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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

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Appellate Case No. 2024-000788  
Case No.: 2019-CP-10-01108

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Balfour Beatty Construction, LLC, Appellant,

v.

Library Associates, LLC; and Metropolitan Life Insurance Company, a New York Corporation, Defendants,

And

Library Associates, LLC, Third-Party Plaintiff,

v.

Lithko Contracting, LLC, Guy M. Beaty, Inc., Bernard MMC, LLC, Gulf Stream Construction Company, Inc., Precision Walls, Inc., Palmetto Automatic Sprinkler Company, Inc., Cook & Boardman, LLC, Strong Tower Construction, LLC d/b/a Koch Corporation, Watson Electrical Construction Co., LLC, Trimark Foodcraft, LLC, Pleasant Places, Inc., David Allen Company, Inc., Premier Exteriors, LLC, Warco Construction, Inc., Old North State Masonry, LLC, Tom Rochester & Associates d/b/a Southeastern Architectural Systems, Forton Company, LLC, Low Country Case & Millwork, Inc., Quantum Coatings, LLC, Balfour Beatty Construction Group, Inc., Third-Party Defendants.

Of which Library Associates, LLC is the Respondent.

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**RECORD ON APPEAL - VOLUME 3 OF 51**

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Video Deposition Testimony of George Michael Baumbach, 13:5-14:10  
(Timestamp 7:28-8:23); 14:24-15:11 (Timestamp 10:00-10:30); 42:12-45:23  
(Timestamp 47:40-52:05); 46:22-47:15 (Timestamp 53:27-54:22) (Placeholder  
for video file being submitted via Court of Appeal’s OneDrive) .....R-25320

30. Specifically, Cunefare directly supervised military housing community managers, including Cabrera, who were responsible for overseeing the day-to-day management of several of BBC's military housing communities.

31. In addition to other oversight duties, Cunefare was responsible for reviewing and approving Quarterly Maintenance Reports prepared by the community managers and their subordinates and ensuring that the numbers in the Quarterly Maintenance Reports were submitted to the Air Force with the Performance Incentive Fee request letters.

32. Cunefare knew that the Quarterly Maintenance Reports he approved were used to report maintenance-related Performance Objectives to the Air Force, and to obtain the Air Force's authorization for the Performance Incentive Fee each quarter. Cunefare further understood that meeting Performance Objectives and achieving Performance Incentive Fees were important goals for BBC, because meeting these goals would allow BBC to obtain more money from the Air Force.

33. In quarters in which BBC did not legitimately meet the maintenance-related Performance Objectives, Cunefare gave instructions to community managers and others that resulted in the community managers and others manipulating and falsifying information in Yardi so that the Quarterly Maintenance Report would falsely reflect that BBC had met the objectives. These actions had the effect of falsely inflating BBC's Performance Objectives.

34. As a result of Cunefare's actions, BBC employees manipulated and falsified information in Yardi in quarters to ensure that they met their Performance Objectives, and BBC obtained the Performance Incentive Fee.

35. By directing information to be manipulated in Yardi, Cunefare and other BBC employees knowingly and intentionally caused false information regarding the Performance Objectives to be supplied to the Air Force on a quarterly basis, deceiving the Air Force into

believing that BBC was meeting the Performance Objectives required to obtain Performance Incentive Fees, and enriching BBC at the expense of the Air Force, when in fact BBC was unable to keep up with maintenance issues at many of the military housing communities that it managed.

*Actions by Cabrera*

36. As the Community Manager for Lackland AFB, Cabrera was the senior on-site BBC employee responsible for overseeing the day-to-day management of the privatized military housing community there. Approximately 20 BBC staff members reported to Cabrera.

37. Cabrera knew that her Quarterly Maintenance Report was used to report the Performance Objectives to the Air Force, and to obtain the Air Force's authorization for the Performance Incentive Fee for Lackland AFB each quarter.

38. Cabrera worked with Cunefare and others to manipulate and falsify information in Yardi in multiple quarters so that Quarterly Maintenance Reports would falsely reflect that BBC had met Performance Objectives, when in truth and in fact, as Cabrera and other BBC employees well knew, it had not. This allowed BBC, acting through these employees, to submit materially false and fraudulent requests to the Air Force for payment of Performance Incentive Fees to which it was not entitled.

39. Specifically, in quarters in which BBC did not meet the Performance Objectives, Cabrera manipulated and falsified information in Yardi so that the Quarterly Maintenance Report for Lackland AFB would falsely reflect that BBC had met the objectives.

40. Cabrera admitted that she knowingly and intentionally directed her subordinates to manipulate information in Yardi by, among other things, adjusting completion times for work orders, "closing" work orders early, or marking work orders "complete" prior to maintenance work

actually being performed. These actions had the effect of falsely inflating BBC's Performance Objectives at Lackland AFB.

41. On various occasions, Cabrera personally manipulated and falsified information in Yardi to create false Quarterly Maintenance Reports which were submitted to the Air Force.

42. By manipulating information in Yardi, and directing information to be manipulated, Cabrera and other BBC employees knowingly and intentionally caused false information regarding the Performance Objectives to be supplied to the Air Force on a quarterly basis, deceiving the Air Force into believing that BBC had met the Performance Objectives necessary to receive Performance Incentive Fees related to work order performance.

**BBC's Inadequate Controls Contributed to the Misconduct**

43. In addition to the specific criminal actions admitted to above, widespread failures at the regional and BBC corporate and executive levels contributed to its provision of false information to the service branches.

44. Specifically, a regional vice president pressured subordinates to meet metrics without regard to accuracy and to ensure that Quarterly Maintenance Report metrics were above thresholds necessary to obtain Performance Incentive Fees.

45. In addition, a regional vice president, and at least two regional property managers (in addition to Cunefare) issued directives to subordinates to meet Performance Objectives and benchmarks in terms that subordinates reasonably interpreted as encouraging improper behavior.

46. In addition to actively promoting the falsification of data, regional personnel were aware of data discrepancy and data falsification allegations and failed to take corrective action.

47. BBC corporate-level employees, including at least one senior vice president, prioritized the payment of Performance Incentive Fees over addressing concerns about the

accuracy of Yardi data.


48. Individuals at the executive level, including BBC's former Chief Operating Officer, contributed to pressure to qualify for and collect Performance Incentive Fees, and were aware of warning signs of Performance Incentive Fee-related misconduct, including concerns raised by the service branches, but failed to take immediate action to investigate the allegations and correct any misconduct. In at least one instance, an executive vice president downplayed Air Force concerns, including about Yardi data accuracy and the falsification of comment cards.

49. These actions and failures to act had the effect of permitting lower-level BBC employees to execute the scheme to defraud, but also allowing it to continue despite warning signs as early as 2016.

50. BBC, acting through its employees and agents, acted knowingly and with the intent to defraud the service branches in connection with military housing contracts.

**Quantification of Losses to the Service Branches**

51. From in or around 2013 to in or around 2020, the Air Force, Army, and Navy collectively sustained a loss of approximately \$18,700,000 as a result of BBC's scheme to defraud. BBC accepts that this figure is the proper measure of loss for the purposes of calculating the appropriate fine under the U.S. Sentencing Guidelines.

  
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Charles Beatty Communities, LLC  
President and Class A Manager

**ATTACHMENT B**

**CERTIFICATE OF CORPORATE RESOLUTIONS**

WHEREAS, Balfour Beatty Communities, LLC (the "Company") has been engaged in discussions with the United States Department of Justice, Criminal Division, Fraud Section (the "Fraud Section") regarding issues arising in relation to the Fraud Section's investigation of violations of Title 18, United States Code, Section 1031(a)(1), Major Fraud against the United States by the Company;

WHEREAS, in order to resolve such discussions, it is proposed that the Company enter into the Plea Agreement with the Fraud Section (the "Agreement");

WHEREAS, the Company's General Counsel and External Counsel advised the President and Class A Manager of the Company, Christopher Williams, of the Company's rights, possible defenses, the Sentencing Guidelines' provisions, and the consequences of entering into such agreement with the Fraud Section;

Therefore, the President and Class A Manager of the Company has RESOLVED that:

1. The Company (a) acknowledges the filing of the one-count Information charging the Company with a felony violation of Major Fraud against the United States in violation of Title 18, United States Code, Section 1031(a)(1); (b) waives indictment on such charge and enters into the Agreement with the Fraud Section; and (c) agrees to pay a Total Criminal Monetary Amount of \$65,532,209 under the Agreement with respect to the conduct described in the Information;
2. The Company accepts the terms and conditions of the Agreement, including, but not limited to, (a) a knowing waiver of its rights to a speedy trial pursuant to the Sixth Amendment to the United States Constitution, Title 18, United States Code, Section 3161, and Federal Rule of Criminal Procedure 48(b); and (b) a knowing waiver for purposes of the

Agreement and any charges by the United States arising out of the conduct described in Attachment A to the Agreement of any objection with respect to venue and consents to the filing of the Information, as provided under the terms of the Agreement, in the United States District Court for the District of Columbia; and (c) a knowing waiver of any defenses based on the statute of limitations for any prosecution relating to the conduct described in Attachment A to the Agreement and in the Information or relating to conduct known to the Fraud Section prior to the date on which the Agreement is signed that is not time-barred by the applicable statute of limitations on the date of the signing of the Agreement;

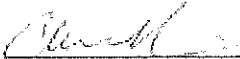
3. The President and Class A Manager of the Company is hereby authorized, empowered, and directed, on behalf of the Company, to execute the Agreement substantially in such form as reviewed by the Company's General Counsel and External Counsel at this meeting with such changes as the President and Class A Manager of the Company may approve;

4. The President and Class A Manager of the Company is hereby authorized, empowered, and directed to take any and all actions as may be necessary or appropriate and to approve the forms, terms, or provisions of any agreement or other documents as may be necessary or appropriate to carry out and effectuate the purpose and intent of the foregoing resolutions;

5. All of the actions of the President and Class A Manager of the Company, which actions would have been authorized by the foregoing resolutions except that such actions were taken prior to the adoption of such resolutions, are hereby severally ratified, confirmed, approved, and adopted as actions on behalf of the Company; and

6. The President and Class A Manager of the Company further authorizes, empowers, and directs the General Counsel of the Company, Leslie Cohn, to appear in the United States District Court for the District of Columbia on behalf of the Company as its

corporate representative to take such actions as may be necessary or appropriate to enter the plea of guilty and in connection with sentencing.

Date: December 22, 2021 By:   
Christopher Williams  
President and Class A Manager  
Balfour Beatty Communities, LLC

**ATTACHMENT C**

**CORPORATE COMPLIANCE PROGRAM**

In order to address any deficiencies in its internal controls, compliance code, policies, and procedures regarding compliance with U.S. anti-fraud laws, Balfour Beatty Communities, LLC (“BBC” or the “Company”) agrees to continue to conduct, in a manner consistent with all of its obligations under this Agreement, appropriate reviews of its existing internal controls, policies, and procedures.

Where necessary and appropriate, the Company agrees to modify its compliance program, including internal controls, compliance policies, and procedures, in order to ensure that the Company maintains an effective compliance program that is designed to effectively detect and deter violations of U.S. anti-fraud law. At a minimum, this should include, but not be limited to, the following elements to the extent they are not already part of the Company’s existing internal controls, code of conduct, policies, and procedures:

*High-Level Commitment*

1. The Company will ensure that its directors and senior management provide strong, explicit, and visible support and commitment to its corporate policy against violations of U.S. anti-fraud laws and its code of conduct and demonstrate rigorous adherence by example. The Company will also ensure that middle management, in turn, reinforces those standards and encourages employees to abide by them. The Company will create and foster a culture of ethics and compliance with the law in its day-to-day operations.

*Policies and Procedures*

2. The Company will develop and promulgate a clearly articulated and visible corporate policy against violations of U.S. anti-fraud laws, which policy shall be memorialized in a written code of conduct.

3. The Company will develop and promulgate compliance policies and procedures designed to reduce the prospect of violations of U.S. anti-fraud laws and the Company's code of conduct, and the Company will take appropriate measures to encourage and support the observance of the code of conduct and related ethics and compliance policies and procedures against violation of U.S. anti-fraud laws by personnel at all levels of the Company. These policies and procedures shall apply to all directors, officers, and employees and, where necessary and appropriate, outside parties acting on behalf of the Company. The Company shall notify all employees that compliance with the code of conduct and related ethics and compliance policies and procedures is the duty of individuals at all levels of the Company.

4. The Company will ensure that its privatized military housing portfolio maintains an effective system of internal controls designed to ensure the making and keeping of fair and accurate reports and records of the Company's facilities management operations, corresponding claims for and payments of fees relating to that work, and policies and procedures designed to effectively detect and deter violations of U.S. anti-fraud law. The system should be designed to provide reasonable assurances that facilities management activities are recorded as necessary to permit accurate and transparent billing in conformity with applicable contracts and legal standards.

*Periodic Risk-Based Review*

5. The Company will develop these compliance policies and procedures on the basis of a periodic risk assessment addressing the individual circumstances of the Company.

6. The Company shall review these policies and procedures no less than annually and update them as appropriate to ensure their continued effectiveness, taking into account relevant developments in the field and evolving industry standards.

*Proper Oversight and Independence*

7. The Company will assign responsibility to one or more senior corporate executives of the Company for the implementation and oversight of the Company's code of conduct and related ethics policies and procedures. Such corporate official(s) shall have the authority to report directly to independent monitoring bodies, including internal audit, or the Company's sole member, and shall have an adequate level of autonomy from management as well as sufficient resources and authority to maintain such autonomy.

*Training and Guidance*

8. The Company will implement mechanisms designed to ensure that its code of conduct and related ethics policies and procedures are effectively communicated to all directors, officers, employees, and, where necessary and appropriate, agents, outside parties, and/or business partners. These mechanisms shall include: (a) periodic training for all directors and officers, all employees in positions of leadership or trust, positions that require such training (e.g., internal audit, sales, legal, compliance, finance), and, where necessary and appropriate, agents, outside parties, and/or business partners; and (b) corresponding certifications by all such directors, officers, employees, agents, outside parties, and/or business partners, certifying compliance with the training requirements. The Company will conduct training in a manner tailored to the audience's size, sophistication, or subject matter expertise and, where appropriate, will discuss prior compliance incidents.

9. The Company will maintain, or where necessary establish, an effective system for providing guidance and advice to directors, officers, employees, and, where necessary and appropriate, agents, outside parties, and/or business partners, on complying with the Company's code of conduct and related ethics policies, and procedures, including when they need advice on an urgent basis.

*Internal Reporting and Investigation*

10. The Company will maintain, or where necessary establish, an effective system for internal and, where possible, confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, agents, outside parties, and/or business partners, concerning violations of U.S. anti-fraud laws or the Company's code of conduct and related ethics policies and procedures.

11. The Company will maintain, or where necessary establish, an effective and reliable process with sufficient resources for responding to, investigating, and documenting allegations of violations of U.S. anti-fraud laws or the Company's code of conduct and related ethics policies and procedures. The Company will handle the investigations of such complaints in an effective manner, including routing the complaints to proper personnel, conducting timely and thorough investigations, and following up with appropriate discipline where necessary.

*Enforcement and Discipline*

12. The Company will implement mechanisms designed to effectively enforce its code of conduct and related ethics policies and procedures, including appropriately incentivizing compliance and disciplining violations.

13. The Company will institute appropriate disciplinary procedures to address, among other things, violations of U.S. anti-fraud laws and the Company's code of conduct and related

ethics policies and procedures, by the Company's directors, officers, and employees. Such procedures should be applied consistently and fairly, regardless of the position held by, or perceived importance of, the director, officer, or employee. The Company shall implement procedures to ensure that where misconduct is discovered, (a) reasonable steps are taken to remedy the harm resulting from such misconduct; (b) appropriate steps are taken to prevent further similar misconduct, including assessing the internal controls, code of conduct, and related ethics policies and procedures; and (c) necessary modifications are made to ensure the overall compliance program is effective.

*Mergers and Acquisitions*


16. The Company will develop and implement policies and procedures for mergers and acquisitions requiring that the Company conduct appropriate risk-based due diligence on potential new business entities, including appropriate due diligence regarding U.S. anti-fraud laws by legal, accounting, and compliance personnel.

17. The Company will ensure that the Company's code of conduct and related ethics policies and procedures regarding U.S. anti-fraud laws apply as quickly as is practicable to newly acquired businesses or entities merged with the Company, and that the Company will promptly (a) train the directors, officers, employees, agents, and business partners consistent with Paragraphs 8-9 above on the Company's code of conduct and related ethics policies, and procedures; and (b) where warranted, conduct an audit of all newly acquired or merged businesses as quickly as is practicable concerning compliance with U.S. anti-fraud laws.

*Monitoring and Testing*

18. The Company will conduct periodic reviews and testing of its code of conduct and related ethics policies and procedures designed to evaluate and improve their effectiveness in

preventing and detecting violations of U.S. anti-fraud laws, as well as of the Company's code of conduct and related ethics policies and procedures, taking into account relevant developments in the field and evolving international and industry standards. The Company will ensure that compliance and internal control personnel have sufficient direct and indirect access to relevant sources of data to allow for timely and effective monitoring and/or testing. Based on such review and testing and its analysis of any prior misconduct, the Company will conduct a thoughtful root cause analysis of such misconduct and timely and appropriately remediate to address such root causes.

  
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Balhore Beatty Communities, LLC  
President and Class A Manager

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**ATTACHMENT D**

**INDEPENDENT COMPLIANCE MONITOR**

The duties and authority of the Independent Compliance Monitor (the “Monitor”), and the obligations of Balfour Beatty Communities, LLC (the “Defendant”), on behalf of itself and its subsidiaries and affiliates, with respect to the Monitor and the United States Department of Justice, Criminal Division, Fraud Section (the “Fraud Section”), are as described below:

1. The Defendant will retain the Monitor for a period of three years (the “Term of the Monitorship”), unless the extension or early termination provision of Paragraph 1 of the plea agreement (the “Agreement”) is triggered.

*Monitor’s Mandate*

2. The Monitor’s primary responsibility is to assess and monitor the Defendant’s compliance with the terms of the Agreement, including the corporate compliance program in Attachment C, to specifically address and reduce the risk of any recurrence of the Defendant’s misconduct. During the Term of the Monitorship, the Monitor will evaluate, in the manner set forth below, the effectiveness of the internal controls, record-keeping, and financial reporting policies and procedures of the Defendant as they relate to the Defendant’s current and ongoing compliance with U.S. anti-fraud laws and applicable Department of Defense regulations and take such reasonable steps as, in his or her view, may be necessary to fulfill the foregoing mandate (the “Mandate”). The Mandate shall also include an assessment of the Board of Directors’ and senior management’s commitment to, and effective implementation of, the corporate compliance program as described in Attachment C of the Agreement.

*Defendant's Obligations*

3. The Defendant shall cooperate fully with the Monitor, and the Monitor shall have the authority to take such reasonable steps as, in his or her view, may be necessary to be fully informed about the Defendant's compliance program in accordance with the principles set forth herein and subject to applicable law, including applicable data protection and labor laws and regulations. To that end, the Defendant shall: facilitate the Monitor's access to the Defendant's documents and resources; not limit such access, except as provided in Paragraphs 5-6; and provide guidance on applicable local law (such as relevant data protection and labor laws). The Defendant shall provide the Monitor with access to all information, documents, records, facilities, and employees, as reasonably requested by the Monitor, that fall within the scope of the Mandate of the Monitor under the Agreement. The Defendant shall use its best efforts to provide the Monitor with access to the Defendant's former employees and its third-party vendors, agents, and consultants.

4. Any disclosure by the Defendant to the Monitor concerning corrupt payments, false books and records, and internal accounting control failures shall not relieve the Defendant of any otherwise applicable obligation to truthfully disclose such matters to the Fraud Section, pursuant to the Agreement.

*Withholding Access*

5. The parties agree that no attorney-client relationship shall be formed between the Defendant and the Monitor. In the event that the Defendant seeks to withhold from the Monitor access to information, documents, records, facilities, or current or former employees of the Defendant that may be subject to a claim of attorney-client privilege or to the attorney work-product doctrine, or where the Defendant reasonably believes production would otherwise be

inconsistent with applicable law, the Defendant shall work cooperatively with the Monitor to resolve the matter to the satisfaction of the Monitor.

6. If the matter cannot be resolved, at the request of the Monitor, the Defendant shall promptly provide written notice to the Monitor and the Fraud Section. Such notice shall include a general description of the nature of the information, documents, records, facilities, or current or former employees that are being withheld, as well as the legal basis for withholding access. The Fraud Section may then consider whether to make a further request for access to such information, documents, records, facilities, or employees.

*Monitor's Coordination with the  
Defendant and Review Methodology*

7. In carrying out the Mandate, to the extent appropriate under the circumstances, the Monitor should coordinate with Defendant's personnel, including in-house counsel, compliance personnel, and internal auditors, on an ongoing basis. The Monitor may rely on the product of the Defendant's processes, such as the results of studies, reviews, sampling and testing methodologies, audits, and analyses conducted by or on behalf of the Defendant, as well as the Defendant's internal resources (e.g., legal, compliance, and internal audit), which can assist the Monitor in carrying out the Mandate through increased efficiency and Defendant-specific expertise, provided that the Monitor has confidence in the quality of those resources.

8. The Monitor's reviews should use a risk-based approach, and thus, the Monitor is not expected to conduct a comprehensive review of all business lines, all business activities, or all markets. In carrying out the Mandate, the Monitor should consider, for instance, risks presented by: (a) organizational structure; (b) training programs or lack thereof; (c) compensation structure; (d) internal auditing processes; (e) internal investigation procedures; (f) reporting mechanisms; (g) corporate culture; and (h) employee incentives and disincentives.

9. In undertaking the reviews to carry out the Mandate, the Monitor shall formulate conclusions based on, among other things: (a) inspection of relevant documents, including the Defendant's current policies and procedures governing compliance with U.S. anti-fraud laws and applicable Department of Defense regulations; (b) on-site observation of selected systems and procedures of the Defendant at sample sites, including internal controls, record-keeping, and internal audit procedures; (c) meetings with, and interviews of, relevant current and, where appropriate, former directors, officers, employees, business partners, agents, and other persons at mutually convenient times and places; and (d) analyses, studies, and testing of the Defendant's compliance program.

*Monitor's Written Work Plans*

10. To carry out the Mandate, during the Term of the Monitorship, the Monitor shall conduct an initial ("first") review and prepare a first report, followed by at least two follow-up reviews and reports as described in Paragraphs 16-19 below. With respect to the first report, after consultation with the Defendant and the Fraud Section, the Monitor shall prepare the first written work plan within sixty (60) calendar days of being retained, and the Defendant and the Fraud Section shall provide comments within thirty (30) calendar days after receipt of the written work plan. With respect to each follow-up report, after consultation with the Defendant and the Fraud Section, the Monitor shall prepare a written work plan at least thirty (30) calendar days prior to commencing a review, and the Defendant and the Fraud Section shall provide comments within twenty (20) calendar days after receipt of the written work plan. Any disputes between the Defendant and the Monitor with respect to any written work plan shall be decided by the Fraud Section in its sole discretion.

11. All written work plans shall identify with reasonable specificity the activities the Monitor plans to undertake in execution of the Mandate, including a written request for documents. The Monitor's work plan for the first review shall include such steps as are reasonably necessary to conduct an effective first review in accordance with the Mandate, including by developing an understanding, to the extent the Monitor deems appropriate, of the facts and circumstances surrounding any violations that may have occurred before the date of the Agreement. In developing such understanding, the Monitor is to rely, to the extent possible, on available information and documents provided by the Defendant. It is not intended that the Monitor will conduct his or her own inquiry into the historical events that gave rise to the Agreement.

*First Review*

12. The first review shall commence no later than one hundred twenty (120) calendar days from the date of the engagement of the Monitor (unless otherwise agreed by the Defendant, the Monitor, and the Fraud Section). The Monitor shall issue a written report within one hundred fifty calendar (150) days of commencing the first review, setting forth the Monitor's assessment and, if necessary, making recommendations reasonably designed to improve the effectiveness of the Defendant's program for ensuring compliance with U.S. anti-fraud laws and applicable Department of Defense regulations. The Monitor should consult with the Defendant concerning his or her findings and recommendations on an ongoing basis and should consider the Defendant's comments and input to the extent the Monitor deems appropriate. The Monitor may also choose to share a draft of his or her reports with the Defendant prior to finalizing them. The Monitor's reports need not recite or describe comprehensively the Defendant's history or compliance policies, procedures and practices. Rather, the reports should focus on areas the Monitor has identified as requiring recommendations for improvement or which the Monitor otherwise

concludes merit particular attention. The Monitor shall provide the report to the governing body and contemporaneously transmit copies to:

Avi Perry  
Acting Chief, Market Integrity and Major Frauds Unit  
Andrew Gentin  
Acting Chief, Corporate Enforcement, Compliance, and Policy Unit  
Criminal Division, Fraud Section  
U.S. Department of Justice  
1400 New York Avenue N.W.  
Bond Building, Eleventh Floor  
Washington, D.C. 20005

After consultation with the Defendant, the Monitor may extend the time period for issuance of the first report for a brief period of time with prior written approval of the Fraud Section.

13. Within one hundred fifty (150) calendar days after receiving the Monitor's first report, the Defendant shall adopt and implement all recommendations in the report. If the Defendant considers any recommendations unduly burdensome, inconsistent with applicable law or regulation, impractical, excessively expensive, or otherwise inadvisable, it must notify the Monitor and the Fraud Section of any such recommendations in writing within sixty (60) calendar days of receiving the report. The Defendant need not adopt those recommendations within the one hundred fifty (150) calendar days of receiving the report but shall propose in writing to the Monitor and the Fraud Section an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the Defendant and the Monitor do not agree, such parties shall attempt in good faith to reach an agreement within forty-five (45) calendar days after the Defendant serves the written notice.

14. In the event the Defendant and the Monitor are unable to agree on an acceptable alternative proposal, the Defendant shall promptly consult with the Fraud Section. The Fraud Section may consider the Monitor's recommendation and the Defendant's reasons for not adopting

the recommendation in determining whether the Defendant has fully complied with its obligations under the Agreement. Pending such determination, the Defendant shall not be required to implement any contested recommendation(s).

15. With respect to any recommendation that the Monitor determines cannot reasonably be implemented within one hundred fifty (150) calendar days after receiving the report, the Monitor may extend the time period for implementation with prior written approval of the Fraud Section.

*Follow-Up Reviews*

16. A follow-up review shall commence no later than one hundred and eighty (180) calendar days after the issuance of the first report (unless otherwise agreed by the Defendant, the Monitor and the Fraud Section). The Monitor shall issue a written follow-up (“second”) report within one hundred twenty (120) calendar days of commencing the second review, setting forth the Monitor’s assessment and, if necessary, making recommendations in the same fashion as set forth in Paragraph 12 with respect to the first review. After consultation with the Defendant, the Monitor may extend the time period for issuance of the second report for a brief period of time with prior written approval of the Fraud Section.

17. Within one hundred twenty (120) calendar days after receiving the Monitor’s second report, the Defendant shall adopt and implement all recommendations in the report, unless, within thirty (30) calendar days after receiving the report, the Defendant notifies in writing the Monitor and the Fraud Section concerning any recommendations that the Defendant considers unduly burdensome, inconsistent with applicable law or regulation, impractical, excessively expensive, or otherwise inadvisable. With respect to any such recommendation, the Defendant need not adopt that recommendation within the one hundred twenty (120) calendar days of

receiving the report but shall propose in writing to the Monitor and the Fraud Section an alternative policy, procedure, or system designed to achieve the same objective or purpose. As to any recommendation on which the Defendant and the Monitor do not agree, such parties shall attempt in good faith to reach an agreement within thirty (30) calendar days after the Defendant serves the written notice.

18. In the event the Defendant and the Monitor are unable to agree on an acceptable alternative proposal, the Defendant shall promptly consult with the Fraud Section. The Fraud Section may consider the Monitor's recommendation and the Defendant's reasons for not adopting the recommendation in determining whether the Defendant has fully complied with its obligations under the Agreement. Pending such determination, the Defendant shall not be required to implement any contested recommendation(s). With respect to any recommendation that the Monitor determines cannot reasonably be implemented within one hundred twenty (120) calendar days after receiving the report, the Monitor may extend the time period for implementation with prior written approval of the Fraud Section.

19. The Monitor shall undertake a second follow-up ("third") review not later than one hundred fifty (150) days after the issuance of the second report. The Monitor shall issue a third report within one hundred and twenty (120) days of commencing the review, and recommendations shall follow the same procedures described in Paragraphs 16-18. Following the third review, the Monitor shall certify whether the Defendant's compliance program, including its policies, procedures, and internal controls, is reasonably designed and implemented to prevent and detect violations of U.S. anti-fraud laws and applicable Department of Defense regulations. The final review and report shall be completed and delivered to the Fraud Section no later than thirty (30) days before the end of the Term.

*Monitor's Discovery of Potential or Actual Misconduct*

20. (a) Except as set forth below in sub-paragraphs (b), (c) and (d), should the Monitor discover during the course of his or her engagement that:

- improper payments or anything else of value may have been offered, promised, made, or authorized by any entity or person within the Defendant or any entity or person working, directly or indirectly, for or on behalf of the Defendant; or
- the Defendant may have maintained false books, records or accounts; or
- the Defendant may have failed to implement a system of internal accounting controls that is sufficient to accurately record the Defendant's transactions (collectively, "Potential Misconduct"), the Monitor shall immediately report the Potential Misconduct to the Defendant's General Counsel, Chief Compliance Officer, and/or Audit Committee for further action, unless the Potential Misconduct was already so disclosed. The Monitor also may report Potential Misconduct to the Fraud Section at any time, and shall report Potential Misconduct to the Fraud Section when it requests the information.

(b) In some instances, the Monitor should immediately report Potential Misconduct directly to the Fraud Section and not to the Defendant. The presence of certain factors militates in favor of reporting Potential Misconduct directly to the Fraud Section and not to the Defendant, namely, where the Potential Misconduct involves senior management of the Defendant or involves obstruction of justice.

(c) If the Monitor believes that any Potential Misconduct has occurred or may constitute a U.S. criminal or regulatory violation (“Actual Misconduct”), the Monitor shall immediately report the Actual Misconduct to the Fraud Section. When the Monitor discovers Actual Misconduct, the Monitor shall disclose the Actual Misconduct solely to the Fraud Section, and, in such cases, disclosure of the Actual Misconduct to the General Counsel, Chief Compliance Officer, and/or the Audit Committee of the Defendant should occur as the Fraud Section and the Monitor deem appropriate under the circumstances.

(d) The Monitor shall address in his or her reports the appropriateness of the Defendant’s response to disclosed Potential Misconduct or Actual Misconduct, whether previously disclosed to the Fraud Section or not. Further, if the Defendant or any entity or person working directly or indirectly for or on behalf of the Defendant withholds information necessary for the performance of the Monitor’s responsibilities and the Monitor believes that such withholding is without just cause, the Monitor shall also immediately disclose that fact to the Fraud Section and address the Defendant’s failure to disclose the necessary information in his or her reports.

(e) Neither the Defendant nor anyone acting on its behalf shall take any action to retaliate against the Monitor for any such disclosures or for any other reason.

*Meetings During Pendency of Monitorship*

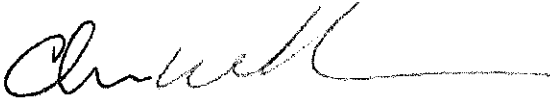
21. The Monitor shall meet with the Fraud Section within thirty (30) calendar days after providing each report to the Fraud Section to discuss the report, to be followed by a meeting between the Fraud Section, the Monitor, and the Defendant.

22. At least annually, and more frequently if appropriate, representatives from the Defendant and the Fraud Section will meet to discuss the monitorship and any suggestions,

comments, or improvements the Defendant may wish to discuss with or propose to the Fraud Section, including with respect to the scope or costs of the monitorship.

*Contemplated Confidentiality of Monitor's Reports*

23. The reports will likely include proprietary, financial, confidential, and competitive business information. Moreover, public disclosure of the reports could discourage cooperation, or impede pending or potential government investigations and thus undermine the objectives of the monitorship. For these reasons, among others, the reports and the contents thereof are intended to remain and shall remain non-public, except as otherwise agreed to by the parties in writing, or except to the extent that the Fraud Section determines in its sole discretion that disclosure would be in furtherance of the Fraud Section's discharge of its duties and responsibilities or is otherwise required by law.

  
Balfour Beatty Communities, LLC  
President and Class A Manager

**ATTACHMENT E**

**CERTIFICATION**

To: United States Department of Justice  
Criminal Division, Fraud Section  
Attention: Chief of the Fraud Section

Re: Plea Agreement Disclosure Certification

The undersigned certify, pursuant to Paragraph 11 of the Plea Agreement (“the Agreement”) filed on December 22, 2021 in the United States District Court for the District of Columbia, by and between the United States of America and Balfour Beatty Communities, LLC (the “Company”), that undersigned are aware of the Company’s disclosure obligations under Paragraph 10 of the Agreement, and that the Company has disclosed to the United States Department of Justice, Criminal Division, Fraud Section (the “Fraud Section”) any and all evidence or allegations of conduct required pursuant to Paragraph 10 of the Agreement, which includes evidence or allegations of any violation of the U.S. fraud laws committed by the Company’s employees and agents upon any domestic government agency (“Disclosable Information”). This obligation to disclose information extends to any and all Disclosable Information that has been identified through the Company’s compliance and controls program, whistleblower channel, internal audit reports, due diligence procedures, investigation process, or other processes. The undersigned further acknowledge and agree that the reporting requirements contained in Paragraph 10 and the representations contained in this certification constitute a significant and important component of the Agreement and of the Fraud Section’s determination whether the Company has satisfied its obligations under the Agreement.

The undersigned hereby certify that they are the President and Class A Manager of the Company, and the President of the Company, respectively, and that each has been duly authorized by the Company to sign this Certification on behalf of the Company.

This Certification shall constitute a material statement and representation by the undersigned and by, on behalf of, and for the benefit of, the Company to the executive branch of the United States for purposes of 18 U.S.C. § 1001, and such material statement and representation shall be deemed to have been made in the District of Columbia. This Certification shall also constitute a record, document, or tangible object in connection with a matter within the jurisdiction of a department and agency of the United States for purposes of 18 U.S.C. § 1519, and such record, document, or tangible object shall be deemed to have been made in the District of Columbia.

Date: \_\_\_\_\_

Name (Printed): Christopher Williams

Name (Signed): \_\_\_\_\_  
President and Class A Manager  
Balfour Beatty Communities, LLC

Date: \_\_\_\_\_

Name (Printed): Richard Taylor

Name (Signed): \_\_\_\_\_  
President  
Balfour Beatty Communities, LLC

## Press Release (RNS)

# Resolution reached between Balfour Beatty Communities, LLC and the U.S. Department of Justice

📅 22 December 2021    📍 US

Balfour Beatty plc (“Balfour Beatty” or the “Company”) announces that, as of 22 December 2021, its U.S. subsidiary Balfour Beatty Communities, LLC (“Communities”) has reached a resolution with the U.S. Department of Justice (“DOJ”). The resolution resolves the DOJ's criminal and civil investigations into specific performance incentive fees improperly claimed by Communities between 2013 and 2019 related to maintenance work at certain United States



**Antonia Walton**

Head of Corporate Communications

[antonia.walton@balf](mailto:antonia.walton@balf)

military housing installations. Under the terms of the resolution, Communities has pleaded guilty to one count of fraud and has agreed to the appointment of an independent compliance monitor for a three-year period. Communities cooperated fully with the DOJ in its investigation.

Communities will pay a total resolution amount of U.S. \$65.4 million (£49.0 million at the current exchange rate) comprising approximately \$33.6 million in penalties and \$31.8 million in restitution.

Balfour Beatty is committed to the highest standards of ethical conduct. The wrongdoing that took place is completely contrary to the way the Company expects its people to behave. The Company apologises for the actions of Communities to all its stakeholders. It has been made clear to all employees that breaches of policies, procedures, or law will not be tolerated. Communities welcomes the appointment of the independent compliance monitor and looks forward to a constructive engagement.

In 2019, the Company undertook an in-depth review of operations at Communities and, as a result, a series of changes have been made to prevent this type of misconduct from occurring in the future. These involved the restructuring of the Communities management team including the

additional appointment of several key executives and a Chief Compliance Officer for the U.S. In addition, Communities has enhanced its ethics and compliance training for all employees and has made significant improvements to the maintenance work order processing system, underpinned by enhanced controls and protocols that are aimed to prevent misuse and strengthen oversight.

Communities is committed to delivering a consistently high level of service to the military residents it serves and will continue to work closely and constructively with its military partners to achieve this.

The resolution brings the investigation of Communities to a close.

*This announcement contains inside information. The person who arranged for the release of this announcement on behalf of the Company is Tracey Wood, Group General Counsel and Company Secretary.*

**ENDS**

**Analyst/investor enquiries:**

Angus Barry

+44 (0)7966 281635

[angus.barry@balfourbeatty.com](mailto:angus.barry@balfourbeatty.com)

### Media enquiries:

Antonia Walton

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[antonia.walton@balfourbeatty.com](mailto:antonia.walton@balfourbeatty.com)

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## Balfour Beatty

Balfour Beatty plc is registered in England as a public limited company.

Registered No: 395826  
Registered Office: 5 Churchill Place, Canary Wharf, London, E14 5HU

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EX 3

EXHIBIT 10  
WIT: BBC 306X6  
DATE: 6-15-21  
TAURA J. VULCANO, RPR

Topic 39 - Leon Blondin Letters.pdf

DEFENDANT'S EXHIBIT  
5

Balfour Beatty  
Leon Blondin  
CEO  
3100 McKinnon Street  
Dallas, TX 75201

Dear Leon,

My name is Michael Bennett. Your company is building a luxury hotel for my family in Charleston, SC. I am writing this letter asking for your help. I would like to give you a little background on this project.

I bought this property in 1994 and rented the existing building to Charleston County to use as a library for a while. I started working on this project in 2003. Our great Mayor of Charleston of 40 years, Joe Riley, insisted that I build a beautiful, luxury hotel on this site. He worked with us throughout the project to help get it approved. Charleston is a historic city and getting approvals can be challenging. Having his support was instrumental in getting this project approved. This hotel took ten years to finally get approved and went all the way to the SC Supreme Court. We won at the Supreme Court and went to work.

We interviewed multiple contractors and selected Balfour Beatty. We broke ground in April 2015. The hotel was scheduled to open in August 2017. For a variety of reasons, we are still under construction with a finish date that is hard to predict. To me there appears to be a shortage of workers and a lack of leadership and management.

I need your help. We have tried to encourage the Balfour Beatty management team to bring more workers and leadership to the job. For whatever reason that has not happened. So, after much time, I have reached out to other construction companies for advice and help. I have a company that is willing to come in, bring senior management and try to help all of us get this hotel open. I think with this new fresh group and with the cooperation and help of Balfour Beatty we will get this hotel opened sooner.

This is my request from me, the owner, to you the CEO of Balfour Beatty to help resolve this problem. I ask that your team welcomes and cooperates with this construction company. They will help assist your team any way possible. Let us team up, cooperate and get the job done. This will result in the hotel opening sooner, which is good for us all.

This is the most important project of my life. It took 10 years to get this approval and when finished can be one of the finest hotels around and it will carry my family's name, Hotel Bennett, named after my mother and father. My mother is 96 and still works for me 5 days a week. My father shined shoes across the street from the hotel in the depression. This project is very important to me.

Please help me get this hotel opened and let's work together with this contractor who is willing to help.

My office number 843-722-8169 x241 and my personal cell is 843-870-7587.

Thank you very much,

Michael R. Bennett

**To:** Melissa Pense[melissa@bennetthospitality.com]  
**Cc:** Dean, Pat[pdean@balfourbeattyus.com]  
**From:** Blondin, Leon[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=FC87235D2217427DBCC2A17E5A418C74-LEON BLONDI]  
**Sent:** Thur 6/21/2018 12:26:58 PM (UTC)  
**Subject:** RE: Letter from Mike Bennett

Mr. Bennett:

Thank you for reaching out. Let me first reiterate Balfour Beatty's commitment to completing your hotel. I am aware of some of the challenges but I have full confidence that you have the correct team and leadership to complete this project. I have discussed this project in great length with Pat Dean and believe he has reached out to you to discuss what is needed to complete this project, I would encourage you to take him up on that offer working together towards that common goal of opening this hotel.

Sincerely,

**Leon Blondin**

Chief Executive Officer | Balfour Beatty  
O: (703) 460-9125 | C: 703-819-0353  
E: lblondin@balfourbeattyus.com | www.balfourbeattyus.com  
11325 Random Hills Road, Ste. 500, Fairfax, VA 22030

**Balfour Beatty**

**Build to Last**  
Lean. Expert. Trusted. Safe.

**From:** Melissa Pense <melissa@bennetthospitality.com>  
**Sent:** Friday, June 15, 2018 1:44 PM  
**To:** lblondin@bbius.com  
**Subject:** Letter from Mike Bennett

Hello Leon,

The attached letter is from Michael Bennett in Charleston, SC. Balfour Beatty is building his hotel.

<https://www.balfourbeattyus.com/our-teams/charleston/community-involvement>

Many thanks,  
Melissa

Melissa Pense on behalf of Michael Bennett  
Bennett Hospitality  
(843) 722-8169 ext. 241  
17 Lockwood Dr. Ste. 400  
Charleston, SC 29401  
[melissa@bennetthospitality.com](mailto:melissa@bennetthospitality.com)

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**R - 1034**

1 STATE OF SOUTH CAROLINA  
 2 IN THE COURT OF COMMON PLEAS  
 3 COUNTY OF CHARLESTON  
 4 FOR THE NINTH JUDICIAL CIRCUIT

5 BALFOUR BEATTY CONSTRUCTION, )  
 6 LLC, ) VOLUME ONE  
 7 ) Case No.  
 8 Plaintiff, ) 2019-CP-10-1108  
 9 )

10 -versus- )  
 11 )

12 LIBRARY ASSOCIATES, LLC; AND )  
 13 METROPOLITAN LIFE INSURANCE )  
 14 COMPANY, A NEW YORK CORPORATION )  
 15 )  
 16 Defendants.)

17 ----- )  
 18 LIBRARY ASSOCIATES, INC., )  
 19 )  
 20 Defendant/Third-Party Plaintiff, )  
 21 )

22 -versus- )  
 23 )

24 LITHKO CONTRACTING, LLC; GUY M. )  
 25 BEATY, INC.; BERNHARD MMC, LLC )  
 GULF STREAM CONSTRUCTION CO., )  
 INC; PRECISION WALLS, INC.; )  
 PALMETTO AUTOMATIC SPRINKLER )  
 COMPANY, INC.; ET AL, )  
 )  
 Third-Party Defendants. )

-----  
 18 Hearing before the Honorable Mikell R.  
 19 Scarborough, reported by Jennifer M. Huggins,  
 20 Court Reporter and Notary Public, at 10:00 a.m.  
 21 on September 13, 2021 at 100 Broad Street,  
 22 Courtroom 2A, Charleston, South Carolina.

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24

25

## 1 A P P E A R A N C E S

2

## ON BEHALF OF PLAINTIFFS:

3

PARKER POE ADAMS & BERNSTEIN, LLP  
4 BY: THOMAS HILDEBRAND, JR., ESQ.  
BY: ROBERT C. BYRD, ESQ.  
5 200 Meeting Street  
Suite 301  
6 Charleston, SC 29401  
(843) 727-6315  
7 Tomhildebrand@parkerpoe.com  
Bobbybyrd@parkerpoe.com

8

9

## ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

10

BUNDY MCDONALD, LLC  
11 BY: WALTER H. BUNDY, JR., ESQ.  
BY: M. BRENT MCDONALD, ESQ.  
12 1516 Old Trolley Road  
Second Floor  
13 Summerville, SC 29485  
(843) 492-0221  
14 Walter@bundymcdonald.com  
Brent@bundymcdonald.com

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## ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

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SMITH TERRY JOHNSON & WINDLE  
18 BY: DON R. TERRY, ESQ.  
150 Milestone Way  
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19 Greenville, SC 29615  
Dterry@smithterrylaw.com

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## ON BEHALF OF DEFENDANT OLD NORTH STATE &amp; LITHKO:

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SMITH TERRY JOHNSON & WINDLE  
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Awindle@smithterrylaw.com

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1

ON BEHALF OF DEFENDANT DAVID ALLEN COMPANY:

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KELLY LAW FIRM, LLC

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BY: RUSSELL BRITTON KELLY, ESQ.

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689 King Street

Charleston, SC 29403

Britt@kellylawsc.com

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ON BEHALF OF DEFENDANT METROPOLITAN LIFE:

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BUIST BYARS & TAYLOR, LLC

BY: G. HAMLIN O'KELLEY, ESQ.

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652 Coleman Boulevard

Suite 200

9

Mt. Pleasant, SC 29464

Hamlin.okelley@buistbyars.com

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1                   THE COURT: Good morning,  
2           everybody. All right. We have hit the day where  
3           we'll start the Balfour Beatty case. I've done a  
4           little reading this weekend getting ready for  
5           y'all, just so you know. I know y'all have been  
6           busy getting ready as well.

7                   I'm sorry I couldn't get y'all in until  
8           this morning to get rolling with the logistics.  
9           But anyway, I knew it would take a little while  
10          to get started on all that stuff.

11                  What I wanted to do, at the outset, I  
12          want to do introductions so that my court  
13          reporter knows everybody that's here and in what  
14          capacity they're here and go through a few  
15          logistical matters.

16                  I don't normally hold court in here, but  
17          it is much larger than my courtroom, as y'all  
18          have seen, so I can accommodate a lot more  
19          people. And we've tried to get through some of  
20          that as well. Acoustics are actually fairly good  
21          until a big truck sits down here on the corner,  
22          and then it will make the whole building shake.  
23          You may have noticed that already.

24                  So if we get to a point where nobody can  
25          hear or you just can't hear for some reason, just

1 raise your hand. We can just stop whatever we're  
2 doing. Okay?

3 MR. BUNDY: Your Honor, just sort  
4 of a heads up. I wear hearing aids. I don't  
5 hear as well anyway. And if somebody wears a  
6 mask, it's virtually impossible to hear them.

7 THE COURT: Right.

8 MR. BUNDY: So would it be possible  
9 for the witnesses, if they're far enough apart  
10 and they're vaccinated, they don't have to wear a  
11 mask?

12 THE COURT: Sure. Absolutely. And  
13 my rule is that, if you have been vaccinated and  
14 you're comfortable removing your mask, you're  
15 free to do that. Okay? Socially distance is  
16 helpful. I think the day that we had the summary  
17 judgment motions was the day I realized there was  
18 just no way I could accommodate this case in my  
19 courtroom.

20 I went to the Clerk of Court, and this  
21 was the next courtroom available. And in fact,  
22 the only other courtroom she had available for  
23 me. So anyway, but we are here and we can get  
24 started.

25 I am going to do the introductions. Let

1 me just tell you that, in preparation for today,  
2 I know that y'all have been busy. I spent some  
3 time this morning reviewing pretrial briefs and a  
4 little bit of legal research motions that we'll  
5 need to take up before you even start, but I went  
6 back and reviewed the pleadings in the case.

7 I went back and reread the contract in  
8 the case. I went back and reviewed the  
9 transcripts from the hearings that we've had in  
10 the case just so I could familiarize myself with  
11 what we're doing here today.

12 One of the things, this case starts out  
13 as a breach of contract case. It's got some  
14 other issues that are going to come up from time  
15 to time. But I think in its essence, it's a  
16 breach of contract case.

17 So one of the things I'm going to ask  
18 that you do when you make a reference to the  
19 contract and how it's been breached or not  
20 breached that you -- and to the extent you can,  
21 cite me to the specific clause in the agreement  
22 so that I can go to it.

23 I've got a copy here. It's all marked  
24 up. I'm ready to roll. To the extent it's not,  
25 that's fine with me, too. But it just helps me

1 to get organized on what my thoughts are and  
2 where we're going in this case. So I think  
3 that's pretty much what I wanted to cover with  
4 y'all.

5 MR. BUNDY: Your Honor, I hate to  
6 interrupt but since you're on the issue of the  
7 contract.

8 THE COURT: Sure.

9 MR. BUNDY: It's our position that  
10 the plaintiff has the burden of proof, obviously.  
11 And the plaintiff brings a breach of contract  
12 action as a foundational matter, the very essence  
13 of how we ended up here, how these parties had  
14 any relationship with each other.

15 It's not a car wreck today. It required  
16 them to put in the entire contract, not portions  
17 that they deem relevant, and I've had -- I  
18 brought this up two weeks ago, I believe.

19 THE COURT: Right.

20 MR. BUNDY: Since that time,  
21 Mr. Hildebrand has informed me he's not going to  
22 put in the whole contract. He's only going to  
23 put in what he thinks is relevant.

24 And I just wanted to bring that to your  
25 attention because I believe that if that is

1       allowed, the case will be a mistrial. I'm  
2       probably going to have to move for a mistrial  
3       because there's no way to cross-examine  
4       witnesses.

5               There's no way to do anything if the  
6       contract, the whole contract is not into  
7       evidence. And so I just wanted to let you know,  
8       Your Honor. That's a very serious matter from  
9       our standpoint, and I think it's foundational for  
10      this entire case.

11              And if you don't have the whole contract  
12      in front of you, there's no way to rule. And all  
13      the testimony that's going to go in when the  
14      whole contract is not in, trying to put the  
15      burden back on me to put the rest of the contract  
16      in.

17              I have no burden in this portion of the  
18      case. And in fact, if, you know, for whatever  
19      reason they decide not to put in the contract,  
20      eventually, I'm going to have to put it in in my  
21      case in chief. I don't intend to try a case with  
22      half the contract. Okay? So at any rate, Your  
23      Honor, that's our position.

24              THE COURT: I'm with you. All  
25      right. Just so I'm clear on that issue, so what

1 I have been looking at is A133, which clearly  
2 references the A201. I think they were  
3 referenced in some other documents in the --

4 MR. BUNDY: Well, Your Honor, the  
5 contract itself says what the contract documents  
6 are.

7 THE COURT: Right.

8 MR. BUNDY: And that includes  
9 change orders, modifications.

10 THE COURT: Okay.

11 MR. BUNDY: I mean, a change order  
12 is nothing but a contract modification.

13 And it becomes a contract document known  
14 on the same scale as -- in fact, a modification  
15 is at the top of the hierarchy in these documents  
16 because that's something that was agreed to after  
17 the original contract and overrides the rest of  
18 the document to the extent it needs to be  
19 overwritten.

20 So you've got that. You've got the  
21 guaranteed maximum sum contract. You've got the  
22 plans, which are incorporated by reference.  
23 You've got the specifications, which are  
24 incorporated by reference. I don't know how you  
25 try a contract case, particularly when they're

1       alleging their design errors, and they don't put  
2       the plans in.

3               There has not been a single reference in  
4       this case to one sheet of document -- one sheet  
5       of plans since we started this case by the -- by  
6       the general contractor.

7               THE COURT:   Okay.   All right.  
8       Well, I'm not going to tell Mr. Hildebrand how to  
9       try his case, but I'm happy to hear from you on  
10      that, Mr. Hildebrand.

11              MR. HILDEBRAND:   Yes, sir, thank  
12      you.   Your Honor, the rule is that a party  
13      introduces the portion of the contract that's  
14      relevant to the case, and there are a lot of  
15      documents that are utterly irrelevant to the  
16      case.

17              So what -- what happened here was that  
18      Mr. Bundy suggested that we meet and see if we  
19      could agree on what the contract is, and I was  
20      happy to do that.   And I said, well, Bill -- he  
21      came over to my office, and I said, let's use the  
22      contract that you filed as a counterclaim in this  
23      very case.

24              And you said, attached is the contract  
25      that we want the Court to declare that this is

1 the contract, and we ask the Court to declare  
2 that some supplementary conditions are not a part  
3 of it.

4 So I said, just if we can agree on that,  
5 that's the basis, and all of the pertinent parts,  
6 in our view, are contained in that. Now, there  
7 are drawings and we've got -- I don't know if  
8 we've got them here yet because they're so dang  
9 big. The drawings, Your Honor, are -- there are  
10 thousand of pages.

11 But they're irrelevant. I mean, our  
12 experts are talking about various parts of them,  
13 but the last thing that you want is a stack of a  
14 whole bunch of documents that are utterly  
15 irrelevant. The same as the specifications, Your  
16 Honor. I sent Mr. -- if I may approach the  
17 bench.

18 THE COURT: Sure.

19 MR. HILDEBRAND: I sent Mr. Bundy a  
20 letter, and I said, Bill, do you really want to  
21 introduce all the -- those are the -- that's the  
22 specifications.

23 THE COURT: Okay.

24 MR. HILDEBRAND: But they're not --  
25 and I've got a copy of them here, and I've got

1 schedules. But I just don't see any reason, if  
2 they're not relevant.

3 And the way I've always tried a case is  
4 that, I put in what I -- like you alluded to,  
5 Your Honor, I put in what I think is relevant,  
6 and then if the other side thinks that another  
7 portion is relevant, then they can say, well, we  
8 contend this is a part of the contract and here  
9 it is. Then that's how it would proceed.

10 THE COURT: Is there a dispute over  
11 what is or is not part of the contract from that  
12 standpoint?

13 MR. BUNDY: But that's the whole  
14 point. He won't put the whole contract in. He  
15 won't tell me what he thinks the contract is.

16 THE COURT: Okay.

17 MR. BUNDY: This is a mousetrap if  
18 I've ever seen one.

19 THE COURT: All right.

20 MR. BUNDY: Two, what rule is he  
21 talking about? What rule? I've heard no  
22 reference to a number of a rule or a case which  
23 says you try a contract case with the portions of  
24 the contract that the party with the burden of  
25 proof decides are relevant. It makes no sense.

1           Every single question, if he asked his  
2           witness -- if this case goes forward without the  
3           whole contract in it, I'm going to object. I'm  
4           going to take the position it's irrelevant, okay,  
5           immaterial and confusing.

6           If you use part of the contract and go  
7           forward with this case, I've got to come back and  
8           put it in and start all over again because how  
9           could I ask a question of somebody about a part  
10          of the contract that's not in it.

11          The notion -- they signed a \$50 million  
12          contract to build a hotel, and they're surprised  
13          that there are a lot of pages in the drawings.  
14          They're surprised that they take pictures as if  
15          that's a surprise to them.

16          Yes, it's all relevant. The notion that  
17          in a contract case, the lawyer stands up here and  
18          says that the specifications and the drawings are  
19          irrelevant. If their client testifies to that,  
20          they lose.

21                   THE COURT: Okay. I'm with you.  
22           All right. So we're going to start in a second.  
23           Let me do -- I just need to know who is here for  
24           the record. I'm going to have Ms. Huggins make  
25           sure y'all do introductions.

1 I'm going to start at the plaintiff's  
2 table. Y'all can introduce yourselves. I will  
3 go to the defendant, Library's table, and then I  
4 will get to -- which I can see some  
5 subcontractors and their counsel here; so I'll  
6 have them start from there.

7 Mr. Byrd?

8 MR. BYRD: Your Honor, Bobby Byrd  
9 for Balfour Beatty.

10 MR. HEUER: Morning, Your Honor,  
11 John Heuer. I'm the chief legal officer for  
12 Balfour Beatty Construction.

13 THE COURT: All right. Mr. Heuer.

14 MR. HILDEBRAND: Good morning, Your  
15 Honor. Tom Hildebrand for Balfour Beatty.

16 THE COURT: Very good. All right.  
17 Mr. McDonald?

18 MR. MCDONALD: Brent McDonald for  
19 Library Associates. Good morning.

20 MR. BUNDY: Walter Bundy for  
21 Library Associates.

22 THE COURT: Mr. Bundy. All right.  
23 Let me go back here.

24 Mr. O'Kelley, I see you sitting front  
25 and center.

1                   MR. O'KELLEY: Thank you, Your  
2 Honor. Hamlin O'Kelley for Metropolitan Life  
3 Insurance Company.

4                   THE COURT: Very good.

5                   MR. WINDLE: Steele Bryce Windle,  
6 III, for Lithko, Old North State Masonry together  
7 with my partner, Don Terry.

8                   THE COURT: All right. Mr. Terry,  
9 good morning. Very good. Any other counsel  
10 making an appearance this morning?

11                   MR. TERRY: Your Honor, Don Terry  
12 also here for Watson Electrical Construction.

13                   THE COURT: And Watson Electrical.  
14 Got it.

15                   MR. TERRY: Your Honor, I have a  
16 motion in limine related to Library's case  
17 against subs and Balfour Beatty.

18                   THE COURT: Okay.

19                   MR. TERRY: I don't -- in theory, I  
20 think you would normally handle that before the  
21 trial starts. I don't know that you're  
22 bifurcating it and want to handle that once they  
23 begin their case or right before they begin their  
24 case.

25                   THE COURT: All right. I will take

1           that up in just a minute.

2                       MR. TERRY: Thank you, Your Honor.

3                       MR. KELLY: Good Morning, Your  
4 Honor. Britt Kelly here on behalf of David Allen  
5 Company.

6                       THE COURT: Very good. Thank you,  
7 Mr. Kelly.

8                       MR. KELLY: Thank you.

9                       THE COURT: All right. That's my  
10 sort of first order business. Do we have any  
11 motions, pretrial motions, motion in limine?

12                      Mr. Terry, let me turn to you first and  
13 foremost. You'd started. I think you filed  
14 something last week if I'm not mistaken or sent a  
15 letter again. I can't remember which.

16                      MR. TERRY: Yes, Your Honor, I  
17 filed it and sent it to you. Your Honor, if I  
18 may approach. I'm going to go ahead and hand  
19 this to you.

20                      THE COURT: Sure. Thank you, sir.

21                      MR. TERRY: Your Honor, again, I'm  
22 Don Terry. This motion is on behalf of Watson  
23 Electrical Construction. Your Honor, Library  
24 Associates has made a civil conspiracy claim  
25 against Watson Electrical, Balfour Beatty and

1 others that presumably will begin trial next  
2 week.

3 It's the only remaining claim in this  
4 case by Library against Watson Electrical  
5 Construction, and to prevail on a civil  
6 conspiracy claim, Your Honor, we have a new case.  
7 Paradis versus Charleston County School District.  
8 Essentially Watson has to -- or not essentially.

9 Library has to prove that Watson,  
10 together with another person, engaged in an --  
11 not illegal.

12 THE COURT: An unlawful act or an  
13 act that --

14 MR. TERRY: Unlawful act or lawful  
15 act by unlawful means. I was getting the legal  
16 and unlawful mixed up, Your Honor. I appreciate  
17 that.

18 And additionally, they must prove  
19 another act in furtherance of that agreement and  
20 damages approximately resulting from that. And,  
21 Your Honor, today, what my motion is about is the  
22 damages.

23 THE COURT: Okay.

24 MR. TERRY: Your Honor, Watson  
25 noticed the rule 30(b)(6) deposition of Library

1 Associates, and then we received a request from  
2 Library Associates for more time either because  
3 they weren't available or needed more time to  
4 look at the issues including the motion or in the  
5 notice of deposition. That deposition was taken  
6 on or about April 28th, 2021.

7 Now, at the time the deposition was  
8 taken, the discovery deadline in this case was  
9 May 15th, so 17 days later. The deadline for  
10 designating experts in their opinions had already  
11 passed at that point in time, and we had taken  
12 the depositions of Library's expert witnesses.

