

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

The Honorable Marvin H. Dukes, III
Beaufort County
Trial Court Case No. 2018-CP-07-1622

APPELLATE CASE NO. 2020-000862

J & W Corporation Of Greenwood,

Appellant,

vs.

Broad Creek Marina Of Hilton Head, LLC;
Broad Creek Marina Operations, LLC;
Broad Creek Marina Properties, LLC; and
Broad Creek Development, LLC,

Respondents.

RECORD ON APPEAL

(Print Volume 2 of 5)

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**ATTORNEYS FOR RESPONDENTS
BROAD CREEK MARINA OF HILTON HEAD,
LLC; BROAD CREEK MARINA
OPERATIONS, LLC; BROAD CREEK
MARINA PROPERTIES, LLC; and BROAD
CREEK DEVELOPMENT, LLC.**

1 Is it back here? No, it's not. My fault. Here
2 you go. (Indicating.)

3 A. Okay. Where am I going? Defendant's
4 Exhibit No. 16?

5 Q. Yes, sir. Defendant's Exhibit No. 16.

6 A. (Complies with request.) Okay. I'm
7 looking at it.

8 Q. Is this a letter that you wrote,
9 Mr. Scurry?

10 A. This is a letter that my attorney wrote.

11 Q. Could you -- now, your attorney may have
12 participated in it but -- well, I'll ask this.
13 Did you sign and issue this letter on behalf of
14 J&W Corporation of Greenwood?

15 A. If I did, I certainly do not remember
16 it.

17 Q. Is that your signature that appears on
18 page 2 of the letter?

19 A. It's close to my signature. I just
20 don't remember signing it, sir.

21 Q. Did you send a letter to Mr. Gossage
22 October 28, 2016?

23 A. Didn't I just say I didn't remember it?

24 Q. You don't remember?

25 A. Yes, sir.

1 Q. All right.

2 A. Did not remember sending it.

3 MR. LESEMANN: Taylor, if you could
4 go back to the first page.

5 MR. POWELL: (Complies with
6 request.)

7 MR. LESEMANN: You could call out
8 this first section here. (Indicating.)

9 Q. Is Mr. Gossage with the insurance
10 carrier that you use -- that J&W Corporation uses
11 for its coverage of its business operations?

12 A. It could be. I just -- honestly, I
13 don't even remember his name.

14 Q. Do you remember in your written signed
15 statement to Mr. Gossage, that you wrote a
16 sentence here referring to your lease agreement
17 and to your Release and Confidential Settlement
18 Agreement?

19 A. Aren't we beating a dead dog since I
20 said I don't remember the letter?

21 Q. I don't know that we --

22 A. I just want to read the letter.

23 Q. It's got your signature on it, and it
24 was provided to us by your attorney; but it
25 says -- what does the last sentence of that

1 paragraph say, Mr. Scurry?

2 A. Where does it start?

3 Q. Now, before you said that your attorney
4 wrote the letter. Now, are you just saying that
5 you don't remember it at all?

6 A. I don't remember the letter, sir.

7 Q. So did your attorney write it, or did it
8 just come out of the ether out of nowhere?
9 Because we got this letter that has your
10 signature on it.

11 A. Okay.

12 Q. You're denying your signature, and
13 you're denying that you sent this letter?

14 A. I just do not remember the letter.

15 Q. Okay.

16 A. I don't remember the letter.

17 Q. So in the letter that bears your
18 signature and that is on your company's
19 letterhead and it's written to Mr. Gossage, what
20 did you say in the last sentence of that first
21 paragraph there?

22 A. "Under the terms of both agreements, J&W
23 is responsible for" -- is that repairs to its --
24 I can't read that. "To its leasehold property in
25 the event of damage."

1 MR. LESEMANN: Thank you, Taylor.
2 You can remove that.

3 MR. POWELL: (Complies with
4 request.)

5 Q. And is this letter, as you go down to
6 the next paragraphs, is it specifically referring
7 to damage arising from Hurricane Matthew?

8 A. Just a minute. Yes, it is.

9 MR. LESEMANN: Taylor, if you could
10 undo the callout.

11 MR. POWELL: (Complies with
12 request.)

13 Q. And this letter was -- is dated what?

14 A. October 28, 2016.

15 Q. And so was this letter sent as an
16 official notice of a claim to be made on the
17 policy for damages to the leasehold property
18 rented by J&W from Hurricane Matthew as it states
19 in paragraph 3?

20 A. It seems to, yes.

21 MR. LESEMANN: Well, Your Honor, I
22 would move for admission of Defendant's Exhibit
23 No. 16 into evidence. Again, it's a business
24 record that was provided to us. Mr. Scurry is
25 not recalling it, but that's where we obtained it

1 from; and it's relevant, and we'd ask for it to
2 be admitted.

3 THE COURT: Mr. Taylor.

4 MR. TAYLOR: Your Honor, I believe
5 that it does qualify under the business records.
6 It was provided by us; and, therefore, I can't
7 object to it.

8 THE COURT: All right. That'll be
9 admitted. Defendant's Exhibit No. 16.

10 (Defendant's Exhibit No. 16 is admitted
11 into evidence.)

12 Q. So, Mr. Scurry, this letter to the
13 insurance carrier, would J&W Corporation endeavor
14 to be truthful and accurate in its communications
15 with its insurance carriers?

16 A. I can't comment on a letter I honestly
17 do not remember. Okay?

18 Q. Under the terms of both the settlement
19 agreement and the lease, is J&W responsible for
20 repairs to its leasehold property in the event of
21 damage, such as the damage that arose from
22 Hurricane Matthew?

23 A. No, I don't believe so.

24 MR. LESEMANN: Your Honor, if I
25 could just take a moment and confer with my

1 client.

2 THE COURT: That's fine.

3 (Pause in proceedings.)

4 MR. LESEMANN: Your Honor, in
5 conferring with Mr. Taylor, the parties might
6 request just a very short recess; and I think I'm
7 probably about done. Five or ten minutes.

8 THE COURT: Yeah. Why don't we
9 take ten minutes. So we'll be off for ten
10 minutes. Mr. Scurry, don't discuss your
11 testimony with anyone during the break.

12 THE WITNESS: Absolutely.

13 THE COURT: Recess for ten minutes.

14 (Recess taken 2:37 p.m. to 2:46 p.m.)

15 THE COURT: Back on.

16 BY MR. LESEMANN:

17 Q. Mr. Scurry, I'd like to hand you a copy
18 of a letter from the United States Coast Guard.

19 Could you identify that letter?

20 A. Just give me a minute, please.

21 Q. Yes, sir.

22 A. Yeah, I do remember the letter.

23 Q. Is it a true and accurate copy that you
24 received as the president of J&W Corporation
25 of -- it says Greenville but should say

1 Greenwood.

2 A. I did.

3 MR. LESEMANN: Your Honor, we'd
4 move for admission of this document as
5 Defendant's Exhibit No. 86.

6 MR. TAYLOR: Objection. Hearsay.
7 No foundation.

8 THE COURT: All right.

9 Q. Mr. Scurry, have you kept -- did the
10 United States Coast Guard --

11 MR. LESEMANN: Your Honor, would
12 you like me to continue to lay a foundation?

13 THE COURT: Yeah. Go ahead.

14 Q. Did the United States Coast Guard issue
15 a Captain of the Port Order Number 23-18 to J&W
16 Corporation?

17 A. If that's what this says, I guess they
18 did.

19 Q. Did they inform you to cease and desist
20 from carrying passengers on the Jake Washington?

21 A. I was never carrying passengers on the
22 Jake Washington. The Jake Washington is a push
23 boat. The barge is not the same thing.

24 Q. Does J&W Corporation keep records of
25 official correspondence it receives from

1 regulatory authorities, such as the Coast Guard?

2 A. I'm sure we have a copy of that.

3 Q. So would you keep these types of
4 documents in your business records?

5 A. I should, yes.

6 Q. And is this your true and accurate copy
7 of a letter that was received from the Coast
8 Guard to you as the owner of J&W Corporation?

9 A. I've already answered yes to that.

10 MR. LESEMANN: So, Your Honor, I
11 just would resume our request -- renew our
12 request for admission of this document as
13 document 86, Defendant's Exhibit No. 86.

14 MR. TAYLOR: Excuse me, Ellis. Are
15 you finished?

16 MR. LESEMANN: Go ahead.

17 MR. TAYLOR: It was an objection.
18 It was a very nicely-worded attempt at laying a
19 foundation; but what Mr. Lesemann did was lay a
20 foundation for saying would you, J&W Corporation,
21 keep a copy of this letter?

22 In order for it to come in as a
23 business record exception to the hearsay rule, it
24 has to have been produced by the party that is
25 shown on the letterhead, has to have been kept in

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1 their normal business records, and has to have
2 been from their normal business records. There's
3 no one here from the Coast Guard to attest to
4 that. It's hearsay. I object to its admission.

5 MR. LESEMAN: Under the rule of
6 Brown v. Allstate with your role as a nonjury --
7 sitting in a nonjury role, what the Brown v.
8 Allstate decision specifically says is the
9 Supreme Court of South Carolina from 2001, a
10 trial judge's role in a bench trial is to admit
11 all evidence and then evaluate it in a nonjury
12 setting.

13 So, again, as we talked about
14 earlier today with regard to the use of
15 photographs that were taken by others and various
16 things that came up, your role would be to
17 receive this information and to, then, evaluate
18 it, good and bad, in a nonjury setting.

19 Again, Mr. Scurry acknowledges the
20 letter. It's a public record. It's from the
21 United States Coast Guard. We received it
22 through a Freedom of Information Act request. We
23 had requested copies of such documents in
24 discovery and didn't obtain them.

25 But, again, it's relevant to the

1 safety and to the operations of the barge, which,
2 in turn, is relevant to the insurance issues that
3 come up in the case and the, you know, permit and
4 various things that the parties have talked
5 about.

6 So that's why this -- this was what
7 happened in November of 2018. The United States
8 Coast Guard put a cease and desist order on the
9 barge. You saw the picture of it earlier, and
10 it's been sitting submerged in the marsh since
11 that time.

12 So, Your Honor, you can give it the
13 weight that it's due; but, again, this is
14 something my clients are aware that this occurred
15 and it's -- it speaks to the importance of the
16 compliance with the insurance issue, the
17 hazardous materials provisions of the lease, and
18 other things that are at issue in the case.

19 MR. TAYLOR: Your Honor, very
20 briefly.

21 THE COURT: Go ahead.

22 MR. TAYLOR: I don't know the case
23 that Ellis is talking about, but I do know that
24 it -- I am sure that it proffers that evidence
25 must be admissible for the Court to take it at

1 any point in time. It can't be saying take any
2 evidence that's thrown out there as being
3 evidence.

4 This is the epitome of why the
5 hearsay rules exists, in order to keep people
6 from putting into evidence a letter that was
7 written by someone; and who knows what it was
8 based on or anything else. And he's not here to
9 be cross-examined. It's clearly hearsay. It's
10 not a business exception. I object to it.

11 THE COURT: And it's offered not
12 for notice but for violation of some portion of
13 this lease? Is that --

14 MR. LESEMAN: Well, for one, Your
15 Honor, yes.

16 And, Taylor, if you could show the
17 hazardous materials section of the lease.

18 MR. POWELL: (Complies with
19 request.)

20 MR. LESEMAN: So hazardous
21 substance, Section 31, Your Honor, of Defendant's
22 Exhibit No. 01.

23 It says that materials, you know,
24 except for materials handled and transported in
25 the ordinary course of tenant's business, which

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1 are transported and handled in compliance with
2 all applicable local, state, and federal
3 environmental laws, rules, regulations, and
4 ordinances, tenant covenants that it shall not
5 permit any hazardous or toxic waste or substances
6 or other hazardous materials regulated,
7 controlled, or prohibited by any federal, state,
8 or local environmental laws. And then it goes on
9 and on and on.

10 So, Your Honor, if they're doing it
11 in the ordinary course of their business, they
12 have to do it in compliance with all laws. This
13 is a Coast Guard action. It's a public record.
14 It's the subject of letters that -- of a letter
15 that was acknowledged by Mr. Scurry that he
16 received and that they had maintained; and it
17 relates to these issues in terms of compliance
18 with hazardous substances because, again,
19 according to the letter, what it says is that
20 there were vehicles and their associated drivers
21 on board the barge.

22 And so that, again, calls into
23 specific importance these insurance issues that
24 we're discussing and the safety record and the
25 compliance record because -- another reason we

1 want to talk about insurance is that there is the
2 Hurricane Matthew damage. There is another
3 incident of dock damage, and there currently --
4 this barge is sitting wedged up on the bank
5 waiting for a storm surge to push it into my
6 client's concrete pier.

7 So we have a lot of concern about
8 this, and we believe that this evidence -- again,
9 I can hand you this copy of Brown v. Allstate.
10 We can make a copy for Mr. Taylor as well; but,
11 again, it indicates that very rule that a judge
12 in a nonjury setting should accept evidence and
13 evaluate it in a nonjury setting.

14 THE COURT: I think I'll allow it
15 over the objection for now. I'm sure there will
16 be a number of questions about its origin and
17 what the current state of affairs is and that
18 sort of thing. But, thank you.

19 MR. LESEMAN: Thank you, Your
20 Honor.

21 (Defendant's Exhibit No. 86 is admitted
22 into evidence.)

23 Q. Mr. Scurry, again, did you receive a
24 second letter from the Coast Guard also dated
25 November 9?

1 A. I don't remember receiving this letter.
2 I'm not saying that we didn't.

3 MR. LESEMANN: So, Your Honor, we
4 received this letter from the same FOIA request
5 that actually came in to us last night at
6 approximately 6 o'clock. It was forwarded to me
7 this morning by my paralegal.

8 It came from the same FOIA request.
9 It's the same set of public records. We'd move
10 to admit it as Defendant's Exhibit No. 87.
11 Again, as a public record relevant to these
12 issues and based on your ruling on the immediate
13 prior document, which is a related example of a
14 different letter.

15 MR. TAYLOR: Your Honor, just so
16 the record is clear, object to it. It is
17 hearsay. There's been no foundation as far as it
18 being anything identified by anyone from the
19 Coast Guard and has not been identified as one of
20 their business records, and there's not the first
21 word in it about hazardous substances. So
22 object.

23 THE COURT: I haven't seen it.
24 What -- is this one different than the --
25 obviously, it's different than the first one.

1 THE WITNESS: There you go.

2 (Indicating.)

3 THE COURT: Thank you.

4 MR. LESEMANN: Your Honor, it says
5 it was discovered that the barge was in an unsafe
6 material condition to include excessive bilge
7 water, severe structural wastage, watertight
8 integrity, fire fighting and electrical hazards.
9 The condition of the barge poses a serious threat
10 to the marine environment and safety of the
11 waterway.

12 So, Your Honor, this one is
13 probably worse in terms of the hazards that
14 are -- and this is currently the barge, again,
15 that's wedged on the bank right next to my
16 client's pier, within approximately 50 feet of
17 the restaurant where they serve the public.

18 So by the same token, Mr. Scurry
19 recalled the first letter, didn't recall the
20 second one; but, again, under the rule of Brown
21 v. Allstate and these being public records and
22 clearly relating to a vessel that's at my
23 client's property that's owned by defendant
24 (SIC), we would move for it to be admitted as
25 Defendant's Exhibit No. 87.

1 THE COURT: I'll allow it. I
2 understand Mr. Taylor's objection, but I'll allow
3 it.

4 MR. TAYLOR: Thank you, Judge.

5 (Defendant's Exhibit No. 87 is admitted
6 into evidence.)

7 BY MR. LESEMANN:

8 Q. So, Mr. Scurry, were the operations of
9 the Jake Washington the subject of a cease and
10 desist order from the United States Coast Guard?

11 A. Yes, it was.

12 Q. And is there an ongoing investigation,
13 to your knowledge, relating to that barge?

14 A. No.

15 Q. No one from the Coast Guard has
16 indicated to you that there may be an ongoing
17 investigation relating to the Jake Washington?

18 A. None at all.

19 Q. Okay.

20 A. And I would also like to say, if I
21 can --

22 Q. Yes, sir.

23 A. -- you keep showing pictures of the
24 barge and implying that it's mired or almost
25 sinking in the marsh. That barge has been

1 sitting exactly as it's been sitting 80 percent
2 of the time for the last 15 to 20 years exactly
3 as it's sitting right now.

4 Q. Well, I understand that, sir.

5 But what provisions do you have? Do you
6 move that barge away from the marina, for
7 example, when there's going to be a storm surge?

8 A. We could move the barge away from the
9 marina if there's going to be a storm surge.
10 Easy enough.

11 Q. If the -- have there been occasions when
12 the landlord has asked you to remove your vessels
13 from the marina, and you have declined to do so?

14 A. I have never moved my vessels from a
15 marina because of -- because of storms or
16 otherwise because it is my understanding and I
17 truly believe that they're much better off where
18 they are than anywhere you could put them.

19 Q. And did your decision to keep your
20 vessel moored at Broad Creek Marina during
21 Hurricane Matthew result in damage to the docks?

22 A. I don't think so.

23 Q. So, Mr. Scurry, you'd mentioned the
24 Release and Confidential Settlement Agreement.
25 It's Defendant's Exhibit No. 03.

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1 A. Okay. Where are we in here, sir?

2 Q. What's that?

3 A. Where do you want to go in here?

4 Q. Yes, sir. We've already reviewed -- you
5 reviewed the first section, the office space
6 section, I think, at some length with Mr. Taylor;
7 and I don't know that we need to elaborate on
8 that here. I'm interested in going to page 4.

9 A. Okay. (Complies with request.)

10 Q. So what would be in that -- it would be
11 Section 1(e) common area charges. Under that
12 section, did the tenant, J&W, agree to pay all
13 common area charges as identified in the lease
14 that come due and payable beginning January 2005?

15 A. Yeah.

16 Q. Has the tenant paid all the common area
17 charges as identified in the lease that come due
18 and payable in 2005?

19 A. As of 2010 or so, we quit that.

20 Q. If the record reflects that was more in
21 the range of 2007-2008, would you have any reason
22 to disagree with that?

23 A. I don't know for sure.

24 Q. Are you contesting any of the amounts on
25 the invoices that you've received in terms of

1 them being accurate?

2 A. It is my understanding that, unless it's
3 to date, we have never had backup for the
4 insurance that the marina says they have paid.

5 Q. So these common area charges that are
6 referred to in Subsection E, you'd understand
7 that to include the utilities, the insurance
8 charges, the property taxes, and anything else
9 that's listed as a common area related charge?

10 A. I would, yeah.

11 Q. And the tenant did promise to pay all of
12 those that are identified in the lease; correct?

13 A. I would assume so, yes.

14 Q. And then attached as Exhibit F to this
15 document was a formula for determining the
16 amounts that would be due and payable for common
17 area charges; is that right?

18 A. Where are you in there, sir?

19 Q. Well, it's the same section; but it
20 refers to section -- Exhibit F.

21 A. Okay.

22 Q. Which then has a different column for
23 the items, who the pay -- who the payment would
24 go to, the annual cost, and then the percentage
25 of J&W's liability.

1 Are you familiar with that?

2 A. Yeah.

3 Q. And so can you confirm that the tenant
4 agreed to those percentages?

5 A. I did, yes.

6 Q. And is the tenant prepared to live up to
7 those percentages that it agreed to in the
8 settlement agreement?

9 A. As long as the landlord fulfills his
10 side of the agreement.

11 Q. But you don't contest those percentages?

12 A. I don't.

13 Q. And you don't argue that they're
14 ambiguous or anything like that?

15 A. Well, just let me look at them again.
16 Where are the percentages in this?

17 Q. So it's the last page, Mr. Scurry.
18 There is -- it says "J&W percentage of
19 liability."

20 A. Oh, yeah. Got you. Thank you.

21 Q. Yes, sir.

22 A. Yeah. I agree that this -- this is what
23 we agreed to.

24 Q. And in Section F it discusses new docks;
25 and then at the bottom of that section, am I

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1 correct in reading -- this is in Section F.

2 J&W shall pay for the installation or
3 shall secure the installation of separate meters
4 for J&W's water and electrical meters, and J&W
5 shall pay for all its own electrical and water
6 use.

7 Did I read that correctly?

8 A. You did.

9 Q. Did J&W agree to undertake those tasks?

10 A. We did. But then the marina put them in
11 anyway.

12 Q. But you still are tapping into the
13 landlord's water and electricity; correct?

14 A. That's correct, yeah.

15 Q. You aren't receiving any separate bills?

16 A. We're using very little electricity.

17 But, yeah, if that's what --

18 Q. Now -- but you still to this day, you
19 don't have -- the tenant does not have separate
20 meters for its own use; correct?

21 A. That is correct.

22 Q. And you still aren't paying for your own
23 electrical and water use; correct?

24 A. I am not, no.

25 Q. Now, then in Section H, the survival of

1 lease. Do you see that section?

2 A. Give me a minute.

3 Q. Same page.

4 A. Yeah. Okay.

5 Q. It says, "Except as set forth, amended,
6 or modified herein, all terms and conditions of
7 the lease remain in full force and effect."

8 A. Yes.

9 Q. Do you understand that -- what that
10 means?

11 A. I understand what it means to me.

12 Q. And does it mean that, basically, every
13 section of the lease that isn't specifically
14 deleted or amended by this settlement agreement
15 continues in full force and effect?

16 A. Yes.

17 MR. LESEMAN: Your Honor, nothing
18 further at this time.

19 THE COURT: Anything else,
20 Mr. Taylor?

21 MR. TAYLOR: Redirect, Your Honor,
22 very briefly.

23 REDIRECT EXAMINATION

24 BY MR. TAYLOR:

25 Q. Wick, a few items of clarification.

1 Mr. Lesemann handed you a letter dated
2 October 28, 2016, to Joe Gossage. It was up on
3 the board. And Mr. Gossage is an adjuster with
4 North American Specialty Insurance Company.

5 Do you recall that discussion you had
6 with Ellis?

7 A. I do, of course.

8 Q. And you did not remember the letter
9 specifically?

10 A. I don't, no.

11 Q. Do you remember that Nate Jones, the
12 general manager of Broad Creek Marina, came to
13 you after Hurricane Matthew and asked for your
14 assistance in trying to find insurance money to
15 help repair the docks at Broad Creek Marina?

16 A. Yeah. There was a little
17 misunderstanding there, basically, because we had
18 a -- an accident not with one of our boats that
19 did damage and so I -- so I would assume that,
20 you know, that's what's spurred that conversation
21 from Nate.

22 Q. Wick, do you recall that you and I, with
23 no waiver of the attorney-client privilege,
24 discussed the issue of trying to get our
25 insurance company to potentially cover some of

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1 the damages that Broad Creek Marina -- under a
2 rental portion of the policy that said any
3 property we rented may be covered by a -- may be
4 covered by insurance?

5 A. I remember you pointing out that it said
6 something about rental; and we agreed that we
7 should try to do that, yeah.

8 Q. Does that refresh your recollection any
9 at all as to whether -- where this Joe Gossage
10 letter came from that you don't remember
11 preparing and was sent?

12 A. Yeah. I remember that. I remember the
13 conversations that we had, yes.

14 Q. And it was in an effort to try to get
15 some insurance funds to assist Broad Creek
16 Marina; right?

17 A. That is correct.

18 Q. Now, Wick, in that vein, let me ask you
19 this: Have you ever tried to procure insurance
20 on the leasehold docks at Broad Creek Marina
21 during the terms of this lease?

22 A. Several times.

23 Q. And there's a gentleman in the courtroom
24 by the name of Ed Barteet. Do you know who he
25 is?

1 A. I do.

2 Q. Who is he?

3 A. He represents Strickland Insurance
4 Company out of Charleston.

5 Q. And are they a broker for marina
6 insurance?

7 A. They are.

8 Q. Does J&W deal with Strickland?

9 A. Yeah, we do.

10 Q. And to your knowledge, does Broad Creek
11 Marina also deal with Strickland --

12 A. I believe so.

13 Q. -- as their broker?

14 A. Yeah.

15 Q. Did you have a conversation with
16 Mr. Barteet as to whether or not you could
17 procure or purchase insurance coverage on the
18 Broad Creek Marina docks?

19 A. Yes.

20 Q. And what were you told?

21 A. I could not.

22 Q. Why?

23 A. Because you couldn't have the docks
24 insured twice or something like that.

25 Q. Wick, Ellis successfully got into

1 evidence the two Coast Guard letters. And you
2 have seen them before, I believe you testified;
3 correct?

4 A. I've seen one of them, for sure. The
5 other one I don't remember, no.

6 Q. Wick, will you tell the Court about the
7 Coast Guard issue involved here and what it meant
8 and what appeal, if any, you made of this letter?

9 A. Yeah. After, I don't know, since we got
10 the second barge in about -- oh, 2004, we had
11 been running back and forth to Daufuskie two to
12 three times a week. The Coast Guard had been on
13 our barge every 4th of July because we shot
14 fireworks off of it. They'd always treated the
15 barge as being something that was not in their
16 bailiwick because it was not an inspected vessel.

17 And out of nowhere, we come rolling in
18 without a problem at all. The Coast Guard gets
19 on board and acts like it's never run out there
20 before. After all those years, they've never
21 seen it, you know, it's like -- never heard of it
22 before.

23 And started really making accusations
24 about, you know, how long have we been running
25 and why are we doing this? And why these people

1 in these trucks? And you're operating a car
2 ferry and all this stuff that was totally against
3 anything we had ever heard from the Coast Guard
4 before.

5 And, you know, they keep showing
6 pictures of the barge, you know. On average,
7 we've been putting thousands of dollars a year
8 into that barge. Now, it -- it's not shiny but
9 it's -- it does not leak one drop. All the water
10 in it is fresh water. The Coast Guard wouldn't
11 even let us prove that to them.

12 To me, it was a -- a setup by somebody.
13 I don't know who, and I don't know who's got that
14 kind of power; but for them to come in when they
15 did and take that attitude makes absolutely no
16 sense to me or anybody else I've ever talked to.

17 Q. Did any incident occur, let's say, in
18 the month prior to the Coast Guard's action on
19 November 9, 2018, that in any way, from your
20 perspective, brought the Coast Guard's attention?
21 Did you have any -- did the barge take on water?
22 Did you hit anything?

23 A. No, no, no, no. Absolutely not. I
24 mean, we've literally moved hundreds of thousands
25 of square feet of material to Daufuskie. And,

1 you know, I know I'm under oath; but I don't
2 remember anything falling off the barge, any
3 accident, any fuel spillage, any anything.

4 And this hazardous stuff they keep
5 talking about, you know, if steel is hazardous,
6 then there might be something on the barge; but
7 the only thing sitting out there is a barge that
8 floats very well when the tide's up. So I still
9 don't know what the deal is or where it came
10 from.

11 Q. But, Wick, have you -- you did appeal
12 this finding of the Coast Guard all the way to
13 the Commander in Miami; right?

14 A. That's correct.

15 Q. And, Wick, you also, I believe, had a
16 survey of the barge performed by an independent
17 person to respond to it; is that correct?

18 A. I certainly did.

19 Q. And what did the survey say?

20 A. He said it was in fair condition and
21 that it -- it certainly was okay to operate
22 equipment to Daufuskie.

23 Q. And, Wick, what plans do you have in
24 motion now concerning the barge operation?

25 A. I've spent a lot more money than I feel

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1 like I should to have a new barge, or it's --
2 actually it's a 2011 barge built by Fogle. In
3 other words, they're put -- they've already put
4 the wrapping on the king posts. Everything is
5 ready to go. I have tried -- been waiting to
6 have it Coast Guard approved to carry passengers.

7 At some point I would like to do that,
8 but I think I'm going to bring it on up next week
9 so that I can start operating again 'cause it's
10 real hard to operate on Daufuskie without a
11 barge; and people are screaming.

12 Q. Wick, do you believe, based on your
13 background and experience, that anything you did
14 or that J&W did during Hurricane Matthew caused
15 damage to the Broad Creek Marina docks?

16 A. I do not. Well, I don't know. I mean,
17 there's no way of knowing. I mean, you know,
18 with a hurricane, you don't know what is coming
19 from where. Right.

20 Q. Yes, sir.

21 MR. TAYLOR: Nothing further,
22 Judge. Thank you.

23 MR. LESEMAN: Briefly, Your Honor.

24

25

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1 RECROSS-EXAMINATION

2 BY MR. LESEMAN:

3 Q. Mr. Scurry, was the portion of the dock
4 that your vessel was moored to pulled up and
5 destroyed during Hurricane Matthew?

6 A. Pulled up?

7 Q. Yeah. Was it, basically, pulled apart
8 from the remainder of the dock?

9 A. Yeah. That portion of the dock
10 certainly was.

11 Q. Okay.

12 A. But at the same time, I have many
13 examples of a dock -- of being completely torn up
14 and 30 feet away, it's not with no boat
15 whatsoever. So there's no way in the world you
16 could say it was my vessels that tore the boat
17 up. I mean, tore the dock up.

18 Q. So your vessel was moored to the dock;
19 right?

20 A. Yeah, because -- okay. It's moored to
21 the dock.

22 Q. And a portion of the dock to which your
23 vessel was moored was pulled up and had to be
24 entirely replaced?

25 A. What do you think? The boat pulled it

1 up?

2 Q. I'm just saying --

3 A. Well, I'm just saying -- no, sir, I do
4 not buy that at all.

5 Q. Your vessel was tied to a portion of the
6 dock that later had to be replaced after
7 Hurricane Matthew because it got ripped out of
8 its location.

9 A. Well -- and you're blaming it on the
10 boat. Is that --

11 Q. The boat was tied to it.

12 A. Okay. The boat was tied to it. That
13 doesn't mean that the boat ripped it out.

14 Q. You admit that the boat was moored to a
15 section of dock during a hurricane and that that
16 section of dock was ripped from its location;
17 correct?

18 A. Yeah. And I can also say at Palmetto
19 Bay, there was about, maybe, 60 percent full; and
20 100 percent of that dock is gone. Are you going
21 to blame that on the boats too?

22 Q. Well, Mr. Scurry, I don't really know
23 anything about that. All I know is that the one
24 section of dock that was totally ripped out was
25 moored to your vessel because all the other

1 vessels listened to the landlord and removed
2 themselves --

3 A. No, they didn't.

4 Q. -- from the marina.

5 A. A lot of them didn't. You're wrong.
6 All the boats did not leave that marina. You're
7 wrong.

8 Q. But, again, Section 6 of the lease
9 discusses what's going to happen with dock
10 repair; correct?

11 A. Yeah. I guess.

12 Q. And you're capable of having a CGL
13 policy. I don't think Mr. Barteet would say that
14 you can't get a CGL policy for your business.

15 A. What is a "CGL"?

16 Q. Comprehensive general liability. Do you
17 know if you have one?

18 A. I don't know, no.

19 Q. Do you know if you have coverage for
20 bodily injury or property damage that results,
21 basically, in connection with your business?

22 A. I'm sure I do.

23 Q. But you're allowed to get that kind of
24 policy?

25 A. I would assume. Yes, sir.

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1 Q. And are you allowed to get hull policies
2 for your vessels?

3 A. Yes, I am.

4 Q. So, for example, if you strike a channel
5 marker coming back from a Christmas party, you're
6 able to use that policy to pay for that damage?

7 A. I could. Absolutely.

8 Q. Did you -- in this past year, did one of
9 your vessels actually strike a channel marker
10 coming back from a Christmas party?

11 A. It most certainly did not.

12 Q. Did not. Okay.

13 And on a separate occasion, did one of
14 your vessels -- one of your captains put the
15 vehicle -- or put the vessel. Excuse me. Into
16 gear when they thought it wasn't, and it took out
17 a section of the docks at Broad Creek Marina?

18 A. Absolutely.

19 Q. So is that an example of an accident
20 that has occurred?

21 A. That -- that absolutely happened, yes.

22 Q. And in that instance, you paid for the
23 repair; correct?

24 A. We did pay for the repair.

25 Q. And did you obtain insurance money to do

1 that in that instance?

2 A. From the boat insurance policy.

3 Q. Even though you weren't able to, quote
4 unquote, insure the landlord's docks, you still
5 paid that claim; correct?

6 A. I could not insure the landlord's docks
7 because they would not insure them. I would have
8 insured my portion of them, either way. Even if
9 they had insurance, I would have insured them on
10 top of that; but I couldn't.

11 Q. And the lease itself, does it make -- do
12 you believe that your -- under Section 6, since
13 it doesn't mention the word "insurance," is there
14 any contingency of the availability of insurance
15 coverage?

16 A. Well, I don't know.

17 Q. We can show it real quick. Section 6 of
18 the lease.

19 Mr. Scurry, the portion we're showing to
20 you -- you may look at it in the paper copy that
21 you have. Is there any reference of insurance
22 coverage in Section 6 which states the tenant's
23 obligation to reimburse the landlord for costs
24 attributed to the tenant's use with regard to
25 dock repair?

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1 A. I don't see anything that says that.

2 Q. Is there anything in here that says that
3 the tenant's obligated to insure the landlord's
4 docks?

5 A. That the tenant is -- let's see. The
6 pro rata portion of the repair of the replacement
7 costs. Is that what you're referring to?

8 Q. Well, I just -- does the word
9 "insurance" appear anywhere in paragraph 6?

10 A. I don't see it.

11 MR. LESEMAN: No further
12 questions.

13 MR. TAYLOR: Nothing further,
14 Judge.

15 THE COURT: Just a couple of quick
16 questions, Mr. Scurry.

17 Taylor, could you please pull back
18 up that aerial -- last aerial shot you had of
19 the --

20 MR. POWELL: The Google Earth of
21 the marina?

22 THE COURT: The Google Earth.

23 MR. POWELL: Yes, sir. (Complies
24 with request.)

25 THE COURT: And maybe zoom it in

1 the way you had it zoomed in earlier once you --

2 MR. POWELL: Absolutely.

3 THE COURT: So, Mr. Scurry, earlier
4 we were talking about that spot that looks like
5 it is to the north. What is that large vessel
6 there that's in the --

7 THE WITNESS: That's our riverboat.

8 THE COURT: There's two large
9 vessels, I guess.

10 THE WITNESS: Yeah. That's the
11 riverboat. The other one is --

12 MR. LESEMAN: Taylor can use a
13 pointer, Your Honor.

14 THE COURT: So the riverboat is the
15 one where the pointer hand is on right now; is
16 that right?

17 THE WITNESS: That's right.

18 THE COURT: So ahead of the
19 riverboat, to the northeast of the riverboat is
20 that section of dock where there was some
21 suggestion, I think, by Mr. Lesemann about the
22 floating office might be able to go in there; and
23 your concern was that would diminish your
24 available or useful dock space, I think was your
25 answer.

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1 THE WITNESS: Yeah, absolutely. If
2 you just look at that boat moving forward right
3 all the way to that -- as far as it could go
4 forward, right. It's going to take, I would say,
5 between 30 percent of the dock space on that
6 side. Now, that's dock space that I lease, that
7 I have. Okay.

8 THE COURT: I can see that small
9 center console or whatever's there on the right.

10 THE WITNESS: Right. But if I
11 pull -- pull -- both large boats were pulled all
12 the way up, which they would be in the winter,
13 then there would be about maybe 10 feet of that
14 dock available is my whole point.

15 THE COURT: What was the -- what
16 were the dimensions? Maybe this is a question
17 for counsel. What were the dimensions of the
18 approved floating office?

19 MR. TAYLOR: 28 feet deep by 55
20 feet wide.

21 THE COURT: So if that were turned
22 sideways, it would be 20-some-odd feet back
23 toward the riverboat; right? And the -- just for
24 perspective, I'm guessing that center console is
25 what? A 19- or 20-footer there on the right?

1 MR. TAYLOR: It's a 20-footer.

2 THE WITNESS: Right.

3 THE COURT: So, essentially, the
4 riverboat would be able to go no further than it
5 is now, more or less, if one were to put the bow
6 right up next to the potential office. We're
7 assuming -- I'm assuming that center console with
8 the blue top is a 20-footer, 19, 20-footer.

9 MR. LESEMAN: Your Honor, there's
10 some factors there. I just would add for
11 purposes of the discussion, the maximum permitted
12 size of that floating office would be what you
13 mentioned, 28 x 55. But it could be reduced from
14 that, and it could be placed in different -- it
15 could be perpendicular to the dock, or it could
16 be parallel to the dock.

17 THE COURT: I was working with 20 x
18 28 feet. Okay. So it's a little bit longer. On
19 the other hand, the little boat we're talking
20 about isn't backed all the way up to the dock.
21 It's actually out a little bit.

22 MR. LESEMAN: And where the hand
23 is right now, Your Honor, just for clarification,
24 those linear feet, those are reserved to the
25 landlord there. And, again, this -- is there a

1 stopping point here? Or does this -- does the
2 tenant space go all the way up to the --

3 THE WITNESS: It goes all the way
4 to the corner.

5 MR. JONES: It goes to the corner.

6 MR. LESEMANN: But not be on the
7 corner. So, Your Honor, we actually were out
8 there -- Nate and I were out there measuring, you
9 know, 300-square-foot spaces and things like that
10 in that area and in the general area too where
11 the water is all of a depth where it would not
12 have any of the issues that would be experienced
13 there, perhaps.

14 THE COURT: The metal bottom could
15 sit at an angle at low tide and all that stuff.

16 MR. LESEMANN: Correct.

17 THE COURT: Mr. Scurry, the
18 concern, then, about the floating dock there is
19 not its location, which would actually put it
20 pretty close to your business. The concern is
21 the diminution of leasable dock space or useable
22 dock space. Is that accurate?

23 THE WITNESS: Well, my whole point
24 is I'm leasing 300 feet of dock space. Right.
25 And if you -- if you -- I got -- and I think this

1 is the question you're asking.

2 But if you -- if you use the dock
3 space for large commercial boats, which I
4 basically have those, then it -- whether or not
5 that is Roger's dock space or not all the way up,
6 my boats can't use the 300 feet of dock space
7 if -- if they're put in place because there's,
8 you know, they -- you couldn't -- you couldn't
9 put a boat in front of them. You couldn't use it
10 that way because you just -- it's just simply not
11 enough room.

12 THE COURT: Well, I mean, the way
13 the riverboat is configured right now, you're
14 saying, is not, perhaps, the normal way; that it
15 would be more forward, more northeast.

16 THE WITNESS: Well, I'm just saying
17 if you have 300 feet of dock space, Judge, you
18 got to be able to -- I mean, that's not a lot of
19 dock space when it comes to it. So, you know,
20 when -- let's say I get a third boat, you know, a
21 third barge boat, which will probably -- that's
22 primarily what I use is the larger boats for my
23 operation.

24 Then I can't use 100 percent of the
25 300 feet of dock space that basically clearly

1 says in the -- in the lease commercial dock
2 space. You know --

3 THE COURT: Does that software
4 allow you to draw squares of a certain size or
5 any rectangles? Anything like that?

6 MR. POWELL: Earlier we drew a
7 straight line that we can measure. I don't know
8 if it allows you to draw more than one.

9 THE COURT: I think Mr. Lesemann
10 had a good point, that the maximum permitted size
11 is that. What was the number associated with the
12 agreement? Was it 300 square feet?

13 MR. TAYLOR: That's correct, Your
14 Honor.

15 THE WITNESS: 300 feet of usable
16 space.

17 THE COURT: So a 20 x 20 would be
18 400, and it almost looks like a 20 x 20 could
19 squeeze in ahead -- how wide is the riverboat?
20 What is the beam on the riverboat?

21 THE WITNESS: The riverboat is --
22 well, I believe those docks are 50 feet apart; is
23 that correct? Nate?

24 MR. JONES: 60.

25 THE WITNESS: 50 feet apart.

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1 MR. JONES: 60. 6, 0.

2 THE COURT: So a 20 x 20 square
3 ahead of the riverboat would leave enough space
4 for another large vessel to put its bow all the
5 way up to that long --

6 THE WITNESS: On a side tie, you
7 mean?

8 THE COURT: Well, 20 x 20 would be
9 square. But, yeah, exactly. I mean, it looks
10 like there's a way to accomplish what you say
11 would be a good location and not create too much
12 in there.

13 That's -- I mean, if you -- the way
14 it's configured right now, it wouldn't surprise
15 me if there's 20 feet between the bow of the
16 riverboat and that dock. I don't know if that
17 thing measures.

18 THE WITNESS: Well, again, I think
19 the beam of the riverboat, the width, is -- is --
20 it is 20 feet. At least 20 feet. And, again, so
21 if you have 20 and 20, that would leave -- if
22 it's 60 feet between it, that would leave 20 in
23 the center; right? But that would -- but, again,
24 you know, the boat would have to be directly
25 against the sides of the building.

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1 THE COURT: Actually, what I was --
2 well, you're correct. If you put a 20 x 20 dead
3 center, then you really could run the --

4 MR. POWELL: Your Honor was talking
5 about this line more here so that one could pull
6 all the way up to it? (Indicating.)

7 THE COURT: I really wasn't
8 thinking about it; but if you were to run a 20 x
9 20 right where that line is right now, the two
10 boats don't carry their beam all the way to the
11 bow; right? I mean, so you still run them almost
12 all the way. You wouldn't want to get so close
13 they're going to hit the dock.

14 But, I mean, there's got to be a
15 way to maximize and make it efficient the way
16 it's sitting in there. I don't know. This is --
17 I was just curious about locations.

18 In your opinion, Mr. Scurry, just
19 to make sure, that location is not a bad
20 location. It is the diminution of available dock
21 space that concerns you about that location.

22 THE WITNESS: Well, I -- Judge, I
23 think -- what the -- the one occasion that I was
24 talking about that I would be happy with is --
25 can anybody move that white thing in the center

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1 of that wide square? Okay. As you walk down the
2 dock to the left is where the floating store used
3 to be.

4 THE COURT: Right.

5 THE WITNESS: And when you walk
6 down the dock, that's the first thing you see.
7 That's where you go. If you move it somewhere
8 else out there, it's, kind of, pot luck, I guess.
9 So that's where we would like to be is, you know,
10 the -- the center of the activity means a
11 tremendous amount to our business 'cause it's all
12 tourists, right.

13 THE COURT: But, I mean, I thought
14 we established -- maybe this is stipulated --
15 that the inside of the dock is unavailable
16 because at low tide --

17 THE WITNESS: That's correct.

18 THE COURT: -- it's not going to
19 work. So I understand that would be a preferable
20 location, but it just won't work.

21 THE WITNESS: That's right.

22 THE COURT: So, I mean, if there's
23 another place to put a --

24 THE WITNESS: Well, they have a --
25 a permit, if you take a look at that drawing --

1 THE COURT: Yes, sir.

2 THE WITNESS: -- on the very top
3 right there to put an office, they have a permit
4 for it right now. (Indicating.)

5 THE COURT: You mean floating --

6 THE WITNESS: No. I mean, which is
7 great. It would be -- it -- it's a -- 'cause,
8 see, that's a fixed pier. Right.

9 THE COURT: So you mean on pilings,
10 not --

11 THE WITNESS: On pilings.

12 THE COURT: Okay. Not floating.

13 THE WITNESS: But they've got an
14 existing permit for it right now, and I would
15 think -- I mean, to me, that is as good a
16 location as you can get unless you're -- I have
17 no problem with where my office is now because
18 that's -- everybody rolls through there. Right.
19 I'm just looking for the other area where, you
20 know, people come through and see what we're
21 doing; and we can sell tickets.

22 THE COURT: All right. I don't
23 have any other questions of Mr. Scurry. Any
24 questions of Mr. Scurry related to my questions?

25 MR. TAYLOR: Not from the

1 plaintiff, Your Honor.

2 THE WITNESS: No, sir. Thank you,
3 though. Actually. Thank you for that.

4 FURTHER RECROSS-EXAMINATION

5 BY MR. LESEMANN:

6 Q. So, Mr. Scurry, just for purposes of
7 clarification, our locations such as here or
8 here, are those ones that are acceptable to you,
9 for example, because they aren't here where your
10 linear footage is? (Indicating.)

11 A. You know, where you -- what you point
12 to -- the first place you pointed. Okay. You
13 know, I'm looking at traffic. Okay. So when
14 people walk down the dock, they're going to see
15 that. If it were there, I think it would be
16 seen, you know. I don't think I would have a
17 problem with that.

18 Q. In this location here, sir?
19 (Indicating.)

20 A. I don't think I would.

21 Q. Would this location here, you sort of --
22 your point would be maybe the visibility would
23 not be as -- well, what was your point by this
24 one? (Indicating.)

25 A. Well, my whole point is right as they

1 walk down and they make the turn, they would see
2 us; and we could, kind of, do our thing. But I
3 would certainly prefer for location to be on the
4 wooden pier where there's already a permit; but,
5 you know, I guess that's for the judge to decide.

6 Q. Sure. No. I mean, this is helpful. I
7 appreciate everybody.

8 What about if the configuration, in
9 terms of you can make the square or a rectangle
10 or any shape, if one were feasible in some
11 location here, maybe where the depth was not
12 as -- the distance -- this deck actually was not
13 as much and it might be longer, is that something
14 that is, potentially, acceptable to the tenant?

15 A. Well --

16 Q. Provided, again, assuming that the issue
17 about the low tide condition would not be a
18 problem.

19 A. Well, if it were at a minimum 15 feet
20 wide, you know, you would -- it would be -- I
21 think it could be usable. But if you get into,
22 like, 10 feet and stuff like that, it -- it would
23 make it -- it tougher.

24 Q. It's too narrow. Okay.

25 MR. LESEMAN: Thank you,

1 Mr. Scurry. Thank you, Your Honor, for allowing
2 us to follow up with the witness.

3 THE WITNESS: I just don't think,
4 though, at low tide, especially like right now,
5 we're going into the springtime. If you walk
6 down there at low tide, I don't believe you could
7 do it, unfortunately. 'Cause that's really where
8 I would like to be, would be happy to do that.

9 MR. LESEMAN: Your Honor, we
10 might -- would it make sense to overnight create,
11 maybe, a screenshot? Like use this as a Court's
12 exhibit, or I could move to admit it as an
13 exhibit? It might be --

14 THE COURT: Probably make some
15 sense because we've been asking a lot of
16 questions about that. That could be Court's
17 Exhibit No. 01.

18 Any objection, Mr. Taylor?

19 MR. TAYLOR: No.

20 THE COURT: What was the length of
21 the yellow line? Was that 20 feet?

22 MR. POWELL: 19.28 feet.

23 THE COURT: Okay. Kind of hard to
24 draw them exact, I guess.

25

1 BY MR. LESEMANN:

2 Q. Mr. Scurry, am I correct that your
3 indication of the desired configuration of the
4 floating office would be 15 x 20?

5 A. Yeah. I guess 15 x 20 is 300-square
6 feet. Is that what it is?

7 Q. I think so, yes, sir.

8 A. I don't have a problem with that. I
9 just don't want a long or real long, skinny thing
10 that you can't really deal with furniture and
11 stuff like that.

12 Q. And so is 10 feet where you feel like
13 that concern kicks in, 10 x 30 or somewhere
14 between?

15 MR. JONES: 10 x 20. Excuse me.
16 10 x 30. I'm wrong.

17 Q. Whatever the math would be, where it was
18 12-and-a-half. I don't want to be -- I don't
19 want to be, you know, parsing distances; but do
20 you feel like 12-and-a-half feet wide would be
21 too narrow?

22 A. If it were right in that -- in the right
23 location right there, I could certainly live with
24 it.

25 MR. LESEMANN: Nothing further,

1 Your Honor. Thank you.

2 THE COURT: I don't have anything
3 else of this witness. Any questions? Any more
4 questions?

5 MR. TAYLOR: No, sir.

6 THE COURT: Sir, you can step back
7 down, then. Thank you so much, sir.

8 (The witness was excused.)

9 MR. TAYLOR: Judge, I'm going to
10 have three witnesses that will go fairly quickly,
11 I believe. If you don't mind, can we take a
12 two-minute break before we do that?

13 THE COURT: Let's take a two-minute
14 break; and maybe during the break, we can get a
15 tape measure and see what 300 square feet in a
16 different configuration will look like.

17 All right. We'll be short recess.

18 (Recess taken 3:38 p.m. to 3:43 p.m.)

19 THE COURT: Call your next witness,
20 sir.

21 MR. TAYLOR: Chris Yates, please,
22 Your Honor.

23 THE COURT: Come on around, please.
24
25

1 CHRISTOPHER D. YATES,
2 having been first duly sworn, was examined and
3 testified as follows:

4 THE COURT: Have a seat please.
5 State your whole name for the record.

6 THE WITNESS: Christopher Donald
7 Yates, Y-A-T-E-S.

8 DIRECT EXAMINATION

9 BY MR. TAYLOR:

10 Q. Mr. Yates, good afternoon. Mr. Yates,
11 you are appearing here subject to subpoena of
12 mine; correct?

13 A. Yes, sir.

14 Q. What do you do, Mr. Yates?

15 A. I am the building official for the Town
16 of Hilton Head Island.

17 Q. And what does that entail?

18 A. Well, the building department with the
19 Town of Hilton Head is a part of the community
20 development; and we do the plan reviews and issue
21 building permits for new construction,
22 renovations, and remodels.

23 Q. Do you personally inspect structures
24 where there are questions about whether or not
25 they are permitted or not permitted?

1 A. I do.

2 Q. Mr. Yates, what is your educational
3 background and age, please?

4 A. I am 44 years old. I am an alumni of
5 the technical college here in Beaufort, TCL. I
6 have electrical background, 12 years of
7 journeyman's electrical experience, 15 years of
8 building inspections experience, and three years
9 in the position that I'm currently in.

10 Q. Do you hold any particular
11 certifications or qualifications as a building
12 inspector?

13 A. Yes.

14 Q. What would that be?

15 A. I am certified through ICC,
16 International Code Council. That is the
17 recognized testing and code body for the State of
18 South Carolina. I'm registered with the State as
19 a building official; and as being registered with
20 the State of South Carolina as a building
21 official, I have to hold several certifications
22 through ICC, the code making body.

23 I can go off the list, if you want.

24 Q. No.

25 A. Just, kind of, rattle them off. It's

1 quite a few.

2 Q. That's okay.

3 A. But it's -- we'll just say it's about 12
4 to 13 different certifications for building
5 inspections and codes.

6 Q. And how long have you served in your
7 capacity in Hilton Head?

8 A. Three years in my current capacity.
9 I've been with the Town since 2010. So nine
10 years with the Town.

11 Q. Mr. Yates, I hand you what's been
12 previously marked and entered into evidence as
13 Plaintiff's Exhibit No. 11. It is a set of
14 photographs that show a building at Broad Creek
15 Marina.

16 Can you look through those and tell me
17 whether or not you're familiar with that
18 building?

19 A. (Complies with request.) These appear
20 to be the storage -- boat storage/ticket office
21 at Broad Creek Marina.

22 Q. And at some point in time between
23 January and today of 2019, have you had the
24 opportunity to personally inspect that building
25 yourself?

1 A. I did go out to the site. I did not go
2 inside of the building, but my chief inspector
3 has been through the inside of the building; but
4 I have been out to the site, yes, sir.

5 Q. And who is your chief inspector?

6 A. Tony Pierce.

7 Q. And based upon what Mr. Pierce advised
8 you, did you come to a determination -- as of
9 your own personal observation, did you come to a
10 determination as to whether or not that shed
11 building had ever been permitted by the Town of
12 Hilton Head for use as a commercial office?

13 A. Yes, I did.

14 Q. And what is that?

15 A. My determination was there has never
16 been or hasn't recently been any permits as far
17 as I can tell from the search that I've done
18 through our records. I also FOIA'd information
19 from the county's record as well because there's
20 a period of time from the aerial shots that we
21 have in our archives of when there was a boat
22 storage there and when there wasn't.

23 And even with the -- through the
24 county's records for that period of time when it
25 appeared through aerials, there's no record of

1 any structure ever being built there, whether
2 it's the boat storage or the current ticketing
3 office.

4 Q. Chris, from your understanding, your
5 background, and experience, if an owner of a
6 piece of land has a storage shed hypothetically
7 on his land and desires to turn it into a
8 commercial office, what would be the necessary
9 steps under the code of the Town of Hilton Head
10 that he would go through?

11 A. Well, that would be a change of use and
12 change of occupancy. If you're going to a
13 commercial business, then that would be a B
14 occupancy. A storage shed is going to be
15 accessory utility or maybe in some cases an S
16 occupancy. To change the occupancy from an S or
17 accessory utility to a B would require some sort
18 of drawings, plans.

19 Nine times out of ten, there's a design
20 professional involved, whether it's an architect
21 or engineer; and the reason why you would get a
22 design professional involved is because there are
23 means of egress and life safety issues. And in
24 some cases an engineer may be involved just
25 because of the structural differences between a

1 storage building and a commercial business
2 occupancy.

3 Q. Are there safety issues involved? And
4 is that what you were just alluding to, that a
5 code inspector or an inspector, such as you,
6 would look at?

7 A. Sure. Yes.

8 Q. What, in general, are those safety
9 issues that are evaluated?

10 A. You have to determine what your occupant
11 load is. You have to determine if you have
12 enough exits to get the occupants out of the
13 structure. You have to determine if it's --
14 needs to be accessible. Do we have to make this
15 accessible to where someone who's handicapped or
16 has a disability can use this facility?

17 You have to look at the bathrooms. You
18 know, are there enough rest rooms within the
19 structure or within a certain distance of the
20 structure? Are there enough facilities within
21 those rest rooms for the occupants, you know, the
22 increased occupant load? Because there will be
23 an increased occupant load based on storage to B
24 occupancy.

25 Structural, a storage building is not

1 a -- doesn't have the importance factor as far as
2 safety and structural as a commercial business
3 building would. So, like, for an example, if a
4 storage building, quite possibly, would be built
5 to 130-mile-an-hour wind if you had an engineer
6 design it; whereas, a commercial building would
7 be built to like 140-mile-an-hour wind standard
8 because of the importance factor of the
9 structure.

10 Q. Is that importance factor related to the
11 human beings that are likely to be inside?

12 A. Sure, yes, yes.

13 Q. Chris, when the -- when a proper permit
14 is sought, how does that process normally work?
15 For example, what is the first thing you would
16 ask for if you did have drawings and you did
17 have, let's say, a structural engineer that came
18 in and brought forth, would they come to your
19 office and then you evaluate the plans first?

20 A. Yeah. It -- it's a two-fold where
21 planning and the building department both look at
22 it simultaneously. Planning to see if it's an
23 allowable use for the zoning district and then
24 building, once that's been determined, to
25 determine if the structure itself is allowable.

1 Q. Before January of this year, do you know
2 if you or any other representative of the Town
3 was aware that this shed was being used as a
4 commercial office space?

5 A. Not to my knowledge, no, sir.

6 Q. All right.

7 A. January was the first that I had heard
8 of it.

9 Q. Chris, I show you what has been marked
10 and earlier admitted as Plaintiff's Exhibit
11 No. 04 that shows a floating building at Broad
12 Creek. Are you also familiar with that?

13 A. Yes, sir.

14 Q. And my same question basically is
15 between January and today, have you -- of 2019,
16 have you at some point in time been to Broad
17 Creek and personally viewed that building?

18 A. Yes, sir.

19 Q. Is that building a legally certified and
20 permitted building for commercial use in the Town
21 of Hilton Head?

22 A. No, sir.

23 Q. And why is that? Tell me what you did
24 to determine that.

25 A. Well, there haven't been any permits

1 pulled for the construction of that structure as
2 far as I can tell. So without, you know, proper
3 plans and permits, then it's not a legal
4 conforming structure.

5 Q. Okay.

6 A. Beyond that, I don't believe -- and it
7 would have to go through planning first. As in
8 stages of process, I don't think it would be an
9 allowable use, even on the planning level; but
10 that's not my area of expertise. But that's
11 what -- that's what I would guess.

12 Q. I understand.

13 As we sit in this courtroom today, to
14 your knowledge, has anyone from Broad Creek
15 Marina or any representative from Broad Creek
16 Marina, such as an engineer or an architect, made
17 an application with the Town of Hilton Head for
18 consideration of any type of floating office
19 building at Broad Creek Marina in the past ten
20 years?

21 A. Not to my knowledge, no.

22 Q. Chris, based upon your review of these
23 two buildings and your determination based on
24 your background and experience, did you issue a
25 letter of May 3, 2019, to Roger Freedman on

1 behalf of Broad Creek Marina?

2 A. Yes, sir.

3 (Plaintiff's Exhibit No. 12 was marked
4 for identification.)

5 Q. I show you what I've marked for
6 identification as Plaintiff's Exhibit No. 12 and
7 ask you if you can identify that.

8 A. This was a letter, notice of violation,
9 that was mailed Certified Mail to Mr. Roger
10 Freedman. Basically the letter outlines the fact
11 that the structure was illegally occupied as a
12 commercial business, and it never received any
13 permits from the Town to change the occupancy to
14 a commercial business.

15 So pursuant to Section 114.1 of the
16 International Building Code, it is a violation of
17 the code and the fact that it's being illegally
18 occupied.

19 Q. And then what, in your position as the
20 building official for the Town of Hilton Head,
21 does this letter instruct Mr. Freedman to do?

22 A. Basically he's got 60 days from the
23 receipt of this letter to relocate all occupants
24 and their belongings, acquire a building permit
25 to change the occupancy of the two buildings.

1 And this letter actually addresses both
2 of those structures that you've identified in the
3 pictures -- that we've identified in the pictures
4 to acquire building permit -- or to change the
5 occupancy of the two buildings.

