THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Henry W. Brown
Special Referee

Unpublished Opinion No. 2022-UP-175
Filed April 20, 2022
Petition for Rehearing Denied May 19, 2022

Appellate Court Case No. 2019-000513
Trial Court Case No. 2014-CP-10-3881

Brown Contractors, LLC under S.C. Residential Builders License No. 20378,

.....Petitioner,

v.

Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin and Amy Salzhauer,

.....Respondents.

APPENDIX VOLUME I

/s Robert B. Varnado

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S.C. SUPREME COURT

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

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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
	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,	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

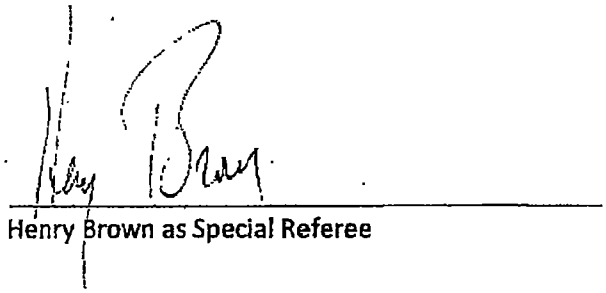
STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS
	CASE NO: 2014-CP-10-3881
BROWN CONTRACTORS, LLC, under S.C. Residential Builders License No. 20378 Plaintiff, vs. ANDREW JOSEPH MCMARLIN A/K/A ANDREW JOSEPH MC MARLIN AND AMY SALZHAUER Defendants,	**ORDER DENYING RULE 59 MOTIONS 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.)	**ORDER AWARDING ATTORNEY'S FEES**
Andrew Joseph McMarlin a/k/a Andrew Joseph McMarlin 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 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.

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

2014 JUN 18 PM 4:32
CLERK OF COURT
CHARLESTON COUNTY

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.

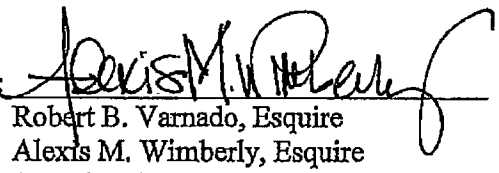
30. Defendants, and each of them, have retained the benefits, as established above, under such circumstances that make it unjust and inequitable for said contributions to be retained without paying Plaintiff for their full value.

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
103 Church Street (29464)
P.O. Box 1127
Mt. Pleasant, South Carolina 29465
(843) 737-7300
(843) 654-5109 fax
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 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, vs. JAMES BROWN, IV and BROWN-MEIHAUS CONSTRUCTION, CO., LLC Third Party Defendants.	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2014-CP-10-3881 **PLAINTIFF'S REPLY TO DEFENDANTS' AMENDED COUNTERCLAIMS AND THE THIRD** (Jury Trial Demanded)

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.

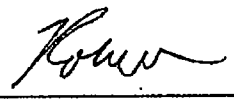
AS AN ADDITIONAL DEFENSE
(Reservation/Non-Waiver)

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.

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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,

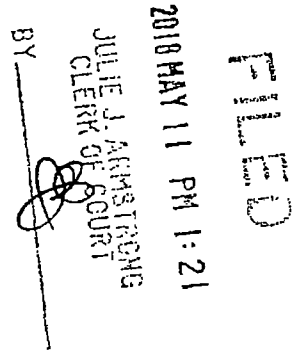
Third-Party Plaintiffs,

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



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

cost-plus jobs; that this project was billed as a cost-plus job; and that Hank Salzhauer and Amy Salzhauer McMarlin were well aware of that fact, as demonstrated by not only by the proposed contracts but by the billing details that Brown Contractors sent Mr. Salzhauer.

11. Proceeding without a written contract was an oversight on Jay Brown's part, but this oversight falls equally on the Defendants, who accepted the cost-plus clearly billing system. Each invoice prepared and sent by Brown Contractors clearly had a "overhead and profit" number of 15% as the last entry on the invoice, throughout the work. If the parties "do not have an executed, written contract" (Order, p. 3), and Brown billed on a cost-plus basis, then the bid documents are irrelevant.

11. Thereafter, on July 25, 2012, Brown Contractors pulled a demolition permit with the Town of Sullivans Island for 1850 Flag Street. This was followed by a full construction permit issued by the Town to Brown Contractors on August 28, 2012. (Pltf's. Exh. 3). The job was completed to the satisfaction of the Town of Sullivans Island code enforcement official on September 23, 2013 (Pltf's Exhibit 4), although Brown Contractors and its sub-contractors, continued to perform punch-type work through the fall and into the New Year at the Defendants' request.

12. A mechanic's lien followed on March 19, 2014. The lien set forth the license number of the qualifier, Vuong Ngyuen, which appeared in all the subsequent pleadings. Thereafter, a timely Lis Pendens, Summons and Complaint followed on June 18, 2014. (Pltfs. Exhs. 6 and 7). Jay Brown's books showed that the Defendants still owed $206,428.59 in unpaid invoices.

13. Defendants timely answered and, thereafter, amended their answer and filed counterclaims and third-party actions against Jay Brown, individually, and Brown-Meihaus

Construction Co., LLC for negligence, breach of implied warranties, breach of contract and unfair and deceptive practices.

14. Importantly, neither Mr. Salzhauer and/or the Defendants sent Brown Contractors a certified letter, setting forth its right to cure.

B(1). Brown Contractors was Licensed under the South Carolina Residential Homebuilders Act.

The Plaintiff respectfully requests that the Order be amended as follows to remove the finding that "a Failure to obtain statutorily required license precludes Plaintiff's recovery" for the following reasons:

15. The Order states that Brown Contractors was unlicensed pursuant to S.C. Code Ann. §§ 40-59-30 and -20 at the time the contract was entered, and as such, is not entitled to pursue a claim for damages or a mechanic's lien under S.C. Code Ann. § 29-5-10. (Order, pp. 4-7). This is ***not*** the case, however. The Special Referee found that the "qualifier" for Brown Contractors, Inc. [to obtain a certificate of authorization, pursuant to S.C. Code Ann. § 40-59-410], was Mr. Vuong Nyguen, who was a duly licensed South Carolina residential builder since 2004. This is correct.

16. Nevertheless, the Special Referee did not find Brown Contractors "properly licensed" through section 40-59-410 based on the ***application*** submitted for these reasons:

(1) The Special Referee held that Nguyen was listed as the application as an employee of Brown Contractors, and that both Brown and Nyguen attested to that fact on the application (Order, p. 7), even though: (a) Brown testified that Nguyen was a 1099 independent contractor (Order, p. 7) and; (b) his bookkeeper, Deborah Winner, testified that Brown Contractors had no employees (Order, p. 8). Thus, the Special Referee found that the testimony established that "Ngyuen was not an employee of Brown, LLC [sic] within the intent of the statute." (Order, p. 8).

(2) The Special Referee also found that Nguyen did not meet the definition of the "role of resident licensee in responsible charge" as set out in Sections 40-59-400(5) and (6), because the qualifying party "may be in responsible charge of only one place

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: _____

Robert B. Varnado
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rvarnado@brown-varnado.com
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
Lyles & Associates, LLC
342 East Bay Street
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Charleston, South Carolina 29401
rtl@lylesfirm.com
Attorney for Defendants

Via U.S. Mail & Email
Henry W. Brown, Esquire
Nexsen Pruet
1230 Main Street, Suite 700
Columbia, SC 29201
hbrown@nexsenpruet.com
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,

Robert T. Lyles Jr. by [illegible]

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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.

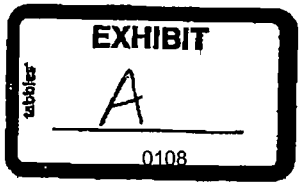
JAMES BROWN, IV AND BROWN-MEIHAUS CONSTRUCTION CO., LLC,

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.

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.

Robert B. Varnado (SC Bar # 0007085)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

March 25, 2019
at Mt. Pleasant, South Carolina

FILED
2019 MAR 25 AM 11:49
CLERK OF COURT
BY

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

Robert B. Varnado (SC Bar # 0007085)
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

March 25, 2019
at Mt. Pleasant, South Carolina

MR. LYLES: I do not remember that. But we have put into evidence the communication that I had with Mr. Varnado about the conditions at the house, and, of course, he has never moved to dismiss the case on the basis of lack of a notice to cure that I can recall; and if he did, I apologize. It was never disposed of by the Court.

THE COURT: No.

MR. LYLES: And, of course, a remedy for a failure to file a notice of right to cure is a stay in the case. And it is irrefutable in this case that Mr. Brown has been notified of these conditions, and at no point in time has anybody ever appeared to so much as look at a problem.

THE COURT: Okay. All right. I don't want to confuse it right now, but we'll -- when that comes up, I'll see if I have noted anything. If we don't have anything else to cover preliminarily, Rob, I'll turn it over to you to start your case.

MR. VARNADO: Can we take a small break?

THE COURT: Sure.

(Whereas, a brief recess was taken.)

THE COURT: All right, we're back on the record in the Jay Brown, I think, 3881, and we'll proceed.

MR. VARNADO: Thank you. Mr. Brown, as you know, we are at the trial of the case, and I've introduced myself to everyone. We have the court reporter sitting here, and Mr. Brown is going to be the judge, so please direct your answers to him; all right? So, Mr. Brown, tell me a little bit about yourself. Where are you from? Where did you grow up?

THE COURT: I'm sorry, would it be easier for you if the witness sat across from you? Because I know you can't --

COURT REPORTER: That would be great.

THE COURT: Robert, can we rearrange so the witness can sit across from the court reporter?

MR. VARNADO: Sure.

(Mr. Jay Brown, having been duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. VARNADO:

Q Now that you're sworn, Mr. Brown, tell me about yourself. Where did you grow up and where did you go to school?

A I grew up outside of Charlotte, North Carolina, in Gastonia. And after growing up there, I went to North Carolina State University. And after that, I lived in Charlotte, North Carolina, for about

15 years before.

Q Did you graduate from NC State?

A No, I didn't graduate from NC State.

Q What did you study there?

A Business economics.

Q Okay. And when did you leave NC State, what year, roughly?

A 1993, I believe.

Q Okay. And what did you do after 1993?

A During school, I had a screen printing business that I ran all through college, and then I continued that for six years afterwards.

Q How did you get into construction?

A My grandfather has been a contractor, homebuilder. My father was. I've been sweeping houses since I was 13 years old, so I grew up in the whole process. I've dug ditches. I've been through the muck of it. I've kind of graduated through the whole construction process hands-on, running material trim crews for, when I moved to Charleston, South Carolina, for, not my competition, but other contractors building on the islands, mainly the -- probably the 1.2 million dollar houses on up, doing trim work for them. And then where I'm at now is basically building these homes for clients, and then also speculative homes, also.

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

A It's a South Carolina residential builder -- it's a specialty contractor.

Q Okay. So why don't you explain a little bit about the licenses that you've personally held and the licenses which Brown Contractors has held?

A I've held a specialty contractor's license, which means we can do work up to $5,000, or if we get special qualification, we can do work higher than that, but we've never exercised that right. And then Brown Contractors, we had a COA, a qualifier, went through the correct procedures every time, making sure with the state we are fully covered.

Q Okay. So Brown -- you said you started Brown Contractors in 2009; is that correct?

A Correct.

Q Okay. And then at some point, there was -- Andy Meihaus came in, and you were going to do Brown-Meihaus; is that correct?

A Yeah. Andy Meihaus was an employee of mine. He was working with Bennett Hofford during the recession. He lost his job. I picked him up. We started Brown-Meihaus as a construction company, too, running adjacent to Brown Contractors. We kind of picked and choosed (sic) our own jobs separately. Yeah.

Q So does that take us to roughly about 2011/2012 when you first met Miss Salzhauer McMarlin and Hank Salzhauer?

A Yeah, I believe it was 2012.

Q Okay. So tell us about how you met them, what was the nature of the meeting, that sort of thing?

A A realtor buddy of mine on the island introduced us. He sold them the house and -- pre-sold the house. Before they bought it, they wanted me to look over it, check all the deficiencies through the home inspection report at the time.

Q And that's 1850 Flag Street?

A 1850 Flag Street.

Q On Sullivan's Island?

A Correct.

Q And you had experience building on Sullivan's Island before; correct?

A Oh, yes.

Q Renovation and new construction?

A Both.

Q And on the Isle of Palms?

A Yes, both.

Q And then in Mt. Pleasant?

A Mt. Pleasant, also, and Kiawah.

Q Okay. So tell us, go back and tell us how you

first met them, Miss Salzhauer McMarlin and Mr. Salzhauer.

A Met them. We went and looked at the house with the realtor, and then they informed me that an architect that I worked for, Beau Clowney, they had renovation plans being drawn up and finished for this house.

Q Okay. And what was the nature of the renovation?

A The initial construction set was full renovation, the whole, from the renovation of the existing house, replacing everything, and to the side houses and decks, everything. So we bid that out, along with another bid from Daly & Sawyer. They came in at around the same price I was. I think it was 1.2 or 1.4 or something like that. Amy informed me it was too expensive so we needed to cut back. She said she wanted to be around 550,000. I informed her it was going to be tough, but we could do some things and stage it out where we can continue on to the rest of the house at a later date, if need be.

Q Was Mr. Salzhauer present at these meetings?

A No. I met him later. I think it was a couple of months later.

Q Okay. So Miss Salzhauer McMarlin -- I'm going

to call you Amy, too. I hope that is okay with you-all.

THE COURT: Whatever suits her.

BY MR. VARNADO:

Q And the house is 1850 Flag, we're all on that?

A Correct.

Q Beau Clowney had done a complete renovation set of drawings; correct?

A Right.

Q And Miss McMarlin wanted to do less than the complete renovation; is that correct?

A Right. We were pricing it out.

Q Okay.

A So, and how this normally goes down is the -- I wish the architects would work with the builders sooner, because that way you could identify a budget and not go over that. We run into this a lot. But Amy and I specifically narrowed it down to specific things that she wanted to do on the house that was in the estimate provided.

Q Like what, for example? What are some of the things that Miss McMarlin wanted to do that were less than a full or complete renovation?

A Well, we left off the right side porch. We originally weren't going to renovate the wing of the

house. We weren't going to renovate the center deck in the pool area. There was not going to be a jacuzzi there. There was -- we were going to leave -- we were going to leave the -- she wanted to leave the existing roof, which was on the main body of the house. She wanted to -- she was really diehard about doing the entryway, which is two full decks on the left side of the house.

And then, of course, as we're tearing into the house, she wanted a master bedroom into -- the only thing on the inside of the house, she left the main air conditioning system, which is hard pipe, a commercial unit that was -- there were several renovations done on this house before me. There was a hard pipe, 12-inch, that was exposed duct. It sweats a lot. It's -- her and Beau wanted to leave it. They thought it was a pretty good architectural feature. So, we decided to leave that.

Master bedroom stayed the same. She had to store her existing kitchen in two containers outside the house for the total period of the project, which we were going to try to reuse those, put them back into the house and save money. Inadvertently, all of that went out the door when all the changes came, and I don't know what happened to the cabinets. But then

again, the driveway, complete. Yard, I had a really nice landscaper come up and finish it off. Closed-cell foam throughout the house. New systems.

What else? Rinnai water heaters, we updated those, too, instead of keeping the existing. The work-out room, which was going to remain the same, we completely gutted that, new floor, made it a gym for Andy. And then the right, her, not housekeeper, her nanny was going to stay on the right side of the house, so we shifted to remodel that, too.

All new windows and doors, impact -- kind of recommended her, on Sullivan's and the beaches, because of the saltwater and the elements, you really have to know how to build out there to prepare, as far as we have to encapsulate these houses with all stainless steel on the exterior, we utilize Ipe decks, coverings, stainless grill, stuff like that, just because if you don't do it, it's just going to really wear and tear on the house.

Q So this wasn't your first house on the island?

A No. This was the 30th house on the island.

Q Okay. Why don't we go to the white notebook, if you can use that.

THE COURT: Do we have a second set I can look at while he testifies, another?

MR. VARNADO: I brought four sets. I think it's actually right there (indicating).

THE COURT: I got one right here. Okay.

BY MR. VARNADO:

Q So Brown-Meihaus may have prepared a contract, but ultimately the work was done by Brown Contractors, LLC?

A No. Brown-Meihaus was just -- the initial budget that I prepared for it was the cost control estimate, it may have had Brown-Meihaus on the top of it. We use that as just a simple -- it's an Excel form that we price these things out as.

Q Okay. And you and Andy Meihaus, what were you doing at that time, were you breaking apart or --

A Yeah. Andy wanted to go downtown and to Kiawah, do more commercial work down here, restaurants, and that's just not my forte. I like new construction to be -- I live on the island, office on the island, I just wanted to stay there. And Kiawah, he shifted more towards Kiawah; too far of a drive for me, so that's why we kind of parted ways.

Q How did you find Vuong Nguyen?

A Vuong was a subcontractor that was introduced to me. I can't remember initially who did that, but I met him. I really liked his personality, driven, nice

guy.

Q Okay. And so then you applied for a Certificate of Authorization from the LLR; is that correct?

A Yeah, we did. So, applied for, the correct procedures going through, the LLR application. Gave them our bond.

Q So go ahead and pull the first exhibit in the white notebook. It's Exhibit No. 1.

A (Witness complied with request of counsel.)

Q Okay. And as you see that exhibit, does it contain a combination of your handwriting and Vuong Nguyen's handwriting?

A Yes. Mine is up top. He is a Qualifying Party. He is the Affidavit of Qualifying Party, and then notarized in --

Q Was there any intent on your part to do this house without getting a Certificate of Authorization?

A No, not at all.

Q Okay. What is the date on this? And I would have you look at page -- the last page, Salzhauer 5420 of the form. Do you have it, Henry?

THE COURT: 18 and 20.

BY MR. VARNADO:

Q 20, what date is on that?

A June 6, 2012.

Q Okay. And walk me through what's on this form. So the first one is the --

A It's just, it's a qualifying party form, and that's my company at the top. Vuong is the qualifying party. State of Incorporation, we had to supply the LLR with our Secretary of State documents, that's the April 14th, 2009. And background information, they ask you if you've ever had disciplinary action. Mine are all nos. Let's see, have you ever had any judgment, lien, anything. No. That's 4. And then No. 5 is the Affidavit of Qualifying Party, what Vuong signed and had notarized. And then No. 5, I guess there's two fives. Five, affidavit of, that's me, and then notaries beneath that. Next page, Section 8, I'm a legal citizen of the United States and I have a driver's license.

And then 5420, state whether the documents were verifiable for South Carolina, and then Section C, basically a sworn statement required by law because I've applied to hold a professional commercial license by the state, and it provides proof that I am lawfully present in the United States. And false statements, I signed it with my license underneath it, and then my license number underneath that.

Q Okay. So it was not your intent to go against the state regulations on being a contractor and doing this job under Brown Contractors, LLC; correct?

A Pull the permit?

Q Yeah.

A No.

Q Really, just right now what my question is, just based on getting the license for it.

A Right. And when we went to permitting for --

Q Yeah, I'll come to that in a second.

A Sorry.

Q So did you call anyone at LLR about this Certificate of Authorization form?

A Yes. We called --

MR. LYLES: Objection, Your Honor, to the extent he is wanting to get in testimony about a conversation he had with somebody at the LLR.

THE COURT: He can certainly say that he had conversations. He can't testify to the -- as the truth of the matter, this is what they said. Just ask it different. If he had conversations, he certainly could say yes.

BY MR. VARNADO:

Q Did you have conversations with the LLR?

A Yes.

Q What was your understanding based on those conversations?

A My -- it's okay?

THE COURT: Yes, sir.

A (Continuing) What they told us is as long as there's a qualifying party that can pull the permit and he's on the job, that he can pull the permit. This happened in the Sullivan's Island office with Kat there present. It was on her phone.

Q Is that in Exhibit No. 3, the permits?

A Yeah. This was the -- this was the initial, when we were demoing the house to see what defects were going on.

Q And its date of issue is what? I'm sorry.

A 8/28/12.

Q Okay. And there was a second permit, 7/25/12; is that correct?

A Yeah, correct.

Q So Mr. Nguyen was -- obviously, that's Mr. Nguyen's signature back on Exhibit 1 in the Qualifying Information; right?

A Correct.

Q Okay. And Mr. Nguyen was with you for the Town of Sullivan's Island permit; correct?

A Correct.

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

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

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

Q Okay. Tell us about that.

A Cameron Glaws was my superintendent, actually on their job, which finished it out. We started getting really busy. He's a younger guy, 28. He's got his GC license and he does a lot of historic stuff, and we just clicked. And literally, running a company this size, you have to have -- you can't do it all by yourself. You have to have someone in the field, somebody running your office, dealing with clients. So Cameron and I, after dating for two years, we partnered up. I brought him on as a partner.

Q And what's the name of the firm?

A Brown-Glaws.

Q It's an LLC?

A Yup.

Q It's a different LLC than Brown Contractors; correct?

A Yes.

THE COURT: Is that G-L-A-W-S?

A (Continuing) Yes, sir.

Q So when was the last house that Brown Contractors worked on?

A I don't know. I would have to check.

Q Okay. Was the McMarlin residence one of the last or --

A That's after -- yeah. After this, we decided to go into partnership.

Q Okay.

A I think we had four of them going on at the same time.

Q So let me draw your attention back to Exhibit No. 1. Did you ever give this form to Amy Salzhauer McMarlin?

A This form?

Q Yeah.

A No, no.

Q Did you ever talk to Amy McMarlin about this form?

A No, I don't believe so.

Q Did you ever have a conversation with Miss McMarlin about you being a contractor?

A No.

Q Was -- are you a contractor?

A Yes.

Q Okay. And does Brown Contractors have a valid Certificate of Authorization?

A They do.

Q Okay. And the question becomes whether or not LLR sat on it for a while, but was there any reason why or just --

A Just with anything, with this type of municipality, it takes a long time. That's why I made the phone call to make sure what we were doing was correct.

Q Okay. And you called LLR; correct?

A God as my witness.

Q And what did -- who did you talk to?

A I believe we found out later Bonny Sweat.

Q Okay. And what was your understanding of what Miss Sweat told you about the contract -- I mean about the --

MR. LYLES: Objection.

BY MR. VARNADO:

Q What was your understanding about --

THE COURT: Just ask him what was his understanding as a result of his conversation.

BY MR. VARNADO:

Q Yeah. What was your understanding as a result of the conversation?

A If I have a licensed contractor/project manager on the job, they can pull the permit.

Q Was Mr. Nguyen on the job the whole time?

A Half the time. Well, half the time, and Amy didn't want him on the job after four or five months and kicked him off. That's when I pulled Cameron in

from another one and put him on it.

Q Okay. So when were you working on the -- when were you -- when was Brown Contractors working on the McMarlin residence?

A Let's see. Permit was issued on 8/28/12. We went through every one of our permits, our -- passed every one, and then we got our Certificate of Occupancy from the Town of Sullivan's Island on September the 13th, 2013. And then after that, we were punching it out until January the -- last sub on the job was January the 9th, 2014.

Q Okay, so let's go back to Mr. Nguyen. You've heard the Defendant's counsel, Mr. Lyles, say he's not an employee or not an owner of the company. What is your understanding of Mr. Nguyen, and how did you set it up with Mr. Nguyen?

A Just as I described earlier. He was handling everything in the field and I was handling everything, design, clients, office, insurances. It was just a two-part business. He was handling all of that for me.

Q Okay.

A Her job, and then the other four.

Q Did you have the right to fire Mr. Nguyen?

A Absolutely.

Q Did you furnish him equipment to do his job?

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

mechanic's lien on this case; is that correct?

A Yes.

Q And that's Exhibit No. 5; is that correct?

A Yes.

Q And how much was the mechanic's lien for?

A $206,428.59.

Q And how did it come to that much money was owed to -- by the McMarlins to Brown Contractors?

A Well, it was a buildup. Hank was -- we run a set of QuickBooks contractors so that Hank -- all of our clients get -- every Friday, they get an update. We have a budget, and then we have an actual, and that's emailed to Hank, Amy, whoever wants to be emailed to.

Q Okay. First of all, what was your understanding of Amy's role, and what was your understanding of Hank's role?

A Amy was the decision-maker; Hank was paying the bills.

Q Okay. So you communicated with both of them; is that correct?

A Yes.

Q Okay. So what would be Brown Contractors normal way of doing it? I think you mentioned earlier that you would send the, whoever the decision-makers

were, a weekly what, what did you call it?

A It was a weekly update. We had our -- normally, if we have a -- we agree on a budget, and then we make all of our subcontractors sign a -- it's basically an acceptance of their bid. Because of this, the changes, this thing multiplied times three.

Q How? How did it multiply?

A Decisions. This thing had three interior designers on it. It was just, at times, chaos. We didn't use the original kitchen cabinets, anything. With the designers, they would just come up with new ideas, which was just an ongoing process, the whole project.

Q Okay. We'll come back to that in a little bit, but so every week you would send budget information and cost information to the Salzhauer McMarlins; correct.

A I don't know if it was every week. Deborah in my office, she would send it out, billing, and whatever Hank needed. Hank was running a separate set of books for this, as well.

Q Okay. And what did you understand about Hank's running the books? What was he doing in New York at the time?

A He was taking ours and having his accountant

put it into a requisition, I believe, and then getting back and forth with my girl, Deborah, making sure that was correct. And then that was our application for payment, and then he would -- I don't know if he wired the check or sent it.

Q Was there any doubt in your mind about the nature of the contract? What kind of contract was it?

A I mean, cost plus since day one. Cost plus 15 percent.

Q And how would you prove that it's a cost plus contract?

A On every invoice we have, at the bottom it says cost plus 15 percent. 15 percent was added to the end of the bill, and then that's what our request was.

Q And how many times did you meet Mr. Salzhauer personally?

A Probably 10 or 12. Actually, when we were in New York, we went and saw him and had a nice, decent lunch, before the chaos.

Q When did the chaos start?

A Oh, I mean, it was trying to get decisions out of -- the window decision just took forever. The house remained -- after we gutted it, we had to wrap it several times. Just that's when it started.

Q So when was that, roughly, do you know?

A I'm not sure. Probably permit was issued on the 8th. Probably towards November.

Q Okay. And then what happened in that with respect to the windows and the gutting of the house? So, the first thing you did was you gutted the house; correct?

A We gutted the house, and then we pulled the stucco off. We found that the stucco, once it was pulled off, the whole band board around the house was rotten with termites, so we had to replace that. We had to replace all the exterior sheathing of the house. We had to -- and by doing this, you now have to go back and put new. So long story short, by the end of everything that was done, it was the equivalent to the original plans that we bidded on for Beau Clowney.

Q Okay. So that was one element that you pulled and found rotted band board and had to replace it?

A There was termite damage. There were rats on one side of the house in the insulation above the rooms. There were holes, yeah.

Q Okay.

A Just deficiencies. It was an old house.

Q Okay. What other things magnified the cost of the project?

A Adding to the finishes. The devil is in the

details on these houses. You can, you know, it's -- it can be an 80,000 dollar kitchen with cabinets just like that, then you've got to put your granite countertops on it. The appliances, you can go from a GE to a Wolf, and that can quadruple. Just everything went from basic, we want to stick to this budget, to over the top for the whole thing.

Q Who was making that decision?

A That was Amy telling us.

Q And what was Amy telling you to do with respect to the kitchen? Just walk me through it.

A She was telling me and my subcontractors and Vuong what to do, and we were all having meetings with interior designers, architects. We were -- it was an ongoing project.

Q Were certain things done once, twice, three times?

A What do you mean?

Q Well, did you do certain things, like, and then she would not like them?

A Oh, yeah. I mean, the floor, we stained the floors, and I think after four weeks, we -- and sandings and samples and -- four weeks on a project, if you have 50 different things going on in this house, that's how you get the time, another year on the

project just like that.

Q So the McMarlins, the Salzhauers want to say, well, this was a house and we had a control document, a budget; correct?

A That's what they are saying.

Q And they want to say that you were responsible for delay after delay after delay?

A Not once.

Q Okay. And who is responsible for the delays that were on the house?

A The majority were Amy. If it wasn't Andy, it was Amy, or the interior designers, they had to ship a piece of tile down. One of the interior designers was from New York City, so there was always this time delay with that. Then she would have to come down three weeks later, so that was another stall.

Q And were you communicating with Miss McMarlin?

A Everybody was in communication.

Q Did this contract, you didn't have a written contract; correct? They never signed a --

A I originally brought a -- we met at a restaurant down here. I had a signed written contract. But then, she explained to me that she had come into some more money. This was between -- before I knew the financial situation, where the relatives were going to

help out, and then this was going to evolve into something a lot more than what we were trying to discount this job for.

Q Okay. What about Miss McMarlin, did she like the subcontractors? Did she like Vuong Nguyen?

A It seemed like she liked everybody at first, but then at the end, she always had a scapegoat. We talked about this as a company. We would -- it would always be somebody who -- we would joke about who is the enemy of the week. So, and Vuong, she got tired of him. So, okay, we'll get him off the job. Here's Cameron. Oh, I love Cameron. You know, let's go on with him, and then she didn't like him later on. This happened with subcontractors, and, you know, just being a pleaser, we were just trying to make her happy the whole job.

Q Okay. And what was -- and so ultimately, as you look through the exhibit book, the -- how was Hank -- was he paying each of the invoices completely when they were received, or what was going on with that?

A He wasn't paying them completely. That's where we ended up with a big lump at the end. He would partially pay the invoices, and then that's how we accumulated this 206,000 by the time we got to the end.

Q Is the numbers reflected in Exhibits 8, 9 and 10?

A Yeah.

Q I'm sorry, 7, 8 and 9?

A Yeah, 8 is our job profitability. You can see where we identified the actual cost, the actual, and it was a task in itself getting costs from the interior designers on what was coming in that we didn't even know about. There was tile coming in, like I said, from New York City. We had no earthly idea what the costs were for that, but they would submit an invoice through our office, and we would bill Hank and then we would pay it. But guys in the field are not going to know -- we didn't know what half the numbers are.

Q And then ultimately, what is Exhibit 9?

A That's it. So Exhibit 9 is where you can see they started off at our required deposit, and then our billing/payment invoice, and then it kind of accumulates to the 206, with the last one not getting paid at all on 12/9/13. So it was up -- up until then it was 155,704. So the whole -- out of all the invoices, the running tally on not paid throughout the whole project was $155,000, and then he didn't pay the last one at all of 50,674, so that gets us to the 206.

Q Okay. You have -- you heard the counsel for

the Defendants' opening statement, and he talked about the house being incomplete and/or faulty construction. First of all, was the house incomplete?

A No. We got our final CO. We've got pictures. We walked it with the architect. We walked it with the interior designer. We walked it with Amy. And the landscape was going on at the tail end of it. It was finished.

Q Okay. Miss McMarlin testified -- or her attorney talked about them living on air mattresses in the house while it was ongoing. Can you talk about that?

A Yeah. She -- we're not even done with the project and moving in air mattresses to -- when we're at a punch stage on a project, you're going to be dealing with some inconveniences, and there was no -- she moved in. There was nothing we could do.

Q When did she move in, do you remember?

A I don't remember. It was -- I don't know. I can't remember.

Q Okay. And then what about the -- and then you've heard some of the things that they've testified to or the attorney has said, and we will receive testimony, I'm sure, concerning the roof. What was your understanding of what Brown Contractors was

supposed to do on the roof?

A We didn't -- we painted the roof. Her and Andy instructed us to paint the roof to match the new roofs on the side house. And the nanny's quarters, that had a new roof over there. The existing roof, we recommended that be done, but they didn't want to spend the money, so they just had the roofer coat it with a -- I think it was like a sealoflex coating and color.

Q So you wanted to replace the roof, but you weren't allowed to. How did that work?

A I believe, yeah.

Q Okay. And then what about the HVAC system, how did that -- there was a -- you've heard their attorney testify that the HVAC system didn't work, and they had to replace the whole thing. What were you -- what was your responsibility on the HVAC?

A Well, Amy had me get an outside HVAC engineer, Volkmar at the time, and I have his letter right here, to come in and test the existing system with J load calculations. They taped up things, and then look at the unit upstairs. So he did that and noted that -- we also put -- recommended doing dehumidification systems in this house because those existing hard ducts sweat so much that if you've got any little bit of humidity in that house, it's going to sweat and drip on the

floor, which it was doing prior to when we even got in there. So Thomas Volkmar came out. He did his report, and that's what we went off of. I mean, we just -- we followed his lead just because he's the -- he was the engineer.

THE COURT: Is that in evidence?

MR. VARNADO: Yes, sir.

BY MR. VARNADO:

Q And that's Exhibit No. 10?

A Yeah, 10. The first one. 8/16/2013.

Q So did you -- were you supposed to put in new HVAC units?

A I mean, we did on his recommendation after -- yeah, new. We -- I don't remember off the top of my head if they were all replaced, but we had them checked out through him, and then put dehumidifiers on them.

Q Okay. What about this business about nails in the -- through the wires, what have you heard about that?

A I mean, it's base -- no idea. I mean, when you shoot trim through a wall, whoever is doing the report saying the nail is too long, I mean, you've got a trim nail gun that can shoot a two-inch nail, that can shoot a half-inch to a two-inch nail. So when my guys are nailing up trim, they're using all the same

length of nails, the trim carpenters.

Q Did you ever get a notice of right to cure letter?

A No.

Q Did you ever have a certified letter sent to you stating the -- what needed to be done?

A I never received a letter.

Q Did you get a statement that the Plaintiff asserts a construction defect?

A I got an email from Hank stating that he was going to send over something that was attached and never was.

Q So what does Miss Salzhauer, Miss McMarlin rather, I'm sorry, and Dr. McMarlin owe Brown Contractors for this -- for the work that you did on the house?

A We're just trying to get paid the final balance.

Q Okay.

A Nothing more.

Q And you moved to foreclose a mechanic's lien. You also brought that same claim for breach of contract?

A What do you mean?

Q Yeah. You brought a breach of contract claim,

too?

A Okay, yeah.

Q All right. All right. Let me have a minute and I'll see if I have anything more. Can we be at ease?

THE COURT: Yup. We are off the record.

(Whereas, a short recess was taken.)

BY MR. VARNADO:

Q Mr. Brown, can I ask you to turn your attention to Exhibit No. 8?

A (Witness complied with request of counsel.)

Q Okay. So you used QuickBooks on this residence?

A Correct.

Q And the QuickBooks was sent to Mr. Hank Salzhauer; correct?

A Yes.

Q Okay. And is Exhibit No. 8 one of the QuickBooks forms or formats that is capable of being used in this case?

A Yes.

Q So what exactly is Exhibit No. 8 again?

A This is our company's unpaid bills as of August 11, 2014.

Q Okay. All right. Why don't you just go

through each one. I know it's a few pages, but Armando Rico, do you remember him?

A He was a laborer.

Q Okay.

A But that -- this wasn't for on this job. See where it says 2662, that's another job. Only the ones with the asterisk 1850, that's this job.

Q Okay, good. Thank you for saying that. So Barry Lingenfelter, what did Barry do for 1850 Flag?

A Electrician.

Q Okay. Bird Decorative Hardware?

A They were a plumbing supplier.

Q Okay.

A There's some pictures.

Q Cameron Glaws, before he became your partner, what was he doing on this?

A Project manager.

Q Okay.

MR. LYLES: How many pages do you have, Rob?

MR. VARNADO: I just have four. It's Exhibit 8.

MR. LYLES: Yeah. I might be missing page 1.

MR. VARNADO: I'm sorry.

MR. LYLES: That's okay. I just want to make sure Henry's got it. Do you got page 1?

THE COURT: Yeah. Rob, you're referring to Cameron Glaws?

MR. VARNADO: Yes, sir.

THE COURT: Under that is Carolina Fiberglass?

MR. VARNADO: Yes, sir.

THE COURT: Are those two the same thing?

MR. VARNADO: I don't believe so.

A (Continuing) No.

THE COURT: Okay, I see. I got it.

MR. LYLES: Keep on going, but I need to get a copy at some point.

MR. VARNADO: I'll get you one.

THE COURT: And 1850 was your job number that you coded --

A (Continuing) Correct, for 1850 Flag.

THE COURT: Or 1855?

A (Continuing) 1850 Flag.

THE COURT: Okay.

A (Continuing) And I believe that's the invoice number in front of the asterisk.

BY MR. VARNADO:

Q Okay. Carolina Fiberglass, what was --

A Fiberglass decks, and we waterproof underneath all of our toilets and --

Q I should have asked you. For Mr.

Lingenfelter, Bird Decorative Hardware and Cameron Glaws, did you end up paying -- did you personally pay these?

A I think Hank paid towards the end. Hank was paying guys towards the end, subcontractors.

Q Have you taken into account that Hank had paid some of the subcontractors, into consideration in your lien?

A For?

Q In your lien, the lien balance?

A I am not sure. No, I don't think. That's not in the lien balance.

Q So, in other words, the lien balance shows that Mr. Salzhauer may have paid some of the subcontractors; correct?

A Correct.

Q And by the lien balances, what you -- you were responsible for what's left over?

