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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

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

Balfour Beatty Construction, LLC, Appellant,

v.

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

And

Library Associates, LLC, Third-Party Plaintiff,

v.

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

Of which Library Associates, LLC is the Respondent.

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1 and what do you understand it to try to say? If
2 you were trying to explain it to a child, what
3 would you say this meant?

4 A. I mean, I can agree that the contractor
5 was -- may have certain claims related to acts or
6 omissions contributable to one or more
7 subcontractors or other subcontractors. Yeah.
8 It's pretty simple.

9 Q. It is pretty simple and pretty
10 straightforward. Let's go to page 8. 22,
11 paragraph 22. Are you with me?

12 A. Yes, sir.

13 Q. Page 8.

14 A. Yes, sir.

15 Q. Do you know what a tolling agreement is?

16 A. No, sir.

17 Q. All right. Well, let's read -- I will
18 read it to you, and you can learn. We will learn
19 together.

20 A. Maybe.

21 Q. Contractor and subcontractors agree that
22 with respect to any and all rights, duties,
23 claims and defenses or potential rights, duties,
24 claims, or defenses arising from or in any way
25 connected with the subcontracts.

1 Subcontractor claims, owner-related
2 claims or -- and/or the project, the claims, all
3 applicable statutes of limitations of proposed
4 and shares, et cetera, will be tolled on this
5 effective date. Do you understand? What does
6 that mean to you, if anything?

7 THE COURT: Do you have a copy of
8 that?

9 MR. BUNDY: I'm sorry, Your Honor.
10 Are you aware --

11 BY MR. BUNDY:

12 Q. While we're looking for that, are you
13 aware of any change order agreements between
14 Balfour Beatty and its subs wherein and whereby,
15 if Balfour Beatty collects any portion of the
16 subcontractor's claim, they get paid a certain
17 amount of money up to a certain point?

18 A. I'm not aware of anything.

19 Q. Okay. How would you book that? If
20 there was an agreement -- let's say that if
21 Watson's claim or if Lithko's claim was going to
22 get passed through to the owner and whatever they
23 got out of it, the first \$90,000 was going to go
24 back to Balfour Beatty. How would you book that
25 \$90,000?

1 A. So that would be -- that would probably
2 be a deductive change order of some sort.

3 Q. A deductive change order of some sort?

4 A. But I would have to see the specifics.

5 Q. Let turn to page 3, item D.

6 A. Yes, sir.

7 Q. Contractors and subcontractors agree to
8 promptly meet, negotiate and resolve all claims
9 between contractor and subcontractor, (contractor
10 and subcontractor claim), if at all possible.

11 Upon resolution of owner-related
12 claims -- until, excuse me -- until resolution of
13 owner-related claims, subcontractors agree that
14 it will assert no claim against contractor except
15 as necessary to perfect lienholders. And
16 contractor agrees that it shall assert no claim
17 against any of its subcontractors.

18 Now, do you read that to mean that
19 somebody who signs this agreement is not going to
20 assert the claims that the subcontractor might
21 have against the general contractor, right? Is
22 that fair to say?

23 A. Yes, sir.

24 Q. Subsequently, subcontractors and the
25 contractors respectively have the right to assert

1 claims against one another for any amount not
2 recovered from the owner or others.

3 Now, does that mean that the
4 subcontractor claims that you put in this report
5 of yours may well not end up being that total
6 amount of money? It might be a different amount
7 of money if the Judge decides differently. And
8 then, at that point, Balfour Beatty and the
9 subcontractor are going to decide how they're
10 going to divide that money up?

11 A. Sure.

12 Q. Okay. But you weren't aware of that
13 when you prepared this document?

14 A. No, sir.

15 Q. Okay. So necessarily, you didn't
16 inquire of anybody as to what their intentions
17 were or how they were going to handle these
18 monies in this settlement between the two
19 subsequent to the -- subsequent to paying any
20 money in this litigation, correct?

21 A. Can you repeat that?

22 Q. All right. I'm just about done. Oh, I
23 know one more thing I would like to ask you.
24 There was a -- where is the deduct thing you did
25 for the credit?

1 A. For the audit.

2 Q. Yeah, for the audit. Where is that?

3 A. It is --

4 Q. Okay. I'm just curious about one thing
5 here. I just want to ask you one question.

6 A. Okay.

7 Q. Here we go. This is what I'm looking
8 for. I want to start right here, interest. I
9 don't want to stand too close to you because your
10 lawyer won't like that. What's the interest you
11 want?

12 A. \$1,313,957.13.

13 Q. Okay. And that's based upon a claim of
14 what?

15 A. So the interest is on our RCOs, OCOs,
16 and unpaid cost and retainage.

17 Q. Okay. And then you add the interest,
18 right? You add the interest to the total of
19 everything above, and then, after you added the
20 full interest -- so the interest is on the total
21 of all of the lines above it?

22 A. No, it's not on all of the total of all
23 the lines. It's on unpaid cost and retainage,
24 owner change orders and RCOs.

25 Q. Okay.

1 A. Yes, sir.

2 Q. Does the audit deduction reflect --
3 change those numbers? In other words, shouldn't
4 that -- shouldn't the audit deduction be above
5 the calculation of interest so you're not
6 calculating interest on a larger amount and
7 then --

8 A. It would --

9 Q. Sir?

10 A. I'm sorry, I don't meant to interrupt
11 you.

12 Q. No, that's okay. Go ahead.

13 A. So it would come out to the same number
14 because the interest is only calculated on those
15 values.

16 Q. Right. But aren't those values reduced
17 by the agreed upon audit deducts?

18 A. Well, that's total cost. So the -- so
19 this is more so pertaining to the open invoices,
20 right?

21 Q. Gotcha.

22 A. Yeah. And I would not have -- the cost
23 is well in excess of those invoices.

24 MR. BUNDY: Okay. All right. Have
25 a safe trip home.

1 THE WITNESS: Thank you.

2 MR. HILDEBRAND: I have just a
3 couple more.

4

5 REDIRECT EXAMINATION

6 BY MR. HILDEBRAND:

7 Q. Very quickly, Mr. Thompson.

8 A. Yes, sir.

9 Q. Let's turn to Exhibit 56 again real
10 quick, please.

11 A. Okay.

12 Q. All right. And the A133, page 12.

13 A. Okay.

14 Q. All right. Article 6, cost for the work
15 for construction phase. Are you with me?

16 A. Yes, sir.

17 Q. All right. That's not it.

18 THE COURT: You're in the contract,
19 right?

20 MR. HILDEBRAND: Right.

21 BY MR. HILDEBRAND:

22 Q. All right. So page 12 of the A133. Are
23 you with me?

24 A. Yes, sir.

25 Q. Up at the very top, 6.1, cost to be

1 reimbursed.

2 A. Yes, sir.

3 Q. 6.1.1, the term cost of the work shall
4 mean costs necessarily incurred by the
5 construction manager in the proper performance of
6 the work; is that right?

7 A. Yes, sir.

8 Q. All right. Such cost shall be at rates
9 not higher than the standard paid at the place of
10 the project except with prior consent of the
11 owner. The cost of the work shall include only
12 the items set forth in section 6.1 through 6.7.

13 Construction manager's labor rates are
14 set forth in Exhibit B. All costs shall be
15 consistent with and allocated as set forth with
16 the project cost elements matrix attached as
17 Exhibit C. Now, let's jump down to -- that
18 defines the cost of work for the job, correct?

19 A. Yes, sir.

20 Q. All right. Now, let's jump down to
21 6.2.4, cost paid or incurred by the construction
22 manager for taxes, insurance, contributions,
23 assessments and benefits required by law or
24 collective bargaining agreements, and for
25 personnel not covered by such agreements,

1 customary benefits such as sick leave, medical
2 and health benefits, holidays, vacations, and
3 pensions, provided such costs are based on wages
4 and salaries included in the cost of the work
5 under sections 6.2.1 through 6.2.3.

6 The contractor's billable total payroll
7 burdened rate salary 62.54 percent an hour and
8 36.98 percent; is that correct?

9 A. Yes, sir.

10 Q. So there are different sections in here
11 for -- that relate to cost paid or incurred and
12 cost just incurred?

13 A. Stipulated between paid and incurred.

14 Q. Okay. And then very quickly turn to
15 A201, page 36.

16 A. Okay.

17 Q. At the very top, 9.6.2.

18 A. Yep.

19 Q. Contractor shall pay each subcontractor,
20 no later than seven days upon receipt of payment
21 from the owner, the amount to which the
22 subcontractor is entitled reflecting percentages
23 actually retained from amounts paid to the
24 contractor on account of each subcontractor's
25 portion of the work.

1 Would that imply that that was a paid
2 condition or incurred condition to you?

3 MR. BUNDY: Objection, leading.

4 THE COURT: I'm going to allow it.
5 Go ahead.

6 THE WITNESS: Can you repeat the
7 question?

8 BY MR. HILDEBRAND:

9 Q. How does that impact whether the -- is
10 there a requirement under that section, in your
11 view, for the contractor to pay the
12 subcontractors in advance of being paid by the
13 owner?

14 A. No, sir. This would rely on the receipt
15 of payment from the owner prior to being --
16 paying the subcontractor.

17 MR. HILDEBRAND: That's all I have,
18 Your Honor.

19 RE CROSS-EXAMINATION

20 BY MR. BUNDY:

21 Q. Are you aware of a statutory requirement
22 regarding payment of subcontractors once the
23 contractor has been paid?

24 A. I read a book on it.

25 Q. Sir?

1 A. Yes, sir.

2 Q. It's illegal in South Carolina, is it
3 not, to take money or to get the money and not
4 pay the subcontractor, right?

5 A. Yes, sir.

6 Q. Okay. And it's also illegal to withhold
7 money from a subcontractor that you have received
8 from the owner for back charges unless you tell
9 the owner you're going to do it, right? That's
10 illegal, too?

11 A. I don't know.

12 Q. You don't know. That's okay.

13 MR. BUNDY: That's all I have.
14 Thank you. Have a nice trip.

15 MR. HILDEBRAND: Nothing further.

16 THE COURT: Mr. Thompson, thank you
17 for coming, sir. Appreciate it. It's 6:20. I
18 suggest we break for the evening. Let's come on
19 back tomorrow. You don't plan to call anyone
20 else, do you?

21 MR. HILDEBRAND: No.

22 THE COURT: We will get our
23 documents in a row tomorrow, and then we will go
24 from there.

25 MR. BUNDY: Because there are not

1 going be any more witnesses?

2 THE COURT: Right.

3 (The hearing was concluded at

4 6:21 P.M.)

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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 hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said hearing
21 and to subscribe the same.

22 Should the signature of the witness
23 not be affixed to the hearing, the witness shall
24 not have availed himself/herself of the
25 opportunity to sign or the signature has been
26 waived.

27 I further certify that I am neither
28 related to nor counsel for any party to the cause
29 pending or interested in the events thereof.

30 Witness my hand, I have hereunto
31 affixed my official seal on August 18, 2022 at
32 Charleston, Charleston County, South Carolina

33 _____
34 Jennifer M. Adams
35 Court Reporter And Notary Public
36 My commission expires: 03/15/2032

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 TEN
) 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 24, 2021 at 100 Broad Street, Courtroom
 22 2A, Charleston, South Carolina.

23

24

25

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1 THE COURT: All right. So what
2 I've been working on is getting just a list of
3 all the exhibits. I think we probably need to go
4 over that this morning to make sure what's in and
5 what's not in, cover that one.

6 And I'm trying to get as -- trying to
7 take my handwritten notes on my exhibit list and
8 make it so it's legible for somebody else so it
9 can be typed up, and y'all can verify it. Okay.

10 MR. BUNDY: Since the clerk doesn't
11 keep the exhibits, right?

12 THE COURT: Yes, sir.

13 MR. BUNDY: My father was a
14 professional gambler. He always taught to me to
15 initially trust everybody.

16 THE COURT: Yeah.

17 MR. BUNDY: But you always cut the
18 cards.

19 THE COURT: Right.

20 MR. BUNDY: Okay. And so what I
21 would like to do is to determine where we're
22 going to keep these exhibits.

23 THE COURT: Okay.

24 MR. BUNDY: The chain of custody,
25 the integrity of the exhibits and if either

1 party, for some reason unbeknownst to me, would
2 need access to those exhibits, it will have to be
3 with the permission of some neutral and detached
4 party.

5 THE COURT: Okay.

6 MR. BUNDY: You know, it's
7 perfectly okay -- and maybe you can't do it --
8 just to keep them in your chambers over here and
9 lock them up or find a room somewhere.

10 And then the clerk -- I'll agree that
11 the clerk is not responsible for anything. But
12 it just seems to me to be easier if we could just
13 keep them over here somewhere and locked up in a
14 room.

15 THE COURT: It will be. I've
16 gotten instructions that they're not going to be
17 kept in this building; however, I'm happy to keep
18 them in my courtroom or my chambers, either one.

19 Typically, what we do, just so y'all
20 know, is the plaintiff takes back the plaintiff's
21 exhibits and the defendant takes back the
22 defendant's exhibits because y'all are
23 responsible for uploading the exhibits. Okay?

24 I don't know if they're doing that in
25 the Circuit Court or not, but that's what I have

1 been instructed. And we cannot -- we, as the
2 Court, cannot upload exhibits. It's just
3 physically impossible because the system doesn't
4 allow us to do it.

5 So when somebody sends me a proposed
6 order with a plat as an exhibit, for example, I
7 can't upload the plat. And I manipulate about 99
8 percent of the orders that come to me so I can
9 manipulate the order, and then I have to send it
10 back to the lawyer and have the plat attached to
11 the order that I want to sign and have it
12 uploaded in the systems.

13 So that's just how that's been working.
14 It is extremely different than what it used to
15 be, no doubt about it, and I had some concerns
16 about it the first time that I had it. But I
17 have not yet had any problems with the system
18 because, as I say, the plaintiff takes their
19 exhibits and uploads them to the server for the
20 clerk's office.

21 And that needs to be done in small
22 pieces, they always like to say. All right.
23 Mr. O'Kelley has probably done this more than
24 anybody. He's back there shaking his head. And
25 then the defendant takes theirs and uploads them

1 in the system. How we're going to get these big
2 plans uploaded is beyond me. Okay?

3 MR. BUNDY: I'm not too sure
4 they're in evidence, are they?

5 THE COURT: I'm not sure if the
6 plans came into evidence either.

7 MR. BUNDY: I don't think they have
8 been.

9 THE COURT: That was the one thing
10 y'all keep stepping over to get to me.

11 MR. BUNDY: Well, these plans are
12 used to being stepped on. My concern is that we
13 have notebooks full of documents that aren't in
14 evidence.

15 THE COURT: Right.

16 MR. BUNDY: And it's extremely
17 complicated. I mean, when I first started doing
18 this, if you touched an exhibit in Federal Court
19 and took it out of that building, you'd better be
20 ready to go back with your toothbrush.

21 THE COURT: Right.

22 MR. BUNDY: So I would just really
23 ask Your Honor to keep these original exhibits
24 somewhere in this building and then maybe if they
25 have to be uploaded, to be uploaded at the end of

1 the case.

2 THE COURT: Oh, yeah, yeah, yeah.
3 They don't need to be uploaded until the case is
4 all over.

5 MR. BUNDY: Okay.

6 THE COURT: You know, I hold out
7 hope y'all can settle this thing between now and
8 October 25th, but I don't expect that to happen.

9 MR. BUNDY: I can guarantee you it
10 ain't going to happen. So anyway, that's just my
11 concern.

12 THE COURT: Yeah, yeah.

13 MR. BUNDY: And I'd like for us,
14 before we leave today or at least Mr. McDonald
15 leaves -- because I'm going to leave him with
16 this task. I ain't doing it.

17 THE COURT: Yeah. No, I'm with you
18 on that one.

19 MR. BUNDY: You know, that --

20 THE COURT: I have been offered the
21 chambers, which is downstairs from here, but I
22 have yet to speak directly with the clerk to see
23 if we could use that room. That would be ideal
24 because they don't actually leave this building.
25 But the initial inquiry I got was shot down. So

1 then we've got start traveling back and forth.
2 At least it's not raining today, you know. So
3 anyway, so that's kind of where we are with the
4 exhibits.

5 MR. BUNDY: Right.

6 THE COURT: I'm hoping y'all have
7 kept a pretty good record as to what exhibits
8 have come in. I have tried to do that. I keep
9 both my notes, and I learned a long time ago,
10 keep a separate exhibit sheet if there are lots
11 of exhibits.

12 And so I -- sometimes I find myself
13 writing on the wrong pad, but anyway, I've got
14 the numbers down here. So I'm happy to go over
15 that now if you would like. I know the plaintiff
16 needs to make sure that that's done in order for
17 them to conclude their case, which is what we're
18 hoping to do here today. And that leads to
19 defense motions, and we will cover those today.

20 Anything else that we need to talk
21 about?

22 MR. HILDEBRAND: I just want to say
23 that you'll see that Mr. Heuer is not sitting
24 next to me. He got a call in the night about a
25 family emergency and had to take off at the crack

1 of dawn to get back to Charlotte.

2 THE COURT: Okay.

3 MR. HILDEBRAND: He apologizes to
4 the Court and said, he means no disrespect,
5 whatsoever, and does not want the Court to think
6 that he was not interested in this last day, that
7 he just had to get back to his family for
8 something. I don't know what exactly it was,
9 but --

10 THE COURT: Okay. All right.
11 That's fine. And Mr. Byrd's said yesterday he
12 had some sort of medical procedure to do this
13 morning.

14 MR. HILDEBRAND: Procedure. It was
15 supposed -- I think it was supposed to have been
16 done at 8 or 8:30; so he confident would be here
17 by 9:30, but --

18 THE COURT: Okay.

19 MR. HILDEBRAND: It ran over
20 apparently, but I think he will be here.

21 THE COURT: Okay. Yeah, he
22 informed me of that.

23 Mr. McDonald?

24 MR. MCDONALD: Your Honor, I've
25 done my earnest best to keep track of the

1 exhibits as they came in.

2 THE COURT: Okay.

3 MR. MCDONALD: And while they would
4 be not in --

5 THE COURT: Numerical sequence?

6 MR. MCDONALD: -- numerical
7 sequence --

8 THE COURT: Right.

9 MR MCDONALD: -- I did keep track
10 of them as they came in, and I would be happy to
11 start with what I think came in.

12 THE COURT: You've got a list as
13 well?

14 MR. HILDEBRAND: I got a typed up
15 list.

16 THE COURT: All right. Well, y'all
17 each have got y'all's list. That's perfect
18 because I've got my own, and I -- and it should
19 be chronological but not numerical, right?

20 MR. MCDONALD: Chronological, not
21 numerical, you're correct.

22 THE COURT: Right.

23 MR. MCDONALD: As they came in --

24 THE COURT: In time?

25 MR. MCDONALD: -- in the trial,

1 yes, sir.

2 THE COURT: And does that -- was
3 that yours as well, or is yours numerical?

4 MR. HILDEBRAND: Yes, sir.

5 THE COURT: Okay. Well, let's go
6 down that list.

7 MR. HILDEBRAND: Let's --

8 THE COURT: The one thing I did not
9 have -- here they are. I just found them. All
10 right. I think my list is pretty full. Let's
11 see if we can agree.

12 MR. MCDONALD: I'm through page 1,
13 and I concur with page 1.

14 THE COURT: Oh, you do?

15 MR. MCDONALD: Now, what is not
16 obviously listed on this is contemporaneous
17 objections, but that they are in. Whether
18 they're in without objection or over objection is
19 not noted on here. But Your Honor has moved each
20 of the exhibits listed on page 1.

21 MR. HILDEBRAND: And you're working
22 off of my sheet?

23 MR. MCDONALD: And I'm working off
24 of plaintiff's sheet.

25 THE COURT: Okay. Okay. Well,

1 that works even better than what I've been doing.

2 MR. MCDONALD: And maybe we should
3 identify this as something.

4 THE COURT: Yeah. You want to call
5 this the exhibit -- let's just call it exhibit
6 log. Okay?

7 MR. MCDONALD: Exhibit log?

8 THE COURT: Let's just call it
9 exhibit log. I will call it Court's exhibit log
10 for the benefit of Judge McDonald (sic). It's
11 nice and typed up. So page 1 looks good.

12 MR. MCDONALD: Yes, sir.

13 THE COURT: Mr. McDonald, very
14 good. All right. Let's flip on over. Let's go
15 to page 2. Here we go.

16 MR. MCDONALD: Okay. On page 2,
17 tab 26, I just want to verify that that is the
18 replaced tab 26. If I recall, it was originally
19 the first page of every schedule, and it was
20 replaced with a dated -- just dates of each
21 updated schedule.

22 THE COURT: All right. Just one
23 second. 26 was replaced?

24 MR. MCDONALD: 26. And by
25 Balfour's description, it looks like that is the

1 replaced one because it says, list of schedule
2 dates typed out during trial.

3 THE COURT: Okay.

4 MR. MCDONALD: I just wanted to be
5 certain of that.

6 THE COURT: Okay. That appears
7 correct?

8 MR. HILDEBRAND: Yes.

9 THE COURT: Thank you. All right.
10 Other than that, page 2 look okay?

11 MR. MCDONALD: I'm almost through
12 IT.

13 THE COURT: Okay.

14 MR. HILDEBRAND: Your Honor, if you
15 would like, I would be happy to keep this current
16 while we progress with the trial and provide it
17 to you daily or whatever.

18 THE COURT: That would be great;
19 that would be good.

20 MR. MCDONALD: And I don't have a
21 103 on page 2.

22 THE COURT: Plaintiff's Exhibit
23 103? 12/28/2016 BBC demand for mediation. It's
24 from Kim Brown's deposition, Exhibit 37.

25 MR. MCDONALD: It says it came in

1 through Spano, but I don't have that in my notes.

2 THE COURT: Okay. I do, and I had
3 it coming in. So I think that's when there was
4 that dispute, and it was asked for mediation.

5 MR. MCDONALD: Your Honor, I have
6 no allusion that your notes do not trump my
7 notes. I understand that. I just -- for the
8 record, I just want to say, I don't have that in
9 my notes.

10 THE COURT: Okay. Just one second.

11 MR. MCDONALD: So with the
12 exception of tab 103, page 2, it appears
13 consistent with my notes.

14 THE COURT: Okay. Let me see if
15 I've got anything on that. Tab 103 was a
16 question, but I had it in evidence, so just one
17 second.

18 MR. MCDONALD: On page 3, tabs 205
19 and 206 are not in evidence. They are a response
20 for request to admit.

21 THE COURT: On which one? I'm
22 sorry.

23 MR. MCDONALD: On page 3, tabs 205
24 and 206. It has not come into evidence because
25 they were requested to admit.

1 THE COURT: 205 and 206?

2 MR. MCDONALD: Yes, sir.

3 MR. HILDEBRAND: I thought that
4 they did actually.

5 THE COURT: Yeah. My notes reflect
6 that those did come into evidence. They are
7 pleadings, but they are -- I think requests to
8 admit would be admissible. We talked about that
9 at one time, about they're being verified.

10 MR. MCDONALD: Okay. I just wanted
11 to put it on the record.

12 THE COURT: Okay. So I had them in
13 evidence. Okay?

14 MR. MCDONALD: Tabs 211 and 212 are
15 the first page of the pay applications, and they
16 were admitted for notice purposes only. Tab 213,
17 I do not have as not admitted. That was the
18 unsigned pay application 44.

19 THE COURT: Yeah. 211, 212, 213,
20 and then if I remember right, 213 -- these are
21 the final pay apps. My notes reflect that we
22 allowed those for notice of the pay application,
23 but they did not originally come in. I think
24 later they did.

25 MR. MCDONALD: Pay application 45.

1 The first page of pay application 45, I believe,
2 came in for the date purposes.

3 THE COURT: Right.

4 MR. MCDONALD: But I didn't have --
5 I'll just put it on the record, I didn't have 44
6 as coming in.

7 THE COURT: Yeah. Number 44?

8 MR. MCDONALD: Yes, sir. And, no,
9 that would be tab 213, which is already -- I
10 referred to it by pay application number 44, tab
11 213.

12 THE COURT: Right. For some
13 reason, I didn't have 14 written down. My notes
14 reflect that those were allowed for notice
15 purposes at that time. I think later on, we -- I
16 think they may have come in.

17 MR. HILDEBRAND: Right.

18 THE COURT: So I think this may
19 be -- this may update those later in time. But
20 that's -- those are the pay apps is what those
21 are. Initially, if they were signed, we allowed
22 them. That would have been -- if memory serves
23 me right, 42 was submitted, right?

24 MR. MCDONALD: Pay app 42 was
25 submitted, certified, and paid.

1 THE COURT: Right. 43 submitted.

2 That was one, I think, that was decertified was
3 the term we used?

4 MR. MCDONALD: At the risk of using
5 decertification --

6 MR. HILDEBRAND: It was not
7 certified.

8 THE COURT: It was or it was not?

9 MR. HILDEBRAND: That's one --

10 THE COURT: That's the one --

11 MR. HILDEBRAND: It was not.

12 THE COURT: That was the one that
13 was signed off, and then -- but then withdrawn
14 pursuant to the correspondence we had in January
15 of '19?

16 MR. MCDONALD: Yes, Your Honor.

17 THE COURT: And that's the one you
18 were fighting over yesterday. That's 43, right?

19 MR. MCDONALD: Yes, sir.

20 MR. HILDEBRAND: Not to belabor,
21 but we don't know when it was withdrawn. We
22 think there were some deducts that were noted,
23 but it was not actually withdrawn. There was
24 no -- the actual pay application was never
25 withdrawn. It was never by the architect. There

1 was no decertification.

2 THE COURT: All right.

3 MR. HILDEBRAND: So I just wanted
4 to state that for the record.

5 THE COURT: I gotcha. So back to
6 that, my notes reflect, initially allowed it for
7 notice purposes. I think we talked about them
8 later. We went into them to some degree. Is
9 there is an objection that --

10 MR. MCDONALD: No, no.

11 THE COURT: Does there remain an
12 objection to any of those pay apps?

13 MR. MCDONALD: No, that's fine.

14 THE COURT: Okay. Good. All
15 right. They're all in.

16 MR. MCDONALD: All right. I do not
17 have 215 as in.

18 THE COURT: You know, again, I put
19 it on there for -- my notes reflect it was for
20 notice purposes at that time. I know we went
21 back into it some time later.

22 MR. HILDEBRAND: I think they were
23 admitted later.

24 MR. MCDONALD: The next one is Phil
25 Garcia, the transcript portions.

1 THE COURT: Yeah.

2 MR. MCDONALD: And that was, I
3 believe, taken down by Madam Court Reporter.

4 THE COURT: I believe it was, yeah.
5 That was -- that all came out of the video?

6 MR. MCDONALD: Yes, sir.

7 THE COURT: And she took that down,
8 so that would be within -- that should be within
9 the record.

10 MR. HILDEBRAND: Right.

11 THE COURT: Objection there.

12 MR. HILDEBRAND: So that's not an
13 exhibit in?

14 THE COURT: Right. We will take
15 that out.

16 MR. HILDEBRAND: Right.

17 MR. MCDONALD: 231 is the Doran
18 PowerPoint presentation.

19 THE COURT: Right.

20 MR. MCDONALD: Just to be clear
21 with that, did you let that in for demonstrative
22 purposes?

23 THE COURT: 231, right?

24 MR. MCDONALD: Yes.

25 THE COURT: Yeah, I did. My notes

1 do not show it as an exhibit.

2 MR. MCDONALD: Okay.

3 MR. HILDEBRAND: Your Honor, I
4 think that was in. It was number 231, and we did
5 specifically move to have that entered, and I
6 think it is in evidence.

7 THE COURT: All right. Hold on a
8 second. That was Mark Doran's --

9 MR. HILDEBRAND: Yes, sir.

10 THE COURT: -- PowerPoint
11 presentation he did? All right. It comes in.

12 MR. MCDONALD: Steve Huyghe,
13 PowerPoint presentation, no number.

14 MR. HILDEBRAND: I know that we
15 moved that one in just like we did with
16 Mr. Doran's, but perhaps I didn't identify what
17 the specific number was. We can do that now.

18 MR. BUNDY: Your Honor, I object to
19 putting in evidence now. I mean, you're done.
20 There's not a witness here to identify anything.
21 It was purely for demonstrative purposes at most.
22 I know I objected to it. I objected to
23 everything.

24 MR. HILDEBRAND: It was in, Your
25 Honor. The only question is, there wasn't a

1 physical sticker. That's an administerial act.

2 THE COURT: Yeah, yeah. He is the
3 one that did the development design and
4 construction?

5 MR. HILDEBRAND: Yes, sir.

6 THE COURT: All right. That was
7 McCullough?

8 MR. MCDONALD: And there were a
9 number of things he wasn't allowed to testify
10 about, Your Honor.

11 THE COURT: Right. I think this is
12 McCullough's here is what I have got, the one
13 I've got in front of me.

14 MR. HILDEBRAND: I think Huyghe's
15 was the -- I think the really thick one.

16 THE COURT: Does that look like it?

17 MR. HILDEBRAND: That's Huyghe's.

18 THE COURT: That's Huyghe's?

19 MR. HILDEBRAND: That's the one
20 we're talking about.

21 THE COURT: Hold on a second.

22 MR. BUNDY: Remember, Your Honor,
23 there were parts of that that talked about the
24 owner's thing, and you said that he couldn't
25 testify to that.

1 THE COURT: Right.

2 MR. BUNDY: He was supposed to take
3 those out and then use the rest of them. My
4 recollection is it was for demonstrative
5 purposes, but you may have let it in. But I know
6 I objected to it so.

7 THE COURT: Okay. Hold on. Here's
8 what I highlighted. He had a lot of background
9 information in here. It's going to be hard to
10 do. It's an awful lot of information. His
11 testimony is clearly in the record.

12 MR. HILDEBRAND: Yes, sir.

13 THE COURT: And so this would
14 just -- this would be for demonstrative purposes.
15 What I would want to do is parse it, so that we
16 go from the plan to the actual. That's what he
17 spent most of his time testifying to.

