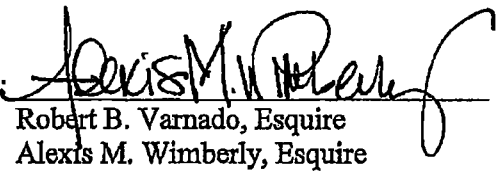
30. Defendants, and each of them, have retained the benefits, as established above, under such circumstances that make it unjust and inequitable for said contributions to be retained without paying Plaintiff for their full value.

31. The foregoing constitutes a breach of quasi-contract on the part of the Defendants, for which Plaintiff has been damaged in an amount not less than **Two Hundred Six Thousand Four Hundred Twenty Eight and 59/100 ($206,428.59) Dollars,** plus interest and attorneys' fees and costs as Plaintiff may be entitled to receive. Plaintiff is entitled to judgment against Defendants, jointly and severally, in such amount or in other such amount as the trier of fact may decide, under theories of quasi-contract and/or *quantum meruit* and/or an unjust enrichment, less any set-off from fund, if any from the foreclosure of Plaintiff's mechanic's lien at the Property if said lien is enforced by the Court, or in such amount or in other such amount as the trier of fact may decide.

WHEREFORE, having Complained of the Defendants, Plaintiff requests that the Court enter judgment in its favor on all causes of actions.

[Signature on following page]

BROWN & VARNADO LLC

By: 

Robert B. Varnado, Esquire
Alexis M. Wimberly, Esquire
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(843) 737-7300
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rvarnado@brown-varnado.com
ATTORNEY FOR PLAINTIFF

June 18, 2014
Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO: 2014-CP-10-3881

BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

Plaintiff,

vs.

ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER

Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

vs.

JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION, CO., LLC

Third-Party Defendants.

DEFENDANTS' AMENDED ANSWER; DEFENDANTS' COUNTERCLAIMS AGAINST PLAINTIFF BROWN CONTRACTORS, LLC; AND THIRD-PARTY PLAINTIFF'S THIRD-PARTY COMPLAINT AGAINST JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION, CO., LLC

FILED
2015 SEP 15 PM 4:49
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: ROBERT B. VARNADO, ESQUIRE, ATTORNEY FOR PLAINTIFF, JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION, CO., LLC:

In this pleading, Defendants and Third-Party Plaintiffs Andrew McMarlin and Amy Salzhauer ("Defendants," "Owners," or "Third-Party Plaintiffs") make this amended answer to Plaintiff's Complaint, assert their counterclaims against Plaintiff Brown Contractors, LLC and assert third-party claims against James Brown, IV and Brown-Meihaus Construction Co. LLC (a/k/a Brown-Meihaus Construction, LLP)

FIRST DEFENSE

1. All allegations of Plaintiff's Complaint not hereinafter admitted, denied or otherwise

modified are denied and strict proof thereof demanded.

2. Responding to the allegations of Paragraphs 1 of Plaintiff's Complaint, Defendants admit, upon information and belief, that Brown Contractors, LLC is a South Carolina Limited Liability Company in good standing in South Carolina. Defendants deny that Brown Contractors, LLC is properly licensed and demand strict proof thereof.

3. Defendants admit the allegations of Paragraph 2 of Plaintiff's Complaint.

4. No response is required to the allegations of Paragraphs 3 and 4 of Plaintiff's Complaint. To the extent a response is required, such allegations are denied and strict proof thereof is demanded.

5. In response to the allegation of Paragraph 5, Defendants reallege and restate the allegations contained above as if fully set forth herein verbatim.

6. Responding to the allegation of Paragraph 6, Defendants admit that Brown Contractors, LLC represents itself to provide general contracting services. Defendants deny that Brown Contractors, LLC is a licensed general contractor and demand strict proof thereof.

7. Responding to the allegations of Paragraph 7 and 8 of Plaintiff's Complaint, Defendants deny that Plaintiff furnished certain services to the Defendants which were actually used in the improvement, alteration and repair of the property.

8. Defendants admit Paragraph 9 of Plaintiff's Complaint.

9. Defendants deny the allegations of Paragraph 10, 11, 12, 13, 14 and 15 of Plaintiff's Complaint and demand strict proof thereof

10. In response to the allegation of Paragraph 16, Defendants reallege and restate the allegations contained above as if fully set forth herein.

11. Responding to the allegations of Paragraph 17 of Plaintiff's Complaint, Defendants crave reference to the Service Agreement between Plaintiff and Defendants and deny any allegation of Plaintiffs Complaint which is contrary thereto or inconsistent therewith and demand strict proof thereof.

12. Responding to the allegations of Paragraph 18, Defendants admit that Plaintiff provided certain supplies and materials which were actually used in the improvement, alteration and repair of the property.

13. Defendants deny the allegations of Paragraphs 19, 20, 21, 22, 23, 24, 25 and 26 of Plaintiff's Complaint and demand strict proof thereof.

14. In response to the allegation of Paragraph 27, Defendants reallege and restate the allegations contained above as if fully set forth herein verbatim.

15. Defendants deny the allegations of Paragraphs 28, 29, 30 and 31 of Plaintiff's Complaint and demand strict proof thereof.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO
(Rule 12(b)(6))

16. Defendants reassert and reallege the allegations contained above as if fully set forth herein verbatim.

17. Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendants and its Complaint should be dismissed pursuant to Rule 12(b)(6), *SCRCP*.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO
(Failure to Comply with Requirements of the Mechanic's Lien Statute)

18. Defendants reassert and reallege the allegations contained above as if fully set forth herein verbatim.

19. Plaintiffs' claim should be denied in whole or in part for Plaintiffs' failure to comply with the requirements of South Carolina Mechanic's Lien Statute, S.C. Code Ann. §29-5-10 et seq.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO
(Failure to comply with the requirements of the LLR and statutes relating to required licensing)

20. Defendants reassert and reallege the allegations contained above as if fully set forth herein verbatim.

21. Plaintiff's claim should be denied in whole or in part for Plaintiff's failure to comply with the requirements of South Carolina LLR.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO
(Unclean Hands)

22. Defendants reassert and reallege the allegations contained above as if fully set forth herein verbatim.

23. The Plaintiff's Demand for Equitable Relief should be denied because Plaintiff has unclean hands.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT AND AS AN AFFIRMATIVE DEFENSE THERETO
(Overcharges)

24. Defendants reassert and reallege the allegations contained above as if fully set forth herein verbatim.

25. The Plaintiff's claim should be denied in whole or in part because Plaintiff has overcharged the Defendants.

ADDITIONAL DEFENSES AND COUNTERCLAIMS AGAINST PLAINTIFF

26. Andrew Joseph McMarlin and Amy Salzhauer ("Owners") repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

27. This action was filed under Residential Builders License No. 20378, which according to the website of the South Carolina Department of Labor, Licensing and Regulation belongs to Vuong Nguyen and not to Brown Contractors, LLC (Attached as Exhibit A).

28. According to the website of the South Carolina Department of Labor, Licensing and Regulation, Brown Contractors LLC holds builder's license no. 43710, a specialty license in the area of Carpentry.

29. In 2012 Owners entered into an agreement with James (Jay) Brown, IV ("Jay Brown") for the completion of an extensive repair and remodeling project of their home located at 1850 Flag Street, Sullivan's Island (the "Project").

30. Jay Brown represented that he would act as the general contractor on the Project.

31. The initial estimated cost of the Project was $685,000, which included a fixed project management fee for Jay Brown in the amount of $55,000.

32. On July 25, 2012, the Town of Sullivan's Island issued a residential permit, which identified the contractor as Brown Contractors, LLC.

33. Upon information and belief, Jay Brown, individually, and d/b/a Brown Contractors, LLC, Brown-Meihaus Construction, Co., LLC and Brown-Meihaus Construction LLP (hereinafter collectively referred to as "Brown") through the use of subcontractors, employees and independent contractors began work on the Project.

34. Brown sent invoices to the Owners, including, upon information and belief, charges for items that were not used at the Project.

35. Owners fully performed all of their obligations with respect to the agreement.

36. Owners paid $1,230,570.00 to Brown.

37. After lengthy delays Brown left the Project and ultimately failed to complete the Project and Owners have been forced to hire others to complete the Project.

38. Since Brown's abandonment of the Project, the Owners have discovered numerous construction deficiencies, building code violations and physical injury to tangible property including, but not limited to, the following:

    a. Improper installation of siding and other components;

    b. Improper waterproofing ;

    c. Improper flashing;

    d. Improper installation of mechanical, electrical and plumbing components;

    e. Improper and deficient framing;

    f. Improper and deficient drywall installation;

    g. Improper and deficient painting and other finishing work.

FIRST ADDITIONAL DEFENSE AND COUNTERCLAIM AGAINST PLAINTIFF
(Negligence)

39. Owners repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

40. At all times relevant hereto Brown, their agents, servants, employees, and/or subcontractors by virtue of its role in the construction/repair and/or supervision of the construction/repair of the above referenced Project undertook and owed a duty to Owners to accomplish such in accordance with applicable building and dwelling codes and

applicable industry standards; in conformance with manufacturer's literature and design documents; and in a careful, diligent, and workmanlike manner, free from latent defects.

41. Brown breached its duties to Owners in one or more of the following particulars:

a. In failing to comply with applicable codes, industry or manufacturer's standards or the applicable standard of care resulting in the deficiencies described above;

b. In failing to properly select, schedule, coordinate and/or supervise its employees, agents or subcontractors;

c. In failing to properly manage the Project;

d. In failing to properly select and/or install components and materials at Project;

e. In failing to adequately or properly work the Project;

f. In misrepresenting the nature of problems at the Project and the completeness of work done to the Project;

g. In failing to repair known defects and concealing said defects from Owners; and

h. In overcharging and improperly charging Owners.

42. The violation of the applicable building codes constitutes negligence per se.

43. As a direct, foreseeable and proximate result of the negligence and gross negligence of Brown, Owners have spent and will continue to expend substantial sums of money in order to complete the prior repairs and remedy and repair the Property and in addition the Property has lost value and depreciated by virtue of its defects and damages.

44. The negligence, gross negligence, willfulness, wantonness and recklessness of the Brown directly resulted in proximate injury to tangible property and/or work of others, caused by the continuous and repeated exposure to substantially the same harmful conditions and the damages set forth above.

SECOND ADDITIONAL DEFENSE AND COUNTERCLAIM AGAINST PLAINTIFF
(Breach of Implied Warranty of Workmanlike Service)

45. Owners repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

46. By undertaking and performing construction work at the Property, Brown impliedly warranted, by operation of law, that its work would be performed in a careful, diligent, and workmanlike manner and would be free from all defects.

47. Brown, its agents, servants, employees and subcontractors breached the implied warranty of workmanlike service by constructing a project with the defects and deficiencies set forth above.

48. The conduct and failures of Brown constitutes a breach of the implied warranty of service.

49. As a direct and proximate result of such breach, Owners have suffered damages including that they have spent and will continue to expend substantial sums of money in order to repair the deficiencies and make the Property safe and habitable including but not limited to the cost of investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct and indirect damages in an amount to be determined. Additionally, Owners have suffered and will continue to suffer loss of use of the Property.

50. As a direct and proximate result of Browns' breach, Owners are entitled to judgment against Brown for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

ADDITIONAL DEFENSE AND COUNTER- CLAIM AGAINST PLAINTIFF
(Breach of Contract)

51. Owners repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

52. As described above Owners entered into a contract with Brown for work on the Project.

53. The referenced conduct of Brown establishes that Brown breached its contract with the Owners.

ADDITIONAL DEFENSE AND COUNTER- CLAIM AGAINST PLAINTIFF
(Unfair Trade Practices)

54. Owners repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

55. Further Brown engaged in unfair and deceptive practices including but not limited to the following;

    a. Misrepresenting their qualifications, specifically the qualifications of Jay Brown;
    b. Performing work they knew they were not licensed or qualified to perform;
    c. Improper billing practices including double billing, over-billing and billing for materials not authorized by Owners and or utilized on the Project;
    d. Failing to disclose that Jay Brown was not licensed as a residential contractor;
    e. Failing to disclose that Jay Brown was only licensed as a specialty contractor;
    f. Representing the role of subcontractors on the Project;
    g. Providing estimates they knew were false in an effort to secure work.

56. Brown's conduct constitutes unfair and deceptive trade practices and is a violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. Furthermore, Brown's s conduct was willful.

57. Brown's conduct is capable of repetition, and upon information and belief, has been repeated.

58. Brown's conduct affects the public interest.

59. Brown knew or should have known that their actions constituted unfair and deceptive trade practices.

RESERVATION AND NON-WAIVER

60. Owners hereby give notice that they intend to rely upon any other defenses that become available or appear during the discovery proceedings in this case and hereby reserve the right to amend their Answer to assert any such defenses.

THIRD-PARTY COMPLAINT

61. Owners as Third-Party Plaintiffs repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

62. The Property belonging to the Owners is located in Charleston County, South Carolina.

63. James Brown, IV ("Jay Brown") is a resident of Charleston County, South Carolina and at all times relevant hereto held himself out as a licensed general contractor.

64. Brown-Meihaus Construction Co., LLC ("Brown-Meihaus") is a company organized and existing pursuant to the laws of South Carolina and at all relevant times conducted business in Charleston County, South Carolina.

65. As noted in the Counterclaims, Jay Brown, Brown-Meihaus and Brown Contracting, LLC (the Plaintiff) are collectively referred to as "Brown.

66. Jay Brown and Brown-Meihaus are collectively referred to as Third-Party Defendants.

FIRST CAUSE OF ACTION
(Negligence)

67. Owners incorporate by reference its allegations in all the preceding paragraphs.

68. At all times relevant hereto the Third-Party Defendants by virtue of their role in the construction/repair and/or supervision of the construction/repair of the above- referenced Project undertook and owed a duty to Owners to accomplish such in accordance with applicable building and dwelling codes and applicable industry standards; in conformance with manufacturer's literature and design documents; and in a careful, diligent, and workmanlike manner, free from latent defects.

69. Third-Party Defendants breached their duties to Owners in one or more of the following particulars:

a. In failing to comply with applicable codes, industry or manufacturing standards or the applicable standard of care;

b. In failing to properly select, schedule, and/or supervise its employees, agents or subcontractors;

c. In failing to properly select and/or install components and materials at Project;

d. In failing to adequately or properly repair the Project;

e. In misrepresenting the nature of problems at the Project and the completeness of repairs done to the Project; and

f. For negligent, willful and intentional failure to repair known defects and concealing said defects from Owners.

70. The violation of the applicable building codes constitutes negligence per se.

71. As a direct and proximate result of the negligence and gross negligence of the Third-Party Defendants, Owners have incurred, and will continue to incur, substantial damages related to the investigation and analysis of the Property; the development of a repair design; the costs and expenses associated with a repair of the Property; the loss of use of

the Property, losses associated with being able to market or sell the Project; and a diminution in value of the Property.

72. The negligence, gross negligence, willfulness, wantonness and recklessness of the Third-Party Defendants directly resulted in proximate injury to tangible property and/or work of others, caused by the continuous and repeated exposure to substantially the same harmful conditions and the damages set forth above.

SECOND CAUSE OF ACTION
(Breach of Implied Warranty of Workmanlike Service)

73. Owners repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

74. By undertaking and performing construction work at the Property, Third-Party Defendants impliedly warranted that their work would be performed in a careful, diligent, and workmanlike manner and would be free from all defects.

75. Third-Party Defendants breached the implied warranty of workmanlike service by constructing a project with the defects and deficiencies set forth above.

76. The conduct and failures of Third-Party Defendants constitutes a breach of the implied warranty of service.

77. As a direct and proximate result of such breaches, Owners have suffered damages including that they have spent and will continue to expend substantial sums of money in order to repair the deficiencies and make the Property safe and habitable including but not limited to the cost of investigation, the design of the repair, the repair itself and other actual, incidental, consequential, special, direct and indirect damages in an amount to be determined. Additionally, Owners have suffered and will continue to suffer loss of use of the Property.

78. As a direct and proximate result of breaches, Owners are entitled to judgment against Third-Party Defendants for all actual, direct, indirect, resulting and consequential damages in an amount to be proven at trial.

THIRD CAUSE OF ACTION
(Breach of Contract)

79. Owners repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

80. As described above Owners entered into a contract with Third-Party Defendants for work on the Project.

81. The referenced conduct of Third-Party Defendants establishes that Third-Party Defendants breached their contract with the Owners resulting in damage to the Owners.

FOURTH CAUSE OF ACTION
(Unfair Trade Practices)

82. Owners repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

83. Further Third-Party Defendants engaged in unfair and deceptive practices including but not limited to the following;

a. Misrepresenting their qualifications, specifically the qualifications of Jay Brown;

b. Performing work they knew they were not licensed or qualified to perform;

c. Improper billing practices including double billing, over-billing and billing for materials not authorized by Owners and or utilized on the Project;

d. Failing to disclose that Jay Brown was not licensed as a residential contractor;

e. Failing to disclose that Jay Brown was only licensed as a specialty contractor;

f. Representing the role of subcontractors on the Project;

g. Providing estimates they knew were false in an effort to secure work.

84. The Third-Party Defendants' conduct constitutes unfair and deceptive trade practices and is a violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. Furthermore, the Plaintiff's conduct was willful.

85. The Third-Party Defendants' conduct is capable of repetition, and upon information and belief, has been repeated.

86. The Third-Party Defendants' conduct affects the public interest.

87. The Third-Party Defendants' knew or should have known that its actions constituted unfair and deceptive trade practices.

THIRD CAUSE OF ACTION
(Alter Ego/Amalgamation)

88. Owners repeat and reallege the responses and allegations contained in the preceding paragraphs as if fully set forth herein.

89. Upon information and belief the interests of James Brown, IV, Brown Contractors, LLC, and Brown-Meihaus are so amalgamated that the Defendants/Third Party Plaintiffs are entitled to disregard the corporate forms and recover against all of the above entities.

DEMAND FOR JURY TRIAL

Owners respectfully request a trial by jury of all issues of fact arising in this litigation.

WHEREFORE, having fully answered the Complaint and having asserted counterclaims against the Plaintiff and their third-party claims against Jay Brown and Brown-Meihaus, Owners ask that the Court:

A) Enter judgment in their favor on all of Plaintiff's claims and dismissal of the Complaint with prejudice;

B) Enter judgment for Owners on their counterclaims and third-party claims including actual, punitive and statutory damages in such amounts as may be proven at trial;

C) Award to Owners attorney's fees and costs incurred in the prosecution of said action; and

D) Order such other and further relief as the Court deems just and proper.

LYLES & LYLES, LLC

Robert T. Lyles / by Lee Anne Walters

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Charleston, South Carolina
September 15, 2015

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2014-CP-10-3881
BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378, Plaintiff, v. ANDREW JOSEPH MCMARLIN a/k/a ANDREW JOSEPH MC MARLIN and AMY SALZHAUER, Defendants.	)	**PLAINTIFF'S REPLY TO DEFENDANTS' AMENDED COUNTERCLAIMS AND THE THIRD** (Jury Trial Demanded)
ANDREW MCMARLIN and AMY SALZHAUER, Third Party Plaintiffs, vs. JAMES BROWN, IV and BROWN-MEIHAUS CONSTRUCTION, CO., LLC Third Party Defendants.	)	

FILED
2016 FEB 11 PM 4:18
JULIE J. ARMSTRONG
CLERK OF COURT

TO: ROBERT T. LYLES, JR. ATTORNEY FOR DEFENDANTS AND THIRD-PARTY PLAINTIFFS:

COMES NOW THE Plaintiff Brown Contractors ("Plaintiff"), and the Third-Party Defendants James Brown IV and Brown-Meihaus Construction, Co, LLC, by and through its undersigned counsel, would reply to Defendants' Amended Counterclaims and answer the Third-Party Defendants' Third-Party Complaint Against James Brown, IV and Brown-Meihaus Construction, Co., LLC ("these Defendants"), and would allege and show unto this Honorable Court as follows:

FOR A FIRST DEFENSE
(Qualified General Denial)

1. Each and every allegation of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint that is not hereafter specifically and expressly admitted below by Plaintiff is denied, and strict proof is demanded thereof.

2. Paragraphs 1 through 38 of these Defendants' Amended Answer, Counterclaims, and Third-Party Plaintiff's Third-Party Complaint consists of these Defendants' Amended Answer to the Complaint and affirmative defenses and state no claims or allegations of liability or wrongdoing against Plaintiff. Thus, no response is required and/or Plaintiff lacks sufficient information to either admit or deny the allegations contained therein, including all sub-paragraphs. Should a response thereto be required, however, then Plaintiff denies the allegations contained in the enumerated paragraphs and demands strict proof thereof.

REPLYING TO THE COUNTERCLAIMS

3. Answering Paragraph 39 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, Plaintiff re-states and re-alleges each of its previous responses as if set forth fully herein verbatim.

4. The allegations in Paragraph 40 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint set forth conclusions of law to which no response is required of the Plaintiff. Should a response thereto be required, however, then Plaintiff denies any and all allegations contained in the enumerated paragraphs which state claims or allegations of wrongdoing and demands strict proof thereof.

5. The Plaintiff denies the allegations contained in Paragraphs 41, 42, 43 and 44 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-paragraphs, and demands strict proof thereof.

6. Answering Paragraph 45 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, Plaintiff re-states and re-alleges each of its previous responses as if set forth fully herein verbatim.

7. The allegations in Paragraph 46 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint set forth conclusions of law to which no response is required of the Plaintiff. Should a response thereto be required, however, then Plaintiff denies any and all allegations contained in the enumerated paragraphs which state claims or allegations of wrongdoing and demands strict proof thereof.

8. The Plaintiff denies the allegations contained in Paragraphs 47, 48, 49 and 50 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-paragraphs, and demands strict proof thereof.

9. Answering Paragraph 51 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, Plaintiff re-states and re-alleges each of its previous responses as if set forth fully herein verbatim.

10. The Plaintiff denies the allegations contained in Paragraphs 52 and 53 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-paragraphs, and demands strict proof thereof.

11. Answering Paragraph 54 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, Plaintiff re-states and re-alleges each of its previous responses as if set forth fully herein verbatim.

12. The Plaintiff denies the allegations contained in Paragraphs 55, 56, 57, 58 and 59 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-paragraphs, and demands strict proof thereof.

13. To the extent a response is required to Paragraph 60 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, then the Plaintiff denies any and all allegations contained in the enumerated paragraphs which state claims or allegations of wrongdoing and demands strict proof thereof.

ANSWERING THE THIRD-PARTY COMPLAINT

14. Answering Paragraph 61 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, the Third-Party Defendants James Brown IV and Brown-Meihaus Construction Co., LLC ("Third-Party Defendants") adopt, state and allege each of the Plaintiff's previous responses, to the extent they are required to do so, as if set forth fully herein verbatim.

15. The Third-Party Defendants admit the allegations contained in Paragraph 62 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint.

16. Answering Paragraph 63 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, the Third Party Defendants deny the same as drafted and demand strict proof thereof.

17. The Third-Party Defendants admit the allegations contained in Paragraph 64 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint but would assert that the Third-Party Defendant Brown-Meihaus is defunct.

18. To the extent a response is required to Paragraphs 65 and 66 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, then the Third-Party Defendants

deny any and all allegations contained in the enumerated paragraphs which state claims or allegations of wrongdoing and demands strict proof thereof.

19. Answering Paragraph 67 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, the Third-Party Defendants re-state and re-allege each of the previous responses as if set forth fully herein verbatim.

20. The allegations in Paragraph 68 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint set forth conclusions of law to which no response is required of the Third-Party Defendants. Should a response thereto be required, however, then Third-Party Defendants deny any and all allegations contained in the enumerated paragraphs which state claims or allegations of wrongdoing and demands strict proof thereof.

21. The Third-Party Defendants deny the allegations contained in Paragraphs 69, 70, 71 and 72 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-paragraphs, and demand strict proof thereof.

22. Answering Paragraph 73 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, the Third-Party Defendants re-state and re-allege each of the previous responses as if set forth fully herein verbatim.

23. The allegations in Paragraph 74 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint set forth conclusions of law to which no response is required of the Third-Party Defendants. Should a response thereto be required, however, then Third-Party Defendants deny any and all allegations contained in the enumerated paragraphs which state claims or allegations of wrongdoing and demands strict proof thereof.

24. The Third-Party Defendants deny the allegations contained in Paragraphs 75, 76, 77 and 78 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-paragraphs, and demand strict proof thereof

25. Answering Paragraph 79 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, the Third-Party Defendants re-state and re-allege each of the previous responses as if set forth fully herein verbatim.

26. The Third-Party Defendants deny the allegations contained in Paragraphs 80 and 81 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-paragraphs, and demand strict proof thereof.

27. Answering Paragraph 82 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, the Third-Party Defendants re-state and re-allege each of the previous responses as if set forth fully herein verbatim.

28. The Third-Party Defendants deny the allegations contained in Paragraphs 83, 84, 85, 86 and 87 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, including all sub-paragraphs, and demand strict proof thereof

29. Answering Paragraph 88 of these Defendants' Amended Answer, Counterclaims, and Third-Party Complaint, the Third-Party Defendants re-state and re-allege each of the previous responses as if set forth fully herein verbatim.

30. The Third-Party Defendants deny the allegations contained in Paragraph 89 of the Defendants' Amended Answer, Counterclaims, and Third-Party Complaint and demands strict proof thereof

AS A SECOND DEFENSE TO ALL CLAIMS
(Failure to State a Cause of Action)

31. The Defendants/Third-Party Plaintiffs have failed to state facts sufficient to constitute a cause of action against this Defendant upon which relief can be granted. Thus, each of their causes of action against should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

AS A THIRD DEFENSE
(Economic Loss Rule)

32. The Defendants/Third-Party Plaintiffs are not entitled to recover in tort for purely economic losses. Thus, all their' tort-based claims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

AS A FOURTH DEFENSE
(No Representations/Warranties)

33. Plaintiff/Third-Party Defendants made no representations or warranties to the Defendants/Third-Party Plaintiff unless reduced to in writing, and such writings are the only and best evidence of their content and legal effect.

AS A FIFTH DEFENSE
(Waiver/Estoppel/Laches/Mistake/Fraud/Unclean Hands)

34. The claims of the Defendants/Third-Party Plaintiffs are barred by the equitable doctrines of waiver, estoppel, laches, mistake, fraud or unclean hands.

AS A SIXTH DEFENSE
(Negligence/Own Fault)

35. Any damages sustained by Defendants/Third-Party Plaintiffs were due to, and caused by, the negligence and recklessness of Defendants/Third-Party Plaintiffs, or their respective agents and

representatives, which acts combined, contributed, and concurred with any alleged negligence or recklessness on the part of the Plaintiff/Third-Party Defendants, if any, which is expressly denied, and, therefore, the Defendants/Third-Party Plaintiffs are barred from recovery herein, or, in the alternative, such recovery should be reduced proportionately, because of contributory fault.

AS A SEVENTH DEFENSE
(Mitigation of Damages)

36. To the extent Defendants/Third-Party Plaintiffs have breached their duty to mitigate their damages, they are barred from recovery against this Defendant or their recovery should be accordingly limited.

AS AN EIGTH DEFENSE
(Right to Cure)

37. Upon information and belief, any claims for which Defendants/Third-Party Plaintiffs or any entity associated failed to give Plaintiff/Third-Party Defendants timely and reasonable notice to cure is barred by law, including S.C. Code of Laws § 36-2-607-(3)(a).

AS A NINTH DEFENSE
(Conformity with Generally Recognized Standards)

38. The Plaintiff/Third-Party Defendants' construction practices are in conformity with generally-recognized and prevailing standards, codes, statutes and regulations.

AS A TENTH DEFENSE
(Acceptance/UCC Defenses)

39. The Defendants/Third-Party Plaintiffs' claims are barred because they accepted the work of the Plaintiff/Third-Party Defendants and failed to seasonably notify Defendants/Third-Party Plaintiffs of any defects.

AS AN ELEVENTH DEFENSE
(Spoliation of Evidence)

40. The Defendants/Third-Party Plaintiffs' claims may be barred by the doctrine of spoliation of evidence.

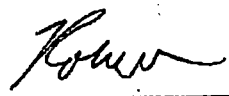
AS AN ADDITIONAL DEFENSE
(Reservation/Non-Waiver)

41. The Plaintiff/Third-Party Defendants specifically reserve any additional defenses, including defenses as may be available or revealed to them during the course of its investigation or discovery in the case, and as are consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Amended Answer, Counterclaims, and Third-Party Complaint, the Plaintiff/Third-Party Defendants **demands a trial by jury** and prays that the causes of action against them be dismissed, with costs, and for such other relief as the Court may grant.

Respectfully Submitted,

BROWN & VARNADO, LLC



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Attorneys for Plaintiff

December 4, 2015
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)))	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2014-CP-10-3881
BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378, Plaintiff, v. ANDREW JOSEPH MCMARLIN a/k/a ANDREW JOSEPH MC MARLIN and AMY SALZHAUER, Defendants.	)	**NOTICE OF MOTION AND PLAINTIFF'S MOTION TO AMEND NOTICE OF LIEN and PLEADINGS PURSUANT TO S.C. CODE ANN. § 29-5-180**
ANDREW MCMARLIN and AMY SALZHAUER, Third Party Plaintiffs, vs. JAMES BROWN, IV and BROWN-MEIHAUS CONSTRUCTION, CO., LLC Third Party Defendants.	)	

FILED
2016 JUL 28 PM 4:2
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: ROBERT T. LYLES, ESQUIRE, ATTORNEY FOR THE DEFENDANTS AND THIRD-PARTY PLAINTIFFS:

PLEASE TAKE NOTICE that the Plaintiff, Brown Contractors, LLC, by and through its undersigned attorneys and pursuant to S.C. Code Ann. § 29-5-180 and Rule 15 of the South Carolina Rules of Civil Procedure, will move before the Special Referee Henry W. Brown, Esquire, ten (10) days hereafter, at 1230 Main Street, Suite 700, Columbia, South Carolina, 29201 or at such other time, date and place as counsel may be heard, for an Order to amend the caption of the Notice of Mechanic's Lien and the Summons and Complaint to add the following: "BROWN

CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378 ***and RBC Registration No. 198."*** This motion is based on the following grounds:

1. This case arises out of a $206,228.59 mechanic's lien filed March 13, 2014 ("Lien"). All the Lien documents and subsequent pleadings met compliance with S.C. Code Ann. § 29-5-15 by referencing "BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378."

2. It is undisputed that Residential Builders License No. 20378 was assigned to Mr. Vuong Nguyen, and that upon application, the South Carolina Residential Builders Commission ("RBC") issued Certificates of Authorization to Plaintiff based on Mr. Nguyen's license number for 2012-2014.

3. The Certificate of Authorization number is for all intents and purposes the Nguyen number. This has been known by Defendants since the inception of the case.

4. At a hearing on a motion for summary judgment before the Honorable J.C. Nicholson held March 29, 2016, Defendants made clear for the first time that their interpretation of S.C. Code Ann. § 29-5-15 required Brown Contractors, LLC to include its Residential Builders Commission ("RBC" or "Commission") "Certificate of Authorization" number – "RBC 198" – on the Notice of Lien, and <u>not</u> the residential builder's license number of Plaintiff's qualifying "resident licensee" Vuong Nguyen ["# 20378"].

5. Rule 15 of the South Carolina Rules of Civil Procedure governs motions to amend and directs the tribunal that "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. Also, under the South Carolina Mechanic's Lien Statute,"[t]he court may at any time allow either party to amend his pleadings as in other civil actions." S.C. Code Ann. § 29-5-180.

6. It is anticipated that Defendants will oppose this motion by arguing that there were falsehoods or inconsistencies on the Certificate of Authorization application to the RBC. However, in *16 Jade Street, LLC v. R. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013), the South Carolina Supreme Court expressly **rejected** the notion that Section 40-59-410 of the Residential Home Builders Act creates any legal benefit for private parties in circuit court. *Id.*, 405 S.C. at 389-390, 747 S.E.2d at 77. Over matters like those argued by Defendants, the RBC's jurisdiction is exclusive. S.C. Code Ann. § 40-59-115 ("[t]he commission has jurisdiction over the actions of licensees and former licensees"). Moreover, the merits of such an argument should not defeat amendment. Rule 15, SCRCP.

7. The RBC – and it alone – has complete, exclusive and administrative control over license and qualifications for certificates of authorization. It promulgates regulations. S.C. Code Ann § 40-59-70. It investigates complaints and conducts hearings from which appeal is to the Administrative Law Judge Division. *Id* at §§ 40-59-80, -90 and -160. It can seek injunctive relief; revoke, restrict or suspend licenses; impose fines; deny license renewal and impose additional penalties. *Id* at §§ 40-59-100, -110, -120, -130 and -220. If Defendants want to argue that Plaintiff or anyone acting on its behalf misled, misread or misunderstood the Residential Home Builders Act, then they should take it up with the Commission.

8. It is anticipated that Defendants will also argue for a "strict" interpretation of S.C. Code Ann. § 29-5-15 as a basis to oppose amendment. *Cohen's Drywall Co., Inc. v. Sea Spray Homes, Inc.*, 374 S.C. 195, 199, 648 S.E.2d 598, 600 (2007).

9. However, "[t]echnical requirements should not stand in the way of achieving the purposes of the mechanic's lien law. Even though a claim contains some defect or error it will be upheld where the owner is informed of the claim and not misled by it or prejudiced." 53 Am. Jur.2d

Mechanic's Liens § 235 (1996). **Moreover, because "the mechanic's lien statutes are remedial, they are to be given a liberal construction."** *Clo–Car Trucking Co. v. Clifflue Estates of S.C.*, 282 S.C. 573, 575–76, 320 S.E.2d 51, 53 (Ct. App. 1984)(emphasis added). The *Clo-Car* Court explained:

> Still, we must take each mechanic's lien statute as we find it. Although the rule in several jurisdictions is that mechanic's lien statutes are to be given a strict construction as being in derogation of the common law we believe the rule in this State is that mechanic's lien statutes, being remedial, are to be given a liberal construction. We are not at liberty to depart from the plain meaning of its language. Even though we follow the view that the mechanic's lien law is to be construed in a most liberal and comprehensive manner in favor of lien claimants, a claim may not be sustained when that can be done only by a forced and unnatural interpretation of the language of the statute.... We will not ... apply the rule of liberal construction to create a lien where none exists or was intended by the legislature.

Id., 282 S.E.2d 575-576, 320 S.E.2d at 53 (citations, internal quotation and punctuation omitted). The *Clo-Car* case remains "good law" and continues to be cited with approval by South Carolina Appellate Courts. *See. e. g., Walls v. RAF Enterprises of Greenville, LLC,* 2006 WL 7285719 *2 (Ct. App. 2006); *Sammy Garrision Const. Co., Inc. v. Russo,* 2006 WL 7285978 *2 (Ct. App. 2006). It is consistent with both long-standing mechanic's lien precedent (*Williamson v. Hotel Melrose,* 110 S.C. 1, 34, 96 S.E. 407, 415 (1918)) ("He who sets up such a lien must bring himself fairly within the expressed intention of the lawmakers.") and modern jurisprudence of statutory construction. *Bass v. Isochem,* 365 S.C. 454, 469, 617 S.E.2d 369, 377 (Ct. App. 2005) ("All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.")

10. Applying the liberal construction principles set forth in *Clo-Car*, there is no cogent reason why amendment should not be granted in this case. Rule 15, SCRCP; S.C. Code Ann. § 29-5-180; 282 S.C. at 575–76, 320 S.E.2d at 53. There is no prejudice to the Defendants. The

Court would simply allow correction of a minor pleading matter. The case should be decided on the merits – not on a picayune technicality that amounts to a "gotcha" argument.

This motion is supported by the laws, statutes and rules of this State and by such other and further supporting material as may be submitted by the Movant. Pursuant to Rule 11, the undersign certifies that no useful purpose would be served by consultation with the opposing party concerning this matter

BROWN & VARNADO LLC

By: _____

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Attorneys for Plaintiff

July 27, 2016
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

Plaintiff,

vs.

ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER

Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

vs.

JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION, CO., LLC

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

CASE NO: 2014-CP-10-3881

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO AMEND

FILED
2016 AUG 11 PM 1:32
JULIE J. ARMSTRONG
CLERK OF COURT
BY

The Plaintiff Brown Contractors, LLC would respectfully submit the following Memorandum of Law in Support of its Motion to Amend, in order to address issues raised in the Defendants' Memorandum in Opposition to the same.

LEGAL STANDARD

A motion to amend is within the sound discretion of the trial judge and the opposing party has the burden of establishing prejudice. *Foggie v. CSX Transp., Inc.*, 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993). When a party seeks leave of the Court to amend, however, Rule 15 of the South Carolina Rules of Civil Procedure is explicit that ... "**leave shall be freely given when justice so**

requires and does not prejudice any other party." Rule 15(a), SCRCP (emphasis added). Thus, it has been said that "Rule 15, as did Code Pleading in this state, strongly favors the granting of amendments." Flanagan, Civil Procedure in South Carolina 3d (2010), p. 129. Clarifying further, Professor Flanagan writes: "[a]mendments before the case is ready for trial should be granted freely. It is well-settled that in the absence of a proper reason, such as bad faith, undue delay or prejudice, denial of leave to amend is an abuse of discretion." *Forrester, Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 508, 369 S.E.2d 156, 159 (Ct. App. 1988); Flanagan, *supra*, at p. 130, n. 14.

I. Lack of Prejudice

Defendants' memorandum of law uses the word "prejudice" precisely one time – in the first sentence. The remaining four-and-one-half pages of the memorandum are silent on the issue of prejudice – i.e., there is zero analysis of prejudice. Despite the fact that Rule 15 puts the burden of proof on Defendants to demonstrate prejudice in order to defeat the motion, the Defendants completely fail to any articulation of prejudice whatsoever. The Court should take this as an admission that there is no prejudice and the Defendants concede that they cannot carry their burden.

The prejudice Rule 15 envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it ... the burden is not on the movant, but the party opposing the motion to show how it is prejudiced. *Stanley v. Kirkpatrick*, 357 S.C. 169, 174-175, 592 S.E.2d 296, 298 (2004); *Collins Entm't, Inc. v. White*, 363 S.C. 546, 562, 611 S.E.2d 262, 270 (Ct. App. 2005) ("The prejudice that Rule 15, SCRCP envisions is a lack of notice that the new issue is to be tried and a lack of opportunity to refute it."); *Ball v. Canadian Am. Exp. Co* ., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) ("Prejudice occurs when the amendment states a new

claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action."); *Johnson v.. Oroweat Foods Co.,* 785 F.2d 503, 510 (4th Cir.1986) (finding prejudice can result when a proposed amendment is offered shortly before or during trial and raises a new legal theory that would require gathering and analysis of facts not already considered by opposition). Delay in seeking leave to amend pleadings, regardless of the length of the delay, will not ordinarily be held to bar an amendment in the absence of a finding of prejudice. *Forrester*, 295 S.C. at 508, 369 S.E.2d at 159 (Ct. App. 1988). "The opposing party must establish prejudice by affidavit or other means." Flanagan, *supra*, at p. 130, n. 13.

Here, Defendants have failed to carry their burden of proof. They have not made any showing of prejudice whatsoever. The case is still not ready for trial; in fact, only one deposition has been completed so far in the case (Vuong Nguyen) and the parties are setting depositions even as these memoranda are being exchanged. For example, the completion of Brown Contractors' deposition and the deposition of the Defendants will be done in August. At the time of the motion there were about two months to proposed trial date of October 18, 2016. Thus, the Defendants have plenty of time to prepare and do not have to re-do any depositions at all.

Also, it is important to note that the amendment seeks to address a rather picayune pleading issue raised by Defendants – i.e., adding the Residential Builders Commission (RBC) number. As the Court can see, it raises no 'surprise' legal theories but is rather a corrective/prophylactic measure in response to Defendants' legal assertion that the failure to include the RBC number on the pleadings is a fatal flaw under S.C. Code Ann. § 29-5-15, made for the first time before Judge Nicholson in 2016. Amending the caption will not require any depositions to be re-taken. It does not add a new party. It does not add a new cause of action. It will not delay the trial.

Based on the foregoing, the Court should grant the motion based on the absence of a showing of prejudice by Defendants.

II. Futility

Defendants' primary argument against amendment is predicated on the concept of futility – to which they cite one interlocutory trial court order in *Lamar Advertising of Mobile, Inc. v. Li'l Cricket, LLC,* 2005 WL 4841658 (Richland Co. Ct. Common Pleas 2005). The Court should not put credence on the futility argument, however, for the following reasons.

South Carolina cases that have discussed futility have applied it either: (a) where there was already prejudice caused by delay; or (b) generally where the statute of limitations had clearly expired – including the *Lamar* trial court order, *supra*, p. 3. *Id.; see also Arant v. Kressler,* 327 S.C. 225, 230, 489 S.E.2d 206, 208 (1997) (proper to disallow amendment because statute of limitations period had already expired against physician when suit commenced); *Red Oak Lands, Inc. v. Lane,* 268 S.C. 631, 636, 235 S.E.2d 718, 720 (1977) (in pre-Rules of Civil Procedure case, it was proper to refuse plaintiff to re-plead because two year statute of limitations had run); *Health Promotion Specialists, LLC v. S .C. Bd. of Dentistry,* 403 S.C. 623, 632, 743 S.E.2d 808, 813 (2013) (approving denial of oral motion to amend at trial to add UTPA cause of action because seven years had elapsed since filing claim and Board was immune from intentional tort suit under the Tort Claims Act); *Jennings v. Jennings,* 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct.App.2010) *rev'd on other grounds,* 401 S.C. 1, 736 S.E.2d 242 (2012) (finding it would have been futile to add a new individual party when the Court of Appeals found other individual parties similarly situated were entitled to summary judgment under the federal Stored Communications Act). In each of the cases the futility was a "slam dunk" summary judgment argument. Here, however,

there is no slam dunk; in fact, Defendants already failed in their motion for summary judgment in front of Judge Nicholson.

In opposing this amendment, Defendants are in essence asking the Court to grant summary judgment on four (4) technical defenses that Defendants assert in opposition to the Plaintiff's lien:

(a) Vuong Nguyen's status with Brown Contractors does not meet the statutory definition of "employee" under S.C. Code § 40-59-410(B)(1) [even though it is an undefined term in the South Carolina Residential Home Builders Act] so that ***if IRS definitions are applied*** Nguyen could not serve as the "qualifier" because he was compensated via a Form 1099 – thus invalidating any Certificate of Authorization issued to Brown Contractors by the RBC;

(b) because of (a), the manner in which Brown filled out his application for the Certificate of Authorization was "fraudulent";

(c) in any event, irrespective of whether Brown Contractors was allowed to have a RBC number in the first place, the failure to include the Brown Contractors RBC number 198 on the lien was a fatal flaw to the lien under S.C. Code Ann. § 29-5-15;

(d) the Certificate of Authorization for Brown Contractors was not applicable until after January 2013 – after Brown began to build the house;

Plaintiff obviously opposes all of these arguments. Before Judge Nicholson, Defendants argued (a) and (b) in their brief, and then advanced (c) in oral argument, following by supplemental submissions. Judge Nicholson denied summary judgment on these three grounds.

To the extent the Court finds these arguments compelling, then the Plaintiff would first point to *16 Jade Street, LLC v. R. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013) – which invalidates arguments (a) and (b). Contrary to Defendants' characterization that *16 Jade Street* as a "limited" ruling, in that case the South Carolina Supreme Court expressly **rejected** the

notion that Section 40-59-410 of the Residential Home Builders Act creates any legal benefit for private parties in circuit court. *Id.*, 405 S.C. at 389-390, 747 S.E.2d at 77. In her opinion, Justice Hearn wrote:

> Based on this language, the circuit court concluded that as a resident licensee, Aten assumed professional responsibility for the project and, furthermore, that the use of the term professional responsibility "is broad enough to include civil liability."
>
> We reject this construction of the statute. Nothing in the language of the statute evinces a legislative intent to create such a legal duty, **nor was this statute enacted for the benefit of a private party**. The provisions in question concern the issuance of certificates of authorization for a company engaging in residential home-building, specialty contracting, or home inspection and serve essentially to define terms used within a subsection the Residential Home Builders Act. Section 40–59–410 of the South Carolina Code (2005) requires the company to identify a resident licensee in "responsible charge" of each principal or branch office. § 40–59–410(B)(1), (D), & (H). The statute therefore requires at least one person in each office of the company to be licensed and assume professional responsibility for the project. However, we disagree with the court's conclusion that professional responsibility is tantamount to civil liability. **The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court.** *See* S.C. Code Ann. § 40–1–110(1) (2005) (listing the acts for which the licensing board can sanction a licensee, including when he "lacks the professional or ethical competence to practice the profession"); § 40–59–110 (2005) (stating additional grounds for which a residential contractor, specialty contractor, or home inspector can be sanctioned)).

Id. (emphasis added). While *16 Jade Street* directly concerned whether a plaintiff could use § 40-59-410 to sue a resident licensee (i.e., qualifier) in tort, the principles in the opinion that the statute was not "enacted for the benefit of a private party" and "the only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court" are directly applicable in the instant motion. *Id.*

In the case at bar, Defendants have pleaded Plaintiff's allegedly invalid licensure status as their second and third affirmative defenses. [See Amend. Comp. ¶¶ 18-19 (Failure to Comply with Mechanic's Lien Statute) and ¶¶ 20-21 (Failure to Comply with Requirements of the LLR)]. "It is well established that a party pleading an affirmative defense has the burden of proving it." *Pike v.*

South Carolina Dep't of Transp., 343 S.C. 224, 540 S.E.2d 87 (2000); *Hoffman v. County of Greenville*, 242 S.C. 34, 129 S.E.2d 757 (1963). "When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence." *Cole v. South Carolina Electric & Gas, Inc.*, 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003). Thus, if a plaintiff cannot create tort liability using Section 40-59-410, a defendant cannot use the same statute to establish an affirmative defense, either. *16 Jade Street*, 405 S.C. at 389-390, 747 S.E.2d at 77.

In the motion at bar, and also in filings before Judge Nicholson, the Plaintiff also extensively argued that the Commission's jurisdiction is exclusive. S.C. Code Ann. § 40-59-115; there are also constitutional separation of powers issues at play. S.C. CONST. ART. V, § 11; *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013). The Plaintiff also advanced the argument that the definition of employee under *Shatto v. McLeod Reg. Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013) and *Wilkinson ex rel Wilkinson v. Palmetto State Transport*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009) – focusing on right to control – is determinative of who is and is not an employee. Under *Todd's Ice Cream, Inc. v. South Carolina Employment Security Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373,375-376 (Ct. App. 1986), the Court of Appeals held it is an issue of fact. Plaintiff also relies on the testimony of Mr. Nguyen that he was, in fact, acting as the qualifier and supervising the construction until the Defendant Ms. Salzhauer demanded he be replaced. Thus, this is not a slam-dunk summary judgment argument of the kind we see where "futility" is applied. The Court should force Defendants to argue this as summary judgment.

As for the "c" argument, which is the purpose of the instant motion to amend, the Court should note that the Defendants appear to ignore Plaintiff 's citation to *Clo–Car Trucking Co. v. Clifflue Estates of S.C.*, 282 S.C. 573, 575–76, 320 S.E.2d 51, 53 (Ct. App. 1984); 53 Am. Jur.2d

Mechanic's Liens § 235 (1996) or S.C. Code Ann. § 29-5-180 (permitting amendments of mechanic's liens). In other words, Defendants appear to concede that their argument under S.C. Code Ann. § 29-5-15 does not render the amendment futile. Since the amendment is directed at this very argument, the motion should not be denied based on futility.

Finally, the last argument, (d), is now expressly advanced for the first time in the Defendants' memorandum of law. The Plaintiff should be allowed the opportunity to show that the RBC approved the application for the registration following the application. As with the preceding paragraph, since there is a factual dispute over when the RBC authorized Brown Contractors, this is an argument which should be tested in summary judgment, or trial, not in opposition to a motion to amend that addresses a different defense. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.,* 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002); *Redwend,* 354 S.C. at 468, 581 S.E.2d at 501; *Hall v. Fedor,* 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Hancock v. Mid-South Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

In advancing the futility argument, Defendants are in essence asking the Court to grant summary judgment. In a situation like this – where there is no clear-cut statute of limitations issue – the Court should analyze the procedural arguments and not the substantive ones:

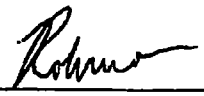
> "A motion to amend an Answer should be contested primarily by procedural arguments, not arguments concerning the substance and merits of the counterclaims and/or defenses proposed. For example, one might argue that it is too late in the case to allow an amendment, and that prejudice would result from such an amendment. *See Potomac Leasing Co. v. Bone,* 294 S.C. 494, 366 S.E.2d 26 (Ct. App. 1988). Arguments going to the legal merits of a proposed defense or counterclaim are better taken up in the context of a Rule 12(b) motion to dismiss or a Rule 56 motion for summary judgment. It follows that the trial judge should generally not consider these substantive arguments at the mere amendment stage."

Collins v. Sigmon, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989). Thus, this is just not a case where the "futility" doctrine applies.

CONCLUSION

Plaintiff respectfully requests that the Court grant the Plaintiff's Motion to Amend its Complaint to add the RBC number to the pleadings. The Defendants have failed to meet their burden of demonstrating prejudice and cannot show futility.

BROWN & VARNADO LLC



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ATTORNEY FOR PLAINTIFF

August 9, 2016
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO: 2014-CP-10-3881

BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

Plaintiff,

v.

ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER,

Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

v.

JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION, CO., LLC

Third-Party Defendants.

NOTICE OF MOTION AND PLAINTIFF'S RULE 59(e) MOTION TO ALTER, AMEND OR RECONSIDER

FILED
2018 MAY 11 PM 1:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: HENRY W. BROWN, ESQ., SPECIAL REFEREE and ROBERT G. LYLES, ESQ., ATTORNEY FOR THE DEFENDANTS/THIRD-PARTY PLAINTIFFS:

PLEASE TAKE NOTICE that the Plaintiff Brown Contractors, LLC, by and through its undersigned counsel, will move before the Special Referee, Henry W. Brown, on the 10th day hence, or at such other time, date and place as counsel may be heard, for an Order pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, to alter, amend and/or reconsider the Order of May 1, 2018, on the following grounds.

A. Missing Factual Findings.

The Plaintiff respectfully requests that the following facts be included in a new order.

1. The Plaintiff Brown Contractors, LLC ("Plaintiff" or "Brown Contractors") was established in April 14, 2009 for the purpose of residential home building, with James L. "Jay" Brown IV as its sole member. Its address was given as 103 Palm Boulevard, Suite 34, Isle of Palms, South Carolina 29451. (Pltfs. Exh. 1).

2. Jay Brown has been in the business of building and renovating custom houses on the Isle of Palms and Sullivans Island for over a decade. Originally from the Charlotte, North Carolina area, he was partnered with a South Carolina residential contractor named Andy Meihaus. Brown and Meihaus separated in 2012, so that Meihaus could be houses in Kiawah and Seabrook Islands, while Brown concentrated East of the Cooper.

3. On June 6, 2012, Brown Contractors filled out a Certificate of Authorization ("COA") form with the State of South Carolina's Residential Builder Commission ("RBC"), with a $100.00 fee attached. Therein, Brown Contractors indicated that Vuong Nyguen would serve as the "qualifying party" for the company pursuant to S.C. Code Ann. § 40-59-400 *et seq*. The COA application was received by the RBC on June 8, 2012. (Plfts. Exh. 1).

4. There was correspondence from the RBC to Brown Contractors on June 12, 2012 seeking a bond to be filed – which was done. At that point, Brown Contractors reasonably believed itself to be in full compliance with South Carolina's Residential Building Code, as confirmed by a telephone call to the RBC from Jay Brown. Ultimately, the RBC finally performed the ministerial act of issuing the COA on January 28, 2013. (Plfts. Exh. 2). No evidence was submitted that this delay was anything other than a bureaucratic mistake. It was issued again on May 1, 2013 and April 16, 2014. (Id.). The McMarlins have never filed a complaint with the RBC against Brown Contractors and/or Jay Brown.

5. The parties are not sure, but in the spring-summer of 2012, Dr. Andy McMarlin and Mrs. Amy Salzhauer McMarlin began to interview contractors for structural renovations to their home at 1850 Flag Street on Sullivans Island, South Carolina ("1850 Flag") and spoke to several contractors, including Jay Brown.

6. A number of "bids" and "estimates" were sent by Brown Contractors and/or requested by the McMarlins, though Henry "Hank" Salzhauer (the Defendants' father in law and father, respectively), who was an experienced electrical services contractor who resided in New York. No one disputes that Mr. Salzhauer handled the business side of the arrangement.

7. Importantly, none of these "bids" or "estimates" (Def. Exhs. 8, 10, 12, 15-18) indicated that they constituted a "guaranteed maximum price" or "not to exceed" pricing, or reflected any agreement by Brown Contractors to do the work for specific sum of money. (Id.). This would have been impossible, since the scope of the renovation was a moving target.

8. Jay Brown did send two contracts on July 20, 2012 and July 24, 2012. (Def. Exhs. 14 and 15). The first clearly states on the front page that it is a Cost-Plus contract; the second's cover email makes it clear that it is another cost-plus contract. (Id.). Neither were signed, however.

9. For their part, the McMarlin-Salzhauer's explained that they assumed the work would performed for specific sums of money and this was the reason why they rejected signing the contracts. Despite their willingness to send numerous, written communications directly to Jay Brown and/or his staff, however, the Defendants can point to no contemporaneous writings – either email or letter – which sets forth their position on the "guaranteed pricing" angle, or even that they rejected the Contracts.

10. Jay Brown and his office assistant, Deborah Kahn (who no longer works for Jay Brown) both testified that all of Brown Contractors building projects during this time frame were

of business at a given time," but Nguyen "was using one license for two places of business and this is in clear violation of the statute." (Order p. 8). The Special Referee also found that "Brown not Mr. Nyguen was directing the building services to a successful completion and Brown, not Mr. Nyguen, was the person in responsible charge." (Order, pp. 7-8).

(3) Thus, the Special Referee held that the COA was "issued in response to misrepresentations and false statements of fact" (Order, p. 8) and, accordingly, "Brown was not properly licensed at any time during the solicitation or performance of the McMarlin job." (Order, p. 9).

17. Unfortunately, these findings by the Special Referee that Brown Contractors (by its "misrepresentations and false statements of fact" in its application) violated the provisions of the South Carolina Residential Homebuilders Act, itself contradicts the clear holding of *16 Jade Street, LLC v. R. Design Constr. Co.*, 405 S.C. 384, 747 S.E.2d 770 (2013).

18. In *16 Jade Street*, the South Carolina Supreme Court expressly **rejected** the notion that Section 40-59-410 of the Residential Home Builders Act creates any legal benefit for private parties in circuit court. *Id.*, 405 S.C. at 389-390, 747 S.E.2d at 773. In her opinion, Justice Hearn wrote:

> Based on this language, the circuit court concluded that as a resident licensee, Aten assumed professional responsibility for the project and, furthermore, that the use of the term professional responsibility "is broad enough to include civil liability."
>
> We reject this construction of the statute. Nothing in the language of the statute evinces a legislative intent to create such a legal duty, **nor was this statute enacted for the benefit of a private party**. The provisions in question concern the issuance of certificates of authorization for a company engaging in residential home-building, specialty contracting, or home inspection and serve essentially to define terms used within a subsection the Residential Home Builders Act. Section 40–59–410 of the South Carolina Code (2005) requires the company to identify a resident licensee in "responsible charge" of each principal or branch office. § 40–59–410(B)(1), (D), & (H). The statute therefore requires at least one person in each office of the company to be licensed and assume professional responsibility for the project. However, we disagree with the court's conclusion that professional responsibility is tantamount to civil liability. **The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court.** *See* S.C. Code Ann. § 40–1–110(1) (2005) (listing the acts for which the licensing board can sanction a licensee,

> including when he "lacks the professional or ethical competence to practice the profession"); § 40–59–110 (2005) (stating additional grounds for which a residential contractor, specialty contractor, or home inspector can be sanctioned)).

Id. (emphasis added).

19. While *16 Jade Street* directly concerned whether a plaintiff could use § 40-59-410 to sue a resident licensee (i.e., qualifier) in tort, the principles in the opinion that the statute was not "enacted for the benefit of a private party" and "the only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court" are directly applicable in the instant case. *Id.* In spite of *16 Jade Street's* clear holding that the Residential Home Builders Act was "not enacted for the benefit of a private party" and that Residential Home Builders Act the Special Referee nevertheless ignored it.

20. The Special Referee found that "*Jade Street* did not repeal the provisions of the licensing statute." (Order, p. 9). This is a straw-man argument; the case specifically says that the statute was not "enacted for the benefit of a private party." 405 S.C. at 389-390, 747 S.E.2d at 773.

21. The Special Referee also held that "the delicts related to the use of the license are a matter to be dealt with by the licensing body, unless there are omissions by the individual license holder that would subject the licensee to liability for claims by the firm's wrongful conduct, independent of the license held." (Order, p. 9). This reasoning is included nowhere in *16 Jade Street*; to allow it to stand as the ruling of the circuit court would fundamentally do violence to the case's clear reasoning, which disagrees with the position that "professional responsibility is tantamount to civil liability." *Id.*

22. Finally, the Special Referee held that "[w]hile the qualifier may not be personally liable solely because he or she is the qualifier, the firm remains unable to enforce its contract or assert equitable claims if the firm fails to comply with the licensing statute." (Order, p. 9). Again,

the Special Referee is driving a huge hole through the heart of *16 Jade Street's* blanket prohibition against the circuit court making findings of licensure when that function is clearly reserved to the licensure board. 405 S.C. at 389-390, 747 S.E.2d at 773.

23. Thus, at the time the contract with the McMarlins was actually entered, and before any work was done on the McMarlin residence, Brown Contractors had met the requirements of the certificate of authorization act by submitting the correct application to the Residential Builders Commission. The Special Referee cannot ignore the plain language of *16 Jade Street* to make the findings in Paragraph 16 above, since these are properly the purview of the Residential Builders Commission and not the circuit court. In other words, the RBC – and it alone – has complete, exclusive and administrative control over licenses, qualifications for certificates of authorization. Defendants may wish to argue that Plaintiff or anyone acting on its behalf misled, misread or misunderstood the Residential Home Builders Act, but it should be taken up with the Commission directly and the Special Referee erred by ignoring this fact. Any other reading would not only ignore the precedent of *16 Jade Street* but fly in the face of the principles of statutory construction. *Browning v. Hartvigsen,* 330 S.C. 175, 181, 498 S.E.2d 635, 638 (1998) (a statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers); *Burns v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) (In ascertaining legislative intent, statutes which are part of the same act must be read together.). Moreover, in *Rainey v. Haley*, 404 S.C. 320, 745 S.E.2d 81 (2013), Justice Kittredge wrote:

> South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts, and shall have such appellate jurisdiction as provided by law. S.C. CONST. ART. V, § 11. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute."

Id., 404 S.C. at 323, 745 S.E.2d at 83. Because exclusive jurisdiction is invested in the RBC with appeal to the Administrative Law Judge Division [S.C. Code Ann. §§ 40-59-115, -90 and -160], this Court simply does not have jurisdiction to challenge how a contractor obtained a license, merely that he has one. *Id.*; *see also Tourism Expenditure Review Comm. v. City of Myrtle Beach*, 403 S.C. 76, 82, 742 S.E.2d 371, 374 (2013) (holding that when General Assembly gave exclusive power to challenge A-Tax funds to the Tourism Expenditure Review Committee, the circuit court lacked subject matter jurisdiction even to consider a declaratory judgment action).

24. In any event, the Special Referee erred in making the findings which are enumerated in Paragraph 16 above.

25. In making the finding set forth in Paragraph 16 (1) above, the Special Referee adopted the Plaintiff's use of "W-2 employee" vs "1099 subcontractor." Unfortunately, the General Assembly did not include "employee" in one of its defined terms in the Residential Home Builders Act. S.C. Code Ann. § 40-59-400. *In Perry v. Bullock*, 409 S.C. 137, 140-141, 761 S.E.2d 251, 253 (2014), however, the Supreme Court ruled that "[w]hen interpreting an undefined statutory term, the Court must look to its usual and customary meaning." there is apparently no South Carolina precedent that gives an all-encompassing, across-the-board definition of employee—but the vast majority of the jurisprudence about what constitutes an employee comes in the field of workers' compensation law. *Wilkinson ex rel Wilkinson v. Palmetto State Transport*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009); *cf.* South Carolina Workers Compensation Act, S.C. Code Ann. § 42-1-130 ("[t]he term employee means every person engaged in an employment under any appointment, contract of hire, or apprenticeship, expressed or implied, oral or written, ... whether lawfully or unlawfully employed, but excludes a person whose employment is both casual and not in the course of the trade"). W-2 and 1099 govern method of payment and do not

define who is and is not an employee. While attorneys, accountants and tax professionals may be familiar with this IRS nomenclature, it fails to meet *Perry's* admonition to look for a 'usual and customary" meaning and instead tries to insert a more specialized one. 409 S.C. at 140-141, 761 S.E.2d at 253. The same holds true for trying to draw a distinction in the area of construction practices – where a general contractor may have office staff, day laborers, sub-contractors and material provider; again, this is using specialized nomenclature instead of usual and customary definition. If the Court follows *Perry* to adopt a usual and customary definition, the Court would reject IRS definitions and look to standard definitions. BLACKS LAW DICTIONARY places a heavy emphasis on control in how it defines employee:

> A person in the service of another under any contract of hire, express or implied, oral or written, **where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed** .... Generally, when person for whom services are performed has right to control and direct individual who performs services not only as to result to be accomplished by work but also as to details and means by which result is accomplished, individual subject to direction is an "employee".

BLACKS LAW DICTIONARY, 6th Ed., p. 525 (1990)(emphasis added). The Merriam-Webster Online Dictionary is far more anodyne: "one employed by another usually for wages or salary and in a position below the executive level." Plaintiff submits that the Court was safest to follow workers' compensation precedent, in which the Court of Appeals has previously opined: "[t]hat the employment relationship is contractual in character; however, no formality is required. The contract may be oral or written, and also may be implied from conduct of the parties. It is enough if the circumstances show unequivocally that the parties recognize the relationship." *Spivey v. D.G. Const. Co.*, 321 S.C. 19, 22, 467 S.E.2d 117, 119 (Ct. App. 1996). In 2013, the Supreme Court emphasized the control factor in determining the existence of an employee-employer relationship: "[u]nder settled law, the determination of whether a claimant is an employee or independent

contractor focuses on the issue of control, specifically whether the purported employer had the right to control." *Shatto v. McLeod Reg. Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013). Justice Kittredge explained that "while evidence of right of actual control exerted by a putative employer is evidence of an employment relationship, the critical inquiry is whether there exists the right and authority to control and direct the particular work and undertaking. The right to control does not require the dictation of the thinking and the manner of performing the work. It is enough if the employer has the right to direct the person by whom the services are to be performed, the time, place, degree and amount of said services." *Id.*, 406 S.C. at 420, 753 S.E.2d at 477.

26. The use of the workers' compensation precedent outside of the traditional workers' compensation arena is supported by *Todd's Ice Cream, Inc. v. South Carolina Employment Security Comm'n*, 281 S.C. 254, 258, 315 S.E.2d 373,375-376 (Ct. App. 1986), in which the Court of Appeals extended the employee versus independent contractor analysis into the realm of an employment security claim. In *Todd's Ice Cream*, the panel found: "[i]n determining whether an individual is a servant (employee) or an independent contractor, the proper test to be applied is not the actual control exercised by the alleged master, but whether there exists the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment." *Id.* The Court should have applied workers' compensation precedent, which focuses on control, and therefore must analyze four factors in determining that right of right of control: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. *Wilkinson ex rel Wilkinson v. Palmetto State Transport*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009) (In evaluating the right of control, the Court examines four factors which serve as a means of analyzing the work relationship as a whole ...we return to

our jurisprudence that evaluates the four factors with equal force in both directions."); *see also Shatto v. McLeod Reg. Med. Ctr.*, 406 S.C. 470, 475-476, 753 S.E.2d 416, 419 (2013).

(1) Direct Evidence of Right of Control.

Nguyen was deposed on March 23, 2015. There is little doubt from his testimony that he was in a relationship in which he was actually controlled by Plaintiff. .While Nguyen conceded he was not a W-2 employee and invoiced Plaintiff as a sub-contractor (in which he hired and directing the work of sub-sub-contractors), he also testified that during the time that Defendants' house was built that he was working exclusively for Plaintiff; that Brown Contractors could pull him on and off jobs as project manager; that while working as project manager he directed the work of all sub-contractors (in addition to the ones he hired) for Brown Contractors; that he met and received instructions from Brown Contractors' owner, Jay Brown, including instructions to meet the highest standards of construction); and that he was to receive management fees in addition to his invoicing. The testimony and affidavit of Jay Brown further buttressed this notion of control ("I had the ability to control where and when he worked, and what he worked on. I had the right to terminate him.").

(2) Furnishing of Equipment and (3) Method of Payment

There is very little equipment one needs to be a Project Manager working day to day on a job site whether one is an employee or contractor; to the extent that the equipment includes the actual materials provided for the use of the builders, the depositions of Nguyen and Jay Brown establish that Plaintiff provided the building materials, etc. Nguyen sent invoices but this is not necessarily dispositive, as the Supreme Court found in *Shatto*. 406 S.C. at 481, 753 S.E.2d at 421-422.

(4) Right to Fire.

Here the Affidavit of Brown and Brown's testimony showed he had the right to fire. In fact, he dismissed Nguyen as the day to day project manager on the Defendants' residence (at the request of the Defendant Amy Salzhaur) and replaced him with another licensed South Carolina home builder, Cameron Glaws.

Applying the four-point test, Mr. Nguyen was clearly employed by the Plaintiff within the meaning of S.C. Code Ann. § 40-59-400(1). Based on the evidence adduced to the Court, thus, he also meets the test of a "resident licensee" and "responsible charge" under S.C. Code Ann. § 40-59-400(1) because he was assigned to the project, was there almost every day, and provided direct control and personal supervision. The fact that Jay Brown did the same thing does not in any way

make Mr. Nyguen less of a "qualifier". Likewise, the fact that Defendants admit to demanding Nguyen be replaced is not inconsistent with the act, either, as he was quickly replaced by another licensed residential homebuilder, Cameron Glaws.

27. In making the finding set forth in Paragraph 16 (2) above, the Special Referee stated that Nyguen "was using one license for two places, and this is a clear violation of the statute" [i.e., S.C. Code Ann. § 40-59-410(H)], which provides that "the resident residential home builder .. is considered in responsible charge of only one place of business at a given time." Contrary to the Special Referee's findings, this statute clearly means that if a fictitious entity had two or more places of business/offices (e.g., one on Edisto Island, one in Mt. Peasant and one North Myrtle Beach), then the qualifier could not cover all three. Here, however, Brown Contractors had only one office. Also, nothing in the Act prohibits Nyguen from maintain his own sub-contracting business; in fact, Section 40-59-410(F) and (I) can be read to allow it. The definition of "resident licensee" in Section 40-59-400(5) does not require that qualifier never 'use one license for two places' either; rather, he "is a licensed practitioner who spends a majority of each normal workday working out of a principal or branch office and who is in responsible charge of the office and the building services provided." The evidence clearly showed this was, in fact, the case. In any event, the testimony of Brown and Ngyuen is clear that Nyguen was only working for Brown Contractors at the relevant time. It is ironic that Defendants claim "Nyguen cannot be the qualifier because he's not an employee!" and "Nyguen cannot be the qualifier because Brown was actually in charge!" – yet, an employee is under the Master's direct control. Just because the Defendants dealt primarily with Brown doesn't mean that Ngyuen did not meet the requirements of the resident licensee; the Special Referee should see this, too. This is yet more grist for the mill in support of

16 Jade Street's injunction on using the Residential Home Builders Act for the benefit of a private party.

B(2). Other Licensure Findings.

The Plaintiff respectfully requests that the Order be amended to remove the following findings regarding licensure for these reasons:

28. The Special Referee also found that "Brown, if it did not have a contract as of June, 2012, was negotiating with Amy McMarlin, and soliciting the residential project in April 2012 and earlier, also prior to the application being submitted." (Order, p. 7). Yet, the bid sheet which the Special Referee puts so much weight on was stamped "Brown-Meihaus" – not Brown Contractors. Brown-Meihaus was a fully licensed entity in 2012. No evidence was adduced at trial whatsoever that Brown-Meihaus was unlicensed. Brown Contractors should not be confused with Brown-Meihaus. Since Brown-Meihaus was properly licensed through 2012, it was sufficient for Jay Brown to solicit the McMarlin job.

29. The Special Referee also found that "on Brown's pay applications, the contract date is stated to be 'January 12, 2012', which the Special Referee finds to be "five months *before* an application for a COA was submitted to the state's licensing board." (Order, p. 7). Yet, the clear testimony from the parties was that they first met in the spring of 2012 and did not agree to work together until the permits were pulled in July. Thus, the "1/23/12" date on the pay applications was clearly a scriveners' error rather than proof that the contract pre-dated the COA application. Even the Defendant did not argue this in their Proposed Order.

30. The RBC issued the COA to Brown Contractors in January of 2013 (Order, p. 7), but the clear testimony and the evidence shows that Brown Contractors submitted the paperwork in June of 2012 before the commencement of the project. This is the only finding which is not

governed by an error of law by the Special Referee. The issuance of the COA was merely an administrative act that the RBC failed to accomplish in a timely manner; it is uncontested that the proper application was completed before any of the work commenced, and Plaintiff reasonably believed, based on Jay Brown's telephone call to the RBC, that it had satisfied the requirements – as it had Mr. Nguyen served as the "qualifier" and licensed contractor throughout that time. Thus, the holdings *Lenz v. Walsh*, 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2004) and *Columbia Pools, Inc. v. Moon*, 284 S.C. 145, 325 S.E.2d 540 (1985) are satisfied, or are otherwise not controlling. In both *Lenz* and *Moon*, the contractor sought licensure status *after* the commencement of the contract; in this case, by contrast, Brown Contractors followed the law by applying before the permits were issued and reasonably assumed that its certificate of authorization had been issued. Likewise, the holding of *Wagner v. Graham*, 296 S.C. 1, 370 S.E.2d 95 (1988) is inapposite also, in that the contractor never had any licensure whatsoever. Based on the facts at bar, the Court should have found that Brown Contractors was duly licensed.

C. The Mechanic's Lien was, in fact, valid.

The Plaintiff respectfully requests that the Order be amended to remove the finding that "the Plaintiff's mechanics lien was invalid" for these reasons:

31. As an additional ground to find the Mechanic's Lien invalid, the Special Referee held that "[s]ection 29-5-15 requires that a contractor seeking to file a lien record his contractor's license number on the lien document when the lien is filed" but that "Plaintiff used Nguyen's license number, and based on the findings above, this was not a valid license number for Brown Contractors and failed to satisfy the requirements of the statute." (Order, p. 10).

32. In fact, the "findings above" do not specify which number Brown Contractors should have used; instead, the "findings above" focus entirely on the purported lack of licensure for Brown Contractors (Order, pp. 4-9), which Plaintiff has responded to in this motion.

33. Assuming that the Special Referee meant to say that the failure of the undersigned to include the Brown Contractors RBC number (# 198), on the lien is a violation of S.C. Code Ann. § 29-5-15, then the Special Referee is demanding the strictest statutory construction of the Mechanics Lien statute in contravention of the law.

34. The purpose of the mechanic's lien statute is to aid both builders and owners. *A.V.A. Const. Corp. v. Santee Wando Constr.*, 303 S.C. 333, 335, 400 S.E.2d 498, 500 (Ct. App. 1990). It is true that all the statutory requirements for enforcement of a mechanic's lien must be strictly followed and that the failure to adhere to the requirements of statutes will result in the dissolution of the lien. *Cohen's Drywall Co., Inc. v. Sea Spray Homes, Inc.*, 374 S.C. 195, 199, 648 S.E.2d 598, 600 (2007). However, "[t]echnical requirements should not stand in the way of achieving the purposes of the mechanic's lien law. Even though a claim contains some defect or error it will be upheld where the owner is informed of the claim and not misled by it or prejudiced." 53 Am. Jur.2d *Mechanic's Liens* § 235 (1996).

35. Additionally, it is also equally true, that because "the mechanic's lien statutes are remedial, they are to be given a liberal construction." *Clo–Car Trucking Co. v. Clifflue Estates of S.C.*, 282 S.C. 573, 575–76, 320 S.E.2d 51, 53 (Ct. App. 1984). Turning to S.C. Code Ann. § 29-5-15, which was enacted in 2009, the General Assembly provided *"[a]s proof of licensure or registration, the contractor must record his contractor license number or registration number on the lien document when the lien document is filed."* The clear intent and purpose is to keep

unlicensed contractors from availing themselves of the mechanic's lien statute. The use of the masculine "his" is consistent with the other parts of the act.

36. Mindful of the admonition in *Clo–Car* that the statutes are to be interpreted liberally, the Court finds that Plaintiff complied with the letter and spirit of S.C. Code Ann. § 29-5-15. Nguyen's # 20378 was the contractor's license number it was using during work on the Defendant's residence; it is included on the Notice showing compliance with the statute. 282 S.C. at 575–76, 320 S.E.2d at 53 (Ct. App. 1984).

37. The legislative intent was satisfied because it allowed Defendants to inquire into licensure status – which they did – as demonstrated by the very motion for summary judgment. Defendants have had zero prejudice as a result; they have not been misled.

38. Moreover, it is an equally valid and liberal interpretation of S.C. Code Ann. § 29-5-15 that Plaintiff could have used *either* License # 20378 or the Certificate of Authorization # RBC 198 or both. At most, the non-inclusion of Certificate of Authorization # RBC 198 in addition to License # 20378 is a minor technical issue. *See* 53 Am. Jur.2d *Mechanic's Liens* § 235 (1996) ("[T]echnical requirements should not stand in the way of achieving the purposes of the mechanic's lien law. Even though a claim contains some defect or error it will be upheld where the owner is informed of the claim and not misled by it or prejudiced.").

39. The mechanic's lien statute also provides for simple amendments under S.C. Code Ann. § 29-5-180, which can be used to add # RBC 198, and which was done in this case.

D. Plaintiff should have its Lien amounts included in the Award.

The Plaintiff respectfully requests that the Order be amended to add its damages to the award for these reasons:

40. Insosfar as the Plaintiff's license was valid, then it's lien was valid. Plaintiff proved its damages with particularity, it should be awarded its full lien amount of $206,428.59, along with pre-judgment interest at the lawful rate, which the Special Referee should accordingly add to the award.

E. Right to Cure Act.

The Plaintiff respectfully requests that the Order be amended to delete the award to the McMarlins because of their failure to follow the "Right to Cure Act":

42. The law of South Carolina is very clear, under the South Carolina Notice and Opportunity to Cure Construction Dwelling Defects Act, codified at S.C. Code Ann. § 49-59-810 ("Right to Cure Act"), that homeowners must serve on the general contractor, no less than ninety days before filing an action, setting forth required information about the claim. In the case of *Grazia v. South Carolina State Plastering*, 390 S.C. 562, 570, 703 S.E.2d 197, 200-201 (2010), the Supreme Court endorsed the view that the Right to Cure Act "encompasses civil law suits filed against a contractor" and "requires the claimant to serve written notice no less than ninety days before the action." The *Grazia* Court then held that "[t]he stated public policy therefore is to ... provide an opportunity to resolve the claim without litigation." Id. Therefore, notice or a stay under the Act must be obtained before the claimant engages in work; to the extent the Plaintiff seeks recovery of work performed without first giving formal notice and the right to inspect the property, it is considered breached. *See* Justice Toal, *Andrew and Kimberly McIntyre v. Seaquest Development Co., Inc.*, 2016-CP-10-1833 (Charleston Co. Ct. Common Pleas, 2017), p. 6.

43. Thus, the Plaintiff must do more than merely give a contractor the right to inspect or say that repairs are underway. It must follow the requirements of S.C. Code Ann. § 49-59-810. Here, there is no evidence adduced anywhere at trial that the Defendants/Claimants complied with

the Act over the last four years, through the trial. Thus, any damages which they claim have been performed by repair contractors cannot be obtained against the Plaintiff or Third-Party Plaintiffs/ Likewise, since the trial is concluded, no damages can be obtained against the Plaintiff or Third-Party Plaintiffs. In much the same way that the Defendants claim that the mechanics lien is void for various technical issues, which Defendants say cannot be washed away, then their claims must be barred by the dictates of the Right to Cure Act.