A Right. So if he pays the subcontractors whatever amount, we deduct that from the 2006.

Q That's what I was asking. All right. Did you pay Mr. Glaws?

A I believe Hank paid half, and then we eventually paid the other half.

Q Okay. Coastal Plumbing & Gas, did you pay

Coastal Plumbing & Gas?

A I'm not sure on all of these. I would really have to see the check ledger.

Q Okay. Four Corners, what was Four Corners?

A That was interior trimwork.

Q And of those unpaid bills details, four of those are for 1850 Flag; is that correct, Four Corners?

A One, two, three, four, correct.

Q John E. Wade, Jr.?

A Surveyor. Probably the final as-built surveyor.

Q Kolbe Gallery of Charleston, last invoice?

A Those are windows or screens probably.

Q Okay. Linked AV, LLC?

A Jeff Neidlinger.

Q M-L Woodworks, LLC?

A That was some sort of brackets or interior trim.

Q M&S Mechanical?

A HVAC.

Q Moluf's?

A Plumbing supplies.

Q Nathaniel Gathers?

A I think he was a laborer.

Q Passion Masonry, at least three of those

charges in Exhibit 8 are for Passion for 1850. Do you remember what Passion was for?

A That's brickwork. I can't remember what it was for, though. Probably exterior brickwork.

Q Pelican Improvements?

A No idea.

Q Southern Lumber? That's on the third page of Exhibit 8.

A Uh-huh. Probably towards the end of the job, it was a, I don't know, punch-out, framing, siding fee.

Q Okay. Tile & Stone Design Studio?

A I've never even heard of them. This might have been the tile coming out of New York.

Q Tomas Guajardo?

A A laborer.

Q Okay. Trash Gurl?

A Dumpsters and porta potties.

Q Vincente Guerrero Hernandez?

A Laborer, clean-up.

Q VLN?

A That's Vuong.

Q Okay. So you're going to hear -- I assume that part of the cross-examination is going to be on VLN and Vuong, so was -- what was Vuong's -- what were Vuong's roles out at the job site?

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

right now.

MR. VARNADO: I might reserve to call Mr. Brown for rebuttal.

THE COURT: Certainly.

MR. VARNADO: And other things. But at this time, it's 11:34, so...

THE COURT: Robert?

MR. LYLES: Yeah.

THE COURT: You ready to cross?

MR. LYLES: Yeah.

CROSS-EXAMINATION

BY MR. LYLES:

Q Mr. Brown, you brought some QuickBooks data to trial today. Have you done a QuickBooks analysis to determine the total amount that you were billed by subcontractors or sub-subs for this job?

A I mean, it's going to be in our QuickBooks.

Q Is that something you brought with you?

A Look at Exhibit 7.

Q Okay.

A Job estimates versus actuals dated 9/12/14.

Q Okay. Does it show, any of the documents you brought, show the total amount that was actually billed to you by the sub?

A Brown 0695, page 4, you can see the actual

cost, 1,227,000.

Q Is this on -- which exhibit?

A Hang on. Come this way a little bit more, towards the back.

THE COURT: What's your Bates number?

A (Continuing) 0695. That's it. So there's four pages to it, and then there is a final. That's what we're talking about there.

Q Okay. So what you show is -- got it, Henry?

THE COURT: I got it.

BY MR. LYLES:

Q So with the page Bates labeled Brown 0695, what you've got is the first column is the estimated cost, and then you've got actual cost?

A Correct.

Q And the actual cost is what you believe to be the total amount of money that was billed to you from this project by your subs or suppliers?

A That was the subs and suppliers, and then our overhead and profit is not in this number.

Q Correct, okay. So the total bill to you, according to this document, for the subs and suppliers for this job is $1,227,847.45; is that right?

A Yes, sir.

Q And you were paid the total amount of

$1,230,500 and -- excuse me, $1,230,570, does that sound right to you?

A I'm not sure off the top of my head.

Q Okay. If that is an accurate number that I just quoted, would you agree with me that the number that you were paid was essentially right at the number that you -- that the cost you incurred from the subcontractors and suppliers on this job?

A Say that again.

Q Sure. The number that I'll represent to you was paid to you was $1,230,570, which is a little less than $3,000 more than the actual cost number incurred by you on this job?

A Okay. That's what was paid to subcontractors and suppliers.

Q That's right. And then you were paid by the McMarlins and the Salzhauers 1,230,570?

A I don't have that number.

Q Okay. Okay.

A According to our QuickBooks, it's 1,227,847.

Q That's what you paid to your subs and suppliers?

A Yeah.

Q What do your QuickBooks show you having received, that has been paid by Amy or Hank?

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

THE COURT: Are we still on seven?

A (Continuing) Yes, sir. I don't see a landscape budget on there. I don't know if they paid him directly or not.

Q Is there any document that you can point to that would establish that you met with Mr. Ulmer out there in 2014?

A A document, no.

Q So it's your word?

A Correct.

Q And you also said that you met with Jeff at I guess Linked AV?

A Uh-huh.

Q And that was in 2014, too?

A Correct.

Q What did you discuss with Jeff at that meeting?

A Just finalizing. He was just -- we were discussing cameras and just minor AV stuff. I think there was some AV lighting on the porches.

Q Was this supposed to be new stuff that was going in or --

A It was -- I can't remember.

Q Did it have something -- did it have something to do with Amy's house?

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

in his hand, is that an exhibit in the record?

MR. VARNADO: It is not, but we can move it in.

MR. LYLES: Let's move that into evidence.

MR. VARNADO: That would be No. 12? Or 13, actually. I think you used No. 12 for my exhibit list.

THE COURT: Exhibit 13 has been offered and will be accepted without objection. It is from Jay Brown to Rob Varnado, and it's a forwarded message from Jeff Neidlinger, March 26, 2014, and that will be Plaintiff's Exhibit 13.

(4/26/14 EMAIL MARKED AS PLAINTIFF'S EXHIBIT NO. 13 AND ADMITTED INTO EVIDENCE.)

BY MR. LYLES:

Q Thank you. Anything else that you did or may have done out at that site in 2014 that you know of?

A I think the first of the year there was just a couple of minor things, and answering phone questions, too.

Q And Linked AV, according to that email, Linked AV was actually paid for their work on this project by Mr. Salzhauer?

A No, by us.

Q By you?

A Yeah.

Q Doesn't that email, and I don't have it in front of me, does it say that he was paid by Henry Salzhauer?

A It doesn't say, but our QuickBooks said, on page 2, it says a Linked AV invoice, 1850 Flag Street, on 10/15/13 was paid, $4,914.

Q Okay. Can you let me have that exhibit back again, just the exhibit?

A (Witness complied with request of counsel.)

Q Yeah, let me look.

THE COURT: What was the Bates number of what you just referred to? Is this Exhibit 8?

A (Continuing) Exhibit 8, page 2, halfway up, Linked AV, where it says 1850 Flag.

THE COURT: All right.

BY MR. LYLES:

Q And then this letter says, and I quote, "I was paid by her dad on 1/19/14 for the full amount remaining." Do you see that?

A Sure.

Q And then he says he was back to troubleshoot a Comcast issue and add a network repeater for her assistant; this was two weeks ago. Do you know if he billed for that trip?

A Normally these guys, if there's anything after

that, the clients will pay for it after we're done within the contract.

Q So that would be an issue between -- or a relationship between Linked AV and the Salzhauers?

A Absolutely, yeah.

Q Okay. Now, you indicated earlier in your testimony that you have been, I think you said, sweeping houses since you were 13?

A Yes, sir.

Q Was your dad a contractor?

A He was.

Q And you are -- how old are you?

A Forty-seven.

Q I'm 54, so you got me.

A Barely.

Q So from 13 to 47, that's what, 34 years?

A Give or take.

Q That you've been doing construction?

A On and off.

Q And you have done lots and lots of houses; is that right?

A That's right.

Q And you have -- I think you testified that you have been involved in all manner of construction in terms of actually performing work?

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

that right?

A That's right.

Q And that was approximately in June of 2012? We can go back and look at the exhibits.

A Double check. June 6th, 2012.

Q Had you met Mr. Salzhauer or Miss McMarlin at that time, Amy? Is it okay if we call you Amy?

MS. SALZHAUER: Yes.

A (Continuing) I kind of got a timeline. Yes.

Q And what services had you performed for Amy at the time you submitted your Certificate of Authorization application?

A We were in the bidding -- I met her -- the initial contact with Amy was March the 12th. We walked the house with the structural defects on -- that was submitted by Live Oak. That was on -- sorry, bear with me. Structural evaluation was March 15th, and then we also met with Beau Clowney on March the 15th, and then I asked for a meeting on the 21st with Amy. March 24th, we received updated plans from Beau Clowney. Then that's -- it looks like that's when we were starting to go in with the bidding process in April, and Amy was getting multiple bids towards the end of April, us and a couple of others, let's see, through April 22nd. And then June 6th, that's when I submitted

to the LLR.

Q Okay. So it's accurate to say that at the time you submitted the application for the Certificate of Authorization, you had invested a substantial amount of time with Amy on her project?

A Correct.

Q And is it also accurate to say that you submitted your Certificate of Authorization request to enable you to do her work?

A Yes. All work.

Q Okay. Now, at the time you submitted this application, you didn't tell Amy that you were not a licensed contractor?

A I did not.

Q And at no time did you tell her that?

A I don't recall, no.

Q Now, you indicated to Mr. Brown earlier in your testimony, to both Mr. Browns, that this was the 30th house you had done on the island?

A Yeah.

Q You're not contending that this was the 30th house where you had pulled a permit and acted as a GC, are you?

A I mean, we had -- every permit we pull, we had to have a GC license.

Q How many permits had you pulled on Sullivan's Island before pulling the permit for Miss Salzhauer's house?

A I'm not sure. Maybe 15, 20.

Q And under what -- were those permits pulled in the name of Brown Contractors?

A We did Brown Contractors. Andy and I pulled one for Brown-Meihaus. Both.

Q Who -- by what authority before this was Brown Contractors pulling building permits on Sullivan's Island?

A Pete Robertson. He was a qualifier for us back in I think 2012 or so, yeah.

Q And so you used Mr. Robertson's license to pull those other permits?

A Correct.

Q And was he not involved with your company I guess when Amy's job came up?

A No.

Q Why not?

A I think he moved. He moved to Louisiana.

Q And was he a subcontractor to you, or was he an employee of Brown Contractors?

A He was a partner.

Q So he was an owner of Brown Contractors?

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

Q And that's a -- he is the person who has the unlimited general contractor's license?

A Both of us. He's the qualifier. Both of us own the company 50/50. It's called Osceola.

THE COURT: Who was the gentleman with Osceola that was the qualifier?

A (Continuing) That was Vuong. So I had a specialty contractor's license, we had the residential builder's, and then the separate unlimited general contractor's license for commercial projects.

Q Now, you submitted the application for the Certificate of Authorization; is that right? You have talked about that as Exhibit 1 in your trial exhibits, and that's a document that I think has got your signature on it and the signature of Mr. Nguyen?

A Correct.

Q Okay. And that was submitted on June the 6th of 2012; right?

A Right.

Q Okay. Now, if we look at page 2, which is Section 5, it refers to section 40-59-410 for further clarification. Do you see that?

THE COURT: What? I'm sorry, I can't find it.

MR. VARNADO: It's the second five.

MR. LYLES: I'm sorry, there might be more than one five. It's the second page of the document. Oh, there are two fives. The lower five.

THE COURT: Is this the second page of Exhibit 1?

MR. LYLES: Second page of Exhibit 1.

BY MR. LYLES:

Q Are you there, Mr. Brown -- Browns?

THE COURT: This one is.

A (Continuing) Yes, sir.

Q The first thing it says is, "See Section 40-59-410 for further clarification." Do you see that?

A Yes.

Q Have you ever looked at that statute?

A I've read it before, yes.

Q And what does that statute speak to, do you know?

A Just making sure that a qualifier is a full-time employee, a responsible management position, as it reads.

Q Did you -- did you read that before you submitted this application?

A I believe so.

Q All right. And you understand that the statute requires that a qualifier needs to be a

full-time employee?

A Yes.

Q And you would agree with me that Mr. Nguyen was not a full-time employee of Brown Contractors?

A Well, he was by being paid as a subcontractor, full-time employee.

Q So any subcontractor you pay is an employee of your company?

A No.

Q Well, what makes Mr. Nguyen an employee, but not some other subcontractor?

A Is that a determination of --

Q You know the answer. You seem to know. You've got a theory. I just want to know what it is.

A I don't know. Let me read it again. It's been a while. So a full-time employee, I was employing him and paying him, he was only on my jobs, and he also had a management position managing on the jobs with the applicant requesting this license, which is me.

Q He was not an employee, though, of your company. He was a subcontractor; right?

MR. VARNADO: Object to the form. I'm sorry, I thought I was in a deposition. I object, but go ahead and answer.

THE COURT: I think we're on cross, so I think

he gets to lead. Go ahead.

A (Continuing) I'd consider him an employee. I'm the one paying him 100 percent for his time.

Q You paid him as a subcontractor; right?

A We cut him a check.

Q He submitted an invoice to you; right?

A Right.

Q And that invoice included costs and expenses that he had incurred; right?

A Correct.

Q And the time that he had spent on the job; is that right?

A Correct.

Q And overhead and profit that he earned on sub-subs; right?

A Correct.

Q And then you paid him the amount that he submitted the invoice for; right?

A Correct.

Q Okay. So as Mr. Varnado asked earlier, at the end of the year he didn't get a W-2 from you; right?

A Correct.

Q He was 1099; right?

A Correct.

Q So he didn't work within the umbrella of your

company; right?

A He worked underneath the insurance umbrella of my company, and I would -- he did work underneath my company.

Q And you charged these people for his overhead and profit; right?

A And project management, also, yeah. He would give us numbers to get things done, would go over it with them, they'd say yes, we'd get it done, he'd bill for it, and then we'd also pay him a project management fee for doing his project management role, as well.

Q And is his project management fee reflected on his invoices?

A Yeah, and he's been paid on them.

Q So he was the project manager for this job?

A Yes.

Q And since he was the project manager, you would not be entitled to any project management fee on this job; right?

A I was the project manager, too, if you want to call it. I mean, there can be three. There was three interior designers. We were both managing the project.

Q So these people wound up paying how many project management fees for this job that went so swimmingly well on your end?

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

A Well, towards the tail end of it, no, not the last half.

Q Okay. So for half of this project, Mr. Nguyen didn't have anything to do with Amy's house?

A We would still have to refer to him to the end, just because the initial stages we didn't know -- we need answers, so, yes, he would pop up back there throughout the whole process.

Q You agree with me, would you not, that ultimately with Brown Contractors, you had the final authority over Cameron Glaws or Vuong Nguyen?

A Yes.

Q You were in charge of Brown Contractors?

A Yes.

Q Now -- okay. Earlier in your testimony you said that when you first started doing the bids for this project, I think that the sum that you mentioned was a sum of 1.2 to 1.4 million?

A I believe the original bid was that.

Q And that bid was for what?

A As per plan, the way Beau Clowney gave us the plans to do.

Q Okay. And so the initial estimate or bid that you gave was -- was it 1.2 or 1.4, or do you remember?

A We were all close. It was me and Daly &

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

exhibits?

MS. WOLK: No.

MR. LYLES: Not here yet?

MS. WOLK: No.

BY MR. LYLES:

Q Well, you and I will just have to sit here and do this together.

MR. VARNADO: I can show him.

MR. LYLES: If you could.

MR. VARNADO: Do you mind if I come over there?

MR. LYLES: No.

MR. VARNADO: Henry, do you mind if I come over?

THE COURT: No. We're in the Defendant's exhibits?

MR. LYLES: That's right. We'll start off with No. 8.

BY MR. LYLES:

Q If you look at Exhibit 8, that's a document that has on top of it the Brown-Meihaus logo. Do you see that, Mr. Brown?

A Yes.

Q Okay. And it's addressed to Andy and Amy, and it speaks for itself, but it's got a total number there

of $685,000. Do you see that?

A I do.

Q What scope of work was contemplated by this document?

A This was after the quote that I just told you for 1.2 for the full house.

Q Okay.

A Amy explained to me that was too much money, they couldn't spend it, then we started cutting it out. And then we went over the things we wanted to do, I'm assuming that's just what was noted here, and then I came back to her with a proposal.

Q So you think that there's another estimate that predates this estimate?

A Yeah, there was. So this, on page 2, this construction template, that's what we use for a bid, and I can't remember if I talked to her on the phone or met with her, and it was just too much, so that's when we backed everything out to get to this number.

Q Well, I will just -- I will represent to you that I have not seen a bid that I understand is predating this bid. So if you have a bid like that, I would like to see it.

A I think she would have it.

Q Well, she has produced her file, and you'll

notice that we've produced thousands of pages of documents, and this document begins with Salzhauer 0007, so this was the seventh thing that she had in her file, or seventh page, and I just haven't seen that estimate.

A Okay. I don't know. This was a revision to get -- cutting the fat out of -- to get where we needed to, to get to her budget.

Q But, now, the letter doesn't say that, does it? In fact, what it says -- it just says what it says. It doesn't say this is a revised estimate, a reduced scope of work, or anything like that.

A It says, "As promised," meaning we had the conversation before, "I broke down the construction process of the house as it were to be completed in stages."

Q I see that. And then you've got the various stages, and the total of all the stages added up to $685,000?

A Yes.

Q Okay. And nowhere in here does it say this is a reduced scope of work?

A No.

Q And there's no date on it. But if you turn over to page 2, where we've got your template, do you

see that?

A Yes.

Q And what you've got there is three months. What did that three months mean?

A Where are you seeing three months?

Q Three months, top of the page.

A It might have been -- I don't know.

Q Was that the anticipated construction schedule?

A I don't think so, because windows and doors, as you can see at the bottom, it takes them six weeks from the order to deliver it, so we couldn't do the whole project in three months. If that's what you're insinuating, no.

Q I just asked you to explain what three months meant, and you don't have an answer, so I'm just trying to find out what it was.

A I don't know.

Q Okay.

A I would never -- no project of this magnitude could be done in three months.

Q Okay. If we turn over now to Exhibit 12, you see that there is another email from you -- or an email to Amy from you dated June 15th, 2012?

A Uh-huh.

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

and to -- well, you sent it to Amy, and she never signed this contract.

A Okay.

Q Is that right?

A Correct.

Q Okay. In fact, she never signed a contract for cost plus?

A No.

Q Okay. And I apologize for getting you to jump around, but if you'll go back to Exhibit 8 for me, Exhibit 8 you give her the prices, and you don't reference cost plus anywhere in those prices, do you?

A No. You can see by having the zeroes at the end of those numbers that it's a ballpark number.

Q Sure. But you don't say in addition to whatever the numbers are, I'm going to charge you overhead and profit; right?

A No.

Q And, in fact, what you say in the last line in that summary of costs is "Fixed project management fee and accounting." Do you see that?

A Sure.

Q So that is -- you were proposing to them that you were going to do this work with a fixed project management fee, and presumably the accounting means the

accounting for the job; is that right?

A It was this plus the cost plus. So this was our project -- that's for the project manager, and Deborah, the accountant, was 65,000.

Q Show me where -- before the total line, where does cost plus show up?

A It doesn't show up at all on here.

Q Okay. And then if you look over at Exhibit 14, there is an email from you to Hank.

A It looks like a revised AIA contract.

Q Okay. So that's a -- you are in that email sending Hank an AIA cost plus contract; is that right?

A Correct.

Q And that was never signed, either?

A Correct.

Q Now, if we look over at Exhibit 15, there's another email from you that says, "Amy and Hank, attached is the estimate. I did a takeoff and bid per Beau's plan. A lot of detail has been added, and I highlighted in red the bids that can be adjusted based on finishes." Are you available to meet with me? Do you see that?

A Yes.

Q If you look behind that email, you'll see that there is an estimate. Did you do that estimate?

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

in Exhibit 15 is only for the main house?

A Yeah. We had this phased out. This is just the main body of the house, and then it looks like the main body of the house, 490; rear of house, 60; and the guest cottage, 30.

Q Okay. But what I'm trying to figure out is the 722. You're saying the 722 only applies to the main house work?

A I'm not sure. What number was that?

Q Sure, 15.

A What's the date on this?

Q Exhibit 15, the email is dated August the 8th, 2012.

A Okay. So this is updated from what -- on Amy's August 2nd email asking me to price out.

Q All right.

A And so whatever she asked me to price out, that's what is in this cost control estimate, and I've got subs from the numbers as you can see in there.

Q Okay.

A Numbers from the subs, sorry.

Q Good deal. So this was in response to an email you received from Amy?

A Yes. On --

Q What was the date of that?

A It was August the 2nd.

Q Okay. So if we were going to try to figure out what was scoped, we would have to look at Amy's email?

A Yes.

Q Okay. But you would agree with me there is nothing in the estimate itself and there's nothing in your email that suggests that this is some limited scope of work?

A It is what she wanted me to price out.

Q Okay. You don't refer to her August 2nd email in this email?

A Not here.

Q Okay. And you've never seen the -- any estimate from Daly & Sawyer?

A No.

Q Okay. Then you continue to provide pricing information to Hank and to Amy. I'll refer you to Exhibit 16 where there's a reference to value engineering in an email that you sent. Do you see that?

A Yes.

Q And so you've adjusted -- because I was not sure how this -- if you'll look at the second page of that. How does this adjust the cost? I can't tell if

it adds $157,949 or subtracts $157,949 or not. I just --

A It looks like these awnings are going to be added. Labor and material total, this would be additions.

Q Okay. So you prepared this to show them that -- that the estimates you had given would have to be adjusted and increased based on additional items that they wanted?

A Correct.

Q You mentioned in your conversations or your testimony with your lawyer something about change orders. I heard that somewhere this morning. Were there any signed change orders on this project?

A There wasn't because it's a cost plus job. Any costs, they ran through the company.

Q So there was no formal document that we might think of as a formal change order?

A No.

Q It was just costs that were added on to the job?

A Anything that was paid out of the job was in addition to it.

Q Okay. Exhibit 17, there's some more pricing information and adjustments of estimates. Do you see

that?

A Yes.

Q All right. And if we look at the -- what you attached as Exhibit 17, we have Bid A, right, on the left-hand column, which totals $722,074.12. We've seen that number before?

A Yes.

Q Okay. Then we've got a Phase I column to the right of that. Do you see that?

A Uh-huh.

Q Phase I, main house only. Do you see that?

A Yes.

Q And if we go down and we look at the main house only column, all the way to the bottom, the number we have there is 451,745?

A Uh-huh.

Q Would you agree with me that it appears as though the Bid A number includes more than just the main house?

A Yes. This is -- this might be the original estimate right here.

Q Okay.

A That's the 1.2 -- those numbers added together.

Q Okay. Well, let me ask you something. So

main house only 451; right?

A Uh-huh.

Q Are you suggesting that you add these two numbers together to come up with a million two?

A I don't know. I haven't -- this is the first time I've looked at this in five years.

Q Well, this says Phase I only, which would suggest that the Phase I cost was included in the 722,074 number, but I don't know that.

A If we were just to do the main house only, it's going to be 451,745. If we were going to do the whole project, it would be both of those numbers added together.

Q Oh, so the 722,074 is in addition to the main house?

A I assume, because that's up in the permits, licenses, and all of that, too.

Q Earlier, I thought you said you thought the 722 was for the main house and only the main house. No?

A I don't know. Like I say, this is the first time I've seen these in a couple of years.

Q Well, you represented to Mr. Brown this morning that you did an original estimate for this project sometime -- somewhere between 1.2 and 1.4, but

that Amy didn't want any part of that.

A Right.

Q And we haven't seen that --

A Right.

Q -- estimate. The only estimate that I see that seems to be based on Beau Clowney's drawings is $722,000.

A Okay.

Q And if we look over at the next page, page 18, we've got more accounting numbers from you which references main house only. That looks like another breakdown of just the main house only number. Do you see that?

A Yes.

Q And that number is 484,283.

A Okay.

Q And then if we go to Exhibit 20, we have another email from you to Hank and to Amy that says, "Hank, below is numbers for our discussion," and then you've got original bid, entire house; updated bid, Phase I only; then you've given them the alternate pricing numbers; right?

A Sure.

Q And then you've got total for the entire house, 691,798.

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

Q Okay.

A You can see here we've got Jenn-Air appliances. Jenn-Air appliances can be 10 grand. Viking Appliances can be 60,000. I don't have the -- when we're trying to get this down as low as we can, that's what I'm trying to work with her on.

Q I'm on Exhibit 17, so where am I looking? You referred to your subcontractor bids, and I'm just trying to figure out where that is.

A You see where it says turnkey foundation, IML? See where it says $6,700 IML?

Q Okay.

A And then you'll see metals, structural metal, A&R Sheet Metal gave us a pricing of -- preliminary pricing of 2,750.

Q I see.

A And then your wood framing, Southern Lumber, gives us 26,000. So they take the not-for-construction Beau Clowney plans and review them, and then they give me numbers back.

Q Okay. So where you've got in those columns a reference to a sub or a supplier, that is based on some proposal that they gave you?

A Correct.

Q Okay. And where there's not anything

referenced in that column, is that just an estimate based on your experience or what? Rough carpentry, for example, finished carpentry, don't have any references by them.

A No. That's interior trim and framing. I'll do it on a square footage number.

Q So that's based on data that you have. That's not a proposal from a subcontractor?

A No.

Q And -- all right. And did you ever go back and look at the numbers that were originally proposed and compare them to what the total job costs were?

A There were so many other variables. It's not even close. When we demoed the whole house, there was so much structural rot and repair that wasn't even included in this. We didn't know. When you look at a house, you don't know what you're getting into until you tear it apart.

Q And did you do the demo work when you started?

A When -- did I do the demo work when I started?

Q When you started the job.

A Yeah.

Q So your testimony earlier that you found yourself being asked to add things on and do things that you didn't expect to work on, I'm trying to

understand that. If you demoed the house to begin with, what was your intention in terms of --

A More or less finishes. Getting -- we don't have a detailed -- in Beau's plans, we did not have a detail on interior finishes like cabinets, what type of granite, what type of shower heads, what type of cans, you know, and all that changed.

Q When we saw earlier, we saw those estimates, and we had a whole house estimate of 722 and that was reduced a little bit down to 600, and then we had the main house estimate. When you started your work, did you think that you were going to be working on the main house or the whole house?

A We demoed the whole house.

Q Is that what Amy wanted you to do?

A Yeah. I mean, we were -- she was, like, find all the -- we started showing her the wood rot and everything, and she told me to continue on and find out what you need to do and get it replaced.

Q So you didn't do -- you have not done any sort of cost comparison to determine, for example, where the final numbers were for somebody like Southern Lumber, in terms of what was originally bid by them or estimated by them, and what they ultimately charged?

A Yeah, this is an estimate. This isn't a fixed

price contract. This is a -- if it would be fixed price, then we could do it, but when you start seeing zeroes at the end.

You know, same thing with the subcontractors, hey, give me a price on solid interior doors, what are they going to be, just so we're not wasting their time or anybody's, you know. And then once we agree on it, that's when we move to get final hard numbers after we get selections from Amy or Beau or the interior designers.

Q How were you able to provide any estimate at all when you didn't know what work was going to be --

A It's an estimate. We didn't -- we had no earthly idea we were going to strip the whole house of its sheathing and insulation and band board. I mean, it was just unknowns. We were going to utilize all the sheetrock. We were going to utilize the hardwood floors and sand them. We were going to reutilize the six-inch cans, but all of those were switched out to full custom imported can lights.

Q So on one of your estimates when you said that you gave them a turnkey price, that was turnkey unless you found something else you didn't know about?

A That was a turnkey estimate price.

Q But turnkey meant what?

A Based on what I can see, this is what it's going to cost to get the job done.

Q Do any of the estimates that you sent to these people qualify -- are they qualified in any way by any representation that, you know, there are unknown conditions, things I'm uncertain about, so on and so forth?

A Say the first part of that again.

Q Sure. Any of the estimates that you and I have talked about, do any of them say, to Amy or to Hank, here's an estimate, but there's an awful lot of stuff about your house I don't know, and so this estimate really doesn't mean much?

A I don't see any demo or structural issues in this, no, but we certainly talked about it because we had the original home inspection.

Q Okay.

MR. VARNADO: Good time for our break?

MR. LYLES: Sure, that's fine.

(Whereas, a lunch recess was taken from 12:30 p.m. to 1:48 p.m.)

THE COURT: We are back on the record, case 2014-CP-10-3881. Robert Lyles is cross-examining and we will pick back up at that point.

BY MR. LYLES:

Q Mr. Brown, a general question, at the time you were working on Amy's house, how many other houses was Brown Contractors working on?

A I don't recall. I would have to check.

Q More than one?

A I honestly don't remember.

Q So do you remember if there were any that you were working on at the time or not?

A I'll have to check. I cannot remember at the time.

Q How many houses did Brown Contractors build?

A For 2013, or '14?

Q Anytime.

A Probably 20 plus.

Q Okay. Did you handle the billing and accounting on Amy's project any differently than you did on the other projects?

A All the same.

Q And right now I think you're doing business as Brown-Glaws; is that right?

A Correct.

Q And you're handling the account in the same --

A Same way.

Q The same way?

A Uh-huh.

Q Now, you -- we've looked at the proposed cost plus contracts that were submitted and not signed; right? And I think you testified earlier that you believed it was a cost plus job?

A Yes.

Q And that the cost plus job is reflected in the billings that you sent?

A Yes.

Q All right, we'll take a look at those. I'm going to show you an email and just ask you -- this is not in our exhibits. I need to add an exhibit. This is an email from Henry to Jay.

(3/12/13 EMAIL MARKED AS DEFENDANT'S EXHIBIT NO. 118 FOR I.D.)

BY MR. LYLES:

Q I'm going to show you what's been marked 118 and let you pass that one to Mr. -- the other Mr. Brown. Rob has got a copy. Do you remember receiving this from Mr. Salzhauer?

A I don't remember the email.

Q Okay.

A I am unfamiliar with the time and material basis.

Q So you don't know what time and material means?

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

your company responded to this email and provided Mr. Salzhauer with an estimate for the completion of the work?

A I don't know, but there really isn't a way to give him a projected cost of work when you don't know what's going in the house.

Q Did you write back to Mr. Salzhauer and tell him that?

A I'm not sure.

Q Do you know -- the time period for this email is March the 12th of 2013. Do you know what the status of completion of the job was at that time?

A Status of completion?

Q Yeah, what percentage of completion.

A We haven't even got the permit yet; right?

Q Well, no. This would have been -- I think you got the permit in 2012.

A 2013?

Q This is March 2013.

A I don't know. I don't have a calendar in front of me.

Q Do you know how much you billed the Salzhauers at this point, March of 2013?

A I just have invoices, but not a total amount.

THE COURT: What exhibit are you referring

to?

MR. VARNADO: You've got a number there.

A (Continuing) Oh, nine, sorry. It's just a customer balance, but it doesn't show a gant chart on what was paid.

Q If you will turn to Exhibit 96 in my exhibit notebook, which is this one. Are you at 96?

A Yes.

Q Your 96 is looking different. I think you're at 95.

A Sorry.

Q That's okay. You with me?

A Uh-huh, I am.

Q So Exhibit 96 appears to be payment application 12. Do you see that?

A Yes.

Q And it's dated 3/11/13. Do you see that?

A Yes.

Q And that's the day before that email from Hank Salzhauer. If you look at this pay application over to the left, it says original contract sum, $543,130.20. Do you see that?

A I do.

Q Where do you get that original contract sum from?

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

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

have any knowledge of where that number came from?

A After application number 12, that's 12 applications --

Q Yeah.

A -- at 543,000. I don't know, I guess we would have to look at the ones in front of it.

Q And what would the purpose be of looking at the ones in front of it?

A Probably just to -- just to see the change order. It looks like there's a net change by change orders, contract sum, retainage.

Q You said earlier that all of your invoices to Amy contained overhead and profit numbers?

A Yes.

Q Where do you find that number?

A First one, Brown 0699.

MR. VARNADO: Which exhibit is it in?

A (Continuing) Exhibit --

MR. VARNADO: Why don't you tell the court reporter what exhibit you're looking at?

A (Continuing) No. 9 exhibit. Brown 0699.

Q Okay.

THE COURT: I'm sorry, exhibit number what?

A (Continuing) 0699 -- oh, I'm sorry. No. 9.

THE COURT: 0699, all right.

BY MR. LYLES:

Q And this is dated 12/9/2013; right?

A Correct.

Q So that's an example of where you bill for overhead and profit?

A Yes.

Q And then where do you bill for your project management fee?

A Line item one, two, three, four, five down.

Q That's Cameron Glaws?

A Correct.

Q And so you were billing for a project management fee for Mr. Glaws?

A Yes.

Q Not for you?

A This is for him.

Q Okay. So you didn't bill a project management fee yourself?

A I don't think so.

Q Okay. All you did was bill this overhead and profit?

A Uh-huh.

Q Okay. Has Mr. Glaws been paid for the work that he did in connection with this job?

A He said he was lacking about $7,000.

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

sorry.

A (Continuing) Seven.

THE COURT: 0695.

BY MR. LYLES:

Q Okay. Now, is this document -- this says, "Job Estimates vs. Actuals Detail for 1850 Flag Street." Is that something that's sent to the client on a periodic basis?

A If he -- I think if Hank asked for it, yes. As far as if it goes out on every invoice, I don't know.

Q You don't know if it goes out or not on every invoice?

A No.

Q You've got your invoices in your exhibit?

A Correct, but I don't know if that's attached to it.

Q Okay. Turn with me to Exhibit 100. Are you there?

A Yes.

Q This is another application for payment. It says application 2.3. Do you see that?

A Yes.

Q And the date on that application is May the 9th, so this is a couple of months after that last

application we looked at. Would you agree with that?

A Yes.

Q And it shows an original contract sum of $999,944.93; right?

A Yes.

Q Again, is it your belief that that is a number that was not supplied by your office?

A I'm not sure.

Q So again, you don't know who else would have supplied the accounting information that's included in that document?

A I mean, Deborah Kahn, my bookkeeper, and Hank were in control of our QuickBooks, and then Hank would have her input what he needed to keep up with job costs.

Q Okay. So it's your belief that Hank was directing Deborah what to input in these documents?

A He was telling her what to do, yes; because if not, she wouldn't have done it.

Q So at this point, which is May of 2013, as you're testifying today, do you have any knowledge about the accuracy of any of the numbers that are included in here or not, or anything about the methodology of creating these pay applications?

A I know ours. But on his, he could have been

instructing her to move this into actuals, up-to-date actuals. That's the only thing I can think of.

Q What do you mean that's the only thing you can think of?

A I mean, you're ask -- this is his -- this is his application for payment.

Q He's doing an application to pay who?

A Us, Brown Contractors.

Q And you're signing it?

A Yes.

Q With no knowledge about how the numbers got there at all?

A Well, they were fluctuating so much. It was -- by being a change order job, they were accumulating.

Q Okay. All right. Do you know how many times they asked you to give them an estimate of how much it was going to cost to complete this job?

A I do not.

Q Do you know how many times they asked you to give them a projected completion date for this job?

A I don't.

Q If you'll turn over to Exhibit 104 for me, we have application number, it looks like, 25. The date on that is also 5/9/2013, but it appears to be a

different application. Do you see that?
A Yes.
Q Is that your signature?
A It is.
Q What does "less O&P" -- I can't tell what that last word is. Do you know?
A "Less overhead and profit from." So it's actually application 2.5.
Q Okay, 2.5.
A I signed it, and then this is where he shorted us on our invoice.
Q Okay.
A Overhead and profit.
Q What do you mean "this is where"?
A Where it's asterisk less overhead and profit from the invoice.
Q Whose writing is this?
A That's mine. Below, it looks like Deborah's. She's got, "Overhead and profit due in addition to this invoice," so he shorted our invoice $36,689.40.
Q Okay. And did you ask him why he had done that?
A I don't recall.
Q Do you know what the total amount of the overhead and profit was that you had been paid at that

point in time?

A It looks like $917,265.

Q That's for the total job; right?

A Based on his form. I don't have it on ours at the time.

Q Okay. Do you know how much you had been paid in terms of overhead and profit as of this date and time?

A No, sir. It looks like 128,376.25.

Q Where are you getting that, the next page?

A Next page, correct.

Q What line?

A 10 -- well, 11.

Q Line 11 is your overhead and profit number; is that right?

A Yes, sir.

Q Okay. So you billed at that point in time $110,000 in overhead and profit. That says from previous applications; right?

A Correct.

Q Okay. And if it's based on previous applications, that means you've been shorted -- Deborah's total for being shorted is about 36,000; right?

A On this one.

Q Well, you got shorted on invoice 109, 119 and 130, according to this note.

A April, May and June, there was no O&P paid.

Q So if you had billed a total of 110 overhead and profit, and you got shorted 36,689, right, then you would have been paid overhead and profit of, in rough numbers, what, 80,000? A little less than 80,000. 74, 75,000?

A I don't know if she -- I don't know. We have to ask her.

Q Okay. Is she going to testify, or do you know?

A Yes.