6 If a building permit is applied for and
7 provided, a Certificate of Occupancy may be
8 issued at some time that all noted violations
9 have been corrected, construction is completed,
10 and properly inspected by Town building
11 inspectors.

12 Q. Mr. Yates, as you sit here today, to
13 your knowledge, have you been contacted or has
14 anyone from the Town of Hilton Head been
15 contacted in any type of reply to this May 3,
16 2019, letter?

17 A. Yes.

18 Q. Tell me about that, please.

19 A. Last Wednesday, I believe it was --
20 don't know the date right offhand, but a week
21 ago. Brian Hulbert, Town's staff attorney, was
22 contacted by Mr. Leashman.

23 MR. LESEMANN: Lesemann.

24 THE WITNESS: Lesemann. I'm sorry.

25 MR. LESEMANN: No problem.

1 A. Was contacted by Mr. Lesemann to set up
2 a meeting with Terry Lewis and myself to discuss
3 these -- these structures and the letter that
4 they received.

5 As part of that meeting, several
6 different scenarios were discussed; but there was
7 no real solution, just, you know, some, you know,
8 what can we do? And just went through several
9 different scenarios.

10 Q. Who attended that meeting?

11 A. Mr. Lesemann, Mr. Freedman, and, I
12 guess -- I don't know the other gentleman's name,
13 but he's in the front row right there.

14 (Indicating.)

15 Q. That would be Mr. Jones.

16 A. Mr. Jones. The three of them.

17 Q. Who on behalf of the Town?

18 A. Terry Lewis, myself, and Brian Hulbert.

19 Q. And please give me as much detail as you
20 possibly can about what you were told as to how
21 these buildings came into use in an unpermitted
22 and unrecognized state.

23 A. I think the story was that there was a
24 floating office at one point in that general
25 vicinity of where the docks are. There was a

1 storm or something, and the floating office sank.
2 And that of necessity, they needed to move
3 Mr. Wick Scurry's office out of the sunken office
4 onto land. They had the storage building, and
5 they moved everything into that storage building
6 for him to use as a building.

7 Q. Did they tell you when that was done?

8 A. I don't think we discussed when that was
9 done. No. I don't remember that.

10 Q. Did they tell you why ten years had
11 passed without anybody contacting the Town about
12 it?

13 A. No.

14 Q. Did anyone from the Town ask about how
15 this had occurred, given the fact that Broad
16 Creek Marina has, in fact, had permits issued to
17 them for other work done at Broad Creek Marina?

18 A. I don't think that was discussed. I
19 think once they explained to us the scenarios,
20 that scenario of how it happened our -- I think
21 our primary focus was on how do we remedy it?
22 And that's when the other different solutions
23 were talked about.

24 Q. And has, to your knowledge, there been a
25 solution arrived at? In other words, did they

1 tell you what they were going to do?

2 A. No. There has not been a solution
3 discussed, just possible solutions to remedy it.

4 Q. Is the letter of May 3, 2019, marked for
5 identification Plaintiff's Exhibit No. 12 still
6 in effect?

7 A. Oh, yes, sir. Yeah. They have 60 days
8 from the date of that letter to address it.

9 Q. Chris, to your knowledge, will it be
10 possible to make minor changes to the shed
11 building in order to come to code; or will there
12 be major changes necessary?

13 A. I think the -- the most significant
14 changes to that shed are going to be structural
15 in nature. I mean, without knowing a whole lot
16 of information, like what the elevation of the
17 ground is there and whether or not the structure
18 has to be elevated or, quite possibly, dry flood
19 proofed and not without having a design
20 professional or engineer or architect do a
21 structural evaluation, I know that there was a
22 third-party inspection done. I have read through
23 some of that material, which I think you
24 provided --

25 Q. I did.

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1 A. -- where they've notated some exposed
2 rebar in certain areas that it appears the
3 ceiling grid is supported by.

4 You know, without a design professional
5 or an engineer of some sort doing a full
6 evaluation to determine how to remedy any
7 structural defects, it would be hard to say if it
8 would be something simple versus significant.

9 Q. Understand.

10 Chris, to your knowledge, can a floating
11 building be used under the Town of Hilton Head
12 code for a commercial space?

13 A. That would fall under planning; and as
14 far as I know, I would say no. The building
15 code --

16 MR. LESEMANN: Your Honor, I'm just
17 going to step in and object on the part of the
18 basis of Mr. Yates saying it's not in his
19 purview. And, in fact, Miss Lewis, who's here in
20 the courtroom, it is under her purview; and she
21 says it could be built.

22 But, again, he said he's been
23 asking for a determination based on something
24 that's not in his area of expertise. I just
25 don't believe it would be competent or

1 appropriate testimony. No offense whatsoever to
2 Mr. Yates.

3 THE COURT: No. No. I understand.
4 He was honest and said he wasn't really sure; but
5 so I think I'm happy to hear from you,
6 Mr. Taylor.

7 MR. TAYLOR: I'll withdraw that
8 question, Your Honor.

9 THE COURT: All right. Thank you.
10 BY MR. TAYLOR:

11 Q. Mr. Yates, did you do anything that you
12 would not have done professionally as far as
13 evaluating these buildings and issuing the letter
14 that has been marked for identification
15 Plaintiff's Exhibit No. 12 based upon the fact
16 that I brought this issue to your attention
17 versus anyone else?

18 A. No. I think we followed the due process
19 that we normally follow. Most of these sorts of
20 complaints or issues that we have are complaint-
21 driven, you know, where we get a complaint; and
22 then we investigate it.

23 That's just the way we operate. If we
24 get a complaint, no matter how insignificant or
25 significant it is, we do investigate it to the

1 fullest; and we were made aware of this in
2 January. But we have a process, and we have to
3 do our full thorough investigation before we take
4 action. We're not going to just jump into
5 something blindly.

6 Q. Chris, thank you.

7 MR. TAYLOR: Your Honor, move
8 admission of Plaintiff's Exhibit No. 12.

9 THE COURT: Objections?

10 MR. LESEMAN: No objection, Your
11 Honor.

12 THE COURT: All right. Thank you.
13 (Plaintiff's Exhibit No. 12 is admitted
14 into evidence.)

15 MR. TAYLOR: No questions, Your
16 Honor.

17 THE COURT: Thank you. Please
18 answer any questions Mr. Lesemann has.

19 CROSS-EXAMINATION

20 BY MR. LESEMAN:

21 Q. Thank you. We did meet last week. I'm
22 Ellis Lesemann. Thanks for being here today.

23 In terms of the timing, just to clarify,
24 in January, do you know whether this matter was
25 actually scheduled to go to trial in January?

1 A. I do not know that.

2 Q. And, obviously, we're here for trial
3 today; correct?

4 A. Yes, sir.

5 Q. And do you know, was it in January when
6 Mr. Taylor contacted the Town to ask them to look
7 into this issue?

8 A. Yes. Well, it -- we got subpoenaed.

9 Q. Okay.

10 A. That's how it came about. My chief
11 inspector was actually subpoenaed by the courts;
12 and through the subpoena, we wanted to figure out
13 what was going on. So that entailed us going out
14 to look at the property and look at, you know,
15 the grounds of the subpoena to figure out what
16 was going on.

17 Q. Yes, sir.

18 And were there a number of follow-up
19 inquiries, to your knowledge, from Mr. Taylor to
20 make sure that a letter might get issued before
21 trial today?

22 A. No, sir.

23 Q. Was there a request made to Mr. Hulbert,
24 if you know, about whether a letter had been
25 issued and if additional meetings could be held?

1 A. I don't know.

2 Q. I don't think, Mr. Yates, you were here
3 all day today. You got other things that you
4 need to do. But were you here when Mr. Scurry
5 testified about how this building initially was
6 located on the property?

7 A. No, sir.

8 Q. And so if he indicated that it was built
9 in -- I think you actually, from review of some
10 aerial photos, you had, sort of, pinpointed a
11 time frame when you thought it was built.

12 A. Yes, sir. Yes, sir.

13 Q. And what time frame was that?

14 A. Based on the aerials and the information
15 that I FOIA'd through the county and doing some
16 deed and title research, it would have had to be
17 between a ten-year period of '75 and '85.

18 Q. Do you know who the owner of the
19 property was at that time?

20 A. If I -- I don't know, no. I don't -- I
21 could guess, but I don't know.

22 Q. Yes, sir. I wouldn't ask you to guess.

23 Do you know if Mr. Taylor's client was
24 directly involved in the original construction of
25 that building?

1 A. I do not know for a fact. I have no
2 records for that building. That's the problem.

3 Q. Do you know if my client owned the
4 property at that time?

5 A. I do not know who owned the property. I
6 could speculate and guess based on some research
7 that I've done and say it was Wick Scurry, but I
8 don't know that for sure.

9 Q. Understood.

10 Again, I think you may have stated this
11 already; but is it true that when that structure
12 was initially built under prior ownership, that
13 no permit was pulled for purposes of constructing
14 that building?

15 A. I would say that is accurate.

16 Q. Okay.

17 A. Yes, sir.

18 Q. Would it -- would a permit have been
19 needed?

20 A. Yes, sir.

21 Q. So as built under prior ownership, a
22 permit should have been applied for?

23 A. Yes, sir.

24 Q. And obtained before activity continued?

25 A. For the boat shed, that's what I -- and

1 the reason why I'm calling it a boat shed is
2 suspect based on the plats and deeds that I've
3 done research on, that's what it's listed at on
4 the earliest plat that I could find showing that
5 structure as a boat storage or boat workshop, I
6 think is what it actually called it on the plat.

7 Q. So you wouldn't, from the research,
8 which is extensive, but from the research that
9 you did, you wouldn't necessarily have confirmed
10 the specific person or entity that initially
11 erected that unpermitted structure?

12 A. No. I was more concerned about when it
13 was done and if it was permitted to be done.

14 Q. And do you understand that Mr. Scurry's
15 company is the tenant in that space currently?

16 A. Yes. I do know that, yes, sir.

17 Q. And do you have any reason to disagree
18 that when Mr. Scurry moved into that building,
19 that he would have known what the permitted or
20 unpermitted nature of that structure was? Do you
21 have any knowledge about that one way or the
22 other?

23 A. I do not 'cause, again, I -- I don't
24 know for sure that it was Wick Scurry who owned
25 that building. I can't figure that part out.

1 Q. Sure.

2 Have you ever looked at the lease? And
3 you probably would never have, but have you ever
4 looked at the lease agreement that's in place
5 between Mr. Scurry's company and Broad Creek
6 Marina?

7 A. No, sir.

8 Q. Do you know -- then you don't have any
9 knowledge about what provisions that it might
10 contain about who's responsible for repair and
11 for upkeep of that building?

12 A. Firsthand, no.

13 Q. And you wouldn't know what that document
14 might say about who's responsible for compliance
15 with all laws and regulations?

16 A. No, sir.

17 Q. But would you believe that the Town of
18 Hilton Head would have laws and ordinances --
19 let's say, ordinances that would be applicable
20 that would need to be followed?

21 A. As far as?

22 Q. The permitting and things of that
23 nature.

24 A. Yes, sir.

25 Q. But as far as your research, you haven't

1 undertaken to determine whether the lease might
2 speak to who might be responsible for that
3 compliance?

4 A. And just to be blunt, the Town doesn't
5 enforce, you know, agreements between third
6 parties.

7 Q. Right.

8 A. We enforce the code and the building
9 code and muni code; and there's nothing, you
10 know, in the building code or the muni code that
11 would require us to look at lease agreements.

12 Q. Understood. I'm not at all suggesting
13 that you were incomplete. I just -- again, we're
14 here in a lease dispute.

15 A. Right.

16 Q. And the lease actually, I'll represent
17 to you, has some provisions about permits,
18 maintenance --

19 A. Sure.

20 Q. -- compliance, and those are things that
21 you just -- and did Mr. Taylor provide you -- in
22 connection with bringing this to your attention,
23 did he provide you with a copy of the lease?

24 A. I -- there -- in the subpoena that we
25 received in January, there was not a copy of the

1 lease, no, sir.

2 Q. In your work as a building official, are
3 there occasions where you work with tenants that
4 might be undertaking tenant upfits or
5 improvements to leased spaces working, perhaps,
6 along with their general contractors? Is that
7 something that occurs?

8 A. Yes, sir.

9 Q. So it is tenants sometimes that would
10 interact with your office on behalf of property
11 that might be owned by some other person --

12 A. Yes.

13 Q. -- from time to time?

14 A. Yes. But as part of our application
15 process, we have to have an owner's affidavit
16 where the owner is giving that tenant permission
17 to do whatever upfits or repairs are needed.

18 Q. So you can confirm that it's authorized?

19 A. Yes.

20 Q. Sure.

21 And do you know -- again, you haven't
22 looked at that lease. So you wouldn't have any
23 knowledge about what provisions might be in there
24 that -- relating that the owners' consent and
25 that it wouldn't be unreasonably withheld, things

1 of that nature. You don't have any knowledge of
2 those provisions?

3 A. No, sir.

4 Q. But you are aware, again, with an
5 owner's affidavit that a tenant can come to you
6 and can make applications to have a building
7 permit or to make structural changes to a
8 building with the owner's permission?

9 A. Yes, sir.

10 Q. And in terms of the determination of the
11 Town relating to the allowance of a floating
12 office, had Miss -- is Miss Lewis in the
13 courtroom?

14 A. Yes, sir.

15 Q. And is that something that, to your
16 knowledge, is within her area of responsibility?

17 A. Yes, sir. She would make that
18 determination.

19 Q. Were you copied on an email that she
20 sent out yesterday afternoon? I know it was very
21 recent but -- that related to the issue about the
22 Town's determination as to whether a floating
23 office would be an allowed use within the
24 conservation district?

25 A. I don't know. I could have been, but I

1 have not checked my emails here recently so --

2 Q. Understood.

3 A. -- could be sitting in my email now.

4 Q. Yes, sir.

5 Would you defer to her interpretation of
6 the land management ordinance and her
7 determination of whether that is or is not an
8 allowable use?

9 A. Completely, yes, sir.

10 Q. When we met with you last week, do you
11 have an understanding of whether that was in
12 close proximity of when the landlord had received
13 your letter?

14 A. Can you rephrase that?

15 Q. Did -- was it your understanding that
16 the landlord sought to schedule a meeting with
17 you soon after receiving your notice, the notice
18 that's been marked as Plaintiff's Exhibit No. 12?
19 Do you know whether the landlord reached out and
20 tried to set up a meeting with you?

21 A. Oh, yes, yes. Very shortly. Within a
22 week.

23 Q. And, again, it could have been shorter,
24 just depends on when the letter actually got
25 received by the landlord.

1 A. Sure. Yes, sir.

2 Q. And we -- do you recall some discussion
3 about whether there was, in fact -- and you
4 received a subpoena. So you recognized there was
5 some pending litigation ongoing?

6 A. Yes, sir.

7 Q. And do you have any knowledge as to
8 whether -- or were you informed that Judge Dukes
9 may make a decision about where the office
10 location might go or where a floating office
11 might go? Of course, consistent with the Town's
12 ordinance and with the OCRM.

13 A. I think that that was the understanding.
14 I don't think it was said; but I think it was,
15 kind of, implied, you know, through our town
16 attorney that that could be a possibility. But I
17 don't think it was a -- it was a discussion.

18 Q. Understood.

19 So were there some options and some
20 things that were discussed in terms of some
21 temporary locations 'cause, again, your letter
22 included a 60-day window; is that right?

23 A. That's correct.

24 Q. Okay. And were -- was there some
25 discussion about specific things that could be

1 done in the interim if the new office location
2 was not completed within 60 days?

3 A. Yes. There were some options.

4 Q. And from your experience as a building
5 code officer, what are some of the options that
6 could be pursued on a temporary basis that would
7 be consistent with the Town's requirements that
8 could involve a relocation of an office into an
9 acceptable site?

10 A. Well, I think on a temporary basis, I
11 think the discussion was about point of sales
12 kiosk, possibly, on the land --

13 Q. Yeah.

14 A. -- side of it, not on the harbor water
15 side but on the land side on the bluff.

16 Q. Yes, sir.

17 A. There was also discussion on the land
18 side of a temporary commercial office trailer --

19 Q. Yes.

20 A. -- modular, if you were. That was
21 approved by the State; and it would be a
22 temporary use until a more permanent solution,
23 you know. Both of those, really, would be
24 temporary until a more permanent solution could
25 be obtained.

1 Q. Understood.

2 And, again, just as far as that
3 discussion, when we use the word "temporary," we,
4 obviously, know that means not permanent.

5 A. Right.

6 Q. But what was the time frame to your
7 belief and to your -- the way that -- you
8 practice it in your work, what would "temporary"
9 be defined as by the Town?

10 A. 180 days.

11 Q. So approximately six months.

12 A. Yes, sir.

13 Q. And then in terms of the -- well, let me
14 ask you this: From your communications with the
15 landlord, was it communicated to you that the
16 landlord would like to move the tenant from that
17 location?

18 A. Yes.

19 Q. And, of course, that that's also part of
20 what your -- it's not a request.

21 A. Yes.

22 Q. It's a requirement by the Town; correct?

23 A. Yes, sir.

24 Q. All right.

25 A. Yeah.

1 Q. Now, did you indicate that there can
2 be -- are there -- is there the ability on the
3 part of the Town, again, at the Town's
4 discretion, to work with a landlord or a property
5 owner in terms of, if progress is being shown and
6 the temporary location is provided, is there some
7 flexibility that the Town can choose in its
8 discretion to allow in order for a transition of
9 an office use to be accomplished?

10 A. Certainly.

11 Q. And so in terms of that 60 days, that's
12 something that in -- if shown good faith and
13 shown some progress, that's something that the
14 Town would entertain the possibility of
15 extending?

16 A. Yes, sir.

17 MR. LESEMAN: All right. And,
18 Taylor, were you able to find --

19 MR. POWELL: Do you want the
20 website?

21 MR. LESEMAN: Yeah, the William
22 Scotsman.

23 MR. POWELL: Yeah.

24 Q. Mr. Yates, did you actually recommend --
25 did you have knowledge and recommendation of a

1 specific type of building?

2 A. Yeah. There's several contractors that
3 the State preapproves, and the one I think I
4 mentioned was William Scotsman that the State has
5 preapproved for commercial business use and --

6 Q. So let's look at that one.

7 So William Scotsman, so, Mr. Yates, was
8 this the sort of structure that you had in mind
9 when we were discussing it?

10 A. Yes, sir.

11 Q. On a temporary basis, this is something
12 that could be used as an office location that
13 would be -- that the Town would permit? Would
14 allow?

15 A. Yes, sir.

16 Q. And, again, one of the requirements
17 would be that steps or, perhaps, a ramp -- ADA-
18 compliant ramp be built that would allow for
19 access to the structure?

20 A. Yes, sir. That's pretty typical when
21 those are used commercially. One of the steps
22 will be a set of steps. The second one will be a
23 ramp of some sort.

24 Q. How long have you -- Mr. Yates, are you
25 newer at the Town; or have you been there a long

1 time?

2 A. I started with the Town 2009. I'm
3 sorry. 2010. October 2010.

4 Q. Yes, sir. Okay. So was Robert Kline
5 there at all when you were there?

6 A. Yes. Mr. Kline was a building official
7 when I started there.

8 Q. Is he now retired or moved on to another
9 opportunity?

10 A. Yes, sir. He's moved to Colorado.

11 Q. Do you know whether Mr. Freedman, the
12 owner of Broad Creek Marina, might have met with
13 Mr. Kline about this specific building?

14 A. I have no knowledge of that.

15 Q. And with Mr. Kline being in Colorado,
16 that would be someone in connection with your
17 research of the issue. You didn't speak to him,
18 did you?

19 A. No, sir.

20 Q. Okay.

21 A. No. I haven't spoken to Mr. Kline in
22 three years, since he left.

23 Q. And if Mr. Kline and Mr. Freedman had a
24 conversation about the landlord's options in
25 moving the tenant out of that existing building,

1 that would be something that you would have no
2 knowledge about.

3 A. No, sir.

4 Q. So would -- Mr. Taylor asked you if you
5 had any knowledge about any conversations with
6 anyone at the Town on behalf of the landlord.
7 You know what you know but you -- there might
8 have been some conversations that you weren't
9 aware of. Is that fair?

10 A. I would say that's a fair assessment,
11 yes, sir.

12 MR. LESEMANN: Your Honor, I would
13 have nothing further.

14 MR. TAYLOR: Very briefly, Judge.

15 REDIRECT EXAMINATION

16 BY MR. TAYLOR:

17 Q. Chris, do you know when the Town was
18 incorporated?

19 A. 1983, I believe.

20 Q. And your earlier testimony was that you
21 believe the structure was built between '75 and
22 '85; correct?

23 A. Yes, sir.

24 Q. So if it was built before the Town was
25 incorporated, certainly nobody would have been

1 asking for any type of permit from the Town,
2 would they?

3 A. That's correct. It would have been the
4 county.

5 Q. Right. Was either Mr. Scurry or I, to
6 your knowledge, invited to the meeting about
7 their office situation that was had at the Town
8 last week with Mr. Freedman and his counsel?

9 A. It was set up through our staff
10 attorney, Brian Hulbert, so I would not be aware
11 of that.

12 Q. Understand.

13 Did Mr. Freedman indicate in the meeting
14 at all that he was surprised by the Town's
15 findings of the illegal use of this building?

16 A. Not that I know of, no.

17 Q. Did he challenge -- did either he or his
18 lawyer challenge the findings of Plaintiff's
19 Exhibit No. 12, the findings that the building is
20 being used illegally?

21 A. No, sir.

22 MR. TAYLOR: That's all I have,
23 Your Honor.

24 THE COURT: Do you have any
25 questions?

1 MR. LESEMANN: Nothing further.

2 THE COURT: Thank you so much, sir.

3 (The witness was excused.)

4 THE COURT: This witness is being
5 excused?

6 MR. TAYLOR: Yes, but I believe he
7 probably rode with Terry Lewis. So he's not
8 going anywhere. She's my next witness, Your
9 Honor.

10 THE COURT: Come on around, please.

11 THERESA B. LEWIS,
12 having been first duly sworn, was examined and
13 testified as follows:

14 THE COURT: Have a seat, please,
15 and state your whole name for the record.

16 THE WITNESS: Theresa Bergo
17 (phonetic) Lewis.

18 THE COURT: How do you spell
19 "Lewis"?

20 THE WITNESS: L-E-W-I-S.

21 THE COURT: Thank you.

22 DIRECT EXAMINATION

23 BY MR. TAYLOR:

24 Q. Miss Lewis, good afternoon.

25 A. Hello.

1 Q. What do you do?

2 A. I am the deputy director of community
3 development and LMO official.

4 Q. What does "LMO" stand for?

5 A. Land management ordinance.

6 Q. And where do you live, Miss Lewis?

7 A. In Bluffton.

8 Q. And how old are you?

9 A. 47.

10 Q. And what is your educational background,
11 briefly?

12 A. I have a Bachelor's in English
13 literature and then a Master's in urban and
14 regional planning.

15 Q. And so far as your job as the LMO
16 official of the Town of Hilton Head, what does
17 that mean?

18 A. So I make interpretations and
19 determinations related to the land management
20 ordinance.

21 Q. And is the land management ordinance the
22 code that Hilton Head has adopted that regulates
23 how structures are built and how zoning applies,
24 things like that?

25 A. Regulates zoning, development standards,

1 not necessarily anything that would be covered by
2 the building code though.

3 Q. That would fall -- strike that.

4 Have you had the opportunity to review
5 between January and, to date, the shed building
6 that exists at Broad Creek Marina that is shown
7 on the front of Plaintiff's Exhibit No. 11?

8 A. I've seen pictures, and I've seen
9 aerials of it. I have not seen it in person.

10 Q. You've not been down there?

11 A. Have not.

12 Q. And, therefore, your answer would be the
13 same as to Plaintiff's Exhibit No. 04, the Pirate
14 Parasail building that exists there?

15 A. That's correct.

16 Q. You have not been down there to look at
17 either one of those?

18 A. Have not.

19 Q. Miss Lewis, can you tell the Court what
20 the appropriate methodology is for someone to
21 apply to bring a building that is basically a
22 storage shed up to usage to a commercial building
23 under the Town code?

24 A. Under the land management ordinance?

25 Q. Yes.

1 A. So for that, we wouldn't necessarily
2 have any changes. So a change in use for us, we
3 would look to determine that there was adequate
4 parking, if the parking standards were different
5 for that use. And other than that, we would only
6 look at it if they were going to make changes to
7 the exterior of the building, which would
8 necessitate a review by our design review board
9 or an internal design staff.

10 Q. And as far as the structural integrity
11 and all those things, if you will, again, under
12 what department?

13 A. They fall under community development
14 department but under our building division.

15 Q. And that was what Mr. Chris Yates just
16 testified to a few moments ago; correct?

17 A. Yes.

18 Q. You were here and heard that testimony?

19 A. I was.

20 Q. Did you hear anything that you disagreed
21 with what he said?

22 A. I did not.

23 Q. Miss Lewis, when you are operating as
24 the LMO official, do you have occasion to review
25 the South Carolina Code and the South Carolina

1 Code of State Regulations?

2 A. The South Carolina Code of Laws, yes.

3 Q. The state regs are part of the South
4 Carolina Code of Laws.

5 Are you familiar with that?

6 A. I wasn't, but it doesn't surprise me.

7 Q. In the normal course of operating as the
8 LMO official, I take it, then, that you don't
9 regularly look to what are known as the South
10 Carolina regs as far as doing what you do?

11 A. No. I look at the land management
12 ordinance and then the state -- more of the --
13 the planning portion of the state code as well.

14 Q. Miss Lewis, to your knowledge, may a
15 floating building be used as a commercial office
16 in the Town jurisdiction of Hilton Head?

17 A. So I can't just answer yes or no. It
18 actually depends. So not as a commercial office
19 for something that isn't -- wouldn't be water-
20 related. So if somebody wanted to have an
21 office -- a floating office for use that wasn't
22 water-related, we wouldn't be able to permit that
23 under the land management ordinance.

24 Q. For example, a restaurant.

25 A. That's correct. And that wouldn't be an

1 office; but, yes, that would be a commercial use
2 but --

3 Q. What would -- how would you define
4 "water related," or is it specifically defined
5 under the LMO?

6 A. It's not specifically defined, but the
7 area where the water is is part of the
8 conservation zoning district. There are limited
9 uses that can occur there. So it's docking
10 facilities, ramps, and marinas. Then there are
11 descriptions of those uses in the land management
12 ordinance. Under marina, you can have certain
13 commercial service uses that are related to
14 watercraft.

15 So, for example, somebody couldn't, you
16 know. You couldn't have a -- we wouldn't permit
17 a dentist office on the water in the conservation
18 zone because it's not related to the water.

19 But if somebody was doing something
20 where they needed to be in the water to operate
21 and not necessarily that that office had to be in
22 the water but that the use associated with the
23 office had to be in the water, then that's
24 something that we could approve.

25 Q. The use associated with the office had

1 to be in the water; is that correct?

2 A. That's correct.

3 Q. So how would you determine whether or
4 not the usage in an office was, quote unquote,
5 water-related? For example, if an office houses
6 people who are performing administrative work for
7 a ferry and a barging company, would you consider
8 that to be water-related?

9 A. Yes.

10 Q. Miss Lewis, have we -- as we are in this
11 courtroom today, has anyone, to your knowledge,
12 representing Broad Creek Marina applied or made
13 even a preliminary application to receive
14 permission to build a commercial office on a
15 floating platform at Broad Creek Marina?

16 A. I was asked if one would be permitted,
17 but nobody submitted an application yet, to my
18 knowledge.

19 Q. And who asked you if one would be
20 permitted?

21 A. Mr. Lesemann.

22 Q. And what were the details as to how that
23 was asked and the details specifically in the
24 hypothetical as to how it would be -- whether it
25 would be permitted?

1 A. Sure.

2 We had a meeting last week -- the same
3 one that Chris Yates referred to -- that was set
4 up by our staff attorney, Brian Hulbert. In that
5 meeting, we talked about some different options
6 for offices; and one of those was would we be
7 able to permit a floating office? I had to do
8 some more research. I wasn't able to provide an
9 answer at that point, but I provided an answer in
10 an email yesterday.

11 Q. And what was your answer?

12 A. Yes. As I earlier stated, as long as
13 it's related to a water -- a use that has to be
14 on the water to operate.

15 Q. And I'm presuming -- and correct me if I
16 am wrong -- that that is in conjunction with
17 appropriate plans being drawn up and submitted to
18 the Town that would fall under Mr. Yates' area?

19 A. Absolutely. And town -- the planning
20 staff would have to look at it as well for design
21 considerations and anything else related to the
22 LMO.

23 Q. The building that is shown in
24 Plaintiff's Exhibit No. 04, I would suggest to
25 you has been being used as commercial office

1 building and accept my question, for purposes of
2 that, for years.

3 Has there been at any point in time
4 until you met with Mr. Lesemann and Mr. Freedman
5 last week, any requests to the Town Hilton Head
6 to evaluate the propriety of a floating office
7 building appropriately?

8 A. I'm not aware of any.

9 Q. Do you have any better recollection,
10 Terry, as to whether or not Mr. Freedman
11 indicated any particular reason that the building
12 had not been brought to the Town's attention --
13 the building being the shed -- in the last ten
14 years until the Town went out and investigated it
15 and found it to be in violation?

16 A. Do I know why he didn't come before ten
17 years?

18 Q. I'm sorry. I poorly worded the
19 question.

20 Do you have any better recollection as
21 to whether Mr. Freedman or Mr. Lesemann indicated
22 any particular excuse or explanation as to why
23 the building had been being illegally used for
24 the last ten years?

25 A. I don't.

1 MR. TAYLOR: Your Honor, nothing
2 further.

3 CROSS-EXAMINATION

4 BY MR. LESEMANN:

5 Q. Miss Lewis, I show you an email that
6 we've premarked as Defendant's Exhibit No. 83 for
7 the record.

8 Miss Lewis, do you recognize that email?

9 A. I do.

10 Q. Could you describe that email for the
11 Court?

12 A. Sure.

13 This was an email that I sent to you
14 yesterday afternoon related to our meeting that
15 we had had the previous week about whether the
16 Town would allow a floating office in the
17 conservation zoning district.

18 Q. And as you explained in response to the
19 questions from Mr. Taylor, did you, as the land
20 management ordinance officer for the Town of
21 Hilton Head, confirm that that would be an
22 allowed use within the conservation district?

23 A. I did.

24 Q. Okay.

25 A. For -- and, again, only certain kinds of

1 uses. Not every office use.

2 Q. That it needs to be a water -- basically
3 a water-related -- and I don't want to use words
4 that you didn't use. But go ahead and -- and you
5 may have already said it.

6 But, again, if you could explain the
7 instances when the floating office would be
8 permitted under the Town's land management
9 ordinance.

10 A. Sure.

11 So my email -- and I was careful about
12 how I worded it -- was that I believe that a
13 floating office that sells tickets for a use that
14 must occur on the water, such as a ferry,
15 qualifies under the other -- other services for
16 watercraft portion of the definition of "marina."

17 Q. And in response to your questions for
18 Mr. Taylor, you indicated that administrative
19 support for a barge operation, for a ferry
20 operation, again, that falls within this idea of
21 office that would be related to a water-dependent
22 or a water-related use?

23 A. Yes. Because it has -- that portion of
24 use has to occur on the water.

25 Q. And so is this a true and accurate copy

1 of the determination that you had made and sent
2 on behalf of the Town of Hilton Head?

3 A. It is.

4 MR. LESEMANN: So, Your Honor, just
5 would move for this to be admitted as Defendant's
6 Exhibit No. 83.

7 MR. TAYLOR: No objection, Judge.

8 THE COURT: All right. That will
9 be Defendant's Exhibit No. 83. Thank you.

10 (Defendant's Exhibit No. 83 is admitted
11 into evidence.)

12 Q. Miss Lewis, if I could ask, based on
13 that determination, while there would be a
14 component of submitting building plans to the
15 building department and things of that nature,
16 from the standpoint of zoning and of your
17 determination, does that determination,
18 essentially, mean it's an allowed use?

19 It's not the kind of thing that would
20 have to go through a BZA review or something else
21 like that in terms -- or just confirm that that
22 use in this specific context is permissible under
23 the LMO; is that correct?

24 A. That's correct. It would not have to go
25 through the BZA or any other body.

1 Q. Okay. Great.

2 MR. LESEMAN: Thank you so much.

3 THE WITNESS: You're welcome.

4 MR. LESEMAN: No further
5 questions, Your Honor.

6 MR. TAYLOR: Nothing from the
7 plaintiff, Your Honor.

8 THE COURT: I have no questions.
9 Thank you so much.

10 (The witness was excused.)

11 MR. TAYLOR: Your Honor, call Ed
12 Barteet.

13 THE COURT: Good afternoon.

14 EDWARD BARTEET,
15 having been first duly sworn, was examined and
16 testified as follows:

17 THE COURT: Please have a seat.
18 State and spell your whole name for the record.

19 THE WITNESS: My name is Ed
20 Barteet. Edward Barteet, B-A-R-T-E-E-T.

21 DIRECT EXAMINATION

22 BY MR. TAYLOR:

23 Q. Good afternoon, Mr. Barteet. Thank you
24 for being here today.

25 You're here voluntarily subject to my

1 subpoena; correct?

2 A. Yes, sir, I am.

3 Q. Mr. Barteet, where do you live?

4 A. Charleston.

5 Q. What do you do?

6 A. I am a producer for Strickland Marina
7 Insurance.

8 Q. What does that mean?

9 A. I -- I work for the agency and solicit
10 business, insurance business, between the client
11 and the carrier.

12 Q. How long have you been employed by
13 Strickland?

14 A. Eight years. Six years.

15 Q. Do you know Mr. Freedman, who is here in
16 the courtroom?

17 A. I do, yes, sir.

18 Q. Do you know Mr. Scurry?

19 A. I do, yes, sir.

20 Q. In fact, you have worked with both of
21 them for the procurement of insurance for both of
22 their entities; correct?

23 A. Yes.

24 Q. Mr. Barteet, tell me a little more.

25 Besides the eight years at Strickland, do you

1 have other years of experience in the insurance
2 business?

3 A. No, I do not.

4 Q. What did you do before that?

5 A. I was in the marine -- I was a yacht
6 broker for 20 years for Palm Beach.

7 (Plaintiff's Exhibit No. 13 was marked
8 for identification.)

9 Q. Mr. Barteet, you brought a document to
10 me subject to my subpoena. I requested a copy of
11 the Broad Creek Marina policy that was in effect
12 from April -- or excuse me. During October of
13 2016, and you brought me what I've marked as
14 Plaintiff's Exhibit No. 13.

15 Is that, in fact, the policy?

16 A. It is, yes, sir.

17 Q. How did you get that? From the files?

18 A. Yes, sir. From the office.

19 Q. And is that a policy that we could call
20 property insurance on the docks at Broad Creek
21 Marina?

22 A. Yes, sir.

23 Q. That was in effect at the time Hurricane
24 Matthew came through?

25 A. I'm not sure the day of Matthew but --

599

1 Q. I'll suggest to you that Hurricane
2 Matthew came in October of 2016.

3 A. Okay.

4 Q. With that in mind and accepting that as
5 the truth, tell me, was that policy in effect at
6 that time?

7 A. Yes.

8 Q. What is the deductible on the Broad
9 Creek Marina policy?

10 A. I do not know.

11 Q. Can you look?

12 A. I'd have to look. I don't have my
13 glasses. I believe it's \$10,000 for all perils
14 except for wind, hail, and flood, which is
15 40,000.

16 Q. Does a hurricane fall under the wind,
17 hail, and flood deductible?

18 A. Yes, sir.

19 Q. Yes?

20 A. It does, yes.

21 Q. So the deductible for the Hurricane
22 Matthew damage, if any, there had been was
23 \$40,000?

24 A. I believe so.

25 Q. How are deductibles normally put into a

1 policy? Terribly-worded question.

2 Does the purchaser of the policy
3 normally decide what he or she is going to have
4 as a deductible?

5 A. The carrier decides that.

6 Q. The carrier does?

7 A. Yes, sir.

8 Q. And does the carrier normally offer
9 different deductibles for different prices on the
10 policy?

11 A. It's possible, but they normally just
12 send you one back and your request. Normally
13 it's just a -- what they send initially.

14 Q. And in this case it was \$40,000?

15 A. Yes, sir.

16 Q. Mr. Barteet, based on your background
17 and experience in the industry and the eight
18 years with Strickland, can you tell me whether or
19 not a dock -- or dock, let's say, at a marina,
20 can be doubly insured by two parties, one that
21 owns it and one who leases a portion of it?

22 A. That's up to the carrier --

23 Q. All right.

24 A. -- I would say.

25 Q. Do you recall having a discussion with

1 Mr. Scurry as to whether or not he could purchase
2 property insurance on the dock at Broad Creek
3 Marina to cover any leasehold exposure he might
4 have?

5 A. I don't recall a conversation, but I
6 know what I would have said.

7 Q. What would you have said?

8 A. And that would be unless you -- if you
9 don't own the property, you can't insure it,
10 unless there's some instrument between the
11 landlord and the tenant that would require you to
12 insure it.

13 Q. Very good.

14 MR. TAYLOR: Your Honor, one
15 second, please.

16 BY MR. TAYLOR:

17 Q. Mr. Barteet, do you have, based upon
18 your background and knowledge and experience in
19 the industry, an opinion as to the propriety of a
20 boat being moored in a marina during a hurricane?

21 MR. LESEMANN: Your Honor, I just
22 would object to the lack of foundation calling
23 for opinion testimony from someone that would
24 not, you know, be a licensed -- or unless,
25 Mr. Barteet, you're a licensed captain or you're

1 a veteran of the Coast Guard, I just don't
2 believe that would be an appropriate question for
3 the witness.

4 THE COURT: We've got a couple of
5 issues. I don't know if he was disclosed as an
6 expert. I guess you're trying to make him an
7 expert.

8 MR. TAYLOR: He was not, Your
9 Honor.

10 THE COURT: So I don't know if I
11 can -- and you're -- it's not your intent to try
12 to turn him into an expert?

13 MR. TAYLOR: It is not, Your Honor.

14 THE COURT: Yeah. I'd have to
15 sustain the objection then. Thank you.

16 MR. TAYLOR: It was my intent just
17 to get that question asked.

18 THE COURT: Right. I understand.

19 BY MR. TAYLOR:

20 Q. Mr. Barteet, do you have any experience
21 in your background in the insurance business with
22 evaluating claims for marinas that were
23 purportedly damaged by boats that were moored at
24 the dock?

25 A. I do not.

1 MR. TAYLOR: Okay. Nothing
2 further, Judge.

3 MR. LESEMAN: Thank you, Your
4 Honor.

5 CROSS-EXAMINATION

6 BY MR. LESEMAN:

7 Q. Mr. Barteet, you may have given the
8 glasses back; but could you point -- oh, you
9 didn't. Good. Can you point me to the policy to
10 where you saw that figure?

11 A. Hopefully I read currently. I
12 haven't --

13 Q. You may have.

14 A. I've not reviewed this policy in quite
15 some time. It's a '16 policy. I saw it here.
16 That's in the dock schedule.

17 Q. And so do those two numbers stack in any
18 way, the 10 plus the 40; or is it just if it's
19 something that's in a wind storm and hail --

20 A. I would have to read it in more detail.
21 It's usually a named storm deductible. It
22 doesn't really say like that. I would have to
23 tell you in more detail.

24 Q. And a named storm deductible is higher
25 or lower typically?

1 A. Higher usually.

2 Q. And do you know if the policy does have
3 a named storm deductible in it?

4 A. I don't know. It's 2016. I need to
5 read through here to be able to tell you.

6 Q. Understood.

7 How long might it take you to see if
8 there's a named storm -- if in there, it's in
9 there, I guess.

10 A. Yes.

11 Q. And Matthew was a named storm?

12 A. Yes, sir. Obviously.

13 Q. Based on your experience, if you were
14 going to see a named storm deductible, you
15 normally would see it on that same page or --

16 A. It could be anywhere. They all do it
17 differently.

18 Q. Okay.

19 A. That's why, if I'd known you were going
20 to ask, I'd be more prepared. I just don't know.

21 Q. That's part of the fun is that you don't
22 know what's going to get asked.

23 So you're able to see the wind storm
24 deductible is \$40,000. Upon further review, but
25 it would be within the policy, there could be a

1 named storm deductible that would be some
2 different amount?

3 A. It would, yeah. It may be a combination
4 of those two. I don't think so, but I'm not
5 sure. I'm not sure.

6 Q. Right. If there was a named storm
7 deductible, you'd expect that it might be higher?

8 A. Well, I don't know. I would expect
9 anything. I wouldn't --

10 Q. Sure.

11 So, Mr. Barteet, do you have any --
12 would you be the person that would be asked to
13 assist Mr. Scurry, for example, for adding an
14 additional named insured, such as the landlord,
15 to the tenant's policies? Is that something that
16 would come through you?

17 A. Through me or my office.

18 Q. Are you aware of Broad Creek Marina,
19 Mr. Freedman's entity, Broad Creek Marina
20 Operations or Broad Creek Marina --

21 A. I'm not sure if it is or not.

22 Q. No knowledge one way or the other?

23 A. No, sir. I heard today. I wish I'd
24 known the answer to that.

25 Q. Oh, sure. You didn't know you needed to

1 study every policy.

2 Do you know whether the -- Mr. Scurry
3 has increased the coverage amount with his -- of
4 his policies consistently with the rate of
5 inflation since 1993 --

6 A. I do not.

7 Q. -- going forward?

8 A. I do not.

9 MR. LESEMANN: No further
10 questions, Your Honor.

11 THE COURT: Anything else?

12 MR. TAYLOR: Your Honor, he may be
13 excused. Nothing else.

14 (The witness was excused.)

15 THE COURT: Is that it for today?

16 MR. TAYLOR: Your Honor, at this
17 point in time, I would propose to publish certain
18 excerpts of the 30(b)(6) deposition, as was
19 noticed by my filing on May 13 of my intention to
20 do so.

21 For purposes of helping the Court
22 run more efficiently, I would suggest, Your
23 Honor, that I can do this. It'll probably take
24 15 or 20 minutes to do so; and then if the Court
25 would be inclined to break today, I will have

1 less than an hour in the morning to finish up the
2 plaintiff's case.

3 THE COURT: Okay. That sounds
4 good.

5 MR. TAYLOR: And it'll help me,
6 kind of, regroup tonight and make sure so we can
7 go ahead and do it quickly in the morning.

8 THE COURT: All right.

9 MR. LESEMANN: Mr. Taylor, are you
10 amenable at all to basically us providing the
11 designations to the Court on paper, both yours
12 and my counter-designations? Or did you want to
13 go through the exercise of reading them in this
14 way?

15 MR. TAYLOR: I wanted to go through
16 the exercise only because I wanted the judge to
17 hear them. I did not receive anything from you
18 as far as the second -- yours. If you have that,
19 you'll give it to me, I would appreciate it.

20 MR. LESEMANN: Sure. No problem.
21 We filed those yesterday.

22 THE COURT: I think I got an email
23 on those somewhere.

24 PROFFERED TESTIMONY OF 30(b)(6) OF DEFENDANT

25 MR. TAYLOR: Your Honor, I'm

1 handing up the original seal I just broke to the
2 court reporter. Your Honor, would you like the
3 designation up there where I'm going to be
4 reading from?

5 THE COURT: You're just going to
6 read it out? You're going to skip around?

7 MR. TAYLOR: I am.

8 THE COURT: Okay. So it's in a
9 linear fashion, I'll just follow. Thanks,
10 though.

11 MR. TAYLOR: Your Honor, beginning
12 at page 13, this is the 30(b)(6) deposition, Your
13 Honor, of the Broad Creek Marina of Hilton Head,
14 LLC, formerly known as Hilton Head Island Marina,
15 LLC, with answers by Roger Freeman, Nate Jones,
16 and Robbin Rachels. The deposition was taken on
17 January the 11th, 2019.

18 Beginning on page 13, Your Honor,
19 at line 10, we will proceed to Topic Number 2,
20 the relationship and ownership interests of
21 Mr. Freedman in BCM from its inception to the
22 present.

23 Mr. Freedman, I believe I
24 understand. But my question is: What happened
25 to your brother's interest? Did you buy him out?

1 Answer, I bought him out.

2 Did your brother have any role in
3 the operations or management today? No.

4 Question, where is he? In Miami.
5 His health is well, but he is not involved in it?
6 Mr. Freedman, his health isn't well; but he is
7 not involved in it.

8 It appeared that Richard Freedman
9 signed the original lease agreement, yes.

10 Mr. Taylor, I am wondering if that
11 was a typo or if that was, in fact, your brother.
12 Mr. Freedman. Yes, he really operated the marina
13 for, maybe, the first ten years of its operation.

14 Your Honor, now, moving to page 17,
15 line 8.

16 We will proceed now with the Topic
17 Number 5, exactly where the offices of the J&W
18 Corporation agreement would have been located at
19 Broad Creek Marina since September 23, 1993, and
20 to date.

21 And that is, of course, the day of
22 the initial 99-year lease agreement was signed.
23 Who is going to speak to that? Mr. Lesemann said
24 that wasn't Nate. I guess there would be a time
25 period before you, Miss Rachels, yes.

1 Mr. Lesemann, would you like to
2 take first crack at it? Mr. Freedman, yes, I
3 would. Mr. Freedman, between '93 and 2003 I
4 wasn't there. So I would only be -- my
5 presumption of where he was -- and I probably was
6 at the property no more than four or five times
7 in ten years. Five times at the most, I think my
8 recollection is.

9 Your Honor, moving to page 19,
10 line 11.

11 Mr. Freedman, yes. And I don't
12 have -- I don't know that he agreed to move out.

13 Let me pick up at line 7, Your
14 Honor.

15 Mr. Taylor, what, to your
16 knowledge, happened next? Because, clearly, J&W
17 moved out from the up-the-creek building at some
18 point. Mr. Freedman, yes. And I don't have -- I
19 know that he agreed to move out, you know; but I
20 don't have specific recollections of that. And
21 we, then, or the time frame of that period, I
22 know at some period -- at some point. I don't
23 know the exact point. The houseboat, the
24 floating store, the floating office was sunk; and
25 J&W moved into a houseboat that we provided. And

1 I think they used that as their combined office
2 at the -- at that point in time.

3 Mr. Taylor, all right, will you
4 continue to walk me through? Mr. Freedman, your
5 understanding of where physically J&W's office
6 operations was located because you have just said
7 that at some point in time, they were back in the
8 houseboat or a floating office.

9 Mr. Freedman, right. And then the
10 part that I don't recall is really more during
11 the time that the marina was reconfigured, and I
12 think I am not sure whether or not the house -- I
13 think the houseboat sunk before the marina was
14 reconfigured. And then when the marina was
15 reconfigured, they were at a location in a
16 houseboat that was in between the docks that J&W
17 have a lease on.

18 Mr. Taylor, and then what happened
19 when their office -- with their office location?
20 The boat sunk, and then I think Mr. Jones will
21 take it from there.

22 Going to page 21, line 10, Your
23 Honor.

24 Mr. Taylor, when you -- when your
25 memory was J&W relocated into the office -- when

1 to your memory was J&W relocated into the offices
2 that you mentioned in the current up-the-creek
3 building?

4 Mr. Freedman, I didn't because I
5 don't have a recollection of that. It had to
6 be -- I can give a summary only because when
7 up-the-creek was built in about '06, it had to be
8 around that time. It might have been later
9 actually because I don't think we used all the
10 office. I'm sorry. My recollections are really
11 hazy.

12 Moving to page 24, Your Honor,
13 line 8.

14 How in your memory did J&W then end
15 up in the building in which they currently
16 occupy? Mr. Freedman, Nate will address that.
17 Mr. Taylor, do you have any recollection of it?
18 Mr. Freedman, yes.

19 Mr. Taylor, tell me what you do and
20 then we will ask Nate. Mr. Freedman, the
21 floating -- the houseboat started sinking or
22 sank, and they needed space; and they got moved
23 into that space.

24 Mr. Taylor, and when you say that
25 space, we're talking about the same building that

1 they are currently in. Mr. Freedman, that they
2 are currently in, yes, sir.

3 Line 21.

4 Mr. Jones, will you tell me what
5 your recollection -- first Nate, let me get it
6 out of the way. When did you join Broad Creek
7 Marina on a full-time basis? May of 2008.

8 Page 27, line 9, Mr. Jones, J&W was
9 located in a floating office.

10 Question, Nate, when you came to
11 Broad Creek Marina in 2008, where was J&W
12 located?

13 Answer, J&W was located in a
14 floating office in between the lease spaces on
15 the dock.

16 And, Nate, when you say in between,
17 do you mean in between the fingers? Basically
18 there is a U that is part of the lease space. I
19 would say in the U or the horseshoe. What
20 happened to the office? The office began taking
21 on water and ended up where it was uninhabitable
22 sinking wise.

23 Who owned that office?
24 Mr. Freedman owned it, to my knowledge. I did
25 not. I was not there on the purchase. I

1 understand. It was in existence when I arrived.
2 And what was causing the water to be taking on?
3 Do you know? My recollection of that is not
4 exact, but I would attribute it to some sort of
5 hole probably.

6 Mr. Taylor, probably. Nate, did
7 you work with Mr. Scurry toward relocating J&W's
8 offices at the time? Yes. Excuse me.

9 Mr. Jones, I did. Tell me about that. What was
10 said by whom, and what did you agree to?

11 That was in the late -- that was in
12 late '09, I believe, and I believe we
13 communicated that there was some office space in
14 where -- in where they currently locate that
15 would be suitable for their office, and that was
16 agreed to. You and I had some correspondence at
17 that point. I -- Nate, that was the building
18 being used -- was that the building -- pardon me,
19 Judge.

20 Nate, what was the building being
21 used for that J&W is currently located prior to
22 them moving into? Answer, an office for a
23 kayaking operation, which one at the time it was
24 Water Dog Kayak. Who owned or ran Water Dog
25 Kayaking? David Flynn. Ms. Rachels may have

1 recollection of the last name, if we need to
2 bring it up.

3 Is Water Dog Kayaking or an entity
4 related to them still in operation at Broad Creek
5 Marina? No, sir. When J&W moved into the
6 office, was Water Dog still there and occupying a
7 part of it? Initially, we moved them next door
8 in the same part of that shed to a small piece
9 adjacent to it.

10 Right. Which if you were standing
11 in front of it looking at it, it would be on the
12 right side; right? Yeah. If you were looking at
13 J&W's current, what we would call, format would
14 be to the right. Yes, where there is another
15 ticket window and another awning there, correct.

16 Is there anybody in there right
17 now? No. Prior to Water Dog Kayaking occupying
18 the building, do you know what it was used for?
19 I do not. Was Water Dog in it when you were
20 hired by Broad Creek Marina? Yes. And was the
21 portion that J&W's currently using in operation
22 was an office with Water Dog at that point in
23 time? Yes, I believe it was.

24 So Water Dog was moved over to the
25 right, and J&W was put in there? Correct. What

1 is your understanding of what that building was
2 originally built for? I wasn't there when it was
3 originally built. So I don't know what it was
4 originally built for.

5 What have you either heard or been
6 told? Mr. Jones, I have heard the legend that it
7 was a boat shed. Mr. Lesemann objected to the
8 form. As to Mr. Taylor, Nate, will you tell me
9 about any discussions you remember having with
10 Mr. Scurry or any of his representatives
11 concerning J&W's agreement to be placed in that
12 building and how long it would last?

13 Mr. Jones, I do not specifically
14 remember any of those discussions. On
15 preparation for this, I did see some
16 correspondence from you at some point, I believe.
17 But that is -- I just saw the dates. I don't
18 remember the specific conversations we had at
19 that time.

20 Moving to page 43, line 14.

21 Do you have any other recollection,
22 other than that -- other than what you just
23 testified to concerning interaction with
24 representatives of J&W about their current office
25 location?

1 Mr. Jones, the only thing I would
2 say is I remember them not being completely
3 dissatisfied that they were moved to that office.
4 And tell me the facts that relate to that memory.
5 I don't remember a huge dumpster fire blowing up
6 in -- in conversations that, you know, they would
7 have been heated at that time if the situation
8 was disagreeable. And I do not recall --
9 recollect that that was -- that that was that
10 much of a disagreeable situation.

11 Moving to line 2, page 39, Your
12 Honor.

13 To your knowledge, has the Town
14 ever authorized the shed structure that J&W is
15 currently occupying to be used as an office
16 building? Mr. Freedman, not to my knowledge.

17 Mr. Jones, in the 2009 time frame,
18 when you were working with J&W toward relocating
19 their office space from the sinking or water-
20 taking-on office to another location, were you
21 aware of this document, Exhibit Number 2?

22 And I'll represent to the Court,
23 Your Honor, that that is the settlement
24 agreement.

25 THE COURT: I lost you for a

1 second. Where are you?

2 MR. TAYLOR: I'm on page 43, Your
3 Honor.

4 THE COURT: Page 43. Go ahead.

5 MR. TAYLOR: At line 10.

6 Mr. Jones' answer -- I asked him
7 was he aware of the settlement agreement? At
8 that time I believe so, but I can't recollect if
9 I was aware of that at the time.

10 Did you understand that it contains
11 an agreement as to how J&W's office space will be
12 handled? I would say that I knew of the space
13 requirement that needed to be filled --
14 fulfilled. And it was communicated to me that
15 space would satisfy.

16 The shed would satisfy the space
17 requirement that was set forth in the lease or
18 settlement. I don't know that I knew the
19 difference between the two at the time.

20 Mr. Taylor, understood. But what
21 you are telling me is that, as you knew was --
22 that there was a requirement that Broad Creek
23 Marina provide J&W with an office space? That
24 was communicated to me, yes. And you didn't know
25 where it was supposed to be or whether there was

1 any other parameters to it; correct? To my -- to
2 recollect at that time, I don't recollect if I
3 knew or -- knew or not what the stipulations
4 there were.

5 Did you ever become aware of an
6 issue regarding the placement of J&W's office
7 space and whether it conformed with what is
8 required by Exhibit Number 2? At some point I --
9 I became aware, obviously.

10 I would have read the document at
11 some point there, and was made aware by either
12 yourself or Mr. Berglind at Vaux & Marscher that
13 there were stipulations that would be in these
14 agreements.

15 What actions did you take, if any,
16 once you found out there were requirements set
17 forth in Exhibit Number 2 pertaining to where
18 J&W's office would be located. Mr. Jones, I
19 can't recall.

20 Moving to page 46, line 18, Your
21 Honor.

22 When did the issue of potentially
23 then relocating them into a floating office
24 arise, Mr. Freedman? I do not recall the
25 specific dates.

1 I said -- you said you do not
2 recall what you did -- that you did something
3 with the floating office. Tell me the best of
4 what you knew. Mr. Freedman, I don't know the
5 time frames to it. Mr. Taylor --

6 Well, we're at page 48 now, Your
7 Honor.

8 Well, what would be your testimony
9 as to when the earliest time frame was that you
10 allegedly notified J&W that you wanted to move
11 them out of the shed space they are currently in
12 and into another situation, apparently a floating
13 office.

14 Mr. Freedman, I don't have a time
15 recollection. Did you understand that you were
16 going to be asked these questions today about
17 this? Yes. Did you make any effort to try to
18 review any documents that would refresh your
19 recollection about that? I was understanding
20 that I was to rely on my recollection.

21 Moving to page 50, line 5, Your
22 Honor.

23 What was the catalyst that brought
24 you to the thought process that you were going to
25 start looking for a floating office?

1 Mr. Freedman, I think we were giving some
2 consideration either to the plans at a point in
3 time to add a restaurant facility and eventually
4 wanted to have them back to where he was supposed
5 to be in there. Because I knew at some point in
6 the future, I would develop that land; and it
7 wasn't the appropriate land for a ticket office
8 for Daufuskie, both in terms of the economic
9 value of the land or the agreements that we had
10 in our lease.

11 Page 51, line 23, Your Honor.

12 And tell me what steps, then, you
13 took to get permission or authorization from
14 either the Town or the Office of Coastal Resource
15 Management concerning the creation of such a dock
16 or such a houseboat or office on the water.

17 Mr. Freedman, we did have the
18 office permitted to do it. For us to take any
19 further steps, we needed Mr. Scurry's agreement
20 to do it. Because you have to have additional
21 permits to be able to do it, and we never were
22 able to get his agreement to do it. So we
23 couldn't take additional steps.

24 Mr. Taylor, I'm sorry. I don't
25 understand that. I'm sure it is me. Would you

1 walk me through it again?

2 Mr. Freedman, we have an OCRM
3 permit for a floating dock at a location that was
4 adjacent to the shore. The shore filled up
5 because all the waters on or close to the shore
6 on the Broad Creek fill in. So where he was
7 supposed to go start filling in, which was, sort
8 of, his original location that was in the
9 exhibit, the settlement exhibit.

10 In order to give him a suitable
11 office, we would have to move that office into
12 another location where he had operated the
13 floating -- the houseboat. That requirement to
14 move the permitting location required a change in
15 OCRM, and I am not sure that it would have
16 required a change from the Town. For us to make
17 that application, it didn't make sense unless we
18 had his approval.