18 MR. HILDEBRAND: Okay.

19 THE COURT: I will allow that into
20 evidence. It's only part of the document, but it
21 goes along with his testimony, so you can see
22 what he is saying. Okay?

23 MR. HILDEBRAND: Okay. Do you want
24 to -- if you want to just pull those pages out,
25 Your Honor, then we can mark what you have agreed

1 to?

2 THE COURT: Yeah. I'm inclined to
3 allow the end of this thing where he talked about
4 the plan versus the actual. This is -- if I
5 remember right, he's the one -- well, he does
6 have -- he's got the one with the red and the
7 blue which turns into purple.

8 MR. HILDEBRAND: Right.

9 THE COURT: That was what I recall
10 about his testimony, okay, as to what -- when the
11 project, according to him, got off track, so.

12 MR. HILDEBRAND: Right.

13 THE COURT: I'm willing to allow
14 that. Again, it was for demonstrative purposes
15 at the time.

16 MR. BUNDY: There you go.

17 THE COURT: Okay.

18 MR. BUNDY: There you go.

19 THE COURT: All right. So that's
20 like the last 10 or 12 pages. I will give that
21 to you and let you look at that.

22 MR. HILDEBRAND: All right, sir.
23 So would that be --

24 THE COURT: That did not get a
25 number, however.

1 COURT REPORTER: I think that's
2 333.

3 THE COURT: Okay. All right.

4 (PLF. EXH. 333 was marked for
5 identification and received in evidence.)

6 MR. HILDEBRAND: So would that be
7 what the first sticker is for?

8 THE COURT: It's says -- it's not
9 the first sticker, but it's like right behind it.
10 It says -- somewhere in there, the headline is
11 actual.

12 MR. HILDEBRAND: The actual?

13 THE COURT: Yeah.

14 MR. HILDEBRAND: Okay.

15 THE COURT: You can pull those
16 other stickers off if they're confusing.

17 MR. HILDEBRAND: So those are 333.

18 THE COURT: They are 333.

19 MR. HILDEBRAND: Is this your
20 working copy, Your Honor? I want to get it with
21 your notes on it.

22 THE COURT: It is.

23 MR. HILDEBRAND: So why don't I
24 give you this back, so I don't -- neither one of
25 us are --

1 THE COURT: Okay. You already put
2 it on there.

3 MR. HILDEBRAND: Okay. So I will
4 give you your working copy back. That will be
5 333.

6 THE COURT: Okay.

7 MR. HILDEBRAND: We can come back
8 to that one if you would like, Your Honor.

9 THE COURT: Okay.

10 MR. HILDEBRAND: I will pull those
11 same pages. It's the one that starts with the
12 actual. It's like the last report or so.

13 THE COURT: Yeah, the last 20 pages
14 or so.

15 MR. HILDEBRAND: Yes.

16 MR. MCDONALD: After that, I have
17 the remainder of page 3 as consistent with my
18 notes, Your Honor.

19 THE COURT: Okay.

20 MR. MCDONALD: On page 4, the only
21 thing I would note -- well, two things I would
22 note is -- I know Your Honor has this, but it
23 appears that when it goes to a Defendant's
24 Exhibit, there's quite a bit of explanation,
25 whereas the Plaintiff's Exhibit is pretty dry as

1 to the title. So obviously I didn't draft any of
2 this.

3 THE COURT: Right.

4 MR. MCDONALD: They've got quotes
5 from the document and I think that's
6 inappropriate.

7 THE COURT: I think they're
8 probably trying to identify it.

9 MR. MCDONALD: Okay.

10 THE COURT: I've got 27, 28, 29.

11 MR. MCDONALD: Yes, and the one
12 that said, showed Nick but not entered is not in
13 evidence.

14 THE COURT: Yeah, yeah, right.

15 MR. MCDONALD: 28 -- I'd just as
16 soon go by the exhibit numbers for
17 identification. 28 is in and 29 is in.

18 THE COURT: Correct. So I think
19 it's just the four. Okay. 30 has got questions,
20 but I show it in as well.

21 MR. MCDONALD: Yes, sir, Your
22 Honor. On page 5, Plaintiff's 300 through 307, I
23 would just note that my understanding is, those
24 are the page and line number rather than the --

25 THE COURT: Correct.

1 MR. MCDONALD: -- depositions
2 themselves.

3 THE COURT: That's correct. Those
4 are the things I took home and read. Okay.

5 MR. MCDONALD: And those would not
6 themselves be exhibits. They would just be page
7 and line number and deposition excerpts.

8 THE COURT: Yeah, because we --
9 ultimately, we submitted the entire depositions,
10 did we not, in the four-in-one format?

11 MR. HILDEBRAND: I'm sorry, Your
12 Honor.

13 THE COURT: 300 through 307 were
14 the -- that were marked as the deposition
15 excerpts that were submitted by plaintiff to
16 which responses were given, as I recall.

17 MR. MCDONALD: Yes, and objections.

18 THE COURT: And objections were
19 given, and we covered that later on.

20 MR. MCDONALD: And the Defendant
21 400 and 401 are the objections, counter
22 designations.

23 THE COURT: Correct.

24 MR. MCDONALD: But those wouldn't
25 have themselves been exhibits, I don't believe,

1 in the case.

2 MR. BYRD: For 300, as you can see
3 that what was entered, you'll have (inaudible).

4 THE COURT: I had those things a
5 minute ago. All right. So 300 is the
6 plaintiff's excerpts designation for the
7 deposition of Kimberly Brown. So Kim Brown was
8 300.

9 MR. MCDONALD: 56.

10 THE COURT: 56 is the contract.
11 That came in, didn't it?

12 MR. MCDONALD: Okay. Yes, so the
13 rest of page 5, subject to the deposition
14 excerpts, counter designations not being exhibits
15 is consistent with my notes.

16 MR. HILDEBRAND: I'm sorry, which
17 number?

18 MR. MCDONALD: Page 5.

19 MR. HILDEBRAND: And which number?

20 THE COURT: 300 through 307 and 400
21 and 401.

22 MR. MCDONALD: Yeah. Those would
23 just be the -- in the record, so you would know
24 what portion of the exhibits -- what portion of
25 those deposition transcripts were actually

1 submitted into evidence.

2 MR. HILDEBRAND: All right.

3 THE COURT: The best evidence there
4 being the depositions themselves. This just
5 takes you to what's relevant.

6 MR. MCDONALD: For what they
7 designated. So even though they gave you the
8 whole deposition transcript, the portions they
9 haven't designated aren't in evidence or aren't
10 relevant.

11 THE COURT: Okay. Got it.

12 MR. MCDONALD: Page 6, tab 132.
13 That was just proffered.

14 THE COURT: Tab 132?

15 MR. MCDONALD: Yes, sir.

16 THE COURT: That's consistent with
17 my records as well, tab 132.

18 MR. MCDONALD: 141 has the notation
19 which is consistent with my notes that it was
20 only page 1.

21 THE COURT: Okay. Sounds right.

22 MR. MCDONALD: The last one on page
23 6, just to be clear, Plaintiff's tab 226. Is
24 that the same thing as binder 5 of 5?

25 MR. BYRD: I think so.

1 THE COURT: That's the fifth
2 binder?

3 MR. BYRD: Yes, sir.

4 MR. MCDONALD: Okay. So binder 5
5 of 5 is --

6 THE COURT: Yeah, that's correct.

7 MR. MCDONALD: So this is not quite
8 up-to-date. The objections to 14, 17 and 18, I
9 believe, were remedied by the replacement --

10 THE COURT: Okay.

11 MR. MCDONALD: -- Portions.

12 THE COURT: Okay. Yeah. That was
13 the one we wanted to change out?

14 MR. MCDONALD: So the objections
15 were actually still to, I believe 19 through 22.

16 THE COURT: As to the objection?

17 MR. MCDONALD: Yes.

18 MR. HILDEBRAND: Just not 19. 19
19 was admitted.

20 MR. MCDONALD: 19 was signed?

21 MR. HILDEBRAND: Yes.

22 MR. BYRD: Your Honor, if I may, on
23 page 8, the changes are addressed.

24 THE COURT: Okay.

25 MR. BYRD: It just says under

1 Plaintiff 264. They're just the plaintiff.

2 MR. MCDONALD: Okay. So can we get
3 rid of one of these just so we're not --

4 MR. BYRD: Yes.

5 MR. MCDONALD: Okay.

6 MR. BYRD: We will get rid of the
7 first one.

8 MR. MCDONALD: Get rid of the first
9 one on September 21st; is that okay?

10 MR. BYRD: Yeah.

11 MR. MCDONALD: Okay.

12 THE COURT: All right. You lost me
13 on that one but anyway.

14 MR. MCDONALD: So the first one,
15 Your Honor, on the bottom of page 6 --

16 THE COURT: Right.

17 MR. MCDONALD: -- is the September
18 21st where they're attempting to identify
19 Plaintiff's tab 256.

20 THE COURT: Yes.

21 MR. MCDONALD: But that has the old
22 objections. If you go to page 8 and look at
23 September 22nd, the third one down.

24 THE COURT: Okay.

25 MR. MCDONALD: It just says

1 plaintiff. My understanding is that they're
2 going to add that as tab 226 so it's up-to-date.

3 THE COURT: Okay.

4 MR. MCDONALD: But I'm not to page
5 8 yet but I just wanted to jump ahead.

6 THE COURT: Okay. That's where we
7 pick it up. It was not --

8 MR. MCDONALD: Other than those
9 issues on -- other than that issue on page 6, it
10 appears to be consistent with my notes.

11 MR. BYRD: One more thing on page
12 6. Tab 132 was subject to you looking at the
13 Clements depo excerpts.

14 THE COURT: Yeah.

15 MR. BYRD: I lost my chart that had
16 (inaudible) and I'm just wondering if maybe we
17 can go back over it and see.

18 THE COURT: Okay. All right.
19 Yeah. All right. Hold on a second because I did
20 do that later. Which document would that be?

21 MR. BYRD: It's Plaintiff's tab
22 132.

23 THE COURT: Is that an e-mail?

24 MR. BYRD: E-mail from Clements, I
25 believe.

1 THE COURT: If you can identify it
2 from his --

3 MR. BYRD: I believe it's Exhibit
4 56 to the August 25th, 2020 deposition of James
5 M. Clements.

6 THE COURT: Exhibit 56? Yeah,
7 trial Exhibit 132, e-mail from Kim Brown,
8 reference of supplementary conditions review, and
9 I allowed that. Okay.

10 MR. MCDONALD: You have that in as
11 evidence, Your Honor?

12 THE COURT: I do. I haven't
13 reviewed his deposition. I think it was --
14 foundational was part of the process, but he
15 clearly acknowledged that he got it. So 132
16 would be in evidence. Okay? So that's a change.

17 MR. MCDONALD: And, Your Honor,
18 this probably doesn't need to be said, but
19 obviously all of -- there were objections
20 throughout the trial that were contemporaneous to
21 all of this. I'm just acknowledging that it's in
22 and it's subject to all the objections that we
23 made.

24 THE COURT: Sure, sure, sure.

25 MR. MCDONALD: Thank you, Your

1 Honor. Okay. Page 7, I go from binder 5 of 5 to
2 Plaintiff's 289. I don't have 283, 284, 285,
3 286, 287, and 288. It says that Simonton was
4 admitted.

5 THE COURT: I don't think I have
6 those numbers either unless they're in one of
7 these books. Are they in a book? 283 to 292.

8 MR. BYRD: So I have 283, it is
9 Clements depo 92. I have that in through
10 Clements' deposition transcript.

11 THE COURT: Okay. All right. So
12 we're back in Jim Clements. Okay.

13 MR. BYRD: I believe 284 is
14 Clements depo 94. I actually don't have in or
15 out written on that one, so I'm not sure
16 whether -- what your ruling was on that.

17 THE COURT: All right. Hold on.
18 Okay. Yeah, I'm seeing one of these now. And I
19 see on Clements -- so I'm on the log of Clements,
20 and I've got on -- April 20, excuse me, that was
21 a long one.

22 On his August 25, 2020, deposition trial
23 Exhibit 283 and 285. Now, 283 is listed, a
24 November 19, '18 e-mail from Foster referencing
25 design continuums, RCO number 161, which is

1 Exhibit 92 to his depositions. I have that as
2 admitted. Okay? Plaintiff's tab 283, I have in
3 evidence.

4 The next one that I'm showing -- I don't
5 have a 284 in this list. So I'm not sure what
6 that is yet. But then the next one in the list
7 that I've got in front of me shows trial Exhibit
8 285. That's an e-mail from Faulkinberry
9 referencing RCO 2015 to Lutron Lighting.

10 I had a question mark on that one
11 because I couldn't find the foundation for it; so
12 that's one of the ones I raised -- well, we
13 discussed this yesterday.

14 MR. MCDONALD: Also, one of the one
15 that I couldn't find foundation for.

16 THE COURT: Yeah. I couldn't find
17 the foundation on that one.

18 MR. MCDONALD: And then 286 is
19 answer and cross-claims, so would that be a
20 pleading.

21 THE COURT: That was not -- yeah,
22 that's not in evidence.

23 MR. MCDONALD: Yeah, and then --

24 THE COURT: That was proffered but
25 not in evidence.

1 MR. MCDONALD: And then 287 is the
2 A133 2009, and I think the last thing we need is
3 another copy of the A133 2009 with another
4 exhibit number.

5 THE COURT: I agree with that.

6 MR. MCDONALD: Okay.

7 THE COURT: Let's call that Exhibit
8 56. How about that?

9 MR. MCDONALD: Okay. And then I
10 don't have a partially executed pay app 9, 288 in
11 evidence in my notes.

12 THE COURT: 288. Help me out with
13 what -- I see that's a list of items. Refresh my
14 memory on how we were doing that. I don't
15 remember. These were all part of the
16 depositions?

17 MR. BYRD: Well, I cannot answer
18 that question.

19 THE COURT: Okay.

20 MR. BYRD: I didn't put this chart
21 together.

22 MR. HILDEBRAND: I think that we --
23 I just talked to the paralegal that did this.

24 THE COURT: All right.

25 MR. HILDEBRAND: I think that what

1 we need to do is probably go back and add the
2 exhibits that you -- that are in through the
3 depositions.

4 THE COURT: Right.

5 MR. HILDEBRAND: I believe --

6 THE COURT: And insert those?

7 MR. HILDEBRAND: Insert those, yes,
8 Your Honor.

9 THE COURT: Okay. Okay. Y'all
10 have got a current list of that?

11 MR. BYRD: I have a chart, and I
12 think there's maybe one or two where I just
13 didn't get the answer.

14 THE COURT: Okay.

15 MR. BYRD: I'm happy to just walk
16 through that, and if y'all heard differently or
17 if there's any reason to believe differently --

18 THE COURT: On the deposition
19 exhibits, correct?

20 MR. BYRD: Yes, sir.

21 THE COURT: Okay.

22 MR. MCDONALD: Can we just -- I
23 mean, we're six pages in.

24 THE COURT: Yeah.

25 MR. MCDONALD: But can we finish

1 this one and see if we can agree on what we can
2 on this one --

3 THE COURT: All right.

4 MR. MCDONALD: -- and then move to
5 that one?

6 THE COURT: Yeah. Then we'll come
7 back. Let's do that. Let's come back to that
8 one.

9 MR. MCDONALD: So 288, we don't
10 know what that is, and we don't have it in our
11 notes. So can we take it out of this one and --

12 THE COURT: Let's just skip it for
13 now. Let's skip over 288 through 292.

14 MR. MCDONALD: Okay.

15 THE COURT: Okay. And let's see if
16 we can get to some --

17 MR. MCDONALD: Well, 289, 290
18 are -- I have it in, in evidence.

19 THE COURT: 289 and 290?

20 MR. MCDONALD: Yes.

21 THE COURT: Okay.

22 MR. HILDEBRAND: What page are we
23 on?

24 MR. MCDONALD: Page 7.

25 THE COURT: Still on page 7.

1 MR. MCDONALD: 291 did not come
2 into evidence, as I have it in ID.

3 THE COURT: Pay app 44.

4 MR. MCDONALD: 292 did come into
5 evidence.

6 THE COURT: Okay. All right. We
7 will come back. Let's come back to those two.
8 All right. See if we can get back on track.
9 251, I have as in.

10 MR. MCDONALD: Okay. So the
11 remainder of page 7 or all of page 7, the ones
12 that -- so I've got one we just talked about,
13 Plaintiff tab 291, I have that as not in
14 evidence, and Plaintiff tab 256, I have as
15 proffered, not in evidence.

16 THE COURT: 256?

17 MR. MCDONALD: Yes, sir -- nope,
18 forgive me. What 256 was, Your Honor, was the
19 letter from Mr. Heuer. It was -- if you will
20 recall, it was originally put up, and it was
21 unsigned.

22 THE COURT: Right.

23 MR. MCDONALD: And I believe
24 Balfour, the following day, came back with a
25 signed version.

1 THE COURT: Came back in.

2 MR. MCDONALD: And that was
3 substituted, and I believe at that time Your
4 Honor let it in.

5 THE COURT: Yeah, okay. So 256 is
6 in. What was the other one you objected to? I'm
7 sorry. Just before --

8 MR. MCDONALD: I just have 291,
9 which is the unsigned pay app 44.

10 THE COURT: Okay. All right.
11 Let's come back to those in a second. I don't --
12 I questioned 288 and 291. Let's come back to
13 that. But other than that, 7 is okay. Let's go
14 to 8.

15 MR. MCDONALD: 287 and 288 -- 286,
16 287, and 288. 286 -- and this is on page 7 -- is
17 the pleading.

18 THE COURT: Right.

19 MR. MCDONALD: 287 is the contract,
20 and then we have the question on 288.

21 THE COURT: Okay.

22 MR. MCDONALD: On page 8, Your
23 Honor -- well, I will just go through the whole
24 thing, and then we'll come back.

25 THE COURT: Okay.

1 MR. MCDONALD: Okay. On page 8,
2 Your Honor, the first one, it doesn't have a
3 number, September 22nd. It's the fourth one
4 down, and it says plaintiff.

5 THE COURT: Yeah.

6 MR. MCDONALD: That's the Lithko
7 pleading that you did not let into evidence
8 because it settled during the claim of the Lithko
9 case.

10 THE COURT: Isn't that tab -- the
11 third one down, OCO binders, swapping tabs, isn't
12 that the one we just discussed?

13 MR. MCDONALD: No, Your Honor, the
14 fourth one down.

15 THE COURT: Fourth one down. Okay.

16 MR. MCDONALD: Yes, sir.

17 THE COURT: Lithko's answer and
18 cross-claim. Yeah, that's not in evidence.

19 MR. MCDONALD: Right. And I have
20 310 and 311, that they are not in evidence. They
21 were for ID only.

22 THE COURT: All right. That gets
23 back into those e-mails. Hold on one second.
24 All right. On Plaintiff tab 132, Trial Exhibit
25 was Exhibit 56 to Clements' deposition. It's an

1 e-mail from Kim Brown referencing the
2 supplementary conditions review.

3 It was allowed into evidence but limited
4 to explain the provision and not to change the
5 contract is what the statement shows. And my
6 records reflect that to be correct, 132.

7 MR. MCDONALD: Yes, sir. We dealt
8 with that one. I was referring to Plaintiff 310
9 and 311.

10 THE COURT: Oh, I'm sorry.

11 MR. MCDONALD: They had -- they
12 have it noted as a proffer. I just wanted to
13 make sure that was correct.

14 THE COURT: Yes, it would be a
15 proffer. It is not in evidence, it's a proffer.
16 Okay?

17 MR. MCDONALD: The one immediately
18 below that, Your Honor, showed day, but not
19 entered. That's correct, it was not entered into
20 evidence.

21 THE COURT: Okay. All right.

22 MR. MCDONALD: And the remainder on
23 page 8 are consistent with my notes, Your Honor.

24 THE COURT: All right. Very good.

25 MR. MCDONALD: All right. Your

1 Honor, page 9, the only thing I would say is that
2 each of these is consistent with my notes.
3 Obviously I believe the entire transcript was
4 marked and given to Your Honor, but obviously
5 that would be subject to the excerpts that were
6 actually designated rather than the entire
7 transcript itself.

8 On page 10, each of those are consistent
9 with my notes. Obviously Plaintiff's 328 was the
10 Cotton and Company report. That was not entered
11 into evidence, and it was noted on here that it
12 was not entered into evidence.

13 THE COURT: Right, right.

14 MR. MCDONALD: The rest are
15 consistent with my note. Your Honor, the last
16 comment I would have is, I don't know what Jim or
17 counter designations. There were other counter
18 designations that we made. So I just don't want
19 that to be indicative that that was the only
20 counter designations that we made. So I don't
21 know what that note is.

22 THE COURT: Which? I'm sorry, take
23 me, I'm not --

24 MR. MCDONALD: On page 10, I'm
25 sorry. The last page, I don't know what that

1 means. We have other counter designations, and
2 they're identified on -- by Defendant's 400 and
3 401.

4 THE COURT: Yes.

5 MR. MCDONALD: So I just don't know
6 what that one means.

7 THE COURT: 400 and 401. And was
8 that included on here? I'm looking to see.

9 MR. MCDONALD: Yes, sir.
10 Defendant's 400 and 401 were listed on page 5.

11 THE COURT: Okay. All right. Got
12 it. Okay. Yeah. Okay. So you want to go back
13 to the --

14 MR. HILDEBRAND: Yes, sir. So we
15 had provided you and everybody kind of a cheat
16 sheet which showed the deposition exhibits, the
17 exhibits that were coming in through the
18 deposition.

19 THE COURT: Right.

20 MR. HILDEBRAND: So that -- my
21 paralegal is making a copy of that, that we can
22 introduce as a Court's Exhibit if you'd like.
23 And here she goes.

24 THE COURT: Okay. Very timely.

25 MR. HILDEBRAND: Johnny on the

1 spot, yes, sir.

2 THE COURT: Okay.

3 MR. HILDEBRAND: So I think you've
4 got a working copy of that.

5 THE COURT: Okay.

6 MR. HILDEBRAND: So we can mark
7 this as a Court's Exhibit 5, and then what I --
8 do you want to mark this as your -- similar to
9 the other one, a Court's Exhibit, Your Honor?

10 THE COURT: Sure.

11 (PLF. EXH. 5 was marked for
12 identification and received in evidence.)

13 MR. MCDONALD: Your Honor, a lot of
14 this has already been dealt with.

15 MR. HILDEBRAND: It has, and I --

16 THE COURT: I think so. Do you
17 just want to verify it?

18 MR. HILDEBRAND: Right.

19 THE COURT: Okay.

20 MR. HILDEBRAND: So from my notes,
21 the exhibits that are at issue -- turn to second
22 page. So the Court's Exhibit would be 334.

23 (PLF. EXH. 334 was marked for
24 identification and received in evidence.)

25 MR. MCDONALD: Let's start on the

1 first page.

2 THE COURT: Yeah, let's start on
3 the first page because I can see one -- Exhibit
4 108 I did not allow under Buck Lindsay.

5 MR. HILDEBRAND: All right. So
6 let's -- we can go through it.

7 MR. MCDONALD: On Mr. Michael
8 Bennett, Exhibit 3 was withdrawn; Exhibit 4 was
9 withdrawn, and for the record, these are --
10 Judge, this document has the exhibits being
11 referred to as both their deposition numbers --

12 THE COURT: Right.

13 MR. MCDONALD: -- and as a
14 particular trial exhibit number.

15 THE COURT: Yes.

16 MR. MCDONALD: It may make more
17 sense for us to refer to the trial exhibits so
18 it's just not confusing --

19 THE COURT: Absolutely.

20 MR. MCDONALD: -- on the record.

21 MR. HILDEBRAND: All right.

22 THE COURT: Yeah.

23 MR. HILDEBRAND: So Exhibit 3, I
24 don't recall if the -- if it was withdrawn.

25 THE COURT: Those were the

1 newspaper articles?

2 MR. HILDEBRAND: Yes, sir.

3 THE COURT: You read them into the
4 record. I think they ought to be -- they ought
5 to come out. You read them in the record. I
6 allowed that.

7 MR. MCDONALD: Trial Exhibit 1.
8 Then the settlement agreement, the 2010
9 Goff D'Antonio settlement agreement, Balfour 28
10 was withdrawn.

11 THE COURT: Right.

12 MR. MCDONALD: Exhibit 56 is in.
13 We don't have to worry about it being referred to
14 as something else.

15 THE COURT: Right. Okay.

16 MR. HILDEBRAND: Your Honor, going
17 back to the newspaper articles, I know that we
18 talked about it, but I think that they were
19 introduced through his exhibit. He identified
20 those. I would like to keep those in the record.

21 THE COURT: Well, I'm not letting
22 you put them in, so there you go.

23 MR. HILDEBRAND: Okay. All right,
24 sir.

25 THE COURT: Okay. Over your

1 objection.

2 MR. HILDEBRAND: All right. Thank
3 you.

4 MR. BUNDY: Get Mr. Manigault in
5 here, I would like to cross-examine him.

6 MR. MCDONALD: Yeah, but I believe
7 that does it for Mr. Bennett's depositions. The
8 only -- the October of 2018 draw number 43 does
9 not have a trial exhibit number. It just says
10 four pages.

11 THE COURT: Right.

12 MR. BYRD: I don't believe those
13 were included in the trial exhibits, I don't
14 think.

15 MR. HILDEBRAND: Okay. I will
16 withdraw that one, Your Honor.

17 THE COURT: All right.

18 MR. MCDONALD: So as to
19 Mr. Bennett's, we have Trial Exhibit 56 and 53.

20 THE COURT: That's correct.

21 (PLF. EXH. 53 was marked for
22 identification and received in evidence.)

23 MR. HILDEBRAND: And then for
24 the -- I think from my records, Your Honor, we
25 then go to Jim Clements, and you went through

1 yesterday the ones that you took out from him.

2 THE COURT: Yeah.

3 MR. MCDONALD: I'm not trying to be
4 contrary at all, but if we could just go in
5 order. Next is Buck Lindsay, and it may be
6 easier.

7 THE COURT: All right. Let me go
8 through this because 108 I struck. That was --
9 my recollection of the deposition was, it was
10 something pulled off the internet. It wasn't
11 official, and that's why I kept it out. And that
12 was Ms. Faulkinberry's license having been
13 expired. So I kept that out.

14 MR. MCDONALD: And that's 182 in
15 the trial.

16 THE COURT: 182?

17 MR. MCDONALD: Yes, sir.

18 THE COURT: The rest of those on
19 that page were all yeses. Okay?

20 MR. MCDONALD: Okay. The rest
21 on -- for Mr. Lindsay, which would be 29, 30, 32,
22 33, 35, 38, 51, 152, and 54.

23 THE COURT: Yes.

24 MR. HILDEBRAND: Are in.

25 THE COURT: Were all in, correct.

1 (PLF. EXH. 29, 30, 32, 33, 35, 38,
2 51, 54 were marked for identification and
3 received in evidence.)

4 MR. MCDONALD: And those would be
5 subject to my objections on 401 -- or excuse me,
6 400.

7 THE COURT: Yes.

8 MR. MCDONALD: Thank you.
9 Defendant's 1.

10 MR. HILDEBRAND: Jennifer
11 Faulkinberry 182, 46 and 93 are in. Jim
12 Clements.

13 (PLF. EXH. 46 and 93 were marked
14 for identification and received in evidence.)

15 MR. MCDONALD: Hold on, hold on.

16 THE COURT: I did have an -- I also
17 made a note here. I have a 122 question mark. I
18 think that was the one we went back and forth on.
19 Was it 122 or 252? But I might just be way off.

20 MR. MCDONALD: Two things, Your
21 Honor.

22 THE COURT: Yes.

23 MR. MCDONALD: 182 is what you just
24 got rid of in Mr. Lindsay's.

25 THE COURT: Exhibit 108.

1 MR. MCDONALD: But Trial Exhibit
2 182 was also listed for Ms. Faulkinberry.

3 THE COURT: Right.

4 MR. MCDONALD: So that would come
5 out.

6 MR. HILDEBRAND: Okay.

7 THE COURT: Correct.

8 MR. MCDONALD: So it would just be
9 46 and 93?

10 THE COURT: I think that's -- yes.

11 MR. HILDEBRAND: Okay.

12 MR. MCDONALD: Subject to my
13 objections on Defendant's 400.

14 THE COURT: Correct.

15 MR. MCDONALD: Okay.

16 THE COURT: Okay.

17 MR. HILDEBRAND: All right. So on
18 Clements, I've got -- 4 is in; 56 is actually --
19 his deposition exhibit was out but that has now
20 been replaced by a subsequent version.

21 THE COURT: Right.

22 MR. HILDEBRAND: And the rest of
23 those are on pages 6, 132, 71, 88, 90.

24 THE COURT: Stop right there.

25 Those I have all in.

1 MR. HILDEBRAND: Yes, sir.

2 THE COURT: Okay. Bottom of page
3 2.

4 MR. HILDEBRAND: Then on the next
5 page in are 92, 94, 100, 111, 117, 133.

6 MR. MCDONALD: Can you slow down
7 just a second, Tom?

8 MR. HILDEBRAND: Sure.

9 THE COURT: I've got those all in.

10 MR. HILDEBRAND: Okay. Out is 151.

11 THE COURT: Right.

12 MR. HILDEBRAND: In is 155. Out is
13 167.

14 THE COURT: Correct.

15 MR. HILDEBRAND: In are 14, 15, 16,
16 17, 22, 164, and then the bottom of that, which
17 was Exhibit 89 to this deposition, is not in.

18 THE COURT: Correct.

19 MR. HILDEBRAND: And on the next
20 page, Plaintiff's Trial Exhibit or the next
21 Exhibit 8 is in, 283. 285, I'm not sure about.
22 I have a question mark when going through that,
23 Your Honor.