F. Defendant's Responsibility for the Delays and Cost Overruns.

The Plaintiff respectfully requests that the Order be amended to delete the award to the McMarlins because of their responsibility for the delays and cost overruns:

44. The major of the McMarlins' defenses to the lien and counterclaims and third-party claims is that the Plaintiff was responsible for time-delays and cost overruns, which extended the time to renovate the house until September of 2013, and resulted in the McMarlins' spending in excess of $1.2m with Brown Contractors – which put them "over budget". The testimony of the Plaintiff's witnesses was compelling to show that the poor condition of the home, as well as Ms. McMarlin's spending habits, were directly and actively responsible to these cost-overruns and delays. Examples in Plaintiff's Exhibit 7 included replacement of the rotten deck, which was nearly triple the original estimate (p. 2. Item 06.02.40, +$13,144); siding and exterior trim tripling because of rotten members (p.2, Item 06.04.50, +$56,789) and a huge number for exterior carpentry caused by exterior rot (p.2, Item 06.20.00, +$72,583). Similarly, the roofing went up because of rot repair. (p.2. Item 07.04.00 $26,300), and so did the stucco and drywall (p.2, Items 09.01.70 and 09.02.50, +$7,750 and $11,750), and finally the electrical work required a demolition, which nearly quadrupled the number (p.4, Items 16.01.00 & 16.01.10, + $30,748 and $1,817).

45. Other items were changed to more expensive systems and/or were simply not in the budget but were added to it, by Ms. McMarlin. Examples include:

p.2, Item 07.06.50	Gutter & Downspout	+$ 2,030	added
p. 2, Item 08.03.00	Overhead Doors	+$15,727	added / mahogany
p. 2, Item 08.06.00	Operable Windows	+$ 9,106	upgraded to impact
p. 2, Item 08.07.10	Finish Hardware	+$27,916	nearly x8 increase; picked by Amy
p. 2, Item 09.03.10	Ceramic Tile	+$10,237	nearly x2 increase in labor
p. 3, Item 09.05.10	Acoustical Ceiling	+ 16,680	not in the budget
p. 3, Item 09.05.50	Wood Flooring	+$22,990	tripled b/c of playroom inlaid floor
p. 3, Item 09.09.00	Painting	+$23,897	almost doubled because of repaints
p. 3, Item 09.09.50	Wall Coverings	+$ 2,735	added wallpaper
p. 3, Item 09.30.00	Tiling	+$ 9,962	almost doubled
p. 3, Item 10.07.00	Plantation Shutters	+$ 3,420	added
p. 3, Item 10.08.30	Glass Shower Doors	+ $ 5,273	added to all bathrooms
p. 3, Item 10.09.30	Kitchen Equipment	+$ 7,574	upgraded from GE to Wolf
p. 3, Item 15.02.00	Plumbing Fixtures	+$28,506	selected by Amy
p. 3, Item 15.08.00	HVAC	+$39,332	x10 more b/c of system upgrade
p. 3, Item 15.09.00	Sprinkler System	+$ 9,420	added
p. 4, Item 16.01.00	Interior Light Fixture	+$ 3,803	increased
p. 4, Item 16.05.00	Alarm System	+$ 4,702	increased
p. 4, Item 16.06.00	Stereo System	+$20,618	added

46. There were some savings, but the actual cost was $1,227,884.45 off a control estimate of $543,140, for an additional $684,744. When it was all said and done, the cost control estimate was rendered worthless by the condition of the house, and also by Ms. McMarlin (along with her interior designers) selecting and having delivered expensive upgrades. The cost-overruns were nearly 2¼ the original cost control estimate. This was a situation with a loving father paying the bills in New York, and a daughter on Sullivans Island increasing the costs dramatically,

combined with her coming to the site and "correcting" the plans, and designers taking long periods of time to ship items.

G. Defendant's Award.

The Plaintiff respectfully requests that the Order be amended to delete the award to the McMarlins for the following reasons:

47. The Special Referee found (correctly) that "the McMarlins and Brown are each capable and experienced in construction and its management and methods. Despite their expertise, the parties proceeded with a complex residential renovation without first having adequately defined their agreement. Brown wanted cost-plus; however, McMarlin rejected that format and made their rejection clear." (Order, p. 10).

48. The Court considered the testimony of Mr. Brown, Mr. Cameron Glaws and Ms. Deborah Kahn versus the testimony of Ms. McMarlin (who was largely absent from dealing financial matters, leaving them to her father) and Mr. Salzhauer (who was an experienced electrical contractor in New York). In each case, the three Plaintiffs' witnesses were adamant that Mr. Salzhauer fully appreciated the fact that there was not guaranteed maximum pricing, but that he understood that he was being billed on a cost-plus basis – which he paid up until just before the C.O. was issued, when he promised to pay Brown Contractors after the work was completed but failed to do so. The separate project management fee was merely that, a separate fee which was not intended to, nor did it, interfere with the cost-plus billing. There was never anything from the dates of the contracts proposed by Brown Contractors where Mr. Salzhauer or Amy McMarlin specifically said that they refused cost-plus work; only their post-litigation testimony which supports their theory. They never made their rejection of cost-plus billing clear at all.

49. Brown Contractors, through its witnesses, has proven that Ms. McMarlin wanted improvements, changed her mind on how things should look, interfered with the workers, and selected components that were over-priced and had to ship in from out-of-state. Moreover, Brown Contractors has proven, through its witnesses, that after the project had dragged on, it agreed to defer payment on its overhead and profit until after the Certificate of Occupancy date had passed. However, the McMarlins did not honor this agreement, leaving Brown Contractors with numerous sub-contractors to pay.

50. Thus, the testimony of the Plaintiff's witnesses should be more compelling on this issue. None of the "bids" and "estimates" ever said that they constituted a maximum pricing; additionally, much of the work was done on contingencies, and with materials provided by the Defendants that was billed out from Brown Contractors. Moreover, it should be noted that Mr. Salzhauer was not a "babe in the woods" when it came to contractual arrangements, yet he did not memorialize the major misunderstanding (if his testimony is the be credenced) with Mr. Brown or anyone on his staff. Additionally, it should be noted that the McMarlins hired their repair contractor on a cost-plus basis, although neither they nor Howard Brown of Brown-Atlantic Contractors ever produced a copy which they signed, either. This shows that the Defendants often do not sign the contracts presented to the them.

51. As a general rule, the evidence should allow the court or jury to determine the amount of damages with reasonable certainty or accuracy." *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008). "Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." *Id.* (quoting *Piggy Park Enters., v. Schofield*, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968)).

Exhibit 1 – Expended Money – Award- $132,500.00.

52. The Special Referee found that Brown Contractors is responsible for the work of the Defendants' repair contractor [Brown-Atlantic] (Order, p. 13), primarily because the Defendants "paid an amount sufficient to entitle them to full performance on the scope of work agreed to be performed for the items of [Brown Contractor's] work in the schedule of values." (Order, p. 12). This should not be the factor to determine damages; rather, damages should be awarded only if the claimant (Defendants) have proven them to a reasonable degree of certainty.

53. The Special Referee considered Exhibit 1 to Howard Brown's Deposition which reflects "work expended" for $174,695.04, and awarded the Defendants $132,500.00 of this work, taking off $42,195 for the "betterment" of the copper roof and other differences. (Order, p. 13). The Plaintiff believes this is equal to Exhibit 1, Codes 014.1 to 014.4 in Labor).

54. The HVAC repair ($56,900.00 and $3,927.00, totaling $60,197.00; Codes 015 and HVAC in Materials) of the amount awarded; Codes 015 and HVAC" can also not be charged to Brown-Contractors. Mr. Brown could not act as an HVAC expert; Mr. Scwheers, the Defendants' HVAC expert, could not date the work, either. As placed on Mr. Jay Brown's response to Brown-Atlantic's Exhibit 1 (attached hereto as Exhibit A and previously forward to the Special Referee on 11/28/17) this was a replacement of the original HVAC units and circuit breakers which passed inspection by the Town of Sullivans Island). This is a betterment (a new system) which cannot fairly be passed along to Brown Contractors, even if Brown Contractors billed $43,147. (Order pp. 11-12). The damages award should be decreased by $60,197 to $72,303.

55. Additionally, Brown-Atlantic could not provide reasonable explanation for the need for $13,470.03 of the work (Codes 001 in Labor, Codes 001, 002, 003, 010 and 011 in Materials), which are highlighted in Purple on Exhibit A. The award should be decreased by $13,470.03 to $58,832.97.

56. Also, $27,296.19 was clearly not in the course of the original work (Exhibit 1, Codes 002, 003, 004, 005, 006, 007, 010, 014.1, 014.2, 014,3 and 014.4 on Labor, and 004, 007, 010, 1011, 014.2 and 014.4 on Materials) (as shown in the Yellow Highlighted Sections on Exhibit A). Accordingly, the award should be decreased by $27,296.19 to $31,536.78.

57 Finally, it should be noted that Brown-Atlantic charged a higher overhead and profit than Brown Contractors (not to mention a separate project management fee which the Defendants complained so much about when Brown Contractors charged). This award should be decreased by Brown-Atlantic's mark-ups ($22,412.01+ $5,735.00).

Exhibit 2 (FS-917 Rev) – Structural Repairs – Award $43,593.00.

58. This was an issue that was raised incredibly late in the project, where Brown Contractors followed the structural plan set forth by Geremy Powell, P.E., which required removal of structural support for the room, which the McMarlins wanted finished. Brown-Atlantic submitted a bid of $43,593.00 which should be charged against the engineer. At least some of this award should be credited to Brown Contractors and allow the McMarlins to chase Geremy Powell, P.E. A 25% overhead and profit is too high to be an element of damages. Also, due to the lack of timeliness, this claim should be disallowed; also, Defendants did not follow the Right to Cure Act. Plaintiff requests that this award be reduced accordingly.

Exhibit 2 – "Punch List" – Award- $133,100.00.

52. The Special Referee found that Brown Contractors is responsible for $133,100 of Brown-Contractors estimate of $152,117.19 (a decrease of $19,017.19).

53. The exterior painting ($23,375.00) is not fairly charged to Brown Contractors because it was not part of the original contract. Brown Contractors did not replace the hardwood floors but sanded and re-sanded at the request of Ms. McMarlin; thus, Brown Contractors should

not have to pay for this ($39,556.25). Similarly, the kitchen cabinets and bathroom cabinets do not need to be refaced or repaint ($14,187.00) – this is a betterment. Finally, the porch slope was inspected by the Town of Sullivans Island, which found no problem with the slope because of the way the stairs interfaced with the deck. This should not be allowed either, as no engineer testified that it was necessary ($21,700.00). Even if the remaining items on the punch list were chargeable to Brown Contractors ($16,875.00) they are not sufficiently detailed for the Special Referee to award them. Plaintiff requests that this award be reduced accordingly.

Exhibit 2 (FS–20) – "Wiring" – Award- $25,000.00.

54. The Special Referee awarded $25,000 in damages to the Defendants for rewiring, despite agreeing that "the dimension of the walls did not implicate the code requirement for nail guards" and "the record does not show sufficiently repetitive instances of incorrectly nailed wires." (Order, p. 14). Awarding roughly 7.5% of the McMarlin's claim of $298,875, on these facts and findings, renders this award speculative. As such, Defendants have failed to prove these damages and/or they are speculative. Plaintiff requests that this award be removed.

Loss of Use Damages – Award $12,500.00.

The Special Referee awarded $12,500 in damages to the Defendants for loss of use, despite Brown Contractors never promised a completion date in either the contract (since there was not one) or subsequent emails.

CONCLUSION

For these reasons, the Special Referee should reinstate the Plaintiff's lien claim for $206,428.59 and either dismiss the Defendants' counterclaim, or in the alternative drastically reduce the same.

BROWN & VARNADO LLC

By: _____

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Attorneys for Plaintiff

May 11, 2018
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served the attached ***Plaintiff's Notice of Motion and Rule 59(e) Motion to Alter, Amend or Reconsider*** in the above-captioned action on all other parties of record to this cause by electronic mail and depositing a copy hereof, postage paid, in the United States mail addressed to the attorneys for said parties as follows:

FILED
2018 MAY 11 PM 1:21
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Via U.S. Mail & Email
Robert T. Lyles, Jr., Esquire
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Special Referee

_____
Robert B. Varnado

May 11, 2018
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2014-CP-10-3881

BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

Plaintiff,

vs.

ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER

Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

vs.

JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION CO., LLC,

Third-Party Defendants.

FILED
2018 MAY 11 PM 4:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

NOTICE OF MOTION AND MOTION TO ALTER OR AMEND TRIAL ORDER PURSUANT TO SCRCP 59

The Defendants/Third-party Plaintiffs, Andrew McMarlin and Amy Salzhauer ("McMarlins" or "Defendants") hereby move, pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, to alter or amend the Special Referee's Order filed on May 4, 2018, (the "Order"). Specifically, the McMarlins seek to amend the portion of the Order dismissing James Brown, IV ("Jay Brown").

I. The McMarlins Ask the Special Referee to Reconsider the Ruling that Jay Brown is Not Personally Liable on the McMarlins' Counterclaims.

The McMarlins seek reconsideration of the portion of the Order finding no evidence of Jay Brown's personal negligence. A Rule 59(e) motion is appropriate when a party seeks to "alter or

amend the judgment," or as a vehicle to seek "reconsideration" of issues and arguments. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). "Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778–79 (2004). The Supreme Court expressed the view that there is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. *Id.*

II. Individual Claims Against Jay Brown Are Supported by Law and Fact.

On Page 16 the Order finds:

> Jay Brown clearly acted on behalf of Brown Contractors, LLC. However, Jay Brown could be personally liable if negligent conduct as to the portion of the residence addressed in the Brown Atlantic report is shown by Mr. Brown personally. As to the specific items of damage found herein, there is not sufficient evidence of Jay Brown's personal negligence to impose liability on Mr. Brown.

The Order correctly states the general premise of the law with respect to liability of an individual who is a member of an LLC. It is clear that one may not be personally liable for the torts of another merely by his or her status as a shareholder or officer of an LLC; but it is also clear when the member has participated in or directed the tortious act, personal liability will attach. *See Steinke v. Beach Bungee, Inc.*, 105 F.3d 192 (4th. Cir. 1997) (holding personal liability attached to corporate members who personally contributed unsafe conditions resulting in Plaintiff's death), *citing Rowe v. Hyatt*, 468 S.E.2d 649, 650 (S.C. 1996) ("An officer, director or controlling person in a corporation is not merely as a result of his or her status as such, personally liable for the torts of the corporation. To incur liability, the officer, director, or controlling person must ordinarily be shown to have in some way participated in or directed the tortious act"). *BPS, Inc., v. Worthy*, 362 S.C. 319, 608 S.E.2d 155 (Ct. App. 2005) (Summary judgment reversed as to corporate officer's

individual liability where evidence presented to support liability based on his own conduct); *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009)(Officer who made misrepresentations regarding proposals of the LLC was not shielded from liability by his status as a corporate officer).

South Carolina's corporate statute provides, in relevant part, as follows: "Unless otherwise provided in the articles of incorporations, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct." *S.C. Code Ann.* 33-6-220(b), Liability of Shareholders.

Similarly, the South Carolina Limited liability Company statute "Liability of Members and Managers" *S.C. Code. Ann.* 33-44-303 contains a limitation on the protection afforded to members. This statute reads as follows:

> (a) Except as otherwise provided in subsection (c), the debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the company. A member or manager is not personally liable for a debt, obligation, or liability of the company **solely by reason of being or acting as a member or manager.**

The comment to the statute includes the following:

> *A member or manager, as an agent of the company, is not liable for the debts, obligations, and liabilities of the company simply because of the agency. A member or manager is responsible for acts or omissions to the extent those acts or omissions would be actionable in contract or tort against the member or manager if that person were acting in an individual capacity.*

In *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009), the court found where an officer of a corporation participated in the commission of conversion and fraud, specifically in making representations regarding proposals of the LLC, he was not shielded from liability merely by his status as an officer or shareholder of a corporation by *S.C. Code Ann.* 33-6-220(b). Specifically, Gerald concealed his knowledge of foreclosure

proceedings on certain property when negotiating with Plantation, A.D., for development of the property.

As an initial matter, there was never a contract between the Defendants and Brown Contractors, LLC or any other document manifesting their intent to do business with that entity. Jay Brown himself did not express an intent to do business through Brown Contractors until after construction, began, when he unilaterally began invoicing the Defendants using the Brown Contractors, LLC name on invoices and pay applications. Prior to that, Brown submitted proposals and estimates first on the letterhead of Brown-Meihaus (a completely different entity) and by email which did not suggest Brown Contractors, LLC (Exhibit 8 and Exhibit 14). Jay Brown at some point decided to proceed via his LLC without the consent or agreement of the Defendants.

Second, the Defendants and Hank Salzhauer testified that they were unaware of how Jay Brown was doing business, which to them was immaterial. Their testimony was unequivocal that "we hired Jay" and it was Jay whom they paid and Jay whom they expected to complete their home.[1]

Third, the order suggests that in the absence or evidence that Jay Brown personally performed defective work, he cannot be held personally liable for it. This does not take into account the functions that Jay Brown was hired to perform. The proposal made by Jay Brown included a fee for "Project Management." The testimony of Defendants was that they expected Jay to manage the project for that fee, believing, of course, that he was licensed to perform that function. Even if there was a valid relationship between the Defendants and an LLC, those functions had to be performed by someone. That person was Jay Brown, who was the sole member and person responsible for the functions of Brown Construction, LLC. Whether it be called

[1] Trial Transcript, 185:2-186:10; 501:17-502:8.

negligent supervision of subcontractors or inadequate coordination and sequencing, Jay Brown was ultimately responsible for ensuring that the work of the subcontractors was performed properly and completely. The evidence was clear that he failed to fulfill those duties.

Finally, it was Jay Brown, personally, who failed to tell the Defendants that he was not licensed; falsified the application for the certificate of authority with the LLR; filed the mechanics lien in violation of the statute; brought a collection action when he had no right to recover, and refused to complete the home or correct the deficient work caused by his subcontractors. All of those failures by Jay Brown, personally, resulted in the enormous expense associated with this case and the damages the Defendants incurred, and this Court has awarded.

The record in this case, and the Court's order, proves conclusively that Jay failed in his management duties. In fact, the evidence clearly establishes that Jay Brown misrepresented to the McMarlins that he was a licensed builder and agreed to take a fee to manage the project. All damages the McMarlins seek result from Jay Brown's misrepresentation and his own conduct as the project manager. Therefore, all of the damages in this action result from Jay Brown's personal conduct.

III. The Order Fails to Address Brown's Individual Liability Under Theories of Alter Ego and/or Amalgamation.

The McMarlins assert claims against Brown under theories of Alter Ego and/or Amalgamation. These are not addressed by the Order.

An alter-ego theory requires a showing of (1) total domination and control of one entity by another and (2) inequitable consequences caused thereby. *Oskin v. Johnson*, 400 S.C. 390, 400, 735 S.E.2d 459, 465 (S.Ct. 2012), *citing Colleton Cnty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cnty.*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006). Control may be shown where the subservient entity manifests no separate interest of its own and functions solely to achieve the goals of the

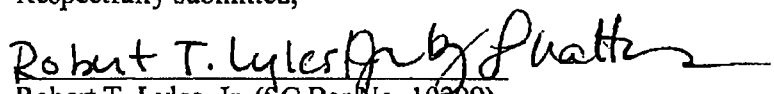
dominant entity. *Id.* (citation omitted). This theory does not apply, however, in the absence of fraud, injustice, or contravention of public policy. *Id.* (citations omitted).

There is an amalgamation of corporate interests where activities "blur the legal distinction between corporations and their activities." *Magnolia North POA, Inc., v. Heritage Communities*, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012) *citing Kincaid v. Landing Development Corp.*, 289 S.C 89, 344 S.E.2d 869 (Ct. App. 1986). In *Magnolia North*, the court looked at factors such as whether entities shared locations, ownership, and representations to the public, to determine that corporate entities were amalgamated and corporate lines blurred.

As noted previously, Jay Brown purported to do business as Brown-Meihaus and there was never a contract between Brown Contractors, LLC and the Defendants. The Defendants were never told, and never assented to doing business with Brown Contractors, LLC, an entity about which they knew nothing. What they knew, or falsely believed, was that Jay Brown was a licensed contractor.

Jay Brown was the sole member and sole employee of Brown Contractors, LLC. The casual nature with which Jay Brown represented himself reflects the fact that he totally controls and dominates the LLC and that entity is, for all intents and purposes, Jay Brown. If Jay Brown desired to properly conduct business through an LLC, he should have communicated that intent clearly to the Defendants. As with the fact that he did not have a license, he did not. The evidence in this case establishes conclusively that Jay Brown neither let the Defendants know of his intent to do business through his LLC and they did not know, or expect that their relationship was with an LLC and not Jay Brown personally. As the testimony made clear, it was always the McMarlins' expectation that they were doing business with Jay Brown, who they believed at the time was a properly licensed contractor, and who concealed that the fact that he was not.

Respectfully submitted,



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ATTORNEY FOR DEFENDANTS

May 11, 2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2014-CP-10-3881

BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

Plaintiff,

vs.

ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER

Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

vs.

JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION CO., LLC,

Third-Party Defendants.

FILED
2018 MAY 25 PM 2:53
JULIE J. ARMSTRONG
CLERK OF COURT

DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS

The Defendants/Third-party Plaintiffs Andrew McMarlin and Amy Salzhauer ("McMarlins" or "Defendants") hereby move for an award of attorney's fees and costs. The Court granted the Defendants an extension of time until May 25, 2018 to file this motion.

I. Award Pursuant to S.C. Code Ann. § 29-5-10(a)

In the trial of this matter involving a mechanic's lien, the Defendants were the prevailing party and are therefore entitled to attorney's fees. S.C. Code Ann. § 29-5-10(a) allows the prevailing party to recover costs, including attorney's fees, associated with defending against the lien. This Court must determine the fee, which may not exceed the amount of the lien. *Id.* The

party defending against a mechanic's lien that is ultimately dismissed is the prevailing party for purposes of the attorney's fee award under § 29-5-10(a). *Cedar Creek Properties v. Cantelou Associates, Inc.*, 320 S.C. 483, 486, 465 S.E.2d 774, 775–76 (Ct. App. 1995); *Seckinger v. The Vessel, Excalibur*, 326 S.C. 382, 388, 483 S.E.2d 775, 777 (Ct. App. 1997). The court **must** award reasonable attorney's fees to the prevailing party. *T.W. Morton Builders, Inc. v. von Buedingen*, 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994) (holding that "may" in § 29-5-10(a) should be interpreted as "must"). In determining a reasonable attorney's fee, the Court should assess the following six factors: 1) the nature, extent, and difficulty of the case; 2) the time necessarily devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) beneficial results obtained; and 6) customary legal fees for similar services. *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

This court dismissed the Plaintiff's mechanic's lien, thus causing the Defendants to prevail in the lawsuit. As the prevailing party who incurred costs, including attorney's fees, to defend against the lien, the Defendants are entitled to an award of reasonable attorney's fees not to exceed the amount of the lien.

II. Award Pursuant to S.C. Code Ann. § 29-5-10(b)

As an alternative basis for the award of attorney's fees, § 29-5-10(b) entitles the Defendants to an award of attorney's fees as the prevailing party whose offer of settlement was closer to the verdict reached. Under § 29-5-10(b), when both parties make an offer of settlement, the prevailing party is determined by the offer that is closer to the verdict reached, a verdict that is inclusive of counterclaims. The court ordered a judgment of $346,693 in favor of the Defendants' counterclaims and dismissed the Plaintiff's mechanic's lien. The parties exchanged offers pursuant to the statute, with Plaintiff offering to accept the sum of $75,000.00 in exchange for

settlement and the Defendants offering to accept $150,000.00 in exchange for settlement. Therefore, the Defendants' offer was closer to the verdict of $346,693, rendering the Defendants the prevailing party under § 29-5-10(b).

III. Award Request

The Defendants' claim for attorney's fees and costs is supported by the Affidavit of Robert T. Lyles, Esq., attached hereto as Exhibit "A" and being filed contemporaneously herewith. The Defendants respectfully request that an award of $158,169.29 for attorney's fees and costs be added to the verdict of $346,693 and a total judgment of $505,132.29 be entered against the Plaintiff in favor of the Defendants. The claim for all fees is based upon *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1992), which contemplates a situation in which nonstatutory causes of action are joined with the statutory cause of action that entitles the prevailing party to the award of attorney's fees and where the nonstatutory causes of action are related and intertwined with the statutory claim. *Taylor* holds the following:

> [W]hen an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding. This approach requires the party asserting the right to attorney fees to produce an itemized affidavit of their fees that they believe are related to the statutory claim. The opposing party then has the burden of showing which of the fees are clearly unrelated.

Id. (citation omitted). See also, *Austin v. Stokes Craven Holding Corp.*, 387 S.C. 22, 57, 691 S.E.2d 135, 153 (2010) (applying *Taylor* and holding, "Under the specific facts of this case, we find it would be difficult to dissect Austin's counsel's fee affidavit to ascertain how much time was spent on this particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud.")

Whereas *Taylor* holds that an attorney need not discount his fees incurred in a related and intertwined nonstatutory claim presented as an alternative theory of recovery based on the same transaction, the instant case presents a procedural history even more compelling. Here, in addition to defending against the mechanic's lien by claiming that Plaintiff was not licensed, the Defendants also defended against the mechanic's lien claim by counterclaiming with nonstatutory causes of action, alleging incomplete and defectively performed work. But for having to defend against the mechanic's lien, the Defendants would not have made claims against the Plaintiff. The counterclaims are therefore related to and intertwined with the mechanic's lien and are certainly based upon the same facts and circumstances giving rise to the lien and the defense of that claim.

While the Court dismissed the mechanic's lien on the licensing issue, the Defendants also prevailed on their counterclaims, and in an amount that exceeded the lien amount, thereby defeating the mechanic's lien even if the Court had found that Plaintiff was properly licensed. Therefore, the Defendants' recovery of a monetary judgment on the counterclaims is based on the same transaction that caused the Defendants to defend against the mechanic's lien. Accordingly, all of the claimed fees should be awarded.

Respectfully submitted,

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ATTORNEY FOR DEFENDANTS

Charleston, South Carolina
May 25, 2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO: 2014-CP-10-3881

BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

Plaintiff,

vs.

ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER

Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

vs.

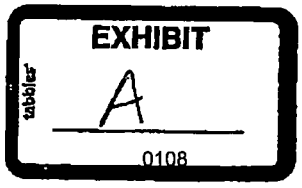
JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION CO., LLC,

Third-Party Defendants.

AFFIDAVIT OF ROBERT T. LYLES

PERSONALLY APPEARED before me, Robert T. Lyles, Jr., who being duly sworn deposes and says:

1. I am over the age of eighteen (18) and the assertions made in this Affidavit are true and are based upon my personal knowledge.
2. I am an attorney practicing law in the firm of Lyles & Associates, LLC, of which I am a principal.
3. I have practiced law in South Carolina for thirty-one (31) years and am licensed in all South Carolina Courts (State and Federal), the Fourth Circuit Court of Appeals, the Fifth Circuit



Court of Appeals, and am a member of the South Carolina Bar and the Bar of the United States Supreme Court.

4. Lyles & Associates represents the above-named Defendants/Third-Party Plaintiffs.
5. The Defendants/Third-Party Plaintiffs entered into a fee agreement with Lyles & Associates, LLC. Under the terms of this agreement, the Defendants are charged an hourly rate. The partner rate is $300. The associate rate is $150. The paralegal rate is $90. The firm keeps itemized billing records for every case.
6. This Affidavit is submitted in support of Defendants/Third-Party Plaintiffs' Motion for Attorney's Fees and Costs.
7. Under the South Carolina Mechanic's Lien Statute, the prevailing party is entitled to the recovery of costs, including reasonable attorney's fees, associated with defending against the lien. The Defendants/Third-Party Plaintiffs' Motion for Attorney's Fees and Costs explains the legal basis for the Defendants' request for an award of attorney's fees and costs.
8. Defendants/Third-Party Plaintiffs have incurred legal fees and costs in this action to date (fees of $145,380.50 and expenses of $11,588.79) in the total amount of $156,969.29. Attached hereto as Exhibit "A" are copies of the billing records for this case.
9. The legal fees and costs incurred in this action relate to Defendants' defense against the Plaintiff's mechanic's lien, which included both a defense based on the fact that Plaintiff was not licensed as well as a defense based on the fact that Plaintiff was not entitled to any additional sums. That second defense was proven by demonstrating that the cost of correcting Plaintiff's defective and incomplete work exceeded the amount of the lien claimed by the Plaintiff. All work in the case was related to Plaintiff's mechanic's lien

claim and to the defense of that claim, which were inextricably joined together and arose out of the same facts and circumstances.

10. I am also estimating that one partner will spend an additional three hours and one associate will spend an additional two hours preparing this Motion and Affidavit and preparing and responding to post-trial motions. The additional fees for legal services are estimated to be $1,200.00.

11. Accordingly, the total award sought for attorney's fees and costs is $158,169.29, to be added to the judgment amount of $346,963.00, for a total judgment in favor of Defendants/Third-Party Plaintiffs against the Plaintiff in the amount of $505,132.29.

FURTHER AFFIANT SAITH NOT.

Robert T. Lyles, Jr. (SC Bar No. 10299)

SWORN to before me this 25th day of May, 2018.

Cynthia R. Worsham
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 2/6/24

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

CHARLESTON COUNTY CASE NO.: 2014-CP-10-3881

Brown Contractors, LLC ..... Appellant,

v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer
..... Respondents.

NOTICE OF APPEAL

Brown Contractors, LLC, by and through its undersigned attorneys, hereby appeals: (i) the *Order* of the Hon. Henry W. Brown, Special Referee, dated June 21, 2016, and attached as Exhibit A; as well as (ii) the *Order Denying Rule 59 Motions to Alter or Amend*, of the Hon. Henry W. Brown, Special Referee, dated February 22, 2019 (served February 25, 2019) attached as Exhibit B; and (iii) the *Order Awarding Attorney's Fees* of the Hon. Henry W. Brown, Special Referee, dated February 22, 2019 (served February 25, 2019) attached as Exhibit C.

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P.O. Box 1127
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(843) 737-7300
Attorneys for Appellant

March 25, 2019
at Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Charleston County Master in Equity

FILED
MAR 25 2019
JULIE J. ARMSTRONG
CLERK, C.P. & G.S.

CHARLESTON COUNTY CASE NO.: 2014-CP-10-3881

Brown Contractors, LLC ..... Appellant,

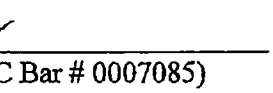
v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer
..... Respondents

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's ***Notice of Appeal*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following:

Robert T. Lyles, Jr., Esquire
Lyles & Associates, LLC
342 East Bay Street
Charleston, South Carolina 29401



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(843) 737-7300
Attorneys for Appellant

March 25, 2019
at Mt. Pleasant, South Carolina

1 MR. LYLES: I do not remember that. But we
2 have put into evidence the communication that I had
3 with Mr. Varnado about the conditions at the house,
4 and, of course, he has never moved to dismiss the case
5 on the basis of lack of a notice to cure that I can
6 recall; and if he did, I apologize. It was never
7 disposed of by the Court.
8 THE COURT: No.
9 MR. LYLES: And, of course, a remedy for a
10 failure to file a notice of right to cure is a stay in
11 the case. And it is irrefutable in this case that Mr.
12 Brown has been notified of these conditions, and at no
13 point in time has anybody ever appeared to so much as
14 look at a problem.
15 THE COURT: Okay. All right. I don't want to
16 confuse it right now, but we'll -- when that comes up,
17 I'll see if I have noted anything. If we don't have
18 anything else to cover preliminarily, Rob, I'll turn it
19 over to you to start your case.
20 MR. VARNADO: Can we take a small break?
21 THE COURT: Sure.
22 (Whereas, a brief recess was taken.)
23 THE COURT: All right, we're back on the
24 record in the Jay Brown, I think, 3881, and we'll
25 proceed.

1 MR. VARNADO: Thank you. Mr. Brown, as you
2 know, we are at the trial of the case, and I've
3 introduced myself to everyone. We have the court
4 reporter sitting here, and Mr. Brown is going to be the
5 judge, so please direct your answers to him; all right?
6 So, Mr. Brown, tell me a little bit about yourself.
7 Where are you from? Where did you grow up?
8 THE COURT: I'm sorry, would it be easier for
9 you if the witness sat across from you? Because I know
10 you can't --
11 COURT REPORTER: That would be great.
12 THE COURT: Robert, can we rearrange so the
13 witness can sit across from the court reporter?
14 MR. VARNADO: Sure.
15 (Mr. Jay Brown, having been duly sworn,
16 testified as follows:)
17 DIRECT EXAMINATION
18 BY MR. VARNADO:
19 Q Now that you're sworn, Mr. Brown, tell me
20 about yourself. Where did you grow up and where did
21 you go to school?
22 A I grew up outside of Charlotte, North
23 Carolina, in Gastonia. And after growing up there, I
24 went to North Carolina State University. And after
25 that, I lived in Charlotte, North Carolina, for about

1 15 years before.
2 Q Did you graduate from NC State?
3 A No, I didn't graduate from NC State.
4 Q What did you study there?
5 A Business economics.
6 Q Okay. And when did you leave NC State, what
7 year, roughly?
8 A 1993, I believe.
9 Q Okay. And what did you do after 1993?
10 A During school, I had a screen printing
11 business that I ran all through college, and then I
12 continued that for six years afterwards.
13 Q How did you get into construction?
14 A My grandfather has been a contractor,
15 homebuilder. My father was. I've been sweeping houses
16 since I was 13 years old, so I grew up in the whole
17 process. I've dug ditches. I've been through the muck
18 of it. I've kind of graduated through the whole
19 construction process hands-on, running material trim
20 crews for, when I moved to Charleston, South Carolina,
21 for, not my competition, but other contractors building
22 on the islands, mainly the -- probably the 1.2 million
23 dollar houses on up, doing trim work for them. And
24 then where I'm at now is basically building these homes
25 for clients, and then also speculative homes, also.

1 Q Okay. When did you move to Charleston,
2 roughly?
3 A About 15 years ago.
4 Q And then you said that you worked as a crew --
5 A A subcontractor, yeah.
6 Q Subcontractor?
7 A Yeah.
8 Q Who did you work for?
9 A Myself, Brown Contractors.
10 Q What contractors did you work for as Brown
11 Contractors?
12 A I did -- a lot of them aren't around anymore,
13 but the ones that are around, Daly & Sawyer, Justin
14 Whitney, Jay Snile (ph). Mainly in I'On and on the
15 beaches.
16 Q Okay. And then tell me how you then came to
17 run your own company.
18 A We --
19 Q I mean your own contracting --
20 A Well, Brown Contractors has been around since
21 2009, and I have been licensed with the state since
22 2009, carrying all the necessary bonds, licenses,
23 equivalent. I've got that right here if you need to
24 see it, as well as --
25 Q What are your licenses with the state?

1 A It's a South Carolina residential builder --
2 it's a specialty contractor.
3 Q Okay. So why don't you explain a little bit
4 about the licenses that you've personally held and the
5 licenses which Brown Contractors has held?
6 A I've held a specialty contractor's license,
7 which means we can do work up to $5,000, or if we get
8 special qualification, we can do work higher than that,
9 but we've never exercised that right. And then Brown
10 Contractors, we had a COA, a qualifier, went through
11 the correct procedures every time, making sure with the
12 state we are fully covered.
13 Q Okay. So Brown -- you said you started Brown
14 Contractors in 2009; is that correct?
15 A Correct.
16 Q Okay. And then at some point, there was --
17 Andy Meihaus came in, and you were going to do
18 Brown-Meihaus; is that correct?
19 A Yeah. Andy Meihaus was an employee of mine.
20 He was working with Bennett Hofford during the
21 recession. He lost his job. I picked him up. We
22 started Brown-Meihaus as a construction company, too,
23 running adjacent to Brown Contractors. We kind of
24 picked and choosed (sic) our own jobs separately.
25 Yeah.

1 Q So does that take us to roughly about
2 2011/2012 when you first met Miss Salzhauer McMarlin
3 and Hank Salzhauer?
4 A Yeah, I believe it was 2012.
5 Q Okay. So tell us about how you met them, what
6 was the nature of the meeting, that sort of thing?
7 A A realtor buddy of mine on the island
8 introduced us. He sold them the house and -- pre-sold
9 the house. Before they bought it, they wanted me to
10 look over it, check all the deficiencies through the
11 home inspection report at the time.
12 Q And that's 1850 Flag Street?
13 A 1850 Flag Street.
14 Q On Sullivan's Island?
15 A Correct.
16 Q And you had experience building on Sullivan's
17 Island before; correct?
18 A Oh, yes.
19 Q Renovation and new construction?
20 A Both.
21 Q And on the Isle of Palms?
22 A Yes, both.
23 Q And then in Mt. Pleasant?
24 A Mt. Pleasant, also, and Kiawah.
25 Q Okay. So tell us, go back and tell us how you

1 first met them, Miss Salzhauer McMarlin and Mr.
2 Salzhauer.
3 A Met them. We went and looked at the house
4 with the realtor, and then they informed me that an
5 architect that I worked for, Beau Clowney, they had
6 renovation plans being drawn up and finished for this
7 house.
8 Q Okay. And what was the nature of the
9 renovation?
10 A The initial construction set was full
11 renovation, the whole, from the renovation of the
12 existing house, replacing everything, and to the side
13 houses and decks, everything. So we bid that out,
14 along with another bid from Daly & Sawyer. They came
15 in at around the same price I was. I think it was 1.2
16 or 1.4 or something like that. Amy informed me it was
17 too expensive so we needed to cut back. She said she
18 wanted to be around 550,000. I informed her it was
19 going to be tough, but we could do some things and
20 stage it out where we can continue on to the rest of
21 the house at a later date, if need be.
22 Q Was Mr. Salzhauer present at these meetings?
23 A No. I met him later. I think it was a couple
24 of months later.
25 Q Okay. So Miss Salzhauer McMarlin -- I'm going

1 to call you Amy, too. I hope that is okay with
2 you-all.
3 THE COURT: Whatever suits her.
4 BY MR. VARNADO:
5 Q And the house is 1850 Flag, we're all on that?
6 A Correct.
7 Q Beau Clowney had done a complete renovation
8 set of drawings; correct?
9 A Right.
10 Q And Miss McMarlin wanted to do less than the
11 complete renovation; is that correct?
12 A Right. We were pricing it out.
13 Q Okay.
14 A So, and how this normally goes down is the --
15 I wish the architects would work with the builders
16 sooner, because that way you could identify a budget
17 and not go over that. We run into this a lot. But Amy
18 and I specifically narrowed it down to specific things
19 that she wanted to do on the house that was in the
20 estimate provided.
21 Q Like what, for example? What are some of the
22 things that Miss McMarlin wanted to do that were less
23 than a full or complete renovation?
24 A Well, we left off the right side porch. We
25 originally weren't going to renovate the wing of the

1 house. We weren't going to renovate the center deck in
2 the pool area. There was not going to be a jacuzzi
3 there. There was -- we were going to leave -- we were
4 going to leave the -- she wanted to leave the existing
5 roof, which was on the main body of the house. She
6 wanted to -- she was really diehard about doing the
7 entryway, which is two full decks on the left side of
8 the house.
9 And then, of course, as we're tearing into the
10 house, she wanted a master bedroom into -- the only
11 thing on the inside of the house, she left the main air
12 conditioning system, which is hard pipe, a commercial
13 unit that was -- there were several renovations done on
14 this house before me. There was a hard pipe, 12-inch,
15 that was exposed duct. It sweats a lot. It's -- her
16 and Beau wanted to leave it. They thought it was a
17 pretty good architectural feature. So, we decided to
18 leave that.
19 Master bedroom stayed the same. She had to
20 store her existing kitchen in two containers outside
21 the house for the total period of the project, which we
22 were going to try to reuse those, put them back into
23 the house and save money. Inadvertently, all of that
24 went out the door when all the changes came, and I
25 don't know what happened to the cabinets. But then

1 again, the driveway, complete. Yard, I had a really
2 nice landscaper come up and finish it off. Closed-cell
3 foam throughout the house. New systems.
4 What else? Rinnai water heaters, we updated
5 those, too, instead of keeping the existing. The
6 work-out room, which was going to remain the same, we
7 completely gutted that, new floor, made it a gym for
8 Andy. And then the right, her, not housekeeper, her
9 nanny was going to stay on the right side of the house,
10 so we shifted to remodel that, too.
11 All new windows and doors, impact -- kind of
12 recommended her, on Sullivan's and the beaches, because
13 of the saltwater and the elements, you really have to
14 know how to build out there to prepare, as far as we
15 have to encapsulate these houses with all stainless
16 steel on the exterior, we utilize Ipe decks, coverings,
17 stainless grill, stuff like that, just because if you
18 don't do it, it's just going to really wear and tear on
19 the house.
20 Q So this wasn't your first house on the island?
21 A No. This was the 30th house on the island.
22 Q Okay. Why don't we go to the white notebook,
23 if you can use that.
24 THE COURT: Do we have a second set I can look
25 at while he testifies, another?

1 MR. VARNADO: I brought four sets. I think
2 it's actually right there (indicating).
3 THE COURT: I got one right here. Okay.
4 BY MR. VARNADO:
5 Q So Brown-Meihaus may have prepared a contract,
6 but ultimately the work was done by Brown Contractors,
7 LLC?
8 A No. Brown-Meihaus was just -- the initial
9 budget that I prepared for it was the cost control
10 estimate, it may have had Brown-Meihaus on the top of
11 it. We use that as just a simple -- it's an Excel form
12 that we price these things out as.
13 Q Okay. And you and Andy Meihaus, what were you
14 doing at that time, were you breaking apart or --
15 A Yeah. Andy wanted to go downtown and to
16 Kiawah, do more commercial work down here, restaurants,
17 and that's just not my forte. I like new construction
18 to be -- I live on the island, office on the island, I
19 just wanted to stay there. And Kiawah, he shifted more
20 towards Kiawah; too far of a drive for me, so that's
21 why we kind of parted ways.
22 Q How did you find Vuong Nguyen?
23 A Vuong was a subcontractor that was introduced
24 to me. I can't remember initially who did that, but I
25 met him. I really liked his personality, driven, nice

1 guy.
2 Q Okay. And so then you applied for a
3 Certificate of Authorization from the LLR; is that
4 correct?
5 A Yeah, we did. So, applied for, the correct
6 procedures going through, the LLR application. Gave
7 them our bond.
8 Q So go ahead and pull the first exhibit in the
9 white notebook. It's Exhibit No. 1.
10 A (Witness complied with request of counsel.)
11 Q Okay. And as you see that exhibit, does it
12 contain a combination of your handwriting and Vuong
13 Nguyen's handwriting?
14 A Yes. Mine is up top. He is a Qualifying
15 Party. He is the Affidavit of Qualifying Party, and
16 then notarized in --
17 Q Was there any intent on your part to do this
18 house without getting a Certificate of Authorization?
19 A No, not at all.
20 Q Okay. What is the date on this? And I would
21 have you look at page -- the last page, Salzhauer 5420
22 of the form. Do you have it, Henry?
23 THE COURT: 18 and 20.
24 BY MR. VARNADO:
25 Q 20, what date is on that?

1 A June 6, 2012.
2 Q Okay. And walk me through what's on this
3 form. So the first one is the --
4 A It's just, it's a qualifying party form, and
5 that's my company at the top. Vuong is the qualifying
6 party. State of Incorporation, we had to supply the
7 LLR with our Secretary of State documents, that's the
8 April 14th, 2009. And background information, they ask
9 you if you've ever had disciplinary action. Mine are
10 all nos. Let's see, have you ever had any judgment,
11 lien, anything. No. That's 4. And then No. 5 is the
12 Affidavit of Qualifying Party, what Vuong signed and
13 had notarized. And then No. 5, I guess there's two
14 fives. Five, affidavit of, that's me, and then
15 notaries beneath that. Next page, Section 8, I'm a
16 legal citizen of the United States and I have a
17 driver's license.
18 And then 5420, state whether the documents
19 were verifiable for South Carolina, and then Section C,
20 basically a sworn statement required by law because
21 I've applied to hold a professional commercial license
22 by the state, and it provides proof that I am lawfully
23 present in the United States. And false statements, I
24 signed it with my license underneath it, and then my
25 license number underneath that.

1 Q Okay. So it was not your intent to go against
2 the state regulations on being a contractor and doing
3 this job under Brown Contractors, LLC; correct?
4 A Pull the permit?
5 Q Yeah.
6 A No.
7 Q Really, just right now what my question is,
8 just based on getting the license for it.
9 A Right. And when we went to permitting for --
10 Q Yeah, I'll come to that in a second.
11 A Sorry.
12 Q So did you call anyone at LLR about this
13 Certificate of Authorization form?
14 A Yes. We called --
15 MR. LYLES: Objection, Your Honor, to the
16 extent he is wanting to get in testimony about a
17 conversation he had with somebody at the LLR.
18 THE COURT: He can certainly say that he had
19 conversations. He can't testify to the -- as the truth
20 of the matter, this is what they said. Just ask it
21 different. If he had conversations, he certainly could
22 say yes.
23 BY MR. VARNADO:
24 Q Did you have conversations with the LLR?
25 A Yes.

1 Q What was your understanding based on those
2 conversations?
3 A My -- it's okay?
4 THE COURT: Yes, sir.
5 A (Continuing) What they told us is as long as
6 there's a qualifying party that can pull the permit and
7 he's on the job, that he can pull the permit. This
8 happened in the Sullivan's Island office with Kat there
9 present. It was on her phone.
10 Q Is that in Exhibit No. 3, the permits?
11 A Yeah. This was the -- this was the initial,
12 when we were demoing the house to see what defects were
13 going on.
14 Q And its date of issue is what? I'm sorry.
15 A 8/28/12.
16 Q Okay. And there was a second permit, 7/25/12;
17 is that correct?
18 A Yeah, correct.
19 Q So Mr. Nguyen was -- obviously, that's Mr.
20 Nguyen's signature back on Exhibit 1 in the Qualifying
21 Information; right?
22 A Correct.
23 Q Okay. And Mr. Nguyen was with you for the
24 Town of Sullivan's Island permit; correct?
25 A Correct.

1 Q Okay. And used his license; correct?
2 A Correct.
3 Q For Brown Contractors; correct?
4 A Correct.
5 Q And your testimony was you were on the phone
6 with the LLR at the time?
7 A Yes.
8 Q And who else was present on that conversation
9 with the LLR?
10 A It was Vuong, myself, and then Kat Kenyon,
11 she's the permitting official.
12 Q Kat Kenyon?
13 A Kat, K-A-T.
14 Q Now, back to the Exhibit 1, if you don't mind.
15 As you're going through it, you got a letter from the
16 LLR, it's Salzhauer 5424, 5424, dated June 12 of 2012.
17 A Yup.
18 Q Saying no bond was submitted; right?
19 A Correct. I think the -- I'm trying to
20 remember correctly, but my insurance guy was sending
21 them the bond.
22 Q Who was your insurance fellow?
23 A That was Rob Dufour.
24 Q Okay. And then you got -- the next letter you
25 got was January the 8th of 2013?

1 A Yup.
2 Q Okay. And it said the bond is not signed?
3 A So he forwarded them the bond, and I didn't
4 see it, but it didn't get signed and that's why they
5 kicked it back.
6 Q Then there was another, at the bottom of that
7 January 8th, 2013, letter, "The bond must be listed in
8 the name of company"?
9 A Yes. So because the LLC, Brown Contractors,
10 and they wanted me to take my name off of it.
11 Q Okay. And then there was a third letter,
12 that's Salzhauer 5428, dated January 16, 2013. It
13 said, "Please submit a rider to change the name on the
14 bond"; right?
15 A Uh-huh.
16 Q Is that correct?
17 A Correct.
18 Q Was all of that information done to the LLR?
19 A Yes.
20 Q Okay. And did you get, Exhibit 2, did you get
21 a Certificate of Authorization from the LLR?
22 A Yes, January 28th.
23 Q And as you look through Exhibit 2, do you see
24 there's two more Certificate of Authorizations. Do
25 those extend you --

1 A Through 2015 and 6/30/2015.
2 Q Okay. Now, I know it's a legal question about
3 Vuong Nguyen, but sitting here today, did you know of
4 any reason why this Certificate of Authorization form
5 wasn't completed -- well, let me strike that. Do you
6 know any reason why the Certificate of Authorization
7 form was incorrect at the time you signed it?
8 A No.
9 Q At the time Vuong signed it?
10 A And it's still not incorrect.
11 Q Okay. And has any -- has any claim been made
12 against your Certificate of Authorization license?
13 A Any claim against my license?
14 Q Yeah.
15 A Never.
16 Q Has any claim been made by the McMarlins
17 against this license?
18 A I don't know.
19 Q Have you been alerted to any claim?
20 A No, nothing. I think I would have gotten a
21 letter from the LLR.
22 Q Yeah. And so the -- so eventually this
23 company, Brown Contractors, ceased doing business; is
24 that fair?
25 A Yes.

1 Q Okay. Tell us about that.
2 A Cameron Glaws was my superintendent, actually
3 on their job, which finished it out. We started
4 getting really busy. He's a younger guy, 28. He's got
5 his GC license and he does a lot of historic stuff, and
6 we just clicked. And literally, running a company this
7 size, you have to have -- you can't do it all by
8 yourself. You have to have someone in the field,
9 somebody running your office, dealing with clients. So
10 Cameron and I, after dating for two years, we partnered
11 up. I brought him on as a partner.
12 Q And what's the name of the firm?
13 A Brown-Glaws.
14 Q It's an LLC?
15 A Yup.
16 Q It's a different LLC than Brown Contractors;
17 correct?
18 A Yes.
19 THE COURT: Is that G-L-A-W-S?
20 A (Continuing) Yes, sir.
21 Q So when was the last house that Brown
22 Contractors worked on?
23 A I don't know. I would have to check.
24 Q Okay. Was the McMarlin residence one of the
25 last or --

1 A That's after -- yeah. After this, we decided
2 to go into partnership.
3 Q Okay.
4 A I think we had four of them going on at the
5 same time.
6 Q So let me draw your attention back to Exhibit
7 No. 1. Did you ever give this form to Amy Salzhauer
8 McMarlin?
9 A This form?
10 Q Yeah.
11 A No, no.
12 Q Did you ever talk to Amy McMarlin about this
13 form?
14 A No, I don't believe so.
15 Q Did you ever have a conversation with Miss
16 McMarlin about you being a contractor?
17 A No.
18 Q Was -- are you a contractor?
19 A Yes.
20 Q Okay. And does Brown Contractors have a valid
21 Certificate of Authorization?
22 A They do.
23 Q Okay. And the question becomes whether or not
24 LLR sat on it for a while, but was there any reason why
25 or just --

1 A Just with anything, with this type of
2 municipality, it takes a long time. That's why I made
3 the phone call to make sure what we were doing was
4 correct.
5 Q Okay. And you called LLR; correct?
6 A God as my witness.
7 Q And what did -- who did you talk to?
8 A I believe we found out later Bonny Sweat.
9 Q Okay. And what was your understanding of what
10 Miss Sweat told you about the contract -- I mean about
11 the --
12 MR. LYLES: Objection.
13 BY MR. VARNADO:
14 Q What was your understanding about --
15 THE COURT: Just ask him what was his
16 understanding as a result of his conversation.
17 BY MR. VARNADO:
18 Q Yeah. What was your understanding as a result
19 of the conversation?
20 A If I have a licensed contractor/project
21 manager on the job, they can pull the permit.
22 Q Was Mr. Nguyen on the job the whole time?
23 A Half the time. Well, half the time, and Amy
24 didn't want him on the job after four or five months
25 and kicked him off. That's when I pulled Cameron in

1 from another one and put him on it.
2 Q Okay. So when were you working on the -- when
3 were you -- when was Brown Contractors working on the
4 McMarlin residence?
5 A Let's see. Permit was issued on 8/28/12. We
6 went through every one of our permits, our -- passed
7 every one, and then we got our Certificate of Occupancy
8 from the Town of Sullivan's Island on September the
9 13th, 2013. And then after that, we were punching it
10 out until January the -- last sub on the job was
11 January the 9th, 2014.
12 Q Okay, so let's go back to Mr. Nguyen. You've
13 heard the Defendant's counsel, Mr. Lyles, say he's not
14 an employee or not an owner of the company. What is
15 your understanding of Mr. Nguyen, and how did you set
16 it up with Mr. Nguyen?
17 A Just as I described earlier. He was handling
18 everything in the field and I was handling everything,
19 design, clients, office, insurances. It was just a
20 two-part business. He was handling all of that for me.
21 Q Okay.
22 A Her job, and then the other four.
23 Q Did you have the right to fire Mr. Nguyen?
24 A Absolutely.
25 Q Did you furnish him equipment to do his job?

1 A Yes.
2 Q Did you instruct Mr. Nguyen on what to do?
3 A Yeah, every morning we met. I wouldn't say
4 every morning, but several times during the week.
5 Q So was Mr. Nguyen, though, did he have
6 oversight of the job, though? What was Mr. Nguyen's
7 role on this job?
8 A He was a project manager for the job while he
9 was there.
10 Q So while you controlled him, he still had the
11 ability to tell you if there was anything wrong and
12 things like that; correct?
13 A Oh, yes.
14 Q How was Mr. Nguyen paid, though?
15 A Through our office.
16 Q Okay. And how was -- was he a W-2 employee or
17 a 1099?
18 A He was 1099.
19 Q That's how the IRS describes him; correct?
20 A The IRS.
21 Q Okay. But in terms of the way it actually
22 worked, you had the right to control him and he was
23 your employee; correct?
24 A 100 percent, yes.
25 Q Okay. Ultimately, you had to file a

1 mechanic's lien on this case; is that correct?
2 A Yes.
3 Q And that's Exhibit No. 5; is that correct?
4 A Yes.
5 Q And how much was the mechanic's lien for?
6 A $206,428.59.
7 Q And how did it come to that much money was
8 owed to -- by the McMarlins to Brown Contractors?
9 A Well, it was a buildup. Hank was -- we run a
10 set of QuickBooks contractors so that Hank -- all of
11 our clients get -- every Friday, they get an update.
12 We have a budget, and then we have an actual, and
13 that's emailed to Hank, Amy, whoever wants to be
14 emailed to.
15 Q Okay. First of all, what was your
16 understanding of Amy's role, and what was your
17 understanding of Hank's role?
18 A Amy was the decision-maker; Hank was paying
19 the bills.
20 Q Okay. So you communicated with both of them;
21 is that correct?
22 A Yes.
23 Q Okay. So what would be Brown Contractors
24 normal way of doing it? I think you mentioned earlier
25 that you would send the, whoever the decision-makers

1 were, a weekly what, what did you call it?
2 A It was a weekly update. We had our --
3 normally, if we have a -- we agree on a budget, and
4 then we make all of our subcontractors sign a -- it's
5 basically an acceptance of their bid. Because of this,
6 the changes, this thing multiplied times three.
7 Q How? How did it multiply?
8 A Decisions. This thing had three interior
9 designers on it. It was just, at times, chaos. We
10 didn't use the original kitchen cabinets, anything.
11 With the designers, they would just come up with new
12 ideas, which was just an ongoing process, the whole
13 project.
14 Q Okay. We'll come back to that in a little
15 bit, but so every week you would send budget
16 information and cost information to the Salzhauer
17 McMarlins; correct.
18 A I don't know if it was every week. Deborah in
19 my office, she would send it out, billing, and whatever
20 Hank needed. Hank was running a separate set of books
21 for this, as well.
22 Q Okay. And what did you understand about
23 Hank's running the books? What was he doing in New
24 York at the time?
25 A He was taking ours and having his accountant

1 put it into a requisition, I believe, and then getting
2 back and forth with my girl, Deborah, making sure that
3 was correct. And then that was our application for
4 payment, and then he would -- I don't know if he wired
5 the check or sent it.
6 Q Was there any doubt in your mind about the
7 nature of the contract? What kind of contract was it?
8 A I mean, cost plus since day one. Cost plus 15
9 percent.
10 Q And how would you prove that it's a cost plus
11 contract?
12 A On every invoice we have, at the bottom it
13 says cost plus 15 percent. 15 percent was added to the
14 end of the bill, and then that's what our request was.
15 Q And how many times did you meet Mr. Salzhauer
16 personally?
17 A Probably 10 or 12. Actually, when we were in
18 New York, we went and saw him and had a nice, decent
19 lunch, before the chaos.
20 Q When did the chaos start?
21 A Oh, I mean, it was trying to get decisions out
22 of -- the window decision just took forever. The house
23 remained -- after we gutted it, we had to wrap it
24 several times. Just that's when it started.
25 Q So when was that, roughly, do you know?

1 A I'm not sure. Probably permit was issued on
2 the 8th. Probably towards November.
3 Q Okay. And then what happened in that with
4 respect to the windows and the gutting of the house?
5 So, the first thing you did was you gutted the house;
6 correct?
7 A We gutted the house, and then we pulled the
8 stucco off. We found that the stucco, once it was
9 pulled off, the whole band board around the house was
10 rotten with termites, so we had to replace that. We
11 had to replace all the exterior sheathing of the house.
12 We had to -- and by doing this, you now have to go back
13 and put new. So long story short, by the end of
14 everything that was done, it was the equivalent to the
15 original plans that we bidded on for Beau Clowney.
16 Q Okay. So that was one element that you pulled
17 and found rotted band board and had to replace it?
18 A There was termite damage. There were rats on
19 one side of the house in the insulation above the
20 rooms. There were holes, yeah.
21 Q Okay.
22 A Just deficiencies. It was an old house.
23 Q Okay. What other things magnified the cost of
24 the project?
25 A Adding to the finishes. The devil is in the

1 details on these houses. You can, you know, it's -- it
2 can be an 80,000 dollar kitchen with cabinets just like
3 that, then you've got to put your granite countertops
4 on it. The appliances, you can go from a GE to a Wolf,
5 and that can quadruple. Just everything went from
6 basic, we want to stick to this budget, to over the top
7 for the whole thing.
8 Q Who was making that decision?
9 A That was Amy telling us.
10 Q And what was Amy telling you to do with
11 respect to the kitchen? Just walk me through it.
12 A She was telling me and my subcontractors and
13 Vuong what to do, and we were all having meetings with
14 interior designers, architects. We were -- it was an
15 ongoing project.
16 Q Were certain things done once, twice, three
17 times?
18 A What do you mean?
19 Q Well, did you do certain things, like, and
20 then she would not like them?
21 A Oh, yeah. I mean, the floor, we stained the
22 floors, and I think after four weeks, we -- and
23 sandings and samples and -- four weeks on a project, if
24 you have 50 different things going on in this house,
25 that's how you get the time, another year on the

1 project just like that.
2 Q So the McMarlins, the Salzhauers want to say,
3 well, this was a house and we had a control document, a
4 budget; correct?
5 A That's what they are saying.
6 Q And they want to say that you were responsible
7 for delay after delay after delay?
8 A Not once.
9 Q Okay. And who is responsible for the delays
10 that were on the house?
11 A The majority were Amy. If it wasn't Andy, it
12 was Amy, or the interior designers, they had to ship a
13 piece of tile down. One of the interior designers was
14 from New York City, so there was always this time delay
15 with that. Then she would have to come down three
16 weeks later, so that was another stall.
17 Q And were you communicating with Miss McMarlin?
18 A Everybody was in communication.
19 Q Did this contract, you didn't have a written
20 contract; correct? They never signed a --
21 A I originally brought a -- we met at a
22 restaurant down here. I had a signed written contract.
23 But then, she explained to me that she had come into
24 some more money. This was between -- before I knew the
25 financial situation, where the relatives were going to

1 help out, and then this was going to evolve into
2 something a lot more than what we were trying to
3 discount this job for.
4 Q Okay. What about Miss McMarlin, did she like
5 the subcontractors? Did she like Vuong Nguyen?
6 A It seemed like she liked everybody at first,
7 but then at the end, she always had a scapegoat. We
8 talked about this as a company. We would -- it would
9 always be somebody who -- we would joke about who is
10 the enemy of the week. So, and Vuong, she got tired of
11 him. So, okay, we'll get him off the job. Here's
12 Cameron. Oh, I love Cameron. You know, let's go on
13 with him, and then she didn't like him later on. This
14 happened with subcontractors, and, you know, just being
15 a pleaser, we were just trying to make her happy the
16 whole job.
17 Q Okay. And what was -- and so ultimately, as
18 you look through the exhibit book, the -- how was
19 Hank -- was he paying each of the invoices completely
20 when they were received, or what was going on with
21 that?
22 A He wasn't paying them completely. That's
23 where we ended up with a big lump at the end. He would
24 partially pay the invoices, and then that's how we
25 accumulated this 206,000 by the time we got to the end.

1 Q Is the numbers reflected in Exhibits 8, 9 and
2 10?
3 A Yeah.
4 Q I'm sorry, 7, 8 and 9?
5 A Yeah, 8 is our job profitability. You can see
6 where we identified the actual cost, the actual, and it
7 was a task in itself getting costs from the interior
8 designers on what was coming in that we didn't even
9 know about. There was tile coming in, like I said,
10 from New York City. We had no earthly idea what the
11 costs were for that, but they would submit an invoice
12 through our office, and we would bill Hank and then we
13 would pay it. But guys in the field are not going to
14 know -- we didn't know what half the numbers are.
15 Q And then ultimately, what is Exhibit 9?
16 A That's it. So Exhibit 9 is where you can see
17 they started off at our required deposit, and then our
18 billing/payment invoice, and then it kind of
19 accumulates to the 206, with the last one not getting
20 paid at all on 12/9/13. So it was up -- up until then
21 it was 155,704. So the whole -- out of all the
22 invoices, the running tally on not paid throughout the
23 whole project was $155,000, and then he didn't pay the
24 last one at all of 50,674, so that gets us to the 206.
25 Q Okay. You have -- you heard the counsel for

1 the Defendants' opening statement, and he talked about
2 the house being incomplete and/or faulty construction.
3 First of all, was the house incomplete?
4 A No. We got our final CO. We've got pictures.
5 We walked it with the architect. We walked it with the
6 interior designer. We walked it with Amy. And the
7 landscape was going on at the tail end of it. It was
8 finished.
9 Q Okay. Miss McMarlin testified -- or her
10 attorney talked about them living on air mattresses in
11 the house while it was ongoing. Can you talk about
12 that?
13 A Yeah. She -- we're not even done with the
14 project and moving in air mattresses to -- when we're
15 at a punch stage on a project, you're going to be
16 dealing with some inconveniences, and there was no --
17 she moved in. There was nothing we could do.
18 Q When did she move in, do you remember?
19 A I don't remember. It was -- I don't know. I
20 can't remember.
21 Q Okay. And then what about the -- and then
22 you've heard some of the things that they've testified
23 to or the attorney has said, and we will receive
24 testimony, I'm sure, concerning the roof. What was
25 your understanding of what Brown Contractors was

1 supposed to do on the roof?
2 A We didn't -- we painted the roof. Her and
3 Andy instructed us to paint the roof to match the new
4 roofs on the side house. And the nanny's quarters,
5 that had a new roof over there. The existing roof, we
6 recommended that be done, but they didn't want to spend
7 the money, so they just had the roofer coat it with
8 a -- I think it was like a sealoflex coating and color.
9 Q So you wanted to replace the roof, but you
10 weren't allowed to. How did that work?
11 A I believe, yeah.
12 Q Okay. And then what about the HVAC system,
13 how did that -- there was a -- you've heard their
14 attorney testify that the HVAC system didn't work, and
15 they had to replace the whole thing. What were you --
16 what was your responsibility on the HVAC?
17 A Well, Amy had me get an outside HVAC engineer,
18 Volkmar at the time, and I have his letter right here,
19 to come in and test the existing system with J load
20 calculations. They taped up things, and then look at
21 the unit upstairs. So he did that and noted that -- we
22 also put -- recommended doing dehumidification systems
23 in this house because those existing hard ducts sweat
24 so much that if you've got any little bit of humidity
25 in that house, it's going to sweat and drip on the

1 floor, which it was doing prior to when we even got in
2 there. So Thomas Volkmar came out. He did his report,
3 and that's what we went off of. I mean, we just -- we
4 followed his lead just because he's the -- he was the
5 engineer.
6 THE COURT: Is that in evidence?
7 MR. VARNADO: Yes, sir.
8 BY MR. VARNADO:
9 Q And that's Exhibit No. 10?
10 A Yeah, 10. The first one. 8/16/2013.
11 Q So did you -- were you supposed to put in new
12 HVAC units?
13 A I mean, we did on his recommendation after --
14 yeah, new. We -- I don't remember off the top of my
15 head if they were all replaced, but we had them checked
16 out through him, and then put dehumidifiers on them.
17 Q Okay. What about this business about nails in
18 the -- through the wires, what have you heard about
19 that?
20 A I mean, it's base -- no idea. I mean, when
21 you shoot trim through a wall, whoever is doing the
22 report saying the nail is too long, I mean, you've got
23 a trim nail gun that can shoot a two-inch nail, that
24 can shoot a half-inch to a two-inch nail. So when my
25 guys are nailing up trim, they're using all the same

1 length of nails, the trim carpenters.
2 Q Did you ever get a notice of right to cure
3 letter?
4 A No.
5 Q Did you ever have a certified letter sent to
6 you stating the -- what needed to be done?
7 A I never received a letter.
8 Q Did you get a statement that the Plaintiff
9 asserts a construction defect?
10 A I got an email from Hank stating that he was
11 going to send over something that was attached and
12 never was.
13 Q So what does Miss Salzhauer, Miss McMarlin
14 rather, I'm sorry, and Dr. McMarlin owe Brown
15 Contractors for this -- for the work that you did on
16 the house?
17 A We're just trying to get paid the final
18 balance.
19 Q Okay.
20 A Nothing more.
21 Q And you moved to foreclose a mechanic's lien.
22 You also brought that same claim for breach of
23 contract?
24 A What do you mean?
25 Q Yeah. You brought a breach of contract claim,

1 too?
2 A Okay, yeah.
3 Q All right. All right. Let me have a minute
4 and I'll see if I have anything more. Can we be at
5 ease?
6 THE COURT: Yup. We are off the record.
7 (Whereas, a short recess was taken.)
8 BY MR. VARNADO:
9 Q Mr. Brown, can I ask you to turn your
10 attention to Exhibit No. 8?
11 A (Witness complied with request of counsel.)
12 Q Okay. So you used QuickBooks on this
13 residence?
14 A Correct.
15 Q And the QuickBooks was sent to Mr. Hank
16 Salzhauer; correct?
17 A Yes.
18 Q Okay. And is Exhibit No. 8 one of the
19 QuickBooks forms or formats that is capable of being
20 used in this case?
21 A Yes.
22 Q So what exactly is Exhibit No. 8 again?
23 A This is our company's unpaid bills as of
24 August 11, 2014.
25 Q Okay. All right. Why don't you just go

1 through each one. I know it's a few pages, but Armando
2 Rico, do you remember him?
3 A He was a laborer.
4 Q Okay.
5 A But that -- this wasn't for on this job. See
6 where it says 2662, that's another job. Only the ones
7 with the asterisk 1850, that's this job.
8 Q Okay, good. Thank you for saying that. So
9 Barry Lingenfelter, what did Barry do for 1850 Flag?
10 A Electrician.
11 Q Okay. Bird Decorative Hardware?
12 A They were a plumbing supplier.
13 Q Okay.
14 A There's some pictures.
15 Q Cameron Glaws, before he became your partner,
16 what was he doing on this?
17 A Project manager.
18 Q Okay.
19 MR. LYLES: How many pages do you have, Rob?
20 MR. VARNADO: I just have four. It's Exhibit
21 8.
22 MR. LYLES: Yeah. I might be missing page 1.
23 MR. VARNADO: I'm sorry.
24 MR. LYLES: That's okay. I just want to make
25 sure Henry's got it. Do you got page 1?

1 THE COURT: Yeah. Rob, you're referring to
2 Cameron Glaws?
3 MR. VARNADO: Yes, sir.
4 THE COURT: Under that is Carolina Fiberglass?
5 MR. VARNADO: Yes, sir.
6 THE COURT: Are those two the same thing?
7 MR. VARNADO: I don't believe so.
8 A (Continuing) No.
9 THE COURT: Okay, I see. I got it.
10 MR. LYLES: Keep on going, but I need to get a
11 copy at some point.
12 MR. VARNADO: I'll get you one.
13 THE COURT: And 1850 was your job number that
14 you coded --
15 A (Continuing) Correct, for 1850 Flag.
16 THE COURT: Or 1855?
17 A (Continuing) 1850 Flag.
18 THE COURT: Okay.
19 A (Continuing) And I believe that's the invoice
20 number in front of the asterisk.
21 BY MR. VARNADO:
22 Q Okay. Carolina Fiberglass, what was --
23 A Fiberglass decks, and we waterproof underneath
24 all of our toilets and --
25 Q I should have asked you. For Mr.

1 Lingenfelter, Bird Decorative Hardware and Cameron
2 Glaws, did you end up paying -- did you personally pay
3 these?
4 A I think Hank paid towards the end. Hank was
5 paying guys towards the end, subcontractors.
6 Q Have you taken into account that Hank had paid
7 some of the subcontractors, into consideration in your
8 lien?
9 A For?
10 Q In your lien, the lien balance?
11 A I am not sure. No, I don't think. That's not
12 in the lien balance.
13 Q So, in other words, the lien balance shows
14 that Mr. Salzhauer may have paid some of the
15 subcontractors; correct?
16 A Correct.
17 Q And by the lien balances, what you -- you were
18 responsible for what's left over?
19 A Right. So if he pays the subcontractors
20 whatever amount, we deduct that from the 2006.
21 Q That's what I was asking. All right. Did you
22 pay Mr. Glaws?
23 A I believe Hank paid half, and then we
24 eventually paid the other half.
25 Q Okay. Coastal Plumbing & Gas, did you pay

1 Coastal Plumbing & Gas?
2 A I'm not sure on all of these. I would really
3 have to see the check ledger.
4 Q Okay. Four Corners, what was Four Corners?
5 A That was interior trimwork.
6 Q And of those unpaid bills details, four of
7 those are for 1850 Flag; is that correct, Four Corners?
8 A One, two, three, four, correct.
9 Q John E. Wade, Jr.?
10 A Surveyor. Probably the final as-built
11 surveyor.
12 Q Kolbe Gallery of Charleston, last invoice?
13 A Those are windows or screens probably.
14 Q Okay. Linked AV, LLC?
15 A Jeff Neidlinger.
16 Q M-L Woodworks, LLC?
17 A That was some sort of brackets or interior
18 trim.
19 Q M&S Mechanical?
20 A HVAC.
21 Q Moluf's?
22 A Plumbing supplies.
23 Q Nathaniel Gathers?
24 A I think he was a laborer.
25 Q Passion Masonry, at least three of those

1 charges in Exhibit 8 are for Passion for 1850. Do you
2 remember what Passion was for?
3 A That's brickwork. I can't remember what it
4 was for, though. Probably exterior brickwork.
5 Q Pelican Improvements?
6 A No idea.
7 Q Southern Lumber? That's on the third page of
8 Exhibit 8.
9 A Uh-huh. Probably towards the end of the job,
10 it was a, I don't know, punch-out, framing, siding fee.
11 Q Okay. Tile & Stone Design Studio?
12 A I've never even heard of them. This might
13 have been the tile coming out of New York.
14 Q Tomas Guajardo?
15 A A laborer.
16 Q Okay. Trash Gurl?
17 A Dumpsters and porta potties.
18 Q Vincente Guerrero Hernandez?
19 A Laborer, clean-up.
20 Q VLN?
21 A That's Vuong.
22 Q Okay. So you're going to hear -- I assume
23 that part of the cross-examination is going to be on
24 VLN and Vuong, so was -- what was Vuong's -- what were
25 Vuong's roles out at the job site?

1 A Vuong was a project manager/coordinator.
2 Q Okay. Did he also bill as a subcontractor?
3 A Yes.
4 Q And was that disclosed to Mr. Salzhauer?
5 A He was getting it on every bill, every
6 invoice.
7 Q Okay. After the Certificate of Occupancy was
8 issued, did you and your subcontractors have occasion
9 to come out to the house again?
10 A Yes.
11 Q Okay. And when was the last time you were at
12 the house?
13 A What was it, first of December, middle of
14 December. I can't remember off the top of my head.
15 Q Do you have anything that you are at the house
16 in 2014?
17 A Yeah. I met Laurie Ulmer, the landscape guy,
18 out there. And then my AV guy, I met him out there; he
19 had a couple of questions.
20 Q Is there any -- to your knowledge, is there
21 any reason that your lien is late?
22 A The lien is not late. I was on the job
23 instructing these guys what to do or coordinating.
24 Cameron was, too. On the job and by phone.
25 Q All right. I think that's all I have for you

1 right now.
2 MR. VARNADO: I might reserve to call Mr.
3 Brown for rebuttal.
4 THE COURT: Certainly.
5 MR. VARNADO: And other things. But at this
6 time, it's 11:34, so...
7 THE COURT: Robert?
8 MR. LYLES: Yeah.
9 THE COURT: You ready to cross?
10 MR. LYLES: Yeah.
11 CROSS-EXAMINATION
12 BY MR. LYLES:
13 Q Mr. Brown, you brought some QuickBooks data to
14 trial today. Have you done a QuickBooks analysis to
15 determine the total amount that you were billed by
16 subcontractors or sub-subs for this job?
17 A I mean, it's going to be in our QuickBooks.
18 Q Is that something you brought with you?
19 A Look at Exhibit 7.
20 Q Okay.
21 A Job estimates versus actuals dated 9/12/14.
22 Q Okay. Does it show, any of the documents you
23 brought, show the total amount that was actually billed
24 to you by the sub?
25 A Brown 0695, page 4, you can see the actual

1 cost, 1,227,000.
2 Q Is this on -- which exhibit?
3 A Hang on. Come this way a little bit more,
4 towards the back.
5 THE COURT: What's your Bates number?
6 A (Continuing) 0695. That's it. So there's
7 four pages to it, and then there is a final. That's
8 what we're talking about there.
9 Q Okay. So what you show is -- got it, Henry?
10 THE COURT: I got it.
11 BY MR. LYLES:
12 Q So with the page Bates labeled Brown 0695,
13 what you've got is the first column is the estimated
14 cost, and then you've got actual cost?
15 A Correct.
16 Q And the actual cost is what you believe to be
17 the total amount of money that was billed to you from
18 this project by your subs or suppliers?
19 A That was the subs and suppliers, and then our
20 overhead and profit is not in this number.
21 Q Correct, okay. So the total bill to you,
22 according to this document, for the subs and suppliers
23 for this job is $1,227,847.45; is that right?
24 A Yes, sir.
25 Q And you were paid the total amount of

1 $1,230,500 and -- excuse me, $1,230,570, does that
2 sound right to you?
3 A I'm not sure off the top of my head.
4 Q Okay. If that is an accurate number that I
5 just quoted, would you agree with me that the number
6 that you were paid was essentially right at the number
7 that you -- that the cost you incurred from the
8 subcontractors and suppliers on this job?
9 A Say that again.
10 Q Sure. The number that I'll represent to you
11 was paid to you was $1,230,570, which is a little less
12 than $3,000 more than the actual cost number incurred
13 by you on this job?
14 A Okay. That's what was paid to subcontractors
15 and suppliers.
16 Q That's right. And then you were paid by the
17 McMarlins and the Salzhauers 1,230,570?
18 A I don't have that number.
19 Q Okay. Okay.
20 A According to our QuickBooks, it's 1,227,847.
21 Q That's what you paid to your subs and
22 suppliers?
23 A Yeah.
24 Q What do your QuickBooks show you having
25 received, that has been paid by Amy or Hank?

1 A I'm not sure.
2 Q Okay.
3 A I've got actual cost and actual revenue and
4 difference.
5 Q Okay. So as you're testifying today, you
6 can't represent to Mr. Brown what you were paid by the
7 Salzhauers for this project?
8 A I would have to find it. I can get back to
9 you on that.
10 Q Okay. All right. We'll get into that later.
11 You mentioned a moment ago that you believe that
12 sometime in 2014 you met with Laurie Ulmer, the
13 landscaper?
14 A Uh-huh.
15 Q Do you have any record of that?
16 A No. Just a meeting in -- outside.
17 Q And was Laurie Ulmer a subcontractor to Brown?
18 A He is a subcontractor of me, yeah.
19 Q He was on that job?
20 A I can't remember if they paid him directly or
21 we paid him.
22 Q Did you charge for Laurie Ulmer's work?
23 A I don't know. I'll have to check. Wait a
24 minute, let me see. We can look at landscaping and I
25 can tell you.