19 Mr. Taylor, okay. So I understand
20 from your testimony that you were telling me that
21 you all -- you and whomever you were working
22 with -- made a decision that you were going to
23 get OCRM approval for a floating office to be
24 attached to a portion of your docks at this new
25 floating office; right?

1 Mr. Freedman, we already had the
2 approval. What we needed to do was have approval
3 to relocate the location.

4 Mr. Taylor, I wanted to get back to
5 when you first got this approval because I
6 thought I understood your testimony to be that
7 you had -- that you all had this idea that you
8 were going to do to this type of house and put it
9 on floats.

10 The first question I have is: You
11 clearly understood that would require OCRM
12 approval; correct? Mr. Freedman, well, we had
13 OCRM approval to put it where he was supposed to
14 go. It was a question of whether we wanted to
15 give him a better space. So if Mr. Scurry wanted
16 to be where he wanted to go, we could put him
17 right there; but we didn't think that was going
18 to be acceptable to him.

19 Moving to page 55, Your Honor.
20 Line 7.

21 Now, do you know whether or not you
22 had any type of specific permit from OCRM or the
23 Town for the existence of that floating office on
24 your docks at that point? Mr. Lesemann, Tom, I
25 just want to object to the form. Just for

1 clarification of the testimony, I think that is
2 when they had the houseboat, not the floating
3 store. I think there's a distinction.

4 Mr. Taylor, thank you. Mr. Freedman, I don't
5 think there were any permits that I'm aware of
6 for the houseboat.

7 Moving to page 59, Your Honor.

8 Mr. Taylor, at line 14, tell me,
9 again, what you intended that to be.

10 Mr. Freedman, initially at the time when the
11 docks were being reconfigured and we got it
12 permitted -- and I can't remember if we permitted
13 it before this or subsequently after that; but it
14 was permitted.

15 There was an OCRM permit for that
16 space. Okay. But apparently, unfortunately,
17 that has now silted in and you cannot have
18 something there; is that right? Mr. Freedman,
19 you could; but it wouldn't be that comfortable
20 for somebody.

21 Mr. Taylor, in fact, it would be on
22 the ground at low tide. Mr. Freedman, right.
23 Exactly. Mr. Taylor, which, with your background
24 and experience, would certainly lead to the
25 probability of danger for the floating.

1 Mr. Freedman, right. That is why we didn't
2 really -- we wanted to move it.

3 Okay. Mr. Freedman, yes.

4 Mr. Taylor, did you not -- do you -- or do you
5 have or have you ever had a permit for OCRM to
6 locate a similar-type floating store or office
7 space at Broad Creek Marina in any other area?
8 Mr. Freedman, no.

9 There is, though, in existence
10 right now, a floating office of some type at
11 approximately this location. Mr. Freedman, that
12 is correct. Mr. Taylor, and what is that
13 serving? Mr. Freedman, initially we got it in a
14 sense to see what we could do with it and thought
15 maybe we would use it. Because I believe my
16 recollection was that the space that was
17 permitted exceeded the space obligated to
18 Mr. Scurry. So that we would have some space for
19 ourselves and some space for Mr. Scurry.

20 We built this store to see, in a
21 sense, if we could do it and if it were suitable,
22 we would put it out there. Subsequently, we
23 never used it; and an existing tenant asked if
24 they could occupy it. Didn't pay us additional
25 rent. In a sense don't have a lease for that

1 property. They just occupy and utilize it.
2 There are tenants there that have preceded my
3 involvement and even my ownership and my
4 brother's ownership in the marina. So they
5 occupy the space now.

6 Mr. Taylor, who is that tenant?
7 The are called -- it is Sky Pirates? Sky Pirates
8 is the tenant. Mr. Taylor, the floating office
9 that Sky Pirates is now in, is that, in fact, the
10 office that you had built after you started
11 thinking about moving J&W back down there? Yes,
12 but it wasn't for J&W.

13 Who was it for? It was going to be
14 for our use. And when you say our use? The
15 marina's use.

16 Moving to page 65, line 18, Your
17 Honor.

18 Mr. Freedman, what happened to the
19 plans for the dockmaster's house? We never went
20 forward with it.

21 Page 69, line 1, Your Honor.

22 What -- was a floating store or a
23 floating office of any type ever actually placed
24 in the area that you pointed out to me on
25 Exhibit 2 earlier?

1 And Exhibit 2, again, being the
2 settlement agreement, Your Honor.

3 Mr. Freedman, no, but -- let me get
4 the question out. That you pointed out to me was
5 the intended area on page 46 of Exhibit 2, did
6 you have place on there? Mr. Freedman, no, but
7 it was permitted.

8 I understand that. So you were
9 permitted to put one there, but you never put it
10 there. That is correct. So then it filled in
11 with mud so that the permit could not be used;
12 correct? Yes.

13 So we understand each other, in
14 order to put another floating office anywhere
15 along here, you would have to have another permit
16 from OCRM. Mr. Freedman, that is correct. And
17 you have never applied for that? That is
18 correct.

19 And Mr. Scurry has never agreed to
20 move there, and the two had to go hand in hand;
21 and as I said on numerous occasions, we tried to
22 get his acquiescence. Mr. Taylor, did you
23 believe that Broad Creek Marina needed any type
24 of further Town approval for the location of an
25 office and a new place on the docks?

1 Mr. Freedman, I don't, you know, I don't think
2 so. I'm not sure I am correct though.

3 Moving to page 78, Your Honor.

4 Mr. Freedman, as you preliminarily
5 let me make sure -- as a preliminary, let me make
6 sure you were the representative of Broad Creek
7 Marina that negotiated and executed the Release
8 and Confidential Settlement Agreement. Was I the
9 officer for the company? Yes, yes, sir.

10 Was anyone else involved with Broad
11 Creek Marina? No. Mr. Freedman, tell me,
12 please, what lead to the apparent controversy
13 from which the Release and Confidential
14 Settlement Agreement came? I think there was --
15 and, again, I don't remember all the detail about
16 it. I think I just -- there was a lot of
17 disputes going back and forth, and I don't
18 remember any detail of it.

19 Moving to page 84, Your Honor.

20 And then the second category is lot
21 maintenance based on eight man hours per week.
22 Now, tell me what it meant to you on the day you
23 signed it. Mr. Lesemann, so Tom, I will do a
24 general objection in terms of asking the witness,
25 the corporate representative, about their

1 understanding of meaning of any of the terms in
2 the document just in terms of them being a
3 written statement.

4 Understood. You may answer,
5 Mr. Freedman. Well, I don't remember what my
6 understanding was at the time because I don't
7 have a remembrance of it. I only remember what I
8 see now. I know what I see now.

9 The parking lot or property
10 insurance, do you have a recollection as to what
11 your understanding was of what that would cover
12 at the time you signed the agreement?

13 Mr. Freedman, I just recall that we had a number
14 of disputes. We signed an agreement and then --
15 and they were outlined in the document.

16 And what, in looking at the words
17 parking lot and property insurance, which is an
18 item set forth on this to which J&W agreed to pay
19 32 per year -- 32 percent per year of, what was
20 going to be in that parking lot and property
21 insurance? Mr. Freedman, I do not have a
22 recollection.

23 Page 92, Your Honor.

24 So is it your testimony that there
25 was not any discussion had at the time Exhibit 2

1 was signed concerning any change in obligation of
2 insurance? Mr. Freedman, I have no recollection.

3 Let the record reflect that I've
4 handed Mr. Freedman Exhibit 2, which, again, Your
5 Honor, is the settlement agreement.

6 I understand under the original
7 99-year lease agreement dated 1993, did J&W have
8 an obligation to pay a portion of your property
9 insurance that you brought to -- that you bought
10 to cover your docks and piers?

11 Mr. Lesemann objected to the form.
12 You can answer the question. Mr. Freedman, the
13 answer is yes. Based on what, Mr. Freedman? A
14 section of the original lease, subheading 3, that
15 says, tenant shall pay annually, commencing with
16 the execution of this lease, any and all amounts
17 expended by landlord for liability, property, and
18 casualty insurance pursuant to paragraph 7
19 entitled liability insurance or to be allocated
20 pursuant to paragraph 5 entitled licensing fee
21 and other costs.

22 What would be the provision of the
23 original agreement? That would be the original
24 of the -- that would be the provision of the
25 original agreement you would point to to say,

1 yes, they had an obligation to pay.

2 Right. And then there was another
3 obligation that said they had to carry their own
4 insurance in Section 17, the liability insurance.
5 It requires the tenant to have insurance for
6 personal property, trade fixtures, property
7 damage, as well as environmental coverage, public
8 liability policy in all forms, et cetera, and
9 satisfactory to the landlord.

10 Going to page 97, Your Honor.

11 Did Broad Creek Marina ever have an
12 instance from 1993 forward where your insurer
13 charged you additional money for the fact that
14 J&W was doing something on your docks?

15 Mr. Freedman, I don't know.

16 Page 100, Your Honor.

17 Well, my question is: Did the Town
18 take action against Broad Creek Marina for making
19 an unpermitted expansion of the up-the-creek
20 building at that point in time? Mr. Freedman,
21 yes, they did.

22 And did that include incurring into
23 the critical line and the critical zone there on
24 the marsh? Mr. Freedman, yes. And that was a
25 result of construction that was done in an

1 unpermitted fashion by Broad Creek Marina to
2 expand the porch; is that correct? Mr. Freedman,
3 that is correct.

4 And that, ultimately, results in
5 Broad Creek Marina not only paying a fine, but
6 redoing some of the work that had originally been
7 done to expand the porch because it had been done
8 unpermitted; correct? Right? Mr. Freedman, I
9 don't recall the fine. It was probably fairly
10 nominal if it was, because I would remember a
11 number if it was significant.

12 Skipping to page 118, Your Honor.

13 All right. Back -- Number 29,
14 Nate, this is probably back to you. The topic
15 being described, Your Honor, was the topics of
16 the 30(b)(6).

17 All damages you allege J&W has
18 caused to any portion of Broad Creek Marina
19 between January 1, 2010, and today's date.
20 Mr. Jones, that is a lengthy list.

21 Mr. Taylor, all right. I am ready.
22 Bear with me. The dates might not be in
23 chronological order. So the hurricane -- we'll
24 start with Hurricane Matthew. Boats being moored
25 to portions of the embarkment and debarkation --

1 embarkation and debarkation in portions of the
2 lease area. Damage that occurred there due to
3 the mooring of the vessels.

4 There was cleat damage in the
5 subsequent Hurricane Irma to multiple cleats as
6 discussed with the managers of J&W. Those have
7 all been rectified by Broad Creek Marina. We had
8 an incident occur where the ferry boat went
9 forward, but that was J&W's -- that was one of
10 J&W's vessels went in forward. I believe you and
11 I worked on that together.

12 That has been resolved, money paid
13 and releases signed; correct? Okay. That
14 incident, yes. Does Broad Creek Marina contend
15 in this lawsuit that J&W owes them money related
16 to that incident where the ferry boat went
17 forward and crashed into the dock? Mr. Jones, to
18 my knowledge, in this suit, no.

19 The question for you, does Broad
20 Creek Marina, does that involve the boats at
21 Broad Creek Marina in that definition of
22 "marina"? Mr. Taylor, yes. Mr. Jones, I am just
23 going down a chronological list. The barge made
24 contact with two vessels moored at the Broad
25 Creek Marina, which was our customers in which

1 J&W paid for the repair of those damages.

2 So that one has been resolved also.

3 Yes. Okay. Mr. Jones, the multiple pilings that
4 have been damaged due to use of the Barge Creek;
5 and then along the way, I have replaced cleats
6 and power pedestals at the expense of Broad Creek
7 Marina on the leasehold space that were -- that
8 were embarkation/debarkation areas due to the
9 usage of the ferry. Also damage that alleged
10 Broad Creek Marina.

11 The continual use of golf carts on
12 the wooden pier, what we would refer to as the
13 wooden pier, as well as pickets in the bars of
14 the fence basically. That is a weekly battle to
15 fix that is due to the use of J&W as well as the
16 decking itself.

17 J&W has damaged the concrete in
18 front of Up-the-Creek Pub and the loading and
19 unloading -- in the course of the loading and
20 unloading of the barge. When excavators load on
21 the barge, they eat up concrete. They have done
22 that. It has happened before.

23 And in my belief, the concrete pier
24 has been contacted multiple times by the barge.
25 I have witnessed it resting on it, and that may

1 not be the extent. To my recollection, that is
2 it now. If Mr. Freedman has any more, of course.

3 Mr. Taylor, nothing else to answer?
4 Mr. Freedman, no, nothing other than I think some
5 of the barge contacts that were not reported in
6 accordance with Coast Guard law and requirements.

7 Page 123 and we're on the home
8 stretch, Your Honor.

9 Were those docks covered at any
10 time at the time of Hurricane Matthew by
11 insurance for Broad Creek Marina? Mr. Jones, to
12 my knowledge, yes.

13 Why did the insurance not pay for
14 that work? Because we did not submit the claim
15 to the insurance. And is there a reason the
16 claim was not submitted? The scope of work was
17 estimated to be \$44,000. The deductible with the
18 wind -- the wind and the hail deductible with
19 ours is, is the deductible is \$50,000.

20 Moving to page 126, Your Honor.

21 As to the \$44,000 in damage, who,
22 from your perspective, is prepared to testify
23 that it was, in fact, the boats being tied up at
24 the dock as opposed to the wind or the rising
25 water from the hurricane itself that caused the

1 dock damage.

2 Mr. Jones, I would be prepared to
3 testify to that. Mr. Taylor, were you there
4 during the storm? Mr. Jones, I was there about
5 six hours after. Mr. Taylor, but you were not
6 there and did not see video of the occurrence
7 during the storm; right? Mr. Jones, I have an
8 agent that would not be prepared to testify that
9 did watch it from another vessel in the marina.

10 Moving to page 133, Your Honor.

11 Does Broad Creek Marina contend
12 that J&W is currently exceeding its allocated
13 parking spaces under the terms of the lease? And
14 if so, what is the complaint? And what are
15 the -- what is the evidence of any damage?

16 Mr. Freedman, we are not making a
17 complaint. We are not making -- we are not
18 making that since Mr. Scurry's contract with the
19 county terminated. Any issues of the parking lot
20 have evaporated.

21 Moving to 138, Your Honor.

22 Mr. Jones, J&W's use of the area
23 between the parking lot and the wooden pier.
24 Yes, that is the intended -- that is intended to
25 be a walking area. There is a chain that

1 separates the parking drive from that area.

2 Mr. Taylor, right. J&W's agents or
3 employees have continually removed that chain,
4 which allows their customers to drive in that
5 area. That area was initially intended -- the
6 reason it was -- it has access is so a fuel truck
7 can access the fuel tanks; right? And no other
8 reason. We believe that to be a walking area for
9 pedestrians and a common area for ticketing
10 for -- that has never been followed and is abused
11 by all agents of J&W at all times.

12 And do you contend that there have
13 been damages that Broad Creek Marina has
14 sustained as a result of that? I refer that to
15 Mr. Freedman. Mr. Freedman, no, but I don't
16 know -- I don't think they are monetary damages.
17 But I don't want it to be an expectation or a
18 right of use because we intend to develop that
19 area. And as we develop adjacent properties, it
20 will have been a passageway; and it will become a
21 dangerous situation.

22 The third part of it is that they
23 use property that they don't have a right to. So
24 they are, in effect, like their customers
25 staging, keeping their baggage on the property

1 and things like that. I don't know that I'm
2 supposed to on our property, you know. We rent
3 stuff and do it commercially. I don't know why
4 they have an expectation not to pay for
5 additional uses of the property, but we have not
6 billed them to date on that.

7 Page 142, Your Honor, line 4.

8 There was a bungee jump erected in
9 the April 2014 time frame in the parking
10 lot/access area to the property. And I am sure
11 you all remember what I'm talking about. My
12 question is: Who decided to put it up? And was
13 that -- and was there any discussions with J&W
14 about it before you did it?

15 Mr. Freedman, they were mobile
16 attractions and -- and consummated a very small
17 amount -- and consumed, I think, is wrong, Your
18 Honor, a very small amount of space; and there
19 was no discussions with J&W. And I don't know of
20 any obligation that we would have had to J&W to
21 do that. That certainly didn't interfere with
22 its operations.

23 Mr. Taylor, you did not believe?
24 Were you there, Mr. Freedman, when they were put
25 up? Yes. So you saw them personally yourself?

1 Yes. I bought them personally.

2 Page 167, Your Honor.

3 If I wanted to review the documents
4 that showed that there was actual payment, let's
5 say, in 2014 of X number of dollars for the real
6 property insurance, what would you have -- have
7 that I could look at there? You would have a
8 check?

9 Miss Rachels, I would have the
10 invoice from the agency, right, that we paid
11 from. We don't get copies of our canceled
12 checks, but we have bank statements that would
13 correspond to the check copy receipt that is with
14 the bills.

15 When I pay a bill, there is a check
16 stub that we attach to the invoice so we know
17 what check number is paid; and then we can refer
18 to bank statements to see that that check in that
19 amount cleared.

20 Mr. Taylor, I understand. Let's
21 just say we were looking for 2009 through 2018 to
22 show the insurance billing that has been given to
23 us. Is something that you have done by pulling
24 these invoices for their premiums and gotten a
25 check stub together, or is that something you

1 would have to do?

2 That is something we would have to
3 do. That is something we are in the -- we are in
4 progress of working on. But that is possible to
5 do if Mr. Lesemann instructs you or asks you to
6 do it? Miss Rachels, yes, it will take some
7 time; and it will close.

8 Page 170, Your Honor.

9 Mr. Taylor, so the same dollar
10 amount you would be -- if we were looking at
11 Exhibit 3 -- and you can look at this, if you
12 would like to. The last page on that, I called
13 for -- it called for approximately an annual cost
14 of -- apparently an annual cost of 4,492 at that
15 point in time. And I am asking you, if that is
16 the number that you continue to use today.

17 Mr. Rachels, the number I use I
18 will need a calculator. I'm sorry. To divide
19 this by 12. But if you look at that number for
20 J&W's portion, which is 1,437.44. Yes. Per
21 month that would \$119.79. We have been billing
22 them \$133.12.

23 I don't know what the difference
24 is. I can look through my files and see if they
25 increased from '04 -- some time between '04 and

1 '09. If they increased, like the per hour rate,
2 for the person doing that or if they took into
3 consideration a little bit for supplies, trash
4 bags, soap, paper towels, toilet tissue.

5 Mr. Taylor, but you don't know how
6 that calculation was made? You were just doing
7 what would be -- yes. I just continued billing
8 them what was being billed when I started.

9 And the last one, Your Honor, page
10 195.

11 All instances where J&W has
12 allegedly failed to make fuel purchases from the
13 defendants and how it has damaged the defendants.
14 Mr. Freedman, we are not claiming damages from it
15 but -- but I didn't have a -- but I did have a
16 conversation with a deceased gentleman, Doug, the
17 owner of Palmetto Bay Marina, which he told me
18 J&W bought fuel from him; and he had canceled
19 checks to demonstrate that. Doug James. But
20 Mr. Freedman, that is not -- you are not looking
21 for damages from that, Mr. Freedman? No, we are
22 not.

23 Your Honor, that concludes the
24 readings of the designated 30(b)(6) portions for
25 Broad Creek Marina.

1 THE COURT: All right. Thank you
2 so much.

3 So my understanding is, in a moment
4 we'll recess for the day; and we'll pick it up
5 tomorrow morning at -- what time would y'all like
6 to -- I've got it scheduled for nine, but I
7 understand you're probably driving back from
8 Charleston.

9 MR. LESEMANN: Well, Your Honor,
10 for my own purpose, I'm right across the street
11 at the Hilton Garden Inn. So thank you for
12 thinking of me.

13 But we're flexible as to the start
14 time, Your Honor. We have -- we'd have three
15 witnesses. I'm sorry. Mr. Freedman,
16 Miss Rachels, and Mr. Jones. So, I mean, I don't
17 think it'll take all day but it -- there's
18 several hours of testimony.

19 THE COURT: You want to call it
20 9:30 then? That'll give me some time to do some
21 things that I didn't do today that probably need
22 signing as soon as I get here.

23 MR. LESEMANN: That would be fine
24 with me, Your Honor.

25 THE COURT: Everything work for

1 9:30?

2 MR. TAYLOR: Yes, sir..

3 (Proceedings adjourned at 5:23 p.m.)

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1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 BEAUFORT COUNTY
4 FINAL HEARING
5 VOLUME 2 of 2

6 MAY 16, 2019

7 J&W CORPORATION OF GREENWOOD,
8 Plaintiff,

9 vs. CASE NO. 2018-CP-07-1622

10 BROAD CREEK MARINA OF HILTON HEAD, LLC, f/k/a
11 HILTON HEAD MARINA, LLC; ROGER M. FREEDMAN, AND
12 BROAD CREEK MARINA, INC.,
13 Defendants.

14 BEFORE: THE HONORABLE MARVIN DUKES

15 TIME: 9:27 A.M.

16 LOCATION: BEAUFORT COUNTY COURT HOUSE
17 BEAUFORT, SOUTH CAROLINA

18 REPORTED BY: RONDA K. BLANTON, RPR
19 NCRA REGISTERED PROFESSIONAL
20 REPORTER

21 CLARK & ASSOCIATES, INC.

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1 Thursday Morning Session

2 May 16, 2019

3 9:27 a.m.

4 - - -

5 (Present are the Court, Counsel, and the
6 Parties.)

7 THE COURT: Good morning, everyone.
8 We're back in 15-1704. Before we went on the
9 record, we were sorting through the exhibits and
10 wanted to make some clarifications for this
11 record.

12 The first clarification is
13 yesterday there was offered and accepted
14 Plaintiff's Exhibit No. 09, which were answers to
15 interrogatories. Those were offered in
16 furtherance of the assertion that Trent Shaw was,
17 in fact, on the witness list.

18 The parties have agreed that Trent
19 Shaw was on the witness list, and so the issue is
20 now a nonissue; and my understanding is
21 Plaintiff's Exhibit No. 09 is withdrawn by
22 consent.

23 Further, Plaintiff's Exhibit No. 08
24 and Plaintiff's Exhibit No. 13 were offered,
25 discussed; but were not actually entered as

1 exhibits. Those by consent or at least without
2 objection are entered as Plaintiff's Exhibits
3 No. 08 and No. 13. Is that accurate?

4 MR. LESEMANN: That's correct, Your
5 Honor.

6 (Plaintiff's Exhibit No. 08 and No. 13
7 were admitted into evidence.)

8 THE COURT: Is there anything else
9 we need to take up before we launch right now
10 into Mr. Taylor's case?

11 MR. TAYLOR: Not on behalf of the
12 plaintiff, Your Honor.

13 MR. LESEMANN: Nothing from the
14 defendant.

15 THE COURT: Thank you so much.
16 Happy to hear from you, Mr. Taylor.

17 MR. TAYLOR: Your Honor, call
18 Mr. Freedman for cross-examination purposes.

19 THE COURT: Come on around, please,
20 sir.

21 ROGER M. FREEDMAN,
22 having been first duly sworn, was examined and
23 testified as follows:

24 THE COURT: Thank you, sir. Please
25 have a seat and state your whole name for the

1 record.

2 THE WITNESS: It's Roger Mitchell
3 Freedman.

4 CROSS EXAMINATION

5 BY MR. TAYLOR:

6 Q. Good morning, Mr. Freedman.

7 A. Good morning.

8 Q. Mr. Freedman, you are the owner, I
9 believe, of all of the defendants by whatever
10 name that are involved in this lawsuit; is that
11 correct?

12 A. That is correct.

13 Q. And we did some substitution yesterday
14 morning with various corporate entities, but you
15 own and control all of them.

16 A. That is correct.

17 Q. When I say "Broad Creek Marina" today,
18 can you and I have an understanding that we are
19 basically talking about all of those defendants?

20 A. Well, I think there is one entity
21 that's, sort of, separate that was, I think, part
22 of it that were just the adjacent property land.

23 Q. All right.

24 A. So exclude that.

25 Q. I'll refer to that as the "adjacent

1 property land," if that's okay.

2 A. Okay. Then I could agree to that.

3 Q. Mr. Freedman, will you tell us where you
4 live, please?

5 A. I live at 40 Yorkshire Drive in Hilton
6 Head.

7 Q. That's Wexford Plantation?

8 A. Wexford Plantation.

9 Q. And I believe you also have a home that
10 you spend a good bit of time in Florida; is that
11 right?

12 A. Yes.

13 Q. Where is that?

14 A. In Boynton Beach, Florida.

15 Q. Boynton Beach?

16 A. Yes.

17 Q. Are there any other residences that you
18 use on a regular basis?

19 A. No.

20 Q. And, Mr. Freedman, as I understand it,
21 you are a retired -- at least the magazine
22 article I read says that you're a retired
23 banking, real estate, communications, and
24 biotechnology former executive; is that right?

25 A. That's, essentially, correct.

1 Q. And you'd spent 16 years at Chase
2 Enterprises, six years as chairman and CEO of the
3 GM Technologies; is that right?

4 A. GM Technologies 16 --

5 Q. It says 6 years and CEO of the --

6 A. That is correct.

7 Q. And you've been retired, basically,
8 since 2003?

9 A. In a -- in a form.

10 Q. And since that time, you've been
11 involved with the operations at Broad Creek
12 Marina on a fairly accurate basis; correct?

13 A. Correct.

14 Q. And would it be fair to characterize
15 what you do basically as a developer there?

16 A. Shouldn't be so hard to answer, but
17 there are a lot of times we're not developing
18 anything. So I'm, sort of, an owner/investor and
19 sometimes a developer.

20 Q. Let's address the ferry issue first over
21 there on the adjoining property that we talked
22 about yesterday.

23 A. Sure.

24 Q. You are aware that the agreement that
25 your brother signed that has been introduced into

1 evidence that's called the 99-year lease
2 agreement contains a prohibition on anyone at
3 Broad Creek Marina competing in the ferry
4 business with Mr. Scurry; is that correct?

5 A. It doesn't say anyone. I think it says
6 "Broad Creek Marina." What does the language
7 say?

8 Q. Well, good thing about being a lawyer
9 is --

10 A. You don't have to answer the questions.

11 Q. That's correct.

12 A. Well --

13 Q. The Judge will help us if we have any
14 problems.

15 A. I don't think it says "anyone." I don't
16 think it refers to a person, but I don't have the
17 lease in front of me.

18 Q. Would it be fair to say that, in
19 general, you knew that Broad Creek Marina
20 entities were prohibited from running ferry
21 traffic back and forth because Mr. Scurry had
22 reserved that right?

23 A. That's correct. Those entities have
24 that prohibition.

25 Q. You knew you couldn't do it from the

1 properties of Broad Creek Marina.

2 A. That is correct.

3 Q. Okay. So --

4 MR. LESEMANN: Your Honor, I object
5 to the form. Use of the term "you" is
6 inconsistent with the language of the lease
7 itself.

8 THE COURT: Yeah. You could break
9 down you, whether -- and I guess he divided it
10 into adjacent properties and marina. So I don't
11 know which "you" that is.

12 THE WITNESS: So the marina cannot
13 do it. I am not the marina.

14 Q. When you decided to get into the
15 competing ferry business next door, did you
16 review that portion of the 99-year lease
17 agreement?

18 A. Yes. I think I discussed it with
19 Mr. Lesemann.

20 Q. And you decided that it was appropriate
21 for you to acquire the property next door and go
22 ahead and try to compete?

23 A. That's not accurate, sir.

24 I had acquired the property before and
25 owned it for a period of time. That was

1 initially going to be developed for a residential
2 village, and so I think I acquired their property
3 in about 2006.

4 Q. When did you decide you were going to
5 develop a ferry terminal there?

6 A. In about 2000 and -- I'm trying to
7 remember the exact. I entered at a point -- a
8 few years ago, I entered into an option agreement
9 to purchase land on Daufuskie Island. At that
10 point in time, I determined it would be nice to
11 have my own ferry terminal.

12 Q. Did you go to Mr. Scurry and discuss
13 with him the fact that you'd be competing against
14 him?

15 A. No. I didn't have any obligation to.

16 Q. Did you consider doing it, whether or
17 not you felt like you had an obligation or not?

18 A. I had discussed cooperating with
19 Mr. Scurry a bunch of years ago and, basically,
20 was repelled on a lot of different bases; and I
21 can go into detail. So the possibility of us
22 cooperating was out of the question.

23 Q. Please go into detail.

24 A. Well, first of all, just from a
25 philosophical standpoint of how one conducts

1 business, Mr. Scurry has entered into this
2 agreement in 1993; and for 12 years my brother
3 operated it. Mr. Scurry basically said, you
4 know, there were arguments.

5 So then I come along. My brother was
6 very ill, long story. Make it short. He exits
7 the picture; and I start getting involved in the
8 marina, looking at different issues and things
9 like that. And there's a -- always a constant
10 issue with Mr. Scurry not paying his bills on a
11 timely basis. He acknowledged in his testimony
12 that he -- functionally, there was almost no part
13 of the lease that he was complying with.

14 He didn't pay his insurance. He didn't
15 pay his -- that. So then in 2004, we -- I think
16 it was the date of the settlement agreement, we
17 entered into a settlement agreement. Is that --
18 I think that's the correct date.

19 Q. 2004, yes, sir.

20 A. Yes, sir.

21 So the settlement agreement had a couple
22 parts to it. First of all, the parts that
23 Mr. Scurry was involved gave him considerable
24 benefit to what he was doing. Maybe the most
25 primary was that the size of the docks were 1800

1 square feet. Mr. Scurry occupied 300 square
2 feet. That was about 16.6 percent of -- of the
3 marina area.

4 So I was anxious to stop all the
5 squabbling about payments and all stuff that. So
6 we entered into this agreement where he basically
7 would pay 7-and-a-half percent. So it was a
8 substantial discount over what was his
9 appropriate common area share.

10 Q. Please go on.

11 A. So from almost the day that lease was
12 signed, Mr. Scurry has not met his obligations.
13 And when you look at what the discounted value of
14 taking the -- just out of the small amounts,
15 which we wanted to create, sort of, a path to not
16 have disputes from 16.6 percent to 7-and-a-half
17 percent, he didn't pay those; and he hasn't paid
18 them on time since that lease was entered.

19 And if you value that amount, if it's
20 5-, 10,000 a year for 90 years or something, it's
21 in the hundreds and hundreds of thousands of
22 dollars.

23 So then, you know, you get involved in
24 and assume -- and you're starting ticking at
25 every little thing about paying this portion or

1 that, he's already saved 4- or \$500,000; and
2 you're questioning \$5 here, \$10 here on an
3 insurance payment or whatever that were easily
4 found. So there's been a pattern of that.

5 Then there's been a pattern of, sort of,
6 litigation and obstruction. And, you know, you
7 go through and -- go through in detail, perhaps,
8 later on but the suit next door. I think you're
9 a very competent attorney; and you know that the
10 language speaks to the marina, not to Roger
11 Freedman.

12 Property right belongs to that. If
13 there was a noncompete, there would be a
14 noncompete for Roger Freedman, not for Broad
15 Creek Marina; and it's, like, if I were to buy
16 Palmetto Bay Marina, would I be precluded to run
17 a ferry to that or anywhere else in the world? I
18 wasn't the direct signatory to the lease. I was
19 the majority owner at the time. So I had no
20 obligation.

21 It's clear that I had no obligation to
22 do it in law and fact. And, you know, so -- and
23 if I sold that property tomorrow, say, to
24 Beaufort County or you, Mr. Taylor, you'd have
25 the right to run a ferry there. Why would I be

1 precluded to run a ferry from there? That was
2 not part of any agreement.

3 Q. All right. Mr. Freeman.

4 A. So just, you know.

5 Q. Excuse me. Right. Go right ahead.

6 A. I'm going to go at length. So I've had
7 an ongoing problem for, basically, almost from
8 the day the lease was signed with Mr. Scurry's
9 nonperformance and substantial nonperformance on
10 payments, on litigation, creating obstruction,
11 and litigation. There have been a whole series
12 of litigations that have, basically, made no
13 sense, you know, on that.

14 So, you know, in 2008 I actually talked
15 to Mr. Scurry about cooperating. I think it was
16 2008 when Melrose went bankrupt and the traffic
17 moved over to -- to Broad Creek Marina. And we
18 had a very pleasant meeting and a trip out to
19 Daufuskie and said, you know, I maybe can really
20 help and like to work and make this work.

21 And the next morning, he starts yelling
22 at me about the parking and that there weren't,
23 you know. Our people were parking in his parking
24 spaces. So then I spent time looking at it and
25 went out there every morning, and it turned out

1 the opposite was true. His people were parking
2 in our spaces.

3 You know, so -- and then there was
4 another incident shortly thereafter where I was
5 in the pub. And while I was in the pub, I walked
6 out on the porch; and there was a Porsche. I
7 mean, there was a truck blocking the barge side.
8 So Mr. Scurry just started yelling, "You're
9 blocking my site. You're blocking my site" and
10 stuff like that.

11 So I immediately ran into the pub to
12 find out whose truck it is, and it turns out to
13 be Mr. Scurry's barge captain. So I go out, and
14 his barge captain was talking to Mr. Scurry's
15 ex-wife. I go out and tell him. I say, real
16 nice, "Your captain's talking to your ex-wife."
17 And he yells out on the porch in front of people,
18 "Go F yourself."

19 So, you know, the relationship has been
20 such that I don't feel a tremendous obligation to
21 consult Mr. Scurry on that and, especially, just
22 by Mr. Scurry's own logic, he says he wasn't --
23 he didn't get the benefit of his bargain in 2008.
24 So I wasn't entitled to get paid.

25 Now, I don't use that same logic; but by

1 his claims that, effectively, why would I do
2 anything associated with the lease and even give
3 him a space, which is not what we've tried to do
4 or not do over a period of time.

5 So that's the answer.

6 Q. Mr. Freedman, the only thing I didn't
7 understand in there was this testimony about how
8 Mr. Scurry had saved 400- to \$500,000, sounded
9 like, off your back somehow. What was that
10 about? Tell me that again.

11 A. So if -- if the settlement agreement
12 wasn't made and Mr. Scurry paid his proportionate
13 share of his obligations, which would have been
14 16.6 percent of the -- essentially, the items
15 that he was obligated for, if they were reduced
16 by more than 50, 60 percent over an 80- or
17 90-year period, it's \$5,000 a year, \$6,000 a
18 year. It amounts to 4- or \$500,000.

19 Q. I understand.

20 So your testimony is that, basically,
21 you agreed to the reduction and agreed at the
22 7.5 percent and lost maybe half a million dollars
23 by doing that.

24 A. I wouldn't say I lost it. It was part
25 of the deal that we made that created different

1 obligations on both parties.

2 Q. I understand.

3 And you intended to be bound by that
4 agreement, didn't you? The settlement agreement?

5 A. Oh, yes, sir.

6 Q. Intended to live up to it?

7 A. I intended to live up to it.

8 MR. TAYLOR: I'm trying to find
9 those agreements.

10 MR. LESEMAN: It's Defendant's
11 Exhibits No. 01 and No. 02 in the notebook,
12 Mr. Freedman.

13 THE COURT: No. 01 and No. 02 in
14 the big notebook that Mr. Freedman has in front
15 of him, if you're trying to get Mr. Freedman to
16 refer to them.

17 MR. TAYLOR: Your Honor, I think we
18 can agree that they are No. 01 and No. 02. We'll
19 worry about finding the actual submitted copies
20 in a little bit; but if Mr. Freedman has them in
21 front of him, that'll be fine. One being the
22 lease and two being the settlement agreement.

23 Q. Mr. Freedman, just to finish off this
24 line about the ferry, you had mentioned that you
25 had an auction, apparently, over on Daufuskie to

1 buy some land.

2 A. Right.

3 Q. According to this magazine article on
4 you, you had an \$11.5 million option to buy 1100
5 acres over there; is that right?

6 A. That's correct.

7 Q. Did you exercise that option?

8 A. No, sir.

9 Q. And the article also was kind enough to
10 talk about the land development corporation,
11 Daufuskie Island Development Company, that you
12 formed in order to attempt to raise money through
13 a Reg D offering; is that right?

14 A. That's correct.

15 Q. And that money was going to be raised to
16 develop your affordable housing for which your
17 new ferry would serve; correct?

18 A. And other activities on the island.

19 Q. How much money did you raise in the
20 Reg D offer?

21 A. None.

22 Q. There were no participants at all?

23 A. None.

24 Q. And is that why you, then, abandoned the
25 project?

1 A. Yes, sir. It was like trying to sell
2 poison ivy.

3 Q. You did, however, as a part of your
4 overall business plan, intend to ask the Town to
5 donate the 17 acres that was adjacent to your
6 ferry terminal for parking; correct?

7 A. I didn't say "donate," I don't think.

8 Q. How did you -- did you come to an
9 agreement with the Town?

10 A. No. The -- there was a potential to
11 acquire it. I was hopeful that we could acquire
12 it or utilize it or partner with the county.

13 The other thing is: I have the only
14 available land with a ferry permit that has the
15 potential to have a substantial amount of parking
16 for Daufuskie Island as it exists today without
17 the Town's land.

18 Q. Mr. Freedman, tell me what you believe
19 the Broad Creek Marina entities owe the J&W
20 Corporation as far as office space.

21 A. Well, I believe what we've tried to
22 provide them is, you know, a 300-square foot
23 office space on the water; and, you know, the
24 space before they inhabited was probably not as
25 nice as what they're in today.

1 So it had four walls, no insulation, and
2 air conditioning. So that's, you know,
3 essentially -- we were going to build them an
4 office, you know, an office 10 by -- a 300-
5 square-foot office facility for them, a floating
6 one.

7 Q. So that's what you would testify you
8 believe Broad Creek Marina owes J&W, a 300-
9 square-foot office space?

10 A. I think the agreement calls for -- the
11 belief at this point is that the tenant is in
12 default of most of their provisions. So whether
13 or not that obligation stays or not, we've been
14 always prepared to fulfill that obligation.

15 Q. Tell me how you've been prepared to
16 fulfill it.

17 A. I think we tried. We, you know -- we
18 built a model. Nate had discussions with them.
19 We sent the letters to you suggesting that we do;
20 and sort of the same pattern, which I think is in
21 a typical pattern from the beginning is the --
22 there's an obstacle created.

23 So before we can really talk about
24 the -- the particular office space, we have to
25 settle some type of obligation to Wick that's

1 been creatively created by yourself and
2 Mr. Scurry, which is, sort of, in the pattern of
3 behavior.

4 So we've never gotten to do it because
5 there's been no meaningful discussions, that
6 they've been precluded by you and Mr. Scurry; and
7 we've always been prepared to do it. Mr. Jones
8 will testify to that because that's the
9 instructions I gave them.

10 I realized that we wanted to do it. I
11 also wanted to do it, want to fulfill the
12 obligation; and, two, I didn't want him in the
13 house because I felt that part was going to be
14 part of the future development of the marina, and
15 I wanted to get it so I had multiple motivations
16 to do it.

17 Q. Tell me what the instructions were you
18 gave Mr. Jones.

19 A. He went out and -- you talk about where
20 the Pirate's, you know, the -- this -- that
21 little house there. (Indicating.) We went out
22 and determined how we could --

23 Q. Plaintiff's Exhibit No. 04?

24 A. Right. Plaintiff's Exhibit No. 04.
25 There are not a lot of floating offices on the

1 marketplace for -- for marinas. So we've tried
2 to figure out how we could build a floating
3 office for Mr. Scurry.

4 So the size of the space that OCRM
5 permitted us was 600 square feet. So
6 Mr. Scurry's would be 300 feet. So many years
7 ago, we went out and we built -- found this,
8 built it, and tried to demonstrate to Mr. Scurry;
9 and Nate had the conversations with his people
10 and that because I've never had a conversation
11 with Mr. Scurry that I can recall related to the
12 office, contrary to his testimony in this case.

13 Q. You don't recall ever having a
14 discussion with Mr. Scurry in all the years that
15 you've been there about his office situation?

16 A. No. Because, generally, the managers
17 have discussed it when the -- the floating store
18 sunk, there were managers there. When this
19 floating store sunk, there was managers there;
20 and I've had not a lot of discussions with
21 Mr. Scurry over the past seven or eight years.

22 There were, maybe, three that I recall
23 specifically. Two were me having discussions to
24 buy his property related to Daufuskie, and the
25 third one was a call that he made to me a few

1 months ago. Would I entertain buying his
2 interests in Daufuskie?

3 Q. So, Mr. Freedman, to get back to your
4 testimony about there weren't a lot of floating
5 offices available, have you ever Googled the
6 issue of floating offices and seen all of the
7 manufacturers of floating offices that actually
8 exist?

9 A. I've Googled it. I haven't seen a lot.

10 Q. You haven't seen a lot?

11 A. Yeah.

12 Q. Did you price any of them?

13 A. No. We looked for this solution.

14 Q. Well, excuse me.

15 A. We've never been told that solution
16 wasn't acceptable.

17 Q. Well, my question to you is: Isn't it
18 actually the truth that the building that is
19 shown in Plaintiff's Exhibit No. 04 is simply a
20 jerry-rigged job that you all went over -- you
21 and Nate went over to Statesboro, Georgia, and
22 bought the prefab building and came back and
23 build a float and put it on it?

24 A. That's correct.

25 Q. All right.

1 A. But that doesn't mean it can't serve as
2 an office.

3 Q. Well, actually it would have been a good
4 idea, probably, to ask the Town of Hilton Head
5 when you did it, wouldn't it?

6 A. In retrospect, I wasn't aware -- I
7 thought our permits covered from the, you know,
8 from OCRM and the Army Corps our ability to do
9 it. I wasn't aware that we were required to get
10 the Town of Hilton Head's permission.

11 Q. Let me pursue that for a minute.
12 Is it your sworn testimony that you
13 believed you had an existing OCRM permit that
14 covered the Pirate's house shown in Plaintiff's
15 Exhibit No. 04?

16 A. No. What I did do is I called up and
17 had a number of discussions with, I think, Jordy
18 Mattingler (phonetic) and Paul Wazowski
19 (phonetic) whether the space where the floating
20 office could be -- would be -- could that be
21 moved to somewhere else? Would it be legal to
22 place it somewhere else?

23 And they told me it would, just as the
24 testimony yesterday was, that you could have that
25 and, basically, in form and substance; and they

1 don't go into the design. They just look at the
2 footprint. When we did it, we thought it just a
3 temporary solution that, effectively, we would be
4 moving into the next phase with Mr. Scurry and
5 J&W.

6 Sky Pirate, it happened to stay there;
7 and it was probably without thought. The
8 attendant came there, asked if they could be in
9 it. We never charged them rent. It wasn't an
10 operational business or an intent on our part to
11 really use it. It just was there more to --
12 built to see if we could do it; and then if we
13 moved the permit to another place, we potentially
14 could have had a site like that if it were
15 functional.

16 Q. You heard your testimony that I read
17 into the record yesterday where I asked you
18 specifically was this building brought over for
19 Wick; and you said, "Oh, no. It was for us."

20 Did you hear that testimony yesterday?

21 A. Oh, yeah, it was. It was for us to
22 demonstrate to Wick. There's a difference
23 whether -- we weren't going to put Wick in that
24 building because it didn't fit the size. So --
25 and did you hear my recent testimony a few

1 sentences ago? What I said was we had 600 square
2 feet. This is substantially -- Wick has 300
3 square feet, and this is probably less than 200
4 square feet.

5 So if we got the permit moved, we could
6 have 300 square feet for Mr. Scurry, 200 square
7 feet for us, and maybe 10 more square feet. So
8 it would all fit into the -- the intent of what
9 the footprint that was not an issue to OCRM in
10 principal.

11 Q. Mr. Freedman, Plaintiff's Exhibit
12 No. 04, the house, I just want to close this out
13 by making sure that I understand your position.

14 You acknowledge that this was bought as
15 a basic prefab building and brought over to Broad
16 Creek and put on a floating --

17 A. That is correct.

18 Q. And you acknowledge that you do not have
19 and have never had an OCRM permit for this.

20 A. For that particular location, no, sir.

21 Q. And you acknowledge that you knew an
22 OCRM permit was required for this?

23 A. Yes.

24 Q. Now, do you also acknowledge that when
25 this was established as whatever we want to call

1 it, you knew the Town of Hilton Head had not
2 properly permitted it?

3 A. I did not know that. That's what you
4 just testified a few minutes ago.

5 Q. Did you and Mr. Jones have any
6 conversations as your general manager about
7 whether or not the Town would need to permit it?

8 A. No, not that I can recall.

9 Q. Do you know who you got to run
10 electricity to it without it being properly
11 permitted?

12 A. No.

13 Q. Would you agree with me that there is an
14 electric wire that runs from underneath the dock
15 that feeds the electricity into this house?

16 A. I don't know.

17 Q. Have you ever been in it?

18 A. No. Have I been in it? I might have
19 walked in it when it first came out there. I --
20 I don't think I've been in it.

21 Q. Since? So for two -- at least two
22 years -- 'cause I know it's been there then --
23 you have not been in this to see what's going on
24 down there? And that's a no for the court
25 reporter?

1 A. I might have gone in there. I think
2 it's been there more than two years. I might
3 have gone in --

4 Q. Me too.

5 A. What's that?

6 Q. Me too. I think it's been there quite a
7 bit longer than that.

8 A. So I might have been in it when it was
9 first -- it was first down there.

10 Q. But not recently.

11 A. Not recently.

12 Q. Now, Plaintiff's Exhibit No. 08 that has
13 been admitted shows -- and Trent Shaw testified
14 to this yesterday -- seven different items at
15 Broad Creek Marina that apparently are not
16 permitted by OCRM.

17 Did you hear that testimony?

18 A. Yes, I did.

19 Q. I show you this and show you the
20 instances that he -- that I circled and asked him
21 about; and I ask you, are any of those structures
22 at Broad Creek Marina properly permitted by OCRM?

23 A. I'm not sure that he testified to these.
24 I don't even -- I think these are attached, just
25 these slips.

1 Q. Mr. Freedman, we'll let his testimony
2 stand for itself. Let me try to rephrase the
3 question better for you.

4 There are seven different entities that
5 are circled and numbered one through seven on
6 that exhibit. Do you see them? It's Plaintiff's
7 Exhibit No. 08. Do you see that?

8 A. I see seven circles, yes.

9 Q. I'll represent to you that Mr. Trent --
10 Mr. Shaw's testimony was that all of those would
11 need OCRM permits.

12 Accepting that as accurate for purposes
13 of my question, tell me this: Do you, as you're
14 speaking on behalf of the entity that owns that
15 property, admit that none of those have been
16 properly permitted by OCRM?

17 A. I would say if -- if they've said those
18 are ones that required permits, I would know that
19 they have not been permitted.

20 Q. And you did hear the property inspector
21 from the Town of Hilton Head yesterday whose
22 name -- embarrassing, eludes me for a minute.
23 Mr. Yates. You heard Mr. Yates' testimony
24 concerning the Pirate house yesterday that we've
25 been referring to?

1 A. Yes.

2 Q. And you agree that that was not properly
3 permitted by the Town of Hilton Head?

4 A. Yes. And we are going to remove it.

5 Q. Mr. Freedman, has it been your
6 inclination, as the property owner, that you
7 simply don't have to follow the regulations
8 requiring permitting?

9 A. Most of these I was not aware of.
10 That's not an excuse. That's my responsibility,
11 but I do believe we tried to follow them; but we
12 have not been perfect. Far from it.

13 Q. Well, tell me this. What have you
14 permitted from OCRM in the last 15 years?

15 MR. LESEMAN: Your Honor, I've --
16 you've given us both lots of latitude, you know.
17 We're here to litigate the issues of this lease
18 and the settlement agreement, and I think the
19 point has been made.

20 We have an OCRM permit for a
21 floating office, and the testimony will show that
22 we can seek to have that amended; and so I think
23 that the evidence is cumulative. It's irrelevant
24 and would suggest that we move on to another
25 issue.

1 'Cause, again, this has nothing to
2 do with the floating office or the parking or
3 Mr. Scurry's docks or the unpaid charges or the
4 insurance obligations or anything that's in front
5 of you to decide.

6 You're not being asked to decide
7 the appropriateness or inappropriateness of the
8 jet-ski slip or the ice machine or any of these
9 corollary things that are being handled by
10 Mr. Taylor right now.

11 THE COURT: Thank you, sir. How
12 about it, Mr. Taylor?

13 MR. TAYLOR: Actually, it has a lot
14 to do with the supposed placement of the floating
15 office because, as I was about to ask
16 Mr. Freedman, aren't those directly in the
17 position where he claims that he has a permit to
18 put the floating office? So if I could just
19 finish through that, I will move on, Your Honor.

20 THE COURT: All right. Please ask
21 that question.

22 Q. Mr. Freedman, first, can you answer my
23 question about have you, as the property owner,
24 permitted anything from OCRM since the 2005
25 permit that is in evidence?

1 A. Subject to its amendments, no.

2 Q. And isn't it correct that a number of --
3 and, if you will, sir, let me look at it just
4 'cause I don't have a copy.

5 A. (Complies with request.)

6 Q. Isn't it correct, Mr. Freedman, that the
7 entities that are marked three and four on
8 Plaintiff's Exhibit No. 08 are directly in the
9 area where you contend you have a permit to put a
10 floating office?

11 A. Yes. I wasn't aware. There was an
12 operation that has a lease with Fish Camp, which
13 was a canoeing -- a kayaking operation that got
14 damaged during the hurricane, and Mr. Jones told
15 me they wanted to operate out of the marina for a
16 while.

17 We did last year on that. I wasn't
18 aware that they affixed something to the dock,
19 and I didn't know it was a violation. And it was
20 more -- although it received rent from it, more
21 of a -- a courtesy to a neighbor because my
22 expectation is that they're going to go back to
23 Fish Camp. And we just really, you know, he had
24 an ongoing business for the last 15 --
25 Mr. Current's last 15 or so years that --

1 Q. Let's talk about the permit that you
2 have.

3 A. Right.

4 Q. You have a permit that allows for the
5 development of two things, to my understanding.

6 One is a floating office of some type at
7 the end of the gangplank; is that correct?

8 A. That is correct.

9 Q. And we both agree, don't we, that it is
10 impossible to locate anything in the position
11 where your permit indicates it would be because
12 of the land having filled in there; correct?

13 A. Well, I think -- I think Mr. Scurry
14 testified or -- that, effectively, you need a
15 steel bottom so when it landed on the -- we've
16 taken the position that we wanted to put him in a
17 better place.

18 Is it impossible? I think the permit's
19 valid so I -- I imagine if the Town of Hilton
20 Head approved it, it would be valid. It just
21 wouldn't be very functional, and our intention
22 was not to have him in a dysfunctional place.

23 Q. So can we, at least, agree that you
24 don't intend, as the owner of Broad Creek Marina,
25 to place Mr. Scurry in a floating office where

1 the permit currently says you can because it
2 would be on the ground at about half the tide
3 cycle?

4 A. That's correct.

5 Q. And you agree with that?

6 A. Yes.

7 Q. That's not where you want to put it.

8 A. You know, if you go there and agree to
9 it, we'd put him there, yeah. It doesn't --
10 it's -- it's no bother to me. I just would be
11 trying to make sure that his operation would
12 function in a way that was functional for him.
13 But if that's where he wants to be and it can be
14 permitted, we -- we will certainly do it. I
15 don't have any problem with it being there.

16 Q. Mr. Freedman, under your
17 understanding --

18 A. So -- so --

19 Q. Pardon me.

20 A. Yeah.

21 So if Mr. Scurry agrees to be there and
22 we can get the Town to permit there, the OCRM
23 permit I don't think has any -- once it's
24 permitted, changes our ability to put something
25 in place while the permit is valid. So the only

1 question becomes whether the Town of Hilton Head
2 would approve the design of it, I think, and the
3 building.

4 Q. So what you're testifying to is that you
5 would have no problem with an office which is
6 going to have a moving incline in the office for
7 at least half of the time?

8 MR. LESEMANN: Your Honor, I object
9 to the form.

10 A. No, that's not what I said. I said --

11 MR. LESEMANN: That's a
12 mischaracterization of the witness' testimony.

13 THE COURT: Mr. Freedman, if you
14 don't mind, if your attorney is objecting, don't
15 saying anything.

16 MR. LESEMANN: Just for the
17 purposes of the court reporter, that was a
18 mischaracterization of the testimony that's
19 already in the record.

20 THE COURT: I think it, kind of,
21 was but -- so sustained. Wait. Don't answer the
22 question. If you could move on.

23 MR. TAYLOR: I will.

24 THE COURT: All right. Thank you.

25

1 BY MR. TAYLOR:

2 Q. Mr. Freedman, I just want to try to end
3 this discussion of this positioning of the
4 floating dock to the immediate right or left of
5 the gangplank; and I understood your testimony
6 that I read into the record yesterday to be that
7 you acknowledge that land had filled up, and it
8 was not possible to put a floating dock -- office
9 there.

10 So my question today is: Do you agree
11 with me that it is impractical and, for all
12 practical purposes, impossible to put a floating
13 office to the immediate right or left on the
14 inside of the dock where the gangplank is now?

15 A. I don't think I -- I can totally agree
16 to that. I think Mr. Scurry said if you can,
17 effectively, have a steel bottom on it, it could
18 land there.

19 So based on what he thinks and then I
20 guess you could have a -- a floating ramp up and
21 down that does it. So I don't know that it's
22 impossible. I hadn't really considered it until
23 you folks raised that possibility.

24 Q. And as the --

25 A. It wasn't -- it has not been my

1 intention to put him there.

2 Q. Mr. Freedman, as you would see it, whose
3 responsibility will it be for the upkeep of the
4 floating office?

5 A. Mr. Scurry's.

6 Q. And if it has, let's say, a particular
7 expected life span of 20 years, which I think we
8 could probably agree, most things that float on
9 the water do, would you -- would it be your
10 position that it would, then, be incumbent upon
11 him to totally replace it in 20 years under the
12 70 years that are left in the lease?

13 A. You know, I -- I don't know, you know.
14 There's a supposition of what the useful life is.
15 I don't know what the useful life was. What I
16 know is if something that he owns and possesses,
17 it's his responsibility. Not owns, but leases,
18 is to repair.

19 Q. And, in your opinion, replace if it has
20 a useful life expectancy of 20 years on the
21 water?

22 A. Sure.

23 Q. Let's try to -- I believe, if we can go
24 through a little bit about how the current office
25 is there; and then we'll finish up with where it

1 should be.

2 First, you've seen and I assume are
3 aware of the current office that Mr. Scurry is in
4 as shown in Plaintiff's Exhibit No. 11; is that
5 right?

6 A. Yes.

7 Q. Tell me how you came to decide that that
8 is where J&W should be positioned after they
9 were, I guess, evicted from the sinking boat?

10 A. I think "eviction" --

11 Q. I'm sorry. After they had to move out
12 of the sinking boat that they were in.

13 A. Right.

14 Q. How did you determine that was where
15 they were going to go?

16 A. It was the most available and convenient
17 space that they could go to keep their operations
18 going.

19 Q. And what was there beforehand?

20 A. I believe there -- there was a ticket
21 office for a kayaking operation and storage
22 possibly.

23 Q. You're aware of the fact that that had
24 formerly been a boat shed; is that right?

25 A. I learned that yesterday.

1 Q. Who on behalf of the Broad Creek Marina
2 entities had authorized the conversion of the
3 boat shed into an office?

4 A. I -- I authorized it.

5 Q. How did you authorize it if you didn't
6 know it was a boat shed?

7 A. Nate said he -- well, I authorized the
8 activity that went on there on behalf of J&W.
9 Nate said, "The boat sunk. What are we going to
10 do?" "The shed's there. Let's put them in it."
11 "I'll take care of it." That's the type of
12 conversation I'd have with Nate.

13 Q. Do you remember that conversation?

14 A. Not specifically. But, in general,
15 that's what it would be. I'm not on the property
16 day to day. I don't have an office there.
17 Occasionally, I had office space there; but,
18 basically, he's left to operate and make
19 decisions and -- as the previous managers were.

20 So they would give me a general idea of
21 what they were going to do; and I said, you know.
22 If I didn't like the idea, I'd say no. And if it
23 was -- seemed suitable and sensible, I'd say yes.

24 Q. This was after the settlement agreement
25 had been executed; correct?

1 A. That's correct.

2 Q. When you were told by Mr. Jones that the
3 boat had sunk in which J&W had had its office and
4 you told Mr. Jones to move forward to put them in
5 the converted shed --

6 A. Right.

7 Q. -- did you look at the settlement
8 agreement before that to see what the
9 requirements were under the settlement agreement
10 for your entity to provide an office space?

11 A. I think at the time, we believed it was
12 going to be a temporary situation so I -- I knew
13 what was in the settlement agreement.

14 Q. Does that mean that you recognized that
15 moving him into the shed in 2008 was not in
16 keeping with what you promised under the terms of
17 the settlement agreement, but it was going to be
18 temporary; is that correct?

19 A. Yes.

20 Q. And that temporariness has now lasted 11
21 years?

22 A. That's correct.

23 Q. Mr. Freedman, did you know when you
24 moved J&W's operations into the converted shed
25 that it was not permitted by the Town of Hilton

1 Head?

2 A. No, I don't believe so.

3 Q. Do you recall receiving letters from me
4 in 2010, which specifically brought that to your
5 attention and called upon you to give them other
6 office space?

