

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

RECEIVED

Nov 17 2025

SC Court of Appeals

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.

RECORD ON APPEAL - VOLUME 6 OF 51

James Lynn Werner (S.C. Bar No. 6029)
Katon E. Dawson, Jr. (S.C. Bar No. 101167)
1221 Main Street, Suite 1100
Columbia, SC 29201
(803) 255-8000
jimwerner@parkerpoe.com
katondawson@parkerpoe.com

Thomas C. Hildebrand, Jr. (S.C. Bar No. 2501)
Robert C. Byrd (S.C. Bar No. 1069)
850 Morrison Drive, Suite 400
Charleston, SC 29403
(843) 727- 2650
tomhildebrand@parkerpoe.com
bobbybyrd@parkerpoe.com

*Attorneys for Appellant Balfour Beatty
Construction, LLC*

Walter H. Bundy, Jr., Esquire
M. Brent McDonald, Esquire
Bundy McDonald, LLC
1516 Old Trolley Rd 2nd Floor
Summerville, SC 29485-8209
walter@bundymcdonald.com
brent@bundymcdonald.com

and

John P. Linton, Sr.
Mary Kathleen Linton
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
jlinton@duffyandyoung.com
mlinton@duffyandyoung.com

Attorneys for Library Associates, LLC

INDEX

Page(s)

Section 1 - Orders

Volume - 1

Order Granting Balfour Beatty Construction, LLC's Motion to Amend Complaint, filed October 2, 2019.....	R-001
Order to Consolidate C.A. No. 2019-CP-10-2868 and Refer to Charleston County Master-In-Equity, filed November 18, 2019.....	R-003
Order to Consolidate C.A. No. 2019-CP-10-2275 and Refer to the Charleston County Master-In Equity, filed November 18, 2019.....	R-003
Form 4 Order Granting Library Associates, LLC's Motion for an Affirmative Junction, filed March 17, 2020	R-007
Order Granting Library Associates, LLC's Motion to Enforce the Court Order, filed June 17, 2020.....	R-010
Order Granting Strong Tower Construction, LLC d/b/a Koch Corporation's Motion for Partial Summary Judgment, filed September 9, 2021	R-017
Order Granting Third-Party Defendant Warco Construction, Inc.'s Motion for Partial Summary Judgment, filed September 13, 2021	R-033
Order Granting Watson Electrical Construction Co., LLC's Motion for Partial Summary Judgment, filed September 13, 2021	R-043
Order Regarding Multiple Motions, filed October 26, 2021	R-053
Consent Order of Dismissal of all Claims by and between Library Associates, LLC and Low Country Case & Millwork, Inc., filed December 20, 2021.....	R-056
Consent Order of Dismissal With Prejudice as to all Claims between Library Associates, LLC and Warco Construction, Inc., filed December 20, 2021	R-059
Order of Dismissal as to Claims between Balfour Beatty Construction, LLC and Gulf Stream Construction Company, Inc., filed December 20, 2021	R-063
Consent Order of Dismissal With Prejudice as to Claims between Library Associates, LLC and Bernhard MCC, LLC, filed December 20, 2021	R-067
Order of Dismissal With Prejudice as to Claims between Pleasant Place, Inc. and Library Associates, LLC, filed December 20, 2021	R-071

Order of Dismissal as to Claims between Library Associates, LLC and David Allen Company, Inc., filed December 20, 2021.....	R-075
Order Dismissing Certain Claims of Premier Exteriors, LLC Against Balfour Beatty Construction, LLC and “Interested Party” Defendants Pursuant to SCRCP 41(a)(2), filed December 20, 2021	R-079
Form 4 Order Judgment Entered in Favor of Premier Exteriors, LLC Against Balfour Beatty Construction, LLC, filed December 22, 2021.....	R-083
Order Granting Premier Exteriors, LLC’s Motion for Summary Judgment Against Balfour Beatty Construction, LLC, filed December 22, 2021	R-086
Form 4 Order Amends the Form 4 Filed on December 22, 2021 to Address the Error that the Case is not Ended, filed December 29, 2021	R-099
Order of Dismissal as to Third Party Defendant Lithko Contracting, LLC’s Claims Against Library Associates, LLC, filed April 4, 2022	R-102
Oder of Dismissal as to Third Party Defendant Old North State Masonry, LLC’s Claims Against Library Associates, LLC, filed April 4, 2022	R-105
Order regarding Rule to Show Cause, filed November 28, 2022	R-108
Form 4 Order Judgment in Favor of Library Associates, LLC Against Balfour Beatty Construction, LLC, filed October 6, 2023.....	R-111
Trial Order, filed October 6, 2023	R-114
Form 4 Order Granting Summary Judgment to Low Country Case & Millwork, Inc., filed April 4, 2024.....	R-161
Form 4 Order Granting Summary Judgment to Premier Exteriors, LLC, filed April 4, 2024	R-166
Form 4 Order Granting Summary Judgment to Strong Tower Construction, LLC, filed April 4, 2024.....	R-171
Form 4 Order Denies Library Associates, LLC’s Motion to Alter or Amend and Make Additional Findings, filed April 4, 2024.....	R-176
Order Denying Balfour Beatty Construction, LLC’s Motion for Reconsideration of Order Granting Summary Judgment to Premier Exteriors, LLC and Certifying Judgment as Final Pursuant to Rule 54(b), S.C.R.C.P., filed April 4, 2024	R-179
Order Denying Balfour Beatty Construction, LLC’s Motion to Reconsider Grant of Summary Judgment in Favor of Strong Tower Construction, LLC and Order Granting Strong Tower’s Motion to Certify Judgment as Final, filed April 4, 2024	R-182

Order Denying Motion to Reconsider Grant of Summary Judgment in Favor of Low Country Case & Millwork, Inc. and Certification of Judgment as Final, filed April 4, 2024	R-185
Form 4 Order Judgment in Favor of Library Associates, LLC Against Balfour Beatty Construction, LLC for Attorneys’ Fees and Costs, filed April 12, 2024.....	R-188
Order Awarding Attorneys’ Fees and Costs, filed April 12, 2024	R-194
Order Awarding Punitive Damages, filed April 12, 2024	R-200
Order Denying Balfour Beatty Construction, LLC’s Motion for Reconsideration of Watson Electrical Construction, LLC’s Summary Judgment, filed April 12, 2024.....	R-212
Order Granting Motion for Reconsideration by Lithko Contracting, LLC, filed April 12, 2024	R-215
Order Granting Watson Electrical Construction, LLC’s Motion for Reconsideration, filed April 12, 2024	R-220
Order Amending Post Judgment Interest Amount, filed April 26, 2024	R-223
Order on Old North State Masonry, LLC’s Motion for Reconsideration, filed April 26, 2024	R-225
Order on Multiple Motions, filed April 29, 2024	R-228
Order Granting and Denying in Part Balfour Beatty Construction, LLC’s Motion to Alter or Amend the Order Awarding Punitive Damages and Election of Remedy, filed April 29, 2024.....	R-231
Form 4 Judgment Order in Favor of Library Associates, LLC Against Balfour Beatty Construction, LLC, filed May 6, 2024.....	R-234
Form 4 Order Denying Balfour Beatty Construction, LLC’s Motions to Alter or Amend, filed May 15, 2024	R-240
Order Granting Motion for Stay of Execution Pending Appeal and Establishing Amount of Bond, filed September 9, 2025	R-243
 <i>Section 2 - Pleadings</i>	
Summons and Complaint, C.A. No. 2019-CP-10-01108, filed March 5, 2019	R-247
Library Associates, LLC’s Answer to Plaintiff’s Complaint and Counterclaims, filed May 3, 2019	R-274
Amended Answer and Counterclaims of Library Associates, LLC and Third-Party Complaint, filed May 15, 2019	R-287

Amended Summons and Complaint, C.A. No. 2019-CP-10-01108, filed
October 3, 2019.....R-455

Answer and Counterclaims of Library Associates, LLC to Amended Complaint
of Balfour Beatty Construction, LLC and Third-Party Complaint, filed
October 17, 2019.....R-474

Volume - 2

Answer and Counterclaims of Library Associates, LLC to Amended Complaint of
Balfour Beatty Construction, LLC and Third-Party Complaint, filed October 17, 2019,
cont'd. R-501

Second Amended Summons and Complaint, C.A. No. 2019-CP-10-01108, filed
October 12, 2020.....R-509

Answer and Counterclaims of Library Associates, LLC to the Second Amended
Complaint of Balfour Beatty Construction, LLC and Third-Party Complaint,
filed October 20, 2020 R-537

Section 3 - Transcripts

Transcript of December 8, 2022 Hearing on Rule to Show Cause regarding
Trial Transcript R-614

Transcript of March 13, 2024 Hearing on Balfour Beatty Construction, LLC's
Motion to Alter/Amend Order Granting Judgment to Library Associates, LLC
and Library Associates, LLC's Petition for Attorneys' Fees and Costs R-638

Transcript of April 2, 2024 Hearing on Balfour Beatty Construction, LLC's
Motion to Require Library Associates, LLC to Elect a Remedy and Library
Associates, LLC's Petition for Attorneys' Fees and Costs R-881

Volume - 3

Transcript of April 2, 2024 Hearing on Balfour Beatty Construction, LLC's
Motion to Require Library Associates, LLC to Elect a Remedy and Library
Associates, LLC's Petition for Attorneys' Fees and Costs, cont'd. R-1001

September 13, 2021 (Day 1 of Trial)

Start of Trial.....R-1035

Tim Spano

Direct, Trial Transcript, Page 91.....R-1125

September 14, 2021 (Day 2)

Alec Dooley R-1320

Direct by Hildebrand, Page 303.....R-1337

Cross by McDonald, Page 356.....R-1390

Cross by Kelly, Page 443.....R-1477

September 15, 2021 (Day 3) R-1498

Volume - 4

September 15, 2021 (Day 3)

Tim Spano

Direct by Hildebrand, Page 468 R-1502

Cross by Bundy, Page 600 R-1634

Cross by Kelly, Page 603 R-1637

Mark Doran

Direct by Hildebrand, Page 675 R-1709

Direct by Hildebrand, Page 690 R-1724

Direct by Hildebrand, Page 715 R-1749

September 16, 2021 (Day 4)

James McAuliffe

Direct by Hildebrand, Page 835 R-1869

Direct by Hildebrand, Page 855 R-1889

Steven Huyghe

Direct by Hildebrand, Page 960 R-1994

Volume - 5

Direct by Hildebrand, Page 960, Cont'd R-2001

Direct by Hildebrand, Page 994 R-2028

September 17, 2021 (Day 5)

Nick Starcevic

Direct by Hildebrand, Page 1094 R-2128

Cross by Bundy, Page 1268 R-2302

September 20, 2021 (Day 6)

Nick Starcevic

Cross by Bundy, Page 1288 R-2322

Volume - 6

September 21, 2021 (Day 7)

Nick Starcevic

Cross by Bundy, Page 1619 R-2653

David Simonton

Direct by Hildebrand, Page 1786 R-2820

September 22, 2021 (Day 8)

David Simonton	
Direct by Hildebrand, Page 1899	R-2933

Volume - 7

Direct by Hildebrand, Page 1899, Cont'd.	R-3001
Cross by Bundy, Page 2047	R-3081

September 23, 2021 (Day 9)

David Simonton	
Cross by Bundy, Page 2167	R-3201
Redirect by Hildebrand, Page 2278	R-3312
Recross by Bundy, Page 2331	R-3365
Casey Thompson	
Direct by Hildebrand, Page 2364.....	R-3398
Cross by Bundy, Page 2439	R-3473

Volume - 8

Cross by Bundy, Page 2439, Cont'd.	R-3501
Redirect by Hildebrand, Page 2473	R-3507
Recross by Bundy, Page 2476	R-3510

September 24, 2021 (Day 10) R-3514

October 25, 2021 (Day 11)

Mark Boe	
Direct by Bundy, Page 2599	R-3633

October 26, 2021 (Day 12)

Mark Boe	
Direct by Bundy, Page 2793	R-3827
Cross by Hildebrand, Page 2872.....	R-3906
Cross by Hildebrand, Page 2907.....	R-3941
Cross by Terry, Page 2924.....	R-3958
Cross by Windle, Page 2927	R-3961
Redirect by Bundy, Page 2931.....	R-3965
Grady Query	
Direct by Bundy, Page 2939	R-3973

Volume - 9

Direct by Bundy, Page 2939, Cont'd.	R-4001

October 27, 2021 (Day 13)

Grady Query

Cross by Hildebrand, Page 3040.....	R-4077
Cross by Terry, Page 3081.....	R-4118
Redirect by Bundy, Page 3092.....	R-4129
Recross by Terry, Page 3100	R-4137

Jim Clements

Direct by Bundy, Page 3116	R-4153

October 28, 2021 (Day 14)

Jim Clements

Cross by Hildebrand, Page 3305.....	R-4342
Cross by Terry, Page 3425.....	R-4462
Redirect by Bundy, Page 3439.....	R-4476

Volume - 10

Redirect by Bundy, Page 3439, Cont'd.	R-4501
Recross by Hildebrand, Page 3480	R-4517
Redirect by Bundy, Page 3493.....	R-4530
Recross by Hildebrand, Page 3493	R-4530

Kim Bennett Brown

Direct by McDonald, Page 3531.....	R-4568

October 29, 2021 (Day 15)

Kim Bennett Brown

Direct by Mcdonald, Page 3587.....	R-4624

November 1, 2021 (Day 16)

Kim Bennett Brown

Direct by McDonald, Page 3693.....	R-4730
Cross by Hildebrand, Page 3835.....	R-4872
Cross by Windle, Page 3861	R-4898
Cross by Terry, Page 3868.....	R-4905
Cross by O'Kelley, Page 3870.....	R-4907
Redirect by McDonald, Page 3875	R-4912
Recross by Hildebrand, Page 3880	R-4917

November 2, 2021 (Day 17)

Sam Hadley

Direct by McDonald, Page 3887.....	R-4924

Volume - 11

Direct by McDonald, Page 3887, Cont'd.....R-5001

November 2, 2021 (Day 18)

Sam Hadley

Direct by McDonald, Page 4044.....R-5081

Cross by Hildebrand, Page 4138.....R-5175

Cross by Windle, Page 4181.....R-5218

Cross by Terry, Page 4189.....R-5226

Tim Spano

Redirect by Hildebrand, Page 4237 R-5274

Recross by Bundy, Page 4246 R-5283

November 4, 2021 (Day 19)

David Simonton

Redirect by Hildebrand, Page 4276 R-5313

Recross by Bundy, Page 4296 R-5333

Casey Thompson

Redirect by Hildebrand, Page 4326 R-5363

Recross by Bundy, Page 4380 R-5417

November 29, 2021 (Day 20)

Mark Doran

Redirect by Hildebrand, Page 4413 R-5450

Recross by Bundy, Page 4433 R-5470

Volume - 12

November 30, 2021 (Day 21) R-5558

December 2, 2021 (Day 22)

Jim Clements

Direct by Terry, Page 4574.....R-5611

Cross by Bundy, Page 4599.....R-5636

Redirect by Terry, Page 4610.....R-5647

Cross by Windle, Page 4614.....R-5651

Cross by Hildebrand, Page 4616.....R-5653

Recross by Bundy, Page 4618.....R-5655

Recross by Hildebrand, Page 4621.....R-5658

William Brittelli

Direct by Terry, Page 4630.....R-5667

Cross by Bundy, Page 4684.....R-5721

Redirect by Terry, Page 4754	R-5791
Joe Anastasi	
Direct by Terry, Page 4768	R-5805

December 3, 2021 (Day 23)

Joe Anastasi	
Direct by Windle, Page 4826	R-5863
Cross by Bundy, Page 4866	R-5903
Redirect by Windle, Page 4957	R-5994
Mike Rohrer	
Direct by Windle, Page 4959	R-5996

Volume - 13

Direct by Windle, Page 4959, Cont'd.	R-5996
Cross by Bundy, Page 5007	R-6044

Section 4 - Exhibits

Balfour Beatty Construction, LLC's Exhibit 3	R-6092
Balfour Beatty Construction, LLC's Exhibit 11	R-6105
Balfour Beatty Construction, LLC's Exhibit 12	R-6113

Volume - 14

Balfour Beatty Construction, LLC's Exhibit 12, Cont'd.	R-6501

Volume - 15

Balfour Beatty Construction, LLC's Exhibit 12, Cont'd.	R-7001
Balfour Beatty Construction, LLC's Exhibit 26	R-7089
Balfour Beatty Construction, LLC's Exhibit 27	R-7091
Balfour Beatty Construction, LLC's Exhibit 42	R-7162
Balfour Beatty Construction, LLC's Exhibit 46	R-7170
Balfour Beatty Construction, LLC's Exhibit 56	R-7191
Balfour Beatty Construction, LLC's Exhibit 72	R-7336
Balfour Beatty Construction, LLC's Exhibit 81	R-7338
Balfour Beatty Construction, LLC's Exhibit 83	R-7340
Balfour Beatty Construction, LLC's Exhibit 85	R-7342
Balfour Beatty Construction, LLC's Exhibit 111	R-7346
Balfour Beatty Construction, LLC's Exhibit 138	R-7349
Balfour Beatty Construction, LLC's Exhibit 141	R-7352
Balfour Beatty Construction, LLC's Exhibit 143	R-7354
Balfour Beatty Construction, LLC's Exhibit 150	R-7357
Balfour Beatty Construction, LLC's Exhibit 151	R-7363
Balfour Beatty Construction, LLC's Exhibit 154	R-7372

Balfour Beatty Construction, LLC's Exhibit 201	R-7383
Balfour Beatty Construction, LLC's Exhibit 202	R-7390
Balfour Beatty Construction, LLC's Exhibit 215	R-7393
Balfour Beatty Construction, LLC's Exhibit 226	R-7422

Volume - 16

Balfour Beatty Construction, LLC's Exhibit 226, Cont'd.	R-7501

Volume - 17

Balfour Beatty Construction, LLC's Exhibit 226, Cont'd.	R-8001

Volume - 18

Balfour Beatty Construction, LLC's Exhibit 226, Cont'd.	R-8501
Balfour Beatty Construction, LLC's Exhibit 231	R-9000

Volume - 19

Balfour Beatty Construction, LLC's Exhibit 231, Cont'd.	R-9001
Balfour Beatty Construction, LLC's Exhibit 255	R-9031
Balfour Beatty Construction, LLC's Exhibit 257	R-9033
Balfour Beatty Construction, LLC's Exhibit 258	R-9037
Balfour Beatty Construction, LLC's Exhibit 261	R-9039
Balfour Beatty Construction, LLC's Exhibit 263	R-9044
Balfour Beatty Construction, LLC's Exhibit 292	R-9048
Balfour Beatty Construction, LLC's Exhibit 300	R-9085
Balfour Beatty Construction, LLC's Exhibit 301	R-9148
Balfour Beatty Construction, LLC's Exhibit 303	R-9197
Balfour Beatty Construction, LLC's Exhibit 304	R-9217
Balfour Beatty Construction, LLC's Exhibit 305	R-9227
Balfour Beatty Construction, LLC's Exhibit 312	R-9350

Volume - 20

Balfour Beatty Construction, LLC's Exhibit 312, Cont'd.	R-9501
Balfour Beatty Construction, LLC's Exhibit 350	R-9554
Library Associates, LLC's Exhibits 1 - 4	R-9586

Volume - 21

Library Associates, LLC's Exhibits 4, Cont'd. - 7	R-10001

Volume - 22

Library Associates, LLC's Exhibit 7, Cont'd.	R-10501

Volume - 23

Library Associates, LLC's Exhibits 7, Cont'd. - 8 R-11001

Volume - 24

Library Associates, LLC's Exhibits 8, Cont'd. - 9 R-11501

Volume - 25

Library Associates, LLC's Exhibits 9, Cont'd. - 10 R-12001

Volume - 26

Library Associates, LLC's Exhibit 10, Cont'd. R-12501

Volume - 27

Library Associates, LLC's Exhibits 10, Cont'd. - 11 R-13001

Volume - 28

Library Associates, LLC's Exhibit 11, Cont'd. R-13501

Volume - 29

Library Associates, LLC's Exhibits 11, Cont'd. - 12 R-14001

Volume - 30

Library Associates, LLC's Exhibits 12, Cont'd. - 13 R-14501

Volume - 31

Library Associates, LLC's Exhibits 13, Cont'd. - 35 R-15001

Volume - 32

Library Associates, LLC's Exhibits 35, Cont'd. - 59 R-15501

Library Associates, LLC's Exhibits 63 - 71 R-15897

Volume - 33

Library Associates, LLC's Exhibits 71, Cont'd. - 80 R-16001

Library Associates, LLC's Exhibits 82, Cont'd. - 88 R-16130

Volume - 34

Library Associates, LLC's Exhibits 88, Cont'd. - 94 R-16501

Volume - 35

Library Associates, LLC's Exhibits 94, Cont'd. - 112 R-17001

Volume - 36

Library Associates, LLC's Exhibits 112, Cont'd. - 118 R-17501

Volume - 37

Library Associates, LLC's Exhibits 118, Cont'd. - 122 R-18001

Volume - 38

Library Associates, LLC's Exhibits 122, Cont'd. - 125 R-18501

Volume - 39

Library Associates, LLC's Exhibits 125, Cont'd. - 127 R-19001

Volume - 40

Library Associates, LLC's Exhibits 127, Cont'd. - 129 R-19501

Volume - 41

Library Associates, LLC's Exhibits 129, Cont'd. - 130 R-20001

Volume - 42

Library Associates, LLC's Exhibits 130, Cont'd. - 132 R-20501

Volume - 43

Library Associates, LLC's Exhibits 132, Cont'd. - 134 R-21001

Volume - 44

Library Associates, LLC's Exhibits 134, Cont'd. - 136 R-21501

Volume - 45

Library Associates, LLC's Exhibits 136, Cont'd. - 139 R-22001

Volume - 46

Library Associates, LLC's Exhibits 139, Cont'd. - 140 R-22501

Volume - 47

Library Associates, LLC's Exhibits 140, Cont'd. - 143 R-23001

Volume - 48

Library Associates, LLC's Exhibits 143, Cont'd. - 163 R-23501

Section 5 - Other Documents

Balfour Beatty Construction, LLC's Notice and Certificate of
Mechanic's Lien, filed January 25, 2019 R-23699

Balfour Beatty Construction, LLC's Notice and Certificate of
Amended Mechanic's Lien, filed July 23, 2019 R-23705

Proposed Trial Order submitted by Balfour Beatty Construction,
LLC, filed May 23, 2023 R-23712

Proposed Trial Order submitted by Library Associates, LLC,
filed May 23, 2023 R-23857

Balfour Beatty Construction, LLC's Motion to Alter/Amend
Order Granting Judgment to Library Associates, LLC, filed
October 16, 2023 R-23905

Volume - 49

Balfour Beatty Construction, LLC's Motion to Alter/Amend
Order Granting Judgment to Library Associates, LLC, filed
October 16, 2023, Cont'd. R-24001

Balfour Beatty Construction, LLC's Motion to Require Library
Associates, LLC to Elect a Remedy, filed October 16, 2023 R-24075

Library Associates, LLC's Petition for Attorneys' Fees and
Costs, filed November 6, 2023.....R-24077

Balfour Beatty Construction, LLC's Memorandum in Opposition
to Defendant Library Associates, LLC's Petition for Attorneys'
Fees and Costs, filed March 7, 2024 R-24086

Balfour Beatty Construction, LLC's Memorandum in Support of
its Motion to Require Library Associates, LLC to Elect a Remedy,
filed March 7, 2024 R-24116

Balfour Beatty Construction, LLC's Memorandum in Support of
Motion to Alter/Amend the Order Granting Judgment to Library
Associates, LLC, filed March 7, 2024 R-24119

Library Associates, LLC's Memorandum in Support of its Petition
for Attorneys' Fees and Costs and Pursuant to the Declaratory
Judgment Act, Additional Interest Payments, Past and Future, as
Direct Costs Incurred and for Prejudgment Interest as Provided by

Law; and in Support of Pending Rule 52(B) and 59(E) Motions to Alter or Amend and Make Additional Findings, filed March 7, 2024.....	R-24162
Balfour Beatty Construction, LLC’s Amended Motion to Require Library Associates, LLC to Elect a Remedy, filed March 8, 2024.....	R-24183
Balfour Beatty Construction, LLC Memorandum in Response to Library Associates, LLC’s Memorandum in Support of its Petition for Attorneys’ Fees and Costs and Pursuant to the Declaratory Judgment Act, Additional Interest Payments, Past and Future, as Direct Costs Incurred and for Prejudgment Interest as Provided by Law; and in Support of Pending Rule 52(B) and 59(E) Motions to Alter or Amend and Make Additional Findings, filed March 11, 2024.....	R-24185
Balfour Beatty Construction, LLC’s Motion to Strike Affidavit of Marvin D. Infinger, filed March 11, 2024	R-24198
Library Associates, LLC’s Reply to Balfour Beatty Construction, LLC’s Memorandum in Opposition to its Petition for Attorneys’ Fees and Costs, filed March 11, 2024.....	R-24204
Revised Affidavit of Marvin D. Infinger, filed March 11, 2024	R-24210
Affidavit of Franklin E. Worrell, filed March 28, 2024	R-24223
Balfour Beatty Construction, LLC’s Motion in Limine Regarding Hearing on Punitive Damages, filed April 1, 2024.....	R-24230
Library Associates, LLC’s Filing of March 13, 2024 Hearing Exhibits, filed April 10, 2024.....	R-24237

Volume - 50

Library Associates, LLC’s Filing of March 13, 2024 Hearing Exhibits, filed April 10, 2024, Cont’d.....	R-24501

Volume - 51

Library Associates, LLC’s Filing of March 13, 2024 Hearing Exhibits, filed April 10, 2024, Cont’d.....	R-25001
Library Associates, LLC’s Supplemental Petition for Attorneys’ Fees and Costs; and in Addition Other Relief Pursuant to Declaratory Judgment Cause of Action, filed April 10, 2024.....	R-25270
Supplemental Affidavit of Kimberly Bennett Brown, filed April 10, 2024	R-25272
Balfour Beatty Construction, LLC’s Motion to Alter or Amend the Order Awarding Punitive Damages and Election of Remedy Pursuant to Rule 59(E), filed April 22, 2024	R-25308

Library Associates, LLC’s Notice of Election of Remedy, filed May 2, 2024	R-25311
Balfour Beatty Construction, LLC’s Motion to Alter or Amend Pursuant to Rule 59(E), filed May 9, 2024	R-25314
Video Deposition Testimony of George Michael Baumbach, 13:5-14:10 (Timestamp 7:28-8:23); 14:24-15:11 (Timestamp 10:00-10:30); 42:12-45:23 (Timestamp 47:40-52:05); 46:22-47:15 (Timestamp 53:27-54:22) (Placeholder for video file being submitted via Court of Appeal’s OneDrive)	R-25320

1 Q. Okay. And Balfour Beatty had in-house
2 counsel to review this contract before it was
3 signed?

4 A. Yes.

5 Q. And it was negotiated; is that correct?

6 A. My -- it was before I was on the
7 project, but my assumption is, yes.

8 Q. All right. Let's go to 249, Exhibit 12.
9 This is a ballroom wall change, \$4,838.77. Do
10 you know whether or not Balfour Beatty has paid
11 Premier Exteriors?

12 A. On this one specifically, no.

13 Q. All right. And if they hadn't paid it,
14 they're not entitled to the 290.32 in markup, are
15 they?

16 A. Again, the work was performed. Are we
17 entitled to fee and overhead from that? I'm not
18 sure.

19 Q. All right. Number 250, has this amount
20 been paid to First Choice Glass?

21 A. I don't know.

22 Q. Okay. Number 251. Do you have any
23 explanation as to why this letter by Dooley is
24 not signed?

25 A. No, sir.

1 Q. He left the job, what, about three days
2 after this? He left, I believe, on Labor Day of
3 this year; is that correct?

4 A. I do not know that. I do not believe
5 that's true, though.

6 Q. Do you know who prepared this letter?
7 Do you think Mr. Dooley actually prepared this
8 letter?

9 A. The contents of it?

10 Q. Yeah.

11 A. He likely prepared it.

12 Q. Okay. Number 253, Exhibit 12. Add
13 crown and rotunda, right?

14 A. Right.

15 Q. And that would be a Low Country Case and
16 Millwork claim?

17 A. Request for change order, yes.

18 Q. And this request for change order came
19 from Balfour Beatty?

20 A. We submitted it.

21 Q. All right. So this is a change order
22 initiated by Balfour Beatty because they were
23 being called upon to do what they consider to be
24 extra work -- or their subcontractor was?

25 A. Yes.

1 Q. Isn't it true that the interior design's
2 disposition was, that had always been in the
3 plans?

4 A. I believe the interior designer --

5 Q. That they believed that Low Country
6 missed this work in their estimate, and it was
7 always part of their work?

8 A. I believe the interior designer had said
9 that it could be interpreted that that was in the
10 plans.

11 Q. Okay. Could be interpreted?

12 A. Yes.

13 Q. Now, are you aware of the provisions in
14 this contract, which say that, if there's any
15 discrepancy or dispute, that the contractor is
16 assumed to have bid the most expensive and the
17 highest quality -- I mean, and the most quality.
18 Are you familiar with that provision?

19 A. If there's two things shown, we're
20 expected to have one or -- to have the higher end
21 of the two.

22 Q. Exactly. So the owner knows, if there's
23 any problems, y'all have bid -- he's told you to
24 bid the higher, more expensive, higher quantity
25 because that's just what you agreed to do, right?

1 A. That's right.

2 Q. Okay.

3 A. We're not talking specifically with this
4 change order, but, yes, generally, you're
5 correct.

6 Q. And that same provision is not only in
7 the general conditions, it's in your subcontract
8 with the general contractor, is it not?

9 A. Sure, yeah.

10 Q. And y'all passed this claim along to us.
11 Has it been paid?

12 A. I do not believe it has.

13 Q. Okay. And did Balfour Beatty look into
14 this to make a determination as to whether or not
15 Low Country was entitled to this additional work
16 because, in fact, they had missed the work?

17 A. That's not -- that's not what we -- we
18 did not believe that Low Country missed the work.
19 We believed they were owed it.

20 Q. You believe they were entitled to it?

21 A. Yes, sir.

22 Q. Okay. But if the architect or the Judge
23 ultimately decides that they're not -- that
24 you're not entitled to it, then clearly, under
25 your subcontract, Low Country is not going to be

1 entitled to it, right? They're going to -- it's
2 going to be sauce for the goose; sauce for the
3 gander, right?

4 A. I don't disagree with that. You would
5 have to look at how the provisions of the
6 contracts are worded.

7 Q. All right. Let's go to 255. Well,
8 let's go back to 254, I'm sorry. Are you with
9 me? 43,000 bucks. Explain this to me.

10 A. Is this the one we withdrew yesterday?

11 Q. Sir?

12 A. This is the one we withdrew yesterday?

13 Q. Oh, you withdrew it?

14 A. That's what I remember.

15 Q. And I've forgotten, why did you withdraw
16 it?

17 A. I don't believe this work was performed.

18 Q. All right. Well, there was a decorative
19 screen allowance, wasn't there?

20 A. Yes, sir.

21 Q. \$50,000?

22 A. Yes, sir.

23 Q. Did you give us our credit for the
24 50,000 bucks?

25 A. Yesterday?

1 Q. Yeah.

2 A. It's shown on this change order.

3 Q. Okay. Gotcha. But I thought you were
4 withdrawing the whole change order?

5 A. Again, this is the change order that we
6 submitted --

7 Q. That's you're withdrawing?

8 A. I can't speak to what we did yesterday.
9 I didn't make that decision.

10 Q. Gotcha.

11 A. This was the change order on August
12 21st, 2019. It had the credit in it.

13 Q. Okay. Let's go to the next one, the
14 255, trim for pocket doors. Has Low Country
15 Millwork been paid that number, 11,000 bucks?

16 A. I don't believe so, but I'm not a
17 hundred percent sure.

18 Q. Did you ever hear anyone say that this
19 header was not a result of any design change; it
20 just had to hide poor workmanship, that the
21 header was necessary to hide poor workmanship in
22 the installation of the pocket doors?

23 A. No one ever told us that.

24 Q. Pardon me?

25 A. No one ever told us that from the --

1 Q. Okay. Do you have an opinion as to
2 whether or not the header was required because of
3 poor workmanship?

4 A. The header? The added trim? It's for
5 the added trim around the header.

6 Q. Yeah, the added trim.

7 A. No. I have an opinion that this was
8 added because it wasn't shown on the design
9 drawings.

10 Q. Pardon me?

11 A. Mr. Bennett asked us to add this to
12 conceal the pocket doors headers.

13 Q. Right.

14 A. It wasn't show on the drawings; so we
15 didn't install it originally.

16 Q. Right.

17 A. He asked us to do it so we did it.

18 Q. Right. But if you did it and did it
19 poorly, and as a result of doing it poorly,
20 incurred additional costs, does he also owe the
21 additional work to get it correct?

22 A. No one said we did it poorly.

23 Q. Okay. You're not aware of anybody
24 saying that?

25 A. No, I don't -- I mean, they never told

1 me it was installed poorly.

2 Q. All right, sir. Let's look at number
3 258. Now, this letter from you is dated March
4 28, 2019, right?

5 A. Yes, sir.

6 Q. All right. What are the dates of the
7 backup from these subs for this work? Because
8 this letter is dated March 28, 2019, and that's
9 three months after the job was over, right?
10 Correct?

11 A. Three months after the substantial
12 completion.

13 Q. Substantial completion. You get a
14 letter wanting this extra money. Now, by this
15 time, you were no longer spending 50 percent of
16 your time between your other jobs and working on
17 the claim, right? Or were you still working on
18 the claim?

19 A. We were still working on the claim.

20 Q. Right. And this was part of the work
21 you were doing on the claim. You were going back
22 through the entire job and gathering up all the
23 information you could find about making claims
24 for additional money and time, right?

25 A. I was going back and gathering

1 information on the work that had not been paid
2 and that was owed, cost of the work.

3 Q. Right. And this work that had not been
4 paid, according to the backup, occurred during
5 what time period?

6 A. July of 17.

7 Q. What year?

8 A. July of 17, 2017.

9 Q. Okay.

10 A. August of 2018; so about five months
11 prior to this being submitted. March 28, 2019.

12 Q. All right, sir?

13 A. July 2nd of 2019; so over a year-plus
14 period of time.

15 Q. All right. Let's look at number RCO
16 259. This work was required by the Department of
17 Transportation, right?

18 A. Yes, sir.

19 Q. And it was a requirement of the street
20 closing permit that was obtained by Balfour
21 Beatty to use part of the street as a lay down
22 yard, right?

23 A. The mill and overlay was. This was an
24 existing faulty box in the storm box. This
25 wasn't because of the street closer.

1 Q. Okay. Who made you fix it?

2 A. The City.

3 Q. Okay. And did Balfour Beatty -- I mean,
4 did Library Associates make you fix it?

5 A. I believe they did as well. I mean,
6 I -- you know, we did it. We fixed it.

7 Q. Well, I understand you fixed it.

8 A. The City made us fix it.

9 Q. I understand you fixed it, but you want
10 us to pay for it, right?

11 A. That's right.

12 Q. Okay.

13 A. I don't want the City to pay for it.

14 Q. Pardon me?

15 A. The City is not going to pay for it.

16 Q. No, and neither are we. Okay? You got
17 a permit from the City of Charleston to build a
18 hotel?

19 A. That's right.

20 Q. In the name of Balfour Beatty?

21 A. That's right.

22 Q. And y'all engaged the City to use their
23 streets to make -- to build a construction. As
24 part of that agreement, you had to put it back
25 into -- put it back into repair, correct?

1 A. This is an underlying condition that we
2 didn't know anything about; we couldn't know
3 anything about.

4 Q. And that's an underlying condition and
5 dispute that you have with the City of Charleston
6 because the -- Library Associates never made you
7 do anything?

8 A. I believe this is a requirement.

9 Q. Pardon me?

10 A. This is a requirement. Somebody has to
11 pay us for the work.

12 Q. Well, and between Library Associates and
13 the contractor, who is supposed to meet the
14 requirements for building the building and
15 getting the permits and complying with the
16 permits?

17 A. This wasn't on the drawings. This -- I
18 don't understand how we would have known to do
19 this. It's an underlying condition. The owner
20 got the benefit.

21 Q. You apparently know a good bit about
22 construction. Do you know what an unforeseen
23 subsurface condition is? Type one, type two and
24 type three?

25 A. I don't know the difference between the

1 three.

2 Q. Of course you don't. Okay. Let's go to
3 number 260. Added wall covering. Now, this is
4 Quantum. Do you know whether this has been paid?

5 A. No, sir.

6 Q. The invoice refers to Merit Professional
7 Coating, right?

8 A. Yes.

9 Q. All right. Now, Merit was a predecessor
10 to Quantum; is that correct, or do you know?

11 A. Same company.

12 Q. Pardon me?

13 A. Same group. Quantum -- the owner of the
14 local Merit franchise bought it and named it
15 Quantum. So it's the same company.

16 Q. Different legal entity?

17 A. That's correct.

18 Q. Okay. Thank you. Do you know when that
19 took place, the change?

20 A. When the change? I don't remember.

21 Q. Well, if it took place before the date
22 of this backup, which is November of 2018, do you
23 have an explanation as to why we have something
24 on Merit Professional Coating?

25 A. No. If that's what's there, I don't

1 know why it's titled Merit.

2 Q. Let's go to 261, accordion door
3 reconciliation. This is out, right? Y'all have
4 removed this one, right?

5 A. I believe so.

6 Q. All right. He hasn't taken the oath.
7 Okay? So you don't get to nod to the lawyer over
8 here about your testimony. You look at me or the
9 Judge. Okay?

10 A. Okay. I thought you were asking it to
11 the Court, sorry.

12 Q. 261 is out. Do you have any problem at
13 all with testifying to a document and asking for
14 \$71,000 in open court and you have no idea
15 whether it's due or not? Does that bother you at
16 all?

17 A. Pardon?

18 Q. Does it bother you at all that you came
19 in here on Friday and testified my client owed
20 Balfour Beatty \$71,000 and had to withdraw it?

21 A. I don't believe I -- I don't believe I
22 testified on Friday that your client owed Balfour
23 Beatty \$70,000. I believe we agreed that the
24 work wasn't performed.

25 Q. Let me ask it to you this way. We've

1 gone through about half of this. Do you believe
2 this Exhibit 12 fairly represents what Balfour
3 Beatty is due, based upon taking hundreds of
4 thousands of dollars out of the claim just on
5 cross-examination and direct examination? Do you
6 think it's a fair representation, or is it full
7 of errors and mistakes?

8 A. I believe there are errors and mistakes.
9 I don't believe there -- I believe that the
10 majority of this is a good representation.

11 Q. The majority. Okay. Let's say it's 8
12 million dollars. If it's 6, is that close enough
13 for you?

14 A. That's not my call to make.

15 Q. Okay. Well, where in the contract does
16 it say that y'all can just simply come in and
17 make a claim and all you have to do is sort of
18 get the majority of it right? Don't you have to
19 get it all right?

20 A. Pardon?

21 Q. Don't you have to get your claims and
22 your numbers and your costs and your accounting
23 all right? The contract doesn't say you have to
24 get most of it right. You have to get it all
25 right, don't you?

1 A. I believe that. I believe the mistakes
2 are made as well.

3 Q. All right. TV wall revision number 262,
4 \$15,000. Do you know whether P Wall has been
5 paid 64?

6 A. I do not.

7 Q. All right. Let's go to -- that was 262.
8 This is 264. All right. Let's look at this one,
9 Pasco. Have they been paid the 79?

10 A. I don't believe they have.

11 Q. How about P Wall, the \$3,024?

12 A. Again, as I sit here today, I don't
13 believe they have, but I don't know.

14 Q. Okay. And as we said before, those
15 haven't been paid and they're not cost of the
16 work. The BBC markup goes down at least to that
17 extent, correct?

18 A. That's not what I said before; so I'm
19 not sure how the contract works, if we're owed a
20 fee on work that took place and overhead on work
21 that took place.

22 Q. Okay.

23 A. Just because the owner, if they did,
24 selected to pay a contractor direct, I don't know
25 if we're still owed overhead and fee on that

1 work. If we managed the work, if we ensured it
2 was performed, I don't know if we're owed a fee
3 or overhead. Just because the owner likely
4 didn't pay them directly, if they did. I don't
5 know if that's the case.

6 Q. 266, additional framing. You don't know
7 whether they paid P Wall, right?

8 A. No, sir.

9 Q. Let's look at the next one, which is
10 267, September 7, 2018. It's a letter from
11 Dooley, not signed; is that correct?

12 A. Yes.

13 Q. And is it true that the backup is 14
14 months prior to the date of the letter requesting
15 the change order?

16 A. This backup is --

17 Q. Pardon me?

18 A. This backup is -- it says, Tuesday,
19 August 14. This letter says, August 14 of 2018;
20 this letter says, September 7th, 2018.

21 Q. So what would it be?

22 A. There was another change. There's -- so
23 there's an initial change order request of June
24 14, 2017. There was a follow-up e-mail from
25 August 14, 2018.

1 Q. All right.

2 A. So, again, about three weeks of delta
3 between the letter -- between both of the e-mails
4 from Alec.

5 Q. All right. Exhibit 270.

6 A. 268 or 270?

7 Q. All right. Do you know whether the
8 \$47,000 has been paid to P Wall?

9 A. No, I don't. I believe it has, but I'm
10 not sure.

11 Q. And this work was in March, but the lien
12 and the complaint had already been filed, right?
13 Is that correct?

14 A. We would have to check the dates. If it
15 was prior to that, then yes.

16 Q. All right. Let's go back to 268 a
17 minute, I'm sorry.

18 A. Uh-huh.

19 Q. This was metal work at Camilla's Bar?

20 A. Yes.

21 Q. And under subs you've got SEAS, S-E-A-S.
22 Who is that?

23 A. I'm sorry, SEAS?

24 Q. Yes, sir.

25 A. Southeastern Architectural Systems.

1 Q. And what are they allegedly due, \$37,894
2 for?

3 A. For MT03, metal 03 and metal 04.

4 Q. And do you know if this work was
5 actually done?

6 A. Yes, sir, it was.

7 Q. Okay. Do you know if it was paid?

8 A. I do not.

9 Q. All right. 270, 271. Is that
10 including -- you don't know whether that was paid
11 either, do you?

12 A. No, sir.

13 Q. Okay. Let's go to 272, \$19,286.37. Was
14 this done?

15 A. Yes, sir.

16 Q. Was it paid?

17 A. I'm not sure. It's happened since I
18 left Balfour Beatty.

19 Q. David Allen tile charges, 273, \$111,000?

20 A. Yes, sir.

21 Q. This change order log starts -- or the
22 change order request log starts in 2016; is that
23 right?

24 A. Yes.

25 Q. And that was from the subcontractor to

1 the general contractor, right?

2 A. I believe so.

3 Q. Sir?

4 A. I believe so.

5 Q. Okay. So there was no notice given
6 to -- or at least this doesn't signify -- this
7 document would not have given Library Associates
8 notice of this work unless it had been forwarded
9 on to Library Associates; is that correct?

10 A. This document?

11 Q. Yes.

12 A. Correct. Unless this was forwarded onto
13 to Library Associates.

14 Q. Yes. When?

15 A. I don't know.

16 Q. Okay. Is it more likely than not, the
17 first time Library Associates saw this document
18 that had been transmitted to Balfour Beatty in
19 April of 2016, was, in fact, when it accompanied
20 this letter of -- what is the date? Is there a
21 date on this thing?

22 A. I don't see one.

23 Q. Okay. So who wrote this?

24 A. I did.

25 Q. You wrote it, right?

1 THE COURT: Who is it addressed to?

2 MR. BUNDY: It's addressed to --

3 THE WITNESS: Myself.

4 MR. BUNDY: He sent it to himself.

5 BY MR. BUNDY:

6 Q. Are you going to pay it? Because I will
7 be glad to let you pay it if you'd like.

8 A. I'm not going to pay it.

9 Q. Okay. Well, why did you send it to
10 yourself if you weren't going to pay it?

11 A. This is a mistake.

12 Q. Okay. Well, it's not -- okay. Do you
13 know it was sent?

14 A. Pardon?

15 Q. Do you know if it was even sent?

16 A. I believe. I would have to check
17 outgoing e-mails, and this may be a -- I may have
18 fixed it and sent the correct one. I'm not sure.

19 Q. You may have, yeah.

20 A. That's right.

21 Q. You may have. Do you really believe
22 that you may have sent an undated letter to
23 yourself?

24 A. Pardon? To myself?

25 Q. Do you really believe that you sent an

1 undated, unsigned letter to yourself?

2 A. No.

3 Q. Okay. Where is the one that you sent?

4 A. It's not in this -- it's not in this
5 tab.

6 Q. Wouldn't it make more sense, if you were
7 going to ask someone to pay \$111,000 in open
8 court, that you would at least have brought a
9 signed cover letter in that showed the letter was
10 delivered and not this ridiculous thing?

11 A. You're calling it ridiculous. I believe
12 it would make more sense if it was signed and
13 addressed to the right person.

14 Q. Yes, it would. Would it make more
15 sense?

16 A. It would make more sense.

17 Q. Okay.

18 A. I do believe this is cost of the work
19 that added to -- the owner got the benefit of,
20 and they should pay for it. I do believe that.

21 Q. Are unsigned, undated letters to
22 yourself kept in the ordinary and normal course
23 of Balfour Beatty's business?

24 A. No.

25 Q. Is this how y'all do business?

1 A. No.

2 Q. Is this an accurate record?

3 A. Pardon?

4 Q. Is this letter an accurate record?

5 A. This is not an accurate record.

6 MR. BUNDY: Okay. Your Honor, I
7 move to strike that. I mean, you know, we were
8 told on direct that all of these things were part
9 of the business records. I mean, we're getting
10 to a point now where I think there's an apparent
11 unreliability to all of this, and I would ask the
12 Judge to consider that you when you look at these
13 documents.

14 THE COURT: Mr. Hildebrand, do you
15 want to be heard?

16 MR. HILDEBRAND: Your Honor, that
17 might go to the weight of it; however, this
18 witness has testified that this was provided, and
19 in his view, his recollection, by the time he
20 left, it had not been paid for.

21 So I think he described it, but I could
22 certainly try to find the -- and I apologize. In
23 getting all of these documents together, I would
24 be shocked if there wasn't a couple in this one.
25 I apologize. I will see if I can get it

1 straightened out and get the e-mail that sent
2 this. And we can go from there.

3 THE COURT: That may be helpful
4 because it is in evidence, but it certainly is
5 questionable based on its origin from and to
6 whom, I would agree with that.

7 MR. BUNDY: Could I get a ruling,
8 Your Honor, that when his case -- when he closes
9 his case and says, I'm done, that he's done and
10 doesn't continue to get to send evidence in; and
11 we're not going to come in and try to fix things
12 and all of that? At some point, we've got to get
13 done with this case.

14 THE COURT: That's usually the way
15 it works.

16 MR. BUNDY: This is not discovery.
17 This is a trial.

18 THE COURT: I'm sure Mr. Hildebrand
19 agrees with that.

20 MR. HILDEBRAND: Well, Your Honor,
21 I agree that we try to put in the evidence as
22 best we can. But I also know that when the
23 defense puts up evidence, they may call somebody
24 and question something that we hadn't seen. And
25 there is some explanation that might be necessary

1 on redirect, and that's why you have redirect.

2 And I don't think Mr. Bundy can say
3 that -- change the rules of trials and evidence
4 about redirect. So I absolutely don't agree that
5 we are prohibited from responding to whatever
6 defenses he might put up there.

7 THE COURT: All right. I'm with
8 you. I'm with you. That's a whole different
9 process. But we're still in the plaintiff's case
10 and they have not yet rested; so they can
11 supplement it.

12 MR. BUNDY: I just wanted to make
13 sure that's the way it was going to go.

14 THE COURT: I hope so.

15 BY MR. BUNDY:

16 Q. All right. Let's go to 274. All right.
17 This is another undated letter that you wrote to
18 yourself?

19 A. That's what is shown here.

20 Q. Yes. 174 -- or excuse me, 274 in
21 Exhibit 12.

22 A. That's what we're looking at.

23 Q. We're looking at an undated letter you
24 wrote to yourself?

25 A. This is an undated letter addressed to

1 myself.

2 Q. Okay. Did you get it?

3 A. Pardon?

4 Q. Did you get it? Did you receive it?

5 A. Do you want to check the record?

6 Q. Sure. Did you get it?

7 A. Did I get the letter I sent to myself?

8 Q. Yeah.

9 A. I got the letter right here.

10 Q. All right. So where is the backup for
11 this \$30,537?

12 A. It's the last page of the attachment.
13 There should be work tickets accompanying it,
14 daily work tickets.

15 Q. And this occurred -- now, you were --
16 this would have been the period of time after the
17 job was substantially complete when you were
18 spending 50 percent of your time still working on
19 the paperwork at this job and working on other
20 jobs at Balfour Beatty, correct?

21 A. Yeah. This is when the owner was still
22 issuing a punch list after we completed the
23 architect's punch list.

24 Q. Okay. All right.

25 A. And this is our third punch list. We

1 talked about it Friday, that they had their
2 operator go through it after we had satisfied
3 those two punch lists.

4 Q. Do you know whether Quantum Coatings has
5 been paid this amount?

6 A. No, sir.

7 Q. All right. Let's just look at this.
8 This is just a summary of work, right?

9 A. Yes.

10 Q. There's no backup? There's no daily
11 reports here or nothing?

12 A. They're not in here. There's signed
13 work tickets for this work, but they're not --

14 Q. They're not in the claim, though?

15 A. They're not in this exhibit, no.

16 Q. And the best evidence of what happened
17 on a particular day would be the work orders on
18 that day, right?

19 A. The signed work tickets?

20 Q. Yes, yes. The best evidence of what
21 occurred are the signed work tickets, not a
22 compilation of documents we don't have in front
23 of us?

24 A. That's correct.

25 Q. Okay. And it wouldn't be fair not to

1 allow someone you were asking to pay \$30,000 --
2 it wouldn't be fair not to show them those
3 tickets so they could add them up themselves to
4 make sure they were properly added up, correct?
5 That wouldn't be fair, would it?

6 A. I don't know that it's fair or not.
7 But, I mean, the work was executed, and we
8 submitted a change order for it.

9 Q. All right. One of these says, for 1, 2
10 and 9, miscellaneous repairs -- okay. Out of
11 scope rework. What does that mean? That's from
12 11/5/18 to 11/26/18, out of scope rework.

13 A. That means that the operator,
14 Salamander, went through and put a punch list
15 together for work that he felt was -- Quantum
16 felt was out of their scope. But we agreed to
17 fix it, and the owner told us they'd pay for it.

18 Q. All right. And where are those punch
19 lists?

20 A. Pardon?

21 Q. Where are those punch lists?

22 A. Salamander delivered them to us via the
23 owner's rep.

24 Q. But are they in this courtroom?

25 A. They're not in this exhibit. I don't

1 know if they're in the courtroom.

2 Q. Would the best evidence of whether or
3 not the work was in or out of the scope of work
4 be to compare the punch list against the plans
5 and the plans and the punch list against the --
6 Salamander's complaints? I mean, that would be
7 the way to do it, wouldn't it?

8 A. The plans aren't going to show what's on
9 a punch list.

10 Q. Okay. All right. Well, the plans will
11 show what the scope of work is. If the
12 allegation is that the work was out of the scope
13 of work, the plans show the scope of work,
14 correct?

15 A. The allegation is that we had already
16 executed the punch list.

17 Q. Well, but this -- okay. But all I'm
18 doing is reading this. Out of scope of rework.

19 A. Right. He asked us to do something for
20 the third time when you've already authored that
21 you've done it for the first two times. That's
22 considered -- we consider that out of scope, and
23 our subcontractor considers that out of scope.

24 Q. But, again, you don't know whether this
25 has been paid for?

1 A. No, sir.

2 Q. Okay.

3 THE COURT: Let's take five
4 minutes.

5 (A recess transpired.)

6 THE COURT: All right, Mr. Bundy.

7 (DFT. EXH. 19 was marked for
8 identification.)

9 BY MR. BUNDY:

10 Q. Mr. Starcevic, I've handed you what's
11 been marked for identification as, I believe,
12 Defendant's Exhibit 19, correct?

13 A. Yes, sir.

14 Q. Can you identify this document?

15 A. It's a change order recorded to Merit
16 Group -- Merit Professional Credit Unions for
17 time and material, repainting \$19,309 - 319.11.

18 Q. All right. And the date of the change
19 order?

20 A. April 23rd, 2019.

21 Q. Pardon me?

22 A. April 23rd, 2019.

23 Q. Okay. This is after the job had been
24 substantially complete. Were you still doing 50
25 percent of your time handling these things?

1 A. Probably.

2 Q. You recognize this document?

3 A. Yeah, it looks familiar.

4 Q. And so --

5 MR. BUNDY: Your Honor, I move to
6 introduce this into evidence as Defendant's
7 Exhibit No. 19.

8 THE COURT: Defendant's 19. No
9 objection?

10 MR. HILDEBRAND: I don't know what
11 it is. It's not signed. I just don't know what
12 this is.

13 THE COURT: All right. Help me out
14 again. I know you laid some foundation. It's
15 from whom to whom?

16 BY MR. BUNDY:

17 Q. Did you prepare this document? Did you
18 fill it out?

19 A. It looks like it.

20 Q. So you prepared the document, and you
21 recognize it as a BBC document?

22 MR. BUNDY: It's just like
23 unsigned, like half the stuff y'all presented.

24 THE COURT: Okay. This is a BBC
25 document.

1 MR. HILDEBRAND: No objection.

2 THE COURT: Without objection.

3 Okay. Thank you, sir.

4 (DFT. EXH. 19 was received in
5 evidence.)

6 BY MR. BUNDY:

7 Q. So you prepared this? This is your
8 language?

9 A. Yeah, it appears so.

10 Q. I mean, it's a form, but you added
11 language?

12 A. Yeah. I added the value and what's
13 below the cost.

14 Q. All right. And did anybody help you do
15 this?

16 A. I don't remember, Mr. Bundy. I don't
17 remember who helped me do this.

18 Q. But you would have done it in the normal
19 course of your -- at that time, the normal course
20 of your work for Balfour Beatty, which was after
21 this job was over, go back and work on the
22 paperwork?

23 A. That's right.

24 Q. Okay. This is change order number 40.
25 Is that a numbering system by and between SBC

1 Group, LLC; PPA, Merit Professional Coatings; and
2 Balfour Beatty Construction?

3 A. Yes.

4 Q. Okay. There's not a change order number
5 relative to anything with the owner or any other
6 subcontractor? Everybody had their own numbers?

7 A. Yes.

8 Q. Okay. And there's not -- all of them
9 would have the same change orders, right?

10 A. That's correct.

11 Q. Okay. So the original previous contract
12 amount was a 1,001,342.11, and this was an add of
13 19,319.11. New contract amount now between SBC
14 Group and Balfour Beatty, as of the date of this
15 change order, April 23, 2019, which was
16 originally signed on June 29, 2015, is now
17 \$1,159,661.21, correct?

18 A. Assuming they had no problems and this
19 is fully executed, then that would be correct.

20 Q. Okay. But what we're looking at here
21 is, at the minimum, an offer that's being made by
22 Balfour Beatty to SBC Group?

23 A. Correct.

24 Q. We don't know whether they accepted your
25 offer, but you made the offer?

1 A. Correct. Assuming this was sent to
2 them, yes.

3 Q. Okay. And it says, it is desired -- it
4 being desirable to modify the work under the
5 above contract in accordance with the contract
6 documents. Now, the contract documents you're
7 referring to are subcontract documents, general
8 conditions. Everything is incorporated in your
9 subcontract, correct?

10 A. That's probably a fair statement.

11 Q. Okay. Because your subcontractor
12 incorporates, by reference, it includes all the
13 general conditions, the plans and the AIA 201,
14 B133, all of them, right?

15 A. There's some flow down from that.

16 Q. Okay. Some flow down or all flow down?

17 A. I believe all flow down. I mean,
18 they've got a marked up version of it, but --

19 Q. And, in fact, your subcontractors assume
20 all the responsibility that you -- that BBC has
21 to the owner, the subcontractor assumes that
22 responsibility, the same responsibility y'all
23 had, exactly the same, as it relates to their
24 scope of work?

25 A. Generally speaking, yes.

1 Q. Okay. Because, in fact, BBC doesn't
2 actually perform any work; they manage and they
3 keep up with money and they run schedules?

4 A. We perform miscellaneous work, but the
5 bulk of it is performed by subcontractors.

6 Q. It would be less than one hundredth of
7 one percent of a 60 million dollar job y'all
8 actually did on this job, right?

9 A. Yeah. It's a small percentage, yeah.

10 Q. All right. So it is necessary in the
11 interest of the parties -- in the interest of the
12 parties to the above-named contract to modify
13 said contract in particular as follows. Is that
14 standard language that's always in these forms?

15 A. I think so, but we can compare it to
16 other ones. But I don't know if that's been
17 modified.

18 Q. In fact, these are standard BBC
19 documents, and y'all attach them to the
20 subcontracts so these subcontractors will know
21 what to expect when they work on your job, what
22 their pay requests need to look like, what their
23 change orders are going to look like and all the
24 rest of it, right?

25 A. Most of the time, yes, sir.

1 Q. Yeah. Because that helps y'all manage
2 the job?

3 A. That's right.

4 Q. If everybody is using different forms,
5 it makes things more complicated?

6 A. That's right.

7 Q. Okay. All right. So CI number, what is
8 that, 3274. What does CI stand for?

9 A. Cost item numbers. It's a cost item
10 number.

11 Q. It's a cost coding thing?

12 A. We generate a cost in this system. It
13 assigns a number to it.

14 Q. And then the description is Quantum C
15 change order request, 118 slash time and
16 materials. It says T and M. It stands for time
17 and materials, paint, repaint, right?

18 A. Yes.

19 Q. And then the amount is \$19,319.11 as
20 stated above, and there's a budget code, right?

21 A. Yes.

22 Q. All right. Now, that budget code, what
23 budget is that?

24 A. Exactly whatever the number is.

25 Q. No. But what is the budget that's being

1 referenced here? What budget?

2 A. The first three digits are an internal
3 number determining what's the cost of work,
4 general conditions, any other -- 400 is our cost
5 of work.

6 Q. Okay.

7 A. The 509-9-1000 typically is whatever we
8 need.

9 Q. Okay.

10 A. That's how we set our internal budget
11 up, and that's where this cost code was assigned
12 to.

13 Q. Okay. And what does the .40 reference?

14 A. It's an internal number, labor or the
15 cost of work again.

16 Q. Okay. And are those budget codes, and
17 is that the budget referenced here the same
18 budget that Balfour Beatty uses for the contract
19 between Balfour Beatty and Library Associates, or
20 is there a sort of separate contract budget to
21 keep up with the subcontractors?

22 A. It's typically pretty -- it's pretty
23 much the same. There's a -- our budget is pretty
24 much how the payout is structured. And there's
25 not a -- really, it's separate.

1 We've got -- obviously, sometimes, there
2 are more than one contractor and one budget with
3 the owner. So they have different budget
4 numbers, but our budgets are typically set up
5 pretty similar to how the owner's payout is set
6 up.

7 Q. Does the owner have access to the budget
8 during the job?

9 A. What budget? Which budget?

10 Q. This budget. The budget referenced to
11 this number.

12 A. The cost codes?

13 Q. Yes.

14 A. Our internal cost? Not necessarily.

15 Q. Okay. So the answer is no, the owner
16 doesn't have access to it?

17 A. No.

18 Q. And I'm trying to understand, within the
19 world of budgets the owner's not entitled to look
20 at, whether there are distinctions or differences
21 in the budgeting Balfour Beatty does between the
22 owner and Library Associates and the budgeting
23 that Balfour Beatty does with its subcontractors?