1 THE COURT: Are we still on seven?
2 A (Continuing) Yes, sir. I don't see a
3 landscape budget on there. I don't know if they paid
4 him directly or not.
5 Q Is there any document that you can point to
6 that would establish that you met with Mr. Ulmer out
7 there in 2014?
8 A A document, no.
9 Q So it's your word?
10 A Correct.
11 Q And you also said that you met with Jeff at I
12 guess Linked AV?
13 A Uh-huh.
14 Q And that was in 2014, too?
15 A Correct.
16 Q What did you discuss with Jeff at that
17 meeting?
18 A Just finalizing. He was just -- we were
19 discussing cameras and just minor AV stuff. I think
20 there was some AV lighting on the porches.
21 Q Was this supposed to be new stuff that was
22 going in or --
23 A It was -- I can't remember.
24 Q Did it have something -- did it have something
25 to do with Amy's house?

1 A Yes.
2 Q What did it have to do with her house?
3 A I can't remember.
4 Q Do you have any document that would support
5 your assertion that you met with Jeff? And I only know
6 him as Jeff because he did my AV work at my house.
7 That you met with Jeff at the site in 2014?
8 A Yes.
9 Q Okay.
10 A Jeff sent me -- I spoke with him. He sent me
11 an email saying that, "Jay, attached is the last visit
12 based on the contract with you. I was paid by her dad
13 on 1/9/14 for the full amount remaining," and he also
14 states that, "I have since been back to troubleshoot a
15 Comcast issue and add a network repeater for her
16 assistant. This was about two weeks ago." So that was
17 first of March, '14.
18 Q Okay. And that's an email that was sent to
19 you by who, by Jeff at Linked AV?
20 A Correct.
21 Q Can you let me see that?
22 MR. LYLES: Do you know if it was produced?
23 MR. VARNADO: I don't know if it was produced
24 or not.
25 THE COURT: Is the document Robert is holding

1 in his hand, is that an exhibit in the record?
2 MR. VARNADO: It is not, but we can move it
3 in.
4 MR. LYLES: Let's move that into evidence.
5 MR. VARNADO: That would be No. 12? Or 13,
6 actually. I think you used No. 12 for my exhibit list.
7 THE COURT: Exhibit 13 has been offered and
8 will be accepted without objection. It is from Jay
9 Brown to Rob Varnado, and it's a forwarded message from
10 Jeff Neidlinger, March 26, 2014, and that will be
11 Plaintiff's Exhibit 13.
12 (4/26/14 EMAIL MARKED AS PLAINTIFF'S EXHIBIT
13 NO. 13 AND ADMITTED INTO EVIDENCE.)
14 BY MR. LYLES:
15 Q Thank you. Anything else that you did or may
16 have done out at that site in 2014 that you know of?
17 A I think the first of the year there was just a
18 couple of minor things, and answering phone questions,
19 too.
20 Q And Linked AV, according to that email, Linked
21 AV was actually paid for their work on this project by
22 Mr. Salzhauer?
23 A No, by us.
24 Q By you?
25 A Yeah.

1 Q Doesn't that email, and I don't have it in
2 front of me, does it say that he was paid by Henry
3 Salzhauer?
4 A It doesn't say, but our QuickBooks said, on
5 page 2, it says a Linked AV invoice, 1850 Flag Street,
6 on 10/15/13 was paid, $4,914.
7 Q Okay. Can you let me have that exhibit back
8 again, just the exhibit?
9 A (Witness complied with request of counsel.)
10 Q Yeah, let me look.
11 THE COURT: What was the Bates number of what
12 you just referred to? Is this Exhibit 8?
13 A (Continuing) Exhibit 8, page 2, halfway up,
14 Linked AV, where it says 1850 Flag.
15 THE COURT: All right.
16 BY MR. LYLES:
17 Q And then this letter says, and I quote, "I was
18 paid by her dad on 1/19/14 for the full amount
19 remaining." Do you see that?
20 A Sure.
21 Q And then he says he was back to troubleshoot a
22 Comcast issue and add a network repeater for her
23 assistant; this was two weeks ago. Do you know if he
24 billed for that trip?
25 A Normally these guys, if there's anything after

1 that, the clients will pay for it after we're done
2 within the contract.
3 Q So that would be an issue between -- or a
4 relationship between Linked AV and the Salzhauers?
5 A Absolutely, yeah.
6 Q Okay. Now, you indicated earlier in your
7 testimony that you have been, I think you said,
8 sweeping houses since you were 13?
9 A Yes, sir.
10 Q Was your dad a contractor?
11 A He was.
12 Q And you are -- how old are you?
13 A Forty-seven.
14 Q I'm 54, so you got me.
15 A Barely.
16 Q So from 13 to 47, that's what, 34 years?
17 A Give or take.
18 Q That you've been doing construction?
19 A On and off.
20 Q And you have done lots and lots of houses; is
21 that right?
22 A That's right.
23 Q And you have -- I think you testified that you
24 have been involved in all manner of construction in
25 terms of actually performing work?

1 A A lot of it.
2 Q Have you ever done anything else?
3 A I was an international sales rep for Natuzzi
4 Leather International for six years, which was a
5 design furniture sales job.
6 Q Were you also doing construction during that
7 job?
8 A We were remodeling show rooms for furniture
9 markets across the world.
10 Q So is it fair to say you've been pretty much
11 steady in the construction business since you were 13?
12 A It just pushes you back into it.
13 Q And you've never had a residential
14 homebuilder's license?
15 A Never.
16 Q Now, you indicated that you do have a
17 specialty contractor's license; right?
18 A Correct.
19 Q Which has some significant limitations on the
20 amount of work you can do?
21 A Yes.
22 Q Or the value of work you can do?
23 A Yes, sir.
24 Q Now, you have testified that you submitted an
25 application for a qualifier for Brown Contractors; is

1 that right?
2 A That's right.
3 Q And that was approximately in June of 2012?
4 We can go back and look at the exhibits.
5 A Double check. June 6th, 2012.
6 Q Had you met Mr. Salzhauer or Miss McMarlin at
7 that time, Amy? Is it okay if we call you Amy?
8 MS. SALZHAUER: Yes.
9 A (Continuing) I kind of got a timeline. Yes.
10 Q And what services had you performed for Amy at
11 the time you submitted your Certificate of
12 Authorization application?
13 A We were in the bidding -- I met her -- the
14 initial contact with Amy was March the 12th. We walked
15 the house with the structural defects on -- that was
16 submitted by Live Oak. That was on -- sorry, bear with
17 me. Structural evaluation was March 15th, and then we
18 also met with Beau Clowney on March the 15th, and then
19 I asked for a meeting on the 21st with Amy. March
20 24th, we received updated plans from Beau Clowney.
21 Then that's -- it looks like that's when we were
22 starting to go in with the bidding process in April,
23 and Amy was getting multiple bids towards the end of
24 April, us and a couple of others, let's see, through
25 April 22nd. And then June 6th, that's when I submitted

1 to the LLR.
2 Q Okay. So it's accurate to say that at the
3 time you submitted the application for the Certificate
4 of Authorization, you had invested a substantial amount
5 of time with Amy on her project?
6 A Correct.
7 Q And is it also accurate to say that you
8 submitted your Certificate of Authorization request to
9 enable you to do her work?
10 A Yes. All work.
11 Q Okay. Now, at the time you submitted this
12 application, you didn't tell Amy that you were not a
13 licensed contractor?
14 A I did not.
15 Q And at no time did you tell her that?
16 A I don't recall, no.
17 Q Now, you indicated to Mr. Brown earlier in
18 your testimony, to both Mr. Browns, that this was the
19 30th house you had done on the island?
20 A Yeah.
21 Q You're not contending that this was the 30th
22 house where you had pulled a permit and acted as a GC,
23 are you?
24 A I mean, we had -- every permit we pull, we had
25 to have a GC license.

1 Q How many permits had you pulled on Sullivan's
2 Island before pulling the permit for Miss Salzhauer's
3 house?
4 A I'm not sure. Maybe 15, 20.
5 Q And under what -- were those permits pulled in
6 the name of Brown Contractors?
7 A We did Brown Contractors. Andy and I pulled
8 one for Brown-Meihaus. Both.
9 Q Who -- by what authority before this was Brown
10 Contractors pulling building permits on Sullivan's
11 Island?
12 A Pete Robertson. He was a qualifier for us
13 back in I think 2012 or so, yeah.
14 Q And so you used Mr. Robertson's license to
15 pull those other permits?
16 A Correct.
17 Q And was he not involved with your company I
18 guess when Amy's job came up?
19 A No.
20 Q Why not?
21 A I think he moved. He moved to Louisiana.
22 Q And was he a subcontractor to you, or was he
23 an employee of Brown Contractors?
24 A He was a partner.
25 Q So he was an owner of Brown Contractors?

1 A Not of Brown Contractors. Another one.
2 Q What was the name of that company?
3 A I can't even remember, it's been so long ago.
4 This was 2010.
5 Q Okay. Had Brown Contractors, the entity that
6 pulled the permit for Amy's house, actually pulled any
7 other permits on Sullivan's Island?
8 A I'm not sure -- yes, yes.
9 Q Okay. Using Mr. Robertson?
10 A I don't recall.
11 Q So you don't know who or by what authority or
12 whose license you may have used to pull those permits?
13 A It was Rob Benson, not Rob Robertson. But,
14 yeah, we pulled underneath his.
15 Q Okay. Had you ever pulled a permit before
16 utilizing the license of Mr. Nguyen?
17 A I think this was the first one.
18 Q And how many permits did you pull using the
19 license of Mr. Nguyen?
20 A I would have to check. A couple. Several
21 years.
22 Q So you -- you pulled permits for several years
23 after pulling the permit for Amy's house?
24 A He and I also had a commercial general --
25 unlimited general contractor's license, also.

1 Q And that's a -- he is the person who has the
2 unlimited general contractor's license?
3 A Both of us. He's the qualifier. Both of us
4 own the company 50/50. It's called Osceola.
5 THE COURT: Who was the gentleman with Osceola
6 that was the qualifier?
7 A (Continuing) That was Vuong. So I had a
8 specialty contractor's license, we had the residential
9 builder's, and then the separate unlimited general
10 contractor's license for commercial projects.
11 Q Now, you submitted the application for the
12 Certificate of Authorization; is that right? You have
13 talked about that as Exhibit 1 in your trial exhibits,
14 and that's a document that I think has got your
15 signature on it and the signature of Mr. Nguyen?
16 A Correct.
17 Q Okay. And that was submitted on June the 6th
18 of 2012; right?
19 A Right.
20 Q Okay. Now, if we look at page 2, which is
21 Section 5, it refers to section 40-59-410 for further
22 clarification. Do you see that?
23 THE COURT: What? I'm sorry, I can't find
24 it.
25 MR. VARNADO: It's the second five.

1 MR. LYLES: I'm sorry, there might be more
2 than one five. It's the second page of the document.
3 Oh, there are two fives. The lower five.
4 THE COURT: Is this the second page of Exhibit
5 1?
6 MR. LYLES: Second page of Exhibit 1.
7 BY MR. LYLES:
8 Q Are you there, Mr. Brown -- Browns?
9 THE COURT: This one is.
10 A (Continuing) Yes, sir.
11 Q The first thing it says is, "See Section
12 40-59-410 for further clarification." Do you see that?
13 A Yes.
14 Q Have you ever looked at that statute?
15 A I've read it before, yes.
16 Q And what does that statute speak to, do you
17 know?
18 A Just making sure that a qualifier is a
19 full-time employee, a responsible management position,
20 as it reads.
21 Q Did you -- did you read that before you
22 submitted this application?
23 A I believe so.
24 Q All right. And you understand that the
25 statute requires that a qualifier needs to be a

1 full-time employee?
2 A Yes.
3 Q And you would agree with me that Mr. Nguyen
4 was not a full-time employee of Brown Contractors?
5 A Well, he was by being paid as a subcontractor,
6 full-time employee.
7 Q So any subcontractor you pay is an employee of
8 your company?
9 A No.
10 Q Well, what makes Mr. Nguyen an employee, but
11 not some other subcontractor?
12 A Is that a determination of --
13 Q You know the answer. You seem to know.
14 You've got a theory. I just want to know what it is.
15 A I don't know. Let me read it again. It's
16 been a while. So a full-time employee, I was employing
17 him and paying him, he was only on my jobs, and he also
18 had a management position managing on the jobs with the
19 applicant requesting this license, which is me.
20 Q He was not an employee, though, of your
21 company. He was a subcontractor; right?
22 MR. VARNADO: Object to the form. I'm sorry,
23 I thought I was in a deposition. I object, but go
24 ahead and answer.
25 THE COURT: I think we're on cross, so I think

1 he gets to lead. Go ahead.
2 A (Continuing) I'd consider him an employee.
3 I'm the one paying him 100 percent for his time.
4 Q You paid him as a subcontractor; right?
5 A We cut him a check.
6 Q He submitted an invoice to you; right?
7 A Right.
8 Q And that invoice included costs and expenses
9 that he had incurred; right?
10 A Correct.
11 Q And the time that he had spent on the job; is
12 that right?
13 A Correct.
14 Q And overhead and profit that he earned on
15 sub-subs; right?
16 A Correct.
17 Q And then you paid him the amount that he
18 submitted the invoice for; right?
19 A Correct.
20 Q Okay. So as Mr. Varnado asked earlier, at the
21 end of the year he didn't get a W-2 from you; right?
22 A Correct.
23 Q He was 1099; right?
24 A Correct.
25 Q So he didn't work within the umbrella of your

1 company; right?
2 A He worked underneath the insurance umbrella of
3 my company, and I would -- he did work underneath my
4 company.
5 Q And you charged these people for his overhead
6 and profit; right?
7 A And project management, also, yeah. He would
8 give us numbers to get things done, would go over it
9 with them, they'd say yes, we'd get it done, he'd bill
10 for it, and then we'd also pay him a project management
11 fee for doing his project management role, as well.
12 Q And is his project management fee reflected on
13 his invoices?
14 A Yeah, and he's been paid on them.
15 Q So he was the project manager for this job?
16 A Yes.
17 Q And since he was the project manager, you
18 would not be entitled to any project management fee on
19 this job; right?
20 A I was the project manager, too, if you want to
21 call it. I mean, there can be three. There was three
22 interior designers. We were both managing the project.
23 Q So these people wound up paying how many
24 project management fees for this job that went so
25 swimmingly well on your end?

1 A I don't know.
2 Q You can't tell us today how many project
3 management fees they were having to pay?
4 A I'll tell you right now.
5 Q Okay.
6 A Sorry. Bills. Project management fees for
7 the whole job are 25,675.
8 Q Okay. And do we know who those were paid to?
9 A Cameron and Vuong.
10 Q So we had two?
11 A Correct.
12 Q In addition to you?
13 A I don't know if I received a project
14 management fee.
15 Q Okay. Now, earlier you said that Vuong, or
16 Mr. Nguyen, was only on the job half the time; right?
17 A Well, until Amy essentially kicked him off,
18 yes.
19 Q Okay. And so at that point, in your mind, did
20 he satisfy the requirements of the statute with regard
21 to being in charge of construction operations?
22 A Yes.
23 Q So he was still in charge of construction
24 operations for this project, even though he wasn't on
25 the project?

1 A Well, towards the tail end of it, no, not the
2 last half.
3 Q Okay. So for half of this project, Mr. Nguyen
4 didn't have anything to do with Amy's house?
5 A We would still have to refer to him to the
6 end, just because the initial stages we didn't know --
7 we need answers, so, yes, he would pop up back there
8 throughout the whole process.
9 Q You agree with me, would you not, that
10 ultimately with Brown Contractors, you had the final
11 authority over Cameron Glaws or Vuong Nguyen?
12 A Yes.
13 Q You were in charge of Brown Contractors?
14 A Yes.
15 Q Now -- okay. Earlier in your testimony you
16 said that when you first started doing the bids for
17 this project, I think that the sum that you mentioned
18 was a sum of 1.2 to 1.4 million?
19 A I believe the original bid was that.
20 Q And that bid was for what?
21 A As per plan, the way Beau Clowney gave us the
22 plans to do.
23 Q Okay. And so the initial estimate or bid that
24 you gave was -- was it 1.2 or 1.4, or do you remember?
25 A We were all close. It was me and Daly &

1 Sawyer and then Diamond. I think we were all close.
2 Q Did you see the Daly & Sawyer?
3 A No.
4 Q You didn't?
5 A Uh-uh.
6 Q How did you know that you were close?
7 A She told me.
8 Q Okay. And that was for -- basically for the,
9 I think what you said is the full scope of what Beau
10 Clowney drew; is that right?
11 A Correct, yes.
12 Q Have you seen any estimate or proposal from
13 you in the amount of 1.2 or 1.4 million dollars?
14 A The one I initially did?
15 Q Uh-huh.
16 A I mean, probably got it somewhere in the
17 documents.
18 Q Can you show it to me? Because I haven't seen
19 it.
20 A I don't think it's here. I can bring it
21 tomorrow, or try to find it.
22 Q Well, when we took your deposition, when I
23 took your deposition, we went through your numbers, and
24 let me -- I've got a --
25 MR. LYLES: Did we bring that other copy, the

1 exhibits?
2 MS. WOLK: No.
3 MR. LYLES: Not here yet?
4 MS. WOLK: No.
5 BY MR. LYLES:
6 Q Well, you and I will just have to sit here and
7 do this together.
8 MR. VARNADO: I can show him.
9 MR. LYLES: If you could.
10 MR. VARNADO: Do you mind if I come over
11 there?
12 MR. LYLES: No.
13 MR. VARNADO: Henry, do you mind if I come
14 over?
15 THE COURT: No. We're in the Defendant's
16 exhibits?
17 MR. LYLES: That's right. We'll start off
18 with No. 8.
19 BY MR. LYLES:
20 Q If you look at Exhibit 8, that's a document
21 that has on top of it the Brown-Meihaus logo. Do you
22 see that, Mr. Brown?
23 A Yes.
24 Q Okay. And it's addressed to Andy and Amy, and
25 it speaks for itself, but it's got a total number there

1 of $685,000. Do you see that?
2 A I do.
3 Q What scope of work was contemplated by this
4 document?
5 A This was after the quote that I just told you
6 for 1.2 for the full house.
7 Q Okay.
8 A Amy explained to me that was too much money,
9 they couldn't spend it, then we started cutting it out.
10 And then we went over the things we wanted to do, I'm
11 assuming that's just what was noted here, and then I
12 came back to her with a proposal.
13 Q So you think that there's another estimate
14 that predates this estimate?
15 A Yeah, there was. So this, on page 2, this
16 construction template, that's what we use for a bid,
17 and I can't remember if I talked to her on the phone or
18 met with her, and it was just too much, so that's when
19 we backed everything out to get to this number.
20 Q Well, I will just -- I will represent to you
21 that I have not seen a bid that I understand is
22 predating this bid. So if you have a bid like that, I
23 would like to see it.
24 A I think she would have it.
25 Q Well, she has produced her file, and you'll

1 notice that we've produced thousands of pages of
2 documents, and this document begins with Salzhauer
3 0007, so this was the seventh thing that she had in her
4 file, or seventh page, and I just haven't seen that
5 estimate.
6 A Okay. I don't know. This was a revision to
7 get -- cutting the fat out of -- to get where we needed
8 to, to get to her budget.
9 Q But, now, the letter doesn't say that, does
10 it? In fact, what it says -- it just says what it
11 says. It doesn't say this is a revised estimate, a
12 reduced scope of work, or anything like that.
13 A It says, "As promised," meaning we had the
14 conversation before, "I broke down the construction
15 process of the house as it were to be completed in
16 stages."
17 Q I see that. And then you've got the various
18 stages, and the total of all the stages added up to
19 $685,000?
20 A Yes.
21 Q Okay. And nowhere in here does it say this is
22 a reduced scope of work?
23 A No.
24 Q And there's no date on it. But if you turn
25 over to page 2, where we've got your template, do you

1 see that?
2 A Yes.
3 Q And what you've got there is three months.
4 What did that three months mean?
5 A Where are you seeing three months?
6 Q Three months, top of the page.
7 A It might have been -- I don't know.
8 Q Was that the anticipated construction
9 schedule?
10 A I don't think so, because windows and doors,
11 as you can see at the bottom, it takes them six weeks
12 from the order to deliver it, so we couldn't do the
13 whole project in three months. If that's what you're
14 insinuating, no.
15 Q I just asked you to explain what three months
16 meant, and you don't have an answer, so I'm just trying
17 to find out what it was.
18 A I don't know.
19 Q Okay.
20 A I would never -- no project of this magnitude
21 could be done in three months.
22 Q Okay. If we turn over now to Exhibit 12, you
23 see that there is another email from you -- or an email
24 to Amy from you dated June 15th, 2012?
25 A Uh-huh.

1 Q Do you see that?
2 A Yes.
3 Q That's nine days after you applied for your
4 Certificate of Authorization. Now, there you've got
5 more prices. Do you agree with that?
6 A Yes.
7 Q You say, "Amy, I brought it down as low as I
8 could. Turnkey, as we discussed." And it looks like
9 what you've got is Phase I, the kitchen, and then the
10 total; right?
11 A Uh-huh.
12 Q Is this before you started work?
13 A I don't know. We had a demo process. No, we
14 hadn't started work yet.
15 Q Okay. So before you started work, there was
16 at least a discussion about doing the kitchen, and then
17 there was a discussion about doing other aspects of the
18 house, which you refer to as Phase I; right?
19 A Right.
20 Q Okay. Now, so if you'll go over to Exhibit
21 13, there's another email from you to Amy, and you have
22 attached there a Brown cost plus contract. Do you see
23 that?
24 A Uh-huh.
25 Q And that was a contract that you sent to Amy

1 and to -- well, you sent it to Amy, and she never
2 signed this contract.
3 A Okay.
4 Q Is that right?
5 A Correct.
6 Q Okay. In fact, she never signed a contract
7 for cost plus?
8 A No.
9 Q Okay. And I apologize for getting you to jump
10 around, but if you'll go back to Exhibit 8 for me,
11 Exhibit 8 you give her the prices, and you don't
12 reference cost plus anywhere in those prices, do you?
13 A No. You can see by having the zeroes at the
14 end of those numbers that it's a ballpark number.
15 Q Sure. But you don't say in addition to
16 whatever the numbers are, I'm going to charge you
17 overhead and profit; right?
18 A No.
19 Q And, in fact, what you say in the last line in
20 that summary of costs is "Fixed project management fee
21 and accounting." Do you see that?
22 A Sure.
23 Q So that is -- you were proposing to them that
24 you were going to do this work with a fixed project
25 management fee, and presumably the accounting means the

1 accounting for the job; is that right?
2 A It was this plus the cost plus. So this was
3 our project -- that's for the project manager, and
4 Deborah, the accountant, was 65,000.
5 Q Show me where -- before the total line, where
6 does cost plus show up?
7 A It doesn't show up at all on here.
8 Q Okay. And then if you look over at Exhibit
9 14, there is an email from you to Hank.
10 A It looks like a revised AIA contract.
11 Q Okay. So that's a -- you are in that email
12 sending Hank an AIA cost plus contract; is that right?
13 A Correct.
14 Q And that was never signed, either?
15 A Correct.
16 Q Now, if we look over at Exhibit 15, there's
17 another email from you that says, "Amy and Hank,
18 attached is the estimate. I did a takeoff and bid per
19 Beau's plan. A lot of detail has been added, and I
20 highlighted in red the bids that can be adjusted based
21 on finishes." Are you available to meet with me? Do
22 you see that?
23 A Yes.
24 Q If you look behind that email, you'll see that
25 there is an estimate. Did you do that estimate?

1 A Yes.
2 Q Okay. If we look under Bid A, the Bid A
3 column, and look all the way at the back page, it shows
4 a grand total of $722,074.12. Do you see that?
5 A Yes.
6 Q Okay. Now, is there any -- what scope of work
7 were you estimating at $722,000 and change?
8 A It looks like we got demolition, driveway,
9 5,000.
10 Q Well, I can read the estimate. I guess what
11 I'm asking is was this estimate not for the renovation
12 that was contemplated by Beau Clowney's plans?
13 A It was not the whole renovation, no.
14 Q Okay. And what would give Amy and Hank
15 understanding -- an understanding that this estimate
16 was somehow limited?
17 A It was because we discussed it in phases.
18 This is a Phase I, which is the main body of the house.
19 Q Okay. Per Beau's plans?
20 A Yes, Beau's plans.
21 Q Because that's what the email says, "I did a
22 takeoff and bid per Beau's plan"?
23 A Sure.
24 Q So what you're telling me, then, is that if we
25 go all the way back to Exhibit 8, that what you've got

1 in Exhibit 15 is only for the main house?
2 A Yeah. We had this phased out. This is just
3 the main body of the house, and then it looks like the
4 main body of the house, 490; rear of house, 60; and the
5 guest cottage, 30.
6 Q Okay. But what I'm trying to figure out is
7 the 722. You're saying the 722 only applies to the
8 main house work?
9 A I'm not sure. What number was that?
10 Q Sure, 15.
11 A What's the date on this?
12 Q Exhibit 15, the email is dated August the 8th,
13 2012.
14 A Okay. So this is updated from what -- on
15 Amy's August 2nd email asking me to price out.
16 Q All right.
17 A And so whatever she asked me to price out,
18 that's what is in this cost control estimate, and I've
19 got subs from the numbers as you can see in there.
20 Q Okay.
21 A Numbers from the subs, sorry.
22 Q Good deal. So this was in response to an
23 email you received from Amy?
24 A Yes. On --
25 Q What was the date of that?

1 A It was August the 2nd.
2 Q Okay. So if we were going to try to figure
3 out what was scoped, we would have to look at Amy's
4 email?
5 A Yes.
6 Q Okay. But you would agree with me there is
7 nothing in the estimate itself and there's nothing in
8 your email that suggests that this is some limited
9 scope of work?
10 A It is what she wanted me to price out.
11 Q Okay. You don't refer to her August 2nd email
12 in this email?
13 A Not here.
14 Q Okay. And you've never seen the -- any
15 estimate from Daly & Sawyer?
16 A No.
17 Q Okay. Then you continue to provide pricing
18 information to Hank and to Amy. I'll refer you to
19 Exhibit 16 where there's a reference to value
20 engineering in an email that you sent. Do you see
21 that?
22 A Yes.
23 Q And so you've adjusted -- because I was not
24 sure how this -- if you'll look at the second page of
25 that. How does this adjust the cost? I can't tell if

1 it adds $157,949 or subtracts $157,949 or not. I
2 just --
3 A It looks like these awnings are going to be
4 added. Labor and material total, this would be
5 additions.
6 Q Okay. So you prepared this to show them
7 that -- that the estimates you had given would have to
8 be adjusted and increased based on additional items
9 that they wanted?
10 A Correct.
11 Q You mentioned in your conversations or your
12 testimony with your lawyer something about change
13 orders. I heard that somewhere this morning. Were
14 there any signed change orders on this project?
15 A There wasn't because it's a cost plus job.
16 Any costs, they ran through the company.
17 Q So there was no formal document that we might
18 think of as a formal change order?
19 A No.
20 Q It was just costs that were added on to the
21 job?
22 A Anything that was paid out of the job was in
23 addition to it.
24 Q Okay. Exhibit 17, there's some more pricing
25 information and adjustments of estimates. Do you see

1 that?
2 A Yes.
3 Q All right. And if we look at the -- what you
4 attached as Exhibit 17, we have Bid A, right, on the
5 left-hand column, which totals $722,074.12. We've seen
6 that number before?
7 A Yes.
8 Q Okay. Then we've got a Phase I column to the
9 right of that. Do you see that?
10 A Uh-huh.
11 Q Phase I, main house only. Do you see that?
12 A Yes.
13 Q And if we go down and we look at the main
14 house only column, all the way to the bottom, the
15 number we have there is 451,745?
16 A Uh-huh.
17 Q Would you agree with me that it appears as
18 though the Bid A number includes more than just the
19 main house?
20 A Yes. This is -- this might be the original
21 estimate right here.
22 Q Okay.
23 A That's the 1.2 -- those numbers added
24 together.
25 Q Okay. Well, let me ask you something. So

1 main house only 451; right?
2 A Uh-huh.
3 Q Are you suggesting that you add these two
4 numbers together to come up with a million two?
5 A I don't know. I haven't -- this is the first
6 time I've looked at this in five years.
7 Q Well, this says Phase I only, which would
8 suggest that the Phase I cost was included in the
9 722,074 number, but I don't know that.
10 A If we were just to do the main house only,
11 it's going to be 451,745. If we were going to do the
12 whole project, it would be both of those numbers added
13 together.
14 Q Oh, so the 722,074 is in addition to the main
15 house?
16 A I assume, because that's up in the permits,
17 licenses, and all of that, too.
18 Q Earlier, I thought you said you thought the
19 722 was for the main house and only the main house.
20 No?
21 A I don't know. Like I say, this is the first
22 time I've seen these in a couple of years.
23 Q Well, you represented to Mr. Brown this
24 morning that you did an original estimate for this
25 project sometime -- somewhere between 1.2 and 1.4, but

1 that Amy didn't want any part of that.
2 A Right.
3 Q And we haven't seen that --
4 A Right.
5 Q -- estimate. The only estimate that I see
6 that seems to be based on Beau Clowney's drawings is
7 $722,000.
8 A Okay.
9 Q And if we look over at the next page, page 18,
10 we've got more accounting numbers from you which
11 references main house only. That looks like another
12 breakdown of just the main house only number. Do you
13 see that?
14 A Yes.
15 Q And that number is 484,283.
16 A Okay.
17 Q And then if we go to Exhibit 20, we have
18 another email from you to Hank and to Amy that says,
19 "Hank, below is numbers for our discussion," and then
20 you've got original bid, entire house; updated bid,
21 Phase I only; then you've given them the alternate
22 pricing numbers; right?
23 A Sure.
24 Q And then you've got total for the entire
25 house, 691,798.

1 A Okay.
2 Q Do you see that?
3 A Uh-huh.
4 Q Does entire house mean entire house?
5 A It does.
6 Q Does not?
7 A I would say it does.
8 Q It does, okay. All right. You mentioned in
9 your earlier testimony that you commonly have
10 subcontractors who I think the term you used was they
11 sign their bids?
12 A Occasionally, yes.
13 Q And what's the purpose of that?
14 A To hold them to their bid.
15 Q Okay. Did any of the subs that you proposed
16 to use for this house sign any bids?
17 A I'm not sure.
18 Q Did you get any bids?
19 A Yeah, I got bids, as you can see on this.
20 Q What is this you're looking at, can you tell
21 Mr. Brown what? Exhibit 17?
22 A Exhibit 17. What this is, the cost control,
23 these are budget allowances. We don't have a finish
24 detail from an architect or the client what they want
25 to put into it.

1 Q Okay.
2 A You can see here we've got Jenn-Air
3 appliances. Jenn-Air appliances can be 10 grand.
4 Viking Appliances can be 60,000. I don't have the --
5 when we're trying to get this down as low as we can,
6 that's what I'm trying to work with her on.
7 Q I'm on Exhibit 17, so where am I looking? You
8 referred to your subcontractor bids, and I'm just
9 trying to figure out where that is.
10 A You see where it says turnkey foundation, IML?
11 See where it says $6,700 IML?
12 Q Okay.
13 A And then you'll see metals, structural metal,
14 A&R Sheet Metal gave us a pricing of -- preliminary
15 pricing of 2,750.
16 Q I see.
17 A And then your wood framing, Southern Lumber,
18 gives us 26,000. So they take the not-for-construction
19 Beau Clowney plans and review them, and then they give
20 me numbers back.
21 Q Okay. So where you've got in those columns a
22 reference to a sub or a supplier, that is based on some
23 proposal that they gave you?
24 A Correct.
25 Q Okay. And where there's not anything

1 referenced in that column, is that just an estimate
2 based on your experience or what? Rough carpentry, for
3 example, finished carpentry, don't have any references
4 by them.
5 A No. That's interior trim and framing. I'll
6 do it on a square footage number.
7 Q So that's based on data that you have. That's
8 not a proposal from a subcontractor?
9 A No.
10 Q And -- all right. And did you ever go back
11 and look at the numbers that were originally proposed
12 and compare them to what the total job costs were?
13 A There were so many other variables. It's not
14 even close. When we demoed the whole house, there was
15 so much structural rot and repair that wasn't even
16 included in this. We didn't know. When you look at a
17 house, you don't know what you're getting into until
18 you tear it apart.
19 Q And did you do the demo work when you started?
20 A When -- did I do the demo work when I started?
21 Q When you started the job.
22 A Yeah.
23 Q So your testimony earlier that you found
24 yourself being asked to add things on and do things
25 that you didn't expect to work on, I'm trying to

1 understand that. If you demoed the house to begin
2 with, what was your intention in terms of --
3 A More or less finishes. Getting -- we don't
4 have a detailed -- in Beau's plans, we did not have a
5 detail on interior finishes like cabinets, what type of
6 granite, what type of shower heads, what type of cans,
7 you know, and all that changed.
8 Q When we saw earlier, we saw those estimates,
9 and we had a whole house estimate of 722 and that was
10 reduced a little bit down to 600, and then we had the
11 main house estimate. When you started your work, did
12 you think that you were going to be working on the main
13 house or the whole house?
14 A We demoed the whole house.
15 Q Is that what Amy wanted you to do?
16 A Yeah. I mean, we were -- she was, like, find
17 all the -- we started showing her the wood rot and
18 everything, and she told me to continue on and find out
19 what you need to do and get it replaced.
20 Q So you didn't do -- you have not done any sort
21 of cost comparison to determine, for example, where the
22 final numbers were for somebody like Southern Lumber,
23 in terms of what was originally bid by them or
24 estimated by them, and what they ultimately charged?
25 A Yeah, this is an estimate. This isn't a fixed

1 price contract. This is a -- if it would be fixed
2 price, then we could do it, but when you start seeing
3 zeroes at the end.
4 You know, same thing with the subcontractors,
5 hey, give me a price on solid interior doors, what are
6 they going to be, just so we're not wasting their time
7 or anybody's, you know. And then once we agree on it,
8 that's when we move to get final hard numbers after we
9 get selections from Amy or Beau or the interior
10 designers.
11 Q How were you able to provide any estimate at
12 all when you didn't know what work was going to be --
13 A It's an estimate. We didn't -- we had no
14 earthly idea we were going to strip the whole house of
15 its sheathing and insulation and band board. I mean,
16 it was just unknowns. We were going to utilize all the
17 sheetrock. We were going to utilize the hardwood
18 floors and sand them. We were going to reutilize the
19 six-inch cans, but all of those were switched out to
20 full custom imported can lights.
21 Q So on one of your estimates when you said that
22 you gave them a turnkey price, that was turnkey unless
23 you found something else you didn't know about?
24 A That was a turnkey estimate price.
25 Q But turnkey meant what?

1 A Based on what I can see, this is what it's
2 going to cost to get the job done.
3 Q Do any of the estimates that you sent to these
4 people qualify -- are they qualified in any way by any
5 representation that, you know, there are unknown
6 conditions, things I'm uncertain about, so on and so
7 forth?
8 A Say the first part of that again.
9 Q Sure. Any of the estimates that you and I
10 have talked about, do any of them say, to Amy or to
11 Hank, here's an estimate, but there's an awful lot of
12 stuff about your house I don't know, and so this
13 estimate really doesn't mean much?
14 A I don't see any demo or structural issues in
15 this, no, but we certainly talked about it because we
16 had the original home inspection.
17 Q Okay.
18 MR. VARNADO: Good time for our break?
19 MR. LYLES: Sure, that's fine.
20 (Whereas, a lunch recess was taken from 12:30
21 p.m. to 1:48 p.m.)
22 THE COURT: We are back on the record, case
23 2014-CP-10-3881. Robert Lyles is cross-examining and
24 we will pick back up at that point.
25 BY MR. LYLES:

1 Q Mr. Brown, a general question, at the time you
2 were working on Amy's house, how many other houses was
3 Brown Contractors working on?
4 A I don't recall. I would have to check.
5 Q More than one?
6 A I honestly don't remember.
7 Q So do you remember if there were any that you
8 were working on at the time or not?
9 A I'll have to check. I cannot remember at the
10 time.
11 Q How many houses did Brown Contractors build?
12 A For 2013, or '14?
13 Q Anytime.
14 A Probably 20 plus.
15 Q Okay. Did you handle the billing and
16 accounting on Amy's project any differently than you
17 did on the other projects?
18 A All the same.
19 Q And right now I think you're doing business as
20 Brown-Glaws; is that right?
21 A Correct.
22 Q And you're handling the account in the same --
23 A Same way.
24 Q The same way?
25 A Uh-huh.

1 Q Now, you -- we've looked at the proposed cost
2 plus contracts that were submitted and not signed;
3 right? And I think you testified earlier that you
4 believed it was a cost plus job?
5 A Yes.
6 Q And that the cost plus job is reflected in the
7 billings that you sent?
8 A Yes.
9 Q All right, we'll take a look at those. I'm
10 going to show you an email and just ask you -- this is
11 not in our exhibits. I need to add an exhibit. This
12 is an email from Henry to Jay.
13 (3/12/13 EMAIL MARKED AS DEFENDANT'S EXHIBIT
14 NO. 118 FOR I.D.)
15 BY MR. LYLES:
16 Q I'm going to show you what's been marked 118
17 and let you pass that one to Mr. -- the other Mr.
18 Brown. Rob has got a copy. Do you remember receiving
19 this from Mr. Salzhauer?
20 A I don't remember the email.
21 Q Okay.
22 A I am unfamiliar with the time and material
23 basis.
24 Q So you don't know what time and material
25 means?

1 A What he's asking, no.
2 Q Okay. And is your email address, is it
3 jaylbrown@me.com?
4 A Yes.
5 MR. LYLES: I would like to move to admit this
6 as Exhibit 118, Defendant's.
7 MR. VARNADO: Without objection.
8 THE COURT: The email of March 12, 2018 (sic),
9 from Mr. Salzhauer is admitted without objection.
10 (DEFENDANT'S EXHIBIT NO. 118 ADMITTED INTO
11 EVIDENCE.)
12 BY MR. LYLES:
13 Q So you were not clear -- or you are not clear
14 today as you are testifying what Mr. Salzhauer means by
15 time and material basis?
16 A I do not know.
17 Q Do you see in that email where he requests for
18 a projected cost of the job through the end of the job,
19 do you see that about the middle of the page?
20 A Yes, I see it.
21 Q Okay. Do you know how many times he requested
22 that you provide him with the projected cost for the
23 job?
24 A I do not.
25 Q Do you know whether or not you or anyone from

1 your company responded to this email and provided Mr.
2 Salzhauer with an estimate for the completion of the
3 work?
4 A I don't know, but there really isn't a way to
5 give him a projected cost of work when you don't know
6 what's going in the house.
7 Q Did you write back to Mr. Salzhauer and tell
8 him that?
9 A I'm not sure.
10 Q Do you know -- the time period for this email
11 is March the 12th of 2013. Do you know what the status
12 of completion of the job was at that time?
13 A Status of completion?
14 Q Yeah, what percentage of completion.
15 A We haven't even got the permit yet; right?
16 Q Well, no. This would have been -- I think you
17 got the permit in 2012.
18 A 2013?
19 Q This is March 2013.
20 A I don't know. I don't have a calendar in
21 front of me.
22 Q Do you know how much you billed the Salzhauers
23 at this point, March of 2013?
24 A I just have invoices, but not a total amount.
25 THE COURT: What exhibit are you referring

1 to?
2 MR. VARNADO: You've got a number there.
3 A (Continuing) Oh, nine, sorry. It's just a
4 customer balance, but it doesn't show a gant chart on
5 what was paid.
6 Q If you will turn to Exhibit 96 in my exhibit
7 notebook, which is this one. Are you at 96?
8 A Yes.
9 Q Your 96 is looking different. I think you're
10 at 95.
11 A Sorry.
12 Q That's okay. You with me?
13 A Uh-huh, I am.
14 Q So Exhibit 96 appears to be payment
15 application 12. Do you see that?
16 A Yes.
17 Q And it's dated 3/11/13. Do you see that?
18 A Yes.
19 Q And that's the day before that email from Hank
20 Salzhauer. If you look at this pay application over to
21 the left, it says original contract sum, $543,130.20.
22 Do you see that?
23 A I do.
24 Q Where do you get that original contract sum
25 from?

1 A I don't know. This is his document.
2 Q Is it your testimony that Mr. Salzhauer
3 prepared this document?
4 A This is his. Yeah, he prepared this document.
5 This is his. He prepared this, most of these.
6 Q So the signature on this document is what?
7 A "The Contractor certifies to the best of the
8 Contractor's knowledge, information and belief the Work
9 covered by this Application for Payment has been
10 completed in accordance with the Contract Documents."
11 Q So it's your belief that -- is that your
12 signature?
13 A Yes, it is.
14 Q Okay. That you didn't fill in the blanks on
15 this document?
16 A The retainage blanks?
17 Q All the blanks. Does it say who the owner is,
18 the street address, pay application number, and then
19 all of the various numbers under contractor's
20 application for payment?
21 A I don't believe we did this. This is Hank's
22 document. We were almost a double -- we were providing
23 QuickBooks documents, but he made us sign these for --
24 to get application of payment.
25 Q Do you know who produced the page on the

1 second page of that document, the continuation sheet?
2 A I do not.
3 Q So would you agree with me that you signed the
4 document?
5 A I did.
6 Q Okay. You did or didn't?
7 A I did, yes.
8 Q But it's your belief that nobody at your
9 office filled in the information on the document?
10 A Not to my knowledge.
11 Q Or the continuation sheet?
12 A Not to my knowledge. I know Deborah was
13 saying that we were doing basically two sets of books,
14 ours, and then he was having something done in New York
15 with his accounting.
16 Q So from your perspective, the original
17 contract sum number of 543,130.20 was not your number?
18 A What do you mean it was not my number?
19 Q Let me ask it another way. I think I asked
20 you earlier. Where did you get that number,
21 543,130.20?
22 A Like I say, this isn't our document.
23 Q Okay. So you didn't supply that number?
24 A I don't know.
25 Q But as you're testifying today, you wouldn't

1 have any knowledge of where that number came from?
2 A After application number 12, that's 12
3 applications --
4 Q Yeah.
5 A -- at 543,000. I don't know, I guess we would
6 have to look at the ones in front of it.
7 Q And what would the purpose be of looking at
8 the ones in front of it?
9 A Probably just to -- just to see the change
10 order. It looks like there's a net change by change
11 orders, contract sum, retainage.
12 Q You said earlier that all of your invoices to
13 Amy contained overhead and profit numbers?
14 A Yes.
15 Q Where do you find that number?
16 A First one, Brown 0699.
17 MR. VARNADO: Which exhibit is it in?
18 A (Continuing) Exhibit --
19 MR. VARNADO: Why don't you tell the court
20 reporter what exhibit you're looking at?
21 A (Continuing) No. 9 exhibit. Brown 0699.
22 Q Okay.
23 THE COURT: I'm sorry, exhibit number what?
24 A (Continuing) 0699 -- oh, I'm sorry. No. 9.
25 THE COURT: 0699, all right.

1 BY MR. LYLES:
2 Q And this is dated 12/9/2013; right?
3 A Correct.
4 Q So that's an example of where you bill for
5 overhead and profit?
6 A Yes.
7 Q And then where do you bill for your project
8 management fee?
9 A Line item one, two, three, four, five down.
10 Q That's Cameron Glaws?
11 A Correct.
12 Q And so you were billing for a project
13 management fee for Mr. Glaws?
14 A Yes.
15 Q Not for you?
16 A This is for him.
17 Q Okay. So you didn't bill a project management
18 fee yourself?
19 A I don't think so.
20 Q Okay. All you did was bill this overhead and
21 profit?
22 A Uh-huh.
23 Q Okay. Has Mr. Glaws been paid for the work
24 that he did in connection with this job?
25 A He said he was lacking about $7,000.

1 Q And how about Vuong Nguyen?
2 A I'm not sure.
3 Q But if they have been paid, then the project
4 management fee would have been paid; right? Because
5 you didn't get a project management fee, you just took
6 overhead and profit; is that right?
7 A Yes. Project management went straight to
8 them.
9 Q Okay.
10 MR. VARNADO: Can we take a time-out real
11 quick?
12 (Whereas, a brief discussion was held off the
13 record.)
14 BY MR. LYLES:
15 Q You've shown me some invoices that your
16 company sent, and you included those in your exhibits;
17 right?
18 A Yes.
19 Q Your invoice form doesn't show the total
20 amount that's been billed on a job; right?
21 A I don't see it. Well, let me see that. No.
22 7, we have an actual cost, on Brown 0695.
23 Q Okay.
24 A And that actual cost --
25 THE COURT: Are you in eight or nine? I'm

1 sorry.
2 A (Continuing) Seven.
3 THE COURT: 0695.
4 BY MR. LYLES:
5 Q Okay. Now, is this document -- this says,
6 "Job Estimates vs. Actuals Detail for 1850 Flag
7 Street." Is that something that's sent to the client
8 on a periodic basis?
9 A If he -- I think if Hank asked for it, yes.
10 As far as if it goes out on every invoice, I don't
11 know.
12 Q You don't know if it goes out or not on every
13 invoice?
14 A No.
15 Q You've got your invoices in your exhibit?
16 A Correct, but I don't know if that's attached
17 to it.
18 Q Okay. Turn with me to Exhibit 100. Are you
19 there?
20 A Yes.
21 Q This is another application for payment. It
22 says application 2.3. Do you see that?
23 A Yes.
24 Q And the date on that application is May the
25 9th, so this is a couple of months after that last

1 application we looked at. Would you agree with that?
2 A Yes.
3 Q And it shows an original contract sum of
4 $999,944.93; right?
5 A Yes.
6 Q Again, is it your belief that that is a number
7 that was not supplied by your office?
8 A I'm not sure.
9 Q So again, you don't know who else would have
10 supplied the accounting information that's included in
11 that document?
12 A I mean, Deborah Kahn, my bookkeeper, and Hank
13 were in control of our QuickBooks, and then Hank would
14 have her input what he needed to keep up with job
15 costs.
16 Q Okay. So it's your belief that Hank was
17 directing Deborah what to input in these documents?
18 A He was telling her what to do, yes; because if
19 not, she wouldn't have done it.
20 Q So at this point, which is May of 2013, as
21 you're testifying today, do you have any knowledge
22 about the accuracy of any of the numbers that are
23 included in here or not, or anything about the
24 methodology of creating these pay applications?
25 A I know ours. But on his, he could have been

1 instructing her to move this into actuals, up-to-date
2 actuals. That's the only thing I can think of.
3 Q What do you mean that's the only thing you can
4 think of?
5 A I mean, you're ask -- this is his -- this is
6 his application for payment.
7 Q He's doing an application to pay who?
8 A Us, Brown Contractors.
9 Q And you're signing it?
10 A Yes.
11 Q With no knowledge about how the numbers got
12 there at all?
13 A Well, they were fluctuating so much. It
14 was -- by being a change order job, they were
15 accumulating.
16 Q Okay. All right. Do you know how many times
17 they asked you to give them an estimate of how much it
18 was going to cost to complete this job?
19 A I do not.
20 Q Do you know how many times they asked you to
21 give them a projected completion date for this job?
22 A I don't.
23 Q If you'll turn over to Exhibit 104 for me, we
24 have application number, it looks like, 25. The date
25 on that is also 5/9/2013, but it appears to be a

1 different application. Do you see that?
2 A Yes.
3 Q Is that your signature?
4 A It is.
5 Q What does "less O&P" -- I can't tell what that
6 last word is. Do you know?
7 A "Less overhead and profit from." So it's
8 actually application 2.5.
9 Q Okay, 2.5.
10 A I signed it, and then this is where he shorted
11 us on our invoice.
12 Q Okay.
13 A Overhead and profit.
14 Q What do you mean "this is where"?
15 A Where it's asterisk less overhead and profit
16 from the invoice.
17 Q Whose writing is this?
18 A That's mine. Below, it looks like Deborah's.
19 She's got, "Overhead and profit due in addition to this
20 invoice," so he shorted our invoice $36,689.40.
21 Q Okay. And did you ask him why he had done
22 that?
23 A I don't recall.
24 Q Do you know what the total amount of the
25 overhead and profit was that you had been paid at that

1 point in time?
2 A It looks like $917,265.
3 Q That's for the total job; right?
4 A Based on his form. I don't have it on ours at
5 the time.
6 Q Okay. Do you know how much you had been paid
7 in terms of overhead and profit as of this date and
8 time?
9 A No, sir. It looks like 128,376.25.
10 Q Where are you getting that, the next page?
11 A Next page, correct.
12 Q What line?
13 A 10 -- well, 11.
14 Q Line 11 is your overhead and profit number; is
15 that right?
16 A Yes, sir.
17 Q Okay. So you billed at that point in time
18 $110,000 in overhead and profit. That says from
19 previous applications; right?
20 A Correct.
21 Q Okay. And if it's based on previous
22 applications, that means you've been shorted --
23 Deborah's total for being shorted is about 36,000;
24 right?
25 A On this one.

1 Q Well, you got shorted on invoice 109, 119 and
2 130, according to this note.
3 A April, May and June, there was no O&P paid.
4 Q So if you had billed a total of 110 overhead
5 and profit, and you got shorted 36,689, right, then you
6 would have been paid overhead and profit of, in rough
7 numbers, what, 80,000? A little less than 80,000. 74,
8 75,000?
9 A I don't know if she -- I don't know. We have
10 to ask her.
11 Q Okay. Is she going to testify, or do you
12 know?
13 A Yes.
14 Q Okay. We have some confusion about our
15 copying when we put our exhibit notebook together, but
16 there's another document that I want to show you that
17 came from our files, but is a Brown-Meihaus document.
18 I want to ask you about it, but let me get her to mark
19 it first.
20 (CLOWNEY PLANS MARKED DEFENDANT'S EXHIBIT
21 NO. 119 FOR I.D.)
22 BY MR. LYLES:
23 Q Let me show you what I've marked as 119. I
24 want to ask you if you recognize that document?
25 A Yes.

1 Q What is that?
2 A Beau Clowney's -- this looks like our pre- --
3 it looks like a takeoff on how we were trying to
4 dissect this thing. This is how I do my takeoffs.
5 I'll do main body of the house, work-out room, and
6 then -- this was the existing house. Wait a minute.
7 No, I'm sorry. Yeah, this was just Beau Clowney's
8 plan.
9 Q Okay. All right. And is the handwriting on
10 the front of this document yours?
11 A It is.
12 Q And then the stamp at the top right-hand
13 corner says "Property of Brown-Meihaus Construction"?
14 A Yes. That -- we've got -- I might have
15 accidentally picked up the wrong stamp. We've got two
16 of the same, similar ones.
17 Q Okay. In other words, what you meant to put
18 there was the stamp of Brown Contractors but you used
19 Brown-Meihaus?
20 A Correct.
21 Q Okay. And, of course, if you had used Brown
22 Contractors, you would have had Vuong's number in
23 there?
24 A Yes.
25 Q If in fact he was your qualifier at the time?

1 A Yes.
2 Q But this is dated April 24th of 2012, which
3 was before your application for a Certificate of
4 Authorization; right?
5 A Yes.
6 Q So what would the Brown Contractors stamp have
7 said at the time?
8 A I think the Brown Contractors has my
9 residential specialty builder's license number.
10 Q Okay.
11 MR. LYLES: I would like to move this into
12 evidence as Exhibit 119.
13 THE COURT: Robert?
14 MR. VARNADO: Without objection.
15 (DEFENDANT'S EXHIBIT NO. 119 ADMITTED INTO
16 EVIDENCE.)
17 BY MR. LYLES:
18 Q Now, if we look at this, what you've got is --
19 THE COURT: Robert, let me do this. Let's
20 just make it -- 119 is three pages.
21 MR. LYLES: Okay. Sorry.
22 THE COURT: That's all right. It's the
23 handwriting and colored lines. Next to it is A.11, A
24 point one one, with just a couple of yellow spaces, and
25 then A.12 has the word "New" written on it. Is that

1 accurate enough?
2 MR. LYLES: Yes.
3 THE COURT: All right.
4 BY MR. LYLES:
5 Q Now, what you've got is a floor plan of the
6 existing house; is that right?
7 A Yes.
8 Q And you've got it color-coded in blue, yellow,
9 orange, and some sort of red or something like that,
10 and then each section of those four sections seem to
11 have a price associated with it. Do you see that?
12 A Yes.
13 Q And then at the bottom -- well, with each
14 price, I guess with the -- you've got an Ipe reference
15 in the middle there. It says 50K, Ipe and rail; is
16 that right?
17 A Yes.
18 Q At the bottom, you've got P&O. What does that
19 mean?
20 A I don't know. O&P is overhead and profit, so
21 profit and overhead, 55.
22 Q And then what does it say?
23 A Fixed.
24 Q Did you provide this Exhibit 119 to Amy, or do
25 you know?

1 A I don't know. This is -- it's a half a
2 takeoff. I didn't even do the upstairs.
3 Q Okay.
4 A So I don't know where this came from.
5 Q Well, when you say you don't know where it
6 came from, what do you mean? That's your writing on
7 it.
8 A This is my writing, but I don't know who
9 supplied it to you.
10 Q Well, it's got your stamp on it and it's got
11 your writing on it, and it wound up in my hands. That
12 would suggest to me that it probably came from Amy.
13 A Right.
14 Q So would you think you gave it to Amy?
15 A Probably so. We laid a lot of these things
16 out on the table to try to figure this out for the
17 pricing.
18 MR. VARNADO: I'm going object because we did
19 a subpoena to Beau Clowney, too.
20 THE COURT: Just keep going. We'll pass by
21 that question and keep going.
22 BY MR. LYLES:
23 Q Okay. Do you know whether or not the numbers
24 that are reflected there correspond to the numbers on
25 some of the proposals you made to Amy?

1 A I do not know.
2 Q If you go back and you look at Exhibit 8,
3 sorry to keep flipping you around, those numbers
4 correspond to the numbers on Exhibit 119, do they not?
5 A They do.
6 Q Also, since we're back on this Exhibit 8, if
7 you'll look down, you say, "Project duration will be
8 five months." Do you see that?
9 A Yes.
10 Q And then, Amy will be given project FastTrack
11 scheduling, a project FastTrack scheduling sheet?
12 A Yes.
13 Q Okay. Then you have a line that says, "As an
14 incentive, any savings coming in below the above amount
15 will be divided 50/50." Do you see that?
16 A Yes.
17 Q Now, is it your belief that this was a cost
18 plus job?
19 A It's -- we don't -- we've never done a fixed
20 job.
21 Q Okay.
22 A Ever, on a custom home.
23 Q Okay.
24 A Yeah, no. See the zeroes, this is one of our
25 first estimates that we -- I didn't even -- this

1 doesn't even have any numbers on the second floor or
2 this other one, so this is an initial takeoff on trying
3 to get to her number.
4 Q Okay. Well, how would you have cost savings
5 if there's no original estimate?
6 A Well, if -- I'm given the parameters of doing
7 this project at this cost.
8 Q Okay.
9 A And I can come in less this number; we split
10 it up 50/50.
11 Q And you say you don't do fixed cost jobs;
12 right?
13 A Right.
14 Q But on Exhibit 119, you wrote the word "Fixed"
15 under P&O?
16 A Down here?
17 Q Yeah.
18 A I don't know why I wrote that. Fixed overhead
19 and profit -- yeah, fixed project management fee and
20 accounting only, not job.
21 Q All right. Now, earlier in your testimony,
22 you indicated that, and I obviously don't have your
23 transcript yet because our court reporter is so slow,
24 but I think I heard you say that, when we were talking
25 about your license and your qualifier, that you had

1 not -- that no claim had been made against your
2 license. Do you remember that?
3 A Today?
4 Q Today, earlier today. And you said no,
5 because I think I would have gotten a letter. Do you
6 remember that?
7 A Yes.
8 Q Okay. In fact, you did get a letter about
9 your license, didn't you?
10 A For which?
11 Q For which license? Your Brown Contractors
12 license.
13 A Right. Cease and desist?
14 Q Yeah.
15 A Yes. After this job.
16 Q But you did get that?
17 A After this job. Not during this job or
18 before.
19 Q Do you know what the basis for that cease and
20 desist order was?
21 A Yes. Vuong pulled his license from Brown
22 Contractors, and Cameron replaced his.
23 Q And that was in 2015, or do you recall?
24 A May 27th, 2015, yeah.
25 Q And that's Exhibit No. 7. And I will ask you,

1 and your lawyer didn't agree to put it into evidence,
2 but I would like to ask you about it now and see if we
3 can get it in, Exhibit 7.
4 MR. VARNADO: Seven can come in.
5 THE COURT: All right. Well, we will --
6 Exhibit 7, Defendant's 7, is now admitted and is in
7 evidence.
8 (DEFENDANT'S EXHIBIT NO. 7 ADMITTED INTO
9 EVIDENCE.)
10 BY MR. LYLES:
11 Q Okay. So, in fact, you did get a letter about
12 your license at some point in time; right?
13 A Yes.
14 Q Okay.
15 A And I called them on this, and since we
16 were -- we now, Brown Contractors, was dissolved, and
17 we were moving to Brown-Glaws, and that's why this was
18 a cease and desist on Brown Contractors. No activity.
19 Q When you had your conversation with the lady
20 from the LLR that you testified about earlier today,
21 did you tell her that Mr. Nguyen was not an employee of
22 your firm?
23 A I don't recall.
24 Q Did you tell her that he was not an owner of
25 your firm?

1 A I don't recall that, either.
2 Q Earlier in your testimony, you indicated that
3 this job was cost plus, and therefore it did not have
4 change orders. Do you remember that?
5 A Yes.
6 Q And there were no change orders on this job?
7 A Identified or --
8 Q Were there change orders?
9 A I don't recall.
10 Q Do you know what a change order is?
11 A Yes.
12 Q Is it a formal document which represents a
13 change in the contract price?
14 A A signed change order.
15 Q But we wouldn't have had that in this case?
16 A I don't think so.
17 Q Okay. Do you remember telling these folks
18 that there were change orders?
19 A Probably a change in the scope of work.
20 Q You indicated earlier that Amy moved into the
21 house in September while you were still involved in, I
22 guess, the punch phase of the house?
23 A Yes.
24 Q Was that an imposition for Brown Contractors?
25 A What do you mean?

1 Q Well, did that interfere with your ability to
2 do your work?
3 A I mean, of course, yes, but we worked with
4 them.
5 Q Do you know how many times you had promised
6 them that the house was going to be complete before
7 September of 2013?
8 A I don't recall.
9 Q Do you know what she was doing while the house
10 wasn't complete, where she was living with her
11 children?
12 A Renting down the street, living on the beach.
13 Q Do you know what that was costing her?
14 A I do not.
15 Q Your subcontractors for the house, how many
16 HVAC subs did you have, do you remember?
17 A Two or three.
18 Q Do you know why you had more than one?
19 A Amy didn't like one of them, so we removed him
20 from the job and brought another one in.
21 Q Okay. Who finished the work, do you remember?
22 A M&S Mechanical.
23 Q And then who was starting out doing the work?
24 A I don't remember who it was.
25 Q But it was somebody you think Amy didn't like?

1 A Yes. It was Vuong -- it was one of his
2 subcontractors that he's worked with in the past.
3 Q Did Vuong contract directly with the HVAC sub?
4 A I'm not sure.
5 Q Why would he have contracted with an HVAC sub,
6 if he did?
7 A Just to get, probably, the best pricing.
8 Q If Vuong contracts with the HVAC sub, who's in
9 charge of the HVAC sub?
10 A Vuong, and ultimately us.
11 Q How do you control the HVAC sub if his
12 contract is with Vuong?
13 A I control Vuong.
14 Q Why wouldn't the HVAC subcontract with you?
15 A No idea.
16 Q Well, when they contract with Vuong, Vuong
17 puts overhead and profit on the HVAC number, and then
18 you put overhead and profit on that number; right?
19 A If that's what it is in the book, yes.
20 Q And how many electrical subcontractors did you
21 have?
22 A I'm not sure.
23 Q Did Vuong hire them, too, or just --
24 A He had one of his initial ones, yes.
25 Q So Vuong hired the electrical subs, or do you

1 know?
2 A The initial one, yes.
3 Q Okay. And how about the second one?
4 A I think that was us. Barry Lingenfelter.
5 Q What was the reason for that change, do you
6 remember?
7 A I think just another Amy change.
8 Q Then why didn't Vuong hire the second sub,
9 electrical sub?
10 A Because he was my sub that I --
11 Q And why didn't he do the job to begin with?
12 A Busy. He was busy.
13 Q Who hired the framer?
14 A That was Vuong.
15 Q And what other subs did Vuong hire?
16 A He did framing, HVAC, electrical. I believe
17 siding.
18 Q And then what subs were hired directly by
19 Brown?
20 MR. VARNADO: At which point? I'm sorry.
21 MR. LYLES: At any point.
22 BY MR. LYLES:
23 Q I know we have an electrical sub that was
24 hired by Brown. What other subs were hired by Brown?
25 A B&F Construction.

1 Q What did they do?
2 A They do carpentry.
3 Q Okay.
4 A Barry Lingenfelter, like we discussed,
5 electrician.
6 Q All right.
7 A Carolina Fiberglass.
8 Q What did they do?
9 A That's a waterproofing deck membrane.
10 Q Okay.
11 A Coastal Plumbing & Gas.
12 Q All right.
13 A DBC Construction Services.
14 Q What did they do?
15 A Roofer.
16 Q What sort of roofing work did they do?
17 A Actually, hold on. That was a different job.
18 THE COURT: DBC is off.
19 A (Continuing) Disher Cabinets. Four Corners
20 Woodworking.
21 Q What did they do?
22 A They supply all the interior trim and doors.
23 Q All right.
24 A Linked AV, audio/video. M-L Woodworks.
25 Q What did they do?

1 A Built-ins. Custom built-ins and cabinets.
2 M&S Mechanical, the HVAC.
3 Q Was hired directly by Brown?
4 A Yes.
5 Q So at least one of the HVAC contractors was
6 hired by Brown, and the other one was hired by Vuong?
7 A Correct.
8 Q And is M&S the company that actually did the
9 HVAC work?
10 A Yes. Mechanical contractor.
11 Q All right.
12 A And then Hardwood Flooring & Tile Guys, they
13 do hardwood flooring and tile.
14 Q Were hired directly by Brown?
15 A Yes.
16 Q Okay. Who hired the roofer?
17 A I believe that was Vuong. I'm not sure,
18 though.
19 Q Do you know what the scope of work was for the
20 roofing?
21 A There was the new roof, and then the coating
22 on the existing roof.
23 Q Where was the new roof put, do you remember?
24 A Over the work-out room.
25 Q Do you know what was charged for that?

1 A I do not.
2 Q That would have come through Vuong?
3 A I'm not sure. Let me check. I don't have it
4 in front of me.
5 Q Okay.
6 A I can find out, though.
7 Q And I'm just making sure I'm straight. Did
8 you hire the framer, or did Vuong hire the framer?
9 A I hired the carpenters. I think he hired the
10 framer.
11 Q Okay. And then who hired the plumber?
12 A There was the original plumber, and then I
13 believe Brett Ford, who does all of our work, I'm
14 pretty sure we hired him.
15 Q Okay. So did VLN hire the first, and you
16 hired the second?
17 A I believe so.
18 Q Okay. All right. So by my reckoning, we've
19 got VL- -- Vuong, he hired the framer, he hired the
20 roofer, he hired one of two plumbers, he hired one of
21 two HVAC companies, and he hired one of two
22 electricians?
23 A Yes.
24 Q Okay. And at any point in time, did you tell
25 Amy that the people who were going to be doing work on

1 her project were going to be working directly for
2 Vuong?
3 A I told her that Vuong was getting his
4 subcontractors together to do this. We were trying to
5 get the price as low as we can. So, yes.
6 Q So you told Amy about Vuong's role in this
7 project when you handed her Exhibit 119?
8 A I don't know. That was an initial -- probably
9 not then, no.
10 Q When do you think she was told for the first
11 time that Vuong was actually hiring subcontractors to
12 do the work on her house?
13 A I don't know. One of our -- I told her we
14 were going to have to -- I could bring in Vuong to get
15 this done at a less expensive price than my premium
16 subs on the island. That was 100 percent told to her.
17 I don't know when.
18 Q Okay. The subcontractors that were hired by
19 Vuong, did you ever meet with them and review the
20 overall job of those subs?
21 A We met with those guys and went over the
22 project and -- yeah.
23 Q Did you tell them what Amy's expectations were
24 in terms of quality and cost?
25 A That she wanted it done cheap, yes.

1 Q So that was the -- that was the --
2 A Reasoning for getting those subcontractors on
3 this job.
4 Q You're here because Amy wants this job done
5 cheap?
6 A Basically, yes.
7 Q Okay. Now, you and Vuong ultimately got into
8 a lawsuit; right?
9 A I don't know if it evolved into a lawsuit, but
10 it was a project management dispute on another job.
11 Q And he sued you?
12 A Yes.
13 Q Did you-all get that resolved?
14 A No. We'll probably get it worked out.
15 Q As I recall, there was some agreement between
16 the two of you that if you prevail in this lawsuit,
17 you're going to give him some money.
18 A If I won in this lawsuit, I'm going to give
19 him some money?
20 Q Uh-huh.
21 A Anything that I've owed him on every sub that
22 wasn't paid on this job, we're going to pay him off
23 with the end amount, yes.
24 Q How much money is Vuong owed on this job?
25 A I don't know. We told that to all the -- many

1 subcontractors.
2 Q I think there's $51,000 worth of subcontractor
3 outstanding bills on this job, based on the accounting
4 that we've seen. Does that number not agree with you?
5 A Yes.
6 Q It does? Sounds right?
7 THE COURT: What was your answer? Because I'm
8 not sure.
9 A (Continuing) Yes, sir.
10 THE COURT: That is right?
11 A (Continuing) The 51, unpaid bills. It looks
12 like we owe Vuong -- well, I would have to look. This
13 is for all jobs. I would have to break this apart.
14 Q Okay. All right.
15 A Here it is, $54,041.05.
16 Q Is what you think Vuong is owed?
17 A Oh, no, no, no. That's the --
18 Q The total amount that has not been paid to
19 subs?
20 A Yeah. But Hank was paying them, and we, over
21 time, paid them.
22 THE COURT: What exhibit was that?
23 A (Continuing) That is Exhibit 7. But it
24 doesn't look like Vuong -- as of 8/18/14, Vuong is not
25 on here. So, according to our books, he was paid.

1 Q Okay. All right. Mr. Brown, you indicated
2 earlier that -- well, let me back up. Are you aware or
3 have you been made aware since you left this job that
4 there are defects and problems at Amy's house?
5 A I've seen emails that stated there were, but
6 nothing specifically what problems.
7 Q And at the time you left the job, did Hank
8 make a demand on you to come back and to fix certain
9 items?
10 A A demand, no.
11 Q Did he make a request?
12 A I don't recall.
13 Q Did you get a copy of a home inspection report
14 done by a company called Benchmark?
15 A No. I got an email saying that Benchmark was
16 coming to us, but it never came.
17 Q So you've never seen a Benchmark report?
18 A Not until today.
19 Q All right. Did you do a punch list for this
20 house?
21 A Yes, a punch list for CO, Certificate of
22 Occupancy.
23 Q All right.
24 A Amy gave us a punch list, which we completed.
25 Q Okay. At any point in time -- when is the

1 last time you were actually at the house?
2 A Inside, or just at it?
3 Q At it.
4 A I mean, we built a house on the beach right
5 across the street. I drove by it every day during that
6 process, but --
7 Q When was the last time?
8 A January 2014.
9 Q When was the last time you were -- that's when
10 you were last in the house?
11 A That was when I was at the house.
12 Q When was the last time you were in the house?
13 A Before Christmas, '13.
14 Q Are you aware that we have notified -- that I
15 have notified your lawyer about issues at the house?
16 A Issues, yes. But I haven't seen any -- I
17 haven't seen any other documents saying what issues.
18 Q Have you -- have you ever requested an
19 opportunity to go back to Amy's house?
20 A Normally, we do a checkup, a three-month
21 checkup and a 12-month checkup.
22 Q But you didn't do that here?
23 A No.
24 Q But you have not requested to go back to the
25 house since you left?

1 A I have not, no.
2 Q Okay. All right. I'm going to show you a
3 couple of letters and just ask you if you have seen
4 these letters.
5 MR. VARNADO: Are these exhibits?
6 MR. LYLES: These are -- well, two of them are
7 not; some of them are.
8 BY MR. LYLES:
9 Q I'll show you, and you can show your lawyer
10 first.
11 MR. VARNADO: Are we going to mark these?
12 MR. LYLES: Probably, yeah.
13 THE COURT: Well, let's mark them for
14 identification right now so we'll know what we did with
15 it.
16 (LETTERS MARKED DEFENDANT'S EXHIBIT NO. 120
17 FOR I.D.)
18 BY MR. LYLES:
19 Q I'm going to show you what's been marked as
20 Exhibit No. 120 for identification. Did you ever get a
21 copy of that letter?
22 A The electronic and regular mail --
23 Q Well, this went to your lawyer, and I'm just
24 wondering if you've ever seen a copy of it.
25 A There's been so many. I don't -- yeah, I've

1 seen this one.
2 Q Okay, you have seen that letter?
3 A Yes.
4 Q Okay. And in response to this letter, do you
5 know whether or not you asked to come out and take a
6 look at any items that were not complete or were done
7 incorrectly?
8 A I mean, it doesn't -- it just says -- it just
9 states that they were done incorrectly. It doesn't say
10 what they are.
11 Q Okay.
12 MR. LYLES: I move this into evidence as
13 Exhibit No. 120.
14 THE COURT: Okay, without objection, and I
15 think I take it as notice and not proof of the matters
16 still --
17 MR. LYLES: Correct.
18 (DEFENDANT'S EXHIBIT NO. 120 ADMITTED INTO
19 EVIDENCE.)
20 THE COURT: Rob, is that --
21 MR. VARNADO: Yes, sir. And I think it's
22 already in the book.
23 MR. LYLES: It may be, Rob. I just
24 didn't --
25 MR. VARNADO: That's okay. It will be fine.

1 MR. LYLES: We might be doubling up. Let me
2 get you to mark that, too, as 121.
3 (LETTER & ATTACHMENT MARKED DEFENDANT'S
4 EXHIBIT NO. 121 FOR I.D.)
5 BY MR. LYLES:
6 Q I'm going to show you, or have showed you,
7 what is marked for identification as Exhibit 121, and
8 I'll ask you if you have ever seen this letter and the
9 attachment before?
10 A This is Howard Brown's unsigned contract?
11 Q Yes.
12 A Yes, I've seen this.
13 Q You've seen that before?
14 A Yeah.
15 Q Do you remember seeing it at about October of
16 2014, or do you know?
17 A I don't know.
18 MR. LYLES: I would like to move that in as
19 Exhibit 121 on the issue of notice, too.
20 MR. VARNADO: Under the same caveat as last
21 time.
22 THE COURT: Admitted for that purpose.
23 (DEFENDANT'S EXHIBIT NO. 121 ADMITTED INTO
24 EVIDENCE.)
25 BY MR. LYLES:

1 Q If you will, now go back to the notebook
2 and --
3 THE COURT: Where is 121?
4 MR. LYLES: I'm not trying to rush you if you
5 want to look at it.
6 BY MR. LYLES:
7 Q Now, if you could go to the notebook and get
8 to No. 72.
9 A (Witness complied with request of counsel.)
10 Q Do you recognize -- do you recognize the
11 letter contained in Exhibit 72?
12 A His Exhibit A is included in this letter?
13 Q Yes.
14 A Yes.
15 Q And you see there's a reference there to a
16 roof problem?
17 A That's the roof repair price on the existing
18 roof that we did not do?
19 Q Just asking you if you recognize the letter.
20 A Yes, I've seen this.
21 Q And in response to this letter, did you make
22 any request to go back out to the house and take a look
23 at it?
24 A Never seen a letter. I don't remember
25 seeing -- this letter doesn't coincide with his

1 estimate.
2 Q Okay. Did you ever request an opportunity to
3 go out and take a look at the roof that was being
4 referenced in the letter?
5 A I mean, we -- I remember riding by, looking at
6 it from the road.
7 Q Okay. You never were denied an opportunity to
8 go out to the house and inspect anything by either me
9 or Amy?
10 A No.
11 Q Okay. If you'll turn over to Exhibit 73 for
12 me.
13 A (Witness complied with request of counsel.)
14 Q I'll ask you if you had an opportunity to see
15 this letter and the photographs that were attached?
16 A I have not seen this one.
17 Q Okay. You have not seen those photographs?
18 A No, have not.
19 Q Okay. Mr. Varnado has been your lawyer
20 through the entirety of this case; right?
21 A Yes.
22 Q Okay. And take your time. I don't want to
23 rush you.
24 A Okay.
25 Q All right. So is today the first time you've

1 seen the photographs of nails penetrating through the
2 electrical wiring and things such as that?
3 A I've seen -- I didn't see the nails
4 penetrating the wire. No, I haven't seen this.
5 Q Okay. If you'll turn over to Exhibit 74, and
6 I'll ask you if you've seen that letter?
7 A So this was basically him repairing the demo
8 and work-in-progress.
9 Q Have you seen the letter?
10 A Yes.
11 Q Okay. So you saw that letter previously?
12 A Yes.
13 Q Okay. And then I'll turn you over to Exhibit
14 75, which is dated July the 5th of 2017, and ask you if
15 you've seen a copy of that letter?
16 A Yes, I have.
17 Q And did you request an opportunity to go out
18 to the house and take a look at the deflection that's
19 referenced in that letter?
20 A I did. I called the -- Geremy Powell and
21 asked him what was going on, and -- and that's how we
22 kind of left it. He explained it to me.
23 Q He did?
24 A Yup.
25 Q All right. Did you give him any input about

1 how to address the deflection problem?
2 A No.
3 Q Is he an engineer that you were comfortable
4 with?
5 A I've worked with Geremy on the majority of my
6 houses.
7 Q You worked with him on this project?
8 A I don't think he was the engineer on this one.
9 Was he? I don't know.
10 Q I think there's some evidence that he was
11 involved on the front end of this project.
12 A Okay.
13 Q But if that's not your recollection, so be it,
14 okay. You would -- is it reasonable to expect, or for
15 Amy to expect, that the electrical system in her house
16 is not a fire hazard?
17 A Expect that -- I would expect it not to be,
18 yes.
19 Q Okay.
20 MR. LYLES: Henry, if you'll give me just a
21 few minutes, I'd appreciate it.
22 THE COURT: Certainly.
23 MR. VARNADO: Maybe we can take a break?
24 THE COURT: We'll take a 10-minute break.
25 (Whereas, a short recess was taken.)

1 THE COURT: We are back on the record in 3881
2 and Plaintiff Lyles is cross-examining Mr. Brown.
3 BY MR. LYLES:
4 Q Mr. Brown, what is a Level 5 finish? Does
5 that name ring a bell, or that term ring a bell?
6 A Drywall Level 5 finish.
7 Q What is that, a Level 5 finish?
8 A It's when you finish drywall. Normally,
9 you'll hang it, tape it, sand it. Instead of priming
10 it, they come in and spray it, lay it over and get a
11 nice smooth finish.
12 Q Is a Level 5 finish better than a Level 4 or a
13 Level 3 finish?
14 A Yes.
15 Q Is it the highest finish you can have?
16 A Yeah.
17 Q Is that what was promised to Amy on this job?
18 A I'm not sure.
19 Q You mentioned dehumidifiers earlier. Do you
20 remember that and part of the I think the HVAC
21 discussion that you had earlier?
22 A Yes.
23 Q Was it a recommendation that dehumidifiers be
24 installed?
25 A Yes.

1 Q And were they installed on this house?
2 A Yes.
3 Q And did she pay for that?
4 A Yes.
5 Q And are you aware they were never hooked up?
6 A No.
7 Q And couldn't be hooked up to the system?
8 A I was not.
9 Q Now, you mentioned VLN as being a project
10 manager of some description for half the job. And then
11 I think you also mentioned Cameron Glaws; is that
12 right?
13 A Yes.
14 Q And he's licensed?
15 A Yes.
16 Q But his license wasn't used in any respect for
17 this job?
18 A Yes.
19 Q Okay. Now, who is Ken?
20 A Who is who?
21 Q Ken. Was somebody named Ken on this job, too?
22 A I don't recall a Ken.
23 Q Okay. Was there ever a period of time between
24 VLN and Glaws that there was no project management on
25 the job?

