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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

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

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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1 THE COURT: All right, folks. Hope
2 y'all had a decent night. Are we ready to
3 commence day three?

4 MR. HILDEBRAND: We are, Your
5 Honor.

6 THE COURT: All right,
7 Mr. Hildebrand.

8 MR. HILDEBRAND: Thank you.
9 Mr. Spano, would you come back to the stand,
10 please.

11 THE COURT: Mr. Spano, come on up.
12 All right, sir. Mr. Spano, you're still under
13 oath.

14 THE WITNESS: Yes, sir.

15 THE COURT: Thank you, sir, very
16 much.

17 All right. Mr. Hildebrand?

18 MR. HILDEBRAND: Thank you, Your
19 Honor.

20 DIRECT EXAMINATION

21 BY MR. HILDEBRAND:

22 Q. Mr. Spano, I'd like to thank you for
23 being here this morning. You were advised at the
24 last -- before you left the last time not to have
25 any communications or discussions with anybody,

1 and I presume that you complied with that; is
2 that correct?

3 A. Yes, sir.

4 Q. All right. I'd like to work through
5 some documents with you, and this will be in
6 notebook number 2.

7 Actually, let's go to number 1 for just
8 a second. There is one in there that I want to
9 introduce. Turn to Exhibit 11, which is at the
10 very, very back, or about halfway through.
11 There's a number of tabs, but it's -- the very
12 last one is 12. The one before that is number
13 11.

14 MR. BUNDY: Your Honor, I object to
15 referring to these documents as exhibits.
16 They're not exhibits.

17 THE COURT: Right. He just said
18 tab 11.

19 MR. HILDEBRAND: Yes, sir.

20 THE COURT: And I don't have one
21 yet; so when y'all put it in there and mark it,
22 you can give it to me. All right?

23 MR. HILDEBRAND: Thank you, Your
24 Honor.

25 BY MR. HILDEBRAND:

1 Q. Tab 11, do you see that?

2 A. I do.

3 Q. All right. And it's Exhibit 28 to Kim
4 Brown's deposition, and it's titled the exhibit
5 for Hotel Marion Square opening master
6 construction request for change order log. Can
7 you identify that document?

8 A. I can.

9 MR. BUNDY: What document are you
10 talking about? What book are you on?

11 MR. HILDEBRAND: Number 1.

12 MR. BUNDY: Number 1, tab what?

13 MR. HILDEBRAND: It's in the first
14 book.

15 MR. BUNDY: Okay. It's in the
16 first book. What tab is it?

17 THE WITNESS: The last one.

18 MR. BUNDY: But for the record, the
19 book you gave me has two 11s, and so this is the
20 second 11. I just wanted to get that straight.

21 MR. HILDEBRAND: Yeah.

22 MR. BUNDY: Okay.

23 BY MR. HILDEBRAND:

24 Q. All right. What is that document,
25 Mr. Spano?

1 A. This is just the change order, a request
2 log.

3 Q. Okay. Could you speak up a little bit,
4 please?

5 A. A change order log.

6 Q. All right. And what is a change order
7 log?

8 A. It's to keep track of all of the change
9 orders that have been submitted or approved or is
10 still waiting for approval.

11 Q. Okay. And is this in -- generally in
12 sequential order, so if we can start with number
13 1, that would be the first change order.

14 MR. BUNDY: Wait, wait, wait. I
15 object. This document is not in evidence.

16 THE COURT: Right.

17 MR. BUNDY: And so before we go
18 down that road, I would like to get some
19 foundation. Okay? On the -- on the face of it,
20 it is not admissible. Okay?

21 Because there's no -- this a summary
22 prepared by I don't know whom, and it doesn't
23 really matter. All of those change orders are --
24 need to be put into evidence, if they're going to
25 talk about them.

1 The log is a summary of un-introduced
2 evidence that he's going to talk about. It's
3 hearsay. It doesn't meet any rule of evidence.
4 It doesn't meet any exception. Thank you, Your
5 Honor.

6 THE COURT: Okay. So right now
7 you're on the summary? You plan to introduce the
8 underlying change order?

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: Okay. I'll allow it,
11 and you can link it up later. Okay?

12 MR. HILDEBRAND: Thank you, Your
13 Honor. In fact, I will lay some more foundation.
14 BY MR. HILDEBRAND:

15 Q. Is this part of the business records of
16 Balfour Beatty?

17 A. Yes.

18 Q. And it's updated contemporaneously with
19 the data that is shown and --

20 A. Yes.

21 Q. -- maintained in the normal course of
22 business?

23 A. Yes.

24 MR. HILDEBRAND: All right. I
25 would like to move this exhibit into evidence,

1 Your Honor.

2 THE COURT: This being the summary
3 of the tab 11?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: Okay. Any objection?

6 MR. BUNDY: Yes, there's an
7 objection. He hasn't testified that he has any
8 personal knowledge of any of this. He's just
9 simply asked -- he just simply responded to a
10 bunch of canned questions.

11 THE COURT: Yeah.

12 MR. BUNDY: Is it a business
13 record? That's the ultimate question. You don't
14 ask the witness to make the ultimate opinion.
15 That's your job.

16 THE COURT: Go ahead and lay the
17 foundation, who prepares it and that kind of
18 stuff.

19 MR. HILDEBRAND: Well, it's
20 prepared by Balfour. Your Honor, I think the
21 business records are an exception to the --

22 THE COURT: They are if the proper
23 foundation is laid. I'm with you on that one.

24 MR. HILDEBRAND: All right, sir.

25 BY MR. HILDEBRAND:

1 Q. So this document is kept in the normal
2 course of business, correct?

3 A. Yes, it is.

4 Q. And do you have personal knowledge of
5 this document as it is being --

6 MR. BUNDY: Objection. He's
7 leading his witness. He's leading.

8 THE COURT: Let him finish. Let
9 him get the question out.

10 MR. HILDEBRAND: Thank you, Your
11 Honor.

12 BY MR. HILDEBRAND:

13 Q. Do you have personal knowledge about
14 this document and the data that goes into it?

15 A. I do.

16 Q. All right, sir. And does this document
17 reflect the data that it purports to relate, to
18 your knowledge?

19 A. Yes.

20 THE COURT: How about who prepares
21 it and how it's prepared, that kind of stuff.

22 MR. HILDEBRAND: Sure. All right.

23 BY MR. HILDEBRAND:

24 Q. Who prepares this document and tell
25 the -- explain to the Judge how this document --

1 it's an ongoing document. Can you tell me how
2 it's updated and who updates it and such?

3 A. Yeah. So we get -- when we get a
4 request for pricing or if we get say a change in
5 drawings or -- that we have to price; so we will
6 request an RCO, request for change order. We
7 will go to our subs. We will get pricing, and we
8 will come back once we've compiled all the
9 information.

10 When I say "we", it's a combination of
11 our project engineer, our APM, our PM. Then
12 we'll compile the information, and then we will
13 submit it to the owner for approval,
14 non-approval, whatever.

15 So what we do is, when we get a request
16 for change order or a change order, we put it in
17 this form so that we can track from one to the
18 end and basically keep track of what's approved,
19 what's not approved so the funds are shown in
20 non-approved.

21 Once it's approved, it would slide over
22 to an approval so that we can keep track -- a
23 track record of the change orders.

24 THE COURT: All right. And what
25 this purports to be is a summary of those items?

1 THE WITNESS: Yes, sir.

2 THE COURT: Okay. All right.

3 MR. HILDEBRAND: I would then move
4 to introduce this into evidence, Your Honor.

5 THE COURT: Okay. I'll allow it.

6 MR. BUNDY: I'm still maintaining
7 my objection.

8 THE COURT: Overruled. Yep.

9 MR. BUNDY: Thank you, Your Honor.

10 (PLF. EXH. 11 was marked for
11 identification and admitted into evidence.)

12 BY MR. HILDEBRAND:

13 Q. All right. So if we turn to the last --
14 let's turn to book 2. Are you there?

15 A. I'm there. I don't know where we're
16 going.

17 Q. Okay. These are -- it's some OAC
18 meeting notes, and I want to ask you some
19 questions about those and the OAC meeting
20 process. Can you describe to the Judge -- what
21 does OAC mean?

22 A. Owner, architect, contractor meeting.

23 Q. Okay. And how often would OAC meetings
24 be held on this job?

25 A. Some biweekly, weekly, monthly,

1 different times.

2 Q. Okay. Who --

3 A. But definitely every month for sure.

4 Q. Okay. Who determined when an OAC
5 meeting would be held? How would they schedule
6 them?

7 A. A combination between the architect and
8 the owner's rep and us would coordinate a date or
9 a time to have an OAC meeting scheduled.

10 Q. Okay. And when you say, "the owner's
11 rep", who would that be?

12 A. Jim Clements.

13 Q. All right. So who would actually send
14 out the invite and get them scheduled? Do you
15 know?

16 A. I don't recall if we sent the schedule
17 or not. I think we did, but --

18 Q. All right. Let's turn to tab 13, and
19 this is marked as Exhibit 75 to Mr. Clements'
20 deposition. And this shows the project hotel at
21 Marion Square, meeting name, OAC, meeting date
22 3/19/2015, meeting number 5, correct?

23 MR. BUNDY: Your Honor, I hate to
24 interrupt him, but we're going to have a mess of
25 a record if we do it this way.

1 THE COURT: Okay.

2 MR. BUNDY: I would respectfully
3 request that the Court require the lawyer to have
4 the exhibit marked for identification purposes in
5 this trial so that it will be a clean record as
6 to what you're ruling on and what we're talking
7 about.

8 I mean, this is a deposition exhibit. I
9 don't know -- I'm not familiar with this process.
10 So can we please get them ID'd?

11 THE COURT: All right. I'm going
12 to presume, just for the record, that they are
13 marked for identification purposes --

14 MR. BUNDY: Okay.

15 THE COURT: -- as they are in the
16 book, and then as presented, then we'll lay the
17 foundation to make sure that they're introduced.

18 MR. BUNDY: Okay.

19 THE COURT: So they're considered
20 for ID purposes, but they're not in evidence
21 until moved into evidence.

22 MR. BUNDY: Right.

23 THE COURT: Okay?

24 MR. BUNDY: Maybe I'm not -- I
25 would like to give them a number now. In other

1 words, if when he uses it, instead of using
2 deposition exhibit so-and-so, right?

3 THE COURT: Right.

4 MR. BUNDY: What I'd rather him say
5 is, you know, what is the next exhibit. You tell
6 him 17. Okay. 17 for ID so I can put 17 down on
7 this piece of paper so we have -- the court
8 reporter has a record. She's going to have a
9 heck of a time putting this record together if we
10 don't do it the right way.

11 THE COURT: Well, let me cover that
12 with y'all right off the bat because you're going
13 to be in for a surprise when all this is said and
14 done. Under our current rules of procedure, any
15 documents that are going to make the record are
16 now going to be put into the record by the
17 lawyers. Okay?

18 MR. BUNDY: Okay.

19 THE COURT: The court reporter no
20 longer handles the exhibits. So all this
21 burdensome work that's going to happen doesn't
22 happen on our side anymore.

23 MR. BUNDY: Okay.

24 THE COURT: It happens on the
25 lawyers' side. This all has to do with this case

1 management system and the uploading of exhibits
2 for the record on appeal. I warned
3 Mr. Hildebrand about that briefly yesterday, but
4 I want everybody to know. That's the new
5 procedure.

6 MR. BUNDY: Sure.

7 THE COURT: So what I'm going to --
8 as far as -- the defendants has put forth 1
9 through whatever. It never matters to me in what
10 order they come in. It does matter that we be
11 able to identify them.

12 And so what Mr. Hildebrand has done on
13 his side is reference the tab numbers. So we
14 will call it a tab number until it becomes an
15 exhibit, at which time we will call it an exhibit
16 number. Okay?

17 MR. BUNDY: Okay.

18 THE COURT: Just so we're clear.

19 MR. BUNDY: Well, and I don't want
20 to argue with you, but if the State of South
21 Carolina or the County of Charleston is now
22 putting it on me or the judiciary is putting it
23 on me --

24 THE COURT: That would be the
25 State.

1 MR. BUNDY: -- the State, whatever,
2 then I've now got to do a job that I used to pay
3 them to do that now they refuse to do and they
4 want me to do it. Okay?

5 Well, if they want me to do it, I should
6 be able to have some say in how it's done, right?
7 So that type of identification, tab number
8 so-and-so, we've got five books. We had two 11's
9 in the same book. So what is the record going to
10 do? You know what I'm saying, Judge?

11 THE COURT: I'm with you. I'm with
12 you. I'm with you.

13 MR. BUNDY: Okay.

14 THE COURT: And just because it's
15 in the book does not necessarily mean it's going
16 to make the record.

17 MR. BUNDY: No, sir. No, sir.
18 That's not what I'm saying. What I'm saying is,
19 it has to be identified -- it has to be
20 identified first so we can find it later
21 regardless of how you rule on it. All right?

22 THE COURT: Okay. All right.

23 MR. BUNDY: So he may identify
24 something and never move to put it into evidence.
25 I don't know what he's going to do, but if the

1 identification in the record is tab 11, there are
2 at least 10 tabs 11's in these five books.

3 Now, if he wants to go through and say
4 tab -- the first tab 11 in the book of 5
5 introduced by yesterday, we can do that. But
6 wouldn't it be easier just to say, Plaintiff's
7 Exhibit 10 for identification and move on?

8 THE COURT: It would be, but
9 that's -- but we've got too much documentation
10 for that. So we're going to do it in the fashion
11 that it's been presented. What I do need to make
12 sure that we're clear on because we've got -- I
13 don't know how many books y'all have got -- four,
14 five books, whatever it is. It's book 1, tab 11.

15 MR. HILDEBRAND: Absolutely.

16 THE COURT: Book 2, tab 13.

17 MR. BUNDY: That's fine.

18 THE COURT: I want to make sure
19 that's clear. Okay? So we are now in book 2,
20 tab 13, I believe it is.

21 MR. HILDEBRAND: Right, Your Honor.
22 And I was trying to respond to his earlier
23 objection to refer them to tabs rather than
24 exhibits that are marked for identification. So
25 anyway --

1 THE COURT: I'm with you.

2 MR. HILDEBRAND: Thank you, Your
3 Honor.

4 THE COURT: As long as we're
5 talking about the same thing, and I do agree that
6 the record needs to be clear. That's my job is
7 to make sure that's clear.

8 MR. HILDEBRAND: And I was also
9 trying to do that by -- to lay a foundation for
10 this, identify the change order, when it was, the
11 number to make it clear.

12 THE COURT: To make sure we're
13 talking about the same document?

14 MR. HILDEBRAND: Yes, sir.

15 THE COURT: I'm with you.

16 MR. HILDEBRAND: Thank you.

17 BY MR. HILDEBRAND:

18 Q. All right. So tab 13, which I have not
19 yet moved into evidence, is an OAC meeting. We
20 were talking about OAC meetings. Do you remember
21 that?

22 A. Yes.

23 Q. And I asked you what the -- who
24 scheduled them, and you said you weren't really
25 sure, you said, but they were scheduled sometimes

1 weekly, sometimes every other week, sometimes
2 monthly, correct?

3 A. Monthly with the whole party. It would
4 just be called sometimes on a weekly, biweekly.
5 Sometimes you'd get a call to put everyone on.
6 But the official OAC meeting would be once a
7 month.

8 Q. Okay. And would some people attend it
9 in person, or how was the attendance in the
10 meetings? How was that done?

11 A. Yeah. Some would be -- most I guess, as
12 far as from our management, Jim Clements was
13 always there. The architects sometimes would be
14 there in person; sometimes it might be on a call.

15 Kim Brown would be there sometimes in
16 person, sometimes on a call, sometimes not. So
17 some of the people kind of -- between Jim,
18 Matrix, BBC, the architect, they were always on
19 the call or in person.

20 Q. Okay. So whenever there was an OAC
21 meeting, was there some aspect of that that was
22 always in person, or would there be some where
23 everybody might be on a Zoom call or something
24 like that?

25 A. No. We didn't really utilize Zoom.

1 Q. So they were in person?

2 A. Yeah.

3 Q. Okay. So on this exhibit, where it says
4 attendees -- where it says attendees and copies
5 to, do you see that right there at the very top?

6 A. I do.

7 Q. Where it says attendees, would those be
8 people who were there in person?

9 A. Yes.

10 Q. And the copy to, those would be the
11 people who were not in person?

12 A. I think they're copied on the official
13 send out of the OAC meeting. So the copy to
14 wouldn't necessarily be there or be on the call.
15 They were just copied on, I guess, the OAC
16 minutes that would be sent out.

17 Q. Okay. I'm looking down at the
18 attendees, and it shows that you were an attendee
19 at this meeting, correct?

20 A. Yes.

21 Q. And are you familiar with these OAC
22 meeting minutes?

23 A. I am.

24 Q. All right, sir. And these are made --
25 they're drafted by -- as a result of this

1 meeting, but they are provided in part of the
2 business records of Balfour Beatty; is that
3 correct?

4 A. Yes.

5 Q. All right, sir.

6 MR. HILDEBRAND: I'd like to move
7 this into evidence at this time, Your Honor.

8 MR. BUNDY: No objection.

9 THE COURT: Very good. In
10 evidence.

11 (PLF. EXH. 13 was marked for
12 identification and admitted into evidence.)

13 BY MR. HILDEBRAND:

14 Q. All right. Let's turn to the -- before
15 we get into the meat of it, let's turn to page 3
16 in the very last paragraph, if you would, sir.

17 THE COURT: I'm sorry, page what?

18 MR. HILDEBRAND: The very last
19 page, yes, sir, page 3.

20 THE COURT: All right.

21 MR. HILDEBRAND: Where it starts,
22 this memorandum is submitted.

23 THE COURT: Okay.

24 BY MR. HILDEBRAND:

25 Q. This memorandum is submitted for the

1 purpose of summarizing the important details of
2 the conference noted above and to confirm the
3 understanding of the items discussed.

4 Please read these minutes carefully and
5 notify the writer within five business days of
6 issuance if any changes or corrections need to be
7 made. Do you know who actually compiled this
8 data?

9 A. This was -- that put the minutes
10 together?

11 Q. Yes, sir.

12 A. Jim with Matrix.

13 Q. Jim Clements?

14 A. Yeah.

15 Q. All right, sir. So tell me -- you
16 described when these meetings -- when the OAC
17 meetings take place, what was the nature of them?
18 What were they for? Why did you have an OAC
19 meeting?

20 A. To coordinate ownership, construction,
21 contractor, designers, or to talk about issues,
22 talk about pay apps, the schedule, just a
23 conglomeration of what's going on in the project
24 and what's coming and things like that.

25 Q. It's a chance to get everybody at the

1 table at the same time and to -- anything that
2 anybody wanted to talk about they could talk
3 about; is that right?

4 A. Right. Correct.

5 Q. Any issues that came up?

6 MR. BUNDY: Objection, leading.

7 THE COURT: Noted. Go ahead.

8 BY MR. HILDEBRAND:

9 Q. Were people allowed to -- was it
10 appropriate or not for people to raise issues in
11 these meetings if they had them with other
12 members?

13 A. Yes. Anything that was going on on the
14 job, that was the time to talk about it, anything
15 that needed to be discussed.

16 Q. Okay. And each of those three parties
17 would determine who they felt was appropriate to
18 attend these meetings; is that correct?

19 A. Yes.

20 Q. All right, sir. All right. So let's
21 turn to page 1, if we could. This is meeting
22 date, March 19, 2015. So that would have been
23 right at the very beginning of the project,
24 correct?

25 A. Correct.

1 Q. All right. Let's turn to -- under
2 number 1, do you see that is design?

3 A. Design.

4 Q. Right in the middle, it says design --

5 A. Yes.

6 Q. -- at the top. What does that
7 designate?

8 A. That's the architect's update.

9 Q. All right. And then later on, there's a
10 section on the second page, a section for
11 construction; is that correct?

12 A. Yes.

13 Q. So where it says design, that's -- those
14 are -- so let's turn to, under design 1.01, the
15 second bullet under that.

16 Under design, Matrix noted that BBC will
17 complete its purchasing by mid April and the lack
18 of coordinated drawings places Library Associates
19 at risk and requested WLA and DCI work out a
20 quicker turnaround. Do you remember what the
21 basis was for why that note was being made?

22 A. I don't remember the exact detail of it,
23 no.

24 Q. When it says --

25 MR. BUNDY: Note, objection.

1 MR. HILDEBRAND: I'm sorry. What
2 was the objection?

3 THE COURT: Basis for the
4 objection? I'm sorry.

5 MR. BUNDY: The objection is, he
6 said he didn't know anything about it. Now, he's
7 getting ready to ask -- now, he's getting ready
8 to read it into the record to him. I mean,
9 he's --

10 THE COURT: Well, he hasn't asked
11 the question yet.

12 MR. BUNDY: Okay.

13 BY MR. HILDEBRAND:

14 Q. My simple question was, where it says
15 WLA and DCI, can you tell the Judge who DCI is,
16 please?

17 A. Yes, the interior designer for the
18 owner.

19 Q. And do you know what that acronym stands
20 for?

21 A. Design continuum. I don't know if it's
22 incorporated or not. I don't remember the I.

23 Q. Okay. All right. Thank you, sir.
24 Let's turn to the next page. This is tab 14, and
25 it is OAC meeting number 25 dated August 20,

1 2015. Do you see that?

2 A. Under 14, I see meeting number 26.

3 Q. I'm sorry. That's right. Did I say 25?

4 A. Yes, sir.

5 Q. I misspoke. It's 26. All right. And
6 it shows that you were an attendee of that
7 meeting; is that correct?

8 A. That's correct.

9 Q. All right, sir. And Jennifer
10 Faulkinberry and Kim Brown were shown as
11 attendees, correct?

12 A. Correct.

13 Q. All right. Let's turn --

14 THE COURT: I'm sorry, which number
15 was that one? Are we still on the same document,
16 14?

17 THE WITNESS: 14.

18 THE COURT: 14.

19 MR. HILDEBRAND: 14.

20 THE COURT: All right, sir.

21 MR. HILDEBRAND: All right. I'd
22 like to move this into evidence, Your Honor.

23 MR. BUNDY: No objection.

24 THE COURT: Without objection.

25 MR. HILDEBRAND:

1 Q. All right, sir. Let's turn to the
2 second page of that document, about two-thirds
3 down, 1.10. Do you see that?

4 A. I do.

5 Q. The second bullet, BBC noted the eighth
6 floor ceiling is loaded with conflicts and
7 requested one of the units that form that floor
8 to be included in the mock-up. Do you remember
9 what the discussion was on that and what that
10 note was referring to?

11 A. The mock-up was something we did. We
12 did an off-site mock-up early on for the owners.
13 So we built a king suite and a queen suite so
14 that we could figure out and get all the details
15 worked out, of course, up front.

16 So when we refer to the mock-up, that's
17 what it's referring to. The eighth floor
18 ceiling -- the eighth floor was where we met --
19 above it was basically -- the ninth floor was a
20 bar and all that, but a lot of the mechanical
21 equipment and a ton of ductwork was in that
22 ceiling.

23 So there was probably more in that
24 ceiling than there was in any other floor to fit
25 everything. So that was -- we're basically

1 referring to getting all the mechanical and
2 everything into -- fitted into the model.

3 Q. Okay. So this is an early notice in the
4 OAC meeting to the designer of issues that needed
5 to be resolved; is that fair to say?

6 A. Yes.

7 Q. All right. Let's turn to the next page,
8 page 3, please, at the very top under -- this was
9 under construction 2.01, the very top one.

10 It was agreed by all that the target
11 turnaround for RFIs is seven days and submittals
12 is 15 days. There will be exceptions as in the
13 case of the hardware submittal that will take
14 three to four weeks.

15 Do you remember going through the
16 contract yesterday when he said that the owner
17 and architect would respond to requests for
18 information or when they had to provide
19 information, it was to be in a reasonable time?

20 A. Yes.

21 Q. This discussion, I guess, clarified that
22 as far as the parties were concerned of putting
23 time limits on that? Agreed upon time and date;
24 is that correct?

25 A. Yes.

1 Q. All right. Let's turn to tab 15. This
2 is meeting number 49, dated -- the meeting date
3 is 4/6/2016. So construction was processing by
4 this point, correct?

5 A. Yeah, at that point. Yeah, April of
6 '16.

7 Q. Right. So kind of tell us -- just tell
8 me where the -- in general terms, where the
9 construction was at that point.

10 A. I recall they're somewhere around the
11 first, second floor, probably somewhere in that
12 range as far as coming up with the structure.

13 Q. Okay. All right. Under -- under number
14 1 design again, if we turn to the second page,
15 1.16, right there in the middle.

16 A. Yes.

17 Q. All right. It says BIM coordination.
18 So that's under the design section, correct?

19 A. Correct.

20 Q. It says, still working to finish one and
21 two. Team concerned with staying ahead of
22 concrete pour schedule. Likely no opportunity to
23 jump ahead to eight and nine. So you're working
24 on the second floor; is that right?

25 A. That's correct.

1 Q. All right. So can you explain to the
2 Judge what this note reflects from your
3 understanding?

4 A. First and second floor in the BIM
5 design, there was indirect HVAC changes. So
6 there was adjustments being made to the trunk
7 lines and branch lines to the A/C equipment to
8 try to basically hide the registers and the
9 grills and make it more pleasurable to the eye.

10 So that was going on. There was a -- I
11 know with the removal of the columns and things
12 where some of the beams got larger, that was some
13 of the conflict, working through some of the
14 areas. So that -- I remember that as being one
15 of the main issues, just getting through the
16 mechanical design on one and two.

17 Q. Okay. So some of the issues that later
18 became problematic changes or such, but were
19 actually noted by Balfour fairly early; is that a
20 fairly statement?

21 MR. BUNDY: Objection, leading.

22 THE COURT: Sustained.

23 BY MR. HILDEBRAND:

24 Q. Okay. Let's turn to tab 16, if you
25 will.

1 THE COURT: I want to make sure.

2 Did 15 get moved into evidence?

3 MR. HILDEBRAND: Oh, I'm sorry.

4 MR. BUNDY: No objection, sorry.

5 THE COURT: All right. Very good.

6 THE WITNESS: Which tab were we
7 moving to?

8 MR. HILDEBRAND:

9 Q. Yes. 16 is the next tab. And the first
10 document under that tab is a OAC meeting agenda
11 for 21 April 2016. Do you see that?

12 A. Yes.

13 Q. Were you provided these agendas prior to
14 the meetings?

15 A. Yes.

16 Q. Can you identify this document as part
17 of the business records?

18 A. Uh-huh.

19 MR. HILDEBRAND: I would like to
20 introduce this tab as my next exhibit, Your
21 Honor.

22 MR. BUNDY: And it's got the
23 meeting minutes behind it. Do you want to put
24 all of that in?

25 MR. HILDEBRAND: Yes.

1 MR. BUNDY: No objection.

2 THE COURT: Without objection.

3 BY MR. HILDEBRAND:

4 Q. All right. This is meeting number 51,
5 April 21, 2016. And under 1.16, under -- and
6 that's under the architect section, BIM
7 coordination, under the second tab.

8 BIM coordination complete through five.
9 WLA to complete all tub coordination next week.
10 What did that mean: BIM coordination was
11 complete through five?

12 A. That the model that was built and
13 everything was included in that model.

14 Q. Okay. So things are looking good at
15 this point?

16 A. Uh-huh.

17 Q. Please answer.

18 A. Yes. Yes.

19 Q. Thank you, sir. All right, sir. Tab
20 17.

21 MR. HILDEBRAND: I'd like to move
22 this into evidence, Your Honor, the next OAC
23 meeting number 66.

24 MR. BUNDY: No objection.

25 THE COURT: All right. Without

1 objection.

2 MR. HILDEBRAND:

3 Q. All right. You are an attendee to this
4 meeting as well, correct?

5 A. Correct.

6 Q. All right. Let's turn to the third
7 page, 2.04, where it says building. Do you see
8 that?

9 A. Yes.

10 Q. The first bullet under building six west
11 pour. Date is impacted by various conflicts on
12 both west and east sides. Follow up BIM call
13 tomorrow in the hopes of starting MCC with sleeve
14 layout on Monday. Can you explain what that note
15 is referring to?

16 A. That we were finishing up the tables on
17 the sixth floor or part of the sixth floor to
18 basically be able to start laying out our sleeves
19 that go on the slab, the location. The sleeves,
20 the location of the penetration that have to go
21 through that floor.

22 Q. Okay.

23 THE COURT: What does MCC stand for
24 here?

25 THE WITNESS: The Bernhart

1 mechanical contractors.

2 THE COURT: Okay. That's the
3 company?

4 THE WITNESS: They did the plumbing
5 and the mechanical on the project.

6 THE COURT: Okay. All right.
7 Thank you.

8 MR. HILDEBRAND: It says MCC, but
9 usually they're referred to as BMCC.

10 THE WITNESS: BMCC purchased them
11 sometime during the construction process, and
12 they went Bernhart MCC.

13 THE COURT: Okay. Gotcha.

14 BY MR. HILDEBRAND:

15 Q. All right. Let's move to tab number 20,
16 if you would, please.

17 MR. HILDEBRAND: This is meeting
18 notes January 11th, 2018, meeting number 132, and
19 I would like to move this into evidence, Your
20 Honor.

21 MR. BUNDY: No objection.

22 THE COURT: Without objection.

23 MR. HILDEBRAND: All right.

24 (PLF. EXH. 20, marked for
25 identification and admitted into evidence.)

1 MR. HILDEBRAND:

2 Q. All right. Now, this is a bit later in
3 the project; is that right?

4 A. January 11, 2018.

5 Q. All right. So where was the -- can you
6 explain to the Judge where the building was at
7 that point?

8 A. At that point, we were, I would say,
9 right at the topping out point to where we get
10 our last structural main slab poured on the ninth
11 floor, getting to basically the shell of the
12 project up to the top.

13 Q. All right, sir. And can you turn to
14 page 6 of that document, please? And at the top,
15 where it says, schedule impact.

16 A. Yes.

17 Q. All right. Do you see that?

18 A. Yes.

19 Q. Schedule impact status quo. Outside of
20 meeting, BBC advised the following RCOs,
21 requested change orders, have or may have
22 schedule impact and need LA, Library Associates'
23 decision. Matrix advised BBC to outline impact
24 to assist Library Associates with a timely
25 resolution. Did I read that correctly?

1 A. Yes.

2 Q. And what were the -- what were the items
3 under there that were -- when it refers to
4 numbers there, those were what? Reflect RCOs?

5 A. RCOs, yes.

6 Q. All right. So when we look at the RCOs,
7 we can determine which requested change orders
8 y'all were talking about that y'all need
9 information in order to stay on schedule. Is
10 that a fair statement?

11 A. Correct, yes.

12 Q. All right. Let's turn to tab 23, and
13 this is meeting number 151 5/24/2018.

14 MR. HILDEBRAND: And I would like
15 to move this into evidence.

16 THE COURT: All right.

17 MR. BUNDY: One minute. Let me
18 just make sure all the pages are here.

19 THE COURT: All right.

20 MR. BUNDY: No objection.

21 THE COURT: All right, sir. Very
22 good. Okay.

23 (PLF. EXH. 23 was marked for
24 identification and admitted into evidence.)

25 BY MR. HILDEBRAND:

1 Q. Let's turn your -- let's turn to page 4
2 of this document. Okay? All right. Kind of
3 halfway down, 2.04, construction progress update,
4 a schedule for May update issued.

5 Matrix noted the amount of slippage in
6 the schedule with CVCDs for stair four and
7 private dining and requested a meeting with BBC
8 next week to review mitigation measures.
9 Substantial completion date has slipped to 26
10 October.

11 Can you explain to the Judge what
12 slippage is, slippage in the schedule?

13 A. Yeah. From the previous schedule where
14 we showed the status of that particular area
15 where stair four was slid to the right or later
16 in the project.

17 Q. Okay. So slippage is basically a delay;
18 is that right?

19 MR. BUNDY: Objection. That's not
20 what he said.

21 THE COURT: Go ahead. Rephrase it.
22 BY MR. HILDEBRAND:

23 Q. So slippage in the schedule, what is
24 that?

25 A. Delay to the schedule.

1 Q. Okay. I don't want to put words in your
2 mouth. You tell, in your words, what is slippage
3 in the schedule? Explain that to the Judge.

4 A. Slippage is a delay in the schedule. A
5 schedule is delayed from where it was before.

6 Q. It's as simple as that?

7 A. Yeah.

8 Q. All right. Where it says, CVCDs for
9 stair four. What are CVCDs?

10 A. A change directive that's given by the
11 architect.

12 Q. Okay. What was the issue here and why
13 was the schedule slipped?

14 A. Stair four and private dining, there
15 were -- we received a CC, or a change directive,
16 for stair four to basically change the millwork
17 in the stair, change the stair rails to a glass
18 handrail, which was a long lead to get that
19 product, the finishes on the stairs.

20 So in that -- any staircase is an egress
21 point out of the building; so it's a critical
22 area to have a change to at that point in the
23 project.

24 Q. Okay. Were you awaiting information or
25 who was the -- what was the reason for the delay

1 at this point? What was the reason for the
2 slippage?

3 A. We received the change directive, and a
4 change directive is basically a time and
5 material, it's how we proceed; so talking to
6 subcontractors for particular materials.

7 Like I said, glass handrails, getting a
8 projection of how long the procurement would take
9 to get it in to where we could put the product
10 into the job. So that -- and just lining up all
11 the processes that had to happen with that change
12 is what -- where it pushes that schedule to.

13 Q. Okay. So there was a change in some
14 aspect of the project that resulted in slippage;
15 is that fair?

16 A. Yes.

17 Q. All right. And where did that change
18 originate?

19 A. It came from the architect.

20 Q. All right. Let's turn to the next
21 meeting minute or the next tab, which is 24.
22 Meeting number 158 7/12/2018.

23 MR. HILDEBRAND: I would like to
24 move that into evidence, Your Honor.

25 MR. BUNDY: No objection.

1 THE COURT: All right. Without
2 objection.

3 (PLF. EXH. 24 was marked for
4 identification and admitted into evidence.)

5 MR. HILDEBRAND:

6 Q. And that shows on the first page, Kim
7 Brown as an attendee. Did she attend most of
8 these meetings to your recollection?

9 A. It was hit and miss. Not as many in
10 person, more on the phone.

11 Q. Okay. All right. Let's turn to -- so
12 this is the prior OAC meeting notes, which were
13 tab 23. And I think it's Exhibit 23 now, 151.
14 The date on that was 5/24/2018. This one is
15 dated 7/12/2018, but it's about a month and a
16 half later or so, six weeks later?

17 A. Correct.

18 Q. Let's turn to page 5 of that, if you
19 would please. 2.04, construction progress update
20 for May update issue. Matrix noted the amount of
21 slippage in the schedule with CCDs for stair four
22 and private dining and request a meeting with BBC
23 next week to review mitigation measures.

24 Substantial completion date has slipped
25 to 26 October, status quo. So had the issue and

1 the information that you had received, had
2 requested previously, had it been provided by
3 that date?

4 A. Say that again, please.

5 Q. There was an earlier note that there was
6 slippage in the schedule because of a design
7 change. Had the design change issues been
8 resolved at this point to allow you to proceed?

9 A. No.

10 Q. All right. Let's turn to -- I would now
11 like to turn to a new topic, which are the
12 project schedules. And that is under tab 26.
13 Are you with me?

14 A. I am.

15 Q. All right. Do you recognize this
16 document?

17 A. I do.

18 Q. And is this a document generated by
19 Balfour Beatty?

20 A. It is.

21 Q. All right. Tell me about -- let's go
22 over to this. Are you familiar with the
23 schedules on this project?

24 A. I am.

25 Q. Have you reviewed them?

1 A. Yes.

2 Q. All right. Would you review them while
3 the project was ongoing?

4 A. Yes. It was a constant moving of pieces
5 of material. So as the project processed,
6 updates were constantly being made and would be
7 adjusted monthly.

8 Q. Okay. And are these schedules part of
9 the business records of Balfour Beatty?

10 A. Yes.

11 Q. Okay. And they're updated
12 contemporaneously as the project proceeds; is
13 that correct?

14 A. Correct.

15 MR. HILDEBRAND: Okay. I'd like to
16 move this as the next exhibit, Your Honor.

17 MR. BUNDY: Objection.

18 THE COURT: Okay.

19 MR. BUNDY: First off, what tab is
20 this from?

21 THE COURT: 26.

22 MR. BUNDY: 25?

23 THE COURT: 26.

24 MR. HILDEBRAND: I'm sorry. I
25 misspoke. It's actually 25.

1 THE COURT: It is 25? I'm sorry.

2 All right. Hold on.

3 MR. BUNDY: Well, the exhibit I
4 have for 25 doesn't say -- that's what you are
5 talking about, right?

6 THE COURT: What's on the screen,
7 yes.

8 MR. BUNDY: Yeah because the one
9 that was on the screen before wasn't 25.

10 THE COURT: Okay.

11 MR. BUNDY: I'm just trying to make
12 sure that we're not making one more -- make it
13 even more problematic. I at least like to look
14 at what -- on the screen, what we've got in front
15 of the witness.

16 THE COURT: Okay.

17 MR. HILDEBRAND: My mistake. I
18 apologize.

19 THE COURT: So we should be at 25?

20 MR. HILDEBRAND: Yes, sir.

21 MR. BUNDY: I object to this
22 document. There's been absolutely no foundation
23 for it. He asked the ultimate question, is this
24 a business record.

25 If that was all that was required, you

1 wouldn't even have a business record rule, would
2 you, Judge? He's got to lay a foundation. This
3 man doesn't know -- he had nothing -- let's see
4 if he can do it.

5 THE COURT: All right. Put a
6 little more foundation. He explained how he used
7 it, but who created it and where did it come
8 from. That's what we need to know. All right?

9 MR. BUNDY: And who did it.

10 THE COURT: Yeah.

11 MR. HILDEBRAND: I'm sorry, who?

12 MR. BUNDY: Who prepared this. Ask
13 him that.

14 MR. HILDEBRAND: Okay. I'll tell
15 you what. I'm danged if I do and I'm danged if I
16 don't. If I ask too many questions to try to lay
17 a foundation, I'm told I haven't introduced it
18 into evidence, but anyway. Okay. All right.

19 THE COURT: Go ahead.

20 BY MR. HILDEBRAND:

21 Q. All right. Is there a scheduling
22 department with Balfour Beatty?

23 A. There is.

24 Q. Was there a scheduler assigned to this
25 project?

1 A. There was.

2 Q. And what was his name?

3 A. Joe Lauricella.

4 Q. Okay. And what was his job on this
5 project?

6 A. His job was to produce and maintain the
7 schedule.

8 Q. All right. And we went through this
9 yesterday that there was actually a baseline
10 schedule attached to the original -- to the
11 contract that was signed, correct?

12 A. Correct.

13 Q. All right. And that baseline schedule
14 was what Balfour anticipated, what it planned for
15 the start through the completion of -- from
16 digging the foundation to finishing the last
17 detail of the project, when that would take
18 place. It was during a 28-month period, correct?

19 A. Correct.

20 Q. All right. This schedule we have here,
21 I guess it -- since it's the first schedule, it
22 would be a replication or along the lines of what
23 the baseline schedule would be. Is that a fair
24 statement?

25 A. Yeah. So may I elaborate?

1 Q. Absolutely.

2 A. The baseline schedule is -- basically
3 would show like a duration on a floor.

4 So as we brought on subcontractors, more
5 detail would be put -- in other words, more tasks
6 -- a little more info in between those main
7 baselines would be inputted into the project as
8 we had meetings with the subs and made it a
9 little more navigational for the subs, a little
10 more clarity, let me put it that way in the -- in
11 between.

12 Q. Okay. So Joe Lauricella would have
13 developed the schedule?

14 A. Yes.

15 Q. And would you have input and would you
16 have communications with Joe Lauricella about
17 what was go on with the job so that he could
18 update his schedules?

19 A. Yes. So typically he would send -- if
20 they're in between schedules, he would send the
21 previous schedule, and then he would send updates
22 for where we are then.

23 So basically it would have -- he would
24 need information on when a task is completed
25 previously, and there would also be projections

1 of when we saw a task completing in the future,
2 so that he could -- so that he could update the
3 schedule and then send it.

4 So when I say in the future, there may
5 be a submittal of procurement that's projected at
6 an item being delivered in 14 days.

7 Q. Okay.

8 A. Once it was delivered, the actual date
9 would be updated in the schedule so that it would
10 be more accurate.

11 Q. Okay. All right.

12 MR. HILDEBRAND: Again, I move
13 to -- again, this into evidence, Your Honor.

14 MR. BUNDY: All right. I know this
15 witness didn't testify yesterday, but apparently
16 he forgot what he said on Monday, which is he had
17 nothing to do with the negotiations in the
18 scheduling of this job. The schedule was handed
19 to him. Okay? He doesn't know anything about
20 the preparation of the schedule based on his own
21 sworn testimony just two days ago.

22 Furthermore, to allow him to talk about
23 the schedule would be akin to bringing a nurse in
24 to talk about the surgeon's notes and explain to
25 you what the surgeon did. There's no way to

1 confront this witness about the efficacy of this
2 schedule, about the logic of this schedule, about
3 how these durations were arrived at, all of the
4 things that went into it. Okay?

5 This is not really a business record.
6 This has got nothing to do with business records.
7 This is a document that purposes a plan. By
8 definition, a business record has to be a record,
9 a recorded record of a transaction that has
10 occurred. It's a record of something that has
11 occurred, right?

12 So none of this set forth as the project
13 schedule has occurred yet. It is a -- I don't
14 know. It's a fantasy in somebody's head,
15 whatever it is they -- however it is they think
16 they're going to build this building. They could
17 have decided to rent a helicopter and held the
18 roof in the air and worked down. They could do
19 that if they wanted to. I doubt they'd stay in
20 business long, but they can do that.

21 This is not a business record. It's
22 pure hearsay. There's no foundation for it, and
23 I have no way of cross-examining the underlying
24 in person. I took his deposition. They got him.
25 I don't know if he still works for him or not.

1 My experience is, the only way to get
2 this thing into evidence, based on doing this for
3 more than time is, you've got to bring the
4 scheduler in, and he's got to identify it and
5 tell you what his plan was. What was my plan of
6 attack? It can't be a business record.

7 THE COURT: All right. Let me ask
8 this question. Is this the original plan, or is
9 this somewhere along the progress?

10 MR. BUNDY: Based --

11 MR. HILDEBRAND: Let me answer,
12 please. Was that directed to me, Your Honor?

13 THE COURT: Yes, sir.

14 MR. HILDEBRAND: Thank you. This
15 was the first schedule, and this witness --
16 that's what this case is about, Judge.

17 THE COURT: Sure.

18 MR. HILDEBRAND: Delays and such
19 and the witnesses are going to testify about
20 what -- and they have, and the experts will
21 testify about what caused the delays, but this is
22 the plan.

23 And this witness has said, this -- if we
24 didn't have a schedule and if he didn't know
25 about it, then I think it would be ridiculous for

1 him not to have -- this is the plan that he
2 followed in the construction.

3 THE COURT: All right. Let me
4 restate my question because my question was --

5 MR. HILDEBRAND: I'm sorry.

6 THE COURT: -- is this the initial
7 plan? Is this plan included in the contract, or
8 would this plan be the initial changes to what
9 was in the initial plan in the contract?

10 MR. HILDEBRAND: I follow you.

11 BY MR. HILDEBRAND:

12 Q. So the document that we reviewed on
13 Monday was a one-page document, correct?

14 A. Correct.

15 Q. This document is 1 of 39; so it's a
16 39-page document, correct?

17 A. Correct.

18 Q. All right. So tell me how this -- I
19 think you already described this, but can you
20 tell me again how this document evolved from what
21 we identified on Monday?

22 A. So the schedule that was in the initial
23 contract, we met with subs. As we are procuring
24 a sub, when we're going to contract, we would
25 meet with subs, we would meet with multiple subs.

1 It may be your concrete guy, your CMU guy, so we
2 could coordinate. But as we did that, we would
3 add more issues or more meat to the schedule.

4 In other words, as we talked, we would
5 get more information, and then Joe would update
6 that information and add more detail to the
7 schedule and then submit it.

8 THE COURT: All right. Before you
9 get to Joe, when you say we, does that include
10 you, as the senior construction --

11 THE WITNESS: Yeah.

12 THE COURT: -- supervisor?

13 THE WITNESS: Me, my team,
14 superintendents, subcontractors.

15 THE COURT: All right. So this
16 schedule would be created by Joe but based upon
17 input that you have given to him; is that
18 correct?

19 THE WITNESS: That's correct.

20 THE COURT: All right. Well, then
21 I find that as sufficient under the business
22 record. Foundation would be the record and made
23 and kept in the course of a regularly conducted
24 business activity. I find that it is. I'm
25 reading from 803(6).

1 Two, that it was regular practice, the
2 business activity to make the record, i.e., it is
3 a routine record. Three, the record was made at
4 or near the time of the event, that it went on.
5 This is an ongoing production, correct?

6 THE WITNESS: Yes, sir.

7 THE COURT: And two, the record was
8 made by or from information transmitted by a
9 person with knowledge.

10 I find Mr. Spano to be that -- who must
11 have acted in the regular course of business or
12 had a duty to report. I find that is a record of
13 a regularly conducted business activity and is an
14 exception to the hearsay rules under Rule 803(6).

15 MR. BUNDY: May I protect my
16 record?

17 THE COURT: Sure.

18 MR. BUNDY: Okay. The date on this
19 document, the data date -- let me get to it.
20 Where is it? If you look at the document itself,
21 what the document says is version 13, November of
22 19 -- of 2015. This is before this gentleman got
23 on this job. He wasn't on the job then.

24 THE COURT: Okay.

25 MR. BUNDY: The data date is

1 September of '15. The job had not even started.
2 There are no facts in this document about
3 anything that has occurred. This document is a
4 projection --

5 THE COURT: Right.

6 MR. BUNDY: -- of future events so
7 it can't be a business record because --

8 THE COURT: I disagree with that.

9 MR. BUNDY: Okay. I just wanted to
10 make sure.

11 THE COURT: Yeah, I disagree.

12 MR. BUNDY: And the witness didn't
13 create the document. This witness didn't create
14 this document.

15 THE COURT: I think we've
16 acknowledged that.

17 MR. BUNDY: Thank you.

18 MR. HILDEBRAND:

19 Q. You were on the job at this time,
20 weren't you?

21 A. Absolutely. The job started in March of
22 '15.

23 THE COURT: Objection is overruled.

24 MR. HILDEBRAND: Thank you, Your
25 Honor. So this is in evidence?

1 THE COURT: In evidence.

2 MR. HILDEBRAND: Thank you, Your
3 Honor.

4 (PLF. EXH. 25 was marked for
5 identification and admitted into evidence.)

6 BY MR. HILDEBRAND:

7 Q. Do you understand what critical path
8 methodology is?

9 A. Yes.

10 Q. All right. Tell the Judge how this --
11 do you know or do you have any knowledge about
12 how this schedule is developed and whether there
13 is -- is it Primavera? Is there some sort of
14 computer program or tell me what you can explain
15 on the -- how this project was -- schedule was
16 developed?

17 A. The software that Balfour Beatty uses is
18 Primavera 6. We call it P6 for short. It's the
19 software that our scheduler used to develop the
20 schedules.

21 Q. Okay. And what is that? When you say
22 it's Primavera, what is --

23 A. It's just a software name, developer of
24 the software.

25 Q. Okay. Wait a minute. When we say it's

1 a critical path schedule, what does that mean?

2 A. That you have tasks that are linked from
3 the beginning of the project to the end of the
4 project, and your critical path is your mainline
5 of connection that gets you from beginning to
6 end.

7 There could be -- there's intermittent
8 tasks, but the main critical path needs you to --
9 the main task that affects the start to finish is
10 your critical path through the -- through the
11 schedule.

12 Q. All right. So in this 39-page schedule,
13 there's no doubt in your mind, from your view of
14 it, that this is a critical path schedule --

15 MR. BUNDY: Objection.

16 Q. -- correct?

17 MR. BUNDY: Objection, leading.

18 THE COURT: Sustained.

19 MR. HILDEBRAND: All right.

20 BY MR. HILDEBRAND:

21 Q. Now, let's turn to Exhibit 27, please.

22 THE COURT: Did you say 27?

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: All right.

25 MR. HILDEBRAND: Wait a second.

1 Let me make sure.

2 MR. BUNDY: 26 or 27, Tom?

3 THE COURT: 26 would be the next
4 number.

5 MR. BUNDY: Pardon me?

6 THE COURT: 26 is next in number.

7 MR. HILDEBRAND: I'm sorry, yeah.

8 THE COURT: 26?

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: All right.

11 BY MR. HILDEBRAND:

12 Q. All right. 26, are you with me?

13 A. Yes.

14 Q. All right. This schedule -- I will tell
15 you what, this might explain this a little bit
16 more easily. Let's go to 27, which is the last
17 schedule. All right. Are you with me?

18 A. I am.

19 Q. Tab 27, is that the last schedule on the
20 project to your knowledge?

21 A. To my knowledge, yes.

22 MR. HILDEBRAND: All right. I
23 would like to move this into evidence, Your
24 Honor.

25 MR. BUNDY: I have no objection to

1 this exhibit because it, in fact, is a business
2 record. It is a record of things that have
3 actually occurred --

4 THE COURT: Okay.

5 MR. BUNDY: -- contrary to the
6 imaginary events that they dreamed of in their
7 head, which are not business records.

8 THE COURT: All right. In
9 evidence, 27.

10 MR. HILDEBRAND: Thank you, Your
11 Honor.

12 (PLF. EXH. 27 was marked for
13 identification and admitted into evidence.)

14 (PLF. EXH. 26 was marked for
15 identification.)

16 BY MR. HILDEBRAND:

17 Q. If we go back to 26 for a second. So
18 we've got the first one in evidence. We've got
19 the last one in evidence. 26 is the first page
20 of all of the intervening schedules in the
21 project. Can you confirm that for me?

22 MR. HILDEBRAND: What I'm doing,
23 Your Honor, this is the first page. Here are all
24 the schedules, and I don't want to clutter the
25 record with a bunch information that is

1 unnecessary. I'm just simply showing that -- and
2 he can testify about this -- that the schedule
3 was updated monthly, and this is the top page of
4 each one.

5 THE COURT: Okay.

6 MR. BUNDY: And I would like to
7 clutter the record with facts. That's what my
8 job is, to put facts in.

9 THE COURT: All right.

10 MR. BUNDY: This is the first page
11 of another document. This is not even the whole
12 document, right?

13 THE COURT: Right.

14 MR. BUNDY: If he wants to put the
15 document in, I object to portions of the
16 schedules going in because there's no way to
17 compare. It may be a lot of paper. They took on
18 a \$60 million job. \$60 million jobs generate a
19 lot of paper. They made a \$24 million claim.
20 That creates a lot of paper.

21 THE COURT: Okay. All right.

22 MR. BUNDY: And there's no way to
23 cross-examine. There's no way to analyze these
24 documents without the whole document. Thank you,
25 Your Honor.

1 THE COURT: All right.

2 MR. HILDEBRAND: Your Honor, he's
3 gotten all these schedules in their totality, and
4 I've got them here.

5 If he wants to cross-examine this
6 witness or other witnesses about them, then he
7 can absolutely do that. I'm simply putting in
8 the record, so as not to clutter the record,
9 full schedules, just the top page to show that
10 they were updated every month.

11 THE COURT: All right.

12 MR. BUNDY: Another objection.
13 It's materiality and relevance. What relevance
14 is the first page of the schedules of this case?
15 No.

16 THE COURT: So let me -- I just to
17 make sure that we're clear on this. The purpose
18 that the plaintiff submits Exhibit 26 is to
19 show -- it's a compilation is what it is.

20 MR. HILDEBRAND: Yes, sir.

21 THE COURT: It's just page one of a
22 number of schedules.

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: And it's to show that
25 the schedule was routinely altered?

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: Is that the purpose?

3 MR. HILDEBRAND: Yes, sir.

4 THE COURT: Just to show the dates
5 of the changes in the schedule? You're not
6 necessarily looking to the underlying data.
7 You're just showing that it was changed on a
8 regular basis. That's the basis for your motion?

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: The objection is that
11 it's not complete? Okay.

12 MR. BUNDY: That's part of my
13 objection. And not only is it not complete, it
14 doesn't qualify as exception to the hearsay rule.
15 It's not the best evidence of what's in the
16 documents.

17 If it's only being offered -- and you
18 can certainly offer evidence for limited
19 purposes, and I get that, okay? But I don't want
20 this whole -- this end for -- because it will be
21 used for other reasons.

22 Why don't we just simply have him put in
23 a piece of paper that says or gets the witness to
24 testify under oath that these were the dates the
25 schedule was updated. Now, it's in the record.

1 We don't have to have more paper in the record
2 because he says he's not going to use them for
3 any other purpose.

4 THE COURT: Okay.

5 MR. BUNDY: And then you'll know
6 that. Okay? If that's what you really want to
7 accomplish is just simply to put in front of Your
8 Honor that this schedule was updated on May 26,
9 all that, you now have that information. You
10 don't need the first page to these schedules
11 because they're useless to you. They're
12 irrelevant, and they don't comply with the rules
13 of evidence. Thank you.

14 THE COURT: All right. Would that
15 suffice?

16 MR. HILDEBRAND: Well, I can --

17 THE COURT: You just give me a list
18 of the dates. I don't think that's
19 objectionable.

20 MR. BUNDY: No, it's not.

21 THE COURT: I think there is a way
22 to do this without overly burdening the record.
23 And if what the purpose of it is to show that the
24 schedule was routinely updated, I don't think
25 that in and of itself is objectionable is what I

1 understand.

2 MR. BUNDY: And I don't object to
3 it, if he wants to testify to it. I just object
4 to doing it the wrong way.

5 THE COURT: Gotcha.

6 MR. HILDEBRAND: I could have him
7 go through and read into the record the dates of
8 each of these updates if we'd like to -- if
9 that's what you would prefer.

10 THE COURT: How about if we had
11 somebody in your office type up those dates and
12 submit them in lieu of the documents so that he
13 can verify that that was done?

14 MR. BUNDY: As a summary under
15 1006, I wouldn't object.

16 THE COURT: Yeah. It's a summary.
17 Okay? Let's do it that way. Very good.

18 MR. HILDEBRAND: All right. Thank
19 you, Your Honor.

20 THE COURT: All right. Very good.
21 So 26 was an objection, but we will replace that
22 with a summary of the dates --

23 MR. HILDEBRAND: Thank you.

24 THE COURT: -- of the changes.

25 MR. BUNDY: That's correct, Your

1 Honor.

2 BY MR. HILDEBRAND:

3 Q. All right. Let's turn to tab 70,
4 please. This is an e-mail from Tim Spano, dated
5 December 17, 2015, to Jim Clements; is that
6 correct?

7 A. Yes.

8 Q. All right. Do you see the subject, BIM
9 coordination invite urgent conflict affecting
10 schedule?

11 A. Yes.

12 Q. All right. Is this a copy of an e-mail
13 that you sent to Jim Clements?

14 A. Yes.

15 Q. All right.

16 MR. HILDEBRAND: I would like to
17 move this as my next exhibit, Your Honor.

18 MR. BUNDY: No objection.

19 THE COURT: Without objection.

20 (PLF. EXH. 70 was marked for
21 identification and admitted into evidence.)

22 MR. HILDEBRAND:

23 Q. All right. And Kim Brown is shown as
24 being copied on this?

25 A. Yes.

1 Q. And the architect's representative,
2 Jennifer Faulkinberry?

3 A. Yes.

4 Q. And the architect himself, Jim Clements?

5 A. Yeah.

6 MR. BUNDY: You-all, I hate to
7 interrupt Mr. Hildebrand, but I -- if you look at
8 the bottom of this e-mail, this looks like -- I
9 don't know if this is a redaction or if it's a
10 graphic.

11 THE COURT: The black box or the
12 gray box?

13 MR. BUNDY: Yeah. I don't know
14 whether that's a graphic or a redaction. Could
15 we just clear up for the record, please?

16 THE COURT: Okay. Any idea what
17 that is?

18 MR. BUNDY: Because if he doesn't
19 know what it is, I'm withdrawing my approval. I
20 just noticed it, sorry.

21 THE COURT: Okay.

22 MR. HILDEBRAND: I don't know what
23 that document is. That's how it was --

24 THE WITNESS: Are you talking about
25 the box below?

1 MR. HILDEBRAND: Yes.

2 THE WITNESS: I don't know.

3 MR. BUNDY: He can't identify the
4 original document. It's not the original
5 document. It can't be.

6 BY MR. HILDEBRAND:

7 Q. Let's just move on. The subject, BIM
8 coordination invite urgent --

9 MR. BUNDY: No, no, no. I want to
10 get this off the screen. One, it's not in
11 evidence. And he's testified that he does not
12 know what it is, and now he wants to ask him
13 questions about a document that I've objected to.

14 First, he's got to get it into evidence.
15 I don't think this an original. It doesn't meet
16 the best evidence rule, and there's been no
17 explanation of why this document has been
18 altered.