24 A. I don't know that I follow that.

25 Q. Okay. Well, let me see if I can --

1 maybe I can help. I don't know. The schedule of
2 values between Balfour Beatty and Library
3 Associates is a number, right? Like the
4 painters, there's a number in there for the
5 painter. Let's just pick a number out of the
6 air, 2 million bucks, right?

7 A. Okay.

8 Q. And that's in the schedule of values,
9 and that's what's used by Balfour Beatty when
10 they ask for payment?

11 A. Correct.

12 Q. All right. Now, in a normal job --
13 well, not a normal job -- in a lump sum job, if
14 the painting budget, the painting line item on
15 the schedule of values was a million -- was 2
16 million dollars, what the contractor would do is
17 they would say, okay, I'm 50 percent complete
18 with the painting. I want a million dollars less
19 retainage, right? That's the way it would work?

20 A. Right.

21 Q. You've handled lump sum jobs, right?

22 A. Yes.

23 Q. Okay. Have you handled more lump sums
24 than cost plus, or is it about the same? I mean,
25 do you have any -- more experience in one than

1 the other?

2 A. No more experience in one than the
3 other.

4 Q. Okay. In a lump sum job, that budgeted
5 number -- or that number in the schedule of
6 values is not necessarily the same as the
7 subcontract amount between the general and the
8 sub, is it?

9 A. In a lump sum job?

10 Q. Yes.

11 A. Not necessarily.

12 Q. No, not necessarily. It doesn't have to
13 be, does it? I mean, it's not a contract
14 requirement?

15 A. No.

16 Q. Okay. And, in fact, a lump sum job
17 schedule of values -- based on the schedule of
18 values, permits a contractor to actually sort of
19 front-end load and get some money that he needs
20 to start a job?

21 A. You're putting words in our mouth. It
22 depends on the agreement.

23 Q. But let's then -- but the lump sum job
24 to get paid is definitely a percentage of the
25 work. The architect goes out and says, you're

1 not 50 percent complete with the painting, you're
2 only 20 percent complete; so I'm not going to
3 certify you the other 30 percent and all you're
4 going to get is that number, right?

5 A. They have the ability to do that.

6 Q. But in a cost-plus job, what you get in
7 a pay request is not a percentage of what's on
8 the schedule of values? Even though it may say
9 50 percent, what you really get is the cost
10 that's actually been incurred and the cost of the
11 work as defined in the contract, right?

12 A. The cost of the work as it's defined in
13 the contract.

14 Q. Correct?

15 A. I believe so.

16 Q. Okay. And that's different from a
17 percentage that you would get if you had a lump
18 sum contract? You actually have to show your
19 cost in a cost-plus job to get paid on a periodic
20 basis, and a lump sum job, you don't?

21 A. If your contract stipulates that, that's
22 correct.

23 Q. Okay. That's what these say. Okay.
24 So, when we look at pay requests and it says, for
25 instance, painting 50 percent complete, right, it

1 may well be 50 percent complete, but the painter
2 may not have spent 50 percent of the -- he may
3 not have spent a million dollars, right, to do
4 that work?

5 A. It could happen.

6 Q. Pardon me?

7 A. That could happen.

8 Q. Okay. And under that hypothetical, he
9 wouldn't be entitled to the million dollars. He
10 would only be entitled to whatever he actually
11 spent less whatever he'd been paid?

12 A. The painter, yes.

13 Q. Okay. That's all I want to understand.
14 So on a job like this, wouldn't it be -- would
15 you keep two sort of budgets so you could keep
16 straight with what the contractor's actual costs
17 were, or if you have -- I'll strike that
18 question.

19 Let's put it this way. If you have a
20 lump sum subcontract and a cost-plus general
21 contract, right, the subcontractors are being
22 paid based on the percentage of the work, right,
23 percent complete if you had a lump sum contract
24 with them, or are they?

25 A. Yeah. I guess in your hypothetical,

1 that's correct.

2 Q. Okay. Well, let's remove it out of the
3 realm of hypothetical.

4 A. All right.

5 Q. Did Balfour Beatty have lump sum
6 subcontracts, or did they have cost plus
7 subcontracts?

8 A. We would have to check. We would have
9 to look at it.

10 Q. Okay. All right. Let's assume that you
11 had lump sum -- didn't you do a -- you weren't
12 involved in the buyout, though, were you?

13 A. A little bit.

14 Q. You were?

15 A. Yeah.

16 Q. Okay. Well, in the buyout is when in --
17 for like in a GMP job, the buyout is when
18 everybody came up with a number and we all agree,
19 we're probably going to have to pay the painter
20 two million bucks to get him to do this job,
21 right?

22 So it comes time. You get the contract.
23 You don't have a painting subcontract yet. You
24 may have talked to some painters and all of that,
25 and in your budget, you may have used a million

1 9. You may have used 2.6, right, or whatever you
2 used?

3 But when it comes time to sign the
4 subcontract, that's when you go to them and say,
5 look, I understand you need some work. Okay? So
6 what we'll do is, you're going to sign a lump sum
7 contract with me for a million 9 or I'm going to
8 go down the street, right? So you have a lump
9 sum contract. What happens to that \$100,000 when
10 you buy out a subcontract for less than what you
11 put in your guaranteed maximum value? Do you
12 know?

13 A. You're going to buy out and pull buyout
14 savings.

15 Q. Buyout savings. Okay. So as you go
16 forward, once you've bought all these
17 subcontracts out, you have lump sum contracts
18 with the subs, but you have cost plus -- cost
19 plus general contract with the owner.

20 You're sending percent completion
21 numbers based on a lump sum contract into a cost
22 plus contract and asserting that you have or will
23 pay that money as a percentage of your
24 subcontract; is that correct?

25 A. We're saying -- we're reviewing a

1 subcontractor schedule of values for the work
2 that they've completed, including that in our
3 draw to the owner.

4 Q. Okay. Do you include things in the draw
5 to the owner in a cost plus contract to the owner
6 that you have not paid or are not going to pay?

7 A. Typically, no.

8 Q. Because, typically, that wouldn't be
9 right, would it?

10 A. Well, there -- we talked about this
11 earlier. There are cases where the scope was
12 complete; however, a part of that work --

13 Q. Right.

14 A. -- is owed to another subcontractor.

15 Q. Sure, sure. But our legislature has
16 written a law that contravenes that process,
17 right? So there's a little dispute about whether
18 that's okay or not. So at any rate --

19 MR. HILDEBRAND: Objection, Your
20 Honor, just to Mr. Bundy making comments.

21 MR. BUNDY: I will withdraw it.

22 THE COURT: All right.

23 BY MR. BUNDY:

24 Q. So back to the book, the budget
25 situation, I'm still a little confused on the

1 budget. Do you have to keep different budgets in
2 order to keep up with the different accounting
3 that has to take place when you have lump sum
4 subcontracts and a cost plus general contract?

5 A. Do you have to? I'm --

6 Q. Do you. It's not have to. Do you?
7 Does Balfour Beatty do that?

8 A. We have an internal budget software that
9 keeps -- that keeps an account for our cost.
10 It's not the same as what we put on the pay
11 application to the owner.

12 Q. Okay. That's solves the problem for me.
13 Now, I understand it. Okay. You have an
14 internal budget -- repeat that for me again.

15 A. No. We have an internal software that
16 manages our costs and our budgets that helps
17 accounting. It lets us know when invoices are
18 coming in. It tracks our budgets. And then we
19 have the pay application in the budget with the
20 owner. So two different software.

21 Q. So the numbers in the subcontractor
22 budget software are not necessarily the same
23 numbers you use to get paid by?

24 A. That's correct. I explained it earlier.
25 There may be two mixed metal subcontractors.

1 Q. Okay. I gotcha. I'm just trying to
2 understand it. Okay. So we have gone through --
3 we got through the budget, thank goodness. Let's
4 read the rest of it. This change order request
5 includes miscellaneous time and material items
6 from 11/5/18 to 11/26/18 period. Okay? Now, if
7 you would turn to tab 274, the one we were
8 talking about before I took a break -- before the
9 Judge allowed me to take a break.

10 A. Okay.

11 Q. Are we together?

12 A. I got it.

13 Q. All right. Let's look at the third page
14 that has the Quantum Coatings logo on it.

15 A. Okay.

16 Q. Okay. Do you see items -- I think it's
17 items 11/5/18 through 11/26/18. Do you see that?

18 A. I see it.

19 Q. Okay. Is that the first one?

20 A. Yeah. There's two with the same date.
21 They just break out different areas of the
22 building.

23 Q. Are those what's being referred to here
24 in Exhibit Defendant's 19?

25 A. I don't believe so. This says, change

1 order request number 118, and this is Quantum
2 change order request 120. So I believe they're
3 different.

4 Q. You believe they're different?

5 A. That's right.

6 Q. 11/5/18 to 11/26/18. Well, they have
7 the same date. 11/5/18 to 11/26/18. They have
8 the same date.

9 A. It's three weeks worth of work. They
10 were in all different places.

11 Q. Huh?

12 A. It's three weeks worth of work. They
13 were in all different places in the building.
14 They had a crew managing the Salamander punch
15 list, and it looks like we had a different crew
16 managing some other costs.

17 Q. How can you tell that from this change
18 order?

19 A. Because it says, different change order
20 numbers. This is change order number 118 right
21 here, COR118, and it says COR120 at the top of
22 the backup on 274. So we were trying not to
23 charge the owner for work -- for internal work.
24 They were requesting money that wasn't their
25 responsibility.

1 Q. Okay. It goes on to say, it
2 incorporates a wide variety of trades, including
3 Watson, Precision Walls, David Allen, and Pasco.
4 What is that? Is this your language, it
5 incorporates a wide variety of trades?

6 A. Yes, sir.

7 Q. What does that mean?

8 A. It means, miscellaneous things that --
9 whether, you know, Watson had to move the outlet
10 from here to there; P Walls had something they
11 had to go back and fix; David Allen, had some
12 grout. He had to clean off the wall. Pasco
13 moved a sprinkler head.

14 We didn't feel this was the
15 responsibility of the owner. It's just
16 miscellaneous things that Quantum had to go
17 through after they had already painted it once
18 and fixed.

19 Q. Okay. So this has nothing to do with
20 the Salamander punch list stuff?

21 A. I don't think so.

22 Q. Okay.

23 A. It shouldn't.

24 Q. All right. So what you're saying here
25 is that the painter had to go back because of the

1 work of a variety of trades: Watson, PWI, David
2 Allen and Pasco?

3 A. That's right.

4 Q. All right. This change order settles
5 outstanding cost items identified in change order
6 request 118 as shown on marked up 118 and so
7 forth.

8 Quantum acknowledged that the
9 subcontractors have reserved their right to
10 review these change order requests, and any
11 adjustments with the back charge subcontractors
12 will be corrected in a change order to Quantum
13 d/b/a Merit Professional Coatings.

14 Now, you wrote this, right?

15 A. That's correct.

16 Q. Are you saying here that these, this
17 118, or this \$19,319.11 is going to be back
18 charged to Watson, PWI, David Allen and Pasco,
19 and that Quantum acknowledges that the
20 subcontractors have reserved their rights to
21 review these change orders and any adjustments
22 with the back -- with the backed -- back charged
23 subcontractors.

24 So the back charge subcontractors are
25 named above: Watson, PWI, David Allen and Pasco;

1 is that correct?

2 A. Yes, sir.

3 Q. Okay. Quantum acknowledges that they
4 reserve their rights, and any adjustments will
5 be -- well, hold on. Here we go. Let's keep
6 going.

7 Quantum acknowledges that the
8 subcontractors have reserved their right to
9 review these change order requests and any
10 adjustments for back charges and will be
11 corrected in subsequent change orders to Quantum.
12 Now, what does that mean? I don't understand
13 that.

14 A. This means Quantum had a lot of
15 outstanding costs, and we were trying to get them
16 to continue to perform on the project. And so
17 the contractor and subcontractor, they alleged
18 had caused them extra work --

19 Q. Right.

20 A. -- had not responded or had not
21 responded to it. We were trying to get Quantum
22 paid for work that they'd performed.

23 Q. By the subcontractors who were the cause
24 of them having to do the extra work?

25 A. That's correct.

1 Q. Okay.

2 A. And so this is saying, should the
3 subcontractor come and prove that it was not
4 their issue, that Quantum understands that, and
5 that there's a forward adjustment. There's an
6 opportunity for an adjustment later.

7 Q. Was there an expectation that you had
8 that all of these back charged subcontractors,
9 none of them would be responsible for any of
10 Quantum's work?

11 A. Was there an expectation that none of
12 them would be responsible?

13 Q. Right. Because you say that, because
14 the subcontractors are reserving their rights --
15 the back charged subcontractors are reserving
16 their rights, I guess to come to you and say,
17 Nick, I didn't move that outlet. Nick, I didn't
18 do that. Okay?

19 So they painted it because a fellow that
20 works for Precision Walls got mad and kicked his
21 shoe in, right? So you might have had your --
22 you might have expected reallocation of this
23 \$19,000 by, among, and between the back charged
24 subcontractor, but you did not expect at the time
25 that they would all be able to come to you and

1 say -- and convince you, none of it was any of
2 our faults.

3 It was all either Quantum Coating's
4 fault or somebody else, and I don't know who it
5 was. You didn't expect that to happen, did you?

6 A. I didn't expect that to happen.

7 Q. Okay. And you knew that the \$19,000
8 that was going to be paid by these
9 subcontractors -- you didn't know exactly in what
10 proportion they were going to pay, but you knew
11 they were going to owe something?

12 A. No. I knew that Quantum performed
13 \$19,000 worth of work.

14 Q. Right.

15 A. And that they're alleging that these
16 subcontractors were responsible for their
17 portion.

18 Q. And you were agreeing with them?

19 A. We usually let the subcontractors settle
20 back charges amongst themselves. We facilitate
21 it. I wasn't really agreeing or disagreeing. I
22 was agreeing that Quantum was responsible and
23 performed this amount of work.

24 Q. Were you agreeing, on behalf of BBC, to
25 pay Quantum the \$19,000?

1 A. I was agreeing -- no, I was agreeing
2 that they were entitled to \$19,000.

3 Q. You were agreeing to what?

4 A. That they were entitled to \$19,000.

5 Q. From whom?

6 A. Pardon?

7 Q. From whom? Whom were they entitled to
8 19 --

9 A. I was agreeing that they had incurred an
10 additional \$19,319 in added costs.

11 Q. But who were supposed to pay them? Was
12 Balfour Beatty going to pay them? Because you're
13 the one that issued the change order.

14 A. I don't know where -- I don't know who
15 was going to pay them. We would -- It all depends
16 on where we are in our contract value. I wasn't
17 committing to anyone -- any Balfour or Library
18 Associates.

19 I wasn't saying anybody was going to pay
20 them. I was saying, this is agreeing that they
21 performed this work. There's no stipulation that
22 we're going -- my understanding is that there is
23 nothing in here that says they are going to be
24 paid \$19,319.

25 Q. It says, Nick, that the contract has

1 been increased by \$19,319.11. The contract has
2 been increased?

3 A. I agree.

4 Q. And the contract is between BBC and
5 Quantum?

6 A. That's right.

7 Q. You are now saying, we owe you, at some
8 point, another -- an additional \$19,000 on your
9 subcontract?

10 A. Assuming that we weren't over-budget or
11 assuming --

12 Q. Assuming what?

13 A. Assuming that we weren't over-budget and
14 still had money left in the contract, then yes.

15 Q. Why would the subcontractor not have to
16 pay you if you were over-budget for something he
17 did that you told him to do and he did it because
18 the other subcontractor damaged his work?

19 A. Can you ask that again?

20 Q. Huh?

21 A. Can you ask that again?

22 Q. Sure. If I can remember it. Why
23 wouldn't BBC have to pay a subcontractor for work
24 BBC directed it to do by virtue and authority of
25 its subcontract for damages caused by other

1 subcontractors regardless of what the budgetary
2 status was of Balfour Beatty's contract with
3 Library Associates? Why?

4 A. I don't know. I mean, I think we're
5 agreeing in this that this is the added work.

6 Q. You know, let's talk a minute about the
7 structure of this job. Library Associates is the
8 owner, right? Library Associates, owner, got it?
9 Balfour Beatty Construction. They are the
10 construction manager at risk. Can we agree to
11 that?

12 A. Yes.

13 Q. All right. A construction manager at
14 risk, by virtue of the language at risk, has
15 subcontracts with subcontractors, correct?

16 A. Correct.

17 Q. Okay. Those are subs. There is no
18 contract between the subs and Library Associates,
19 correct?

20 A. As far as I know.

21 Q. In fact, the general conditions say
22 that, Library Associates will not communicate
23 with your subcontractors, correct?

24 A. It does?

25 Q. Yes, it does. Y'all are in control of

1 your subcontracts, and if you, Balfour Beatty,
2 agree to pay a subcontractor for work on that job
3 and direct them to do the job, you owe them the
4 money, don't you, regardless of whether or not --
5 whatever caused that work? You owe it to them
6 because they don't have a contract with Library
7 Associates.

8 A. Okay.

9 Q. Isn't that true?

10 A. True.

11 Q. Okay. So if you -- if they signed this
12 agreement, this proposed change orders,
13 Library -- Balfour Beatty Construction Company
14 would owe -- because the work had already been
15 done, would owe Quantum Coatings \$19,319.11
16 regardless of the shake out between the
17 subcontractors?

18 A. Yeah.

19 Q. Okay. All right. Now, Balfour Beatty,
20 having a subcontract with these other
21 subcontractors, could clearly go to Watson
22 Electric and say, let me tell you something,
23 okay, I sent you this stuff. It's \$19,000.

24 I'm the project manager, and I think of
25 that \$19,000, 12 of it is your fault. I'm taking

1 \$12,000 out of your subcontract, and I'm going to
2 pay Quantum Coatings. And that way, your budget
3 doesn't get affected, right?

4 A. Right.

5 Q. And that's called project management,
6 isn't it? That's how you manage your project,
7 right?

8 A. Sure.

9 Q. Is that right?

10 A. Yes.

11 Q. Okay. And that, in fact, is what
12 Library Associates hired Balfour Beatty to do?

13 A. Amongst other things.

14 Q. Correct. But the -- it was a pretty big
15 part of your responsibility to manage the
16 subcontractors, right?

17 A. That's correct.

18 Q. Because if there was no manager here,
19 and Library Associates just let these people go
20 out and do whatever they wanted to, we probably
21 still wouldn't have a hotel, would we?

22 A. I agree with that.

23 Q. All right. So let's read on. It says,
24 the add to this contract, the result of this
25 change order is \$19,000, et cetera.

1 This change order constitutes full and
2 complete settlement of any and all costs referred
3 to and/or described herein, but not necessarily
4 limited to all applicable taxes, insurance, bond,
5 delivery, supervision, overhead profit and labor,
6 labor impact, materials, charges, delays,
7 acceleration, deficiency, or any other claims
8 that are afforded in the subcontract here,
9 delays, any and all claims associated with or
10 related to the work.

11 So is this your language or some
12 language a lawyer provided to you?

13 A. It's standard language on the change
14 orders.

15 Q. This language?

16 A. Yes.

17 Q. Provided by the lawyer?

18 A. I don't know who provided it, but it's
19 standard language on the change orders.

20 Q. Okay. Just reading it and knowing what
21 you know about the English language, can you
22 imagine anything that was left out when that was
23 written? Do you see any wiggle room in there to
24 asking for something more?

25 A. I'm not going to imagine or interpret

1 what is and what isn't left out.

2 Q. Right. Well, do you think the intent of
3 it was, I'm going to pay you the 19, leave me
4 alone? We're done here.

5 A. No, I don't think that was the intent.

6 Q. You don't think that was the intent?

7 A. No. I think it protects us, but I don't
8 think that was the intent of this. To say,
9 you've got an open change order that hasn't been
10 resolved. Just because I wrote you this change
11 order means you got me, that's not the intent.

12 Q. That's not what I asked you, but that's
13 okay.

14 A. Well, you asked me what the intent was,
15 right?

16 Q. Okay. Let's go to number 275.

17 A. I would also say that, I doubt they
18 return this undoctored at this point in the
19 project but --

20 Q. Sure. And your doubt is based on?

21 A. The number of change orders having that
22 language struck.

23 Q. Okay. Do you mean the number of change
24 orders the subcontractors struck?

25 A. Internal change orders to

1 subcontractors.

2 Q. Internal change orders?

3 A. Meaning, we issued the subcontractor the
4 change order, and some of them would read this
5 and say, I'm not agreeing to that and strike it.

6 Q. Okat. What are internal change orders?

7 A. It's a change order -- sorry, a CCO.

8 Q. No. But, I mean, is there a distinction
9 between change orders between you and your
10 subcontractors and BBC and the owner?

11 A. Yes.

12 Q. Okay. And y'all --

13 A. A change order from BBC to the owner is
14 different than a change order from BBC to the
15 sub.

16 Q. Right. And y'all euphemistically refer
17 to the substantive change orders between you and
18 your subcontractors as the internal change order?
19 That's just language y'all use?

20 A. No. We usually just call them
21 subcontractor change orders.

22 Q. Okay. Fine. So you've got
23 subcontractor change orders and you've got owner
24 change orders?

25 A. Yes.

1 Q. Okay. All right. Let's go to number
2 275. It looks like Quantum, P Walls, P Walls,
3 BMCC. Do you know if any of these were paid?

4 A. No, sir.

5 Q. No?

6 A. No, sir.

7 Q. Okay. Let's go to 276. What is the
8 story on this one?

9 A. Millwork change orders.

10 Q. Yeah. The millwork changes, Low Country
11 Case and Millwork.

12 A. Yeah. It's a handful of miscellaneous
13 change orders that written out here. Burnout
14 crown, number 1. Rotunda changes, bridal suite,
15 rosettes added, added corbels to the bridal
16 suite. They were not shown. Elevator cab
17 ceiling revisions.

18 Supplemental instruction number 72.
19 It's a private dining corner trim. Added a back
20 bend to (inaudible) another 50 doors, and room
21 719 and 819 for custom window valances and a
22 window back bend.

23 Q. All right, sir.

24 A. \$75,978.

25 Q. All right. Let's go to -- all right.

1 Let's go to 279.

2 A. Skipping through?

3 Q. Yeah, 279.

4 A. I'm there.

5 Q. All right. We've got a letter to Kim
6 Brown with no date and no signature, right? No
7 signer, right?

8 A. Correct.

9 Q. And you've -- do you opine that that was
10 done sometime between January and March of 2019
11 when you were doing the paperwork?

12 A. I would -- this was likely done late
13 March, early April.

14 Q. Okay. All right. Let's take this
15 portion of that. I want to go -- probably need
16 to pull these sheets out, the ones with the
17 columns and all.

18 A. Okay.

19 Q. Because what I want to do, Nick, is, I
20 want to take columns and compare them to what's
21 in the tabs. Okay?

22 A. All right.

23 Q. Because presumably, the columns have
24 some relationship to the tabs because that was --
25 well, let me ask you: Do the columns have any

1 relationships to the tabs?

2 A. Again, I haven't reviewed this, but this
3 is how we typically presented CCD change orders.
4 We would have each column, ours would be
5 numbered.

6 Number 1 would have a folder and would
7 have the cost. We would have this sheet penciled
8 with how much we previously billed, show the
9 delta. I haven't reviewed each one in here to
10 make sure that it aligns with this.

11 Q. I know you haven't. That's why we're
12 going through it now because we want to review it
13 now.

14 A. Okay.

15 Q. All right. The first one is number 1.
16 Now, does number 1 relate to A?

17 A. I don't know. Number 1 is CCD 46, and
18 there's -- sorry, A is CCD46. Number 1 here is
19 CCD7.

20 Q. Okay. So look down to -- look down to
21 number 11.

22 A. Yes.

23 Q. Is that it? I think I can help you.

24 A. Thank you.

25 Q. Because I've been through it.

1 A. Okay.

2 Q. Look at number 11. Is that A?

3 A. Well, there's another -- so there is
4 number 23, which is 46 as well. And, yes,
5 there's two 46s. Are any -- typically, anyone
6 that doesn't have a budget number would be this
7 page right here.

8 Q. Which page is that?

9 A. This is sub pin A in A. The only page
10 in there.

11 Q. Okay.

12 A. And what this doesn't show is -- this
13 doesn't show what has previously already been
14 billed to the owner.

15 Q. What do you mean? Go ahead.

16 A. So what -- if you look at 11, it's
17 3,676.

18 Q. Okay.

19 A. And then you look at revenue cost to
20 date, the first number is 6,259.

21 Q. Right.

22 A. My assumption is, is that we've already
23 been paid the delta between \$6,259 and \$3,676.
24 Sorry, we've already filled the delta between
25 those two in a prior month. Does that make

1 sense?

2 Q. No. This doesn't make sense at all.

3 A. So this is -- Exhibit A is our current
4 cost.

5 Q. And what is that?

6 A. That's how much labor we have spent on
7 the project.

8 Q. And what is that number?

9 A. On this budget code, \$6,259.

10 Q. Okay. That's the projected profit?

11 A. No. That is cost to-date. No profit,
12 no fee, no overhead. Cost to-date.

13 Q. And what does projected profit above it
14 mean?

15 A. That's based off a budget number.
16 There's no budget for it. Because we didn't --
17 this is added work so we didn't have a budget set
18 up for it and didn't have money from the owner
19 yet. They were asking us to do extra work. So,
20 as we talked about yesterday, we set up -- or
21 Friday, we set up a budget code for this added
22 work.

23 Q. Okay.

24 A. So we kept -- printed out the labor, an
25 accounting of the labor, attached it to the back

1 of this. It was typically a green box that said,
2 cost to-date less previous month cost to-date.
3 So this would be -- what is this -- March.

4 Cost through March 29, 2019, would be
5 less previous months, and the owner could refer
6 back, or we could show the owner, we've already
7 billed the cost between \$3,676 and what's shown
8 here.

9 Q. Okay. Nick, the problem with it is,
10 you're really not here to show the owner, you're
11 here to show the Judge, right?

12 And so I'm just simply trying to ask you
13 how His Honor is going to take these documents
14 and come up to a number? And I'd like to be able
15 to do it myself because I am trying to represent
16 my client. So let's go on then, and let's look
17 at B, and tell me what B relates to.

18 A. CCD7, dining room outlets for period
19 ending January 2019.

20 Q. Okay. And where is the backup for this
21 information?

22 A. Here.

23 Q. No, that's a summary of data inputs.
24 Where is the data input?

25 A. What we typically provided to the owner

1 is the CCD draw request. It's not in here.

2 Q. Right. And that may be part of the
3 problem because what you typically provide the
4 owner may not be what's typically provided in a
5 courtroom so the Judge can make a decision.
6 That's why we have rules of evidence. Okay? And
7 so I'm asking you: Where is the backup for this
8 summary?

9 A. The backup that we have here today is in
10 here. I'm not saying that that's everything,
11 right, or what we typically on a month-to-month
12 basis provided the owner.

13 Q. Nick, look through here. Some of these
14 are, like, number -- the tab E. I don't even
15 have anything behind tab F. Okay? And I don't
16 see any invoices or anything other than -- well,
17 I stand corrected.

18 Well, I mean, you go through here. I
19 don't see any backup until you get to G, which
20 has a guaranteed supply company invoice for
21 \$133.53 for dowel caulk, 795 Sandstone. Is there
22 any other -- did I miss something before we got
23 to the caulk invoice?

24 A. Not that I'm aware of.

25 Q. Okay. Do you know why we owe you for

1 that caulk, Nick?

2 A. CCD8. I don't remember what CCD8 was.
3 There were at least 46 of them. I'm not sure
4 which one it was. So I don't know.

5 Q. Take a minute, Nick, and look through
6 the rest of them and tell me if there's any
7 backup behind any of those summaries.

8 A. Behind the summaries, there's a
9 Southeastern Architecture Systems change order.

10 Q. How much is that?

11 A. Change order request, proposed amount of
12 this change order is \$4,316.

13 Q. And what is that for, Nick? When was
14 that work done?

15 A. That was shelving the owner wanted to
16 add on the rooftop bar. It looks like this work
17 was done in late January.

18 Q. Of what year?

19 A. 2019.

20 Q. Okay. And have y'all paid for that?

21 A. I do not know.

22 Q. Okay. All right. I believe that's all
23 I've got on this exhibit, Nick. I'm done with
24 that one. You don't mind if I call you Nick, do
25 you? We've been here long enough, I feel like

1 we're friends.

2 A. Do you want me to call you Bill?

3 Q. Sure. All right. Let's see where we
4 can go from here.

5 MR. BUNDY: Your Honor, I want to
6 move into another topic. I could use about five
7 minutes to get reorganized.

8 THE COURT: All right. Take your
9 time. Y'all take a break if you'd like.

10 (A recess transpired.)

11 (DFT. EXH. 20, was marked for
12 identification.)

13 MR. BUNDY: All right. This is
14 Plaintiff's Exhibit 20 for ID.

15 THE COURT: All right, sir.

16 BY MR. BUNDY:

17 Q. Mr. Starcevic, I'm handing you a
18 document that is at the bottom right-hand corner
19 marked BBC e-mails 00590106. Do you recognize
20 that as a BBC Bates stamp number?

21 A. Yes.

22 Q. Okay. You know what a Bates stamp
23 number is, right?

24 A. Sorry?

25 Q. You know what a Bates stamp number is,

1 right?

2 A. No. What's a Bates stamp?

3 Q. Okay. Do you recognize this document?

4 A. Yeah.

5 Q. All right. And your name is at the
6 bottom left-hand corner?

7 A. That's right.

8 Q. And the next page is just project
9 manager -- I guess, Starcevic project manager,
10 right? This is your work product?

11 A. It looks like it.

12 MR. BUNDY: Okay. Your Honor, I
13 would like to move this -- what number is it, 20?

14 THE WITNESS: You've got a 20 right
15 here.

16 MR. HILDEBRAND: No objection, Your
17 Honor.

18 THE COURT: Without objection.
19 Very good.

20 (DFT. EXH. 20 was received in
21 evidence.

22 BY MR. BUNDY:

23 Q. Let me briefly read the first paragraph
24 for you. First off, do you know when this was
25 prepared?

1 A. No, sir.

2 Q. No?

3 A. No, there's no date on it.

4 Q. But you know you did it?

5 A. I did.

6 Q. Did you do it in a response to a request
7 from anybody?

8 A. I don't know.

9 Q. To be clear, if it's in the claim
10 column, it is a number received from the subs
11 that says either delay claim, claim, or GC
12 extension. The design owner column is my
13 interpretation of whether it's an owner design
14 issue and should be included in the claim. These
15 numbers reported in the risk register -- what is
16 a risk register?

17 A. It's the register of all cost items.

18 Q. Why is it called a risk register? Just
19 because you are having -- you're at risk of
20 having to pay the cost?

21 A. It's the register and risk of receiving
22 a cost item.

23 Q. Okay. I also carry them over to the
24 consolidated claim tab on the attached. What is
25 a consolidated claim tab?

1 A. I also carried them over to the
2 consolidated -- I don't know what that is.

3 Q. Well, let's see if you and I can figure
4 it out.

5 A. All right.

6 Q. We've been referring to a consolidated
7 claim. Remember that --

8 A. Yeah.

9 Q. -- the big list behind you, right?

10 A. Yeah.

11 Q. Wouldn't this have been prepared about
12 the time you were working on the consolidated
13 claim at or about the time -- during the period
14 of time when you were off the job but were
15 spending 50 percent of your time to help with
16 closing out the paperwork?

17 A. Yeah, probably.

18 Q. Okay. So when you prepared this, the
19 job was over. You had been charged by your
20 superiors to analyze the consolidated claim and
21 give your opinion, as the project manager who had
22 been on this job probably as long as anybody,
23 right?

24 A. Yes.

25 Q. You were probably on this job longer

1 than anyone --

2 A. No.

3 Q. -- continuously?

4 A. No.

5 Q. No. Who was on longer?

6 A. Tim.

7 Q. Tim Spano?

8 A. Yes, sir.

9 Q. And he was there, what, another three
10 months?

11 A. Four or five months longer, I believe.

12 Q. Okay. But this job was your life
13 starting at your 28th year on this planet up
14 through about the 32nd year, right?

15 A. It sure was.

16 Q. Okay. Day in, day out?

17 A. Every day.

18 Q. All right. And going back to the notion
19 of succeeding on merit, your meritorious
20 response, or the appropriate response to this
21 request from your superiors would have been to
22 give your opinion and tell the truth as you knew
23 it?

24 A. Yeah.

25 Q. Okay.

1 A. That's accurate.

2 Q. I mean, you certainly didn't -- weren't
3 going to out to look to tell -- you were trying
4 to do the right thing?

5 A. Yes, sir.

6 Q. You were asking me what it was. I was
7 there as long as anybody, but for Spano; here's
8 my opinion as the project manager, right?

9 A. Yes.

10 Q. Okay. You go, I also care to
11 (inaudible) consolidated claim to have on the
12 attached. I'm not very confident in this number
13 because I don't know whether or not these subs
14 are going to join in our claim. Now, what does
15 that mean, join in our claim?

16 A. We had a claim, and I don't know if the
17 subs are going to join in on it.

18 Q. Okay. Support the claim. What does
19 that mean? Whether they're going to take your
20 side of it?

21 A. Support it.

22 Q. Agree with it?

23 A. They don't have to agree with it,
24 support it, provide us information and help.

25 Q. Well, usually, when you support

1 somebody, you generally are agreeing with them
2 and helping them, right? That's the definition
3 of support, right?

4 A. That's correct.

5 Q. Okay. So you didn't know whether they
6 were going to join. You didn't know if they were
7 going to be -- to join in on the claim. You
8 didn't know whether they were going to support
9 the claim or even collaborate --

10 A. Corroborate.

11 Q. -- or even corroborate, I apologize --
12 that they are owner design issues. So you don't
13 know what they're going to do?

14 A. I can't speak for a sub.

15 Q. Exactly. But you knew what you knew,
16 and you knew what Nick knew about what had gone
17 on on that job?

18 A. Yes, sir.

19 Q. Okay. So under the subcontractor, BMCC,
20 you put nothing down for design or owner because
21 you just didn't know?

22 A. Because all of their claim at any cost
23 that they were -- they felt stood out, they
24 thought they were owed. This was their claim
25 number that they sent to us, I believe.

1 Q. Right. But you say, the design owner
2 column is my interpretation of whether it was an
3 owner design issue and should be included in the
4 claim. That's what you said up above.

5 A. Yes.

6 Q. Okay. And so, was it your understanding
7 that, unless it was owner design claim, it should
8 not be included in the claim?

9 A. No.

10 Q. That's not what you're saying?

11 A. No. I'm saying, these are numbers that
12 we got sent to us called claims, right? And I
13 had a different understanding of a claim when we
14 were doing the project.

15 Outstanding change orders, when we're in
16 the heat of a project, to us were not called
17 claims. They were called change order requests.
18 Claims were typically delays, interruptions,
19 things that were outside the added cost of work
20 or directed by an owner or designer. That's kind
21 of the difference.

22 Q. Okay. But do you know how the contract
23 defines a change order?

24 A. This was an internal document. I wasn't
25 speaking to the contract. So, again, this is my

1 interpretation and how I broke it down. The
2 claim that we received from the sub was in this
3 column, and the owner design outstanding cost was
4 in this column.

5 Q. All right. Can we at least agree, this
6 is what it says and when BMC, you put the title
7 of the claim was a claim, the numbers, this is
8 the claim they were making, and you didn't put
9 anything in the square for design owner and you
10 made no notes? Can we at least agree that that's
11 what it says?

12 A. We can agree that there's nothing in the
13 design owner and there are no notes.

14 Q. All right. The next one is Watson. The
15 type of claim is a claim, and it's a million six,
16 913, and there's nothing there in that column for
17 design owner. Nothing in the block, right?

18 A. There is nothing in that block.

19 Q. And you have a note that at least
20 1,604,913 in their claim response. What does
21 that mean there?

22 A. It means that, when we asked them if
23 they had an outstanding claim, what it was,
24 because we were trying to pull together the total
25 number. And they sent to us, at least

1 \$1,604,913.

2 Q. Okay.

3 A. So that's what it says, at least
4 \$1,604,913, in their claim response.

5 Q. Sure. Okay. And if we go back -- we
6 now know that BMCC no longer has a claim -- BMCC
7 no longer has a claim, right?

8 A. Okay.

9 Q. Pardon me?

10 A. Okay.

11 Q. Okay. So the 6 million 5 is gone. We
12 know that Precision Walls, which is next, that
13 you didn't put anything in the block; didn't make
14 a note. They're also gone, right?

15 A. Okay.

16 Q. All right. Now, we get to Lithko. They
17 had a delay claim of \$449,401.20, and you put in
18 the column, design owner, the number \$35,835.06.
19 Does that mean that your interpretation of this
20 is that, of the \$449,401.20, that the owner
21 designer was responsible for \$35,835.06 of that
22 amount?

23 A. No, sir.

24 Q. All right. What does it mean?

25 A. It means that they had a \$449,401 claim,

1 delay claim, and they had \$35,835.06 in
2 outstanding cost items is what I believe that
3 means.

4 Now, I think this first column was their
5 structural delay claim, and I believe this
6 \$35,000 number are design owner driven costs.
7 That's probably one of these RCOs that we went
8 through. I'm not a hundred percent sure, but
9 that's what I believe.

10 Q. In your paragraph above, where is
11 outstanding cost items? I don't see that word.

12 A. Pardon?

13 Q. You just said 35,835.06 represented
14 outstanding cost items, and I'm just asking you,
15 I don't see outstanding cost items anywhere.
16 What I see is design slash owner.

17 A. Mr. Bundy, this is one e-mail. I'm sure
18 that we talked about it, and I could explain
19 myself to whoever I sent this to. Again, it's an
20 e-mail, so it was sent to somebody. This
21 isn't -- this doesn't have all the information
22 out there on how this is broken down. It's just
23 a summary.

24 Q. You can explain yourself to whoever you
25 sent it to?

1 A. That's right.

2 Q. You don't know who you sent it to?

3 A. It's not on here. I sent a lot of
4 e-mails over the last four years, five years.

5 Q. Can you explain it to me?

6 A. I just tried to.

7 Q. And you think I understand?

8 A. Do you?

9 Q. No. I think it's ridiculous.

10 A. Okay.

11 Q. So let's move on to David Allen,
12 extended GC. There's a claim number of \$222,359,
13 correct?

14 A. 222,359.

15 Q. And then there's a design number of
16 88796. What does that number mean? What does it
17 represent?

18 A. I believe it represents outstanding
19 costs for change order requests.

20 Q. Just out of curiosity, that language
21 doesn't appear in this chart anywhere, right?

22 A. Okay. It's not a change order request,
23 though. I don't understand the --

24 Q. All right. The next one is ONSM claim,
25 1,056,804, and there's nothing in the design

1 block and there's nothing in the notes, right?

2 A. Yes.

3 Q. Pasco, that's extended GCs for L9 and
4 L7, \$6,550. But Pasco is out, right? Or do you
5 know?

6 A. I don't know.

7 Q. And so the rest of these claims, Gulf
8 Stream, Lithko, Tate, LCCM, First Choice, Premier
9 Exteriors, Quantum, Norco, Trimark, Wesley, are
10 in the design owner column. And what do those
11 numbers represent?

12 A. I believe these represent outstanding
13 cost items, design changes or submitted change
14 orders to us that had not been reconciled with
15 the owner.

16 Q. All right. Under LCCM, it says,
17 includes change orders, we've written them, and
18 that's next to the \$113,000. What does that
19 mean?

20 A. That probably means that we had written
21 them a change order to either perform work or
22 whatever it is that we had not reconciled with
23 the owner yet or the owner had not agreed to it.

24 Q. Okay. Cook and Boardman would be the
25 same?

1 A. Yes, sir.

2 Q. Okay. C's, owner rejects slash disputes
3 this change order request. What's the
4 significance of that language?

5 A. It's pretty self-explanatory. The owner
6 rejected it or refused it, the change order that
7 we submitted.

8 Q. So are you implying by that, in this
9 particular block, that it doesn't -- that the
10 owner doesn't dispute the rest of the numbers?

11 A. No, sir.

12 Q. First Choice 23, no notation. Premier
13 Exteriors doesn't include wall prep for spec gap.
14 What does that mean?

15 A. Yeah. We talked a little bit about this
16 yesterday -- on Friday, where there was -- the
17 design documents had a built-in spec tolerance.
18 The stucco that was -- ended up being selected,
19 wasn't originally selected, had a smaller
20 tolerance.

21 Q. Right.

22 A. So there's a gap.

23 Q. Right.

24 A. And this number does not include that.

25 Q. Okay. Then you've got Quantum, \$48,000

1 bucks. You say in your note, not confident about
2 this number. Is it not high enough?

3 A. Just not confident about the number. I
4 don't know whether it's high or low. I'm just
5 not confident in it.

6 Q. Are you not confident because it's not
7 high enough or because it's too low or what?

8 A. I don't know. I don't remember whether
9 I thought this number was high or low. I
10 probably hadn't spent enough time with Quantum's
11 ultimate change orders.

12 (DFT. EXH. 21 was marked for
13 identification.)

14 BY MR. BUNDY:

15 Q. All right. Nick, I'm going to hand you
16 Defendant's Exhibit 21.

17 MR. BUNDY: Here you go, Judge.

18 THE COURT: Do you have an extra
19 copy of that? Exhibit 19, did you have an extra
20 copy of that?

21 MR. BUNDY: Exhibit 20?

22 THE COURT: Exhibit 19. The prior
23 one is the one I didn't get. The one we were
24 doing before the break.

25 MR. BUNDY: Okay. I don't know

1 where it is.

2 THE COURT: That's all right. We
3 will find it later.

4 MR. BUNDY: We are on Defendant's
5 21.

6 THE COURT: Defendant's 21. All
7 right.

8 MR. BUNDY:

9 Q. 21. All right. Let's go to the -- how
10 about look over this and tell me if you can --
11 first, if you can identify or if you recognize
12 this document?

13 A. It looks like an e-mail sent from Ryan.

14 MR. BUNDY: And for the record,
15 this is BBC e-mails, 00750043, 44, and 45. I
16 move to introduce it into evidence.

17 THE COURT: Any objection?

18 MR. HILDEBRAND: On 21?

19 THE COURT: 21, yes, sir.

20 MR. HILDEBRAND: No objection.

21 THE COURT: Without objection.

22 (DFT. EXH. 21 was received in
23 evidence.)

24 BY MR. BUNDY:

25 Q. Thank you. All right. This starts

1 from -- it starts on the -- I guess it's the
2 second page, and it will start in the back. It's
3 from Dale Winovich. And who was that?

4 A. It's product manager for Watson
5 Electric.

6 Q. Watson Electric. And he sent it to
7 David Stanton, and David Stanton's job on this
8 job was that?

9 A. Project executive.

10 Q. Project executive. All right. And are
11 you copied on this e-mail?

12 A. Yes, sir.

13 Q. Okay. David, per my walk through this
14 morning, it's clear the project is still
15 struggling to establish (inaudible). And this is
16 dated September of 2017; is that correct?

17 A. Yes.

18 Q. All right. And you were the project
19 manager on the job for this period?

20 A. Yes.

21 Q. And you've been on the job for
22 approximately how long?

23 A. A year plus or a year and a half at that
24 point, maybe longer.

25 Q. We continue to be re-tasked to multiple

1 different areas from changes, design detail
2 clarifications where predecessor work is
3 completed or clarified. As far as level 6, we've
4 had our overhead and in wall inspection since the
5 beginning of September.

6 I'm not sure how the feedback is, that
7 we continue to fail inspections. This is
8 inaccurate. We received an RFI on 9/16/17 to
9 demo down lights in the manager's apartment,
10 which as of today is still being framed. We also
11 received and priced SI -- let's see. It looks
12 like SI54 --

13 THE COURT: 54.

14 Q. -- which will rework the electrical in
15 the kitchen on the manager's apartment. These
16 are just typical and common examples of the work
17 disruptions that we are encountering every week
18 and are expected to accommodate with unplanned
19 manpower.

20 Level 9 in-wall is complete, and as
21 discussed plans, we are working on finishing
22 overhead light fixtures and mechanical equipment.
23 In walking the L9 and L6, they're still
24 incomplete or missing framing as well as
25 continual changes.

1 There's FCU re-work ongoing, soffit and
2 miscellaneous wall framing, rework ongoing.
3 David, we can continue to go in circles as to who
4 caused the issues, but to say that we are lacking
5 manpower and we are responsible for incorrect
6 work is over-generalized.

7 We continually rework and do the
8 incorrect framing, design clarifications and
9 changes. After today's walk and about a dozen
10 pictures of work, it was installed and is now
11 hanging or removed with no notice. I
12 respectfully disagree that notice of schedule has
13 activities overdue by 30 days as change orders,
14 rolling design issues are not effectively
15 accounted for in the schedule.

16 Okay. And then the response is from
17 Stanton to Ledford. Who was Ledford?

18 A. Senior project engineer in the field.

19 Q. Okay. And you are copied on that, too,
20 right?

21 A. Yes, sir.

22 Q. And it says, Ryan, can you send me all
23 open items that Watson has on BIM 360, right?
24 That's what it says?

25 A. Yes.

1 Q. All right. What is BIM 360?

2 A. It's a tracking device for using punch
3 deficiencies, open items.

4 Q. All right. And did BMCC provide BIM
5 services?

6 A. It's different. It's not -- it's not
7 information modeling, building information
8 modeling. This BIM 360 is not the building model
9 that we were talking about. BIM 360 is a
10 tracking system that we do in terms of punch
11 lists, completion lists --

12 Q. Gotcha.

13 A. It's all things where I say, hey, this
14 is not in the right place; assign a sub. They
15 get it.

16 Q. Okay. This is sort of a status of work
17 advice for where we are sort of thing?

18 A. Not really. It's more of a
19 communication tool between the contractor and
20 subcontractor.

21 Q. So with that -- is that BIM 360
22 available to the subcontractors to look at?

23 A. Yes, sir.

24 Q. Okay. And who inputs the information to
25 BIM 360?

1 A. Subcontractors typically can. They can
2 respond and say, hey, I need something done. The
3 contractor probably puts in most of it.

4 Q. Okay. But it's basically almost -- it's
5 basically almost like a chat room in a way for
6 all the subs and the generals to leave notes to
7 each other so they could say, I need to get this,
8 this, and this, and they can sort of find out
9 what everybody is doing? Is that a fair
10 description?

11 A. A little bit more sophisticated than a
12 chat room.

13 Q. Okay. Well, I don't do any of that.
14 I'm just asking.

15 A. We do it by room and say room 667,
16 you've got to move an outlet. You can take a
17 picture of it. There's all different kinds of
18 ways to use it.

19 Q. So it's not like they have -- I guess,
20 they don't have to go chase somebody down to find
21 out what they need to do in room 367? They can
22 get on BIM360 and say, you need to send an
23 electrician over here to move this?

24 A. Yeah. I don't know that it's a complete
25 list of everything they have to do, but it's a

1 tool.

2 Q. It's a tool? It's a management tool?

3 A. That's right.

4 Q. Okay. All right. And Ledford responds,
5 see attached BIM360 list for Watson's open items.
6 There are probably a few items on the lower floor
7 that can be marked as complete, but I know six
8 and seventh floor are up-to-date as of 3 p.m.
9 today.

10 While Kevin does attempt to stay on top
11 of issues, it's obvious that Watson and other
12 trades are overwhelmed by the amount of work to
13 complete. They simply don't have enough manpower
14 to handle the activities at hand.

15 As you know, it's a red herring to state
16 that design issues are holding up work. The
17 design issues are probably less than 10 percent
18 of the list. The bulk of the list contains
19 issues like fire caulking, moving outlets, or
20 lights that were not installed per the dimensions
21 on the contract drawings, missing, or covered up
22 devices.

23 There are over 66 issues that we have
24 caught so far just on level 7, just to allow us
25 to get an overhead inspections. It is due to

1 poor QC. What does QC stand for?

2 A. Quality control.

3 Q. That we are in the position now where
4 multiple trades must be involved to fix these
5 issues and disrupt the flow of work. BBC has
6 tried to help by going above and beyond, logging
7 literally thousands of issues into the BIM360,
8 trying to spoon feed these guys and help push the
9 job. Johnny and I have been on six and seven --
10 who's Johnny?

11 A. Johnny Irvine, superintendent.

12 Q. -- floors constantly trying to keep
13 these -- help -- trying to help these -- help
14 work these items off the list, but it's clear,
15 more qualified help is needed by Watson. Please
16 let me know if you need anything else. Okay?
17 Got it?

18 A. Got it.

19 Q. Have you ever seen this e-mail before?

20 A. I believe I've seen it.

21 Q. Okay. I took Ledford's deposition. Do
22 you think Ledford is an honest man?

23 A. Yes, sir.

24 Q. Okay. Do you know of any reason why he
25 would say something in here that wasn't true?

1 A. Yeah. Not intentionally, no. I think
2 Ryan, for better or worse, was probably pretty
3 fired up, that, you know, Watson was saying they
4 didn't have many issues.

5 I think this is -- and he doesn't
6 understand the entire consequence and everything
7 that's happening on the job, how Watson is being
8 pushed here, pushed there. The manpower is
9 spread out on that floor, constantly having to
10 skip rooms, come back. And it's -- he's probably
11 for more -- he's trying to push his work to get
12 done. That's what he was tasked with, and he's
13 pushing as hard as he can.

14 Q. Now, was he a field guy or an office
15 guy?

16 A. He was a field guy at this point.

17 Q. Okay. So let me see if I get this
18 right. You work in the office, and the guy that
19 works in the field is misinformed about what's
20 going on in the field?

21 A. I didn't say he was misinformed.

22 Q. Oh, he didn't understand?

23 A. I'm saying he probably didn't understand
24 the big picture.

25 Q. The big picture. He saw the trees, you

1 saw the forest; is that what we're saying?

2 A. I'm saying that he was looking at a
3 vacuum of level 6 and level 7 and what had
4 happened on level 6 and level 7.

5 Q. Well, one thing we can all be assured
6 of, you knew more about the job than Ryan did?

7 A. From a big picture, I would agree that I
8 knew more about what was going on with
9 communication with the owner, changes that were
10 coming.

11 Q. Sure.

12 A. These day-to-day issues, I wouldn't say
13 that I knew any more about them.

14 Q. And what was Mr. Stanton's job again?

15 A. Project executive.

16 Q. He was what?

17 A. Project executive.

18 Q. Project executive. Is that the guy that
19 got you this job?

20 A. No, sir.

21 Q. Is that the guy or is this somebody
22 else?

23 A. Somebody else.

24 Q. Okay. So the project executive on this
25 project, when he got a letter from Watson

1 Electric -- well, how big a subcontractor, 3 or 4
2 million bucks?

3 A. I don't remember.

4 Q. The project executive on this job, now,
5 he was above you, right?

6 A. Yes, sir.

7 Q. He was above you, your boss, right?

8 A. Right.

9 Q. And he could have chosen anybody on that
10 job, including you, to report back to him about
11 the statements that had been made by the
12 electrician, whether -- how many BIM360 things
13 they had, and what they're -- what this
14 particular person's on the job opinion was as to
15 Watson's letter, right? He could have picked
16 anybody he wanted to ask?

17 A. Absolutely.

18 Q. Absolutely. And he didn't have the good
19 sense to get you to do it, right?

20 A. This is a report. He asked for a report
21 on open items and BIM360. Ryan was a lot more
22 technically savvy in BIM360. He uses it on a
23 more daily basis than I do, and there's no reason
24 to ask me for it.

25 Q. But if your boss had just had enough

1 sense to know who to ask and who actually knew
2 how to run this job, he would have called the guy
3 who's 29 years old and asked him, and instead, he
4 called the field superintendent who was out there
5 every day. Had they fired Stanton yet?

6 A. No.

7 Q. Well, they ought to because he made a
8 big mistake. He should have called you.

9 A. He just asked me for a report.

10 Q. All right.

11 A. He said, can you send me all the open
12 items that Watson has on BIM360.

13 Q. I hear you.

14 A. He didn't ask to know -- how Watson was
15 performing on the job. He said, send me reports,
16 and Ryan felt obliged to respond to him.

17 Q. Okay. This was just a gratuitous
18 opinion given by the superintendent?

19 A. It was an opinion, absolutely.

20 Q. And he's wrong?

21 A. I'm not saying he's wrong. I'm saying
22 that he was probably fired up. He was probably
23 trying to get his floors done, and he responded
24 like this. And he sent it internally. He didn't
25 send it to the subcontractor. He sent it

1 internally.

2 Q. If it said internally, it's not true or
3 doesn't have to be true?

4 A. I didn't say that.

5 Q. No, I'm asking you. If it says
6 internally, is it still supposed to be true?

7 A. He has no reason to lie.

8 (DFT. EXH. 22 was marked for
9 identification.)

10 Q. Okay. Thank you. All right. Let's
11 look at exhibit -- what I will identify as 22.

12 A. Notice of delay and --

13 Q. Hold on one second. All right. This is
14 Exhibit 22, right?

15 A. Yes.

16 Q. All right. And what is the title of
17 this document?

18 A. Notice of delay and demand for cure.

19 Q. And who signed this document?

20 A. I did.

21 Q. As the project manager?

22 A. Yes, sir.

23 Q. Is this the standard form that's used by
24 BBC?

25 A. It's the standard form that we used on

1 this project.

2 Q. All right. And, in fact, it's demand --
3 notice of delay and demand for cure is sort of a
4 term of art in the subcontract, right? It has a
5 definition in the subcontract?

6 A. I believe so.

7 Q. Okay. And certain event have to occur
8 before your company would be contractually
9 entitled to issue such a notice, correct?

10 A. Contractually entitled to issue a
11 notice?

12 Q. Yes.

13 A. I believe that's correct.

14 Q. Pardon me?

15 A. I believe that's correct.

16 Q. Well, the contract doesn't allow you to
17 issue a notice to cure and demand -- of delay and
18 demand for cure when it's not delayed and there's
19 nothing to cure, does it?

20 A. Sure.

21 Q. Okay. So you would only send these
22 notices out when that condition actually existed?

23 A. Yes, sir.

24 Q. Okay. And there's a number of check off
25 things here. How many different boxes are there

1 in total to check off as evidence of default of
2 the subcontract, which, in fact, are, I believe,
3 outlined by paragraph and article? How many of
4 them are there?

5 A. Eight.

6 Q. How many?

7 A. Eight.

8 Q. I see 12.

9 A. Eight checked off.

10 Q. Okay. I asked you how many there was
11 altogether, but okay.

12 A. I thought you said checked off.

13 Q. No, I didn't mean to -- I apologize if I
14 did. There are 12 things you can put a
15 subcontractor in default for under the
16 subcontract. And this subcontractor might
17 have -- managed to get 8 out of 12, right?

18 A. No, sir. There are 12 things on this
19 list, the last one being other. I'm sure there
20 are other reasons they can be in default of the
21 subcontract. These are just ones that we
22 selected.

23 Q. Okay.

24 A. This isn't a full recap of their
25 subcontract.

1 Q. Okay. So they could make even more
2 mistakes than these?

3 A. Sure. Again, we can pull out the
4 subcontract and identify it.

5 Q. But the form -- the form, created by
6 Balfour Beatty, selected 12?

7 A. With the 12th being other to fill in.

8 Q. Eight out of 12 is what percentage?

9 A. Eight out of 12 is 75 percent.

10 Q. Okay. And if we were talking about a
11 batting average, you would be hitting 750,
12 correct?

13 A. We're not talking about batting
14 averages.

15 Q. So this is what --

16 A. If I were to read this list, if I only
17 listed the ones that they were in default for,
18 they'd be at 100 percent.

19 Q. Pardon me?

20 A. If I only put the ones that they were in
21 default of, were put on notice, I'd have to
22 include all of these. This is a standard form.

23 Q. Well, let's talk about what you believe
24 they were doing wrong. On 16 December 2016, how
25 long had you been on the job at that point?

1 A. Eight months.

2 Q. Eight months?

3 A. Yes.

4 Q. Okay. So had you turned -- let's see.

5 In December, you hadn't quite made -- were you 29
6 yet, or were you 30?

7 A. I don't know. I have no idea. Do you
8 want to do the math?

9 Q. But you were on the job at 28 or 29, and
10 within six months, you were issuing a notice of
11 delay and demand for cure to Old North State
12 Masonry, correct?

13 A. Yes, sir.

14 Q. All right. And presumably, before you
15 did that, you reviewed the subcontract and went
16 out and reviewed the work in the field?

17 A. Presumably.

18 Q. And presumably, you talked to the people
19 in the field?

20 A. Yes.

21 Q. All right. And what you said was that
22 they were in default. Now, what does that mean
23 in terms of -- what does that mean in terms of a
24 Balfour Beatty subcontract, when a subcontractor
25 is in default?

1 A. They're not performing.

2 Q. Okay. Is that a breach of that
3 subcontract?

4 A. It could be considered that, not --
5 yeah. It could be considered that they weren't
6 fulfilling their obligations as we saw it.

7 Q. And does the contract require that you
8 give subcontractors a notice of default, if in
9 fact, they are in default?

10 A. I don't know if it requires us to, but
11 it's an option.

12 Q. It's an option. Okay. So it's also an
13 option just to let them go and do defective work
14 that you know about and not put it -- give it to
15 their attention?

16 A. That's right.

17 Q. Okay. And how many times did y'all
18 exercise the option of allowing a subcontractor
19 to proceed with defective work without putting
20 them on notice of defective work?

21 A. I can't imagine we did it frequently,
22 Mr. Bundy.

23 Q. All right. First one, fully perform and
24 timely complete the work in accordance with the
25 subcontract. So at least as of September 16,

1 2016, Old North State Masonry was not fully
2 performing and timely completing its work in
3 accordance with the subcontract? True or not?

4 A. December 16.

5 Q. Excuse me, December 16. Is it true or
6 is it not true that, as of December 16, 2016,
7 you, the project manager on this job with Balfour
8 Beatty, the Bennett Hotel, put your
9 subcontractor, Old North State Masonry, declared
10 them in default for failing to fully perform and
11 timely complete its work in accordance with the
12 subcontract; is that true?

13 A. True.

14 Q. Okay. Is it also true that you put them
15 on default, notice of default for failing to
16 provide written assurances of complete and timely
17 performance?

18 A. True.

19 Q. Is it also true that you held them in
20 default and you believed it to be true, that they
21 were failing to coordinate its work with that of
22 the contractor and other subcontractors?

23 A. True.

24 Q. Is it also true they were failing to
25 provide sufficient labor, equipment, materials,

1 and supervision required for the proper and
2 complete performance of the work?

3 A. True.

4 Q. Is it true they were failing to correct
5 their defective work?

6 A. True.

7 Q. Is it true they weren't cleaning up
8 every day as required?

9 A. True.

10 Q. Is it true that they weren't protecting
11 the work and store materials from damage and
12 destruction and/or avoiding damage to the work or
13 materials of other trades?

14 A. True.

15 Q. All right. And down at the bottom, you
16 were directing them to correct deficiencies in
17 work and to distribute the field report 0245,
18 Hotel Marion Square, FR-2, right?

19 A. We were doing everything we could to get
20 their work complete as fast and as efficiently as
21 possible.

22 Q. Okay. Demand is hereby made to the
23 subcontractor commence and continue to cure the
24 aforementioned defaults within three business
25 days of receipt of this notice.

1 Failure to cure any defaults will cause
2 BBC to take those actions described in the
3 contract or any action permitted by law
4 including, without limitation, the remedies set
5 forth in articles 5 and 11, correct?

6 A. That's what it says.

7 Q. Do you know off the top of your head
8 what those remedies might be?

9 A. You can replace the subcontractor.

10 Q. There you go. You can fire them if you
11 wanted to?

12 A. You could if you want.

13 Q. All right. And did y'all get a payment
14 performance bond on your subcontractors?

15 A. I don't remember if we got one on this
16 one.

17 MR. BUNDY: Your Honor, I'd move to
18 put that in evidence. I don't know if I'd moved
19 or not, but I'm going to go ahead and --

20 THE COURT: You had not. Do you
21 want it in? This is Defendant's 22.

22 MR. HILDEBRAND: No objection.

23 THE COURT: Without objection.

24 (DFT. EXH. 22 was received in
25 evidence.)