Q Okay. We have some confusion about our copying when we put our exhibit notebook together, but there's another document that I want to show you that came from our files, but is a Brown-Meihaus document. I want to ask you about it, but let me get her to mark it first.

(CLOWNEY PLANS MARKED DEFENDANT'S EXHIBIT NO. 119 FOR I.D.)

BY MR. LYLES:

Q Let me show you what I've marked as 119. I want to ask you if you recognize that document?

A Yes.

Q What is that?

A Beau Clowney's -- this looks like our pre- -- it looks like a takeoff on how we were trying to dissect this thing. This is how I do my takeoffs. I'll do main body of the house, work-out room, and then -- this was the existing house. Wait a minute. No, I'm sorry. Yeah, this was just Beau Clowney's plan.

Q Okay. All right. And is the handwriting on the front of this document yours?

A It is.

Q And then the stamp at the top right-hand corner says "Property of Brown-Meihaus Construction"?

A Yes. That -- we've got -- I might have accidentally picked up the wrong stamp. We've got two of the same, similar ones.

Q Okay. In other words, what you meant to put there was the stamp of Brown Contractors but you used Brown-Meihaus?

A Correct.

Q Okay. And, of course, if you had used Brown Contractors, you would have had Vuong's number in there?

A Yes.

Q If in fact he was your qualifier at the time?

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

accurate enough?

MR. LYLES: Yes.

THE COURT: All right.

BY MR. LYLES:

Q Now, what you've got is a floor plan of the existing house; is that right?

A Yes.

Q And you've got it color-coded in blue, yellow, orange, and some sort of red or something like that, and then each section of those four sections seem to have a price associated with it. Do you see that?

A Yes.

Q And then at the bottom -- well, with each price, I guess with the -- you've got an Ipe reference in the middle there. It says 50K, Ipe and rail; is that right?

A Yes.

Q At the bottom, you've got P&O. What does that mean?

A I don't know. O&P is overhead and profit, so profit and overhead, 55.

Q And then what does it say?

A Fixed.

Q Did you provide this Exhibit 119 to Amy, or do you know?

A I don't know. This is -- it's a half a takeoff. I didn't even do the upstairs.

Q Okay.

A So I don't know where this came from.

Q Well, when you say you don't know where it came from, what do you mean? That's your writing on it.

A This is my writing, but I don't know who supplied it to you.

Q Well, it's got your stamp on it and it's got your writing on it, and it wound up in my hands. That would suggest to me that it probably came from Amy.

A Right.

Q So would you think you gave it to Amy?

A Probably so. We laid a lot of these things out on the table to try to figure this out for the pricing.

MR. VARNADO: I'm going object because we did a subpoena to Beau Clowney, too.

THE COURT: Just keep going. We'll pass by that question and keep going.

BY MR. LYLES:

Q Okay. Do you know whether or not the numbers that are reflected there correspond to the numbers on some of the proposals you made to Amy?

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

doesn't even have any numbers on the second floor or this other one, so this is an initial takeoff on trying to get to her number.

Q Okay. Well, how would you have cost savings if there's no original estimate?

A Well, if -- I'm given the parameters of doing this project at this cost.

Q Okay.

A And I can come in less this number; we split it up 50/50.

Q And you say you don't do fixed cost jobs; right?

A Right.

Q But on Exhibit 119, you wrote the word "Fixed" under P&O?

A Down here?

Q Yeah.

A I don't know why I wrote that. Fixed overhead and profit -- yeah, fixed project management fee and accounting only, not job.

Q All right. Now, earlier in your testimony, you indicated that, and I obviously don't have your transcript yet because our court reporter is so slow, but I think I heard you say that, when we were talking about your license and your qualifier, that you had

not -- that no claim had been made against your license. Do you remember that?

A Today?

Q Today, earlier today. And you said no, because I think I would have gotten a letter. Do you remember that?

A Yes.

Q Okay. In fact, you did get a letter about your license, didn't you?

A For which?

Q For which license? Your Brown Contractors license.

A Right. Cease and desist?

Q Yeah.

A Yes. After this job.

Q But you did get that?

A After this job. Not during this job or before.

Q Do you know what the basis for that cease and desist order was?

A Yes. Vuong pulled his license from Brown Contractors, and Cameron replaced his.

Q And that was in 2015, or do you recall?

A May 27th, 2015, yeah.

Q And that's Exhibit No. 7. And I will ask you,

and your lawyer didn't agree to put it into evidence, but I would like to ask you about it now and see if we can get it in, Exhibit 7.

MR. VARNADO: Seven can come in.

THE COURT: All right. Well, we will -- Exhibit 7, Defendant's 7, is now admitted and is in evidence.

(DEFENDANT'S EXHIBIT NO. 7 ADMITTED INTO EVIDENCE.)

BY MR. LYLES:

Q Okay. So, in fact, you did get a letter about your license at some point in time; right?

A Yes.

Q Okay.

A And I called them on this, and since we were -- we now, Brown Contractors, was dissolved, and we were moving to Brown-Glaws, and that's why this was a cease and desist on Brown Contractors. No activity.

Q When you had your conversation with the lady from the LLR that you testified about earlier today, did you tell her that Mr. Nguyen was not an employee of your firm?

A I don't recall.

Q Did you tell her that he was not an owner of your firm?

A I don't recall that, either.
Q Earlier in your testimony, you indicated that this job was cost plus, and therefore it did not have change orders. Do you remember that?
A Yes.
Q And there were no change orders on this job?
A Identified or --
Q Were there change orders?
A I don't recall.
Q Do you know what a change order is?
A Yes.
Q Is it a formal document which represents a change in the contract price?
A A signed change order.
Q But we wouldn't have had that in this case?
A I don't think so.
Q Okay. Do you remember telling these folks that there were change orders?
A Probably a change in the scope of work.
Q You indicated earlier that Amy moved into the house in September while you were still involved in, I guess, the punch phase of the house?
A Yes.
Q Was that an imposition for Brown Contractors?
A What do you mean?

Q Well, did that interfere with your ability to do your work?

A I mean, of course, yes, but we worked with them.

Q Do you know how many times you had promised them that the house was going to be complete before September of 2013?

A I don't recall.

Q Do you know what she was doing while the house wasn't complete, where she was living with her children?

A Renting down the street, living on the beach.

Q Do you know what that was costing her?

A I do not.

Q Your subcontractors for the house, how many HVAC subs did you have, do you remember?

A Two or three.

Q Do you know why you had more than one?

A Amy didn't like one of them, so we removed him from the job and brought another one in.

Q Okay. Who finished the work, do you remember?

A M&S Mechanical.

Q And then who was starting out doing the work?

A I don't remember who it was.

Q But it was somebody you think Amy didn't like?

A Yes. It was Vuong -- it was one of his subcontractors that he's worked with in the past.
Q Did Vuong contract directly with the HVAC sub?
A I'm not sure.
Q Why would he have contracted with an HVAC sub, if he did?
A Just to get, probably, the best pricing.
Q If Vuong contracts with the HVAC sub, who's in charge of the HVAC sub?
A Vuong, and ultimately us.
Q How do you control the HVAC sub if his contract is with Vuong?
A I control Vuong.
Q Why wouldn't the HVAC subcontract with you?
A No idea.
Q Well, when they contract with Vuong, Vuong puts overhead and profit on the HVAC number, and then you put overhead and profit on that number; right?
A If that's what it is in the book, yes.
Q And how many electrical subcontractors did you have?
A I'm not sure.
Q Did Vuong hire them, too, or just --
A He had one of his initial ones, yes.
Q So Vuong hired the electrical subs, or do you

know?
A The initial one, yes.
Q Okay. And how about the second one?
A I think that was us. Barry Lingenfelter.
Q What was the reason for that change, do you remember?
A I think just another Amy change.
Q Then why didn't Vuong hire the second sub, electrical sub?
A Because he was my sub that I --
Q And why didn't he do the job to begin with?
A Busy. He was busy.
Q Who hired the framer?
A That was Vuong.
Q And what other subs did Vuong hire?
A He did framing, HVAC, electrical. I believe siding.
Q And then what subs were hired directly by Brown?
MR. VARNADO: At which point? I'm sorry.
MR. LYLES: At any point.
BY MR. LYLES:
Q I know we have an electrical sub that was hired by Brown. What other subs were hired by Brown?
A B&F Construction.

Q What did they do?
A They do carpentry.
Q Okay.
A Barry Lingenfelter, like we discussed, electrician.
Q All right.
A Carolina Fiberglass.
Q What did they do?
A That's a waterproofing deck membrane.
Q Okay.
A Coastal Plumbing & Gas.
Q All right.
A DBC Construction Services.
Q What did they do?
A Roofer.
Q What sort of roofing work did they do?
A Actually, hold on. That was a different job.
THE COURT: DBC is off.
A (Continuing) Disher Cabinets. Four Corners Woodworking.
Q What did they do?
A They supply all the interior trim and doors.
Q All right.
A Linked AV, audio/video. M-L Woodworks.
Q What did they do?

A Built-ins. Custom built-ins and cabinets. M&S Mechanical, the HVAC.

Q Was hired directly by Brown?

A Yes.

Q So at least one of the HVAC contractors was hired by Brown, and the other one was hired by Vuong?

A Correct.

Q And is M&S the company that actually did the HVAC work?

A Yes. Mechanical contractor.

Q All right.

A And then Hardwood Flooring & Tile Guys, they do hardwood flooring and tile.

Q Were hired directly by Brown?

A Yes.

Q Okay. Who hired the roofer?

A I believe that was Vuong. I'm not sure, though.

Q Do you know what the scope of work was for the roofing?

A There was the new roof, and then the coating on the existing roof.

Q Where was the new roof put, do you remember?

A Over the work-out room.

Q Do you know what was charged for that?

A I do not.
Q That would have come through Vuong?
A I'm not sure. Let me check. I don't have it in front of me.
Q Okay.
A I can find out, though.
Q And I'm just making sure I'm straight. Did you hire the framer, or did Vuong hire the framer?
A I hired the carpenters. I think he hired the framer.
Q Okay. And then who hired the plumber?
A There was the original plumber, and then I believe Brett Ford, who does all of our work, I'm pretty sure we hired him.
Q Okay. So did VLN hire the first, and you hired the second?
A I believe so.
Q Okay. All right. So by my reckoning, we've got VL- -- Vuong, he hired the framer, he hired the roofer, he hired one of two plumbers, he hired one of two HVAC companies, and he hired one of two electricians?
A Yes.
Q Okay. And at any point in time, did you tell Amy that the people who were going to be doing work on

her project were going to be working directly for Vuong?

A I told her that Vuong was getting his subcontractors together to do this. We were trying to get the price as low as we can. So, yes.

Q So you told Amy about Vuong's role in this project when you handed her Exhibit 119?

A I don't know. That was an initial -- probably not then, no.

Q When do you think she was told for the first time that Vuong was actually hiring subcontractors to do the work on her house?

A I don't know. One of our -- I told her we were going to have to -- I could bring in Vuong to get this done at a less expensive price than my premium subs on the island. That was 100 percent told to her. I don't know when.

Q Okay. The subcontractors that were hired by Vuong, did you ever meet with them and review the overall job of those subs?

A We met with those guys and went over the project and -- yeah.

Q Did you tell them what Amy's expectations were in terms of quality and cost?

A That she wanted it done cheap, yes.

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

subcontractors.

Q I think there's $51,000 worth of subcontractor outstanding bills on this job, based on the accounting that we've seen. Does that number not agree with you?

A Yes.

Q It does? Sounds right?

THE COURT: What was your answer? Because I'm not sure.

A (Continuing) Yes, sir.

THE COURT: That is right?

A (Continuing) The 51, unpaid bills. It looks like we owe Vuong -- well, I would have to look. This is for all jobs. I would have to break this apart.

Q Okay. All right.

A Here it is, $54,041.05.

Q Is what you think Vuong is owed?

A Oh, no, no, no. That's the --

Q The total amount that has not been paid to subs?

A Yeah. But Hank was paying them, and we, over time, paid them.

THE COURT: What exhibit was that?

A (Continuing) That is Exhibit 7. But it doesn't look like Vuong -- as of 8/18/14, Vuong is not on here. So, according to our books, he was paid.

Q Okay. All right. Mr. Brown, you indicated earlier that -- well, let me back up. Are you aware or have you been made aware since you left this job that there are defects and problems at Amy's house?

A I've seen emails that stated there were, but nothing specifically what problems.

Q And at the time you left the job, did Hank make a demand on you to come back and to fix certain items?

A A demand, no.

Q Did he make a request?

A I don't recall.

Q Did you get a copy of a home inspection report done by a company called Benchmark?

A No. I got an email saying that Benchmark was coming to us, but it never came.

Q So you've never seen a Benchmark report?

A Not until today.

Q All right. Did you do a punch list for this house?

A Yes, a punch list for CO, Certificate of Occupancy.

Q All right.

A Amy gave us a punch list, which we completed.

Q Okay. At any point in time -- when is the

last time you were actually at the house?
A Inside, or just at it?
Q At it.
A I mean, we built a house on the beach right across the street. I drove by it every day during that process, but --
Q When was the last time?
A January 2014.
Q When was the last time you were -- that's when you were last in the house?
A That was when I was at the house.
Q When was the last time you were in the house?
A Before Christmas, '13.
Q Are you aware that we have notified -- that I have notified your lawyer about issues at the house?
A Issues, yes. But I haven't seen any -- I haven't seen any other documents saying what issues.
Q Have you -- have you ever requested an opportunity to go back to Amy's house?
A Normally, we do a checkup, a three-month checkup and a 12-month checkup.
Q But you didn't do that here?
A No.
Q But you have not requested to go back to the house since you left?

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

seen this one.

Q Okay, you have seen that letter?

A Yes.

Q Okay. And in response to this letter, do you know whether or not you asked to come out and take a look at any items that were not complete or were done incorrectly?

A I mean, it doesn't -- it just says -- it just states that they were done incorrectly. It doesn't say what they are.

Q Okay.

MR. LYLES: I move this into evidence as Exhibit No. 120.

THE COURT: Okay, without objection, and I think I take it as notice and not proof of the matters still --

MR. LYLES: Correct.

(DEFENDANT'S EXHIBIT NO. 120 ADMITTED INTO EVIDENCE.)

THE COURT: Rob, is that --

MR. VARNADO: Yes, sir. And I think it's already in the book.

MR. LYLES: It may be, Rob. I just didn't --

MR. VARNADO: That's okay. It will be fine.

MR. LYLES: We might be doubling up. Let me get you to mark that, too, as 121.

(LETTER & ATTACHMENT MARKED DEFENDANT'S EXHIBIT NO. 121 FOR I.D.)

BY MR. LYLES:

Q I'm going to show you, or have showed you, what is marked for identification as Exhibit 121, and I'll ask you if you have ever seen this letter and the attachment before?

A This is Howard Brown's unsigned contract?

Q Yes.

A Yes, I've seen this.

Q You've seen that before?

A Yeah.

Q Do you remember seeing it at about October of 2014, or do you know?

A I don't know.

MR. LYLES: I would like to move that in as Exhibit 121 on the issue of notice, too.

MR. VARNADO: Under the same caveat as last time.

THE COURT: Admitted for that purpose.

(DEFENDANT'S EXHIBIT NO. 121 ADMITTED INTO EVIDENCE.)

BY MR. LYLES:

Q If you will, now go back to the notebook and --

THE COURT: Where is 121?

MR. LYLES: I'm not trying to rush you if you want to look at it.

BY MR. LYLES:

Q Now, if you could go to the notebook and get to No. 72.

A (Witness complied with request of counsel.)

Q Do you recognize -- do you recognize the letter contained in Exhibit 72?

A His Exhibit A is included in this letter?

Q Yes.

A Yes.

Q And you see there's a reference there to a roof problem?

A That's the roof repair price on the existing roof that we did not do?

Q Just asking you if you recognize the letter.

A Yes, I've seen this.

Q And in response to this letter, did you make any request to go back out to the house and take a look at it?

A Never seen a letter. I don't remember seeing -- this letter doesn't coincide with his

estimate.

Q Okay. Did you ever request an opportunity to go out and take a look at the roof that was being referenced in the letter?

A I mean, we -- I remember riding by, looking at it from the road.

Q Okay. You never were denied an opportunity to go out to the house and inspect anything by either me or Amy?

A No.

Q Okay. If you'll turn over to Exhibit 73 for me.

A (Witness complied with request of counsel.)

Q I'll ask you if you had an opportunity to see this letter and the photographs that were attached?

A I have not seen this one.

Q Okay. You have not seen those photographs?

A No, have not.

Q Okay. Mr. Varnado has been your lawyer through the entirety of this case; right?

A Yes.

Q Okay. And take your time. I don't want to rush you.

A Okay.

Q All right. So is today the first time you've

seen the photographs of nails penetrating through the electrical wiring and things such as that?

A I've seen -- I didn't see the nails penetrating the wire. No, I haven't seen this.

Q Okay. If you'll turn over to Exhibit 74, and I'll ask you if you've seen that letter?

A So this was basically him repairing the demo and work-in-progress.

Q Have you seen the letter?

A Yes.

Q Okay. So you saw that letter previously?

A Yes.

Q Okay. And then I'll turn you over to Exhibit 75, which is dated July the 5th of 2017, and ask you if you've seen a copy of that letter?

A Yes, I have.

Q And did you request an opportunity to go out to the house and take a look at the deflection that's referenced in that letter?

A I did. I called the -- Geremy Powell and asked him what was going on, and -- and that's how we kind of left it. He explained it to me.

Q He did?

A Yup.

Q All right. Did you give him any input about

how to address the deflection problem?

A No.

Q Is he an engineer that you were comfortable with?

A I've worked with Geremy on the majority of my houses.

Q You worked with him on this project?

A I don't think he was the engineer on this one. Was he? I don't know.

Q I think there's some evidence that he was involved on the front end of this project.

A Okay.

Q But if that's not your recollection, so be it, okay. You would -- is it reasonable to expect, or for Amy to expect, that the electrical system in her house is not a fire hazard?

A Expect that -- I would expect it not to be, yes.

Q Okay.

MR. LYLES: Henry, if you'll give me just a few minutes, I'd appreciate it.

THE COURT: Certainly.

MR. VARNADO: Maybe we can take a break?

THE COURT: We'll take a 10-minute break.

(Whereas, a short recess was taken.)

THE COURT: We are back on the record in 3881 and Plaintiff Lyles is cross-examining Mr. Brown.

BY MR. LYLES:

Q Mr. Brown, what is a Level 5 finish? Does that name ring a bell, or that term ring a bell?

A Drywall Level 5 finish.

Q What is that, a Level 5 finish?

A It's when you finish drywall. Normally, you'll hang it, tape it, sand it. Instead of priming it, they come in and spray it, lay it over and get a nice smooth finish.

Q Is a Level 5 finish better than a Level 4 or a Level 3 finish?

A Yes.

Q Is it the highest finish you can have?

A Yeah.

Q Is that what was promised to Amy on this job?

A I'm not sure.

Q You mentioned dehumidifiers earlier. Do you remember that and part of the I think the HVAC discussion that you had earlier?

A Yes.

Q Was it a recommendation that dehumidifiers be installed?

A Yes.

Q And were they installed on this house?
A Yes.
Q And did she pay for that?
A Yes.
Q And are you aware they were never hooked up?
A No.
Q And couldn't be hooked up to the system?
A I was not.
Q Now, you mentioned VLN as being a project manager of some description for half the job. And then I think you also mentioned Cameron Glaws; is that right?
A Yes.
Q And he's licensed?
A Yes.
Q But his license wasn't used in any respect for this job?
A Yes.
Q Okay. Now, who is Ken?
A Who is who?
Q Ken. Was somebody named Ken on this job, too?
A I don't recall a Ken.
Q Okay. Was there ever a period of time between VLN and Glaws that there was no project management on the job?

A No -- oh, Ken. He was a project manager for me on another job, yeah, yeah.

Q Was he ever on Amy's job?

A I think he came by there, and due to the circumstances, he didn't want to take it.

Q Okay. So he was there, but not for long?

A I don't even recall.

Q Was he licensed?

A No.

Q Was there ever a period of time when the job did not have some sort of licensed project manager on it?

A I don't recall because -- I don't recall.

Q As the contractor who pulled a permit, would you agree with me that you have an obligation to comply with the building code?

A Absolutely.

Q With respect to the work that you do?

A Yes.

MR. LYLES: I think that's all the questions I've got for you. Thanks.

REDIRECT EXAMINATION

BY MR. VARNADO:

Q Mr. Brown, will you turn your attention to, in the Defendant's book, Exhibit No., I think it's 13?

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

Lyles' book, 13, and that is a -- when you send a cost plus agreement to Mr. Salzhauer; is that correct?

A Correct.

Q Okay. Did you sign that document? I don't know if you did or didn't.

A I didn't sign this one in his -- in this book, no.

Q So who wrote this contract, in 13?

A This -- this is our AIA document that we kind of had someone put more in layman's terms so clients and contractors can understand.

Q This was produced by the Salzhauers; is that correct?

A No. This is our contract.

Q I'm sorry. But it was produced in discovery by the Bates label Salzhauer at the bottom; is that fair?

A Yes.

Q And then if you go to Exhibit 14 -- I'm sorry, 15. Now I'm confused because -- yeah, go to 14, although it has the Exhibit No. 15 on it.

THE COURT: I think that's the deposition exhibit.

MR. VARNADO: Yeah, that's right.

BY MR. VARNADO:

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

BY MR. VARNADO:

Q Based on your communication with Mr. Salzhauer -- did you have communications with Mr. Salzhauer at the time you sent these two contracts?

A Yes.

Q Okay. And based on your communications with Mr. Salzhauer at that time, what did you believe was the understanding of Mr. Salzhauer about a cost plus contract?

A It was -- I mean, he agreed to what we were talking about.

Q Okay. How did you bill again for this job? Tell Mr. Brown how you billed and what your understanding was and what Mr. Salzhauer did when he got the bills to pay them.

A So what we do is we take every one of our subcontractors' invoice and we copy it and attach it to the invoice, and then we send it to him. And --

Q Would that include Mr. Vuong's invoices?

A Everybody's, the whole project. So, and at the end of the project, we save everything to a disc and give it to the clients.

Q And Mr. Salzhauer did more than that, then he would send it back to you? He would --

A He would have my secretary update his, what we

were looking at earlier, requisitions. He would have her update those and me sign it to get a check.

MR. VARNADO: Okay. That's all the questions I have at this time.

THE COURT: Robert, anything?

RECROSS-EXAMINATION

BY MR. LYLES:

Q Going back to Exhibit 8 again, I think your testimony just a few moments ago was that Exhibit 8 was the first one that you did for Amy?

A One of the first ones.

Q Was it the first one, or was it one of the first ones?

A I'm not sure. There's no date on it. There's not a date on that or the cost control estimate.

Q But we do agree that the numbers on Exhibit 8 do match up to the numbers on the first page of Exhibit 119?

A For the lower body of the house, yes.

Q And the date on Exhibit 119 is April 24th, 2012?

A Correct.

MR. LYLES: I think that's all I've got.

THE COURT: Do either of you-all have any objection to my asking a few questions?

MR. VARNADO: No.

EXAMINATION

BY THE COURT:

Q Mr. Brown, I want to try to just clarify what I think I heard and make sure that my recollection and notes are correct. You were asked about various companies that you and Vuong had had association with, and I think you mentioned Osceola?

A Uh-huh.

Q And I understood that was a commercial entity?

A Yes, sir.

Q And I understood you to say Vuong was the qualifier for that?

A Yes, he was the qualifier for that one.

Q Was that in existence at the same time that you were involved with the Salzhauer residence?

A I guess towards the middle or tail end of it, I'm not quite sure. But we were --

Q They overlapped?

A Overlapped.

Q Okay. And I understand Mr. Vuong had his own business?

A VLN Contractors.

Q And he would work on projects other than yours?

A He -- when we first started, he was wrapping those up. And then, you know, we kind of had a -- we had our agreement on he's going to run all of mine.

Q But he was -- that company was available to do business outside of your business?

A Yes, sir.

Q In terms of the money and what you're asking for, the 206,000 is the difference between the total cost and overhead you billed, less payments?

A The 206 is total amount owed.

Q All right. Well, I don't know the mathematics by which you get to total amount owed is what I'm asking about. That is a million four some odd that you billed, including profit and overhead?

A Correct.

Q Less total payments received?

A Less the total payments received? I don't understand what you're asking.

Q Okay. You got money from Mr. Salzhauer or Amy over the course of this job?

A Yes, sir.

Q And you sent bills?

A Yes.

Q You added up your bills and you subtracted what they paid you?

A Yes.

Q Okay. In terms of the 206,000, is it total bills less money they paid you, is that what it is?

A Is it less money they paid me as far as -- that's what they owe -- owe me.

Q Okay. I'm trying to understand the mathematics of how you get to what they owe you. Have you given them credit for the money they paid you against the bills you sent?

A Well, their invoicing over the course of these 18 invoices, there were numerous -- he wouldn't pay the full amount. So if we billed 30,000 and he'd pay 25, that would be 5,000 owed.

Q Okay.

A That's what it amounted to at the end of the job. The final invoice was 50, just completely not paid.

Q But maybe I'm confusing you. I'm trying to do this very simply because it helps me. I think better that way. The 206,000 is total bill, less total payments?

A Yes.

Q Now, have you -- can you tell me what was short-paid to create that difference?

A Yes.

Q Was it profit and overhead? Was it HVAC? Was it siding? As we sit here today, can you tell me what items of work were short-paid that created the difference?

A I can't today, but I could probably find it for you. I would have to get up with my bookkeeper.

Q And in terms of the contract, you sent two different -- you sent an AIA form, and you sent another form that you said was AIA but simplified?

A Yes.

Q And did you intend for those, either one of those documents, to be the guide for the rights between you and Mr. -- Mr. -- I'm sorry. Amy and her father, Hank?

A Yes. Based on the cost plus, you can -- that contract has -- you can check off the cost plus or -- I don't know. There's a couple others.

Q That cost plus contract has definitions of what are -- what is billable and what is not billable; correct?

A Correct.

Q Did you intend to be guided by those definitions in what you billed Amy?

A Yes, sir.

Q And would you agree that you would have to

have -- that the language I think in the AIA is necessary, do you agree with that?

A Yes.

Q And you would agree that in evaluating the cost plus, Amy or her father, Hank, would have the right to assess the numbers in terms of either reasonable or necessary?

A Yes.

Q Was the 55,000 fixed for purposes of this building as it was stated in some of the documents? Did you consider the 55,000 to be fixed as stated in your documents?

A The one that I wrote on there was just on an evaluation when I was just trying to bid it out for my purposes. I didn't -- we didn't -- like I said before, we didn't have any of the -- normally, an architect will specify what we're using, interior designer, what they choose, and as long as it runs through our office, we'll tack on the cost, plus 15.

Q The 55,000 was overhead and accounting; correct? Profit, overhead and accounting?

A Yes.

Q Did you consider that to be fixed as part of the verbal agreement between you and Amy when the job began?

A If we were to do this, what we just looked at on the plans, if we were to stick with those, it was all budgetary numbers. If we were to do that amount, yes. But if it continues without going -- I mean, we would have had 2,000 change orders on this job if we had a fixed price, so but a cost plus just kind of kept it simple for all of us, and Hank, too.

Q I'm confusing you again, I think. You considered the hard dollars to be cost plus with no cap, but the representations that I see to Amy appear to say the 55,000 was fixed. Is that what you recognized as an obligation between you and Amy when the work began?

A When it began? We -- this was one of the first ones. No, this was one of the first ones, and then we had probably 20 cost control estimate re-dos.

Q When the work began, what did you think your understanding was about profit and overhead and accounting?

A It was just based on cost plus.

Q Whatever you needed to bill?

A Yeah, 15 percent on everything.

Q In terms of overhead, what were the items that you believed would be included within your 15 percent as opposed to build?

A Overhead is -- I'll separate line item of project management fee. A super- -- like that overhead would be if we needed a supervisor to help out on the job, or accounting office, and then profit.

Q All right. But in terms of -- you have profit and overhead of 15 percent?

A Yes, sir.

Q You're recovering that not on cash expended, but on a percentage against cash expended; correct?

A Correct.

Q What were the items that you considered to be billing -- or that you were collecting as a percentage versus the items of overhead that you consider to be cash, or did you have a distinction?

A The secretary, we gave her two or three hundred a week, so that was kind of a fixed deal throughout the project, just for her, for accounting, and then the rest was the rest of the overhead and profit.

Q Did you bill all overhead to the job in cash except for this couple hundred dollars a week you paid to -- who was the lady, what was the name?

A Deborah.

Q Deborah?

A Yes, sir.

Q Was Deborah's money billed as part of the cash cost, or was it included in your percentage markup?

A Let me see, hang on one second. I'm not sure. Do you want me to find out for you real quick?

Q Where would I find it if I looked in your records?

A In our QuickBooks. I can find it. She would be under administrative and accounting.

Q Did you bill her as cash cost, or did you include her in the 15 percent profit and --

A No. She was outside of that.

Q Was there anything that wasn't outside of the 15 percent -- excuse me. Did you -- is there any cost incurred in regard to this project?

A I mean, overhead is, you know, office, gas, trucks. You know, it's all office. Brown Contractors overhead, that's how I categorize it. Am I answering your question?

Q Well, I'm trying to understand what you billed them in cash and what you intended to get back in terms of profit and overhead. Can you make -- you have that distinction?

A I'm not sure I know what you're asking. There's O&P, 15 percent, and then administrative accounting is outside of that. Project manager is

outside of that. But, you know, overhead was just even costs that aren't associated in this, like getting these bids together, meetings and hourlies. Instead of me billing out hourly, that's kind of included in overhead for going, meeting with the interior designers. When Hank and them come down and want to walk the house on a weekend, you know, to me, that's hours of overhead.

Q Well, I think one of the things I'm going to be asked to do in this case is evaluate your 206,000 dollar claim. If I guide myself in looking at your numbers by referencing the reimbursable and unreimbursable definitions in your AIA form, will I be being fair to you?

A Yes.

THE COURT: Okay. That's all.

MR. VARNADO: I just have a couple of follow-ups, if I may.

FURTHER REDIRECT EXAMINATION

BY MR. VARNADO:

Q Is it fair for Amy and Hank to claim that Exhibit No. 8 is the contract document?

A Absolutely not. That was a first discussion article, just -- no.

Q Okay. When you say it was the first, you mean

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

quick?

THE COURT: Sure.

(Whereas, a brief discussion was held off the record.)

THE COURT: Back on the record in 3881, and Rob has concluded except for one more witness or if he -- or otherwise, but Robert is now starting his case with Miss Salzhauer.

(Ms. Amy Salzhauer McMarlin, having been duly sworn, testified as follows:)

DIRECT EXAMINATION

BY MR. LYLES:

Q Amy?

A Yes.

Q Is it okay if I call you Amy?

A Yes, please.

Q I'm sure Rob will want the same thing.

MR. VARNADO: I think I have called you two different names, Miss Salzhauer, Miss McMarlin, Ms. Salzhauer McMarlin.

A (Continuing) Don't worry, I know who you meant.

Q Would you provide Henry Brown with a little bit of information about your educational background, where you come from, things like that?

A Sure. I grew up on Long Island in Port Washington, New York, and then I went to Harvard University, and then I was working, and then I went to Cambridge University, and then I went to MIT.

Q And what did you study?

A I studied environmental decision-making and political philosophy at Harvard, so I took an A.B., magna cum laude, from Harvard. And then I studied plant sciences and have a master's degree in plant sciences from Cambridge University, and I have an MBA from MIT as part of a Ph.D. that I was working on.

Q What have you done in terms of employment since you graduated?

A I was a writer for Newsweek and Technology Review magazines, Boston magazine, and a few other magazines. And then I started a company called Ignition Ventures, and we were working on helping to transfer technology to scientific laboratories.

Q Transfer it where?

A Into the commercial sphere.

Q Are you still doing that?

A No. I retired because I wanted to stay home with my children, and also because I was very hurt having our second child. And then I, just in the last two years, started to go back to work, and now I

started a venture capital fund here in Charleston with other partners called the Good Growth Capital.

Q And you mentioned children. How many do you have?

A I have two.

Q What are their names?

A Amelia and Annie.

Q And how old are they?

A They are now eleven and eight.

Q And you're married?

A I am.

Q And your husband is named?

A Andrew McMarlin.

Q And what does he do?

A He's a sports medicine doctor.

Q And how long have you-all been married?

A Twelve and a half years.

Q And does he have an active practice in Charleston?

A He does.

HENRY SALZHAUER: What's the name?

A (Continuing) Winning Health.

Q There you go, got a plug in. How long have you lived in South Carolina?

A A little more than six years.

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

A We moved here in August, and we bought Flag Street I guess sometime in that following spring.

Q So you wanted to stay on Sullivan's Island, obviously?

A Yes, we did.

Q Okay. What appealed to you about Flag Street?

A The location, and we liked the modern, open feel of the house.

Q And how old was the house when you were looking at it, do you remember?

A It was built in 1991 or 1992.

Q Did you anticipate having to do some renovation to the house?

A We did.

Q Okay. And did you involve renovation professionals prior to actually purchasing the house?

A Yes.

Q Okay. And who all did you involve?

A We asked Jay to take a look and give us a general estimate, ballpark estimate, of what it might cost to renovate the house, and we had Beau Clowney come up with some ideas for designs.

Q And who is Beau?

A Beau is a designer in Charleston.

Q Okay. An architect?

A I believe that Beau himself is a designer and Kate Campbell in his office is the architect.

Q Does he have anybody else working in his office that you met with or dealt with?

A There are other people who work in his office, but those were the two people we primarily dealt with.

Q Who is Cortney?

A Cortney is Cortney Bishop.

Q Okay.

A And she is a designer, but we didn't hire her really as a designer on the job.

Q Okay. Does she work with Beau Clowney?

A No.

Q Anybody other than Beau Clowney, and then trying to -- working with Jay?

A Not that I recall.

Q And that was engagement or interaction that you had with them prior to actually closing on the purchase of the house?

A Yes, because we were trying to get an idea of what we should bid on the house. So we knew that the house only had one bedroom -- well, it had two bedrooms at opposite sides of the house, for example, so we were trying to figure out whether we could make it a family house.

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

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

A I did.

Q Okay. All right. Was your father involved in this process, this pre-purchase renovation analysis process?

A I don't remember, honestly.

Q When did your father first become involved, that you can remember?

A Certainly when -- I imagine he would have come down to see the house before we purchased it. I'm very close with my parents. And he was involved in the bidding process for the actual bids for the renovation of the house.

Q Okay. And what's your dad's background?

A My dad was an electrical engineer from MIT, and then my dad, my uncle and my grandfather had a commercial electrical contracting firm. And when my uncle retired, my dad really stopped doing that and became an investor.

Q Did you trust his experience and background in building and just the general processes?

A Absolutely.

Q Okay. We introduced earlier an exhibit. I introduced Exhibit 119; do you remember seeing that?

A Yes.

Q What is that document?

A Jay and I were trying to figure out whether we could phase the construction of the house so that it would fit into Andy's and my budget, what we needed to do over the course of time, so you're seeing different areas of the house listed as phases.

Q Okay. And at what point in the process was that drawing done, do you know?

A My dad suggested to me that we should mark up drawings to make sure that everything was clear in what we were getting and what we were doing.

Q Okay.

A So, you know, along in the process.

Q Was this -- was that -- you see the date is 4/24, I think, 2012. Is that during the period of time you were assessing whether or not to buy the house, or was that after you had bought the house?

A I have to look up the purchase date of the house. I don't recall the exact date.

Q There are three pages on that document. There is a front page, which you've been looking at.

A Uh-huh, yes.

Q Okay. And the other pages, what are they?

A This is showing the second floor of the main part of the house, and the porch that was being added onto the house on the second floor.

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

in the office, it's showing a built-in that Beau had contemplated for $30,000, and we chose not to do that, and it's already got two bathrooms and things like that.

Q Okay. Other than those items that you've mentioned, does the drawing reflect the areas on the house where you expected work to be done?

A At the beginning of the process, it was not clear whether we were going to do the -- in my mind, whether we were going to renovate the kitchen or not. I wanted everything that we were doing to be done well, and I wasn't sure whether I -- we had the budget for the kitchen, so that was still a question, in my mind.

Q Okay. Let me turn your attention to -- I think this is the witness's notebook.

A Okay.

Q So if you'll look at Exhibit 8 for me.

A (Witness complied with request of counsel.)

Q We talked a lot about Exhibit 8 today. Is that a document that you recognize?

A Yes.

Q And what is that?

A That is a document that Jay gave us when we were meeting with him. That was an estimate for building our house.

Q Do you know whether or not this was given to you after you had purchased the house, or not?

A I just can't remember which -- which came first, the purchase date of the house or this.

Q Okay.

A This looks, you know, like it's more advanced than the purchase of the house, but I can't recall.

Q Now, you mentioned that you had a bid process or bidding process for the house?

A Yeah.

Q And who did you -- tell me about that, what sort of bidding process.