19 MR. HILDEBRAND: I believe that
20 this is -- gosh, there's been so much water under
21 the bridge. I think this is one of the documents
22 that you noted that there was a redaction on, but
23 I will -- let me come back to that. I have it
24 noted.

25 THE COURT: All right. Let's look

1 into it, and we'll come back to it.

2 MR. HILDEBRAND: Okay. We'll come
3 back to it.

4 THE COURT: I'm not sure, but I did
5 review a lot of documents, and I did redact some.
6 So that may be, but I don't know. We all have to
7 look into that one.

8 MR. BUNDY: And I'm entitled to an
9 answer.

10 THE COURT: Sure.

11 MR. HILDEBRAND: I will move on,
12 Your Honor.

13 MR. BYRD: Tom, excuse me?

14 THE COURT: Go ahead. Let's go
15 ahead and take a little break right now. Let's
16 take about five.

17 (A recess transpired.)

18 THE COURT: Are y'all ready? Okay.
19 Y'all have a seat, please.

20 MR. LAND: Your Honor, if I may,
21 may I approach?

22 THE COURT: Sure.

23 MR. LAND: Okay. So if you look at
24 it in the actual e-mail format, there's a logo,
25 and it says, Balfour Beatty.

1 THE COURT: Okay.

2 MR. LAND: And then every time it's
3 printed in a PDF or sent to someone else and they
4 can't load it, it becomes an "X" or --

5 THE COURT: Gotcha.

6 MR. LAND: This is going to be --

7 THE COURT: It just wipes it out?

8 MR. LAND: Yeah.

9 MR. BUNDY: That's why I brought it
10 up. You know, I didn't know what it was.

11 THE COURT: Yeah. Okay.

12 MR. BUNDY: But what I would like,
13 if that's going to be the case, that every one of
14 these witnesses testifies that that in fact is
15 the case for that particular document. I'm not
16 going to -- you know what I'm saying? Because I
17 don't know whether it might show up again, and in
18 fact, it has been redacted.

19 THE COURT: Yeah.

20 MR. BUNDY: So I need a witness to
21 testify under oath that he's looked at the
22 original --

23 THE COURT: Okay.

24 MR. BUNDY: -- on a computer and
25 that there's no change. And I want to have the

1 option to look at it myself if I need to.

2 THE COURT: Sure, sure.

3 MR. BUNDY: Thank you.

4 MR. LAND: Just to be clear, it
5 will take me a minute each time to pull that up.

6 THE COURT: Sure, sure. There's a
7 term of art for what it is.

8 MR. BUNDY: If you tell me -- if
9 this young man tells me he's an officer of the
10 Court, it's okay. I'm good with it.

11 THE COURT: Okay. All right.

12 MR. LAND: I'm happy to -- any time
13 there's a question, I can pull that up.

14 THE COURT: Very good. It's
15 just -- it's the logo for Balfour Beatty is what
16 it looked like, right?

17 MR. LAND: Yeah.

18 THE COURT: Okay. Okay. With that
19 understanding, the objection is withdrawn?

20 MR. BUNDY: Yeah.

21 THE COURT: Okay. Very good.

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

24 BY MR. HILDEBRAND:

25 Q. All right, sir. On the subject of

1 incoordination invite, urgent conflict affecting
2 the schedule. Then the first sentence says, Jim,
3 we have major design conflicts on the second
4 floor that affects structural, architectural --
5 I'm sorry.

6 We have major design conflicts on the
7 second floor that affects structural,
8 architectural, interior design, ceiling heights,
9 framing, electrical, mechanical, and probably 50
10 percent of second floor plumbing that was looked
11 at in the BIM coordination yesterday with Taylor
12 Walker and our BIM team.

13 Can you describe -- tell the Judge what
14 the issue was here, why that e-mail is labeled an
15 urgent conflict affecting schedule?

16 A. That in the BIM coordination meeting,
17 the conflicts that were identified were multiple.
18 It had to do with framing, millwork finishes,
19 ductwork, plumbing lines, to work within the
20 confinements of the original document.

21 Q. And this is dated December 17, 2015.
22 Where in the project were you at that time,
23 Mr. Spano?

24 A. We were at the top of the structure; so
25 at that point, we were installing basically

1 rough-in. We would be installing rough-ins on
2 those floors that we're talking about.

3 So as the structure goes up -- I think I
4 explained Monday how the shoring works about
5 three levels down. But at that point, we would
6 have been up around the eighth floor, ninth
7 floor. So our shoring would have been in for say
8 three floors down, so around the fifth floor.

9 So we would have already basically
10 installed CMU, installed framing on like floors
11 one and two, possibly on three, and then the
12 rough-ins, of course, follow all your framing and
13 all your MEPs, your electrical. You're starting
14 to run outlets, switches.

15 Q. Okay. And had the concrete pours
16 started at that point?

17 A. Concrete pours were already up at like
18 the eighth floor at that point. Eighth, ninth
19 floor up at the top, yes.

20 Q. All right.

21 A. May I rephrase that?

22 Q. Sure, yeah.

23 A. December of 2015, yeah, we didn't -- we
24 didn't talk about it until December of '16. So
25 let me think about where I was at. I was

1 thinking the year '16, I apologize.

2 December of '16, let's see, we started
3 in March, shoring piles. So at that point, we
4 would have been -- we would have been basically
5 in the basement portion of work and then -- but
6 BIMing the floors up above us at that point.

7 Q. So that would have been before the
8 concrete pour?

9 A. That would have been before the concrete
10 pour.

11 Q. Okay.

12 A. I apologize.

13 Q. All right. Let's turn to tab 72,
14 please. Are you with me?

15 A. Yes.

16 Q. And this is a letter to Kim Brown from
17 Nick Starcevic. And you were copied on that?

18 A. Yes.

19 Q. All right. Do you have personal
20 knowledge of the contents of this letter?

21 A. I do.

22 Q. All right. Is this -- was this part of
23 the business records and generated
24 contemporaneously with the subject matter of the
25 letter?

1 A. Yes.

2 MR. HILDEBRAND: I would like to
3 move this as our next exhibit, Your Honor.

4 MR. BUNDY: No objection.

5 THE COURT: Without objection.

6 (PLF. EXH. 72 was marked for
7 identification and admitted into evidence.)

8 BY MR. HILDEBRAND:

9 Q. The re is, design of BIM coordination
10 delayed impact notification. First paragraph,
11 please accept this letter as formal notice of
12 delay due to design and BIM coordination
13 conflicts.

14 At this time, we still lack final design
15 for the L2 ceilings due to multiple clash
16 detection issues that are yet to be confirmed in
17 BIM. Once the design is confirmed, the
18 subcontractor still needs to produce shop
19 drawings, coordinate layout, fabricate material
20 and install.

21 And the third paragraph, last one, due
22 to lack of direction, as of 5/17/16, the level 3
23 west pour and overall schedule will be delayed a
24 minimum of two working days.

25 Each day that we do not have finalized

1 design, confirmed BIM coordination, and approval
2 to proceed with the L3 deck slope slab redesign,
3 the overall project schedule is delayed an
4 additional day.

5 Can you describe what you're -- what
6 this notice was and what you're talking about?

7 A. So any conflicts or mechanical,
8 electrical conflicts level 2, BIM or MEP -- when
9 you -- there were some changes that were going on
10 as far as design, as I stated earlier on. When
11 it refers to the level 3 decks -- so there were
12 terraces on the level 3, basically, in the south
13 center portion of the building.

14 So the entire footprint went up two
15 floors. Once you got to the third floor, the
16 center area -- basically, it created a horseshoe.
17 So you had a terrace there in the middle, and you
18 had decks on balconies, things like that.

19 So when we're looking at fitting -- you
20 have drain bodies like on those terrace drains
21 that are certain depths that have to be roughed
22 in to -- we were running into conflicts with
23 fitting everything to, when we'd pour and create
24 proper slopes to drain. So that was what we were
25 referring to as far as terraces go.

1 Q. Do you know how long it was before this
2 issue was resolved?

3 A. I don't recall the total duration.

4 Q. And the letter was written to Kim Brown?

5 A. It is.

6 Q. Okay. All right. Let's turn to tab
7 70 -- I'm sorry, tab 81. Are you with me?

8 A. I am.

9 Q. All right. And this is a letter similar
10 to -- to try to move this along quickly, this is
11 a letter similar to the one that we just
12 identified?

13 A. Similar, yes.

14 Q. And this is actually from you, correct?

15 A. Correct.

16 MR. HILDEBRAND: I would like to
17 move this into evidence, Your Honor.

18 MR. BUNDY: No objection.

19 THE COURT: Without objection, 81.

20 (PLF. EXH. 81 was marked for
21 identification and admitted into evidence.)

22 BY MR. HILDEBRAND:

23 Q. Okay. This is August 18, 2016, again to
24 Kim Brown, and it says, notification of delay.

25 The first line, as a follow-up to the notice of

1 delay on 7/25/16, please accept this letter as
2 notification of cost impact and delay to the
3 critical path.

4 Let me read the last paragraph. BBC is
5 requesting finalized design 10 days prior to
6 scheduled concrete slab pours at this time to
7 prevent future delays. Can you tell us what
8 you're talking about there?

9 A. Yes. So the typical process before we
10 do a pour is, we would -- if we BIM that floor,
11 we BIM the sleeves. We BIM the models.

12 Once any conflicts are resolved, the
13 subcontractor would then take it, put it into a
14 shop drawing, and then submit it as basically a
15 submittal for approval by the architect.

16 So what was happening, as we got closer
17 to the sixth floor issue, for the sake of trying
18 to keep the project as close as possible, there
19 was a point that we were getting the BIM
20 photograph of the sleeves, and we were having the
21 architect sign it so that we could proceed, and
22 then follow -- you know, and then following up
23 with the official shop drawings.

24 So we were requesting 10 days so that we
25 could get that to the subs, the subs put it into

1 a thing called the trimble machine. So they load
2 all the data into a trimble machine. They put it
3 on the deck, and it lays out their sleeves to
4 basically a laser system that lines everything up
5 and gives them a computer printout of where the
6 sleeves go together.

7 Q. Okay.

8 A. So we were requesting the ten days.
9 Typically, we would have more than that for shop
10 drawings and all, but that was what we needed to
11 get -- just for the subs, to get the information
12 to be able to get out there on the deck and start
13 installing.

14 Q. Okay. So is it a fair statement, y'all
15 were trying to -- to pivot and try to make
16 changes to work around some of the design issues
17 and try to continue to expedite the construction?

18 MR. BUNDY: Objection, leading.

19 Q. You explained that y'all were having --
20 y'all were signing -- you were having architects
21 sign off on just signed pictures of some of the
22 changes. Is that a normal practice?

23 A. Not normal, but it was -- we were trying
24 to get on that deck as soon as possible. So we
25 were -- we were making adjustments to get the

1 information approved from the architect in a
2 quicker way to get on the deck and get that deck
3 board as soon as possible.

4 Q. From your perspective, were you -- were
5 you trying -- making your best efforts to keep
6 the project on schedule?

7 MR. BUNDY: Objection, leading.

8 THE COURT: Sustained.

9 BY MR. HILDEBRAND:

10 Q. All right. What is your opinion, if
11 any, as to what your efforts were around this
12 time to keep -- or tell me what your testimony is
13 as to what your efforts were to keep the project
14 on schedule.

15 A. We looked for any way -- I personally
16 looked for any way to get the product built as
17 fast as possible. So if there was an option to
18 shorten any duration to get to that process, we
19 would figure out ways that we could make that
20 happen to try to stay as close to schedule as
21 possible. Can I elaborate a little bit?

22 Q. Sure.

23 MR. BUNDY: No, Your Honor. He's
24 here to answer questions. I object.

25 THE COURT: I will allow it. Go

1 ahead.

2 THE WITNESS: For instance, you
3 have a schedule that says, block walls go up.
4 Block walls complete. You frame the walls. Your
5 rough-in starts, and that's how you -- your
6 schedules normally read.

7 If there was an instance where say,
8 structure got delayed, delayed CMU because the
9 structure was delayed, moving up the building
10 waiting on reshores to come out. There were
11 things that we did to -- when we put up reshores,
12 they have to go within so many feet.

13 We would get with the concrete
14 contractor, and we basically strategically,
15 within those parameters, shifted shoring so that
16 we could get block guys on that floor sooner. Or
17 we could get framing started in sections on that
18 floor.

19 So we -- you always look for ways -- if
20 the schedule is moving this way, you look for a
21 way to pull that schedule back. And it's in
22 means and methods. You adjust what may be
23 normally in that schedule, and you figure out --
24 you talk to your subs, and you figure out a way
25 to try make a --

1 BY MR. HILDEBRAND:

2 Q. Okay. Thank you. All right. Let's
3 turn to exhibit or tab 85, please. Are you with
4 me?

5 A. Uh-huh.

6 Q. All right. This is an agenda on Balfour
7 Beatty's letterhead, Hotel Marion Square,
8 August 11, 2016, mid-project status meeting. And
9 it shows the invitees, Tim Spano. Do you see
10 that?

11 A. I do.

12 Q. Was this document -- do you have
13 personal knowledge of this document?

14 A. I do.

15 Q. Is it part of the business records of
16 Balfour Beatty?

17 A. Yes.

18 MR. HILDEBRAND: I would like to
19 move this in.

20 MR. BUNDY: No objection.

21 THE COURT: Without objection.

22 (PLF. EXH. 85 was marked for
23 identification and admitted into evidence.)

24 BY MR. HILDEBRAND:

25 Q. All right. Let's go to the third page

1 of this, if you would, please. And it says, top
2 paragraph, sixth floor, final design delay.

3 And then about midway down, it says,
4 Dan, Jim, and Tim expressed concerns with getting
5 ahead to the eighth floor overhead design
6 affecting the ninth floor slab. BBC WLA
7 explained that they were focusing on staying
8 ahead of the sixth, seventh, and eighth floor
9 pours and had no more manpower to put on it.

10 Mike asked Buck Lindsey if they could
11 hire a BIM design person to start on the eighth
12 floor overhead design now. Buck said that he
13 would find someone, and Jeff said that he would
14 ask our Atlanta firm if they knew anyone in
15 Atlanta that could help.

16 When it says, Mike asked Buck Lindsey,
17 who is the "Mike" they're referring to?

18 A. Mike Bennett.

19 Q. And can you explain to the Judge what
20 the context of the meeting was, what we're
21 talking about here?

22 A. The meeting was -- with the delays that
23 were going on to the structure, we had -- we had
24 already hit a sixth floor delay. We were
25 continuing to hit delays with design. We

1 would -- so we would -- we would BIM the model.

2 Our subs would put their input into it.

3 It would identify clashes, and we would send it a

4 picture or have a call back to the architecture

5 firm. They would make the adjustment in 2D

6 format. They weren't using BIM.

7 So then it would come back. Our guys

8 would model it in 3D, relook at it again, make

9 sure it worked. Sometimes it -- if we moved

10 something, it caused another conflict, and we

11 would send it back. So having an architect be

12 able to see 3D, it made the process move much

13 quicker.

14 THE COURT: Okay.

15 THE WITNESS: So that was -- that

16 was the basis for the meeting, to get together to

17 talk about the issues of design, where we were,

18 kind of a mid-building talk through where we are,

19 where we're -- we're looking at what's coming in

20 the future, where design was, that kind of stuff.

21 BY MR. HILDEBRAND:

22 Q. So at this point, the architect had not

23 used BIM; is that correct?

24 A. Correct.

25 Q. But the agreement was that they were

1 going to hire somebody and start using it or help
2 with them or what was -- exactly what were they
3 going to do?

4 A. Well, they were going to help with the
5 internal design of the BIM, with the MEPs and
6 everything. They were going to help so that we
7 could -- when we -- they would be involved in the
8 BIM process instead of us BIMing it and then
9 sending it, waiting on the answer. So they would
10 be -- you know, be able to see it in realtime and
11 make adjustments.

12 Q. Okay. All right. Let's turn to Exhibit
13 88, please. Are you with me?

14 A. I am.

15 Q. This is an e-mail from -- to Jim
16 Clements and yourself. Do you see that at the
17 top?

18 A. I do.

19 Q. All right. And do you have -- so is
20 this part of the business records of Balfour
21 Beatty?

22 A. Yes.

23 Q. All right. Do you have personal
24 knowledge of this document?

25 A. Give me a second. I do.

1 MR. HILDEBRAND: Okay. All right.
2 I would like to move this into evidence as the
3 next exhibit, please.

4 MR. BUNDY: No objection.

5 BY MR. HILDEBRAND:

6 Q. All right. So let's move down to where
7 this e-mail starts or down to -- about halfway
8 down where it says, from Buck Lindsay to Tim
9 Spano and Kim Brown. Do you see that?

10 A. I do.

11 Q. And it says, Tim. That's -- is he
12 referring to you?

13 A. Yes.

14 Q. All right. Tim, am swinging at air on
15 trying to find a BIM supplement player; have made
16 20-plus calls in different directions, including
17 BBC office in Orlando and to a few of your
18 competitors. Not wanting to go to India or
19 China. Confirming the reason you guys can't do
20 this work is too much competing work in your
21 house.

22 So is this a response to the mid-year
23 meeting from Buck Lindsey?

24 A. It is.

25 Q. And he's saying that he's trying to get

1 BIM capabilities. Did he ever get them?

2 A. To my knowledge, he got someone on board
3 around August, September of that year.

4 Q. Did they stay throughout the project?
5 Did that BIM person continue working and stay,
6 help throughout the project?

7 A. Not that I'm aware of, no.

8 Q. Do you know how long they participated?

9 A. I believe it was a couple months.

10 Q. Did the design documents from that point
11 forward that were generated by WLA, had they been
12 BIMed and were they in a BIM format?

13 A. I recall it was still in our BIM format
14 through the rest of the structure.

15 Q. Okay. All right. So he's saying that
16 he cannot get BIM. The next e-mail up, it's to
17 Buck Lindsey and yourself from Jim Clements. So
18 that's the owner's representative, correct?

19 A. Correct.

20 Q. It says, nobody -- Buck, nobody
21 understood the enormity costs of the lack of
22 coordination at the time Mike Baumbach made that
23 statement. The owner is now looking at claims
24 for additional BIM time. Project delays from
25 both BBC and subcontractors and negative feedback

1 from the bank.

2 Last Thursday, WLA was directed to jump
3 ahead and look at the eighth floor in the hope
4 that WLA could discover conflicts and resolve
5 them before the form work gets to that level.
6 Stops the project and the owner incurs further
7 claims for the coordination issues. BIM or not,
8 WLA needs to get out front. Did I read that
9 correctly?

10 A. Yes.

11 Q. All right. Then let's jump to the very
12 top e-mail from Buck Lindsey. And his response
13 is, on board period B; is that right?

14 A. Yes.

15 Q. So that's on board Buck?

16 A. Yes.

17 Q. All right. I want to go into the sixth
18 floor claim and how that was paid and some of the
19 details on that. So let's turn to Exhibit 95 if
20 we could, please. I'm sorry, tab 95. Do you see
21 that?

22 A. I do.

23 Q. All right. At the top, it's a letter
24 from Jennifer Faulkinberry. That's the on-site
25 project architect, correct?

1 A. Correct.

2 Q. To you, correct?

3 A. Correct.

4 Q. All right. And below that is an e-mail
5 from Nick Starcevic. He is one of the people
6 with Balfour Beatty?

7 A. Project manager, yes.

8 Q. Right. And you're copied on that, and
9 it says, see attached claim from Lithko for level
10 6 design in place. Are you with me?

11 A. Yes.

12 MR. HILDEBRAND: Did I move this
13 into evidence?

14 THE COURT: Not yet.

15 BY MR. HILDEBRAND:

16 Q. Is this a part of the business records
17 for Balfour Beatty?

18 A. Yes.

19 Q. Do you have personal knowledge of it?

20 A. I do.

21 MR. HILDEBRAND: I would like to
22 move this, Your Honor.

23 MR. BUNDY: No objection.

24 THE COURT: Without objection.

25

1 (PLF. EXH. 95 was marked for
2 identification and admitted into evidence.)
3 BY MR. HILDEBRAND:

4 Q. All right. Let's turn in the notes
5 to tab 100, please, sir. All right. This is a
6 letter from December 21, 2016 to you from
7 Jennifer Faulkinberry. And do you have personal
8 knowledge of this letter?

9 A. I do.

10 Q. Part of the business records of Balfour?

11 A. Yes.

12 MR. HILDEBRAND: I would like to
13 introduce this, Your Honor.

14 MR. BUNDY: Your Honor, this wasn't
15 signed.

16 THE COURT: I'm sorry, which
17 exhibit no. is this?

18 MR. HILDEBRAND: Tab 100.

19 MR. BUNDY: I mean, I'm not saying
20 that it wasn't sent. I'm just noting to the
21 Court that it wasn't signed, and that's sort of a
22 problem when you have the rule requiring an
23 original.

24 THE COURT: Okay. This is
25 addressed to Mr. Spano?

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: Lay a little more
3 foundation for it.

4 MR. HILDEBRAND: I'm sorry, Your
5 Honor?

6 THE COURT: Lay a little more
7 foundation for it.

8 MR. HILDEBRAND: Okay.

9 BY MR. HILDEBRAND:

10 Q. Do you remember seeing this letter?

11 A. I do.

12 Q. I see that it's not signed. Do you know
13 if you ever got a signed copy?

14 A. I would have.

15 Q. Do you remember getting a signed copy of
16 this?

17 A. I don't recall the signature.

18 Q. Okay. Well, where would you have gotten
19 this letter? Where did it come from?

20 A. It would have come from WLA to Balfour
21 Beatty.

22 Q. All right. Whether it was signed or
23 not, you didn't generate this letter, correct?

24 A. Correct.

25 Q. So however you got it, it came from

1 them, correct?

2 A. Correct.

3 Q. All right. And do you remember getting
4 this letter?

5 A. I do.

6 MR. HILDEBRAND: All right. I
7 would like to move to admit it, Your Honor.

8 MR. BUNDY: Unless in the normal
9 course of business, WLA doesn't sign its
10 correspondence and just sends it out without a
11 signature, there would need to be proof of that
12 from somebody at WLA.

13 The way we regularly conduct business is
14 to send out unsigned letters. And I've been in
15 the Court when a judge stood around and waved --
16 or a lawyer waved an unsigned order in front of
17 the judge.

18 Well, I've got an unsigned order here,
19 and I objected to it. The lady that used to be a
20 judge said, well, he said it was unsigned, and
21 she went ahead and enforced it. So I've dealt
22 with unsigned things, Judge.

23 THE COURT: How did he receive it?
24 Do we know that?

25 BY MR. HILDEBRAND:

1 Q. Yeah. Can you tell me how you received
2 it?

3 A. I recall e-mail and certified mail or
4 mail through the office.

5 Q. Okay.

6 MR. BUNDY: No objection.

7 THE COURT: All right. Very good.

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

10 BY MR. HILDEBRAND:

11 Q. Okay. So it says, Tim, we have -- the
12 first paragraph. We have received and reviewed
13 your revised claim dated of 12/9/16 in response
14 to our request for additional backup supporting
15 your, quote, "level 6 structural delay claim
16 dated 9/4/16."

17 Your revised claim asked for a change
18 for contract time, an amount of 22 days and
19 \$21,945 respectively.

20 A. 221.

21 Q. I'm sorry. \$221,945 respectively. Did
22 I read that correctly?

23 A. Yes.

24 Q. Okay. Go down to paragraph 2 below
25 that, numbered paragraph 2. We approved 20 days

1 of rent valued at \$51,000; 3, costs associated
2 with labor force valued at \$80,500; 4, costs
3 associated with demobilization, mobilization,
4 \$12,500.

5 Let's go to the next page. The second
6 sentence says, attached is our redline adjustment
7 to the submitted spreadsheet that reflects the
8 above. The approved sum is \$144,907. So a claim
9 was submitted to their architect; is that
10 correct?

11 A. That's correct.

12 Q. And this is their letter in response to
13 you, correct?

14 A. Correct.

15 MR. BUNDY: Your Honor, I'm afraid
16 I'm going to have to withdraw my lack of
17 objection because I was unaware that this letter
18 had an attachment, which is not being put into
19 evidence.

20 And so it's not a complete exhibit, and
21 there would be no way for anybody to know what
22 Ms. Faulkinberry redlined, no way to
23 cross-examination the witness. We wouldn't have
24 any -- because I don't think Ms. Faulkinberry is
25 going to come to the trial.

1 THE COURT: Okay.

2 MR. HILDEBRAND: I'm not -- I'm not
3 concerned with what the attachment is. If
4 Mr. Bundy wants to admit it and cross-examine him
5 about it, he can certainly do that.

6 MR. BUNDY: And I'm concerned with
7 the rules of evidence.

8 THE COURT: Let him finish. I'm
9 with you. Go ahead.

10 MR. HILDEBRAND: Your Honor, the
11 simple point is that this reflects -- the
12 architect is saying, we've approved. The
13 approved sum is \$144,907.

14 How they came to that, you know, I don't
15 care, and I can't call the -- I can't subpoena
16 the architect to come in here. The simple point
17 is, as referenced on this letter that, she said,
18 we're going to give you \$144,000. And my simple
19 question to him is, did you get that amount?

20 THE COURT: Okay.

21 MR. BUNDY: And I am withdrawing my
22 objection to a document that I did not realize
23 had an attachment, which is not made part of the
24 exhibit.

25 All I'm asking for is him to comply with

1 the rules of evidence, which is to put the whole
2 document in. And this is not a, Bundy can do
3 this and Bundy can do that. I don't have to go
4 and look through my documents to put -- to
5 complete his exhibits.

6 I'm entitled to know what's in the
7 attachment. I'm entitled to know what she did
8 and didn't approve. There may be things in there
9 they were asking for that were just absolutely
10 ridiculous that she had to strike.

11 They may have asked for a new
12 automobile. I don't know what they asked for. I
13 know she struck some things out, and I'm entitled
14 to know what those are as part of a complete
15 exhibit. This is not -- this isn't the best
16 evidence.

17 Not only do they bring you an unsigned
18 letter, they bring you an unsigned letter that
19 refers to attachments that aren't here. I don't
20 know how it could be any worse.

21 MR. HILDEBRAND: Your Honor, again,
22 if Mr. Bundy wants to bring up the underlying
23 data or call that witness to testify about what
24 they may have -- I have -- it doesn't matter.
25 The simple -- all I'm trying to -- I'm

1 introducing this for a narrow point.

2 And Mr. Bundy acknowledged earlier that
3 evidence can be submitted on a narrow point, and
4 you don't have to bring out the -- describe every
5 potential point that you might want to bring out.
6 The simple point here, which is real clear is,
7 the architect approved payment of \$144,000, and I
8 simply want to ask him if he got that.

9 THE COURT: Okay. I'm with you.

10 MR. BUNDY: The letter is being
11 offered into evidence. It's hearsay and doesn't
12 comply with an evidentiary objection. Whether I
13 can fix his problem or not is irrelevant. He's
14 got a problem. He's got a piece of paper he
15 cannot get into evidence under the rules that we
16 all agreed to go by.

17 THE COURT: Okay. All right. Ask
18 him about the attachment, or maybe you have. But
19 ask him about -- if he recalls what the
20 attachment was.

21 BY MR. HILDEBRAND:

22 Q. Do you recall what the attachment was to
23 this, Mr. Spano?

24 A. The attachment is the backup that
25 reflects the total claim, I believe.

1 Q. Let's do -- I'll tell you what. What
2 was in that backup? You said this was for
3 redline backup. What was the backup that she was
4 talking about?

5 A. The claim was made by Lithko
6 Contracting. Our subcontractors would submit
7 their costs that they incurred for the delay. So
8 that and the compilation with our paperwork would
9 be compiled made into spreadsheets.

10 She had asked for additional information
11 from the subcontractors. So we compiled that and
12 resubmitted that to her and for her to make a
13 ruling.

14 Q. Okay. And do you have personal
15 knowledge of what was submitted?

16 A. I do.

17 Q. Did y'all compile that and provide it to
18 her?

19 A. We did.

20 Q. All right. So she's responding --
21 whatever it was that y'all compiled, she says,
22 we're going to pay \$144,000 of it, correct?

23 A. Yes.

24 MR. HILDEBRAND: Your Honor, I
25 think that's sufficient foundation.

1 MR. BUNDY: I don't disagree that's
2 what the letter says. But it still doesn't
3 properly exception of the hearsay rule.

4 THE COURT: All right. I'm going
5 to allow this letter on the basis that it does
6 state what it states. I acknowledge that it is
7 not a complete exhibit because there is some type
8 of redline attachment.

9 But my understanding is, you would have
10 sent the attachment. She would have stricken
11 through the attachment as to what was and was not
12 allowed, and the dollar figure is the 144 that
13 was allowed; is that right?

14 THE WITNESS: Yes, sir.

15 MR. BUNDY: Okay. Now, but may I
16 say something?

17 THE COURT: Sure.

18 MR. BUNDY: Where does that put me?
19 I now have a witness in Atlanta that I cannot
20 make come to Charleston. Okay?

21 THE COURT: I'm with you.

22 MR. BUNDY: And I can't
23 cross-examine anybody about what's in this secret
24 document that they refuse to produce even though
25 they have it. Okay?

1 So now they've got a number in with no
2 evidence as to how that number was arrived at
3 when they got the evidence that could establish
4 that so I could cross-examine on that? And yet
5 now that's a fact in this case. That can't be.

6 THE COURT: Okay. I'm with you.
7 Objection noted.

8 MR. BUNDY: Judge, that's --

9 THE COURT: I'm with you. I'm with
10 you.

11 MR. BUNDY: Some of these things,
12 and you and I both know --

13 MR. HILDEBRAND: Your Honor, I
14 think we are getting to --

15 THE COURT: That's okay. Let him
16 make his record.

17 MR. BUNDY: Let me finish. You and
18 I are, you know, obviously going to -- have not
19 always agreed about evidence, and I will readily
20 admit that your discretion is vast and wide.
21 Okay?

22 But some evidentiary rulings are so out
23 that they are prejudicial to my client's ability
24 to defend themselves and make out a case. This
25 is such a ruling.

1 THE COURT: Okay.

2 MR. BUNDY: Along with the ruling
3 that Your Honor made about the as-planned
4 schedule, and I have case law for you that I
5 didn't -- I don't know if you noticed. I turned
6 around. I was getting ready to hand you the
7 cases. I didn't have them. They were in my
8 hotel room.

9 I have cases which say the as-planned
10 schedule does not comply with the business
11 records rule. So some of these -- I don't want
12 to try this case again, I really don't.

13 THE COURT: I'm with you. I'm with
14 you.

15 MR. HILDEBRAND: Your Honor, for
16 him to stand up and say that they didn't --
17 again, what I'm trying to do is trying to be
18 somewhat economical with the case. For him to
19 say that he doesn't have these documents that we
20 submitted to him with our claim, and here's this
21 agent saying, we looked at the documents, and
22 here's our ruling.

23 That's -- for him to stand up and say
24 that he doesn't have access to them -- he does
25 have access to them. He has access to every

1 document that they have in their file and that we
2 have in our file. But I'll move on, Your Honor.

3 MR. BUNDY: I have access to two or
4 three automobiles, but I don't have to drive them
5 up here every time I come. Okay? This is his
6 case in chief. I don't have to put in anything.
7 Okay?

8 THE COURT: I'm with you.

9 MR. BUNDY: And he has to comply
10 with the rules. Sure, I could go back right now
11 and go through 50 boxes in my office and try to
12 find it. Okay?

13 But I don't know whether what I'm going
14 to find is what was attached to that letter. I
15 can't get the lady here. I can't cross-examine.
16 And this statement is an out-of-court statement
17 offered for the truth of the fact asserted, this
18 144,907.

19 And there's no foundation for it. It's
20 not the best evidence of how that number was
21 arrived at. So, you know, this is very -- this
22 is fundamental and foundational to this whole
23 case, this kind of lack of evidence.

24 THE COURT: I'm with you. I'm with
25 you. Objection noted and overruled. Go ahead.

1 BY MR. HILDEBRAND:

2 Q. All right. Let's turn to tab 103,
3 please. This is a letter to you from Kim Brown.
4 Based on the architect's decision letter received
5 from WLA on December 21, 2016 about the sixth
6 floor delay. This is a letter to you from Kim
7 Brown, correct?

8 A. Yes.

9 Q. Part of the business records of Balfour
10 Beatty?

11 A. Yes.

12 MR. HILDEBRAND: I would like to
13 admit it, Your Honor.

14 THE COURT: All right. Any
15 objection to this one?

16 MR. BUNDY: What number is it, Tom?

17 THE COURT: 103. It's a demand for
18 mediation, right?

19 MR. BUNDY: 103. Here it is. No
20 objection.

21 (PLF. EXH. 103 was marked for
22 identification and admitted into evidence.)

23 BY MR. HILDEBRAND:

24 Q. All right. So in response to the
25 owner's -- to the architect's statement that she

1 would approve \$144,000, let me ask just you this:
2 Did you ever get paid that amount?

3 A. No.

4 Q. Okay. Do you know why not?

5 A. No.

6 Q. In response to that -- the architect's
7 decision that you would get part of your claim
8 but not -- part of it was undisputed from the
9 architect and part of it was disputed, correct?

10 A. Correct.

11 Q. And did y'all agree with the architect's
12 assertion on the disputed part?

13 A. We did not.

14 Q. All right. And what did you -- as a
15 result, what did Balfour Beatty do?

16 A. Offer mediation.

17 Q. All right. And that's what this letter
18 reflects?

19 A. Yes.

20 Q. All right. Let's turn to tab 109. This
21 is a letter from Nick Starcevic, you're copied,
22 to Kim Brown dated -- an e-mail letter dated
23 5/26/17. Do you see that?

24 A. I do.

25 Q. Okay. Part of the business records of

1 Balfour Beatty?

2 A. Yes.

3 MR. HILDEBRAND: All right. I
4 would like to admit this, Your Honor.

5 MR. BUNDY: Let me take a look at
6 it.

7 THE COURT: What exhibit number?
8 I'm sorry.

9 MR. HILDEBRAND: It's 109.

10 THE COURT: All right.

11 MR. BUNDY: Your Honor, if I
12 could -- if the witness will confirm that all of
13 these documents that were attached to the e-mail
14 were part of this e-mail and sent at the time, I
15 got no problem with it. But I need just a little
16 bit of authorization or foundation.

17 THE COURT: Okay. A little more
18 foundation.

19 MR. HILDEBRAND: All right.

20 BY MR. HILDEBRAND:

21 Q. Do you remember submitting a claim
22 for -- as reflected in this e-mail?

23 A. Yes.

24 Q. And do the documents -- is this an
25 e-mail forwarding the attachments that are part

1 of it?

2 A. Yes.

3 Q. All right. So this is a part of the
4 claim where you're requesting 61 days and costs
5 associated with delays; is that correct?

6 A. Yes.

7 Q. All right.

8 MR. HILDEBRAND: Are we good?

9 MR. BUNDY: Based on that
10 representation that this is a complete document
11 and not a partial document and it's authentic, no
12 objection, based on that representation.

13 THE COURT: All right. Very good.

14 (PLF. EXH. 109 was marked for
15 identification and admitted into evidence.)

16 BY MR. HILDEBRAND:

17 Q. Let me ask you this. Let's turn to the
18 fifth page back. Do you see a schedule that's
19 attached?

20 A. Yes.

21 Q. Why was a schedule attached to that
22 e-mail?

23 A. It would show the actual progression of
24 the structure.

25 Q. And how did that relate to your delay

1 claim?

2 A. The delay would be -- let me look at
3 this real quick.

4 Q. Let me ask you this.

5 A. It showed the actual dates of the
6 construction scheduled through level 8.

7 Q. Were you asked to provide critical path
8 schedules in support of your delay from the
9 architect?

10 A. I don't know that we were asked, but we
11 provided it.

12 Q. Okay. All right. Let's turn to tab
13 111, please. Actually, I will skip that one.
14 All right. Let's turn to tab 120, please.

15 A. 120?

16 Q. Yes, sir. It's a letter dated December
17 4, 2017, and this one is to David Simonton from
18 Buck Lindsey.

19 A. David Stanton.

20 Q. I'm sorry, David Stanton, you're right.

21 A. That's what I read.

22 Q. Right. Are you -- have you seen a copy
23 of this letter?

24 A. I have.

25 Q. Were you provided a copy at or about the

1 time that it came into Balfour Beatty?

2 A. I was.

3 Q. Are you familiar with the contents of
4 it?

5 A. I am.

6 MR. HILDEBRAND: I would like to
7 admit this, Your Honor.

8 MR. BUNDY: No objection.

9 THE COURT: Without objection, 120.

10 (PLF. EXH. 120 was marked for
11 identification and admitted into evidence.)

12 BY MR. HILDEBRAND:

13 Q. All right. A letter to David Stanton,
14 Buck Lindsey, December 4, 2017, the re is,
15 Bennett Hotel Marion Square, South Carolina, RCO
16 122R. First sentence, we are in receipt of your
17 November 27, 2017 e-mail containing RCO 122R
18 addressing L6, L8 and L9 structural delays with a
19 total value of \$1,012,042 along with related
20 backup materials.

21 At the very bottom of the paragraph, the
22 very bottom paragraph on that first sentence,
23 today for L7, L8 and L9 structural delay claims,
24 the architect has published an initial decision
25 recommending an award of 20 days and \$72,454 in

1 related costs. Do you see that?

2 A. I do.

3 Q. Was that payment of \$72,454 ever
4 received by Balfour?

5 A. No.

6 Q. Do you know why not?

7 A. I don't.

8 Q. Turn to the second page of this. It
9 says under number 8, the cause of the delays was
10 the inability of the BIM system coordination work
11 to keep ahead of the actual L6, L9 structural
12 work, thereby delaying that construction work.
13 Do you agree with that?

14 A. I do.

15 Q. Right. And to whom do you attribute
16 that delay or that issue? Who's at fault there
17 in your view?

18 A. I mean, the architect, owner. I mean,
19 everyone -- all the MEPs, the architect, the
20 interior designer and all are contracted through
21 the owner. We're contracted to the owner, so...

22 Q. All right. So turn to tab 123, please.
23 This is a letter dated December 21, 2017, and
24 it's from David Stanton, director of operations,
25 and you were copied on it. Do you see that on

1 the last page?

2 A. I do.

3 Q. All right. Is this part of the business
4 records for Balfour Beatty?

5 A. Yes.

6 MR. HILDEBRAND: I'd like to admit
7 this, Your Honor.

8 MR. BUNDY: Okay. The only --
9 there are, I think, a series of attachments to
10 this. I've heard no foundation on the
11 attachments. So I don't -- well, I don't know.
12 I'll have to look at the attachments first before
13 I can tell you whether I object to it.

14 THE COURT: All right. Go ahead.
15 BY MR. HILDEBRAND:

16 Q. All right. What are the attachments,
17 Mr. Spano?

18 A. The cost freight downs, verifications
19 from Lithko, cost freight downs, paycheck history
20 details, a combination of e-mails, previous
21 letters, just a compilation of backup for the
22 claims.

23 Q. Okay.

24 MR. BUNDY: The letter doesn't
25 refer to any attachments, either in the body or

1 underneath or at least as my quick read. I could
2 be wrong. I don't see any reference in this
3 letter to the inclusion of the attachments.

4 The letter on its face, if you use the
5 normal business methodology, would be to note
6 that there were attachments in the letter for
7 obvious reasons, and unless Balfour Beatty wants
8 to put into evidence that it's their normal,
9 custom usage in keeping up with their business
10 records is not to put in cover letters of their
11 attachments.

12 And maybe they send attachments without
13 cover letters. I have no idea how they do
14 business. Okay? But this is not normal
15 business.

16 MR. HILDEBRAND: Okay. Well, why
17 don't I just --

18 MR. HILDEBRAND:

19 Q. Turn to the second page, number 3.

20 MR. BUNDY: All right. I see it
21 now. It says attachment, additional
22 documentation. I just need to, you know.

23 THE COURT: Okay.

24 MR. BUNDY: If it's this witness's
25 testimony that this is the attachments, that he

1 refers to attached as additional documentation,
2 honestly, I wouldn't have a valid objection, and
3 since he's testified it's kept in the normal
4 course of business.

5 And I'm not so sure that really, it
6 qualifies for business records because they're
7 not the business records of Balfour Beatty.
8 They're the business records of Lithko, and
9 there's been no foundation as to how Lithko keeps
10 its records. I think we've got some pretty
11 interesting stuff about the way they keep their
12 books, too.

13 So I would take the position that the
14 letter is admissible, but that the attachments
15 are not because there's a lack of foundation.
16 This gentleman cannot testify to the business
17 record keeping of Lithko unless he worked for
18 Lithko. And he didn't testify to it.

19 You can come back later, tomorrow, put
20 up a Lithko guy. They're in this case, Judge.
21 But once again, without any -- I can't defend the
22 case if this happens.

23 THE COURT: All right. Point
24 noted. Okay?

25 MR. HILDEBRAND: Your Honor,

1 obviously for Balfour to submit a delay claim,
2 that included -- they didn't self-perform any of
3 this work.

4 THE COURT: Right.

5 MR. HILDEBRAND: They used
6 subcontractors. And so to establish what the
7 costs are -- just like with the pay applications
8 and everything else, we submit information to the
9 owner from our subcontractors.

10 The owner doesn't call in the
11 subcontractors and put the subcontractors under
12 oath. They -- we provide information to the
13 owner that we get from subcontractors throughout
14 the project. And here, these -- this is simply
15 the substantiation for the subcontractors that --
16 and our costs that we are submitting in
17 substantiation of our claim, and that's what he
18 is testifying about.

19 THE COURT: Has he properly laid
20 that foundation?

21 MR. HILDEBRAND: Let ask him again.

22 BY MR. HILDEBRAND:

23 Q. Do you know what these attached
24 documents are? It says, attached is additional
25 documentation from Lithko confirming the labor

1 cost being charged as part of their claim
2 request.

3 A. Lithko -- there's Lithko labor report
4 attached.

5 MR. HILDEBRAND: All right, Your
6 Honor.

7 THE COURT: Have you gone through
8 those documents? Is that what you're seeing?

9 THE WITNESS: That's what I'm
10 seeing right now looking through them, that
11 they're Lithko labor reports.

12 THE COURT: All right. And do you
13 have specific recollection of having received
14 this document? It looked like you were copied on
15 it. Do you recall?

16 THE WITNESS: Originally, I was
17 copied on the receipt of the backup documents to
18 the claim from our subcontractors, yes.

19 THE COURT: And reviewed it at the
20 time?

21 THE WITNESS: At the time, yes.

22 MR. BUNDY: May I make my record?

23 THE COURT: Sure.

24 MR. BUNDY: The argument that the
25 claim is evidence in a courtroom, that because

1 apparently Kim Brown didn't raise the ruling,
2 didn't rule on these documents as evidence --
3 what he is saying is that, once a party out of
4 court, Kim Brown first.

5 Kim Brown got this in the mail. There
6 ain't no doubt about it, right? Whatever she
7 got. Whoever got this, got it. Okay? I
8 don't -- you know, I don't deny that they may
9 have gotten it, right?

10 THE COURT: Okay. All right.

11 MR. BUNDY: That's not the issue.
12 Kim Brown -- we never denied a single claim
13 because it violated the rules of evidence. We
14 never did that.

15 THE COURT: Okay.

16 MR. BUNDY: But we also didn't --
17 we never agreed to come down here, and because we
18 have accepted documents from someone, that they
19 automatically are admissible into evidence. And
20 that just, of course, could never be the rule.
21 We agreed that we would come before you, a Judge,
22 to apply the rules of civil procedure into
23 evidence.

24 THE COURT: Okay.

25 MR. BUNDY: There's no foundation

1 for these documents, none. He doesn't know the
2 books and records of Lithko. He doesn't know who
3 prepared them. He doesn't know if they were
4 prepared in the ordinary course of business.

5 All he knows is he got them in the mail.
6 I mean, that could -- is the rule now, if I got
7 something in the mail, now it's admissible into
8 evidence? It couldn't be the rule. It couldn't
9 be the rule.

10 THE COURT: No. Objection noted,
11 overruled.

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

14 THE COURT: Go ahead. 109 was that
15 one? I'm sorry, 123?

16 MR. HILDEBRAND: Yes, sir.

17 (PLF. EXH. 123 was marked for
18 identification and admitted into evidence.)

19 BY MR. HILDEBRAND:

20 Q. Let's look at something on that
21 paragraph 3, level 7 delay.

22 Right in the middle of it, it says, as
23 for the notification statement in the 2/8/17
24 letter, please note that the modification for the
25 seventh floor delay and the ninth floor delays

1 are considered as an ongoing delay to the
2 notification that was issued as part of the level
3 6 delay. Did I read that correctly?

4 A. Yes.

5 Q. All right. Let's turn to tab 126,
6 please? This is a letter from -- to Jim Clements
7 from David Simonton regarding a January 29, 2018,
8 demand for payment to Balfour Beatty. I will
9 tell you what, I'll come back. I'll introduce
10 this through Mr. Simonton rather than you. We
11 will disregard that.

12 THE COURT: All right.

13 BY MR. HILDEBRAND:

14 Q. Let's go to the next book.

15 A. What would be the next book?

16 Q. Binder 3.

17 THE COURT: Okay. All right. This
18 is binder number 3.

19 I was going to run until about 12:30 or
20 so. Does that sound good?

21 MR. HILDEBRAND: Yes, sir. I would
22 like to try to get through it --

23 THE COURT: Sure.

24 MR. HILDEBRAND: -- if I can.

25 THE COURT: Yep.

1 MR. HILDEBRAND: All right.

2 Exhibit tab 185.

3 MR. BUNDY: And it's in book 3 of
4 5? 185 in book 3 of 5?

5 MR. HILDEBRAND: Yes.

6 MR. BUNDY: For the record, I
7 thought we were going to say what book we were
8 in.

9 MR. HILDEBRAND: I'm sorry.

10 THE COURT: So we're now in binder
11 3, Exhibit 185, tab number 185. Got it.

12 BY MR. HILDEBRAND:

13 Q. All right. Can you identify what is
14 included in Exhibit 185?

15 A. Yes, one page of the Hotel Bennett.

16 Q. And do you know where this came from?

17 A. I saw it in an -- I can't remember what
18 newspaper or whatever, but I saw the
19 advertisement of it.

20 MR. HILDEBRAND: I've move to
21 introduce.

22 MR. BUNDY: No objection at all.

23 THE COURT: Best luxury hotel.

24 MR. BUNDY: That's a good way to
25 get fired is to object to that evidence.

1 THE COURT: That looks like the
2 same thing you showed me on opening day. Is it?

3 MR. HILDEBRAND: It is.

4 THE COURT: All right. From the
5 Post and Courier. Sometimes you can believe
6 them.

7 (PLF. EXH. 185 was marked for
8 identification and admitted into evidence.)

9 BY MR. HILDEBRAND:

10 Q. Let's turn to tab 203, please. Are you
11 with me?

12 A. I'm with you.

13 Q. All right. This is a subcontract to
14 Lithko for this project; is that correct?

15 A. That's correct. A copy of it, yep.

16 Q. All right. Have you reviewed this
17 subcontract in the past?

18 A. In the past, yes.

19 Q. Are you familiar with it?

20 A. With the subcontract, yes.

21 Q. Yes. Is it part of the business records
22 of Balfour Beatty?

23 A. Yes.

24 MR. HILDEBRAND: I would like to
25 admit this one, Your Honor.

1 MR. BUNDY: Objection.

2 THE COURT: All right.

3 MR. BUNDY: It's not the complete
4 contract. I know it's not the complete contract
5 because they signed a secret agreement or what
6 they call a pass-through agreement, confidential
7 and all that.

8 But that's part of this contract. They
9 signed some modification to this contract that
10 they signed, and they have not, as far as I know,
11 withdrawn. A couple of the coconspirators got
12 out. You've still got a couple left. This is
13 one of them.

14 MR. HILDEBRAND: Your Honor, I
15 strongly object to that speaking objection, and
16 for him to argue to this Court -- he can make the
17 arguments that he wants to later. There were pay
18 apps, and obviously there were documents that
19 came after this.

20 And for him to make that speech, I
21 think, is just entirely inappropriate. This case
22 trial is going to go on a long time if we -- if
23 counsel is allowed -- I don't do it.

24 THE COURT: Yeah.

25 MR. HILDEBRAND: If present counsel

1 is allowed to make those sort of statements.

2 THE COURT: It would be best, and I
3 would request that, if the objection is made,
4 then the -- I'll ask for the basis for the
5 objection would be best. But this is being
6 presented as the contract between Balfour Beatty
7 and Lithko contract; is that correct?

8 MR. HILDEBRAND: Correct, yes, sir.

9 THE COURT: That's what's
10 represented here?

11 MR. HILDEBRAND: Yes, sir.

12 THE COURT: And the objection is,
13 it doesn't include everything?

14 MR. BUNDY: I mean, specifically,
15 the -- specifically, it doesn't include the
16 pass-through agreement which modified the terms
17 of this contract.

18 THE COURT: It's some type of
19 subsequent agreement, correct?

20 MR. BUNDY: But it modifies the
21 terms of his contract. The payment terms, who's
22 going to process the claims, their cooperation
23 agreement, which violates the contract between my
24 client and Balfour Beatty.

25 THE COURT: All right.

1 MR. BUNDY: So it's just not a
2 complete contract is really all I'm really
3 saying.

4 THE COURT: I'm with you. I'm
5 going to overrule the objection for now and allow
6 it in.

7 MR. BUNDY: Thank you, Your Honor.

8 THE COURT: Yes, sir.

9 MR. HILDEBRAND: So this is
10 admitted?

11 THE COURT: 203, yes, in evidence.

12 (PLF. EXH. 203 was marked for
13 identification and admitted into evidence.)

14 BY MR. HILDEBRAND:

15 Q. So let's go through some terms. This
16 particular contract is Lithko for concrete,
17 correct?

18 A. Yes.

19 Q. Dated April 7, 2015?

20 A. Yes.

21 Q. All right. I would like to go through
22 some provisions in it. Go to the third page,
23 which is actually -- it says 2 of 12 at the
24 bottom. Under paragraph A at the top, about
25 two-thirds down where it says, subcontract -- or

1 contractor may withhold?

2 A. Yes.

3 Q. Okay. Contractor may withhold funds
4 from monthly progress payments to protect
5 contractor because of any actual or reasonably
6 likely fault by a subcontractor, correct?

7 A. Correct.

8 Q. Paragraph D below that, contractor may
9 withhold amounts due under the subcontract or any
10 other agreement between the parties to cover
11 contractors reasonable estimate of any costs or
12 liability contractor or its surety has incurred
13 or may incur for which subcontractor may be
14 responsible, correct?

15 A. Correct.

16 Q. Turn to 5 of 12. Article 5, default in
17 damages, paragraph A, first sentence. If
18 subcontractor fails to fully or timely comply
19 with any duty imposed on legal requirements for
20 the subcontract including the contract documents,
21 it is in default, correct?

22 A. Correct.

23 Q. Okay. Next page, article 7, indemnity.

24 A, to the full extent permitted by law,
25 subcontractor will indemnify him, protect and

1 hold harmless contractor and its surety. And
2 then skipping down to small i, any default or
3 failure to timely or fully perform as required by
4 subcontractor, correct?

5 A. I didn't follow you on that one. Where
6 are we at?

7 Q. On page 6 of 12.

8 A. Okay.

9 Q. Article 7, indemnity, the first
10 sentence. To the full extent permitted by law,
11 subcontractor will indemnify, protect and hold
12 harmless contractor and its surety. And then
13 skip down to small i. From any default or
14 failure to timely or fully perform as required by
15 subcontractor, correct?

16 A. Correct.

17 Q. And the contractor of this document is
18 Balfour Beatty, correct?

19 A. Correct.

20 Q. And then under B, the second sentence,
21 the duty to depend includes all costs of
22 litigation, attorney's fees, expert and
23 consultant fees, settlement costs, and reasonable
24 expenses in connection with the claim or
25 litigation, correct?

1 A. Correct.

2 Q. Page 10 of 12, at the B at the top. If
3 disputes between contractor and subcontractor
4 involve the conduct of the owner or an
5 interpretation of requirement of the contract
6 documents, then subcontractor must follow all
7 claim, notice, and dispute procedures and
8 requirements of the contract documents.

9 And the subcontractor recognizes that it
10 may be joined in any court or arbitration
11 proceedings required by the contractor documents.
12 Subcontractor is bound to the contractor to the
13 same extent that contractor is bound to the owner
14 by the terms of the contract documents and by any
15 and all preliminary and final decisions or
16 determinations made by the party, board, or court
17 authorized in the contract documents or by law.

18 Regardless of whether subcontractor is a
19 party to the proceedings, subcontractor will, as
20 a condition, precedent to its right to pursue any
21 claim, comply with all notes, claim and dispute
22 resolution provisions of the contract documents
23 including allowing a reasonable time for
24 contractor to analyze and forward to the owner
25 any required communications or documentation.

1 Contractor will, at its option, present
2 to the owner in contractor's name or authorize
3 subcontractor to present to the owner in
4 contractor's name all of the subcontractor's
5 claims and answer the owner's claims involving
6 subcontractor's work whenever the contractor is
7 permitted to do so by the terms of the contract
8 documents.

9 If the dispute is prosecuted or defended
10 by contractor, the subcontractor, at its expense,
11 agrees to furnish all documents, statements,
12 witnesses, and other information required by
13 contractor and to pay or reimburse contractor for
14 subcontractor's allocable share of reasonable
15 costs incurred by contractor in connection with
16 the dispute including attorney's fees, correct?

17 A. Correct.

18 Q. Okay. Turn to the next attachment to
19 the document, which is subcontract, special
20 provisions and page 11 of 16.

21 A. I'm not following you.

22 Q. There is an attachment that is the
23 special conditions, subcontract special
24 conditions. You might need to keep turning.

25 A. Go the other way?

1 Q. It's 1 of 16.

2 THE COURT: It's back a ways.

3 Q. I believe at the bottom it says, 1 of 16
4 or it's numbered, and there are 16 pages.

5 A. Yeah, special provisions?

6 Q. Right. All right. Let's turn to
7 paragraph 43, the second paragraph.

8 A. Paragraph which one, sorry?

9 Q. 43 on page 11 of 16.

10 A. Yes, sir.

11 Q. And the second paragraph of that.

12 A. All right. I'm with you.

13 Q. Okay. Subcontractor further understands
14 and agrees that the terms of the agreement
15 between the owner and contractor, as regards but
16 not limited to timely notification of delays
17 and/or change requests and resolution of claims
18 had substantial completion, also do apply to this
19 subcontracted agreement, correct?

20 A. Correct.

21 Q. Okay. Almost finished. Page 13 of 16,
22 paragraph 58, liquidated damages. Subcontractor
23 is responsible for payment of liquidated damages
24 as set forth in owner's contractor supplementary
25 general conditions.

1 Liquidated damages will apply to the
2 project final completion date. The contractor
3 will begin deducting and withholding liquidated
4 damages from subcontractor monthly pay
5 applications as delays occur to ensure monies are
6 available at conclusion of phase or project,
7 correct?

8 A. Correct.

9 Q. All right. And the last one, page 16 of
10 16, at the very last paragraph, paragraph 76. 76
11 A, subcontractor acknowledges the agreement
12 between the contractor and the owner provides
13 that, for any delay attributable to the
14 contractor or entity for which it is responsible,
15 there is a potential recovery of liquidated
16 damages as detailed below.

17 Subcontractor further acknowledges and
18 agrees that, should contractor be assessed
19 liquidated damages in any part or all of the
20 delay is attributable to the subcontractor's
21 performance of the work, then subcontractor will
22 be responsible for its proportionate share of the
23 liquidated damages amount. And then below that,
24 hotel LD amount is \$9,000 per day, correct?

25 A. Correct.

1 Q. This contract is between Balfour and
2 Lithko, correct?

3 A. This one, yes.

4 Q. Right. Are the terms of the
5 subcontracts with Balfour's other
6 subcontractors -- are the subcontractors
7 basically identical insofar as those provisions
8 are concerned, to your knowledge?

9 A. They are.

10 Q. All right. Turn to Exhibit 205, please.
11 Are you familiar with this document?

12 A. Let's see. I'm familiar with it but
13 not, you know, directly, I guess.

14 MR. HILDEBRAND: This is a request
15 to admit that we had served on Library
16 Associates.

17 THE COURT: Probably the lawyers
18 are a little more familiar with this one than the
19 witness is.

20 MR. BUNDY: I'm not familiar with
21 the procedure where a witness puts in the
22 pleadings or request to admit. If Mr. Hildebrand
23 wants to read into the record the request to
24 admit at the appropriate time in this case, I
25 will be happy to go that way. I'm a little bit

1 confused about this.

2 THE COURT: Yeah.

3 MR. HILDEBRAND: I can do that. I
4 thought it might be -- do you have any objection
5 to admissibility of my request to admit from you?
6 Will you stipulate that --

7 MR. BUNDY: What I object to is the
8 procedure. You can read to the Judge, but we're
9 not -- I'm not going to -- it's a filing in the
10 case, I mean, you know.

11 THE COURT: Right.

12 MR. BUNDY: The Judge has it. It
13 doesn't need to be in evidence. Okay? You can
14 read it, and the Judge has it. And you can file
15 it. Whatever makes you happy. I just don't want
16 it as an exhibit in this case.