7 A. Yes, I do.

8 Q. You do?

9 (Plaintiff's Exhibits No. 14 and No. 15
10 were marked for identification.)

11 Q. Mr. Freedman, have you ever been in the
12 converted shed?

13 A. Yes.

14 Q. When?

15 A. It's been a number of years.

16 Q. Do you have any better idea than that?

17 A. Got to be five, six years ago.

18 Q. Was that the only time you've ever been
19 in it?

20 A. How many times have I been there? I
21 think I've been in it a few different times, but
22 I don't have specific recollections of it.

23 Q. Did you find it to be, from your
24 observations when you were in it, an appropriate
25 place from which to conduct commercial office

1 procedures?

2 A. Well, I wasn't inside Mr. -- I don't
3 believe I was inside Mr. Scurry's office. If I
4 was, it was only once; and I don't really have a
5 strong recollection of it. I know they were able
6 to conduct their business there.

7 Q. They were able to?

8 A. Yes.

9 Q. Do you consider that the converted shed
10 that you were in when you were in it was in good
11 working condition and repair?

12 A. I -- you know, I think it functioned.

13 Q. But not good working condition and
14 repair?

15 A. Well, I think the -- didn't the lease
16 obligate them to repair it?

17 Q. We're going to talk about that in a
18 minute. Let's talk about it now.

19 A. All right. Let's.

20 Q. Is it your contention under your reading
21 of the lease that if there had been a tree house
22 on the property, that you could have assigned J&W
23 to that and said to them, "It's your obligation
24 to repair it"?

25 A. No, sir.

1 Q. Then what's the difference between what
2 you're saying about an unpermitted
3 functionally -- well, I won't describe it because
4 I'm not a witness.

5 If you don't -- put it this way. When
6 you assigned J&W to go into the converted shed,
7 you knew that it was not approved appropriately
8 by the Town as a commercial office space;
9 correct?

10 A. I don't know that I knew that or didn't
11 know that.

12 Q. Well, with your background and
13 experience as a developer, you certainly would
14 have known that would be required; correct? Is
15 that a yes for the court reporter, Mr. Freedman?

16 A. I'm trying to --

17 Q. I'm sorry. You nodded your head, and I
18 was just trying to expedite things. You please
19 take your time.

20 A. I -- I believe I would have known that,
21 yes.

22 Q. You believe what?

23 A. I would have known that, yes.

24 Q. Right.

25 Mr. Freedman, I'm handing you what I've

1 marked for identification purposes as Plaintiff's
2 Exhibit No. 14 and No. 15, that purport to be
3 copies of letters to you July 6, 2010, and
4 July 22, 2010.

5 Would you review those and tell me if
6 you recall having received them?

7 A. (Complies with request.) Yeah, I did
8 receive those.

9 Q. And did you receive them on or about the
10 dates of which they show, the July 6 --

11 A. Yes.

12 Q. Yes? All right. And, Mr. Freedman,
13 would you agree with me that in the July 6, 2010,
14 you were advised that, from the position of J&W,
15 the temporary quarters that have been provided
16 are not permitted, are at variance with the town
17 code, are not acceptable for business purposes,
18 and are plainly deficient under the requirements
19 of the lease and settlement agreement?

20 A. That's what it says.

21 Q. You were advised of that. You read it,
22 and you understood it in your mind.

23 A. Yes, sir.

24 Q. What action did you take from July 6,
25 2010, until we stand here today to go to confirm

1 with the Town of Hilton Head that this was, in
2 fact, a non-permitted building?

3 A. What -- repeat the question.

4 Q. Yes, sir.

5 You were advised nine years ago that
6 this was an unpermitted building, and whether or
7 not you contend that it was still acceptable
8 under the lease is not the question.

9 My question is: You've had in your hand
10 an allegation that it was not properly permitted
11 and/or a variance with the Town of Hilton Head;
12 correct?

13 A. Yes.

14 Q. You own the building; correct?

15 A. Yes, sir.

16 Q. You had a leaseholder in the building at
17 your direction.

18 A. Yes, sir.

19 Q. All right.

20 A. So there were two --

21 Q. What did you do --

22 A. Well, there were two elements.

23 Initially, that period in time, we were
24 facing a potential foreclosure of the property.
25 That was the height of the financial crisis, I

1 believe; and it was about that time our bank was
2 in financial trouble, and our loan had come due
3 and they started -- we were either in
4 negotiations or a foreclosure action.

5 So our focus was more directed on doing
6 that, and we weren't in a position to do very
7 much related to Mr. Scurry if we were going to
8 have the property.

9 Subsequently to 2011, when we settled
10 with the bank and I had an attorney call you,
11 Allen Lambert, who was my attorney representing
12 me overall in the financial negotiation; and I
13 was informed by him that you refused to meet him
14 because I said, "Let's get all the issues settled
15 with J&W, if we can."

16 And, you know, you'd mentioned the
17 foreclosure action and all that. Well, we
18 weren't allowed to have that discussion. A
19 few -- so there was the continuance. So we
20 weren't able to do anything with them because it
21 always needed their acquiescence, and we didn't
22 have the ability to have that communication.

23 Secondly, a few years later, I did go to
24 the Town of Hilton Head, the building inspector,
25 Robert Kline, and asked him -- 'cause my

1 motivation was basically to get this thing
2 settled and removed. And he -- I gave him the
3 information as I knew it, not as explicitly as
4 you did; and he came back to me and said there's
5 nothing we could do.

6 So I at that point didn't do anything,
7 and we had just the ongoing dispute; and the
8 dispute had multiple parts to it.

9 Q. Mr. Freedman, I apologize that I didn't
10 understand the end of your testimony and must ask
11 you this.

12 Are you saying that you went to the Town
13 of Hilton Head at some point in time and told
14 them about this unlicensed, unpermitted shed that
15 J&W was operating in; is that correct?

16 A. Yes.

17 Q. And what are you testifying under oath
18 the Town told you?

19 A. I said, "They're in this building. Take
20 a look at it, please. Is there a way that we can
21 have them removed from it?" That was the
22 building inspector, Robert Kline; and he came
23 back to me and said, no, sir.

24 Q. Mr. Freedman, are you saying that you
25 were trying to eject your own lessee from a

1 building that you placed him in because the
2 building was not up to --

3 A. Because we wanted to place him --

4 MR. TAYLOR: Judge, may I finish
5 the question?

6 THE COURT: Yeah. Let him finish.

7 Q. Mr. Freedman, are you telling me you
8 went to the Town to try to get the assistance to
9 eject the tenant that you had placed in an
10 unlicensed, unpermitted building on the premises
11 that it was an unlicensed, unpermitted building;
12 is that correct?

13 A. It's sort of what -- you did much better
14 than I did. You went to the Town, had them
15 inspect it, and got your client ejected from it.
16 Isn't that the -- isn't that what was
17 accomplished in the last two weeks or since
18 January?

19 Q. Mr. Freedman --

20 A. So -- but, yes, sir. That's what I was
21 intending to do because then I would have placed
22 him in accordance with the -- the lease in a
23 suitable location.

24 Q. So during this conversation with the
25 Town in which you were seeking their assistance

1 in ejecting your tenant from an unpermitted
2 building in which you had placed him, did you ask
3 what steps you could take to bring the building
4 up to code?

5 A. We wanted to move him, according to the
6 lease, on a floating dock. That's been our
7 intention, and that's why I wanted to do it. I
8 didn't want him in that location.

9 Q. What you really wanted to do was build a
10 restaurant there and move him out; isn't that
11 right?

12 A. At the time, one of the considerations
13 were a restaurant. But, yes. It is a -- a piece
14 of property that has value to the development of
15 the business that I don't believe Mr. Scurry is
16 entitled to, and we'd like to move him to a
17 different location. We've contended that from
18 the very beginning.

19 Q. And as we sit here today, apparently you
20 decided to not worry about Mr. Scurry being in
21 there, I assume, because you lost interest in
22 building the restaurant; is that right?

23 A. Well, you know, Mr. Scurry had a lot of
24 different options too; and he seemed to have been
25 losing interest in taking care of that situation.

1 Q. I don't know --

2 A. We haven't changed our position from
3 then to now.

4 Q. What is that position about Mr. Scurry's
5 office? Because he's still in the shed. What is
6 your position?

7 A. We would like to move him to a floating
8 dock.

9 Q. Floating office?

10 A. Floating office.

11 Q. Which you do not either own nor have a
12 permit to place anywhere, other than the dirt
13 that is evident at half tide; correct?

14 A. Yes. But as you heard the testimony and
15 the conversations I've had with OCRM, they have
16 said they -- that if they would potentially
17 permit if you apply to a -- put him in a --
18 remove -- move that to a different place in the
19 marina.

20 It's sort of -- no. Because for us to
21 do it, we need his acquiescence; and we haven't
22 been able to get his acquiescence, and that's
23 been the fundamental issue.

24 Q. Why do you need his acquiescence to get
25 a floating office?

1 A. Because he has -- well, because are you
2 saying -- because I guess I can place him
3 anywhere I want, or he needs to agree to where he
4 goes; and we need to work together to get the
5 permits.

6 Q. But you didn't need his acquiescence to
7 get the permit that you currently hold, did you?

8 A. Well, yes. Yes, he -- yes, we did. I
9 think it was outlined in the settlement
10 agreement. So I think -- I think it was defined
11 in the settlement agreement as an exhibit, if my
12 memory is not correct.

13 Q. What do you think was defined?

14 A. Can I see the settlement agreement,
15 please?

16 Q. It's No. 2 in front of you.

17 THE COURT: In the notebook.

18 Q. In the notebook, sir.

19 MR. TAYLOR: Your Honor, move the
20 Plaintiff's Exhibit No. 14 and No. 15, the
21 letters of July 6 and 22nd.

22 THE COURT: Mr. Lesemann, any
23 objection.

24 MR. LESEMAN: No objection, Your
25 Honor.

1 (Plaintiff's Exhibits No. 14 and No. 15
2 are admitted into evidence.)

3 A. I think the settlement agreement --

4 THE COURT: Should be Tab 2.

5 A. I'm looking at it.

6 So in the settlement agreement, there's
7 a -- showing the reconfiguration of the marina.
8 So Mr. Scurry was informed about the
9 reconfiguration of the marina because it's there
10 as part of the settlement.

11 Q. Mr. Freedman, if I can help you. The
12 pending question is: You didn't need J&W's
13 acquiescence to make a permit -- to make an
14 application for the permit for the floating
15 office that you currently hold; correct?

16 A. No. But if we were going to move it
17 from where it was, it wouldn't make sense --
18 let's see. Oh, yes, here. So here is where it
19 is in the settlement agreement. (Indicating.)

20 Q. Can you tell me what page you're looking
21 at? Because I'm not sure what you're even
22 referring to, Mr. Freedman.

23 A. It's in the exhibits. It's 14 of 14,
24 the last page of the exhibits.

25 Q. Yes, sir.

1 A. So Mr. Scurry agreed to this location.

2 Q. Mr. Freedman, I just want to make sure
3 I'm looking at the same thing you are.

4 A. So, you know, this is the proposed
5 floating office. (Indicating.)

6 Q. Understand. Yes, sir.

7 A. So he had -- he concurred with that and
8 concurred with the reconfiguration of the marina
9 as part of that.

10 Q. Right. And that is, as we've described
11 for purposes of the testimony, that is a
12 location. When you walk down the existing
13 gangplank, you would take a right; and then it
14 would be on the inside of that finger.
15 (Indicating.)

16 A. That is correct.

17 Q. And that is -- we've had this discussion
18 already; and I'm not going to ask you to do it
19 again, but that's the area where the dirt is --

20 A. Exactly.

21 Q. -- in evidence about half the tide
22 cycle.

23 A. Right.

24 Q. But you still think it might be able to
25 be done? Well, your testimony will stand.

1 Let me just ask, let me move on from
2 this. The current permit that you have for
3 putting in a floating office --

4 A. Right.

5 Q. You're familiar with it, and I assume
6 you've looked at it before this trial?

7 A. I've looked at it before.

8 Q. It also allows for the construction of a
9 dock house.

10 A. Right.

11 Q. At the top of the gangplank on the
12 right; correct?

13 A. Correct. Yes, sir.

14 Q. And that dock house could be built
15 tomorrow by you, if you wanted to, without the
16 need of any other permits or probably even
17 permission; correct?

18 A. That is not correct.

19 Q. What do you feel you would need?

20 A. You'd need the Town of Hilton Head to do
21 it. You'd need to get it permitted by the Town
22 of Hilton Head.

23 Q. All right.

24 A. I learned that, you know.

25 Q. Learned that recently?

1 A. Recently.

2 Q. And have you proceeded to consider that
3 option for yourself and for J&W?

4 A. We did consider it.

5 Q. When did you do that, and what kind of
6 numbers did you come up with?

7 A. They were, I think, within the last six
8 months.

9 Q. And what kind of numbers did you come up
10 with considering --

11 A. I think it was like 150-, \$200,000.

12 Q. And that would be today the one thing
13 that we can all agree is permitted and possible
14 to easily construct without doing anything else,
15 except paying the money to construct; is that
16 right?

17 A. No. Because you have to get the Town of
18 Hilton Head.

19 Q. Let's assume that you could.

20 A. Well, you're assuming a lot there.

21 It would be harder to get that permit
22 than it would to get a permit on a floating dock
23 because the -- that will be easily visible from
24 the water and the waterway because of its
25 elevation; whereas, a floating dock would be

1 amongst the boats.

2 So from a design standpoint and all of
3 those things, but also from a practical
4 utilization standpoint, when it was permitted, it
5 was permitted by the manager at the time that had
6 a concept of the way he wanted -- he was -- he
7 was also a dock builder, and he was very excited
8 about doing it. I allowed him to permit it and
9 then, you know, really entertain it again until
10 recently; and it wasn't practical for us to do
11 it.

12 Q. And why was it not practical?

13 A. We have no utilization for -- for it
14 from our business perspective.

15 Q. Mr. Freedman, would that not be the most
16 ideal place that you could put any charters or
17 anything like that that is going to be catching
18 all the people going down on your docks?

19 A. It could be a very viable place to do
20 that, yes.

21 Q. Well, wouldn't it -- I mean, actually be
22 an incredible opportunity for you to put J&W --

23 A. No, sir.

24 Q. Well, let me make sure of one thing.

25 Is it your intention to try to resolve

1 this case, by either order or some other way, put
2 Mr. Scurry in a floating office and then build
3 that dock house and take advantage of it
4 yourself?

5 A. I won't be allowed to.

6 Q. Why not?

7 A. In a conversation with OCRM, they said
8 you couldn't do both; but I also have no
9 intention to do that in any way, shape, or form.

10 Q. Tell me about that conversation.

11 A. I had it with Mr. Mattingler, I think, a
12 year or so ago when we were looking at how to
13 resolve different things; and he said, "When you
14 extend the permit, the laws may be changing. So
15 you can't have both the dockmaster house and the
16 floating office" was my recollection.

17 Q. So your testimony is that a permit that
18 you have confirmed is still in play that allows
19 both the dock house to be built and the floating
20 office --

21 A. No. I'm saying something different.

22 If I go to have a -- a -- what I
23 understood was if I went to move the existing --
24 existing one from a different place to a
25 different place, the existing floating office to

1 a different location, then I would have to
2 abandon that one.

3 Q. I understand.

4 So what you're saying is if you decided
5 to try to move the currently-permitted floating
6 office that will be sitting on shells half the
7 time to another place, you're saying that they
8 already told you, you would lose the entire
9 permit.

10 A. No. He said you could have one or the
11 other. You couldn't have both.

12 Q. Wouldn't it be a lot better in your
13 financial interests and J&W's to build the dock
14 house?

15 A. No, sir.

16 Q. Okay.

17 A. And I'll explain why.

18 First of all, when Mr. Scurry -- well,
19 our -- our -- almost all the business today is
20 done on the internet, and our vendors sell their
21 tickets on that. So the location is almost
22 irrelevant.

23 Q. You talking about Mr. Scurry's business
24 or yours, sir? I'm sorry.

25 A. Our other customers.

1 Q. Your other customers being charter
2 captains and boat rentals and things like that?

3 A. Right. And Mr. Scurry, I think,
4 testified to the same thing, that basically his
5 business wasn't dependent on traffic. His
6 business was dependent on people coming over to
7 Daufuskie. He sold his business -- most of his
8 tickets on the internet.

9 So what might have been perceived as
10 important a number of years ago is -- is less
11 important. His business has shifted away from
12 that anyway. So when you -- like my zip line
13 business, which is very similar. People -- it's
14 not a function of foot traffic.

15 Often in retail and shopping centers,
16 foot traffic is very, very important; but today
17 the way tourists book, tourists, you don't decide
18 to go to Daufuskie and walk by the, you know, the
19 ticket office and say, "I'm going to go to
20 Daufuskie." Or the zip line people.

21 They -- they look on the internet. They
22 figure out where they're going to go, and then
23 they buy their tickets on the internet.

24 Q. Have you asked the people that you
25 currently have housed in the floating office,

1 Plaintiff's Exhibit No. 04, the Pirate people,
2 whether or not they'd be interested in a charter
3 office up there?

4 A. No. We -- I think we just told them --
5 I think Nate can testify to the conversations.
6 We told them they have to -- we're going to take
7 it out and not do it. And they -- I haven't
8 heard -- I think Mr. Jones' testimony can give
9 you their response and their view.

10 Q. Mr. Freedman, I'm going to try to move
11 along; and I apologize for the length of things.
12 Let me try to wrap up a couple of things. I want
13 to go over the one point.

14 First, what do you intend as we sit here
15 today in response to the Town of Hilton Head
16 60-day termination letter?

17 A. I think the outcome of our trial here
18 will do it. We've created options so that
19 Mr. Scurry can continue his business in the same
20 manner.

21 We've contacted Scotsman. We have a
22 proposal that can be fixed immediately. The Town
23 has also indicated if we make good faith steps to
24 make -- to move forward, the 60-day isn't hard
25 and fast. So we don't want any disruption to

1 Mr. Scurry's business.

2 Q. And I thank you for that.

3 A. And, you know, so they also said you
4 could have a ticket kiosk there. That probably
5 wouldn't be so acceptable. So we looked at the
6 construction trailer-type of thing that I think
7 the building inspector testified.

8 So we proceeded to figure out and, you
9 know, how we can make sure his business continues
10 while we work this out in a timely basis without,
11 you know, much disruption to his business.

12 Q. Right. You don't intend to challenge
13 the Town of Hilton Head's finding that the
14 building is unpermitted and illegal as it
15 currently sits?

16 A. No, sir.

17 Q. And has been for the last nine years.

18 A. That is correct. We don't have any
19 intention of challenging.

20 Q. Mr. Freedman, if you'll look at page 2
21 of the settlement agreement, I want to walk you
22 through this; and I will try to stay on focus. I
23 apologize that I -- can you open your book up to
24 this so that I'm not hovering over you?

25 A. (Complies with request.)

1 Q. I'm looking at page 2, paragraph 1,
2 marked consideration A office space. And I want
3 to go through this and find out exactly what your
4 testimony is concerning this.

5 Will you let me know when you're at the
6 page?

7 A. Yes.

8 Q. I'm going to read across, and I'm going
9 to stop and ask you questions. So if you'll
10 follow along with me.

11 "A, J&W previously occupied office space
12 identified in the lease as part of the lease
13 property. As a result of a total casualty loss
14 to the floating store, J&W's office operations
15 are currently located in the marina office."

16 Would you agree that that was correct on
17 the day that this settlement agreement was
18 signed?

19 A. Yes.

20 Q. And that was over there in the marina
21 office that is now the store -- excuse me. The
22 up-the-creek --

23 A. It's the kitchen.

24 Q. Kitchen. Right. There were bathrooms
25 in that building; correct?

1 A. Yes, sir.

2 Q. And there are -- currently your people
3 work out of that building. "Your people" being
4 the people who administer Broad Creek Marina.

5 A. Right. That's correct.

6 Q. So that's their office now.

7 A. Yes, sir.

8 Q. And it has bathrooms; and as far as you
9 know, it's properly permitted by the Town.

10 A. Yes.

11 Q. To your knowledge, have they ever had
12 any problems with snakes or rodents in that
13 building?

14 A. Yes.

15 Q. Which one?

16 A. I'm -- I think Nate could give you
17 better answers, but I know there were some rodent
18 issues underneath and --

19 Q. Okay.

20 A. I think it's on the property.

21 Q. In the office is what I'm asking about.

22 A. Well, it was under the building. No,
23 not -- not that I know -- aware of in the office.

24 Q. "J&W shall continue to occupy its
25 existing space in its current location at the

1 marina until such time as new office space is
2 available for its use and occupation."

3 Do you agree with me that's what that
4 sentence says?

5 A. Yes.

6 Q. New office space.

7 A. Correct, yeah.

8 Q. "The new office space shall be in
9 substitution for the office space previously
10 located in the floating store as identified in
11 the lease. J&W agrees that they waive any
12 entitlement, if any, to the insurance proceeds
13 that HHIM receives from the casualty loss to the
14 floating side. The parties agree that HHIM may
15 provide one of the following alternatives as
16 substitute office space for J&W."

17 Did I read that correctly?

18 A. Yes, sir.

19 Q. So the first paragraph establishes that,
20 at such time they'll be moved out of the marina
21 office space when new office space is available?

22 A. That's correct.

23 Q. So let's go down to what the options
24 were then.

25 No. 1, "HHIM will seek approval from the

1 necessary regulatory authorities for the
2 replacement of the floating store. Copy of the
3 plan is attached as Exhibit D. The new
4 replacement of the floating store must be of a
5 design and construction acceptable to HHIM. J&W
6 agrees to accept the 300 useable square feet in
7 full substitution for office space located in the
8 southwestern end of the store. The 300 useable
9 square feet, as shown on Exhibit D, shall have a
10 separate entrance and shall be an enclosed space
11 with appropriate ventilation and shall be
12 provided with the same utility service as the
13 remainder of the new floating store.

14 "Said utilities shall be separately
15 metered and shall be the sole responsibility of
16 J&W. J&W can seek approval if landlord's
17 application is denied subject to the landlord's
18 review and approval of the design and
19 construction, and such approval shall not be
20 unreasonably withheld."

21 My question to you, Mr. Freedman, is
22 this: Have you, as we sit here today, at any
23 time in the last nine years, had a floating store
24 available or a floating office available on the
25 dock and said to Mr. Scurry, "That's your

1 floating office. Go to it"?

2 A. No, sir.

3 Q. Then the next thing is "II."

4 Dockmaster's house. "If, and only if, the
5 floating store is not replaced due to denial of
6 any permits required for its replacement or for
7 any other reason at all, HHIM agrees to provide
8 J&W with 300 usable square feet of office space
9 in the dockmaster's house. A copy of the plan
10 for the dockmaster's house is attached as Exhibit
11 E and incorporated herein."

12 Mr. Freedman, can we agree that the
13 floating store has not been replaced as we sit
14 here today?

15 A. That's correct.

16 Q. Therefore, we would go into 2; and that
17 would be: If, and only if, it's not replaced,
18 then they will be provided with 300 useable
19 square feet of space in the dockmaster's house.
20 That is the same dockmaster's house which we've
21 already talked about that's properly permitted
22 and you could start destruction on tomorrow;
23 correct?

24 A. No.

25 Q. Sir?

1 A. We keep going over that.

2 Q. If you got Town approval. I forgot
3 about the Town approval this time. I'm sorry.

4 A. Well -- but it's the same circumstances.
5 It's not very much different than getting the
6 other approval from OCRM and -- and the Town.
7 The Town has to be involved, you know.

8 Q. Well, let's assume that you could do
9 that and that there are people available who will
10 help get Town approval, and just assuming you
11 could get that. You haven't made any effort
12 actually at all to build the dockmaster's
13 house --

14 A. No, sir, we have not.

15 Q. -- which is the second proviso?

16 A. We have not.

17 Q. So then we go to Number 3.

18 If, and only if, HHIM is unable to
19 provide space to J&W in a new floating store or
20 on the dockmaster's house, then J&W will continue
21 to occupy its existing space in the marina
22 office. If HHIM decides at some time in the
23 future to relocate the marina offices, the space
24 provided to J&W for its office and business needs
25 shall be relocated to a mutually-agreeable

1 location of the size, kind, and quality, at least
2 comparable to the existing space, and such
3 replacement space shall be located in the center
4 of the commercial and retail activities at the
5 marina."

6 Mr. Freedman, it's correct also that
7 that has not occurred either; is that correct?

8 A. That is correct.

9 Q. Now, is there anywhere in here that I
10 have missed the option for you to put J&W in an
11 unpermitted shed that has been converted?

12 A. No, sir.

13 Q. And that was, as you said, intended to
14 be simply temporary.

15 A. Yes, sir.

16 Q. And Mr. Scurry never agreed to operate
17 J&W from that location on a long-term basis, did
18 he?

19 A. I didn't have any conversations with
20 Mr. Scurry regarding that.

21 Q. Were you ever -- were you told by Nate
22 or any other managers that you trust that
23 Mr. Scurry had agreed to accept that on a long-
24 term basis?

25 A. No, sir.

1 Q. And, in fact, you certainly have been
2 aware since 2010 that we objected to it.

3 A. Yes, yes.

4 Q. Correct?

5 A. Yes. I know.

6 Q. Now, Mr. Freedman, all the times that
7 you have contended that Broad Creek Marina was
8 ready, willing, and able to relocate J&W down to
9 the dock, that, in fact, is incorrect. There has
10 never been a floating office that has been
11 properly permitted by any -- by the regulatory
12 agencies and put there and ready for his
13 occupancy, has it?

14 A. I -- I don't agree with the -- the
15 question.

16 What the -- if we were to move J&W to a
17 floating office, we need regulatory permits; and
18 then if we're going to move it from that space,
19 we would need his approval. So we have never
20 gotten his approval. We've tried to get that.
21 So the answer to that is not correct.

22 Q. There's never been a new floating office
23 put down there and --

24 A. If we put a new floating office in, A,
25 that wasn't, B, where it's designated,

1 Mr. Scurry, more than likely, would object
2 because he objects to just about everything.

3 MR. LESEMANN: Your Honor, we can
4 stipulate, in lieu of Mr. Taylor having to ask
5 the question again, that the floating office has
6 not yet been built. I think that that's evident
7 to everybody.

8 THE COURT: I got that part figured
9 out.

10 MR. TAYLOR: I understand.

11 THE COURT: Thank you. I
12 appreciate that.

13 BY MR. TAYLOR:

14 Q. Mr. Freedman, one second.

15 MR. TAYLOR: Your Honor, nothing
16 more from Mr. Freedman right now. Thank you.

17 THE COURT: All right. Thank you
18 so much.

19 Did y'all want to take a quick
20 break? We've been at this for a while before we
21 begin. Mr. Freedman, you know the rules. Don't
22 discuss your testimony with anyone during the
23 break. Okay?

24 THE WITNESS: Yes.

25 THE COURT: Ten minutes.

1 (Recess taken 10:43 a.m. to 10:54 a.m.)

2 THE COURT: We're back on. Sir,
3 you're still under oath so please proceed.

4 CROSS EXAMINATION

5 BY MR. LESEMANN:

6 Q. Mr. Freedman, were you in the court
7 yesterday when I cross-examined Mr. Scurry?

8 A. I was.

9 Q. And do you recall questions that I posed
10 to Mr. Scurry about locations of a floating
11 office that would be acceptable to him?

12 A. Yes, sir.

13 Q. And do you recall a discussion here in
14 this general area that I'm indicating here that
15 would be -- let's see. To the -- to the north/
16 northeast of this dock here in the middle.

17 (Indicating.)

18 Did you hear Mr. Scurry indicate that a
19 floating office in that area would be acceptable
20 to him?

21 A. Yes, sir.

22 Q. And did you also hear Mr. Scurry
23 indicate that, although a floating office had
24 been located on the southern side of that same
25 walkway, he wasn't interested in that from his

1 perspective because that might affect his
2 utilization of his linear footage?

3 A. Yes, sir.

4 Q. But from your standpoint from the
5 landlord, you believe that that would be a fair
6 location for a floating office?

7 A. Yes.

8 Q. Because that's the landlord's retained
9 footage?

10 A. That's correct.

11 Q. So when Mr. Scurry indicated that he'd
12 be accepting of a floating office here in this
13 location, do you know why you just had to answer
14 45 minutes of questions about why a floating
15 office ought not to be allowed?

16 MR. TAYLOR: Objection, Your Honor.

17 THE COURT: What's the objection?

18 MR. TAYLOR: The objection is as
19 argumentative as to why he had to answer
20 questions.

21 THE COURT: Well, anyway, I'll
22 allow him to answer.

23 Q. So when Mr. Scurry indicated that he'd
24 be accepting of a floating office in that
25 location, can you explain to me why you -- why

1 Mr. Scurry's attorney might be arguing with you
2 about why a floating office shouldn't be allowed?

3 A. I have no comprehension of -- I can't,
4 you know, tell what Mr. Taylor's purpose is.

5 Q. But you did hear that there was a
6 floating office, and you were able to get a
7 specific location that would be acceptable?

8 A. That's correct.

9 Q. In the nine years that this litigation
10 has been pending, have you been able to get that
11 piece of information?

12 A. No.

13 Q. Have you had a permit to place the
14 floating office at the marina since,
15 approximately, 2005?

16 A. That's correct.

17 Q. And how close was that after the 2004
18 settlement, approximately?

19 A. Within 12 months, I think.

20 Q. So following the 2004 settlement, did
21 the landlord initiate permitting applications
22 with OCRM for the floating office that's
23 contemplated in the settlement agreement?

24 A. Yes.

25 Q. Did you cause -- this area here where

1 the floating office was initially permitted to be
2 located, did you cause that to be filled? Did
3 you go put dumps of truckloads of dirt there?

4 A. No, sir.

5 Q. Did you have -- did you want to be
6 unable to place a floating office in that
7 location?

8 A. No, sir.

9 Q. Are these other locations -- based on
10 what the judge thinks would be appropriate, were
11 these other locations for a floating office
12 acceptable to you?

13 A. Absolutely.

14 Q. And did you hear the representative of
15 OCRM indicate that there is an amendment process
16 whereby you could seek to amend the location?

17 A. Yes, sir.

18 Q. Do you have an understanding, again, why
19 the OCRM representative that was here was grilled
20 about whether such a floating office should even
21 be allowed when you and Mr. Taylor's client
22 entered a settlement agreement indicating that
23 you would cooperate to seek one? Can you
24 understand why that happened?

25 A. Repeat the question. Why did

1 Mr. Taylor --

2 Q. Yeah. Why would Mr. Taylor be going
3 through these regulations seeking to have the
4 OCRM employee suggest that a floating office
5 isn't allowed when you and Mr. Scurry have agreed
6 that a floating office ought to be located in one
7 of these two locations --

8 A. Right.

9 Q. -- and selected by the judge? Can you
10 make sense of that in your mind?

11 A. No, sir.

12 Q. Now, Mr. Taylor asked you briefly about
13 your background.

14 A. Yes.

15 Q. But you also have experience in real
16 estate and in a company that has a lot of
17 commercial space for lease; is that accurate?

18 A. Yes, yes, sir.

19 Q. Okay.

20 A. So, yes, we had about -- when I was a
21 CFO, we had about 3 million square feet of
22 shopping centers, a million-and-a-half feet of
23 office space, a couple thousand hotel rooms, some
24 development property, housing that were thousands
25 of homes.

1 Q. So you've got experience as a landlord
2 and in a company that had a tremendous number of
3 landlord-tenant relationships and leases?

4 A. Yes, sir. Yes, sir.

5 Q. Have you ever dealt with a 99-year lease
6 for \$1 a year that included a provision that the
7 tenant could not be ejected?

8 A. No, sir.

9 Q. Have you ever had a relationship with a
10 tenant such as the one that the landlord has had
11 with the tenant in this case?

12 A. No, sir.

13 Q. Just -- I ask you an open-ended
14 question. You got into some of it with
15 Mr. Taylor; but what do you feel like has been
16 the history and pattern from the beginning, from
17 the moment that you had active involvement with
18 this landlord-tenant relationship? What has been
19 the history and pattern that you've experienced
20 in this landlord-tenant relationship?

21 A. Well, I -- I think there's a particular
22 modus operandi and, sort of, led by Mr. Scurry
23 and ably abetted by Mr. Taylor where basically
24 the -- the premise is if we create an obstacle or
25 a problem, then we negotiate. You don't get what

1 you're supposed to get, but we're going to get
2 something different and more.

3 Q. Right.

4 A. Or we create a litigation that doesn't
5 particularly have a lot of validity or problem,
6 you know. So that we never could get to a real
7 discussion about the house because there were all
8 these litigations that were presented.

9 And, for example, the barge site being
10 filled in, that the dirt was filled in and
11 somehow we owe them \$50,000. Well, the barge
12 wasn't operated from -- was under a lease from
13 International Paper from, like, the years that I
14 recall were 1996 to 2000 --

15 Q. Let me -- Mr. Freedman, could I
16 interrupt and stop you for just a minute?

17 A. Yes.

18 MR. LESEMAN: Taylor, could you go
19 to Defendant's Exhibit No. 09? Well, first go to
20 the photographs of the -- the old photographs.

21 A. Are they in front of you on that thing
22 there too?

23 Q. Well, let me -- why I wanted to stop you
24 is -- is Barge Creek; right? (Indicating.)

25 A. Right.

1 Q. Is the common name given to the area
2 where the barge operates.

3 A. Right, right.

4 Q. Correct?

5 A. Yes.

6 Q. Did you fill in Barge Creek and cause
7 the pluff mud to creep and silt in?

8 A. No, sir.

9 Q. Did Mr. Taylor write a letter to OCRM in
10 2014 accusing of doing that?

11 A. Yes, sir.

12 Q. Did Mr. Taylor and Mr. Scurry sue you in
13 this litigation for allegedly filling in Barge
14 Creek?

15 A. Yes, sir.

16 Q. What happened to that cause of action?

17 A. I believe it was dismissed.

18 Q. And under the lease, who's responsible
19 for -- if there needs to be a certain level of
20 depth kept in Barge Creek, who would be
21 responsible for seeking the permits and
22 undertaking the expense to make sure that Barge
23 Creek is useable for the tenant?

24 A. Mr. Scurry.

25 Q. Okay. Now --

1 A. J&W.

2 Q. -- alternatively, if the tenant wanted
3 to avoid undertaking an expense and a
4 responsibility that the lease puts on him, what
5 might be another way of trying to put that on the
6 landlord?

7 A. Well, making some type of claim that it
8 was the landlord's fault.

9 Q. Or initiating some sort of regulatory
10 activity.

11 A. Right.

12 Q. Did OCRM come to the site?

13 A. I believe they --

14 Q. Did you receive any notice of any
15 violation or any claim for environmental
16 enforcement from OCRM that you had filled in
17 Barge Creek?

18 A. No, sir.

19 Q. Okay.

20 A. Not that I'm aware.

21 Q. Were you able to find some old
22 photographs of Barge Creek --

23 A. Yes.

24 Q. -- Mr. Freedman?

25 A. Yes.

1 MR. LESEMAN: Taylor, is it
2 possible just to highlight either one of these?

3 MR. POWELL: Sure. (Complies with
4 request.)

5 Q. So this here -- this is the -- it is a
6 little overexposed; but, Mr. Freedman, would this
7 be the concrete pier? (Indicating.)

8 A. Yes, sir.

9 Q. And this area here would be Barge Creek?
10 (Indicating.)

11 A. Right.

12 Q. And then this would be in the vicinity
13 of the dry stack building, although that's a
14 different --

15 A. That's the old dry stack. So one is
16 able to determine the time frame of it.

17 Q. And this is the approximate location of
18 where the pub currently is but an existing
19 building that was there?

20 A. Right. Yes, sir.

21 Q. So based on your ability to look at
22 those landmarks that are there --

23 A. Right.

24 Q. -- what's the approximate time frame of
25 this photograph?

1 A. Well, it has to be prior to about 2005,
2 2006.

3 Q. And from the evidence of the
4 photograph --

5 A. And before the pub was altered in any
6 way.

7 Q. And what do you see? As the owner of
8 the property, what do you see is the condition of
9 Barge Creek in this photograph?

10 A. Barge Creek is filled with mud
11 basically, you know.

12 Q. Did you cause tons upon tons of earth to
13 be moved into Barge Creek so that this would get
14 filled in so you could frustrate Mr. Scurry's
15 barge operation?

16 A. No, sir.

17 Q. But were you accused by Mr. Scurry's
18 attorney of doing so?

19 A. Yes, sir.

20 Q. Do you have an understanding about what
21 circumstances may have caused some of that to
22 occur over time in terms of the history of the
23 disuse or use or lack of use of Barge Creek is?

24 A. Yes. International Paper leased the --
25 that Barge Creek for a number of years from

1 Mr. Scurry, and they did not use the site at a
2 point in time that was probably about 2002. When
3 I was getting first involved with it, I had some
4 discussions with them about taking over their
5 lease and -- and doing it.

6 However, they also thought the site
7 couldn't get permitted for a barge anymore
8 because it was a nonconforming use, and it had
9 been abandoned for a year; but somehow Mr. Scurry
10 was able to do it.

11 I didn't go forward with the sublease
12 with International Paper because their legal
13 documents had indemnifications that included
14 environmental and everything; and so I had no
15 knowledge or way to protect the, you know, the
16 potential legal exposure if I indemnified them.
17 So I didn't go forward.

18 Q. Understood.

19 A. But -- so there's a whole history of
20 that not being used, being filled in, and prior
21 to our involvement, and potentially not even
22 properly permitted. I don't know.

23 Q. And is it your understanding, as a
24 landlord, that the cost of maintenance and repair
25 of the lease property -- and this barge site

1 would include it -- would be strictly upon the
2 tenant?

3 A. That is correct.

4 Q. And if there are permits or regulatory
5 approvals that are required in order for that
6 maintenance to be undertaken, who is responsible
7 for obtaining those?

8 A. The tenant.

9 Q. Did you have an understanding that when
10 International Paper went to the Town of Hilton
11 Head at one time to seek a business license to
12 reactivate this use, did they run into some
13 interference or denials?

14 MR. TAYLOR: Objection, Your Honor.
15 Hearsay.

16 Q. Do you have -- have you spoken with
17 individuals that have allowed for you to have an
18 understanding of some of the business license
19 history relating to Barge Creek?

20 MR. TAYLOR: Objection. Hearsay.

21 THE COURT: The first question,
22 have you spoken with him, I don't know if you get
23 into it, I don't know what the follow-up is. So
24 I'll allow him to answer the question and see
25 where it goes.

1 Q. Do you have an understanding relating to
2 certain issues with the licensing history
3 relating to a barge operation in Barge Creek?

4 A. Yes. I saw a document that indicated
5 that --

6 MR. TAYLOR: Objection, Your Honor.
7 Hearsay.

8 Q. Just speak from your understanding.

9 A. My understanding is that a permit was
10 denied.

11 Q. Do you have an understanding about
12 whether J&W Corporation has an active business
13 license from the Town of Hilton Head at this time
14 in order to conduct specifically a barging
15 operation in this creek?

16 A. I'm not aware whether they do or not.

17 Q. Have you yourself caused me to write a
18 letter to the Town of Hilton Head in order to
19 have them launch an investigation into whether
20 there is a properly-licensed barging operation
21 going on in this creek?

22 A. I don't recall doing that.

23 Q. Do you know whether the license that
24 they actually currently hold includes barging as
25 an acceptable activity within its scope?

1 A. I do not know.

2 Q. Have you sought to undermine
3 Mr. Scurry's operation by initiating any
4 investigation or notices of violations from the
5 Town of Hilton Head relating to his operations?

6 A. No, sir.

7 Q. Did you have anything to do with
8 contacting the Coast Guard in the fall of 2018
9 relating to the hazardous materials or the unsafe
10 conditions on the Jake Washington barge?

11 A. No, sir.

12 Q. However, as a landlord, do those Coast
13 Guard activities and those enforcement activities
14 concern you?

15 A. Absolutely.

16 MR. LESEMANN: Taylor, could you go
17 back to Defendant's Exhibit No. 06.

18 MR. POWELL: (Complies with
19 request.)

20 Q. Mr. Freedman, all right. There's a
21 dollar-a-year lease that has obligations on the
22 part of the tenant; correct?

23 A. Yes, sir.

24 Q. Essentially, it's a triple net type of
25 situation. Is that accurate?

1 A. Yes, sir.

2 Q. Is it also accurate that all costs of
3 upkeep and maintenance are placed upon the
4 tenant?

5 A. Yes, sir.

6 Q. Would that make sense to you as a
7 businessman in the context of a dollar a year,
8 99-year lease?

9 A. Yes, sir.

10 Q. Would you want to have to provide him
11 continually new office buildings over a 99-year
12 period when you're getting a dollar a year in
13 rent?

14 A. No, sir.

15 Q. Is that why, in your mind as the
16 landlord, that the lease places the obligations
17 of all costs of ownership and possession
18 allocated portions of your own costs, all costs
19 of maintenance and upkeep, costs of replacement,
20 ultimate responsibility for repairing damage,
21 does all this fit part of the understanding of
22 the lease, in your mind, as to why those costs
23 are put on the tenant?

24 A. Yes, sir.

25 Q. Why is that?

1 A. Well, you're getting a dollar-a-year
2 lease. All the expenses would normally be
3 allocated to the tenant.

4 Q. Okay.

5 A. Usually you don't get a dollar a year.
6 You get more, plus those are allocated to the
7 tenant.

8 Q. Mr. Freedman, has Mr. Scurry ever
9 complied with the insurance provisions of the
10 lease?

11 A. No, sir.

12 Q. Has he ever timely paid -- in your
13 experience timely paid all of the lease charges
14 that are due?

15 A. Never.

16 MR. LESEMANN: Could you --

17 A. And if you'll -- well --

18 Q. Yeah. Go ahead, please.

19 A. Not timely paid. Failed to pay. So
20 when you look in the settlement agreement, it
21 refers to the past due moneys being waived. Sort
22 of the indication there was always a problem
23 collecting from Mr. Scurry, both in substance and
24 in -- on a timely basis.

25 Q. So was there an arrears before 2004?

1 A. Yes, sir.

2 Q. And is there arrears as we sit here
3 today?

4 A. Yes, sir. Substantial.

5 Q. And has there been an arrears,
6 essentially, in every moment in between from 2004
7 to the present at some level or another?

8 A. Yes, sir.

9 Q. Now, you had prior attorneys that helped
10 you with your relationship. You basically had to
11 be -- you've had to be lawyered up, essentially,
12 during this entire landlord-tenant relationship;
13 is that accurate?

14 A. Yes, sir. Yes, sir.

15 Q. And did your attorney -- well, let's
16 just talk about it generally.

17 What has been the experience? Talk
18 about the nature of J&W's business, the nature
19 of --

20 A. Put it in the context of my own, for
21 instance, to start with, I've been in business as
22 a banker, a CFO, as a board director of three
23 public companies, a New York stock exchange
24 investment banking firm; and I've never been a
25 big fan of litigation. And the fact of the

1 matter is: I've always been able to, if there
2 were disputes, to get them settled.

3 I've only been in a -- before a judge
4 two times in my life, and Judge Dukes has had
5 that privilege. So he's my favorite judge but --
6 but the reality is I'm always very reluctant to
7 spend time, money, and that in terms of getting
8 into disputes.

9 And when we did the settlement
10 agreement, the reason I gave such a substantial
11 discount to Mr. Scurry related to the charges was
12 that I hoped he would be satisfied; and then we
13 could go on and live peacefully. Because you
14 take 16.6 percent of the dock space that he was
15 obligated to before and you take it to 7-and-a-
16 half percent, it's a very substantial discount.

17 So there should have been no need for
18 the interim because most business people that
19 function in a, sort of, a decent, responsible way
20 would continue about arguing every section of
21 that from the day almost, you know, from 12
22 months after when the obligations were made way
23 before any house obligations or office
24 obligations were presented to us.

25 Q. So it's not that you're seeking closure

1 because there are approximately 76 years left on
2 the lease; right? More than closure, is it -- do
3 you need function? Do you need functionality?

4 A. Well, I guess there's a term in real
5 estate that doesn't -- isn't applicable, but I'd
6 like "quiet enjoyment."

7 Q. Right.

8 A. So that functionally, the tenant meets
9 its obligations, pays, doesn't interfere with our
10 business, and -- and we move forward.

11 MR. LESEMAN: So, Taylor, if you
12 could highlight section -- paragraph 1.

13 MR. POWELL: (Complies with
14 request.)

15 Q. Let's talk about that interference, and
16 let's talk about the nature of J&W's business.

17 Lots of traffic, lots of impact on your
18 property; is that right?

19 A. Yes, sir. Yes, sir.

20 Q. Would you describe that for Judge Dukes.

21 A. Well, it's -- it's gone upward and
22 downward over a period of time but it -- when the
23 lease was taken in early 2004, the ferry
24 operation, I think, barely operated a number of
25 people. They probably didn't have 30 people a

1 day going on the ferry operation.

2 Q. So if I could just step in there real
3 quick, Mr. Freedman. You mentioned the lease in
4 2004. The settlement agreement was in '04, and
5 the lease was in '93?

6 A. Yes.

7 Q. But your brother had been involved.

8 A. Yeah. My brother, the first time I -- I
9 was probably on the property two to three times
10 between that -- that -- the inception of the
11 lease in 2003 --

12 Q. Okay.

13 A. -- and that.

14 Q. So move forward in terms you were
15 discussing when I interrupted you.

16 A. There was just a very small amount of
17 people going back and forth to Daufuskie, some
18 contractors and some --

19 Q. Did Mr. Scurry's operation clean up
20 after all those people? Did he clean up -- I
21 mean, would there be issues with garbage and use
22 of the property?

23 A. It got increasingly worse as the volume
24 increased substantially so that, then, in later
25 years, especially after the Melrose bankruptcy,

1 when all the traffic from Melrose and that
2 increased dramatically, and then he also
3 increased his tourism business.

4 So there was, you know, an enormous
5 amount of additional people on the property.
6 There was an additional amount of refuse; and
7 although we're responsible for cleaning the
8 property, he's responsible for cleaning up his
9 own stuff, which he never, you know, garbage.

10 Q. And he's responsible for paying you an
11 allocated share of those common areas charges
12 that would --

13 A. Right, right.

14 Q. That would compensate for cleaning.

15 A. Yes.

16 Q. Does he pay them?

17 A. No, sir.

18 Q. And you mentioned parking before. So we
19 don't need to stay on this for too much longer;
20 but there have been issues where you've been able
21 to confirm that, from time to time, J&W
22 Corporation has exceeded its parking rights on
23 the lease.

24 A. Right, that's correct.

25 Q. And do they continually use areas of the

1 property that they aren't authorized to use?

2 A. All the time.

3 MR. LESEMANN: Could you go to the
4 pictures that were just from the other day.

5 MR. POWELL: (Complies with
6 request.)

7 Q. I think one of these issues popped up
8 just the other day, Mr. Freedman. Can you
9 identify for Judge Dukes what's shown in
10 Defendant's Exhibit No. 74?

11 A. Yes. This is adjacent to the office
12 building that J&W occupies now.

13 Q. Okay.

14 A. So they've put up tents, a ramp.
15 They've parked carts there, golf carts there; and
16 so they have a right of access, but they act as
17 if they own everything there and around them.

18 Q. So is this part of the lease property
19 here? (Indicating.)

20 A. No, sir.

21 Q. Is this approximately 1900 square feet
22 that were taken up through these tents and these
23 picnic tables?

24 A. Right.

25 Q. Okay.

1 A. I think they might have moved our picnic
2 tables over there for their use.

3 Q. And there's some 2 x 4s and some lumber
4 off to the side. Did Mr. Scurry ask if it would
5 be okay if he used 1900 square feet of your
6 property to create an area for his business?

7 A. No, sir.

8 Q. Does he have permission to do it?

9 A. No, sir.

10 Q. Is this an example of the day-to-day
11 ongoing year-to-year issues and frustrations that
12 you continue to have with Mr. Scurry?

13 A. Yes, sir.

14 MR. LESEMANN: So, Taylor, could
15 you go back to -- try Defendant's Exhibit No. 72.

16 MR. POWELL: (Complies with
17 request.)

18 MR. LESEMANN: Okay. Defendant's
19 Exhibit No. 71.

20 Q. So did you have the opportunity to take
21 this picture the other day?

22 A. Yes, sir.

23 Q. And is this just an example of
24 Mr. Scurry's and J&W Corporation's customers that
25 are able to come and buy tickets and get on the

1 ferry?

2 A. Right. Sure.

3 Q. Does anybody seem to be in distress?

4 A. No, sir.

5 Q. Does the office seem to be functioning
6 for the purpose of receiving these folks and
7 selling them tickets?

8 A. Yes. It is functioning.

9 Q. And, in fact, at least, you know, it
10 seems everybody wants to, you know. Is
11 everybody, in this courtroom wanting to -- the
12 judge obviously, makes all the decisions; but are
13 the landlord and the tenant wanting to move the
14 tenant from this building?

15 A. Yes, sir.

16 Q. And have you wanted to do that for some
17 time?

18 A. Yes, sir.

19 Q. But in order to do that, you have to
20 amend the permit with OCRM; correct?

21 A. Right. And I need his cooperation.

22 Q. And now based on what the judge decides,
23 you have a spot where you can put the new
24 floating office; correct?

25 A. Yes, sir.

1 Q. That Mr. Scurry himself said he would
2 accept?

3 A. Yes, sir.

4 Q. Are you prepared to pursue that
5 amendment?

6 A. Absolutely.

7 Q. Are you prepared to interact with the
8 Town of Hilton Head for whatever requirements
9 they have?

10 A. Yes, sir.

11 Q. And did you get a determination from
12 Miss Lewis, Terry Lewis, the land management
13 officer, to indicate that that would be
14 acceptable in terms of a use from the Town?

15 A. Yes.

16 Q. Do you know whether there may have been
17 some activity on the part of the tenant to get
18 them to issue a determination that was of some
19 other nature?

20 A. Well, they seem to have gone to the Town
21 to provoke the notice of -- of, you know, the --
22 the violation.

23 Q. But insofar as it goes, the Town has
24 indicated that in the waterfront mixed use
25 district and the conservation district --

1 A. It seemed like Mr. Taylor was trying to
2 imply that you couldn't get that done. You can.

3 Q. The Town has confirmed with you that you
4 can?

5 A. Yes. You heard that testimony. You
6 have the letter.

7 MR. LESEMAN: Your Honor, I'd like
8 to just admit the photographs Defendant's Exhibit
9 No. 71 and --

10 A. And can I comment?

11 Q. Yes, sir. Please go ahead.

12 A. And if you notice too, this isn't the
13 parking lot; and there's always constant cars
14 there. It's a danger to different people coming.

15 As we develop the property, we're going
16 to have more people accessing there; and they use
17 it as, sort of, a drop zone and have multiple
18 cars. They park them there. Their people leave
19 their suitcases there.

20 That's not what is contemplated in the
21 lease. The lease contemplates access. So access
22 is you take your stuff. You move. You do it.
23 But sometimes people come, sit there with their
24 cars. Somebody is dropping them off, their
25 suitcases all over the property.

1 That -- that's an additional use of the
2 property that we don't get compensated nor have
3 we permitted.

4 Q. Does the dollar a year get Wick those
5 additional 1900 square feet of space?

6 A. No, sir.

7 MR. LESEMAN: Your Honor, I just
8 would move for the two photographs that we
9 discussed, Defendant's Exhibit No. 71 and No. 74,
10 to be entered as Defendant's Exhibits.

11 MR. TAYLOR: I am looking at
12 Defendant's Exhibit No. 74, Your Honor. One
13 second. No objection, Your Honor.

14 THE COURT: All right. They will
15 be entered.

16 (Defendant's Exhibits No. 71 and No. 74
17 are admitted into evidence.)

18 Q. And so let's go to Defendant's Exhibit
19 No. 02.

20 MR. TAYLOR: Your Honor, I object
21 to the letter that is on the board. I kept
22 waiting on him to identify it and put it in
23 evidence, but he hasn't yet; but it is being
24 shown on a board.

25 Your Honor, if you'll look at the

1 first page, that letter specifically says "for
2 settlement purposes only." It's a letter between
3 attorneys; and under the South Carolina Rules of
4 Evidence and common law holdings, it is
5 specifically not authorized to be used as any
6 evidence in this courtroom at all.

7 MR. LESEMAN: So, Your Honor --

8 MR. TAYLOR: If you'll show the
9 first page with the "for settlement purposes
10 only" under it.

11 THE COURT: Let me hear the
12 response.

13 MR. LESEMAN: Yeah. It says -- it
14 says "for settlement purposes only" on the first
15 page; but, Your Honor, that rule would speak to
16 if I came to trial. And I said, "Well,
17 Mr. Scurry offered us 60 grand for these accrued
18 charges so he must be liable. Why would he have
19 offered 60 grand?"

20 You can offer these for other
21 purposes, and the purpose that I'm doing these
22 for is purposes for -- of notice and purpose for
23 showing how far back these problems go.

24 I'm going to use this as a
25 demonstrative exhibit, and I'm just using this to

1 show -- it goes through in paragraph by paragraph
2 form the issues that are at hand.

3 THE COURT: You're not going to
4 offer the letter itself; and you'll stop before
5 you get to the end, we'll settle it for such and
6 such.

7 MR. LESEMANN: There actually is no
8 such statement in this letter. There's no
9 number; and, again, it's -- this is not from
10 Mr. Taylor or any attorney on behalf of
11 Mr. Scurry. It was from the landlord's attorney;
12 and there is no, you know, there is no monetary
13 offer in it.

14 THE COURT: You're just outlining
15 the allegations of violation of the lease --

16 MR. LESEMANN: Right.

17 THE COURT: -- essentially.

18 MR. LESEMANN: Yeah.

19 THE COURT: So it sounds like it's
20 not to be offered; and there's no real offer of
21 settlement anyway, apparently, in it. And all
22 you're going to do is just demonstrate through
23 use of highlighting these allegation paragraphs.
24 Is that the intent?

25 MR. LESEMANN: Yes. That's the

1 intent, Your Honor.

2 THE COURT: So I'll let him
3 question the witness from it. Doesn't sound like
4 it's going to be offered anyway, and there's no
5 real settlement anyway.

6 MR. TAYLOR: Your Honor, as long as
7 my objection is noted on the record. He's using
8 it to, basically, tutor the witness through his
9 testimony. And, again, it says "for settlement
10 purposes only."

11 I believe it's excluded from use in
12 the courtroom, and I appreciate you noting it on
13 the record.

14 THE COURT: As to the tutoring, I
15 guess, technically, it is cross. So I think --

16 MR. LESEMAN: Thank you.

17 MR. TAYLOR: Your Honor, for the
18 record, I would not -- Mr. Freedman was,
19 obviously, called for cross-examination purposes.
20 This is not cross-examination. This is direct, I
21 believe, is what Mr. Lesemann's testimony is.

22 MR. LESEMAN: Well, once he takes
23 the liberty of calling out, he's allowed to treat
24 the witness as hostile; but when I'm in the
25 posture of a cross-examination, I do have the

1 ability to cross-examine. He called the witness.
2 I don't revert to a direct.

3 THE COURT: Right. I -- yeah, I
4 think we're still in the plaintiff's case so --

5 MR. TAYLOR: Yes.

6 THE COURT: But anyway, please
7 proceed.

8 MR. LESEMANN: Thank you, Your
9 Honor.

10 BY MR. LESEMANN:

11 Q. So has the payment of utilities been a
12 constant problem?

13 A. Yes, sir.

14 Q. Now, we went over this some yesterday
15 with some of the other witnesses; but has
16 Mr. Scurry had continuous use of the 300 feet of
17 linear dock space?

18 A. Yes, sir.

19 Q. And he's had the parking spaces?

20 A. Yes, sir.

21 Q. And he's had the barge site?

22 A. Yes, sir.

23 Q. And he's had an office in one form or
24 another?

25 A. Yes. And with more space. He has 450

1 feet, 300 that he uses for the office and about
2 150 or so for the storage, I believe.

3 Q. Sure. And let's talk about that. So
4 the existing space --

5 A. Yes.

6 Q. -- such as it is, does it exceed 300
7 square feet?

8 A. Yes, it does.

9 Q. Under the lease, who's responsible for
10 any alterations, upkeep, permits, compliance, and
11 sanitation, and expenses of the lease property?

12 A. The tenant.

13 Q. But is the tenant here asking the Court
14 to impose all of those obligations on the
15 landlord?

16 A. Yes, sir.

17 Q. And do you feel like that violates the
18 exact expressed written terms of the lease?

19 A. Yes, sir.

20 Q. And has that, in your mind, been a
21 pattern on the part of this tenant?

22 A. Yes, sir.

23 Q. And utilities continues to be -- now,
24 does J&W use power?

25 A. Yes, sir.

1 Q. And do their patrons use water and
2 sewer?

3 A. Yes, sir.

4 Q. Did you get -- for all the -- and
5 Mr. Scurry mentioned yesterday, did you hear him
6 say that maybe 20,000 people or so come through
7 the property for the ferry?

8 A. Yes, sir.

9 Q. Do you get any -- receive any
10 compensation from him for the utilities
11 compensation from his enterprise plus the 20,000
12 plus patrons that it serves?

13 A. There -- there might have been in the
14 last couple of years an occasional payment, but
15 I'm not aware of any substantive.