13 In the notice of deposition, there were  
14 a lot of topics, Your Honor, but the topics that  
15 are relevant for this motion are, all facts  
16 Library relies on in support of its claims  
17 against Watson; damages that Library incurred or  
18 claims to have incurred relating to the project;  
19 damages incurred by Library as a result of any  
20 act or omission by Watson; and Library's expert  
21 opinions, the factual basis for each opinion, the  
22 supporting documents for each opinion, and  
23 whether Library agreed with each opinion.

24 Library did not object to any of the  
25 topics or ask -- seek a motion for protective

1 order as it relates to those topics. At the  
2 deposition, Watson -- or I asked questions on  
3 behalf of Watson as it relates to each of the  
4 topics. And at the deposition, Ms. Kim Brown was  
5 designated as the designee for Library Associates  
6 to answer questions about each topic.

7 I asked her, were there -- are there any  
8 topics that you're not designated to answer for  
9 us, and her answer was no. At the deposition,  
10 Library Associates couldn't seem to make up its  
11 mind whether it was seeking damages against  
12 Watson or not.

13 During the deposition, Ms. Brown  
14 testified, and I've included all the sections of  
15 the deposition in the -- filed in with the motion  
16 and I've included it in the packets that I gave  
17 you, where she said, we're not seeking damages  
18 against Watson; we're seeking damages against  
19 Balfour Beatty. That's consistent with her  
20 personal deposition, Your Honor, as well.

21 At the deposition, Ms. Brown repeatedly  
22 testified that she does not know the damages that  
23 Library Associates is seeking against Watson.  
24 Now, eventually she got around to talking about  
25 liquidating damages and her -- her belief is that

1 liquidated damages in the -- in the contract with  
2 Balfour and Library, there's a cap on liquidated  
3 damages.

4 And her argument is -- at the deposition  
5 is that that cap should be lifted as a result of  
6 civil conspiracy, and therefore she was able to  
7 articulate these liquidated damages. But as  
8 you'll see in the transcript that I submitted,  
9 she testified that all liquidated damages were  
10 caused by delays to the project.

11 She testified that all of the -- all of  
12 these liquidated damages would have been incurred  
13 had Watson Electrical Construction not entered  
14 into the joint prosecution event and tolling  
15 agreement, which she also testified is the  
16 agreement which Watson entered into that creates  
17 the civil conspiracy.

18 So again, we're back to a point where  
19 the only damages she's able to testify about are  
20 these liquidated -- this extension of liquidated  
21 damages that arise out of delay, not out of this  
22 alleged conspiracy.

23 THE COURT: Contractual, in other  
24 words, right?

25 MR. TERRY: That's right, Your

1 Honor.

2 THE COURT: All right.

3 MR. TERRY: So as I continued to  
4 ask her questions about it, she says, well, we've  
5 hired an expert that hasn't told me the damages  
6 yet that they're seeking against Watson. Have  
7 you asked the expert in preparation for this  
8 deposition if you're -- what damages you're  
9 seeking against Watson? No.

10 Is there any information that they --  
11 that Cotton -- she says Cotton and Company, which  
12 is the company that's going to provide these  
13 damages. Is there any information that Cotton  
14 and Company has asked you for to help understand  
15 your damages with Watson? No. Is there anything  
16 you're withholding, so they can understand your  
17 damages? No.

18 And is Cotton and Company even -- has  
19 Cotton and Company even been retained to help  
20 assert the -- or help you to provide testimony in  
21 furtherance of your civil conspiracy claim? No.

22 Now, we'd already taken the deposition  
23 of Cotton and Company, Your Honor. And they  
24 weren't able to testify as to damages solely  
25 related to Watson or the civil conspiracy as

1 well.

2 And so, Your Honor, Watson asks that you  
3 exclude evidence of damages by Library Associates  
4 against Watson because at their -- one, Library  
5 Associates is bound by the 30(b)(6) testimony of  
6 their witness; two, it will be severely  
7 prejudicial to Watson to allow -- for this Court  
8 to allow Library Associates to enter evidence of  
9 damages.

10 We have no ability to know what the  
11 damages are, but I asked them to explain the  
12 category of damages they're seeking against  
13 Watson as well, other than just liquidated  
14 damages. She mentioned some categories but  
15 wasn't able to give me a number associated with  
16 any of them.

17 So Watson can't investigate the damages.  
18 We haven't had the ability to see what they are.  
19 We have no ability to rebut those damages. So,  
20 Your Honor, we'd ask that you exclude Library  
21 Associates from entering any evidence of damages  
22 as it relates to Watson Electrical Construction.  
23 Thank you, Your Honor.

24 THE COURT: All right. Thank you,  
25 Mr. Terry.

1                   Mr. Bundy?

2                   MR. TERRY: One more thing. I have  
3 two other outstanding motions. I would refer to  
4 the motions in limine, but we can take those up  
5 later.

6                   THE COURT: Okay. All right. All  
7 right. Thank you. Let's go ahead and address  
8 this one.

9                   MR. BUNDY: Well, first of all, I'm  
10 a little confused because I haven't offered  
11 anything into evidence.

12                  THE COURT: Right.

13                  MR. BUNDY: My trial hasn't even  
14 started. No foundation has been laid, and yet  
15 here I am prevented from putting in damages  
16 already. I can't even go into the Court. Okay.  
17 Well, this argument is specious and stems from  
18 some basic misunderstandings of discovery.

19                  THE COURT: All right.

20                  MR. BUNDY: First off, there is no  
21 difference. Read the rules regarding depositions  
22 and the use of depositions. I'll defile anybody  
23 to find rule that a 30(b)(6) deposition is  
24 anything other than a deposition. You can use it  
25 just like any other.

1           In fact, my learned counsel may not  
2           agree with Eleventh Circuit, but in -- let's  
3           see -- AI credit Corp v. Legion Insurance Co.,  
4           265 F. 3rd 630, Seventh Circuit 2001. Testimony  
5           given in a rule 30(b)(6) deposition is evidence,  
6           which like any other deposition testimony, can be  
7           contradicted and used for impeachment purposes.

8           Any witness whose deposition is taken  
9           can come in and change their testimony.  
10          Absolutely entitled to do so, but they're going  
11          to be subject to cross-examination if somebody  
12          wants to know why. So that's completely out of  
13          the question. It doesn't make any sense.

14          The other problem with the 30(b)(6)  
15          deposition that they discussed is that deposition  
16          was taken before we got any damage documents  
17          from -- had got any of the documents from Balfour  
18          Beatty, wherein we discovered the conspiracy.

19          We discovered more of the conspiracy,  
20          the acts of conspiracy, the damages caused by the  
21          conspiracy. It's a little bit -- I'm still  
22          confused because I don't understand. I assume  
23          that Watson's counsel reads discovery responses  
24          when they come in. We got a discovery request  
25          from Balfour Beatty.

1           We answered it on January 29, 2021,  
2           within the discovery deadline after the  
3           deposition of the 30(b)(6) witness, which they  
4           could have retaken, I guess, if they had wanted  
5           to. But I don't know. I can't figure out what  
6           they're going to do.

7           The question: State with specificity  
8           any and all damages, general, consequential, and  
9           special. You allege you have incurred, as a  
10          result of Balfour Beatty's alleged breach of  
11          contract, accompanied by fraudulent act,  
12          violation of South Carolina Unfair Trade  
13          Practices and civil conspiracy.

14          Now, Watson is in this conspiracy. They  
15          now know that their coconspirator has asked,  
16          what's the damages? Apparently they didn't read  
17          it. But here is what we told them.

18          Library Associates has sustained and  
19          continues to sustain the following damages:  
20          Liquidated damages between (inaudible) lost  
21          profits and use; damages of the amount calculated  
22          in the report of Cotton and Cotton. Additional  
23          loan interest in the amount of 2 million 69.  
24          Attorneys fees and costs and expert costs, travel  
25          damages and punitive damages.

1           So, you know, what we have here is -- it  
2           sounds like a dispositive motion. Really, what  
3           he is trying to do is move for summary judgment  
4           under the guise of motion in limine that doesn't  
5           even have any basis. So, Your Honor, we  
6           respectfully oppose this motion. Thank you.

7           THE COURT: Okay.

8           MR. TERRY: All right. Your Honor,  
9           the -- a couple responses to what Mr. Bundy just  
10          said. I don't have those interrogatory responses  
11          sitting in front of me, but he said those are  
12          January 29th, 2021. This deposition was taken on  
13          April 28th, 2021, after the interrogatory  
14          responses.

15          Those interrogatory responses are to  
16          Balfour Beatty, not to Watson. Second or next,  
17          the 30(b)(6) testimony of Balfour Beatty is --  
18          I'm sorry, of Library Associates is binding on  
19          Library Associates.

20          It's not a fact deposition. They don't  
21          get to come in to Court and say, we've changed  
22          our mind. We have different knowledge today than  
23          we did. They had an obligation to go find out  
24          what damages they had that were caused by the act  
25          or omission of Watson. And they chose to come in

1 and say, we don't know.

2 So, Your Honor, we respectfully request  
3 that you grant our motion. Thank you, Your  
4 Honor.

5 THE COURT: All right. Thank you.  
6 All right. Well, motions in limine generally are  
7 to set the status of the case. I'm not so sure  
8 that they're ultimately binding because as the  
9 facts develop in the case, they may well  
10 materialize differently.

11 We're yet to get into defendant, Library  
12 Associates' case. That would be in their case in  
13 chief, which hopefully is going to take up next  
14 week.

15 So I'm inclined, on that basis, to deny  
16 the motion at this time and allow them to go  
17 forward with their case is what I'm going to do.  
18 So I'm going to deny the motion in limine at this  
19 time.

20 Any other motions that we need to take  
21 up before we start? Mr. Hildebrand, shaking your  
22 head no.

23 MR. HILDEBRAND: I don't think so,  
24 Your Honor.

25 THE COURT: Very good. Mr. Bundy?

1 MR. BUNDY: I have just one.

2 THE COURT: Sure.

3 MR. BUNDY: Your Honor, this case  
4 started a couple of years ago. The parties  
5 agreed to a consent schedule. You changed that  
6 order, but you've only changed the dates.

7 You never changed the terms of the  
8 order, which are clear, unambiguous, and were  
9 relied upon by Library Associates, when they  
10 consented to the order, that they would be  
11 enforced, according to the plain terms of the  
12 order. That's what we relied on.

13 And if the order is not enforced or if I  
14 had known when I signed the -- when I agreed to  
15 consent to this order, that there was a chance it  
16 was not going to be enforced, although it was  
17 clear on the space, I would not have agreed -- I  
18 would not have consented because you can be  
19 prejudiced greatly if somebody wants to  
20 manipulate the game.

21 Okay. So how does -- what does that  
22 mean for us here today? Well, the mechanic's  
23 lien in this case was filed in 2019, and the  
24 statement of account on the mechanic's lien was  
25 \$12.9 million. And we took the deposition of --

1 30(b)(6) deposition of Balfour Beatty on June  
2 15th, 2021.

3 Now, that's two years, the day they  
4 filed the lien. That's 20-something months into  
5 discovery. That's 60 days before discovery is  
6 going to end. I waited to take that deposition  
7 on purpose. I don't take deposition early in a  
8 case. It's a waste of time, particularly on  
9 damages because damages change all throughout a  
10 case.

11 But damages are supposed to quit  
12 changing when the discovery is open. That's what  
13 I assumed when I consented my -- when I gave my  
14 client legal advice to consent the scheduling  
15 order. I relied on the terms of the order being  
16 clearly enforced.

17 In June of 2021, I took the 30(b)(6)  
18 deposition of Library Associates. This is at  
19 page -- it's page 96, line one. Question --  
20 let's start here. Okay. Okay.

21 Question: So what's there as it relates  
22 to your claim, it is the responsibility of the  
23 designer to make your claim for you? Answer:  
24 I've already made my claim. I've submitted  
25 everything to you.

1           Question: But in that claim, where is  
2           the list of applicable laws, ordinances, code,  
3           and regulations that the design failed to conform  
4           with? A, everything is outlined in the claim  
5           that was submitted.

6           So if it's somewhere in this claim,  
7           there is a list of these things? Answer:  
8           Everything is defined in our claim. Question:  
9           If it's not in there, then if something is not  
10          listed in there, then we don't have to worry  
11          about it if it's not listed, right? Objection.  
12          Answer: Everything is outlined in the claim.

13          Question: So everything is in the  
14          claim. We've got all we need in order to  
15          evaluate your claim? Objection to the form.  
16          Question: Is that correct? Library  
17          Associates -- answer: Can you please re-ask the  
18          question?

19          Question: Library Associates in this  
20          claim, this four volume set, has been provided  
21          everything they need in order to evaluate your  
22          claim. Answer: We have submitted a complete  
23          claim with all of our documents.

24          Now, that complete claim is up here.  
25          That's what was made. That's the claim that was

1 submitted to the architect. Now, before the  
2 architect could rule on the claim, they violated  
3 the condition, preceded and went ahead and filed  
4 a lawsuit. But that's not an issue I want to  
5 talk about now.

6 MR. HILDEBRAND: Your Honor,  
7 that -- may I interpret for a second?

8 MR. BUNDY: Now, Your Honor, on --

9 THE COURT: Just one sec. Hold on  
10 a second. Let me just -- Mr. Hildebrand, go  
11 ahead. Just one second.

12 MR. HILDEBRAND: Yes, sir. There's  
13 been no motion filed here. We had a hearing  
14 earlier before the Court for pretrial motions.  
15 I've got no motion. This is an ambush for  
16 Mr. Bundy to come in here this morning and start  
17 arguing about the evidence, and that's what it  
18 is.

19 Mr. Bundy: No, it's not.

20 MR. HILDEBRAND: It's an argument  
21 about --

22 MR. BUNDY: I'd like to finish it,  
23 and I can explain it.

24 THE COURT: All right. Let him  
25 finish. Go ahead, go ahead.

1                   MR. BUNDY: Thank you. Okay. So  
2 we have the lien, and we had the claim. We took  
3 the 30(b)(6).

4                   Friday, on the 10th day of September  
5 2021, after discovery had been over for at least  
6 30 days, after we had taken the 30(b)(6)  
7 deposition two months earlier, we get an amended  
8 claim which is 10-page report with some backup.

9                   All new numbers, all new stuff, right?  
10 First time they had ever actually explained  
11 anything because, as you know, the statement of  
12 account doesn't tell you anything. Everything is  
13 in here. We've been through this over and over  
14 and over again. They reduced the claim by \$1.1  
15 million. That's what they did first. That was  
16 on Friday.

17                   Now, we've been working on this case for  
18 two years. I've got accountants. I've got  
19 people I've got to talk to. It's now Friday  
20 before a Monday trial, and I get a \$1.2 million  
21 change in their claim with documents we've never  
22 seen.

23                   So we start looking at those, and before  
24 we can even get through those on Sunday at 4  
25 o'clock, not even 24 hours ago, they submit

1 another claim. And now we're back up to a new  
2 number of \$13-some-odd million above the original  
3 lien claim.

4 This isn't a question of evidence. This  
5 isn't a question of arguing any motions about  
6 anything. I'm asking you to enforce the  
7 scheduling order and prohibit these people from  
8 introducing these documents or using this  
9 information because it's unfair. It's highly  
10 prejudicial. It violates the clear terms of your  
11 order, and it puts us at an extreme disadvantage.

12 If you were even to say to me, well,  
13 Bundy, I'll tell you what I'll do, I'll give you  
14 a week to figure it out. I've then got to stop  
15 my -- who's paying for all of this? Mike Bennett  
16 is going to pay a couple hundred thousand  
17 dollars? No.

18 They've had two years. We've had them  
19 audited. They wouldn't let us have an audit.  
20 Those things should not be admitted into  
21 evidence. If they are, we would be prejudiced to  
22 a point where I would have to move for a  
23 mistrial. Thank you.

24 THE COURT: All right.

25 Mr. Hildebrand?

1                   MR. HILDEBRAND: Yes, sir. You'll  
2 recall that last week -- my first response is,  
3 this is an ambush, but I'm happy to respond to  
4 it.

5                   And my response, first off is, that I  
6 remember -- heard Mr. Bundy say just a few  
7 minutes ago that a 30(b)(6) deposition is taken,  
8 and then he can cross-examine somebody on the  
9 30(b)(6) deposition and so forth. So we haven't  
10 even put in our evidence, and if he wants to  
11 cross-examine our witnesses, then he can do so.

12                   My second point is that, what we have  
13 done is -- there's not a provision in the order  
14 that says, you have to identify all of your  
15 damages by a certain time period.

16                   What we did was simply last week -- you  
17 will recall that Mr. Bundy said, Your Honor, we  
18 want all of -- we think that some of the numbers  
19 have changed, and we want Mr. Hildebrand -- we  
20 want you to compel Mr. Hildebrand to bring in  
21 additional evidence of some of the -- some of the  
22 damages that have increased since the start of  
23 the case and such.

24                   And I -- he actually subpoenaed me. I  
25 got a subpoena on Friday personally saying,

1 Mr. Hildebrand, you need to bring this in to the  
2 Court.

3 So what I did in an attempt to be  
4 accommodating and to try to narrow the issues --  
5 remember, he said, Your Honor, you may want to  
6 call the Court's witness or something. And I  
7 said, you know, I think that we can probably  
8 figure out -- my understanding was, he was trying  
9 to figure out where things stood with the various  
10 subcontractors who had settled, and let's see if  
11 we can agree on that.

12 So what we did was, I gave him the  
13 information that he requested, that he subpoenaed  
14 for me today. I gave it to him last week. I  
15 said, here's the information so that you can have  
16 your person distill it and come in and tell the  
17 Court.

18 And, again, we might be able to come to  
19 an agreement on exactly where we stand. I also,  
20 as an accommodation, sent Mr. Bundy just a  
21 PowerPoint of a damages compilation that our  
22 in-house person will testify.

23 And he is the one who participated in  
24 the audit that the Court ordered. So what  
25 that -- what that person has done is simply

1       stated, here's -- here's the damages, which we  
2       have claimed really from the get-go, based on the  
3       audit and based on the damages and the costs that  
4       we have incurred.

5               But he also said that, we are claiming  
6       interest. So we have computed the interest up  
7       until last Friday. That changes some of the  
8       figures. There have been some subcontractors who  
9       have settled out. That has changed some of the  
10      figures.

11             So, yeah, it has changed a little bit,  
12      but the basic claim has not changed. And I would  
13      refer the Court to an interrogatory response.  
14      Mr. Bundy sent me an interrogatory dated -- to  
15      the plaintiff's amended -- the Library Associates  
16      second set of interrogatories.

17             And I served my response to those on  
18      September 24, 2019, and I've got -- I just have  
19      one copy because I didn't know that this was  
20      coming up. But I will be delighted to hand this  
21      to you, Your Honor. Mr. Bundy said, okay, y'all  
22      filed an amended lien of \$12 million. What is  
23      the basis for it?

24             And I said, well, here is the basis for  
25      it. We've got a breach of contract. We've got

1 additional general conditions. We've got general  
2 trade cost overages. It's very detailed about  
3 what our damages are. So we told him two years  
4 ago what the damages are.

5 And have they been -- changed a little  
6 bit because of some recent developments? Yes.  
7 We provided them that -- those documents,  
8 certainly. Our witness will be here and can  
9 testify about them, and he can cross-examine him.

10 He can provide the information to his  
11 expert witness who doesn't -- she's pretty smart.  
12 She has already done a full audit of this. I  
13 think she can develop her opinions very quickly.  
14 So I'm a little bit flummoxed as to exactly what  
15 the objection is.

16 THE COURT: All right.

17 MR. HILDEBRAND: And particularly  
18 in light of Mr. Bundy's comment that -- we  
19 haven't even started the case, and our fellow  
20 would be able to testify about -- a 30(b)(6)  
21 deposition deponent would be able to --

22 THE COURT: All right. Well,  
23 here's my question. Has the underlying data all  
24 been provided?

25 MR. HILDEBRAND: It has, Your

1 Honor.

2 THE COURT: And then clearly  
3 interest is going to change on a daily basis, and  
4 then we had this -- whether they were settlements  
5 or whether or not the Court issued orders on a  
6 breach of contract, it may have impacted what the  
7 numbers would be.

8 But my concern, of course, is the data  
9 because I will tell you, if it hadn't been  
10 produced in discovery, it ain't going to come  
11 into evidence. That's one I thing I can promise  
12 you.

13 MR. BUNDY: Let me -- may I say  
14 something? One, I'm a little flummoxed because  
15 of the misrepresentations you've been hearing.  
16 We've -- that hearing was transcribed. We can go  
17 and read what I said.

18 What I said was, we need to update the  
19 audit. I have an auditor that has got nothing to  
20 do with damages. It's got nothing to do with  
21 discovery. It's got nothing to do with anything  
22 except the audit, which ultimately has to be  
23 done.

24 I sent -- you said, get with  
25 Mr. Hildebrand. I got with my client, the

1 expert. I sent him a letter and said, we need  
2 these four things. I think I sent them to you.  
3 I think I sent it on to your clerk and said, we  
4 need these four things.

5 Mr. Hildebrand sent me back one of the  
6 four saying he was not going to produce it for  
7 the audit, not going to do. And that's another  
8 issue. I issued a subpoena the next day for  
9 trial documents, and attached to that subpoena is  
10 a subpoena wanting those documents for the audit  
11 delivered in this courtroom today.

12 The subpoena has been issued. There has  
13 been no motion to set it aside or vacate it. And  
14 I want to know where my documents are because I  
15 got a subpoena. Okay? But that's only part of  
16 it.

17 The truth of the matter is, this -- this  
18 notion about the 30(b)(6) has got nothing to do  
19 with any of this. It has got nothing to do with  
20 any of this. What we have is a discovery  
21 violation. The document -- the fact -- I mean,  
22 you answered the interrogatory.

23 You say, I've got breach of contract  
24 damages for loss of productivity. A bucket. But  
25 I have no water in the bucket. I'm entitled to

1 go see what he's got to back it up. And every  
2 time I asked, all I got was, it's in the claim.

3 Now, clearly, under the 30(b)(6)  
4 deposition rules, if he wants to put a witness up  
5 here to say, no, I was lying. Okay? It's not in  
6 the claim.

7 We were -- we managed to put it all  
8 together during that period of time where there  
9 was no discovery going on, so you wouldn't be  
10 able to ask any questions, and I could spring  
11 this on you on the last day right before trial.  
12 I'm not talking about his damage claim. He put  
13 in whatever he wants to in as long as I seen it.

14 THE COURT: Right.

15 Mr. Bundy: And he needs to prove  
16 that I've seen it, and he needs to prove I've  
17 seen it before discovery ends or give you an  
18 explanation.

19 And there's no explanation that would be  
20 reasonable that would allow a plaintiff, who's  
21 had a case for two years, a major construction  
22 company can't come up with their damages. Thank  
23 you, Your Honor.

24 THE COURT: All right. Very good.

25 MR. HILDEBRAND: Your Honor, I have

1 produced it.

2 THE COURT: I'm going to let you  
3 put your case up, and he is going to object. If  
4 he objects, then we'll have to establish that  
5 it's been done.

6 All right. Any other pretrial motions?  
7 Mr. Terry, you indicated you had some.

8 MR. BUNDY: The subpoena, Judge.  
9 Can I get a response to my subpoena?

10 THE COURT: As far as the documents  
11 that you're requesting?

12 MR. BUNDY: Yes. Where are they?

13 MR. HILDEBRAND: Then I'll make a  
14 motion to quash here in open court. Your Honor,  
15 what happened was, he served me, an attorney,  
16 with a subpoena for my client. I'm not the  
17 registered agent for Balfour Beatty, and  
18 discovery has passed.

19 You can't serve a subpoena on a party.  
20 If you want a party to produce documents, you  
21 serve a request for production. I will tell you  
22 what, Your Honor, I feel like I'm just getting  
23 whipsawed here because I try to be accommodating.  
24 Mr. Bundy asked me to provide these documents to  
25 him voluntarily, and I do that.

1           And I can show you the documents that we  
2           provided to him last week in an e-mail, and I  
3           will call the witnesses, if you like and say,  
4           this is exactly what we produced, very  
5           conscientiously in response to your request.

6           There were four requests. We provided  
7           those documents. If he wants to cross-examine  
8           the witness and say, you didn't provide them,  
9           then he can do that.

10           As far as saying that he didn't get the  
11           documents that he needed to -- look at this case.  
12           Good Lord, Your Honor. You ordered an audit of  
13           this thing, and holy mackerel, we spent an  
14           incredible amount of time and huge resources to  
15           comply with your order.

16           And I'm happy with -- you made your  
17           order. They did a very exhaustive report, and  
18           we're going to address that. These are just  
19           additional things that changed a little bit since  
20           the audit. Thank you, Your Honor.

21           THE COURT: All right. On that  
22           basis, I'll deny the motion as to the subpoena.  
23           Clearly discovery has ended at this point in  
24           time. It should have been produced. If it  
25           wasn't produced, I'll expect an objection.

1           If it was not produced, you can  
2           establish it was not produced and they can't  
3           establish it was produced, then I'm going to keep  
4           it out of evidence, I can assure you that.

5           We spent a significant amount of time  
6           talking about the audit. I'm assuming that audit  
7           was done, and there should be a result as a  
8           consequence of that audit. So we'll get to that  
9           point as well.

10          All right. Are we about ready to start?

11                 MR. HILDEBRAND: Yes, sir.

12                 THE COURT: Mr. Terry, anything  
13           further?

14                 MR. TERRY: Your Honor, I have one  
15           motion that is not right yet.

16                 THE COURT: Okay.

17                 MR. TERRY: I have one motion  
18           before you for an entry of judgment against  
19           Library Associates, and because Watson accepted  
20           the offer of settlement made by Library  
21           Associates, I don't think it's necessary that you  
22           handle that before trial. But I was making you  
23           aware that it was still out there.

24                 THE COURT: Okay. Got it. I'm  
25           with you. Okay. So noted. All right. I don't

1 really feel like we need to make opening  
2 statements, but if you would like five minutes, I  
3 will give it to you. You can waive it. And if  
4 you waive it, I'm going to make him waive it. So  
5 if y'all are ready to start, I'm ready to start.

6 MR. HILDEBRAND: Thank you, Your  
7 Honor. I would like to make an opening -- I  
8 think it will take over five minutes, if you  
9 would accommodate me, I'd appreciate it.

10 THE COURT: I'll give you ten.  
11 I'll be surprised if I hear something new today,  
12 but go ahead.

13 MR. HILDEBRAND: Thank you, Your  
14 Honor.

15 THE COURT: Go ahead.

16 MR. HILDEBRAND: Your Honor, this  
17 is the first opportunity I've had to get in front  
18 of you and tell you what my case is about and  
19 tell you from Balfour's perspective what this  
20 matter is about.

21 And I -- and I hope that you will give  
22 me a few minutes. If I run over ten, I hope  
23 you'll accommodate me, Your Honor. This is my  
24 time in Court and it's incredibly important to  
25 Mr. Heuer and my client.

1                   And I would just -- I didn't realize we  
2                   were going to have limit. So I had prepared some  
3                   comments. I don't think I'm going to go real  
4                   long, but if you will --

5                   THE COURT: Well, you're talking to  
6                   the judge and the jury; so there's only so much  
7                   they can take.

8                   MR. HILDEBRAND: I understand, Your  
9                   Honor.

10                  THE COURT: All right.

11                  MR. HILDEBRAND: I understand.  
12                  Here's the situation, is that, Balfour has been  
13                  in business for a long time.

14                  We do a lot of work locally for local  
15                  businesses, and our business model, as you might  
16                  imagine, Your Honor, is to finish projects where  
17                  both sides shake hands and are happy with the way  
18                  that things turned out and can move on and  
19                  recommend each other to other people.

20                  And that's what Balfour strives to do.  
21                  It gets involved in very little litigation with  
22                  mechanic's liens and such and tries to avoid them  
23                  and tries to shake hands. And it does work for  
24                  local companies, like The Beach Company. They  
25                  have done eight projects, I believe, for Balfour,

1           because they try to end on those good notes.

2                       What happened in this case, Your Honor,  
3           I think does take some explanation because a lot  
4           of the discovery has not yet been -- has not been  
5           put in. But I'd like to give you a brief rundown  
6           if I could of what the case is about and what  
7           happened.

8                       In November of 2013, Balfour was asked  
9           to -- was given a request for a proposal to build  
10          this hotel, The Hotel Bennett. At that time it  
11          was called Hotel Marion Square.

12                      So November 2013, there is a request for  
13          proposal, and in that request for proposal, it  
14          says that, by March 1, 2014, this project is  
15          going to start. It's anticipated the  
16          construction is going to start. So four months  
17          later, this -- we're going to start construction.

18                      Balfour went into the -- into that  
19          arrangement in good faith and said, okay, we  
20          appreciate you selecting us as the general  
21          contractor, and we're happy to move forward with  
22          you. That original construction start of March  
23          2014 didn't take place. The project didn't start  
24          for 13 months after.

25                      That had nothing to do with Balfour, but

1 the reason I'm bringing this up, Your Honor, is  
2 that, it was a portent of things to come on this  
3 project. So we signed a contract, and we were  
4 given a notice to proceed on March 30, 2015.  
5 We're saying, Balfour, y'all can proceed.

6 Now, the contract that we have, that  
7 you've read, is a construction manager as  
8 constructor, and the only difference between  
9 that -- the basic difference is, the regular  
10 contract where you just hire a general  
11 contractor, you don't have much preconstruction  
12 activities.

13 In this type of contract, you can say,  
14 okay, we want you to have some preconstruction  
15 activities. Balfour said, okay, what do you  
16 want?

17 And we were told, we want you to do  
18 three pricing exercises before you start the work  
19 and give us a 33 percent price; a 66 percent  
20 price; and then the final price, and we're going  
21 to pay you \$66,000 for that, which is a nominal  
22 amount.

23 It's a Herculean effort to make a -- to  
24 price out a project the size it takes. You have  
25 to go to subcontractors and do a lot of homework.

1 So we signed the A133 and agreed on a maximum  
2 price of approximately \$60 million.

3 So we said, for these drawings, what --  
4 we will build this project, and we will charge  
5 you about \$60 million. And we started, as I  
6 mentioned, in March 30, 2015. Very importantly,  
7 Your Honor, the contract that we signed -- and I  
8 will have the drawings here for you to review, if  
9 you would like.

10 It says that the drawings are to be 100  
11 percent plus, and the architect represents on  
12 those drawings that they're 100 percent plus. So  
13 what we did was -- and you'll hear the testimony,  
14 we said, okay, sounds good. We see what we're  
15 supposed to build. The drawings are correct.

16 Y'all have guaranteed 100 percent plus,  
17 and here's the schedule. We will have this hotel  
18 built in 28 months. And the way that the  
19 contractor schedules things is, they get the --  
20 they have a lot of experience, they know you  
21 start at the bottom, obviously.

22 You do the foundation. It is very  
23 commonsensical. Then you go up with the  
24 structure. The structure goes up floor by floor.  
25 It gets to the ninth floor. Then you close it

1 in, and then you do your interior work.

2 So we got started on this and were ready  
3 to go; and right from the start Your Honor, right  
4 from the start, there were major problems on this  
5 project. Right from the start, there were delays  
6 and problems.

7 What were those delays and problems?  
8 The first huge problem that we incurred was that  
9 these drawings, which were represented to be 100  
10 percent plus, absolutely were not. They were  
11 some of the worst drawings that my client has  
12 seen. They were riddled with problems.

13 Now, why were they riddled with  
14 problems? The reason is that the architect who  
15 did these drawings, had done primarily kind of  
16 cookie-cutter hotels for Mr. Bennett, Hampton  
17 Inns and such, not a luxury five-star hotel,  
18 which is pretty complicated.

19 So what the architect -- what happened  
20 was, the architect gave us drawings that were  
21 bad, and the reason that they were bad is that we  
22 found out in discovery that the architect had  
23 actually tried to use a prior architect's  
24 drawings, and it tried to massage them and change  
25 them to work on -- for the drawings that he did.

1                   And when he tried to do that, it didn't  
2                   work. That was one problem. But the bigger  
3                   problem, Your Honor, was -- and you're going to  
4                   hear a lot of reference to this term, and it's  
5                   something I'd like to talk to you about in just a  
6                   second. It's called -- there's an acronym called  
7                   BIM, B-I-M. You're going to hear about it a lot,  
8                   and it stands for building information modeling.

9                   So here's the deal, Your Honor, is that,  
10                  for centuries, obviously, buildings have been  
11                  constructed according to two dimensional flat  
12                  drawings.

13                  And you can -- you can't see how  
14                  everything fits together. It's difficult. But  
15                  you can do the drawings to make sure that  
16                  everything does fit together. It takes a lot of  
17                  time and effort, but you can do it. That's the  
18                  way it's always been done.

19                  A number of years ago, a computer  
20                  program came out called building information  
21                  modeling, which allows the drawings to go into a  
22                  computer, and then you can see how everything  
23                  fits together in a three-dimensional model.

24                  And why is that important on this hotel?  
25                  This is important on this hotel because the hotel

1 was restricted to 105 feet. There was a lot of  
2 litigation. I think that you were actually  
3 involved in that -- where the hotel was  
4 restricted to 105 feet.

5 Well, the owner, Mr. Bennett, wanted to  
6 have ceiling heights in the bedrooms as high as  
7 he could get them; so the architect was forced to  
8 squeeze the space that all of the mechanical and  
9 plumbing and all to fit into a very tight space.

10 So in most buildings, right above the  
11 ceiling that you see here, if there is another  
12 floor above here, between the floor and this  
13 ceiling, there -- it's called interstitial space  
14 or plenum. And you have to install -- that's  
15 where all the plumbing and the HVAC, beams run in  
16 there and all that sort of stuff.

17 And on this building, it was very  
18 constrictive; so the building information  
19 modeling would have allowed the architect to see  
20 how everything was supposed to fit, so that when  
21 he gives us the drawings that he says are 100  
22 percent plus, they actually were.

23 This is a big point in this case, Your  
24 Honor. The architect -- we've taken his  
25 deposition, and the documents that you're going

1 to see are really eye opening. The architect  
2 says, before we ever got involved, this project  
3 must be BIM'd.

4 I must use BIM because it is so  
5 complicated with these tight spaces that BIM is  
6 the way that we avoid clashes and we can issue  
7 correct drawings. The architect said that, but  
8 then he never used it. And he never had the  
9 capability to use it, and he never hired anybody  
10 to use it.

11 So, when he gave us the drawings, they  
12 didn't work and once -- you'll hear the  
13 testimony, Your Honor. Our obligation, Balfour's  
14 obligation during construction is, before it  
15 starts to construct a section, it reviews the  
16 drawings, and if we see a problem, then we are to  
17 alert the architect.

18 And then the architect says, here is how  
19 you have to fix it. We don't have -- we're not a  
20 designer. We can't design a project; so when  
21 there's a problem with the design, we have to go  
22 back to the designer and say, you have to fix it.  
23 So the original drawings that we had were bad.

24 And then, Your Honor, right off the  
25 get-go, the owner on this project, Mr. Bennett,

1       decided that he was going to make major changes  
2       to his hotel.  What were some of those changes?  
3       And you will hear about -- hear those discussed  
4       in detail.  One of them is that half of the rooms  
5       that were going to be just regular single rooms  
6       were changed to suites.

7                   That was during construction.  Half the  
8       rooms were going to be changed to suites.  So  
9       when the architect -- when the architect gave us  
10      the revised drawings for that change and other  
11      changes, he didn't use BIM so that, when he gave  
12      us the drawings for every change, we had the same  
13      problem.  They weren't coordinated, and we were  
14      given bad drawings.

15                   On that sixth floor, Your Honor, you're  
16      going to hear that, when you change -- when you  
17      change the rooms above a floor, that is a huge  
18      change because, when you change where toilets are  
19      and laboratories and you change walls and  
20      whenever -- before you can do a concrete pour,  
21      you have to put in sleeves, as you may well know  
22      this.

23                   You put in a plastic sleeve, and then  
24      that's where you run the plumbing.  And once that  
25      concrete is poured, it's extremely difficult to

1       pour it and change it. On this project, it was  
2       incredibly difficult, and in fact, dangerous  
3       because these -- the concrete on these floors has  
4       what's called post-tension steel in it that you  
5       put these steel rods, and then you put 5,000  
6       pounds of pressure on the rods that are running  
7       through the concrete.

8                If you go through there and you nick one  
9       of those cords, you've got to -- they will  
10      somehow pop outside of the building, and they can  
11      kill somebody. It's a serious thing to try to  
12      change, to re-core floors that have post-tension  
13      steel.

14               So anyway, these -- these major changes  
15      were made, and they impacted Balfour greatly.  
16      Balfour, Your Honor, was not required to enter --  
17      to use BIM in its contract, but what we did do  
18      voluntarily, we said, look, we don't have to use  
19      BIM.

20               But we think that building information  
21      modeling would be helpful to us for us to put  
22      these drawings in three dimensional situations so  
23      that we can see where the problems are and tell  
24      the architect why their drawings were bad. So we  
25      did it voluntarily.

1           And as we went through the building, we  
2           spent time and money to look at the drawings.  
3           And all we did was what we were supposed to  
4           respond to the architect and tell them why they  
5           were -- why their drawings were bad, and we did  
6           that. That was a major delay on this project.

7           And I want you to -- if I may, what  
8           happened was, we actually got started on  
9           construction, Your Honor. And despite -- you're  
10          going to hear a lot -- about all the problems  
11          with the design and changes. Despite all those  
12          changes and problems, the -- by the time we got  
13          to the sixth floor, we were basically on  
14          schedule.

15          We had worked hard to coordinate our  
16          subcontractors, worked through all the problems.  
17          But by that point, when we started to get these  
18          major changes, it just really overwhelmed us.  
19          And Balfour filed a formal claim with the owner.  
20          They had the architect to look at it, as was  
21          required.

22          We documented it, and we went through a  
23          procedure to get an award on that. And the  
24          architect said, yes, you are entitled to money  
25          because of that little -- that change. But we

1        were never paid that money by the owner. We  
2        continued -- so we made a delay. We went through  
3        the procedures; weren't paid on that change, on  
4        that delay claim. We continued to notify the  
5        owner of delays.

6                So the project was originally scheduled  
7        to be finished on July 31 of 2017. It was  
8        extended by 20 days; so the final completion day  
9        was supposed to be August 15 of 2017. The  
10       project didn't finish until the week of December  
11       31, 2018; so it was 496 days late.

12               And this is a really important component  
13       of our claim, Your Honor. The project was 16  
14       months late, and we kept -- Balfour kept  
15       complaining, look, we're getting delayed and held  
16       up and incurring additional costs because of  
17       these design mix-ups, the design problems from  
18       the architect, by these changes that keep coming  
19       along.

20               And also because Mr. Bennett would take  
21       inordinate amounts of time, where we would say,  
22       Mr. Bennett, you need to tell us what color you  
23       want for the equipment that you're supposed to  
24       finish or things that you need to make a decision  
25       on. You need to tell us by a certain date, and

1 we'll introduce evidence where it was often  
2 months and months before we got the information  
3 needed to even proceed.

4           So we kept notifying the owner that we  
5 are being delayed, and we were incurring costs  
6 because of all these issues: Failure of the  
7 owner to make decisions, design changes, and  
8 design busts. So what happens? We get paid for  
9 basically every pay application right up until  
10 the very end.

11           In each of those pay applications, Your  
12 Honor, you'll hear was a bit of an arduous  
13 process. We provide a whole -- a huge stack of  
14 documents to the owner. They would review them  
15 in depth. We'd go back and forth and arrive at  
16 the final number, and we would get paid. We got  
17 paid every month right up until the very end,  
18 right up until the last couple of pay  
19 applications.

20           So when this project was finished on,  
21 like I said, December 31, 2018, we were owed --  
22 there were three primary components, things that  
23 we were owed money for, Your Honor. One was an  
24 increase in the contract from the original 60  
25 million that I told you about. It had increased

1 by about \$5 million that the owner agreed.

2 They said, yes, we agree that these are  
3 changes. You're entitled to this money. They  
4 signed the contractual changes. We owe you that.  
5 They owed us about \$5 million under the contract  
6 for the amount that they agreed. And that \$5  
7 million, of course, included retainage and such.  
8 So there's that \$5 million.

9 We had also, during the project,  
10 incurred costs with things that are called  
11 requested change orders, where we said, look,  
12 owner, we've done additional work here that we  
13 need to get paid for, and the owner said, well,  
14 we don't have time to review them yet. We'll  
15 work that out at the end. Those amounted to  
16 about \$3 million.

17 The owner's representative -- you'll  
18 hear his name a lot -- was a fellow named Jim  
19 Clements. He said -- I took his deposition. He  
20 said, Mr. Hildebrand, what I was planning to do  
21 was, at the very end of the job, sit down and  
22 review all of these RCOs that totalled about \$3  
23 million, and I was going to review them. And  
24 that's what happens on projects.

25 You review them and try to work them out

1 and come to a resolution. And that took --  
2 that's what happens. He said, I was told not to  
3 review them, that they weren't going to be  
4 considered, and the owner was going to pay me.

5 Balfour, Your Honor, also made a claim  
6 for all of the time and money for the 16  
7 additional months that we were on the project  
8 because of the delays. As I said, the  
9 schedule -- it was originally scheduled for 28  
10 months, and it took 16 months longer.

11 So we went to the owner and said, owner,  
12 under the contract, this delay was caused by you,  
13 and we want you -- as we've been telling you, we  
14 want compensation for these 16 months, extra  
15 months.

16 When we made those claims right at the  
17 end of the job, Your Honor, for the first time --  
18 for the first time, the owner said, oh, well, you  
19 know what? Balfour Beatty, despite the fact that  
20 you put in all that money and you built the  
21 project in this time, we're not going to pay you  
22 your contract balance of \$5 million.

23 We're not going to pay you the \$3  
24 million for your RCOs. We're not going to pay  
25 you anything for your delays. And why not? They

1       said, well, we're going to go back and we're  
2       going to claim -- we claim that you were late as  
3       of the first day that you extended the contract  
4       completion date in July or August of 2017.

5               So we're going to retroactively assess  
6       liquidated damages, despite the fact, Your Honor,  
7       that no claim had ever been made by the owner.  
8       Those liquidated damages are \$270,000 a month.  
9       They're \$9,000 a day. The owner never made a  
10      peep about a claim.

11              So, as you can imagine, Balfour was  
12      aggravated, and they said, holy mackerel, here we  
13      are. We're finished, and we're dealing our final  
14      payment, and you're going to tell us that you're  
15      going to retroactively, with no prior warning,  
16      assess liquidated damages?

17              Then the owner said, well, there's a cap  
18      on the liquidated damages of \$1,400,000 in the  
19      contract. When we made our claim at the end of  
20      the job for the cost that I told you about, we  
21      got a letter from Kim Brown.

22              And Kim Brown said, look, we're not even  
23      going to recognize the cap of 1 million 4 when we  
24      can go back and retroactively assess damages  
25      against you. We're going to do them from day one

1 all the way until now, so it's a whole lot more,  
2 a couple million dollars in liquidated damages.

3 Then she said, well, and on top of that,  
4 Balfour Beatty, there's a provision in --  
5 obviously, for liquidated damages for delays, and  
6 there's a provision, a very exclusive provision  
7 for -- where the owner waives consequential  
8 damages. It includes specifically lost profits  
9 and such.

10 But what Ms. Brown said, we're not going  
11 to -- we're going to assess liquidated damages.  
12 We're not going to recognize the cap, and we're  
13 going to disregard the limitation on  
14 consequential damages, and we're going to claim  
15 that y'all -- that we lost millions of dollars in  
16 lost profits, going way back.

17 So we're not going to pay you one penny  
18 for any of these moneys that were owed. So, as  
19 you could imagine, we were surprised by that,  
20 that the owner took that position because no  
21 claim had been made. And we don't think that  
22 it's right.

23 And to this day, Your Honor, not one  
24 penny has been offered to Balfour Beatty in  
25 payment of any of those amounts that I've just

1 articulated to you.

2 We have been put in a double pinch, Your  
3 Honor, because the subcontracts that we have with  
4 our subcontractors say, if there are problems  
5 with how our -- our work, the subcontractors'  
6 work and the owner claims that there are problems  
7 with it, then Balfour, you're entitled to reduce  
8 our pay applications because of problems that the  
9 owner claims.

10 So you've heard me in Court, Your Honor,  
11 saying, a problem that we have here is that we  
12 have subcontractors who did work for us and who  
13 we owe money and, frankly, we think that they're  
14 entitled to money. There's no question about  
15 that.

16 The problem is that we did -- I sent a  
17 request for admissions to the owner, to Library  
18 Associates and Mr. Bundy saying, look, let's just  
19 be real candid here. Let's be -- just tell up  
20 straight, if there are subcontractors who you're  
21 not going to claim who are -- have defective work  
22 or cause these delays, just tell me.

23 Admit that you don't have delays or  
24 claims against these subcontractors so we can let  
25 them go. Mr. Bundy, for about half of the

1 subcontractors, he said, we admit that we have no  
2 claim against them. For about half, he said, we  
3 do have some problems with their work.

4 I then asked the Court -- I filed a  
5 motion. I said, Your Honor, good grief.  
6 Actually, he said, we don't have enough  
7 information, and this was two years after the  
8 case had been filed. And I said, Mr. Bundy, just  
9 tell me. Good grief. You have to have enough  
10 information at this point. We're on the eve of  
11 trial.

12 Do you have any problems with these  
13 subcontractors' work? You said, Mr. Bundy, you  
14 have to answer all of those requests for  
15 admissions in full, and then he just denied all  
16 of them. So it put us in a bad position because  
17 we didn't know what they were going to come in to  
18 Court and allege their problems or defective work  
19 were.

20 So what we have, Your Honor, is -- what  
21 I ask you to do is to look at the correspondence  
22 and the communications while this project was  
23 ongoing. And you said early today -- and I agree  
24 with you very much -- that this is basically a  
25 breach of contract claim.

1           I urge you to look at the evidence and  
2           the documents that were done while this project  
3           was ongoing and determine if Balfour breached its  
4           contract and caused these delays.

5           The internal documents that you're going  
6           to see, Your Honor, are truly eye popping, where  
7           the owner is talking with the architect about who  
8           is causing these issues. Who caused the sixth  
9           floor delays. And the architect is saying, gosh,  
10          yeah, our -- our drawings were bad, but y'all  
11          made changes and such.

12          There's no mention about Balfour Beatty  
13          being the problem there. That contemporaneous  
14          evidence is -- is just really compelling. So,  
15          Your Honor, I'm just about to wrap up. I've just  
16          got another minute. I appreciate your patience,  
17          I really do. I know I went over, and I  
18          apologize.

19                    THE COURT: Just a little.

20                    MR. HILDEBRAND: But my client, I  
21                    can assure you -- again, this is my first chance  
22                    to get in front of you and tell you a little bit  
23                    about your case; so I appreciate your patience.  
24                    Your Honor, I don't mean to be sappy about it,  
25                    but you're the Master in Equity.

1           Like you said, you're the judge and the  
2 jury. You're the one who will look at these  
3 facts, and you will decide what is right. What  
4 should Balfour Beatty be paid?

5           On some of these delay claims, Mr. Bundy  
6 is going to say, well, Your Honor, they didn't  
7 dot the I and cross the T on some of their delay  
8 notices, and as you know, there are -- the Court  
9 can say, well, did they substantially comply?  
10 Was there a waiver?

11           Gosh, if they were a day later and they  
12 didn't dot an I, should the owner just get a  
13 complete windfall, and should there be a  
14 forfeiture of all these monies that are due just  
15 because there's a slight irregularity perhaps of  
16 the delay or something like that.

17           But what I ask you to do, Your Honor, is  
18 to look at the facts that happened during  
19 construction and assess the case on those issues.  
20 I'll leave you with this. I was reading the  
21 paper, Sunday paper a couple weeks ago and was  
22 just finishing up and saw this huge article.

23           It's a huge one-page ad on the back of  
24 the A section, just a couple weeks ago, where the  
25 hotel that we've spent so much time, blood,

1       sweat, and tears building and that Mr. Bennett  
2       has had the pleasure of owning. He didn't pay  
3       his bills on it. He hasn't paid us the contract  
4       balance. He hasn't paid us for the RCOs.

5               He hasn't paid us for the 16 months of  
6       delays that we had, and that's basically -- all  
7       we're here to do, Your Honor, is ask you to be  
8       fair, listen to us. Listen to the others.  
9       Listen to their case. Listen to both sides, and  
10      then you make a determination of whether the  
11      owner should not have to pay for what we provided  
12      or whether they should.

13             And I think that after you -- I would  
14      hope that after you listen to all the evidence,  
15      that you will come to the determination that  
16      Balfour Beatty is entitled to be paid. Thank you  
17      very much.

18                     THE COURT: Thank you.

19                     MR. HILDEBRAND: I appreciate your  
20      time.

21                     THE COURT: Very good,  
22      Mr. Hildebrand. Thank you.

23                     MR. BUNDY: I'm sorry, I dozed off.  
24      I'm going to hold off on my statement, Your  
25      Honor.

1 THE COURT: All right.

2 MR. BUNDY: Judge, did you quash my  
3 trial subpoena?

4 THE COURT: I did.

5 MR. BUNDY: Would you mind -- I  
6 don't really understand why. Would you give me  
7 something in the record, so I will have a clear  
8 understanding. Is it that I'm not entitled to  
9 issue a trial subpoena, or is it because -- I  
10 mean, if you don't mind, if you could explain to  
11 me the legal basis.

12 THE COURT: My rationale is, if it  
13 has not already been produced at -- in discovery,  
14 it's not going to come into evidence. Okay?

15 So if you don't have it now, if you  
16 don't have the documentation now, if they're  
17 going to submit any evidence or whatever their  
18 proof is and you say, I don't have it, then it's  
19 not coming in. All right.

20 MR. BUNDY: Okay. But --

21 THE COURT: You're saying there's a  
22 lack of evidence here.

23 MR. BUNDY: The documents that I'm  
24 asking for are needed in order to do the audit.  
25 I am not asking for their damages.

1 THE COURT: I thought the audit had  
2 been done.

3 MR. BUNDY: No, Your Honor. The  
4 audit has been done, but it was -- it was two  
5 years ago. They've paid money. Money has come  
6 in. They got paid.

7 You know, those are the -- and in fact,  
8 he sent me at least one or two changes that have  
9 been made. That's why I'm trying to get to. I  
10 don't think -- I didn't make myself very clear,  
11 and I apologize.

12 THE COURT: All right. Well, I  
13 reread that contract. Y'all had two audits in  
14 the contract. I don't know if the first one was  
15 ever done, but the second one was basically done  
16 sometime shortly at the end of the project.

17 And my recollection was, that had not  
18 been done. I thought that needed to be done, and  
19 I ordered that to be done.

20 MR BUNDY: If I may?

21 THE COURT: Okay.

22 MR. BUNDY: What the contract says  
23 is, that the owner has the option to get the job  
24 audited, right?

25 THE COURT: Right, right.

1                   MR. BUNDY:  It's not -- there's not  
2                   a one and two.  We can get as many -- there's no  
3                   limit to the number of options if we had audits.

4                   But we don't want -- what we wanted was  
5                   one.  Okay?  We're entitled to have it.  Their  
6                   defense was, it was discovery material that was  
7                   going to come up because we were in litigation.

8                   THE COURT:  Right.

9                   MR. BUNDY:  And if you may recall,  
10                  that has nothing to do with it.

11                  So all I did, when I was in Court two  
12                  weeks ago, when I wrote you a letter and I wrote  
13                  Hildebrand a letter, all I did in Court was say,  
14                  we need to get the information to hand to Balfour  
15                  Beatty, which only Balfour Beatty has, that will  
16                  allow my expert, okay, Sam, Ms. Hadley, to  
17                  complete the audit.

18                  Because there was plenty of stuff they  
19                  didn't give us.  Payroll information, what was  
20                  claimed back and forth; in other words, it's the  
21                  information that they have to put into evidence  
22                  to prove the cost of the work.

23                  THE COURT:  Okay.

24                  MR. BUNDY:  And we don't have that  
25                  information, not all of it.

1 THE COURT: The underlying data is  
2 what you're seeking?

3 MR. BUNDY: That's correct. And I  
4 believe I have the right to issue a trial  
5 subpoena for documents. It's not got anything to  
6 do with discovery.

7 I'm still trying to figure out what they  
8 actually spent. So if you don't mind, I actually  
9 need to have a clear record. If I'm not going to  
10 be entitled to them, I want to make sure I  
11 understand why.

12 THE COURT: Okay. Do you want to  
13 be heard at all?

14 MR. HILDEBRAND: Your Honor, as I  
15 had stated, we provided that information, and I  
16 will have witnesses to testify that we provided  
17 it last week and Mr. Bundy can cross-examine.

18 They did a full audit. There's no  
19 question about that. You have ordered it, and  
20 then they even said, y'all are not providing all  
21 the information, which I think was wrong.

22 But we -- they filed a motion for  
23 contempt, and we went through a huge process,  
24 Your Honor and spent a lot of time and money to  
25 respond to that audit. And there hasn't been any

1 request for a renewed audit. And I don't think  
2 it's appropriate, and it was after discovery.

3 All Mr. Bundy did was saying, look, we  
4 want some additional updated information. If you  
5 are going to claim updated damages, give us the  
6 updated information; so that's what we gave them.  
7 I don't understand what -- what it is that he is  
8 complaining about.

9 MR. BUNDY: I will be glad to  
10 explain it to you. I'm entitled to issue a  
11 subpoena because I'm a lawyer. Okay?

12 THE COURT: Okay.

13 MR. BUNDY: And the documents that  
14 I asked for were very specific attached to a  
15 subpoena issued to Balfour Beatty, who is a party  
16 to this case that has underlying data that we  
17 need in order to complete the audit which is the  
18 cost of the work.

19 They have -- they don't have it here  
20 today. All you hear is what I've been hearing in  
21 this case since it started, you've got it. We  
22 already gave it to you. Well, if he gave it to  
23 me or sent it to me, put it on that table, so I  
24 can put an exhibit on it and say, okay, this is  
25 all y'all have with regard to the audit.

1           Because they told us when this -- having  
2           finished this, this was all they had. Okay? And  
3           the -- I will get you a copy of the subpoena. I  
4           apologize I don't have it. It is very specific.  
5           We want the cost of the work. We want a payroll  
6           update. We want the information; we want it back  
7           then.

8           And it's changed, and in fact, in  
9           response to the letter to Mr. Hildebrand, he sent  
10          me one or two little documents. He just didn't  
11          send me all four categories, and since he refused  
12          to do it, I had no choice -- because it's not a  
13          discovery issue. I don't want to make a motion  
14          to compel.

15          I believe I have the right to issue a  
16          trial subpoena. I can make people come in here  
17          and bring their files with them. And this is  
18          crucial to my case. Thank you.

19                   THE COURT: All right. Now, you  
20          get me the subpoena, and I will take a look at  
21          it. We'll cover that.

22                   MR. BUNDY: Thank you, Your Honor.

23                   THE COURT: My initial response  
24          was, no, but we'll get there. All right? No  
25          opening statement.

1                   Are y'all ready to go? Are y'all ready  
2                   to proceed?

3                   MR. HILDEBRAND: Yes, sir.

4                   MR. BUNDY: I defer the opening  
5                   statement. I've got nothing to say.

6                   THE COURT: All right. Nothing to  
7                   say. That's a good opening statement.

8                   MR. BUNDY: I'm going to be able to  
9                   do it when I start my case, right?

10                  THE COURT: Sure. So I will give  
11                  you that.

12                  Mr. Hildebrand, are y'all ready to  
13                  start? Do you want to take five minutes?  
14                  It's -- I usually break for lunch anywhere  
15                  between noon and 1. It's 11:45 now. So we could  
16                  either get --

17                  MR. HILDEBRAND: That's fine.

18                  THE COURT: -- get rolling or just  
19                  come back at about 1 o'clock and get started,  
20                  whatever you want to do.

21                  MR. HILDEBRAND: As a matter of  
22                  housekeeping, what we have done is put all of our  
23                  exhibits in notebooks.

24                  THE COURT: Okay.

25                  MR. HILDEBRAND: If you'd like, I

1 can e-mail them to you.

2 MR. BUNDY: No, no, no, no, no, no.

3 MR. HILDEBRAND: Would you please  
4 back --

5 THE COURT: Just one at a time;  
6 just one at a time. One at a time. Okay. Go  
7 ahead.

8 MR. HILDEBRAND: Your Honor, as I  
9 was about to say before I was interrupted, I've  
10 got hard copies here of our exhibits. If you  
11 would like or if Mr. Bundy would like an  
12 additional copy by e-mail, we can do that.

13 But I'll retract that because he says he  
14 doesn't want it. But what we've got is, our five  
15 notebooks that have our exhibits.

16 THE COURT: Okay. All right.

17 MR. HILDEBRAND: We've got a copy  
18 for you, a copy for your law clerk, and a copy  
19 for Mr. Bundy. So I think it will take a few  
20 minute -- and a copy for a witness. It will take  
21 a few minutes to disseminate those.

22 So this might be a good time for me to  
23 take a few minutes, and I can give you the --  
24 before we get started so we can -- start going  
25 through the exhibits, you will have it in front

1 of you.

2 THE COURT: Okay. All right.

3 MR. BUNDY: May I be heard?

4 THE COURT: Yes, sir.

5 MR. BUNDY: All right. This is  
6 not -- what this is not, is an arbitration. You  
7 are not an arbitrator. You are a judge. We have  
8 a contract with this company where everybody  
9 agreed a judge was going to follow the Rules of  
10 Civil Procedure, evidence, trial procedure, and  
11 issue an order that can be appealed.

12 There was a reason we wanted to do that.  
13 Okay? They don't like it because they tried  
14 to -- they tried to get me to change, and I ain't  
15 never going to change. Okay? I've been doing  
16 this too long. Arbitration, Your Honor, is a  
17 process where construction lawyers decide they're  
18 going to represent clients, and they take turns  
19 being the arbitrator. Okay?

20 And this time, if you don't make a lot  
21 of waves in this arbitration and if you split it  
22 all up, then the next time, I'll get to be the  
23 arbitrator, okay, and that's the way it has been  
24 going in this -- in this state since I started  
25 with the first arbitration in 1978 with the

1 Trident Tech building, tore it down.

2 The first case I ever arbitrated lasted  
3 for 48 days. Okay? First one. In arbitration,  
4 they put in all these books. I'm going to  
5 vehemently object to anything being sent to you  
6 that's not moved into evidence and accepted into  
7 evidence.

8 Every single piece of paper in every one  
9 of those books, I'm going to look at to see if it  
10 is hearsay, to see if it meets the Business  
11 Records Act, to make sure it's -- it meets the  
12 Best Evidence Rule.

13 I intend to cite every single Rule of  
14 Evidence necessary to make sure that no evidence  
15 goes in this case that I haven't objected to,  
16 which I believe to be either irrelevant,  
17 immaterial, or hearsay and doesn't have -- and  
18 there's no exceptions.

19 So I object to sending you anything.  
20 Now, that gets us into this 2006 motion I made.  
21 All these PowerPoints, those -- you know, they're  
22 clearly not evidence under Rule 106. I mean,  
23 that's not even an argument. It's -- you know, I  
24 don't know if it even facially makes any sense.