17 MR. HILDEBRAND: Okay. I would
18 like to move it as an exhibit in the case, Your
19 Honor.

20 MR. BUNDY: I object to that
21 procedure.

22 THE COURT: On the basis that?

23 MR. BUNDY: Sir?

24 THE COURT: On the basis that it is
25 what?

1 MR. BUNDY: Well, one, on the basis
2 that this witness can't lay a foundation for it.

3 THE COURT: Right.

4 MR. BUNDY: So this is
5 inappropriate.

6 THE COURT: I don't think he needs
7 to put it in through the witness.

8 MR. BUNDY: Exactly.

9 THE COURT: I think that he can put
10 it in, in any event.

11 MR. BUNDY: Right. He can put it
12 in, in any event.

13 THE COURT: Right.

14 MR. BUNDY: But I would like to
15 have it done separately like it's supposed to be,
16 and I don't agree to putting my letterhead in
17 evidence and all of that, right?

18 THE COURT: Okay. Just the
19 responses?

20 MR. BUNDY: Just read the request
21 and the response.

22 THE COURT: Right.

23 MR. BUNDY: And, you know, if I
24 want to put in the first one we put in which
25 tried to explain why we weren't going to be able

1 to omit it. We're going to put that one in too,
2 I guess.

3 MR. HILDEBRAND: We've got that.

4 THE COURT: Okay.

5 MR. HILDEBRAND: And I'm happy to
6 withdraw the cover letters and just submit the
7 two drafts of the request to admit that I had --
8 the two responses that I got from Mr. Bundy, and
9 I'd like to put those into evidence.

10 THE COURT: All right. I'll allow
11 that.

12 MR. HILDEBRAND: Thank you, Your
13 Honor. So I will remove the cover letter from
14 tab 205 and the cover letter from tab 206.

15 THE COURT: Okay. So this will be
16 supplemental responses --

17 MR. HILDEBRAND: Yes, sir.

18 THE COURT: -- or additional?
19 Okay. Moved into evidence.

20 BY MR. HILDEBRAND:

21 Q. All right. Let's turn to tab 211,
22 please. Do you see that?

23 A. I do.

24 Q. All right. This is the first page of
25 pay application 42; is that correct?

1 A. That's correct.

2 Q. Are you familiar with this document?

3 A. I am.

4 Q. Were you involved with compiling the
5 data for it?

6 A. I believe Nick Starcevic was on this
7 one.

8 Q. Are you familiar with the data that went
9 into it?

10 A. The backup, yes.

11 Q. Okay. Is this --

12 A. I sat in those meetings for --

13 Q. Okay.

14 A. The pay app meetings.

15 MR. HILDEBRAND: I would like to
16 move to introduce this into evidence, Your Honor.

17 MR. BUNDY: Which one? What number
18 is this, Tom?

19 MR. HILDEBRAND: 211.

20 MR. BUNDY: 211. Okay. I object
21 to the first page. It's not the entire document.

22 MR. HILDEBRAND: I understand that,
23 Your Honor. And I'm just introducing it for the
24 information, and I understand it's not a complete
25 document. But I'm introducing it for limited

1 purposes, Your Honor, just to show the dates and
2 whether it was approved or not.

3 THE COURT: Okay. And the
4 objection is it's not a complete document?

5 MR. BUNDY: Yes, sir. It's not the
6 entire document. I don't know how you -- you put
7 the documents in, all of them or you don't put
8 them in at all. You know, I don't know what the
9 limited purpose would be. I mean, is it for
10 notice? I guess we got notice of this.

11 MR. HILDEBRAND: I'm trying to --
12 if he wants to put in the whole thing, Your
13 Honor. I'm just putting in -- I'm trying to put
14 in the relevant data that I want, and it's just
15 this one page on each one of them.

16 THE COURT: Okay. All right. So
17 the purpose of it is notice; is that right?

18 MR. HILDEBRAND: Yes, sir.

19 THE COURT: And the amount would be
20 substantiated by the documentation behind it,
21 correct?

22 MR. HILDEBRAND: Right. That's
23 correct, Your Honor.

24 THE COURT: All right. I'm going
25 to allow it for notice reasons.

1 MR. BUNDY: Thank you, Your Honor.

2 MR. HILDEBRAND: Thank you. All
3 right.

4 (PLF. EXH. 211 was marked for
5 identification and admitted into evidence.)

6 MR. HILDEBRAND: Page 212, pay app
7 43, I'd like to move that in on the same basis,
8 Your Honor.

9 THE COURT: 212?

10 MR. BUNDY: Same objection.

11 THE COURT: Allowed for the same
12 reason, notice.

13 (PLF. EXH. 212 was marked for
14 identification and admitted into evidence.)

15 MR. HILDEBRAND: Okay. 213.

16 THE COURT: The same.

17 MR. BUNDY: Well, this one is not
18 signed.

19 MR. HILDEBRAND: Right. It wasn't
20 signed. We submitted it, and it wasn't signed.

21 MR. BUNDY: Okay. It wasn't signed
22 by anybody?

23 MR. HILDEBRAND: Right.

24 MR. BUNDY: It's not signed by the
25 contractor either.

1 THE COURT: Right.

2 MR. BUNDY: So what relevance is
3 it?

4 THE COURT: Well, let me -- yeah.
5 I think that's a legitimate question. It's a pay
6 application request, but it's unsigned by anyone,
7 whatsoever?

8 MR. BUNDY: Right. How could it be
9 relevant to this case? We've got another
10 unsigned order here. Okay?

11 THE COURT: Yeah.

12 MR. HILDEBRAND: Let me come back
13 to that one, Your Honor.

14 THE COURT: Okay. I will allow 11,
15 12 and 13. But 14 is just for ID.

16 MR. HILDEBRAND: Yes, sir. And
17 then to 14, this is signed by -- it's the same
18 that we had before, pay application 45. Any
19 objections to that first page?

20 MR. BUNDY: Same objections that I
21 have to all of them, Judge. I assume it will be
22 the same rule, the notice again.

23 THE COURT: Okay. This one is
24 signed.

25 MR. HILDEBRAND: Yes, sir.

1 THE COURT: I will allow it.

2 MR. HILDEBRAND: Thank you, Your
3 Honor.

4 (PLF. EXH. 213 and 215 were marked
5 for identification and admitted into evidence.)

6 MR. HILDEBRAND: Okay. I'm going
7 back to book 1.

8 THE COURT: Okay. I just want to
9 make sure on the numbers. We did pay apps 211,
10 212, 213 and 215; is that right?

11 MR. HILDEBRAND: 214, we are going
12 to come back to.

13 THE COURT: 214, we'll come back
14 to? All right. Now, we're back to binder number
15 1?

16 MR. HILDEBRAND: Yes.

17 THE COURT: Okay.

18 MR. HILDEBRAND: Thank you, Your
19 Honor. I think that I will introduce the main
20 documents through another witness.

21 THE COURT: All right. Okay.

22 BY MR. HILDEBRAND:

23 Q. Mr. Spano, you had testified -- I think
24 I asked you a question earlier if you have ever
25 testified in a matter, and you said that you had.

1 What was the matter that you testified in?

2 A. I testified many, many moons ago in a
3 case between a client, a homeowner against a
4 drywall contractor, just as a witness to what I
5 saw when I -- they asked me to come look at the
6 house, tell them what I saw as far as the drywall
7 work. That's all that was about.

8 Q. Okay. Have you been involved as a
9 witness or has any other project that you've been
10 involved in, to your knowledge, with Balfour
11 Beatty been involved in litigation?

12 A. No.

13 Q. Have you ever testified in any
14 litigating matter with regard to Balfour Beatty?

15 A. No.

16 MR. HILDEBRAND: Your Honor, may I
17 have just a couple of minutes to confer with my
18 co-counsel to make sure?

19 THE COURT: Sure. Okay.

20 MR. HILDEBRAND: All right. Your
21 witness.

22 MR. BUNDY: Thank you.

23 CROSS-EXAMINATION

24 BY MR. BUNDY:

25 Q. Mr. Spano, how are you?

1 A. I'm okay. I've been better.

2 Q. Good. Do you still work with Balfour
3 Beatty or don't you or do you?

4 A. I do. May I elaborate?

5 Q. Pardon me?

6 A. I can elaborate a little bit. I'm in
7 the process of shifting to a different division
8 with Balfour. That's the reason my address was
9 Florida. I just moved out of Johns Island.

10 Q. So where are you living now?

11 A. It's called Seffner, Florida. It's a
12 suburb of Tampa, Florida. It was within the last
13 two weeks.

14 MR. BUNDY: I'm done.

15 THE COURT: You're done? All
16 right. Well, this might be a good time to take a
17 break for lunch.

18 MR. HILDEBRAND: Sounds good.

19 THE COURT: Let's come back at
20 1:30. Okay. Very good.

21 MR. BUNDY: Can we get the next
22 witness or what's going to happen next?

23 THE COURT: Yeah. Who would that
24 be, Mr. Hildebrand?

25 MR. HILDEBRAND: Well, this throws

1 me off the schedule a little bit because
2 Mr. Bundy had said he was going to be --

3 THE COURT: Two days and he took
4 two minutes.

5 MR. HILDEBRAND: Right.

6 MR. BUNDY: Well, I recall an
7 e-mail you got from Mr. Hildebrand when he said
8 he wouldn't give us his witnesses the next day,
9 that he changed course mid-witness. So I made a
10 change.

11 THE COURT: He might do that, too.
12 All right. Are you prepared to go forward at
13 1:30?

14 MR. HILDEBRAND: I've got some
15 other evidence that I can introduce, but then
16 I've got -- yes, sir, I do have some depositions
17 that I would like to introduce.

18 THE COURT: Okay.

19 MR. HILDEBRAND: And I've got a
20 video deposition I would like to introduce. So,
21 yes, and then I can call another witness that
22 will take about two hours to get here. But I
23 think that we'll be okay until then; so we can
24 proceed.

25 THE COURT: Okay. Do you want to

1 call that witness and see if he can't come? Who
2 would that be? Can you tell me who that is?

3 MR. HILDEBRAND: Oh, yeah,
4 absolutely. Mark Doran.

5 THE COURT: Okay. Should be the
6 next live witness?

7 MR. HILDEBRAND: Yes, sir.

8 MR. KELLY: Your Honor, before
9 Mr. Spano is excused, I may have 10 or 15
10 minutes.

11 THE COURT: You want to talk to
12 Mr. Spano?

13 MR. KELLY: Yes, sir.

14 THE COURT: All right. Mr. Spano,
15 Mr. Kelly has got some questions for you. I let
16 you go too soon.

17 CROSS-EXAMINATION

18 BY MR. KELLY:

19 Q. Mr. Spano, my name is Britt Kelly. I
20 represent David Allen Company.

21 A. Yes.

22 Q. You were here yesterday when I asked
23 Mr. Dooley some questions, correct?

24 A. I was.

25 Q. It's going to be pretty similar to that.

1 I understand you're the senior project manager on
2 the job?

3 A. Yes, sir.

4 Q. That's for Balfour, correct?

5 A. That's correct.

6 Q. And as that senior project manager, did
7 you work with David Allen Company?

8 A. Absolutely.

9 Q. All right. How did you work with David
10 Allen Company?

11 A. In the beginning was involved in their
12 contract process negotiations, scope of work,
13 things like that. Throughout the project, I
14 worked some in the field with them and especially
15 toward the latter half of the project, I was
16 involved more in the field with the finishes
17 going on.

18 Q. All right. And did they install stone
19 and tile on the project?

20 A. They did.

21 Q. Okay. And some of that tile was, as I
22 understand it, called large format tile that
23 went on some of the terraces?

24 A. Yes.

25 Q. Are you familiar with the work they

1 performed on those terraces to install large
2 format tile?

3 A. Yes, I am.

4 Q. All right. And as part of your work as
5 senior project manager for Balfour Beatty, did
6 you oversee and observe the work of David Allen
7 Company as being performed?

8 A. I did some, and I had communication with
9 Joey or Joe, which was their superintendent.

10 Q. And when David Allen Company submitted
11 applications to be paid, were you involved in the
12 process to observe and determine whether or not
13 they had performed the work they said they had
14 performed?

15 A. I would have been, yes.

16 Q. Okay. If there were any issues with
17 their work, would you have been a part of that
18 process to bring those issues to their attention
19 to get them corrected?

20 A. Yes.

21 Q. All right. Did David Allen Company
22 perform or complete the performance of its work
23 on the project?

24 A. Yes.

25 Q. Okay. Was that work accepted by Balfour

1 Beatty?

2 A. Yes.

3 Q. And that work was accepted by the owner?

4 A. Yes, through a punch list process.

5 Q. His final work wasn't ripped out or
6 anything at the end of the job and performed by
7 another contractor; is that correct?

8 A. That's correct.

9 Q. So if we went down to the hotel today,
10 you'd still see David Allen Company's work in
11 that hotel today?

12 A. I would specifically go in the Camellia
13 lounge.

14 Q. Say that one more time.

15 A. Go to the Camellia lounge because they
16 did some great work in there.

17 Q. Tell me about the Camellia lounge,
18 specifically.

19 A. Just some very, very detailed -- I know
20 Alec went into a little bit of detail about it,
21 but there was some very thin tile. The shapes
22 went from wide to long, narrow curved points. So
23 it was basically a difficult puzzle to put
24 together.

25 As he indicated, the tile on the floor

1 that surrounded the outer perimeter matched the
2 mirror design above it, and a lot of great detail
3 went into work to make that happen.

4 I just remember, when they were
5 installing the tile, assisting some with helping
6 them carry some of the pieces. They were so
7 delicate, you needed a spot without breaking
8 them. So it's just very intricate work but good
9 work, great work.

10 Q. And did Balfour and its subcontractors
11 win awards for the work it performed at the
12 hotel?

13 A. I don't remember if Balfour has won an
14 award, to be honest with you.

15 Q. Okay. I was just wondering if any of
16 the tile work we were talking about in the
17 Camellia lounge was the subject of any award, but
18 that's not anything you know about?

19 A. Not that I'm aware of.

20 Q. And the end of the day, were you pleased
21 with the work that David Allen Company performed
22 on the project?

23 A. I was.

24 Q. At the end of David Allen Company's
25 work, were there in breach of their subcontract

1 with Balfour Beatty?

2 A. With Balfour Beatty? No, I don't
3 believe so.

4 Q. So there weren't any events of default
5 provide by Balfour or you to David Allen Company
6 upon completion of David Allen Company's work?

7 A. No defaults, no.

8 Q. David Allen Company contends in this
9 litigation, \$293,000 for its work on the project.
10 Are you able to tell us any reason why it has not
11 been paid?

12 A. I don't, in detail. I don't know the
13 timing and the liens or whatever. I don't know.
14 I can't exactly know.

15 Q. But David Allen Company completed its
16 work on the job?

17 A. Yes.

18 Q. Okay. And its work, pursuant to the
19 subcontract, was satisfactory?

20 A. Yes.

21 Q. Did David Allen Company also do
22 additional work over and above the scope of work
23 of the subcontract?

24 A. There were, I believe -- yeah, there
25 were some changes that they did, changes in work

1 that they did.

2 Q. Okay. And was some of that work on
3 those sixth floor terraces?

4 A. Yes. They had to do some build up to
5 create more slope to the drains, things like
6 that.

7 Q. And that would be considered extra work
8 or something that was more than what they were
9 originally expected to do?

10 A. It would, yeah.

11 Q. That's something that they would be
12 entitled to be paid for?

13 A. Sure.

14 MR. KELLY: I think those are all
15 the questions I have for you. Thank you for your
16 time.

17 THE WITNESS: Sure.

18 THE COURT: Anything further? All
19 right. Very good. Thank you, Mr. Spano. I'm
20 assuming you can be relieved. You might have to
21 stay, but anyway, I'm hoping they are done with
22 you. All right?

23 THE WITNESS: I am, too. Thank
24 you, sir.

25 THE COURT: Let's take that break

1 and plan to come back about 1:30. Okay?

2 (A recess transpired.)

3 THE COURT: Any matters before we
4 commence the afternoon session?

5 MR. BUNDY: I think we're good,
6 Your Honor.

7 THE COURT: Very good.

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

10 THE COURT: Mr. Hildebrand?

11 MR. HILDEBRAND: I would like to
12 introduce some deposition excerpts.

13 THE COURT: Okay.

14 MR. HILDEBRAND: And I'd like start
15 with Phil Garcia, who's videotaped. He actually
16 was deposed by Mr. McDonald. So -- go ahead.

17 MR. MCDONALD: Your Honor?

18 THE COURT: Okay. Mr. McDonald?

19 MR. MCDONALD: Mr. Garcia was the
20 30(b)(6) representative of Bernhard, MCC, which
21 as Your Honor has heard, BMCC or MCC.

22 THE COURT: Right.

23 MR. MCDONALD: We are in receipt of
24 the deposition excerpts that they seek to read,
25 which include two exhibits, and I will start off

1 with the objection as to Exhibit 1 in the
2 deposition. And what that is, Your Honor, is
3 Exhibit 1, 30(b)(6) deposition, is a deposition
4 notice --

5 THE COURT: Okay.

6 MR. MCDONALD: -- with a list of
7 topics.

8 THE COURT: All right.

9 MR. MCDONALD: That's hearsay.
10 It's irrelevant, and it wouldn't be admissible.

11 The second issue, and more pressing
12 is -- and, Your Honor, I have a copy of the
13 designations that we've received, and if you
14 wouldn't mind, I'll approach you and give you an
15 extra copy so that you can kind of follow along.

16 If Your Honor would recall in this
17 action, BMCC filed a lien in this case for six
18 and a half million dollars. They have -- in
19 support of that lien, they had a document -- a
20 claim document that was included in Balfour's
21 March 6th, 2019, consolidated claim documentation
22 that Your Honor hadn't heard about yet in this
23 trial but has heard about it previously -- in
24 support of the \$6.5 million.

25 They're no longer making that

1 claim. If Your Honor recalls, Mr. Linton stood
2 up in open court and said, we're not making that
3 claim in this case and settled with Library. The
4 only claim that BMCC had in this action was the
5 mechanic's lien filed against the property, and
6 that is now -- and they're done, as far as BMCC
7 is concerned, in this action.

8 THE COURT: Okay.

9 MR. MCDONALD: The excerpts from
10 page 45 down to page 105 relates specifically to
11 that claim document, which itself, of course, is
12 hearsay. But it's also irrelevant in this action
13 as to Balfour's claim because that Exhibit 3 was
14 the substance of the claim that BMCC is not
15 making in this action anymore, Your Honor.

16 So it would be irrelevant, it's hearsay,
17 and all the questioning from page 45, line 1;
18 page 51, line 18 through the bottom are -- are
19 immaterial and irrelevant because there's no more
20 claim. And if you'll recall, BMCC and --

21 THE COURT: So let me stop you just
22 so I'm clear. Page 5, lines 1 through 4, and
23 then you went to page 45?

24 MR. MCDONALD: Yeah. Page 5, lines
25 1 through 4 is basically just his introduction as

1 to who he is.

2 THE COURT: Yeah.

3 MR. MCDONALD: But quite frankly,
4 all of that lead up, if you get rid of Exhibit 1,
5 which is the objection to the deposition notice
6 coming into evidence in this case, all that lead
7 up is basically just who this guy was in the lead
8 up of introducing the claim, which would be
9 irrelevant. So you don't really need to read any
10 of it.

11 All of it would be immaterial, but, you
12 know, this guy exists, and it would be irrelevant
13 if we're making an objection on something that's
14 meaningless.

15 THE COURT: Okay.

16 MR. MCDONALD: And BMCC is not a
17 party to the case anymore and they're not here,
18 and therefore, reading their deposition in this
19 action would be inappropriate as well. Thank
20 you, Your Honor.

21 THE COURT: Okay. So Exhibit 1 is
22 the notice of the deposition, and Exhibit 3 is
23 basically the basis for their claim; is that --

24 MR. MCDONALD: It was the basis for
25 their claim.

1 THE COURT: Was the basis for their
2 claim. Okay. All right.

3 Mr. Hildebrand?

4 MR. HILDEBRAND: Thank you, Your
5 Honor. A witness can be deposed whether they're
6 a party or not. It doesn't matter. He was a
7 witness. He was one of the primary
8 subcontractors that was impacted by this matter,
9 and he was deposed by Mr. McDonald.

10 And he will testify about his
11 involvement with the project and the problems
12 that he encountered and certainly he's qualified.
13 I mean, he can testify about what he did. So his
14 claim relates to the problems that he
15 encountered.

16 So that's exactly why we want to depose
17 him, and it's certainly relevant. There's no
18 basis to disqualify him based on the fact that
19 he's testified about what the issues were in the
20 case.

21 THE COURT: And he is unavailable
22 now as a witness?

23 MR. HILDEBRAND: Right. He lives
24 in Louisiana.

25 THE COURT: Okay.

1 MR. MCDONALD: Your Honor, briefly.
2 This is the cost of the work job with a
3 guaranteed max.

4 THE COURT: Right.

5 MR. MCDONALD: They're not making
6 that claim against Balfour in this action. It's
7 irrelevant what this guy's -- what BMCC, quote,
8 unquote, "claim" may be. Therefore, that's the
9 problem with this. It's going through their
10 claim that they're no longer making against
11 Balfour Beatty.

12 It can never be cost of the work. They
13 can't charge something that they don't -- Balfour
14 cannot expend is what Ms. Hadley is going to go
15 through with you. You can't charge for something
16 they don't expend.

17 In fact, the settlement of Library
18 Associates, Library Associates has paid Bernhard,
19 MCC, their retainage, their last pay request.
20 That's coming out of our pocket, which could
21 never be cost of the work.

22 And as a result of that, this would be
23 irrelevant. It's immaterial. It's prejudicial
24 because Your Honor is going to be hearing about a
25 claim that hasn't been made, that is not being

1 made against Balfour by BMCC.

2 THE COURT: That is no longer being
3 made?

4 MR. MCDONALD: It is no longer
5 being made against Balfour by BMCC.

6 THE COURT: All right. How is it
7 relevant then, Mr. Hildebrand?

8 MR. HILDEBRAND: Your Honor, it's
9 relevant because one of the critical issues in
10 this case, as you well know, you said, listen, I
11 need to hear the evidence on the delay. What
12 were the problems on this job and what was the
13 delay?

14 And this is one of primary
15 subcontractors, and that's what he testified
16 about was his delay and the reasons for it and
17 his impacts. And I think you need to hear that.

18 THE COURT: Let me just ask you
19 this question: Is it cumulative to what we've
20 already heard, or is it -- how would you
21 characterize his testimony?

22 MR. HILDEBRAND: No, sir, it's not
23 cumulative because it's a subcontractor who had
24 very specific issues with his work, and I think
25 that you will hear that it's not -- I don't

1 believe it is because you haven't heard from any
2 subcontractors. You've only heard from Mr. Spano
3 and --

4 THE COURT: Okay. All right.
5 Well, I think my position on this is going to be
6 that it is relevant. It is material. I don't
7 know yet if it's prejudicial, but if we get to
8 that point, I will expect you to make that
9 objection as well. Okay? It's a 404 balance and
10 stuff. 403, 404 balance and stuff.

11 MR. MCDONALD: And it's also
12 hearsay. The claim document itself does not come
13 in. There's nobody to lay the foundation for it
14 because it's not being made by BMCC as to
15 Balfour.

16 THE COURT: Was that not done
17 during the deposition?

18 MR. MCDONALD: Excuse me?

19 THE COURT: Was that not done
20 during the deposition?

21 MR. MCDONALD: No. The foundation
22 wasn't done, Your Honor. And two, more
23 importantly, since the 30(b)(6) deposition has
24 been taken, they -- they're not making the claim
25 anymore.

1 THE COURT: I understand that.

2 MR. MCDONALD: A claimant was
3 not -- Bernhard MCC never sued Balfour in this
4 case for breach of contract. They didn't bring a
5 breach of contract claim against them. They only
6 filed a lien.

7 THE COURT: Okay.

8 MR. MCDONALD: That was it. So
9 this all relates to the lien, and I would submit
10 to you that their claim relates to retainage,
11 RCOs, unexecuted request for change order,
12 inefficiencies, loss of productivity. All of the
13 things that they, BMCC, thought they were
14 experiencing, which they are no longer making
15 against Balfour.

16 THE COURT: Because you settled it?

17 MR. MCDONALD: Because it's settled
18 with them. And there's no way to unwind that
19 from the deposition testimony that Your Honor is
20 going to hear.

21 THE COURT: All right. So on that
22 basis, if they've settled with them and they've
23 made no claim against Balfour, how does it then
24 remain relevant?

25 MR. HILDEBRAND: Because, Your

1 Honor, he was the subcontractor. He was the
2 primary subcontractor who was impacted by all
3 these changes.

4 And that's the basis for his testimony,
5 and that's a huge part of this claim. And I
6 think you will hear it, and I would like
7 certainly -- I think you need to hear his
8 deposition testimony.

9 Basically, Mr. McDonald was asking him
10 about his delays, and that's the reason I'm
11 calling him is for him to testify, for you to
12 hear his testimony, about what caused him delays
13 and the impacts that he had, which is a big part
14 of Balfour's claims.

15 Obviously, again, we didn't self-perform
16 anything, and the delays that hit us came through
17 subcontractors. So I think it is clearly
18 relevant.

19 And to the extent that they say that his
20 claim is not -- they hadn't made a claim, they --
21 Mr. McDonald said they assigned them to Library
22 Associates. So now Library is pursuing those
23 claims. So -- well, they assigned the rights.

24 But I don't want to get -- to digress,
25 Your Honor. It's clearly relevant. It's a

1 subcontractor who works on this project. It's a
2 primary subcontractor that's going to talk about
3 his issues with the delays.

4 THE COURT: All right. Okay.

5 MR. MCDONALD: And just very
6 briefly, Your Honor.

7 THE COURT: Yeah.

8 MR. MCDONALD: Obviously, we're in
9 a unique situation where you're the Judge and the
10 jury, right? So it takes away that wall that we
11 sometimes would have.

12 THE COURT: It's not unique for me,
13 unfortunately.

14 MR. MCDONALD: Well, very much. So
15 he keeps saying delays. This testimony you're
16 about to hear somehow relates to delays. The
17 burden of proof is on Balfour Beatty to show
18 those delays.

19 I will submit to you, if you go through
20 this claim that he's trying to get into evidence
21 with Exhibit 3 and the testimony that this
22 gentleman is testifying to, it doesn't relate in
23 any way to Balfour's burden of proof to show on
24 the schedule, this was the delay on the critical
25 path.

1 I'm not saying that they don't have the
2 ability to bring up delay. I'm saying, this
3 testimony doesn't relate to that. This claim
4 that -- this lien that Bernhard filed and never
5 made a breach of contract claim as to Balfour,
6 related to their claim damages, not ours. Not a
7 pass-through situation, nothing, just their claim
8 damages.

9 Inefficiency. That's where they say,
10 their guys were out there. They should have been
11 able to do it in a period of time, and it took
12 them longer to do it. Their guys, right? Or
13 loss of productivity. They have too many guys
14 out there, and they're working on top of each
15 other.

16 Their unexecuted change orders, right,
17 they're not going to get paid for by Balfour, and
18 their subcontractor costs that they're not going
19 to get paid for by Balfour.

20 So in addition to all the objections I
21 made before, once Your Honor sees this, it can't
22 be unrung. This isn't related. It's not just a
23 general, this goes to their delay. This was
24 their lien and the explanation of their lien that
25 is gone.

1 THE COURT: Okay. All right. I'm
2 going to admit it. My basis is this, I'm going
3 to allow it. I'm going to admit it into
4 evidence. But what weight to give it is within
5 the providence of the jury. It's the same person
6 who is the Judge.

7 But I think as the Judge, it comes in,
8 as the jury, I will be taking into consideration
9 it's purpose, which is intended to be for a
10 delay, according to the plaintiff. But, of
11 course, I'm taking into consideration as well,
12 the fact that defendant, Library Associates, has
13 settled with this claimant.

14 So that's a major factor in its weight
15 that the Court is going to give to it. I just
16 want y'all to know that. So that's my --

17 MR. MCDONALD: Thank you, Your
18 Honor.

19 THE COURT: -- my ruling for the
20 record.

21 MR. MCDONALD: Your Honor, just
22 while they're doing that, I just want to make
23 sure the record is clear. I obviously had an
24 objection to the two exhibits themselves.

25 THE COURT: Right.

1 MR. MCDONALD: I understand you're
2 going to hear the testimony, but I don't believe
3 I got a ruling on the inadmissibility of the
4 deposition notice and the hearsay claim.

5 THE COURT: Okay. The notice of
6 deposition, is that of significance?

7 MR. HILDEBRAND: No.

8 THE COURT: He was noticed as the
9 30(b)(6) --

10 MR. MCDONALD: Right.

11 THE COURT: -- witness, was he not?

12 MR. MCDONALD: Right.

13 THE COURT: I will take that as a
14 stipulation.

15 MR. HILDEBRAND: Okay.

16 THE COURT: As to the lien itself?

17 MR. MCDONALD: No, the claim
18 document. He wants to -- he wants to put into
19 evidence Exhibit 3, which of course, for all the
20 reasons previously, my claim was not being made.

21 MR. HILDEBRAND: I will withdraw
22 that.

23 THE COURT: Okay. All right. So
24 the two exhibits will not come in. All right.
25 Very good. Okay.

1 (Video deposition played.)

2 MR. MCDONALD: Mr. Garcia, my name
3 is Brett McDonald. We briefly met. Would you
4 give me your full name for the record, please.

5 THE WITNESS: Joseph Garcia, Jr.

6 MR. MCDONALD: What is your
7 position at Bernhard, MCC, LLC?

8 THE WITNESS: Executive vice
9 president.

10 MR. MCDONALD: I'm going to hand
11 you, sir, what's been marked as Exhibit 1. I
12 apologize for squatting over. I was trying to
13 get it over to you.

14 THE WITNESS: Okay.

15 MR. MCDONALD: And I'm going to ask
16 if you have ever seen that document before?

17 THE WITNESS: Yes, I've seen this
18 document. This is the notification for this
19 meeting.

20 MR. MCDONALD: Yes, sir. And did
21 you see this document the first time, a couple
22 weeks ago?

23 THE WITNESS: Yes.

24 MR. MCDONALD: Turn if you would
25 to -- let's see -- the fifth page of the document

1 that's entitled Exhibit A.

2 THE WITNESS: Okay.

3 MR. MCDONALD: Are you there?

4 THE WITNESS: Yes.

5 MR. MCDONALD: Okay. And these are
6 12 topics that you have been designated by BMCC
7 to testify about here today. Is that your
8 understanding?

9 THE WITNESS: Yes.

10 MR. MCDONALD: Okay. And have you
11 reviewed each of these 12 topics?

12 THE WITNESS: I've read Exhibit A,
13 yes.

14 MR. MCDONALD: And you've read
15 Exhibit A in its entirety?

16 THE WITNESS: The 12 topics, yes.

17 MR. MCDONALD: Yes, sir. And are
18 you prepared to testify as to each of these 12
19 topics?

20 THE WITNESS: I'm prepared to
21 answer any questions associated with those 12
22 exhibit items.

23 MR. MCDONALD: Okay. And do you
24 understand that you're here as a -- what's called
25 a 30(b)6 representative, which is a reference to

1 our civil rules and procedures in South Carolina?

2 THE WITNESS: I'm not familiar with
3 30(b)6.

4 MR. MCDONALD: Let me explain that
5 to you. Obviously, you can't take the deposition
6 of a corporate entity because it's a fictional
7 entity, it doesn't exist. You have to have a
8 human being that comes here to answer questions.

9 So what we've done, what the State of
10 South Carolina has done is developed a rule
11 called Rule 30(b)(6) that allows a party in
12 litigation to list out topics in which the
13 corporation need to respond to. Do you
14 understand so far?

15 THE WITNESS: Yes.

16 MR. MCDONALD: Okay. And the
17 purpose of doing that is, when you try to take
18 the deposition of a big corporation, individuals
19 within a big corporation, they would say, you
20 need to go talk to Suzy. Suzy would say, you
21 need to go talk to John. John would say, you
22 need to go talk to Mark. And then you get the
23 runaround.

24 So what we've done is we created a rule
25 that allows a listing of topics for the

1 corporation to review in advance of the
2 deposition and produce a deponent that can answer
3 as to those topics. Understood?

4 THE WITNESS: Yes.

5 MR. MCDONALD: So that's what we're
6 doing here today. You're answering on behalf of
7 BMCC?

8 THE WITNESS: Yes.

9 MR. MCDONALD: Okay. And that's
10 your understanding?

11 THE WITNESS: That's my
12 understanding.

13 MR. MCDONALD: Okay. What, sir,
14 was your role as executive vice president at BMCC
15 on what I will call the Hotel Bennett job?

16 THE WITNESS: So I oversee today,
17 this project is -- I oversee all operations that
18 this project would fall under.

19 MR. MCDONALD: Okay. And when you
20 say, that this project would fall under,
21 you're -- you oversee every aspect of BMCC's
22 role, whatever it may be in this project?

23 THE WITNESS: That's correct.

24 MR. MCDONALD: Okay. And who do
25 you report to?

1 THE WITNESS: Philip Catanzaro, our
2 president.

3 MR. MCDONALD: All right. And what
4 was Mr. Catanzaro's involvement in the project?

5 THE WITNESS: He is our president;
6 so his involvement is a little more strategic,
7 and on a little higher of an executive level.
8 For day-to-day operations, that would be myself.

9 MR. MCDONALD: My next question is,
10 how often are you on site for Hotel Bennett?

11 THE WITNESS: For myself, I,
12 depending -- at points of the job, I was on the
13 site weekly, and through -- it was periodic, as
14 needed. But it was very frequent, especially
15 from '17 on, spring of '17 forward, at least once
16 a month.

17 MR. MCDONALD: Okay. So on
18 average, you feel comfortable saying you were on
19 site throughout the job at least once a month?

20 THE WITNESS: That's correct. From
21 '17 on. I was not involved, a counterpart -- I
22 was involved earlier on in the project. I was
23 not involved in the same capacity that I was in
24 the spring of '17.

25 MR. MCDONALD: Okay.

1 THE WITNESS: So the structure
2 changed, and this project transitioned from one
3 executive vice president to another.

4 MR. MCDONALD: Okay. And let's
5 look very brief outside of that. So when in '17
6 did you become involved with day-to-day --

7 THE WITNESS: In May of '17.

8 MR. MCDONALD: And again, I'm not
9 trying to cut you off. Just let me finish. It's
10 a lot easier for her. So in May of '17, you get
11 involved in Hotel Bennett?

12 THE WITNESS: In May of '17, I
13 began -- assumed involvement of day-to-day
14 responsibilities. As executive one of three
15 operational executives of Bernhard MCC, I always
16 was involved with this project --

17 MR. MCDONALD: Okay.

18 THE WITNESS: -- at some level,
19 knowledge, and capacity.

20 MR. MCDONALD: We talked about
21 Mr. Catanzaro. You report to him, correct, as
22 the president?

23 THE WITNESS: That's correct.

24 MR. MCDONALD: And is Russ Yeager
25 your senior vice president, correct?

1 THE WITNESS: That's correct.

2 MR. MCDONALD: And you have
3 day-to-day operational control over this
4 particular project, correct?

5 THE WITNESS: Correct.

6 MR. MCDONALD: When you were
7 involved in the day-to-day process of this job,
8 the Hotel Bennett project, how --

9 (Video deposition paused.)

10 MR. MCDONALD: I just want to just
11 be clear that this is the point of the deposition
12 to which I had lodged my objection. I just
13 wanted to make sure the record is clear. From
14 this point on.

15 THE COURT: Okay. All right. Very
16 good.

17 MR. MCDONALD: Thank you very much.

18 (Video deposition played.)

19 MR. MCDONALD: How often did you
20 personally communicate directly with the owner or
21 a representative of the owner?

22 THE WITNESS: So, I mean, they
23 attended some of the meetings that we sat
24 through, especially when we discussed change
25 orders. Now, I've met Mr. Bennett outside of

1 this project.

2 MR. MCDONALD: And when you say
3 you've met Mr. Bennett outside of this project,
4 you're referring to something that doesn't have
5 anything to do with the project?

6 THE WITNESS: We had a previous
7 discussion about the project, and then we talked
8 about things outside of this project, correct.

9 MR. MCDONALD: Okay. And so,
10 during the course of BMCC or president or
11 entities work on the project, how often would you
12 say you had direct communication with any
13 representative of the owner?

14 THE WITNESS: How often like --

15 MR. MCDONALD: Yes, sir.

16 THE WITNESS: -- quantity per
17 month?

18 MR. MCDONALD: Sure.

19 THE WITNESS: During certain
20 stages, when we were going through the change
21 orders, it was -- they were part of the
22 conversations and the calls.

23 So I would say a couple times a month if
24 you count the owner's representative as a
25 representative of the owner. And he participated

1 every week via calls that I frequently called
2 into weekly. And at times, him and some of her
3 other associates attended meetings as well.

4 MR. MCDONALD: Okay. So you're
5 saying that call -- you were on calls weekly
6 with -- that included representatives of the
7 owner?

8 THE WITNESS: If you consider the
9 owner's hired construction rep, yes, he
10 participated.

11 MR. MCDONALD: On calls that you
12 participated in weekly?

13 THE WITNESS: Construction calls,
14 yes, sir.

15 MR. MCDONALD: Okay.

16 THE WITNESS: I mean, not
17 throughout the entire project, but at times,
18 throughout the project.

19 MR. MCDONALD: What does that mean,
20 though, at times? I'm just trying to understand.

21 THE WITNESS: So our scope of work,
22 you ramp up the job and you bring the job down.
23 So at times, we were busier than other times. So
24 when we're busier and we had more open change
25 orders that we're trying to work with, your

1 team -- or your representative's team wanted to
2 close out and they needed my assistance, I
3 participated.

4 But I don't participate on weeks that we
5 might only have two or three people on site, and
6 they're just -- we're just -- I call and we're
7 there more to make sure that our piece is getting
8 done and we have less men on site.

9 But in the heat of the construction from
10 '17 probably through -- and it kind of varied
11 because at times, even Balfour Beatty had their
12 president on site. I mean, we all participated
13 so that we could meet the schedule and get the
14 project open successfully for your client.

15 MR. MCDONALD: Okay. And what --
16 when you reference change orders in the response
17 you just gave me, are you talking about change
18 orders that BMCC or president or entities
19 submitted to Balfour Beatty?

20 THE WITNESS: There was a lot of
21 owner-driven changes of this project, and so when
22 I speak of change orders in construction, change
23 orders are not defined in any certain bucket,
24 who's initiated those changes or when they were
25 submitted.

1 So when I see the change orders, they
2 could fall in any bucket in that large sense.
3 But I'll be happy to clarify any specific
4 questions you may have regarding that.

5 MR. MCDONALD: Well, you used the
6 term change order. I'm just trying to understand
7 what you were referring to. You're referring to
8 universal change orders that could include change
9 orders that were initiated by the owner, change
10 orders that were initiated by Balfour Beatty or
11 change orders that were initiated by BMCC or one
12 of its entities or --

13 THE WITNESS: Well, you asked me
14 how I used it in my brief -- momentarily ago
15 because I was generally speaking very broad, much
16 like your Exhibit A generally speaks. I'm
17 generally speaking of any change outside the
18 scope of work agreed upon and executed in the
19 original contract.

20 That's all I meant by that. If you have
21 anything specific, I would be happy to answer
22 because you did have a lot of owner-driven
23 changes on this project that were either
24 initiated by the owner, the owner's rep and/or
25 the owner's design team.

1 MR. MCDONALD: Okay. Would have --
2 is it BMCC's decision that all the change orders
3 were owner initiated?

4 THE WITNESS: I would tell you that
5 you would have to ask me what specific
6 question -- you're asking me to speak in general
7 terms, much like your Exhibit A. I will answer
8 any specific question you have, but you're going
9 to need to rephrase and define that a little bit
10 for me.

11 MR. MCDONALD: Is it your
12 position -- is it BMCC's position that every
13 change order on this job was owner initiated?
14 That's the direct question.

15 THE WITNESS: Well, first of all,
16 you're --

17 MR. MCDONALD: Answer the question.

18 THE WITNESS: I would answer your
19 question, but you need to be very specific
20 because I don't understand what you are asking.

21 MR. MCDONALD: Okay. Is it BMCC's
22 position that every change order on this job was
23 owner initiated?

24 THE WITNESS: I will tell you that
25 the change orders that we submitted in our claim,

1 we believe were either owner -- they were owner
2 driven, either by themselves, their rep, or their
3 design team.

4 MR. MCDONALD: Okay. So you
5 believe that every change order that you
6 submitted in your claim was driven by the conduct
7 of the owner or its design team?

8 THE WITNESS: Yes. I mean, you may
9 have (inaudible).

10 MR. MCDONALD: So that's --

11 THE WITNESS: But the majority of
12 those were driven by that entity.

13 MR. MCDONALD: So necessarily, none
14 of the change orders issued included in your
15 claim, it's BMCC's position, were driven by the
16 conduct of the general contractor, Balfour
17 Beatty?

18 THE WITNESS: But I think the --
19 (Inaudible.)

20 MR. MCDONALD: Here, I'll rephrase.
21 So if it's your position that all of the change
22 orders that are included in your claim, okay,
23 were owner -- either owner issued or driven by
24 the owner's design team, it's necessarily true
25 that none of those change orders that were

1 included in your claim, BMCC takes the position,
2 were the responsibility of Balfour Beatty or the
3 conflict of Balfour Beatty?

4 THE WITNESS: I believe that the
5 majority of the claim, and we -- it's a
6 significant dollar, right? The dollar value is
7 insignificant, if any, that were driven by
8 anything other than the owner, the owner's rep,
9 which they influenced, and the owner's design
10 team, which they influenced.

11 MR. MCDONALD: So whatever portion
12 that's insignificant in your claim, would be
13 attributable to somebody else because the vast
14 majority of it, BMCC's position is, driven by the
15 conduct of the owner or the owner's design team?

16 THE WITNESS: Would you like me to
17 restate what I just said?

18 MR. MCDONALD: Yes, or answer the
19 question I just asked.

20 THE WITNESS: Again, I will restate
21 what I just said. I believe that the majority of
22 change orders submitted on this project were
23 initiated either by the owner directly, the
24 owner's rep, and/or influenced with -- by the
25 owner to their design team, whether the design

1 team had an issue with the design, et cetera. I
2 look at the design team as the owner's
3 representative in this case.

4 MR. MCDONALD: I'm going to hand
5 you what has been marked as Exhibit 3 and ask if
6 you have seen that document before?

7 THE WITNESS: Yes.

8 MR. MCDONALD: All right. And what
9 do you recognize that document to be?

10 THE WITNESS: This was our claim we
11 had submitted on January 23.

12 MR. MCDONALD: Okay. And did you
13 participate in the involvement of this document
14 itself?

15 THE WITNESS: Yes, with my -- our
16 counsel.

17 MR. MCDONALD: Let's take a look at
18 the first line on the first page under executive
19 summary. Are you there?

20 THE WITNESS: Yes.

21 MR. MCDONALD: Okay. It says, BMCC
22 contract amount was, \$137,917.73.

23 THE WITNESS: That's correct.

24 MR. MCDONALD: That's what left on
25 BMCC's contract with Balfour Beatty to be paid?

1 THE WITNESS: No, sir. So would
2 you like me to explain what that is?

3 MR. MCDONALD: Absolutely.

4 THE WITNESS: Sure. So our claim
5 is for 6 million as submitted January 23rd, 2019,
6 \$6,539,992. In an effort to try to put some
7 structure behind what makes up that claim as it
8 relates to the factual material and labor values
9 of the claim, we attempted to try to break them
10 into (inaudible). That's all.

11 That contract, that value of the balance
12 was the balance that was owed on our pay
13 application at that time, not including
14 retention.

15 MR. MCDONALD: So the BMCC line,
16 contract balance line item is the balance that
17 was owed on the final pay application?

18 THE WITNESS: No, sir. The pay
19 application as of January 23 at the time -- I
20 mean, work was still going on on the project,
21 from a closeout standpoint. So at the time of
22 this claim, that is the balance that was on the
23 owed line of our pay application, not including
24 retainage because we had not billed retainage at
25 that time.

1 MR. MCDONALD: Okay. So the
2 contract balance less retainage at the time,
3 January 23, 2019, was 137 --

4 THE WITNESS: No, sir, I did not
5 say that. I said, this was what was owed in that
6 pay application at that time. The -- we spread
7 the retainage in all the work to be completed
8 if -- whatever was left, amongst the other line
9 items of bucket.

10 All of these are actual costs of dollars
11 spent here in Charleston on this project. We
12 spread that throughout this to try to help put
13 together some buckets. I helped explain the
14 story of where the cost is, but the contract
15 balance was what was owed at the pay application
16 for -- in January for that pay period only.

17 MR. MCDONALD: Okay. As of January
18 23, 2019, what was the contract sum with approved
19 change orders for BMCC?

20 THE WITNESS: At that point in
21 time, I could not answer.

22 MR. MCDONALD: Do you know how much
23 was owed left with retainage on the contract sum
24 with approved change orders?

25 THE WITNESS: I do not have that in

1 front of me today.

2 MR. MCDONALD: The next one, change
3 orders approved for less than amount sought by
4 BMCC, 131,006.62. Do you see that?

5 THE WITNESS: Yes, sir.

6 MR. MCDONALD: When you talked
7 about change orders approved, were you talking
8 about change orders approved by Balfour Beatty?

9 THE WITNESS: So those change
10 orders were approved per -- per our contract,
11 yes. So Balfour Beatty would have issued us a
12 contractual executed change order for that scope
13 of work, yes.

14 MR. MCDONALD: Okay. But they were
15 approved by Balfour Beatty for less than the
16 amount you sought for?

17 THE WITNESS: It was this period
18 amount, that's correct. And I believe we do
19 define that within this document.

20 MR. MCDONALD: And so it's a
21 disputed amount between you and Balfour Beatty.

22 THE WITNESS: Disputed at -- when
23 we -- it was a disputed amount for this project.
24 In many cases, your client elected not to pay.
25 If we were to still wait to approve every change

1 order, your client would be without a building
2 today.

3 So we had to make a business decision to
4 move forward to help get to your client, who is
5 now successfully utilizing the building.

6 MR. MCDONALD: So do you know
7 whether or not Balfour Beatty approved the change
8 order for less than the amount you sought?

9 THE WITNESS: I don't understand
10 your question.

11 MR. MCDONALD: You have change
12 orders here. Is this change order approved for
13 less than the amount sought by you?

14 THE WITNESS: Yes. You're reading
15 the line item of which I defined throughout the
16 document. If you would like to go back to that
17 document, let's go in detail. Let's not try to
18 keep generalizing.

19 MR. MCDONALD: Those change orders
20 are change orders between you -- between BMCC and
21 Balfour Beatty, correct?

22 THE WITNESS: That's who my
23 contract goes through. My contract also states
24 that, I don't get a change order unless it's
25 approved by your client, per the terms of my

1 contract, which I -- we can go back to, if you
2 would like, but we need that document.

3 MR. MCDONALD: Okay. My question
4 is so much simpler than this. Are the change
5 orders you're referring to, change orders that
6 BMCC submitted directly to the owner or submitted
7 to -- just submitted to --

8 THE WITNESS: Sir, actually, if we
9 had that document, we could outline the process,
10 and that would answer your question.

11 Without that document, I cannot quote
12 the process or boiler plate. But if you were to
13 read that document in summary form, I don't
14 receive a change order unless your owner approves
15 that change order.

16 MR. MCDONALD: Unapproved proposed
17 change orders. What is an unapproved proposed
18 change order?

19 THE WITNESS: They're the change
20 orders that we submitted that were not approved,
21 but again, at some point, we needed to proceed
22 with the work so that we could make a business
23 decision to help get this project open.

24 MR. MCDONALD: And submitted to
25 who? Who did you submit those change orders to?

1 THE WITNESS: The same people. We
2 enter it through the process. That's spelled out
3 in our contract. And we can go through that if
4 we had that document. But the way my contract
5 reads, I submit it to Balfour Beatty.

6 Balfour Beatty submits it to the
7 customer, and we had weekly meetings. Some were
8 weekly; some were biweekly, depending upon the
9 quantity and mostly with your client, their
10 representative, as well as the design team to
11 review notes.

12 MR. MCDONALD: Let me ask you this:
13 Are you aware of any change orders that you
14 submitted to Balfour Beatty that Balfour Beatty
15 made the decision to reject?

16 THE WITNESS: Without a specific
17 reference to one, I don't recall. None that are
18 listed in the claim.

19 MR. MCDONALD: So BMCC's testimony
20 here today is that Balfour Beatty agrees with all
21 of these change orders?

22 THE WITNESS: You would have ask
23 Balfour Beatty that.

24 MR. MCDONALD: You don't know?

25 THE WITNESS: I can't answer for

1 them.

2 MR. MCDONALD: All right. Extended
3 general conditions of \$1,919,282.82. Do you see
4 that?

5 THE WITNESS: Yes.

6 MR. MCDONALD: And if you go to
7 page 7 of 13 and 8 of 13, that's where you come
8 up with that number, correct?

9 THE WITNESS: That's correct.

10 MR. MCDONALD: Okay. And on 8 of
11 13, you said on the first little paragraph -- or
12 the document says, BMCC's work on the project was
13 delayed, disrupted, rendered inefficient and more
14 costly as a result of -- and you list four
15 subcategories, correct?

16 THE WITNESS: A, B, C, and D.

17 MR. MCDONALD: Yes, sir. And I'm
18 pointing to D, the lack of coordination. Was
19 that -- whose job was it to -- what does lack of
20 coordination mean, I guess?

21 THE WITNESS: So I would define the
22 lack of coordination as the -- the owners had an
23 owner's rep who would sit in the meeting and
24 either -- sometimes they had authority; sometimes
25 they did not have an authority.

1 And the owners sometimes would overrule
2 them. They had a design team that sat in the
3 meetings. Sometimes they had authority;
4 sometimes they didn't. There was no coordinated
5 effort on the owner's side to get through that.

6 So our lack of coordination is --
7 there's an interface that should have it on the
8 project if you're going to outline it -- the
9 process for approved change orders. That lack of
10 coordinated effort on the owner's part did not
11 happen.

12 MR. MCDONALD: So even though you
13 don't have -- on page 8 of 13 of Exhibit 3, you
14 don't have lack of coordination by the owner;
15 that's what you meant when you put that in there?

16 THE WITNESS: I think the intent
17 was that, that is correct.

18 MR. MCDONALD: You didn't mean lack
19 of coordination by the construction manager at
20 Balfour Beatty?

21 THE WITNESS: The intent of this
22 claim was not intended.

23 MR. MCDONALD: Okay. Now, the
24 extend general conditions of \$1,919,282.82, it
25 says, includes expenses for office trailers,

1 project, office equipment, additional supervision
2 expenses, equipment rental, safety equipment,
3 just to name a few, correct?

4 THE WITNESS: That's correct.

5 MR. MCDONALD: And what that is is,
6 you-all take the position that it took longer to
7 get the job done than it should have took; so you
8 should be able to get paid for that additional
9 cost of time; is that right?

10 OTHER ATTORNEY: Object to the
11 form.

12 THE WITNESS: Can you rephrase the
13 question?

14 MR. MCDONALD: Sure. Is it your
15 position that the said general conditions that
16 you-all think, for whatever reason, somebody
17 else, not BMCC, but somebody else caused the job
18 to take longer than it should have taken?

19 THE WITNESS: The extended -- the
20 extended -- what the extended general conditions
21 is extended based upon a duration of time that
22 exceeded our contractual obligation.

23 MR. MCDONALD: Okay. And because
24 you-all thought you could get the same amount of
25 work done within the contractual time, correct?

1 That's why you came up with the contractual time,
2 correct?

3 THE WITNESS: So you have a
4 question, or you're trying to lead me to a
5 question and answer?

6 MR. MCDONALD: You-all -- did BMCC
7 think it could finish this job in the contractual
8 amount of time that was in the original contract?

9 THE WITNESS: BMCC executed an
10 agreement to finish it in that -- and that we've
11 completed many successful projects through that.

12 MR. MCDONALD: Okay. And all I'm
13 asking very simply is, the stated general
14 conditions as being claimed by BMCC because
15 you-all believe that the job took longer than it
16 should have as a result of someone else's
17 conduct?

18 THE WITNESS: I don't believe -- I
19 don't believe anything. We, again, had a
20 contractual obligation for a schedule with the
21 separation of time.

22 Beyond Bernhard MCC's control, that
23 schedule was extended. We're looking for that
24 date, the extension date, compensation for only
25 the items of things that were spent to perform

1 the work on site.

2 MR. MCDONALD: Beyond the time that
3 you thought that you could perform that, that
4 BMCC thought it could perform it, correct?

5 THE WITNESS: That's the way we've
6 outlined it in our submission.

7 MR. MCDONALD: Okay.

8 THE WITNESS: I mean, it's --
9 there's no thinking. I mean, we gave you the
10 math in -- on page 8 of 13.

11 MR. MCDONALD: And your position
12 is, this project was delayed 18 months through no
13 fault of BMCC, right? That's your-all's
14 position?

15 THE WITNESS: My position is as
16 stated on page 8 of 13 in anything I've answered
17 today.

18 MR. MCDONALD: Okay. And as a
19 result of that being your position, you all are
20 claiming that you're entitled to another 2
21 million bucks because the project was delayed 18
22 months through no fault of BMCC, right?

23 THE WITNESS: We entered claims
24 that it would -- the project was delayed through
25 no fault of BMCC.

1 MR. MCDONALD: And as a result of
2 that delay, you-all want another 2 million bucks,
3 right?

4 THE WITNESS: We don't want another
5 2 million bucks. That's what it costs to
6 successfully complete your owner's project. That
7 was what we spent here in Charleston.

8 MR. MCDONALD: Okay.

9 THE WITNESS: Can I say something
10 to you by the way? A discussion I had with your
11 customer, your client?

12 MR. MCDONALD: Sure?

13 THE WITNESS: So I met your client
14 on a couple of occasions, right? And on one
15 occasion I met with him and his wife and son at
16 a -- when I was getting up from the table to
17 leave the restaurant at the (inaudible) -- at the
18 corner where they had -- unfortunately had a
19 shooting some time back.

20 And he asked me to sit down with him.
21 And he asked me how the project was going and so
22 forth. He and I had already met through
23 mediation that you -- that was at this office
24 here sometime in '17 maybe. So he recognized me;
25 I recognized him. And so we talked a little bit.

1 And I explained to him that we had a lot
2 of change orders out there, and that we needed to
3 help resolve that. We wanted to make sure
4 that -- we wanted to get it done. He assured me
5 at that time that, Phil, we've got to let the
6 dust clear. We've got to get through the
7 process, but anything and everything you do here
8 in Charleston, I'll get you taken care of.

9 So I had a good sense of reassurance
10 that your guy was -- that Mr. Bennett was a
11 stand-up guy. Then on another unrelated project,
12 right before y'all had the hurricane last year,
13 the day before the hurricane, he invites us --
14 myself and our general counsel, Michael Durham,
15 to his office unrelated to Marion Square to come
16 visit about an energy project on -- at Patriots
17 Point.

18 So we went out there and met with -- one
19 hour meeting turned into a four hour meeting.
20 Again, the conversation started, hey, how are
21 things going? In that conversation, he even said
22 when he came in the group, we may have caused
23 some things, but we've got to let the dust
24 settle. And we've got to go through this
25 process.

1 Anything you're owed for your work done
2 in Charleston, when it's settled, I'm going to
3 get you taken care of. Then he told us the story
4 about, why even build the building? And I think
5 you see that.

6 I hadn't personally read the newspaper
7 articles, but we talked about it at dinner the
8 last night, about his story of why he built the
9 building and that his dad worked here and jumped
10 shoes or whatever it may be. He told us that. I
11 even met his mother that day, four hours later.

12 So I judged him on his character, said
13 look, they're -- we needed help. We left that
14 meeting saying, rather than stopping doing what
15 we're doing, we needed help getting this man's
16 building open because I took him on his word. I
17 was -- I felt comfortable from a business
18 standpoint that he was an up and great guy. And
19 yeah, we might have -- but that's who he is.

20 Our previous owner is a developer as
21 well. His style is to make a bunch of changes
22 and so forth. That is what it is. But we made a
23 business decision to move forward. It would best
24 for the (inaudible) of the community. Let's get
25 the project open.

1 Mr. Bennett, for no reason, didn't have
2 to volunteer that to us. He didn't even have to
3 spend four hours with us. The day of the -- the
4 day before your hurricane hit -- obviously, it
5 didn't hit, thank goodness and things went away
6 and so forth. But we got a fairly good reading
7 of who he was as a person, not a personality or
8 anything. Guard down, person.

9 So that's why we moved forward. I can't
10 answer for any other contractor, but that's why
11 we moved forward. So what we submitted the claim
12 on is what I believe, and Bernhard MCC believe,
13 is factual material, labor of what we spent here
14 in Charleston. Whether it's general conditions,
15 productivity. Productivity was the way that we
16 could formulate what -- why they were overrun,
17 right? Why they were overrun because that's the
18 big question.