1 (DFT. EXH. 23 was marked for
2 identification.)

3 BY MR. BUNDY:

4 Q. All right. Let's look at 23. Start at
5 the bottom, and it's from Joshua Beitz to you.
6 Who is Joshua Beitz, Nick?

7 A. Project manager for Lithko.

8 Q. So a director for the --

9 A. Project manager for Lithko.

10 Q. Okay. And Beitz is saying, Nick and
11 Tim, please see the attached release of
12 mechanic's lien from Doka. Who is Doka?

13 A. I think they were a form supplier.

14 Q. A supplier?

15 A. A supplier.

16 Q. And who did they supply to?

17 A. Lithko.

18 Q. Okay. So they were second to your
19 subcontractor?

20 A. Supplier type, provider, material.

21 Q. Okay. They weren't in contract with
22 Balfour Beatty?

23 A. No, sir.

24 Q. And they weren't in contract with
25 Library Associates, correct?

1 A. To my knowledge, they were not.

2 Q. All right. And they filed the lien on
3 my client's hotel, right?

4 A. Pardon?

5 Q. Doka, they filed a lien on my client's
6 hotel. Library Associates is my client.

7 A. Okay.

8 Q. Did they file a lien on my client's
9 hotel?

10 A. This says they had. I don't remember
11 all the liens that were filed.

12 Q. I'm not asking you to remember all of
13 them because there were a bunch of them filed. I
14 want to talk about the Doka lien, which is in
15 this e-mail. And he says, see the attached
16 release of mechanic's lien. Okay? So do you
17 think somebody would file a release for
18 mechanic's lien that was never filed?

19 A. No.

20 Q. Okay. So there must have been a lien,
21 and it must have been filed by Doka, correct?

22 A. It must have been.

23 Q. Is the filing of a lien by a material
24 supplier, a breach of the subcontract between
25 Balfour Beatty and the subcontractor?

1 A. I don't know.

2 Q. You don't know. Is the filing of a lien
3 by a subcontractor a breach that required the
4 general contractor or construction manager, in
5 this instance, to file a release of mechanic's
6 lien?

7 A. Pardon?

8 Q. Is the general contractor or the
9 construction manager, BBC, required to bond off
10 or otherwise satisfy liens filed on the project?

11 A. I believe the contract says that.

12 Q. Okay. And why?

13 A. I don't know why. It's just what the
14 contract says.

15 Q. Well, do you know what a lien is?

16 A. Yes, sir.

17 Q. Tell me what it is. What is your
18 understanding?

19 A. My understanding of a lien is, it's a --
20 the contractor performed work or supplied
21 material to the project, and they are holding
22 their rights to lien on the project.

23 A lien is basically their service that
24 they've -- not service they provide, but a lien
25 is basically telling someone or filing, that they

1 have not been paid or satisfied on their
2 contract.

3 Q. Something like that?

4 A. Yeah, something like that.

5 Q. What effect does the filing of a lien
6 have on the title to a piece of property? Do you
7 know?

8 A. I don't know all the effects that it
9 has.

10 Q. What effect does a lien have on the
11 ability of an owner, such as Library Associates,
12 to obtain a draw request once that lien has been
13 filed?

14 A. I'm not a hundred percent sure. I don't
15 know what they can and cannot do with a lien on
16 the property. That's probably in their agreement
17 with the bank.

18 Q. Do you know whether or not, when you
19 file a lien, you have to sign an affidavit and
20 swear under oath that the money is actually due?

21 A. I don't know that.

22 Q. Do you know whether it's filed with the
23 RMC office and becomes a public record for the
24 entire world to --

25 A. I do not know that.

1 Q. -- be put on notice of?

2 A. I do not know that.

3 Q. Do you know why Doka filed the lien?

4 A. They probably haven't been paid.

5 Q. And do you know whether or not Lithko
6 had been paid by Balfour Beatty?

7 A. I do not.

8 Q. Okay. If Lithko had been paid by
9 Balfour Beatty, should they have paid Doka?

10 A. I can't speak for Lithko.

11 Q. Okay. All right. Are lien releases
12 required -- strike that. Let me start again.
13 We've been talking about liens. What is -- you
14 know what a lien is now, or you told me what you
15 think a lien is. I would like to know now what
16 you think a release of lien is?

17 A. It's releasing your right to file a lien
18 for the amount that's in the release.

19 Q. Okay. All right. And do you know what
20 law is relevant to what is required in terms of
21 timeliness or the time of the filing of the lien?

22 A. I'm just going to say, no, I don't know
23 the law around it.

24 Q. So you're unaware that a lien has to be
25 filed, one, within 90 days of the last day you

1 did work on the job?

2 A. I'm aware of that.

3 Q. Did you know that?

4 A. I'm aware of that.

5 Q. Okay. So since you've got 90 days, do
6 you think it would behoove a lender to get a
7 release of lien before he pays money on a
8 project, because somebody could come in
9 afterwards and claim a lien? If he didn't have
10 the lien release, that lien would affect his
11 position and title. Are you aware of that?

12 A. I can't speak to that.

13 Q. Okay. So you really don't know what the
14 significance of the lien or the ramifications of
15 the filing of a lien are?

16 A. I don't know what benefits the lender
17 and what doesn't.

18 Q. So I guess you didn't have any lien
19 lunches?

20 A. Lien lunches?

21 Q. Lien lunches, where you learned about
22 liens at Balfour Beatty?

23 A. No.

24 Q. You said you had lunch and learn. Did
25 you have a lunch and learn about liens?

1 A. About what a lender requires?

2 Q. No, sir.

3 A. I'm sure we had lunch and learns on
4 whether --

5 Q. Oh, so you had one? Okay. So you had a
6 lender -- did you have a --

7 A. No.

8 MR. HILDEBRAND: Your Honor, he's
9 not letting him finish his answer. They're
10 talking over each other.

11 MR. BUNDY: I gotcha.

12 THE COURT: Go ahead. Let him
13 finish.

14 BY MR. BUNDY:

15 Q. All right. Let's go up a little bit.
16 Who is Candace?

17 A. Project accountant.

18 Q. Okay. And I have a hard time figuring
19 out who is writing who on these things. Okay.
20 Is this from you? Tim Spano is writing to
21 Candace; is that what's going on?

22 A. That's who he is addressing it to.

23 Q. Huh?

24 A. That's who he's addressing it to.

25 Q. Okay. I have a hard time with these

1 things.

2 A. Candace, this is the final meeting
3 release with Lithko's pay app number 16 for
4 October of 2016. We want to release this
5 funding. Let us know if anything else is needed
6 to cut the check. Thanks.

7 Q. Okay. So in order -- by release the
8 funding, he means pay them, I guess?

9 A. I would assume so.

10 Q. Okay. And Candace -- then you write
11 Candace, right?

12 A. Yes.

13 Q. Okay. And you send a copy to Sandeen
14 and whoever, Stanton or whoever. And the title
15 is, Marion Square satisfaction of mechanic's
16 lien.

17 Candace, we need to know if we have all
18 the required leases for Lithko through pay app
19 19. Did you mean releases because I -- y'all
20 didn't lease anything to Lithko, did you?

21 A. I assumes I meant releases.

22 Q. All right. Let's do it this way. This
23 is an assumption, but let's look in -- let's
24 drill down on the assumption. Did Balfour Beatty
25 Construction Company lease Lithko any property

1 that you know of?

2 A. Not that I know of.

3 Q. Okay. So then this notice could have
4 been a mistake. It should have said release,
5 right?

6 A. Yes, sir.

7 Q. Okay. And really, if we fill it out is,
8 we need to know if we have all the required
9 releases of liens for Lithko, right?

10 A. Okay.

11 Q. Through pay app 19. We need to hold
12 funds for potential back charges. What back
13 charges?

14 A. I don't know. Potential back charges.

15 Q. Okay. But what would they be for?

16 A. A number of things.

17 Q. Name one.

18 A. I don't know what these back charges
19 were for.

20 Q. You just know they were potential?

21 A. That's right.

22 Q. Okay. But we can release most of their
23 draws if all the required lien releases and all
24 the required releases have been received. Do you
25 know whether or not you ultimately got all the

1 required releases?

2 A. No, sir. I would imagine we did,
3 though.

4 Q. You would imagine you did. Okay. Now,
5 if you got the complete release and released all
6 the funds, based on the language we read earlier
7 today, if it was similar language, would Lithko
8 be entitled under that lien release to file any
9 more claims or have any -- make any more claims
10 against either BBC or Library Associates?

11 A. I don't understand.

12 Q. That's fine.

13 MR. BUNDY: Your Honor, I move to
14 put Exhibit 23 into evidence.

15 THE COURT: Exhibit 23?

16 MR. HILDEBRAND: No objection.

17 THE COURT: All right. Without
18 objection. I need a copy of that one, if you
19 have got it.

20 (DFT. EXH. 23 was received in
21 evidence.)

22 (DFT. EXH. 24 was marked for
23 identification.)

24 BY MR. BUNDY:

25 Q. All right. 23?

1 A. Got it. 24?

2 Q. Excuse me, is it 24?

3 A. 24 is the new one.

4 MR. BUNDY: This is, for the
5 record, BBC e-mails 01747917. I move to
6 introduce it into evidence.

7 MR. HILDEBRAND: No objection, Your
8 Honor.

9 THE COURT: Without objection. Got
10 it.

11 (DFT. EXH. 24 was received in
12 evidence.)

13 BY MR. BUNDY:

14 Q. All right. Look through it and we'll
15 try to get through it quick.

16 A. Okay.

17 Q. All right. The very last notes on --
18 I'm going to try to move along. At the top of
19 the first page, the last e-mail in this string,
20 it's from Tim Spano to you and others, right?

21 A. Yep.

22 Q. And it's entitled, Marion Square,
23 Lithko, demand for cure, right?

24 A. Yes.

25 Q. And what Spano says, regardless of the

1 pour, and that's P-O-U-R, look ahead, right?

2 That's what it says, regardless of the pour, look
3 ahead.

4 A. That's what it says.

5 Q. What he's talking about is pouring
6 concrete, right?

7 A. I do not know.

8 Q. Huh?

9 A. I do not know.

10 Q. Okay. Well, do you --

11 A. If he's assuming there's poor weather
12 coming or if he's looking at a pour schedule. I
13 don't know what he's talking bout.

14 Q. Well, poor is spelled P-O-O-R, if
15 something is in poor shape.

16 A. I understand that.

17 Q. If you're pouring something out of a
18 glass, it's P-O-U-R, or if you were pouring
19 concrete, it would be P-O-U-R.

20 A. I understand that.

21 Q. Okay. So what do you think this is,
22 pouring concrete, or is it poor concrete,
23 P-O-O-R?

24 A. I don't know.

25 Q. Okay.

1 A. I loved him to death, but it wouldn't be
2 the first time he made a spelling mistake.

3 Q. I gotcha. Do you recall calling him up
4 and saying, what are you talking about?

5 A. No.

6 Q. Are you talking about pouring concrete
7 or are you talking about poor workmanship?

8 A. No, I don't recall calling him and
9 asking him.

10 Q. Okay. The loss of decking. What is
11 decking?

12 A. Decking, it's formwork underneath the
13 slab.

14 Q. Okay. Into which concrete is poured,
15 P-O-U-R?

16 A. Correct.

17 Q. Okay. So does that give you any hint on
18 what he's talking about?

19 A. No. He could be forecasting before
20 looking at it. I'm reading this and saying, he
21 could be forecasting a poor look ahead, P-O-O-R.
22 If they saw weather coming, they're -- they're
23 not going to put decking up because there's a
24 poor weather coming. I don't know.

25 Q. I don't know either. The loss of

1 decking today will delay the structure and
2 ability to pull the schedule in. That's on
3 Lithko.

4 A. Yes, sir.

5 Q. What does that mean?

6 A. He's blaming Lithko.

7 Q. He's blaming Lithko for whatever it is
8 he's talking about?

9 A. For not being able to get ahead, and we
10 were doing everything we could to push our
11 subcontractors, Mr. Bundy.

12 Q. This is BBC e-mail 01746035.

13 MR. BUNDY: Your Honor, I think I
14 already got the last one in, didn't I?

15 THE COURT: It was in, yes.

16 MR. BUNDY: Did I get the last one
17 in?

18 THE COURT: It was in, yes.

19 (DFT. EXH. 25 was marked for
20 identification.)

21 MR. BUNDY: 25, I move to put into
22 evidence, Your Honor.

23 MR. HILDEBRAND: No objection.

24 THE COURT: Without objection.

25 (DFT. EXH. 25 was admitted into

1 evidence.)

2 BY MR. BUNDY:

3 Q. All right. And this is July 14, 2016 to
4 Spano, and you received a copy, right?

5 A. Yes.

6 Q. All right. And it's from a guy or a
7 gentleman named Chip Venable. He's the project
8 manager, it looks like, for Old North State
9 Masonry; is that correct?

10 A. Yes.

11 Q. All right. He writes, Mr. Spano, please
12 accept this letter as an official notice of delay
13 for the masonry scope of work. As of today, we
14 have demobilized from your job. When we arrived
15 on the job -- your job Monday, this week,
16 numerous areas were brought to you and your
17 team's attention for rebar, either completely
18 missing or in the wrong place.

19 This is not been corrected at this
20 point. Other area of delay are materials and
21 pour -- and post shores preventing us from
22 stocking out and performing our work. More
23 importantly, while on site this week, it has come
24 to our attention, that the grout, G-R-O-U-T,
25 holes, paren, detail S303-4, are missing in all

1 slabs currently poured.

2 What are grout pour? And it's not
3 P-O-O-R but P-O-U-R holes.

4 A. Pour holes?

5 Q. Yes.

6 A. It's holes in the slab. You stick rebar
7 ring in, it goes through the block, and you pour
8 from above down below.

9 Q. You pour grout to fill CMU units?

10 A. Yes, sir.

11 Q. Okay. And the way CMU units are laid,
12 the drillings don't lay up on top of each other
13 so the holes sometimes don't match up on the way
14 down, right? So you've got to have a way to fill
15 them up as you go up, right?

16 A. Yes.

17 Q. Okay.

18 A. I believe that's correct.

19 Q. And it is in fact the law, or the
20 building inspector, will not let you lay but so
21 many courses of CMU before you fill the bar; is
22 that correct?

23 A. To an extent, yes.

24 Q. No. It's a code -- it's a code
25 requirement --

1 A. There's various --

2 Q. -- to a specific number of feet. Are
3 you not aware of that?

4 A. No. There is a code. To an extent, he
5 won't let me go but so far.

6 Q. Okay. Do you know what that number is?

7 A. I do not, off the top of my head.

8 Q. And you know, don't you, that if you put
9 up more block that is allowed before you pour the
10 grout, you're going to have to take it down and
11 repour it, right?

12 A. That's right.

13 Q. Okay. And the grout holes allow for
14 that pour to take place so that it conforms with
15 the standard building code?

16 A. There's other ways to do it.

17 Q. And in this instance, the mason is
18 complaining that was not done?

19 A. No. He is complaining that the holes
20 were not there yet. He's not saying that he put
21 up too much.

22 Q. Whose job was it to put the holes in?

23 A. Lithko's.

24 Q. Huh?

25 A. Lithko's. This was in their scope of

1 work.

2 Q. And I presume you've some some document
3 somewhere where Mike Bennett or Kim Bennett Brown
4 or the architect told you, no, we will not allow
5 you to have pour holes on this job? Is that why
6 y'all didn't get Lithko to do it?

7 A. We did get Lithko to do it.

8 Q. All right. Did it delay the job?

9 A. The critical path?

10 Q. Sir?

11 A. The critical path?

12 Q. Yes.

13 A. Again, I don't know that it did or
14 didn't.

15 Q. If it did delay the critical path, that
16 would be on BBC as it relates to Library
17 Associates, and it would be on Lithko as it
18 relates to BBC, correct?

19 A. Yeah. There's a number of things that
20 go into it, but if they didn't do something they
21 were supposed to do, that's on us.

22 (DFT. EXH. 26 was marked for
23 identification.)

24 MR. BUNDY: 26. Number 26, Your
25 Honor, BBC e-mails 01746036. I move to introduce

1 this into evidence as Exhibit 26.

2 THE COURT: Okay.

3 MR. HILDEBRAND: No objection, Your
4 Honor.

5 THE COURT: Again, without
6 objection.

7 (DFT. EXH. 26 was received in
8 evidence.)

9 BY MR. BUNDY:

10 Q. All right. This exhibit, you were
11 copied on. It's another letter from Mr. Venable.
12 This was dated August 11, 2016, and it's
13 entitled, Marion Square Hotel, second notice of
14 delay. Do you see that?

15 A. Yes.

16 Q. Mr. Spano, please accept this letter as
17 our official second notice of delay to the
18 masonry scope of work. Once we complete the
19 basement and first floor CMU, we will be
20 demobilizing from the job. What does
21 demobilizing mean?

22 A. Leaving the job.

23 Q. All right. Did the schedule that you
24 were building this building by have a section in
25 it where Old North State Masonry was going to

1 leave the job, come back to the job, leave the
2 job, come back to the job, or did you expect,
3 according to the schedule if it were followed,
4 that they would be there pretty much
5 continuously?

6 A. When you lay a plan out, typically, you
7 want a subcontractor there continuously. I don't
8 think our schedule had the subcontractor leaving.

9 Q. We still do not have any clear direction
10 as to what is happening with the rebar. As an
11 update to the job schedule, we are still being
12 delayed due to rebar on second floor not being
13 installed per the drawings. Is that what it
14 says?

15 A. Yes, sir.

16 Q. This has caused a complete loss of
17 production this week. Is that what it says?

18 A. Yes.

19 Q. The missing grout pour holes is
20 impacting our grouting procedures, correct?

21 A. Yes.

22 Q. The last lift of CMU cannot be vibrated.
23 Now, what does that mean?

24 A. Exactly what it says, can't vibrate the
25 grout to make sure it gets into all the CMUs.

1 Q. Explain to the Judge what a vibrator is
2 for concrete purposes.

3 A. It's a device, placed down in the grout,
4 fill up the grout, usually at the bottom beam
5 vertically. You pour grout, and you vibrate it
6 in to make sure it fits all of the --

7 Q. And the purpose of that is two-fold, is
8 it not, to get the grout fully within the cells
9 but also to get the air out of the grout?

10 A. That's correct.

11 Q. Okay. But there's an art to that, like
12 everything else. You can also over-vibrate the
13 concrete and vibrate it --

14 A. Sure.

15 Q. -- so much it separates it and it's
16 useless?

17 A. That's right.

18 Q. Okay. And that's why you need the holes
19 so you'll -- so you're able to do it properly?

20 A. There's several ways do to it.

21 Q. Means, methods, and procedures, right?

22 A. Yes.

23 Q. Means and methods?

24 A. That's correct.

25 Q. Okay. But it's also a requirement in

1 the contract plans and specifications and the
2 building code?

3 A. Which we met.

4 Q. As you cannot fit the vibrator down to
5 the last lift. Well, if you can't fit it down to
6 the last lift, you can't vibrate the last lift;
7 so, therefore, the installation of the grout
8 would not be consistent with the plans and
9 specifications of the building code, correct?

10 A. Not true. The inspector would be there.
11 We made special accommodations so the inspector
12 could review it.

13 Q. We do understand your team is to have a
14 conversation with the inspector trying to resolve
15 this issue. Well, tell me about, what was the
16 issue that you were trying to resolve with the
17 building inspector?

18 A. We wanted -- this was the third party
19 inspector. We wanted to make sure that the grout
20 had made it to all -- all the CMU holes as
21 planned.

22 Q. I don't understand what the -- what is
23 the issue you're trying to resolve? The failure
24 to have grout, the way to put the grout in?

25 A. The failure to have it as the way it was

1 designed and planned. There's other ways to
2 remedy problems than the way it's designed in the
3 plans. Instead of taking the block down, we came
4 up with another way to do it.

5 Q. Are you telling me the design is
6 defective?

7 A. No, sir.

8 Q. Okay. So we're not going to blame this
9 on the architect?

10 A. I'm not blaming this on the architect.

11 Q. Okay. Well, we find something he did
12 right on the 50 million dollar hotel. So what
13 was the fix that y'all came up with or the
14 alternate course?

15 A. We left the top level of the CMU block
16 off, and they were able to get their grout pump
17 in, and that's how they filled up the last lift.
18 And then the inspector would come behind and
19 either do sound checks or ask us to spot check
20 places within the CMU.

21 Q. And would that procedure be a deviation
22 of standard practice and what was required in the
23 plans and specifications?

24 A. No, sir.

25 Q. So you didn't issue -- there wasn't an

1 RFI that would allow y'all to do it this way?

2 A. There may have been.

3 Q. There may have been?

4 A. There may have been. I don't -- I don't
5 remember.

6 Q. Okay. So there may have been an RFI, at
7 least maybe one on this job, that was a result of
8 the contractor not following the plans and
9 specifications and not understanding the plans
10 and specifications?

11 A. No, sir. If you're saying that we
12 deviated from the plans and specifications, I'm
13 not saying that. The plans and specifications
14 never say that you have to put a -- you have to
15 put a grout on from the floor above into the CMU
16 where the vibrator is. The plans and specs never
17 said that. Means and methods.

18 Q. Let's go on. However, we are losing
19 valuable time to the schedule due to the
20 confusion of rebar spacing, rebar not passing
21 through the floor, and our inability to vibrate
22 the last lift of CMU. Is that statement true?

23 A. It's their take on it. I don't know if
24 it's true or not. I don't believe that's true or
25 not.

1 Q. You can't deny it, can you?

2 A. What's that?

3 Q. You cannot deny it's true, can you?

4 A. I'm saying, this is the subcontractor's
5 point of view.

6 Q. What is your point of view,
7 Mr. Starcevic?

8 A. That we found out -- we figured out a
9 way to accomplish the task.

10 Q. No. Well, it also says, we are losing
11 valuable time. Is that a correct statement or
12 not?

13 A. From their original anticipated
14 duration, it probably took longer than they had
15 planned. And they also got paid for that.

16 Q. We expect that -- your team to take the
17 lead on this and make sure all parties concerned
18 have a clear understanding of the expectation
19 structurally to get the CMU walls built. Did
20 y'all get together with all parties and come to a
21 clear understanding at any point?

22 A. I believe so.

23 Q. All right.

24 A. These are things we -- we worked these
25 out on the site. This is atypical from a

1 (inaudible) job.

2 MR. BUNDY: If I haven't done it,
3 I'll move the last -- I think I've got it in
4 evidence already.

5 THE COURT: Yeah. 26, was in,
6 yeah.

7 (DFT. EXH. 27 marked for
8 identification.)

9 MR. BUNDY: All right. Exhibit 27
10 is BBC e-mail 01747431. I move to put it into
11 evidence.

12 THE COURT: Okay.

13 MR. HILDEBRAND: No objection.

14 THE COURT: Without objection. All
15 right.

16 (DFT. EXH. 27 received in
17 evidence.)

18 BY MR. BUNDY:

19 Q. All right. Let's go to the second page,
20 which is 01747432. Do you see that?

21 A. Yes.

22 Q. All right. Now, this is an e-mail from
23 John Heuer?

24 A. Heuer.

25 Q. Heuer, sorry. I apologize. Sent on

1 Monday, July 9th at 2:18. Now, he is the general
2 counsel for this company, BBC, right?

3 A. Senior vice president of legal.

4 Q. Pardon me?

5 A. Senior vice president of legal.

6 Q. And he is also general counsel, isn't
7 he?

8 A. Yes, sir.

9 Q. Okay. And the job is how far away from
10 completion in July 9, actual completion? It's
11 another, what, 15 months away, 16 months away?

12 A. Sounds about right.

13 Q. And you've been on the job how long as
14 of July 9?

15 A. Two months, a month and a half or a year
16 and a half.

17 Q. Okay. And the subject, the letter is to
18 Simonton, Spano, Starcevic, Alec Dooley, Pat
19 Dean. The subject here is Old North State
20 Masonry. Where this black is, was there typing
21 and wording in this before? Has this been
22 redacted?

23 A. It looks like it.

24 MR. BUNDY: Okay. Your Honor, I
25 don't know if this is something that you have

1 approved to be redacted or not, but have you --
2 do you remember it?

3 THE COURT: I don't, but let me see
4 it.

5 MR. BUNDY: Because I believe I
6 should be entitled to see it, but we can
7 certainly have a conference about it. I don't
8 believe it was on the privilege list either, Your
9 Honor.

10 THE COURT: I don't recall it. Do
11 you recall?

12 MR. HILDEBRAND: I don't, Your
13 Honor, sorry.

14 MR. BUNDY: You know, if I could
15 interrupt you, this might be a good time to stop.
16 I'm tired, and maybe y'all can figure this out,
17 and then we will come back tomorrow.

18 THE COURT: Okay. All right. It
19 clearly looks like it was redacted.

20 MR. BUNDY: Right. I just need to
21 know --

22 THE COURT: Since it's from
23 Mr. Heuer to these folks, that may well explain
24 that, but anyway, we will see. We will compare
25 it with what we have.

1 MR. BUNDY: I just need you to look
2 at it to make sure it's actually privileged.

3 THE COURT: Yeah. Do you want to
4 break for today?

5 MR. BUNDY: Yeah, if you don't
6 mind.

7 THE COURT: Yeah. It's a little
8 after 5. We can certainly do that.
9 Mr. Starcevic, it sounds like you may be back
10 tomorrow. Do you have a few more questions for
11 him?

12 MR. BUNDY: Yes, sir. I've got
13 about a half day.

14 MR. HILDEBRAND: Half day?

15 MR. BUNDY: Maybe a day; half day
16 at least. All you've got to do is say, yes,
17 Mr. Bundy, and it will go very quickly.

18 THE WITNESS: I'm trying.

19 THE COURT: All right. Well, why
20 don't we conclude for the day and come on
21 back -- let's come back tomorrow morning about 9
22 o'clock.

23 MR. BUNDY: 9 o'clock?

24 THE COURT: Yeah.

25 MR. BUNDY: What about the

1 continuance, Judge? What are we going to do
2 about that?

3 THE COURT: I will -- let me pull
4 that thing up a second. Hold on. So I don't
5 know. I'm assuming the plaintiff has got maybe
6 two more witnesses?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: Does that sound right?

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: So it's going to take
11 tomorrow and some time into Wednesday --

12 MR. BUNDY: Yes, sir.

13 THE COURT: -- realistically?

14 MR. BUNDY: Probably Thursday, to
15 be honest with you.

16 THE COURT: Okay. Well, I think it
17 would probably easier -- based on that, it would
18 probably be easier enough just to go ahead and
19 grant the continuance --

20 MR. BUNDY: Right.

21 THE COURT: -- and come back -- at
22 one time, you had an issue with starting October
23 25th. Has that resolved?

24 MR. BUNDY: Yeah. I will be
25 finished fishing on Sunday. I will be here on

1 Monday.

2 THE COURT: Okay. All right. Very
3 good? So then why don't we -- let's just plan to
4 get through the plaintiff's case this week.
5 Okay? Sounds like it's going to take -- we've
6 got two more witnesses. This one is taking
7 longer than most, and the others may, I don't
8 know.

9 And then let's just plan to do it. So I
10 will grant his continuance for the plaintiff's
11 case -- excuse me, the defense case. And the
12 counter-claims wouldn't start until October 25th.
13 Okay.

14 MR. BUNDY: Well, my case, right,
15 yeah.

16 THE COURT: Your case. Okay. And
17 so I will need to let those subcontractors know,
18 but like I said, the -- one of the things I want
19 to do, I want to do some housekeeping. I don't
20 need to do that today. I may do that first thing
21 in the morning.

22 That one document had the list of all
23 the parties. We started going down the list of
24 who has now settled out. I may want to do that
25 with y'all tomorrow so just we're clear. But

1 we've certainly got a lot less subcontractors
2 than we initially had.

3 MR. BUNDY: I've got a couple other
4 suggestions, if you'd like to hear them, to how
5 we might move it along.

6 THE COURT: Okay. Well, I also
7 wanted to get from you a couple of documents that
8 I never got handed up today. 19 and 23 were the
9 two I was looking for.

10 MR. BUNDY: Okay. One is, you
11 know, what about -- when they finish their case,
12 I'm obviously going to have a motion or two to
13 make.

14 THE COURT: Sure.

15 MR. BUNDY: Do you want to handle
16 those, or do you want us to file briefs, or do
17 you want to do them on Friday? How do you want
18 to do all of that?

19 THE COURT: I want to play it by
20 ear, but depending on what time we finish up, if
21 it's Thursday, I will be glad to entertain them.

22 MR. BUNDY: We would be glad to go
23 forward on Friday. That way you could get it all
24 behind you and you can take -- you can think
25 about it over the 24th or from then. Now, the

1 other issue I would have or the other thing I
2 would suggest is, in our case-in-chief, we're
3 going to put in a good many video depositions of
4 various witnesses.

5 THE COURT: Okay.

6 MR. BUNDY: All of which are
7 unavailable, yada-yada, or otherwise under the
8 rule. It occurred to me that, since they're all
9 on video, right, that I could go ahead and we
10 could give them the portions we want to read.
11 They could supplement it with their portions, and
12 you could go and start watching depositions.

13 Because as I understand it, you're not
14 going to watch them in front of us anyway, right?
15 And so I could just -- I mean, you could have
16 them. I don't know -- you'd have to think about
17 that because if you start reading depositions,
18 he's going to take the position -- no, that's a
19 bad idea. I don't want to do that.

20 THE COURT: All right.

21 MR. BUNDY: I don't want to do
22 that.

23 THE COURT: That's the continuance
24 aspect of it. As long as y'all have got the
25 aspect of the -- as we did before, as long as

1 y'all got the aspect of the video deposition that
2 you intend to put into evidence.

3 MR. BUNDY: Right.

4 THE COURT: And, again, if I can
5 get it in that fashion, if there's a written
6 communication of it as well. If not, she's got
7 to take it and transcribe it.

8 MR. BUNDY: Most of my depositions
9 are video. I probably took -- 90 percent of mine
10 were video. All depositions I took were video
11 except for one or two that I took in the very
12 beginning.

13 THE COURT: Okay. Do you have a
14 written transcript with that?

15 MR. BUNDY: Absolutely. A written
16 transcript. We can get you anything you want.

17 MR. MCDONALD: Got your 23. I'll
18 try to find the other one.

19 THE COURT: All right. 19 was the
20 one we were missing. 23 was the one we had.

21 MR. MCDONALD: This is 23, and then
22 let me get you -- you know, what it was? It was
23 the change order 40, Quantum.

24 THE COURT: That's right.

25 So what I'm going to do -- what I'll do

1 is, I'll send out an e-mail this evening to Don
2 Terry, and I'm going to issue a Form 4 either
3 overnight or in the morning. I'm going to grant
4 it to the extent that this extends a continuation
5 of the case until the 25th, after the plaintiff
6 has rested.

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

9 THE COURT: Okay. Just to be clear
10 on that.

11 MR. HILDEBRAND: Your Honor, I'd
12 like to -- we also have depositions that I'd -- I
13 want to put the other side on notice. It's been
14 over a week now, about the sections that we would
15 like to have from the deposition transcripts.
16 You said that you would like to read those.
17 That's fine. But I would like to get those in
18 evidence and the exhibits that go with them
19 because that would impact how much I've got to
20 call and things like that. So maybe we can do
21 that first thing in the morning.

22 THE COURT: Okay.

23 MR. HILDEBRAND: And I think that
24 you also were kind enough to say that, you're not
25 going to -- you're going to read the depositions,

1 but you will allow me to -- for 10 minutes max to
2 read the sections from the excerpts that I would
3 like to. So we can do that tomorrow morning or
4 we can do that after Mr. Starcevic.

5 THE COURT: I would like to get
6 Mr. Starcevic in and out of here the best we can.

7 MR. HILDEBRAND: Do you want to
8 wait on all of that until --

9 THE COURT: Yeah, let's hold off on
10 that. Okay? Let's just hold off. We can do
11 that on one of the breaks or in between witnesses
12 or whatever. I'm assuming you've got your other
13 witnesses here already?

14 MR. HILDEBRAND: Yes, sir.

15 THE COURT: But that's what I
16 assumed. All right, folks. Thank y'all very
17 much. I look to see you in the morning.

18 (The hearing was concluded at
19 5:15 P.M.)

20

21

22

23

24

25

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing deposition was by me duly sworn to
9 testify to the truth, the whole truth, and
10 nothing but the truth in the within-entitled
11 cause; that said deposition was taken at the time
12 and location therein stated; that the testimony
13 of the witness and all objections made at the
14 time of the examination were recorded
15 stenographically by me and were thereafter
16 transcribed by computer-aided transcription; that
17 the foregoing is a full, complete and true record
18 of the testimony of the witness and of all
19 objections made at the time of the examination;
20 and that the witness was given an opportunity to
21 read and correct said deposition and to subscribe
22 the same.

23 Should the signature of the witness
24 not be affixed to the deposition, the witness
25 shall not have availed himself/herself of the
opportunity to sign or the signature has been
waived.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal on July 12, 2022 at
Charleston, Charleston County, South Carolina

19

20

21 _____
22 Jennifer M. Adams
23 Court Reporter And Notary Public
24 My commission expires: 03/15/2032
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 SEVEN
) 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 21, 2021 at 100 Broad Street, Courtroom
 22 2A, Charleston, South Carolina.

23

24

25

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

2
3 ON BEHALF OF PLAINTIFFS:

4 PARKER POE ADAMS & BERNSTEIN, LLP
5 BY: THOMAS HILDEBRAND, JR., ESQ.
6 BY: ROBERT C. BYRD, ESQ.
7 200 Meeting Street
8 Suite 301
9 Charleston, SC 29401
10 (843) 727-6315
11 Tomhildebrand@parkerpoe.com
12 Bobbybyrd@parkerpoe.com

13
14 ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

15 BUNDY MCDONALD, LLC
16 BY: WALTER H. BUNDY, JR., ESQ.
17 BY: M. BRENT MCDONALD, ESQ.
18 1516 Old Trolley Road
19 Second Floor
20 Summerville, SC 29485
21 (843) 492-0221
22 Walter@bundymcdonald.com
23 Brent@bundymcdonald.com

24 ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

25 SMITH TERRY JOHNSON & WINDLE
26 BY: DON R. TERRY, ESQ.
27 150 Milestone Way
28 Suite C
29 Greenville, SC 29615
30 Dterry@smithterrylaw.com

31 ON BEHALF OF DEFENDANT OLD NORTH STATE & LITHKO:

32 SMITH TERRY JOHNSON & WINDLE
33 BY: STEELE B. WINDLE, III, ESQ.
34 150 Milestone Way
35 Suite C
36 Greenville, SC 29615
37 Awindle@smithterrylaw.com

1

ON BEHALF OF DEFENDANT DAVID ALLEN COMPANY:

2

KELLY LAW FIRM, LLC

3

BY: RUSSELL BRITTON KELLY, ESQ.

689 King Street

4

Charleston, SC 29403

Britt@kellylawsc.com

5

6

ON BEHALF OF DEFENDANT METROPOLITAN LIFE:

7

BUIST BYARS & TAYLOR, LLC

BY: G. HAMLIN O'KELLEY, ESQ.

8

652 Coleman Boulevard

Suite 200

9

Mt. Pleasant, SC 29464

Hamlin.okelley@buistbyars.com

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 INDEX OF WITNESSES

2	PLAINTIFF'S WITNESSES	<u>PAGE</u>
	NICK STARCEVIC	
3	Cross-Examination by Mr. Bundy	1612
4	DAVID SIMONTON	
	Direct Examination by Mr. Hildebrand	1780
5	Certificate	1894

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: I apologize for
2 starting late, but I can't apologize for the car
3 wreck on the corner down there. That was a new
4 one on me. I saw plenty of lawyers out there
5 taking photographs, though.

6 That was unbelievable. All right. Did
7 y'all want to do some housekeeping before we
8 start this morning or jump right in? I
9 apologize, Mr. Starcevic, but anyway. I got the
10 message about 8:30 that traffic was bad. I had
11 taken my wife to work at 7 a.m., and there was a
12 car wreck on every interstate exit from
13 Dorchester Road to Summerville.

14 So I'm sure it wasn't much fun coming
15 down this way today. So anyway, sorry to get
16 y'all in a hurry and ready to roll. Why don't we
17 just start rolling. Let's get back on -- unless
18 there's something we need to take up, why don't
19 we start rolling with Mr. Starcevic.

20 MR. BUNDY: I just want to make my
21 daily request --

22 THE COURT: Okay.

23 MR. BUNDY: -- for Balfour Beatty
24 to comply with the subpoena I issued before we
25 started this trial.

1 THE COURT: Okay.

2 MR. BUNDY: One of my
3 understandings is, is that they contest the
4 service. Okay?

5 THE COURT: Of the subpoena, yeah.

6 MR. BUNDY: So I'm going tomorrow
7 or whenever I can get to it, I'm going to serve
8 the South Carolina Secretary of State. I'm going
9 serve their registrative with service of process.
10 I'm going to get a subpoena in North
11 Carolina, and I'm going to serve every single
12 officer of that corporation. I'm going to serve
13 everybody that's been in this courtroom that
14 subpoena.

15 I'm going to get good service on one of
16 them unless I'm -- as a lawyer that's been doing
17 this for 42 years, simply don't know how. So I
18 just wanted to let the Court know that.

19 I do not have the documents. Those
20 documents were not subpoenaed by Sam Hadley.
21 They were subpoenaed by Bill Bundy. I have a
22 right to issue a subpoena as a lawyer, and I
23 would like it enforced. Thank you, Your Honor.

24 THE COURT: All right.

25 Mr. Hildebrand?

1 MR. HILDEBRAND: We've been through
2 this, Your Honor. And I'll tell you what, again,
3 we went through the audit process in depth, and
4 our accountant -- internal accountant, Casey
5 Thompson, will talk about that.

6 And an audit report that was generated
7 as a result of your orders. So a heck of a lot
8 of time went into that, and then the discovery
9 period is cutoff and the period for all experts
10 to have finalized their opinions has been cutoff.

11 We've gotten Ms. Hadley's report. I
12 took her deposition and asked her if she was
13 prepared to render her final opinions as required
14 by the scheduling order. She said yes. So,
15 again, I understood that that request was simply
16 to update the documents because of some of the
17 settlements that have taken place.

18 I don't think it's appropriate at this
19 point for me or the other side, under the guise
20 of a subpoena, to continue discovery in this
21 matter, and that's what Mr. Bundy is doing. He's
22 saying, okay, I can subpoena anybody to do
23 anything, despite the fact that discovery has
24 ended.

25 Regardless of all of that, Your Honor,

1 again, we went through a list the other day of
2 documents that you said, okay, Balfour, give us
3 these documents. And we went through that, and
4 we provided them.

5 So I disagree very strongly that a
6 subpoena is appropriate or allowable, one, under
7 the rules; two, particularly in the middle of the
8 trial; three, under the scheduling order in the
9 history that's already taken place in this
10 matter. So I know I'm repeating myself. I think
11 Mr. Bundy is probably repeating his self. But I
12 don't think it's appropriate. Thank you.

13 THE COURT: All right. And then
14 back to the request. Mr. Bundy, there was -- I
15 was looking on my list. There were one or two --
16 I think one or two, I believe if memory serves me
17 right, there were four items on the list.

18 And I'm pretty confident that Ms. Hadley
19 said she'd gotten at least the first two. But
20 there was some question, I think, about the cost
21 of the work. I think that's where you were
22 going.

23 MR. BUNDY: No, Your Honor.

24 THE COURT: All right.

25 MR. BUNDY: No. You missed my

1 point. Ms. Hadley did not issue the subpoena.
2 The subpoena -- those documents have to be
3 brought to me.

4 THE COURT: Okay.

5 MR. BUNDY: I'm entitled to see
6 them. The fact that he gave them to his sister
7 or Ms. Hadley or anybody doesn't comply with the
8 terms of the subpoena. That's all I'm asking
9 for. If I'm not entitled to them, I just need a
10 ruling so I can do it properly.

11 THE COURT: All right. It's a
12 trial subpoena that you seek, right?

13 MR. BUNDY: Yes, sir.

14 THE COURT: And it's for original
15 documents?

16 MR. BUNDY: Copies will do if
17 they'll sign the subpoena and say they're copies
18 of the -- I mean, the subpoena itself allows them
19 to say these are copies of the original -- these
20 are certified copies of the original. I'm not
21 trying to make it any more difficult than it is.

22 MR. HILDEBRAND: Your Honor, I
23 mean, I will tell you what, I feel like I'm being
24 whipsawed here because the other day I was told
25 that they wanted the Excel sheet. They didn't

1 want a PDF. They wanted a manipulated Excel
2 sheet which we provided them. I'll tell you
3 what, I'm just at a loss.

4 And for him to want -- all of the
5 documents in this have been produced
6 electronically. All of the documents to
7 Ms. Hadley have been produced electronically.
8 That's how she's reviewed the documents. I
9 don't -- I just don't feel it's appropriate, Your
10 Honor.

11 THE COURT: All right. Well, once
12 again, I'm looking for the subpoena, and I can't
13 find it. So it is -- we are at the point of
14 trial. I understand what you're requesting. It
15 would appear to me -- and I understand you want
16 the documents, not Ms. Hadley.

17 I think she wants it for her report, at
18 least she wanted it. The updated projected final
19 cost report was item number three and four was
20 BBC's identification of which expenses it
21 incurred and submitted to Library as cost of the
22 work. That's my recollection, as cost of the
23 work.

24 I don't know that I've ever seen
25 anything broken out that way. Is there anything

1 that has been determined to be, quote, "cost of
2 the work?" Have y'all done it in that fashion?

3 MR. HILDEBRAND: Yes, sir. We've
4 got a program that has that, and that's been
5 provided to Ms. Hadley.

6 THE COURT: That's been provided?

7 MR. HILDEBRAND: Yes, all four of
8 those. And I've got her accounting, and he's
9 here in Charleston. He can come in and talk --
10 my understanding is, from talking to him, all of
11 those have been provided.

12 THE COURT: Okay. All right. And,
13 Mr. Bundy, you disagree with that?

14 MR. BUNDY: You Honor --

15 THE COURT: Or you don't disagree
16 with that?

17 MR. BUNDY: I'm going to because
18 here's what I'm trying to get. What I'm trying
19 to avoid is, when Ms. Hadley gets on the witness
20 stand, it's going to be a swearing contest
21 between the unsworn lawyer and the sworn witness
22 about what she had or didn't have, what she was
23 provided and she wasn't provided.

24 This shouldn't be that complicated.
25 It's a trial subpoena. I've asked for documents.

1 Either you need to quash the subpoena or he needs
2 to provide the documents. The fact that somebody
3 else has got them and the fact that they're in an
4 electronic format is irrelevant.

5 THE COURT: All right. Well, I'm
6 going to quash the subpoena then. There's your
7 ruling.

8 MR. BUNDY: Okay. Thank you.

9 THE COURT: All right.

10 MR. BUNDY: Are you ready to go?

11 THE COURT: Yes sir.

12 CROSS-EXAMINATION

13 BY MR. BUNDY:

14 Q. Good morning, Mr. Starcevic.

15 A. Good morning, afternoon almost.

16 Q. I'm going to hand you one, two, three,
17 four, five documents that are comprised of pages.
18 They're all paper clipped together, and they're
19 all part of one document, request for proposal --
20 entitled, request for proposal for
21 preconstruction and construction management
22 services related to hotel at Marion Square,
23 Charleston, South Carolina.

24 I would like to you to look at this, not
25 every page, just look at the first page of each

1 one of these paper clipped documents. Okay? If
2 you'll tell me what the next -- the first one I
3 just read. What's the title of the second
4 document, if there's a title?

5 A. The first one, request for proposal for
6 preconstruction and -- preconstruction and
7 construction management services related to hotel
8 at Marion Square, Charleston, South Carolina.

9 That's the first one. The second one,
10 hotel, Marion Square project cost items matrix.
11 Third one, Marion Square Hotel, Charleston, South
12 Carolina, building systems narrative dated
13 October 15, 2013. I think this is the -- there's
14 six here. This is the fourth hotel at Marion
15 Square. It looks like a set of drawings.

16 The fifth is the AIA document 133. It
17 appears to be a draft. And the sixth is the AIA
18 document 201, the general conditions of the
19 contract for construction.

20 Q. All right.

21 A. Again, not filled out but appears to be
22 a draft.

23 Q. Okay. Have you ever seen these
24 documents before as a package of documents?

25 A. I can't say that I have.

1 Q. Okay.

2 A. I have all of them together in the same
3 place. I'm not sure.

4 Q. And they are -- the requested proposal
5 is dated -- okay. Well, on page number 3 of the
6 first part of it, request for proposal, there's a
7 thing that says, key dates are as follows. Do
8 you see that?

9 A. Yes, sir.

10 Q. All right. And under release, RFP.
11 What does that stand for?

12 A. Release request for proposal.

13 Q. Okay. Two builders, October 16, 2013.
14 Do you see that?

15 A. Yes, sir.

16 Q. All right. In 2013, what were you doing
17 for Balfour Beatty?

18 A. I was in Charlotte as probably a senior
19 project engineer.

20 Q. Okay. Deadline for questionnaire
21 October 25, 2013. Responses due from bidders
22 November 6, 2013. Do you see that?

23 A. Yes, sir.

24 Q. And then interview and award November of
25 2013. Do you see that?

1 A. Yes, sir.

2 Q. All right. When you were working for
3 Balfour Beatty during October through November of
4 2013, were you provided these documents for your
5 review?

6 A. No, sir.

7 MR. BUNDY: Your Honor, yesterday
8 when we adjourned, we were looking at Exhibit
9 No. 27?

10 THE COURT: Yes.

11 MR. BUNDY: And I believe we
12 adjourned, and you were going to inquire
13 regarding the redacted information on the second
14 page of that exhibit?

15 THE COURT: And we did, and we
16 determined that in fact we did -- or that it
17 should be redacted.

18 MR. BUNDY: Okay.

19 THE COURT: It's from Mr. Heuer to
20 counsel for Balfour Beatty, and it's to a bunch
21 of his employees with the company. So, yeah, I
22 did redact that, yeah.

23 MR. BUNDY: But I may discuss
24 what's been unredacted, may I not?

25 THE COURT: You may.

1 MR. BUNDY: Thank you.

2 BY MR. BUNDY:

3 Q. Do you have Exhibit 27 in front of you?

4 A. I probably do have it somewhere in this
5 pile. Do you have another copy?

6 Q. Do you have a copy?

7 A. I've given some copies away. I don't
8 know -- here it is. I got it.

9 Q. I just want to make sure it's --

10 A. It's Old North State Masonry.

11 Q. It's got an exhibit sticker on it from
12 this Court.

13 MR. BUNDY: It's going into
14 evidence; is that correct, Your Honor?

15 THE COURT: It should, yes.

16 MR. BUNDY: If it's not, I move it
17 into evidence. Any objection?

18 MR. HILDEBRAND: It was moved in.

19 THE COURT: I believe it is in
20 evidence, yeah.

21 BY MR. BUNDY:

22 Q. All right. Mr. Starcevic, you were a
23 copy recipient of Mr. John Howard's letter or
24 e-mail of July 9, 2018, were you not?

25 A. Yeah, Mr. Hoarder's letter?

1 Q. Pardon me?

2 A. Mr. Hoarder's e-mail?

3 Q. Yes. You were a copy recipient?

4 A. Yes.

5 Q. Okay. And did you receive the e-mail?

6 A. Assume so.

7 Q. Pardon?

8 A. I assume so.

9 Q. Did you read it?

10 A. Pardon?

11 Q. Did you read it?

12 A. I would assume I read it if he sent it
13 to me.

14 Q. And it related -- it says, the subject
15 is Marion Square, Old North State Masonry,
16 correct?

17 A. It does.

18 Q. And that's the hotel we're talking
19 about?

20 A. Yes.

21 Q. And Old North State Masonry was a
22 subcontractor on this job?

23 A. Yes.

24 Q. Turn over the page.

25 A. Yes, sir.

1 Q. On July -- refer to the bottom of the
2 next page, it says, on July 9, 2018, at 8:54
3 p.m., Nicholas Starcevic -- that's you, right?

4 A. Yes.

5 Q. -- responded, right?

6 A. Yes.

7 Q. All right. You got the e-mail at 4:21
8 p.m.; is that correct, or it was sent on 4:21
9 p.m. on July 9?

10 A. It was sent on 4:21 p.m. on July 9.

11 Q. And you responded at 8:54 p.m. on the
12 same day?

13 A. It was a late night.

14 Q. Pardon me?

15 A. It was a late night.

16 Q. Okay. And so you received the e-mail
17 some time between the time it was sent, 4:21 and
18 the time you responded at 8:54?

19 A. Yes.

20 Q. And how long did it take you to prepare
21 the information that's contained in your
22 response?

23 A. I would assume that this information had
24 already been prepared, but I don't know.

25 Q. Why would you assume it had already been

1 prepared?

2 A. Pardon?

3 Q. Why would you assume it had already been
4 prepared?

5 A. That's my assumption.

6 Q. But why? What is the basis of the
7 assumption?

8 A. Because I typically track costs. I
9 didn't create them out of nowhere.

10 Q. Okay. So this -- these back charges,
11 this list of back charges existed somewhere else,
12 and you just merely picked -- you just merely
13 went and pulled that out and sent it to him?

14 A. It may have, yes, sir.

15 Q. But it also may not have?

16 A. Okay.

17 Q. All right. Explain to me what you
18 understood you were supposed to provide with
19 regard to back charges on Old North State
20 Masonry?

21 A. I don't know what I was supposed to
22 provide. This is what I provided. I've got back
23 charges that I currently have.

24 Q. So you --

25 A. That's what I provided. I don't

1 remember what this e-mail said, what the request
2 was. All I have is --

3 Q. So you don't know what you were supposed
4 to have provided, but you know this is what you
5 provided?

6 A. Yes, sir.

7 Q. Okay. He could have been asking you
8 what your vacation days were going to be for this
9 year, but you decided to send him this; is that
10 what you're saying?

11 A. He could have, but I doubt it.

12 Q. Okay. But it's possible?

13 A. Anything is possible, Mr. Bundy.

14 Q. Sure. It's possible the general counsel
15 for Balfour Beatty would have written you at 4
16 o'clock in the afternoon and asking you when your
17 next vacation days were, and you sent him a list
18 of back charges from Lithko. Are you telling the
19 Court that's possible?

20 A. I don't know what he asked me is what
21 I'm telling the Court.

22 Q. All right. Stucco prep allowance. What
23 does that relate to?

24 A. That is -- that is a prep work that our
25 stucco subcontractor had to do because there was

1 a gap in our specification. Masonry walls are
2 allowed, a certain amount of movement and
3 tolerance.

4 And the stucco that was selected was a
5 very fine finish, had one-eighth of a tolerance,
6 masonry had a quarter inch or half inch, there
7 was a gap there. So we had to close that gap to
8 make sure there was a good finish on the stucco.
9 And that's what the allowance was.

10 Q. When were y'all first aware of this
11 gap -- that this gap was going to be involved in
12 this project?

13 A. I don't remember. I believe it was when
14 our stucco subcontractor reviewed the masonry in
15 place.

16 Q. And where did the \$100,000 number come
17 from?

18 A. I believe I created that.

19 Q. And tell the Judge how an allowance
20 works.

21 A. An allowance is a cost that is -- it's a
22 number, an estimate. It's an agreed upon amount.
23 If it's used -- if it's used, the subcontractor
24 accounts for the cost, and if there's anything
25 left over from it that's not spent, it comes back

1 to whoever holds the contract or whoever holds
2 the budget.

3 Q. Do sometimes people refer to that as a
4 plug number?

5 A. No.

6 Q. All right. So who was the agree -- who
7 was going to provide the \$100,000, Library
8 Associates? Who was going to -- who was putting
9 up the \$100,000 to fund the allowance?

10 A. At this point, I don't know that we
11 know -- we knew who was going to provide the
12 allowance. We knew that the subcontractor, the
13 stucco subcontractor had the tolerance, the day
14 we had to meet. And we were not sure, at this
15 point, who was responsible for the gap in that
16 spec.

17 Q. Did you contact the owner to tell them
18 that there was going to be a \$100,000 allowance
19 for this gap between the -- or for preparation
20 that was necessary?

21 A. I don't remember. I think at this point
22 we were trying to work it out amongst ourselves
23 and figure out -- we had to get the
24 subcontract -- the stucco subcontractor started,
25 and he wouldn't start on a wall that was not an

1 existing condition, that was not within his
2 tolerance.

3 And he also wouldn't start with an
4 assurance that he would get paid for the work.
5 So at the time we created this, I'm not sure that
6 we had alerted -- that we knew who was going to
7 be responsible, whether it was the architect, the
8 owner, our concrete subcontractor, our mason.

9 Q. That's a long answer to a question I did
10 not ask. My question is very simple. Did you or
11 did you not -- and you, I mean, BBC or anyone at
12 BBC, Balfour Beatty Construction, inform the
13 owner at or about the time you became aware of
14 the need for the stucco allowance, that there was
15 going to be a \$100,000 stucco allowance on this
16 job? Yes or no?

17 A. I don't remember, Mr. Bundy.

18 Q. Should you have?

19 A. If they were responsible for it, we
20 should have.

21 Q. If what?

22 A. If they were responsible for it, we
23 should have.

24 Q. Okay. But you didn't know at the time;
25 so you didn't notify them?

1 A. I don't -- I'm not saying I didn't
2 notify them. I'm saying I don't know if I --

3 Q. You don't know that you notified them?

4 A. Yes, sir.

5 Q. Okay. All right. Window opening
6 patching, \$4,680. Now, that is a back charge
7 from whom to whom? Who's back charging who?

8 A. I don't know who is back charging them.
9 I believe it's the stucco subcontractor having to
10 prep the window openings, but I'm not a hundred
11 percent sure.

12 Q. Does the stucco contractor have a
13 contract with the mason?

14 A. No.

15 Q. Pardon me?

16 A. No.

17 Q. Under what contractual or legal theory
18 would the stucco subcontractor be able to back
19 charge the mason?

20 A. Pardon?

21 Q. Under what contract theory would the
22 stucco contractor be legally able to back charge
23 the mason, a party with whom it had no contract?

24 A. What's a contract theory?

25 Q. Give me an explanation, in your own

1 words, to the best of your ability, as to how a
2 stucco contractor back charges a mason, a party
3 with whom it has no contractual relationship.

4 A. Via the contractor.

5 Q. Pardon me?

6 A. Via the general contractor.

7 Q. Via the general contractor?

8 A. They would -- yes, through us.

9 Q. What's via the general contractor?

10 A. Through us.

11 Q. What do you mean by through --

12 A. They would identify a cost that they
13 felt was -- not their responsible -- that they
14 were not responsible for, and they would contact
15 Balfour Beatty.

16 Q. I'm not familiar with the legal concept
17 of via, so you're going to have to explain that
18 me. Is the via legal concept something you
19 learned at lunch?

20 A. Pardon?

21 Q. Is the via legal concept something you
22 learned at lunch?

23 A. I don't know what a via legal concept
24 is, Mr. Bundy. I'm saying the stucco
25 subcontractor would have made a request for a

1 back charge through Balfour Beatty to the mason.
2 There you go.

3 Q. Right?

4 A. Yes, sir.

5 Q. There's a contract obligation between
6 Balfour Beatty and stucco subcontractor?

7 A. There is a contract obligation between
8 Balfour Beatty and the stucco subcontractor

9 Q. If the stucco subcontractor is damaged
10 or has to do additional work, the only party that
11 it can seek relief from is Balfour Beatty?

12 A. Or they can work something out directly
13 with the mason. We've had that happen before.

14 Q. I ask you again, as a matter of contract
15 and law and these documents that you were
16 supposed to be monitoring and taking care of, is
17 there any obligation, other than the obligation
18 that BBC owes to the stucco contractor to pay
19 them for work they have to do that's extra and
20 not in their subcontract?

21 A. I think you're -- I think that's
22 accurate.

23 Q. Thank you. Now, BBC has a contract with
24 the mason, correct?

25 A. Old North State Masonry.

1 Q. Pardon me?

2 A. Old North State Masonry, they do.

3 Q. Old North State Masonry. Under the
4 contract between BBC and the stucco guy, if the
5 stucco guy says to BBC, you owe me 4,600 bucks
6 because I had to do extra window work, BBC pays
7 you and then goes down to North State Masonry and
8 says, you owe us 4,600 bucks because you breached
9 your subcontract, and because you breached your
10 subcontract, I had to pay damages over here to
11 the stucco subcontractor; is that correct?

12 A. If Old North State Masonry is
13 responsible for the cost, then yes.

14 Q. So going back, window opening patching
15 is a back charge by Balfour Beatty against the
16 mason, Old North State Masonry?

17 A. Okay.

18 Q. Because that's what you were asked to
19 do, was it not? Or at least that's what you did.
20 You gave a list of the back charges.

21 A. I provided a list of back charges.

22 Q. It doesn't matter where this money that
23 they're back charging goes to entitle BBC for the
24 money. The money could go to somebody who got
25 hurt, and they had to pay them and just because

1 of something that -- the Old North State Masonry
2 did. It is irrelevant why there's this back
3 charge. It's a back charge. It exists, correct?

4 A. Correct.

5 Q. And it's up to BBC to collect its own
6 reimbursement for back charges. It's not up to
7 the stucco man to collect back charges from Old
8 North State Masonry, is it?

9 A. We require the stucco subcontractor to
10 support the effort. It ultimately --
11 contractually, it's our responsibility, but our
12 contract bears some responsibility on the stucco
13 sub.

14 Q. All right. Masonry walls rubbing, clean
15 up, patching, what does that relate to?

16 A. It's prep work.

17 Q. Pardon me?

18 A. Preparatory work, cleaning walls,
19 knocking extra stuff off walls.

20 Q. Is that a back charge?

21 A. It is identified as a back charge or
22 potential back charge.

23 Q. I don't see anything in here about
24 potential. It says back charges.

25 A. These were not settled at the time; so

1 everything is potential or pending at this point.

2 Q. At the time you issued this e-mail, were
3 these back charges or were they not?

4 A. They were potential back charges.

5 Q. It doesn't say potential back charges.

6 A. I'm telling you what they were.

7 Q. All right. So explain then again why
8 Old North State Masonry potentially was facing a
9 \$32,500 back charge. What did they do wrong?
10 What did they breach in their contract that
11 entitled BBC potentially to collect \$32,500?

12 A. It says, rubbing, clean up and patching.

13 Q. What?

14 A. The wall.

15 Q. What wall?

16 A. The masonry wall.

17 Q. Which ones?

18 A. I don't remember which ones. I'm sure
19 there was more than one. The masonry wall on the
20 outside of this building, Mr. Bundy.

21 Q. Where did you get the information to
22 come up with \$32,500?

23 A. I have no idea. Probably from the
24 stucco subcontractor, maybe from our own survey.
25 Without looking at it, I -- and looking at the

1 supporting information, it probably came. We did
2 surveys of walls; stucco subcontractor did
3 surveys of walls.

4 There may -- this is either an estimate
5 or an accounting of the actual work that was
6 performed. I don't remember the timeline on
7 whether the work had been performed or was
8 potential.

9 Q. Right. It's hard to analyze a back
10 charge without the backup, isn't it?

11 A. Pardon?

12 Q. It's hard or difficult to analyze a back
13 charge without the backup, is it not?

14 A. I would agree unless it's an estimate.

15 Q. Broken window, who broke what window?
16 Why is it a back charge and where was the window?

17 A. The window was on King Street. I
18 believe it was the fourth floor, and we contended
19 that the mason broke the window.