25 But if you read the last pronouncement

1 by our Supreme Court on these PowerPoints, you  
2 are a gatekeeper. And I know you're the judge  
3 and you're the jury and all of that, but you are  
4 also a human being. And if you hear a bell ring,  
5 you can't make it unring in your head, right?

6 THE COURT: I agree.

7 MR. BUNDY: So it's up to me to  
8 make sure that you, sitting as the jury, don't,  
9 through the -- you know, through the very, you  
10 know, primitive or basic idea of persuasion. The  
11 basic two ideas of persuasion are recency and  
12 primus, right?

13 THE COURT: Yep.

14 MR. BUNDY: This is going to be the  
15 first thing you hear. I was out this morning  
16 with Mr. Howe. I used to work for Mr. Howe. I  
17 don't know if you remember that, but I did. I  
18 worked for him until he passed.

19 And he used to tell me, Bundy, if you go  
20 to a party, if you're nice to the hostess on the  
21 way in and kiss her on the way out, she don't  
22 care what you do at that party because you are --  
23 that's recency. The first thing she saw was you  
24 smiled, and the last thing she saw was you  
25 smiling.

1           You cannot unread these documents, if  
2           you start looking through documents that I  
3           haven't had a chance to object to. So I wanted  
4           to -- I object to this whole arbitration process  
5           because I did not agree to it.

6           THE COURT: All right. Very good.

7           MR. BUNDY: Okay.

8           THE COURT: So I will tell you  
9           what, I don't need them by e-mail, but it sounds  
10          like you need to provide them to Mr. Bundy.

11          MR. HILDEBRAND: I will do that.

12          THE COURT: Okay. I will tell you,  
13          the one thing I've learned in doing this as long  
14          as I have is, I -- apparently, I'm a tactile  
15          learner. So I like to touch stuff.

16          So I used to think I was auditory, but  
17          I've learned, I like to touch stuff. So I will  
18          let you move it into evidence. We'll pass over  
19          the objection, and then you can hand it to me,  
20          and I'll be looking at it. Okay?

21          MR. HILDEBRAND: Thank you, Your  
22          Honor.

23          MR. BUNDY: What about tomorrow's  
24          witness? There was -- he wouldn't tell me who  
25          today's witness was, but I thought you wrote us

1 and said if you were going to ask him to tell me.  
2 I'd like to know who his tomorrow witness is.

3 THE COURT: By the end of the day,  
4 we're going to -- we're going to cover that one,  
5 for sure. Okay?

6 MR. BUNDY: Thank you.

7 THE COURT: Okay. All right. Are  
8 you ready to proceed?

9 MR. HILDEBRAND: Would you like me  
10 to distribute these? I can call my first  
11 witness. We've got the exhibit books, but I can  
12 go ahead and -- yes, sir. We can get started.

13 THE COURT: All right. Let's roll  
14 for about 30 minutes or so. Okay?

15 MR. HILDEBRAND: Okay.

16 THE COURT: All right.

17 MR. HILDEBRAND: Thank you. The  
18 plaintiff would call Tim Spano.

19 THE COURT: Mr. Spano, if you will  
20 come up this way, however you can get here. And  
21 this is our witness chair over here. Put your  
22 left hand on the Bible and raise your right.

23 (TIM SPANO, having first been duly  
24 sworn, testified as follows:)

25 MR. BUNDY: Your Honor, can I ask

1 you about the mask?

2 THE COURT: Yeah. Mr. Spano, if  
3 you could remove that mask, we'd appreciate it.  
4 Just, it's a lot easier to hear and to see.

5 THE WITNESS: No problem. No  
6 problem.

7 THE COURT: So what I always ask  
8 the witness to do is to give us your full name,  
9 spell your last name, and your address for the  
10 record. Okay?

11 THE WITNESS: Okay. I'm Timothy  
12 Spano, S-P-A-N-O. Address, 2104 Darlington Oak  
13 Drive, Seffner, Florida 33584.

14 THE COURT: How you spell Seffner?

15 THE WITNESS: S-E-F-F-N-E-R.

16 THE COURT: Thank you. Very  
17 good.

18 DIRECT EXAMINATION

19 BY MR. HILDEBRAND:

20 Q. All right. Mr. Spano, you just stated  
21 your full name for the record. How old are you?

22 A. 55.

23 Q. All right. Where are you from  
24 originally?

25 A. Tampa, Florida.

1 Q. Okay. Can you speak up just a little  
2 bit, please?

3 A. Sure.

4 Q. Okay. Where are you from?

5 A. Tampa, Florida.

6 Q. All right. And tell me about your  
7 educational background. Did you go to college?

8 A. I went to junior college, Dalton,  
9 Georgia. No degree. And then I started  
10 construction, making good money, and the rest is  
11 history.

12 Q. Okay. And when was that?

13 A. That was, gosh, 1985, '86. I graduated  
14 high school in '84.

15 THE WITNESS: Can you hear me, sir?

16 THE COURT: Yes, sir.

17 THE WITNESS: Okay.

18 THE COURT: I can hear you.

19 Mr. Bundy, I know you have difficulty hearing.  
20 If you need to move around, you certainly may.  
21 Okay?

22 MR. BUNDY: Do you mind if I sat  
23 over there next to -- closer to the witness?

24 THE COURT: I got no problem with  
25 that. Just don't scare him.

1 BY MR. HILDEBRAND:

2 Q. All right. Mr. Spano, so you started  
3 work with -- in the construction business in  
4 1984, '85?

5 A. A little more to it. Dad was a  
6 contractor; so I was kind of born and raised in  
7 it. I did it for the summer, worked for my dad,  
8 things like that. So I was kind of always around  
9 it.

10 And I chose that profession even though  
11 my dad tried to talk me out of it. Yeah, so  
12 basically during college time, I was working  
13 construction also and doing drafting, designs,  
14 things like that.

15 Q. Okay. And then how long -- when did you  
16 actually start working for Balfour Beatty?

17 A. 2004. I believe it was April, the  
18 beginning of 2004. I've got about 17 years in  
19 now.

20 Q. Okay.

21 A. Formerly Centex Construction, but  
22 Balfour bought them in '07; so it's a combination  
23 of the two.

24 Q. Okay. All right. So you -- before you  
25 came with Balfour, you had been doing

1 construction work for about 19 years, if I did  
2 the math right? Does that sound right?

3 A. That's about right.

4 Q. Okay. And tell me what sort of  
5 construction, generally what sort of work you did  
6 in those 19 years?

7 A. Started off as mostly residential, some  
8 commercial, and then went into more commercial,  
9 industrial. Early on, did a lot of, you know,  
10 custom homes and kind of high-end stuff like  
11 that, and I then started doing more commercial.

12 And most of -- I should say, like the  
13 first part of my career was more -- was the  
14 superintendent field is kind of my -- how I came  
15 up through the ranks. And then pretty much the  
16 last half of my career has been, you know, in the  
17 project management side.

18 Q. All right. So the last half, so the  
19 last 20 years or so approximately?

20 A. Approximately, yeah.

21 Q. Okay. And you came to work for Balfour  
22 Beatty in 2004; is that right?

23 A. Uh-huh.

24 Q. Okay. And tell me what your job title  
25 was when you started and how that progressed.

1           A.    When I first started with them, I was a  
2           project manager with a different company before I  
3           came over.

4           Q.    Okay.

5           A.    RCS Construction out of Tampa. We did,  
6           you know, refrigerated. We did large commercial.  
7           We did industrial. Just kind of a combination of  
8           things.

9                    When I came over to Centex at the time  
10           with Balfour, I started on the Bank of America  
11           project, building new banks, and I was a  
12           superintendent for -- with them to get onboard  
13           with them for about the first year. So I built,  
14           I think, three banks, very fast-paced  
15           construction.

16          Q.    Okay.

17          A.    So that's why I said three in a little  
18           over a year.

19          Q.    Right.

20          A.    They were doing them pretty quick. At  
21           that point, I rolled into project manager.

22          Q.    And when would this take us? About what  
23           year?

24          A.    It was only 2005, '6, right in there.

25          Q.    Okay.

1           A.    And then basically was doing banks, and  
2           then BB&T came into Florida.  I ended up heading  
3           up that account in Florida for building new  
4           branch banks, Bank of -- or BB&T, which is now  
5           Truist, I guess.

6           Q.    All right.  So what has been your  
7           progression with Balfour since you became a  
8           project manager in about 2005, 2006?

9           A.    Basically, you know, worked -- worked my  
10          way up to senior project manager, and then was  
11          senior project manager on this project through  
12          the duration of the project.

13          Q.    Okay.

14          A.    That was my title.

15          Q.    Okay.  Can you tell me what sort of -- I  
16          understand that Balfour Beatty is a large  
17          construction company; is that right?

18          A.    Yeah, very large.

19          Q.    Okay.  Can you tell me about it,  
20          generally?

21          A.    Yeah.  They're pretty much worldwide.  
22          The corporate is in London.  We build all over  
23          the world.  We build very diversified commercial,  
24          industrial, hospitals, apartments, military.  So  
25          just kind of a plethora of things they do all

1 over the place.

2 Q. Okay. And are you in a particular -- is  
3 it called a division, or what sort of section?  
4 Or what would you call it where you are now --

5 A. So --

6 Q. -- during this project?

7 A. Yeah, during this project, I was  
8 basically based out of the Charlotte division. I  
9 had moved from Tampa to Charlotte, I guess, about  
10 a year before this had started, so near the  
11 beginning of 2014, right in that timeframe.

12 I moved to Charlotte and was overseeing  
13 as senior project manager. I was overseeing a  
14 mid-rise downtown Charlotte, apartment, parking  
15 deck. They're on a zero lot line. I was also  
16 over an apartment complex here on Daniel Island.  
17 So I was kind of going back and forth.

18 Q. Okay. So the Charlotte division, what  
19 geographical area does that cover?

20 A. Basically North Carolina, South  
21 Carolina, is where they cover.

22 Q. Okay.

23 A. It morphs a little bit; in other words,  
24 like our -- one time our president would be over  
25 in North Carolina, South Carolina, and Georgia.

1       So some of that geography moved a little bit as  
2       far as our upper executives.

3           Q.    Okay.

4           A.    But for the most part, it's North  
5       Carolina, South Carolina.

6           Q.    Okay. Do you have any approximation of  
7       how many projects you have worked on while you  
8       have been with Balfour prior to the Hotel  
9       Bennett?

10          A.    Oh, gosh, probably ten, somewhere in  
11       that range.  10, 12 maybe.

12          Q.    Okay. And what was the nature of those  
13       projects?

14          A.    Like I said, banks, a lot of banking for  
15       Bank of America BB&Ts, military housing; worked  
16       for a military group doing officer homes,  
17       apartment complex, community centers.

18                There's kind of a multitude of  
19       construction in the Southeast United States.  So  
20       I was heading up all construction in the Gulf  
21       Coast region, which basically was from Key West,  
22       Pensacola, Gulfport, Mississippi, all the way  
23       around pretty much to Texas.

24          Q.    Okay.

25          A.    There were several bases there.

1 Q. Okay. Are there any sort of  
2 philosophies that are engrained in the employees  
3 of Balfour as far as work slogans or anything  
4 like that, that you could tell me about?

5 MR. BUNDY: Objection. Calls for  
6 hearsay. It's an out-of-court statement offered  
7 for proof of the matter asserted. There's no  
8 exception to the hearsay rule for him to talk  
9 about a philosophy. Objection.

10 MR. HILDEBRAND: It's not -- Your  
11 Honor, it's not hearsay. It's not an  
12 out-of-court statement offered for his truth.  
13 It's his knowledge of the -- how the company is  
14 run. It's not hearsay.

15 THE COURT: I'm going to overrule  
16 it. I will allow it. Go ahead.

17 THE WITNESS: Our motto is  
18 relentless ally.

19 BY MR. HILDEBRAND:

20 Q. Okay. And what does that mean?

21 A. It basically means you put the owner  
22 first. You go above beyond. You, you know, do  
23 the extra that's not the norm. It's to build an  
24 excellent job for an owner, I mean.

25 Q. Tell me about the work that Balfour --

1 the Charlotte division does. Is it -- before I  
2 ask you that, can you describe to me what the  
3 difference is between negotiated work and bid  
4 work, and tell that the Judge, please.

5 A. Yeah. I mean, bid work is multiple  
6 bidders or contractors bid on a job. You have  
7 that a lot in public work, right, hospitals,  
8 things like that.

9 Q. Okay.

10 A. Negotiated work is basically, you've got  
11 a relationship with a client, and you work  
12 through drawings, and you negotiate prices on  
13 projects.

14 Q. Okay. Do you have any sort of  
15 approximation of -- well, since you have been  
16 with Balfour, about what percentage, just in  
17 gross numbers, would be bid work as opposed to  
18 negotiated work?

19 A. Oh, gosh. Probably 70, 80 percent  
20 negotiated.

21 Q. Does Balfour have a -- is there a  
22 preference in the construction industry as to  
23 whether it's typically preferable to do bid work  
24 or negotiated work?

25 A. We'd much rather do negotiated work.

1 Q. Why is that?

2 A. You're -- well, you're not just a  
3 number, you know, among a bunch of numbers.  
4 You're building that relationship with that  
5 client.

6 Q. All right. What is the -- Balfour's  
7 philosophy as far as its business development  
8 model is concerned and how it wants to build its  
9 business base and client base?

10 A. I mean, the ultimate goal is to have  
11 repeat clients, you know, to have repeat work.  
12 You want a client that's very satisfied, and he's  
13 going to refer you to other people he knows.

14 And he's going to -- if something else  
15 comes along or another development, you're the  
16 first call. I mean, this builds future work for  
17 you in negotiation.

18 Q. So repeat business. That's something  
19 that y'all try to develop?

20 A. Absolutely, absolutely.

21 Q. Good relationships with your clients?

22 A. Absolutely.

23 Q. Do you have a lot of repeat business?

24 A. We do. We do.

25 Q. What sort of -- have you done any

1 projects here locally? Any other projects  
2 besides Hotel Bennett?

3 A. Yes. We, of course, started with Jasper  
4 & Beach Company. We just finished up. It's over  
5 700,000 square feet, a mixed use office,  
6 apartment, parking deck, retail.

7 We just started across the street for  
8 the Beach Company, the Charles, which are very  
9 high-end townhomes. We're putting in piles right  
10 now.

11 Q. Are those negotiated jobs?

12 A. Absolutely. Just our department for  
13 Beach Company on John's Island, Stono Oaks, that  
14 was a negotiated deal. We're also doing up-fits,  
15 of course, in the office tower of Jasper for the  
16 Beach Company.

17 Q. Okay. What other -- how many projects  
18 have y'all done for the Beach Company, would you  
19 say?

20 A. I think we're -- I think Jasper was  
21 seven completed to-date, and I guess Stono would  
22 be eight, and Charles would be nine; so we have  
23 just started.

24 Q. Did those projects end well?

25 A. Yes, sir.

1 Q. What other -- any other major projects  
2 in the Charleston area that y'all have done?

3 A. Not completed, just starting Kiawah  
4 Senior Living, which is an assisted and senior  
5 living facility. That's been -- we've been  
6 working on the front-end of that and precon,  
7 things like that for a couple years now.

8 Of course with COVID, it got delayed.  
9 But that was a repeat client. We had built a  
10 high-rise assisted living facility in  
11 Celebration, Florida, for them.

12 Q. Okay.

13 A. And when they came and bought land here,  
14 they came to us.

15 Q. All right. Have you ever testified in  
16 court before?

17 A. Testified one time for -- kind of as a  
18 witness on a residential project that I just went  
19 and looked at.

20 A client asked me to come look. He was  
21 having an issue with drywall, and I was giving  
22 him my opinion of what I saw. And basically I  
23 got called just to testify what I saw. That was  
24 it.

25 Q. Okay. Have you testified in any prior

1 lawsuits --

2 A. No.

3 Q. -- similar to this?

4 A. No, sir.

5 Q. Okay. Have you done any prior projects  
6 for Michael Bennett or any entities related to  
7 him?

8 A. I have not.

9 Q. How about with his -- with the owner's  
10 representative, a fellow named Jim Clements? To  
11 your knowledge -- or have you done any work with  
12 him?

13 A. No prior work with him.

14 Q. And how about with Buck Lindsay, the  
15 architect on this project?

16 A. No prior work with him.

17 Q. Do you know how Balfour came to get  
18 involved with the Hotel Bennett?

19 A. I don't. I wasn't at the precon part of  
20 the process; so, no, I don't know how it  
21 originated.

22 Q. All right. When did you get involved  
23 with this project?

24 A. Beginning of 2015. I was -- I had been  
25 living in Charlotte for about a year, away from

1 my wife. So we were in the process of loading  
2 our home in Tampa and moving to Charlotte. It  
3 was being organized, and I was asked that -- if I  
4 was willing to move to Charleston and work on  
5 this project, and I immediately said yes.

6 Q. Okay. So you said early 2015. Was that  
7 January?

8 A. I think it's around January. I know I  
9 officially moved here into the house, I think it  
10 was, the first week of March in '15 when I  
11 actually moved my stuff here. But I had -- I  
12 know once I got involved, I immediately started,  
13 that I was looking into the permit process.

14 So I started coming down and checking  
15 with the city and the county, trying to figure  
16 out what the permits were to get the permit. You  
17 know, visiting the site, but ultimately getting  
18 the permits so the job could start.

19 Q. So construction had not started when you  
20 got involved?

21 A. It had not.

22 Q. Okay. Can you tell me what you  
23 understood the -- this hotel was going to be or  
24 what the project was?

25 A. A luxury hotel. Basically, a high-rise

1 marquis hotel for Charleston.

2 Q. Okay. All right. The contract that was  
3 entered into in this matter was a construction  
4 manager as constructed. Do you understand that?

5 A. I do.

6 Q. All right. Can you describe for the  
7 Judge what the difference is between a  
8 construction manager as constructor and just a  
9 contract that involves just with a general  
10 contractor? What's the distinction?

11 A. My understanding is it's basically more  
12 of a precon side of things. Basically, you're  
13 working as a construction manager and then  
14 becoming the constructor, you know, once that's  
15 settled, is my understanding of it.

16 Q. Okay. All right. On this particular  
17 project, the -- who are the primary parties to  
18 the agreement and for the project?

19 MR. BUNDY: Your Honor, I object.  
20 The contract is the only evidence that was  
21 establishing who the primary parties are.

22 This would be an out-of-court statement  
23 or proof of matter asserting. He's already said  
24 he wasn't involved in negotiations. So now it's  
25 time to put the contract in if we're going to

1 start talking about it.

2 MR. HILDEBRAND: Your Honor, he can  
3 testify certainly based on his experience who the  
4 primary parties are in a project, generally, and  
5 certainly for this particular job.

6 THE COURT: I'll allow it.

7 Overruled.

8 MR. HILDEBRAND: Thank you.

9 BY MR. HILDEBRAND:

10 Q. Who are the primary parties to this  
11 particular project?

12 A. So it's Library -- the contract was with  
13 Library Associates, LLC.

14 Q. Okay.

15 A. Per the contract, I believe we had Jim  
16 Clements as the owner's representation, which  
17 is -- I believe it's the company's matrix. I  
18 don't know the whole LLC unless it's in front of  
19 me.

20 Q. Okay.

21 A. The architect was Winford Lindsay --

22 Q. Okay.

23 A. -- out of Atlanta. And then -- and they  
24 also held all of the MEP, you know, structural,  
25 electrical. That was all in-house as part of

1 WLA, Winford Lindsay, is what we referred to him  
2 in Balfour Beatty.

3 Q. Okay. Did Balfour Beatty have any  
4 design responsibilities for this project?

5 MR. BUNDY: Objection. That's  
6 hearsay. The contract is not in evidence.

7 MR. HILDEBRAND: Your Honor, he can  
8 testify about what his -- I mean, my gosh, if he  
9 can't testify about what their responsibilities  
10 were, but then -- everything we do in life is  
11 based on a contract, Your Honor.

12 And he can testify about what he did and  
13 what his responsibilities are, and we can get to  
14 the contract. But I'd like to be able to try the  
15 case like I want to.

16 MR. BUNDY: Well, the problem with  
17 trying the case like he wants to is it doesn't  
18 comply with the Rules of Evidence. This is an  
19 out-of-court statement offered for the proof of  
20 the matter asserted. Okay? It's hearsay.

21 He doesn't know any -- how would he  
22 possibly know that? There's nothing in the  
23 record for him -- because the best evidence -- we  
24 can go to the Best Evidence Rule. The best  
25 evidence of who is in the parties to this

1 contract is the contract.

2 So it's inadmissible under the Best  
3 Evidence Rule. He's required to put in the  
4 document before he can talk about it.

5 THE COURT: We are going to get  
6 there. I'm going to allow it. Go ahead.

7 MR. HILDEBRAND: Thank you, Your  
8 Honor.

9 BY MR. HILDEBRAND:

10 Q. And what responsibilities, if any, did  
11 Balfour have on this project as far as the design  
12 is concerned?

13 A. No design. No design responsibilities.

14 Q. Okay. All right. So when the -- when  
15 you got involved in this project, the contract  
16 had already been signed; is that correct?

17 A. I believe so. I believe -- I don't know  
18 the -- I can't remember the exact execution date,  
19 but it was right at that time. I knew it was  
20 awarded here verbally, or it was already  
21 assigned.

22 Q. Okay. Do you know what the original  
23 scheduled time was for this job?

24 MR. BUNDY: Objection.

25 MR. HILDEBRAND: Your Honor.

1 THE COURT: Overruled. Go ahead,  
2 go ahead.

3 THE WITNESS: The 28-month duration  
4 is -- was the duration for the -- for the  
5 project.

6 BY MR. HILDEBRAND:

7 Q. Okay. Can you tell me how a general  
8 contractor goes about scheduling a project? Do  
9 you have any involvement with that?

10 A. Yeah, at times. Sometimes we're -- we  
11 get into -- you know, we'll come in earlier. If  
12 we have time, we'll come in earlier and we'll  
13 help with the scheduling.

14 But basically you're looking at, you  
15 know, the documents and the structure and how  
16 you're putting it together. You've got to look  
17 at the logistics, the area of the site, and how  
18 you're getting materials in and out. I mean,  
19 there's a lot that comes into the conversation on  
20 a schedule.

21 Q. Okay. Is the owner part of those  
22 discussions and part of the scheduling  
23 discussions?

24 A. No.

25 MR. BUNDY: Objection. Lack of

1 personal knowledge.

2 BY MR. HILDEBRAND:

3 Q. What was your answer?

4 A. I don't normally know. I don't know if  
5 they were not.

6 Q. On this job, you don't know whether they  
7 were not?

8 A. I don't.

9 Q. Okay.

10 A. They weren't -- when I got the schedule,  
11 it was -- the schedule was put together.

12 Q. All right. What involvement do the --  
13 does Balfour Beatty's subcontractors have with  
14 the project schedule and their work?

15 A. So for the most part, your main -- your  
16 main subs that have to do with structure or  
17 mechanical, electrical, plumbing, they're  
18 involved in the discussion and the duration.

19 We normally have meetings, coordination  
20 meetings, and talk through, you know, sequencing  
21 and things like that to make any kind of tweaks  
22 or adjustments to it.

23 There are some subcontractors, I should  
24 say, that may not be included on those kind of  
25 meetings, like landscaping. You know, we know

1       how many trees or plants are going in, and we  
2       allot the time, but then send it for review or  
3       acceptance.

4           Q.    All right.  How do subcontractors plan  
5       for their work on a job like this or how they're  
6       going to --

7                   MR. BUNDY:  Objection.  There's no  
8       foundation for that.  He hadn't testified as a  
9       subcontractor.  He hadn't testified he's a  
10      scheduler.  Now we're being asked how a third  
11      party does something.  I object.

12                   THE COURT:  Yeah.  I might sustain  
13      that one.  Tell me what the -- tell me where  
14      you're going.  I know you're trying to lay a  
15      foundation.

16                   MR. HILDEBRAND:  Yes, sir.  He's --  
17      I'm simply asking him -- he works with  
18      subcontractors every day.  He knows how -- what  
19      their knowledge is when they go about scheduling  
20      and what they do.  I'm asking him generally  
21      what --

22                   THE COURT:  You're saying  
23      generally, based on his experience?

24                   MR. HILDEBRAND:  Yes, sir.

25                   THE COURT:  Generally, based on

1       that. All right. I'll allow it on that basis.

2       Go ahead.

3                       MR. HILDEBRAND: Thank you.

4                       THE WITNESS: So repeat it, please.

5       BY MR. HILDEBRAND:

6               Q. Certainly. As a general proposition on  
7       a complicated project like this, can you tell me  
8       how a subcontractor goes about scheduling and  
9       planning for its work?

10              A. Yes. So, I mean, you look at the  
11      duration. So within a schedule, you have  
12      durations for say per floor or per area, right?

13                      So you look to the flow of the building,  
14      how we're going to start at the bottom and work  
15      up, how we're going to rotate around the  
16      building. You get in a sequence because subs  
17      can't all be in the same place at one time.  
18      Certain subs go first, and then, you know, you  
19      have a path.

20                      So all those things are discussed, so  
21      that they can look at durations that they have in  
22      a particular area to figure, you know, manpower  
23      or resources to make -- meet that schedule.

24              Q. Okay. Do subs sometimes -- on  
25      construction jobs, do subs prefabricate work?

1           A.    They do.

2           Q.    Tell me -- explain to the Judge what  
3           that is.

4           A.    Kind of most prefer to.  So any work  
5           that they can -- pieces of their work that they  
6           can put together kind of in a controlled  
7           environment, maybe off-site, tends to be more  
8           efficient for them.

9                     In other words, I guess probably an easy  
10           reference is, say a shower valve that's going in  
11           a shower.  If you can take that valve, solder  
12           your pipe connections for your cold water, your  
13           hot water, and have those connections already  
14           soldered in say a factory setting or a warehouse  
15           setting, then you're shipping it with all that  
16           work already completed, and you're just tying in.

17                     So it just eliminates the onsite process  
18           of the work, and, you know -- and the other  
19           things that come with it with other work going on  
20           around you.  It just enables them to get little  
21           more work done in a controlled environment before  
22           it ships to the site.  Basically, it's prefab.

23                     THE COURT:  Okay.

24           BY MR. HILDEBRAND:

25           Q.    All right.  Let me ask you about some of

1 the subcontractors on this particular job. I  
2 want to ask you -- well, let me ask you this.  
3 Generally, how does Balfour go about selecting  
4 subcontractors for a particular job?

5 A. I mean, it would be based on, of course,  
6 the type of project, and we typically try to work  
7 with subs that we worked with before that we have  
8 experience with and --

9 Q. Why is that?

10 A. Well, you know their performance. You  
11 know what they're capable of. You know their  
12 amount of employees and things like that.

13 Q. How about the -- let's go through some  
14 of the primary subs on this job and tell me  
15 whether you've had prior relationships with them.  
16 How about Baker Rubin (ph)?

17 A. Yes.

18 Q. Bernhard MCC?

19 A. Yeah, the company has. I didn't before  
20 this job, but the company has.

21 Q. I'm talking about Balfour.

22 A. Yeah, yeah.

23 Q. Okay. Cook and Boardman?

24 A. Yes.

25 Q. David Allen Company?

1 A. Yes.

2 Q. First Choice Glass?

3 A. Maybe. I'm not sure. I'm not sure.

4 This could have been the first one.

5 Q. Flooring Services?

6 A. They were a local sub; so I believe this

7 was the first project we used them on.

8 Q. How about Gulf Stream Construction?

9 A. Yes.

10 Q. Guy Beaty?

11 A. No. They were a sub for, I think, BMCC.

12 Q. Okay. Lithko?

13 A. Yes.

14 Q. Old North State Masonry?

15 A. Yes.

16 Q. Pasco?

17 A. I believe so, yes.

18 Q. Pleasant Places?

19 A. Yes. They did some of the other Beach

20 projects.

21 Q. Precision Walls?

22 A. Yes.

23 Q. Warco?

24 A. Yes.

25 Q. Watson Electric?

1           A.    Yes.

2           Q.    Okay.  And those are all I listed.

3           Would you describe that -- characterize that list  
4           I gave you as many of the primary subs on this  
5           job?

6           A.    That's, yeah, the majority of them.

7           Q.    Okay.  All right.  So the job -- the  
8           ground had not yet been broken when this job  
9           began; is that correct?

10          A.    Yeah.  When I got here, there was  
11          basically a chain link fence around it.  I guess  
12          the old building had been demoed; so there was  
13          still a little rubble, you know, things like that  
14          on the site.  That was the condition on the site  
15          when I got down here, the first time I looked at  
16          it.

17          Q.    Okay.  All right.  So tell me what the  
18          progress of construction was.  What did you do?  
19          What did you start with and how did that go?

20          A.    So, of course, you put your swift  
21          measures, your basically silt fence in and things  
22          like that, for erosion control stuff, having an  
23          inspection.  And then it allows you, kind of  
24          releases you to do your land alteration, site  
25          work.

1           So at first, there was a little bit of  
2           clean up just with some of the rubbles there.  
3           But with this job, there was -- there was an  
4           underground parking garage with, you know, a  
5           water table that's not that far down.

6           So the first thing we did was we came in  
7           and we basically had to drive sheet pile, metal  
8           sheathing that would interlock. I'm trying to  
9           explain it to you guys.

10           So you basically are building a steel  
11           wall around the perimeter of the basement that is  
12           driven down into the ground, that then allows you  
13           to excavate down.

14           So, I guess, your first process would be  
15           to drive sheet pile, and then before you start  
16           any excavation, you would have -- you would  
17           basically have a concrete cap that locked all  
18           that sheet pile in it.

19           Q.    Okay.

20           A.    But you also had to -- well points are  
21           basically PVC pipe that runs down in the ground  
22           with a pumping system that extracts the water, so  
23           you can lower the water table.

24           So as you're digging down the inside of  
25           the parking garage, you want to lower the water

1 table on the outside so -- just so the  
2 hydrostatic pressure is not pushing the walls in.  
3 So that's the first process. So that was the --  
4 probably the most complicated thing, you know,  
5 here was, getting that process, getting it down  
6 to grade to where you could start, you know,  
7 foundation.

8 But once we got all of that in, then you  
9 drive your piles, your concrete piles that this  
10 building has to sit on, the foundation has to sit  
11 on.

12 Q. Okay.

13 A. You're basically driving them and  
14 punching them down around -- and this one was  
15 around 20 feet -- 18 to 20 feet to the bottom of  
16 your parking deck, where your actual slab on  
17 grade would start down there.

18 So you punched them through. Then you  
19 start excavating the hole out to where you'd start  
20 the foundation.

21 Q. Okay. Let me stop you there for a  
22 minute and we'll get back in just a -- for a  
23 moment, if I may. Have you heard the acronym or  
24 the term BIM?

25 A. Yes.

1 Q. Do you know what that stands for?

2 A. Yeah, building information modeling.

3 Q. And what is BIM?

4 A. It's a software program that basically  
5 takes a set of drawings or two-dimensional  
6 drawings and puts it in a 3D model.

7 Q. All right. And can BIM be used by an  
8 architect?

9 A. Sure.

10 Q. Can it be used by a contractor?

11 A. Sure.

12 Q. To your knowledge, did the architect  
13 employ BIM on this project?

14 A. They did not.

15 Q. Do you know why they didn't?

16 MR. BUNDY: Objection. Based on  
17 hearsay. And there's no foundation how he --  
18 there's no foundation as to how he can possibly  
19 know that.

20 MR. HILDEBRAND: Your Honor, it's  
21 not hearsay. It's knows and knowledge.  
22 Certainly he can testify about whether -- and if  
23 he had a conversation with the owner's  
24 representative, who is the architect, then  
25 certainly he can testify about that. It's not

1 offered to -- as a matter of proof.

2 MR. BUNDY: It's an out-of-court  
3 statement on the proof of the matter asserted.  
4 He's saying -- he's asking him why somebody else  
5 did something. Why did the architect do that?

6 And he hadn't laid any foundation as to  
7 how he could possibly know the answer to that  
8 question. The First Rule of Evidence says --

9 THE COURT: Unless he has personal  
10 knowledge, right?

11 MR. BUNDY: If he has got personal  
12 knowledge, sure, under the Rules of Evidence, he  
13 can, sure.

14 THE COURT: Sure. Okay.

15 MR. BUNDY: But it can't be based  
16 on hearsay. It's got to be personal knowledge.

17 THE COURT: I'm with you. Okay.  
18 If he has got personal knowledge, you can tell  
19 me, whether or not the architect had BIM.

20 BY MR. HILDEBRAND:

21 Q. Did they?

22 A. They did not.

23 Q. Okay. Was there a requirement in  
24 Balfour's contract for Balfour to provide BIM?

25 MR. BUNDY: Objection. The

1 contract is not in the record, and this witness  
2 is now testifying what's in the contract. The  
3 contract is not in the record. The best evidence  
4 is the contract. Thank you, Your Honor.

5 MR. HILDEBRAND: Your Honor, he  
6 can -- his knowledge of the contract is critical  
7 to the case and everything that he has done. He  
8 can certainly testify about what his obligations  
9 were, and I don't have to go through every single  
10 time and say, did you have to do this, or what  
11 did you --

12 THE COURT: Okay. I'm going to  
13 allow it. Go ahead.

14 MR. HILDEBRAND: Thank you.

15 THE WITNESS: BIM requirement was  
16 not in the contract.

17 BY MR. HILDEBRAND:

18 Q. Okay. Did Balfour employ BIM on this  
19 project?

20 A. We did.

21 THE COURT: Was that a yes or a no?  
22 I'm sorry.

23 THE WITNESS: Yes, sir.

24 BY MR. HILDEBRAND:

25 Q. If you could speak up just a little bit.

1           A.    I'm sorry.

2           Q.    And why did Balfour use BIM if it was  
3 not contractually obligated to?

4           A.    We like to use it especially on a  
5 complicated job, as -- such as this one was.

6                    With our main mechanical, electrical,  
7 plumbing subs, basically to take what's on the  
8 drawings, get it in a 3D model, which gives you a  
9 vertical aspect of the building to fit in their  
10 mechanical, electrical, plumbing, piping, and  
11 things like that.

12                   So for instance, like the ceiling --  
13 this ceiling to the actual structure deck above  
14 it, sometimes you have larger spaces less, but  
15 you've got to fit all of those components up  
16 there. So it allows you to design the size of  
17 the duct, the size of the pipe, maybe insulation  
18 around the pipe.

19                   And it's basically coordinating the  
20 mechanical, electrical, plumbing to detect any  
21 kind of interference or clashes that are -- that  
22 are in it. So basically you can figure out if  
23 the drawings, as designed, it works.

24           Q.    So is it a fair statement that you used  
25 the BIM to determine if the work shown on the

1 drawings actually works or not in the real world?

2 MR. BUNDY: Leading. Objection.

3 THE COURT: I'm sorry, I missed the  
4 question. Objection was to leading, but --

5 MR. BUNDY: Yes, Your Honor.

6 BY MR. HILDEBRAND:

7 Q. So the purpose of BIM, from Balfour's  
8 perspective, is for -- to allow it to review the  
9 drawings to determine if there are clashes; is  
10 that a fair statement?

11 MR. BUNDY: Objection.

12 THE COURT: Objection noted.

13 Overruled. Go ahead.

14 THE WITNESS: Yes.

15 BY MR. HILDEBRAND:

16 Q. All right. Okay. So you were there on  
17 this job from the very beginning with the site  
18 preparation until completion?

19 A. Uh-huh.

20 Q. You need to answer yes or no for the  
21 record, please.

22 A. Yes.

23 Q. All right. And what was your role on  
24 this job?

25 A. Senior project manager.

1 Q. All right. What was your job as the  
2 senior project manager?

3 A. To oversee the project, to oversee the  
4 field, the office, oversee the whole project  
5 basically.

6 Q. Okay. So you were boots on the ground?  
7 You were there every day; is that right?

8 A. I was.

9 Q. Okay. Was there anybody above you who  
10 was on-site on this job? Did you have a  
11 supervisor who was on-site?

12 A. Yes. So you mean full-time on-site?

13 Q. Yes.

14 A. No, just part-time.

15 Q. Okay. So who would have been there  
16 part-time?

17 A. Originally Mike Baumbach, senior vice  
18 president. So he was -- when we first started,  
19 he was basically above me, and he would come down  
20 to meetings and visit every couple of weeks or  
21 whatever.

22 Q. Okay.

23 A. And we'd go through things.

24 Q. All right. So were you the top dog on  
25 this project as far as the supervision, on-site,

1 daily supervision?

2 A. On-site, yes.

3 Q. Okay. And then who was under you?

4 A. I had -- of course, we had  
5 superintendents. Bob Kauferman originally was a  
6 senior and general, I think. I can't remember  
7 the title now, but was the original super on the  
8 ground, I believe, for the first year or so.

9 Q. Okay.

10 A. Dan Richie came in, superintendent.

11 Q. Okay.

12 A. I believe about -- I don't know -- 10  
13 months and maybe a year in, somewhere in there,  
14 around the time Bob left.

15 Q. Okay.

16 A. Marty Dale, senior super, was on the  
17 project. Johnny Eldridge, superintendent; Ryan  
18 Ledford, superintendent.

19 I do want to state, when we were coming  
20 out of the ground, those guys were working on  
21 other projects, finishing them up, anywhere  
22 between 10 months in and 12 months in. We were  
23 transitioning them on as -- as the job started --  
24 began in progress. You know what I mean.

25 Q. Okay.

1           A.    We also had periodically through the  
2           project, I mean, we brought in more  
3           superintendents; so going by memory here, but  
4           brought in Mike Jansen, a general superintendent,  
5           out of Atlanta. We bought him in for a little  
6           while to help.

7                    Brought in Heath Bradford,  
8           superintendent, brought him down for a while.  
9           Steve Zenowski was an assistant superintendent,  
10          brought him in.

11                   Let me think. AJ. I'm trying to  
12          remember AJ's full name. He was a project  
13          engineer. We brought him in to help. We also  
14          had Travis Farris, assistant superintendent.

15          Q.    Okay.

16           A.    We had him for a while. So we kind  
17          of -- as work got heavy, we would bring guys in  
18          to assist on different areas of the project. So  
19          that's on the superintendent side.

20          Q.    When you say, "on the superintendent  
21          side", do you mean on the -- out in the field  
22          side?

23          A.    The field side.

24          Q.    Okay. So there -- you would have  
25          typically different employees on the field side

1 and then in the office?

2 A. Correct.

3 Q. Okay. And I would assume that people in  
4 the field are overseeing the actual construction  
5 and then office people have different  
6 responsibilities?

7 A. Yeah. They tend to -- I mean, they are  
8 doing paperwork, RFIs, submittals, pay apps, you  
9 know, depending on their title or role, and  
10 basically moving the paperwork along and the  
11 e-mails and all the office side of things.

12 They also have overlap out in the field.  
13 That's one of my preferences is to get office  
14 staff in the field as much as possible just for  
15 experience.

16 Q. Okay. So can you explain to the  
17 Judge -- and it's not entirely clear to me. So  
18 at the top of the triangle on -- or top of the  
19 pyramid during construction for supervision was  
20 you, correct?

21 A. Supervision?

22 Q. Right.

23 A. Overall, over the job, I'm here. We had  
24 a set of -- we had a set of field  
25 superintendents.

1 Q. Okay.

2 A. And then we had office, right?

3 Q. Okay.

4 A. So go ahead.

5 Q. So you have field superintendents. Is  
6 there anybody underneath a field superintendent?

7 A. Say that again.

8 Q. Is there anybody underneath a field  
9 superintendent, or is that where --

10 A. You have those titles: General  
11 superintendent, senior superintendent,  
12 superintendent, assistant superintendent, field  
13 PE. So that's kind of the progression of  
14 authority on the field side.

15 Q. Okay. When you -- you said a field PE?

16 A. Uh-huh.

17 Q. What is that?

18 A. Basically a project engineer that -- you  
19 have an office project engineer, and you have a  
20 field project engineer.

21 So they're more, basically -- typically  
22 out of school, working under a superintendent,  
23 learning just the field engineering side. It's  
24 not a quote, "engineer". That's just a title  
25 term To be clear.

1           Q.   Gotcha.  Okay.  All right.  So you've  
2           already described to the Judge how you came out  
3           on the ground for this project or what the  
4           beginning stages were.  Can you just very briefly  
5           kind of work -- tell him what the sequence of  
6           construction is all the way to topping out?  How  
7           does construction proceed?

8           A.   Okay.  This particular job is a  
9           cast-in-place concrete job.  So basically you're  
10          forming and pouring your concrete columns, your  
11          floors, and working all the way up to the roof  
12          basically.

13                    So once we excavated down into the  
14          basement, per se, and got the dirt out to where  
15          we could start foundations.  The foundations are  
16          a little more complicated.  You do have grade  
17          beams and pile caps and things to where you can  
18          get to the point to pour your slab.

19                    Then you come up with formed columns.  
20          Then at that point, once you have columns, you  
21          come in with what we call tables, big wood  
22          tables, with basically shoring underneath that  
23          builds basically a platform or a floor base above  
24          you.

25                    So you build these tables.  You put the

1 shoring under it. Once you do that, on top of  
2 those tables is where you put your sleeves. You  
3 put your PT cable, post-tension cable, and you  
4 put your rebar reinforcements. All the things  
5 that have to go in that slab, you put on this  
6 platform to where you can pour the concrete.

7 For that next floor, the same thing.  
8 You strip the forms. You put what we call  
9 re-shores. You have to put shoring back under it  
10 to support it for a certain amount of time,  
11 typically three floors above before you can take  
12 that shoring out.

13 So you just kind of work your way in a  
14 stack system. This particular job, when we were  
15 in the basement, we ended up having to pour the  
16 slab a little differently other than the original  
17 contract, what the original schedule showed, just  
18 from the elements we ran into down there.

19 Pluff mud, which I wasn't familiar with  
20 before -- to where we would put a wellpoint in  
21 the middle to pull water out. It wouldn't  
22 pull -- it would pull the water out, about a cup.

23 THE COURT: Right.

24 THE WITNESS: So, basically, we  
25 kind of changed gears and started isolating into

1 smaller sections to where we could have a normal  
2 pump, as you would to know it, to pump the water  
3 out to work the foundation. So the basement part  
4 went a little different, in smaller sections,  
5 than was originally planned.

6 BY MR. HILDEBRAND:

7 Q. And describe, if you would again, what  
8 stripping forms means and doing the re-shores.

9 A. So the tables that we built, which are  
10 big wood platforms with shores that are  
11 supporting it. Basically, once you pour that  
12 concrete and it's cured to a certain point, you  
13 pull the shoring out.

14 You drop those tables. You move them.  
15 You use them in another section. But you have --  
16 you have shoring that you have to put in just  
17 under the concrete to help support it until it  
18 fully cures.

19 Q. Okay.

20 A. Not just fully cures, but because you're  
21 adding floors above it, you've got to leave --  
22 per an engineer, you've got to leave those --  
23 that shoring in for a certain amount of time or a  
24 certain --

25 Q. Typically, how long is the re-shores

1 plugged in?

2 A. Well, it's -- typically, you want three  
3 floors of shoring. So once we get three floors  
4 above, then we typically pull that bottom  
5 re-shore out.

6 Q. Okay.

7 A. And that basically opens up the floor  
8 for framing and whatnot.

9 Q. Okay. All right. So you basically  
10 leapfrog your way up the building with the  
11 concrete floors?

12 A. Yeah. This particular job, we ended up  
13 doing basically those slab -- the slab sections  
14 in two sections. So we were kind of moving east,  
15 west, you know, kind of jogging back and forth as  
16 we -- you would do half. You would pour it.

17 You would move -- the columns would  
18 start over here while we're prepping slab over  
19 here. It's just kind of -- it's basically a  
20 rotation around the job; so you kind of have a  
21 pattern that you would move up the shell.

22 Q. Okay. So I interrupted you earlier. So  
23 you start the foundation. Then you do each pour  
24 for the floor. You do your steel structure  
25 around; is that correct, the next thing?

1 A. On the basement?

2 Q. Right.

3 A. Yes. So we did the sheet pile.

4 Q. Okay.

5 A. Which created the wall.

6 Q. The next phase, generally, is what?

7 A. Pardon?

8 Q. The next phase, generally, is what?

9 A. On that situation, you drive piles once  
10 you get the shoring in place.

11 Q. Once you've done that, going up, what's  
12 the progression?

13 A. Basically, you pour your slab, columns,  
14 tables, shoring, layout, all your elements on  
15 your slab, your penetration sleeve, your rebar  
16 and all that.

17 Q. Right.

18 A. There the inspection, pour, strip forms,  
19 shift to another area. So you're just moving  
20 tables. The columns are constantly going up,  
21 rotating around. Tables are constantly going up,  
22 rotating around. We're kind of working a spiral  
23 effect up the building.

24 Q. Okay. What's the next general phase of  
25 construction?

1           A.   Well, once you get shell up -- or I  
2           should say, once you get your floors and you're  
3           able to pull the re-shores out on the lower  
4           floor, on this one, it was -- you know, exterior  
5           walls, CMU walls would go on the exterior. That  
6           would --

7           Q.   What is CMU?

8           A.   Basically block, cement block. Cement  
9           block would form between the columns and from  
10          floor to floor. So you basically fill in that  
11          wall around the building.

12          Q.   And is that how it went all the way up  
13          the whole building?

14          A.   It did. It did.

15          Q.   Okay. So you pour the floors, you fill  
16          in the sides with cinder blocks, and you do that  
17          all the way up to the top; is that right?

18          A.   Uh-huh.

19          Q.   All right. What's next, generally?

20          A.   Your interior frame.

21          Q.   What is that?

22          A.   Basically metal stud, building your  
23          walls, your interior walls, your layout, build  
24          all your interior walls, and, of course, tie into  
25          the bottom wall or the exterior walls.

1 Q. Okay. What's next?

2 A. Then your rough-ins, so your MEPs. Your  
3 mechanical, your electrical, your plumbing.  
4 Rough-ins start in the wall systems. So where  
5 you're running outlets, which is thermostats, et  
6 cetera. Then you would basically sheetrock the  
7 walls.

8 Q. Okay.

9 A. And then you put the drywall up.

10 Q. Drywall and then you do your finishes  
11 after that?

12 A. Yeah. I mean, you've got, you know --  
13 you've got cabinets in some areas. You've got  
14 millwork or trim in some areas. Painting, of  
15 course. Countertops, crown molding, lighting.  
16 So, yeah, it's a progression of finishes.

17 MR. HILDEBRAND: Okay. I'm about  
18 to go into another area where he's going to talk  
19 about the problems that he encounters; so it's a  
20 natural stopping place if you'd like to.

21 THE COURT: Okay. All right.  
22 Let's take a break now. Let's plan to come back  
23 at 2 o'clock.

24 MR. BUNDY: Can I ask you to  
25 admonish the witness since he's under oath?

1 THE COURT: All right. So,  
2 Mr. Spano, you're under oath. You're on direct  
3 testimony. So just, I would -- when you come  
4 back, I want you to come on back in the witness  
5 stand. But you shouldn't be consulting with your  
6 attorneys during the break.

7 (A recess transpired.)

8 THE COURT: Okay. Back on the  
9 record. Mr. Spano, you're still under oath.

10 THE WITNESS: Yes, sir.

11 THE COURT: All right. Very good.

12 Mr. Hildebrand?

13 MR. HILDEBRAND: Thank you, Your  
14 Honor.

15 BY MR. HILDEBRAND:

16 Q. All right. Mr. Spano, would you please  
17 turn to Exhibit 56 on that document.

18 A. Okay.

19 MR. BUNDY: Your Honor?

20 THE COURT: Yes, sir.

21 MR. BUNDY: This is an exhibit  
22 that's labeled 56. I wasn't aware we had any  
23 exhibits in evidence yet. I've heard no motion  
24 to introduce any evidence. And could we mark  
25 them for ID first and then move them when they're

1 in exhibits? That way if they don't get in,  
2 there's no confusion.

3 THE COURT: They'll already -- all  
4 right. So what we'll do is, we'll consider them.  
5 They could be -- it doesn't matter what number  
6 they are, but they'll be considered to be marked  
7 for identification purposes until they're moved  
8 into evidence. If there's an objection, we'll  
9 entertain that at that time.

10 MR. HILDEBRAND: Yes, sir.

11 MR. BUNDY: And I'll need to be  
12 provided with a copy of the document that they've  
13 propose to identify.

14 THE COURT: All right.

15 MR. HILDEBRAND: Yeah. We have  
16 several copies.

17 MR. BUNDY: And, Your Honor, we're  
18 going to need some way to keep these things  
19 separate. It seems to -- and I don't care, but I  
20 mean, from an administrative matter, you've got  
21 to -- 100-and-something exhibits in here, none of  
22 which have been produced into -- none of which  
23 are in evidence.

24 THE COURT: Okay.

25 MR. BUNDY: And so if he marks No.

1 36 and you let it in, I think we ought take it  
2 out of the book and set it over somewhere. And  
3 when he gets them all done, if he gets them all  
4 in, we'll put them back in the book.

5 THE COURT: We can monitor. We'll  
6 monitor them as to what they are. There's -- is  
7 there an index before each binder as to what's in  
8 the binder, or is there an overall index?

9 MR. HILDEBRAND: There is one. I  
10 will make a copy for the Court.

11 THE COURT: Okay. All right.

12 MR. HILDEBRAND: Yes, sir. What I  
13 thought -- what I normally do is -- and normally  
14 Court's like you to premark exhibits and have  
15 them well organized.

16 THE COURT: Right.

17 MR. HILDEBRAND: I've tried to make  
18 it just quick and convenient for the Court. And  
19 what I usually do is, when I do a notebook like  
20 this, if -- you could turn to the one and counsel  
21 can, and if it comes in, it stays in the  
22 notebook. And then at the end, the ones that  
23 were not admitted, then would come out.

24 THE COURT: Right.

25 MR. HILDEBRAND: So it's pretty

1 straightforward.

2 THE COURT: Okay. All right. I'm  
3 with you.

4 BY MR. HILDEBRAND:

5 Q. All right. Will you turn to -- we've  
6 got exhibit -- I'm sorry, tab 56 in the notebook,  
7 Plaintiff's tab 56. And I would refer you to the  
8 document that you see in front of you. Do you  
9 see that, Mr. Spano?

10 A. I do, yes.

11 Q. All right. Are you familiar with  
12 the contract, Mr. Spano?

13 A. Yes.

14 Q. Have you had a chance to review that  
15 document?

16 A. Yes.

17 Q. All right. And is that Balfour's  
18 contract with the owner, Library Associates?

19 A. Yes.

20 MR. HILDEBRAND: Okay. I would  
21 like to move that into evidence.

22 MR. BUNDY: Objection. It's not  
23 the complete contract. The best evidence of the  
24 contract between the parties is the complete  
25 contract. And the contract documents themselves

1 outline what the contract documents are.

2 THE COURT: Okay.

3 MR. BUNDY: Plus, you may recall, I  
4 tried to have a meeting to go through all of this  
5 two weeks ago. I don't -- I have never seen this  
6 exhibit before.

7 I've seen, obviously, the contract. I  
8 have no way of sitting here in open court and  
9 going through every page to make sure that this  
10 is in fact an accurate copy of the contract.

11 Okay. And the witness hadn't testified  
12 to that. Whether he has or not, I'm still  
13 entitled some time to look at it. Okay. So we  
14 can do it a couple of different ways. I mean, I  
15 can certainly -- I'll certainly -- well, however  
16 you want to do it.

17 But I reserve my right -- would reserve  
18 my right to go tonight and look at these  
19 documents to -- to establish that in fact they  
20 are because if we'd have gotten together, we  
21 could have premarked them and both agreed it was  
22 all in the contract.

23 That was my hope all along, but we  
24 weren't able to accomplish that. Thank you, Your  
25 Honor.

1 THE COURT: All right. All right.  
2 I'm going to note the objection, but what's being  
3 presented is the document A133-2009?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: All right. I'm going  
6 to allow that into evidence. All right.

7 MR. HILDEBRAND: Thank you, Your  
8 Honor.

9 BY MR. HILDEBRAND:

10 Q. And that's the document that you  
11 referred to throughout the contract when you  
12 would have questions or issues that came up with  
13 regard to it; is that correct?

14 A. Yes.

15 Q. We're going to go through some of the  
16 provisions in just a moment, but before I do, I  
17 want to return you to -- return to an area that I  
18 had touched on earlier. And I had asked you who  
19 the people in the field were and what the  
20 hierarchy was there. You went through that with  
21 a typical job.

22 A. Yes, uh-huh.

23 Q. Can you please tell Judge Scarborough  
24 who, on the other side of the house, so to speak,  
25 who the administrative people are who are back at

1 the -- in the trailer?

2 A. Yes. So Nick Starcevic was project  
3 manager. Alec Dooley was assistant project  
4 manager.

5 THE COURT: First name of  
6 Mr. Dooley?

7 THE WITNESS: Alec.

8 THE COURT: Alec Dooley?

9 THE WITNESS: Alec Dooley.

10 THE COURT: All right.

11 THE WITNESS: Through, I guess,  
12 most of the project, early on, we had Brandon  
13 Denny, was a project engineer for us. Clark --  
14 I'm drawing a blank on his last name -- is a  
15 project engineer we had working for us.

16 We also had Shanti Pieniak. I'll  
17 probably misspell her last name, but Shanti is  
18 probably the easiest way to -- as a project  
19 engineer in the office also.

20 BY MR. HILDEBRAND:

21 Q. All right. Can you describe, generally,  
22 what the dichotomy of responsibilities is on a  
23 job like this between the office people and the  
24 field people?

25 A. Yes. So the office people are receiving

1       submittals, things like that, from the subs.  
2       They execute -- they meet with the  
3       subcontractors. They work through scopes of  
4       work, things like that, to get them contracted,  
5       get them bought out or under contract, each  
6       subcontractor.

7             Q.    Okay.

8             A.    Then there's a submittal process where  
9       items being used on the job will be submitted,  
10       the criteria, the data, dimensions, schematics,  
11       thing like that.

12             You review them against the documents or  
13       the specifications that are supposed to be  
14       provided for the job and then submit them to the  
15       architect for review and approval. And that  
16       basically releases materials to be ordered for  
17       the field.

18             And then you've also got any change  
19       order process or request for information.  
20       Sometimes you have the field guys see something,  
21       and they'll say, hey, what's going on here? I  
22       don't see it. And usually the project manager or  
23       the assistant project engineer will submit a  
24       request for information to the architect to get  
25       clarification on something.

1 Q. Okay.

2 A. Whether it's from the office or from the  
3 field.

4 Q. Okay. Do the people in the office ever  
5 go out in the field? I think you may have  
6 alluded to that.

7 A. They do. They do.

8 Q. Okay.

9 MR. BUNDY: Tom, is this Exhibit 14  
10 or is it Exhibit 36 -- 56?

11 MR. HILDEBRAND: It's tab 56.

12 MR. BUNDY: But what exhibit number  
13 is it, though? Is this -- I just want to make  
14 sure I'm -- that we're talking about the same  
15 document. I'm really not being hard to live  
16 with.

17 MR. HILDEBRAND: Fair enough. No.

18 MR. BUNDY: I'd like to know what  
19 the document is.

20 MR. HILDEBRAND: What I would  
21 suggest is that that's tab 56, but I would just  
22 mark that as Plaintiff's 56 would be the easier  
23 way.

24 THE COURT: All right. Do you want  
25 to call it Plaintiff's 56?

1 MR. BUNDY: That's fine. As long  
2 as it's -- I'm not binding this whole book.

3 THE COURT: Okay. We can have --  
4 all right.

5 MR. BUNDY: It's Exhibit 56.

6 THE COURT: Got it.

7 MR. BUNDY: Okay. Thank you.

8 THE COURT: Okay.

9 MR. HILDEBRAND: Bear with me, Your  
10 Honor.

11 THE COURT: Okay.

12 MR. HILDEBRAND: These rings get  
13 out of whack.

14 BY MR. HILDEBRAND:

15 Q. Let me walk you through, if I can, some  
16 of the provisions in this contract and get those  
17 published in the record. All right. Let's go  
18 to -- the agreement was made as of the 22nd day  
19 of September of the year 2014; is that correct?

20 A. Yes.

21 Q. All right. And between the owner. And  
22 who is the owner?

23 A. Library Associates, LLC.

24 Q. And the construction manager is who?

25 A. Jim Clements Matrix Program Management

1 Services, LLC.

2 Q. That's at the very bottom. I think  
3 that's the owner's designated representative?

4 A. Right, right.

5 Q. All right. Go back up to where -- do  
6 you see Balfour Beatty Construction, LLC?

7 A. Yeah, Balfour Beatty Construction, LLC.

8 Q. That's the construction manager?

9 A. Yeah.

10 Q. Okay. And the architect is who?

11 A. Winford Lindsay, architect,  
12 Lawrenceville, Georgia.

13 Q. All right. At the very top, it says,  
14 standard form of agreement between owner and  
15 construction manager as constructed. Do you see  
16 that?

17 A. I do.

18 Q. All right. And as constructor, that is  
19 where y'all were acting as the general  
20 contractor; is that correct?

21 A. Correct.

22 Q. Okay. Let's turn to article 1 on page  
23 3. 1.1 of the contract documents, and the last  
24 two sentences where it starts, the contract  
25 represents.

1           The contract represents the entire and  
2           integrated agreement between the parties hereto  
3           and supercedes prior negotiations,  
4           representations for agreements, either written or  
5           oral.

6           If anything in the other contract  
7           documents, other than a modification is  
8           inconsistent with this agreement, this agreement  
9           shall govern. Did I read that correctly?

10          A. Yes.

11          Q. Now, turn to the article 2 at the  
12          bottom. Do you see that? Article 2,  
13          construction manager's responsibilities.

14          A. I do.

15          Q. Okay. And on the next page, article  
16          2.1. Do you see where it says, 2.1,  
17          preconstruction phase?

18          A. I do.

19          Q. Let's turn to -- I will tell you what.  
20          All right. Let's turn to page 5, please. Right  
21          in the middle 2.1.8, extent of responsibility,  
22          starting with the third line.

23                 The construction manager is not required  
24                 to ascertain that the drawings and specifications  
25                 are in accordance with applicable laws, statutes,

1 ordinances, codes, rules and regulations or  
2 lawful orders of public authorities.

3 But the construction manager shall  
4 promptly report to the architect and owner any  
5 nonconformity discovered by it and made known to  
6 the construction manager as a request for  
7 information in such form as the owner and  
8 architect may require. Did I read that  
9 correctly?

10 A. Yes.

11 Q. Can you explain to the Judge what a  
12 request for information -- that's commonly  
13 abbreviated as RFI, isn't it?

14 A. Correct.

15 Q. Okay. What is that?

16 A. If we run into something where we don't  
17 understand, whether it be a design or it be a  
18 statement, a clause, anything in the contract --  
19 or I'm sorry, in the documents or the plans.

20 Sometimes there's duplicates for the  
21 same thing that says two different things for the  
22 same item. So it's just a clarification that we  
23 request further information so that we understand  
24 what the designer is wanting.

25 Q. Okay. If there's something that appears

1 to be unworkable in the drawings, is that  
2 something that you would submit an RFI on?

3 A. Yes, absolutely.

4 Q. All right. Let's turn to page 6,  
5 please. Article paragraph 2.2.4.2, the fourth  
6 line down.

7 This construction continuously is  
8 included to provide funds for unanticipated costs  
9 resulting from, and then I would like to go down  
10 to C. Deductibles, penalties for builder's risk  
11 insurance or other insurance claims to which a  
12 deductible applies. Did I read that correctly?