19 So that's it. That's all I have to say.
20 But we keep talking about change orders. You
21 keep talking about this. You keep asking me this
22 and the other. I understand we've got to go
23 through that process. I hired counsel to support
24 us on that. That's not who I am. I'm a
25 businessman from a construction standpoint. We

1 performed our work.

2 All I'm here and Bernhard MCC is here
3 speaking, is that commitment that I verbally got
4 from Mr. Bennett that, once the dust settles,
5 we're going to be paid for anything and
6 everything that we've got left here -- that we
7 left in Charleston because we helped him get his
8 building open. That's it.

9 MR. MCDONALD: Are you done?

10 THE WITNESS: Yes.

11 MR. MCDONALD: Mr. Garcia, you just
12 gave a long story. Did you discuss any kind
13 of -- during the conversations you just
14 referenced, any pricing or any actual numbers?

15 THE WITNESS: No, sir. Again, it
16 was very brief, but actually, initiated by
17 Mr. Bennett.

18 MR. MCDONALD: Does -- I know we
19 discussed Balfour Beatty. Does BMCC take the
20 position that any other Balfour Beatty
21 subcontractors or trades caused BMCC any delays
22 or interruption or disruption or anything like
23 that?

24 THE WITNESS: Can you rephrase that
25 again?

1 MR. MCDONALD: Yes, sir. Does BMCC
2 take the position that any other subcontractors
3 for Balfour Beatty caused BMCC delays,
4 disruptions or in any way gave rise to the
5 dollars that its claiming in Exhibit 3?

6 THE WITNESS: I do not have any
7 claims for any subcontractors on the project, if
8 that's what you're asking.

9 MR. MCDONALD: Yeah. Well, I
10 guess, what I'm asking is a little bit different
11 than that, which is, did you -- did BMCC take the
12 position that any of the six and a half million
13 dollars its claiming was caused by the conduct of
14 any other Balfour Beatty subcontractors?

15 THE WITNESS: I can tell you that
16 the changes that occurred in -- that were on the
17 project that were presented as previously stated,
18 caused -- there was a -- when you make a change,
19 there's a cause and an effect of that change.

20 The effect of that change, what the root
21 cause of the -- of the issue. So if that caused
22 additional confusion and Balfour Beatty
23 coordinated or may have attributed to delay me,
24 if that's what you're asking, I can't
25 specifically answer without commenting on a

1 specific instance.

2 But I believe that the claim -- the root
3 cause of the claim, as previously stated, was
4 design, which was influenced by the owner, the
5 owner's rep and -- as well as the owner's -- the
6 changes and the timing of those changes.

7 MR. MCDONALD: Okay. You've got
8 core drill on page 1 of 13.

9 THE WITNESS: Yes, sir.

10 MR. MCDONALD: Can you elaborate on
11 what core drill is?

12 THE WITNESS: Sure. So core
13 drill -- I'm glad you said that because it kind
14 of leads into the previous item. In the BIM
15 process, where it -- and it's a couple things
16 that caused the core drill. The structure had
17 already started.

18 When they redid the upper floors, there
19 were rework items that needed to be done, and
20 those -- the cause and the effect of the engineer
21 design issues are one item that caused core
22 drill.

23 The other item is, when the owner made
24 program changes or floor plan changes, they only
25 wanted to pay -- if they moved the wall 2 feet,

1 they only wanted to pay the 2 foot of the wall.
2 That's an example.

3 But that -- moving that 2 foot might
4 have offset a riser from top to bottom of the
5 building. Those were the lengthy discussions
6 that I participated in that you asked me about
7 earlier that went on for months and months, and
8 that became undisputed, right?

9 Core drill was a bucket of money in the
10 disputed items that we -- we pulled out to try to
11 help identify where your issues were to help
12 summarize how we got to our number. That is a
13 real cost. That is a real item due to one of two
14 items. The engineers lack of design and accuracy
15 of their documents, as well as the multiple
16 changes that the owners had put forth for various
17 requests for change that we were not compensated
18 for.

19 MR. MCDONALD: Okay. I want to
20 know what you were -- what you looked at to come
21 up with this chart, what physical document?
22 Whatever the name of it is, what was it?

23 THE WITNESS: A cost report and MCA
24 labor factors that help explain, when issues
25 arise on a project, why you overrun. We

1 understand why we overrun. We just had those
2 discussions about the owner-driven changes, the
3 engineer, et cetera.

4 What -- and the effect of when you have
5 changes is that there's a learning curve that has
6 to start, and I can get you that definition if
7 you'd like from an MCA, which is a published
8 industry standard document published in
9 supervision.

10 Crew inefficiency, reassign new
11 manpower, errors and omissions and a ripple
12 effect. And MCA allows us to apply that
13 opportunity factor to that. So if it helps
14 substantiate why (inaudible) who would be there,
15 I would hope that they have interest in why the
16 labor overran. That would be generally in this
17 document. But they are all a cost of this
18 project.

19 MR. MCDONALD: Okay. What is a
20 crew inefficiency?

21 THE WITNESS: A crew inefficiency?

22 MR. MCDONALD: Yes, sir.

23 THE WITNESS: Where are you
24 referencing? Oh, right here?

25 MR. MCDONALD: Yeah.

1 THE WITNESS: I don't have that
2 document in front of me, so don't -- bear with me
3 if I don't give you the appropriate straight out
4 of MCA because there's like 24 it's that MCA
5 allows for a productivity factor.

6 And that's change orders or where you
7 run into issues of labor because labor for us is
8 the biggest impact, right, on a project. So crew
9 inefficiency is that we do not have the ability
10 to create flow. A project, whether you start and
11 stop -- for instance, I will give you an example
12 on this project.

13 When we did this project and we figured
14 an estimated labor to perform the install of the
15 fixtures, right, we did -- and his schedule,
16 original contract schedule shows this as well.
17 When we go in there, we're going to go wipe out a
18 floor all at one time.

19 We're going to set every job on this
20 floor, and then we're going to go to the next
21 floor and the next floor because the crew
22 efficiency is, the same guy that goes in the
23 first job that goes through the owner's punch
24 list and everybody's sign off and the mockup. We
25 want them to repeat that every floor every time,

1 right?

2 They didn't have that on this job. What
3 we had on this job, because of the owner direct
4 changes is, you had rooms over here we never had
5 answers on, whether we were waiting on the design
6 from the owner or whatever. And we went and put
7 two tubs on this room, two tubs on that room. We
8 had to jump up here and put two tubs, two tubs.

9 That's crew solid inefficiency. There
10 was no flow on the job. That's what cost more
11 than if you just went from one to the other is
12 guys that are recreating a learning curve. It
13 kind of gives you a couple definitions in one,
14 right? Contract (inaudible). And I can provide
15 that backup if needed.

16 And they had to go recreate. They had
17 to train new teams to go put that in because when
18 we bid the job, when MCA allows you bid a job at
19 a one, they go measure all of the MCA contractors
20 saying, on a normal crew. When the job goes
21 awry, then you get into productivity. This is
22 productivity that's on the job, not productivity
23 of using labor or something like that. So I want
24 to be very clear with that.

25 This is productivity of why you go awry.

1 So as the owner, I would hope that they would
2 want to know, why are you sending that much
3 later? So I'm getting -- that's one example. We
4 can go through many other examples if you'd like
5 or have any questions on, of that. Did I define
6 that for you?

7 MR. MCDONALD: What is DIL of
8 supervision?

9 THE WITNESS: Dilution of
10 supervision.

11 MR. MCDONALD: And what is your
12 understanding of --

13 THE WITNESS: Same thing. So let's
14 say, I'm jumping around, right, and I have to
15 take my crew down to five men this week and next
16 week, I've got to go put in 12 men because now
17 the area (inaudible) because they've released so
18 many change orders or the owner said, in this
19 case, you know what? I'm just fine with extra
20 workers. Let's get the men out here.

21 Well, I didn't have enough supervision
22 to go manage double the crewmen next week. We
23 had to ship all of these men in from out of town.
24 So here's the dilution of supervision. So
25 instead of having a one to seven ratio, I might

1 have had a 1 to 12 ratio. So I had three guys
2 more on the crew that's being in addition because
3 I don't have the management on site.

4 I didn't have enough management because
5 I was indirectly impacted in some form or
6 fashion. In this case, owner-driven changes,
7 inefficiency of design, errors and omissions and
8 so forth.

9 MR. MCDONALD: Learning curves.

10 THE WITNESS: We just covered that,
11 but I'd be happy to cover it again.

12 MR. MCDONALD: Sure, please do.

13 THE WITNESS: So the learning curve
14 is just what -- we can go back and you touched on
15 an area that he can replay for us, but I will be
16 happy to. Substantive area. The same two guys
17 that put in the mock-up, we couldn't utilize them
18 to put in every tub because not every tub area
19 was ready on the project.

20 We were waiting for answers over here;
21 waiting for answers over there. So we had to
22 jump around. Well, we had to go retrain people
23 every time that we went to start new areas of
24 work. We never did get any kind of flow on the
25 project that would be typically dealt by the

1 original construction schedule.

2 And I'm giving you one example. I mean,
3 there's countless examples that can be given on
4 this project because you're asking me for a
5 learning curve. That's the reteaching of
6 something that we should have learned with the
7 same crew that did the mock-up.

8 MR. MCDONALD: Reassignment of
9 manpower.

10 THE WITNESS: The same thing.
11 That's each stop and go. And what I just
12 mentioned to you about the five men versus the
13 ten men. One day I had to ship five men to
14 Charleston in one week. I had to pull them off
15 and go out of Charleston the next week. That's
16 the reassignment of manpower.

17 They don't count all of the other -- the
18 per diem that doesn't (inaudible) because I had
19 to put in a hotel room because I couldn't even
20 help the owner and get an apartment for them to
21 share because they were on and off. It was
22 sporadic. Our crews went up and down. That is
23 the reassignment of manpower.

24 MR. MCDONALD: So reassignment of
25 manpower on this page 12 of 13 of Exhibit 3 is

1 related to both on the job here and other jobs
2 that you had going on?

3 THE WITNESS: Yes, sir. It's all
4 directly as it related, as I just gave an
5 example, to this job. One day you're having
6 three or four guys. This really happened in a
7 big way at the end of the job when we got into
8 the finishes because we -- we didn't have the
9 answers.

10 I mean, the apartment is another thing.
11 The manager's apartment, that thing stayed open
12 all the time. Every time I walked the building
13 it was -- it was wide open. But there's
14 countless examples of that, but we had to -- they
15 did an area complete. We had to ship in three to
16 four men. Come knock out this here and go to the
17 next one so that we could help the contractor get
18 some sort of flow, but we never got true
19 construction flow.

20 MR. MCDONALD: Okay.

21 THE WITNESS: That's -- did I
22 answer that for you?

23 MR. MCDONALD: What is errors and
24 omissions?

25 THE WITNESS: Do I really need to

1 define that for you? Errors and omissions is
2 errors and omissions by the owner's design team
3 that's not living up to their obligation to
4 provide the design comparable to be built and the
5 countless RFIs and many things we talked about
6 leading up to this point in time.

7 If you need a more technical answer, I
8 can provide that back to you. But the errors and
9 omissions in simple form is the design
10 deficiencies that formed on the project.

11 MR. MCDONALD: Okay. And how did
12 that relate to your productivity claim, the
13 errors and omissions? It took more time, more
14 people? What is it?

15 THE WITNESS: The errors and
16 omissions per MCA, I can give you that defining,
17 that backup, but you asked me what errors and
18 omissions were.

19 Well, when you take longer to do
20 something than to go originally do what we had
21 contractually, we're obligated -- we lose
22 productivity early and MCA allows us to recoup
23 that. And I can get you the MCA backup if you'd
24 like, to provide that. This is straight up a
25 published MCA document.

1 And by the way, we -- MCA has three --
2 they have two ranges. There's a minimum and a
3 maximum. To help this owner out, we used
4 somewhere at the minimum or the middle ground.

5 (Video deposition paused.)

6 MR. BUNDY: Your Honor, just for --

7 MR. HILDEBRAND: Wait, Mr. --

8 MR. BUNDY: Wait a minute.

9 MR. HILDEBRAND: You're not
10 involved in this.

11 MR. BUNDY: Just let me speak.

12 MR. HILDEBRAND: This is
13 Mr. McDonald, Your Honor.

14 MR. BUNDY: No, this is not an
15 objection. This is not an objection.

16 THE COURT: All right.

17 MR. BUNDY: I want just to simply
18 say to you that the name of this subcontractor is
19 BMCC, right?

20 THE COURT: Right.

21 MR. BUNDY: He keeps repeating MCC.
22 What he's referring to is the mechanical -- or
23 MCA. He's referring to the Mechanical
24 Contractor's Association.

25 THE COURT: Yeah.

1 MR. BUNDY: Not to his entity that
2 he works for. That's all I want you to
3 understand because I can see how somebody
4 listening to this could be confused when one
5 minute he says BMCC and the next minute he says
6 MCA.

7 So what he's referring to here is a
8 manual provided by the mechanical contractor's
9 association. That's all I wanted to bring to
10 your attention.

11 THE COURT: Okay.

12 MR. BUNDY: Thank you.

13 THE COURT: All right. Got it.

14 MR. HILDEBRAND: Can you back up
15 about a minute or so and start it over again.

16 (Video deposition played.)

17 THE WITNESS: There's a minimum and
18 a maximum published in errors and omissions.
19 Well, when you take longer to do something than
20 to go -- originally do what we had to
21 contractually, we're obligated. We lose
22 productivity on our labor.

23 And MCA allows us to recoup that, and I
24 could get you the MCA backup if you'd like, to
25 provide that. This is straight up a published

1 MCA document. And, again, by the way, we -- MCA
2 has three -- they have two ranges. There's a
3 minimum and a maximum.

4 To help this owner out, we used
5 somewhere at the minimum or the middle ground.
6 We did not, I don't believe, use the larger
7 ground. Maybe on the crew side's inefficiency we
8 might have reached that. And some of these
9 percents can go up to 35, 40 percent.

10 We can provide that to you if you'd
11 like. I would be happy to because it is a
12 standard in the industry and it has been
13 substantiated in many of our previous claims
14 with -- on the government projects, et cetera.
15 It's a known published document for our -- the
16 mechanical industry.

17 MR. MCDONALD: Okay. What is the
18 ripple effect?

19 THE WITNESS: Ripple effect is the
20 ripple and cause of everything else that went
21 awry. So it's just another twist to this whole
22 puzzle we just talked about. And in simplest
23 forms, it's -- you have one -- it's a cause and
24 effect, right? And that's all it is. And MCA
25 can further define that for you as well.

1 And again, the -- just to be clear,
2 these items were -- these items were an effort to
3 define to the owner where the additional dollars
4 were spent and what we believe they were spent
5 on. These are not additional dollars that we're
6 asking for above and beyond what was not spent.

7 MR. MCDONALD: All right. You gave
8 some explanation, before we took our break, on
9 the -- what is categorized as the productivity
10 claim on page 11 of 13.

11 And my question is, and before we fully
12 took a break, you said, these -- this was more of
13 an explanation of costs that BMCC takes the
14 position it incurred, correct?

15 THE WITNESS: Yes.

16 MR. MCDONALD: Okay. So the
17 \$2,140,450 BMCC takes the position, those were
18 costs that it incurred on the job?

19 THE WITNESS: Yes.

20 MR. MCDONALD: Okay. And is that
21 true with all of the claim amounts or pockets, as
22 you call them, that are included on Exhibit 3?

23 THE WITNESS: Yeah. It says, claim
24 consisted of material and labor that was utilized
25 on the project.

1 MR. MCDONALD: Okay.

2 THE WITNESS: That is correct.

3 MR. MCDONALD: Is any portion of
4 this claim by BMCC related to acceleration?

5 THE WITNESS: I believe we have, in
6 this document, noted that there are acceleration
7 due to schedule. I believe that is in your
8 document, yes.

9 MR. MCDONALD: Okay. And does BMCC
10 take -- who does BMCC take the position demanded
11 acceleration?

12 THE WITNESS: What do you mean by
13 demanded?

14 MR. MCDONALD: Was it expressly
15 instructed by any individual or entity for BMCC
16 to accelerate?

17 THE WITNESS: Was it expressly -- I
18 mean, we -- yeah, I don't believe anyone -- your
19 definition of acceleration can -- define that as
20 you're asking the question because there's --
21 there is a construction term that I don't think
22 we're on the same page.

23 So I've got to be very clear of my
24 answer. So can you define your definition and
25 your legal side of what you're calling as

1 acceleration because they're not going to match
2 structural technical scheduling acceleration
3 because you're phrasing it differently than the
4 technical construction term.

5 MR. MCDONALD: How about this. How
6 about you tell me what you consider to be
7 acceleration and that will be what we go off of.

8 THE WITNESS: Are we driving a car
9 or are we riding -- planning on the schedule?

10 MR. MCDONALD: We're building Hotel
11 Bennett.

12 THE WITNESS: Okay. Cool. So as
13 it relates to acceleration, I think, as we noted
14 earlier, we needed to get the project done, and
15 we had to vary from the contract schedule.

16 MR. MCDONALD: So there were
17 certain variations from the contract schedule
18 related somehow to --

19 THE WITNESS: I simply don't have
20 that specific detail.

21 MR. MCDONALD: You don't know?

22 THE WITNESS: No. I mean, you
23 asked me to paraphrase something or do you want
24 me to give you a timeline detail. I don't have
25 that information without all the supporting data.

1 But I will tell you, I think at times,
2 the project team, as a whole to benefit the
3 owner, had you -- accelerated the schedule due to
4 the cause and effect of the changes, the design,
5 et cetera, as we noted earlier. I think that is,
6 in effect, of the issue.

7 MR. MCDONALD: So BMCC made the
8 decision to accelerate?

9 THE WITNESS: I think we as a team
10 made the decision to accelerate.

11 MR. MCDONALD: Who is the team?

12 THE WITNESS: I would say the
13 entire construction and project team. I mean,
14 that's what -- Balfour Beatty for -- I mean, for
15 the benefit of the owner. I mean, we worked as
16 partners here. We don't work independently.

17 (Video deposition stopped.)

18 THE COURT: Let's take a little
19 break right now, and then we'll come back.

20 (A recess transpired.)

21 THE COURT: Thank you. All right.
22 Mr. Hildebrand?

23 MR. HILDEBRAND: Thank you, Your
24 Honor. There's one ministerial matter we've got.
25 You had asked us to put together a schedule -- a

1 synopsis of the schedule updates on a monthly
2 basis.

3 THE COURT: Sure. Okay. I think
4 that was in lieu of one of the exhibit numbers.

5 MR. HILDEBRAND: 27?

6 THE COURT: 27 or 26, one of the
7 two, yeah.

8 MR. HILDEBRAND: 26.

9 THE COURT: 26 is what I have. So
10 why don't we just designate that as 26? How does
11 that sound?

12 MR. BUNDY: Sure. Just need to put
13 a little something on the record about what it is
14 and all that.

15 THE COURT: Yeah. Do you want to
16 just publish that and we'll call it -- well, in
17 lieu of document tab number 26, we will call
18 this -- it would be Plaintiff's Exhibit No. 26,
19 which is a summary or a compilation of the
20 schedule data date changes in the flow
21 schedule --

22 MR. HILDEBRAND: Yes, sir.

23 THE COURT: -- of the project,
24 correct?

25 MR. HILDEBRAND: Yes, sir.

1 THE COURT: All right.

2 MR. HILDEBRAND: Your Honor, I've
3 handed you a document that we will exchange for
4 the schedule first pages that I had referenced
5 earlier in the case.

6 This is, as you've suggested, a
7 compilation of just when schedule updates were
8 published by Balfour in the -- in this matter.
9 So I would like to substitute this for Exhibit 26
10 and introduce this into evidence.

11 THE COURT: All right. Very good.
12 Any objection to that, Mr. Bundy?

13 MR. BUNDY: Substituting as per
14 the -- no objection.

15 THE COURT: Without objection, very
16 good. All right. That will be our Exhibit 26
17 then.

18 (PLF. EXH. 26 was received in
19 evidence.)

20 THE COURT: And at the end of the
21 day, I'm going to run through with y'all all the
22 exhibits that are in and make sure we're all in
23 agreement on what's in. Okay?

24 MR. HILDEBRAND: Okay.

25 THE COURT: All right. Very good.

1 All right.

2 MR. HILDEBRAND: Thank you, Your
3 Honor. The plaintiff would call Mark Doran.

4 THE COURT: All right. So come
5 right around here if you would. Watch your step.
6 And, sir, I missed your name.

7 THE WITNESS: Mark Doran.

8 THE COURT: Doran. All right.
9 Mr. Doran, if you would, sir.

10 (MARK DORAN, having first been duly
11 sworn, testified as follows:)

12 THE COURT: And if you'll give us
13 your full name and address for the record,
14 please, sir.

15 THE WITNESS: Yes, Your Honor.
16 It's Mark Joseph Doran, D-O-R-A-N. My address is
17 915 Preservation Circle, Pawleys Island, South
18 Carolina 29585.

19 THE COURT: All right, Mr. Doran.
20 Thank you, sir.

21 Mr. Hildebrand?

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

24 DIRECT EXAMINATION

25 BY MR. HILDEBRAND:

1 Q. All right. Mr. Doran, you've stated
2 your name and address, and let's go through a
3 little more of your background. And I think that
4 you have prepared a PowerPoint that has some
5 slides that -- let me ask you this: Have you
6 prepared a PowerPoint relative to your
7 presentation here today?

8 A. I have.

9 Q. And have you -- the PowerPoint, is it
10 based upon the information that you've received
11 from various parties in this matter?

12 A. It is. It's based on my report, which
13 was based on all the information I received from
14 the parties in this matter. It's basically a
15 summary of opinions and findings I had in my
16 report.

17 Q. Okay. And is the information that you
18 have provided with the charts and summaries that
19 are included within your PowerPoint, are those of
20 a type that are typically included and reasonably
21 relied upon by experts in your field of
22 scheduling?

23 A. Sure, yes.

24 Q. I would like to, and do you -- what was
25 the reason for preparing the PowerPoint?

1 A. The reason for preparing the PowerPoint
2 was to summarize my findings and opinions in a
3 simpler format to present to the Court.

4 Q. Do you feel like the PowerPoint would be
5 hopeful to Judge Scarborough in following your --
6 what your opinions are and helping him to
7 understand what it is that you're trying to
8 convey?

9 A. I think it's a lot more helpful than my
10 report. My report is full of all kinds of
11 narratives and discussions and some charts. It
12 just basically boils that down to allow pictures,
13 which I think are a lot more understandable and
14 easy to follow.

15 Q. Okay. And are the diagrams and
16 photographs that are included in your PowerPoint,
17 do you believe that those would be more helpful
18 for the Judge to understand your opinions than
19 simply you trying to testify orally?

20 A. Of course.

21 MR. HILDEBRAND: Okay. Your Honor,
22 he's got some preliminary slides I can --

23 MR. BUNDY: I object. I filed a
24 motion. I think Your Honor has it, on 1006.

25 THE COURT: 1006? Yeah. Okay.

1 MR. BUNDY: May I do some voir dire
2 on this to maybe save us some time?

3 THE COURT: Okay. All right. I
4 assume you're going to put him in as an expert
5 scheduling --

6 MR. HILDEBRAND: Yes.

7 THE COURT: A scheduling expert?

8 MR. HILDEBRAND: That's right.

9 THE COURT: Okay. That's what he's
10 being offered for, correct?

11 MR. BUNDY: This voir dire is not
12 going towards his expertise. I'm going to go
13 into that in another area when he offered -- he
14 hasn't offered him up as an expert yet.

15 THE COURT: Right.

16 MR. BUNDY: What he's offering is
17 a -- what he alleges to be a 1006 exhibit. Okay?
18 And I can tell you all of the things that are
19 wrong with it, and he is going to go back and
20 forth. It would probably be easier for me just
21 to see if he can establish the elements that are
22 necessary. Do you know what I'm saying?

23 THE COURT: Yeah.

24 MR. BUNDY: Okay.

25 THE COURT: A preliminary? I'll

1 allow it. Go ahead.

2 MR. BUNDY: Thank you.

3 MR. HILDEBRAND: Your Honor, I

4 can --

5 THE COURT: Do you want to take the
6 first stab at it and we'll go from there?

7 MR. HILDEBRAND: Yeah, Your Honor.

8 THE COURT: Sure. Okay.

9 MR. HILDEBRAND: And I've prepared
10 a brief on this.

11 THE COURT: Okay.

12 MR. HILDEBRAND: Mr. Bundy is
13 correct that Rule 1006 provides, in part, the
14 contents of voluminous writings, recordings, or
15 photographs which cannot conveniently be examined
16 in Court and may be presented in the form of a
17 chart, summary, or calculation, provided the
18 underlying data are admissible into evidence.

19 And then for experts, there is a
20 provision that, basis of opinions -- bases of
21 opinion testimony by experts, that's Rule 703,
22 which states, the facts or data in the particular
23 case upon which an expert bases an opinion or
24 inference may be those perceived by or made known
25 to the expert at or before the hearing.

1 If of a type reasonably relied by
2 experts in a particular field in forming opinions
3 or inferences upon the subject, the facts or data
4 need not to be admissible in evidence. And then,
5 as I cite the case that -- in the brief, State
6 vs. Warner. The parties seeking to admit a
7 summary must demonstrate that the contents of the
8 documents upon which the summary is based are so
9 voluminous, they would be inconvenient to examine
10 in the Court.

11 The underlying documents are admissible
12 in evidence, and the summary is a faithful
13 rendering of the underlying data and any
14 inferences it contains are supported by the
15 contents and are neutral and non-argumentative,
16 and the originals or duplicates of the underlying
17 documents have been made reasonably available to
18 the parties.

19 So we've got two rules here. One is a
20 rule that allows summaries of data, and that's
21 what you've allowed me to introduce as Exhibit
22 26. Instead of introducing all the schedules, we
23 introduced the dates that they were entered into.

24 And this rule -- it's basically a rule,
25 Your Honor, to -- gosh, sometimes instead of

1 having just -- introducing a massive amount of
2 data, it allows the party to economically produce
3 it to the trier of fact in a concise form just to
4 make the proceedings.

5 What we're -- what this is about, Your
6 Honor, is an attempt to make -- for the Court to
7 be able to understand, in a reasonable manner,
8 without unduly complicating the record, make it
9 commonsensical on the data.

10 And sometimes it just makes no sense to
11 introduce -- try to introduce a huge base pile of
12 data without having it summarized, and that's
13 what this rule allows and says, if you can
14 introduce summaries, if the party can, so long as
15 the underlying data has been produced. And all
16 of the data in this matter has been produced by
17 these experts, and they've submitted affidavits
18 about what they have produced.

19 All the underlying data, by the way, is
20 data that has been generated and received by the
21 parties in discovery. It's discovery responses
22 from Library Associates, and its expert and
23 subpoenas that were done to the architect. So
24 you can do summaries.

25 And then the Court, as noted in this

1 brief, Clark vs. Cantrell has said, one,
2 summaries are admissible; but then, two, experts
3 can certainly testify about, even if documents
4 are not admissible into evidence, they can
5 certainly offer their opinions based on the
6 information that might not be admissible.

7 In reading that, Clark vs. Cantrell
8 talks about demonstrative evidence, and it says,
9 demonstrative evidence often is admitted only for
10 use of the courtroom to explain and illustrate a
11 witness's testimony, but may also be admissible
12 as an exhibit for the jury to examine and
13 consider during deliberations.

14 So what Mr. Doran has drafted as -- and
15 I can ask him some more questions about it to
16 further the -- further the base for it is, he
17 simply -- he did a report that -- you've probably
18 seen reports, typically reports by experts not
19 admissible into evidence.

20 But it's kind of long-winded and boring
21 in my view, and it's difficult to understand.
22 But what he's done is try to do -- present this,
23 get this PowerPoint, which is a series of
24 diagrams and such, distillations of the data to
25 try to understand -- help the Court understand,

1 as a layman, some of these scheduling issues.

2 I don't know if you've had them before
3 you or not, but they can be just a little bit
4 complicated. So that's what he has done, and
5 I've got an -- certainly, it's appropriate. I've
6 got a copy of the actual exhibits. Some of these
7 are very --

8 THE COURT: Just one second. This
9 would be a picture of the PowerPoint? These are
10 the slides of the PowerPoint?

11 MR. HILDEBRAND: Yes, sir.

12 THE COURT: All right. Let me ask
13 you this question, and that has to do with this
14 underlying report. There is an underlying report
15 of Mr. Doran?

16 MR. HILDEBRAND: Yes, sir.

17 THE COURT: That's been prepared,
18 and that's been produced?

19 MR. HILDEBRAND: Yes, sir.

20 THE COURT: All right. And so --

21 MR. BUNDY: But it's not
22 admissible.

23 THE COURT: The report itself is
24 not admissible?

25 MR. BUNDY: No, it's not.

1 THE COURT: Right. But he is here
2 to testify as to his findings or his opinions as
3 an expert?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: That would be
6 admissible, would it not, provided he's an
7 expert?

8 MR. BUNDY: Well, sure. His
9 testimony certainly is admissible provided he is
10 qualified for everything else. It's amazing --
11 it's interesting. In order to make this
12 argument, counsel for Balfour Beatty has to
13 conflate two rules.

14 THE COURT: Right.

15 MR. BUNDY: These aren't two --
16 these aren't one rule. These are two rules.
17 They're two rules for a reason. So let's try to
18 be analytical about this because I think that's
19 what the rules require.

20 THE COURT: All right.

21 MR. BUNDY: The first thing I
22 object to is the 1006 or based on 1006. This
23 PowerPoint is not admissible in evidence under
24 Rule 1006 because it -- it's not -- the
25 evidence -- it's not in the evidence. The facts

1 in this report are not in evidence.

2 THE COURT: Okay.

3 MR. BUNDY: I've focused my whole
4 attention on that PowerPoint.

5 THE COURT: Okay.

6 MR. BUNDY: That's all I am talking
7 about.

8 THE COURT: All right.

9 MR. BUNDY: It is not admissible in
10 evidence. The fact that under Rule 703, an
11 expert can testify on the witness stand under
12 oath and give his opinions has nothing at all to
13 do with the admissibility of a 1006 report. I
14 mean, it's apple and oranges.

15 These are two different things because
16 the real issue here is, under the -- you know,
17 State vs. Warner sets it out about as clear as
18 you can set it out. And it says, the Courts are
19 better attuned to the (inaudible) has wide
20 discretion of whether a summary should be
21 admitted, excluded, or allowed only as a
22 demonstrative aid.

23 And they go on the previous page and
24 say, the more -- the first it says, the more
25 inference a summary chart contains, the less

1 likely it will be admissible under Rule 6 and the
2 more likely it will draw objection based on other
3 grounds.

4 And the more likely the Trial Court
5 decided not to admit the summary as an exhibit
6 but restricted it to being a demonstrative aid.
7 But even as a demonstrative aid, it can't be
8 misleading. It can't have opinions in it. It
9 can't draw unnecessary inferences, and all the
10 rest of it.

11 And it's highly -- and I know Judge and
12 jury, you're the Judge and the jury and all of
13 that. And it's true. But I don't think if you
14 were sitting -- let me ask you, let me put it to
15 you this way: If you were sitting as a Trial
16 Judge in a jury trial, would you allow this to be
17 used to show to a jury because that's who's
18 really sitting there. You're going to have to
19 judge your own ability.

20 THE COURT: Right. That's the
21 admissibility aspect, right?

22 MR. BUNDY: He said, this is the
23 admissibility aspect.

24 THE COURT: All right.

25 MR. BUNDY: Okay. So could I ask

1 him one or two questions?

2 THE COURT: All right. Let me make
3 sure he's said his background, and I'm going to
4 give you that opportunity.

5 MR. HILDEBRAND: What I might
6 suggest, Your Honor, is, let him go through the
7 PowerPoint, and then, when he is finished, then
8 you determine whether you want to admit it as --

9 MR. BUNDY: No.

10 THE COURT: I think that's just the
11 opposite of what Mr. Bundy is wanting to do.

12 MR. BUNDY: That's exactly right.

13 THE COURT: I think he first has to
14 establish his bases, what is his opinion and what
15 is it based upon; and if that's been admissible,
16 then we can get to the admissibility of the
17 PowerPoint. I think we've got to talk somewhat
18 about his credentials.

19 We've got to talk about his opinions,
20 what he relied upon in those opinions before we
21 get to the -- and this is more of an -- I see it
22 more as a demonstrative evidence, sort of a wrap
23 up more so than an introductory exhibit is the
24 way I would see that.

25 MR. HILDEBRAND: And some of them,

1 though, Your Honor -- some of the slides are very
2 basic to try to help the Court understand. For
3 example --

4 THE COURT: Well, I'm okay with
5 that. But I think you've got -- right now, you
6 want to show me a video through this witness. I
7 know nothing about it.

8 MR. HILDEBRAND: It's not a video.

9 THE COURT: Okay.

10 MR. HILDEBRAND: They're just
11 slides, Your Honor.

12 THE COURT: Just slides?

13 MR. HILDEBRAND: Yes, sir.

14 THE COURT: Same difference. I
15 know nothing about his testimony, his background.
16 I don't know anything about him.

17 MR. HILDEBRAND: Okay.

18 THE COURT: So first, I don't know
19 if he is a fact witness or an expert witness, but
20 I'm assuming he is being presented as an expert.

21 MR. HILDEBRAND: He is.

22 THE COURT: So give me some
23 background.

24 MR. HILDEBRAND: All right.

25 THE COURT: And then let's voir

1 dire. We can voir dire him on that basis.

2 MR. HILDEBRAND: All right.

3 THE COURT: I don't know that
4 there's an objection there. He clearly has an
5 objection as to the presentation of the format.

6 MR. HILDEBRAND: Fair enough, Your
7 Honor.

8 MR. BUNDY: Can I just ask him one
9 question? Just one question?

10 THE COURT: All right. Go ahead.

11 VOIR DIRE EXAMINATION

12 BY MR. BUNDY:

13 Q. Mr. Doran, is that it?

14 A. Yes, sir.

15 Q. Your PowerPoint is essentially a
16 teaching aid, right? You're trying to teach the
17 Judge what your opinion is, right?

18 A. To explain to the Judge.

19 Q. Yes, to teach the Judge.

20 A. So he can understand it.

21 Q. To teach the Judge what your opinion is?

22 A. To explain it so he can understand it.

23 Q. Pardon me?

24 A. To explain it, so he can understand it.

25 Q. So like a teacher? Like, you're

1 explaining it to him, like if you were taught --
2 if you were teaching scheduling, and you were
3 teaching kind of as scheduling people, this would
4 be a device that you would use to teach them how
5 to do this kind of thing, right?

6 A. No. This is an explanation.

7 Q. Uh-huh. Okay.

8 THE COURT: Okay. All right.

9 MR. HILDEBRAND: Thank you.

10 THE COURT: Go ahead and lay some
11 foundation.

12 DIRECT EXAMINATION

13 BY MR. HILDEBRAND:

14 Q. Tell me about your background. Where
15 did you go to school, Mr. Doran?

16 A. I went to Purdue University. I majored
17 in construction management, but it's what it's
18 called now. I graduated in 1985. After
19 graduation from Purdue, I went to work for Turner
20 Construction Company in --

21 Q. I'm sorry, when did you -- '85 was when
22 you graduated?

23 A. 1985.

24 Q. Okay.

25 A. And at Turner Construction, I was at

1 Turner for seven years.

2 Q. Tell me about Turner. What is that?

3 A. Turner Construction was -- at that time
4 was the largest general contractor in the world.
5 We had offices all over the country and all over
6 the world. I was assigned to the Washington, DC,
7 office and assigned as a field engineer.

8 As a field engineer, you layout a
9 project. You like layout the walls and things.
10 A field engineer might supervise two or three
11 subcontractors, coordinate the work between two
12 or three subcontractors, get the contractor's
13 information, subcontractors the information they
14 need if their information missing.

15 Q. Okay. How long were you at Turner?

16 A. I was at Turner for seven years, and I
17 progressed from field engineer to project
18 engineer, which administers the paperwork for a
19 project, submitting change orders to the owner,
20 and then also to the concept contractors, getting
21 the submittals approved.

22 And then also into the superintendents,
23 where I was superintendent of a project or
24 projects. As a superintendent, you are in charge
25 of the all the field work on the project.

1 Q. All right. So you were at Turner for
2 about seven years; is that right?

3 A. Yeah. Yes. I started with Turner in
4 March of '86 and left in March of '93, seven
5 years.

6 Q. All right. And what did you do after
7 that?

8 A. After I left Turner, I went to work for
9 a national consulting firm specializing in
10 schedule delay analysis. I was hired as a
11 schedule delay analyst, and I was there for seven
12 years.

13 Q. Okay. So that was -- so from '93 to
14 2000?

15 A. I left in '99, late '99.

16 Q. What was the firm that you worked with
17 during that time?

18 A. I'm sorry?

19 Q. What was the name of the firm that you
20 worked with during those said years?

21 A. It was -- the name of the firm back then
22 was Barrington Consulting Group.

23 THE COURT: Barrington?

24 THE WITNESS: B-A-R-R, Barrington
25 Consulting Group. We had seven or eight offices

1 nationwide. I was in the Washington, DC, office.

2 Right after I left, they were bought out
3 by Navigant, which is one of the largest
4 international consulting companies that's
5 specializing in -- part of it specialized in
6 schedule delay analysis and dispute resolutions.

7 BY MR. HILDEBRAND:

8 Q. Okay. So while you were at Turner
9 Construction Company, that was more of -- you
10 were a field engineer? That was kind of boots on
11 the grounds, sort of experience?

12 A. It was. One thing I forgot to say was,
13 I was very involved in scheduling each of the
14 projects at Turner. I had scheduling courses and
15 project management courses at Purdue, which gave
16 me the background to input the data and help with
17 the scheduling services at Turner.

18 Q. Okay. All right. And then, while you
19 were with what is now called Navigant -- I think
20 that was Barrington you said -- what sort of
21 scheduling experience did you have during that
22 time?

23 A. Mostly scheduling was forensic
24 scheduling, schedule delay analysis after a
25 project is complete or nearly complete to

1 determine why a project went awry or why a
2 project -- actually why a project incurred
3 delays, the quantity of delays, causation of the
4 delays, and the responsible party for the delays.

5 Q. Okay.

6 A. I did not get personally involved in the
7 cost of the delays.

8 Q. Okay. All right. And since you left
9 Barrington or Navigant in 2000, approximately,
10 what have you done since then?

11 A. I formed Contract Solutions, which is a
12 company I still own, and shortly after I formed
13 it, three of the senior managers from then
14 becoming Navigant joined me, and we brought some
15 other people with us. Most of what we did was
16 the same schedule delay analysis forensically.

17 I also was preparing schedules for
18 contractors and provided schedule oversight for
19 owners to help the owner determine if the
20 projects from -- I'm sorry, the schedules from
21 the contractors were acceptable, reasonable, and
22 help with the owner understanding information in
23 the schedule, helping to determine when their
24 contract was due. I was also helping the
25 contractors.

1 Q. Okay. So you assisted both the owners
2 and contractors; is that right?

3 A. Yes. Mostly owners at that time.

4 Q. And it sounds like during your career,
5 you worked not only on the forensic side to
6 determine what the cause of delays was and the
7 length of delays, but you might be responsible --
8 but you've also helped out and assessed schedules
9 while a project was ongoing and even before a
10 project gets started to see whether, in your
11 view, the project is reasonable. Is that a fair
12 statement?

13 A. Yes. It's very accurate.

14 Q. Okay. And so on the -- tell us about
15 forensic scheduling and what that entails and
16 really what you spent a lot of your career doing?
17 What is forensic scheduling?

18 A. So forensic scheduling is, after the
19 fact, analysis of a project to determine why --
20 how much delay was incurred on a project, why did
21 that happen, and who is responsible.

22 Q. Okay. And what did -- I'm sorry?

23 A. I'm sorry. And you asked what goes into
24 that.

25 Q. Yeah, yeah. So tell me how you go about

1 doing a scheduling analysis, and I will guess
2 where forensic work comes in is when you have a
3 case just like this, where you get to the end of
4 the job and then it's late and then there's a
5 dispute over who causes; is that right?

6 MR. BUNDY: Objection, leading.

7 A. Yes, that's correct.

8 Q. Okay. All right. So what do you do in
9 order to do a forensic analysis? What's your
10 protocol?

11 A. So, generally, the protocol is depending
12 on which party hires me. Like, if I'm hired,
13 which either -- I meet with them first, whichever
14 party hires me. I meet with them to determine
15 what is it they think happened, what is it they
16 want me to do. It's always generally saying they
17 want me to, you know, review the project records
18 and provide an independent assessment of my
19 findings.

20 Q. When you say that your protocol -- and
21 maybe I'm misunderstood you and I don't think we
22 were clear. Did you say your protocol changes
23 depending on whether you're doing a forensic
24 analysis for owners as opposed to a contractor?

25 A. No, just the initial meeting is

1 different usually.

2 Q. Okay. How is that different?

3 A. Usually with the contractor, you sit in
4 a room with multiple people involved, from the
5 field engineer to the owner of the company maybe.
6 And they give you a flavor for what happened on
7 the project.

8 They go through lots of detail maybe,
9 and give you some -- a lot of good -- a lot of
10 information that would give an analyst like me
11 information to where I could look further to form
12 an analysis.

13 Q. Okay.

14 A. Usually when I meet with an owner, it's
15 usually one or two people, and they say, we've
16 got a claim from the contractor. We'd like for
17 you to take a look at it, write a report, give us
18 your opinions.

19 Q. Okay.

20 A. So it's a little bit different from the
21 amount of 20 people involved and the amount of
22 detailed information.

23 Q. Okay.

24 A. By the time I get involved with the
25 owner, there's already a claim, a written claim

1 usually by the contractor, sometimes an expert
2 report. It is, you know, by the contractor. And
3 that gets me off running because I already know a
4 lot about the project.

5 Q. Okay.

6 A. When I work for the contractors, it's a
7 lot of detail work to do to get all of that
8 information and start from the ground up.

9 Q. Okay. All right. And I would imagine
10 that the amount of time that you spent doing --
11 assessing the background work and such would
12 depend on -- largely on the size of the project.
13 Is that a fair statement?

14 A. The size of the project, the complexity
15 of the project, and mostly -- what I tell people,
16 it's quantity of documents I have to review.

17 You could have a short project that has
18 a lot of documentation that I have to review than
19 maybe a middle size or a larger contract that has
20 a lot less correspondence or documentation for me
21 to maintain proficiency. The quantity of
22 documents usually is what determines the cost of
23 my services and how long it takes me to do that.

24 For instance, on this project, 43
25 schedule updates. That's a pretty long project.

1 Pretty long, pretty big. One of my work products
2 from those schedules was I exported the data. I
3 have a database. It's in Excel. 93,000 --

4 Q. You said it's in Excel?

5 A. It's in Excel.

6 Q. Okay.

7 A. And I supported the data from the
8 scheduling software into an Excel database. It
9 has 93,000 lines of data all in one place. So I
10 could go to that tool to get information rather
11 than trying to open up 43 different schedules and
12 then trying to get information.

13 That has a lot of data, a lot of
14 information on this project. And I always
15 asked -- not just for this one, but I always ask
16 for owner and architect meeting minutes,
17 schedules that were submitted, schedules that
18 were accepted, correspondence, requests for
19 information, change orders that were issued,
20 change orders requested, requested change orders
21 that maybe did not become change orders but they
22 may still be in dispute.

23 So it goes on. It's just a lot of
24 information that I request that -- so I could go
25 through the data and information to make

1 hopefully an accurate and -- an accurate
2 assessment --

3 Q. Right.

4 A. -- of what happened on the project and
5 then present it in as simple a format as I
6 possibly can.

7 Q. Okay. All right. So you're the -- the
8 time that would go say into a delay analysis on a
9 single family residence obviously would be a lot
10 shorter than it would be for someone in North
11 Charleston Coliseum, so to speak?

12 A. I didn't hear those examples, I'm sorry.

13 Q. Okay. Your time that would be devoted
14 say for -- there is a scheduling delay on a
15 single family residence would be different and
16 much shorter than it would be if there were some
17 delays at North Charleston Coliseum or somewhere?

18 A. Sure.

19 Q. Okay. All right. So you assessed the
20 delay. And then what sort of assessment -- you
21 used critical path, and one of your slides is
22 something to where you try to explain critical
23 path, but is critical path a CPM methodology,
24 something that you use?

25 A. Of course. And that's what most

1 consultants would use these days. The critical
2 path method is generally the path of activities
3 that determines the duration of the project,
4 whether that's planned or as-built.

5 And so in the forensic analysis, such as
6 the one I performed, I looked at all kinds of
7 data outside of just the project schedule to
8 be -- to create an as-built critical path, the
9 path to determine the length of the project and
10 duration of the project.

11 Whereas, if you're working a critical
12 path method during the project, it's basically
13 limited to just what's in the scheduled software
14 and still -- you're still quantifying the
15 duration of the project. It's an estimate. It's
16 a guess, but when I do it after the fact, it's
17 actual. I determine what actually happened on
18 the project.

19 Q. Okay. Let me stop you there. So do you
20 sometimes get involved in a project as a
21 scheduling expert while it's ongoing, while the
22 construction is still ongoing?

23 A. Sometimes.

24 Q. Okay. And you said that the analysis
25 changes depending on whether -- maybe I

1 misunderstood you.

2 A. And maybe I didn't present it correctly.
3 If I'm working for a contractor or if any
4 contractor, during the course of the project -- I
5 was just try to explain the CPM scheduling.

6 CPM scheduling, you have perspective.
7 You have forensic perspective. It's limited to
8 what's put into the scheduled software, and it's
9 an estimate of when the project will complete.
10 It's a guess.

11 Q. Okay.

12 A. Forensic scheduling is what actually
13 happened.

14 Q. Okay. All right.

15 THE COURT: One is looking forward
16 in time to project what's going to happen, and
17 the other is looking back in time to see what did
18 happen, correct?

19 THE WITNESS: Exactly, Your Honor.

20 THE COURT: All right.

21 BY MR. HILDEBRAND:

22 Q. All right. So you've been doing
23 scheduling work almost exclusively now since '93;
24 is that right?

25 A. I'm sorry, what's the question?

1 Q. You've been doing scheduling analysis
2 and work -- this has been your career since 1993;
3 is that correct?

4 A. Yes, that's correct.

5 Q. Okay. And have you been qualified as an
6 expert in courts?

7 A. I've testified 36 times prior to today.

8 Q. Okay.

9 A. Various courts and jurisdictions
10 including arbitrations, a few arbitrations by
11 several boards and for the federal -- at the
12 government level as well as a couple of state
13 courts such as this.

14 Q. Okay. And what has your -- what have
15 you been qualified as an expert in?

16 A. Generally, a schedule delay expert, CPM
17 expert. I've been qualified in a few other
18 things, too, but that's primarily it.

19 Q. Okay. Do you serve on any advisory
20 boards, or do you have any experience advising
21 regarding scheduling and how forensics should be
22 done?

23 A. Not anymore. I mean, actually, I am on
24 a committee that we're redrafting a recommended
25 practice to -- that would be published to the

1 industry as a guideline for how to perform and
2 the different methodologies to perform forensic
3 schedule delay and analysis.

4 Q. Okay. All right.

5 A. That won't be out for another year or
6 so.

7 MR. HILDEBRAND: Okay. Your Honor,
8 I would like to proffer Mr. Doran as an expert in
9 scheduling analysis.

10 THE COURT: All right. Mr. Bundy?

11 MR. BUNDY: May I voir dire, Your
12 Honor?

13 THE COURT: Certainly. Okay.

14 VOIR DIRE EXAMINATION

15 BY MR. BUNDY:

16 Q. How do you get compensated for your
17 work?

18 A. I'm sorry?

19 Q. How do you get compensated for your
20 work?

21 A. How do I? And can you repeat your
22 question, sir?

23 Q. Okay. How do you get compensated for
24 your work?

25 A. And I'm sorry to make you jump through

1 hoops, sir. I'm hard of hearing, sir.

2 Q. That's all right. We're going to be
3 sitting together. I can't hear and neither can
4 you.

5 A. By the hour.

6 Q. How was it?

7 A. By the hour.

8 Q. All right. And what is that for you?

9 A. For this project, it's been going on for
10 a few years now. It's 385 an hour.

11 Q. 385, okay. Have you ever had any
12 experience in like billing one number and getting
13 paid a different one? In other words, not
14 getting the whole bill paid? Have you ever
15 had -- have you ever been stuck for a bill?

16 A. I'm thinking.

17 Q. If you've got to think, you probably
18 didn't. Okay? So I will give you -- I'll let
19 that one pass.

20 A. Okay.

21 Q. Because I remember all the ones I got
22 stiffed on. And how many hours have you spent
23 prior to today on this job?

24 A. I would have to look at my invoices.
25 I'm not sure.

1 Q. A thousand hours?

2 A. Several hundred probably.

3 Q. Several hundred?

4 A. Several hundred, yeah.

5 Q. Okay. So you think you've probably
6 billed, what, a couple hundred thousand bucks?

7 A. Yes, sir, probably a couple hundred
8 thousand.

9 Q. Is that about average for you on a job
10 like this?

11 A. Yes.

12 Q. Okay. Let me ask you this: You went
13 through some documents that you relied on, that
14 you typically would rely on in coming to a
15 conclusion, right, in order to be able to give an
16 opinion?

17 A. Yes.

18 Q. And is it -- has it ever happened to you
19 that you never have gotten sufficient
20 documentation or information to allow you to give
21 your opinion to a reasonable degree of certainty?

22 A. I don't think so. I think I would
23 always give an opinion to a reasonable degree of
24 certainty based on documents I've reviewed.

25 Q. So you've never had a situation where

1 the documents you received, in and of themselves,
2 were not adequate for you to give an opinion on
3 behalf of your client to a reasonable degree of
4 certainty?

5 A. I don't think so.

6 Q. Okay.

7 A. I would be able to give an opinion based
8 on that document.

9 Q. All right. And how long have you been
10 doing this?

11 A. 30 years.

12 Q. Okay. All right. So then you've always
13 got an opinion when somebody is coming to you?
14 No matter what, you're always going to be able to
15 give them some opinion to a reasonable degree of
16 certainty regardless of what they bring?

17 A. Yes, sir. It would be based on the
18 documents that I'd reviewed.

19 Q. Right. The quality of your opinion
20 directly reflects the quality of what you were
21 told?

22 A. No, I wouldn't say the quality of my
23 opinion. My opinion is based on the documents I
24 reviewed. Sometimes it could be to the detail
25 and the level in the documents that I've

1 reviewed.

2 Q. All right. Let me put it to you this
3 way: Is it fair that the more documents you
4 receive, the more confident you are in your
5 opinion?

6 A. No, not necessarily.

7 Q. Not necessarily. Okay.

8 A. It's just a lot of the documents are
9 irrelevant to the issues that I'm looking at.

10 Q. I understand that. But I just want to
11 go back and make sure that I understand that you,
12 regardless of the documents you receive, are
13 always able to give an opinion to a reasonable
14 degree of certainty when you are asked for one?

15 A. Yes.

16 Q. Okay. And I presume Balfour Beatty knew
17 that the day they hired you?

18 A. I don't know what they knew.

19 Q. Okay. Now, let's talk a minute. You
20 said something about, when you worked for a
21 contractor, you actually sit down with people
22 that built the job. They bring records, and
23 they've got schedules, and they know a lot about
24 the job because they built it, right?

25 A. The general contractor?

1 Q. Yes, sir.

2 A. Yes.

3 Q. Okay. And that's an entirely different
4 client than the owner on that very same job. If
5 the owner had come to you on that very same
6 hypothetical job where the contractor had all the
7 project managers, all the documents, the plans
8 and all of his internal reports and all that,
9 that's a different situation than when the owner
10 comes to you and says, I've got a letter here,
11 and they say I owe 20 million bucks.

12 You then have to go hunt those
13 documents, right? You've got to go on a search
14 to get the contractor's documents?

15 A. I ask for them.

16 Q. Right.

17 A. I also ask for them from the contractor.

18 Q. I understand that.

19 A. If we don't have the same documents.

20 Q. Well, we will see about that. But if we
21 had just had a time -- if you were a scheduler,
22 timeline kind of guy, which I think you are,
23 right? Given your experience, okay?

24 If the owner and contractor come to you
25 on the same day, hypothetically, okay? You're

1 going to be much further along arriving at your
2 opinion the day you meet the contractor than you
3 will be with the owner because you've got to go
4 assemble a lot of documents that the contractor
5 already has. It takes longer, doesn't it?

6 A. It's exactly the opposite.

7 Q. It's exactly the opposite?

8 A. It's exactly the opposite. When I work
9 for the owner, they have already received --
10 generally, they have already received the claim
11 from the contractor. The contractor has already
12 done all of that work and presented it to the
13 owner, and that puts me a lot further ahead.

14 Q. But your assumption there is, is that
15 claim from the contractor was legible, complete,
16 honest, straightforward, and properly presented,
17 does it not?

18 A. I don't have -- I don't have a comment
19 for that.

20 Q. Well, you said you just -- you said you
21 had a -- what you liked about the owner was, you
22 already had all the contractor's documents.
23 You're assuming that you are going to get those,
24 right?

25 A. When I work for an owner, I get all

1 kinds of levels of documents from the -- from
2 contractors that could be from a little bit of
3 nothing sometimes to very voluminous, detailed
4 documentation.

5 Q. In your experience, is the owner behind
6 the eight ball from starting the claims case
7 because the contractor has already got his
8 documents all together, he has already got his
9 claim prepared, and he is ready to go when he
10 meets you as opposed to the owner? Or is that
11 not your opinion?

12 A. That's not my opinion.

13 Q. Okay. Your opinion is that -- is just
14 the opposite. It is between the two parties to a
15 contract, the owner is in the best position to
16 know what the contractor's claim is and the best
17 position to have all the documents and the best
18 position to defend the claim, and all they do is
19 lay it in front of you and you've got less work
20 to do for an owner than you do for a contractor?
21 Is that what you are saying?

22 MR. HILDEBRAND: Your Honor, may I
23 interrupt? This is not questioning him on voir
24 dire about his expertise as an expert. It's
25 cross-examination after he's proffered his

1 opinions.

2 MR. BUNDY: I will withdraw the
3 question.

4 THE COURT: Okay.

5 BY MR. BUNDY:

6 Q. When you looked at these -- let's talk
7 about the documents because you did look at
8 documents and you did talk to people. Okay? You
9 listed some documents. I didn't hear you list
10 the daily reports. Did you look at the daily
11 reports on this job?

12 A. A few.

13 Q. A few. Now --

14 MR. HILDEBRAND: Your Honor, this
15 still is going to --

16 THE COURT: Yeah.

17 MR. HILDEBRAND: --

18 cross-examination, Your Honor. This is not --

19 THE COURT: Let me -- I understand
20 the objection. So the objection has to do with
21 the qualifications; is that right?

22 MR. BUNDY: Right. And my position
23 is that an expert who doesn't read the daily
24 reports in a construction scheduling case is --
25 he's not an expert.

1 THE COURT: Well, isn't that for
2 cross and not for qualification?

3 MR. BUNDY: Pardon me?

4 THE COURT: Isn't that for
5 cross-examination and not for qualification?

6 MR. BUNDY: I think it's for
7 qualification.

8 THE COURT: The question is whether
9 or not he's qualified.

10 MR. BUNDY: All right. Okay.

11 THE COURT: They're not necessarily
12 in this case, but then he's testified he's been
13 an expert in 36 other cases. What about his
14 qualifications is suspect, not what he did in
15 this case.

16 MR. BUNDY: What suspect is --

17 THE COURT: Yeah.

18 MR. BUNDY: -- is if a medical
19 malpractice expert came in front of you and
20 testified in voir dire that he had not reviewed
21 any medical records. Okay?

22 THE COURT: Okay.

23 MR. BUNDY: And so he has got a
24 medical opinion and then doesn't -- hadn't looked
25 at any records. My point that I'm simply trying

1 to make is, is that, my opinion and my position
2 is going to be --

3 THE COURT: All right.

4 MR. BUNDY: -- that an expert who
5 does -- a scheduling expert who does not look at
6 the daily reports is incompetent and unqualified
7 and incapable of giving an opinion to a
8 reasonable degree of certainty. That's all.

9 THE COURT: Okay. All right. Your
10 objection is noted. I find he's qualified.

11 MR. BUNDY: Okay. We're done with
12 that?

13 THE COURT: Yeah.

14 MR. BUNDY: I will take care of the
15 rest of it on --

16 THE COURT: Okay. All right.
17 Qualified as an expert in scheduling, correct?

18 MR. HILDEBRAND: Yes, sir.

19 THE COURT: Under what? Critical
20 path management? Is that what we are talking
21 about?

22 MR. HILDEBRAND: Well, yeah, as a
23 scheduler and critical path as to the methodology
24 he used, yes, sir.

25 THE COURT: All right.

1 MR. HILDEBRAND: Absolutely.

2 THE COURT: So qualified.

3 DIRECT EXAMINATION

4 BY MR. HILDEBRAND:

5 Q. All right, sir. I would like to talk to
6 you about some of the projects that you worked
7 on, and actually, I will try to move this thing
8 along here.