A Sure. We had Daly & Sawyer give a bid. We had Evan Diamond give a bid. And Andy Hager was going to give a bid, but then they were -- honestly, I think they were too busy to do the bid.

Q Okay. And did Jay provide you with a response to the bid request?

A Yes.

Q And can you identify for us what document you believe to have been the document that was responsive to the bid request?

A This is the document. We are already up to the Andersen Windows and the exterior fasteners, the three Rinnai water heating systems, the metal roofing,

what the decks are going to be, the mahogany entry doors, et cetera.

Q So you believe Exhibit 8 was Mr. Brown's response to your request for bidding?

A That's what I recall. There were other back and forths between Jay and I on -- and I think you can see those in the documents with, well, what if we take this out, what if we put this in. So he gave us a document that was, you know, we could take this out and deflect the price this way, and we could put -- and then we might say, well, but we can't take that out, we need to leave that in. So, he gave us kind of a checklist.

Q And was it your expectation when you received this response to the request for bids that this was going to be the price of the scope of work that was contemplated?

A This was a -- this was getting close to it, but we had that back-and-forth after this.

Q Okay. Did you believe that this price was relative to the -- to what Beau had designed, or how did this price relate to that? Understanding there may have been subsequent changes.

A Yeah. I mean, this is very similar to the price that we got from Daly & Sawyer as well, and so it

seemed like a good price.

Q Did you ever get an estimate from Mr. Brown of a cost between a million two and a million four?

A No.

Q As far as you know, had you gotten any cost estimates prior to Exhibit 8?

A I don't recall. You know, I wasn't keeping -- before we built -- you know, before we bid for the house, I wasn't -- it was all kind of a pie in the sky. I wasn't keeping my records in that kind of way until we actually bought the house.

Q Did you ultimately decide to go with Jay?

A We did.

Q And why was that?

A First of all, I liked him. Secondly, he had been really helpful in the bidding process, so we felt like that should be rewarded. I mean, he was just doing that on a flyer. And frankly, Daly & Sawyer, they were going to be busy for I think it was maybe a six week delay, and I thought that was important because I only thought that the renovation of the house was a matter of months. So, those three reasons. But we looked at work that Brown-Meihaus had done, or that Jay had done, or, you know, that Jay presented that he had done, and I liked Jay. I mean, honestly, I really

believed in him.

Q Now, when you were dealing with Jay as part of the buildup to the purchase of the house and the bidding process, what entity did you think you were dealing with?

A I didn't focus on that, to -- I have to be honest with you, I just was dealing with Jay. And, you know, sometimes he would present something as Brown & Meihaus. Sometimes he might put it as Brown Construction. That didn't -- I didn't understand that that was relevant in any way. I was talking to Jay Brown, and he's the guy who is signing the thing, and he was the person I trusted to build our family house. So, yeah.

Q Did you ever go to the office of Brown-Meihaus?

A I don't know whose office it was anymore. There's an office on -- it was Jay's office. It's right next to the Boathouse, or at least it was when we went there.

Q The Boathouse Restaurant on the Isle of Palms?

A Yes.

Q Yup. Did you ever meet with anybody else that you understood to be affiliated with Brown-Meihaus?

A I think there was a -- Deborah might have been

there. There was a woman who was there. I don't know if it was Deborah or somebody else.

Q Have you ever met with anybody else that you have felt was associated with Brown Contractors or Constructors?

A No. I mean, I think it was really just -- I think it was -- Jack Brown was -- it was really Jay. I didn't know it, but it wasn't relevant to me, that he and Andy Meihaus weren't doing business anymore. I just met with -- we met with Jay.

Q On this response to the bid request, there's a line item for fixed project management fee and accounting. Do you see that?

A Yes.

Q And who did you understand was going to be providing the project management service?

A Jay.

Q Did you base your retention or selection of Jay on Exhibit 8?

A Like I said, there was some back-and-forth on, you know, this will be in and this will be out, but my dad was very clear he didn't want it to be a time and materials contract, didn't want it to be a cost plus contract. So, yeah, this was --

Q Would you have agreed to an open-ended cost

plus contract with no limitations or parameters?

A No.

Q So with respect to this project management component of the contract, did you understand that you were going to be paying a project management fee?

A You know, I think a project management fee is reasonable. You know, the guy is managing the project; he deserves to be paid to do that.

Q And is that what you were expecting you were going to be paying, a project management fee?

A Yes.

Q And who did you believe the project manager for your project was going to be?

A Jay Brown.

Q Were you ever told that the project manager was going to be Vuong Nguyen?

A No.

Q Or Cameron Glaws?

A No.

Q Or Ken?

A No.

Q Were you ever told that anybody other than Jay Brown was going to contract with subcontractors?

A No.

Q If you understood that Vuong Nguyen was going

to be retaining and managing subcontractors on your job, would you have wanted to meet Vuong Nguyen?

A Yes.

Q If you will, turn over to Exhibit 12, please.

A (Witness complied with request of counsel.)

Q Do you recognize this document?

A Yes.

Q And what is this?

A This is what I was referencing before, that we were going back and forth over what could we take out of the project, and we were trying to decide whether we were doing the kitchen or not. So, what if we did Phase I and what would it cost to add in the kitchen or take out the kitchen.

Q Okay. And then if you'll turn over to Exhibit 13 for me.

A Yes.

Q What is this?

A This is a cost plus contract.

Q Okay. Sent to you?

A It was sent to me.

Q And did you sign it?

A No.

Q Did you talk to Jay about it at that point?

A I'm not sure if I talked about it with him, or

my father.

Q Was the cost plus contract that he sent to you acceptable to you?

A No. That's why we didn't sign it.

Q Okay. If you'll turn over to Exhibit 15 for me.

A (Witness complied with request of counsel.)

Q Can you tell me what that is?

A That is Jay doing another cost estimate.

Q Okay.

A On Beau's plan.

Q What does this represent, in your mind?

A This represented that we were adding more detail to the bid. Jay was adding more detail to the bid. So this was a cost estimate that -- where he was really -- he's putting the bids that could go up or down based on finishes that were chosen in red, and then other things that you can't, you know, there's no way to change to do the house right, and then coming up with an estimate for the job.

Q What was that total?

A $722,074.12.

Q And what price -- what scope of work did you anticipate being done for $722,000.

A The whole house. The whole house. That's the

whole house.

Q There's also a column for Bid B. Do you see that?

A Yes.

Q Do you know what Bid B was?

A Let me see. Bid B, my copy here is not showing detail. Oh, I see. So here if, say, for example, 8.06.00, that was the red stuff that I was talking about, where it was if you chose AGM granite for $10,000 versus -- actually, that's 9.0.3.9, 17,300, from Lowcountry Turnkey. Here's an estimate of $64,000 more for a -- or it changed from 44,000 to 64,000 for Kolbe impact, or $61,000 for Andersen impact. So those were, you know, alternate bids for the pieces here, if you add Forticell insulation, if you have -- or don't, and different prices for cabinets.

Q Okay. And that 189,886 at the end of that column, is that the amount of the potential add-ons that he's including?

A Yes, I believe so. I'm not quite certain. I mean, there's also -- because here, I don't know how their spreadsheet worked, so if there's multiple estimates in that column, whether they all add up or what, so you'll have to add that up.

Q Okay. The next exhibit over is Exhibit 16.

A Yes.
Q And that's the value engineering email?
A Yes.
Q What is that?
A That is what I was talking about where we took that first -- that bid that was the -- on the Brown-Meihaus stationery, I guess it's Exhibit 8, and then these next refinements of the bid, and the questions are what are we going to put in and take out, are we going to put the Ipe decking around the pool or not, or they could put screen doors, going to be this or that, and so there's -- he's taking things in or out based on that.

Now, there's a piece of the house that we didn't build that's -- there was going to be -- that's in these estimates, that was to have a -- to have on the other side of the house, on the second floor, we were supposed to have -- we were going to have, in Beau's plan, another deck that came out of my older daughter's window and ran along the length of the side of the house. So some of the things here aren't quite making -- you know, they're looking different because that wasn't done.

Q They were included in the estimate, you believed?

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

A Yes.

Q Do you know what 18 is, or can you tell us what 18 is?

A It's a control estimate for that Phase I and with bids, you know, what the prices were going to be and what our allowances were to stay within that.

Q And then, finally, if you'll look at Exhibit 20 for me.

A Here's a --

MR. VARNADO: Which number, I'm sorry?

MR. LYLES: Exhibit 20.

MR. VARNADO: Thank you.

A (Continuing) So first we had this entire house as -- I'm trying to look at this here, "Hank, below is numbers for our discussion," and dad says, "Numbers keep going up instead of down." This is an email between my dad and Jay, and I think that what's happened is it looks like they -- they're looking at two different bids. One, the entire house at 722. One, for Phase I is 484,000, and then another, and then they're putting these alternate pricing line item additions. Here's the total for the entire house at 691,000. That's kind of going back to in a difference from the original bid. I'm not exactly sure which one was which, because then my dad says, "I don't

understand what I have here. Should there be three price sheets or two; also, the numbers keep going up instead of down." But it's an email back and forth between my dad, going on these estimates, up and down, with about 30,000 difference between the estimates.

Q When you look at the timing of the emails, it looks like Hank's email was before Jay's email.

A Okay.

Q Does that look right?

A Yes, that does look right.

Q Well, at what point did you feel as though you had an agreement with Jay to proceed forward and renovate the house?

A We came up with his control estimates and -- to renovate the house. We didn't accept the cost plus contracts. But, it was my understanding from my dad that you don't necessarily have to have a signed contract to go forward. You had to have the clear bid. We felt like we had that clear bid. We had an agreement. And we were still going on the assumption that -- I mean, we were still going on that if there were any cost savings, it would be split 50 percent.

So the conversations were that Jay would be managing this job and he would, you know, do a great job, we'd have a great house that would be what he

called turnkey, and then if things came in under the bid price, he would pass that along, but he would still have his fixed price. He wouldn't suffer from that kind -- you know, if something was under. He had a fixed price for managing the job.

Q At any point, did the scope of the work that Jay was going to do surprise you at all, either way?

A Well, when they demoed the house, they demoed almost the entire house. So while we were still going back and forth on the kitchen, it was taken out of the house.

Q When you say "going back and forth on the kitchen," what do you mean?

A If you look at this bid, there was -- there was a question of whether we were doing the kitchen or not. And we're just preparing that for that kitchen to, you know, be changed, and that kitchen was demoed. There was also a question of whether we were going to do the -- put in two bathrooms or just leave the existing bathroom that was in the Phase II, the exercise area, and that was taken out. There were plans drawn for how that not to be taken out, but, anyway.

THE COURT: Taken out of the contract or taken out of the house?

A (Continuing) I mean, it was -- it was -- the house was demoed.

THE COURT: Okay.

BY MR. LYLES:

Q While you were in the process of trying to decide whether you were going to renovate the kitchen or renovate these other bathrooms, that decision was made for you because they were demoed?

A The kitchen was definitely made for me. The bathroom, what they said was that, when they were looking at the shower, that the shower had problems and we were going to have to change that window anyway. So he draw a plan where we would put in a -- take out the shower and put in a bathtub and leave the existing cabinetry, and still have one bathroom in that part of the house, and then they took out everything.

Q And Kate worked for Beau Clowney?

A Yes.

Q So you were living on Sullivan's Island when the work began; is that right?

A When the work began, we had -- we rented a house downtown, 95 East Bay Street.

Q Okay. And why did you move to downtown from the island?

A That was where we could find a, you know, a

reasonable place to stay that fit our needs.

Q How long did you expect the renovation at your house was going to take?

A I rented 95 East Bay Street until -- the house was supposed to be done at the end of December, but I rented it until the end of January because I figured things often go over.

Q When you say the house was supposed to be done at the end of December, when did -- or how did you get that information?

A From Jay.

Q And that was on some of these estimates, or where did the information come from?

A I remember an email where he mentions -- at one point, he mentions five months. At one point, he mentions three months. I can look up those emails if you would like.

Q If you look back at Exhibit 8, there's a reference to five months.

A Okay.

Q Do you see that reference to five months?

A Yes.

Q Was that consistent with what you understood from Jay would be the time period?

A Can I look something up? I can't remember

whether at the end he said five months or three months, but it was three to five months.

Q Okay. And so you based your alternate housing on a five-month time period?

A I know that we rented the house to be until the end of January, thinking that that gave us extra time.

Q And you're talking about what you expected is that you would be able to get in the house in either December of 2012 or January of 2013?

A Yes.

Q And were you able to?

A No.

Q How far along was the house in January of 2013, in your estimation?

A I was clearly not a good estimator of -- because I would keep asking Jay when we were going to be done, and then I would believe that, so I thought that we were coming very close. And then Jay -- I asked Jay for an outside date, when we would absolutely be in the house, so that we could extend the house rental. We had a very nice landlord, Kiara Balish, who said to me, tell the last date and I won't -- and the house was on the market -- I won't rent the house out and I won't sell it, I'll let you stay. I haven't had

a bid anyway. And I believe Jay said March 1st, and that's how we came up with the idea of renting it until March 31st in case we went long again. So, then the problem was that it wasn't ready and there were people moving into that house on April 1st.

Q And so you had to move where?

A Well, we really thought we were going to be in the house before the end of that, so then I was stuck. I spoke to Tim Reese. And then I believe it was the Jones Company controls Porpoise Point on Sullivan's Island, I think it's 853 Middle Street, and they said that that was available for the month. And so even though it had lead paint, I have a four-year-old and a seven-year-old, I moved into Porpoise Point.

Q Okay. And how long did you live there?

A Well, the house was not done at the end of March, but they were -- they let us extend the house on a monthly basis, and we ended up staying there until the end of June, at which point that house rental would have gone up to $40,000 a month.

Q Okay. So where did you go at the end of June -- or was your house ready at the end of June?

A No. We went into a hotel. And then we -- I think it was the Homewood Suites. I don't remember at that moment where we went. Maybe we went to Wild

Dunes. We went into a hotel, and then the children and I just left, and my husband started staying in people's guest rooms.

Q Where did you and the children go?

A We went -- first we went to New York, to my parents. It's not easy to find a place in the summer. And then we went on a trip, so we had a nice time.

Q And did you have to come back to Charleston at the end of the summer?

A Yes. My children were starting school.

Q Okay. Was your house ready then?

A No. We were going to come back August 1st. There was a June -- at some point in there, there was a June 11th completion date that was promised. The March one went to June 11th, then that went to August 1st. And then, I don't remember the date the children and I came back, but we came back sometime in August and the house was not ready.

Q So what did you do then in terms of living?

A First we were staying at John Hagerty and Susan Simons' house, and then their children came back, so then we -- no, first we were staying at the Homewood Suites. Then we were staying at their house. Then we rented a house, like, you know, one of those little townhouse things at Wild Dunes. Then maybe we moved

back in the Homewood Suites, I don't remember. Then we were staying -- then we were back at John and Susan's because they were on vacation, and then they came back. They were just on vacation for a few days, and we kept thinking we were about to be back into the -- into the house. And they came back, and so we were trying to find some place. And then Susan said, you guys have had it. I mean, the children were absolutely miserable. These were very small children, a three-year-old and a six-year-old, and then they turned four and seven. And she said, why don't you just stay, just stay so you don't keep moving around, for which I am eternally grateful.

Q So when did you finally get into Flag Street?

A Well, at the beginning of October, looking back in my emails, I -- we moved in an air mattress or -- we didn't have -- I mean, we were staying at the Hagertys', but it was a big imposition. We moved in with some air mattresses, but we didn't move in our furniture; we left that all in storage. The children and I continued to stay at the Hagertys' until the end of October because there was still construction going on in the house, but it seemed like it was better to have Andy there so he could see what was going on. And then we moved, I mean, looking back in the emails, I'm

finally sending emails saying I am moving our furniture in, and, you know, at this point if you need to move the furniture, you're going to have to move the furniture around because we can't keep doing this.

Q You heard Mr. Brown earlier today say that the delays were caused by Amy. Is that your recollection of things?

A No.

Q Who, in your mind, or what, in your mind, caused the delays?

A At the beginning of the job, when things were not moving along, Jay said the delays were the windows were taking longer to come in. Should I -- can I look at my notes?

Q If you can remember, and we can go through your emails and whatnot. Just tell me what you remember.

A Then there were lots of time periods where there would only be one or two guys on the job, or two or three guys on the job. There were times when I would come to the job, and I'm not a contractor, but I could understand the plan, and, you know, I arrived to the job and they had put -- they opened up an area in what's now our playroom and were installing a window, and there was no window that was supposed to be there,

and they were closing up another part, so then they had to take out the window and close that up, and then put another piece in. I think a lot of delays were just because there weren't many people working on the job. Then there were delays, the floor caused a significant delay at different times in the job, so --

Q How so?

A Well, the flooring guy, Terrence was the name of the person who owned the company, but there was somebody who came to do the floors, and they made big gouges in the floors and took out this big section of floor. And it was gouges in the floors on two areas of the house, in the master bedroom and in the main section of the house, and so then they had to -- they kept sanding that. They just kind of sanded it out, but then they never fully finished that job. And so, I went away for the summer; and when I came back, they had just -- I'm sorry, that's an editorial -- they had just put paper over the problems in the floor.

And then I came back in August, and now it was supposed to be that things were supposed to be happening like paint, and they took up the paper and there were still these big gouges in the floor, and I have the pictures of the gouges in the floor. And so then, they had to sand the floor again, and so the

painter can't come when the floor is being sanded and that guy is not coming and then that guy is not coming, and then there were different weeks at a time where the painter wouldn't show -- wasn't coming to the job, or he would say that he was working nights on a job but not sending anybody in the day.

Q Back to the floor issue just a minute. Do you have wood floors in your house?

A Yes.

Q And are those wood floors -- what's the condition of the wood floors now?

A They are still not acceptable.

Q And can they be sanded further?

A No. They sanded off the floor. I mean, you know, you don't have to take my word on it, we have that. Other people came to look at the floor and measured the floor.

Q Okay. Any other events, in your mind, or circumstances, in your mind, caused delays?

A Just off the top of my head? I'm tired.

Q Off the top of your head. I know you're tired. We'll wrap up shortly and then we'll pick back up.

THE COURT: Amy, if you need to take a break, please do so. Don't wear yourself out. If you feel

like a five-minute break would help you --

A (Continuing) Just a five-minute break.

Q You can do anything you want.

A I don't even need five minutes. I just need to jog my memory with my notes because that's how I operate.

Q Well --

A But if you don't want that, then we don't have to do that. I'm trying to think what else.

MR. VARNADO: I could use a break.

MR. LYLES: Okay.

(Whereas, a brief recess was taken.)

THE COURT: We are back on the record.

BY MR. LYLES:

Q You mentioned staffing on the job or people at the job. Can you describe, at least from your perspective, how many days a week were people working on the job as an average or as a rule?

A It varied. There were times when there were people on the job every day, and then there were times when there didn't seem to be anybody on the job or there might have been just one or two guys on the job.

Q For what length of time?

A I mean, I have -- I would say there were weeks where it was like that, might have been two guys on the

job.

Q Doing what?

A I don't know what everybody was doing. I think that happened in the framing time. That happened in the finishing time when things were like, you know, things were supposed to be getting put in the house, like trim and that kind of stuff. Or then there were supposed to be painters in the house, you know, at a time when I thought everybody was going to come and everything was going to get done. There's another staffing issue, to my mind, which is that things would happen like Kate Campbell from Beau Clowney's office and I did a walk-through for the heating and air conditioning with a man named Timmy Motte.

Q Who was Mr. Motte?

A He was -- I think he's M&S, I think that's his company, so he's a heating and air conditioning contractor. So we did the whole walk-through. That was, you know, on a -- I don't know, third -- one day of the week, one week.

Q Is this an appointment that was scheduled in advance?

A Yes.

Q Okay. And what was the purpose of the walk-through?

A The purpose was to plan out the heating and air conditioning system, to go through what Kate had planned, and look at things that, you know, were actually at the site and see if there were any concerns so that they could adjust things and make sure that things were correct. I believe that Jay was expected at that meeting, but he wasn't there and Vuong was there instead.

And then the next week, I came to the house and, or a few days later, don't quote the timing, but it's not more than a week, and there are all of these guys doing, three guys, putting in ducts that didn't make any sense compared to what we walked through. And I said, that is not my understanding of what was supposed to be happening; did you talk about this with Timmy. And they said, who is Timmy; we work for Jimmy. They had -- Jay had switched over the heating and air conditioning person without telling us, without telling Kate, without an additional walk-through, there was just this other set of people on the job.

Similarly, while Jay might say that we were causing delays of this or that, he would say -- he would send an email, for example, to my -- he sent an email to my dad saying that I caused a delay on the job because I was insisting on interior doors being

reframed. Well, if you look in the email stream, I'm sending an email saying that I was at the house, and there is a guy who is trying to put the doors in who says he cannot possibly put in the doors because the doors were framed wrong. So that gets translated by Jay to that I am now insisting on a change order in the house to reframe the interior doors, but I'm not insisting on that. They just didn't frame the doors right, so then they had to reframe the doors and that would cause a delay.

Q How about, did you -- you mentioned the walk-through you did with the mechanical sub, or the first mechanical sub. Did you do a walk-through with the electrical sub?

A That was also an adventure. So we --

Q Was this before or after the HVAC walk-through?

A I am not certain. I think it was after.

Q Okay. Was this also a meeting that was scheduled in advance?

A It was a meeting that was scheduled in advance.

Q What was the purpose of the meeting?

A The purpose of the meeting was to go over the electrical plan and look at the situation again on

site, and so we had Kate Campbell from Beau Clowney's office and myself, and we were expecting an electrical contractor to be there. Instead, there was a person who had been on the site. Sometimes he would be the guy who just kind of seemed like he was overseeing what was happening on the job that day, and I don't remember his name. He was very nice. He was an elderly African-American man, and he said that he was going to do the electrical walk-through, and that he was an electrician, and that he didn't need to write anything down or mark anything on the walls because he was going to memorize the entire electrical plan.

Q So did you have a walk-through with him?

A So we had a walk-through with him; but afterwards, Kate said that was crazy. I mean, I'm not a contractor, but I knew that that was crazy. And so I called Jay, and I think it might have been -- sort of in my head I remember it on a Friday. So I called Jay and I said, what was that. That was not an electrician we would want to have on the job. That's not an electrical contractor. That's the guy who's been on the job, you know, dealing with the guys working on the job. And he said, oh, no, no, that's not the person who's doing that, who's doing the electrical work. And Barry came to the job the next week.

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

place, I remember it was Anhel who was in charge of the job. But, you know, sometimes it was the African-American guy that I referenced, but a lot of times it was Vuong who was at the job.

Q Okay. And how did you get introduced to Vuong?

A When we were inside the house. The house was already -- I mean, the house would have already had work started.

Q Did Jay tell you anything about him or what his role was going to be?

A No. I think Vuong introduced himself. He told us that his -- his father was like a Vietnam war hero, and that was when I -- that was the first day I met Vuong.

Q Did you know the name of his company?

A No. I didn't realize that he had a company.

Q Okay. All right. You don't remember the name of the elderly African-American man?

A I remember in an email that it's ref- -- his name is referenced in an email from Vuong back to us. I objected -- for example, we had a charge for I think it's $750 for that man to do -- he did 3D modeling or something they said of the electrical system in the house, and so when I saw that come through as a charge,

I said we're not paying that. Now, when we had the next contractor come and Barry came, Vuong and that gentleman came up to me in the car and they said that I had made a terrible mistake, that he was a great electrician, and that, you know, I should have him do the work on the house.

Q This is the elderly African-American man?

A Yes. And I said, I'm a daughter of an electrician; I'm sorry, I feel very strongly about this, and, you know, I need it to be somebody who all they do is electrical work. But I know that in the email from Vuong, he implies that I was a racist and said I didn't want him to do the work because he couldn't spell toaster correctly, and he says his name in that email, so if we found that, we would have his name.

Q How long was Vuong on the job, in your mind?

A I mean, I think it's around January when the job was clearly late and there were all these things that were wrong with the job, and I would come and there was not proper oversight of the job. I think it might have been soon after that window misplacement that I -- I asked Jay if he could please take Vuong off the job, and if there were any other foremen that were available.

Q What other things were wrong with the job at that point in time, do you recall?

A There were so many things that were wrong with the job.

Q Can you tell me some that you attributed to Vuong's foremanship?

A Yes. There was water intrusion into the house where they were repairing the roof, so the roof over Annie's room and heading over towards the master bedroom. And they said that the reason that that had happened was that they had -- that the roofer had failed to cover over something when the work was being done, and that the -- you know, this and that. You know, there was this host of excuses, but the fact is that water was running into my house. Nobody -- I was the person who had to notice that. I was the person who had to deal with that, and that it had not been properly supervised. The -- yeah, that's just a good example.

Q Okay. At what point in time, if any, did you understand that Vuong was hiring subcontractors?

A At some point, I looked at a bill, and I was shocked to see that Vuong was submitting this bill. But see, I'm not in construction. Vuong was submitting a bill to pay the heating and air conditioning person

or the plumber, one of those two, and I thought that that was strange. But then when I asked people, they said, you know, subs sometimes pay another sub, so, you know, that could be, he could have -- he could have been doing that. I didn't understand, honestly, that VLN, LLC, was Vuong. I had not figured that out.

Q Okay. So at what point in time did you figure out that Vuong had been hiring subcontractors?

A I'm not sure of the exact date.

Q Was it while he was there, or after he left?

A I think he -- I knew that he was hiring subcontractors while he was -- was there, because, you know, it would be -- you know, I'm honestly not sure. I knew it -- the time I knew that he was hiring was -- I knew that VLN, LLC, was hiring subcontractors. I knew that it sounded like the men -- I guess I knew it when he was there. It sounded to me like the men who were working for him, some of them were working at the house, were subcontractors of Vuong, Vuong would say.

Q Did you have a conversation with Jay, where Jay told you in order to get a cheaper job, he would get Vuong to hire subcontractors?

A No.

Q Did you hear that testimony earlier today?

A Yes.

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

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CHARLESTON, SOUTH CAROLINA, WEDNESDAY, NOVEMBER 8, 2017

9:09 A.M.

P R O C E E D I N G S

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THE COURT: We are starting the second day of testimony in 2014-3881. We concluded with Amy Salzhauer as the witness, and we are continuing with her direct examination. Robert?

MR. LYLES: Okay, give me just a second.

(Amy Salzhauer McMarlin, having previously been sworn, continues to testify as follows:)

CONTINUED DIRECT EXAMINATION

BY MR. LYLES:

Q Amy, we ended the day yesterday talking a little bit about Mr. Nguyen. Is it Nguyen? Vuong?

A Vuong.

Q Yeah, Nguyen. Let me get you to turn your attention to Exhibit 57. Let's get these.

A Okay.

Q Put these down. You've got -- oh, this is the witness set, is that right?

MR. VARNADO: This is the witness set.

A (Continuing) Thank you.

Q All right. What is Exhibit 57?

A That is an email from me to Jay, asking for

him to take Vuong off of the job.

Q Okay. Did you have any sort of personal animus with Vuong?

A No.

Q What were your concerns about Vuong?

A My concerns were that I would repeatedly come to the job, and there were problems at the job that I could see that had not been rectified at the job site by the person who was supposed to be overseeing them. I have no construction experience, so my concern was that if I could see those big problems, that there were a lot of smaller problems that were certainly happening that I couldn't see, and that those big problems were also happening and not being fixed.

Q Okay.

A At least not fixed in a timely manner.

Q What's the date on Exhibit 57?

A March 2nd, 2013.

Q Up until that time, how often would you describe Jay's personal attendance to the job?

A I didn't see -- really see Jay at the job. Sometimes he would answer an email. He -- you know, the job site was often left unlocked, and we would go by the house and the house would be open, and I remember sending him some emails about that, and I

remember Jay saying he was responsible for locking the house, or his people were, something like that. He sent the bills.

Q In response to Exhibit 57, was Vuong removed from the job.

A Yes.

Q Okay. How long after that, do you recall?

A Pretty soon after that. I mean, you know, I saw him at the job site, once again, sometime later in the job, and I said, what is he doing here. That was several months later, because he was not supposed to be at our job site anymore.

Q Okay. After Vuong left, who did you perceive to be the person managing the job site?

A I don't remember the order. I remember saying -- I mean, there didn't -- at one point, it was this person Ken, and then at another point, there didn't seem to be anybody, and I said to Jay -- or emailed to Jay, I think we have it in an email, who is now managing the job site, and he said, me; but he wasn't there.

Q And in terms of time, looking at the length of time of the job, how long was Ken there?

A A short time. Maybe, I don't know, maybe a month.

Q Okay.
A A few weeks to a month. I understand that he went just 2062 -- 2652 Middle Street, to another job that was having problems.
Q And then the period of time where you perceived that there was nobody managing the job site, how long did that last?
A That would last until Cameron Glaws came on the job.
Q And when was that, do you remember?
A It was before the beginning of the summer. I don't remember the exact date.
Q Okay. So sometime between March and late June, you had Ken?
A Yes.
Q And you had some period of time where there was nobody on the job site?
A Yes.
Q And is it your recollection that Cameron came on site about summertime?
A A little before the summer.
Q So sometime in mid June, early June?
A Something like that.
Q Okay.
A I think he sent an email to my father

detailing his dates. I think it might have said something like -- it's a date in June -- until a date in December that he was on the job, December 3rd.

Q And what was your experience with Cameron?

A My early experience with Cameron was really good, and I thought that the job was finally going to get done.

Q Yeah?

A Yes.

Q And did you regularly communicate with Cameron?

A Yes.

Q Was he on the job site?

A Yes.

Q So you were satisfied with at least his attendance?

A Cameron would be on the job site, and he had two guys who were working for him who were on the job site often.

Q Was the level of activity on the job site under Cameron better than it had been under Vuong?

A It was better than it had been under Vuong. Cameron was having trouble getting trades to come back, though.

Q Okay.

A And I have emails to that effect. So, the painter wouldn't come for weeks or the cabinet people or the plumber, the roofer. It seemed to me, though, that he himself was trying, but, again, I have multiple emails where I'm saying Jay, you know, the subs aren't coming to the job and we're never going to finish if you don't get people to come.

Q Did you understand the reason that subs were not coming to the job?

A One sub left me a message to say that he hadn't been paid on another job. I -- I don't know why subs weren't coming to the job. I did feel for Cameron. I felt that Cameron came into a botched job, and he knew that, too.

Q Now, were you satisfied with Cameron through the -- his involvement with the job, which I think you said ended in early December?

A No.

Q When did you become dissatisfied?

A I started to become dissatisfied when I came back in August and saw that the job hadn't been close to finished the way it was supposed to be, and we were expecting to move in. That things like the gouges in the floor instead of being fixed during that time had just been covered up with paper. And that things were

happening that, you know, say, for example, I remember sending an email where I say so, you know, somebody's got -- Jay, you've got to come in and have some oversight here, because everybody is waiting for some guy to build a curb to a shower and he's not coming, so then the next person can't work and the next person can't work, and that's been happening over the course of weeks.

Also, I had these problems -- I could tell there were problems with the heating and air conditioning system, and I was very concerned because there were two different trades and I did not want there to be -- or two different subcontractors for the heating and air. And when that switch happened, which I was -- there were multiple switches, right, for that.

So first, Kate Cambell and I walked with Timmy Motte. Then there was the switch that I did not approve to whatever that other guy was, whose name I don't know, who came and did the first part of the heating and air conditioning system. And then there was another -- then they brought back in Timmy Motte, and I said, well, if we have two heating and air conditioning system guys, then who will be responsible if something goes wrong; they'll both just say he said/he said, so I don't want that. So that next, you

know, piece was not approved, either.

And then Timmy Motte's people explained to me that really they were redoing things that had been done wrong on the site, and that there were still things that were, you know, that were wrong. And then, but I couldn't get Cameron or Jay, you know, I kept saying I want both subs to be meeting together and figuring out what is wrong with my heating and air conditioning system, and I asked for that multiple times; and different times that meeting was supposed to happen, and it would not happen.

Q Do you recall when your heating and air work was initially done?

A I mean, I think that there was heating and air conditioning work that was done towards the beginning of the job, and then there was a big gap in when they needed heating and air conditioning work done, and then the other heating and air conditioning people came in. The initial heating and air conditioning people, to my mind, to my knowledge, never -- never came back in to see what went wrong, or et cetera.

Q At what point did they do their work, if you can remember?

A I would say they were done by March.

Q Of 2013?

A You know, actually they should have -- I think they might have been done in the fall of 2013.

Q Okay. Do you remember a discussion yesterday with Mr. Brown's testimony about a report that was done?

A Yes. Mr. Volkmar.

Q Okay. And do you remember -- let's see, where is my Plaintiff's book? Where is the witness Plaintiff's book? Okay, look at Exhibit 10, if you will. Do you recognize Exhibit 10?

A Yes.

Q Okay, and tell me what that is.

A This is a report from Volkmar Consulting Services on August 16th, 2013.

Q Okay. And why was that report obtained?

A That report was obtained at my request because I felt that the heating and air conditioning system was not working properly.

Q Okay. Was the heating and air conditioning system already installed when that report was received?

A Yes, for sure.

Q Okay.

A In fact, this report wasn't even received by me until September of 2013.

MR. VARNADO: Report date, 9/17/2013.

A (Continuing) His report date is 8/16/2013, but I kept requesting the report, and I have emails to the effect of us saying what happened to the engineering report, we've been asking for it and it happened three weeks ago. So I know that it was not received by me until September 2013. So when Jay said that they followed the advice or the description lead out by Volkmar Consulting Services, that was completely untrue.

Q So you became dissatisfied with Cameron when you got back into town in August and the house was not where you thought it should be?

A Correct.

Q And did you ever request that Cameron be removed?

A No. I thought -- I really thought that we were about to be in the house, so it didn't make sense for Cameron to be removed.

Q Okay.

A I mean, I have emails with me, you know, telling people that I expect -- you know, that Andy can't come to the party because we were supposed to move into the house today, and I think it's August 17th, 2013, and we can't move into our house so we're moving into a rental in Wild Dunes. But, it was a

surprise.

Q Did -- let's see. During the time that Cameron was on site, did you see Jay on site more?

A No.

Q Less?

A I would say -- I didn't see Jay on the site very much. Jay -- I remember Jay once being on the site when we were figuring out doors and floors in the playroom. He had a nice suggestion for floors.

Q Okay.

A That was probably in the springtime. There were multiple times where there's supposed to be something like a paint walk-through, and Jay was supposed to come to the paint walk-through and he didn't show up. He wasn't there for the heating and air conditioning walk-through. He wasn't there for the electrical walk-through. So major systems of the house, where he was supposed to be in charge of it, and he wasn't there.

Q Okay. Your decision to move into the house, can you tell me again what was the basis for that?

A We had -- we had a very hard time with this because I would find out -- I would expect that the house was ready, and again not, so I have a set of emails in March from me to realtors, in mid March,

where I think -- where I've just found out that the house is still not going to be ready for me to move into by the end of this -- by the way, I found my rental agreement for 95 East Bay Street. It was originally scheduled until January 7th, 2013, so my expectation was December, and then we scheduled it to the end of March.

And then you can see me around March 17th sending emails to realtors saying my house was supposed to be ready and it's not, do you have anything that we can move into; even I see that your house has somebody who has rented it for a week in the middle, but we could move out for Easter week, and then move back in. And then we had the same thing. So we were supposed to be in by June 11th, and we had Porpoise Point rented at 853 Middle Street until the end of June, but we knew we had to get out, so we moved out. So, we were in this set of hotel rooms and short-term rentals.

Andy sent an email to Jay or Cameron, or both, probably to Cameron at this point, saying, look, you've got to tell me whether we're going to be able to move in, because we have small children that at this point are desperate. They don't know where they're sleeping. They don't know where the bathroom is. And the whole family is frazzled to the point of desperation. And I

don't mean to be dramatic about it, but it's very hard when you don't know if you're moving into the house and you just keep doing these short-term things.

In October, like I said, we sort of, we moved some things in in a kind of a camping way so that Andy could stay in the house. We thought that that would help with the -- with the -- with him overseeing. And also we were staying at John and Susan Hagerty's house, but there weren't enough bedrooms, really. So both children, you know, we would have one child on an air mattress and one child in a bed, and then they would switch every other night. And so by moving Andy into the house on an air mattress, then we could put one child into a bed with me, and then everybody had a bed, so that was the big improvement for everybody. I mean, we just -- everybody needed a place to stay. And frankly, having an adult male in a house is not a big deal.

And there was also this business where Jay was saying that they would give us a partial Certificate of Occupancy, which turned out not to be really something that they would do. They wouldn't, you know, let children live on a construction site. But at that point, we had the Certificate of Occupancy, and we had had it for several weeks, and it was supposedly just

the paint was supposed to be happening and different things like that. But then we realized that there was no hot water, for example, in the children's shower; right? So, we didn't know that until Andy was in the house and we were really looking at things in the house, and --

Q Were you involved in the process of securing the CO?

A Was I involved in the process?

Q Yeah.

A Can you explain the question?

Q Did you have to do anything yourself personally with respect to the CO?