20 Q. Who is we?

21 A. Balfour Beatty.

22 Q. All right. Deduct CMU at CIP arch wall
23 on L2, \$1,356.30. What is the back charge for
24 and where is the work located?

25 A. It was -- it's really a credit because

1 somebody -- because they actually poured that
2 arch in concrete.

3 Q. A credit to whom?

4 A. To Balfour Beatty.

5 Q. So this is \$1,356.30 that should have
6 come out of the subcontract between Balfour
7 Beatty and Old North State Masonry?

8 A. We felt it should have been more but
9 yes.

10 Q. And that was then no longer work that
11 was going to be done, and it would no longer be
12 cost of the work as it related to the owner's
13 contract with Balfour Beatty?

14 A. We paid someone else to do it.

15 Q. Who?

16 A. Lithko.

17 Q. You paid Lithko to put in the CIP arch
18 wall on L2?

19 A. Cast in place arch.

20 Q. You paid Lithko to do that?

21 A. Yes, sir.

22 Q. And How much did they charge?

23 A. I have no idea. More than this.

24 Q. Okay. Would it be more than that?

25 A. Yes, sir.

1 Q. Okay. So is the owner, under that set
2 of circumstances, do they owe the -- are they
3 entitled to the credit, and they pay the full
4 amount of what Lithko charges? Is that the way
5 it's billed?

6 A. I don't know how it's billed.

7 Q. Well, do you know what the contract says
8 about how its billed's?

9 A. I don't believe we charged the owner for
10 either.

11 Q. Okay. Move precast from basement and
12 Hutson to south. What does that mean?

13 A. It means we had precast in the basement.
14 We needed to clean out the basement for other
15 contractors to start in there, and this is the
16 cost to move it to where -- to the Hutson Street
17 so we could -- or this is the cost to move it
18 from the basement and Hutson Street to the south
19 side of the building.

20 Q. Why is it a back charge?

21 A. Because we performed the work.

22 Q. Do what?

23 A. Because Balfour Beatty performed the
24 work.

25 Q. Okay. So it's really a credit, not a

1 back charge?

2 A. No, sir. It's a back charge.

3 Q. It's a back charge because Old North
4 State refused to do the work?

5 A. Yes, sir.

6 Q. Okay. Why did they refuse to do the
7 work? Did they tell you?

8 A. They may not have been on site. They --
9 I don't remember why. They may not have felt it
10 was their obligation, but they refused to do the
11 work.

12 Q. This could have been a function of
13 supplementing Old North State's forces in order
14 to get work done in a timely fashion?

15 A. Yeah. I mean, they may have agreed to
16 allow us to do it, too. I don't quite remember
17 the circumstance. But we moved precast so the
18 work could get completed, and this was the cost.

19 Q. Then there's an e-mail from Simonton to
20 you at 9:14 p.m., which would have been within 20
21 minutes, correct?

22 A. Correct.

23 Q. So 20 minutes later, Simonton, right,
24 David Simonton -- he hasn't testified in this
25 case yet, has he?

1 A. I don't know. I haven't been here the
2 whole time.

3 Q. What was his position on the job?

4 A. Vice president of operations.

5 Q. Okay. And was he on the site?

6 A. Yes.

7 Q. All the time?

8 A. At this time he was.

9 Q. At that time he was. Was he your boss?

10 A. He would have been, yes, sir.

11 Q. Was he your boss when you left?

12 A. Yes, sir. Actually, no, he was not.

13 Q. Did you have any bosses by the time you
14 left, or were you pretty much running the
15 company?

16 A. I had bosses.

17 Q. All right. And he says, so what is the
18 stucco allowance? What did he mean by that? Do
19 you know?

20 A. I believe he was referencing the top
21 line of this chart.

22 Q. So he's pretty much asking you what I
23 just asked you?

24 A. Yes.

25 Q. Okay. And why didn't he know the answer

1 to that question?

2 A. You'd have to ask him.

3 Q. Okay. Are you surprised that he didn't
4 know it if he was on the job every day?

5 A. He wasn't on the job the entire time.

6 Q. Okay. Are you surprised he didn't
7 know --

8 A. He joined the project at a certain
9 point, and I'm sure he will testify to when he
10 joined the project. But he wasn't around during
11 the masonry installation, so that's why he was
12 asking.

13 Q. Are you surprised that, as of July 9,
14 2018, he did not know the answer to that question
15 without having to ask you?

16 A. No, sir. Again, as I just said, he
17 wasn't there when all of that work was being put
18 in place.

19 Q. And then, it looks like -- did he then
20 send you another e-mail a minute later?

21 A. I responded.

22 Q. I'm having a hard time reading this.
23 You respond a minute later saying, masonry wall
24 prep. Is that your response?

25 A. That's me.

1 Q. Okay. And you say, the stucco guys made
2 us write them an allowance to bill against?

3 A. Yes, sir.

4 Q. Which is what you just told me?

5 A. Yes, sir.

6 Q. You gave him the same explanation you
7 just gave me. All right. And then the question
8 was, okay, so they know about it. Was it all
9 spent? Do you know he's -- who he is referring
10 to when he says they?

11 A. I do not. I don't know who he's talking
12 about, the stucco sub or the mason.

13 Q. Well, What about the owner? Was he
14 talking about the owner?

15 A. Could have been.

16 Q. Okay. Was he talking about Balfour
17 Beatty?

18 A. You'd would have to ask Mr. Simonton.

19 Q. Was he talking about the architect?

20 A. I don't know, Mr. Bundy. I assume it
21 was either the stucco sub or the mason.

22 Q. Did you ever respond to this question?
23 Did you ever answer his question?

24 A. We may have talked about it in the
25 office. I don't know if I responded to him in

1 person.

2 Q. Okay. So let me ask you then: At -- as
3 of 7:19 p.m., 2/18, what was your answer, or what
4 would have been your answer to -- so they know
5 about it? What would you have said?

6 A. I probably would have said -- so they'd
7 know. That wasn't a question. But was it all
8 spent?

9 Q. Okay. Let me ask you this: Who was
10 they?

11 A. I don't know.

12 Q. Okay. Did you ever ask him at the time
13 when he sent you that e-mail who they was?

14 A. I don't remember. That was over three
15 years ago.

16 Q. And did you ask him the next day who
17 they was?

18 A. I don't remember. That was over three
19 years.

20 Q. As you sit here today, you still don't
21 know who he was referring to when he said they?

22 A. I'm assuming it was the stucco sub or
23 the mason.

24 Q. Okay. That's all I want to know. Then
25 the next question -- the question he asked you

1 was, based on, I guess, your opinion or your
2 assumption, I guess, one of the two, was it all
3 spent? What did that mean to you?

4 A. To me, that means it was all of the prep
5 allowance spent.

6 Q. Okay. And was it?

7 A. I believe so.

8 Q. Okay. Thank you.

9 MR. BUNDY: Is that 27?

10 THE WITNESS: 29, Exhibit 29?

11 THE COURT: 28 should be the next
12 one.

13 THE WITNESS: Mine is titled 29.

14 THE COURT: All right.

15 BY MR. BUNDY:

16 Q. Change order 32, right?

17 A. Yes, sir.

18 Q. All right. What's the number on it?

19 A. 29.

20 MR. BUNDY: I think that it's out
21 of order, but I don't care.

22 THE COURT: That's okay.

23 THE WITNESS: Do you want me to
24 make it an 8?

25 THE COURT: No. Just keep it the

1 same. Just call it 29.

2 (DFT. EXH. 29 was marked for
3 identification.)

4 BY MR. BUNDY:

5 Q. Can you identify Exhibit 29,
6 Mr. Starcevic?

7 A. Change order number 32 to Lithko from
8 Balfour Beatty. Operating elevators to punch 1
9 through 4 shafts, back charge from Otis.
10 Scheduling Otis operator to run the elevators in
11 order to complete concrete punch items and shafts
12 1 through 4.

13 Q. All right. And who signed this change
14 order on behalf of Lithko?

15 A. Mr. Michael Rohrer.

16 Q. Who signed it on behalf of Balfour
17 Beatty?

18 A. I did.

19 Q. And is the owner involved in this change
20 order at all?

21 A. Is the owner involved? No.

22 Q. Has the owner signed this change order?
23 Does the owner's name appear anywhere on the
24 change order?

25 A. No.

1 Q. Was the owner advised of this change
2 order?

3 A. I don't know that they were.

4 MR. BUNDY: Okay. Now I move to
5 introduce it as Exhibit 29.

6 MR. HILDEBRAND: No objection.

7 THE COURT: Without objection.
8 Okay.

9 MR. BUNDY: Without objection?

10 THE COURT: Yes.

11 (DFT. EXH. 29 was received in
12 evidence.)

13 (DFT. EXH. 28 was marked for
14 identification.)

15 BY MR. BUNDY:

16 Q. I hand you now what's been marked as
17 Defendant's Exhibit 28 for identification. Can
18 you identify the exhibit, please?

19 A. Change order number 34 dated April 7th
20 to Lithko.

21 Q. All right. And the change order is
22 between what parties?

23 A. Balfour Beatty and Lithko.

24 Q. And who signed it on behalf of Lithko?

25 A. Mr. Michael Rohrer.

1 Q. And who signed it on behalf of Balfour
2 Beatty?

3 A. Nick Starcevic, that's me.

4 Q. What's the day it was executed?

5 A. Fully executed, April 9th, 2019.

6 MR. BUNDY: Your Honor, I move to
7 introduce 28 as an exhibit into evidence.

8 MR. HILDEBRAND: No objection.

9 THE COURT: Without objection,
10 okay.

11 (DFT. EXH. 28 was received in
12 evidence.)

13 BY MR. BUNDY:

14 Q. Was the owner advised of this change --
15 the existence of this order?

16 A. I do not know that, Mr. Bundy. I don't
17 know.

18 Q. Does the owner's name appear anywhere on
19 this change order?

20 A. It does not, and it wouldn't.

21 Q. This is a change order that changes the
22 subcontract sum between Balfour Beatty and
23 Lithko, is it not?

24 A. It is.

25 (DFT. EXH. 31 was marked for

1 identification.)

2 Q. I hand you now what's been marked as
3 Exhibit 31 for identification. I ask you to
4 identify the document, please.

5 A. Change order number 31 dated April 7th.
6 Sorry, that's the contract dated April 7, 2015,
7 to Lithko from Balfour Beatty. Elevator 6, motor
8 replacement damage, Otis back charge.

9 Q. Okay. And who signed on behalf of
10 Lithko?

11 A. Michael Rohrer. And I signed it on
12 behalf of Balfour Beatty.

13 Q. And when was it signed by -- what day
14 was it signed by Lithko?

15 A. March 14, 2019.

16 Q. What was the status of the job in March
17 of 2019?

18 A. Close out.

19 Q. When was it signed by Balfour Beatty?

20 A. April 9, 2019.

21 Q. What was the status of the job on April
22 9, '19? The job, what was the status of the job?

23 A. Substantial completion had been reached.
24 I don't remember if we were still cleaning things
25 up, executing punch lists, but we were probably

1 off the project at that point.

2 Q. Do you know if y'all were even on the
3 job in April of 2019?

4 A. No, sir, I do not. I do not believe we
5 were.

6 Q. Okay. Is the owner's name anywhere on
7 this change order?

8 A. No.

9 Q. Did you advise the owner of the
10 existence of this change order?

11 A. I don't know if we did specifically.

12 Q. Okay.

13 A. It may have been in a Lithko pay
14 request.

15 Q. But you don't know?

16 A. I don't know.

17 MR. BUNDY: All right. I move to
18 introduce Exhibit 31.

19 MR. HILDEBRAND: No objection.

20 THE COURT: Without objection.

21 (DFT. EXH. 31 was received in
22 evidence.)

23 (DFT. EXH. 30 was marked for
24 identification.)

25 BY MR. BUNDY:

1 Q. I hand you now what's been marked for
2 identification as Exhibit 30 and ask you to
3 identify the document.

4 A. Change order number 33 to Lithko from
5 Balfour Beatty, back charge embassy walls,
6 stucco. From Mike Rohrer of Lithko, signed by
7 Michael Rohrer of Lithko, signed by Nick
8 Starcevic of Balfour Beatty; owner's name is not
9 on here.

10 Q. Okay. And it was signed along -- on the
11 same day as the previous Exhibit 31?

12 A. It was signed on April 9, 2019 by
13 Balfour Beatty.

14 Q. The same time as Exhibit 31, on the same
15 day?

16 A. Exhibit 31 was also signed on April 9,
17 2019, yes.

18 Q. So the answer is yes, thank you.

19 A. The answer is yes. The owner should
20 have been aware of that one.

21 MR. BUNDY: Okay. I move to
22 introduce that exhibit into evidence.

23 MR. HILDEBRAND: No objection, Your
24 Honor.

25 THE COURT: Defendant's 30, all

1 right.

2 (DFT. EXH. 30 was received in
3 evidence.)

4 (DFT. EXH. 32 was marked for
5 identification.)

6 BY MR. BUNDY:

7 Q. I hand you now Defendant's Exhibit 32
8 for identification. Can you identify the
9 exhibit, please?

10 A. Change order number 20 to Old North
11 State Masonry from Balfour Beatty signed by Joe
12 Anastasi, president of Old North State Masonry,
13 signed by Nick Starcevic of Balfour Beatty
14 Construction.

15 Q. All right. And it was signed by Old
16 North State Masonry on September 4, 2019?

17 A. September 4, 2019 by Old North State
18 Masonry, yes.

19 Q. And that was approximately nine months
20 after substantial completion?

21 A. Plus or minus.

22 Q. And Then you signed it roughly two weeks
23 later?

24 A. Yes, sir.

25 Q. Were y'all still on the job nine months

1 after substantial completion?

2 A. No, sir.

3 Q. Were you working into September of '19
4 still on behalf -- spending 50 percent of your
5 time with Balfour Beatty working on closing out
6 the paperwork on this job?

7 A. I don't remember the time percentage,
8 but I was still involved in the job.

9 Q. Let's go over change order number 20 in
10 a little detail if we might. The owner's name
11 does not appear on here, does it not? It does
12 not, does it?

13 A. It says the owner, omissions -- Old
14 North State Masonry claimed it acts or omissions
15 of the owner.

16 Q. Okay. But the owner's name -- okay, it
17 does appear. The owner's name -- the word owner
18 appears on this, but the owner's signature
19 appears nowhere on here?

20 A. That's correct.

21 Q. Was the owner given notice of this
22 change order?

23 A. I'm not aware if they were or were not.

24 Q. Okay. Now, let's start at the top.
25 This is change order number 20.

1 A. Yes.

2 Q. All right. And change order number 33
3 is dated in March of '19?

4 A. Yes, sir.

5 Q. Change order number 20 is dated
6 September of '19, some six months later?

7 A. Yes, sir.

8 Q. Do y'all work backwards in your
9 numbering system on change orders?

10 A. No, so each --

11 Q. Pardon me, let me finish.

12 A. Yes, sir.

13 Q. Or do you number your change orders
14 sequentially based on a calendar date?

15 A. That's what we do, and that's what we
16 did.

17 Q. Okay.

18 A. You're looking at two -- you're looking
19 at change orders for different subcontractors.

20 Q. I gotcha.

21 A. So Old North State Masonry's are
22 sequentially.

23 Q. I apologize.

24 A. Lithko's are sequentially. They would
25 not -- they were not out of order.

1 Q. I apologize, I didn't see that. Sorry.

2 A. That's okay.

3 Q. So we're now with Old North State
4 Masonry. Let's go through the change. It says,
5 date of this change is July 9, 2019, right?

6 A. Yes.

7 Q. But the change order was signed in
8 September of 2019. Why are there two dates? Why
9 is this change order allegedly effective two
10 months before it was signed?

11 A. I don't know.

12 Q. Does that make any sense to you?

13 A. Pardon?

14 Q. Does that make any sense to you?

15 A. It could be the date it was created. I
16 don't know.

17 Q. Don't the contract documents say, the
18 change order is not effective until it's signed
19 by both parties?

20 A. Yes, I believe.

21 Q. Okay. And so this change order, based
22 on the contract documents, could not have been
23 effective on July 9, 2019, because it wasn't
24 executed by both parties until as late as
25 September 19, 2019, correct?

1 A. Okay.

2 Q. Why would you back date a change order?

3 A. I didn't back date a change order.

4 Q. Oh, you didn't, okay.

5 A. I just told you, that's probably the
6 date when it was created.

7 Q. Does it say that?

8 A. Pardon?

9 Q. Does it say that the date of the
10 creation is July 9, 2019, or does it say, date of
11 this change order, July 9, 2019?

12 A. I would have to forward date change
13 orders for them to be executed. That's the date
14 its created, I've got to send it to the party,
15 and they've got to execute. And if all of that
16 happens on the same day, then these two have the
17 same dates. But that's not how it always works,
18 Mr. Bundy.

19 Q. Okay. I gotcha. The previous contract
20 amount is \$2,629,281, right?

21 A. Yes.

22 Q. Now the add/deduct, I don't see a
23 number. I see three letters. Capital T capital
24 B and capital D. What does that stand for?

25 A. I believe that means to be determined.

1 Q. Okay. And I don't see a new contract
2 amount. I see TBD. What does that stand for?

3 A. Same thing.

4 Q. So y'all signed a change order that did
5 not tell or would not tell anybody whether, one,
6 it was an additional change order or deducted
7 change order, nor would it inform anybody about
8 what the number was regardless of whether it was
9 add or deduct, right?

10 A. Correct.

11 Q. Okay. Was there a number that was
12 agreed upon at that time -- strike that. Don't
13 change orders require for a change order to be
14 effective, that the amount of the change order,
15 either addition -- an additur or deductive must
16 be established and agreed upon at the time of the
17 change order?

18 A. I don't believe that to be true.

19 Q. You don't think that's true?

20 A. No, sir.

21 Q. Okay. So you can -- do you understand
22 that contract change order to be a contract
23 modification?

24 A. Yes.

25 Q. Okay. And do you understand that

1 contract modification requires all the same
2 things that a contract requires?

3 A. Unless it's modifying the contract.

4 Q. Do you know what is required to have a
5 contract, what the elements of a contract are?

6 A. I don't. I don't know all the elements
7 that are required to have a contract.

8 Q. So you don't know that a contract is
9 simply an agreement between two parties in an
10 exchange for mutual promises, as long as it's
11 certain enough to be enforced? That's not your
12 understanding?

13 A. That's generally my understanding.

14 Q. Well, let's use that as your
15 understanding. How would you enforce this
16 contract because there's no consideration here?
17 There's no number. There's no dollar amount that
18 had been agreed upon.

19 A. There's language that's agreed upon.

20 Q. Okay. So that's where we're going to go
21 next. What was -- we're going to now read what
22 the understanding was. I'm going to read, and
23 you tell me if I'm wrong. ONSM claim due to acts
24 or omissions of the owner, \$1,139,509, right?

25 A. Yes, sir.

1 Q. All right. Now, that number was
2 available to put in the column under to be
3 determined, right? You could have put in the
4 \$1,139,500 add, and then that would have been a
5 new contract amount, right?

6 A. We could have.

7 Q. Okay. But you didn't do that?

8 A. No.

9 Q. Okay. What you did was, you entered
10 through this agreement, Balfour Beatty agrees to
11 include these change order requests in the
12 pending claim against the owner upon execution of
13 CCO 19 and 20. All right. This is 20, right?
14 This is number 20, right? This change order is
15 number 20, right?

16 A. Yes.

17 Q. Was 19 agreed to, or do you know?

18 A. I don't know.

19 Q. All right. I will hand you now ONSM
20 Bates number ONSM 0000099 and 100 and ask you, is
21 this change order number 19 executed by Old North
22 State Masonry on 9/4/19 and by you, Nick
23 Starcevic, on 9/19/2019?

24 A. Yes, sir.

25 MR. BUNDY: All right. Your Honor,

1 I move to introduce this document as the next
2 exhibit which would be -- I've got to see
3 where -- I premarked things.

4 THE COURT: It would be Defendant's
5 33.

6 MR. BUNDY: Well, I've already
7 premarked some.

8 THE COURT: Oh, okay, sorry.

9 MR. BUNDY: This would be 36, Your
10 Honor.

11 THE COURT: All right. Exhibit 36.

12 MR. HILDEBRAND: Do you have a copy
13 for me?

14 MR. BUNDY: Yeah.

15 (DFT. EXH. 36 was marked for
16 identification.)

17 MR. BUNDY: I would move to put 36
18 into evidence, Your Honor.

19 THE COURT: Okay. And did you want
20 32 in as well?

21 MR. BUNDY: Yes, Your Honor, 32 and
22 36. Move to enter 32 and 36. Any objection?

23 MR. HILDEBRAND: I didn't even have
24 a chance to look at it. Is this my copy?

25 MR. BUNDY: Yes, that's your copy.

1 MR. HILDEBRAND: So this is 36?

2 MR. BUNDY: Yes.

3 MR. HILDEBRAND: No objection, Your
4 Honor.

5 (DFT. EXH. 32 and 36 were received
6 in evidence.)

7 BY MR. BUNDY:

8 Q. All right. Let's go back to Exhibit 30,
9 the first one we were talking about. Was that --

10 A. 32.

11 Q. 32. And that's the change order 20,
12 correct?

13 A. Yes.

14 Q. Okay. Balfour Beatty agrees to include
15 these change order requests in the pending claim
16 against the owner upon execution of CCO 19 and
17 CCO 20. Was that -- did that condition occur?
18 Did that occur?

19 A. The execution of 19 and 20 did occur.

20 Q. So since both of those were executed, it
21 then effectuated the agreement that follows; is
22 that correct?

23 A. I assume effectuated means that it
24 executed or --

25 Q. Well, what it means is -- let's look at

1 it this way. What this says is that Balfour
2 Beatty agrees to do these things which means
3 include these change orders in the pending claim
4 against the owner upon the execution of CCO 19
5 and 20. Execution of CCO 19 and 20 is a
6 condition precedent to any obligation that
7 follows, correct?

8 A. Correct.

9 Q. And that condition precedent was met
10 because we now have in evidence the executed copy
11 of 19 and 20?

12 A. Correct.

13 Q. So now the agreement that follows is an
14 agreement that currently exists between Balfour
15 Beatty and Old North State Masonry?

16 A. Correct, unless something --

17 Q. Is that correct?

18 A. Unless something was executed after
19 this.

20 Q. The agreement was, it is agreed that
21 Balfour Beatty will receive 70 percent of any
22 monies recovered on the change order 20 from the
23 pursuit of the aforementioned claim but not
24 exceeding \$70,000.

25 ONSM agrees to fully support and defend

1 all submitted change orders, claims, costs,
2 delays, et cetera, to help recover monies
3 included in this claim. Notwithstanding the
4 foregoing, both parties reserve their respective
5 rights as specified in the joint defense
6 agreement dated June 19, 2019. Did I read that
7 correctly?

8 A. Yes.

9 Q. Is that the agreement between Balfour
10 Beatty -- or part of the agreement between
11 Balfour Beatty and Old North State Masonry?

12 A. Yes.

13 Q. All right. Who drafted this language?

14 A. I did not.

15 Q. It was provide to you?

16 A. Yes, sir.

17 Q. Was this document provided to you,
18 already filled it out, and you signed it, or did
19 you fill it out based on instructions you were
20 given?

21 A. I filled it out based on instructions I
22 was given.

23 Q. Okay. And where did those instructions
24 come from?

25 A. I don't remember exactly who sent it to

1 me. I would imagine my boss.

2 Q. Pardon me?

3 A. I would imagine my boss or someone at --
4 that was negotiating this.

5 Q. All right. Well, give me the universal
6 people, and by universal people, I mean, all the
7 people that would reasonably be presumed to have
8 given you this information. Clearly I wasn't one
9 of the persons in that universal, was I?

10 A. No. I said my boss.

11 Q. So which boss? You have more than one
12 boss.

13 A. It was either Jeff Sandeen, Dave
14 Simonton or John Heuer.

15 Q. Okay. So one of the three gentlemen --

16 A. Or Pat Dean.

17 Q. -- would have told you, Nick, here's
18 what you put in there and here's what you're
19 going to sign?

20 A. Yes, sir.

21 Q. You had no idea what the conversations
22 were leading up to this agreement or who they
23 were among and between?

24 A. Not really.

25 Q. You made no independent evaluation of

1 the contents of the joint defense agreement?

2 A. I made no independent --

3 Q. You didn't look at the joint defense
4 agreement before you signed this, did you?

5 A. Not before I signed this.

6 Q. Okay. And you had no knowledge -- did
7 you even have any knowledge that it existed when
8 you signed this?

9 A. I believe so. I'm not -- I don't
10 remember when I gained knowledge of it, but I
11 generally believed I knew there was a joint
12 defense agreement out there.

13 Q. Did you have any role in negotiating the
14 joint defense agreement?

15 A. No, sir.

16 Q. Are you a signator personally to the
17 joint defense agreement?

18 A. Never signed one like it.

19 Q. Did you obtain any independent legal
20 advice before you signed this document?

21 A. No.

22 Q. Did you rely on those who told you to
23 prepare and sign the document in agreeing to sign
24 the document?

25 A. Yeah. I trusted -- trusted those

1 persons.

2 Q. You did what you were instructed to do?

3 A. Yes, sir.

4 Q. And the only -- and what would have been
5 your options if you had said, no, I'm not signing
6 it? What options would have been available to
7 you?

8 A. I don't know. I didn't really consider
9 it.

10 Q. You never considered it?

11 A. That's correct.

12 Q. Do you think that -- if you had said no,
13 that that would have been something that would
14 have allowed you to go up the chain, so to speak,
15 in Balfour Beatty, or is saying yes something
16 that helps you move up the chain in Balfour
17 Beatty?

18 A. No, sir. I didn't -- I wasn't thinking
19 about that.

20 Q. Okay. Let's go to the rest of it.

21 Change order constitutes full and complete
22 settlement of any and all costs referred to
23 and/or described herein, including but not
24 necessarily limited to, all applicable taxes,
25 insurance, bond, delivery, supervision, overhead

1 and profit.

2 Labor, labor impact, materials, changes,
3 delays, acceleration and inefficiency, or any
4 claims therefore. And the subcontractor hereby
5 waives and all claims for such items associated
6 with or related to the work covered by this
7 change order.

8 All previous change orders and base
9 subcontract agreement and all conditions incurred
10 to date. Did I read that correctly?

11 A. I believe so.

12 Q. All right. Now, there is a line that
13 follows, and this line -- I'm going to read it
14 first. And it says, notwithstanding the
15 foregoing both parties reserve their respective
16 rights as specified by the joint defense
17 agreement dated June 19, 2019. Do you see that?

18 A. Yes.

19 Q. Do you see where that line has been
20 stricken through?

21 A. Yes.

22 Q. Does that mean to you it's no longer
23 part of this agreement?

24 A. It's the same line as above, but, yeah,
25 the redundant --

1 Q. Whose initial is that?

2 A. I believe that's Joe Anastasi. I don't
3 remember. I'm not a hundred percent sure whose
4 initial that is.

5 Q. All right. Joe Anastasi signed it
6 first, right? He signed it on September 4, 2019;
7 is that correct?

8 A. Yes.

9 Q. You signed it second two weeks later?

10 A. Yes.

11 Q. When you got it, it had the offer, so to
12 speak, because it -- it was an offer when you
13 sent it to them? It wasn't a signed agreement.
14 You were offering them a change order, correct?

15 A. The proposed change order.

16 Q. Correct?

17 A. The proposed change order.

18 Q. A proposed change order? You were
19 offering a proposed change order?

20 A. Yes.

21 Q. Do you understand that this -- striking
22 this out then constituted -- then this made this
23 a counter-offer, that Mr. Anastasi was not
24 agreeing to what had been offered? He was making
25 you a counter-offer by striking out language in

1 your offer. Did you understand that?

2 A. If he's the one that initialed that, I
3 didn't understand that. It was a counter offer.

4 Q. You didn't understand it?

5 A. No, sir.

6 Q. Okay. So you don't know -- you didn't
7 learn at lunch that an offer which is responded
8 to by a counter-offer is now off the table and no
9 longer available for acceptance? You never
10 understood that?

11 A. No. I just believed he was striking the
12 language because it was redundant.

13 Q. Okay. So you made -- was that a legal
14 decision on your part?

15 A. I don't make legal decisions.

16 Q. Well, why would you strike it because it
17 was redundant?

18 A. I didn't strike it.

19 Q. Oh, you're speculating as to why he
20 struck it?

21 A. Yeah, I'm speculating.

22 Q. Okay.

23 A. I don't know why he struck it.

24 Q. All right. Well, did it occur to you or
25 does it occur to you now that he might not have

1 been striking it because it was redundant but
2 because he only wanted the joint defense
3 agreement to relate to the information in
4 paragraph 1, but he didn't agree to have it
5 relate to information in paragraph 2? That
6 wouldn't be redundant, would it?

7 A. I don't know why he was thinking and why
8 he struck it.

9 Q. Well, you just speculated that he
10 thought it was redundant.

11 A. I speculated. I don't know.

12 MR. BUNDY: Your Honor, would you
13 direct the witness to please not speculate. It's
14 going to take us a long time. He's supposed to
15 testify under what he knows. I move to strike
16 the answer.

17 THE COURT: I will grant that.
18 Just --

19 MR. BUNDY: Please don't speculate.

20 THE COURT: Stay in your lane.

21 THE WITNESS: I'm usually good at
22 that.

23 BY MR. BUNDY:

24 Q. But you signed the document anyway, even
25 though it came to you with an initial amendment?

1 A. Yes, sir.

2 Q. So you had set whatever these terms are
3 on behalf of Balfour Beatty as written and as
4 received by you?

5 A. Yes, sir.

6 Q. Okay. What's the other exhibit you got?

7 A. 36.

8 Q. Let me see that exhibit. All right.
9 Let's look at 36. This change order 19 was
10 executed again on September 4 and again by you on
11 September 19; is that correct?

12 A. Yes.

13 Q. Tell me about September 19, 2019 in your
14 life. Was that a day where you signed a lot of
15 stuff to sort of clean up this contract?

16 A. Mr. Bundy, I don't -- I don't remember
17 the date.

18 Q. Well, where was your office in September
19 of '19?

20 A. In Charleston.

21 Q. Okay. And where would you have most
22 likely been when you signed all these documents?

23 A. I don't know. It was either here or
24 Charlotte.

25 Q. Okay. And in whose presence would you

1 more likely than not have signed this document?

2 A. You asked me not to speculate; so I
3 don't know.

4 Q. You don't know. That's perfect. I
5 don't know is a perfectly good answer. Ain't but
6 three answers to any question. I don't know, I
7 don't remember, and the truth. Okay?

8 A. Yes, sir.

9 Q. I just want one of those three.

10 MR. HILDEBRAND: Objection, Your
11 Honor. He can answer -- obviously, he can answer
12 a question as appropriate.

13 THE COURT: I'm going to allow it.
14 Noted but go ahead.

15 BY MR. BUNDY:

16 Q. The contract amount, the previous
17 contract amount is 2,560,540.89, correct?

18 A. Yes.

19 Q. And this one -- you had a number in this
20 one of \$68,740.20, right?

21 A. Yes.

22 Q. Let's look at the language that's asked
23 in the second paragraph. I'm going to read it
24 and tell me if I'm right.

25 This change order represents full and

1 final settlement on the change orders between Old
2 North State Masonry and Balfour Beatty
3 Construction specified below.

4 Although BBC contends that these costs
5 are due to acts or omissions of the owner for
6 which the owner is liable. BBC agrees to pay Old
7 North State Masonry 68,740.20 within 30 days of
8 the execution of this change order 19 by both
9 parties. Was that paid within 30 days?

10 A. I don't know.

11 Q. You don't know?

12 A. Not going to speculate.

13 Q. Right. You don't know?

14 A. No.

15 Q. Okay. I'm sorry, my hearing is not that
16 good.

17 A. You asked me to say I don't know or I
18 don't remember.

19 Q. Oh, I didn't hear you say I don't know,
20 I apologize. However, this payment is not in
21 admission of any liability by BBC, and BBC
22 reserves all right to reimbursements to these
23 costs by the owner. Do you know if this was
24 provided to the owner, this document?

25 A. No, sir.

1 Q. No, you don't know?

2 A. I don't know.

3 Q. Okay. Let's go down. It says, CI
4 number 3287. Do you know what that stands for?

5 A. Cost item number.

6 Q. Okay. Description, ONSM code
7 settlement, for settlement only. Where did that
8 language come from?

9 A. Old North State Masonry change order
10 settlement, for settlement only.

11 Q. Yeah. Who told you to put for
12 settlement only in the language?

13 A. I don't remember.

14 Q. Do you know why that's in here?

15 A. It's for settlement only. I'm not sure.

16 Q. Do you know what the reason that's in
17 there for?

18 A. No, sir.

19 Q. Is this a rare thing to see in a change
20 order from Balfour Beatty for settlement only?

21 A. We were -- I believe this was after we
22 had submitted the claim; so there were a bunch of
23 things that I didn't -- wasn't familiar with that
24 were happening.

25 Q. Okay. And then you've got a budget

1 code. What's that budget code for?

2 A. I believe that's for our masonry budget.

3 Q. Okay. Let's look at the -- let's look
4 at the language at the bottom.

5 This change order constitutes full and
6 complete settlement of any and all costs referred
7 to and/or described herein including but not
8 necessarily to all applicable laws, insurance,
9 bond, or supervision, overhead and profit, labor,
10 labor impact, materials, changes, delays,
11 acceleration, inefficiency, or any claims
12 therefore relating to the items specified in the
13 chart set forth above.

14 And subcontractor hereby waives and all
15 claims for such items associated with or related
16 to the work by this change order. Did I read
17 that correctly?

18 A. Yes.

19 Q. Does that mean that if any of these
20 items caused a delay in the job, that Old North
21 State Masonry is waiving any claims it has for
22 delay for anything listed in this change order?

23 A. I don't know.

24 Q. You don't know. Okay. Does it mean
25 that Old North State Masonry is waiving any

1 claims for supervision, overhead, profit, labor,
2 labor impact, materials, changes, acceleration,
3 and inefficiency as it relates to each and every
4 one of those items as a result of this change
5 order?

6 A. That wasn't the intent.

7 Q. Pardon me?

8 A. That wasn't the intent.

9 Q. That wasn't whose intent?

10 A. That wasn't our intent. This -- we
11 talked about this yesterday, Mr. Bundy.

12 Q. Wait, wait, wait.

13 A. And there's another one -- there's
14 another change order after this that says,
15 Balfour Beatty -- Balfour Beatty agrees to
16 include these change order requests in the
17 pending claim against the owner upon execution of
18 19 and 20. So I don't think their intent was to
19 waive rights to any claims, change orders,
20 delays, or inefficiencies caused.

21 Q. Okay. There are a lot of documents in
22 this case, and the contract says modifications.
23 They all stand on their own two feet. You're not
24 allowed to introduce parol evidence in law about
25 what you think the intent was, I don't believe in

1 a court of law; however, whether I'm right I am
2 wrong, I would like to restrict your answer to
3 the contents of this --

4 MR. HILDEBRAND: Objection, Your
5 Honor. Your Honor, if he has a question, then
6 just ask him the simple question. These
7 preparatory diatribes are inappropriate for him
8 to state what he thinks the law is, and then, at
9 the end, tag on a question. It's like it's on
10 the record that he's agreeing with all of his
11 preparatory comments.

12 I think he just needs to answer -- ask
13 him a simple question, not his interpretation of
14 the law, and all of his explanations. Just ask
15 him a simple question and let him answer it.

16 MR. BUNDY: I believe, with an
17 obstinate witness who refuses to answer a
18 straight question, who obfuscates and will not
19 speak clearly, that I need to inform the witness
20 of what I'm trying to get across to him.

21 He apparently has a lot of trouble
22 answering straight questions. But I will
23 withdraw all of that, and I'll start all over
24 again.

25 MR. HILDEBRAND: There we go again,

1 Your Honor. That's just so inappropriate.
2 This -- for him to berate this witness, I think
3 is harassment. This witness has been, I think,
4 very candid and very straightforward. That's
5 just inappropriate, Your Honor.

6 THE COURT: I'm going to overrule
7 you. Go ahead.

8 MR. BUNDY: Thank you, Your Honor.

9 BY MR. BUNDY:

10 Q. Now, you signed this document on behalf
11 of Balfour Beatty?

12 A. Yes, sir.

13 Q. You put in this document what you were
14 told to put in it?

15 A. Change order 19?

16 Q. Yes.

17 A. Yes.

18 Q. You were not told why, and you had
19 nothing to do with the negotiation of this -- of
20 the change order 19?

21 A. That's correct.

22 Q. You have no actual knowledge of what the
23 intent was of either party as a result?

24 A. This change order? That's correct.

25 Q. Okay. Now, let's talk about the change

1 order 19 itself, these items that are listed.

2 Now, these -- according to the change order, BBC
3 contends that these costs are due to actual
4 omissions of the owner for which the owner is
5 liable. Did I read that correctly?

6 A. Yes.

7 Q. All right. The first item in the change
8 order is bone white aluminum. What is the amount
9 allocated to bone white aluminum out of the
10 \$68,740.20?

11 A. Mr. Bundy, I don't remember the
12 allocations for any of these.

13 Q. Pardon me?

14 A. I don't remember the cost allocations
15 for any of these.

16 Q. Explain to me what acts -- or tell me
17 what acts or omissions of the owner occurred,
18 which BBC contends are the responsibility or the
19 liability of the owner as it relates to bone
20 white aluminum?

21 A. I can't remember.

22 Q. Okay. Same question for EWO ticket cut
23 stone due to footer height.

24 A. Yeah. There's a -- there was a footer
25 height shown on the architectural drawings and a

1 footer height shown on the structural drawings.
2 They conflicted. So there was extra work that
3 was required to make the stone work.

4 Q. And what's the amount? What portion of
5 this 68,740.20 is that number?

6 A. I don't remember.

7 Q. Deduct CMU at south arches. Let's do it
8 this way. I'm going to ask you three questions
9 about every one of these things. If you can
10 remember the three questions, we can go pretty
11 quickly.

12 A. Great.

13 Q. The first question is, what's the amount
14 allocated to the item we're discussing?

15 A. It's going to be, I don't remember for
16 all of them.

17 Q. All of them. Okay. So we're done with
18 that one.

19 A. Yes.

20 Q. Okay. The second question -- we're now
21 down to two questions.

22 A. Yeah.

23 Q. What was the act or omission of the
24 owner that Balfour Beatty contends makes the
25 owner liable for these alleged omissions and

1 errors?

2 A. Okay.

3 Q. Okay. Let's answer that as to all of
4 them.

5 A. What's the third one so I can just --

6 Q. Well, just answer that one question and
7 go all the way down and then we'll come back.

8 A. Okay. Deduct CMU at south arches, that
9 was a credit that we've already talked about. It
10 required stone. It required concrete. So
11 there's a cost increase there.

12 Cut precast due to concrete placed
13 wrong. I believe the concrete was -- this is,
14 again, a conflict in the structural and
15 architectural drawings. Concrete was shown one
16 elevation; however, the precast setting on the
17 architectural drawings was shown at a different
18 elevation.

19 Concrete dimensions growing, I don't
20 remember what that one was for. Damage precast
21 due to BBC moving because Old North State Masonry
22 refused to move. That's not due to an error or
23 omission by the owner. Relocating Old North
24 State Masonry and material out of the way is not
25 due to owner error or omission.

1 Rework corner due to drawing conflict.

2 I believe that one is self-explanatory. The
3 drawing is conflicting, and now the corners need
4 to be set.

5 Q. Let me stop you there. What drawing
6 conflict are we talking about?

7 A. Probably between the structural and
8 architectural drawings. There's quite a few
9 conflicts that structural said to do it one;
10 architecturally said another way, and it created
11 a conflict it how the stones should have been
12 produced and how it ended up.

13 Q. Okay. You started with the word
14 probably, and this talk about corner, right?

15 A. Yes, sir.

16 Q. So you don't know for sure, do you?

17 A. I know there was a drawing conflict.

18 Q. Okay. The drawings are right over here
19 on the floor. Could you come around and show us,
20 please?

21 A. I'm not going to be able to find it,
22 sir. I don't --

23 Q. Pardon me?

24 A. I'm not going to be able to find the
25 conflict. We'll be here all day.

1 MR. BUNDY: So for the record, can
2 we establish the drawings are here in front of
3 the witness. I've given him an opportunity to
4 look at them, and his testimony under oath is
5 he's not able to do it.

6 THE COURT: Noted.

7 MR. BUNDY: Okay. Thank you.

8 BY MR. BUNDY:

9 Q. All right. Let's move on.

10 A. Rework corner due to drawing conflict.
11 Remove and reinstall precast set to roof. I
12 don't remember exactly what that was for. Extra
13 work ticket cut stone due to footer height, same
14 as before. Footer height was shown at a
15 different height on the two drawings.

16 Q. But the drawings are here. Do you want
17 to show me?

18 A. Yeah, I can.

19 THE COURT: Do you want to take
20 five minutes and let him take a look?

21 MR. BUNDY: Sure.

22 THE WITNESS: Not really, but sure.

23 MR. BUNDY: Long as he does it by
24 himself.

25 THE WITNESS: Do you want to let me

1 do it in this five minutes or is this a break?

2 THE COURT: Let's take a break, and
3 then go ahead, come back, and take a look and see
4 what you can find. All right?

5 THE WITNESS: Can I look while
6 everybody else is on break?

7 THE COURT: Sure, absolutely.

8 (A recess transpired.)

9 THE WITNESS: So these are the
10 architectural drawings.

11 MR. BUNDY: If he could take the
12 stand, please.

13 THE COURT: Okay. Go ahead. You
14 found something? All right. Good.

15 THE WITNESS: Do you want me to go
16 back?

17 THE COURT: Sure. Go ahead and
18 have a seat.

19 BY MR. BUNDY:

20 Q. Okay. I don't need an explanation.
21 What I want you to do is give me the page number
22 identifying the plan sheet and the details that
23 you intend are in conflict.

24 A. I can't see it.

25 THE COURT: You will need to come

1 on down for that.

2 MR. BUNDY: You can come around. I
3 just want to be -- what I'm trying to tell you
4 is, I don't want a long explanation. I just want
5 to know which plan sheets you contend are in
6 conflict.

7 THE WITNESS: A622. Detail 5,
8 A622.

9 THE COURT: All right. So page
10 A622?

11 BY MR. BUNDY:

12 Q. And can you identify this sheet, please,
13 this sheet of drawings? Identify the sheet.

14 A. So it's architect drawing A622. We
15 identify them by bottom right dated -- let's see.
16 The date there is July 4, 2014.

17 Q. Okay. And then which sheet? 8622
18 detailed what?

19 A. 5.

20 Q. Detail 5. Okay. What's -- that's the
21 architectural?

22 A. That's the architectural.

23 Q. All right. And that conflicts with the
24 structural?

25 A. Here's the structural drawing dated --

1 this delays addendum December 1st, 2014.

2 Q. Hold on now. Issued 7/4/14, 100 plus,
3 11/06/14, edition 3, 12/01/14 sheet S-201, right?

4 A. Yes, sir. Addendum 3, December 1, 2014.

5 Q. Right. And what section?

6 A. Detail 3.

7 Q. Detail 3.

8 A. Which is what the drawings reference to
9 the same section.

10 BY MR. BUNDY:

11 Q. Okay. All right. So now let's move on.
12 That was which one you were talking about?

13 A. I don't know.

14 Q. The rework corner due to drawing
15 conflict?

16 A. No. That's splitter heading. That's
17 extra work ticket cut center due to footer
18 height.

19 Q. Point it to me.

20 A. EWO ticket cut center due to footer
21 height.

22 Q. Okay. And we don't know the number on
23 that, the dollar amount?

24 A. No, sir.

25 Q. Okay. All right. CCD number 3520,

1 flints?

2 A. Yep. That's a request by the owner to
3 add flints underneath the lights.

4 Q. And we don't know the number on that?

5 A. No, sir.

6 Q. Stucco build up due to exterior masonry
7 issues?

8 A. Yes, sir.

9 Q. Whose responsibility is that?

10 A. The owners.

11 Q. Okay. And why?

12 A. Because there was a spec app. We
13 discussed that.

14 Q. Okay. So that's the spec app that's the
15 allowance was for?

16 A. Part of the allowance, yes, sir.

17 Q. Okay. Which part?

18 A. I don't remember.

19 Q. Okay. WSI back charges, what is WSI?

20 A. Caulking subcontractor.

21 Q. Huh?

22 A. Our caulking subcontractor.

23 Q. Caulking subcontractor. WSI back
24 charges for window. I guess that's relocated
25 caulking?

1 A. Yes, sir.

2 Q. All right. And there are one, two,
3 three, four, five -- five of those, right?

4 A. Yes, sir.

5 Q. And how much are those worth?

6 A. I'm not sure.

7 Q. Okay. And they are due to owners
8 omissions and errors?

9 A. I'm not sure.

10 Q. Okay. Then you've got MS4 back charges
11 stair free mason delays. Is that an owner
12 problem?

13 A. I'm not sure.

14 Q. Okay. And do you know what the amount
15 of it is?

16 A. No, sir.

17 Q. MSI back charges for multiple MOBs.
18 That's mobilization, I guess?

19 A. Yes, sir.

20 Q. For stairs. Is that an owner
21 responsibility?

22 A. I believe as a result of the delays
23 incurred on the job.

24 Q. You believe. Okay. And those delays
25 you describe all of them to be owner, correct?

1 A. Yes, sir.

2 Q. Okay. So you disagree with the expert,
3 Mr. Doran, who said that at least one day of
4 delay was the responsibility of Balfour Beatty?

5 A. Yes, my opinion.

6 Q. Okay. Your opinion, he's wrong about
7 that?

8 A. No, sir.

9 Q. Huh?

10 A. No, sir.

11 Q. So he is right?

12 A. Pardon?

13 Q. Is Doran right or wrong that Balfour
14 Beatty is responsibility for at least one day of
15 delays?

16 A. I don't have an opinion on Mr. Doran.
17 You ask my --

18 Q. What is your opinion?

19 A. I believe the owner is responsible for
20 the delays.

21 Q. A hundred percent of them?

22 A. Yeah. I think they're responsible for
23 most of the delays. I'm not 100 percent, but I
24 haven't done a critical path analysis myself.

25 Q. Okay. So it's not an a hundred percent.

1 It's most of them, in your opinion. And what
2 percentage would that be? What percentage would
3 most of it be?

4 A. I don't have it pinned down to a
5 percent, Mr. Bundy. I believe the owner is
6 responsible for all the changes they incurred,
7 all the changes they imposed, delays they
8 incurred. I don't have a date, a number of days
9 or percentage. So it's hard to assign one.

10 Q. I'm restricting my question to delays.
11 Do you have an opinion as to whether or not the
12 owner is responsible for all the critical path
13 delays on this job?

14 A. I have an opinion. I don't have an
15 opinion on whether it's all or not.

16 Q. You don't have a what?

17 A. I don't have an opinion on whether it's
18 all or not.

19 Q. So is it some?

20 A. Yes.

21 Q. All right. So then we go on and down at
22 the bottom, change order constitutes full and
23 final -- I think we've been through all this. So
24 we're done with 36, I believe, right?

25 A. Yes.

1 (DFT. EXH. 37 was marked for
2 identification.)

3 Q. Okay. I hand you what's been now marked
4 for identification as Defendant's Exhibit 37, and
5 can you look at that, please?

6 MR. HILDEBRAND: I'm sorry, what
7 number is that?

8 MR. BUNDY: This is an e-mail
9 from --

10 THE COURT: 37 is the number.

11 MR. BUNDY: 37.

12 MR. HILDEBRAND: Thank you.

13 BY MR. BUNDY:

14 Q. This is an e-mail from you, subject
15 forward CMT masonry overage. What does CMT stand
16 for?

17 A. Construction material testing.

18 Q. July 22nd, 2017, 2:39 am, correct?

19 A. Yes, sir.

20 Q. And you sent it to Chip Venable. Who is
21 he?

22 A. Project manager for Old North State
23 Masonry.

24 Q. You sent it to Toby Holloway. Who is
25 he?

1 A. Toby Holloway is the -- he ran
2 operations for Old North State Masonry.

3 Q. You sent it to Tim Spano, who is he?

4 A. Tim Spano is employed by Balfour Beatty.

5 Q. David Stanton, who is he?

6 A. Employee of Balfour Beatty.

7 Q. Okay. And you -- the addressees, I
8 guess, are Chip and Joe. That's Chip Venable and
9 Joe Anastasi, right?

10 A. Yes.

11 Q. And you sent it as -- on behalf of
12 Balfour Beatty as the project manager on this
13 job?

14 A. I was the project manager at this point,
15 yes.

16 Q. And how long had you been on the job as
17 of July 22nd, 2017? You started in May of 2015,
18 it likes like.

19 A. So that would be just over two years.

20 Q. Okay. I'm going to read this and you
21 tell me if I'm reading it wrong. Chip and Joe,
22 see below from the owner and attached report,
23 take note that they have put us notice for
24 recovery of the testing overages due to poor
25 management by ONSM.

1 BBC subsequently is putting ONSM on
2 notice for this potential claim. BBC has already
3 put ONSM on notice multiple times for this
4 project for delays, quality and repairs.

5 Be advised that the current total for
6 stucco high build, a result of masonry walls
7 being out of plumb, is projected to exceed
8 \$200,000. This only accounts for the time and
9 material BBC has paid the stucco subcontractor to
10 correct the masonry walls that are out of plumb,
11 of which we fully intend to recover from ONSM.

12 Additional monies will have been spent
13 correcting on the interior side of the walls
14 where block is not plumbed. All direct and
15 indirect projected costs associated with these
16 issues will be presented to OSM in a claim when
17 they are verified.

18 Mr. Starcevic, did you write this?

19 A. Yes.

20 Q. Was it true when you wrote it?

21 A. Except for the last word, I said vetted,
22 not verified.

23 Q. Except for what?

24 A. I said vetted, not verified.

25 Q. Oh, I'm sorry. So this a true e-mail?

1 It's accurate?

2 A. I wrote this e-mail.

3 Q. You wrote it?

4 A. Yes.

5 Q. And at the time you wrote, you believed
6 it to be true and accurate?

7 A. I believe it to be true at the time.

8 MR. BUNDY: Okay. I move it to be
9 produced into evidence.

10 MR. HILDEBRAND: No objection.

11 THE COURT: Without objection.

12 (DFT. EXH. 37 was received in
13 evidence.)

14 (DFT. EXH. 33 was marked for
15 identification.)

16 BY MR. BUNDY:

17 Q. I hand you now Defendant's Exhibit 33
18 for identification.

19 MR. HILDEBRAND: What is this?

20 MR. BUNDY: 33.

21 BY MR. BUNDY:

22 Q. All right. Do you recognize this
23 e-mail?

24 A. It's an e-mail from Alec Dooley to Josh
25 Beach, who is project manager for Lithko; Nick

1 Starcevic with Balfour Beatty; Jennifer
2 Faulkinberry with WLA, the architect; Kirk
3 Stephens with David Allen; Martindale with
4 Balfour Beatty; Pete Waterfield with Balfour
5 Beatty, superintendent, and Gino Cassetto,
6 superintendent with Balfour Beatty.

7 It says, guys, per our conversation with
8 Lithko, before pouring into slab, we're going to
9 sweep around the drains to get the concrete one
10 inch below the lowest drain grate.

11 Lithko will be responsible for exposing
12 the weep holes before David Allen begins their
13 work. David Allen will install and slope mud bed
14 underneath the AC before they install their
15 mercury water proofing.

16 Lithko will be responsible for paying
17 David Allen to set their mud bed. If you have
18 any questions please, let me know, Mr. Alec
19 Dooley on January 26th, 2017, at 3:30 p.m.

20 Q. Okay. And Mr. Dooley, he was what,
21 project engineer?

22 A. He was project engineer or senior
23 project engineer.

24 Q. Senior project engineer. He was in the
25 field?

1 A. No, sir. He was in the office.

2 Q. Oh, he was in the office?

3 A. We had our engineers in the field quite
4 a bit. So Dooley did a little bit of both.

5 Q. Okay. Was the mud bed for which Lithko
6 he was to be responsible for paying David Allen
7 part of Lithko's original subcontract?

8 A. No, sir. This is a change.

9 Q. A change?

10 A. Yes, sir.

11 Q. And is this additional work that Lithko
12 was doing so David Allen could set their mud bed?

13 A. No, sir. We had a large format tile on
14 the pool deck and we couldn't meet the slopes
15 that the architect had designed. So we came up
16 with an alternate option because concrete doesn't
17 allow you to meet those slopes.

18 So we held it low and Lithko agreed to
19 hold the slab low and pay David Allen the extra
20 Mercury fee, the extra underlayment to meet those
21 slopes because you can manipulate this grout bed
22 better than you can concrete, and David Allen was
23 the person who could do it. So they agreed to
24 pay them to do and the architect agreed to this.

25 Q. Okay. And is this a result of

1 architectural error?

2 A. Yes, sir.

3 Q. Well, if this was a result of an
4 architectural error, notwithstanding as a result
5 of an architectural error, Lithko was going to be
6 responsible for paying David Allen; is that
7 correct?

8 A. Yes, sir.

9 MR. BUNDY: Okay. Your Honor I
10 move to introduce this into evidence?

11 THE COURT: Number 33?

12 MR. HILDEBRAND: No objection.

13 THE COURT: Without objection.

14 (DFT. EXH. 33 was received in
15 evidence.)

16 (DFT. EXH. 38 was marked for
17 identification.)

18 BY MR. BUNDY:

19 Q. All right. I hand you Defendant Exhibit
20 38 for identification and ask you to look through
21 it. I think it's more than one document. It's a
22 group of documents.

23 A. Change order number 6.

24 Q. Just look at them for me first. I will
25 get you to identify them in a minute.

1 A. Got it.

2 Q. Okay.

3 A. Got it.

4 Q. Okay. Is it true that change order on
5 Exhibit 3 -- what is it?

6 A. 8.

7 Q. -- 38 contains a change order 06 between
8 Premier and Balfour Beatty. It contains change
9 order 07 between Premier and Balfour Beatty. It
10 contains change order 8 between Premier and
11 Balfour Beatty. It contains -- and it contains
12 10 between Premier and Balfour Beatty, and it
13 contains 16 between Premier and Balfour Beatty;
14 is that correct?

15 A. Yes, sir.

16 Q. Can you identify these as part of the
17 project records?

18 A. Do you want me to tell you what they
19 are?

20 Q. Yes. Are these part of the project?
21 These are generated here. These are generated
22 by -- these are documents in this --

23 A. Yes, sir.

24 Q. -- this project, correct?

25 A. Yes, sir.

1 MR. BUNDY: Your Honor, I move to
2 introduce this document as an exhibit in this
3 case, No. 38.

4 THE COURT: Exhibit 38?

5 MR. BUNDY: Yes, Your Honor.

6 MR. HILDEBRAND: No objection, Your
7 Honor.

8 THE COURT: Without objection.

9 (DFT. EXH. 38 was received in
10 evidence.)

11 BY MR. BUNDY:

12 Q. All right. Let's look at Exhibit No --
13 let's look at change order number 6, all right?

14 A. Okay.

15 Q. It's accepted by Premier on March 3,
16 '17; accepted by Nick Starcevic on March 6, '17,
17 right?

18 A. Yes, sir.

19 Q. And if we turn to the third page three,
20 there's a thing that says change order approval
21 cover sheet, correct?

22 A. Yes, sir.

23 Q. The amount is 147,198.74.

24 A. Yes.

25 Q. Okay. And under the heading, total add

1 slash, deducted results of charge orders dollar
2 value, which includes all applicable tax, right?

3 A. Yes.

4 Q. And there are three items that have been
5 blacked out, buy out contingency. What does that
6 mean?

7 A. It's -- we bought a subcontractor for
8 less than a budget. It goes to buy out.

9 Q. RCO, what does that mean?

10 A. Request for change order.

11 Q. Back charge subcontractor, what does
12 that mean?

13 A. The back charge for the subcontractor.

14 Q. Okay. Can you tell from this -- from
15 the face of this change order, number 6, what
16 subcontractor is going to be back charged for the
17 work or any of the work in this change order?

18 A. No, sir.

19 Q. Sir?

20 A. No, sir.

21 Q. You cannot tell?

22 A. No, sir.

23 Q. Okay. All right. Let's go to No. 7,
24 signed by Brian O'Shaughnessy on April 3, signed
25 by you April 17 as project manager; is that

1 correct?

2 A. Sorry, No. 7? April 17th, yes.

3 Q. Okay. Let's look at the descriptions of
4 this change order. CI number 923 is 2/6/17,
5 L3-L4 footing bad masonry openings. Is that a
6 back charge to somebody?

7 A. Fixing bad masonry openings on level 3
8 and level 4 appears to be a back charge.

9 Q. Against who?

10 A. The Masonry.

11 Q. The Mason?

12 A. Yes.

13 Q. Old North State Masonry.

14 A. Yes.

15 Q. The next one is CI number 924,
16 description 2/5/17, water proofing eight windows
17 on L4, three sizes of window with rapid seal
18 \$665.28. Is that a back charge?

19 A. I'm not sure.

20 Q. Okay. The next one is CI number 925,
21 water proofing windows on L4 that had wrong
22 openings, 559.47. Is that a back charge?

23 A. I believe so. We've got the last one
24 where I'm looking at it.

25 Q. Is that a back charge to OSM?

1 A. I believe both of these are.

2 Q. Okay. Masonry repairs of windows on
3 time, material is \$1,359.79. Is that a back
4 charge, CI number 926?

5 A. It appears so.

6 Q. Okay. Now, this change order between
7 Premier Exterior and Balfour Beatty contains the
8 release language as follows, does it not? This
9 change order constitutes full and complete
10 settlement, meaning all cost referred to and/or
11 described herein, including but not necessarily
12 limited to all applicable taxes, insurance, bond,
13 and supervision, overhead and profit, labor,
14 labor impact, materials, changes, delays,
15 acceleration and inefficiencies for any claims
16 therefore, and the subcontractor hereby waives
17 any and all claims for such damages associated
18 with or related to the work covered by this
19 change order, all previous change orders, and
20 based subcontract amount, and all conditions
21 occurred to date. Did I read that correctly?

22 A. I believe all the change orders had the
23 same language on them.

24 Q. Okay.

25 A. So we --

1 Q. All right.

2 A. -- just assume that's the same.

3 Q. The next change order is number 8,
4 Premier Exterior and it's add of \$6,240; is that
5 correct?

6 A. Yes, sir.

7 Q. The descriptions is CI number 1207, and
8 it says five guys for three rooms. What is that
9 for?

10 A. Housing for their additional work.

11 Q. Okay. And is that a back charge to
12 somebody?

13 A. It's hard to say.

14 Q. Hard to say. It wasn't signed by you.
15 Was it paid?

16 A. I do not know.

17 Q. Okay. The next page --

18 A. I would assume it was.

19 Q. The next page is the change order
20 approval cover sheet that goes with change order
21 eight; is it not?

22 A. Yes.

23 Q. All right. Again, we have the blocks
24 buyout contingency FRN 7 checked, correct?

25 A. Yes.

1 Q. Does that have anything to do with this
2 change order?

3 A. Yes, sir.

4 Q. Back charge subcontractor, SFRN number
5 10, do you know what subcontractor would be back
6 charging for \$6,240?

7 A. We were trying to figure out who was
8 responsible. We were going to use buy out
9 contingency or back charge at the time, but we
10 knew we had to -- we knew it was extra work for
11 the stucco subcontractor. So we checked both
12 boxes.

13 Q. And then if we go underneath that it
14 says reviewed by, the approved boxes is checked,
15 and it says signed and dated buyer, Shanti
16 Pieniak. Who was that?