9 THE COURT: Why don't we talk about
10 this one?

11 MR. HILDEBRAND: Right, absolutely.
12 I think so. You read my mind, Your Honor. I
13 would like to -- all right.

14 BY MR. HILDEBRAND:

15 Q. Let's talk about a critical path
16 analysis, and this is in the first couple of
17 pages where he's provided some explanation that I
18 think would be beneficial.

19 THE COURT: Just ask him. Just ask
20 him.

21 BY MR. HILDEBRAND:

22 Q. What is a critical path analysis,
23 Mr. Doran?

24 A. Critical path analysis is -- we've been
25 discussing it here for the last 15 minutes, I

1 think. But it's an analysis that determines --
2 it determines what activities determine the
3 duration of the project.

4 Q. Okay. And what activities determine the
5 duration of the project?

6 A. What work, what events occurred that
7 determined the overall duration of the project.

8 Q. Okay. And I'll assume that there is
9 a -- in a project such as this, you have the
10 as-planned critical path; is that right?

11 A. Yes. There's an as-planned critical
12 path and baseline schedule, and there's an
13 estimated critical path on each of the monthly
14 updates.

15 Q. Okay. And can you explain to the Judge
16 that the critical path in the context of
17 Thanksgiving dinner?

18 MR. HILDEBRAND: And, Your Honor,
19 would it be okay if he shows this one slide on --

20 MR. BUNDY: I don't object to the
21 chicken dinner. I haven't seen it before.

22 MR. HILDEBRAND: All right.

23 THE COURT: It's a turkey dinner,
24 but go ahead.

25 MR. HILDEBRAND: Turkey dinner, all

1 right.

2 MR. BUNDY: It's all Thanksgiving.

3 THE COURT: There you go.

4 THE WITNESS: All right. So this
5 slide is a representative, a representation -- a
6 very simple, simplistic representation of a plan
7 schedule, a baseline schedule for a project.

8 THE COURT: Okay.

9 THE WITNESS: This project is to
10 make Thanksgiving dinner.

11 THE COURT: All right.

12 THE WITNESS: And in creating
13 the -- in trying to figure out how to make the
14 Thanksgiving dinner, you have to determine the
15 different steps involved to get to the end, which
16 is serving the Thanksgiving dinner.

17 So in this one, we identified the
18 various activities. Prep the turkey, cook the
19 turkey, cool the turkey. You have to prep the
20 potatoes, cook the potatoes, prep the veggies,
21 prep the cranberries or whatever you're having.
22 And then you serve the dinner.

23 THE COURT: You left off the
24 stuffing, but I gotcha. I'm with you.

25 THE WITNESS: So on this one, it's

1 very easy to see what determines the duration of
2 this project, how long it's going to take before
3 we get to serve the dinner is prepping and
4 cooking and cooling the turkey.

5 And the other activities that you have
6 to eat alongside of the right (inaudible), like
7 the potatoes, the green beans, cranberries, they
8 take a much shorter amount of time. And those
9 are in this. Those are shown in green. Those
10 are not the critical path. The critical path is
11 the turkey.

12 THE COURT: Okay. All right.

13 THE WITNESS: The green ones would
14 be the float now. I will get into it later.

15 BY MR. HILDEBRAND:

16 Q. Well, just explain however.

17 A. So the green ones, between when they end
18 and that vertical black line at the end, it can
19 float anywhere in that time frame, be delayed, be
20 impacted, maybe have to cook the green beans
21 twice because you burned them or something.

22 But there is a float in there,
23 contingency that, as long as they don't get
24 delayed beyond 2:30, just as an example, past
25 whenever the turkey is done, they are not a

1 critical path delay, the project.

2 Sure they may have been delayed but not
3 a critical path delay, which leads us into the
4 next slide, which is the as-built. Now, this is
5 what I would do on a big project in which I --
6 now, I can see what's actually happened here.

7 Q. In your hypothetical turkey there?

8 A. Because we didn't serve this until 4:30,
9 not 3:30. 4 is not up there, but we didn't serve
10 it until about 4:30. What the heck happened?
11 Doran, get in there and go find out. How much
12 was this project delayed? Who is responsible for
13 it, and why did that happen?

14 So I would look at this data in a
15 nutshell. And on this one, about 1:30, the
16 mother-in-law shows up, and the mother-in-law
17 says, I don't want to eat these potatoes. I
18 don't like them. I want rice. And I don't want
19 green beans. I don't like them either. I like
20 collard greens. I want those. That's an impact.

21 We're almost done with the turkey, not
22 quite, but we're an hour away. Now that throws a
23 very inappropriate time (inaudible). But it's
24 not a good time. If she would have come in at 9
25 o'clock, they had no problem. But she comes in

1 at 1:30. So that's what it -- now, in a forensic
2 sense, I can see how that really impacted this
3 dinner, this project.

4 So you had to go shopping and go get
5 that food and get the rice and get the collard
6 greens and bring it back, prep it and cook it,
7 but by the time they do that, now, dinner is not
8 served for another hour. But the critical path
9 is no longer finishing and cooking the turkey,
10 cooling it.

11 Now, the critical path is going to the
12 store, getting the collard greens, getting the
13 rice, cooking them properly, letting them cool
14 and then serving them. So that's the as-built
15 critical path, and that's how I would do an
16 analysis generally, high level, very high level.
17 And that's the difference between a planned CPM
18 and an as-built CPM analysis.

19 MR. BUNDY: And I'm only not
20 objecting to those two charts, right? I'm not
21 agreeing on this whole PowerPoint.

22 THE COURT: Okay.

23 BY MR. HILDEBRAND:

24 Q. All right. Have you -- do you have a
25 chart that shows very simplistically what the

1 as-planned critical path was on this project and
2 what the as-built critical path was on this
3 project?

4 A. It's probably more simpler than that,
5 but, yes, I've broken down about five lines, five
6 parts each. It's very simple to show.

7 MR. BUNDY: Do you mind if I look
8 at it first?

9 MR. HILDEBRAND: You've gotten
10 them.

11 THE COURT: It's in this document
12 here.

13 MR. BUNDY: I might not object, but
14 I would like to look at it.

15 MR. HILDEBRAND: Here we go. So
16 that's the next -- if you go past the turkey
17 dinner, Your Honor, the Thanksgiving meal, that
18 would be the next slide.

19 MR. BUNDY: All right. Let me look
20 through this here. I think that makes this
21 easier on everybody. I presume he prepared all
22 of; is that correct?

23 THE WITNESS: Yes, sir.

24 MR. BUNDY: And prepared any
25 contract documents and all that stuff? Okay.

1 Here's what I would agree to, without objection:
2 He can show this document as a demonstrative aid.
3 It's not going to be introduced in evidence.
4 You're not going to keep a copy of it.

5 It's not going to be in the record, and
6 his report doesn't go in the record as evidence.
7 But he can testify and use this to help you
8 understand his testimony. That's all I can agree
9 to without objection.

10 THE COURT: Okay. As demonstrative
11 evidence?

12 MR. BUNDY: As demonstrative
13 evidence.

14 THE COURT: Mr. Hildebrand, does
15 that work for you?

16 MR. HILDEBRAND: I'm not going to
17 agree that it will not be in evidence. That's
18 something that you will have to determine at the
19 end of the presentation.

20 THE COURT: Okay. All right.

21 MR. HILDEBRAND: But I will proceed
22 on it.

23 THE COURT: I will take it under
24 advisement with that caveat. Okay?

25 MR. HILDEBRAND: Thank you, Your

1 Honor.

2 MR. BUNDY: But the problem with
3 it --

4 THE COURT: No, I'm with you. I'm
5 with you.

6 MR. BUNDY: The problem is, you've
7 already seen it now.

8 THE COURT: I've seen it. I'm
9 going to allow him to testify from his report,
10 and then I'm going to let you cross-examine him
11 at great length or short length, whichever you
12 prefer.

13 MR. BUNDY: I may not have any
14 questions at all. You never know.

15 BY MR. HILDEBRAND:

16 Q. All right. Explain to the Judge, if you
17 would, please, Mr. Doran, what we have here on
18 the screen, and let me see if I can maybe move
19 this back a little bit. Okay. So do you want to
20 use this and just point at it?

21 A. This is a summary of the as-planned
22 schedule on top in blue, which is what that says
23 right there, as-planned and the as-built critical
24 path -- I'm sorry, as-planned critical path and
25 the as-built critical path in red. The

1 as-planned critical path, I -- obviously there
2 was maybe a hundred activities that created that
3 in the schedule.

4 I summarized it down to these four and
5 kind of combined them to make it much more
6 simpler. And the project was supposed to be
7 completed by July 30th, 2017. In the as-built
8 sense, these tasks or summarization of work
9 doesn't match all of these. It became different,
10 kind of like the turkey example.

11 It became a new, a different critical
12 path. And in doing so, the project didn't become
13 substantially complete, in my analysis, until
14 December 28th, 2018, and the difference between
15 what was planned and contracted for and what
16 actually occurred was 516 days, roughly 17
17 months.

18 THE COURT: Okay. All right.

19 BY MR. HILDEBRAND:

20 Q. So the as-planned is on top; the
21 as-built is on the bottom and then you've got --

22 A. And then what I did, if you're going
23 to -- if we're going to continue with these
24 slides is, I broke this project. I then
25 discussed how I arrived at 516 days. I broke it

1 up into five periods to present it to you or to
2 whoever I'm speaking to.

3 And the five periods basically go --
4 that would be period one. It goes halfway
5 between bars one and two. Period two ends at the
6 end of that bar; period three is that bar; period
7 four is that bar; period five is that bar. And I
8 compare the time between what actually occurred
9 in those bars to what was planned to quantify the
10 delay.

11 Q. Okay. Let's talk about that first
12 period of delay on the as-built path. It says,
13 excavate footings, slab on grade. Can you --

14 A. Correct.

15 Q. -- tell us what that is?

16 A. So there's another chart after this that
17 identifies -- there it is -- and you asked about
18 the first bar. The first bar goes out to slab on
19 grade, and on that slab on grade, it completed on
20 April 1st, 2017, and it was supposed to complete
21 on March 11th. The difference between those two
22 days -- two dates is 21 days.

23 Now, what happened to delay the project
24 by 21 days on that first bar, well, if 20 days --
25 up until on or about October 19th or 20th of

1 2015, for 20 days, there was a flood, 1,000-year
2 flood -- you might remember it -- that hit
3 Charleston.

4 And they were doing site work at that
5 point in time, building foundations and doing
6 site excavation. So obviously it's going to
7 delay the project. It delayed it by 20 days.
8 They ended up getting a change order for that 20
9 days eventually.

10 Then there was another day somewhere in
11 there where the contractor lost a day on top of
12 this one. So at the time -- as of April 1st, the
13 project was 21 days behind schedule, 20 of which
14 was due to flood. Another day, because of lack
15 of progress, which would be to Balfour Beatty's
16 account.

17 And then the second part of that bar is,
18 it goes up to level 5 of the structure. It's a
19 nine-story structure with a little -- the norm
20 building on top of it. It's basically a
21 nine-story structure, nine levels above grade,
22 above ground level.

23 And up until the -- through the fifth
24 floor, the fifth slab up, up until that point,
25 the contractor was on schedule, accounting for

1 this other 20 days. They're on schedule. And
2 then on June 26, there's equipment breakdown.
3 The crane broke down. They lost a day.

4 Well, as of July 23 of 2016, the fifth
5 floor gets poured. It's 22 days behind schedule.
6 22 days. So it's your 20 days that they lost
7 there, another day there, and that date for the
8 equipment breakdown.

9 So that takes you out to July 23rd, and
10 they start forming the sixth floor slab. They
11 did the four days of work -- of progress. All of
12 a sudden, they have to stop work, can't go any
13 further. They don't have the information to
14 layout on the slab or on the floor where the
15 penetrations will be in the slab.

16 Penetrations to the slab -- for the
17 penetration to the slab, that had to be
18 coordinated by the architect to tell Balfour
19 Beatty where to put these holes in the slabs.
20 They have plumbing that goes where it's supposed
21 to go and mechanical to where it's supposed to
22 go, ductwork maybe and things like that.

23 So for 15 days, Balfour Beatty sat,
24 couldn't make a dent either until they got the
25 coordinated drawings to show how the

1 post-tensioning, the rebar, and the slab
2 penetrations all could be laid out and installed
3 in the slab, ready for it to pour. And that
4 finish date was August of -- that's where I cut
5 off my period one.

6 THE COURT: Okay.

7 MR. BUNDY: All right. I have an
8 objection and move to strike. He just gave an
9 opinion that the drawings were not coordinated or
10 were not adequate. He's not an architect. That
11 is an opinion that can only be given by an
12 architect. He's only been qualified as a
13 scheduler. Okay?

14 He is not qualified to say or put in an
15 opinion, okay, that the drawings were not
16 adequate. He's just not qualified to do that,
17 and it's -- you know, as of yet, they hadn't put
18 an architect up here yet. So I strongly object
19 to that and move that it be stricken from the
20 record.

21 THE COURT: All right. Do you want
22 to cover that?

23 MR. HILDEBRAND: Yes, sir.

24 BY MR. HILDEBRAND:

25 Q. When you were doing scheduling delays,

1 do you look at all the facts, the underlying
2 facts and the underlying data to see what the
3 data show the cause of delays was?

4 A. I did. And on this particular issue,
5 there was correspondence between Balfour Beatty
6 and the architect or owner, whoever the -- I
7 think it was Mr. Clements and maybe the Library
8 Associates and the architect, that they needed
9 this information.

10 It delayed the job. It was delaying the
11 job, and that they couldn't pour the slab without
12 this. And not only that, but even coming up
13 closer to that, there was a hint, if you will. I
14 mean, not a hint, but a notice there of, hey, if
15 we don't get these, then the project is going to
16 be delayed.

17 MR. BUNDY: I don't have a problem
18 if he says the alleged cause of this was
19 architectural error. Okay? He can certainly say
20 that he bases an opinion on an allegation.

21 THE COURT: Right.

22 MR. BUNDY: But he can't give an
23 opinion --

24 THE COURT: Okay.

25 MR. BUNDY: -- to a reasonable

1 degree of architectural certainty that that in
2 fact is true. He can simply say that's what he
3 knows to be an allegation, and that it's
4 reasonable for experts to rely on allegations.

5 Some of them rely on allegations that
6 are ridiculous. But at least you're entitled to
7 know that it's just an allegation, that there is
8 no proof in this case so far of that.

9 THE COURT: All right.

10 MR. HILDEBRAND: Well, Your Honor,
11 he can -- this is not -- we need to be real clear
12 is that, I have been involved in a lot of cases
13 where there are allegations that an architect is
14 negligent and he is under the gun.

15 And when that happens, you have to call
16 in an architect and say, what is the standard of
17 care for this area and can you state to a
18 reasonable architectural certainty. That's not
19 the case. For some reason, the Library
20 Associates did not bring the architect into this
21 case, and you will hear about that later on.

22 But we're not here to establish the
23 ultimate liability of the architect. What he is
24 doing is -- and this is what he does day in and
25 day out. He has been doing it for 30 years is,

1 look at the facts and determine what the causes
2 were of the delay.

3 Now, if Mr. Bundy, disagrees, he can
4 certainly cross-examine him. If he wants to call
5 his own expert to say that he didn't think that
6 these were design issues or whatever, then that's
7 fine. But Mr. Doran has looked at the documents,
8 and in his opinion, the documents established
9 that there were design issues that caused these
10 delays. And that's all he's testified about; so
11 I think it's appropriate.

12 THE COURT: All right. I think his
13 testimony is based upon his review of the records
14 that he's reviewed.

15 MR. HILDEBRAND: Right.

16 MR. BUNDY: But it's not a legal,
17 professional opinion.

18 THE COURT: I understand that.

19 MR. BUNDY: (Inaudible) of the
20 architect falling below the standard of care.
21 And to answer the question about why we didn't
22 sue the architect, because he didn't do anything
23 wrong. Okay? And I don't sue people that don't
24 do things wrong.

25 THE COURT: Okay. All right. And

1 I understand that as the basis for the opinion.
2 Okay.

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

5 THE COURT: All right.

6 BY MR. HILDEBRAND:

7 Q. So if we're looking at -- if I'm looking
8 at this chart right, it looks like that's the
9 original schedule date and the --

10 A. Well, that original schedule date was
11 July 23 -- was July 1st to get the fifth floor
12 slab.

13 Q. Okay.

14 A. July 1st. I said July 23rd. And they
15 made a few days more of progress, and then they
16 were stopped then and for 15 days were waiting on
17 information to locate the sleeves on the sixth
18 floor slab.

19 Q. Okay. All right.

20 A. That's why I cut it off there. I could
21 have easily cut it off at July 23rd and made it
22 clear, hey, this the fifth floor slab.

23 And then my period starts up 15 days of
24 delay right away. I felt it was better to
25 present this in the way someone can understand

1 it, by ending it where the delay ended, and the
2 delay ended on August 11th.

3 Q. All right. So what was the next period
4 if we -- I'm not going to ask you how the sleeves
5 delayed the job. I think there's been a lot of
6 testimony about that, and we'll try to move
7 forward. So tell me -- go ahead.

8 A. I just wanted to point out how these
9 slides are designed, so Your Honor can follow
10 them as we move forward.

11 Q. Okay.

12 A. So on the bottom you see in yellow, 37.
13 My period one totaled 37 days of delay. When you
14 get to period two or period three and so on,
15 you're going to see the total, the culmination
16 and the total each time down here which may be
17 different than that number. The number up top is
18 that period.

19 THE COURT: Okay.

20 THE WITNESS: We will see that on
21 the next slide, Your Honor.

22 THE COURT: All right.

23 BY MR. HILDEBRAND:

24 Q. Okay.

25 A. So on period two --

1 Q. Let's back up. Do you want to back up?

2 A. Okay.

3 Q. All right. So what was your clue
4 that -- you divided the project up into five
5 periods, based on your analysis, right? That
6 made logical sense, correct?

7 A. Correct.

8 Q. And the critical path, in your view, is
9 appropriate to break up into five periods?

10 A. Yes.

11 Q. All right. So on the first period,
12 you've got -- if you could just tell the Judge or
13 you can refer to the exhibit. If you can tell
14 what your opinion is as to the period one delay.

15 A. Well, I've already done that, but --

16 Q. Okay. Let's move on then. All right.

17 THE WITNESS: Now are you clear,
18 sir?

19 THE COURT: Yes, yes.

20 THE WITNESS: So this is period
21 two. On period two, I quantify that 167 more
22 delays that's in the middle of the page to total,
23 to date, 204 days that you see down on the
24 bottom. That's the relationship.

25 And as of March 3rd, 2017, the project

1 had incurred 204 delays -- days of delay, 167 of
2 which occurred between August of 2016 and March
3 of 2017. And what I measured to was the start of
4 ballroom framing for this period two, which is
5 this bar.

6 BY MR. HILDEBRAND:

7 Q. Okay. So --

8 MR. BUNDY: Well, I'm going to
9 object to this chart, but very quickly. This
10 witness is here to establish and has been
11 qualified to establish critical delays on the
12 job, where they occurred and how many days.

13 He has not been qualified to assign
14 liability or responsibility for those delays.
15 That's a separate line of testimony entirely
16 because this is his opinion that the AE delay, ME
17 sleeve locations. That's just his opinion.
18 There is no facts on that, and he has not been
19 qualified to give an opinion on that.

20 N and S arch window design revisions.
21 Well, I don't -- you know, I don't know
22 whether -- if he is not ascribing that design to
23 any one person or he is just simply saying that
24 there was that many days of delay because the
25 revision occurred. I don't think that's a

1 legitimate objection. I think that's okay.

2 But he can't go to the next level, which
3 is and it was so-and-so's fault, the architect's
4 fault, because I'm not an architect, and I don't
5 get to do that. Do you see what I'm saying?

6 THE COURT: I think the objection
7 is noted. The assignment of blame is where you
8 have the problem, right?

9 MR. BUNDY: Exactly right.

10 THE COURT: All right. Okay. All
11 right.

12 MR. HILDEBRAND: Well, Your
13 Honor --

14 THE COURT: He is basing his
15 opinion upon what he is seeing in the record.

16 MR. HILDEBRAND: Right.

17 THE COURT: That I get. Okay?

18 MR. HILDEBRAND: Yes, sir.

19 THE COURT: I get that. Okay. All
20 right.

21 MR. HILDEBRAND: And that's what he
22 does.

23 BY MR. HILDEBRAND:

24 Q. In all of these projects, you've --
25 that's what you were asked to do?

1 A. That's my job, usually. That's my job
2 to quantify the delay, to find out why the --
3 what happened and who is responsible.

4 Q. All right. So explain to the Judge what
5 is involved in this second period of critical
6 path and what the period two delays were. Tell
7 him about those.

8 A. Period two is a continuation of period
9 one. Period one went up through level five. The
10 building goes up for four more levels to the
11 ninth floor, and then they had a big tower crane
12 that they used to load the materials on the roof.

13 And then while that building is going
14 up, the higher it gets, they're -- in the
15 structure, the work below there, the interior
16 work, they can start, and it usually doesn't
17 (inaudible) on this project.

18 So let's say, when you are through level
19 7, pouring the concrete slab, you may have
20 subcontractors down on level 1 or 2, you know,
21 running conduit for electric and mechanical work
22 and ductwork and things like that. That's
23 understandable. That's usually what happens.

24 Usually, what the plan was, was by the
25 time they got to level 3 in the structure and the

1 critical path would jump down to interior work.
2 That didn't happen in reality. What really
3 happened was, the structure -- the delays in the
4 structure continued and outpaced the work that
5 was going on down on the lower levels. So the
6 structure remained on the critical path until
7 that crane got removed.

8 And to start then to transition to the
9 interior work, for this framing of the ceilings
10 in the ballrooms, what is the critical path? And
11 so that's what period two is. So at the end of
12 period two, to start the ballroom ceiling framing
13 on March 3rd, 2017, the project had lost 167 days
14 in period two, 204 overall. The same
15 continuation of what was happening on level 6
16 continued on levels 7, 8 and 9.

17 Q. All right. Can you explain what the AE
18 in the yellow box there, specifically what the AE
19 delay, MEP sleeve locations in the NS arch window
20 design revisions are?

21 A. Yes. The AE delay, the MEP sleeve
22 location is the same thing I just discussed on
23 level 6. They didn't have the locations.

24 The contractor was waiting on
25 information to locate the sleeves in the slab,

1 the penetrations so they could continue forming
2 and pouring those slabs. That just continued,
3 but they got longer. The information came later
4 and later on the seventh, eighth and ninth
5 floors.

6 THE COURT: Okay.

7 THE WITNESS: So then there was
8 another 90 days of delay before they got to the
9 top of the building. So then the north, N and S
10 arched windows is north and south arch window
11 design revision.

12 So within the ballroom itself, that
13 ballroom one, it's a very extravagant ballroom,
14 very detailed. The main ballroom, ballroom one
15 has a big barrel or arched ceiling. And then at
16 either end of that, there are arched windows that
17 are below the ceiling but higher than -- and this
18 area is basically a 2-story structure at this
19 point, so it's up higher.

20 So these north and south arches are in
21 that ballroom that can -- that work was revised
22 by the architect -- by the owner. And the
23 affected two parts of that were -- one part was
24 the structural part, and the next part was the
25 hanging of the drywall and the plywood to close

1 it in. And they took two portions of that
2 change.

3 BY MR. HILDEBRAND:

4 Q. So this ballroom, it's -- you say it's a
5 vaulted ceiling?

6 A. I mean, I thought -- well, they called
7 it a barrel ceiling.

8 Q. Okay. And it's two stories, that barrel
9 ceiling?

10 A. Yes, like 20-some feet high.

11 Q. All right. And what was the problem
12 here?

13 A. So at either end of that, below the
14 ceiling level, there's big half circle window,
15 and they call the arched window.

16 Q. Okay.

17 A. And so at the north -- and so that both
18 of those windows, they couldn't get to that until
19 the crane got removed because the crane is
20 sitting right there in the middle of the
21 footprint for that ballroom.

22 So they can't get to do this change work
23 until that. So they remove the crane. Once they
24 removed the crane, they were able to get to this
25 north and south arch windows, perform the change

1 work and then start on the meaningful framing of
2 the ballroom ceiling.

3 Q. Okay. Why were they not able to remove
4 the crane?

5 A. Because the structure was delayed, and
6 it continued to be delay.

7 Q. Okay. Explain why the crane is crucial
8 to the structure.

9 A. The crane is crucial because that's
10 what's used to pour each slab all the way up to
11 level 9, and this area of the building where the
12 ballroom is, is really, like, about three stories
13 tall, two floors with a high second floor.

14 And so the crane was set in that area,
15 so they could access the entire -- I call it a
16 horseshoe, if you will -- of the remaining three
17 sides of the building from nine floors up. So
18 they frame it, pour it, stock it with materials
19 to do follow-along work. And that's what they
20 needed to continue that structure all the way up.

21 Q. Okay. So the delays with the concrete
22 and the sleeves that you have -- that have been
23 talked about a lot already, those delayed the
24 concrete pours and the concrete pours were
25 delayed because -- the crane was critical to

1 making the concrete pours? So the crane could
2 not be removed until those were done; is that
3 right?

4 A. That's correct.

5 Q. Okay. Was there anything else that the
6 crane was necessary for that affected the
7 critical path?

8 A. The crane was necessary to put some
9 things on the roof that the -- they had to set
10 the swimming pool, the big huge stainless steel
11 swimming pool. That had to be set on the roof
12 before they could remove the crane.

13 The last bit of work performed on
14 February 3rd, 2017, was their second or third.
15 It was to set that swimming pool and then remove
16 the crane.

17 Q. All right. Let me ask you this. I hate
18 to interrupt you, but that swimming pool, is
19 that -- is there any life safety issue or
20 fireproofing issue in relation to that swimming
21 pool?

22 A. Yeah. I mean, I was going to discuss
23 that later in period four, but I can do it right
24 now.

25 Q. All right. Go ahead.

1 A. The swimming pool is integral to the --
2 over the whole building and integral to getting
3 substantial completion on the project because it
4 served two -- it served at least two purposes.
5 Those two purposes are recreation and use for
6 swimming.

7 The other was, it was a secondary source
8 of water for fire protection for the building
9 because the water pressure in Charleston is low,
10 and it may not provide enough -- enough power
11 pressure to provide enough sprinkler coverage to
12 put out a fire.

13 So this pool was a secondary source.
14 They had big pipe sections, I think, that were
15 piped to the pool; so if there was a fire, to
16 supplement the city's water system, they would
17 pump the water out of the pool to fight the fire.

18 Q. Okay. So you could basically have a
19 water tower in effect?

20 A. Yeah. It is basically a water tower, an
21 open water tower.

22 Q. Okay. And was that the last major thing
23 that the crane was used for was --

24 A. Yes.

25 Q. -- to place that?

1 A. That was it. As soon as they -- I mean,
2 it's so big and heavy. It's 14,000 pounds, the
3 swimming pool, empty. They had to -- they had to
4 set it before they could -- they had to have a
5 crane set it there.

6 Q. Okay. All right.

7 A. So that takes us through period two.

8 Q. So let's go to the next line. So you've
9 got -- maybe you've talked about it.

10 A. This just a summary of my opinions,
11 findings and opinions. I qualified 167
12 additional days of delay in period two caused by
13 the ceiling -- well, the framing for the ceiling
14 in the ballroom ceiling, the bars were delayed.

15 Why were they delayed? Because of the
16 continued structure not getting poured on time
17 and because they're waiting on information.
18 That's what I called the AE delay, and then the
19 arch window design revisions.

20 Q. All right. All right. So now, we've
21 got five periods and now we are in period three,
22 right?

23 A. Correct. This period three, it takes us
24 out to, after the ceilings are framed in the
25 ballroom, there was some mechanical and

1 electrical work that goes in the ceilings and
2 then hanging the drywall.

3 And so there was just a multitude of
4 design revisions and changed information that
5 affected the ability to hang drywall on the
6 ceiling. It should have happened within a couple
7 of months at starting the framing. It didn't
8 really get started until October 7th of 2017.

9 There was a delay in period three of 95
10 days for a total of 299 days of delay through
11 October 7th of 2017, and up here in that yellow
12 box, I determined the causation of that was owner
13 design revisions I have a couple of slides to
14 show some multitude of issues, the design
15 revisions that went into that ballroom.

16 Q. Okay. Great. Go to the next one,
17 please.

18 THE WITNESS: So I have three
19 slides similar to this, Judge. This is -- and
20 the reason I made three is, I'm a visual person
21 myself, and people I talk to -- well, most people
22 are visual.

23 But whether I put it in this format or a
24 second format or a third format, one may work for
25 me and one may work for you. I put in three

1 formats and one may work for counsel.

2 BY MR. HILDEBRAND:

3 Q. Let's skip ahead. Let's jump to the
4 next two just to kind of give the Judge --

5 A. Yeah.

6 Q. Tell him the three different types you
7 used.

8 A. All right.

9 Q. That's the same thing as the --

10 A. Same exact information, but now it's on
11 call outs across the timeline.

12 THE COURT: Okay. All right.

13 Q. And then the third one?

14 A. And now this in is a narrative format.
15 I call it narrative. Tabular, if you will. So
16 they're all color-coded. They all work together.
17 It's all the same information on all three
18 slides. So when I --

19 MR. HILDEBRAND: So do you have any
20 preference, Judge, on which of the three that he
21 explains?

22 THE COURT: Do I have a preference?
23 No. I can follow it.

24 MR. HILDEBRAND: All right. Let's
25 go to the second one.

1 MR. BUNDY: Well, just for the
2 record to make it clear, none of this is in
3 evidence.

4 THE COURT: Right.

5 MR. BUNDY: None of the individual
6 notations or anything that is referred, none of
7 that is in evidence.

8 THE COURT: All right. This is for
9 demonstrative purposes for now. Yes, sir.

10 MR. BUNDY: All right. Thank you,
11 Your Honor.

12 THE WITNESS: This is my favorite
13 to me.

14 THE COURT: Okay.

15 THE WITNESS: It helps me
16 understand that throughout this time line -- the
17 only reason you have some above and some below is
18 because it didn't all fit above.

19 THE COURT: Okay.

20 THE WITNESS: There's just a ton of
21 design revisions and information, clarification
22 that was required to change the work to get it
23 installed.

24 THE COURT: Okay. And the time
25 line is still going left to right, right?

1 THE WITNESS: Correct, sir, yeah.
2 Up above it goes, yeah, 2015, '16, '17.

3 THE COURT: And the levels and
4 colors are demonstrative of what?

5 THE WITNESS: The issue.

6 THE COURT: Okay.

7 THE WITNESS: So all of the purple
8 items are significant dates that happened for RFI
9 0799. In fact, that's one that I was -- I picked
10 out three or four to discuss. That was actually
11 one of them.

12 THE COURT: Okay.

13 THE WITNESS: So the timeline,
14 looking at it all at once here, here's an issue
15 that a question was generated in the RFI, request
16 for information, to locate dimensions on what --
17 where are these ceiling lights going to go?

18 Well, they ended up going through some
19 different discussions and all, different designs
20 that may not work. But that came up on December
21 3rd. May 15th of 2017, the information was
22 finally provided in a format that actually worked
23 in the field.

24 BY MR. HILDEBRAND:

25 Q. Explain it to us.

1 A. To locate --

2 Q. Slow down a bit on that one. So tell us
3 what the problem was and just tell me in a little
4 more detail on that one. What was the problem
5 and what was the delay?

6 A. I'm not sure if this is the one for
7 the -- the barrel ceiling that we talked about
8 earlier.

9 MR. BUNDY: Objection.

10 THE WITNESS: There are a lot of
11 different notations required for that.

12 THE COURT: Okay.

13 THE WITNESS: But this is a request
14 for information that Balfour Beatty required
15 dimensions to locate the layout, to locate the
16 lights in the ceiling area.

17 And they got an answer a couple of weeks
18 later, six weeks later, got an answer for that.
19 And then the design team -- Balfour Beatty
20 notified that the locations given would not work
21 through to the ceiling height.

22 BY MR. HILDEBRAND:

23 Q. Do you know why that was, why they
24 wouldn't work?

25 A. It wouldn't fit in the depth of the

1 ceiling, for the ceiling up above. For the
2 framing to up above, it is not very deep there.

3 Q. So there were canned lights and --

4 A. These were canned lights in the
5 building, yes.

6 Q. So the recessed lights that were shown
7 by the interior designer or whoever, didn't work?

8 A. Didn't fit in the space provided.

9 Q. And how long were --

10 A. There were -- so I think it was the
11 framing that hit it, but it wouldn't -- the
12 locations for it were in conflict with the
13 structure above it.

14 Q. Okay.

15 A. That's one issue. There's another -- I
16 think the black one, which actually started
17 before this. So it was just -- I think it's that
18 one. Yeah, so even the -- remember they started
19 framing on March 3rd.

20 On March 10th, there's an RFI that, hey,
21 the ductwork doesn't fit in the soffit, and
22 again, this went through some iterations of
23 rerouting, and eventually, on May 11th, a revised
24 sketch was sent and confirmed. And so, by May
25 11th, they were able to continue in that area.

1 Q. All right. So how long is the delay?

2 A. Overall? Well, there is a ton of
3 things. These are -- this has happened for the
4 next seven months. These issues keep popping up.
5 That's two of them. There's several more. By
6 the time you get to the last one, the information
7 was provided in the red, I think.

8 The bright red, I think. That might be
9 it. Yeah, if you go back to the other chart.
10 No. Go back to the chart that has all of the
11 call-outs. So that's RCO 170, I think, 157. So
12 in August, a lot of these conflicts that
13 weren't -- that were occurring by -- most of
14 those had been resolved by the time you get to
15 March.

16 So they started -- they made progress in
17 March. And on March 7th, Balfour Beatty
18 identified that the lower soffit tract that --
19 now, this ballroom is comprised of four
20 ballrooms. Basically, it's four.

21 Q. Comprised of what?

22 A. Four ballrooms.

23 Q. Four ballrooms.

24 A. There are four ballrooms on the second
25 floor, and three of them, maybe four, but

1 definitely three are separated by a movable
2 partition. This is a soffit underneath the
3 movable partition. So until you know where the
4 soffit is that holds the structure to hold the --
5 I forget the term.

6 Q. The sliding doors?

7 A. Sliding partition. You know, when you
8 go into a ballroom sometimes, you can make it
9 smaller maybe by moving the walls. That's what
10 these are.

11 THE COURT: Sure. Okay.

12 THE WITNESS: And so that
13 identified the soffit height that would work to
14 accommodate the movable partition.

15 BY MR. HILDEBRAND:

16 Q. Okay.

17 A. And there was conflicts in that. It
18 wasn't working as designed. It got that -- they
19 finally got the answer on that on -- they finally
20 got direction to proceed after getting the
21 information on October 7th. And that was the
22 last issue or conflict on October 7th here.

23 So they got a response. Balfour Beatty
24 priced it up, submitted to the owner. The owner
25 didn't like it, but said go ahead anyway. So

1 they went ahead and directed the contractor to
2 perform, and that's where I stopped. I said,
3 okay, now, they have information. They have been
4 given direction. That delay has ended. Sorry,
5 that's where I stopped the delay on October 7th,
6 2017.

7 They ended up getting an RCO, a request
8 for change order, got it signed, and 10 days
9 later, it was eventually included in the change
10 order. But I stopped, you know, on October 7th.
11 That's when the delay ended.

12 Q. All right. So each one of these blowups
13 or clouds or whatever we have here represent
14 different design issues or changes that occurred
15 during this period; is that correct?

16 A. Right, yes.

17 Q. All right. And the underlying data for
18 this is readily available, the RFIs and the other
19 data that's in the project files?

20 A. Right.

21 Q. All right. And if you could go -- you
22 could, with your testimony, explain to the Judge
23 each one of these and why you feel that
24 particular item delayed the job?

25 A. Well, first of all, you do the timing.

1 You know, you look at the time. It's like, why
2 wasn't the ceiling making progress? Well, they
3 didn't have the information or Balfour Beatty
4 didn't have the information.

5 When did they get that information?
6 They finally got that on October 7, and then I
7 can work backwards. Okay. That's RFI, you know,
8 RCO 157, which is RFI whatever it is. So, yes
9 all of that information. I mean, I couldn't sit
10 here right now and just cite every single one of
11 those timelines to the Judge. But at one point,
12 I probably could.

13 Q. Okay. But the data is there if we
14 wanted to go back and --

15 A. Yes.

16 Q. Somebody wanted to go back and look at
17 it? Okay. All right. I doubt the Judge wants
18 you to go through all of those.

19 A. No. I think we're -- I mean, that was
20 the last one. I had four. We went through some
21 of them. I think that's sufficient.

22 THE COURT: Let me ask you this
23 question while it's on my mind, and that is, I
24 saw -- so I counted a 60-day delay, August 7th to
25 October 7th from the RFI to the RCO, correct?

1 Change orders executed by the --

2 THE WITNESS: On that one?

3 THE COURT: On that particular one?

4 THE WITNESS: On that one, yes.

5 THE COURT: So that's a 60-day
6 delay. Now, is that cumulative to everything, or
7 is that just that one project and there may be
8 other delays going on at the same time?

9 THE WITNESS: Just that one
10 activity.

11 THE COURT: Okay. All right.

12 THE WITNESS: I mean, there are
13 2,000 activities in this case.

14 THE COURT: Sure, sure. Yeah.
15 Okay. All right.

16 THE WITNESS: But I also
17 identified, this is the critical path.

18 THE COURT: Yeah, yeah. I'm with
19 you. We're cooking the turkey, right?

20 THE WITNESS: Pardon me?

21 THE COURT: We're cooking the
22 turkey.

23 THE WITNESS: We're cooking the
24 turkey.

25 THE COURT: All right.

1 THE WITNESS: Exactly.

2 THE COURT: Can't have Thanksgiving
3 dinner without the turkey.

4 THE WITNESS: So this is my
5 conclusion on period three. There are 95 days of
6 additional delay due to numerous changes. I
7 picked out four to discuss with you, but that
8 ended with that -- you know, that RCO 157.

9 BY MR. HILDEBRAND:

10 Q. All right. On the previous period,
11 period two, to whom did you allocate those
12 delays?

13 A. To the owner because of the lack of
14 information to locate a sleeve to the slabs.

15 Q. Okay. And how about on this period
16 three? To whom do you allocate the delay?

17 A. To the owner.

18 Q. Why is that?

19 A. Because they're design changes and
20 revisions that delayed the work.

21 Q. Okay. All right. Period four, can you
22 describe to the Judge what this is?

23 A. So period four, using the same method we
24 did before, I identified 141 days between October
25 7th, 2017, and June 18th of 2018. 141 days in

1 that period. So by June 18th, 2018, the project
2 is now 440 days behind schedule.

3 Q. 440 days?

4 A. 440 days.

5 Q. Over a year?

6 A. Over a year.

7 Q. Okay. All right. Tell us about this
8 period delay.

9 A. So I called this the barn doors there
10 and up there. This is what I called the barn
11 door issue. The barn doors were sliding doors in
12 most of the guest rooms that slid in front of a
13 tub, separating the tub from the bedroom, if you
14 will, the bathroom from the bedroom.

15 Q. Okay.

16 A. Initially, they were in the GMP. They
17 were in the contract initially. They value
18 engineered out of the contract.

19 Q. The barn doors were in the original
20 contract and then taken out?

21 A. Right.

22 Q. Okay.

23 A. Value engineered out. So by the time we
24 got -- by the time we got the -- I looked at the
25 GMP. By the time you got to the GMP and

1 (inaudible), they were out of the contract.

2 Q. Okay.

3 A. Okay. So they're not -- they're no
4 longer in. Balfour Beatty submitted the hardware
5 schedule a couple of times. They submitted a
6 hardware schedule.

7 THE WITNESS: A hardware schedule,
8 Your Honor, if you don't know is a schedule,
9 which a listing, not a time schedule. The
10 listing of all the doorknobs and hinges and
11 things like that, and all the doors that are
12 required on the project.

13 So Balfour Beatty submitted the hardware
14 schedule, and it was returned with additional
15 scope of work now. Now, the architect wants the
16 barn doors back in. And they had a certain
17 design that took -- well, through -- between
18 those in 2017, June or so of 2017 -- or '16, I'm
19 sorry. It was in 2016.

20 It took a year of submittals and pricing
21 and revisions, continued revising of those barn
22 doors until they ended up having mirrors, I
23 think, on both sides of the barn doors, which
24 it's a very common -- and it didn't match up from
25 one side to the other. They had a window or

1 mirror on one side and the barn door was a
2 different size or location that was on the other
3 side. So it was very complex.

4 Well, they finally -- Balfour Beatty
5 finally got that request for change order
6 approved on October 19th, 2017, just a week or so
7 after we stopped, period. We ended, period. So
8 about 10 days later -- 12 days later on October
9 19th, the new revised barn doors are added back
10 into the contract with the approved pricing and a
11 direction basically to proceed, October 19th.

12 Well, Balfour Beatty submitted the shop
13 drawings for it, got rejected; resubmitted them
14 in December of that year. The pricing was not
15 acceptable to the owner. On January 3rd it was
16 rejected, of '18. The shop drawings finally got
17 approved later in January.

18 But when they got approved, they were
19 approved as noted. And one of the notes was,
20 contractor to determine the height of the doors.
21 And Balfour Beatty was like, we're not the -- you
22 tell us the height of the doors. Well, it took a
23 couple of days.

24 But they went out in the field and
25 measured, gave the information and confirmed what

1 the height of the door should be. Then on
2 February 1st of 2018, they confirmed that --
3 Balfour Beatty confirmed that with the architect,
4 released the doors for fabrication.

5 As I explained earlier, these aren't a
6 normal barn door. You can't go to Home Depot and
7 get them. It took four months to get these
8 doors, 16 weeks. So those are shipped --
9 released on February 1st. They don't get
10 delivered, Your Honor, until May 29th, 2018.

11 After they get delivered, they're not
12 primed and they're not painted. These are wooden
13 doors, and the reason they're not is we have all
14 of mirrors and windows. So they come to the
15 project site and there's a paint shop that was
16 built on site to paint these doors. And so from
17 May 29th until the middle of June, they're
18 painting the doors.

19 The first set of barn doors were
20 installed on level 3 on June 18th. That's where
21 I saw that delay ends because now the barn door
22 issue is complete on June 18. The follow-on work
23 can now continue.

24 Well, the only work now to be done is
25 basically owner fixture, furniture, fixtures, and

1 equipment, what they call FFE and punch list.
2 Because Balfour Beatty, by February of 2018, had
3 two coats of paint on the entire project, four
4 months earlier.

5 So there's a lot of time that the
6 project was substantially complete on a given
7 floor, and they couldn't do anything else before
8 they got these barn doors. It's pretty easy to
9 say that's a critical path delay. It's kind of
10 like the mother-in-law coming and right before
11 the dinner is over and saying, wait, we want
12 something else. That's kind of the same thing
13 you have here.

14 So there's a slide. I believe it's the
15 next one, and if not, then we'll get to it. But
16 it shows that -- there it is -- waiting on the
17 barn doors.

18 Q. Can you explain that just a little bit.

19 A. Level 3 was painted, punched out, final
20 cleaned, ready for the owner's punch list and
21 then to start installing that furniture,
22 fixtures, and equipment. That was at the end of
23 March of 2018, level 4, 5, 6, 7, 8 here. Now,
24 level 6, that really was substantially complete
25 back here.

1 There was one activity that wasn't
2 complete. That was putting on the cover plates
3 with switches, but -- so even though that shows a
4 solid bar, slight gap in time. So you have a gap
5 of time ranging from about, you know, two and a
6 half months or so to -- down to a little over a
7 month. But, you know, as you work up the
8 building.

9 So the building has -- aside from all of
10 the other changes that were occurring in 2018 --
11 and we will get to that later -- there's no other
12 work, contract work going on at that time, just
13 waiting on these barn doors.

14 And basically, in my opinion, all the
15 delays -- and it's just very clear that, once the
16 owner started issuing contract change directives
17 in 2018, at that point, in February 2018, all
18 delays -- and it's not even up to discussion
19 really. They're just -- they're adding and
20 changing, modifying the scope of work.

21 The building's painted in February with
22 two coats of paint. It's very clear that any
23 delay after that is going to -- in my assessment
24 to the owner. I jumped way ahead. But that's
25 where I'm going to get to. So period four.

1 We're in period four. Did we skip a slide?

2 Q. Is this it?

3 A. Yeah.

4 Q. Okay. Can you explain this one to the
5 Judge, please?

6 A. There were other critical paths also.
7 Go back to slide one. Go back one. Yeah. So I
8 identified -- there wasn't just one critical
9 path, there were multiple critical as-built
10 critical paths during period four.

11 The barn doors we discussed. There were
12 three other issues that came up, additional work
13 that was required. One was stair four; one was
14 the front desk; one was the elevator interiors.
15 And I will discuss those in a little more detail.
16 Stair four --

17 Q. What was the issue with stair four?

18 A. Stair four was -- what had been revised
19 earlier in the project -- or actually, they were
20 late in the project -- in 2017, to add additional
21 millwork in the stairwell.

22 Now, stair four goes from the first
23 floor to the ninth floor, and between levels 1
24 and 2 -- level 2 is pretty -- they're both pretty
25 important floors. And, you know, there are lots

1 of high-level finishes. On level 2 is where --
2 there's another dining room up on level 2. This
3 is the stairwell, grand stairwell that gets you
4 up to that dining area.

5 And then it continues up to level 9.
6 But between level 1 and 2, the architect had
7 added plywood and -- I'm sorry, millwork and
8 things that changed the scope. And then there
9 was discussion about the pricing and all and how
10 long it was going to take it.

11 So the owner said, well, just forget it.
12 We're going to back to GMP, the design that was
13 agreed upon, that Balfour Beatty based their
14 proposal on, their bid on.

15 Q. Okay. So wait a second. So there was
16 a -- the grand stairway you're talking about on
17 this --

18 A. Yes. It's on level 2.

19 Q. -- stair number 4? All right. There
20 was an original design on how it was supposed to
21 be finished, and then there was a discussion
22 about changing it; is that right?

23 A. Yes.

24 Q. All right. And then it went back to the
25 original?

1 A. Yeah. It went back to the original.
2 After that -- yeah, after shop drawings were
3 submitted, it then went back to the original one.

4 Q. All right. Now, how long a delay
5 occurred because of that issue?

6 A. I didn't assess any delay because of
7 that initial issue.

8 Q. Gotcha. That was just another delay
9 that occurred during the --

10 MR. BUNDY: I object and move to
11 strike the testimony. He signed no delay to that
12 issue. He is supposed to be a delay expert.
13 He's been qualified to talk about delays, and he
14 just said he didn't design any delay.

15 THE COURT: All right.

16 MR. BUNDY: So it's irrelevant.

17 THE COURT: No delay was assigned
18 to that.

19 THE WITNESS: All right. To answer
20 his question, to the revisions on the millwork
21 shop drawings, the revision was not done anyway.

22 THE COURT: Right.

23 THE WITNESS: I found no delays in
24 that.

25 THE COURT: Okay. Okay. Noted.

1 Okay. I'm with you.

2 MR. BUNDY: That's why I'm having
3 to pay attention over here, right?

4 THE COURT: Yeah.

5 THE WITNESS: So what happened, we
6 went back to the GMP design. The architect still
7 kept it into millwork. And so this stairwell
8 has -- instead of spindles, like what's below
9 here, it was glass. It was glass and not
10 spindles.

11 THE COURT: Okay.

12 THE WITNESS: And so that glass has
13 to be supported by something, and then the
14 original, I think design --

15 MR. BUNDY: What's the question?
16 He's just talking now. There is no question on
17 the table, and he already said that it's not
18 admissible, I think.

19 THE COURT: No, I hadn't said that,
20 but the objection is noted and overruled. Go
21 ahead.

22 THE WITNESS: Thank you, sir.

23 The architect left in wood that goes
24 underneath and supports this glass. So now that
25 that's finally determined at the end of January

1 by that time. Then they were able to release the
2 glass. They'd not released it yet.

3 They had to then start framing in the
4 stair, but they couldn't -- the glass is a 16
5 week lead item, and it's going to take four
6 months to get the glass. So they don't know
7 where that -- how they're going to locate that
8 glass until they put what supports it underneath
9 it. They have to field measure it. It's very
10 custom.

11 They have to field measure and then
12 order the glass accordingly. So that ended up
13 getting -- I had a time like this. (Inaudible).
14 But that -- they got far enough of the framing of
15 that work in the stairwell. They could field
16 measure where the wood, where the millwork was
17 going to go, and then order the glass. That was
18 on -- I forget the date -- February, March. It
19 was in March.

20 So anyway, but it's a -- clearly, now,
21 that stairwell is life safety exit for the
22 building. So you need that stairwell to get to
23 substantial completion.

24 THE COURT: All right.

25 THE WITNESS: So now that's going

1 to delay the stairwell past June, so now it's
2 another delay, a delay in the path project past
3 June 18.

4 THE COURT: Awaiting the glass; is
5 that right?

6 THE WITNESS: Yes.

7 THE COURT: Okay. All right.

8 THE WITNESS: Awaiting the glass.
9 After the glass got there, they finished quickly.
10 Another issue was --

11 BY MR. HILDEBRAND:

12 Q. Mr. Doran, you've been going for a
13 while. Are you okay?

14 A. What's that?

15 Q. You've been going pretty hard for a
16 while. Are you okay to be --

17 A. I'm fine. I'm fine. All right.

18 THE COURT: He is an expert. He's
19 tough.

20 BY MR. HILDEBRAND:

21 Q. All right. Good. Go ahead.

22 A. Another one was the elevator. There's a
23 front desk.

24 Q. Tell us, what was the issue with the
25 front desk?

1 A. There was no front desk. The contract
2 was issued without a front desk. And so Balfour
3 Beatty --

4 Q. A reception desk?

5 A. Where you check in, the front desk to
6 check in.

7 Q. Okay.

8 A. So Balfour Beatty inquired, thinking
9 this is -- inquired, how are you going to check
10 in your guests? And the owner -- and he brought
11 it up to the architect's attention that, hey, we
12 don't have a front desk here. I mean, when I
13 discussed this with Balfour Beatty, they said --
14 they told me, it's like --

15 MR. BUNDY: Wait. That's hearsay.

16 THE COURT: Yeah.

17 MR. BUNDY: I mean, come on.

18 THE COURT: I know you're giving me
19 a basis for it, but anyway, there was no front
20 desk in the original design?

21 THE WITNESS: There's none.

22 THE COURT: Okay.

23 THE WITNESS: And Balfour Beatty
24 wasn't concerned with that.

25 THE COURT: Okay.

1 THE WITNESS: They had a reason not
2 to be concerned. They were not concerned. So,
3 boom, you know, there's a big light bulb, hey,
4 where in the heck is the front desk? We've got
5 to design the front desk. And that's the
6 mother-in-law showing up.

7 THE COURT: Okay. All right.

8 MR. BUNDY: Could we get rid of the
9 light bulb? I mean, really, you know.

10 MR. HILDEBRAND: It's not on the
11 actual copy of the --

12 THE WITNESS: And so when that
13 finally gets added to the contract in March of
14 '18, it doesn't actually get the final install
15 until November 20th with the whole -- and because
16 it's a front desk, that's electric through it.
17 It wasn't just a piece of wood you stick. It's
18 got electric and other things going into it.

19 THE COURT: Right.

20 THE WITNESS: And then the last
21 item was the elevator interior finishes, and it's
22 almost another light bulb here because the owner
23 didn't provide any finishes for the interior of
24 the elevators until June 12th, 2018. Now, it's
25 in supplemental instruction, SI 67.

1 So at the conclusion of period 4, I
2 concluded that 141 days of critical path delay
3 during this period due primarily to the barn
4 doors, but also due to the stairs, lack of a
5 front desk, and no selections of interiors for
6 the four main passenger elevators.

7 BY MR. HILDEBRAND:

8 Q. And you'd attribute those to the owner;
9 is that correct?

10 A. Yeah. I assigned all of those to the
11 owner.

12 Q. Okay.

13 A. They're all design delays.

14 Q. All right.

15 THE WITNESS: That leads us to the
16 last period, Your Honor, level -- I'm sorry,
17 period five. I had quantified 76 days, which is
18 in the lower right-hand corner, for a total 516
19 days for the entire contract. I concluded that
20 the delays were due to added scope and design
21 changes, and I assigned those to the owner as
22 such.

23 The multiple critical paths that were in
24 existence at the end of period four continued
25 into period 5. Some dropped off, but another one

1 or two took their place. So at the -- throughout
2 period five, the -- and the next slide will show
3 critical paths that will show the other issues.

4 So you had the elevators continue until
5 the end of the project, and I'll discuss that in
6 a minute. Stair four was delayed due to those
7 revised finishes I just discussed. That doesn't
8 get complete until October 4th. The front desk
9 was delayed due to no design. That got delayed
10 until November 20th, as I said a minute ago.

11 The pool -- now this kind of jumps up
12 and takes over late in the project. But the pool
13 became another as-built critical path. It ended
14 on the same day as the elevators. The elevator
15 and the pool both passed final inspection the
16 same day. Both were needed for substantial
17 completion.

18 THE COURT: Okay.

19 THE WITNESS: And that's why I
20 found that they were critical path delays. This
21 is just a chart showing a summary of the
22 selective changes that I selected throughout
23 2018, in addition to those others.

24 They include those, but there's an
25 addition of others. You can see the pervasive

1 nature, I guess, not just on level 1 and 2. 2 is
2 more like critical path (inaudible) but
3 throughout the building. And these are --

4 BY MR. HILDEBRAND:

5 Q. Wait a second. What is this?

6 A. It's a --

7 Q. Slow down a little bit on this, please.
8 Can you explain to the Judge what this slide
9 shows and what these delays are?

10 A. This slide shows owner revisions of
11 changes and added scope of work throughout
12 periods four and five.

13 MR. BUNDY: Objection.

14 THE COURT: Okay.

15 MR. BUNDY: He is not tying them to
16 any delays. These are just owner changes of
17 work. That's irrelevant to a delay analyses.

18 THE WITNESS: So if I can continue.

19 MR. BUNDY: And I object.

20 THE COURT: All right. Overruled.

21 Go ahead.

22 THE WITNESS: Thank you. So if
23 you -- if I didn't find the elevators or the pool
24 or the front desk or stair four as the critical
25 path, one of these others would pop up and take

1 over and be the as-built critical path.

2 THE COURT: Okay. In other words,
3 these are not critical as-builts?

4 THE WITNESS: No.

5 THE COURT: But they would be
6 incorporated in there if they were?

7 THE WITNESS: Yeah. If those other
8 delays had not occurred, some of these would then
9 have been become critical.

10 THE COURT: Okay. Okay. All
11 right.

12 BY MR. HILDEBRAND:

13 Q. And what are these delays?

14 A. These are mostly CCDs, which are
15 contract change directives.

16 Q. Construction change directives?

17 A. Construction change directives, which
18 just by its title, you know, it's a change to the
19 contract. So those are easy to identify, it's an
20 owner responsibility.

21 MR. BUNDY: Your Honor, I object.

22 THE WITNESS: And that's the CCDs.

23 THE COURT: All right. Hold one
24 second.

25 MR. BUNDY: I object to the

1 reference to these things as delays. I think the
2 appropriate definition would be noncritical
3 delays. He just testifies that unless those
4 other delays went away, these were not critical.

5 THE COURT: Okay.

6 MR. BUNDY: He is supposed to
7 present a critical path delay analysis. Okay?

8 THE COURT: Okay.

9 MR. BUNDY: This is not a mud ball.
10 He's got to have an analysis. Okay?

11 THE COURT: Okay.

12 MR. BUNDY: So can we at least
13 agree that the proper terminology is a
14 noncritical path delay in this summary?

15 MR. HILDEBRAND: Well, I think the
16 point, Your Honor, is that, okay, somebody wants
17 to come in and say, oh, gosh, well, the barn
18 doors weren't our problem. They weren't our
19 fault. Or this wasn't our problem. Then
20 Mr. Doran says, okay, then we drop down to this
21 next one, and this next one is on the critical
22 path and is the owner's fault.

23 MR. BUNDY: I realize he has got an
24 answer to every question.

25 THE COURT: Right.

1 MR. BUNDY: I'm not concerned about
2 his lack of -- able to come in here and make up
3 more stuff, right? He just keeps dealing out of
4 the same deck. What I'm talking about is, these
5 are noncritical path items, right?

6 And if my guy comes in here and says,
7 no, one of them is not, that's his reply
8 testimony because that's new evidence in reply to
9 what he said. But it's not evidence now proper
10 for this witness because he is only supposed to
11 testify to critical path delays.

12 THE COURT: All right. Let me make
13 sure I summarize this properly because I'm going
14 to allow it, but it's a but-for test. But for
15 these other items which you found to be critical
16 path delays, these items would constitute
17 critical path delays; is that correct?

18 THE WITNESS: Yes, sir. But as I
19 said, as I brought this slide up, this -- it
20 might include them. It does include some that
21 actually were on the critical path, like the
22 elevators at the bottom. So this slide includes
23 both --

24 THE COURT: Okay.

25 THE WITNESS: -- as-built with a

1 path like for the elevators, stair four on the
2 bottom, but then all of these -- some of these
3 are showing that, if this didn't occur, these
4 others would pop up.