13 A. Yes.

14 Q. Did that become an issue later in the  
15 case? Let me ask you this way: Do you remember  
16 an issue that came up --

17 A. I do.

18 Q. -- under builder's risk deductibles --

19 A. I do.

20 Q. -- that they would be responsible?

21 A. I do.

22 Q. Okay. We'll come back to that then with  
23 an RCO. All right. The next page, page 7,  
24 2.3.1.1 about two-thirds down. For purposes of  
25 section 8.1.2 of A201-2007, the date of

1 commencement of the work shall mean the date of  
2 commencement of the construction phase; is that  
3 correct?

4 A. Yes.

5 Q. All right. So we will need to look at a  
6 separate document to ascertain when you were  
7 given a date of commencement; is that right?

8 A. Yes.

9 Q. Okay. Now, the next paragraph, 2.3.1.3.  
10 In the event construction manager does  
11 not achieve substantial completion of the work  
12 within the contract time including approved  
13 extensions, the contractor shall pay to owner as  
14 liquid damages and not as a penalty, the sum of  
15 \$9,500 or in \$9,000 per day for each calendar day  
16 that the actual time of performance to achieve  
17 substantial completion exceeds the authorized  
18 contract time, which amount shall not exceed the  
19 amount of contractor's stated fee.

20 Such liquidated damages are hereby  
21 agreed to be a reasonable estimate of damages the  
22 owner would incur as a result of a delayed  
23 completion of the work and shall be the owner's  
24 sole and exclusive remedy for the delayed  
25 completion of the work. Did I read that

1 correctly?

2 A. Yes.

3 Q. Do you see that there are conflicting  
4 provisions in this document? One says that it's  
5 going to be written out that it's \$9,500 a day  
6 and then another provision that says --

7 A. I do.

8 Q. -- \$9,000?

9 A. I do.

10 Q. Okay. Do you know, was that ever  
11 resolved among the parties during the  
12 construction or early in the construction as to  
13 what that or which one that would control?

14 A. Not that I'm aware of.

15 THE COURT: I didn't hear that.

16 THE WITNESS: Not that I'm aware  
17 of.

18 THE COURT: Okay. Thank you.

19 BY MR. HILDEBRAND:

20 Q. Page 9, if you would please, article 3.  
21 3.1, information in services required of the  
22 owner.

23 The owner shall provide information with  
24 reasonable promptness regarding requirements for  
25 and limitations on the project including a

1 written program which shall set forth the owner's  
2 objectives, constraints, and criteria including  
3 schedule, space requirements and relationships,  
4 flexibility, and expandability, special  
5 equipment, systems, sustainability and site  
6 requirements; is that correct?

7 A. Yes, sir.

8 Q. All right. The next page, 3.1.4.4.  
9 During the construction phase, the owner shall  
10 furnish information or services required of the  
11 owner by the contract documents with reasonable  
12 promptness.

13 The owner shall also furnish any other  
14 information or services under the owner's control  
15 and relevant to the construction manager's  
16 performance of the work with reasonable  
17 promptness after receiving the construction  
18 manager's written request for such information or  
19 services; is that correct?

20 A. Yes.

21 Q. Were requests made to the owner on this  
22 project for information?

23 A. Yes.

24 Q. When request were made to the owner,  
25 were days -- were specific days provided that --

1 on occasion that the owner needed to respond by?

2 A. Yeah. Our replies are basically within  
3 seven days as far as the response.

4 Q. Okay. And is that -- were RFIs  
5 responded by the owner on a timely basis on this  
6 project?

7 A. Some, but a lot, no.

8 Q. Okay. And is there a document that  
9 discusses that on these documents?

10 A. Yes.

11 Q. All right. Down at the bottom, page 10,  
12 article 5, compensation for construction phase  
13 services. For the construction manager's  
14 performance of the work as described in section  
15 2.3, the owner shall pay the construction manager  
16 the construction sum in current funds.

17 The guaranteed maximum price, quote,  
18 "GMP" for the cost of the work plus the  
19 construction manager's fee and the guaranteed  
20 maximum price for general conditions shall be  
21 established in the A133, Exhibit 3.

22 Costs which would cause the respective  
23 guaranteed maximum price to be exceeded shall be  
24 paid by the construction manager without  
25 reimbursement by the owner and may not be billed

1 under the other GMP.

2 What does that mean, to your  
3 understanding, as the general contractor on this  
4 job?

5 A. That the construction -- let's see.  
6 That basically the guaranteed maximum price  
7 included our fees, our general conditions, and  
8 cost of work for the plans, for the documents.

9 Q. Okay. Is there a document that's  
10 attached to the contract that represents what is  
11 included in the guaranteed maximum price?

12 A. There is.

13 Q. We will get to that in just a minute.  
14 Next paragraph, 5.1.1, the construction manager's  
15 fee. Second sentence, the construction manager's  
16 fee shall be two and a half percent of the GMP,  
17 correct?

18 A. Correct.

19 Q. Right. 5.1.3, below that, limitations,  
20 if any, on a subcontractor's overhead and profit  
21 for increases in the cost of its portion of the  
22 work. The contractor's -- the subcontractor's  
23 fees for changes combined overhead and profit  
24 shall be 15 percent, correct?

25 A. Correct.

1           Q.   Okay. 5.2.1, the construction manager  
2           guarantees that the contract sum shall not exceed  
3           the guaranteed maximum prices as set forth in the  
4           guaranteed maximum price amendment unless it is  
5           amended from time to time, correct?

6           A.   Correct.

7           Q.   Okay. Are there provisions that the  
8           guaranteed maximum price can be amended under the  
9           contract?

10          A.   Yes.

11          Q.   Okay. 5.2.2, the guaranteed maximum  
12          price is subject to additions and deductions by  
13          change order as provided in the contract  
14          documents, and the date of substantial  
15          completions shall be subject to adjustment as  
16          provided in the contract documents, correct?

17          A.   Yes.

18          Q.   Okay. 5.3, changes of the work. 5.3.1.  
19          The owner may, without invalidating the contract,  
20          order changes in the work within the general  
21          scope of the contract consisting of additions,  
22          deletions, or other revisions.

23                   The owner shall issue such changes in  
24          writing. The architect may make minor changes in  
25          the work as provided in section 7.4 of AIA

1 document A201-2007, general conditions of the  
2 contract for construction.

3 The construction manager shall be  
4 entitled to an equitable adjustment in the  
5 contract time as a result of changes in the work  
6 when such changes directly impact the critical  
7 path of the work; is that correct?

8 A. Yes.

9 Q. Do you have an understanding of what the  
10 critical path is on the job?

11 A. Yes.

12 Q. What is that?

13 A. Basically your schedule is made up of  
14 tasks, items and tasks. Basically, the critical  
15 path is the process or the main line or the main  
16 objective that takes you from the end to the  
17 completion date. So that critical path could  
18 adjust at times, depending on how those tasks  
19 within it shift around, what becomes priority.

20 Q. Okay. 5.3.2. Adjustments to the  
21 guaranteed maximum price on account of changes in  
22 the work subsequent to execution of the  
23 guaranteed maximum price amendment may be  
24 determined by any of the methods listed in  
25 section 7.3.3 of the AIA document A201-2007

1 general conditions, correct?

2 A. Correct.

3 Q. Article 6, cost of the work for  
4 construction phase. 6.1.1. The term cost of the  
5 work shall mean costs necessarily incurred by the  
6 construction manager in the proper performance of  
7 the work. Such costs shall be at rates not  
8 higher than the standard place of the project  
9 except with prior written consent of the owner.

10 The cost of the work shall include only  
11 the items set forth in section 6.1 through 6.7.  
12 Construction manager's labor rates as set forth  
13 in Exhibit B. All costs shall be consistent with  
14 and allocated as set forth in the project cost  
15 elements matrix attached to Exhibit C, correct?

16 A. Correct.

17 Q. 6.3. Subcontractor costs. Payments  
18 made by the construction manager or subcontractor  
19 in accordance with the requirements of the  
20 subcontractor; is that correct?

21 A. Yes.

22 Q. On this project, were -- did Balfour  
23 Beatty self-perform any of the work?

24 A. No. We had like an hourly carpenter  
25 that would put safety rails and more safety

1 features. They would keep up railing. If there  
2 was a safety issue, we'd send him over there to  
3 do that, but other than that, no.

4 Q. Okay. So, I mean, we will get into the  
5 pay applications in some of the documents a  
6 little bit later, but the -- a pay application,  
7 any -- I guess each pay application on this job  
8 included work that was done by subcontractors,  
9 work and materials; is that correct?

10 A. Correct.

11 Q. All right. Did -- and 42 of the pay  
12 applications were paid by the owner; is that  
13 correct?

14 A. Yes.

15 Q. On each of those pay applications, you  
16 told me that there were subcontractors' work and  
17 materials. Before they were paid, did the owner  
18 ever require Balfour Beatty to pay its  
19 subcontractors in advance of Balfour Beatty being  
20 paid for its payment applications?

21 A. No.

22 Q. Have you ever heard of that being done  
23 on a project?

24 A. No, not that I've known.

25 Q. All right. 11.4, assignment. The owner

1 and construction manager respectively bind  
2 themselves, their agents, successors and --

3 A. I'm sorry, where are you at?

4 Q. I'm sorry. Page 21, the next page,  
5 11.4, assignment.

6 A. Okay.

7 Q. The owner and construction manager  
8 respectively bind themselves, their agents,  
9 successors, assigns and legal representatives to  
10 this agreement, correct?

11 A. Correct.

12 Q. Okay. All right. So then the next  
13 page, page 22, 12.2. The following documents  
14 comprised the agreement, and I would like to  
15 turn -- go down to number 4.

16 AIA document E202-2008. Building  
17 information modeling protocol exhibit if  
18 completed for the following. Was a form  
19 E202-2008 completed as part of Balfour Beatty's  
20 contract?

21 A. No.

22 Q. Were there any other requirements in the  
23 contract, to your knowledge, that required them  
24 to --

25 A. No.

1 Q. All right. Let's turn to the next  
2 document that's attached. AIA document  
3 A133-2009, Exhibit A. Guaranteed maximum price  
4 amendment. Do you see that?

5 A. I do.

6 Q. Okay.

7 THE COURT: I'm sorry. Which  
8 section again?

9 MR. HILDEBRAND: It's the next  
10 section of the document. It's a couple pages  
11 past the one that I just referred to.

12 THE COURT: Okay. All right.

13 MR. HILDEBRAND: Exhibit A. 209  
14 Exhibit A.

15 BY MR. HILDEBRAND:

16 Q. A 1.1.1. The contract sum is  
17 guaranteed -- the contract sum is guaranteed by  
18 the construction manager not to exceed  
19 \$59,354,747. Subject to additions and deductions  
20 by change order as provided in the contract  
21 documents, correct?

22 A. Correct.

23 Q. Was that amount changed during the  
24 project?

25 A. Yes.

1 Q. Do you know approximately what it went  
2 up to under change orders?

3 A. My recollection is around \$64,000. I  
4 mean, somewhere in there.

5 Q. Okay. All right. And then the -- under  
6 A 1.1.2 the second paragraph, it says, see  
7 attached, the hotel at Marion Square guaranteed  
8 maximum price dated February 18, 2015, section 2A  
9 GMP summary. So that's the date of this GMP  
10 document; is that correct?

11 A. Correct.

12 Q. Okay. Turn to, if you would, section 1,  
13 clarifications, about three pages in. Do you see  
14 that document, Mr. Spano?

15 A. Yes. Certifications and assumptions?

16 Q. Right. All right. Page 1 at the very  
17 top, division 01, general requirements. So this  
18 is the very first general requirement of your GMP  
19 document?

20 A. Uh-huh.

21 Q. You need to answer yes or no.

22 A. Yes. I apologize.

23 Q. The GMP is based on the 100 percent plus  
24 pricing documents dated November 6th, 2014,  
25 addendum 1 dated 11/14/14; addendum 2 dated

1 11/20/14; addendum 3 dated 12/1/14 and addendum 4  
2 dated 12/3/14 received from Winford Lindsay,  
3 architect and design continuum, to arrive at the  
4 designated GMP price.

5 Addendums include requests for  
6 information responses. Refer to the document  
7 list within the booklet, correct?

8 A. Correct.

9 Q. Okay. And number 13 below that. This  
10 GMP assumes a 28-month construction schedule from  
11 notice to proceed, correct?

12 A. Correct.

13 Q. All right. Let's turn to page 11 of  
14 that document. At the very top, division 9,  
15 finishes. Do you see that?

16 A. Yes.

17 Q. Okay. And I would like to refer to the  
18 very first one. Level 5 drywall finish is  
19 included at special finish SF02 and SF03 only; is  
20 that correct?

21 A. Yes.

22 Q. Is that -- can you describe for the  
23 Judge what drywall levels are, how many there  
24 are, and kind of what they mean?

25 A. Yeah. So there's five levels, of

1 course. So your typical -- your typical drywall  
2 finish is a level 3, which is basically meaning  
3 you're putting coats on joints, screw holes up to  
4 three levels of finish, and then sanding before  
5 you paint them.

6 Level 4, you would go beyond that and  
7 you would put another basically wider drywall  
8 joint over your joints so that you're basically  
9 tapering out your joints even wider. It's a  
10 little bit better finish.

11 Level 5, you're following those  
12 processes, and then you're skimming -- you're  
13 basically skimming the entire wall with drywall  
14 and then sanding it. So you're getting a  
15 complete coat of drywall on the entire surface.

16 Q. Okay. When it says that a level 5 will  
17 be only on SF02 and SF03, if we turn to the  
18 drawings, would that be -- would that relate to  
19 the guest room?

20 A. No.

21 Q. Okay. All right. Page 13, up at the  
22 top, division 10 specialties no. 1. All signage,  
23 exterior and interior is provided and installed  
24 by the owner, correct?

25 A. Yes.

1 Q. All right. Let's turn to section -- go  
2 about another 10 pages or so, the next section.  
3 Section 1E, responsibility matrix. Do you see  
4 that?

5 A. Not yet. You said E?

6 Q. Yes, sir.

7 THE COURT: Responsibility matrix?

8 MR. HILDEBRAND: Yes, sir.

9 THE WITNESS: Got it.

10 BY MR. HILDEBRAND:

11 Q. All right. So this document, did the  
12 owner on this job self-perform any work? In  
13 other words, did the owner have its own  
14 subcontractors or own contractors who were  
15 obligated to provide some of the work?

16 A. Some of the work, yes.

17 Q. All right. And then in a nutshell, what  
18 the owner didn't provide was provided by Balfour  
19 Beatty; is that correct?

20 A. Correct.

21 Q. Okay. Do you -- I'm not going to read  
22 through all of these, but can you tell us  
23 generally what the sort of items were -- the  
24 owner was to provide?

25 A. Of course, signage, security, data, like

1 laundry equipment, items like that. I don't have  
2 the entire details but --

3 Q. Okay. All right. The next document is  
4 the next section, section 2, a GMP summary. Do  
5 you see that?

6 A. Got it.

7 Q. Okay. All right. The page with the  
8 chart on it, do you see that?

9 A. Yes.

10 Q. All right. Let's go down to the very  
11 bottom, the, I guess, sixth line up. Do you see  
12 where it says fee?

13 A. Where it says what? Excuse me?

14 Q. Fee.

15 A. Yes.

16 Q. Yeah, sixth line from the bottom. It  
17 says, \$1,451,902. It's pretty small and hard to  
18 read.

19 A. Yeah.

20 Q. Is that correct?

21 A. It is.

22 Q. All right. Now, two lines below that,  
23 do you see where it says, preconstruction fee?

24 A. Yes.

25 Q. And what was the total for that?

1 A. \$66,779.

2 Q. Okay. All right. Sorry, this was  
3 just -- I had to slide through those. It takes a  
4 little while. The next section, section 3A  
5 schedule. Do you see that?

6 A. I do.

7 Q. And there's a schedule. The second  
8 page, there's a chart that looks like -- I know  
9 it's a schedule and Judge probably knows too.  
10 It's a chart that's a schedule, correct?

11 A. Yes.

12 Q. Is that called the baseline schedule?

13 A. Yes, that's what it looks like, the  
14 baseline.

15 Q. All right. And basically is what's  
16 shown on there, is that the critical path? Do  
17 you know? Or are those just bar charts, or what  
18 is it?

19 A. There are bar charts, but it -- yeah, it  
20 will identify the data from start to finish.

21 Q. Okay. And on the left-hand side of  
22 that, it's extremely small -- those are the items  
23 that -- when various items are supposed to be  
24 completed as originally scheduled, correct?

25 A. Started and completed, yes.

1 Q. Okay. And that's what the 28 months  
2 that's -- we talked about earlier is set on,  
3 correct?

4 A. That's correct.

5 Q. Okay. All right. Let's go to the next  
6 document A101, document A201-2007, the general  
7 conditions.

8 MR. BUNDY: Your Honor, I hate to  
9 interrupt, but as I told you earlier, I hadn't  
10 seen this document before.

11 THE COURT: Okay.

12 MR. BUNDY: The AIA 201-2007, I  
13 just happened to look through it. It's got  
14 underlining. It's got handwritten scribbles in  
15 it, and I need some testimony that this document  
16 was amended and initialed by the parties if we're  
17 going to put modified documents in the record.

18 THE COURT: Okay.

19 MR. HILDEBRAND: Well, Your Honor,  
20 the specific reason that I used this document is  
21 it's basically identical with the one that I  
22 have, and I've got here with me the original  
23 signed agreement.

24 THE COURT: Okay.

25 MR. HILDEBRAND: But this is the

1 one that Mr. Bundy had filed with the Court  
2 earlier. This is the contract. So I thought of  
3 all of the documents, this would be the one that  
4 he would agree to.

5 So I can just tell you that that -- and  
6 the reason this had Exhibit A on it, on the very  
7 front -- first page of the first document was  
8 that that was the exhibit sticker that Mr. Bundy  
9 had put on when he moved to -- for the Court as a  
10 dec action.

11 MR. BUNDY: Sure. During  
12 discovery, attached to a pleading. We're now in  
13 Court, and he's moving to put evidence in the  
14 record. Where he got it from is irrelevant to  
15 me. Turn to page 23, please, Your Honor.

16 THE COURT: All right, sir.

17 MR. BUNDY: This document is not  
18 authentic. It's not the best evidence. There's  
19 no foundation for this document, which has been  
20 modified, and it's completely improper to put  
21 this in evidence. And I object.

22 THE COURT: Okay. Do we have  
23 another unaltered exhibit?

24 MR. HILDEBRAND: Yes, Your Honor.  
25 I think Mr. Bundy would -- could explain that. I

1 think that it's probably some notes that his  
2 clients had. But I would be absolutely happy to  
3 substitute the actual original. It's identical  
4 and nothing on it.

5 MR. BUNDY: He might be happy with  
6 that, but I would like a witness to testify that  
7 the contract that he's now handing with a  
8 different exhibit number is really the contract.  
9 I'm very concerned about the record. Okay?

10 THE COURT: I understand. Do you  
11 want to take a look at that and see if it has any  
12 markings on it? Mr. Bundy?

13 MR. BUNDY: Sir?

14 THE COURT: Do you want to take a  
15 look at that exhibit and see if it has any of the  
16 markings on it, see if it's clean?

17 MR. BUNDY: Give me a minute, Your  
18 Honor.

19 THE COURT: Sure.

20 MR. BUNDY: I mean, this is a  
21 fairly important document. It's a \$60 million  
22 job. I'd like to get the contract straight.

23 THE COURT: I'm with you.

24 MR. BUNDY: No, Your Honor. If I  
25 may?

1 THE COURT: Uh-huh.

2 MR. BUNDY: All right. These  
3 documents are produced electronically on the AIA  
4 software. If you modify them, you print them  
5 out.

6 THE COURT: Okay.

7 MR. BUNDY: And you can print them  
8 out with or without modified language stricken or  
9 whatever. And that's why you -- anytime you see  
10 a line --

11 THE COURT: Right.

12 MR. BUNDY: -- next to a paragraph,  
13 it's been modified. Okay?

14 THE COURT: Right.

15 MR. BUNDY: This contract was  
16 negotiated. It wasn't just -- and it wasn't a  
17 standard form contract. It was part of the  
18 request for proposal, and it was attached to the  
19 request for proposal.

20 And after that, my recollection is it  
21 may have been modified after that. Attached to  
22 this document he's put up here is a document  
23 entitled, additions and deletions report for AIA  
24 document A133-2009. Nowhere in this document is  
25 the additions and deletions report listed as a

1 part of this contract.

2 So these documents cannot be a part of  
3 this contract, at least insofar as this is  
4 concerned. Here's another deletion report. This  
5 is why I really just wanted to get together last  
6 week to avoid all of this. But here we are.

7 THE COURT: All right. This is  
8 part of the A133?

9 MR. BUNDY: No. Here's what  
10 happened. When parties negotiate an electronic  
11 AIA document, if you buy the software -- because  
12 they're going to make you, of course, buy it,  
13 right?

14 THE COURT: Sure.

15 MR. BUNDY: And the other thing  
16 about these documents, you can tell when they  
17 were printed because there's a time stamp on it.

18 I caught a guy one time for putting a  
19 fraudulent contract in a case, and it was -- it  
20 was printed before the document ever came in  
21 existence at the AIA. Okay? It will catch you  
22 sometimes.

23 THE COURT: Right.

24 MR. BUNDY: What happens is, when  
25 two parties negotiate an AIA contract and they

1 both have access to the computer, I'll send you  
2 what I want to change. You put it on your  
3 computer, and it spits it back out and shows you  
4 all of my changes. You then change it, send it  
5 back to me, and I spit it out. And that's how  
6 you and I track our changes.

7 THE COURT: Got it.

8 MR. BUNDY: But at the end of the  
9 job, this is no more than a reporting device.  
10 This is no more than a lawyer's notes as if you  
11 were negotiating -- these are contract -- this is  
12 evidence of contract negotiations. They're not  
13 part of the contract.

14 They're not listed anywhere in the  
15 contract, and they've got nothing to do with the  
16 contract except if it comes up in this case that  
17 the standard AIA contract has certain language  
18 and I modify it or somebody else modified it, you  
19 might find it interesting to know what the  
20 standard language was. But it wouldn't make it  
21 part of the contract.

22 THE COURT: I'm with you there.

23 MR. BUNDY: So this is not part of  
24 the contract.

25 MR. HILDEBRAND: Your Honor, I'm

1 just trying to accommodate.

2 THE COURT: Yeah. I'm trying to  
3 figure out exactly what it is. Is that -- you're  
4 saying that's not what the original was?

5 MR. BUNDY: No. What I'm saying  
6 is, the originals -- when you print out a  
7 contract, an AIA contract on the computer, it has  
8 all of this language on it, right? But it  
9 doesn't have any of these lines.

10 THE COURT: I'm with you.

11 MR. BUNDY: There's no changes that  
12 have been made.

13 THE COURT: I'm familiar with that.  
14 Right. That shows alterations.

15 MR. BUNDY: Then if you want to use  
16 a feature of the software, much like any letter  
17 writing software feature, you can go back with  
18 what they call metadata, I guess, is what some  
19 people call it.

20 THE COURT: Sure.

21 MR. BUNDY: You can go back and  
22 forth and see where it is.

23 THE COURT: Okay.

24 MR. BUNDY: This is just simply, at  
25 most, a record of contract negotiations. Okay?

1 THE COURT: Okay.

2 MR. BUNDY: Which are, by  
3 definition, not part of the contract. He just  
4 read the contract provision that would keep this  
5 out as a matter of contract. So it's not part of  
6 the contract.

7 THE COURT: You're talking about  
8 the A201 itself?

9 MR. BUNDY: No, sir. He had --

10 THE COURT: All these changes?

11 MR. BUNDY: This is actually what  
12 he had attached to that as part of the contract.  
13 I'm just trying to clean it up.

14 THE COURT: Okay.

15 MR. BUNDY: You're going to end  
16 back there -- you're going to end up back in your  
17 chambers with 40 pages that have nothing to do  
18 with this contract. And you're not going to know  
19 why you have them and they're not part of this  
20 contract. And they shouldn't have been attached.  
21 It's just poor presentation.

22 MR. HILDEBRAND: Your Honor, this  
23 is the original signature.

24 THE COURT: That looks like the  
25 originals to me, yeah.

1 MR. HILDEBRAND: Right. That's --  
2 none of this really makes any --

3 THE COURT: That's the 133 there.

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: All right.

6 MR. HILDEBRAND: None of this makes  
7 any difference because there's some handwriting  
8 on that one page on the document that  
9 Mr. Bundy -- and I'll stipulate that I don't know  
10 where that handwriting came from.

11 THE COURT: Okay.

12 MR. HILDEBRAND: But it's not  
13 germane to this case.

14 THE COURT: Okay.

15 MR. HILDEBRAND: So we can -- we  
16 can really gum up the record with a lot of  
17 documents; so I would stipulate that that  
18 handwriting that Mr. Bundy noted that was on his  
19 agreement is irrelevant, or he can explain it.

20 But my point is that -- what I've tried  
21 to do is attach a copy of the contract. And we  
22 can talk about the points that are relevant.  
23 What he marked on there, the handwriting is  
24 irrelevant. And I'm willing to stipulate that or  
25 we can --

1 THE COURT: Okay. Let me ask this  
2 question. The document you showed me was the  
3 original -- like, it was a green inked signature  
4 on there?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: Is that the original?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: Okay. Do you differ  
9 with that?

10 MR. BUNDY: Nobody is listening to  
11 me. This is not -- look at this, Judge.

12 THE COURT: Well, I don't -- I  
13 don't think that's what -- based on what I just  
14 saw, that's not --

15 MR. BUNDY: This is what he just  
16 handed me. He's just handed me this and said,  
17 we're going to put this into evidence. And I'm  
18 objecting to these documents right here.

19 THE COURT: Okay.

20 MR. BUNDY: Is he trying to put  
21 them in evidence or not?

22 THE COURT: All right. This  
23 document was not what was suggested, was it?

24 MR. BUNDY: The one with the errors  
25 is not part of the contract.

1 THE COURT: The one with all the  
2 strike-throughs?

3 MR. BUNDY: Right. It's not part  
4 of this contract.

5 THE COURT: I agree with that.

6 MR. BUNDY: Okay. So take it out.

7 THE COURT: Those are just  
8 negotiations, correct?

9 MR. BUNDY: Right. So let's take  
10 it out of the exhibit. I'm just trying to get  
11 things out of the exhibit.

12 THE COURT: I'm with you.

13 MR. HILDEBRAND: Your Honor,  
14 this --

15 THE COURT: I saw a bunch of strike  
16 through in what you handed me; so I don't  
17 think -- I think that was probably a negotiation  
18 there. The document that I was following along  
19 with you and the witness didn't have any of that  
20 in there. I want to make sure we're clear on  
21 that.

22 MR. BUNDY: Right. And I have  
23 objected.

24 THE COURT: Yeah.

25 MR. BUNDY: Until we got to this

1 document --

2 THE COURT: Okay.

3 MR. BUNDY: -- I had no reason to  
4 object. Because I told you earlier, I needed to  
5 look at the documents.

6 THE COURT: I'm with you.

7 MR. BUNDY: So now I've had a  
8 chance to look at that one.

9 MR. HILDEBRAND: I'm trying to be  
10 accommodating, Your Honor. I'm willing to  
11 stipulate that the document that Mr. Bundy  
12 represented to the Court as being the contract is  
13 the contract and that that handwriting that he  
14 had on the document that he introduced is  
15 irrelevant, or he can explain it with his  
16 witnesses. I will stipulate to that.

17 THE COURT: Okay.

18 MR. BUNDY: I do not accept that  
19 stipulation. He has the burden of proof to put  
20 in the original document under the Best Evidence  
21 Rule.

22 THE COURT: All right.

23 MR. BUNDY: He has to at least come  
24 in with the original or explain to you why he  
25 can't come in here with the original. And

1 Mr. Bundy putting it on a pleading in this case  
2 is not an excuse.

3 THE COURT: Okay. All right. I'm  
4 with you. I understand the distinction you're  
5 making. Is it only -- is it as to the entire  
6 contract, or is it only as to where we are now  
7 with the A201?

8 MR. BUNDY: It's just that portion  
9 that we just got into, the AIA 20 -- whatever he  
10 just handed me that has notes and underlining.

11 THE COURT: All right.

12 MR. BUNDY: Those aren't original  
13 documents.

14 THE COURT: Okay.

15 MR. BUNDY: Attached to that, he  
16 then hands me all the lined out stuff. I  
17 objected to that, too.

18 THE COURT: I'm with you on that  
19 objection. Do we have an original A201 document?

20 MR. HILDEBRAND: Yes, sir. I've  
21 got the original.

22 THE COURT: I assume it's included  
23 in there.

24 MR. HILDEBRAND: Yes, sir.

25 THE COURT: Is it?

1 MR. HILDEBRAND: I believe so.

2 THE COURT: Is it a clean copy, or  
3 is it a red-lined copy?

4 MR. HILDEBRAND: This is not -- the  
5 signed copy does not have the A201.

6 THE COURT: Okay. All right.

7 MR. HILDEBRAND: The A201 is part  
8 of the exhibit that I've already introduced; so  
9 there is some handwriting on it.

10 THE COURT: Okay.

11 MR. HILDEBRAND: I'm sure I can --  
12 but I would stipulate that what Mr. Bundy has  
13 provided --

14 THE COURT: I'm with you. I'm with  
15 you there. Do we know where the original A201  
16 would be, is the question for the Court? Do we  
17 know where that is?

18 MR. HILDEBRAND: This is the A133  
19 but without the A201. Do you want the one  
20 without the handwriting?

21 THE COURT: Well, that would be the  
22 best evidence. If you can't find the best  
23 evidence, if you come up with a reasonable  
24 explanation, the Court is going to allow it in.  
25 I think that's the -- what the rules provide for.

1 MR. HILDEBRAND: Okay.

2 THE COURT: Just need to know where  
3 the original is. That's the basis for the  
4 objection.

5 MR. HILDEBRAND: Okay.

6 THE COURT: I'm happy to get around  
7 that if need be, but I need to be able to answer  
8 the question that's been raised, which is, where  
9 is the best evidence.

10 MR. HILDEBRAND: All right. Let me  
11 then find one that -- where the AIA does not have  
12 that handwriting on it.

13 THE COURT: Okay. All right. If  
14 we've got that, we can submit that if you would  
15 like.

16 MR. HILDEBRAND: All right. Thank  
17 you, Your Honor. May I continue with this  
18 document on the -- going through the provisions  
19 on the assumption that it's an AIA?

20 THE COURT: I'm going to allow you  
21 to link it up later. I will allow that.

22 MR. HILDEBRAND: Thank you, Your  
23 Honor.

24 BY MR. HILDEBRAND:

25 Q. All right, sir. Article 1, if you

1 would, please. 1.1, contract documents, the very  
2 last sentence. Are you with me?

3 A. No. 1.1 base definition, is that where  
4 you are?

5 Q. Yes, sir. The very last sentence,  
6 unless specifically enumerated in the agreement,  
7 the contract documents do not include the  
8 advertisement or invitation to bid instructions  
9 to builders, sample forms, other information  
10 furnished by the owner in anticipation of  
11 receiving bids or proposals, the contractor's bid  
12 or proposal or portions of addenda relating to  
13 bidding requirements, correct?

14 A. Yes.

15 Q. Under 1.1.2, the contract, the third  
16 sentence, halfway through. The contract  
17 documents shall not be construed to create any  
18 contractual relationship of any kind -- number 2,  
19 between the own and a subcontractor or a  
20 sub-subcontractor, correct?

21 A. Yes.

22 Q. The next page, page 11, 1.2.4. In the  
23 event any conflict or discrepancy between or  
24 among elements of the contract documents, the  
25 most recently issued contract documents shall

1 take precedence over previously -- previous  
2 issues of the same document.

3 The order of precedence shall be as  
4 follows, with the highest authority listed first:  
5 A, or number 1, change orders. Those of a later  
6 date shall take precedence over those of an  
7 earlier date. Two, written agreements to the --  
8 written amendments to the agreements between the  
9 owner and the construction manager as a  
10 constructor signed by both parties.

11 Those of a later date shall take  
12 precedence over those of an earlier date. Three,  
13 written clarifications. Four, supplementary  
14 conditions. Five, general conditions of the  
15 contract for construction. Six, the agreement  
16 between the owner and the contractor, correct?

17 A. Correct.

18 Q. Next page, article 2, 2.1.1. The  
19 owners, the person or entity identified as such  
20 in the agreement and is referred to throughout  
21 the contract documents as a singular number.

22 The owner shall designate in writing a  
23 representative who shall have expressed authority  
24 to bind the owner with respect to all matters  
25 requiring the owner's approval or authorization.

1 Except as otherwise provided in 4.2.1, the  
2 architect does not have such authority.

3 The term owner means the owner or the  
4 owner's authorized representative. On the first  
5 page of where we looked at this document, the  
6 owner's authorized representative was Jim  
7 Clements, correct?

8 A. Correct.

9 Q. Okay. Did you have an understanding  
10 that he was the designated representative of the  
11 owner on this project?

12 A. I did at the beginning.

13 Q. Under the contract?

14 A. Under the contract, yes.

15 Q. Okay. The next page, 3.2, at the  
16 bottom. I will tell you what, let's skip ahead.

17 3.2.2, any design errors or omissions  
18 noted by the contractor during this review shall  
19 be reported promptly to the architect, but it is  
20 recognized that the contractor's review is made  
21 in the contractor's capacity as a contractor and  
22 not a licensed design professional unless  
23 otherwise specifically provided in the contract  
24 documents.

25 The contract does not require to

1       ascertain that the contract documents are in  
2       accordance with applicable laws, statutes,  
3       ordinances, building codes and rules and  
4       regulations, but any nonconformity discovered or  
5       made note to the contractor shall be reported  
6       promptly to the architect, correct?

7             A.    Correct.

8             Q.    And that would have been through an RFI?

9             A.    Correct.

10            Q.    Request for information?

11            A.    Correct.

12            Q.    Page 16, please, article 3.7.3. It is  
13       not the contractor's responsibility to ascertain  
14       that the contract documents are in accordance  
15       with applicable laws, statutes, ordinances,  
16       building codes and rules and regulations except  
17       for work to be designed by contractor pursuant to  
18       the contract documents.

19                    However, if the contractor observes that  
20       portions of the contract documents are variants  
21       therewith, the contractor shall promptly notify  
22       the architect and owner in writing and necessary  
23       changes shall be accomplished by the appropriate  
24       modification, correct?

25            A.    Correct.

1           Q.   Article 3 on the next page, page 17 at  
2           the bottom. 3.10.4.2. The construction schedule  
3           shall be a critical path method type of schedule,  
4           correct?

5           A.   Correct.

6           Q.   Was the -- were the schedules that were  
7           produced -- we're going to refer to them in a  
8           just a few minutes. Were they critical path  
9           schedules that were produced during this project?

10          A.   Yes.

11          Q.   Were the schedules that were produced  
12          during the project provided to the owner?

13          A.   Yes.

14          Q.   And when would they be provided?

15          A.   Typically, monthly. A lot in the like  
16          OAC meetings are monthly meetings. The pay apps  
17          would usually submit those in. Sometimes by  
18          e-mail.

19          Q.   Were they -- if requested by the owner,  
20          were they available at any time of the owner's  
21          inspection?

22          A.   Yes, sir.

23          Q.   So the owner could look at the schedules  
24          and see exactly where the project was or  
25          presumably exactly or approximately where the

1 work was in relation to the completion date?

2 A. Yes.

3 Q. Did the owner's representative, Jim  
4 Clements, have construction experience?

5 A. Yes.

6 Q. Do you know what it was?

7 A. Not exactly.

8 Q. All right. Page 19, 3.12.7. The  
9 contractor shall perform no portion of the work  
10 for which the contract documents require  
11 submittal and review of shop drawings, product  
12 data, samples or similar submittals until the  
13 respective submittal has been approved by the  
14 architect, correct?

15 A. Correct.

16 Q. So submittals had to be approved before  
17 the work could be implemented?

18 A. Yes, correct.

19 Q. 3.12.10. The contractor shall not be  
20 required to provide professional services which  
21 constitute the practice of architect or  
22 engineering unless such services are specifically  
23 required by the contract documents for a portion  
24 of the work or unless the contractor needs to  
25 provide such services in order to carry out the

1 contractor's responsibilities for construction  
2 means, method's, sequences, and procedures. The  
3 contractor should not be required to provide  
4 professional services in violation of applicable  
5 law.

6 Is there a provision in the contract  
7 where some of the design work can be delegated to  
8 a contractor?

9 A. Not that I'm aware of.

10 Q. Was any of the design work delegated to  
11 Balfour Beatty in this action, to your knowledge?

12 A. No.

13 Q. All right. Page 21, at the very top,  
14 article 4 architect. 4.2, administration of the  
15 contract. 4.2.1.

16 The architect will provide  
17 administration of the contract as described in  
18 the contract documents and will be an owner's  
19 representative; one, during construction; two,  
20 until final payment is due; and, three, with the  
21 owner's concurrence from time to time during the  
22 one-year period for correction of work described  
23 in section 12.2.

24 The architect will have authority to act  
25 on behalf of the owner only to the extent

1 provided in the contract documents unless  
2 otherwise modified in writing in accordance with  
3 other provisions of the contract, correct?

4 A. Correct.

5 Q. Okay. 4.2.7. And we're going to talk  
6 about the first top half of that.

7 The architect will review and approve or  
8 take other appropriate action upon the contractor  
9 submittals, such as shop drawings, product data,  
10 and samples, but only for the limited purpose of  
11 checking for conformance of information given and  
12 the design concept expressed in the contract  
13 documents, except to the extent contractor  
14 identifies deviations pursuant to section 3.12.8,  
15 in which case, the architect will review for  
16 purposes of determining the propriety of the  
17 contractor's request.

18 The architect's action will be taken  
19 with such reasonable promptness as to cause no  
20 delay of the work or in the activities of the  
21 owner, contract, or separate contractors, while  
22 allowing sufficient time in the architect's  
23 professional judgment to permit adequate review  
24 at a minimum, comply with schedule for submittals  
25 and responses agreed to pursuant to section 3.10,

1 correct?

2 A. Correct.

3 Q. 4.3, at the very bottom of that same  
4 page, claims and disputes. 4.3.1, definition.

5 A claim is a demand or assertion by one  
6 of the parties seeking, as a matter of right,  
7 adjustment or interpretation of contract terms,  
8 payment of money, extension of time, or other  
9 relief with respect to the terms of the contract,  
10 correct?

11 A. Correct.

12 Q. Let me ask you this: The section for  
13 claims and disputes, it's shown under the  
14 architect section. Do you see that?

15 A. Yes.

16 Q. Let's turn to page 4 of this document.  
17 On the left-hand side, about a third of way down,  
18 do you see where it says, claims, definition of?

19 A. Yes.

20 Q. It says claims and disputes, and then  
21 it's got a number of sections that are listed in  
22 the contract. And there are sections for claims  
23 for additional costs and claims for additional  
24 time, but I don't see any reference to section  
25 4.3, claims and disputes. Is that a correct

1 observation?

2 A. Yes.

3 Q. Do you know why that is?

4 A. I don't.

5 Q. Okay. When you're reviewing a contract  
6 like this and you want to look up something in  
7 the AIA A201, do you look at the digest section  
8 or the index section?

9 MR. BUNDY: Objection. Leading the  
10 witness.

11 Q. What, if anything, do you do in  
12 reference to the index section if you have any  
13 interest in determining where a particular  
14 provision of the document may be or not?

15 A. Find it in the index section for a page  
16 number of the document.

17 Q. All right. Let's turn to page 23.  
18 4.3.1.1. The notice of a claim shall be in  
19 writing and shall reasonably identify the claim,  
20 and to the extent reasonably possible, the  
21 grounds thereof and the relief sought, correct?

22 A. Correct.

23 Q. Okay. Go down to section 4.3.1.4, and I  
24 would like to read the last sentence of that.  
25 However the owners shall have no right to

1 withhold any undisputed amounts and shall pay any  
2 undisputed amounts due to the contractor,  
3 correct?

4 A. Correct.

5 Q. 4.3.2. Time limits on claims. Claims  
6 by either party must be initiated within 30 days  
7 after occurrence of the event giving rise to such  
8 claim or within 30 days of -- after the claimant  
9 first recognizes the condition giving rise to the  
10 claimant, whichever is later.

11 Claims must be initiated by written  
12 notice to the architect and the other party,  
13 correct?

14 A. Correct.

15 Q. Next page, 24. 4.3.7.1. Claims for  
16 additional time, last sentence, in the case of a  
17 continuing delay, only one claim is necessary,  
18 correct?

19 A. Correct.

20 Q. Next page, 25. 4.4.8. If a claim  
21 relates to or is the subject of a mechanic's  
22 lien, the party asserting such claim may proceed  
23 in accordance with applicable law to comply with  
24 the lien notice for filing deadlines prior to  
25 resolution of the claim, correct?

1           A.    Correct.

2           Q.    Next page 27.  Article 6, owner's right  
3           to perform construction and to award separate  
4           contracts.

5                   6.1.1, the owner reserves the right to  
6           perform constructions or operations related to  
7           the project the owner's own forces and to award a  
8           separate contract in connection with other  
9           portions of the project for other construction.  
10          Did I read that correctly?

11          A.    Yes.

12          Q.    6.1.3.  The owner shall provide for  
13          coordination of the activities of the owners own  
14          forces and of each separate contractor with the  
15          work of the contractor who shall cooperate with  
16          him, correct?

17          A.    Correct.

18          Q.    Okay.  Article 7, changes in the work.  
19          7.1.1.  Changes in the work may be accomplished  
20          by the execution -- may be accomplished after  
21          execution of the contract and without  
22          invalidating the contract by change order,  
23          construction change directives or order for a  
24          minor change in the work, subject to the  
25          limitations stated in the article 7 and elsewhere

1 in the contract documents, correct?

2 A. Correct.

3 Q. 7.1.2. A change order shall be based  
4 upon agreement among the owner, contractor, and  
5 architect. A construction change directive  
6 requires agreement by the owner and architect and  
7 may or may not be agreed to by the contractor.

8 So if a change order -- if there's a  
9 change order, that has to be a document agreed by  
10 the owner, architect, and Balfour, correct?

11 A. Correct.

12 Q. But the owner can direct Balfour to  
13 provide additional work, and Balfour may not  
14 agree to what the owner is proposing, but the  
15 owner can direct that through a construction  
16 change directive; is that correct?

17 A. Correct.

18 Q. 7.2, change orders. Change order is a  
19 written instrument prepared by the architect and  
20 signed by the owner, contractor, and architect  
21 stating their agreement upon all of the  
22 following.

23 One, the change in the work; two, the  
24 amount of the adjustment, if any, in the contract  
25 sum, including general conditions costs and the

1 contractor's fee; three, the extent of the  
2 adjustment, if any, in the contract time,  
3 correct?

4 A. Correct.

5 Q. Next page, 29. 7.3, the first sentence.  
6 A construction change directive is a written  
7 order prepared by the architect and signed by the  
8 owner and architect directing a change in the  
9 work prior to agreement or adjustment, if any, in  
10 the contract sum or contract time or both,  
11 correct?

12 A. Correct.

13 Q. Next section, 7.3.2. A construction  
14 change directive shall be used in the absence of  
15 total agreement on the terms of a change order,  
16 correct?

17 A. Correct.

18 Q. Below that, 7.3.6. If the contractor  
19 does not respond promptly or disagrees with the  
20 method for adjustment in the contract sum, the  
21 method and the adjustment shall be determined by  
22 the architect on the basis of reasonable  
23 expenditures and savings of those performing the  
24 work attributable to the change, including in the  
25 case of an increase in the contract sum, a

1 reasonable allowance for overhead and profit,  
2 correct?

3 A. Correct.

4 Q. Next page, 7.4, minors changes in the  
5 work. The architect has authority to order minor  
6 changes in the work not involving adjustment in  
7 the contract sum or extensions of the contract  
8 time and not inconsistent with the intent of the  
9 contract documents.

10 Such changes will be affected by written  
11 order signed by the architect and shall be  
12 binding on the owner and contractor. The  
13 contractor shall not carry out such orders --  
14 shall carry out such written orders promptly.

15 So, in other words, is that called a --  
16 what's the acronym for an order from the  
17 architect that's a change but involves no time  
18 and no money?

19 A. Supplemental instruction.

20 Q. So an SI?

21 A. SI is, yes, the terminology or acronym.

22 Q. Okay. So no time, no money that an  
23 architect can do that through a supplemental  
24 instruction?

25 A. Correct.

1           Q.    The next section, page 31, delays and  
2           extensions of time. 8.3.2. A basis may exist  
3           for an extension of time if, one, the contractor  
4           is delayed in performing the work, but solely to  
5           the extent that delays are caused by events that  
6           are beyond the control and/or the contractual  
7           responsibility of the contractor, its  
8           subcontractor, sub-subcontractors, and suppliers  
9           at every tier tear as defined in 8.3.1.

10           All right. Section 4. 8.3.2.4. Delays  
11           stem from the following policies: A, class one  
12           policies. An act or failure to act on the part  
13           of the owner, any consultant, or employee of the  
14           owner, or of a separate contractor employed by  
15           the owner that is in breach of this agreement,  
16           correct?

17           A.    Correct.

18           Q.    All right. Then skip down to 8.3.3. If  
19           the basis exists for an extension of time under  
20           8.3.2 and the contractor has timely submitted a  
21           written claim, documenting the basis for such  
22           extension, the owner may exercise one of the  
23           follow options: One, for class one causes, the  
24           owner may accept a reasonable and appropriate  
25           time extension to cover such delay and grant and

1 corresponding adjustment in the contract sum.

2 The contract sum will be adjusted only  
3 to the extent of those necessary and reasonable  
4 on-site costs incurred by field office and other  
5 job site costs made necessary as a consequence of  
6 the delay and as limited and defined by section  
7 7.3.6, correct?

8 A. Correct.

9 Q. Okay. Page 34, at the very top.  
10 9.3.1.2. With each application for payment, the  
11 contractor shall issue lien releases -- I'm  
12 sorry, lien waivers from the contractor verifying  
13 that all parties submitting applications for  
14 payment to the contractor have been or will be  
15 paid, and that title to all work billed for under  
16 the application for payment is passed to the  
17 owner?

18 If any subcontractor, sub-subcontractor,  
19 laborer or supplier of materials files a lien or  
20 notice of claim for an unpaid labor for materials  
21 against the owner's property, the contractor  
22 agrees immediately bond off such a lien in  
23 accordance with applicable law or to otherwise  
24 cause such lien to be discharged at the  
25 contract -- at the contractor's sole extension,

1 so long as the owner is not in default of the  
2 payment of any uncontested amount, and that such  
3 non-payment is the cause or non-payment to the  
4 subcontractor. Did I read that correctly?

5 A. Yes.

6 Q. Bottom of that page, 9.4.1. The  
7 architect will, within seven days after receipt  
8 of that contractor's application for payment,  
9 either issue to the owner a certificate for  
10 payment with a copy to the contractor for such  
11 amount as the architect determines is properly  
12 due or notify the contractor and owner in writing  
13 of the contractor's reasons for withholding  
14 certification, in whole or in part, as provided  
15 in section 9.5.1, correct?

16 A. Correct.

17 Q. Next page, 35. Actually page 36. 9.8,  
18 substantial completion. 9.8.1.1.

19 Substantial completion is the stage in  
20 the progress of the work when the work for  
21 designated portion thereof is sufficiently  
22 completed in accordance with the contract  
23 documents so that the owner may occupy or utilize  
24 the work for its intended use and other various  
25 subsections. Did I read that correctly?

1 A. Yes.

2 Q. Almost finished. Page 47, please.

3 13.6, interest. Payments due and unpaid under  
4 the contract documents shall bear interest from  
5 the date payment is due at such rate as the  
6 parties may agree in writing or the absence  
7 thereof at the legal rate prevailing from time to  
8 time at the place where the project is located.

9 Are you aware of any provision in the  
10 contract that otherwise states an agreed upon  
11 interest rate?

12 A. I'm not.

13 Q. Okay.

14 A. No.

15 Q. All right. Paragraph 48, at the very  
16 top. 14.2. Termination by the owner for cause.  
17 The owner may terminate the contract if the  
18 contractor, number 4, otherwise is guilty of  
19 substantial breach of a provision of the contract  
20 documents, correct?

21 A. Correct.

22 Q. All right. The next page, 49. At the  
23 very top, it says, claims and disputes. 15.1  
24 through 15.1.5.2. We looked earlier at the index  
25 in the beginning of this document, about claims

1 and disputes, and it says, go to section 15.1.

2 Do you remember that?

3 A. I do.

4 Q. And here, it shows that all of those  
5 have -- so if you turn to that, on claims and  
6 disputes, it shows that they've all been deleted,  
7 correct?

8 A. Yes, intentionally omitted, yes.

9 Q. Okay. The next paragraph, 15.1.6,  
10 claims for the consequential damages. The  
11 contractor and owner waive claims against each  
12 other for consequential damages arising out of or  
13 relating to this contract.

14 This mutual waiver includes, one,  
15 damages incurred by the owner for rental  
16 expenses, for loss of use, income, profit,  
17 financing, business and reputation and for loss  
18 of management or employee productivity or the  
19 services of such persons, correct?

20 A. Correct.

21 Q. Number 2, damages incurred by the  
22 contractor for principal office expenses  
23 including the compensation of personnel stationed  
24 there for losses of financing, business and  
25 reputation and for loss of profit except

1 anticipated profit arising directly from the  
2 work, correct?

3 A. Correct.

4 Q. Next page, 50. 15.2.8. If a claim  
5 relates to or is the subject of a mechanic's  
6 lien, the party asserting such claim may proceed  
7 in accordance with applicable law to comply with  
8 the lien noticed for filing deadlines, correct?

9 A. Correct.

10 Q. Okay. All right. That's it for this  
11 log of files there. All right. Let's turn to  
12 volume 5.

13 All right. So the next -- we talked  
14 about the start of the -- to the project and the  
15 date of commencement, and I'm not sure we  
16 introduced that. Let's see here. Let's turn to  
17 tab 60 again. I'm sorry.

18 A. Did you say five?

19 Q. Yes. Volume 2. It would be tab 60.

20 A. Volume 2 of 5?

21 Q. Yes, sir. Do you see that document?

22 A. This is -- yes.

23 Q. And do you see the middle section where  
24 it says from Jim Clements dated March 19, 2015?

25 A. Yes.

1 Q. And it shows that you were a recipient  
2 of this document?

3 A. Yes.

4 Q. Okay. And it says, Mike, confirming our  
5 conversation, on behalf of Library Associates,  
6 LLC, Balfour Beatty Construction is hereby given  
7 notice to proceed with the work of the project;  
8 is that right?

9 A. Yes.

10 Q. Okay. So the notice to proceed was  
11 provided on March 19, 2015?

12 A. Yes.

13 MR. HILDEBRAND: I would like to  
14 move to introduce that, Your Honor.

15 MR. BUNDY: And that will be  
16 exhibit what?

17 THE COURT: We'll call that 60.

18 MR. BUNDY: No objection.

19 THE COURT: All right. No. 60.

20 (PLF. EXH. 60, was marked for  
21 identification and admitted into evidence.)

22 BY MR. HILDEBRAND:

23 Q. All right. Mr. Spano, so Balfour was to  
24 started work, as we've just read on March 19,  
25 2015, and it had a baseline schedule for the work

1 to be completed in 28 months, correct?

2 A. Correct. Notice to proceed March 19th,  
3 date of commencement March 30th.

4 Q. Okay.

5 A. So commencing on the 30th would be 28  
6 months.

7 Q. Okay. Gotcha. So the clock starts on  
8 March 30th?

9 A. Correct.

10 Q. And then you've got 28 months?

11 A. Correct.

12 Q. Balfour had developed a schedule for  
13 completion in 28 months, correct?

14 A. Correct.

15 Q. Did you expect that you would be able to  
16 meet that successful?

17 A. I did.

18 Q. Did you expect that you would be able to  
19 perform the work required under the contract  
20 documents and the GMP for the original GMP of  
21 approximately \$59 million?

22 MR. BUNDY: Objection. Witness  
23 previously testified he did not work on the  
24 schedule on this job, nor did he -- was he  
25 involved in the bid; so I don't know how he could

1       have any knowledge or expectation about whether  
2       the schedule would work or the price was good.  
3       He was involved in neither.

4                   MR. HILDEBRAND:   Your Honor, he was  
5       the guy who was managing the project and was  
6       working on it from the very start.   And he  
7       certainly knows -- he's aware of the schedule.  
8       He's already testified about that.

9                   He said he's aware that it has to be  
10      finished in 28 months; so it's certainly, it  
11      seems to me, germane to the case.   He could  
12      testify about whether he thought --

13                   MR. BUNDY:   I would certainly agree  
14      he should know that.

15                   THE COURT:   Okay.

16                   MR. BUNDY:   Okay.   But his  
17      testimony is, he doesn't know that.

18                   THE COURT:   All right.

19                   MR. BUNDY:   And the Rules of  
20      Evidence require that he has first-hand  
21      knowledge.   He testifies in his direct  
22      examination, he did not know anything about the  
23      schedule that was built, prepared to do this job.  
24      The job was already online.   He came in after the  
25      job had started.   He had nothing to do with the

1 bidding and nothing do with the schedule. And I  
2 don't, I mean, you know --

3 THE COURT: I'm with you. Lay a  
4 little more foundation.

5 MR. HILDEBRAND: All right, sir.

6 THE COURT: Go ahead and ask a  
7 foundational question.

8 BY MR. HILDEBRAND:

9 Q. All right. Did you understand that the  
10 original schedule called for completion of the  
11 work at 28 months?

12 A. Yes.

13 Q. Okay. Do you have -- did you have an  
14 opportunity to review the schedule, even though  
15 you had not drafted it after you came onboard  
16 with the project?

17 A. Yes, sir.

18 Q. Okay. Are you familiar with project  
19 schedules, such as the baseline schedule that we  
20 identified in the contract documents?

21 A. Yes.

22 Q. Do you know how to read them?

23 A. Yes.

24 Q. All right. Is that part of your job to  
25 look at schedules and try to follow them?

1 A. Yes.

2 Q. All right. Did you understand the  
3 original baseline schedule when you read it?

4 A. Yes.

5 Q. Did you understand what work was going  
6 to be required when?

7 A. Yes.

8 Q. Okay. Based on your experience as a  
9 project manager, did you have an opinion, when  
10 you first reviewed the schedule, as to whether  
11 the time set was appropriate for completion of  
12 the job?

13 MR. BUNDY: Objection. This  
14 witness has not been listed as an expert witness.  
15 He hasn't been qualified to give an opinion on  
16 scheduling. Thank you, Your Honor.

17 THE COURT: I think he can give his  
18 testimony as a lay witness on that. Go ahead.

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

21 MR. BUNDY: Pardon me?

22 THE COURT: Lay witness testimony,  
23 he can give it, based on experience.

24 BY MR. HILDEBRAND:

25 Q. Yes, sir?

1 A. Yes.

2 Q. And the same question with regard to the  
3 GMP that we talked about earlier, 59 million and  
4 something. Based on your experience as a  
5 construction manager, did you have an opinion on  
6 whether the work that was provided could be  
7 provided for that amount?

8 A. I did.

9 Q. Okay. Are you familiar with cost  
10 overruns on a project? Does that happen  
11 sometimes?

12 A. Yeah.

13 Q. Are you familiar with change orders on  
14 projects?

15 A. Yes, sir.

16 Q. Okay. If an owner wants to make changes  
17 and the owner in this job to the project once it  
18 gets started, is that generally appropriate under  
19 the contract that we just read?

20 A. Yes.

21 Q. Okay. If the owner wants to make  
22 changes, when is the most economical time to make  
23 those changes? Before construction starts or  
24 after?

25 A. Before.

1 Q. Why is that?

2 A. It allows you to plan for it, plan --  
3 your subs can plan for it. They can plan the  
4 manpower. They can plan the materials, things  
5 like that.

6 Q. Okay. All right. What I'd like to  
7 do -- we talked about the start of this job, and  
8 we've talked about the fact that it did not -- I  
9 believe you testified that it did not complete  
10 until late 2018. We've talked about the fact  
11 that the original schedule was extended by about  
12 16 months, correct?

13 A. We talked about it.

14 Q. And you were the man on the job for  
15 Balfour and were overseeing the construction  
16 during the delay period; is that correct?

17 A. That's correct.

18 Q. Okay. What I would like for you to do  
19 now is to explain to the Judge -- and I know this  
20 is going to take a little while -- from the start  
21 of the project to the completion, what were the  
22 significant delays? I know there were a lot of  
23 them. What were the significant factors that, in  
24 your view, caused the job to be delayed?

25 MR. BUNDY: Objection. He hasn't

1       been listed as a delay expert. There's no  
2       foundation. He hasn't talked about a single  
3       delay yet. These things have to be proximately  
4       caused, one delay after the other, and so this  
5       is -- I object to his testimony, object to the  
6       question.

7                               THE COURT: Overruled. He can  
8       answer.

9       BY MR. HILDEBRAND:

10            Q. All right. Where is the best place to  
11       start? From the bottom?

12            A. Yeah. I mean we started at the ground  
13       up, right, like I stated before.

14            Q. Okay. What was the first problem you  
15       ran into?

16            A. So let me clarify. There's always --  
17       there's issues in construction constantly.  
18       There's curve balls that are thrown at you  
19       constantly, right?

20                               There's always things that you --  
21       changes or adjustments or things that happen that  
22       you respond to, you know, to run the job. Means  
23       and methods, whatever you want to say. So when  
24       we got -- of course, when we got our sheet pile  
25       in and we got our piles in, we were down on the

1 ground, and we were able to excavate to get down.

2 The first issue we ran into was right  
3 when we got down to grade, the thousand-year  
4 storm hit us. So it basically washed our dirt  
5 wedges up against the sheet pile down; so there  
6 was a period where we had strategically pump the  
7 water out of the inside. At the same time, we  
8 had to control the water level on the outside of  
9 the sheet pile.

10 So we were -- we made efforts to lower  
11 the water table on the outside to be equivalent  
12 with the inside and kind of drop it as we dropped  
13 the inside. So we were regulating making sure  
14 those -- those sheet piles didn't shift.

15 Q. Okay.

16 A. So that was one the biggest changes off  
17 the bat to get to a point where you could get the  
18 water out and we could get basically our dirt  
19 back, our dirt wedges that were piled up against  
20 the sheet pile on the inside, get all that back  
21 in place.

22 Q. So the thousand-year storm delayed the  
23 project?

24 A. Pretty early, yeah.

25 Q. Was there a change order that was issued

1 as a result of that?

2 A. There was.

3 Q. And how many -- do you recall how many  
4 times days were given to you?

5 A. Twenty days, I believe.

6 Q. Were any other days awarded to Balfour  
7 throughout the rest of the project?

8 A. No.

9 Q. Let me ask you this, before we go on:  
10 Do you like being a construction manager?

11 A. I do.

12 Q. What do you like about the job?

13 A. It's not easy. It's challenging. It's,  
14 you know, working through conflicts, figuring  
15 things out, making -- you know, problem solving,  
16 I guess you could say, that side of it.

17 And it's starting with something that's  
18 dirt and building something like Hotel Bennett.  
19 When you're done, it's a gratification, you know,  
20 to be able to build something that's going to be  
21 there that people are going to see for years to  
22 come. That's what I like the most about it.