24 THE COURT: Yeah. And that's what
25 I had. I had a question mark about it because I

1 couldn't find a foundation for that one. You
2 remember we talked about that yesterday.

3 MR. MCDONALD: Yeah. And I had
4 more that I couldn't find than you had.

5 THE COURT: Yeah.

6 MR. MCDONALD: But I also couldn't
7 find it.

8 THE COURT: I just couldn't find
9 it. I couldn't find the foundation; so that's
10 going to be a no.

11 MR. HILDEBRAND: Okay. And then
12 Exhibit 98 was in.

13 MR. MCDONALD: Well, it doesn't
14 have a trial exhibit.

15 MR. HILDEBRAND: We'll mark that as
16 the next exhibit. We have a copy of that.

17 So Court Reporter, that will be?

18 COURT REPORTER: 335.

19 THE COURT: 335.

20 (PLF. EXH. 335 was marked for
21 identification and received in evidence.)

22 MR. HILDEBRAND: And then going
23 down to Jim Clements, still Monday, October 5,
24 2020, 128 was out. 130 is in, and we will mark
25 that 336.

1 (PLF. EXH. 336 was marked for
2 identification and received in evidence.)

3 MR. HILDEBRAND: And 134 was in,
4 and we'll mark that 337. 135 out. 142 in, 29
5 pages, and we will mark that 338. 145 is in, we
6 will mark that 339.

7 (PLF. EXH. 337 through 339 were
8 marked for identification and received in
9 evidence.)

10 MR. HILDEBRAND: The next two I
11 have question marks by, Your Honor, so I'm not
12 sure where those --

13 THE COURT: All right. My records
14 show that 133 was admitted at some time during
15 Nick Starcevic's testimony.

16 MR. HILDEBRAND: Yep, it is,
17 correct.

18 THE COURT: Okay.

19 MR. MCDONALD: Where is that? What
20 page is that on?

21 MR. HILDEBRAND: On page 3, seven
22 down.

23 THE COURT: So it's the second
24 trial exhibit from the bottom is the reference,
25 but I had it in evidence at some point in time

1 during Nick Starcevic's testimony.

2 MR. MCDONALD: I don't see it on
3 our Court's exhibit log.

4 MR. HILDEBRAND: All right. Hold
5 on. I was looking at the wrong one.

6 MR. BYRD: It is entirely possible
7 that this is not an exhaustive list of all of the
8 exhibits.

9 THE COURT: Well, there's our
10 problem, but let's see if we can find it.

11 MR. MCDONALD: Your Honor, I have
12 it in my notes as in over objection, Plaintiff
13 133.

14 THE COURT: Yeah. Okay. You
15 showed it as coming in, right?

16 MR. MCDONALD: I have that in my
17 notes.

18 THE COURT: Yeah.

19 MR. MCDONALD: In over objection,
20 Your Honor.

21 THE COURT: Yeah. The next one I
22 did have any reference to.

23 MR. HILDEBRAND: That would be 148?

24 THE COURT: 148. I had a question
25 for it. I couldn't find the foundation for it.

1 MR. MCDONALD: So is that out?

2 THE COURT: So that would be a no,
3 yes.

4 MR. HILDEBRAND: Okay. All right.
5 So then we go down to the very bottom. I had a
6 question mark about the very bottom one, Clements
7 listing of notes. I think he identified those as
8 his notice in his document that he took
9 contemporaneous with that deposition. So I
10 believe (inaudible).

11 THE COURT: These are notes that he
12 would have prepared?

13 MR. HILDEBRAND: Yes, sir, that he
14 brought to his deposition.

15 MR. MCDONALD: It doesn't -- he is
16 going to come testify, and he's going to
17 cross-examine him on them, so it is what it is.
18 They're his notes.

19 THE COURT: All right.

20 MR. MCDONALD: That's just saying
21 they're his notes.

22 THE COURT: Well, I'm going to keep
23 it out for now.

24 MR. MCDONALD: Okay. And then you
25 had 9.

1 MR. HILDEBRAND: Exhibit 9 I had
2 in.

3 MR. MCDONALD: It does not have
4 a --

5 THE COURT: Right.

6 MR. HILDEBRAND: Right. That would
7 need to be marked.

8 THE COURT: Would that be 340?

9 MR. HILDEBRAND: Yeah, 340.

10 (PLF. EXH. 340 was marked for
11 identification and received in evidence.)

12 MR. MCDONALD: Because once again,
13 these would be -- for Mr. Clements, these would
14 be subject to the objections that I have put on
15 the record rather than the written.

16 THE COURT: Yes.

17 MR. MCDONALD: Thank you. All
18 right. Ms. Brown, I think 28 is out. That was
19 withdrawn. 286 out. That's the Lithko pleading.
20 56 is fine, just so long as we're clear that
21 we're going to do 56 instead of a deposition
22 exhibit.

23 MR. HILDEBRAND: Right.

24 THE COURT: Right.

25 MR. MCDONALD: I believe you had 45

1 and 41 as in.

2 (PLF. EXH. 41 and 45 were marked
3 for identification and received in evidence.)

4 MR. HILDEBRAND: I don't have any
5 remaining ones out. Maybe that's the easy way to
6 look at it.

7 THE COURT: I have 177 in, invoice
8 register. I had 42 out, and I had 66 in.

9 (PLF. EXH. 66 and 177 were marked
10 for identification and received in evidence.)

11 MR. HILDEBRAND: Maybe that's an
12 easier way to do it, Your Honor, if you can just
13 tell us which ones you had that are in.

14 THE COURT: Yeah, from there. So
15 on Kim Brown on the list would be the first and
16 second because Trial Exhibits 28, 286, and then
17 the next to last one, number 42 out, all the rest
18 of them in.

19 MR. HILDEBRAND: Okay.

20 THE COURT: Next, Kim Brown from
21 August 5, 2020. I had no on the first one,
22 e-mail from Simonton to Lindsay. That's Trial
23 Exhibit 167. I'm going to allow the next two in,
24 the last one being the contract documents, so 62
25 and 56, of course.

1 (PLF. EXH. 62 was marked for
2 identification and received in evidence.)

3 MR. HILDEBRAND: And then --

4 THE COURT: On Exhibit 68, my notes
5 reflect that I have a question mark. I was going
6 to allow it in, and I have a question on whether
7 or not it was withdrawn. So whether that was in
8 the deposition or it's a Trial Exhibit 68.

9 MR. MCDONALD: If you recall, these
10 are the ones we did first or maybe like the
11 second day of the trial.

12 THE COURT: Okay.

13 MR. MCDONALD: So they had a
14 different -- then we did a big chunk together; so
15 let me pull my notes from that.

16 THE COURT: All right.

17 MR. HILDEBRAND: I believe this is
18 already in. I think this is already in.

19 THE COURT: 68?

20 MR. HILDEBRAND: 168?

21 THE COURT: No. What's this
22 number? It was Trial Exhibit No. 68. And in my
23 notes, we skip from 26 to 70 so.

24 MR. MCDONALD: Sorry, Your Honor,
25 this is the 30(b)(6) one. I have it as withdrawn

1 on my notes, Your Honor, because that was Exhibit
2 22.

3 THE COURT: Yeah, Exhibit 22 to the
4 deposition.

5 MR. MCDONALD: Yeah, to the
6 30(b)(6) deposition. That's the April 29, 2021
7 deposition. I have it as withdrawn.

8 THE COURT: The exhibit?

9 MR. MCDONALD: The exhibit, yes,
10 sir.

11 THE COURT: That's what mine --
12 that's what mine shows.

13 MR. HILDEBRAND: I couldn't
14 remember on that one, Your Honor, I don't have
15 notes; so I will withdraw that.

16 THE COURT: Okay. All right.

17 MR. MCDONALD: I also have the
18 Exhibit 25 as withdrawn.

19 MR. HILDEBRAND: 167.

20 THE COURT: I had no on that one
21 anyway as well as on 29.

22 MR. MCDONALD: And then there is no
23 Exhibit 29 to this deposition.

24 MR. HILDEBRAND: Well, he said --

25 THE COURT: Yeah.

1 MR. MCDONALD: Oh, sorry, Your
2 Honor.

3 THE COURT: I kept all of those
4 out. On the 30(b)(6), I kept those out. While
5 we're at it, on Jim Lord, I allowed that, and
6 then is this where -- this must be where they
7 added that other language of the -- on the
8 counter designations because it only made sense
9 to read it to the next page, page 51, line 6 to
10 page 52, line 21 where I added -- that was a
11 notation.

12 MR. MCDONALD: For my counter
13 designation?

14 THE COURT: Yeah, on the counters.

15 MR. MCDONALD: Yes, Your Honor.

16 THE COURT: So just read. I
17 allowed that and just extended it out another
18 page, I think it was. It was through page 52,
19 line 21, per the counter designation.

20 MR. HILDEBRAND: Okay.

21 THE COURT: Okay.

22 MR. BUNDY: Now, we have that
23 behind us.

24 THE COURT: I think we do. Did we
25 cover everything?

1 MR. HILDEBRAND: I think so, Your
2 Honor. So what I might suggest is, we are going
3 to get the transcript. If there's anything we
4 missed, that we can come back and just to put --
5 and maybe -- would you like for me to consolidate
6 these two for the Court going forward? I don't
7 want it make more -- it might make it easier.

8 MR. BUNDY: Might I suggest we ask
9 the court reporter just to give us the transcript
10 of what she just did over the last hour, provide
11 it to both parties, and then Mr. Hildebrand can
12 accommodate us by taking that transcript and put
13 together a list that we've all agreed on and said
14 in open court?

15 MR. HILDEBRAND: Well, the only
16 problem with that is that there might be exhibits
17 that were somehow missed when we put this
18 together. I think it's accurate, but the
19 transcript would speak for itself. So I will --
20 we'll see the -- I think this is it, Your Honor.

21 THE COURT: All right. Before we
22 finish, I want to go back to Plaintiff tabs 288
23 and 291. We talked about those. That was pay
24 app 9 in December of '15 and pay app 44 in
25 November of '18. I want to make sure that we

1 covered those. Those are the ones I want to go
2 back to.

3 MR. HILDEBRAND: Oh, right. That's
4 on page 7, I believe.

5 THE COURT: Page 7 of the exhibit
6 log. All right. I did not show 288 come into
7 evidence on my list; however, I did show 291
8 coming in. So those are those pay apps.

9 MR. HILDEBRAND: Okay. That's
10 fine. So 291 is in; 288 is out.

11 THE COURT: All right. Just to
12 cover that. I would say for now let's keep them
13 separate if you would.

14 MR. HILDEBRAND: Okay, sure.

15 THE COURT: Just because it's
16 clearer, and then once we've got a chance to look
17 over it, then let's see if we can't merge it as
18 one document --

19 MR. BUNDY: Okay.

20 THE COURT: -- when we finalize
21 this whole process. Okay? At least we can keep
22 it separate that way.

23 It easier for me, if there's a question
24 about it, to go to the deposition and see what
25 the deposition exhibit is right now and then make

1 sure it's in. And then we can transpose it over
2 to the exhibit log when it's all said and done.

3 MR. HILDEBRAND: Okay. Sounds
4 good.

5 MR. BUNDY: Thank you, Your Honor.
6 I have a proposal I would like to make --

7 THE COURT: All right.

8 MR. BUNDY: -- for the next four
9 weeks. As you know, Your Honor --

10 MR. HILDEBRAND: I've got a couple
11 more aspects -- a couple of things I would like
12 to introduce.

13 THE COURT: Okay, okay. Plaintiff
14 has not rested yet.

15 MR. HILDEBRAND: Yes, sir.

16 THE COURT: I'm with you. Just one
17 second. Very good. Okay.

18 MR. HILDEBRAND: All right. Just
19 one more housekeeping matter, we had not
20 introduced the miniscript of Jim Lord's
21 deposition inadvertently, so I would like to do
22 that now, and that would be --

23 THE COURT: Next number would be --

24 MR. HILDEBRAND: 341.

25 THE COURT: 341, right.

1 MR. MCDONALD: What is the date on
2 that?

3 MR. HILDEBRAND: November 18.

4 THE COURT: What was the date
5 again? I'm sorry.

6 MR. MCDONALD: November 18, 2020.

7 THE COURT: 2020?

8 MR. HILDEBRAND: All right. So Jim
9 Lord's deposition will be marked as Exhibit 341,
10 and I would like move to admit that, Your Honor.

11 THE COURT: All right. In
12 evidence.

13 (PLF. EXH. 341 was marked for
14 identification and received in evidence.)

15 MR. MCDONALD: And, again, it's
16 just the excerpts that have been designated?

17 THE COURT: It's only like three
18 pages. Okay.

19 MR. HILDEBRAND: All right. And
20 then last, what I've done, Your Honor, is to --
21 I've got a summary of your orders for -- as to
22 summary judgment with the subcontractor, the
23 amount, and the attorneys' fees totaled,
24 prejudgment interest.

25 THE COURT: Okay.

1 MR. HILDEBRAND: It's a composite
2 of those orders just to make it easier on the
3 Court. So I would like to introduce that as a
4 filed exhibit.

5 MR. BUNDY: There's not a witness
6 on the stand; so I don't know how we introduce
7 evidence in a case without a witness on the
8 stand.

9 THE COURT: All right. It's not
10 going to come into evidence. It's just a summary
11 or compilation?

12 MR. BUNDY: If he's not moving to
13 put it into evidence, then it's just --

14 THE COURT: Well, no, he is, but
15 I'm not going to allow it as evidence. But I
16 will use it as an exhibit. Do you want to use it
17 as a proffer or something, whatever is --

18 MR. HILDEBRAND: As a Court's
19 exhibit.

20 THE COURT: It's a benefit to the
21 Court to add to the calculation numbers. I guess
22 it updates the numbers from what Casey Thompson
23 was talking about or includes those, I'm not sure
24 which.

25 MR. HILDEBRAND: It includes them,

1 yes, sir. And it's just an easier format.

2 THE COURT: Sure.

3 MR. HILDEBRAND: I thought it might
4 be for the Court's sake.

5 THE COURT: Okay.

6 MR. HILDEBRAND: If we can mark
7 this as the exhibit as Court's --

8 THE COURT: Court's exhibit or
9 something? I'm going to call it a proffer again.
10 Do you want to give it the next number?

11 MR. HILDEBRAND: So that would be?

12 COURT REPORTER: 342.

13 THE COURT: 342 for ID. Okay.
14 Let's just call it that. Okay.

15 MR. HILDEBRAND: Thank you, sir.

16 (PLF. EXH. 342 was marked for
17 identification and received as a proffer.)

18 THE COURT: Okay. So we've had six
19 subs get judgment plus some others that settled
20 out, right?

21 MR. HILDEBRAND: Yes, sir.

22 THE COURT: Okay. I don't have a
23 definitive number yet, but we will get to that in
24 a minute. Okay. All right.

25 MR. HILDEBRAND: And the plaintiff

1 rests.

2 THE COURT: There you go.

3 MR. BUNDY: Done?

4 THE COURT: Yes, sir. Thank you
5 very much. Appreciate y'all putting all of that
6 together. Nice, clean record. Very few
7 objections. All right. We're about to hear the
8 principal objection now.

9 All right. You've got a motion to make,
10 Mr. Bundy?

11 MR. BUNDY: Yes, sir.

12 MR. HILDEBRAND: Can we take a few
13 minutes?

14 THE COURT: Do you want a few
15 minutes?

16 MR. HILDEBRAND: I don't know how
17 long it's going to take, but if it's going to
18 take more than just a couple minutes, I would
19 like --

20 MR. BUNDY: It's going to take five
21 minutes.

22 THE COURT: Okay. Go ahead.

23 MR. BUNDY: All right. As I
24 understand the way it works now is you hear
25 directed verdict motions, et cetera. We've got

1 four weeks approximately from Monday before we
2 come back.

3 You have before you, and I believe the
4 issues have been joined, the declaratory judgment
5 decision. I don't think we need to put in any
6 more evidence for now. And, you know, there's no
7 need for anymore evidence on a DJ action. They
8 filed an action, we filed an action, and got it
9 in front of you.

10 So what I would propose is this, is that
11 the defendant has until October the 4th, which
12 would be 10 days to file briefs and motions in
13 writing or with regard to his position on the DJ,
14 his position on our directed verdict motions. So
15 we're going to have quite few and hopefully
16 convince you, but if we don't, so be it.

17 Then the plaintiff would have 10 days
18 until October the 14th to file its reply briefs
19 and its position on the declaratory judgment
20 action. During that time, hopefully this young
21 lady will have concluded the transcript.

22 And so I would request that the Court
23 allow the parties, both of them, to amend their
24 briefs to add actual recitations to the record
25 book and line. Okay? Because we're going to

1 have to -- particularly the plaintiff, because
2 we're not going to have a transcript by the 10th
3 of October or by the 4th of October.

4 So we will be reciting what was based on
5 our notes, recollections, et cetera, and it may
6 well be that we'll be able to substantiate that
7 with the actual transcript language to help you
8 in making the decision.

9 Then I would request, very respectfully,
10 that the Court issue its ruling by October 24th
11 or obviously as early as possible. If you want
12 to do it quicker, that would be great, too. But
13 it would be -- I would like to go into the next
14 phase of this trial knowing where I stand
15 regarding how much the plaintiff has -- how much
16 of the case the plaintiff has left, and also what
17 the contract is as a result of your ruling on
18 declaratory judgment actions.

19 Because, of course, it's going to
20 influence how I try my case when I started on
21 Monday. And that would be my proposal. Thank
22 you, Your Honor.

23 THE COURT: All right. Let me hear
24 you from on that, Mr. Hildebrand.

25 MR. HILDEBRAND: Your Honor, at the

1 directed verdict stage of every case I've ever
2 tried, you -- the other side, the person moved
3 that for directed verdict, they moved right then
4 and there, and they just put their notes on the
5 record, and you argue it.

6 You don't take -- you don't get the
7 transcript and then do briefs and everything
8 else. You move for directed verdict right then
9 and there. And the attorneys' fees are already
10 extremely high in this matter, as you can
11 imagine, and I don't -- I can't imagine how much
12 time and effort that's going to take.

13 I'd like to just have Mr. Bundy make his
14 motions now like it is in every other case.
15 Let's address them. And then as far as the dec
16 action, I absolutely object, and I think it's
17 improper and highly prejudicial.

18 He can't just move for a dec action as
19 part of his case, and I move forward as part of
20 my case, and then him not put up his evidence and
21 whatever evidence that he wants to introduce at
22 trial. That's the way it works. We put up our
23 evidence, and we put in evidence to show the
24 supplementary conditions are not in. He puts up
25 his evidence, and then the Court decides.

1 It is not like summary judgment or you
2 just do it on briefs or anything else like that.
3 So I've asked Mr. Bundy several times, just tell
4 me, you want just -- and I think the Court has
5 asked him that same thing, why are we even -- is
6 this in controversy? The witnesses agree that
7 these aren't in, so -- but I don't agree to a
8 kind of interlocking --

9 THE COURT: A preliminary ruling on
10 the DJ action?

11 MR. HILDEBRAND: Right. Yes, sir.

12 THE COURT: I got you on that. Let
13 me ask this question: If you were to limit that
14 issue to whether or not those supplemental
15 conditions are in the record, does that really
16 answer the question? It may not answer the
17 ultimate question, but it is an answer to a
18 question that we need to get --

19 MR. BUNDY: And I can solve his
20 problem.

21 THE COURT: Yeah.

22 MR. BUNDY: If I withdraw my dec
23 action, so the only dec action before you is his.
24 He has finished his case, and he wants to know
25 whether the supplemental conditions are in or

1 out.

2 THE COURT: Okay.

3 MR. BUNDY: I don't need to put in
4 any evidence, so I withdraw my dec action. But I
5 would like a ruling on the pending dec action
6 brought by Mr. Hildebrand. Thank you, Your
7 Honor.

8 THE COURT: Okay. All right. I
9 will tell you what I would be willing to do, and
10 that would be to hear from each of you on the
11 limited question of whether or not those
12 supplementary conditions are or are not in the
13 contract.

14 On that one issue alone, that's been
15 burning up some time and effort in here. The
16 evidence that I've seen so far would indicate to
17 me that it was in there by mistake. Okay? And
18 that's what it seems to me, but I would like
19 y'all to -- if y'all want to brief that and do it
20 in that short timeframe, I would be happy to hear
21 from you on that question. Okay?

22 MR. BUNDY: Okay. That's fair
23 enough.

24 THE COURT: Because that would -- I
25 think that would clear up one just sort of -- and

1 I think more of a red herring maybe, but it could
2 be pivotal for this case. I don't know.

3 MR. BUNDY: Are you going to -- if
4 you're just going to do the dec case, we don't
5 need this much time, and I can -- and you could
6 probably make that decision quicker if we know it
7 sooner, and I could prepare for trial, if that's
8 the only thing you're going to rule on.

9 But if you -- but I would ask that you
10 in fact allow us to write a brief in five or ten
11 days or whatever on a DJ -- on the directed
12 verdict. I don't know what my opposing counsel's
13 experience has been in trial. I don't know how many
14 cases he's tried. I've been trying it for 40
15 years, and that's not my experience, okay,
16 Particularly in nonjury cases.

17 So this gives us the opportunity to put
18 before you, in clear fashion, whatever it is. We
19 can make it short. Okay? Or I can just make a
20 perfunctory motion, and you can deny it, and we
21 can go on with it. And that's fine, too.

22 But I don't see, with the amount of
23 money involved here, why it wouldn't be
24 beneficial to the Court for us to be able to
25 point out to you what we see as the deficiencies

1 in the presentation. It's not as if it's a
2 burden on them because they're the ones who is
3 responsible for the case they put in.

4 It's more of a burden on me because I've
5 got to do two things at once. I've got to not
6 only make a brief and file a motion on a DJ case,
7 I have also got to prepare for trial.

8 THE COURT: Right.

9 MR. BUNDY: He has done. All he
10 has got to do is defend what he has already put
11 in. So I'm just trying to -- I don't know --
12 avoid wasting a lot of time, that's all.

13 THE COURT: Well, I'm all for that.
14 Are you -- I want to make sure I'm clear because
15 my understanding was that the issue you were
16 asking to be addressed was the declaratory
17 judgment action and what is the contract.

18 MR. BUNDY: Correct.

19 THE COURT: Right?

20 MR. BUNDY: Right. That's one of
21 them.

22 THE COURT: Okay.

23 MR. BUNDY: The other issue is, I
24 would like to make written directed verdict
25 motions and brief it as opposed to standing up

1 here now and move for directed verdict, reading
2 the pleadings, and moving for a directed verdict
3 on everything. And you just simply say, well,
4 you know what? He has made a prima facie case.
5 Let's move on, and I'll see you on October 25th.
6 And I'm glad to do it that way.

7 THE COURT: Okay.

8 MR. BUNDY: But it seems to me,
9 that this sitting nonjury four week hiatus,
10 however you pronounce it --

11 THE COURT: Right.

12 MR. BUNDY: -- and a recorded
13 transcript, it might make sense in this case --
14 and you might be -- I'm not suggesting you're
15 going to through them out of Court. But you
16 might narrow the issues coming up in October. I
17 won't have to put in -- I may not have to put in
18 evidence in defense of some of his claims, which
19 he clearly hasn't proven.

20 I'm going to have to try to clean the
21 thing up, and you're not in the position today, I
22 don't believe, to listen to a motion, a verbal
23 motion, and clean this thing up. You know what
24 I'm saying.

25 THE COURT: I'm with you. I think

1 I've got ---

2 MR. BUNDY: So that's all I'm
3 trying to do. You can make it a lot shorter.
4 You can give me until Tuesday if you want to or
5 Monday. I just would like a little time to be
6 able to make it cogent and clear. And I don't
7 know -- the position that at least outlines it
8 for not only you, but him, where I think we are.
9 Thank you, Your Honor.

10 THE COURT: Let me hear from you on
11 that, Mr. Hildebrand.

12 MR. HILDEBRAND: Your Honor, I've
13 never had a case -- and Mr. Bundy, I guess, is
14 alluding to, he thinks he's tried more cases than
15 I have. I don't know. I'm not going to try to
16 swap experiences. He is a good lawyer.

17 I can tell you that every case that I
18 have tried -- and I've probably tried a
19 hundred -- the parties move immediately after the
20 case to -- for directed verdict, and you stand up
21 and you make your motion in every case I've ever
22 had.

23 And I would imagine that's probably been
24 your experience. You've tried a whole bunch more
25 than I have. So I just get concerned. My gosh,

1 this thing has dragged on, and the attorneys'
2 fees are high. That's the usual procedure.
3 That's what I would like for him to follow.

4 And the fact is that, at this point,
5 he's -- Mr. Bundy has alluded to it is, have we
6 put on evidence of our causes of action. And
7 I've been through every single one of them, and I
8 have been through the exhibits and the witnesses
9 that we've introduced and the deposition
10 transcripts that we've introduced, so we put
11 breach of the contract, and then you put whole on
12 a lot of issues.

13 I think if we put in all the evidence --
14 and you're smart enough and tried enough of
15 these, I would think, to look at those same
16 causes of action and say, have we put all the
17 evidence to support those cases? So I would --
18 that's what I would suggest, and let's move
19 forward and not just have open-ends now until the
20 next three weeks or whatever. Let's just decide.

21 THE COURT: Well, let me -- I've
22 not done it this way before, but isn't the burden
23 of proof at this point in time, to establish
24 their motion on the defendants? To toss you out
25 of Court, doesn't the Court have to look at the

1 facts and the like most favorable to the
2 nonmoving party?

3 MR. HILDEBRAND: Right.

4 THE COURT: Clearly that's to your
5 benefit, is it not at this stage?

6 MR. HILDEBRAND: Yes, sir.

7 THE COURT: I have never thought
8 about that, but there are a lot of moving parts
9 here. Do you think you can get me a brief within
10 10 days?

11 MR. BUNDY: Yes, sir.

12 THE COURT: Can you keep that
13 within 25 pages?

14 MR. BUNDY: Yes, sir. I can keep
15 it within any number of pages you deem fit.

16 THE COURT: All right.

17 MR. BUNDY: 25?

18 THE COURT: If you can keep it
19 within 25 pages, I will give you until October
20 4th.

21 MR. BUNDY: Thank you, Your Honor.

22 THE COURT: Mr. Hildebrand, it's
23 unusual, but I'm willing to entertain it that
24 way, and I would ask from y'all's perspective,
25 all you need to do is just show that you've got

1 some evidence in the record that supports your
2 claim. So I think y'all should be fairly
3 straightforward. Okay?

4 What I would like -- I'll tell you what
5 I would like to do, and that would be to try get
6 rid of this red herring about the supplemental
7 conditions.

8 MR. HILDEBRAND: Okay.

9 THE COURT: That's what I would ask
10 that y'all each focus on there, and especially
11 from your perspective. Okay?

12 MR. HILDEBRAND: Okay. Fair
13 enough. So we have 10 days and the same limit on
14 the pages?

15 THE COURT: Sure, yeah, if y'all
16 can do that. I should be able to get to an
17 answer. I will just have to dig into these
18 documents then. Okay? If I don't have one, I
19 will call you about it, but --

20 MR. HILDEBRAND: So our response
21 will be due on the 15th?

22 THE COURT: Yeah. I didn't pull
23 out my calendar, but that sounds --

24 MR. BUNDY: Well, I did -- well, I
25 asked Brent to do it for me. I hope he did it

1 right. 10/4 would be my deadline; 10/14 would be
2 Mr. Hildebrand's deadline.

3 THE COURT: Yeah. All right.

4 MR. BUNDY: And I gave you a
5 deadline of the 24th.

6 THE COURT: Yeah. Okay. So if the
7 plaintiff -- plaintiff can get me something by
8 Monday -- by the end of the day, Monday, October
9 the 4th, I give the -- excuse me, the defendant
10 is going to make the motion in writing by Monday,
11 October the 4th. And if the plaintiff will reply
12 by the end of the day on the 15th, I will give
13 you that Friday, the 15th.

14 MR. HILDEBRAND: Thank you.

15 THE COURT: And then what I will do
16 is, I will plan to get y'all an answer by the
17 22nd, Friday, October 22. Okay? And then we are
18 set to commence the 25th. If you'll bear with me
19 for like two seconds, I will see if I've gotten
20 an answer from the clerk to my request.

21 MR. HILDEBRAND: And that will just
22 be on the briefs? You'll just rule on the
23 briefs, Your Honor.

24 THE COURT: Yeah, yeah.

25 MR. BUNDY: Your Honor, we are

1 going for two weeks? Is that the next round is
2 two weeks?

3 THE COURT: Yes, sir.

4 MR. BUNDY: Okay.

5 THE COURT: Yes, sir. No, I have
6 not gotten a response back from the clerk yet,
7 but let's plan to meet back in here on the 25th
8 unless you hear from me otherwise. Okay? That
9 would be the plan. All right. That will be my
10 preferred plan. I might not get granted that
11 plan, but we will see. Okay?

12 MR. BUNDY: Thank you, Your Honor.

13 MR. KELLY: Your Honor, when we
14 original set these dates, you were going to have
15 the subcontractors go first, and then I know
16 obviously the plaintiff --

17 THE COURT: We switched that
18 around, and we managed to get through the
19 plaintiff's case in two weeks as opposed to both
20 trials.

21 MR. KELLY: We're rolling now. And
22 my assumption is, Mr. Bundy is going to take a
23 while during that first week of October.

24 So I just didn't know what the plan was,
25 assuming -- I don't know if he's going to get it

1 done in one week or not, but if we go into that
2 second week, is the assumption that
3 subcontractors then present their case.

4 THE COURT: Probably go at that
5 time. Do you know how many witnesses roughly
6 you're going to have? I counted up nine
7 including the video deposition that we showed is
8 what I counted.

9 I could be off on my numbers, but -- and
10 we had lots of dealings with the deposition
11 transcripts. But I'm just trying to sort of
12 figure it down. We've averaged about one witness
13 a day is what I'm saying. Okay? We had a couple
14 of them go three days.