5 THE COURT: All right.

6 THE WITNESS: So it includes both.

7 THE COURT: So my question then
8 becomes, is it cumulative or is it -- and how is
9 it in addition to? That's my question. In other
10 words, you've got stair four and elevators again
11 and this list. But we've already covered those,
12 right?

13 THE WITNESS: Yes.

14 THE COURT: Okay. All right.

15 THE WITNESS: Yeah.

16 BY MR. HILDEBRAND:

17 Q. So just run through these real quick.
18 What are the other critical path delays that were
19 for --

20 A. Well, I already had, you know, stair
21 four millwork up here.

22 Q. Just walk from there and just put them
23 in the record real quickly for me, please.

24 A. Well, like I said, most of these were
25 CCDs. So you have CCD3, which is color sprinkler

1 at stair four millwork, which led then to the
2 stair four design refinishes.

3 Q. All right. I don't know if this is
4 going to be admitted into evidence or not. So if
5 it's not, then I need for you to just probably
6 tell the Judge what all of these are. So let's
7 back up just a second. So what under -- you've
8 got the floors. Explain what that is and then
9 what the -- what is AS?

10 A. AS is actual start. AF is actual
11 finish.

12 THE COURT: Okay.

13 THE WITNESS: The description is
14 my -- it's probably my description that came off
15 the document as to what -- the summary of what
16 the change was. All of these are changes --
17 added scope and changes to the contract, and
18 that's why I added it here then. These were all
19 changes added seven months after the original
20 contract completion date.

21 BY MR. HILDEBRAND:

22 Q. Okay. That's what I was trying to get
23 at, and I don't think I did it very well. So all
24 of these are after the originally scheduled date
25 of July of 2017; is that correct?

1 A. Yes.

2 Q. Okay. Let's go through them
3 individually just very quickly and explain to
4 Judge -- it's near the end of the day, but can
5 you go through each one of these and describe
6 what the issue is and what the delays are for
7 each of these after the original date? What's
8 the first one?

9 A. Here in purple?

10 Q. No, the very top one.

11 A. This one, CCD?

12 Q. Right, yeah. Just go through each one,
13 please.

14 A. I don't know if I can recite every
15 single one without my report, without all of my
16 other work product I have. I mean, at one point
17 in time, I probably knew every one of these. I
18 didn't review every one for this presentation.

19 Q. Just read them into the record and then
20 we'll --

21 A. Yes.

22 MR. BUNDY: Wait, wait, wait. I
23 object. If he says he can't remember, he says
24 it's in another box and he could have done it,
25 but he can't do it now. I don't know how -- why

1 would we put that in the record? That's just a
2 list that he made. It's irrelevant. It's
3 immaterial.

4 It doesn't go to the issue which he has
5 been qualified for, which is to give a critical
6 path delay analysis. A list of documents on the
7 screen is not a critical path delay analysis,
8 particularly when it is made up of things he
9 cannot remember. He doesn't -- he can't even
10 describe them. All he can do is read them to
11 you. It's not proper.

12 MR. HILDEBRAND: Your Honor, maybe
13 Mr. Bundy has a lot better memory than I do, but
14 I will tell you what, if I were to look at all of
15 these -- you put them in your report as a
16 summary, and I think that he can qualify that he
17 does have the underlying data.

18 And he's come to a conclusion as to when
19 the actual start and actual finish work and what
20 the periods are. I mean, if we want to take the
21 time, I can have him bring the relevant data
22 behind each one.

23 BY MR. HILDEBRAND:

24 Q. Let me ask you the question. On each
25 one of these, have you taken the time and do you

1 have the data to support your opinion for each
2 one of these delays?

3 A. Each one of these came directly from the
4 project schedule.

5 Q. Okay.

6 MR. BUNDY: We're talking about two
7 different things. If he wants to -- I would
8 agree -- I don't have any way of arguing that he
9 went to the documents and found this activity,
10 CCO number 1 on floor 1 was as -- was that as
11 scheduled?

12 THE WITNESS: Actual start.

13 MR. BUNDY: Actual start and actual
14 finish.

15 THE COURT: Okay.

16 MR. BUNDY: That's okay. I have no
17 problem with that. I mean, but what he can't do
18 is come in here and give an opinion about
19 something he says he cannot remember, right? Do
20 you see what I'm saying?

21 THE COURT: Okay. All right.

22 MR. BUNDY: He doesn't even have a
23 copy of shift kitchen 17 AC for lighting, drain
24 panel R. I will agree, I guess, that he can say
25 CCD was 11. It was drain power and alarm was

1 on -- it was on the first floor, and these are
2 the two dates associated with it.

3 THE COURT: Okay.

4 MR. BUNDY: That's it. That's all
5 he's qualified to testify to.

6 THE COURT: All right. Do you want
7 to run down the list?

8 THE WITNESS: We can try.

9 THE COURT: Yeah. Go ahead.

10 BY MR. HILDEBRAND:

11 Q. Just start at the first one, please.

12 A. So the first one, custom color sprinkler
13 heads, and this was a change directive from the
14 architect in early 2018, and the work was
15 performed in -- from April 10, 2018 to July 6,
16 2018, which certainly could never have been
17 completed before the original contract conclusion
18 date.

19 Q. Okay.

20 A. And that's the actual start to finish.
21 So this was obvious owner change to the contract.

22 THE WITNESS: And remember, Your
23 Honor, by February of 2018, the building has two
24 coats of paint. By March of 2018, level 3 is
25 punched, and, I mean, is final and cleaned.

1 That's why I'm showing these things.

2 THE COURT: Okay.

3 THE WITNESS: These are all
4 occurring at -- you know, that late in the game.

5 THE COURT: Okay.

6 THE WITNESS: Stair four millwork.
7 That was the millwork revision changes I was
8 talking about.

9 BY MR. HILDEBRAND:

10 Q. What is the actual start and -- tell us
11 the actual start and the actual --

12 A. The actual start on this issue was
13 December 11th, 2017, finished on March 8th, 2018.
14 Those were revisions in the millwork shop
15 drawings by the architect.

16 Q. That was a change?

17 A. Part of that ended up in the change for
18 stair four.

19 Q. Okay.

20 A. CCD 7.

21 Q. What floor gives the --

22 A. So that the floor -- that's why I had
23 these broken up. All of these occurred on the
24 first floor lobby level and main entrance to the
25 building.

1 THE COURT: Okay. All right.

2 THE WITNESS: CCD 7, construction
3 change directive 7, supplemental instruction
4 number 62R1, private dining. I had this one from
5 floor 1. Actual start May 14th, 2018; actual
6 finish, January 23rd, 2019.

7 This is where the owner requested a
8 different wall covering. In fact, the wall
9 covering, as it was finally installed was
10 installed after substantial completion. They
11 didn't need it for substantial completion.

12 CCD 9, supplemental instruction 66R1,
13 front desk/bellhop/host. We already discussed
14 part of that. It was just the front desk that
15 CCD was issued on April -- and I think that was
16 first floor front -- April 2nd, 2018.

17 Finally, it was completed and accepted
18 by the owner, front desk only. By November 20th,
19 2018, the bellhop and the host stations were
20 provided later by the owner in January. CCD 11,
21 drain pan and alarm. I think this was up in
22 level 9, if I'm not mistaken.

23 This was a drain pan for an air handler
24 unit. It didn't have an alarm on it, so they --
25 oh, it's on level 1, I'm sorry. When it came

1 out, it was issued CCD 11 on 4/27/18.

2 BY MR. HILDEBRAND:

3 Q. This is AF --

4 A. Actual finish. Actual start on April 27
5 at 2018. Actual finish, June 27, 2018. I
6 believe this is up in the ceiling area.

7 Q. Is that a code issue, that drain pan
8 alarm, to your knowledge?

9 A. Yeah. I mean, that was part of the -- I
10 forget which inspection it was. It was closed-in
11 ceilings. I can't remember which one.

12 Q. So the building inspector caught up an
13 issue and said, this has to be --

14 A. And then the architect designed it and
15 issued it as a construction change directive.

16 Q. Okay.

17 A. Construction change directive on 12, AC
18 for lighting on level 1. Actual start of April
19 27, 2018; actual finish of October 5th, 2018.

20 Q. What was that issue?

21 A. I forget that one. I know the lighting
22 and they were concerned with the lighting making
23 the room too hot or the area too hot. I just
24 don't remember this one.

25 Q. All right. Fair enough.

1 A. Shift kitchen. On some level, they had
2 two kitchens, one on the first floor and one on
3 the second. CCD 13, level 1. Actual start, May
4 3rd, 2018 and actual finish, May 23rd, 2018, so
5 only 20 days.

6 This shifted some -- I think it was some
7 lighting or it shifted something in the kitchen
8 which required (inaudible) shifting it over and
9 reinstalling it.

10 MR. BUNDY: Objection.

11 BY MR. HILDEBRAND:

12 Q. What's the next one?

13 A. CCD 21, added chiller to waterline,
14 level 1 and 9. I had it on level 1 here. Actual
15 start, June 25th, 2018; actual finish, July 19th,
16 2018 on level 1. My understanding, my
17 recollection on this was that the chiller line
18 was too small. It had to be added in, a second
19 chiller line, to make it work properly. The
20 design didn't work, the original design.

21 CCD 22, patisserie, floor 1. Actual
22 start, June 8th, 2018; actual finish, November
23 19th, 2018. That was in -- the patisserie is on
24 the -- it's close to the -- it's a bakery.

25 THE COURT: Right.

1 THE WITNESS: They bake breads and
2 stuff down on the first floor. And there was
3 some revisions on the layout of that area. That
4 may be when they changed some of the finishes and
5 added some marble.

6 And this the owner wall covering that
7 they ordered, this level 2. It began back in
8 July 27th, 2018 when they replaced it, and
9 finally came and was delivered on May 18th, 2018
10 for those three floors.

11 BY MR. HILDEBRAND:

12 Q. What was the actual start on that?

13 A. Actual start was July 6th, 2017.

14 Q. Okay.

15 A. CCD 4, supplemental instructions 61R,
16 boardroom TV relocation.

17 Q. That's the second floor?

18 A. Yes, the second floor.

19 Q. What's the actual start on that one?

20 A. Actual start, May 30th, 2018, the
21 actual -- I'm sorry. Actual start, April 16th,
22 2018; actual finish August 15th, 2018.

23 Q. Describe to the Judge what the issue was
24 there, what the change was.

25 A. I don't remember why, but it was

1 relocated as a change from the --

2 MR. BUNDY: Objection.

3 THE WITNESS: -- to in the wall,
4 and this is the plug-in for the TV relocation and
5 finishes. So they had to relocate it to fit the
6 size of the television.

7 BY MR. HILDEBRAND:

8 Q. Sure. Is that a paneled room, a wood
9 paneled room?

10 A. Pardon me?

11 Q. Was that a wood paneled room?

12 A. The boardroom, yes. The boardroom is.
13 That's on the second floor. There was something
14 else besides the -- there's a spa in that area
15 before -- on the side of it.

16 I think there's something else right
17 beside that room, but anyway, yes. This is your
18 boardroom that has high level finishes throughout
19 the room. I think it's floor to ceiling, if I'm
20 not mistaken, millwork, wood work.

21 Q. When that change was made, had the
22 paneling already been installed?

23 A. By April 16th, 2018, everything is done
24 by then. I mean, substantially complete in these
25 rooms. And so it's ready to be final cleaned and

1 punched out. So to make a change like this, you
2 have to go in and cut through the millwork and
3 replace the millwork. That's a big deal.

4 Q. All right.

5 A. CCD 17, PIU two and three. Access level
6 2, May 30, 2018 to June 13th, 2018.

7 Q. Where it says, actual start is May 30,
8 2018?

9 A. Actual start is May 30, 2018; actual
10 finish, June 13th, 2018. These are units by the
11 ceiling on the second floor that the access
12 panels were supposed to be a certain size to
13 access, to maintain the area that's above the
14 ceiling.

15 THE COURT: Okay.

16 THE WITNESS: And the owner and
17 architect directed the -- the inspector said it
18 need to be bigger. The architect and owner
19 directed the contractor. We want them small.
20 They made them small. And then, eventually, they
21 had to --

22 MR. BUNDY: Your Honor, I object.
23 It's hearsay.

24 THE WITNESS: The inspector made
25 them change that, and this is that -- they had to

1 cut the ceiling and put in a bigger access panel,
2 two of them, and refinish the ceiling around it.

3 THE COURT: Okay. All right.

4 BY MR. HILDEBRAND:

5 Q. All right. What is the next one?

6 A. CCD 19, 200 volt shift fire alarm, level
7 2. Actual start, June 25th, '18, to actual
8 finish August 16, 2018.

9 Q. So that's almost two months. What's the
10 delay there? What was the issue?

11 A. This is where they had to move -- or
12 shift to relocate. They were talking about some
13 shift room or shift changes. This is where they
14 had to relocate the fire alarm pool in a finished
15 room in the corridor, guest.

16 And by then, again, like I said, all the
17 finishes were done, and they had to shift it -- I
18 forget in which direction. They had to shift it
19 to get the material, order it, like the example
20 used for Thanksgiving dinner. Get the material
21 there, and then they performed the work.

22 RCO, which means request for change
23 order, 228 stone top. It's by retail. This is
24 on level 2. Actual start, March 2nd, 2018;
25 actual finish, June 18, 2018. This was changing

1 the -- they now required a stone top, and that's
2 in the spa area, change it to marble. They got
3 confused with the patisserie. This was the area
4 this happened.

5 Q. All right. What's the next one?

6 A. Hold on one second.

7 Q. I think we're starting to end up -- let
8 me ask you this: You were about to start in the
9 white section, but why do you have some in orange
10 and some in blue and some in white?

11 A. Down on the bottom where you see the
12 orange?

13 Q. No. If you look at the picture on the
14 chart.

15 A. Right. So the chart is separate in
16 three areas.

17 THE COURT: First floor, second
18 floor, and other floors, right?

19 THE WITNESS: And the rest of the
20 building.

21 THE COURT: And what's the
22 significance of the numbers in front of the bar
23 graphs?

24 THE WITNESS: Those were the actual
25 start date or actual finish date that correspond

1 to these actual start date and actual finish
2 date. You're asking about these?

3 THE COURT: The 9th or the 11th.
4 Okay, okay. All right. Coincides with the date?

5 THE WITNESS: Yes. So if I read
6 this later, where there's a blue bar, there is a
7 number to the left of it that corresponds to the
8 actual start date I have listed. The number to
9 the right corresponds to the actual finish date
10 that I have in the column.

11 THE COURT: Okay. All right.
12 Gotcha.

13 THE WITNESS: The first one up here
14 is RCO 176, concierge lounge millwork. This is
15 the sixth floor, which is the manager's apartment
16 level. This is where the -- the owner's room,
17 basically.

18 This actual start, October 9th, 2017;
19 actual finish, July 11th, 2018. The concierge
20 room is in the back northwest corner of the
21 floor -- the owner's apartment in the southeast
22 corner of the room. This is the concierge
23 lounge.

24 And so this added millwork to that
25 lounge and which had to be -- you know, designs

1 submitted, procured, shipped, delivered, and
2 installed. So it takes a long time.

3 THE COURT: All right.

4 BY MR. HILDEBRAND:

5 Q. Let me interrupt you just for a second,
6 if I may. So all of these -- we can figure out,
7 we have the actual start and actual finish. Each
8 period of that is a delay and would be a delay to
9 the critical path if other delays had not taken
10 place; is that correct?

11 A. Yes, yes.

12 Q. Okay. And we can figure out the number
13 of days between -- just figure out the time
14 between the actual start and actual finish of
15 each period?

16 A. Right.

17 Q. All right. I'm sorry to interrupt you.
18 Go ahead.

19 A. It's okay.

20 Q. CCD 8, I think we're on.

21 A. CCD 8 is supplemental instruction 571R1
22 and supplemental instruction 63R1, manager's
23 apartment. This happens -- the manager's
24 apartment or room goes -- it's a two-level room.
25 There's a stair that goes from one level

1 the other one so the manager doesn't have to
2 go and -- doesn't have to go out into the common
3 area, if you will. He can access it within his
4 own room. So it's two stories.

5 Q. Actual start and actual finish?

6 A. So the actual start is April 2nd, 2018;
7 the actual finish is April 8, 2019. So these
8 were -- this was a lot of changes. I can't tell
9 you what. There was a lot of changes made in the
10 manager's apartment that continued even after
11 substantial completion.

12 AE is architect engineer. BAR is an
13 Architect Review Board for Charleston. Delay.
14 This has to do with the shutters that's exterior
15 of the building. The actual start, December 20,
16 2017; actual finish, May 31, 2019.

17 THE COURT: That's about right, 18
18 months. Sounds about right.

19 THE WITNESS: Yes. So this did not
20 delay the project. This one did not delay
21 substantial completion unless it required a
22 substantial completion. But it was required in
23 the final completion.

24 BY MR. HILDEBRAND:

25 Q. So you get the CO?

1 A. I'm sorry?

2 Q. To get the CO, would you have to have
3 that done on the shutters?

4 A. The certificate of occupancy was issued
5 in May 2019. I had in my mind May 24th, but it
6 must have been -- I must have been mistaken. It
7 must have been May 31st.

8 Generally, the certificate of
9 completion, which is different than the
10 certificate of occupancy. The certificate of
11 completion means that everything has to be
12 completed as it was on the permit drawings, a
13 hundred percent.

14 MR. BUNDY: Objection. Certificate
15 of completion is a defined contract term.

16 THE COURT: Okay.

17 MR. BUNDY: So I object to him
18 paraphrasing what the contract said.

19 THE COURT: All right. Got it.

20 THE WITNESS: Now, CCD 2, blackout
21 stair with the drywall stairs. Actual start,
22 March 30, 2018; actual finish, September 20th,
23 '18.

24 Several of the windows were blacked out.
25 It was a change directive. Some of those were

1 stair four; some of those were stair three, and
2 some of them would have been another stair. They
3 were stairs three and four, but some were in
4 stair four.

5 So that's just another revision in stair
6 four that was different than the millwork
7 revision. Did I get the actual start and actual
8 finish date on that? I think I did. The actual
9 start date, March 30, 2018; actual finish date,
10 September 20 of '18.

11 BY MR. HILDEBRAND:

12 Q. Okay. What's the next one?

13 A. CCD 6, supplemental instruction 60R1,
14 stair four. Stair four, actual start, April 16,
15 2018; actual finish, October 4, 2018. This is
16 that same stair four issue we discussed.

17 CCD 16, car equipment at level 9.
18 Actual start, May 14, 2018; actual finish, June
19 27, 2018. This is where the owner added the
20 equipment at the bar level like refrigerator and
21 stuff like that.

22 CCD 10, supplemental instruction 58R1,
23 ninth floor air changes, level 9. April 18 --
24 the actual start, April 18, 2018; actual finish,
25 September 4, 2018.

1 Q. And what the issue there?

2 A. There? I'm trying to remember which one
3 it was. There were two -- I think there were two
4 issues with floor change with CCD 10.

5 Okay. So this is over on the east side
6 of the building, I believe, where they had
7 revised the airflow and air change. I forget
8 what they did exactly, but they revised the air
9 handlers that the air -- flow of air fans that
10 were servicing the east part of the ninth floor.

11 The last -- second to last is the
12 elevator. That -- actually, I don't have the
13 actual start and actual finish on that. You
14 know, this bar, this blue bar was just from
15 whenever the elevator or the contractor first
16 started. They were substantially complete by
17 June 1st, 2018. The owner -- and right below
18 that in the orange, owner custom cab trim
19 beginning on June, and that must be May.

20 Q. What was that?

21 A. And I don't know that date, but this is
22 the -- what was on my critical path for the
23 elevators, that interior, the finishes had not
24 been designed. That's what that issue is. Stair
25 four we discussed, and I don't have dates on

1 there either. You got me through it.

2 Q. All right. Yes, sir. Thank you. All
3 right. What is this next one?

4 A. This is just a summary of -- beginning
5 in February of 2018, Balfour Beatty was requiring
6 that any changes or added scope to be issued as a
7 construction change directive, the owner -- the
8 architect issued about, you know, 35 to 40 of
9 those throughout the year between February and
10 December of 2018.

11 This is just a listing of all of those
12 contract construction change directives, the date
13 it was issued and a description of that work.
14 Now, a lot of these CCDs we just went through on
15 the previous one.

16 Q. Okay. So this just shows changes --
17 these are changes by the owner to the contractor,
18 just saying, you've got to make this. We haven't
19 agreed on the price or anything else, but make
20 it -- and these were done from February 27th,
21 2018? That's well after the original
22 construction.

23 A. That's seven months after the original
24 contract completion date. But what I said
25 earlier was important was, by February -- by this

1 date, there's two coats of paint on the whole
2 building. And then there's 35 or 40 changes,
3 just in construction change directives issued
4 after that.

5 And then the relevance of that is
6 something that, without being one hundred percent
7 painted is, to shift a light switch or relocate
8 or make a revision to a television in the
9 ballroom, why would it take two months to do
10 something like that or four months for something
11 else? Because the fixtures weren't there.

12 And so most of these changes require
13 ripping something out, ordering maybe, getting
14 submittals, ordering -- getting stuff delivered,
15 reinstalling it and repatching up the finishes
16 around them. That's what -- that's why I felt
17 this was relevant to this presentation.

18 Q. Okay. All right. What's the next
19 slide, next chart?

20 A. Supplemental instructions. These are
21 only the ones issued in 2018. Again, as I
22 discussed earlier, any changes in 2018, I felt,
23 you know, but for that as-built critical path, it
24 would have been -- and eventually getting back to
25 it anyway would have probably been a critical

1 path delay.

2 Q. So the previous ones were construction
3 change directives and then these are supplemental
4 instructions?

5 A. Yes. Every one of these is a change.

6 Q. I'm sorry?

7 A. Every one of these is a change to the
8 contract -- I mean, is a change to the work,
9 change to the contract. Every one of these is a
10 revision.

11 Q. All right. Would you be able to
12 describe what each one of these is?

13 A. No. I mean, if it was not on the
14 critical path, I didn't waste my time. I can
15 only go back so far, knowing all the information
16 on the project. I stick to what's critical or
17 near critical. So a lot of these --

18 MR. BUNDY: Move to strike,
19 irrelevant.

20 THE WITNESS: -- you know, they're
21 off my radar to analyzing them. I mean, at one
22 time I knew these three years ago or two and a
23 half years ago when I started with this work.
24 But, you know, sitting here today, I didn't
25 review all of that.

1 BY MR. HILDEBRAND:

2 Q. All right. So what is your conclusion
3 on the period five delays?

4 A. On period five, I concluded 76 days of
5 as-built critical path delay, and the causation
6 was added scope of work through supplemental
7 instructions, construction change directives and
8 change orders and design changes to address
9 inspections, which we didn't address yet.

10 Q. All right. Tell us about that.

11 A. Pardon me?

12 Q. Can you tell us about that?

13 A. Yes, sir. The elevator and the pool
14 that I started to talk about earlier, they both
15 finished on December 28th, 2018. When the
16 inspector came to inspect the elevator in
17 October, I think, 2018, the inspector found that
18 it did not meet the code requirements, and he
19 wanted additional work done.

20 To kind of summarize this, the
21 information went back to architect. The
22 architect designed it, reissued it, the work as a
23 change directive, construction change directive,
24 and the elevator work was performed. Some of
25 that even had to do with -- you know, the lights

1 were not an emergency light circuit.

2 And so then the lighting for the
3 elevators had to be put on the emergency light
4 circuit in December of 2018, the last three weeks
5 of the project, to meet the code requirements of
6 the inspector.

7 The other one was the pool. The pool
8 has a life safety issue, and the equipment for
9 the pool was in an equipment room. And it had
10 ductwork and it had equipment that ran on
11 national gas or propane. Either way, it was gas.

12 And the inspector had an issue with how
13 that was -- how that gas and the ductwork were
14 located. It wasn't venting outside, either
15 completely outside or not high enough above the
16 roof.

17 And so that required additional design
18 by the architect or issues of construction change
19 directive. The pool inspected -- that work was
20 performed, inspected in December of 2018, and the
21 same day, the inspector for the DHEC -- it's not
22 the building inspector. It's South Carolina
23 Department of Environmental.

24 THE COURT: Health and
25 Environmental Control.

1 THE WITNESS: Control, thank you,
2 sir. That's when they did their final inspection
3 and approved it, the pool. And that was -- the
4 reason that was so important was that was a
5 secondary source of fighting fires.

6 THE COURT: Okay.

7 BY MR. HILDEBRAND:

8 Q. Okay. All right, sir. What does the
9 next chart show us?

10 A. One of my other opinions was that, when
11 unimpacted, Balfour Beatty performed as good as
12 planned or better. I printed out a copy of a
13 listing of the as-planned critical path for the
14 project.

15 If you performed the as-planned critical
16 path, the project should finish on time.
17 Everything in orange, each one of those
18 activities was either -- was performed either on
19 time or better, faster than what was planned by
20 Balfour Beatty.

21 So any time you get all the way down
22 to -- I can't really read it. It's a 16 here.
23 So you get down to this level. These are all
24 structural delays up until this time is when
25 we're getting through the structure of the

1 building. Like I said, the structure on the
2 as-planned critical path only went up through
3 level 3.

4 But all of the work prior to that
5 structural work, civil work -- not all, but most
6 of it was performed on time or better. Then,
7 when you got into the ballroom, which takes over
8 on the aspect critical path, most of that work
9 was also performed on time or better than
10 planned.

11 Q. All right.

12 A. Now, you have the insulated, the
13 ductwork. They installed the ceiling framing in
14 28 days. It was planned for seven weeks.

15 THE WITNESS: That 35, Your Honor,
16 is 35 work days. That's seven weeks, almost two
17 months. Balfour Beatty did it in 28 days, once
18 they got started. They started several months
19 later. Once they got started, they were able to
20 do it far faster.

21 Ceiling, electrical, a pre-function.
22 This gets performed after ceiling is framed,
23 during it, and before the drywall gets hung.
24 That was performed as-planned or better. As you
25 know, we have all kinds of delays and impacts

1 with the above ceiling work that affected hanging
2 the drywall ceiling.

3 So the important part here is Balfour
4 Beatty is performing better than planned. And
5 they have all these design changes affecting the
6 ceiling, and then, of course, they didn't perform
7 those timely.

8 Painted it timely. Painted it,
9 installed light fixtures timely. Paint and
10 carpet timely. They created their own punch list
11 timely. They performed their punch list timely.
12 The engineer's punch list repairs to interiors
13 was dropped out. That doesn't have an actual
14 finish date. It was not in the schedule.

15 The prefunction -- the last schedule
16 that we had, I think, was November of 2018, so
17 some of these are architect punch list repairs
18 that continued on beyond that. Oh, wait, wait.
19 I think that the last schedule was in May of '19,
20 April or May of '19. But for some reason, I
21 don't have the actual finish date for the
22 architect's punch list.

23 Q. All right. Let's go back up for a
24 second on that chart, and let's go to the very
25 top. I want you to explain that very top line so

1 that the Judge can understand what these columns
2 are, if he decides to look at them later on.

3 A. So this spreadsheet has broken into --
4 it looks like about 11 columns. Moving left to
5 right, the first column is activity ID number
6 that was in the project schedules.

7 The activity name is a description for
8 the work that was given to it by Balfour Beatty
9 that's in the construction schedules. The
10 original duration is of work days assigned to
11 perform that work. Usually it's a five-day
12 calendar. So 10, that first line would be two
13 weeks.

14 THE COURT: Okay.

15 THE WITNESS: Start date is the
16 as-planned start date. The finish date is the
17 as-planned finish date for that work. Total flow
18 is -- we have -- is that flow that you have in
19 the turkey scenario for the cooking of the
20 potatoes and any such activities as far as could
21 have floated. These are critical path activities
22 because they have zero float.

23 Actual start is the actual start date
24 for these activities. The actual finish date --
25 VAR start means variance to the start date, just

1 actual start on this start. VAR finish is the
2 variance finish date, which is the actual finish
3 minus finish. And then better means whether they
4 perform better than planned or not, they being
5 Balfour Beatty.

6 BY MR. HILDEBRAND:

7 Q. So are all of these ones that Balfour
8 performed better or just the ones that are in
9 orange?

10 A. Just the ones in orange. This entire
11 listing is the entire as-planned critical path.

12 Q. All right. So what is your conclusion
13 from -- so what is your opinion relative to this
14 chart, or why is this important?

15 A. One more thing I should point out for
16 Your Honor, going back to that. Some of these
17 activities have blank and actual, and that may be
18 why it's down there.

19 Those activities were deleted from the
20 schedule. Sometime before the baseline schedule
21 and the final schedule, those activities were
22 deleted. That's why there's -- no dates were
23 actual.

24 THE COURT: Okay. All right.

25 BY MR. HILDEBRAND:

1 Q. All right. So what is your conclusion
2 on this chart? What's the inference?

3 A. It's right -- Balfour Beatty performed
4 as-planned or better when unimpacted.

5 Q. Now we're done, thanks. All right.
6 Mr. Doran, let me ask you this: The opinions
7 that you have expressed thus far, have they --
8 those been expressed to a reasonable scheduling
9 certainty in your view?

10 A. In my opinion, yes.

11 Q. And the reason -- the opinions that
12 you're going to articulate here in just a moment
13 for your conclusions for this project, are you
14 prepared to state those to a reasonable
15 scheduling and delay certainty?

16 A. Yes, I am.

17 Q. All right. What are your conclusions
18 on -- after having analyzed the schedule?

19 A. After spending lots of time on this, my
20 final conclusions were that -- and throughout the
21 schedule delay analysis, that the owner is --
22 that there were 516 days of delay to the project.
23 Of those, the owner's responsible for 494 days
24 of delay for which -- that are identified as
25 being compensable to Balfour Beatty. 21 days --

1 MR. BUNDY: Objection, Your Honor.

2 Just to protect the record. He's not here and
3 has not been qualified to give opinions about the
4 compensable delays. Compensable delays are
5 defined in the contract, okay, and that's not a
6 term -- that's not a term of art. Okay?

7 It's specific to each contract. Some
8 contracts are -- I think we've already had it
9 pointed out to you. You've got class A and class
10 B delays, right? Some of them are -- have
11 certain -- so I'm objecting to that. I know I'm
12 going to get overruled, but I object.

13 THE COURT: All right. But clearly
14 he's entitled to render his opinion, maybe not as
15 to delay, but as to schedule delays, correct?

16 MR. BUNDY: Right. I mean, he's
17 here -- as I understood what he was going to tell
18 us was, he was going to tell us where the
19 critical path delays were. Okay?

20 THE COURT: Right.

21 MR. BUNDY: And he wasn't -- he
22 can't assign liability because some of those are
23 legal conclusions if they're governed by the
24 contract.

25 THE COURT: Okay.

1 MR. BUNDY: But he's clearly
2 entitled to say, this is a critical delay or it's
3 not. And that's why some of this stuff is
4 irrelevant because it's not a critical delay.
5 That's my position. Thank you, Your Honor.

6 THE COURT: Very good.

7 THE WITNESS: To clarify, Your
8 Honor, prior to today, I've testified 36 times in
9 all kinds of jurisdictions. Every single time,
10 part of that testimony --

11 MR. BUNDY: Your Honor, I object to
12 all of this. He is not a lawyer. He is not
13 supposed to be arguing his position and case, and
14 I really object to this.

15 THE COURT: Okay. I agree with
16 that. I'm going to give him the -- you've got
17 the right to give your opinion. All right? I'm
18 going to let you do that, no question about that.
19 BY MR. HILDEBRAND:

20 Q. Mr. Doran, have you been -- what is a
21 compensable delay under this contract?

22 A. Under this contract, it's --

23 MR. BUNDY: Objection. Out of
24 court statement offered for truth of matter
25 asserted. The best evidence of what the contract

1 says about compensable delays is in the contract.

2 Read the contract.

3 BY MR. HILDEBRAND:

4 Q. Have you reviewed the contract?

5 A. I have.

6 Q. All right. And do you have an opinion
7 here today as to what the compensable delays are
8 under that contract?

9 MR. BUNDY: Objection. It's a
10 legal opinion.

11 MR. HILDEBRAND: Well, I think the
12 rules of evidence allow him to -- it's the
13 ultimate opinion. Mr. Bundy just objected to him
14 not tying his opinion to the contract, and
15 Mr. Doran said that he has reviewed the contract
16 and is able to -- is here to testify in his
17 opinion what the compensable delays are. That's
18 the root issue.

19 MR. BUNDY: I was objecting to him
20 giving his opinion, and now because he -- I was
21 objecting because he wasn't tying it in, and now
22 he's tied it in and improper the way he's tying
23 it in. He's not a lawyer.

24 THE COURT: All right. All right.
25 So I think it would be proper to say that these

1 were critical path delays as opposed to
2 compensable delays. I think that's the ultimate
3 issue for the Court.

4 MR. HILDEBRAND: Okay.

5 THE COURT: Who's at fault, who
6 breached first, who's at fault, and what is the
7 compensability of that. I think those are the
8 ultimate questions for the Court to decide.

9 He's entitled to render his opinion as
10 to what were schedule delays and whether or not
11 they were authorized under the contract or
12 outside the terms of the contract. That, I
13 think, he's entitled to.

14 MR. HILDEBRAND: All right.

15 THE COURT: And which we've defined
16 as critical path delays. Okay?

17 BY MR. HILDEBRAND:

18 Q. All right. So let me understand your
19 opinion. Is it your opinion that 494 days of
20 delay, you would attribute to being owner caused
21 that were not concurrently caused by Balfour?

22 A. Yes.

23 Q. All right. Thank you.

24 A. I found in addition to that, 21 days
25 were excusable, meaning not attributable to

1 either the owner or Balfour Beatty. Found one
2 day that I assigned that was attributable to
3 Balfour Beatty. It's an equipment breakdown day.

4 Balfour Beatty has already received 20
5 days in the time extension in change order three,
6 which is OCO, owner change order number 3, for
7 the 1,000-year flood. And then in the box below
8 that, it's just a summary of everything we have
9 gone through for -- from periods one through
10 five. Now, I apportion -- quantified them and
11 apportioned the delays.

12 One thing I did not mention earlier that
13 I'd like to bring it up, that change order three
14 included 20 days of time extension for Balfour
15 Beatty. When the structural delay started at
16 level 6, Balfour Beatty submitted a claim for
17 additional time in those delay -- I don't think
18 it got to the claim. The architect agreed for 20
19 days for level 6, and they didn't get a change
20 order for that.

21 But usually the -- you know, the
22 architect agreed to give them 20 days just for
23 level 6. I came up with maybe more than that,
24 but that's what the architect came up with. And
25 that is not in the quantification of time

1 extensions issued.

2 THE COURT: Okay. All right.

3 Thank you. Yep, got it.

4 BY MR. HILDEBRAND:

5 Q. All right. What is the next chart?

6 Well, let me ask you this way. What did you use
7 as the date of substantial completion in your
8 analysis?

9 A. I used December 28, 2018.

10 Q. And why did you use that?

11 A. Because that was the final two
12 inspections required for the building to be used
13 for its intended use.

14 Q. Okay. All right. So are we down to the
15 last chart -- the last two charts?

16 A. This chart slide 29 is just a summary of
17 the previous charts where the -- each of those
18 charts had a yellow bar on the bottom and it
19 added up to 516.

20 This shows it in the middle of delay.
21 Period one had 37 days. Period two -- that
22 should be 167, not 168. That should be 167. 95
23 for period three. 141 critical path delays in
24 period four, and 76 days of critical path for
25 period five.

1 Q. And the last chart?

2 A. This is the -- this shows a summary of
3 the original substantial completion date, July
4 30, 2017 and the date of substantial completion,
5 December 20, 2018, which is significant because
6 that's when liquidated damages stopped, that the
7 owner can charge the contractor.

8 April 26, 2019, is that the -- when
9 Balfour Beatty, that was their last day on the
10 project, and so the damages that they claim that
11 they're entitled to, I think, or at least in my
12 opinion, would end on April 26, 2019, for
13 indirect costs at the period level.

14 MR. BUNDY: I object. That's a
15 legal conclusion as to when their damage has
16 stopped, and he wasn't hired to give us his
17 opinion on that and he is not qualified to do.

18 THE COURT: I will sustain that.
19 Yeah, that's fine.

20 BY MR. HILDEBRAND:

21 Q. All right. Was your deposition taken in
22 this matter, Mr. Doran?

23 A. No.

24 MR. HILDEBRAND: Give me just one
25 minute, Your Honor. That's all, Your Honor.

1 THE COURT: All right. I'm
2 assuming you're going to --

3 MR. HILDEBRAND: Oh, I'm sorry,
4 Your Honor. That's all for the witness, but I
5 would like to --

6 THE COURT: On the report? You
7 want to submit that into evidence?

8 MR. HILDEBRAND: Yes, sir.

9 MR. BUNDY: I object.

10 THE COURT: All right. I'm going
11 to allow it. Let me give you my basis for the
12 ruling. The objection was rendered under Rule
13 1006 of the South Carolina Rules of Evidence
14 which states, the contents of voluminous
15 writings, recordings, or photographs which cannot
16 conveniently be examined in court may be
17 presented in the form of a chart, summary, or
18 calculation provided the underlying data are
19 admissible into evidence.

20 Originals or duplicates shall be made
21 available for examination or copying by parties
22 at a reasonable time and place. The Court may
23 order that they be produced. The rule is
24 identical to the Federal rule except the language
25 provided in like data are admissible into

1 evidence.

2 So I have found that -- it's of this
3 Court's opinion that the basis for his opinions
4 is and has been admitted into evidence. I'll be
5 glad to hear from you.

6 MR. BUNDY: So your ruling is that
7 an expert's out-of-court statement, that we don't
8 allow affidavits, we don't allow any out-of-court
9 statements into evidence as far as I know. He
10 just testified. That's the evidence in this
11 case.

12 You know, I've never had, in my opinion
13 or in my experience, except in arbitrations, a
14 judge allow an expert report in because it's all
15 hearsay. This is his report. Are we talking
16 about the report now?

17 THE COURT: We're talking about
18 his, yeah, his --

19 MR. BUNDY: We're not talking
20 about -- I'm not talking about demonstrative
21 evidence now. I'm talking about his report,
22 okay, which is not a 1006.

23 THE COURT: We're talking about
24 this document, right?

25 MR. BUNDY: No. There's a report

1 he's got.

2 THE COURT: No, no. I'm only
3 referring to his presentation.

4 MR. BUNDY: Okay. All right.

5 THE COURT: I'm only referring to
6 his presentation.

7 MR. BUNDY: We traded reports. I
8 just wanted to make sure we weren't talking about
9 that.

10 THE COURT: No. I find this to be
11 extremely helpful to the Court under the Rule 403
12 analysis, and on that basis, I'm going allow it.
13 Not his report, but this.

14 MR. BUNDY: Sure. And just to
15 protect my record --

16 THE COURT: And it will help you on
17 the cross-examination, too, I hope.

18 MR. BUNDY: And just to protect my
19 record, I'm also objecting under Rule 403.

20 THE COURT: Okay.

21 MR. BUNDY: You know that rule. So
22 that's the other rule cited in the case.

23 THE COURT: Right, right. I found
24 it to be more helpful than harmful, more
25 probative than prejudicial under Rule 403 and

1 also under -- what was the other rule we talked
2 about? It was 703 on the expert's opinion.

3 MR. BUNDY: Right.

4 THE COURT: It provides a basis for
5 his opinion. So on those bases, I'm going to
6 allow --

7 MR. BUNDY: So the PowerPoint is
8 going into evidence?

9 THE COURT: -- the PowerPoint in
10 there, correct. Okay. Got that, but not the
11 report.

12 MR. BUNDY: I assume I -- I know
13 we're good on the objections.

14 THE COURT: Yeah. You got them
15 covered. Good to know the rules of evidence. We
16 may differ in opinion. Do you have -- it's 5:45.
17 I'm assuming you would like to cross-examine
18 Mr. Doran? Would you like to do that today or
19 tomorrow?

20 MR. BUNDY: I would like to think
21 about it.

22 THE COURT: All right.

23 MR. BUNDY: I'm like
24 Mr. Hildebrand, it's hard for me to make a
25 decision on the fly. So I would like to think

1 about it, but I would also like to know who the
2 witness is going to be tomorrow.

3 THE COURT: Okay. All right. I
4 know Mr. Doran is in Pawleys Island.

5 Mr. Doran, got here in decent time
6 today. We may need you tomorrow for
7 cross-examination. It's close to 6 o'clock, and
8 I'm getting tired; so the jury can only take so
9 much.

10 MR. BUNDY: I don't want to
11 unnecessarily --

12 THE COURT: Burden anybody?

13 MR. BUNDY: -- move this guy up and
14 down the highway. So can you give me five
15 minutes to consult with my party?

16 THE COURT: Sure. Absolutely.

17 (A recess transpired.)

18 MR. BUNDY: Mr. Doran, have a nice
19 trip back to Pawleys Island.

20 THE COURT: All right. Very good.
21 Mr. Bundy and Mr. McDonald, what we were doing
22 while y'all were out of the room was just
23 verifying our exhibits that are in. I've got a
24 list here. I was running that by Mr. Byrd.

25 I think we're clear on the exhibits,

1 some of the Defendant's exhibits. We've got --
2 excuse me, the Plaintiff's exhibits. They
3 started with 56. The documents we went through
4 this morning were through 215. We came back with
5 the video deposition of Mr. Paul Garcia. Was it
6 Mr. Garcia?

7 MR. BYRD: Phil Garcia.

8 THE COURT: That probably needs a
9 number.

10 MR. BYRD: Our exhibit book ends
11 with Exhibit 226. So we can just make the
12 deposition 227.

13 MR. BUNDY: Are the depositions
14 going to be an exhibit?

15 THE COURT: Well, how do you want
16 to put them in there?

17 MR. BUNDY: I don't think
18 deposition exhibits are proper. I don't think
19 depositions are proper exhibits. Read them just
20 like any other witness's testimony.

21 THE COURT: Well, they've got to go
22 into the record, but I'm trying to save her from
23 having to type everything up, frankly.

24 MR. BUNDY: But they read it into
25 the record. So it's in the record is my point.

1 THE COURT: I don't know how many
2 video depositions we've got. She was taking it
3 down. I'm trying to save her hands so she gets
4 through the next two weeks.

5 MR. BUNDY: The problem with it is,
6 if we put it in, then you're going to have
7 everything in front of you that was never even
8 offered, right? They can put the whole
9 deposition in, right? So --

10 THE COURT: The whole was not,
11 right, I agree.

12 MR. BUNDY: So I think it would be
13 easier and cleaner just to leave it in the
14 record. It will be in the record, and when we
15 can on appeal, we can quote the record and what
16 she took down.

17 THE COURT: Okay. We're trying to
18 get a number to this --

19 MR. BYRD: Binder four actually
20 ends with 230. So we need to -- 231 needs to be
21 our next one. Whether that's the video or
22 whether that is the --

23 THE COURT: All right. So let's
24 call Mr. Doran's schedule delay analysis
25 Plaintiff's Exhibit 231. Okay?

1 (PLF. EXH. 231 was marked for
2 identification and admitted into evidence.)

3 MR. MCDONALD: And the schedule
4 delay analysis is what also has been referred to
5 as a PowerPoint, and it was the subject of
6 numerous objections. That's all the same thing.

7 THE COURT: Correct. Correct. All
8 right. If y'all have any other questions, I'm
9 happy to go over them with you, but I think we
10 are clear on that.

11 MR. MCDONALD: Did you need our
12 exhibits, or did you already go through them?

13 THE COURT: Y'all have got
14 Defendant's 1 through 7 or something in.

15 MR. MCDONALD: 1 through 10.

16 THE COURT: 1 through 10. Okay. I
17 don't think that's a question. Not yet anyway.
18 It might become. Okay. All right. So it's
19 almost 6. Plaintiff's proceeding tomorrow.

20 MR. HILDEBRAND: Yes, sir.

21 THE COURT: Witnesses? How far are
22 we going?

23 MR. HILDEBRAND: We've got
24 Mr. McAuliffe will be in the morning.

25 THE COURT: Okay.

1 MR. BUNDY: Is he going to be a
2 live witness?

3 MR. HILDEBRAND: Uh-huh. I have
4 not yet decided if -- I've got a couple others.
5 It will be -- Mr. McAuliffe will start in the
6 morning.

7 THE COURT: Okay. All right.

8 MR. BUNDY: What's in the morning?

9 MR. HILDEBRAND: Mr. McAuliffe,
10 James McAuliffe.

11 MR. BYRD: I think I was looking
12 for a binder when -- did Your Honor make a ruling
13 about whether the video was going to be --

14 THE COURT: Yeah. What we've done
15 is we've transcribed what was testified to with
16 the video; so not the video itself, but the
17 transcription of the video will be in the record.

18 MR. BYRD: Very good. Thank you.

19 THE COURT: All right. Anything
20 further for today?

21 MR. HILDEBRAND: No, sir.

22 THE COURT: All right. We'll start
23 back at 9 o'clock.

24 (The hearing was concluded at
25 5:53 P.M.)

3 I, Jennifer M. Huggins, Certified
4 Shorthand Reporter and Notary Public for the
5 State of South Carolina at Large, do hereby
6 certify that the witness whose attached in the
7 foregoing hearing was by me duly sworn to testify
8 to the truth, the whole truth, and nothing but
9 the truth in the within-entitled cause; that said
10 hearing was taken at the time and location
11 therein stated; that the testimony of the witness
12 and all objections made at the time of the
13 examination were recorded stenographically by me
14 and were thereafter transcribed by computer-aided
15 transcription; that the foregoing is a full,
16 complete and true record of the testimony of the
17 witness and of all objections made at the time of
18 the examination; and that the witness was given
19 an opportunity to read and correct said hearing
20 and to subscribe the same.

Should the signature of the witness
13 not be affixed to the hearing, the witness shall
not have availed himself/herself of the
14 opportunity to sign or the signature has been
waived.

15 I further certify that I am neither
16 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 April 12, 2022 at
Charleston, Charleston County, South Carolina

19

20

21 Jennifer M. Huggins
Court Reporter And Notary Public
My commission expires: 03/15/2032

22

23

24

25

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

3
 4 BALFOUR BEATTY CONSTRUCTION,)
 LLC,) VOLUME FOUR
) 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)
 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 9:00 a.m. on
 21 September 16, 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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ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

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ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

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1 THE COURT: Okay. Day 4, still on
2 the plaintiff's case.

3 MR. HILDEBRAND: Yes, sir.

4 THE COURT: Mr. Hildebrand, are you
5 ready to proceed?

6 MR. HILDEBRAND: I am, Your Honor.

7 THE COURT: All right, sir.

8 MR. HILDEBRAND: We're going to
9 introduce the deposition of Michael Bennett.

10 THE COURT: All right.

11 MR. MCDONALD: Your Honor?

12 THE COURT: Yes, sir.

13 MR. MCDONALD: I've got -- we just
14 received the designations yesterday from Michael
15 Bennett; so I don't have my full 24 hours on that
16 particular one.

17 THE COURT: All right.

18 MR. MCDONALD: There's that.

19 THE COURT: Okay.

20 MR. MCDONALD: I mean, I also have
21 additional objections, but, I mean, if that's
22 going to solve it and this can come up tomorrow,
23 we are where we are.

24 THE COURT: All right.

25 MR. HILDEBRAND: Your Honor, it was

1 actually -- I provided it to them on Sunday.
2 There was -- on Sunday, I think I did both
3 Mr. Bennett, Phil Garcia, and Kimberly Brown.
4 There was an issue, though. When we got our
5 transcript -- his deposition was over two days.
6 So when we got our transcript, it went from 1 to
7 300, which had both days on it.

8 Apparently, the deposition also was in
9 another format where it went 1 to 150 for the
10 first day and 150 for the second day. So we did
11 our designations with the combined transcript.
12 And then we realized that there were kind of two
13 versions out there. We did one -- sent out a
14 revised one yesterday.

15 THE COURT: Okay.

16 MR. HILDEBRAND: I think it's the
17 day before that you're supposed to give notice,
18 not strictly 24 hours. So I would like to go
19 ahead and introduce this deposition.

20 THE COURT: All right. So the
21 issue would be with the -- really the second 150
22 pages? Is that really what the problem is or
23 what?

24 MR. MCDONALD: Well, just how it's
25 presented. I have my paralegal going through it

1 as fast as she can. I mean, I don't know how I'm
2 supposed to deal with that when they change it
3 up.

4 THE COURT: All right. Is this
5 only as to Mr. Bennett?

6 MR. MCDONALD: As to Mr. Bennett.
7 And I have additional objections, but, yes, we
8 received other designations on Sunday. But it's
9 just confusing, I mean, based on what he just
10 said. I mean, I don't know how I'm supposed to
11 respond to that.

12 THE COURT: Okay. All right. When
13 did all of this come to light that you had two
14 different versions of the same thing?

15 MR. MCDONALD: Your Honor, my phone
16 is off during court.

17 THE COURT: Okay.

18 MR. MCDONALD: They send this stuff
19 while we're in court. I believe it was at 4:30
20 yesterday or something like that.

21 THE COURT: Okay. All right.

22 MR. MCDONALD: So I can go ahead
23 and make my objections, but I can't make specific
24 objections. I can make the general objections to
25 it, but I don't know how they'll line up with the

1 page and line number.

2 THE COURT: Right.

3 MR. MCDONALD: But the other thing
4 that I would bring to Your Honor's attention is,
5 I did bring this up with Your Honor, and my
6 understanding of what your preference was, was to
7 provide the deposition transcript portions that
8 they want to provide. I can provide you with the
9 objections in writing.

10 Because here's the problem, some of my
11 objections in these depositions are just simply
12 lack of foundation for these witnesses, and if
13 there is a lack of foundation and Your Honor
14 rules in my favor, there's no way to fix it.
15 It's not as if he can lay additional foundation.

16 Having said that, you're going to have
17 to read the questioning to see if there is a
18 foundation. So I think there is a much more
19 efficient way to do this.

20 THE COURT: Okay. All right. I
21 would agree with that. Let me hold off on that
22 for a while on Mr. Bennett.

23 I don't -- that's what I was trying to
24 figure out, if there were other ones that we have
25 an issue with, which is one of the reasons I like

1 to know a day ahead of time who we're going to
2 call. Neither one of those were mentioned
3 yesterday.

4 Depositions can be used for any purpose,
5 I understand that. It's just the notice issue.
6 So if he's got something to object to, he needs
7 to have a basis upon which he can review the
8 record so that he can make a reasonable
9 objection.

10 So I will give him some time for that,
11 if you would. We're still on the plaintiff's
12 case, and it doesn't matter to me which order you
13 call them in.

14 MR. HILDEBRAND: And, Your Honor,
15 my mistake. I thought you wanted to know which
16 live witnesses there were.

17 THE COURT: Yeah.

18 MR. HILDEBRAND: That was my
19 mistake. I apologize for that. I tell you what,
20 we'll just go ahead and call Jim McAuliffe then.

21 THE COURT: That sounds good to me.

22 (JAMES MCAULIFFE, having first been
23 duly sworn, testified as follows:)

24 THE COURT: Thank you, sir.

25 Mr. McAuliffe, please, when you get comfortable,

1 give us your full name and address for the
2 record.

3 THE WITNESS: It's James Rogers
4 McAuliffe, 2564 Grand Prix Court in Atlanta,
5 30345.

6 THE COURT: All right, sir. How do
7 you spell McAuliffe?

8 THE WITNESS: It's
9 M-C-A-U-L-I-double F-E.

10 THE COURT: Very good. Thank you,
11 sir.

12 DIRECT EXAMINATION

13 BY MR. HILDEBRAND:

14 Q. All right. Mr. McAuliffe, you've
15 already introduced yourself. Where are you from?

16 A. Atlanta. I grew up there, went to
17 school there and practiced there.

18 Q. All right. Tell me about your
19 educational background. Where did you go to
20 school?

21 A. I went to Georgia Tech in the five-year
22 architectural program. Actually, it was
23 architecture, which at that time was a five-year
24 program, and then I began practicing right after
25 that.

1 Q. Can you speak up just a little bit?

2 A. I started practicing right after
3 graduation in 1972.

4 Q. Okay. All right. So in '72, you
5 started practicing. Did you get your license as
6 a --

7 A. Under the rules that were in place at
8 the time, you had to practice for three years in
9 an office in order to get your license. But the
10 State of Florida offered an opportunity to take
11 the exam after one year, in Florida, but you
12 still had to wait three years in order to get
13 your license.

14 And I did that and passed the exam after
15 one year of practice and then was licensed the
16 third year. I went down for an interview and
17 became licensed at that point.

18 Q. All right. So give me a brief rundown
19 of your work history after you graduated from
20 Georgia Tech.

21 A. Starting in '72 through about 1982, I
22 was in general practice at office buildings.
23 Primarily office buildings, condominiums, single
24 family residences, just kind of getting a variety
25 of different kinds of experiences at that time.

1 Beginning in 1982, I joined a firm that
2 did hotel interiors and we created an
3 architectural arm for that firm. And for the
4 next five years, six years, I was involved with
5 that where we were doing hotels around the
6 country, both architecture and interior design
7 for the hotels.

8 And then beginning in 1986, we started
9 our own practice, two of the other principals in
10 that firm and I joined, and we began our own
11 practice. And I was there from 1986 to 2006 when
12 I retired, thinking that I was going to enjoy
13 retirement.

14 But it was -- after about a year, I was
15 called out to help a friend who had another
16 practice and being able to form a general
17 practice at that time and practiced for
18 another -- from 2006 through 2016.

19 Q. Okay. All right. So tell me,
20 generally, what sort of architectural practice
21 you did.

22 A. Primarily, as it turns out, I was an
23 architect for 44 years, and 24 of those years, I
24 was a hospitality architect.

25 Q. What does that mean?

1 A. Hotels, both the architecture and
2 interior design, and architecture that was
3 related to the hospitality of restaurants, things
4 of that nature.

5 Q. Okay. All right. Can you tell us about
6 some of the five-star hotels that you have been
7 involved with?

8 A. Well, certainly. I selected a couple of
9 examples here today that tend to fit into the
10 same -- have some of the similar experiences that
11 I have seen here with the Hotel Bennett.

12 This particular hotel was in New
13 Brunswick, New Jersey, and it was for a
14 development authority in New Jersey. It's a
15 combination of the development authority, a
16 contractor as the developer, and of course, the
17 contractor is the contractor.

18 The interesting story about this is that
19 the head of the development authority was the one
20 responsible for this hotel. He bulldogged it
21 through, got it approved, and once it started
22 being built, he became more and more involved
23 with it in terms of its evolution, and it became
24 sort of his living room, if you will, for the
25 community. And he sort of referred to it from

1 time to time as his gift to New Brunswick.

2 So there was -- I saw some various close
3 similarities to what I saw here with the Hotel
4 Bennett. And, again, this was a hotel. It also
5 included condominiums and an office building. So
6 it was quite a complex building as well.

7 Q. Was that something that you would
8 characterize as a five-star hotel?

9 A. It was a five star in terms of the hotel
10 portion. It was -- but it was more of a
11 conference center as opposed to a more
12 traditional hotel. So the ballroom and functions
13 of the conference center were the primary use of
14 the hotel.

15 Q. Okay. Let's go to the next slide,
16 please.

17 A. This was the Gotham -- what had been the
18 Gotham Hotel in downtown New York. We were
19 brought in to help renovate this project. It was
20 built originally in 1914; so it had been through
21 a lot of different things over the years.

22 As you can see by the slide on the -- or
23 the image on the right, it was a very ornate,
24 mosaic style building. And part of our
25 requirements were to enhance that where we could

1 and make the hotel function in a modern
2 functional way.

3 You can see by the ceiling there, it's
4 very complex, and the hotel was very limited in
5 terms of its accessibility and required a lot of
6 kind of effort on our part to make these pieces
7 all fit together. You can see by the ownership,
8 that Hotel Zeckendorf out of New York contained
9 quite an egocentric project as well in terms of
10 everybody had something to say about the project.

11 Q. All right. Would you -- so that would
12 be a five star?

13 A. At the time we did it, it was a Maxims
14 (ph), and then shortly afterwards, it was
15 converted to a peninsula hotel, which is the full
16 service five-star hotel.

17 THE COURT: Where is that?

18 THE WITNESS: 55th and 5th in New
19 York. It's a beautiful old building, absolutely
20 spectacular.

21 BY MR. HILDEBRAND:

22 Q. All right. Next slide, please.

23 A. This was the Hyatt Regency at Coconut
24 Point in Naples, Florida. We were the interior
25 designer. I was responsible for heading up that

1 team. You can see it appears to be a bit over
2 the top.

3 The Hyatt was interested in creating a
4 resort similar to the resorts they have in
5 Hawaii. What I wanted to illustrate here is --
6 you can see there's a lot of ceiling work,
7 high-detailed ceiling coffers, a lot of special
8 lighting in the ceilings.

9 And I will speak about this a little bit
10 later, but it was -- we, as interior designers,
11 provided the architect of record what we call the
12 architectural information package, which detailed
13 where these coffers were to be, where the
14 lighting was to be, where the build-outs for the
15 finishes were to be.