17 A. Shanti Pieniak was the project
18 coordinator at the time.

19 Q. All right. And the buyer-manager Nick
20 Starcevic. That's you, right?

21 A. Yes, it is.

22 Q. So you did approve this change order?

23 A. Pardon?

24 Q. You did approve this charge order or
25 not? You didn't sign it, but did you approve it?

1 A. Yes.

2 Q. Yes, you approved it?

3 A. Yes.

4 Q. All right. Let's go to number 10. This
5 is a \$100,000 add to Premier Exteriors contract;
6 is that correct?

7 A. Yes.

8 Q. Signed by you on June 30?

9 A. Yes.

10 Q. '17?

11 A. Yes.

12 Q. Okay. And if we look to the change
13 order approval cover sheet on the next page, it
14 says buy out -- it says back charge
15 subcontractor. Is this 100,000 a back charge to
16 the subcontractor?

17 A. At the time we did not know it was --
18 whether it was a buy out contingency, back charge
19 subcontractor or hold the owner and design team
20 responsible.

21 Q. Is there anything on the form which says
22 you did not know, or does it simply say back
23 charge subcontractor?

24 A. The form says back charge subcontractor
25 or buy out contingency.

1 Q. All right. And then the next one is
2 change order 16. And it's for 12,295. T and M
3 work for 5/23 through 6/6 in the amount of 9,630.
4 Do you know what that was for other than just
5 time and material?

6 A. No, sir.

7 Q. You don't know who -- you don't know why
8 that work had to be done?

9 A. I don't remember it.

10 Q. Okay. All right. And then there's a
11 main entry high bill. What is that about?

12 A. The CMU was out of plumb at the main
13 entry and we had to build it up to --

14 Q. Okay.

15 A. -- get a good finish on the stucco.

16 Q. All right. And it was the architect's
17 fault that the CMU was out of plumb?

18 A. I didn't say that.

19 Q. I'm asking you. Was it the architect's
20 fault that the CMU was out of plumb?

21 A. I don't remember the exact condition.

22 Q. Who laid the CMU? Did the architect lay
23 the CMU?

24 A. The mason did. The architect inspected
25 the tolerance in the masonry, which differed from

1 the tolerance they had in the stucco. So there's
2 a gap there and that the architect is responsible
3 for.

4 Q. Are you finished?

5 A. Yes.

6 Q. Okay. This doesn't say tolerance. It
7 says out of plumb. What does plumb mean?

8 A. There's plumb, which is straight, and
9 there's out of plumb.

10 Q. And so this doesn't say out of
11 tolerance, does it?

12 A. No, sir.

13 Q. It says out of plumb, correct?

14 A. It says main entry height built.

15 Q. It doesn't say out of plumb?

16 A. I don't see it.

17 Q. I thought you just testified something
18 that was out of plumb?

19 A. You asked me what this said.

20 Q. What do you say? Are you saying it's
21 out of plumb or it was out of tolerance? Which
22 is it? I don't care.

23 A. I'm not sure.

24 Q. You're not sure. Okay. Well, let's do
25 it this way. You've watched masons put block up,

1 right?

2 A. Yes, sir.

3 Q. Okay. And now they use lasers, but they
4 also used to use levels, four foot wooden levels
5 to lay masonry, right? Have you ever seen a
6 mason lay brick or block?

7 A. Yes, sir. I've watched quite a few of
8 them on projects.

9 Q. Do you know how to lay block?

10 A. I've never done it.

11 Q. Well, I have. Now, when you go to lay a
12 block, you put your mason's level up four feet
13 and there's a little bubble in there, right,
14 inside the level? Do you know what level is?

15 A. I do.

16 Q. Okay. And there's a bubble inside of
17 it, and if you get in between the two lines that
18 means that whatever your working against, if it's
19 in between -- if that bubble is in between those
20 two little lines that means it's plumb, straight
21 up and down, as it relates to the elevation,
22 right?

23 A. How straight?

24 Q. Pardon me?

25 A. How straight? There's a --

1 Q. Absolutely straight.

2 A. Yes.

3 Q. It's absolutely straight. And then you
4 have things in the contract called tolerance,
5 which allow things to be out of perfectly
6 straight, correct?

7 A. Yes.

8 Q. You understand these concepts. They're
9 not new to you, are they?

10 A. No, sir.

11 Q. Okay. And is there in the construction
12 industry a general understanding when something
13 is out of plumb it doesn't mean the spec, but if
14 it within tolerance, it could meet the spec and
15 still with be out of plumb, correct? Is that
16 correct?

17 A. Yeah. Generally speaking, yes.

18 Q. Something that is within tolerance --
19 something that is out of plumb and also out of
20 tolerance does not meet the requirements of the
21 documents, does it?

22 A. Correct.

23 Q. Okay. So when somebody refers to
24 something as out of plumb, I would like you to
25 consider that for purposes of my question that

1 it's not meeting the specifications, it's outside
2 of tolerance?

3 A. Outside of tolerance. Out of plumb is
4 outside of tolerance.

5 Q. Man.

6 A. Plumb is inside the tolerance.

7 Q. Was -- did my client lay -- did Library
8 Associates lay any block on this job?

9 A. Not that I'm aware of.

10 Q. Did they have any responsibility to see
11 that the block work was plumb?

12 A. No, sir.

13 Q. All right. Well, did the architect lay
14 any block on this job?

15 A. No, sir.

16 Q. Did the project manager lay any block on
17 this job?

18 A. For who?

19 Q. For anybody.

20 A. I don't know if any Old North State
21 Masonry project managers did or not.

22 Q. I didn't mean project manager. Well,
23 did you lay any block on the job?

24 A. No, sir.

25 Q. But was your company responsible to make

1 sure that the block was laid was within
2 tolerance?

3 A. Yes, sir.

4 (DFT. EXH. 34 was marked for
5 identification.)

6 Q. Okay. Thank you. Now, let's look at
7 Exhibit 34. Can you identify Exhibit 34, please?

8 A. Marion Square pay application number 38.

9 Q. Look inside and see if it's the accurate
10 copy of the pay application 34?

11 MR. HILDEBRAND: Is this one that
12 you earlier introduced?

13 MR. BUNDY: Pardon me?

14 MR. HILDEBRAND: Is this an earlier
15 one?

16 THE WITNESS: Pay application 38.

17 MR. BUNDY: Excuse me, 38.

18 THE WITNESS: 38.

19 MR. BUNDY: 38, I'm sorry.

20 BY MR. BUNDY:

21 Q. All I'm doing, Mr. Witness, is asking
22 you to look at the document and identify as an
23 accurate copy of the original.

24 A. I believe so. It looks accurate.

25 Q. Thank you.

1 MR. BUNDY: Your Honor, I move to
2 introduce this exhibit into evidence. No
3 objection?

4 THE COURT: Sure. Show it to
5 Mr. Hildebrand, if you would.

6 (DFT. EXH. 35 was marked for
7 identification.)

8 BY MR. BUNDY:

9 Q. While he is looking at, Mr. Starcevic,
10 look at Defendant's Exhibit 35 for identification
11 and tell me if you identify it?

12 A. Pay application number 42.

13 Q. Does it appear to be an accurate copy of
14 the original?

15 A. It's a lot of pages to say. It looks
16 like --

17 MR. BUNDY: Your Honor, I move to
18 move Exhibit 35 into evidence.

19 THE COURT: Okay.

20 MR. HILDEBRAND: 38 appears to be
21 in order, sir.

22 THE COURT: All right. That's
23 marked as Defendant's 34, correct?

24 MR. BUNDY: This one, 35, any
25 objection?

1 MR. MCDONALD: 38 is 34, Your
2 Honor, and 42 is 35.

3 THE COURT: I got it. It's like
4 playing football up here.

5 MR. BUNDY: I quit. I retire.

6 MR. HILDEBRAND: Got it.

7 (DFT. EXH. 34 and 35 were received
8 in evidence.)

9 BY MR. BUNDY:

10 Q. All right, Mr. Starcevic. Did you see
11 or did you observe or were you in the courtroom
12 when the three expert witnesses testified for
13 Balfour Beatty?

14 A. I was here for either all or a portion
15 of Mr. Huyghe.

16 Q. You were here for what?

17 A. All or a portion of Mr. Huyghe's.

18 Q. Okay. Anybody else?

19 A. No, sir.

20 Q. Okay. What interaction did you have
21 with Mr. Huyghe in this job?

22 A. During the job, none. I believe I met
23 with him once or twice afterwards in preparing of
24 the claim.

25 Q. In preparation of the claim?

1 A. Yes, sir.

2 Q. What time period would that have been?

3 A. I don't remember. Late 2019, early
4 2020.

5 Q. Okay. You have the claim here -- it's
6 right there. Would it have predated the date on
7 that claim?

8 A. I don't remember.

9 Q. Okay.

10 A. Again, I don't know.

11 Q. Did you meet with him after the claim
12 was filed?

13 A. I believe so.

14 Q. You don't believe so?

15 A. I do believe so after March 6th, 2019.

16 Q. What was the nature of your meeting?
17 What did you provide to Mr. Huyghe?

18 A. The information, documentation, anything
19 he requested.

20 Q. Anything he requested?

21 A. Yes, sir.

22 Q. Okay. And can you tell me what he
23 requested?

24 A. I cannot. I don't remember.

25 Q. Did you provide him any written reports

1 or memos or anything like that?

2 A. Personally, no.

3 Q. Okay. Did you provide any information
4 related to discovery requests in the litigation?

5 A. I don't know.

6 Q. Okay. Do you know what a discovery
7 request is?

8 A. From you?

9 Q. Yeah. From Library Associates.

10 A. I don't remember if I did or not.

11 Q. Okay.

12 A. I really don't.

13 Q. So you don't have any recollection of
14 somebody bringing you say a list of what we call
15 interrogatories or questions to be answered to
16 ask for your assistance in answering those
17 questions?

18 A. I believe -- I don't remember if they
19 came from you or Ms. Hadley. I remember there
20 was some information that she requested that I --
21 (inaudible) had supported. I don't remember the
22 specifics.

23 Q. Do you have any recollection of someone
24 bringing you a request for a production of
25 documents and you being asked to collect those

1 particular document?

2 A. I believe so. Not really. Not really.
3 I believe that happened but --

4 Q. Okay.

5 A. -- most of my digital document are
6 available.

7 Q. Do you know whether or not Balfour
8 Beatty in this litigation sent any discovery
9 requests to any of its subcontractors asking for
10 information?

11 A. I don't. I wouldn't have done that. So
12 I don't know if they were actually sent or not.

13 Q. Were you involved at all during the
14 litigation process in trying to ascertain either
15 -- for anybody, the lawyers, your boss, or
16 anybody else -- what claims Balfour Beatty may
17 have back against subcontractors or the validity
18 of the subcontractors claims that were being
19 passed through?

20 A. I'm sorry. Can you ask that again?

21 Q. Sure. During the litigation progress,
22 and by that I mean after the litigation has
23 commenced --

24 A. Okay. That the March 6th date or --

25 Q. Pardon me?

1 A. Was that March 6th of '19.

2 Q. Yeah, that's fine.

3 A. Okay.

4 Q. Let's just use January 1 through today.

5 A. Of '19.

6 Q. '19 through today. During that time
7 period, were you ever tasked with the job of
8 making a determination about the validity of back
9 charges against Balfour Beatty's subcontractors?

10 A. Tasked?

11 Q. Asked to.

12 A. I believe so. Sorry, I don't remember.

13 Q. Okay. All right. During that same
14 period of time, were you ever asked to or tasked
15 with the job of reviewing any of the
16 subcontractor claims which were being made by
17 subcontractors through Balfour Beatty for their
18 viability, adequacy, whatever word you want to
19 use?

20 A. Yes.

21 Q. Were you ever asked to do that?

22 A. Yes.

23 Q. Okay. And who asked you to do that?

24 A. I don't remember who.

25 Q. And what determination did you make as

1 to your claims that you were asked to review?

2 A. I don't remember my determination. I'm
3 sure I provided that information on though.
4 There was a handful of them.

5 Q. Now, how about the other two witnesses?
6 Did you ever talk to Doran, D-O-R-A-N, did you
7 ever talk to him?

8 A. Yes, sir.

9 Q. When did you talk to him?

10 A. A number of times, maybe six or seven
11 times, maybe once a month for a six, seven month
12 period.

13 Q. And on average how long did those
14 conversations last?

15 A. Typically an hour -- 30 minutes to an
16 hour.

17 Q. Over the phone?

18 A. There was a meeting or two in person in
19 our office.

20 Q. Who else was there?

21 A. Dave Simonton, Joe Lauricella, Tim
22 Spano. I believe Tom Hildebrand was at one or
23 two. Taylor Morrison was at one or two or a
24 handful of them, if not all of them, and then an
25 associate of Mr. Doran was there.

1 Q. And what was the nature of Mr. Doran's
2 inquiries of that group?

3 A. Ask schedule questions, asking for
4 supporting information, what happened, a lot of
5 fact finding.

6 Q. With regard to those fact finding
7 matters, was any review made of the daily
8 reports?

9 A. You have to ask him. I don't remember.

10 Q. How about project photographs, did y'all
11 look at project photographs?

12 A. I don't remember what he looked at as
13 far as it relates to photographs.

14 Q. What was it as far as?

15 A. As far as it relates to photographs, I
16 don't remember what he looked at.

17 Q. The photographs you looked at may have
18 been sparse, but aren't there thousands of
19 pictures in this building during construction?

20 A. Yes, sir.

21 Q. Because the owner, in fact, paid for and
22 hired a professional photographer to photograph
23 this building from soup to nuts, and there's a
24 website which contains thousands of photographs,
25 correct?

1 A. There's a website that has thousands of
2 photographs.

3 Q. Okay. And did you ever sit down with
4 that group and y'all together visit that website
5 and look at these photographs in these
6 discussions to try to determine what happened
7 when and where the delay was?

8 A. I don't know. I don't remember that
9 happening.

10 Q. Okay. One thing we can know for sure is
11 that in determining the delay analysis the groups
12 that met with the delay experts saw no real -- or
13 did not look at the project photographs or view
14 the daily reports; is that correct?

15 A. I did not say that. I said I did not.
16 You would have to ask them what they reviewed.

17 Q. Okay. Who was the other witnesses that
18 was here with us? I think that's all I've got.
19 Oh, one more question. With regard to these
20 meetings with Mr. Doran, did the lawyers provide
21 information to the expert about when the delays
22 occurred and how they occurred or whatever it was
23 they were trying to get Mr. Doran to do?

24 A. I don't know. My understanding was
25 Mr. Doran used the information that was available

1 to him, schedules, archives, RFI's, that's my
2 understanding of how he came up with his report.

3 Q. Do you know whether Mr. Doran was told
4 what result he was supposed to reach in order --

5 A. No, sir.

6 Q. -- to get paid and to testify?

7 A. I do not know.

8 Q. Okay. All right. Now, we got a guy
9 named Huyghe. Did you meet with him?

10 A. He's the one we already talked about.

11 Q. Okay. So we got one more. How about
12 McAuliffe?

13 A. No, sir, never met him --

14 Q. Never met him?

15 A. -- until after his testimony.

16 MR. BUNDY: Okay. Thank you, sir.
17 That's it for me.

18 THE COURT: All right, sir.

19 Mr. Hildebrand, it's 12:30. I assume you've got
20 some redirect. Do you want to -- we started late
21 down to --

22 MR. HILDEBRAND: Can you give me
23 just a few minutes to confer with my counsel?

24 THE COURT: Sure.

25 MR. HILDEBRAND: I'm not sure about

1 how long it will take.

2 THE COURT: That would be fine. I
3 want to get Mr. Starcevic out of here if I can.

4 THE WITNESS: Don't worry about me.

5 MR. HILDEBRAND: Do we need the
6 subcontractors and their counsel before I ask any
7 questions?

8 MR. KELLY: I don't have any
9 questions.

10 THE COURT: Okay. Thank you,
11 Mr. Kelly. Apparently not.

12 MR. HILDEBRAND: If you will give
13 me just a few minutes?

14 THE COURT: Sure.

15 (A recess transpired.)

16 MR. HILDEBRAND: Well, I think I'm
17 really going to hurt Nick's feelings with this,
18 but I don't have any questions.

19 THE WITNESS: Are you sure?

20 THE COURT: All right. Very good.

21 All right. Mr. Starcevic, you may step down, and
22 I'm assuming they've got no more questions for
23 you. It's 12:40. We started a little bit late,
24 but why don't we just plan to come back and 2
25 o'clock and you can call your next witness.

1 MR. HILDEBRAND: Okay. Thank you,
2 Your Honor.

3 THE COURT: And who would that be?

4 MR. HILDEBRAND: It would be David
5 Simonton, but I would like to get through the
6 deposition -- the exhibits to come in through the
7 depositions and work through that for an hour.

8 THE COURT: Okay.

9 MR. HILDEBRAND: It may take an
10 hour, but we can start with the next witness
11 after that.

12 THE COURT: Okay.

13 MR. MCDONALD: And, Your Honor,
14 I've got -- we've got waves of these things; so I
15 was able to do what I said I was going to do and
16 put together the objections and the counter
17 designations into some of them.

18 Some of them I've gotten through the
19 objections and the counter designations, but it's
20 not in the document that I have created. So some
21 of them will have to go on the record. Others I
22 have got copies -- both of them I've got copies
23 to hand up so you can see what the objections
24 are.

25 THE COURT: Okay. All right.

1 Let's plan to do that at 2 o'clock.

2 MR. BUNDY: Can I ask for some
3 clarification?

4 THE COURT: Yes.

5 MR. BUNDY: I know you've quashed
6 my subpoena, but did you quash it because it
7 wasn't properly served, or did you quash it
8 because you didn't like the subpoena, or did you
9 do both? Because if it wasn't properly served,
10 I'm going to serve it again and see if I can fix
11 that. If you didn't -- if that wasn't the
12 reason, then I won't go through the trouble.

13 THE COURT: Okay. All right. Let
14 me give you --

15 MR. BUNDY: And this afternoon is
16 fine. You don't have to do it right now if you
17 don't want to.

18 THE COURT: Well, I will tell you
19 what I -- I have already written down my ruling,
20 so I will give it to you. I've just got to type
21 it up.

22 The Court orders the subpoena quashed
23 based on representations that all documents have
24 already been provided through discovery in either
25 electronic or paper production. And then, of

1 course, I was going to add that it wasn't
2 properly served. So if you want to try and
3 reserve it, you can. But that's my ruling.

4 MR. BUNDY: If I can fix something,
5 I want to try to fix it.

6 THE COURT: I'm with you. I'm with
7 you.

8 MR. MCDONALD: And, Your Honor, you
9 mentioned something yesterday about you want to
10 do some housekeeping as to who is in and who is
11 out. I've got those. So you can have them
12 whenever you want.

13 THE COURT: All right. Let's do
14 that at 2 o'clock. Okay. Perfect. See you
15 then.

16 (A recess transpired.)

17 THE COURT: All right. So I want
18 to get started. Let's do some housekeeping on
19 exhibits and then deposition and deposition
20 exhibits. I think we have an issue about that.

21 MR. MCDONALD: Your Honor, I don't
22 know exactly how you want to do it, but what the
23 rule requires is that they provide us with the
24 excerpts and the exhibits, and then at the time
25 they offer them, then we would provide, if we so

1 chose, counter designations and objections to
2 those exhibits.

3 Thus far in trial, what's been offered
4 by the plaintiff is the individual deposition of
5 Mr. Kim Brown, and we had our arguments over
6 that.

7 THE COURT: Right.

8 MR. MCDONALD: So I don't know what
9 he's going to do. I don't know what he's going
10 to offer, when he's going to offer it.

11 THE COURT: Okay.

12 MR. MCDONALD: But I've got my
13 stuff ready to go to put on the record. Now,
14 having said that, as I discussed before lunch,
15 this has been kind of a rolling procedure. So I
16 do have written out my objections -- and I don't
17 know how Your Honor wants to do it. I understood
18 from your ruling is you wanted to read these.

19 THE COURT: Yeah. Well, let me
20 make sure the first base has been gotten to, and
21 that is that y'all have received the designations
22 of the deposition excerpts. Have you gotten
23 that?

24 MR. MCDONALD: Yes, sir.

25 THE COURT: All right. So we are

1 at first base. Now, second base would be any
2 counter designations.

3 MR. MCDONALD: And objections.

4 THE COURT: And objections.

5 MR. MCDONALD: And the way I have
6 it, Your Honor, is, as I said, there's rolling --
7 so the first ones that came through, Mr. Michael
8 Bennett, the 30(b)(6) deposition of Library
9 Associates; the first Jennifer Faulkinberry
10 excerpts; and the first -- his name is Winfred
11 Lindsay, but he goes by Buck, as you've heard in
12 the trial.

13 THE COURT: Right.

14 MR. MCDONALD: I have those written
15 out what my objections are, and to the extent we
16 have counter designations, they're in there as
17 well.

18 THE COURT: Okay.

19 MR. MCDONALD: I also have written
20 out the -- and I've got a copy for Your Honor,
21 and I don't know exactly -- I thought Your Honor
22 said that you wanted to read them. But -- so
23 this would avoid all of that. I could just hand
24 up my objections. The ones that I have come in a
25 rolling portion, I need to put on the record.

1 But the other written objections -- or
2 not objections, but counter designations relate
3 to Ms. Karen Jenkins and Mr. Woody Faust.
4 They're with ECI, the interior designer.

5 So I'm prepared those up to Your Honor
6 if Your Honor is going to read it, then you would
7 be able to make a determination. And I would
8 like to mark it as a Court's exhibit so I'm
9 protected on the record for my objection.

10 THE COURT: Sure. Karen Jenkins.
11 And what was the other witness?

12 MR. MCDONALD: Mr. Woody Faust,
13 F-A-U-S-T.

14 THE COURT: Faust, okay.

15 MR. HILDEBRAND: Your Honor,
16 perhaps what I should do and what I would suggest
17 is, I would like to mark my -- the plaintiff's
18 excerpt designation for the depositions -- the
19 deposition excerpts for each one that I would
20 like to introduce.

21 THE COURT: Okay.

22 MR. HILDEBRAND: And then we can --
23 if he has a counter designation, let me just --
24 if I could just introduce all of those as
25 exhibits.

1 THE COURT: Okay.

2 MR. HILDEBRAND: And then we can go
3 through each one if you -- as you would prefer
4 them and then talk about exhibits that I'd like
5 to come through as well.

6 THE COURT: Well, why don't -- why
7 don't we do this -- have you gotten the counter
8 designations back as well?

9 MR. HILDEBRAND: No, sir.

10 THE COURT: You don't have those
11 back. Were those only as to those two witnesses
12 that you had?

13 MR. MCDONALD: I have counter
14 designations as to Mr. Jenkins, Mr. Faust,
15 Library Associates 30(b)(6), volume two. The
16 rest on those are objections. I have a counter
17 designation from Mr. Jim Ward, and then the rest,
18 supplemental Buck Lindsay deposition;
19 supplemental Jennifer Faulkinberry deposition;
20 and then we've got a significant issue with
21 Mr. Clements' deposition -- depositions.

22 THE COURT: Okay. Supplemental on
23 Buck Lindsay and who else?

24 MR. MCDONALD: Ms. Faulkinberry.
25 They added some exhibits and some testimony for

1 the two of them.

2 THE COURT: Okay. Jim Ward, Buck
3 Lindsay, Ms. Faulkinberry, and then there was one
4 more, I think you said?

5 MR. MCDONALD: Yes. And then we
6 have -- I have some significant objections to
7 Mr. Clements' deposition in toto. And exhibits
8 from that deposition.

9 THE COURT: Gotcha. Okay. All
10 right. At least I know what we're doing. So you
11 want to just publish what your exhibit -- who
12 your deposition notices are and who you're
13 looking to submit?

14 MR. HILDEBRAND: Yes, sir.

15 THE COURT: Let's cover them. You
16 have an overarching objection to all of them or
17 have you done it individually as to each
18 presentation?

19 MR. MCDONALD: I've got -- I've got
20 two objections that are overarching as to
21 Mr. Clements. I've got an objection that's
22 overarching as to Mr. Bennett. Then I've also
23 got individual objections to exhibits that are in
24 depositions.

25 THE COURT: Okay. All right. I

1 will take --

2 MR. MCDONALD: Again, as I
3 understood your ruling, the way I tried to
4 organize it was, you would have in one place, our
5 objections and counter designations.

6 Because as sure as -- I'll just give you
7 an example. A lot of these times there's just a
8 discussion about some document. There's no
9 foundation laid for it. There's no -- nothing.
10 It reads like a discovery deposition.

11 THE COURT: Okay.

12 MR. MCDONALD: So I've got
13 objections to that, but I don't know how you're
14 going to rule on it without looking at the
15 excerpts.

16 THE COURT: I'm with you. I'm with
17 you. All right. So go ahead and publish who
18 you've got, and then let's -- let's take them up
19 individually as a deposition.

20 MR. HILDEBRAND: Okay. Yes, sir.
21 So I would like to mark for identification as
22 Exhibit 300, Plaintiff's Exhibit 300, the
23 plaintiff's excerpt designation for the
24 deposition of Kimberly Brown, and that's both her
25 individually and as a 30(b)(6) representative.

1 MR. MCDONALD: May I see that?

2 THE COURT: This is Plaintiff's

3 300. Okay.

4 (PLF. EXH. 300 was marked for
5 identification.)

6 MR. MCDONALD: Your Honor, this
7 still has the exhibits that we went through and
8 we object -- remember, they were withdrawn and --
9 because it was portions of the contract. It was
10 the notice.

11 We already went through Ms. Brown. We
12 already did that. That's already occurred. We
13 put all our objections on the record. Remember I
14 said, well, this isn't even referenced on this
15 page, and then it was withdrawn, and then he
16 handed up the deposition of Ms. Brown. So I
17 don't know why we're doing that again.

18 Now, with regard to the 30(b)(6), volume
19 two -- it's not described as volume two on here.
20 That's covered in my written document I have
21 here. I don't know why we're kind of continuing
22 with that.

23 THE COURT: So let's go into
24 Ms. Brown. You've got both individually and
25 30(b)(6)?

1 MR. HILDEBRAND: Yes, sir. They're
2 all in one section.

3 THE COURT: All right. To what
4 extent is this? What stuff -- the ground we've
5 already covered. Is this something -- you can go
6 ahead and make your record. I don't have a
7 problem with that. Go ahead.

8 MR. HILDEBRAND: Okay.

9 THE COURT: As to what she's --
10 what you seek.

11 MR. HILDEBRAND: Plaintiff's
12 Exhibit 3 are plaintiff's deposition excerpts for
13 Kimberly Brown.

14 THE COURT: Got it.

15 MR. HILDEBRAND: I would like to
16 introduce that. Then --

17 THE COURT: That was 300, right?

18 MR. HILDEBRAND: Yes, sir. And
19 then the next one are Plaintiff's excerpt
20 designations for the deposition of Michael
21 Bennett, which would be Plaintiff's 301. And the
22 next one would be --

23 (PLF. EXH. 301 was marked for
24 identification.)

25 MR. MCDONALD: May I have a copy?

1 MR. HILDEBRAND: Sure. Okay. Then
2 the next one would be 302, which would be
3 plaintiff's excerpts for the deposition of Buck
4 Lindsay.

5 THE COURT: Is that all one
6 deposition, or is that a compilation?

7 MR. HILDEBRAND: Yes, sir.

8 THE COURT: Okay. All right.

9 (PLF. EXH. 302 was marked for
10 identification.)

11 MR. HILDEBRAND: And then 303 would
12 be excerpts for Jennifer Faulkinberry.

13 (PLF. EXH. 303 was marked for
14 identification.)

15 MR. HILDEBRAND: We have 304,
16 excerpts of Woody Faust. 305 would be Jim
17 Clements.

18 (PLF. EXH. 304 and 305 were marked
19 for identification.)

20 MR. MCDONALD: Do you have 304?

21 THE COURT: 304 was Woody Faust.

22 MR. MCDONALD: Do you have 305,
23 Tom?

24 MR. HILDEBRAND: 305 was Jim
25 Clements. 306 is Phil Garcia. Okay. That was

1 taken down by video; so I don't think we need to
2 introduce that. And the last one would be -- 306
3 would be Karen Jenkins.

4 THE COURT: Karen Jenkins?

5 MR. HILDEBRAND: Yes, sir.

6 (PLF. EXH. 306 was marked for
7 identification.)

8 MR. HILDEBRAND: And there's one
9 other one for Jim Lord.

10 THE COURT: And what was that one?

11 MR. HILDEBRAND: There will be one
12 more for Jim Lord. This would be 307.

13 THE COURT: Plaintiff's 307?

14 MR. HILDEBRAND: 307, yes, sir. So
15 would you like these, Your Honor?

16 THE COURT: Okay. Very good.

17 (PLF. EXH. 307 was marked for
18 identification.)

19 MR. HILDEBRAND: And I would like
20 to introduce those, please.

21 THE COURT: Okay. So these are
22 Plaintiff's deposition excerpts listed 300
23 through -- I've got 306, but you're handing up
24 307?

25 MR. HILDEBRAND: Yes, sir, sorry.

1 THE COURT: So awaiting that,
2 Mr. McDonald, do you want to go through, or do
3 you want to start with 300? Let's just start
4 there, or do you want to make your overarch in
5 one first? What do you want to do?

6 MR. MCDONALD: Yes, sir. If Your
7 Honor wants to start with 300, that's fine with
8 me.

9 THE COURT: All right.

10 MR. MCDONALD: Okay. 300 is the
11 individual depositions of Ms. Brown. Previously,
12 I already put my objections on the record as it
13 relates to those. They've already been handed
14 up.

15 Unfortunately, this document, Exhibit
16 300, contains exhibits that were previously
17 withdrawn prior to handing up to Your Honor, and
18 my notes indicate those would be Exhibit Bennett
19 4.

20 MR. HILDEBRAND: Give me one
21 second.

22 MR. MCDONALD: Which was the
23 settlement agreement from 2007, Goff D'Antonio,
24 whoever it was, and it has no relevance. That
25 was withdrawn.

1 MR. HILDEBRAND: Okay.

2 MR. MCDONALD: Exhibit 13 was
3 withdrawn. That's a pleading.

4 THE COURT: Exhibit 13?

5 MR. MCDONALD: Yes, sir. Exhibit
6 14 was objected to and withdrawn, a portion of
7 the contract was already in evidence. A portion
8 of the portion of the contract was already in
9 evidence. There is no Exhibit 5, for Exhibit
10 Bennett 5.

11 THE COURT: That does not exist or
12 it just wasn't part of the record?

13 MR. MCDONALD: Just wasn't -- it
14 didn't -- wasn't referenced in those page
15 numbers.

16 THE COURT: Okay.

17 MR. MCDONALD: And then I've got an
18 objection, and I don't have in my notes whether
19 this was withdrawn or not, but Exhibit 31 is
20 hearsay.

21 THE COURT: Okay.

22 MR. HILDEBRAND: And this is Kim
23 Brown?

24 MR. MCDONALD: This is Kim Brown.
25 And no foundation. And then right after Exhibit

1 31, Your Honor will note that Exhibit 5 pops up
2 again, which was withdrawn.

3 THE COURT: That's the same Exhibit
4 5?

5 MR. MCDONALD: I believe so.

6 THE COURT: Okay.

7 MR. MCDONALD: Now, I will do it
8 however Your Honor desires. As to the -- the one
9 that's identified as Kimberly Bennett Brown,
10 April 19th, 2001, Your Honor, on Exhibit 300.

11 MR. HILDEBRAND: If I may
12 interrupt, I think I can make this a little bit
13 easier. I know it's kind of complicated with all
14 of the depositions and such.

15 THE COURT: Yeah. That's all
16 right.

17 MR. HILDEBRAND: What I've done is
18 I've got a chart prepared which shows the -- up
19 at the top, it shows the deponent and then a
20 short description of the exhibit, and then where
21 it says, trial exhibit number, that's actually a
22 tab number in our notebooks and then in evidence
23 when.

24 So if you -- if we're going through
25 the -- my designations, which are on the left,

1 each one of those separate shows a separate
2 exhibit number, and then you can look at the tab
3 in our notebook to correlate which ones go where.

4 THE COURT: Got it. Okay.

5 MR. MCDONALD: Your Honor, I have
6 no idea what the short description of exhibit is.
7 I'm about to make objections to a multitude of
8 these exhibits, and I think it's improper to
9 submit this for any purpose.

10 THE COURT: You're talking about
11 the --

12 MR. HILDEBRAND: It's not an
13 exhibit, Your Honor. It's just a tool to help
14 you to expedite this process.

15 THE COURT: Yeah. I actually like
16 this. It's not going to be evidence, but it's
17 going to help us get through this process, I
18 hope.

19 MR. MCDONALD: I'm concerned
20 though, Your Honor. The prejudice to me is, this
21 a -- my client -- this is a six-page document
22 that has exhibits that the vast majority are not
23 in evidence. Okay?

24 And there's no way for you to know
25 because they've now all been compiled. Why don't

1 we wait and go through all of the objections I
2 had. There may be ten of these left.

3 THE COURT: That's what I'm here
4 for. That's what we're doing.

5 MR. MCDONALD: All right. So, Your
6 Honor --

7 THE COURT: So you've made your
8 list as to Ms. Brown?

9 MR. MCDONALD: Yes.

10 THE COURT: She's on page -- it
11 looks like about page 4 of this -- or 5 of this
12 document.

13 As to those documents to which he has
14 raised an objection, Mr. Hildebrand, do you have
15 any objection to those?

16 MR. HILDEBRAND: I haven't even
17 seen his designation of -- first, as
18 housekeeping, let me -- I've got Jim Lord's
19 deposition, which will be 307.

20 THE COURT: Okay. All right.

21 MR. MCDONALD: Just as another
22 note, the exhibits are listed both in trial
23 exhibit and deposition exhibit numbers.

24 MR. HILDEBRAND: Right. That's
25 just --

1 MR. MCDONALD: Well, that's a layer
2 of confusion.

3 MR. HILDEBRAND: Well, because the
4 exhibit number obviously is that it's -- that's
5 how it's designated in the deposition.

6 THE COURT: Okay.

7 MR. HILDEBRAND: So that should
8 clarify that. So 307, which I will now hand to
9 you and would like to introduce, would be the
10 excerpts for the deposition of Jim Lord.

11 THE COURT: Okay.

12 MR. MCDONALD: The individual, Kim
13 Bennett Brown deposition has already occurred in
14 this trial. All I did was go back through my
15 notes about something that has already occurred.

16 So I don't know what opposing counsel
17 means by, I don't have the -- this is an event
18 that we've already discussed. We've already been
19 through Kim Bennett Brown's individual deposition
20 exhibits. The ones I objected to, I understood
21 were withdrawn, and deposition excerpts were
22 handed up to you.

23 So I didn't know that we were going to
24 go back through that. Obviously, I had a number
25 that I was aware that we could have gone through.

1 I certainly can if Your Honor wants me to do
2 that. That's why -- I thought I just did that.
3 I made the objections on my understanding of the
4 ones I thought had been withdrawn.

5 THE COURT: Okay. And you've
6 lodged that; so let me go back through and make
7 sure Mr. Hildebrand is either in agreement or if
8 he's not in agreement, then we will have to work
9 through it. Okay?

10 MR. HILDEBRAND: So for Kimberly
11 Brown, if you are looking at my chart that I've
12 just handed you --

13 THE COURT: Yep.

14 MR. HILDEBRAND: -- it looks like
15 Exhibit 4 is out, which I don't think is on
16 there.

17 MR. MCDONALD: It is on here. It
18 is on here.

19 MR. HILDEBRAND: Okay. I gotcha.
20 So Exhibit 4 is out. 13 is out. 14 is out. And
21 5 is out. So as I -- the rest of the exhibits
22 are now in.

23 MR. MCDONALD: No, no, no, that's
24 not correct.

25 THE COURT: Just stop right there

1 because that gets you through that August 4
2 deposition date. How about August 5? There was
3 an objection lodged to Exhibit 31, which was an
4 e-mail chain apparently.

5 MR. HILDEBRAND: All right, sir.
6 So do you have notebook number 2 in front of you?
7 That's what we need to look at.

8 MR. MCDONALD: No, Your Honor. The
9 process, we need to look at the deposition
10 transcripts --

11 THE COURT: Yeah, hold on.

12 MR. MCDONALD: -- and see if
13 there's actual foundation.

14 THE COURT: Yeah. Let's address
15 the document itself. So one are we talking about
16 and where are we?

17 MR. HILDEBRAND: This is Exhibit 31
18 to Kim Brown's deposition on Wednesday, August 5,
19 which is -- which should be tab 62.

20 THE COURT: Tab 62. Okay. All
21 right.

22 MR. MCDONALD: I'd just like to
23 make sure my record is clear.

24 THE COURT: Yeah.

25 MR. MCDONALD: The deposition is

1 what's being offered into evidence. If the
2 questioning in the deposition is insufficient to
3 lay a foundation, insufficient to make the
4 document admissible, there are no do overs.

5 There's no counsel arguing, this is what
6 the document is, here's who it's from. All that
7 goes away. It's just like we're in court. If
8 this is what he wants to do is to offer a
9 deposition excerpt, then that's what he's stuck
10 with.

11 If he doesn't lay the proper foundation
12 in the deposition, then it doesn't come in.
13 That's my position, Your Honor.

14 THE COURT: My question to you
15 would be, was an objection lodged at the time of
16 the deposition?

17 MR. MCDONALD: There are no
18 objections --

19 THE COURT: I asked you a question,
20 Mr. McDonald, that's a yes or no answer. Was an
21 objection lodged at the time of the deposition?
22 That's how you protect your record.

23 MR. MCDONALD: To answer your
24 question, Your Honor, no.

25 THE COURT: All right. What is the

1 basis for the objection? Lack of foundation?

2 MR. MCDONALD: Lack of foundation,
3 hearsay.

4 THE COURT: Lack of foundation and
5 hearsay. All right.

6 MR. MCDONALD: And just to be
7 clear, the document also wasn't offered into
8 evidence at the deposition either. So I don't
9 believe there was anything to object to.

10 THE COURT: Okay. But it would
11 be -- apparently, it's described as an e-mail
12 chain between Kim Brown and Jim Clements,
13 correct?

14 MR. HILDEBRAND: Yes, sir.

15 MR. MCDONALD: From Jim Clements to
16 Kim Brown, yes, sir.

17 THE COURT: Okay. And so it's
18 offered on what basis?

19 MR. HILDEBRAND: As a statement by
20 a party opponent. It's her e-mail chain, Your
21 Honor. Kim Brown, the deponent, was asked about
22 these, and she responded to questions about it.
23 Your Honor, the --

24 THE COURT: That's about all I need
25 to know for now.

1 MR. HILDEBRAND: Okay.

2 THE COURT: Statement by party
3 opponent?

4 MR. HILDEBRAND: Right.

5 THE COURT: Hearsay exception?

6 MR. HILDEBRAND: Yes, sir.

7 THE COURT: All right. And, again,
8 the basis is hearsay and lack of foundation?

9 MR. MCDONALD: Yes. And it's
10 not --

11 THE COURT: Does she not
12 acknowledge that it's her statement in her
13 deposition?

14 MR. MCDONALD: This is from
15 Mr. Clements to Ms. Brown.

16 THE COURT: I understand.

17 MR. MCDONALD: So --

18 THE COURT: Does she acknowledge
19 receiving it?

20 MR. MCDONALD: She says, okay, I'm
21 handing you Exhibit 31. Do you see at the top of
22 that it's to you from Jim Clements? Answer is
23 yes. Then he goes to read from the documents,
24 and then asks questions about what was said in
25 the document about seal impacts.

1 THE COURT: Okay. So in other
2 words, Ms. -- wait a minute. There's something
3 in here from Kim Brown. Hold on. She does join
4 in there in the middle. You not be aware of how
5 important the sealant had issue as to Mike.
6 There are a few hot button issues, and this is
7 one. That's her statement, is it not?

8 MR. MCDONALD: In the middle of
9 that e-mail, yes.

10 THE COURT: Right.

11 MR. MCDONALD: And I don't
12 believe -- but I would object to the whole
13 document coming in without foundation for the
14 entirety of it.

15 THE COURT: All right. Objection
16 noted. Otherwise, it's hearsay between the
17 others. Is that what you're telling me?

18 MR. MCDONALD: Yes, sir.

19 THE COURT: Clearly her statement
20 comes in party opponent. Do you agree or
21 disagree with that one?

22 MR. MCDONALD: Well, subject to my
23 previous objection, that she's -- you ruled that
24 this deposition could come in.

25 THE COURT: Right.

1 MR. MCDONALD: Obviously I objected
2 to that because she's not an officer, director or
3 managing agent of Library Associates. Subject to
4 previous objection, Your Honor has taken me past
5 that and said, I'm allowed to read that. And I
6 would have to agree, it would be a party opponent
7 in that instance.

8 THE COURT: All right. Well, her
9 statement would be an admission. His statement
10 may well be hearsay. I don't know if it's being
11 offered somewhere else or not. Okay. So that
12 would be my ruling there. Clearly her testimony
13 is admissible.

14 MR. HILDEBRAND: Your Honor, if we
15 can address -- I'm happy to address Jim Clements
16 now because he's certainly in a lot of these
17 exhibits.

18 THE COURT: Sure. I have no doubt
19 about it.

20 MR. HILDEBRAND: Let's do that.

21 THE COURT: Let's finish with Kim
22 Brown, though. Was that Exhibit 31?

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: All right. So I'm
25 going to allow it as an admission -- or a

1 statement by a party opponent for now. The other
2 information in there may well be hearsay, but it
3 sounds like we're going to talk about him next,
4 him being Jim Clements. Okay?

5 MR. HILDEBRAND: Yes, sir.

6 MR. MCDONALD: All right. Your
7 Honor, we object in toto for use of Mr. Clements'
8 deposition in these proceedings. Mr. Clements
9 works at Matrix Program Consulting and is not a
10 party to this action; therefore, rule 32(a)(1)
11 does not apply. He is not an officer, director,
12 or managing agent of a party to this action;
13 therefore, rule 32(a)(2) does not apply.

14 What you would get to is rule 32(a)(3),
15 the deposition of a witness, whether or not a
16 party may be used by any party for any purpose if
17 the Court finds. First, A, the witness is dead.
18 I can assure you Mr. Clements is alive.

19 THE COURT: Okay.

20 MR. MCDONALD: B, the witness is a
21 greater distance than one hundred miles from the
22 trial -- from the place of trial or hearing or is
23 out of state. Unless it appears that the absence
24 of the witness was procured by the party offering
25 the deposition, in this case, it would be Balfour

1 Beatty.

2 Your Honor, I know that they have
3 procured his absence so that would not apply. He
4 lives in Georgetown, South Carolina, at 322
5 Prince Street, Georgetown, South Carolina 29440,
6 a distance of 61 miles.

7 THE COURT: Okay.

8 MR. MCDONALD: It would not apply.
9 If the witness is unable to attend or testify
10 because of age, illness, infirmity, or
11 imprisonment. No evidence of that. If the party
12 offering the deposition has been unable to
13 procure the attendance of a witness by subpoena.
14 No evidence of that.

15 E, upon application of notice, none of
16 which has been done, that such exceptional
17 circumstances exist, none of which has been
18 shown, as to make it desirable in the interest of
19 justice and with due regard in accordance with
20 presenting testimony of witnesses orally in open
21 court to allow the deposition to be used.

22 E does not apply; therefore, the
23 deposition of Jim Clements cannot be read into
24 evidence at this trial. If they want to subpoena
25 him and put him on the stand, they can have at

1 it.

2 THE COURT: All right.

3 Mr. Hildebrand?

4 MR. HILDEBRAND: May I address
5 this, Your Honor?

6 THE COURT: Sure.

7 MR. HILDEBRAND: I'll agree with
8 this point. Here in a nutshell, Your Honor, is
9 the argument relative to Jim Clements.

10 THE COURT: Okay.

11 MR. HILDEBRAND: On the very front
12 page of the contract that is in evidence, it
13 says, the owner's designated representative is
14 Jim Clements. In the contract that was signed,
15 that I've cited in this brief under section 3.2,
16 it says, the owner's designated representative.
17 The owner shall identify a representative
18 authorized to act on behalf of the owner with
19 respect to the project.

20 So Mr. Clements is their designated
21 representative. The owner has explicitly
22 authorized him in this contract. And I went
23 through this with Mr. Bennett. It's in his
24 deposition. It's in Kim Brown's. It's in Jim
25 Clements'.

1 Yes, he is the designated representative
2 in the contract. On top of that, we have, under
3 there, a discovery response from the -- from
4 Library Associates where they identify Jim
5 Clements as a witness, and I would like to read
6 that to you.

7 It says, Mr. Clements served as the
8 owner's representative for the project. He may
9 provide opinion testimony related to all aspects
10 of the project, including but not limited to,
11 scheduling, supervision, sequencing,
12 coordination, management, construction of the
13 project.

14 So the -- for them to argue that he's
15 not their agent is contrary to their -- to the
16 express representations in the contract. So that
17 establishes that he is an agent in fact under the
18 contract.

19 The next provision that I would like to
20 cite to you is -- and this is under rule
21 801(d)(2), subsections C and D, and this is
22 under -- again, Your Honor, I've mentioned this
23 before.

24 It is labeled an admission by a party
25 opponent, but it's actually not that. It's a

1 statement. If you read the actual rule, it says,
2 C, a statement by a person authorized by the
3 party to make a statement concerning the subject.

4 So here, explicitly, Mr. Clements, under
5 the contract, is their agent. He's been
6 authorized under the contract to speak for them,
7 and then they've designated him in discovery as
8 the person who was their project representative
9 and is going to testify about everything in the
10 case.

11 So under C, it's a statement by a party,
12 and then D, a statement by the party's agent or
13 servant concerning a matter within the scope of
14 the agency or employment made during the
15 existence of the relationship.

16 And there again, you've got his -- these
17 documents that we've indicated are documents that
18 he made during the project. And he's been
19 designated as their witness in this case to
20 testify about all those things. So without
21 further ado, I think that clearly it's under the
22 rules, and his deposition should come in and
23 his -- the exhibits.

24 THE COURT: All right. You're just
25 seeking deposition excerpts, but you're offering

1 them as the agent of the plaintiff --

2 MR. HILDEBRAND: Yes, sir.

3 THE COURT: -- of the defendant,
4 Library Associates?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: All right.

7 Mr. McDonald?

8 MR. MCDONALD: We're conflating at
9 least three things. The first is, what an
10 owner's representative is pursuant to the
11 contract documents.

12 The second is, what the rule requires an
13 officer, director, or a managing agent. You
14 could have a million kinds of agents for a
15 corporation. This says a managing agent of
16 Library Associates. If he was a managing agent
17 of Library Associates, there would be no reason
18 to have him sign a contract to be the owner's
19 representative. Those two things couldn't exist
20 at the same time.

21 He's not the managing agent. Saying
22 that had responsibilities as the owner's
23 representative on the construction job itself has
24 no bearing on whether he's the managing agent of
25 the entity itself. And we're incredibly

1 prejudiced because none of these things are met.

2 There's no evidence that he's the
3 managing agent of Library Associates other than
4 he's the owner's representative under the
5 contract documents, which is something completely
6 different.

7 And also, if Your Honor will recall,
8 Mr. Starcevic, to great accord, referred to
9 Mr. Clements as just the messenger, that he
10 couldn't make any decisions. That's the
11 testimony under oath from Balfour Beatty from
12 this stand in front of you.

13 And now it's, not only can he make
14 decisions, he's the managing agent of the entity
15 itself. And I think that's completely at odds
16 with the rule, with the testimony, and with the
17 conflation of these three things.

18 And I would just say for the record,
19 under rule 30(j), all objections except those
20 which would be waived or if not made at
21 the dep -- if not made at the deposition pursuant
22 to rule 32(d)3, and those necessary to assert a
23 privilege, to enforce a limitation on evidence as
24 directed by the Court, or present a motion
25 pursuant to 30(b) shall be preserved. And this

1 is conduct during depositions.

2 I would also refer -- if the document
3 itself is not offered into evidence, which it was
4 not, then there would be no objection to be made
5 at the deposition itself, even if I could make a
6 deposition -- an objection at the deposition
7 itself.

8 THE COURT: All right.

9 MR. MCDONALD: And this is from
10 32(d), Your Honor, 3(a) and (b).

11 MR. HILDEBRAND: Your Honor, he --
12 with all due respect, Mr. McDonald is not reading
13 from you the rule of evidence, which is very
14 clear. All it says is, a statement by a person
15 authorized by the party to make a statement
16 concerning the subject.

17 THE COURT: Well, let me ask you
18 this question. If he's in Georgetown, what's the
19 problem with getting him here?

20 MR. HILDEBRAND: Well, maybe I
21 could subpoena him, but that's not the issue,
22 Your Honor, with all due respect.

23 The issue is, under the rules, am I
24 allowed to read the statements of their agent?
25 And I'm allowed to do that. It's clear under the

1 rule. And, also, it's clear under the case law,
2 which I've cited in my brief. A statement by an
3 agent of a party within the scope of his agency
4 is admissible against the principal. That's in
5 Hunter v. Hyder, a case, Rookard v. The Railroad
6 Company.

7 The general rule is that declarations or
8 admissions of the agent within the scope of his
9 agency are admissible into evidence in a suit
10 against the principal. Mr. Clements, good Lord,
11 Your Honor, Mr. Clements was their agent. He was
12 out there all the time. He was in all of these
13 e-mails. He was so integrally involved as the
14 owner's designated representative on this
15 project.

16 For them to argue that he wasn't their
17 agent is just -- I think you've already heard the
18 testimony, and I think that you can -- certainly,
19 it's appropriate. And talk about prejudicial, it
20 is highly prejudicial. I might call somebody and
21 I can cross-examine them on the record, and it's
22 all convoluted and not clear.

23 Here, the rule allows me -- 32 allows me
24 to introduce deposition testimony that is
25 otherwise admissible for any purpose, the South

1 Carolina Rules of Civil Procedure, 32.

2 THE COURT: All right. It looks
3 like you're trying to get a lot of exhibits in
4 through him as well, you know?

5 MR. HILDEBRAND: Yes, sir.

6 MR. BUNDY: Your Honor, if I may
7 say something?

8 THE COURT: Yep.

9 MR. HILDEBRAND: Your Honor, it was
10 inappropriate for separate --

11 (Overlapping dialogue.)

12 MR. BUNDY: May I say something?

13 THE COURT: All right. Go ahead.
14 I'm going to allow him to speak. Go ahead.

15 MR. BUNDY: Thank you. Opposing
16 counsel wants to put the cart before the horse.
17 The evidentiary rules are the cart. The horse is
18 the rule relating to the introduction of
19 depositions. That's the first hurdle he has to
20 overcome. He can't use the rules of evidence to
21 overcome the rules of civil procedure. The rules
22 of civil procedure specifically require a
23 managing agent. He has not proven that.

24 Two, the rules with regard to the use of
25 depositions say, as we've reported, that

1 objections are preserved, all of them except to
2 the form of the question. Your Honor, that's the
3 whole purpose of this form of the -- this object
4 to the form is so people won't argue.

5 In addition to that, even if you read
6 the rule in its most favorable light, it requires
7 that we could have cured this problem at the
8 deposition. He did not offer this exhibit into
9 evidence at trial at the deposition. So there
10 was nothing to object to.

11 When we used to take de bene esse
12 depositions, Your Honor remembers that, you
13 couldn't -- you went into a de bene esse
14 deposition and it was just as if you were in
15 trial, and you had to say, here's the foundation.
16 But you had to actually make an offer of the
17 evidence so your adversary got the opportunity to
18 say, no, I object.

19 We no longer have de bene esse
20 depositions because we don't need them anymore.
21 But we still have rules, which require us to be
22 put on notice that he intends to introduce these
23 things at trial.

24 I can't stop him from marking a piece of
25 paper as an exhibit. I would be put in jail. He

1 would be calling you wanting to know why I'm
2 obstructing his deposition, why I'm saying, you
3 haven't offered it into evidence and why I'm
4 doing hearsay and all the rest of it.

5 We have got to have some rules that we
6 can rely on. And when we go to a deposition and
7 the adversary only refers to an exhibit, and I
8 cannot prohibit him from marking it. I don't
9 have an objection against, you can't mark the
10 exhibit.

11 But I do have an objection that it's not
12 admissible, but I can't make the objection until
13 the evidence is offered into evidence. And now
14 he's offering it into evidence, and he's stuck
15 with what he put in the deposition. Thank you,
16 Your Honor.

17 MR. HILDEBRAND: Your Honor, may I
18 respond?

19 THE COURT: Yes.

20 MR. HILDEBRAND: Rule 32, the use
21 of depositions in court proceedings. It says
22 that the deposition of a party or anyone can be
23 used for any purpose, and that's where -- and
24 here, Your Honor, this is where the rubber really
25 hits the road here, Your Honor.

1 And it's a common sense analysis. And I
2 think that that's what you have done from the
3 start in your questions. Here's the common
4 sense.

5 What this rule was designed to do is, if
6 you look at the very first paragraph of
7 authentication, requirements of authentication,
8 one, or A, general provision, the requirement of
9 authentication for identification as a condition
10 precedent to admissibility is satisfied by
11 evidence sufficient to support a finding that the
12 matter in question is what its proponent claims.

13 Your Honor, you hit the nail on the
14 head. Are they denying -- am I trying to sneak
15 something in here? Are these fraudulent
16 documents? Are these fraudulent statements? No.
17 All you have to do is -- if you look at this and
18 say, you know, Mr. Bundy, maybe that's a
19 technical argument, but I'm looking at the
20 documents.

21 Unless you can have an affidavit or
22 something saying that these are not the e-mails
23 from your agent and this is not the testimony of
24 your agent, then all you have to do is satisfy
25 yourself as to the sufficiency of the evidence.

1 So I can see your --

2 MR. MCDONALD: Five seconds?

3 MR. HILDEBRAND: Is everybody going
4 to be allowed to argue?

5 MR. MCDONALD: Because he -- he
6 just read a truncated chopped up version. The
7 rule says, the deposition of a party for anyone,
8 who at the time of the taking of the deposition
9 was an officer, director, or managing agent.

10 Mr. Clements' first deposition was taken
11 August 25th, 2020. Mr. Starcevic just testified
12 the job was over in April of 2019. There's no --
13 there's no way that this complies with that rule.
14 Thank you very much.

15 THE COURT: Well, I was going to
16 ask you that because I do think that's a
17 significant factor on this.

18 The deposition of the party or anyone
19 who at that time of taking the deposition was the
20 agent of a person. So was he still the agent?
21 Clearly he was the agent at the time of the
22 contract, but his deposition wasn't taken until
23 some time later, correct?

24 MR. HILDEBRAND: But they
25 identified him even now as their -- in the

1 discovery response, they're going to call him to
2 testify about his involvement in -- as their
3 agent.

4 But, Your Honor, there are two
5 complete -- there are several different ways that
6 this comes in. The primary argument that we
7 have, and the one cited first in my brief is
8 under -- is it authenticated. And I think you're
9 convinced that these are his statements and this
10 was his deposition.

11 So the only issue then, very simply is,
12 is it a statement as noted in my brief. Is it --
13 that's all it requires. That's all the rule
14 requires.

15 C, this is not hearsay. A statement by
16 a person authorized by a -- the party to make a
17 statement. He was -- he's designated as their
18 representative. It's ludicrous, Your Honor.

19 THE COURT: Let me ask you this
20 question: Are all of the statements of
21 Mr. Clements that are offered into evidence, are
22 they all made contemporaneous with the time of
23 the contract being performed? In other words, do
24 they all predate March of 2019 or whenever the
25 project --

1 MR. HILDEBRAND: Yes, sir. All of
2 the e-mails, all of the documents, yes, sir.

3 THE COURT: They're all in that
4 time frame?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: All right. Well, then
7 I'm going to -- on that basis then, I'm going to
8 allow it. Okay?

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

11 THE COURT: I will allow it. I'm
12 going to review it. I will look at the
13 documents. If I find something that I don't
14 think there's a basis for, I'm going to raise
15 that -- I will bring that point to you. But
16 other than that, I think it can be used --

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

19 THE COURT: -- in the plaintiff's
20 case. Okay?

21 MR. MCDONALD: And our objection is
22 noted on the record?

23 THE COURT: Objection is noted,
24 yeah.

25 MR. HILDEBRAND: I think the next

1 one would be --

2 MR. MCDONALD: Well, I've got
3 objections to them if they're -- we're going to
4 talk about them, I think we've got to go through
5 the whole objections to them, to Mr. Clements.
6 All right. The first one is Exhibit 50. That is
7 various pages, as I understand it, from
8 Mr. Clements' website. It's hearsay.

9 THE COURT: Okay.

10 MR. HILDEBRAND: That was a
11 document that he specifically identified right
12 then and there as a current document.

13 THE COURT: Hold on a second. This
14 outline describes it as a Matrix program
15 management documents is what that describes that
16 as, Exhibit 50.

17 MR. MCDONALD: The page is off the
18 website. That's not --

19 MR. HILDEBRAND: Which he
20 identified, which is -- he authenticated. This
21 is what he --

22 THE COURT: Is this his company,
23 Matrix?

24 MR. MCDONALD: Yes, Your Honor.

25 THE COURT: Is that his company? I

1 will allow that.

2 MR. MCDONALD: All right. Bennett
3 Exhibit 5, previously withdrawn, is also not even
4 referenced on page 51.

5 THE COURT: That's the A133 2009?

6 MR. MCDONALD: Yes, sir.

7 THE COURT: According to this, it's
8 in evidence as tab 56 of the first document put
9 into evidence.

10 MR. MCDONALD: All right. Those
11 are two different documents. Mr. Spano put it
12 into evidence, and they had a very difficult time
13 finding the original. They finally went back and
14 replaced 56. Exhibit 5 is not Exhibit 56.
15 That's another reason why I have a problem with
16 this spreadsheet.

17 THE COURT: Okay.

18 MR. HILDEBRAND: We will withdraw
19 that one, Your Honor.

20 THE COURT: All right. Withdrawn.

21 MR. MCDONALD: All right. Now I go
22 to page 135, line A through 23, Exhibit 54.
23 There is no Exhibit 54 identified on page 135,
24 which also, if you go back in the deposition, it
25 hadn't been designated. It's an e-mail about

1 draft specs dated March 6th, 2014. It's parol
2 evidence.

3 THE COURT: The objection --

4 MR. HILDEBRAND: He was asked about
5 that, Your Honor, and he testified about it.
6 They were documents during this project that he
7 testified about. It's very similar.

8 THE COURT: Okay. His objection is
9 it's parol evidence outside of the contract. Do
10 you have a position on that?

11 MR. HILDEBRAND: Yes, sir. And
12 this is one of the points that we haven't gotten
13 to yet, but here's one of the issues, is that the
14 contract that was signed, if you have it in front
15 of you, that's Exhibit 56, that we went around
16 about. It says -- it lists specifically --
17 there's a listing as an exhibit of documents that
18 are in the specifications and a listing of all
19 the drawings.

20 So every single drawing in every
21 document that was a specification is listed.
22 Okay. The specifications were provided by the
23 architect and are included in this big stack. So
24 we have this big stack of specifications. We
25 have all of the drawings.

1 When the contract was ready to be
2 signed, Balfour was given this stack of
3 specifications from the architect in the
4 drawings, and administrative assistant then, when
5 we were asked to list what are the contract
6 documents, and administrative assistant went
7 through them and said, okay, page 1 is this; page
8 2 is that, and listed all the documents in here.

9 One of the documents in here are -- is
10 titled supplementary conditions. And what
11 happened was, the architect accidentally
12 installed -- inserted some supplementary
13 conditions.

14 Now, how do we know it was by -- it was
15 accidental? Because the documents relating to
16 the negotiation of the contract, specifically
17 with Mr. Bundy and people on his side, and
18 explicitly with us said, these supplementary
19 conditions are not part of the contract, and
20 these provisions are not part of the contract.

21 So what happened was, they were
22 accidentally inserted. The documents that talk
23 about what should be in the contract and should
24 not be specifically say, those supplementary
25 conditions are not in the contract. And in fact,

1 you will recall that Mr. Bundy filed a pleading
2 with this Court saying, the contract is what I've
3 attached, and these supplementary conditions were
4 not a part of it and were done by -- included by
5 accident.