15 MR. BUNDY: We got probably seven
16 or eight live witnesses.

17 THE COURT: Okay.

18 MR. BUNDY: But we have a good many
19 video depositions --

20 THE COURT: All right.

21 MR. BUNDY: -- that we will edit
22 and get the clips to Mr. Hildebrand. I convinced
23 my client to spend probably \$100,000 on video
24 depositions because I don't believe reading a
25 deposition is nearly as informative to Your Honor

1 as watching a video deposition in Court because
2 you see the demeanor of the witness. And you can
3 do all of those things, which you just simply
4 can't do.

5 So I'm going to respectfully request
6 that you actually watch them in Court because if
7 you watch them in Court with all of us, then the
8 next witness will make more sense to you. I will
9 be using these video depositions to lay a
10 foundation for the next witness so that things
11 will flow and make some sense.

12 THE COURT: Okay.

13 MR. BUNDY: And they're fairly
14 short. I don't know that any video depositions
15 last more than 20 minutes or 30 minutes.

16 MR. MCDONALD: Yeah, more like 20
17 minutes.

18 MR. BUNDY: 20 to 25 minutes for
19 each. I mean, a lot of them are just -- I went
20 and took all the depositions of everybody at
21 Balfour Beatty that worked on this job basically
22 in the field.

23 THE COURT: Okay.

24 MR. BUNDY: You know, did you know
25 anything about it? No, I was -- spent my whole

1 time (inaudible) drinking coffee. Okay, thank
2 you very much. And I just went to the next one.

3 MR. HILDEBRAND: Your Honor --

4 THE COURT: Okay. Sounds like we
5 might take two weeks to get there.

6 MR. BUNDY: Yeah, it will take two
7 weeks.

8 MR. KELLY: And that was my
9 question.

10 THE COURT: So I may have to be
11 looking for another two weeks, and I can tell
12 you, it's going to be hard to find between now
13 and the end of the year. That's one of the
14 reasons why I was trying to get you guys out of
15 the case, but we will get to that in a minute.

16 MR. HILDEBRAND: Your Honor, I
17 object to what Mr. Bundy just proposed. I, on
18 several occasions --

19 THE COURT: Yeah.

20 MR. HILDEBRAND: -- have asked the
21 Court, I would like put -- to read these
22 depositions into the record, and you've said --
23 and I understand it -- look, I can read, and this
24 is something that I can do out of Court.

25 So now, Mr. Bundy -- the Court has said,

1 Tom, you're just going to have to live with that.
2 Now, what Mr. Bundy wants to do is basically read
3 all the depositions into evidence in here in
4 Court, except he wants to do it through videos.
5 So I would ask, what's fair is fair, Your Honor.
6 What I was -- what he did with me, I think is the
7 same thing with Mr. Bundy.

8 If he wants to submit a deposition by
9 video or by written transcript, then the Court
10 should not do it in open court because that --
11 what that does is -- I think it's always
12 important that in jury trials, I read the
13 transcripts, and I think it makes the impact. I
14 think it would be unfairly prejudicial to me for
15 me not to have read them into Court, but now Mr.
16 Bundy does get the chance to have them read in
17 Court through the video.

18 So I would ask that you apply the same
19 rule to him that you did to me, any of his
20 excerpts, whether he wants to do them by video or
21 by reading them into the Court, that you do on
22 your own time, like you did with me.

23 MR. BUNDY: I agree with
24 Mr. Hildebrand. I don't want to do anything
25 that's unfair to Mr. Hildebrand. That's the last

1 thing I want to do. Okay?

2 So what I would propose is one of two
3 things, that either I send you those video
4 transcripts, you watch them at your leisure,
5 right? Any time you want to, there will be -- I
6 will send him the copy of it first. He can get
7 anything added to it that he wants to add to it,
8 right?

9 THE COURT: Okay.

10 MR. BUNDY: But I would also
11 suggest, if you're going to do that, why not let
12 me go ahead and get them to you before we start
13 the trial, and you could have already watched
14 them.

15 And then, when you get to the courtroom
16 on Monday morning, you can hit the ground
17 running. You will know what all of my witnesses
18 are going to say that I would have put up before
19 you, and it will save you from having to stay up
20 until 10 or 11 o'clock at night, and it will give
21 you something to do for the next four weeks.

22 Mr. Hildebrand: I'm in agreement.
23 That's fine with me. So if he can get me
24 those --

25 THE COURT: All right.

1 MR. HILDEBRAND: If he's already
2 done it, he can get it to me within --

3 MR. BUNDY: Okay. So that's great.
4 We will work that out.

5 THE COURT: Yeah, how much time
6 would you like -- how much time do you need to
7 get your vignettes -- I'm going to call them
8 vignettes -- together?

9 MR. BUNDY: Well, he's going to be
10 writing a brief, so I don't know how much time
11 he's going to have left to do that. I can
12 probably get the videos to you -- if we get the
13 brief to you on the 4th, so it will probably take
14 him a week to get that done.

15 So by the 11th, I will get
16 Mr. Hildebrand the video transcripts edited, and
17 then I would take it -- it would take Tom, what,
18 a week for you or two or three days for you to
19 give me your adds?

20 MR. HILDEBRAND: It's more -- it's
21 taking him a lot of time. Why can't you
22 give them -- are they ready now?

23 MR. BUNDY: Pardon me?

24 MR. HILDEBRAND: Are they ready
25 now, the vignettes?

1 MR. BUNDY: The what?

2 MR. HILDEBRAND: The vignettes.

3 You've said you spent a lot of time already on
4 them. Are they already -- do you have them?

5 MR. BUNDY: I've got the videos.

6 Tom, I haven't edited them yet.

7 THE COURT: Okay.

8 MR. BUNDY: Because my case doesn't
9 start until October the 24th. I'm willing to do
10 it in the next ten days.

11 MR. HILDEBRAND: All right.

12 THE COURT: Yeah, okay. I'm with
13 you.

14 MR. HILDEBRAND: All I'm saying is,
15 Your Honor, it -- it takes longer than you might
16 think.

17 THE COURT: Hey, the best case I
18 ever had, they had a video. They played it for
19 the opposing lawyer. He objected to the sound
20 because it was a fire in an animal hospital.

21 I said, okay, if you're going to object
22 to the sound, I will take the sound out. It
23 looked like a World War II movie when we took the
24 sound out. Okay? And then they -- as soon as
25 they sent in the edited version, he called me,

1 and they settled the case. I was like, that's
2 how it worked for me.

3 MR. BUNDY: Well, I tell you what I
4 will do to even make it easier. Okay?

5 THE COURT: But what he's entitled
6 to is some advance notice -- and I don't know
7 whether you have got just the deposition excerpts
8 he can look at. Then you can do your editing.
9 He can look at the excerpts that you propose, put
10 his excerpts in.

11 MR. BUNDY: Right.

12 THE COURT: He might be able to do
13 it, so y'all can do the editing at the same time.

14 MR. BUNDY: Sure.

15 THE COURT: Then all I've got to do
16 is look at it once.

17 MR. HILDEBRAND: Okay.

18 MR. BUNDY: I will tell you what
19 I'll do, I'll give you a list of videos right now
20 that I'm going to take excerpts out of so y'all
21 can pull them out and start looking at it. Okay?

22 THE COURT: Okay.

23 MR. HILDEBRAND: But that doesn't
24 really help me because I don't know --

25 MR. BUNDY: Well, what do you want

1 me to do, Tom?

2 MR. HILDEBRAND: Well, just -- all
3 I was alluding to, Your Honor, is, I -- you
4 mentioned maybe needing a couple of days or three
5 to four days. I don't know if that would be
6 sufficient.

7 MR. BUNDY: Give him a week. I
8 don't care.

9 MR. HILDEBRAND: Okay. I don't
10 know that we've got enough -- as long as we can
11 get them -- do you have the designations?

12 MR. BUNDY: Not yet, Tom.

13 THE COURT: Okay. All right.

14 MR. HILDEBRAND: Okay. I just --
15 I'm going to need at least, gosh, ten days
16 probably.

17 MR. BUNDY: No problem.

18 THE COURT: Yeah. Okay.

19 MR. BUNDY: I don't want to be
20 unfair.

21 THE COURT: If y'all can get those
22 to me on about the same timeframe, that would be
23 great. Okay?

24 MR. BUNDY: We will get it done
25 sir.

1 THE COURT: You've got to do the
2 depo excerpts. Y'all can just get that typed up
3 and ship that over to him.

4 Y'all can see what they're trying to put
5 in there, and you can put whatever y'all want in
6 there and then have -- if y'all can agree then on
7 what the video is going to look like and do that
8 one time, that would be great.

9 MR. BUNDY: Great.

10 THE COURT: And then all I've got
11 to do is find me a computer to turn on.

12 MR. BUNDY: You know, some of the
13 video depositions aren't more than an hour long
14 at most.

15 MR. MCDONALD: I mean, once they're
16 edited, some of them --

17 MR. BUNDY: Well, even if they
18 aren't edited, some of them aren't but an hour.
19 I'm not a big, long deposition taker.

20 THE COURT: Yeah.

21 MR. BUNDY: So we may end up just
22 saying, just watch what you want. I don't care,
23 you know.

24 THE COURT: Put it on a disc and
25 send it to my office. I'll slap it in the

1 computer. I've still got -- I've still got one
2 computer left with a disc drive.

3 MR. KELLY: Your Honor, if I could
4 pause this conversation while y'all move things
5 forward. I'm just selfishly wondering about that
6 next two-week period.

7 THE COURT: Whether or not you want
8 to even be here?

9 MR. KELLY: Correct.

10 THE COURT: All right.

11 MR. KELLY: I'm supposed to be out
12 of town for Sewanee's homecoming.

13 THE COURT: Well, by all means, go
14 to Sewanee.

15 MR. KELLY: Well, I'd love to go,
16 but I'd hate to miss something important, Your
17 Honor.

18 THE COURT: There's nothing
19 important going on here, you know that.

20 MR. BUNDY: We'll call you.

21 MR. KELLY: Well, as you know,
22 we've got like four or five subcontractors still
23 out with some variety of claims.

24 THE COURT: Sure.

25 MR. KELLY: And I just -- it seems

1 impractical that they put up -- they put up their
2 case, Tom put up whatever rebuttal case he has
3 got, and then we would still be able to --

4 THE COURT: I'm going to --

5 MR. KELLY: -- do the subcontractor
6 claims.

7 THE COURT: Mr. Kelly, I'm going to
8 make sure your client gets his day in Court.
9 Okay?

10 MR. KELLY: I appreciate it, Your
11 Honor.

12 THE COURT: All right. I will
13 guarantee you that. It is not looking real good
14 right now for the week of November the 1st, but
15 we're going to work towards it.

16 MR. KELLY: And that's okay, even
17 if we have to push it out. I just want to have
18 some idea of when that may be.

19 THE COURT: Yeah. And when I get
20 back in my office, I'm going to look at my
21 calendar and see when those subcontractor cases
22 are going to come up. Okay?

23 MR. KELLY: Thank you, Your Honor.

24 THE COURT: All right.

25 MR. HILDEBRAND: And if it would be

1 easier on you -- I know it's -- you've got, gosh,
2 ten days to get your brief together. If you just
3 want to give the Judge the video depositions and
4 have him look at them in toto, then I'm fine with
5 that.

6 MR. BUNDY: Okay.

7 MR. HILDEBRAND: Do you want to do
8 that?

9 THE COURT: I'm not.

10 MR. BUNDY: I know.

11 THE COURT: I would much rather
12 watch something else on television. Okay?

13 MR. BUNDY: If the Judge wants
14 edited depositions, okay.

15 THE COURT: Listen, y'all have been
16 living this thing for at least two years, if not
17 more.

18 MR. HILDEBRAND: Fair enough.

19 THE COURT: Mr. Bennett for about
20 20, so anyway. All right. Thank you all very
21 much. I'm thinking we made some progress here
22 today. I plan to see y'all on the 25th. I'll
23 look for those briefs on or about the 4th and the
24 15th.

25 MR. MCDONALD: And the exhibit

1 boxes -- I'm just going to collect our exhibits
2 and put them in a box.

3 THE COURT: Yeah. I think it's
4 going to take about an hour to get ourselves
5 together here and packed up and take what we
6 need.

7 MR. HILDEBRAND: Maybe we need to
8 address it, Your Honor. Is there a place to put
9 all these? And as I understand it, we will
10 take -- the plaintiff will take all of our
11 exhibits back, and then --

12 THE COURT: Yeah. I think we each
13 need to be -- we're going to need to have access
14 to this place for at least the balance of the
15 day. I'm sure somebody can be here for that.
16 All right. Thank you.

17 (The hearing was concluded at
18 11:34 a.m.)

19
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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 hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed by computer-aided
transcription; that the foregoing is a full,
complete and true record of the testimony of the
witness and of all objections made at the time of
the examination; and that the witness was given
an opportunity to read and correct said hearing
and to subscribe the same.

Should the signature of the witness
not be affixed to the hearing, the witness 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 August 25, 2022 at
Charleston, Charleston County, South Carolina

20 _____
21 Jennifer M. Adams
22 Court Reporter And Notary Public
23 My commission expires: 03/15/2032
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 ELEVEN
) 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 October 25, 2021 at 100 Broad Street, Courtroom
 22 2A, Charleston, South Carolina.

23

24

25

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1 THE COURT: Okay. Folks, we're
2 back for round two in our beautiful courthouse in
3 downtown Charleston. I didn't know they were
4 inviting the First Lady, but apparently she's
5 next door. I thought it was this case that
6 brought all of the security down. Apparently,
7 Air Force One came in last night, I was told. So
8 anyway, that probably provides that.

9 We've got the next two weeks set aside
10 to be here. We're going to get into the
11 defendant's case. Plaintiff's put their case up
12 two weeks ago. I did rule on the directed
13 verdict motion, the motion for nonsuit, only ask
14 to -- only granted it as to the one cause of
15 action, which was implied covenant of good faith
16 and fair dealing.

17 Those of you who are here on the
18 subcontractor claims, y'all may have some
19 interest. I had granted -- as you all know, I
20 had granted summary judgment on some of those
21 claims. No sooner than I had granted summary
22 judgment, then objections and Rule 59(e) motions
23 were raised. And so I've just sort of held off
24 on that.

25 So I probably need to get into that, and

1 quite frankly, I've sort of had to rethink where
2 I was. And so as we go through the main trial, I
3 think it will become more and more apparent as to
4 what we need to do relative to those
5 subcontractor claims.

6 And then I see Mr. Steele back there. I
7 did deny y'all's motion to produce some
8 additional documentation. I haven't received --
9 I'm not aware of anything subsequent to that. We
10 can cross that bridge if we need to get there.
11 That was my position. I entered those orders in
12 the middle of last week, I think it was.

13 So before we start, I did have one
14 issue, Mr. Bundy, they informed me you wanted to
15 ask me about something. Let me tell you, it's my
16 rule -- it's the Chief Justice's rule, enforced
17 by the clerk and the sheriff's office to wear the
18 masks as you come and go from the building.

19 It's my rule that, once you're in the
20 courtroom, if you have been vaccinated and you're
21 comfortable with removing your mask, you're
22 certainly free to do so. So that's just my rule.
23 If you're not vaccinated and you're not
24 comfortable with doing that, I would suggest you
25 keep it on. It makes it a lot easier for me to

1 hear people and also to assess their credibility,
2 which is part of what my job is a nonjury Judge.

3 Anything further?

4 MR. BUNDY: Judge, does that
5 exception apply to the room we're using
6 downstairs?

7 THE COURT: If you're in that room,
8 I think you can take that off. Okay? But I
9 think coming and going, I would like you to do
10 that.

11 And just so I'm clear, I know the
12 plaintiffs were using what was considered counsel
13 chambers. I tried to set y'all up. I don't know
14 if you have taken over that today or whether or
15 not the administer's office, but there's actually
16 two offices, both on the Broad Street side of
17 this building.

18 One has got a huge conference table, so
19 it might make it easier for y'all to work in.
20 The other one has got some smaller tables. But
21 since we're sort of moving into the defendant's
22 case, it would make some sense for y'all to take
23 that over. I've got no problem with that.

24 One thing that has come up is on Friday
25 afternoon at 5:30, this room is going to be used

1 for some proceeding. I don't know what it is.
2 But we've been finishing up around lunchtime on
3 Fridays. I plan to do that again this week as
4 well.

5 I know y'all have brought a lot of
6 documents in here, a lot of boxes. We're going
7 to see if we can't find a place here for them to
8 stay so you don't have to physically relocate
9 them over the weekend. I'll just make sure we
10 get that done. We will cover that again on
11 Thursday and on Friday.

12 All right. So based upon that, are
13 there any matters that I need to take up before
14 we start? I'll start with Mr. Bundy on the
15 defense.

16 MR. BUNDY: The only thing that
17 comes to my mind, Your Honor, are these
18 depositions that we submitted, and Mr. Hildebrand
19 has now given his counter designations.

20 I assume that all of those have been
21 completed, done, and the only issue is, as I
22 understand it, is my expert witness, Mr. Pat
23 O'Connor -- they made a motion in limine. And I
24 don't know if that's the appropriate -- I hadn't
25 offered him yet, but --

1 THE COURT: Right.

2 MR. BUNDY: But our position, I
3 think, as we stated in our memorandum and
4 response, and so whichever way Your Honor rules,
5 I think you're going to have to read it
6 regardless.

7 THE COURT: All right. Very good.
8 Mr. Hildebrand?

9 MR. HILDEBRAND: I guess there are
10 two issues. One, is it appropriate to introduce
11 his deposition testimony as proof opposed to
12 calling him in live.

13 THE COURT: Right.

14 MR. HILDEBRAND: And he wasn't
15 taken de bene esse, and I don't -- it's up to
16 your discretion for it. But I don't think
17 it's -- I've never seen the rule of civil
18 procedure oppose where a witness, who's just an
19 expert witness, can just testify through his --

20 THE COURT: Through deposition?

21 MR. HILDEBRAND: Deposition, yes,
22 sir.

23 THE COURT: I think you had a --
24 you had a further objection as to what he was
25 opining upon, did you not?

1 MR. HILDEBRAND: Right, right.

2 Yes, Your Honor, and just for a very brief
3 synopsis, there are a couple provisions in the
4 contract that he has offered opinions on. One is
5 whether the owner has to give notice that -- or
6 whether liquidated damages are a claim.

7 And he says that, in his opinion, they
8 are not. I don't think that his opinion is
9 relevant. I mean, you can look at the contract
10 language, and you can determine whether you think
11 that it's applicable or not. Whether he thinks
12 it's applicable or not is, I think, irrelevant.

13 He also says that he serves with the
14 AIA, and the AIA has rewritten some of the
15 contract -- standard contract provisions so that
16 liquidated damages in the newer versions are
17 explicitly -- apparently, there are explicit
18 sections as to whether you now have to give
19 explicit -- whether the owner has to give
20 explicit notice.

21 Again, I think that's irrelevant. I
22 mean, contracts change. People can change, and
23 what you might do with a contract later on, what
24 third parties might do with a contract later on,
25 I think is irrelevant. I think that you can look

1 at the contract, and you can determine whether
2 you think it's ambiguous.

3 And if you think it's ambiguous, then
4 you can consider whether you want to take his
5 opinion. But I don't think that it's relevant.
6 And I don't think that you need to have a third
7 party come in and give opinions about what he
8 thinks the contract is.

9 THE COURT: Okay. I agree. All
10 right. Very good. Mr. Bundy?

11 MR. BUNDY: Thank You, Your Honor.
12 The first issue is, I'm glad to bring him down
13 here. That's not the problem. I was trying to
14 move things along.

15 In reading his deposition, everything
16 was accomplished that I needed to accomplish.
17 I'm glad to bring him down here from Minnesota,
18 but I don't want to bring him down here from
19 Minnesota, and you tell me, I'm not going to let
20 him testify.

21 THE COURT: Right.

22 MR. BUNDY: So that would be the
23 first issue because if you're not going to let
24 him testify, then I would just offer deposition
25 as a proffer as to what he would have said and

1 that would take care of my record.

2 With regard to the substantive response
3 of counsel, custom uses in the industry is always
4 relevant to the interpretation of a contract,
5 specifically ready to the industry you're talking
6 about.

7 I mean, uniform commercial clothing is
8 absolutely clear in interpreting commercial
9 documents. It's codified. The custom and usage
10 applies in making the interpretation. That
11 doesn't make the document ambiguous. These
12 documents aren't ambiguous. But Your Honor is
13 entitled to the benefit of the custom usage in
14 the industry.

15 Counsel is correct, the AIA has, in
16 later editions, made it absolutely clear to those
17 people who didn't understand it before, and
18 apparently, there are more people out there that
19 didn't understand it than I thought -- that in
20 fact, liquidated damages have not, nor has it
21 ever been a claim in the 30-something years I've
22 been doing this for the AIA documents.

23 And that's clear from Mr. O'Connor's
24 testimony. And of course, clever lawyers can do
25 all kind of things, and I guess finally the AIA

1 got tired of listening to it and made it more
2 specific. But it's always been the case.

3 So, Your Honor, first, I need a ruling
4 on whether or not I should bring him. And if I
5 should bring him, then I will be glad to get him
6 here. Thank you, Your Honor.

7 THE COURT: All right. So let me
8 just say this, having reviewed it, what my
9 initial thoughts are is, it does come as a motion
10 in limine, and it could change. But we need to
11 address it. And so, as to Balfour Beatty's
12 motion in limine, as to the use of Patrick
13 O'Connor's deposition -- this is your expert,
14 correct?

15 MR. BUNDY: Yes, Your Honor.

16 THE COURT: I was inclined to grant
17 that motion on the basis that, if he's seeking to
18 opine to this Court what the meaning of the
19 contract is, I don't believe he is entitled to do
20 that. If what you're telling me is that his -- I
21 think that's within the purview of the Court.
22 Okay?

23 MR. BUNDY: Correct.

24 THE COURT: If what you're telling
25 me is that he's being offered for some historical

1 basis or background knowledge as to what the AIA
2 contracts were or what is involved with this -- I
3 have had other cases in which I have allowed that
4 testimony, but it's for that limited purpose.
5 And it's not to opine upon what would be an
6 ultimate issue for the Court's decision. I just
7 want to be clear on that.

8 MR. BUNDY: I'm not seeking to
9 replace Your Honor. I just to get some more sort
10 of meat to this story so you'll have the context
11 within which these contracts are used.

12 THE COURT: Right. And then not
13 having reviewed the deposition, I would think it
14 would be better that he be here personally to
15 make that record rather than --

16 MR. BUNDY: I will have him here.

17 THE COURT: -- putting in the form
18 of a discovery deposition.

19 MR. BUNDY: I will have him here,
20 Your Honor. I may have to call him out of turn,
21 if that's --

22 THE COURT: That's always fine.

23 MR. BUNDY: Because he's in
24 Minnesota.

25 THE COURT: Yeah, no problem.

1 There's a direct flight somewhere on some airline
2 that's doing that. I don't know if they started
3 yet or not, but anyway, you can get from
4 Minneapolis to here. Just things continue to
5 amaze you in Charleston, South Carolina.

6 MR. HILDEBRAND: Well, Your Honor,
7 I am inclined to admit, I will just withdraw my
8 objection then. He can just introduce the
9 deposition testimony.

10 THE COURT: You would rather it
11 come in in the form of deposition testimony?

12 MR. HILDEBRAND: That's fine. If
13 you're going to allow his testimony -- I don't
14 think it's appropriate, but you've already ruled
15 on --

16 THE COURT: Yeah.

17 MR. HILDEBRAND: -- on the limited
18 issue. And if he wants to introduce the
19 deposition sections that relate to that, then
20 that's fine with me.

21 MR. BUNDY: I can't argue with
22 that.

23 THE COURT: Okay.

24 MR. BUNDY: Thank you, sir.

25 THE COURT: We'll get that. I'm

1 sure we'll cross that bridge another time.

2 MR. HILDEBRAND: Thank you, Your
3 Honor. I haven't seen your order on the directed
4 verdict, but on the implied warranty breach of
5 the implied obligation of good faith and fair
6 dealing. I mean, that's not a separate cause of
7 action, but it does --

8 THE COURT: Right.

9 MR. HILDEBRAND: -- it is an issue
10 because it's part of South Carolina law. Again,
11 you will decide.

12 THE COURT: It's contained --

13 MR. HILDEBRAND: It's not physical,
14 it's applicable. Just simply it's not in a
15 separate cause of action.

16 THE COURT: Correct, right.

17 MR. HILDEBRAND: Lastly, Your
18 Honor, is, have you had -- did you take a chance
19 to look at the supplementary conditions and did
20 you decide there?

21 THE COURT: Yeah. I believe -- I
22 thought we had issued that order. We have had
23 all kind of issues with the electronic filing
24 system. But I did that. I left town late last
25 week, but I thought I had issued an order that

1 should have been of record, so hold on. On the
2 supplementary conditions, I granted that because
3 I think everybody was in agreement as to what was
4 and was not in the contract --

5 MR. HILDEBRAND: That they are not?

6 THE COURT: -- on the supplemental
7 conditions.

8 MR. HILDEBRAND: But they're not?

9 THE COURT: Correct, correct.

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

12 MR. BUNDY: Just some housekeeping,
13 I will give you Mr. O'Connor's deposition now.

14 THE COURT: Okay.

15 MR. BUNDY: So you will have all
16 the depositions, all the exhibits to go with
17 them, and we're done with that.

18 THE COURT: All right. Do you want
19 to submit the whole thing or you want to do --

20 MR. BUNDY: Yes.

21 THE COURT: All right. Have y'all
22 had a chance to review?

23 MR. HILDEBRAND: We haven't done a
24 counter designation, but I can have that -- today
25 is Monday -- by Wednesday morning.

1 MR. BUNDY: Sure. Not a problem.

2 THE COURT: We'll check on it. I
3 thought that that order was filed, but anyway, I
4 cleared my cubicle again this morning. I know I
5 cleared it before I left town on Thursday. We'll
6 find out what's going on with that.

7 MR. HILDEBRAND: Did you just send
8 written designations or was it on video?

9 MR. MCDONALD: Yes. We've got
10 copies of the video. It's all right here. So
11 we've got for you of the videos. We've got --
12 and it's been edited with your counter
13 designations.

14 MR. HILDEBRAND: Oh, you've got
15 the --

16 MR. MCDONALD: Yeah.

17 MR. HILDEBRAND: One last
18 housekeeping, Your Honor. I understand that
19 there was one exhibit when you went through --
20 when we took several hours to try to figure out
21 and were asked --

22 THE COURT: What's in and what's
23 out?

24 MR. HILDEBRAND: Yeah. There was
25 one, I think it was Exhibit 312. We had done a

1 separate binder where the architect's agent had
2 signed off on the punch list, and I think that
3 that was introduced into evidence that we've now
4 had a chance to get from the court reporter the
5 record that noted that that was in evidence. So
6 I think that that was -- what number was that?
7 It should be Plaintiff's 312.

8 THE COURT: It's on my list as a
9 number in front of it, and that's all I can tell
10 for now. Have y'all had a chance to review the
11 record?

12 MR. HILDEBRAND: Yes, sir.

13 THE COURT: The record says it's
14 in, does it not?

15 MR. HILDEBRAND: Yes, sir.

16 THE COURT: Okay. All right. Then
17 that should be in.

18 MR. MCDONALD: Your Honor, I
19 haven't reviewed the record, but did the record
20 say it was in over objection?

21 THE COURT: I don't have any note
22 other than 312. 313 was for ID only, and those
23 were some discovery answers is what I showed on
24 that. So there was an issue on 313, but 312
25 itself, I'm assuming to be in.

1 MR. MCDONALD: Yes, Your Honor,
2 there was an objection.

3 THE COURT: So it was in over
4 objection?

5 MR. MCDONALD: Yes, sir.

6 THE COURT: Okay. That apparently
7 took place on Thursday, the 23rd of September was
8 the day that was introduced. It looks like my
9 notes do not reflect anything other than it came
10 in over objection.

11 Okay. All right. So that, Mr. Bundy,
12 you had reserved the right to make an opening
13 statement, and if you would like to do that, you
14 certainly may. I have some idea what this case
15 is about, and I'm happy to get started if you
16 would like.

17 MR. BUNDY: I will pass.

18 THE COURT: All right. Very good.
19 Thank you, sir. All right. So into the
20 defendant's case, you may proceed.

21 MR. BUNDY: Thank you, Your Honor.

22 THE COURT: All right, sir.

23 MR. BUNDY: Your Honor, Library
24 Associates calls Mark Boe to the stand.

25 THE COURT: All right, sir.

1 Mr. Boe, come right on around.

2 (MARK BOE, having first been duly
3 sworn, testified as follows:)

4 THE COURT: Please have a seat.
5 Mr. Boe, when you get comfortable, if you will
6 give us your full name and address for the
7 record.

8 THE WITNESS: My name is Mark Boe.
9 That's spelled B-O-E.

10 THE COURT: B-O-E?

11 THE WITNESS: B-O-E.

12 THE COURT: All right, sir.

13 THE WITNESS: And my address has
14 changed since my deposition. It's 20 Calibougue,
15 C-A-L-I-B-O-G-U-E, Cay Road, number 2610, in
16 Hilton Head, South Carolina 29928.

17 THE COURT: All right, sir. Thank
18 you very much.

19 Mr. Bundy?

20 DIRECT EXAMINATION

21 BY MR. BUNDY:

22 Q. Mr. Boe, before you moved, where did you
23 live?

24 A. In Blue Bell, Pennsylvania.

25 Q. All right. Where did you grow up?

1 A. I grew up in Seattle.

2 Q. Okay. And what is your educational
3 background?

4 A. I attend the Coast Guard Academy and got
5 a bachelor's degree in civil engineering in 1979,
6 a couple years ago. And then I attended, through
7 the Coast Guard again, the University of Illinois
8 as a civil engineer and got a master's in
9 engineering in 1983.