A Yes, because Jay was telling us in writing that he would not call for the CO until we had paid him 75 percent of the profit and overhead that he was billing for the house, that he could hold up the CO based on us paying him this additional profit and overhead that he was asking for.

Q Did you pay that?

A We did not pay it, but I went in to speak to Randy in the town office on Sullivan's Island and said, is this right, that he can hold up our Certificate of Occupancy over this, and he said, no. So the other thing there is that Randy had done an inspection and we

didn't get the CO, and they said it was just a few little things. But then when I spoke to Randy, it was significant things, plumbing and the heating and air conditioning system, and I needed to understand that because we kept thinking we were going to move into the house.

Q But you got the CO sometime in maybe mid September?

A We did.

Q And you occupied in what, October; right?

A We -- I have emails that we started -- we moved some air mattresses into the house. I'm telling them on October 2nd or something that we're going to start moving some air mattresses into the house.

Q When did you believe that the house realistically was first supposed to be complete?

A In December of 2012.

Q And have you calculated the amount of the loss of use that you believe you suffered because you didn't get into the house until the following October?

A I have. I don't have it in front of me, but I know we have -- I know we've submitted that to you.

Q Okay.

THE COURT: Where is that calculation in here?

MR. LYLES: It's in our discovery responses.

BY MR. LYLES:

Q Do you have a general idea of what that amount was?

A Well, for example, I have here a lease for 95 East Bay Street.

Q Let me do this, we'll come back to that.

A Okay.

Q We'll come back to it. Okay, now, when you returned from New York in August of 2013, and I think you said you were disappointed in the status of the construction?

A Yes.

Q Do you remember doing an email to Jay at that point in time about a number of issues that you observed on the job?

A Yes. I think it's August 7th.

Q Okay. We'll mark this for identification.

(EMAIL MARKED DEFENDANT'S EXHIBIT NO. 122 FOR I.D.)

BY MR. LYLES:

Q I'll show you what we've marked as Exhibit 122 and ask you if you recognize that.

A Yes, I do.

Q And what is that?

A That is an email that I wrote to Jay Brown, to

my husband, Andy McMarlin, and to my father, Henry Salzhauer, describing things that I was concerned about on the job.

Q Okay. And if we can walk through -- or did you send this email to Jay?

A Yes.

Q Did you get a response to this email from Jay?

A No. I ultimately got a response from Vuong.

Q Okay. But not from Jay?

A I think that the Jay response is -- the Jay response was, you know, perfunctory, if it came. I don't recall the substance of his response.

MR. LYLES: I would like to move this into evidence as Exhibit 122.

THE COURT: Rob?

MR. VARNADO: Sure.

THE COURT: All right, 122 is admitted without objection.

(DEFENDANT'S EXHIBIT NO. 122 ADMITTED INTO EVIDENCE.)

A (Continuing) I should mention that I had a friend help me look through the books, et cetera, because I was having trouble with -- I don't have experience to understand what happened on the job, and so he helped me look through things to figure this out.

Q Okay. And run through this, the first item that you mention under the question column has to do with siding and exterior trim?

A Yes.

Q And what was your concern there? If you could just describe it to Mr. Brown as opposed to reading it.

A Yeah.

Q Could you tell me generally what your concern was?

THE COURT: You say the question column?

MR. LYLES: She has, "Here are some of my questions," on the first page.

THE COURT: Okay, I got it. I was looking for the column.

MR. LYLES: Sure. Sorry about that.

A (Continuing) Well, the price of the siding and the trim increased by 300 percent on the job, and there was a legitimate problem that they had encountered that they hadn't expected, which was the band board, but that increased the cost only by $10,000. So the original control estimate was $27,500, and then we were already billed, as of June, $86,000, so that's, you know, $58,000 plus over.

Q Okay. And I omitted this and didn't mention it. But in the first paragraph, you reference the

initial price for construction?

A Yes.

Q And what was that?

A $722,074, and then we didn't do that entirely, the entire job. We didn't put that porch on. We didn't put the built-ins in. And, but the price kept going up.

Q Your second concern under your list of questions is HVAC. What is that related to?

A Again, an increase by over 500 percent, from $4,700 to $33,760. And I reference that there was a new unit, and that was true. That was billed as $5,200 on an invoice to Vuong. But I checked the price of that unit online, and that was -- the price was $1,273 to $1,432, including free shipping from reliable retailers, so I started to realize the problems.

Q You mentioned earlier that you believe that Motte's company came back on site to correct improperly performed work?

A They corrected improperly performed work, and they did additional work.

Q And were you charged for the cost of correcting the improperly done work?

A Yes.

Q Is that something that you can recall

happening more than once?

A Yes.

Q Can you describe another instance where you were charged for the cost of correcting improper work?

A Plumbing work.

Q And tell me about that.

A Well, so, the plumbers also had two different sets of plumbers. Again, I was concerned about the change. I did not approve the change. The -- at the start of the job, I think I thought it was going to be Coastal Plumbing, I did, and then that was not the sub that was used for the rough-in on the job. The -- I don't remember the name of the sub. It was somebody that Vuong brought in. And then, again, there was this change back to Coastal Plumbing.

And you can see Jay references change orders to cabinets. I mean, the cabinets that were there were the cabinetry over the -- in the bathrooms; and what happened is the rough-ins were done incorrectly, and so then the cabinetry had to be changed around the existing conditions of the plumbing rough-ins. And one of the plumbers was kind enough to tell me, and I sent an email to this effect, look, we're really redoing shoddy plumbing and problems with the plumbing on this job, and under the house, we're redoing things under

the house, and because you will not get a CO with the plumbing the way it is. And then, they asked that guy to leave the job.

Q Okay. You mention on the next page, wood framing increases?

A Yes.

Q What is that?

A It went over by -- it was increased by over 300 percent.

Q Okay. Roofing cost, you reference that?

A Yup, 250 percent.

Q Can you tell us -- and if you mentioned this yesterday, I apologize. But tell us again what roofing work was done by Jay Brown on your job.

A They did roofing over the new -- the exercise room, which was always planned. That was -- that was -- there had been an inlet -- kind of insets into the house that were -- that were leaking. That was a known issue with the inspection report. And which, by the way, I realized those initial inspections and Jay's initial in looking at the house with us was in January of 2012, not, you know, later.

And then he also did the area over our daughter Annie's room, and over the master bedroom. That was the area that I referenced that there was

significant water intrusion because they had been working on that area of the house and they didn't seal it up.

Q Okay. If we move down a little bit on your letter -- or email.

A Yes.

Q You see at the bottom of page 2, you say, "As you know, I have a red roof." What does that refer to?

A Well, we were replacing significant parts of the roof, and we also had been discussing color scheme for the house. And amazingly, at the same time that Vuong was at a meeting where Beau Clowney and I were discussing the color scheme of the house, and that the roof would be either steel or light blue, and that the house would be a cream color, and the different, you know, trim colors of the house, Vuong was actually upstairs installing a new red roof, and he knew that. I don't know what was in his mind. I can't know what was in his mind.

And so then they said, well, the roof was ordered many weeks ago, which turned out to not be true; we spoke with the roofing company. And the fix was that they could paint the roof with HydroStop paint, but then I understood that that would not be as strong a finish. So I said, all right, well, I'll live

with the red roof. I'd rather do that than to have a roof with HydroStop paint flaking off. And the agreement was that they would credit the cost of the HydroStop paint painting to the cost of the house. It would be a credit for our charges for the house.

Q And did that happen?

A No.

Q As you turn over to page 3 of your email, you've got some inset references to invoices there. Do you see that?

A Yes.

Q Okay. Did you at any point become concerned about being invoiced for work that was not done at your house?

A Yes.

Q And can you describe some of that for Mr. Brown?

A Yes. For example, we had an invoice from Eugene's Marble & Granite for eight hand-hewn stone sinks that were installed at 7 Conquest Street, but they were billed to 1850 Flag Street.

Q What is 7 Conquest Street, that's a different house?

A That's a different house that I assume Jay must have been doing construction work on. And my

initial emails to Jay about problems with billing like that is, you know, I understand that you're doing accounting on multiple houses and mistakes happen, but please just can you fix it, but I received no response and no change to the billing.

Q Anything else that you can recall?

A Yes. There was a shed. We were billed for a shed to be built over our pool, which was for -- you know, I don't know what house that was for, but we certainly didn't have any roof built over our pool. There was a bill to VLN for tiling, but they didn't do any of the tiling on the job. So those are the first pieces that I recall.

Q Are most of those concerns set forth in this email to Jay?

A I don't recall. This was just, you know, what I had noticed at the time on August 7th, 2013.

Q Okay.

A I can see that there -- there were also sometimes where things would be double billed.

Q Can you give me an example of that?

A We would be billed twice for moving furniture or installing different things. There were things that were done wrong, that then they would call a -- that when they were asked to fix it, they would say it was a

change order, so we would be billed for the initial work that was done incorrectly, and then we would be billed for the change to change it. We had -- I had questions about things like we were -- we would keep getting these invoices for renting equipment for -- from VLN, LLC, and I felt that we should have some accounting for what that equipment was.

And additionally, I started -- I noticed things like there was a -- one of the three designers that's been described on this job is a woman named Cristina Swinney. Jay told me that Cristina was the person who worked for him who did his cabinets and countertops, and that I needed to do all of that through Cristina, and that he didn't handle that, but she just worked for him in his office and that she did that for him. But as -- as things progressed, I came to realize that that was not true, that Cristina was a sub who was also marking up her bill. In fact, I have two invoices, one where she has, and I have them here if people would like to look at it, on the same date, where she's billing me, I think it's for the granite countertop. And I said I wanted to understand whether that was the full cost of the granite, or whether there was any charge for her time in that, and she sent another invoice which shows the $250 that was going to

her, and then the cost of the granite.

So then I realized that in the cabinetry work there was also this same double-billing scheme, where he's got somebody who is presented as -- he's presented as working for him, and that his -- their time -- and he clearly told me that her time would be coming out of his fee, and I have emails to that effect. And then he was -- what was actually happening is that she's submitting invoices with her time put on top of it, and then I'm getting billed from Jay as his overhead and profit number. Now, I didn't understand that number as it was being billed, so that's a separate issue.

Q Who were the other two designers?

A I had a designer in New York named Linda Holtzschue who did the drawings for the kitchen cabinets and for the bathroom cabinets.

Q Okay.

A And then I became very concerned, around the time I realized that the window had been put in the wrong place, about the oversight on the job, and I asked Cortney Bishop, who is a designer who lives on Sullivan's Island, to come and start looking at the job, you know, every afternoon to see what was happening and see whether she saw anything that was wrong, and she also was trying to help move things

along with the job.

Q Okay. So did you pay Cortney?

A Yes, I did.

Q Do you know how much you paid her?

A I ended up paying Cortney $50,000 approximately.

Q How much?

A About $50,000.

Q That's in addition to what was paid to Jay?

A Correct.

Q And the concern about the window being installed in the wrong place was during Vuong's involvement in the job?

A Yes, although Vuong wasn't there that day. The person, most senior guy, on the job that day was a nice guy, Latin American guy, named Anhel.

Q Okay.

A But they didn't do the window all in one day.

Q Okay. In your -- from your perception, did the involvement of the New York designer delay the job?

A No. She had her drawings in on time.

Q And there was some discussion about some New York tile. What was that about? I just heard that yesterday in Mr. Brown's testimony.

A Well, we ordered a lot of the tile from New

York, and she, you know, paid -- we paid for it through an account through her. The other thing that happened is that she submitted cabinetry drawings, say, for example, for the kitchen, in -- I think in November of 2013. And then in January of 2013, we -- we realized -- or -- or November of 2012. I'm getting my years --

Q Sure.

A November 2012. And in January, we realized that the cabinets had never been ordered.

Q Who was supposed to order the cabinets?

A Cristina Swinney was supposed to order the cabinets.

Q And she's the person you believe worked for?

A Jay.

Q Okay.

A And so we inquired why the cabinets had not been ordered, and the answer was that Cristina said that she had not received payment, a deposit, and so she was holding up the cabinet drawings until she received a deposit, which was -- we responded, it was just another example of the poor oversight of the job, because that was not how the job was being billed. Jay should have been billing that and Jay knew -- you know, Cristina should have known that Jay knew that, you

know, as soon as he called for a requisition, he needed to call for a requisition, and then we would pay it, but nobody ever called for the requisition for the cabinets, so the kitchen cabinets were not ordered in a timely way.

Q Okay.

A I have those emails, too.

Q Okay. Did you -- do you mind if I take a short break?

A Thank you for asking.

(Whereas, a short recess was taken.)

THE COURT: Continuing with Amy Salzhauer's testimony.

BY MR. LYLES:

Q Before the break, we were discussing your rental charges and whatnot?

A Yes.

Q Let me turn your attention to Exhibit 76. Do you see that?

A Yes.

Q That's a letter from me to Mr. Varnado?

A Yes.

Q Do you see that there's a line that says, "In addition, Amy's loss of use number."

A Yes.

Q And what's the total loss of use number that we have referenced?

A $50,000.

Q Okay. And do you remember how that was calculated?

A Yes. I multiplied the cost of the leases and the hotel rooms and using the Hagertys' house, and I'm trying to -- we might have added in there the cost of the storage facility, and the cost of moving multiple times.

Q And that would be a loss of use for 12 months -- or 10 months?

A Correct.

Q I'll refer you also to Exhibit 41, and ask you if those are some of the checks that you wrote during your time --

A Yes.

Q There was a discussion yesterday about the report done by a company called Benchmark, or the reports?

A Yes.

Q Tell me about the Benchmark reports. What were -- how did those come about?

A I was concerned that it was he said/she said on the conditions of the construction of the house, and

also that I could see that there were things that, to my untrained eye, looked like they were wrong with the house, so I asked a certified house inspector to come so I could understand what this -- the state of the work at the house. That happened once during the job, and then, I don't know if this is a term of art, but Jay never really finished the job; right? So, and I'm not talking about little pieces of trim that might be missing. I'm talking about I still have bathrooms that don't have hot water in the shower, and he knows that and is not returning to fix the job. So I felt like we might be coming to a situation like this and I should have an outside party take a look at it again, and so I asked the same gentleman who had done the earlier report to come back and look to see what had been fixed from the early report, what was happening now.

Q Okay. Well, let's look at Exhibit 32. And do you recognize Exhibit 32?

A Yes. Although, I would have to look to see which one is it, the first one or the second one.

Q Well, then, I will refer you to Exhibit 31.

A It looks like this is probably the first one and that's the second one. I'll have to look. This looks like the 31 is the second one and 32 is the first one.

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

"Got it. Will get it taken care of. Thanks."

Q And were the items on the punch list ultimately -- or the items addressed in the Benchmark report ultimately taken care of?

A Some of them were and some of them were not, as you can see in the next report from March 2014.

Q Okay. And that's Exhibit 31?

A Yes.

Q Okay. So there's a -- so the first report is October of 2013?

A Yes.

Q And then the second report is in March of 2014?

A Yes.

Q Did Jay receive a copy of the second report?

A Yes.

Q Did you also give that second report or any of these reports -- either of these reports to Howard Brown?

A Yes.

Q And why did you give them to Howard Brown?

A Jay had not been to the job since the beginning of December 2014. When Cameron said he left the job December 4th, that was really nobody had come to the job. Jay had bowed out of the job long before

Cameron, as far as I could tell, and I needed somebody to fix the problems in the house, because we had some significant problems in the house.

THE COURT: Robert, I'm sorry, but what do you want to do with 123?

MR. LYLES: Oh, I'm sorry. I need to move that into evidence.

MR. VARNADO: You can move it in, but it's only for the 2013 report. That's fine.

THE COURT: I understand.

MR. VARNADO: Okay. It doesn't do anything about the 2014 report.

THE COURT: Well, what is your -- the 2014 report has already been admitted.

MR. LYLES: It's admitted into evidence. We just don't have an email that we put in, yet, to establish that Mr. Brown got the report, even though he said yesterday he didn't.

THE COURT: All right.

MR. LYLES: We'll see what we can come up with.

THE COURT: But we're going to -- 123 is admitted in relation to the first report, Exhibit 32.

MR. VARNADO: Sure.

(DEFENDANT'S EXHIBIT NO. 123 ADMITTED INTO

EVIDENCE.)

BY MR. LYLES:

Q So, when did you first talk to Mr. Brown, Howard Brown?

A I spoke to him in the spring of 2014.

Q And what was your purpose of speaking to Howard Brown?

A We had significant issues at the house, and I had called in Neil Sawyer and asked him to take a look at the issues at the house. He was kind enough to say, look, I'll try to help you with my -- with the big systems of the house, but you have a lot of work here that needs to be overseen on a daily basis, and I have jobs going and this is too small a job for me, and somebody is probably going to have to testify about this stuff in court and I don't do that. And yet, he had gone up to see the heating and air conditioning system, and he said, I'm sorry, but this is a disaster, and let me suggest a sub.

MR. VARNADO: I'm going to object to --

THE COURT: I'm going to sustain the objection as to what people are specifically telling you.

A (Continuing) Okay.

THE COURT: You can testify that you talked to them.

A (Continuing) I talked to Neil Sawyer and he told me that I had --

MR. VARNADO: No.

BY MR. LYLES:

Q You can't say what Neil Sawyer told you.

A I talked to Neil Sawyer, and my understanding from Neil was that I had a significant problem at the house.

Q And Neil was unable to help you?

A And Neil was unable to help me.

THE COURT: Okay.

A (Continuing) Neil suggested that I speak to you. I already knew I -- it's not that Neil suggested I needed a lawyer. I knew that I needed a lawyer because I had a lien filed against me. And I knew that I needed a contractor, and Mr. Howard Brown came very highly recommended as a very honest contractor who could help oversee things.

Q And so what was the purpose of your retention overall of Howard Brown?

A I had a punch list, an extensive punch list, left on my house. It was compiled from these inspections and from my previous punch lists on the house, some of which had been walked through with Cameron. And they -- they were not fixing the problems

on the house, so I needed somebody to come and fix things. I mean, I still didn't -- I had one bathroom, as I said, with no hot water, and a guest bathroom where you can have hot or cold, you just couldn't have warm. I knew there were problems with the heating and air conditioning system. There were extensive -- well, I don't need to go through the whole punch here. It was a long punch list. And in addition to this, there was another punch list that we sent to Jay and Cameron, and those things were not being responded to, either.

Q And when you say "there was another punch list," who prepared that punch list?

A I prepared that punch list, and there was a friend of ours who is a contractor, William Dion, walked the house with us, and a nice carpenter who had done work for Cortney Bishop, who had experience with construction, walked the house with us. Some of it had come from walking the house with Cameron before they left the job.

So there are all of these items of punch. For example, there were doors that couldn't close. So, you know, we needed things to start working in the house, and they clearly were not coming back.

Q Are you confident that the punch lists were provided to Jay Brown?

A Yes.
Q Let me turn your attention to Exhibit 25. What is that?
A This is our contract with Howard Brown.
Q Okay. And what is attached to that exhibit, or the back of Mr. Brown's contract?
A His estimate of the work required to finish the job.
Q And that's on page 3?
A Yes.
Q And then there's another page behind that. Do you see that?
A Yes. So, he was looking at our punch list, the builder's punch list, the contractor's punch list. And so, and then his own looking at what was happening at the job.
Q Okay. Under the job description section of his Exhibit A --
THE COURT: What's the Bates number on that?
MR. LYLES: Salzhauer 05182.
BY MR. LYLES:
Q Does Mr. Brown, Howard Brown, reference the various punch lists?
A Yes, he does.
Q And then if you continue to go under his

Exhibit B, which is Salzhauer 05184, and the next 15 or 20 pages, are those the punch lists that he's put together --

A Yes.

Q -- that have been put together?

A I should tell you that these were the punch lists at that time. There were issues that came up that we did not know when we prepared these punch lists, so...

Q Okay. Has Mr. Brown been actively trying to accomplish the items on this punch list --

A Yes.

Q -- or these punch lists?

A Yes.

Q And have you been satisfied with his performance so far?

A Yes.

Q And Mr. Brown is going to be here to testify later. Would you rely on him to testify about the amount of his bills and his estimates?

A Yeah.

Q Okay. Now, you mentioned that since this Exhibit 25 was created, there have been other issues that have come up at the house?

A Yes.

Q What issues are those? If you can tell me.
A I can. I have to check what's on this. I don't -- don't, you know, quote me that there might not be something that's on here that I don't know -- you know, yeah. The -- in this punch list, they're waiting for the mechanical engineer, Louie Schweers, to complete his work so that we understood the estimates to correct the heating and air conditioning system, so I don't see that in this estimated cost.
Q Did that come later?
A Well, we knew that the heating and air conditioning system was a problem, but the estimate is not on here.
Q And who is Mr. Schweers?
A He is an engineer, mechanical engineer.
Q Did he ultimately come to your house and look at your system?
A Yes.
Q And did he provide you with recommendations?
A Yes.
Q And did you follow those recommendations?
A Yes.
Q And did that result in the replacement of the HVAC system?
A Yes.

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

to leave again because it was a lot of work. So we waited until the summer when they were out of school, and we went to go stay with my parents in New York. And Howard called and said that in the garage -- I had -- I had concern about the way the ductwork and the wiring and different things were in the garage, but I didn't understand the whole extent, so they were not sheetrocked over. And then, but what they could see was that gas lines and electrical lines and the heating and air were -- I wasn't on the site to understand it. They were not to code. They were mingled together, and they needed to fix all of that in the garage. I don't think that that was anticipated when we were looking at this.

Q Okay.

A That was the first set of electrical issues. The second set of electrical issues we didn't understand until recently. We knew that there were certain problems with electricity in the house, for example, different appliances would stop working, and then you could flip the circuit breaker and maybe make them work again; or there were different places in the house where light bulbs would burn out rapidly. Different things like that, that -- or that, you know, made us understand there might have been electrical

issues in the house.

But what happened is, we were putting in a built-in bookcase -- or not a built-in bookcase. Floating shelves. And the carpenter said that he didn't think there would be studs in the appropriate locations for the design of the bookcase, so he was going to put in plywood, open up the wall, put in plywood, and then we would -- you know, then he would have a place to hang things.

What happened when he opened up the wall is we found a few things. One is, we found that while that wall was dealt with in emails and conversations, that it was supposed to be an acoustical, isolating wall, none of that was done, and that was one problem. But the bigger problem, the electrical problem that you're talking about, is that when he opened up the wall, he said, I'm so sorry to tell you this, but your --

MR. VARNADO: Again, I'm going to object to --

A (Continuing) Okay.

Q Just if you would describe what was found.

A What was found was that the electrical work had not been shielded. So there are supposed to be plate -- metal plates, I guess, covering, shielding the wires from the studs, and shielding the wires going

across, and none of that had been done. Additionally, I guess when -- I'm not a contractor, so forgive me. But that when you're using -- when you're hammering in trim, you're supposed to use a nail that's, you know, one inch or one and a half inch, and these were two and three-inch nails, so he could see in that small section of wall that there were nails that had touched the wiring but hadn't penetrated. And on the basis of that, he recommended that I call in the electrician.

Q Okay. And so you've done some additional electrical investigation?

A Well, the electrician only had to open up a very small additional area of wall to see nails that were hammered through the wiring.

Q And those photographs have been produced?

A Those photographs have been produced.

Q And so that's an issue that was not addressed by Mr. Brown initially; right?

A We didn't know that issue.

Q But has recently been -- he has recently estimated the repair for that?

A Yes, he has.

Q Okay. And what's the amount of that repair?

A There was a kind of a stopgap repair that was done, which was just to place an arc fault circuit

breaker in the house. Well, the electrician -- I mean, we were very concerned that the house was really subject to fire, and so they put in an arc fault circuit breaker. I'm not sure what the cost was of that off the top of my head.

Q But Mr. Brown did that?

A But Mr. Brown did that.

Q Howard Brown did that?

A Howard Brown did that, with Carmona Electric. And then there's a very big number to properly fix the situation; but in order to do that, they're going to have to open up the walls and see where the problems are. Once they put the arc fault circuit breaker in, then there are places where, you know, lights won't work or you can't -- another issue that we found out from them is that the electrician didn't properly do things like the kitchen island. When I was talking about those appliances that we knew were dependent on flipping the breaker, there should have been two, I guess, and I'm not an electrician, two circuits so that they would each have the amount of amperage, and they don't. So when they put in the arc fault breaker, then you're always going over that amperage and you can't, say, use the toaster oven and use a microwave at the same time because then everything shuts off.

Q Okay. And Mr. Brown has given you -- Mr. Howard Brown has given you a price to deal with the electrical issues?

A Yes.

Q Is that right?

A Yes.

Q And he can testify about that?

A Yes.

Q Okay. Did you have any roof work done?

A Yes.

Q And was that contemplated by Mr. Brown's first estimate?

A No.

Q And what did you have done on the roof?

A The roof over Annie's room again had to be replaced, and then heading across further from that. So the same roof work that had been done here, which I have emails where people who understood what was happening had concerns about the way the roof was being installed when it was happening with Jay Brown. And so we had water leaking, again, into that room, and then they repaired the roof and then -- but they couldn't -- then they -- they repaired -- replaced, it's my understanding, more of the roof because they couldn't -- they kind of couldn't stop. They had to

not have two different metals meeting. They kept going over that section of the roof.

Q So the roof work that you've had done with Mr. Howard Brown, is that to address issues with the roof work that was done by Jay Brown?

A Yes.

Q At least in part?

A Yes.

Q Okay. In large part?

A I would rather that you speak to the roofer to know the percentage of which and the percentage of that, because I never went up on the roof.

Q Okay. But there is no doubt in your mind that the roof work was to repair either incomplete or defective work of Jay Brown?

A Yes.

Q Okay. You mentioned the roof leak on your screen porch. That's at the front door?

A Yes.

Q Is there any slope on the floor?

A No. That's another defect of the work.

Q Is that something that's been addressed by Mr. Brown, Howard Brown's first estimate, or do you know?

A I don't know.

Q Okay. Is that something you brought to the

attention of Jay Brown during construction?
A Yes.
Q And what did you tell him during construction?
A I told him the porch isn't sloped and -- or properly sloped.
Q And what was his response to that?
A It is.
Q What was the response?
A That, yes, the porch is properly sloped.
Q Okay. And have you ultimately found out that that's not right?
A Yes.
Q Is there any slope on that porch?
A I think there's a very slight slope on the porch, but it doesn't meet anybody's specifications. You know, I think Howard Brown can testify to that better.
Q Okay. Have you noticed any sagging or deflection in your walls?
A Oh, yes. That's the next issue.
Q And that wasn't addressed by Mr. Brown in his initial estimate?
A No, it wasn't.
Q What's that about?
A Well, we noticed cracks in Annie's room, and

then in also the -- there's a sliding door, and it kept -- it would work and then it wouldn't work. And then Howard, we pointed it out to Howard and his -- Kyle, a person who was working for him, noticed it, at first just the part in Annie's room, and then Howard noticed that actually that followed through to the main floor of the house, and then looked at it more carefully and said, actually, you know, this is a real problem, you've got a real deflection issue here.

Q What have you done to deal with that?

A We're still working on that.

Q Did you retain an engineer?

A Yes.

Q And who is that?

A Geremy.

Q Geremy Powell?

A Yes, Geremy Powell.

Q Do you know if he was involved in the project initially?

A Yes, he was.

Q During Mr. Jay Brown's work?

A Yes, he was.

Q And so did Geremy Powell come out and take a look at the issue?

A Yes.

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

that's, you know, that -- I'm complaining about the plumbing and the hot water not working, and his response is perhaps you should check the propane levels.

Q Meaning that your water didn't have any fuel?

A Right, but that wouldn't make any sense. There was hot water to the sinks, just not to the -- so at one point, he was responsive and said he would fix it. At one point, I think that on a walk-through Jay was responsive and said he would fix it, sometime in the early fall. And then, nothing ever got fixed. I mean, it did get fixed, but it got fixed under Howard Brown.

Q Have you seen the total amount of Howard Brown's estimates with the new electrical issue included in that? Do you know how much that is?

A I have seen that. I have tried to repress it. It's a large sum.

Q Do you know what that number is?

A I have -- I don't know the exact number in my head because it was just coming in, but it's over $200,000.

Q Just for the electrical work?

A The electrical work and repairing after the electrical work. It also necessitates the children and

I leaving the house again.

Q Have you -- do you know how long you might be out of the house to accomplish that work?

A We haven't discussed that yet.

Q Are you concerned about the safety of the house?

A Yes, I am. The -- I know I -- my understanding from the electrician was before the arc fault breaker was put in -- we found that, luckily, close to the start of the summer. And he was -- I became very concerned, based on nails going into electrical wiring, about the risk of fire for the house. So the children and I again left for the summer and went to stay with my parents while they put in the arc fault circuit wiring.

THE COURT: You're saying arc fault, A-R-C?

A (Continuing) Yes.

THE COURT: Okay.

A (Continuing) It's -- again, an electrician can explain it better than I can. My understanding is that while it doesn't really fix the whole issue, what it will do is if there is a -- if there is a short circuit, it will -- that might be causing a slow burn in the walls, it will shut off the circuit.

THE COURT: I'm just asking. I'm familiar

with ground fault breakers, but I'm not -- I'll leave it up to the electricians with the arc fault.

A (Continuing) The electrician, I mean, the electrician was helpful because we thought there was no stopgap, and my dad was talking to people and said, well, if we could do this, then at least you could come back and live in the house. But it doesn't, it's like a -- you know, it's just like a patch.

THE COURT: Go ahead. I was more curious than anything.

BY MR. LYLES:

Q Okay. You heard Mr. Brown yesterday say that initially he believed that his initial estimate was for 1.2 to 1.4 million dollars. Do you remember that?

A Yes, I do.

Q I think your testimony was that you never saw such an estimate?

A No.

Q And you also heard him say that he believed that his estimate, his initial estimate, was comparable to the estimate of Daly & Sawyer?

A Yes.

Q And who was Daly & Sawyer?

A Daly & Sawyer is another contractor on Sullivan's Island.

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

and I might have chosen, you know, plumbing handles and things that exceeded that. I'm not certain. But, we're talking about, you know, an overage on the job of tens of thousands of dollars, not an overage of the job of half a million dollars.

Q Are there circumstances that you can recall where you believed that your either changes in the job or your selection process delayed the job?

A We -- there is a legitimate change that Jay suggested that we have, that we put a sprinkler system in the house, and that was a legitimate change, for sure. I -- there's lots of emails where Jay would say that we were delaying things, but then it would turn out not to be true.

Let's see, there was -- there was a time -- so we had selected a slab for the kitchen island. We selected that very, very early in the process, because what I was told was that you select the slab first and then you can -- you make the kitchen island to fit with what you can cut from the slab. There was a mistake that was made by the cabinetmaker and they made the kitchen island longer than the slab. This was happening in, I don't know, August or something. And I don't -- don't quote me on the time.

Q August 2012 or 2013?

A 2013, or maybe it's in the spring. Whenever that piece of granite was supposed to be coming in and the kitchen island was put in, we realized that problem. And then there was -- you know, there were a few days, for sure, where we were trying to figure out what to do about that, and I went to look and see if I could find a different slab or what should we do, and we ultimately put strips of stainless steel and put more pieces of another slab on either side. And again, that was supposed to be credited back, but wasn't. But there were a few days there where I did not know what to do about that problem.

Q Okay. When you agreed to let Jay Brown build your house, did you believe he was a licensed contractor?

A Yes.

Q Did you believe that he was going to be the project manager for your job?

A Yes.

Q Did you believe that the project management fee was going to be included in his project management fee that he quoted to you?

A Yes.

Q Did you expect that you were also going to be paying other people project management fees?

A No.
Q When you -- did you expect that you would be paying Jay Brown on an overhead and profit basis?
A No.
Q Did you expect that there was going to be overhead and profit billed to you for subcontractors, for work or materials done by their sub-subs?
A No.
Q So you were never told that your -- that Jay's subcontractors were going to be hiring the subcontractors themselves?
A No.
Q And that would not have been acceptable to you?
A It would not have been acceptable to me.
Q The job cost is approximately twice what the original estimate was; is that right?
A Yes.
Q And you and your dad paid Jay a sum exceeding 1.2 million dollars?
A Yes.
Q Which is $500,000 more than the original contract price?
A Yes.
Q Why, if you believed that the original

estimate was 722, did you agree to pay Jay a million two?

A We had multiple communications with Jay about -- and he would agree, that where we would say, look, it seems like we're paying the same sub twice, we expect to be credited back at the end of the job, so we did think that that was going to happen. When I was getting the bills where he would list his overhead and profit line, I figured he was drawing down against the number that he had quoted for overhead and profit.

Q That's the $55,000, the project management fee?

A I mean, it makes sense to me that he wouldn't pull that to the end. He needs to be paid for doing work along the job. So then what happened is that, and, again, we have a series of emails, then he went over that number, and that's when we got concerned, and my dad and -- my father and I -- and my father and Jay sat down in the spring of 2013, and they came to an agreement that we would pay some extra on that fee. I think they put it at $74,000, and then they would hold it at that. So that, you know, that should have been the end of that fee. My dad always says a workman is worthy of his hire, and if Jay said it's taking a lot more of my time, and my dad always wants everybody to

be paid, and so do I.

Q So when you say when it reached that point, you mean when the billings from Jay on the overhead and profit number on his invoices reached the project management number that had originally been quoted?

A That's correct.

Q At that point, when the billings continued, you became concerned?

A Correct.

Q Did you feel some level of -- despite dissatisfaction with Jay Brown, did you feel some level of pressure to get the house completed?

A We felt pressure to get the house completed and we thought the house was almost done. You know, unfortunately, I really thought, you know, that we were moving into the house first of December, and then I really thought that we were almost done in January, and then I really thought that we were going to be done at the beginning of March. And, you know, and then we really thought that the June 11th date was a real date. So, we kept thinking we were almost done.

We also had -- Jay gave -- my dad kept pressing him for a cost to completion, a cost to completion, a cost to completion, and Jay gave a cost to completion of a little over $900,000. I don't

remember the exact number.

Q Do you remember when that was?

A I'd have to look it up in the emails, we have that, and that's sometime in the spring of 2013. And so we thought that that was really the cost of completion. And that just to stop the job when we had so little left, and yet the guy is over, but we really needed to get into the house. And so we -- we thought we were done. We didn't understand things like -- that the -- when, you know, plumbers came back or heating and air conditioning came back, that they were going to redo things and those numbers were going to skyrocket. I didn't -- I just didn't -- I didn't know that.

Q Are you happy with your house?

A I love living in my house. I have this concern about the house. You know, I don't like to get emotional, so give me a moment.

Q Sure.

A The house has been a nightmare. The truth is that the house has been a nightmare, because we had a year of moving around like vagabonds, which was very difficult for everybody. The half million dollars represents the difference for me going back to work and being able to stay home with the children.

Q You mean the half million dollars --

A Of costs so far, and this ongoing unknown number of costs to repair that keeps going on and on and on. So, you know, we feel happy in the house, and then we realize that we put our children in a house that might burn down, and there is actually a Jay Brown house on the Isle of Palms that burned down. We -- and I don't know why it burned down, but it concerns -- it concerns me.

We keep having these repairs that are big repairs. They're intrusive repairs. We never had -- we've never had a time period where there isn't some -- something going on, and it's -- it's not like I'm asking for a house where, you know, every cabinet is perfect. I'm asking for a house where the heating and air conditioning system works and there's hot water in the bathroom.

Q You started construction on this house when, renovation?

A In August 2012.

Q And it's now November of 2017?

A Yes.

Q So five years?

A Yes.

Q And the work is still ongoing?

A Yes.

MR. LYLES: If you don't mind giving me just a minute to check some notes and stuff?

THE COURT: Sure.

(Whereas, a brief recess was taken.)

MR. LYLES: I think that's all the questions I've got of Amy.

THE COURT: We took a little break. You-all ready to go straight to cross?

MR. LYLES: I didn't mean to surprise you, Rob.

MR. VARNADO: Yeah, that was a little bit of a surprise.

MR. LYLES: Okay, well, no problem.

MR. VARNADO: Can we start at 11:00? Seven or eight minutes?

THE COURT: Yeah.

(Whereas, a brief recess was taken.)

CROSS-EXAMINATION

BY MR. VARNADO:

Q So, we're back on the record. Amy, I'm Rob Varnado; we have met before, obviously. And I'm going to call you Amy, if that's okay, because I've messed up your name so many times.

A Please.

Q Salzhauer and McMarlin and Salzhauer McMarlin,

so I'm going to call you Amy, if that's all right.

A Even I get confused sometimes.

Q All right. First, I want to talk about the house at the time that you were getting contractors to look at it.

A Yes.

Q Okay. So you bought the house I think in late March of 2012; is that right? I have a copy of your -- the title to real estate, so this is March 26, 2012. I mean, we can make it an exhibit, but it's a matter of public record. So does that sound about right?

A That sounds about right.

THE COURT: What was that date, Rob?

MR. VARNADO: March 26th, 2012.

BY MR. VARNADO:

Q Okay. Did you have it inspected when you bought it?

A I believe we did.

Q Do you remember who the inspector was?