16 And it, as you can see, it became a very
17 integrated design with the architecture as a
18 finished project. Again, in this case, to the
19 owner, the Pritzker family, obviously as owners
20 of the Hyatt Hotel Group, Jason Pritzker was very
21 personally involved with this project, and we
22 would make presentations to him.

23 And he was very interested in the
24 design. He helped set this design. Initially,
25 he was the one who wanted it to be the Hawaiian

1 resort style property. But he also had a
2 development team that he looked to, to see that
3 his vision was carried out.

4 John Lyons, who was his first in
5 command, if you will, he saw to it that we stayed
6 on schedule and on budget throughout the entire
7 process.

8 Q. All right. Next slide.

9 A. This was the Omni Hotel addition in
10 Atlanta. It was for Turner Properties, Ted
11 Turner, and the Omni Hotels. They were a 50/50
12 joint venture; so it was quite an ownership issue
13 in terms of how direction was given. But once
14 that was given, the Omni Hotel was responsible
15 for the budget and schedule on the project.

16 This one, while height, obviously, was
17 not a problem with this hotel, there was three
18 areas where the -- we had to interface with the
19 ground plane. There was a motor lobby that had a
20 certain elevation that we were limited to.

21 There was the street corner, if you
22 will, and then you can see in the image, a bridge
23 that connected to the original hotel. And we had
24 to match up with that elevation. That was an
25 existing bridge that you had to match. So it

1 required a great detail of vertical coordination
2 in this project.

3 Q. All right. The next one.

4 A. This was one of my favorites. This was
5 the Lodge at Colonial Williamsburg. This one we
6 worked for Colonial Williamsburg, and it's sort
7 of like working for the Architectural Review
8 Commission here in Charleston.

9 They were -- as the owners, they were
10 very interested in the historical fabrication of
11 this building. We were bringing -- I don't know
12 if you-all are familiar with their lodge, but
13 over the years, it had been built onto, added
14 onto, and it had kind of lost its original
15 flavor.

16 And part of our responsibility was to
17 bring that back. Obviously, we were limited
18 to -- in this case a two-story building and we
19 had to then fit the functionality of a modern
20 hotel, modern convention hotel into this
21 property.

22 And you can see in the lobby space, we
23 incorporated a good deal of what was Colonial
24 Williamsburg's aesthetic -- they're style
25 aesthetic, and we felt like it turned out pretty

1 well in terms of how it functioned.

2 If you may indulge me for a moment, one
3 of the folks that we had to present to on this
4 project was Justice Anthony Kennedy. He was on
5 the Architectural Review Board for Colonial
6 Williamsburg. And it was quite an interesting
7 presentation, I think.

8 But the important thing was, during the
9 entire process of designing the hotel, he
10 remained involved. He would ask questions, have
11 comments about the design, but he always deferred
12 to the production or the development team to make
13 sure that everything got accomplished on time and
14 on budget.

15 Q. All right. So explain to the Judge --
16 so with your experience, have you been involved
17 with projects, I guess, from the very just
18 conceptual idea?

19 Or tell me how you might be approached
20 by an owner who says, okay, I've got an idea for
21 a hotel. Have you been involved right from the
22 start, right until the final completion and
23 certificate of occupancy?

24 A. Yeah.

25 Q. Explain to the Judge what your

1 experience has been with these hotels with that.

2 A. Right. There's obviously the very
3 straightforward design process where you're
4 brought in -- there's a program that's been
5 established, and you take that program and you
6 start developing the design. In some cases, you
7 go back -- we get -- we got involved in the
8 feasibility stage of the project.

9 We had a project outside of Philadelphia
10 that the feasibility went on for a number of
11 years trying to get the right program, trying to
12 get the correct operator, trying to get the
13 budgets to work, trying to get the feasibility of
14 the hotel to pencil out, if you will. The
15 performance are always very important especially
16 in those beginning times.

17 So you had -- again, at that point,
18 you're doing, well, here's one idea, and it's a
19 four-star hotel. Maybe it's a limited service,
20 maybe it a full serve. So you're making those
21 decisions along with a team of others on the
22 development side, as well as typically an
23 operator.

24 Sometimes an interior designer might be
25 brought to the table at that time, but that's not

1 as common having an operator at that time.

2 Q. All right. So have you been involved
3 with drafting schematic designs all the way
4 through final construction designs?

5 A. Oh, absolutely. Well, one of my
6 favorite times is that schematic design where you
7 can do a lot of what-ifs. You know, what can we
8 do? What's the possibility? And then obviously
9 taking that from that point through the design
10 development where you start integrating the
11 interior design of the project into the
12 architecture through construction documents.

13 And at that time, many times that's when
14 the contractor will become involved where they're
15 providing pricing that you're being able to
16 understand where you are going from the
17 construction documents.

18 Q. Okay. And have you been involved with
19 projects as doing construction administration
20 while the project was ongoing?

21 A. Yes. We --

22 Q. Can you explain to the Judge what
23 project administration is for contract
24 administration from an architect's standpoint?

25 A. Correct. The contract administration is

1 what the architect typically does or the design
2 team typically does during the construction.

3 There's certain obligations in terms of
4 periodic visits to the site, reviewing the pay
5 applications from the contractor, and then, of
6 course, advising the owner from time to time on
7 the status of the project and how its
8 progressing.

9 We've had jobs where we have been on
10 site during the construction administration,
11 especially on jobs that tend to be very complex
12 or have a really tight time schedule. But it
13 depends on how it's contractually arranged with
14 the owner.

15 Sometimes the owners will have their own
16 development staff that provides some of that
17 on-site management responsibility. But as an
18 architect, we like to stay involved as much as
19 possible because it does affect the way in which
20 the design is ultimately executed in maintaining
21 the quality.

22 Q. Okay. And during the design services
23 that you offer, during the -- sometimes during
24 the original design and then during the
25 construction administration process, do you have

1 occasion to work with contractors and deal with
2 them as far as issues that might pop up and RFIs
3 and such as that?

4 A. Absolutely, yes. Again, a lot of
5 architects take an adversarial role with a
6 contractor. I personally like to take a more
7 collaborative role with the contractor because
8 its in my best interest and in his best interest
9 to make sure that the project stays on track, and
10 having that relationship with the contractor is
11 always very important.

12 Providing him with timely -- well, also
13 you're obligated by a contract many times as to
14 how long of a time you have in order to generate
15 responses to RFIs, shop drawing reviews, and pay
16 app reviews as well as site visits.

17 Q. All right. Okay. All right, sir.
18 You -- so you've worked with owners, and you are
19 the architect, and you've worked with contractors
20 in high-end hospitality projects; is that
21 correct?

22 A. Correct.

23 Q. And that's really been your forte and
24 your primary experience in your life; is that
25 correct?

1 A. That's correct. We were primarily four-
2 to five-star hotel and resort architects,
3 conference center architects primarily.

4 Q. Okay. Do you feel comfortable offering
5 opinions in this case based on your review of the
6 documents and such relative to what the
7 obligations of the parties were and what the
8 issues were that arose and testifying and
9 offering opinions as to that, from an
10 architectural --

11 MR. BUNDY: Objection.

12 THE COURT: What's the objection?

13 MR. BUNDY: The objection is, I
14 don't think it's relevant whether this gentleman
15 is comfortable or not.

16 THE COURT: All right. Do you want
17 to rephrase it?

18 MR. HILDEBRAND: All right, sir.

19 BY MR. HILDEBRAND:

20 Q. Do you feel, based on your -- I'm sorry,
21 40 years experience?

22 A. 24 in hospitality and 44 in
23 architecture.

24 Q. All right, sir. On your 24 years of
25 hospitality experience, do you feel that you are

1 qualified to offer opinions as an architect
2 relative to the roles of the party, the parties,
3 and the issues that arose in this case relative
4 to the architectural functions and such?

5 MR. BUNDY: Objection.

6 THE COURT: Okay.

7 MR. BUNDY: I believe it was your
8 job to decide whether this witness was qualified.
9 It's immaterial what he thinks. It's your job to
10 decide whether he's qualified, not his.

11 MR. HILDEBRAND: I will tell you
12 what, I'll withdraw it, Your Honor. I'd like to
13 offer Mr. McAuliffe as an expert to testify in
14 the area of --

15 MR. BUNDY: May I voir dire, Your
16 Honor?

17 THE COURT: You may.

18 MR. BUNDY: Thank you.

19 VOIR DIRE EXAMINATION

20 BY MR. BUNDY:

21 Q. Where do you -- what states do you hold
22 an architectural license in?

23 A. I am retired, and so I have allowed my
24 licenses to --

25 Q. So you're not currently a licensed

1 architect in any state of this union?

2 A. No, sir.

3 Q. And how long ago did you let your
4 license expire?

5 A. After I retired in 2016.

6 Q. When?

7 A. 2016.

8 Q. Now, as such, you are not subject to any
9 ethical rules within the architectural profession
10 that would be enforceable by any architectural
11 board in the state of -- in this entire country
12 because you're no longer an architect, licensed;
13 is that correct?

14 A. That's correct.

15 Q. So no architectural agency provided by
16 any of the states -- what states were you
17 previously licensed in?

18 A. I was licensed in 27 states.

19 Q. Okay. So you were licensed in 27
20 states. You're no longer licensed in any states,
21 and there's nobody that could have any effect on
22 your professional abilities because there are no
23 agencies overseeing your conduct, correct?

24 A. Correct.

25 Q. Okay. Are you practicing architecture,

1 as we sit here today, in South Carolina without a
2 license?

3 A. No, sir.

4 Q. Okay. So you're not practicing
5 architecture. You're not a licensed architect.
6 And do you -- but you are going to testify to a
7 reasonable degree of architectural certainty,
8 that Buck Lindsay committed malpractice? Is that
9 what you're going to do?

10 A. I'm not sure if that's what I've been
11 asked to do.

12 Q. Is that what you're going to do, if you
13 were asked to do it? If I were to ask you now,
14 do you have an opinion to a reasonable degree of
15 certainty that Buck Lindsay or WLA, his firm, to
16 a reasonable degree of architectural certainty,
17 committed malpractice, was negligent in this
18 case, what would your answer be?

19 A. I'm not sure how to answer that at this
20 juncture.

21 Q. You're on the witness stand, sir. We've
22 been waiting two years to hear you testify.

23 A. I cannot say malpractice. I do not know
24 whether that is the case or not. All I can do is
25 tell you from my experience, what -- the actions

1 that took place on the job by the design team,
2 how they affected the outcome of the project.
3 Now, I am not in the position to tell you that's
4 malpractice.

5 Q. Okay.

6 MR. BUNDY: Your Honor, I object to
7 this witness testifying. If that's what -- if
8 what he's going to do is come in here and simply
9 be another advocate for the plaintiff's position,
10 they've already got lawyers. You're not licensed
11 to practice law, are you?

12 THE WITNESS: No.

13 MR. BUNDY: So he's not licensed to
14 practice law. He's reviewed the facts, and what
15 he's going to do -- and I assume you're going to
16 let him do it, but I've got to make a record.

17 THE COURT: I'm with you.

18 MR. BUNDY: His report that we've
19 got in this case, the title --

20 MR. HILDEBRAND: Your Honor, may I?

21 MR. BUNDY: No, no. I'm making an
22 objection. I'm making my record.

23 THE COURT: Go ahead and make your
24 record.

25 MR. HILDEBRAND: Okay.

1 MR. BUNDY: The title of his
2 report, an assessment of the design and
3 construction process as influenced by the owner
4 and design team for the Hotel Bennett Charleston,
5 South Carolina. He's going to give us his
6 assessment.

7 Nowhere in the rules of evidence does it
8 refer to expert assessments. He doesn't have an
9 opinion about the architect's conduct. The only
10 thing he's qualified to do is to give an opinion
11 as a professional about the architect's conduct.

12 I have serious reservations about the
13 legality of what he's doing today in the State of
14 South Carolina because while he may not think
15 he's practicing architecture, I will represent to
16 you that the licensing board in South Carolina
17 may well consider this practicing architecture in
18 the State of South Carolina without a license,
19 but unfortunately, since he doesn't have a
20 license, they can't do anything to him.

21 That's the circle you go in in these
22 cases. So, Your Honor, with all due respect, I
23 object to him being a witness and offering an
24 expert opinion because it's irrelevant, it's
25 immaterial, and he's not going to do anything.

1 THE COURT: Okay. Being offered as
2 an expert?

3 MR. HILDEBRAND: Yes, sir.

4 THE COURT: In the area of?

5 MR. HILDEBRAND: Architecture.

6 THE COURT: Architecture?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: All right. I'm going
9 to allow it. Go ahead.

10 DIRECT EXAMINATION

11 BY MR. HILDEBRAND:

12 Q. All right. Mr. McAuliffe, what did you
13 do -- what was your charge in this matter? When
14 you were first contacted, what were you asked to
15 do?

16 A. I was asked to render an opinion as to
17 the situation after reviewing the documents that
18 were provided, as to what happened and what
19 should have happened in this project in terms of
20 design, the architectural design.

21 Q. All right. So you understand that there
22 was -- when you were retained, that there was a
23 dispute between Balfour and the owner, Library
24 Associates; is that correct?

25 A. Correct, yes.

1 Q. All right. And you were asked to review
2 the facts and then formulate your own opinion as
3 to what the cause of the dispute was and render
4 your opinions with regard to that dispute,
5 correct?

6 A. Correct, based on my experiences.

7 Q. Okay. What --

8 MR. BUNDY: I object. I object to
9 the answer to the question because that's your
10 job. He was asked to do -- what he just
11 described is, he was asked to do the job of the
12 Master-in-Equity. And now, he's going to come in
13 here and tell you what he thinks you ought to do
14 based on his review of the facts. Okay?

15 THE COURT: I'm with you.

16 MR. BUNDY: I object, Your Honor.

17 THE COURT: Objection noted.

18 Overruled. Go ahead.

19 BY MR. HILDEBRAND:

20 Q. So what did you do Mr. McAuliffe when
21 there's a -- you knew nothing about this case
22 when it started. What did you -- how did you
23 tackle this?

24 A. Well, we can go to the next slide. It
25 shows the -- these are the documents that I

1 reviewed that were provided, the contract, the
2 construction documents, and the schedules, the
3 request for information, the supplemental
4 information documents that were produced, the
5 project e-mails and correspondence, the
6 contractor's narratives that were accomplished,
7 as well as various team member legal depositions,
8 and then some other bits and pieces.

9 So I reviewed all of those, and in terms
10 of what they -- how they influenced where the
11 project got to, at the point to which we are
12 today.

13 Q. Okay. Do you have any approximations of
14 how many hours you spent reviewing all of the
15 project documents?

16 A. No. It was a good bit. I can't -- I'm
17 sorry, I don't remember the exact amount, but it
18 was at least a couple hundred hours.

19 Q. Okay. All right. And what did you do
20 next?

21 A. Well, after reviewing all the documents,
22 then I tried to put together a -- my assessment
23 report, which took those documents and tried to
24 interpret how they influenced what happened. In
25 other words, there was kind of the cause and

1 effect situation in terms of getting to my
2 opinion or conclusions as to what happened. I'm
3 sorry.

4 Q. Okay. So I had asked you what you had
5 done next. Were the documents that you reviewed,
6 documents that an architect in your position who
7 is trying to assess what happened and what went
8 wrong in a project?

9 MR. MCDONALD: Objection, leading.

10 MR. HILDEBRAND: You know, I don't
11 know how else to ask him --

12 THE COURT: Go ahead and set it up.

13 MR. HILDEBRAND: -- to lay a
14 foundation.

15 BY MR. HILDEBRAND:

16 Q. Let me start over. Are the documents --
17 I'm sorry. Are the documents that you reviewed
18 and that you're going to testify about here,
19 documents that you believe are reasonably --
20 would be reasonably relied on by an architect in
21 order to formulate an opinion as to what should
22 have happened and what actually happened on this
23 project?

24 MR. BUNDY: Objection. Architects
25 don't -- that's not what an architect does.

1 Okay? They don't form opinions about what
2 happens and what should have happened, I mean, so
3 I object.

4 THE COURT: Okay. All right. In
5 arriving at his opinion, correct?

6 MR. HILDEBRAND: Yes, sir.

7 THE COURT: Based on that, I will
8 allow it.

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: Go ahead.

11 BY MR. HILDEBRAND:

12 Q. What did you do next?

13 A. Well, yes, to answer your question, yes,
14 the documents would be reasonable for somebody
15 to --

16 Q. Rely on?

17 A. Rely on, yes.

18 Q. All right. Next line, please. All
19 right.

20 A. So at this point, what --

21 MR. BUNDY: Objection. The last
22 witness we had in here was a scheduling expert.
23 He was qualified as a scheduling expert by you,
24 and we all recognized, you have to be a
25 scheduling expert in order to give an opinion

1 about the schedules and the delays. I hope we've
2 at least established that.

3 This gentleman is not qualified, has not
4 been qualified as a scheduling expert. He's not
5 and he should not be able, with all due respect,
6 to give an opinion about owner causes for delays
7 and/or additional costs.

8 THE COURT: All right.

9 MR. BUNDY: I mean, if he does --
10 if he can do this, I've been completely
11 blind-sided, and I -- my client is very, very
12 prejudiced.

13 THE COURT: I'm with you.

14 MR. HILDEBRAND: Your Honor, we
15 said --

16 THE COURT: So it may be the
17 terminology, but he's getting at -- what he's
18 getting at is, this -- these are the owner causes
19 for delays. Would it not be the architect's
20 issues that he's really addressing?

21 MR. HILDEBRAND: Right. And he has
22 to start his testimony. What he will say is that
23 the architect is the agent for the owner. He
24 works for the owner, and he's the owner -- in his
25 view, the owner provides the plans to the

1 contractor, and the owner is the one who gives us
2 the information and gives us the design that we
3 talked about yesterday and that Mr. Doran
4 described at length.

5 All these changes that took place came
6 through certainly the architect. It is just -- I
7 think it's a matter of terminology, Your Honor.
8 The architect is the one who did it, and he will
9 testify about who actually published the changes.

10 They come through the owner because
11 that's who our contract is with. But he is going
12 to talk about the architectural issues and the
13 architectural changes and how they affected this
14 project.

15 THE COURT: I think he's qualified
16 to testify about the architectural issues. I'm
17 not sure that he's qualified to testify about the
18 owner issues.

19 MR. BUNDY: Well, okay. But I want
20 my record to be clear. I object to this slide to
21 start out with.

22 THE COURT: All right.

23 MR. BUNDY: It improper. It
24 doesn't meet any rule. Okay. It's improper. I
25 object to the testimony. It's improper.

1 If he's going to -- if this witness
2 believes that he is qualified to give you a legal
3 opinion about the agency relationship between the
4 owner and the architect, then we've got another
5 problem, okay, because he's already said he's not
6 a lawyer.

7 The agency relationship in this case is
8 a limited agency in writing. It's not a general
9 agency. I'm the only one that can come in here
10 and speak for Library Associates, and I can bind
11 them. I can say things that they're bound by.
12 Okay?

13 The architect doesn't have that kind of
14 authority. Okay? And where we're headed is --
15 and I can see where it's going, okay, and I am
16 objecting. We're just getting started, and I
17 object.

18 THE COURT: All right.

19 MR. HILDEBRAND: Your Honor, what
20 Mr. Bundy would like to do is to look at this in
21 a complete vacuum and without this architect's
22 experience on what should happen on a complex
23 hotel development, and what happened here. And I
24 think that he can certainly testify that, here's
25 what the owner does.

1 Here's what the contract -- that's what
2 you want to hear. What are the responsibilities
3 of the parties and what were they on this job,
4 based on his review of the documents, and what
5 went wrong. That's what is beneficial to the
6 Court, and that's what he's going to testify
7 about.

8 MR. BUNDY: May I be heard?

9 THE COURT: Yeah. Go ahead.

10 MR. BUNDY: The relationship
11 between these parties was established in written
12 contract documents that this gentleman cannot
13 change. The best evidence of what's the
14 obligation between the owner, the architect, and
15 the contractor is exclusively limited to the
16 contract documents, one.

17 And two, Balfour Beatty had the absolute
18 right to sue Buck Lindsay and the architect in
19 negligence. They did not do it, and the reason
20 they didn't do it, I presume, is because they
21 couldn't find an architect to sign an
22 affidavit --

23 MR. HILDEBRAND: Your Honor,
24 that --

25 MR. BUNDY: -- that he was

1 negligent. For whatever reason, they have not
2 sued the architect.

3 THE COURT: All right.

4 MR. BUNDY: The architect's conduct
5 is really -- I don't know what it's got to do
6 with this case. This case is about facts and
7 contracts and what happened. Okay?

8 And the fact that he doesn't like the
9 architect or doesn't think he went to enough
10 meetings or doesn't believe that Mr. Bennett
11 knows what's he's doing in the hotel business is
12 really what this is all about. He's coming to
13 the conclusion that Mike Bennett don't know what
14 he's doing. Okay?

15 I don't know. Seems like he's doing
16 pretty well to me. But at any rate, I object.

17 THE COURT: All right. I think
18 he's been offered as an expert in architectural
19 design, but I think his testimony should be
20 limited to that area. Okay?

21 MR. HILDEBRAND: All right.

22 BY MR. HILDEBRAND:

23 Q. So tell us what the architectural issues
24 were, as far as you're concerned, on this
25 project.

1 A. Can we skip to those slides?

2 Q. Absolutely.

3 MR. BUNDY: They keep going. I
4 object to that one.

5 THE COURT: Yeah. I'm going to
6 sustain the objection as it relates to anything
7 having to do with the owner. Let's just get
8 right down to the architect. You've got that
9 covered.

10 THE WITNESS: Well, there's a
11 series of slides that talk about the owner, and
12 then there's a series of slides that talk about
13 the architect.

14 MR. HILDEBRAND: We'll skip ahead.

15 MR. BUNDY: I object to that one.

16 THE COURT: So anything to do with
17 the owner, I will grant your objection.

18 MR. BUNDY: Thank you.

19 THE COURT: All right.

20 THE WITNESS: But this is just
21 an -- a side slide that talks about the aspects
22 of a full service hotel, they're programatically
23 complex.

24 THE COURT: All right. Go ahead.

25 I will allow that. Go ahead.

1 THE WITNESS: They operate 24/7.

2 They have a public side and a back of house side
3 that have to -- they're separate, but they have
4 to operate efficiently together.

5 Again, this applies to most all hotels,
6 but especially in a full service hotel where it
7 becomes more critical of that separation. And,
8 again, a full service is typically centered
9 around the food service, the kitchen, the service
10 areas, and how they interface with the public and
11 then how they function in the back of the house.

12 And then ultimately, there has to be an
13 efficient integration of the structural system,
14 the program and the mechanical systems, which we
15 can talk about in a little bit more detail.

16 MR. HILDEBRAND: Okay.

17 THE COURT: Okay. Go ahead.

18 MR. BUNDY: Objection. Objection.
19 Objection. Objection. Objection. Objection.
20 Objection.

21 BY MR. HILDEBRAND:

22 Q. Let me ask -- let me ask you this
23 question for now. Tell us -- and we'll get to
24 the slide in just a minute -- about when, if
25 design changes are going to be made on a

1 project -- I guess an owner always has the
2 opportunity to make design changes if they want
3 to? Are we going to get to that slide?

4 A. I believe so, yes.

5 Q. About when they should be made?

6 A. And how, yes.

7 Q. And how that affects the architect?

8 A. Correct.

9 Q. All right. Tell us about the -- we're
10 talking about the architect now.

11 MR. BUNDY: I object. Now, we're
12 talking about delays and additional costs for the
13 design team. That's still not an architectural
14 issue.

15 He's talking about -- he's still talking
16 about delays, which he's not qualified to talk
17 about because he's not a scheduling expert, and
18 he's not -- and architects aren't accountants.
19 They're aren't CPAs. And now he's coming up with
20 costs. You know, I don't -- this is --

21 MR. HILDEBRAND: Your Honor --

22 MR. BUNDY: I object. I object.

23 MR. HILDEBRAND: Your Honor, this
24 is what architects do every -- that's what their
25 job is, Your Honor. They have to look at what

1 the -- how the changes that they are going to
2 implement impact whether the project is going to
3 be finished on time or not and whether they do
4 their job properly or improperly or give
5 information that's correct or not.

6 That absolutely will cause a project to
7 overrun, just like we spent so much yesterday
8 with Mr. Doran, when he said, okay, the project
9 was finished or the critical path was impacted by
10 these design changes. That's what architects --
11 and I can ask him about that.

12 I can ask him more background to support
13 that, if you'd like for me to, about what the
14 actions and involvement architects have, and then
15 additional costs for -- good grief, Your Honor.
16 That's what -- and I can ask him more about that,
17 too.

18 Architects are intimately involved with
19 costs and working with the owner and working with
20 the contractor to try to avoid budget overruns.
21 So let me ask him some questions about that.

22 THE COURT: All right. Yeah, lay a
23 little more foundation.

24 MR. HILDEBRAND: All right, sir.

25 MR. BUNDY: May I make an objection

1 to that?

2 THE COURT: All right. Go ahead.

3 MR. BUNDY: Those -- everything
4 that counsel just said are principles of
5 negligence. They are principles that stem from a
6 notion of a duty of due care owed by one party to
7 another.

8 This is a contract case. And this case
9 is not brought in negligence. My client has not
10 been sued for negligent developing. The
11 architect has not been sued for negligence as an
12 architect. It's not an issue. It's immaterial
13 in this case.

14 He's going to -- he can't testify about
15 what the architect should have done or he thinks
16 the architect should have done because those
17 things are set forth in the contract as to what
18 he should -- what should have been done.

19 We have to compare somebody's conduct,
20 the facts to what the agreement was, not what
21 this gentleman thinks the agreement should have
22 been and not what this gentleman thinks
23 Mr. Bennett should have done.

24 A lot of criticism he makes relate to
25 not being ready to build the hotel, I mean, and

1 that Mike Bennett wasn't ready. He didn't have
2 the right team and on and on and on. Clearly,
3 there are a million ways to skin a cat, clearly.

4 But because we decided to skin the cat
5 the way that doesn't suit this gentleman because
6 that's not the way he skins cats, does not make
7 his testimony relevant in this case. Thank you,
8 Your Honor.

9 THE COURT: Overruled. Go ahead.
10 Lay a little more foundation. I'll allow it.

11 MR. HILDEBRAND: All right, sir.

12 BY MR. HILDEBRAND:

13 Q. So tell me, what do -- as an architect,
14 are you involved with project scheduling?

15 A. Only as it applies to the design
16 schedule, not necessarily the construction
17 schedule.

18 Q. All right. And how does the design
19 schedule impact the construction schedule?

20 A. Well, typically, they are integrated
21 together, particularly if a contractor is
22 involved with the project in the early phase.
23 But, for example, the construction administration
24 needs to correspond with the construction of the
25 building. So there is that point at which it's

1 integrated. The drawings have to be complete in
2 order for the contractor to do his work and his
3 schedule.

4 MR. BUNDY: Objection.

5 Q. All right, sir. While you're involved
6 with projects, the -- do you understand, as an
7 architect, that the product -- the work product
8 that you put on your drawings and that are given
9 to the contractor will impact whether the
10 contractor is able to perform the work properly
11 or not?

12 MR. BUNDY: Leading, objection.

13 THE COURT: Overruled. Go ahead.

14 THE WITNESS: My experience is that
15 it's very critical that there be that
16 understanding that what you produce as architects
17 are critically important to what gets built.

18 BY MR. HILDEBRAND:

19 Q. All right. And you understand that
20 there's a standard, based on a representation
21 that the drawings are a hundred percent plus or
22 capable of being built? Do you render -- or do
23 you have opinions there as to whether the
24 drawings in this case met that representation?

25 MR. BUNDY: Objection. The

1 question is leading, and it contains about three
2 different questions inside of it. It's
3 confusing.

4 THE WITNESS: I will try to answer
5 the components.

6 BY MR. HILDEBRAND:

7 Q. All right.

8 A. A hundred percent plus, in my
9 experience, that's a meaningless number. It's
10 either 100 or it's not.

11 Q. Okay.

12 A. That was confusing in that nomenclature.
13 I'm sorry, could you repeat that?

14 Q. All right. What I'm getting at is, I
15 think the basic background issue was, are you
16 involved, and do you have knowledge as to what
17 impact design irregularities or omissions or
18 errors have on the constructability and the final
19 completion of the building?

20 A. In my experience, the more incomplete a
21 drawing is, the more difficulties that arise
22 during construction in that it's going to lead to
23 change orders and cost issues as the project --

24 MR. BUNDY: Objection. The answer
25 wasn't responsive to the question. Move to

1 strike.

2 THE COURT: Overruled.

3 BY MR. HILDEBRAND:

4 Q. Do you have opinions relative to when
5 design changes should be made and what impact
6 they will have on the final completion date and
7 delays of the project?

8 A. There's a graph in the slide, but it
9 indicates or shows how there's a correlation
10 between design input and construction costs, that
11 at the beginning of a project, a design change
12 has a minimal impact.

13 MR. BUNDY: Your Honor, I object.
14 He's not responding to the question. He's just
15 simply asking if he had an opinion. That's a yes
16 or no answer.

17 Now, he's taking that answer and now
18 he's giving the opinion, and I don't have the
19 opportunity to object to the opinion. The
20 question was, do you have an opinion. It wasn't,
21 what is your opinion because I'm going to object
22 when he asks his opinion.

23 THE COURT: All right.

24 MR. BUNDY: And I'm also going to
25 object when he doesn't answer the question that's

1 asked of him and seeks to pontificate for the
2 next 10 minutes.

3 THE COURT: All right.

4 BY MR. HILDEBRAND:

5 Q. So with your experience, do you
6 understand what impacts design changes and design
7 errors and omissions have during a project on
8 thea final completion of the project?

9 A. Yes.

10 Q. All right. Do you -- based on your
11 experience, do you have opinions on design
12 changes and errors and omissions that take place
13 during the project and whether that will impact
14 the cost?

15 A. Yes.

16 Q. And is that something that you've had
17 involvement with throughout your career?

18 A. Yes.

19 MR. BUNDY: He just testified, when
20 I talked to him, that he had no opinions as to
21 errors and omissions to a reasonable degree of
22 certainty. Now, he's being asked if he has an
23 opinion regarding errors and omissions. I don't
24 know how we -- I don't know how we do that.

25 MR. HILDEBRAND: This is not a

1 malpractice case.

2 THE COURT: I'm with you.

3 MR. BUNDY: No, it's not.

4 Absolutely it's not.

5 THE COURT: I got that. All right.

6 I think foundation has been laid. You can ask

7 your questions.

8 BY MR. HILDEBRAND:

9 Q. All right. So let's go through your
10 opinions now. I think we're at that point. Tell
11 the Judge, if you would please, what your
12 opinions are regarding the design team causes for
13 delays and additional costs.

14 MR. BUNDY: Objection.

15 THE COURT: Overruled. Go ahead.

16 BY MR. HILDEBRAND:

17 Q. Go ahead.

18 A. In this project, based on my experiences
19 with the circumstances, the architect's limited
20 experience -- or experience with limited service
21 hotels, contributed to some of the issues.

22 If he had had more experience in higher
23 level hotels, then those issues would have been
24 lessened. Okay? It doesn't mean they
25 necessarily would have been eliminated, or

1 likewise, that he couldn't have handled it with
2 the limited service experience.

3 Q. And why is that -- why did that fact
4 impact your ultimate opinions in this case?

5 MR. BUNDY: Objection.

6 THE COURT: Overruled. Go ahead.

7 THE WITNESS: Could you repeat the
8 question?

9 BY MR. HILDEBRAND:

10 Q. What relevance is the fact that the
11 architect of record had limited high-end hotel
12 experience?

13 A. There was a lot of issues that came to
14 light that were driven by issues that the higher
15 end hotel required, the ceiling heights, the
16 integration in the mechanical in the ceiling
17 design of the particular -- the ceiling heights
18 in general were a big issue.

19 Those were probably the biggest. And
20 the fact that at this point in the hotel design,
21 there was no operator and the interior design
22 that would provide the architect with a lot of
23 the missing information that he might have had
24 was not available to him.

25 So his lack of experience in higher-end

1 hotels meant that he -- and when there was no
2 interior design provided and no operator, there
3 was a vacuum that he was working in that he might
4 have overcome if he had had more experience in
5 higher-end hotels.

6 Q. All right. Next page.

7 A. And so this speaks to that about the
8 difference or what was --

9 MR. BUNDY: Object to the slides.

10 THE COURT: Overruled. Go ahead.

11 THE WITNESS: There was a
12 disconnect between what the architect was
13 initially asked to provide and what was
14 ultimately required in the hotel as the finished
15 project.

16 BY MR. HILDEBRAND:

17 Q. Can you explain that to us?

18 A. Initially, the architect was asked to
19 provide the design of the hotel, that while it
20 wasn't just a limited service, it was a bit more
21 than a limited, but it was not described as a,
22 quote, "Ritz Carlton type of project."

23 Q. Okay.

24 A. Okay. But what was ultimately built was
25 a hotel that was a full service that had a lot of

1 millwork and a lot of high design. And so there
2 was that disconnect between what he had -- was
3 originally asked to provide and what was
4 ultimately provided.

5 Q. All right. Next page.

6 A. The other -- I'm sorry.

7 Q. Go ahead. What is your next opinion?

8 A. The other issue that I saw as a
9 potential that caused some of the issues was the
10 gap that occurred when there was a project
11 handoff from the original design architect and --

12 MR. BUNDY: Objection to the --
13 excuse me. Objection to the demonstrative
14 exhibit.

15 THE COURT: All right. Overruled.
16 Go ahead.

17 MR. BUNDY: And objection to the
18 testimony.

19 THE WITNESS: The architect was not
20 part of the schematic design that was provided by
21 the original architect. And in fact, there's
22 correspondence about how to integrate that design
23 into the final design, both from a physical
24 documentation standpoint, as well as the design
25 standpoint. One of the other really critical

1 issues in my opinion --

2 MR. BUNDY: Object to the document.
3 Object to the testimony.

4 MR. HILDEBRAND: I will note a
5 standing objection, Your Honor.

6 MR. BUNDY: Pardon me?

7 THE COURT: Objection noted. All
8 right. Go ahead.

9 THE WITNESS: Based on my
10 experience, particularly with building
11 information modeling, which is a three
12 dimensional representation of the building to
13 help understand how the components fit together,
14 the architect -- the building information
15 modeling was not required contractually by the
16 contract, and again, that was from the contract
17 itself.

18 Q. Right.

19 A. And so, as a result, the contractor was
20 providing his own version of BIM for contract --
21 conflict resolution and not design. And so the
22 -- regardless of how the conflicts were
23 discovered, it was still the architect's
24 contractual responsibility to put together the
25 cost to indicate or document those design

1 changes.

2 Q. And whose responsibility was it on this
3 job to provide the design and the design
4 documents?

5 A. The architect's.

6 Q. All right. And should those design
7 documents, when they were provided to the
8 contractor, have been relative to -- should they
9 have already been coordinated?

10 MR. BUNDY: Objection.

11 THE COURT: Overruled. Go ahead.

12 THE WITNESS: Yes. They -- the
13 coordination is a critical aspect of the
14 architect's responsibility.

15 BY MR. HILDEBRAND:

16 Q. And what is coordination? What does
17 that mean?

18 A. In the broadest sense, it just means
19 that the architecture, the structure, mechanical,
20 electrical and plumbing drawings and documents
21 are all integrated together. They work together.
22 In this case, there's also interior design that
23 needs to be integrated in the design as well.

24 Q. Okay. So tell me about -- or explain to
25 the Judge how BIM in your opinion should have

1 been used by the architect in his design of this
2 building?

3 MR. BUNDY: Objection.

4 THE COURT: I'm going to sustain
5 that. It wasn't required, was it?

6 MR. HILDEBRAND: No, sir. But
7 he's --

8 BY MR. HILDEBRAND:

9 Q. Do you have an opinion as to -- I
10 understand that it wasn't -- the architect didn't
11 use it. Do you have an opinion as to whether he
12 should have used it?

13 MR. BUNDY: Objection.

14 THE COURT: I think he can give
15 that opinion. Overruled on that one.

16 THE WITNESS: As an architect, in
17 my experience, BIM has become a critical item in
18 which buildings, especially complex buildings and
19 buildings that are schedule driven, is an
20 important part of getting that project
21 accomplished.

22 MR. HILDEBRAND:

23 Q. What is BIM?

24 A. It's a -- technically, it's building
25 information modeling, and to me, it's not a very

1 descriptive term. But it's where you design the
2 building in three dimension, as opposed to a
3 series of two-dimensional drawings.

4 Although for hundreds and thousands of
5 years, buildings have been done on two dimension,
6 but as buildings have become more complex, this
7 three dimensionality of being able to view the
8 building, what's above the ceiling, what's in the
9 walls, being able to visualize all of that
10 greatly enhances and makes the process go a lot
11 smoother and eliminates many of the conflicts
12 that occur.

13 Q. All right, sir. What is your next
14 opinion?

15 A. Well, and again, this is based on my
16 experience. And I had the very same experiences
17 where, when a building has a lot of changes and
18 it's getting very complex, in terms of how it's
19 coming together, having an on-site person helps
20 to mitigate and reduces a lot of the delay --
21 time delay that's caused by getting documented
22 changes made.

23 MR. BUNDY: Objection, speculation.

24 THE WITNESS: This is from my
25 experience.

1 MR. HILDEBRAND: Okay. Thank you.

2 THE COURT: I will allow that,
3 yeah.

4 THE WITNESS: I'm sorry. I lost my
5 train there. My experience is, having an
6 architect on site to respond in a timely manner
7 to these issues that come up, whether they're
8 discovered by conflict resolution or just where
9 does this go, is a big help to the -- scheduling
10 the project.

11 BY MR. HILDEBRAND:

12 Q. All right. What is your next opinion
13 there, sir?

14 A. Without the true BIM model, what
15 happened was, the coordination of the design to
16 construction was overwhelmed. And again, you're
17 right, it was not required by contract, but the
18 lack of it contributed to the -- being
19 overwhelmed in the coordination phase of the
20 project.

21 Q. All right.

22 MR. BUNDY: Move to strike.

23 THE COURT: Overruled. I think
24 you -- I want to pin this down for my benefit.

25 MR. HILDEBRAND: Yes, sir.

1 THE COURT: You testified,
2 Mr. McAuliffe, that BIM in the design phase would
3 have been a benefit, although not required. When
4 BIM was utilized by the contractor, it was a
5 conflict avoidance standpoint, not a design, but
6 it became -- it became a construction issue and
7 not a design issue. Is that a fair assessment?

8 THE WITNESS: That's correct.
9 Absolutely.

10 THE COURT: Okay. All right.

11 THE WITNESS: This gets into the
12 issue of, what does a hundred percent plus mean.
13 The documents dated on November 6th were
14 described and identified as a hundred percent
15 plus.

16 BY MR. HILDEBRAND:

17 Q. And what is important about those
18 construction documents that are dated 11/6/2014?

19 A. Those were part of the documents that
20 were the basis for the guaranteed maximum price.

21 Q. So those were the contract documents at
22 that point?

23 A. That's correct.

24 Q. All right. And have you had an
25 opportunity to actually look at the drawings in

1 this matter?

2 A. Yes.

3 Q. All right.

4 A. Under extensive detail.

5 Q. On the actual drawings, we've got a set
6 right here. Is it indicated whether they are a
7 hundred percent -- do you want to come and refer
8 to the -- maybe point to the Judge?

9 MR. HILDEBRAND: Your Honor, if you
10 would like to look at this.

11 A. These drawings are dated 7/4/14 and are
12 described as a hundred percent plus -- I'm
13 sorry -- and then that's dated 11/6/14.

14 Q. We have the actual drawings.

15 THE COURT: There's a whole stack
16 of them down there.

17 MR. HILDEBRAND: Right.

18 MR. BUNDY: You need a forklift to
19 move them around.

20 MR. HILDEBRAND: The small stack is
21 the GMP stack, the one -- that stack is what we
22 ended up with, but that will be identified later.

23 THE COURT: Okay.

24 MR. HILDEBRAND: The one on this
25 side is the original stack, and then this big

1 like this is what it ended up with.

2 THE COURT: Okay. So the date of
3 November 6th, 2014?

4 THE WITNESS: Correct. That's the
5 documents that were described as a hundred
6 percent plus.

7 BY MR. HILDEBRAND:

8 Q. On the drawings?

9 A. On the drawings, yes.

10 Q. The architect put that on the drawings.
11 All right.

12 A. Which being described as one hundred --
13 whether it's a hundred percent plus or just a
14 hundred percent creates a reasonable expectation
15 that the project is ready for construction.

16 MR. BUNDY: Objection.

17 THE COURT: Overruled.

18 THE WITNESS: At the GMP or the
19 guaranteed maximum price document, pricing
20 documents were 654 sheets, which is -- that
21 includes the engineering documents as well.

22 BY MR. HILDEBRAND:

23 Q. Speak up just a little bit, please.

24 A. Sorry. 654 drawing sheets that included
25 the architecture of MEP drawings, structural at a

1 construction cost of \$59 million. After
2 construction began, after GMP was issued, there
3 were 1200 requests for information of RFIs were
4 generated, which indicated to me that that's -- a
5 hundred percent wasn't valid, wasn't correct.

6 Now, that's -- you know, you might
7 expect some RFIs, but 1200 is excessive. My
8 experience would have been closer to 750 to maybe
9 even 900 in a job that's complex. And during the
10 construction process, there were over 2,000
11 individual drawings that were modified. In other
12 words, the same sheet may have been modified a
13 number of times, and there were 136 new drawings
14 added. So at the conclusion --

15 Q. So after the GMP -- let me understand
16 this.

17 A. Oh, yes.

18 Q. After the contractor signed his
19 agreement and said, I will bill the hotel for \$59
20 million, 2,000 design changes took place?

21 A. Or at least modifications to the
22 documents, yes, indicating a design change.

23 Q. Okay. Is that a significant amount of
24 change in your view?

25 A. It would seem to be, yes.

1 Q. All right.

2 A. Based on my experience, that's a lot.

3 Q. All right. What's your next opinion?

4 A. At the conclusion of construction, there
5 was a total of 790 sheets, and the cost then had
6 risen to \$64 million, almost 65 million. That's
7 a 20 percent increase in documentation, which
8 tells me a hundred percent just was not a valid
9 number.

10 Q. All right.

11 A. So because the changes occurred
12 primarily after GMP, those changes disrupted the
13 flow and sequence of construction, which
14 contributed to the delay and costs.

15 Q. All right, sir. What is your next
16 opinion?

17 A. Well, I've spoken to this about the fact
18 that there was no interior designer contracted
19 for in the design phase, which the issue there
20 becomes this lack of architectural information,
21 which I refer to in the Hyatt project.

22 It's an important series of documents
23 that provide the architect with direction on how
24 to create the interior architecture of the
25 building, and that was missing.

1 And in this particular project, based on
2 the correspondence that I reviewed, the architect
3 had provided a prototype interior design that was
4 completely invalidated once the contractor's
5 interior design was brought on, which contributed
6 again to one set of documents were part of the
7 completion and a redo of the whole interior
8 design, sir.

9 Q. Explain this to me, if you would. As a
10 layman, when I think about interior design, I
11 think about somebody coming into my house and
12 picking out curtains, maybe changing some of the
13 paints and putting some photographs up.

14 On a project like this, can you explain
15 to the Judge how interior design, if at all,
16 impacts the structure and the -- a lot of the
17 complexities of the building?

18 A. Right. And, again, this is based on my
19 experiences in that, but to the layman question,
20 the issue is, typically, the drapes are left to
21 interior decorating and establishing the profiles
22 of the trim around the windows or the mantels,
23 that's interior design. How this room is
24 configured, where the doors are, that's all part
25 of interior design.

1 Again, in a hotel, that interior design
2 is very integrated into the architecture. Again,
3 it's the functionality of what's behind that door
4 has to work with the programatic requirements of
5 the building. So, I'm sorry, that was -- did
6 that answer your question?

7 Q. It does, yes, sir. Next opinion.

8 A. Again, in particular, the higher
9 ceilings added to the complexity, the higher
10 ceiling requirements added to the complexity of
11 this upscale property, which required a lot of
12 redesign once the interior designer was brought
13 on.

14 Q. What do you mean by the higher ceiling
15 requirements? Required by who?

16 A. By the fact that it was a full service
17 or five-star hotel typically, and, again, this is
18 not a hard and fast rule. But, typically, a full
19 service or five star, the ceilings in the public
20 spaces tend to be higher. It's just one of those
21 things.

22 And so it creates -- when it's added to
23 the issue of the limited height of the building,
24 it adds -- or it creates this squeezing of the
25 spaces and adds to the complexity of how you can

1 integrate the design of the building.

2 Q. All right. What is your next opinion?

3 A. Well, in general, and again this is
4 based on my experience, the design process did
5 not adequately address the complexity of the
6 building dynamic.

7 Again, this whole ceiling is
8 problematic, and when the pieces occur -- when
9 the design pieces occurred, the interior designer
10 coming onboard, operator, all of them,
11 problematic changes was required once those came
12 into play.

13 MR. BUNDY: I object to the
14 question and the answer.

15 THE COURT: All right. Overruled.
16 Go ahead.

17 BY MR. HILDEBRAND:

18 Q. All right. So your next opinion,
19 please.

20 A. So as far as the Hotel Bennett is
21 concerned, it was -- the complexity of the
22 project included an underground parking garage,
23 the lobby, the restaurant, the ballroom, kitchen,
24 spa and fitness areas were all on the second
25 floor. It's a limited area floor plan, and a lot

1 of the functions were placed on the first and
2 second floor, complex functions.

3 Q. All right. So the point here is, you've
4 got a lot going on, a lot of complex things that
5 have to be coordinated by the -- in the design;
6 is that right?

7 A. Yes, correct. The guest rooms occurred
8 on the third through the eighth level.

9 Q. Okay. We talked about that.

10 A. The bar, pool, and other functions were
11 on the ninth level. Now, again, part of the
12 complexity of this building, which is not totally
13 unheard of -- but added to the complexity is
14 having a pool on the roof.

15 Now, I understand that it helps with the
16 fire suppression system, but having a pool on top
17 of a building is -- it makes it a lot more
18 complex. There's things that have to be done.

19 Q. All right.

20 A. Add the four passenger elevators that
21 served floors one through nine, the service
22 elevator that handles just the first two floors,
23 one and two, and then a freight elevator that
24 went all the way from the parking lot because a
25 lot of them service the entire building.

1 Q. All right. And the reason for -- what
2 is the reason for articulating what these
3 complexities are? How does that impact your
4 ultimate opinion in this matter?

5 A. Well, two things. Again, there's
6 complexity in the items, the underground parking,
7 pool on the roof, a lot of functionality on the
8 two floors. That added to the -- I'm sorry,
9 repeat your question.

10 Q. Yes. Do those complexities, would
11 they -- we've seen the set of drawings here.
12 That's the shorter one. For a hotel, would you
13 expect that the nine documents would be pretty
14 extensive from the get-go based on all these
15 complexities?

16 A. Yes.

17 Q. Okay. Your next opinion, please.

18 A. This is my favorite part about this.
19 It's the math that has to do with the building
20 height. Here the height was limited at 105 feet,
21 although the documents show it at around 104.5
22 feet with the roofing material.

23 The first floor was established at 15
24 feet, not unreasonable. Second floor, 15 feet.
25 Fifth floor was 10 feet. Upper floor that

1 included the roof was 14 feet.

2 There was a transfer -- some mechanical
3 transfers on the eighth floor, which bumped it up
4 to 11 feet 10 inches. The remaining available
5 for the guest room floors was 38 feet 8 inches,
6 and you have four floors, which meant that they
7 were each 9 feet and eight inches from slab to
8 slab.

9 So the guest room, floor to ceiling --
10 or excuse me, the guest room ceiling height was
11 established at 8 feet, again not unreasonable,
12 which meant that the remaining interstitial
13 space, the space between the ceiling and the top
14 of the slab above was one foot eight inches.

15 The structure itself was 8 inches, which
16 left one foot to get all of the mechanical,
17 plumbing, sprinklers, all of those components in,
18 which just, again, is not undoable. But it just
19 leaves no room for error.

20 Again, in a more typical hotel, based on
21 my experience, you kind of worked from the guest
22 room floors up, and it would tell you how tall
23 the building was going to be. But this one was
24 constrained by 105 feet which --

25 Q. Okay.

1 A. -- created the issues.

2 Q. So if there weren't 105-foot height
3 restriction, the simple solution would have been,
4 what this really tight area to try to work with,
5 the designer could simply increase the height of
6 the building and take care of that, correct?

7 A. Correct. And again, based on
8 experience, you don't want to just say, okay,
9 make the interstitial space three feet. You
10 still want to try and control the height of the
11 building because adding height to the building
12 does add cost. But again, you pick a number
13 that's more forgiving, if that's the right word,
14 of being able to get everything in.

15 Q. So having one foot that is allowable,
16 one foot for everything between the floors --
17 what was your term, that there's no room for
18 error?

19 A. Correct.

20 Q. Literally no room for error?

21 A. They're just -- it's tight. And again,
22 if there's -- if there's a plumbing trap that
23 comes down that -- you know, if it's not
24 installed just right or whatever, it could be
25 that conflict with the ceiling below.

1 Q. All right. So from the get-go, as
2 originally designed, the design was very
3 difficult; is that correct?

4 A. Correct.

5 Q. Because there's -- it's so compact; is
6 that right?

7 A. Right.

8 Q. All right. And then with changes that
9 were made, would that -- would those changes need
10 to take account this limited design, this limit
11 space as well?

12 MR. BUNDY: Objection. Calls for
13 speculation.

14 THE COURT: Overruled. Go ahead.

15 THE WITNESS: In general, yes, it
16 would -- it still has to be built within the same
17 envelope.

18 And again, from a design standpoint,
19 there may have been a decision to change the
20 second floor to 14 feet so that you could have
21 increased the height between the floor and the
22 guest room. I mean, there's opportunities to do
23 some, but it still has to occur within the
24 same --

25 BY MR. HILDEBRAND:

1 Q. From your review of the documents, do
2 you have any understanding of whether it was
3 important to the owner, Michael Bennett, to have
4 the ceiling heights as high as possible?

5 A. Based on the documentation that I saw
6 and read, it was very critical in terms of
7 keeping the ceiling heights. It was a hot button
8 issue, if you will.

9 Q. All right. Next opinion, please.

10 A. This is -- I have spoken about this a
11 bit about the --

12 MR. BUNDY: Objection.

13 THE COURT: I don't know what the
14 objection is.

15 MR. BUNDY: Maybe I will make it
16 easy. Can I just -- I don't like rolling
17 objections.

18 THE COURT: Right.

19 MR. BUNDY: But if we can all agree
20 that I'm not going to be told in the Court of
21 Appeals, I didn't object to every slide, can we
22 all agree that I object to every slide because I
23 don't want to interrupt the witness.

24 MR. HILDEBRAND: That's fine.

25 THE COURT: Okay. All right.

1 Yeah. Preserve the record by that, sure.

2 THE WITNESS: Again, based on my
3 experience and observation of the documentation,
4 the design team was a bit untimely and provided
5 inadequate construction and then administrative
6 services, especially regarding the site visits
7 and the time required to make the requested
8 changes.

9 So the required document changes based
10 on, for example, the conflict that were
11 discovered through the contractors, BIM work, it
12 still took the architect a good deal of time to
13 make those changes to fix the conflicts.

14 And in some instances, it appears the
15 change was made and additional conflicts were
16 discovered before the changes were even issued.
17 So it just kind of snowballed the problem of how
18 long it took for the conflicts to get resolved.

19 Q. All right, sir.

20 A. So like I said, that led to many man
21 hours expended by the design team on trying to
22 coordinate.

23 Q. What's your next opinion, sir?

24 A. Well, the process was derailed and
25 delayed by the untimely changes that were

1 impacting the work while all of this was going
2 on. It was the change from the guest rooms to
3 suites that were happening while the building was
4 being built. That was just kind of the incorrect
5 place for that to be happening.

6 Q. Let's talk about that for a second. I
7 think there's one slide that we didn't go over,
8 which is the -- explain to the Judge, based on
9 your experience, when is the time to make changes
10 to a design in order to keep a project on time
11 and on budget?

12 MR. BUNDY: Objection.

13 THE COURT: Overruled.

14 THE WITNESS: There's a graph that
15 we didn't visit, but I'll try and explain it.
16 There's design changes and construction costs,
17 and at the beginning of a project, a design
18 change has very little impact on the cost and the
19 time of the project, the most influence and the
20 least cost.

21 But as the project progresses, -- this
22 is any project, not just this one -- but any
23 project, as time increases and you get further
24 and further along in the design process and in
25 the construction process, the cost of any

1 design -- or any design change has a greater
2 impact on the cost as it goes along.

3 In other words, if you have a cost or a
4 design change when the building is nearly
5 complete, then that design change is going to be
6 costly and can be -- affect the time schedule.
7 So the idea is that you get your design in order
8 before the construction starts.

9 Now, you know, there's always going to
10 be changes in any project. The owner has the
11 prerogative to make a change. There just needs
12 to be an understanding that there's a cost and
13 schedule implication applied to that.

14 Q. Okay. So in the industry, is it
15 recognized that if you want to maximize cost
16 efficiencies, that design changes should be made
17 before construction starts?

18 A. Absolutely, yes.

19 Q. All right. And is it recognized in the
20 industry that design changes that take place
21 during construction will impact cost and schedule
22 oftentimes?

23 A. Always, yes.

24 Q. Can you explain? Here's the chart.

25 A. Well, if you click one more time, you'll

1 see that --

2 MR. BUNDY: Objection. We've
3 already said we're not going to look at -- you've
4 already told him not to put these up there.

5 MR. HILDEBRAND: Let's do this.
6 Let's just pull out just the chart that talks
7 about the design and the construction cost, which
8 is what he's referring to.

9 MR. BUNDY: I still object.

10 THE COURT: All right. Objection
11 is noted. I will let you use the design, the
12 diagram.

13 THE WITNESS: Perhaps this is a
14 test on how good my description was. But as you
15 can see, the --

16 MR. BUNDY: This is exactly what is
17 not permitted in a demonstrative. This is a
18 pedantic or a whatever the -- it's a teaching
19 aid. This is not appropriate.

20 THE COURT: He's showing exactly
21 what he just testified to, as I see it. I saw
22 this in here, as I skipped over, and I've already
23 X'ed off this one. But go ahead.

24 THE WITNESS: Well, as you can see,
25 the planning programming phase, the design can

1 have the greatest impact with the least amount of
2 effect on the cost.

3 And as you go through schematic design,
4 design development, construction documents, the
5 opportunity for employing the design goes down
6 and the cost of any change goes up through to the
7 end of the job. I mean, that's just one of those
8 facts of nature in architecture, I guess.

9 BY MR. HILDEBRAND:

10 Q. All right. So can we get back where we
11 left off? All right. So what are we talking
12 about here?

13 A. I need slide 2. Well, we discussed this
14 in concept before the -- guaranteed maximum price
15 documents did not necessarily represent a hotel
16 that was ultimately constructed.

17 Obviously, there was a great deal of
18 documents added so that, you know, based on one
19 hundred percent of documents that we discussed,
20 11/6 documents were presumably approved by the
21 owner. So he gave tasks and approval to the
22 design at that point.

23 There was obviously, based on the
24 correspondence, the architect had expended a
25 large amount of man hours, but as we know because

1 of the RFIs and changes that were made, that it
2 was not coordinated fully. In my opinion, it
3 lacked the interior design data that was really
4 necessary to complete the design.

5 Q. All right, sir.

6 A. You know, the architectural coordination
7 was critical to the complexities, and just as a
8 note, the GMP documents, the pricing documents
9 always includes a substantive clarification from
10 the contractor, which were incorporated into the
11 documents.

12 Q. All right. Next slide.

13 A. As an architect, I saw that the fact
14 that the lower compensation --

15 MR. BUNDY: Objection. Now, Your
16 Honor, this -- he's now going into an issue that
17 the architect didn't charge enough money. Okay?
18 That -- how can that opinion be relevant to this
19 case, that he didn't charge enough money?

20 THE COURT: Okay. Objection noted.
21 All right. Where are we going?

22 MR. HILDEBRAND: It's pretty clear
23 that the architect was tight from the start and
24 did not -- I think that that explains why, if he
25 didn't charge enough for his services, I think

1 the inference that you might draw is that, okay,
2 he was not being paid enough to do full service
3 drawings and maybe skipped on them.

4 But we can skip this one. Let's go on
5 to the next one.

6 MR. BUNDY: Yeah. That's total
7 speculation. I mean, he could have had a family
8 member that was ill during this period that
9 caused this. I have no idea.

10 MR. HILDEBRAND: We'll move on.

11 THE COURT: All right. He withdrew
12 it. All right. Objection noted.

13 THE WITNESS: So, again, just to
14 review the chronology, this is based on the
15 documents. The concept spec, design was
16 established by the previous architect, who was
17 not there.

18 There was a change to the architect of
19 record to finalize what was an incomplete design
20 -- hotel design. There was obviously a delay in
21 receiving the height approval for the hotel.

22 BY MR. HILDEBRAND:

23 Q. Let me ask you this. Let's go back to
24 that first one, the concept schematic design
25 established by the previous architect. In your

1 view, how does that invite, if at all, future
2 problems with the design?