10 Q. All right. And what is your employment
11 history?

12 A. I spent 10 years with the Coast Guard
13 out of the Coast Guard Academy. And I was on the
14 ship for a couple years, and then I went to an
15 engineering office.

16 So I spent two or three years doing
17 engineering construction work, some design work
18 for the Coast Guard in San Francisco, you know,
19 on local shore projects, shore-type things, after
20 I spent two years on the ship. And then I went
21 to grad school, and I went to grad school at
22 Illinois for a year and a half, for two football
23 seasons.

24 And then I went to Seattle for
25 three-and-a-half-year tour doing construction

1 projects for the Coast Guard, basically the
2 government, the owner's rep, the government rep
3 for construction projects up and down the west
4 coast, even out to Hawaii, up to Alaska, Oregon,
5 Washington, California.

6 (DFT. EXH. 92 was marked for
7 identification.)

8 Q. All right. Let me -- maybe we can
9 shortcut this. I hand you what's been marked as
10 Defendant's Exhibit 92 for identification. Can
11 you identify that document?

12 A. Yeah. That looks likes the CV I
13 included in my report.

14 MR. BUNDY: Your Honor, at this
15 point --

16 BY MR. BUNDY:

17 Q. And you prepared this document?

18 A. Yes.

19 Q. Is it accurate?

20 A. Yes.

21 Q. Truthful?

22 A. Yes.

23 MR. BUNDY: Your Honor, I move to
24 introduce this into evidence.

25 MR. HILDEBRAND: No objection.

1 THE COURT: Without objection.

2 MR. BUNDY: Here's your copy, Your
3 Honor.

4 THE COURT: Thank you, sir.

5 (DFT. EXH. 92 was received in
6 evidence.)

7 BY MR. BUNDY:

8 Q. All right. Mr. Boe, I don't want to go
9 into too much, but I would like to ask you a few
10 things. With regard to your experiences as set
11 forth -- and I think you just went through
12 that -- what are your areas of expertise,
13 mr. Boe, based upon education and experience?

14 A. Primarily what I've done over the last
15 30-plus years, probably 40 years now, is delay
16 and disruption. So loss of productivity and
17 delay of construction projects and various types
18 of projects, lots of different kinds.

19 Q. And it says here that you have contract
20 dispute resolution, CPM schedule delay analysis,
21 labor productivity, and damages resulting from
22 delay and disruptions of the CPM schedule.

23 A. Right.

24 Q. Is that pretty much --

25 A. And pretty much I've been --

1 Q. Now, your official affiliations are
2 what, sir?

3 A. I have a professional engineering
4 license from Pennsylvania and Washington State.
5 I will probably get that here too at some point.

6 But I'm a member of AACEI, the
7 American -- let's see -- Association for the
8 Advancement of Cost Engineers International, and
9 I'm a planning scheduled professional through
10 them. And then I'm also a member of CMAA,
11 Construction Management Association and the ABA
12 construction forum.

13 Q. And it says here you've had a couple of
14 publications; is that correct, as listed here?

15 A. Yes.

16 Q. And these are in the same general area
17 of expertise?

18 A. Yes.

19 Q. Okay. And it appears as though you've
20 given seminars and speaking engagements over the
21 last 30 years?

22 A. About that, yes.

23 Q. Okay. And we've got a list of projects
24 here. It takes up about -- it looks likes about
25 two pages, two or three pages?

1 A. Three or four pages, yeah.

2 Q. Starting in, it looks like, 1979 all the
3 way to up to today, correct?

4 A. Right.

5 Q. And I noticed that this particular job
6 is listed number 4 from the top, right?

7 A. Yes.

8 Q. Okay. Have you done any work for the
9 United States Government?

10 A. I've done a lot of work for the US
11 Government.

12 Q. Will you tell us what particular
13 departments in the government you worked for?

14 A. We have a -- I have a term contract with
15 the State Department to review schedules and do
16 claims work. We do -- I do a lot of work with
17 the Department of Justice. In the past 30 years,
18 I've worked with the Department of Justice on 100
19 cases maybe.

20 Q. And in your work with the Department of
21 Justice, how is that -- are these projects that
22 the Department of Justice is building, or are
23 these projects you're somehow involved with
24 tangentially?

25 A. No. This is the civil group, civil

1 construction litigation group, so the Federal
2 Circuit and Claims Court attorneys, and so they
3 are cases that were delay cases or disruption
4 cases.

5 Q. Do you have any clearance with the
6 government?

7 A. I do. I have secret clearance.

8 Q. And why would you need a secret
9 clearance in order to do construction litigation
10 with the Department of Justice?

11 A. Well, we've had several cases where they
12 were -- where there were confidential contracts,
13 or top secret contracts, and our State Department
14 contract requires us to have the clearance.

15 Q. So apparently at least the Federal
16 Government trusts you?

17 A. Apparently.

18 Q. Can you tell me any projects you've
19 worked on in other parts of the world?

20 A. Sure. I recently completed a case,
21 settling with the State Department, OBO, the
22 Office of Overseas Building, and that was having
23 to do with some housing projects in Haiti. And I
24 also did a project that had a case where it went
25 to trial. Was in the Mumbai Embassy, US Embassy

1 in Mumbai. And then another case that is in
2 Palau which (inaudible).

3 COURT REPORTER: Can you speak up
4 for me? I'm having trouble hearing you.

5 THE WITNESS: I will try.

6 BY MR. BUNDY:

7 Q. Have you ever provided expert testimony
8 before today?

9 A. Yes, the last page --

10 Q. Would it be found on the -- that would
11 be the last page of your resume?

12 A. Yes.

13 Q. Okay. And if you would, just tell the
14 Court basically where you have been qualified as
15 an expert in those issues.

16 A. For the most part, I think the Civilian
17 Board of Contract Appeals and the US Federal
18 Claims Court and then several arbitrations.

19 Q. Put aside arbitrations, what is the
20 business of the Federal Claims Court? What do
21 they do?

22 A. It's basically, they do -- they review
23 construction cases -- many other types of cases,
24 but construction cases is obviously what we did.

25 Q. Have you ever been appointed as a court

1 expert?

2 A. I have. I'm actually just finishing up
3 an assignment for a court in Israel that has to
4 do with the Ben Gurion Airport.

5 Q. Okay. And how did it come to be that
6 you were assigned that task?

7 A. I taught a seminar at some point, and
8 one of the attendees was representing the
9 Israel -- the IAA Airport Authority, and they
10 recommended me after that seminar. And I was
11 selected over four or five other people.

12 MR. BUNDY: And, Your Honor, at
13 this point, I would move to qualify mr. Boe as an
14 expert in contract dispute resolutions, CPM
15 schedule delay analysis, labor productivity
16 analysis, damages resulting from delay and
17 disruption, CPM scheduling and scheduling,
18 forensic scheduling analysis as well.

19 THE COURT: All right.

20 MR. HILDEBRAND: That seems pretty
21 broad. The only documents that we've gotten
22 relative to his testimony are delayed -- was his
23 testimony regarding delay. That was a long
24 litany of what he's qualifying him.

25 As I heard him testify that he's

1 primarily a delay expert, and that's what I heard
2 him testifying about. All those others things, I
3 just -- I don't know that he is qualified on all
4 of those. But I certainly would stipulate to his
5 credentials as a scheduling delay expert.

6 THE COURT: Okay.

7 MR. BUNDY: I can lay more
8 foundation, if you would like.

9 THE COURT: Is that generally the
10 area that you are seeking to have him opine?

11 MR. BUNDY: Well, I'm seeking to
12 have him qualified in all the areas he's
13 qualified to testify to, and to the point we get
14 into -- and to the extent we get outside of what
15 he's thinks is fair, then he can object at that
16 point in time. But that doesn't make him not an
17 expert. I mean, he might be an heart surgeon. I
18 may not ask him about it, but I don't know.

19 THE COURT: Well, it all looks to
20 be -- and other than the contract dispute
21 resolution area, which I don't think we're going
22 to get into with him --

23 MR. BUNDY: Right, right.

24 THE COURT: -- everything else
25 seemed to have to do with construction project

1 management schedule and delay analysis. And I
2 will allow him to -- I will certify him as an
3 expert in that area, okay --

4 MR. BUNDY: Thank you, Your Honor.

5 THE COURT: -- based on that.

6 BY MR. BUNDY:

7 Q. Mr. Boe, when did you first become
8 involved on this project?

9 A. I believe it was February or March of
10 2019.

11 Q. 2019. And do you know how -- who
12 contacted you?

13 A. I would say that you contacted us.

14 Q. Okay. And do you have any knowledge
15 about how it happened to pass that I called you?

16 A. I think you were asking for
17 recommendations from another counsel in South
18 Carolina and got a recommendation for our firm.

19 Q. Okay. And I assume we had a phone call?

20 A. I'm sure we did.

21 Q. And as a result of that conversation,
22 were you hired?

23 A. Yes.

24 Q. Okay. And you've been working on this
25 case for about how long now?

1 A. Two and a half years.

2 Q. Okay. And what do your -- how much is
3 Library Associates paid you to-date for your
4 work?

5 A. It's between 400 and \$450,000.

6 Q. Okay. So Library Associates has paid
7 your firm between 400 and \$450,000 to analyze
8 this case; is that correct?

9 A. Yes, sir.

10 Q. And how many man hours does that
11 represent, just generally, do you think?

12 A. Well, my part of it was a half or
13 quarter of -- half a million. No, quarter of a
14 million. So 500, 600 hours. So I would say five
15 times that.

16 Q. Okay. So 2500 hours?

17 A. Yeah.

18 Q. Okay, sir. And the other people who
19 work with you on this job, what are their names
20 and what are their qualifications?

21 A. Kevin Eckert is one. He has 12 years of
22 experience doing construction work, working for
23 first a general contractor and then -- well, two
24 different general contractors and has been
25 working for CPMI for about four years or about

1 three years -- three years.

2 Q. And CPMI is the company you work for,
3 correct?

4 A. Exactly, yeah. I'm a founding
5 shareholder.

6 Q. All right. And the other person who
7 worked on this job?

8 A. Supriya Panwar, who has six -- six years
9 of construction experience working in the field
10 for the most part. And for the last two years,
11 she's been working for CPMI. Before that, she
12 worked for a couple years as a scheduler on
13 projects while she was getting her master's
14 degree.

15 Q. Okay. And who supervises these people?

16 A. I do.

17 Q. And you're familiar with their work and
18 you understand what they do?

19 A. We basically don't go a day without
20 talking about what they're working on, on my
21 cases. So we go back and forth on the specifics
22 of what they're doing.

23 Q. All right. What were you asked to do,
24 mr. Boe?

25 A. Well, basically, our tasking was to look

1 at the claim that existed. So by that time,
2 there were four binders that were -- that were in
3 existence from Balfour Beatty, and those four
4 binders made up their initial claim from January
5 of 2019.

6 So we were asked to look at that and
7 then to look over some of the owner's documents
8 just to get a basis of the project and to
9 determine whether or not there was something that
10 we could move forward with and analyze and come
11 up with a solution, to come up with a
12 recommendation.

13 Q. Were you hired to do a delay analysis on
14 this job to determine where the delays were?

15 A. No.

16 Q. Okay. So you were hired to review the
17 delay claims made by the contractor to determine
18 their validity in your opinion, correct?

19 A. Right.

20 Q. And the opinions you're going to give
21 today, are they to a reasonable degree of
22 certainty within your area of expertise?

23 A. Yes.

24 Q. Okay. So I won't need to ask you every
25 time to a reasonable degree of certainty because

1 you're not going to give an opinion in this
2 courtroom that is not to a reasonable degree of
3 certainty, are you?

4 A. That's right.

5 Q. Okay. Thank you. So let's begin with
6 Exhibit 252. I believe you have that in front of
7 you.

8 A. Okay.

9 MR. BUNDY: Your Honor, would you
10 like to get that in front of you?

11 THE COURT: Yes.

12 MR. BUNDY: Do you have it? Your
13 Honor, I have another copy. That way we can move
14 ahead. It's not marked, but that is 252.

15 BY MR. BUNDY:

16 Q. All right. Mark, do you have 252 in
17 front of you?

18 A. I do.

19 Q. And what do you understand Exhibit 252
20 to be?

21 A. This is the initial claim that was
22 presented to Library Associates.

23 Q. And how much -- and this is a four page
24 letter?

25 A. Yeah.

1 Q. And how much is Balfour Beatty asking
2 for based on the contents of this four page
3 letter?

4 A. \$22,452,000.

5 Q. And do you have an opinion as to whether
6 or not my client should have stroke them a check
7 for \$22,452,282.51 based upon the contents of
8 this four page letter?

9 A. Yes, that would be really premature.

10 Q. And what about this letter -- when
11 analyzing this letter, what were you able to
12 determine about this claim as an expert in
13 reviewing claims?

14 A. So, generally, I focus on delay, loss
15 productivity and disruption. In this case,
16 there's some line items here that we say what
17 some of the items were in the claim.

18 But there's no -- there's no backup to
19 these things. There's nothing that says, here's
20 the number of days of delay. That might be
21 stated here, but without any analysis at all,
22 just saying, this is the total general conditions
23 claim.

24 So without a delay analysis, if you
25 start with that idea, you need to have a delay

1 analysis. And then there's subcontractor claims
2 for 11 million dollars out of this number, and
3 they're not included here. I know they were
4 included in the four binders that came later.

5 Q. Okay. So is it fair to say that this is
6 just simply a litany of allegations with no
7 factual backup?

8 A. Right.

9 Q. Now, let's look at Exhibit 11. For the
10 record, would you tell us what the Exhibit 11 is?

11 A. This is the four binders that I was
12 referencing.

13 Q. Exhibit 11 is one of four?

14 A. One of four.

15 Q. Okay. What is Exhibit 12?

16 A. It's two of four.

17 Q. And Exhibit 13?

18 A. This is three of four.

19 Q. And Exhibit 14?

20 A. It's four of four.

21 Q. Okay.

22 A. So those are the four binders that I was
23 discussing earlier.

24 Q. Is this the claim that was prepared by
25 Balfour Beatty, which followed the letter, which

1 has been marked and introduced as Exhibit 252?

2 A. Yes.

3 Q. Okay. Now, did you review this -- these
4 documents, this claim -- let's call it the binder
5 claim, I guess?

6 A. Yes.

7 Q. Okay. And approximately how much did
8 Library Associates pay you to review this claim?

9 A. Between 40 and \$50,000.

10 Q. Okay. So you spent -- and roughly how
11 much time is that if you extrapolate it in time?

12 A. Sorry. I used to be able to do that
13 math in my head, and I'm afraid I can't. If I
14 average \$200 an hour, that's probably 200 hours.

15 Q. Okay. So you spent 200 hours -- 150,
16 200 hours and sent my client a bill for \$40,000
17 to review it, and at the conclusion of that
18 review, what was your opinion to a reasonable
19 degree of certainty about the validity of this
20 claim?

21 A. It was essentially that I didn't have
22 the information that I needed in order to do a
23 reasonable analysis to figure out what was going
24 on, what was the cause of the delay.

25 They didn't make specific allegations

1 concerning delay. It's more, here's the number.
2 You know, the number is what it is. And then
3 there's backup to -- there's a single schedule
4 that's provided that's -- that's the last
5 schedule on the project.

6 And there's several subcontractor claims
7 that, quite frankly, have more meat on them than
8 the actual Balfour Beatty part of the claim.
9 They actually had a summary of the cost and a
10 reasoning, at least, for what the damages were.

11 Q. Okay. You reviewed this claim in 20 --
12 roughly 2019, correct?

13 A. Yes.

14 Q. And at that time in your career, how
15 many claims do you think you had reviewed prior
16 to this one?

17 A. Over 500, I would say.

18 Q. Okay. So on a scale of one to ten, ten
19 being the very best organized claim you have ever
20 seen, right, in your career, and zero being the
21 worst claim you've ever seen, where would you put
22 this four volume set along that scale for
23 purposes of educating someone about what the
24 basis of the claim was and the justification for
25 the number?

1 A. I mean, I have seen some pretty bad
2 claims that are worse than these -- than this,
3 but I still would put it in the two or three
4 range.

5 It's just -- it's very difficult to be
6 able to analyze -- to tell that something is
7 owed. And that's what my task, from my
8 perspective, is. I want to know if I can
9 recommend payment, and I really couldn't in this
10 case.

11 Q. In your career, receiving claims, have
12 you ever recommended to your client, you know,
13 I've looked at it, and we ought to pay them some
14 money?

15 A. I do it all the time.

16 Q. Okay. Did you make that recommendation
17 to Library Associates once you looked at this
18 document?

19 A. No.

20 Q. Did you make a recommendation regarding
21 payment?

22 A. I recommended that they get more
23 information, that they needed a delay analysis,
24 that they needed more information.

25 Q. All right. Well, let's talk about the

1 information that you actually looked at in these
2 claims. I would like to sort of drill down a
3 little bit into these.

4 MR. BUNDY: Your Honor, we're going
5 to begin with Defendant's Exhibit 11 in evidence.
6 It's volume one of four.

7 THE COURT: Got it.

8 MR. BUNDY: Are you ready?

9 THE COURT: Yes, sir.

10 BY MR. BUNDY:

11 Q. All right. Mr. Boe, let's start with
12 Exhibit, Defendant's Exhibit 11. Now, what was
13 the purpose, as you understand it, of Balfour
14 Beatty in making -- in providing this
15 documentation? What is it you understand that
16 they were trying to accomplish?

17 A. From my perspective, they were -- they
18 were putting meat on the bones of that previous
19 letter, the previous letter that requested 22
20 million dollars. This was supposed to be backup
21 that caused the owner to look at it and say,
22 okay, we can pay that or we can pay some portion
23 of it.

24 Q. Do you know whether this -- have you
25 read the contract between these parties?

1 A. I have.

2 Q. Okay. And do you know whether that
3 contract has any provisions related to disputes,
4 claims, and how you make them and what needs to
5 be in them?

6 A. I know it does.

7 Q. Okay. And in general, in the
8 construction industry, is it generally understood
9 how claims are generally presented, what needs to
10 be in a claim in order to justify payment?

11 A. I think it's well understood, and by
12 most contractors, I'm sure that they --

13 Q. Tell the Judge, if you would, what that
14 understanding is, as you understand it to be, as
15 it relates to claims. The contractor is making a
16 the claim. What is he trying to do?

17 A. I think generally he is trying to put
18 forward his best foot and his best effort to say,
19 you owe me money and here's why -- here's
20 specifically why, step by step, issue by issue.

21 Q. And does causation between an event and
22 damages play any role in the validity of a claim
23 in your mind?

24 A. Of course. Cause and effect is key to
25 any of this claim. Is it a requirement of the

1 contract? Did that requirement change? Did that
2 specific event cause delay or cause additional
3 costs? You know, you've got to show each of
4 those steps, entitlement and the -- and the
5 impact.

6 Q. In your opinion, is it sufficient for a
7 contractor to simply say, there were changes,
8 there were delays, and so therefore, I'm entitled
9 to be paid?

10 A. No.

11 Q. Why not?

12 A. I mean, as an outside person coming into
13 a claim, I can't look at -- I mean, I want to
14 look at a claim and be able to say, step by step,
15 okay, that sounds -- that's a story that is
16 logical. Now, I just have to verify that that's
17 what really happened.

18 And so having those allegations right up
19 front and being able to say, okay, I've seen the
20 allegation, and I can dig into the details of it.
21 And it -- the best way to do that is to have that
22 information right here, so the schedules, and the
23 daily reports and the weekly meetings that show
24 those things.

25 And I truly -- I expect to see that when

1 I'm reviewing a claim. It doesn't have to be the
2 first step. It doesn't have to be that first
3 letter, but if you're going to put together four
4 binders, there ought to be a sequence or a logic
5 to it that makes sense.

6 Q. Do you know whether or not the contract
7 speaks to who has the burden of proof when a
8 claim is being made?

9 A. I haven't seen very many contracts that
10 say it's other than contractor, the person making
11 the claim.

12 Q. So whoever is making the claim has the
13 burden, whether it's the owner or the contractor?

14 A. Yes.

15 Q. Okay. So have you ever been in a
16 situation where the contractor made a claim and
17 it was the owner's responsibility to disprove the
18 claim, not the contractor's responsibility to
19 prove his claim?

20 A. No.

21 Q. Okay. So let's look at volume one.
22 Let's start out with the letter that's dated
23 March 6th, 2019. It's directed to, I think, a
24 Mr. Buck Lindsay. Who is Buck Lindsay?

25 A. He's the architect on the project.

1 Q. Okay. And do you know why the
2 contractor was sending this claim to Buck
3 Lindsay?

4 A. That's the initial step of the dispute
5 process in the contract.

6 Q. Okay. And the dispute process is found
7 where?

8 A. Well, in the contract. I don't -- I
9 can't really recollect the --

10 Q. I'm just -- but this is something the
11 parties agreed to do, that they would do it this
12 way --

13 A. Yes.

14 Q. -- correct?

15 A. Yes.

16 Q. And as I understand it, the process was,
17 you send it to the architect first and he makes a
18 decision, correct?

19 A. Yes.

20 Q. Okay. And does the first paragraph
21 inform us that this was additional information
22 that was being provided at the architect's
23 request?

24 A. Yes.

25 Q. And do you know whether or not that was

1 because the architect, much like you, didn't
2 think that a four page letter justified a 22
3 million dollar payment?

4 A. I see that this is in response to a
5 letter from the architect; so I assume that's the
6 case.

7 Q. So let's look down at -- further down on
8 this letter. It says, tab one. What was tab one
9 supposed to do? What was it supposed to tell us?

10 A. It's supposed to be support for the
11 additional general conditions costs incurred
12 through the contractor during the contract
13 period. So it's additional general conditions
14 that were incurred during the contract period.

15 Q. And that's not an item that you would
16 have been investigating, correct, the cost
17 itself?

18 A. Oh, not -- we didn't know at that
19 initial stage at that point, but yes, I wouldn't
20 be looking at the cost necessarily, just what the
21 justification would be for that.

22 Q. And the cost in this number would have
23 been a consequence of the delay or ties to the
24 delay, if no delay in the cost, right?

25 A. No, not really in this case. This is

1 during the contract period. So the idea was that
2 this is over and above what they had originally
3 estimated.

4 Q. I got ahead of myself. All right. What
5 is tab 2 then?

6 A. Tab 2 is support for the extended
7 general conditions.

8 Q. Okay. And the extended general
9 conditions, are they premised on the notion that
10 the contractor was entitled to additional time?

11 A. Additional time meaning compensation; so
12 it has to be compensable time.

13 Q. Right. But you can't get additional
14 compensation if you don't get additional time,
15 right?

16 A. Right.

17 Q. Okay. And time is what you were
18 investigating, correct?

19 A. Yes.

20 Q. Okay. And then tab 3 is subcontractor
21 claims, pass-through claims?

22 A. Yes.

23 Q. Tab 4, support for change orders, and it
24 goes on down. Tab 7, what was tab 7?

25 A. Tab 7 is the -- it says, entitlement --

1 support for entitlement to schedule delays and
2 impacts.

3 Q. Okay. And it says, which consists of
4 Balfour Beatty Construction's most recent updated
5 schedule and -- so did you understand tab 7 to be
6 the support for entitlement to delay?

7 A. Yes.

8 Q. That was what they were sending the
9 architect? This is why we're entitled to delay?

10 A. Yes.

11 Q. Okay. Now, let's look at Exhibit 14.
12 Okay. You have it. Was it your interpretation
13 of this March 6th letter, 2019, containing
14 Exhibit 11, that tab 7 refers to Defendant's
15 Exhibit 14?

16 A. Yes.

17 Q. Okay. And tell us, if you will, how
18 that would inform someone that Balfour Beatty was
19 entitled to delays?

20 A. Well, frankly, it doesn't. All it
21 demonstrates is that delay occurred, that there
22 wasn't -- there was more time required or more
23 time was taken on the project. So all this shows
24 is, for the most part, that it took longer than
25 it was planned.

1 Q. So at this time, when you looked at this
2 the first time, this is simply telling you there
3 was a delay, and this is how much it was -- how
4 much the delay was?

5 A. And even that is not necessarily
6 accurate because it's -- it's the last schedule
7 update. But it did not -- when did they actually
8 complete what was the --

9 Q. I guess that was my point. Let's look
10 at the first page of this document, and it says,
11 detailed project schedule, right? Do you see
12 that?

13 A. Yes.

14 Q. And it says here, data date in the
15 bottom left-hand corner. What does that mean?
16 Data date, January 4, 2019.

17 A. So the data date on any of these
18 printouts that we get essentially says, what's
19 the status as of.

20 And you know, from a scheduling
21 standpoint, everything to the left of that data
22 date is as built information. At least you can
23 assume that it's as built. And everything to the
24 right of that is still planned and not completed
25 yet.

1 Q. As of January '19, that data date, where
2 was the project? Do you know? What was the
3 status of completion of the project?

4 A. It was essentially complete.

5 Q. Okay. Now, there's another notation
6 above that. It's got a hole, but I think it says
7 version 06 March '19; is that correct?

8 A. Yes.

9 Q. All right. What does that mean?

10 A. It just means that's when it was
11 printed.

12 Q. Means what?

13 A. That's when it was printed.

14 Q. That's when it was printed?

15 A. Yes.

16 Q. Is there any way to tell what the logic
17 was in this schedule by looking at this document?

18 A. No.

19 Q. Is there any way to tell what the plan
20 schedule was according to this document?

21 A. No.

22 Q. Can you tell any -- is this just
23 basically a list of to do items and the days they
24 occurred on?

25 A. Well --

1 MR. HILDEBRAND: Objection, Your
2 Honor. Mr. Bundy is really testifying more than
3 the witness here. I'm trying not to interrupt
4 him, but if he'd just ask him what his opinions
5 are and what his observations are on that
6 document, I think that would be fine. But I
7 don't think it's appropriate for Mr. Bundy to
8 testify.

9 THE COURT: Okay. I will sustain
10 that. Rephrase that question, if you would.

11 MR. BUNDY: Thank you, Your Honor.
12 BY MR. BUNDY:

13 Q. What use, if any, were you able to make
14 of this exhibit, Defendant's 14, in determining
15 in March of 2019, whether there were any delays
16 on this job and who caused them?

17 A. It was really of no value by itself. We
18 really needed somebody to say, based on this,
19 here's where the delays occurred, here's what
20 caused those delays, and explain to us what --
21 why did you even give us this? So it isn't -- by
22 itself, it's of no value.

23 Q. All right. Let's go to tab -- let's go
24 back to your Exhibit 11, please. We're looking
25 at the letter. Let me ask you this: I think you

1 said 500 hours, you spent on this or somebody
2 spent on this?

3 A. Yes.

4 Q. Of the 500 hours that were spent, how
5 much time did you need --

6 A. I think this was 200 hours.

7 Q. 200 hours. Of the 200 hours that you
8 spent, how much time did it take you to determine
9 that Exhibit 14 was completely useless to you?

10 A. Not very long. A few hours looking
11 through to try to see if there was something that
12 explain what the delay was.

13 Q. All right. Let's go back to tab 8.
14 Now, what is tab 8 supposed to -- what is it
15 represented to be?

16 A. It's additional. It's supposed to be
17 support for entitlement related to circumstances,
18 so related to delay. So it includes an RFI log,
19 a drawing log, and some other information.

20 Q. How do those documents support
21 entitlement? It says they support entitlement,
22 but how do those documents that were in tab 8
23 support entitlement?

24 A. An RFI log, by itself, the fact that
25 there were RFIs or weren't RFIs or if there were

1 thousands of RFIs or tens of RFIs doesn't get us
2 there.

3 In a delay analysis, there has to be
4 cause and effect. You have to be able to say,
5 there was -- here's the cause of the delay and
6 there's an effect that actually delayed something
7 that was on the critical path. So you have to
8 identify the critical path, and you have to say
9 the specifics that delay it.

10 So we do see it a lot where there's
11 1,000 RFIs or 2,000 or 10,000 RFIs, and
12 therefore, we see it all the time, and that
13 doesn't cut it. It just -- under no
14 circumstances, does the number of the RFIs
15 reflect -- you know, get you to a proof of delay.
16 It just doesn't get a cause and effect.

17 Q. Well, where in the contract does it say,
18 there's a magic number here, and if you ask for
19 more than X number of RFIs, you're in -- you've
20 been delayed automatically. Is that in the
21 contract anywhere?

22 A. No.

23 Q. Have you ever seen that in the contract
24 in your 40 years of -- in this industry?

25 A. No.

1 Q. Okay. All right. Let's go through and
2 look at exhibit -- I'm going to go through these
3 very quickly, if we could. Let's go to section
4 1. What do we get out of section 1 here?

5 A. This looks to be a printout of a cost
6 report or a portion of a cost report, just kind
7 of identifying an overrun. So a budget number
8 and an actual number to that date, I suppose, and
9 saying, during the project, we overran the amount
10 of general conditions.

11 Q. Who prepared the budget?

12 A. Balfour Beatty.

13 Q. So this document proved that they had a
14 budget and they went over budget?

15 A. Yes.

16 Q. Okay. What else did it prove?

17 A. I'm -- I guess I'm -- maybe it's saying
18 too much to say it proved it. This is the start
19 of the proof that they went over budget in that
20 area. So you would have to look at more detail,
21 and that's what I get out of it.

22 Q. What is tab 2?

23 A. Tab 2 measures the same kind of costs,
24 but it's for extended -- for the extended time,
25 for the time after the original contract

1 completion date, and it measures what the costs
2 were for that period afterwards.

3 Q. What are they looking for on this one?

4 A. I should remember, but I don't. 3
5 million, 3.1 million.

6 Q. Okay. And is it typical for you to
7 recommend that your clients pay 3 million dollars
8 based on a three page summary?

9 A. No.

10 Q. No?

11 A. Again, entitlement, we need a delay
12 analysis. We need something that says, it's
13 clear that these additional costs or this
14 additional time is owed, and there's not
15 concurrent delay.