1 A No -- oh, Ken. He was a project manager for
2 me on another job, yeah, yeah.
3 Q Was he ever on Amy's job?
4 A I think he came by there, and due to the
5 circumstances, he didn't want to take it.
6 Q Okay. So he was there, but not for long?
7 A I don't even recall.
8 Q Was he licensed?
9 A No.
10 Q Was there ever a period of time when the job
11 did not have some sort of licensed project manager on
12 it?
13 A I don't recall because -- I don't recall.
14 Q As the contractor who pulled a permit, would
15 you agree with me that you have an obligation to comply
16 with the building code?
17 A Absolutely.
18 Q With respect to the work that you do?
19 A Yes.
20 MR. LYLES: I think that's all the questions
21 I've got for you. Thanks.
22 REDIRECT EXAMINATION
23 BY MR. VARNADO:
24 Q Mr. Brown, will you turn your attention to, in
25 the Defendant's book, Exhibit No., I think it's 13?

1 A (Witness complied with request of counsel.)
2 THE COURT: Thirteen?
3 MR. VARNADO: Yes, sir. I'm sorry, let's go
4 to eight. Is everyone at eight?
5 THE COURT: Yeah, Exhibit 8.
6 BY MR. VARNADO:
7 Q Mr. Brown, 8 and 119, that's the paper, that
8 has Brown-Meihaus on it; correct?
9 A Correct.
10 Q But you didn't have a -- this was
11 introductory, would you agree with that?
12 A First ones.
13 Q First ones, so it's -- would you agree that
14 it's part and parcel of trying to come to terms with
15 Amy and Hank?
16 A That's what we were trying to do.
17 Q And when did you actually start the house,
18 working on the house?
19 A After the first permit was issued.
20 Q Okay.
21 A 8/28/12.
22 Q 8/28/12, so that's almost four months after
23 the Brown-Meihaus initial estimate; right?
24 A Yes, sir.
25 Q So then if you turn to Exhibit 13 in Mr.

1 Lyles' book, 13, and that is a -- when you send a cost
2 plus agreement to Mr. Salzhauer; is that correct?
3 A Correct.
4 Q Okay. Did you sign that document? I don't
5 know if you did or didn't.
6 A I didn't sign this one in his -- in this book,
7 no.
8 Q So who wrote this contract, in 13?
9 A This -- this is our AIA document that we kind
10 of had someone put more in layman's terms so clients
11 and contractors can understand.
12 Q This was produced by the Salzhauers; is that
13 correct?
14 A No. This is our contract.
15 Q I'm sorry. But it was produced in discovery
16 by the Bates label Salzhauer at the bottom; is that
17 fair?
18 A Yes.
19 Q And then if you go to Exhibit 14 -- I'm sorry,
20 15. Now I'm confused because -- yeah, go to 14,
21 although it has the Exhibit No. 15 on it.
22 THE COURT: I think that's the deposition
23 exhibit.
24 MR. VARNADO: Yeah, that's right.
25 BY MR. VARNADO:

1 Q What date is this? You sent an email with
2 this contract. What date is it on the email?
3 A July 24th, 2012.
4 Q And that's to Hank; correct?
5 A Correct.
6 Q And it contains another standard form
7 agreement?
8 A Yes.
9 Q And what was the nature of this contract,
10 would you say it was cost plus, too?
11 A Standard form agreement, yeah, cost plus with
12 a percentage contractor fee and the control estimate.
13 Q Was there any doubt in your mind that Mr.
14 Salzhauer knew that you were doing a cost plus
15 contract?
16 MR. LYLES: Object to the form of the
17 question -- or object to the question. It's calling
18 for speculation.
19 BY MR. VARNADO:
20 Q I'm asking in your mind. Is there any doubt
21 in your mind?
22 MR. LYLES: Well, he's asking about what he
23 understood.
24 THE COURT: Ask him what conclusions he drew
25 from his communications with Mr. Salzhauer.

1 BY MR. VARNADO:
2 Q Based on your communication with Mr.
3 Salzhauer -- did you have communications with Mr.
4 Salzhauer at the time you sent these two contracts?
5 A Yes.
6 Q Okay. And based on your communications with
7 Mr. Salzhauer at that time, what did you believe was
8 the understanding of Mr. Salzhauer about a cost plus
9 contract?
10 A It was -- I mean, he agreed to what we were
11 talking about.
12 Q Okay. How did you bill again for this job?
13 Tell Mr. Brown how you billed and what your
14 understanding was and what Mr. Salzhauer did when he
15 got the bills to pay them.
16 A So what we do is we take every one of our
17 subcontractors' invoice and we copy it and attach it to
18 the invoice, and then we send it to him. And --
19 Q Would that include Mr. Vuong's invoices?
20 A Everybody's, the whole project. So, and at
21 the end of the project, we save everything to a disc
22 and give it to the clients.
23 Q And Mr. Salzhauer did more than that, then he
24 would send it back to you? He would --
25 A He would have my secretary update his, what we

1 were looking at earlier, requisitions. He would have
2 her update those and me sign it to get a check.
3 MR. VARNADO: Okay. That's all the questions
4 I have at this time.
5 THE COURT: Robert, anything?
6 RECROSS-EXAMINATION
7 BY MR. LYLES:
8 Q Going back to Exhibit 8 again, I think your
9 testimony just a few moments ago was that Exhibit 8 was
10 the first one that you did for Amy?
11 A One of the first ones.
12 Q Was it the first one, or was it one of the
13 first ones?
14 A I'm not sure. There's no date on it. There's
15 not a date on that or the cost control estimate.
16 Q But we do agree that the numbers on Exhibit 8
17 do match up to the numbers on the first page of Exhibit
18 119?
19 A For the lower body of the house, yes.
20 Q And the date on Exhibit 119 is April 24th,
21 2012?
22 A Correct.
23 MR. LYLES: I think that's all I've got.
24 THE COURT: Do either of you-all have any
25 objection to my asking a few questions?

1 MR. VARNADO: No.
2 EXAMINATION
3 BY THE COURT:
4 Q Mr. Brown, I want to try to just clarify what
5 I think I heard and make sure that my recollection and
6 notes are correct. You were asked about various
7 companies that you and Vuong had had association with,
8 and I think you mentioned Osceola?
9 A Uh-huh.
10 Q And I understood that was a commercial entity?
11 A Yes, sir.
12 Q And I understood you to say Vuong was the
13 qualifier for that?
14 A Yes, he was the qualifier for that one.
15 Q Was that in existence at the same time that
16 you were involved with the Salzhauer residence?
17 A I guess towards the middle or tail end of it,
18 I'm not quite sure. But we were --
19 Q They overlapped?
20 A Overlapped.
21 Q Okay. And I understand Mr. Vuong had his own
22 business?
23 A VLN Contractors.
24 Q And he would work on projects other than
25 yours?

1 A He -- when we first started, he was wrapping
2 those up. And then, you know, we kind of had a -- we
3 had our agreement on he's going to run all of mine.
4 Q But he was -- that company was available to do
5 business outside of your business?
6 A Yes, sir.
7 Q In terms of the money and what you're asking
8 for, the 206,000 is the difference between the total
9 cost and overhead you billed, less payments?
10 A The 206 is total amount owed.
11 Q All right. Well, I don't know the mathematics
12 by which you get to total amount owed is what I'm
13 asking about. That is a million four some odd that you
14 billed, including profit and overhead?
15 A Correct.
16 Q Less total payments received?
17 A Less the total payments received? I don't
18 understand what you're asking.
19 Q Okay. You got money from Mr. Salzhauer or Amy
20 over the course of this job?
21 A Yes, sir.
22 Q And you sent bills?
23 A Yes.
24 Q You added up your bills and you subtracted
25 what they paid you?

1 A Yes.
2 Q Okay. In terms of the 206,000, is it total
3 bills less money they paid you, is that what it is?
4 A Is it less money they paid me as far as --
5 that's what they owe -- owe me.
6 Q Okay. I'm trying to understand the
7 mathematics of how you get to what they owe you. Have
8 you given them credit for the money they paid you
9 against the bills you sent?
10 A Well, their invoicing over the course of these
11 18 invoices, there were numerous -- he wouldn't pay the
12 full amount. So if we billed 30,000 and he'd pay 25,
13 that would be 5,000 owed.
14 Q Okay.
15 A That's what it amounted to at the end of the
16 job. The final invoice was 50, just completely not
17 paid.
18 Q But maybe I'm confusing you. I'm trying to do
19 this very simply because it helps me. I think better
20 that way. The 206,000 is total bill, less total
21 payments?
22 A Yes.
23 Q Now, have you -- can you tell me what was
24 short-paid to create that difference?
25 A Yes.

1 Q Was it profit and overhead? Was it HVAC? Was
2 it siding? As we sit here today, can you tell me what
3 items of work were short-paid that created the
4 difference?
5 A I can't today, but I could probably find it
6 for you. I would have to get up with my bookkeeper.
7 Q And in terms of the contract, you sent two
8 different -- you sent an AIA form, and you sent another
9 form that you said was AIA but simplified?
10 A Yes.
11 Q And did you intend for those, either one of
12 those documents, to be the guide for the rights between
13 you and Mr. -- Mr. -- I'm sorry. Amy and her father,
14 Hank?
15 A Yes. Based on the cost plus, you can -- that
16 contract has -- you can check off the cost plus or -- I
17 don't know. There's a couple others.
18 Q That cost plus contract has definitions of
19 what are -- what is billable and what is not billable;
20 correct?
21 A Correct.
22 Q Did you intend to be guided by those
23 definitions in what you billed Amy?
24 A Yes, sir.
25 Q And would you agree that you would have to

1 have -- that the language I think in the AIA is
2 necessary, do you agree with that?
3 A Yes.
4 Q And you would agree that in evaluating the
5 cost plus, Amy or her father, Hank, would have the
6 right to assess the numbers in terms of either
7 reasonable or necessary?
8 A Yes.
9 Q Was the 55,000 fixed for purposes of this
10 building as it was stated in some of the documents?
11 Did you consider the 55,000 to be fixed as stated in
12 your documents?
13 A The one that I wrote on there was just on an
14 evaluation when I was just trying to bid it out for my
15 purposes. I didn't -- we didn't -- like I said before,
16 we didn't have any of the -- normally, an architect
17 will specify what we're using, interior designer, what
18 they choose, and as long as it runs through our office,
19 we'll tack on the cost, plus 15.
20 Q The 55,000 was overhead and accounting;
21 correct? Profit, overhead and accounting?
22 A Yes.
23 Q Did you consider that to be fixed as part of
24 the verbal agreement between you and Amy when the job
25 began?

1 A If we were to do this, what we just looked at
2 on the plans, if we were to stick with those, it was
3 all budgetary numbers. If we were to do that amount,
4 yes. But if it continues without going -- I mean, we
5 would have had 2,000 change orders on this job if we
6 had a fixed price, so but a cost plus just kind of kept
7 it simple for all of us, and Hank, too.
8 Q I'm confusing you again, I think. You
9 considered the hard dollars to be cost plus with no
10 cap, but the representations that I see to Amy appear
11 to say the 55,000 was fixed. Is that what you
12 recognized as an obligation between you and Amy when
13 the work began?
14 A When it began? We -- this was one of the
15 first ones. No, this was one of the first ones, and
16 then we had probably 20 cost control estimate re-dos.
17 Q When the work began, what did you think your
18 understanding was about profit and overhead and
19 accounting?
20 A It was just based on cost plus.
21 Q Whatever you needed to bill?
22 A Yeah, 15 percent on everything.
23 Q In terms of overhead, what were the items that
24 you believed would be included within your 15 percent
25 as opposed to build?

1 A Overhead is -- I'll separate line item of
2 project management fee. A super- -- like that overhead
3 would be if we needed a supervisor to help out on the
4 job, or accounting office, and then profit.
5 Q All right. But in terms of -- you have profit
6 and overhead of 15 percent?
7 A Yes, sir.
8 Q You're recovering that not on cash expended,
9 but on a percentage against cash expended; correct?
10 A Correct.
11 Q What were the items that you considered to be
12 billing -- or that you were collecting as a percentage
13 versus the items of overhead that you consider to be
14 cash, or did you have a distinction?
15 A The secretary, we gave her two or three
16 hundred a week, so that was kind of a fixed deal
17 throughout the project, just for her, for accounting,
18 and then the rest was the rest of the overhead and
19 profit.
20 Q Did you bill all overhead to the job in cash
21 except for this couple hundred dollars a week you paid
22 to -- who was the lady, what was the name?
23 A Deborah.
24 Q Deborah?
25 A Yes, sir.

1 Q Was Deborah's money billed as part of the cash
2 cost, or was it included in your percentage markup?
3 A Let me see, hang on one second. I'm not sure.
4 Do you want me to find out for you real quick?
5 Q Where would I find it if I looked in your
6 records?
7 A In our QuickBooks. I can find it. She would
8 be under administrative and accounting.
9 Q Did you bill her as cash cost, or did you
10 include her in the 15 percent profit and --
11 A No. She was outside of that.
12 Q Was there anything that wasn't outside of the
13 15 percent -- excuse me. Did you -- is there any cost
14 incurred in regard to this project?
15 A I mean, overhead is, you know, office, gas,
16 trucks. You know, it's all office. Brown Contractors
17 overhead, that's how I categorize it. Am I answering
18 your question?
19 Q Well, I'm trying to understand what you billed
20 them in cash and what you intended to get back in terms
21 of profit and overhead. Can you make -- you have that
22 distinction?
23 A I'm not sure I know what you're asking.
24 There's O&P, 15 percent, and then administrative
25 accounting is outside of that. Project manager is

1 outside of that. But, you know, overhead was just even
2 costs that aren't associated in this, like getting
3 these bids together, meetings and hourlies. Instead of
4 me billing out hourly, that's kind of included in
5 overhead for going, meeting with the interior
6 designers. When Hank and them come down and want to
7 walk the house on a weekend, you know, to me, that's
8 hours of overhead.
9 Q Well, I think one of the things I'm going to
10 be asked to do in this case is evaluate your 206,000
11 dollar claim. If I guide myself in looking at your
12 numbers by referencing the reimbursable and
13 unreimbursable definitions in your AIA form, will I be
14 being fair to you?
15 A Yes.
16 THE COURT: Okay. That's all.
17 MR. VARNADO: I just have a couple of
18 follow-ups, if I may.
19 FURTHER REDIRECT EXAMINATION
20 BY MR. VARNADO:
21 Q Is it fair for Amy and Hank to claim that
22 Exhibit No. 8 is the contract document?
23 A Absolutely not. That was a first discussion
24 article, just -- no.
25 Q Okay. When you say it was the first, you mean

1 it was among the first?
2 A Among the first.
3 Q All right. And when you would bill Hank,
4 would all of your invoices say overhead and have
5 overhead and profit --
6 A Yes.
7 Q -- listed on them?
8 A Last item on every invoice before the total.
9 Q So we're looking at Exhibit 9, and it would
10 have overhead and profit, which he would pay sometimes?
11 A Overhead and profit. Overhead and profit,
12 every one, 15 percent.
13 Q And Hank would pay that; correct?
14 A Not all the time, but, yeah. He held whatever
15 he felt like he needed to hold.
16 MR. VARNADO: One second, please. That's
17 all.
18 MR. LYLES: I don't think I've got any
19 questions.
20 THE COURT: Mr. Brown, thank you.
21 THE WITNESS: You're welcome.
22 THE COURT: You can stay, if you'd like. I
23 think you probably will. But as we tell all witnesses,
24 unless asked otherwise, you are free to go.
25 MR. VARNADO: Can we go off the record real

1 quick?
2 THE COURT: Sure.
3 (Whereas, a brief discussion was held off the
4 record.)
5 THE COURT: Back on the record in 3881, and
6 Rob has concluded except for one more witness or if
7 he -- or otherwise, but Robert is now starting his case
8 with Miss Salzhauer.
9 (Ms. Amy Salzhauer McMarlin, having been duly
10 sworn, testified as follows:)
11 DIRECT EXAMINATION
12 BY MR. LYLES:
13 Q Amy?
14 A Yes.
15 Q Is it okay if I call you Amy?
16 A Yes, please.
17 Q I'm sure Rob will want the same thing.
18 MR. VARNADO: I think I have called you two
19 different names, Miss Salzhauer, Miss McMarlin, Ms.
20 Salzhauer McMarlin.
21 A (Continuing) Don't worry, I know who you
22 meant.
23 Q Would you provide Henry Brown with a little
24 bit of information about your educational background,
25 where you come from, things like that?

1 A Sure. I grew up on Long Island in Port
2 Washington, New York, and then I went to Harvard
3 University, and then I was working, and then I went to
4 Cambridge University, and then I went to MIT.
5 Q And what did you study?
6 A I studied environmental decision-making and
7 political philosophy at Harvard, so I took an A.B.,
8 magna cum laude, from Harvard. And then I studied
9 plant sciences and have a master's degree in plant
10 sciences from Cambridge University, and I have an MBA
11 from MIT as part of a Ph.D. that I was working on.
12 Q What have you done in terms of employment
13 since you graduated?
14 A I was a writer for Newsweek and Technology
15 Review magazines, Boston magazine, and a few other
16 magazines. And then I started a company called
17 Ignition Ventures, and we were working on helping to
18 transfer technology to scientific laboratories.
19 Q Transfer it where?
20 A Into the commercial sphere.
21 Q Are you still doing that?
22 A No. I retired because I wanted to stay home
23 with my children, and also because I was very hurt
24 having our second child. And then I, just in the last
25 two years, started to go back to work, and now I

1 started a venture capital fund here in Charleston with
2 other partners called the Good Growth Capital.
3 Q And you mentioned children. How many do you
4 have?
5 A I have two.
6 Q What are their names?
7 A Amelia and Annie.
8 Q And how old are they?
9 A They are now eleven and eight.
10 Q And you're married?
11 A I am.
12 Q And your husband is named?
13 A Andrew McMarlin.
14 Q And what does he do?
15 A He's a sports medicine doctor.
16 Q And how long have you-all been married?
17 A Twelve and a half years.
18 Q And does he have an active practice in
19 Charleston?
20 A He does.
21 HENRY SALZHAUER: What's the name?
22 A (Continuing) Winning Health.
23 Q There you go, got a plug in. How long have
24 you lived in South Carolina?
25 A A little more than six years.

1 Q And what brought you here?
2 A We just loved it here.
3 Q What was your first introduction to the state?
4 A We were looking for where we wanted to raise
5 our children, and so we were looking around the East
6 Coast because we wanted to be close -- still close
7 enough to my parents, and then we met John Hagerty and
8 Susan Simons, who helped encourage us to move here. I
9 think our first introduction to the state was a medical
10 conference in Greenville, South Carolina, and my first
11 introduction to Charleston was staying at Wild Dunes
12 previous.
13 Q And you've been here six years, so you moved
14 here in 2012?
15 A We moved here in -- let's see, when Amelia --
16 we moved here when Amelia was in kindergarten, and now
17 she's in sixth grade. How's that?
18 Q Okay. And where did you first live when you
19 moved here?
20 A We rented a house at 1760 I'On Avenue.
21 Q And was that before or after you bought Flag
22 Street?
23 A That was before we bought Flag Street.
24 Q How long did you live on Sullivan's before
25 buying Flag Street?

1 A We moved here in August, and we bought Flag
2 Street I guess sometime in that following spring.
3 Q So you wanted to stay on Sullivan's Island,
4 obviously?
5 A Yes, we did.
6 Q Okay. What appealed to you about Flag Street?
7 A The location, and we liked the modern, open
8 feel of the house.
9 Q And how old was the house when you were
10 looking at it, do you remember?
11 A It was built in 1991 or 1992.
12 Q Did you anticipate having to do some
13 renovation to the house?
14 A We did.
15 Q Okay. And did you involve renovation
16 professionals prior to actually purchasing the house?
17 A Yes.
18 Q Okay. And who all did you involve?
19 A We asked Jay to take a look and give us a
20 general estimate, ballpark estimate, of what it might
21 cost to renovate the house, and we had Beau Clowney
22 come up with some ideas for designs.
23 Q And who is Beau?
24 A Beau is a designer in Charleston.
25 Q Okay. An architect?

1 A I believe that Beau himself is a designer and
2 Kate Campbell in his office is the architect.
3 Q Does he have anybody else working in his
4 office that you met with or dealt with?
5 A There are other people who work in his office,
6 but those were the two people we primarily dealt with.
7 Q Who is Cortney?
8 A Cortney is Cortney Bishop.
9 Q Okay.
10 A And she is a designer, but we didn't hire her
11 really as a designer on the job.
12 Q Okay. Does she work with Beau Clowney?
13 A No.
14 Q Anybody other than Beau Clowney, and then
15 trying to -- working with Jay?
16 A Not that I recall.
17 Q And that was engagement or interaction that
18 you had with them prior to actually closing on the
19 purchase of the house?
20 A Yes, because we were trying to get an idea of
21 what we should bid on the house. So we knew that the
22 house only had one bedroom -- well, it had two bedrooms
23 at opposite sides of the house, for example, so we were
24 trying to figure out whether we could make it a family
25 house.

1 Q Was money or budget an issue for you?
2 A Yes.
3 Q Did you have an idea in your head about what
4 you were going to spend or what you could spend to
5 renovate the house and still purchase it?
6 A Yes. If we had come up with a two million
7 dollar estimate on renovating that house, we would not
8 have purchased the house. But we put the bid in for
9 the house as a low bid, and it was accepted.
10 Q Okay. Now, prior to the purchase of the
11 house, what was the level of involvement of Beau
12 Clowney, what all did he do?
13 A He helped -- he walked us through the house,
14 and he had an idea for how we could renovate the house
15 and make it work. The house had a 26-foot high
16 ceiling, when you first walked into the house, in a
17 lofted area, and so one question was could we close
18 that up, could we make -- change the lofted area into a
19 master bedroom, how could we add a second children's
20 room, those kinds of questions.
21 Q Okay. And then how did you interact or
22 interface Beau and Jay during that pre-purchase time
23 period?
24 A I think Beau suggested Jay to come. I can't
25 remember whether it was Tim Reese or Beau.

1 Q Who is Tim Reese?
2 A He was the realtor for the seller of the
3 house.
4 Q Okay.
5 A It could have been George Read who was our
6 realtor. I don't remember who first did the
7 introduction to Jay.
8 Q And what did you ask Jay to do prior to the
9 purchase of the house?
10 A To give a ballpark estimate of how much this
11 was going to run. I don't remember whether there was
12 any -- I imagine we had an inspection of the house. I
13 don't honestly recall it. I know there was -- there
14 was some leaks in several roof areas that were obvious,
15 so we knew we had to change the exercise room roof. We
16 had to change the roof over Annie's room. We wanted to
17 make sure things were structurally sound.
18 Q Okay. And how much time would you estimate
19 you spent with Mr. Brown during that phase of your
20 involvement with him?
21 A He was really helpful, honestly. I don't know
22 exactly how much time, but he was really helpful.
23 Q Was he responsive?
24 A Yes. He was very responsive.
25 Q Did you believe that he was a contractor?

1 A I did.
2 Q Okay. All right. Was your father involved in
3 this process, this pre-purchase renovation analysis
4 process?
5 A I don't remember, honestly.
6 Q When did your father first become involved,
7 that you can remember?
8 A Certainly when -- I imagine he would have come
9 down to see the house before we purchased it. I'm very
10 close with my parents. And he was involved in the
11 bidding process for the actual bids for the renovation
12 of the house.
13 Q Okay. And what's your dad's background?
14 A My dad was an electrical engineer from MIT,
15 and then my dad, my uncle and my grandfather had a
16 commercial electrical contracting firm. And when my
17 uncle retired, my dad really stopped doing that and
18 became an investor.
19 Q Did you trust his experience and background in
20 building and just the general processes?
21 A Absolutely.
22 Q Okay. We introduced earlier an exhibit. I
23 introduced Exhibit 119; do you remember seeing that?
24 A Yes.
25 Q What is that document?

1 A Jay and I were trying to figure out whether we
2 could phase the construction of the house so that it
3 would fit into Andy's and my budget, what we needed to
4 do over the course of time, so you're seeing different
5 areas of the house listed as phases.
6 Q Okay. And at what point in the process was
7 that drawing done, do you know?
8 A My dad suggested to me that we should mark up
9 drawings to make sure that everything was clear in what
10 we were getting and what we were doing.
11 Q Okay.
12 A So, you know, along in the process.
13 Q Was this -- was that -- you see the date is
14 4/24, I think, 2012. Is that during the period of time
15 you were assessing whether or not to buy the house, or
16 was that after you had bought the house?
17 A I have to look up the purchase date of the
18 house. I don't recall the exact date.
19 Q There are three pages on that document. There
20 is a front page, which you've been looking at.
21 A Uh-huh, yes.
22 Q Okay. And the other pages, what are they?
23 A This is showing the second floor of the main
24 part of the house, and the porch that was being added
25 onto the house on the second floor.

1 Q Okay.
2 A So it's showing the second floor layout of the
3 house.
4 Q And was -- were you contemplating having that
5 work done?
6 A Yes.
7 Q Okay. And what's the third page?
8 A The third page looks like it is showing -- it
9 looks like it's showing the -- it's showing the first
10 floor again, but it's showing an alternate placing of
11 where the refrigerator, freezer, and where the stove
12 top are. Those are moving around a little bit in this
13 plan.
14 Q Okay. In terms of what you believed the work
15 of Jay Brown was going to be, how does that document
16 relate to that, if at all?
17 A This document shows the scoping of what we
18 were contemplating it being, but I believe that when
19 I'm looking at -- let's see, it's 490,30. We did
20 not -- for example, here, it's 50K.
21 Q What are you pointing to?
22 A I'm sorry. I'm pointing to this pink area.
23 That's $50,000 for Ipe and rails, and we chose to not
24 use Ipe because it was expensive for us and we just
25 used treated lumber, so I know that's different. Here

1 in the office, it's showing a built-in that Beau had
2 contemplated for $30,000, and we chose not to do that,
3 and it's already got two bathrooms and things like
4 that.
5 Q Okay. Other than those items that you've
6 mentioned, does the drawing reflect the areas on the
7 house where you expected work to be done?
8 A At the beginning of the process, it was not
9 clear whether we were going to do the -- in my mind,
10 whether we were going to renovate the kitchen or not.
11 I wanted everything that we were doing to be done well,
12 and I wasn't sure whether I -- we had the budget for
13 the kitchen, so that was still a question, in my mind.
14 Q Okay. Let me turn your attention to -- I
15 think this is the witness's notebook.
16 A Okay.
17 Q So if you'll look at Exhibit 8 for me.
18 A (Witness complied with request of counsel.)
19 Q We talked a lot about Exhibit 8 today. Is
20 that a document that you recognize?
21 A Yes.
22 Q And what is that?
23 A That is a document that Jay gave us when we
24 were meeting with him. That was an estimate for
25 building our house.

1 Q Do you know whether or not this was given to
2 you after you had purchased the house, or not?
3 A I just can't remember which -- which came
4 first, the purchase date of the house or this.
5 Q Okay.
6 A This looks, you know, like it's more advanced
7 than the purchase of the house, but I can't recall.
8 Q Now, you mentioned that you had a bid process
9 or bidding process for the house?
10 A Yeah.
11 Q And who did you -- tell me about that, what
12 sort of bidding process.
13 A Sure. We had Daly & Sawyer give a bid. We
14 had Evan Diamond give a bid. And Andy Hager was going
15 to give a bid, but then they were -- honestly, I think
16 they were too busy to do the bid.
17 Q Okay. And did Jay provide you with a response
18 to the bid request?
19 A Yes.
20 Q And can you identify for us what document you
21 believe to have been the document that was responsive
22 to the bid request?
23 A This is the document. We are already up to
24 the Andersen Windows and the exterior fasteners, the
25 three Rinnai water heating systems, the metal roofing,

1 what the decks are going to be, the mahogany entry
2 doors, et cetera.
3 Q So you believe Exhibit 8 was Mr. Brown's
4 response to your request for bidding?
5 A That's what I recall. There were other back
6 and forths between Jay and I on -- and I think you can
7 see those in the documents with, well, what if we take
8 this out, what if we put this in. So he gave us a
9 document that was, you know, we could take this out and
10 deflect the price this way, and we could put -- and
11 then we might say, well, but we can't take that out, we
12 need to leave that in. So, he gave us kind of a
13 checklist.
14 Q And was it your expectation when you received
15 this response to the request for bids that this was
16 going to be the price of the scope of work that was
17 contemplated?
18 A This was a -- this was getting close to it,
19 but we had that back-and-forth after this.
20 Q Okay. Did you believe that this price was
21 relative to the -- to what Beau had designed, or how
22 did this price relate to that? Understanding there may
23 have been subsequent changes.
24 A Yeah. I mean, this is very similar to the
25 price that we got from Daly & Sawyer as well, and so it

1 seemed like a good price.
2 Q Did you ever get an estimate from Mr. Brown of
3 a cost between a million two and a million four?
4 A No.
5 Q As far as you know, had you gotten any cost
6 estimates prior to Exhibit 8?
7 A I don't recall. You know, I wasn't keeping --
8 before we built -- you know, before we bid for the
9 house, I wasn't -- it was all kind of a pie in the sky.
10 I wasn't keeping my records in that kind of way until
11 we actually bought the house.
12 Q Did you ultimately decide to go with Jay?
13 A We did.
14 Q And why was that?
15 A First of all, I liked him. Secondly, he had
16 been really helpful in the bidding process, so we felt
17 like that should be rewarded. I mean, he was just
18 doing that on a flyer. And frankly, Daly & Sawyer,
19 they were going to be busy for I think it was maybe a
20 six week delay, and I thought that was important
21 because I only thought that the renovation of the house
22 was a matter of months. So, those three reasons. But
23 we looked at work that Brown-Meihaus had done, or that
24 Jay had done, or, you know, that Jay presented that he
25 had done, and I liked Jay. I mean, honestly, I really

1 believed in him.
2 Q Now, when you were dealing with Jay as part of
3 the buildup to the purchase of the house and the
4 bidding process, what entity did you think you were
5 dealing with?
6 A I didn't focus on that, to -- I have to be
7 honest with you, I just was dealing with Jay. And, you
8 know, sometimes he would present something as Brown &
9 Meihaus. Sometimes he might put it as Brown
10 Construction. That didn't -- I didn't understand that
11 that was relevant in any way. I was talking to Jay
12 Brown, and he's the guy who is signing the thing, and
13 he was the person I trusted to build our family house.
14 So, yeah.
15 Q Did you ever go to the office of
16 Brown-Meihaus?
17 A I don't know whose office it was anymore.
18 There's an office on -- it was Jay's office. It's
19 right next to the Boathouse, or at least it was when we
20 went there.
21 Q The Boathouse Restaurant on the Isle of Palms?
22 A Yes.
23 Q Yup. Did you ever meet with anybody else that
24 you understood to be affiliated with Brown-Meihaus?
25 A I think there was a -- Deborah might have been

1 there. There was a woman who was there. I don't know
2 if it was Deborah or somebody else.
3 Q Have you ever met with anybody else that you
4 have felt was associated with Brown Contractors or
5 Constructors?
6 A No. I mean, I think it was really just -- I
7 think it was -- Jack Brown was -- it was really Jay. I
8 didn't know it, but it wasn't relevant to me, that he
9 and Andy Meihaus weren't doing business anymore. I
10 just met with -- we met with Jay.
11 Q On this response to the bid request, there's a
12 line item for fixed project management fee and
13 accounting. Do you see that?
14 A Yes.
15 Q And who did you understand was going to be
16 providing the project management service?
17 A Jay.
18 Q Did you base your retention or selection of
19 Jay on Exhibit 8?
20 A Like I said, there was some back-and-forth on,
21 you know, this will be in and this will be out, but my
22 dad was very clear he didn't want it to be a time and
23 materials contract, didn't want it to be a cost plus
24 contract. So, yeah, this was --
25 Q Would you have agreed to an open-ended cost

1 plus contract with no limitations or parameters?
2 A No.
3 Q So with respect to this project management
4 component of the contract, did you understand that you
5 were going to be paying a project management fee?
6 A You know, I think a project management fee is
7 reasonable. You know, the guy is managing the project;
8 he deserves to be paid to do that.
9 Q And is that what you were expecting you were
10 going to be paying, a project management fee?
11 A Yes.
12 Q And who did you believe the project manager
13 for your project was going to be?
14 A Jay Brown.
15 Q Were you ever told that the project manager
16 was going to be Vuong Nguyen?
17 A No.
18 Q Or Cameron Glaws?
19 A No.
20 Q Or Ken?
21 A No.
22 Q Were you ever told that anybody other than Jay
23 Brown was going to contract with subcontractors?
24 A No.
25 Q If you understood that Vuong Nguyen was going

1 to be retaining and managing subcontractors on your
2 job, would you have wanted to meet Vuong Nguyen?
3 A Yes.
4 Q If you will, turn over to Exhibit 12, please.
5 A (Witness complied with request of counsel.)
6 Q Do you recognize this document?
7 A Yes.
8 Q And what is this?
9 A This is what I was referencing before, that we
10 were going back and forth over what could we take out
11 of the project, and we were trying to decide whether we
12 were doing the kitchen or not. So, what if we did
13 Phase I and what would it cost to add in the kitchen or
14 take out the kitchen.
15 Q Okay. And then if you'll turn over to Exhibit
16 13 for me.
17 A Yes.
18 Q What is this?
19 A This is a cost plus contract.
20 Q Okay. Sent to you?
21 A It was sent to me.
22 Q And did you sign it?
23 A No.
24 Q Did you talk to Jay about it at that point?
25 A I'm not sure if I talked about it with him, or

1 my father.
2 Q Was the cost plus contract that he sent to you
3 acceptable to you?
4 A No. That's why we didn't sign it.
5 Q Okay. If you'll turn over to Exhibit 15 for
6 me.
7 A (Witness complied with request of counsel.)
8 Q Can you tell me what that is?
9 A That is Jay doing another cost estimate.
10 Q Okay.
11 A On Beau's plan.
12 Q What does this represent, in your mind?
13 A This represented that we were adding more
14 detail to the bid. Jay was adding more detail to the
15 bid. So this was a cost estimate that -- where he was
16 really -- he's putting the bids that could go up or
17 down based on finishes that were chosen in red, and
18 then other things that you can't, you know, there's no
19 way to change to do the house right, and then coming up
20 with an estimate for the job.
21 Q What was that total?
22 A $722,074.12.
23 Q And what price -- what scope of work did you
24 anticipate being done for $722,000.
25 A The whole house. The whole house. That's the

1 whole house.
2 Q There's also a column for Bid B. Do you see
3 that?
4 A Yes.
5 Q Do you know what Bid B was?
6 A Let me see. Bid B, my copy here is not
7 showing detail. Oh, I see. So here if, say, for
8 example, 8.06.00, that was the red stuff that I was
9 talking about, where it was if you chose AGM granite
10 for $10,000 versus -- actually, that's 9.0.3.9, 17,300,
11 from Lowcountry Turnkey. Here's an estimate of $64,000
12 more for a -- or it changed from 44,000 to 64,000 for
13 Kolbe impact, or $61,000 for Andersen impact. So those
14 were, you know, alternate bids for the pieces here, if
15 you add Forticell insulation, if you have -- or don't,
16 and different prices for cabinets.
17 Q Okay. And that 189,886 at the end of that
18 column, is that the amount of the potential add-ons
19 that he's including?
20 A Yes, I believe so. I'm not quite certain. I
21 mean, there's also -- because here, I don't know how
22 their spreadsheet worked, so if there's multiple
23 estimates in that column, whether they all add up or
24 what, so you'll have to add that up.
25 Q Okay. The next exhibit over is Exhibit 16.

1 A Yes.
2 Q And that's the value engineering email?
3 A Yes.
4 Q What is that?
5 A That is what I was talking about where we took
6 that first -- that bid that was the -- on the
7 Brown-Meihaus stationery, I guess it's Exhibit 8, and
8 then these next refinements of the bid, and the
9 questions are what are we going to put in and take out,
10 are we going to put the Ipe decking around the pool or
11 not, or they could put screen doors, going to be this
12 or that, and so there's -- he's taking things in or out
13 based on that.
14 Now, there's a piece of the house that we
15 didn't build that's -- there was going to be -- that's
16 in these estimates, that was to have a -- to have on
17 the other side of the house, on the second floor, we
18 were supposed to have -- we were going to have, in
19 Beau's plan, another deck that came out of my older
20 daughter's window and ran along the length of the side
21 of the house. So some of the things here aren't quite
22 making -- you know, they're looking different because
23 that wasn't done.
24 Q They were included in the estimate, you
25 believed?

1 A Yes.
2 Q But they weren't done?
3 A But we chose not to do that. That was part of
4 figuring out what we were -- we didn't feel like we
5 really needed it.
6 Q Okay. If you go over to Exhibit 17, can you
7 tell me what this sheet is or what this summary is?
8 A In this summary, he's pulled out, on the left
9 is that 722,000 is the whole house, and on the column
10 that I guess is the B column, Phase I column, then
11 there's this 451,741 to just do the Phase I of the
12 house.
13 Q Okay.
14 A Which is really --
15 Q And what was Phase I?
16 A Well, it's related back to -- here it's the
17 main section of the house, but I think --
18 Q You're holding Exhibit 19 -- 119?
19 A Exhibit 19, but --
20 Q 119.
21 A -- but I think that it included the entire
22 exterior envelope of the house was in Phase I, but
23 don't quote me on that. To my recollection, that might
24 have been included in the exterior envelope, not --
25 Q Okay. And then if you'll go over to 18.

1 A Yes.
2 Q Do you know what 18 is, or can you tell us
3 what 18 is?
4 A It's a control estimate for that Phase I and
5 with bids, you know, what the prices were going to be
6 and what our allowances were to stay within that.
7 Q And then, finally, if you'll look at Exhibit
8 20 for me.
9 A Here's a --
10 MR. VARNADO: Which number, I'm sorry?
11 MR. LYLES: Exhibit 20.
12 MR. VARNADO: Thank you.
13 A (Continuing) So first we had this entire house
14 as -- I'm trying to look at this here, "Hank, below is
15 numbers for our discussion," and dad says, "Numbers
16 keep going up instead of down." This is an email
17 between my dad and Jay, and I think that what's
18 happened is it looks like they -- they're looking at
19 two different bids. One, the entire house at 722.
20 One, for Phase I is 484,000, and then another, and then
21 they're putting these alternate pricing line item
22 additions. Here's the total for the entire house at
23 691,000. That's kind of going back to in a difference
24 from the original bid. I'm not exactly sure which one
25 was which, because then my dad says, "I don't

1 understand what I have here. Should there be three
2 price sheets or two; also, the numbers keep going up
3 instead of down." But it's an email back and forth
4 between my dad, going on these estimates, up and down,
5 with about 30,000 difference between the estimates.
6 Q When you look at the timing of the emails, it
7 looks like Hank's email was before Jay's email.
8 A Okay.
9 Q Does that look right?
10 A Yes, that does look right.
11 Q Well, at what point did you feel as though you
12 had an agreement with Jay to proceed forward and
13 renovate the house?
14 A We came up with his control estimates and --
15 to renovate the house. We didn't accept the cost plus
16 contracts. But, it was my understanding from my dad
17 that you don't necessarily have to have a signed
18 contract to go forward. You had to have the clear bid.
19 We felt like we had that clear bid. We had an
20 agreement. And we were still going on the assumption
21 that -- I mean, we were still going on that if there
22 were any cost savings, it would be split 50 percent.
23 So the conversations were that Jay would be
24 managing this job and he would, you know, do a great
25 job, we'd have a great house that would be what he

1 called turnkey, and then if things came in under the
2 bid price, he would pass that along, but he would still
3 have his fixed price. He wouldn't suffer from that
4 kind -- you know, if something was under. He had a
5 fixed price for managing the job.
6 Q At any point, did the scope of the work that
7 Jay was going to do surprise you at all, either way?
8 A Well, when they demoed the house, they demoed
9 almost the entire house. So while we were still going
10 back and forth on the kitchen, it was taken out of the
11 house.
12 Q When you say "going back and forth on the
13 kitchen," what do you mean?
14 A If you look at this bid, there was -- there
15 was a question of whether we were doing the kitchen or
16 not. And we're just preparing that for that kitchen
17 to, you know, be changed, and that kitchen was demoed.
18 There was also a question of whether we were going to
19 do the -- put in two bathrooms or just leave the
20 existing bathroom that was in the Phase II, the
21 exercise area, and that was taken out. There were
22 plans drawn for how that not to be taken out, but,
23 anyway.
24 THE COURT: Taken out of the contract or taken
25 out of the house?

1 A (Continuing) I mean, it was -- it was -- the
2 house was demoed.
3 THE COURT: Okay.
4 BY MR. LYLES:
5 Q While you were in the process of trying to
6 decide whether you were going to renovate the kitchen
7 or renovate these other bathrooms, that decision was
8 made for you because they were demoed?
9 A The kitchen was definitely made for me. The
10 bathroom, what they said was that, when they were
11 looking at the shower, that the shower had problems and
12 we were going to have to change that window anyway. So
13 he draw a plan where we would put in a -- take out the
14 shower and put in a bathtub and leave the existing
15 cabinetry, and still have one bathroom in that part of
16 the house, and then they took out everything.
17 Q And Kate worked for Beau Clowney?
18 A Yes.
19 Q So you were living on Sullivan's Island when
20 the work began; is that right?
21 A When the work began, we had -- we rented a
22 house downtown, 95 East Bay Street.
23 Q Okay. And why did you move to downtown from
24 the island?
25 A That was where we could find a, you know, a

1 reasonable place to stay that fit our needs.
2 Q How long did you expect the renovation at your
3 house was going to take?
4 A I rented 95 East Bay Street until -- the house
5 was supposed to be done at the end of December, but I
6 rented it until the end of January because I figured
7 things often go over.
8 Q When you say the house was supposed to be done
9 at the end of December, when did -- or how did you get
10 that information?
11 A From Jay.
12 Q And that was on some of these estimates, or
13 where did the information come from?
14 A I remember an email where he mentions -- at
15 one point, he mentions five months. At one point, he
16 mentions three months. I can look up those emails if
17 you would like.
18 Q If you look back at Exhibit 8, there's a
19 reference to five months.
20 A Okay.
21 Q Do you see that reference to five months?
22 A Yes.
23 Q Was that consistent with what you understood
24 from Jay would be the time period?
25 A Can I look something up? I can't remember

1 whether at the end he said five months or three months,
2 but it was three to five months.
3 Q Okay. And so you based your alternate housing
4 on a five-month time period?
5 A I know that we rented the house to be until
6 the end of January, thinking that that gave us extra
7 time.
8 Q And you're talking about what you expected is
9 that you would be able to get in the house in either
10 December of 2012 or January of 2013?
11 A Yes.
12 Q And were you able to?
13 A No.
14 Q How far along was the house in January of
15 2013, in your estimation?
16 A I was clearly not a good estimator of --
17 because I would keep asking Jay when we were going to
18 be done, and then I would believe that, so I thought
19 that we were coming very close. And then Jay -- I
20 asked Jay for an outside date, when we would absolutely
21 be in the house, so that we could extend the house
22 rental. We had a very nice landlord, Kiara Balish, who
23 said to me, tell the last date and I won't -- and the
24 house was on the market -- I won't rent the house out
25 and I won't sell it, I'll let you stay. I haven't had

1 a bid anyway. And I believe Jay said March 1st, and
2 that's how we came up with the idea of renting it until
3 March 31st in case we went long again. So, then the
4 problem was that it wasn't ready and there were people
5 moving into that house on April 1st.
6 Q And so you had to move where?
7 A Well, we really thought we were going to be in
8 the house before the end of that, so then I was stuck.
9 I spoke to Tim Reese. And then I believe it was the
10 Jones Company controls Porpoise Point on Sullivan's
11 Island, I think it's 853 Middle Street, and they said
12 that that was available for the month. And so even
13 though it had lead paint, I have a four-year-old and a
14 seven-year-old, I moved into Porpoise Point.
15 Q Okay. And how long did you live there?
16 A Well, the house was not done at the end of
17 March, but they were -- they let us extend the house on
18 a monthly basis, and we ended up staying there until
19 the end of June, at which point that house rental would
20 have gone up to $40,000 a month.
21 Q Okay. So where did you go at the end of
22 June -- or was your house ready at the end of June?
23 A No. We went into a hotel. And then we -- I
24 think it was the Homewood Suites. I don't remember at
25 that moment where we went. Maybe we went to Wild

1 Dunes. We went into a hotel, and then the children and
2 I just left, and my husband started staying in people's
3 guest rooms.
4 Q Where did you and the children go?
5 A We went -- first we went to New York, to my
6 parents. It's not easy to find a place in the summer.
7 And then we went on a trip, so we had a nice time.
8 Q And did you have to come back to Charleston at
9 the end of the summer?
10 A Yes. My children were starting school.
11 Q Okay. Was your house ready then?
12 A No. We were going to come back August 1st.
13 There was a June -- at some point in there, there was a
14 June 11th completion date that was promised. The March
15 one went to June 11th, then that went to August 1st.
16 And then, I don't remember the date the children and I
17 came back, but we came back sometime in August and the
18 house was not ready.
19 Q So what did you do then in terms of living?
20 A First we were staying at John Hagerty and
21 Susan Simons' house, and then their children came back,
22 so then we -- no, first we were staying at the Homewood
23 Suites. Then we were staying at their house. Then we
24 rented a house, like, you know, one of those little
25 townhouse things at Wild Dunes. Then maybe we moved

1 back in the Homewood Suites, I don't remember. Then we
2 were staying -- then we were back at John and Susan's
3 because they were on vacation, and then they came back.
4 They were just on vacation for a few days, and we kept
5 thinking we were about to be back into the -- into the
6 house. And they came back, and so we were trying to
7 find some place. And then Susan said, you guys have
8 had it. I mean, the children were absolutely
9 miserable. These were very small children, a
10 three-year-old and a six-year-old, and then they turned
11 four and seven. And she said, why don't you just stay,
12 just stay so you don't keep moving around, for which I
13 am eternally grateful.
14 Q So when did you finally get into Flag Street?
15 A Well, at the beginning of October, looking
16 back in my emails, I -- we moved in an air mattress
17 or -- we didn't have -- I mean, we were staying at the
18 Hagertys', but it was a big imposition. We moved in
19 with some air mattresses, but we didn't move in our
20 furniture; we left that all in storage. The children
21 and I continued to stay at the Hagertys' until the end
22 of October because there was still construction going
23 on in the house, but it seemed like it was better to
24 have Andy there so he could see what was going on. And
25 then we moved, I mean, looking back in the emails, I'm

1 finally sending emails saying I am moving our furniture
2 in, and, you know, at this point if you need to move
3 the furniture, you're going to have to move the
4 furniture around because we can't keep doing this.
5 Q You heard Mr. Brown earlier today say that the
6 delays were caused by Amy. Is that your recollection
7 of things?
8 A No.
9 Q Who, in your mind, or what, in your mind,
10 caused the delays?
11 A At the beginning of the job, when things were
12 not moving along, Jay said the delays were the windows
13 were taking longer to come in. Should I -- can I look
14 at my notes?
15 Q If you can remember, and we can go through
16 your emails and whatnot. Just tell me what you
17 remember.
18 A Then there were lots of time periods where
19 there would only be one or two guys on the job, or two
20 or three guys on the job. There were times when I
21 would come to the job, and I'm not a contractor, but I
22 could understand the plan, and, you know, I arrived to
23 the job and they had put -- they opened up an area in
24 what's now our playroom and were installing a window,
25 and there was no window that was supposed to be there,

1 and they were closing up another part, so then they had
2 to take out the window and close that up, and then put
3 another piece in. I think a lot of delays were just
4 because there weren't many people working on the job.
5 Then there were delays, the floor caused a significant
6 delay at different times in the job, so --
7 Q How so?
8 A Well, the flooring guy, Terrence was the name
9 of the person who owned the company, but there was
10 somebody who came to do the floors, and they made big
11 gouges in the floors and took out this big section of
12 floor. And it was gouges in the floors on two areas of
13 the house, in the master bedroom and in the main
14 section of the house, and so then they had to -- they
15 kept sanding that. They just kind of sanded it out,
16 but then they never fully finished that job. And so, I
17 went away for the summer; and when I came back, they
18 had just -- I'm sorry, that's an editorial -- they had
19 just put paper over the problems in the floor.
20 And then I came back in August, and now it was
21 supposed to be that things were supposed to be
22 happening like paint, and they took up the paper and
23 there were still these big gouges in the floor, and I
24 have the pictures of the gouges in the floor. And so
25 then, they had to sand the floor again, and so the

1 painter can't come when the floor is being sanded and
2 that guy is not coming and then that guy is not coming,
3 and then there were different weeks at a time where the
4 painter wouldn't show -- wasn't coming to the job, or
5 he would say that he was working nights on a job but
6 not sending anybody in the day.
7 Q Back to the floor issue just a minute. Do you
8 have wood floors in your house?
9 A Yes.
10 Q And are those wood floors -- what's the
11 condition of the wood floors now?
12 A They are still not acceptable.
13 Q And can they be sanded further?
14 A No. They sanded off the floor. I mean, you
15 know, you don't have to take my word on it, we have
16 that. Other people came to look at the floor and
17 measured the floor.
18 Q Okay. Any other events, in your mind, or
19 circumstances, in your mind, caused delays?
20 A Just off the top of my head? I'm tired.
21 Q Off the top of your head. I know you're
22 tired. We'll wrap up shortly and then we'll pick back
23 up.
24 THE COURT: Amy, if you need to take a break,
25 please do so. Don't wear yourself out. If you feel

1 like a five-minute break would help you --
2 A (Continuing) Just a five-minute break.
3 Q You can do anything you want.
4 A I don't even need five minutes. I just need
5 to jog my memory with my notes because that's how I
6 operate.
7 Q Well --
8 A But if you don't want that, then we don't have
9 to do that. I'm trying to think what else.
10 MR. VARNADO: I could use a break.
11 MR. LYLES: Okay.
12 (Whereas, a brief recess was taken.)
13 THE COURT: We are back on the record.
14 BY MR. LYLES:
15 Q You mentioned staffing on the job or people at
16 the job. Can you describe, at least from your
17 perspective, how many days a week were people working
18 on the job as an average or as a rule?
19 A It varied. There were times when there were
20 people on the job every day, and then there were times
21 when there didn't seem to be anybody on the job or
22 there might have been just one or two guys on the job.
23 Q For what length of time?
24 A I mean, I have -- I would say there were weeks
25 where it was like that, might have been two guys on the

1 job.
2 Q Doing what?
3 A I don't know what everybody was doing. I
4 think that happened in the framing time. That happened
5 in the finishing time when things were like, you know,
6 things were supposed to be getting put in the house,
7 like trim and that kind of stuff. Or then there were
8 supposed to be painters in the house, you know, at a
9 time when I thought everybody was going to come and
10 everything was going to get done. There's another
11 staffing issue, to my mind, which is that things would
12 happen like Kate Campbell from Beau Clowney's office
13 and I did a walk-through for the heating and air
14 conditioning with a man named Timmy Motte.
15 Q Who was Mr. Motte?
16 A He was -- I think he's M&S, I think that's his
17 company, so he's a heating and air conditioning
18 contractor. So we did the whole walk-through. That
19 was, you know, on a -- I don't know, third -- one day
20 of the week, one week.
21 Q Is this an appointment that was scheduled in
22 advance?
23 A Yes.
24 Q Okay. And what was the purpose of the
25 walk-through?

1 A The purpose was to plan out the heating and
2 air conditioning system, to go through what Kate had
3 planned, and look at things that, you know, were
4 actually at the site and see if there were any concerns
5 so that they could adjust things and make sure that
6 things were correct. I believe that Jay was expected
7 at that meeting, but he wasn't there and Vuong was
8 there instead.
9 And then the next week, I came to the house
10 and, or a few days later, don't quote the timing, but
11 it's not more than a week, and there are all of these
12 guys doing, three guys, putting in ducts that didn't
13 make any sense compared to what we walked through. And
14 I said, that is not my understanding of what was
15 supposed to be happening; did you talk about this with
16 Timmy. And they said, who is Timmy; we work for Jimmy.
17 They had -- Jay had switched over the heating and air
18 conditioning person without telling us, without telling
19 Kate, without an additional walk-through, there was
20 just this other set of people on the job.
21 Similarly, while Jay might say that we were
22 causing delays of this or that, he would say -- he
23 would send an email, for example, to my -- he sent an
24 email to my dad saying that I caused a delay on the job
25 because I was insisting on interior doors being

1 reframed. Well, if you look in the email stream, I'm
2 sending an email saying that I was at the house, and
3 there is a guy who is trying to put the doors in who
4 says he cannot possibly put in the doors because the
5 doors were framed wrong. So that gets translated by
6 Jay to that I am now insisting on a change order in the
7 house to reframe the interior doors, but I'm not
8 insisting on that. They just didn't frame the doors
9 right, so then they had to reframe the doors and that
10 would cause a delay.
11 Q How about, did you -- you mentioned the
12 walk-through you did with the mechanical sub, or the
13 first mechanical sub. Did you do a walk-through with
14 the electrical sub?
15 A That was also an adventure. So we --
16 Q Was this before or after the HVAC
17 walk-through?
18 A I am not certain. I think it was after.
19 Q Okay. Was this also a meeting that was
20 scheduled in advance?
21 A It was a meeting that was scheduled in
22 advance.
23 Q What was the purpose of the meeting?
24 A The purpose of the meeting was to go over the
25 electrical plan and look at the situation again on

1 site, and so we had Kate Campbell from Beau Clowney's
2 office and myself, and we were expecting an electrical
3 contractor to be there. Instead, there was a person
4 who had been on the site. Sometimes he would be the
5 guy who just kind of seemed like he was overseeing what
6 was happening on the job that day, and I don't remember
7 his name. He was very nice. He was an elderly
8 African-American man, and he said that he was going to
9 do the electrical walk-through, and that he was an
10 electrician, and that he didn't need to write anything
11 down or mark anything on the walls because he was going
12 to memorize the entire electrical plan.
13 Q So did you have a walk-through with him?
14 A So we had a walk-through with him; but
15 afterwards, Kate said that was crazy. I mean, I'm not
16 a contractor, but I knew that that was crazy. And so I
17 called Jay, and I think it might have been -- sort of
18 in my head I remember it on a Friday. So I called Jay
19 and I said, what was that. That was not an electrician
20 we would want to have on the job. That's not an
21 electrical contractor. That's the guy who's been on
22 the job, you know, dealing with the guys working on the
23 job. And he said, oh, no, no, that's not the person
24 who's doing that, who's doing the electrical work. And
25 Barry came to the job the next week.

1 Q Who is Barry?
2 A Barry Lingenfelter who's the electrical
3 contractor.
4 Q Okay. And did you do a walk-through then with
5 Barry?
6 A Not with Kate. We had already had that
7 walk-through. So I tried to -- you know, Barry and I
8 tried to put it back together, what it was. But
9 Kate -- at that point, Beau and Kate weren't available,
10 and we had already been -- we waited several weeks for
11 that electrical walk-through before, and now we just
12 needed to get the electrical started, so...
13 Q Okay. So there's been a lot of talk today
14 about Mr. Nguyen. Who was he, in your mind?
15 A He was like the -- he was the foreman on the
16 job.
17 Q Was he there from the time of demo on, or when
18 did he get on the job, to your knowledge?
19 A I think he was there from the demo time on,
20 yeah.
21 Q Okay. And what did -- so you thought he was a
22 job foreman?
23 A I thought he was a job foreman. Sometimes
24 there would be this guy named Anhel (ph) who would be
25 the -- like the day that the window was in the wrong

1 place, I remember it was Anhel who was in charge of the
2 job. But, you know, sometimes it was the
3 African-American guy that I referenced, but a lot of
4 times it was Vuong who was at the job.
5 Q Okay. And how did you get introduced to
6 Vuong?
7 A When we were inside the house. The house was
8 already -- I mean, the house would have already had
9 work started.
10 Q Did Jay tell you anything about him or what
11 his role was going to be?
12 A No. I think Vuong introduced himself. He
13 told us that his -- his father was like a Vietnam war
14 hero, and that was when I -- that was the first day I
15 met Vuong.
16 Q Did you know the name of his company?
17 A No. I didn't realize that he had a company.
18 Q Okay. All right. You don't remember the name
19 of the elderly African-American man?
20 A I remember in an email that it's ref- -- his
21 name is referenced in an email from Vuong back to us.
22 I objected -- for example, we had a charge for I think
23 it's $750 for that man to do -- he did 3D modeling or
24 something they said of the electrical system in the
25 house, and so when I saw that come through as a charge,

1 I said we're not paying that. Now, when we had the
2 next contractor come and Barry came, Vuong and that
3 gentleman came up to me in the car and they said that I
4 had made a terrible mistake, that he was a great
5 electrician, and that, you know, I should have him do
6 the work on the house.
7 Q This is the elderly African-American man?
8 A Yes. And I said, I'm a daughter of an
9 electrician; I'm sorry, I feel very strongly about
10 this, and, you know, I need it to be somebody who all
11 they do is electrical work. But I know that in the
12 email from Vuong, he implies that I was a racist and
13 said I didn't want him to do the work because he
14 couldn't spell toaster correctly, and he says his name
15 in that email, so if we found that, we would have his
16 name.
17 Q How long was Vuong on the job, in your mind?
18 A I mean, I think it's around January when the
19 job was clearly late and there were all these things
20 that were wrong with the job, and I would come and
21 there was not proper oversight of the job. I think it
22 might have been soon after that window misplacement
23 that I -- I asked Jay if he could please take Vuong off
24 the job, and if there were any other foremen that were
25 available.

1 Q What other things were wrong with the job at
2 that point in time, do you recall?
3 A There were so many things that were wrong with
4 the job.
5 Q Can you tell me some that you attributed to
6 Vuong's foremanship?
7 A Yes. There was water intrusion into the house
8 where they were repairing the roof, so the roof over
9 Annie's room and heading over towards the master
10 bedroom. And they said that the reason that that had
11 happened was that they had -- that the roofer had
12 failed to cover over something when the work was being
13 done, and that the -- you know, this and that. You
14 know, there was this host of excuses, but the fact is
15 that water was running into my house. Nobody -- I was
16 the person who had to notice that. I was the person
17 who had to deal with that, and that it had not been
18 properly supervised. The -- yeah, that's just a good
19 example.
20 Q Okay. At what point in time, if any, did you
21 understand that Vuong was hiring subcontractors?
22 A At some point, I looked at a bill, and I was
23 shocked to see that Vuong was submitting this bill.
24 But see, I'm not in construction. Vuong was submitting
25 a bill to pay the heating and air conditioning person

1 or the plumber, one of those two, and I thought that
2 that was strange. But then when I asked people, they
3 said, you know, subs sometimes pay another sub, so, you
4 know, that could be, he could have -- he could have
5 been doing that. I didn't understand, honestly, that
6 VLN, LLC, was Vuong. I had not figured that out.
7 Q Okay. So at what point in time did you figure
8 out that Vuong had been hiring subcontractors?
9 A I'm not sure of the exact date.
10 Q Was it while he was there, or after he left?
11 A I think he -- I knew that he was hiring
12 subcontractors while he was -- was there, because, you
13 know, it would be -- you know, I'm honestly not sure.
14 I knew it -- the time I knew that he was hiring was --
15 I knew that VLN, LLC, was hiring subcontractors. I
16 knew that it sounded like the men -- I guess I knew it
17 when he was there. It sounded to me like the men who
18 were working for him, some of them were working at the
19 house, were subcontractors of Vuong, Vuong would say.
20 Q Did you have a conversation with Jay, where
21 Jay told you in order to get a cheaper job, he would
22 get Vuong to hire subcontractors?
23 A No.
24 Q Did you hear that testimony earlier today?
25 A Yes.

1 Q And is that testimony, at least in your
2 recollection, true or not?
3 A I'm sorry to call a liar, but it's not true.
4 Q So you didn't have that conversation?
5 A No.
6 Q Okay.
7 THE COURT: Up to you?
8 MR. LYLES: Yeah, that's fine. This is as
9 good a spot as any.
10 THE COURT: We have concluded -- we have
11 stopped at 5:05 today. We will come back tomorrow.
12 Amy, you will be the witness tomorrow, a continuation.
13 You cannot discuss your testimony tonight with anybody,
14 particularly Mr. Lyles.
15 THE WITNESS: Okay.
16 THE COURT: As long as you are under oath and
17 as long as you are testifying, you cannot get help with
18 your testimony.
19 THE WITNESS: So, it's 10 o'clock tomorrow
20 morning?
21 THE COURT: Let's start at 9:00, if we can.
22 And there is no reason to squeeze an extra day out of
23 this if we don't have to.
24 (Whereas, the above proceedings adjourned at
25 5:05 p.m. on November 7th, 2017.)

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1 CHARLESTON, SOUTH CAROLINA, WEDNESDAY, NOVEMBER 8, 2017
2 9:09 A.M.
3 P R O C E E D I N G S
4 - - - - -
5 THE COURT: We are starting the second day of
6 testimony in 2014-3881. We concluded with Amy
7 Salzhauer as the witness, and we are continuing with
8 her direct examination. Robert?
9 MR. LYLES: Okay, give me just a second.
10 (Amy Salzhauer McMarlin, having previously
11 been sworn, continues to testify as follows:)
12 CONTINUED DIRECT EXAMINATION
13 BY MR. LYLES:
14 Q Amy, we ended the day yesterday talking a
15 little bit about Mr. Nguyen. Is it Nguyen? Vuong?
16 A Vuong.
17 Q Yeah, Nguyen. Let me get you to turn your
18 attention to Exhibit 57. Let's get these.
19 A Okay.
20 Q Put these down. You've got -- oh, this is the
21 witness set, is that right?
22 MR. VARNADO: This is the witness set.
23 A (Continuing) Thank you.
24 Q All right. What is Exhibit 57?
25 A That is an email from me to Jay, asking for

1 him to take Vuong off of the job.
2 Q Okay. Did you have any sort of personal
3 animus with Vuong?
4 A No.
5 Q What were your concerns about Vuong?
6 A My concerns were that I would repeatedly come
7 to the job, and there were problems at the job that I
8 could see that had not been rectified at the job site
9 by the person who was supposed to be overseeing them.
10 I have no construction experience, so my concern was
11 that if I could see those big problems, that there were
12 a lot of smaller problems that were certainly happening
13 that I couldn't see, and that those big problems were
14 also happening and not being fixed.
15 Q Okay.
16 A At least not fixed in a timely manner.
17 Q What's the date on Exhibit 57?
18 A March 2nd, 2013.
19 Q Up until that time, how often would you
20 describe Jay's personal attendance to the job?
21 A I didn't see -- really see Jay at the job.
22 Sometimes he would answer an email. He -- you know,
23 the job site was often left unlocked, and we would go
24 by the house and the house would be open, and I
25 remember sending him some emails about that, and I

1 remember Jay saying he was responsible for locking the
2 house, or his people were, something like that. He
3 sent the bills.
4 Q In response to Exhibit 57, was Vuong removed
5 from the job.
6 A Yes.
7 Q Okay. How long after that, do you recall?
8 A Pretty soon after that. I mean, you know, I
9 saw him at the job site, once again, sometime later in
10 the job, and I said, what is he doing here. That was
11 several months later, because he was not supposed to be
12 at our job site anymore.
13 Q Okay. After Vuong left, who did you perceive
14 to be the person managing the job site?
15 A I don't remember the order. I remember
16 saying -- I mean, there didn't -- at one point, it was
17 this person Ken, and then at another point, there
18 didn't seem to be anybody, and I said to Jay -- or
19 emailed to Jay, I think we have it in an email, who is
20 now managing the job site, and he said, me; but he
21 wasn't there.
22 Q And in terms of time, looking at the length of
23 time of the job, how long was Ken there?
24 A A short time. Maybe, I don't know, maybe a
25 month.

1 Q Okay.
2 A A few weeks to a month. I understand that he
3 went just 2062 -- 2652 Middle Street, to another job
4 that was having problems.
5 Q And then the period of time where you
6 perceived that there was nobody managing the job site,
7 how long did that last?
8 A That would last until Cameron Glaws came on
9 the job.
10 Q And when was that, do you remember?
11 A It was before the beginning of the summer. I
12 don't remember the exact date.
13 Q Okay. So sometime between March and late
14 June, you had Ken?
15 A Yes.
16 Q And you had some period of time where there
17 was nobody on the job site?
18 A Yes.
19 Q And is it your recollection that Cameron came
20 on site about summertime?
21 A A little before the summer.
22 Q So sometime in mid June, early June?
23 A Something like that.
24 Q Okay.
25 A I think he sent an email to my father

1 detailing his dates. I think it might have said
2 something like -- it's a date in June -- until a date
3 in December that he was on the job, December 3rd.
4 Q And what was your experience with Cameron?
5 A My early experience with Cameron was really
6 good, and I thought that the job was finally going to
7 get done.
8 Q Yeah?
9 A Yes.
10 Q And did you regularly communicate with
11 Cameron?
12 A Yes.
13 Q Was he on the job site?
14 A Yes.
15 Q So you were satisfied with at least his
16 attendance?
17 A Cameron would be on the job site, and he had
18 two guys who were working for him who were on the job
19 site often.
20 Q Was the level of activity on the job site
21 under Cameron better than it had been under Vuong?
22 A It was better than it had been under Vuong.
23 Cameron was having trouble getting trades to come back,
24 though.
25 Q Okay.

1 A And I have emails to that effect. So, the
2 painter wouldn't come for weeks or the cabinet people
3 or the plumber, the roofer. It seemed to me, though,
4 that he himself was trying, but, again, I have multiple
5 emails where I'm saying Jay, you know, the subs aren't
6 coming to the job and we're never going to finish if
7 you don't get people to come.
8 Q Did you understand the reason that subs were
9 not coming to the job?
10 A One sub left me a message to say that he
11 hadn't been paid on another job. I -- I don't know why
12 subs weren't coming to the job. I did feel for
13 Cameron. I felt that Cameron came into a botched job,
14 and he knew that, too.
15 Q Now, were you satisfied with Cameron through
16 the -- his involvement with the job, which I think you
17 said ended in early December?
18 A No.
19 Q When did you become dissatisfied?
20 A I started to become dissatisfied when I came
21 back in August and saw that the job hadn't been close
22 to finished the way it was supposed to be, and we were
23 expecting to move in. That things like the gouges in
24 the floor instead of being fixed during that time had
25 just been covered up with paper. And that things were

1 happening that, you know, say, for example, I remember
2 sending an email where I say so, you know, somebody's
3 got -- Jay, you've got to come in and have some
4 oversight here, because everybody is waiting for some
5 guy to build a curb to a shower and he's not coming, so
6 then the next person can't work and the next person
7 can't work, and that's been happening over the course
8 of weeks.
9 Also, I had these problems -- I could tell
10 there were problems with the heating and air
11 conditioning system, and I was very concerned because
12 there were two different trades and I did not want
13 there to be -- or two different subcontractors for the
14 heating and air. And when that switch happened, which
15 I was -- there were multiple switches, right, for that.
16 So first, Kate Cambell and I walked with Timmy
17 Motte. Then there was the switch that I did not
18 approve to whatever that other guy was, whose name I
19 don't know, who came and did the first part of the
20 heating and air conditioning system. And then there
21 was another -- then they brought back in Timmy Motte,
22 and I said, well, if we have two heating and air
23 conditioning system guys, then who will be responsible
24 if something goes wrong; they'll both just say he
25 said/he said, so I don't want that. So that next, you

1 know, piece was not approved, either.
2 And then Timmy Motte's people explained to me
3 that really they were redoing things that had been done
4 wrong on the site, and that there were still things
5 that were, you know, that were wrong. And then, but I
6 couldn't get Cameron or Jay, you know, I kept saying I
7 want both subs to be meeting together and figuring out
8 what is wrong with my heating and air conditioning
9 system, and I asked for that multiple times; and
10 different times that meeting was supposed to happen,
11 and it would not happen.
12 Q Do you recall when your heating and air work
13 was initially done?
14 A I mean, I think that there was heating and air
15 conditioning work that was done towards the beginning
16 of the job, and then there was a big gap in when they
17 needed heating and air conditioning work done, and then
18 the other heating and air conditioning people came in.
19 The initial heating and air conditioning people, to my
20 mind, to my knowledge, never -- never came back in to
21 see what went wrong, or et cetera.
22 Q At what point did they do their work, if you
23 can remember?
24 A I would say they were done by March.
25 Q Of 2013?

1 A You know, actually they should have -- I think
2 they might have been done in the fall of 2013.
3 Q Okay. Do you remember a discussion yesterday
4 with Mr. Brown's testimony about a report that was
5 done?
6 A Yes. Mr. Volkmar.
7 Q Okay. And do you remember -- let's see, where
8 is my Plaintiff's book? Where is the witness
9 Plaintiff's book? Okay, look at Exhibit 10, if you
10 will. Do you recognize Exhibit 10?
11 A Yes.
12 Q Okay, and tell me what that is.
13 A This is a report from Volkmar Consulting
14 Services on August 16th, 2013.
15 Q Okay. And why was that report obtained?
16 A That report was obtained at my request because
17 I felt that the heating and air conditioning system was
18 not working properly.
19 Q Okay. Was the heating and air conditioning
20 system already installed when that report was received?
21 A Yes, for sure.
22 Q Okay.
23 A In fact, this report wasn't even received by
24 me until September of 2013.
25 MR. VARNADO: Report date, 9/17/2013.

1 A (Continuing) His report date is 8/16/2013, but
2 I kept requesting the report, and I have emails to the
3 effect of us saying what happened to the engineering
4 report, we've been asking for it and it happened three
5 weeks ago. So I know that it was not received by me
6 until September 2013. So when Jay said that they
7 followed the advice or the description lead out by
8 Volkmar Consulting Services, that was completely
9 untrue.
10 Q So you became dissatisfied with Cameron when
11 you got back into town in August and the house was not
12 where you thought it should be?
13 A Correct.
14 Q And did you ever request that Cameron be
15 removed?
16 A No. I thought -- I really thought that we
17 were about to be in the house, so it didn't make sense
18 for Cameron to be removed.
19 Q Okay.
20 A I mean, I have emails with me, you know,
21 telling people that I expect -- you know, that Andy
22 can't come to the party because we were supposed to
23 move into the house today, and I think it's August
24 17th, 2013, and we can't move into our house so we're
25 moving into a rental in Wild Dunes. But, it was a

1 surprise.
2 Q Did -- let's see. During the time that
3 Cameron was on site, did you see Jay on site more?
4 A No.
5 Q Less?
6 A I would say -- I didn't see Jay on the site
7 very much. Jay -- I remember Jay once being on the
8 site when we were figuring out doors and floors in the
9 playroom. He had a nice suggestion for floors.
10 Q Okay.
11 A That was probably in the springtime. There
12 were multiple times where there's supposed to be
13 something like a paint walk-through, and Jay was
14 supposed to come to the paint walk-through and he
15 didn't show up. He wasn't there for the heating and
16 air conditioning walk-through. He wasn't there for the
17 electrical walk-through. So major systems of the
18 house, where he was supposed to be in charge of it, and
19 he wasn't there.
20 Q Okay. Your decision to move into the house,
21 can you tell me again what was the basis for that?
22 A We had -- we had a very hard time with this
23 because I would find out -- I would expect that the
24 house was ready, and again not, so I have a set of
25 emails in March from me to realtors, in mid March,

1 where I think -- where I've just found out that the
2 house is still not going to be ready for me to move
3 into by the end of this -- by the way, I found my
4 rental agreement for 95 East Bay Street. It was
5 originally scheduled until January 7th, 2013, so my
6 expectation was December, and then we scheduled it to
7 the end of March.
8 And then you can see me around March 17th
9 sending emails to realtors saying my house was supposed
10 to be ready and it's not, do you have anything that we
11 can move into; even I see that your house has somebody
12 who has rented it for a week in the middle, but we
13 could move out for Easter week, and then move back in.
14 And then we had the same thing. So we were supposed to
15 be in by June 11th, and we had Porpoise Point rented at
16 853 Middle Street until the end of June, but we knew we
17 had to get out, so we moved out. So, we were in this
18 set of hotel rooms and short-term rentals.
19 Andy sent an email to Jay or Cameron, or both,
20 probably to Cameron at this point, saying, look, you've
21 got to tell me whether we're going to be able to move
22 in, because we have small children that at this point
23 are desperate. They don't know where they're sleeping.
24 They don't know where the bathroom is. And the whole
25 family is frazzled to the point of desperation. And I

1 don't mean to be dramatic about it, but it's very hard
2 when you don't know if you're moving into the house and
3 you just keep doing these short-term things.
4 In October, like I said, we sort of, we moved
5 some things in in a kind of a camping way so that Andy
6 could stay in the house. We thought that that would
7 help with the -- with the -- with him overseeing. And
8 also we were staying at John and Susan Hagerty's house,
9 but there weren't enough bedrooms, really. So both
10 children, you know, we would have one child on an air
11 mattress and one child in a bed, and then they would
12 switch every other night. And so by moving Andy into
13 the house on an air mattress, then we could put one
14 child into a bed with me, and then everybody had a bed,
15 so that was the big improvement for everybody. I mean,
16 we just -- everybody needed a place to stay. And
17 frankly, having an adult male in a house is not a big
18 deal.
19 And there was also this business where Jay was
20 saying that they would give us a partial Certificate of
21 Occupancy, which turned out not to be really something
22 that they would do. They wouldn't, you know, let
23 children live on a construction site. But at that
24 point, we had the Certificate of Occupancy, and we had
25 had it for several weeks, and it was supposedly just

1 the paint was supposed to be happening and different
2 things like that. But then we realized that there was
3 no hot water, for example, in the children's shower;
4 right? So, we didn't know that until Andy was in the
5 house and we were really looking at things in the
6 house, and --
7 Q Were you involved in the process of securing
8 the CO?
9 A Was I involved in the process?
10 Q Yeah.
11 A Can you explain the question?
12 Q Did you have to do anything yourself
13 personally with respect to the CO?
14 A Yes, because Jay was telling us in writing
15 that he would not call for the CO until we had paid him
16 75 percent of the profit and overhead that he was
17 billing for the house, that he could hold up the CO
18 based on us paying him this additional profit and
19 overhead that he was asking for.
20 Q Did you pay that?
21 A We did not pay it, but I went in to speak to
22 Randy in the town office on Sullivan's Island and said,
23 is this right, that he can hold up our Certificate of
24 Occupancy over this, and he said, no. So the other
25 thing there is that Randy had done an inspection and we

1 didn't get the CO, and they said it was just a few
2 little things. But then when I spoke to Randy, it was
3 significant things, plumbing and the heating and air
4 conditioning system, and I needed to understand that
5 because we kept thinking we were going to move into the
6 house.
7 Q But you got the CO sometime in maybe mid
8 September?
9 A We did.
10 Q And you occupied in what, October; right?
11 A We -- I have emails that we started -- we
12 moved some air mattresses into the house. I'm telling
13 them on October 2nd or something that we're going to
14 start moving some air mattresses into the house.
15 Q When did you believe that the house
16 realistically was first supposed to be complete?
17 A In December of 2012.
18 Q And have you calculated the amount of the loss
19 of use that you believe you suffered because you didn't
20 get into the house until the following October?
21 A I have. I don't have it in front of me, but I
22 know we have -- I know we've submitted that to you.
23 Q Okay.
24 THE COURT: Where is that calculation in here?
25 MR. LYLES: It's in our discovery responses.