16 Q. But you're here because you can't get
17 him to pay the difference.

18 A. That's right.

19 Q. And absent an order from Judge Dukes,
20 are you able to get the tenant to ever pay these
21 amounts on a timely basis and on a voluntary
22 basis?

23 A. Never done since the inception of the
24 lease.

25 Q. Now, is there any --

1 A. Which is 1993, not from the settlement.

2 Q. I mean, in your mind, in your
3 experience, is there anything draconian or
4 particularly unusual about a lease that calls for
5 a tenant to pay allocated portions of utilities
6 and insurance and taxes?

7 A. No, sir.

8 Q. Is that what's known commonly as a
9 "triple net lease"?

10 A. Right.

11 Q. Is that a common instrument that's used
12 in landlord-tenant relationships?

13 A. Yes. And I don't really have -- recall
14 any tenant that we ever had that basically
15 started questioning the -- the nitty-gritty,
16 especially when the charges were so nominal.

17 Q. Right. Has -- does the lease require
18 that the tenant pay its allocated share of
19 property tax before delinquency?

20 A. Yes, sir.

21 Q. Has the tenant failed to do that?

22 A. Yes, sir.

23 Q. Has that fail been repeated?

24 A. Yes, sir.

25 Q. Has that failure been, in your mind,

1 intentional?

2 A. Yes, sir.

3 Q. Are there, as we are here today, still
4 unresolved amounts of property taxes that J&W
5 Corporation owes but has not paid?

6 A. Yes.

7 Q. Have you placed -- has the landlord
8 placed the tenant on repeated notice of that
9 failure?

10 A. Yes. The litigation.

11 Q. The tenant's taken steps to ever -- now,
12 at one point did you -- do you know -- and
13 Miss Rachels may be able to testify with more
14 precision -- but did you get a check for a couple
15 of back years of back taxes at one time?

16 A. I think we got a small amount of money
17 at some point in time.

18 Q. And was that, if you recall, during the
19 same time frame that J&W Corporation was located
20 in its current space?

21 A. Yes.

22 Q. If the premise is they're going to pay
23 nothing while we're in that office space, do you
24 have an explanation as to why the tenant might
25 have paid some but not all of the charges?

1 A. I have no explanation.

2 Q. Does it make any sense to you?

3 A. No, sir.

4 MR. LESEMANN: If you go to
5 paragraph 4, please.

6 MR. POWELL: (Complies with
7 request.)

8 Q. Has the tenant paid its allocated
9 portion of insurance?

10 A. No, sir.

11 Q. Does the lease specifically provide for
12 this?

13 A. Yes, sir.

14 Q. Have you placed the tenant on notice of
15 the amounts that they owe?

16 A. Yes, sir.

17 Q. Have they refused to pay?

18 A. Yes, sir.

19 Q. Is failure, in your mind, intentional?

20 A. Yes, sir.

21 Q. Is it going to continue until Judge
22 Dukes decides how he wishes to act on it?

23 A. Yes, sir.

24 MR. LESEMANN: Section 5, please.

25 MR. TAYLOR: (Complies with

1 request.)

2 MR. LESEMAN: Okay. Go on to
3 Section 6.

4 Q. But we talked and Mr. Scurry admitted
5 that he leases parking spaces and charges
6 customers for parking; is that right?

7 A. I don't believe that's a permitted
8 activity.

9 Q. But he has done it.

10 A. Yes, he has.

11 Q. And he has made money from it?

12 A. Yes, sir.

13 Q. To your knowledge, he's made substantial
14 amounts of money from ferrying and barging as
15 well?

16 A. Yes, sir.

17 Q. But won't pay you for the charges under
18 the lease.

19 A. Which are nominal compared to his
20 revenues in his pockets.

21 Q. Have there been issues from time to time
22 with oil cans, garbage, debris, bags of trash,
23 and so on left on the property?

24 A. Yes, sir.

25 Q. Would Mr. Jones probably be the best

1 person to speak to about that?

2 A. He would be the best person, yes.

3 Q. Has the tenant been placed on notice of
4 this issue?

5 A. Yes, sir, yes, sir.

6 Q. All right. No. 7.

7 Has the tenant ever asked permission
8 from you as the landlord for any signage that it
9 has erected?

10 A. No, sir.

11 Q. Does the lease speak to that the
12 landlord would need to approve any awnings or
13 signage?

14 A. Yes.

15 Q. Do you know whether the tenant has ever
16 received permission from the Town of Hilton Head
17 for its signage?

18 A. I'm not aware that they have, but I
19 doubt that they ever sought permission.

20 Q. Have you ever run to the Town or written
21 letters to the Town to initiate an investigation
22 of J&W's signage for purposes of having them
23 issue notices of violation or otherwise cause a
24 disruption to Mr. Scurry's business?

25 A. No, sir.

1 Q. Does -- do J&W's operations cause damage
2 to the walkways and to the docks from time to
3 time?

4 A. Yes, sir.

5 Q. Does Mr. Scurry ever pay for those
6 damages?

7 A. No, sir.

8 Q. Does the lease obligate him to pay for
9 those damages?

10 A. Yes, sir.

11 Q. Have you placed the tenant on notice of
12 this issue?

13 A. Yes, sir.

14 Q. Have they done anything about it?

15 A. No, sir.

16 MR. LESEMANN: Go to paragraph 12.

17 MR. POWELL: (Complies with
18 request.)

19 Q. One of the issues in 2004, was it to
20 figure out ways to avoid future disputes about
21 utility charges and things like that?

22 A. That's exactly.

23 Q. Okay.

24 A. My hope was that we, sort of, you know,
25 clean things up and move forward.

1 Q. And what was the methodology, at least
2 as far as utilities, that you could do it so that
3 you would know for certain who was using what and
4 who was responsible for what?

5 A. The tenant was obligated to install
6 meters.

7 Q. And that obligation goes back to the
8 signing of the settlement agreement; correct?

9 A. Right.

10 Q. All right.

11 A. Which included the docks and his boats.
12 So he -- he hooks up to our -- every day his
13 boats hook up to our power; and they really, in a
14 sense, are trespassing because he has no right to
15 those utilities without observing this.

16 Q. Have you ever -- have you cut off the
17 electricity to -- and basically prevented him
18 from being able to have access to water and
19 electricity?

20 A. I think I've dreamt it once or twice.

21 Q. But you --

22 A. But I haven't done it.

23 Q. But you haven't done it?

24 A. I haven't done it.

25 Q. Although you might -- the law might

1 decide if you have the right to do that --

2 A. Right.

3 Q. -- but after -- has the tenant failed to
4 uphold these provisions in the settlement
5 agreement to obtain meters and to pay for their
6 own utilities?

7 A. They have failed to honor their
8 obligation.

9 Q. And is that something else that, again,
10 in connection with this lawsuit that we've been
11 at now -- although it started in a different
12 format and it's continued -- it's been going on
13 for about nine years?

14 A. Yes, sir.

15 Q. And this is one of the things -- now at
16 the end of the nine years when we get everything
17 resolved and Judge Dukes helps us, this is one of
18 the things you need him to help us resolve;
19 correct?

20 A. Absolutely.

21 Q. To enforce all aspects of that agreement
22 and also to enforce all aspects of the lease?

23 A. Yes, sir.

24 Q. We talked about a --

25 MR. LESEMAN: Taylor, if you could

1 show Defendant's Exhibit No. 08.

2 MR. POWELL: 8?

3 MR. LESEMANN: Yeah. No. 80.

4 Sorry.

5 Q. Mr. Freedman, you and I have been
6 working together since about 2014?

7 A. Yes, sir.

8 Q. And have I sent various notices at your
9 instruction to the tenant relating to various
10 deficiencies under the lease?

11 A. Yes, sir.

12 Q. Could you look in the notebook in front
13 of you as Defendant's Exhibit No. 80, No. 81, and
14 No. 82.

15 A. (Complies with request.) Yes. I have
16 it.

17 Q. So if you could just look at Defendant's
18 Exhibit No. 80, No. 81, and No. 82. And do these
19 appear to be letters that I wrote at your
20 instruction and on your behalf --

21 A. Yes, sir.

22 Q. -- to counsel for the tenant --

23 A. Yes.

24 Q. -- relating to violations under the
25 lease?

1 A. Yes, sir.

2 MR. LESEMAN: Your Honor, we'd
3 just ask that these be admitted as notifications
4 to the tenant relating to violations and defaults
5 under the lease.

6 THE COURT: Mr. Taylor.

7 MR. TAYLOR: No objection, Your
8 Honor.

9 THE COURT: All right. No. 81,
10 No. 82, and No. 83?

11 MR. LESEMAN: I believe it's
12 No. 80, No. 81, and No. 82.

13 THE COURT: You're right. No. 80,
14 No. 81, and No. 82.

15 MR. LESEMAN: Thank you, Your
16 Honor.

17 (Defendant's Exhibits No. 80, No. 81,
18 and No. 82 were admitted into evidence.)

19 Q. Mr. Freedman, we continue to discuss
20 this pattern and the history. Was there any --
21 was there a circumstance where, in order to meet
22 the business needs, that you needed to look at
23 extending the pier at Broad Creek Marina?

24 A. Yes, sir.

25 Q. Did you receive obstruction and

1 interference and objection to your efforts from
2 the tenant?

3 A. Yes, sir.

4 Q. Ultimately, were you able to obtain the
5 approvals that you wanted?

6 A. Yes, sir.

7 Q. Okay.

8 A. But, you know, like everything involved
9 in that instruction, it was a costly process to
10 have to litigate.

11 Q. Right. To use your property.

12 A. To use my property, yes.

13 Q. I think I've got another example that's
14 similar. Do you operate a zip line business on
15 an adjoining parcel?

16 A. Yes, I do, sir.

17 Q. And is that zip line business, did the
18 tenant attempt to obstruct that -- the approval
19 of that business as well?

20 A. Yes, sir.

21 Q. And did that go so far as where the
22 tenant filed a lawsuit against the Town of Hilton
23 Head?

24 A. Right. Yes, they did.

25 Q. And was the tenant successful in

1 blocking your ability to open a zip line
2 business?

3 A. No, sir.

4 Q. It opens to this day?

5 A. Yes, sir.

6 Q. And what was the basis of the tenant's
7 objection?

8 A. They said the -- we didn't have enough
9 parking there, and the way the approval process
10 works for the Town is there's a subjective aspect
11 to it. And the fact that if you could
12 demonstrate that you don't need additional
13 parking, they'll approve it; but if they think
14 you might have a need, you have to demonstrate
15 that you have the capability to have that
16 parking.

17 So we demonstrated that we had the
18 capability because, basically, the zip line
19 property at the time is 10 acres; and the
20 footprint was 1200 feet. So there was a lot of
21 space that we could add additional parking.

22 And we did add additional parking; but
23 the tenant never came to us, other than when we
24 got in the litigation. And then their solution,
25 which was, sort of, typical, was that,

1 effectively, if we rented them additional parking
2 at a below market price in conjunction with them
3 never paying for it, they would withdraw their --
4 they have a history of not paying.

5 So, A, their settlement was that we give
6 them more parking, not that we provide more
7 parking for our operation. And, two, the -- they
8 pay us a price that didn't reflect the value;
9 and, three, they have a history of never paying.

10 So it wasn't attractive; but we had to
11 litigate and go through all this, join the Town,
12 and defend our interests.

13 Q. Is there also a history of accidents,
14 pier collisions, lack of control of vessels, and
15 things of that nature that cause you concern as
16 the landlord?

17 A. Yes. You know, and, again, typical of
18 the, sort of, unfortunate litigation, I think the
19 judge dismissed their case when their boat came
20 out, backed up the -- the captain was in charge
21 and they -- they sued us for -- for what was his
22 responsibility. So they tried to litigate that
23 position, and then it got dismissed.

24 They had another instance where they
25 were repairing the boat, and the boat went out of

1 control; and it smashed the dock space.

2 They had another incident where they
3 were witnessed smashing into the pier and didn't
4 report it to the Coast Guard, and then it was
5 reported; but there were other times where we saw
6 there was potential damage. Or we saw it, never
7 reported it, and always took the position it
8 wasn't their responsibility.

9 Q. We're going to show a Google -- the
10 Google Earth image of the marina again. But,
11 Mr. Freedman, you were here when Mr. Scurry
12 described the -- sort of the geographic footprint
13 of his business operation; right?

14 A. Right.

15 Q. What's your understanding of that in
16 terms of he's got, you know, does he have assets
17 and property on Daufuskie?

18 A. Yes, he does.

19 Q. And he has assets and property on Hilton
20 Head through your lease; correct?

21 A. Yes, sir.

22 Q. Tell me about your dry stack operation.
23 Are you able to get up to the concrete pier?

24 A. Sure.

25 Q. Tell me about your dry stack operation

1 at Broad Creek Marina.

2 A. And what --

3 Q. Just for the record, the Court might be
4 aware of it. It saw it, but approximately how
5 many boats are there?

6 A. We have about 210 boats there.

7 Q. And is the -- is -- what's the
8 importance of the concrete pier to your ability
9 to operate that business?

10 A. Well, without it, it would be almost
11 impossible to operate it.

12 Q. Okay.

13 A. So the -- the danger of the barge
14 damaging it and putting it out of business is --
15 the potential is extraordinary, and it's very
16 disturbing that they don't carry amount of
17 insurance.

18 The lease talks about inflation. Well,
19 they -- probably the cost of replacement is
20 exceeded by any inflation rate; and so they're
21 vastly underinsured in, you know, contrast to
22 what their obligation is.

23 And then there have just been numerous
24 incidents where they have touched or hit the
25 marina. I've witnessed it --

1 Q. I don't think this point is lost on
2 Judge Dukes; but, again, if the barge undermines
3 the concrete pier, what happens to your dry stack
4 business?

5 A. It dries up.

6 Q. And what happens to your ability to
7 serve -- service -- how many people did you --
8 how many boats?

9 A. 200 boats.

10 Q. What's happens to your ability to
11 service the 200 boat owners?

12 A. It would be difficult, you know, to do
13 it on a sustained basis; and a lot of the boats
14 would go in the water, and the benefit of the dry
15 storage is it's a -- it's a very environmentally-
16 conducive operation because you keep the boats
17 out of the water. The oil and all those things
18 don't go into it. So it's a very positive thing
19 for the health of the local environment.

20 Q. When I was cross-examining Mr. Scurry
21 yesterday, he suggested that the insurance
22 requirements of the lease might be, in essence,
23 technical or technicalities.

24 As the owner of this property and the
25 person who needs to make sure it can continue to

1 operate and service its various customers, are
2 issues relating to insurance technical or
3 technicalities to you?

4 A. No. They're, you know, material and
5 important as you could have.

6 Q. And does the failure to pay for the
7 hurricane damage from Hurricane Matthew, does
8 that simply underscore the significance of the
9 problem and the potential significance of it for
10 you?

11 A. Right. And it was, sort of, stunning
12 yesterday that they refused to pay because the
13 lease basically says what their obligation is.
14 And then they said, well, if we could have
15 insured it, that -- but the insurance agent made
16 it very clear that the deductible was higher than
17 the claim. So no matter how you did it, that
18 cause was there.

19 Q. Okay.

20 A. And then it was their, you know, their
21 lease property.

22 Q. Right. Was there a time -- so do you
23 also have a maintenance shop on the property?

24 A. Yes, we do.

25 Q. And is Mr. Scurry, from time to time, is

1 he a patron of the maintenance shop?

2 A. Yes, sir.

3 Q. Has he from time to time also refused
4 and failed to pay amounts that are -- were due
5 for maintenance?

6 A. Yes, sir.

7 Q. Did that cause you to take a certain
8 action at one time when he came back to request
9 more work?

10 A. Yes, sir.

11 Q. And what was the -- what did you do?

12 A. We -- well, we initially refused. He
13 then wrote the engine manufacturer to do it; and
14 then we did an accommodation that if he paid us
15 in advance, we would do it.

16 Q. So did you tell Mr. Jones to not perform
17 further work on Mr. Scurry's engines or vessels
18 until he, basically, came current?

19 A. Right. With all -- with his
20 obligations. Sure.

21 Q. And in response to that, did Mr. Taylor
22 write a letter to the CEO of Suzuki --

23 A. Yes.

24 Q. -- of its North American subsidiary
25 complaining that you were in violation of your

1 franchise?

2 A. Yes, sir.

3 Q. Did Mr. Scurry also object when you,
4 again, through a separate entity, through Broad
5 Creek Marina Development, when you sought to
6 obtain the permit approval for the ferry on the
7 Lucas Tract? Did Mr. Taylor and Mr. Scurry
8 also --

9 A. Yes.

10 Q. -- object to that?

11 A. They did.

12 MR. LESEMANN: Could you go to
13 Defendant's Exhibit No. 06. No. 20. Go to
14 Defendant's Exhibit No. 20.

15 MR. POWELL: (Complies with
16 request.)

17 Q. So are you aware, did Mr. Taylor and
18 Mr. Scurry indicate to OCRM their objections
19 based on the marina lease and their belief that
20 the -- about the scope of what that --

21 A. I also think they went to the Army Corps
22 of Engineers as well.

23 Q. Did you obtain the approval of the
24 Office of Coastal Resource Management and the
25 Department of Health and Environmental Control --

1 A. Right.

2 Q. -- to pursue the ferry terminal?

3 A. Yes, sir.

4 Q. And is that permitted in the name of
5 Broad Creek Marina Development, LLC?

6 A. I believe it is.

7 Q. And is that the entity that currently
8 owns the Lucas Tract property?

9 A. Yes.

10 Q. Was the Lucas Tract property owned by
11 the landlord when the 1993 lease was signed?

12 A. No, sir.

13 Q. Was the Lucas Tract owned by the
14 landlord -- or, well, I may have just asked that
15 question.

16 When you look at the lease, is the Lucas
17 Tract part of the property that's defined in the
18 lease?

19 A. There's a lease property and an outline
20 of it, and it's not there.

21 Q. And so have you also received Army
22 Corps -- well, sorry.

23 Mr. Freedman, could you look at
24 Defendant's Exhibit No. 20 in your book and
25 confirm that this is a true and accurate copy of

1 the permit authorizing the ferry terminal that
2 you have received.

3 A. (Complies with request.) Yes, sir.

4 MR. LESEMAN: Your Honor, we'd
5 just ask that Defendant's Exhibit No. 20 be
6 admitted into evidence.

7 THE COURT: Any objection?

8 MR. TAYLOR: Your Honor, I'm
9 looking at it. Just one second, please.

10 THE COURT: All right.

11 MR. TAYLOR: No objection, sir.

12 THE COURT: All right. That'll be
13 Defendant's Exhibit No. 20.

14 (Defendant's Exhibit No. 20 is admitted
15 into evidence.)

16 Q. And, Mr. Freedman, could you go to
17 Defendant's Exhibit No. 56.

18 Well, before we do that, is the permit
19 that's been granted to Broad Creek Marina
20 Development, LLC, is it the subject of any
21 pending challenge or appeal at this time?

22 A. No, sir.

23 Q. So there are no pending objections or
24 appeals on the part of J&W Corporation to the
25 duly-issued permit that you've received?

1 A. I'm not aware of any.

2 Q. If we could go to -- now, in addition to
3 the OCRM approval, was there a different
4 regulatory approval that you also needed?

5 A. Yes. The Army Corps of Engineers.

6 Q. Have you obtained that approval?

7 A. Yes, sir.

8 Q. And could you turn to Defendant's
9 Exhibit No. 56.

10 A. (Complies with request.) Yes, sir.

11 Q. And could you identify Defendant's
12 Exhibit No. 56?

13 A. It's from the Army Corps of Engineers,
14 and it's a --

15 Q. So is this a true and accurate copy of
16 the approval that you received from the Army
17 Corps of Engineers --

18 A. Yes, sir.

19 Q. -- relating to the construction of the
20 ferry terminal on the Lucas Tract?

21 A. Yes, sir.

22 Q. And the Lucas Tract is a separate
23 parcel?

24 A. Yes, sir.

25 Q. With its own TMS number?

1 A. I believe so, yes.

2 Q. That's owned separately from the
3 ownership of the marina property?

4 A. Yes, sir.

5 Q. And when --

6 MR. LESEMANN: So, Your Honor, I'd
7 ask that Defendant's Exhibit No. 56 be admitted
8 into evidence.

9 MR. TAYLOR: No objection, Your
10 Honor.

11 THE COURT: No. 56 without
12 objection.

13 (Defendant's Exhibit No. 56 is admitted
14 into evidence.)

15 MR. LESEMANN: Taylor, could you go
16 to exhibit -- to the lease and then to
17 paragraph 12 of the lease.

18 MR. POWELL: (Complies with
19 request.)

20 Q. Mr. Freedman, could you go to
21 Defendant's Exhibit No. 01.

22 A. (Complies with request.)

23 Q. And then paragraph 12. Should be "use
24 of the property," I believe.

25 So Mr. Freedman, are you with me as far

1 as paragraph 12?

2 A. Yes.

3 Q. Do you see the sentence about halfway
4 down that says "the marina is excluded"?

5 A. Yes.

6 Q. Could you read that out?

7 A. "The marina is excluded with competing
8 with the tenant's commercial ferry and barge
9 service."

10 Q. And the "marina" is the Broad Creek
11 Marina?

12 A. Right.

13 Q. And that's owned by Broad Creek Marina
14 Operations, LLC; but it's operated by Broad Creek
15 Marina Operations, LLC?

16 A. Yes, yes.

17 Q. And it's owned by Broad Creek Marina
18 Properties?

19 A. I believe so.

20 Q. Is that right?

21 A. Yeah.

22 Q. And so in 1993 when this lease was
23 entered, was the Lucas Tract a part of the
24 marina?

25 A. No, sir.

1 Q. Is it currently a part of the marina?

2 A. No, sir.

3 Q. Is it under separate ownership? Is the
4 Lucas Tract under separate ownership from the
5 marina?

6 A. Yes, yes.

7 MR. LESEMANN: If you could go to
8 Exhibit B, Taylor, of this exhibit.

9 MR. POWELL: (Complies with
10 request.)

11 Q. Could you go to the property description
12 in the lease of the property. I believe it's
13 Exhibit B, Mr. Freedman.

14 A. (Complies with request.)

15 MR. POWELL: I think A is the lease
16 property.

17 Q. So A is the lease property, and I think
18 B is the property. Now you're in the settlement
19 agreement. Oh, it's a copy of the lease?

20 A. Yes, yes.

21 Q. A is the lease property. What's behind
22 that?

23 MR. POWELL: It's the second to
24 last page.

25 Q. Exhibit B. Okay. So Exhibit B -- so

1 let's do this. Hold your place at Exhibit B,
2 Mr. Freedman.

3 A. Right.

4 MR. LESEMANN: And then, Taylor, if
5 you flip to page 1 of the lease, then we'll come
6 back to this.

7 MR. POWELL: (Complies with
8 request.)

9 Q. So paragraph 1, Mr. Freedman, are you
10 with me?

11 A. Yes, sir.

12 Q. And what does that say?

13 A. "The lease property is described in
14 Exhibit A being part of Broad Creek Marina, the
15 property, which is described in Exhibit B."

16 Q. Is the only marina in this area, the
17 Broad Creek Marina, on any of these tracts, the
18 only --

19 A. Yes.

20 Q. -- the only marina is the Broad Creek
21 Marina; correct?

22 A. Yes, yes.

23 Q. So let's now go to Exhibit B.

24 A. (Complies with request.)

25 Q. And so just to confirm, this property

1 description on Exhibit B does not include the
2 Lucas Tract; correct?

3 A. That is correct.

4 Q. And who, if you know, owned the Lucas
5 Tract back in this -- in the '90s or in the
6 earlier time frame?

7 A. Mrs. Lucas.

8 Q. At one time was it owned by the County?

9 A. No. I think Wick or somebody said that;
10 but I believe prior to that, it was owned by
11 Mr. Simmons.

12 Q. And so on the Lucas Tract itself, has
13 any owner of the Lucas Tract ever agreed to be
14 bound by this lease?

15 A. No. No, sir.

16 Q. Has any restrictive covenant been filed
17 on the Lucas Tract relating to limitations on
18 what can be done or cannot be done on that Lucas
19 Tract?

20 A. No, sir.

21 Q. As a developer and a businessman, do you
22 have an understanding of the word "entitlement"
23 as it relates to real property?

24 A. Sort of.

25 Q. Would you view the permitted, approved

1 ferry terminal on the Lucas Tract as approved by
2 DHEC and by the Army Corps -- in your mind, as
3 the property owner, do you view that as an
4 entitlement?

5 A. Yes, sir.

6 Q. Does it have an effect on the value of
7 that tract?

8 A. Significant.

9 Q. Just describe that.

10 A. Well, there's no other tract on Hilton
11 Head that has the potential for a ferry terminal
12 with a substantial amount of parking.

13 Q. Okay.

14 A. Mr. Scurry's property is limited to 55
15 spaces or 50 spaces, and maybe he's acquired some
16 from the Simmons' next door or a lease; but we
17 basically, if we wanted to, we'd have 10 acres.

18 Q. Have you incurred time and expense in
19 order to pursue that entitlement?

20 A. Yes, sir.

21 Q. Do you believe it would be appropriate
22 for that entitlement to be taken away when no
23 owner of the Lucas Tract has ever agreed to any
24 form of restrictive covenant on that property?

25 A. That is correct.

1 Q. So let's get to the current dispute.

2 We talked about a lot of things. But,
3 again, the litigation's taken a while; right?

4 A. Yes, sir.

5 Q. And both sides have participated in
6 ongoing discussions and agreed to continuances.
7 Is that fair?

8 A. Yes, sir.

9 Q. And I know you may not know what a 40(j)
10 is, per se; but do you recall a time when the
11 case was actually removed from the active docket
12 and went inactive for a time?

13 A. Yes, sir.

14 Q. And did both sides have to agree to that
15 in order for that to happen?

16 A. Yes, sir.

17 Q. And so I know there's been discussions
18 about the office issue and how long it's been
19 going; but, to your knowledge, have both sides
20 agreed to all the continuances and all the
21 removals from the active trial docket that have
22 occurred over the last nine years?

23 A. Yes.

24 Q. At any time before a continuance or when
25 the case was removed from the docket, was there

1 ever any contingency or requirement on the part
2 of the tenant that, no, no, no, before I agree to
3 that, you've got to move me out of my office
4 space?

5 A. No, sir.

6 Q. In fact, it's -- Mr. Scurry -- this is
7 an issue that's been discussed. When -- how
8 often do you speak with Mr. Scurry?

9 A. Rarely.

10 Q. Okay.

11 A. I think in, you know, in the last two
12 years, we've probably spoken more times. We
13 spoke twice when I tried to engage a -- two or
14 three times when I tried to engage him in
15 purchasing his property and once with a phone
16 call recently in the last 90 days or so or 120
17 days asking me if I would be interested in
18 purchasing the property.

19 Q. Did the office space come up?

20 A. No, sir.

21 Q. Now, when we've talked about the pattern
22 of things that have come along, were you sued
23 personally in this case initially?

24 A. Yes, sir, I was.

25 Q. Do you have any understanding on why you

1 would have been sued personally in a lease
2 dispute?

3 A. I think it's a -- a tactic that an
4 attorney does. But, no. No legal basis for it.

5 Q. Do you know what the Court did with the
6 inclusion of you as an individual defendant in
7 this contractual lease dispute? Do you know what
8 came of that?

9 A. I believe it was dismissed.

10 Q. Did Mr. -- did J&W Corporation also sue
11 you personally and the landlord entity for
12 allegedly causing the tenant's boat captain to
13 drive one of the tenant's vessels onto an oyster
14 bank?

15 A. Yes, sir.

16 Q. And what happened to that claim, to your
17 knowledge?

18 A. That was dismissed.

19 Q. And so as we talk about all of the
20 claims in litigation and issues that have
21 happened over, essentially, a 26-year period,
22 what does that expense and that exhaustion, what
23 does that -- where does that leave you, and why
24 are we here; and what are you asking the judge to
25 try to help us avoid this?

1 A. You know, we want to get the issues
2 resolved, you know. The -- the cost has been
3 extraordinary, and the cost -- the legal cost is,
4 you know, more than any of the -- of the --
5 building a house or anything.

6 It just -- the time involved, the time
7 of our employees has been extraordinary with
8 this, sort of, type of questions related to the
9 lease and that. So we'd like to get the issues
10 resolved, you know. My goal, you know, I -- I
11 would like Mr. Scurry to operate his business,
12 operate it successfully, and move on, you know,
13 and just meet his obligations.

14 They're de minimis in terms of the
15 benefits that he's receiving from the property,
16 and to fight these small payments and then make
17 it impossible to settle and then be interfering
18 with a constant barrage of litigation, that's
19 just -- it's unfortunate.

20 Q. And let's be clear about this. Has the
21 tenant engaged in business operations on the
22 property on a continuous basis from 1993 to the
23 present?

24 A. Yes.

25 Q. And for the whole time frame going back

1 to 2008 when we're here to try to collect these
2 back charges, has the tenant been engaging in a
3 business for profit on your property during that
4 entire time frame?

5 A. Yes, sir.

6 Q. Okay.

7 A. And I think also profitable.

8 Q. Yes.

9 A. At least from the returns that I saw
10 from 2009 going forward.

11 Q. And in terms of -- do you know whether
12 there's a provision in the lease --

13 MR. LESEMAN: In Section 13,
14 Taylor.

15 MR. POWELL: (Complies with
16 request.)

17 Q. Do you see the sentence, Mr. Freedman?
18 I'll give everybody a chance to get there.

19 "Landlord shall have no right to eject
20 tenant or to terminate this lease"?

21 A. Yes.

22 Q. And then "Landlord's sole remedy shall
23 be to obtain a money judgment against tenant."

24 Do you see that?

25 A. Yes.

1 Q. And "if the judgment remains unpaid, the
2 landlord can execute on the same"?

3 A. Yes.

4 Q. In a normal circumstance, if the tenant
5 doesn't pay rent or charges, what would the
6 landlord normally be able to do?

7 A. He would be able to evict the tenant.

8 Q. Do you think that that provision has
9 enabled certain behaviors in this case?

10 A. Absolutely.

11 Q. And is that why the judge's ruling is
12 going to be important in order for this 99-year
13 lease to become functional?

14 A. Right. If, in fact, you look at it, at
15 least the way I look at it -- and I hope the
16 judge will see it -- it's a modus operandi to
17 create a problem, not allow it to be resolved and
18 then not pay.

19 So the only way we're not going to be
20 here again is to make sure that they pay all the
21 moneys that are owed them, that they effectively
22 pay the legal fees, and pay the penalty interest
23 because it's nonstop.

24 It's not -- it hasn't ever been correct
25 since the inception of the lease. The amounts

1 are small. Legal expenses are high. So it's
2 a -- it's a very successful tactic that they've
3 employed because they've deferred doing it.

4 They did it before there was an issue
5 with the house. They did it before there was an
6 issue with the settlement agreement. It's just a
7 continual ongoing pattern of behavior.

8 Q. And so there now are lease charges that
9 are due over an 11-year period. Is that
10 accurate?

11 A. Yes, sir. Yes, sir.

12 Q. Do you think it would be fair or would
13 it make the landlord whole if you were merely in
14 the position of extending the tenant an 11-year
15 interest free loan and you got back just the
16 money that you were owed without any interest or
17 attorney's fees? Would that be fair, in your
18 mind?

19 A. No, sir.

20 MR. LESEMANN: So if we could go to
21 Defendant's Exhibit -- I'm sorry. To Section 6,
22 Taylor.

23 MR. POWELL: (Complies with
24 request.)

25 MR. LESEMANN: Well, first, let's

1 go to Section 5.

2 MR. POWELL: (Complies with
3 request.)

4 Q. And I don't want to -- I'm moving along.
5 I don't want to belabor all this. But,
6 Mr. Freedman, could we talk about -- we look at
7 Section 5 and other sections of the lease that
8 are like it.

9 "Tenant shall pay taxes, license fees,
10 insurance, utilities, and all other costs of
11 ownership and possession for the lease property."

12 As the landlord, what does this mean and
13 how does it relate to these issues with the
14 office space that have been brought up?

15 A. There's not -- there's not a right of
16 offset in the -- in the lease.

17 Q. Right.

18 A. It says they shall pay. They are
19 used -- and they've been getting office space.
20 They just, you know, want to use it as more of an
21 excuse not to pay.

22 Q. Now, I know that both parties want to
23 move the tenant from that office location; but,
24 conceivably, the office site is permissible.

25 Is that fair?

1 A. That -- the one they're in now?

2 Q. Yes.

3 A. Yes.

4 Q. But the person who would be obligated
5 for obtaining the permits and the person who
6 would be obligated for funding the repairs and
7 the alterations, would that be the person that
8 would undertake that effort? Who would
9 appropriately -- under the terms of this lease,
10 who would be the person --

11 A. Under the terms of this lease, the
12 tenant would.

13 Q. Is the tenant responsible to get
14 permits?

15 A. Yes.

16 Q. And all costs of upkeep?

17 A. Yes, sir.

18 Q. All costs -- does it say "all other
19 costs of ownership and possession of the
20 property"?

21 A. Yes, sir.

22 Q. As a business person, as a landlord, and
23 the developer, are there any expenses that you
24 feel that fall outside the scope of the terms of
25 the lease in terms of what's been attributed to

1 the tenant and to the tenant's responsibility?

2 Is the tenant responsible for all of these costs?

3 A. All of these costs, yes, sir.

4 Q. And has that been part of the lease
5 since 1993?

6 A. Yes, sir.

7 Q. Is it clear to you from reading that?

8 A. Yes, sir.

9 Q. Does it confuse you why it would be
10 unclear to anybody else that would read it?

11 A. No. And it seems, you know, pretty
12 logical if you're -- especially, if you're only
13 paying a dollar a year for a lease.

14 Q. On the issue of the dock repair, do you
15 feel like the lease is crystal clear, that the
16 tenant's responsible for costs for dock repair
17 that are attributable to their use?

18 A. Yes.

19 Q. And have you seen documentation where
20 the tenant has admitted as much to its insurance
21 company?

22 A. Yes.

23 Q. So are you baffled as to why the tenant
24 won't pay you the \$45,000 that you went out of
25 pocket to repair the dock?

1 A. I'm totally, you know, baffled.

2 Q. We've discussed liability insurance and
3 we've discussed --

4 MR. LESEMANN: If you could just go
5 to Section 18 and 19, Taylor.

6 MR. POWELL: (Complies with
7 request.)

8 Q. Again -- and just moving quickly --
9 Mr. Freedman, Sections 18 and 19, again, who's
10 receiving the obligations? Who are these
11 sections placing the obligations upon for
12 maintenance, repair, and for compliance with all
13 laws, regulations, and requirements of every
14 authority?

15 A. The tenant.

16 Q. Is this part of the binding lease that
17 you agreed to in 1993?

18 A. Yes, sir.

19 Q. Does the tenant have the right to seek
20 alterations of the lease property in
21 paragraph 20? Did they ever seek your permission
22 to seek alterations?

23 A. No, sir.

24 Q. Does it include rewiring?

25 A. Yes.

1 Q. I was, sort of, confused when I heard
2 the testimony that they thought the wiring was so
3 bad they didn't want to touch it; but if there
4 was an issue with the wiring, did the tenant have
5 the right to address it?

6 A. Yes.

7 Q. With your consent?

8 A. Yes.

9 Q. If you were asked to consent to an issue
10 relating to the wiring in the office space over
11 the last ten years, would you have done that?

12 A. Yes, I would.

13 Q. Who's responsible for seeking and for
14 paying for those alterations under this lease?

15 A. The tenant.

16 Q. But as part of this litigation, what is
17 the tenant trying to do in terms of that
18 responsibility?

19 A. Not pay.

20 Q. Are they trying to place it all on the
21 landlord?

22 A. Yes, sir.

23 Q. Do you feel like that violates the
24 agreement that you made?

25 A. Yes, sir.

1 Q. So are you asking the Court to help us
2 enforce all of these provisions of the lease?

3 A. Yes, sir.

4 Q. Does that include timely payment of all
5 charges?

6 A. Yes, sir.

7 Q. Does that include timely payment of all
8 dock repairs?

9 A. Yes, sir.

10 Q. Does that include ongoing responsibility
11 for cost of compliance with laws, alterations,
12 upkeep, and maintenance?

13 A. Yes, sir.

14 Q. Does this include a recognition that,
15 once you provide a floating office, based on what
16 the Court -- how the Court resolves the case,
17 that you aren't obligated to provide eight
18 floating offices over the next 76 years; is that
19 correct?

20 A. That's correct.

21 Q. You provide one. And then it's up to
22 the tenant to upkeep it, in your mind; correct?

23 A. Yes. Yes, sir.

24 Q. And do you -- would you ask for
25 clarification on that from the Court?

1 A. Yes, sir.

2 Q. To enforce the terms of this lease?

3 A. Yes, sir.

4 MR. LESEMANN: And the release and
5 the settlement agreement, again, if you could go
6 to that, Taylor. It's Section 2. I'm sorry.
7 Defendant's Exhibit No. 02.

8 MR. POWELL: (Complies with
9 request.)

10 Q. You know, Mr. Freedman, is it your
11 understanding that, in terms of this section, it
12 relates to office space, that it sets forth an
13 alternate set of solutions?

14 A. Yes, sir.

15 Q. And when you look at the dockmaster's
16 house, it says, "If, and only if, the floating
17 store is not replaced due to the denial of any
18 permits required for its replacement"; is that
19 correct? That first clause?

20 A. Right.

21 Q. Have any permits been denied?

22 A. No, sir.

23 Q. And do you have reason to believe that
24 there's a process in place where you could seek
25 to amend the existing permit to relocate it?

1 A. Yes, sir.

2 Q. And is that, in part, because the
3 existing permitted location is not exactly
4 feasible?

5 A. That's correct.

6 Q. And would it be your intention and are
7 you ready, willing, and able to complete that
8 process?

9 A. Yes, sir.

10 Q. And you heard Mr. Scurry say that he'd
11 be comfortable with a floating office?

12 A. Yes, sir.

13 Q. So is that what you'd ask the Court to
14 adopt as a solution to this issue?

15 A. Yes, sir.

16 Q. Again, when we talk about, well, have
17 you done this? Have you done that? Who's been
18 incurring the expense of the permitting process
19 and of researching these issues?

20 A. Me. Or our company. Broad Creek
21 Marina.

22 Q. And in order to ask OCRM to move the
23 floating office to a new location, do you have to
24 have the spot determined where it's going to be
25 moved?

1 A. Yes, sir.

2 Q. And is that something you're asking
3 Judge Dukes to help the parties with?

4 A. Yes, sir.

5 Q. And at that point, as soon as he tells
6 you, provided that there's not an appeal or some
7 other issue that comes up --

8 A. Yes, sir.

9 Q. -- would you expeditiously pursue it?

10 A. Yes, sir.

11 Q. But that being in mind, as you're asked
12 to incur expense and to do a floating office and
13 to do all these other things, is it also
14 important that we ask the Court to require the
15 tenant to pay all the things and do all the
16 things that the tenant's required to do?

17 A. Yes, sir.

18 MR. LESEMAN: I have nothing
19 further at this time, Your Honor.

20 MR. TAYLOR: Your Honor, I've got
21 maybe five, seven minutes. You want to go ahead
22 and finish it now, sir?

23 THE COURT: Yeah, let's go ahead
24 and do it.

25

1 RECROSS-EXAMINATION

2 BY MR. TAYLOR:

3 Q. Mr. Freedman, I'd like you to, please,
4 put your fairness adjudicating hat on because you
5 gave some good testimony about what all is fair a
6 few minutes ago. So go and answer this question.

7 Do you think it's fair that you assigned
8 J&W into an unlicensed, unpermitted shed that had
9 been converted into what you consider to be
10 appropriate office space for nine years?

11 A. In the context of everything there, it's
12 generous.

13 Q. Generous?

14 A. Generous.

15 Q. It was a generous move?

16 A. Yes. If you have a tenant that normally
17 would be evicted under a normal lease situation,
18 their butt would be thrown out about as quickly
19 as you could see. That's what would happen in a
20 normal situation, and that's what would be fair.

21 So if you have a tenant that's
22 interfering with your operations, not cleaning,
23 not paying -- and we haven't even got into all
24 the things that the tenant has done or not done
25 that were appropriate, damaged the piers, and

1 everything else like that.

2 Do I think it's fair? I think it's very
3 unfair that he even gets to keep a space on it;
4 but I'm very prepared to do it, you know, in
5 context of what the law is.

6 But if you ask me what is fair, in all
7 the litigation that we've had to expense and do,
8 without any success on the part of them, because
9 it's just been to create obstacles and prevent us
10 from running our business, boy, do I think
11 it's -- I don't think it's unfair. I think it's
12 more than a generous, more than appropriate.

13 And if Mr. Scurry was on the other side
14 of it, he would also -- well, I'm not going to
15 speak for Mr. Scurry; but I'll speak for myself
16 very clearly.

17 We have been extraordinarily
18 accommodating to Mr. Scurry and have tried to
19 make peace, to negotiate a fair transaction, get
20 him into a situation; and, again, from 1993, a
21 year after, he has never observed the things of
22 this lease. And if you have a read through the
23 lease, the obligations of Mr. -- of Mr. Scurry
24 and J&W do not seem to exist, in his mind. It's
25 only what our obligations are.

1 The fact that his barge -- we've spent
2 probably \$800,000 on the pier repairs over the
3 last 10, 15 years. Not all of it's attributable
4 to Mr. Scurry, but some of it is; and it's
5 probably a significant amount. We've never made
6 claims for that.

7 When I talk about fair, I've never been
8 in a situation where I've been treated so
9 unfairly and the tenant has ever taken advantage
10 of and taken advantage of the legal system and
11 that -- that.

12 So I have a very strong feeling about
13 what fairness is; and I've never seen in my whole
14 business career the lack of fairness, equity,
15 propriety, the interference with our opportunity
16 in Daufuskie, the interference with our trying to
17 get our dock permitted, the interference with our
18 zip line, the potential to create a better
19 business by just acting in a normal, civilized
20 fashion.

21 So when you ask me about fairness,
22 that's my answer.

23 Q. Mr. Freedman, so it's your testimony
24 that when you made this generous offer of putting
25 Mr. Scurry and his business into the shed, that

1 you believe, at that point in time, that he was
2 not paid up to date on what he owed your
3 corporation?

4 A. Yes, sir.

5 Q. That's your testimony. Very good.

6 Now, you talked a minute ago about
7 reversing places. Let me ask you this: If the
8 tables were reversed and you had been the
9 leaseholder in this situation and your business
10 had been put in the converted unpermitted shed,
11 what would you have done?

12 A. Well, first of all, I wouldn't be in the
13 position that I didn't pay the landlord. So
14 you -- you can't ask the premise of what I would
15 have done without the fundamental issue that's
16 here. You have a tenant that isn't paying. So
17 no landlord says, "Okay. You don't pay me, but
18 I'm going to put you in a great space." They
19 say, "Pay me, and then we'll do it."

20 So that's what would happen. I wouldn't
21 be having that issue because I would have paid
22 for it; and then if I needed to fix it, I would
23 have fixed it. And then I wouldn't obstruct a
24 settlement over seven or eight or nine years and
25 create all the litigation that interferes with

1 the potential for a settlement.

2 Q. And we're in agreement that the
3 assignment into the shed was in 2008; correct?

4 A. I believe that's the time, yes, sir.

5 Q. I want to ask you a quick question about
6 a paragraph Ellis was reading to you a few
7 minutes ago about the water. The specific
8 sentence on paragraph 12 says, "J&W must install
9 meters immediately, or these meters will be
10 installed by BCM and billed to J&W."

11 When did y'all install those meters?

12 A. We did not.

13 Q. Why not? You said you were going to and
14 then bill us. Why didn't you do it?

15 A. I don't know.

16 (Plaintiff's Exhibit No. 16 was marked
17 for identification.)

18 Q. Mr. Freedman, I hand you what I've
19 marked for identification as Plaintiff's Exhibit
20 No. 16. Mr. Freedman, you were asked a number of
21 questions by Mr. Lesemann relating to the time
22 that J&W tendered a payment in 2014. And,
23 basically, you were set up to say, "Can you
24 possibly imagine why they would have done this?"
25 And you said, "Oh, no, I don't have any

1 imagination."

2 Let me ask you: Did you ever get a copy
3 of this May 14 letter that went with the check?

4 A. I don't remember it, sir.

5 Q. You'll see a copy of the check with it.
6 Do you see that?

7 A. I remember that there was some payment
8 made. I don't remember the letter.

9 Q. You don't remember getting the letter?
10 Getting a copy of it from your lawyer?

11 A. I don't remember that, no, sir.

12 MR. TAYLOR: Your Honor, I move the
13 admission of Plaintiff's Exhibit No. 16 based on
14 the fact that the testimony has been raised as to
15 what possible explanation there could have been
16 with it; and this provides the explanation
17 because it accompanied the check.

18 THE COURT: Any objection?

19 MR. LESEMAN: Your Honor, no.

20 Under the circumstances with what's been
21 admitted, we would not object.

22 THE COURT: That will be No. 16.

23 MR. TAYLOR: Thank you very much.

24 (Plaintiff's Exhibit No. 16 is admitted
25 into evidence.)

1 BY MR. TAYLOR:

2 Q. Mr. Freedman, I will quickly summarize
3 the letter because you -- I don't recall having
4 seen it. Property taxes from 2008 through 2013
5 were tendered, and then there were a couple of
6 statements made that the check is tendered in a
7 good faith effort to comply with the terms of the
8 lease, et cetera; and it can be read.

9 But then it said that we were asking for
10 additional documentation concerning proof of
11 insurance that had actually been given -- or
12 excuse me. Proof of insurance actually having
13 been purchased. And there was other
14 documentation requested concerning the parking
15 lot and property insurance charges that were
16 being made and then proof for the lot
17 maintenance.

18 Do you know if any response was ever
19 given to that request for additional information?

20 A. I believe we have over a period of time.

21 Q. Over a period of time?

22 A. Well, I -- you'll have to ask
23 Miss Rachels that.

24 Q. I understand. All right.

25 Mr. Freedman, how much would it have

1 cost you in 2008 to build an approximate 300-
2 square-foot freestanding building within the same
3 general parameters of where the shed is?

4 A. Where the -- where the shed is?

5 Q. Yes, sir. It's got an elevation of
6 9 feet. How much would it have cost, do you
7 think?

8 A. I couldn't, you know, render an educated
9 guess.

10 Q. I'm sure in all your development there
11 and the development next door and the ferry
12 landing, that you've, at least, explored
13 preliminarily what a square foot building would
14 cost, haven't you?

15 A. Not that small. Because it's very
16 different.

17 Q. More expensive to do that?

18 A. Probably more expensive because, you
19 know, just the permitting costs are the same.
20 They're de minimis with Hilton Head. And then,
21 you know, the -- just the cost of doing something
22 small.

23 Q. Would you agree with me that probably a
24 300 square -- \$300 a square foot would be a good
25 price, if you could get it for a 300-square-foot

1 building on Hilton Head?

2 A. You know --

3 MR. LESEMANN: Your Honor, I just
4 would object to the form. The witness has
5 indicated that he's not able to provide an
6 off-the-cuff construction cost for a hypothetical
7 building.

8 MR. TAYLOR: Your Honor, that's not
9 a proper objection.

10 THE COURT: Well, I'll let him --
11 if you know. You can --

12 A. I don't know, you know. I haven't built
13 anything on Hilton Head and that -- I've gotten
14 things permitted; but I haven't built a building
15 that, you know, you know, and this is very
16 specific use building too.

17 Q. Right. Mr. Freedman, I thought I had
18 framed my question differently. Let me try
19 again.

20 I asked you if you would agree with me
21 that \$300 a square foot would probably be a good
22 price on a 300-square-foot building in that
23 locale based on your background and experience as
24 a developer?

25 A. I think it might be a very high price.

1 Q. You think?

2 A. I don't know, sir.

3 Q. Well, would you agree with me that you
4 probably saved at least \$75,000 over the course
5 of the years by not building a building which was
6 called for under the settlement agreement of a
7 300-square-foot new office?

8 A. That we haven't spent \$75,000 to build
9 that, yeah. I think, certainly, it's not that we
10 saved because we've always intended to build it
11 so we are --

12 Q. Mr. Freedman, you remember there was a
13 lot of pictures up about the barge and Mr. --

14 A. Yeah.

15 Q. -- Lesemann asked you a lot of questions
16 about filling in.

17 A. Yeah.

18 Q. In fact, your corporation was cited by
19 the Town of Hilton Head for improperly filling in
20 that area, wasn't it?

21 MR. LESEMAN: Object to the form.
22 That's a mischaracterization of -- well, if you
23 classify the area -- if you classify "area."
24 Yeah. Meaning the deck next to the pub as
25 opposed to the entire watershed.

1 MR. TAYLOR: Mr. Taylor, could we
2 have the barge photograph back up again? We'll
3 come back to that then, while you're getting that
4 up, if you don't mind, because that was used
5 earlier as a demonstrative.

6 MR. POWELL: (Complies with
7 request.)

8 Q. Mr. Freedman, are you currently
9 marketing your interest in the Lucas Tract or
10 whatever you would call that over there? Do you
11 have it for sale?

12 A. No, sir.

13 Q. Are you trying to sell it?

14 A. I've had a couple of conversations with
15 the County, but they're not -- no. Advanced
16 anywhere.

17 Q. What are the dollar figures that you've
18 had in these conversations with the County?

19 A. Nothing. The County chairman has
20 suggested that they might be interested in the
21 property, and I said I might be interested in
22 selling it.

23 Q. Didn't give them a number?

24 A. No number.

25 Q. Mr. Freedman, do you recognize these

1 pictures as being of Barge Creek that were up
2 earlier; is that correct?

3 A. Yes, sir.

4 Q. And you own the building that's shown in
5 the top one up there that's now been converted
6 into a restaurant?

7 A. Right, right, right.

8 Q. And there was outside work done between
9 what we can see of this building and the creek in
10 the late 2000s, around 2007, 2008; and fill was
11 put into that area. Correct?

12 MR. LESEMAN: Objection to the
13 form. I don't know what he means by "put in that
14 area."

15 THE COURT: Hold on one second,
16 Mr. Freedman. Say the objection again.

17 MR. LESEMAN: Yes, sir. I
18 apologize, Your Honor. When he says "area," I
19 just would like clarification as to what area
20 he's referring to very specifically.

21 THE COURT: Okay. Can you be
22 specific on area, please.

23 Q. Your Honor, Mr. Freedman, I am asking
24 you about the area outside of the building
25 between the building and the waterway, there

1 is -- what would you say? 20 feet between the
2 building and the waterway?

3 THE COURT: Now, which building are
4 you talking about?

5 MR. TAYLOR: The restaurant now,
6 Your Honor, which is right there on the top of
7 that photograph. (Indicating.)

8 A. Right. And this predates the
9 restaurant. This is the barge landing with mud
10 as it is today.

11 Q. Mr. Freedman, my question is: Isn't it
12 correct that Broad Creek Marina, or one of your
13 entities, actually undertook work to build an
14 outside porch and put in dirt in that area and
15 was cited by the Town for improperly having done
16 that?

17 A. I don't know if they cited it. I don't
18 recall the citation. If you have it, I know
19 the -- we had to reduce the size of the porch,
20 and they extended the level of the porch.

21 Q. And then found out that they had not
22 gotten correct Town approval for it and had to
23 change it; right? They actually had to take down
24 some of the construction and redo it.

25 A. Oh, yeah. But the Town also had, you

1 know, committed, you know, stuff with us that
2 were on the other side of the building.

3 So they wanted us to take down and so,
4 you know. There's stuff going back and forth,
5 but the history -- the Town doesn't have
6 particularly perfect hands in their conduct with
7 the property either. I can go into detail with
8 you but --

9 Q. That's all right.

10 I got a little confused at the very end
11 because I thought you and I had established an
12 understanding this morning that if you had
13 decided in 2008 to put J&W in a tree house, that
14 you would not take the position that it was their
15 responsibility to fix it up.

16 And then I heard you answer
17 Mr. Lesemann's questions that, "Well, if they
18 wanted to fix up the shed, they should have done
19 it at their dime."

20 Is that your position? That you have
21 the authority under the settlement agreement to
22 put us in that building and then turn to us and
23 say, "If you want to fix it up, pay for it"?

24 A. Well, I think the dispute revolves
25 around whether he's agreed to be there or not and

1 for how long. So if he agrees to be at and
2 accepts the space, then it's his responsibility..

3 Q. Mr. Freedman, there is no dispute in
4 this case at all as to whether or not Mr. Scurry
5 has accepted that space, is there?

6 A. What's that?

7 Q. In your mind, is there any dispute in
8 this case as to whether or not J&W has accepted
9 that space in the shed?

10 A. Not on a long-term basis, I don't think
11 they've accepted.

12 Q. No, sir. I think it's been clear.

13 Mr. Freedman, you talked a little bit
14 about the zip line parking and how you were
15 incredulous that we sued about the parking.

16 In fact, your corporation made an
17 agreement with the Town to add a new strip of
18 parking over there to accommodate what the Town
19 said was a shortage of parking. Isn't that
20 right?

21 A. No.

22 Q. There was no parking added over there
23 whatsoever?

24 A. Yes, there was. But we -- we decided,
25 after reflecting on it, to do it; but we weren't

1 ordered by the -- my recollection, unless there's
2 an order from the Town and the Court, I don't
3 believe that it was ever ordered.

4 Q. No. I agree with you. It was a
5 settlement between your corporations and the
6 Town --

7 A. No. I don't think there --

8 Q. Okay.

9 A. If there was a settlement, please show
10 it to me. I do not believe it. I think -- I
11 think the position was denied. We looked at the
12 potential for the building of the business and
13 decided to add parking. It was a decision that
14 we made slowly out of the context of that suit.

15 Q. Just made that decision to have parking?

16 A. Yeah.

17 Q. That's kind of like the same way you
18 made the decision after the Town notified you
19 that your building was an illegal structure after
20 nine years to fix it.

21 Same kind of premise? Once you got
22 notice, you decided to do it?

23 A. No. No, sir.

24 Q. Okay.

25 A. Because we had a build -- we had all the

1 permits in place from the Town of Hilton Head.
2 The Town bases it on a design review board,
3 issues of construction permit, notifications. I
4 believe when that suit took place -- I'd have to
5 get my memory refreshed -- but all those permits
6 were granted.

7 MR. TAYLOR: Your Honor, nothing
8 further. Thank you very much.

9 THE COURT: Mr. Lesemann, anything
10 else?

11 MR. LESEMAN: Just very briefly,
12 Your Honor, 'cause I know it's about lunchtime.

13 RECROSS-EXAMINATION

14 BY MR. LESEMAN:

15 Q. Mr. Freedman, when we talked about
16 insurance, is there a provision in the lease that
17 necessitates that the tenant, that the tenant
18 increase its coverage minimums in order to adjust
19 for inflation?

20 A. Yes, sir.

21 MR. TAYLOR: Your Honor, I object.
22 This is not -- was not covered in the recross.
23 It was --

24 THE COURT: No, I don't think it
25 was. But, yeah, sustained. I mean, you're going

1 to have an opportunity, of course, in your case
2 to ask whatever questions. But we've been over
3 the lease several times and I --

4 MR. LESEMANN: Understood.
5 Understood.

6 THE COURT: -- I've seen that.

7 MR. LESEMANN: Understood. Yeah.
8 Very good. We'll address it all in due time,
9 Your Honor.

10 THE COURT: Anything else?

11 MR. TAYLOR: No, sir.

12 THE COURT: Any other questions,
13 Mr. Lesemann?

14 MR. LESEMANN: Your Honor, I think
15 that --

16 BY MR. LESEMANN:

17 Q. Again, Mr. Freedman, in terms of who
18 facilitated the move of J&W Corporation into the
19 current office location, was that Mr. Nate Jones?

20 A. Yes, sir.

21 Q. So would he be able to speak most
22 authoritatively to the conversations and
23 interactions that happened?

24 A. Yes. Yes, sir.

25 Q. And have we all been waiting over the

1 course of this extended litigation in order to
2 get an answer as to the final solution for the
3 office?

4 A. Yes, sir.

5 Q. And there -- do you really await that
6 resolution?

7 A. Eagerly.

8 MR. LESEMANN: Thank you. Nothing
9 further.

10 THE COURT: All right.

11 MR. TAYLOR: Nothing from the
12 plaintiff, Judge.

13 THE COURT: Let's do this then.
14 We'll be in recess probably an hour and 15. Can
15 we do it in an hour? Probably not because
16 yesterday it took everybody an hour-and-a-half, I
17 think. It's hard to get out of here and come
18 back, unfortunately. Let's do this. Anything
19 else for this record?

20 MR. TAYLOR: No, sir.

21 THE COURT: All right. Right now
22 we'll be in recess as far as the record goes.

23 (Proceedings adjourned at 12:31 p.m. for
24 the lunch recess.)

25

1 Thursday Afternoon Session

2 May 16, 2019

3 2:50 p.m.

4 - - -

5 THE COURT: All right. Then back
6 on in 18-1622, and I believe it is still
7 plaintiff's case. Anything else, Mr. Taylor?