6 We have the same -- I think that it's --
7 I don't know if they've changed their mind now or
8 they want to try to say that they are included,
9 but they're not. And that's what I just wanted
10 to establish with Mr. Clements and Mr. Bennett
11 and Kim Brown. And I can establish it through
12 our witnesses as well. Look, they got stuck in
13 there, but they weren't part of it. And that's
14 what that document goes to.

15 THE COURT: Is that a fact at
16 issue? That's my question.

17 MR. HILDEBRAND: I don't know.

18 MR. MCDONALD: Your Honor, you're
19 telling me -- this is one page of a deposition.
20 This is the prejudice. This is the essence of
21 what's occurring. One page of the deposition.

22 THE COURT: Is that a fact at
23 issue? The question is simple.

24 MR. MCDONALD: I don't know what
25 the fact is that he's putting forth other than

1 what Mr. Hildebrand just argued. I'm going from
2 Mr. Clements' testimony at page 135 that doesn't
3 reference an Exhibit 54. It doesn't say that on
4 this page.

5 So what happens to me is, he then says,
6 move 54 into evidence. Then 54 can be used for
7 whatever purpose he wants to use it for. I have
8 no idea what he is going to argue in the future.

9 THE COURT: All right. Well, let
10 me -- I understand what the objection is now, and
11 I understand what you're saying. But if I'm
12 going to read the deposition excerpts, and when I
13 read the deposition excerpts, there is no Exhibit
14 54, I'm going to strike through it, and it ain't
15 going to come in. Okay?

16 MR. MCDONALD: You've just cut this
17 process by hours.

18 THE COURT: Yeah. Okay. If it's
19 not there, it ain't there. Okay. And some live
20 witnesses are going to have to come in here and
21 testify to the basis for the document. Okay?

22 MR. MCDONALD: All right. And then
23 after Your Honor does review it, if there --
24 because I'm not saying you'll come to the exact
25 same conclusion I do. I hope you do, okay, but

1 to the extent you don't, then could we get a list
2 of things saying, okay, here's the --

3 THE COURT: Yeah.

4 MR. MCDONALD: -- ones I let in?

5 THE COURT: Oh, yeah. I will be
6 reading and marking at the same time.

7 MR. MCDONALD: And then, once we do
8 that, I think we could cut this way down, and you
9 say, all right, I've got six exhibits left,
10 McDonald, what do you have to say on your
11 objections? That will save a lot of time.

12 MR. BUNDY: It should be on the
13 record.

14 MR. MCDONALD: And then on the
15 record.

16 THE COURT: Yeah.

17 MR. BUNDY: I don't have anything
18 to appeal if I don't know what you're doing.

19 THE COURT: You're going to get --
20 you're going to get my ruling, and I will give
21 you my record, and that's what I've been trying
22 to do.

23 MR. MCDONALD: Thank you.

24 THE COURT: Listen, I'll tell you
25 like I tell everybody else, I don't care if I get

1 affirmed or reversed. I just don't like to get
2 remanded. Okay? Y'all take it up there. Y'all
3 argue it all day long and let's not have to do it
4 again. Okay?

5 MR. BUNDY: Absolutely.

6 THE COURT: My hope is, I'll get
7 affirmed. But I don't mind getting reversed if I
8 don't get remanded.

9 MR. BUNDY: Absolutely.

10 THE COURT: If I have to try it
11 again with new rules, I don't like it. Okay.
12 It's just the way it is. Okay. And neither does
13 anybody else. I fully understand that. We don't
14 waste time. We want to make a record. I'm
15 trying to make sure we all get the record
16 covered. Okay?

17 MR. HILDEBRAND: I understand, Your
18 Honor. I think that each one of these -- each
19 exhibit is referenced in our designations. So I
20 believe we've done that. But on top of that,
21 I --

22 THE COURT: If I read whatever that
23 line is and there's no Exhibit 54 --

24 MR. HILDEBRAND: Right.

25 THE COURT: -- I'm going to --

1 MR. HILDEBRAND: I'm with you.

2 THE COURT: I'll be scratching that
3 through.

4 MR. HILDEBRAND: But the bigger
5 question that you just asked is, can we -- this
6 is where we really cut -- this is a dub in
7 eliminating potentially a lot of testimony. Is
8 that an issue? Do y'all claim that the
9 supplementary conditions are part of the
10 contract?

11 I'm not asking you, Mr. Bundy.

12 MR. BUNDY: Well, I'm going to give
13 you an answer. We claim that you have the burden
14 of proof. I don't agree to anything. That's
15 what we claim, Mr. Hildebrand. You are in the
16 plaintiff's seat, put up your case.

17 THE COURT: I got it. I got it.
18 All right. I'm with you. I understand that
19 answer, too. Okay. The plaintiff has got the
20 burden of proof.

21 MR. MCDONALD: So, Judge, just so
22 I'm clear, the Clements exhibit being offered
23 through the deposition testimony of Mr. Clements,
24 which has the overarching objection and has been
25 overruled, Your Honor will read the deposition

1 and then compile a list of those exhibits that
2 Your Honor feels is appropriate, and at that
3 time, we will probably have narrowed it down a
4 good bit. And we can put objections on the
5 record, if there are in fact any objections ever
6 made.

7 THE COURT: Right. Got it.

8 MR. HILDEBRAND: But obviously it
9 was very important, much more limited to decide
10 whether the -- it's simply, did we reference the
11 exhibit in the designations?

12 THE COURT: Right.

13 MR. HILDEBRAND: It's as simple as
14 that. It's a litmus test.

15 THE COURT: I want to make sure
16 that -- there needs to be a basis for it in the
17 deposition transcript and then the document
18 itself, correct?

19 MR. HILDEBRAND: That they are
20 listed and that they are referenced in the
21 testimony.

22 THE COURT: Yeah. Okay.

23 MR. MCDONALD: And at that time, we
24 will --

25 THE COURT: I understand your

1 concern because it's fraught with potential
2 problems, none the -- none the worst of which
3 would be hearsay and authentication. Okay?

4 MR. MCDONALD: Yes.

5 THE COURT: Some of the same issues
6 we've been fighting.

7 MR. MCDONALD: And we're going to
8 reduce them -- I believe, Your Honor, we'll
9 reduce them down significantly and make this task
10 a lot more --

11 THE COURT: I'm all for that.

12 MR. MCDONALD: Thank you. All
13 right. So the next one we have is -- actually,
14 the next one is -- except for Mr. Lord, which
15 will be very brief, I will have one counter
16 designation that I'll put on the record, and we
17 can get that squared away, however he publishes
18 it.

19 THE COURT: Okay.

20 MR. MCDONALD: The next one, Your
21 Honor, as it relates to Mr. Bennett, Library
22 Associates 30(b)(6) deposition, Ms. Faulkinberry
23 and Mr. Lindsay, I have in writing for Your Honor
24 to review at your leisure.

25 THE COURT: Okay.

1 MR. MCDONALD: I will say that the
2 only two things I want to put -- may I approach,
3 Your Honor?

4 THE COURT: Yes, sir.

5 MR. MCDONALD: The only two things
6 that I wanted to bring to your attention is, as
7 to Mr. Bennett, there is the overarching
8 objection that Mr. Bennett is not a party and is
9 present in the courtroom. All the rest of them
10 are specific to the excerpts that are offered.

11 And then the last thing I want to bring
12 to your attention is that you will note that on
13 5, under Mr. Bennett, it said Exhibit 1. I have
14 hand drawn in a zero. This is what happens when
15 you are doing it later at night.

16 THE COURT: Is it No. 10?

17 MR. MCDONALD: It's No. 10, yes,
18 sir. I've got a zero there. Thank you very
19 much.

20 THE COURT: Thank you.

21 MR. MCDONALD: Also, in addition to
22 those written objections and counter designations
23 that I just handed up, Your Honor.

24 THE COURT: Do you have a copy of
25 that?

1 MR. MCDONALD: And I'm not familiar
2 with this exhibit numbering of deposition
3 excerpts; so that's how Your Honor is going to
4 keep track of them, and I can assign an ID number
5 to ours, too, which is our counter designations
6 and objections. I know they're not exhibits
7 themselves in trial, but he has marked his 301
8 through 307.

9 THE COURT: Okay.

10 MR. MCDONALD: So that's one way of
11 keeping up with mine, too.

12 THE COURT: And yours is all on one
13 sheet, right?

14 MR. MCDONALD: Well, there's
15 another sheet for two of them that came later.

16 THE COURT: Okay.

17 (DFT. EXH. 400 was marked for
18 identification.)

19 MR. MCDONALD: That I mean, I can
20 mark them some high number. I don't mind marking
21 ours Defendant's 400, you know, just so we
22 know --

23 THE COURT: Just to get back.

24 MR. MCDONALD: If that's okay with
25 Your Honor. So the deposition -- deposition

1 designations for use at trial from Library
2 Associates, both objections and counter
3 designations for Michael Bennett 30(b)(6), volume
4 2 of Library Associates, Jennifer Faulkinberry,
5 and Winfred Lindsay are identified as Exhibit
6 400.

7 THE COURT: Okay.

8 MR. MCDONALD: And then the next
9 document, Your Honor, which we'll call 401. May
10 I approach?

11 THE COURT: Yes, sir.

12 MR. MCDONALD: Is counter
13 designations for Mr. Jenkins and Mr. Faust.

14 THE COURT: All right, sir.

15 MR. MCDONALD: And there's a very
16 brief -- and then finally as to the ruling.

17 THE COURT: Do you want to make
18 that 401?

19 MR. MCDONALD: That's 401, Your
20 Honor.

21 (DFT. EXH. 401 was marked for
22 identification.)

23 MR. MCDONALD: And finally, as to
24 the ruling of Jim Lord, which is their 307, we've
25 got objections to their Exhibit 126. This is

1 eight months. This document is eight months
2 before the contract GMP. The actual design this
3 is in reference to design documents leading up to
4 the actual design document.

5 THE COURT: Okay.

6 MR. MCDONALD: I know what they are
7 as well. I think it's important for, Your Honor,
8 to understand with regard to this particular
9 objection something I'm not sure has come up yet.
10 You lead up to a contract in this case, right, in
11 September of 2014. You sign a contract.

12 But with GMP contract -- cost plus for
13 GMP, everybody has the right once contractor,
14 construction manager comes up with the GMP to
15 say, I'm good. That's -- we're walking away.
16 You still owe them for the pre-construction and
17 you walk away.

18 That doesn't occur until February of
19 '15. So you've got a lag between September of
20 '14 and February of '15 before the GMP is arrived
21 at. During that time, you have addendum in the
22 contract drawings, you have changes to the
23 contract drawings, you have a bunch of things
24 that occur in order to firm up as Your Honor
25 might imagine, the GMP. So I only tell you that,

1 that it could be that they're being offered to
2 say, look, they're saying that the plans aren't
3 in good order.

4 What we would really like if Your Honor
5 would take specific care to know when the
6 conversation in these e-mails that I take the
7 position number 11 because the design part of the
8 contract document. I've pointed that out to Your
9 Honor. I think it's important as you evaluate
10 this. So our objection to the Exhibit 126 for
11 Jim Lord would be -- that would be our objection.

12 Then we have a counter designation, and
13 that is -- and, Your Honor, I don't have this one
14 written out so perhaps -- I'm going to put it on
15 the record, but perhaps you may on Exhibit 307
16 make a note to yourself -- counter designation is
17 page 51, line 6 through page 52, line 21.

18 THE COURT: Page 56 through page?

19 MR. MCDONALD: Page 51, line 6,
20 through page 52, line 21.

21 THE COURT: Okay. This is the next
22 page?

23 MR. MCDONALD: Yes, sir.

24 THE COURT: Okay.

25 MR. MCDONALD: And subject to my

1 previous objections and your previous rulings as
2 to how we're going to handle Mr. Clements in
3 order to scale it down, that's all I have, Your
4 Honor.

5 THE COURT: All right. I agree
6 with you.

7 MR. MCDONALD: Oh, just to be
8 clear, I know I brought this up before when we
9 were talking about this. Obviously -- and this
10 isn't contributable to Your Honor, this happened
11 earlier in my career, I was entitled to put in
12 evidence in my case in chief, even if I don't
13 counter --

14 THE COURT: I'm going to allow you
15 to do that.

16 MR. MCDONALD: Thank you, Your
17 Honor.

18 THE COURT: You'll get your day in
19 Court.

20 MR. HILDEBRAND: Your Honor, I'm
21 not, it's perplexing -- I guess what Mr. McDonald
22 is trying to argue is that any documents that
23 post date the GMP are irrelevant, but that's not
24 the case. And if you look at the specific --

25 THE COURT: Well, what the -- what

1 was the actual date of the contract? I don't see
2 it in front o me. What's the date that we saw it
3 was signed, was it March --

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: -- of '15, isn't that
6 that?

7 MR. MCDONALD: September of '14,
8 and then the GMP, and then it's September of '15.
9 There's no contract until there's a GMP.

10 THE COURT: All right. I gotcha.
11 And this happened in the inter-meeting period of
12 time or does this predate that?

13 MR. HILDEBRAND: What it was, Your
14 Honor --

15 THE COURT: Go ahead.

16 MR. HILDEBRAND: -- is that the
17 hundred percent drawings that were designated as
18 the hundred percent drawings, the architect is
19 talking about, look, we're giving them a hundred
20 percent drawings. That's what is being
21 referenced, and they're saying, these documents
22 are gross negligence.

23 I've got a specific brief on that
24 exhibit, and the reasons that they don't want
25 that exhibit in is because it is such a smoking

1 gun against them. I mean, here's what the fellow
2 says, these are the architect -- these are two
3 architects in-house talking about the drawings.

4 MR. BUNDY: Objection. It's not in
5 evidence. It's not in evidence. You can't make
6 an argument in trial of something that's not in
7 evidence.

8 THE COURT: Let's just say this,
9 I'm going to accept it as a proffer right now,
10 and I will make a decision about really whether
11 it's admissible or not. How about that? How
12 about if I figure this out?

13 MR. BUNDY: That's fine. If I can
14 make objections. That's fine.

15 THE COURT: Let's go ahead and put
16 proffer in the air. I got to figure out more
17 things about it, reading last night it was -- I
18 was boning up on my parol evidence rule because
19 guest what.

20 That's what just came up today. I've
21 been reading every night. I know y'all are busy,
22 too. I've been reading every night, too. I just
23 want y'all to know.

24 MR. HILDEBRAND: All right, sir.

25 THE COURT: So I'm going to give

1 you a response tomorrow as to what I found was --
2 what was acceptable, what was not acceptable. So
3 y'all can keep track of what I found was
4 admissible. I certainly understand why it's
5 being offered. Okay. Thank you. Yes, sir.

6 MR. HILDEBRAND: Yes, sir.

7 THE COURT: And this is on
8 Mr. Lord, right?

9 MR. HILDEBRAND: Yes. It's the
10 exhibit that Mr. McDonald was specifically
11 referencing, number 126.

12 THE COURT: You lost me on that
13 one.

14 MR. HILDEBRAND: What I'm handing
15 you is an --

16 THE COURT: Exhibit 126. Okay.
17 I'm sorry. Yeah. Yeah. Yeah. Got it. Okay.

18 MR. HILDEBRAND: All right. So as
19 I understand it where we stand, Your Honor,
20 except for the exhibits that were stricken from
21 Kim Brown's deposition, all other -- at this
22 point all of the deposition transcripts,
23 designations that plaintiff has offered are in.

24 Their counter designations are in, and
25 the only issue before the Court at this point is

1 whether the exhibits that we have referenced are
2 in evidence. Is that where we stand? That's my
3 understanding.

4 THE COURT: Yes.

5 MR. MCDONALD: What I handed up is
6 not just counter designations. 400 and 401 also
7 contain objections to the exhibits offered in
8 those depositions, and they are spelled out what
9 they are. It's not just objection, and the
10 ground for it are in there.

11 THE COURT: Just one second.

12 MR. MCDONALD: But as I asserted
13 before, because of the nature of the objection
14 and the nature of what Your Honor is going to do,
15 read the deposition excerpt, I don't know how you
16 do it without looking at the deposition excerpt
17 to make that determination. That's why I did it
18 that way, Your Honor.

19 THE COURT: Okay. All right. Have
20 y'all had a chance to review each of these back
21 and forth?

22 MR. HILDEBRAND: They've seen mine.
23 I haven't seen theirs.

24 THE COURT: Okay.

25 MR. HILDEBRAND: I haven't got

1 anything from them.

2 THE COURT: All right. That I will
3 do. I will take the exhibits, and the objections
4 into consideration. I'll give you a ruling on
5 that as I go. I'll keep track of it as I go.

6 All right. It's 3:15. Do you want to
7 start on somebody today?

8 MR. HILDEBRAND: It's up to you,
9 Your Honor. I have two more live witnesses and
10 then I'll be done. It's up to you.

11 MR. BUNDY: Defendant would like to
12 proceed, Your Honor.

13 THE COURT: Yeah. Okay.

14 MR. HILDEBRAND: We're ready to go
15 there. If we can take just a quick break.

16 THE COURT: Yeah. Let's take five
17 minutes and come right back. Okay? We will run
18 for a couple hours today.

19 (A recess transpired.)

20 MR. HILDEBRAND: The plaintiff
21 would call David Simonton.

22 (DAVID SIMONTON, having first been
23 duly sworn, testified as follows:)

24 THE COURT: Thank you, sir. Please
25 sit. Be careful over there. You're wrapped in

1 there pretty tight. And I'm sure they have a
2 few -- all right. Mr. Simonton, give us your
3 full name and address for the record, please,
4 sir.

5 THE WITNESS: It's David Merritt
6 Simonton, S-I M-O-N-T-O-N, 2973 Black Hills
7 Boulevard, Heath, Texas 75123.

8 THE COURT: That was Beef?

9 THE WITNESS: Heath, H-E-A-T-H.

10 DIRECT EXAMINATION

11 BY MR. HILDEBRAND:

12 Q. Can you speak up a little bit,
13 Mr. Simonton?

14 A. Yes.

15 Q. Try to speak loud and clear.

16 A. I will do that.

17 Q. Thank you. Where are you from
18 originally?

19 A. Dallas, Texas.

20 Q. All right. And just tell me, tell the
21 Judge briefly, if you would, Mr. Simonton about
22 your experience in the construction industry
23 prior to starting work with Balfour Beatty?

24 A. Prior to starting with Balfour Beatty, I
25 was in the mechanical industry. My father was in

1 the mechanical business. And up until the '70s,
2 the mid '80s, I was working mechanical,
3 electrical and plumbing industry.

4 Q. MEP?

5 A. MEP.

6 Q. All right. And so that -- when did you
7 actually join Balfour Beatty?

8 A. I joined in 1986 with a company that was
9 called JW Basin (ph) out of Dallas, Texas and was
10 owed by Syntech. We were a commercial side.
11 Then over the years, it transferred -- change in
12 that Syntech Construction and basically started
13 in '86 working in the Dallas, Fort Worth area on
14 museum art, (inaudible) as like an assistant
15 superintendent at the time in the field and in
16 the office managing different trades.

17 Q. Can you speak up a little bit, please?

18 A. Managing different mechanical,
19 electrical plumbing trades on large projects and
20 then moved over and started a large Navy hospital
21 in Dallas.

22 Q. Okay. What was your job title when you
23 started with Balfour?

24 A. Mechanical, electrical, plumbing
25 coordinator. So basically a subcontractors,

1 which there were about 60, 70 percent of the job
2 for the total manage of the job, I was managing
3 those subcontractors.

4 And then I went over to build prisons
5 and jails in the Dallas, Fort Worth area, and
6 then moved out to -- moved out to the next
7 project. I did move me 12, 13 times with
8 Syntech. We changed to Syntech in the '90s, we
9 were building hotels, office buildings. I worked
10 in the '90s, I worked on the Gaylord Texan.

11 Q. Worked on what?

12 A. Gaylord Texan. It's a 2,000 room hotel,
13 convention center in Grapevine, Texas, five star
14 alliance, very large hotel.

15 And then basically in '07, '06, I was
16 out in California working for our development
17 branch and construction building high end condos
18 in San Diego and San Jose and San Antonio,
19 starting some. They asked me to come out to
20 Charlotte, and they had a large project, which
21 was the superblock.

22 Q. I'm sorry, the superblock?

23 A. Superblock in Charlotte because it was a
24 high end. I built a lot of hotel and office
25 building and downtown areas. The CEO called me

1 and asked me if I would go to Charlotte and help
2 build -- the lead team to build the Charlotte
3 (inaudible) down and Ritz Carlton Hotel of
4 Charlotte.

5 Q. Was that a five-star hotel?

6 A. Yes.

7 Q. Have you had other five-star hotels that
8 you have worked on?

9 A. I worked on the Omni in Hilton Head,
10 later on, a few years back. That's basically the
11 best one, the largest value hotel that I worked
12 on.

13 Q. Okay.

14 A. Well, the Gaylord, it was 500 million,
15 but the Ritz was 200.

16 Q. Okay. So the risk -- and that was just
17 before this project; is that right?

18 A. No, sir. This was before this project,
19 the Bennett Hotel.

20 Q. Right, the Ritz?

21 A. No. So we built the Ritz. I was
22 operations director. We had a team of about 50
23 people on that project.

24 Q. Balfour?

25 A. Yeah. We had about 50 people working on

1 the upfit side, working on the upfit of the
2 tower, working on finishing up of the Ritz, and
3 moved in on time in 2009, opened them up and did
4 a Winter Garden and then Founders Hall.

5 And so from that point, Bank of America
6 was one of my clients so they asked me if I could
7 go up to Richmond, Virginia, and lead a team and
8 build a data center for them. They needed a data
9 center up there and I went up and led that team.

10 Q. What was your job description? What was
11 your job title at this point?

12 A. At that time, I was operations director,
13 but I worked out in the field and in the office,
14 to lead the team on the buy out, and
15 pre-construction, of course, at first, and then
16 the buy out. Those are all GMP contract. And
17 then get the job rolling and then make sure that,
18 you know, we have the keys to finish the job.

19 Q. Okay.

20 A. From that point, I went down to build a
21 data center in Winston Salem for Lowe's.

22 Q. And when was this approximately?

23 A. 2012. And then Microsoft was one of our
24 clients. They approached us about building a
25 confidential data center -- I should have said

1 Microsoft, major software developer in Redmond,
2 Washington.

3 Q. All right.

4 A. We built a confidential data center in
5 San Antonio, Texas. So we precon that with the
6 architect down in Austin. The architect was in
7 Austin; so they moved me to San Antonio from
8 Charlotte.

9 Q. Okay.

10 A. And kicked that off onsite, building
11 that, that was about a couple hundred million and
12 build that confidential data center, cranked it
13 up running.

14 And then at that time, I went to -- I
15 believe we acquired a contractor in Austin. They
16 wanted to open up a large project division. So I
17 went up there and ended up acquiring 30-story,
18 514 multiple family projects in downtown Austin.
19 We got that built, I was lead over that. Again,
20 I had a team.

21 Q. You're working at the tip of the spear
22 on those?

23 A. Yeah. So I worked for Trammell Crow,
24 the developer out of Texas, and then while we
25 were building that, we started a 60-story condo

1 project in downtown Austin. (Inaudible). I
2 believe there's 300 condominiums in it.

3 Q. Try to speak just a little more
4 distinctly if you could, please.

5 A. Sorry, it's the Texas accent.

6 Q. All right.

7 A. Anyway, went from there to then 2016, I
8 decided I wanted to retire.

9 Q. So you retired in 2016?

10 A. Late 2016.

11 Q. All right. Let me stop you there just
12 for a second.

13 A. Okay.

14 Q. So what was your job title in 2016 when
15 you retired?

16 A. Vice president of operations.

17 Q. Okay. And can you tell me what the
18 spread in dollar value is of projects that you
19 had been the tip of the spear, so to speak,
20 during the last 15 years of your career from
21 about what to about what?

22 A. Probably about 3 billion, two and half
23 to 3 billion.

24 Q. Billion dollars?

25 A. Yes.

1 Q. What about individual projects? What
2 were some of the bigger dollar amounts?

3 A. The Bank of America or the superblock,
4 it sold a little over 7 hundred million. The
5 hotel in Grapevine, that was 500 million. The
6 data center 250, data center down in San Antonio,
7 it was north of 200.

8 Q. Okay.

9 A. And then the 60-story condo was 175
10 million, I think.

11 Q. All right. So you were -- again, your
12 official title was, again, the vice president
13 of --

14 A. Operations.

15 Q. Vice president of operations. Okay.
16 And was that primarily an office position or a
17 field position or did you ever see both or
18 describe that for me?

19 A. Both. Oversee the office and then to
20 work with the superintendents, working with the
21 project manager, senior project managers, working
22 with precon, making sure everybody is turning
23 over a project.

24 Q. Okay. All right. So you retired in
25 Texas and obviously you came out of retirement,

1 what happened?

2 A. So I was up helping a friend of mine in
3 Oklahoma City, a small general contractor and Pat
4 Dean called me.

5 Q. Who is Pat Dean?

6 A. Pat Dean, at that time, was president of
7 Charlotte or Carolina's Division, Atlanta,
8 Carolina, Raleigh, Charlotte and Charleston, all
9 the Carolina's plus Georgia. So he called me and
10 said, hey, what you are you doing --

11 MR. BUNDY: Objection.

12 THE COURT: Overruled. Go ahead.

13 THE WITNESS: So when he did -- he
14 said I have an opportunity for you. I'd like to
15 think about going back to Balfour Beatty, come to
16 Charleston, and help us on an existing project
17 and anything else we have.

18 And so after a period of time, I came to
19 an agreement and literally within a day I was in
20 Charleston. I believe he had contacted me in
21 October of '17 and I was in Charleston the first
22 couple weeks of December.

23 BY MR. HILDEBRAND:

24 Q. Okay.

25 A. And my wife and I, we relocated down

1 here.

2 Q. So you came to the Hotel Bennett in
3 October of '17?

4 A. No.

5 Q. When?

6 A. December.

7 Q. December of '17; is that correct?

8 A. Yes, sir.

9 Q. All right. And did you -- was there --
10 did you replace another vice president of
11 operations? How did that work?

12 A. David Stanton, who I worked with out of
13 our Charlotte office, he was down here taking
14 care of Hotel Bennett.

15 Q. Right.

16 A. And eventually as things started
17 rolling, I started getting familiar with the
18 project and the team, he slowly backed out where
19 I could, you know, get a grip on dealing with the
20 subs, dealing with the team, and things like
21 that. So he backed out I believe by February he
22 had pulled out, February of '18, sorry.

23 Q. Okay. What was the status of the
24 project when you came on board?

25 A. The status was ongoing. And they were

1 working on finishes, trying to work on finishes
2 on the first floor. I walked the outside, you
3 know, some of the wall between the two hotels
4 wasn't finished, making an assessment of what
5 wasn't done, and seeing what we needed to finish.

6 But walked the first floor, second floor
7 with different team members just trying to get an
8 assessment of where the project was as far as
9 finishes.

10 Q. Okay. All right. We have a couple sets
11 of -- so we've got two stacks of drawings here;
12 is that right?

13 A. Yes, sir.

14 Q. All right. Can you describe for the
15 Judge --

16 MR. HILDEBRAND: Your Honor, would
17 you mind coming down so he could show you what
18 he's got? Can you come down here -- and will you
19 come around here, please?

20 THE WITNESS: Do you want me to
21 come around there?

22 MR. HILDEBRAND: Yes, please.

23 THE WITNESS: So this is the GMP
24 set that they invoked the number from on the
25 right side. Basically the architectural,

1 structural, mechanical, electrical and AV, the
2 kitchen drawings.

3 MR. BUNDY: Objection. The answer
4 is not responsive. There's no way in the record
5 to know what he's referring to.

6 MR. HILDEBRAND: You referring to
7 the stack?

8 THE WITNESS: Yeah. All the
9 drawings that are GMP are the contract documents.

10 MR. BUNDY: They need to be marked.
11 They need to be marked with a sticker.

12 MR. HILDEBRAND: Let me --

13 MR. BUNDY: No. I'm not going to
14 let you do whatever you want to. I'm going to
15 object.

16 MR. HILDEBRAND: Okay.

17 THE COURT: I'm going to overrule
18 the objection. Go ahead. Go ahead. We will get
19 it marked.

20 THE WITNESS: So that's the
21 original set of drawings.

22 BY MR. HILDEBRAND:

23 Q. One thing I would like for you to point
24 out, if you would, please. Is there any
25 indication --

1 A. On this set of drawings it says 100
2 percent plus 11/6/14, and there's -- it's said
3 that throughout 100 percent plus, 11/6/14, then
4 one, two, three, four, and 100 percent plus, and
5 that's on the architectural.

6 Q. You don't have to go through all of
7 them.

8 A. So on the interior.

9 Q. Okay. So the hundred percent plus, we
10 read that designation in your contract, but it's
11 also on the drawings; is that correct?

12 A. Yes, sir.

13 Q. All right. And then can you identify
14 what this second stack is that I'm referring to?

15 MR. BUNDY: Objection.

16 A. So the second stack is --

17 THE COURT: Overruled.

18 A. The second stack is the GMP set.

19 Q. I thought this was the GMP set?

20 A. GMP. So in order to identify the
21 original document with the additional document --
22 documents that were added, you stack them.

23 Q. Wait. Wait. Wait. Describe in general
24 terms what is the difference between this stack
25 and that stack.

1 A. These are all the drawings that we were
2 issued after GMP.

3 Q. After GMP.

4 A. With the GMP front sheet on each one.
5 They were issued 10 sheets of A101, there's 11
6 sheets there because the GMP set of drawings. So
7 it's called a slip set of drawings. This is all
8 of the drawings they issued afterwards.

9 Q. So the stack to the right is the
10 original GMP and then the stack to the left is
11 how it progressed with all the changes --

12 A. Yes.

13 Q. -- and that's what y'all ended up with
14 at the end of the job; is that correct?

15 A. Yes. Correct.

16 Q. Okay.

17 THE COURT: All right. Now, this
18 is what I'm happy to do for the record so it is
19 clear. This looks to me to be three separate
20 sets of documents based on the binder at the end,
21 and they are architectural, structural,
22 mechanical, and electrical.

23 THE WITNESS: Plumbing and
24 electrical.

25 THE COURT: Plumbing and

1 electrical?

2 THE WITNESS: Plumbing and
3 electrical, yes.

4 THE COURT: All right.

5 THE WITNESS: They're actually
6 marked on the end, Your Honor. It says GMP, GMP,
7 GMP, GMP, GMP, GMP.

8 THE COURT: So it's seven sets?

9 THE WITNESS: Yes.

10 THE COURT: Seven sets. And how do
11 you distinguish these on the left, the thicker
12 stack?

13 THE WITNESS: These would be the
14 same seven.

15 THE COURT: The same seven?

16 THE WITNESS: Yes, sir.

17 THE COURT: Just with the
18 additional information and additional drawings in
19 there?

20 THE WITNESS: Yes, sir, where they
21 added drawings.

22 THE COURT: Okay. This looks to be
23 about 6 inches tall and that may be a foot.

24 THE WITNESS: Yes, sir.

25 THE COURT: Okay. Anything

1 further?

2 MR. HILDEBRAND: No, sir.

3 BY MR. HILDEBRAND:

4 Q. Mr. Simonton, do you recall the last
5 date of work that Balfour had on this project?

6 A. April 26th, excuse me, April 26th, 2019.

7 Q. Do you remember what day of the week
8 that was?

9 A. I believe it was a Friday. It was a
10 momentous day.

11 Q. What was the -- do you remember what was
12 going on with the final work materials?

13 A. We were working on shutters, finishing
14 up some shutters, and then we see they were
15 working on the fence between the two buildings.

16 Q. Okay.

17 MR. HILDEBRAND: I would like to
18 publish -- let's turn to Exhibit 56 and binder
19 two there.

20 THE COURT: 56?

21 MR. HILDEBRAND: Yes, sir. And the
22 A201, go to that.

23 THE COURT: I'm sorry, I missed it.

24 MR. HILDEBRAND: A201.

25 THE COURT: A201?

1 MR. HILDEBRAND: Yes, sir. Page
2 46, A201 supplementary division, page 46.

3 BY MR. HILDEBRAND:

4 Q. All right. Are you there?

5 A. Supplementary provisions?

6 Q. Yes.

7 A. Almost there.

8 MR. BUNDY: Page what?

9 MR. HILDEBRAND: 46.

10 MR. BUNDY: In Exhibit 56?

11 MR. HILDEBRAND: Right.

12 MR. HILDEBRAND:

13 Q. Are you with me?

14 A. Yes, I'm with you.

15 Q. All right. And I just want to publish
16 this section 13.4, which is entitled rights and
17 remedies, 13.4.1, duties and obligations and post
18 by the contract documents and rights and remedies
19 available there under shall be in addition to,
20 yet not a limitation of duties, obligations,
21 rights and remedies otherwise opposed for
22 available by law. Did I read that correctly?

23 A. (Inaudible.)

24 Q. You need to answer yes or no.

25 A. Yes.

1 Q. All right. Thank you.

2 MR. HILDEBRAND: Your Honor, I'm --
3 those are actually the A201 general conditions.

4 A. Yes.

5 Q. Okay. Let's see. Let's turn in volume
6 1, if you would, please, in Exhibit 3.

7 A. Exhibit 3?

8 Q. Yes, sir. All right. This is actually
9 a document as contained in the document of Mr.
10 Bundy introduced earlier today, the claim back up
11 Exhibits 1 through 4. Do you remember that being
12 discussed?

13 A. Yes.

14 MR. BUNDY: Could we turn to that
15 exhibit, please? What exhibit number was it?

16 MR. HILDEBRAND: Your big stack in
17 your stack.

18 MR. BUNDY: Are you talking about
19 the consolidated claim?

20 MR. HILDEBRAND: Yes.

21 MR. BUNDY: Did I put it in
22 evidence?

23 MR. HILDEBRAND: Yes, sir.

24 THE WITNESS: Right.

25 MR. BUNDY: It's got a sticker on

1 it. Okay. Perfect.

2 MR. HILDEBRAND: I just pulled it
3 out, Your Honor, for ease of reference and for
4 clear record.

5 MR. BUNDY: If I could, I would
6 like to use the exhibit that's in evidence as
7 opposed to what has been marked up. If this
8 exhibit is already in evidence, I would prefer to
9 use evidence that's already in. So I would
10 object to this procedure.

11 THE COURT: All right. If this is
12 already in evidence as an exhibit, my first
13 question in my mind is what -- if it's already
14 in, what exhibit number does it have?

15 THE WITNESS: It's in one of -- it
16 needs volumes right in either two, 3 or 4.

17 MR. HILDEBRAND: It's 2, 3 or 4 in
18 your evidence.

19 MR. BUNDY: Your Honor, can we
20 remove this from the screen until it's in the
21 evidence?

22 THE COURT: Defendant's 11, 12 and
23 13.

24 THE WITNESS: Volume 2. Exhibit --
25 Defendant's Exhibit 12.

1 THE COURT: 12?

2 THE WITNESS: Yes, sir.

3 THE COURT: Okay. Thank you.

4 MR. HILDEBRAND: All right. So I
5 prefer to mark this as a separate exhibit. It's
6 just makes it a lot easier for reference, Your
7 Honor.

8 MR. BUNDY: I prefer to object.

9 THE COURT: Objection noted.
10 Overruled. You can mark it.

11 MR. HILDEBRAND: All right. Thank
12 you, Your Honor.

13 MR. BUNDY: Objection, Your Honor.
14 It's also highlighted. And this exhibit is
15 not -- the exhibit in evidence is not
16 highlighted.

17 THE COURT: I understand.

18 (PLF. EXH. 3 was marked for
19 identification.)

20 MR. HILDEBRAND: So let's pull that
21 back up.

22 BY MR. HILDEBRAND:

23 Q. Can you tell me what this document is
24 please?

25 A. This document is a record of all the

1 RFI for the Marion Square Hotel.

2 Q. How was is this document generated?

3 A. These document is generated out of
4 Constructware. So as each RFI is given a
5 distinct number, sent to the architect, unless
6 it's to the owner, and then it's logged of when
7 it goes out, the date that it goes out, the RFI
8 date. Can I point at the screen?

9 Q. Yeah.

10 THE COURT: Yeah. RFI is a request
11 for information?

12 THE WITNESS: Yeah. The slope
13 concrete slab, number 17, it went out on
14 4/28/2015. The slope concrete slabs -- and I'm
15 just using this as an example, Your Honor, went
16 out 4/28/15. It was supposed to come back
17 5/5/2016 because it was agreed upon length of
18 seven days. It came back on -- I can't read that
19 5/6/15. So it was one day past due.

20 BY MR. HILDEBRAND:

21 Q. Okay.

22 A. So basically this log keeps track of
23 every RFI went out and came in and it's generated
24 out of Constructware.

25 Q. So if we look at the top, we've got RFI

1 number top left. Let's just look at the very
2 first one. RFI number?

3 A. 1.

4 Q. Subject right, subject that first one
5 is?

6 A. File design load.

7 Q. File design load. RFI date, due from
8 architect engineer, received from architect
9 engineer, days held, dates over due, and status
10 closed. What does it mean when it says closed
11 again?

12 A. Closed means nobody can go in and audit
13 it or touch it. It's closed. They agree with
14 the answer and it's closed.

15 Q. Okay. And so the data that's input has
16 information that comes due on each of these RFIs
17 that gets noted in here, correct?

18 A. Sorry, repeat that.

19 Q. The data that is noted in here gets
20 noted contemporaneously when y'all receive it; is
21 that a fairly statement?

22 A. Yes, sir.

23 Q. All right. So can you tell me what the
24 yellow highlighting is on here?

25 A. The yellow highlighting is basically --

1 the first, they did come in on time. All these
2 that are highlighted below are the ones that came
3 in past -- they agreed to seven days in the
4 contract and as the team agreed to. So some are
5 one day over, the mirrored ceiling, somebody
6 asked that earlier, and they were on 5/6/15, it
7 was due 5/13, 9/15, it was answered. So it was a
8 125 days overdue, and that's a mirrored ceiling
9 in the camp line.

10 Q. Okay. Let's turn to the very back of
11 this, the very last page of this tab, if you
12 would. So I just want get -- for you to get in
13 the record, how many total RFIs were there? The
14 very last package of this one.

15 A. 1,200, I believe.

16 Q. He will pull it up. So how many RFIs
17 total were there?

18 A. There's 1,224.

19 Q. Okay. So let's go back to the first
20 page.

21 THE COURT: Where did you get that
22 number from?

23 THE WITNESS: The last RFI, Your
24 Honor.

25 MR. HILDEBRAND: The very bottom

1 left is 1,224.

2 THE COURT: Okay. Got it.

3 BY MR. HILDEBRAND:

4 Q. So on this first page, let's go to that.
5 Let's go to -- let's look at representative
6 samples. So go down to number 83 on the list.
7 Do you see that? Number 83, finish hardware
8 questions. 47 days overdue. It says 47; is that
9 correct?

10 A. Yes, sir. 47 days on finish hardware
11 questions, RFI number 83.

12 Q. Okay. Now, let's go to the next page.
13 I'm just going to pull up some representative
14 samples. Number 111, eighth floor, finish drain
15 conflict, 59 days; is that right?

16 A. Yes. 59 days on eighth floor -- sixth
17 floor. I believe it says sixth floor.

18 Q. Okay. And just above that number, it
19 looks like 105, fire protection secondary supply
20 storage, 87 days?

21 A. 87 days, that's number 105.

22 Q. Okay. Let's go down -- jump down to
23 169, roof top gutter downspouts in nano wall
24 drain connections, 143 days; is that correct?

25 A. Yes. 143 days.

1 Q. All right. Let's turn the page. Number
2 214, fixed shutters at covered windows, 220 days,
3 correct?

4 A. Yes, sir, R5214.

5 Q. Number 228, shutter vertical side,
6 style, width and wind load capacity, 1,176 days;
7 is that correct?

8 A. No. That one shows open.

9 Q. Okay. So that one is one that was never
10 resolved; is that correct?

11 A. Right. We never received it back.

12 Q. Okay. Let's go down to the very bottom
13 of that one starting with 299. Or actually 294.
14 Wall (inaudible) on eighth floor for storm riser,
15 174 days, correct?

16 A. Correct.

17 Q. Roof 513, plumbing conflict, 173 days,
18 correct?

19 A. Yes.

20 Q. 300, room 601, wall referring behind
21 laboratories, 173 days?

22 A. Yes, that's correct.

23 Q. Room 531, ceiling tub location, 173
24 days, right?

25 A. That's correct.

1 Q. Room 543, ceiling elevation, 173 days?

2 A. That's correct.

3 Q. Fifth floor ceiling conflict 173 days?

4 A. That's correct.

5 Q. Stair floor ceiling conflict, 173 days?

6 A. That's correct.

7 Q. Let's go to the next page. 323. Paint
8 colors, 254 days, correct?

9 A. Correct.

10 Q. 348, underground plumbing piping soil
11 compaction, 89 days, correct?

12 A. Correct.

13 Q. 394, drips screen at window heads, 97
14 days, correct?

15 A. Just a second. That's correct.

16 Q. Next page. 414, Graham window sill
17 flashing, 84 days, correct?

18 A. That's correct.

19 Q. 433, resilient channel in lieu CRC. Is
20 that 84 days or 64?

21 A. Just a second, which number?

22 Q. 433.

23 A. There it is, resilient channel load CRC,
24 64 days.

25 Q. Okay. What is that? Do you know what

1 the resilient channel includes of CRC?

2 A. No, sir.

3 Q. Down below that, plumbing manifold type,
4 119 days; is that correct?

5 A. Yes.

6 Q. 487, first floor east pour tendon, 40A,
7 113 days? Do you know what that was?

8 A. That was a tendon they had to right an
9 RFI, but I don't know --

10 Q. What is a tendon?

11 A. Tendon is what is inside a slab, post
12 tension slab, big tendon that they pour 5,000
13 pounds. So they maybe had -- either a high or
14 low number on it so they had to write it off to
15 see if it was okay.

16 Q. All right. Let's turn to a couple pages
17 to number 649. Carpet seaming diagrams, 144 days
18 later?

19 A. Correct, 144 days.

20 Q. And that's one of the finish items; is
21 that right?

22 A. That's one of the finish items to try to
23 figure out which way to turn the seams on the
24 carpet.

25 Q. Okay. 660, valet room ceiling height,

1 59 days, what is that?

2 A. The valet room where they store the
3 luggage and things that are coming in, it was the
4 ceiling height for that room.

5 Q. Okay. All right. 727, do you see that
6 one on the next page?

7 A. Managers apartment lighting product
8 date.

9 Q. 181 days late?

10 A. Yes.

11 Q. Do you know what that was?

12 A. Manager apartment lighting kept changing
13 so they were asking what the product was.

14 Q. Okay. At the very bottom of that same
15 page, 831, roof top bar and lobby tile selection,
16 126 days late?

17 A. Yeah. That's up on the roof top bar,
18 down the steps of the pool.

19 Q. 887 on the next page. Lab three,
20 different spec, 147 days, do you know what that
21 is?

22 A. That's a lavatory and a sink.

23 Q. Okay. Do you know if it --

24 A. I'm trying to remember exactly where it
25 was located. Right now, I can't recall exactly

1 where it's located.

2 Q. All right. How about 898, pre-cast at
3 south elevation store front doors, 110 days late.
4 What was that?

5 A. Pre-cast above the doors was a tight fit
6 and there was a window up above it and that's to
7 question on how it all came together.

8 Q. Okay. How 904, added SI38, added
9 transformer, 91 days. What is that supplemental
10 instruction?

11 A. That's a supplemental 136.

12 Q. Right. 38, I believe, yeah. 38, added
13 transformer, 91 days late, what is that?

14 A. I don't recall that.

15 Q. Okay. Let's turn to the next page, 960.
16 Final fixture schedule is 113 days late. What
17 was that?

18 A. That's the final fixtures, the light
19 fixtures, plumbing fixtures, I can't really
20 distinct which one it is. I believe it's the
21 final fixture schedule for finishes.

22 Q. Let's go to the very last page, 1165.
23 Laundry washer re-drain, 442 days. Do you know
24 what that was?

25 A. Trough drain is a -- trough drain behind

1 the big washer that they had, I believe it was
2 overflowing and we asked a question on how to
3 keep it from -- it was catching up with the sump
4 and we were trying to figure out how to make it
5 work. I believe that was that one. I was there
6 when that one kicked in.

7 Q. All right. Jump down to 1183, ADA guest
8 room shower glass panel, 89 days, what was that?

9 A. I don't recall that one, Tom --
10 Mr. Hildebrand, sorry.

11 Q. All right. So I didn't go through all
12 of these, but is it a fair statement that there
13 are a lot of past due RFI responses from the --

14 MR. BUNDY: Objection.

15 Q. -- architect engineer?

16 THE COURT: Objection to what,
17 Mr. Bundy?

18 MR. BUNDY: As to leading his
19 witness, Your Honor, and asking for an opinion
20 and then quantifying it. The document speaks for
21 itself.

22 BY MR. HILDEBRAND:

23 Q. What problem, if any, was there with
24 getting RFI response dates from the architect for
25 this job?

1 A. As you can see the number count was 400
2 to 100 days. A lot of these had to do with the
3 finishes of the project, and the subs were trying
4 to submittals in, and as it came down to the end
5 of the job, they had questions that needed to be
6 answered.

7 Q. Was that a problem?

8 A. Yes. When you don't have approved
9 submittals, you can't order the finishes.

10 MR. HILDEBRAND: I would like to
11 move this into evidence, Your Honor.

12 MR. BUNDY: Objection. Objection.
13 It's already in evidence.

14 THE COURT: It is already in
15 evidence. On the basis, I was going to go ahead
16 and allow it. What number did you call this?

17 MR. HILDEBRAND: That would be No.
18 3, Plaintiff's Number 3.

19 THE COURT: Plaintiff's Number 3?

20 MR. HILDEBRAND: Yes, sir.

21 (PLF. EXH. 3 was received in
22 evidence.)

23 MR. HILDEBRAND:

24 Q. All right. And let's go to the next
25 book.

1 MR. HILDEBRAND: And, Your Honor, I
2 will introduce a lot of documents for this
3 witness.

4 THE COURT: Okay.

5 MR. HILDEBRAND: Try to work
6 through this.

7 MR. MCDONALD: Your Honor,
8 Mr. Hildebrand he says he introduced a lot of
9 documents in evidence. Well, he did introduce a
10 lot of documents in evidence. What he did was,
11 he submitted them into deposition testimony.

12 MR. HILDEBRAND: Wait. Wait.
13 Wait, Your Honor. It's not fair, Your Honor.

14 MR. MCDONALD: I'm talking about
15 the deposition transcripts. He just said he
16 admitted a lot of documents into evidence, and
17 that didn't take place yet.

18 THE COURT: Okay.

19 MR. MCDONALD: So I'd just like him
20 to call out those documents that he believes were
21 not objected to so I can cross-reference it
22 because you're going to rule on a number of those
23 exhibits.

24 MR. BUNDY: And my objection from
25 my end is the one who's doing this, is that he

1 has not introduced a lot of it with documents in
2 evidence. He's put a lot of notebooks in front
3 of you that contain a lot of paper that are not
4 in evidence. So it's a mischaracterization of
5 what's occurred in this trial.

6 THE COURT: Okay. I'm with you on
7 that.

8 MR. HILDEBRAND: I will withdraw
9 the statement, Your Honor. Let's just keep
10 going.

11 THE COURT: Okay.

12 MR. HILDEBRAND:

13 Q. Let's turn to volume 2, if you would,
14 tab 126. Are you with me?

15 A. I'm getting there. Okay. I'm there.
16 All right.

17 Q. This is a letter and it shows that you
18 are the author; is that correct?

19 A. Yes, that's my signature.

20 Q. And it was sent to Mr. Jim Clements?

21 A. Yes.

22 Q. Okay. Why did you sent it to Jim
23 Clements?

24 A. He was the owner's designated
25 representative.

1 Q. Okay. The date says January 29, 2018,
2 but let's jump down. It says, demand is hereby
3 made for payment \$8,409,658.54. Do you see that
4 at the bottom below?

5 A. Yes.

6 Q. All right. My question is, was this
7 letter -- is the date correct on this? Is it
8 actually 2018 or should this have been 2019?

9 MR. BUNDY: Objection, leading.

10 THE COURT: I'm -- I will sustain
11 it. Just reask it.

12 MR. HILDEBRAND:

13 Q. All right. Do you know if there was a
14 date -- a mistake on the dates?

15 MR. BUNDY: Objection, leading.

16 MR. HILDEBRAND:

17 Q. What mistake, if any, was there relative
18 to the date of this letter?

19 MR. BUNDY: Objection, leading.

20 THE COURT: Overruled. Go ahead.

21 THE WITNESS: Yes, sir. It should
22 say 2019.

23 BY MR. HILDEBRAND:

24 Q. Thank you.

25 A. January 28, 2019.

1 Q. And the last sentence, demand is hereby
2 made for late payment of \$8,409,658.54 as
3 provided by South Carolina code 27-1-15, correct?

4 A. Yes, sir.

5 MR. HILDEBRAND: All right. I
6 would like to move that into evidence, Your
7 Honor?

8 MR. BUNDY: No objection.

9 THE COURT: In evidence.

10 MR. BUNDY: So this is going to be
11 Exhibit 126?

12 THE COURT: Yes.

13 MR. HILDEBRAND: Yes.

14 (PLF. EXH. 126 was marked for
15 identification and received in evidence.)

16 MR. BUNDY: Okay. Which for the
17 record is contained in book 2 of 5, which
18 contains 13 through 132 tabs, all of which are
19 not in -- exhibits in this case. But this
20 exhibit is, 126.

21 THE COURT: Right.

22 BY MR. HILDEBRAND:

23 Q. All right. Let's turn to tab 132,
24 Mr. Simonton, actually before we do that, let's
25 turn to tab 56, and I'm going to ask you some

1 questions about the contract.

2 A. Okay. I'm there.

3 Q. All right. If you turn about maybe
4 about a quarter inch back in this document,
5 there's a document marked Hotel Marion Square
6 Exhibit A, contract documents.

7 A. Okay. I'm there.

8 Q. Okay. Do you see --

9 MR. BUNDY: It doesn't look like
10 one quarter of an inch to me. So I can't find
11 it.

12 THE WITNESS: It's right at the
13 end.

14 MR. BUNDY: That's more like
15 five-eighth of an inch.

16 THE WITNESS: You must be from
17 Texas. It may be five-eighth of an inch.

18 THE COURT: Thank you. It's before
19 the A201, right?

20 MR. HILDEBRAND: It's section 1D
21 document list.

22 THE COURT: Document list?

23 MR. HILDEBRAND: Yes, sir. It's
24 the next page.

25 THE COURT: Okay.

1 MR. HILDEBRAND:

2 Q. All right. Mr. Simonton, do you see
3 that document?

4 A. Yes, sir.

5 Q. All right. Can you tell me how that
6 document is -- have you been involved with --
7 have you been with Balfour Beatty for how many
8 times years?

9 A. 30 plus.

10 Q. Okay. How are contract documents like
11 this put together by Balfour Beatty? What is it
12 the customary practice?

13 MR. BUNDY: Objection, lack of
14 foundation.

15 THE COURT: Lay a little more
16 foundation.

17 MR. HILDEBRAND:

18 Q. Okay. So you've been with Balfour
19 Beatty for over 30 years at this point, correct?

20 A. Yes, sir.

21 Q. Have you been involved with compiling
22 documents or do you have personal knowledge of
23 how documents, such as this listing of contract
24 documents are compiled by Balfour Beatty, to be
25 referenced in a contract?

1 A. Yes, sir.

2 Q. Okay. And what is the basis of that
3 personal knowledge that you have?

4 A. Normally we put together an exhibit --

5 MR. BUNDY: Objection, foundation.

6 MR. HILDEBRAND:

7 Q. Answer my question about foundation. Go
8 ahead.

9 A. You put together Exhibit A. Exhibit A
10 is an index from specifications and from the
11 drawings. There's an index in the drawings. So
12 you take those two things and -- basically, it's
13 an admin or clerical position -- take an Excel
14 sheet and they add in the section, section title,
15 and the date at issue, and then spits out, and
16 then becomes part of the contract document.

17 MR. BUNDY: Objection, lack of
18 personal knowledge.

19 THE COURT: Overruled. Overruled.

20 MR. HILDEBRAND:

21 Q. All right. So if we look several pages
22 into here, say page -- let's look at page 6 of
23 17. That's where the drawings start?

24 A. Yes, sir. That's a project drawings.

25 Q. Okay. So how would that -- where it's

1 got the listing of drawings, how would that be
2 populated?

3 A. The list of drawing would be populated
4 from the cover sheet from the architect -- the
5 GMP architects.

6 Q. Okay. So we should be able to correlate
7 this list with the list of -- stack of documents
8 that are in the short stack over here?

9 A. Yes, sir.

10 Q. Okay. All right. And then similarly
11 the specifications would be compiled by the
12 project specifications in this case?

13 A. Yes.

14 Q. All right. Where did the project
15 specifications come from on this job?

16 A. WLA.

17 Q. Okay. So how were the documents that
18 are enumerated in this contract document, how
19 were they populated?

20 A. These enumerations or these spec
21 sections 0001, project director, table of
22 contents in front of each book, normally two
23 books, and take that front page and you go
24 through and you transfer those numbers over to
25 Excel sheet.

1 Q. So this is stack of specifications from
2 WLA, somebody would have gone through for each
3 separate division and re-correlate them to that
4 table of contents; is that correct?

5 A. Yes, sir.

6 Q. All right. Do you see under section
7 00800, supplementary conditions?

8 A. Yes.

9 (PLF. EXH. 293 was marked for
10 identification.)

11 Q. All right. And let's -- we're going to
12 have to jump to Exhibit 293, which --

13 A. Do I need to leave this one open,
14 Mr. Hildebrand?

15 Q. Yeah. I'm going to come back to that
16 one in a little bit.

17 A. Okay.

18 THE COURT: This is a new binder?

19 MR. HILDEBRAND: Yes, sir.

20 MR. BUNDY: For the record, this
21 new notebook is -- they offer Balfour Exhibit 283
22 through 93, none of which are in evidence.

23 THE COURT: Right. Right.

24 THE WITNESS: Which tab?

25 MR. HILDEBRAND:

1 Q. The very last one, 293. Are you with
2 me?

3 A. Yes, sir.

4 Q. All right. Now, is this -- look through
5 this stack and look at 0800, is what is in front
6 of you a copy of the supplementary specifications
7 that have been pulled from that?

8 A. Yes, sir.

9 MR. BUNDY: Objection.

10 MR. HILDEBRAND:

11 Q. All right.

12 MR. HILDEBRAND: I would like to
13 move this into evidence, Your Honor.

14 MR. BUNDY: Objection. If, in
15 fact, 00800 is in here, he's identified these as
16 the supplementary conditions he says are in
17 there. I don't think I have to take his word for
18 it. If that's what they contend they are, I
19 think you ought to go to that stack of documents,
20 because he's already identified those, and make
21 sure they're in there. I have no idea what's in
22 there.

23 THE COURT: Have we been in that?

24 MR. HILDEBRAND: Do you want to do
25 that? What's the easiest way?.

1 THE COURT: Are these originals or
2 what is this?

3 MR. HILDEBRAND: It's a full copy
4 of the project specifications.

5 THE COURT: Okay. All right.

6 MR. HILDEBRAND: All of these
7 documents on this list, and he can look through
8 it right now -- for Mr. Bundy's to say, he don't
9 know what's in them. It's his specifications or
10 his --

11 MR. BUNDY: What Mr. Bundy said --
12 no. What Mr. Bundy said, was I'm going to object
13 to evidence that's not in evidence. And it's not
14 Mr. Bundy's specifications. I'm a lawyer. They
15 don't give me anything. All I'm asking is, if
16 the witness has not laid proper foundation for
17 what's he's testifying to.

18 THE COURT: Okay. All right.

19 MR. BUNDY: That's all.

20 THE WITNESS: It's right here.

21 MR. HILDEBRAND: Put it back up
22 then.

23 THE WITNESS: Just a second.

24 MR. HILDEBRAND:

25 Q. Mr. Simonton, when you got involved with

1 this project, did you have occasion to look at
2 all of the contract documents?

3 A. Yes, sir.

4 Q. All right. And did you have occasion to
5 review all of the specifications that are in the
6 stacks that is in front of you?

7 A. Yes, sir.

8 Q. All right. And can you identify that
9 stack of specifications as the specifications for
10 this project?

11 A. Yes, sir.

12 Q. And can you identify the document that
13 we are -- have identified for identification as
14 Exhibit 293 as a copy of the supplementary
15 specifications that are contained in the full set
16 of specifications?

17 A. Yes, sir.

18 MR. HILDEBRAND: All right, sir. I
19 would like to move that into evidence.

20 MR. BUNDY: Objection. I don't
21 think you can enter in partial portions of
22 exhibits, either the specifications are in
23 evidence, or they're not. That's all. I just
24 take the position that it's immaterial and
25 irrelevant to -- and it's not full contract set

1 of documents. You've heard my objection.

2 THE COURT: All right. Objection
3 noted. Overruled.

4 MR. HILDEBRAND: So this will be
5 admitted as Plaintiff's 293?

6 THE COURT: Yes.

7 (PLF. EXH. 293 was received in
8 evidence.)

9 MR. HILDEBRAND: All right. Thank
10 you, Your Honor.

11 MR. HILDEBRAND:

12 Q. All right. So when you got involved in
13 this project, Mr. Simonton, did you have have
14 occasion to review these specific supplementary
15 conditions?

16 A. Yes.

17 Q. All right. And what were the
18 circumstances -- let me ask you this, were there
19 any particular portions of the supplementary
20 conditions that you felt would be beneficial to
21 Balfour, and which you brought to the attention
22 of the owner?

23 A. Yes. They were withholding 10 percent
24 retainage and supplementary conditions was stated
25 5 percent retainage.

1 Q. Okay. And there's a provision in the
2 supplementary provisions that said 5 percent?

3 A. Yes.

4 Q. All right. And did you make argument to
5 the owner that the retainage should be reduced?

6 A. Yes.

7 Q. And was the retainage reduced?

8 A. No.

9 Q. And why was it not?

10 A. The owner told me that the bank required
11 10 percent retainage. It was in the bank
12 agreement. They were not going to reduce the 5
13 percent at that time. And there in owner's
14 meeting it was brought, the architect said these
15 specifications were put in by mistake.

16 Q. Okay. And who was that?

17 A. Jennifer Faulkinberry.

18 Q. So Jennifer Faulkinberry said that they
19 were in here by mistake, correct?

20 A. Yes.

21 Q. Since then -- so let's now turn to
22 Exhibit 132, in notebook in Plaintiff's Exhibit
23 Notebook Number 2.

24 MR. MCDONALD: Your Honor, for the
25 record, this document is not in evidence.

1 THE COURT: Tab 132.

2 MR. BUNDY: I'll try to find
3 notebook number 2.

4 THE COURT: It would have been the
5 one we were just in, the title with 56.

6 MR. HILDEBRAND: Notebook number 2.

7 THE COURT: 132.

8 MR. BUNDY: Notebook Number 2.
9 What number is it?

10 THE COURT: 132.

11 MR. BUNDY: All right. I got it.
12 Thank you. Plaintiff's Exhibit 56?

13 THE COURT: That's what it says on
14 page on the face of it there.

15 MR. HILDEBRAND:

16 Q. Are you with me, Mr. Simonton?

17 A. Yes.

18 Q. All right. Can you turn three pages
19 back and let me ask you this. After this --
20 after the discussions arose about the supplementary
21 conditions, have you had an opportunity to go
22 back and look at the e-mails relative to the
23 supplementary conditions and the negotiations
24 that led up to it?

25 A. Yes.

1 Q. All right. And can you identify these
2 e-mails as the documents that you were able to
3 detect and find out and discuss the supplementary
4 conditions that we've been talking about?