A I don't recall.

Q Okay. Do you remember what the inspector found?

A I remember that there was -- there was leakage into an area, and it was what I'm calling near Annie's room. And that the way the house was constructed

originally, the shape of the area that we now call the exercise room, it went in and out. It had two kind of cut-ins, so -- so this was open, and it had -- on either side, and it had kind of clear plastic sheathing. Apparently, it was meant to bring wind into the house, I think, something like that, and those had significant leaks. We knew that we had to -- we had to change that. Those were two things that I remember that were problems with the house.

Q I have a Live Oak inspection. Is this the report? It's dated January 26th of 2012, so it's a couple of months before you bought the house. Is that the estimate -- I mean, I'm sorry, is that the home inspection?

A Yes, it is.

Q Okay, great. Thank you so much. All right. When was the house built, do you know?

A 1991 or 1992.

Q Okay. And how many renovations had it had before you began your renovation, do you know?

A I don't think it had any extensive renovation.

Q Okay. And you testified about interviewing contractors; correct?

A Yes.

Q Okay. And it's your testimony that Jay Brown

and Daly & Sawyer, and maybe another guy, Terminas (ph) or Terminand (ph), I forget, submitted bids?

A Evan Diamond --

Q Diamond, okay.

A -- submitted a bid. I looked at my notes last night. I could see that we started that process in January 2012 with Jay.

Q Okay. So let's get a timeline that we can agree on. So I have the first contact with Jay Brown on March 12th of 2012; is that correct?

A No, that's not correct. Here is an email on January 30th, 2012, from George Read. If you want to see it, you're welcome to.

Q Yes.

A Where he says that he reached out to Jay and he passed on the inspection reports. And then I have an email from -- let's see, the next time -- so George was then talking to Daly & Sawyer. He's referencing it on February 6th, 2012, and that Jay has both reports, he sent them last week just in case.

Q Which reports?

A He's referring to the --

Q Live Oak?

A To the Live Oak inspection, correct.

Q And what else? He said there are two reports.

A I don't know here. It might have been the numbers -- it might have been from Beau. And he's checking in on February 6th to say, "I wanted to check how the conversations have been with Jay Brown, Michael Daly and Beau Clowney, because, per the agreement, we have until this Friday to negotiate anything regarding home inspections and repairs." So, that process had come up. February 27, 2012, we are going over with Beau and Kate the -- who we have as people to -- to bid the house. On March 8th, 2012, Jay is telling me that he switched his email.

Q From what to what?

A From -- from Jay@brownmeihaus.com to Jaylbrown@me.com.

Q Okay.

A And on March 8th I say that I'm excited to get started on the house, and that Edmond Cooper said nice things about Jay. And that was Jay responding to -- that he should pick up plans, I believe. Oh, yes. I had written to him on March 8th, 2012, that Jay -- that Beau Clowney had another set of plans ready for Jay to look at, and so Jay is responding, that, yes, he will look at them.

And on March 15th, Jay is -- has sent him something on Brown-Meihaus Construction stationery,

that's his structural evaluation, that upon inspection of 1850 Flag Street, the subterranean termite damage that is present will not affect the structural integrity of the house, and this is going to be corrected by -- all rot and termite damage will be replaced and documented for your records, that he's in consultation with Ledford's.

On March 15th, he mentions that he's meeting with Kate at Beau's office, and was there anything that was updated. So...

Q So February and March, basically? January, February and March?

A January, February and March, yup.

Q Okay. So you've already testified about Exhibit 119. Was this a record from your file?

A Yes, from --

Q It was?

A Yes.

Q Is that bearing the Salzhauer stamp on it?

A No. It's bearing a Brown-Meihaus stamp on it.

Q But it's from your file, this document?

A That document is from my file, yes.

Q Okay. So you have it with you here?

A Yes, I do.

Q Okay. Can I see it?

A I gave it to Robert. It was photocopied here, I believe. There's the original. That's the original.

THE COURT: This is marked as 119.

MR. LYLES: That's the original, okay. So we marked the original, okay.

BY MR. VARNADO:

Q All right. You testified yesterday that there was a lot of back-and-forth about the numbers, correct, with Jay Brown?

A Yes, but not on the scale of from 1.2 million to --

Q No, no, no, no, no. You said there was a lot of back-and-forth about the numbers; is that fair? Yes or no.

A Yes, but we're not talking about that magnitude of numbers. We're talking about adding in this or taking in that, is the deck Ipe, is the deck pressed wood.

Q Well, this is 119, so the yellow is what part of the house? Would you say that's the front of the house or the main part of the house?

A That's the main part of the house.

Q Okay. And then what's the blue back here?

A That's the exercise room area of the house.

Q Okay. And what's back here (indicating)?

A That we call the guest room of the house.
Q Did you have a nanny living in there, too?
A We have a nanny living in this bedroom in the house (indicating).
Q Which bedroom?
A In this area (indicating).
Q Is she still with you?
A Well, they au pairs, so they're not really nannies, and they can come and stay for a year or two.
Q Okay.
THE COURT: What was the color? Give me the color of the area she was referring to.
BY MR. VARNADO:
Q It's this blue area, if I'm not mistaken?
A Yes.
Q Okay. Now, the first thing I want to ask you about is what the nature of the contract was between you and Brown Contractors.
A Yes.
Q Okay. And you're saying that Brown Contractors sent a contract that was cost plus?
A I'm saying that we accepted Jay's bid with a fixed overhead and profit.
Q Okay.
A And then he sent multiple versions of a cost

plus contract, which we would not sign because that had no bearing on our understanding of Jay. So we determined that he did not fix -- sign them because they were incorrect; they did not reflect our understanding with Jay.

Q But you never said that to Jay in an email?

A Yes, we did. And I believe we might even have an email from my father to Jay. We also have emails and conversations back and forth with my father and Jay when we realized that he was billing more than the agreed-to-amount of overhead and profit.

Q The thing is, Amy, is that you testified yesterday that there were lots of back-and-forth with you and Jay, and you said about this, and then you said another number was 770. But Jay Brown sent you a contract that was for cost plus, and you didn't sign it; correct?

A Correct. And I believe that any job will have back-and-forth. For example, we had one -- we had one number where he was saying, well, it would be this number, but then when I asked him a question, that number didn't include Rinnai water heaters. But the plan from Beau took out the rooms that would have held the bigger water heaters, so I insisted that those be put back in, which is memorialized in an email.

Q Which email?
A We can look it up.
Q Okay.
A And, in fact, if you look at the -- no, the Exhibit 18 or Exhibit 8, you'll see that it specifically called out that it includes those water heaters.
Q But I want to know, what was the -- what was the bid that you say you got that was Jay Brown's final work, what was the bid?
A The bid that my understanding was the final work was that if we did the whole house, it would be $722,000.
Q Where did that come from?
A That came from Jay Brown.
Q Show me, please.
A I'll have to look up what exhibit number it is.
Q Maybe it's in the exhibit book.
MR. LYLES: It is.
A (Continuing) I might be able to find it in my emails more quickly. Hang on, let me see if I put it in something from today. I have an exhibit here; I suppose I should give that back to you.
COURT REPORTER: Thank you.

THE COURT: If I can work from exhibits, it will make my job easier.

MR. LYLES: Yeah. Could you look through what we have as exhibits as opposed to your stuff so that we can --

MR. VARNADO: And you can help her, too, Robert. I just want to get --

MR. LYLES: I think if you go to eight -- anywhere from eight to 21 is where those price controls are.

THE COURT: I think it was eight.

A (Continuing) This is the --

MR. LYLES: What is "this"?

A (Continuing) Exhibit 8 was where we have kind of a -- the general bid for the house, and you can see this goes back and forth then. The numbers are going back and forth because, for example, Jay said we could do Kolbe windows instead of Andersen windows, and, you know, we discussed whether -- whether they're impact or not, and we decided to do the impact. Updated cost control estimate. I would say this August -- Exhibit 15 on August 8th, and Exhibit 16 --

Q The one that says cost estimate is 16?

A Cost estimate. And then on the next page it's the -- he's showing detail back to that previous

spreadsheet, and then -- so now you can see us going back and forth on what will it be if there's Ipe decking around the pool, what will -- you know, what if we do different pieces, custom cabinets versus semi-custom cabinets, what if we do a cabinet in the playroom, or the Murphy bed and the closet in the guest room, which was never built. So I was able to take things out like that, that I said, well, I don't really need that now. There was an option of putting -- Beau Clowney was suggesting that we might put a tongue-and-groove ceiling in the dining room, and when that was going to be another $5,000, we said we don't really need that. So then we come to this next --

Q Which is what?

A August 15th, 2012.

Q Which is what exhibit?

A Which is -- sorry. It's No. 17, the revised pricing for Phase I. And then on August 22nd, it looks like he has another email, this is Exhibit 18, and that is just showing the Phase I pricing of the $484,000. So...

Q But each of these says estimates on it -- estimate?

A Correct.

Q You understand the difference between an

estimate and a bid; right?

A No.

Q You don't?

A I don't.

Q Okay. Did you rely on your father to help you with what the difference between an estimate and a bid was?

A Well, on August 23rd, 2012, this is Exhibit 20, he said this is an "Updated bid per Beau Clowney meeting." The entire house is going to be $722,074. So if there's a difference between an estimate and a bid, then he has just said on August 23rd that that's his bid.

Q But he had already submitted a contract to you pre to that that he was going to do the work on a cost plus basis?

A Which was not our understanding, and so we didn't sign it. So he sent -- my dad said that contract is not acceptable.

Q But you didn't tell him that?

A So he sent a second one. Otherwise, why would he have sent a second contract if my dad said that first one is not acceptable. He sent a second one, which was also not acceptable, so we did not sign it.

Q So your testimony today is that you -- you

relied on this bid in Exhibit 20, that it was based on these estimates, and that's what you're saying the contract was?

A With all due respect, my father had done millions of dollars of work based on these kinds of documents and a handshake and a bid, without issue, over the course of 30 years or something of -- I don't know how many years he was in the electrical contracting industry. So this seemed -- we trusted Jay. I really truly trusted Jay and thought he was a nice guy, and this seemed reasonable.

Q But it really wasn't a bid, it was an estimate. And everything was cost plus, and everything was billed to you as cost plus.

A It was -- here it says, "Updated bid per Beau Clowney meeting." I am looking at No. 20. I don't know the difference between an estimate and a bid, but whatever it is, he said estimate and he said bid, and both of them match.

Q Okay. Well, then, when was the permit pulled on the house, August the 28th? August 28th, 2013?

A I don't know.

Q Let's get the timeline going.

A I did not pull the bid -- the permit on the house.

Q Well, if you look at exhibit number --

THE COURT: You-all slow down a little bit. You're going to drive Miss Sampson to distraction.

MR. LYLES: Don't want to do that.

THE COURT: So one of you-all talk at a time. Amy, let him finish his question. Let her finish her answer.

BY MR. VARNADO:

Q Exhibit 3.

A Exhibit 3 is the residential permit for 1850 Flag Street, and it says that the total valuation will be $380,000, and it is August 28th, 2012.

Q Okay, so August 28th, 2012. Okay, when did Jay submit his first invoice?

A I would have to look that up.

Q I have September 12th.

A Can you -- is there some --

Q 518, Salzhauer 518. It's not in my -- I'm asking you. It's not in my exhibits.

A I do need to look it up.

Q Okay, then look it up, 518.

THE COURT: 518 is a Bates number?

MR. VARNADO: Yes, sir.

THE COURT: Is there an exhibit number?

MR. VARNADO: I don't know if they made it an

exhibit or not.

A (Continuing) Will somebody give me a clue how I should find 518?

Q Here it is. It's Exhibit 27. Actually, it was -- it's Exhibit 27.

A All right, yes, Exhibit 27. I cannot testify that this was the first invoice, but it does say Invoice No. 1 written on it.

Q Okay. And at the bottom -- you looked at these invoices all the time?

A Honestly, I didn't pay that much attention to the invoices, I have to admit. I did not understand the importance of what was happening on the invoices, nor did I fully understand what I would be -- what I was seeing. You know, I have no perspective on --

Q But you said your father was a contractor, in the business 30 years, he had done work on a handshake and all of these things, so you had him helping you; right?

A I did.

Q So he looked at Invoice No. 1; correct?

A I can't speak to what my father did, but somebody paid it so somebody must have -- but I can't speak for my father.

Q There's an overhead and profit of 27,297.52?

A Divided by 15 percent, so $4,094.63.
Q Right. So, but it shows right there that there's overhead and profit being charged for all of this work; correct?
A But he deserved to have overhead and profit on the job. We never said that he had no overhead and profit on the job.
Q Well, the distinction is that you're saying that he capped the price, and we're saying he didn't cap the price. So where is his overhead and profit --
A And he's charging overhead and profit on the --
THE COURT: You-all are going to have to slow down, because I can't keep up with two people, either.
A (Continuing) Okay. I'm sorry.
THE COURT: Let him finish his question.
A (Continuing) Fair enough.
THE COURT: He's going to let you finish your answer.
A (Continuing) That's fair enough.
THE COURT: And then we'll proceed.
BY MR. VARNADO:
Q Where is the overhead and profit on this Exhibit 20 bid?
A It is the last line.

MR. LYLES: Listen to the question.

A (Continuing) On the -- oh, on the November 20th bid? November 20th bid? I don't know what you're referring to, the November 20th bid.

Q I think it's fair, isn't it, that this was a cost plus job and was billed as a cost plus job?

A No. It's completely incorrect.

Q It was billed as a cost plus job, though; would you agree?

A No. You're drawing down on an overhead and profit number, and however he accounts for it in his accounting, in his QuickBooks, that's entirely up to him. It was not unreasonable for him to be charging overhead and profit if he's managing a job. I don't -- you know, I wouldn't have -- I might have objected if he put the $55,000 right up front, but he's putting some small, some percentage of his overhead and profit number there. I mean, I was fine with that.

Q You said that Exhibit 20 is the bid, you felt that this was something you could rely on. So where is the overhead and profit in that?

A Well, if you look at this bid, it's not too far off from Exhibit 8. So, we didn't discuss a change in overhead and profit from one to the other. We're talking about 686,000 versus 722,000, and the

difference is things like making sure the, you know, that there's enough of allowance for cabinetry and different things like that, so I don't know why that should have affected that line.

Q There are numerous invoices that are contained, some in your exhibits and some that Jay sent. Each one of them have an overhead and profit line, and it was billed as cost plus; do you agree?

A Each one of them had an overhead and profit line. He was doing work on the house, so he should be billing overhead and profit going along with the job.

Q But you say it's maxed out?

A Yes.

Q At what?

A We didn't have a concern until he went over the max.

Q What was the max-out?

A $55,000.

Q 55,000. So for everything, even though you have admitted that there were a lot of delays and a lot of problems that were fairly not his fault, like the band board and the rot, you know, the demo?

A Now, repairing the band board cost $10,000, according to the bill.

Q And the rot?

A I firmly believe, and I learned it from my dad, that every workman deserves his hire. Jay said that there were problems on the job that were beyond his control, okay. And they came to an agreement where my father gave basically 50 percent more overhead and profit to Jay to say, all right --

Q When was that agreement?

A That agreement was in the spring of 2013.

Q And where is that memorialized?

A You can see it referenced multiple times in emails, and we can show you those emails.

Q I would like to see them, please.

A Sure. Let me find my books from 2013. We might have some of them here.

MR. LYLES: Check your book out.

A (Continuing) Over here. We had them pulled out in emails yesterday.

Q We'll take a break while you look.

(Whereas, a short break was taken.)

THE COURT: We took a break. We are back on the record in 2014-3881. Miss Salzhauer is under cross-examination by Mr. Varnado. We took a break for her to look for some documents, and we are back and that question stands. Go ahead, Rob.

A (Continuing) This is an email from my father

to Jay Brown on March of 2013 saying this seems to have become a time and material basis and that's not what the intention was. Then, as we continue, and perhaps you want to enter that into an exhibit. I don't know what the process is. We are -- I would like to also add that this was not being -- I mean, we were being sent things that would show things as change orders. So, you know, some of those things were completely inappropriate as change orders; right? So wrapping the house in tar paper or Tyvek or whatever you do is billed as a change order, but we can show you those things stamped as change orders. So if this was a time and material or an overhead and profit, whatever, open-ended job, then that would have been completely irrelevant.

Here's my dad continuing to find requisitions. Here is April 4th, 2013. My father saying that you sent me an estimate of what the job would cost in the end; please put the last requisition against that estimate. Would you like to see that email? And he says it's never my intention to cause the subs financial stress, but the fault is yours and you need to tell us what the list of payments that should be made by a contractor, the amount of their contract, and the amount completed to date, and assurance will be on

the job until the completion. This is -- would you like to see that email?

Q Sure.

MR. LYLES: Do you have a date for it?

A (Continuing) That's April 4th, 2013.

MR. LYLES: Are you marking all of that, Syd?

MS. WOLK: Uh-huh.

BY MR. VARNADO:

Q Thank you.

A And my father was continuously asking for -- for requisition -- you know, for a breakdown in schedule, and I have those emails. And -- and on June 5th and June 6, 2013, find them here. I think I might have pulled them out already here, or somewhere on the table we'll be able to find them. We -- I have in my records that on June 5th and 6th, 2013, my dad is objecting. And I believe we pulled those emails out somewhere to enter them as exhibits. My dad is objecting to the additional overhead and profit, and he references an agreement made in conversation with Jay Brown. And you will note that Jay does not argue with him that that conversation never happened, that he's due additional, you know, that that was not in the agreement. So now I need to find where those were pulled out, or else I can pull them out of my Gmail

account.

Q Do any of those emails show, Amy, an agreement by Jay to cap his overhead and profit at $74,000, as you testified to earlier?

A What it shows is that my father is referencing an agreement that they made in a conversation together, in person together, and that Jay does not argue about that, although he continues to bill for overhead and profit. Now, my father stopped paying that overhead and profit number, but you will note that the job continued.

Q Is there a number -- is there an email that shows an agreement, that you testified to, that Jay Brown accepted $74,000 of overhead and profit?

A I don't think there's an email that Jay comes back with saying, yup, I accepted the number. And I can't tell from here whether it was 74 or 85,000 that they agreed on. I was not present. My dad can testify to that conversation. But you will note that the job, which was being billed with change orders and et cetera, that this was happening in -- in June of 2013, that we stopped paying for that line, and that the job continued.

Q The change orders were from subcontractors, correct, not from Jay Brown?

A Everything on this job was a change order. That's not fair, that's not accurate. But I have change orders from VLN, LLC, where it would be, you know, stamped when I -- when we -- I finally asked for them, which was long into the job. There were things that are clearly just in the course of doing -- doing a job, that were stamped as change orders. In addition --

Q Like what?

A And Jay references things as change orders. For example, when I referred previously to doors that were incorrectly framed, that the -- that I had been at the job and the person trying to put in the doors says he can't because they're incorrectly framed. Well, Jay later in an email references that as a change that I'm requesting, that it's a change order to reframe the doors. And I think if we went through the bills, we would find it that way. Or a closet was incorrectly framed, and then the closet comes back on the bills as a change order. Like I said, basic things like, I don't know if you wrap it in Tyvek or tar paper or whatever, when we actually saw the billing on the job, that was stamped as a change order.

Q It was stamped as a change order on the bill?

A Oh, yeah. Now, we didn't see those bills

until we requested invoices; but if you look through VLN, LLC's, invoices, you will see all of these things that are stamped as change orders.

Q But that was -- VLN is a subcontractor to Jay, and Jay was on a cost plus contract, so he was billing --

A Jay was not on a cost plus contract. Let's be clear.

Q So we're going to disagree on that?

A We will absolutely disagree on that.

Q Your father handled the billing; correct?

A Yes. We had an official accountant in his office, and that was a good way to have things be billed and be paid.

Q Well, I think in your deposition testimony, you told me earlier that you don't even know which funds -- where it was coming from, who was paying for what?

A That's correct. We have a family business, and there are multiple accounts that some specific payment could come from, that, you know, I'm not privy at that moment in time to exactly which account an accountant would be taking it from.

Q But your father, he's handling the money; correct?

A My father with the assistance of Valentina Vorschgya (ph) or Vorschov (ph), and Mary Ballante (ph). Those are people who work for my family business.

Q And your father was paying invoices with cost plus language in them until May or June of 2013?

A I would have to look back to see exactly when he stopped paying it. He objected when we went over that number, and then he was -- came down to South Carolina and talked to Jay. Now, like I said, my father is very fair; so if Jay says it's taking him longer and he needs more money, then my father came to a second agreement where they agreed to some number between 70,000 and $85,000.

Q You have said 70 and 85, but you haven't shown me an email that memorializes an agreement between Jay and your father between -- what is it? Which was it?

A I will tell you that I was not present in that conversation, so Jay and my father would have to be the people who told -- who memorialized their conversation. But I will also tell you that the way my dad does business, if they make that agreement, then that is an agreement, and he's happy, as you can hear, to pay guys some extra money if he thinks, first of all, it will bring the job to a close, and, secondly, it's fair to a

guy, to that guy. And thirdly, as you can see, Jay continued to do the job.

Q He continued to do the job on a cost plus basis.

A He continued to do the job because he knew he had already been paid his fair share. He continued to bill that, but that's -- that was never paid. We paid everything else, but we did not pay that, very specifically. The job was not a cost plus job. The job was a fixed price job.

Q You are testifying that your father did not pay the cost plus add-ons anymore, and that was an understanding that you and Hank had?

A I am testifying that we understood at that point in time, when things went over the price that we had agreed on, that -- that we needed to come back to the fixed -- some understanding of what we would fully pay Jay, that we were happy to pay him some extra because we are more than fair.

Q I'm going to say that before March 12th of 2013, I can't find anything in there where either you or Hank or Andy is complaining at all about the cost plus basis of the contract until this email where, hey, I think it's -- this is looking like a time and material basis, with no regard to the pricing.

A Because it is reasonable for them to bill overhead and profit. On a fixed price job, right, how would you bill your overhead and profit? I don't know because I'm not a contractor, but I will tell you that it seemed reasonable to me that over the course of the job, he is adding an overhead and profit line. How he intends to distribute that over his job, that's -- that was up to Jay, and it made sense to me that he might have times in the job where he's doing more, more supervision, and so that line might be bigger or it might be smaller. The idea that that might go up and down with the numbers that are on a requisition sheet makes sense to me, because maybe more work is happening on the job at that point in time.

So, yeah, he's billing me an overhead and profit line. He was entitled to overhead and profit on the job. He wasn't entitled to have Vuong taking overhead and profit and then he's taking overhead and profit, and we're paying all of these guys extra for project management, and Cristina is taking her overhead and profit, and then he's going on -- that was -- I mean, you know, that's obvious to everybody, really, in my mind.

Q I think that you said -- you testified that you paid Jay one million, two hundred twenty, some odd

thousand dollars; is that fair?

A That's fair.

Q Okay. Of which 15 percent overhead and profit would be $183,000?

A Correct. Well, I didn't calculate it out. You're telling me that that's the right calculation. I don't know what the right calculation is offhand. I'll have to do the math.

Q Can you show me an example where your father did not pay Jay Brown's overhead and profit on a -- on an invoice?

A Yes.

Q Can you show it to me now, please, ma'am?

A Let's see, here is an email.

Q Is it an exhibit, ma'am?

A There's going to be multiple pieces, and I'm going to -- you'll have to bear with me as I --

Q Please take your time.

A -- go through it. So on June 18th, 2013 -- remember, I had a friend, Marcus Aguirre (ph), with construction experience looking through things.

Q Now, this is the first I think I've heard of Marcus Aguirre. Did he help you with that exhibit that Mr. Lyles marked recently? I think it was --

THE COURT: 123.

BY MR. VARNADO:

Q 123?

A He did.

Q Okay, Marcus Aguirre?

A So here's -- I'm going to give you several examples of what I'm talking about.

THE COURT: And what are you referring to?

A (Continuing) In terms of my father not continuing to pay overhead and profit.

THE COURT: I'm sorry, is that an exhibit already, or is this another additional --

A (Continuing) Let's enter this as an exhibit. These are emails from June 18th and June 21st, 2013. Would you --

MR. LYLES: We can either hand them over like that, or Syd can pull up the Bates labels, whatever you-all want to do.

MR. VARNADO: Let's take a break real quick.

THE COURT: Okay. Off the record.

(Whereas, a lunch recess was taken from 11:50 a.m. to 1:09 p.m.)

THE COURT: We are back on the record in 2014-10-3881. We broke for lunch at 10 to 12:00, in part to allow Miss Salzhauer the ability to locate some documents that Mr. Varnado had asked her about. I

think she spent time during lunch, and we're back on the record with Mr. Varnado's cross-examination. Go ahead.

MR. VARNADO: Thank you, Mr. Brown.

BY MR. VARNADO:

Q Amy, did you find the documents that you would say are the most -- the most cogent to the position that your father and Jay Brown agreed to cap the overhead and profit?

A I have found several. I would suggest you also ask my father for specifics.

Q I will.

A But, first of all, I -- I do want to point out that if you look back to Jay Brown's bid and control estimates that are exhibits, I think, 15 and 16, I can double-check them, from August 15th and August 22nd, that he has a number of $50,000 for the -- for the whole house, and that he has a number of $30,000 for the partial part of the house. I would also like to point out that it's for his overhead and profit. And those are clearly listed as line items for overhead and profit.

Q In the estimate, okay.

A In the estimate. And the estimate is referred to as a bid. Like I said, I don't understand the

importance of that, but you do. And -- and those numbers, 50,000 and 30,000, do not relate to a 15 percent overhead and profit, according to his control estimate and his bid. So if he intended to charge 15 percent overhead and profit, if that was the intent of the contract, then he should have put that in the control estimate and bid. Wouldn't you say so? So those two numbers, your client's contention that he would end up charging 15 percent does not match what he actually wrote. There is no way that his numbers would lead to that.

Q Tell me now the documents which you say prove that your father and Jay Brown had an agreement to limit his overhead and profit.

A I --

Q Just tell me the document numbers.

A Hang on. Some of these are not document numbers. On June 5th, 2013.

Q Hang on a second, please, ma'am.

A This is an email from --

Q Just hold on a second, please. Okay.

A -- from Henry Salzhauer to Jay Brown, which I believe is Exhibit 68. Sydney, is that right?

MS. WOLK: Yes.

BY MR. VARNADO:

Q 68 is not that. 68 is dated September 13th.
MR. LYLES: Yeah.
A (Continuing) Okay, that's a different one.
MR. LYLES: Yeah, this is not an exhibit.
A (Continuing) On June 5th, 2013, we can enter it as an exhibit, my father wrote --
MR. LYLES: Hang on just a minute.
BY MR. VARNADO:
Q I have this one. I have that one. I have a June 5th.
THE COURT: June 5th of what year?
MR. VARNADO: 2013.
(EMAIL MARKED DEFENDANT'S EXHIBIT NO. 124 FOR I.D.)
MR. LYLES: The document has been marked for identification as 124.
A (Continuing) My father wrote, "Jay, something is wrong with the requisition. I have not reviewed the whole thing, but line 11, we agreed when we met, was going to be held at THE $85,521. There should have been no further payment to that account."
Q All right, we can read it.
A Okay. Now, you will note here that he says, "I sent a note to that effect with each of the prior payments."

If you had actually produced any of your records for discovery that were requested, we might have those records. But you did not -- Jay did not. So I can't tell you what happened to my father's notes. Perhaps Jay can. But he's clear, the money that got allocated to that line should have gone somewhere else.

Then we're up to, and I don't know if my father has additional records, but these are the things --

THE COURT: What are we going to do with that document?

MR. VARNADO: It's in without objection.

THE COURT: All right.

MR. LYLES: So it's in.

(DEFENDANT'S EXHIBIT NO. 124 ADMITTED INTO EVIDENCE.)

A (Continuing) Then, so my father is clear that I'm not paying -- that he's not paying that. You'll note that the job continues. You'll also note, as I said, that 15 percent had no bearing on his earlier numbers when he was bidding and estimating the job. And then in document 68, let me make sure that this is the document that I'm meaning, this is -- the beginning is the document to my father -- I mean, an email from my father to Jay. The second part of that document is

an email from Jay to my father, cc'ing me, and the first part is that they passed the mechanical inspections, and he's going to call for a Certificate of Occupancy and get them in there if 75 percent of the profit holdings are funded.

And before that, there is -- if you keep going backwards, you'll see an email from Jay Brown to my father as we're flipping back, where Jay -- Jay is replying to an email that my father has written to him. And as you look, head down towards about two-thirds down the page, three-quarters of the way down the page, it says, "This job has been properly paid all along, but not properly produced." And Jay replies, "No overhead and profit has been paid since May."

Q Where is that again? I'm sorry, which page?

A It is --

MR. LYLES: 3998 is the Bates label.

A (Continuing) How convenient to have Bates labels.

MR. LYLES: Exhibit 68.

A (Continuing) I'm also not sure if you're going to consider this relevant, but on September 13th, Jay is again, the capital letters, this is Exhibit 69, Jay is responding to my dad's email. My dad's saying that -- referencing that the plumber and the HVAC

contractor -- well, that's not relevant to what you're talking about. Here you go, it's on page 004003.

Q 69?

A Exhibit 69. "Your final payment is a matter of discussion, as we said in our meeting. I believe it was in February." And you replied -- Jay replied, "Let's discuss it because we need final payment to issue a CO. My offer yesterday was more than generous." I was not privy to that conversation between the two of them. Maybe it was this idea of the 75 percent. If there was a conversation.

Q Is that it?

A That's it for right now. That's what I found during lunchtime.

Q Okay. Can I ask you a question about exhibit number -- the last one in Robert's book, your exhibits? Bear with me, I got stuck with the bad one.

A So it's No. 117?

Q Yeah, 117. Obviously, we have more exhibits that you've added on. But this is Brown Contractors' last invoice; do you agree with me?

A To the best of my knowledge, yes.

Q Okay, great. And, I'm sorry, I've dealt you the wrong -- it's 116, not 117. I'm sorry.

A We're still at the back of the book.

Q Back of the book. Do you recognize these documents?

A It looks like an application and payment -- for payment, and a continuation sheet from Brown Contractors.

Q Now, did your father create the continuation sheet, do you know?

A I have no knowledge if he created a continuation sheet. I have trouble believing it was my father, but that's okay.

Q Do you see at line 11, overhead and profit?

A I do.

Q And what does that number say?

A It says Phase I, 128,376.25. Phase II and III is left blank. New estimate from previous application, 170,459. So, yup.

Q Okay. All right. Now, Miss Amy, you are testifying that you are entitled to receive $50,000 in compensation for damages related to being out of the home, okay. And when your examination wasn't quite clear, your lawyer referenced a letter to me saying it was $50,000, but I haven't seen the backup for that. So can you tell me how you came up with that, and where those documents are?

A Sure. I believe that you have some documents,

but I have some documents, too.

MR. LYLES: Checks. Loss of use checks.

MS. WOLK: 41.

MR. VARNADO: 41, thank you.

BY MR. VARNADO:

Q I see in Exhibit 41, one, two, three, four, five checks. And who are they made payable to?

A Let me go to Exhibit 41. These first three checks are to Kiara Barnett, and there are checks to the Jones Company.

Q So those represent all the checks that you are claiming for --

A No. I think I can produce for you if I -- if we don't have it in another place, the rental agreements and the checks for -- I have receipts from the hotels we stayed in. I have receipts from -- off the top of my head, I can't remember right now if it was Dunes Properties or a different agency that did the first house rental on the Isle of Palms. Then I have, this is the first residential rental agreement until the 30th of March from the Jones Company. We have -- I can provide you with backup, if I don't have it here from emails, on the cost of moving expenses. We can get you a bill from Johnson's Moving. And then here is a -- we have Statewide Moving & Storage. And then we

have backup from, we can get it for you, from AAA Storage, which was where we were storing the majority of our household.

Q So you're contending that all of your living costs from January the 1st through the CO date should be compensated by Jay Brown?

A No. I am only suggesting that he should compensate us for the additional rent, for the additional storage fees, and for the additional moving from -- out of 95 East Bay Street we should have been moving into 1850 Flag Street, and instead we had to move some things into storage and some things into 853 Middle Street. The house was not ready, so we had to move things from 853 Middle Street again into storage, and then we moved all over the place. So, that seems to be fair compensation.

Q Well, you know, I haven't seen the documentation, so get it to your lawyer and I guess we'll supplement it. But you said that -- how long did you think that Jay's work was going to take?

A He gave initial estimates. There was one thing that I found I believe that's five months, and another which we referenced here already I believe for the -- there was another conversation about three months, so it was three to five months.

Q But he took out -- he demoed the whole front part of the house; right? He found rot and band board damage. And then none of the -- the architect had not done the interior fit and finish; right?

A Incorrect. Also, I would mention that when he demoed the house, they demoed more of the house than was anticipated. They did not listen to the electrician and leave the wiring, which then resulted in -- they cut all the wiring, which resulted in additional costs in the house. The electrician, especially there are -- there are curved ceilings in the house and taking off the wood, their demo was one of the things that caused problems in the house. I can also show you an email from Jay where he talks about how he had to explain to other people the window delay at the beginning of the job. So he said the windows would be there in three and a half weeks, and the windows were not there in three and a half weeks. That's his delay.

Q That's not your -- you don't bear any responsibility for the window delay?

A No.

Q None at all?

A None at all.

Q All right. I'm still not with you on -- you

have to get all of your documentation and get it to your lawyer for your 50,000 dollar loss of use claim, because the checks in Exhibit 41 only total 22,000 or $21,000. And if it was a five-month job and it started on August of 28th, then that would take it to what, February?

A The five months would have taken it to February.

Q But you know that it took longer than five months, right, so --

A And I -- if you would like, we can go through the emails documenting the different promised completion dates by Jay throughout the job.

Q Just tell me the numbers.

A Sure. He promised on -- on January 29th, we felt -- my dad is sending an email, we're coming to the end.

MR. VARNADO: I'm sorry, Henry, but I need to see an exhibit number, if we can. Are these the ones that you gave me that are -- that don't have exhibits?

THE COURT: Amy, as you relate these dates, if you can tie it to an exhibit number, please do so.

A (Continuing) I might need somebody's help.

THE COURT: Or if you can't do it, let's do

this. Tie it to an exhibit number, a Bates number, or a date or some identification that we can locate it in the record.

A (Continuing) Yes, that totally makes sense. You might be able to help me on that.

THE COURT: Sometime after today, I'm going to need some help.

A (Continuing) Can I see --

MS. WOLK: The ones that we pulled are right --

MR. LYLES: Got it now?

MS. WOLK: Yeah. And Robert has them, too, but she has her copies.

A (Continuing) First of May, end of March, okay. On -- then we have -- if you remember, I told you that we changed our lease. We added onto the lease at 95 East Bay Street and we made that for March. Here's an email from my father to Jay.

Q Dated?

A Dated February 25th, 2013.

Q Okay.

A Where he's saying, "As you can imagine, I'm not happy with the finish date." Now, mind you, if you look in these emails and the exhibits, you'll find multiple times where we're asking for a completion

date, with no response again and again and again. And Beau Clowney did the same thing. And my dad says, "As you can imagine, I'm not happy with the finish date. The last time we had one, the date was the end of March."

Q I'm sorry, which number? Which Bates label?

A This is 002722.

MS. WOLK: And that's Exhibit 55.

A (Continuing) Thank you, Sydney. And Jay had -- was -- on page 002723, you can see that Jay is responding to an email from my father on February 22nd, saying, "Two more things: One, the finish date for the house. Be realistic, please."

Q And he says, "I am shooting for the first of May"?

A And he responds on February 25th, "I am shooting for the first of May."

Q "If there are no other changes and supplies can get here ASAP"?

A Yup. And then on April 23rd --

MR. VARNADO: Let's mark that one, if you don't mind.

MR. LYLES: I don't mind.

A (Continuing) It's 002723.

MS. WOLK: That one's still 55.

MR. LYLES: Oh, it is, 55 already?

MS. WOLK: Yes. It's right behind that sheet right here.

MR. VARNADO: Oh, I see. Okay, 55.

BY MR. VARNADO:

Q And what other promise emails about --

A Yup. Here on April 23rd, 2013, Jay has again been pressed for a finish date, and he replies, "Rough finish schedule below from today's date," and he goes through, "Trim guy needs two weeks," so he gives detail, and he says June 11th. And then on February -- on May -- and that is 0322 -- 003221 and 003222.

MR. VARNADO: Can we put this into evidence now?

MR. LYLES: That one's not in?

MR. VARNADO: No. So this will be 125?

MR. LYLES: No, I think that's --

MS. WOLK: What are the numbers again?

THE COURT: Let's mark it as 125. If it turns out to be a duplicate --

MR. VARNADO: 3221 and 3222.

THE COURT: -- it won't be the end of the world.

(EMAIL MARKED AS DEFENDANT'S EXHIBIT NO. 125 AND ADMITTED INTO EVIDENCE.)

THE COURT: We have admitted without objection the email of June 25th, 2013, Bates Salzhauer 003221, Exhibit 125.

A (Continuing) There is -- also, on May 28th, 2013, there's another email Sydney was finding.