1 BY MR. LYLES:
2 Q Do you have a general idea of what that amount
3 was?
4 A Well, for example, I have here a lease for 95
5 East Bay Street.
6 Q Let me do this, we'll come back to that.
7 A Okay.
8 Q We'll come back to it. Okay, now, when you
9 returned from New York in August of 2013, and I think
10 you said you were disappointed in the status of the
11 construction?
12 A Yes.
13 Q Do you remember doing an email to Jay at that
14 point in time about a number of issues that you
15 observed on the job?
16 A Yes. I think it's August 7th.
17 Q Okay. We'll mark this for identification.
18 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 122 FOR
19 I.D.)
20 BY MR. LYLES:
21 Q I'll show you what we've marked as Exhibit 122
22 and ask you if you recognize that.
23 A Yes, I do.
24 Q And what is that?
25 A That is an email that I wrote to Jay Brown, to

1 my husband, Andy McMarlin, and to my father, Henry
2 Salzhauer, describing things that I was concerned about
3 on the job.
4 Q Okay. And if we can walk through -- or did
5 you send this email to Jay?
6 A Yes.
7 Q Did you get a response to this email from Jay?
8 A No. I ultimately got a response from Vuong.
9 Q Okay. But not from Jay?
10 A I think that the Jay response is -- the Jay
11 response was, you know, perfunctory, if it came. I
12 don't recall the substance of his response.
13 MR. LYLES: I would like to move this into
14 evidence as Exhibit 122.
15 THE COURT: Rob?
16 MR. VARNADO: Sure.
17 THE COURT: All right, 122 is admitted without
18 objection.
19 (DEFENDANT'S EXHIBIT NO. 122 ADMITTED INTO
20 EVIDENCE.)
21 A (Continuing) I should mention that I had a
22 friend help me look through the books, et cetera,
23 because I was having trouble with -- I don't have
24 experience to understand what happened on the job, and
25 so he helped me look through things to figure this out.

1 Q Okay. And run through this, the first item
2 that you mention under the question column has to do
3 with siding and exterior trim?
4 A Yes.
5 Q And what was your concern there? If you could
6 just describe it to Mr. Brown as opposed to reading it.
7 A Yeah.
8 Q Could you tell me generally what your concern
9 was?
10 THE COURT: You say the question column?
11 MR. LYLES: She has, "Here are some of my
12 questions," on the first page.
13 THE COURT: Okay, I got it. I was looking for
14 the column.
15 MR. LYLES: Sure. Sorry about that.
16 A (Continuing) Well, the price of the siding and
17 the trim increased by 300 percent on the job, and there
18 was a legitimate problem that they had encountered that
19 they hadn't expected, which was the band board, but
20 that increased the cost only by $10,000. So the
21 original control estimate was $27,500, and then we were
22 already billed, as of June, $86,000, so that's, you
23 know, $58,000 plus over.
24 Q Okay. And I omitted this and didn't mention
25 it. But in the first paragraph, you reference the

1 initial price for construction?
2 A Yes.
3 Q And what was that?
4 A $722,074, and then we didn't do that entirely,
5 the entire job. We didn't put that porch on. We
6 didn't put the built-ins in. And, but the price kept
7 going up.
8 Q Your second concern under your list of
9 questions is HVAC. What is that related to?
10 A Again, an increase by over 500 percent, from
11 $4,700 to $33,760. And I reference that there was a
12 new unit, and that was true. That was billed as $5,200
13 on an invoice to Vuong. But I checked the price of
14 that unit online, and that was -- the price was $1,273
15 to $1,432, including free shipping from reliable
16 retailers, so I started to realize the problems.
17 Q You mentioned earlier that you believe that
18 Motte's company came back on site to correct improperly
19 performed work?
20 A They corrected improperly performed work, and
21 they did additional work.
22 Q And were you charged for the cost of
23 correcting the improperly done work?
24 A Yes.
25 Q Is that something that you can recall

1 happening more than once?
2 A Yes.
3 Q Can you describe another instance where you
4 were charged for the cost of correcting improper work?
5 A Plumbing work.
6 Q And tell me about that.
7 A Well, so, the plumbers also had two different
8 sets of plumbers. Again, I was concerned about the
9 change. I did not approve the change. The -- at the
10 start of the job, I think I thought it was going to be
11 Coastal Plumbing, I did, and then that was not the sub
12 that was used for the rough-in on the job. The -- I
13 don't remember the name of the sub. It was somebody
14 that Vuong brought in. And then, again, there was this
15 change back to Coastal Plumbing.
16 And you can see Jay references change orders
17 to cabinets. I mean, the cabinets that were there were
18 the cabinetry over the -- in the bathrooms; and what
19 happened is the rough-ins were done incorrectly, and so
20 then the cabinetry had to be changed around the
21 existing conditions of the plumbing rough-ins. And one
22 of the plumbers was kind enough to tell me, and I sent
23 an email to this effect, look, we're really redoing
24 shoddy plumbing and problems with the plumbing on this
25 job, and under the house, we're redoing things under

1 the house, and because you will not get a CO with the
2 plumbing the way it is. And then, they asked that guy
3 to leave the job.
4 Q Okay. You mention on the next page, wood
5 framing increases?
6 A Yes.
7 Q What is that?
8 A It went over by -- it was increased by over
9 300 percent.
10 Q Okay. Roofing cost, you reference that?
11 A Yup, 250 percent.
12 Q Can you tell us -- and if you mentioned this
13 yesterday, I apologize. But tell us again what roofing
14 work was done by Jay Brown on your job.
15 A They did roofing over the new -- the exercise
16 room, which was always planned. That was -- that
17 was -- there had been an inlet -- kind of insets into
18 the house that were -- that were leaking. That was a
19 known issue with the inspection report. And which, by
20 the way, I realized those initial inspections and Jay's
21 initial in looking at the house with us was in January
22 of 2012, not, you know, later.
23 And then he also did the area over our
24 daughter Annie's room, and over the master bedroom.
25 That was the area that I referenced that there was

1 significant water intrusion because they had been
2 working on that area of the house and they didn't seal
3 it up.
4 Q Okay. If we move down a little bit on your
5 letter -- or email.
6 A Yes.
7 Q You see at the bottom of page 2, you say, "As
8 you know, I have a red roof." What does that refer to?
9 A Well, we were replacing significant parts of
10 the roof, and we also had been discussing color scheme
11 for the house. And amazingly, at the same time that
12 Vuong was at a meeting where Beau Clowney and I were
13 discussing the color scheme of the house, and that the
14 roof would be either steel or light blue, and that the
15 house would be a cream color, and the different, you
16 know, trim colors of the house, Vuong was actually
17 upstairs installing a new red roof, and he knew that.
18 I don't know what was in his mind. I can't know what
19 was in his mind.
20 And so then they said, well, the roof was
21 ordered many weeks ago, which turned out to not be
22 true; we spoke with the roofing company. And the fix
23 was that they could paint the roof with HydroStop
24 paint, but then I understood that that would not be as
25 strong a finish. So I said, all right, well, I'll live

1 with the red roof. I'd rather do that than to have a
2 roof with HydroStop paint flaking off. And the
3 agreement was that they would credit the cost of the
4 HydroStop paint painting to the cost of the house. It
5 would be a credit for our charges for the house.
6 Q And did that happen?
7 A No.
8 Q As you turn over to page 3 of your email,
9 you've got some inset references to invoices there. Do
10 you see that?
11 A Yes.
12 Q Okay. Did you at any point become concerned
13 about being invoiced for work that was not done at your
14 house?
15 A Yes.
16 Q And can you describe some of that for Mr.
17 Brown?
18 A Yes. For example, we had an invoice from
19 Eugene's Marble & Granite for eight hand-hewn stone
20 sinks that were installed at 7 Conquest Street, but
21 they were billed to 1850 Flag Street.
22 Q What is 7 Conquest Street, that's a different
23 house?
24 A That's a different house that I assume Jay
25 must have been doing construction work on. And my

1 initial emails to Jay about problems with billing like
2 that is, you know, I understand that you're doing
3 accounting on multiple houses and mistakes happen, but
4 please just can you fix it, but I received no response
5 and no change to the billing.
6 Q Anything else that you can recall?
7 A Yes. There was a shed. We were billed for a
8 shed to be built over our pool, which was for -- you
9 know, I don't know what house that was for, but we
10 certainly didn't have any roof built over our pool.
11 There was a bill to VLN for tiling, but they didn't do
12 any of the tiling on the job. So those are the first
13 pieces that I recall.
14 Q Are most of those concerns set forth in this
15 email to Jay?
16 A I don't recall. This was just, you know, what
17 I had noticed at the time on August 7th, 2013.
18 Q Okay.
19 A I can see that there -- there were also
20 sometimes where things would be double billed.
21 Q Can you give me an example of that?
22 A We would be billed twice for moving furniture
23 or installing different things. There were things that
24 were done wrong, that then they would call a -- that
25 when they were asked to fix it, they would say it was a

1 change order, so we would be billed for the initial
2 work that was done incorrectly, and then we would be
3 billed for the change to change it. We had -- I had
4 questions about things like we were -- we would keep
5 getting these invoices for renting equipment for --
6 from VLN, LLC, and I felt that we should have some
7 accounting for what that equipment was.
8 And additionally, I started -- I noticed
9 things like there was a -- one of the three designers
10 that's been described on this job is a woman named
11 Cristina Swinney. Jay told me that Cristina was the
12 person who worked for him who did his cabinets and
13 countertops, and that I needed to do all of that
14 through Cristina, and that he didn't handle that, but
15 she just worked for him in his office and that she did
16 that for him. But as -- as things progressed, I came
17 to realize that that was not true, that Cristina was a
18 sub who was also marking up her bill. In fact, I have
19 two invoices, one where she has, and I have them here
20 if people would like to look at it, on the same date,
21 where she's billing me, I think it's for the granite
22 countertop. And I said I wanted to understand whether
23 that was the full cost of the granite, or whether there
24 was any charge for her time in that, and she sent
25 another invoice which shows the $250 that was going to

1 Q And what's the total loss of use number that
2 we have referenced?
3 A $50,000.
4 Q Okay. And do you remember how that was
5 calculated?
6 A Yes. I multiplied the cost of the leases and
7 the hotel rooms and using the Hagertys' house, and I'm
8 trying to -- we might have added in there the cost of
9 the storage facility, and the cost of moving multiple
10 times.
11 Q And that would be a loss of use for 12
12 months -- or 10 months?
13 A Correct.
14 Q I'll refer you also to Exhibit 41, and ask you
15 if those are some of the checks that you wrote during
16 your time --
17 A Yes.
18 Q There was a discussion yesterday about the
19 report done by a company called Benchmark, or the
20 reports?
21 A Yes.
22 Q Tell me about the Benchmark reports. What
23 were -- how did those come about?
24 A I was concerned that it was he said/she said
25 on the conditions of the construction of the house, and

1 also that I could see that there were things that, to
2 my untrained eye, looked like they were wrong with the
3 house, so I asked a certified house inspector to come
4 so I could understand what this -- the state of the
5 work at the house. That happened once during the job,
6 and then, I don't know if this is a term of art, but
7 Jay never really finished the job; right? So, and I'm
8 not talking about little pieces of trim that might be
9 missing. I'm talking about I still have bathrooms that
10 don't have hot water in the shower, and he knows that
11 and is not returning to fix the job. So I felt like we
12 might be coming to a situation like this and I should
13 have an outside party take a look at it again, and so I
14 asked the same gentleman who had done the earlier
15 report to come back and look to see what had been fixed
16 from the early report, what was happening now.
17 Q Okay. Well, let's look at Exhibit 32. And do
18 you recognize Exhibit 32?
19 A Yes. Although, I would have to look to see
20 which one is it, the first one or the second one.
21 Q Well, then, I will refer you to Exhibit 31.
22 A It looks like this is probably the first one
23 and that's the second one. I'll have to look. This
24 looks like the 31 is the second one and 32 is the first
25 one.

1 Q Okay. So Exhibit 32 is the first report?
2 A Yes.
3 Q And do you remember receiving and reviewing
4 that report?
5 A Yes.
6 Q And did you provide that report to Jay?
7 A Yes.
8 Q And did you hear him say yesterday he didn't
9 get the report?
10 A Yes. But they even responded to certain of
11 these pieces on the, you know, in their work on the
12 job, and I believe in an email, too.
13 Q Okay. Let me show you --
14 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 123 FOR
15 I.D.)
16 BY MR. LYLES:
17 Q Let me show you what I've marked as Exhibit
18 123 and ask you if you recognize that.
19 A Yes. This an email from me on October 7th,
20 2013, to -- no, this is an email from October 8th,
21 2013, from Jay Brown. I have sent him an email on
22 October 7th, 2013, giving him a link to the inspection
23 report that was completed last week. "I sent it to
24 Cameron over the weekend so it could be added to his
25 punch list." And Jay replied on October 8th, 2013,

1 "Got it. Will get it taken care of. Thanks."
2 Q And were the items on the punch list
3 ultimately -- or the items addressed in the Benchmark
4 report ultimately taken care of?
5 A Some of them were and some of them were not,
6 as you can see in the next report from March 2014.
7 Q Okay. And that's Exhibit 31?
8 A Yes.
9 Q Okay. So there's a -- so the first report is
10 October of 2013?
11 A Yes.
12 Q And then the second report is in March of
13 2014?
14 A Yes.
15 Q Did Jay receive a copy of the second report?
16 A Yes.
17 Q Did you also give that second report or any of
18 these reports -- either of these reports to Howard
19 Brown?
20 A Yes.
21 Q And why did you give them to Howard Brown?
22 A Jay had not been to the job since the
23 beginning of December 2014. When Cameron said he left
24 the job December 4th, that was really nobody had come
25 to the job. Jay had bowed out of the job long before

1 Cameron, as far as I could tell, and I needed somebody
2 to fix the problems in the house, because we had some
3 significant problems in the house.
4 THE COURT: Robert, I'm sorry, but what do you
5 want to do with 123?
6 MR. LYLES: Oh, I'm sorry. I need to move
7 that into evidence.
8 MR. VARNADO: You can move it in, but it's
9 only for the 2013 report. That's fine.
10 THE COURT: I understand.
11 MR. VARNADO: Okay. It doesn't do anything
12 about the 2014 report.
13 THE COURT: Well, what is your -- the 2014
14 report has already been admitted.
15 MR. LYLES: It's admitted into evidence. We
16 just don't have an email that we put in, yet, to
17 establish that Mr. Brown got the report, even though he
18 said yesterday he didn't.
19 THE COURT: All right.
20 MR. LYLES: We'll see what we can come up
21 with.
22 THE COURT: But we're going to -- 123 is
23 admitted in relation to the first report, Exhibit 32.
24 MR. VARNADO: Sure.
25 (DEFENDANT'S EXHIBIT NO. 123 ADMITTED INTO

1 EVIDENCE.)
2 BY MR. LYLES:
3 Q So, when did you first talk to Mr. Brown,
4 Howard Brown?
5 A I spoke to him in the spring of 2014.
6 Q And what was your purpose of speaking to
7 Howard Brown?
8 A We had significant issues at the house, and I
9 had called in Neil Sawyer and asked him to take a look
10 at the issues at the house. He was kind enough to say,
11 look, I'll try to help you with my -- with the big
12 systems of the house, but you have a lot of work here
13 that needs to be overseen on a daily basis, and I have
14 jobs going and this is too small a job for me, and
15 somebody is probably going to have to testify about
16 this stuff in court and I don't do that. And yet, he
17 had gone up to see the heating and air conditioning
18 system, and he said, I'm sorry, but this is a disaster,
19 and let me suggest a sub.
20 MR. VARNADO: I'm going to object to --
21 THE COURT: I'm going to sustain the objection
22 as to what people are specifically telling you.
23 A (Continuing) Okay.
24 THE COURT: You can testify that you talked to
25 them.

1 A (Continuing) I talked to Neil Sawyer and he
2 told me that I had --
3 MR. VARNADO: No.
4 BY MR. LYLES:
5 Q You can't say what Neil Sawyer told you.
6 A I talked to Neil Sawyer, and my understanding
7 from Neil was that I had a significant problem at the
8 house.
9 Q And Neil was unable to help you?
10 A And Neil was unable to help me.
11 THE COURT: Okay.
12 A (Continuing) Neil suggested that I speak to
13 you. I already knew I -- it's not that Neil suggested
14 I needed a lawyer. I knew that I needed a lawyer
15 because I had a lien filed against me. And I knew that
16 I needed a contractor, and Mr. Howard Brown came very
17 highly recommended as a very honest contractor who
18 could help oversee things.
19 Q And so what was the purpose of your retention
20 overall of Howard Brown?
21 A I had a punch list, an extensive punch list,
22 left on my house. It was compiled from these
23 inspections and from my previous punch lists on the
24 house, some of which had been walked through with
25 Cameron. And they -- they were not fixing the problems

1 on the house, so I needed somebody to come and fix
2 things. I mean, I still didn't -- I had one bathroom,
3 as I said, with no hot water, and a guest bathroom
4 where you can have hot or cold, you just couldn't have
5 warm. I knew there were problems with the heating and
6 air conditioning system. There were extensive -- well,
7 I don't need to go through the whole punch here. It
8 was a long punch list. And in addition to this, there
9 was another punch list that we sent to Jay and Cameron,
10 and those things were not being responded to, either.
11 Q And when you say "there was another punch
12 list," who prepared that punch list?
13 A I prepared that punch list, and there was a
14 friend of ours who is a contractor, William Dion,
15 walked the house with us, and a nice carpenter who had
16 done work for Cortney Bishop, who had experience with
17 construction, walked the house with us. Some of it had
18 come from walking the house with Cameron before they
19 left the job.
20 So there are all of these items of punch. For
21 example, there were doors that couldn't close. So, you
22 know, we needed things to start working in the house,
23 and they clearly were not coming back.
24 Q Are you confident that the punch lists were
25 provided to Jay Brown?

1 A Yes.
2 Q Let me turn your attention to Exhibit 25.
3 What is that?
4 A This is our contract with Howard Brown.
5 Q Okay. And what is attached to that exhibit,
6 or the back of Mr. Brown's contract?
7 A His estimate of the work required to finish
8 the job.
9 Q And that's on page 3?
10 A Yes.
11 Q And then there's another page behind that. Do
12 you see that?
13 A Yes. So, he was looking at our punch list,
14 the builder's punch list, the contractor's punch list.
15 And so, and then his own looking at what was happening
16 at the job.
17 Q Okay. Under the job description section of
18 his Exhibit A --
19 THE COURT: What's the Bates number on that?
20 MR. LYLES: Salzhauer 05182.
21 BY MR. LYLES:
22 Q Does Mr. Brown, Howard Brown, reference the
23 various punch lists?
24 A Yes, he does.
25 Q And then if you continue to go under his

1 Exhibit B, which is Salzhauer 05184, and the next 15 or
2 20 pages, are those the punch lists that he's put
3 together --
4 A Yes.
5 Q -- that have been put together?
6 A I should tell you that these were the punch
7 lists at that time. There were issues that came up
8 that we did not know when we prepared these punch
9 lists, so...
10 Q Okay. Has Mr. Brown been actively trying to
11 accomplish the items on this punch list --
12 A Yes.
13 Q -- or these punch lists?
14 A Yes.
15 Q And have you been satisfied with his
16 performance so far?
17 A Yes.
18 Q And Mr. Brown is going to be here to testify
19 later. Would you rely on him to testify about the
20 amount of his bills and his estimates?
21 A Yeah.
22 Q Okay. Now, you mentioned that since this
23 Exhibit 25 was created, there have been other issues
24 that have come up at the house?
25 A Yes.

1 Q What issues are those? If you can tell me.
2 A I can. I have to check what's on this. I
3 don't -- don't, you know, quote me that there might not
4 be something that's on here that I don't know -- you
5 know, yeah. The -- in this punch list, they're waiting
6 for the mechanical engineer, Louie Schweers, to
7 complete his work so that we understood the estimates
8 to correct the heating and air conditioning system, so
9 I don't see that in this estimated cost.
10 Q Did that come later?
11 A Well, we knew that the heating and air
12 conditioning system was a problem, but the estimate is
13 not on here.
14 Q And who is Mr. Schweers?
15 A He is an engineer, mechanical engineer.
16 Q Did he ultimately come to your house and look
17 at your system?
18 A Yes.
19 Q And did he provide you with recommendations?
20 A Yes.
21 Q And did you follow those recommendations?
22 A Yes.
23 Q And did that result in the replacement of the
24 HVAC system?
25 A Yes.

1 Q How much did that cost you?
2 A About $60,000.
3 Q Okay. Anything else come up after this that
4 you can think of?
5 A Yes. I'm not sure whether the leak in the
6 porch roof was on this -- I imagine it was. Yes, the
7 leak on the porch roof must be on this punch list.
8 Q Which porch roof?
9 A Well, there was a leak, and I have emails
10 where Cameron was trying to repair it but he didn't, in
11 the fall of 2013. There's a second floor to the front
12 porch, a balcony, and that's leaking down into the
13 front porch.
14 Q Okay. And that's a screened porch?
15 A That's a screened porch.
16 Q Okay.
17 A And then we didn't understand the extent of
18 electrical problems on two different -- two different
19 time periods of not understanding the extent of the
20 electrical problems.
21 Q Can you describe the electrical problems that
22 you are referring to?
23 A Yes. The first set is that when they
24 started -- so in order to do the heating and air
25 conditioning repair, the children and I really needed

1 to leave again because it was a lot of work. So we
2 waited until the summer when they were out of school,
3 and we went to go stay with my parents in New York.
4 And Howard called and said that in the garage -- I
5 had -- I had concern about the way the ductwork and the
6 wiring and different things were in the garage, but I
7 didn't understand the whole extent, so they were not
8 sheetrocked over. And then, but what they could see
9 was that gas lines and electrical lines and the heating
10 and air were -- I wasn't on the site to understand it.
11 They were not to code. They were mingled together, and
12 they needed to fix all of that in the garage. I don't
13 think that that was anticipated when we were looking at
14 this.
15 Q Okay.
16 A That was the first set of electrical issues.
17 The second set of electrical issues we didn't
18 understand until recently. We knew that there were
19 certain problems with electricity in the house, for
20 example, different appliances would stop working, and
21 then you could flip the circuit breaker and maybe make
22 them work again; or there were different places in the
23 house where light bulbs would burn out rapidly.
24 Different things like that, that -- or that, you know,
25 made us understand there might have been electrical

1 issues in the house.
2 But what happened is, we were putting in a
3 built-in bookcase -- or not a built-in bookcase.
4 Floating shelves. And the carpenter said that he
5 didn't think there would be studs in the appropriate
6 locations for the design of the bookcase, so he was
7 going to put in plywood, open up the wall, put in
8 plywood, and then we would -- you know, then he would
9 have a place to hang things.
10 What happened when he opened up the wall is we
11 found a few things. One is, we found that while that
12 wall was dealt with in emails and conversations, that
13 it was supposed to be an acoustical, isolating wall,
14 none of that was done, and that was one problem. But
15 the bigger problem, the electrical problem that you're
16 talking about, is that when he opened up the wall, he
17 said, I'm so sorry to tell you this, but your --
18 MR. VARNADO: Again, I'm going to object
19 to --
20 A (Continuing) Okay.
21 Q Just if you would describe what was found.
22 A What was found was that the electrical work
23 had not been shielded. So there are supposed to be
24 plate -- metal plates, I guess, covering, shielding the
25 wires from the studs, and shielding the wires going

1 across, and none of that had been done. Additionally,
2 I guess when -- I'm not a contractor, so forgive me.
3 But that when you're using -- when you're hammering in
4 trim, you're supposed to use a nail that's, you know,
5 one inch or one and a half inch, and these were two and
6 three-inch nails, so he could see in that small section
7 of wall that there were nails that had touched the
8 wiring but hadn't penetrated. And on the basis of
9 that, he recommended that I call in the electrician.
10 Q Okay. And so you've done some additional
11 electrical investigation?
12 A Well, the electrician only had to open up a
13 very small additional area of wall to see nails that
14 were hammered through the wiring.
15 Q And those photographs have been produced?
16 A Those photographs have been produced.
17 Q And so that's an issue that was not addressed
18 by Mr. Brown initially; right?
19 A We didn't know that issue.
20 Q But has recently been -- he has recently
21 estimated the repair for that?
22 A Yes, he has.
23 Q Okay. And what's the amount of that repair?
24 A There was a kind of a stopgap repair that was
25 done, which was just to place an arc fault circuit

1 breaker in the house. Well, the electrician -- I mean,
2 we were very concerned that the house was really
3 subject to fire, and so they put in an arc fault
4 circuit breaker. I'm not sure what the cost was of
5 that off the top of my head.
6 Q But Mr. Brown did that?
7 A But Mr. Brown did that.
8 Q Howard Brown did that?
9 A Howard Brown did that, with Carmona Electric.
10 And then there's a very big number to properly fix the
11 situation; but in order to do that, they're going to
12 have to open up the walls and see where the problems
13 are. Once they put the arc fault circuit breaker in,
14 then there are places where, you know, lights won't
15 work or you can't -- another issue that we found out
16 from them is that the electrician didn't properly do
17 things like the kitchen island. When I was talking
18 about those appliances that we knew were dependent on
19 flipping the breaker, there should have been two, I
20 guess, and I'm not an electrician, two circuits so that
21 they would each have the amount of amperage, and they
22 don't. So when they put in the arc fault breaker, then
23 you're always going over that amperage and you can't,
24 say, use the toaster oven and use a microwave at the
25 same time because then everything shuts off.

1 Q Okay. And Mr. Brown has given you -- Mr.
2 Howard Brown has given you a price to deal with the
3 electrical issues?
4 A Yes.
5 Q Is that right?
6 A Yes.
7 Q And he can testify about that?
8 A Yes.
9 Q Okay. Did you have any roof work done?
10 A Yes.
11 Q And was that contemplated by Mr. Brown's first
12 estimate?
13 A No.
14 Q And what did you have done on the roof?
15 A The roof over Annie's room again had to be
16 replaced, and then heading across further from that.
17 So the same roof work that had been done here, which I
18 have emails where people who understood what was
19 happening had concerns about the way the roof was being
20 installed when it was happening with Jay Brown. And so
21 we had water leaking, again, into that room, and then
22 they repaired the roof and then -- but they couldn't --
23 then they -- they repaired -- replaced, it's my
24 understanding, more of the roof because they
25 couldn't -- they kind of couldn't stop. They had to

1 not have two different metals meeting. They kept going
2 over that section of the roof.
3 Q So the roof work that you've had done with Mr.
4 Howard Brown, is that to address issues with the roof
5 work that was done by Jay Brown?
6 A Yes.
7 Q At least in part?
8 A Yes.
9 Q Okay. In large part?
10 A I would rather that you speak to the roofer to
11 know the percentage of which and the percentage of
12 that, because I never went up on the roof.
13 Q Okay. But there is no doubt in your mind that
14 the roof work was to repair either incomplete or
15 defective work of Jay Brown?
16 A Yes.
17 Q Okay. You mentioned the roof leak on your
18 screen porch. That's at the front door?
19 A Yes.
20 Q Is there any slope on the floor?
21 A No. That's another defect of the work.
22 Q Is that something that's been addressed by Mr.
23 Brown, Howard Brown's first estimate, or do you know?
24 A I don't know.
25 Q Okay. Is that something you brought to the

1 attention of Jay Brown during construction?
2 A Yes.
3 Q And what did you tell him during construction?
4 A I told him the porch isn't sloped and -- or
5 properly sloped.
6 Q And what was his response to that?
7 A It is.
8 Q What was the response?
9 A That, yes, the porch is properly sloped.
10 Q Okay. And have you ultimately found out that
11 that's not right?
12 A Yes.
13 Q Is there any slope on that porch?
14 A I think there's a very slight slope on the
15 porch, but it doesn't meet anybody's specifications.
16 You know, I think Howard Brown can testify to that
17 better.
18 Q Okay. Have you noticed any sagging or
19 deflection in your walls?
20 A Oh, yes. That's the next issue.
21 Q And that wasn't addressed by Mr. Brown in his
22 initial estimate?
23 A No, it wasn't.
24 Q What's that about?
25 A Well, we noticed cracks in Annie's room, and

1 then in also the -- there's a sliding door, and it
2 kept -- it would work and then it wouldn't work. And
3 then Howard, we pointed it out to Howard and his --
4 Kyle, a person who was working for him, noticed it, at
5 first just the part in Annie's room, and then Howard
6 noticed that actually that followed through to the main
7 floor of the house, and then looked at it more
8 carefully and said, actually, you know, this is a real
9 problem, you've got a real deflection issue here.
10 Q What have you done to deal with that?
11 A We're still working on that.
12 Q Did you retain an engineer?
13 A Yes.
14 Q And who is that?
15 A Geremy.
16 Q Geremy Powell?
17 A Yes, Geremy Powell.
18 Q Do you know if he was involved in the project
19 initially?
20 A Yes, he was.
21 Q During Mr. Jay Brown's work?
22 A Yes, he was.
23 Q And so did Geremy Powell come out and take a
24 look at the issue?
25 A Yes.

1 Q And did he provide you with some drawings?
2 A Yes, he did.
3 Q And did Mr. Howard Brown provide you with a
4 price to implement Geremy's suggested repair?
5 A Yes.
6 Q Now, is that a repair that you believe you are
7 going to do?
8 A We have to repair the house. I'm still trying
9 to see if there's another way to do it that is not as
10 intrusive as the repair that was proposed by Geremy
11 Powell, to see whether Geremy can work and find some
12 other way to do it.
13 Q Okay. You mentioned several times plumbing
14 issues. Were those issues ultimately addressed?
15 A By Jay Brown, or by Howard Brown?
16 Q Howard.
17 A Yes.
18 Q Can you describe what you found or what you
19 observed during those repairs?
20 A Yes. I mean, valves were put in upside down.
21 We have pictures for that, so very clearly say this end
22 up, that end was down. The plumbing rough-ins were
23 just done wrong, and that's why things wouldn't work.
24 I mean, Cameron's response to me at some point in this
25 was that I should check the propane levels, that

1 that's, you know, that -- I'm complaining about the
2 plumbing and the hot water not working, and his
3 response is perhaps you should check the propane
4 levels.
5 Q Meaning that your water didn't have any fuel?
6 A Right, but that wouldn't make any sense.
7 There was hot water to the sinks, just not to the -- so
8 at one point, he was responsive and said he would fix
9 it. At one point, I think that on a walk-through Jay
10 was responsive and said he would fix it, sometime in
11 the early fall. And then, nothing ever got fixed. I
12 mean, it did get fixed, but it got fixed under Howard
13 Brown.
14 Q Have you seen the total amount of Howard
15 Brown's estimates with the new electrical issue
16 included in that? Do you know how much that is?
17 A I have seen that. I have tried to repress it.
18 It's a large sum.
19 Q Do you know what that number is?
20 A I have -- I don't know the exact number in my
21 head because it was just coming in, but it's over
22 $200,000.
23 Q Just for the electrical work?
24 A The electrical work and repairing after the
25 electrical work. It also necessitates the children and

1 I leaving the house again.
2 Q Have you -- do you know how long you might be
3 out of the house to accomplish that work?
4 A We haven't discussed that yet.
5 Q Are you concerned about the safety of the
6 house?
7 A Yes, I am. The -- I know I -- my
8 understanding from the electrician was before the arc
9 fault breaker was put in -- we found that, luckily,
10 close to the start of the summer. And he was -- I
11 became very concerned, based on nails going into
12 electrical wiring, about the risk of fire for the
13 house. So the children and I again left for the summer
14 and went to stay with my parents while they put in the
15 arc fault circuit wiring.
16 THE COURT: You're saying arc fault, A-R-C?
17 A (Continuing) Yes.
18 THE COURT: Okay.
19 A (Continuing) It's -- again, an electrician can
20 explain it better than I can. My understanding is that
21 while it doesn't really fix the whole issue, what it
22 will do is if there is a -- if there is a short
23 circuit, it will -- that might be causing a slow burn
24 in the walls, it will shut off the circuit.
25 THE COURT: I'm just asking. I'm familiar

1 with ground fault breakers, but I'm not -- I'll
2 leave it up to the electricians with the arc fault.
3 A (Continuing) The electrician, I mean, the
4 electrician was helpful because we thought there was no
5 stopgap, and my dad was talking to people and said,
6 well, if we could do this, then at least you could come
7 back and live in the house. But it doesn't, it's like
8 a -- you know, it's just like a patch.
9 THE COURT: Go ahead. I was more curious than
10 anything.
11 BY MR. LYLES:
12 Q Okay. You heard Mr. Brown yesterday say that
13 initially he believed that his initial estimate was for
14 1.2 to 1.4 million dollars. Do you remember that?
15 A Yes, I do.
16 Q I think your testimony was that you never saw
17 such an estimate?
18 A No.
19 Q And you also heard him say that he believed
20 that his estimate, his initial estimate, was comparable
21 to the estimate of Daly & Sawyer?
22 A Yes.
23 Q And who was Daly & Sawyer?
24 A Daly & Sawyer is another contractor on
25 Sullivan's Island.

1 Q Okay. Did they also bid for your house?
2 A Yes.
3 Q And what was their bid, do you remember?
4 A It was in the same ballpark as Jay. It was,
5 you know, high 600s; and then if you added certain
6 things on, it would be 700 or 800.
7 Q Okay. Was there any doubt in your mind that
8 the estimate or bid from Jay Brown to accomplish the
9 work called for by Beau Clowney was $722,000?
10 A No.
11 Q Okay. No doubt in your mind that that's what
12 the number was?
13 A No. I recognized within that that there were
14 specific allowances that we were given for things like
15 plumbing fixtures, and that if I bought plumbing
16 fixtures that were more expensive than that, then that
17 number would go up based on what I, you know, my going
18 over the allowance for a plumbing fixture, which seemed
19 reasonable to me.
20 Q Are there -- were there any instances that you
21 can recall, after hearing Jay Brown's testimony
22 yesterday, where you acknowledge that you exceeded the
23 budget with your material selections?
24 A Yes. I mean, I think that I chose appliances
25 that might have exceeded our -- but we're talking --

1 and I might have chosen, you know, plumbing handles and
2 things that exceeded that. I'm not certain. But,
3 we're talking about, you know, an overage on the job of
4 tens of thousands of dollars, not an overage of the job
5 of half a million dollars.
6 Q Are there circumstances that you can recall
7 where you believed that your either changes in the job
8 or your selection process delayed the job?
9 A We -- there is a legitimate change that Jay
10 suggested that we have, that we put a sprinkler system
11 in the house, and that was a legitimate change, for
12 sure. I -- there's lots of emails where Jay would say
13 that we were delaying things, but then it would turn
14 out not to be true.
15 Let's see, there was -- there was a time -- so
16 we had selected a slab for the kitchen island. We
17 selected that very, very early in the process, because
18 what I was told was that you select the slab first and
19 then you can -- you make the kitchen island to fit with
20 what you can cut from the slab. There was a mistake
21 that was made by the cabinetmaker and they made the
22 kitchen island longer than the slab. This was
23 happening in, I don't know, August or something. And I
24 don't -- don't quote me on the time.
25 Q August 2012 or 2013?

1 A 2013, or maybe it's in the spring. Whenever
2 that piece of granite was supposed to be coming in and
3 the kitchen island was put in, we realized that
4 problem. And then there was -- you know, there were a
5 few days, for sure, where we were trying to figure out
6 what to do about that, and I went to look and see if I
7 could find a different slab or what should we do, and
8 we ultimately put strips of stainless steel and put
9 more pieces of another slab on either side. And again,
10 that was supposed to be credited back, but wasn't. But
11 there were a few days there where I did not know what
12 to do about that problem.
13 Q Okay. When you agreed to let Jay Brown build
14 your house, did you believe he was a licensed
15 contractor?
16 A Yes.
17 Q Did you believe that he was going to be the
18 project manager for your job?
19 A Yes.
20 Q Did you believe that the project management
21 fee was going to be included in his project management
22 fee that he quoted to you?
23 A Yes.
24 Q Did you expect that you were also going to be
25 paying other people project management fees?

1 A No.
2 Q When you -- did you expect that you would be
3 paying Jay Brown on an overhead and profit basis?
4 A No.
5 Q Did you expect that there was going to be
6 overhead and profit billed to you for subcontractors,
7 for work or materials done by their sub-subs?
8 A No.
9 Q So you were never told that your -- that Jay's
10 subcontractors were going to be hiring the
11 subcontractors themselves?
12 A No.
13 Q And that would not have been acceptable to
14 you?
15 A It would not have been acceptable to me.
16 Q The job cost is approximately twice what the
17 original estimate was; is that right?
18 A Yes.
19 Q And you and your dad paid Jay a sum exceeding
20 1.2 million dollars?
21 A Yes.
22 Q Which is $500,000 more than the original
23 contract price?
24 A Yes.
25 Q Why, if you believed that the original

1 estimate was 722, did you agree to pay Jay a million
2 two?
3 A We had multiple communications with Jay
4 about -- and he would agree, that where we would say,
5 look, it seems like we're paying the same sub twice, we
6 expect to be credited back at the end of the job, so we
7 did think that that was going to happen. When I was
8 getting the bills where he would list his overhead and
9 profit line, I figured he was drawing down against the
10 number that he had quoted for overhead and profit.
11 Q That's the $55,000, the project management
12 fee?
13 A I mean, it makes sense to me that he wouldn't
14 pull that to the end. He needs to be paid for doing
15 work along the job. So then what happened is that,
16 and, again, we have a series of emails, then he went
17 over that number, and that's when we got concerned, and
18 my dad and -- my father and I -- and my father and Jay
19 sat down in the spring of 2013, and they came to an
20 agreement that we would pay some extra on that fee. I
21 think they put it at $74,000, and then they would hold
22 it at that. So that, you know, that should have been
23 the end of that fee. My dad always says a workman is
24 worthy of his hire, and if Jay said it's taking a lot
25 more of my time, and my dad always wants everybody to

1 be paid, and so do I.
2 Q So when you say when it reached that point,
3 you mean when the billings from Jay on the overhead and
4 profit number on his invoices reached the project
5 management number that had originally been quoted?
6 A That's correct.
7 Q At that point, when the billings continued,
8 you became concerned?
9 A Correct.
10 Q Did you feel some level of -- despite
11 dissatisfaction with Jay Brown, did you feel some level
12 of pressure to get the house completed?
13 A We felt pressure to get the house completed
14 and we thought the house was almost done. You know,
15 unfortunately, I really thought, you know, that we were
16 moving into the house first of December, and then I
17 really thought that we were almost done in January, and
18 then I really thought that we were going to be done at
19 the beginning of March. And, you know, and then we
20 really thought that the June 11th date was a real date.
21 So, we kept thinking we were almost done.
22 We also had -- Jay gave -- my dad kept
23 pressing him for a cost to completion, a cost to
24 completion, a cost to completion, and Jay gave a cost
25 to completion of a little over $900,000. I don't

1 remember the exact number.
2 Q Do you remember when that was?
3 A I'd have to look it up in the emails, we have
4 that, and that's sometime in the spring of 2013. And
5 so we thought that that was really the cost of
6 completion. And that just to stop the job when we had
7 so little left, and yet the guy is over, but we really
8 needed to get into the house. And so we -- we thought
9 we were done. We didn't understand things like -- that
10 the -- when, you know, plumbers came back or heating
11 and air conditioning came back, that they were going to
12 redo things and those numbers were going to skyrocket.
13 I didn't -- I just didn't -- I didn't know that.
14 Q Are you happy with your house?
15 A I love living in my house. I have this
16 concern about the house. You know, I don't like to get
17 emotional, so give me a moment.
18 Q Sure.
19 A The house has been a nightmare. The truth is
20 that the house has been a nightmare, because we had a
21 year of moving around like vagabonds, which was very
22 difficult for everybody. The half million dollars
23 represents the difference for me going back to work and
24 being able to stay home with the children.
25 Q You mean the half million dollars --

1 A Of costs so far, and this ongoing unknown
2 number of costs to repair that keeps going on and on
3 and on. So, you know, we feel happy in the house, and
4 then we realize that we put our children in a house
5 that might burn down, and there is actually a Jay Brown
6 house on the Isle of Palms that burned down. We -- and
7 I don't know why it burned down, but it concerns -- it
8 concerns me.
9 We keep having these repairs that are big
10 repairs. They're intrusive repairs. We never had --
11 we've never had a time period where there isn't some --
12 something going on, and it's -- it's not like I'm
13 asking for a house where, you know, every cabinet is
14 perfect. I'm asking for a house where the heating and
15 air conditioning system works and there's hot water in
16 the bathroom.
17 Q You started construction on this house when,
18 renovation?
19 A In August 2012.
20 Q And it's now November of 2017?
21 A Yes.
22 Q So five years?
23 A Yes.
24 Q And the work is still ongoing?
25 A Yes.

1 MR. LYLES: If you don't mind giving me just a
2 minute to check some notes and stuff?
3 THE COURT: Sure.
4 (Whereas, a brief recess was taken.)
5 MR. LYLES: I think that's all the questions
6 I've got of Amy.
7 THE COURT: We took a little break. You-all
8 ready to go straight to cross?
9 MR. LYLES: I didn't mean to surprise you,
10 Rob.
11 MR. VARNADO: Yeah, that was a little bit of a
12 surprise.
13 MR. LYLES: Okay, well, no problem.
14 MR. VARNADO: Can we start at 11:00? Seven or
15 eight minutes?
16 THE COURT: Yeah.
17 (Whereas, a brief recess was taken.)
18 CROSS-EXAMINATION
19 BY MR. VARNADO:
20 Q So, we're back on the record. Amy, I'm Rob
21 Varnado; we have met before, obviously. And I'm going
22 to call you Amy, if that's okay, because I've messed up
23 your name so many times.
24 A Please.
25 Q Salzhauer and McMarlin and Salzhauer McMarlin,

1 so I'm going to call you Amy, if that's all right.
2 A Even I get confused sometimes.
3 Q All right. First, I want to talk about the
4 house at the time that you were getting contractors to
5 look at it.
6 A Yes.
7 Q Okay. So you bought the house I think in late
8 March of 2012; is that right? I have a copy of your --
9 the title to real estate, so this is March 26, 2012. I
10 mean, we can make it an exhibit, but it's a matter of
11 public record. So does that sound about right?
12 A That sounds about right.
13 THE COURT: What was that date, Rob?
14 MR. VARNADO: March 26th, 2012.
15 BY MR. VARNADO:
16 Q Okay. Did you have it inspected when you
17 bought it?
18 A I believe we did.
19 Q Do you remember who the inspector was?
20 A I don't recall.
21 Q Okay. Do you remember what the inspector
22 found?
23 A I remember that there was -- there was leakage
24 into an area, and it was what I'm calling near Annie's
25 room. And that the way the house was constructed

1 originally, the shape of the area that we now call the
2 exercise room, it went in and out. It had two kind of
3 cut-ins, so -- so this was open, and it had -- on
4 either side, and it had kind of clear plastic
5 sheathing. Apparently, it was meant to bring wind into
6 the house, I think, something like that, and those had
7 significant leaks. We knew that we had to -- we had to
8 change that. Those were two things that I remember
9 that were problems with the house.
10 Q I have a Live Oak inspection. Is this the
11 report? It's dated January 26th of 2012, so it's a
12 couple of months before you bought the house. Is that
13 the estimate -- I mean, I'm sorry, is that the home
14 inspection?
15 A Yes, it is.
16 Q Okay, great. Thank you so much. All right.
17 When was the house built, do you know?
18 A 1991 or 1992.
19 Q Okay. And how many renovations had it had
20 before you began your renovation, do you know?
21 A I don't think it had any extensive renovation.
22 Q Okay. And you testified about interviewing
23 contractors; correct?
24 A Yes.
25 Q Okay. And it's your testimony that Jay Brown

1 and Daly & Sawyer, and maybe another guy, Terminas (ph)
2 or Terminand (ph), I forget, submitted bids?
3 A Evan Diamond --
4 Q Diamond, okay.
5 A -- submitted a bid. I looked at my notes last
6 night. I could see that we started that process in
7 January 2012 with Jay.
8 Q Okay. So let's get a timeline that we can
9 agree on. So I have the first contact with Jay Brown
10 on March 12th of 2012; is that correct?
11 A No, that's not correct. Here is an email on
12 January 30th, 2012, from George Read. If you want to
13 see it, you're welcome to.
14 Q Yes.
15 A Where he says that he reached out to Jay and
16 he passed on the inspection reports. And then I have
17 an email from -- let's see, the next time -- so George
18 was then talking to Daly & Sawyer. He's referencing it
19 on February 6th, 2012, and that Jay has both reports,
20 he sent them last week just in case.
21 Q Which reports?
22 A He's referring to the --
23 Q Live Oak?
24 A To the Live Oak inspection, correct.
25 Q And what else? He said there are two reports.

1 A I don't know here. It might have been the
2 numbers -- it might have been from Beau. And he's
3 checking in on February 6th to say, "I wanted to check
4 how the conversations have been with Jay Brown, Michael
5 Daly and Beau Clowney, because, per the agreement, we
6 have until this Friday to negotiate anything regarding
7 home inspections and repairs." So, that process had
8 come up. February 27, 2012, we are going over with
9 Beau and Kate the -- who we have as people to -- to bid
10 the house. On March 8th, 2012, Jay is telling me that
11 he switched his email.
12 Q From what to what?
13 A From -- from Jay@brownmeihaus.com to
14 Jaylbrown@me.com.
15 Q Okay.
16 A And on March 8th I say that I'm excited to get
17 started on the house, and that Edmond Cooper said nice
18 things about Jay. And that was Jay responding to --
19 that he should pick up plans, I believe. Oh, yes. I
20 had written to him on March 8th, 2012, that Jay -- that
21 Beau Clowney had another set of plans ready for Jay to
22 look at, and so Jay is responding, that, yes, he will
23 look at them.
24 And on March 15th, Jay is -- has sent him
25 something on Brown-Meihaus Construction stationery,

1 that's his structural evaluation, that upon inspection
2 of 1850 Flag Street, the subterranean termite damage
3 that is present will not affect the structural
4 integrity of the house, and this is going to be
5 corrected by -- all rot and termite damage will be
6 replaced and documented for your records, that he's in
7 consultation with Ledford's.
8 On March 15th, he mentions that he's meeting
9 with Kate at Beau's office, and was there anything that
10 was updated. So...
11 Q So February and March, basically? January,
12 February and March?
13 A January, February and March, yup.
14 Q Okay. So you've already testified about
15 Exhibit 119. Was this a record from your file?
16 A Yes, from --
17 Q It was?
18 A Yes.
19 Q Is that bearing the Salzhauer stamp on it?
20 A No. It's bearing a Brown-Meihaus stamp on it.
21 Q But it's from your file, this document?
22 A That document is from my file, yes.
23 Q Okay. So you have it with you here?
24 A Yes, I do.
25 Q Okay. Can I see it?

1 A I gave it to Robert. It was photocopied here,
2 I believe. There's the original. That's the original.
3 THE COURT: This is marked as 119.
4 MR. LYLES: That's the original, okay. So we
5 marked the original, okay.
6 BY MR. VARNADO:
7 Q All right. You testified yesterday that there
8 was a lot of back-and-forth about the numbers, correct,
9 with Jay Brown?
10 A Yes, but not on the scale of from 1.2 million
11 to --
12 Q No, no, no, no, no. You said there was a lot
13 of back-and-forth about the numbers; is that fair? Yes
14 or no.
15 A Yes, but we're not talking about that
16 magnitude of numbers. We're talking about adding in
17 this or taking in that, is the deck Ipe, is the deck
18 pressed wood.
19 Q Well, this is 119, so the yellow is what part
20 of the house? Would you say that's the front of the
21 house or the main part of the house?
22 A That's the main part of the house.
23 Q Okay. And then what's the blue back here?
24 A That's the exercise room area of the house.
25 Q Okay. And what's back here (indicating)?

1 A That we call the guest room of the house.
2 Q Did you have a nanny living in there, too?
3 A We have a nanny living in this bedroom in the
4 house (indicating).
5 Q Which bedroom?
6 A In this area (indicating).
7 Q Is she still with you?
8 A Well, they au pairs, so they're not really
9 nannies, and they can come and stay for a year or two.
10 Q Okay.
11 THE COURT: What was the color? Give me the
12 color of the area she was referring to.
13 BY MR. VARNADO:
14 Q It's this blue area, if I'm not mistaken?
15 A Yes.
16 Q Okay. Now, the first thing I want to ask you
17 about is what the nature of the contract was between
18 you and Brown Contractors.
19 A Yes.
20 Q Okay. And you're saying that Brown
21 Contractors sent a contract that was cost plus?
22 A I'm saying that we accepted Jay's bid with a
23 fixed overhead and profit.
24 Q Okay.
25 A And then he sent multiple versions of a cost

1 plus contract, which we would not sign because that had
2 no bearing on our understanding of Jay. So we
3 determined that he did not fix -- sign them because
4 they were incorrect; they did not reflect our
5 understanding with Jay.
6 Q But you never said that to Jay in an email?
7 A Yes, we did. And I believe we might even have
8 an email from my father to Jay. We also have emails
9 and conversations back and forth with my father and Jay
10 when we realized that he was billing more than the
11 agreed-to-amount of overhead and profit.
12 Q The thing is, Amy, is that you testified
13 yesterday that there were lots of back-and-forth with
14 you and Jay, and you said about this, and then you said
15 another number was 770. But Jay Brown sent you a
16 contract that was for cost plus, and you didn't sign
17 it; correct?
18 A Correct. And I believe that any job will have
19 back-and-forth. For example, we had one -- we had one
20 number where he was saying, well, it would be this
21 number, but then when I asked him a question, that
22 number didn't include Rinnai water heaters. But the
23 plan from Beau took out the rooms that would have held
24 the bigger water heaters, so I insisted that those be
25 put back in, which is memorialized in an email.

1 Q Which email?
2 A We can look it up.
3 Q Okay.
4 A And, in fact, if you look at the -- no, the
5 Exhibit 18 or Exhibit 8, you'll see that it
6 specifically called out that it includes those water
7 heaters.
8 Q But I want to know, what was the -- what was
9 the bid that you say you got that was Jay Brown's final
10 work, what was the bid?
11 A The bid that my understanding was the final
12 work was that if we did the whole house, it would be
13 $722,000.
14 Q Where did that come from?
15 A That came from Jay Brown.
16 Q Show me, please.
17 A I'll have to look up what exhibit number it
18 is.
19 Q Maybe it's in the exhibit book.
20 MR. LYLES: It is.
21 A (Continuing) I might be able to find it in my
22 emails more quickly. Hang on, let me see if I put it
23 in something from today. I have an exhibit here; I
24 suppose I should give that back to you.
25 COURT REPORTER: Thank you.

1 THE COURT: If I can work from exhibits, it
2 will make my job easier.
3 MR. LYLES: Yeah. Could you look through what
4 we have as exhibits as opposed to your stuff so that we
5 can --
6 MR. VARNADO: And you can help her, too,
7 Robert. I just want to get --
8 MR. LYLES: I think if you go to eight --
9 anywhere from eight to 21 is where those price controls
10 are.
11 THE COURT: I think it was eight.
12 A (Continuing) This is the --
13 MR. LYLES: What is "this"?
14 A (Continuing) Exhibit 8 was where we have kind
15 of a -- the general bid for the house, and you can see
16 this goes back and forth then. The numbers are going
17 back and forth because, for example, Jay said we could
18 do Kolbe windows instead of Andersen windows, and, you
19 know, we discussed whether -- whether they're impact or
20 not, and we decided to do the impact. Updated cost
21 control estimate. I would say this August -- Exhibit
22 15 on August 8th, and Exhibit 16 --
23 Q The one that says cost estimate is 16?
24 A Cost estimate. And then on the next page it's
25 the -- he's showing detail back to that previous

1 spreadsheet, and then -- so now you can see us going
2 back and forth on what will it be if there's Ipe
3 decking around the pool, what will -- you know, what if
4 we do different pieces, custom cabinets versus
5 semi-custom cabinets, what if we do a cabinet in the
6 playroom, or the Murphy bed and the closet in the guest
7 room, which was never built. So I was able to take
8 things out like that, that I said, well, I don't really
9 need that now. There was an option of putting -- Beau
10 Clowney was suggesting that we might put a
11 tongue-and-groove ceiling in the dining room, and when
12 that was going to be another $5,000, we said we don't
13 really need that. So then we come to this next --
14 Q Which is what?
15 A August 15th, 2012.
16 Q Which is what exhibit?
17 A Which is -- sorry. It's No. 17, the revised
18 pricing for Phase I. And then on August 22nd, it looks
19 like he has another email, this is Exhibit 18, and that
20 is just showing the Phase I pricing of the $484,000.
21 So...
22 Q But each of these says estimates on it --
23 estimate?
24 A Correct.
25 Q You understand the difference between an

1 estimate and a bid; right?
2 A No.
3 Q You don't?
4 A I don't.
5 Q Okay. Did you rely on your father to help you
6 with what the difference between an estimate and a bid
7 was?
8 A Well, on August 23rd, 2012, this is Exhibit
9 20, he said this is an "Updated bid per Beau Clowney
10 meeting." The entire house is going to be $722,074.
11 So if there's a difference between an estimate and a
12 bid, then he has just said on August 23rd that that's
13 his bid.
14 Q But he had already submitted a contract to you
15 pre to that that he was going to do the work on a cost
16 plus basis?
17 A Which was not our understanding, and so we
18 didn't sign it. So he sent -- my dad said that
19 contract is not acceptable.
20 Q But you didn't tell him that?
21 A So he sent a second one. Otherwise, why would
22 he have sent a second contract if my dad said that
23 first one is not acceptable. He sent a second one,
24 which was also not acceptable, so we did not sign it.
25 Q So your testimony today is that you -- you

1 relied on this bid in Exhibit 20, that it was based on
2 these estimates, and that's what you're saying the
3 contract was?
4 A With all due respect, my father had done
5 millions of dollars of work based on these kinds of
6 documents and a handshake and a bid, without issue,
7 over the course of 30 years or something of -- I don't
8 know how many years he was in the electrical
9 contracting industry. So this seemed -- we trusted
10 Jay. I really truly trusted Jay and thought he was a
11 nice guy, and this seemed reasonable.
12 Q But it really wasn't a bid, it was an
13 estimate. And everything was cost plus, and everything
14 was billed to you as cost plus.
15 A It was -- here it says, "Updated bid per Beau
16 Clowney meeting." I am looking at No. 20. I don't
17 know the difference between an estimate and a bid, but
18 whatever it is, he said estimate and he said bid, and
19 both of them match.
20 Q Okay. Well, then, when was the permit pulled
21 on the house, August the 28th? August 28th, 2013?
22 A I don't know.
23 Q Let's get the timeline going.
24 A I did not pull the bid -- the permit on the
25 house.

1 Q Well, if you look at exhibit number --
2 THE COURT: You-all slow down a little bit.
3 You're going to drive Miss Sampson to distraction.
4 MR. LYLES: Don't want to do that.
5 THE COURT: So one of you-all talk at a time.
6 Amy, let him finish his question. Let her finish her
7 answer.
8 BY MR. VARNADO:
9 Q Exhibit 3.
10 A Exhibit 3 is the residential permit for 1850
11 Flag Street, and it says that the total valuation will
12 be $380,000, and it is August 28th, 2012.
13 Q Okay, so August 28th, 2012. Okay, when did
14 Jay submit his first invoice?
15 A I would have to look that up.
16 Q I have September 12th.
17 A Can you -- is there some --
18 Q 518, Salzhauer 518. It's not in my -- I'm
19 asking you. It's not in my exhibits.
20 A I do need to look it up.
21 Q Okay, then look it up, 518.
22 THE COURT: 518 is a Bates number?
23 MR. VARNADO: Yes, sir.
24 THE COURT: Is there an exhibit number?
25 MR. VARNADO: I don't know if they made it an

1 exhibit or not.
2 A (Continuing) Will somebody give me a clue how
3 I should find 518?
4 Q Here it is. It's Exhibit 27. Actually, it
5 was -- it's Exhibit 27.
6 A All right, yes, Exhibit 27. I cannot testify
7 that this was the first invoice, but it does say
8 Invoice No. 1 written on it.
9 Q Okay. And at the bottom -- you looked at
10 these invoices all the time?
11 A Honestly, I didn't pay that much attention to
12 the invoices, I have to admit. I did not understand
13 the importance of what was happening on the invoices,
14 nor did I fully understand what I would be -- what I
15 was seeing. You know, I have no perspective on --
16 Q But you said your father was a contractor, in
17 the business 30 years, he had done work on a handshake
18 and all of these things, so you had him helping you;
19 right?
20 A I did.
21 Q So he looked at Invoice No. 1; correct?
22 A I can't speak to what my father did, but
23 somebody paid it so somebody must have -- but I can't
24 speak for my father.
25 Q There's an overhead and profit of 27,297.52?

1 A Divided by 15 percent, so $4,094.63.
2 Q Right. So, but it shows right there that
3 there's overhead and profit being charged for all of
4 this work; correct?
5 A But he deserved to have overhead and profit on
6 the job. We never said that he had no overhead and
7 profit on the job.
8 Q Well, the distinction is that you're saying
9 that he capped the price, and we're saying he didn't
10 cap the price. So where is his overhead and profit --
11 A And he's charging overhead and profit on
12 the --
13 THE COURT: You-all are going to have to slow
14 down, because I can't keep up with two people, either.
15 A (Continuing) Okay. I'm sorry.
16 THE COURT: Let him finish his question.
17 A (Continuing) Fair enough.
18 THE COURT: He's going to let you finish your
19 answer.
20 A (Continuing) That's fair enough.
21 THE COURT: And then we'll proceed.
22 BY MR. VARNADO:
23 Q Where is the overhead and profit on this
24 Exhibit 20 bid?
25 A It is the last line.

1 MR. LYLES: Listen to the question.
2 A (Continuing) On the -- oh, on the November
3 20th bid? November 20th bid? I don't know what you're
4 referring to, the November 20th bid.
5 Q I think it's fair, isn't it, that this was a
6 cost plus job and was billed as a cost plus job?
7 A No. It's completely incorrect.
8 Q It was billed as a cost plus job, though;
9 would you agree?
10 A No. You're drawing down on an overhead and
11 profit number, and however he accounts for it in his
12 accounting, in his QuickBooks, that's entirely up to
13 him. It was not unreasonable for him to be charging
14 overhead and profit if he's managing a job. I don't --
15 you know, I wouldn't have -- I might have objected if
16 he put the $55,000 right up front, but he's putting
17 some small, some percentage of his overhead and profit
18 number there. I mean, I was fine with that.
19 Q You said that Exhibit 20 is the bid, you felt
20 that this was something you could rely on. So where is
21 the overhead and profit in that?
22 A Well, if you look at this bid, it's not too
23 far off from Exhibit 8. So, we didn't discuss a change
24 in overhead and profit from one to the other. We're
25 talking about 686,000 versus 722,000, and the

1 difference is things like making sure the, you know,
2 that there's enough of allowance for cabinetry and
3 different things like that, so I don't know why that
4 should have affected that line.
5 Q There are numerous invoices that are
6 contained, some in your exhibits and some that Jay
7 sent. Each one of them have an overhead and profit
8 line, and it was billed as cost plus; do you agree?
9 A Each one of them had an overhead and profit
10 line. He was doing work on the house, so he should be
11 billing overhead and profit going along with the job.
12 Q But you say it's maxed out?
13 A Yes.
14 Q At what?
15 A We didn't have a concern until he went over
16 the max.
17 Q What was the max-out?
18 A $55,000.
19 Q 55,000. So for everything, even though you
20 have admitted that there were a lot of delays and a lot
21 of problems that were fairly not his fault, like the
22 band board and the rot, you know, the demo?
23 A Now, repairing the band board cost $10,000,
24 according to the bill.
25 Q And the rot?

1 A I firmly believe, and I learned it from my
2 dad, that every workman deserves his hire. Jay said
3 that there were problems on the job that were beyond
4 his control, okay. And they came to an agreement where
5 my father gave basically 50 percent more overhead and
6 profit to Jay to say, all right --
7 Q When was that agreement?
8 A That agreement was in the spring of 2013.
9 Q And where is that memorialized?
10 A You can see it referenced multiple times in
11 emails, and we can show you those emails.
12 Q I would like to see them, please.
13 A Sure. Let me find my books from 2013. We
14 might have some of them here.
15 MR. LYLES: Check your book out.
16 A (Continuing) Over here. We had them pulled
17 out in emails yesterday.
18 Q We'll take a break while you look.
19 (Whereas, a short break was taken.)
20 THE COURT: We took a break. We are back on
21 the record in 2014-3881. Miss Salzhauer is under
22 cross-examination by Mr. Varnado. We took a break for
23 her to look for some documents, and we are back and
24 that question stands. Go ahead, Rob.
25 A (Continuing) This is an email from my father

1 to Jay Brown on March of 2013 saying this seems to have
2 become a time and material basis and that's not what
3 the intention was. Then, as we continue, and perhaps
4 you want to enter that into an exhibit. I don't know
5 what the process is. We are -- I would like to also
6 add that this was not being -- I mean, we were being
7 sent things that would show things as change orders.
8 So, you know, some of those things were completely
9 inappropriate as change orders; right? So wrapping the
10 house in tar paper or Tyvek or whatever you do is
11 billed as a change order, but we can show you those
12 things stamped as change orders. So if this was a time
13 and material or an overhead and profit, whatever,
14 open-ended job, then that would have been completely
15 irrelevant.
16 Here's my dad continuing to find requisitions.
17 Here is April 4th, 2013. My father saying that you
18 sent me an estimate of what the job would cost in the
19 end; please put the last requisition against that
20 estimate. Would you like to see that email? And he
21 says it's never my intention to cause the subs
22 financial stress, but the fault is yours and you need
23 to tell us what the list of payments that should be
24 made by a contractor, the amount of their contract, and
25 the amount completed to date, and assurance will be on

1 the job until the completion. This is -- would you
2 like to see that email?
3 Q Sure.
4 MR. LYLES: Do you have a date for it?
5 A (Continuing) That's April 4th, 2013.
6 MR. LYLES: Are you marking all of that, Syd?
7 MS. WOLK: Uh-huh.
8 BY MR. VARNADO:
9 Q Thank you.
10 A And my father was continuously asking for --
11 for requisition -- you know, for a breakdown in
12 schedule, and I have those emails. And -- and on June
13 5th and June 6, 2013, find them here. I think I might
14 have pulled them out already here, or somewhere on the
15 table we'll be able to find them. We -- I have in my
16 records that on June 5th and 6th, 2013, my dad is
17 objecting. And I believe we pulled those emails out
18 somewhere to enter them as exhibits. My dad is
19 objecting to the additional overhead and profit, and he
20 references an agreement made in conversation with Jay
21 Brown. And you will note that Jay does not argue with
22 him that that conversation never happened, that he's
23 due additional, you know, that that was not in the
24 agreement. So now I need to find where those were
25 pulled out, or else I can pull them out of my Gmail

1 account.
2 Q Do any of those emails show, Amy, an agreement
3 by Jay to cap his overhead and profit at $74,000, as
4 you testified to earlier?
5 A What it shows is that my father is referencing
6 an agreement that they made in a conversation together,
7 in person together, and that Jay does not argue about
8 that, although he continues to bill for overhead and
9 profit. Now, my father stopped paying that overhead
10 and profit number, but you will note that the job
11 continued.
12 Q Is there a number -- is there an email that
13 shows an agreement, that you testified to, that Jay
14 Brown accepted $74,000 of overhead and profit?
15 A I don't think there's an email that Jay comes
16 back with saying, yup, I accepted the number. And I
17 can't tell from here whether it was 74 or 85,000 that
18 they agreed on. I was not present. My dad can testify
19 to that conversation. But you will note that the job,
20 which was being billed with change orders and et
21 cetera, that this was happening in -- in June of 2013,
22 that we stopped paying for that line, and that the job
23 continued.
24 Q The change orders were from subcontractors,
25 correct, not from Jay Brown?

1 A Everything on this job was a change order.
2 That's not fair, that's not accurate. But I have
3 change orders from VLN, LLC, where it would be, you
4 know, stamped when I -- when we -- I finally asked for
5 them, which was long into the job. There were things
6 that are clearly just in the course of doing -- doing a
7 job, that were stamped as change orders. In
8 addition --
9 Q Like what?
10 A And Jay references things as change orders.
11 For example, when I referred previously to doors that
12 were incorrectly framed, that the -- that I had been at
13 the job and the person trying to put in the doors says
14 he can't because they're incorrectly framed. Well, Jay
15 later in an email references that as a change that I'm
16 requesting, that it's a change order to reframe the
17 doors. And I think if we went through the bills, we
18 would find it that way. Or a closet was incorrectly
19 framed, and then the closet comes back on the bills as
20 a change order. Like I said, basic things like, I
21 don't know if you wrap it in Tyvek or tar paper or
22 whatever, when we actually saw the billing on the job,
23 that was stamped as a change order.
24 Q It was stamped as a change order on the bill?
25 A Oh, yeah. Now, we didn't see those bills

1 until we requested invoices; but if you look through
2 VLN, LLC's, invoices, you will see all of these things
3 that are stamped as change orders.
4 Q But that was -- VLN is a subcontractor to Jay,
5 and Jay was on a cost plus contract, so he was
6 billing --
7 A Jay was not on a cost plus contract. Let's be
8 clear.
9 Q So we're going to disagree on that?
10 A We will absolutely disagree on that.
11 Q Your father handled the billing; correct?
12 A Yes. We had an official accountant in his
13 office, and that was a good way to have things be
14 billed and be paid.
15 Q Well, I think in your deposition testimony,
16 you told me earlier that you don't even know which
17 funds -- where it was coming from, who was paying for
18 what?
19 A That's correct. We have a family business,
20 and there are multiple accounts that some specific
21 payment could come from, that, you know, I'm not privy
22 at that moment in time to exactly which account an
23 accountant would be taking it from.
24 Q But your father, he's handling the money;
25 correct?

1 A My father with the assistance of Valentina
2 Vorschgya (ph) or Vorschov (ph), and Mary Ballante
3 (ph). Those are people who work for my family
4 business.
5 Q And your father was paying invoices with cost
6 plus language in them until May or June of 2013?
7 A I would have to look back to see exactly when
8 he stopped paying it. He objected when we went over
9 that number, and then he was -- came down to South
10 Carolina and talked to Jay. Now, like I said, my
11 father is very fair; so if Jay says it's taking him
12 longer and he needs more money, then my father came to
13 a second agreement where they agreed to some number
14 between 70,000 and $85,000.
15 Q You have said 70 and 85, but you haven't shown
16 me an email that memorializes an agreement between Jay
17 and your father between -- what is it? Which was it?
18 A I will tell you that I was not present in that
19 conversation, so Jay and my father would have to be the
20 people who told -- who memorialized their conversation.
21 But I will also tell you that the way my dad does
22 business, if they make that agreement, then that is an
23 agreement, and he's happy, as you can hear, to pay guys
24 some extra money if he thinks, first of all, it will
25 bring the job to a close, and, secondly, it's fair to a

1 guy, to that guy. And thirdly, as you can see, Jay
2 continued to do the job.
3 Q He continued to do the job on a cost plus
4 basis.
5 A He continued to do the job because he knew he
6 had already been paid his fair share. He continued to
7 bill that, but that's -- that was never paid. We paid
8 everything else, but we did not pay that, very
9 specifically. The job was not a cost plus job. The
10 job was a fixed price job.
11 Q You are testifying that your father did not
12 pay the cost plus add-ons anymore, and that was an
13 understanding that you and Hank had?
14 A I am testifying that we understood at that
15 point in time, when things went over the price that we
16 had agreed on, that -- that we needed to come back to
17 the fixed -- some understanding of what we would fully
18 pay Jay, that we were happy to pay him some extra
19 because we are more than fair.
20 Q I'm going to say that before March 12th of
21 2013, I can't find anything in there where either you
22 or Hank or Andy is complaining at all about the cost
23 plus basis of the contract until this email where, hey,
24 I think it's -- this is looking like a time and
25 material basis, with no regard to the pricing.

1 A Because it is reasonable for them to bill
2 overhead and profit. On a fixed price job, right, how
3 would you bill your overhead and profit? I don't know
4 because I'm not a contractor, but I will tell you that
5 it seemed reasonable to me that over the course of the
6 job, he is adding an overhead and profit line. How he
7 intends to distribute that over his job, that's -- that
8 was up to Jay, and it made sense to me that he might
9 have times in the job where he's doing more, more
10 supervision, and so that line might be bigger or it
11 might be smaller. The idea that that might go up and
12 down with the numbers that are on a requisition sheet
13 makes sense to me, because maybe more work is happening
14 on the job at that point in time.
15 So, yeah, he's billing me an overhead and
16 profit line. He was entitled to overhead and profit on
17 the job. He wasn't entitled to have Vuong taking
18 overhead and profit and then he's taking overhead and
19 profit, and we're paying all of these guys extra for
20 project management, and Cristina is taking her overhead
21 and profit, and then he's going on -- that was -- I
22 mean, you know, that's obvious to everybody, really, in
23 my mind.
24 Q I think that you said -- you testified that
25 you paid Jay one million, two hundred twenty, some odd

1 thousand dollars; is that fair?
2 A That's fair.
3 Q Okay. Of which 15 percent overhead and profit
4 would be $183,000?
5 A Correct. Well, I didn't calculate it out.
6 You're telling me that that's the right calculation. I
7 don't know what the right calculation is offhand. I'll
8 have to do the math.
9 Q Can you show me an example where your father
10 did not pay Jay Brown's overhead and profit on a -- on
11 an invoice?
12 A Yes.
13 Q Can you show it to me now, please, ma'am?
14 A Let's see, here is an email.
15 Q Is it an exhibit, ma'am?
16 A There's going to be multiple pieces, and I'm
17 going to -- you'll have to bear with me as I --
18 Q Please take your time.
19 A -- go through it. So on June 18th, 2013 --
20 remember, I had a friend, Marcus Aguirre (ph), with
21 construction experience looking through things.
22 Q Now, this is the first I think I've heard of
23 Marcus Aguirre. Did he help you with that exhibit that
24 Mr. Lyles marked recently? I think it was --
25 THE COURT: 123.

1 BY MR. VARNADO:
2 Q 123?
3 A He did.
4 Q Okay, Marcus Aguirre?
5 A So here's -- I'm going to give you several
6 examples of what I'm talking about.
7 THE COURT: And what are you referring to?
8 A (Continuing) In terms of my father not
9 continuing to pay overhead and profit.
10 THE COURT: I'm sorry, is that an exhibit
11 already, or is this another additional --
12 A (Continuing) Let's enter this as an exhibit.
13 These are emails from June 18th and June 21st, 2013.
14 Would you --
15 MR. LYLES: We can either hand them over like
16 that, or Syd can pull up the Bates labels, whatever
17 you-all want to do.
18 MR. VARNADO: Let's take a break real quick.
19 THE COURT: Okay. Off the record.
20 (Whereas, a lunch recess was taken from 11:50
21 a.m. to 1:09 p.m.)
22 THE COURT: We are back on the record in
23 2014-10-3881. We broke for lunch at 10 to 12:00, in
24 part to allow Miss Salzhauer the ability to locate some
25 documents that Mr. Varnado had asked her about. I

1 think she spent time during lunch, and we're back on
2 the record with Mr. Varnado's cross-examination. Go
3 ahead.
4 MR. VARNADO: Thank you, Mr. Brown.
5 BY MR. VARNADO:
6 Q Amy, did you find the documents that you would
7 say are the most -- the most cogent to the position
8 that your father and Jay Brown agreed to cap the
9 overhead and profit?
10 A I have found several. I would suggest you
11 also ask my father for specifics.
12 Q I will.
13 A But, first of all, I -- I do want to point out
14 that if you look back to Jay Brown's bid and control
15 estimates that are exhibits, I think, 15 and 16, I can
16 double-check them, from August 15th and August 22nd,
17 that he has a number of $50,000 for the -- for the
18 whole house, and that he has a number of $30,000 for
19 the partial part of the house. I would also like to
20 point out that it's for his overhead and profit. And
21 those are clearly listed as line items for overhead and
22 profit.
23 Q In the estimate, okay.
24 A In the estimate. And the estimate is referred
25 to as a bid. Like I said, I don't understand the

1 importance of that, but you do. And -- and those
2 numbers, 50,000 and 30,000, do not relate to a 15
3 percent overhead and profit, according to his control
4 estimate and his bid. So if he intended to charge 15
5 percent overhead and profit, if that was the intent of
6 the contract, then he should have put that in the
7 control estimate and bid. Wouldn't you say so? So
8 those two numbers, your client's contention that he
9 would end up charging 15 percent does not match what he
10 actually wrote. There is no way that his numbers would
11 lead to that.
12 Q Tell me now the documents which you say prove
13 that your father and Jay Brown had an agreement to
14 limit his overhead and profit.
15 A I --
16 Q Just tell me the document numbers.
17 A Hang on. Some of these are not document
18 numbers. On June 5th, 2013.
19 Q Hang on a second, please, ma'am.
20 A This is an email from --
21 Q Just hold on a second, please. Okay.
22 A -- from Henry Salzhauer to Jay Brown, which I
23 believe is Exhibit 68. Sydney, is that right?
24 MS. WOLK: Yes.
25 BY MR. VARNADO:

1 Q 68 is not that. 68 is dated September 13th.
2 MR. LYLES: Yeah.
3 A (Continuing) Okay, that's a different one.
4 MR. LYLES: Yeah, this is not an exhibit.
5 A (Continuing) On June 5th, 2013, we can enter
6 it as an exhibit, my father wrote --
7 MR. LYLES: Hang on just a minute.
8 BY MR. VARNADO:
9 Q I have this one. I have that one. I have a
10 June 5th.
11 THE COURT: June 5th of what year?
12 MR. VARNADO: 2013.
13 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 124 FOR
14 I.D.)
15 MR. LYLES: The document has been marked for
16 identification as 124.
17 A (Continuing) My father wrote, "Jay, something
18 is wrong with the requisition. I have not reviewed the
19 whole thing, but line 11, we agreed when we met, was
20 going to be held at THE $85,521. There should have
21 been no further payment to that account."
22 Q All right, we can read it.
23 A Okay. Now, you will note here that he says,
24 "I sent a note to that effect with each of the prior
25 payments."

1 If you had actually produced any of your
2 records for discovery that were requested, we might
3 have those records. But you did not -- Jay did not.
4 So I can't tell you what happened to my father's notes.
5 Perhaps Jay can. But he's clear, the money that got
6 allocated to that line should have gone somewhere else.
7 Then we're up to, and I don't know if my
8 father has additional records, but these are the
9 things --
10 THE COURT: What are we going to do with that
11 document?
12 MR. VARNADO: It's in without objection.
13 THE COURT: All right.
14 MR. LYLES: So it's in.
15 (DEFENDANT'S EXHIBIT NO. 124 ADMITTED INTO
16 EVIDENCE.)
17 A (Continuing) Then, so my father is clear that
18 I'm not paying -- that he's not paying that. You'll
19 note that the job continues. You'll also note, as I
20 said, that 15 percent had no bearing on his earlier
21 numbers when he was bidding and estimating the job.
22 And then in document 68, let me make sure that this is
23 the document that I'm meaning, this is -- the beginning
24 is the document to my father -- I mean, an email from
25 my father to Jay. The second part of that document is

1 an email from Jay to my father, cc'ing me, and the
2 first part is that they passed the mechanical
3 inspections, and he's going to call for a Certificate
4 of Occupancy and get them in there if 75 percent of the
5 profit holdings are funded.
6 And before that, there is -- if you keep going
7 backwards, you'll see an email from Jay Brown to my
8 father as we're flipping back, where Jay -- Jay is
9 replying to an email that my father has written to him.
10 And as you look, head down towards about two-thirds
11 down the page, three-quarters of the way down the page,
12 it says, "This job has been properly paid all along,
13 but not properly produced." And Jay replies, "No
14 overhead and profit has been paid since May."
15 Q Where is that again? I'm sorry, which page?
16 A It is --
17 MR. LYLES: 3998 is the Bates label.
18 A (Continuing) How convenient to have Bates
19 labels.
20 MR. LYLES: Exhibit 68.
21 A (Continuing) I'm also not sure if you're going
22 to consider this relevant, but on September 13th, Jay
23 is again, the capital letters, this is Exhibit 69, Jay
24 is responding to my dad's email. My dad's saying
25 that -- referencing that the plumber and the HVAC

1 contractor -- well, that's not relevant to what you're
2 talking about. Here you go, it's on page 004003.
3 Q 69?
4 A Exhibit 69. "Your final payment is a matter
5 of discussion, as we said in our meeting. I believe it
6 was in February." And you replied -- Jay replied,
7 "Let's discuss it because we need final payment to
8 issue a CO. My offer yesterday was more than
9 generous." I was not privy to that conversation
10 between the two of them. Maybe it was this idea of the
11 75 percent. If there was a conversation.
12 Q Is that it?
13 A That's it for right now. That's what I found
14 during lunchtime.
15 Q Okay. Can I ask you a question about exhibit
16 number -- the last one in Robert's book, your exhibits?
17 Bear with me, I got stuck with the bad one.
18 A So it's No. 117?
19 Q Yeah, 117. Obviously, we have more exhibits
20 that you've added on. But this is Brown Contractors'
21 last invoice; do you agree with me?
22 A To the best of my knowledge, yes.
23 Q Okay, great. And, I'm sorry, I've dealt you
24 the wrong -- it's 116, not 117. I'm sorry.
25 A We're still at the back of the book.