8 MR. TAYLOR: No, sir. The
9 plaintiff rests.

10 THE PLAINTIFF RESTS ITS CASE

11 THE COURT: Okay. Thank you so
12 much. Any motions from the defense?

13 MR. LESEMAN: Yes, Your Honor. We
14 would like to move for directed verdict at this
15 time.

16 First, in renewal of our motion on
17 the claim for lost profits, in addition to the
18 grounds that were stated at the outset of the
19 case in support of our Motion in Limine, the
20 plaintiff's case in chief actually contained no
21 number.

22 There was no evidence that was
23 presented of any number of any alleged lost
24 profit or impact in terms of revenue or
25 otherwise; and so absent that evidence, we

1 believe that that would foreclose that claim.
2 And so that that should be, whether you'd
3 consider it lost profits, setoff, or recoupment,
4 there's been no amount that's been stated. So
5 we'd ask for a directed verdict on that damages
6 claim.

7 Additionally, Your Honor, with
8 regard to the prayer for temporary and permanent
9 injunctive relief, we believe that directed
10 verdict is appropriate in that instance. Your
11 Honor did enter a preliminary injunction in this
12 case. I believe it was back in 2014.

13 But subsequent to that, there's
14 been no showing of pending irreparable harm,
15 inadequate remedies at law, or anything that was
16 adduced in the record before you that would
17 support any permanent injunctive relief.

18 Again, the parties can revert to
19 their rights under the lease and under the
20 Confidential Release and Settlement Agreement.
21 So we believe that that sixth cause of action
22 has, essentially, been -- has been not shown and
23 likely because the issues are not pressing or
24 pending at this time that underlie that
25 beginning -- to begin with.

1 Additionally, the seventh cause of
2 action for sanctions for contempt of the existing
3 temporary injunction, Your Honor, we believe that
4 directed verdict is appropriate on that. There's
5 been no showing or any basis that would support
6 any award of sanctions on that seventh cause of
7 action; and, therefore, would ask for a directed
8 verdict there.

9 Again, on the eighth cause of
10 action, Your Honor, that relates to the
11 declaratory judgment for the competing ferry
12 service at Broad Creek Marina. We believe that
13 the -- under the applicable legal standard, a
14 directed verdict is appropriate, both on that
15 eighth cause of action and on the ninth cause of
16 action, which is a request for a permanent
17 injunctive relief.

18 Again, the release contains a use
19 limitation on the marina. It is applicable to
20 the property as it existed at that time, and it's
21 applicable to the party that signed that lease;
22 and its assignee, the party that signed the lease
23 was the Hilton -- HHIM Limited Partnership,
24 Hilton Head Island Marina. The current assignee
25 is the entity that currently owns the property,

1 which is Broad Creek Marina Properties, LLC.

2 So the entitled ferry on the
3 adjacent property, on the Lucas Tract, separately
4 owned, was not part of the lease property. It is
5 not owned by the landlord, and that language in
6 the lease cannot bind a separate property that
7 was not encompassed within the lease property or
8 within that tract period.

9 It just refers to marina, and the
10 Broad Creek Marina is not the owner or the
11 permittee under that other proposed ferry
12 terminal. As Mr. Freedman testified, that's an
13 entitlement. It runs with that land; and there's
14 no applicable restrictive covenant or lease or
15 other limitation that, as a matter of law, would
16 allow for that restriction to be imposed.

17 So, again, just in brief recap,
18 Your Honor, the claim for lost profits, the claim
19 for the injunctive relief, the claim for
20 sanctions, and the claim for declaratory judgment
21 and injunction against the marina, we believe
22 that all of those are subject to directed verdict
23 under the applicable legal standard.

24 THE COURT: Thank you so much.

25 Mr. Taylor, happy to hear from you,

1 sir.

2 MR. TAYLOR: Your Honor, addressing
3 them in order, as to the lost profits, you, I'm
4 sure, heard Mr. Scurry's testimony that he
5 perceives his damages to have been a failure in
6 growth of the business that we would have
7 expected had we been put in an office that was
8 properly permitted and was properly outfitted for
9 us to perform our work in.

10 I acknowledge the fact that there's
11 been no specific dollar figures put up in support
12 of that, Your Honor; but I believe Mr. Scurry has
13 adequately made a case for an award of damages at
14 the Court's discretion concerning the damages
15 we've suffered.

16 And, of course, we believe that is
17 separated, completely different, from the claim
18 for damages that we have suffered, in general, as
19 to the breach of contract for nine years on
20 failing to provide an appropriate office.

21 We also assert that as either
22 equitably a right of what is known as recoupment,
23 Your Honor, or setoff for the Court to consider
24 against the alleged damages Mr. Freedman is
25 claiming of the sum \$60,000 in common area

1 charges that have not been paid.

2 Your Honor, I would ask you to
3 reserve ruling until the end of the case
4 concerning the temporary restraining and
5 permanent restraining order. This, Your Honor,
6 relates back to actions that were threatened in
7 2012 by Mr. Freedman's then attorneys to do -- to
8 take certain actions to bar usage of the
9 restroom.

10 And I have been awaiting to see if
11 there was going to be some testimony in the case
12 about that, and I intend -- I assume on direct,
13 they may claim that there were certain damages
14 that they are suffering.

15 I just want to find out whether
16 they are still intending to try to do this, to
17 block our usage of the restroom, to block our
18 usage of a golf cart on the deck, and to prohibit
19 us from certain access to areas so that we're not
20 back on this issue again.

21 I simply thought it had gone away,
22 but with Mr. Lesemann's movant to dissolve the
23 injunction, there may be something there; and I'd
24 like the opportunity to ask Mr. Jones, who I
25 believe is going to be put up. So if you would

1 reserve your ruling on that till the end of the
2 case, I think it would be appropriate.

3 And, Your Honor, I believe that
4 is -- there has been no evidence presented by us
5 concerning the request for an injunction
6 concerning the dock because they've now taken
7 good faith steps to try to keep our docks clear,
8 and we are not experiencing that problem anymore.

9 THE COURT: There was actually one
10 more; and that was the declaratory judgment,
11 paragraphs 8 and 9, having to do with the
12 prohibition on competing.

13 MR. TAYLOR: Pardon me, Your Honor.
14 Thank you for reminding me of that.

15 THE COURT: Sure.

16 MR. TAYLOR: Your Honor, we
17 disagree with Mr. Lesemann. We believe that
18 Mr. Freedman has admitted that when he signed --
19 or when his brother signed the original
20 agreement, there was a prohibition on competing
21 against Mr. Scurry or against J&W's business
22 there. I acknowledge that everything that
23 Mr. Lesemann said is accurate concerning the
24 separation of the lot at that point in time.

25 But as a matter of what I believe

1 was the intent of the contract and the implied
2 covenant of good faith and fair dealing that is
3 in viewed in every contract in South Carolina,
4 that to allow someone like Mr. Freedman to simply
5 move next door and operate a competing business
6 that was specifically agreed he would not compete
7 against on the adjacent property is
8 inappropriate.

9 THE COURT: Thank you so much.

10 What I'm going to do, as the
11 attorneys and I discussed earlier, the luxury of
12 nonjury is we can shuffle these things around.
13 What I think I'm going to do is take these under
14 advisement. May rule before we leave today. May
15 not. I'll get to them as quickly as possible.

16 So thank you both, and happy to
17 hear from you Mr. Lesemann.

18 MR. LESEMAN: Thank you, Your
19 Honor.

20 DEFENDANT'S CASE

21 The Defendants, in order to maintain the
22 issues upon their parts, presented the following
23 testimony:

24 MR. LESEMAN: We call Miss Robbin
25 Rachels.

1 THE COURT: Come on around, please.

2 ROBBIN RACHELS,

3 having been first duly sworn, was examined and
4 testified as follows:

5 THE COURT: Come on around. State
6 and spell your whole name for the record.

7 THE WITNESS: Robbin Rachels.

8 R-O-B-B-I-N, last name Rachels, R-A-C-H-E-L-S.

9 DIRECT EXAMINATION

10 BY MR. LESEMAN:

11 Q. Miss Robbin, could you explain to Judge
12 Dukes who's your employer? And what's your role
13 as it relates to the Broad Creek Marina?

14 A. Yes. I'm the accounting manager, Broad
15 Creek Marina. I've worked for Mr. Freedman and
16 Mr. Jones since February of 2009. So just
17 celebrated my ten-year anniversary there. I do
18 all of the bookkeeping, accounting, collections,
19 pay the bills, all the girl stuff.

20 Q. Lot of hats.

21 And so as it relates to this lease
22 relationship between the current landlord and the
23 tenant, what's your involvement on a week-to-week
24 or month-to-month basis with the lease?

25 A. I generate monthly invoices for the

1 common area reimbursement, utilities, and lot --
2 I think we call it lot maintenance. And then
3 annually or periodically the invoices for J&W for
4 the reimbursements, the insurance, the property
5 tax.

6 Q. So, Miss Robbin, could you go to
7 Defendant's Exhibit No. 02 in this large book
8 here, the big binder.

9 A. Yes, sir.

10 Q. And find the confidential settlement
11 agreement, and there's an Exhibit F.

12 A. Yes. (Complies with request.)

13 Q. Do you recognize that exhibit?

14 A. Yes. It is the chart or form that's in
15 the J&W file in the accounting office my
16 predecessors had used for billing, and then we --
17 when I came in -- into the position, continued
18 doing it.

19 Q. And when was that? When did you
20 overtake the monthly charges and billing?

21 A. February of 2009 --

22 Q. Okay.

23 A. -- was when I started.

24 Q. So, essentially, so from February 2009
25 to now, a lot of those invoices that you have

1 issued to J&W Corporation, by and large, have not
2 been paid. Is that true?

3 A. Correct.

4 Q. And do you utilize the percentages in
5 this Exhibit F in your tasks in performing your
6 work?

7 A. Yes, sir. For the -- let's see. For
8 the lot maintenance, I think that is an annual
9 amount; and we've been using a monthly amount,
10 and we also issue a monthly invoice for utility
11 reimbursement. I believe it's 55 a month for
12 that.

13 Q. So when we looked at Section 3 of the
14 lease before and we saw that it talks about the
15 tenant paying an allocated share of utilities and
16 property taxes and insurance and other charges,
17 are those calculations that you perform?

18 A. Yes. With insurance and the property
19 tax each year when we get those invoices, 7-and-
20 a-half percent is what we use of the total
21 premium for the general liability; and then on
22 the property tax bills for the marina, land is
23 10 percent of the total tax bill.

24 Q. And you perform those calculations in
25 conformity with the percentages stated in the

1 settlement agreement --

2 A. Yes.

3 Q. -- and in the -- sort of the --

4 A. Yes, sir.

5 Q. -- and using figures that have been in
6 place at the landlord -- with the landlord for
7 some time?

8 A. Yes, sir.

9 Q. Okay. Could you go to Defendant's
10 Exhibit No. 25.

11 A. (Complies with request.) Yes, sir.

12 Q. And what's the first date that you see?
13 Could you identify that first page there?

14 A. Yes. The first page is the first page
15 statement dated 12/31/2015 for Broad Creek
16 Marina, and it is -- it's like 23 pages.

17 Q. And so this statement, is this different
18 from the monthly invoices?

19 A. Yes. Monthly invoices would be just a
20 sheet of paper with each month's billing. I
21 generate the \$55 utility reimbursement and the --
22 I think it's like 133 -- yeah. 133.12 for lot
23 maintenance. And those are delivered to the
24 office across the parking lot each month.

25 Q. Okay.

1 A. But this statement recaps that with each
2 invoice and --

3 Q. And so is the statement, essentially, an
4 aggregate or a total of unpaid amounts?

5 A. Yes, sir.

6 Q. And so does it, essentially, serve as a
7 summary of all of the unpaid invoices?

8 A. Yes, sir. This first -- well, the first
9 tab of Defendant's Exhibit No. 25, that goes
10 through December of 2015.

11 Q. Right.

12 A. If you could refer to the next tab --

13 Q. Right.

14 A. -- Defendant's Exhibit No. 26.

15 Q. (Complies with request.) Yes.

16 A. You'll see the name at the top's a
17 little different. Instead of just Broad Creek
18 Marina, it's Broad Creek Marina Operations when
19 we had the change in the structure of the
20 companies; and that balance was brought forward
21 from the old system. The 31,862 was transferred
22 to this account lump sum, the first number.

23 Q. Okay.

24 A. And then the monthlies continue on
25 there.

1 Q. Could you go to page 23 of Defendant's
2 Exhibit No. 25, the last page.

3 A. (Complies with request.) Yes, sir.

4 Q. And the last date that appears on that
5 page is what?

6 A. December 1 --

7 Q. And so --

8 A. -- 2015.

9 Q. -- does this statement represent,
10 essentially, an aggregate statement of the amount
11 of the tenant allocations that were due and
12 unpaid from January 1, 2008, through December 1
13 of 2015?

14 A. Yes, sir.

15 Q. And what is that total amount?

16 A. 31,862.73.

17 Q. And can you confirm for the record that
18 that is the amounts unpaid that are due and owing
19 but are unpaid from J&W Corporation, the
20 tenant --

21 A. Yes.

22 Q. -- for that same time period?

23 A. Yes, sir.

24 Q. And you mentioned that the statement
25 that's in Defendant's Exhibit No. 26, does that

1 number, that 31,862.73, does that tie into the
2 statement that's Exhibit No. 26?

3 A. Yes, sir.

4 Q. Can you tell us where that is?

5 A. Yes, sir. Under Tab 26, statement dated
6 May 10, 2019, the first -- well, the first line
7 is the balance forward zero. But then dated
8 January 1, 2016, balance from Broad Creek Marina
9 Hilton Head, a balance forward of 31,862.73.

10 Q. Yeah.

11 A. And then the monthly charges continue.

12 Q. And so if I called out the section you
13 were referring to, that basically brings that
14 balance forward?

15 A. Yes, sir.

16 Q. And you mentioned -- you've mentioned
17 that there was a change in the accounting system?

18 A. Yes. When the structures -- when the
19 company -- corporate structure happened effective
20 January 1, 2016, we started a new operating
21 company, Broad Creek Marina Operations, operating
22 the marina operations; and the balances moved
23 from -- we used QuickBooks in the accounting
24 office, and we started a new QuickBooks company
25 and moved the balance from the Broad Creek Marina

1 Hilton Head.

2 Q. So then in looking at Defendant's
3 Exhibit No. 26, if you go to the back of that
4 document to page 10.

5 A. (Complies with request.) Yes, sir.

6 Q. Does the statement at Defendant's
7 Exhibit No. 26, it carries forward the balance
8 from Defendant's Exhibit No. 25; and then does it
9 itemize all those charges --

10 A. Yes, sir.

11 Q. -- going forward to a later date?

12 A. Yes, sir. They -- then it picks up
13 January 1 of 2016, through last week, through
14 May 10 of 2019; and the balance now as of May 10
15 was \$56,371.27.

16 Q. And so to clarify, that number, the
17 \$56,371.27, does that include any prejudgment
18 interest to which the landlord might be entitled?

19 A. No. That is just the actual charges.

20 Q. And to clarify also, that number at the
21 end of Defendant's Exhibit No. 26, that 56,000,
22 it does include the total of Defendant's Exhibit
23 No. 25?

24 A. Yes, sir.

25 Q. So we don't mean for those to be

1 duplicated.

2 A. Huh-uh, no, sir.

3 Q. But Defendant's Exhibit No. 25, does
4 that allow you to show the itemization of what
5 was in the old system?

6 A. Yes. The unpaid items from the previous
7 years.

8 Q. So the number appearing there at the end
9 of Defendant's Exhibit No. 26, \$56,371.27, is
10 that the cumulative amount, excluding interest or
11 attorney's fees, that the landlord is owed for
12 lot maintenance, utilities, and the tenant's
13 share of the landlord's insurance and the
14 property taxes?

15 A. Yes, sir. That is everything that we've
16 billed to date.

17 There is one exclusion that is not --
18 it's the -- it was not billed, but we've not
19 billed this past year's property tax or
20 insurance. We discussed some of that and said we
21 would wait until this action. So there are some
22 things that we have not billed for, but there's a
23 lot unpaid. So I don't think it makes a
24 difference.

25 Q. So if they have not been billed, then

1 the tenant would not have known yet to pay them.

2 Is that fair?

3 A. That's pretty fair.

4 Q. But when they are billed, the landlord
5 will expect those to be paid?

6 A. Yes. Yes, sir.

7 Q. There are some unbilled amounts that are
8 not reflected in Defendant's Exhibit No. 26?

9 A. Correct.

10 Q. But Defendant's Exhibit No. 26 does
11 reflect --

12 A. Everything, yes, sir.

13 Q. Yeah. It reflects everything from 2008
14 through 2019 for those items in Section 3 of the
15 lease; correct?

16 A. Yes, sir.

17 Q. The tenant allocations.

18 A. The reimbursements, yes, sir. The
19 expense reimbursements.

20 Q. So would the landlord be asking the
21 Court to award for those -- Section 3 of the
22 lease items, those ten allocations that are
23 unpaid, the \$56,371.27?

24 A. Yes, sir.

25 Q. And would you also ask -- since those

1 amounts go back to 2008 in some instances, would
2 you also ask for the Court to award the
3 prejudgment interest that would be owed?

4 A. Yes, sir. That would be applicable in
5 this case.

6 Q. And I know you're not an expert on the
7 lease, but do you understand that the lease has a
8 provision about attorney's fees in it?

9 A. Yes. I think it does.

10 Q. Would you also ask the Court to award
11 the landlord the attorney's fees that were
12 incurred and necessary in order to collect these
13 amounts?

14 A. Yes, sir. Since this is not our action
15 and this was brought against us. In fact, we had
16 to defend ourselves.

17 Q. So are Defendant's Exhibits No. 25 and
18 No. 26, are those examples of the types of
19 records that Broad Creek Marina of Hilton Head,
20 LLC, and Broad Creek Marina Operations, LLC,
21 would keep in their regular course of business?

22 A. Yes, sir.

23 Q. Are those documents using the aid of
24 software programs that you have personally
25 prepared?

1 A. Yes, sir. And at times, we have
2 delivered a statement outlining, you know,
3 summarizing everything.

4 Q. Has Mr. Scurry ever called you about
5 these statements or the monthly invoices that you
6 issue?

7 A. No, sir.

8 Q. Has anyone in his operation called you
9 to contest the amounts of lot maintenance or
10 property taxes or insurance or utilities that
11 have been allocated on these invoices --

12 A. No, sir.

13 Q. -- over this ten-year period?

14 A. No, sir.

15 Q. 11-year period?

16 A. No, sir. I'm not sure why; but over the
17 last few months, they have chosen to sporadically
18 pay some of the lot maintenance and utilities as
19 detailed on -- I'm under Tab 26. I think it
20 starts on page 9 back at the back. No. The
21 first one is on page 8 of the -- on all --

22 Q. For example, where it says "PMT" is
23 payment?

24 A. Yes, sir.

25 Q. Okay.

1 A. Like on page 8 on August 27, there was a
2 payment for one month of lot maintenance and
3 electric or utility reimbursement --

4 Q. Okay.

5 A. -- for total of 188. And then there's
6 a -- on the next page, there's a couple of 188 --
7 well, yeah. Two -- there's two payments of 188
8 and, looks like, two separate checks. One for
9 133 and one for 55.

10 MR. LESEMAN: So, Your Honor, at
11 this time, we would ask for the admission of
12 Defendant's Exhibit No. 25 and No. 26 as itemized
13 statements and business records of the landlord
14 relating to unpaid amounts for the tenant
15 allocations of utility, lot maintenance, property
16 taxes, and insurance.

17 THE COURT: Mr. Taylor, any
18 objection?

19 MR. TAYLOR: No, sir.

20 THE COURT: That will be
21 Defendant's Exhibits No. 25 and 26.

22 (Defendant's Exhibits No. 25 and No. 26
23 are admitted into evidence.)

24 MR. LESEMAN: And I know you had
25 mentioned that, but so 25 is included as an

1 itemization. But the total that it appears at
2 the back of that itemization on Defendant's
3 Exhibit No. 25 is included in Defendant's Exhibit
4 No. 26. So Defendant's Exhibit No. 26 includes
5 the total for that particular category of
6 damages.

7 THE COURT: It just picks up at
8 that amount?

9 MR. LESEMAN: Yes. Where there
10 was a changeover in the accounting system. So we
11 just included both statements so that there's an
12 itemization.

13 THE COURT: Got it. So the backup
14 for No. 26, at least its initial figure, is
15 No. 25.

16 MR. LESEMAN: Correct.

17 THE COURT: Okay. Got it.

18 BY MR. LESEMAN:

19 Q. And then we also have -- do we have
20 further backup, Miss Robbin, behind Tab 27?

21 A. Yes, sir. We have each statement -- or
22 excuse me. Each invoice from January 1, 2008,
23 through May of this year. We have every
24 statement, and the ones that are paid are stamped
25 with a "paid" mark.

1 Q. And so your system is able to track that
2 there is a -- whether something is paid or
3 unpaid?

4 A. Yes, sir.

5 Q. And so, for example, the payment that --
6 when you see "PMT" on one of the statements, that
7 records and gives credit --

8 A. Credit on the account, yes, sir.

9 Q. -- for the payment that was made?

10 A. Uh-huh.

11 Q. Very good.

12 And so Defendant's Exhibit No. 27 is
13 basically going from January 1, 2008, through
14 May 1 of 2019. That's all invoices for the
15 tenant-allocated charges, paid and unpaid?

16 A. Yes, sir.

17 Q. And so with each example of something
18 that's been unpaid in those statements, the
19 invoice is behind Tab 27?

20 A. Yes, sir.

21 Q. Are these invoices something that are
22 generated and kept by Broad Creek Marina
23 Operations and before it, Broad Creek Marina of
24 Hilton Head, in its regular course of business?

25 A. Yes, sir. We generate a copy and send

1 it to the customer, or in this case the lessee.
2 We don't keep a paper copy on file, but it's
3 digitally available in the office.

4 Q. And either in court today or while you
5 have been in depositions or what you've seen
6 relating to this case --

7 A. Yes, sir.

8 Q. -- are you aware of any challenge to
9 these allocation percentages or amounts on the
10 part of the tenant? Has the tenant contacted
11 you, or are you aware of any challenge of
12 inaccuracy in these amounts?

13 A. No, sir.

14 MR. LESEMANN: Your Honor, at this
15 time, we'd ask to move Defendant's Exhibit
16 No. 27, which is bulky, but just so you have the
17 backup of all the invoices, paid and unpaid,
18 related to these ten allocation amounts.

19 THE COURT: No objection?

20 MR. TAYLOR: No objection, Your
21 Honor.

22 THE COURT: That'll be Defendant's
23 Exhibit No. 27. Thank you.

24 (Defendant's Exhibit No. 27 is admitted
25 into evidence.)

1 Q. Now, from time to time, are there also
2 charges due from J&W Corporation for other types
3 of items, such as storage or boat-related
4 charges?

5 A. Yes, sir. We did incur some charges,
6 and Tab 28 is the account we've marked or
7 designated as other/miscellaneous charges for J&W
8 to keep it separate from the regular
9 reimbursement entries.

10 But back in 2010 and in the beginning of
11 2011, we had stored some of their vessels. Nate
12 Jones, the marina manager, had instructed me to
13 invoice -- or some of them he invoiced, but the
14 statement lists bimonthly with a number fee, the
15 amount per foot.

16 Looking at the first -- I apologize, but
17 looking at the first charge on that statement
18 dated June 1, 2010, was an invoice for 331.25.
19 That was for storage of the Calibogue on hard,
20 which means we had it up on the pad in front of
21 the barn storing is it up on dry land for them.

22 And also a Key West, charged a 20 -- I'm
23 not sure if it was a 20-foot. We have a 20-foot
24 minimum. It could have been an 18 but charged at
25 20 feet. And then, again, in June of 2010 for

1 both vessels. Excuse me. June, July, and August
2 for the Calibogue and the Key West.

3 Q. And so what's the total amount that
4 is -- has been -- so these amounts have been
5 billed?

6 A. The total on that is 2,866.25.

7 Q. Miss Robbin, does that represent amounts
8 that have been incurred and billed but unpaid by
9 J&W Corporation for these storage charges?

10 A. Yes, sir, that's correct.

11 Q. And so would the defendants -- in this
12 instance, it would be Broad Creek Marina of
13 Hilton Head, LLC. Would they ask for the Court
14 to award the 2,866.25 in unpaid storage charges?

15 A. Yes, sir.

16 Q. And plus the applicable interest and
17 attorney's fees?

18 A. And interest and attorney's fees as
19 appropriate for the lease.

20 Q. So, Robbin, the statement here similar,
21 this is the type of document that is created and
22 maintained by Broad Creek Marina in the normal
23 course of its business?

24 A. Yes, sir.

25 MR. LESEMAN: Your Honor at this

1 time we would move for admission of Defendant's
2 Exhibit No. 28.

3 THE COURT: No. 28. No objection?

4 MR. TAYLOR: No objection, Judge.

5 THE COURT: Thank you.

6 (Defendant's Exhibit No. 28 is admitted
7 into evidence.)

8 Q. And then, Miss Robbin, at Tab 29, are
9 these invoices the backup for those unpaid
10 charges?

11 A. Yes. It's the invoice for each of the
12 charges summarized on the statement.

13 Q. And these invoices would have been
14 created and sent to J&W Corporation?

15 A. Yes, sir. To their office.

16 Q. Would these invoices remain unpaid at
17 this time?

18 A. These are all unpaid, yes, sir.

19 Q. Have you received any dispute or
20 challenge of these storage charges from J&W?

21 A. No, sir. There's been no inquiry, and I
22 would have to refer to my file in my office; but
23 at times when totals were presented to J&W's,
24 statements summarizing these charges, that's been
25 presented to them. But I've never had an

1 inquiry.

2 MR. LESEMAN: Okay. Your Honor,
3 at this time would he would move for the
4 admission of Defendant's Exhibit No. 29, which
5 are the individual invoices for the unpaid
6 storage charges.

7 MR. TAYLOR: No objection, Judge.

8 THE COURT: Thank you so much.

9 (Defendant's Exhibit No. 29 is admitted
10 into evidence.)

11 Q. Miss Robbin, could you look at Tab 30?

12 A. (Complies with request.) Yes, sir.

13 Q. Do you administer the payment of
14 property taxes for the owned property?

15 A. Yes. Yes, sir.

16 Q. Is Broad Creek Marina, are the entities
17 current during this time frame from 2008 to the
18 present?

19 A. Yes, sir. All taxes were paid.

20 Q. So the landlord has paid the amounts it
21 owes to Beaufort County?

22 A. Yes, sir.

23 Q. And is this an example of a printout
24 from the county website that would reflect the
25 amounts billed and the amounts paid?

1 A. Yes, sir.

2 Q. And can you here confirm under oath that
3 the amounts that have been charged for property
4 taxes billed to the tenant have, in fact, been
5 paid by the landlord?

6 A. Not all of them, no, sir.

7 Q. Right.

8 A. A few -- a few of the years have been
9 paid.

10 Q. Okay.

11 A. As Mr. Taylor stated earlier --

12 Q. Oh, oh, oh, I think you misunderstood my
13 question.

14 A. I'm sorry. Property tax.

15 Q. No. I'm going to help you out.

16 A. Oh, I'm sorry.

17 Q. The landlord has paid its property
18 taxes.

19 A. The landlord has paid, yes, sir.

20 Q. And the tenant did at one time issue you
21 a payment for -- I think it was approximately
22 2008 through 2012 for the property taxes?

23 A. Yes. Yes, sir. That's correct.

24 Q. And let's see. There is -- if you look
25 at Tab 8, Miss Robbin. Defendant's Exhibit

1 No. 08.

2 A. (Complies with request.) Yes, sir.

3 Q. Do you recognize -- do you see -- is
4 there a check?

5 A. Yes, sir. This is a check from J&W.

6 Q. And so just to confirm, this check that
7 did come in, this paid for property taxes from
8 2008 to 2013?

9 A. Yes, sir, that's correct.

10 Q. And so the amounts that we discussed,
11 has the tenant been given the full credit for the
12 amount of 20,537.07?

13 A. Yes, sir.

14 Q. All right.

15 A. It would be reflected on the statement
16 for the expense reimbursement account.

17 Q. Now, were those amounts of property
18 taxes paid by the tenant on time?

19 A. No, sir. They were paid, as you can see
20 from the date of the check, the check was dated
21 May 9 of 2014 paying for property tax back to
22 '08 --

23 Q. Okay.

24 A. -- through '13.

25 Q. But the landlord is not seeking either

1 interest or any other amounts, and has the
2 landlord credited the account for that payment?

3 A. Yes. The payment has been credited, and
4 there is no interest calculated on that past due
5 until it was paid.

6 Q. Okay.

7 A. The interest, I believe, is just on the
8 outstanding.

9 Q. In terms of the insurance amounts that
10 have been billed to the tenant and the tenant
11 allocations, has Broad Creek Marina, in fact, had
12 those policies in force; and has it paid for the
13 insurance policies that it has allocated, in
14 part, to the tenant?

15 A. Yes, sir.

16 Q. Have you undertaken to assemble the
17 copies of the policies and the payments and all
18 of those things and provided those to me?

19 A. Yes, sir.

20 Q. Can you look at Defendant's Exhibit
21 No. 31 for a moment and see if that represents
22 the items you assembled?

23 A. (Complies with request.) Yes, sir.

24 Q. In terms of the -- so is that evidence
25 that exists within the business records?

1 A. Yes, sir. I believe this reflects the
2 invoicing from the insurance companies, along
3 with our check receipts where these are paid for
4 each of the years.

5 We have been with different companies
6 through the years. We're talking 10 years, 11
7 years. So there have been a couple of changes.
8 So the documentation under each year is tabbed,
9 may look a little different; but you'll see the
10 invoicing and then the payment receipts.

11 Q. So the insurance charges that we've --
12 that the landlord has passed along to the tenant
13 are for insurance policies and for premiums that
14 the landlord has, in fact, obtained and paid. We
15 have paid for these policies.

16 A. We have paid, yes.

17 Q. And we've paid those premiums?

18 A. Yes, sir. All of our premiums have been
19 paid, and all our policies have always been in
20 place.

21 Q. To find the items that are accumulated
22 in Defendant's Exhibit No. 31, did you find those
23 with the business records of the landlord?

24 A. Yes, sir.

25 MR. LESEMAN: Your Honor, just

1 for -- since it was questioned for, you know,
2 proof of payment of all the insurance policies
3 and the existence of the policies that the
4 landlord had and had charged tenant their pro
5 rata share, we would move exhibit -- move for
6 admission of Defendant's Exhibit No. 31, as those
7 business records indicating the existence of
8 those policies and the payment of the premiums.

9 THE COURT: All right.

10 MR. TAYLOR: No objection, Judge.

11 THE COURT: No. 31. Thank you so
12 much.

13 (Defendant's Exhibit No. 31 is admitted
14 into evidence.)

15 Q. Miss Robbin, do you have a copy of
16 the -- well, actually, let's go back.

17 So is it Defendant's Exhibit No. 18?
18 Mr. Jones is going to talk about the dock repair,
19 but he doesn't write the checks. You write the
20 checks; right?

21 A. Yes, sir. Mr. --

22 Q. Do you see Tab 18? Do you recall that
23 there was a situation in which it was necessary
24 to perform some dock repairs following Hurricane
25 Matthew?

1 A. Yes, sir. Thankfully, the marina didn't
2 suffer damage like Palmetto Bay did or some of
3 the other areas; but there was a portion of the
4 leaseholder's -- or the lessee's docks were
5 damaged with Hurricane Matthew. And I did -- you
6 said I pay the bills. Mr. Jones doesn't, but I
7 do. I do write the checks, and actually
8 Mr. Jones or Mr. Freedman signs the checks.

9 But I prepare the payments; and when
10 this matter came up, I questioned Mr. Jones, "Why
11 are we paying this if it's J&W's docks?" And he
12 said, "It's just like last time. We're getting
13 it fixed. We've got a relationship with them,
14 and we're getting it fixed for them; and they'll
15 reimburse us, like when the ferry hit the finger
16 of the dock and" --

17 Q. Right.

18 A. -- "damaged it a year or two prior."

19 So we paid Atlantic Marine, and I
20 believe there was someone else -- yeah, Barrier
21 Island. And we had to have some work done.

22 Q. So Defendant's Exhibit No. 18. We'll
23 let Mr. Jones talk more about the nature of what
24 was done and his testimony about our belief that
25 it's the tenant's responsibility.

1 But if you could just confirm, are these
2 invoices invoices that were received and were
3 paid by the landlord?

4 A. Yes, sir.

5 Q. And are these invoices kept in the
6 business records -- in the landlord's business
7 records?

8 A. Yes, uh-huh.

9 MR. LESEMAN: Your Honor, we'd
10 move for admission of Defendant's Exhibit No. 18.

11 THE COURT: No. 18. Without
12 objection?

13 MR. TAYLOR: Your Honor, I thought
14 they were going to wait for Mr. Jones to testify
15 to that. I just wanted to look at them again.

16 THE COURT: Okay.

17 MR. TAYLOR: No objection to the
18 admission, Your Honor.

19 THE COURT: Thank you. That'll be
20 Defendant's Exhibit No. 18.

21 (Defendant's Exhibit No. 18 is admitted
22 into evidence.)

23 Q. And then, Miss Robbin, could you look at
24 Defendant's Exhibit No. 19.

25 A. Yes, sir. (Complies with request.)

1 Q. And so corresponding to the invoices
2 that were just admitted into the record, are --
3 what is Defendant's Exhibit No. 19?

4 A. The first page of Defendant's Exhibit
5 No. 19 is the -- is just an account detail off of
6 our computer system.

7 We had -- I had set up an account for
8 J&W dock repair, and it lists the charges related
9 to that totaling \$44,398. And then the second
10 page is copies of the three payment receipts,
11 check receipts; and also enclosed is -- pages 3
12 and 4 of that tab are two bank statements showing
13 the -- where those checks cleared.

14 Q. So, Robbin, did the landlord pay those
15 invoices that we just admitted into evidence as
16 Defendant's Exhibit No. 18?

17 A. Yes, sir. They were paid when the
18 invoices were presented.

19 Q. And does Defendant's Exhibit No. 19
20 provide -- in addition to your testimony that
21 they were paid, does Defendant's Exhibit No. 19
22 represent proof of payment of those invoices?

23 A. Yes, sir. It has the payment receipts,
24 the check receipts with the check number, and
25 then the two pages from BB&T bank statements show

1 those check numbers clearing and the date they
2 cleared our account.

3 Q. Those items that are included in
4 Defendant's Exhibit No. 19, are those kept within
5 the business records of the landlord?

6 A. Yes, sir.

7 MR. LESEMAN: Your Honor, I would
8 ask for admission of Defendant's Exhibit No. 19.

9 MR. TAYLOR: No objection, Your
10 Honor.

11 THE COURT: No. 19 without
12 objection then.

13 (Defendant's Exhibit No. 19 is admitted
14 into evidence.)

15 Q. Robbin, do you have a book that looks
16 like this with a clear cover? (Indicating.)

17 A. Yes, I do.

18 Q. Did you mention previously that -- to
19 the extent -- that consistent with applicable
20 law, that the landlord would seek any prejudgment
21 interest that the Court may award?

22 A. Yes, sir. Yes, sir.

23 Q. Working together with my office, has
24 there been a calculation, sort of, on an invoice-
25 by-invoice basis --

1 A. Yes, sir, there has.

2 Q. And does Defendant's Exhibit No. 52 --

3 MR. LESEMANN: Your Honor, I'm
4 sorry. Did you see this? It's a --
5 (Indicating.)

6 THE COURT: Oh, one of these. I've
7 got 31 and 34 and --

8 MR. LESEMANN: This one has a clear
9 cover on it, and it's Trial Exhibits 52 through
10 55.

11 THE COURT: Got it. Thank you.

12 Q. Does Defendant's Exhibit No. 52, Robbin,
13 does it, essentially, reflect itemized
14 calculation of interest at the rate of
15 8.75 percent on each of the unpaid amounts owed
16 by the landlord -- by the tenant to the landlord?

17 A. Yes, sir, it does.

18 Q. And then Defendant's Exhibit No. 53,
19 does that include, similarly, calculations of
20 interest at the rate of 8.75 percent on the
21 amounts that have been paid by the landlord for
22 damage to the dock --

23 A. Yes, sir.

24 Q. -- for which payment has not been
25 received from the tenant?

1 A. Yes, sir, that's correct.

2 Q. And then Defendant's Exhibit No. 54, is
3 that a summary of the interest charges along with
4 some backup documentation relating to interest
5 calculations due on the miscellaneous charges
6 that have -- that are --

7 A. Yes.

8 Q. -- due and owing from the tenant?

9 A. Yes, sir.

10 Q. And then Defendant's Exhibit No. 55, is
11 that a summary of the -- of various categories
12 and amounts that are due?

13 A. Yes, sir. Tab 55 is a summary of the
14 three previous tabs, with the total by category
15 by lease charge reimbursements, the dock repair,
16 and the miscellaneous charges totaling
17 \$134,983.73. And that would be the charges and
18 the -- sorry. That would be the charges and the
19 interest.

20 Q. Yes, ma'am.

21 Is the landlord asking for the Court to
22 award \$134,983.73 to provide for payment and
23 prejudgment interest for the unreimbursed lease
24 charges, the dock damage, and the unreimbursed
25 miscellaneous charges --

1 A. Yes, sir.

2 Q. -- that remain unpaid at this time from
3 the tenant?

4 A. Yes, sir.

5 Q. And does that amount reflect all the
6 appropriate credits to the tenant for what
7 amounts they did, in fact, pay?

8 A. Yes, sir.

9 Q. And is this based on a percentage rate
10 of 8.75 percent? Is that your understanding what
11 the --

12 A. Yes, sir.

13 Q. -- percentage interest rate would be on
14 prejudgment interest?

15 A. Uh-huh, yes, sir.

16 MR. LESEMANN: Your Honor, at this
17 time we just would move -- this was really an aid
18 to the Court and intended as a summary
19 compilation of evidence for interest charges and
20 for the total amount, and so we would just move
21 for admission of Defendant's Exhibits No. 52
22 through No. 55.

23 MR. TAYLOR: Your Honor, no
24 objection.

25 THE COURT: No. 52 through No. 55

1 will be admitted without objection.

2 (Defendant's Exhibits No. 52, No. 53,
3 No. 54, and No. 55 are admitted into evidence.)

4 Q. And, Miss Rachels, just for
5 clarification, that number would not include any
6 amount of attorney's fees; is that correct?

7 A. Oh, no, sir.

8 Q. But the landlord would ask for the
9 Court, in the Court's appropriate discretion, to
10 award attorney's fees to the landlord at the
11 appropriate time?

12 A. Yes, sir. Mr. Freedman and I have had
13 that discussion, and we would request that.

14 MR. LESEMANN: Your Honor, with
15 those exhibits admitted, with the testimony, we'd
16 have nothing further for the witness at this
17 time. Please answer any questions that
18 Mr. Taylor may have for you.

19 CROSS-EXAMINATION

20 BY MR. TAYLOR:

21 Q. Miss Robbin, good afternoon. How are
22 you?

23 A. I'm good. How are you?

24 Q. Good.

25 I'd like to refer you, please, to

1 Defendant's Exhibit No. 25 and also to
2 Defendant's Exhibit No. 52. Can you put your
3 fingers on those?

4 A. Okay. (Complies with request.)

5 Q. Defendant's Exhibit No. 25 seems to
6 be -- do you see it?

7 A. We're in the big book. 25 is a
8 statement.

9 Q. Yes, ma'am.

10 A. Yes. Dated December 31, 2015, yes, sir.

11 Q. That's it.

12 It appears to me from reading this,
13 which has been admitted into evidence, that the
14 defendant's contention is that beginning on
15 January 1 of 2008, there was rendered a \$55 bill
16 for electric; and J&W paid it. Is that correct?

17 A. Yes, sir.

18 Q. It appears that on March the 1st, there
19 was rendered an invoice for electric of \$55; and
20 J&W paid it. Is that right?

21 A. Yes, sir. It looks like they paid that
22 on February --

23 Q. And on April 1, 2008, electric was
24 rendered of \$55; and it was paid. Correct?

25 A. Yes, sir.

1 Q. And would that indicate to you that in
2 the beginning of 2008, without any balance coming
3 forward, that J&W was current on all that it owed
4 to the Broad Creek Marina entities?

5 A. Yes, sir. I think so going by -- by the
6 reimbursements.

7 Q. By your records, it would indicate that
8 by, at least, April of 2008, J&W had paid all
9 that it was supposed to pay to Broad Creek Marina
10 at that time; correct?

11 A. According to this statement, which I'm
12 going by from my predecessor. But, yes, uh-huh.

13 Q. Well, that statement --

14 A. Yes.

15 Q. -- that you're going by from your
16 predecessor is the basis, in part, of your
17 testimony here today; correct?

18 A. Okay. Yes.

19 Q. All right.

20 A. According to this, everything I know of.
21 I'm not sure what you're leading up to, but go
22 ahead.

23 Q. Well, that's good.

24 What I'm leading up to is this,
25 Miss Rachels. I want to make sure the Court

1 understands that J&W stopped making its payments,
2 it would appear, according to your records, in
3 the June of 2008 time frame; is that correct?

4 A. Yes.

5 Q. And were you working with Mr. Freedman
6 and Broad Creek Marina at that time?

7 A. No, sir.

8 Q. Do you know, do you have any information
9 that would lead you to contest the assertion that
10 that is the same exact time that J&W was placed
11 in the shed office?

12 A. It was not.

13 Q. It was not?

14 A. No.

15 Q. And you were there?

16 A. I was there when they were placed in
17 that office, and I started at the marina in
18 February of 2009.

19 Q. When were they placed in the office?

20 A. They were placed -- I think it was in
21 the fall, like at the end of the season, in the
22 fall of 2009. I thought it was 2010; but in
23 going back and looking, I think it was 2009. I
24 know it -- wait. I know it was 2009. The exact
25 month, I'm not sure of right now.

1 Q. What did you go back and look at?

2 A. We paid Hargray Communications, the
3 local phone company. We paid a fee to them for
4 something that had to be moved or connected or
5 disconnected for them in the -- what are we
6 calling it? J&W's office is what I call it. The
7 boat shed that you referred to.

8 But going back to that reimbursement to
9 Hargray, it was in 2009. It was in the fall of
10 the year.

11 Q. And so that is the basis of your
12 testimony was a Hargray receipt that you saw that
13 you believe is related to paying for the
14 installation of the work at the building?

15 A. Yes, sir.

16 Q. And do you have any reason to believe
17 that the invoice necessarily found its way to you
18 at the same time they did the work?

19 A. I know it did. It came to me because
20 Nate Jones told me we would be paying that for
21 J&W because of inconvenience --

22 Q. Okay.

23 A. -- of them having to move.

24 Q. Do you have any recollection of how many
25 times the boat had taken on water and had

1 problems at about this same time?

2 A. No, sir. I think Mr. Jones can answer
3 that for you better.

4 Q. All right.

5 A. Because his guys run the pump-out boat.
6 I think that was what --

7 Q. Miss Rachels, when you looked at the
8 annual shared liabilities, which is attached to
9 the settlement agreement. I believe it's
10 Defendant's Exhibit No. 02. Can you find a copy
11 of that? It's the annual --

12 A. That back page?

13 Q. Yes, ma'am.

14 A. Uh-huh. (Complies with request.) Yes,
15 sir.

16 Q. And this page is the basic Bible for you
17 in to how you do your work and assign liabilities
18 to J&W; is that correct?

19 A. Yes, sir.

20 Q. And this document has not changed any
21 since the date that it was signed off on in 2004,
22 has it?

23 A. No, sir, not to my knowledge.

24 Q. If you take a look at the lot
25 maintenance number, eight man hours per week.

1 The annual cost of \$4,492. J&W's shared
2 liability of that is 1437.44; correct?

3 A. Yes, sir.

4 Q. Is that right?

5 A. Yes, sir.

6 Q. All right.

7 A. I'm guess -- I'm assuming. I don't have
8 my calculator here. But, yes, sir. I think it
9 does. Because actually, I think I know where
10 you're going; but that's okay. Let's keep going.

11 Q. That's mine. I was going to let you use
12 my calculator.

13 A. Okay. I'll do it. That's fine.

14 Q. Where do you think I'm going, ma'am?

15 A. No. Go ahead.

16 Q. Well, Miss Rachels, what I want to know
17 is if you take the 1437.44 annual J&W liability
18 and divide it by 12, what do you get?

19 A. You get \$119.78 -- rounds up to 79
20 cents, which is less than we've been billing each
21 month. That was discovered during my deposition
22 at your offices in January --

23 Q. Right.

24 A. -- of this year.

25 Q. Right. And how did you make that

1 mistake?

2 A. I made the mistake of billing the wrong
3 amounts since 2000 -- since 2009 because I used
4 the same number that had been billed in the past
5 and up until that time had been paid most months;
6 but I just continued to use that same number that
7 had been billed, I guess, since '04.

8 Q. So is it your testimony that as the
9 bookkeeper and the person who generates the
10 accounts at Broad Creek Marina, that in January
11 of 2009 (SIC) at your deposition when I asked you
12 this same question, you did determine that you
13 had been wrongfully overbilling J&W for this lot
14 maintenance by -- I'm looking at \$24 a month;
15 correct? Excuse me. My bad.

16 A. 20 something and change maybe.

17 Q. 20 something and change.

18 A. Your phone's gone blank. So I can't
19 tell you. I can't add two and two without a
20 calculator. Sorry.

21 Q. You're all right.

22 A. Yes, sir. But I'd also like to point
23 out that the lot maintenance fee of \$4,492 a year
24 has greatly increased since 2004.

25 Q. Is there any proviso, to your

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1 knowledge -- and, apparently, you talk about it
2 with a lot of people. Is there any proviso in
3 the settlement agreement that contains an
4 inflation factor for that number?

5 A. I would have to refer to the lease
6 agreement or the settlement agreement; but off
7 the top of my head, it seems like it said
8 something in there that the numbers would be
9 adjusted as, you know, inflation or with the
10 times. But I'd have to refer to the lease.

11 Q. Well, we can tell from your back -- I
12 don't know if I asked you this. What is your
13 financial accounting background?

14 A. I'm a bookkeeper. I graduated high
15 school in 1980, and I've worked in finance since
16 1981.

17 Q. And as a part of your day-to-day
18 activities, you are computing numbers and
19 rendering bills to people that you expect to be
20 accurate?

21 A. Yes, sir.

22 Q. And, again, I want to make sure I
23 understand your testimony.

24 From January 2019 when you first
25 discovered that you were overbilling J&W until we

1 sit here today, you have not made one change in
2 that computation of that amount.

3 A. No, sir. I haven't. Because we're
4 waiting on this --

5 Q. I'm sorry.

6 A. Because we're waiting on this action, I
7 guess, to see what happens from this trial.

8 Q. But you've had plenty of time, if you
9 had wanted to, to have actually prepared correct
10 figures and presented them; correct?

11 A. I could. I would discuss it with
12 Mr. Freedman and Mr. Jones; and we would, you
13 know, figure it out.

14 But Mr. Scurry has not questioned
15 anything, and no direction came from the
16 depositions about that amount. And the amount
17 had -- the amount had been billed each month at
18 the 133 and some cents and had been paid.

19 I would have to go back through the
20 files to see if anything had changed. Maybe
21 there was something added to it. I don't know.
22 They call it lot maintenance, but it includes
23 more than just the parking -- I mean, when I read
24 lot maintenance, I think cleaning, like a yard or
25 parking lot.

1 But there's bathrooms and trash cans and
2 everything else. So I don't know if that number
3 was adjusted up for something, and maybe
4 Mr. Scurry would know.

5 Q. Miss Rachels --

6 A. Uh-huh.

7 Q. -- in January I just -- I'm trying to
8 close this out. In January 2019 --

9 A. I have not gone back and changed the
10 amount billed each month. We have continued to
11 bill the incorrect amount.

12 Q. And you knew it for the last four
13 months.

14 A. Yes.

15 Q. And does -- each and every one of the
16 exhibits that has been marked and entered into
17 evidence in which you've taken a seat in that
18 witness chair today, is inaccurate and is, in
19 fact, an overbill; correct?

20 A. Yes.

21 Q. Miss Rachels, let me ask you about a
22 letter. It's been marked and introduced into
23 evidence as Plaintiff's Exhibit No. 16.

24 Miss Rachels, I hand you what's been
25 marked and admitted into exhibit. It is

1 Plaintiff's Exhibit No. 16. Purportedly it's a
2 letter from me to Mr. Vaux who represented Broad
3 Creek Marina in May of 2014.

4 Have you seen this before?

5 A. Yes, sir.

6 Q. You stated several times under direct
7 examination that nobody has ever questioned or
8 asked you for backup documentation for any of
9 your charges; is that correct? Did you testify
10 to that earlier?

11 A. Yes. I think I said that Mr. Scurry or
12 anyone in his office didn't ask for anything.

13 Q. Did you infer that that --

14 A. And I said --

15 Q. -- meant not me?

16 A. Your letter to Mr. Vaux is requesting
17 something, yes.

18 Q. Was it given to you?

19 A. Yes, it was; and I referred it to our
20 counsel.

21 Q. And you referred it to your legal
22 counsel?

23 A. Yes, sir.

24 Q. Did you at the time that you received
25 this letter -- and we'll assume it was around May

1 or June of 2014. Is that fair?

2 A. Yes, sir. It's May.

3 Q. Were you in charge of the bookkeeping --

4 A. Yes, sir.

5 Q. -- at Broad Creek Marina?

6 A. Yes, sir.

7 Q. Were you the person who could have
8 answered the questions asked in this document
9 concerning backup documentation for the insurance
10 and for the eight man hours per week? Were you
11 the one who could have done that?

12 A. In regard to the insurance, when the
13 original invoices are presented, we've presented
14 a calculation or a -- what our agent gives us
15 listing the premiums and highlighting the general
16 liability, the -- because there's a lot of other
17 policies Mr. Scurry doesn't pay anything on. But
18 highlighting the policy and showing the
19 calculation, 30 percent or whatever it is.

20 We enclose a copy of that with the
21 statement -- with the invoice. When the
22 insurance is invoiced -- and I believe I gave our
23 attorneys copies of all that at that time.

24 As far as the calculation for man hours,
25 Mr. Jones, Nate Jones, the general manager, would

1 be able to go into more detail on that because
2 that work is performed by our personnel, which do
3 other -- other -- they have other duties along
4 with, you know.

5 They clean the entire property. They
6 maintain and clean the entire property. They
7 clock in when they come in. They clock in when
8 they leave. They don't clock in and out when
9 they're doing something specifically for J&W's
10 space.

11 Q. I appreciate that.

12 A. Uh-huh.

13 Q. The question was: Were you the person
14 who could have gotten this documentation together
15 at Broad Creek Marina?

16 A. Yes.

17 Q. Let me now, if you wouldn't mind, go to
18 Defendant's Exhibit No. 27, which is apparently
19 copies of invoices. And I'd like for you, if you
20 wouldn't mind, ma'am, to turn to the page that is
21 marked Broad Creek Marina 340 at the bottom.

22 A. (Complies with request.)

23 Q. Will you let me know when you get there?

24 A. Okay.

25 Q. Are you there, ma'am?

1 A. Uh-huh, yes, sir.

2 Q. Now, I want to use this as an example so
3 I can understand something, if you don't mind,
4 please.

5 A. Okay.

6 Q. We agree, I am sure, that the
7 calculations on the specific amounts of money
8 that J&W was to pay are based upon the annual
9 shared liability sheet on Exhibit 2; correct?

10 A. Yes. But I do know that on one of
11 these, I found an error in the calculation and
12 went back and issued a credit. So let me look
13 and see if this is the specific one. I'm not
14 sure. Again, I'm not sure where you're going
15 with this.

16 Q. It would probably be easiest if you let
17 me ask the questions and try not to anticipate
18 that.

19 A. Okay. Go ahead.

20 Q. But I'm more than willing to work with
21 you.

22 A. No. Go ahead.

23 Q. Okay. Thank you.

24 Do we agree that J&W is financially
25 responsible for paying 7.5 percent of the general

1 liability docks, wharfs, and piers insurance that
2 is purchased by Broad Creek Marina?

3 A. Yes.

4 Q. And that J&W is responsible for paying
5 7.5 percent of the real property insurance on the
6 docks and piers?

7 A. Yes, sir.

8 Q. Now, if you'll look at that page, which
9 is Bates numbered 340 in Defendant's Exhibit
10 No. 27 --

11 A. Okay.

12 Q. -- there are amounts that are computed
13 that are supposedly due from J&W for insurance
14 reimbursement, general liability policy dated
15 April 9, 2013, through 2014. And then there's
16 one for docks and piers.

17 Where do we find the backup
18 documentation that proves that Broad Creek Marina
19 had in effect docks and piers property insurance
20 that computed to \$1745 at 7.5 percent?

21 A. The attachments are not included in this
22 part. It's in Defendant's Exhibit No. 31.

23 Q. Okay. I have that.

24 A. Okay.

25 Q. Will you show me there where that is

1 included?

2 A. Can you -- Tom.

3 Q. Yes.

4 A. Can you flip your phone back on?

5 Q. I'm sorry.

6 A. I'll look on the calculator right there.

7 Q. (Complies with request.)

8 A. Thank you.

9 Q. Miss Rachels, you have a calculator in
10 your hand. Will you tell me what page you're
11 working off of in what I believe is Defendant's
12 Exhibit No. 31?

13 A. I'm looking at invoices from R. A.
14 Belter Insurance.

15 Q. Will you call out the Bates number page
16 at the bottom?

17 A. Right now I'm looking at page 599.

18 Q. Okay.

19 A. Again, I'm going to have to -- I may
20 have to get some more documentation for you, but
21 let me look here.

22 This was when we were with Belter out of
23 California. In some of their policies, they had
24 to provide us with a spreadsheet for the
25 different -- they had to provide us with a

1 spreadsheet breaking down some of the -- anybody
2 got a phone without a lock?

3 And I do apologize, but this is going to
4 take a little while because there's not a simple
5 answer to anything dealing with insurance.

6 Okay. The example is installment
7 payments on the policy. So I'm going to have to
8 add them up to get the total, and then get you a
9 percentage. Okay. So if you can bear with me.

10 Q. Oh, yes. Of course.

11 A. Okay.

12 Q. Just tell me which pages you are getting
13 your figures from as you get them.

14 A. I will.

15 Q. Thank you.

16 A. Okay. For the first line of the
17 invoice, general liability.

18 Q. Yes, ma'am.

19 A. If you go to Defendant's Exhibit No. 31,
20 Tab 2013.

21 Q. I'm sorry? Yes. 2013.

22 A. 2013.

23 Q. Right.

24 A. Okay. The --

25 Q. They're Bates numbered at the bottom.

1 A. Yeah. About five pages in, Number 599.

2 Q. Yes, ma'am.

3 A. It's 8,207. That's a quarterly payment.

4 We made four installment payments that year. So

5 if you multiply that by the four, the 8,207 --

6 Q. I'm sorry. How much do you get?

7 A. 8,207 by four, it's \$32,828 for the

8 year.

9 Q. Okay.

10 A. And 7-and-a-half percent of that is --

11 hang on. 2,462.10.

12 Q. Now, I followed that calculation --

13 A. Okay.

14 Q. -- fine.

15 Can you tell me -- before we talk about

16 that, then, where the docks and piers, that's

17 right underneath that, of 1745.70 comes from?

18 A. Okay. There's an invoice from Belter

19 for installment payments on a commercial property

20 policy; and that commercial policy, that's what I

21 was referring to earlier. Commercial property

22 included everything.

23 Q. What page you looking at?

24 A. Well, page 600.

25 Q. 600. Okay.

1 A. Okay? And that's just one of the
2 installment payments on the commercial property.

3 Q. All right.

4 A. Is 10,158.

5 Q. All right.

6 A. So that would be 40,000 plus a year.
7 That -- that includes everything. The agent's
8 office had to provide me with a spreadsheet
9 breaking down docks and piers versus buildings
10 versus, you know, all the commercial property. I
11 don't see that in here. I apologize for that
12 oversight, but I think I can provide that for
13 you.

14 Q. Miss Rachels, first, your testimony is
15 that the 10,158 is a quarterly payment for
16 general commercial insurance that was in effect
17 at that point in time?

18 A. Correct.

19 Q. But you cannot tell me what you then got
20 out of that to show -- well, first, general
21 commercial liability would not be property -- no.
22 It is. Excuse me. Commercial property. I'm
23 with you. All right.

24 So there was a lot of property, I'm
25 sure, covered under it.

1 A. Yes, sir.

2 Q. And the docks and piers would only be a
3 part of it; correct?

4 A. That's correct.

5 Q. And how then did you discern the portion
6 of property insurance for the docks and piers
7 which you then, I take it, multiplied by 7.5
8 percent?

9 A. Yes, sir. I had to get a breakdown from
10 the agent office. They provided me with a
11 spreadsheet listing the different entities that
12 totaled this. One of the items was docks; and,
13 as I said, it's not in here. I apologize. And I
14 can go back through my records and find that.
15 That would be what we had attached to the
16 original invoice to J&W.

17 Q. Well, let me break that down into two
18 questions.

19 A. Okay.

20 Q. First, so is it correct to say that you
21 actually didn't review the insurance dec sheet
22 yourself to determine the number. You asked an
23 insurance agent to provide you with a
24 spreadsheet; is that right?