16 Q. And, again, who has the burden of
17 proving these damages?

18 A. The contractor.

19 Q. All right. Let's look at tab 3. Tab 3
20 was described -- if you would read tab 3 to the
21 Judge so he can understand what tab 3 was
22 supposed to represent.

23 A. It's support for the subcontractor
24 claims. So it includes some initial kind of
25 narrative based on e-mails, and then it gets into

1 the subcontractor claims from Old North and from
2 BMCC, Bernard.

3 Q. All right. So these are the
4 subcontractor claims, and it appears to be about,
5 what, 4 and a half to 5 inches of paper?

6 A. Yeah.

7 Q. Okay. And do you know what
8 responsibility, if any, Balfour Beatty had to
9 review subcontractor claims before submitting
10 them to the owner for payment?

11 A. I can't say that I know exactly what
12 clause requires that, but there's always a
13 requirement. There's always a need to verify
14 that those things are -- things that should be
15 paid by the owner as opposed to being internal to
16 Balfour Beatty.

17 Q. Well, what is your understanding
18 generally in the industry of a construction
19 manager's obligation as it relates to claims of
20 its subcontractors?

21 MR. HILDEBRAND: Objection, Your
22 Honor. Mr. Bundy has made a real point in this
23 case of saying, what were the obligations under
24 the contract and just asked for general
25 obligations of what it might be. I just don't

1 think it's relevant. I think he should direct
2 the questions to the particular facts in this
3 case.

4 THE COURT: Overruled. Go ahead.

5 MR. BUNDY: I will withdraw the
6 question.

7 BY MR. BUNDY:

8 Q. Let's look at what's under tab 3,
9 Exhibit A, page 7 of 7. What is it that you were
10 able to determine, if anything, about the
11 validity of this claim you reviewed for \$50,000
12 based upon what's contained in attachment A,
13 seven pages? What did that inform you of?

14 A. I've got to tell you that I'd have to
15 look at it again because it's been too long, but
16 just looking at it and seeing it's got some
17 actual allegations in here or some discussions of
18 actual facts, it just doesn't sum up to anything.
19 It doesn't give me an idea of what's the big
20 picture, why are you telling me these things.

21 Q. All right. And then let's go to the
22 next -- let's keep going. There's a change order
23 4, and there's some -- what is the next
24 attachment? Well, the rest of Exhibit A, the
25 attachment B. What does attachment B tell you

1 regarding this claim?

2 I want you to just look at it briefly to
3 try to refresh your recollection. I want to go
4 through these to determine why it is that you
5 told my client not to pay 22 million dollars. We
6 paid you \$50,000 to look at this thing and tell
7 us to pay it or not pay it, and I want to know
8 why you told us not to pay it.

9 A. I mean, in this case, this is a change
10 order written to Old North State; so it's a
11 mason. And it discusses masonry edge of slab
12 changes. Without knowing more, my immediate
13 thought was, you know, that could be an owner
14 problem. It could be a contractor problem. It
15 could have been a predecessor contractor problem.

16 Knowing a little bit more about it now,
17 I know that it was -- this masonry edge of slab
18 changes was at least an allegation that said,
19 this is a Balfour problem because their
20 predecessor subcontractor didn't work within the
21 tolerance it was supposed to be worked to.

22 Q. All right. Let's look at attachment C.
23 What is this? And this is entitled, for
24 settlement purposes only. And this is from ONSM,
25 and who is ONSM?

1 A. Old North State Masonry.

2 Q. And what was their scope of work?

3 A. They did the CMU block work that was the
4 exterior skin of the building -- not the skin
5 ultimately, but the exterior and then precast
6 work, setting precast after that.

7 So this document, though, is -- it
8 starts to layout their allegations, their
9 specific allegations. And it's -- you know, it's
10 got some specific items, coordinations,
11 scheduling, planning, sequencing of trades in its
12 logical sequence.

13 And they had block working pacts. And
14 one of the block working pacts was hoisting.
15 Well, hoisting doesn't sound like an owner
16 problem. It sounds like a contractor worked it
17 out type problem.

18 Completion of preceding activities in a
19 logical manner. It's possible the owner could
20 have influenced that, but it doesn't sound like
21 it on its face. Conflicts with other trades.
22 Again, it doesn't like an owner problem. It
23 could be something there. It's possible, but it
24 doesn't sound like it.

25 Water proofing and (inaudible), hoisting

1 of the precast on the fifth floor. Length of
2 time to resolve additional scope. Okay. That
3 could be an owner problem, but again, they're not
4 specific.

5 I don't have anything that tells me what
6 it specifically is. So, I mean, we can kind of
7 go through it, but that's where we get at, is
8 that there's -- this doesn't say, we have a claim
9 against the owner, and here's the pieces that are
10 against the owner, and maybe here's the pieces
11 that are against Balfour Beatty.

12 Q. Well, was this claim for settlement
13 purposes only a claim against Balfour Beatty, or
14 was it a claim against the owner?

15 A. No idea. I have no idea.

16 Q. Attachment D, what did attachment D tell
17 you, if anything?

18 A. I mean, I can see that it's supposed to
19 be saying something about the timing, but it
20 doesn't tell me what it is. I don't -- I can't
21 tell anything.

22 It's like that as built schedule for a
23 house. This is how we ended up. This is what we
24 had to do or this is how we worked on the
25 project, but it doesn't give me any conclusion.

1 It doesn't tell me that there's delay or why
2 there's delay. It's just information.

3 Q. Where on this document does it even
4 inform you this relates to this hotel?

5 A. It doesn't.

6 Q. I mean, there's nothing in there. Okay.
7 That's all I need to know. So let's go to
8 attachment E. What are you able to glean from
9 attachment E?

10 A. From a start of it is, it's the
11 notifications. It's the times when ONSM, Old
12 North State said, we're being delayed and told
13 Balfour Beatty.

14 Q. Now, at the time you -- and attachment E
15 goes how far? Does it go until we get to
16 Shumaker and Loop, for settlement purposes only?
17 Okay. That's Old North State Masonry, too.

18 A. Right. It's not defined.

19 Q. Okay. Well, let's just -- so we've got
20 to -- I'm trying to understand what you were
21 looking at. What did these letters from Old
22 North State through -- there's a white sheet of
23 paper, and then there's a letter, January 9,
24 2019, from Shumaker, Loop and Kendrick.

25 Those pages -- these pages right here,

1 what did that tell you about the claim that
2 assisted you in arriving at any conclusions?

3 A. It's actually counter to what we would
4 want to be finding that we -- you would want. If
5 this is going to be a claim that we're going to
6 be able to say, yes, we recommend paying for this
7 part of the claim, we want it to say, it's very
8 specific. There's design changes, here's the
9 specific design changes and here's what happened
10 that caused us to be delayed.

11 Instead in this case, it talks to
12 impacts that don't appear to have anything to do
13 with the owner, and this is July of 2016. So
14 it's fairly early in the process. But it talks
15 very specifically about some beams to ensure the
16 these are required at all vertical joints. Pour
17 grout holes are missing and all the slabs cannot
18 be poured.

19 So the predecessor trade did something
20 wrong. Now, was that because of the design
21 change? Standing here, I don't think so, but I
22 don't know. I can't imagine that it would.

23 Q. All right. So then you proceeded to the
24 next letter, which is a January 9, 2019 letter,
25 for settlement purposes -- for settlement only

1 signed by Mr. Steele B. Windle, III. Do you see
2 that on page 4?

3 A. Yes.

4 Q. Okay. And what did this letter -- or
5 how did this letter assist you, if at all, in
6 making a determination -- making your
7 determination as to whether or not Library
8 Associates should pay 22 million dollars?

9 A. Well, this is a claim document that has
10 some backup to it, and it looks like maybe the
11 documents that we were just talking about A, B,
12 et cetera, are supposed to be attached to this
13 letter.

14 Because they're -- for example, the
15 documents we just referenced are in that last
16 paragraph or second to last paragraph. But this
17 is trying to make allegations that there is a
18 claim, but it's still not apparent that this
19 claim is against the owner. It looks like most
20 of the blame is to predecessor trades or to
21 scheduling.

22 Q. Do you have an opinion as to whether or
23 not the contents of this letter helps or hurts
24 Balfour Beatty's cause in trying to get money out
25 of the owner?

1 A. It hurts it. These claims seem to be
2 more related to Balfour Beatty.

3 Q. Okay. And do you know whether
4 Mr. Steele B. Windle, III, is going to be a fact
5 witness in this case?

6 A. It looks like he's an attorney.

7 Q. It's a lawyer letter, right?

8 A. Yeah.

9 Q. Okay. All right. And behind that
10 letter is what, and what use -- well, actually,
11 we go from there to -- turn some pages. Do you
12 know what these charts relate to?

13 A. It's a claim from Lithko, the
14 structure -- the structure contractor, and it
15 looks like -- it talks to some of the level 6, 22
16 day delay, 188,000, about seven, eight days. So
17 it's a delay claim, and it's trying to identify
18 the --

19 Q. Let me ask you this: Let's back up a
20 minute. The letter written by Mr. Steele B.
21 Windle, III, says it has enclosures, but the
22 letter is written on behalf Old North State
23 Masonry; is that correct?

24 A. Yes.

25 Q. But the attachment appears to be a

1 Lithko claim; is that correct?

2 A. I think I said -- I think the
3 attachments are before the letter, the actual
4 attachments to that, and this is completely
5 separate. This is a different claim.

6 Q. A different claim. Okay. And so what
7 is this claim for?

8 A. This is for delay to the structure, to
9 the concrete contractor, Lithko. And it could --

10 Q. And how do you know that by looking at
11 this?

12 A. I just -- I see level 6, 22 days in the
13 middle of the top -- the top column, the top row.
14 It says, level L6, 22 days, and then it says,
15 base bid \$188,000. I don't know what that has to
16 do with anything. But then it goes through and
17 talks to costs. So I'm guessing.

18 Q. Well, I don't want you to guess.

19 A. It would be an estimated guess.

20 Q. And what, if anything, did you know more
21 about this claim than you did after you looked at
22 these five or six sheets of paper?

23 A. There's a couple of specific delay
24 request days, but there's no backup to it.
25 There's nothing that I could --

1 Q. Where does it say who caused the delay?

2 A. It doesn't.

3 Q. Where does it say whether it was on the
4 critical path?

5 A. It doesn't provide any analysis of
6 critical path.

7 Q. Where's the information that would allow
8 you to give an opinion that my client owes money
9 on that?

10 A. I couldn't do it.

11 Q. All right. Let's go to the next one.
12 David Allen Company. Do you see that?

13 A. Yes.

14 Q. All right. Who is David Allen?

15 A. Just offhand right now, I don't know.

16 Q. Okay. And they want \$222,000, correct?

17 A. Yes.

18 Q. And that's -- and that's based on how
19 many pages of information?

20 A. Three.

21 Q. Huh?

22 A. Three.

23 Q. Three.

24 A. Two or three. Sorry, two.

25 Q. Two. We go from David Allen \$222,000,

1 and there's a sheet behind it, right, cost
2 impact? Is that what you're talking about? Are
3 we looking at the same thing?

4 A. Yes.

5 Q. All right. You've got a \$22,000 claim
6 based on two pieces of paper. What would inform
7 you, from these two pieces of paper, about paying
8 David Allen \$222,000?

9 A. Nothing.

10 Q. Okay. All right. Let's go to the next
11 one, Pasco. Who is Pasco?

12 A. Pasco is the sprinkler contractor.

13 Q. Okay. And what is Pasco looking for
14 here?

15 A. This is a change order proposal, and
16 they're requesting general conditions for
17 schedule push on level 7, 21 days.

18 Q. Where does it say they're requesting
19 anything?

20 A. It says, change order proposal at the
21 top.

22 Q. Who is the change order to?

23 A. Balfour Beatty.

24 Q. Okay. So how do you relate this --
25 these pages, which relate to Pasco's claim

1 against Balfour Beatty to the owner? How would
2 you get from one point to the other based on
3 these pages?

4 A. I can't.

5 Q. Okay. And how much time in your \$50,000
6 of looking through this document did you have to
7 spend on these fours pages to come to the
8 conclusion, I can't make -- there's nothing here?
9 How long did that take?

10 A. Again, it didn't take long.

11 Q. In terms of claims that you get, is this
12 typical of what you see? When you see a 22
13 million dollar claim, is this the kind of
14 paperwork you see typically from a multinational
15 contractor?

16 A. No.

17 Q. Okay. Let's go to the next one,
18 Bernhard MCC. Do you see that?

19 A. Yes.

20 Q. Now, this letter is 13 pages long,
21 correct?

22 A. Yes, it is.

23 Q. And do you know who prepared the letter?
24 Is it signed by anybody?

25 A. I don't think so.

1 Q. Okay. The --

2 A. No, it's not signed.

3 Q. And it's 13 pages, and they only wanted
4 6 and a half million dollars, correct?

5 A. Yes.

6 Q. How many times in your career have you
7 recommended to your client to pay a 6 million
8 dollar -- 6 and a half million dollar claim based
9 on a 13 page letter with no backup?

10 A. Never.

11 Q. All right. In your profession, would
12 that consider to be malpractice, to recommend to
13 somebody to pay a 6 and a half million dollar
14 claim on a 13 page letter such as this, this
15 letter?

16 A. As an engineer, we don't talk about
17 malpractice a lot, but it's really bad.

18 Q. In this letter -- let's turn to page 3
19 of 13. I would like to read the last paragraph
20 to you. Another issue that greatly impacted the
21 project design was that after the construction of
22 the hotel began, the City of Charleston notified
23 the owner and the City had made a mistake of
24 approving the plans for the project.

25 Now, are you aware of how many times the

1 plans for this project went to the State Supreme
2 Court?

3 A. I don't know the number.

4 Q. Do you have any idea how many meetings
5 Mike Bennett went to to get this hotel approved,
6 over what period of time?

7 A. I've known at some point in the past.

8 Q. But we do know that after all of that,
9 according to Bernhard MCC, the City made a
10 mistake on the building plans, correct, according
11 to this?

12 A. That's what it says.

13 Q. Okay. Buildings in Charleston cannot be
14 taller than the tallest church steeple, which
15 St. Matthews Lutheran church; however, the
16 original plans for the project called for the
17 building to be taller than St. Matthews.

18 As such, the architect was required to
19 shrink the building by approximately 120 feet
20 after the building was already under
21 construction. Now, are you aware of that
22 happening on this job?

23 A. It didn't happen.

24 Q. Okay. How tall is this building? Nine
25 stories?

1 A. Nine stories.

2 Q. If you shrunk it 120 feet, how tall
3 would it be?

4 A. It would be on the ground.

5 Q. Okay. Do you think the contractor would
6 have made a change order request saying that you
7 know what, I've been deprived of nine stories
8 over here, right? You would expect that change
9 order request, right?

10 A. Yes.

11 Q. Are you aware of such a request?

12 A. It didn't happen.

13 Q. All right. Now, having looked at a
14 letter that asks for 6 and a half million
15 dollars, which contained an allegation that the
16 building had been shrunk by 120 feet, which was a
17 lie, did that influence you in determining
18 whether or not that was a legitimate claim?

19 A. It pretty clearly -- that part of it was
20 clearly not a legitimate allegation.

21 Q. All right. Now, let's go to BMCC claim,
22 Exhibit 5, Marion Square project. This -- if you
23 look at Exhibit 5 -- is a series of scheduled
24 observations, I guess, for lack of a better word,
25 from a gentleman named Randy P. Lynn. Do you see

1 that?

2 A. Yes.

3 Q. All right. And it's schedule review and
4 compare, and it starts in February of '18 and
5 goes back to '17.

6 What, if anything, did these documents
7 inform you of to allow you to make a decision or
8 give my client a recommendation to a reasonable
9 degree of certainty as to whether or not BMCC had
10 been delayed and/or whether the owner had caused
11 it?

12 A. This is at least good schedule
13 information that talks through what was going on
14 on the project and talks to some of the delays on
15 the project. So at least it was something that
16 was readable and could be understood.

17 But it still doesn't demonstrate or
18 didn't demonstrate that the owner was the cause.
19 It doesn't talk to the owner being the cause of
20 the delay. It really talks to schedule, you
21 know, details and how the schedules that were
22 contemporaneous on the project weren't
23 necessarily -- they weren't great. They weren't
24 accurate necessarily.

25 Q. In reviewing Mr. Lynn's schedule

1 analysis, did you see where he made a schedule
2 change when they reduced the building by 120
3 feet?

4 A. No. First, I would hesitate to call
5 this a schedule analysis. This is really a
6 review of the schedules. But, no, there's no
7 change orders.

8 Q. Let me ask it to you this way: Would
9 you have expected Mr. Lynn in your review of the
10 schedule, to have noted that the building had
11 shrunk by 120 feet after he started construction?

12 A. If he was involved at that time, he
13 certainly would have noticed it, but we know that
14 that didn't happen.

15 Q. All right. Let's go to claim Exhibit 7.
16 Now, what are we being -- what are you learning
17 from what's in Exhibit 7? What is that telling
18 you about BMCC's claim?

19 A. Well, the start of it is just change
20 orders. I mean, it's not a change order. It's a
21 payment from May of 2018.

22 Q. And then we've got Exhibit 8, which is a
23 list of proposed change orders, correct?

24 A. Yes.

25 Q. All right. Now, let's go to the next

1 one, which is for settlement purposes only. Are
2 you with me? This is 12/7/17.

3 A. Yes.

4 Q. All right. And this is a claim for Old
5 North State Masonry?

6 A. So we're back to Old North State.

7 Q. Okay. We are back to Old North State.
8 Is this typically how you see these claims
9 organized in your experience, to go from one
10 contractor to another and back to another one?

11 A. No.

12 Q. Okay. What was your opinion of the
13 organization of this claim? Was it organized
14 well in your opinion?

15 A. No.

16 Q. Okay. Did the lack of organization
17 cause you any additional time in trying to figure
18 what they were trying to say?

19 A. We expect to see an outline and damages,
20 you know, kind of identified and then what --
21 what are the allegations and that kind of thing.
22 We didn't see that here.

23 You know, eventually you can dig out
24 these proposed change orders, for example, just
25 from looking at it. You can dig that out and

1 say, okay, there's some things that we can look
2 at and determine or we can leave that and at
3 least identify it and say, that's something that
4 the owner needs to look at. But the organization
5 just isn't good.

6 Q. And let me ask you something about this
7 document, for settlement purposes only from Old
8 State Masonry, claim calculations. It's dated
9 12/7/2017. That predated the submission of this
10 claim in March of 2019 by how much?

11 A. Two years and three months.

12 Q. Okay. Do you know if the contract
13 speaks to any time restraints on the filing of
14 claims?

15 A. I seem to recall that it says 20 days.

16 Q. 20 days. Do you have an opinion as to
17 whether or not this claim exceeds those 20 days?

18 A. I would say that three years is more
19 than two years.

20 Q. What, if any, problems are caused to an
21 owner by a contractor or subcontractor submitting
22 a claim for -- how much? How much did they want?
23 \$1,127,871.

24 Does it cause an owner any problems when
25 they try to analyze -- well, what problems is

1 caused by a subcontractor waiting two and a half
2 years before they submit a 1.27 million dollar
3 claim? What problems does that cause?

4 A. Well, I don't want to -- I'm not sure
5 that that was the problem.

6 This says that they generated this
7 document for settlement purposes. The
8 subcontractor did make the claim, it looks like.
9 It's that Balfour didn't forward it to the owner
10 at that point, that we know of. I mean, from
11 this, I can't tell, but we know that this -- this
12 happened two years before.

13 Q. Do you know whether or not the general
14 construction manager has any obligation to
15 forward the claims of subcontractors onto the
16 owner if they think the owner is responsible?

17 A. I'm sure they do. And it looks like I'm
18 off by a year on that, so December to January.

19 Q. All right. After you looked at this
20 claim, what were you able to determine as it
21 relates to its validity, as it relates to
22 entitlement and quantity?

23 A. I didn't have the information that I
24 needed. I needed specific allegations, and what
25 I really needed was a delay analysis that told me

1 what happened on the project, what critical paths
2 were taken, what are the allegations that brought
3 delay to the project specifically, you know,
4 period by period.

5 Q. Now, the Old North State Masonry has
6 behind it how many -- when do we get -- how far
7 do we go to get through the Old North State
8 Masonry?

9 A. Almost through the end of this section.

10 Q. So basically all the rest of this?

11 A. Well, no. It goes to Precision Walls is
12 the next yellow sheet; so it's a couple issues of
13 Old North. They included the date in their daily
14 reports, which is good information that I like to
15 see in a claim. But, again, this is just one
16 sub.

17 Q. All right. Show me where Old North
18 State Masonry starts back.

19 A. It starts --

20 Q. Where does it end? Where does Old North
21 State end? Back here?

22 A. Where you see the yellow sheet.

23 MR. BUNDY: Judge, I don't know if
24 you have a yellow sheet. There should be a white
25 sheet, I guess, somewhere in there. It might be

1 a tab.

2 THE COURT: Do you know where it
3 ends?

4 THE WITNESS: Yes.

5 MR. BUNDY: It must be the tab,
6 Judge, tab 4.

7 THE WITNESS: There's some fold out
8 sheets that are soon after that one.

9 BY MR. BUNDY:

10 Q. All right. Well, as it relates to the
11 Old North State Masonry, it appears as though
12 there are a series of daily logs and production
13 reports, correct?

14 A. Yes.

15 Q. All right. Now, what use were those to
16 you in trying to analyze the validity of Old
17 North State's Masonry claim?

18 A. Well, it's the kind of information that
19 I want to see. It's the kind of information
20 that, as a delay analyst, you want to see the
21 schedules and you want to see the daily reports
22 and perhaps the meeting minutes so you know what
23 the issues were at the time.

24 So it was useful information. It's just
25 that without an analysis behind it that says,

1 what were the delays, what was going on, there
2 wasn't much we could do with it.

3 Q. So it was left to you to make the
4 analysis from their own reports, right?

5 A. Right.

6 Q. Okay. Is that typically the way it's
7 done, that the contractor just dumps their daily
8 reports, and then you do the analysis to
9 determine what their claim is?

10 A. No.

11 Q. Because you don't send your bill to
12 Balfour Beatty, do you? You send it to Library
13 Associates, correct?

14 A. Yes.

15 Q. And if you took their documents and made
16 their claim, you would be working for them, and
17 that's who you would send your bill to, right?

18 A. You're right.

19 Q. All right. Let's go to the next tab,
20 which is what? What is this -- what is the next
21 tab telling us?

22 A. It says Exhibit B, and it's Precision
23 Walls' claim.

24 Q. Okay. All right. Anything else in this
25 first volume that informs you of sufficient

1 information for you to be able to make any
2 realistic determination about the validity of
3 this claim?

4 A. No. I'll just get back this last
5 section. There's some information about the
6 thousand year storm that -- where a change order
7 was granted for 20 days. That's probably helpful
8 at least to know that that time was granted. But
9 other than that, it wasn't much.

10 Q. Okay. All right. So let's look at the
11 next volume then.

12 MR. BUNDY: Your Honor, the next
13 one is Exhibit 12.

14 BY MR. BUNDY:

15 Q. Can you give me a -- just sort of look
16 through it quickly if you need to. Just give me
17 a general description of what it is that was
18 provided in this Exhibit 12 to you in order to
19 arrive at some sort of conclusion?

20 A. Sure. This is a delay notification log.
21 So it seems like something that would really make
22 a lot of sense, that there might be something
23 behind it that would tell us that, here's the
24 causes of delay, and here's the ones that are
25 important. Except that it doesn't get there.

1 It just gives us the notifications and
2 doesn't give us the critical path, which
3 ones matter. So there's a lot of information,
4 and going through this took a lot of time. But
5 it doesn't -- it turns out it doesn't give the
6 information that we're looking for, which is what
7 was the critical path delays, what happened on
8 this project that caused the delays.

9 Q. So you spent -- I don't know what -- how
10 many hours do you think going through this
11 particular document?

12 A. I would guess that this is the bulk --
13 this and the subcontractor claims are the bulk of
14 what we spent time on. So out of 200 hours, we
15 probably spent 150 or something on this part.

16 Q. And at the conclusion of that time
17 expenditure, what, if anything, more did you know
18 about it than before you started?

19 A. We knew that up to that point, there
20 wasn't enough information for us to recommend
21 any -- and we also had some information at least
22 that the allegations were not going to end up
23 being completely the owner's problem.

24 Q. Okay. All right. And then let's look
25 at Exhibit 13 next. All right. Pretty much the

1 same question. How much time do you think you
2 spent looking at Exhibit 13?

3 A. This is, I believe, the same -- just a
4 continuation of the previous section. So this is
5 kind of what I was talking about before for the
6 hours.

7 But, again, it doesn't give us the
8 critical path. It doesn't tell us what's
9 important from here. It just identifies that
10 there were some issues that might have caused
11 delay. Notification was granted for sure when it
12 was given, that there was -- that there were
13 delays that occurred.

14 Q. Okay. Was responsibility assigned for
15 those delays? Was there any causation provided?

16 A. There probably is for some of these
17 items. I mean, some of them are just change
18 orders. So in the case of the owner change
19 orders, it certainly would be maybe assumed that
20 the owner was responsible.

21 Q. Was there any way to determine, or were
22 you able to determine how many days the
23 contractor was entitled to the time extension
24 based upon the information provided in this
25 claim?

1 A. No.

2 Q. And why not?

3 A. Well, first, it -- that wasn't my
4 initial task. It wasn't to figure out what the
5 number of days was that should be granted.

6 But at least -- it was at least to look
7 at and see if there was justification that said,
8 here's what the delays are. And that information
9 just isn't there. So there's no way that we
10 could make a recommendation for even a small
11 amount of the delay.

12 Q. Okay. Let me ask it to you a different
13 way. How many days were you able to justify,
14 based upon your analysis of the -- how many days
15 time extension were you able to justify giving
16 the general contractor and recommend to Library
17 Associates based upon the information provided in
18 these four volumes?

19 A. I think the 20 days for the hurricane
20 was justified, but it was already granted. So
21 other than that, none.

22 Q. So the 20 days the architect had already
23 granted?

24 A. Right.

25 Q. But no additional days?

1 A. No.

2 Q. Okay. All right. But what was the --
3 once you got through this report or this claim,
4 what was the next stage of your work or your work
5 product?

6 A. We issued a one page thing just saying
7 what we -- what we just talked about, that there
8 wasn't enough information here to analyze. And
9 we had already spent X dollars and we -- we
10 really thought it was important that we stop at
11 that point.

12 And the next phase for us was when -- I
13 think a year later-ish, we were asked some
14 questions at different points, but it -- but when
15 a schedule was set for reports, that's when we
16 really started (inaudible) back again.

17 Q. Now, in terms of the work you did --
18 this is the March '19, April '19 timeframe,
19 correct?

20 A. Yes.

21 Q. Between March of '19 and November of
22 '19, what work did you engage in as it related to
23 your employment on this particular job?

24 A. On this job? We had a task that had to
25 do with the leads. And I think I wrote up an

1 affidavit for the leads, and other than that,
2 nothing.

3 Q. And in or about November, did you come
4 to any conclusions, have any opinions about the
5 documents you had reviewed up until that point
6 and the status of the claim?

7 A. Well, the status hadn't changed. So I
8 hadn't looked at anything.

9 Q. How would you characterize the delay
10 claim methodology that the -- that Balfour Beatty
11 is making? How would characterize this type of
12 delay claim?

13 A. Well, really, the only way to -- the
14 only thing I could call it is a total time claim.
15 It essentially says, we were delayed. The owner
16 was at fault, and we're owed that much time.
17 We're owed all of the damages all of the time.

18 Q. And is that total time claim generally
19 recognized? How is that dealt with in your
20 field?

21 A. I was on a case at some point in the
22 past, and the Judge referred to it as virtually
23 worthless.

24 Q. And why is that?

25 A. Because there's no cause and effect, in

1 large part, and it's very conclusory. It
2 essentially says, there's this much delay, a
3 bunch of stuff happened -- a bunch of things
4 happened, a bunch of change orders, a bunch of
5 RFIs, and therefore, that's what caused the
6 delay.

7 And sometimes there's additional
8 research and additional documentation behind it,
9 and sometimes there's not. But ultimately, on
10 that case, the Judge kind of determined that it
11 was in total time.

12 Q. What is a critical path analysis? What
13 is a critical path when talking about scheduling?

14 A. Well, I mean, I read through Mr. Doran's
15 testimony, and I think he defined it fairly well.
16 A critical path schedule is the amount of time,
17 the shortest amount of time, the longest
18 continuous path on a project that you can, you
19 know, identify. And it's very important that
20 float be taken into account.

21 So before this just -- and I know
22 Mr. Doran talked about a turkey dinner. I don't
23 want to talk about that. But bottom line,
24 there's time on some activities that wouldn't
25 impact if you delay a few days. It doesn't

1 matter.

2 And it's important to make sure that you
3 recognize where float exists and where float
4 doesn't exists, what impacts the end date, what
5 impacts the last of the items on a project.

6 Q. Okay. Have you -- and I'm going to go
7 through your findings, and then I want to go back
8 and put some meat on the bone, so to speak. What
9 are your basic four or five opinions in this case
10 based upon the work you've done to-date for
11 roughly \$450,000? What are your opinions?

12 A. I'll go quickly through the four or
13 five. The first one is that I believe Mr. Doran
14 selected the wrong methodology. He used an as
15 plan, as built methodology with an as built
16 critical path, and I think that methodology is
17 susceptible to a whole bunch of problems.

18 And I will go through kind of in a
19 little bit more detail what those problems are,
20 why using that methodology is just not a good
21 idea, especially on a project this big.

22 Q. And that's an opinion to a reasonable
23 degree of certainty?

24 A. Yes.

25 Q. Okay. And your next opinion?

1 A. The second one is that there was a
2 significant error made by Mr. Doran on the -- on
3 the -- what the as built critical path was, what
4 was -- you know, how did those -- how did he
5 determine what the as built critical path was and
6 why those things did not jive with what was
7 happening on the project, with what the
8 contractor said was critical on the project
9 itself.