3 A. Again, from my experience, when you
4 transition from one architect to another,
5 irregardless of this project, there's an
6 opportunity for decisions that were made,
7 knowledge not being fully transmitted to the new
8 architect.

9 And this particular case was exacerbated
10 by the nature of the documentation that was
11 provided. It was in PDF form, not necessarily
12 CAD drawings. So there was a lot of, how do we
13 get from point A to point B. And there's a good
14 bit of correspondence from the architect about
15 what he should do in order to be able to best
16 utilize the design that came before.

17 MR. BUNDY: Objection to the answer
18 and the question.

19 THE COURT: All right. I'm missing
20 something. Was there another architect before
21 the Lindsay crowd? Is that what y'all are
22 telling me?

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: Okay.

25 THE WITNESS: The next slide will

1 help describe that a little bit.

2 THE COURT: All right.

3 THE WITNESS: The GMP documents
4 were dated -- it started 11/6 and went through
5 12/3. Obviously, the general contractor was
6 selected to construct the hotel after the GMP
7 documents had come on.

8 The contract would be between the owner
9 and the contractor and was signed on September
10 12th, 2014, and the construction began on March
11 30th, 2015. Prior to that construction term was
12 deemed to be 28 months and a substantial
13 completion established to occur on July 30th,
14 2017.

15 BY MR. HILDEBRAND:

16 Q. All right.

17 A. Now, this puts that chronology in just a
18 large graph so you can sort of like see the time
19 that was involved. The first is the red, which
20 was the previous architect, the conceptual
21 architect.

22 Q. Do you remember who that was?

23 A. It was Goff D'Antonio Associates.

24 Q. Goff Associates?

25 A. No. I'm sorry. It -- I can't read it

1 from here. I see it was Goff, but I can't see --

2 Q. All right. So Goff was involved until
3 2009?

4 A. Correct. And the interesting thing
5 there was -- there was obviously some schematic
6 design was accomplished in terms of how is this
7 building going to kind of lay out in broad terms.
8 But there was correspondence that I saw that
9 indicated that he was looking for an operator to
10 help with the problematic aspects of the project.

11 There was talk with Hilton, with Astoria
12 specifically from the project, but nothing ever
13 came of that. So early 2009 was when the
14 architect of record was brought on board.

15 Q. WLA?

16 A. Correct.

17 Q. Okay.

18 A. Yes, Buck Lindsay's firm, which their
19 work began in 2009 and the design and through
20 construction lasted until the end of 2018.

21 Q. Okay. When WLA came on the project, was
22 there already a design -- did the exterior of the
23 design look basically like it does now?

24 A. I think the delay in construction
25 because the broad scope had been established,

1 where pieces were going to fit together on the
2 site because it was part of the height -- to get
3 through the height issues. So a lot of those
4 pieces were in place, but the hotel wasn't --
5 there was no construction documents for the
6 hotel.

7 Q. Right. You could look at those original
8 drawings provided by Goff D'Antonio, and that's
9 basically what we have there?

10 A. That's correct.

11 Q. Okay. All right. So what is your next
12 opinion?

13 A. So at that point, it still -- they were
14 still waiting on the approval of the height.
15 That was really kind of the critical point, but
16 that period of time --

17 MR. HILDEBRAND: I think the Judge
18 is familiar with that one.

19 THE COURT: I am.

20 THE WITNESS: All right. During
21 that waiting period, there was a lot of
22 correspondence about how best to take the
23 original design, how to integrate it into the
24 next step, was the design development. The
25 project architect was struggling with how to do

1 that.

2 Again, there was some discussion about
3 operator at that point, but nothing came of it.
4 So it wasn't until after the height was approved,
5 that the design really began earnest in terms of
6 getting construction documents.

7 BY MR. HILDEBRAND:

8 Q. Okay.

9 A. So there's a design development phase
10 and a construction document phase that was
11 somewhat truncated. But as you can see on the
12 chart there, the GMP documents, the 11/6
13 documents occurred at the end of the contract
14 document phase.

15 And the interior designer had only been
16 involved for six or seven months at that point,
17 which as I had pointed out before, did not
18 provide the architect with a lot of information
19 he needed to be able to get his documents fully
20 scheduled.

21 So once the GMP was issued and the
22 construction was scheduled to begin, it began a
23 sort of design revision phase. So that lasted
24 for the length of construction because they
25 were -- even after substantial completion, which

1 was the July date of 2017, there were items --
2 changes being made after the substantial
3 completion.

4 THE COURT: Let's take a break
5 right now.

6 MR. BUNDY: Can you admonish the
7 witness?

8 THE COURT: Sure. So
9 Mr. McAuliffe, while on the break, I'd ask that
10 you not consult with the lawyers and just come on
11 back when you're ready. Let's take five or ten
12 minutes.

13 (A recess transpired.)

14 THE COURT: Okay.

15 MR. HILDEBRAND: Thank you, sir.

16 THE COURT: Ready to resume.

17 THE WITNESS: So we were talking
18 about the expanded project chronology, just kind
19 of the overview and viewing in time, you know,
20 how long the project was involved.

21 During the construction phase, there was
22 five parts of what we refer to as the changes.
23 Period one, there were utility issues, the flood
24 and some of the uncoordinated design. Period two
25 was the uncoordinated design, structural and

1 other delays.

2 Period three, I can't find this written.
3 Period four came with the -- the periods just are
4 describing the various changes and issues that
5 have occurred during the construction process
6 that impacted the schedule and the cost.

7 MR. MCDONALD: I object to the
8 impact of schedule language which he's not been
9 qualified as an expert in scheduling.

10 THE COURT: Go ahead.

11 THE WITNESS: If we were to look at
12 this as a hypothetical --

13 BY MR. HILDEBRAND:

14 Q. Speak up just a little bit.

15 A. If we were to view this as a
16 hypothetical, which we kind of addressed some of
17 this in earlier testimony, there would have been
18 a feasibility stage where financing was discussed
19 and programatic things that would be established.

20 And usually this is where an owner -- or
21 excuse me, an operator becomes involved because
22 they provide a lot of program data. Next would
23 come the schematic design where the architect
24 would become involved if he wasn't involved in
25 the feasibility portion before.

1 Then design development documents would
2 begin, and during this time is when the interior
3 designer would normally be brought on, where
4 there would be that sort of complimentary work of
5 designing the interiors and coordinating
6 integrating data into the architecture of the
7 building. Then construction documents then
8 ensue.

9 There may or may not be a pricing phase,
10 depending on how the contractor was involved in
11 the project, and then ultimately, the
12 construction. And in this model, it sort of ends
13 construction on when the original substantial
14 completion date was established.

15 And again, this is just only to serve as
16 a model kind of referencing the amount of time
17 that might be expected based on some of my prior
18 experiences with this kind of thing. Again,
19 hotels like the Omni, although it's a big, tall
20 building, it followed pretty much this kind of
21 scheduling.

22 Q. Okay.

23 A. So just some of the summaries and the
24 factors that impacted the cost and the schedule.

25 MR. MCDONALD: Objection.

1 A. There was the impact of the limited
2 building height vis-à-vis the programming --
3 hotel programmatic pieces that needed to be
4 included. The architect and the owner's
5 experience with this type of hotel was to be
6 constructed.

7 Again, this is based on my experience,
8 that I felt like the late inclusion of the
9 project management firm in the project, a lot of
10 decisions were made prior to that project manager
11 being on board. And, of course, I've spoken at
12 length about the timing of having a hotel
13 operator be involved and the interior.

14 Q. When was the hotel operator brought on?
15 Do you recall?

16 A. Pardon?

17 Q. Do you remember when the hotel operator
18 was --

19 A. It was during -- it was after
20 construction began. I do not have the exact
21 date, but it was after March 30th.

22 Q. Okay.

23 A. Of course, the late inclusion of the
24 interior design firm and the impact that had,
25 pieces that were not of anybody's making but the

1 two hurricanes, Michael and Irma, and some of the
2 actions and inactions of the development team.

3 Q. Okay.

4 A. So, you know, my feeling -- again, this
5 is an opinion based on experience, but any of
6 these factors can be overcome.

7 Every project has a hanger date that
8 gets thrown into it at some point. But when you
9 take all of these together and, you know, they
10 just -- they overwhelm the project. They
11 overtook the schedule and ultimately the budget.

12 Q. All right. Let me ask you this: Have
13 you had an opportunity -- I think you testified
14 about this -- to review the underlying project
15 data to see whether the contemporaneous documents
16 shed any light on your opinions regarding the
17 architect's acknowledgement or involvement in
18 these projects with these issues?

19 A. There were several documents, e-mails
20 that -- where there's concern first about the
21 inclusion of the original architect work.

22 Q. Okay.

23 A. And then BIM was an issue that he was
24 concerned about, and ultimately, another aspect
25 was his ability to produce the kind of documents

1 necessary for this level of hotel, the full
2 service.

3 Q. Okay.

4 A. And, ultimately, being able to staff the
5 project during the construction administrative
6 phase.

7 Q. Okay. Is it appropriate and necessary,
8 in your view, to review those documents from the
9 architect to confirm your opinion here today
10 relative to his exposure?

11 A. I'm certainly prepared, although, again,
12 my conclusions were based on -- and my opinions
13 were based on reading of those documents, and
14 that really is the basis of my knowledge of this
15 project is the documents that included those.

16 Q. Okay. Let's pull up Exhibit 108,
17 please.

18 MR. BUNDY: Is this in evidence?

19 MR. HILDEBRAND: It's 108. It's in
20 the --

21 MR. BUNDY: It's in the book. But
22 it's not in evidence yet?

23 MR. HILDEBRAND: No, no.

24 MR. BUNDY: Okay.

25 BY MR. HILDEBRAND:

1 Q. All right. Explain to the Judge --
2 let's go to the second -- this is an e-mail from
3 Buck Lindsay, that's the project architect --

4 A. Correct.

5 Q. -- to Jim Clements. That's the owner's
6 representative, correct?

7 A. Correct.

8 Q. All right. And let's turn to the second
9 full paragraph, which says, in the contract in
10 review.

11 THE COURT: All right. Tell me
12 where we are because I'm lost. Exhibit 149?

13 MR. HILDEBRAND: 108.

14 THE COURT: 108?

15 MR. BYRD: Tab 108, Judge.

16 THE COURT: 108. All right. Hold
17 on. Okay. Found it.

18 BY MR. HILDEBRAND:

19 Q. All right. Is this your highlighting?

20 A. Correct.

21 Q. Yes. Explain to the Judge what you've
22 highlighted and why this document, to support
23 your evidence.

24 A. This is from Buck, correct?

25 Q. Yes.

1 A. Right. So he's indicating that, when
2 the contractor was asked if their services
3 included them, they answered that, yes. And
4 there were some comments about how that process
5 was working, even though, again, the contractor
6 is not obligated to design the project. He was
7 providing them for his own use.

8 MR. BUNDY: Your Honor, I'm going
9 to object to this. The witness can rely on
10 evidence that's not admissible, right? But he
11 doesn't make it admissible because he's relying
12 on it.

13 THE COURT: Right. I agree.

14 MR. BUNDY: So this is inadmissible
15 evidence.

16 THE COURT: Okay.

17 MR. BUNDY: There is no foundation
18 for it. They haven't moved it into evidence. He
19 can certainly say that there is -- within these
20 documents, there is a letter I relied upon, and
21 that's where I got my information, or he can say
22 it was dated such and such a day, I guess.

23 But I don't -- you can't circumvent the
24 rules of evidence and the hearsay and all of the
25 exceptions by having a witness take a document

1 which by definition is not admissible. Thank
2 you, Your Honor.

3 MR. HILDEBRAND: Your Honor,
4 experts certainly are entitled to rely on
5 documents that might not be admissible. This is
6 a document by the project architect.

7 THE COURT: Right.

8 MR. HILDEBRAND: There's no
9 question about that. And it's a document from
10 the project architect to their representative.

11 THE COURT: Okay.

12 MR. HILDEBRAND: So there's no
13 question that -- there's no question about the
14 authenticity of this document. It's their
15 e-mail.

16 THE COURT: Okay.

17 MR. HILDEBRAND: So I think it is
18 admissible as an admission by a party opponent.
19 It's simply a statement. If you look at the
20 rule, Your Honor, and I can cite it to you --

21 MR. BUNDY: Buck Lindsay is not --

22 MR. HILDEBRAND: -- I think it is
23 ultimately admissible. But we can come back on
24 the admissibility of these like we did with the
25 PowerPoint yesterday.

1 THE COURT: Okay.

2 MR. HILDEBRAND: But I'd kind of
3 like for him to refer to these because they
4 impact his opinion, and I think that's
5 appropriate.

6 THE COURT: All right. And he can
7 testify to it as being a basis of his opinion,
8 but the document itself would not necessarily be
9 admissible based on the record we now have.

10 MR. HILDEBRAND: Correct.

11 THE COURT: You know, I don't see
12 it as an admission by a party opponent because
13 Mr. Lindsay is not -- is the one that opined --
14 Mr. Lindsay is the one making the statement, and
15 he's not a party to the case.

16 MR. BUNDY: That's correct.

17 MR. HILDEBRAND: Well, it's -- but
18 if I could be heard on that one, Your Honor.

19 THE COURT: Sure.

20 MR. HILDEBRAND: If we could -- I
21 would refer you to Rule 801.

22 THE COURT: Okay.

23 MR. HILDEBRAND: And this
24 definition of -- 801, definitions of hearsay, the
25 statements which are not hearsay, and it says,

1 admission by a party opponent. But it's -- it
2 says admission, but it's really statements by a
3 party opponent.

4 And it says, the statement is offered
5 against a party, and it's the party's own
6 statement, either an individual or a
7 representative capacity. A statement in which
8 the party has manifested an adoption for belief
9 in its truth or, C, a statement by a person
10 authorized by the party to make a statement
11 concerning the subject.

12 The owner in this matter retained the
13 architect as its architect and agent. I went
14 through the contract provisions earlier on. It
15 was this agent to do the design and do the
16 construction administration; so it is a
17 statement. I think it meets that -- the terms of
18 that very clearly.

19 A statement by a person authorized by
20 the party to make a statement concerning the
21 subject. This is during the project, and the
22 architect is communicating with the owner's
23 representative. So it seems to me that it would
24 be clearly within -- it's not hearsay.

25 MR. BUNDY: All right. Your Honor,

1 the one that applies here is D. Buck Lindsay is
2 not a party, period. His architectural firm is
3 not a party, period.

4 THE COURT: Right.

5 MR. BUNDY: D says, a statement
6 made by the party's agent or servant concerning a
7 matter within the scope of agency or employment
8 made during the existence of the relationship.
9 There's been no foundation in this case laid as
10 to the scope of his agency.

11 He has a written agency. There's
12 nothing in evidence in this case that speaks to
13 Mr. Lindsay's position as an agent. He is a
14 limited agent for certain purposes, and in order
15 to -- you've got to put in the evidence of what
16 that agency is, what the scope of it is. The
17 rule specifically says within the scope.

18 THE COURT: Right.

19 MR. BUNDY: The contract between
20 the architect and the owner is not in evidence.

21 THE COURT: Okay.

22 MR. HILDEBRAND: Your Honor, an
23 agent is somebody who is a representative -- is
24 retained to operate on behalf of an individual.
25 The architect in this case was the hired

1 architect and consultant for the owner. There's
2 no question that he was the owner.

3 He provided the design that my client
4 was to bill by. You have to use your common
5 sense, Your Honor. That's what you've done is,
6 who -- was the architect the agent of the owner?
7 Clearly he was. He was providing plans on behalf
8 of the owner to the contractor for the contractor
9 to bill by.

10 He was on-site making inspections on
11 behalf of the owner and reporting back to the
12 owner his inspections and whether the project was
13 in conformity with the project or not. It says,
14 the architect. I'm reading from paragraph 4.2.1,
15 the contract.

16 The architect will provide
17 administration of the contract as described in
18 the contract documents and will be the owner's
19 representative during construction, and with the
20 architect, will have authority to act on behalf
21 of the owner. I'm reading from the contract.

22 THE COURT: All right. Let me ask
23 you this question. For what purpose are you
24 offering the document? What is the purpose of
25 the document?

1 MR. HILDEBRAND: Yes, sir. This is
2 an acknowledgment. It is the data in the
3 contemporaneous file to accept -- this whole case
4 and this whole issue that we're here about is,
5 who is responsible for these overruns and these
6 delays.

7 THE COURT: Okay.

8 MR. HILDEBRAND: That's the meat of
9 this. Who is responsible for these overruns and
10 delays. It's a breach of contract case. So what
11 we're establishing yesterday, through Mr. Doran,
12 on the critical path, he talked about when --

13 THE COURT: All right. Let's get
14 back to this document. What's the purpose of
15 this particular document?

16 MR. HILDEBRAND: This document and
17 several that will follow it will demonstrate --
18 during the course of the project, Your Honor,
19 some of these are crystal clear where the
20 owner -- where the architect admits liability for
21 these deficiencies.

22 He just flat out admits and says, I
23 should have performed to BIM and I didn't.
24 During the -- while he was -- before the
25 construction documents, when the construction

1 documents were being produced, the owners -- one
2 of the architect's internal people said to the
3 project architect -- one architect from another
4 in the same firm -- these documents are gross
5 negligence.

6 For us to say that these are one hundred
7 percent drawings is inaccurate. Gross
8 negligence. Unparalleled negligence, I think, is
9 the term that he used. So what happened was, the
10 owner said, this project will be billed. We're
11 going to use BIM because of the tight spaces that
12 are in this hotel.

13 MR. BUNDY: Your Honor --

14 MR. HILDEBRAND: Then he decided --

15 MR. BUNDY: Your Honor, none of
16 this is in evidence.

17 MR. HILDEBRAND: Excuse me.

18 THE COURT: I'm with you. I'm just
19 trying to go there. So the desire is to get the
20 document in as an admission by a party opponent
21 is what I'm hearing you say. That's what I'm
22 hearing.

23 MR. HILDEBRAND: No, sir. But by a
24 party opponent, that's part of it, but a
25 statement -- under the rule, Mr. Bundy, I

1 think --

2 THE COURT: And to what extent has
3 the party opponent, Library Associates,
4 acknowledged that, the statement in the document?

5 MR. HILDEBRAND: Well, there are
6 two components of the rule.

7 THE COURT: Right.

8 MR. HILDEBRAND: I think it comes
9 up in both of them. One of them is -- and these
10 are independent.

11 THE COURT: Right.

12 MR. HILDEBRAND: It's simply a
13 statement by -- a statement by a person
14 authorized by the party to make a statement
15 concerning the subject. Here, the owner
16 specifically in his contract with my client says,
17 the architect will have authority to act on
18 behalf of the owner.

19 So his statements -- clearly, he's
20 empowered by the owner in the contract to act on
21 his behalf. So I think that it --

22 MR. BUNDY: Why don't we look at
23 that.

24 THE COURT: All right. I've got
25 your argument.

1 MR. BUNDY: Why don't we look at
2 the contract? Maybe that would be helpful.
3 Okay?

4 THE COURT: Yeah, okay.

5 MR. BUNDY: Why don't we look at
6 4.2 administration of the contract.

7 THE COURT: All right.

8 MR. HILDEBRAND: That's where I was
9 reading from.

10 MR. BUNDY: 4.2.1. It says in the
11 last sentence, the architect will have the
12 authority to act on behalf of the owner only to
13 the extent provided in the contract documents
14 unless otherwise modified in writing in
15 accordance with any other provision of the
16 contract.

17 As a foundational matter, for this
18 architect to have been acting as our agent, he
19 has to put in evidence which exists in the AIA
20 contract between us and the owner, which is not
21 in evidence -- as to the scope of their
22 authority.

23 All I'm trying to do is follow the
24 rules, Judge. I'm not trying to be obstructive
25 here. I'm trying to protect my client from

1 documents which shouldn't be put in evidence.

2 THE COURT: I understand.

3 MR. HILDEBRAND: Well, let me, let
4 me -- let's turn to that, Your Honor. He
5 referred to section 4.2.

6 THE COURT: Okay.

7 MR. HILDEBRAND: And it says, the
8 owner will provide administration to contract as
9 described in the contract documents and will be
10 an owner's representative during construction.

11 So what Mr. Bundy didn't emphasis was
12 that, in our contract, clearly, specifically and
13 emphatically, the architect was the owner's
14 representative during construction.

15 MR. BUNDY: And the rule doesn't
16 say anything about representatives. It says
17 agent. That's the distinction.

18 MR. HILDEBRAND: A representative
19 is not the same?

20 MR. BUNDY: It says, a statement by
21 the party's agent or servant concerning the
22 matter. A statement by the agent. He wasn't our
23 agent. He had limited agency. He may have had
24 the agency to do this, but he hasn't put any
25 evidence in of it. That's all I'm saying.

1 THE COURT: Okay. All right.

2 MR. BUNDY: The cab driver is my
3 agent taking me down the street, but he doesn't
4 get to assign my bank account or any of the rest
5 of it.

6 THE COURT: Okay. All right. I
7 don't see where you need the document to have
8 Mr. McAuliffe to testify from it on that basis.
9 One, I don't think -- I don't think a basis has
10 been made in order to get the document into
11 evidence; so I'm going to exclude the document.
12 We can mark it for ID purposes as a proffer if
13 you would like.

14 MR. HILDEBRAND: Thank you, sir.

15 THE COURT: Okay. We will note it
16 as that, tab number what? 108?

17 MR. HILDEBRAND: 108, yes, sir.

18 THE COURT: All right. Do it for
19 now. We might be able to link it up later, but
20 as of now, the document itself doesn't come in
21 and doesn't keep Mr. McAuliffe from opining about
22 what he's seen in the record.

23 MR. HILDEBRAND: I understand.

24 THE COURT: All right.

25 MR. HILDEBRAND: So that will be --

1 108 will be marked as the Court's Exhibit,
2 correct?

3 THE COURT: Just call it for ID
4 purposes. Okay?

5 (PLF. EXH. 108 was marked for ID
6 only.)

7 MR. BUNDY: Can we take that off
8 the screen?

9 THE COURT: You can.

10 MR. BUNDY: Thank you.

11 MR. HILDEBRAND: I think he already
12 said that he could testify about it.

13 THE COURT: He can use it as a
14 basis for his opinion.

15 MR. HILDEBRAND: Right, right.

16 THE COURT: That's what he can use
17 it for. Okay?

18 MR. BUNDY: The existence of the
19 documents. But he still needs to go through the
20 entire document as it if were in evidence.

21 THE COURT: No, no. He gets to
22 say, based upon his review of the record,
23 which --

24 MR. BUNDY: Well, that's why. So
25 that's the reason it needs to come down. We're

1 still doing indirectly what we can't do --

2 THE COURT: I'm with you on that
3 one. All right. So it should come down, yeah.
4 But go ahead. You can ask him what formed his
5 basis and what that was, where it came from,
6 which I think he's already testified to, frankly,
7 but that's another story.

8 BY MR. HILDEBRAND:

9 Q. All right. Let's turn to -- I would
10 like to refer you to what's been marked or tabbed
11 as an exhibit index tab 90 in our documents. And
12 that is an e-mail from Jim Clements to Buck
13 Lindsay. Do you see that?

14 A. Yes, sir.

15 Q. All right. And the bottom e-mail under
16 tab 90 is from Buck Lindsay to Jim Clements and
17 says --

18 MR. BUNDY: Are these in evidence?

19 MR. HILDEBRAND: No.

20 MR. BUNDY: Okay. Well, I object
21 to him talking about what the document says.

22 THE COURT: Okay.

23 MR. HILDEBRAND: Your Honor,
24 that's -- under the rules, an expert has -- I
25 understand you have not ruled it into evidence,

1 but --

2 THE COURT: Right.

3 MR. HILDEBRAND: -- an expert can
4 testify about the foundations for his -- can rely
5 on documents that may not be in evidence, and
6 that's clearly part of the rules. And he can
7 testify about some of the foundational documents
8 for his opinions, and that's simply what I want
9 to go through.

10 THE COURT: I would imagine he's
11 got an opinion based on his review of the record
12 without having to go to the individual documents,
13 does he not?

14 MR. HILDEBRAND: He does, but I
15 think it would be appropriate on a few of these
16 for him to submit into evidence and for you to
17 review the --

18 MR. BUNDY: If I may --

19 THE COURT: I don't think they come
20 in through him. I don't think they come in
21 through him.

22 MR. BUNDY: No. You know, the way
23 this typically works is, I, on cross-examination,
24 if he said, I relied on all the documents in this
25 box and I come to the opinion, Mr. Bundy, you

1 don't know how to practice law.

2 Then I can go to the box and say, well,
3 did you read this letter here I got from the
4 Supreme Court Justice that you helped with the
5 hotel. I mean, he's a buddy of mine. Okay. He
6 might write that letter. So do you see what I'm
7 saying?

8 THE COURT: I absolutely see it.

9 MR. BUNDY: So this is just not the
10 way it should be.

11 THE COURT: Okay. I don't think
12 you need it.

13 MR. BUNDY: I don't either. I
14 don't think he needs it.

15 THE COURT: So I'm going to sustain
16 the objection on that basis.

17 MR. BUNDY: Thank you, sir.

18 MR. HILDEBRAND: Okay.

19 BY MR. HILDEBRAND:

20 Q. Let me ask you this. All right. Let's
21 go through your -- let's get into the slide with
22 the final billing served in this matter, and I
23 would like for you to express today your -- I'm
24 going to ask you about some specific opinions,
25 and I would like for you to tell those to the

1 Judge. Okay?

2 A. Certainly.

3 Q. Can we agree that your -- the opinions
4 that you are articulating here today will be made
5 to a reasonable degree of architectural
6 certainty?

7 A. Yes.

8 Q. All right.

9 MR. BUNDY: I just want to clarify.
10 Are these the opinions he's already given or the
11 ones he is getting ready to give?

12 THE COURT: I think he's asking
13 about going forward.

14 BY MR. HILDEBRAND:

15 Q. The ones that you've already given and
16 the ones that you're about to give, can we agree
17 that the opinions --

18 A. Yes, to a reasonable degree of --

19 MR. BUNDY: Then I would have
20 objected at the time if you'd have asked that
21 question or if he'd have given that opinion.
22 We've now got a new answer.

23 THE COURT: All right. All right.
24 Go ahead and lay the foundation going forward.
25 All right?

1 MR. HILDEBRAND: All right, sir.

2 BY MR. HILDEBRAND:

3 Q. Are the opinions that you are about to
4 provide to the Judge given to a reasonable degree
5 of architectural certainty?

6 A. It is.

7 Q. All right, sir. Do you have an opinion
8 as to whether the architect fulfilled its
9 obligations as outlined in the contract with
10 Balfour to provide an adequate design?

11 MR. BUNDY: Objection. That's a
12 contract. That's for you to decide. So clearly
13 the witness can give an opinion that y'all -- I
14 got no problem with that. But what he can't do
15 is tell you that what the architect did was or
16 was not breach of contract. That's for you to
17 decide.

18 He can certainly testify, as he has
19 testified, that he has an opinion, the architect
20 did these things, right? Based on his review of
21 the documents, the architect ran over your dog or
22 my dog. Okay? But it is up to you to decide.
23 You know what I'm saying?

24 The next issue is not what he -- he
25 doesn't get to say that he -- that Buck Lindsay's

1 conduct breached the contract, I do not believe.
2 He can describe the contract and say the conduct,
3 but -- anyway, you get my objection. Thank you.

4 THE COURT: Okay. All right.
5 Restate the question.

6 MR. HILDEBRAND: Yes, sir.

7 BY MR. HILDEBRAND:

8 Q. Do you have an opinion as to whether the
9 architect's services that were provided as
10 represented in the contract documents to Balfour
11 were appropriate or not?

12 A. I do have an opinion.

13 Q. What is that opinion?

14 A. May I ask a clarification?

15 MR. BUNDY: No. He don't get to
16 ask questions. Objection.

17 THE COURT: Go ahead and give your
18 opinion, and then, if you want some
19 clarification, we will follow it up. All right?

20 THE WITNESS: Well, my opinion as
21 to whether they met their contractual obligations
22 to the contractor, that's asking whether I'm --
23 about the contract between the two of them, and
24 it doesn't really -- there's not really any
25 contractual relationship between the two of them.

1 BY MR. HILDEBRAND:

2 Q. Okay.

3 A. And that's my question. Is that
4 correct?

5 Q. Let me ask you this, sir. Do you have
6 an opinion as to whether the design documents
7 provided by the architect for construction by
8 Balfour Beatty in this matter were sufficient or
9 not?

10 A. My opinion is that they were less than
11 sufficient. They bordered on being incomplete
12 and, yes, I would leave it at that. They were
13 incomplete.

14 Q. All right. Do you have an opinion as to
15 whether the design changes that were made on this
16 project caused or contributed to the overages
17 from the -- that are being claimed?

18 A. My opinion is that they contributed to
19 the additional costs associated with the project.

20 Q. Do you have an opinion as to whether the
21 timing of the design changes that were made in
22 the construction directives that were given to
23 Balfour Beatty impacted the completion date of
24 this project?

25 A. The evidence --

1 MR. BUNDY: Objection. He's not
2 qualified as an expert in scheduling.

3 THE COURT: Overruled. Go ahead.

4 THE WITNESS: The evidence
5 indicates that changes were provided way beyond
6 the original substantial completion date, which
7 by inference, would mean that they were impacting
8 the timing of the construction.

9 BY MR. HILDEBRAND:

10 Q. Okay. Let's walk through the -- go
11 through your summary and conclusions if you
12 would.

13 A. These, again, are a summary of my
14 previously expanded upon opinions. One, that the
15 architect's life and experience with full service
16 at a 5-star hotel methodology, design
17 methodology. There was the gaps that occurred
18 with a handoff of the design between Goff and
19 Buck Lindsay's firm.

20 The critical item, in my opinion, was
21 the lack of BIM construction documents for
22 whatever those reasons were. The fact that the
23 architect indicated that the hundred percent
24 documents were complete when the evidence again
25 indicates that they were incomplete, and at best,

1 were imprecise.

2 Q. All right.

3 A. And the fact that there was no interior
4 designer, which meant that there was no
5 architectural information drawings available to
6 the architect.

7 THE COURT: At the outset?

8 THE WITNESS: Correct. And then
9 just the design team's inability to handle the
10 construction administration services with -- in a
11 timely manner, especially with the site visits
12 and the required change documentation that needed
13 to be done.

14 And, ultimately, the GMP documents, the
15 guaranteed maximum price documents did not
16 represent the hotel that was ultimately
17 constructed, which again, in my opinion,
18 contributed to the additional costs and delays in
19 the contract.

20 BY MR. HILDEBRAND:

21 Q. All right.

22 A. Okay. And as an architect --

23 Q. We will skip that one.

24 A. Okay.

25 Q. All right, sir.

1 MR. BUNDY: And I think that last
2 one you struck, right?

3 THE COURT: I did.

4 MR. BUNDY: My turn?

5 THE COURT: Literally and
6 figuratively. All right.

7 MR. BUNDY: My turn?

8 MR. HILDEBRAND: All right. You
9 can answer any questions that Mr. Bundy might
10 have.

11 THE COURT: Okay.

12 MR. BUNDY: No questions. Thank
13 you.

14 THE COURT: All right.

15 Mr. McAuliffe, let me just say that I've been
16 doing some research up here. It appears that in
17 our -- were you previously licensed in this
18 state, in South Carolina?

19 THE WITNESS: Yes, sir.

20 THE COURT: It looks like you would
21 fit under the category of an architect emeritus.
22 Are you familiar with that term?

23 THE WITNESS: Yes.

24 THE COURT: All right. Is that how
25 you'd describe yourself these days?

1 THE WITNESS: It's a technical term
2 that I have chosen not to, but I'd rather the
3 wisdom of the old guy.

4 THE COURT: Okay. But you've been
5 retired for some five years now?

6 THE WITNESS: Correct.

7 THE COURT: Not actively engaged in
8 the practice?

9 THE WITNESS: That's correct. I
10 have become a painter.

11 THE COURT: Okay. All right. Very
12 good. All right. Mr. McAuliffe, thank you very
13 much. You may step down.

14 THE WITNESS: Thank you.

15 THE COURT: And can he be excused?

16 MR. HILDEBRAND: Yes, sir.

17 THE COURT: All right. Thank you
18 for your presence today, Mr. McAuliffe.

19 THE WITNESS: Certainly.

20 THE COURT: Okay. All right. Do
21 y'all have somebody you want to present now or
22 later?

23 MR. HILDEBRAND: Do you want to
24 break for lunchtime, Your Honor?

25 THE COURT: It's 11:30. It's a

1 little early, but I'm happy to do it now if it's
2 a good time to break.

3 MR. HILDEBRAND: All right.

4 THE COURT: You had some
5 depositions that you wanted to put in. Have
6 y'all had a chance to share that?

7 Mr. McDonald, have y'all had a chance to
8 review that at all?

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: All right. Let's take
11 that up after lunch.

12 MR. MCDONALD: Your Honor, I have
13 not had the opportunity to look at Mike Bennett.
14 There are a number that he has sent timely that I
15 haven't had the time to look at. And I might get
16 the objections ready on those. I don't know if
17 you plan to do those or not.

18 THE COURT: Okay. I was going to
19 say, do you want to do that now before we break
20 or do you want to do that when we come back? Why
21 don't we do that now. Let's plan to break in
22 about half an hour or so, whatever it takes.

23 And then we've got some live testimony
24 after lunch as well?

25 MR. HILDEBRAND: Yes, sir.

1 THE COURT: And who would that be?

2 MR. HILDEBRAND: Steve Huyghe.

3 THE COURT: Steve Huyghe.

4 MR. HILDEBRAND: Huyghe.

5 THE COURT: Okay. All right.

6 Let's take up some of these ones. Not
7 Mr. Bennett's deposition, but let's take up the
8 other aspects, and we will go from there. All
9 right?

10 Y'all are free to go if you'd like. I'm
11 going to do -- we're going to do some
12 housekeeping here for a little while. My plan is
13 to come back at 1 o'clock. Okay?

14 All right. Let's talk about -- let's
15 see. You have a number of deposition excerpts
16 you wanted to put forth?

17 MR. HILDEBRAND: Yes, sir.

18 THE COURT: And then you have a
19 number of objections. Let's talk about who the
20 people are. Let's talk about that for a second.

21 MR. HILDEBRAND: Bear with me, Your
22 Honor.

23 THE COURT: Sure.

24 MR. MCDONALD: Your Honor, if you'd
25 like, my first objection is the general objection

1 to the reading of the deposition of Ms. Brown,
2 Kimberly Brown.

3 THE COURT: Okay.

4 MR. MCDONALD: She's not a party to
5 the case. They took her deposition as a
6 30(b)(6). She was a 30(b)(6) representative, and
7 I'm prepared to say what her counter designations
8 are on that one.

9 THE COURT: Okay.

10 MR. MCDONALD: They also list her
11 personal deposition. I mean, she's sitting right
12 there. She's certainly not a hundred miles away;
13 so if they want to call her as a witness,
14 certainly, they can do that.

15 THE COURT: Okay.

16 MR. MCDONALD: Thank you, sir.

17 THE COURT: All right. That's on
18 Kim Brown. She testified as 30(b)(6) for Library
19 Associates?

20 MR. HILDEBRAND: Yes, sir.

21 THE COURT: And is otherwise
22 available, correct?

23 MR. MCDONALD: She's otherwise
24 available. But they also took her individual
25 deposition, and they seek to read that into the

1 Court as well.

2 THE COURT: Okay.

3 MR. MCDONALD: But she individually
4 is not a party.

5 THE COURT: Okay. Okay.

6 MR. HILDEBRAND: One minute. I've
7 got a brief on that, Your Honor.

8 THE COURT: Sure.

9 MR. HILDEBRAND: May I approach the
10 bench, Your Honor?

11 THE COURT: Sure. All right, sir.

12 MR. HILDEBRAND: Your Honor, I just
13 handed you a brief. It's on the use of Kim
14 Brown's deposition transcript at trial.

15 And the rules of civil procedure
16 provides, and it's Rule 32(a)(2) that the
17 deposition of a party or anyone who, at the time
18 of taking the deposition, was an officer,
19 director, or managing agent or a person
20 designated under Rule 30(b)(6) to testify on
21 behalf of a public or private corporation, can be
22 used for any purpose.

23 So if I depose Kim Brown -- you've
24 heard -- she's on every single e-mail virtually
25 in this case. She is -- you will hear from the

1 deposition of Michael Bennett, who I have not yet
2 introduced, but I think maybe that will add some
3 additional support to this -- that Kim Brown does
4 everything for him.

5 He says, he has the -- very little -- he
6 is the big picture guy. Kim Brown is his sister.
7 She does -- she has access to absolutely
8 everything. She has authority to speak for him.
9 She signed change orders. She did everything on
10 this project, and as noted in this document,
11 there's a question where I asked her.

12 So tell me what your role was with
13 Bennett hospitality since you have been with him.
14 My role is involved over 36 years. Okay. Tell
15 me about that. Started out as a receptionist.
16 We really had no titles. Everyone needs -- does
17 what needs to be done, but I'm involved in
18 obtaining loans for the projects, working with
19 our attorneys to close these type of real estate
20 transactions or for loans, and I oversee the
21 day-to-day operations.

22 How about for the project administration
23 from the owner's standpoint on all of the hotels
24 that were done prior to Hotel Bennett? Who
25 performed all the owner's roles and whatever was

1 expected of the owner for those hotels? What I'm
2 getting at, was that all done in-house, or was
3 there ever a time for any of those hotels, where
4 you-all contracted out separately to have a
5 construction manager or somebody like that?

6 Answer, it was all done in-house. Okay.
7 And who specifically was responsibility for that?
8 Answer, myself and Peter Wright. And then, here
9 is the really big one, Your Honor, is, question,
10 you run the corporation basically for your
11 brother, don't you? Answer, yes, but I'm not an
12 officer of Library Associates.

13 So Kim Brown is certainly under the text
14 of that rule, a managing agent by her own
15 admissions of her brother. And it's clear from
16 the documents in this case that she was a
17 managing agent of the -- of Library Associates.
18 She is intimately involved with all of that
19 stuff.

20 I believe that under that rule, or in
21 discovery, her deposition would be appropriate
22 and admissible, and I believe it would also be
23 admissible, Your Honor, under the rule that I
24 read earlier about the admissions or statements
25 by a party opponent are not hearsay.

1 And the statement is offered by a person
2 authorized by the party to make a statement
3 concerning the subject. And Mr. Bennett has
4 testified in his deposition that he gave absolute
5 authority to Ms. Brown.

6 THE COURT: Okay. All right.

7 MR. MCDONALD: Your Honor, the
8 question here is whether you can read the
9 deposition or not. I will submit to you, it
10 is -- they took it over three days. It's 600
11 pages. The way they chopped it up. It is what
12 it is. Okay?

13 And in fact, I don't think there's any
14 way to do it, but to read the whole thing based
15 on the way that they chopped it up. I've got
16 some objections to exhibits.

17 But that's Rule 32. Okay? And the
18 first section that's quoted in the brief is, tell
19 me what your role has been with Bennett
20 hospitality. The last section is, I'm not an
21 officer of Library Associates.

22 This almost describes the role of --
23 that you could make any employee just read their
24 deposition, when they're sitting in the
25 courtroom, and that's what the rule seeks to

1 avoid. It seeks to have Your Honor, if there's
2 the ability to have live testimony, to have live
3 testimony.

4 She doesn't fit into any one of these
5 categories, which it would -- should be read
6 under Rule 32. And she was a 30(b)(6)
7 representative, and that -- they have that
8 deposition. They could have asked for all of
9 these questions on behalf of -- at the Rule
10 30(b)(6) deposition and read them into the
11 record. They have that absolute right.

12 What they have don't the absolute right
13 to do, is take her deposition personally, when
14 she's not a party to the case, ask these
15 questions and then take the position, well, she's
16 got the authority, we can now read her
17 deposition. That doesn't give us any notice that
18 that's potentially going to be read, and that's
19 what they did. They are absolutely entitled to
20 take her deposition personally. They can't read
21 it.

22 They are absolutely entitled to take the
23 30(b)(6) deposition if we can note who we're
24 going to note, and they can read that one.
25 That's just where they are. And they can call

1 her right to the stand right now and go through
2 all of this stuff and truncate 600 pages of
3 deposition testimony, and -- that the rule
4 doesn't allow for. Thank you very much, Your
5 Honor.

6 And just to be clear, the evidentiary
7 argument, I don't think has any relevance to
8 whether or not they can publish the deposition.

9 THE COURT: Let me ask you this
10 question. Let me cut to the chase. Any of the
11 testimony that you've put forth to put into
12 evidence in your case in chief, was it objected
13 to at the time of the deposition?

14 MR. HILDEBRAND: I don't believe
15 so.

16 THE COURT: All right. Well, then
17 I will allow it. Okay.

18 MR. HILDEBRAND: Thank you, Your
19 Honor.

20 THE COURT: On that basis. For the
21 record, I'll give you my ruling. Clearly, as a
22 30(b)(6) witness, you can put that testimony in.
23 But this is under Rule 32(a)(2).

24 This is the deposition of someone, under
25 the category of anyone, who at the time of the

1 taking of his deposition, was a managing agent of
2 the party, and the party being Library
3 Associates, which Ms. Brown testified that all
4 the work for the project administration was done
5 in-house by herself and Peter Wright.

6 So it's on that basis that I'm going to
7 grant that it may be submitted. I don't know how
8 much you got, but anyway.

9 MR. HILDEBRAND: It's about -- it's
10 nowhere near the whole thing. It's very limited
11 excerpts.

12 THE COURT: All right. Well, I
13 don't need to hear it right now. Okay?

14 MR. HILDEBRAND: All right.

15 THE COURT: Let's move on to the
16 next one.

17 MR. MCDONALD: And, Your Honor, and
18 as an additional -- two additional things. One,
19 just for the record, so I can make my record.
20 I'm not certain what objection I could have made
21 at the deposition. We're limited to objecting to
22 the form of the question. There would be no
23 way --

24 THE COURT: That's the objection
25 you get.

1 MR. MCDONALD: And we would have to
2 do that to every question on the -- under the
3 understanding that they might try to read it.

4 THE COURT: Was there an overriding
5 objection made at the outset of the deposition?

6 MR. MCDONALD: We wouldn't have
7 known at the time he was going to put -- try to
8 read an individual deposition in the case in
9 chief. Under the rules, deposition rules, all
10 objections, other than objection to the form of
11 the question are preserved until trial.

12 THE COURT: Right.

13 MR. MCDONALD: And that was, of
14 course, done to prevent all the speaking
15 objections and the arguing going on in the
16 deposition. So I want to put that on the record.
17 I don't know what objections could have been
18 made --

19 THE COURT: Okay.

20 MR. MCDONALD: -- at the time to
21 anticipate that this would be submitted
22 inconsistent with the rule.

23 THE COURT: All right. Well, I
24 think it is consistent with the rule, and to the
25 extent you made an objection contemporaneously

1 with the testimony, I will allow you to expand on
2 that here in the courtroom. But to the extent
3 you did not, you have waived the right to make
4 that objection. All right?

5 MR. MCDONALD: All right. And then
6 I have objections to certain exhibits that are
7 being offered in these three depositions.

8 THE COURT: All right. Any in
9 Ms. Brown's?

10 MR. MCDONALD: Yes.

11 THE COURT: Okay.

12 MR. MCDONALD: All right. The
13 first one --

14 THE COURT: Well, let's first see
15 if -- are they being submitted? Are the exhibits
16 being --

17 MR. HILDEBRAND: Yes, sir.

18 THE COURT: All right. As in some
19 of the ones we just talked about a minute ago?

20 MR. MCDONALD: Yeah. We're
21 withdrawing the other one. These ones are --
22 okay. The first one is Bennett Exhibit 4, which
23 purports to be a settlement agreement between
24 Hardee and Goff D'Antonio. It would be hearsay,
25 and that's completely irrelevant to this case.

1 MR. HILDEBRAND: Are we going back
2 to that? I thought we were going to do them one
3 at a time.

4 MR. MCDONALD: Well,
5 Mr. Hildebrand, what you've done is you've taken
6 exhibits from the Bennett deposition, Mike
7 Bennett deposition, used them in the Kim Brown
8 deposition, and then in your notice of excerpts
9 you're going to use, you identify as Exhibit
10 Bennett 4, which you have to go back to
11 Mr. Bennett's deposition to talk about that.

12 MR. HILDEBRAND: I just didn't know
13 which deposition you were --

14 MR. MCDONALD: Still on
15 Ms. Brown's.

16 THE COURT: Yeah. Let's stick to
17 that.

18 MR. MCDONALD: In Ms. Brown's
19 deposition, she was asked questions about an
20 exhibit from Mr. Bennett's deposition.

21 THE COURT: Okay.

22 MR. MCDONALD: He has identified it
23 as Exhibit Bennett 4 --

24 THE COURT: Okay.

25 MR. MCDONALD: -- in his excerpt

1 designation.

2 THE COURT: All right.

3 MR. MCDONALD: It is a settlement
4 agreement between Goff D' Antonio, the original
5 architect, which you just saw, stopped working
6 around 2009.

7 THE COURT: Right.

8 MR. MCDONALD: 12 years ago.

9 THE COURT: Okay.

10 MR. MCDONALD: Four years before
11 Balfour responds to a request for proposal, and I
12 think it's completely irrelevant. It's hearsay.
13 It is not subject to any exception.

14 THE COURT: Okay.

15 MR. HILDEBRAND: I will withdraw
16 that one, Your Honor.

17 THE COURT: All right. Very good.

18 MR. MCDONALD: The next one is
19 Exhibit 13. It's a pleading in this case.
20 Pleadings are not admissible.

21 THE COURT: I think pleadings are
22 part of the record; so I don't see a need to put
23 that in, in addition, no.

24 MR. HILDEBRAND: Okay.

25 MR. MCDONALD: Exhibit 14 is a

1 portion of the contract that's already in
2 evidence. It doesn't need to come in. Or a
3 portion of the portion of contract documents
4 that's already in evidence.

5 THE COURT: All right. From the,
6 what, the A133 or the 201 or what?

7 MR. MCDONALD: Yes. I think it is
8 from one of those. 133 or 201.

9 THE COURT: All right. Should be
10 in evidence already. Okay.

11 MR. MCDONALD: Page 113, lines 1
12 through page 114, there's a discussion about
13 something and then they list Exhibit -- Bennett
14 Exhibit 5, but there is no Exhibit 5 referenced
15 in that. So I would object to that.

16 THE COURT: Are you saying there is
17 no Exhibit 5 to Mr. Bennett's deposition?

18 MR. MCDONALD: There is an Exhibit
19 5 to Mr. Bennett's deposition, but it was not --
20 the section that they want to bring it in through
21 Ms. Brown's deposition, it doesn't talk about
22 Exhibit 5.

23 THE COURT: Okay. All right.

24 MR. HILDEBRAND: I will withdraw
25 that, too.

1 THE COURT: All right.

2 MR. BUNDY: You can't withdraw a
3 nonexisting exhibit.

4 THE COURT: It's incongruent.

5 MR. MCDONALD: All right. I
6 believe that does it for the objections as to the
7 exhibits on Ms. Brown's individual three days of
8 deposition testimony.

9 THE COURT: All right.
10 Notwithstanding the fact that she is here and she
11 is available to testify?

12 MR. MCDONALD: Yes, sir.

13 THE COURT: I got it. I got it.

14 MR. MCDONALD: But I want to be
15 clear about something because I don't want to get
16 in a mousetrap.

17 THE COURT: Okay.

18 MR. MCDONALD: I don't have to put
19 in any evidence in the plaintiff's case.

20 THE COURT: Not in their case.

21 MR. MCDONALD: Okay. So I can
22 still call Ms. Brown because she's on --

23 THE COURT: Absolutely.

24 MR. MCDONALD: Okay. I had a
25 situation in Georgia where we had a

1 misunderstanding.

2 THE COURT: Oh, no. You get your
3 own case.

4 MR. MCDONALD: Thank you, Your
5 Honor.

6 THE COURT: No doubt about that.
7 You get your own case. Now, I'm even going to
8 let Mr. Bundy make an opening statement. I'm
9 going to hold him to five or ten minutes.

10 MR. MCDONALD: I also have the
11 30(b)(6) testimony. I've got objections, and
12 then I've got just a couple of counter
13 designations.

14 THE COURT: All right. And that's
15 as to Ms. Brown as a 30(b)(6)?

16 MR. MCDONALD: Yeah, a 30(b)(6)
17 witness, yes.

18 THE COURT: Okay.

19 MR. MCDONALD: Okay. The first one
20 that's listed is an Exhibit 22, and what Exhibit
21 22 was, is Ms. Brown brought with her a copy of
22 their -- and I think we've already been through
23 this -- their 30(b)(6) notice that she had taken
24 notes on to be prepared to testify as a 30(b)(6)
25 witness. And that wouldn't be proper at -- to

1 admit into evidence in this matter. It's the
2 notice. It's the 30(b)(6) notice.

3 THE COURT: Notice of deposition.

4 MR. HILDEBRAND: I will withdraw
5 that one, Your Honor.

6 THE COURT: All right.

7 MR. MCDONALD: Exhibit 25, Your
8 Honor, is listed for page 205, line 20 through
9 page 206, line 15, and there is no Exhibit 25
10 referenced in there. Exhibit 25 in this
11 deposition is a change order log, and that
12 testimony is not referring to a change order log.

13 And if you're not going to take this
14 testimony now, I mean, I can point out -- I've
15 got a couple more things to point out. But they
16 might go back and just clarify this stuff. But I
17 got two more things to point out, and I got some
18 counter designations.

19 THE COURT: Okay. All right.

20 MR. MCDONALD: It might make it
21 easier.

22 THE COURT: Okay. Do y'all want to
23 do that? Because clearly that's as to
24 Mr. Bennett's deposition. Y'all need to spend
25 some time on that. There is no doubt about that.

1 MR. HILDEBRAND: Yeah. And I
2 think, Your Honor -- gosh, I think we could
3 resolve a lot of these.

4 THE COURT: Okay.

5 MR. HILDEBRAND: If we take a few
6 minutes to sit down and --

7 THE COURT: All right. I'm all for
8 it.

9 MR. MCDONALD: Your Honor indicated
10 that you probably aren't going to be listening to
11 this today; so I can jot my notes down.

12 THE COURT: Give you some time?

13 MR. MCDONALD: And tonight, e-mail
14 them to Mr. Hildebrand.

15 THE COURT: Okay.

16 MR. HILDEBRAND: I think we can
17 come to an agreement on it.

18 THE COURT: Okay. All right.
19 Let's do that.

20 MR. HILDEBRAND: Narrow it down to
21 save you on some time.

22 (A recess transpired.)

23 THE COURT: All right. Back to the
24 plaintiff's case. Mr. Hildebrand?

25 MR. HILDEBRAND: Thank you, Your

1 Honor. We would -- the plaintiff would call
2 Steve Huyghe.

3 THE COURT: Mr. Huyghe, come on
4 around, sir.

5 (STEVEN HUYGHE, having first been
6 duly sworn, testified as follows:)

7 THE COURT: Please pull up your
8 chair, have a seat, get comfortable. And, sir,
9 if you would, when you get a chance, give us your
10 full name and address for the record, please,
11 sir.

12 THE WITNESS: My name is Steven
13 Albert Huyghe, H-U-Y-G-H-E. I live at 980
14 Peachtree Battle Avenue in Atlanta, 30327.

15 THE COURT: Thank you, sir. Spell
16 that last name again, I'm sorry.

17 THE WITNESS: H-U-Y-G-H-E.

18 THE COURT: Okay. Got it. Thank
19 you, sir.

20 Mr. Hildebrand?

21 DIRECT EXAMINATION

22 BY MR. HILDEBRAND:

23 Q. Thank you, Mr. Huyghe. I appreciate you
24 being here today. Let's go through some of your
25 background, your educational background, and work

1 background to inform Judge Scarborough about why
2 you're here today and why you're prepared to
3 testify. So can you tell me where you went to
4 school?

5 A. If you'll show up a document that I
6 have, that would be helpful. I went to college
7 at Purdue University.

8 Q. What was your degree?

9 A. I graduated with two degrees. One in
10 civil engineering and one in construction
11 management.

12 Q. And when was that?

13 A. That was in the early '70s.

14 Q. All right. Second one today. All
15 right. And then, tell me what you did after
16 graduating with the engineering and construction
17 degrees.

18 A. Well, I actually began before college.
19 I started working for a large general contractor
20 in the late '60s, and I had to work my way
21 through school.

22 So I started working for a general
23 contractor, and I started as a draftsman,
24 engineer training, estimating. Then I started
25 learning on -- in the field. And I was a general

1 contractor for a little over 23 years before
2 becoming a partner.

3 Q. So you were a practicing general
4 contractor for 23 years?

5 A. Yes. I was a class A licensed general
6 contractor.

7 Q. Any particular states that you
8 concentrated on or tell me about that.

9 A. Basically I'm from Fulton, Indiana; so
10 my office was there or outside of there. So we
11 did a lot of work there, and then we had to go --
12 I started living in Florida. I did a lot of work
13 in Florida.

14 Q. Can you speak up a little bit, please,
15 sir?

16 A. A lot of work in Florida, also New
17 Jersey, New York, and various areas as a general
18 contractor. And then, during that timeframe, I
19 also joined forces with a real estate developer.

20 Q. Okay.

21 A. And for 8 to 10 years, I developed
22 property with them as well as I had a
23 construction entity that built our projects, but
24 we also built other projects as well.

25 Q. All right. So what sort of projects did

1 you -- or do you do want all of this later, what
2 sort of projects you built as a general
3 contractor?

4 A. Well, I think the slides speak to that.

5 Q. Okay. All right. So you were close to
6 22 years as a general contractor and partner in
7 real estate. So were you on the development side
8 as well?

9 A. Yes, yes. We developed -- as a partner,
10 developed the firm. I built the projects for us.

11 Q. Okay. Gotcha. All right. Now, the
12 next -- I think the fourth bullet down, close to
13 30 years provided project advisory and dispute
14 resolution services. What is that?

15 A. Yeah. In the late '80s, I was convinced
16 by an attorney in Atlanta called (inaudible)
17 Curry to get involved in the construction
18 dispute. I reluctantly wanted to do that, but I
19 had a partner who decided to take that on.

20 And the next thing I knew, I was in the
21 dispute resolution business as well. But not
22 only dispute resolution. We were -- and we still
23 do it to this day. I think that when you're
24 evaluating large construction matters, that you
25 stay involved in the actual construction process

1 because things change over time.

2 Q. Okay.

3 A. Construction evolves over time. The
4 types of things you use during construction
5 change. So I deal with plaintiffs even over the
6 last 30 years. I've also been involved in
7 ongoing construction projects to stay familiar
8 with all the trades and all the things that are
9 going on around us.

10 Q. So you're not just sitting in an ivory
11 tower, but somebody who talks the talk and still
12 walks the walk?

13 A. No. My father was a crane operator. My
14 passion is construction. Unless I get involved
15 in the business side, I've always loved
16 construction, and I've always tried to stay in
17 both elements, whether I'm evaluating a troubled
18 project or a dispute, or I am also assessing
19 ongoing construction projects as well as staying
20 up with the labor and productivity --

21 Q. Okay.

22 A. -- and the constructions that occurred
23 on the project.

24 Q. Okay. Tell me about Core International.
25 Is that the name of your company?

1 A. Yes.

2 Q. Tell the Judge what that is.

3 A. Core International is a firm that
4 specializes in dispute resolution and project
5 advisory services. I founded that firm in 2014
6 on the heels of coming back from Asia where I
7 spent four years doing the same type of work on
8 large international projects.

9 So I came back from Asia. My wife was
10 going to retire. So I started Core, and the next
11 thing I know, I'm busier than I intended on.
12 Core is a business that does project advisory and
13 dispute resolutions.

14 Q. All right. Now, your testimony
15 experience, can you tell the Judge about that,
16 where you've been admitted as an expert, what
17 sort of courts, what --

18 A. I've been admitted in State Courts,
19 Federal Courts, Board of Contract Appeals. I've
20 been in venues internationally in Paris, in the
21 London arbitration, LA, New Mexico City, and
22 international arbitrations in Guam, Panama, in
23 international arbitrations in New York and
24 international arbitrations. And so probably of
25 the 30 years, it's probably been -- 22 of it has

1 been testifying as an expert.

2 Q. Okay. Do you have any approximation of
3 how many times you've been qualified in some sort
4 of arbitrations or judicial proceedings as an
5 expert?

6 A. I haven't counted them. Many times.
7 Over 30, I guess, or more.

8 Q. Okay. And what is the last one down
9 there? It says member of Academy of Experts and
10 a member of Royal Institution of Chartered
11 Surveyors?

12 A. Yeah. When I traveled to Hong Kong and
13 UK and all, there is a group that you must belong
14 to, to qualify you to be an expert. And it's not
15 like you take a test. It's just that you have to
16 have a background, you know, to submit all your
17 projects you've worked on, your construction
18 projects, the projects you've evaluated.

19 And then you become a partner or a part
20 of the Academy of Excellence, which I belong to.
21 And then also to -- really, to help solidify your
22 experience, if you join the Royal Charter --
23 Royal Institution of Chartered Surveyors, that's
24 also highly recognized international agencies for
25 experts.