23 Q. What are the difficulties, in any job,  
24 that you experience as a construction manager?  
25 What is difficult about your job, if anything?

1           A.    I guess the -- the conflicts you run  
2           into, the changes, of course, the -- I guess  
3           time.

4                    You know, the time you spend on the job,  
5           that takes a toll on you.  There's a lot of --  
6           you know, there can be stress at times.  It's  
7           usually a pretty fast-paced job, things like  
8           that.

9           Q.    When you were dealing with their  
10          subcontractors, what are your -- what are your  
11          habits with regard to pushing them to complete  
12          their work?

13          A.    Pushing is a part of the job.  I mean,  
14          that's definitely a part of the job.  I push  
15          pretty hard when you're trying to maintain a  
16          schedule.

17                   Like I say, there's always curve balls  
18          that come along that you're not expecting.  
19          Weather -- you know, it could be weather.  It  
20          could be different things that happen.  So if --  
21          when we schedule and a sub say has 14 days to  
22          complete a task, if he slips a day, we're on  
23          them.

24                   We're sending them a notice, you know,  
25          you're delaying us.  You're delaying us, you

1 know. So it's a constant push with subs to make  
2 sure everybody is staying on schedule. There's  
3 thing that happen that are maybe out of their  
4 control, and you understand. But I'm pushing  
5 hard a lot.

6 Q. Okay. Is it unusual on a project or on  
7 a job for a subcontractor to be behind schedule  
8 at some point but then make it up?

9 A. Sure. They do it all the time.

10 Q. And how do they make it up when they --  
11 after they've been behind?

12 A. Sometimes it's working weekends. You  
13 know, you work extra days where your schedule is  
14 built on a five-day schedule. You basically have  
15 Saturday as makeup days, sometimes longer hours.

16 Sometimes you adjust other things in the  
17 project. So -- because in a schedule, there's --  
18 things are tied together, right? So one thing is  
19 tied to another. One pushes -- it could push  
20 another thing. Some of them overlap.

21 So sometimes there's a situation where  
22 this one may push, but it's not pushing the next  
23 task. You know what I mean? So you can see an  
24 opening to keep that thing back on track between  
25 the two subs.

1           Q.    Okay.  What is your -- having finished  
2           the Hotel Bennett, as far the -- how the job  
3           went, are you -- what are your feelings in  
4           general about that?

5           A.    It was a very tough job.  It took its  
6           toll on the team and me, personally.  It was a  
7           lot of extra hours.  You know, some sleepless  
8           nights as things go.  A lot of -- just a lot of  
9           moving parts, a lot of people on a job like that.

10                    And so it's -- yeah, pretty much keeping  
11           you -- just keeping you in tune and keeping your  
12           mind right and keeping everybody positive, you  
13           know, is the goal.

14           Q.    Okay.  What was the primary -- was there  
15           a primary problem that caused you angst and  
16           frustration on this job?

17           A.    I mean, there was -- there was a lot of  
18           changes.  There was a lot of design conflicts on  
19           the job.

20                    MR. BUNDY:  Your Honor, he's not an  
21           architect, and now he's testifying that the  
22           problem on the job was design problems.  He's not  
23           qualified as an architect.  He's not been listed  
24           as an architectural expert.  He's laid no  
25           foundation.

1                   And this cannot be lay testimony. It  
2                   simply can't be lay testimony. The -- that a  
3                   contractor can talk about whether an architect's  
4                   design is in conflict. Furthermore, I've not  
5                   seen any drawings yet, not one. So I would  
6                   object.

7                   THE COURT: All right. Objection  
8                   noted. Lay a little more foundation. You might  
9                   want to go into specifics, it sounds like.

10                  BY MR. HILDEBRAND:

11                  Q. All right. Do you look at drawings  
12                  every day when you're on a job?

13                  A. Usually.

14                  Q. Okay. Do you know what at -- so you  
15                  know what drawings are?

16                  A. Sure.

17                  Q. Can you recognize when you get a drawing  
18                  and what is shown on the drawing doesn't work  
19                  from a construction standpoint?

20                  A. Sometimes, sure.

21                  Q. Okay. So if you -- are you able to  
22                  determine what is an -- if you can't build it, do  
23                  you infer that that's a design issue?

24                  MR. BUNDY: That's ipse dixit.

25                  Things that contractors can't build, by

1 definition, are not all design problems because  
2 if they were, we wouldn't need architects and  
3 engineers. It could be just as likely, the  
4 contractor doesn't know how to read the  
5 documents.

6 In order to have an expert who can  
7 testify that these architectural documents don't  
8 meet the standard of care because they're in  
9 conflict and unbuildable, it takes an architect.

10 THE COURT: Well, didn't the  
11 contract allow for the contractor to object to  
12 some problems if they saw those problems? That's  
13 in the contract, is it not?

14 MR. BUNDY: Well, sure. He could  
15 object to them, but that doesn't -- the contract  
16 doesn't change the Rules of Evidence.

17 The Rules of Evidence still require that  
18 if somebody is going to come in here and give a  
19 professional opinion that they be qualified and  
20 listed as a witness. And that's what he's doing.  
21 That's a conflation of two different things.

22 THE COURT: All right. Well, noted  
23 and overruled. Go ahead.

24 BY MR. HILDEBRAND:

25 Q. All right. You talked about the

1 thousand-year flood. What was the next problem  
2 that you encountered on this job?

3 A. When we -- so, of course, we did a  
4 modeling process with our subs, right? So that  
5 was the first thing that we did to get the  
6 mechanical, electrical, plumbing coordinated  
7 inside the building model of the structure.

8 Q. Okay.

9 A. One of the first things we ran into in  
10 the basement, in the mechanical room, fire pump  
11 room, once you get like equipment specifics,  
12 basically our then designer would put that say  
13 fire pump in that room.

14 The first problem we had was the  
15 equipment wouldn't go in. It would fit with the  
16 pumps there. It had to be modified to move some  
17 of the pumps around.

18 Q. So you got the drawings and put them  
19 into the 34D?

20 A. I did, but, yes, we also have a BIM  
21 person.

22 Q. And it was discovered that some of the  
23 equipment didn't fit once you looked at it in  
24 34D; is that correct?

25 A. That's correct.

1           Q.    So what was the result of that?  Whose  
2    fault was that, in your view?

3                   MR. BUNDY:  Objection.  That's  
4    leading.

5                   THE COURT:  I will sustain that  
6    objection.

7    BY MR. HILDEBRAND:

8           Q.    Okay.  What was the sequence of that  
9    issue?

10                   MR. BUNDY:  Objection.  The  
11    documents are the best evidence of whether or not  
12    the pump was not the right size or anything like  
13    that.  You have to put -- at least bring in front  
14    of this Court the documentation that shows the  
15    pump was wrong, so I can cross-examine him on it.

16                   There's no foundation for his testimony  
17    other than his recollection.  The documents are  
18    out-of-court statements.  He's offering us  
19    documents for approval of the Court.  The  
20    documents themselves are hearsay, and they're not  
21    even in evidence.

22                   THE COURT:  All right.  Noted.  Go  
23    ahead.

24                   MR. HILDEBRAND:  Thank you, Your  
25    Honor.

1 BY MR. HILDEBRAND:

2 Q. Okay. So you look at the drawings and  
3 design and figure out if it's going to -- if you  
4 can construct, correct?

5 A. Yes.

6 Q. All right. And what are your  
7 obligations when that happens?

8 A. To any conflicts or -- like that that  
9 arise, we send the information to the architect,  
10 the designer.

11 Q. Okay. Whose obligation is it to design  
12 a fix?

13 A. The architect.

14 Q. Okay.

15 A. Or engineer.

16 Q. All right. Was there an issue with some  
17 of the equipment in the basement of the building?

18 A. Yes.

19 Q. Was that brought to the attention of the  
20 architect?

21 A. Yes.

22 Q. Did they make a change?

23 A. Yes.

24 Q. What impact did that change have to you  
25 or to Balfour?

1 A. Well, it takes time and money.

2 Q. Okay. Explain to the Judge if you  
3 would --

4 A. To perform the work, if it's extra work.

5 Q. Explain to the Judge, if you would,  
6 exactly what it was -- was the equipment too big  
7 for the space, or what was the problem that you  
8 discovered on the drawings?

9 MR. BUNDY: Before he proceeds, I'd  
10 like to strike his previous answer because he  
11 said it takes time and money. How much time?  
12 How much money? Pure speculation. So I move to  
13 strike his previous answer.

14 THE COURT: Noted. And I'll let  
15 you go into that on cross. Go ahead.

16 BY MR. HILDEBRAND:

17 Q. What was the equipment problem? What  
18 was it that didn't work?

19 A. I guess the equipment fitting in the  
20 area. There was a little more to it. There was  
21 an elevator equipment room that was -- had a door  
22 opening to enter it off of that pump area.

23 Q. Right.

24 A. Which is not allowed by code, by the  
25 State Department. So we basically, they had --

1       that doorway had to move around, you know what I  
2       mean, to shift to another area, which we created  
3       room to shift some of the mechanical equipment.

4           Q.    Okay.  What was the next problem that  
5       arose?

6           A.    Piping.  So there's terraces up on the  
7       third floor, sixth floor, and ninth floor, which  
8       have drains -- four drains in them.  So the  
9       piping for all those drains ran down to the  
10      basement.

11                  So the concept of the design was -- when  
12      it rained, the water would run down to the  
13      basement.  Then it would get pumped back up into  
14      the street storm system.

15           Q.    So there were areas, I guess, that  
16      weren't sloped roofs that water just dumped off?  
17      It collected water and had to be --

18           A.    It was about -- like balconies.

19           Q.    Okay.

20           A.    So you had periodic drains on those  
21      balconies or terraces that would catch the water  
22      and bring it down to the basement.

23                  So one of the first issues was the  
24      piping was originally shown as 4 inch drains and  
25      then got changed to 6 inch drains, 6 inch piping

1       because of the volume. To capture and not cause  
2       a problem with the amount of volume of rain,  
3       whatever the calculations are, they changed the  
4       piping size.

5           Q.    How was that problem discovered? Who  
6       discovered it and how?

7           A.    It was in -- it was in part of the BIM  
8       process, but I know that BMCC, our mechanical  
9       contractor brought it up on one of the design  
10      drawings.

11           And he said, hey, I don't think the  
12      calculations are correct for this. You need to  
13      look at it. So that process went on for a few  
14      months until it finally changed by the architect  
15      or engineer.

16           Q.    Was that a big deal?

17           A.    Yeah.

18           Q.    And why was that? It sounds pretty  
19      simple. You just go from a 4-inch pipe to a 6  
20      inch.

21           A.    Well, keep in mind the pipe goes from  
22      the basement, and in some cases, all the way to  
23      the ninth floor. So it has to have a chase to  
24      carry that pipe, you know, all the way to the  
25      roof.

1 Q. What is a chase?

2 A. Chase is just basically a hollowed out  
3 column to allow that pipe -- it's not visible  
4 inside the building. So if you increase the  
5 pipe, you increase the path that it has to go  
6 through.

7 So it ended up making some adjustments  
8 for the rest of the building up through there.  
9 But the immediate concern was we were -- we were  
10 piping -- you know, trying to rough in  
11 underground, that piping under the ground that  
12 comes into our, you know, drain lines and things  
13 like that.

14 Q. Did those have to be changed?

15 A. They had to be upsized, yes.

16 Q. Okay. All right. What was the next  
17 problem there?

18 A. One of them was down there in the  
19 basement and some tanks had collected water that  
20 weren't in the original design.

21 Q. Okay. Why were those added?

22 A. Just the amount of volume that was, I  
23 guess, coming down. I don't know the exact  
24 details, but basically, to handle the water flow  
25 coming down off terraces to get back out of the

1 building.

2 MR. BUNDY: Move to strike. He  
3 just testified he didn't know the details.

4 THE COURT: So noted. Overruled.  
5 Go ahead.

6 BY MR. HILDEBRAND:

7 Q. All right. So you got an instruction  
8 from who? The architect to change the piping and  
9 make a change?

10 A. Uh-huh.

11 Q. You have to answer yes or no.

12 A. Yes.

13 Q. All right. What was the next problem  
14 that occurred?

15 A. I need you to clarify. At the time we  
16 were building -- at the time we're moving up the  
17 building, do you know what I mean? Because some  
18 of those areas, there were things that later came  
19 about. Do you know what I'm saying?

20 Q. You can answer however you think is  
21 appropriate. What was the next major significant  
22 issue that occurred from your perspective as the  
23 construction manager on this project?

24 A. Okay. There was electrical. There was  
25 some electrical service that had to be added to

1 the project. There was some modifications to  
2 electrical panels that -- the electrical room was  
3 down in the basement.

4 Q. So there was a change from the original  
5 drawings?

6 A. Yes.

7 Q. And why was that?

8 A. It's additional circuitry needed or  
9 additional power needed.

10 Q. Needed for what?

11 A. Needed for heaters and just -- it was  
12 several things that were in the -- I would have  
13 to look at the change order.

14 Q. Okay. Was that a pretty easy change to  
15 integrate?

16 MR. BUNDY: Objection.

17 THE COURT: Overruled. Go ahead.

18 THE WITNESS: Was it easy?

19 BY MR. HILDEBRAND:

20 Q. Yes, sir.

21 A. I wouldn't say easy.

22 Q. What was the next problem that  
23 developed?

24 A. I'm sorry. I'm still in the basement,  
25 running it through my head.

1 Q. Okay.

2 A. I know there was a wall that had to be  
3 deleted between two electrical rooms for  
4 mechanical equipment. There was eventually a  
5 change order approved for that, to eliminate that  
6 wall.

7 Q. Okay.

8 A. There was a -- there may have been --  
9 and I don't remember other things right now in  
10 the basement.

11 Q. Okay. What was the next problem?  
12 What's the next significant issue that arose as  
13 you --

14 A. I mean, one of the -- one of the first  
15 things that were done -- and this was early on --  
16 was columns were deleted from the ballroom.

17 So the ballroom, I guess, originally had  
18 more columns in it. Those were deleted. That  
19 was early on. It created beams. The beams being  
20 upsized, I guess, to carry, you know -- because  
21 of the weight distribution, so they upsized beams  
22 when columns were deleted.

23 So with those columns enlarging, it  
24 created some mechanical issues, fitting  
25 mechanical in and above the ceilings type of

1 thing with those beams and getting around them  
2 and things like that.

3 So I know on the first floor there  
4 was -- it went to an indirect HVAC system, which  
5 basically hides your A/C grills. It kind of  
6 hides them inconspicuous, maybe behind the crown  
7 mold or whatever. So there was a mechanical  
8 redesign on the first and second floor.

9 Q. Okay. Why was that made?

10 A. I think -- I don't remember that being a  
11 design issue, but -- I don't know if it was the  
12 owner or not.

13 MR. BUNDY: Move to strike. He  
14 doesn't know the answer.

15 MR. HILDEBRAND: Okay. That's just  
16 his answer, though.

17 THE COURT: He doesn't know the  
18 basis for it, just that it happened.

19 THE WITNESS: Right.

20 THE COURT: All right.

21 BY MR. HILDEBRAND:

22 Q. Let's discuss the ballroom column issue.  
23 Was that a significant change in your view?

24 A. Yes, structural, yes.

25 Q. All right. And tell what the -- what

1 exactly was the change there?

2 A. Well, the original building was designed  
3 with more columns in it, right, through the  
4 ballroom. You had additional columns. When you  
5 remove those columns, to create more space,  
6 you've still got to carry all the weight of the  
7 building up above it. So it was just increased  
8 sizing of beams, things like that.

9 Q. Okay. Did that cause any delays to the  
10 project in your view?

11 A. No.

12 Q. Okay. What was the next problem that  
13 arose or issue?

14 A. So if I'm kind of running -- when you  
15 say next in sequence, there were a lot of changes  
16 that came later on the first and second floor.  
17 But at the time, moving up the structure, do you  
18 know what I mean? They didn't come about until  
19 later in the project.

20 Q. Okay.

21 A. So moving up the structure, basically as  
22 we're -- as we're designing or doing our BIM  
23 design with our MEPs, right, our mechanical,  
24 electrical, plumbing, because you're trying to  
25 locate anywhere sleeves are going to go through

1       that concrete slab.

2               So with those sleeves, basically we go  
3 through with their -- for instance, if that  
4 piping changed, it could adjust something. So we  
5 were coordinating all the drawings with changes  
6 as they were coming in also.

7               Q.    And which floor was this?

8               A.    This was basically the first and second  
9 floor.

10              Q.    Okay.

11              A.    So we moved up the building with BIM  
12 just like we're moving in construction to  
13 basically have the MEP design or MEP modeling for  
14 clashes to stay ahead of the structure that we're  
15 putting up tables and we're pouring concrete and  
16 things like that.

17              So as the changes were coming about, we  
18 would put those into the model. If there was a  
19 clash, we would send the clash to the architect.  
20 The architect would have a response to it or a  
21 change to it.

22              We would put it -- get it back. We  
23 would put it into the BIM model again to see if  
24 that worked or if it caused any other issues or  
25 conflicts within the structure.

1 Q. Okay. So when you say that there were  
2 changes -- so the original design was changed on  
3 the first and second floors?

4 A. It was -- it was basically like piping,  
5 indirect HVAC, things like that, that may affect  
6 the sleeve that goes through the floor.

7 Q. Okay.

8 A. The sleeves in your floor is anything  
9 past (inaudible) whether it's plumbing,  
10 electrical, mechanical, things like that. You've  
11 got to coordinate that to get your sleeve where  
12 it's going to go.

13 Q. Okay. And is that something that the  
14 architect tells you where to put those?

15 A. Yes.

16 Q. Okay. Give me a little more detail, if  
17 you would, Mr. Spano -- I'm not sure I'm real  
18 clear on the complexities of -- I would imagine  
19 that under this floor there might be a few HVAC  
20 ducts or maybe some mechanical equipment.

21 But can you describe to the Judge how  
22 complex it is in between each floor? What goes  
23 in there and what has to be worked around or  
24 prepared in order for a floor to take place?

25 A. So, in other words, between a ceiling

1 and a floor above, you're going to have your HVAC  
2 ductwork.

3 You're going to have waterlines  
4 electrical lines, lighting. I mean, your  
5 lighting -- say a can light could be 8 inches.  
6 It could be 6 inches. All those are taking fire  
7 sprinkler lines, things like that.

8 They're all taken into consideration to  
9 figure out how they're going to crisscross and  
10 work together within that space. So that's one  
11 of the reasons we, with our subs, do a model to  
12 try to get ahead of any of those conflicts.

13 Q. Okay. What was the next issue that  
14 arose?

15 A. I know one of the kind of big ones had  
16 to do with chilled water. I believe it was at  
17 the third or fourth floor. When we were up  
18 there, there were chilled waterlines that would  
19 run basically down the corridors to carry water  
20 to the guest rooms.

21 Q. So is this just in the ceiling area?

22 A. This is in the ceiling area.

23 Q. What is a chilled waterline?

24 A. Basically it's coming from your -- we  
25 basically have large chillers outside that cooled

1 water pushes it through the building to feed all  
2 your plumbing fixtures, things like that.

3 Q. Okay.

4 A. So one of the problems, when we first  
5 went in with BIM, it had -- originally had, I  
6 believe, a 4-inch waterline. Once you insulate  
7 it, once we fit everything within that ceiling it  
8 was going to cause the ceiling to be lower, to be  
9 able to fit everything.

10 So I know that that was kind of a no-no.  
11 They didn't want to lower the ceiling; so they  
12 basically redesigned the chilled waterline to go  
13 to like 2-inch lines to minimize the distance and  
14 keep the ceilings as high as possible.

15 Q. Okay.

16 A. So that affects, you know, sleeves and  
17 everything. You know, your penetration and stuff  
18 when you change water. You know, you change one  
19 pipe to another or you change sides.

20 Q. Okay. So the BIM process that you and  
21 your subcontractors did, when y'all put them in  
22 the 3D, it showed that the chilled waterlines  
23 were two -- they wouldn't fit in the space  
24 provided; is that right?

25 A. That's correct.

1 Q. And you submitted an RFI to the  
2 architect and said, what do we do?

3 A. We did.

4 Q. And then you were told --

5 A. And they were on the -- you know, they  
6 would get on the BIM calls.

7 And when our guys would put the  
8 information in, find the conflicts, get on the  
9 call with the architect, show it to them, then  
10 they would basically in 2D version, figure out  
11 how they're going adjust it, send it back and put  
12 it in the model and look at it again.

13 Q. Okay. When you said there were BIM  
14 calls, what does that mean?

15 A. Just conference calls so that all  
16 parties, the architect, whoever could see the 3D  
17 model on the screen to see the conflicts. And  
18 we'd have a 3D visual of where the conflict was.

19 Q. Okay. So your BIM would identify --  
20 might identify the problem, and when it did, it  
21 would be a conference call with the architect so  
22 that they could get it resolved?

23 A. Yes, so that they could understand it.

24 Q. How often did those calls take place?

25 A. Oh, gosh. I think for the most part

1       like biweekly, as I recall.

2           Q.    I always get it mixed up on biweekly.  
3       Is that every other week or --

4           A.    Like every two weeks because keep in  
5       mind, our guys were -- it took a little time to  
6       get everything into the model.  You know, also  
7       your MEP subs are getting their information over  
8       for their model.

9                    So there's a coordination between  
10       mechanical, electrical, plumbing models and our  
11       BIM coordinator that would fit everything  
12       together and put it in.  So sometimes it would  
13       take two weeks to have another call; sometimes it  
14       would be more.  It just depends on the amount of  
15       information they were putting in.

16          Q.    Okay.  If y'all had not used BIM, it may  
17       have taken longer to have discovered the clashes  
18       in your view?

19          A.    Sure, absolutely.

20          Q.    That's why you use it, correct?

21          A.    Yes.  It's a quicker tool.

22          Q.    Okay.  All right.  What was the next  
23       issue that arose?

24          A.    Really where we hit a wall was the fifth  
25       floor -- basically, the slab.  The fifth floor

1 ceiling slab or sixth floor slab, I should say.  
2 I know that the rooms from the sixth, seventh,  
3 and eight floor were being -- got consolidated  
4 and revised to suites.

5 Q. All right. Let me stop you just for a  
6 second so the Judge can be clear. The building  
7 has nine floors, correct?

8 A. Correct.

9 Q. The first two floors are the restaurant,  
10 the ballroom and spa and all that sort of stuff?

11 A. The patisserie, the foyer, all that  
12 stuff.

13 Q. All right. Then the third through  
14 eighth floors --

15 A. Were guest rooms.

16 Q. Okay. So you had a total of six floors  
17 with guest rooms?

18 A. Yes.

19 Q. Is that correct?

20 A. That's correct.

21 Q. And what was on the ninth floor?

22 A. That was for -- it was a meeting space.  
23 There was a pool. There was a rooftop bar, a  
24 little kitchen up there.

25 Q. Okay. So all the guest rooms were going

1 to be on rooms 3 through 8, correct?

2 A. Correct.

3 Q. And what is this change that you're  
4 telling me to place, I guess, right in the middle  
5 of the floors, right at the top, from the ceiling  
6 of the fifth to the --

7 A. Six, seventh and eighth floor went to --  
8 got modified to suites.

9 Q. Do you know why that was?

10 A. No.

11 Q. Was that after construction had started?

12 A. Yes.

13 Q. Okay. What impacts did that have with  
14 your progress on your job?

15 A. So basically getting the sleeve  
16 locations correct for the sleeve design so that  
17 we can get them in the slab and get the slab  
18 forward.

19 Q. Okay. When you said, we hit the wall at  
20 that point, what did you mean by that?

21 A. We basically got tables up, our shoring  
22 underneath it, to where we were ready to layout  
23 all the sleeves on the floor, and we did not have  
24 any information from the architect.

25 Q. So your construction -- the design

1       didn't keep up where you -- the design changes  
2       didn't keep up with where you were constructing?

3           A.    The construction wasn't, correct.

4           Q.    And was there any stoppage of work?

5       What happened as a result of that?

6           A.    There was.

7           Q.    So y'all had to come to a stop?

8           A.    We came to a stop on the sixth floor.

9       My concrete guy had demobilized -- had put the  
10       tables up as much as he could.

11                   Some of the workers worked, you know,  
12       down below where they could; in other words,  
13       MEPs.  But our work stopped up on the sixth floor  
14       building for -- to be able to pour the slab.  So  
15       it basically stopped at that point.

16           Q.    Okay.  So when was that resolved and how  
17       was it resolved?

18           A.    We sent a delay notice, per the  
19       contract.  So we, up until that point, had been  
20       sending just kind of -- you know, sending e-mails  
21       saying, hey -- we just saw our time frame  
22       narrowing down as we were moving up the building.

23                   So we were requesting the shop drawings  
24       or the information with enough time to allow us  
25       to go through the kind of normal process where

1       you -- your subs have a little more time to prep  
2       material or maybe prefab or whatever. So as we  
3       were moving up the building, that normal kind of  
4       prefab time was just going away.

5                So pretty early on we were starting to  
6       say, hey, we need this floor by this date and  
7       this floor by this date because we saw what was  
8       happening. You know what I mean? We saw it  
9       coming to a head basically. At that point, we  
10      came to a head, and we had to stop.

11             Q.    And do you know why the architect was  
12      unable to give you the corrected designs in time  
13      for you to proceed with the work?

14             A.    Only they didn't have the information at  
15      the time of what was changing, I guess, you know,  
16      because they didn't have the information.

17                   MR. BUNDY:   Move to strike. He  
18      says he guesses.

19                   THE COURT:   That would be  
20      speculation, right?

21                   MR. BUNDY:   Yes, by definition.

22                   THE COURT:   I will sustain that  
23      objection.

24             BY MR. HILDEBRAND:

25             Q.    Okay. All right. So you made a claim,

1 a formal claim; is that right?

2 A. I did.

3 Q. Okay. And we'll go through those  
4 documents a little bit later. What was the  
5 result of that?

6 A. The original -- so the claim process  
7 goes to the -- went to the architect. They were  
8 the person to rule on it, I guess, is how it was  
9 put in the contract. So WLA came back with an  
10 answer.

11 Q. That's the architect?

12 A. That's the architect.

13 Q. Okay.

14 A. They basically granted us a certain  
15 amount of days and a certain amount of money was  
16 their ruling, not what we totally had asked for.  
17 At that point, we followed the contract process  
18 to request a mediation -- to have a mediation to  
19 try to further resolve, you know, the rest of the  
20 non-approval.

21 Q. Okay. Were you ever -- so they  
22 disputed -- they agreed with part of -- the  
23 architects agreed with part of your claim and  
24 denied part of it; is that correct?

25 A. That's correct.

1 Q. Were you ever paid for the part that  
2 they agreed you were entitled to?

3 A. No.

4 Q. The undisputed claim?

5 A. Huh-uh.

6 Q. All right. So how long was the delay on  
7 the sixth floor? How long was the work stoppage?

8 A. 21 days, I believe.

9 Q. Who was the subcontractor? The concrete  
10 subcontractor, who was that?

11 A. Lithko.

12 Q. Okay. All right. What was the next  
13 issue that arose on the job?

14 A. Once we got back on -- were able to  
15 continue with the sixth floor, the same process  
16 was going on. So there was basically a continual  
17 delay that in -- that went up to seven or went up  
18 to eight.

19 So we had sent an additional delay  
20 notification, you know, explaining the seventh  
21 floor timing and where we were at and all of that  
22 stuff.

23 Q. Okay. Were you ever provided any  
24 compensation for those -- as a result of those  
25 delay notices?

1 A. No.

2 Q. Was any part of that claim, to your  
3 recollection, agreed with by the architect and  
4 part was not agreed with like on the sixth floor?

5 A. I don't believe so.

6 Q. All right. What was the next -- let me  
7 ask you this: With regard to your  
8 subcontractors, when there's a work stoppage or  
9 an issue like you described with the sixth floor,  
10 how does that impact them?

11 A. I mean, they will -- if they're in a  
12 delay, they will send us a delay notice.

13 Q. Okay. Does that -- what impact, if any,  
14 does that have on the job efficiencies for the  
15 subcontractors?

16 A. Delay?

17 Q. Yeah.

18 A. Well, it stops the progression and the  
19 normal flow of the work as planned.

20 Q. Okay. All right. What was the next  
21 issue that arose?

22 A. I know that there -- there was some  
23 design that continued for a while up in the bar  
24 area, ninth floor. There was the bar design that  
25 flagged quite a bit.

1                   Once we got back on six, we basically  
2                   were -- it was kind of a continual -- a continual  
3                   delay up the thing to get us to the ninth floor.  
4                   So the ninth floor is where we basically top out  
5                   our structure, right? So that's a key milestone  
6                   on the project, right, to get your final pour in.

7                   So there was -- on the ninth floor,  
8                   there was changes going on up there that  
9                   affected, you know, some of the, I guess, more --  
10                  not as much the structural part of it but more  
11                  finishes and things that were coming with the bar  
12                  and things like that.

13                 Q.    Okay. At what point did -- when the  
14                  sixth floor issue came up, was the project on  
15                  schedule or behind?

16                 A.    We were, I believe, within one day of  
17                  schedule.

18                 Q.    Is that right? Okay. So all the 16  
19                  months that we've referred to earlier that the  
20                  project was delayed, all that happened after the  
21                  sixth floor?

22                 A.    Yes.

23                 Q.    Okay. And the issues that you  
24                  identified earlier in the structure had been  
25                  overcome; is that right?

1           A.    That's correct.

2           Q.    What were the issues that -- what other  
3           issues happen after that?  What other significant  
4           issues?

5           A.    With the interiors basically, there were  
6           door selections, hardware selections, things that  
7           were -- took a lot of time to get selections on  
8           that affect your procurement of say doors.  You  
9           need to know what hardware are going in the doors  
10          and vice versa.  There were changes to egress  
11          stairwells, changing finishes, changing  
12          handrails.

13                    There were, of course, lighting changes,  
14          selecting entrance doors like in the Camilla  
15          lounge.  There were restaurant equipment changes  
16          in your Camilla lounge or in your lobby bar or in  
17          your kitchens, things like that.  So there was  
18          some equipment changes also that happened.

19          Q.    Okay.

20          A.    There were some guest rooms; so there  
21          were like barn doors added in the guest rooms  
22          which are basically sliding doors over an opening  
23          between the bedroom and the tub.

24          Q.    Okay.

25          A.    With that, the barn door add, it

1 required basically a header or a bulkhead to be  
2 built to make the track for that door basically  
3 to be recessed and somewhat hidden.

4 So at the time we -- and most of the  
5 job, it depends -- I can't tell how many floors  
6 we were on at the time when we first started it.  
7 I think two or three that we -- were drywall; so  
8 we went back in, and we framed out the headers.  
9 We had to drywall those. We also had to -- at  
10 the time, we had sprinkler heads and HVAC grills  
11 in that wall.

12 Q. Okay.

13 A. So when you bring that header out, those  
14 things have to be extended out to the base of the  
15 new wall, right. So there was going back,  
16 framing, MEP subs, going back extending their  
17 rough-ins out to be able to drywall it.

18 Q. Does the changing of the barn -- adding  
19 the barn doors cause all that impact?

20 A. Yes.

21 Q. Well, why couldn't you -- why couldn't  
22 you just proceed with the rest of the guest rooms  
23 if you were -- or could you? Were you able to  
24 proceed with finishing the guest rooms except for  
25 the barn doors?

1           A.    You could work in the bathrooms, yeah.  
2           There were other areas you could be working in,  
3           but you couldn't completely finish the room.  
4           There was also trim added on all the exterior  
5           windows in the guest rooms.

6                        So it was originally drywall and then  
7           they went with wood trim, you know, so that was  
8           sort of millwork adds throughout.  On the barn  
9           door header, there was millwork that was added  
10          there.  There was a piece of trim across it.

11                       So those were areas where the barn doors  
12          were a very long lead time; so you couldn't  
13          complete the room until those barn doors came in  
14          and painted them and put them in place and  
15          finished the trim over the top.

16           Q.    When you say there was a "long lead",  
17          can you describe to the Judge what that means?

18           A.    Just once we receive the change order  
19          for a product -- when I say long lead, I believe  
20          the barn doors were somewhere around 14 months,  
21          once released, to get them in stock.

22           Q.    When you said, "once released", what  
23          does that mean?

24           A.    Once the change order is approved for  
25          the cost of it.

1 Q. So release is a term of art in the  
2 construction industry?

3 A. Yes.

4 Q. And that means what it implies, that the  
5 contractor is released to start the work?

6 A. Yes.

7 Q. Okay. So the release of the barn door  
8 issue, that means that y'all were able to order  
9 them or able to install them?

10 A. Order them.

11 Q. And how long did it take for them to  
12 come in?

13 A. Around 14 weeks.

14 Q. Okay. Do you know why it took so long?

15 A. I don't. Just that it was the supply  
16 chain.

17 Q. Was there something in particular about  
18 the barn door that was -- was there a particular  
19 barn door that was required?

20 A. It was a particular one. It had a  
21 mirror or glass in it.

22 Q. Okay. All right. And who directed you  
23 on the specific barn door and the specific  
24 supplier for it to be ordered?

25 A. The architect.

1           Q.   Okay. All right. What other issues did  
2           you encounter?

3           A.   Hardware selection. It took a long  
4           time.

5           Q.   What do you mean by hardware?

6           A.   Door hardware, doorknobs, locks.  
7           There's finishes, there's types, which affect the  
8           door and preparing the door for the actual lock  
9           that's being selected, that kind of stuff. So  
10          when hardware delays, it will delay your door  
11          work also.

12          Q.   Why is that?

13          A.   So they go into -- because of the prep  
14          work on the door. The door is pre-prepped for  
15          the lock, you know, for mortise or whatever  
16          hinges, things like that. So the hardwood  
17          selection affects the door prep.

18          Q.   So if there's a hardware delay, so the  
19          door latches and such, you can't even order the  
20          door yet?

21          A.   If you know what your ordering for the  
22          locks, yes, you can order the door.

23          Q.   Okay. But if you don't know what  
24          hardware is going to be used, then you can't  
25          order the door typically; is that correct?

1           A.   Typically, right.

2           Q.   Okay.  What other delays were there on  
3 the job?

4           A.   I know there was the guest room baths  
5 over the tubs.  There was a lighting issue there.  
6 There was basically what we call a doughnut  
7 recessed area in the ceiling above the soaker  
8 tubs.  Those lights were owner furnished, and  
9 when they came in, they weren't UL rated.

10                   So our electrical contractor said, I  
11 can't put these up unless they're UL rated.  So I  
12 know I personally got a light, took it down to  
13 the city to the electrical inspector to take a  
14 look at it because he agreed to take a look at  
15 it.  He responded and said, I need a UL approved  
16 sticker on these lights, et cetera.

17                   So I know the owner went back to whoever  
18 to get them through the UL process and all that.  
19 So that was -- I don't remember the gap of time  
20 before we got them, but I know they went up  
21 right -- very close to TCO time.  I want to say  
22 maybe November of '18, somewhere in there, toward  
23 the end of '18, I think, when we actually got the  
24 lights and got them all up.

25           Q.   Do you have any approximate recollection

1 of how long the delay was caused because the  
2 lights were -- because you upgraded them?

3 MR. BUNDY: Objection. The delays  
4 have to be critical delays.

5 THE COURT: Noted. Overruled. Go  
6 ahead.

7 THE WITNESS: I don't exactly.

8 BY MR. HILDEBRAND:

9 Q. Okay. What other issues did you  
10 encounter, to your recollection?

11 A. I know up on the ninth floor, the full  
12 equipment room, we had a design change there that  
13 had to do with the exhaust fans in the equipment  
14 room and, you know, the chemical room. And that  
15 was DHEC, the Department of Health.

16 Q. Did that delay the job in your view?

17 A. No, I don't think so. It was very close  
18 at the end, but I believe we got in there just in  
19 time.

20 Q. Okay. What other issues did you  
21 encounter?

22 A. Down in the first and second floor, we  
23 had a late flooring change in the restaurant  
24 area, kind of the lobby/restaurant area that went  
25 from carpet to wood flooring. So the wood

1        flooring had to be ordered.

2                    Stair four, which basically takes you  
3        from the ground floor of the restaurant up to  
4        the -- you can access the ballroom and you can  
5        also access a private dining room up there.

6            Q.    When the change came through to change  
7        from carpet to wood flooring, do you know how  
8        long it took for the wood flooring to be selected  
9        and to be ordered to get on-site?

10           A.    I think it was a month probably to make  
11        the selection, and I believe it was around ten  
12        weeks to get the materials.    Eight to ten weeks,  
13        something like that.

14           Q.    Okay.

15           A.    I know the stair four that went from the  
16        first floor to the second floor, a few changes  
17        there.    A change to basically wood treads risers  
18        instead of carpet.    There was millwork on the  
19        walls basically going up that stair.

20                    The handrails had changed to a glass  
21        handrail, which were also a long lead time.    And  
22        when you're dealing with stairs -- and I know  
23        that one was critical because it has to do with  
24        egress, fire inspections, exiting the building,  
25        that kind of stuff.

1 Q. All right. What other changes or issues  
2 that were involved?

3 A. There was a wine bar added -- I mean, a  
4 wine cooler added.

5 Q. That doesn't sound big.

6 A. Well, it was basically in a -- kind of a  
7 pathway between the dining room and basically the  
8 lobby off of stair four and adjacent to stair  
9 four. It kind of tucked up under stair four.

10 So there was some modification framing  
11 that had to happen there. There was cedar  
12 paneling that came in that had to create this  
13 wine cooler. There's also basically a  
14 refrigerant system that goes in. It's underneath  
15 stair four.

16 We had to core a hole to get the  
17 equipment -- to get power to the refrigeration  
18 equipment, to get drainage and water to the  
19 refrigeration equipment. So that was right  
20 towards the end also.

21 Q. Okay. What other issues did you  
22 encounter on the job?

23 A. I guess some of the others were like  
24 elevations from interior design that are  
25 basically showing how the millwork is to be

1 installed in different areas. And this is  
2 primarily on the first and second floor amenity  
3 areas.

4 So getting some of those drawings or  
5 elevations later in the project -- because when  
6 you go in at the beginning and you frame and you  
7 rough-in say your electrical, your switches, your  
8 fire alarm strobes, things like that, you're  
9 roughing all that into the framing. You're  
10 drywalling.

11 When a millwork elevation comes later,  
12 there's coordination that has to happen there  
13 because you may have a receptacle that doesn't  
14 line up in that -- in that wood panel or it hits  
15 a piece of chair rail or hits a piece of base.

16 So there was -- when those would come  
17 out, we would look at it, and we were shifting  
18 the -- you know, shifting electrical outlets and  
19 shifting switches and trying to get them centered  
20 in the panels and things like that, so it caused  
21 a disruption.

22 Q. So that was after the finishes had been  
23 installed, like after the sheetrock and/or the  
24 wood paneling had been installed?

25 A. In many cases, yes.

1           Q. All right. What other changes were  
2 there?

3           A. I think one of the -- one of the ones  
4 that happened a little bit later was the  
5 stairwells -- there were windows in the  
6 stairwells, and they originally had like interior  
7 shutters that were deleted.

8                   So one of the problems was, when you  
9 stood on the outside of the building and looked  
10 through the window, you could see, say a stair  
11 landing or a stair stringer, you know, through  
12 the window.

13                   So we went back and forth for a while,  
14 what are we going to do to fix that? And I know  
15 the designers had to go back, you know, with the  
16 BAR because anything on the exterior, Board of  
17 Architectural Review, they've got a say-so,  
18 right.

19           Q. Okay.

20           A. So we eventually went in after  
21 stairwells were drywalled and painted. They had  
22 us go in and basically put metal panels, dark  
23 metal panels over the inside of the window to  
24 basically blank off the inside and then drywall  
25 over then and then go back and paint. So that

1 was one of the, I guess, bigger change orders on  
2 the job.

3 Q. Okay. Were there any issues with the  
4 Hope's doors?

5 A. No. The Hope's doors originally had a  
6 VE that took them to a Jamestown series, I  
7 believe it was.

8 Q. What is a VE?

9 A. Value engineering, a reduction of cost,  
10 trying to find something that's equivalent but  
11 less expensive.

12 So there was -- there was a VE to the  
13 doors that basically changed some of the beams  
14 and headers around it -- you know, around those  
15 as far as on the inserts. So there was a little  
16 bit of change there as far as the structure, the  
17 framing, the sealing around it.

18 Q. Okay. Any other issues?

19 A. I know the general windows, which I  
20 believe were peerless originally in the original  
21 docs that were on for the most part floors three  
22 through eight in your guest rooms and all. It  
23 basically got upgraded to a Graham window. That  
24 was one of the requests. I know peerless had  
25 been used with WLA in previous hotels, like

1 Hampton Inns and things like that.

2 Q. Okay.

3 A. And I knew the owner wanted better  
4 windows. So we talked to First Choice. We  
5 talked to Graham, brought Graham in, got some  
6 samples and took them to Mike and Kim at their  
7 office to let them look at them.

8 He would look at the muntins or the  
9 profile and make adjustments until he got the  
10 windows the way he liked. And then we were able  
11 to get the change order resolved and get them  
12 ordered.

13 Q. Okay. Was there a delay associated with  
14 that?

15 A. No.

16 Q. Any other significant changes or issues  
17 that developed?

18 A. Stucco change early on, a stucco finish  
19 change early on, on the exterior. I know there  
20 was an address given to me of a building  
21 downtown. I can't remember the address that Mike  
22 had liked the finish on.

23 So I grabbed our stucco subcontractor.  
24 We went and looked at it to see the finish. It  
25 wasn't an engineered system. It was just a

1 direct applied, but we understood the finish. So  
2 we got some samples, showed them. Then we ended  
3 up making some larger sample boards.

4 I think I recall four of them with  
5 different textures or different colors,  
6 antiquing, things like that. And we had Mike and  
7 Kim come out to look at it and decide, and so we  
8 ended up having a change order to the type of  
9 stucco on the project.

10 Q. Okay. Any other issues that you can  
11 recall?

12 A. Some smaller ones, changes to -- some of  
13 the balconies had knee walls on them. There was  
14 a minor change to modify a couple of the balcony  
15 walls on the third floor. There was -- over the  
16 ballroom up on the third floor, third floor  
17 terraces.

18 They're basically like a third story  
19 there with walls and a roof. That was originally  
20 CMU. That changed the framing to DensGlass, and  
21 that was part of the column removal, structural  
22 change.

23 Q. Okay. When you say, "CMU", that's  
24 concrete --

25 A. Block. It was originally block walls up

1       there with BAR choice copper roof and that went  
2       to framing DensGlass stucco; so that was a  
3       change. That was part of the structural change.

4               Then up on that third floor terrace,  
5       there were owner furnished lighting that we ended  
6       up getting it changed to kind of relocate them.  
7       This was after the balcony was tiled. And  
8       basically that required -- you had stub-ups for  
9       your power.

10              So we had to do some shifting, some more  
11       cord drilling, which required going in the  
12       ballroom, opening up the ceilings, moving  
13       electrical, things like that. The ballroom  
14       chandeliers originally came in. They were owner  
15       furnished. The contractor installed. We put  
16       those up.

17              And then Mike came in one day and said,  
18       those aren't right. That's too small. So they  
19       looked at it and then reordered larger  
20       chandeliers. Reordered the larger chandelier.  
21       It required additional weight, additional  
22       anchoring from the schematic we had with the  
23       other lights. So there was some opened up  
24       ceilings adding additional anchors for the  
25       additional weight for those lights.

1                   There was some can lights deleted in the  
2 ballroom. Of course, I had spoke to it earlier.  
3 There was a lot of the HVAC that had to be  
4 rerouted to try to fit within the ceiling  
5 confinements.

6                   There was one in particular where we had  
7 to go take ductwork outside of the ballroom into  
8 the adjacent room, come around and come back in  
9 because we were trying to keep the interior  
10 design elements intact as much as possible. So  
11 we made -- there was some HVAC ductwork changes  
12 to work with that.

13                  Q. Okay. How often would you see Michael  
14 Bennett on-site?

15                  A. I'd see him. I mean, sometimes he would  
16 stop by for lunch, you know, come by around  
17 lunchtime periodically. But I would say on  
18 average maybe once a month, something like that.

19                  Q. Okay.

20                  A. Sometimes twice a month. It just  
21 depended.

22                  Q. How about Kim Brown?

23                  A. Kim would come probably about the same,  
24 a little bit more. Probably twice a month,  
25 something like that.

1 Q. What is Kim Brown's relation to Mike  
2 Bennett?

3 A. She works for Mike in -- I would say  
4 Mike's right hand.

5 Q. Okay. All right. How about Jim  
6 Clements, the owner's representative, that you  
7 talked about earlier. How often did he come  
8 on-site?

9 A. Jim would be on-site weekly. He would  
10 come on-site and do walks. He would be in our  
11 OAC meetings, of course. So he was frequently  
12 there.

13 Q. Okay. So when you say weekly, was that  
14 typically once a week, one day a week or --

15 A. Sometimes two days a week. One to two  
16 days a week but consistently there every week.

17 MR. HILDEBRAND: I'm going to go  
18 back into the document, if that's okay.

19 THE COURT: Okay. Before we get  
20 there, let me just ask. It's almost 5 o'clock.  
21 You've still got a little more to go. How much?  
22 Do you have any idea?

23 MR. HILDEBRAND: It's --

24 THE COURT: I was going to go -- I  
25 typically go anywhere from 5:00 to 6:00. So

1       that's why I was just trying to figure out if we  
2       were at a stopping point now.

3               I think I put word out to y'all last  
4       week, I've got -- my morning is covered up  
5       tomorrow. So we're not going to start back until  
6       after lunch. So I was just kind of trying to  
7       figure out where we are on a stopping point.

8               MR. HILDEBRAND: This is probably a  
9       good stopping point before I get into the  
10       drawings.

11              THE COURT: For now?

12              MR. HILDEBRAND: Yes, sir.

13              THE COURT: Okay. All right. Then  
14       let's go ahead and let's stop here for today.  
15       I've got Court. I've got my usual foreclosure  
16       roster I've got to get through. And I'm  
17       scheduled to run until 12:30. So why don't we  
18       pick up back here at 1:30 tomorrow.

19              Let's just pick back up at 1:30. We'll  
20       have Mr. Spano back on the stand at that time,  
21       and then you wanted to get some idea -- I don't  
22       know how long you anticipate cross being, but  
23       he's got -- do you got any idea? Maybe another  
24       hour or so?

25              MR. HILDEBRAND: I would guess

1 probably maybe two hours or so.

2 THE COURT: A couple more hours?

3 Okay.

4 MR. HILDEBRAND: Yes, sir.

5 MR. BUNDY: Couple days.

6 THE COURT: Couple days? All  
7 right. We'll be here a while.

8 MR. HILDEBRAND: Well, can we --  
9 I've got one -- and this kind of segues into  
10 Mr. Bundy's request for witness identification.

11 THE COURT: Sure.

12 MR. HILDEBRAND: I've got a witness  
13 who is -- has flown in to testify. He's a  
14 factual witness. It's a fellow named Alec  
15 Dooley. He lives in Ohio.

16 THE COURT: Okay.

17 MR. HILDEBRAND: And I'm told that  
18 he would likely -- and this is before we had  
19 gotten your word that you wouldn't be able to  
20 start until a little bit late.

21 THE COURT: Right.

22 MR. HILDEBRAND: And so he is  
23 actually here.

24 THE COURT: Okay.

25 MR. HILDEBRAND: I'd like -- I

1 think he'll take about two hours or so. If I  
2 could just call him out of order tomorrow so we  
3 can get him up and down, particularly if he's  
4 going to take a couple day. I'd like to do that  
5 and then send him on his way.

6 MR. BUNDY: I have no objection to  
7 that at all. I would be more than happy to  
8 accommodate him. Two days may have been an  
9 exaggeration. Probably a day. Okay?

10 THE COURT: Right.

11 MR. BUNDY: So as I understand it,  
12 we're going to start tomorrow at 1:30?

13 THE COURT: Yeah.

14 MR. BUNDY: He's going to put  
15 Mr. Dooley up. And I assume he'll stay until I  
16 can cross-examine him?

17 MR. HILDEBRAND: Yeah.

18 MR. BUNDY: He's not that busy?

19 MR. HILDEBRAND: That's fine.

20 MR. BUNDY: I'll cross-examine him,  
21 and then we'll more likely than not, start back  
22 with this gentleman on Wednesday.

23 THE COURT: Probably. That's what  
24 it sounds like.

25 MR. BUNDY: Can we just admonish

1 the witness again not to talk to anybody because  
2 these overnight direct examinations --

3 THE COURT: Yeah.

4 MR. BUNDY: -- don't sit -- I mean,  
5 they scare me. Okay?

6 MR. HILDEBRAND: I'm not going to  
7 talk to him.

8 MR. BUNDY: So there's that.

9 MR. HILDEBRAND: That's no problem.

10 MR. BUNDY: The other thing is, I  
11 think we've admitted -- do we have the subpoena?

12 THE COURT: Oh, yeah. Okay.

13 So, Mr. Spano, you can step down if  
14 you'd like. You can stay right there if you're  
15 comfortable.

16 MR. BUNDY: Your Honor, earlier  
17 today, we discussed the subpoena that I had  
18 issued and I, unfortunately, didn't have a copy  
19 at the time. I do now.

20 THE COURT: Sure.

21 MR. BUNDY: The subpoena was served  
22 right after the meeting that my law partner had  
23 with Mr. Hildebrand.

24 THE COURT: Okay.

25 MR. BUNDY: And we got the letter

1 back saying he was not going to provide what we  
2 requested. So we attached documents to be  
3 produced at trial, Exhibit A.

4 All of these descriptions came from --  
5 to me from Ms. Hadley, and they were a direct  
6 approximate result of my representation to you.  
7 The last time we were together, she was going to  
8 attempt to finish the audit and update the audit.

9 THE COURT: Right. Okay.

10 MR. BUNDY: Nothing to do with  
11 discovery; nothing to do with exhibits; nothing.

12 THE COURT: Okay.

13 MR. BUNDY: It's just a subpoena.

14 THE COURT: So, generally speaking,  
15 we're talking about updated job cost report,  
16 updated subcontractor status report, updated  
17 projected final cost report, and the  
18 identification of expenses incurred as cost of  
19 the work; is that right?

20 MR. BUNDY: And she attempts to  
21 explain it. It's not like these are just words  
22 that she made up.

23 THE COURT: Right.

24 MR. BUNDY: She really has gone --  
25 I really feel like she's tried to do her job to

1 explain what it is she wanted. And she dealt  
2 with these people when she did the original  
3 audit. So they should be familiar with all of  
4 these terminologies and that sort of thing.

5 THE COURT: Okay.

6 MR. BUNDY: And she's here from  
7 Maryland, and we're paying her to sit here all  
8 week. So I'd like to give her something to do  
9 other than listen to me complain.

10 THE COURT: Mr. Hildebrand?

11 MR. HILDEBRAND: Your Honor, that  
12 subpoena is inappropriate to serve an attorney  
13 for a client. There's no place in the rules that  
14 would provide for a subpoena to be served on an  
15 attorney.

16 If you want documents or if you need to  
17 subpoena somebody, you serve the subpoena on the  
18 person or on the client. I don't think -- more  
19 over, I don't think a subpoena is appropriate for  
20 a discovery request, which this is. It's after  
21 the discovery period.

22 So I think that the subpoena is  
23 inappropriate, but like I told you earlier, Your  
24 Honor, I tried to accommodate Mr. Bundy. His  
25 auditor spent an inordinate amount of time

1 going -- asked our witnesses as many questions as  
2 they wanted to, got all sorts of documents and  
3 issued their report.

4 So when I got this request for  
5 additional information that Mr. Bundy sent and  
6 noted for the first time last week at that  
7 hearing, I said, well, let's see what it is and  
8 if we just need to update the figures again. I  
9 understood it, based on subcontractors who had  
10 settled and such.

11 Let's see if we can get to the same  
12 figure. And he said okay. And then I got this  
13 document request, and I said, well, let me see  
14 what I can do. I then just voluntarily provided  
15 him -- I sent this to my clients, and they said,  
16 well, okay, we'll provide that.

17 And my understanding was, we've answered  
18 all four of these. And I sent an e-mail to  
19 Mr. Bundy directly from my client saying, here  
20 are the documents. So first off, I think that  
21 the subpoena is inappropriate.

22 THE COURT: All right.

23 MR. HILDEBRAND: But I think I've  
24 produced the documents. I think that they're  
25 outside of discovery, but I said that -- told you

1 I would try to work with them to see if we could  
2 come to some sort of agreement on what the  
3 actual -- that the owners are.

4 THE COURT: Okay.

5 MR. HILDEBRAND: So that's kind of  
6 where we are. I think I had provided this. I  
7 gave it to my client and I just told him, these  
8 are the answers to it. So I'm not really sure  
9 where we are.

10 THE COURT: Okay. All right.

11 MR. BUNDY: I just want the  
12 document. I don't want -- I don't need a lot of  
13 talk about who agreed to what or anything else.  
14 I sent him a letter. I told him, this is the  
15 documents I wanted. He refused to produce them,  
16 and I issued a trial subpoena.

17 And now he's telling me he's produced  
18 them, but I don't see any documents. Just bring  
19 me what it is that he contends comply with this  
20 subpoena so I can see if that is in fact true.

21 THE COURT: Okay.

22 MR. BUNDY: Because I'm going to  
23 ask these witnesses when he finally puts up  
24 somebody to talk about numbers, whether these  
25 documents actually exist or not. And if they do,

1 they're going to be in violation of the subpoena.  
2 If they don't exist, then we've got other  
3 problems with the cost of the work.

4 THE COURT: Okay. All right.

5 MR. HILDEBRAND: Your Honor, I sent  
6 him an e-mail with the documents. Every other  
7 document production in this case has been done by  
8 e-mail, and that's what was required under the  
9 actual contract, the original contract.  
10 Everything was to be done electronically.

11 THE COURT: Okay.

12 MR. HILDEBRAND: So I provided  
13 them. I had sent them by e-mail.

14 THE COURT: Do we have hard copies  
15 or what do you have? You've submitted them  
16 electronically --

17 MR. HILDEBRAND: Yes, sir.

18 THE COURT: -- what you've got?

19 MR. HILDEBRAND: Yeah. That's what  
20 we did.

21 THE COURT: And updated through  
22 what? Friday, Saturday, Sunday?

23 MR. HILDEBRAND: That's my  
24 understanding, Your Honor. I haven't reviewed  
25 them, but I've been told by my client that

1       they -- these are the documents in response to  
2       Mr. Bundy's request.

3                   THE COURT: All right. Here's what  
4       I want y'all to do. I've got things to do in the  
5       morning. Y'all have got things to do in the  
6       morning. I want y'all to put your heads together  
7       in the morning, come on in here at 8:30, 9,  
8       whatever time y'all want to get started, and  
9       let's make sure we work out what it is we've got  
10      to get to. Okay?

11                   She's trying to get the documentation  
12      that she needs to do her report. She was shaking  
13      her head back there just like Mr. Bundy was. So  
14      I need to get her whatever it is that she's  
15      looking for so we can get this done.

16                   MR. BUNDY: Well, I don't know what  
17      I want to come down here and talk about. Either  
18      he's going to produce the documents that are  
19      listed here because he doesn't have them or  
20      because he refuses the -- I don't want to talk  
21      about it anymore because there's nothing to talk  
22      about.

23                   THE COURT: I'm assuming that they  
24      exist somewhere, right?

25                   MR. BUNDY: Or if they don't, all

1       they have to do is say no. I can't make him  
2       produce something that doesn't exist. But he  
3       doesn't even personally know himself whether they  
4       do exist. Somebody else has told him. This is a  
5       subpoena. This is serious stuff. He's supposed  
6       to go get it.

7                       MR. HILDEBRAND: Your Honor, I'm  
8       going to respond to that. I got his letter, and  
9       I volunteered -- I think the discovery period is  
10      over.

11                      THE COURT: Right.

12                      MR. HILDEBRAND: And it's -- his  
13      client who's supposed to have done the audit many  
14      months ago produced a report, and we're going to  
15      talk about that. Now, she's saying she wants  
16      additional documents. I've done that  
17      voluntarily, but I don't think I'm under an  
18      obligation to.

19                      But I've done it voluntarily with -- I  
20      will tell you what, Your Honor -- in good faith,  
21      to try to work with the Court to give you  
22      accurate numbers. Again, I thought that it was  
23      related to the number of subs who had settled out  
24      on those issues. That's where the context of  
25      where it came in.

1 THE COURT: Okay.

2 MR. HILDEBRAND: What Mr. Bundy is  
3 now trying to do is to engage in additional  
4 discovery after the discovery period, and saying,  
5 okay, well, I didn't do a request for production  
6 a while back. Now, I'm going to try to do a  
7 trial subpoena and have you come in and produce  
8 additional documents.

9 So I don't think I'm under an obligation  
10 to, but I have, as an accommodation, provided  
11 responsive documents. And I think it just needs  
12 to end at that. His witness can testify about  
13 what her opinions and whether they've changed or  
14 not, but I don't think it's an issue for the  
15 Court, frankly.

16 MR. BUNDY: I don't want anybody to  
17 accommodate me at all. I'm not asking for  
18 accommodation. I just want you to make a  
19 decision that, in all due respect, you quash the  
20 subpoena or enforce the subpoena. And it's very  
21 simple. If you've got a legal ground to quash  
22 it, quash it, and I'll just live with it. If you  
23 don't, make him do it, right?

24 I mean, those are the only two choices,  
25 Judge. I mean, we can talk about who's

1       accommodating who and who said what. The  
2       subpoena is very clear. If I had subpoenaed a  
3       witness, we'd be looking at people's IDs and --

4                   THE COURT: Making sure they are  
5       what they are.

6                   MR. BUNDY: -- and driver's  
7       licenses.

8                   MR. HILDEBRAND: That's entirely  
9       different.

10                  THE COURT: Well, let me ask this  
11       question. Ms. Hadley, you're on the back row  
12       back there. The first thing requested is an  
13       updated job cost report. What do you -- have you  
14       gotten anything since March of 2020?

15                  (Ms. Hadley:) Yes. We got a job  
16       cost report on Friday.

17                  THE COURT: On Friday. Was that  
18       sufficient to answer this -- to put into your  
19       report?

20                  (Ms. Hadley:) It's not in the same  
21       format, and it's -- the PDF is not useable but --

22                  THE COURT: If it were provided in  
23       a different format, would that become useable for  
24       you?

25                  (Ms. Hadley:) It would. If it's

1 in Excel would be great.

2 THE COURT: Is that something that  
3 could be done?

4 MR. HILDEBRAND: I don't know, Your  
5 Honor. I would assume so. I don't know where  
6 the documents came from.

7 (Ms. Hadley:) It's been produced  
8 in a PDF.

9 MR. HILDEBRAND: Why can she not  
10 use it? I don't understand.

11 THE COURT: Well, with the PDF, she  
12 can't manipulate it.

13 MR. HILDEBRAND: I'm sorry?

14 THE COURT: I said, with the PDF,  
15 she can't manipulate it. She's got to be able to  
16 use it.

17 (Ms. Hadley:) It's been given to  
18 me in Excel before.