25 A. Their billing is in total for

1 everything, which would go over everything with
2 the -- with our insurance people when we renew.
3 They bill for a policy there -- at that time all
4 the property was in one policy. Every year it's
5 something different. I'm not sure how insurance
6 companies work, but it would be quite a study.

7 Every year, seems like, it's different;
8 but I do remember the lady in their office
9 forwarding me the spreadsheet that listed the
10 different properties, like each building and the
11 percentage of policy, the percentage of the total
12 amount of the premium, that that would apply to.

13 One of those items was docks and piers,
14 and that's the portion of the total 40,000 that I
15 would have charged J&W 7-and-a-half percent for
16 just the docks and piers.

17 Q. I believe that's a long answer of yes to
18 my question, but I want to make sure the record
19 is clear.

20 A. Me too.

21 Q. So in order for you to discern the bill
22 that you sent to J&W that, supposedly, was for
23 the docks and piers coverage, you relied on a
24 spreadsheet that was prepared by a broker or an
25 agent that was sent to you but that is not here?

1 A. Yes. And I can get that for you. As I
2 said, I apologize for it not being in Defendant's
3 Exhibit No. 31.

4 Q. Let me ask one more question before we
5 address that.

6 Are you familiar, in your role as a
7 bookkeeper at Broad Creek Marina, with actual
8 insurance policies as they are issued? Have you
9 ever seen them?

10 A. Yes, sir.

11 Q. And do you agree with me that if you
12 take a look at that actual property policy,
13 they'll be spelled out in there, the docks and
14 piers coverage; and it'll assign an amount of
15 money that that policy charged for that.

16 Would you agree with that?

17 A. No.

18 Q. Then how would you ever, in good faith,
19 discern the amount of money that was being
20 charged in a general property insurance policy
21 for the docks and piers?

22 MR. LESEMANN: Your Honor, I will
23 object because the question has been asked and
24 answered twice. This is the third time, at which
25 point the witness can reexplain that she gets

1 information from the agent that writes this down
2 on a spreadsheet; and we'll go through it as many
3 times as necessary. I'd like to object to the
4 report because I'd like for us to finish today.

5 THE COURT: I did hear that
6 question and answer before. I'll see if she can
7 answer one more time. I think I'll let her.

8 Q. Is that correct? Now what Mr. Lesemann
9 has told us is that you haven't seen ever an
10 actual policy that breaks it down, but that your
11 insurance agent provides you with a breakdown as
12 to how much is charged?

13 A. No.

14 Q. No what?

15 A. I can't say I've never seen it, and I
16 can't say I've always seen it. It depends on how
17 the policy is -- how the dec page is prepared.
18 Sometimes they do break it down on the dec page.
19 Sometimes it is not. When it's not, I have to
20 rely on the agent who gets her information from
21 the insurance company.

22 Q. Miss Rachels, I hand you what I've
23 marked for identification as Plaintiff's Exhibit
24 No. 17. It was a subpoena that was delivered to
25 you last week.

1 Do you recall receiving that?

2 A. Yes, sir.

3 Q. Once you received it, did you review it
4 and see what it asks for you to bring?

5 A. Yes, sir.

6 Q. And if you will look at --

7 A. I've already apologized for that being
8 left out of the -- out of this exhibit. Errors
9 happen.

10 Q. I don't know what that means. I mean --

11 A. Well, you're about to say this list has
12 all the stuff you're supposed to bring.

13 Q. Yes, ma'am.

14 A. That spreadsheet, if that's what you're
15 wanting to see, I said it's left out; and I can
16 get it for you.

17 Q. Well, what I'm wanting to see and what
18 you were commanded to bring with you today to
19 back up your testimony was all documentation from
20 which we could discern whether these numbers are
21 accurate or not.

22 A. Okay.

23 Q. And what I'm trying to get to is, is
24 there anything with you today with that
25 subpoena --

1 MR. TAYLOR: First, Your Honor,
2 move the admission of Plaintiff's Exhibit No. 17.

3 THE COURT: No. 17 is the subpoena?

4 MR. LESEMAN: Your Honor, may we
5 move my Motion to Quash, then, also as an
6 exhibit? Because after this litigation's been
7 going on for nine years, we've provided all the
8 documentation that he wanted.

9 We got another single-spaced
10 three-page subpoena from him the week before
11 trial. I filed a Motion to Quash because the
12 discovery, whatever it is and whatever has been,
13 has gone along for a long time.

14 So Miss Rachels is not familiar
15 with all the legal back and forth, but I filed
16 that motion; and so far, it has not been
17 addressed. Maybe we can hear it now if now is
18 the time to hear it.

19 But after all the years of
20 discovery and the thousands of pages of backup
21 and everything else that we've provided, I filed
22 a Motion to Quash. I thought it was untimely. I
23 thought it was burdensome. I thought it was
24 overdone because it asked for, not just the
25 spreadsheet she had used.

1 If we had gotten that request, that
2 would have been easy; but if you look at the
3 subpoena, do you see how much it includes and all
4 the stuff that we've already given over years and
5 years and years? I moved to quash that subpoena
6 'cause I thought it was improper.

7 But if it had been presented as a,
8 Tommy, give me -- can I see the spreadsheet that
9 you used in 2013 to come up with that number?
10 That could have been something different. Again,
11 also, could have been requested in discovery.

12 So I'll just leave it at that, but
13 I want to make that point up because Miss Rachels
14 is probably not aware of all that that happened;
15 but that subpoena is subject to a Motion to
16 Quash.

17 THE COURT: Right.

18 MR. TAYLOR: Your Honor.

19 THE COURT: Yes, sir.

20 MR. TAYLOR: I want to remind you
21 of the testimony that was read into the record
22 yesterday afternoon by Miss Rachels from January
23 when I asked for that, and she said she would get
24 it. It would be hard, but she would get it.
25 That testimony is in the record.

1 THE COURT: Well, let's do this.
2 This witness was deposed, of course, because we
3 heard all that yesterday. The cases, plural,
4 have gone on for years.

5 So I'm going to grant
6 Mr. Lesemann's Motion to Quash. At the same time
7 I'm listening to the cross-examination as to
8 backup and that sort of thing, and I'll consider
9 it all so --

10 MR. TAYLOR: Your Honor,
11 Plaintiff's Exhibit No. 17, then, you are
12 granting the Motion to Quash that, until ten
13 minutes ago, had not been brought and has just
14 been made; and I just want to --

15 MR. LESEMAN: No, sir. No, sir.
16 No, sir. No. I filed that motion and it's --
17 it's of record.

18 MR. TAYLOR: Oh, no. He filed it
19 much earlier. It just had not been brought up in
20 court.

21 I want to make sure the subpoena is
22 a part of the record, Your Honor. If I can, if
23 you would mark it as a Court's exhibit. I just
24 want to make sure that it would be there for you.

25 THE COURT: I think it's well

1 described in the record, but if you want to mark
2 it and put it in the record but as not accepted
3 as an exhibit but simply for purposes of
4 preservation.

5 MR. TAYLOR: May I do that, sir?

6 THE COURT: Yes. That's fine.

7 MR. TAYLOR: Then I'll be glad to
8 move on.

9 THE COURT: All right.

10 BY MR. TAYLOR:

11 Q. Miss Rachels --

12 A. Yes, sir.

13 Q. -- in addition to the spreadsheets, did
14 you bring with you any of the actual policies of
15 insurance that were requested in the subpoena?

16 A. No, sir.

17 Q. So is it correct to say that, as to the
18 page that I just pulled out, Number 340, the bill
19 of \$1,745.70 to J&W, you can't tell me right now
20 or show me any documentation that shows that's
21 actually related to docks and piers coverage, can
22 you?

23 A. No, sir. Not with me.

24 Q. Miss Rachels, if you look at Defendant's
25 Exhibit No. 31.

1 A. (Complies with request.)

2 Q. First, did you assist in the preparation
3 of this exhibit, putting all the documentation
4 together that went into it?

5 A. I provided some -- some -- I provided
6 the information.

7 Q. Can you point to me a single page in the
8 Defendant's Exhibit No. 31 of all the years of
9 documentation you put together that shows this is
10 actually for the charges that are related to the
11 docks and -- let me see the actual word. Docks
12 and moors insurance coverage.

13 Is there a single page in there?

14 A. This is proof of payment is what
15 Defendant's Exhibit No. 31 is. All of this, it's
16 insurance premiums and proof of payment.

17 Q. Yes, ma'am.

18 A. And, unfortunately, I omitted including
19 the copies of the backup that went with the
20 invoice -- with the invoices. When the insurance
21 was originally billed, there would be a backup of
22 some kind. A sheet attached, whether it be --
23 and, as I said, different years, different
24 things. Because every year the insurance would
25 be different.

1 Q. So the answer to my question is: As far
2 as Defendant's Exhibit No. 31 goes, you can't
3 point to a single page within it that actually
4 shows a computation for docks and piers coverage;
5 right?

6 A. No. Because I was -- it's in that --
7 and that is, again, my error for not including
8 those copies. This is for providing the
9 invoicing and the payments to the agent or to the
10 insurance companies.

11 Q. Miss Rachels, this sounded like you were
12 pretty familiar with the lease agreement and the
13 settlement agreement, that you read them before;
14 is that right?

15 A. I have read them before, but I learned a
16 lot more the last couple of days.

17 Q. I'm sure.

18 I will ask you on page 3 of the original
19 lease agreement -- can you open to that?

20 A. Uh-huh. (Complies with request.)

21 Q. Paragraph 5.

22 A. Okay.

23 Q. Are you familiar with the following? If
24 one party pays any such item with respect to a
25 portion of the property for which it or they are

1 not responsible, the other party shall reimburse
2 the paying party on or before the latter of the
3 date upon which such payment is due or ten days
4 after demand for reimbursement, subject to the
5 right of each party to contest the amount of any
6 such tax assessment, fee, or charge.

7 A. Okay.

8 Q. Do you understand that that's in there
9 and that either party had the right to contest
10 the amount of any such assessment, fee, or
11 charge; right? And to question it?

12 A. Yes.

13 Q. And to question how it was computed;
14 correct?

15 A. Yes.

16 Q. And, Miss Rachels, again, back in
17 January -- and your deposition testimony was read
18 yesterday -- you were asked to get the backup
19 documentation with the policies from which we
20 could review it, and you'll recall saying you
21 would do that. It would be hard, but you would
22 do that; right?

23 A. Okay. Yes.

24 MR. TAYLOR: Judge, nothing
25 further.

1 THE COURT: Thank you so much.

2 Any other questions, Mr. Lesemann?

3 MR. LESEMAN: Yes.

4 REDIRECT EXAMINATION

5 BY MR. LESEMAN:

6 Q. Robbin, the \$134,000 that's owed by the
7 tenant for these charges that we've discussed
8 with the interest --

9 A. Uh-huh.

10 Q. -- how much of that money is going to go
11 to you personally?

12 A. None.

13 Q. Have you ever been accused of -- I don't
14 know what the word was -- illegally or
15 fraudulently overbilling someone?

16 A. No.

17 Q. Do you know approximately how much that
18 the --

19 MR. LESEMAN: Taylor, if you could
20 show the -- that formula, Exhibit F.

21 MR. POWELL: (Complies with
22 request.)

23 Q. Have you ever sought to overbill or to
24 fraudulently take money from Mr. Scurry or his
25 business?

1 A. No, sir.

2 Q. Until five minutes ago, have you ever
3 been accused of that?

4 A. No, sir.

5 Q. Were you aware that Mr. Scurry has
6 stated that he thought that the lot maintenance
7 charge was fair?

8 A. Yes, sir.

9 Q. Okay.

10 A. I heard him say that yesterday.

11 Q. When Mr. Scurry says that lot
12 maintenance charge is fair, does that leave you
13 puzzled as to why his attorney would say you were
14 fraudulently overbilling him?

15 A. Yes, sir.

16 Q. Me too.

17 So do you know approximately how much
18 that the -- that workers that performed the lot
19 maintenance, the guys that works for Nate, do you
20 know about how much they make per hour?

21 A. Yes, sir.

22 Q. If I told you between 13 and \$15 an
23 hour, would you have any reason to quarrel with
24 that?

25 A. No, sir. That's about dead on.

1 Q. Do you have a calculator up there still?

2 A. I do.

3 Q. Okay.

4 A. Thank you, Ronda.

5 THE COURT: Got a real shortage of
6 calculators.

7 THE WITNESS: See, I'm telling you
8 in five years, we're not going to be able to
9 speak. We're going to need these stupid things
10 for --

11 Q. Here it is.

12 MR. LESEMAN: Taylor, could you --

13 Q. Can you see that, Robbin, from across
14 the way?

15 A. Yes, sir, uh-huh.

16 Q. Do you see where it says "property
17 taxes" at the bottom?

18 A. Yes, sir.

19 Q. Beaufort County Treasurer \$16,149?

20 A. Uh-huh.

21 Q. Does that amount change from year to
22 year?

23 A. Yes, sir.

24 Q. Are you allowed to tell Beaufort County
25 that, "No, my amount's \$16,148. I'm not paying

1 you anymore"?

2 A. I'm sure we all wish we could do that,
3 but no, sir.

4 Q. And so does this amount change?

5 A. Oh, yes, sir.

6 Q. Do these insurance amounts change?

7 A. Yes, sir, the insurance amounts change.

8 Q. Do these insurance amounts change?

9 A. Oh, yes, sir.

10 Q. What has remained the same?

11 A. The percentage.

12 Q. Has the cost of labor increased over
13 time, to your knowledge, in terms of your
14 experience at the marina?

15 A. Yes, sir.

16 Q. And so if a -- let's just use the \$13 an
17 hour figure.

18 A. Uh-huh.

19 Q. If the folks that are performing the lot
20 maintenance perform eight man hours per week at
21 \$13 per hour, what is that amount?

22 A. \$13 an hour for eight hours?

23 Q. Yes, ma'am.

24 A. That would be \$104.

25 Q. You were there in the 30(b)(6)

1 testimony, were you not, when Mr. Jones testified
2 that, actually, it takes more --

3 A. Yes.

4 Q. -- typically more hours than that are
5 utilized for that effort; is that right?

6 A. Yes, sir.

7 MR. TAYLOR: Your Honor, I object,
8 both, as to relevance and to improper redirect.
9 Redirect was not brought up in this; and it's got
10 absolutely no relevance under all the testimony.
11 The numbers are what the numbers are.

12 MR. LESEMANN: Your Honor, he
13 alleged my client of wrongfully overbilling his
14 client. I am showing for, hopefully showing with
15 some convincing nature, that these amounts that
16 are shown on this, this annual cost, these
17 amounts change.

18 And what this exhibit is to do is
19 to discuss a formula; and what a formula is, is
20 when you multiply a variable times some other
21 constant and then you come up with some sort of
22 product.

23 And all these numbers are variables
24 and that these numbers are the constants. And
25 the number of 133.12 not only was confirmed by

1 Mr. Scurry as being fair; but is actually less
2 than the actual cost, and all these amounts vary.
3 And I feel it's fair redirect, basically, to
4 speak to my witness after what Mr. Taylor asked
5 her.

6 THE COURT: Well, let me get you to
7 limit it to -- my understanding of the witness'
8 testimony is she thought she had it figured
9 correctly, save and except for the \$20 and
10 whatever cent change.

11 MR. LESEMAN: \$14.

12 THE COURT: \$14. I'm sorry.

13 MR. LESEMAN: I'm speaking right
14 to that, Your Honor.

15 THE COURT: It sounded like you
16 were, sort of, going through all of it.

17 MR. LESEMAN: I'm sorry, Your
18 Honor. What I was doing is, I was talking
19 about -- since all these matters vary, that these
20 can too, and that by the course of dealing and by
21 the mutual interpretation of the document, these
22 amounts were never fixed. That 70 years from
23 now, that Mr. Scurry would only have to pay
24 10 percent of \$16,000 for the property tax at
25 such time as the property tax might be \$50,000

1 per year or whatever it might grow into.

2 The point I was making is that
3 these numbers change, and I'll be quick with it.

4 THE COURT: Now, back to the still-
5 on-the-table, objection. I think that is outside
6 the scope of cross.

7 MR. LESEMAN: Well, Your Honor,
8 thank you. I'm speaking -- I'm going to limit it
9 to this lot maintenance issue.

10 THE COURT: The \$20.

11 MR. LESEMAN: It's in this
12 exhibit.

13 THE COURT: Try to stay within the
14 part that was the issue.

15 MR. LESEMAN: Thank you, Your
16 Honor.

17 BY MR. LESEMAN:

18 Q. So, again, Miss Rachels, you were able
19 to multiple \$8 by 13?

20 A. Yes, sir.

21 Q. 8 hours by \$13?

22 A. Yes, sir.

23 Q. And you can multiply that by 52.

24 A. As soon as I got Ronda's calculator
25 back. Oh, goodness.

1 Q. So 8 times 13 times 52. What's that
2 number?

3 A. 5,408.

4 Q. And so 5,408, which would be higher than
5 the annual cost reflected in this document?

6 A. Yes, sir.

7 Q. Did you confirm that these various
8 annual costs in this exhibit do change?

9 A. Yes.

10 Q. When you multiply the number you just
11 created by 32 percent, what do you get?

12 A. 1730.56.

13 Q. And so if you divide that by 12, what do
14 you get?

15 A. \$144.21.

16 Q. And what was the amount that's been
17 billed to J&W Corporation on a monthly basis?

18 A. 133 -- \$133.12.

19 Q. So is \$133.12 lower than the actual
20 monthly allocation would be based on the
21 current -- a current wage rate of \$13 times the
22 eight hours?

23 A. Yes, sir. It's \$11.10 plus.

24 Q. And, again, the 133.12 figure, that's
25 one that was in place before you were at the

1 marina?

2 A. Yes, sir. And J&W had been paying the
3 majority of it.

4 Q. Now, in light of the your testimony and
5 what we've reviewed in terms of the \$144 versus
6 \$133 and the fact that these things can change,
7 do you believe that you've been wrongfully
8 overbilling Mr. Scurry for something that is
9 greater than what the landlord has actually
10 incurred?

11 A. No, sir.

12 Q. With regard to the insurance billing,
13 have you ever sought to push more of the
14 insurance bill over to Mr. Scurry's entity than
15 would be your fair share?

16 A. No, sir. As a matter of fact, during
17 one of these many times of pulling records and
18 assembling information, I have found where one
19 year we -- I had overcharged them. I had
20 charged -- I had used the wrong policy to
21 calculate their portion.

22 And I don't remember right now which one
23 it is. It's detailed on the credit memo that I
24 think's copied in here, but I went back and
25 issued a credit memo to their account crediting

1 them for where I had overcharged them.

2 Q. No one asked you to do that, did they?

3 A. No. No one even knew it.

4 Q. Have you performed your billing function
5 in good faith and to the best of your ability?

6 A. Yes, sir.

7 Q. And so do you believe that the numbers
8 that have been presented in terms of the amounts
9 owed and the prejudgment interest --

10 A. Yes, sir.

11 Q. -- are the amounts that you believe are
12 owed after performing your work in good faith?

13 A. Yes, sir.

14 MR. LESEMANN: Nothing further,
15 Your Honor.

16 THE WITNESS: Thank you.

17 THE COURT: Anything else for this
18 witness?

19 RE CROSS-EXAMINATION

20 BY MR. TAYLOR:

21 Q. Miss Rachels --

22 A. Yes.

23 Q. -- you just picked up the \$133 billing
24 per month from the person who had been doing it
25 before --

1 A. Yes, sir.

2 Q. -- correct?

3 A. Uh-huh.

4 Q. And you continued it through till today.

5 A. Yes, sir.

6 MR. TAYLOR: Thank you. That's it,
7 Judge.

8 THE COURT: All right.

9 MR. LESEMAN: Nothing further,
10 Your Honor, for this witness.

11 THE COURT: Okay. Ma'am, you can
12 step down.

13 (The witness was excused.)

14 MR. POWELL: Call Nate Jones, Your
15 Honor.

16 THE COURT: Come on around here.

17 NATHAN W. JONES,
18 having been first duly sworn, was examined and
19 testified as follows:

20 THE COURT: Can you state your
21 whole name for the record, please?

22 THE WITNESS: Nathan Walker Jones.

23 THE COURT: Sir, please answer any
24 questions that Mr. Lesemann may have of you.

25

1 DIRECT EXAMINATION

2 BY MR. POWELL:

3 Q. Mr. Jones, what's your role at Broad
4 Creek Marina? And can you give the Court a
5 general description of your day-to-day
6 responsibilities?

7 A. Sure. I'm the general manager, head of
8 operations at Broad Creek Marina, as well as Zip
9 Line Hilton Head, and Up-The-Creed Pub; but I've
10 been there 11 years now working for that -- for
11 Broad Creek Marina.

12 And day-to-day operations, management of
13 employees, administration of billing, director of
14 operations, maintenance, pretty much the whole
15 gamut of things that go on there.

16 Q. And among those entities is, is it equal
17 breakdown in terms of what you need to see to or
18 attend to; or does one of them demand more of
19 your attention than others?

20 A. Broad Creek Marina commands -- the
21 marina commands the majority of the attention on
22 a day to day.

23 Q. And when did you first come to work for
24 Broad Creek Marina or any of its related entities
25 that were similarly named or differently, you

1 know, that we've covered earlier, the other
2 defendants in this action?

3 A. I believe two years ago, I graduated
4 from taking care of just the marina to the
5 other -- to the other entities.

6 Q. When did you initially come to work for
7 just the marina, just your first employment under
8 any of Mr. Freedman's entities?

9 A. I believe that was May of '08.

10 Q. And where did you work before that?

11 A. I was working as a captain of a yacht in
12 South Florida.

13 Q. There was some back and forth earlier,
14 some testimony as to what -- this is a photograph
15 of Defendant's Exhibit No. 08, the aerial
16 photograph.

17 In discussion with Mr. Freedman and the
18 OCRM witness as to the permitting or not
19 permitting, as I kind of point to each of these
20 that were previously numbered, can you tell me
21 what they are and how they came to be there and
22 the life span of them? So that Number 1 here
23 that's circled.

24 A. That's the Craig Cat (phonetic) dock, I
25 believe where they -- they do small boat rental

1 for -- for tour activity purposes; and to my
2 knowledge, I didn't know that that needed to be
3 permitted with OCRM.

4 Q. And then what about right next to it?
5 Here is Number 2, is that the -- that is -- that
6 is occupied by --

7 A. Very similar. Same charter operator
8 occupies both of those slips.

9 Q. Do you know approximately when they came
10 to be in the state that they're in now that was
11 discussed with the OCRM witness?

12 A. Between one and two years for those
13 locations there.

14 Q. And what about Numbers 3 and 4 over here
15 right as you come down the ramp? (Indicating.)

16 A. If you could zoom in so I could
17 accurately --

18 Q. Sure. (Complies with request.)

19 A. So those are the kayaking docks used
20 just primarily for storage of kayaks but Kayaking
21 Hilton Head, they are pieces of floating dock
22 that are tied to cleats there at our dock. And
23 they -- that tenant was a former tenant of the
24 Fish Camp next door, who was displaced in the
25 hurricanes and needed a place to go. We gave him

1 a place to go and put his stuff there.

2 Q. Got you.

3 And then Number 5 is here right in the
4 middle almost. Can you tell us about what that
5 is? (Indicating.)

6 A. I believe Number 5 has always been there
7 and as an electrical -- it's basically the
8 breaker box for the entire docks. So I think
9 that may have been mischaracterized as being
10 non-permitted; but, I mean, it holds an
11 electrical box and trash cans.

12 Q. So is Number 5, is there a -- is that a
13 floating dock like the other ones that's tied up
14 or --

15 A. It's a piece of floating dock attached
16 to the rest, but it is fixed to the dock; and
17 it's where the main breaker goes in the trans --
18 the transformer, I believe, is what you would
19 refer to it as.

20 Q. Got you. And so was that there when you
21 arrived at Broad Creek Marina?

22 A. That's been there -- I've -- I've shored
23 it up a couple times, made sure that it was
24 stayed fixed to the dock; but it has been there
25 since -- since I was there.

1 Q. Got you.

2 And then what about 6 and 7 right up
3 here, the last two, which are -- (Indicating.)

4 A. Uh-huh.

5 Q. So this one is six here. (Indicating.)

6 A. Six is where we have the ice machine.

7 When I arrived at the marina, the ice machine was
8 on one of those pieces of dock which -- excuse
9 me. A normal walkable section of the dock.

10 It was stressing the dock and, you know,
11 creating a hazard to the walkway. So we put it
12 on a small piece of floating dock that nobody
13 actually steps on. It just assists the ice
14 machine in floating correctly and not stressing
15 the rest of the dock sections because of the
16 weight of it.

17 And the -- the other building is a
18 floating dock that I built in a test to see if I
19 could build a floating dock in-house.

20 Q. Is there anything -- is that used for
21 anything, or is it just storage or --

22 A. That is -- that is the office for the
23 Sky Pirate Parasail.

24 Q. Other than the one you said, the Sky
25 Pirate, would you have even described any of

1 those at -- how would you have described those
2 items?

3 A. They're small pieces of floating dock
4 attached to our big floating dock that are, you
5 know.

6 Q. Was there any effort by you or Broad
7 Creek Marina to slip in unpermitted items or
8 structures or is -- or can you describe how
9 those -- what y'all's position was on the
10 permitting nature of those?

11 A. You know, I -- the majority of those, I
12 just did out of necessity or -- or out of the
13 fact that I didn't know I didn't need a permit to
14 do that.

15 Q. And over the years while these would
16 have been called structures here, representatives
17 from OCRM or DHEC been on the property multiple
18 times?

19 A. Multiple times.

20 Q. Anybody ever said anything to you or any
21 Broad Creek Marina --

22 A. Not in regards any of those docks.

23 Q. Do any of these items or structures or
24 the failure to have any permit by OCRM have any
25 effect on J&W's ability to operate or conduct its

1 businesses?

2 A. Not to my knowledge or not that was
3 communicated to me.

4 Q. Would you --

5 A. I --

6 Q. I'm sorry.

7 A. I'll elaborate on that. I did ask about
8 the kayak docks in there. I asked
9 representatives of J&W Corporation if it was okay
10 and not in the way of their operations if those
11 kayak docks were located there.

12 Q. And what was the response you got?

13 A. No. That was the appropriate place.

14 Q. When you first started at Broad Creek
15 Marina, were you hired as the general manager of
16 just the marina at that time?

17 A. Just the marina at that time, yes.

18 Q. And when you started in that role, were
19 you at that point given a copy of the 1993 lease
20 or the 2004 settlement agreement?

21 A. I don't know if that was part of the
22 welcome packet at the marina but very -- I would
23 say at some point in that year after that, I
24 would have come into knowledge of that document.

25 Q. And so you started in May of 2008. Do

1 you recall approximately how long after you
2 started that J&W's operations were relocated to
3 where they currently sit in what's been referred
4 to as the boat shed by plaintiff and plaintiff's
5 counsel?

6 A. Yeah. I believe that was the fall of
7 '09 when we had the issues with the -- the
8 floating houseboat office that they were -- we
9 relocated him up to the current office space.

10 Q. And the floating houseboat that they
11 were in, were they sharing that with anyone else;
12 or was it just them in that?

13 A. No. It was just them, to my knowledge.

14 Q. Do you have any recollection on what
15 caused that floating houseboat to fail or take on
16 water?

17 A. I think it was said in the deposition it
18 was a compromise in the hull of the vessel.

19 Q. And that's the extent of your knowledge
20 as to what led to or caused the compromise.

21 A. Yeah. We did multiple attempts to try
22 to figure out with some assistance with the --
23 whoever was working for J&W to find out what the
24 problem was to remedy it, but I can't remember
25 the specifics of it.

1 Q. And were you the person or employee of
2 Broad Creek who would have been the point person
3 in dealing with either Mr. Scurry or other J&W
4 employees in the relocation from that compromised
5 floating houseboat to what was temporary or what
6 was at the time described as the temporary
7 relocation of the boat shed?

8 A. That is correct.

9 Q. Was it Mr. Scurry or did you have
10 interaction with any other J&W employees in
11 facilitating that relocation?

12 A. As it being some time ago, I believe it
13 was Mr. Scurry; and I believe it was probably
14 some interaction with his other employees of
15 office nature at that time. I'm not specific.

16 Q. And at the time, would it be your
17 contention that it was everybody's understanding
18 that that was to be temporary? Or was -- let me
19 rephrase that.

20 Was there any discussion at the time as
21 to how long Mr. Scurry and J&W would be there?

22 A. I believe it was -- it was regarded as a
23 temporary solution at the time. I -- I don't
24 recollect exactly what was said at that time.

25 Q. Under the guise of it being a temporary

1 solution, was there any objection at the time by
2 Mr. Scurry or any other employees at J&W?

3 A. I -- as I -- I believe I said in the
4 deposition, I don't remember it being a massive
5 problem. So I don't specifically remember, you
6 know, a huge issue that was raised to it.

7 Q. Can you talk, just generally, as to what
8 led from that being a temporary solution to now
9 here we are almost ten years later; and they're
10 still there? What has prevented it from being
11 anything more than temporary?

12 A. I think it's agreement among the parties
13 to -- to determine a location and suitable nature
14 of an office.

15 Q. And have you made attempts to work with
16 J&W employees or Mr. Scurry in an attempt to
17 relocate them?

18 A. I believe we have talked in concepts
19 before of -- of locations, but I don't know that
20 I can elaborate much past that.

21 Q. And you say the discussions about
22 locations, what would your explanation be for why
23 that never progressed past conceptual or
24 locations?

25 A. I think at some point or another, we've

1 been in litigation or arguments between the two
2 parties that have prevented a -- an actual
3 solution -- a possible solution occurring.

4 Q. Have any J&W employees ever come to you
5 as the general manager of Broad Creek and
6 complained that that office made it so that they
7 could not operate or was preventing them from
8 operating at a higher capacity for the ferry
9 operations?

10 A. I don't believe I've ever had any
11 complaints from any of the employees of the J&W
12 Corporation. The only person I've probably ever
13 heard of that really had a problem with it was
14 Tom Taylor's letters.

15 Q. Have any of the J&W employees ever
16 complained directly to you as to just the general
17 conditions?

18 A. As much as all employees complain about
19 general conditions of their work places.

20 Q. After your meeting last week with the
21 Town of Hilton Head zoning officials where you --
22 where the Town said that Will Scott or William
23 Scotsman was an approved vendor of office
24 buildings, did you then undertake actions on
25 behalf of Broad Creek to investigate what could

1 be a temporary solution to get Mr. Scurry and J&W
2 out of the boat shed within the 60-day time frame
3 given by the Town?

4 A. I did. As everything, I try to do as
5 quickly as I can to try to figure out a solution.
6 I got a hold of a -- a -- the sales contact at
7 William Scotsman and got a quote on a temporary
8 structure.

9 Q. And can you describe the -- what you saw
10 and what was provided from the William Scott or
11 the Will Scott sales representative?

12 A. Yeah. I think it was a 32 x 8 box or
13 32 x 8. When I emailed him, I told him I needed
14 a 300-square foot temporary solution for an
15 office; and this was the quote he provided. It
16 was a 32 x 8 box with two accesses, I believe.

17 Q. And how soon would -- if Mr. Scurry and
18 J&W is agreeable to this as a temporary solution
19 to get them out of the boat shed, how soon would
20 Broad Creek be able to facilitate that?

21 A. We could start as early as next week, if
22 that became a feasible solution and it was
23 communicated to me that that was the solution we
24 wanted to undertake.

25 Q. And is there a space in and around the

1 area of the current boat shed where something of
2 this size and nature could be placed on a
3 temporary basis while the floating office
4 potential solution is worked out either between
5 the parties or by the Court?

6 A. I believe so, yes, sir.

7 Q. And is Broad Creek prepared to undertake
8 that on an expedited basis?

9 A. With direction from the owner, yes, sir.

10 Q. Can you give us as detailed as possible
11 or more general a description of the various
12 instances you personally have observed of J&W
13 employees causing damage -- physical damage or
14 property damage to Broad Creek Marina's property
15 or operations?

16 A. I mean, we have a long list. I think
17 I've went over this in my deposition a little
18 bit.

19 But even as recent as Monday, I believe,
20 all of the -- the rubber stripping on one side of
21 Mr. Scurry's horseshoe was ripped off by one of
22 his boats. It's -- last I heard yesterday it was
23 left hanging in the water, about 50 feet of
24 rubber.

25 You know, a lot of the use of the ferry

1 boats in that horseshoe area cause damage just
2 due to the nature of large boats moving and --
3 and when wave and operations and in high-traffic
4 areas. We try our best to fix those issues as
5 they come up to maintain a high-class marina and
6 a safe marina for all its patrons. I don't know
7 that the J&W company follows those same ideas.

8 You know, I think there's the issue that
9 where the, you know, that was rectified where the
10 ferry boat ran through the dock the one time.
11 There was the Matthew incident, you know.
12 There's been multiple cleats. I've replaced
13 cleats down on that horseshoe more times than I
14 can think of.

15 Multiple boards, power pedestals, things
16 of nature, you know. The damage, you know, the
17 contact between the broken pilings, guide pilings
18 next to the pier, you know, from the ferry
19 operation, the ferry -- or from the barging
20 operation.

21 The barging operation has hit customer's
22 boats on our floating dock before as well as the
23 concrete's been damaged by excavators, you know.
24 And I -- and I would say that I don't know that
25 we have generated bills for many of those issues

1 to the J&W Corporation.

2 Q. As to the barge hitting customers' boats
3 on the floating dock, are you aware of any
4 outstanding issues there; or the customers
5 resolve that directly with J&W?

6 A. J&W and the customers resolved that
7 issue.

8 Q. Mr. Jones, did you take this photograph?
9 (Indicating.)

10 A. Yes, I believe I did.

11 Q. And does this appear to be a true and
12 accurate representation or copy of the photograph
13 you took?

14 A. Yes.

15 Q. And can you describe what you see in it?

16 A. So this is Barge Creek looking from,
17 basically, almost the end of our concrete pier
18 looking back up at the land; and those would be
19 snapped piling -- we got pilings that are
20 supposed to be protector pilings -- from the
21 barging operation in Barge Creek. And that's a
22 pretty common sight in Barge Creek.

23 Q. And did you take this photograph as
24 well? (Indicating.)

25 A. Yes, sir.

1 Q. And does it also appear to be a true and
2 accurate representation of the photograph that
3 you took on the screen?

4 A. It does appear.

5 Q. And do you know if it -- were these two
6 photographs taken at the same time on the same
7 day, or are they --

8 A. I believe it may have been a couple
9 hours later with the tide. I can't remember.

10 Q. So is this the same broken piling that
11 was shown in that first photograph, or do you
12 know?

13 A. With the perspective, I can't say for
14 sure that it's the same broken piling or another
15 broken piling.

16 MR. POWELL: Your Honor, at this
17 time, we would move to admit Defendant's Exhibit
18 No. 40, which is two photographs of the broken
19 pilings along the inlet here in Barge Creek.

20 MR. TAYLOR: No objection, Judge.

21 THE COURT: No objection. That
22 will be No. 40.

23 (Defendant's Exhibit No. 40 is admitted
24 into evidence.)

25 Q. Now, you say you can't remember if it

1 was the same or multiple. How many instances of
2 broken pilings caused by J&W along that pier have
3 you witnessed or have you been made aware of?

4 A. I mean, I would say that it's been more
5 than ten. I will say that in the same aspect of
6 that, that J&W does pay for those pilings, I
7 believe, almost every time.

8 Q. Do they timely pay for that, or is that
9 an issue that --

10 A. That's -- they have them replaced as
11 they deem necessary. Joe, the old manager of
12 J&W, and I had a pretty good relationship where I
13 would say, "Hey, Joe, looks like there's a big
14 gap in the pilings now. What do you think?"

15 Q. And are those pilings the only thing
16 protecting the structural integrity of the cement
17 pier? Let me phrase that better.

18 Do those pilings serve as a buffer to
19 protect that pier, or do they serve any other
20 purpose?

21 A. No. That is the idea, to buffer the
22 barge operation from contact with our wood pier.
23 Or our concrete pier. Excuse me.

24 Q. If Broad Creek's cement pier were ever
25 to be damaged as a result of a crash, do you have

1 any idea as to what that would cost to fix just
2 in terms of --

3 MR. TAYLOR: Objection, Your Honor.
4 There's been no foundation for him to be able to
5 render that opinion.

6 Q. As a general manager of Broad Creek
7 Marina and one who oversees the replacement or
8 repair of damage caused at the marina, do you
9 have any idea of what it would cost to -- what
10 costs would be incurred if the barge were to hit
11 that cement pier?

12 A. Almost any work to that pier would be
13 not less than a million dollars, for sure.

14 Q. I'll hand you a copy of the lease here,
15 which is Defendant's Exhibit No. 01; and if you
16 can read it from there, I've also put it up on
17 the screen. This has previously been admitted as
18 Defendant's Exhibit No. 01. This is Section 24
19 of the 1993 lease.

20 Once you get to it or if you can read it
21 from there, can you tell the Court that that's a
22 section that you've read and are familiar with?

23 A. (Complies with request.) Okay. I've
24 read it now, yes, sir.

25 Q. And specifically the sentence that says,

1 "Landlord reserves the right at any time to make
2 further reasonable rules and regulations to be
3 applied uniformly to all users, including
4 landlord, as in landlord's judgment may be
5 necessary for the safety, care, appearance, and
6 cleanliness of the property, preservation, and
7 good order therein."

8 Do you believe that -- as the general
9 manager of Broad Creek Marina, do you believe
10 that paragraph gives you authority to make rules
11 and regulations that you can enforce against J&W
12 as the tenant to preserve the safety of -- or the
13 integrity of the marina and safety of your users
14 and customers?

15 A. As I read that, yes, sir.

16 Q. Okay.

17 A. It would be --

18 Q. And do you have a standing order; or
19 does Broad Creek Marina have a standing order
20 that if there is a named storm, that all boats
21 are to be removed? Or is that applied on a
22 case-by-case basis depending on proximity of the
23 named storm and the severity of it?

24 A. It says in our contracts that customers
25 sign that they must remove the boat from our

1 facility in a named storm if they are, typically,
2 stored in a wet slip. We do not have the ability
3 to enforce or make them leave. It says that they
4 must leave, but I don't have the ability to make
5 them leave.

6 Q. And has that been your practice in the
7 past? To give that same instruction to J&W and
8 its employees regarding their boats when a named
9 storm is approaching?

10 A. That's correct.

11 Q. And when Hurricane Matthew was
12 approaching, did you give that instruction to
13 remove all boats to J&W from the marina?

14 A. I asked if Joe was going to remove the
15 boats, and the answer was no.

16 Q. Do you have an opinion as to whether or
17 not the failure to remove the boats and leave
18 them tied up to the dock, as a general manager of
19 Broad Creek Marina and somebody who oversees the
20 marina and has overseen it through storms,
21 whether or not that is what caused the damage
22 specifically to the portion of the leased dock
23 area of J&W?

24 MR. TAYLOR: Objection, Your Honor.
25 There's been absolutely no testimony that would

1 indicate he has any expertise in that. He was
2 not named as an expert witness to give expert
3 witness testimony as to that.

4 Q. In the past when named storms have come
5 through, have you observed boats that have been
6 tied up to the marina cause damage to their --
7 that specific portion of the dock as opposed to
8 the entire dock was damaged?

9 A. Say that one more time, please.

10 Q. So in the past when you've been acting
11 as the general manager at Broad Creek Marina and
12 a named storm has come through, have you
13 witnessed more damage or significantly more
14 damage to a portion of the marina where a boat
15 was tied up as opposed to areas of the marina
16 where there were no boats?

17 A. That's correct.

18 Q. And you were in the courtroom earlier,
19 and did you hear Miss Rachels testify as to her
20 conversations between you and her as to why Broad
21 Creek Marina was paying for the dock damage that
22 occurred during Matthew rather than passing that
23 expense along to J&W?

24 A. I did hear that.

25 Q. Was that a correct recitation of the

1 conversation you had had in the past?

2 A. I believe I had that conversation with
3 Miss Rachels, yes.

4 Q. After Matthew occurred and this damage
5 happened to the portion of the property -- or the
6 dock that J&W leases, did you have any
7 conversations with J&W employees where they
8 either conceded responsibility or agreed that
9 they were financially responsible for that?

10 A. To my recollection, there was
11 conversations where they would take
12 responsibility financially.

13 MR. TAYLOR: Objection, Your Honor.
14 It's hearsay.

15 Q. Who did you have these conversations
16 with at the time?

17 A. I remember having conversations with
18 Joe, and then I believe Tom Taylor and I had a
19 conversation whereas he assured me that they were
20 going to take care of this issue.

21 MR. TAYLOR: Your Honor, objection
22 as to the hearsay.

23 MR. POWELL: We'll move on.

24 THE COURT: All right.

25 A. Also believe I have an email.

1 THE COURT: Hold on. Hold on.

2 MR. POWELL: Your Honor, we'd say
3 they're both party admissions and, therefore,
4 admissible.

5 THE COURT: They are, kind of,
6 statements against interest and party admissions.
7 Not you. I think probably improper to deal with
8 your -- that you're counsel at all times
9 associated with this so --

10 MR. TAYLOR: Your Honor, I think
11 there has to be some evidence put in that the
12 person who is spoken to who is being represented
13 by the person trying to get in hearsay had
14 authority to make the statement at the time or
15 was in a position to have made the statement at
16 the time. I don't think that's been laid a
17 foundation for. Again, just continuing
18 objection.

19 Q. What was Joe's title and role at the
20 time when you would have had these conversations
21 with him?

22 A. I believe he was the manager of J&W --
23 Wick's manager for J&W of Greenwood, to my
24 knowledge.

25 Q. And that would have been who you would

1 have dealt with primarily involving issues with
2 J&W?

3 A. That's correct. He would have been my
4 on-site contact.

5 Q. Have you witnessed either some
6 discussion earlier, but have you personally
7 witnessed J&W failing to clean up after
8 themselves or their customers or leaving trash or
9 garbage around areas of the property that were
10 not their lease property?

11 A. Daily.

12 Q. And is there a dumpster on property that
13 J&W has access to?

14 A. Yes.

15 Q. How far is that, generally, from J&W's
16 office space?

17 A. I would say 5- to 600 feet.

18 Q. Well, let me back up.

19 Can you describe where you've witnessed
20 such, you know --

21 A. My -- my guys take the trash out every
22 day from the office -- from the trash cans
23 immediately in front of their office, from the
24 trash cans at the head of the dock, from the
25 trash cans at the end of the dock.

1 Their contractors, while working on
2 their boat, leave jugs of oil on the dock. They
3 leave jugs of oil on land. They leave trash,
4 construction debris from working on their --
5 their boats. The pickets that -- they damage --
6 their golf carts run into the pickets on the
7 wooden fence, which we replace on a weekly basis.

8 Q. The pickets are the vertical parts?

9 A. Vertical, yeah.

10 Q. Those are damaged by the -- by J&W's
11 golf carts?

12 A. Carts. You know, we have a tractor. We
13 take the trash out. I think they're used to us,
14 just, cleaning up after them at this point. So
15 I'm not going to let it get dirty so --

16 Q. Right.

17 A. -- they're not going to clean it up, I'm
18 going to have to.

19 Q. Mr. Jones, did you take this photograph?
20 (Indicating.)

21 A. Yes, I did. From my office.

22 Q. You took this from your office?

23 A. Oh, from my -- yes.

24 Q. And what's on the screen appears to be a
25 true and accurate representation of the

1 photograph you took?

2 A. Yes.

3 Q. And can you describe generally what you
4 photographed, what you see here?

5 A. I believe there's a bunch of jugs of
6 waste oil right there in front of our restaurant
7 office as well as old CO2 cartridges that were
8 probably offloaded off the barging operation
9 there, and that was -- those were left there for
10 weeks at a time and different -- different things
11 have been left there for weeks at a time, very
12 similar to that.

13 Q. And as to this one, it appears to be
14 just a zoomed-in version. Did you take this
15 photograph as well? (Indicating.)

16 A. Yes.

17 Q. And was -- would that have been taken
18 the same day and just a more zoomed-in version of
19 the other photograph?

20 A. Right. And I think you can tell by the
21 rusty, leaky substance on the concrete that it
22 had been there a bit, a little while.

23 MR. POWELL: Your Honor, at this
24 time, we would ask to admit Exhibit No. 39, which
25 is two photographs that Mr. Jones took of the

1 contents left along the pier.

2 MR. TAYLOR: No objection.

3 THE COURT: No objection.

4 (Defendant's Exhibit No. 39 is admitted
5 into evidence.)

6 Q. Mr. Jones, as the general manager of
7 Broad Creek Marina, specifically as to the oil,
8 can you describe some of the concerns you guys
9 have there in relation to its proximity to the
10 water?

11 A. I think that's within the critical line.
12 So, you know, storage of oil within the critical
13 line, not a good idea. And waste oil, you know,
14 just things of that nature. That's also, you
15 know, when the -- like Mr. Scurry was saying when
16 the spring high tide, you know, when they get a
17 big high tide, that stuff could be washed away.

18 Q. So a high tide in that area
19 could potentially --

20 A. At a very high tide, that would be wet,
21 yes.

22 Q. Do you have personal knowledge that you
23 can provide us of any of J&W's competitors in the
24 ferry business in the Hilton Head specific area?

25 A. Yeah. I mean, I have a pretty good idea

1 of their competition.

2 Q. How many other companies are there that
3 run ferries in the Hilton Head area?

4 A. There's large ones, and then there's
5 small ones. So you want me to list them?

6 Q. Let's, I guess, maybe stick specifically
7 to the large ones that would be of a size and
8 scale to what Mr. Scurry's operation runs.

9 A. The one that I don't know the specific
10 name is the one that has the contract now.

11 Q. Okay.

12 A. But they would be one.

13 Q. Have you ever been on any of those
14 boats?

15 A. No, sir.

16 Q. So do you have any idea as to age of any
17 of the boats or the condition of their boats
18 versus Mr. Scurry's boats?

19 A. I don't.

20 Q. Do you have any personal knowledge about
21 any safety records of any of those companies or
22 boats?

23 A. I don't.

24 Q. Do you have any personal knowledge as
25 to -- strike that. Sorry.

1 So, Mr. Jones, we talked about the dock
2 damage from boats being from the Hurricane
3 Matthew damage. We talked about the picket
4 damage. Talked about the wear and tear. Talked
5 about J&W's employees leaving materials and trash
6 around.

7 Were there any other actions by J&W or
8 their employees that you as general manager feel
9 are a violation of either the lease or the 2004
10 settlement agreement, as you understand it, as
11 the general manager of Broad Creek Marina?

12 A. You know, I think we have the daily
13 squabbles of certain things, such as the -- the
14 location of boats in the horse, you know,
15 their -- the lease space in the horseshoe has
16 become an issue in the past on both sides.

17 We've had to redo the decking of all the
18 pier before. I attribute that to a lot of golf
19 cart wear and tear on that wooden pier, you know.
20 J&W was not billed for any of that -- that
21 redecking of the wooden pier, which was a
22 substantial cost.

23 I've replaced the gangway, which is
24 primarily used by -- by their customers. We had
25 to have that re -- completely redone, which I

1 think are all benefits for J&W. You know, that
2 we did redo those; and I just -- you know, I
3 think, trying to maintain a cleanly, safe marina
4 is a challenge sometimes.

5 Q. What you were talking about earlier as
6 the horseshoe, is that this area here that I'm
7 pointing to on Plaintiff's Exhibit No. 08?
8 (Indicating.)

9 A. The horseshoe I referred to as the
10 whole.

11 Q. This entire portion? (Indicating.)

12 A. Yes.

13 Q. So you're talking about some of the
14 challenges or issues there. Can you go into any
15 more detail as to what --

16 A. We have a back and forth over if
17 somebody was pulling off and his boats are trying
18 to get in as to the agreeable space. That's one
19 of the things we deal with on a -- on a -- but
20 that's it. It's dealt with. And, you know, I
21 wouldn't say it's an ongoing issue. It just --
22 it's something that happens. It's solved on a
23 daily basis.

24 MR. POWELL: Brief indulgence, Your
25 Honor.

1 THE COURT: Go ahead.

2 BY MR. POWELL:

3 Q. Mr. Jones, we had a little back and
4 forth earlier. As a general manager of Broad
5 Creek Marina, do you have reason to believe that
6 the dock damage that occurred during Hurricane
7 Matthew was attributable to J&W?

8 MR. TAYLOR: Same objection, Your
9 Honor. He's not qualified to give that opinion.

10 MR. POWELL: And, Your Honor, we're
11 not seeking to provide as expert testimony, just
12 as his fact testimony as a witness who is the
13 general manager of that marina where that damage
14 occurred.

15 THE COURT: I'll let him testify to
16 it.

17 A. I believe they -- the fact that their
18 boat was tied up to that section of dock that was
19 damaged in the storm is completely why that
20 section of dock was torn up. And, you know, the
21 rest of the marina was -- had some floats missing
22 from sections of docks but was not -- there were
23 not pilings smashed because -- and cracked.

24 Q. And it may help the -- well, strike
25 that.

1 You said the rest of the marina had some
2 floats missing, but can you describe the nature
3 of the damage that had to be repaired that cost
4 that \$44,000 and change?

5 A. Yes. Do you see where the boat is
6 parked in that -- the ferry boat is parked in
7 that -- (Indicating.)

8 Q. This one here? (Indicating.)

9 A. No. The other one.

10 Q. This one? (Indicating.)

11 A. Trying to remember the two times they
12 were damaged. Yeah. Right there. It was back a
13 little bit. So the boat would have been,
14 basically, started where the gangway is and goes
15 forward. So it would have been about 20 feet
16 back from the -- from the end of the horseshoe
17 there. That was a big section. The pilings were
18 cracked there along the inside. They had to be
19 replaced, and the dock was -- basically did a big
20 S right there but it -- it was broken.

21 Q. And did J&W, through its general manager
22 at the time, Joe Peltier, concede this to you
23 that they were responsible?

24 MR. TAYLOR: Same objection, Your
25 Honor, as to hearsay.

1 THE COURT: I'll allow it.

2 A. Yes. And there's a letter from Tom to
3 the insurance company where he says the same
4 thing.

5 THE COURT: We won't bother on
6 that. It wasn't asked of you.

7 Q. And so as the general manager of Broad
8 Creek Marina, are you asking the Court to hold
9 the tenant responsible to its obligation under
10 the 1993 lease and the 2004 settlement agreement
11 regarding past money owed and damage owed that
12 J&W feels it is entitled to under those
13 documents? I'm sorry. That Broad Creek Marina
14 feels it's entitled to under those documents?

15 A. Yes, please. And, you know, just to,
16 yes, please, and create something going forward
17 so we can ensure that we have a much better
18 relationship going forward where that stuff
19 doesn't happen and takes up all of our time.

20 Q. And that kind of answered my next
21 question.

22 As general manager, which you're about
23 roughly a quarter into the 99-year lease. Why is
24 it so important for the Court to give some final
25 resolution to these issues?

1 A. It's very important that the Court gives
2 final resolution. I don't plan on going
3 anywhere, and I don't really want to continue to
4 deal with this on a day-to-day basis like we
5 have. I don't want to find myself in court. I
6 want, you know, Mr. Freedman to have good
7 enjoyment of his property. And, you know,
8 Mr. Scurry would have good enjoyment of his
9 lease. I think we can all work together, but we
10 need to get a starting point that we can -- we
11 can -- that is fair to start from.

12 MR. POWELL: No further questions
13 of this witness, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. TAYLOR:

16 Q. Mr. Jones, Broad Creek Marina has lease
17 agreements with a number of commercial operators
18 that rent boats in these little island skiffs
19 here; right? (Indicating.)

20 A. Correct.

21 Q. Right. And you also have lease
22 agreements with, I believe, at least six charter
23 captains that run charter boats out of here;
24 correct?

25 A. Yes.

1 Q. The boat rental and the -- well, I think
2 that's both -- boat rental is a different type.
3 And the charter boats generate hundreds of people
4 during the week out there on those docks in the
5 summer, don't they?

6 A. That's correct.

7 Q. So when you talked earlier about the
8 trash cans that were overflowing, those were the
9 trash cans that are there in the general area
10 where everybody walks through that is coming down
11 to the dock; correct?

12 A. The ones on the dock, yes.

13 Q. And the ones that you talked about and
14 said that this was J&W's people that were causing
15 all of this, those are, in fact, trash cans that
16 are accessible and used by everybody who is going
17 down to rent boats, to go out on charter fishing
18 expeditions and do other things in addition to
19 J&W; right?

20 A. That's correct.

21 Q. So you certainly wouldn't think it would
22 be fair to say that all that trash was generated
23 by J&W's people, would you?

24 A. No. That's not -- you are right, sir.

25 Q. Who did the electric work to hook up the

1 Pirate building, Plaintiff's Exhibit No. 04?

2 A. I think that was Bold at Simoneaux.

3 Q. Who is that? Is that a corporation or a
4 person?

5 A. I think -- I think he works for
6 Simoneaux Electric.

7 Q. Did you arrange for that, or did someone
8 from Pirate arrange for that?

9 A. I believe originally I arranged for
10 electrical.

11 Q. And did y'all discuss the fact that it
12 was an unpermitted structure being run to
13 electricity sitting on the water?

14 A. I do not remember any conversation about
15 it being unpermitted.

16 Q. Were you concerned about it?

17 A. At the time, no. I trust his electrical
18 knowledge.

19 Q. Understood.

20 As -- Nate, as we sit here today, I have
21 to ask you some questions because in 2012, a
22 letter was written to J&W advising that Broad
23 Creek Marina was going to take certain actions.
24 And in response to that, we sought a temporary
25 injunction; and I need to understand what the

1 intentions of Broad Creek Marina are.

2 So as we are in this courtroom today,
3 does Broad Creek Marina intend to take action to
4 bar J&W or its customers from using the restroom
5 facilities out at Broad Creek Marina?

6 A. Not to my knowledge at this time.

7 Q. Does Broad Creek Marina intend to bar
8 J&W from using its golf cart on the wooden pier?

9 A. That's not my intent. I think we need
10 to have a discussion about how to effectively do
11 it. 'Cause at this time, you know, we keep
12 incurring maintenance costs.

13 So I don't believe that it's our intent
14 not to let them have -- use the golf cart. But I
15 think we need to have a discussion that creates a
16 way to do it, you know, and that -- that
17 everybody is amicable --

18 Q. Understood.

19 A. -- about.

20 Q. Do you intend to bar J&W for deliveries
21 after 7 a.m. in the morning?

22 A. No, I do not.

23 Q. Do you intend to bar J&W's employees or
24 customers from accessing certain portions of the
25 property that they would need to walk over in

1 order to get to either our current temporary
2 structure or our to-be current temporary
3 structure?

4 A. No, I don't believe we do.

5 Q. Tell me, please, about the storms that
6 you were -- or the named storms that you were
7 present at the marina for during your tenure
8 where you observed boat damage to the docks.

9 A. Was I present during the storm? Is that
10 the question, sir?

11 Q. That's the first question.

12 A. Okay. I believe at both -- I was at my
13 house during both storms.

14 Q. What storms are we talking about?

15 A. You tell me.

16 Q. Well, I'm sorry. Let me ask my question
17 better.

18 You testified that you were willing to
19 give an opinion that J&W's boats damaged your
20 docks based upon the fact that you'd been there
21 before and seen it in other named storms. At
22 least that's what I recall.

23 A. Uh-huh.

24 Q. And my question to you is: What other
25 named storms before Matthew in October 2016 had

1 you been at and watched?

2 A. Wasn't there one where the other side of
3 the horseshoe got damaged when the wind blew from
4 the south?

5 Q. I'm afraid you have to answer and not
6 ask.

7 A. Yeah. I mean, there was one where the
8 other side of the horseshoe was damaged; and we
9 got it fixed, and cleats were blown off.

10 You know, those large boats act like a
11 sail. When the wind blows like it does, those
12 docks are not designed to be, you know. If you
13 see ferry terminals, they have big ballasts and
14 they have large docks. Those are normal
15 recreational floating docks that we have.

16 Q. Do you have any engineering background
17 or design background at all?

18 A. No. But I'm in a lot of marinas.

19 Q. Well, let me get back to my question.

20 Apparently, in order to give the
21 testimony you've given, you're relying, in part,
22 on what you've observed before.

23 So was there a named storm before
24 Matthew that you would contend you saw damage at
25 Broad Creek Marina caused by boats as a result of

1 being tied up during the storm?

2 A. I would have to look back at the list of
3 named storms that have occurred --

4 Q. You don't remember?

5 A. -- in South Carolina. I don't remember
6 specifically, sir.

7 Q. Did you, on behalf of Broad Creek
8 Marina, file suit against the owner of the boat
9 in order to collect money damages for the alleged
10 damage the boat did to the dock?

11 A. I believe we have. We have -- say that
12 one more time, sir.

13 Q. In that case, the one that you can't
14 remember well but that you're relying on, did you
15 file suit against the owner of the boat
16 apparently on the other side of the U? You
17 understand what I'm asking there?

18 A. Right. Yeah.

19 Q. Did Broad Creek Marina seek to recover
20 their damages from whoever owned that boat?

21 A. I don't know that we did or not.

22 Q. Why not?

23 A. I can't recollect.

24 Q. Was there any other instance ever before
25 the one that you're trying to recollect now?

1 A. Not to my recollection.

2 Q. And you do acknowledge that you were not
3 present in October 2016, the night of the storm.

4 A. Not that I -- not that night, no, sir.

5 Q. And you don't really know whether or not
6 anything else hit the docks or whether water hit
7 the docks or whether wind caused the damage, do
8 you?