10 And the best example is at the end of
11 the second and third periods. Okay. So that's
12 after the structure is built, after the pool is
13 set down and you go drop down to the second floor
14 to the ballroom. You fill that in so you can
15 start the ceilings in the ballroom.

16 The contemporaneous schedules that --
17 the schedules that Balfour was using to manage
18 their people on the site and what they pushed and
19 what they didn't push said that there was 10
20 weeks of float on that schedule, 10 weeks of
21 float on that activity.

22 Q. And what does that mean?

23 A. That means that the people on the site
24 at the time believed that there was 10 weeks they
25 could have delayed that activity and had it not

1 impact the end date.

2 Q. And that's the definition of float?

3 A. That's the definition of float. Ten
4 weeks. At the end of that period, Mr. Doran
5 still has the same as built critical path, the
6 same spot as on the second floor in the ballroom
7 doing drywall.

8 And at the end of that period, there's
9 13 weeks involved in the contemporaneous
10 schedule. So I have trouble concluding -- I have
11 trouble looking at the analysis that he did of
12 the as built critical path and giving it credence
13 because it doesn't agree.

14 Either he's wrong or the people on the
15 project site were wrong. You know, they're off
16 by that much, and it's just not -- it's just
17 never that far off. It just pretty much can't
18 be. I've never seen it that far off.

19 Q. Well, let me ask -- let's explore that a
20 little bit. You've been jousting with other
21 schedulers all your life, right?

22 A. Yes.

23 Q. And typically, they come in with a
24 delay, and you come in and have some criticism,
25 right?

1 A. Oh, yes.

2 Q. Typically, what are the deltas you're
3 talking about in your experience? I mean, how
4 many days do y'all typically argue over?

5 A. It's variable completely, but when we
6 find -- you know, when we're looking at critical
7 path, it's usually based on evidence in the
8 project records, something in the record that
9 says, this is critical at the time. This is what
10 the people on the project site thought was
11 critical.

12 And if it's -- if it turns out that it's
13 not, if there's some other overriding thing, the
14 people on the project site still have to know.
15 They have to know that that's close. And I've
16 never seen it be that there's ten weeks of float
17 shown contemporaneously, ten weeks of float on
18 the project, that they thought at the time, and
19 that somebody comes in and says, no, no, that was
20 the critical path.

21 Now, if that is the critical path, and
22 there's changes involved in that second floor,
23 there's a real problem here because the -- now
24 the owner doesn't know that that's the critical
25 path. What he's told is, here's -- the critical

1 path is elsewhere. It's in the structure, or
2 it's in -- in this case, the masonry. Anyway,
3 I'm getting too far into the details.

4 Q. Well, all I wanted to know was, as
5 between experts.

6 A. Right.

7 Q. Typically, what are y'all arguing about
8 in terms of durations?

9 A. Usually, you think in terms of a couple
10 weeks of float as being the thing that you might
11 argue about. And I think Mr. Doran says that he
12 thinks 10 to 15 days of float might be
13 concurrently critical.

14 But in this case, there's 10 weeks, not
15 two weeks, not three weeks, 10 weeks, and then 13
16 weeks. It's just -- it's hard to believe that
17 that could really -- you know, that one or the
18 other of those parties is wrong. Either
19 Mr. Doran is wrong or the other side.

20 Q. All right. What other -- some of the
21 other opinions do you have?

22 A. So the third item is that Mr. Doran
23 recognized, and he saw it in there, and he spent
24 a lot of time justifying the idea that the
25 critical path -- the as built critical path was,

1 build the structure, set the pool on top, remove
2 the tower crane, and now you can do the in-fill
3 work, and now you can work on the ceilings in the
4 ballroom.

5 And he is right. That sequence was
6 necessary, no question about it. But that
7 sequence wasn't in the baseline schedule. It
8 wasn't in that as built schedule. He's using an
9 as plan versus an as built analysis, and it
10 wasn't -- that logic wasn't in the as planned
11 schedule.

12 Q. All right. Let's drill down a little
13 bit on that. What did the as plan -- first of
14 all, who created the as plan schedule?

15 A. Balfour Beatty.

16 Q. Okay. And is it correct, the contractor
17 can prepare his schedule any way he wants to?

18 A. Well, I mean, within physical limits, et
19 cetera, yeah. That's the main point of doing
20 this as plan schedule is, this is how they intend
21 to work on the project. And they get to choose
22 certain options.

23 They can -- they can work off the
24 structure, and then they can work the finishes
25 going down the structure. They can follow

1 directly going up the structure. There's lots of
2 different options, and they get to choose.
3 That's the means and methods.

4 Q. Okay. But some logics defy the ability
5 to do them, right? I mean, some things you just
6 can't do. You can't build a roof first and work
7 down, right?

8 A. Right.

9 Q. Okay. So let's talk about the as
10 planned original baseline schedule prepared by
11 Balfour Beatty. Was there a logic bust or a
12 mistake in the as planned schedule?

13 A. Yes.

14 Q. All right. And what was it?

15 A. The main point is the way the -- you
16 know, just exactly that logic that we were
17 talking before, build the structure, set the
18 pool, drop the tower crane. The tower crane
19 wasn't in there. The removal of the tower crane
20 wasn't in the schedule at all. There was no
21 logic tied between building the structure and
22 then starting that second floor. There was no
23 tie there.

24 So in that baseline schedule, the second
25 floor ceilings were able to start on August 11,

1 2016, according to that schedule, but the pool
2 wasn't going to be set until November 22nd, three
3 months later.

4 Q. And how was the pool going to get set?

5 A. Right. You can't actually do those
6 ceilings until you set the pool and drop the
7 tower crane. So that three months, three and a
8 half months of time is still a delay, but it's
9 not because of the structure being delayed.

10 And ultimately, the way to measure how
11 the structure was delayed is just saying, when
12 was the pool supposed to be set? When did it
13 actually get set? It's 74 days. It's not 204,
14 which is what Mr. --

15 Q. Is it correct that it was impossible --
16 impossible to close up the second floor in
17 August, the ceiling of the second floor in
18 August, because the tower crane had to be there
19 until November to set the pool; is that correct?

20 A. Yes.

21 Q. And is it correct that this schedule did
22 not have a single activity on it for the erection
23 or the removal of the tower crane?

24 A. I think it had something for the
25 erection, but not for the removal.

1 Q. Not for the removal?

2 A. Right. So there was none of that
3 sequence.

4 Q. So if the ceiling completion on the
5 second floor was delayed past August, it was
6 because the tower crane was in the way?

7 A. It couldn't have started in August.

8 Q. Because the tower crane was in the way?

9 A. And it couldn't have started until the
10 tower crane was removed, and that would have been
11 in December some time. It's three and a half
12 months.

13 Q. And is that what is referred to in the
14 industry as a bust in the schedule?

15 A. Sure.

16 Q. Okay. So how much delay then, since we
17 were restrained by reality -- that's the real
18 restraint here is reality here, right? You can't
19 do it?

20 A. It's a physical constraint.

21 Q. Okay. How much delay was built into the
22 original schedule built by Balfour Beatty from
23 day one? How much delay was there if they did it
24 the way they wanted to do it?

25 A. It was about 137 days.

1 Q. Okay. So when they got the building
2 permit, if they would have followed their own
3 schedule, they were at least what?

4 A. Three and a half months.

5 Q. Behind to start with?

6 A. Yes.

7 Q. Do you have any idea whether they ever
8 discovered that until today when you told them?

9 A. Well, it's in my report, and it's -- it
10 was also something that was inserted into the
11 schedule eventually, but it took them 19 months
12 before they got to the point of actually
13 inserting that into the schedule.

14 Q. All right. What was your next finding
15 or conclusion?

16 A. The next point being that there was no
17 cause and effect, that the analysis done by
18 Mr. Doran, again, he shows the time and then says
19 there were a bunch of changes and kind of
20 concludes that, because there were a bunch of
21 changes, therefore -- therefore, the changes
22 caused the delay.

23 Instead of trying to get down to the
24 nitty gritty detail of what was the critical
25 path, how did those changes -- what specific

1 changes caused that delay. And that's the hard
2 part of the delay analysis. It's, you know,
3 doing the conclusion, the big conclusion that,
4 hey, we had a bunch of changes; therefore, it
5 must -- and they're big changes.

6 And frankly, you know, I think I said it
7 in my report, I don't doubt that there's some
8 time here. But you can't just jump to
9 compensable delay. You can't just jump to delay.
10 You have to do the work to get the schedule -- to
11 get the critical path to identify it and make
12 sure that that's what caused the delay.

13 Q. And do you have an opinion to a
14 reasonable degree of certainty whether or not
15 Doran did the necessary work to determine that?

16 A. I don't believe he did.

17 Q. Okay. Could he have done it?

18 A. Yes. And the last item of the five is
19 that there were subcontractors -- subcontractors
20 had their own problems. They had manpower
21 problems, and these are all basically
22 demonstrated by Balfour Beatty documents to the
23 subcontractors for procure notices, et cetera,
24 saying, you're the cause of delay. You're on the
25 critical path, and you're causing delay.

1 And to some extent, it's -- Mr. Doran
2 dismissed those. He essentially said, well,
3 that's not critical without any -- again, no
4 justification as to why except that there was
5 some work that moved inside.

6 But the contemporaneous schedules say
7 that, for example, masonry is critical. And
8 there's major problems. There's three cure
9 notices to the mason that say that they're on the
10 critical path, and that's just dismissed by
11 Mr. Doran.

12 Q. Those are your basic findings?

13 A. Yes.

14 MR. BUNDY: Your Honor, this would
15 be a good time to take lunch because I'm going to
16 circle back around like that Jen Psaki woman
17 says, and we're going to start back all over
18 again.

19 THE COURT: All right. It's 1
20 o'clock. Let's just plan to come back at 2:30.

21 (A recess transpired.)

22 THE COURT: Okay. Mr. Bundy?

23 MR. BUNDY: If it pleases the
24 Court.

25 (DFT. EXH. 89 and 90 were marked

1 for identification.)

2 BY MR. BUNDY:

3 Q. Mr. Boe, I hand you what's been marked
4 as Exhibit 89 for identification and Exhibit 90.

5 THE COURT: 89 and 90?

6 MR. BUNDY: Yes, sir.

7 THE COURT: All right.

8 BY MR. BUNDY:

9 Q. Mr. Boe, if you would please identify
10 Defendant's Exhibit 89 for identification,
11 please.

12 A. All right. Exhibit 89 is AACE
13 International recommended practice number 29,
14 revision 03 -- R03.

15 Q. And AACE stands for the Association for
16 the Advancement of Cost Engineering
17 International; is that correct?

18 A. Yes.

19 Q. All right. Tell me little about that
20 organization, please.

21 A. The organization is kind of an
22 organization where scheduling falls under. They
23 call it cost engineering for the bigger pictures,
24 so it includes estimators and other people, too.
25 But it's been around for 50 years or so, and it

1 basically has developed into an organization that
2 writes these standards, writes these recommended
3 practices.

4 And it's put out by a lot of industry
5 practitioners, a lot of -- there's a bunch names
6 on the front of this that talk to who
7 specifically reviewed and who provided initial
8 input, et cetera. There are a lot of names from
9 the industry including attorneys.

10 Q. As an expert, who's been qualified in
11 this field, do you consider this document to be a
12 reliable authority?

13 A. It is.

14 MR. BUNDY: And, Your Honor, at
15 this point, I would move to introduce this as a
16 learned treatise under Rule 803(18) of the South
17 Carolina Rules of Evidence.

18 MR. HILDEBRAND: All right. No
19 objection.

20 THE COURT: Without objection.

21 (DFT. EXH. 89 was received in
22 evidence.)

23 BY MR. BUNDY:

24 Q. And the next exhibit is Exhibit 90, I
25 believe; is that correct?

1 A. Okay. Exhibit 90.

2 Q. And this is a document from the American
3 Society of Civil Engineering; is that correct?

4 A. That's right.

5 Q. Can you identify it, please?

6 A. It's ASCE standard 67-17 schedule delay
7 analysis, and it was built under the ANSI, so the
8 American National Standards Institute also. So
9 it's an actual standard from that perspective.

10 Q. As an expert, who's been qualified in
11 this Court, in this field, do you consider it to
12 be a reliable authority --

13 A. Yes.

14 Q. -- in this area?

15 A. Yes.

16 MR. BUNDY: Your Honor, I would
17 move to introduce this as a learned treatise
18 under Rule 803, rules of evidence, paren 18,
19 learned treatise.

20 THE COURT: All right. Any
21 objection?

22 MR. HILDEBRAND: No, sir.

23 THE COURT: Without objection.

24 Okay.

25 (DFT. EXH. 90 was received in

1 evidence.)

2 BY MR. BUNDY:

3 Q. Now, one of your -- we're going to now
4 go through your findings. We talked earlier
5 before lunch about your conclusions to a
6 reasonable degree of certainty; is that correct?

7 A. Yes.

8 Q. And one of your conclusions to a
9 reasonable degree of certainty was that
10 Mr. Doran's method didn't meet the contract
11 burden to use BBC updates as the basis for time
12 extension and that Doran chose the wrong method,
13 correct?

14 A. I actually excluded the first part of
15 that based on the Judge's determination that that
16 wasn't part of the contract, but the second part
17 of the item, that this doesn't -- it doesn't meet
18 industry standard.

19 Q. Okay. All right. If you would, using
20 whichever learning treatise you wish to use
21 first, if you would walk through the treatise,
22 please, and explain to his Honor why it is in
23 your opinion that Ms. Doran used the wrong
24 methodology to analyze -- to make a forensic
25 analysis of the delay on this job?

1 A. So first of all, this documents doesn't
2 really exclude any method. It goes through and
3 identifies and it looks through and tells the
4 advantages and disadvantages as how to select,
5 what method you're going to use.

6 And then it has a bunch of warnings that
7 warn the practitioner to make sure that, if
8 you're going to use that method, you have to look
9 at it in detail. And you've got to solve some of
10 these questions, these caveats they call them.

11 The document itself -- like I say,
12 there's nine different methods, and the bottom
13 line on it is, the -- it goes from -- it doesn't
14 take into account court cases. So there's a
15 method in here called the impacted as planned
16 method that is always rejected by courts. It
17 just always is, and yet it's in here.

18 And it gives you warnings about how to
19 deal with that kind of thing. In this case, what
20 they've identified, what Mr. Doran has identified
21 is an as planned, as built using an impact,
22 using -- I'm sorry, using an as built critical
23 path. And that is identified --

24 Q. Let me stop you here just to make sure
25 that I understand and the Judge is following.

1 The learned treatise provides for nine different
2 ways to analyze the schedule?

3 A. Yes.

4 Q. And the ninth method, what's the name of
5 that again?

6 A. Well, one of the methods is the impacted
7 as plan.

8 Q. Okay. And that method is not approved
9 in the court system?

10 A. Right. Every -- there are tons of court
11 cases out there that say, don't use this, it's
12 not useful.

13 Q. Okay. So that leaves us with eight?

14 A. Right.

15 Q. Of the eight that are left, in terms of
16 viability, priority, or however you want to look
17 at it, where -- which one is number 8?

18 A. From my perspective, I look at these and
19 say that two that are the bottom of that barrel
20 are as planned, as built and something called
21 collapsed as built.

22 Q. Okay.

23 A. So they take an as built schedule and
24 pull things out of it.

25 Q. And which one did Mr. Doran use?

1 A. He used the as planned, as built.

2 Q. Okay. Now, what does this learned
3 treatise tell us about the use or viability of
4 the as planned, as built methodology as used by
5 or attempted to be used by Mr. Doran?

6 A. The place where I'm pointing as the
7 primary source of what I pull out of this
8 document is on page 44 of 134, and it's at the
9 top of that. And it talks about --

10 MR. BUNDY: Let me stop you. Your
11 Honor, you might want to follow along because
12 it's a little bit --

13 THE COURT: We're in 89, right?

14 MR. BUNDY: Yes, sir. We're going
15 to start with 89, and we're going to go to 90.
16 But it's probably helpful to read it as he goes
17 along. It's not that --

18 THE WITNESS: Page 44.

19 THE COURT: Page 44.

20 BY MR. BUNDY:

21 Q. So where are you again, please?

22 A. Page 44. It has to do with -- they call
23 it 3.1, which is exactly the item that we're
24 talking about, as planned, as built. And this
25 list of caveats, it says, caveats in using

1 minimum protocol conditions.

2 And the first one is, it's not suitable
3 for project durations extending into multiple
4 dozens of updates. Well, we know an update
5 period is a month. The multiple dozens means 24
6 months. This was about a four-year project. So,
7 you know, it's not -- this project lasted much
8 longer, and there's good reason for that.

9 You know, when you start with an as
10 planned schedule, things change over time, and
11 things don't go according to plan. And there's
12 likely to be adjustments. For example, if a
13 contractor gets delayed themselves, they're
14 likely to pull back and work around some problem,
15 and that will get reflected. And it won't be
16 reflected if you use just the beginning and the
17 end.

18 So this says it's not suitable for
19 projects extending, and Mr. Doran, of course,
20 used it. I'm not going to go through every one
21 of these. The fifth item is it's susceptible to
22 unintentional or intentional manipulation by
23 choice of the as built data that is incorporated
24 into the schedule.

25 So when we get to an as built -- so we

1 got an as planned schedule, and it has got the
2 logic all built into it. Its scheduled moving
3 forward and moving back and forward and backward
4 (inaudible) talked about.

5 When you get to the as built, all you've
6 got is a recording of dates. It's a big bar
7 chart with no relationships in there, and so what
8 happens is, somebody has to draw in, what is the
9 as built. Now, it can be prepared in several
10 different ways. I don't want to get into that.

11 Q. Okay.

12 A. The point is that it can be manipulated
13 by looking at the wrong things as the critical
14 path.

15 Q. In your review of Mr. Doran's analysis,
16 did you see any indication that Mr. Doran had
17 manipulated the as built schedule in order to
18 achieve a specific result?

19 A. I think that's what I talked about this
20 morning with respect to the -- his as built
21 critical path not having any relationship at all
22 to the evidence of the schedules that were issued
23 at the time during the construction.

24 So that leads me to believe -- I can't
25 see why he would select those items when they

1 were -- when they indicate 10 to 13 weeks of
2 float. So that looks -- that appears to be
3 manipulation.

4 Q. Okay. Anything else?

5 A. Yes.

6 Q. Okay.

7 A. The primary point here, I think, for me
8 is that, it does not consider that changes to the
9 original baseline schedule may have been the
10 actual cause of delay instead of the identified
11 delay issues. And that's exactly what I feel
12 like happened in this first two periods of this
13 project.

14 And we will get into detail a little bit
15 more, but that idea that the logic that was
16 needed, absolutely needed in the -- you know,
17 order to build this thing, the physical logic of,
18 you build the structure, load the pool, remove
19 the tower crane. Then you can work on the --
20 that second floor. That wasn't in that baseline.
21 If it had been, it would have been a longer
22 schedule.

23 Q. Let me stop you here. Can you identify
24 this document, please?

25 A. Yes. I think it's Exhibit 15 to my

1 report, which is the detailed baseline schedule
2 with a date of November 13, 2015.

3 Q. This is Balfour Beatty's schedule,
4 correct?

5 A. Balfour Beatty's schedule.

6 Q. You just simply copied their as planned
7 schedule?

8 A. Yeah. We actually printed it out from
9 the perimeter of the house from the files, the
10 electronic files.

11 Q. And the as planned schedule is just
12 that, it is a plan in the future -- none of these
13 things have happened yet, correct?

14 A. Right.

15 Q. This is the process by which they intend
16 to build this building?

17 A. Yes.

18 Q. The sequence they intend to use -- the
19 activities, the durations, et cetera?

20 A. And the sequencing.

21 Q. And the sequencing. And the logic?

22 A. Yes.

23 Q. And who or what entity decides what goes
24 in this document?

25 A. Balfour Beatty.

1 MR. BUNDY: Okay. Your Honor, I've
2 move to mark this as exhibit -- the next exhibit,
3 please.

4 MR. MCDONALD: 93.

5 COURT REPORTER: 93? Okay.

6 MR. HILDEBRAND: No objection.

7 (DFT. EXH. 93 was marked for
8 identification.)

9 MR. BUNDY: Move to introduce
10 without objection, Your Honor --

11 THE COURT: Yes.

12 MR. BUNDY: -- Defendant's Exhibit
13 93.

14 (DFT. EXH. 93 was received in
15 evidence.)

16 MR. BUNDY: For the record, it is
17 what's referred to as MSH, which I think stands
18 for Marian Square Hotel 000111315. For Your
19 Honor's edification, subsequent interim schedules
20 will be the next one. They will be 0001, 0002.

21 THE COURT: Okay.

22 MR. BUNDY: They start at zero, and
23 every time they do an interim, they add another
24 number.

25 THE COURT: Gotcha. Okay. Thank

1 you.

2 BY MR. BUNDY:

3 Q. Now, we spoke earlier from -- I believe
4 you said that one of the problems or one of the
5 things pointed out in this treatise, is it --
6 there may be something wrong with the original
7 schedule?

8 A. Right. The changes -- any changes to
9 that original schedule might have been the cause
10 of delay.

11 Q. Can you show me on this schedule the
12 line item for putting up and taking down the
13 tower crane?

14 A. No.

15 Q. Why not?

16 A. I can't because it's not here.

17 Q. Should it be there in your opinion to a
18 reasonable degree of certainty?

19 A. Oh, absolutely.

20 Q. Would you consider the erection and
21 demolition of a tower crane on a nine story
22 building a pretty significant event?

23 A. Absolutely. I mean, it's on Mr. Doran's
24 as built critical path. He says that it's a key
25 item that is required to happen before they can

1 get to that second floor, and he's right about
2 getting it to the second floor.

3 Q. In your 35 years of experience, have you
4 handled any multi-story buildings that use tower
5 cranes to erect the building?

6 A. Yes.

7 Q. Okay. And how many instances in your
8 last 30 years or 35 years has a contractor failed
9 to enter into his schedule the erection and
10 demolition of the tower crane with which to erect
11 that building?

12 A. I can't think of any.

13 Q. Would you consider that to be a major
14 fall in the schedule?

15 A. It is.

16 Q. Okay. And is that an example of what
17 this treatise is actually talking about, why you
18 don't do this?

19 A. It's exactly what they're talking about.

20 Q. Okay. So what else is in this treatise
21 that would indicate the impropriety of
22 Mr. Doran's forensic methodology?

23 A. Well, the other piece here is a warning
24 that the -- that may not properly treat
25 concurrence.

1 Because it's only looking at the
2 beginning and the end, it can't really see what
3 is close to being critical or what is co-critical
4 at any one point. So a lot of assumptions had to
5 be made to try to think of what could be
6 concurrent and a lot of things had to be
7 discarded.

8 Q. Did Mr. Doran make any assumptions in
9 his analysis?

10 A. Of course. He made tons of assumptions.

11 Q. And were his assumptions based on the
12 actual daily reports and records of what happened
13 on the job, or were they assumptions that came
14 out of his head?

15 MR. HILDEBRAND: Objection, Your
16 Honor. He's leading him now.

17 A. I mean, I can't know the bottom line.

18 Q. Were you in --

19 A. I don't think there's any proof in the
20 record as to how he developed or what he did
21 other than looking at a lot of documents to
22 develop that as built critical path. I just
23 don't know.

24 Q. Okay. All right. So anything else that
25 you -- that this treatise provides you with

1 regard to the inappropriateness of using an as
2 built, as planned?

3 A. Well, the one other thing is that, in
4 here -- and I've got to say, I don't know exactly
5 where it is. But I know that in here is a
6 discussion of how you develop and what you do to
7 get an as built critical path. And they quibble
8 over the idea of what we call an as built
9 critical path and an as built controlling path.

10 But that's really not the important
11 point. The point is that it makes a strong
12 recommendation that the way you get to an as
13 built critical path is by going to the
14 contemporaneous schedules and looking at them one
15 by one and trying to figure out what was critical
16 at the time.

17 Q. All right. And how many interim
18 schedules were there between the baseline and the
19 last one?

20 A. I don't know if it's 46 or 47. It's
21 something in that range.

22 Q. Okay. Of those 46 or 47 interim
23 schedules, how many did Mr. Doran refer to in his
24 analysis?

25 A. I know he referred to the baseline and

1 the last schedule and then maybe two others,
2 maybe three.

3 Q. In your opinion, to a reasonable degree
4 of certainty, is that an appropriate methodology,
5 not to look at the individual interim schedules?

6 MR. HILDEBRAND: Objection, Your
7 Honor. His follow-up question did not comply
8 with his predecessor point. He asked him a
9 question, how many times did the report state
10 that Mr. Doran had looked at the schedule.

11 And then he said, well, is it
12 inappropriate for him not to look at any of the
13 other schedules. There's no testimony that he
14 didn't, and I think that he said that he did look
15 at the schedules when he gave his opinion. So I
16 think that's an improper question.

17 THE COURT: Do you want to rephrase
18 that question?

19 MR. BUNDY: Sure, Your Honor. I
20 will just withdraw it.

21 BY MR. BUNDY:

22 Q. All right, sir. Anything else in this
23 treatise that relates to the impropriety or
24 the -- any failures in Mr. Doran's analysis?

25 A. Not that's inferred at this point.

1 Q. All right, sir. Now, let's look at
2 Exhibit 90, and I believe that's -- now, this
3 treatise is prepared by what?

4 A. It's prepared by the ASCE, so the
5 association, American Society of Civil
6 Engineering.

7 Q. And you're an engineer, right?

8 A. I'm an engineer, and I'm a civil
9 engineer, but I'm not a member of the ASCE. I've
10 been involved with reviewing this document when
11 it was first issued. I think actually probably
12 Mr. Doran was, too.

13 And it was created by a group of people
14 that's a very diverse group, and their point,
15 their real goal was to meet all the ANSI
16 requirements, the standards requirements, to
17 develop a standard that is a recommended
18 standard. And they worked hard to do that, to
19 try to get this to be across the industry,
20 whether the major truths that go into delay
21 analysis.

22 So in this case, the main points that I
23 looked at and that I believe that Mr. Doran
24 didn't follow, one of the major ones is item 5.1.

25 Q. What page is that on?

1 A. Well, let me start with chapter 4. So
2 page 7, 4.1 says, because the critical path is
3 dynamic, delays should be evaluated based on the
4 critical path during each delay. So that maybe
5 doesn't say specifically that you should be
6 looking at, what is critical during that time
7 based on what was happening at that time.

8 The next item, 4.4, you should generally
9 be measured -- they should generally be measured
10 by the change to the completion date caused by
11 the delay, and I don't think that really can be
12 done without using those contemporaneous project
13 schedules.

14 Q. And in your review of Mr. Doran's
15 report, were contemporaneous schedules used?

16 A. For the most part, they were -- they
17 were not used. Not only were they -- if they
18 were reviewed -- and I kind of assumed the same
19 thing. Mr. Doran did review those schedules. He
20 had to ignore them. He had to say, my judgment
21 is better than the people at the time.

22 Because putting in an activity that has
23 10 weeks of float in the contemporaneous
24 schedule, that's, from my perspective, the best
25 evidence that you have of what is critical. And

1 he went a completely different way and chose
2 something else. And I can't understand it.

3 Q. Okay. Anything else in here?

4 A. Yes. 5.1 is very specific. Activities
5 with float are not critical, and those -- that
6 second floor room, the ballroom, the ceiling
7 activity specifically had a ton of float in the
8 contemporaneous schedule.

9 Q. 5.2 says float is owned by the project.
10 What does that mean?

11 A. Generally speaking, unless there's a
12 contract clause that says something different,
13 it -- whoever gets to that delay first, whoever
14 gets to that float first, whoever causes the
15 project to be delayed within the float, nobody
16 owns it.

17 So if the contractor of sorts float
18 during that -- a delay, or if the owner absorbs
19 what causes a delay, that only absorbs float, and
20 it doesn't impact the end date, they don't get
21 charged for that. There's no damages. There's
22 no delay there because it doesn't impact the end
23 date.

24 Q. So as an example, if you, the
25 contractor, were delayed by two weeks by the

1 owner, but there was five weeks of float, there
2 would be no delay? You couldn't say, I want my
3 float back because the float doesn't belong to
4 you to get it back?

5 A. Right.

6 Q. It belongs to project; is that correct?

7 A. That's correct.

8 Q. Okay. All right. Anything else?

9 A. Let me see. 10.4. So that's on page --
10 into 20, page 20. I'm going to start with 19.
11 So changes -- changing the schedules after the
12 fact is the name of this chapter, and what it's
13 recommended here is that -- and 10.4 is specific
14 to it.

15 It's recommended that you use the
16 contemporaneous schedules, and the follow on
17 piece of this is, whenever possible, the
18 preference for dealing with inaccurate
19 schedules -- so, if there are inaccuracies in the
20 scheduling, and there are many times inaccuracies
21 in the schedules -- after the fact, the
22 preference for dealing with inaccurate scheduling
23 after the fact is to make corrections rather than
24 to abandon the schedules. And it's subject to
25 the nature and scope of the corrections.

1 But the idea is, you're not supposed to
2 just say, I'm not going to use that schedule. I
3 don't make a conscious decision not to use that
4 schedule. Instead, I look at it and say, can I
5 make a change that will allow me to use that
6 schedule?

7 Q. And how would this statement in this
8 learned treatise apply to the mistake in the
9 baseline schedule related to the crane?

10 A. Well, the first thing you would do is
11 make that correction because it's a clear
12 problem.

13 Q. In order to comply with this?

14 A. Right.

15 Q. And did Doran do that?

16 A. No.

17 Q. Okay. And what is the result of that in
18 terms of how it affected the viability or
19 reasonableness of his conclusion?