Q Can you give us the bates label, please, ma'am? Bates label for your May 28th, 2013, email?

A Let's see if I can find it in here.

MR. LYLES: It may be in there. It may not be. Have you got it, Syd?

A (Continuing) Let's see if it's here.

MS. WOLK: I got it.

MR. LYLES: Is that it?

MS. WOLK: Or do you want this one?

A (Continuing) I'll take both of them. Thank you. This is Bates marking 002955, from my father to Jay Brown. "Jay, the house was promised for a June 11th completion. Where is the house in respect to that completion date? And can it be trusted? And if not, why not?" And in Bates marking 002956, Jay responds that, "Final paint colors were just given to me Friday," which Cortney Bishop can establish was previous to that. "We are finishing interior trim punch this week and paint prep." You know, basically he says that we are on time.

And then my husband follows up on May 28th, 2013, and says, it's an email from Andy McMarlin, "Some good news is that nothing left to be done outside the house, nor the bedroom painting should affect the Certificate of Occupancy and move-in date of June 11th. When will Randy be doing the assessment for the CO?" So that was when we thought we were moving in in June.

Now, I didn't have time during lunch, but I can do it now, to find the August days that I think --

Q Can you find the email that you referenced that your husband, Andy McMarlin, sent May 28th?

A I have it. We can find it, for sure, because I have it in my emails. So if you -- if we can't find it here, we can --

Q Let's go ahead and mark the other two that Sydney just located.

MR. LYLES: These right here?

MR. VARNADO: Yeah. Mark those as one exhibit.

(EMAILS MARKED AS DEFENDANT'S EXHIBITS NOS. 126 AND 127 AND ADMITTED INTO EVIDENCE.)

THE COURT: 126 and 127 have been admitted without objection, Rob?

MR. VARNADO: Yeah, that's fine. And this will be 128.

(EMAIL MARKED DEFENDANT'S EXHIBIT NO. 128 AND ADMITTED INTO EVIDENCE.)

THE COURT: All right. 126, 127 and 128 have been added as Defendant's exhibits. 126 is Bates 2955, 127 is 2956, and 128 is 2957. They're all marked as Salzhauer documents.

MR. VARNADO: Can we go off the record while she is looking?

(Whereas, a brief discussion was held off the record.)

(LIVE OAK HOME INSPECTIONS REPORT AND INVOICE MARKED AS PLAINTIFF'S EXHIBIT NO. 14 AND ADMITTED INTO EVIDENCE.)

THE COURT: Plaintiff's 14 has been admitted without objection. It's Live Oaks Home Inspections, LLC, 1850 Flag Street, Sullivan's Island. It does not appear to have a date on the first page.

MR. VARNADO: There is a date I believe on the second page, which has an invoice, and it's dated January 26th, 2012.

THE COURT: Okay. All right.

A (Continuing) We have here an email from Henry Salzhauer to Jay Brown, and he's asking now for the completion schedule because we clearly haven't met June 11th, and he's referencing a number of things that are

wrong at the job, and --

MR. LYLES: What's the Bates label on that?

MR. VARNADO: 03 -- 03234.

A (Continuing) It sounds like Jay either called my father or sent an email, and my father replies by saying that the granite that he was speaking to me about today, this granite was ordered late in this job, came about because Cristina was supposed to order Corian for the countertops but she didn't, and then when she told me that it would take a large number of weeks but she could get granite quickly, I substituted granite for Corian to move things along.

And then on July 2013, this is a story about the corian order that did not happen, had many repeats through the course of the job. Mind you that I was not in Charleston at this time, so whatever was selected was fine with me. I just wanted to get in the house.

On July 25th, 2013, this is an email from me to Jay Brown and Cortney Bishop. "If this looks" -- I am clearly being asked to approve something, and I say, "If this looks right to Cortney, it is approved by me. I'm assuming that we will be able to get a CO and move in by August 1st when we return. Please let me know as soon as possible, Jay, if this is not the case." And there's no response to the contrary. Should I

continue?

Q Is that it?

A That's -- you asked me for --

Q I asked you for the documents.

THE COURT: You-all don't -- Rob, let her finish. She's going to let you finish.

MR. VARNADO: Yes, sir.

A (Continuing) You asked me for the documents that would establish a March date, a June date, and an August date, and those are some documents that establish those dates.

Q And you're going to get the backup for your $50,000 number?

A Those are real expenses. It's not hard to find the backup for that number. I'm happy to do that.

Q Okay. And that will start when, and they will end when?

A That will start -- I believe the first thing that we charged you for was the rent in February of 2013, and the storage. And I don't -- the dates of the moves are -- we moved out of 95 East Bay Street at the end of March, so it will be a date sometime within that time period. We moved out of 853 Middle Street sometime before July 1st, so that means that's when we moved, in that time period. We moved into a hotel room

or a short-term rental at Wild Dunes probably June 30th or July 1st of 2013 until July 4th when we flew out of town because it was no longer available, and then we moved back in. And I don't remember exact dates in August 2013 of the hotel rooms from Homewood Suites. And then there will be a rental agreement for Wild Dunes for two weeks, and then the Hagertys.

Q The Hagertys are going to charge you rent?

A It is reasonable to pay them back for what we were doing, yeah. I mean, we stayed at their house and took over their house.

Q For how long?

A I can't give you the exact number of weeks off the top of my head.

Q All right. All right. Okay, I think we covered that. All right, the next item of damages that you have is the punch list items that Howard Brown --

A Yeah, the punch list items from our punch list that was created with Cameron Glaws.

Q Did Cameron go over the punch list items with you?

A He went over certain of the punch list items, but some of those came from the punch list from the home inspection report, which Cameron received and responded to. Some of them went through -- came from

our walking the job or from Cameron walking the job. Some things that I brought up when we were in the house. And then there is an additional set of punch list items that was -- that was created with Howard Brown. And then there are items that were discovered later.

Q So this is -- I'm going to hand you the only original I have at this time, and it's a blow-up of Cameron Glaws working on the -- whenever it was sent to you, as Cameron Glaws working on the punch list items?

A Yes. I would say that there are multiple punch lists. However --

Q Okay. So you don't have any reason to sit here and to say that that's incorrect, what's on that sheet?

A I would say it's correct that this is a punch list, but it might not be a complete punch list.

Q Okay.

A I also have emails from me to Cameron, and today where they're asking for me to find all the deficits on the job and create the punch list which they need, and my response is you're the contractor, you need to go through the job and create a punch list.

Q So you don't think the owner has anything to do with adding to the punch list?

A I think the owner has something to do with adding to the punch list, but Jay had the responsibility for the job.

MR. VARNADO: Can we mark this as 15?

(EMAIL MARKED PLAINTIFF'S EXHIBIT NO. 15 FOR I.D.)

MR. LYLES: No objection.

THE COURT: All right, 15 is entered without objection. It is titled -- well, it's from Cameron Glaws to Jay Brown. It appears to be a punch list.

(PLAINTIFF'S EXHIBIT NO. 15 ADMITTED INTO EVIDENCE.)

BY MR. VARNADO:

Q Okay. So Howard Brown will testify about the punch list that was incorporated with his documents; correct?

A I can't tell you what Howard Brown will testify to. That's up to you guys what you ask him.

Q Okay. I'm going to ask you to turn to Exhibit 24, please, ma'am.

A Yes.

Q First of all, this is a cost plus contract?

A Yes.

Q So you signed a cost plus contract with Brown Atlantic?

A Yes.
Q Or you didn't actually sign it, did you?
A I believe there's another copy of this contract that is --
Q I asked you in your deposition and you said the same thing.
THE COURT: Rob, don't cut her off. I can't keep up.
A (Continuing) I believe there is another version of this contract that is signed, it's just not in these books. The other part is that this is the cost plus contract for 32 percent, and I believe that the agreement was 20 percent or 25 percent in the end.
Q 25 percent cost plus basis?
A It was 20 or 25 percent. I will try to find that in another book if you would like me to look for it, but it was a cost plus contract.
Q Okay. If you turn to Exhibit 25, and you look at Exhibit B --
MR. LYLES: Did you say B as in boy?
MR. VARNADO: B as in boy. I'm sorry.
A (Continuing) Yes.
Q Okay. Those are the Coastal Plumbing & Gas punch lists?
A Yes.

Q And then if you turn to Exhibit C, Charlie, Salzhauer 5187.

A Yes.

Q Are you able to testify about which ones Mr. Brown has done, or should I ask Mr. Brown?

A You should ask Mr. Brown.

Q Okay.

A I mean, I'm happy to testify, if that's easier for you. I'm saying you should ask Mr. Brown, but whatever is easier for you.

Q Exhibit D, are these additional punch list items?

A Yes, they are.

Q Okay. Do you know, sitting here today, whether Mr. Brown has completed all of the punch list items in Exhibits C & D, or would you have to look through --

A I would have to really look through it and go through it.

Q So we'll ask Mr. Brown. In Exhibit E, same, Exhibit is Salzhauer 5204?

A Yes.

Q Okay, same question with that. So I can ask Mr. Brown? Yes, ma'am?

A Yes.

Q Great.
A Sorry.
Q And then Howard Brown, the only thing in your book is Exhibit 26 which is invoices from Howard Brown?
A Yes.
Q Is there another Brown Atlantic invoice?
A We have many Brown Atlantic invoices. If you would like us to furnish them, we can.
Q Yeah.
A Do you have the additional Brown invoices, or do I need to --
Q Exhibit 44?
A He's asking for all of the invoices from Brown Atlantic.
MR. LYLES: Did you hear that, Amy, 42?
A (Continuing) 42? Okay, 42. These are additional invoices from Brown Atlantic. I can't tell you whether these are complete invoices from Brown Atlantic, but those are some additional invoices from Brown Atlantic.
Q And 44 and 45?
A This is more detail on the cost of repairs and what punch list it was coming from.
Q How long has Mr. Brown been out at the house?
A How long has he been out of my house?

Q At your house.

A He has come and gone at different times in the course of -- in the course of things. So we might think that we're done, and then we uncover another issue and then Howard comes back.

Q Okay. I'm going to show you some photographs of the house. We can mark that, please, ma'am.

(PHOTOGRAPHS MARKED PLAINTIFF'S EXHIBIT NO. 16 FOR I.D.)

THE COURT: All right. Let's -- these are new photographs to the record?

MR. VARNADO: Yes, sir. One of them had handwriting on it. I probably gave that one away.

THE COURT: We've got Plaintiff's Exhibit 16, which is seven photographs. I don't know how to clearly identify for the record what the remaining photos are. You can use them as they are, or to be clear in the record, you may want to mark each photograph, because I don't know of any way that you'll know later that these are the same seven photographs.

MR. VARNADO: Well, it's the -- they'll be the photographs that have the house behind the Sullivan's Island Lighthouse.

BY MR. VARNADO:

Q And I would ask Miss Amy if are these

photographs of your house?

A Yes.

Q Okay.

THE COURT: Do you want to admit them as a block?

MR. VARNADO: Yes, please, sir.

THE COURT: Okay. The seven photographs of the house are marked as Exhibit 16.

MR. VARNADO: Okay.

THE COURT: Collectively.

(PLAINTIFF'S EXHIBIT NO. 16 ADMITTED INTO EVIDENCE.)

BY MR. VARNADO:

Q Now, on -- then I would like the witness to go ahead and draw on the exhibit which part of the roof Jay Brown did in his contract and which part he didn't do.

A You would have to ask the roofer to draw that. I was not up on the roof.

Q Well, you testified about the roof, you wanted the roof to be blue and it was red, and you heard Mr. Jay Brown testify that, I believe, that he had told you he needed to replace the whole roof.

A I can testify that there was -- that was area that was flat and the area over Annie's room, but I

cannot testify to the full extent of the roof that was done on the main part of the house because I was not up on the top of the house. But we do have a roofing contractor who can testify to that because he could easily see what was previously done and what was not previously done.

I can tell you that this area of the house was certainly new, and that there's some on this area of the house that was newly done by Jay Brown (indicating).

Q Okay, wait a second.

A But I can't tell you exactly which parts of the top of the roof that --

THE COURT: Rob, go ahead.

BY MR. VARNADO:

Q Okay. You're looking at this exhibit, looking at the -- which page of the exhibit were you looking at to say that the roof was new, was it the third or the second page?

A This area with the pool was new.

Q The second page, okay.

A Yup.

HENRY SALZHAUER: May I make a suggestion? Unless you have the number on these --

THE COURT: I'm going to have trouble later

unless you-all number each page.

MR. VARNADO: What we can do is we can just write a number on them.

THE COURT: If you want to write A, B, C, D on them, let's do that. And then you can call it 16A through --

MR. VARNADO: I'm doing that. I'm marking A, B, C, D, E.

THE COURT: Okay. Now, for the record, it's seven pages. It has now been marked as 16 A, B, C, D, sequentially, so please refer to them by their letter so that we'll have a record of which picture you're looking at.

A (Continuing) Okay, sounds good. You mean that's more specific than my saying "this one"?

THE COURT: It works better.

A (Continuing) I can confirm for you that in -- on letter G, this area of the roof is new, over the exercise room.

THE COURT: Is that the only area of the roof you can see in that picture?

A (Continuing) Not really.

HENRY SALZHAUER: This lettering is different.

MR. VARNADO: I don't have lettering on mine.

A (Continuing) I can confirm for you in letter F

that this part of the roof is new, and that some section over here is new (indicating).

MR. LYLES: What are you pointing to?

A (Continuing) I'm sorry. The -- this kind of part of the house that's sticking out.

THE COURT: Small square on the right side of the page?

A (Continuing) Yeah.

THE COURT: And that's new.

A (Continuing) This seems to be the same picture, E seems to be the same as F. This one seems to be the same thing as B. And in section D, now we're in the main section of the house, number D, and some parts of this are definitely new, but I cannot tell you the beginning and the end. You'll need to speak to the roofing contractor, to Howard Brown -- I mean --

THE COURT: But whether you speak to the beginning or the end, there's a high section and a low section; is that right?

A (Continuing) Yes. But like I said, while I know that significant parts of that were done by Jay, and then done again, I know that --

THE COURT: Did the high section have any part of it redone by Brown Contracting?

A My belief is yes.

THE COURT: On the low part, was any of that done by Brown Contracting?

A (Continuing) I'm not certain on this part, whether it was or not.

MR. LYLES: That's the low part.

A (Continuing) That's the low part. But there's another section that -- over here (indicating).

THE COURT: Which letter?

A (Continuing) This is C, and I believe that that was done by Brown Contractors. Like I said, I have never been up on the roof.

THE COURT: I understand. All right. I'm sorry, Rob. Go ahead.

BY MR. VARNADO:

Q Mr. Howard Brown replaced the entire roof; correct?

A Mr. Howard Brown replaced the roof in that remaining section of the house where I was telling you that there was water intrusion during the job, and over here in these pictures that I couldn't tell you the extent to which Jay did and didn't, but that some of it he certainly did. I can tell that for sure because of emails regarding the work, the quality of workmanship that was done on that roof, and I can easily find those emails for you. Those -- I was not the person who

walked the roof and noticed the defects in the quality of the workmanship. I was the person who noticed the water intrusion into the house.

Q If you can easily find them, can you please find them for me?

A Sydney, I know we have this marked. So...

(Whereas, a brief recess was taken.)

THE COURT: We're back on the record in 3881, and we are continuing the cross-examination of Amy Salzhauer.

BY MR. VARNADO:

Q Miss Salzhauer, when we took a break, you said you needed to find some emails which talked about roofing issues. Did you find them? Just yes or no.

A Yes.

Q Okay. And are they exhibits in the exhibit book?

A I cannot tell you that, but I can tell you the Bates label on the first, the two Bates labels on the first email, which is my email, and that we have a photocopy of the second email, so we can photocopy that and distribute it if you would like.

Q Okay, so we'll mark this one as the next exhibit.

(EMAIL MARKED DEFENDANT'S EXHIBIT NO. 129 FOR

I.D.)

BY MR. VARNADO:

Q And the other one that Sydney is getting for us, is this another email?

A Yeah.

Q And this will be 130.

(EMAIL MARKED DEFENDANT'S EXHIBIT NO. 130 FOR I.D.)

BY MR. VARNADO:

Q And those are the emails that you looked for responsive to my question; correct?

A Yes. If you give them back to me, I can tell you what they say.

Q That's all right.

MR. LYLES: Exhibit 130 doesn't have a Bates label on it because apparently we didn't have it, so that's an original with no Bates label.

THE COURT: Okay.

BY MR. VARNADO:

Q All right. Amy, in your deposition you testified that you never discussed Jay Brown's licensure status with him; is that correct?

A Not when we were beginning the job, not at all.

Q And you never discussed licensure status with

him; correct?

A At a certain point, and I'm not sure whether it was during the job or after the job, we became aware that he did not have a license, and I don't know whether I discussed that with Jay or not, and I don't know whether it was before the job or after the job. I know that we sent emails to Jay asking for his license. I don't recall the responses. I believe those emails came from my dad, so I would have to refer you to him.

Q Okay. And you testified that you were working with Jay Brown; correct?

A Yes.

Q So what company he used wasn't really important to you at the time; correct?

A No, it wasn't. You know, when we do a real estate partnership, you know, there's one partnership that's called Binker Goes Shopping, that was our dog, and another was Binker on Fifth Avenue, and they are different, but really it's somebody doing business with my dad and my brother.

Q Okay. And you heard Mr. Brown's testimony that he was -- he was a project manager on this job. And there were other project managers on the job; correct?

A That was I believe my interpretation of his

testimony. I don't really honestly recall what he testified to.

Q You've testified today that you had numerous conversations, and your father, Henry Salzhauer, copied you on numerous conversations with Jay Brown; correct?

A Yes.

MR. VARNADO: Okay, I think honestly that this will do it. I want to talk to my client for two minutes, and then we'll move on.

THE COURT: All right. Who have you got next? Oh, you have redirect?

MR. LYLES: I have a little. But Howard Brown is supposed to be back.

(Whereas, the deposition recessed briefly.)

THE COURT: Rob is finished. Back to you for redirect.

REDIRECT EXAMINATION

BY MR. LYLES:

Q Amy, I have just maybe one question.

A Okay.

Q Rob asked you some questions about change orders. Do you remember that?

A I don't remember the specific questions, no.

Q But do you remember discussing change orders with him?

A Yes.
Q Did you understand at some point in time from Jay that there were change orders?
A What happened is that, way into the job, we asked -- we asked for the invoices from Vuong Nguyen, for his backup invoices, and Deborah in his office sent them. I can find the dates of that. I believe it's maybe the end of March, June, sometime like that, and that's when I saw these things, and they just kind of were stamped change order after change order after change order.
Q So, and I think Mr. Varnado asked you if the change orders came from the subcontractors. Do you remember that?
A I don't remember. But, if you say he did, I'm sure he did.
Q And is that -- in your recollection, is that where they seemed to come from?
A You know, I don't know when we look at her billing whether it will have been marked as a -- I mean, most of them I think come from VLN, LLC.
Q What sort of agreement did you have with VLN, LLC?
A I didn't have any agreement with VLN, LLC.
Q So would there be a change order from VLN,

LLC?

A I don't know. You see, I didn't see those. I saw these invoices coming from VLN, LLC, to Jay. I didn't actually realize that that was Vuong.

Q Did you have any agreement with any company called VLN, LLC?

A No.

Q Who had an agreement with VLN, LLC?

A I imagine Jay did.

MR. LYLES: Okay. All right. I think that's all I've got.

MR. VARNADO: Okay.

EXAMINATION

BY THE COURT:

Q Amy, let me understand the paperwork. And if you could look at, for no reason other than it's at random, Plaintiff's Exhibit 9, and I want to reference you to an invoice.

A Is it Exhibit 9 from --

MR. LYLES: Plaintiff's Exhibit 9.

A (Continuing) Okay. Okay.

Q That's a collection of invoices, but it's -- the first page is the accounting of the payments and charges. But let's -- if you could look at the next -- not the final invoice, but look at the 10/14/2013, and

I can tell you that's just at random.

A Okay.

Q You received these invoices, as I understand it. This is a copy of what you were sent?

A Yes.

Q To what extent did it have any backup or documentation for the line items listed on the invoice description block?

A It depended at what point we were in the job. So when it was the beginning of the job, very little. Then later in the job, first of all, we were asking for it, and, secondly, Cameron Glaws was better about providing that backup. So at this point in the job, at the end of the job, we were probably -- we were probably asking for, you know, real receipts.

My dad, at some point, was asking to do, and I'm not sure whether he did, you'll have to ask my dad, three-party checks. We couldn't get -- and I can show you multiple emails. Making this point, we couldn't get a clear understanding of what subs had actually been paid, and it took a long time for Jay to respond if he ever did -- it wasn't clear to me whether Jay actually --

Q I probably asked too long of a question. Just in simple terms, did you routinely get backup from

Brown for the items in the bill? For example, ceramic tile, Tile & Stone Design Studio, $1,091. Was it a routine practice for Brown to send you the backup, the documentation, that evidenced that particular item that he wanted to be paid for?

A No. Although, at this point on the job, I was probably -- we were almost done with the job and, you know, this is already after we have our CO. So at that point, I was -- I was onto the game, so I was probably asking for receipts. But, for example, when VLN, LLC, would send an invoice saying that it was, you know, $8,500, or whatever it would be, for an HVAC, I didn't realize that there was a -- I actually didn't realize there was another contractor that was at issue there, and there would never -- there was no backup.

Q All right. But I'm trying to understand the backup you were sent. Is it your testimony that in the absence of a request, what you generally received was this invoice and not backup?

A Like I said, it depends on the point in the job.

Q All right. Early in the job?

A Early in the job, we did not receive the backup.

Q All right. Now, in terms of the -- have you

received a final accounting, a cleaned-up final accounting, from Brown Contracting showing documentation for all of the expenditures they're asking to be paid for?

A That is a great question. I have heard multiple versions of what that is, and I cannot tell you with certainty that -- that we received something that, without our input, reflected what was clearly paid to subs. Additionally, we paid some of the subs on our own because --

Q Okay.

A So, you know --

Q But just as a matter of paperwork -- excuse me for interrupting you after I fussed at Rob -- but just to get this one question, have you ever gotten a document or a set of documents from Brown Contracting that was represented to be a comprehensive final accounting, here's all the money we want to be paid? I haven't seen it is the reason. I just want to know if one exists.

A I would have to ask Roy Strickland or ask somebody to Roy Strickland if he felt like there was something that was -- that clearly represented that. I -- you know, like I said, we didn't start -- we didn't even understand that certain subs hadn't been

paid until they applied for payment directly to us, so that would indicate no. But it's possible that within the different billing documents, that there is something that represents that, that Roy would understand represents that, that I didn't.

Q Okay. Thank you. That's all.

A I'm sorry to be obtuse, but --

Q No, no, you're not, you're not. I'm just trying to make sure I'm finding everything. Thank you.

A I mean, what I can tell you is that if you look at the end of the job, we're asking him again and again and again for a final accounting of what the subs are paid, or what the subs need to be paid, so that we can make sure that the subs are paid. Now, there were certain subs that never finished their work. I don't know if that -- to my mind, when he filed the lien, he still -- he hadn't even finished. He never finished.

Q I mean, this is what I'm looking for: Are you aware of a comprehensive document that bundles together and includes all of the costs that Brown says we incurred in the building of your house and this is what we want to be paid for, plus markup?

A I --

Q Have you seen that document anywhere?

A I've seen a final invoice from Brown, but I

Q And that would include --

MR. VARNADO: I'm sorry, are you done?

MR. LYLES: Sure.

BY MR. VARNADO:

Q That would include the owner didn't call you and the architect didn't call you; is that true, Mr. Powell? And the contractor?

A Correct.

Q And you said that you have consulted on additional repair, and I show you Brown Atlantic's estimate to fix it on Exhibit 45 for $65,000. Are you saying that the repair that you're contemplating, that you've actually explored, is less? You just don't know at this time?

A I don't know costs. Only when -- contractors give me feedback on different things. It was brought to my attention that dealing with the second floor tile, the plumbing and all of that would be very costly, so we tried to tack the solution above that area. So, I could only assume it would help with these estimates.

Q In your original plans, did you know a bathroom was going to go on that second floor?

A Yes.

MR. VARNADO: All right, that's all I have.

THE COURT: I'm done. Thank you.

MR. LYLES: Thank you, Mr. Powell.

MR. VARNADO: Thank you.

THE COURT: Who is the next witness?

MR. LYLES: Mr. Salzhauer.

THE COURT: Would you move one seat down, and the court reporter will swear you.

(Whereas, a brief recess was taken.)

(Henry Salzhauer, having been duly sworn, testified as follows:)

THE COURT: We are back on the record. And, Robert, proceed.

DIRECT EXAMINATION

BY MR. LYLES:

Q Mr. Salzhauer?

A That's me.

Q I know you've already been sworn in, and you've had an opportunity this week to speak a little bit to everybody who is here. But if you would, just for the record, provide Mr. Brown with your -- a summary of your educational background.

A I went to a very good high school in Brooklyn, it's Poly Prep, and then I went to MIT and I got a degree in electrical engineering and one in management.

Q Okay. And what did you do after school?

A After school, I worked for a little bit of time until I was called to the Army. I went into the Army, and then I was fortunate enough to marry my wife, so and then I went to some licensing courses. I became a licensed electrical contractor.

Q Okay. And where did you work?

A I worked in a business, a family business that my father started in New York. It's called Benjamin Electric, or it was called Benjamin Electric. And eventually, my brother and I ran the business, and I carried the electrical license for the business.

Q How long did you do that?

A From about 1960 until I don't know when.

Q Do you still got it?

A No. You can't have a license unless you're in the business.

Q Okay. When did you get out of the business, if you can remember?

A I can't.

Q Okay. Do you know approximately how long you were in the business?

A Well, actually, I grew up in the business. So I was in the business, I worked in the motor shop when I was 14 years old. And then in order to get my electrical license, I worked with tools in the trade

for two years. And then I guess in the early, very early sixties, I worked -- I came into the office and I learned to estimate and run work. And probably in the late eighties, early nineties is when I left the business. Amy, do you remember when I left the business?

Q She can't help you.

MS. SALZHAUER MCMARLIN: Sometime when I was in college.

A (Continuing) Well, anyhow, I was probably in the business 40 years or so.

Q So you're familiar with -- well, the type of business that Benjamin Electric did, what was it, primarily?

A Primarily, we did office alteration business. We started out as industrial contractors, and at that moment in time, that was our business, industrial. New York City was -- New York City was a very big printing town, and we did maybe 80, 90 percent of the electrical work for commercial printers in the city.

And then, there were all kinds of businesses. There were machine tool businesses. There were garment businesses. But, that started to leave the city. And we were always a heavy design company in that -- in the industrial work, we designed a lot of the work that we

installed, and that carried over to the new business of New York City, which was office. And if you have a 500,000 square foot or a million foot building, then you have a somewhat complicated electrical system. So we wound up doing work for people who understood what we had in our business in terms of qualification, and we had very good labor, so we were very competitive, and the people we worked for understood us and we understood them. And we did most of our work -- well, I don't know if it's in respect to this, but a lot of our work was with unsigned contracts and on the basis of what we called not-to-exceed price.

Q What is not-to-exceed price?

A We would give a price for the -- to work, $5.00, and if we could do the work for less on labor and material basis, they got billed for the lesser; and if we were over, we ate it.

Q And so that was a -- that was a -- would it be accurate to say that was a common way of contracting for Benjamin Electric?

A For Benjamin Electric it was. For other contractors, it was not.

Q After you left Benjamin Electric, what did you do?

A While I was at Benjamin Electric, we had an

unusual organization in that we did not let it get bigger than a certain size. And since my brother and I were in the business, if I had spent all of my time at the business and he all of his time at the business, then there would be no room for anybody to grow up. So while I had my spare time, I had an ice skating rink, I invested in real estate, and I invested in marketable securities.

Q Okay. And so when you get out of Benjamin Electric, that's what you did?

A When I got out of Benjamin Electric, our son had come into the business. My brother and I had, between us, six children. One boy. It was not a time in the world when young ladies went into the contracting business in New York. So, our son was in the business, and it turned out that when we started in the business, my brother and I had grown up in it and we saw our father's generation stay in it until they died in harness. Whether they wanted to or not, they just did. And we made up our minds, if God were nice enough to us and we didn't have to, we wouldn't.

And my brother was eight years older than me, and my brother was a very big hobbyist and he was involved with his hobbies, and I said to him, Charley, why don't we stop this. And he said to me, Hank, what

will I do. And I said, Charley, you'll do the same thing Mike and I do. So with that conversation, we altered our office space to make room for Charley. And my brother's and my office were always back to back with a door between us. And so we altered the space so that it fit with Charley and Mike and I, and he never came back. He came book to see the space, but -- and my brother moved to North Carolina.

Q Okay. And how many children do you have?

A Well, we have three that we had plus three that they married, so we really look at it as six children.

Q And Amy and Andy are two of the six?

A Exactly.

Q And do you remember when Amy began to look at and evaluate 1850 Flag Street for purchase?

A I do.

Q And was she talking to you about that?

A In a very generalized manner, dad, you know, we're going to look for a house.

Q Okay.

A And then this house came up, and the location was very good. Andy is a very big oarsman. He was an Olympic rower, and he still competes internationally in rowing kinds of things. And the water always had a big

appeal to them, and that's where they eventually wound up by.

Q Okay. What did she tell you about the house before you saw it?

A That the location was very good. That we're going to need to alter it to make it work for us.

Q And Amy's got two children. Do you have other grandchildren?

A We have six grandchildren.

Q Okay. At what point do you recall first --

MRS. SUSAN SALZHAUER: You have nine.

A (Continuing) It sounded a little funny to me when I said that. I started to count up again. One daughter has four, one has three, and one has two, that makes nine. Sorry about that, Amy.

Q Do you remember the first time you saw 1850 Flag Street?

A Not really.

Q Do you know the first time you met Jay Brown?

A Yes, I do. The first time I met Jay Brown was in the bidding process for the house. Actually, I think Amy already was involved with getting bids.

Q So you weren't instrumental in the process of getting the bids?

A No, I was not.

Q So you were not involved with, at least at that point, with Beau Clowney?

A I had met Beau previous to that, I believe. I'm not quite sure. This was more than three grandchildren ago. But I met Beau I think before the drawings were complete.

Q Okay. But you weren't involved in the bid process?

A That's correct.

Q And so you didn't select Jay as a potential bidder?

A No.

Q Or Daly & Sawyer or Diamond Construction?

A No.

Q Okay. Did you evaluate the responses to bid requests?

A In terms of evaluation, going over the -- I did not, no.

Q Was the decision to hire Jay and accept his bid, was that Amy's decision?

A I participated in that.

Q Okay.

A And I -- when I came here, I'm pretty sure that Amy -- Amy had the prices from Sawyer, and the price from the third party, and a price from Jay.

Q Diamond.

A Okay. And the price from Jay. And she was in a very big hurry to get started with the work.

Q Why was that?

A Because she was renting a place, and the lease was at a finite end, and she had two little children and she knew she had to get out.

Q Okay, go ahead.

A And at that moment Sawyer's bid and Jay's bid were very similar, and Amy had some questions about the work and going over the pricing. And Sawyer was very busy, and Jay, before Amy bought the house, had been very helpful to her in terms of examining the house so that she would be able to qualify her price for the house, and he was very responsive at that time.

My wife and I came down and we met Jay, and we went to his office and I -- I really was not, I was not too sure of the pricing. You know, I had no way of understanding pricing. I didn't know if the view was we're taking -- we've got New York City people, let's give it a ride, or if it was he's straightforward on his price. I explained to Jay in his office what I had called a not-to-exceed price, and that's the way I would like to go about this work.

So, it was determined that Jay had given an

estimate which had a management and a -- I don't know if you call it a profit and overhead column, whatever it was, and at that moment in time, we came to a conclusion that the work would be done based upon certain work on the plans, and that if the work could be done for less, Jay would keep the management fee, or whatever you're going to call it, and 50 percent of any savings would go back to us and 50 percent would go to him.

Q Okay. If you'll turn in this book right here to Exhibit 8 for me.

A How come it's upside down?

Q Here you go.

A I do need help with the numbers. Okay, that's familiar.

Q Okay. Tell me why that's familiar to you. Have you seen it before?

A Yes. This is my understanding.

Q Of what?

A Of --

THE COURT: Rob, tell me the number again. I'm sorry.

MR. LYLES: Eight.

A (Continuing) This is my understanding of what the job was going to cost.

Q Okay.

A And again, if there were -- it says, "As an incentive, any savings coming in below the above will be divided 50/50. Project duration will be five months. You will be given a project FastTrack scheduling sheet," which I never got.

Q Okay. Does this Exhibit 8 represent sort of structurally to you what you had agreed to in terms of pricing with Jay?

A Yes.

Q And that exhibit contains on the top the name of a company called Brown-Meihaus. Do you see that?

A Yes.

Q Do you know anything about who Meihaus is?

A No -- well, subsequently, from this litigation, I understand who Meihaus is.

Q Okay.

A But when I met Jay, Jay spoke to me about himself and how he grew up in the business and the work that he was doing, and he took us to a house either on the Isle of Palms or --

MRS. SUSAN SALZHAUER: Isle of Palms.

A (Continuing) You're not allowed to talk to me.

THE COURT: We'll make an exception. If she speaks to you, we're going to make an exception for

that.

A (Continuing) Correcting me on grandchildren is all right. I'm never going to live this down. So, we had gone to -- to look at this house on the Isle of Palms, and the house was being very well done. There was an area in the house where Jay pointed out that he had made some architectural change on his own, and he improved the appearance of the house, greatly. The house was pretty close to finish. And I developed a level of real confidence. Jay sold himself to me, and that's how -- that's how I came to my dealings with him, because I -- my feelings about him was he was going to give us a good job. And, you know, I also grew up in the business. So we talked about him growing up in the business, and I related to that issue.

Q Okay. Was it your belief at that time that you were dealing with Jay Brown?

A Exactly. My belief -- my belief in terms of my relationship to Jay for a long period of time was I could trust this guy. I was new to Charleston, and I was interested in real estate in Charleston at that time, and Amy had looked at a piece of property in downtown Charleston, which would have required extensive renovation. We got pricing from Jay for that

work. Subsequently, she did not put in a price for the property. After that, I had spoken -- or Jay and I had spoken about him buying a property on Coleman Boulevard and building a space for a restaurant, that he felt he had the restaurant tenant, and that was the kind of confidence I had in him.

Q Okay.

A But to me, the job was always Jay.

Q Okay. Did you believe that Jay was a licensed contractor?

A I had no reason -- all appearances were that Jay was a licensed contractor. I have never -- we did three alterations to our own home, and two alterations to an apartment, and I never asked the question of the contractor as to whether or not he was licensed. It wasn't a -- it would not have occurred to me to ask that question.

Q If you had known that Jay was not licensed, would you have hired Jay?

A A license means something to me, and I would not have done it. Because a license means that you have knowledge of building codes and practices, and you also have an honest responsibility for the job, that you personally are committed to following all the codes and ordinances. You know, there was a -- there is

conversation on the table about the law and whether or not somebody can carry the license, somebody cannot carry the license. But for me, in this job, I think the job lacked anybody with the requirements of having a license. A licensed contractor -- had a licensed contractor been on the job, I don't think the issue of the nails in the electrical wiring would come up, because that's a violation of building codes. I also -- and that problem is flagrant. I also think that had a licensed contractor been on the job in respect to the structural issues, there wouldn't be the problems. Howard Brown ran into this issue of the deflection. Well, he's a licensed contractor and he knew enough to call an engineer. While the work was going on, somebody substituted bad judgment in an area that really needed an engineer. You don't need an engineer --

MR. VARNADO: I'm going to object because we're getting a little bit -- I don't think you have laid a foundation for him to even testify about this. He's --

BY MR. LYLES:

Q We'll get to that, Mr. Salzhauer.

A Okay.

Q Would you have hired Jay Brown, or would you

have allowed Amy to hire Jay Brown, to construct this house, do this project, had you known he was not licensed?

A No.

Q In your mind, does a license issued by the state establish, in your mind, some level of competence and financial wherewithal for the person that you're dealing with?

A Yes.

Q And does, in your mind, a license cause you to believe that the contractor with whom you were dealing would be familiar with the code and applicable regulations?

A Definitely, yes.

Q And that if his license is actually used to pull a building permit, that he is personally obligated to ensure compliance with the building code?

A Yes.

Q And would you have expected a licensed contractor to understand the job structure?

A Yes.

Q And would you have expected a contractor with a license to actually directly retain the subcontractors that were used on the job?

A Yes.

Q Had you known Jay Brown was not going to directly contract with subcontractors, would you have hired him?

A No.

Q We looked yesterday at what was marked as Exhibit 119. That documented is dated 4/24/12. Is that something you saw during the negotiation process, or do you remember?

A At the end -- at the end of the process, I think I saw -- at the end of the process, I asked Amy to make sure she defined the work that was going to go on, by room, and so she would know what she's getting and what the contractor is going to be giving.