19 MR. BUNDY: Your Honor, the  
20 witness, could you look at the subpoena, please?

21 THE COURT: Yeah. I've got it in  
22 front of me.

23 MR. BUNDY: She's the one that  
24 prepared the narrative.

25 THE COURT: I've just got to get to

1 this. Y'all can work on it overnight and in the  
2 morning. Updated job cost report. You said you  
3 got something Friday, but it was in PDF. If what  
4 you got Friday is put together in an Excel  
5 spreadsheet, you could use that --

6 (Ms. Hadley:) Yes.

7 THE COURT: -- to give your report?  
8 All right. I'm going to ask that y'all produce  
9 that in an Excel format.

10 All right. Item number 2, an updated  
11 subcontractor status report. I would assume that  
12 includes the -- what we just talked about, that  
13 these subs, some of them are in and some of them  
14 are out now.

15 (Ms. Hadley:) Yes. That was also  
16 produced on Friday night.

17 THE COURT: Okay. Do you have the  
18 data you need for that?

19 (Ms. Hadley:) Yes.

20 THE COURT: Okay. Sufficient in  
21 format?

22 (Ms. Hadley:) It's also in PDF.  
23 That is very hard to manipulate. I would love it  
24 in Excel, but it isn't my highest priority.

25 THE COURT: All right. Let's put

1 that in Excel, if we can do that. It's got to be  
2 done in that fashion, one way or the other.  
3 Number 3, updated project final cost report.  
4 Anything since March of '19?

5 (Ms. Hadley:) No.

6 THE COURT: All right. Is there  
7 any additions, corrections to that updated  
8 project final cost report?

9 MR. HILDEBRAND: I don't know, Your  
10 Honor. I would have to check.

11 THE COURT: All right. If you've  
12 got it --

13 MR. HILDEBRAND: Yeah, if it has  
14 been updated, I'll --

15 THE COURT: If you've got it,  
16 produce it in Excel if you could. And then  
17 finally, expenses submitted as cost of the work,  
18 and there's a number down here, approximately  
19 \$108,000 or so. I want to make sure we're  
20 talking about apples and apples.

21 (Ms. Hadley:) Not exactly. We are  
22 looking for BBC's cost of the work. We've never  
23 received that. It's not that we need an update.  
24 We've never gotten one.

25 THE COURT: That's a line item cost

1 of the work?

2 (Ms. Hadley:) We would like to  
3 know what BBC is saying their cost of the work  
4 was.

5 THE COURT: Okay.

6 MR. HILDEBRAND: Your Honor, it  
7 sounds like this is what she should have done  
8 when she did her audit many months ago. And I  
9 have no idea -- and I don't think it's fair to --  
10 I can't represent what she's talking about, how  
11 difficult it would be to get.

12 But I do know that the audit was  
13 finished, and it was represented by Mr. Bundy and  
14 Library Associates that the audit was finished,  
15 and it was provided. So they did the audit, and  
16 they said that they had gotten everything, and it  
17 was done. So we got it.

18 And nobody -- if we hadn't done it  
19 right, they would -- I can guarantee you, they  
20 would have come back to you and said, Hildebrand  
21 didn't cooperate because they've already done  
22 that before.

23 So she did an audit, and she published  
24 an audit. And I don't know what it is that she's  
25 asking for or saying that she did not have

1           because it should have all been produced long  
2           ago.

3                           (Ms. Hadley:) I can explain it.

4                           THE COURT: Okay.

5                           MR. BUNDY: It wasn't produced, and  
6           this lady can explain it.

7                           THE COURT: All right. Tell me  
8           what you're looking for.

9                           (Ms. Hadley:) That report is 15  
10          pages long. Two of the 15 pages of that report  
11          are itemizing that I didn't get the cost of the  
12          work documents, and all of the laborious work  
13          that I had to do that Mr. Hildebrand referenced  
14          earlier, we did spend hours with them because  
15          they wouldn't give us cost of the work. I've  
16          never gotten it, and that report clearly shows  
17          that.

18                          MR. HILDEBRAND: I can respond to  
19          that, Your Honor.

20                          THE COURT: Yeah. I'm not -- I  
21          think I'm lost now. I'm not sure what we're  
22          looking for. Is this any expense that Balfour  
23          Beatty has expended out of pocket? Is that what  
24          we're looking for?

25                          (Ms. Hadley:) Yes. Well, I will

1 say, it's slightly different. It is what -- what  
2 Balfour is saying represents cost of the work as  
3 defined in the contract.

4 THE COURT: Right.

5 (Ms. Hadley:) Section 6.

6 THE COURT: Okay.

7 (Ms. Hadley:) I received their  
8 accounting report, but they don't claim all of  
9 those costs as cost of the work because maybe  
10 they're legal fees or maybe they're  
11 reconstruction or whatever they might be. I need  
12 them to identify what they believe is cost of the  
13 work because then we compare it to the GMPs.

14 THE COURT: Okay. Got it. I'm  
15 with you.

16 MR. HILDEBRAND: Your Honor, again,  
17 this audit was done, and I don't have -- I think  
18 we have a copy of the audit. I think it's one of  
19 our exhibits. I'm almost sure that it is. Let's  
20 look at it, and we can show you, that's what they  
21 provided as the audit of our work.

22 THE COURT: Okay.

23 MR. HILDEBRAND: And I know we  
24 spent a whole lot of time and effort responding  
25 to it for them to come in now and say, we didn't

1 cooperate, and we haven't provided all the  
2 documents. We did. But what they're hitting me  
3 with now is -- I don't know what she's talking  
4 about.

5           These are accounting issues, and I don't  
6 think it's appropriate or fair to me to ask me to  
7 respond to her allegations without the fellow who  
8 did those for Balfour Beatty. He's an inhouse  
9 fellow named Casey Thompson. So I would like for  
10 him to understand --

11           THE COURT: And that's probably  
12 what needs to happen here would be to have him  
13 communicate with her and see if he's got  
14 something, whether it's buried in something else  
15 or it's a line item that's the cost of the work.  
16 I don't know how that is.

17           But the only way I know to get that  
18 stuff together, you've got to get lawyers talking  
19 to lawyers and engineers talking to engineers and  
20 accounting people talking to accounting people.  
21 That's the only way you get -- to my way of  
22 thinking, that you get something like that  
23 resolved.

24           I'm not a hundred percent either or  
25 whether or not it's buried in some other

1 document, you know, some other category of  
2 expense somewhere else. I don't know the answer  
3 to that question. But I do recall the language  
4 in the contract, something about cost of the work  
5 that involved the language of the contract.

6 MR. HILDEBRAND: Your Honor, they  
7 provided the audit, and I can show it to you  
8 because I know that we have it here and have it  
9 marked.

10 They produced -- and that's what we went  
11 through so much trouble with. They said, yes,  
12 we've gotten -- in fact, there was an affidavit  
13 from Ms. Hadley, and I had taken her deposition,  
14 that she did her full her audit, and she  
15 published her audit.

16 And that was all done. And for her --  
17 for them to now come in and say, wait a second,  
18 we didn't do it, and y'all didn't provide  
19 something way back when. I'm saying, what on  
20 earth are you talking about? Because we went  
21 through that about a year ago.

22 MR. BUNDY: Here it is right here.

23 THE COURT: Okay.

24 MR. BUNDY: When she wrote her  
25 report, she wrote down all the things that were

1       necessary to do her audit that they did not  
2       produce. They still haven't produced it. They  
3       need to read the audit before they -- no wonder  
4       they don't understand it. They probably haven't  
5       read it.

6                   THE COURT: This was correspondence  
7       she was having with Casey Thompson. Is that the  
8       fellow?

9                   MR. HILDEBRAND: Yes, sir.

10                  THE COURT: Yeah. Okay. So if you  
11       read further, they're trying to distinguish  
12       between expenses which are claimed reimbursable  
13       versus those which are not. Is that something  
14       that y'all have done or that you are aware of  
15       having done? Reimbursable versus  
16       non-reimbursable expenses?

17                  MR. HILDEBRAND: Your Honor, Casey  
18       Thompson, I would --

19                  THE COURT: All right. What I'd  
20       ask you to do is to make him and her available to  
21       talk, and let's get a report tomorrow before we  
22       start. Okay?

23                  MR. BUNDY: Thank you, Your Honor.

24                  THE COURT: All right. So I plan  
25       to see y'all tomorrow, whoever wants to come back

1 at 1:30.

2 (The hearing was concluded at  
3 5:13 P.M.)

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1 CERTIFICATE OF REPORTER  
2 STATE OF SOUTH CAROLINA  
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Huggins, Certified  
5 Shorthand Reporter and Notary Public for the  
6 State of South Carolina at Large, do hereby  
7 certify that the witness whose attached in the  
8 foregoing hearing was by me duly sworn to testify  
9 to the truth, the whole truth, and nothing but  
10 the truth in the within-entitled cause; that said  
11 hearing was taken at the time and location  
12 therein stated; that the testimony of the witness  
13 and all objections made at the time of the  
14 examination were recorded stenographically by me  
15 and were thereafter transcribed by computer-aided  
16 transcription; that the foregoing is a full,  
17 complete and true record of the testimony of the  
18 witness and of all objections made at the time of  
19 the examination; and that the witness was given  
20 an opportunity to read and correct said hearing  
21 and to subscribe the same.

22 Should the signature of the witness  
23 not be affixed to the hearing, the witness shall  
24 not have availed himself/herself of the  
25 opportunity to sign or the signature has been  
waived.

I further certify that I am neither  
related to nor counsel for any party to the cause  
pending or interested in the events thereof.

Witness my hand, I have hereunto  
affixed my official seal on December 14th, 2021  
at Charleston, Charleston County, South Carolina

\_\_\_\_\_  
Jennifer M. Huggins  
Court Reporter And Notary Public  
My commission expires: 02/07/2022

1 STATE OF SOUTH CAROLINA  
IN THE COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON  
FOR THE NINTH JUDICIAL CIRCUIT

3 BALFOUR BEATTY CONSTRUCTION, )  
4 LLC, ) VOLUME TWO  
Plaintiff, ) Case No.  
5 ) 2019-CP-10-1108

6 -versus-

7 LIBRARY ASSOCIATES, LLC; AND )  
METROPOLITAN LIFE INSURANCE )  
8 COMPANY, A NEW YORK CORPORATION )  
Defendants.)

10 ----- )  
LIBRARY ASSOCIATES, INC., )  
Defendant/Third-Party Plaintiff, )

12 -versus-

13 LITHKO CONTRACTING, LLC; GUY M. )  
BEATY, INC.; BERNHARD MMC, LLC )  
14 GULF STREAM CONSTRUCTION CO., )  
INC; PRECISION WALLS, INC.; )  
15 PALMETTO AUTOMATIC SPRINKLER )  
COMPANY, INC.; ET AL, )  
16 Third-Party Defendants. )

17 -----  
18 Hearing before the Honorable Mikell R.  
19 Scarborough, reported by Jennifer M. Huggins,  
20 Court Reporter and Notary Public, at 1:30 p.m. on  
21 September 14, 2021 at 100 Broad Street, Courtroom  
22 2A, Charleston, South Carolina.

23  
24  
25

## 1 A P P E A R A N C E S

2

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1                   THE COURT: All right. So we're  
2 back on the record in the Balfour Beatty vs.  
3 Library Associates case. We're in the  
4 plaintiff's case.

5                   We broke yesterday with Mr. Spano on the  
6 stand, but I knew that y'all wanted to call a  
7 witness sort of out of order to get him in and  
8 out of here. Any other matters to take up before  
9 we start today.

10                  MR. BUNDY: Yes, Your Honor. As we  
11 left yesterday -- when we left yesterday, I  
12 believe you directed Ms. Hadley or directed  
13 Balfour Beatty to get in touch with Ms. Hadley.

14                  I haven't been involved in that loop so,  
15 I don't guess. It's not my sort of concern. But  
16 she has contacted them. They have talked to her.  
17 They have sent her some documents or whatever.  
18 And she's prepared to tell you what they did and  
19 whether she has it all or not.

20                  Regardless of the outcome of that, I  
21 would request that Your Honor require Balfour  
22 Beatty to comply with my subpoena, which is to  
23 produce an isolated form with those documents  
24 that are in response to the subpoena that I sent  
25 them, which I will mark as an exhibit or whatever

1       because I'm very concerned about confusion in the  
2       record.

3               I'm very concerned about, we gave it to  
4       you. We told you on the phone that you had it.  
5       You admitted that you had it. You admitted you  
6       won't -- Bundy, you've admitted, we don't owe any  
7       money to Balfour Beatty. So I don't want to go  
8       into all of that. Okay?

9               What I would like to do is have  
10       everything in the record and -- unless you're  
11       going to quash the subpoena, and I didn't get the  
12       impression that you were going to do that. So if  
13       the subpoena is going to be honored and enforced,  
14       I would like it properly honored with the  
15       required verifications or whatever is required in  
16       our state. Thank you, Your Honor.

17               THE COURT: All right. Very good.  
18       Mr. Hildebrand?

19               MR. HILDEBRAND: Yes, sir, thank  
20       you, Your Honor. I didn't realize you had  
21       responded to the subpoena, and I believe that it  
22       should be quashed. There's nothing in the rules  
23       that allows for a party to serve a subpoena on an  
24       attorney for a party and have him bring documents  
25       to the trial.

1           If you want to serve a subpoena, you  
2           serve the party, and you do it through their  
3           registered agent. So Mr. Bundy has insisted on  
4           technicalities many times throughout this trial,  
5           and that's a technicality. He did not properly  
6           serve a subpoena. He served one on me.

7           Second, Your Honor -- I have a couple of  
8           points. The second is, discovery is over. If he  
9           wanted to request additional documents, then the  
10          way to do that is through discovery, and you  
11          can't circumvent the discovery rule by simply  
12          serving subpoenas after discovery requiring  
13          additional documents.

14          Third, Your Honor, the -- we went  
15          through this before at great length and at great  
16          inconvenience. And I understood that you had  
17          made your ruling, and we, in good faith,  
18          attempted to comply with it and believed that we  
19          had complied with it because Ms. Hadley produced  
20          her audit, and I took her deposition on it. And  
21          I thought it was done. We heard nothing else from  
22          them. If it hadn't been right, they would have  
23          gotten back to you.

24          So I think that the subpoena needs to be  
25          quashed. Again, Your Honor, I'm not trying be

1       contrary. I'm trying to be cooperative with you.  
2       I'm not going to repeat all the arguments that  
3       I -- or the points that I made yesterday that we  
4       thought that we -- my understanding from  
5       Mr. Bundy's request last week when we were in  
6       court the week before was, we just needed to see  
7       where we were given all the subcontractor  
8       settlements. And that's where I was with it.

9                But beyond that, Your Honor, I've gone  
10       above and beyond. We've had our people talk with  
11       Ms. Hadley and have given her documents. Even  
12       this morning I was on a call where we attempted  
13       to comply with that. So I would ask that you do  
14       squash the subpoena. Mr. Bundy has asked you to  
15       rule one way or the other, and then I'm glad to  
16       address what we have voluntarily produced. Thank  
17       you.

18               THE COURT: Let me ask this  
19       question, Mr. Hildebrand.

20               MR. HILDEBRAND: Yeah.

21               THE COURT: Yesterday before we  
22       left, it appeared that, at least as to items one  
23       and two in this trial subpoena, one updated job  
24       cost report; two, updated subcontractor status  
25       report, that those could be produced in Excel

1 format and sent to Ms. Hadley. Do you know if  
2 that was done?

3 MR. HILDEBRAND: It was, Your  
4 Honor.

5 THE COURT: Ms. Hadley is shaking  
6 her head yes. I went back and looked at this  
7 again last night. It looked like the third item  
8 on the list should also probably be in an Excel  
9 spreadsheet updated project final cost report.  
10 Do you whether or not that was done?

11 MR. HILDEBRAND: I would say that  
12 it was.

13 (Ms. Hadley:) BBC noted that it  
14 couldn't be produced in Excel, but I do have it  
15 in a PDF. Because of the way the report writer  
16 works, it's just not available in Excel.

17 THE COURT: Okay. But you do have  
18 it in PDF?

19 (Ms. Hadley:) I do.

20 THE COURT: And you can work with  
21 that?

22 (Ms. Hadley:) Yes.

23 THE COURT: All right. Then let's  
24 get to item number four. That's cost of the  
25 work. Have you gotten that?

1                   (Ms. Hadley:) I received my first  
2 draft of the cost of the work at 12:30 today  
3 after I called Mr. Simonton and Mr. Casey.

4                   THE COURT: Okay.

5                   (Ms. Hadley:) We talked for quite  
6 some time, from probably 10 to 11 today. I  
7 explained, you know, what -- we're looking for  
8 possible work.

9                   We brainstormed together about how that  
10 needs to be calculated, and they submitted a  
11 draft. I replied back to that e-mail with some  
12 things that are wrong with it, and I think that  
13 they're working on it, Your Honor.

14                  THE COURT: Okay. So that's being  
15 done the best you can tell?

16                  (Ms. Hadley:) I think so.

17                  THE COURT: And would that be in a  
18 PDF or an Excel spreadsheet or do you know?

19                  (Ms. Hadley:) Currently, it's in  
20 an Excel spreadsheet.

21                  THE COURT: Okay. And that was --  
22 my next question really to y'all was whether or  
23 not you keep that -- in what formula you would  
24 keep that data and do you have that data. That  
25 was my question that I raised to myself last

1 night.

2 MR. HILDEBRAND: Well, Your Honor,  
3 we provided the information. At the audit, we  
4 provided all of the requested information that  
5 Ms. Hadley has audited. We've done that.

6 THE COURT: Right.

7 MR. HILDEBRAND: And then the other  
8 issue is, what is the amount of -- I believe that  
9 the issue is, what is the amount of our claim,  
10 and that's not going to be determined until you  
11 make a final ruling in this case based on our --

12 THE COURT: I realize that. But I  
13 think what's sought here is how Ms. Hadley is  
14 going to be able to give her report. And I'm not  
15 going to sit here and wait for her computer to  
16 spit out her report. I'm trying to get her the  
17 information so that she can deliver that report  
18 when it comes her time to testify.

19 That's all I'm trying to get done here.  
20 It sounds to me like items one, two and three  
21 have been done to the extent they can be done,  
22 and they're working on item number four. Okay.

23 So on that basis, I'm not going to quash  
24 the subpoena. I'm going to ask that y'all  
25 continue to work and just give me an update on it

1 as we go. Okay? Well, now, you said 12:30  
2 today. I'm assuming that was an hour ago?

3 (Ms. Hadley:) Yes, sir.

4 THE COURT: Okay. All right.

5 Well, it's being done. It's being worked on. So  
6 I'm not going to quash the subpoena. It sounds  
7 like it's being complied with the best they can,  
8 and I will continue to work in that regard.  
9 We're going to be here for a while, and  
10 hopefully, we will get through that process.

11 Okay. Anything further?

12 MR. HILDEBRAND: One other  
13 housekeeping matter, Your Honor. There was some  
14 issue regarding the contract yesterday and you  
15 had asked me to get you --

16 THE COURT: Yeah.

17 MR. HILDEBRAND: -- a copy of one  
18 that is --

19 THE COURT: A cleaned up A201,  
20 right?

21 MR. HILDEBRAND: Yes, sir.

22 THE COURT: Okay. All right.

23 MR. HILDEBRAND: So what I've got,  
24 that is the signed contract. The confusion  
25 yesterday was that there was an additional

1 document that did show where there had been  
2 variations, but the document, the signed  
3 contract, the A201, the GMP, that is the  
4 document, sir.

5 THE COURT: Okay. All right. This  
6 is the original?

7 MR. BUNDY: May I have a minute to  
8 look at it?

9 THE COURT: Sure. Sure. Do you  
10 want to see the original as well just to compare  
11 them?

12 MR. BUNDY: Yes, sir.

13 THE COURT: It's got the green  
14 signature on there. See if that -- Mr. Bennett,  
15 it looks familiar to him.

16 THE COURT: And then in the back,  
17 we had another motion? I'm sorry.

18 MS. BAUM: Yes, sir. Good  
19 afternoon, Your Honor. Sarah Baum on behalf of  
20 Quantum Coatings, LLC. I just want to inform the  
21 Court that Quantum Coatings and Balfour Beatty  
22 were able to reach a settlement agreement, and I  
23 just respectfully request that we put the terms  
24 of that agreement on the record.

25 THE COURT: All right. Do you want

1 to come forward?

2 MS. BAUM: Sure.

3 THE COURT: All right. Ms. Baum.  
4 Balfour Beatty agrees to pay Quantum Coatings  
5 \$175,000 in resolution of Quantum Coatings'  
6 claims against Balfour Beatty, with each party  
7 agreeing to bear their own costs. This  
8 settlement ends Quantum Coatings' involvement in  
9 this case as a party. Thank you, Your Honor.

10 MR. HILDEBRAND: All right.

11 Ms. Baum, thank you.

12 MR. MCDONALD: I didn't hear the  
13 end of that, I'm sorry.

14 THE COURT: \$175,000 resolves their  
15 claims against Balfour Beatty.

16 MR. HILDEBRAND: And they're no  
17 longer a party in this action?

18 THE COURT: And asked to be  
19 relieved from the action. Okay?

20 MR. HILDEBRAND: That's correct.  
21 And I can confirm that amount.

22 THE COURT: Okay. Very good.  
23 Thank you, Mr. Hildebrand. All right. No  
24 objection then, Mr. McDonald? All right.

25 MR. HILDEBRAND: One other

1 preliminary matter, Your Honor.

2 THE COURT: Yes.

3 MR. HILDEBRAND: Mr. Spano was  
4 taken off the stand so that Alec Dooley could  
5 testify. Mr. Spano is here. I don't know  
6 what -- if he should -- is it okay for him to sit  
7 here?

8 THE COURT: I have no problem with  
9 Mr. Spano being present. Do y'all have any  
10 concern with his presence? None, whatsoever.  
11 Thank you. Very good.

12 All right. Are you ready for  
13 Mr. Dooley?

14 MR. BYRD: We are, Your Honor.

15 THE COURT: All right. Mr. Dooley,  
16 why don't you come on up. I'll get you sworn in  
17 while they're glancing over that thing.

18 MR. BUNDY: Your Honor, let me get  
19 you yours back to you. These appear to be  
20 accurate copies of that portion of the contract.

21 THE COURT: Okay.

22 MR. BUNDY: I continue with my  
23 continuing objection that this is not the  
24 contract.

25 THE COURT: Right.

1                   MR. BUNDY:  It's a portion of the  
2                   contract.

3                   THE COURT:  I'm with you.  But  
4                   what's been handed up is accurate that we've  
5                   received to the best of your knowledge?

6                   MR. BUNDY:  Sir?  Pardon?

7                   THE COURT:  What has been handed up  
8                   appears to be accurate, correct?

9                   MR. BUNDY:  Yes, sir.  And if I  
10                  come -- I mean, I looked at it in five minutes.  
11                  It's a 50-page document.  So if I come up with  
12                  something, I may reserve the right --

13                  THE COURT:  If you find something,  
14                  let me know.

15                  MR. BUNDY:  -- to at least take a  
16                  closer look.

17                  THE COURT:  All right.  Very good.  
18                  As far as this goes, this is the -- one second.

19                  MR. BUNDY:  Our position is  
20                  obviously the contract documents are enumerated  
21                  in that contract, and they haven't put those in  
22                  the documents.

23                  THE COURT:  I'm with you.

24                  MR. BUNDY:  Thank you.

25                  THE COURT:  Okay.  These are the

1 originals? Do y'all want these back? I'm happy  
2 to hold them, but I guess I'm happy to give y'all  
3 the originals back, and you can substitute the  
4 copies for now.

5 MR. BUNDY: I prefer you have the  
6 originals.

7 THE COURT: Do you want me to hold  
8 onto it? I'll hold onto it.

9 MR. HILDEBRAND: Actually, Your  
10 Honor, this is the --

11 THE COURT: That's the original?

12 MR. HILDEBRAND: Yes, sir.

13 THE COURT: I'll give you that one  
14 back then. All right. Thank you.

15 MR. HILDEBRAND: So this will be  
16 substituted for 56, and then it has been entered  
17 into evidence?

18 THE COURT: Yes, 56. That was tab  
19 56, and it will go into evidence. All right. In  
20 toto.

21 Okay. Mr. Dooley, if you would, sir,  
22 raise your right hand for me.

23 (ALEC DOOLEY, having first been  
24 duly sworn, testified as follows:)

25 THE COURT: Thank you, sir. Please

1 give me your full name and address for the  
2 record.

3 THE WITNESS: Alec Michael Dooley,  
4 D-O-O-L-E-Y.

5 THE COURT: And your address,  
6 Mr. Dooley?

7 THE WITNESS: 322 South Wood  
8 Avenue, Columbus, Ohio 43207.

9 THE COURT: All right, sir, thank  
10 you.

11 Mr. Byrd?

12 DIRECT EXAMINATION

13 BY MR. BYRD:

14 Q. Mr. Dooley, thank you for being here  
15 today. Tell me what you do in Columbus, Ohio,  
16 for a living.

17 A. I am a project manager for my father's  
18 mechanical construction company doing heating and  
19 air conditioning.

20 Q. And how long have you done that?

21 A. Since September of 2018, three years.

22 Q. Did that coincide with when you left  
23 Balfour?

24 A. Yes. I left Balfour Beatty to go work  
25 for my father's company.

1 Q. And what do you do currently in your  
2 father's business?

3 A. So my project title is project manager,  
4 but I work for a family business; so I like to  
5 say I play free safety.

6 But -- so I manage day-to-day  
7 construction operations. I'm also involved in  
8 estimating and sales as well as workforce  
9 development, safety management, and then also I  
10 have a little bit of responsibility in some of  
11 our HR matters.

12 Q. Okay. Did you grow up in Columbus or  
13 Ohio?

14 A. Yeah. I grew up in a town called  
15 Dublin, Ohio, which is a suburb of Columbus.

16 Q. Where did you go to college?

17 A. I went to the University of Cincinnati.

18 Q. And did you get a degree there?

19 A. Yes. I have a degree in construction  
20 management.

21 Q. When did you join Balfour Beatty?

22 A. I started with Balfour Beatty upon  
23 graduation of college in, I guess, May of 2014.

24 Q. And what was your first job with Balfour  
25 Beatty?

1           A.    My first role was as a project engineer,  
2           and my first project I was assigned to was called  
3           Peak 10 Data Center in Alpharetta, Georgia.

4           Q.    And what were your job responsibilities  
5           during that?

6           A.    So that project was nearing completion;  
7           so my responsibilities were daily site  
8           managements, punch lists.

9                    I did a little bit of scheduling  
10           coordination with commissioning agents and  
11           submitting RFI's and request for information.  
12           There's -- that project only had about three  
13           months left when I got there; so I didn't do many  
14           of the early activities.

15          Q.    And where did you go after Alpharetta,  
16           Georgia?

17          A.    I went to New Albany, Ohio, to build a  
18           data center for a company called Compass Data  
19           Centers, and I was the project engineer on that  
20           project.

21                    So I would have handled the submittal  
22           process, the archive process, daily site  
23           coordination, progress meetings, and like a  
24           little bit of quality control. That project had  
25           a pretty commissioning team; so a lot of the

1 quality control measures were handled by a third  
2 party company. But I did assist them.

3 Q. How long did that job take, that  
4 project?

5 A. I would have been there from September  
6 of 2014 until May or June of 2015.

7 Q. Okay. What did you do next?

8 A. I moved to Dallas, Texas, and built  
9 another data center for a company called Align  
10 Energy performing essentially the same role.

11 At about halfway through the project in  
12 December of '15, I got promoted to senior project  
13 engineer, at which point I began continuing the  
14 RFI submittal coordination responsibility. Then  
15 I started to work on the on the change order  
16 process and submitting change order requests and  
17 requests for change orders to the owner and then  
18 issuing it to subcontractors.

19 Q. And how long did that project last,  
20 your involvement in that project?

21 A. So I would have been there from June of  
22 2015 until March of 2016.

23 Q. Okay. Is that when you came to  
24 Charleston?

25 A. Yes, sir.

1 Q. And what was your -- you came to  
2 Charleston to specifically work on the Hotel  
3 Bennett?

4 A. Correct.

5 Q. And what was your initial position in  
6 connection with that project?

7 A. I was senior project engineer. There  
8 were multiple project engineers at the time when  
9 I first started the project. So I initially  
10 started work with -- my initial focus when I came  
11 onto the team was daily site coordination,  
12 request for information, and submittals.

13 Q. And did that -- did your job  
14 responsibilities change at some point?

15 A. Correct. About -- that following  
16 December, so December of 2016, I was promoted to  
17 assistant project manager, at which point on this  
18 project, I became more involved than I -- I  
19 became more involved with the change order  
20 process, as well as I started preparing the 703  
21 portion of the owner pay apps.

22 Q. Had you worked on any hotels prior to  
23 Hotel Bennett?

24 A. I had not.

25 Q. Have you worked on any hotels since?

1           A.    Yes.

2           Q.    About how many?

3           A.    Two.

4           Q.    Yesterday -- and you weren't here  
5 yesterday -- when Mr. Spano was testifying, we  
6 walked through a lot of the contract provisions  
7 in the contract between Library Associates and  
8 Balfour. Did you have any involvement in the  
9 negotiation or drafting of the contract between  
10 the parties?

11          A.    No, sir.

12          Q.    To everyone's relief, I'm not going to  
13 go through those with you at this time. What I  
14 am, though, is interested in doing -- is having  
15 you explain a little bit more about your  
16 involvement with the actual construction, kind of  
17 what you did, what you observed, what you  
18 witnessed. Do you think you can do that with me  
19 today?

20          A.    Yes, sir.

21          Q.    Okay. Before we start talking about  
22 actual construction, let's talk a little bit  
23 about BIM. Do you know what I'm talking about  
24 when I reference BIM?

25          A.    Building information modeling.

1 Q. Okay. Were you personally involved in  
2 BIM on any projects that you've done?

3 A. Yes. I had been previously during  
4 that -- on previous projects, during the Hotel  
5 Bennett projects, and since then, I have been,  
6 yes.

7 Q. And you were personally involved in  
8 performing BIM on the Hotel Bennett, correct?

9 A. I was the -- I didn't perform the BIM,  
10 to answer your question.

11 Balfour Beatty had a BIM manager, and  
12 then each of the mechanical, electrical,  
13 plumbing, fire protection contractors had a BIM  
14 manager that worked with the BIM team. My  
15 involvement with that team was issuing requests  
16 for information that would dissolve from the BIM  
17 coordination effort.

18 I said dissolve, and I meant discovered  
19 during the BIM coordination effort, as well as  
20 translating that information to the field staff  
21 and the superintendents at the time of BIM like  
22 Marty Dale and Dan Ricky, and giving them the  
23 information for what was going on in the computer  
24 and the coordination layout and making sure that  
25 it got done in the field.

1           Q.    Okay.  Tell me a little bit more about  
2    BIM.  How did this work, particularly here on the  
3    Hotel Bennett job?

4           A.    Okay.  So the way that this project  
5    worked was that Balfour Beatty held the master  
6    model.  I don't know where the master model came  
7    from.  I don't know if we drew it or who drew it.

8                    But the master model is your structural  
9    model and your walls.  It's something that -- in  
10   my experience now, when we were to -- when we're  
11   to -- it's something that's given to you by the  
12   design professional that had the walls and the  
13   structure laid out.

14                   Sometimes it has the mechanical,  
15   electrical, plumbing in it, and sometimes it  
16   doesn't.  It kind of depends on what type of  
17   building it is.  For example, a core and shell  
18   office building that just has two shafts, the  
19   mechanical, electrical, and plumbing might not be  
20   in it.

21                   But like a hotel or a hospital or  
22   anything where you're actually running systems at  
23   every individual space, it usually does.  Did you  
24   have a set of questions there, or do I need to go  
25   on?

1 Q. No, I can --

2 A. Sorry. So on this project --

3 MR. MCDONALD: Your Honor, if I  
4 may. The original question was --

5 MR. HILDEBRAND: Wait. Who is  
6 going be objecting, Your Honor?

7 MR. MCDONALD: I'm objecting, Your  
8 Honor. I'm objecting.

9 MR. MCDONALD: So Mr. Bundy is not  
10 involved with this witness?

11 MR. MCDONALD: Yes. I'm the one  
12 that's objecting.

13 THE COURT: Got it.

14 MR. MCDONALD: But the initial  
15 question was, tell me about the process on BIM of  
16 Hotel Bennett. We're talking about hospitals.  
17 We're talking about jobs he did after. I think  
18 there needs to be a question that's asked and a  
19 direct answer to the question that's asked.

20 MR. BYRD: He was comparing the way  
21 BIM worked at the Hotel Bennett with other types  
22 of construction. I think it's a legitimate  
23 response to my question.

24 THE COURT: I got it.

25 MR. BYRD: I'll ask another

1 question.

2 THE COURT: Yeah. Ask a question  
3 and let's go -- rather than a narrative, let's do  
4 a question.

5 MR. BYRD: Thank you, Your Honor.

6 BY MR. BYRD:

7 Q. As part of this process, did Balfour  
8 receive drawings from the design team, the  
9 owner's design team, whether that's the architect  
10 or the owner?

11 A. I don't -- I don't know when the drawing  
12 process was given to Balfour Beatty. That --  
13 because the BIM process started. That process  
14 had the start of BIM coordination, and that  
15 happened before I had started on the project.

16 Q. Okay. So do you know what -- you  
17 wouldn't know whether or not the initial drawings  
18 that Balfour would have received on this project  
19 from whomever, whether those had been BIM'd?

20 A. I only know secondhand.

21 Q. Okay. Did Balfour receive subsequent,  
22 additional drawings from the owner's design team  
23 throughout the project?

24 A. In the 3D format?

25 Q. Correct.

1 A. No.

2 Q. And so you never received, while you  
3 were working on the project, ever receive 3D  
4 drawings from the architect?

5 A. Correct.

6 Q. Okay. Is that unusual?

7 A. Yes.

8 Q. I mean, does that -- does that happen  
9 frequently, or is that just -- you say it's  
10 unusual. Have you ever run into that before on a  
11 large project?

12 A. No. On a -- if there's a major change  
13 to -- it doesn't have to be a major change, but  
14 if there's a significant change to the layout of  
15 building or the systems in the building, the  
16 engineer will provide a new model.

17 Q. Okay. So what happens when you run  
18 everything through this model? What happens to  
19 it?

20 A. So, specifically -- and we'll get back  
21 to this project.

22 MR. MCDONALD: Objection. If I  
23 may. The testimony was that his role was to  
24 issue RFIs from them and translate that info into  
25 the field, to the members in the field. RFI's,

1 request for information of written documents.  
2 The specific written documents, RFIs, that  
3 Mr. Dooley wants to talk about and then talk  
4 about how he translated that information in the  
5 field.

6 That is what he would have firsthand  
7 knowledge of. This testimony is based on the  
8 complete BIM process. We started at the BIM, the  
9 drawings from the architect, and he said, well, I  
10 don't have anything to do with that.

11 So I just want to be clear, this witness  
12 has testified that what he did is generate RFIs  
13 from the BIM process and translated the responses  
14 to the individuals in the field. Nothing more,  
15 nothing less.

16 THE COURT: All right.

17 MR. BYRD: I can -- I don't believe  
18 he has limited his testimony, but the witness can  
19 certainly understand what --

20 THE COURT: The objection is  
21 overruled. Go ahead.

22 BY MR. BYRD:

23 Q. Okay. You mentioned RFI, request for  
24 information. What is an RFI? What does that  
25 mean?

1           A.    It's a request for information.  It's a  
2           document where you ask for supplemental  
3           instructions or information from the design team  
4           or the owner for how to proceed on a -- whether  
5           it be a conflict or insufficient information.

6           Q.    And how do you arrive at the decision  
7           that you need to send an RFI request?

8           A.    How do I --

9           Q.    What would prompt you to send an RFI?

10          A.    If it became apparent that we needed to  
11          do something to construct the building that  
12          deviated from the contract documents, I would  
13          send an RFI.  If it was apparent that I didn't  
14          have enough information to build the building the  
15          way that the contract documents showed, I would  
16          send an RFI.

17          Q.    And although -- I believe you've already  
18          testified that you did not actually run the BIM  
19          program or perform the BIM.  Did you receive the  
20          results of the BIM process that would allow you  
21          to generate an RFI?

22          A.    Correct.  And for clarity, I sat through  
23          all those meetings.

24          Q.    Okay.  Go ahead and --

25          A.    It would have been some earlier version

1 of Zoom or teams, but I sat on the committee and  
2 watched the model as the team was together  
3 working through class coordination.

4 Q. Let's go through this process. Let's go  
5 through the project. Yesterday, Mr. Spano also  
6 started walking us through the project from  
7 basement up. And are you okay with doing that?  
8 Are you familiar with the project enough to be  
9 able to walk me through from starting at the  
10 bottom to the top?

11 A. Yes. So long as we're clear that I came  
12 to the project as the bottom slab was being  
13 poured. So the mass excavation, the pilings, the  
14 sheet pilings were completed before I came here,  
15 and I don't have any firsthand knowledge of that  
16 work.

17 Q. Okay. So your first involvement would  
18 have been with the first floor or --

19 A. We were standing columns in the basement  
20 and the basement sublevel. There was still a --  
21 the sublevel basement patterns were broken up  
22 into like eight sections.

23 And there was still at least one left to  
24 be -- to form and pour, but there were standing  
25 columns on the other ones when I came to the

1 project in March.

2 Q. So after these columns -- when did you  
3 stay -- when was work started on the first floor  
4 and the second floor?

5 A. I'm going to -- I don't recall  
6 firsthand. It would have been the spring of  
7 2015. Whether it was April or May, I don't  
8 recall.

9 MR. MCDONALD: The spring of 2015,  
10 Your Honor? He said he didn't get out there  
11 until the spring of -- March of '16.

12 THE WITNESS: I don't know if I'm  
13 allowed to address you, but he's correct. I have  
14 my years backwards.

15 THE COURT: 2016?

16 THE WITNESS: Yes, sir.

17 THE COURT: Okay. Yeah.

18 MR. MCDONALD: Thank you.

19 BY MR. BUNDY:

20 Q. Kind of tell me, generally speaking, how  
21 this building goes up from one floor to the next.  
22 There are only nine floors. So how do we get  
23 from the basement to the first floor?

24 A. Okay. So the building is a post-tension  
25 concrete building with concrete columns; so the

1 way that -- the process to build the building  
2 going up was, you would build the columns from  
3 the sublevel.

4 We would pour the columns up to the  
5 height about 8 inches below the first floor  
6 finish slab. We would then build decks on what's  
7 called shoring posts to then stand on and perform  
8 the work, whether it be the end slab rough-in,  
9 the sleeving or the reenforcing seal, at which  
10 point you would then pull what's called the  
11 post-tension cables across the building.

12 You would then pour the concrete. You  
13 would then stress the cables. A post-tension  
14 cable is like a rubber band that, as it gets  
15 pulled, like inverse the flex of that -- the load  
16 can set back on it.

17 And then you start the next columns  
18 coming up. So we broke the floors up into two  
19 sections; so we would pour the west half of floor  
20 one. Then we would move over and pour the east  
21 half of floor one.

22 While we're doing the slab work on the  
23 east half of floor one, we're standing columns on  
24 the west half of floor one. And then we're  
25 bouncing and flowing up left and right, up and

1 down, up through the building.

2 Q. Did you run into any issues in the first  
3 one, two, or three floors of this building from a  
4 structural standpoint that would have caused, you  
5 know, issues with timing or delay?

6 A. Nothing outside of the normal  
7 construction. There were conflicts, but nothing  
8 that was -- it was all, you know, a piece --  
9 we've got to move this piece of rebar to put a  
10 sleeve in. It wasn't -- nothing abnormal, I  
11 would say.

12 Q. As you went up the building to higher  
13 floors, did you run into issues where you had  
14 problems that could result in delay or additional  
15 costs that you had not anticipated?

16 A. With the physical work or when I did the  
17 work?

18 Q. Both.

19 A. With the physical work itself, there  
20 was -- it was setting sleeves, setting plywood,  
21 pouring concrete. It wasn't anything that a crew  
22 of professionals couldn't know how to do.

23 There were constraints in terms of the  
24 beam locations as we went up the building. As  
25 the building steps in -- as the building steps

1       inwards and birthday cakes itself, there's  
2       reenforced concrete columns -- concrete beams  
3       that kind of form those perimeter slabs, and that  
4       created some conflict -- or not conflict.  
5       Conflict is a poor term.

6                That was a little more difficult to do  
7       than it was to just pour a flat slab when you got  
8       to those edge conditions. But from a planning  
9       standpoint, we weren't able to identify the  
10      sleeve and then slab rough-in locations properly  
11      by the time we got to the sixth floor.

12             Q.    Why is that?

13             A.    We -- well, we didn't have any  
14      information that we needed to locate the rough-in  
15      in the -- in the sleeve locations at the sixth  
16      floor by the time that we were actually  
17      physically building the sixth floor slab.

18             Q.    I believe you told me that, as we're  
19      going up, we're still able to stay roughly on the  
20      schedule, right? But is there any time built  
21      into these schedules that you've got some built  
22      in grace period?

23                   MR. MCDONALD:  Lack of foundation,  
24      Your Honor.  Objection.

25                   THE COURT:  Overruled.  Go ahead.

1                   THE WITNESS: In the fee schedule  
2                   or this specific schedule? Like a project of  
3                   this type but this specific schedule?

4                   BY MR. BYRD:

5                   Q. Well, let's talk about the specific  
6                   schedule.

7                   A. I don't recall what the -- how the  
8                   preconstruction schedule was written.

9                   By the time that I came to the project,  
10                  we were in full-blown construction. So most of  
11                  my work was focusing on the future work forward,  
12                  and I didn't do an analysis, or if I did, I don't  
13                  remember what it looks like and what the previous  
14                  activities were.

15                  Q. Is it fair -- did you get the sense that  
16                  you were running out of -- you said the sixth  
17                  floor. Did you have any issues with the fourth  
18                  floor or the fifth floor?

19                  A. With the physical construction?

20                  Q. Correct.

21                  A. No. We were able to -- we were able to  
22                  build those floors without incident.

23                  Q. Tell me what happened when you got to  
24                  the sixth floor.

25                  A. So by the time we got to the sixth

1 floor, we could not get shop drawings approved  
2 for any end slab rough-in in order to place the  
3 end slab rough-in, at which point, we couldn't  
4 set the rebar. We couldn't set the post-tension  
5 cable, and we couldn't pour concrete.

6 Q. You said you could not get shop  
7 drawings. First of all, explain what shop  
8 drawings are for me.

9 A. Okay. So the shop drawings are when the  
10 trade contractor is there to perform the work,  
11 rep indicates the design documents and prepares  
12 fabrication and installation drawings for their  
13 crew to install the -- to install that said scope  
14 of work.

15 Q. Okay. Do you -- were there specific  
16 trade contractors you were waiting on shop  
17 drawings from?

18 A. So the specifications require which  
19 contractor was supposed to submit shop drawings,  
20 and the mechanical and the plumbing, fire  
21 protection company would have been named there.

22 I don't recall if the electrical  
23 contractor was named, but my -- but they were  
24 providing shop drawings. Balfour was requesting  
25 them, too. I do not recall if they had to per

1 the contract.

2 Q. So you get to the sixth floor and you're  
3 waiting on shop drawings, what do you do? Do you  
4 just wait?

5 A. That's what we did, yes.

6 Q. Okay. Is there action being taken to  
7 get the shop drawings so that you could keep  
8 going?

9 A. Yes, yes. Action was taken. We both  
10 were -- you know, we had our list of information  
11 that we needed from the architect or the owner at  
12 the time. The problem is that, as we were  
13 getting those in, the manpower to take that  
14 information and put it into their model and then  
15 replicate the model the next day wasn't there.

16 So we were asking our trade partners to  
17 have their -- to bring in like a second -- a  
18 second BIM manager or something like that that  
19 wasn't as familiar with the project in order to  
20 help push that through. But we did ask  
21 specifically Bernhard MCC to do that.

22 Q. And did they do that?

23 A. My recollection is yes. I don't -- I  
24 know that Ryan Shephard was there, their primary  
25 manager. I don't remember the gentleman's name

1       who assisted.

2           Q.    In connection with, you know, you had  
3       say you're waiting on shop drawings.  Were there  
4       any design changes when you got to the level six?

5           A.    So the sixth floor design is where  
6       the -- I believe it was modification seven or  
7       eight is where we had the expanded guest room  
8       floors.

9                    So to back up a second, like the reason  
10       I said the floors three, four and five -- really,  
11       sorry, it's like two, three and five.  Just for  
12       the purposes of this conversation, whichever slab  
13       I'm talking about, we're talking about the  
14       overhead below it.  Does that make sense?

15          Q.    Yep.

16          A.    So floors three, second floor overhead,  
17       floors four, third floor overhead, and floor  
18       six -- no, sorry, floors three and four were  
19       okay.

20                   And the reason they were okay is  
21       because, as a hotel, you generally have the same  
22       type of rooms stacked on top of each other.  Room  
23       301 to 302 -- sorry, room 301, 401, 501, 601, 701  
24       are going to be a double queen suite, same floor  
25       plan, same footprint.

1                   So once we got through the third floor,  
2                   we could copy and paste to go up to four. We, by  
3                   and large, could copy and paste four and go up to  
4                   five, but the fifth floor was the location of  
5                   what was called the condenser water loop. And  
6                   condenser water is what feeds the  
7                   air-conditioning units in all the suites.

8                   So the main loop that feeds the  
9                   mechanical water to the building was located on  
10                  the fourth floor, and that added time instead of  
11                  the copy and paste method. It was to figure that  
12                  portion of it out.

13                 Q.    And what was involved with figuring that  
14                 out?

15                 A.    So the problem with the fourth floor  
16                 condenser water loop was that the size of the  
17                 pipe and then the specifications for the  
18                 insulation would not fit above the ceiling space  
19                 as the architect had designed the ceiling space.

20                 So we went through a couple rounds of  
21                 decisions and discussions of, do we lower the  
22                 ceilings instead of the 5-inch pipe with the 2  
23                 inches of insulation. So that's really 9 inches  
24                 at that point. Do we break that up into 3-inch  
25                 pipe, 2- to 3-inch pipes in order to feed the

1 water at different circumstances? And there was  
2 a long discussion about what was the best way to  
3 go.

4 Lowering the ceiling would have been --  
5 was the cheapest option, but it also -- you know,  
6 there was a sacrifice there in terms of ceiling  
7 head height. And then adding and going to two  
8 smaller pipes, we could keep a higher head  
9 height, but it would obviously add more labor to  
10 the project and more material to the project  
11 because we're running more piping.

12 So when it was discovered that through  
13 the BIM coordination process that we couldn't get  
14 that ceiling height, we -- you know, we met with  
15 Kim Brown and Jennifer Faulkinberry and the  
16 interior designer, Jim Clements, and discussing,  
17 what are our best options here for what to do.

18 Q. Who is Jill Faulkinberry?

19 A. Jennifer Faulkinberry.

20 Q. Who is she?

21 A. She was the project administrator for  
22 Winford Lindsay and Associates.

23 Q. The architect?

24 A. They're the architect, yes.

25 Q. And who is Jim Clements?

1           A.    Jim Clements, I believe his title is  
2           program manager for Matrix Program Management,  
3           and he was serving in the capacity of an owner's  
4           representative.

5           Q.    So you said BIM modeling was run on this  
6           specific issue, this waterline issue?

7           A.    This issue was discovered because of the  
8           BIM modeling process, yes.

9           Q.    Tell me how that got discovered.

10          A.    Okay.  So when after the -- the answer  
11          to your question is, it would have been  
12          discovered through a clash detection report.  A  
13          clash detection report is when the BIM manager --  
14          in this case, it was Balfour Beatty, and Ryan  
15          Lawrence.

16                    After the trades have input their  
17          products into the BIM model, it runs a clash  
18          detection report, and a list will populate.  And  
19          it's not uncommon for that list to have a hundred  
20          items on it.  So what you do is -- in the  
21          software is, you click on the item, and it takes  
22          you to a viewport of where the issue is taking  
23          place.

24                    And so, for an example, in this case it  
25          would be, there's a mechanical clash against

1 architectural ceilings, and it would have -- when  
2 you clicked on it, the viewport would have gone  
3 to the whole floor plan because of the -- the  
4 water would have carried it around the whole  
5 floor.

6 So by using that software, we were able  
7 to identify that there is this clash and that we  
8 would either need to lower the ceiling. We  
9 couldn't raise the pipe because of the other  
10 items above it, crossing -- running across it.  
11 So there were our two options.

12 Q. And how do you resolve that? Did you --

13 A. Well, we would have written an RFI.

14 Q. Okay. And do you recall writing an RFI  
15 on this or submitting one?

16 A. I mean, I don't know if I personally  
17 sent one, but somebody on our team -- somebody on  
18 our team would have done it. It probably would  
19 have been me because that was my job at the time.  
20 But I don't know what RFI number it is or the  
21 wording in it.

22 Q. And this would have been sent to who?

23 A. Jennifer Faulkinberry, Jim Clements, Kim  
24 Brown, Woody Faust, and the Balfour Beatty team.

25 Q. Was this something that Balfour Beatty

1       could have just made a decision on its own, what  
2       to do?

3             A.    No.

4             Q.    Was this a decision that required the  
5       input of an architect?

6             A.    Yes.

7             Q.    Take me on up to the next level.  I  
8       guess this is the sixth floor we're talking  
9       about, the expansion of the suites.

10            A.    So when we were getting to that point,  
11       we were made aware of -- that the suites on the  
12       sixth floor, seventh floor, and eighth floor were  
13       being combined into a combination of combined  
14       suites, essentially deleting, you know, a  
15       demising wall in the bathroom and 10 guest rooms  
16       per floor and dividing it to be five big guest  
17       rooms per floor.

18            Q.    And how did that change your flow of  
19       work or --

20            A.    Well, the challenge there is that when  
21       we got to that point, these walls were deleted  
22       that we were planning on using to go up through  
23       the building and get to the eighth floor and then  
24       get to the roof.  We had nowhere for those  
25       systems to go.

1           So we had to identify, where are we  
2           going to do an offset or where are we going to  
3           run across the ceiling space in order to get to a  
4           different wall or a different shaft cavity in  
5           order to go up through it.

6           That's how it messed up the -- like, the  
7           planning process. From a construction  
8           standpoint, it's significantly easier if you're  
9           going to run a riser, which is just a word for a  
10          plumbing stack. If it's straight down, two guys,  
11          you and me -- I could be standing up on this  
12          floor, and you could be standing on this floor,  
13          and I'd just pass it down to you.

14          Well, now, we've got to break it and do  
15          offsets. I've got to pass it down to you. We've  
16          both got to stop and come down to the next floor  
17          and run across the room, step up to each other,  
18          up to the next ceiling, run it all the way over  
19          and then run all the way back up.

20          So it's effectively adding -- without  
21          like -- on each room, what an average -- at least  
22          the length of a guest room in pipe, twice, one  
23          below and one above. So that's how it slows down  
24          the actual like -- the actual construction  
25          process because it kind of breaks that rhythm of

1 going up the building relatively quickly.

2 Q. Whose decision was it to change the  
3 configuration of the rooms and expand them into  
4 suites?

5 A. I don't know if it was the owners or the  
6 architects or the interior designers, but it  
7 wasn't -- it wasn't Balfour Beatty's.

8 Q. When did you find out and how did you  
9 find out that the configuration of the rooms on  
10 the sixth floor were changing?

11 A. So I would have been told that the  
12 change was coming, whether it be in a meeting  
13 or -- like, I was -- I was made aware that this  
14 change was forthcoming, but I didn't have any  
15 specifics on it.

16 But the modifications seven or  
17 modification -- one of the modifications, I think  
18 it was seven, but I don't know if it was seven or  
19 eight. But one of the modifications came out to  
20 change the floor plan.

21 Q. Okay. And do you remember when that  
22 came out?

23 MR. MCDONALD: Your Honor, he  
24 doesn't even remember what modification it was.  
25 Objection.

1                   MR. BYRD: I think he might -- I  
2                   don't know. He can testify whether he remembers  
3                   what month it was or not.

4                   THE WITNESS: It was the summer of  
5                   2016.

6                   BY MR. BYRD:

7                   Q. Thank you. So did you -- how did you go  
8                   about figuring out what you were going to do  
9                   with -- with this change? Once you got plans,  
10                  what did you do with them?

11                  A. What did I do?

12                  Q. What did Balfour do?

13                  A. Balfour Beatty would have given them to  
14                  the subcontractors to put into their models.

15                  Q. And to the best of your knowledge, they  
16                  did that?

17                  A. They definitely did that.

18                  Q. And how long did it take to get the  
19                  drawings back from the subcontractor?

20                  A. I don't know.

21                  Q. Did this process add any -- add any  
22                  delay to the schedule that you were operating?

23                  MR. MCDONALD: Objection, Your  
24                  Honor, lack of foundation.

25                  MR. BYRD: I think the witness can

1       testify as to whether it delayed the schedule he  
2       was on.

3                   MR. MCDONALD: Your Honor, we don't  
4       even know which schedule he's talking about.  
5       He's just saying the schedule. Lack of  
6       foundation. Same objection.

7                   THE COURT: Give him a little  
8       bit -- give him a little more detail on where we  
9       are. The summer of '16?

10                  MR. BYRD: We're in the summer of  
11       '16.

12       BY MR. BYRD:

13                  Q. You're moving up the building, and then  
14       you learn of the change in the rooms and some  
15       expanded suites on level six. Did everything  
16       stop as far as going up the building, or did they  
17       continue to go up?

18                  A. We couldn't set sleeves or do any  
19       in-slab rough-in without the shop drawings that  
20       were produced -- that needed to be produced. We  
21       didn't have -- we didn't have the shop drawings  
22       because the requirements -- the contract  
23       documents changed in the summer.

24                         So we had -- so any progress that we had  
25       made towards the shop drawings to get approved

1 and then set the sleeves and the in-slab  
2 rough-in, we didn't have them because they didn't  
3 have -- they wouldn't have been accurate with  
4 what the -- to match the contract documents.

5 So we couldn't set the sleeves;  
6 therefore, we couldn't set the rebar, and  
7 therefore, we couldn't set the post-tension  
8 cabling, and therefore, we couldn't pour  
9 concrete.

10 Q. Okay. So as far as the sixth floor  
11 is concerned, you're kind of in a holding pattern  
12 until you get the shop drawings and figure out  
13 how it's all going to look, correct?

14 A. Yes.

15 Q. What impact did this have on the seventh  
16 floor?

17 A. Well, on the seventh floor, we at least  
18 had identified where we were now going up. So we  
19 were able to get back into the process of getting  
20 the seventh floor shop drawings drawn and get  
21 those sleeves roughed in and installed.

22 Q. Okay. Was the configuration of the  
23 rooms on the seventh floor the same as the  
24 configuration of the rooms on the sixth floor?

25 A. No. Because the sixth floor had what's

1 called a concierge suite on it, which would  
2 have -- had guest rooms above it; so it wasn't  
3 the same floor plan.

4 But as far as the expanded suites, I  
5 don't recall if the -- like, the expanded suites  
6 in the corner rooms had the exact same floor  
7 plans step-to-step. I think they did.

8 Q. As you keep going up, I guess we're up  
9 to the eighth floor now?

10 A. So the eighth floor would have been  
11 getting back on schedule of getting the shop  
12 drawings produced for the seventh floor overhead  
13 and then going back up through the roof.

14 Q. Was there a -- was the tower crane still  
15 on-site during this time?

16 A. Yes.

17 Q. And tell me where that was located.

18 A. So the way that the buildings go, the  
19 first two floors were all equal, and then the  
20 third floor forms like a horseshoe on top of the  
21 second floor and runs up to the sixth floor. And  
22 then that horseshoe steps in on itself to go up  
23 to floor nine where the pool is.

24 The tower crane would have been located  
25 inside of the horseshoe on the sixth -- the

1 horseshoe that starts on the third floor. So if  
2 you've been to the hotel, it would have been  
3 located in what's currently the ballroom, the  
4 lobby, and then the sublevel parking spaces.

5 Q. And how does that -- how does affect the  
6 ability to complete at least the first and the  
7 second floors?

8 A. The tower crane being there?

9 Q. Yes.

10 A. Well, we had a hole in the building.

11 Q. Right.

12 A. So, you know, we tried to box it in with  
13 this queen and sheathing, but it wasn't like a --  
14 it wasn't like a fully-sealed waterproofing that  
15 would keep water from coming down through the  
16 tower crane opening.

17 And then also, it was in the way, for  
18 lack of a better term. I mean, it was like -- it  
19 was physically there. The mast of the thing was  
20 the size of this carpeting.

21 Q. Once the tower was -- well, when was the  
22 tower gone? When did it leave the site?

23 A. February of 2017.

24 Q. And once it's gone, you can complete the  
25 first and second floors at that time?

1           A.   Well, first, we had to pour the concrete  
2           slab into where the hole was, but, yes, then we  
3           could.  Then we could continue to stand the  
4           walls, or we could do overhead rough-in in those  
5           areas.

6           Q.   Do you recall how much longer the  
7           crane -- the tower crane was there than you  
8           anticipated that it would be -- that it was  
9           supposed to be?

10                   MR. MCDONALD:  Objection, lack of  
11           foundation.

12                   THE COURT:  Overruled.  Go ahead.

13                   THE WITNESS:  I don't know.  I  
14           don't know if the -- if the crane was supposed to  
15           be down -- if we were supposed to be topped out  
16           in September or were we supposed to come down in  
17           October, I don't know.

18           BY MR. BYRD:

19           Q.   Once the crane was removed, does that  
20           mean that you could just go ahead and proceed  
21           with finishing out the project as you had  
22           intended or not?

23           A.   We were able to start that process, but  
24           we still had other problems that we couldn't  
25           finish the first floor of the ballroom after the

1 crane was gone.

2 Q. What were those problems?

3 A. Well, the first problem that we had in  
4 the ballroom had to do with the overhead  
5 rough-in. So, if you recall, I spoke about the  
6 beams that formed around the superstructure that  
7 forms the ballroom itself.

8 We identified at the time during the BIM  
9 process that we couldn't actually get the  
10 ductwork all the way to that end. And I don't  
11 know whose decision it was to -- it didn't  
12 penetrate the slab above; so we were okay to move  
13 on from it.

14 But we couldn't actually get the  
15 ductwork from what's now called the prefunction  
16 room, which is the room when you (inaudible) dome  
17 or rotunda into the ballroom to then start  
18 framing the ceiling that was below it.

19 On the first floor, I don't recall any  
20 overhead ceiling rough-in issues. I'm pretty  
21 sure that that went fine. But then we started  
22 getting into like the finishes, and we couldn't  
23 actually enclose the building because of the  
24 first floor. We had -- there's -- it's called  
25 storefront doors. Do you know what a storefront

1 door is?

2 Q. Uh-huh.

3 A. So we were -- the project called for  
4 these big doors called Hope's Doors. It's a  
5 company out of Buffalo, New York. And they're  
6 bronze, and they're very substantial, and they're  
7 very nice. They're very substantial doors.

8 Well, we wanted to get those in in order  
9 to try to seal up the first floor and the second  
10 floor windows so we could, you know, A, turn the  
11 air on, or whether it be temp heat or temp  
12 cooling so that we could start doing the drywall  
13 with the drywall finishing.

14 But we had a procurement issue in  
15 getting the doors released, and the procurement  
16 issue resolved around door hardware, of all  
17 things. And the hardware for the door, the  
18 closers, and the door pulls weren't decided upon.