5 MR. BUNDY: Objection, Your Honor.
6 Could I ask that you not read the document to him
7 until we get through this because this is
8 Mr. Clements' deposition. Okay. It's not been
9 offered into evidence here. There's no
10 foundation for the exhibit, and I believe this is
11 an exhibit that is in controversy in the
12 depositions.

13 THE COURT: Okay.

14 MR. BUNDY: And so clearly, this --
15 not clearly -- I just don't see how this witness
16 can get it in. It has to go in through
17 Mr. Clements it would appear to me and you
18 haven't made that decision yet.

19 THE COURT: Okay. I would agree
20 with that.

21 MR. HILDEBRAND: Well, Your
22 Honor I'm trying to --

23 THE COURT: Unless Mr. Simonton was
24 part of the deal, but I didn't see his name on
25 there.

1 MR. HILDEBRAND: Right, Your Honor.
2 But I think that this goes to notes, and that is
3 what is being introduced for notice that these
4 provisions were not part of the contract. I
5 mean, Mr. Bundy is on here too. I mean, I could
6 call him as a witness. I'm trying not too.

7 MR. BUNDY: Absolutely. You want
8 to take my deposition, I'll be glad to take the
9 stand. He's taken my deposition once, we can do
10 that again if you'd like.

11 THE COURT: I don't want to go
12 there.

13 MR. HILDEBRAND: Your Honor, I'm
14 just -- is there any basis -- is there really a
15 basis for them arguing against this? They have
16 been identified in Mr. Clements' case.

17 THE COURT: So far they're hearsay
18 unless you can put Mr. Simonton in the
19 conversation.

20 MR. HILDEBRAND: Okay. Well, I
21 would like to then -- this is one of the
22 documents that is in Mr. Clements' depositions.
23 So if you could please take a look at that?

24 THE COURT: All right. For now,
25 you want to make a proffer and try to link it up

1 later?

2 MR. HILDEBRAND: Yes, sir, let's do
3 that.

4 THE COURT: All right. I'll allow
5 him to do that. I'm allowing him to make a
6 proffer, subject to my review of Mr. Clements'
7 deposition whether I allow it in.

8 MR. BUNDY: You're going to proffer
9 it as procedure, but I'm not familiar with it.
10 But --

11 THE COURT: I use it all the time,
12 and it's partly because there's no jury sitting
13 over there and no jury is sitting right there.

14 MR. BUNDY: Fair enough. I'm just
15 trying to draw it to your attention.

16 THE COURT: And I will give you my
17 answer as I indicated as I go through those
18 depositions. Okay.

19 MR. HILDEBRAND:

20 Q. So let's turn to page 3 of this
21 document. And the e-mail right in the middle
22 from Brett Estridge, who is Brett Estridge?

23 A. Brett Estridge was, I believe at the
24 time, a senior project manager. He came to work
25 for us -- he came to work for myself in the Ritz

1 project. He had moved over to precon on the
2 executive side, working on the contracts. He
3 just did precon.

4 Q. Okay. And this e-mail is from Brett
5 Estridge to Jim Clements, you've already told us
6 who he is, correct?

7 A. Yes.

8 Q. And this is dated May 27, 2014, correct?

9 A. Yes, sir.

10 Q. All right. So this is before Balfour
11 signed its contract with Library Associates,
12 correct?

13 A. Yes.

14 Q. All right. And it's also CC, John
15 Heuer, Emily Elder, and Mike Baumbach. Who is
16 Emily Elder?

17 A. She is on our insurance risk.

18 Q. Okay. And the subject is Marion Square
19 supplementary conditions review, 5/27/14, do you
20 see that?

21 A. Yes.

22 Q. All right. Jim, below are the changes
23 that we propose to incorporate. If this is
24 acceptable, BBC will revise the A133 and A201 to
25 reflect these changes. At that point, WLA will

1 need to delete the specifications as it will
2 become invalid.

3 And I would like to refer you down to --
4 it says below that supplementary conditions
5 amendment WLA 209007, section 00800. Below that
6 paragraph -- subparagraph 9. Section 3.10.4
7 through 3.10.78, and it red highlighting says,
8 delete these paragraphs; is that correct?

9 A. Yes.

10 Q. And on the next page, I would like to
11 refer you to paragraph July 26 where it says
12 9.10.7, then, again highlighting delete this
13 paragraph, A2.3.1.3, takes precedence, original
14 paragraph to stay intact, correct?

15 A. Yes, sir.

16 Q. All right. And then the first page of
17 this document, there's an e-mail from Jim
18 Clements to Bill Bundy and copied Kim Brown and
19 Buck Lindsay, dated June 6, 2014. Do you see
20 that?

21 A. Yes, sir.

22 Q. And the subject is Marion Square
23 supplementary conditions review, 5/27/14,
24 correct?

25 A. Yes.

1 Q. All right. BBC and I met and
2 incorporated the bulk of Buck's supplemental
3 conditions that were not redundant with existing
4 language in the 133 and 201.

5 There is one related item I need to
6 discuss with Kim as soon as she has availability.
7 It has come to do with owner's assess prior to
8 substantial completion. There's -- I think
9 that -- I think that is already covered, but I
10 need to understand her requirements to be sure.

11 I also need Kim to approve or get
12 approval of the revised insurance language.
13 Coincidentally, I've also taken the few open
14 contract items as far as I can with BBC, see the
15 recap below. These reflect the last e-mail you
16 sent to me and the discussion we had where you
17 asked me to get with Mike.

18 I didn't get far with Mike because the
19 LD's were the topic with him. So I need you to
20 look through the revisions made by BBC, Mike will
21 want to know if you are okay with where we ended
22 up.

23 Note, I have not agreed to the revisions
24 on behalf of the owner. LDs are still open. The
25 good news is we are close. Mike is down to

1 \$10,000 a day; BBC is at 7,500.

2 Both parties have agreed to no holiday
3 period of full access to all BBC's fees. Comment
4 -- based on comments made by Mike, I believe he
5 is confident that we will reach an agreement with
6 BBC. Okay.

7 A. Yes.

8 Q. Okay. Based on your review of the
9 documents, have you formed an opinion as to
10 whether these supplemental conversations were
11 intended to be incorporated into the contract or
12 whether they were included by mistake as noted by
13 the architect?

14 THE COURT: Mr. Bundy?

15 MR. BUNDY: I don't know where to
16 begin. I don't know where to begin. Maybe we
17 should begin with the first day I walked into
18 Randy Bell's contract class in 1975.

19 THE COURT: Okay.

20 MR. BUNDY: This is before --

21 THE COURT: There is an objection
22 to the question?

23 MR. BUNDY: Oh, I have a strong
24 objection.

25 THE COURT: All right.

1 MR. BUNDY: This is hearsay.

2 THE COURT: I'm going to sustain
3 the objection on general terms right now unless
4 Mr. Hildebrand has some way to get it in, but I
5 don't know what the basis for that would be.

6 MR. HILDEBRAND: Okay.

7 BY MR. HILDEBRAND:

8 Q. You said that Jennifer Faulkinberry said
9 that the general -- that the supplemental
10 conditions were included by mistake. What was
11 the -- where was the meeting and when was that
12 meeting?

13 A. That was OA/C meeting in our office on
14 Meeting Street.

15 Q. Who else was present?

16 A. The team. I believe Nick, and the bank,
17 myself. That's all I can recall right now.

18 Q. Was Jim Clements present?

19 MR. BUNDY: Objection, leading.

20 A. Jim Clements led the meeting.

21 Q. He led?

22 A. Yeah. He did the meeting minutes.

23 Q. Okay. When Jennifer Faulkinberry made
24 that statement, did anybody object or say that
25 she was incorrect?

1 A. I didn't hear anybody.

2 Q. Okay. All right. Let's turn to -- this
3 is at the next volume, number 133.

4 MR. BUNDY: Is this exhibit into
5 evidence now?

6 THE COURT: It's been ID'd subject
7 to me going into Jim Clements testimony. Okay.

8 MR. BUNDY: But it's not into
9 evidence?

10 THE COURT: No, it's not in
11 evidence.

12 MR. BUNDY: Okay. Might I say that
13 even if you look at Jim Clements' deposition, it
14 will be never be admissible into evidence,
15 because it's just not relevant under basic
16 contract law. A project manager writes a lawyer
17 for an owner or a year before a contract is being
18 negotiated, and now that e-mail somehow two years
19 later, which doesn't agree to anything, then
20 years after the contract is assigned at a meeting
21 where a gentleman is present, who wasn't involved
22 in any of the contracts, somebody says something,
23 nobody complaints, and now the contract has been
24 amended and documents that were never in it are
25 now in it. There's no consideration.

1 THE COURT: Not through this
2 witness.

3 MR. BUNDY: Okay.

4 THE COURT: Not through this
5 witness. Not through this witness.

6 MR. HILDEBRAND: Your Honor, I
7 think when you read -- specifically asked him
8 about these supplemental conditions, and I asked
9 him about that very e-mail and what were the
10 intentions and --

11 THE COURT: This document is in Jim
12 Clements' depositions; was it not?

13 MR. HILDEBRAND: Yes, sir. Yes,
14 sir. And I asked him specific about it.

15 THE COURT: It would have to come
16 in through him. Okay?

17 MR. HILDEBRAND: Or other persons
18 who --

19 THE COURT: Or somebody else who was
20 a party.

21 MR. HILDEBRAND: Okay. All right.
22 I'll move on, Your Honor.

23 THE COURT: All right.

24 MR. HILDEBRAND:

25 Q. So let's move to Exhibit 133, please.

1 A. Which volume?

2 Q. That would be in volume 3.

3 MR. MCDONALD: Your Honor, while
4 everybody is shuffling around, this exhibit is
5 also not in evidence, this is also subject to
6 objection not actually being rendered --

7 MR. HILDEBRAND: Your Honor, this
8 is just not fair. I don't have -- it's just not
9 fair. I don't have -- I've never been in a trial
10 where --

11 THE COURT: Where other people
12 have --

13 MR. HILDEBRAND: Yes, sir.

14 THE COURT: I think the proper
15 objection is, whoever is cross-examining the
16 witness to make the objection. So I would ask
17 that you stick with that. We're in binder number
18 3 and tab number what?

19 MR. HILDEBRAND: Tab 133, Your
20 Honor.

21 BY MR. HILDEBRAND:

22 Q. All right. Are you with me?

23 A. 133, yes, sir.

24 Q. Yes, sir. All right. Do you see that
25 this is an e-mail from Nick Starcevic to Jennifer

1 Faulkinberry and you were copied on it?

2 A. Yes.

3 Q. And it's Marion Suare GR, I guess that's
4 guest room?

5 A. Yes.

6 Q. Guest room, punch direction to proceed.
7 Are you with me?

8 A. Yes.

9 Q. All right. And there's an e-mail right
10 below that as well from Jennifer Faulkinberry and
11 you were copied dated May 9, 2018?

12 A. Yes.

13 Q. All right. Are you familiar with these
14 documents?

15 A. Yes, I am.

16 Q. All right. Okay. And do you have
17 personal knowledge of them?

18 A. Yes.

19 MR. HILDEBRAND: All right. I
20 would like to move these into evidence, Your
21 Honor.

22 MR. BUNDY: Objection. These
23 documents can only come in through Mr. Clements.
24 The fact that he just read e-mails does not make
25 them admissible into evidence.

1 MR. HILDEBRAND: Your Honor, he was
2 a recipient. He can identify them. This is an
3 authentication issue. Is it -- and again, Your
4 Honor, I would refer you to the rule on
5 authentication is very clear and very simple and
6 very common sensible. It's very common sensible.

7 THE COURT: I'm -- okay. I think
8 he can authenticate it and the objection was --
9 but the objection was as to what?

10 MR. BUNDY: The objection is to
11 hearsay. This is -- these are out of court
12 statements are being offered for proof of the
13 matter asserted, and the statements are being
14 made by Nick Starcevic and/or -- to Jennifer
15 Faulkinberry.

16 These people that received copies aren't
17 involved. They're just simply receiving
18 information, but the document itself is an out of
19 court statement offered for the proof of the
20 matter asserted, and he's bringing somebody
21 before you that either wrote the letter or who
22 was supposed to respond to the letter.

23 THE COURT: So for what purpose do
24 you introduce the exhibit?

25 MR. HILDEBRAND: Your Honor -- Your

1 Honor, this is not hearsay.

2 THE COURT: And so for what purpose
3 is there to introduce the exhibit?

4 MR. HILDEBRAND: For -- you will
5 see in just a minute, there is an issue relating
6 to how the punch lists is to be performed. So it
7 goes to show what the agreements of the parties,
8 and Mr. Simonton was a part of that, and he can
9 testify personally about him being involved with
10 meetings with people, how was the punch -- what
11 was the agreement on how the punch list was to be
12 done.

13 THE COURT: All right. Lay a
14 little more foundation for that and then we'll
15 get into it.

16 MR. HILDEBRAND: All right, sir.

17 MR. HILDEBRAND:

18 Q. Were you involved with meetings relative
19 to punch list items and how punch lists would be
20 -- how punch list inspections were to be
21 performed?

22 A. Yes, I was in that meeting.

23 Q. You were in this very meetings?

24 A. At the Marion Square jobsite.

25 Q. Okay. And is this a written note of

1 what transpired at the meeting, is that a fair
2 statement?

3 MR. BUNDY: Objection, leading.
4 That's not what this document says.

5 THE COURT: Overruled. Go ahead.

6 MR. HILDEBRAND: All right, sir.

7 THE COURT: Have him just lay the
8 foundation for it -- basis for it. He says he
9 was in the meetings?

10 MR. HILDEBRAND: Yes, sir.

11 THE COURT: And is this a
12 compilation of what happened at the meetings?

13 THE WITNESS: Yes, sir.

14 THE COURT: All right. Have you
15 reviewed this document before?

16 THE WITNESS: Yes, sir.

17 THE COURT: And I think you were
18 copied on the letter --

19 THE WITNESS: I was copied.

20 THE COURT: -- and were you
21 somebody that they would have asked to make an
22 objection or interact if they had requested that?

23 THE WITNESS: Right. I can agree
24 or not agree.

25 THE COURT: All right. On that

1 basis, I think there's a foundation laid. He can
2 testify to it.

3 MR. HILDEBRAND: I would like to
4 introduce this, Your Honor.

5 THE COURT: All right. I'm going
6 to to allow it into evidence.

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

9 MR. HILDEBRAND:

10 Q. So on the prior page at the very bottom,
11 there's an e-mail from Nick Starcevic, again, and
12 you're copied, referencing GR punch list; do you
13 see that?

14 A. Yes.

15 Q. And there are notes about -- it says,
16 see our attached mark up punch list. We have
17 highlighted items that are not in our scope.
18 Some general notes below, DOT, DOT, DOT. It
19 says, a flashlight cannot be used for punch.
20 What does that mean?

21 A. Use a flashlight on a wall and show
22 holidays, and it doesn't give a representation on
23 a flashing on the wall. It gives a flash. In
24 the industry, you don't punch with a flashlight.

25 Q. It's highlights imperfections?

1 A. Yeah. You use natural light or you just
2 artificial light to punch a room.

3 Q. Okay. Where it says JF, okay, whose
4 initials are those?

5 A. Jennifer Faulkinberry.

6 Q. And what does okay mean?

7 A. Okay. To that sense.

8 Q. Okay. Below that it says, the standard
9 distance to punch is 5 feet off the finished
10 surface. This goes for tile, drywall, wall
11 coverings, caulk, etcetera, closer than 5 feet in
12 bathroom areas; is that correct?

13 A. Yes, that's correct.

14 Q. Okay. So there's a -- it's allowable to
15 observe or identify a deficiency less than 5 feet
16 in bathrooms; is that right?

17 A. Yes, sir.

18 Q. And why was that?

19 A. Because the bathroom is a lot smaller.
20 You can't back up 5 feet from the shower.

21 Q. Down below that number 6, sheetrock at
22 the ceiling is an L4 finish and installed on hat
23 channel. The mock up rooms exceed this standard
24 and so we are not addressing the flashing that is
25 typical of an L4 finish without an approached

1 change order. First off, what is an L4 finish?

2 A. An L4 finish is the five different
3 standards of finish L1, 2, 3, 4. 04 is basically
4 four coatings on the seams and on the nails and
5 you spread it out on each one and you sand it.

6 Q. Okay. What is the next higher level?

7 A. Level five is one step above level four.
8 It's 5 and you can coat the whole sheet of
9 sheetrock and tape them.

10 Q. Okay. All right. What was the
11 understanding that was reached at this meeting
12 that you attended relative to what the finishes
13 were -- what standard that they were to meet in
14 the guest room?

15 MR. BUNDY: Objection. Even
16 though it's in evidence, he can't deviate from
17 what the document says. He understood -- the
18 best evidence was with the understanding is
19 understood, don't think it will be a problem once
20 window treatments are installed. That's the
21 understanding in the document.

22 MR. HILDEBRAND: That's not we're
23 back to. I think 43 --

24 THE COURT: Speaking objection.

25 MR. HILDEBRAND: Long speaking

1 objections.

2 THE COURT: So restate the
3 question. I'm sorry.

4 THE COURT: What was your
5 understanding that was reached.

6 MR. HILDEBRAND:

7 Q. What was your understanding as to what
8 the level of finishes was to be in the guest
9 rooms?

10 A. Level 4 finish.

11 Q. Okay. All right. Let's turn to Exhibit
12 138, please. Are you with me?

13 A. Yes, sir.

14 Q. All right. Can you -- this is an owner
15 architect notification log August 2018. Were you
16 on the job at this time?

17 A. Yes, sir.

18 Q. Were you -- are you familiar with
19 this --

20 A. Yes, sir.

21 Q. -- delay notification log?

22 A. Yes, sir.

23 Q. How was this generated?

24 A. We would generate this and it would go
25 in the owner's monthly report.

1 Q. All right. Okay. So was this list
2 discussed at OA/C meetings?

3 A. I don't recall ever going through it in
4 OA/C meeting that I attended.

5 Q. I'm sorry?

6 A. We did not go through it in the OA/C
7 meetings that I was at.

8 Q. Okay. Who was provided this list?

9 A. Jim Clements, the owner, the architect.
10 We get the monthly report, the bank would get the
11 the monthly report.

12 Q. Okay. You need to speak up a little
13 bit.

14 A. The owner, the bank, Metlife, or the
15 bank's representative.

16 Q. Okay.

17 A. Steve, Jim Clements, and Jennifer
18 Faulkinberry.

19 MR. HILDEBRAND: Okay. I'd like to
20 move this into evidence, Your Honor, as --

21 MR. BUNDY: Objection. The witness
22 testified --

23 MR. HILDEBRAND: -- 138.

24 MR. BUNDY: The witness testified
25 that this document was included in a monthly

1 report. This is one page out of a monthly
2 report. I object to the introduction of one page
3 out of total exhibit. There's no -- it's not --
4 it's one page -- it's a monthly reports. It's
5 got pictures in it. It's got conversations. I
6 just don't --

7 THE COURT: I'm with you.

8 MR. BUNDY: I don't don't
9 understand. I object.

10 THE COURT: Do you got any further
11 foundation? I think he said he was working
12 there, but did he produce, did he create this,
13 who would have done that?

14 MR. HILDEBRAND:

15 Q. Are you personally familiar with this
16 document?

17 A. Yes.

18 Q. Are you personally familiar how it's
19 generated?

20 A. Yes.

21 Q. Are you personally familiar with
22 providing this to Jim Clements and the bank
23 representative like you've --

24 A. Yes.

25 Q. -- indicated?

1 A. Yes.

2 Q. And are you familiar with the items that
3 are noted in the delay notification log?

4 A. Yes.

5 MR. HILDEBRAND: All right.

6 THE COURT: And then you testified,
7 it's included in what would be a monthly log of
8 whatever is going on?

9 THE WITNESS: Yes, Your Honor, it's
10 a monthly report.

11 THE COURT: Okay. All right. And
12 when you met and had these monthly meetings, you
13 had go through some of the things in the report
14 but not everything; is that right?

15 THE WITNESS: I don't recall going
16 through it, no, sir, Your Honor. They were
17 provided the report.

18 THE COURT: Okay. And the report
19 went to the owner's rep and the architect's rep?

20 THE WITNESS: Owner.

21 THE COURT: And y'all generated it?

22 THE WITNESS: Yes.

23 THE COURT: I will allow it.

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

1 MR. HILDEBRAND:

2 Q. What was the purpose for providing this
3 delay notification log to the owner?

4 A. Subcontractor requirement to notify the
5 delays.

6 (PLF. EXH. 138 was marked for
7 identification and received in evidence.)

8 MR. HILDEBRAND: So that has been
9 marked as -- admitted as Plaintiff's Exhibit 138?

10 THE COURT: Yes.

11 MR. HILDEBRAND: All right.

12 (PLF. EXH. 141 was marked for
13 identification.)

14 MR. HILDEBRAND:

15 Q. All right. Let's turn to tab 141,
16 please. All right. This document is dated a
17 month later, October 2018. So this is right at
18 the very end of the project, correct?

19 A. Yes, sir.

20 Q. This one is sideways. The other one was
21 top to bottom. Can you tell the Judge why that
22 happened?

23 A. So I noticed from the previous month and
24 I went into this month and thought it would print
25 it out, and it had cut off some of the -- Of the

1 words on the right-hand column. So I wanted to
2 make sure that the whole thing printed out, Your
3 Honor.

4 Q. All right. Did you actually generate
5 this document?

6 A. This one I did, yes, sir.

7 MR. HILDEBRAND: I would like to
8 move this in evidence, Your Honor?

9 MR. BUNDY: He's testified he
10 generated the first page. I object to it based
11 on my previous objections, but this tab
12 contains -- I don't know another hundred pages
13 that's he's not testified to that I don't know
14 anything about. So I object to putting in
15 documents that have no foundation at all, no
16 testimony from the witness.

17 MR. HILDEBRAND: My apologies. I
18 thought these could be easily admitted based on
19 the prior testimony. Let's go do that.

20 BY MR. HILDEBRAND:

21 Q. Okay. So with this delay modification
22 log, there are other documents that are attached
23 to that. Do you see that?

24 A. Yes.

25 Q. Were those, to your knowledge, provided

1 with attached to the delay notification log?

2 A. I don't recall.

3 Q. Okay. Are are -- okay. Fair enough.

4 MR. HILDEBRAND: I will just move
5 at this point, Your Honor, to introduce the first
6 page of this document?

7 MR. BUNDY: And I would move at
8 this point to remove every single sheet of paper
9 behind the first page under tab, whatever the tab
10 number is, tab number 141, so to avoid any
11 confusion in the record.

12 MR. HILDEBRAND: Your Honor, this
13 is another of Jim Clements that he identified in
14 his deposition. So I think if you will read his
15 deposition.

16 THE COURT: For the record, I'm
17 going to allow tab 141 into evidence, but for
18 now, only take one page of that document comes
19 in.

20 (PLF. EXH. 141 was received in
21 evidence.)

22 MR. BUNDY: For the record,
23 contrary to what you just heard, it is not
24 identified in Clements -- all these documents are
25 not identified as an exhibit in Jim Clements'

1 deposition.

2 THE COURT: No. Mr. Simonton
3 identified this one.

4 MR. BUNDY: This one page?

5 THE COURT: Yeah.

6 MR. BUNDY: He said he could not --

7 THE COURT: And I didn't let
8 anything but the first page in.

9 MR. BUNDY: Well, okay. So I made
10 a motion these need to come out of his tab.

11 THE COURT: And I'm going to do
12 that.

13 MR. BUNDY: Well, how are we going
14 to keep up with the exhibits?

15 THE COURT: Because the record just
16 says what exactly I just said. Page 1 came in.
17 The rest of it did not.

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

20 THE COURT: All right.

21 MR. BUNDY: Sometimes I
22 misunderstand you.

23 THE COURT: Sometimes we have
24 communications problems.

25 BY MR. HILDEBRAND:

1 Q. Let me ask you this, are the actual
2 delay notices, can you correlate the documents
3 behind the first page, each one of these delay
4 notices, are the documents that are behind it do
5 they correlate to the delay notifications on the
6 front page?

7 MR. BUNDY: Objection, leading.

8 THE COURT: He is leading, but I'm
9 going to allow it. Go ahead.

10 MR. BUNDY: But he also just said
11 he couldn't -- he also said he couldn't testify.

12 THE COURT: He said he couldn't
13 identify. It sort of blew my mind too.

14 THE WITNESS: The first document is
15 set, sheet pile, delay, time, extension, which is
16 number 1 on the list.

17 MR. HILDEBRAND:

18 Q. Okay. So if we -- each one of these
19 documents that followed the cover sheet
20 correlate, are the actual delay notice of letters
21 that are reflected on that top page; is that
22 correct?

23 A. Yes. Yes.

24 Q. All right.

25 MR. BUNDY: Was the answer yes?

1 THE WITNESS: Yes.

2 MR. BUNDY: My objection, lack of
3 foundation.

4 (PLF. EXH. 143 was marked for
5 identification.)

6 MR. HILDEBRAND:

7 Q. Let's turn to tab 143, please. Are you
8 with me?

9 A. Yes.

10 Q. All right. This is a letter to Jim
11 Clements, notification of delays, and on the
12 second page, you signed it, correct?

13 A. Yes, sir.

14 Q. All right.

15 A. Let me make sure, yes.

16 Q. So you drafted this letter?

17 A. Yes.

18 Q. And sent it to Jim Clements?

19 A. Yes, sir.

20 MR. HILDEBRAND: I would like to
21 admit this, Your Honor, as --

22 MR. BUNDY: No objection.

23 THE COURT: In evidence.

24 (PLF. EXH. 143 was received in
25 evidence.)

1 MR. HILDEBRAND:

2 Q. And it's dated October 30, 2018, we are
3 writing this notice of construction delay to
4 advise you of time and cost impact to the project
5 that will ultimately affect the construction
6 teams ability to deliver the project to Library
7 Associates. Did I read that correctly?

8 A. Yes, sir.

9 Q. All right. And then below you listed
10 items that your identifying to the owner that are
11 causing delays, right?

12 A. Yes, sir.

13 Q. All right. Let's turn to Exhibit 146.

14 MR. BUNDY: 146?

15 THE COURT: 146.

16 (PLF. EXH. 146 was marked for
17 identification.)

18 MR. HILDEBRAND:

19 Q. All right. This is a letter to Jim
20 Clements from yourself, correct?

21 A. Yes.

22 Q. Dated November 2, 2018. And the ray is
23 MSH owner direct contractor damage to building?

24 A. Yes.

25 Q. And you've wrote this letter?

1 A. Yes.

2 MR. HILDEBRAND: I would like to
3 admit this, Your Honor.

4 THE COURT: All right. In
5 evidence, 146.

6 (PLF. EXH. 146 was received in
7 evidence.)

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

10 MR. HILDEBRAND:

11 Q. Without reading the letter, can you tell
12 me what the problem was here, what you were
13 advising the owner of?

14 A. The owner had a separate subcontractor
15 in there installing the TV, the phone systems,
16 and we were getting damage to the building. We
17 had punched it out and completed.

18 And they were going in without -- nobody
19 was supervising them from the owner's side, they
20 were owner directed contractors. So the subs
21 were calling us out, so I went and investigated
22 and found all this material scattered everywhere
23 and the TV pulled off.

24 Q. Okay. You said, how often was Jim
25 Clements on site?

1 A. Towards the end, I believe once a week.

2 Q. Okay. When -- how often would the owner
3 have its own personnel on site performing work in
4 the last year on average?

5 A. Every day.

6 Q. Okay. So when Jim Clements wasn't
7 there, who was overseeing the owner's forest --
8 retract that -- for fire benefit, if anybody?

9 A. Nobody.

10 Q. Was somebody supposed to be doing that
11 for the owner?

12 A. Normally they do, yes, sir.

13 Q. Do you know if that's required in the
14 contract?

15 A. They have to manage their own
16 subcontractor?

17 Q. Yes, sir.

18 A. Yes.

19 (PLF. EXH. 150 was marked for
20 identification.)

21 Q. All right. Let's turn to 151. I'm
22 sorry. I misspoke. Actually 150, if you would
23 please.

24 A. Okay.

25 Q. All right. So this is a letter -- an

1 e-mail that where -- that you had sent to Jim
2 Clements and Kim Brown and others regarding
3 substantial completion second request 11/17 of
4 2018; is that correct?

5 A. Yes.

6 Q. All right. So you have personal
7 knowledge of this e-mail?

8 A. Yes.

9 Q. Attached to the e-mail three pages back
10 is a letter from you to Jim Clements dated
11 November 12, 2018. Do you see that?

12 A. Yes, sir.

13 Q. And in red, it says -- and November 17,
14 2018; is that correct?

15 A. Yes.

16 Q. All right. So you -- is it true that
17 you wrote the e-mail and the letter that's
18 attached to it?

19 A. Yes.

20 Q. All right, sir.

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

23 MR. BUNDY: No objection.

24 THE COURT: In evidence.

25 (PLF. EXH. 150 was received in

1 evidence.)

2 BY MR. HILDEBRAND:

3 Q. All right. So explain to the Judge what
4 the issue was here and what you are requesting
5 from the owner.

6 A. Your Honor, we were requesting
7 substantial completion, which is a major
8 milestone in this project, substantial complete,
9 then start kicking in and the owner can start
10 using for its purposes.

11 THE COURT: Pardon me, what did you
12 just say? I didn't hear you.

13 THE WITNESS: The owner can start
14 using it for its purpose. Going through contract
15 documents, there are certain steps in the
16 contract that we have to achieve in order to get
17 that substantial completion. So we were sending
18 over our request for that substantial completion.

19 BY MR. HILDEBRAND:

20 Q. Do you know why it was not granted at
21 that time?

22 A. No.

23 Q. Okay. All right.

24 MR. HILDEBRAND: I'd like to move
25 that --

1 THE COURT: 150.

2 (PLF. EXH. 151 was marked for
3 identification.)

4 BY MR. HILDEBRAND:

5 Q. All right. Let's turn to 151. This is
6 an e-mail to Jim Clements from yourself dated
7 November 27, 2018. Do you see that?

8 A. Yes.

9 Q. All right.

10 MR. HILDEBRAND: I would like to
11 introduce this as Plaintiff's No. 151, Your
12 Honor.

13 THE COURT: 151.

14 BY MR. HILDEBRAND:

15 Q. All right. Under -- below that, there's
16 an e-mail November 27, 2018 from Jim Clements
17 where it says Jennifer and Dave. And Dave is
18 yourself?

19 A. Yes. He called me Dave.

20 Q. Okay. Confirming our discussion,
21 Jennifer will issue a certificate of substantial
22 completion for guest rooms only in attached rays
23 of punch list. This includes FFE items such as
24 drapes and LMI light switches, and as well as a
25 few BBC items. Jennifer will do her -- what she

1 can to grant the certificate today, if not in the
2 morning.

3 What was the -- what was the issue
4 there? What were you confirming? What was being
5 confirmed?

6 A. I'm confirming that in order to -- so
7 they -- the architect did a punch list, signed it
8 off, we sent it in, the architect signed it off,
9 and they were going to issue a substantial
10 completion for the guest rooms where the owner
11 could take them over and finish whatever they
12 needed to do inside, lock them down.

13 I do a substantial completion, basically
14 it becomes the owner of the hotels rooms. We
15 don't have keys or access to them. So at G704
16 list those rooms that were sent.

17 Q. Okay. So let me understanding this.
18 Can you have substantial completion of a part of
19 the building and not the entire building?

20 A. Yes, sir.

21 Q. All right. And here what Balfour was
22 trying to do was get substantial completion of
23 the guest rooms, correct?

24 A. Yes.

25 Q. And were you present when the architect

1 said that she was going to issue a certificate of
2 substantial --

3 A. Yes.

4 Q. -- substantial completion for all the
5 guest rooms?

6 A. Yes.

7 Q. All right. And do you know -- so that
8 would indicate that the guest rooms were ready
9 for occupancy or used by the owner, correct?

10 A. Yes.

11 Q. And then y'all would be locked out of
12 them?

13 A. Yes. We would have to go to the hotel
14 to get into them.

15 Q. Okay. Was that substantial -- was that
16 substantial completion for the guest rooms ever
17 issued?

18 A. In February.

19 Q. Do you know why it was not issued in
20 November?

21 A. No, sir.

22 MR. HILDEBRAND: Did I introduce
23 this one?

24 THE COURT: I'm not sure you did.
25 No, not yet.

1 MR. HILDEBRAND: Okay. I would
2 like to, Your Honor.

3 THE COURT: 151, in evidence.

4 (PLF. EXH. 151 was received in
5 evidence.)

6 (PLF. EXH. 154 was marked for
7 identification.)

8 MR. HILDEBRAND:

9 Q. All right. The next document, let's
10 turn to 154, please, tab 154.

11 A. Okay. I'm there.

12 Q. All right. This is a letter from
13 yourself to Jim Clements?

14 A. Yes.

15 Q. All right. MSH, BBC response to
16 additional third party hotel room inspection
17 slash punch. All right. You wrote this letter?

18 A. Yes.

19 MR. HILDEBRAND: I would like to
20 introduce this, Your Honor?

21 MR. BUNDY: No objection to the
22 letter. There's a bunch of stuff behind it. I
23 presume it is not being offered into evidence at
24 this time?

25 THE COURT: No objection to the

1 letter.

2 MR. BUNDY: No objection to the
3 letter. Object to everything behind it.

4 MR. HILDEBRAND: All right.

5 BY MR. HILDEBRAND:

6 Q. All right. So give me a synopsis of the
7 reason that you drafted this letter. Let me do
8 this, let's turn to the third paragraph. The
9 rooms have been punched no less than four times
10 by the subcontractors BBC, Salamander, and the
11 architect of record.

12 Per the contract, the architect of
13 record has issued a completion list in which BBC
14 has executed and had our eight architect of
15 record sign off all items as complete, meeting
16 the intent of the contract documents, as well as
17 meeting the intended use of the building.

18 Punch list expectations and requirements
19 were established by all parties via meeting
20 attended by yourself, owner, operator, and BBC on
21 January 24, 2018. At that time all parties
22 walked the agreed upon model units, 309 and 311,
23 and set the levels of quality expectations that
24 all parties agreed to and the architect created a
25 punch list for these rooms that was completed.

1 It was also agreed that the owner's
2 consultant architect operator would work together
3 to create one punch list. An e-mail on March 21,
4 2018 agreed on what was acceptable and how the
5 punch process would proceed going forward, see
6 attached correspondence on meeting, as well as as
7 original punch list.

8 Can you describe to us what the problem
9 here and what was the reason for created this
10 punch?

11 A. The owner after walking in a few rooms
12 wanted to bring in a third party to do another
13 inspection of the rooms, a contractor --

14 Q. Speak up, please.

15 A. The owner wanted to bring in a third
16 party, which was another contractor, to inspect
17 the rooms.

18 Q. All right. And what understanding, if
19 any, did you have as to whether the rooms were
20 acceptable to the architect of record?

21 A. They were acceptable because we did our
22 punch list. We signed off on the punch list. We
23 did our remaining punch list and we finished that
24 punch list and then we're done with the rooms.

25 Q. And the architect signed off on your

1 punch list?

2 A. Yes.

3 Q. Do you know what's required per the
4 contract document?

5 A. The architect punch the rooms and
6 provide a punch list. We provide a punch list
7 first, and then they provide a punch list, they
8 can after.

9 After an agreement with the owner, they
10 would sign off it on that punch list, and the
11 Salamander provided another punch list. So the
12 same architect signed off on Salamander punch
13 list.

14 So we've got two punch lists. So we had
15 done two written punch lists by the architect and
16 by the operator. And they were done. Now, they
17 were going to bring in a third punch, and we were
18 completed with those rooms. We completed them
19 and ready to turn them over.

20 Q. All right, sir. When it says there were
21 agreed upon model rooms 309 and 311. What does
22 that mean? Can you describe for the Judge what
23 that --

24 A. There were two rooms that were built,
25 that were inspected early on, the letter of the

1 criteria that I described earlier. There were
2 two rooms we built, king and queen, next door to
3 each other, had everything set up in them, then
4 we put in furniture, and those were punched.

5 We worked out those punch lists and then
6 made agreements on what was going to go in the
7 rooms. Everybody agreed that's the way we were
8 going to build them and we built 177 more rooms
9 just like them. Basically we finished it, the
10 paint and caulk and everything else.

11 And then once we had them ready by
12 floor, they came and they punched floor three,
13 four -- five, then four, then six, seven and
14 eight. They provided us a punch list and we
15 immediately started working them off, and the
16 operator went out with their people and started
17 punching the orders.

18 Q. In the last paragraph I read, it says,
19 see attached correspondence on meeting as well as
20 original punch list. Were the e-mails that are
21 attached to this attached to your original
22 letter?

23 A. Yes. The criteria of the punching
24 order, I would attach it to.

25 MR. HILDEBRAND: So I would like to

1 move this in its entirety, Your Honor.

2 MR. BUNDY: I object to the
3 attachments, hearsay.

4 THE COURT: All right. I will
5 allow it, 154.

6 (PLF. EXH. 154 was received in
7 evidence.)

8 BY MR. HILDEBRAND:

9 Q. All right. 155. The e-mail, second
10 e-mail down, said it's from Jim Clements to
11 yourself, subject door issues. Do you see that?

12 A. Yes.

13 Q. December 13, 2018?

14 A. Yes.

15 Q. All right. And so obviously this was to
16 you from Jim Clements?

17 A. Yes.

18 Q. And do you have personal knowledge of
19 it?

20 A. Yes.

21 MR. HILDEBRAND: And I would like
22 to introduce this as Plaintiff's 155, Your Honor.

23 THE COURT: Okay. Without
24 objection. In evidence. All right.

25 MR. HILDEBRAND: Thank you.

1 MR. HILDEBRAND:

2 Q. It says from Jim Clements. Dave, thanks
3 for your follow-up. Buck will be here Tuesday,
4 walk it off with him. He is the authority you
5 need to convince. Neither of us have a role in
6 his objective and final decision. Buck is here
7 to assess BBC overall completion status as well.

8 Do you know what he was referring to
9 when he says, he is the one you need to convince?

10 A. He is the architect of record that's
11 what WLA -- he is Jennifer's boss.

12 Q. Okay. Were the doors -- were there
13 doors that were the subject of a punch list
14 dispute or what was the nature of the issue here?

15 A. Doors and walls that after we had
16 punched it, the client said he didn't like the
17 finish.

18 Q. Okay. So this is a confirmation of your
19 understanding from the owner's representative
20 that the architect of the record has the final
21 say on the punch list?

22 A. Yes, sir.

23 MR. BUNDY: Did you already put 155
24 in?

25 THE COURT: Yeah.

1 MR. HILDEBRAND: Yeah, we did.

2 MR. BUNDY: No objection.

3 (PLF. EXH. 159 was marked for
4 identification.)

5 BY MR. HILDEBRAND:

6 Q. All right. Let's turn to exhibit or tab
7 159, please.

8 A. I'm there, sir.

9 Q. All right. Are you with me?

10 A. Yes, sir.

11 Q. What is this document? It's dated
12 January 2, 2019 table summary; what is this?

13 A. This is a table summary of the CCD,
14 which is construction change directive. The
15 contract allows the owner to issue a construction
16 change directive, architect issues this and the
17 owner signs it, and we go do the work. And it's
18 basically time and material basis.

19 And I believe there was 45, 46 issued on
20 this project while I was there. So we track it,
21 and then each month we were bill it in an owner
22 change order, tracking the values. So we're
23 tracking the values and we're also separating out
24 BBC's cost, and all that back up and signed
25 tickets are provided in the plan, or in the owner

1 change order, I'm sorry.

2 Q. Do you have personal knowledge of this
3 document?

4 A. Yes.

5 Q. Is this part of the business records of
6 Balfour Beatty?

7 A. Yes.

8 Q. And it's created contemporaneous with
9 the data that is reflected in it?

10 A. Yes.

11 MR. HILDEBRAND: All right. I
12 would like to admit this, Your Honor, as 159.

13 MR. BUNDY: Objection. We're on
14 106, South Carolina Rules of Evidence require
15 that the underlying data be in evidence. Note,
16 that evidence that underlies this data, it's not
17 in evidence.

18 THE COURT: All right. It's a
19 compilation of what's been done?

20 MR. HILDEBRAND: Right.

21 THE COURT: Do we have the
22 underlying data?

23 MR. HILDEBRAND: Yes, sir. It's
24 been provided. They've got all this.

25 THE COURT: Okay.

1 MR. HILDEBRAND: And that's the
2 whole reason they have a compilation so that you
3 don't have to bring in everything, just like the
4 other summaries that he already admitted that
5 he's had the same objection about. As long as
6 the underlying data is available and they have
7 all these construction -- they issued them to us.

8 THE COURT: Okay.

9 MR. HILDEBRAND: It's a --

10 MR. BUNDY: I don't know what the
11 purpose of the rule is, I just know what the rule
12 says. The rule says, it has to be admitted into
13 evidence.

14 MR. HILDEBRAND: It does not.

15 THE COURT: Let me look and go look
16 at the rule. Underlying data are admissible into
17 evidence. We've covered this before.

18 (Inaudible) shall be made available for
19 examination. The court may order them to be
20 produced.

21 I would allow the exhibit as it is with
22 the assumption that it has been provided, and if
23 it's not, I'm sure I will be hearing about it on
24 cross.

25 MR. HILDEBRAND: Thank you, Your

1 Honor.

2 (PLF. EXH. 159 was received in
3 evidence.)

4 (PLF. EXH. 201 was marked for
5 identification.)

6 BY MR. HILDEBRAND:

7 Q. All right. Let's turn to -- never mind.
8 Let's turn to Exhibit 201.

9 MR. HILDEBRAND: Your Honor, I've
10 still got a little ways to go. I'm happy to go
11 as long as you want to.

12 THE COURT: It's 5:30. I was going
13 to go it until 6, if you'd like.

14 MR. HILDEBRAND: Sure. I'm fine
15 with that.

16 THE COURT: We started late. I'm
17 just trying to press on.

18 BY MR. HILDEBRAND:

19 Q. All right. We will move on. So turn to
20 Exhibit 201.

21 A. I'm there.

22 Q. You've got 201? This is a notice and
23 certificate of amended mechanic's lien at the
24 bottom for the amount of \$12,066,147.09. Are you
25 familiar with this document?

1 A. Yes.

2 Q. All right. Did you review it before it
3 was filed?

4 A. Yes.

5 Q. And I think that Exhibit B statement of
6 accounts is -- contains your signature the fifth
7 page in?

8 A. Yes.

9 Q. All right.

10 MR. HILDEBRAND: I would like to
11 introduce this as our next exhibit, Your Honor.

12 MR. BUNDY: No objection.

13 THE COURT: Without objection.
14 Into evidence.

15 (PLF. EXH. 201 was received in
16 evidence.)

17 MR. HILDEBRAND: Your Honor, the
18 next document I wanted to introduce though this
19 individual, it's filed with the Court --
20 electrically filed August 17th, affidavit of
21 service of the mechanic lien on Kim Brown. So I
22 would like to mark this as our next exhibit.

23 MR. BUNDY: Which number is it
24 again?

25 MR. HILDEBRAND: 202.

1 THE COURT: It's affidavit of
2 service?

3 MR. HILDEBRAND: Yes, sir.

4 MR. BUNDY: I don't have any
5 objection.

6 THE COURT: All right. In
7 evidence.

8 MR. HILDEBRAND: All right.

9 (PLF. EXH. 202 was marked for
10 identification and received in evidence.)

11 (PLF. EXH. 204 was marked for
12 identification.)

13 BY MR. HILDEBRAND:

14 Q. Turn to exhibit attachment tab 204,
15 please. Are you with me?

16 A. I'm with you.

17 Q. All right. What is this document?

18 A. This is a total account of the documents
19 for the project, the RFIs and OCOs.

20 Q. So it shows 1,224 RFIs. Did you count
21 the number of RFIs?

22 A. Yes. In the previous log we reviewed,
23 yes, 1,224 RFIs.

24 Q. Okay. 22 owner change orders; is that
25 correct?

1 A. Yes.

2 Q. 279 RCOs; is that correct?

3 A. Request for -- yes.

4 Q. Request for change orders?

5 A. Yes.

6 Q. 46 construction change directives; is
7 that number correct?

8 A. Yes.

9 Q. 81 SI's?

10 A. Yes.

11 Q. 8 mocks; is that number correct?

12 A. Yes.

13 Q. 8 revisions to the model room plan; is
14 that correct?

15 A. Yes.

16 Q. Total drawings impacted 2,023; is that
17 correct?

18 A. Yes.

19 Q. Okay. So is this a summary of the data
20 that it reflects?

21 A. Yes.

22 Q. Did you prepare this document?

23 A. Yes.

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

1 MR. BUNDY: Objection, relevance.

2 THE COURT: I will allow it. 204?

3 MR. HILDEBRAND: Yes, sir.

4 (PLF. EXH. 204 was received in
5 evidence.)

6 (PLF. EXH. 209 was marked for
7 identification.)

8 MR. HILDEBRAND:

9 Q. All right. Let's turn to Exhibit 209.
10 Are you with me?

11 A. Yes, I'm with you.

12 Q. All right. This document is a -- who --
13 are you familiar with this document?

14 A. Yes.

15 Q. All right. And what does this show?

16 A. This is a joint defense agreement, the
17 party -- basically is a matrix of subcontractors,
18 when it was signed, when Balfour signed it, and
19 then the date the sub withdrew, and their
20 attorney's names.

21 Q. Okay. And have you reviewed the tabs
22 behind this one through 10?

23 A. Yes.

24 Q. So it's 209, and then you have 209.1
25 through 209.10. And do those documents

1 accurately --

2 A. Yes.

3 Q. -- reflect, to your knowledge, the data
4 in the summary chart?

5 A. Yes.

6 Q. Okay. Did you -- what involvement, if
7 any, did you have with the joint defense
8 agreement?

9 A. I hosted the joint defense agreement by
10 our inhouse counsel, and then I distributed to
11 the subcontractors.

12 Q. Okay. And what was your understanding
13 of what the joint defense agreement did?

14 MR. BUNDY: Objection.

15 THE COURT: Do you need him to
16 testify to that?

17 MR. HILDEBRAND: I'm sorry?

18 THE COURT: Do you need him to
19 testify to that?

20 MR. HILDEBRAND: No.

21 THE COURT: He wasn't involved with
22 the preparation of it, I wouldn't think.

23 MR. HILDEBRAND: All right. I
24 would like to move the compilation and the tabs 1
25 through 10 into evidence.

1 MR. BUNDY: No objection.

2 THE COURT: Without objection. All
3 right. Very good.

4 (PLF. EXH. 209 was received in
5 evidence.)

6 MR. HILDEBRAND:

7 Q. Do you have a binder five of five up
8 there, Mr. Simonton? Do you have that?

9 A. I have it.

10 Q. Okay. All right. This is binder five
11 of five, is a compilation of 22 owner change
12 orders?

13 A. Yes.

14 Q. All right. It start with one and goes
15 through 22?

16 MR. BUNDY: Your Honor, it might be
17 helpful if we could take five minutes to look
18 this book. It's a thick book. It won't take
19 five minutes. I don't want to end today,
20 probably could save us 10 minutes.

21 THE COURT: Okay. Just to review
22 it. All right. We will take a little break.

23 (A recess transpired.)

24 MR. BUNDY: Here are my objections.
25 Number one, presumably, Mr. Hildebrand's

1 objective is to move the entire book into
2 evidence.

3 THE COURT: Is that true?

4 MR. HILDEBRAND: Yeah, Your Honor.

5 MR. BUNDY: Okay. Here are my
6 objections. Number one, it was not signed and
7 was not in the form of a change order.

8 Number 3 is not signed. Number 4 is not
9 signed. Number 14 not signed and no back up.
10 Number 15 there's no back up. Number 17 there's
11 no back. And number 18 through 22, not signed.

12 Any change orders in this book that I
13 did not reference by number are without
14 objection. So it's 1, 3, 4, 14, 15, 17, 18
15 through 22 for the reasons stated. Thank you,
16 Your Honor.

17 THE COURT: Lack of signatures on
18 1, the backups were only 14, 15 and 17 is what
19 I'm seeing; is that right?

20 MR. BUNDY: No back up for 15,
21 number 17 and --

22 THE COURT: 14?

23 MR. BUNDY: The not signed ones
24 are --

25 THE COURT: Was 14 have back up?

1 MR. BUNDY: 14 was not signed and
2 no back up.

3 THE COURT: And no back up?

4 MR. BUNDY: Right. Let me just
5 give this to you. That way we won't have any --

6 MR. HILDEBRAND: What is that?

7 THE COURT: This is just his list.
8 And if you didn't get a chance to write it down,
9 I did.

10 MR. HILDEBRAND: Okay.

11 THE COURT: You have to make the
12 foundation on those.

13 MR. HILDEBRAND: I will come back
14 to that one.

15 BY MR. HILDEBRAND:

16 Q. Okay. So let's turn to 283 to 293.

17 MR. BUNDY: 283 to 293?

18 THE COURT: Is that --

19 MR. HILDEBRAND: It's 283 to 293.

20 BY MR. HILDEBRAND:

21 Q. All right. Mr. Simonton, I would like
22 to refer you to Exhibit 288, please.

23 A. I am there.

24 (PLF. EXH. 289 was marked for
25 identification.)

1 Q. Actually let's go to 289, if you would.

2 A. I'm there.

3 Q. All right. This is pay app 42?

4 A. Yes.

5 Q. Are you familiar with this document?

6 A. Yes.

7 Q. Do you have personal familiarity with
8 it?

9 A. Yes.

10 Q. Did you have input into its preparation?

11 A. Yes.

12 Q. Is it part of business records of
13 Balfour Beatty Company?

14 A. Yes.

15 MR. HILDEBRAND: I would like to
16 move this in, Your Honor.

17 THE COURT: 289?

18 MR. HILDEBRAND: Yeah. I think
19 there's the cover sheet that was previously
20 marked.

21 THE COURT: 278. I'll check to see
22 if it's already in.

23 MR. BUNDY: It's represented to be
24 the complete tab?

25 MR. HILDEBRAND: Right.

1 MR. BUNDY: No objection.

2 THE COURT: Without objection.

3 (PLF. EXH. 289 was received in
4 evidence.)

5 (PLF. EXH. 290 was marked for
6 identification and received in evidence.)

7 MR. HILDEBRAND: If we could do the
8 same for 290, it's pay app 43.

9 MR. BUNDY: Same representation, no
10 objection.

11 THE COURT: Okay.

12 MR. HILDEBRAND: And 291 is 44, and
13 I will state that there's not a signed one. We
14 don't have a signed copy of that.

15 MR. BUNDY: So you're submitting an
16 unsigned tab?

17 MR. HILDEBRAND: Right.

18 MR. BUNDY: It's not signed by
19 anybody?

20 MR. HILDEBRAND: Right. We cannot
21 locate the signed tab.

22 MR. BUNDY: I'm going to have to
23 object to that one.

24 THE COURT: Was that 291 was the
25 one you were just offering?

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: Objection was made
3 because it was unsigned?

4 MR. BUNDY: Yes, sir. It was not
5 signed by anybody.

6 (PLF. EXH. 291 was marked for
7 identification and received as a proffer.)

8 BY MR. HILDEBRAND:

9 Q. How about Exhibit 291, Mr. Simonton.

10 A. Yes. I've seen this pay paper.

11 Q. All right. Do you know why it was not
12 signed?

13 A. They have turned pay app 43. No, sir.
14 I don't know. I do not know why it's not signed.

15 (PLF. EXH. 292 was marked for
16 identification.)

17 Q. All right. How about Exhibit 292? Can
18 you identify that? It's a pay app 45 and it is
19 signed, right?

20 A. Yes, it is signed.

21 MR. HILDEBRAND: All right.

22 MR. BUNDY: No objection.

23 MR. HILDEBRAND: So that one's in.

24 THE COURT: 292?

25 MR. HILDEBRAND: Yes, sir.

1 (PLF. EXH. 292 was received in
2 evidence.)

3 MR. HILDEBRAND: All right. So I'm
4 about to move into the last area, but I think
5 it's probably going to take maybe an hour.

6 THE COURT: Okay. All right.

7 MR. HILDEBRAND: It would be a good
8 time to break.

9 THE COURT: Yeah, I would say so.
10 Let's break for today. We can shoot for 9 a.m.
11 again. I don't know. It started to clear and
12 there's supposed to be rain tomorrow because
13 there's a cool front coming through. If we're
14 lucky, that will happen tonight. Let's just say
15 9:30 tomorrow just to be safe.

16 MR. BUNDY: Could I ask that you
17 admonish the witness and also admonish whoever at
18 Balfour Beatty needs to call, the gentleman who
19 calls people, who have been admonished who
20 doesn't know they've been admonished, and let him
21 know that he's not supposed to call this witness?

22 THE COURT: All right. So
23 Mr. Simonton, you'll be under oath overnight.
24 And I would just ask that you not consult with
25 anybody and don't let anybody consult with you.

1 Come back in the morning. Come on right back
2 here at 9:30 in the morning, if you would, sir.

3 THE WITNESS: Yes, sir. I will be
4 here.

5 THE COURT: All right. Very good.
6 Y'all have a good night.

7 (The deposition was concluded at
8 5:56 P.M.)

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF DORCHESTER

4 I, Jennifer M. Adams, Certified
5 Shorthand Reporter and Notary Public for the
6 State of South Carolina at Large, do hereby
7 certify that the witness whose attached in the
8 foregoing deposition was by me duly sworn to
9 testify to the truth, the whole truth, and
10 nothing but the truth in the within-entitled
11 cause; that said deposition was taken at the time
12 and location therein stated; that the testimony
13 of the witness and all objections made at the
14 time of the examination were recorded
15 stenographically by me and were thereafter
16 transcribed by computer-aided transcription; that
17 the foregoing is a full, complete and true record
18 of the testimony of the witness and of all
19 objections made at the time of the examination;
20 and that the witness was given an opportunity to
21 read and correct said deposition and to subscribe
22 the same.

23 Should the signature of the witness
24 not be affixed to the deposition, the witness
25 shall not have availed himself/herself of the
opportunity to sign or the signature has been
waived.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal on July 30, 2022 at
Charleston, Charleston County, South Carolina

19

20

21 _____
22 Jennifer M. Adams
23 Court Reporter And Notary Public
24 My commission expires: 03/15/2032

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 EIGHT
) 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 9:30 a.m. on
 21 September 22, 2021 at 100 Broad Street, Courtroom
 22 2A, Charleston, South Carolina.

23

24

25

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

2
3 ON BEHALF OF PLAINTIFFS:

4 PARKER POE ADAMS & BERNSTEIN, LLP
5 BY: THOMAS HILDEBRAND, JR., ESQ.
6 BY: ROBERT C. BYRD, ESQ.
7 200 Meeting Street
8 Suite 301
9 Charleston, SC 29401
10 (843) 727-6315
11 Tomhildebrand@parkerpoe.com
12 Bobbybyrd@parkerpoe.com

13
14 ON BEHALF OF DEFENDANT LIBRARY ASSOCIATES:

15 BUNDY MCDONALD, LLC
16 BY: WALTER H. BUNDY, JR., ESQ.
17 BY: M. BRENT MCDONALD, ESQ.
18 1516 Old Trolley Road
19 Second Floor
20 Summerville, SC 29485
21 (843) 492-0221
22 Walter@bundymcdonald.com
23 Brent@bundymcdonald.com

24 ON BEHALF OF DEFENDANT WATSON ELECTRICAL:

25 SMITH TERRY JOHNSON & WINDLE
26 BY: DON R. TERRY, ESQ.
27 150 Milestone Way
28 Suite C
29 Greenville, SC 29615
30 Dterry@smithterrylaw.com

31 ON BEHALF OF DEFENDANT OLD NORTH STATE & LITHKO:

32 SMITH TERRY JOHNSON & WINDLE
33 BY: STEELE B. WINDLE, III, ESQ.
34 150 Milestone Way
35 Suite C
36 Greenville, SC 29615
37 Awindle@smithterrylaw.com

1

ON BEHALF OF DEFENDANT DAVID ALLEN COMPANY:

2

KELLY LAW FIRM, LLC

3

BY: RUSSELL BRITTON KELLY, ESQ.

689 King Street

4

Charleston, SC 29403

Britt@kellylawsc.com

5

6

ON BEHALF OF DEFENDANT METROPOLITAN LIFE:

7

BUIST BYARS & TAYLOR, LLC

BY: G. HAMLIN O'KELLEY, ESQ.

8

652 Coleman Boulevard

Suite 200

9

Mt. Pleasant, SC 29464

Hamlin.okelley@buistbyars.com

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 INDEX OF WITNESSES

2 PLAINTIFF'S WITNESSES

PAGE

DAVID SIMONTON

3 Direct Examination by Mr. Hildebrand

1899

Cross-Examination by Mr. Bundy

2047

4

5 Certificate

2158

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 THE COURT: Okay. Next day,
2 Wednesday, Mr. Simonton is on the stand, still
3 under oath. I had a chance to review some but
4 not all of the transcripts last night. So let me
5 just hold off on those rulings. Some came in;
6 some did not. I'll just let you know later so we
7 can take them all up at once.

8 Okay. So any matters before we start?
9 Plaintiff? Defendant?

10 MR. BUNDY: No, Your Honor.

11 THE COURT: All right. We're still
12 on direct examination of Mr. Simonton. He is
13 still under oath.

14 MR. HILDEBRAND: There is one
15 administerial thing that we can -- I can do it
16 now or I think I just need to actually mark as
17 exhibits the depositions that I -- usually I
18 would read them so they're in the record.

19 THE COURT: Right.

20 MR. HILDEBRAND: Since you're
21 reading them out of court, I guess I probably
22 need to proffer them to get them in the record.

23 THE COURT: So they've been
24 proffered to me, but they've not been marked.
25 But let's do that when we go deal with the whole

1 thing.

2 MR. HILDEBRAND: Right.

3 Absolutely.

4 THE COURT: We will have them in
5 the record and we will have an exhibit number and
6 everything else. Okay? All right. Very
7 good.

8 DIRECT EXAMINATION

9 BY MR. HILDEBRAND:

10 Q. All right. Mr. Simonton, morning.

11 A. Good morning.

12 Q. I will assume you've not had any
13 communications with anybody since yesterday
14 relative to the case?

15 A. No, sir.

16 Q. All right. Good. All right. A couple
17 of preliminary matters before we get started on
18 the next group of documents, the -- have you ever
19 testified in a lawsuit before?

20 A. No, sir.

21 Q. Have you ever been involved in a lawsuit
22 that your career was for or against Balfour
23 Beatty?

24 A. No, sir.

25 Q. Have you been involved in the matters,

1 to your recollection, where liquidated damages
2 were an issue or in dispute with -- in other past
3 projects?

4 A. No, sir.

5 Q. You can't remember one?

6 A. No, sir. Projects all closed out.

7 Q. Okay. When is the -- for RCOs, for
8 requested change orders, what is the typical time
9 that those are reconciled on a job? There are
10 some that have not been resolved during the job.
11 When does that typically take place?

12 A. We try to close out the subcontractors
13 at the end of the job. Normally we submit those
14 to the owner. The owner reviews them, the
15 architect, or whoever they need to review those
16 RCOs, and then they may send them back with some
17 comments.

18 They would get feedback from the
19 subcontractors, and then we can close them out.
20 We try to close out within 30 days, 45 days, so
21 they get in the next pay cycle.

22 Q. Okay. Do you have the marked binder? I
23 believe that's 205 or 206. Do you have that
24 binder in front of you?

25 A. Yes, sir.

1 THE WITNESS: 205.

2 MR. HILDEBRAND: 205.

3 THE WITNESS: 205.

4 MR. HILDEBRAND: 205 and 206.

5 THE COURT: Binder three?

6 MR. HILDEBRAND: Sorry. Yes, sir.

7 Binder three.

8 THE COURT: Binder three, tab 205.

9 THE WITNESS: I didn't hear you,
10 sorry about that.

11 MR. HILDEBRAND: Binder three.

12 BY MR. HILDEBRAND:

13 Q. There was an allusion to these earlier.
14 These are the first set of our -- are you there?

15 A. Yes, sir.

16 Q. Okay.

17 A. 205.

18 Q. All right. Do you recognize these
19 documents?

20 A. Yes, sir.

21 Q. These are what --

22 (PLF. EXH. 205 and 206 were marked
23 for identification.)