1 Q Back of the book. Do you recognize these
2 documents?
3 A It looks like an application and payment --
4 for payment, and a continuation sheet from Brown
5 Contractors.
6 Q Now, did your father create the continuation
7 sheet, do you know?
8 A I have no knowledge if he created a
9 continuation sheet. I have trouble believing it was my
10 father, but that's okay.
11 Q Do you see at line 11, overhead and profit?
12 A I do.
13 Q And what does that number say?
14 A It says Phase I, 128,376.25. Phase II and III
15 is left blank. New estimate from previous application,
16 170,459. So, yup.
17 Q Okay. All right. Now, Miss Amy, you are
18 testifying that you are entitled to receive $50,000 in
19 compensation for damages related to being out of the
20 home, okay. And when your examination wasn't quite
21 clear, your lawyer referenced a letter to me saying it
22 was $50,000, but I haven't seen the backup for that.
23 So can you tell me how you came up with that, and where
24 those documents are?
25 A Sure. I believe that you have some documents,

1 but I have some documents, too.
2 MR. LYLES: Checks. Loss of use checks.
3 MS. WOLK: 41.
4 MR. VARNADO: 41, thank you.
5 BY MR. VARNADO:
6 Q I see in Exhibit 41, one, two, three, four,
7 five checks. And who are they made payable to?
8 A Let me go to Exhibit 41. These first three
9 checks are to Kiara Barnett, and there are checks to
10 the Jones Company.
11 Q So those represent all the checks that you are
12 claiming for --
13 A No. I think I can produce for you if I -- if
14 we don't have it in another place, the rental
15 agreements and the checks for -- I have receipts from
16 the hotels we stayed in. I have receipts from -- off
17 the top of my head, I can't remember right now if it
18 was Dunes Properties or a different agency that did the
19 first house rental on the Isle of Palms. Then I have,
20 this is the first residential rental agreement until
21 the 30th of March from the Jones Company. We have -- I
22 can provide you with backup, if I don't have it here
23 from emails, on the cost of moving expenses. We can
24 get you a bill from Johnson's Moving. And then here is
25 a -- we have Statewide Moving & Storage. And then we

1 have backup from, we can get it for you, from AAA
2 Storage, which was where we were storing the majority
3 of our household.
4 Q So you're contending that all of your living
5 costs from January the 1st through the CO date should
6 be compensated by Jay Brown?
7 A No. I am only suggesting that he should
8 compensate us for the additional rent, for the
9 additional storage fees, and for the additional moving
10 from -- out of 95 East Bay Street we should have been
11 moving into 1850 Flag Street, and instead we had to
12 move some things into storage and some things into 853
13 Middle Street. The house was not ready, so we had to
14 move things from 853 Middle Street again into storage,
15 and then we moved all over the place. So, that seems
16 to be fair compensation.
17 Q Well, you know, I haven't seen the
18 documentation, so get it to your lawyer and I guess
19 we'll supplement it. But you said that -- how long did
20 you think that Jay's work was going to take?
21 A He gave initial estimates. There was one
22 thing that I found I believe that's five months, and
23 another which we referenced here already I believe for
24 the -- there was another conversation about three
25 months, so it was three to five months.

1 Q But he took out -- he demoed the whole front
2 part of the house; right? He found rot and band board
3 damage. And then none of the -- the architect had not
4 done the interior fit and finish; right?
5 A Incorrect. Also, I would mention that when he
6 demoed the house, they demoed more of the house than
7 was anticipated. They did not listen to the
8 electrician and leave the wiring, which then resulted
9 in -- they cut all the wiring, which resulted in
10 additional costs in the house. The electrician,
11 especially there are -- there are curved ceilings in
12 the house and taking off the wood, their demo was one
13 of the things that caused problems in the house. I can
14 also show you an email from Jay where he talks about
15 how he had to explain to other people the window delay
16 at the beginning of the job. So he said the windows
17 would be there in three and a half weeks, and the
18 windows were not there in three and a half weeks.
19 That's his delay.
20 Q That's not your -- you don't bear any
21 responsibility for the window delay?
22 A No.
23 Q None at all?
24 A None at all.
25 Q All right. I'm still not with you on -- you

1 have to get all of your documentation and get it to
2 your lawyer for your 50,000 dollar loss of use claim,
3 because the checks in Exhibit 41 only total 22,000 or
4 $21,000. And if it was a five-month job and it started
5 on August of 28th, then that would take it to what,
6 February?
7 A The five months would have taken it to
8 February.
9 Q But you know that it took longer than five
10 months, right, so --
11 A And I -- if you would like, we can go through
12 the emails documenting the different promised
13 completion dates by Jay throughout the job.
14 Q Just tell me the numbers.
15 A Sure. He promised on -- on January 29th, we
16 felt -- my dad is sending an email, we're coming to the
17 end.
18 MR. VARNADO: I'm sorry, Henry, but I need to
19 see an exhibit number, if we can. Are these the ones
20 that you gave me that are -- that don't have
21 exhibits?
22 THE COURT: Amy, as you relate these dates, if
23 you can tie it to an exhibit number, please do so.
24 A (Continuing) I might need somebody's help.
25 THE COURT: Or if you can't do it, let's do

1 this. Tie it to an exhibit number, a Bates number, or
2 a date or some identification that we can locate it in
3 the record.
4 A (Continuing) Yes, that totally makes sense.
5 You might be able to help me on that.
6 THE COURT: Sometime after today, I'm going to
7 need some help.
8 A (Continuing) Can I see --
9 MS. WOLK: The ones that we pulled are
10 right --
11 MR. LYLES: Got it now?
12 MS. WOLK: Yeah. And Robert has them, too,
13 but she has her copies.
14 A (Continuing) First of May, end of March, okay.
15 On -- then we have -- if you remember, I told you that
16 we changed our lease. We added onto the lease at 95
17 East Bay Street and we made that for March. Here's an
18 email from my father to Jay.
19 Q Dated?
20 A Dated February 25th, 2013.
21 Q Okay.
22 A Where he's saying, "As you can imagine, I'm
23 not happy with the finish date." Now, mind you, if you
24 look in these emails and the exhibits, you'll find
25 multiple times where we're asking for a completion

1 date, with no response again and again and again. And
2 Beau Clowney did the same thing. And my dad says, "As
3 you can imagine, I'm not happy with the finish date.
4 The last time we had one, the date was the end of
5 March."
6 Q I'm sorry, which number? Which Bates label?
7 A This is 002722.
8 MS. WOLK: And that's Exhibit 55.
9 A (Continuing) Thank you, Sydney. And Jay
10 had -- was -- on page 002723, you can see that Jay is
11 responding to an email from my father on February 22nd,
12 saying, "Two more things: One, the finish date for the
13 house. Be realistic, please."
14 Q And he says, "I am shooting for the first of
15 May"?
16 A And he responds on February 25th, "I am
17 shooting for the first of May."
18 Q "If there are no other changes and supplies
19 can get here ASAP"?
20 A Yup. And then on April 23rd --
21 MR. VARNADO: Let's mark that one, if you
22 don't mind.
23 MR. LYLES: I don't mind.
24 A (Continuing) It's 002723.
25 MS. WOLK: That one's still 55.

1 MR. LYLES: Oh, it is, 55 already?
2 MS. WOLK: Yes. It's right behind that sheet
3 right here.
4 MR. VARNADO: Oh, I see. Okay, 55.
5 BY MR. VARNADO:
6 Q And what other promise emails about --
7 A Yup. Here on April 23rd, 2013, Jay has again
8 been pressed for a finish date, and he replies, "Rough
9 finish schedule below from today's date," and he goes
10 through, "Trim guy needs two weeks," so he gives
11 detail, and he says June 11th. And then on February --
12 on May -- and that is 0322 -- 003221 and 003222.
13 MR. VARNADO: Can we put this into evidence
14 now?
15 MR. LYLES: That one's not in?
16 MR. VARNADO: No. So this will be 125?
17 MR. LYLES: No, I think that's --
18 MS. WOLK: What are the numbers again?
19 THE COURT: Let's mark it as 125. If it turns
20 out to be a duplicate --
21 MR. VARNADO: 3221 and 3222.
22 THE COURT: -- it won't be the end of the
23 world.
24 (EMAIL MARKED AS DEFENDANT'S EXHIBIT NO. 125
25 AND ADMITTED INTO EVIDENCE.)

1 THE COURT: We have admitted without objection
2 the email of June 25th, 2013, Bates Salzhauer 003221,
3 Exhibit 125.
4 A (Continuing) There is -- also, on May 28th,
5 2013, there's another email Sydney was finding.
6 Q Can you give us the bates label, please,
7 ma'am? Bates label for your May 28th, 2013, email?
8 A Let's see if I can find it in here.
9 MR. LYLES: It may be in there. It may not
10 be. Have you got it, Syd?
11 A (Continuing) Let's see if it's here.
12 MS. WOLK: I got it.
13 MR. LYLES: Is that it?
14 MS. WOLK: Or do you want this one?
15 A (Continuing) I'll take both of them. Thank
16 you. This is Bates marking 002955, from my father to
17 Jay Brown. "Jay, the house was promised for a June
18 11th completion. Where is the house in respect to that
19 completion date? And can it be trusted? And if not,
20 why not?" And in Bates marking 002956, Jay responds
21 that, "Final paint colors were just given to me
22 Friday," which Cortney Bishop can establish was
23 previous to that. "We are finishing interior trim
24 punch this week and paint prep." You know, basically
25 he says that we are on time.

1 And then my husband follows up on May 28th,
2 2013, and says, it's an email from Andy McMarlin, "Some
3 good news is that nothing left to be done outside the
4 house, nor the bedroom painting should affect the
5 Certificate of Occupancy and move-in date of June 11th.
6 When will Randy be doing the assessment for the CO?"
7 So that was when we thought we were moving in in June.
8 Now, I didn't have time during lunch, but I
9 can do it now, to find the August days that I think --
10 Q Can you find the email that you referenced
11 that your husband, Andy McMarlin, sent May 28th?
12 A I have it. We can find it, for sure, because
13 I have it in my emails. So if you -- if we can't find
14 it here, we can --
15 Q Let's go ahead and mark the other two that
16 Sydney just located.
17 MR. LYLES: These right here?
18 MR. VARNADO: Yeah. Mark those as one
19 exhibit.
20 (EMAILS MARKED AS DEFENDANT'S EXHIBITS NOS.
21 126 AND 127 AND ADMITTED INTO EVIDENCE.)
22 THE COURT: 126 and 127 have been admitted
23 without objection, Rob?
24 MR. VARNADO: Yeah, that's fine. And this
25 will be 128.

1 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 128 AND
2 ADMITTED INTO EVIDENCE.)
3 THE COURT: All right. 126, 127 and 128 have
4 been added as Defendant's exhibits. 126 is Bates 2955,
5 127 is 2956, and 128 is 2957. They're all marked as
6 Salzhauer documents.
7 MR. VARNADO: Can we go off the record while
8 she is looking?
9 (Whereas, a brief discussion was held off the
10 record.)
11 (LIVE OAK HOME INSPECTIONS REPORT AND INVOICE
12 MARKED AS PLAINTIFF'S EXHIBIT NO. 14 AND
13 ADMITTED INTO EVIDENCE.)
14 THE COURT: Plaintiff's 14 has been admitted
15 without objection. It's Live Oaks Home Inspections,
16 LLC, 1850 Flag Street, Sullivan's Island. It does not
17 appear to have a date on the first page.
18 MR. VARNADO: There is a date I believe on the
19 second page, which has an invoice, and it's dated
20 January 26th, 2012.
21 THE COURT: Okay. All right.
22 A (Continuing) We have here an email from Henry
23 Salzhauer to Jay Brown, and he's asking now for the
24 completion schedule because we clearly haven't met June
25 11th, and he's referencing a number of things that are

1 wrong at the job, and --
2 MR. LYLES: What's the Bates label on that?
3 MR. VARNADO: 03 -- 03234.
4 A (Continuing) It sounds like Jay either called
5 my father or sent an email, and my father replies by
6 saying that the granite that he was speaking to me
7 about today, this granite was ordered late in this job,
8 came about because Cristina was supposed to order
9 Corian for the countertops but she didn't, and then
10 when she told me that it would take a large number of
11 weeks but she could get granite quickly, I substituted
12 granite for Corian to move things along.
13 And then on July 2013, this is a story about
14 the corian order that did not happen, had many repeats
15 through the course of the job. Mind you that I was not
16 in Charleston at this time, so whatever was selected
17 was fine with me. I just wanted to get in the house.
18 On July 25th, 2013, this is an email from me
19 to Jay Brown and Cortney Bishop. "If this looks" -- I
20 am clearly being asked to approve something, and I say,
21 "If this looks right to Cortney, it is approved by me.
22 I'm assuming that we will be able to get a CO and move
23 in by August 1st when we return. Please let me know as
24 soon as possible, Jay, if this is not the case." And
25 there's no response to the contrary. Should I

1 continue?
2 Q Is that it?
3 A That's -- you asked me for --
4 Q I asked you for the documents.
5 THE COURT: You-all don't -- Rob, let her
6 finish. She's going to let you finish.
7 MR. VARNADO: Yes, sir.
8 A (Continuing) You asked me for the documents
9 that would establish a March date, a June date, and an
10 August date, and those are some documents that
11 establish those dates.
12 Q And you're going to get the backup for your
13 $50,000 number?
14 A Those are real expenses. It's not hard to
15 find the backup for that number. I'm happy to do that.
16 Q Okay. And that will start when, and they will
17 end when?
18 A That will start -- I believe the first thing
19 that we charged you for was the rent in February of
20 2013, and the storage. And I don't -- the dates of the
21 moves are -- we moved out of 95 East Bay Street at the
22 end of March, so it will be a date sometime within that
23 time period. We moved out of 853 Middle Street
24 sometime before July 1st, so that means that's when we
25 moved, in that time period. We moved into a hotel room

1 or a short-term rental at Wild Dunes probably June 30th
2 or July 1st of 2013 until July 4th when we flew out of
3 town because it was no longer available, and then we
4 moved back in. And I don't remember exact dates in
5 August 2013 of the hotel rooms from Homewood Suites.
6 And then there will be a rental agreement for Wild
7 Dunes for two weeks, and then the Hagertys.
8 Q The Hagertys are going to charge you rent?
9 A It is reasonable to pay them back for what we
10 were doing, yeah. I mean, we stayed at their house and
11 took over their house.
12 Q For how long?
13 A I can't give you the exact number of weeks off
14 the top of my head.
15 Q All right. All right. Okay, I think we
16 covered that. All right, the next item of damages that
17 you have is the punch list items that Howard Brown --
18 A Yeah, the punch list items from our punch list
19 that was created with Cameron Glaws.
20 Q Did Cameron go over the punch list items with
21 you?
22 A He went over certain of the punch list items,
23 but some of those came from the punch list from the
24 home inspection report, which Cameron received and
25 responded to. Some of them went through -- came from

1 our walking the job or from Cameron walking the job.
2 Some things that I brought up when we were in the
3 house. And then there is an additional set of punch
4 list items that was -- that was created with Howard
5 Brown. And then there are items that were discovered
6 later.
7 Q So this is -- I'm going to hand you the only
8 original I have at this time, and it's a blow-up of
9 Cameron Glaws working on the -- whenever it was sent to
10 you, as Cameron Glaws working on the punch list items?
11 A Yes. I would say that there are multiple
12 punch lists. However --
13 Q Okay. So you don't have any reason to sit
14 here and to say that that's incorrect, what's on that
15 sheet?
16 A I would say it's correct that this is a punch
17 list, but it might not be a complete punch list.
18 Q Okay.
19 A I also have emails from me to Cameron, and
20 today where they're asking for me to find all the
21 deficits on the job and create the punch list which
22 they need, and my response is you're the contractor,
23 you need to go through the job and create a punch list.
24 Q So you don't think the owner has anything to
25 do with adding to the punch list?

1 A I think the owner has something to do with
2 adding to the punch list, but Jay had the
3 responsibility for the job.
4 MR. VARNADO: Can we mark this as 15?
5 (EMAIL MARKED PLAINTIFF'S EXHIBIT NO. 15
6 FOR I.D.)
7 MR. LYLES: No objection.
8 THE COURT: All right, 15 is entered without
9 objection. It is titled -- well, it's from Cameron
10 Glaws to Jay Brown. It appears to be a punch list.
11 (PLAINTIFF'S EXHIBIT NO. 15 ADMITTED INTO
12 EVIDENCE.)
13 BY MR. VARNADO:
14 Q Okay. So Howard Brown will testify about the
15 punch list that was incorporated with his documents;
16 correct?
17 A I can't tell you what Howard Brown will
18 testify to. That's up to you guys what you ask him.
19 Q Okay. I'm going to ask you to turn to Exhibit
20 24, please, ma'am.
21 A Yes.
22 Q First of all, this is a cost plus contract?
23 A Yes.
24 Q So you signed a cost plus contract with Brown
25 Atlantic?

1 A Yes.
2 Q Or you didn't actually sign it, did you?
3 A I believe there's another copy of this
4 contract that is --
5 Q I asked you in your deposition and you said
6 the same thing.
7 THE COURT: Rob, don't cut her off. I can't
8 keep up.
9 A (Continuing) I believe there is another
10 version of this contract that is signed, it's just not
11 in these books. The other part is that this is the
12 cost plus contract for 32 percent, and I believe that
13 the agreement was 20 percent or 25 percent in the end.
14 Q 25 percent cost plus basis?
15 A It was 20 or 25 percent. I will try to find
16 that in another book if you would like me to look for
17 it, but it was a cost plus contract.
18 Q Okay. If you turn to Exhibit 25, and you look
19 at Exhibit B --
20 MR. LYLES: Did you say B as in boy?
21 MR. VARNADO: B as in boy. I'm sorry.
22 A (Continuing) Yes.
23 Q Okay. Those are the Coastal Plumbing & Gas
24 punch lists?
25 A Yes.

1 Q And then if you turn to Exhibit C, Charlie,
2 Salzhauer 5187.
3 A Yes.
4 Q Are you able to testify about which ones Mr.
5 Brown has done, or should I ask Mr. Brown?
6 A You should ask Mr. Brown.
7 Q Okay.
8 A I mean, I'm happy to testify, if that's easier
9 for you. I'm saying you should ask Mr. Brown, but
10 whatever is easier for you.
11 Q Exhibit D, are these additional punch list
12 items?
13 A Yes, they are.
14 Q Okay. Do you know, sitting here today,
15 whether Mr. Brown has completed all of the punch list
16 items in Exhibits C & D, or would you have to look
17 through --
18 A I would have to really look through it and go
19 through it.
20 Q So we'll ask Mr. Brown. In Exhibit E, same,
21 Exhibit is Salzhauer 5204?
22 A Yes.
23 Q Okay, same question with that. So I can ask
24 Mr. Brown? Yes, ma'am?
25 A Yes.

1 Q Great.
2 A Sorry.
3 Q And then Howard Brown, the only thing in your
4 book is Exhibit 26 which is invoices from Howard Brown?
5 A Yes.
6 Q Is there another Brown Atlantic invoice?
7 A We have many Brown Atlantic invoices. If you
8 would like us to furnish them, we can.
9 Q Yeah.
10 A Do you have the additional Brown invoices, or
11 do I need to --
12 Q Exhibit 44?
13 A He's asking for all of the invoices from Brown
14 Atlantic.
15 MR. LYLES: Did you hear that, Amy, 42?
16 A (Continuing) 42? Okay, 42. These are
17 additional invoices from Brown Atlantic. I can't tell
18 you whether these are complete invoices from Brown
19 Atlantic, but those are some additional invoices from
20 Brown Atlantic.
21 Q And 44 and 45?
22 A This is more detail on the cost of repairs and
23 what punch list it was coming from.
24 Q How long has Mr. Brown been out at the house?
25 A How long has he been out of my house?

1 Q At your house.
2 A He has come and gone at different times in the
3 course of -- in the course of things. So we might
4 think that we're done, and then we uncover another
5 issue and then Howard comes back.
6 Q Okay. I'm going to show you some photographs
7 of the house. We can mark that, please, ma'am.
8 (PHOTOGRAPHS MARKED PLAINTIFF'S EXHIBIT NO. 16
9 FOR I.D.)
10 THE COURT: All right. Let's -- these are new
11 photographs to the record?
12 MR. VARNADO: Yes, sir. One of them had
13 handwriting on it. I probably gave that one away.
14 THE COURT: We've got Plaintiff's Exhibit 16,
15 which is seven photographs. I don't know how to
16 clearly identify for the record what the remaining
17 photos are. You can use them as they are, or to be
18 clear in the record, you may want to mark each
19 photograph, because I don't know of any way that you'll
20 know later that these are the same seven photographs.
21 MR. VARNADO: Well, it's the -- they'll be the
22 photographs that have the house behind the Sullivan's
23 Island Lighthouse.
24 BY MR. VARNADO:
25 Q And I would ask Miss Amy if are these

1 photographs of your house?
2 A Yes.
3 Q Okay.
4 THE COURT: Do you want to admit them as a
5 block?
6 MR. VARNADO: Yes, please, sir.
7 THE COURT: Okay. The seven photographs of
8 the house are marked as Exhibit 16.
9 MR. VARNADO: Okay.
10 THE COURT: Collectively.
11 (PLAINTIFF'S EXHIBIT NO. 16 ADMITTED INTO
12 EVIDENCE.)
13 BY MR. VARNADO:
14 Q Now, on -- then I would like the witness to go
15 ahead and draw on the exhibit which part of the roof
16 Jay Brown did in his contract and which part he didn't
17 do.
18 A You would have to ask the roofer to draw that.
19 I was not up on the roof.
20 Q Well, you testified about the roof, you wanted
21 the roof to be blue and it was red, and you heard Mr.
22 Jay Brown testify that, I believe, that he had told you
23 he needed to replace the whole roof.
24 A I can testify that there was -- that was area
25 that was flat and the area over Annie's room, but I

1 cannot testify to the full extent of the roof that was
2 done on the main part of the house because I was not up
3 on the top of the house. But we do have a roofing
4 contractor who can testify to that because he could
5 easily see what was previously done and what was not
6 previously done.
7 I can tell you that this area of the house was
8 certainly new, and that there's some on this area of
9 the house that was newly done by Jay Brown
10 (indicating).
11 Q Okay, wait a second.
12 A But I can't tell you exactly which parts of
13 the top of the roof that --
14 THE COURT: Rob, go ahead.
15 BY MR. VARNADO:
16 Q Okay. You're looking at this exhibit, looking
17 at the -- which page of the exhibit were you looking at
18 to say that the roof was new, was it the third or the
19 second page?
20 A This area with the pool was new.
21 Q The second page, okay.
22 A Yup.
23 HENRY SALZHAUER: May I make a suggestion?
24 Unless you have the number on these --
25 THE COURT: I'm going to have trouble later

1 unless you-all number each page.
2 MR. VARNADO: What we can do is we can just
3 write a number on them.
4 THE COURT: If you want to write A, B, C, D on
5 them, let's do that. And then you can call it 16A
6 through --
7 MR. VARNADO: I'm doing that. I'm marking A,
8 B, C, D, E.
9 THE COURT: Okay. Now, for the record, it's
10 seven pages. It has now been marked as 16 A, B, C, D,
11 sequentially, so please refer to them by their letter
12 so that we'll have a record of which picture you're
13 looking at.
14 A (Continuing) Okay, sounds good. You mean
15 that's more specific than my saying "this one"?
16 THE COURT: It works better.
17 A (Continuing) I can confirm for you that in --
18 on letter G, this area of the roof is new, over the
19 exercise room.
20 THE COURT: Is that the only area of the roof
21 you can see in that picture?
22 A (Continuing) Not really.
23 HENRY SALZHAUER: This lettering is different.
24 MR. VARNADO: I don't have lettering on mine.
25 A (Continuing) I can confirm for you in letter F

1 that this part of the roof is new, and that some
2 section over here is new (indicating).
3 MR. LYLES: What are you pointing to?
4 A (Continuing) I'm sorry. The -- this kind of
5 part of the house that's sticking out.
6 THE COURT: Small square on the right side of
7 the page?
8 A (Continuing) Yeah.
9 THE COURT: And that's new.
10 A (Continuing) This seems to be the same
11 picture, E seems to be the same as F. This one seems
12 to be the same thing as B. And in section D, now we're
13 in the main section of the house, number D, and some
14 parts of this are definitely new, but I cannot tell you
15 the beginning and the end. You'll need to speak to the
16 roofing contractor, to Howard Brown -- I mean --
17 THE COURT: But whether you speak to the
18 beginning or the end, there's a high section and a low
19 section; is that right?
20 A (Continuing) Yes. But like I said, while I
21 know that significant parts of that were done by Jay,
22 and then done again, I know that --
23 THE COURT: Did the high section have any part
24 of it redone by Brown Contracting?
25 A My belief is yes.

1 THE COURT: On the low part, was any of that
2 done by Brown Contracting?
3 A (Continuing) I'm not certain on this part,
4 whether it was or not.
5 MR. LYLES: That's the low part.
6 A (Continuing) That's the low part. But there's
7 another section that -- over here (indicating).
8 THE COURT: Which letter?
9 A (Continuing) This is C, and I believe that
10 that was done by Brown Contractors. Like I said, I
11 have never been up on the roof.
12 THE COURT: I understand. All right. I'm
13 sorry, Rob. Go ahead.
14 BY MR. VARNADO:
15 Q Mr. Howard Brown replaced the entire roof;
16 correct?
17 A Mr. Howard Brown replaced the roof in that
18 remaining section of the house where I was telling you
19 that there was water intrusion during the job, and over
20 here in these pictures that I couldn't tell you the
21 extent to which Jay did and didn't, but that some of it
22 he certainly did. I can tell that for sure because of
23 emails regarding the work, the quality of workmanship
24 that was done on that roof, and I can easily find those
25 emails for you. Those -- I was not the person who

1 walked the roof and noticed the defects in the quality
2 of the workmanship. I was the person who noticed the
3 water intrusion into the house.
4 Q If you can easily find them, can you please
5 find them for me?
6 A Sydney, I know we have this marked. So...
7 (Whereas, a brief recess was taken.)
8 THE COURT: We're back on the record in 3881,
9 and we are continuing the cross-examination of Amy
10 Salzhauer.
11 BY MR. VARNADO:
12 Q Miss Salzhauer, when we took a break, you said
13 you needed to find some emails which talked about
14 roofing issues. Did you find them? Just yes or no.
15 A Yes.
16 Q Okay. And are they exhibits in the exhibit
17 book?
18 A I cannot tell you that, but I can tell you the
19 Bates label on the first, the two Bates labels on the
20 first email, which is my email, and that we have a
21 photocopy of the second email, so we can photocopy that
22 and distribute it if you would like.
23 Q Okay, so we'll mark this one as the next
24 exhibit.
25 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 129 FOR

1 I.D.)
2 BY MR. VARNADO:
3 Q And the other one that Sydney is getting for
4 us, is this another email?
5 A Yeah.
6 Q And this will be 130.
7 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 130 FOR
8 I.D.)
9 BY MR. VARNADO:
10 Q And those are the emails that you looked for
11 responsive to my question; correct?
12 A Yes. If you give them back to me, I can tell
13 you what they say.
14 Q That's all right.
15 MR. LYLES: Exhibit 130 doesn't have a Bates
16 label on it because apparently we didn't have it,
17 so that's an original with no Bates label.
18 THE COURT: Okay.
19 BY MR. VARNADO:
20 Q All right. Amy, in your deposition you
21 testified that you never discussed Jay Brown's
22 licensure status with him; is that correct?
23 A Not when we were beginning the job, not at
24 all.
25 Q And you never discussed licensure status with

1 him; correct?
2 A At a certain point, and I'm not sure whether
3 it was during the job or after the job, we became aware
4 that he did not have a license, and I don't know
5 whether I discussed that with Jay or not, and I don't
6 know whether it was before the job or after the job. I
7 know that we sent emails to Jay asking for his license.
8 I don't recall the responses. I believe those emails
9 came from my dad, so I would have to refer you to him.
10 Q Okay. And you testified that you were working
11 with Jay Brown; correct?
12 A Yes.
13 Q So what company he used wasn't really
14 important to you at the time; correct?
15 A No, it wasn't. You know, when we do a real
16 estate partnership, you know, there's one partnership
17 that's called Binker Goes Shopping, that was our dog,
18 and another was Binker on Fifth Avenue, and they are
19 different, but really it's somebody doing business with
20 my dad and my brother.
21 Q Okay. And you heard Mr. Brown's testimony
22 that he was -- he was a project manager on this job.
23 And there were other project managers on the job;
24 correct?
25 A That was I believe my interpretation of his

1 testimony. I don't really honestly recall what he
2 testified to.
3 Q You've testified today that you had numerous
4 conversations, and your father, Henry Salzhauer, copied
5 you on numerous conversations with Jay Brown; correct?
6 A Yes.
7 MR. VARNADO: Okay, I think honestly that this
8 will do it. I want to talk to my client for two
9 minutes, and then we'll move on.
10 THE COURT: All right. Who have you got next?
11 Oh, you have redirect?
12 MR. LYLES: I have a little. But Howard Brown
13 is supposed to be back.
14 (Whereas, the deposition recessed briefly.)
15 THE COURT: Rob is finished. Back to you for
16 redirect.
17 REDIRECT EXAMINATION
18 BY MR. LYLES:
19 Q Amy, I have just maybe one question.
20 A Okay.
21 Q Rob asked you some questions about change
22 orders. Do you remember that?
23 A I don't remember the specific questions, no.
24 Q But do you remember discussing change orders
25 with him?

1 A Yes.
2 Q Did you understand at some point in time from
3 Jay that there were change orders?
4 A What happened is that, way into the job, we
5 asked -- we asked for the invoices from Vuong Nguyen,
6 for his backup invoices, and Deborah in his office sent
7 them. I can find the dates of that. I believe it's
8 maybe the end of March, June, sometime like that, and
9 that's when I saw these things, and they just kind of
10 were stamped change order after change order after
11 change order.
12 Q So, and I think Mr. Varnado asked you if the
13 change orders came from the subcontractors. Do you
14 remember that?
15 A I don't remember. But, if you say he did, I'm
16 sure he did.
17 Q And is that -- in your recollection, is that
18 where they seemed to come from?
19 A You know, I don't know when we look at her
20 billing whether it will have been marked as a -- I
21 mean, most of them I think come from VLN, LLC.
22 Q What sort of agreement did you have with VLN,
23 LLC?
24 A I didn't have any agreement with VLN, LLC.
25 Q So would there be a change order from VLN,

1 LLC?
2 A I don't know. You see, I didn't see those. I
3 saw these invoices coming from VLN, LLC, to Jay. I
4 didn't actually realize that that was Vuong.
5 Q Did you have any agreement with any company
6 called VLN, LLC?
7 A No.
8 Q Who had an agreement with VLN, LLC?
9 A I imagine Jay did.
10 MR. LYLES: Okay. All right. I think that's
11 all I've got.
12 MR. VARNADO: Okay.
13 EXAMINATION
14 BY THE COURT:
15 Q Amy, let me understand the paperwork. And if
16 you could look at, for no reason other than it's at
17 random, Plaintiff's Exhibit 9, and I want to reference
18 you to an invoice.
19 A Is it Exhibit 9 from --
20 MR. LYLES: Plaintiff's Exhibit 9.
21 A (Continuing) Okay. Okay.
22 Q That's a collection of invoices, but it's --
23 the first page is the accounting of the payments and
24 charges. But let's -- if you could look at the next --
25 not the final invoice, but look at the 10/14/2013, and

1 I can tell you that's just at random.
2 A Okay.
3 Q You received these invoices, as I understand
4 it. This is a copy of what you were sent?
5 A Yes.
6 Q To what extent did it have any backup or
7 documentation for the line items listed on the invoice
8 description block?
9 A It depended at what point we were in the job.
10 So when it was the beginning of the job, very little.
11 Then later in the job, first of all, we were asking for
12 it, and, secondly, Cameron Glaws was better about
13 providing that backup. So at this point in the job, at
14 the end of the job, we were probably -- we were
15 probably asking for, you know, real receipts.
16 My dad, at some point, was asking to do, and
17 I'm not sure whether he did, you'll have to ask my dad,
18 three-party checks. We couldn't get -- and I can show
19 you multiple emails. Making this point, we couldn't
20 get a clear understanding of what subs had actually
21 been paid, and it took a long time for Jay to respond
22 if he ever did -- it wasn't clear to me whether Jay
23 actually --
24 Q I probably asked too long of a question. Just
25 in simple terms, did you routinely get backup from

1 Brown for the items in the bill? For example, ceramic
2 tile, Tile & Stone Design Studio, $1,091. Was it a
3 routine practice for Brown to send you the backup, the
4 documentation, that evidenced that particular item that
5 he wanted to be paid for?
6 A No. Although, at this point on the job, I was
7 probably -- we were almost done with the job and, you
8 know, this is already after we have our CO. So at that
9 point, I was -- I was onto the game, so I was probably
10 asking for receipts. But, for example, when VLN, LLC,
11 would send an invoice saying that it was, you know,
12 $8,500, or whatever it would be, for an HVAC, I didn't
13 realize that there was a -- I actually didn't realize
14 there was another contractor that was at issue there,
15 and there would never -- there was no backup.
16 Q All right. But I'm trying to understand the
17 backup you were sent. Is it your testimony that in the
18 absence of a request, what you generally received was
19 this invoice and not backup?
20 A Like I said, it depends on the point in the
21 job.
22 Q All right. Early in the job?
23 A Early in the job, we did not receive the
24 backup.
25 Q All right. Now, in terms of the -- have you

1 received a final accounting, a cleaned-up final
2 accounting, from Brown Contracting showing
3 documentation for all of the expenditures they're
4 asking to be paid for?
5 A That is a great question. I have heard
6 multiple versions of what that is, and I cannot tell
7 you with certainty that -- that we received something
8 that, without our input, reflected what was clearly
9 paid to subs. Additionally, we paid some of the subs
10 on our own because --
11 Q Okay.
12 A So, you know --
13 Q But just as a matter of paperwork -- excuse me
14 for interrupting you after I fussed at Rob -- but just
15 to get this one question, have you ever gotten a
16 document or a set of documents from Brown Contracting
17 that was represented to be a comprehensive final
18 accounting, here's all the money we want to be paid? I
19 haven't seen it is the reason. I just want to know if
20 one exists.
21 A I would have to ask Roy Strickland or ask
22 somebody to Roy Strickland if he felt like there was
23 something that was -- that clearly represented that.
24 I -- you know, like I said, we didn't start -- we
25 didn't even understand that certain subs hadn't been

1 paid until they applied for payment directly to us, so
2 that would indicate no. But it's possible that within
3 the different billing documents, that there is
4 something that represents that, that Roy would
5 understand represents that, that I didn't.
6 Q Okay. Thank you. That's all.
7 A I'm sorry to be obtuse, but --
8 Q No, no, you're not, you're not. I'm just
9 trying to make sure I'm finding everything. Thank you.
10 A I mean, what I can tell you is that if you
11 look at the end of the job, we're asking him again and
12 again and again for a final accounting of what the subs
13 are paid, or what the subs need to be paid, so that we
14 can make sure that the subs are paid. Now, there were
15 certain subs that never finished their work. I don't
16 know if that -- to my mind, when he filed the lien, he
17 still -- he hadn't even finished. He never finished.
18 Q I mean, this is what I'm looking for: Are you
19 aware of a comprehensive document that bundles together
20 and includes all of the costs that Brown says we
21 incurred in the building of your house and this is what
22 we want to be paid for, plus markup?
23 A I --
24 Q Have you seen that document anywhere?
25 A I've seen a final invoice from Brown, but I

1 Q And that would include --
2 MR. VARNADO: I'm sorry, are you done?
3 MR. LYLES: Sure.
4 BY MR. VARNADO:
5 Q That would include the owner didn't call you
6 and the architect didn't call you; is that true, Mr.
7 Powell? And the contractor?
8 A Correct.
9 Q And you said that you have consulted on
10 additional repair, and I show you Brown Atlantic's
11 estimate to fix it on Exhibit 45 for $65,000. Are you
12 saying that the repair that you're contemplating, that
13 you've actually explored, is less? You just don't know
14 at this time?
15 A I don't know costs. Only when -- contractors
16 give me feedback on different things. It was brought
17 to my attention that dealing with the second floor
18 tile, the plumbing and all of that would be very
19 costly, so we tried to tack the solution above that
20 area. So, I could only assume it would help with these
21 estimates.
22 Q In your original plans, did you know a
23 bathroom was going to go on that second floor?
24 A Yes.
25 MR. VARNADO: All right, that's all I have.

1 THE COURT: I'm done. Thank you.
2 MR. LYLES: Thank you, Mr. Powell.
3 MR. VARNADO: Thank you.
4 THE COURT: Who is the next witness?
5 MR. LYLES: Mr. Salzhauer.
6 THE COURT: Would you move one seat down, and
7 the court reporter will swear you.
8 (Whereas, a brief recess was taken.)
9 (Henry Salzhauer, having been duly sworn,
10 testified as follows:)
11 THE COURT: We are back on the record. And,
12 Robert, proceed.
13 DIRECT EXAMINATION
14 BY MR. LYLES:
15 Q Mr. Salzhauer?
16 A That's me.
17 Q I know you've already been sworn in, and
18 you've had an opportunity this week to speak a little
19 bit to everybody who is here. But if you would, just
20 for the record, provide Mr. Brown with your -- a
21 summary of your educational background.
22 A I went to a very good high school in Brooklyn,
23 it's Poly Prep, and then I went to MIT and I got a
24 degree in electrical engineering and one in management.
25 Q Okay. And what did you do after school?

1 A After school, I worked for a little bit of
2 time until I was called to the Army. I went into the
3 Army, and then I was fortunate enough to marry my wife,
4 so and then I went to some licensing courses. I became
5 a licensed electrical contractor.
6 Q Okay. And where did you work?
7 A I worked in a business, a family business that
8 my father started in New York. It's called Benjamin
9 Electric, or it was called Benjamin Electric. And
10 eventually, my brother and I ran the business, and I
11 carried the electrical license for the business.
12 Q How long did you do that?
13 A From about 1960 until I don't know when.
14 Q Do you still got it?
15 A No. You can't have a license unless you're in
16 the business.
17 Q Okay. When did you get out of the business,
18 if you can remember?
19 A I can't.
20 Q Okay. Do you know approximately how long you
21 were in the business?
22 A Well, actually, I grew up in the business. So
23 I was in the business, I worked in the motor shop when
24 I was 14 years old. And then in order to get my
25 electrical license, I worked with tools in the trade

1 for two years. And then I guess in the early, very
2 early sixties, I worked -- I came into the office and I
3 learned to estimate and run work. And probably in the
4 late eighties, early nineties is when I left the
5 business. Amy, do you remember when I left the
6 business?
7 Q She can't help you.
8 MS. SALZHAUER MCMARLIN: Sometime when I was
9 in college.
10 A (Continuing) Well, anyhow, I was probably in
11 the business 40 years or so.
12 Q So you're familiar with -- well, the type of
13 business that Benjamin Electric did, what was it,
14 primarily?
15 A Primarily, we did office alteration business.
16 We started out as industrial contractors, and at that
17 moment in time, that was our business, industrial. New
18 York City was -- New York City was a very big printing
19 town, and we did maybe 80, 90 percent of the electrical
20 work for commercial printers in the city.
21 And then, there were all kinds of businesses.
22 There were machine tool businesses. There were garment
23 businesses. But, that started to leave the city. And
24 we were always a heavy design company in that -- in the
25 industrial work, we designed a lot of the work that we

1 installed, and that carried over to the new business of
2 New York City, which was office. And if you have a
3 500,000 square foot or a million foot building, then
4 you have a somewhat complicated electrical system. So
5 we wound up doing work for people who understood what
6 we had in our business in terms of qualification, and
7 we had very good labor, so we were very competitive,
8 and the people we worked for understood us and we
9 understood them. And we did most of our work -- well,
10 I don't know if it's in respect to this, but a lot of
11 our work was with unsigned contracts and on the basis
12 of what we called not-to-exceed price.
13 Q What is not-to-exceed price?
14 A We would give a price for the -- to work,
15 $5.00, and if we could do the work for less on labor
16 and material basis, they got billed for the lesser; and
17 if we were over, we ate it.
18 Q And so that was a -- that was a -- would it be
19 accurate to say that was a common way of contracting
20 for Benjamin Electric?
21 A For Benjamin Electric it was. For other
22 contractors, it was not.
23 Q After you left Benjamin Electric, what did you
24 do?
25 A While I was at Benjamin Electric, we had an

1 unusual organization in that we did not let it get
2 bigger than a certain size. And since my brother and I
3 were in the business, if I had spent all of my time at
4 the business and he all of his time at the business,
5 then there would be no room for anybody to grow up. So
6 while I had my spare time, I had an ice skating rink, I
7 invested in real estate, and I invested in marketable
8 securities.
9 Q Okay. And so when you get out of Benjamin
10 Electric, that's what you did?
11 A When I got out of Benjamin Electric, our son
12 had come into the business. My brother and I had,
13 between us, six children. One boy. It was not a time
14 in the world when young ladies went into the
15 contracting business in New York. So, our son was in
16 the business, and it turned out that when we started in
17 the business, my brother and I had grown up in it and
18 we saw our father's generation stay in it until they
19 died in harness. Whether they wanted to or not, they
20 just did. And we made up our minds, if God were nice
21 enough to us and we didn't have to, we wouldn't.
22 And my brother was eight years older than me,
23 and my brother was a very big hobbyist and he was
24 involved with his hobbies, and I said to him, Charley,
25 why don't we stop this. And he said to me, Hank, what

1 will I do. And I said, Charley, you'll do the same
2 thing Mike and I do. So with that conversation, we
3 altered our office space to make room for Charley. And
4 my brother's and my office were always back to back
5 with a door between us. And so we altered the space so
6 that it fit with Charley and Mike and I, and he never
7 came back. He came book to see the space, but -- and
8 my brother moved to North Carolina.
9 Q Okay. And how many children do you have?
10 A Well, we have three that we had plus three
11 that they married, so we really look at it as six
12 children.
13 Q And Amy and Andy are two of the six?
14 A Exactly.
15 Q And do you remember when Amy began to look at
16 and evaluate 1850 Flag Street for purchase?
17 A I do.
18 Q And was she talking to you about that?
19 A In a very generalized manner, dad, you know,
20 we're going to look for a house.
21 Q Okay.
22 A And then this house came up, and the location
23 was very good. Andy is a very big oarsman. He was an
24 Olympic rower, and he still competes internationally in
25 rowing kinds of things. And the water always had a big

1 appeal to them, and that's where they eventually wound
2 up by.
3 Q Okay. What did she tell you about the house
4 before you saw it?
5 A That the location was very good. That we're
6 going to need to alter it to make it work for us.
7 Q And Amy's got two children. Do you have other
8 grandchildren?
9 A We have six grandchildren.
10 Q Okay. At what point do you recall first --
11 MRS. SUSAN SALZHAUER: You have nine.
12 A (Continuing) It sounded a little funny to me
13 when I said that. I started to count up again. One
14 daughter has four, one has three, and one has two, that
15 makes nine. Sorry about that, Amy.
16 Q Do you remember the first time you saw 1850
17 Flag Street?
18 A Not really.
19 Q Do you know the first time you met Jay Brown?
20 A Yes, I do. The first time I met Jay Brown was
21 in the bidding process for the house. Actually, I
22 think Amy already was involved with getting bids.
23 Q So you weren't instrumental in the process of
24 getting the bids?
25 A No, I was not.

1 Q So you were not involved with, at least at
2 that point, with Beau Clowney?
3 A I had met Beau previous to that, I believe.
4 I'm not quite sure. This was more than three
5 grandchildren ago. But I met Beau I think before the
6 drawings were complete.
7 Q Okay. But you weren't involved in the bid
8 process?
9 A That's correct.
10 Q And so you didn't select Jay as a potential
11 bidder?
12 A No.
13 Q Or Daly & Sawyer or Diamond Construction?
14 A No.
15 Q Okay. Did you evaluate the responses to bid
16 requests?
17 A In terms of evaluation, going over the -- I
18 did not, no.
19 Q Was the decision to hire Jay and accept his
20 bid, was that Amy's decision?
21 A I participated in that.
22 Q Okay.
23 A And I -- when I came here, I'm pretty sure
24 that Amy -- Amy had the prices from Sawyer, and the
25 price from the third party, and a price from Jay.

1 Q Diamond.
2 A Okay. And the price from Jay. And she was in
3 a very big hurry to get started with the work.
4 Q Why was that?
5 A Because she was renting a place, and the lease
6 was at a finite end, and she had two little children
7 and she knew she had to get out.
8 Q Okay, go ahead.
9 A And at that moment Sawyer's bid and Jay's bid
10 were very similar, and Amy had some questions about the
11 work and going over the pricing. And Sawyer was very
12 busy, and Jay, before Amy bought the house, had been
13 very helpful to her in terms of examining the house so
14 that she would be able to qualify her price for the
15 house, and he was very responsive at that time.
16 My wife and I came down and we met Jay, and we
17 went to his office and I -- I really was not, I was not
18 too sure of the pricing. You know, I had no way of
19 understanding pricing. I didn't know if the view was
20 we're taking -- we've got New York City people, let's
21 give it a ride, or if it was he's straightforward on
22 his price. I explained to Jay in his office what I had
23 called a not-to-exceed price, and that's the way I
24 would like to go about this work.
25 So, it was determined that Jay had given an

1 estimate which had a management and a -- I don't know
2 if you call it a profit and overhead column, whatever
3 it was, and at that moment in time, we came to a
4 conclusion that the work would be done based upon
5 certain work on the plans, and that if the work could
6 be done for less, Jay would keep the management fee, or
7 whatever you're going to call it, and 50 percent of any
8 savings would go back to us and 50 percent would go to
9 him.
10 Q Okay. If you'll turn in this book right here
11 to Exhibit 8 for me.
12 A How come it's upside down?
13 Q Here you go.
14 A I do need help with the numbers. Okay, that's
15 familiar.
16 Q Okay. Tell me why that's familiar to you.
17 Have you seen it before?
18 A Yes. This is my understanding.
19 Q Of what?
20 A Of --
21 THE COURT: Rob, tell me the number again.
22 I'm sorry.
23 MR. LYLES: Eight.
24 A (Continuing) This is my understanding of what
25 the job was going to cost.

1 Q Okay.
2 A And again, if there were -- it says, "As an
3 incentive, any savings coming in below the above will
4 be divided 50/50. Project duration will be five
5 months. You will be given a project FastTrack
6 scheduling sheet," which I never got.
7 Q Okay. Does this Exhibit 8 represent sort of
8 structurally to you what you had agreed to in terms of
9 pricing with Jay?
10 A Yes.
11 Q And that exhibit contains on the top the name
12 of a company called Brown-Meihaus. Do you see that?
13 A Yes.
14 Q Do you know anything about who Meihaus is?
15 A No -- well, subsequently, from this
16 litigation, I understand who Meihaus is.
17 Q Okay.
18 A But when I met Jay, Jay spoke to me about
19 himself and how he grew up in the business and the work
20 that he was doing, and he took us to a house either on
21 the Isle of Palms or --
22 MRS. SUSAN SALZHAUER: Isle of Palms.
23 A (Continuing) You're not allowed to talk to me.
24 THE COURT: We'll make an exception. If she
25 speaks to you, we're going to make an exception for

1 that.
2 A (Continuing) Correcting me on grandchildren is
3 all right. I'm never going to live this down. So, we
4 had gone to -- to look at this house on the Isle of
5 Palms, and the house was being very well done. There
6 was an area in the house where Jay pointed out that he
7 had made some architectural change on his own, and he
8 improved the appearance of the house, greatly. The
9 house was pretty close to finish. And I developed a
10 level of real confidence. Jay sold himself to me, and
11 that's how -- that's how I came to my dealings with
12 him, because I -- my feelings about him was he was
13 going to give us a good job. And, you know, I also
14 grew up in the business. So we talked about him
15 growing up in the business, and I related to that
16 issue.
17 Q Okay. Was it your belief at that time that
18 you were dealing with Jay Brown?
19 A Exactly. My belief -- my belief in terms of
20 my relationship to Jay for a long period of time was I
21 could trust this guy. I was new to Charleston, and I
22 was interested in real estate in Charleston at that
23 time, and Amy had looked at a piece of property in
24 downtown Charleston, which would have required
25 extensive renovation. We got pricing from Jay for that

1 work. Subsequently, she did not put in a price for the
2 property. After that, I had spoken -- or Jay and I had
3 spoken about him buying a property on Coleman Boulevard
4 and building a space for a restaurant, that he felt he
5 had the restaurant tenant, and that was the kind of
6 confidence I had in him.
7 Q Okay.
8 A But to me, the job was always Jay.
9 Q Okay. Did you believe that Jay was a licensed
10 contractor?
11 A I had no reason -- all appearances were that
12 Jay was a licensed contractor. I have never -- we did
13 three alterations to our own home, and two alterations
14 to an apartment, and I never asked the question of the
15 contractor as to whether or not he was licensed. It
16 wasn't a -- it would not have occurred to me to ask
17 that question.
18 Q If you had known that Jay was not licensed,
19 would you have hired Jay?
20 A A license means something to me, and I would
21 not have done it. Because a license means that you
22 have knowledge of building codes and practices, and you
23 also have an honest responsibility for the job, that
24 you personally are committed to following all the codes
25 and ordinances. You know, there was a -- there is

1 conversation on the table about the law and whether or
2 not somebody can carry the license, somebody cannot
3 carry the license. But for me, in this job, I think
4 the job lacked anybody with the requirements of having
5 a license. A licensed contractor -- had a licensed
6 contractor been on the job, I don't think the issue of
7 the nails in the electrical wiring would come up,
8 because that's a violation of building codes. I
9 also -- and that problem is flagrant. I also think
10 that had a licensed contractor been on the job in
11 respect to the structural issues, there wouldn't be the
12 problems. Howard Brown ran into this issue of the
13 deflection. Well, he's a licensed contractor and he
14 knew enough to call an engineer. While the work was
15 going on, somebody substituted bad judgment in an area
16 that really needed an engineer. You don't need an
17 engineer --
18 MR. VARNADO: I'm going to object because
19 we're getting a little bit -- I don't think you have
20 laid a foundation for him to even testify about this.
21 He's --
22 BY MR. LYLES:
23 Q We'll get to that, Mr. Salzhauer.
24 A Okay.
25 Q Would you have hired Jay Brown, or would you

1 have allowed Amy to hire Jay Brown, to construct this
2 house, do this project, had you known he was not
3 licensed?
4 A No.
5 Q In your mind, does a license issued by the
6 state establish, in your mind, some level of competence
7 and financial wherewithal for the person that you're
8 dealing with?
9 A Yes.
10 Q And does, in your mind, a license cause you to
11 believe that the contractor with whom you were dealing
12 would be familiar with the code and applicable
13 regulations?
14 A Definitely, yes.
15 Q And that if his license is actually used to
16 pull a building permit, that he is personally obligated
17 to ensure compliance with the building code?
18 A Yes.
19 Q And would you have expected a licensed
20 contractor to understand the job structure?
21 A Yes.
22 Q And would you have expected a contractor with
23 a license to actually directly retain the
24 subcontractors that were used on the job?
25 A Yes.

1 Q Had you known Jay Brown was not going to
2 directly contract with subcontractors, would you have
3 hired him?
4 A No.
5 Q We looked yesterday at what was marked as
6 Exhibit 119. That documented is dated 4/24/12. Is
7 that something you saw during the negotiation process,
8 or do you remember?
9 A At the end -- at the end of the process, I
10 think I saw -- at the end of the process, I asked Amy
11 to make sure she defined the work that was going to go
12 on, by room, and so she would know what she's getting
13 and what the contractor is going to be giving.
14 Q Okay. Hang on just a minute, let me make a
15 note. Okay, you and I have looked at Exhibit 8. And
16 let me ask you about some other -- let me do it this
17 way. Would you agree that after -- or at some point
18 early in the process, there was some discussion between
19 Jay Brown and Amy, perhaps you, about pricing
20 alternatives for the job?
21 A That was kind of an ongoing thing before the
22 work started.
23 Q Okay. And we looked, for example, at -- at --
24 if you'll flip over to 12. Exhibit 12 is a different
25 way of pricing the job. Do you see that?

1 A Yeah.
2 Q And were you copied on things such as this, or
3 did you ultimately see things like this, or was this
4 between Amy and Jay?
5 A I may have been copied, but I was not part of
6 it.
7 Q Okay. If you will, go over to Exhibit 14 for
8 me, and that's an email that's addressed to you. Do
9 you see that?
10 A Yes.
11 Q Do you remember receiving this email?
12 A I received a contract. I can't say that this,
13 looking at this, this specifically was the contract,
14 but I did receive a contract.
15 Q Okay. Was it a cost plus contract?
16 A Yes.
17 Q Okay. And did you sign that contract?
18 A No.
19 Q Why not?
20 A Because it was not our agreement to have a
21 cost plus job.
22 Q Okay.
23 A The agreement was for a fixed price job with
24 a -- if there were a saving -- I gave you the terms.
25 It was a fixed price, and if there were a saving, 50

1 percent to each party.
2 Q Okay. So you did not ever sign a cost plus
3 contract?
4 A That's correct.
5 Q You did not believe it was a cost plus job?
6 A Correct.
7 Q Okay. If you go over to Exhibit 15, you're
8 shown as a copy on that letter, or email. Do you see
9 that?
10 A Yes.
11 Q And there is a document that, as I understand
12 it, is referred to as a Brown Contractors Control
13 Estimate. Do you see that?
14 A Yes.
15 Q Okay. And if you go to the last page of that
16 document, under column A, which is bid A.
17 MR. VARNADO: Which exhibit are you on again?
18 I'm sorry.
19 MR. LYLES: 15. It's okay.
20 A (Continuing) Pay attention, will you, please.
21 Q The last page of that document, which is right
22 there, we see a number of 722,074.12?
23 A Correct.
24 Q Do you see that?
25 A Yes.

1 Q Is that a number that resonates with you
2 relative to this job?
3 A Yeah. I believe that was the sum total of --
4 oh, two phases. I think this got broken down into two
5 phases. It was a Phase I and a Phase II.
6 Q Okay. But that was the total amount?
7 A I believe that's correct.
8 Q Which would include both phases?
9 A Correct.
10 Q All right. Did you ever see an estimate from
11 Mr. Brown for the entire job that exceeded 722,074.12?
12 A Not to the best of my knowledge, because I was
13 really not involved --
14 Q Okay.
15 A -- with that part of this conversation.
16 Q Okay.
17 A Amy was trying to see what she could get
18 within the framework of what she could afford to pay?
19 Q Okay. What did -- what was the project
20 management fee that was contemplated in that exhibit,
21 or were you still basing it on the prior --
22 A I think it was -- I think it was $50,000, and
23 when the job got broken down, it was -- this is what
24 I'm -- off the top of my head, I think it was 30,000
25 for the first part, and 20,000 for the second part.

1 Q And if you look at Exhibit 15, there's a
2 couple of things there. There's a project management
3 number of $8,000?
4 MR. VARNADO: Which page are you on, Robert?
5 MR. LYLES: Sure. I'm on 1508.
6 MR. VARNADO: Thank you.
7 BY MR. LYLES:
8 Q There's a project management -- excuse me,
9 $12,500. Do you see that?
10 A Yes.
11 Q And then down below that, you've got an
12 overhead and profit number of $50,000. Do you see
13 that?
14 A Yes.
15 Q And did you see those at the time this was
16 being priced?
17 A I saw this afterwards.
18 Q Okay.
19 A These are Jay's numbers.
20 Q Okay. But you understood that this
21 represented the control estimate?
22 A Yes.
23 Q Okay. All right. Now, let's see what we got
24 here. Hang on just a second. You never signed a cost
25 plus agreement that was sent to you; is that right?

1 A That's correct.
2 Q And did you ever sign any contract with Mr.
3 Brown?
4 A No.
5 Q And were you comfortable proceeding with the
6 renovation of the house without a signed contract?
7 A Yes.
8 Q Why were you comfortable proceeding without a
9 signed contract?
10 A I was comfortable with Jay, and I had
11 confidence in his integrity, and I was used to doing
12 business with people without signing contracts.
13 Q Okay. What -- once renovation began, were you
14 on site?
15 A No.
16 Q You were in New York?
17 A Yes.
18 Q And what was your role during renovation?
19 A Basically, the bills came -- it was easy for
20 us to pay the bills out of New York and keep the
21 bookkeeping in New York. So the bills -- the bills
22 came, and the bills that came to New York had -- there
23 was conversation about the backup bills from, you know,
24 the lumber yard and this and this and this. Those did
25 come to my office. Amy was not aware of it, I don't

1 believe.
2 Q Okay. So you got -- invoices from Mr. Brown
3 were sent to you in New York?
4 A Correct.
5 Q And those invoices had some backup material
6 included with them?
7 A Correct.
8 Q Backup material for the charges that you were
9 receiving?
10 A Yes.
11 Q And then those payments, the invoices were
12 processed for payment?
13 A Correct.
14 Q And paid by your office?
15 A Correct.
16 Q There has been some discussion in this case
17 about -- let me turn your attention to -- let's go
18 to --
19 MR. VARNADO: 101, 102.
20 A (Continuing) Six grandchildren.
21 BY MR. LYLES:
22 Q Let's go to Exhibit 78.
23 A Exhibit 72?
24 Q 78.
25 A 78, which is "Application and Certification

1 for Payment, Companion to Invoice #" -- what is that
2 number?
3 Q It looks like 45 to me. I don't know. The
4 invoice should be --
5 MS. WOLK: That's 43.
6 BY MR. LYLES:
7 Q There you go, right there, next exhibit over.
8 A Okay.
9 Q Are you at Exhibit 78, Mr. Salzhauer?
10 A I am, yes.
11 Q Go back to the first page of that, if you
12 don't mind.
13 A (Witness complied with request of counsel.)
14 Q Do you recognize the form that is before you?
15 A Yes.
16 Q What is that?
17 A This is what I paid the job from.
18 Q Okay. And the form itself, is that an AIA
19 form?
20 A I'm looking at the top, so it is. It's says
21 an AIA form.
22 Q Okay.
23 A When the job started --
24 Q Yes.
25 A -- I asked for really simple billing, which

1 was the price, the amount that was -- the -- if there
2 were, let's say, air conditioner work, the value of the
3 air conditioning, $5.00. When the -- when work
4 happened, a certain amount of work happened, there
5 would be a bill for $3.00. And my control over this
6 was that it should not run more than $5.00. If there
7 were changes, there was to be another column
8 incorporated into that so that I always knew how much
9 the job was going to cost, and that's how I paid them.
10 I paid the bills.
11 Q So you requested that the -- that the job cost
12 information be provided to you in that manner?
13 A Exactly.
14 Q And was that done by Jay Brown?
15 A Yes.
16 Q Or someone in his office?
17 A Well, it came from his office.
18 Q Okay. Did you send the form that we're
19 looking at to Jay Brown to use to accomplish that?
20 A No, I did not.
21 Q Look at Exhibit 78. Who prepared the -- or
22 filled in the blanks and prepared the continuation
23 sheet?
24 A I believe the woman in the office, or the lady
25 in New York, was Deborah. But I -- more than that, I

1 don't know. I never met Deborah, and I had some
2 conversation with her when things -- most of it, I
3 guess, was emails, but when things got either hairy or
4 tight or something like that, I would have a
5 conversation with her. When I was not getting stuff on
6 time or --
7 Q Did you or anybody in your office fill in the
8 blanks on these forms during the course of this job?
9 A No.
10 Q This is a document that was provided to you
11 along with Jay Brown's invoices?
12 A Exactly.
13 Q Your request was simply to be able to chart or
14 monitor the flow of the cash on the job, relative to
15 the initial cost?
16 A Exactly.
17 Q Okay. At some point you've seen -- you go
18 ahead, I'm sorry. I didn't mean to interrupt you.
19 A No.
20 Q Okay. In your mind, the numbers represented
21 here are numbers that were provided by Jay Brown and
22 his office?
23 A Exactly.
24 Q And that's true for all of these?
25 A Yes.

1 Q At any point -- well, let me ask you a
2 different way. When the job began, did you have an
3 expectation of the length of time it was going to take
4 to complete the job?
5 A The length of time that I got were lengths of
6 time that Jay spoke to Amy about it, or I got from Jay,
7 and I asked as -- when the job started, I asked for a
8 schedule of -- a detailed schedule of the work. By
9 this time, you should be doing, this, this and this,
10 and the job is over by such and such date. I never got
11 such a schedule.
12 Q Okay. Did that concern you?
13 A It did concern me, and I kept asking for it
14 and never got it.
15 Q Okay. And I hate to do this to you, but I'm
16 going to zip all the way back to Exhibit 8.
17 A You're good attorneys.
18 Q Oh, I'm a page-turner. Okay, go to Exhibit 8.
19 Do you see any reference in there to the length of the
20 project?
21 A Let's see. Five months. Project duration,
22 five months.
23 Q Okay.
24 A I'll read it. "Project duration will be five
25 months. You will be given a project FastTrack

1 scheduling sheet." I never got that.
2 Q Go to the last line just above the signature
3 line, if you will, on that document from Jay Brown.
4 A "We offer a five-year home warranty on all of
5 our homes."
6 Q Okay. Was that significant to you?
7 A Yes.
8 Q Why?
9 A It meant that the contractor or the person was
10 standing behind the work, and if there were a problem,
11 he would remedy.
12 Q So the five-year warranty was a significant
13 issue for you?
14 A Yes. I think it would be to anybody.
15 Q Before construction began, did anybody ever
16 indicate to you that you weren't going to be getting a
17 five-year warranty?
18 A No.
19 Q At any point during the renovation, did you
20 begin to get concerned about the cost of the project?
21 A I did.
22 Q Do you know when that was?
23 A I believe it was in December. I would have to
24 look at my notes. May I do that?
25 Q Well, let's --

1 A I think it was somewhere in December.
2 Q Of 2012?
3 A 2012.
4 Q Okay.
5 A Or early January of 2012.
6 Q Okay. And do you recall what concerned you?
7 A Well, the price was adding up, and the work
8 was not -- the work was not commensurate with the
9 finish. I mean, the price was X and it looked like the
10 house was finished X minus Y and it was not going to
11 come out right.
12 Q So you began to get concerned?
13 A I did.
14 Q Okay. And what did you do in response to
15 that?
16 A I wrote to Jay and asked him, certainly by
17 early January or middle of January --
18 Q Okay.
19 A -- and certainly in February, to please give
20 me a price to finish, an all-encompassing price to
21 finish the work.
22 Q Okay.
23 A I realized that there had been some changes,
24 all of which I was not aware of, but I wanted an
25 all-encompassing price, what is the job going to be.

1 There's a cost to date, and there's going to be a
2 certain amount more money to finish. Jay gave me the
3 cost to date, the certain amount of money to finish,
4 and a list of items that -- I don't remember exactly
5 what that list of items was, but altogether it gave me
6 a number that the job would be finished at.
7 Q So at some point, you became aware that he was
8 not going to meet the agreed-upon price?
9 A Exactly.
10 Q And your concern at that point was to try to
11 make sure that you understood what the ultimate cost
12 was going to be?
13 A Yes.
14 Q Why would you not just stop the work right
15 then and there?
16 A Amy had two little girls, and they were
17 wandering around in the wilderness of Charleston, and
18 it made no sense because, supposedly, the job was going
19 to get done by -- I don't remember what that promise
20 date was. I think the first promise date was something
21 in December. That never happened. And then there was
22 a subsequent promise date. And I think when I got this
23 cost update or -- cost update, I think the date that
24 was on there was March 11th.
25 Q Okay.

1 A So to stop the job at that moment in time made
2 no sense.
3 Q And you were -- if you had stopped the job,
4 what would you have had to do?
5 A If I had stopped the job, I would have had to
6 get contractors to finish the job. It would have been
7 a complete mess.
8 Q Okay. Let me turn your attention to Exhibit
9 50, please.
10 MR. VARNADO: 15?
11 MR. LYLES: 50.
12 BY MR. LYLES:
13 Q Do you see that, Mr. Salzhauer?
14 A Yes.
15 Q Is that an email that you sent to Jay on
16 February the 15th of 2013?
17 A Before this, I believe that Jay had given me
18 the numbers on his sheet. I'm not positive exactly.
19 Q Okay.
20 A But I wanted those numbers incorporated into
21 that payment schedule that you saw so that I could
22 follow, follow the billing in the same way that I had
23 been following it.
24 Q Do you remember the number that Jay gave you
25 as being the cost to complete?

1 A I think it was 901,000.
2 Q Okay. But this email represents -- or does
3 this email represent the efforts that you were engaged
4 in in early 2013 to try to get that final number?
5 A Yes.
6 Q Is that right?
7 A Correct.
8 Q Okay.
9 THE COURT: Mr. Salzhauer, what was the number
10 you just stated?
11 A (Continuing) I think it was 901,000.
12 THE COURT: Okay.
13 BY MR. LYLES:
14 Q If you'll go over to Exhibit 51, you'll see
15 this is an email exchange between you and Deborah.
16 A Okay.
17 Q Do you see that, Miss Kahn, Deborah Kahn?
18 A Right.
19 Q You understood that she worked for Jay?
20 A Correct.
21 Q And is this, again, part of your efforts to
22 get the information that you needed to understand what
23 the cost to complete was going to be?
24 A Yes.
25 Q And Miss Kahn is writing you back and telling

1 you that she's trying to put that information together
2 for you?
3 A Yes.
4 Q And do you see the continuation sheet that's
5 attached to the bottom of that -- or excuse me, to the
6 back of that email?
7 A Yeah, but I can't read this.
8 Q It's too small?
9 A Yes.
10 Q Do you remember getting a continuation sheet?
11 MR. VARNADO: Do you want my cheaters, Hank?
12 THE COURT: What's the Bates number of the
13 one?
14 MR. LYLES: 2684 is what I'm looking at.
15 THE COURT: Okay, I got it.
16 A (Continuing) I can't --
17 Q Just too much?
18 A Yeah.
19 Q Do you remember getting this continuation
20 sheet from her?
21 A I got some continuation sheet. This may be a
22 later one.
23 Q Okay. What makes you think that this is a
24 later one?
25 A Because I believe -- I think -- what is the

1 number down at the bottom, is that 981?
2 THE COURT: Yeah.
3 A (Continuing) Okay. I got one for 901 when Jay
4 had -- the first sheet I got.
5 Q Okay. And you see the number to the left on
6 that bottom. If you look at the first number in the
7 column on the bottom, it says totals 543,130. Is that
8 what you understood to be the scheduled value of the
9 job?
10 A The 543 I believe was the Phase I of the job.
11 I asked them to put together Phase I and Phase II,
12 because it was running Phase I and Phase II.
13 Q Okay.
14 A And then add the additional cost.
15 Q Okay.
16 A Okay. This is 981. This is not what I got.
17 Q Okay. Well, and if you'll turn over to
18 Exhibit 52, email exchange between you and Deborah.
19 Jay is included on this. It's dated February the 19th.
20 And do you see what you're still asking for?
21 A Yes.
22 Q Okay. Was it important to you at that point
23 in time to understand what the total job cost was going
24 to be?
25 A Yes. Additionally, I didn't want to continue

1 to pay unless I got that kind of information.
2 Q Okay. Why would you have agreed at this point
3 in time to any increase in the price?
4 A We had to get this job done.
5 THE COURT: Robert, there's no continuation
6 sheet on 52; is that right?
7 MR. LYLES: That's right.
8 THE COURT: Okay.
9 BY MR. LYLES:
10 Q Okay.
11 A At that time, I had a meeting with Jay down
12 here and we discussed this, and the issue of his
13 overhead and profit came up.
14 Q Okay. Tell me about that.
15 A At that meeting, I was, I think, rightfully
16 upset with where the job was and where the billing was,
17 but in several ways. I was upset with the fact that
18 the cost had run away, and I was upset with the fact
19 that the job was nowhere near getting finished
20 properly, or in a timely way. And I looked at the
21 overhead and profit number.
22 Q Okay.
23 A And I said, we're going to stop paying this,
24 and we'll discuss that at the end to see where -- where
25 you're rightfully entitled to it.

1 Q Okay.
2 A I think the number turned out to be 70 some
3 odd thousand, and then I paid a little bit more, so I
4 wound up paying overhead and profit of about $80,000.
5 Q Now, why would you be paying overhead and
6 profit?
7 A At that moment in time, I still felt he could
8 be getting the job done. And, look, there was a moment
9 in time here when I still had some kind confidence left
10 in Jay. I actually offered to sit down with him and
11 his minister to talk about the differences between us,
12 and see if we could come to some kind of level of
13 peace. He never took me up on that.
14 Q Okay. Did you think this was an overhead and
15 profit job?
16 A No. I felt that it was -- that he was
17 entitled to -- he was entitled to six percent on the
18 first part, and I don't remember what percentage on the
19 second part, assuming the work was legitimate. Based
20 on that, my house letter.
21 Q Exhibit 8?
22 A Yeah. And then the subsequent breakdown of
23 the job into two phases. And the percentages were
24 different, and so he would be entitled to the six
25 percent on the first, X, and the next number on the

1 next, Y, and anything over, he would be entitled to --
2 I don't remember what -- I don't remember if there was
3 any writings between us about the next part.
4 Q Those percentages were his project management
5 fee that he agreed to as part of the --
6 A Yes.
7 Q Okay. And the job cost obviously increased;
8 is that right?
9 A Yes.
10 Q You were willing to increase his project
11 management fee?
12 A Correct.
13 Q Okay. By some agreed-upon amount?
14 A Well, I paid it up to the 80,000. And after
15 that, I wanted to have a conversation, look, I don't
16 think he's entitled to any project management fee. We
17 paid for somebody to manage a project, or -- and
18 obviously, from this trouble, there was no project
19 management. So the issue of a project management fee,
20 in my mind, he's not entitled to it.
21 Q At any point, did you agree that this was an
22 overhead and profit job?
23 A No.
24 THE COURT: Let's take a break. It's a
25 logical place.

1 (Whereas, the deposition recessed for
2 lunch from 12:10 p.m. to 1:06 p.m.)
3 THE COURT: We had our lunch break. We are
4 resuming in 3881. Mr. Henry Salzhauer was under
5 examination by Robert Lyles. We'll pick up at that
6 part. Robert, continue.
7 THE WITNESS: Can I ask one question, please?
8 THE COURT: Go ahead.
9 THE WITNESS: Can we strike from the record
10 "Six grandchildren"?
11 THE COURT: No, sir. We're going to have that
12 transcribed and sent to your wife.
13 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 131 FOR
14 I.D.)
15 BY MR. LYLES:
16 Q Mr. Salzhauer, I'm going to jump ahead a
17 little bit in the chronology here and show you what's
18 been marked as Exhibit 131 for identification. Do you
19 recognize that?
20 THE COURT: Rob, do you have any objection?
21 MR. VARNADO: No, sir.
22 THE COURT: Okay. Submitted into evidence
23 without objection.
24 (DEFENDANT'S EXHIBIT NO. 131 ADMITTED INTO
25 EVIDENCE.)

1 A (Continuing) Yes, sir.
2 BY MR. LYLES:
3 Q You do recognize that?
4 A This? Yes.
5 Q Is it an email that you sent to Mr. Brown?
6 A Yes.
7 Q Okay. And on the first page of that email,
8 you reference an April 13th date. Do you see that?
9 A Yes.
10 Q And there's an indication that at that point
11 you got the cost for what the job would be until
12 completion?
13 A Correct.
14 Q And what was that number?
15 A 901,000. So this may be some cents or some --
16 maybe there was some odd dollars, but around 901,000.
17 Q Okay. And in that same paragraph where you
18 talk about 901,000, you also reference that original
19 price of 722,074. Do you see that?
20 A Yes.
21 Q Does that all jibe with your recollection of
22 things?
23 A Yes.
24 Q And then finally you're asking for a litany of
25 information from Mr. Brown at this point in time;

1 right?
2 A Yes.
3 Q Okay. Did you receive that information?
4 A No.
5 Q I'm going to ask you also to look at what was
6 marked yesterday as Exhibit 124. You can put this
7 over -- give this to her. I'm going to show you what
8 was marked yesterday as Exhibit 124, which we pulled
9 out of the exhibit notebook. Do you see that?
10 A Yes.
11 Q And what is that?
12 A Let me read it. This -- this refers to the
13 billing for what's marked overhead and profit on that
14 cost control sheet that I have.
15 Q Okay. And does this memorialize your -- or
16 does this reference an agreement you had with Jay?
17 A Yes.
18 Q And what is the total amount that was agreed
19 between you and Jay for that number?
20 A 85,521.
21 Q Okay. And did that result from a face-to-face
22 meeting you had with Jay?
23 A Yes.
24 Q And so after meeting with Jay to discuss the
25 overall cost of the project, is that what you believed

1 to be his project management fee or his profit and
2 overhead?
3 A This was -- this presumed that we were basing
4 it on the 901,000 dollar price. I believe that's the
5 case.
6 Q So you -- I'm sorry, go ahead.
7 A You know, if there had been a major change in
8 what was going to be done in the house, he would have
9 been entitled to more, but based upon what was supposed
10 to be the outside price for the work, that would have
11 been the fee.
12 Q And to your recollection or way of thinking,
13 that was in June of 2013. Were there any major changes
14 in the job after that date?
15 A Not to the best of my knowledge.
16 MR. VARNADO: '13 or '14?
17 MR. LYLES: '13.
18 A (Continuing) What should I do with this?
19 Q Give it back to her. Actually, this goes back
20 in this book. I'll refer you back now to our notebook,
21 Mr. Salzhauer. Let's see, this is February. Exhibit
22 56 is February of 2013; is that correct?
23 A Yes.
24 Q And is it fair to say that at that point in
25 time you were trying to -- still trying to determine

1 what the outside cost was going to be, and the
2 schedule?
3 A Yes.
4 Q Okay. Did you have difficulty getting the
5 schedule information from Mr. Brown?
6 A Yes.
7 Q Was that a problem that persisted throughout
8 the course of the job?
9 A From the start, through to the end.
10 Q And did you ever feel like you got the
11 financial information on the job that you had been
12 requesting from Mr. Brown?
13 A No.
14 Q At any point in time did you --
15 A The answer to --
16 Q Yes, sir.
17 A You asked did I ever get it?
18 Q Yeah.
19 A I never did get it. That's the answer.
20 Q Yes, sir. The next email I'll turn your
21 attention to -- go ahead --
22 A Excuse me, may I go?
23 Q Sure.
24 A Can we look at the third paragraph of this?
25 Q Yes, sir. Which exhibit is that, 56?

1 A Yeah. The extra work she will pay for. "I
2 would be less than frank if I didn't say that I am
3 concerned that the extra work not caused by her gets
4 put into other costs. One thing you will know from me
5 and our relationship is you will always know my honest
6 thoughts. Anyhow, the time now is how to get the job
7 back onto a track that gets it well-built in as rapid a
8 manner as possible." I was always concerned with that
9 issue.
10 Q What issue?
11 A The issue of extra work or work redone, and I
12 was going to pay -- or we were going to pay for it
13 twice. Once the original, and the second time around
14 to fix it, and/or somebody agreed to a price, for
15 example, the painter had agreed to a price of $65,000.
16 Q Yes, sir.
17 A And subsequent to that, there was some
18 painting going on by other people, and this is just one
19 incident that I can show. There was some painting
20 going on by some other people, but the $65,000 price
21 was supposed to be for painting for the whole job, and
22 I said is there going to be a deduct from the 65,000 to
23 cover the work that the other people are doing, and the
24 answer was yes. And then I asked Jay to get a writing
25 from the contractor, from the -- Kershaw I think the

1 painter's name is -- a writing from him that he would
2 accept that term, that there would be a deduct. There
3 never was a deduct, and I got a painting -- or we got a
4 painting bill of 70 -- I think $74,000. Now, I believe
5 that this probably occurred throughout the job.
6 We also had situations where a second
7 contractor came in to fix stuff that other people had
8 put in badly. The second contractor was entitled to be
9 paid, and Jay -- and I said that this should not come
10 out of -- out of our hide. We were entitled to get a
11 credit back. But it also shouldn't come out of the
12 hide of the contractor that was called in to remedy or
13 to finish the work. So we paid the bill, and we never
14 did get any kind of credits back. That's -- that's
15 basically what was in my mind in that third paragraph.
16 Q Okay. If you will, turn to Exhibit 68 for me.
17 A I can even do that.
18 Q At some point in time, you stopped paying for
19 overhead and profit. Do you remember that?
20 A Yes. As I -- we said that we would.
21 Q Okay. And the reason you had stopped is
22 because it had reached or exceeded, to some extent, the
23 agreed-upon project management fee?
24 A Yes.
25 Q And the fact that you stopped paying it at

1 $70,000 is referenced by Mr. Brown in this email; is
2 that right? If you go down, it's on the first page, I
3 think. Nope, it's not on the first page. It's on the
4 third or fourth. September 12th, 2013. Keep going, I
5 think. Bates labeled 3987. There you go.
6 A Down here?
7 Q Yes, sir, right where your fingers are. Keep
8 going down. Right there.
9 A Okay.
10 Q Do you see the reference there to the fact
11 that you had stopped making payments on that overhead
12 and profit in May?
13 A Yes.
14 Q When they had reached $70,000?
15 A Right.
16 Q Does that jibe with your recollection?
17 A I don't know what that number would have been.
18 I don't know what that number would have been offhand
19 in May.
20 Q But that's Jay's number? That's Jay's text?
21 A Yes.
22 Q Okay.
23 A The bold is Jay's text.
24 Q And the non bold is your initial letter to
25 him, or email?