19 And these doors, because they're factory  
20 cast bronze, it's not like the wood door you see  
21 over there where you can take a screwdriver or a  
22 drill and drill a new latch set into it. It  
23 needed to be precut that way. So even after we  
24 got the tower crane gone and we put the ceiling  
25 on, we still had to deal with the elements coming

1 in from the side.

2 So Balfour, again, built temporary walls  
3 and in this queen to try to water -- water  
4 tighten it, but with some of the -- with the rain  
5 and we had a cold winter that year, it didn't  
6 work to -- like the way that a finished product  
7 would have for the seal to be inside the space.

8 And so we were always dealing with water  
9 as we were doing the drywall portion of the  
10 building. The combination of that and the third  
11 floor and the sixth floor terraces. Our plan was  
12 always to install a waterproofing membrane that  
13 goes underneath the tile that's up on those  
14 patios and those terraces.

15 Q. Are you talking about the third and the  
16 sixth floor?

17 A. Yeah, the balconies. Yeah, I apologize.  
18 So the third and the sixth floor balcony  
19 terraces, we were going to put -- Mercury is the  
20 name of the product, sorry. And it's a  
21 waterproofing membrane that you put on your tile  
22 and like pool decks, for example, so that the  
23 water doesn't come down and -- come in and down  
24 below.

25 And we had some issues there because --

1 we had a bunch of different issues in trying to  
2 get that done. We couldn't get the third floor  
3 terrace walls built around the tower crane fully  
4 because we had to actually get into that space  
5 and take the tower crane down.

6 So we couldn't put that membrane down on  
7 the third floor, and then we also couldn't get it  
8 to line up with the sloping of the patio.  
9 Because it didn't have -- I don't know if they  
10 didn't have enough storm drains or they didn't  
11 have a thick enough deck, one way or the other.

12 But the problem that we had was because  
13 of the fall on these patios, we were -- we had to  
14 put like step lifts in because we would have  
15 followed the drawings with, you know, the patio  
16 drains spaced as far apart as they were.

17 At 1/8th inch per slope over 20 feet,  
18 we're really rubbing that 8-inch slab down to  
19 like, you know, 5 or 4 inches, at which point,  
20 you're getting into the reinforcing seal. So we  
21 had issues getting the building dried in both  
22 from above and below and the basement.

23 Q. You had mentioned earlier about you were  
24 waiting on some selection on door hardware. Tell  
25 me about that. Who were you waiting on a

1 decision from? Who was supposed to make a  
2 decision on door hardware?

3 A. We submitted on the -- on the -- sorry.  
4 To answer your question, the designs came from  
5 the owner. That's who we were waiting on an  
6 answer from.

7 Q. Okay. How long did you wait on an  
8 answer from the design team for door hardware  
9 selection?

10 A. I don't know the difference from when we  
11 were first requested and when the final decision  
12 was made. The only thing that I do know is that  
13 we had an approved submittal in place, and before  
14 we went to go order them, we were notified that  
15 they wanted to change the hardware.

16 Q. And do you recall there was some delay  
17 in --

18 A. I do know that at the time it was  
19 decided that the hardware was changing until it  
20 was ordered, it was at least a two-week lap, if  
21 not more.

22 Q. Were there any other fixtures or  
23 finishings that you were waiting on a design for?

24 A. Yeah, the case work and the millwork.

25 Q. The case work and the millwork?

1 A. Yes, sir.

2 Q. Tell me about that.

3 A. Okay. So Balfour Beatty submitted the  
4 shop drawings for the case and millwork in  
5 December of 2016. And at the time, the millwork  
6 contractor, Lowcountry Case and Millwork -- I'm  
7 going to use their name a lot in this. They're  
8 called LCCM.

9 They had provided us shop drawings based  
10 on what was in their -- based on the current  
11 contract documents. So we submitted those shop  
12 drawings for review and approval to then release  
13 the material for the fabrication and  
14 installation. They were returned to us in  
15 February of 2017, marked rejected or revise and  
16 resubmit.

17 And usually, when that happens, you look  
18 to see, okay, they didn't follow the contract  
19 documents when they did their shop drawings. The  
20 review comments on the submittal were, see  
21 architectural supplemental instruction, and then  
22 it would give a number.

23 And that number wouldn't have been  
24 issued to us at the time. We didn't know  
25 about -- we didn't have architectural

1 supplemental instruction 39 or 44. So we were  
2 essentially, for the shop drawing process, we  
3 were told, don't order this material; it's going  
4 to change at some point.

5 Q. You were verbally told that?

6 A. Well, no. That was what the submittal  
7 was telling me.

8 Q. Okay.

9 MR. MCDONALD: Your Honor,  
10 objection. 1002, best evidence. Thank you very  
11 much.

12 MR. BYRD: I think what I'm asking  
13 him about is what he -- what he knows, what he  
14 received. I'm not trying to get a document into  
15 evidence. I'm not -- I'm just -- we're in the  
16 process here.

17 THE COURT: I'll allow it.  
18 Overruled.

19 MR. MCDONALD: Can I be very brief,  
20 Your Honor?

21 THE COURT: Sure.

22 MR. MCDONALD: Very brief. I said  
23 1002, and to prove the contents of a writing,  
24 recording, or photograph -- the original writing,  
25 recording or photograph is required. Thank you

1 very much.

2 THE COURT: All right. Overruled.

3 THE WITNESS: So we then needed to  
4 get the new designs for the space, whatever the  
5 architectural supplemental instruction was in  
6 order to redo the shop drawing process, in order  
7 to resubmit them to the architect and engineer  
8 and the owner, in order to finalize what we're  
9 doing, in order to finalize pricing, in order to  
10 release the millwork.

11 BY MR. BYRD:

12 Q. And did you eventually get that, some  
13 approval?

14 A. Eventually, yes. But we weren't able to  
15 do it in a space -- in a large chunk of the  
16 building because every room was changed through a  
17 different architectural supplemental instruction.

18 So instead of -- instead of us being  
19 able to say, here's the first floor case work, we  
20 would get an ASI for the patisserie. We would  
21 get an ASI for the private dining room. We'd get  
22 an ASI for stair four, at which point we had to  
23 segment everything individually in order to, A,  
24 redraw it; B, reprice it, and then get it into  
25 fabrication and then go to install it.

1           Q.    You stated earlier that the millwork  
2           could not be released without signed  
3           authorization.  Tell me what that means to be  
4           released.  What does that involve?

5           A.    So to release the material?

6           Q.    Correct.

7           A.    So to release material, depending on the  
8           specifications, you need to have a list of  
9           submitted documents, whether it be product data,  
10          sample warranties, shop drawings approved by the  
11          architect and engineer in order to release it.

12                    In this case, we were asked to produce  
13          shop drawings, which were not able to be produced  
14          because of future design changes at the time --  
15          at the time of initial submission.  So what then  
16          happened was the initial -- the redesign added  
17          scope to the millwork contractor.

18                    So that's the second part of the release  
19          is the -- is the change order documents agreed  
20          upon and taken care of.  And so, once the shop  
21          drawings and the redesign was complete, we would  
22          then get pricing from the subcontractor to then,  
23          you know, send to the owner in order for the  
24          owner to agree, this is what I want in this  
25          space, and are you okay with this cost.

1           At which point we would send a change  
2           order back to Lowcountry Case and Millwork and  
3           they would have all the information, all the  
4           authorization and all the costs accounted for in  
5           order to release the material or equipment.

6           Q.    Okay.  During this time period, when  
7           you're waiting to get the approvals for the  
8           millwork in order to proceed with that, was any  
9           other work on the first or second floor being  
10          held up?

11          A.    Well, the subsequent trades that  
12          couldn't take place until the millwork was  
13          installed, you know, the painting, all -- not  
14          all, but the vast majority of trim in that space  
15          is painted.  It's prefinished wood in the lobby  
16          and the dining room and spa.

17                But the ballroom, the grand entry foyer,  
18          the guest room suites, they're all -- they were  
19          all painted and finished on-site.  So that trade  
20          contractor couldn't even start the painting and  
21          the finishing process until -- of the wood until  
22          after the wood had been ordered, fabricated, and  
23          installed.

24                At which point then, you know, the  
25          trades that come in after the painter; namely,

1 the flooring guy and the fixture, trim out guys,  
2 whether it be the electrical light outlets or the  
3 light fixtures, would then have to wait until the  
4 painting was done.

5 Q. Do you have any estimate of what  
6 percentage of the work on one and two was being  
7 held up from being completed?

8 MR. MCDONALD: Objection, Your  
9 Honor. Lack of foundation. This is a lay  
10 witness, and this question is -- relates to  
11 scheduling the project as a whole. Thank you  
12 very much.

13 THE COURT: I'm sorry, ask the  
14 question again.

15 MR. BYRD: The witness has already  
16 testified that some work was being held up while  
17 they were waiting on this millwork issue to be  
18 resolved.

19 My question was simply, on these two  
20 levels, one and two, if he has an idea as to --  
21 any idea as to what percentage the balance of the  
22 work was being held up while we were waiting on  
23 the millwork. He either knows or he doesn't  
24 know. But he would have been there on-site, and  
25 certainly can testify what he knows.

1 THE COURT: And the objection is as  
2 to opinion?

3 MR. MCDONALD: Yeah. It relates to  
4 opinion, but it's also -- it relates to the  
5 project schedule in the whole. He's just a lay  
6 witness that hasn't testified that he -- I'm  
7 objecting, lack of foundation. It doesn't have  
8 anything to do with the scheduling in the  
9 project.

10 So when you're talking about delay on a  
11 critical path method, a critical path analysis  
12 was required by this contract for every delay.  
13 Simply asking the question, what percentage of  
14 the delay without any foundation as to what he  
15 has done with that is improper, I believe.

16 THE COURT: Okay. Lay a little  
17 more foundation for it then.

18 BY MR. BYRD:

19 Q. Are you familiar with the term critical  
20 path?

21 A. I'm familiar with it, yes.

22 Q. Okay. I believe you've already  
23 testified that the painting couldn't be completed  
24 until the millwork was installed, correct?

25 A. Correct.

1 Q. Were there any other trades that were  
2 also held up on levels one and two waiting on the  
3 millwork to be resolved?

4 A. Yes.

5 Q. What other trades were being held up?

6 A. Flooring contractors. Depending on the  
7 space, either the wood flooring, carpet, or tile,  
8 the electrician, plumber, fire suppression  
9 contractor, fire alarm contractor.

10 Q. Were there any other issues in these  
11 public areas, one to two, that we haven't  
12 discussed so far? You mentioned -- I think you  
13 mentioned la patisserie. Were there any  
14 finishing issues that had to be addressed in that  
15 location?

16 A. So, yes, la patisserie, which I believe  
17 is French for bakery was -- had a bakery design.  
18 At a point in the project, we were asked to stop  
19 work in the patisserie in order to do a -- for  
20 the owner to do an evaluation of putting an Irish  
21 pub concept in the space.

22 So we had other things to do. We moved  
23 on. And then that stopped work was lifted, and  
24 we went back into the patisserie, at which point,  
25 it was still a bakery-style concept, but a

1 different design came out to us to work with.  
2 Which the challenge there was it added a  
3 decorative ceiling style assembly.

4 So instead of sheetrock ceiling with the  
5 can lights where they go over an ACT ceiling, it  
6 was like an -- it was like a floral pattern  
7 essentially that came in 2 by 2 squares that we  
8 would put up there.

9 But the challenge there was that, with  
10 the floral pattern, it didn't match the light  
11 fixtures that we had already installed, and the  
12 rough-in for the light fixtures that were up  
13 there, the conduit and the lighting controls and  
14 fire alarm.

15 So what we had to do was we -- we had to  
16 go back into that space set to rework the  
17 lighting up overhead, and we would layout these  
18 panels on the floor and then laser up and see so  
19 how far over that we had to take the lights and  
20 move the rough-in over to, and then put the  
21 ceilings back up to.

22 Which, you know, essentially taking a  
23 five-day activity of finishing the drywall and  
24 making it a ten-day activity right off the bat,  
25 regardless of the fact that the drywall was

1 already installed.

2 And then the second change was, the  
3 patisserie's back counter, after the case work  
4 and the countertops were installed, the owner's  
5 management team, I guess, is what Salamander --  
6 you would call Salamander. Their -- the hotel  
7 operator asked that the back bar be revised in  
8 order to fit the type of coffee arrangement that  
9 we they wanted to have back there.

10 So we had to leave that wall undone and  
11 couldn't finish the upper cabinets of it until we  
12 got direction for what to do. And so that space  
13 sat unfinished, like ready to be finished but  
14 couldn't. And so we were waiting on this back  
15 space for at least three weeks.

16 Q. Were there any design changes that you  
17 recall on the guest floors, in the guest rooms?

18 A. There were. My prime area of focus was  
19 the first two floors unless there was a third  
20 floor issue that affected every guest room. But  
21 the individual guest rooms, like if it was a  
22 certain isolated room, Ryan Ledford would kind of  
23 handle it for us. But if it was like a sweeping  
24 change across is where I would get involved.

25 The most notable change that happened in

1 every guest room was what I -- I use the term tub  
2 soffit, and what -- initially, the bathroom  
3 ceilings were a single, flat plane across. And  
4 after we had gotten the single flat ceiling plane  
5 completed, at which point we'd be ready for  
6 millwork or paints or flooring, the finished  
7 stage.

8 We were asked to add a second tier  
9 soffit over the featured bathtubs that are in the  
10 rooms with a pop-up soffit, like a pop-up dome in  
11 the soffit in order to hang a chandelier over.  
12 So we had to go back into all of those rooms and  
13 essentially frame the ceiling a second time in  
14 order to add that half ceiling soffit over all  
15 the bathtubs and put the chandeliers over them.

16 And then, at which point, after we did  
17 all that and we put the chandeliers up, it -- we  
18 had to take all the chandeliers off because they  
19 didn't meet code. They weren't UL listed to be  
20 above a bathtub. So we put them up, and then the  
21 electrical inspector failed them, and we had to  
22 take them down and recreate them until they could  
23 get the approval done and then put them back up.

24 Q. While you were waiting on that process,  
25 did that affect the ability to complete the tile

1 work?

2 A. Yes. And then the subsequent trim out  
3 of the showers and the bathtubs.

4 Q. Were there any other design changes in  
5 the guest rooms that you can recall?

6 A. I mean, there was numerous. From  
7 like -- like I said, from a broad span sweeping  
8 decoration standpoint, the other only one that  
9 happened was, when we were doing the electrical  
10 rough-in they added and relocated outlets.

11 They issued a design revision that  
12 changed the electrical outlet configuration of  
13 all the rooms. At the time, we were roughed in  
14 on guest room floors three and four; so we had to  
15 go back and redo the electrical -- the electrical  
16 work in those two rooms.

17 And then, you would then have -- and  
18 then, at that point, we hadn't done five, six,  
19 seven, and eight. And so I don't -- aside from  
20 adding outlets, I don't know if that added a  
21 bunch of time up through the floor. But we had  
22 to redo the floors three and four. So, I mean,  
23 that's probably 50 rooms, I would say.

24 Q. Were there any rooms in which the  
25 ceiling heights were changed?

1           A.    Yeah, the vast majority of them. Like I  
2    said, during the BIM process, you know, we kept  
3    finding these issues where we had to lower the  
4    ceiling somewhat. Nowhere was the issue as  
5    profound as the fourth floor, where we had that  
6    9-inch pipe, and we had to push it down.

7                    But initially -- initially, all of  
8    the -- all of the bathroom, all of the -- the  
9    corridors over the bathroom where the water  
10   source heat pump and the domestic water is  
11   distributed across the space where the electrical  
12   and fire alarm is. All of those spaces had to be  
13   lowered during the course of the project.

14                   And then on like the corner suites where  
15   we had to -- underneath the expanded rooms, like  
16   on the fifth floor, where we had to offset over  
17   to get to our new wall that I described earlier  
18   from the expanded suites. We had to add soffits  
19   or lower ceilings in all of those spaces, which  
20   caused its own new set of headaches because I  
21   don't know if somebody didn't notify the owner's  
22   FF&E vendor. FF&E stands for fixtures,  
23   furniture, and equipment.

24                    But the result is that a lot of these  
25   premanufactured shelving units or TV stands or

1 bed stands -- bed headboards were now too tall  
2 because the ceiling came down. So we had to go  
3 cut these -- all of the -- the bottom legs out of  
4 the owner's finished products to then stick them  
5 on the wall and get them to fit to -- at which  
6 point we could tie the millwork into them.

7 MR. BYRD: I don't have any further  
8 questions.

9 THE COURT: Okay. Let's take five  
10 minutes right now.

11 (A recess transpired.)

12 THE COURT: All right. Mr. Dooley,  
13 Mr. McDonald is going to ask you a few questions.  
14 All right?

15 MR. MCDONALD: Thank you very much,  
16 sir.

17 THE COURT: Yes, sir.

18 CROSS-EXAMINATION

19 BY MR. MCDONALD:

20 Q. Mr. Dooley, you are from Ohio?

21 A. Yes, sir.

22 Q. When did you get down here?

23 A. Today. I'm sorry, for this trip?

24 Q. Yes, sir.

25 A. Yesterday afternoon.

1 Q. Okay. Are you being compensated for  
2 your time here today?

3 A. My expenses are being reimbursed.

4 Q. Okay. Other than reimbursement on  
5 expenses, anything else?

6 A. No.

7 Q. All right, sir. And you were onsite  
8 from March of 2016 to September of 2017; is that  
9 correct?

10 A. September 2018.

11 Q. September of 2018; is that correct?

12 A. Yes.

13 Q. And how confident are you with that  
14 date, September of 2018?

15 A. Very.

16 Q. Very confident?

17 A. (No audible response.)

18 Q. And, in fact, you took a two-week  
19 sabbatical, vacation, whatever you want to call  
20 it, after you left the Hotel Bennett project  
21 after September of 2018 before going to work for  
22 your family company, right?

23 A. Correct.

24 Q. Okay. So you have a very high degree of  
25 confidence in the fact that you left the job in

1 September of 2018; is that correct?

2 A. I left on Labor Day.

3 Q. Labor Day. All right. Did you work on  
4 the Hotel Bennett at any point after you left on  
5 Labor Day of 2018?

6 A. No, sir.

7 Q. Now, when you were there -- when you  
8 arrived in March of '16, was Mr. Ledford onsite?

9 A. No.

10 Q. Okay. Who were the folks on-site when  
11 you arrived in March of '16? And what we're  
12 going to do is we're going to break it down the  
13 way it was broken down yesterday. The field  
14 superintendent group and the trailer management  
15 group. Fair enough?

16 A. Yes, sir.

17 Q. All right. So who was there when you  
18 got there in March of '16?

19 A. The field was being managed by Robert  
20 Cotherman and Daniel Ricci.

21 Q. Okay. And what were their titles?

22 A. Bob would have been a general  
23 superintendent.

24 Q. That's Cotherman?

25 A. Yes.

1 Q. Okay.

2 A. And Daniel Ricci was the superintendent.

3 Q. Anybody under Mr. Cotherman or  
4 Mr. Ricci?

5 A. There was a laborer. From a management  
6 standpoint, no.

7 Q. So they were the two field guys when you  
8 got there?

9 A. Yes.

10 Q. And had you had any experience with  
11 Mr. Cotherman in the past?

12 A. No. I hadn't met any -- either of them  
13 before I came to the jobsite.

14 Q. Didn't know Mr. Ricci and didn't know  
15 Mr. Cotherman?

16 A. No.

17 Q. Did you work on the Ritz-Carlton for  
18 Balfour Beatty in Charlotte?

19 A. No.

20 Q. Do you know whether Mr. Cotherman did?

21 A. I do not know.

22 Q. Do you know whether Mr. Ricci did?

23 A. I don't know.

24 Q. Fair enough. Was Mr. Cotherman on the  
25 job the entire time that you were there from

1 March of '16 to September of '18?

2 A. No.

3 Q. Was he fired by Balfour Beatty?

4 A. Yes.

5 Q. Okay. And was Mr. Ricci on the site the  
6 entire time you were their superintendent from  
7 March of '16 to September of 2018?

8 A. No.

9 Q. All right. When you arrived in March of  
10 2016, who was on the project management side?  
11 Who was in the trailer?

12 A. Tim Spano, Brandon Denny, and Clark  
13 Johnson.

14 Q. Clark Johnson?

15 A. Yes.

16 Q. Was Mr. Denny on the job -- or let's  
17 back up. Mr. Spano, he was the senior project  
18 manager, correct?

19 A. Yes.

20 Q. He was the lead guy that was on the --  
21 that was actually on the site every day?

22 A. Yeah. Yes.

23 Q. Fair enough. And what was Mr. Denny's  
24 title?

25 A. Senior project manager.

1 Q. Okay. And I wanted to ask you about  
2 that. The project engineer title is the title  
3 that Balfour Beatty uses, correct?

4 A. Correct.

5 Q. You're not an engineer?

6 A. I'm not a professional engineer, no.

7 Q. Okay. So just because they call you a  
8 project engineer, that -- you didn't go to school  
9 for engineering? You don't hold a South Carolina  
10 PE? You're just not an engineer?

11 A. Correct.

12 Q. Okay. All right. And Mr. Denny, what  
13 was his title?

14 A. Mr. Denny was senior project engineer.

15 Q. He was a senior project engineer. Do  
16 you know if Mr. Denny was, in fact, an engineer  
17 or if that was also a function of Balfour Beatty  
18 calling employees project engineers?

19 A. I don't know Mr. Denny's educational  
20 background.

21 Q. Fair enough. And what was Mr. Johnson's  
22 title?

23 A. Project engineer.

24 Q. Okay. And so were there going to be two  
25 project engineers, yourself and Mr. Johnson when

1       you arrived, or was there going to be some  
2       overlapping, he was going to train you, or how  
3       did that work?

4           A.    I don't know what the initial intent  
5       was, but I worked with Clark for about a month,  
6       and then he was let go from the Balfour Beatty,  
7       and I resumed his responsibilities and worked  
8       with Brandon.

9           Q.    And do you know if Mr. Johnson was let  
10      go at the same time that Mr. Cotherman was let  
11      go?

12          A.    Yes.  I mean, yes, they were.

13          Q.    They were in fact let go at the same  
14      time?

15          A.    Yes.

16          Q.    Okay.  And were you involved in any  
17      discussions about why they were let go?

18          A.    I was not involved with any discussions  
19      before the fact.

20                After they were let go, Tim and the HR  
21      woman, Teresa Newman, kind of brought us together  
22      to let us know what was going on, that they  
23      weren't the right fit for our team moving  
24      forward.  And that was the discussion that was  
25      had that day after two of our team members were

1 let go.

2 Q. And that's all you know?

3 A. That's the -- that's all that I know,  
4 yeah.

5 Q. And Mr. Denny, was he there the whole  
6 time that you were there from March of '16 to  
7 September of '18?

8 A. No.

9 Q. Okay. And when did Mr. Denny leave?

10 A. Honestly, I don't know which day he  
11 stopped working on the project.

12 Q. Could you give me a year?

13 A. I think I'm going to -- he was not there  
14 in 2017. Let me -- so Brandon transitioned to a  
15 role in our building technologies team, which  
16 is -- the BIM coordination team is a part of  
17 that. And so he was -- he stopped working with  
18 us at that time point, which would have been the  
19 summer of '16.

20 I mean, he stopped being a day-to-day  
21 manager of the project, but he was still involved  
22 in doing the laser scanning and like quality  
23 control work for us as we were pouring the decks  
24 in the summer and into the -- into the fall. And  
25 then he stopped doing that, and I don't know when

1 he -- if like -- so I don't know when he stopped  
2 doing that.

3 Q. So sometime in the summer or fall of  
4 '16?

5 A. Yes.

6 Q. Okay. Summer or fall of 2016. Now, is  
7 that everybody? Is that the team at the time you  
8 arrived? You've got Cotherman. You've got  
9 Ricci. You've got Spano. You've got Denny, and  
10 you've got Johnson and you showed up, right?

11 A. Right.

12 Q. And that's the team -- that's the  
13 Balfour team, correct?

14 A. Yep.

15 Q. Okay. All right. Do you know whether  
16 or not any of that team, when you showed up in  
17 March of '16, had worked on the Ritz-Carlton in  
18 Charlotte?

19 A. I don't know.

20 Q. Fair enough. All right. Now, at some  
21 point in your tenure, from March of '16 to  
22 September of '18, did Mr. Marty Dale show up?

23 A. Yes.

24 Q. Okay. And when was that?

25 A. Summer of '16.

1           Q.    Summer of '16.  Okay.  And what was his  
2           role?

3           A.    Senior superintendent.

4           Q.    Did he replace Mr. Cotherman?

5           A.    No.  Because -- no.  Because Bob was the  
6           general superintendent over the whole project,  
7           and then, when Marty came in, the decision was  
8           kind of made to split that high-level  
9           responsibility and have Dan focus on the  
10          structure, and building up the structure, and  
11          have Marty finish on the interiors.

12                    So, like, I don't think that -- like,  
13          Bob would have overruled Dan if there was, like,  
14          a disagreement in how we were supposed to proceed  
15          with things.

16          Q.    And when you say "Bob", you're talking  
17          about Mr. Cotherman?

18          A.    Robert Cotherman, sorry.  Robert  
19          Cotherman would have overruled Dan because Robert  
20          Cotherman would have been Dan's superior.

21          Q.    Okay.

22          A.    Where with the new arrangement, it was  
23          more of a partnership, and one guy was focused on  
24          the structure and one guy was focused on the  
25          interior.

1 Q. Okay. Between Mr. Ricci and Mr. Dan?

2 A. Yes, sir.

3 Q. Okay. And how long did you say  
4 Mr. Ricci was the on the job while you were there  
5 from March of '16 to September of '18?

6 A. He would have left at Christmas of 2016.

7 Q. December of '16?

8 A. Yes.

9 Q. Okay. All right. And Mr. Dale would  
10 have showed up summer or fall of '16; is that  
11 right?

12 A. Summer.

13 Q. Summer of '16. Okay. And Mr. Dale, was  
14 more -- was he more interiors, or was he more  
15 structure? I'm sorry, I didn't write that down.

16 A. Interiors.

17 Q. He was the interiors guy?

18 A. Yeah.

19 Q. Okay. Did you ever see a gentleman  
20 called Knox Tate on this job?

21 A. He walked the job when I was -- a couple  
22 of times. He was never there -- like, he was  
23 never there every day for like a week, but I --  
24 he had been to the project, and I had walked the  
25 project with him before.

1           Q.    Okay.  So other than walking the project  
2           with him, did you -- while you were from March of  
3           '16 to September of '18, did Mr. Knox Tate do  
4           anything?

5           A.    He didn't have a role in the day-to-day  
6           of the project, no.

7           Q.    Did he have any role other than walking  
8           the project with you?

9           A.    Well, when he walks the project, he  
10          would provide like a -- like, whenever a Balfour  
11          executive-level guy would walk the project, he  
12          would issue a -- like, hey, here's some things  
13          that I saw that you guys have a peer review-type  
14          thing.  Like, hey, this is what you guys need to  
15          look for.  And so Knox did that the one time that  
16          he came.

17          Q.    The one that he came?

18          A.    The one time I walked with him, yeah.

19          Q.    All right.  And so Mr. Ricci leaves in  
20          December of '16.  How long is Mr. Dale on the  
21          job?

22          A.    Marty was -- Marty was there -- he left  
23          at some point to go -- for like a two- or  
24          three-month period, and I don't recall when.

25                    And then he came back, and then he left

1       again in the -- right in the spring before I  
2       left. So I would say he was on -- he was on the  
3       project from the summer of '16 to the spring of  
4       '18, but there was a three-month gap somewhere  
5       where he had to go handle another issue.

6           Q.    Okay. So summer of '16 to spring of  
7       '18. So what is that? Some 20 months, something  
8       like that?

9           A.    Yeah.

10          Q.    And then out of that, there was a  
11       three-month hiatus for Mr. Dale --

12          A.    Yeah. I'm sure that people knew where  
13       he went. I don't recall what projects he went  
14       to.

15          Q.    Well I'm only interested in -- he wasn't  
16       on this job for that three months?

17          A.    Right.

18          Q.    Okay. Fair enough. All right.

19       Mr. Johnny Eldridge, did he ever show up on the  
20       job?

21          A.    Oh, yeah.

22          Q.    Okay. And what time did he show up?

23          A.    About a month after I did.

24          Q.    Okay. So he's there maybe April of '16?

25          A.    Yeah.

1 Q. And how long is Mr. Eldridge on the job?

2 A. Johnny was there until I left.

3 Q. Okay. So he was pretty much there the  
4 whole time as you?

5 A. Yep.

6 Q. And what was his title?

7 A. He was a superintendent. We treated him  
8 as our MEP superintendent. Johnny is a master  
9 electrician by trade. So he was there -- he was  
10 the one that handled the MEP rough-in portion of  
11 the project for us. But his title was  
12 superintendent.

13 Q. And did Mr. Eldridge communicate -- do  
14 you know whether or not Mr. Eldridge communicated  
15 with the MEP, mechanical, electrical, plumbing,  
16 right? Am I correct on that?

17 A. Yes, sir.

18 Q. With the MEP subcontractors? Was that  
19 kind of his specialty?

20 A. Yeah. He worked with the superintendent  
21 and every superintendent very closely, yes.

22 Q. And that's because he was a master  
23 electrician, right?

24 A. Uh-huh.

25 Q. Is that a yes?

1 A. Yes.

2 Q. I'm not trying to be rude. She just has  
3 a difficult time --

4 A. I understand. I had this issue in my  
5 deposition.

6 Q. That's all right. All right. So  
7 Mr. Eldridge was there pretty much the whole time  
8 as you were. He was the superintendent, master  
9 electrician. And then Mr. Ledford, did there  
10 come a time where Mr. Ledford showed up?

11 A. Yes. He showed up about two months  
12 after I did, in May of 2016, and he was there  
13 until I left the project.

14 Q. Okay. And what was Mr. Ryan Ledford's  
15 title?

16 A. He was a senior project engineer also.

17 Q. So he's below Mr. Eldridge, right?

18 A. Correct.

19 Q. All right. And he showed up in May of  
20 '16?

21 A. Uh-huh.

22 Q. Is that a yes?

23 A. Yes.

24 Q. And he was there until you left, right?

25 A. Yes.

1 Q. And did he have a specialty like  
2 Mr. Eldridge did?

3 A. No.

4 Q. He was just an assistant project  
5 engineer?

6 A. Well, he was a senior project engineer.

7 Q. A senior project engineer. Gotcha. And  
8 once again, he's not an engineer. It's just,  
9 that's what Balfour calls him?

10 A. Correct.

11 Q. All right. What about Mike Jansen? Did  
12 he ever show up while you were there?

13 A. Yes. He was there for a few months,  
14 three or four, and I don't recall the exact time  
15 frame.

16 Q. And what was his title?

17 A. He was general superintendent.

18 Q. Did he have any specialties?

19 A. Not that I know of it.

20 Q. Okay. And he was there was for three or  
21 four months, and you don't -- sometime while you  
22 were there?

23 A. I would be guessing if I gave you a time  
24 frame.

25 Q. No, I don't want you to guess. You said

1 three or four months, you thought he was there;  
2 is that correct?

3 A. No. He was definitely there for that  
4 amount of time.

5 Q. That's all I'm trying to establish. He  
6 was there for three or four months during the  
7 time while you were -- while you were on the job,  
8 you just don't know when that three or four  
9 months occurred?

10 A. Yes, sir.

11 Q. Thank you very much. What about a  
12 gentleman called Heath Bradford? Did he ever  
13 show up when you were there?

14 A. Yeah.

15 Q. And how long was he there?

16 A. He was probably there for a little bit  
17 closer to six months.

18 Q. And what was his title?

19 A. He was a superintendent.

20 Q. Do you know what six months portion  
21 Mr. Bradford was there?

22 A. I'd be guessing again.

23 Q. He was a superintendent, too, right?

24 A. Correct.

25 Q. All right. And who was Mr. Bradford --

1       who did he report to? Do you know?

2           A.    Tim Spano.

3           Q.    Even though he was on the superintendent  
4       side?

5           A.    Correct.

6           Q.    So did the senior superintendent, which  
7       is the field guy, right?

8           A.    Correct.

9           Q.    Did he report to the senior project  
10       manager? Is that how it works?

11          A.    Yes.

12          Q.    Okay. When Mr. Bradford was there for  
13       six months, he was the lead senior  
14       superintendent?

15          A.    Well, when he was there, I don't -- I  
16       don't -- when he was there, all the  
17       superintendents were reporting to Tim.

18          Q.    Okay. When you're saying all the  
19       superintendents, are you saying all the senior  
20       superintendents or just any? If you've got  
21       superintendent in your title, you're reporting to  
22       Mr. Spano?

23          A.    No. So when Heath was there, he, Johnny  
24       Eldridge, and at this point, Ryan Ledford was  
25       assistant superintendent, they were all reporting

1 to Tim.

2 Q. Directly to Mr. Spano?

3 A. Yes.

4 Q. Gotcha. So Mr. Bradford is there with  
5 Mr. Ledford and Mr. Eldridge?

6 A. And Marty would have been there as well.

7 Q. And Mr. Dale is still there?

8 A. There was overlap there, yes.

9 Q. Okay. So you've got four  
10 superintendents, whether they be senior or  
11 assistant, and they're all reporting to  
12 Mr. Spano?

13 A. Correct.

14 Q. Okay. Now, what about Mr. Zanowski,  
15 Steve Zanowski?

16 A. He was on the jobsite.

17 Q. And what was his title?

18 A. I think that he was an assistant  
19 superintendent.

20 Q. When was he there?

21 A. He was there during the punch list phase  
22 of the project; so spring, summer of '18.

23 Q. And he was an assistant superintendent?

24 A. I believe so.

25 Q. Okay. And he's there spring or summer,

1 so he's there four, five, six months, something  
2 like that?

3 A. During my time there -- I don't know  
4 about after I was gone, but during my time, I  
5 worked with him for six months.

6 Q. He was still there when you left?

7 A. Yes.

8 Q. Okay. What about a gentleman who  
9 doesn't have the last name yet, but has the first  
10 name AJ?

11 A. AJ Wachsberger.

12 Q. AJ Wachsberger?

13 A. Yes.

14 Q. Can you spell that?

15 A. No.

16 Q. Okay. That's fair enough. All right.  
17 And what was Mr. Wachsberger's title?

18 A. He was a project engineer.

19 Q. Project engineer on the superintendent  
20 side or the project management side?

21 A. Superintendent side.

22 Q. Superintendent side. Okay. And when  
23 was Mr. Wachsberger there?

24 A. May of '18 until I left.

25 Q. And is he, too, reporting to Mr. Spano

1 at the same time the other four individuals are?

2 A. I don't recall because AJ was just out  
3 of college. He graduated that year. So Balfour  
4 normally has, like, some sort of mentor.

5 That would have been like -- it would  
6 have been me if I wasn't leaving or Nick  
7 Starcevic. So I don't know that was handled, but  
8 he was working actively with the superintendents  
9 on the field. I don't know who signed his time  
10 cards.

11 Q. He was just out of college?

12 A. Yeah.

13 Q. And you mentioned Mr. Starcevic. When  
14 we talked about the original team, I know  
15 Mr. Spano was there and Mr. Starcevic was not  
16 there, correct, when you got there in March of  
17 '16?

18 A. Nick wasn't there in March.

19 Q. When did Mr. Starcevic show up?

20 A. He started getting involved in the  
21 project the following month after I'd been there  
22 for about four weeks, in April, mid April.

23 And then he was at the -- the jobsite  
24 office was right across the street at 301 Meeting  
25 Street, right at that basketball stadium; so that

1 was like our field office. And he was there  
2 every day from May of '16 until I left the  
3 project.

4 Q. Okay. And he was on the project  
5 management side, right?

6 A. Right.

7 Q. He was on the trailer side, right?

8 A. Correct.

9 Q. All right. What about Mr. Travis  
10 Ferris? Did he ever show up on time?

11 A. Yes. He was there in the summer of '18.

12 Q. Summer of '18. And what was his title?

13 A. He was an assistant superintendent.

14 Q. Okay. All right. Superintendent. And  
15 was he there when you left?

16 A. Yep.

17 Q. And was he reporting with -- directly to  
18 Mr. Spano along with the other five  
19 superintendents?

20 A. May I clarify?

21 Q. Sure.

22 A. I believe he had just left right before  
23 I left.

24 Q. Okay. So he was there until August of  
25 '16 --

1 A. Yes.

2 Q. -- or something like that?

3 A. Yes.

4 Q. Or of '18, sorry.

5 A. Correct.

6 Q. All right. Anybody else on the super  
7 side that I haven't mentioned that was there  
8 while you were there? Not necessarily the whole  
9 time while you were there, but on-site while you  
10 were on-site?

11 A. Yes, sir, a gentleman named Peter  
12 Waterfield.

13 Q. Pierre?

14 A. Peter.

15 Q. Peter Waterfield?

16 A. Yes.

17 Q. All right. And when did Mr. Waterfield  
18 show up?

19 A. The summer of '16.

20 Q. Summer of '16?

21 A. Yep.

22 Q. And how long was Mr. Waterfield there?

23 A. The fall of '17.

24 Q. Okay. And what was his title?

25 A. He was a superintendent.

1 Q. And do you know his reason for leaving?

2 A. He was let go. I don't know why.

3 Q. He was let go as well. Did you have a  
4 little team meeting with HR after he was let go  
5 to tell you why he was let go?

6 A. No.

7 Q. Okay. Anybody else, other than  
8 Mr. Waterfield and the people I brought up hereto  
9 forward?

10 A. Yes.

11 Q. Who's that?

12 A. So there was like a two-month period  
13 where a gentleman named Sachin Arunkumar out of  
14 Atlanta.

15 Q. I try to use last names, but I'm going  
16 to use Sachin. Sachin Arunkumar?

17 A. Yeah.

18 Q. And he was there for a two- or  
19 three-month period?

20 A. He was assisting us remotely with some  
21 of the change order pricing.

22 Q. Change order pricing. Okay. Was he an  
23 employee of Balfour Beatty?

24 A. Yes.

25 Q. And how long was he assisting with some

1 of the change order pricing?

2 A. About two months.

3 Q. Two months. And when was that two-month  
4 span?

5 A. It would have been the late spring of  
6 '17.

7 Q. The late spring of '17. All right.  
8 Anybody else on the field side?

9 A. We had a project administrator and  
10 Shanti Pieniak was working with us in the office.

11 Q. What is the -- I'm sorry. I cut you  
12 off. If you need to finish, go ahead.

13 A. That's it.

14 Q. Project administrator, that's the first  
15 time I've heard that title with Balfour. What  
16 was the role of the project administrator?

17 A. So she was essentially helping keep us  
18 organized, helping with -- print off documents  
19 and drawings and copies and handling certain  
20 office duties for us is how she started. And  
21 then she -- because she was so organized, we  
22 actually had her start helping organize the punch  
23 lists for the superintendents.

24 So as the punch list would, you know,  
25 check off their -- the work being completed,

1 Shanti would actually, you know, consolidate the  
2 list of what was approved or what was left to be  
3 done. And she would go around the rooms and post  
4 those signs in each and every room and update the  
5 software, working with the superintendents to  
6 kind of help keep them organized.

7 Q. Okay. So Ms. Pieniak started out as  
8 a -- on an administrative role in the office  
9 printing off documents and drawings; is that  
10 fair?

11 A. Right, yeah.

12 Q. Okay. And then she moved on to  
13 basically -- and I'm not putting words in your  
14 mouth -- but a punch list administrative role.  
15 She updated the software. She took things that  
16 had been signed off by somebody else --

17 A. Right.

18 Q. -- and updated the list; is that  
19 correct?

20 A. You're correct, with the clarification  
21 that, the information she was given to do was  
22 told to her by the superintendents.

23 Q. Gotcha. So she wasn't going into the  
24 room and saying, this room is done, and I'm going  
25 to sign off on it?

1           A.    She wasn't making that determination by  
2 herself, no.

3           Q.    Okay.  She wasn't making those  
4 decisions.  She was merely taking decisions that  
5 were made by other superintendents and putting in  
6 whatever software Balfour has or updating  
7 whatever lists are out there; is that fair?

8           A.    Yes, sir.

9           Q.    All right.  Anybody else other than  
10 Ms. Pieniak?

11          A.    We had a bevy of college interns over  
12 the summer that would have been helping me as --  
13 they would have been helping me as like assistant  
14 project engineers.  We would have Alec Barr for  
15 one summer and Kevin Haslett for one summer.

16          Q.    And I'm not trying to cut you off, but  
17 college interns, are you talking about students  
18 from the College of Charleston?

19          A.    No.  From like Clemson and Virginia  
20 Tech.

21          Q.    Okay.  And they would come in on an  
22 unpaid internship or a paid internship?

23          A.    They were paid.

24          Q.    Okay.  And they would assist the project  
25 engineer and the assistant project engineer?

1           A.    They would serve as an assistant project  
2           engineer.  They would assistant the project  
3           engineer and the project manager.

4           Q.    Okay.  And like Ms. Pieniak, did they  
5           have any ability to make any actual decisions?

6           A.    No.

7           Q.    Anybody else?

8           A.    Well, would you like me to name like our  
9           safety officers that came in to inspect the  
10          jobsite?

11          Q.    Safety -- a safety officer, to be clear,  
12          is somebody from home office that comes and makes  
13          sure your temporary railings are up and that the  
14          job is running pursuant to whatever Balfour's  
15          safety guidelines are; is that correct?

16          A.    Correct.

17          Q.    Okay.  It doesn't have anything to do,  
18          other than making sure y'all are compliant,  
19          keeping people safe, and making sure OSHA is not  
20          out there writing tickets, right?

21          A.    Correct.  They would also consult on  
22          some means and methods and how we were planning  
23          on doing certain activities and the safest way  
24          possible.

25          Q.    Okay.  So they would consult from a

1 safety standpoint on how y'all were planning on  
2 tackling a particular task?

3 A. Correct. Like, yes. Do you want me to  
4 name those people or no?

5 Q. No. How many different -- I only need  
6 to know how many different safety officers there  
7 were?

8 A. Three.

9 Q. Three. Okay. Anybody else other than  
10 the safety officers?

11 A. We had our scheduling manager, Joe  
12 Lauricella.

13 Q. Okay. And the scheduling manager. What  
14 did Mr. Lauricella do?

15 A. So Joe was the -- Joe is the one that  
16 ran the actual scheduling software. He would  
17 issue a report to the field staff, the project  
18 manager, and at that point, I was the assistant  
19 project myself. He'd fill out these reports with  
20 dates so that he could put it into the master  
21 schedule and then run a report for us.

22 And then he would also walk the jobsite  
23 as well in order to help gauge -- so that he  
24 could gauge where -- like, what -- see how the  
25 schedule that he had in his hand matched up to

1 the actual completeness of the project.

2 Q. Okay. So he's an in-house guy, right?  
3 He's an employee of Balfour Beatty?

4 A. He was, yes.

5 Q. Okay. Well, at the time of this project  
6 he was?

7 A. Yes, sir.

8 Q. And he was -- and just like you, you  
9 used to be an employee of Balfour Beatty,  
10 correct?

11 A. Correct.

12 Q. You're not an employee anymore, right?

13 A. I am not.

14 Q. Do you know when Mr. Lauricella left?

15 A. I don't.

16 Q. Okay. But his sole job, as far as you  
17 know, is he was the scheduling guy, right?

18 A. He was our scheduling manager, yes. He  
19 managed the schedule.

20 Q. For the Hotel Bennett project, correct?

21 A. Yes.

22 Q. All right. Other than Mr. Lauricella,  
23 was there anybody else? Is it Lauricella or  
24 Lauricello?

25 A. I've always pronounced it Lauricella.

1 Q. But I could be right; you could be  
2 right. We don't know.

3 A. Yeah.

4 Q. It doesn't matter. Who else was the --  
5 who else was out there?

6 A. Well, the -- from an executive level  
7 standpoint, we had a combination during the  
8 course of the project being Jeff Sandeen, David  
9 Stanton and Dave Simonton working with us on the  
10 project. Do you want to go through that, too?

11 Q. How often were they on-site?

12 A. Well, Dave Simonton was on-site every --  
13 he was in the office every day. I don't know if  
14 he went onto the jobsite every day, but he was on  
15 the jobsite at multiple days during the course of  
16 every week.

17 Q. In the office that you described that  
18 was on King Street?

19 A. Yes.

20 Q. And he was there the whole time that you  
21 were there, Mr. Simonton?

22 A. No. He came in the fall of '17.

23 Q. Fall of '17?

24 A. Uh-huh.

25 Q. Okay. So when he got there --

1 Mr. Simonton got there in the fall of '17, he was  
2 in the office every day on King Street?

3 A. Yes.

4 Q. Okay. And was there anybody else in  
5 Mr. Simonton's role prior to the fall of '17?

6 A. David Stanton.

7 Q. Mr. Stanton. Okay. And was he in the  
8 office every day?

9 A. No.

10 Q. How often was he in the office or  
11 on-site?

12 A. I would say over the course of a  
13 two-week period, three days. So, like, he might  
14 be here for half a week one week and then would  
15 be gone for a week and then he'd come back. It  
16 was kind of depending on what was going on.

17 Q. What about Mr. Jeff Sandeen?

18 A. Jeff was on-site maybe one day every  
19 three weeks for the first like -- the first  
20 summer that I was there, and then David Stanton  
21 starting getting involved.

22 Q. So it was Sandeen in that role that  
23 we're talking about, this executive role -- he  
24 didn't go quite as much. Then Stanton shows up.  
25 He went a little bit more. And then Simonton

1 shows up and replaces Stanton; is that fair?

2 A. Yes.

3 Q. Okay. All right. What about Mike  
4 Baumbach?

5 A. I never worked with Mike on this  
6 project.

7 Q. All right. Have we covered the team?

8 A. Yeah.

9 Q. All right.

10 MR. MCDONALD: Your Honor, I'm  
11 going to mark for identification purposes -- I  
12 have asked the court reporter if she's okay with  
13 this procedure, but I'd like to ask you as well.  
14 I'd like to mark for identification purposes and  
15 hand it to the witness and lay some foundation.

16 THE COURT: Sure.

17 MR. MCDONALD: Thank you very much.  
18 I'm going to mark this, with the court reporter's  
19 permission, for ID purposes as 1.

20 (DFT. EXH. 1 was marked for  
21 identification.)

22 BY MR. MCDONALD:

23 Q. Take a look at that document, and the  
24 first question I'm going to ask you, sir, is if  
25 you recognize it?

1 A. I recognize this e-mail.

2 Q. Okay. What do you recognize it to be?

3 A. It's an e-mail from me saying to Jim  
4 Clements that I have uploaded the Multivista  
5 photos.

6 Q. Okay. And is it a true and accurate  
7 copy of the e-mail sent by you to Mr. Clements on  
8 Wednesday, April 25th of 2018?

9 A. It appears to be, yes.

10 Q. Okay. And our rules of evidence require  
11 the next question was, but I don't think they  
12 anticipated e-mails -- was this sent on or  
13 contemporaneous with 4:57 on Wednesday, April  
14 25th, 2018?

15 A. I'm sorry. Can you repeat the question?

16 Q. Yeah. Was this e-mail sent on or  
17 contemporaneous with at 4:57 on April 25th, 2018?

18 A. I dont know what the word  
19 "contemporaneous" means.

20 Q. At the same time, sir.

21 A. Okay. It appears to be, yes.

22 Q. It's got a time there?

23 A. It's got a timestamp on it, yes.

24 Q. All right. And you sent it, correct?

25 A. It appears so, yes.

1 Q. And you sent it as -- in your capacity  
2 as an assistant project manager for Balfour  
3 Beatty Construction, correct?

4 A. Yes.

5 Q. And it relates to the Hotel Bennett  
6 project, right?

7 A. Yes.

8 MR. MCDONALD: Your Honor, at this  
9 time, I would move into evidence Defendant's  
10 Exhibit 1.

11 THE COURT: Any objection?

12 MR. HILDEBRAND: No objection.

13 THE COURT: Without objection.

14 MR. MCDONALD: May I approach, Your  
15 Honor?

16 THE COURT: Yes, sir. Thank you.

17 (DFT. EXH. 1 was admitted into  
18 evidence.)

19 BY MR. MCDONALD:

20 Q. All right, sir. This e-mail references  
21 something called multi-vista photos; is that  
22 correct?

23 A. Yep.

24 Q. Do you know what those are?

25 A. I know that Multivista was a company

1       that was hired to take progress photos of the  
2       project. I don't know who hired them, if it was  
3       the Bennetts or Jim Clements, but I know  
4       Balfour -- my understanding is Balfour didn't  
5       hire them.

6             Q.    Okay.

7             A.    And so that's what I know that they are.

8             Q.    Great. And you used the term -- and I  
9       didn't have a chance to write it down -- but what  
10       type of photos were they taking?

11            A.    Progress.

12            Q.    Progress photos. What are progress  
13       photos?

14            A.    Photos taken during the course of  
15       construction to document the progress of the  
16       construction.

17            Q.    Okay. And do you know how often they  
18       were out there taking photos?

19            A.    Monthly. Yeah, something like that.  
20       They weren't there every day, but like I  
21       recognized the guy when I saw him.

22            Q.    Okay. All right. And it says, Jim,  
23       I've successfully uploaded the Multivista photos  
24       onto a shareable link, see below. Did you, in  
25       fact, do that?

1           A.    I can only assume so.

2           Q.    So as of April 25th, 2018, you had  
3           uploaded -- and we'll get there in a second --  
4           all the Multivista photos onto a shareable link?

5           A.    I don't know which photos that I had,  
6           but the Multivista photos that was given to me by  
7           somebody else, I put them onto Balfour Beatty's  
8           Egnyte site.

9           Q.    And that's what I'm going to ask about  
10          next.  What is the Egnyte site?

11          A.    It's like a Dropbox or a shared file.  
12          It's a shared folder service.  It's a file  
13          computing shared folder service.

14          Q.    Okay.  And what kind of things do y'all  
15          put on the Egnyte site?

16          A.    Everything.  I mean, we would put -- we  
17          would put plans, specifications, RFI responses,  
18          submittals, progress photos.

19          Q.    What about change orders?

20          A.    So I don't recall if we put them on  
21          there.  I know that we used a different program  
22          called Constructware for change orders.

23          Q.    Okay.

24          A.    I don't know if we would actually copy  
25          those into Egnyte.  I don't remember.

1 Q. And what about change order requests or  
2 RCOs, request for change orders?

3 A. The same response. I don't know if we  
4 did that or not.

5 Q. Fair enough. All right, sir. At some  
6 point in time, you were promoted on this job; is  
7 that correct?

8 A. Yes.

9 Q. All right. And one of the things that  
10 came along with that promotion was the additional  
11 responsibility of being involved in the pay  
12 application process; is that right?

13 A. I took on an added responsibility, yes.

14 Q. Okay. All right. And prior to taking  
15 on that added responsibility, or shortly  
16 thereafter, did you have occasion to review the  
17 contract to see what the pay application process  
18 entailed?

19 A. I don't ever remember doing that.

20 Q. Okay. All right. Do you know whether  
21 or not the contract document, or portion of the  
22 contract document, identified as the A133 details  
23 the pay application process at Article 7?

24 A. I don't. I don't know what Article 7 --  
25 or I don't know what those terms read.

1 Q. Okay. Have you ever reviewed the  
2 contract for this job?

3 A. I have read excerpts of the contract at  
4 certain points in time, but I never sat down and  
5 read the contract from start to finish.

6 Q. Did you ever read the contract as it  
7 relates to the pay application process?

8 A. I don't recall ever doing that, but it  
9 was -- I probably should have, yeah.

10 Q. Notwithstanding the fact that you didn't  
11 read the contract as it relates to the pay  
12 application process, isn't it true that for --  
13 that what's submitted to the owner for payments  
14 are certified pay requests from the architect; is  
15 that correct?

16 A. I would say, yes.

17 Q. Okay. So how the process works is you  
18 gather up your costs, your subcontractors and  
19 whatever cost Balfour Beatty takes the position  
20 as the cost of work, you-all compile that  
21 information, correct?

22 A. That was my job was the compilation,  
23 yeah.

24 Q. That was your job, right?

25 A. Yep.

1           Q.   All right.  And then you take that --  
2           once you compiled it on this job, did you send  
3           that to home office for review?

4           A.   I would have given it to Nick and David  
5           Simonton for review.

6           Q.   Okay.  And how?  Would you physically  
7           hand it to them?

8           A.   No.  I don't know if I would hand it to  
9           them or e-mail it to them.  We sat in the same  
10          office; so I don't know how I would have given it  
11          to him.

12          Q.   Did you send it to the accounting folks  
13          in Charlotte?

14          A.   I would not have because I wouldn't have  
15          done anything with it until it was approved by  
16          the -- certified by the architect.

17          Q.   Sure.  Okay.  So you would gather the  
18          information, just so just I understand, of the  
19          cost of the work that Balfour Beatty contended in  
20          that particular progress -- we're going to go  
21          through the pay applications in a second -- but I  
22          just want to understand the process right now,  
23          given that you didn't read the contract -- which  
24          is, you would gather it up, and you would give it  
25          to Mr. Spano or Mr. Simonton when he was there,

1 or the other two gentlemen when they were there;  
2 is that right?

3 A. Yes.

4 Q. And then do you know what they did with  
5 it?

6 A. Well, they would review it and tell me  
7 to send it -- ask me to make a change or they  
8 would review it and I would send it to the  
9 architect and the owner or the owner's rep, Jim  
10 Clements.

11 Q. All right. So they would review it; you  
12 would review it, and then you all would send  
13 the -- what you contended to be cost of the work  
14 to the architect and to Mr. Clements, correct?

15 A. Yes.

16 Q. And you also understood that there was a  
17 bank inspector there, correct?

18 A. Yes, Steve Iver (ph).

19 Q. Say that name again.

20 A. Steve Iver.

21 Q. Steve Iver. What did you understand the  
22 purpose of Mr. Iver was?

23 A. My -- so there was a bank on the  
24 project, right. My understanding was that  
25 Steve's job was to protect the interests of the

1 lender, the bank lender. And what exactly  
2 protect the interest means, it'd probably be a  
3 bunch of different things, but he was there to  
4 look out for them as the lender.

5 Q. Sure. Because you knew, when you were  
6 running these pay applications, that ultimately  
7 they were going to be sent to a lender for  
8 funding, correct?

9 A. Yes.

10 Q. And then at some point, you would wait  
11 to get the signed pay application or certified  
12 pay application by the architect, correct?

13 A. I don't know about -- what do you mean  
14 by wait?

15 Q. I mean, that would be the next step.  
16 After you sent it to Mr. Clements and the  
17 architect and the bank inspector came, what  
18 you-all expected the next step to be was, if the  
19 architect -- if it complied with the provisions  
20 of the contract documents, the architect would  
21 certify it and send it back to the owner,  
22 correct?

23 A. My recollection was that -- yeah, she  
24 would send it to the owner. She wouldn't send  
25 it -- we'd probably be copied on that e-mail,

1 saying, Kim, I've certified the payment  
2 application. But I don't ever remember her  
3 sending it to me and then do anything with it. I  
4 remember she sent it to Kim.

5 Q. Yeah. The architect would certify it  
6 and send it to the owner, correct?

7 A. That's my -- yeah.

8 Q. Because the architect's contract is with  
9 the owner, right?

10 A. Correct, yes.

11 Q. Okay. And then now, you, Balfour had a  
12 certified pay application. You-all created it.  
13 We're going to look at it in a second -- and now  
14 at this point, it would be certified by the  
15 architect and put up for payment, correct?

16 A. Yes.

17 Q. Okay. And that's what the contract  
18 documents required prior to the owner being  
19 responsible to pay anything is that architect  
20 certification?

21 A. I told you I didn't read the contract,  
22 that portion of the contract.

23 Q. Fair enough. And then, after the  
24 architect certifies it, you understood that it  
25 went to the bank and then the bank would fund the

1 draw, right?

2 A. Yeah. I knew that happened.

3 Q. Okay. And then once Balfour Beatty  
4 received the funds, the amounts that the  
5 architect had certified, you-all, to the extent  
6 you included subcontractor costs in that draw,  
7 you-all would then pay your subcontractors?

8 A. Yes.

9 Q. Is that correct?

10 A. Yes.

11 Q. And how would that work?

12 A. How would that work? So we would notify  
13 the accounting team that --

14 Q. I'm not trying to cut you off, but the  
15 pronoun -- I just want to get rid of the pronoun  
16 first. You would notify the accounting team or  
17 somebody else?

18 A. Nick Starcevic would notify the  
19 accountant -- the project accountant, who is  
20 primarily a woman named Candace Ash, that the  
21 following payment applications were able to be  
22 paid for. And it would be the -- it would be the  
23 pay apps less retainage of what was in the draw.  
24 He would -- you would notify her of which ones  
25 that were approved.

1           Q.    And the pay applications themselves  
2           physically had attached to them -- the pay  
3           applications that you-all sent to the owner  
4           physically had attached to them the pay  
5           applications that your subcontractors would send  
6           to you-all?

7           A.    Yeah.  I would print them all out.

8           Q.    That's exactly right.  And just for  
9           benefit of clarity, just because it's owner  
10          subcontracts -- owner pay application 35, it may  
11          contain subcontractor X, pay application 2?  
12          Sometimes those numbers don't line up, correct?

13          A.    Right.  Well, a subcontractor wasn't --  
14          you know, Balfour Beatty has been on-site and had  
15          a progress building every month.  So the  
16          subcontractor -- you know, the painter wasn't  
17          there when we were digging dirt so he wouldn't  
18          have a payment application.

19          Q.    All right, sir.

20                       MR. MCDONALD:  I'm going to mark  
21          for ID purposes Defendant's Exhibit 2.

22                       (DFT. EXH. 2 was marked for  
23          identification.)

24                       MR. MCDONALD:  May I approach the  
25          witness, Your Honor?

1 THE COURT: You may.

2 BY MR. MCDONALD:

3 Q. I hand you what's been marked as  
4 Defendant's 2. I would first ask you if you  
5 recognize that document?

6 A. Yes.

7 Q. All right. And what do you recognize it  
8 to be?

9 A. Our payment application for the period  
10 of February of 2018.

11 Q. And is it a true, accurate, and complete  
12 copy of the pay application for the period of  
13 February 1st, '18 through February 28th, '18?

14 A. It appears to be, yes.

15 Q. All right. And as we just went over,  
16 you-all create these documents at or about the  
17 time of February 2018, right? You're creating  
18 these documents for this pay period, correct?

19 A. Yes.

20 Q. And you create them in the ordinary  
21 course of your business. This is how y'all get  
22 paid, right?

23 A. Yes.

24 Q. On this job is how y'all got paid,  
25 right?

1           A.    Yes.

2                   MR. MCDONALD:  All right.  Your  
3 Honor, at this time I would move into evidence  
4 Defendant's Exhibit 2.

5                   MR. HILDEBRAND:  No objection.

6                   THE COURT:  Without objection.

7                   MR. MCDONALD:  May I approach, Your  
8 Honor?

9                   THE COURT:  Sure.  Thank you, sir.

10                   (DFT. EXH. 2 was admitted into  
11 evidence.)

12 BY MR. MCDONALD:

13           Q.  All right.  Mr. Dooley, I have a number  
14 of these pay applications, but what I would like  
15 to do -- and you said this is a pay application  
16 for February of '18, right?