9 A. Well, I mean, as a -- no.

10 Q. You indicated earlier that it is part of
11 Broad Creek Marina's policies and procedures to
12 now require that the written contracts between
13 charter boat operators in Broad Creek Marina
14 provide that they'll move their boats out when a
15 named storm comes; correct?

16 A. Yes.

17 Q. Yes?

18 A. Yes.

19 Q. But you are not aware of anything
20 contained in the lease agreement or the
21 settlement agreement, Defendant's No. 01 and
22 No. 02, that require that or acknowledge that J&W
23 will do that, are you?

24 A. No, I'm not.

25 Q. In fact, there's nothing in there that

1 requires J&W to do that, is there?

2 A. I believe you are correct.

3 Q. Nate, you showed us some photographs
4 that you took of the oil cans and some carbon
5 dioxide things, I think, that were down there.

6 The day that you saw that, did you go
7 get someone from J&W and point it out and tell
8 them to clean it up?

9 A. I did not.

10 Q. Why not?

11 A. I would spend a lot of my day doing that
12 on a daily basis and I -- I have a lot of things
13 to do.

14 Q. I understand.

15 But you've got phone numbers for J&W;
16 and you could make a phone call and say, "Hey,
17 guys. Come over here and clean it up."

18 A. Yes, sir. That's true.

19 Q. Have you ever done that and had anybody
20 from J&W tell you to pound sand. I'm not going
21 to do it?

22 A. That's a good question. Not off the top
23 of my head.

24 Q. Did you call Mr. Scurry about any of the
25 concerns that you had at all about the photos

1 that were showing the oil cans and the carbon
2 dioxide canisters?

3 A. No.

4 Q. And the pilings that you showed earlier
5 that were broken that you introduced the
6 photographs about, they have been replaced by J&W
7 and are regularly replaced by J&W if they're
8 broken; right?

9 A. Yes. I believe I did say that too.

10 Q. You did. I just wanted to make sure
11 that was true.

12 Nate, why did Broad Creek Marina not
13 file an insurance claim for the damages from
14 Hurricane Matthew to your docks?

15 A. Because, as I understood it, the
16 deductible was \$50,000 for a named storm. The
17 total estimates I got from the contractors to
18 repair the dock was 44,000.

19 In my opinion, in business, if the
20 amount that it's going to take to fix it is less
21 than the deductible you're going to need to pay,
22 then there's no reason to call the insurance,
23 file an insurance claim. Yeah.

24 Q. Well, it sounds from Mr. Barteet's
25 testimony yesterday that the deductible was

1 actually \$40,000; correct?

2 A. I think he's mistaken.

3 MR. POWELL: Objection, Your Honor.

4 Mischaracterization of --

5 MR. TAYLOR: I'll withdraw that.

6 Q. Did you review the insurance policy in
7 the October 2016 time frame and make a
8 determination as to what your deductible was?

9 A. I did.

10 Q. And what was that -- your determination?

11 A. 50.

12 Q. 50. Okay.

13 Now, was there other damage to the docks
14 from Hurricane Matthew?

15 A. Very little, yes.

16 Q. Where was that? And you can use my hand
17 to, kind of, help me. Was it down on this
18 finger? (Indicating.)

19 A. Yes.

20 Q. And were other boats still at the marina
21 the night Hurricane Matthew came in?

22 A. Yes, sir.

23 Q. I thought you said they all left.

24 A. I did not say that.

25 Q. I was wrong.

1 A. I did not say that.

2 Q. Tell me how many boats were still there.

3 A. Oh, there was probably -- I would say
4 nine boats --

5 Q. Okay.

6 A. -- in addition to Mr. Scurry's two.

7 Q. And the nine boats were all not
8 associated with J&W; right?

9 A. No, sir.

10 Q. Was the dock damage, in your opinion,
11 that was not in the U-shape, but out here, caused
12 by the boats being tied to the docks during the
13 storm? (Indicating.)

14 A. Not in my opinion.

15 Q. What was the difference?

16 A. It was -- they were floats just
17 misplaced from the wave action of the docks.

18 Q. So your -- you feel comfortable with
19 making the determination or giving the opinion
20 that wave action may have caused some of the
21 damage, but not other?

22 A. I mean, I think it had -- it was a
23 combination. I don't know that we can properly
24 allot what wave action, wind action, and boat
25 action.

1 Q. I agree.

2 Did you file any type of collection
3 action against the other boat owners who,
4 apparently, stayed in disregard of your rules and
5 regulations?

6 A. No, sir.

7 Q. How much money in total did Broad Creek
8 Marina pay for any work that you associated with
9 Hurricane Matthew, aside from the J&W docks?

10 A. I would have to look back in the
11 records.

12 Q. What would you need? We've got records
13 here. What would you need?

14 A. Let's see. I would need -- do you have
15 the entire bill that we parsed for the -- for
16 the -- where is the Matthew records? That would
17 be what I need.

18 MR. TAYLOR: Ellis, can you help
19 me?

20 MR. LESEMAN: Sure.

21 A. I would need my right hand,
22 Miss Rachels, to tell me where that is.

23 Q. Your counsel has handed me some
24 documents. I'm not looking at them. Can you
25 tell me if that's what you're looking for?

1 MR. POWELL: And that's Defendant's
2 Exhibit No. 18, for the record.

3 MR. TAYLOR: Thank you very much,
4 Taylor. Defendant's Exhibit No. 18.

5 A. Yeah. Here's the floats. (Indicating.)

6 Q. I'm sorry, Nate?

7 A. So they installed nine new floats,
8 three-person dive team with hydraulic machine,
9 Mike Majors, 3150. And attach and reattach
10 existing float, 600. I don't know that that's
11 attributable -- that's the --

12 Q. I'm trying to help the court reporter so
13 let me ask the question again.

14 Can you tell -- has your memory been
15 refreshed as to the amount of money that Broad
16 Creek Marina paid for alleged other damage
17 related to Hurricane Matthew over and above the
18 J&W attributed damage?

19 A. Yes, it has.

20 Q. How much?

21 A. You got that calculator?

22 Q. I can get it. Why don't you just tell
23 me the numbers that your at.

24 A. All right. 6,850.

25 Q. Got it.

1 A. And 3150.

2 Q. That's an even \$10,000.

3 A. That would be a good estimate there.

4 Q. So an even \$10,000 in addition to the
5 44,000 that you're contending was related to
6 J&W's boats?

7 A. Uh-huh.

8 Q. Yes?

9 A. I believe so, yes.

10 Q. So your testimony would be that Broad
11 Creek Marina suffered approximately 54,000 plus
12 in damages as a result of Hurricane Matthew?

13 A. That would be correct.

14 Q. I hand you what's been marked for
15 identification as Plaintiff's Exhibit No. 13 and
16 entered into evidence. That is purportedly a
17 copy of your policy that was in effect.

18 Will you show me where the \$50,000
19 deductible is in that policy? And if that is not
20 right, will you tell us what the deductible is?

21 A. Uh-huh, yes. I will look for that.

22 (Complies with request.)

23 THE COURT: While he's looking,
24 Mr. Taylor, estimate on balance of cross?

25 MR. TAYLOR: Two minutes.

1 THE COURT: Two minutes?

2 MR. TAYLOR: I'm done, Judge.

3 MR. POWELL: If he only has two
4 minutes, I've only got two follow-up questions,
5 Your Honor.

6 THE COURT: It's my 27th
7 anniversary. So I've got to get home and take my
8 wife out to dinner. Take your time. I'm not
9 meaning to rush anyone. I have plenty of time.

10 A. So right here, yeah. I got you. Wind,
11 storm, hail, or flood deductible. 40,000. All
12 covered perils deductible 10,000.

13 Q. Does it appear that the deductible in
14 the policy was actually \$40,000 and not \$50,000?

15 A. I'm not sure that you don't add the two.

16 Q. Do you have any reason to believe, based
17 on what you're looking at, that you add the two?

18 A. I'd have to read the whole thing. You
19 know, I would have to refer to my agent or Lee
20 Strickland, the owner of Strickland Marine. I
21 would lean on him for that.

22 Q. You don't see anything in there about
23 adding the two?

24 A. I also don't read insurance documents
25 well. That's why we --

1 Q. Nate, I understand. But from what we
2 look -- and Mr. Barteet is, in fact, your
3 insurance agent, isn't he?

4 A. He's the salesman.

5 Q. But it appears that there was a total
6 loss of about \$54,000 from what you've put
7 together today; correct?

8 A. Uh-huh, uh-huh.

9 Q. And at least from what we can see in the
10 policy, a deductible of 40,000; right?

11 A. Yeah.

12 Q. And Broad Creek chose not to file a
13 claim on that?

14 A. That's correct.

15 Q. Last question. Do you know or have an
16 opinion about why the docks that were tied up to
17 the other nine boats did not suffer damages as a
18 result of the boats being tied to them during the
19 hurricane?

20 A. Yeah. 'Cause those were not 100-foot
21 long 100-ton vessels.

22 MR. TAYLOR: That's all I have,
23 Judge. Thank you.

24 MR. POWELL: Very briefly, Your
25 Honor.

1 REDIRECT EXAMINATION

2 BY MR. POWELL:

3 Q. Nate, if you'll flip to Tab 1, which is
4 the lease.

5 A. (Complies with request.)

6 Q. Are you aware of any provision in that
7 lease, as you're reviewing it, that would require
8 Broad Creek to submit a claim to its own carrier
9 as opposed to seeking payment from J&W under
10 paragraph 6, which is entitled "dock repair"?

11 A. I am not.

12 Q. Do you read paragraph 6 -- I'll give you
13 a minute to get to it -- have any language in
14 there relating to insurance or deductibles or how
15 one is to proceed to be reimbursed for dock
16 repair?

17 Let me rephrase that. How do you read
18 paragraph 6 relating to dock repairs specific to
19 the dock leased by J&W?

20 A. I read it as to say that the landlord
21 shall complete said repairs and replacement, and
22 tenant shall pay the landlord all costs
23 attributed to its use. Said costs to be paid as
24 they are incurred by the landlord.

25 So we would do the work. They would pay

1 us for it, or we would have the work done and
2 repaired. They would pay us for it.

3 MR. POWELL: Thank you, Your Honor.

4 MR. TAYLOR: Nothing further,
5 Judge.

6 THE COURT: Thank you, sir.

7 (The witness was excused.)

8 THE COURT: What else from the
9 defense?

10 MR. LESEMAN: Your Honor, that
11 would close the defendant's case and be our final
12 witness.

13 THE DEFENDANTS RESTS THEIR CASE

14 THE COURT: Thank you very much.
15 Anything else from the plaintiff?

16 MR. TAYLOR: No rebuttal.

17 THE COURT: I understand that
18 attorney's fees have been sought maybe by both
19 parties.

20 MR. TAYLOR: Yes. By both parties.

21 THE COURT: And I think you both
22 pointed out earlier my practice, and I guess a
23 lot of nonjury is to see how I'm going to rule
24 first before I get to that point. So unless
25 there's some objection, I'll hold the record open

1 for that.

2 I think what I'd like to do is
3 review everything I've got and maybe have a
4 conference call with the two of you ten days,
5 something like that, out to see where we are. I
6 know that certain aspects of, perhaps, settling
7 portions of this were discussed.

8 And if that happens, or not, I'd be
9 interested in knowing about it before I delve
10 into it and try to figure out how I'm going to
11 rule.

12 So I'm sure Heather's already gone.
13 But maybe tomorrow, if you can get your offices
14 to call Heather tomorrow, Monday, and try to
15 schedule something that works with your schedules
16 for maybe 30, 45 minutes, ten days, two weeks
17 out, something like that. We'll figure it out.

18 MR. LESEMANN: Yes, Your Honor.
19 And thank you. We will do that and maybe confer
20 with Mr. Taylor because with the issue of the --
21 and also if we could expedite things, perhaps, by
22 preparing proposed orders or whatever we might be
23 able to do to help you with the time frame that's
24 been created through the regulatory action from
25 the Town of Hilton Head.

1 THE COURT: Let me do this.
2 Anything else for this record?

3 MR. LESEMANN: Your Honor, I would
4 just renew the defendant's motions for directed
5 verdict. If I'm allowed to simply restate the
6 grounds or reincorporate the grounds as we stated
7 earlier on the record, I would do that just for
8 the grounds already stated, just renew
9 defendant's motions for a directed verdict.

10 THE COURT: Okay. Thank you so
11 much.

12 Anything else from you, Mr. Taylor?

13 MR. TAYLOR: Yes, sir. Very
14 briefly, Your Honor.

15 First, to assist in Ellis' -- and
16 kind of cleaning up the record, I asked Mr. Jones
17 about the intentions of Broad Creek Marina to
18 implement the threatened actions of six years
19 ago. He indicated they were not. Ellis has made
20 a Motion to Dismiss that portion of the complaint
21 where we sought a permanent injunction, and we
22 will agree that that will be appropriate.

23 THE COURT: Okay. Great.

24 MR. TAYLOR: Secondly, Your Honor,
25 two things. I move for the exclusion of all

1 previously admitted evidence here or material
2 that was tied to Miss Rachel's testimony as being
3 admittedly an error.

4 We didn't get to that until after
5 the stuff had been put into evidence, and I move
6 for the exclusion of all of the bills because
7 Miss Rachels has testified that they are
8 erroneous; and, secondly, I would like, again,
9 Judge, to make sure the subpoena that was quashed
10 will be made part of the record in some way,
11 please.

12 THE COURT: I think we did that
13 earlier.

14 MR. TAYLOR: I think we did.

15 THE COURT: I'm happy to hear from
16 you on Miss Rachels.

17 MR. LESEMAN: Thank you, Your
18 Honor.

19 Miss Rachels, on further
20 reflection, modified her testimony to indicate
21 that she did not believe that she had overbilled.
22 And so Your Honor can take that testimony in its
23 totality, but those are the business records.
24 They all reflect what they reflect the sum total
25 of that, as you're well aware; and I think that

1 you properly moved me along.

2 We talked about a \$14 per month
3 difference in terms of, if you look at that --
4 Taylor, if you could show the last page, and I
5 want to get you done because I want to get you
6 out to your anniversary dinner.

7 There was an issue where there was
8 a stated amount on that exhibit; but, ultimately,
9 those costs all vary, like property taxes
10 vary, et cetera. And so I performed a
11 calculation to show that, actually, at this
12 point, 8 man hours per week costs more than the
13 amount stated there.

14 So, again, Your Honor, we would
15 oppose that. Those are all business records.
16 They're accurate. And you can, in your
17 discretion, determine whether an appropriate
18 charge was \$133 or \$119 dollars; and you can make
19 that \$14 adjustment, if you would be so inclined.
20 But that witness -- those -- all of that was
21 admitted evidence. It was properly admitted.

22 Tom did his job to indicate why to
23 give you a reason to think about that evidence,
24 but it should not be removed or excluded.

25 THE COURT: I don't think I'm going

1 to exclude the evidence. Certainly I've listened
2 to cross carefully, and I'll consider all of
3 that.

4 Anything else for this record
5 which, again, we'll keep open solely for the
6 purpose, if necessary, of attorney's fees and
7 then maybe the occasional cleaning up exhibits in
8 case we've got an issue with that.

9 But other than that, that'll be the
10 conclusion of the record for today. That'll
11 conclude today's record.

12 (Proceedings concluded at 5:31 p.m.)

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1 CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
2 COUNTY OF HORRY

3 I, Ronda K. Blanton, a Registered
Professional Reporter and Notary Public for the
4 State of South Carolina at Large, do hereby
certify that the testimony of the witnesses and
5 all objections made at the time of these
proceedings were recorded stenographically by me
6 and were thereafter transcribed by computer-aided
transcription; that the foregoing is a full,
7 complete, and true record of the testimony of the
witnesses and of all objections made at the time
8 of the proceedings; and that includes Volume 1
and Volume 2, pages 1 through 655.

9
10 I further certify that I am neither related
to nor counsel for any party to the cause pending
or interested in the events thereof.

11
12 Witness my hand, I have hereunto affixed my
official seal on September 20, 2019, at Myrtle
Beach, Horry County, South Carolina.

13
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15
16 Ronda K. Blanton
NCRA REGISTERED PROFESSIONAL
17 REPORTER, RPR
Notary Public,
18 State of South Carolina at Large
My Commission expires:
19 May 15, 2028.
20
21
22
23
24
25

1 State of South Carolina) Court of Common Pleas
 2 County of Beaufort) 14th Judicial Circuit
 No. 2018-CP-07-01622

3 J&W Corporation of)
 4 Greenwood,)

5 Plaintiff,)

6 vs.)

7 Broad Creek Marina of)
 8 Hilton Head, LLC, Broad)
 9 Creek Marina Operations,)
 10 LLC, Broad Creek Marina)
 11 Properties, LLC, and)
 Development, LLC,)

Defendants.)

HEARING

July 19, 2019

COPY

12
 13 Hearing reported by Deborah S. Thomas,
 14 Certified Verbatim Reporter and Notary Public in and
 15 for the State of South Carolina; said hearing held
 16 before Honorable Marvin H. Dukes, III, Beaufort
 17 County Master in Equity and Special Circuit Court
 18 Judge in accordance with the South Carolina Rules of
 19 Civil Procedure, at the Beaufort County Courthouse,
 20 102 Ribaut Road, Room 212, Beaufort, South Carolina
 21 on July 19, 2019, at the hour of 11:10 a.m.

22
 23 DEBORAH S. THOMAS, CVRM
 80 Plymouth Lane
 24 Bluffton, South Carolina 29909
 (803) 206-7390
 25

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Certificate of Reporter

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Word Index

* * * * *

EXHIBIT INDEX

Exhibits:

Marked at Page

(Exhibits retained by Clerk of Court.)

NONE PROFFERED

* * * * *

1 This hearing is conducted in
2 accordance with the South Carolina Rules of Civil
3 Procedure.

4 JUDGE DUKES: Good Morning. We're
5 here in 2018-CP-07-01622. This is J&W Corporation
6 of Greenwood versus Broad Creek Marina, et al. This
7 is Plaintiff's motion to alter or amend. And,
8 Mr. Taylor, I'm happy to hear from you, sir.

9 MR. TAYLOR: Your Honor, thank you
10 very much. Judge, we're here today on a very
11 limited motion. As the court will recall, this case
12 was tried May 15th and 16th. And the court entered
13 an interim order on May 29th of 2019, regarding
14 office space.

15 Judge, part of the order that we're here
16 about today is the construction, development and
17 siting of the future office, floating office. And
18 the court will recall that. Judge, part of your
19 order provides that with regard to the permanent
20 relocation of J&W's office for the unexpired portion
21 of the lease, it is further ordered that as soon as
22 reasonably possible BCM shall, at their sole expense
23 take reasonable steps to permit and acquire a new
24 floating office with at least 300 square feet of
25 commercially usable space and at least a 20-year

1 anticipated service life.

2 And then on down, it provides that all
3 future costs and expenses of maintenance, repair,
4 upkeep and environmental and regulatory compliance,
5 sanitation, utilities, trash service, taxes,
6 insurance and future replacement of floating office
7 shall be the sole responsibility of J&W.

8 Your Honor, the focus of my motion to
9 alter or amend judgment pursuant to 59(e) concerns
10 only the future replacement of the floating office
11 being assigned as the responsibility of J&W. My
12 motion is fairly short.

13 Your Honor, to appreciate where I am at as
14 far as an argument today, I need to also let the
15 court know of kind of the timeline and how things
16 have progressed since the trial.

17 On May the 20th, I wrote Mr. Lesemann a
18 letter in which I advised that we had done some
19 initial research and suggested the possibility of an
20 floating office builder called Bellingham Marine
21 which was the only people we could find anywhere to
22 do it. And I asked Mr. Lesemann and his clients to
23 please keep us advised of the design and the plans
24 as soon as possible so that we could, hopefully,
25 have some input into it.

1 I then -- you entered your order on the
2 29th. On June 6th, I filed this motion in a
3 timely manner. On June 28th, Your Honor, over
4 five weeks after your order, I wrote Ellis and,
5 again, raised the issue of the floating office plans
6 and advised him that I had filed the 50(e) which he
7 already knew about. And stated that we do not
8 believe the relatively short 20-year anticipated
9 service life comports with the letter or spirit of
10 what BCM is required to provide and that that was
11 the essence of the motion.

12 I advised him that part of my argument on
13 this motion will center on the issue of what service
14 life can actually be expected from any floating
15 office in the waters of Broad Creek under generally
16 accepted standards of anticipated wear and use. And
17 I advised him that I had a forensic engineer and
18 architect standing by to review proposed plans and
19 specifications.

20 If BCM intends to provide a floating
21 office where it -- the court has -- I'm sorry,
22 Judge. I said I have an architect and engineer
23 standing by to review the proposed plans,
24 specifications of the floating office BCM intends to
25 provide. And I need to get them these plans and

1 specs at least two weeks prior to the hearing to
2 give them time to analyze them and provide an
3 affidavit regarding their professional opinions
4 about the projected service life of the structure.

5 That was what I was relying on, Judge, in
6 order to come today to show you that we needed to
7 have a difference on the order.

8 I did not receive any response to that.
9 And in June 28th, Ellis wrote me and said he would
10 review and respond to my letter and wanted to tell
11 me about the temporary office, which there is good
12 news. We've been working on it.

13 On July 9th, Judge, I wrote Ellis again
14 and said I was out of town over the 4th and wanted
15 to make sure that I had not missed anything, would
16 you please update me on BCM's actions regarding
17 preparation for the floating office? And, Judge, to
18 date, we have received nothing further. Although,
19 Ellis had verbally affirmed to me that they are
20 working on it.

21 But, Judge, my first idea would be to ask
22 you to hold this motion in abeyance or hold your
23 ruling on it in abeyance until such time as we
24 actually get some plans and specifications for the
25 proposed floating office because I can't really make

1 my argument about the anticipated service life of it
2 until I see what they're actually going to provide.

3 But with that request being made, I'd like
4 to just very briefly, Judge, tell you why I think
5 that the order is in error insofar as assigning us
6 the obligation to replace it. Judge, you'll
7 remember there is a 99-year lease that was executed
8 back in 1993. That lease talks about -- and it
9 actually lists on Exhibit A that part of the 99-year
10 leasehold is the southwestern most 300 square feet
11 of the floating store. That's how it began back in
12 1993.

13 Then there were disputes that arose
14 between the parties over the course of the years and
15 a release of confidential settlement agreement was
16 entered into in 2004 in which the office was
17 specifically addressed and talked about as far as
18 here or -- here or what the obligations are to do.
19 And through the different alternatives, if they
20 didn't do the floating office, then they would do
21 the dock master's office. And if not that, then
22 they would build us one.

23 You had already heard a good bit of
24 testimony at trial. And I think, Judge, it's
25 undisputed that for over a ten-year period between

1 2009 until 2019, despite written notice to Broad
2 Creek Marina that the office we were in was not
3 within code and was not properly permitted. J&W sat
4 in that office space for the ten years without
5 anything new, ultimately, leading up to the trial.

6 I raise that point, Judge, because I think
7 it's important to note that we are now two months
8 down the line from the original request to Broad
9 Creek for specs on the floating office. We don't
10 have anything about it. And it's one of those
11 issues where I can't really argue except for what I
12 think the court can take judicial notice of, and did
13 it somewhat in its order, is that a floating office
14 is going to, almost by definition and from anyone
15 who knows about it, last 20 years at maximum.

16 There are over seven -- there are over 65
17 years remaining on this 99-year lease agreement.
18 And to assign to J&W the basic responsibility of the
19 complete replacement of this at what we can best
20 hope is going to be 19 or 20 years is assigning to
21 us a capital contribution that was not envisioned
22 under the terms of the original lease. It was
23 always -- I believe, it's assumed in the original
24 lease agreement that it would be owned by Broad
25 Creek and that ultimately we would have the

1 obligation to repair it and to do those things th
2 become necessary in the ordinary course.

3 But if one of the hurricanes comes and
4 it's something that cannot be replaced or repaired
5 or planned for, then certainly we believe it's the
6 responsibility to provide us with office space
7 during the full terms of the lease agreement.

8 And I think, Judge, the confidential
9 settlement agreement and release which as you know
10 restructured the insurance provisions to which J&W
11 agreed to pay a portion of the insurance coverage
12 that would be assumed by Broad Creek Marina. And
13 it's spelled out in there that the portions that J&W
14 are to pay are to cover those portions of its
15 leasehold such as the docks and the office space.

16 Then, you know, we have put in your, I
17 think, lap the question of equitable and the
18 question of the interpretation of the lease as to
19 who should be responsible for the replacement of the
20 office. And this environment with what we know is
21 happening with storms now, we just believe it is
22 inequitable to have that replacement cost assigned
23 to J&W when a 65-year lease is going to certainly by
24 probably three times outlive the life of any
25 floating office.

1 And that's my motion, Judge.

2 JUDGE DUKES: All right. Thank you
3 so much. Happy to hear from you, sir.

4 MR. LESEMANN: Thank you, Your Honor.
5 May I approach?

6 JUDGE DUKES: Sure.

7 MR. LESEMANN: This was filed late
8 yesterday and approved and we sent Tom a copy by
9 e-mail and hand-delivered him one this morning.

10 Your Honor, if I might. I don't think it
11 really has anything to do with the motion, but I
12 know that you continue to have the case under your
13 jurisdiction and you do care about the progress
14 that's being made. And you want -- and I know from
15 our many conversations, you want to make sure that
16 some solutions are had.

17 As you'll recall the Town of Hilton Head
18 had placed a timeline on the occupancy of the
19 existing office space. We've worked with the Town
20 of Hilton Head to extend that time. And that was --
21 and I'll submit, welcomed by Mr. Scurry because he
22 did not want to move his operation on the 3rd of
23 July which would have been --

24 MR. TAYLOR: Yes, sir.

25 MR. LESEMANN: -- the 60-day period.

1 So, Your Honor, we now have an extension of time.
2 Operations have continued in that office space just
3 as they -- just as they have.

4 And we have a -- you'll recall, Your
5 Honor, that there was a picture on a Will Scott,
6 sort of like a construction style trailer like you
7 might see or as a -- as a -- as a sales office a lot
8 of times they're used. We have one of those now
9 that's on-site. Power has been run to it. And
10 we're in the final stages of getting that permitted
11 by the Town. So that's a temporary office solution,
12 Your Honor.

13 So we've got about another 45 days or so
14 that Mr. Scurry and J&W were able to operate in the
15 existing office. We've removed, for example, the
16 other -- the other floating office that was in the
17 marina that you may recall that became a subject.
18 That's been removed. We're -- Nate Jones is in
19 constant contact with the Town. We are just about
20 to have that temporary office permitted.

21 And then, honestly, Your Honor, there's
22 been efforts and quotes and things that have been
23 coming in for the permanent space. But our first
24 priority has been to avoid any interruption in the
25 day-to-day operations of J&W. So that required for

1 us to work with the Town and for us to get this
2 temporary solution --

3 Tom did facilitate a group called
4 Bellingham Marine to come and to review it. We've
5 never received a quote from them. We're obtaining
6 our own quotes, including from a company called Aqua
7 Lodge. And there was another company. Tom, you
8 might recall the name, but it's more of a local dock
9 builder. We received a quo.

10 MR. TAYLOR: Barrier Island.

11 MR. LESEMANN: Yeah, right. And I
12 think that with -- wasn't very keen on that plan.

13 So, Your Honor, there is a lot of
14 interaction. And I -- I'm busier than I should be
15 sometime, but Mr. Taylor's been at the marina. Nate
16 has spoken with him. Nate has spoken with the
17 office manager for J&W. So I just wanted to tell
18 you. And I've got a -- where is it -- a whole --
19 these are just the e-mails that, you know, Nate and
20 -- things that Nate's done since June 1st on all of
21 the issues relating to the Town and to getting that
22 done. So I just wanted you to know.

23 I think that's really more of a status
24 report more than anything else because I don't think
25 that that's what we're here to discuss. I don't

1 think that it'd be appropriate for us to be looking
2 at having engineers that didn't testify at trial or
3 have quotes presented that weren't presented at
4 trial. We're talking about a motion to alter or
5 amend.

6 And the issue that Mr. Taylor has raised
7 is that he believes that it's inequitable for the
8 replacement cost of the office over the balance of
9 the lease once it's been delivered. That the
10 replacement cost shouldn't be borne by the tenant.
11 That that's unfair.

12 Your Honor, you didn't assign that. You
13 didn't create that. You looked at the lease. The
14 lease says that. The lease is the document that
15 dictates that the tenant has agreed to repair and
16 maintain the leased property.

17 A lot of times damage is not going to be
18 complete. All right? There might be a leak here.
19 There might be something there. Somebody might run
20 a vessel into it. We've had examples of that
21 happen, you know, at that arena. So the lease very
22 clearly says that that's going to be the tenant's
23 responsibility to repair and to maintain it.

24 Okay. What if it goes all the way to the
25 level of where the property actually is destroyed

1 and is a total loss? Paragraph 26 of the lease
2 speaks to that. You didn't modify it. You didn't
3 -- you knew about it. You accepted that evidence.
4 You reviewed it. And your ruling is consistent with
5 that which says it is on the tenant go seek to --
6 and you made actually -- and I'll get there in a
7 second.

8 I think you actually went beyond the lease
9 to assist the tenant in that -- and that's in part
10 your reading the lease and the settlement agreement
11 together. Right? That although the lease by itself
12 would say, hey, it's on the tenant to go get new
13 permits. Its on the tenant to go do this if it's
14 lost.

15 We could go back to that settlement
16 agreement that says, all right, here's the different
17 options. The landlord will either put you here or
18 they'll put you here or they'll put you here or
19 they'll put you here.

20 Your decision to allow for the floating
21 office was essentially with the consent of both
22 sides that was presented at trial. So that wasn't
23 anything that you did or invented. The allocation
24 of costs is something that the lease speaks about.

25 You know, we have a situation, again, a

1 dollar per year, 50 parking spaces, 70 --
2 approximately, what, 360 feet of dock space, access
3 to all the other docks, use of the barge. All that.
4 So is it inequitable that the lease then says, okay,
5 well, we're going to give this to you. But if the
6 dock needs repair, you're going to have to repair
7 it. You're going to pay some pass-through costs.
8 If the floating office is destroyed or any portion
9 of leased property is destroyed, you have to pay for
10 it.

11 Now, with a caveat, if there is insurance
12 coverage that's available and then -- and insurance
13 proceeds are delivered, those are to be held in
14 trust for the tenant. Right? So -- and that's part
15 of the lease. That's all in there.

16 But when we look at Paragraph 26, and if
17 -- Your Honor, if you wouldn't mind, if we could
18 just sort of -- I know you've read the whole thing
19 probably many times over. But if we could look at
20 Section 26.

21 JUDGE DUKES: Is 26 the original
22 lease?

23 MR. LESEMAN: Yes, sir. So it's on
24 Page 8, and that's Exhibit A to the -- in the binder
25 that I handed you.

1 JUDGE DUKES: Damages to or
2 destruction of?

3 MR. LESEMANN: Yes, sir. And so goes
4 on. You know, tenant would give notice. And then
5 it continues on. Tenant shall apply for all
6 necessary permits and approvals and shall repair,
7 restore, rebuild or replace the damaged leased
8 property to the extent that it shall deem
9 necessarily desirable in connection with the
10 requirements of its business.

11 Your Honor, your ruling essentially,
12 faithfully reflects that, again, with the caveat
13 that you recognize from the settlement agreement
14 that the landlord would initially place the tenant
15 into an office space.

16 The trial we talked about all the reasons
17 why that's been an issue. And why it's been -- why
18 it's been delayed. We don't need to retry those
19 issues.

20 And then, Your Honor, as you're reading,
21 it continues to say that, all right, well, if there
22 are insurance proceeds from insurance policies
23 carried by the landlord that relate or result from
24 damage to the leased property, those will be held in
25 trust.

1 In the last sentence, if the insurance
2 proceeds are insufficient to repair the damage then
3 tenant shall pay for the difference. So the
4 landlord's only obligation would be to turn over
5 such insurance proceeds as may exist from the
6 casualty or as may become available from the
7 casualty. It is the tenant's responsibility to
8 repair, restore, replace, maintain the leased
9 property.

10 So, Your Honor, if you were to go in a
11 different direction and if you were to accept
12 Mr. Taylor's invitation to change that part of your
13 ruling, we respectfully submit that you'd be
14 undermining the agreement that the parties wrote for
15 themselves. And I know that you would not intend to
16 do it. And that isn't what a court would want to
17 do.

18 And so there is no assumptions in this
19 lease. You know, nothing was left to be guessed
20 upon or guessed at with regard to this specific
21 issue. And the subject of the motion to alter/amend
22 which can only be reviewed on the record that was
23 available to the court at the trial which basically
24 brings us back to this lease and the settlement
25 agreement.

1 The settlement agreement indicates within
2 it that it doesn't modify any provisions in the
3 lease unless they're directly modified in the
4 settlement agreement. You found correctly, both
5 based on the terms of the settlement agreement and
6 upon the testimony of both sides, that a floating
7 office is a feasible and suitable resolution. It's
8 one of the options that's called upon in the
9 settlement document. In fact, it's the primary one.
10 It's the first one. And all the other options are
11 something you would reach only if the floating
12 office couldn't be done.

13 The testimony showed that it could be
14 done. Mr. Scurry testified that it'd be acceptable
15 to him in a certain location. You ordered that it
16 be put in that location. My clients are working
17 toward placing it in that location. Again -- and I
18 -- and I already gave you the update on that.

19 So, Your Honor, there's no error
20 underlining this Rule 59(e) motion. There's nothing
21 that was in this record, in this lease or in that
22 settlement agreement that would call for you to make
23 any other decision than what you did. I think the
24 20-year service life -- that it should have an
25 anticipated 20-year service life was something that

1 you did within your equitable powers. You know, the
2 lease doesn't speak to that. But you said, you
3 know, I want to -- I want to make sure that this
4 solution is not going to be, I mean, for lack of a
5 better word, flimsy. You wanted it to be something
6 that was suitable. And so I think in your equitable
7 power you added that. But I just would note that
8 that was something that was not directly in the
9 settlement agreement or in the lease.

10 So, Your Honor, with all that having been
11 said, we'd ask that you not hold this motion in
12 abeyance. We do look forward to being able to move
13 on with the remaining term of this lease. I think
14 your rulings will give us good guidance, both the
15 ones that we've received and the ones that we will
16 later receive. You don't need to hold it in
17 abeyance for evidence from witnesses that didn't
18 appear at trial. And it isn't really to be about an
19 analysis of what the floating office is going to be.
20 I mean, certainly, Tom is an excellent lawyer. And
21 if he feels like the plan that we bring forward is
22 something that violates your order or the lease or
23 the settlement agreement, he'll make sure that we
24 appear before you to argue that. But it has nothing
25 to do with your assignment of responsibility for

1 that replacement cost.

2 You properly read the lease and you didn't
3 change the lease. It would have been inappropriate
4 to place that responsibility for replacement costs
5 anywhere other than where it is. And that's with
6 the tenant.

7 And so we'd ask that the motion be denied.

8 MR. TAYLOR: Your Honor, very briefly
9 in reply, please.

10 Your Honor, Ellis is as always right on
11 point on what the lease -- the original lease
12 agreement said. And it brings to the foreground the
13 exact issue that revolves here totally and that is
14 the issue of the -- who's going to be responsible
15 for the replacement and how's it going to be paid
16 for because what, Your Honor, also did in the order
17 which we would contend should be reconsidered is
18 assign the responsibility of the insurance on the
19 new floating office to us.

20 And that's of key importance because the
21 portion of the original lease that Ellis read a few
22 minutes ago that says tenant shall apply for -- this
23 is Paragraph 26. Tenant shall apply for all
24 necessary permits and approvals and shall repair,
25 restore, rebuild and replace the damaged lease

1 properties to the extent it shall be necessary or
2 desirable in connection with the requirements of
3 it's business. Any and all insurance proceeds from
4 insurance policies carried by landlord or in
5 landlord's name resulting from damage to the leased
6 property shall be held in trust and disbursed for
7 the repairs, restoration, rebuilding or replacement
8 undertaken by the tenant pursuant to this paragraph
9 unless landlord and tenant agree otherwise. If the
10 insurance proceeds are insufficient to repair the
11 damage, then tenant shall pay the difference.

12 So the original lease not only assumed
13 that the landlord would be carrying the insurance,
14 but it specifically says in the paragraph where it
15 calls for the tenant to be responsible for the
16 replacement of the floating store that the insurance
17 proceeds carried by the landlord will be held in
18 trust to do it.

19 Now, you'll recall, Your Honor, that that
20 was one of the specific disputes that led to the
21 settlement agreement which specifically in its terms
22 allocated the way the new insurance was going to be
23 broken up. And instead of the landlord carrying all
24 of the insurance, the new the settlement agreement
25 says J&W will pay it's proceeds for the insurance --

1 the property insurance that were allocated to it.

2 It lists on here, Judge, the storage shed
3 which was apparently the -- what they called the
4 office building, the floating store, a dock master's
5 office and the dock and piers. So those were items
6 that were assigned to J&W under the new -- quote,
7 under the new settlement agreement. J&W was were
8 going to pay a portion of Broad Creek Marina's
9 insurance to cover those items.

10 Well, the order -- the interim that issued
11 from this court said, no, J&W must carry the
12 insurance on the office. So what that order does, I
13 believe mistakenly, is transfer that obligation.
14 And you'll recall, Judge, that one of the issues
15 that arose that was well argued at trial was the
16 fact that the Broad Creek Marina had property
17 insurance on the docks and at a large deductible and
18 did not even bother to file a claim that would have
19 paid for the damage to J&W's portion of the docks.
20 This is all at the heart of this insurance dispute
21 as to who should have paid what for the insurance.

22 But this could be remedied, Your Honor,
23 also, if the court is not agreeable to reassigning
24 whose responsibility it is to replace it. Then I
25 would argue that the court should reconsider the

1 insurance requirement and say that the insurance
2 shall be paid as the parties agreed in the
3 settlement agreement.

4 In other words, J&W will contribute to the
5 property insurance the landlord carries to the
6 percentages that are assigned in the settlement
7 agreement. And that will cover the floating office.
8 And then we need an understanding that Mr. Friedman
9 will not have a deductible so high that we are
10 assigned that because that's inequitable and would
11 not be in keeping with the spirit of the agreement
12 because if Mr. Friedman decides to choose to carry
13 \$100,000 deductible when the most likely thing
14 that's liable to get hit is a floating office or get
15 damage and then just assign that to us. That
16 wouldn't be right.

17 JUDGE DUKES: What was the
18 deductible? I know there was testimony.

19 MR. TAYLOR: The deductible --

20 MR. LESEMANN: It was --

21 MR. TAYLOR: -- was 40.

22 MR. LESEMANN: It was 40.

23 MR. TAYLOR: \$40,000.

24 MR. LESEMANN: So, Tom, if I could
25 ask you, do you feel like the insurance issue is

1 raised in your motion to alter or amend?

2 MR. TAYLOR: The court's decision to
3 assign responsibility for the future replacement of
4 the new floating office to the Plaintiff, I would --
5 I would want to read that broadly, yes. But I
6 understand what you're about to say here.

7 MR. LESEMAN: Yes, sir. I -- but,
8 Your Honor, again, I'm -- you're not on technical --
9 you're not a hyper-technical judge and I don't try
10 to be hyper-technical lawyer. I do feel like the
11 issue was not raised and so I would -- I would note
12 that.

13 But, furthermore, so that you don't feel
14 like you would be, you know, sort of elevating any
15 technical -- although, that's not technical. But as
16 you know what I mean, Your Honor, we look at these
17 insurance issues. If I could take you back to the
18 lease really quickly.

19 So Page 2, Section 3, Rental, Subsection
20 Roman numeral III, Insurance. So, Your Honor, that
21 indicates what would be known as part of the
22 (unintelligible) in that type of provision, right?
23 That said the tenant's going to pay a allocated
24 portion of the amounts expended by landlord.

25 So the policies that the landlord gets,

1 the tenant is going to pay a pro rata allocated
2 amount of those. That provision in the -- but
3 you'll see that there's no -- it doesn't spell out
4 what that ought to be. That was -- that was what
5 was omitted from that 1993 lease. The settlement
6 agreement, Your Honor, merely came up with a
7 specific formula that was agreed upon as to what
8 those allocations would be. It didn't invent a new
9 system or means of handling the insurance issue. It
10 merely gave a formula to parties to the lease that
11 couldn't agree to what it would otherwise be.

12 So, Your Honor, if I could take you now
13 from Subsection 3.b.3 on Page 2 which from the
14 get-go is (unintelligible) the tenant was going to
15 pay an allocable pro rata share of the landlord's
16 insurance.

17 Let's go to Page 3 now if you wouldn't
18 mind in Section 5. Tenant shall pay taxes, license
19 fees, insurance, utilities and all other costs in
20 ownership and possession for the leased property.
21 So when we have a provision that indicates that
22 tenant is to carry insurance on the leased property,
23 you've merely faithfully implemented the provisions
24 of this lease which called not only that the tenant
25 would insure the leased property as a whole, but

1 also would pay an allocated portion of the insurance
2 on the property as a whole. The entire property
3 which I know you visited.

4 And then Section 17, Your Honor, speaks to
5 liability insurance. And goes so far as to state
6 what the minimum coverage would be, \$1 million. And
7 also indicates that there would be an upward
8 adjustment annually to reflect inflation rates. If
9 you see that sort of in the mid part of the
10 paragraph.

11 So again, more provisions that speak
12 exactly to how insurance was to be handled going all
13 the way back to '93. And I raise this, Your Honor,
14 for another point. If anybody -- if the parties
15 wanted to have a dictate as to what the deductibles
16 needed to be on any of the policies, well, this
17 would have been where they would have written them.
18 Somewhere in this lease they would say, well, you
19 can't have a -- you can't carry policies that have
20 greater than an X deductible or less than an X
21 deductible or whatever it might be. That's
22 something that wasn't agreed upon.

23 So the landlord is entitled to carry the
24 insurance the landlord wants to carry. The tenant
25 is to pay an allocated share of that. The tenant on

1 Paragraph 5 is to pay all costs of insurance related
2 to the leased property. The tenant is to follow all
3 the provisions in Section 17 of the lease.

4 And if we go to the settlement agreement,
5 Your Honor, all right, common area charges is really
6 the paragraph that speaks to the issue about the
7 insurance. It's on Page 4, Subsection E. J&W
8 agrees to pay all common charges as identified in
9 the lease that come due and payable beginning
10 January 2005.

11 The formula for determining amounts due
12 and payable by the parties for common area charges
13 is (unintelligible) Exhibit F. So, Your Honor, that
14 again, I think that underscores my point which is to
15 say the parties never were able to come to an
16 agreement as to what the allocation ought to be.
17 They had litigation. They came up with an
18 agreed-upon formula and they adopted it.

19 But, Your Honor, I think it's not
20 appropriate at all to read that subsection as
21 modifying Section 3.3 of the lease that calls for
22 the tenant to carry that share of the -- of the
23 landlord's insurance. It just specifies what the
24 shares's going to be.

25 It certainly doesn't modify or delete

1 Section 5 from the lease which indicates that
2 tenants to carry the insurance costs relating to the
3 leased property. And it doesn't reflect or amend or
4 delete or strike Section 17 of the lease. And in
5 fact, it just states what it states. It's going to
6 provide a formula.

7 And then, as I mention, on that same page
8 at H, Survival of Lease. Except to set forth
9 amended or modified herein, all terms and conditions
10 of the lease shall remain in full force and effect.

11 So again, if we do argue, if you do reach
12 the issue of insurance, you shouldn't change
13 anything that you've ruled on so far. If we don't
14 reach it because it wasn't raised then I think that
15 that is also an appropriate resolution. But I think
16 you can do that with the comfort that, you know, you
17 didn't make an error. You correctly reflected the
18 lease.

19 And on the greater issue, again, we've
20 talked about that replacement cost is right where it
21 is and right where it always has been, both under
22 the settlement agreement and under the lease and
23 should not be disturbed.

24 JUDGE DUKES: Thank you so much.

25 MR. TAYLOR: Your Honor, just so that

1 the record again is kind of closed out, I would move
2 on behalf of the Plaintiff pursuant to Rule 60(b)
3 for the court to consider this a verbal motion made
4 on the record for relief from the order for B.1.
5 either mistake, inadvertence, surprise or excusable
6 neglect insofar as the court's inadvertent --
7 inadvertently assigning the insurance coverage to us
8 which is, as Ellis has made very clear, the
9 responsibility of the landlord under the settlement
10 agreement and we are to pay our fair share for it.

11 JUDGE DUKES: Okay. That is noted
12 for the record. Anything else for this record then?

13 MR. LESEMAN: No, sir.

14 JUDGE DUKES: That will conclude
15 today's record.

16 (Whereupon, the hearing was concluded
17 at 11:45 a.m.)
18
19
20
21
22
23
24
25

Certificate of Reporter

I, Deborah S. Thomas, Certified Verbatim Reporter and Notary Public in and for the State of South Carolina, do hereby certify that I reported the hearing of J&W Corporation of Greenwood v. Broad Creek Marina of Hilton Head, LLC, et al, on the 19th day of July, 2019, and that the foregoing pages constitute a true and correct transcription of the said hearing.

I further certify that I am neither attorney nor counsel for, nor related to or employed by, any of the parties connected with this action, nor am I financially interested in said cause.

I further certify that the original of said transcript shall be hereafter delivered to Thomas C. Taylor, Esquire, Law Office of Thomas C. Taylor, LLC, Post Office Box 5550, Hilton Head, Island, South Carolina 29938-5550.

In witness whereof, I set my hand and sealed this 6th day of August, 2020.

My Commission
expires 2/7/28


Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina



986

State of South Carolina) Court of Common Pleas
) 14th Judicial Circuit
 County of Beaufort) No. 2018-CP-07-01622

J&W Corporation of)
 Greenwood,)

Plaintiff,)

vs.)

Broad Creek Marina of)
 Hilton Head, LLC, Broad)
 Creek Marina Operations,)
 LLC, Broad Creek Marina)
 Properties, LLC, and)
 Development, LLC,)

Defendants.)

HEARING

November 18, 2019

COPY

Hearing reported by Deborah S. Thomas,
 Certified Verbatim Reporter and Notary Public in and
 for the State of South Carolina; said hearing held
 before Honorable Marvin H. Dukes, III, Beaufort
 County Master in Equity and Special Circuit Court
 Judge in accordance with the South Carolina Rules of
 Civil Procedure, at the Beaufort County Courthouse,
 102 Ribaut Road, Room 212, Beaufort, South Carolina
 on November 18, 2019, at the hour of 9:25 a.m.

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EXHIBIT INDEX

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(Exhibits retained by Clerk of Court.)

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* * * * *

1 This hearing is conducted in
2 accordance with the South Carolina Rules of Civil
3 Procedure.

4 JUDGE DUKES: Good Morning. We're
5 here in 2018-CP-07-01622. This is J&W Corporation
6 of Greenwood versus Broad Creek Marina. This matter
7 has an extensive record. It involves some issues
8 associated with a marina here in Hilton Head. And I
9 understand that today we have two motions, a Motion
10 to Implement and Enforce Master's Interim order. We
11 also have a Motion for Relief from Interim Order and
12 to Allow Additional Discovery. Both of these having
13 to do with the issue of the floating office that is
14 the subject of a previous order.

15 So I guess it can probably make some sense
16 to hear Mr. Taylor's motion first. Any objection to
17 that?

18 MR. LESEMANN: Your Honor, we're
19 happy to proceed in how you see fit.

20 JUDGE DUKES: Okay. All right. Mr.
21 Taylor, I'm happy to hear from you.

22 MR. TAYLOR: Your Honor, thank you
23 very much. Your Honor, as you will recall, without
24 belaboring the record, you did enter an interim
25 order on May the 29th. And that interim order

1 addressed the floating dock. And it -- for purposes
2 of importance says, with regard to the permanent
3 relocation of J&W's office for the unexpired portion
4 of the lease, which, Your Honor, we all agree is 72
5 more years, it is further ordered that as soon as
6 reasonably possible Broad Creek Marina shall, at
7 their sole expense, take all reasonable steps to
8 permit and acquire a new floating office with at
9 least 300 square feet of commercially usable space
10 and at least a 20-year anticipated service life.

11 Floating office will remain the legal
12 property of BCM as an improvement to the real
13 property but shall be a portion of the leased
14 property for all purposes under the lease and the
15 release and settlement agreement.

16 Your Honor, on June 28th, and it is
17 attached as Exhibit '1, I wrote Ellis and asked
18 him -- told him that I had filed the motion -- the
19 motion to reconsider or the motion to alter or amend
20 that judgment. And you'll recall, Your Honor, we
21 already discussed with the court that motion which
22 was basically that a floating office with just a
23 20-year service life would not be in keeping with
24 the overall intent, clearly, of the lease and
25 settlement agreement because that'll put J&W to

1 buying a new office for the remaining 50 or so years
2 of the lease. We did not believe that was probably
3 what the court really intended to do.

4 By letter of June 28th to Ellis, I asked
5 him to give me as much information as they have
6 about whatever floating offices they're considering.

7 On September 26th, Exhibit 2, I wrote him
8 again and asked him to provide me with whatever
9 specifications they have because we had hired --
10 retained an outside consultant to look at the
11 specifications so that the court could have
12 information about the anticipated actual longevity
13 of it.

14 And then on October 10th, I wrote again.
15 And by this time, I had received the -- basically,
16 the fiberglass floating -- I don't know how else to
17 say it, Your Honor. It's a houseboat. The
18 houseboat that they want to give us as a office
19 which is going to have fiberglass pontoons which, as
20 the court will recall from our previous trial, we
21 had been in one like this before and it had sank
22 twice.

23 And what I asked Ellis at that point in
24 time was before we got here for today could we
25 please have some discovery and see the backup

1 documentation as to this and let us potentially have
2 a chance to talk to somebody about how it was built.

3 And then, Your Honor, the most interesting
4 thing to us and the scariest thing is the affidavit
5 that we got from the owner of the company which
6 Ellis filed along with his motion which the court --
7 if you've looked at it, Judge, the affidavit makes
8 it real clear. Actually, it's almost like the
9 arbitration provision that we have in South
10 Carolina. The very first thing underlined at the
11 top, this is not a warranty or guaranty.

12 And then the manufacturer of Aqua Lodges
13 goes on to talk about what a great idea it is to
14 have a fiberglass hull but then mentions several,
15 several times that, as noted above, this statement
16 is not a warranty or guaranty. I am not aware of
17 any manufacturer of such structures that guarantees
18 the performance of their vessels for 20 years.
19 Clearly, the one that they are proposing, Your
20 Honor, not only is not likely to last 20 years, but
21 it's own manufacturer, at this point time, is
22 suggesting that it can't.

23 We would like to have the opportunity, and
24 what we've requested, Your Honor, is to have brief
25 discovery of all of the documentation that shows

1 what Broad Creek Marina did as far as talking to
2 potential manufacturers because, you know, Judge, we
3 think, given the history of this, that what happened
4 is they've likely chosen the least expensive option
5 that they possibly can. And we don't know anything
6 about any others. We'd like to see if there were
7 other ones out there. And we'd like to take a brief
8 telephone deposition from the manufacturer to be
9 able to ask him if there are any other offices
10 they've ever done because I have a distinct feeling,
11 Your Honor, that if they had ever built one that was
12 actually being used for a floating office and had
13 had a good experience with it, we know about it.
14 And they would've been hailing that as being let me
15 show you why this is going to work as an office.

16 So, Your Honor, we are opposed to the
17 fiberglass underpinnings of the one they have
18 proposed. We're opposed to a -- what is clearly,
19 Your Honor, just a houseboat that they expect us to
20 operate out of. You will recall, I'm sure, that Mr.
21 Scurry testified that when the last one sank for the
22 second time, we lost all of our computers, all of
23 our equipment and everything else that was with it
24 that was never reimbursed. And that's well outside
25 the statute of limitations. So it was not an issue

1 during the trial, but it is what it is.

2 And, Your Honor, based upon that, we ask
3 that Ellis' motion be either denied or deferred to
4 and allow the additional brief discovery which,
5 again, just a telephone deposition and the
6 production of documents so that we could have an
7 expert look at them. I don't believe is onerous
8 whatsoever.

9 And, Judge, all of that goes with this,
10 too. We are in the temporary office at this point.
11 And I assume the court understands that. The
12 Scotsman has been set up, and it is operating. So
13 there -- while there is a sense of urgency, Your
14 Honor, there is no immediate emergency.

15 JUDGE DUKES: Okay. Thank you so
16 much. Happy to hear from you, sir.

17 MR. LESEMAN: Your Honor, this
18 dispute has been going on, in part, since 1993. And
19 it's possible that it may go on forever until one or
20 both of the gentlemen is no longer here to fight it.

21 We're working today to try to enforce the
22 lease. The lease as written requires 300 feet of
23 office space. It requires the tenant maintain and
24 repair and incur all costs of ownership. Mr. Taylor
25 can discuss how the prior offices have sank. If you

1 don't take care of a boat, as you know, if you don't
2 take care of a marine structure, as you know, it
3 will sink. At no point has the lease or the
4 settlement agreement ever required my client to be
5 the warrantor or the guarantor of the office space.

6 The 20-year service life provision, Your
7 Honor, as you've indicated in some prior hearings,
8 was something that you did as almost an equitable
9 measure to try to make things fair. But again, a
10 storm could come next year that could destroy any
11 structure. So there is no warranty. There is no
12 service life.

13 What we do have is a 99-year lease where
14 Mr. Scurry's business is supposed to pay a dollar a
15 year in rent. And they're supposed to pay for
16 additional rent and additional charges. For the
17 course of ten years, as you know, they've refused to
18 do that, running a total of \$56,000. The interest
19 on those amounts is itself significant, in the
20 \$30,000.

21 We've had a dock damage incident in which
22 they've indicated in writing that they're
23 responsible to pay for those damages through their
24 own insurance carrier and dock -- and the lease
25 itself over settle provisions indicates that they're

1 supposed to pay for those damages, and they refuse,
2 requiring my client to go to a trial over multiple
3 years in which over \$100,000 of attorneys fees have
4 been incurred.

5 So we have \$56-some thousand in unpaid
6 tenant charges. We have \$30-some thousand in unpaid
7 prejudgment interest. We have \$44,000 in unpaid
8 dock damage. We've got \$1,500 a month -- really
9 approximately \$2,000 a month that we're incurring
10 for a temporary office that became necessary due to
11 Mr. Taylor's activities with the Town of Hilton
12 Head.

13 So at what point, when we're looking at a
14 lease that requires the tenant to pay for all of
15 these charges and to pay to repair and replace his
16 office space, at what point can we realize that this
17 relationship has become abusive and out of whack and
18 unbelievably one-sided and in contrary to the
19 writing of the lease and the settlement agreement?

20 I think that we've been there, and we're
21 certainly there now. There is time pressure and
22 there is urgency because we're having to lease this
23 temporary space and we're having to deal with the
24 Town of Hilton Head. We're at a post-trial
25 situation, Your Honor.

1 There are no provisions in the settlement
2 agreement in the interim order or in the lease that
3 require the floating office to be made out of any
4 given material. The Town of Hilton Head has
5 clarified that if it's a vessel, it's outside of
6 their jurisdiction. And we -- and also OCRM has
7 indicated that all we would need in order to clarify
8 things with them is to -- is to make an amendment to
9 the existing permit for the location. And then we
10 can move forward. Or else, we can have more and
11 more and more litigation. We could have more
12 discovery.

13 Your Honor, Mr. Jones is here and he's
14 prepared to testify about his communications with
15 Aqua Lodge, that this isn't a cheap option. This is
16 going to cost \$58,000. There are a lot of reasons
17 why this is an appropriate solution, Your Honor.

18 First of all, it's portable. When we look
19 at when the prior offices had been lost or damaged,
20 it generally deals with storm events. This
21 particular office solution would allow for the
22 office to be hauled out of the water during the
23 storm or certainly to make it more durable.

24 One of the concerns that my client has, as
25 indicated in Hurricane Matthew and otherwise, is the

1 damage that's caused by the tenants' vessels during
2 storms when they're left tethered to the dock and
3 unwatched and unmanned.

4 This fiberglass hull is not going to act
5 as a big hulking steel wrecking ball through my
6 client's property that until, Your Honor, orders we
7 may not even be able to force the lease provisions
8 that put the dock repair liability strictly upon the
9 tenant. We're fighting that battle, too.

10 So now we've got a solution that's
11 insurable as a vessel with a low deductible, again,
12 at tenants' expense because they're supposed to pay
13 those charges. It's portable. It's durable. It's
14 sufficient size. It's placeable without regard to
15 the Town of Hilton Head's further interaction
16 because it's outside of their jurisdiction, and OCRM
17 will agree to placement of it. We just need to put
18 in an amended application. Now, if OCRM has and
19 issue that we're not expecting then Your Honor made
20 provisions for us to come back. But, Your Honor,
21 this is going to be fought forever. There is no
22 veto power.

23 We're to provide 300 square feet of office
24 space. This is a suitable office space. I wrote on
25 the top of this statement that it's not a warranty