1 A Yes.
2 Q Okay.
3 MR. VARNADO: What exhibit number was that?
4 MR. LYLES: Let me see, 68.
5 BY MR. LYLES:
6 Q Mr. Salzhauer, if you go to 61, back to
7 Exhibit 61, that's an email dated October the 2nd,
8 2013; right?
9 A Yes.
10 Q And what did you tell Jay in that email?
11 A "Your actions seem to show you have abandoned
12 the job. This sure isn't the Jay of the references we
13 got."
14 Q Is that what you believed at the time?
15 A Yes.
16 Q Is that what you still believe, that he was
17 effectively off the job by October?
18 A I can't be sure of the date that he was off.
19 Q Okay.
20 A But towards that moment in time, stuff just
21 was not getting done.
22 Q Okay. Did you get any response from Jay to
23 that, do you recall?
24 A I don't remember.
25 Q Okay. And again, the next exhibit over, which

1 is 62, do you see there that it starts on October the
2 25th with an email from you to Jay, saying you had not
3 gotten a response?
4 A The 6:06 a.m.?
5 Q Uh-huh. And at that point, you tell Jay that,
6 "Don't you realize that you have a license that you put
7 in jeopardy when you proceed in this manner?" Do you
8 see that?
9 A Yes.
10 Q And then Jay responds and tells you what's
11 going on; is that right?
12 A Yes. That's the 11:02 a.m.
13 Q That's right.
14 A Yes.
15 Q And he tells you there, "I have not had any
16 legal problems other than us liening a property for
17 nonpayment. I do have a license, as well as Brown
18 Contractors, residential and a commercial, also." Do
19 you see that?
20 A Yes.
21 Q At this point, in October of 2013, were you
22 aware that he was -- did not have a residential
23 homebuilder's license?
24 A I -- I had heard that there was some
25 litigation with -- in respect to another house, and the

1 issue of Jay's having a license had come up, but we
2 didn't know directly except from conversation with the
3 people. And I believe that that had happened about
4 this time, or maybe somewhat before that time.
5 Q Okay.
6 A Amy would know that better than me.
7 Q Let me turn you over to Exhibit 63. It's an
8 email from Jay Brown to you and others of January the
9 9th, 2014. Of course, at this point in time, Amy is in
10 the house; right?
11 A Yes.
12 Q And Jay is telling you that the house is
13 completely done except for a few punch list items; do
14 you see that?
15 A Yes.
16 Q And he references the CO; right?
17 A Right.
18 Q And then he says you have a one-year warranty
19 on everything from that date. Do you see that?
20 A Yes.
21 Q Is that the kind of warranty you thought you
22 were going to get?
23 A Well, no. We were supposed to get a five-year
24 warranty.
25 Q Had you had any negotiations with Jay to

1 reduce the length of the warranty he was willing to
2 offer?
3 A No.
4 Q Just it's simply a unilateral change in terms?
5 A Yes.
6 Q Now, he's providing you in January of 2014
7 with some subcontractor information. Do you know
8 what -- why he was providing that to you?
9 A These were the unpaid -- supposedly, the
10 unpaid bills to the subcontractors.
11 Q And were you trying to get those
12 subcontractors paid?
13 A I was trying to get the subcontractors to come
14 back and finish their work, and then they would be
15 paid. What I had asked for is for each of these
16 subcontractors to give me a -- what they had been paid,
17 what it would take for them to finish the job, a date
18 by which they would finish the job, and to warranty
19 that their work would be properly done, and that I
20 would escrow the money, so that when they finished in
21 accordance with that, they would be paid.
22 Q And was it your recollection -- or is it your
23 recollection that at that point in time you couldn't
24 get the trades back out to the house?
25 A I could not, and I'm not sure if what I had

1 asked Jay to give the contractors ever went to the
2 contractors.
3 Q Okay. Now, the issue of subcontractors
4 getting paid had been going on for a while, had it not?
5 A There was always a claim that we were late
6 with payment to the subcontractors, but I couldn't get
7 the billing out. I couldn't get the sheet that we're
8 talking -- that I was talking about, the cost kind of
9 sheet, I couldn't get that out of their office. So I
10 kept asking to get it, and when I got it, I would pay.
11 And, but that was a continuous problem throughout the
12 job.
13 Q If you go back over to exhibit -- go to
14 Exhibit 68, that's an email from back in September when
15 you were discussing subcontractor payments, September
16 of 2013. You were concerned about that issue?
17 A That's what I was talking about before.
18 Q Yeah.
19 A That the plumber and the HVAC contractor, who
20 picked up the work from the originals, deserved to be
21 paid and not left out to dry. This is the whole issue
22 of payment.
23 Q Okay.
24 A "There seems to have been little or no
25 supervision of the work done by the original

1 contractors. We expect this payment to be a
2 back-charge that you make to the original contractor.
3 We will front the payment, but expect the money back."
4 Q Okay.
5 A And the other items are all to try and get a
6 handle on what was going on.
7 Q Did you ever feel like you got a handle on
8 what was going on?
9 A No. Down to five, "Why is the entire plumbing
10 job twice the finish estimate?"
11 Q Did you get an answer to that question?
12 A No.
13 Q Did you get an explanation from Mr. Brown
14 about all of the various cost overruns on the job?
15 A No.
16 Q There was a -- or has been discussion over the
17 last few days about requests that Jay come back out and
18 remedy issues at the job. You heard some of that
19 testimony?
20 A Yes.
21 Q And you've seen some letters that we sent to
22 Jay.
23 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 132 FOR
24 I.D.)
25 BY MR. LYLES:

1 Q Let me show you what's been marked as Exhibit
2 132. Do you recognize that?
3 A Yes.
4 Q Is that an email that you sent to Jay on March
5 the 17th of 2014?
6 A Yes.
7 Q And what are you sending him in that email?
8 A I'm sending him a list of items that needed to
9 be corrected on the job.
10 Q Okay. And did you expect him to come back out
11 and do that?
12 A Realistically, yes, because he -- I mean, he
13 had a warranty. If he were the Jay I thought he was,
14 he would have done it. But at this moment in time, I
15 didn't -- I really didn't expect it.
16 Q Okay.
17 A I had a right to expect it, but I didn't
18 expect it.
19 Q Do you remember there being some discussion
20 earlier in this trial about the Benchmark home
21 inspection reports?
22 A Yes.
23 Q And let me find them.
24 THE COURT: Robert, do you want to --
25 MR. LYLES: Yeah, I want to move it into

1 evidence as Exhibit 132.
2 THE COURT: 132 is in without objection, the
3 March 17, 2014, email from Mr. Salzhauer.
4 (DEFENDANT'S EXHIBIT NO. 132 ADMITTED INTO
5 EVIDENCE.)
6 BY MR. LYLES:
7 Q All right, let's see what we've got here. Do
8 you recall that there were two Benchmark inspection
9 reports?
10 A Yes.
11 Q One from 2013?
12 A One from --
13 Q The fall of 2013?
14 A Right.
15 Q And then one from the spring of 2014?
16 A I don't remember the exact dates, but there
17 were two. One at that moment in time when the job was
18 going on, and then one at the moment in time when the
19 job was basically finished.
20 Q Okay. Go to, if you will, to Exhibit 31.
21 A (Witness complied with request of counsel.)
22 Q Okay, I'll ask you about this Benchmark
23 report. If you'll turn to about page three or four,
24 there's a date on it.
25 A 3/26/14 --

1 Q Okay.
2 A -- is the date.
3 Q Okay, let's see. 3/6/14; is that right?
4 A Yes.
5 Q Okay. Who is Sarah Kibbey?
6 A Sarah Kibbey was my secretary.
7 Q I'm going to --
8 A Unfortunately, she passed away.
9 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 133 FOR
10 I.D.)
11 BY MR. LYLES:
12 Q I'm going to show you what's been marked as
13 Exhibit 133 and ask you if you can identify that for
14 me? Do you see the title in the email?
15 A I'm looking. Let's see, Amy's -- should I be
16 looking at just this or this (indicating)?
17 Q The title in the email. Go all the way to the
18 top.
19 A Okay. "Home Inspection Report - 1850 Flag
20 Street part of email sent to Jay Brown on this date."
21 Q Do you know if that was the second inspection
22 report done by Benchmark?
23 A Yes.
24 MR. LYLES: Okay. I would like to move that
25 into evidence as Exhibit 133.

1 THE COURT: Rob?
2 MR. VARNADO: Okay.
3 THE COURT: All right, it's in without
4 objection.
5 (DEFENDANT'S EXHIBIT NO. 133 ADMITTED INTO
6 EVIDENCE.)
7 MR. LYLES: Is that 133?
8 THE COURT: It is 133. It is the -- appears
9 to be a March 17 email from Miss Kibbey to Jay
10 Brown and others.
11 BY MR. LYLES:
12 Q In addition to speaking with Mr. Brown about
13 invoices and job records, did you have an opportunity
14 to speak to Vuong Nguyen about that?
15 A I don't believe that I had verbal
16 conversation. I had some emails.
17 Q Okay. And did you make any requests from
18 Vuong for information about the job?
19 A It was about the billing. And at that moment
20 in time, when I first -- when I first heard about Vuong
21 in respect to being a contractor, I was really stunned.
22 Jay was supposed to hire an air conditioning -- let the
23 work to an air-conditioning contractor, and the other
24 work to other contractors. There was not supposed to
25 be a contractor between Jay and the job. The job was

1 supposed to be done directly by Jay. So we were paying
2 an additional markup on the work, and that, to me, it's
3 dishonest and, to me, I don't know what the definition
4 of fraud is, but it's fraudulent behavior. I mean,
5 it's just not honest behavior. He could have passed it
6 around to the dentist and the doctor and hair cutter,
7 and then they all bill me for the air-conditioning
8 work, and he puts his profit on top of -- or he puts
9 his overhead and profit on top of the pass-around.
10 It's not what I would have expected.
11 Q So did you want to see what those invoices
12 were that Vuong had received?
13 A You mean from -- from the sub -- from the
14 sub-subcontractors, yes.
15 Q Did you ever see that?
16 A I'm not sure if I did or if Amy did, but I'm
17 not positive.
18 Q Were you ever able to determine how many times
19 you had to pay multiple markups for the work that was
20 done on this job?
21 A I -- I do not know that. And, you know, the
22 issue, the whole issue of things of that nature is
23 reflected in the story about the painter. I don't know
24 how many people were in that position, but I paid a
25 markup on that painter and I paid another markup on

1 another painter, or I got billed another markup on
2 another painter. How many times this happened in the
3 course of the work, I don't know.
4 And Amy spoke yesterday about the cabinets and
5 the cabinet work with I think her name is Cristina, who
6 supposedly was in Jay's office, and then we got a
7 separate bill for -- to pay for -- to pay Cristina, and
8 there was a markup on that bill, too. So trying to
9 identify those kinds of things, it's not possible.
10 That's the reason that I was looking for a control
11 sheet that said the plumbing is going to be X number of
12 dollars, and with that I could control the job and
13 understand it.
14 Q Yeah.
15 A If you're dealing with somebody that's going
16 to be dishonest with you on a job like this, it's very
17 hard not to deal with it in bulk.
18 Q Have you spent some time at the house since it
19 was -- since Amy moved in?
20 A Yes.
21 Q How much time would you say you've spent
22 there?
23 A It's hard to know, but several weekends and
24 long visits, you know, have occurred from the time she
25 moved in.

1 Q Are you generally familiar with the condition
2 of the house as it was left by Jay Brown?
3 A Yes.
4 Q You've heard over the last two or three days
5 some discussion about issues with the house, floors,
6 painting issues, things like that. Are those things
7 that you are generally familiar with?
8 A Yes.
9 Q You heard Mr. Brown say yesterday, Howard
10 Brown say yesterday, that he had priced repainting the
11 interior of the house as part of the punch list
12 process. Is that something you're familiar with?
13 A Yes.
14 Q Is that something you think is necessary?
15 A Yes.
16 Q Why is that?
17 A Because the painting was done in a
18 helter-skelter manner. There were people on the job,
19 off the job, supposed to be at the job, never showed up
20 on the job, somebody was supposed to be there and they
21 were supposed to be painting at night, and the paint
22 never came out right.
23 Q In your observation, did the house ever
24 receive a complete, finished paint job on the interior?
25 A No. If you talk about interior, you're

1 talking about the kitchen cabinets, also?
2 Q Sure.
3 A The kitchen cabinets are three, four, five
4 years old, and the paint, when Amy moved in, was
5 peeling. And the paint right now is worse, and that's
6 not anywhere near a decent paint job on the cabinets.
7 Q Okay. Are you familiar -- you've heard some
8 discussion about the replacement of the floors, the
9 pine floors?
10 A Yes.
11 Q Are you generally familiar with the condition
12 of the pine floors?
13 A Yes.
14 Q And how would you describe the condition of
15 the pine floors?
16 A The pine floors were sanded down to a level
17 that you really can't refinish them any longer.
18 There's not much wood left. It's the description that
19 Howard Brown gave you yesterday. They're splintered.
20 The floors, you know, they're visible today; you can go
21 out and take a look at them. Those pine floors are
22 destroyed.
23 Q Do you know how many times those floors were
24 sanded by Jay Brown's people?
25 A I don't know by count, but it's obvious that

1 the work was such that they got sanded and resanded,
2 and there's not much wood left.
3 Q Okay. Have you observed, in your time at the
4 house, problems with the electrical system at the
5 house?
6 A Yes.
7 Q And would you tell me about that?
8 A Part of it -- part of those problems I didn't
9 observe, but I got a phone call. I would get a phone
10 call from Amy at night, dad, the floor is so hot that
11 we're concerned that the lighting fixture is dangerous
12 in the house; what should I do. Or, dad, the circuit
13 breaker is tripping out, et cetera, et cetera; what
14 should I do.
15 In respect to the electrical system in the
16 house, this issue of the nailing is a serious, serious
17 issue. The metal shielding should have been on that
18 wiring, and somebody should have dealt with the
19 finisher who was putting nails in that were too long
20 for the work involved. Somebody should have
21 supervised. I heard a conversation about, here at the
22 table from Jay, that, oh, the nailing gun sometimes
23 it's an inch and a half and sometimes it's two inch
24 nails, or whatever. Somebody should have been
25 supervising the guys who were doing that nailing. It's

1 irresponsible.
2 Q Did you actually observe personally that
3 nailing condition into the electrical wiring at the
4 house?
5 A Only from the pictures.
6 Q Okay. Does that create in your mind a concern
7 about nailing through the wires and other spots in the
8 house?
9 A If it happened in one eight-by-whatever, it --
10 MR. VARNADO: I'm going to object. Just going
11 to object.
12 A (Continuing) Pardon?
13 MR. VARNADO: I'm going to object.
14 Speculating.
15 THE COURT: I'll listen to it on that basis.
16 I'll take into consideration --
17 MR. VARNADO: Thank you.
18 THE COURT: -- any foundation that may not be
19 there.
20 A (Continuing) As a side order, I'm willing to
21 take a bet that if I open up another two walls, I'm
22 going to find the same condition. That's just as a
23 side bet. What happened in one location happened in
24 the rest of the house.
25 Q That's your concern?

1 A Yes. And it's a very dangerous situation.
2 Q Do you have any reason to believe that it did
3 not happen in other places in the house?
4 A I have every reason to believe that it did
5 happen because that's the way the work was going on,
6 and I don't think you're going to find any metal
7 shields on anything in that house.
8 Q Were there any -- we heard some discussion
9 about the -- is it called an arc preventer?
10 A An arc fault breaker.
11 Q An arc --
12 A A-R-C, fault, F-A-U-L-T, breaker. And I did
13 that without checking my spelling anyplace.
14 Q Okay. What's the purpose of an arc fault
15 breaker?
16 A An arc fault breaker is supposed to trip. If
17 you have a slow or arcing, what we call, fault, which
18 does not generate enough electrical power running
19 through the circuit to trip out an ordinary circuit
20 breaker, but is -- those kind of arcs historically
21 cause fires. Stuff, the arc is going on, there is heat
22 there, it's building up, and until -- the surrounding
23 item, you get real combustion.
24 Q Did you pay for the installation of the arc
25 fault breakers in this house?

1 A Yes.
2 Q And why did you do that?
3 A To minimalize the opportunity for a serious
4 fire with our children in the house.
5 Q And when were they installed, do you recall?
6 A I don't know. Maybe the last two, three
7 months, something like that. I don't know exactly.
8 Q Are those a permanent solution to the problem
9 of nails through wires?
10 A No.
11 Q They just minimize or mitigate the impact of
12 that?
13 A They minimize the opportunity for a real fault
14 to occur, but it -- it's a bandaid on a hemorrhage.
15 Q Does the rest of the wiring in the house, in
16 your estimation, need to be checked?
17 A Yes. It needs -- the arc, the shielding has
18 to be put in, and in certain locations the wiring is
19 definitely going to have to be checked or changed.
20 Q Okay.
21 A And you're not going to open -- you're not
22 going to understand that until they open up all the
23 walls and the ceilings and the baseboards, and that's
24 said by an ex-electrical contractor. I used to be a
25 wire electrical contractor; now I'm an ex-contractor.

1 Q I'm sorry to take this a little bit out of
2 order. Yesterday, Mr. Salzhauer, we were running over
3 Mr. Brown's, Howard Brown's, numbers, and did you see
4 where the HVAC replacement number was in Howard's
5 estimate or proposal, or not?
6 A I'm not sure.
7 Q Okay. Well, let me show you -- let's mark
8 this.
9 (INVOICE MARKED DEFENDANT'S EXHIBIT NO. 134
10 FOR I.D.)
11 BY MR. LYLES:
12 Q Let me show you what I've marked as Exhibit
13 134 and ask you if you recognize that? Do you
14 recognize that?
15 A Yes.
16 Q Is that an invoice from AC Heating & Air
17 Conditioning?
18 A Yes.
19 Q Dated 7/21/2015?
20 A Yes.
21 Q Does this represent the invoice for the
22 mechanical work that Amy did in response to Louis
23 Schweers' proposal?
24 A Yes.
25 Q And did you pay this bill?

1 A Yes.
2 MR. LYLES: I would like to move this into
3 evidence as Exhibit 134.
4 MR. VARNADO: I'm going to object. It's
5 hearsay. I don't think he can qualify it.
6 MR. LYLES: He can testify he paid the bill.
7 THE COURT: Not qualified in what respect?
8 MR. VARNADO: I think it's from AC Heating &
9 Air. It's to 1850 Flag, to Howard Brown. Howard Brown
10 needs to testify to it.
11 THE COURT: All right. He doesn't need to be
12 qualified in order to say I saw it and paid it, does
13 he?
14 MR. VARNADO: No. I mean, he could say that.
15 THE COURT: And I don't know that he was asked
16 an opinion about the work. So if it is -- since -- I
17 can take it as a document that he saw and paid for for
18 purposes of their claim for correcting the house.
19 MR. VARNADO: Yeah. And I would note that Mr.
20 Schweers testified yesterday that the units were old,
21 and that the --
22 THE COURT: I understand. I'll take it in
23 context of all the testimony, but it seems that it is
24 admissible as a description of the work done, and that
25 it was paid.

1 MR. VARNADO: That's fair.
2 MR. LYLES: And I'll just say that to the
3 extent it's already included in Howard's global
4 estimate, we don't want to get it twice. I just went
5 through Howard's estimate yesterday and I was not able
6 to find it, so if it is in there --
7 THE COURT: I'll take it as described. I'll
8 take it as described and for those purposes, and I
9 think what Rob has described is there's no objection to
10 it.
11 MR. VARNADO: That's fair.
12 THE COURT: I will acknowledge your objection
13 and accept it as to taking it beyond that.
14 MR. VARNADO: Thank you.
15 (DEFENDANT'S EXHIBIT NO. 134 ADMITTED INTO
16 EVIDENCE.)
17 BY MR. LYLES:
18 Q Do you know how much Mr. Jay Brown billed you
19 for mechanical work at your project?
20 A I would have to look at the cost sheet, but I
21 think it was in the neighborhood of 40 some odd
22 thousand dollars.
23 Q Do you know what he did for that $44,000?
24 A I think he installed some new unit, and I know
25 that Amy was not getting satisfactory cooling and

1 heating in the spaces, and I think there was some
2 mechanics working on the -- you know, I think that's
3 better answered by Amy.
4 Q Okay.
5 A I just know that it was not working properly.
6 One girl's room was hot. One girl's room was cold.
7 The noise level in the house was substantial, that I
8 heard. But past that, I'm not a --
9 Q Okay. We looked at some correspondence in the
10 file that referenced a representation by Mr. Brown
11 sometime in the spring of 2013 that the cost to
12 complete the job had risen from 772 to 901. Do you
13 remember that?
14 A Yes.
15 Q Ultimately, you were billed a total of in
16 excess of 1.4 million dollars for the job?
17 A Okay.
18 Q Were you aware of that?
19 A I know it's -- I don't know the number
20 offhand. It's not a happy number to remember.
21 Q At what point did you realize that Mr. Brown
22 had significantly exceeded the outside number that was
23 on top of what he had originally estimated?
24 A Well, there's correspondence about that. I'm
25 not sure exactly of the date, but it was an ongoing

1 kind of a situation.
2 Q Okay. You -- if you turn your mind to the
3 early part of 2014, after Amy had moved her air
4 mattresses into the house; okay?
5 A That would have been 2013, not 2014.
6 Q She moved -- that's right. She moved in in
7 2013, but if you turn your attention to the early part
8 of 2014 --
9 A Okay.
10 Q -- when Mr. Brown was no longer working on the
11 job; all right?
12 A All right.
13 Q Okay. Did you have discussions with him about
14 settling out these issues once and for all, after you
15 had gotten his final billing?
16 A I'm trying to think if I did or I didn't. I
17 think that -- I don't know. I don't know if it was
18 with -- is this before he left the job?
19 Q After.
20 A After he left the job? In 20 --
21 Q '14. The lien was filed in March of 2014.
22 A In 2014, when the lien was filed, we sent him
23 the notice of stuff to correct, and I don't believe
24 there was any conversation subsequent to that.
25 Q Were you surprised to get the lien?

1 A Yes.
2 Q Why?
3 A The job was not finished, and the job was not
4 proper, and I think the lien was a faulty lien.
5 Q When you say "faulty," what do you mean?
6 A The job was not finished, and the job was not
7 functioning. This job was -- it was a defective
8 product that was -- if this were an automobile --
9 MR. VARNADO: I mean, Mr. Brown, can we --
10 let's not have a -- this isn't an automobile.
11 THE COURT: Hold on, hold on. Mr. Salzhauer,
12 the objection is to using examples that may not be
13 pertinent. Confine your testimony -- and I understand
14 your point, but confine your testimony to the house, if
15 you can.
16 A (Continuing) The house was -- the house as a
17 product was a defective product.
18 Q Okay.
19 A By the way --
20 THE COURT: Just hold on.
21 BY MR. LYLES:
22 Q Mr. Salzhauer, were you involved in the
23 decision to do the roof work at the house, the roof
24 repair work?
25 A Yes.

1 Q And what was your involvement in that?
2 A There was a leak and --
3 Q Where was the leak?
4 A Over a certain part of the house in Annie's
5 room -- or that part I'm not sure about, but there was
6 a leak and there was a question of what to do about the
7 leak. And Howard Brown went through substantial kind
8 of checking to find out where the -- you know, where
9 the leak is. He spoke to several roofers, and he came
10 to -- I'm not sure of the fellow's name, but he's a
11 highly regarded roofer in this area, and that fellow
12 spent some time at the job in looking at the roof, and
13 I spent some time learning about roofs. And the
14 problem here was -- what is that? It begins with a T.
15 Terne --
16 Q Terne metal?
17 A Terne metal. Terne metal has a lot of lead in
18 it, so they stopped producing terne metal. The roof is
19 a -- the problem roof was a terne metal roof. There
20 was -- the question was to replace it with an aluminum
21 roof or a copper roof. The aluminum roof, the panels
22 could not be made to follow the roof line. Putting in
23 the copper roof, the problem with the copper roof was
24 where the copper roof met another terne metal roof, the
25 electrolysis would have destroyed both roofs. Trying

1 to terminate the copper roof at a location that would
2 have required less roofing was almost as much -- or as
3 much money as continuing the copper roof, so they had
4 to do the whole roof in copper.
5 MR. LYLES: Okay, give me just a minute, if
6 you don't mind here. I'm going to go speak to Amy.
7 THE COURT: Sure.
8 (Whereas, a brief recess was taken.)
9 THE COURT: We're back on the record. We are
10 Continuing the direct examination of Mr. Salzhauer.
11 Mr. Salzhauer has asked to comment on a
12 question he was asked before. Mr. Salzhauer, do it in
13 a limited fashion, not -- dealing simply with what you
14 testified to before. And if someone -- if Mr. Varnado
15 objects, I want you to stop until we deal with the
16 objection.
17 A (Continuing) Very simple, I don't think these
18 photographs properly portray the issue with the roof.
19 THE COURT: Okay.
20 A (Continuing) Done.
21 THE COURT: Thank you. Rob, you all right
22 with that?
23 MR. VARNADO: Yes.
24 THE COURT: All right, Robert, proceed.
25 MR. LYLES: Sure.

1 BY MR. LYLES:
2 Q Just a few follow-up questions, and I'll turn
3 you over. Would you turn to Exhibit No. 21 for me?
4 A 21? I'm sorry.
5 Q Yes, sir. Do you recognize that email
6 exchange?
7 A Yes.
8 Q What is that -- or who is that email exchange
9 with?
10 A With Vuong from VLN.
11 Q Were you trying to get information from Vuong?
12 A Yes.
13 Q Backup and things such as that?
14 A Yes.
15 Q And then he responds to you on June 13th at
16 11:15 a.m.?
17 A May I read the --
18 Q Sure. You can read anything you want to.
19 A Okay. What's the question? I'm sorry.
20 Q This email exchange with Vuong, were you
21 trying to get from Vuong information about what he had
22 paid subcontractors and suppliers?
23 A Yes.
24 Q So that you could understand what you had been
25 billed?

1 A Yes.
2 Q And do you notice that in Vuong's response,
3 one of the things he tells you is that, and I quote,
4 "Just to be clear, I'm not required to supply any of
5 these items to you"?
6 A Yes.
7 Q Did you ever get those items from Vuong?
8 A We did.
9 Q Okay. He did send them to you?
10 A Yes. What he sent was his bills. I don't
11 recall exactly how much detail was in the bill.
12 Q Were you ever able to determine how much
13 overhead and profit he had added to bills that he had
14 then submitted to Jay?
15 A Yes. It was marked.
16 Q All right. Now, I'm going to show you a
17 series of emails that relate to the floor issue, and
18 just ask you if you can remember receiving these
19 emails.
20 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 135 FOR
21 I.D.)
22 BY MR. LYLES:
23 Q Let me show you what's been marked as Exhibit
24 135. You are shown as a recipient of that email. Do
25 you see that?

1 A Start at the top? Okay.
2 Q Yes, on June 24th, 2013.
3 A At 8:02 a.m.?
4 Q Yes, sir. Do you remember receiving that
5 email?
6 A Yes.
7 Q You do?
8 A Uh-huh.
9 Q Is Jay copied on that email?
10 A I have to look and see.
11 Q About the middle of the address line.
12 A Yes.
13 MR. LYLES: I'd like to move this into
14 evidence as Exhibit 135.
15 THE COURT: Rob?
16 MR. VARNADO: Sure.
17 THE COURT: 135 is admitted without objection.
18 June 24th, 2013, email.
19 (DEFENDANT'S EXHIBIT NO. 135 ADMITTED INTO
20 EVIDENCE.)
21 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 136 FOR
22 I.D.)
23 BY MR. LYLES:
24 Q Let me show you what's been marked as Exhibit
25 136 and ask you if you recognize that email?

1 A Yes.
2 Q That's an email exchange, towards the bottom,
3 from Amy to you; is that right?
4 A Yes.
5 Q And then it appears as though that email
6 exchange was forwarded to Jay Brown on August the 30th;
7 is that right?
8 A Yes.
9 MR. LYLES: I would like to move that into
10 evidence as No. 136.
11 MR. VARNADO: Without objection.
12 THE COURT: 136 is admitted without objection.
13 (DEFENDANT'S EXHIBIT NO. 136 ADMITTED INTO
14 EVIDENCE.)
15 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 137 FOR
16 I.D.)
17 BY MR. LYLES:
18 Q Mr. Salzhauer, let me show you what I've
19 marked as Exhibit 137 and ask you if you recognize that
20 email exchange?
21 A Let's see, which -- where am I looking, August
22 30th?
23 Q There's an email from you to Amy --
24 A Okay.
25 Q -- that seems to reference an email or is

1 above an email that Amy sent to you. Do you see that?
2 A Right.
3 Q And then it appears that those emails were
4 sent to Jay.
5 A Okay.
6 Q Do you see that?
7 A Yes.
8 Q Do you recognize that?
9 A Yes.
10 MR. LYLES: I'd like to move that into
11 evidence, Exhibit 137.
12 THE COURT: Rob?
13 MR. VARNADO: Yes, please.
14 THE COURT: All right, 137 is admitted without
15 objection.
16 (DEFENDANT'S EXHIBIT NO. 137 ADMITTED INTO
17 EVIDENCE.)
18 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 138 FOR
19 I.D.)
20 BY MR. LYLES:
21 Q Let me show you what I've marked as Exhibit
22 138 and see if you recognize that, Mr. Salzhauer, an
23 email exchange between Amy and Jay Brown?
24 A Which part of the email are you looking at?
25 Q Well, you've got one page, and so there's a

1 couple. There are some discussions about a meeting
2 below from Amy and Jay, and then you're copied on an
3 email from Amy to Jay that the same day, just a little
4 bit later.
5 A Okay.
6 Q Do you remember receiving that?
7 A Yes.
8 MR. LYLES: I'd like to move Exhibit 138
9 into evidence.
10 MR. VARNADO: Sure.
11 THE COURT: Admitted without objection.
12 (DEFENDANT'S EXHIBIT NO. 138 ADMITTED INTO
13 EVIDENCE.)
14 (EMAIL MARKED DEFENDANT'S EXHIBIT NO. 139 FOR
15 I.D.)
16 BY MR. LYLES:
17 Q Let me show you what I've marked as Exhibit
18 139, which is a series of emails beginning with Jay
19 Brown's email at 7:01 p.m. on September the 3rd, and
20 then followed by an email from Amy at 8:53 p.m. You
21 were copied on that. Do you remember receiving that?
22 A Yes.
23 MR. LYLES: I'd like to move Exhibit 139 into
24 evidence.
25 THE COURT: 139 is the September 3rd email?

1 MR. LYLES: Yes.
2 THE COURT: Rob, what is your --
3 MR. VARNADO: I don't have an objection.
4 THE COURT: All right. Now, I've got one
5 page, thanks, in the bottom, but I don't have --
6 MR. LYLES: One page.
7 THE COURT: -- any notification of whose text
8 this is.
9 MR. LYLES: It's above that line. It's from
10 Jay to Amy.
11 THE COURT: Okay. All right, thank you. 139
12 is admitted.
13 (DEFENDANT'S EXHIBIT NO. 139 ADMITTED INTO
14 EVIDENCE.)
15 MR. LYLES: I think that's all I've got for
16 Mr. Salzhauer.
17 THE COURT: Okay. Rob, are you ready to
18 proceed?
19 MR. VARNADO: Can we go off the record real
20 quick?
21 THE COURT: Yeah.
22 (Whereas, a brief discussion was held off the
23 record.)
24 THE COURT: Mr. Salzhauer, you are still under
25 oath, don't talk about your testimony with anybody.

1 A Yeah.
2 MR. VARNADO: Okay, thank you.
3 MR. LYLES: One more question.
4 FURTHER REDIRECT EXAMINATION
5 BY MR. LYLES:
6 Q Can you offer any -- have you seen a copy of
7 the mechanic's lien in this case?
8 A Yeah. Early on, yeah.
9 Q Do you know the amount of the mechanic's lien?
10 A It was 200 and --
11 MR. VARNADO: Six.
12 A (Continuing) Yeah, 200.
13 Q Do you have any opinions based upon your
14 review of the accounting as to whether or not that
15 amount was accurate or not?
16 A Well, I'm not an attorney. If a mechanic's
17 lien -- a mechanic's lien, if you're filing that on the
18 owner, and you're filing it because the owner didn't
19 pay your bill in an adequate fashion to satisfy that
20 invoice -- the Salzhauers paid enough to satisfy the
21 bills that were included on these invoices. So if
22 you're not allowed to file a mechanic's lien if you
23 paid the amount to cover the cost on the job, then it
24 was not correct. Mr. Brown was paid enough that he
25 could have paid his vendors, and there would have --

1 CHARLESTON, SOUTH CAROLINA, FRIDAY, NOVEMBER 10, 2017
2 9:12 A.M.
3 P R O C E E D I N G S
4 - - - - -
5 THE COURT: Okay. We are back on the record
6 in 2014-10-3881, Brown Contractors. We concluded
7 yesterday after we took the testimony of Miss Wenner --
8 no, actually, we concluded with Mr. Glaws; right?
9 MR. VARNADO: Yes.
10 THE COURT: Miss Wenner and Mr. Glaws, and
11 they were taken as part of the Plaintiff's case. And,
12 Robert, you're still presenting your case through Mr.
13 Salzhauer?
14 MR. LYLES: Yes.
15 THE COURT: All right. Continue with your
16 direct examination.
17 MR. LYLES: I think I had concluded my direct
18 examination.
19 THE COURT: All right. Rob, Mr. Salzhauer is
20 your witness for cross.
21 (Henry Salzhauer, having previously been duly
22 sworn, continues to testify as follows:)
23 CROSS-EXAMINATION
24 BY MR. VARNADO:
25 Q Mr. Salzhauer, I'm Rob Varnado. We've met --

1 A Yes, we have.
2 Q -- through the course of the days, and several
3 times before. So let me ask you, I think in your
4 deposition, which was taken on August 17th of last
5 year, you told me that you had never discussed Jay's
6 licensure status with Jay.
7 A That's correct.
8 Q All right. So Jay never made a false
9 representation to you about his licensure status
10 because he never made a representation to you about it?
11 A I never asked the question.
12 Q Okay. And you don't have -- and you told me
13 in this deposition you have no knowledge of his
14 corporate structure; is that correct?
15 A That's correct.
16 Q So again, he made no false representations
17 because you never brought it up, he never brought it
18 up; correct?
19 A Correct.
20 Q Okay.
21 A I assumed I was doing business with Jay Brown.
22 Q And during the -- you had -- how many times
23 have you talked with Jay? I think in your deposition
24 you told me you had five meetings with Jay, and you had
25 email correspondence with him, too?

1 A I don't know what I told you in respect to
2 meetings.
3 Q Okay. Do you remember how many meetings you
4 had?
5 A I don't.
6 Q Okay. Your testimony is that you did not --
7 Jay sent you a cost plus -- unlimited cost plus
8 contract; is that correct?
9 A He sent me the -- the contract that he sent
10 me --
11 Q He sent two.
12 A Okay. You have copies of those contracts. So
13 whatever they say, they say.
14 Q Okay. And you didn't sign them?
15 A Exactly.
16 Q And you told Amy not to sign them?
17 A Exactly.
18 Q But you didn't complain about the cost plus
19 basis until January or February the following year?
20 A That's not the case.
21 Q Okay.
22 A I --
23 Q When did you complain about it?
24 A I said I'm not going to sign these contracts,
25 and they don't represent our agreement.

1 Q You said that to Jay?
2 A Look, I don't remember the exact words I said.
3 But Jay never said anything to me, either, about not
4 getting a signed contract back.
5 Q I don't see -- you said you sent lots of
6 emails, but I don't see an email from you to Jay
7 complaining about the fact that this is a cost plus --
8 unlimited cost plus contract at all until 2014; is that
9 your understanding?
10 A I don't know if I -- if I ever sent him an
11 email before. Jay never got a signed contract back
12 from me. If he had any concerns about it, he should
13 have spoken up. I was going on the basis of a letter
14 that I had from Jay on Brown-Meihaus stationery which
15 outlined our terms.
16 Q And then that was -- your testimony is that
17 you had that. And then it was amended; right?
18 A Amended.
19 Q Orally?
20 A What kind of amendment?
21 Q It went up. You said that it went up to 772?
22 A That was in conversation with our daughter in
23 terms of taking this in or taking that out of the job
24 and coming to a final price. But the basic -- the
25 basic price was two parts, one part for Phase I and the

1 other part for Phase II. And each one of those parts,
2 there was a defined number for, let's call it, overhead
3 and profit. In one of them, it was six percent of the
4 job, and the other one I don't remember exactly what
5 percentage of the job it was.
6 Q So you think six percent overhead and profit
7 is fair for the job?
8 A It depends on the job and how it's let.
9 Q Okay. Mr. Salzhauer --
10 A There was no -- there was no risk on the part
11 of the contractor. All he was -- what he was doing was
12 managing the job. I've seen lots of work where a
13 project manager gets six percent for the job.
14 Q You said there was not a licensed contractor
15 on the job?
16 A That's correct.
17 Q You realize that Jay Brown has a South
18 Carolina specialty license; correct?
19 A I don't know what kind of license he has.
20 Q Okay. And you realize that Vuong Nguyen is a
21 contractor; correct?
22 A Look, I was looking to Jay Brown to run that
23 job.
24 Q But you said earlier that there was no
25 licensed contractor on the job, so I'm asking you if

1 you knew that Vuong Nguyen was a licensed contractor?
2 A I did not.
3 Q Okay. And did you know the same thing about
4 Cameron Glaws being a licensed contractor?
5 A If Cameron Glaws is a licensed contractor and
6 Vuong Nguyen is a licensed contractor, they don't know
7 their business. Otherwise, the house would not look
8 the way the house looks. Jay -- or Cameron was there
9 from June, early June, to the end of the job. The
10 results on that job speak for themselves.
11 Q Okay. If they speak for themselves, they
12 speak for themselves.
13 A Excuse me, can I ask a question?
14 Q No, you cannot. I'm sorry.
15 THE COURT: No.
16 A (Continuing) First time I've been shut up
17 since I was a little kid.
18 THE COURT: I'm sorry if I transmitted it in
19 that fashion.
20 BY MR. VARNADO:
21 Q Mr. Salzhauer, I'm trying to go through this
22 quickly, so forgive me. All right, I'm going to ask
23 you to turn to the Plaintiff's exhibit book to Exhibit
24 7, which is a long exhibit, and I'm going to ask you to
25 go to Brown 0693.

1 A Brown?
2 Q Yeah. The Bates label is 0693 at the bottom,
3 so it's about --
4 MR. VARNADO: It's towards the end, Robert.
5 It's the last three pages of that Exhibit 7.
6 BY MR. VARNADO:
7 Q Now, I'm going to represent that this has been
8 admitted into evidence and it is a -- the Jay Brown
9 Contractors, LLC, job estimates versus actual costs for
10 1850 Flag Street for all transactions, dated 9/12/14.
11 Have you seen this document before?
12 A No.
13 THE COURT: Rob, quickly, I've got 0692. This
14 is third from the last page in Exhibit 7.
15 MR. VARNADO: Well, I'm asking him to do 0693,
16 and I have 0693, 4 and 5.
17 THE COURT: All right, I've got it. I'm
18 sorry.
19 MR. VARNADO: That's fine.
20 BY MR. VARNADO:
21 Q So you were -- Mr. Salzhauer, you were the --
22 you were the bank, pretty much, for Amy's payments on
23 this; would you say that's correct?
24 A No. I was paying -- as an accommodation for
25 handling the paperwork, my office was paying the bills.

1 Amy was the bank.
2 Q Okay. But you were responsible for paying the
3 bills; correct?
4 A Correct.
5 Q Okay. And we heard the testimony from Miss
6 Wenner about how that would go. Do you disagree with
7 her on anything that she said?
8 A Yes.
9 Q What do you disagree with?
10 A In respect to getting timely payment out to
11 the contractors, I asked to get my -- to get responses
12 to the bills that came in in a timely way. I did not
13 get that. And there are many emails saying, so we
14 don't have this go-round again about timely payment,
15 please get me the answer to this in a timely way, and I
16 didn't get those responses.
17 Q Okay. Mr. Salzhauer, if you look at the job
18 estimates versus actual detail for 1850 Flag Street,
19 which is Brown 0693, 694 and 695, this is an exhibit
20 that's been admitted into evidence. It is a QuickBooks
21 sheet from Brown Contractors. It shows the -- an
22 estimated cost in the first column, an actual cost in
23 the second column, and a difference between the third
24 cost -- the third column is a difference between the
25 actual and estimated. Do you see that?

1 A I do.
2 Q Okay. All right. So the -- and then if you
3 look at the third page at the bottom of the columns,
4 you see the estimated cost was 50 -- was 543,130? It's
5 the bottom of the third page.
6 A The bottom of the third page?
7 Q Yeah, the last page in the exhibit, 7.
8 A I see page 3. Is that what I'm looking at?
9 Q No, you're looking at page 4.
10 A I should be looking at page 4?
11 Q 0695.
12 A Yeah, page 4, not page 3.
13 Q Okay. So it showed an estimate of --
14 A Excuse me. I'm correct, on page 4, not page
15 3?
16 Q Yes.
17 A Okay, thank you.
18 Q Okay. And it shows the total estimated cost
19 was 543,130. Do you see that?
20 A Yes.
21 Q And you see that the actual cost was
22 1,227,847?
23 A Correct.
24 Q Okay. And those were the numbers that -- I
25 mean, I think that we have established that you-all

1 paid roughly 1.227 million; correct?
2 A Wait a minute. This estimated cost number,
3 how was that -- how was that generated?
4 Q I'm saying that this is a job estimate versus
5 actual cost. So the five --
6 A Wait a minute, wait a minute.
7 THE COURT: Hold on.
8 A (Continuing) I'm trying to understand this.
9 THE COURT: I understand. You-all don't talk
10 over each other.
11 A (Continuing) I'm sorry.
12 THE COURT: Rob, I'm assuming he's asking for
13 clarification on your question. If you can clarify
14 that for purposes of his answer.
15 BY MR. VARNADO:
16 Q All right. Isn't the 543,130 number the first
17 number you-all got from Brown-Meihaus?
18 A We got lots of numbers from Brown-Meihaus.
19 Q Is it the first number --
20 A We got -- excuse me. We got the first number,
21 and then a second number. That's -- because of the way
22 the demolition was done, Amy had to start the second
23 phase at the same time she was starting the first
24 phase, so the estimated cost at that moment in time
25 should have been Phase I and Phase II. That was 700

1 and some odd thousand.
2 Q Whether it's 700 or 543, the 543,000 is where
3 this QuickBooks entry starts; correct?
4 A Look, I can't -- I don't know about the
5 QuickBooks. I'm telling you what I know from --
6 Q Yeah. Because you don't use QuickBooks;
7 correct?
8 A That's correct.
9 Q And so you had Miss Wenner input the data into
10 your continuation estimate?
11 A Exactly.
12 Q But I'm going to go through this QuickBooks
13 with you real quick.
14 A Yeah, but you -- you're picking a number that
15 has no relevance to the work.
16 THE COURT: Mr. Salzhauer, let me ask you to
17 do this. Just answer his questions.
18 A (Continuing) Okay.
19 THE COURT: I understand your point, and he's
20 just asking you what is on the face of this document.
21 A (Continuing) Okay.
22 THE COURT: Your answers are simply agreeing
23 or disagreeing with him on what's on the face of the
24 document.
25 A (Continuing) Okay.

1 BY MR. VARNADO:
2 Q Okay. So as you look at the, back to 0693,
3 the page -- oh, I see, this is a four-page document,
4 and I was looking on the second page. So, okay, do you
5 see that the decks and porches was estimated at 6,580?
6 A What page are you on now?
7 Q Second page, page 2, 0693.
8 A And where are you?
9 Q At the top.
10 A Okay.
11 Q 06 -- 0.6 -- 06.02.40, decks and porches; do
12 you see that?
13 A I do.
14 Q Okay. And the estimated cost was $6,580?
15 A Correct.
16 Q And the actual cost was what?
17 A 14,900 some odd.
18 Q It's actually the number below that number,
19 sir. 19,724?
20 A Okay, I got it.
21 Q And they replaced a rotten deck; did you know
22 that?
23 A I'm not familiar with all of the work that
24 went on on the job.
25 Q Okay. The siding and exterior trim, three or

1 four down from the decks and porches; do you see that?
2 A I do.
3 Q Okay. So because the house was -- had a lot
4 of rotten members and trim, the estimated cost tripled
5 from 27,500 to 92,269.41. Do you have any reason to
6 doubt that?
7 A Look, I wasn't following the job, but I asked
8 for -- if you're trying to go from the estimated cost
9 to the actual cost, I always asked for -- if there was
10 an addition to the work, that it be added on to the
11 not-to-exceed price, and I never got that information.
12 That was the reason I came to, sometime in January and
13 February, insisting on getting that, and it was a hard,
14 long fight until I got it. And I asked for the
15 estimated cost at that moment in time to the end of the
16 job. The job was close enough to a moment in time
17 where that -- where it was feasible to give me that
18 number.
19 Q Okay, and I understand your position on that.
20 Now, returning to my questions. Do you see the
21 exterior carpentry number?
22 A Where are we?
23 Q We're in the same column. We're siding and
24 exterior trim, we're a few more down from that.
25 A Okay.

1 Q Okay, exterior carpentry. Do you see that?
2 A Yes.
3 Q The estimated cost is what?
4 A Zero.
5 Q And what was the actual cost?
6 A My eyes are not so good for this.
7 Q $72,583?
8 A Yes.
9 Q And that was because of rot, do you know?
10 A I have no idea.
11 Q Okay. Go down to the next group of items, the
12 thermal and moisture protection.
13 A Yes.
14 Q Okay. Do you see the insulate, Q7.02.00
15 insulate? Do you see that number?
16 A I do.
17 Q And the estimate was what?
18 A Read it for me.
19 Q 14,000.
20 A Help me out and please read those numbers. I
21 trust you will read the correct numbers.
22 Q And the actual cost was $19,768?
23 A Yes.
24 Q Okay. The roofing estimate was what? Was
25 zero dollars? Underneath that.

1 A Okay.
2 Q And then the actual was 28,300?
3 A Okay.
4 Q The -- do you see gutter and downspout?
5 A Okay.
6 Q And it was also a zero dollar in the estimate?
7 A Okay.
8 Q And it went up to $2,030?
9 A Okay.
10 Q Did you know about the adding the gutter and
11 downspout?
12 A If you're going to go through this -- the
13 answer is no. But if you're going to go through all
14 these line items, I trust you.
15 Q Okay. Well, we don't have very much further
16 to go.
17 A You're reading numbers that I have no
18 identification with.
19 Q Okay. The overhead doors, see the next line
20 item, 08, doors and windows?
21 A Yes.
22 Q And then you go down about four or five and
23 you find overhead doors?
24 A Yes.
25 Q Okay. And that was a zero in the estimate,

1 but the overhead doors actually came in what, 15,727?
2 A Okay.
3 Q So do you know what happened there?
4 A Absolutely not.
5 Q So Amy added the overhead doors, they weren't
6 a part of the original estimate?
7 A If Amy added something and we have emails that
8 indicated we added something, we intended to pay for
9 it.
10 Q Okay, that's fine. The operable windows is
11 next under the overhead doors.
12 A Okay.
13 Q It was 50,939 in the estimate, but it turned
14 out to be 60,045.59 in the actual cost, and that was
15 because she upgraded to impact windows.
16 A Okay.
17 Q Do you know that?
18 A Yes. I know she upgraded -- I don't know if
19 the job was let with impact windows or not, but I do
20 know that impact windows were installed. I'm not sure
21 if all of the windows that were bought and were
22 supposed to be impact windows are impact windows, that
23 I'm not sure about.
24 Q Okay. Then the -- do you see at the bottom of
25 the doors and windows, it says 08.07.10, finish

1 hardware, the finish hardware number?
2 A Yes.
3 Q Okay. And that was estimated at what, $4,000?
4 A Okay. Will you please read the numbers?
5 Q Yeah, I'll be happy to.
6 A Thank you.
7 Q And then the actual cost was 31,916.94?
8 A Okay.
9 Q That was Cortney Bishop had ordered hardware
10 for Amy that was nine -- or eight times the cost,
11 roughly, of the allowance.
12 A If we ordered something in addition, we had
13 intentions of paying for something in addition.
14 Q Okay.
15 A But we did not have intentions of paying for
16 work that was done twice, or substandard work.
17 Q Go to the 09, finishes. Do you see that the
18 estimated cost was -- for the stucco was 6,800, for the
19 drywall was 7,500, for ceramic tile was 5,000, for the
20 marble -- I'm sorry, for the solid surface Corian was
21 zero.
22 MR. LYLES: Where are you, Rob? I'm sorry.
23 MR. VARNADO: I'm at the bottom of page 2,
24 finishes.
25 A (Continuing) I assume -- I don't know enough

1 about what -- but in respect to the Corian, Amy would
2 have to talk to the Corian and the granite. I don't
3 know.
4 Q So, but the actual cost for the drywall was
5 19,250. The actual cast for ceramic tile was --
6 A Excuse me. When you're saying the actual
7 cost, I don't know if that's a proper actual cost or an
8 improper actual cost.
9 Q Okay, that's fine. But I'm asking you --
10 A You're asking me --
11 THE COURT: You-all --
12 A -- the actual cost. I don't know if it's the
13 actual.
14 THE COURT: Rob, keep going if you want to,
15 but I follow the numbers on the page. I
16 understand his testimony that I can't tell you why
17 they increased, and he's telling you I can't verify
18 that they're accurate, and I've got that from both
19 sides. But if there's something else you -- I
20 mean, if you want to keep going with it, please do
21 so, because I'm not cutting you off. I'm just
22 letting you know I understand the three points
23 where we are.
24 MR. VARNADO: Okay. Bear with me one second,
25 then.

1 BY MR. VARNADO:
2 Q Mr. Salzhauer, do you know today how much
3 money you-all spent for the repair, the renovation, of
4 1850 Flag with Brown Contractors, LLC?
5 A You have bills that show that number. I don't
6 know the number in my head.
7 Q Okay. And I'm going to say that the
8 demolition of the house, the rotten wood, everything,
9 the painting, the things that Amy ordered, all came in
10 at 1,227.847, and that was the reason why it was the
11 cost overrun. Do you agree with that or disagree?
12 A No. I disagree. That's what was billed.
13 That's what was charged. Whether it was proper or not
14 is a whole different story.
15 Q But you're not able to talk about whether it's
16 proper or not, either, are you?
17 A In some cases, yes. In some cases, no.
18 Q Because everything -- you were in New York,
19 and everything you were hearing, you were hearing
20 through Amy; correct?
21 A No. I was hearing from Amy, and I was seeing
22 from results, and I was asking for numbers and never
23 got them.
24 Q Okay. And did you -- you told Miss Wenner
25 that you would pay the overhead and profit number that

1 you had stopped paying in May at the completion of the
2 project?
3 A No.
4 Q You never did?
5 A No, I never did. I told Jay at a moment in
6 time when the price was so and so, and he would -- the
7 overhead and profit number that he had billed was X, I
8 don't remember exactly, but that we would talk about
9 paying additional overhead and profit of the 85, over
10 the 85, or whatever number was in that letter, at the
11 conclusion of the job, depending upon how the job went.
12 At that moment in time, the job was not proceeding, it
13 was behind schedule, and the bills were running up.
14 And -- and the overhead and profit was supposed to be
15 for managing the work, and the work was not getting
16 managed.
17 Q That's your position?
18 A Exactly.
19 Q Do you think that the problem was Amy's here
20 in Charleston and she's dealing with the
21 subcontractors, she's directing subcontractors, she's
22 making changes, she doesn't like this, she doesn't like
23 that, and you're in New York and you're paying the
24 bills, and that's the disconnect?
25 A I don't think that's a fair representation of

1 the facts.
2 Q Bear with me one second. I'm going to step
3 out and see if I have more to go; okay?
4 A Okay.
5 THE COURT: Take your time.
6 (The deposition recessed briefly.)
7 MR. VARNADO: That's all the questions I have.
8 THE COURT: Robert?
9 REDIRECT EXAMINATION
10 BY MR. LYLES:
11 Q Mr. Salzhauer, do you believe that you were
12 over-charged, that you and Amy were over-charged for
13 this job by Jay Brown?
14 A Yes.
15 Q Significantly over-charged?
16 A Yes.
17 Q Rob asked you about the money that you paid.
18 I think that Roy -- Roy testified yesterday that
19 you-all paid a total of $1,230,570. Do you remember
20 that number?
21 A If that's what the number is, that's what it
22 is.
23 Q And you believed that that is more than you
24 should have paid for this job?
25 A Yes.

1 Q If the job had been satisfactorily completed,
2 would you have demanded that you be repaid some of that
3 money?
4 A Probably not. There is obvious over-billing,
5 and the last bill for the overhead and profit is -- I
6 don't know if it's intentionally miscalculated, but
7 it's somewhere around 50 -- I think it's $59,000.
8 There was $177,000 billed in the final bill, and -- or
9 as a total, and the final bill was for 151, I think,
10 and that didn't give us credit for the 80,000 that had
11 already been paid, so there was 50 some odd -- or close
12 to $60,000 of over-billing for that item.
13 Q If the house had been properly completed,
14 would you have brought a claim against Jay to address
15 those over-billing issues?
16 A No, but I would not have paid something that's
17 so blatant as that number.
18 Q Was the house properly completed in your
19 estimation?
20 A No.
21 Q Are you seeking to recover, you and Amy, the
22 cost associated with making the house right?
23 A Yes.
24 MR. LYLES: That's all the questions I've got.
25 A (Continuing) There's one other obvious bill.

1 The plumber, who -- the plumber's last bill, and this
2 was true with certain other people all left on the job.
3 The work was not finished, or, for example, the
4 plumbing did not work, and I think that was $8,000. I
5 wouldn't have paid that.
6 Q Okay.
7 MR. LYLES: Henry?
8 THE COURT: No, I don't think I have anything.
9 MR. VARNADO: Okay. Thank you, Mr. Salzhauer.
10 THE COURT: All right, Robert, anybody else?
11 MR. LYLES: Jay Brown.
12 THE COURT: Okay. Mr. Brown, you're being
13 called as a witness.
14 (A brief recess was taken.)
15 (Jay Brown, having previously been duly sworn,
16 continues to testify as follows:)
17 DIRECT EXAMINATION
18 BY MR. LYLES:
19 Q Mr. Brown, just a few questions. Your lawyer
20 was asking Mr. Salzhauer a number of questions about
21 the Exhibit 7 in the Plaintiff's exhibits, and so I'll
22 ask you a few questions about that, too, so we
23 understand how these numbers came together.
24 First of all, if we go to the page that 0695,
25 which I think is page 4.

1 everybody would have been square, based on the costing
2 that I -- and the cash, checks, et cetera, that I
3 reviewed.
4 Q You have not been asked to assess that in this
5 case?
6 A From a legal standpoint. I have -- I mean,
7 that's one of the things we did, is I looked at -- I
8 was looking at how much money did we pay them in
9 comparison to costs, and the amount that's showed as
10 owing, the $206,000, basically relates to Mr. Brown's
11 markup that he put on the work. There was adequate
12 cash funded on the job to pay any vendors that, based
13 on these records, that billed Mr. Brown.
14 MR. LYLES: Okay, I think that's all, Mr.
15 Strickland.
16 THE COURT: Thank you very much.
17 (Whereas, a brief recess was taken.)
18 (Deborah Lee Wenner, having been duly sworn,
19 testified as follows:)
20 DIRECT EXAMINATION
21 BY MR. VARNADO:
22 Q Can you please state your full name for the
23 record?
24 A Deborah Lee Wenner.
25 Q And how do you spell your last name?

1 everybody would have been square, based on the costing
2 that I -- and the cash, checks, et cetera, that I
3 reviewed.
4 Q You have not been asked to assess that in this
5 case?
6 A From a legal standpoint. I have -- I mean,
7 that's one of the things we did, is I looked at -- I
8 was looking at how much money did we pay them in
9 comparison to costs, and the amount that's showed as
10 owing, the $206,000, basically relates to Mr. Brown's
11 markup that he put on the work. There was adequate
12 cash funded on the job to pay any vendors that, based
13 on these records, that billed Mr. Brown.
14 MR. LYLES: Okay, I think that's all, Mr.
15 Strickland.
16 THE COURT: Thank you very much.
17 (Whereas, a brief recess was taken.)
18 (Deborah Lee Wenner, having been duly sworn,
19 testified as follows:)
20 DIRECT EXAMINATION
21 BY MR. VARNADO:
22 Q Can you please state your full name for the
23 record?
24 A Deborah Lee Wenner.
25 Q And how do you spell your last name?

1 A W-E-N-N-E-R.
2 Q Okay. Miss Wenner, when you were working --
3 are you currently working for Jay Brown?
4 A No.
5 Q Okay. And when you were working for him, did
6 you have another surname, another name?
7 A Yes. I was married, and my last name was
8 Kahn, K-A-H-N.
9 Q So if we see emails or communications between
10 Miss Kahn and Mr. Salzhauer or Miss McMarlin, we know
11 that; right?
12 A Yes.
13 Q That's you?
14 A Yes.
15 Q So, if you don't mind, we'll call you Deborah.
16 Hank and Amy and Jay.
17 A Absolutely.
18 Q Okay, that's good. Can you just tell us
19 briefly about yourself. Where did you grow up? Where
20 did you go to high school? That sort of thing.
21 A Well, I grew up as a Navy brat. My dad is
22 retired Navy, so we traveled. We moved to South
23 Carolina middle school age-ish. I went to school here.
24 I've been here ever since. I've been married,
25 divorced, kids.

1 Q And what is your primary occupation -- well,
2 what was your primary occupation when you were working?
3 A I was a business professional. I did
4 accounting. I did different books for companies, et
5 cetera.
6 Q A lot of times lawyers call that a bookkeeper.
7 Would that be something that you would say you were?
8 A That was part of what I did, yes.
9 Q And how long had you worked in the
10 construction business?
11 A Well, over 10 years.
12 Q Okay. And Jay Brown was not your first rodeo
13 with construction; right?
14 A No, he was not.
15 Q So just briefly walk us through. Walk us
16 through your relevant construction history in terms of
17 bookkeeping and other business and accounting jobs.
18 A Well, all of the companies that I've worked
19 with, I used QuickBooks, so that is the program I'm
20 used to using. I was already accustomed to using
21 QuickBooks prior to that because I was a business owner
22 and had used that for many years. The first
23 construction company I was working with was the company
24 that Jay actually used to be a subcontractor for them.
25 They went out of business when the industry -- the real

1 estate market crashed. They went out, and I started
2 working for Jay not long after that.
3 Q That's roughly 2008, 2009?
4 A No. I was working for Jay prior to that,
5 prior to that.
6 Q Okay.
7 A And I'm trying to remember the exact dates,
8 but there were multiple companies. I wasn't just doing
9 books for Jay.
10 Q Okay. So you were a bookkeeper for separate
11 contractors including Jay?
12 A Yes.
13 Q Okay. And do you remember the McMarlin job?
14 A Yes.
15 Q And right now, when did you leave Jay --
16 before we go into the McMarlin job, when did you leave
17 Jay, and what are you doing these days?
18 A What am I doing? My mom has dementia.
19 Q Oh, okay. I'm sorry.
20 A And I primarily take care of my mother. I am
21 not working outside of the home. If I have any
22 bookkeeping jobs, I do them at home, just because it's
23 better for my mother.
24 Q Okay.
25 A As far as when I left Jay, it was July of '13

1 or '14.
2 Q Okay.
3 A That's a hard number to remember, but I know
4 it was July because it was summer and we had just got
5 back from vacation.
6 Q Well, it might be '14 because we know that the
7 McMarlin job was in 2012 and 2013; right?
8 A Okay.
9 Q All right. And you were there all during that
10 time?
11 A Yes.
12 Q Okay. And when I say "there," were you
13 working at Jay's office?
14 A Yes.
15 Q And his office is on the Isle of Palms?
16 A It was.
17 Q Okay. So, and you said you had been working
18 with Jay for a few years, even before 2008, 2009;
19 right?
20 A Yes.
21 Q Okay. So tell me about Jay's practice. So
22 what was his -- what was he building, mostly?
23 A Mostly, it was new construction. There were a
24 lot of remodelings in between. The primary, you know,
25 big jobs were new construction.

1 Q Would you say it was high-end residential?
2 A Yes, absolutely. We didn't do anything that
3 was not high-end, that I remember.
4 Q And what would be some of the -- what would be
5 some of the garden variety type jobs you would do in
6 terms of new construction and remodeling, over a
7 million dollars, things like that?
8 A Definitely over a million dollars.
9 Frequently, double and triple, quadruple that.
10 Q Oh, really?
11 A Yes.
12 Q And you had the acumen and the training in
13 order to handle the QuickBooks and send the QuickBooks
14 to the various clients; is that correct?
15 A Yes.
16 Q Okay. So, and what was -- what kind of
17 contract did Jay use when you worked for him to deal
18 with clients, both new construction and residential
19 remodeling?
20 A He had a standard contract that he had written
21 with an attorney's assistance.
22 Q And what was it, what kind of nature of the
23 contract? Was it cost plus? Was it guaranteed --
24 A Always cost plus. We never did any jobs that
25 were not cost plus.

1 Q So always cost plus with Jay?
2 A Yes.
3 Q And was the McMarlin job a cost plus job?
4 A Absolutely.
5 Q Okay. So why don't you tell me about the --
6 how you drafted the first bills. And I think that what
7 we did was, Jay I think pulled these two --
8 MR. VARNADO: And, Robert, I think you've got
9 these. I don't know.
10 BY MR. VARNADO:
11 Q But these are the invoices; is that correct?
12 A Yes.
13 Q Okay.
14 MR. VARNADO: And I think, Henry, you had
15 asked about these, and although we don't have
16 copies, I would like to go ahead and mark them as
17 exhibits.
18 THE COURT: I asked was there something
19 already in the record, and I think -- Robert, what's
20 your position on using those?
21 MR. LYLES: Tell me again what these are.
22 MR. VARNADO: These are the invoices and all
23 the backup for each invoice.
24 MR. LYLES: And those came out of Jay Brown's
25 files?

1 MR. VARNADO: Yeah.
2 MR. LYLES: Did she retrieve them?
3 MR. VARNADO: No, she didn't retrieve them.
4 Jay retrieved them.
5 MR. LYLES: Okay.
6 THE COURT: Is that the same or similar to
7 what was turned over to Mr. Strickland?
8 MR. VARNADO: Yeah. He said you talked to an
9 accountant. He got the records. He got all the
10 backup.
11 MR. LYLES: He talked to an accountant and got
12 the actual QuickBooks documents?
13 MR. VARNADO: And the backup he said.
14 MR. LYLES: The actual data?
15 THE COURT: What time do you need to review
16 those, if at all?
17 MR. LYLES: I just want to know where they
18 came from. I'm not sure where they came from. If
19 somebody wants to verify where they came from and what
20 they are.
21 MR. VARNADO: We can do that. I mean, maybe
22 we can mark them for identification and ask her about
23 it.
24 THE COURT: Mark them for identification, and
25 then so long as they are identified and

1 authenticated and Robert doesn't have an objection
2 and doesn't need time, we'll take them.
3 MR. VARNADO: I'm just going to go ahead and
4 put an exhibit sticker on each one, 20 and 21.
5 (INVOICES AND BACKUP MARKED PLAINTIFF'S
6 EXHIBIT NO. 20 AND ADMITTED INTO EVIDENCE.)
7 (INVOICES AND BACKUP MARKED PLAINTIFF'S
8 EXHIBIT NO. 21 AND ADMITTED INTO EVIDENCE.)
9 THE COURT: Again, Rob, those both purport to
10 be the invoices and the backup for the statements
11 and the invoices?
12 MR. VARNADO: Yes, sir.
13 THE COURT: Okay.
14 BY MR. VARNADO:
15 Q Okay. So we've marked Exhibit 20 and 21.
16 These are what Mr. Brown said they were. And is that
17 your -- are you familiar with these?
18 A Absolutely, very familiar.
19 Q Okay. And tell me how -- how you would
20 typically do a bill for a client, and then did you do
21 that for the McMarlins?
22 A Okay. The first part of the process of taking
23 in a new client, I would meet with them and we would go
24 over how the finances work, how we bill, how we get the
25 deposit. Every project had its own checking account,

1 et cetera, and I would explain the process of funding
2 that account, how to keep it funded during the interim
3 of the billing process, et cetera.
4 Q Did you meet with Miss McMarlin?
5 A Everything was over a phone and text.
6 Q Okay.
7 A I did not get to sit down with them, but
8 everything was reviewed verbally over the phone because
9 Mr. Salzhauer was in New York.
10 Q And Mr. Salzhauer was in New York and he's
11 paying the bills; right?
12 A Correct.
13 Q And so the bills are sent to Mr. Salzhauer and
14 Miss McMarlin; is that correct?
15 A Right.
16 Q Okay. And then what happened? Go on, if you
17 don't mind.
18 A Well, the invoices, the way the invoices are
19 generated, as bills would come in from whether they
20 were suppliers or a subcontractor, they would get put
21 into the folder for the job. They would then be
22 approved on a weekly basis by the project manager.
23 Then I would process them for payment. And then I
24 would create an invoice for the client. And may I --
25 Q Sure.

1 A That's pretty simple. So, I mean --
2 Q Will you show Mr. Brown, because he's the --
3 A Sure.
4 THE COURT: Do we have something that's
5 already marked that we can refer to?
6 MR. VARNADO: Sure, I think so. I think we
7 can use the Defendant's book.
8 THE COURT: If we need to, we can use what you
9 just referred to out of --
10 BY MR. VARNADO:
11 Q See the black book in front of you?
12 A Uh-huh.
13 Q Miss Wenner, can you open it up to Exhibit No.
14 83?
15 A All right. So that's invoice No. 63, is
16 that --
17 Q Yes, that's correct.
18 A Okay.
19 Q So you're just doing this by way of kind of
20 explaining what was going on; right?
21 A Right. After you would enter the invoices
22 into QuickBooks, then you can then generate an invoice
23 for the client. Again, because it was cost plus, we
24 would provide them the exact amount of whatever was
25 paid and to whom. And then behind it, we would supply

1 the copy of their invoice or their payment requisition,
2 whatever it was, accordingly. That was how we billed
3 most of the clients, and that is how we started billing
4 this job. But about two invoices or so in, we were
5 requested to submit it along with AIA documents, which
6 we did not typically use. One was a spreadsheet that
7 he sent.
8 Q Okay. So why don't you turn to Exhibit 84?
9 It's next in the book.
10 A Uh-huh.
11 Q Okay. So here's -- this is an AIA document,
12 and on the next page of 84 is a continuation sheet;
13 correct?
14 A Right. They work together.
15 Q Okay. So why don't you explain how -- how it
16 came to pass that you started to work on these two, and
17 who was responsible for that?
18 A Hank sent me an email in response to receiving
19 one of the invoices, saying that he would prefer to see
20 it in this type of format because it was easier for him
21 to manage and take control of, in his mind.
22 Q Okay. So actually, how did the -- the AIA
23 document, was that -- the AIA document on the front,
24 would that be something that you had and you were able
25 to use? Who sent that to you, or did you have it and

1 did you do it yourself?
2 A We didn't have the document itself. I
3 recreated the document for the purpose of using this
4 form.
5 Q Okay. So Hank wanted it?
6 A Yes.
7 Q And he wanted both of these documents?
8 A Yes. Because I had never used these or seen
9 these documents prior to that. I had never used them.
10 Q And then the continuation sheet, how did
11 that -- did he -- how did that come to pass?
12 A We had put in --
13 Q I mean, when I mean "come to pass," I want to
14 know -- and I'm sorry for interrupting you, Miss
15 Wenner. Did Hank send you a continuation sheet as a
16 go-by, or did you -- how did you come to use
17 continuation sheets?
18 A Again, he requested me to use this sheet. The
19 amount in the C column, that's directly from the
20 estimate. And then as payments would be -- were
21 requested, the current request is in E.
22 Q The E column, in Echo?
23 A Yes. And then after that invoice, the next
24 invoice, all of those totals would move into the column
25 D, and it would accumulate so that you knew how much

1 had been previously paid for that category, if there
2 was any current request for payment in that category.
3 And then the percentages, if you look further to your
4 right, you'll see the percentage of completion as far
5 as the ratio and payment to balance.
6 Q Okay. Did you understand that Jay sent a
7 contract to the Salzhauer/McMarlins?
8 A It was my understanding he sends a contract to
9 every client.
10 Q Okay. Did you actually -- did you handle the
11 contract? Did you see it?
12 A I've seen it, yes.
13 Q Did Miss McMarlin or Hank Salzhauer sign the
14 contract?
15 A I thought it had been signed, but I don't
16 remember seeing a signed copy, but we discussed the
17 contract on a regular basis.
18 Q Who? Who is "we"?
19 A Hank and I had talked about, you know, the
20 paperwork associated with the contract and, you know,
21 how it was -- because there was some confusion on the
22 billing. That's why he asked it to be put on here. He
23 didn't understand the QuickBooks version, so that's why
24 he asked me to put it on these AIA documents.
25 Q Okay. So what estimate did column C come

1 from? Did it come from an estimate, and which
2 estimate, do you know? I mean, sitting here today, are
3 you able to tell me which estimate it came from?
4 A There were multiple estimates because the job
5 changed as it progressed. It started as one estimate,
6 and then, as with most remodels, once you're into a
7 project, you find other problems that you can't
8 progress until it's fixed, that are unseen.
9 Q Okay. And what was your belief about talking
10 with Mr. Salzhauer about the cost plus contract? You
11 had mentioned that earlier. Can you discuss that
12 again?
13 A It was always understood. There was never any
14 variance of it being a cost plus contract. It was,
15 from beginning to end, a cost plus contract.
16 Q And what was the cost -- what was the plus?
17 The plus was how much percent, do you remember?
18 A I want to say it was 15.
19 Q Okay.
20 A I'm pretty sure it was 15 percent.
21 Q And the estimate, do we know that the estimate
22 in table C on this continuation sheet is an
23 approximation because they're all zero zero numbers on
24 the end? You know, they're not hard numbers, they're
25 an estimated number; right, zero, zero?

1 A Right. This estimate should agree with, at
2 some point, the QuickBooks estimate. At whichever
3 point this was created, it would have agreed with that.
4 Q So how much time did you spend importing your
5 QuickBooks stuff into the continuation sheet?
6 A Everything was manually done. And it took,
7 depending on the week, sometimes there may have been 10
8 bills, sometimes there were 50 bills. It just -- it
9 was a variation. I had to go through each line item
10 and put it into the right column, make sure it was
11 totaled, make sure it added and equaled the invoice
12 that was on the front, our QuickBooks invoice, make
13 sure everything added, and then we would send it via
14 email.
15 Q And this was to help Mr. Salzhauer; correct?
16 A Yes.
17 Q And that's the only time you remember doing
18 the QuickBooks sheet and AIA document?
19 A I have only used AIA documents for this one
20 job, ever.
21 Q Ever?
22 A Ever.
23 Q So the -- and as the items mounted up, you had
24 to add lines to the continuation sheet, I guess?
25 A Correct. Because, again, things were added,

1 and we had to have a space for them.
2 Q And how long would it take you to actually sit
3 down and transpose from the QuickBooks to these AIA
4 documents?
5 A Again, it varied on the week because of how
6 many invoices were to be paid. I would say probably
7 about an hour for each one, to go through and balance
8 them back out.
9 Q And then Mr. Salzhauer would call after each
10 one, or how would he -- what would be your typical way
11 of dealing with him?
12 A Typically, in the beginning, I would just
13 email it to him. He would receive that -- well, it was
14 actually sent to your assistant, and I don't remember
15 her name, I'm sorry.
16 MR. SALZHAUER: Valentina.
17 A (Continuing) Yes. So it was sent to her, and
18 then it was transferred over to him, and we would
19 normally receive a check. There wasn't a lot of
20 communication back and forth in the beginning, and then
21 we started getting questions, and then we started
22 having a delay in the payment that wasn't as quick as
23 it was in the beginning.
24 Q So when did the delays in the payments start?
25 A It was several months into the job. I mean,

1 we were probably getting a half to two-thirds done, and
2 we started, probably closer to the two-thirds, started
3 to have some delays in the process, which was causing
4 delays on the job.
5 Q And were you dealing, also, with Miss McMarlin
6 who is sitting here today?
7 A Once in a while, but normally when I was
8 dealing with her, it was because she needed copies.
9 She needed additional copies of things, which we
10 provided on a regular basis.
11 Q So you would make the copies to put in your
12 QuickBooks invoices to send to Hank; correct?
13 A Yes. They were scanned and emailed.
14 Q And Miss McMarlin would want copies, too?
15 A Yes.
16 Q Would she take them by email?
17 A Well, there were several different methods.
18 First I emailed them to her, and then she could not
19 find, you know, couldn't print them. Said she didn't
20 have a printer, so I supplied them on a disc at one
21 point, because she was asking for many invoices and --
22 a lot of papers. So I put them on a disc, and she said
23 I don't have a printer, I can't print it, can you print
24 them for me. So I did that, and, of course, that was a
25 very long process because that was a lot of paper and

1 invoices, and told her they were ready, she could pick
2 them up. And she asked me, no, I can't pick them up,
3 will you take them to my house, so I had to go drop
4 them off.
5 Q So this was -- was -- this job, was it
6 labor-intensive on your end?
7 A Yes.
8 Q Was it -- how would you compare it on a scale
9 of one of ten, with one being the least and ten being
10 the most labor-intensive that you've worked on with
11 Jay?
12 A Probably around an eight as far as the
13 constant back-and-forth, trying to re-explain and
14 re-provide the same information over and over and over
15 again.
16 Q Okay. And you put the subs' backup on each of
17 these documents; correct?
18 A Yes.
19 Q All right.
20 A In the order that they appeared on the
21 QuickBooks invoice.
22 Q All right. Okay, so it came to pass that Mr.
23 Salzhauer refused to pay the overhead and profit?
24 A Correct.
25 Q And when -- do you remember when that was,

1 basically?
2 A It was probably at least eight weeks before --
3 you know, seven to eight weeks before the job, what I
4 would consider, getting close to being done. He
5 refused to pay any more until the job was complete and
6 they had a CO.
7 Q Did he say it was because he had -- he had a
8 deal with Jay, or was that ever brought up to you?
9 A He was irritated with Jay. He said Jay wasn't
10 as responsive as he would like him to be. He would
11 send me an email and ask me to have Jay call him, and
12 he would. It was prompt. You know, he was busy. He
13 wasn't in the office. There were days I wouldn't see
14 him at all because he was on job sites and wasn't
15 checking his email constantly. But he just said that
16 he was no longer going to pay that until he was happy
17 and he had a CO, and that was that.
18 Q And he didn't say it was related to any deal
19 or any estimate that he received before?
20 A Not to me.
21 Q Okay.
22 A Not to me.
23 Q That's fair. And then after the CO was -- was
24 to be issued, what did Mr. Salzhauer tell you, or what
25 did he promise to pay?