24 MR. HILDEBRAND: I would like to go
25 ahead and mark these as -- this would be

1 Plaintiff's No. 205 and 206, Your Honor.

2 MR. BUNDY: Objection, Your Honor.

3 These are pleadings. This is part of the
4 discovery in this case. If the plaintiff wishes
5 to publish, request to admit, that's perfectly
6 appropriate. But this is not how it's done.
7 It's not through witnesses, and I object to this
8 procedure.

9 THE COURT: Okay.

10 MR. HILDEBRAND: Your Honor, it can
11 be done. There's nothing that says in the rules
12 this is how you introduce discovery or ask
13 somebody to introduce discovery.

14 And it's perfectly -- I want to make a
15 record simply of our request to admit to them,
16 and then the second set and introduce them as an
17 exhibit. I don't have to read them. So that's
18 all I'm doing, Your Honor, is to make -- what is
19 the objection? I mean, good grief.

20 THE COURT: Yeah. I'm not sure
21 either, but what you would like to do is to make
22 the request to admit --

23 MR. HILDEBRAND: Yes, sir.

24 THE COURT: -- or answers to the
25 request to admit as part of the record?

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: 205 and 206?

3 MR. HILDEBRAND: Right.

4 THE COURT: Any objection to that,
5 Mr. Bundy?

6 MR. BUNDY: No, Your Honor.

7 THE COURT: Without objection.

8 (PLF. EXH. 205 and 206 were
9 received into evidence.)

10 MR. BUNDY: What I object to is
11 this witness reading to you that request to
12 admit.

13 THE COURT: I don't think we need
14 to do that.

15 MR. HILDEBRAND: Okay. So would
16 you prefer for me to do that?

17 THE COURT: You can publish them or
18 tell me which -- you have particular ones you
19 want to go through?

20 MR. HILDEBRAND: I will just
21 redirect, Your Honor, and I will publish just a
22 couple of representatives.

23 THE COURT: Okay. All right.

24 MR. HILDEBRAND: Okay. In 205 is
25 our -- is Library's responses to our set of

1 requests for admissions, and the answers are
2 dated April 26, 2021.

3 And the request to admit -- the first
4 one is, admit that Library agrees and admits that
5 it does not and will not hereafter, through the
6 conclusion of this litigation, claim through any
7 witness, lay or expert, document, data, or
8 argument of counsel that any breach, act, error,
9 or omission of any of the third-party defendants
10 above caused or contributed in any manner to the
11 claims and damages as defined above.

12 THE COURT: What number is that?

13 MR. HILDEBRAND: That's number 1,
14 Your Honor.

15 THE COURT: Okay.

16 MR. HILDEBRAND: And the response
17 was denied. And that was for all of the
18 third-party defendants. And then number 2 is
19 specific as to Lithko Contracting, LLC, and that
20 was denied.

21 THE COURT: Okay.

22 MR. HILDEBRAND: Number 3 is
23 specific as to Guy Beatty, and there's another
24 stop response that I will repeat. I'll try to do
25 this quickly, Your Honor.

1 Response, Library Associates is unable
2 to admit or deny this request because after
3 reasonable inquiry the information known or
4 readily available to it is insufficient. By way
5 of further response, there exists no contract
6 between Library's subcontractors of any tier.
7 See section 1.1.2 of the A201.

8 Library does not have contractual claims
9 against subcontractors of any tier. Balfour is
10 solely responsible for its subcontractors. See
11 section 2.1.6 of the A133. Balfour is solely
12 responsible for the critical path construction
13 schedule and all updates thereto. See sections
14 3.10.4.2, 3.10.14.7, and 3.10.4.8.

15 Finally as the party purporting to make
16 a claim for additional time and/or cost, Balfour
17 has the burden of proof to show that its
18 subcontractors did not contribute to any failure
19 of Balfour to achieve substantial completion
20 within the contract time and/or within the GMP,
21 see section 4.3.1 of the A201. So that was the
22 answer for Guy Beatty.

23 As to Bernard MCC, the request was
24 denied. As to the next one, Gulf Stream
25 Construction, denied. As to the next one, number

1 6, Palmetto Automatic Sprinkler, that was the
2 long answer where it said that it does not have
3 sufficient information.

4 The next one was Cook and Boardman
5 without -- along with that information --
6 sufficient information. Eight, Strong Tower
7 Construction, without sufficient information.
8 Nine was Watson Electrical, denied. Ten, TriMark
9 Foods, without information.

10 The next one, Pleasant Places, denied.
11 Twelve, David Allen Company, without information.
12 Thirteen is Premier Exteriors, denied. Fourteen,
13 Warco Construction, without permission. Fifteen,
14 Old North State Masonry, denied. Sixteen is to
15 LowCountry Case and Millwork, without
16 information. And 17 was Quantum Coatings, and
17 that's without sufficient information.

18 Very quickly, Your Honor, turn to
19 Exhibit 206, which are answers to the same
20 requests for admissions from Library, dated July
21 2021. Each of the 17 responses for all of the
22 same 17 subcontractors was denied.

23 THE COURT: Okay. All of those
24 denied, right?

25 MR. HILDEBRAND: Yes, sir.

1 THE COURT: Okay.

2 MR. BUNDY: Your Honor, you have to
3 ask a question. You can't just make a speech on
4 this.

5 THE COURT: Okay.

6 MR. HILDEBRAND: Is there an
7 objection?

8 THE COURT: Go ahead.

9 MR. BUNDY: He's putting in request
10 to admit. Okay? Normally you would do it in
11 between witnesses and I would get an opportunity
12 to say something. I'd like to say something.
13 May I say something?

14 THE COURT: You may.

15 MR. BUNDY: Thank you. Between the
16 first answers to interrogatories, or the answers
17 to request to admit, and the second answers to
18 the same request to admit, there was a motion by
19 Balfour Beatty requiring us to answer those ones
20 that we did not -- that we took exception to
21 because they were ridiculous request -- they're
22 all ridiculous, in my opinion.

23 But at any rate, you ordered us to
24 answer the interrogatories that we had previously
25 answered with insufficient information.

1 THE COURT: Okay.

2 MR. BUNDY: I denied those because
3 I was ordered to answer those. I didn't
4 voluntarily change these answers because
5 something came up. I just want the record to be
6 clear.

7 If he's trying to make some inference
8 that we changed our minds because he hasn't given
9 you all the information for the record. I want
10 the record to be clear, and I would request --
11 and I'm going to ask -- that we mark the motion
12 he made and the order of our response to the
13 motion and order ordering us to do that. So the
14 Court of Appeals will have a full record on this
15 issue. Thank you.

16 THE COURT: That should be -- that
17 motion and that order should be in the record if
18 it took place some time between April and July of
19 this year.

20 MR. BUNDY: Right. But all of
21 these are in the record too and now we're marking
22 things as exhibits, and so, you know --

23 MR. HILDEBRAND: I'm just trying to
24 make a clear record, Your Honor. If Mr. Bundy
25 wants to admit something, then certainly he's

1 free too.

2 THE COURT: Well, Discovery in
3 itself is not generally in the record, but orders
4 and motions certainly would be. That's up to
5 y'all when y'all make y'all's record on appeal.

6 MR. HILDEBRAND: Right.

7 THE COURT: But that's fine.

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

10 THE COURT: That procedure is fine.

11 (PLF. EXH. 207 and 208 were marked
12 for identification.)

13 BY MR. HILDEBRAND:

14 Q. All right. Let's turn to Exhibit 208.
15 Actually, let's start with 207, please. Are you
16 with me?

17 A. Yes, sir.

18 Q. All right. Do you recognize that
19 document?

20 A. Yes, sir.

21 Q. All right. And you recognize that as a
22 subpoena that we did for the -- Balfour did for
23 the records of the project architect?

24 A. Yes, sir.

25 Q. WLA?

1 A. Yes, sir.

2 MR. HILDEBRAND: I would like to
3 mark that as Plaintiff's Exhibit 207, Your Honor.

4 MR. BUNDY: Objection.

5 THE COURT: To what purpose is this
6 being offered?

7 MR. HILDEBRAND: I think it will
8 become clear with the next exhibit, and this goes
9 to establish the record on -- regards to some of
10 our arguments relative to the admission of some
11 of the -- depending on what your ruling is on
12 some of the documents from the architect and what
13 they supplied.

14 And the next document is just an
15 affidavit of compliance with the subpoena, which
16 I think will have some relevance under the rules.
17 That what will come in.

18 THE COURT: Okay. One is signed by
19 William Richardson; one by Taylor Walker.

20 MR. HILDEBRAND: Yes, sir. So I'd
21 like to mark Plaintiff's 207 with -- admit 207,
22 and then 208 is the affidavit of compliance with
23 the subpoena.

24 THE COURT: 207 being the subpoena?

25 MR. HILDEBRAND: Yes, sir. And 208

1 is the affidavit of compliance.

2 MR. BUNDY: Objection.

3 THE COURT: All right. What's the
4 objection? Mr. Bundy, what's the objection?

5 MR. BUNDY: It's all hearsay. It's
6 hearsay. It's irrelevant. It's immaterial. I
7 object to it. It doesn't meet any of the rules,
8 the exception to any of rules of hearsay, and
9 it's immaterial.

10 THE COURT: It's foundational that
11 it was produced, right?

12 MR. HILDEBRAND: Yes, sir.

13 THE COURT: Is there a question
14 about that?

15 MR. HILDEBRAND: No, sir. And
16 Mr. Simonton was -- that was part of -- let me
17 ask him a few questions.

18 BY MR. HILDEBRAND:

19 Q. When the project was finished and this
20 litigation was started, Mr. Simonton, did you
21 still stay involved with this project?

22 A. Yes, sir, until I retired.

23 Q. All right. And that was for a number
24 of -- so you were involved for how long?

25 A. I don't know. From '19 until December

1 28th of 2020.

2 Q. Okay. So last December?

3 A. Yes, sir.

4 Q. All right, sir. And what was your
5 primary role with Balfour during that period from
6 the completion of this project until the time
7 that you retired?

8 A. Reviewing the subpoena documents.

9 Q. For what?

10 A. For anything that had pertained to this
11 project, any e-mails, letters, back and forth
12 correspondence.

13 Q. Okay. So do you have personal
14 familiarity with the documents that were produced
15 to Balfour in response to the subpoena to
16 Mr. Lindsay?

17 A. Yes, sir.

18 Q. All right, sir.

19 MR. HILDEBRAND: So I'd like to get
20 a --

21 THE COURT: I still don't know
22 where we're going.

23 MR. HILDEBRAND: Where we're going
24 with it is that there is a certificate of
25 compliance from the architect --

1 THE COURT: Okay.

2 MR. HILDEBRAND: -- saying that
3 these are their records, and we are producing
4 these in response to our subpoena from Balfour
5 Beatty.

6 THE COURT: Okay.

7 MR. HILDEBRAND: So that
8 establishes a foundation that those are their
9 records and what they produced in response to the
10 subpoena.

11 THE COURT: That doesn't make them
12 admissible. That's the objection. That doesn't
13 make them --

14 MR. BUNDY: The other objection --

15 MR. HILDEBRAND: I'm not moving to
16 admit all those records at this point, Your
17 Honor.

18 THE COURT: Okay.

19 MR. HILDEBRAND: I'm simply moving
20 to admit the response that we got to the
21 subpoena.

22 THE COURT: Is that -- that was
23 everything?

24 MR. HILDEBRAND: Yes, sir, they
25 are --

1 THE COURT: Can we stipulate to
2 that or no?

3 MR. BUNDY: No.

4 THE COURT: Okay. All right.
5 State your objection.

6 MR. BUNDY: This gentleman has not
7 been qualified as the subpoena police.

8 THE COURT: I understand. All
9 right. He said he was involved in the subpoena,
10 but his name is not on these documents.

11 MR. HILDEBRAND: I understand that.

12 THE COURT: There is a chain of
13 custody issue, is what I'm seeing right now.
14 That's what I'm seeing.

15 MR. BUNDY: Among others, yes.

16 MR. HILDEBRAND: Your Honor, I
17 think it goes to show the -- as to how it's a
18 discovery response, but it's one that we -- that
19 he has reviewed and that we got in response from
20 the architect.

21 THE COURT: All right. It's some
22 sort of blanket process. I'm just going to ask
23 that we move on from there. You've got the
24 particular documents -- and we've got into and
25 will get into particular documents. So let's

1 just establish that. Y'all have asked for it.
2 This is some basis that y'all had asked for it.
3 They have produced it. Said it was the full
4 record.

5 MR. HILDEBRAND: I understand, Your
6 Honor.

7 THE COURT: Okay.

8 MR. HILDEBRAND: Can we mark these
9 Court exhibits just for --

10 THE COURT: Do you want to proffer
11 them?

12 MR. HILDEBRAND: Yes, sir.

13 THE COURT: What was that, 207 and
14 208?

15 MR. HILDEBRAND: Yes, sir.

16 (PLF. EXH. 207 and 208 were
17 received as a proffer.)

18 THE COURT: All right. Those are
19 proffers and not in evidence. Okay?

20 MR. HILDEBRAND: Okay. Thank you,
21 Your Honor.

22 BY MR. HILDEBRAND:

23 Q. All right, sir. The next exhibit that I
24 would like for you to refer to are under exhibit
25 tab 215. If you would turn to those, please.

1 A. I'm there.

2 Q. All right. Were you familiar -- were
3 you involved with the payment application process
4 on this job?

5 A. Yes, sir.

6 Q. All right. And are you familiar -- have
7 you reviewed the pay applications in this matter
8 as part of your job responsibilities?

9 A. Yes.

10 Q. All right, sir. We have -- and are you
11 familiar with the documents that are attached,
12 the contractor's conditional partial payment
13 waiver and release of lien upon progress payment,
14 that the ones that are attached to this exhibit?

15 A. Yes, sir.

16 Q. All right, sir.

17 MR. HILDEBRAND: I would like to
18 admit those, Your Honor.

19 MR. BUNDY: No objection.

20 THE COURT: Without objection. And
21 that's all under tab 215?

22 MR. HILDEBRAND: Yes, sir.

23 THE COURT: Okay.

24 BY MR. HILDEBRAND:

25 Q. All right, sir. So if we turn to the

1 first page of that?

2 A. Yes, sir.

3 Q. It says, there is a release of lien at
4 the very top upon progress payment. Do you see
5 that?

6 A. Yes.

7 Q. Was that the standard procedure while
8 you were there that the -- let me ask you this,
9 what requirement, if any, was there from the
10 owner that Balfour paid its subcontractors in
11 advance of receiving payments from the owner?

12 MR. BUNDY: Objection. Best
13 evidence of those requirements would be found in
14 the contract documents.

15 THE COURT: I'm going to overrule
16 it. Go ahead. What was the standard procedure
17 for payments?

18 MR. HILDEBRAND: Right.

19 THE COURT: He can testify to that
20 based on his personal knowledge, if he knows.

21 THE WITNESS: There was no
22 requirement for us to prepay our subcontractors.
23 BY MR. HILDEBRAND:

24 Q. And the actual lien release says upon
25 progress payment, does that language reflect that

1 understanding from your standpoint?

2 A. Yes.

3 Q. Okay. Now, under this first one it says
4 that there are releases of lien upon progress
5 payments, except for the very last line of that
6 first paragraph, retention, open change orders,
7 claims or disputes identifies as follows, pending
8 RCOs, correct?

9 A. Yes, sir.

10 Q. Now, let's turn to the next page. That
11 one says RCOs number 14, 20, 22, 27; is that
12 right?

13 A. Yes, sir.

14 Q. And then we turn to the very last page,
15 there's a whole list of pending RCOs from 18 to
16 it looks like 268, correct?

17 A. Yes, sir.

18 Q. All right. Let's turn to the next
19 volume, please.

20 MR. HILDEBRAND: We're going to
21 volume 4.

22 (PLF. EXH. 228 was marked for
23 identification.)

24 BY MR. HILDEBRAND:

25 Q. All right. Let's turn to Exhibit 228

1 please, right at the very back.

2 A. I'm there.

3 Q. All right. Are you with me?

4 A. Yes, sir.

5 Q. Can you describe what this document is?

6 A. This is a plan versus actual supervision
7 with the blue lines at the top being the planned
8 staffing of the project. First of the project,
9 and then the bottom with the red lines and the
10 green lines, that is the actual supervision that
11 was on the project.

12 Q. All right. And what involvement did you
13 have with the preparation of this document?

14 A. I created this document.

15 Q. You did it yourself?

16 A. (No audible response.)

17 MR. HILDEBRAND: I would like to
18 move this -- enter this as our next exhibit, Your
19 Honor.

20 MR. BUNDY: Objection.

21 THE COURT: Basis?

22 MR. BUNDY: It's an improper 1006
23 document.

24 THE COURT: All right. Lay a
25 little more foundation for this.

1 BY MR. HILDEBRAND:

2 Q. All right. So as part of the audit
3 process and the discovery process, were all the
4 pay records provided to Ms. Hadley and to
5 Mr. Bundy for them to review who was involved on
6 the job and what they got paid and daily reports
7 and everything else like that?

8 A. Yes, sir.

9 Q. All right, sir. So the records that we
10 have here, are -- how did you compile them? Let
11 me ask you this very simple question, how did you
12 compile the data that reflects when the folks
13 were on the job?

14 A. The folks that were on the job, there
15 was an accounting -- there was a process where
16 the salaries and the laborer's time was coded to
17 a certain color in the project record and the
18 project accounting records.

19 They printed that out and sent it to me,
20 as well as to Ms. Hadley and Mr. Bundy. And so I
21 took that and derived after the time that people
22 were actually charged and what was done on the
23 project.

24 Q. Okay. So this is simply a summary of
25 the data that we could go back, if we wanted to,

1 if we wanted to take the time now, we could get
2 the employment records and the daily reports and
3 such for all of these individuals and show
4 exactly when each one was planned to start and
5 planned to finish and when they actually did
6 that. Is that a fair statement?

7 A. Yes, sir.

8 THE COURT: So the basis for this
9 is time spent on the job by these individuals?

10 THE WITNESS: Yes, sir.

11 THE COURT: Is the basis for the
12 record? Okay. All right. I find that
13 sufficient. I will allow it.

14 MR. HILDEBRAND: Thank you. So
15 that would be introduced as Plaintiff's 228.

16 THE COURT: 228.

17 MR. HILDEBRAND: Thank you.

18 (PLF. EXH. 228 was received in
19 evidence.)

20 BY MR. HILDEBRAND:

21 Q. All right. The next documents that I
22 would like to go through is a separate notebook,
23 smaller one, that has exhibits, I believe 228
24 to -- I'm sorry, 250 to 264.

25 A. You said a smaller one, Mr. Hildebrand?

1 Q. Yes, sir.

2 THE COURT: Is that the one we had
3 yesterday?

4 MR. HILDEBRAND: Yes, sir.

5 (PLF. EXH. 251 was marked for
6 identification.)

7 BY MR. HILDEBRAND:

8 Q. All right, sir. Let's turn to tab 251,
9 if you would, please. Are you with me?

10 A. Yes, sir.

11 Q. All right. This is a letter dated
12 January 22, 2018, and it's from -- is that your
13 signature on the second page?

14 A. Yes, sir.

15 Q. And it says MSA Bennett Hotel architects
16 withholding of project funds, response R1; is
17 that correct?

18 A. Yes, sir.

19 Q. Did you draft this letter?

20 A. Yes, sir.

21 Q. All right. And is this part of the
22 business records of Balfour Beatty and was this
23 document prepared contemporaneously with the
24 content therein?

25 A. Yes, sir.

1 Q. All right, sir. Generally what was the
2 nature -- what was the reason that you wrote this
3 letter?

4 A. The architect is withholding funds for
5 our September pay application and any more funds
6 due to the owner performing its own work in the
7 rooms.

8 Q. What was that work that the owner was
9 performing?

10 A. The owner did not like the finishes in
11 the room that were specified and decided to go
12 back with a separate contractor and change those
13 finishes in the rooms.

14 Q. Okay. So when you say finishes, what
15 was being changed? What did the owner do?

16 A. The painting was changed -- the paint
17 from a specified eggshell to a flat paint.

18 Q. All right, sir. And we've been through
19 this before. That seems to be inconsequential.
20 As a layman, can you tell me why that would make
21 any difference to like a contractor or somebody
22 in the business?

23 A. The eggshell paint on a low floor finish
24 seems to flash more when he put one coat on it.
25 We had probably no less than three coats of paint

1 in those rooms, and we had a base paint that you
2 paint everything a base color and off white. And
3 then you come back and you paint it with an
4 eggshell, another coat.

5 And the last coat we put on was after
6 the furniture was in. Just touch up things and
7 put that last coat on. In certain light, when
8 the curtains are open, and then by that time all
9 the lamps were in the room, and it shows up
10 flashes, almost like a flashing on the wall.

11 Q. A flash of what? I'm not sure the
12 Judge --

13 A. It's just like the sun hitting that wall
14 right there. It's like you see that part, and it
15 flashes.

16 Q. It flashes. What is being flashed, some
17 irregularity?

18 A. Yes, sir. It shows on the wall.

19 THE COURT: Where the third coat
20 came on, right?

21 THE WITNESS: Well, it's just the
22 series of coats, Your Honor. It probably
23 wouldn't show, with the first coat I don't
24 remember seeing it, and then by the time we got
25 to the last coat, you could see some flashes with

1 the wall where it may have touched, see some
2 eggshell paint. It doesn't dull the wall. It
3 seems to bring out the --

4 THE COURT: Imperfections?

5 THE WITNESS: The spots in it, yes,
6 sir.

7 BY MR. HILDEBRAND:

8 Q. All right. What knowledge, if any, do
9 you have as to whether an eggshell paint is
10 recommended in the industry for a level 4
11 sheetrock finish?

12 MR. BUNDY: Objection.

13 THE COURT: What's his basis for
14 that? Lay a little more foundation.

15 BY MR. HILDEBRAND:

16 Q. Okay. How long have you been in the
17 construction industry?

18 A. 48 years.

19 Q. All right, sir. Are you familiar with
20 sheetrock finishes and paints that are compatible
21 with particular sheetrock finishes?

22 A. Yes, sir.

23 Q. All right, sir. Do you have any
24 experience with eggshell paint and more glossy
25 finish on level 4 sheetrock?

1 A. Yes, sir.

2 Q. All right. And what is -- is there any
3 issue related to using a -- from based on your
4 knowledge and experience with using a glossy
5 paint, like an eggshell, on a level 4 sheetrock?

6 MR. BUNDY: Objection.

7 THE COURT: All right.

8 MR. BUNDY: This gentleman is
9 getting ready to give you an expert opinion, and
10 he's not been listed as an expert witness. I
11 will be prejudice if he now can bring people in
12 here and testify beyond your knowledge and my
13 knowledge about paint finishes.

14 He hasn't been qualified as a painter.
15 He hasn't been qualified as a chemist. He hasn't
16 been listed as an expert witness. This is highly
17 prejudicial to my client.

18 THE COURT: Overruled. I find he's
19 qualified. Go ahead.

20 THE WITNESS: Can you repeat that
21 question?

22 BY MR. HILDEBRAND:

23 Q. Yes, sir. The question is, is it
24 appropriate, based on your experience, to use an
25 eggshell finish with level 4 sheetrock finishes?

1 A. No, sir.

2 MR. BUNDY: Objection.

3 THE COURT: Overruled.

4 MR. BUNDY: Appropriate to whom,
5 however? Objection to the question. It's
6 leading.

7 THE WITNESS: Hospitals, you put a
8 level 5 finish on, and you put eggshell,
9 semi-gloss paint due to surfaces, touching the
10 surfaces, more durable surface. Eggshell is the
11 more durable surface. And in the symphony hall,
12 we had level 5 finishes. That was the last
13 eggshell actually that we put on the walls.
14 BY MR. HILDEBRAND:

15 Q. So eggshell is appropriate for a level
16 5, but not level 4?

17 A. Yes, sir.

18 Q. Why is that?

19 A. Because you cover the whole sheetrock
20 wall with a type of bed mud, the white mud, where
21 a level 4 finish, even though you put in base
22 coats, you still can see some of the stripes
23 where you tape the bed into the screws and then
24 where the joints come together. And any patch
25 you may have on the wall, remove electrical

1 outlets, thermostat, or sprinkler head.

2 Q. Okay. Based on your experience, what is
3 the appropriate paint to use for a level 4
4 sheetrock finish?

5 MR. BUNDY: Objection.

6 THE COURT: Overruled. Go ahead.

7 THE WITNESS: Flat wall paint.

8 BY MR. HILDEBRAND:

9 Q. And why is that?

10 A. It doesn't show the distortions in the
11 sheetrock or the bleeding through of that
12 sheetrock between those joints. Flat paint on
13 the level 4 finish is the normal of what we put
14 on projects.

15 Q. Okay. And to be clear, flat paint was
16 specified for the guest room -- I'm sorry -- an
17 eggshell glossy paint was specified on this
18 project for use in the guest rooms, correct?

19 A. Yes, sir. There was on the plan
20 schedule.

21 Q. But the guest rooms were not a level 5;
22 is that correct?

23 A. No, sir.

24 Q. When this issue came up with the
25 painting right at the end of the job -- well, let

1 me ask you, when did the issue come up with this
2 repainting?

3 A. At the end of the project, and I believe
4 it was in November or December.

5 Q. Okay. And the owner made a decision to
6 repaint all the rooms?

7 A. Yes, sir.

8 Q. And what would they -- what were the
9 rooms repainted with? Was it an eggshell or flat
10 wall?

11 A. Flat wall paint.

12 Q. Okay. Was it the same color, to your
13 knowledge, as what was original?

14 A. It was the same color, same brand,
15 Sherwin Williams. It was a flat FL paint.

16 Q. Okay. All right.

17 A. For the walls.

18 Q. Okay. Give me just a little bit more
19 background on that one. So the -- you explained
20 to the Judge, and I think Mr. Doran -- were you
21 here during Mr. Doran's testimony?

22 A. Yes, I was.

23 Q. All right. He said that as of --

24 MR. BUNDY: Objection.

25 MR. HILDEBRAND: I will rephrase.

1 BY MR. HILDEBRAND:

2 Q. Let me ask you this: When were the
3 guest -- when were the model rooms completed on
4 this job, approximately?

5 A. February.

6 Q. Of what year?

7 A. 2018.

8 Q. Okay. And as I understand it, those
9 were kind of the templates that would be used
10 to -- that would be replicated for the remainder
11 of the rooms; is that correct?

12 A. Yes, sir.

13 Q. All right, sir. The -- and then when
14 were all of the rooms -- when -- by what date had
15 all of the guest rooms received the several coats
16 of paint or final coats of paint on this job?

17 A. August, September. I mean, as we
18 stacked up the building. If I remember right,
19 it's August, September.

20 Q. All right. So prior to December, was
21 there any or -- when the model rooms, the two
22 model rooms, were done, was there any notes from
23 the owner or the architect or anybody else, to
24 your knowledge, that the paint that was being
25 used, the eggshell paint, was not appropriate and

1 it was not to be used?

2 A. No, sir.

3 Q. Okay. So when was the first time that
4 you received notice that the owner did not like
5 the eggshell paint?

6 A. We received notice they were going to
7 repaint the rooms, I believe it was late
8 November, early December.

9 Q. Okay. And was Balfour asked to fund the
10 cost or to perform that work?

11 A. We were asked to perform that work, and
12 I asked the owner's representative, Jim Clements,
13 if he wanted to issue a change order for that
14 work -- to change that order to repaint the
15 rooms.

16 Q. Why did you feel it was a change order?

17 A. Because we had painted, we had built the
18 rooms per plans and specs, for the inspections,
19 and had them signed off the architect of record,
20 and they were ready to be turned over for the
21 owner do whatever he needed to get them ready for
22 fit and finish.

23 Q. Okay. All right.

24 A. And the subcontractors were demobilizing
25 the project.

1 Q. Okay. So was a change order issued by
2 the owner for y'all to repaint the rooms in the
3 flat finish?

4 A. No, sir.

5 Q. All right. And then in this letter --

6 MR. HILDEBRAND: I would like to
7 admit 251.

8 MR. BUNDY: No objection.

9 THE COURT: Without objection.

10 (PLF. EXH. 251 was received in
11 evidence.)

12 THE COURT: And let me ask this
13 question right off the bat. You stated January
14 22, 2018 was a response to a January 19 e-mail.
15 Can I presume that the actual date on this letter
16 would be January 19?

17 THE WITNESS: No -- yes, sir, it
18 would be 2019.

19 THE COURT: All right. I think I
20 saw that once before.

21 THE WITNESS: It's inherit with
22 word, I guess.

23 MR. HILDEBRAND: I think it's about
24 the same date, about the same that your --

25 THE WITNESS: Yeah.

1 THE COURT: All right. 251 is in
2 evidence.

3 MR. HILDEBRAND: Thank you.

4 (PLF. EXH. 252 was marked for
5 identification.)

6 BY MR. HILDEBRAND:

7 Q. All right. Let's turn to Exhibit 252.

8 A. I'm there.

9 Q. All right. This is a letter dated
10 January 25, 2019, and the fourth page is signed
11 by yourself, David Simonton as vice president,
12 correct?

13 A. Yes, sir.

14 Q. All right, sir. And it's consolidate
15 claim preliminary. Do you see that?

16 A. Yes, sir.

17 Q. All right. You wrote this letter?

18 A. Yes, sir.

19 Q. And what was the purpose for writing it?

20 A. To notify the owner that we intended to
21 file a claim. We had gotten with the
22 subcontractors, trying to close them out, and
23 then talking to them to see if they had any
24 claims to make sure they passed those claims so
25 we could review them. And we pulled all of that

1 together and came up with a number.

2 And then we wanted to go through our
3 entitlement process for that claim. We listed
4 out the letters and wanted to give them a
5 preliminary actual dollar value.

6 Q. Okay. Is this document part of business
7 records, normal business records of Balfour
8 Beatty Construction?

9 A. Yes, sir.

10 MR. HILDEBRAND: I would like to
11 move this in to evidence, Your Honor.

12 MR. BUNDY: No objection.

13 THE COURT: Without objection.

14 (PLF. EXH. 252 was received in
15 evidence.)

16 BY MR. HILDEBRAND:

17 Q. All right, sir. This is a long letter.
18 I'd like to introduce and read some of this into
19 the record. So the first paragraph is generally
20 saying that Balfour and subcontractors are
21 submitting their claim. Is that a fair
22 statement?

23 A. Yes, sir.

24 Q. And then there's a second paragraph that
25 reads, the project is to be a signature luxury

1 hotel in the vision of Michael Bennett,
2 principals of the project's owner, Library
3 Associates, and when completed, it will be just
4 as described.

5 Unfortunately, however, the process of
6 constructing the hotel was made excessively more
7 difficult because of a design that was
8 inconsistent with the owner's vision, an owner
9 vision that changed and morphed many times over
10 the course of the project.

11 An operator that was brought to the
12 table long after construction had commenced and
13 more events, all of which resulted in material
14 changes in the scope of work that greatly drove
15 up the cost of construction and extended the time
16 in which to complete the project by more than a
17 year.

18 Exacerbating these the problems, the
19 owner often acted in a manner that was
20 accusatory, confrontational, and uncooperative by
21 and among other things, refusing to pay for
22 changes and delays, failing to make decisions and
23 provide information in a reasonable and prompt
24 manner, abandoning provisions of the contract
25 when they were unfavorable to the owner's

1 position and generally creating an unproductive
2 atmosphere on the project.

3 Were those the -- did I just -- does
4 that aspect of the letter correctly reflect
5 Balfour's position as to the reasons for the
6 claim?

7 MR. BUNDY: I object, Your Honor.
8 This letter contains opinions that are not --
9 that are outside the expertise of this witness.
10 Specifically, he's not been qualified, nor has he
11 been offered as an expert opinion in
12 architecture.

13 Okay. So to the extent that I admitted
14 this or agreed to the admission of this document,
15 I was not agreeing to the admission of his
16 opinions.

17 I agreed to this letter as admissible
18 for the limited purpose of notice. That's it.
19 That's all this letter is, is a notice letter.
20 All the rest of it is hearsay.

21 It's opinions that aren't substantiated,
22 given by somebody who is not qualified to give
23 the opinions, particularly those opinions that
24 relate to the plans and specifications. This
25 witness has not been qualified. He's not been

1 listed as expert witness in architecture. Thank
2 you.

3 THE COURT: All right. Objection
4 noted. Overruled. This is your document, is it
5 not?

6 THE WITNESS: Yes, sir. I wrote
7 this document.

8 MR. HILDEBRAND: All right, sir.
9 And, Your Honor, may I ask that we go back to
10 rule 43(i) because we could just be here for a
11 long time. If you need an explanation --

12 THE COURT: No speaking objection,
13 okay.

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

16 BY MR. HILDEBRAND:

17 Q. So does the paragraph that I just read,
18 is that a fair summary from your perspective of
19 what the claim -- underlying reasons for the
20 claims were?

21 A. Yes, sir.

22 Q. Next paragraph, in spite of repeated
23 representations by Mr. Bennett, that he intended
24 to pay everyone for all the work that was done to
25 complete the project, in actuality, the actions

1 of Mr. Bennett and those who work for him were
2 wholly inconsistent with those representations.

3 As a result, the claimants had incurred
4 substantial damages and unreimbursed costs for
5 which a consolidated claim in the amount of
6 \$22,452,282.51, the claim amount is being
7 submitted.

8 The claim amount is comprised of the
9 components described below and is based on a
10 preliminary accounting of the cost that have been
11 incurred through the noted dates; however,
12 because work on the project continues, a final
13 accounting of costs presentable to the owner
14 cannot be done.

15 Once the work by Balfour Beatty and its
16 subcontractors is completed, a full accounting of
17 those additional costs will be provided by
18 supplement or an amendment.

19 Now, when you say that the letter
20 includes claims by subcontractors, can you tell
21 me how you went about asking subcontractors to --
22 what claims they have and what support they had
23 for those claims?

24 A. We reached out to the subcontractors,
25 calling them, and seeing if they had any claims

1 because we didn't want any surprises, you know,
2 after we were trying to close the job out, with
3 not being paid by the owner for several months.

4 They kind of went in their corners and
5 went through their books, obviously as we did,
6 and pulled together their claims, mechanical,
7 electrical, plumbing and electrical and drywall.
8 Those major subcontractors that were impacted by
9 all the changes and the sprinkler person -- the
10 sprinkler guy that was trying to remember the
11 list. I believe that's a pretty close list of
12 who sent in the claims.

13 Q. Okay. Were you here when we reviewed
14 the salient provisions of the Lithko contracts
15 and the -- specifically the provision that
16 provides that if a subcontractor has a claim
17 attributable to the owner that that could be
18 passed through Balfour?

19 MR. BUNDY: Objection.

20 BY MR. HILDEBRAND:

21 Q. Were you here?

22 THE COURT: And the basis?

23 THE WITNESS: Yes, I was here.

24 THE COURT: Just one second.

25 THE WITNESS: Sorry.

1 MR. BUNDY: The basis is the fact
2 that he was in the courtroom is irrelevant. The
3 basis of it is that whatever contract rights they
4 had with the subcontractors, the best evidence is
5 contained in the contract.

6 THE COURT: Right.

7 MR. BUNDY: And I would like to
8 refer to the contract. So I object. Thank you,
9 Your Honor.

10 THE COURT: Okay. All right. Just
11 lay a little more foundation.

12 BY MR. HILDEBRAND:

13 Q. Okay. Are you familiar with the
14 subcontracts in this matter? I probably should
15 have said that.

16 A. Yes, sir.

17 Q. Is there a pass-through provision in the
18 subcontracts that states that if a subcontractor
19 has a claim attributable to the owner that that
20 claim can be passed through Balfour because the
21 subcontractor does not have privity of the
22 contract with the owner?

23 MR. BUNDY: Objection.

24 THE COURT: All right. Overruled.

25 Go ahead.

1 THE WITNESS: Yes, sir. There is a
2 clause in our subcontract.

3 BY MR. HILDEBRAND:

4 Q. Okay. Is that a pretty standard clause
5 from -- based on your experience?

6 MR. BUNDY: Objection.

7 THE COURT: Overruled.

8 THE WITNESS: Yes, sir.

9 BY MR. HILDEBRAND:

10 Q. All right, sir. So in this letter
11 you're passing along to the owner -- you
12 requested from the subs what claims they had
13 related to the owner and you're passing them
14 along to the owner along with the claim of
15 Balfour; is that a fair statement?

16 A. Yes, sir.

17 Q. All right. And the basis for the letter
18 or for the claim are itemized in numbers 1
19 through 20?

20 A. Yes, sir.

21 Q. All right. And how did you come up with
22 those 20 items? How was that list compiled?

23 A. Just going from the early parts of the
24 job with the team and with some of the
25 subcontractors and reviewing the documents that

1 we had, all the change orders that were issued
2 throughout the project, and actions of the team,
3 actions of the owner's side, of the architects,
4 came together and pulled together 20 items we
5 felt were the high topics of why the project went
6 over budget.

7 Q. Okay. Number 1, the owner's failure to
8 provide information of services required of the
9 owner with reasonable promptness. What was the
10 basis for that?

11 A. RFIs. I mean, we had that document
12 earlier, the 125 days, 60 days, 30 days to answer
13 RFI's.

14 Q. Okay. Number 2, the failure of the
15 owner to provide an owner's representative who
16 could make decisions promptly by the owner and
17 who could furnish information expeditiously to
18 subs to avoids delays and impacts to the project,
19 Balfour Beatty and the subcontractors. What is
20 that? What was the basis for that?

21 A. The owner's representative, Jim
22 Clements, had no authority on the project. He
23 was given no authority. And when you ask
24 questions about things, and he was the most
25 acceptable person on the owner's side of the

1 project, he couldn't answer those design
2 decisions, change order decisions, any decisions
3 on the project.

4 Q. So when you would ask him a question,
5 what would his response be?

6 A. He would get with Mike or Kim or get the
7 architect involved.

8 Q. Did that cause delays?

9 A. Yes, sir.

10 Q. Would the responses have been quicker if
11 he had had actual authority?

12 MR. BUNDY: Objection.

13 THE COURT: Overruled.

14 A. Normally when you have an owner's rep on
15 the project, you get instantaneous decisions.

16 Q. Is that how most of your projects run?

17 A. The projects that I've had an owner's
18 representative on, yes, sir.

19 Q. Is it a fair statement that all of the
20 delays that we went through yesterday on the RFI
21 log showed those delays, most of those do not
22 take place on a typical job?

23 A. No, sir.

24 MR. BUNDY: Objection.

25 BY MR. HILDEBRAND:

1 Q. Nowhere close?

2 A. No, sir.

3 Q. All right, sir. Number 3, failure to
4 timely and promptly pay undisputed amounts to
5 Balfour Beatty. What was the basis for that?

6 A. Most of that is, there was a disputed
7 amount during the initial \$71,000 that the
8 architect had authorized to be paid to Balfour
9 Beatty, and due to a previous delay, and then at
10 the end of the project, the monies that they were
11 withholding, there was no accountability of
12 whether there was disputed amounts or undisputed
13 amounts.

14 So we weren't paid anything. There was
15 no math provided on the rest of the 8 or 9
16 million dollars worth of the funds that were in
17 the project, why we weren't paid any undisputed
18 amounts. We had subcontractors that needed to be
19 paid.

20 Q. Okay. Number 4, the owner's decisions
21 to make significant changes to the character of
22 the building while the project was underway
23 resulting in major changes to the layout of the
24 building and systems of the building, all without
25 adequate compensation to Balfour Beatty and

1 subcontractors.

2 Two examples are, decisions by the owner
3 well after construction had commenced to upscale
4 the hotel to a higher luxury rating leading to
5 changes in room layouts, which drove major system
6 changes and the owner's decision to wait to
7 select a hotel operator, which then led to
8 changes in the levels of finishes in guest rooms
9 and public spaces to adjust to the operator's
10 branding -- to the operators branding of
11 requirement.

12 Was that -- did you address that? Was
13 that addressed yesterday when we talked about the
14 salamander punch list? Let me ask you this.
15 What was the basis for that statement?

16 A. This project had countless changes all
17 the way up to the end of the project, which you
18 normally don't see.

19 You normally see there was a cutoff
20 point. You try to curtail the changes to where
21 you can get the project finished, and then
22 anything you want to do after the project is
23 completed, then do those changes. The salamander
24 came in and changed the lines in the room and
25 changed (inaudible) in the room they wanted.

1 Q. Speak up, please.

2 A. The salamander came in and had ideas how
3 they wanted the hotel to look and those changes
4 were implemented through the big stack of
5 drawings over there.

6 Q. Okay. Additionally, there were -- I'm
7 continuing reading -- additionally, there were
8 continual design changes during construction that
9 were seemingly made or proposed simply to address
10 the owner's consistently changing and shifting
11 visions of what was wanted for the project.

12 Many changes were mandated by the owner
13 and persons for whom the owner was responsible
14 that resulted in significant cascading effects on
15 other work that resulted in higher costs and
16 delays. All these design changes and more caused
17 delay and additional costs for which Balfour
18 Beatty and its subcontractors have not been
19 compensated.

20 Have we already talked about that one?

21 A. Yes, sir.

22 Q. All right, sir. We will move on. The
23 owner's interference and disruption with the
24 project as a result of countless instances where
25 he communicated possible changes to the building,

1 and therefore, failed to promptly make decisions
2 as to such proposed changes, many times
3 abandoning the proposed changes after months of
4 indecision leading to, among other things,
5 delays, disruptions, impacts, accelerations, and
6 interference of Balfour Beatty and its
7 subcontractors.

8 What was the basis for that statement?

9 A. Just a couple of examples, when I
10 arrived there in December, there was a screen
11 wall that was held down between the hotel next
12 door and the Hotel Bennett, and we didn't get
13 that change until the very end of the job.

14 I mean, there was probably almost 10 or
15 11 months before that decision was made to raise
16 that wall up so you couldn't see all the doors
17 for the Hotel Bennett from the hotel next door.
18 The accordion door or the door into Camilla's, I
19 mean, that was a late decision on what they
20 wanted to do. Ballroom doors.

21 Q. What other -- during the project, were
22 there any instances where the owner advised
23 Balfour Beatty that it was thinking about
24 changing its mind on some of the aspects of the
25 hotel, then changed back to what was originally

1 scheduled?

2 MR. BUNDY: Objection, leading.

3 BY MR. HILDEBRAND:

4 Q. All right. Well, explain to me what the
5 sentence, the owner's countless instances where
6 he communicated possible changes to the building
7 and failed to make prompt decisions.

8 A. One instance I remember is that we would
9 get an electrical change, lighting change, like
10 for level 1, and they would change the lights
11 over to small retail, in the lobby, and this was
12 well after the fact.

13 And we would sit down and try to go
14 through it and they said, no, I don't want this.
15 They would cherry pick the change for the value
16 of -- for whatever reason. I don't know. Say
17 the change was 100,000, they would pick 70,000 of
18 the change order and say we want to do this and
19 not revise the drawings to show that lighting had
20 been deleted in that change.

21 That's just one example. And then when
22 the lighting designer came in to do the punch
23 list, all those lights that weren't put in showed
24 up on the punch list. And that was inherent with
25 the lighting punch list and the electrical punch

1 list. So it was a lot of confusion of what was
2 in the job and what was out.

3 Q. All right. Number 6, failure to procure
4 builders risk insurance in accordance with the
5 requirements of the contract documents and the
6 owner's failure and refusal to compensate Balfour
7 Beatty for losses incurred, which were covered by
8 the builders risk policy, or what should have
9 been covered by -- which should have been covered
10 had the owner procured a policy pursuant to the
11 contract requirements. What was the issue there?

12 MR. BUNDY: Objection. He is not
13 qualified as a lawyer.

14 THE COURT: I'm going to overrule.
15 Go ahead.

16 THE WITNESS: So in the contract,
17 the insurance documents that the owner carried
18 builders risk on the project, hail, rain, things
19 like that.

20 The first instance, they didn't have the
21 1,000 year flood, they didn't have insurance on
22 the project. And the contract -- and then once
23 they did procure insurance, the adjuster was so
24 high. It was a percentage of the value of the
25 project, a million bucks deductible.

1 And the contractor calls for the owner
2 to recover any deductibles not covered in the
3 insurance, but we had to cover 10,000 if it was
4 our fault. And we never received reimbursement
5 for the builders risk claims that we had turned
6 in.

7 BY MR. HILDEBRAND:

8 Q. Were y'all paid? So the issue is y'all
9 paid -- were charged with the amount over \$10,000
10 deductible that was your responsibility?

11 A. We never received any reimbursement for
12 the funds we spent for hurricane preparedness and
13 the flood and things like that.

14 Q. How about number 7, failure to underrate
15 its consultants to provide contract documents
16 that include all the necessary -- all the items
17 necessary for the proper execution and completion
18 of the work by Balfour Beatty and the
19 subcontractors?

20 MR. BUNDY: Objection.

21 THE COURT: Overruled. Go ahead.

22 THE WITNESS: There were a lot
23 of --

24 BY MR. HILDEBRAND:

25 Q. I'm sorry. I think we've talked about

1 this so why don't we move on. I'm sorry.

2 A. Yeah, that's fine with me.

3 Q. I think number 8, failure of the owner
4 and its consultants to provide contract documents
5 that were properly coordinated. Has that been
6 discussed?

7 A. Yes, sir.

8 Q. And number 9, failure of the owner to
9 either authorize or direct its design consultants
10 to provide adequate timely and sufficient
11 additional services, including additional
12 modeling BIM, for the pre-construction and
13 construction phases. We've already talked about
14 that?

15 A. Yes, sir.

16 Q. All right. 10, failure of the owner and
17 its consultants to furnish information and
18 services required and the subcontractors to
19 officially construct the project. We've already
20 talked about that one?

21 A. Yes, sir.

22 Q. Okay. Number 11, failure of the owner
23 to provide prompt approvals. We've already
24 talked about that?

25 A. Yes, sir.

1 Q. Repeated failures on the part of the
2 owner and the owner's representative, among
3 others, to refrain from directly communicating
4 with Balfour Beatty employees and subcontractors.
5 Very briefly, what was that?

6 A. The owner and owner's rep would go
7 straight to the subcontractors and flooring
8 people, the LCCM, LowCountry Millwork that was
9 putting in the wood, they had relationships with
10 them, I guess, in the past and working through
11 direction on proper seams and what wood goes
12 where and things like that.

13 Q. Does that cause problems -- okay. Does
14 that cause problems on the job when the owner has
15 direct contact with your subcontractors?

16 A. The chain of command is broken. You
17 know, our subcontractors were necessarily working
18 with them trying to get them through the project,
19 or attempting to get them through the project,
20 work through all the changes, making sure we're
21 getting the right product into the room through
22 all the changes that we've gotten. Communication
23 should always come through your contractor.

24 Q. Okay. Thirteen, delays, disruptions and
25 damage caused to the project by the owner's

1 separate contractors resulting in Balfour Beatty
2 and its subcontractors incurring
3 additional costs and delays, including costs to
4 repair resulting damages. What was that?

5 A. We talked about that earlier where they
6 were going into the rooms, basically laying TVs
7 on the beds and tools all over the cabinets. We
8 talked about that earlier yesterday.

9 Q. Okay. All right. Fourteen, failure to
10 design and perform with applicable laws, codes,
11 rules and regulations. I think the experts
12 addressed that one.

13 Fifteen, failure of the owner and its
14 consultants and representatives to reasonably
15 interpret and administer allowances set forth in
16 the contract documents, including the refusal to
17 execute change orders for costs exceeding
18 allowance amounts and refusing to act reasonably
19 and promptly in selecting materials and equipment
20 covered by allowances.

21 Can you very briefly tell me what --

22 A. The allowances were -- a couple of them
23 was the door going into Camilla's lounge, there
24 was some screens that went into the bar -- lobby
25 bar that was supposed to go up and screen that

1 bar from the rest of it.

2 And then there was an allowance on the
3 ballroom doors, and those selections came very
4 late in the project and over a long lead for
5 materials.

6 Q. Okay. Abandonment by the owner of much,
7 if not all, of the administrative provisions of
8 the contract, as well as change order provisions
9 which was drafted by the owner and set forth in
10 the contract documents. What was that?

11 A. That's timely negotiating and paying for
12 the change order on the project. Some of the
13 change orders went 8 or 9 months before they were
14 settled, and therefore, the subcontractors were
15 having to basically build the project on their
16 own nickel, their own dime.

17 Q. Okay. Seventeen, requiring Balfour
18 Beatty and its subcontractors to provide work
19 that went beyond what was depicted in the
20 drawings or provided in the specifications for
21 reasonably inferring -- inferable from those
22 documents, all without the provision of
23 additional compensation and extensions of time.
24 Have we talked about that?

25 A. Yeah.

1 Q. All right. Eighteen, the owner's
2 abandonment of the contract provisions by
3 selectively enforcing provision only when the
4 circumstances may have favorable to the owner.
5 What was that?

6 A. That was the insurance, basically, not
7 providing funds to Balfour Beatty to reimburse
8 the subcontractors from the insurance claims.
9 That's one that comes to mind right now.

10 Q. Okay. That was early in the project
11 when those issues arose?

12 A. Early, and in '18, there was a hurricane
13 or tropical storm.

14 Q. Okay. All right. Next one, failure on
15 the part of the owner and its design consultants
16 to reasonably, with impartiality, on the part of
17 the architect to interpret and administer the
18 contract documents. What was that about?

19 A. The failure would go towards the owner.
20 Like when we submitted the claim, basically he
21 didn't give us anything to look at and then
22 denied our claim.

23 Q. Okay. Twenty, failure to extend the
24 contract completion dates and compensate Balfour,
25 the claimants, for delay costs of damages. What

1 does that mean?

2 A. Failure to give us our time and our
3 change orders that we asked for.

4 Q. Okay. All right. Subsection C,
5 damages. As a result of the above-described
6 errors, admissions, failures and breaches of the
7 owner, were those for which the owner was
8 responsible, Balfour Beatty and its
9 subcontractors have incurred additional costs far
10 in excess of what has been paid due to delays,
11 disruptions, accelerations, impacts, inference
12 and extra work in the aggregate of
13 \$22,452,282.51.

14 The claim amount is comprised of the
15 following elements. And then we set forth the
16 damages that speak for themselves, and Mr. Casey
17 Thompson is going to address the damages in
18 detail; is that right?

19 A. Yes, sir.

20 Q. All right, sir. As far as the damages
21 that came from the subcontractors, where they are
22 listed below here, so how did those come to you
23 again?

24 A. By e-mail and by mail and dropped off.

25 Q. Did you -- what communications, if any,

1 did you have with the subcontractors when you
2 would get their proposed claims before you
3 included them in this claim?

4 A. We would go through them and ask them
5 questions about it, like Watson, and then
6 Bernhard MCC, BMCC, asked them questions, you
7 know, if these changes were already funded. They
8 had to print out a list of the change orders and
9 if they've been funded. They basically came back
10 and said the claims are the claims.

11 Q. Okay. All right. D, reservation. This
12 claim by Balfour Beatty and the subcontractors is
13 not intended to be the final claim for it to
14 include all elements and damages submitted as by
15 a preliminary claim while the work on the project
16 is still ongoing.

17 Claimants reserve any and all rights and
18 remedies to which they're entitled under the
19 contract for applicable law and reserve the right
20 to supplement, amend, and/or revise any aspect of
21 the claim in the future based upon further
22 analysis and evaluation.

23 E, closing. Balfour Beatty and its
24 subcontractors wish to resolve this matter and
25 these claims with the owner, whether it be

1 informally or through the dispute resolution
2 process prescribed by the contract documents that
3 were principally drafted by the owner.

4 Collectively, we are prepared to present
5 the owner materials and information that
6 substantiate the intentions described above and
7 the costs that have been claimed.

8 The owner has received a hotel that far
9 exceeds what was shown on the drawings and
10 described in the specifications, and the owner
11 should pay for the direct and indirect costs
12 incurred to upgrade the hotel to a heightened
13 vision all to deliver this project to the owner
14 for its use and enjoyment of its guests. Did I
15 read that correctly?

16 A. Yes, sir.

17 Q. All right. So this was provided -- this
18 claim letter was sent to Jim Clements, correct?

19 A. Yes, sir.

20 Q. All right, sir. And it was -- I show
21 it's being copy to Kim Brown, correct?

22 A. Yes, sir.

23 Q. Tom Ryan, life insurance company, who is
24 that?

25 A. They were the owner's lender, Lender and

1 Associates.

2 Q. Jennifer Faulkinberry and Buck Lindsay
3 is the architect?

4 A. Yes, sir.

5 Q. All right. So let's turn -- we already
6 introduced that.

7 THE COURT: It's in, yeah.

8 (PLF. EXH. 253 was marked for
9 identification.)

10 MR. HILDEBRAND:

11 Q. 253, if you can turn to that.

12 A. Yes, sir.

13 Q. It's a letter to you from the project
14 architect, Buck Lindsay, correct?

15 A. Yes, sir.

16 Q. All right. So this is his response to
17 your claim letter, correct?

18 A. Yes, sir.

19 MR. HILDEBRAND: I would like to
20 introduce this, Your Honor.

21 MR. BUNDY: What, tab 253?

22 MR. HILDEBRAND: Yes.

23 MR. BUNDY: Absolutely. No
24 objection.

25 THE COURT: All right. In

1 evidence. All right.

2 (PLF. EXH. 253 was received in
3 evidence.)

4 BY MR. HILDEBRAND:

5 Q. All right. His response, we have
6 received and reviewed the above-referenced
7 letter, your consolidated claim letter, claiming
8 extra cost of BBC above contract amount in the
9 pursuit of the work for this project. Note that
10 certain items of your claim are covered in the
11 contract and are not in debate.

12 Let me ask you this: When he said,
13 certain items are not in debate, have you been --
14 after you presented the claim letter to the
15 owner, have you received any money -- to your
16 knowledge, has Balfour received any money
17 whatsoever in response to the claim?

18 A. No, sir.

19 Q. Not a penny?

20 A. No, sir.

21 Q. We have thoroughly analyzed the contents
22 of the letter. In the absence of any details
23 according to this claim, we can draw no
24 conclusion as to the legitimacy of the claim
25 except to say that it appears to be grossly

1 overstated.

2 The owner disputes the claim. We have a
3 decision to render an initial decision on this
4 disputed claim within 10 days of receipt. To
5 exercise that duty, we request additional
6 supporting data on the claim. And he asked to do
7 so before -- within 30 days?

8 A. Yes, sir.

9 Q. And that additional data is what has
10 been -- we've talked about already, these volumes
11 have been introduced; is that correct?

12 A. Yes, sir.

13 Q. All right, sir.

14 MR. BUNDY: Do you mind if we
15 identify for the record what those are so we have
16 a clean record?

17 THE WITNESS: Is this your Exhibit
18 11?

19 MR. HILDEBRAND: Yeah, let's go
20 back.

21 THE COURT: It would be Defendant's
22 11, 12, 13 and 14; is that correct?

23 THE WITNESS: Yes.

24 THE COURT: And it's volumes 1, 2,
25 3 and 4?

1 THE WITNESS: Yeah.

2 MR. BUNDY: Thank you, Your Honor.

3 THE COURT: Yep.

4 BY MR. HILDEBRAND:

5 Q. All right. So you provided the
6 documents that I will call a stack of documents
7 11 through 14 that have been marked; is that
8 correct?

9 A. Yes, sir.

10 Q. All right. And how did you go about
11 compiling those documents?

12 A. The team got together along with the --
13 when I say the team, it was Nick, myself, Tim,
14 Shanti, and pulling together out of the documents
15 and then got with accounting on how much funding
16 was going out, how much money we were owed, and
17 going through all the changes and getting all the
18 last pricing -- trying to get the last pricing
19 from the subcontractors, and then the
20 documentation supporting those 20 items that were
21 in that listed letter, 1 through 20.

22 (PLF. EXH. 254 was marked for
23 identification.)

24 Q. Okay. All right, sir. Let's turn to
25 tab 254, please.

1 A. Okay. I'm there.

2 Q. All right. And this is an e-mail --
3 okay. So the letter requesting additional
4 information is February 4th for Buck Lindsay, the
5 prior exhibit, correct?

6 A. Yes. February 4, 2019.

7 Q. All right. And then it looks like one
8 week later, on Monday, February 11, he sends you
9 another e-mail, and that's this e-mail, correct?

10 A. Yes, sir. Contract -- subject line,
11 contract close out, Bennett Hotel contract close
12 out.

13 Q. Okay. All right, sir. So he had asked
14 you for additional documentation and he had given
15 you 30 days to do that. How long was it before
16 you provided that additional documentation?

17 A. It took us about 28 days, I believe, 25
18 days, to pull it together and get it printed.

19 Q. About a month?

20 A. About a month. He had given us 30 days
21 and we were ticking along and getting it
22 completed and getting it printed.

23 Q. Okay. All right. And you received this
24 e-mail from Mr. Lindsay?

25 A. Yes, sir.

1 Q. And it shows, Jim Clements, Jennifer
2 Faulkinberry and Kim Brown being copied?

3 A. Yes, sir.

4 MR. HILDEBRAND: All right. I
5 would like to introduce this.

6 MR. BUNDY: Unsigned, Your Honor.
7 I object.

8 THE COURT: It's an e-mail.
9 Overruled.

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

12 (PLF. EXH. 254 was received in
13 evidence.)

14 BY MR. HILDEBRAND:

15 Q. All right. Now, this is contract close
16 out. What does that mean?

17 A. Pulling together the final calculation
18 of the cost of the project.

19 Q. Is this something that happens on every
20 project?

21 A. Yes, sir. You have to come to a number,
22 total cost of the project.

23 Q. All right. David, regrets for not
24 responding sooner on the status of applications
25 for payments 43, 44 and 45. We have been working

1 to assemble all of the relevant information
2 needed to complete this evaluation.

3 The following is what we have as I see
4 it condensed into an actual format. If you
5 disagree with any of the numbers -- with any of
6 the below numbers in paragraphs 1 and 2, please
7 advise. One, a NTP, that's notice to proceed?

8 A. Yes, sir.

9 Q. March 30, 2015, construction period, 852
10 days, 28 months. So that was the original plan,
11 correct?

12 A. Yes, sir.

13 Q. Contract completion as planned was July
14 30, 2017?

15 A. Yes, sir.

16 Q. Days added by CEO, 20 days by owner
17 change order number 3?

18 A. Yes, sir.

19 Q. Okay. Adjusted contract completion, so
20 with the 20 days, it went to August 19, 2017,
21 correct?

22 A. Yes, sir.

23 Q. All right. Days delayed, 531 as of
24 2/1/19?

25 A. Yes, sir.

1 Q. All right. Substantial completion to be
2 determined. All right. So he's acknowledging
3 what the number of delays were to that day,
4 correct?

5 A. Up to February 1, 2019.

6 Q. All right. And then the next document
7 is -- next aspect of this amount, contract amount
8 \$59,344,747, change order amount through AFP --
9 and that's application for payment --

10 A. Yes, sir.

11 Q. -- 44, \$5,637,169.15. So this is the
12 amount of the changes that had been added to the
13 original contract amount?

14 A. Yes, sir.

15 Q. Okay. Adjusted contract amount,
16 \$64,981,916.14. So you add the changes, and
17 those were agreed upon changes by the owner,
18 correct?

19 A. Yes, sir.

20 Q. So there's no dispute on that as far as
21 you're concerned?

22 A. None that I'm aware of.

23 Q. Okay. So the architect is saying,
24 here's the agreed upon contract amount
25 \$64,981,000. Amount paid through AFP, 42,