17           A.  Correct.

18           Q.  All right.  And another way that you can  
19 identify this is by the pay application number,  
20 correct?

21           A.  Yes, number 35.

22           Q.  Number 35.  All right.  Now, what I  
23 would like to do is walk the Judge through this  
24 document -- not the entirety of it, but I'm more  
25 focused on the G702 and the 703.  Okay?

1 A. Okay.

2 Q. All right. So what we start off with  
3 here, this document is first created by the  
4 Balfour team. This one has already been -- this  
5 one has been certified by the architect, correct?

6 A. Her signature is on here, yes.

7 Q. Excuse me?

8 A. Her signature is on the front page, yes.

9 Q. And that means she certified it,  
10 correct?

11 A. Yes.

12 Q. Okay. But the G702, y'all -- Balfour  
13 originally creates that, right?

14 A. Yes.

15 Q. All right. And we've got the original  
16 contract sum. We've got change orders that are  
17 identified on here, contract sum and date, total  
18 completed, got retainage, which is 10 percent,  
19 right?

20 A. Yep.

21 Q. All right. And then the math adds up.  
22 You say, how much have we earned? How much is  
23 retainage, right? If you take out your-all's  
24 position on how much you've earned, right? You  
25 start with that?

1 A. Uh-huh.

2 Q. Correct?

3 A. Yes.

4 Q. And that's line item 6 on the right-hand  
5 side, correct?

6 A. Well, line item 6 is the amount less  
7 retainage.

8 Q. Oh, excuse me. The total completed  
9 store to-date, number 4?

10 A. That's number 4, yes.

11 Q. And then you reduce the retainage?

12 A. Yes. That's number 5.

13 Q. Then you get to 6, right?

14 A. Yep.

15 Q. And that's the \$51 million number,  
16 right?

17 A. Correct.

18 Q. And then you subtract the amount you've  
19 been paid?

20 A. Well, that's the amount previously  
21 billed, not necessarily paid.

22 Q. All right. Well, we'll look at the  
23 certification in a second.

24 A. Okay.

25 Q. But that's how you arrive at your

1       \$859,241.51, correct?

2           A.    Right.

3           Q.    All right.  Now, then if we go over --  
4           and before this thing can be certified by the  
5           architect, Balfour Beatty, or some human being  
6           from Balfour Beatty, has to sign this, correct?

7           A.    Correct.

8           Q.    Okay.  Now, do you know whether or  
9           not -- well, strike that.  It says, the under --  
10          are you familiar with this certification over  
11          here?

12          A.    Yes.

13          Q.    Okay.  Are you familiar with South  
14          Carolina law and the requirements of the  
15          certification?

16          A.    I don't know the difference between  
17          South Carolina law versus any other place.

18          Q.    Fair enough.  But did you sign this on  
19          March 5th, 2018?

20          A.    That's my signature, yes.

21          Q.    Okay.  And did you read this  
22          certification prior to signing it?

23          A.    Yes.

24          Q.    Okay.  It says, the undersigned  
25          contractor certifies that, to the best of the

1 contractor's knowledge, information, and belief,  
2 the work covered by this application for payment  
3 has been completed in accordance with the  
4 contract documents. Let's stop there. Did I  
5 read that correctly?

6 A. Correct.

7 Q. All right. So the first thing you-all  
8 are certifying is, the work we're trying to get  
9 paid for has been completed in accordance with  
10 the contract documents, right?

11 A. Yes.

12 Q. Okay. And the contract documents are  
13 the A133, the 201, the plans, the specs, the  
14 addenda, the change orders? Those are contract  
15 documents, right?

16 A. Yes.

17 Q. Okay. That's the first thing y'all are  
18 certifying to the owner in order to get paid,  
19 right?

20 A. Correct.

21 Q. We've done the work correctly; is that  
22 right?

23 A. Correct.

24 Q. That all amounts have been paid by the  
25 contractor for work for which previous

1 certificates for payment were issued and payments  
2 received from the owner. Did I read that  
3 correctly?

4 A. You did read it correctly.

5 Q. All right. So the second certification  
6 that you-all have made to the owner in order to  
7 get paid is, everything that you've paid us  
8 to-date, okay, we've paid out, right?

9 A. Yeah, that's what it reads.

10 Q. That's what it says, right? And that  
11 goes back to your qualification earlier -- and I  
12 appreciate the qualification -- that the previous  
13 certificates for, that doesn't necessarily --  
14 that number doesn't reflect payment; but if  
15 you-all had received payment, that would be the  
16 only way that you could certify this particular  
17 provision, right?

18 If they had paid it, that would be the  
19 only way you could certify it, if you paid it  
20 out, correct?

21 A. If we received the money, you mean?  
22 Yes, correct.

23 Q. Okay. So we now know that your  
24 certification, since you've signed it, it says  
25 that we've gotten the money and we paid it,

1 right, as of -- this is March 5th, 2018, right?

2 A. That's what it says.

3 Q. Okay. And then the last certification,  
4 and that current payment shown herein is now due.  
5 Did I read that correctly?

6 A. You did.

7 Q. So the third certification you-all are  
8 making is that, if we're attaching back up for  
9 payment, right, on this pay application, it's  
10 due, correct?

11 A. Correct.

12 Q. All right. Are you familiar with South  
13 Carolina law on what Balfour Beatty has to do if  
14 they're going to back charge a subcontractor or  
15 withhold sums from a subcontractor? Do you know  
16 anything about that?

17 A. I do not.

18 Q. Let's go to the second page, G703. Now,  
19 Mr. Dooley, for the purposes of my questions, I  
20 fully understand taking an electronic document  
21 and make copies of copies and that the numbers  
22 themselves may at times be tough to read.

23 I'm not as focused on the numbers as I  
24 am about the organization. So you can explain to  
25 the Judge, as the Balfour Beatty pay application

1 gentleman, what these things mean generally.

2 Okay?

3 A. Okay.

4 Q. Is that fair? All right. So on the  
5 left-hand side -- well, let me back up. As a  
6 preliminary matter, what this is, what these two  
7 pages is, is basically referred to as a schedule  
8 of values, right?

9 A. Yes.

10 Q. Okay. And the contract requires at the  
11 time of contract, the construction manager, the  
12 contractor, Balfour, whatever you want to call  
13 them, to come up with a schedule of values and  
14 submit it to the architect for approval, correct?

15 A. Yes.

16 Q. And that's how you guys bill against the  
17 in-progress billing?

18 A. Correct.

19 Q. All right. And in the schedule of  
20 values, there's obviously a line item. There's a  
21 line number, and of course, that goes 1 through  
22 66. But there's also a division number. Do you  
23 see that?

24 A. I do.

25 Q. All right. And what the division number

1 is, is that stays consistent throughout each pay  
2 application, correct?

3 A. I don't -- that's generally true.  
4 There's --

5 Q. Okay. And when I say number, I mean  
6 that the HVAC and the plumbing is going to be  
7 division 15B?

8 A. All the way through, yes.

9 Q. Well, it's got to be. That's the only  
10 way can keep up with it in accounting, right?

11 A. There's a couple of spec sections that I  
12 was curious that they were broken out. Like,  
13 there were multiple people that were in, like,  
14 specialties, for example, but that's why I  
15 answered your question generally speaking. But,  
16 yes, they're consistent.

17 Q. They're consistent throughout?

18 A. Correct.

19 Q. So if you wanted to find a particular  
20 division, you would go to that column, right?

21 A. Correct.

22 Q. All right. And then in the work  
23 description, all that does is it assumes that the  
24 people aren't going to memorize all the divisions  
25 and you can go over and see what is the work. It

1 doesn't identify the name of the subcontractor,  
2 but it identifies what -- what portion of the  
3 work they're in, correct?

4 A. Correct.

5 Q. All right. In the first column, you've  
6 got the original amount. That's the original  
7 contract amount, correct?

8 A. Correct.

9 Q. All right. Then you've got the change  
10 order column, right?

11 A. Yes.

12 Q. All right. Then you've got a column  
13 called budget transfers. Do you see that?

14 A. I do.

15 Q. Were you involved in the budget  
16 transfers?

17 A. Yeah. Yes. I have made adjustments in  
18 that column before, yes.

19 Q. Okay. But were you the one that figured  
20 out what a budget transfer is on this job?

21 A. I wasn't the one.

22 Q. And do you know whether or not budget  
23 transfer, if that term is found on the contract  
24 documents anywhere?

25 A. I don't know.

1 Q. And then you've got current amount,  
2 correct?

3 A. Correct.

4 Q. That column, okay. Then you have from  
5 previous pay applications. We looked at that  
6 earlier. That's column D, right?

7 A. Yes.

8 Q. All right. And this is the important  
9 part. Then you get to the this period column,  
10 right?

11 A. Correct.

12 Q. That's what you-all are looking for, for  
13 this period?

14 A. Right.

15 Q. Now, there are a couple of things I want  
16 to be clear on. That this period column E is not  
17 less retainage. That's the full amount, right,  
18 because we have a different column for retainage?

19 A. Yes. There's a different column for  
20 retainage.

21 Q. Okay. So if the Court in this action  
22 looks at the subcontractor pay applications,  
23 their pay applications that they submit to you  
24 are going to be less retainage, correct?

25 And my point is, that number is not

1 going to add up. This period number is not going  
2 to add with that sub bills because their pay  
3 application has already been a subtracted  
4 payment? And you can look at one if you need to.

5 A. Yeah. I mean, that sounds right.

6 Q. Okay.

7 A. I can look at one.

8 Q. All right. So what you would do is you  
9 would just simply -- if you were trying to make  
10 those numbers add up, you would just take 10  
11 percent off the this period work and that would  
12 match up the subcontractor's pay application,  
13 correct?

14 A. Correct.

15 Q. Okay. All right. Then you've got a  
16 total complete and stored to-date. You've got a  
17 percentage complete, and you've got a balance to  
18 finish, and finally, you have a retainage; is  
19 that right?

20 A. Correct.

21 Q. Okay. And in this particular one, it is  
22 for a total amount certified of \$859,241.51,  
23 correct? Front page.

24 A. Could you read the amount again? Sorry,  
25 I was on the page review.

1 Q. \$859,241.51.

2 A. That's what -- that's correct, payment  
3 due.

4 Q. All right. The fourth page of this  
5 document is the lien waiver, correct?

6 A. The conditional partial?

7 Q. Yes, sir. Contractor's conditional  
8 partial waiver of release of lien; is that  
9 correct?

10 A. Yep.

11 Q. Okay. And that's your signature, right?

12 A. That is.

13 Q. Okay.

14 MR. MCDONALD: Your Honor, I have  
15 pay applications 36 and 41, and I'm more than  
16 willing to go through the rigmarole of each one.  
17 If counsel for Balfour is not going to object,  
18 then I'll go ahead and mark them, and we'll move  
19 through them as quickly as possible.

20 THE COURT: Okay. 36 through 41?

21 MR. MCDONALD: Yes, sir.

22 THE COURT: All right.

23 MR. MCDONALD: Well, excuse me.

24 36, 39, 40 and 41 because there's different  
25 signatures. I'm just going to go through his

1 signature.

2 THE COURT: Okay. Those are --

3 MR. MCDONALD: 36.

4 THE COURT: 36, 39.

5 MR. MCDONALD: 39, 40 to 41, yes,

6 Your Honor.

7 MR. HILDEBRAND: What's the

8 question?

9 THE COURT: The question is whether  
10 or not there's any objection. He just wants to  
11 submit them like that. Do you want to have him  
12 just verify his signatures on there, Mr. Dooley,  
13 Mr. McDonald?

14 MR. HILDEBRAND: I still don't  
15 understand what the question is.

16 MR. MCDONALD: Yes, I can.

17 Do you want me to go through all the  
18 questions with him, with each pay application, or  
19 do you -- can I just put them all in front of him  
20 and say, is this a true and accurate copy? Is  
21 this your signature? Are you okay with that?

22 MR. HILDEBRAND: Sure. He can --  
23 you can ask him to identify them, and is this  
24 your signature?

25 THE COURT: Yeah.

1 MR. HILDEBRAND: Absolutely.

2 MR. MCDONALD: Thank you.

3 THE COURT: Okay.

4 MR. MCDONALD: All right, sir. I'm  
5 going to mark for ID purposes pay application 36  
6 as Defendant's 3.

7 THE COURT: Okay.

8 (DFT. EXH. 3 was marked for  
9 identification.)

10 MR. MCDONALD: Pay application 39,  
11 Defendant's 4 for ID purposes.

12 (DFT. EXH. 4 was marked for  
13 identification.)

14 MR. MCDONALD: Pay application 40,  
15 Defendant's 5 for ID purposes.

16 (DFT. EXH. 5 was marked for  
17 identification.)

18 MR. MCDONALD: 41, Defendant's  
19 Exhibit 6 for ID purposes.

20 (DFT. EXH. 6 was marked for  
21 identification.)

22 BY MR. MCDONALD:

23 Q. Mr. Dooley, in an effort to save some of  
24 your time, I'm going to hand these all to you at  
25 once. The question is going to be whether you

1 recognize them answer first. Okay? Take your  
2 time. Do you recognize it?

3 A. Yes, sir.

4 Q. Okay. And do they contain your  
5 signature?

6 A. Yes, sir. On the payment application,  
7 there's a check for lien waivers. Do you want me  
8 to do that?

9 Q. On the payment application, it contains  
10 your signature?

11 A. They do, yes.

12 Q. And the lien waivers were included in  
13 the pay application?

14 A. I didn't actually go to a lien waiver  
15 page. Do you want me to go through and do that  
16 real quick?

17 Q. I don't need you to do it, but if you  
18 would feel more comfortable doing that, go ahead.

19 A. Well, I just -- so we're on the same  
20 page.

21 Q. All right. That's fine. Are you good?

22 A. Yes.

23 Q. Did you verify that's your signature on  
24 those documents?

25 A. Yes, sir.

1           Q.   All right.  And are they truth and  
2           complete, accurate copies of pay applications 36,  
3           39, 40, and 41?

4           A.   They appear to be.

5                   MR. MCDONALD:  At this time, I  
6           would move these documents into evidence, Your  
7           Honor.

8                   MR. HILDEBRAND:  No objection, Your  
9           Honor.

10                   THE COURT:  Without objection.  
11          Very good.

12                           (DFT. EXH. 3, 4, 5 and 6 were  
13          admitted into evidence.)

14          BY MR. MCDONALD:

15           Q.   All right, sir.  Briefly, Exhibit 3,  
16           which is pay application 36, that follows pay  
17           application 35, correct?  It's the period of  
18           March 1, 2018 to March 31, 2018; is that right?

19           A.   Yes, sir.

20           Q.   Okay.  Do you know whether or not  
21           Exhibit 2, which was pay application 35, was  
22           actually funded by the other?

23           A.   I don't know.

24           Q.   You don't know.  All right.  And this  
25           document here, pay application 36, contains your

1 signature under that certification, correct?

2 A. It does.

3 Q. Okay. What would you have done to make  
4 sure, prior to signing this, that the amounts  
5 that have been paid to you-all, to Balfour, had  
6 actually been paid to your subcontractors from a  
7 previous pay application?

8 A. I wouldn't have done anything in that  
9 regard. That would have been Nick Starcevic's  
10 responsibility.

11 Q. Okay. Did you physically walk into  
12 Mr. Starcevic's office and say, Mr. -- Nick or  
13 whatever you called him, I'm about to certify  
14 this thing, and I just want to make sure we paid  
15 our subs?

16 A. Correct. Nick would -- I would have --  
17 the way you've described it is correct. I would  
18 have asked Nick and said, Nick, is this good to  
19 go? Is this true? And he would have told me yes  
20 or no.

21 Q. And you would have relied on what  
22 Mr. Starcevic told you prior to certifying this  
23 pay application?

24 A. Correct.

25 Q. Because you were the one going under

1 oath, right?

2 A. I'm the one that signed the document,  
3 yes.

4 Q. Under oath, right?

5 A. Well, I didn't know that's what -- yes.

6 Q. Okay. So you relied on Mr. Starcevic to  
7 say, listen, we've got -- the money we got was  
8 paid to our subs?

9 A. Right. Or Mr. Spano and Simonton at the  
10 time, whoever was in there, or the accountant  
11 also. I don't know because they didn't actually  
12 write the check. They would have to get that  
13 report from the accountant.

14 Q. So you would have expected them to do  
15 their due diligence prior to telling you, you're  
16 good to go under oath, and sign this document?

17 A. Correct.

18 Q. And if they had told you, you know what?  
19 Just between us, we're holding some of the subs'  
20 money, you wouldn't have certified it, right?

21 A. I guess I never thought of that.

22 Q. But if they would have told you that?  
23 We've got the subs' money from the owner and  
24 we're not going to pay them. We need you to go  
25 ahead and certify this pay application so we can

1 get more money, you wouldn't have certified it?

2 A. Yes, that's the -- that's how that  
3 reads. So I don't think there -- I don't recall  
4 like ever being asked to do that; so I never put  
5 much thought into it.

6 Q. Okay. All right. Do you know whether  
7 or not Balfour Beatty received the \$1,236,286.71?

8 A. I don't know.

9 Q. All right. Exhibit 4. This is pay  
10 application 39, and you've already verified that  
11 that was your signature; is that correct?

12 A. Correct.

13 Q. And it was the same process -- this was  
14 for the pay period of June 1, 2018 through June  
15 30, 2018, correct?

16 A. Correct.

17 Q. And was the same process followed -- you  
18 relied on your superiors to confirm that what you  
19 were certifying to be true under oath was in fact  
20 true?

21 A. Correct.

22 Q. Okay. And this pay application is in  
23 the amount of \$2,203,493.42. Did I read that  
24 correctly?

25 A. \$2,203,493.42.

1 Q. That's right. And do you know whether  
2 that money was paid?

3 A. No.

4 Q. Pay application 40, Exhibit 5. You  
5 verified that's your signature, correct?

6 A. Yes.

7 Q. All right. And was the same process for  
8 pay application 40, which is a period of July 1,  
9 2018, through July 31, 2018, that you relied on  
10 your superiors to confirm that what you were  
11 going under oath to certify was true, was in fact  
12 true?

13 A. Correct.

14 Q. And this is the amount of \$1,014,305.39?

15 A. That is the balance.

16 Q. Okay. Do you know whether that money  
17 was paid?

18 A. By the owner?

19 Q. Yes, sir.

20 A. I'm sorry. I don't know regardless. I  
21 don't know what -- I don't know regardless.

22 Q. Do you have a specific recollection,  
23 each pay application, of going and talking to  
24 your superiors, or is that just something you  
25 think you did?

1 A. Do I have a specific?

2 Q. About having that conversation. All  
3 right. I'm about to sign it. I got my pen out.

4 A. About each and every one, I guess I  
5 don't have a specific recollection.

6 But it was reviewed by the -- like, when  
7 we would -- when we would make this copy, the  
8 whole team would sit down to review it between  
9 the architect, the -- the architect, the owner,  
10 Mr. Rickard (ph), myself, Nick, and then whether  
11 it was Tim or Dave at the time.

12 We would all review it together through  
13 that process. But the actual question of walking  
14 into their office and saying, hey, show me where  
15 all of these guys got paid, I don't remember  
16 specifically doing that every time.

17 Q. And the architect and Jim and the owner,  
18 they didn't --

19 A. They didn't --

20 Q. -- they didn't review whether you-all  
21 had paid your subcontractors, right?

22 A. Correct, yes.

23 Q. And that's why have this certification,  
24 right?

25 A. Right.

1 Q. All right. 41. This is pay application  
2 August 1, 2018 through August 31st, 2018, and  
3 verify this is your signature, correct?

4 A. Yes.

5 Q. And is it true that, with regard to this  
6 pay application, you relied on your superiors to  
7 tell you that going under oath to certify -- to  
8 execute the certification was in fact true? You  
9 relied on your superiors for that, correct?

10 A. Yes.

11 Q. Same as all the other ones? Same as all  
12 the other pay applications?

13 A. Yes.

14 Q. All right. Do you know whether this  
15 money was funded, \$1,261,496.89?

16 A. No.

17 Q. All right. And this is through August  
18 31st of 2018, right? Pay application 41?

19 A. Yes, sir.

20 Q. And you leave Labor Day, right?

21 A. This would have been one of the last  
22 things that I ever did for Balfour Beatty.

23 Q. Gotcha. Because Labor Day is the one  
24 that's -- that's beginning in September, right?

25 A. Yep.

1 Q. Okay. What involvement did you have  
2 with entering the information in the daily logs?

3 A. Very minimal. Like, maybe if a  
4 superintendent asked me to do it for him, I would  
5 do it, but that wouldn't -- like, if I did it ten  
6 days over the course of the two and a half years  
7 I was there. And if I did -- if I did that many  
8 it would have been because somebody handed me a  
9 report to actually enter and to construct.

10 Q. Okay. Did you review the contract  
11 documents to make a determination as to what was  
12 required of Balfour Beatty to put in its daily  
13 logs?

14 A. I remember reading it at one point.  
15 This -- all this time later, I don't remember  
16 what it reads.

17 Q. Okay. Take a look. There's a bunch  
18 of --

19 MR. MCDONALD: May I approach the  
20 witness, Your Honor?

21 THE COURT: You may.

22 BY MR. MCDONALD:

23 Q. All right. There's a bunch of notebooks  
24 here that are Balfour's notebooks. I believe  
25 what they've done, sir, is at tab 56, which is

1       now Plaintiff's Exhibit 56 is a portion of the  
2       contract documents.  And if you would, sir, when  
3       you get there, if you would let me know.

4             A.  Tab 56, sir?

5             Q.  Yes, tab 56 is my understanding.

6             A.  I am on -- what I see is Exhibit B and  
7       Exhibit A.

8             Q.  Yeah, tab 56?

9             A.  Yes, sir.

10            Q.  Okay.

11            A.  I'm sorry, Exhibit 16 and Exhibit A.

12            Q.  Okay.  And that is the A133; is that  
13       right?

14            A.  And the document says A133 at the top.

15            Q.  Okay.  And would you turn to section  
16       2.3.2.7?

17            A.  2.3.2.7?

18            Q.  Yes, sir.

19            A.  I'm on it.

20            Q.  All right.  And is that the provision  
21       that you reviewed prior to whatever minimal --  
22       however minimal it may have been, prior to you  
23       doing any daily logs for some superintendent?

24            A.  Excuse me, sir.  You said 2.3.2.7?

25            Q.  Yes, sir.

1 A. Okay. Let me read this.

2 Q. Yeah. Take your time.

3 A. Can you please rephrase your question?

4 Q. Is that the section that you reviewed,  
5 section 2.3.2.7, that you just referenced in your  
6 earlier testimony --

7 A. I recall reading this before.

8 Q. Okay. And I'm sorry, let me finish my  
9 question, otherwise the record is not going to  
10 make any sense.

11 A. Sorry.

12 Q. Is this section, section 2.3.2.7, the  
13 section that you reviewed prior to doing any  
14 daily logs?

15 A. No. I would have reviewed this article  
16 primarily because of my responsibility to, on a  
17 monthly basis or otherwise agreed to by the  
18 owner, the construction manager submit written  
19 progress reports to the owner, architect, showing  
20 percentages of completion and other --

21 COURT REPORTER: Can you slow down  
22 because you're reading very fast.

23 THE COURT: She's trying to take  
24 down what you're saying.

25 THE WITNESS: I would have read --

1 I would have read this article to research my  
2 responsibility for the monthly report that was  
3 submitted with the payment applications, not the  
4 daily logs, which is also mentioned in this  
5 paragraph below.

6 BY MR. MCDONALD:

7 Q. So did you just stop reading after the  
8 first sentence?

9 A. No. I'm sure that I read it all. I  
10 just did stop reading after the first sentence.

11 Q. Well, no, but at the time you reviewed  
12 it?

13 A. Gotcha. No, I would have read the whole  
14 paragraph.

15 Q. All right. And can you read the second  
16 sentence, albeit much slower?

17 A. Yes. The second sentence?

18 Q. Yes, sir.

19 A. On a monthly basis or otherwise --

20 Q. Excuse me, the third sentence, sir.

21 A. I'm sorry. The construction manager  
22 shall also keep and make available to the owner  
23 and architects a daily log containing a record  
24 for each day of whether portions of the work in  
25 progress, number of workers on-site,

1 identification of equipment on-site, problems  
2 that might affect progress of the work,  
3 accidents, injuries, and other information  
4 required by the owner.

5 Q. In the minimal daily logs that you  
6 authored, did any of the ones that you authored  
7 include information that would have fallen under  
8 problems that might affect progress of the work?

9 A. I don't know.

10 Q. Okay. And if I were to set in front of  
11 you all the daily logs of the project, you  
12 wouldn't be able to identify them because you  
13 only did a couple of them?

14 A. Which ones I wrote?

15 Q. No, the entirety of them.

16 A. Oh. I mean, I would know what they are.

17 Q. Okay.

18 A. But did I actually -- I didn't actually  
19 offer them.

20 Q. But you will be able to identify them?

21 A. I guess I'm misunderstanding the term  
22 "identify them".

23 Q. Yeah. Tell me whether these are the  
24 daily logs or not.

25 MR. MCDONALD: Your Honor, with the

1 Court's permission, what I would like to do is  
2 mark the box because it's got four daily logs  
3 that -- for ID purposes for right now -- that are  
4 identified as 2015, 2016 binder one of four and  
5 so on and so forth.

6 THE COURT: Just go ahead and  
7 get -- I'll tell you what, give him a sample.  
8 Just bring one out and give him a samples, so he  
9 can identify it.

10 MR. MCDONALD: How about this? I'm  
11 going to hand you the daily log. May I approach,  
12 Your Honor?

13 THE COURT: Sure.

14 BY MR. MCDONALD:

15 Q. Are you able to identify those, is going  
16 to be question, just so you're thinking about it  
17 while you're -- while you're going through them.  
18 That the daily logs -- the Balfour Beatty daily  
19 logs for the Hotel Bennett project.

20 A. These look to be the daily log reports  
21 that were published from the software called  
22 Constructware; and, yes, I have a couple in my  
23 hand.

24 Q. Okay. And those daily logs, is it -- it  
25 may be self-evident, but you-all keep those in

1 the ordinary course of your business at or about  
2 the time that they incurred?

3 A. I'm sorry, repeat your question.

4 Q. Do you fill them out every day?

5 A. The superintendents are supposed to.

6 Q. Okay. And maybe sometimes it's the next  
7 day, and maybe sometimes it's the day of. But in  
8 order to keep up with them, you've got to fill  
9 them out as the days go along?

10 A. Correct. And we would -- and even like  
11 if it was the next day, like, we would require  
12 the subcontractors to turn them in daily. So at  
13 the end of the day, the sub -- the superintendent  
14 comes in the next morning and fills it out for  
15 what happened the day prior, previous. But yes.

16 Q. And y'all do -- well, when you were with  
17 Balfour, y'all did that on every job you worked  
18 on, right?

19 A. We did that on -- yeah, on my other  
20 projects, I did, yes.

21 Q. And as we just read, the contract on  
22 this job, in fact, requires it, right?

23 A. Right.

24 MR. MCDONALD: All right. Your  
25 Honor, at this time, I would move the daily logs

1       into evidence as Defendant's Exhibit 7, 8, 9, and  
2       10. I'm just going to -- I'm not going to be  
3       lazy. I'm just going to mark all four of them.

4                   THE COURT: All right. Any  
5       objection there?

6                   MR. HILDEBRAND: So these are --  
7       let me understand. These are all the daily logs  
8       that have been produced for the project?

9                   MR. MCDONALD: The 2015, I believe.  
10       He's got the folder. '16, '17. Well, he's got  
11       the folders. I think it's '15, '16, '17, '18 and  
12       '19 are Bates stamped as produced.

13                   THE COURT: Okay.

14                   MR. MCDONALD: And previously  
15       identified by the witness.

16                   THE COURT: Are they divided by  
17       year?

18                   MR. MCDONALD: Yes, sir.

19                   THE COURT: Okay.

20                   MR. MCDONALD: I think '15 and '16  
21       are together because '15 had a --

22                   THE COURT: It was shorter? Okay.

23                   MR. MCDONALD: That was 7, 8, 9 and  
24       10.

25                   THE COURT: Are you comfortable

1           that that's what they are?

2                       THE WITNESS:  Yes, yes.  I'm  
3           comfortable that these are the daily reports.

4                       THE COURT:  Very good.

5           Mr. Hildebrand, any objection?

6                       MR. HILDEBRAND:  I certainly have  
7           no reason to dispute Mr. McDonald's  
8           representation that that's what they are.  I  
9           haven't reviewed them.  If they aren't complete  
10          or whatever, then I'll have to take that up at a  
11          later point.  But at this point, no, no  
12          objection.

13                      THE COURT:  Okay.  All right.  I'll  
14          allow it, Defendant's 7, 8, 9 and 10.

15          BY MR. MCDONALD:

16                Q.    And I'm going to hand you these  
17          stickers, Mr. Dooley.  And if you would put 7 on  
18          '15 and '16 and so on and so forth.  I believe  
19          that's the easiest way to do it just so we're not  
20          on top of each other.

21                      MR. MCDONALD:  Your Honor, I have  
22          less than two minutes.

23                      THE COURT:  That's fine.

24                      THE WITNESS:  I'm sorry, you wanted  
25          me to start with 7 on 2015 through 2016?

1 BY MR. MCDONALD:

2 Q. Yes, sir, whatever the binder one is.

3 A. Right. So Bates 1275 and 276 --

4 Q. It should be a binder one of --

5 A. Oh, I see it here, yes, yes.

6 Q. Thank you.

7 (DFT. EXH. 7, 8, 9 and 10 were  
8 marked for identification and admitted into  
9 evidence.)

10 MR. HILDEBRAND: I'm sorry, before  
11 we go on, can you tell me exactly -- I didn't  
12 write it down.

13 MR. MCDONALD: Yes, sir.

14 MR. HILDEBRAND: -- what we've got.  
15 What is what?

16 MR. MCDONALD: 7, 8, 9, and 10.

17 MR. HILDEBRAND: What is 6?

18 MR. MCDONALD: 6 is --

19 THE COURT: 6 was pay app number  
20 41.

21 MR. HILDEBRAND: What are the other  
22 ones?

23 MR. MCDONALD: Yeah. 7 is '15 and  
24 '16 daily logs books. 8 is --

25 MR. HILDEBRAND: 2015 and 2016?

1 THE COURT: Correct.

2 THE WITNESS: Yes, sir.

3 MR. MCDONALD: 8 is '16 and '17  
4 daily logs. 9 is '17 continued daily logs and 10  
5 is '18 and '19 daily logs.

6 MR. HILDEBRAND: All right.

7 BY MR. MCDONALD:

8 Q. All right. Mr. Dooley, when you showed  
9 up in March of '16, you understood that you were  
10 about to embark on work on a five-star luxury  
11 hotel; is that correct?

12 A. Absolutely.

13 Q. And when you showed up in March of 2016,  
14 you didn't have any responsibility for any  
15 preconstruction activities?

16 A. Correct.

17 Q. All right. And you didn't engage in any  
18 constructability review by Balfour of the  
19 architect's plans and specifications?

20 A. I did not.

21 Q. All right. When you were with Balfour,  
22 did you ever use the term yourself, internal  
23 change order?

24 A. Yes.

25 Q. And how did you use it? What is an

1 internal change order? Let me ask it that way.

2 A. Well, so an ICO would be -- like, let's  
3 say we were moving something from contingency  
4 to -- like, if we held our own contingency or if  
5 we had the contractor's contingency, we're going  
6 to move that into a subcontractor's contract for  
7 work they needed to do or to a general  
8 requirement of some sort, we would create an  
9 internal change order, so there would be a paper  
10 trail of it if the accounting team ever asked  
11 about it.

12 Q. Any other reasons, while you were at  
13 Balfour, that you would have utilized an internal  
14 change order or ICO?

15 A. So if the scope of work would have been  
16 bought out, and we had like -- I don't know --  
17 like toilet accessories, and we had like the  
18 money in the toilet accessory division 10  
19 specification, we would -- or spec number, which  
20 is how that division number is worked out on the  
21 pay app. We would do an -- and the drywall guy  
22 agreed to do it, we would do an ICO and write it  
23 over to him.

24 Q. Wait. So we've got Balfour contingency  
25 money and we've got a situation where you-all

1       hadn't bought out that particular division? You  
2       might utilize an internal change order in those  
3       instances?

4           A.    We would use it then.

5           Q.    Okay. Any other instances?

6           A.    We would use it if we changed -- if we  
7       made a decision to change who was handling a  
8       certain portion of scope. Like, if the concrete  
9       guy and the masonry guy, they're always going to  
10      have like -- it's an internal struggle about  
11      who's got the embeds, right?

12          Q.    Sure.

13          A.    And so if you decide, well, this guy is  
14      going to do these embeds and they're going to do  
15      these embeds and they do an internal change order  
16      and move the embeds from one person to the other  
17      and then --

18          Q.    So that would be -- we'll call that  
19      scope shift; is that fair?

20          A.    Scope shift, that's a nice word.

21          Q.    Okay. Any other -- when you were at  
22      Balfour, any other use of internal change orders?

23          A.    So an internal change order would be the  
24      forum for a back charge, but I don't know if I  
25      ever really did one for a back charge.

1 Q. Okay. You never did one?

2 A. I don't -- if you have one in your hand  
3 that shows that I did one, I'm going to believe  
4 you that I did it. But I don't -- I had a  
5 manager who handled those disputes. That wasn't  
6 my job.

7 Q. Gotcha. So that was a superior?  
8 Starcevic, Spano, somebody else?

9 A. Yeah.

10 Q. All right. Do you know what Balfour  
11 Beatty utilizes these daily reports for?

12 A. There is an abundance of reasons. Would  
13 you like me to give you some examples?

14 Q. Please.

15 A. Well, it's a contract requirement, so  
16 that we're appeasing that requirement by filling  
17 it out. We might not always have all of the  
18 information that was required, but -- or at least  
19 making the attempt to document manpower and  
20 weather and equipment.

21 We would also use it in order to track  
22 subcontractor progress. On a building that size,  
23 we'd need to figure out, okay, we have 10  
24 drywallers and they're able to knock out a floor,  
25 how many -- how many drywallers do we have to

1 knock out that floor? So if we have 20, can we  
2 do two floors?

3 So in order to do some sort of internal  
4 review there, we tracked weather obviously, even  
5 though there's -- you don't need (inaudible) to  
6 do that. There's plenty of other services to do  
7 that. The only time that I ever really looked at  
8 it was to go back and check what happened on like  
9 a Saturday, like, if I wasn't here that Saturday  
10 and I came in on Monday.

11 A lot of times if I worked that  
12 Saturday, I would type a big, long e-mail to send  
13 to the superintendents so that they had my  
14 reports, so they can put that into the daily  
15 report; and then also so anybody else who wasn't  
16 on-site that Saturday knew what was up for Monday  
17 morning, so kind of internal communication.  
18 Those are the best examples that I can come up  
19 with.

20 Q. Okay. So you-all or the superintendent  
21 creates the daily report about what happened on  
22 the job that day, correct?

23 A. Yes.

24 Q. And the purpose of it is to make sure  
25 that there's a record as to -- if there's ever an

1 issue in the future, as to what happened on that  
2 day, correct?

3 A. Yeah. That's one of the reasons for it,  
4 yeah.

5 Q. And one thing you-all do is you use it  
6 to make a determination if some subcontractor  
7 says, another subcontractor did this, you can go  
8 back to the daily reports and see if they were  
9 even on the site. You can see what the -- what  
10 was going on on that day if there's an allegation  
11 made in the future, right?

12 A. I guess you could.

13 Q. Okay. In fact, they're the best  
14 evidence of what went on that day because that's  
15 the only written report about what went on that  
16 day, correct?

17 A. That's the only consistent report. I  
18 don't want to put words in your mouth, sorry.

19 Q. That's the only written report as to  
20 what occurred on that job that day, that's a  
21 chronicle of every day, right? That's the daily  
22 report?

23 A. The one that Balfour Beatty produces.  
24 Some of our subcontractors probably had their  
25 superintendents fill out their own daily reports

1           that they logged also.

2           Q.    I'm just talking about Exhibits 7  
3           through 10 that we put in evidence.  That's the  
4           Balfour Beatty daily report, right?

5           A.    You're saying that's -- you're saying,  
6           that's the only daily report that Balfour Beatty  
7           has?

8           Q.    Yeah, that's the only daily report that  
9           Balfour Beatty creates?

10          A.    Yeah, that's correct.

11          Q.    So that's the best evidence of what  
12          happened that day because it's the only one that  
13          exists?

14          A.    Correct.

15          Q.    Okay.  All right.  Now, I believe you  
16          testified in your deposition that you spoke to  
17          Mr. Doran, and the only reason I remember is you  
18          got a T-shirt or something?

19          A.    Yeah.  I still have it.

20          Q.    Okay.  And is that the last time you  
21          spoke to Mr. Doran?

22          A.    Yeah, June of '18 -- July of '18.

23          Q.    And what about Mr. Huyghe?

24          A.    I had never spoken with him.

25          Q.    Okay.  And what about Mr. McAuliffe?

1 A. I've never even heard that name.

2 Q. Okay. So you never heard of  
3 Mr. McAuliffe, you never heard of Mr. Huyghe, and  
4 you spoke to Mr. Doran once in June of '18?

5 A. Let me -- I have heard the name.  
6 McAuliffe. I've never spoken to him. Heard the  
7 name Huyghe, never spoken to him. I have met  
8 Mark Doran.

9 Q. Okay. In June of '18?

10 A. Probably July.

11 Q. July '18?

12 A. Yeah.

13 Q. And you got a T-shirt?

14 A. Yeah.

15 Q. All right.

16 MR. MCDONALD: Thank you very much,  
17 Your Honor.

18 THE COURT: All right.

19 MR. KELLY: Your Honor, I hate to  
20 throw a curve ball. I have a few questions, too.

21 THE COURT: All right. Let me see  
22 if there's any redirect before I do that.

23 Anything?

24 MR. BYRD: Not yet.

25 THE COURT: Okay. All right. Go

1 ahead, Mr. Kelly.

2 MR. KELLY: Thank you, Your Honor.

3 THE COURT: Yes, sir. Britt Kelly  
4 representing? Remind me.

5 MR. KELLY: David Allen Company.

6 THE COURT: David Allen Company.

7 Thank you, sir.

8 CROSS-EXAMINATION

9 BY MR. KELLY:

10 Q. Mr. Dooley, I'm Britt Kelly. I  
11 represent David Allen Company.

12 A. How are you doing today?

13 Q. I'm doing well. How are you doing?

14 A. Good.

15 Q. I don't think I will be long. I just  
16 kind of want to understand what David Allen  
17 Company's role was on the job, and I understand  
18 you were the assistant project manager?

19 A. Yes.

20 Q. Did you interact with your  
21 subcontractors on the project?

22 A. I did.

23 Q. Was David Allen Company a subcontractor  
24 on the project?

25 A. Yes.

1 Q. What was David Allen Company's  
2 responsibilities on the project?

3 A. They were responsible primarily for the  
4 tile work, floor, bathroom wall tile. They also  
5 had some responsibility for like epoxy resinous  
6 work. Do you know what that is?

7 Q. I'm familiar with the term. I'm not  
8 sure I can describe it for you.

9 A. It's like an industrial or a commercial  
10 coating that you put on concrete to make it not  
11 get scuffed. You see it in like commercial  
12 kitchens and things like that; so they had that  
13 scope as well. But they did all of the tile --  
14 the floor tile on the first floor and the  
15 bathroom tile. I think that the elevator lobby  
16 was tiled, too, up through the building.

17 Q. Okay. Did they install waterproofing  
18 and tile in the terraces that you were talking  
19 about earlier?

20 A. I believe that was their scope, yes.

21 Q. Okay. Did you interact in the project  
22 with David Allen Company?

23 A. Yeah. I spoke to, yeah, Joey and  
24 Clovis.

25 Q. In what ways did you interact with them

1 on the job?

2 A. So I know Clovis primarily on shop  
3 drawings and change orders. And there's a guy  
4 before him. His name has escaped me. But Clovis  
5 was the PM that I dealt with.

6 Joey, I didn't really deal with quite  
7 that often because I wasn't too involved in  
8 their -- like their actual installation, but I  
9 was there while they were doing their work and  
10 was in the progress meetings with him when our  
11 superintendents were trying to determine what  
12 areas we needed him to be working in at a certain  
13 period of time.

14 Q. Do you know what Clovis' role was with  
15 David Allen Company?

16 A. Project manager.

17 Q. What was Joey's role?

18 A. Superintendent.

19 Q. All right. And would you go on the site  
20 sometimes and be with Joey and/or Clovis?

21 A. I would meet with Clovis more than Joey  
22 because I was -- because project manager and  
23 project manager. But I had worked with -- if  
24 Joey had like an issue he wanted me to look at to  
25 like help get an RFI written or something, then

1       like I have his number, and we would speak and  
2       work through it together.

3           Q.    What types of things did you meet with  
4       them on-site about?

5           A.    Joey or Clovis?

6           Q.    Either one.

7           A.    Clovis, we discussed other change  
8       orders, open requests for information and  
9       submittal of the shop drawings.  Joey would be  
10      more to the effect of like the -- like, the first  
11      floor bathroom, there was, like, a problem where  
12      the trim and the tile, like one was taller than  
13      the other.

14                So it's something like that.  So what do  
15      you want me to do?  Do you want me to cut the  
16      tile down to have like a quarter inch -- you  
17      know, I've got to cut a piece of tile in order to  
18      have like a cut piece in here to make this flush  
19      out.  Do you want me to put it at the bottom or  
20      at the top?

21                At which point I would take a picture  
22      and send it to the architect who sends it to the  
23      interior designer and say, hey, this is what  
24      we're up against, what do we want to do?  And  
25      that would be my interaction with Joey.

1           Q.    Would you consider that means and  
2           methods type stuff on the job?

3           A.    I don't know because some of those sorts  
4           of decisions -- like, means and methods, I think,  
5           a lot of times is to the discretion of the  
6           contractor to use.

7                    Some of these areas, like the dollars of  
8           like -- that we're talking about for like the  
9           tile and how important it was to look. I  
10          wouldn't have felt very comfortable deviating  
11          from like the plan, the shop drawings, and the  
12          interior designers drawings.

13                   Like, half of the building -- not half  
14          of it but like the whole lobby, the tile  
15          actually -- I don't know if you ever noticed  
16          this -- it actually mirrors and reflects the --  
17          like the mirrors above it like in Camellia's  
18          lounge.

19                   So, like, that sort of stuff was --  
20          like, yeah, you could say it was means and  
21          methods. But, like, David Allen would -- like  
22          took a laser and like surveyed that room and sent  
23          it to a laser cutter to actually cut the piece of  
24          the tile that -- to match the mirror that was  
25          above it.

1 Q. And being the assistant project manager  
2 on the job and interacting with subcontractors  
3 including David Allen Company, did you get an  
4 understanding of what David Allen Company's  
5 obligations were on the job?

6 A. Yes.

7 Q. Okay. Did Balfour have kind of  
8 supervisory responsibilities over David Allen  
9 Company?

10 A. Most of Balfour Beatty's supervisory --  
11 supervisory responsibilities were broken up by  
12 area, so yes.

13 Q. Okay. When David Allen Company  
14 completed some work, would a Balfour  
15 representative go observe that work and see if it  
16 was in place?

17 A. Yes.

18 Q. Were you involved in observing the work  
19 from David Allen Company to determine whether it  
20 had been completed properly?

21 A. No.

22 Q. Okay. Who was doing that?

23 A. Marty.

24 Q. Say it again.

25 A. Marty Dale on the first two floors, and

1       then up the building, it would have been a  
2       combination of Heath Brafford, John Eldridge,  
3       Ryan Ledford, and maybe Peter Waterfield. He was  
4       kind of -- he was always kind of up there in that  
5       context.

6               Q.    During your interactions with David  
7       Allen Company on the project, were you impressed  
8       with their work?

9               A.    Yeah.

10              Q.    Was the work that they performed while  
11       you were there accepted by Balfour?

12              A.    I can't blankedly say everything was  
13       because not everything was done right away. So I  
14       can't think of anything that was rejected, like  
15       outright rejected while I was there. But they  
16       were still working in certain areas of the  
17       building before I left. So to say everything was  
18       accepted, I couldn't.

19              Q.    So you left in September 2018, right?

20              A.    Yes.

21              Q.    So David Allen Company was not  
22       completely finished at that time? Is that what  
23       you're saying?

24              A.    They're pretty close to being done, but  
25       there was still work being done.

1 Q. Based on your knowledge --

2 A. And can I clarify that?

3 Q. Sure, certainly.

4 A. I wasn't there through the -- through  
5 the completion of the first floor punch list,  
6 right, or really in the first version of the  
7 upstairs punch list.

8 So that's where like -- that's why I  
9 can't tell you about the -- like, the tile was  
10 laid that -- when I left. But it wasn't punched  
11 out and full accepted. That process was ongoing,  
12 even if -- I know some of the areas didn't start  
13 until after I left.

14 Q. Fair enough. Based on your knowledge  
15 and interaction with David Allen Company, did  
16 David Allen Company breach its subcontract?

17 A. I -- off the top of my head, Mr. Kelly,  
18 I can't name anything that they did to breach the  
19 subcontract.

20 Q. All right. David Allen Company contends  
21 it's owed approximately \$293,000 on the job.

22 A. Okay.

23 Q. As the assistant project manager for  
24 Hotel Bennett, are you able to give us a reason  
25 as to why it has not been paid, those sums?

1 A. No. I can't answer that.

2 Q. Okay. What is a CCD?

3 A. Construction change directive.

4 Q. Were CCDs issued on the Hotel Bennett  
5 project?

6 A. Yes.

7 Q. And are you aware of -- or were you  
8 around when a CCD was issued related to a  
9 manager's apartment?

10 A. I was.

11 Q. Okay. Can you tell us about that,  
12 please?

13 A. So it would have been in the late spring  
14 of '18, maybe early summer. A construction  
15 change directive was issued for the finish and  
16 scope of the manager's apartment.

17 The manager's apartment underwent  
18 several design revisions prior to that, and up to  
19 that point, was a relatively -- just a room with  
20 drywall and light fixtures, not like -- you know,  
21 canned light fixtures and outlets. There  
22 wasn't -- you know, we had never been given  
23 direction of what to do, and we had priced a  
24 bunch of different variations over -- probably  
25 four or five times.

1                   And when the final decision was made,  
2                   the -- I don't know if it was the architect or  
3                   the owner or whoever, but the architect issued us  
4                   a construction change directive with the latest  
5                   and greatest most current version of the  
6                   manager's apartment.

7                   Q.    Fair enough.  Did that latest and  
8                   greatest directive include work that needed to be  
9                   done by David Allen Company?

10                  A.    So I don't remember.  I couldn't like  
11                  look at the manager's apartment drawings and tell  
12                  you what they look like.  But what I can answer  
13                  is that there was a kitchen and a bathroom that  
14                  were unfinished; so I don't know what the scope  
15                  would look like.

16                  Q.    Okay.  Do you know whether David Allen  
17                  Company did any work in that manager's apartment?

18                  A.    Right.  The -- when I left, the  
19                  manager's apartment wasn't done, or I don't even  
20                  know if the -- if like the finish trades, if like  
21                  the painter, the mill worker, the tile  
22                  contractor, I don't even know where they would  
23                  have been because it wasn't done when I left.

24                  Q.    Okay.  What's the supplemental  
25                  instruction?

1           A.    How was it used on this project?

2           Q.    Correct.

3           A.    So an ASI would have been issued to us  
4           containing revisions and drawing revisions to the  
5           project, and that we would then have to get  
6           pricing from it and submit it to the owner to  
7           make a decision if they wanted to do it or not,  
8           and then we would do it.

9           Q.    So I assume SI means supplemental  
10          instruction.  What is the A part?

11          A.    Architect.

12          Q.    Okay.  So the architect issues the  
13          supplemental instruction saying, this is how we  
14          want some phase or some aspect of the work to be  
15          done?

16          A.    Well, there was certain architectural  
17          supplemental instructions that changed half of  
18          the drawings set.  The electrical plans, the  
19          plumbing plans, the mechanical plans, the  
20          interior design drawings, the architectural  
21          plans.

22                    So you -- you're asking me the question  
23          of some changes is not on -- is not  
24          representative of these architects or  
25          supplemental instructions.

1           Q.    Do you recall a supplemental instruction  
2           being the issue for this sixth floor concierge  
3           suite?

4           A.    I do recall drawing revisions being  
5           issued for the concierge suite.  I don't know if  
6           it was a modification or an architectural  
7           supplemental instruction.  But I do -- I do  
8           recall a change document coming out about the  
9           concierge lounge.  I think they call it the  
10          president's club now or something.  I don't know.

11          Q.    All right.  Were you still there when  
12          that work was completed?

13          A.    No.

14          Q.    What about the supplemental instruction  
15          for the ninth floor pool deck?  Do you have any  
16          recollection of that?

17          A.    I do.  So there's a couple of changes --  
18          there was a change on the pool deck.  I don't  
19          remember if it had to do with the tile selection  
20          or the sloping of the -- of the drain.  I know  
21          that was an issue, but I don't know if that was  
22          done by tile.  I don't know if that was done by  
23          concrete or tile.

24                    But there was -- there was a change at  
25          the ninth floor pool deck that David Allen had to

1 build up a slope essentially in order to make the  
2 pool deck work. But I don't know if that changed  
3 the tile selection or if that changed the method,  
4 like the actual patterning of it. I don't  
5 recall.

6 Q. And you said there was a change that  
7 occurred?

8 A. Yes, it was a change to the -- it was a  
9 change to what information that we had, or it was  
10 an added scope; so we had to do an addition of  
11 what we were told to do in order to make the  
12 system work.

13 Q. All right. So David Allen Company did  
14 work to the ninth floor pool deck for work more  
15 than what it had originally agreed to perform?

16 A. That's my recollection, yes. The  
17 specifics of what they had to do, I'm not sure.

18 Q. All right. As the assistant project  
19 manager of the Hotel Bennett, do you understand  
20 that David Allen Company had a responsibility to  
21 bring to Balfour's attention any issues with the  
22 work that preceded it if it saw those issues in  
23 the field prior to the time it started working?

24 A. Yes.

25 Q. Okay. Do you recall any time that David

1 Allen Company did that relating to its work on  
2 the sixth floor terraces?

3 A. I remember it.

4 Q. And just so we're clear on David Allen  
5 Company's work, the work it contracted to do was  
6 put in waterproofing and tile as it relates to  
7 the terraces; is that correct?

8 A. Yes.

9 Q. And how many terraces are we talking  
10 about on the sixth floor?

11 A. Well, the sixth floor is -- the entire  
12 perimeter of the sixth floor, so, I don't know,  
13 12. They're kind of big because you have the  
14 extended suite and you have the manager's  
15 apartment.

16 And you have the concierge lounge in the  
17 other corner. So I don't even really know how to  
18 describe it to you, but it's essentially the  
19 entire outer perimeter of the sixth floor of the  
20 building.

21 Q. A large area?

22 A. It is a big space, yes.

23 Q. All right. And the work that would  
24 precede David Allen Company's waterproofing and  
25 tile work on those terraces would be concrete

1 placement?

2 A. That was one of them. Masonry placement  
3 was the other one. And I would be -- I don't  
4 recall if the tile membrane turned up before or  
5 on top of the block waterproofing. Does that  
6 make sense?

7 I don't recall which one of those, what  
8 happened first, but the block had to be there  
9 because the waterproofing membrane needed to turn  
10 up a vertical surface, like 8 inches or a foot;  
11 so the block would have to be there before they  
12 could start.

13 Q. Were you involved in any conversations  
14 for David Allen Company brought to Balfour's  
15 attention, issues with the sloping on concretes  
16 on the sixth floor terraces that impacted its  
17 ability to properly perform its work?

18 A. I'm aware that those conversations  
19 happened, but a different manager from Balfour  
20 Beatty handled that issue.

21 Q. Who was that?

22 A. My recollection was Tim Spano, Nick  
23 Starcevic, and from the field standpoint, I do  
24 not know.

25 Q. Were you involved in conversations with

1 David Allen Company where it was seeking  
2 additional compensation to help achieve slope on  
3 the terraces on the sixth floor?

4 A. I know that that happened, yes.

5 Q. And was David Allen Company seeking  
6 compensation because it was performing work to  
7 provide a proper slope so that it could put in  
8 the waterproofing and tile on the sixth floor  
9 terraces that it needed to?

10 A. That was their position.

11 Q. Okay. And did Balfour agree with that  
12 decision?

13 A. I don't recall.

14 Q. Who would know the answer to that?

15 A. At this point, my answer to you is going  
16 to be, like, someone like Nick or Tim who were  
17 still around the project (inaudible) because it's  
18 probably in one of the many exhibits that have  
19 been turned in at this point.

20 Q. Okay.

21 A. If you give me access to my own computer  
22 in two hours, I might be able to figure it out.

23 Q. Okay. Is there any question that David  
24 Allen Company did the work on the sixth floor  
25 terrace decks as it was instructed to do the work

1 by Balfour?

2 A. They would have been -- they were  
3 instructed to do the work, yes, and that would  
4 have come from us, yes.

5 MR. KELLY: All right. Thank you,  
6 sir. Those are all my questions.

7 THE WITNESS: Appreciate it.

8 THE COURT: Okay. Any redirect,  
9 Mr. Byrd?

10 MR. BYRD: No, Your Honor.

11 THE COURT: All right. Very good.

12 Mr. Dooley, thank you, sir. You may  
13 step down. Thank you. Okay. All right. It's 5  
14 o'clock. I'm assuming we're going to resume  
15 tomorrow with Mr. Spano.

16 MR. HILDEBRAND: Yes, sir.

17 THE COURT: And I don't know how  
18 long that's going to take, but it might take --  
19 you were maybe halfway with your examination, you  
20 thought? You had a couple more hours, I think  
21 you said yesterday.

22 MR. HILDEBRAND: Probably a couple  
23 hours, yes, sir.

24 THE COURT: Okay. All right. And  
25 then we will do the cross. Any other witnesses

1       you think will go forward tomorrow?

2                   MR. HILDEBRAND: I hadn't planned  
3       on particularly -- no, I'm not sure.

4                   THE COURT: Okay. All right.

5                   MR. BUNDY: Well, I guess if I  
6       finish early, I'll just have to cross and reply  
7       and finish it.

8                   THE COURT: Yeah. We'll get there.  
9       We'll try to get to that point. Why don't we  
10      start back tomorrow morning -- I should be clear  
11      for the day.

12                   So why don't we plan to start back at 9  
13      o'clock here in the morning. Okay? And, again,  
14      y'all can leave your stuff, and we'll have it  
15      ready for you to go. Take what you need, and  
16      then we'll go from there. Okay?

17                   MR. BUNDY: Thank you, Your Honor.  
18      Can you remind Mr. Spano he's still under oath?

19                   THE COURT: Yeah. Mr. Spano --

20                   THE WITNESS: Understood.

21                   THE COURT: -- you're in  
22      sequestration.

23                   THE WITNESS: Understood.

24                   MR. MCDONALD: Your Honor, one  
25      brief point.

1 THE COURT: Yes, sir.

2 MR. MCDONALD: We received Sunday  
3 evening, deposition designations.

4 THE COURT: Okay.

5 MR. MCDONALD: There ain't but so  
6 many hours in a day and two of us; so I'm trying  
7 to go through them with the counter destinations.

8 THE COURT: All right.

9 MR. MCDONALD: So I would just ask  
10 if I could get a heads up on what he wants to  
11 publish and then I can --

12 THE COURT: Okay.

13 MR. MCDONALD: -- I can put time  
14 towards it. If it's not going to be tomorrow,  
15 then I'll bump it.

16 THE COURT: And just so y'all know,  
17 I know how to read; so I can take that stuff home  
18 in the evenings, and you don't have to actually  
19 read it into the record unless there's something  
20 you really want to know. Okay? But I can read  
21 it.

22 MR. MCDONALD: Sure.

23 THE COURT: If you make it easy for  
24 me, I will read it quicker.

25 MR. BUNDY: We can actually

1       probably -- some of them you can provide him the  
2       video, so you won't even have to read it. You  
3       can watch it.

4                   THE COURT: All right.

5                   MR. BUNDY: If that's easier for  
6       you, we'll be glad to do that.

7                   THE COURT: Maybe, maybe not. It  
8       depends on what it is.

9                   MR. BUNDY: Thank you, Judge.

10                  THE COURT: All right. Very good.  
11       See y'all in the morning.

12                  MR. HILDEBRAND: Thank you, Your  
13       Honor.

14                               (The hearing was concluded at  
15       4:54 P.M.)

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1 CERTIFICATE OF REPORTER  
2 STATE OF SOUTH CAROLINA  
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Huggins, Certified  
5 Shorthand Reporter and Notary Public for the  
6 State of South Carolina at Large, do hereby  
7 certify that the witness whose attached in the  
8 foregoing hearing was by me duly sworn to testify  
9 to the truth, the whole truth, and nothing but  
10 the truth in the within-entitled cause; that said  
11 hearing was taken at the time and location  
12 therein stated; that the testimony of the witness  
13 and all objections made at the time of the  
14 examination were recorded stenographically by me  
15 and were thereafter transcribed by computer-aided  
16 transcription; that the foregoing is a full,  
17 complete and true record of the testimony of the  
18 witness and of all objections made at the time of  
19 the examination; and that the witness was given  
20 an opportunity to read and correct said hearing  
21 and to subscribe the same.

22 Should the signature of the witness  
23 not be affixed to the hearing, the witness shall  
24 not have availed himself/herself of the  
25 opportunity to sign or the signature has been  
waived.

I further certify that I am neither  
related to nor counsel for any party to the cause  
pending or interested in the events thereof.

Witness my hand, I have hereunto  
affixed my official seal on December 28th, 2021  
at Charleston, Charleston County, South Carolina

\_\_\_\_\_  
Jennifer M. Huggins  
Court Reporter And Notary Public  
My commission expires: 02/07/2022

1 STATE OF SOUTH CAROLINA  
IN THE COURT OF COMMON PLEAS  
2 COUNTY OF CHARLESTON  
FOR THE NINTH JUDICIAL CIRCUIT

3 BALFOUR BEATTY CONSTRUCTION, )  
4 LLC, ) VOLUME THREE  
) Case No.  
5 Plaintiff, ) 2019-CP-10-1108  
)  
6 -versus- )  
)  
7 LIBRARY ASSOCIATES, LLC; AND )  
METROPOLITAN LIFE INSURANCE )  
8 COMPANY, A NEW YORK CORPORATION )  
)  
9 Defendants.)

10 ----- )  
LIBRARY ASSOCIATES, INC., )  
)  
11 Defendant/Third-Party Plaintiff, )

12 -versus- )  
)

13 LITHKO CONTRACTING, LLC; GUY M. )  
BEATY, INC.; BERNHARD MMC, LLC )  
14 GULF STREAM CONSTRUCTION CO., )  
INC; PRECISION WALLS, INC.; )  
15 PALMETTO AUTOMATIC SPRINKLER )  
COMPANY, INC.; ET AL, )  
16 )  
17 Third-Party Defendants. )  
-----

18 Hearing before the Honorable Mikell R.  
19 Scarborough, reported by Jennifer M. Huggins,  
20 Court Reporter and Notary Public, at 9:00 a.m. on  
21 September 15, 2021 at 100 Broad Street, Courtroom  
22 2A, Charleston, South Carolina.

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## 1                   A P P E A R A N C E S

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