1 A Well, he had said the whole time that he would
2 pay once the house was complete, and he did not.
3 Q He would pay the complete overhead and profit
4 and the complete bills that you would send him?
5 A Yes. That he would pay the rest of the amount
6 that they had agreed upon, which was documented, and
7 that he would pay -- he would make sure that
8 subcontractors would get paid. And he was telling the
9 subcontractors directly that he would make sure they
10 got paid.
11 Q So, explain that to me. Was that normal?
12 A No.
13 Q Okay.
14 A Typically, you don't -- the clients aren't
15 supposed to contact the subcontractors. That's why
16 you're the general contractor; you're the contact
17 point. You're supposed to be the person that contacts
18 the subs if there's an issue or a problem. You as the
19 builder and as the contractor are responsible for
20 paying your subs. We had to do that. So, no, it's
21 very unusual for a client to do that, and you don't
22 want a client to do that for a multitude of reasons.
23 Q Would you consider it that he was doing it on
24 purpose in order to undercut you?
25 A Yes. That's what it appeared to be, yes.

1 Q So every invoice had a subcontractor backup
2 attached to it every time; correct?
3 A Yes.
4 Q And it went to Mr. Salzhauer; correct?
5 A Yes.
6 Q And then -- and he was the one who was in
7 charge of paying?
8 A Yes.
9 Q And then he decided that he was angry at Jay
10 and he wasn't going to pay overhead and profit?
11 A Yes.
12 Q That's your understanding?
13 A Yes.
14 Q And that was based on your conversations with
15 him?
16 A Yes.
17 Q That's not from Jay. That's from Hank
18 Salzhauer; correct?
19 A Correct.
20 Q And that he promised to pay the overhead and
21 profit when the Certificate of Occupancy was issued?
22 A Yes.
23 Q And did he?
24 A No.
25 MR. VARNADO: Henry, I'm going to take just a

1 minute with Jay.
2 THE COURT: Okay.
3 BY MR. VARNADO:
4 Q We're going to step out, so just bear with us
5 one second, and then Mr. Lyles may have some questions
6 for you.
7 A All right.
8 (Whereas, a short recess was taken.)
9 MR. VARNADO: Miss Wenner, thank you. That's
10 all the questions I have for you at this time. Mr.
11 Lyles or Mr. Brown may have some additional questions.
12 CROSS-EXAMINATION
13 BY MR. LYLES:
14 Q So, now, Miss Wenner, it's your testimony that
15 you provided backup with every invoice that you sent to
16 Mr. Salzhauer?
17 A That's correct.
18 Q How much backup?
19 A What do you mean how much?
20 Q What did you send him? What did the backup --
21 what constituted the backup?
22 A The invoice that we received.
23 Q From whom?
24 A From the supplier or the subcontractor for
25 payment. So whatever the request for payment, whatever

1 format that was, that's what got attached.
2 Q And did you also send him the backup from the
3 subcontractor's invoice?
4 A The subcontractor's invoice?
5 Q Sure. Did the subcontractors, when they sent
6 you an invoice, did they provide you with backup?
7 A The subcontractors were labor-based.
8 Q Okay. So they would only invoice you for
9 their labor?
10 A Right. They typically had a contracted
11 amount, and the requisition had what they were -- what
12 the job was, how much they had been paid, how much they
13 were requesting this time, and how much is left on
14 their job so that they wouldn't get ahead of
15 themselves.
16 Q So the subcontractors that were being paid on
17 a labor basis had -- had fixed agreements with Brown
18 for the job?
19 A For the most part, yes. I mean, occasionally,
20 you might have somebody that charges, you know, a
21 random amount for something added to or, you know,
22 something like that; but, generally speaking, most of
23 the subcontractors had a price that they were working
24 from.
25 Q A fixed price?

1 The plumber, who -- the plumber's last bill, and this
2 was true with certain other people all left on the job.
3 The work was not finished, or, for example, the
4 plumbing did not work, and I think that was $8,000. I
5 wouldn't have paid that.
6 Q Okay.
7 MR. LYLES: Henry?
8 THE COURT: No, I don't think I have anything.
9 MR. VARNADO: Okay. Thank you, Mr. Salzhauer.
10 THE COURT: All right, Robert, anybody else?
11 MR. LYLES: Jay Brown.
12 THE COURT: Okay. Mr. Brown, you're being
13 called as a witness.
14 (A brief recess was taken.)
15 (Jay Brown, having previously been duly sworn,
16 continues to testify as follows:)
17 DIRECT EXAMINATION
18 BY MR. LYLES:
19 Q Mr. Brown, just a few questions. Your lawyer
20 was asking Mr. Salzhauer a number of questions about
21 the Exhibit 7 in the Plaintiff's exhibits, and so I'll
22 ask you a few questions about that, too, so we
23 understand how these numbers came together.
24 First of all, if we go to the page that 0695,
25 which I think is page 4.

1 A Yes.
2 Q There's a reference under that column to
3 estimated cost, 543,130.20?
4 A Yes.
5 Q Can you point me to any proposal that you made
6 to Amy or Mr. Salzhauer with that being the estimated
7 price?
8 A In this book, the proposals in this book?
9 Q Anywhere you want to find it.
10 A I don't know where to look.
11 Q So as you're testifying today, you can't
12 present to me a proposal that you sent to them that
13 shows an estimated price of $543,130?
14 A I could, but I don't know where it is.
15 Q I'll represent to you it's not an exhibit in
16 this trial.
17 A Okay.
18 Q Are there documents outside of this trial that
19 you think might reflect that estimate?
20 A We did a dozen estimates for her. That could
21 possibly very well be one of them. I would say one of
22 the 12 is.
23 Q But you can't point that to me -- after three
24 days of trial, you can't point me to an estimate that
25 you gave to her that's an exhibit in this case?

1 Q If the job had been satisfactorily completed,
2 would you have demanded that you be repaid some of that
3 money?
4 A Probably not. There is obvious over-billing,
5 and the last bill for the overhead and profit is -- I
6 don't know if it's intentionally miscalculated, but
7 it's somewhere around 50 -- I think it's $59,000.
8 There was $177,000 billed in the final bill, and -- or
9 as a total, and the final bill was for 151, I think,
10 and that didn't give us credit for the 80,000 that had
11 already been paid, so there was 50 some odd -- or close
12 to $60,000 of over-billing for that item.
13 Q If the house had been properly completed,
14 would you have brought a claim against Jay to address
15 those over-billing issues?
16 A No, but I would not have paid something that's
17 so blatant as that number.
18 Q Was the house properly completed in your
19 estimation?
20 A No.
21 Q Are you seeking to recover, you and Amy, the
22 cost associated with making the house right?
23 A Yes.
24 MR. LYLES: That's all the questions I've got.
25 A (Continuing) There's one other obvious bill.

1 The plumber, who -- the plumber's last bill, and this
2 was true with certain other people all left on the job.
3 The work was not finished, or, for example, the
4 plumbing did not work, and I think that was $8,000. I
5 wouldn't have paid that.
6 Q Okay.
7 MR. LYLES: Henry?
8 THE COURT: No, I don't think I have anything.
9 MR. VARNADO: Okay. Thank you, Mr. Salzhauer.
10 THE COURT: All right, Robert, anybody else?
11 MR. LYLES: Jay Brown.
12 THE COURT: Okay. Mr. Brown, you're being
13 called as a witness.
14 (A brief recess was taken.)
15 (Jay Brown, having previously been duly sworn,
16 continues to testify as follows:)
17 DIRECT EXAMINATION
18 BY MR. LYLES:
19 Q Mr. Brown, just a few questions. Your lawyer
20 was asking Mr. Salzhauer a number of questions about
21 the Exhibit 7 in the Plaintiff's exhibits, and so I'll
22 ask you a few questions about that, too, so we
23 understand how these numbers came together.
24 First of all, if we go to the page that 0695,
25 which I think is page 4.

1 A Yes.
2 Q There's a reference under that column to
3 estimated cost, 543,130.20?
4 A Yes.
5 Q Can you point me to any proposal that you made
6 to Amy or Mr. Salzhauer with that being the estimated
7 price?
8 A In this book, the proposals in this book?
9 Q Anywhere you want to find it.
10 A I don't know where to look.
11 Q So as you're testifying today, you can't
12 present to me a proposal that you sent to them that
13 shows an estimated price of $543,130?
14 A I could, but I don't know where it is.
15 Q I'll represent to you it's not an exhibit in
16 this trial.
17 A Okay.
18 Q Are there documents outside of this trial that
19 you think might reflect that estimate?
20 A We did a dozen estimates for her. That could
21 possibly very well be one of them. I would say one of
22 the 12 is.
23 Q But you can't point that to me -- after three
24 days of trial, you can't point me to an estimate that
25 you gave to her that's an exhibit in this case?

1 A An estimate in this case? We went over them.
2 Do you want to --
3 Q I just want you to tell me if you can show me
4 a document where you estimated the cost of this work at
5 $543,130.20, please show it to me. I just want to know
6 where this number came from. If it's there, it's
7 there.
8 A If it's in the book, but I don't know where to
9 look. Rob, do you have it?
10 MR. VARNADO: Well, this --
11 THE COURT: Hold on, whoa. Okay. Robert?
12 MR. LYLES: I'm fine with Mr. Barrineau (sic)
13 handing him a document.
14 MR. VARNADO: Varnado, but that's okay.
15 THE COURT: Either Varnado or Barrineau can
16 hand it to him.
17 MR. VARNADO: And if you knew Barrineau, you'd
18 know that was an insult. He's insulting me.
19 MR. LYLES: Not on purpose.
20 MR. VARNADO: That's a continuation sheet.
21 THE COURT: I know she didn't possibly get all
22 of that on the record, but in the response to the
23 question, Mr. Varnado has handed the witness a sheet.
24 Identify it, please. What's the Bates number in the
25 lower right-hand corner?

1 A (Continuing) 0083.
2 THE COURT: And that's out of exhibit what?
3 MR. VARNADO: It popped out of my book.
4 THE COURT: All right, we'll find it.
5 A (Continuing) 65?
6 MR. LYLES: Bates labeled document.
7 MR. VARNADO: It's not 65. It's a Bates
8 labeled document. It's one of the continuation sheets
9 that was testified about, but I can find another one.
10 THE COURT: So long as we can locate it in the
11 record later.
12 BY MR. LYLES:
13 Q Well, if you can read the Bates label number
14 on the bottom of that sheet?
15 A Yes. $543,130.20.
16 THE COURT: In the right-hand corner there's a
17 number that's a name and four digits. What is it?
18 A (Continuing) Oh, Brown 0083.
19 THE COURT: Okay. Go ahead, Robert.
20 BY MR. LYLES:
21 Q Okay. Now, what you have referred to is a
22 continuation sheet that went with an AIA pay app?
23 A Correct.
24 Q Okay. And you heard yesterday Miss Wenner
25 testified that she put together those sheets for

1 billing purposes?
2 A Yes.
3 Q Okay. What I'm looking for is a document
4 where you communicated to these people an estimated
5 cost for this job of 543 and -- $543,130.20.
6 A And once again, if it's out there, I don't
7 know where it is.
8 Q Okay. I don't, either.
9 A I will say it's a -- on this document Brown
10 0659, which is our QuickBooks --
11 Q Yeah.
12 A It's a -- the estimated cost is 543,130.20.
13 Q Okay, fair enough. And that estimated cost is
14 important to Mr. Varnado, Mr. V, because he wanted to
15 demonstrate with Mr. Salzhauer that the price had gone
16 up substantially, and so I'm just trying to find out
17 where it was represented that that's where we start,
18 and so that was why I was asking the question. Since
19 we're on the subject, if you will, turn to Exhibit 116
20 in this book, Defendant's Exhibit 116.
21 A (Witness complied with request of counsel.)
22 Q Okay. Now, you're at Exhibit 116; right?
23 A Yes.
24 Q And is that the last pay application that was
25 submitted to the Salzhauers by you?

1 A I -- I don't know. It's a -- I don't know the
2 application for payment.
3 Q Well, the date on the document is what?
4 A December the 9th, 2013.
5 Q Okay. Do you recall sending any bills to the
6 Salzhauers after that date?
7 A I don't recall.
8 Q And again, you heard Miss Wenner say she
9 prepared those documents; right?
10 A Yes.
11 Q Okay. If you will, look at the original
12 contract sum on that document, prepared by your office.
13 A The 999,944.96?
14 Q Yeah.
15 A Okay.
16 Q All right. And then you've got a number that
17 says, "Total Completed and Stored to Date, 1,357,528."
18 Do you see that?
19 A Yes.
20 Q Okay. Now, does that number correspond to the
21 number in this exhibit that Mr. Varnado is asking
22 about?
23 A With the actual cost?
24 Q Yeah.
25 A No, it does not.

1 Q Well, now, the --
2 A Oh, I'm sorry. That was from August. I need
3 to see December's. I've got your pay app. I don't
4 have ours.
5 Q Your invoice?
6 A The actuals versus estimate. I don't know
7 where that is in correspondence with this one.
8 MR. VARNADO: Is it the Exhibit 117?
9 BY MR. LYLES:
10 Q There's an invoice that's dated 12/9, Invoice
11 No. 181 for 50,674.27.
12 A Where is that at?
13 Q Exhibit 117.
14 A Yes, I see our invoice for $50,674.27.
15 Q Okay. All right, so my question is, this is
16 the last bill that was sent to the Salzhauers, and I'm
17 trying to figure out how we get from the numbers on
18 this bill to the numbers that are in your QuickBooks?
19 A And what -- what's the date on that?
20 Q It would show, for example, your QuickBooks is
21 dated 9/12/14.
22 A Uh-huh.
23 Q Okay? And we've got -- you've got estimated
24 revenue, then you've got actual revenue, and you've got
25 a total number of 1,436,998.75.

1 A Okay.
2 Q I'm just trying to find out on this bill that
3 you sent to these people, where would they see that
4 number, 1,436,998?
5 A Well, they wouldn't, because this was dated in
6 August and this is a December bill.
7 Q Dated in --
8 MR. VARNADO: September.
9 A (Continuing) Sorry. September 12th, 2014.
10 Q Okay. And the bill is dated December of 2013?
11 A Right.
12 Q So there were additional amounts charged after
13 the last bill?
14 A Apparently so.
15 Q And they were never sent a bill for that
16 additional amount?
17 A I don't know.
18 Q Okay.
19 A There are still bills, even after CO, that
20 keep continue coming in, even for months after.
21 Q Okay. But you didn't send them to the
22 Salzhauers?
23 A I don't know.
24 Q But you filed a lien and sued them for them?
25 A I filed a lien for the amount that was owed at

1 the time.
2 Q At the time, March of 2014?
3 A Right.
4 Q Which included amounts that hadn't been billed
5 to the Salzhauers?
6 A Right.
7 Q Now, if we go back and look again at sort of
8 the first part of these pages, what's Bates labeled in
9 Exhibit 7, Plaintiff's Exhibit 7, as 693, let's take a
10 look at some of those numbers.
11 A Uh-huh.
12 Q Mr. Varnado was asking why those numbers went
13 up. Do you recall that?
14 A Yes, I do.
15 Q I would like to do the same thing. While
16 we're doing this, if you'll go back to Exhibit 8 here.
17 Okay, I've gotten in the habit of helping witnesses
18 find the documents. Okay, if we go back to Exhibit 8,
19 which is an exhibit that we had discussed lots in this
20 case. I think it's been represented that was the first
21 proposal sent to the Salzhauers. First item in your
22 exhibit, on page 693, I'm going back to your white
23 notebook, I just want to ask you some questions about
24 these numbers that Mr. Varnado was asking about.
25 A Yes.

1 Q He asked Mr. Salzhauer about the siding and
2 exterior trim number.
3 A Correct.
4 Q Do you see that?
5 A Yes.
6 Q And that number went from an estimated cost of
7 27,500?
8 A Yes.
9 Q To another $94,269.41?
10 A Yes.
11 THE COURT: Which line item was that?
12 MR. LYLES: That's line item 060450.
13 MR. VARNADO: It's in the white notebook.
14 MR. LYLES: White notebook, Exhibit 7.
15 THE COURT: Okay, what's the --
16 MR. LYLES: Siding and exterior trim.
17 THE COURT: Siding, okay. Go ahead.
18 BY MR. LYLES:
19 Q So that number went up by $66,769.41.
20 A Yes.
21 Q Do you see that?
22 A Yes.
23 Q Okay. My question is, did you install the
24 siding and exterior trim two or three times?
25 A No. Just -- this is demo two. This is a demo

1 price in this.
2 Q What's demo price?
3 A When we got our exploratory permit and then we
4 got into the house, and I showed Amy, when you start
5 pulling back siding, you see that the total band board
6 is rotten, you see that the windows have all failed,
7 that there's rot underneath each one, and you have
8 to -- we had to pull the siding and trim off of the
9 whole house.
10 Q And you didn't expect to have to do that?
11 A From this bid, no.
12 Q You did not?
13 A Did not.
14 Q All right. How much siding and trim did you
15 expect to have to pull off?
16 A Minimal. We were replacing windows and
17 porches on the left side, just enough to where you
18 could feather it back in.
19 Q And did you provide them with the 27,500 --
20 excuse me. Did you price your estimate based on a
21 proposal from a subcontractor?
22 A No. This is just an estimate. And if you'll
23 notice how the zeroes, the 3,000, the 30,000 note,
24 they're basically round numbers. When I estimate
25 something, it's a general, this is probably what it's

1 going to cost.
2 Q So what square footage of siding and exterior
3 trim did you estimate you were going to have to remove
4 and replace at the house initially?
5 A This is -- because the entryway, we had to
6 demo the whole left side of the house, build two
7 porches, feather back in, like I said, the siding and
8 trim. And then whatever windows we had to pull out and
9 put back in, we had to demo the existing trim around
10 the windows. We had to come back and reflash, you
11 know, everything to put these windows back in.
12 Q Okay. My question is what square footage of
13 siding and exterior trim did you estimate to arrive at
14 an estimate of $27,500?
15 A I didn't estimate it on a square footage
16 basis.
17 Q How did you estimate it?
18 A Just by -- I estimated it by looking at it.
19 Q Okay.
20 A Conservative number.
21 Q And did you price it, actual cost, by looking
22 at that, too, or is that actually numbers that were
23 given to you by subcontractors?
24 A The actual cost is the actual cost of what the
25 bills came in through the subcontractor.

1 Q So there's no way for us today to understand
2 how much siding and trim you estimated initially?
3 A No way to understand how I estimated?
4 Q No way for us to know.
5 A No.
6 Q Okay. So your initial estimate of 27,500 was
7 an eyeball estimate?
8 A Correct. Ballpark, eyeball, whatever you want
9 to call it.
10 Q How many square feet of siding and trim did
11 you put up ultimately?
12 A Square footage, I don't -- it's more linear
13 footage because they're boards --
14 Q That's how you pay your subs, on a linear
15 footage basis?
16 A No, I pay my subs based on their invoice.
17 Q How would they charge you?
18 A They're billing -- they charge me for the work
19 done.
20 Q They're charging you for the materials and for
21 their time?
22 A We buy materials from Southern Lumber and we
23 put them on the job based on the sub's estimate on what
24 it's going to put back on the house. And then when the
25 bills come in from both, that's what's calculated to

1 the 94,269.
2 Q Did your subs estimate that -- but you had no
3 subs's estimate when you provided the estimate to the
4 McMarlins?
5 A This right here? I had -- I believe I had
6 some. This was just the initial -- I didn't even have
7 a -- how this works is I get a set of plans and I put
8 it out to every subcontractor and supplier out there.
9 I need details for allowances. I need a plumbing
10 allowance -- I'm sorry, a plumbing detail that I can
11 send out to my suppliers so I can get numbers on them,
12 and I give it to the subcontractors, too, and get it
13 back in. I never had that at this time. This is just
14 when they were looking to buy the house. I can't --
15 from the street, the house looks likes it was okay. We
16 walked, there was some minimal damage. But once you
17 pull everything back and you get into it, you have
18 rotten walls, you have termite invasion, you have bad
19 electrical, you have bad HVAC, and that's how this
20 was -- what I'm telling you after this. This is just
21 the initial ballpark estimate.
22 Q Well, actually, what you're pointing to in the
23 book is in Exhibit 8, which is right behind a letter
24 from you to them giving them an estimate for this work.
25 A Yes.

1 Q Okay.
2 A Ballpark estimate.
3 Q Is the word "ballpark" anywhere on that
4 document?
5 A No.
6 Q Is there any reference in that document to the
7 fact that this is an estimate that is somehow qualified
8 or based upon limited information?
9 A No.
10 Q In fact, at the time you did this estimate,
11 you had already received the inspection report that was
12 done when she bought the house; right?
13 A Correct.
14 Q So you knew you were getting into an old
15 house; right?
16 A Oh, yes.
17 Q Okay. But there's nothing on this document to
18 suggest that it's somehow, again, qualified or limited
19 based upon the fact that apparently you just rode by in
20 an automobile and looked at it?
21 A Well, it's an estimate. An estimate is an
22 estimated price on what you think it's going to be.
23 Q Is an estimate different than a quote?
24 A Same thing.
25 Q Okay.

1 A Bid. I mean, there's no fixed bids in this
2 contract -- or in this, I'm sorry, this estimate.
3 Q As a contractor, do you -- when you consider
4 general pricing rules for a house, such as Amy's, and
5 you're thinking about siding, how do you -- is it
6 possible -- or do contractors estimate things like
7 siding cost on a square-foot basis?
8 A There's some -- we don't do it like that.
9 Contractors can.
10 Q Well, what did you -- how do you do it? I
11 guess there's --
12 A I bid it out, like I explained earlier. I
13 have a full set of detailed plans, and I send it out to
14 bid, and it takes normally two or three weeks to get
15 the numbers back in, and then we put it into a cost
16 control estimate, and then we sit down with a client
17 and give to them and they approve it and go over it.
18 That was never done here.
19 Q Okay. You did come up with a cost control
20 estimate?
21 A The estimate that we had?
22 Q Yeah. You came up with a cost control
23 estimate?
24 A Yes, this is -- like we just talked about,
25 this is just budgetary, ballpark numbers. The zeroes

1 you can -- there's no clear -- when I get -- when I get
2 numbers back from subcontractors and suppliers, they'll
3 have more decimal point numbers on them.
4 Q Okay. Well, let's go over to Exhibit 15,
5 then, since we want to talk about cost control
6 estimates. If you look at Exhibit 15, we have -- in
7 the document that's Bates labeled Salzhauer 1508,
8 that's a document that refers to a cost that says
9 "Brown Contractors Control Estimate." Is that the same
10 thing as a cost control estimate?
11 A Yes.
12 Q Okay. And this is a document that you are
13 contending is related to -- is based on more specific
14 subcontractor information?
15 A It doesn't -- it looks like we're getting a
16 couple of numbers in, yes.
17 Q Okay.
18 A Now, this is -- this is my numbers that I sent
19 out that weren't necessarily installed in the house.
20 Q Okay. Well, let's figure this out. Based on,
21 as shown on the cost control estimate, show me what the
22 siding number is on the cost control estimate. How do
23 we arrive at that?
24 A 27,5 -- I've got -- on 060410, I've got a
25 siding number of 23,000.

1 Q I think that's -- okay, that's siding, all
2 right.
3 A And I don't know, you could add the porch and
4 railing package. I don't know how -- we could add a
5 couple of these together to put it to this final
6 spreadsheet. But to answer your question, the 27,5 is
7 not --
8 Q Not what?
9 A In this estimate. I don't see it.
10 Q Okay. Well, you've got a siding number there
11 from Southern Lumber of 23,417; right?
12 A Yeah.
13 Q And that's just material?
14 A Material.
15 Q And how much material was that?
16 A I'm not sure. I mean, that's porch and
17 railing packages and exterior siding and window wrap
18 packages. We have ice & water shield. We have nails.
19 It's not all -- that's not just strictly siding.
20 There's a lot more other --
21 Q Okay. Because this --
22 A -- that's involved in it.
23 Q This is some references in here to ice & water
24 shield, too, so that's not a separate line item?
25 A It is. I don't know whether it's in this

1 estimate or not.
2 Q Okay. Where would we find the labor to
3 install the siding in your control estimate?
4 A I think we've got that in 062000.
5 Q 062000, is that finish carpentry?
6 A Correct.
7 Q Okay. So in the control estimate, that --
8 now, finish carpentry would include what?
9 A Interior trim, exterior trim and siding.
10 Q Okay.
11 A Finish work.
12 Q So in between the siding from Southern Lumber
13 and the finish carpentry number, that's about $100,000.
14 A On the estimate, yes.
15 Q But that includes some interior work, too;
16 right?
17 A Yes.
18 Q Okay, and all of that is included in this
19 control estimate which shows a price of $722,074?
20 A Totals up to that, yes.
21 Q Did you ever provide the Salzhauers with the
22 proposals or estimates that you received from
23 subcontractors for the work on this project before or
24 at the time it began?
25 A I'm not sure. I get them in -- I usually

1 produce a bid book, similar to this, and it's labeled,
2 you know, foundation, framing, siding, Southern Lumber,
3 and it gets pretty lengthy, about this size, too. And
4 I don't know whether they saw it or not.
5 Q Let's go down and look at the roofing number.
6 You've got 070400, and you have in this document, which
7 is your QuickBooks, you have a zero dollar estimate for
8 the roof; right?
9 A Correct.
10 Q And then Mr. Varnado said that jumped up
11 dramatically to $26,300. Do you see that?
12 A Correct.
13 Q And what was the reason for that jump up?
14 A We replaced metal roofing and flashing, and I
15 don't know, it was just an old roof from a 1991 repair.
16 There was a lot of factors involved in that.
17 Q Okay. How much roof did you replace?
18 A The metal roof, I don't know if you've got
19 that picture, over Annie's --
20 Q Annie's room?
21 A Yeah. And when we redid the tower, as we're
22 calling it, it was basically a -- it was a Sealoflex,
23 if you want to act as a -- it had scuppers, so it was a
24 pond, and that's where the majority of the leaking was
25 occurring that was causing the rot. So what we did is

1 we replaced the whole top of the tower, we framed up
2 the top, and then we fiberglassed the whole top of it
3 just to waterproof it.
4 Q Okay.
5 A So all of that's in the roofing.
6 Q All right. Any more roof work that you can
7 recall?
8 A The awning that goes over to the right side of
9 the house above the porches, we -- there was
10 substantial rot damage behind that, so we had to take
11 the whole awning down. And then, the shed style roof,
12 had to replace that, and then the metal roof there.
13 And there was kind of a -- there was an elliptical to
14 it, so there was a little bit of cost involved in that
15 one.
16 Q Okay. So the roof number was $26,300, that's
17 what ultimately it got to?
18 A Yes.
19 Q Okay. Now, if we can go back to Exhibit 8.
20 THE COURT: I'm sorry. What page were you on
21 when you said -- what's the Bates?
22 A (Continuing) What's what?
23 THE COURT: The Bates number.
24 MR. LYLES: 693.
25 MR. VARNADO: 693 of Plaintiff's.

1 THE COURT: All right.
2 MR. LYLES: Looking at the roof number.
3 THE COURT: Okay.
4 A (Continuing) Roofing, there's nothing there
5 for the roofing and that's what it ended up.
6 THE COURT: Okay. Go ahead. I'm getting too
7 many numbers. Keep going.
8 BY MR. LYLES:
9 Q Okay. Go back, if you will, to Exhibit No. 8.
10 THE COURT: Robert, can you give me one
11 minute?
12 MR. LYLES: Sure.
13 THE COURT: I'm sorry.
14 MR. LYLES: That's all right.
15 THE COURT: Okay, thank you.
16 MR. LYLES: Sure.
17 BY MR. LYLES:
18 Q If we go back, Mr. Brown, to Exhibit No. 8,
19 and we look at the first page of that exhibit, which is
20 your quote to the Salzhauers, I turn your attention to
21 sort of the middle of the page when you're listing, "As
22 building for Beau Clowney in the past, my suggest
23 materials will be," and then if you go down that list,
24 there's a reference there to 5V metal roofing, full
25 envelope of house wrapped and ice -- and Grace Ice &

1 Water Shield. Do you see that?
2 A Yes.
3 Q So you were contemplating using 5V metal
4 roofing at the time you did the proposal?
5 A If that's what was on the plan. I can't
6 remember. Yes.
7 Q And it's on your quote; right?
8 A I'm pretty sure 5V or standing seam went over
9 Andy's work-out room.
10 Q So you were contemplating, at least with
11 regard to Exhibit 8, doing some roofing work?
12 A Yes.
13 Q Okay. And so the reference there to the roof
14 number being estimated cost zero wouldn't be accurate,
15 would it?
16 A No, it would not.
17 Q You've also got a reference on that list, the
18 next line down is, "All decks are to be Ipe/ironwood.
19 Do you see that?
20 A Correct.
21 Q Were any Ipe or ironwood decks utilized at
22 this house?
23 A Yes.
24 Q Where was that?
25 A Front porch.

1 Q Anywhere else?
2 A I think the handrails were made out of Ipe,
3 not around the pool.
4 Q Okay. Your -- if we roll down to your Exhibit
5 7 again, still on page 693, you've got some other costs
6 down there I just want to ask you about. You've got
7 drywall. Do you see that, under finishes, 09.
8 A Yes.
9 Q And you've got $7,500?
10 A Yes.
11 Q And that apparently went up to 19,250?
12 A Correct.
13 Q Why did that go up?
14 A We basically had to tear out all the drywall
15 because we were exposing the exterior walls and the
16 interior walls.
17 Q Okay. So how much drywall did you originally
18 estimate you were going to have to do?
19 A This was a replace on the interior, like in
20 the main body of the house, when we had to tear down
21 the walls and build them back. That's drywall just
22 going -- interior walls.
23 Q Okay. So is drywall priced on a
24 square-footage basis?
25 A Per-sheet basis.

1 Q Per-sheet basis, how many sheets were
2 initially estimated, do you know?
3 A I don't know.
4 Q And how many sheets were ultimately used, do
5 you know that?
6 A I do not, no.
7 Q But you did take down all the drywall on the
8 interior of the house?
9 A The majority of it, yeah.
10 Q Okay. Your plumbing number on the next page
11 40, which is 694, went from 8,000 to 31,245. Do you
12 see that?
13 A Yes.
14 Q And what was the reason for that increase?
15 MR. VARNADO: What was the plumbing number
16 again? I'm sorry.
17 A (Continuing) 15.01.00.
18 MR. VARNADO: Thank you.
19 A (Continuing) Increase, I don't know. I don't
20 have it in front of me.
21 Q What did you originally price?
22 A I bid it from the plans, so that was replacing
23 new bathrooms, per fixture, $400 a fixture. If there's
24 four fixtures in the bathroom, then multiply that times
25 how many are in the bathroom -- how many bathrooms are

1 in the house.
2 Q So that's how we came up with 8,000?
3 A I assume, yes.
4 Q But we don't know how we went four times that
5 to get to the final number?
6 A This includes exterior stuff, too. I don't
7 know. It was all installed, whatever our plumber did
8 to install. I mean, it can go rough plumbing to
9 fixture installs and final installs.
10 Q Should you bill a client for the cost
11 associated with repairing improperly done work?
12 A No.
13 Q Okay. Do you know if that happened with the
14 plumbing?
15 A I'm not sure.
16 Q Or with the HVAC work?
17 A I'm not sure.
18 Q Okay. Your HVAC number went from 4,700 to
19 $44,032. Do you see that?
20 A Uh-huh.
21 Q And why did that go up so much, do you know?
22 A Yes.
23 Q Why?
24 A So when we got in the house and we started
25 doing our demo, we saw the exposed duct from when the

1 house was built in '91. Well, rats, and it had come --
2 the mastic on it deteriorated underneath all the units,
3 and the rats had eaten all the insulation around all
4 the duct, and it just -- it needed to come out and be
5 replaced. So, that's a demo. That's the number from
6 our HVAC subs of pulling it out and replacing all the
7 ductwork, as well as some new units. I can't remember,
8 I think there might have been a wall unit in this
9 house, too, or I'm not sure on that.
10 Q And as I understood it, VLN at least retained
11 initially the HVAC subcontractor?
12 A For the exploratory demo.
13 Q Anything else?
14 A Plumber for the exploratory demo, and then the
15 electrical, too.
16 Q Who retained the HVAC contractor who went in
17 and actually reinstalled all the ductwork?
18 A That was me.
19 Q Okay.
20 A Yeah.
21 Q And who did that work?
22 A That was Timmy Motte's Mechanical. So these
23 initial -- we've been talking about these initial
24 subcontractors with Vuong, that was demo. We had to
25 have a permit to pull this stuff out, and then once we

1 got the house back to a normal state -- if it were a
2 new house, it would be framed up. And then our new
3 mechanical sub to start there and finish it off.
4 Q Let me show you, just to make sure I
5 understand --
6 MR. VARNADO: We've got a new document?
7 MR. LYLES: Yeah.
8 (VLN ESTIMATE MARKED DEFENDANT'S EXHIBIT NO.
9 141 FOR I.D.)
10 BY MR. LYLES:
11 Q I'm going to show you what I've marked for
12 identification as Exhibit 141, and it's a document, a
13 two-page document, that's referenced as Salzhauer --
14 Bates labeled Salzhauer 706 and 707. Do you see that?
15 A Yes.
16 Q Okay. This is, I think, an estimate from VLN
17 to you; is that right?
18 A Correct.
19 Q Okay. And do you recognize the work that he
20 has specified in there?
21 A Give me a second, let me read it.
22 Q Sure.
23 THE COURT: What's the exhibit number on this?
24 MR. VARNADO: 141.
25 THE COURT: Do you object?

1 MR. VARNADO: No, I don't.
2 THE COURT: Okay. Note that 141 is admitted
3 without objection.
4 MR. LYLES: Thank you.
5 (DEFENDANT'S EXHIBIT NO. 141 ADMITTED INTO
6 EVIDENCE.)
7 A (Continuing) Do you want me to go through it?
8 Q Well, I mean, it says what it says. I just
9 want to see if you recognize that exhibit.
10 A It's been years, but if that's what the price
11 he gave us was, this is.
12 Q Okay. And I guess my question is, do you know
13 whether or not Vuong or his subs actually performed
14 this work?
15 A Yes.
16 Q They did?
17 A Yes.
18 Q Okay.
19 A I don't know about all of it. They did remove
20 and relocate the rooftop units that was over this
21 turret, whatever you want to call it. They demoed out
22 the trunk line in the upstairs air handler. Added new
23 spiral duct, I know they had to get that fabricated,
24 take off the two runs on that. They had a bookshelf
25 going in there; we had to modify that spiral duct for

1 there. It looks like he connected some copper lines,
2 installed new condensating drain lines, new return.
3 Q Okay.
4 A Second floor, new duct connections to the
5 kitchen area, new toe vents at the counter, so...
6 Q They did all of that?
7 A It's has been a while. I don't know
8 specifically if he did that or Motte, or even sometimes
9 the kitchen guys will do some of these features.
10 Q I'll show you -- if we could mark this one.
11 (VLN INVOICE MARKED DEFENDANT'S EXHIBIT NO.
12 142 FOR I.D.)
13 MR. VARNADO: 142, it's a three-page document?
14 MR. LYLES: Yes.
15 THE COURT: Without objection?
16 MR. VARNADO: Without objection.
17 THE COURT: 142 is admitted without objection.
18 (DEFENDANT'S EXHIBIT NO. 142 ADMITTED INTO
19 EVIDENCE.)
20 BY MR. LYLES:
21 Q That appears to be some invoicing that VLN did
22 against that proposed $15,000 number; is that right?
23 A Yes.
24 Q Okay, good deal.
25 (VLN INVOICE/CHANGE ORDER MARKED DEFENDANT'S

1 EXHIBIT NO. 143 FOR I.D.)
2 THE COURT: Rob, is 143 okay?
3 MR. VARNADO: Yes.
4 THE COURT: All right, admitted without
5 objection, 143.
6 (DEFENDANT'S EXHIBIT NO. 143 ADMITTED INTO
7 EVIDENCE.)
8 BY MR. LYLES:
9 Q On Exhibit 143, we have a proposal from VLN
10 that -- or an invoice from VLN that says change order?
11 A Right.
12 Q What does that mean?
13 A A change order is based on his original
14 estimate to me. So this, apparently, something has
15 come up where they changed it to a three-zone system
16 instead of -- new connections, new ducts, new wire
17 thermostat -- so it was a -- originally, it was a
18 single system; that's what he bidded on on this
19 estimate that he sent you, 141.
20 Q And that was for $15,000?
21 A Correct.
22 Q Okay.
23 A And then, I don't know if that's when we were
24 talking about Amy, where we wanted it zoned out, where
25 we had master bedroom on a separate zone, and then the

1 girls' room on a separate zone, so that would be the
2 $4,500 change to his estimate.
3 Q Okay. Now, his initial estimate was, that
4 I've seen, is $15,000; right?
5 A Right.
6 Q Now, what you've got on your -- in the white
7 notebook, on Exhibit 7, page 694, you have estimated
8 costs of $4,700. Why is there a difference between
9 what is shown on your QuickBooks as the estimated cost
10 and the estimate that Mr. Nguyen gave you?
11 A That was -- I don't know. That was my
12 original estimate, $4,700, I assume. And then after we
13 demoed the whole house, this was kind of part -- he did
14 this as we were demoing, so this was not accounted for
15 there.
16 MR. VARNADO: When you say "he did this," can
17 you --
18 A (Continuing) Oh, I'm sorry. He did the -- he
19 produced the estimate --
20 Q Exhibit number what?
21 A Exhibit 141.
22 MR. VARNADO: Thank you.
23 BY MR. LYLES:
24 Q Okay.
25 A And it looks like he's -- so in this estimate

1 it looks likes he's adding, modifying to accommodate
2 the new floor plan, so I don't know if there was a new
3 mechanical that came in or what.
4 Q At some point in your testimony the other day,
5 I understood you to say that on a cost plus job a
6 change order would not be expected?
7 A A change order to the client. This is a
8 change order to me on his estimate. He was just
9 notating that it was changing from 15,000 and adding
10 4,500 to it, which would make it 19,5.
11 Q So as to change order -- references to change
12 orders are changes between what they told you the price
13 was going to be, to a new price?
14 A I assume, yes.
15 Q Because --
16 A Yeah, because these are -- his estimate was
17 12 -- 12 -- December 7th, '12, and this one is February
18 the 8th, '13.
19 Q Okay. Now, let me show you --
20 (INVOICE MARKED DEFENDANT'S EXHIBIT NO. 144
21 FOR I.D.)
22 MR. VARNADO: Without objection.
23 (DEFENDANT'S EXHIBIT NO. 144 ADMITTED INTO
24 EVIDENCE.)
25 BY MR. LYLES:

1 Q Let me show you what has been introduced as
2 Exhibit 144. And if you will, this is a -- is what is
3 reflected in Exhibit 144 different than what's
4 reflected in Exhibit 143?
5 A Installed, Goodman condenser unit -- yeah, so
6 that's the Goodman -- that's a condenser unit that's on
7 the roof, and then the three-zone system would be what
8 is in the house.
9 Q Okay.
10 A Yes.
11 Q So that's two units, two different units?
12 A No, it's a single unit, but the condenser is
13 on the roof and the three-zone system would be on the
14 unit in the house.
15 Q So for that total HVAC unit, that cost was
16 $9,700?
17 A Correct, which is pretty good for a unit in a
18 house.
19 Q He doesn't put change order on invoice 144.
20 Is there any significance to that?
21 A I don't even know why he put it on 143. I
22 mean, he was just kind of letting us know that there
23 must have been a conversation where Amy wanted the
24 three-zone system.
25 THE COURT: Robert, I'm sorry, the 9,700 is a

1 combination of 143 and 144?
2 MR. LYLES: Yes, sir.
3 BY MR. LYLES:
4 Q And then we've got -- so we have for VLN on
5 the HVAC, and then we have 15,000 which was the
6 original estimate; right? And then we have the
7 additional 9,700; is that right?
8 A Yes, with a $4,500 change to the original
9 15,000, not at the 19,5.
10 Q Okay. So if we've got 15,000, plus 9,700,
11 which is that new unit, that gives us a total of
12 24,700; right?
13 A No. He's billing -- this invoice, out of his
14 15,000, it looks like he's billing out of the -- his
15 5,200 out of the 15,000. That's what I would assume.
16 It just looks like this invoice from him from 2/8 is
17 different from 12/17, because he's pulling his -- he's
18 pulling -- basing it on his estimate on Exhibit 142.
19 Q Okay.
20 A And then on 144, he's just sending an invoice.
21 Q So the 5,200 is included in the 15, initial
22 15?
23 A Let me see. No. It looks like, his original
24 estimate, he's just removing and relocating the two,
25 five ton rooftop condensers. So this is adding a new 3

1 1/2 ton Goodman unit and a new three-zone system. So
2 this $9,700 is not included in the 15, so this would be
3 a change, an addition to his original estimate.
4 Q So if we added that to the original 15, his
5 total would have been $24,700?
6 A Okay.
7 Q Okay?
8 A Going off what you said, yes.
9 Q That's 15, plus 9,700?
10 A Sure.
11 Q So then the question that I have is, if we
12 look at VLN's work and the new unit that they added, we
13 have -- there's an additional almost $20,000 in HVAC
14 actual costs in your QuickBooks numbers, because that,
15 the total cost for the HVAC, according to your numbers,
16 was 44,032.37.
17 A We're talking about VLN. Now, we add Timmy
18 Motte with M&S Mechanical come in.
19 Q What did they do?
20 A After we had Volkmar, the mechanical engineer,
21 come in, he had us modify some trunk lines and some
22 other things. So that's -- this 27 -- I'm sorry, this
23 $44,032 is a combination of VLN and M&S Mechanical.
24 Q Now, were those trunk lines that had been
25 installed or modified already by VLN?

1 A I'm not sure.
2 Q Did Motte also charge for installing the two
3 dehumidifiers?
4 A I'm not sure. I think he -- I'm not sure.
5 One of the two did.
6 Q Okay.
7 A Actually, I'm pretty sure it was Timmy because
8 it was after the --
9 Q Volkmar?
10 A Yeah, Volkmar.
11 Q And you, of course, heard the testimony of Mr.
12 Schweers that neither of them work?
13 A I don't know if he said they didn't work.
14 Q Okay. He said what he said.
15 A Volkmar said they did work.
16 Q Did Volkmar install the dehumidifiers?
17 A He was -- I don't have his letter in front of
18 me. He didn't install them. He looked at them.
19 Q Okay. So he didn't call for them, he just
20 looked at them?
21 A This was after they were installed. He was
22 saying that everything was working properly.
23 Q Okay.
24 A At the time.
25 MR. VARNADO: That's Exhibit 23.

1 BY MR. LYLES:
2 Q All right. Now, the last number I wanted to
3 ask you about was the electrical number.
4 A Okay.
5 Q Which is on page 695. Your original
6 electrical number was $12,000 and you say it went up to
7 $44,478.50?
8 A Went up to 42,746.
9 Q Okay. Well, if you look at the line below
10 that --
11 A Oh, okay. I'm sorry. I don't know what the
12 1,700 -- $1,732 is.
13 Q Okay. It went up from 12,000 to something in
14 the 40s; right?
15 A Sure.
16 Q What was the reason for that cost increase?
17 A We had to take down -- we had to gut the
18 majority of the old electrical in there.
19 Q You didn't anticipate that as part of your
20 original --
21 A No.
22 Q -- pricing on the job?
23 A I mean, we got in there and there was a bunch
24 of bad wiring and wire nuts, and you can see it on the
25 inspection report, so we replaced those.

1 Q Did you essentially replace all the wiring in
2 the house?
3 A Not all the wiring. The nanny's side of it,
4 we left that intact.
5 Q Okay. You saw the pictures during the week
6 that we've had here together of the wires being
7 penetrated by nails. Is that work that was done by
8 your company?
9 A A subcontractor, yes.
10 Q Okay. Who did that work?
11 A I don't know. We had -- one of the two
12 electricians.
13 Q Who was the subcontractor who did the -- who
14 actually put the nails in?
15 A There's no telling. It could be a drywall
16 nail, it could be a trim nail, it could be a
17 carpenter -- and then we did find -- do you have the
18 sheets?
19 MR. VARNADO: The sheets for what?
20 A (Continuing) The code. Is this an exhibit?
21 MR. VARNADO: No, it's not.
22 A (Continuing) Okay. So, I called Randy
23 Robinson, the Sullivan's Island inspector, yesterday.
24 He informed me --
25 Q Excuse me. I'm not -- don't tell me what Mr.

1 Robinson said.
2 THE COURT: Mr. Brown, I can hear testimony
3 of what other people have said if it's something you
4 acted on. But if you're trying to prove what the code
5 said with a call to someone else, I can't consider
6 that.
7 A (Continuing) Okay.
8 Q Were you out there when they covered up the
9 wiring in the walls?
10 A When they covered it up, yes.
11 Q So you were there when the drywall went up?
12 A I wasn't watching -- what was your question?
13 Q Sure. Were you there when they covered up
14 that wiring in the walls?
15 A With the drywall?
16 Q Yes.
17 A Yes.
18 Q And it did not dawn on you to install a
19 protector, nail protector, nail guard?
20 A It's not code to.
21 Q So that was a decision that was made by you?
22 A It was a decision made by me to what, cover it
23 up?
24 Q To not install the nail guards.
25 A Yes.

1 Q Okay. And then who made the decision on which
2 nails to use to either put up drywall or trim?
3 A That would be the trim carpenters. So these
4 guns, they run a 1 1/4 inch nail to a two-inch nail --
5 or 2 1/2 inch nail.
6 Q And who was the trim carpenter?
7 A That was Kenny Brinson, Marshview.
8 Q And who did he work for?
9 A He's got his own company. He had guys out
10 there.
11 Q Who did he work for on this job?
12 A I think it was Frank. I forget their name.
13 M&L Woodworking.
14 Q Okay. And then M&L was retained on this job
15 by who?
16 A By me.
17 Q So he worked directly for you, Mr. Brinson?
18 A He didn't work for me. He was a subcontractor
19 of M&L.
20 Q Okay.
21 A And I think he -- I think there was at some
22 point in that job where we retained him to finish up
23 some stuff on the end.
24 Q Did you check and confirm the length of nails
25 that he was going to use to put the trim up?

1 A No. But there's nothing to say you can't run
2 a two-inch nail. I mean, how long were the nails that
3 hit it?
4 Q I couldn't tell you. I just know they were
5 long enough to hit it.
6 A I can't tell you how long they were if I don't
7 see it. That could be a -- it could be a -- it could
8 be the smallest nail that could go in the gun, but
9 until you've got the nails and the board in here, I
10 can't tell you.
11 Q Would you agree with me that nails shouldn't
12 penetrate the electrical wiring?
13 A Well, of course.
14 Q Is there anything you can do to assure Miss
15 McMarlin and her husband that there's no other location
16 in that house where nails penetrate the electrical
17 wiring?
18 A I can't -- but I can honestly say that if it
19 hasn't burned down in four years, probably your house
20 is not going to burn down. Normally, this stuff
21 happens within weeks or a month.
22 MR. SALZHAUER: That's comforting.
23 A (Continuing) That's a common sense approach, I
24 guess.
25 MR. LYLES: Let me have just a couple of

1 minutes with these folks.
2 (Whereas, a brief recess was taken.)
3 BY MR. LYLES:
4 Q Mr. Brown, just very quickly going back
5 through, I showed you Exhibits 143 and 144 which
6 referenced a new 3 1/2 ton Goodman condenser unit, and
7 I think that your testimony was that those -- both of
8 those invoices related to one unit; is that right?
9 A I'm sorry. Which --
10 Q Exhibits 143 and 144.
11 A I don't know. This Goodman would have went on
12 the right side of the house to replace that one. I
13 don't know if it was on the main body or the one on the
14 right. I don't know where this one went.
15 Q Okay. All right. Do you know how many new
16 HVAC units you installed at the house during the
17 renovation?
18 A The existing ones were in the main body of the
19 house. We repaired those and added the two
20 dehumidifiers. And then I can't remember if there was
21 a wall in Andy's playroom -- just -- I'm sorry, it's
22 been a while.
23 Q Okay.
24 A But going off of his two invoices, right now I
25 look at this and I would say one.

1 Q Okay. And this, of course, is just VLN. We
2 haven't looked at Motte's invoices.
3 A Correct.
4 Q Do you have any recollection of Motte
5 installing a new unit?
6 A I don't -- I can't remember.
7 Q Now, I'm going to ask you --
8 MR. LYLES: Rob, this is Exhibits 5 and 6.
9 BY MR. LYLES:
10 Q I'm going to ask you, Mr. Brown, to turn and
11 look at Exhibit 6.
12 A Okay.
13 Q And you will see that Exhibit 6 was made an
14 exhibit to your deposition, which was taken on November
15 the 20th, 2015. Do you see that? And what I'm --
16 it's got that exhibit sticker that says 7 Brown
17 11/20/15.
18 A Okay.
19 Q And do you remember seeing that exhibit when I
20 took your deposition --
21 A I don't remember --
22 Q -- where I was discussing it?
23 A I don't remember seeing this.
24 Q And do you -- so you don't remember me and you
25 talking about it in your deposition?

1 A I remember us talking about it. I just don't
2 remember seeing this exact one.
3 Q And were you aware in May of 2015 that Mr.
4 Nguyen had demanded that his license no longer be
5 associated with Jay Brown Contracting?
6 A Was I aware of it at the time?
7 Q Yes.
8 A I can't -- I can't remember. But if it's --
9 this is like -- from this date, it looks like he pulled
10 it from the LLR.
11 Q Okay. But you don't know if you were aware of
12 that at the time or not?
13 A I'm not aware.
14 Q And did you know whether or not Miss Sweat
15 ever talked to you about that?
16 A I spoke with Miss Sweat prior to this, but,
17 no, not afterwards.
18 Q Okay. But you and I talked about this in your
19 deposition. You'll agree with that?
20 A Okay, yes.
21 Q Okay. All right. And then if you'll go back
22 and look at Exhibit 5, that appears to be a letter that
23 Mr. -- or that VLN, LLC, sent to the LLR. Would you
24 agree with that?
25 A I don't know if he sent it to the LLR or not.

1 Q Okay. It was also an exhibit to your
2 deposition?
3 A Okay, yes.
4 Q Do you see that -- did you know that in August
5 of 2012, that Mr. Nguyen had -- if I'm not saying his
6 name right, I apologize.
7 A That's okay.
8 Q After four years, that's my best shot.
9 MR. VARNADO: I think he's used to it.
10 A (Continuing) Try to spell it.
11 Q Were you aware in August of 2012 that Mr.
12 Nguyen was asking that the Certificate of Authorization
13 be removed as it relates to his license?
14 A I was not.
15 Q Okay.
16 A I really -- I don't understand this because
17 he's pulled permits after this for us.
18 Q Okay. But you had no idea that this was --
19 A No idea.
20 Q -- going on? And he just never -- he never
21 told you that?
22 A No, and I don't know why he would even do
23 this.
24 Q Did he know that you had pulled the permit for
25 the -- for Amy's house using his license?

1 A Did I know that he pulled that?
2 Q Did he know that?
3 A Yes. He was there with me.
4 Q When you pulled the permit?
5 A Me, him and Kat Kenyon went to the Town of
6 Sullivan's Island.
7 Q But he never spoke to you about this
8 communication with the LLR?
9 A Not at all.
10 Q Okay. But you and I did talk about it at your
11 deposition?
12 A What I remember, yes.
13 Q Okay.
14 THE COURT: Are you-all going to submit the
15 depositions of the parties? I mean, I think either
16 one of you is entitled to them regardless of --
17 MR. LYLES: I think I will, and I would like
18 to move to introduce these exhibits into evidence. And
19 then Mr. Brown was asked a question the other day
20 about, in his initial testimony, about claims made
21 against his license, and he said that he knew of none,
22 and I think that he did know about them. I think he
23 knew about the exhibit, Exhibit 7, and I know that he
24 knew, because of his deposition, about these efforts on
25 the part of VLN, and so I would move to introduce those

1 as exhibits.
2 THE COURT: Okay. Rob, comment on it. Let me
3 think, but give me your side of it before I --
4 MR. VARNADO: Well, you know, these are
5 definitely hearsay, and Mr. Nguyen could have been a
6 witness and isn't, so, and these are not copied to Jay.
7 I've been very good about admitting all sorts of
8 evidence, especially that bears Bates stamps or that
9 Jay was copied on, or back and forth. But these two, I
10 don't know.
11 Now, I agree with you that they're exhibits to
12 the deposition, and so if you want to see the
13 deposition, you'll see the exhibits, so...
14 THE COURT: Subject to what was said in the
15 deposition.
16 MR. VARNADO: Yeah, subject to what was said
17 in the deposition.
18 A (Continuing) May I respond to something you
19 asked me earlier?
20 THE COURT: No.
21 A (Continuing) Oh, sorry.
22 THE COURT: I think the rules allow a
23 deposition of a party or a managing agent to be used
24 for any purpose.
25 MR. VARNADO: That's true.

1 THE COURT: And I can take the deposition
2 simply because it's offered. I don't think you have to
3 have either side's agreement. So I will accept the
4 deposition of Mr. Brown, and if you want to put in
5 the --
6 MR. VARNADO: Might as well. Might as well.
7 THE COURT: Okay. Now, I think as far as
8 taking this letter as proof of what is stated in it,
9 that he in fact consciously pulled his license, I don't
10 think I can do that. I think it would be hearsay to
11 prove that he did this in the absence of his
12 authentication or verification. I think I -- you have
13 asked him what he knew about the circumstances, I've
14 heard his testimony. I think I probably should not
15 take either five or six based on the testimony here, or
16 take them as proof of the fact that he did in fact pull
17 it, unless this comes out of LLR. If this document was
18 produced in their file, I can take it as a document
19 that was in their file.
20 MR. LYLES: It was produced in response to a
21 FOIA request that we made to the LLR.
22 THE COURT: Rob, do you agree this is a
23 document from the LLR files?
24 MR. VARNADO: I don't know that.
25 MR. LYLES: I can provide the documentation of

1 that. I wouldn't have gotten these any other way.
2 THE COURT: Provide that, then I can take it
3 as something that was in the LLR files for whatever,
4 that they received it, it was in their file. And
5 whether it has any bearing on the existence of the
6 license or not, I'll take it into consideration under
7 those circumstances.
8 MR. VARNADO: That's fair. Let Robert get you
9 the FOIA response.
10 THE COURT: Yeah. If it's produced --
11 MR. VARNADO: If it's produced as part of the
12 FOIA, subject to the limitations you put on it,
13 then you can take it for whatever it's worth.
14 THE COURT: Take it for what it's worth, as a
15 document within LLR, okay. Does that handle it?
16 MR. LYLES: Yes.
17 THE COURT: Okay. Rob?
18 MR. VARNADO: Yes, sir.
19 THE COURT: All right. I will consider these
20 letters, assuming documentation is given to me showing
21 that it came from LLR and was in their file, and it
22 will mean that it was in the file. It won't be proof
23 that Mr. Vuong actually sent it and that was his
24 intent.
25 MR. LYLES: Okay.

1 THE COURT: All right.
2 MR. LYLES: I don't think I have any more
3 questions of Mr. Brown.
4 MR. VARNADO: I have some. It won't be long.
5 And then I know you'll have some, or maybe.
6 THE COURT: Maybe.
7 MR. VARNADO: Okay.
8 CROSS-EXAMINATION
9 BY MR. VARNADO:
10 Q Mr. Brown, seeing that it's 11:00 and we're
11 trying to wrap it up, can you -- you did some -- you
12 pulled some photographs from your laptop computer that
13 show the finished state of the house, and I'm going to
14 mark them as exhibit -- the next Plaintiff's exhibit.
15 A Those are actually during construction.
16 Q During construction?
17 A Yes.
18 (PHOTOGRAPHS MARKED PLAINTIFF'S EXHIBIT NO. 22
19 FOR I.D.)
20 BY MR. VARNADO:
21 Q Bear with me. It's a lengthy, composite
22 exhibit. So using Exhibit 22 and Exhibit 7, the job
23 estimates versus actual details for 1850 Flag, can you
24 just tell Mr. Brown what was going on with the house.
25 And you've heard the testimony now of Miss McMarlin and

1 you've heard the testimony of Mr. Salzhauer, you've
2 heard the testimony of Cameron Glaws, you've heard the
3 testimony of Miss Wenner, all of the witnesses, Howard
4 Brown. Can you just tell a little bit about the house
5 and what was going on with it?
6 A Yes. Just after everything I've heard, I just
7 want to say that when we originally met with Amy, it
8 was our full intent to get this done for as least
9 amount of money as we could. She closed on the house.
10 We started getting in there and pulling apart some of
11 the windows, and then we realized we had to do
12 exploratory work. So we pulled -- I pulled an
13 exploratory permit with the Town of Sullivan's Island
14 so we could take down, look what is inside the walls,
15 let's look at what we could see, so we started pulling
16 apart various items about the whole house.
17 Once we got in there, we realized it was just
18 severely damaged. The windows, probably 90 percent of
19 them had failed, that's allowing water penetration into
20 the house. They had a Tyvek wrap that was from '91
21 that was just completely deteriorated. The insulation
22 was soaked. It was then we assessed that, hey, we have
23 got a bigger problem here than what was in any original
24 bid estimate, whatever you want to call it. Went over
25 with Amy, we walked it. We had guys pulling off stuff

1 for weeks. As we're doing this, like I stated earlier,
2 band board rot, framing rot. It had to be repaired.
3 So when we pulled -- went and talked with
4 Randy with the Town of Sullivan's Island, he gave us
5 a -- once we pulled our permit, we put the house back
6 together. So it's -- we redid the framing. We pulled
7 every bit of exterior OSB off the house, replaced it
8 with CDX siding. We wrapped the whole house in --
9 instead of tar paper or Tyvek, we did an ice & water
10 shield, which is a Bituthene membrane.
11 I do -- I build on the islands for a reason.
12 There's a different element than with any other house.
13 You have to use stainless steel fasteners on all
14 exteriors. You have to use MP1, it's a type of caulk
15 that's a polyurethane, so the saltwater and the air and
16 the elements can't deteriorate this. I've gone behind
17 a lot of builders in the past and corrected their
18 stuff, too. They just didn't know, you know. Our
19 intent was to preserve this house as much as we could.
20 We did that.
21 We came back with all new electrical, all new
22 mechanical. We refixed the entire turret of the roof
23 that was basically a bathtub that was leaking,
24 penetrating all the way to the ground floor through the
25 wall systems. We had to get in there and jack up

1 joists. We had to replace any type of -- I'm a
2 structural guy. This stuff has to be put together
3 good. We used pressure treated wood, we used
4 galvanized nails for framing, we used AdvanTech
5 flooring, all the high elements.
6 Q Well, on your Exhibit 7 in the white notebook,
7 the -- it's a four-page document, job estimates versus
8 actual detail, and you'll see that on the second page,
9 page 2, job estimates versus actual detail from
10 QuickBooks, Brown 0693, the decks -- the -- let's see,
11 the decks and --
12 THE COURT: Exhibit 7?
13 MR. VARNADO: Yes, it's Exhibit 7.
14 THE COURT: I've got unpaid bills.
15 MR. VARNADO: Keep going to -- 0692 to -- it's
16 the last part of the Exhibit 7.
17 THE COURT: Okay.
18 MR. VARNADO: Back of that. So Robert and I
19 have been talking about that with him this week.
20 BY MR. VARNADO:
21 Q So the first group of, on page 2, the first
22 group of line items, or items, was that part of the --
23 and you'll see that the actual cost went up
24 dramatically. Was that the result of the -- what you
25 described?

1 MR. LYLES: Which number are you --
2 MR. VARNADO: 0963.
3 MR. LYLES: I see that, but which particular
4 line item are you looking at?
5 MR. VARNADO: Top ones.
6 MR. LYLES: Porches and decks?
7 MR. VARNADO: Yeah, and everything down that
8 whole group. I'm trying to move fast, Robert.
9 BY MR. VARNADO:
10 Q So that went up I think $454,000?
11 A Yes. When -- as soon as we determined this
12 house was in a bad condition, this estimate went
13 completely out the window. I mean, it's going to --
14 unless you're the most ignorant person in the world,
15 it's going to escalate from the budgeted ballpark price
16 right then. So, we talked it over with Amy, it had to
17 be done. She talked with her dad, Hank. I don't
18 remember if I met with Hank on it, but I explained to
19 him it's in a bad state, we've got to get it to a good
20 state. Since we have everything gutted, we're
21 essentially building a new house now as much as we
22 could, so we're running -- that's when we progressed to
23 moving on to all new -- well, I wouldn't say all new
24 everything, but we got it back to a good state before
25 the finishes.

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20 state. Since we have everything gutted, we're
21 essentially building a new house now as much as we
22 could, so we're running -- that's when we progressed to
23 moving on to all new -- well, I wouldn't say all new
24 everything, but we got it back to a good state before
25 the finishes.

1 Q So you've heard them say that you promised
2 dates of completion?
3 A There's no contractor in the area could -- the
4 best ones cannot give you a date if you have to go
5 through this and you don't have control of the finishes
6 that are coming into the job. I had -- she's got
7 interior designers. We have tile showing up on the
8 job. We have Farrow & Ball paint. We don't have any
9 control over what it is. We don't have any control on
10 how much they spend on it. Cortney Bishop, interior
11 designer, is sending bills in the office. These guys
12 are telling us to pay, submit them and pay them, which
13 they did, but it is all elevated now. If you've got a
14 5,000 dollar tile budget and it goes up to 30,000, that
15 is beyond my control. We had no -- we had no idea how
16 much this was coming in at.
17 Q Well, let's just break it down. The first
18 part, the demo and everything you found in the demo
19 which required extra work, that would be on page 2 of
20 the job estimates versus actual details. And if you
21 look at the top, you see 454,019, right, was the cost
22 of that first group; correct? The decks and porches,
23 the cabinets, the paneling, the siding, exterior, all
24 came out.
25 A I'm not seeing your 454. Where is that? What

1 page?
2 Q Page 2, right there.
3 A Oh, 454.
4 Q Yeah.
5 A Right. Yeah, so this is getting -- that
6 explains it right there. I mean, this is -- you've got
7 cabinets. We have cabinetry. Mantels, we didn't pick
8 those out. The closet systems. She added her master
9 closet and we didn't even have a number to do that.
10 She was adding things. The majority of these additions
11 are -- additions to the actual cost are from stuff that
12 weren't even -- we didn't originally have a number on
13 it.
14 Q Okay. So, and then the -- is that the same
15 with the window number?
16 A Windows, we were originally going to -- we
17 were going to -- she wanted to repair the original
18 windows. There was no way. They had all failed.
19 Since we were going back with a new window, I suggested
20 that they need to be impact because it's rated to --
21 hurricane and storm rated, Dade County ratings that --
22 and plus you save about 15 percent of your insurance by
23 having your whole house done in an impact window and
24 door system.
25 Q I suggested, and when I was examining Hank,

1 that part of the problem was you had Amy here in
2 Charleston, correct, and she was coming to the job site
3 when you weren't there, or sometimes when Vuong wasn't
4 there, sometimes when he was, and she is directing the
5 sub-subs and the subs?
6 A Yes.
7 Q Okay. And she's adding things. She doesn't
8 like the layout of the things; is that fair?
9 A Not only that, changing things. Just the
10 amount -- if you look in this right here, we did nine
11 different colors for the existing floor that was put
12 down in 1991. Nine. My highest -- my biggest client
13 I've ever had, we've done three. So, these floors had
14 already been sanded by a couple of previous remodels.
15 Like Howard Brown explained, once you get to a point in
16 the tongue, you can't sand these things anymore. We
17 were at this point. So this was -- when we sanded it
18 down -- well, we did -- these were samples, and we
19 explained to her, this is it; after this, your floors,
20 you're not going to have a resanding issue -- you're
21 not going to be able to refinish these floors again,
22 they're going to have to be replaced. I suggested
23 replacing the entire house. No, didn't want to do
24 that.
25 Q Were you on the job every day or most every

1 day?
2 A It wasn't every day, but I was on it sometimes
3 three times a day. Maybe I've got -- my project
4 manager on the job, who is a general contractor, even
5 on all of these jobs, are fully competent on doing
6 this. We do the highest of high-end houses on the
7 island. I have bigger paperwork duties to do. I have
8 insurance to pay. We have payroll to sign. But the
9 amount that I was on this, it was -- I get -- let me
10 explain something to you. Construction workers start
11 at -- the majority of these guys live up 26. They beat
12 traffic. They get on the job at 7:00; they leave at
13 4:00. When clients come out to the houses, it's at
14 noon or it's at 5:00, after work. That's why you don't
15 see people on the job. That's what went on in this
16 case.
17 Amy was such a problem on this job, to the
18 end. I just -- I had to beg for subcontractors to just
19 stay and finish like I have never begged before. They
20 just didn't want to deal with her. And it was -- it
21 just got to a point towards the end -- and then to top
22 it off, not getting paid to be able to pay these guys
23 was the ultimate, you know. But we got it, we got a
24 CO, got it done, and then she was still having work
25 done on the house afterwards. And the biggest kick was

1 not getting the promised overhead and profit the day we
2 got the CO.
3 Q What was the promise that Hank --
4 A Hank and I agreement were -- and I think
5 Deborah attested to this. Hank, if you're so -- I
6 said, if you're so unsure about us on this job -- you
7 had faith in me at the beginning of this. If you're so
8 unsure, hold our profit to the end and pay us at the CO
9 date.
10 Q Did he promise that?
11 A Yes, he promised that. Did that get done, no.
12 Q Is that the reason why there's a lien?
13 A Yes. If he would have simply -- if the man
14 would have done what he said, paid us, we wouldn't be
15 in this situation.
16 Q Okay. So the -- I know -- we don't have to go
17 over it again, but that's the -- that's basically what
18 happened. You had Hank in New York who is trying to
19 have you redo the numbers and --
20 A He ran Deborah around like crazy. I mean,
21 I've never -- she's -- there were -- we had to talk her
22 down a couple of times off the ledge.
23 Q And then you have Amy who is here in
24 Charleston who is talking to subs, directing subs?
25 A Oh, yes. I mean -- yes.

1 Q Okay. And did you -- did you use good faith
2 when you billed them?
3 A The best faith. I run my office -- I run my
4 office, it's total transparency. That means they could
5 come in any time they want to. If Hank needs a
6 document, Deborah can email it to him right then. Just
7 so when it comes down to situations like this, as this
8 guy said yesterday, no fraud. You can't get to where
9 you're at doing things the wrong way.
10 Q And you've heard Hank say that he asked and
11 asked and asked for documents and he didn't get them.
12 What's your opinion --
13 A Hank would send out 12 emails a day. I'm in
14 the field. Construction guys are not sitting here at a
15 computer punching a button every day. Deborah is there
16 trying to pacify him as much as she could, and I think
17 she did a really good job at it. We went outside of
18 the realm of taking our billing from QuickBooks, which
19 we know, and then putting it into his AIA cost control
20 document, and signing it and expecting a check.
21 MR. VARNADO: I would like to move 22 in.
22 It's just the pictures of the house.
23 THE COURT: I assume that they are presented
24 as accurate representations?
25 MR. VARNADO: They are.

1 THE COURT: Conditions on the --
2 MR. VARNADO: They are.
3 THE COURT: Let me talk to the attorneys.
4 MR. LYLES: (To Ms. Salzhauer) I understand
5 the issue. I got it, I got it, I got it, but I don't
6 see any reason to object to introducing these. I got
7 another thing I want to say about them; okay? So
8 just --
9 MS. SALZHAUER: I just see pictures of another
10 house here. These are not my house.
11 MR. LYLES: Okay, fair enough. Fair enough.
12 THE COURT: If it's another house, I'll be
13 able to recognize if it's --
14 A (Continuing) That's not this house.
15 THE COURT: Mr. Brown, you're not being
16 questioned.
17 A (Continuing) Okay. Sorry.
18 THE COURT: You answer questions, and you
19 don't participate in the conversation between the
20 attorneys and me. Is that okay?
21 A (Continuing) Yeah. I'm sorry.
22 MR. VARNADO: This is another set of pictures
23 which I haven't put in, and that's the set of pictures
24 from your house.
25 THE COURT: Hold on, let's get the record

1 clear. Now, the other thing we're going to do, we have
2 marked as 22 those photographs, but we must have 30,
3 with no identification of what they are, and so someone
4 please mark them as A, B, C, D or something.
5 MR. VARNADO: Okay.
6 THE COURT: And we'll want Miss Sampson to
7 note that so that we have a record.
8 MR. VARNADO: Okay, we will do that.
9 THE COURT: Now, Robert, are you willing to
10 take them? Are you going to object to them?
11 MR. LYLES: What has been handed to me is this
12 stack of --
13 THE COURT: Yes.
14 MR. LYLES: And this is what's at issue?
15 THE COURT: Yes.
16 MR. LYLES: Okay. I have no objection to the
17 introduction --
18 MS. SALZHAUER: These aren't my house.
19 MR. LYLES: -- of these.
20 THE COURT: All right. And I understand.
21 Miss Salzhauer, do me the same favor I asked of Mr.
22 Brown. Let the court and the attorneys monitor this.
23 MS. SALZHAUER: I was only concerned because I
24 saw a stack --
25 THE COURT: Please let us handle this. I

1 understand your issue. Believe me, I do. But those
2 are accepted. You're not objecting to those pictures,
3 offered under the terms and the testimony presented.
4 MR. LYLES: Correct, Exhibit 22.
5 (PLAINTIFF'S EXHIBIT NO. 22 ADMITTED INTO
6 EVIDENCE.)
7 THE COURT: All right. Now, let's give those
8 to Miss Sampson to mark. But in some way or the other,
9 we need an index or a record.
10 MR. VARNADO: She has marked them, and at a
11 break I'll put A, B, C, D. Some of these are two, some
12 of these are one, but they just show the house.
13 THE COURT: I understand. A year from now, if
14 someone appeals this, and there are photographs that
15 are contested, oh, that photograph wasn't in evidence,
16 we're going to have a problem. I just don't want any
17 concern later as to the documents that were introduced
18 and used here today.
19 MR. VARNADO: I understand. All right.
20 BY MR. VARNADO:
21 Q Also, Mr. Brown, you pulled these 20 and 21?
22 A Yeah, for him.
23 Q And these represent copies with the backups?
24 A Yes. Our invoice, and then, as he requested,
25 every subcontractor invoice for the entire job is in

1 that right there (indicating).
2 THE COURT: All right, let me be clear. I
3 asked a question of the attorneys, is there a complete
4 audit accounting at the end of the job. I want to get
5 the record clear, I have not asked anybody to put
6 anything into evidence.
7 MR. VARNADO: That's fair.
8 THE COURT: Now, Rob, you have brought those
9 records.
10 MR. VARNADO: And I would like to move them
11 into evidence.
12 THE COURT: Do you need time -- I understand
13 that's a lot of data you've just gotten. How do you
14 want to deal with it?
15 MR. LYLES: I would like to ask some questions
16 about their origin.
17 THE COURT: Certainly. All right, they're
18 identified. You've moved them. I won't act on it
19 until I hear your questions --
20 MR. LYLES: Okay, fair enough.
21 THE COURT: -- and you've had a chance to deal
22 with them.
23 BY MR. VARNADO:
24 Q Okay. And then the last thing I want to ask
25 you about is the nail plate protection.

1 A Yes.
2 Q And you brought this document, did you not?
3 A Yes.
4 Q And you can't tell us about what Randy
5 Robinson told you.
6 A Okay.
7 Q But you can tell us about how you got this
8 document, I believe. You have to actually let Mr.
9 Brown make this decision, but I understand that you can
10 testify about how you got this document, and what it
11 shows and what you believe to be the --
12 THE COURT: Well, just ask him the question.
13 Robert has been real considerate with leading, and I'm
14 listening to it, understanding that, but let's let the
15 witness testify.
16 BY MR. VARNADO:
17 Q Okay. What is this document?
18 A All right. I understand -- listen, I'm very
19 concerned about a client's house burning down. I
20 wouldn't have suggested the sprinkler system --
21 THE COURT: What is that document? That's the
22 question.
23 A (Continuing) Okay, this an IRC document
24 stating that you do not need protective cable, you
25 don't need these guards, if --

1 THE COURT: What's the version of the IRC?
2 A (Continuing) This is '09 IRC. That's what we
3 were going by at the time, before it was -- they re-did
4 it in '15.
5 THE COURT: Okay. Is there another question?
6 MR. VARNADO: Yes, sir.
7 BY MR. VARNADO:
8 Q Can you explain what you understood the code
9 to be for the IRC, or what you understand the code to
10 be for needing nail guards?
11 A Yes. If -- sorry nail guards didn't get put
12 on there, but if there's a half-inch hole borne in a
13 2x4 stud, like it showed on Howard Brown's picture, the
14 code allows for, as long as the wire is 1 1/4 inch from
15 the outside of the face of the studs, then it's going
16 to give us a half-inch play where that is. That's the
17 code. So, they're not required.
18 Q Okay, I think that's all I have. Now, he may
19 have some redirect, and he may ask you questions about
20 those two documents.
21 A Sure.
22 Q And then Mr. Brown will ask you questions.
23 A Okay.
24 REDIRECT EXAMINATION
25 BY MR. LYLES:

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

CASE NO: 2014-CP-10-3881

BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

Plaintiff,

vs.

ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER

Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

vs.

JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION, CO., LLC

Third-Party Defendants.

OFFER OF SETTLEMENT
S.C. CODE ANN. § 29-5-10(b)

TO: ROBERT T. LYLES, ESQUIRE, ATTORNEY FOR DEFENDANTS:

Pursuant to S.C. Code § 29-5-10(b), the Plaintiff Brown Contractors, LLC, by and through its undersigned attorneys, makes the following offer of compromise for settlement of the lien, exclusive of interests and costs, of Seventy-Five Thousand and No/100 ($75,000.00) Dollars.

[Signature on following page]

BROWN & VARNADO, LLC

By: _____

Robert B. Varnado
Alexis M. Wimberly
P.O. Box 1127
Mt. Pleasant, South Carolina 29465
Telephone: (843) 737-7300
Facsimile: (843) 654-5109
rvarnado@brown-varnado.com
awimberly@brown-varnado.com
Attorneys for Plaintiff

October 3, 2016
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

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BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378

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Defendants,

ANDREW MCMARLIN AND AMY SALZHAUER,

Third-Party Plaintiffs,

vs.

JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION CO., LLC,

Third-Party Defendants.

OFFER PURSUANT TO S.C. CODE ANN. § 29-5-10, et. seq.

YOU WILL PLEASE TAKE NOTICE that Pursuant to South Carolina Code Annotated §29-5-10 *et seq.*, ANDREW JOSEPH MCMARLIN and AMY SALZHAUER ("Defendants") hereby submit an Offer of Settlement and will accept payment of the amount of Two Hundred Fifty Thousand and no/100 Dollars ($250,000.00), exclusive of interest and costs, for the settlement of the mechanic's lien and other claims of Plaintiff and in full satisfaction of the counterclaims and third-party claims asserted by Defendants in the above matter.

If this Offer of Settlement is not timely accepted, Defendant shall seek to recover from Plaintiff all amounts allowable by law.

Dated this 28 day of August, 2017.

LYLES & ASSOCIATES, LLC

Robert T. Lyles, Jr., Esquire
342 East Bay Street
Charleston, SC 29401
Phone: 843-577-5530
Fax: 843-577-7172
rtl@lylesfirm.com

Counsel For Defendants Andrew McMarlin, Amy Salzhauer, et al.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

RECEIVED
JUL 01 2020
SC Court of Appeals

The Honorable Henry W. Brown
Special Referee

APPELLATE CASE NO.: 2019-000513

Brown Contractors, LLC under S.C. Residential Builders License No. 20378,
.....Appellant/Respondent,

v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer,
.....Respondents/Appellants,

And

Andrew McMarlin and Amy Salzhauer,
.....Respondents/Appellants,

v.

James Brown IV and Brown-Meihaus Construction, LLC,
.....Third-Party Defendants.

CERTIFICATE OF COUNSEL FOR VOL. I

Pursuant to Rule 268(g) of the South Carolina Appellate Court Rules, the undersigned attorney hereby certifies that this ***Record on Appeal Vol. I*** contains a true copy of all materials proposed to be included by the Respondents/Appellants (as were contained in Respondent/Appellant's briefs) and no other material.

Robert B. Varnado (SC Bar # 0007085)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant/Respondent and Third-Party Defendants.

July 29, 2020
Mt. Pleasant, South Carolina