Q Okay. Hang on just a minute, let me make a note. Okay, you and I have looked at Exhibit 8. And let me ask you about some other -- let me do it this way. Would you agree that after -- or at some point early in the process, there was some discussion between Jay Brown and Amy, perhaps you, about pricing alternatives for the job?

A That was kind of an ongoing thing before the work started.

Q Okay. And we looked, for example, at -- at -- if you'll flip over to 12. Exhibit 12 is a different way of pricing the job. Do you see that?

A Yeah.
Q And were you copied on things such as this, or did you ultimately see things like this, or was this between Amy and Jay?
A I may have been copied, but I was not part of it.
Q Okay. If you will, go over to Exhibit 14 for me, and that's an email that's addressed to you. Do you see that?
A Yes.
Q Do you remember receiving this email?
A I received a contract. I can't say that this, looking at this, this specifically was the contract, but I did receive a contract.
Q Okay. Was it a cost plus contract?
A Yes.
Q Okay. And did you sign that contract?
A No.
Q Why not?
A Because it was not our agreement to have a cost plus job.
Q Okay.
A The agreement was for a fixed price job with a -- if there were a saving -- I gave you the terms. It was a fixed price, and if there were a saving, 50

percent to each party.

Q Okay. So you did not ever sign a cost plus contract?

A That's correct.

Q You did not believe it was a cost plus job?

A Correct.

Q Okay. If you go over to Exhibit 15, you're shown as a copy on that letter, or email. Do you see that?

A Yes.

Q And there is a document that, as I understand it, is referred to as a Brown Contractors Control Estimate. Do you see that?

A Yes.

Q Okay. And if you go to the last page of that document, under column A, which is bid A.

MR. VARNADO: Which exhibit are you on again? I'm sorry.

MR. LYLES: 15. It's okay.

A (Continuing) Pay attention, will you, please.

Q The last page of that document, which is right there, we see a number of 722,074.12?

A Correct.

Q Do you see that?

A Yes.

Q Is that a number that resonates with you relative to this job?

A Yeah. I believe that was the sum total of -- oh, two phases. I think this got broken down into two phases. It was a Phase I and a Phase II.

Q Okay. But that was the total amount?

A I believe that's correct.

Q Which would include both phases?

A Correct.

Q All right. Did you ever see an estimate from Mr. Brown for the entire job that exceeded 722,074.12?

A Not to the best of my knowledge, because I was really not involved --

Q Okay.

A -- with that part of this conversation.

Q Okay.

A Amy was trying to see what she could get within the framework of what she could afford to pay?

Q Okay. What did -- what was the project management fee that was contemplated in that exhibit, or were you still basing it on the prior --

A I think it was -- I think it was $50,000, and when the job got broken down, it was -- this is what I'm -- off the top of my head, I think it was 30,000 for the first part, and 20,000 for the second part.

Q And if you look at Exhibit 15, there's a couple of things there. There's a project management number of $8,000?

MR. VARNADO: Which page are you on, Robert?

MR. LYLES: Sure. I'm on 1508.

MR. VARNADO: Thank you.

BY MR. LYLES:

Q There's a project management -- excuse me, $12,500. Do you see that?

A Yes.

Q And then down below that, you've got an overhead and profit number of $50,000. Do you see that?

A Yes.

Q And did you see those at the time this was being priced?

A I saw this afterwards.

Q Okay.

A These are Jay's numbers.

Q Okay. But you understood that this represented the control estimate?

A Yes.

Q Okay. All right. Now, let's see what we got here. Hang on just a second. You never signed a cost plus agreement that was sent to you; is that right?

A That's correct.
Q And did you ever sign any contract with Mr. Brown?
A No.
Q And were you comfortable proceeding with the renovation of the house without a signed contract?
A Yes.
Q Why were you comfortable proceeding without a signed contract?
A I was comfortable with Jay, and I had confidence in his integrity, and I was used to doing business with people without signing contracts.
Q Okay. What -- once renovation began, were you on site?
A No.
Q You were in New York?
A Yes.
Q And what was your role during renovation?
A Basically, the bills came -- it was easy for us to pay the bills out of New York and keep the bookkeeping in New York. So the bills -- the bills came, and the bills that came to New York had -- there was conversation about the backup bills from, you know, the lumber yard and this and this and this. Those did come to my office. Amy was not aware of it, I don't

believe.

Q Okay. So you got -- invoices from Mr. Brown were sent to you in New York?

A Correct.

Q And those invoices had some backup material included with them?

A Correct.

Q Backup material for the charges that you were receiving?

A Yes.

Q And then those payments, the invoices were processed for payment?

A Correct.

Q And paid by your office?

A Correct.

Q There has been some discussion in this case about -- let me turn your attention to -- let's go to --

MR. VARNADO: 101, 102.

A (Continuing) Six grandchildren.

BY MR. LYLES:

Q Let's go to Exhibit 78.

A Exhibit 72?

Q 78.

A 78, which is "Application and Certification

for Payment, Companion to Invoice #" -- what is that number?

Q It looks like 45 to me. I don't know. The invoice should be --

MS. WOLK: That's 43.

BY MR. LYLES:

Q There you go, right there, next exhibit over.

A Okay.

Q Are you at Exhibit 78, Mr. Salzhauer?

A I am, yes.

Q Go back to the first page of that, if you don't mind.

A (Witness complied with request of counsel.)

Q Do you recognize the form that is before you?

A Yes.

Q What is that?

A This is what I paid the job from.

Q Okay. And the form itself, is that an AIA form?

A I'm looking at the top, so it is. It's says an AIA form.

Q Okay.

A When the job started --

Q Yes.

A -- I asked for really simple billing, which

was the price, the amount that was -- the -- if there were, let's say, air conditioner work, the value of the air conditioning, $5.00. When the -- when work happened, a certain amount of work happened, there would be a bill for $3.00. And my control over this was that it should not run more than $5.00. If there were changes, there was to be another column incorporated into that so that I always knew how much the job was going to cost, and that's how I paid them. I paid the bills.

Q So you requested that the -- that the job cost information be provided to you in that manner?

A Exactly.

Q And was that done by Jay Brown?

A Yes.

Q Or someone in his office?

A Well, it came from his office.

Q Okay. Did you send the form that we're looking at to Jay Brown to use to accomplish that?

A No, I did not.

Q Look at Exhibit 78. Who prepared the -- or filled in the blanks and prepared the continuation sheet?

A I believe the woman in the office, or the lady in New York, was Deborah. But I -- more than that, I

don't know. I never met Deborah, and I had some conversation with her when things -- most of it, I guess, was emails, but when things got either hairy or tight or something like that, I would have a conversation with her. When I was not getting stuff on time or --

Q Did you or anybody in your office fill in the blanks on these forms during the course of this job?

A No.

Q This is a document that was provided to you along with Jay Brown's invoices?

A Exactly.

Q Your request was simply to be able to chart or monitor the flow of the cash on the job, relative to the initial cost?

A Exactly.

Q Okay. At some point you've seen -- you go ahead, I'm sorry. I didn't mean to interrupt you.

A No.

Q Okay. In your mind, the numbers represented here are numbers that were provided by Jay Brown and his office?

A Exactly.

Q And that's true for all of these?

A Yes.

Q At any point -- well, let me ask you a different way. When the job began, did you have an expectation of the length of time it was going to take to complete the job?

A The length of time that I got were lengths of time that Jay spoke to Amy about it, or I got from Jay, and I asked as -- when the job started, I asked for a schedule of -- a detailed schedule of the work. By this time, you should be doing, this, this and this, and the job is over by such and such date. I never got such a schedule.

Q Okay. Did that concern you?

A It did concern me, and I kept asking for it and never got it.

Q Okay. And I hate to do this to you, but I'm going to zip all the way back to Exhibit 8.

A You're good attorneys.

Q Oh, I'm a page-turner. Okay, go to Exhibit 8. Do you see any reference in there to the length of the project?

A Let's see. Five months. Project duration, five months.

Q Okay.

A I'll read it. "Project duration will be five months. You will be given a project FastTrack

scheduling sheet." I never got that.

Q Go to the last line just above the signature line, if you will, on that document from Jay Brown.

A "We offer a five-year home warranty on all of our homes."

Q Okay. Was that significant to you?

A Yes.

Q Why?

A It meant that the contractor or the person was standing behind the work, and if there were a problem, he would remedy.

Q So the five-year warranty was a significant issue for you?

A Yes. I think it would be to anybody.

Q Before construction began, did anybody ever indicate to you that you weren't going to be getting a five-year warranty?

A No.

Q At any point during the renovation, did you begin to get concerned about the cost of the project?

A I did.

Q Do you know when that was?

A I believe it was in December. I would have to look at my notes. May I do that?

Q Well, let's --

A I think it was somewhere in December.
Q Of 2012?
A 2012.
Q Okay.
A Or early January of 2012.
Q Okay. And do you recall what concerned you?
A Well, the price was adding up, and the work was not -- the work was not commensurate with the finish. I mean, the price was X and it looked like the house was finished X minus Y and it was not going to come out right.
Q So you began to get concerned?
A I did.
Q Okay. And what did you do in response to that?
A I wrote to Jay and asked him, certainly by early January or middle of January --
Q Okay.
A -- and certainly in February, to please give me a price to finish, an all-encompassing price to finish the work.
Q Okay.
A I realized that there had been some changes, all of which I was not aware of, but I wanted an all-encompassing price, what is the job going to be.

There's a cost to date, and there's going to be a certain amount more money to finish. Jay gave me the cost to date, the certain amount of money to finish, and a list of items that -- I don't remember exactly what that list of items was, but altogether it gave me a number that the job would be finished at.

Q So at some point, you became aware that he was not going to meet the agreed-upon price?

A Exactly.

Q And your concern at that point was to try to make sure that you understood what the ultimate cost was going to be?

A Yes.

Q Why would you not just stop the work right then and there?

A Amy had two little girls, and they were wandering around in the wilderness of Charleston, and it made no sense because, supposedly, the job was going to get done by -- I don't remember what that promise date was. I think the first promise date was something in December. That never happened. And then there was a subsequent promise date. And I think when I got this cost update or -- cost update, I think the date that was on there was March 11th.

Q Okay.

A So to stop the job at that moment in time made no sense.

Q And you were -- if you had stopped the job, what would you have had to do?

A If I had stopped the job, I would have had to get contractors to finish the job. It would have been a complete mess.

Q Okay. Let me turn your attention to Exhibit 50, please.

MR. VARNADO: 15?

MR. LYLES: 50.

BY MR. LYLES:

Q Do you see that, Mr. Salzhauer?

A Yes.

Q Is that an email that you sent to Jay on February the 15th of 2013?

A Before this, I believe that Jay had given me the numbers on his sheet. I'm not positive exactly.

Q Okay.

A But I wanted those numbers incorporated into that payment schedule that you saw so that I could follow, follow the billing in the same way that I had been following it.

Q Do you remember the number that Jay gave you as being the cost to complete?

A I think it was 901,000.
Q Okay. But this email represents -- or does this email represent the efforts that you were engaged in in early 2013 to try to get that final number?
A Yes.
Q Is that right?
A Correct.
Q Okay.
THE COURT: Mr. Salzhauer, what was the number you just stated?
A (Continuing) I think it was 901,000.
THE COURT: Okay.
BY MR. LYLES:
Q If you'll go over to Exhibit 51, you'll see this is an email exchange between you and Deborah.
A Okay.
Q Do you see that, Miss Kahn, Deborah Kahn?
A Right.
Q You understood that she worked for Jay?
A Correct.
Q And is this, again, part of your efforts to get the information that you needed to understand what the cost to complete was going to be?
A Yes.
Q And Miss Kahn is writing you back and telling

you that she's trying to put that information together for you?

A Yes.

Q And do you see the continuation sheet that's attached to the bottom of that -- or excuse me, to the back of that email?

A Yeah, but I can't read this.

Q It's too small?

A Yes.

Q Do you remember getting a continuation sheet?

MR. VARNADO: Do you want my cheaters, Hank?

THE COURT: What's the Bates number of the one?

MR. LYLES: 2684 is what I'm looking at.

THE COURT: Okay, I got it.

A (Continuing) I can't --

Q Just too much?

A Yeah.

Q Do you remember getting this continuation sheet from her?

A I got some continuation sheet. This may be a later one.

Q Okay. What makes you think that this is a later one?

A Because I believe -- I think -- what is the

number down at the bottom, is that 981?

THE COURT: Yeah.

A (Continuing) Okay. I got one for 901 when Jay had -- the first sheet I got.

Q Okay. And you see the number to the left on that bottom. If you look at the first number in the column on the bottom, it says totals 543,130. Is that what you understood to be the scheduled value of the job?

A The 543 I believe was the Phase I of the job. I asked them to put together Phase I and Phase II, because it was running Phase I and Phase II.

Q Okay.

A And then add the additional cost.

Q Okay.

A Okay. This is 981. This is not what I got.

Q Okay. Well, and if you'll turn over to Exhibit 52, email exchange between you and Deborah. Jay is included on this. It's dated February the 19th. And do you see what you're still asking for?

A Yes.

Q Okay. Was it important to you at that point in time to understand what the total job cost was going to be?

A Yes. Additionally, I didn't want to continue

to pay unless I got that kind of information.

Q Okay. Why would you have agreed at this point in time to any increase in the price?

A We had to get this job done.

THE COURT: Robert, there's no continuation sheet on 52; is that right?

MR. LYLES: That's right.

THE COURT: Okay.

BY MR. LYLES:

Q Okay.

A At that time, I had a meeting with Jay down here and we discussed this, and the issue of his overhead and profit came up.

Q Okay. Tell me about that.

A At that meeting, I was, I think, rightfully upset with where the job was and where the billing was, but in several ways. I was upset with the fact that the cost had run away, and I was upset with the fact that the job was nowhere near getting finished properly, or in a timely way. And I looked at the overhead and profit number.

Q Okay.

A And I said, we're going to stop paying this, and we'll discuss that at the end to see where -- where you're rightfully entitled to it.

Q Okay.

A I think the number turned out to be 70 some odd thousand, and then I paid a little bit more, so I wound up paying overhead and profit of about $80,000.

Q Now, why would you be paying overhead and profit?

A At that moment in time, I still felt he could be getting the job done. And, look, there was a moment in time here when I still had some kind confidence left in Jay. I actually offered to sit down with him and his minister to talk about the differences between us, and see if we could come to some kind of level of peace. He never took me up on that.

Q Okay. Did you think this was an overhead and profit job?

A No. I felt that it was -- that he was entitled to -- he was entitled to six percent on the first part, and I don't remember what percentage on the second part, assuming the work was legitimate. Based on that, my house letter.

Q Exhibit 8?

A Yeah. And then the subsequent breakdown of the job into two phases. And the percentages were different, and so he would be entitled to the six percent on the first, X, and the next number on the

next, Y, and anything over, he would be entitled to -- I don't remember what -- I don't remember if there was any writings between us about the next part.

Q Those percentages were his project management fee that he agreed to as part of the --

A Yes.

Q Okay. And the job cost obviously increased; is that right?

A Yes.

Q You were willing to increase his project management fee?

A Correct.

Q Okay. By some agreed-upon amount?

A Well, I paid it up to the 80,000. And after that, I wanted to have a conversation, look, I don't think he's entitled to any project management fee. We paid for somebody to manage a project, or -- and obviously, from this trouble, there was no project management. So the issue of a project management fee, in my mind, he's not entitled to it.

Q At any point, did you agree that this was an overhead and profit job?

A No.

THE COURT: Let's take a break. It's a logical place.

(Whereas, the deposition recessed for lunch from 12:10 p.m. to 1:06 p.m.)

THE COURT: We had our lunch break. We are resuming in 3881. Mr. Henry Salzhauer was under examination by Robert Lyles. We'll pick up at that part. Robert, continue.

THE WITNESS: Can I ask one question, please?

THE COURT: Go ahead.

THE WITNESS: Can we strike from the record "Six grandchildren"?

THE COURT: No, sir. We're going to have that transcribed and sent to your wife.

(EMAIL MARKED DEFENDANT'S EXHIBIT NO. 131 FOR I.D.)

BY MR. LYLES:

Q Mr. Salzhauer, I'm going to jump ahead a little bit in the chronology here and show you what's been marked as Exhibit 131 for identification. Do you recognize that?

THE COURT: Rob, do you have any objection?

MR. VARNADO: No, sir.

THE COURT: Okay. Submitted into evidence without objection.

(DEFENDANT'S EXHIBIT NO. 131 ADMITTED INTO EVIDENCE.)

A (Continuing) Yes, sir.
BY MR. LYLES:
Q You do recognize that?
A This? Yes.
Q Is it an email that you sent to Mr. Brown?
A Yes.
Q Okay. And on the first page of that email, you reference an April 13th date. Do you see that?
A Yes.
Q And there's an indication that at that point you got the cost for what the job would be until completion?
A Correct.
Q And what was that number?
A 901,000. So this may be some cents or some -- maybe there was some odd dollars, but around 901,000.
Q Okay. And in that same paragraph where you talk about 901,000, you also reference that original price of 722,074. Do you see that?
A Yes.
Q Does that all jibe with your recollection of things?
A Yes.
Q And then finally you're asking for a litany of information from Mr. Brown at this point in time;

right?

A Yes.

Q Okay. Did you receive that information?

A No.

Q I'm going to ask you also to look at what was marked yesterday as Exhibit 124. You can put this over -- give this to her. I'm going to show you what was marked yesterday as Exhibit 124, which we pulled out of the exhibit notebook. Do you see that?

A Yes.

Q And what is that?

A Let me read it. This -- this refers to the billing for what's marked overhead and profit on that cost control sheet that I have.

Q Okay. And does this memorialize your -- or does this reference an agreement you had with Jay?

A Yes.

Q And what is the total amount that was agreed between you and Jay for that number?

A 85,521.

Q Okay. And did that result from a face-to-face meeting you had with Jay?

A Yes.

Q And so after meeting with Jay to discuss the overall cost of the project, is that what you believed

to be his project management fee or his profit and overhead?

A This was -- this presumed that we were basing it on the 901,000 dollar price. I believe that's the case.

Q So you -- I'm sorry, go ahead.

A You know, if there had been a major change in what was going to be done in the house, he would have been entitled to more, but based upon what was supposed to be the outside price for the work, that would have been the fee.

Q And to your recollection or way of thinking, that was in June of 2013. Were there any major changes in the job after that date?

A Not to the best of my knowledge.

MR. VARNADO: '13 or '14?

MR. LYLES: '13.

A (Continuing) What should I do with this?

Q Give it back to her. Actually, this goes back in this book. I'll refer you back now to our notebook, Mr. Salzhauer. Let's see, this is February. Exhibit 56 is February of 2013; is that correct?

A Yes.

Q And is it fair to say that at that point in time you were trying to -- still trying to determine

what the outside cost was going to be, and the schedule?

A Yes.

Q Okay. Did you have difficulty getting the schedule information from Mr. Brown?

A Yes.

Q Was that a problem that persisted throughout the course of the job?

A From the start, through to the end.

Q And did you ever feel like you got the financial information on the job that you had been requesting from Mr. Brown?

A No.

Q At any point in time did you --

A The answer to --

Q Yes, sir.

A You asked did I ever get it?

Q Yeah.

A I never did get it. That's the answer.

Q Yes, sir. The next email I'll turn your attention to -- go ahead --

A Excuse me, may I go?

Q Sure.

A Can we look at the third paragraph of this?

Q Yes, sir. Which exhibit is that, 56?

A Yeah. The extra work she will pay for. "I would be less than frank if I didn't say that I am concerned that the extra work not caused by her gets put into other costs. One thing you will know from me and our relationship is you will always know my honest thoughts. Anyhow, the time now is how to get the job back onto a track that gets it well-built in as rapid a manner as possible." I was always concerned with that issue.

Q What issue?

A The issue of extra work or work redone, and I was going to pay -- or we were going to pay for it twice. Once the original, and the second time around to fix it, and/or somebody agreed to a price, for example, the painter had agreed to a price of $65,000.

Q Yes, sir.

A And subsequent to that, there was some painting going on by other people, and this is just one incident that I can show. There was some painting going on by some other people, but the $65,000 price was supposed to be for painting for the whole job, and I said is there going to be a deduct from the 65,000 to cover the work that the other people are doing, and the answer was yes. And then I asked Jay to get a writing from the contractor, from the -- Kershaw I think the

painter's name is -- a writing from him that he would accept that term, that there would be a deduct. There never was a deduct, and I got a painting -- or we got a painting bill of 70 -- I think $74,000. Now, I believe that this probably occurred throughout the job.

We also had situations where a second contractor came in to fix stuff that other people had put in badly. The second contractor was entitled to be paid, and Jay -- and I said that this should not come out of -- out of our hide. We were entitled to get a credit back. But it also shouldn't come out of the hide of the contractor that was called in to remedy or to finish the work. So we paid the bill, and we never did get any kind of credits back. That's -- that's basically what was in my mind in that third paragraph.

Q Okay. If you will, turn to Exhibit 68 for me.

A I can even do that.

Q At some point in time, you stopped paying for overhead and profit. Do you remember that?

A Yes. As I -- we said that we would.

Q Okay. And the reason you had stopped is because it had reached or exceeded, to some extent, the agreed-upon project management fee?

A Yes.

Q And the fact that you stopped paying it at

$70,000 is referenced by Mr. Brown in this email; is that right? If you go down, it's on the first page, I think. Nope, it's not on the first page. It's on the third or fourth. September 12th, 2013. Keep going, I think. Bates labeled 3987. There you go.

A Down here?

Q Yes, sir, right where your fingers are. Keep going down. Right there.

A Okay.

Q Do you see the reference there to the fact that you had stopped making payments on that overhead and profit in May?

A Yes.

Q When they had reached $70,000?

A Right.

Q Does that jibe with your recollection?

A I don't know what that number would have been. I don't know what that number would have been offhand in May.

Q But that's Jay's number? That's Jay's text?

A Yes.

Q Okay.

A The bold is Jay's text.

Q And the non bold is your initial letter to him, or email?

A Yes.
Q Okay.
MR. VARNADO: What exhibit number was that?
MR. LYLES: Let me see, 68.
BY MR. LYLES:
Q Mr. Salzhauer, if you go to 61, back to Exhibit 61, that's an email dated October the 2nd, 2013; right?
A Yes.
Q And what did you tell Jay in that email?
A "Your actions seem to show you have abandoned the job. This sure isn't the Jay of the references we got."
Q Is that what you believed at the time?
A Yes.
Q Is that what you still believe, that he was effectively off the job by October?
A I can't be sure of the date that he was off.
Q Okay.
A But towards that moment in time, stuff just was not getting done.
Q Okay. Did you get any response from Jay to that, do you recall?
A I don't remember.
Q Okay. And again, the next exhibit over, which

is 62, do you see there that it starts on October the 25th with an email from you to Jay, saying you had not gotten a response?

A The 6:06 a.m.?

Q Uh-huh. And at that point, you tell Jay that, "Don't you realize that you have a license that you put in jeopardy when you proceed in this manner?" Do you see that?

A Yes.

Q And then Jay responds and tells you what's going on; is that right?

A Yes. That's the 11:02 a.m.

Q That's right.

A Yes.

Q And he tells you there, "I have not had any legal problems other than us liening a property for nonpayment. I do have a license, as well as Brown Contractors, residential and a commercial, also." Do you see that?

A Yes.

Q At this point, in October of 2013, were you aware that he was -- did not have a residential homebuilder's license?

A I -- I had heard that there was some litigation with -- in respect to another house, and the

issue of Jay's having a license had come up, but we didn't know directly except from conversation with the people. And I believe that that had happened about this time, or maybe somewhat before that time.

Q Okay.

A Amy would know that better than me.

Q Let me turn you over to Exhibit 63. It's an email from Jay Brown to you and others of January the 9th, 2014. Of course, at this point in time, Amy is in the house; right?

A Yes.

Q And Jay is telling you that the house is completely done except for a few punch list items; do you see that?

A Yes.

Q And he references the CO; right?

A Right.

Q And then he says you have a one-year warranty on everything from that date. Do you see that?

A Yes.

Q Is that the kind of warranty you thought you were going to get?

A Well, no. We were supposed to get a five-year warranty.

Q Had you had any negotiations with Jay to

reduce the length of the warranty he was willing to offer?

A No.

Q Just it's simply a unilateral change in terms?

A Yes.

Q Now, he's providing you in January of 2014 with some subcontractor information. Do you know what -- why he was providing that to you?

A These were the unpaid -- supposedly, the unpaid bills to the subcontractors.

Q And were you trying to get those subcontractors paid?

A I was trying to get the subcontractors to come back and finish their work, and then they would be paid. What I had asked for is for each of these subcontractors to give me a -- what they had been paid, what it would take for them to finish the job, a date by which they would finish the job, and to warranty that their work would be properly done, and that I would escrow the money, so that when they finished in accordance with that, they would be paid.

Q And was it your recollection -- or is it your recollection that at that point in time you couldn't get the trades back out to the house?

A I could not, and I'm not sure if what I had

asked Jay to give the contractors ever went to the contractors.

Q Okay. Now, the issue of subcontractors getting paid had been going on for a while, had it not?

A There was always a claim that we were late with payment to the subcontractors, but I couldn't get the billing out. I couldn't get the sheet that we're talking -- that I was talking about, the cost kind of sheet, I couldn't get that out of their office. So I kept asking to get it, and when I got it, I would pay. And, but that was a continuous problem throughout the job.

Q If you go back over to exhibit -- go to Exhibit 68, that's an email from back in September when you were discussing subcontractor payments, September of 2013. You were concerned about that issue?

A That's what I was talking about before.

Q Yeah.

A That the plumber and the HVAC contractor, who picked up the work from the originals, deserved to be paid and not left out to dry. This is the whole issue of payment.

Q Okay.

A "There seems to have been little or no supervision of the work done by the original

contractors. We expect this payment to be a back-charge that you make to the original contractor. We will front the payment, but expect the money back."

Q Okay.

A And the other items are all to try and get a handle on what was going on.

Q Did you ever feel like you got a handle on what was going on?

A No. Down to five, "Why is the entire plumbing job twice the finish estimate?"

Q Did you get an answer to that question?

A No.

Q Did you get an explanation from Mr. Brown about all of the various cost overruns on the job?

A No.

Q There was a -- or has been discussion over the last few days about requests that Jay come back out and remedy issues at the job. You heard some of that testimony?

A Yes.

Q And you've seen some letters that we sent to Jay.

(EMAIL MARKED DEFENDANT'S EXHIBIT NO. 132 FOR I.D.)

BY MR. LYLES:

Q Let me show you what's been marked as Exhibit 132. Do you recognize that?
A Yes.
Q Is that an email that you sent to Jay on March the 17th of 2014?
A Yes.
Q And what are you sending him in that email?
A I'm sending him a list of items that needed to be corrected on the job.
Q Okay. And did you expect him to come back out and do that?
A Realistically, yes, because he -- I mean, he had a warranty. If he were the Jay I thought he was, he would have done it. But at this moment in time, I didn't -- I really didn't expect it.
Q Okay.
A I had a right to expect it, but I didn't expect it.
Q Do you remember there being some discussion earlier in this trial about the Benchmark home inspection reports?
A Yes.
Q And let me find them.
THE COURT: Robert, do you want to --
MR. LYLES: Yeah, I want to move it into

evidence as Exhibit 132.

THE COURT: 132 is in without objection, the March 17, 2014, email from Mr. Salzhauer.

(DEFENDANT'S EXHIBIT NO. 132 ADMITTED INTO EVIDENCE.)

BY MR. LYLES:

Q All right, let's see what we've got here. Do you recall that there were two Benchmark inspection reports?

A Yes.

Q One from 2013?

A One from --

Q The fall of 2013?

A Right.

Q And then one from the spring of 2014?

A I don't remember the exact dates, but there were two. One at that moment in time when the job was going on, and then one at the moment in time when the job was basically finished.

Q Okay. Go to, if you will, to Exhibit 31.

A (Witness complied with request of counsel.)

Q Okay, I'll ask you about this Benchmark report. If you'll turn to about page three or four, there's a date on it.

A 3/26/14 --

Q Okay.
A -- is the date.
Q Okay, let's see. 3/6/14; is that right?
A Yes.
Q Okay. Who is Sarah Kibbey?
A Sarah Kibbey was my secretary.
Q I'm going to --
A Unfortunately, she passed away.
(EMAIL MARKED DEFENDANT'S EXHIBIT NO. 133 FOR I.D.)

BY MR. LYLES:

Q I'm going to show you what's been marked as Exhibit 133 and ask you if you can identify that for me? Do you see the title in the email?
A I'm looking. Let's see, Amy's -- should I be looking at just this or this (indicating)?
Q The title in the email. Go all the way to the top.
A Okay. "Home Inspection Report - 1850 Flag Street part of email sent to Jay Brown on this date."
Q Do you know if that was the second inspection report done by Benchmark?
A Yes.
MR. LYLES: Okay. I would like to move that into evidence as Exhibit 133.

THE COURT: Rob?
MR. VARNADO: Okay.
THE COURT: All right, it's in without objection.
(DEFENDANT'S EXHIBIT NO. 133 ADMITTED INTO EVIDENCE.)
MR. LYLES: Is that 133?
THE COURT: It is 133. It is the -- appears to be a March 17 email from Miss Kibbey to Jay Brown and others.
BY MR. LYLES:
Q In addition to speaking with Mr. Brown about invoices and job records, did you have an opportunity to speak to Vuong Nguyen about that?
A I don't believe that I had verbal conversation. I had some emails.
Q Okay. And did you make any requests from Vuong for information about the job?
A It was about the billing. And at that moment in time, when I first -- when I first heard about Vuong in respect to being a contractor, I was really stunned. Jay was supposed to hire an air conditioning -- let the work to an air-conditioning contractor, and the other work to other contractors. There was not supposed to be a contractor between Jay and the job. The job was

supposed to be done directly by Jay. So we were paying an additional markup on the work, and that, to me, it's dishonest and, to me, I don't know what the definition of fraud is, but it's fraudulent behavior. I mean, it's just not honest behavior. He could have passed it around to the dentist and the doctor and hair cutter, and then they all bill me for the air-conditioning work, and he puts his profit on top of -- or he puts his overhead and profit on top of the pass-around. It's not what I would have expected.

Q So did you want to see what those invoices were that Vuong had received?

A You mean from -- from the sub -- from the sub-subcontractors, yes.

Q Did you ever see that?

A I'm not sure if I did or if Amy did, but I'm not positive.

Q Were you ever able to determine how many times you had to pay multiple markups for the work that was done on this job?

A I -- I do not know that. And, you know, the issue, the whole issue of things of that nature is reflected in the story about the painter. I don't know how many people were in that position, but I paid a markup on that painter and I paid another markup on

another painter, or I got billed another markup on another painter. How many times this happened in the course of the work, I don't know.

And Amy spoke yesterday about the cabinets and the cabinet work with I think her name is Cristina, who supposedly was in Jay's office, and then we got a separate bill for -- to pay for -- to pay Cristina, and there was a markup on that bill, too. So trying to identify those kinds of things, it's not possible. That's the reason that I was looking for a control sheet that said the plumbing is going to be X number of dollars, and with that I could control the job and understand it.

Q Yeah.

A If you're dealing with somebody that's going to be dishonest with you on a job like this, it's very hard not to deal with it in bulk.

Q Have you spent some time at the house since it was -- since Amy moved in?

A Yes.

Q How much time would you say you've spent there?

A It's hard to know, but several weekends and long visits, you know, have occurred from the time she moved in.

Q Are you generally familiar with the condition of the house as it was left by Jay Brown?
A Yes.
Q You've heard over the last two or three days some discussion about issues with the house, floors, painting issues, things like that. Are those things that you are generally familiar with?
A Yes.
Q You heard Mr. Brown say yesterday, Howard Brown say yesterday, that he had priced repainting the interior of the house as part of the punch list process. Is that something you're familiar with?
A Yes.
Q Is that something you think is necessary?
A Yes.
Q Why is that?
A Because the painting was done in a helter-skelter manner. There were people on the job, off the job, supposed to be at the job, never showed up on the job, somebody was supposed to be there and they were supposed to be painting at night, and the paint never came out right.
Q In your observation, did the house ever receive a complete, finished paint job on the interior?
A No. If you talk about interior, you're

talking about the kitchen cabinets, also?

Q Sure.

A The kitchen cabinets are three, four, five years old, and the paint, when Amy moved in, was peeling. And the paint right now is worse, and that's not anywhere near a decent paint job on the cabinets.

Q Okay. Are you familiar -- you've heard some discussion about the replacement of the floors, the pine floors?

A Yes.

Q Are you generally familiar with the condition of the pine floors?

A Yes.

Q And how would you describe the condition of the pine floors?

A The pine floors were sanded down to a level that you really can't refinish them any longer. There's not much wood left. It's the description that Howard Brown gave you yesterday. They're splintered. The floors, you know, they're visible today; you can go out and take a look at them. Those pine floors are destroyed.

Q Do you know how many times those floors were sanded by Jay Brown's people?

A I don't know by count, but it's obvious that

the work was such that they got sanded and resanded, and there's not much wood left.

Q Okay. Have you observed, in your time at the house, problems with the electrical system at the house?

A Yes.

Q And would you tell me about that?

A Part of it -- part of those problems I didn't observe, but I got a phone call. I would get a phone call from Amy at night, dad, the floor is so hot that we're concerned that the lighting fixture is dangerous in the house; what should I do. Or, dad, the circuit breaker is tripping out, et cetera, et cetera; what should I do.

In respect to the electrical system in the house, this issue of the nailing is a serious, serious issue. The metal shielding should have been on that wiring, and somebody should have dealt with the finisher who was putting nails in that were too long for the work involved. Somebody should have supervised. I heard a conversation about, here at the table from Jay, that, oh, the nailing gun sometimes it's an inch and a half and sometimes it's two inch nails, or whatever. Somebody should have been supervising the guys who were doing that nailing. It's

irresponsible.

Q Did you actually observe personally that nailing condition into the electrical wiring at the house?

A Only from the pictures.

Q Okay. Does that create in your mind a concern about nailing through the wires and other spots in the house?

A If it happened in one eight-by-whatever, it --

MR. VARNADO: I'm going to object. Just going to object.

A (Continuing) Pardon?

MR. VARNADO: I'm going to object. Speculating.

THE COURT: I'll listen to it on that basis. I'll take into consideration --

MR. VARNADO: Thank you.

THE COURT: -- any foundation that may not be there.

A (Continuing) As a side order, I'm willing to take a bet that if I open up another two walls, I'm going to find the same condition. That's just as a side bet. What happened in one location happened in the rest of the house.

Q That's your concern?

A Yes. And it's a very dangerous situation.
Q Do you have any reason to believe that it did not happen in other places in the house?
A I have every reason to believe that it did happen because that's the way the work was going on, and I don't think you're going to find any metal shields on anything in that house.
Q Were there any -- we heard some discussion about the -- is it called an arc preventer?
A An arc fault breaker.
Q An arc --
A A-R-C, fault, F-A-U-L-T, breaker. And I did that without checking my spelling anyplace.
Q Okay. What's the purpose of an arc fault breaker?
A An arc fault breaker is supposed to trip. If you have a slow or arcing, what we call, fault, which does not generate enough electrical power running through the circuit to trip out an ordinary circuit breaker, but is -- those kind of arcs historically cause fires. Stuff, the arc is going on, there is heat there, it's building up, and until -- the surrounding item, you get real combustion.
Q Did you pay for the installation of the arc fault breakers in this house?

A Yes.
Q And why did you do that?
A To minimalize the opportunity for a serious fire with our children in the house.
Q And when were they installed, do you recall?
A I don't know. Maybe the last two, three months, something like that. I don't know exactly.
Q Are those a permanent solution to the problem of nails through wires?
A No.
Q They just minimize or mitigate the impact of that?
A They minimize the opportunity for a real fault to occur, but it -- it's a bandaid on a hemorrhage.
Q Does the rest of the wiring in the house, in your estimation, need to be checked?
A Yes. It needs -- the arc, the shielding has to be put in, and in certain locations the wiring is definitely going to have to be checked or changed.
Q Okay.
A And you're not going to open -- you're not going to understand that until they open up all the walls and the ceilings and the baseboards, and that's said by an ex-electrical contractor. I used to be a wire electrical contractor; now I'm an ex-contractor.

Q I'm sorry to take this a little bit out of order. Yesterday, Mr. Salzhauer, we were running over Mr. Brown's, Howard Brown's, numbers, and did you see where the HVAC replacement number was in Howard's estimate or proposal, or not?

A I'm not sure.

Q Okay. Well, let me show you -- let's mark this.

(INVOICE MARKED DEFENDANT'S EXHIBIT NO. 134 FOR I.D.)

BY MR. LYLES:

Q Let me show you what I've marked as Exhibit 134 and ask you if you recognize that? Do you recognize that?

A Yes.

Q Is that an invoice from AC Heating & Air Conditioning?

A Yes.

Q Dated 7/21/2015?

A Yes.

Q Does this represent the invoice for the mechanical work that Amy did in response to Louis Schweers' proposal?

A Yes.

Q And did you pay this bill?