20 A. Well -- and I don't want to jump too far
21 ahead, but in his period 2, he uses a measure
22 that says, if the baseline schedule says that
23 you're going to be able to start this ceiling
24 work on the second floor in the ballroom on
25 August 11th, and it didn't actually start until

1 March 3rd of the following year, and that's 203
2 days.

3 So there's 203 days between the time
4 that it was critically supposed to start, as that
5 was critical in the baseline schedule, and the
6 time when it actually was able to start. That
7 sounds like 203 days of delay. And frankly, but
8 for some float out here, it is 203 days. The
9 calculation is right.

10 But the problem is that the structure
11 wasn't delayed by that much time. If you are
12 looking at how much time the structure was
13 delayed, it was only delayed 74 days. The rest
14 of that entire time is because of this change --
15 because of this change to the baseline.

16 So that's -- and the 74 that I come up
17 with compared to 204 is really -- it's what --
18 the difference is, the baseline schedule and what
19 has to happen and what correction has to be made
20 to that baseline schedule. So there's a couple
21 ways to look at that. We can look at that 74 as
22 when did the -- like I said, when did the -- when
23 could you put the -- drop the pool in and when
24 did you drop the pool in? That's 74 days.

25 And the problem that came with that is,

1 first, there's float in that part of the
2 schedule, and, second, that 74 has to account for
3 also the hurricane. So subtract 20 from that 54
4 days is where there's the delay in the structure.

5 Q. How did Doran account for the bust in
6 the schedule related to the crane in his
7 analysis?

8 A. He didn't. He charged all that time as
9 if it was a structure delay, as if it was an
10 owner delay caused by the structure.

11 Q. And in your opinion to a reasonable
12 degree of certainty, that's not the appropriate
13 methodology to forensically analyze the delay on
14 this job?

15 A. It's clearly wrong.

16 Q. All right. Anything else in this
17 treatise?

18 A. I don't believe so.

19 Q. That's it?

20 A. That's it.

21 Q. All right, sir. Do you know whether or
22 not the interim schedules were available to
23 Mr. Doran to use in his analysis if he chose to
24 do so?

25 A. I have to assume they were available to

1 him.

2 Q. And what evidence do you have that he
3 did use those schedules and/or to what extent he
4 used those schedules?

5 A. Like I said, he referenced it in his
6 analysis.

7 Q. All right. Do you have an opinion, one
8 way or the other, whether he should have walked
9 through the job change by change by change to
10 figure out what the critical path was at any
11 point in time?

12 A. So that's the method that I would
13 choose. That method of going through period by
14 period by period, from my perspective, is my
15 chosen method if I can. If it's possible to do
16 it, that's what I'd want to use.

17 And so, yes, I believe that that's how
18 he should have looked at it, and that that would
19 have come up with a documentable analysis that
20 would give -- hopefully give some level of cause
21 and effect.

22 Q. That can be done, right? I mean, it's
23 not impossible?

24 A. It can be done.

25 Q. Okay. And if you would have been

1 charged to do it, that's the method you would
2 have used?

3 A. That's the method I would have used.

4 Q. And do you have an opinion one way or
5 the other whether that's the more -- whether or
6 not that's a more accurate way of determining
7 where the schedules are delayed and who's
8 responsibility?

9 A. Yes, it definitely is.

10 Q. And then, do you have an opinion to
11 reasonable degree of certainty whether or not
12 that is also a more accurate way to determine and
13 differentiate concurrent delays from non-current
14 delays?

15 A. Yes. It's a lot better -- because you
16 can look at it in a lot finer slicers, basically,
17 you can see what else might be concurrent, what
18 else might be happening at the same time.

19 Q. Okay. What is the difference in this
20 contract? Let me strike that question. In this
21 contract, in these documents, did the contract
22 documents make distinction between types of
23 delay?

24 A. Yes.

25 Q. All right. Can you tell the Judge what

1 the different types of delays are as were agreed
2 by and between these parties when they signed
3 this contract?

4 A. I would probably have to refer back. I
5 know that essentially there's -- there are
6 directed changes, and then there are type two
7 changes, which are essentially force majeure,
8 weather, that kind of thing.

9 Q. Non-compensable?

10 A. Non-compensable type delays.

11 Q. Do you know whether or not -- or have
12 you seen any evidence that Doran made any attempt
13 to characterize his delays or categorize his
14 delays between compensable or non-compensable or
15 type one and type two as set forth in the
16 contract?

17 A. Well, he didn't identify them as
18 compensable, and with respect to the weather
19 delay, he said that was non-compensable. So he
20 didn't look at the requirements of the contract,
21 I think. Apparently, he didn't refer to them as
22 type one or type two. But he did say, all of the
23 delay other than the 20 days was compensable
24 delay. He -- that was his opinion.

25 Q. So he agreed that the architect, they

1 got 20 days, and that was non-compensable, but
2 everything -- all the rest of the delay on this
3 entire job except for one day, he contended it
4 was compensable; is that correct?

5 A. Yes.

6 Q. Now, what was the length of the delay on
7 this job, according to Doran?

8 A. 516 days, I believe.

9 Q. How many?

10 A. 516.

11 Q. In your experience, in a 516 delay on a
12 60 million dollar contract, how many times have
13 you run across a delay of that magnitude, where
14 every single day of delay, except one, was a
15 compensable delay chargeable to the owner?

16 A. I'm afraid it happens too often.

17 Q. All right, sir. Now --

18 A. I assume that there -- how many days
19 have -- has it been claimed, or how many days has
20 it actually been that it was determined that all
21 the delays -- the days were --

22 Q. Okay. So you're making a distinction
23 between the claim and what it was actually to
24 become?

25 A. I'm saying that it's way too many times

1 that it's claimed that way. It's -- I've never
2 seen it actually found that way.

3 Q. Well, I guess, what's the success -- or
4 let me ask it this way. What is the success rate
5 in your experience?

6 MR. HILDEBRAND: Objection, Your
7 Honor. That calls for speculation. It's not in
8 his report, and I think it's inappropriate for
9 him to ambush us on this. I haven't seen any
10 sort of analysis captioning this underlying data.
11 Getting him to give this opinion, I think it
12 would be speculative.

13 THE COURT: Mr. Bundy?

14 MR. BUNDY: I will withdraw the
15 question, Your Honor.

16 THE COURT: All right. Withdrawn.

17 BY MR. BUNDY:

18 Q. All right. Now, Mr. Doran, I think,
19 divided up his analysis into periods; is that
20 correct?

21 A. Yes.

22 Q. Let's talk about period one. What was
23 period one?

24 A. Period one was intended to run for the
25 time from the notice to proceed to that August

1 11th timeframe when the second floor was supposed
2 to have started. And as it -- so that's the
3 definition, or that's the time period, August
4 11th, 2016.

5 And the delay that actually occurred,
6 based on those -- during that time, Mr. Doran has
7 identified 20 days due to the hurricane, plus a
8 day caused by utility outage. I know I've seen
9 testimony that he said there was a day of crane
10 delay, crane downtime, and then 15 days for the
11 contractor. But it only adds up to 36 days. So
12 I don't think -- and there is 36 days of delay.

13 Q. Okay. And what is your opinion with
14 regard to his period one delay?

15 A. Well, the 20 days is indisputable. I
16 don't have any problems with it.

17 Q. And the architect gave him 20 days,
18 right?

19 A. The architect gave him 20 days, and then
20 the additional time, I had in my report some
21 arguments about -- back and forth about whether
22 that 15 days was early completion or not. I
23 don't think that really matters. I, frankly,
24 think that it's just part of the structure delay
25 if I get to that part of it.

1 So if I do the calculation the way I've
2 done it, where I said, that delay in the
3 structure is from November 22nd to setting the
4 pool, to March 3rd. That should be the same
5 calculations and basic calculation as
6 Mr. Doran's. And then I just subtract out the 20
7 days or 21 days to get how much was the structure
8 delays, 52 days or 53 days.

9 Q. Okay. Were there any allegations
10 regarding early completion in his analysis? I
11 thought there was some early completion. What is
12 your understanding of that?

13 A. His argument in the -- in his report,
14 and it had something to do with early completion.
15 I don't think he testified to that, and so I kind
16 of dropped that part of my argument.

17 Q. All right. Let's talk about period two.
18 What is period two in Mr. Doran's analysis?

19 A. Period two is the full extent of this
20 time where the second floor, the ballroom ceiling
21 framing was delayed. So he measures August 11th
22 of 2016 to March 3rd of 2017, and that's where he
23 comes up with the 203 days of delay.

24 And frankly, you know, what I believe is
25 that the 203 days of delay, there were -- if you

1 count the days that way, there's 203 days. And
2 my problem is, there's only 73 of them caused by
3 the structure. The delay to the structure is
4 only 73 delays.

5 Q. And the remainder of those days were
6 caused by what?

7 A. The bust in the schedule.

8 Q. Bust in the schedule. Okay.

9 A. I keep using different terms, just so
10 you know, and I apologize for that. The as
11 planned versus the as built schedule, that his
12 methodology.

13 So I really should refer to the -- you
14 know, that initial schedule as that as planned
15 schedule each time. But I fall into calling it a
16 baseline or an initial schedule. But it's the
17 exhibit that we just looked at. I think it's 93,
18 but the MSH000.

19 Q. Mr. Doran referred to design milestones,
20 design complete milestones. What was your
21 understanding of that portion of his analysis, if
22 any?

23 A. Well, so an as built milestone or even a
24 milestone or an as built was put into the
25 schedule. In the contemporaneous schedules, they

1 put into the schedule an additional activity that
2 said, design complete.

3 And from my perspective, that's -- he
4 wanted to say, that's what drove the schedule,
5 but I just think that's an overly simplistic
6 view. There were a lot of activities that led to
7 what he calls the design complete. Design
8 complete meaning, that's where the subcontractor
9 can create these shop drawings and start building
10 what he's supposed to build.

11 Well, there was a process before that
12 where the -- where the contractor builds a model,
13 a BIM, and then questions are asked, RFIs are
14 asked and answered. And that's the date we're
15 kind of talking about.

16 Q. Are you saying that, simply because
17 there was a day for design complete and it was
18 not met, that that does not necessarily mean that
19 that delay was caused by the designer? Is that
20 what you're saying?

21 A. Yes. It wasn't necessarily caused by
22 the designer, but there was a series of
23 activities that led up to it or should have led
24 up to it. That's not how the schedule was put
25 together.

1 Q. All right. Were you able to determine,
2 further down that line, or did -- was there, in
3 this analysis, any cause and effect relationship
4 between a failure to meet a design complete and
5 an actual delay? Was there causation there for
6 you to look at?

7 A. This is maybe the place where it got
8 close in some of the items. In the sixth floor,
9 for example, there was a lot of back and forth
10 about the sixth floor delay.

11 But there still was no real tie between
12 what was it about, the design, that couldn't
13 proceed, other than you couldn't put the sleeves
14 in. What was it? What specific change? What
15 was that -- you know, each floor would be
16 different, et cetera, but what was it that caused
17 that change, that caused that time?

18 Q. And is that the kind of information you
19 would expect to find in an analysis?

20 A. I would hope to, yes.

21 Q. All right. During period two, in your
22 review of documents -- and let's talk for a
23 minute about your review of documents. As you
24 sit here today, can you tell the Judge generally,
25 or as broadly as you want to, what documents

1 you've actually looked at, put your hands on and
2 your eyes on to earn \$450,000 in fees?

3 A. I mean, I would like to think that I've
4 looked at every type of document. I can't say
5 that I've looked at every detail of every
6 document, and one of the examples is the BIM
7 models. I didn't look at the BIM models.

8 Q. Have you looked at all the daily
9 reports?

10 A. Myself or somebody that works with me
11 have looked at every daily reports.

12 Q. Have you looked at all interim
13 schedules?

14 A. Yes.

15 Q. Okay. And would that be something usual
16 or unusual for you to do is a forensic schedule
17 analysis, to look at those things?

18 A. It would be very unusual not to do that.

19 Q. Now, during period two, based on your
20 review of the documents, were you able to
21 determine if there were or were not any
22 subcontractor problems on this project?

23 A. Well, there were a lot of subcontractor
24 problems during that time.

25 Q. And how would those subcontractor

1 problems impact your analysis if you had been
2 called on to, instead of just simply critiquing
3 Mr. Doran's work product, but even asked to
4 provide a delay analysis yourself?

5 A. Well, I mean, the primary thing is that
6 I would have to take them into account. I would
7 have to know that they occurred and take them
8 into account, one way or another, either to -- on
9 purpose say, this did not cause a concurrent
10 delay or this did cause a concurrent delay.

11 And so the way you would look at that
12 is, you find out what's on the critical path now
13 and is that impacted by these subcontractors, by
14 this problem? And one example is the tower
15 crane. The tower crane was a major sticking
16 point. It was a problem on the project. We had
17 a lot of down time.

18 Q. All right. We previously discussed the
19 fact that there was a bust schedule related to
20 the tower crane, and that is its erection and
21 demolition, but have you discovered there were
22 actual problems in the field with the erection
23 and use and demolition of the tower crane?

24 A. Yes. The tower crane broke down on a --

25 Q. Okay. I would like you to give us those

1 examples, please, for the record. What has your
2 investigation revealed?

3 A. January 18th of 2016, the tower crane
4 was down for approximately seven days. Now, if
5 the structure is critical, if the concrete work
6 going up the building is critical -- and this is
7 before there's any real alleged design problems,
8 so this is the lower part of the (inaudible).

9 Losing a tower crane for seven days
10 sounds like it has to impact the project. In
11 February, the same time frame, February 17th of
12 2016, the tower crane's main motor is shot and
13 this unit is a nightmare. So the BBC folks on
14 the project were upset at the old crane that they
15 got. And they complained several times, and
16 there was a lot of detail about it.

17 In June of 2016, so this was around the
18 time that the fifth floor is being worked, into
19 the sixth floor, so it's the time frame of
20 that -- you know, the start of those delays. The
21 tower crane shut down for several days, and I
22 quote, "We have lost about three weeks so far
23 from the crane breakdowns and have six to seven
24 months to go."

25 So the six to seven months to go was

1 right. That's about what they ended up being
2 because the tower crane broke down in February.
3 But they had lost three weeks of time. Now, that
4 includes those other two times. We're not trying
5 to add those on.

6 Q. If you would, just tell the Judge what
7 use was made of this tower crane? It was doing
8 more than just lifting swimming pools. What else
9 was it doing?

10 A. Right. It was helping with concrete
11 floors and forms and that kind of thing, and then
12 it also was assisting with the precast, at least
13 in the early stage.

14 Q. In your opinion, at that point in the
15 job, if the tower crane was out of service for
16 seven days, would that have been on the critical
17 path, or would it have affected the critical path
18 in any way?

19 A. Right.

20 MR. HILDEBRAND: I'm sorry?

21 THE WITNESS: I think it had to
22 be --

23 MR. HILDEBRAND: Your Honor --

24 THE WITNESS: -- if that was the
25 critical path.

1 MR. HILDEBRAND: If it were. Your
2 Honor, this is an issue I would like to discuss.
3 I did take Mr. Boe's deposition, and I do have
4 copies of his reports. And he has already said
5 he has not done a critical path analysis. And
6 I've asked -- got him in his deposition where he
7 says, there are subcontractor issues, but he
8 doesn't know whether they were concurrent or not.

9 So if he is now going to say that these
10 were on the critical path, that is contrary to
11 his deposition, and those are new opinions that
12 he has not expressed before. His testimony is
13 real clear. He did not do a delay analysis.

14 And when I deposed him before, he said
15 he can't tell me how many days of delay they were
16 attributable to the owner, to design issues, to
17 any other issues. All he's done is assessed
18 Mr. Doran's -- like Mr. Bundy said, critique
19 Mr. Doran. So I would very much object to him
20 now changing those opinions and testify that
21 things are on the critical path.

22 THE COURT: Do you want to be heard
23 on that?

24 MR. BUNDY: Well, one, he is
25 certainly going to get to cross-examine him.

1 Two, he didn't do a critical path analysis, and
2 we don't have one.

3 But it seems beyond the (inaudible) that
4 this gentleman wouldn't be able to testify in
5 open court, that a tower crane on a construction
6 job that was out of work for seven days, wasn't
7 on the critical path. I mean, I just -- that's
8 so fundamental to construction, but, you know,
9 that's fine. It is what it is, right.

10 THE COURT: I'm going to allow it,
11 and he is subject to cross. I will let you go
12 into cross on that. Okay?

13 BY MR. BUNDY:

14 Q. Let's continue on the tower crane
15 problems. What about July -- in July of '16, was
16 there any -- did you see any records of problems
17 with the tower crane?

18 A. Yes. They were shut down again for
19 repairs.

20 Q. All right. What about in December? Did
21 you see any problems with the tower crane?

22 A. In December, there was a crane
23 malfunction and an accident and --

24 Q. And was there a notation with regard to
25 this malfunction?

1 A. Yes. Thank God with your team's
2 assistance, that's (inaudible).

3 Q. In your review of Mr. Doran's forensic
4 analysis, did you see any indication that he had
5 any of this information involved -- that was
6 involved in his decisions?

7 A. No. I think I said before, I did see
8 something, I think, in his testimony about one
9 day of down time.

10 Q. All right. Let's talk about some more
11 subcontractors in period two. Old North Masonry
12 (sic). And, again, your comments are based on
13 documents that are in evidence. The daily
14 reports are in evidence, and you've read the
15 daily reports, correct?

16 A. Yes, sir.

17 Q. Okay. So what we're doing now is
18 talking about the evidence, and so I would like
19 you to tell me, based on the evidence in this
20 case that you've looked at, what subcontractor
21 problems were there in period two as defined by
22 Mr. Doran with Old North State Masonry? Can you
23 give me that information? Do you have it?

24 A. There's basically nothing that Mr. Doran
25 included on Old North other than to say -- that

1 Mr. Doran included other than to say that the
2 masonry wasn't critical.

3 Q. Okay. Did you look at any Old North
4 State Masonry e-mails or anything like that to
5 the owner or to the contractor between the two
6 that relates to this analysis?

7 A. Yes.

8 Q. All right. Would you tell us about
9 those, please.

10 A. Sure. But, you know, first of all, by
11 the end of this period, so in March of 2017,
12 there had been three curing notices sent to Old
13 North. So Balfour Beatty had forwarded three
14 different times, said, you are delaying the
15 project.

16 On December 7, 2016, Mr. Spano from
17 Balfour Beatty said, we need a meeting or a call
18 with ONS, so Old North State -- the delays on the
19 entry stairwell, fifth floor, and exterior
20 repairs are greatly affecting our critical path
21 and the building drawing. I want to discuss the
22 schedule effects from completion delay in these
23 areas as -- I'll just stop there.

24 And then on February 8th -- so that was
25 December of 2016. On February 8th of 2017,

1 Mr. Spano said, there is no ONS presence at
2 today's sub meeting that is half over. As
3 critical path and as masonry is, ONS needs a
4 competent person that all pull planning. Pull
5 planning is a scheduling type meeting, and sub
6 meetings. In December of 2016, Balfour Beatty
7 forwarded a cure notice.

8 Q. Tell the Judge what a cure notice is, as
9 you understand it, based on the subcontract
10 documents between Old North State Masonry and
11 Balfour Beatty Construction.

12 A. From my perspective, it's a threat of
13 termination. It is a notification of delay and a
14 threat. It is the first step in the termination
15 process.

16 Q. And how is the cure notice different
17 from an e-mail saying, you know, you're late, get
18 some more people on the job?

19 A. It's always -- it's always a situation
20 where we know that the contractors push
21 subcontractors, and whether it's critical or
22 not -- but in a situation where you get serious
23 enough that you say, I'm going to send you a cure
24 notice. I'm going to threaten to terminate to --
25 or, you know, I want you to cure your defect or

1 we will go to the next step. It's a lot more
2 serious. You just don't see that on a regular
3 basis for unimportant items.

4 Q. All right. So let's continue with this
5 December 2016 cure notice.

6 A. It provides the -- so the detail below
7 provides additional clarification for items of
8 Old North State that need attention to. We have
9 concerns that Old North State Masonry has the
10 proper manpower and the supervision on-site to
11 meet the schedule and quality necessary to
12 complete this project.

13 We continued to get excuses on why work
14 cannot be done instead of solutions to make this
15 project a success. The recovery plan needs to be
16 submitted to my attention.

17 Q. Okay. Now, that's of December 2016.
18 Did Balfour Beatty in fact issue another cure
19 notice a month later?

20 A. Yes.

21 Q. All right. Can you tell us about that,
22 please?

23 A. We've got the items in this case -- and,
24 again, the critical path of the project, you
25 know, on the contemporaneous schedules continued

1 in this time frame, and so this is not my
2 analysis of the -- that's what the
3 contemporaneous schedules show.

4 Q. So just to be clear, this is not Mark
5 Boe on critical path on this job? This is the
6 schedule that was in existence, created by
7 Balfour Beatty, which put this work on the
8 critical path; is that correct?

9 A. On their contemporaneous critical path,
10 yes.

11 Q. Okay. And tell me about the cure
12 notice.

13 A. So this cure notice went through floor
14 by floor and discussed what the process would
15 continue to be.

16 BBC has acknowledged the extended dates
17 and change in scope. We have committed to pay
18 every penny and give every request. So there are
19 other issues that were going on at that time, and
20 BBC is going to issue, extend dates, and change
21 in scope.

22 THE COURT: And what is the date on
23 that?

24 THE WITNESS: It's January of 2017.

25 BY MR. BUNDY:

1 Q. Just start all over again. Can you
2 start reading from the beginning, please?

3 A. BBC has acknowledged the extended dates
4 and change in scope. We have committed to pay
5 every penny and give every requested schedule
6 extension to ONSM for the sleeve issue.

7 But ONSM has not committed to keeping
8 the schedule. 80 percent of that value has been
9 paid. We're grossly behind schedule, after
10 incorporating your requested extensions. See
11 below for actual dates this project has
12 experienced.

13 And then it says, the January 24th
14 response shows no commitment by Old North State
15 to cure the schedule. We're now plus or minus 50
16 days behind schedule, mostly in part to masonry,
17 after we acknowledge and pay for the additional
18 time on level 1, level 3, and level 4.

19 So I'm not hiding the idea that there's
20 other things going on, but this says that, in
21 addition to that, there are 50 more days for Old
22 North State.

23 Q. And did you see any evidence that
24 Mr. Doran considered any of this information in
25 arriving at his conclusions?

1 A. No.

2 Q. Okay. Do you have any opinion as to
3 whether he should or should not have?

4 A. Yes, he should, and I don't want to
5 overstate that. He says in his report, in his
6 analysis, that the masonry wasn't critical
7 because they broke a tie semblance because they
8 broke a tie from exterior to interior.

9 And therefore, he has kind of dismissed
10 that masonry. My problem with that is,
11 contemporaneously, they're beating on the mason.
12 At the same time, they're writing schedules that
13 say, that that's what on the critical path, not
14 other items of the project, not the -- you know,
15 not the second floor at that point. But they're
16 pointing at the mason for this delay.

17 Q. So Doran disagrees with the people on
18 the job about what was going on the job,
19 essentially?

20 A. Essentially.

21 Q. Okay. Did you have any indication that
22 he was ever on the job during this period,
23 Mr. Doran?

24 A. I have no idea.

25 Q. Okay. All right. Then, again, in March

1 of 2017, there was another notice of cure letter
2 to ONSM; is that correct?

3 A. Yes.

4 Q. All right. Tell us about that one.

5 A. In this case, so this is March of 2017,
6 the exterior skin continues to slip. It is
7 evident that we were not achieving the agreed to
8 rate of installation due to a multitude of
9 issues.

10 And in parentheses, it says, BBC
11 acknowledges not all issues are a hundred percent
12 ONSM. BBC has gone above and beyond to
13 coordinate ONSM on the precast setting and
14 provide the books necessary for installation.

15 If precasting needs to be cut, modified,
16 repaired, et cetera, it needs to be done in a
17 manner that does not delay the installation. It
18 is clear that the necessary manpower is not on
19 the site as Toby Holloway promised, an expert
20 crew on-site, 3/13/17, to speed up installation.
21 And that crew is not on-site as of 3/15/2017.

22 Due to the lack of production, ONSM is
23 directed to work on level 9 parapet southeast
24 door surrounds and level 2 cornice. I do want to
25 note that this is March of 2017. It's a cure

1 notice that's talking to the mason. It talks to
2 specific areas that they need to accelerate and
3 to move faster.

4 But, again, the contemporaneous
5 schedules say that masonry is critical, but
6 Mr. Doran says that the second floor ceilings,
7 the ceiling framing is what is critical.

8 Q. Mr. Boe, did the daily reports have a
9 place for the author of the report to note
10 problems with the design or other problems that
11 are being experienced at the time?

12 A. I'm trying to think in this case. I'm
13 sure they do, and generally speaking, there's
14 some comments like that.

15 Q. And in your consideration of daily
16 reports, do you also consider the fact that daily
17 reports don't contain certain information you
18 would expect to see, and therefore, that is proof
19 that those things didn't happen? Do you consider
20 that?

21 A. I try not to prove the negative in the
22 situation like that.

23 You know, they may miss it for a week or
24 something like that, but you usually expect to
25 see something, especially if there's a tradition

1 or a practice of, they regularly put in
2 something, and then they miss this one or they
3 miss this large item that Mr. Doran says is
4 critical. At the same time, they are putting in
5 some of the subcontractor problems.

6 Q. Well, let me put it to you another way.
7 A daily report has a place in it for delays,
8 delays occurring today, right?

9 A. Yes, sir.

10 Q. And you go to the daily report, and
11 there's nothing right there, right? Is that
12 evidence, at least to some extent, that nothing
13 happened that day because nobody put it down?

14 A. I try to use it sparingly that way.

15 Q. Okay.

16 A. It's evidence, but it's not -- it
17 doesn't convince me completely.

18 Q. I understand. Let me put it to you this
19 way. Has a delay job, and there was not a single
20 daily report that recorded any delay over a three
21 year period, but you think that would be
22 significant in determining whether there was any
23 delay on the job?

24 MR. HILDEBRAND: Object to the
25 leading, Your Honor.

1 MR. BUNDY: I'll withdraw it.

2 BY MR. BUNDY:

3 Q. Now, that was in March of 2017. Who is
4 Precision Walls, and what they did?

5 A. Precision Walls is a drywall contractor,
6 who was involved in the ceilings. Specifically,
7 the ceilings and the --

8 Q. Were they involved -- were they doing
9 work during this period two of Mr. Doran, or do
10 you know?

11 A. What about Mr. Doran? Sorry, I missed
12 your question.

13 Q. Well, I'm trying to figure -- the
14 Precision Walls, did you find any evidence in the
15 daily reports of any problems with Precision
16 Walls?

17 A. Yes.

18 Q. Okay. Tell his Honor what problems you
19 saw on the daily reports as it related to the
20 work of Precision Walls.

21 A. So the big picture was that Mr. Doran's
22 critical path, starting in March 3rd of 2017, is
23 the ceilings, these barrel ceilings in the
24 ballroom of the second floor.

25 And that was critical path that had to

1 be done right away. And what we found is that
2 the discussions between Balfour Beatty and
3 Precision were more like, you need labor in
4 different places, not -- not specific.

5 There are some specific references to
6 that, but it doesn't seem like a priority in
7 these documents. So in March 2nd of 2017, so
8 that's right at the time when the tower crane was
9 removed, and they were ready to start that
10 activity. Balfour writes -- or this was from
11 Precision to Balfour.

12 We gathered intel from our troops today,
13 and here's our position. The ninth floor, we are
14 behind schedule. So there's a predecessor e-mail
15 to this that says, you're behind schedule. And
16 so they're responding and trying to find out what
17 their status is.

18 So the ninth floor, we are behind
19 schedule. We're tying up loose ends on the first
20 and second floors. Some we own; the majority we
21 don't. So that still could indicate that there's
22 problems with getting that work -- being able to
23 start on that.

24 We have been stopped from hanging some
25 ceilings on the first due to other trades,

1 hanging on the third floor, full tilt, but
2 leaving loose ends behind out of our control,
3 such as pocket doors. Framed up to seventh for
4 the most part, except for areas out of our
5 control. So they are making progress up the
6 building.

7 The eighth floor is laid out a hundred
8 percent and ready to frame, but not yet on
9 schedule. Our plan is to have nine, one, and two
10 complete with what is available by the end of
11 next week. We will hang on for -- next week we
12 will up our manpower a bit and by the end of the
13 week.

14 The electrician seemed to be blaming us
15 for holding them up, but from what I gather,
16 that's not the case. We'll look at that later.
17 So the main point here was just that the second
18 floor doesn't seem to be an emphasis, and we
19 know, from the contemporaneous schedules, that
20 there was ten weeks of float in those schedules,
21 in that work.

22 So soon after that, Tim Spano responded
23 or sent an e-mail that said, per our walk through
24 today, to Precision with the frames -- this is
25 March 7th. The framing on floors five and six

1 needs to have framing, punch, including shaft
2 walls to be completed by Friday for MEP, starting
3 on Monday before six.

4 Floor seven is wide open and has been
5 for a week, and floor eight is ready for framing
6 in all areas except for the (inaudible). So
7 they're waiving all those areas from waiting for
8 framing, waiting for Precision. Precision is not
9 keeping up.

10 We also have a lot of areas available on
11 floor two for ceiling framing. BBC removed the
12 tower crane a month ago so P. Walls could get
13 these areas, and we are not taking advantage of a
14 few guys working on (inaudible). So it's not
15 that they've let it go.

16 But they're -- and they are saying, you
17 need to get to it, but it's not -- it doesn't
18 sound like that they are hundreds of days behind
19 schedule, and it doesn't sound like that's -- and
20 we know that the schedule indicates 10 weeks of
21 float.

22 Q. All right. What else? Anything else on
23 Precision Walls that you need to talk about?

24 A. This is slowing me down a little bit,
25 sorry. Yeah, I don't think so. That's period 2.

1 So that's really the beginning of period 3.

2 Q. There's a note here on March 7. It
3 says, we also have a lot of areas available on
4 floor two with ceiling framing, ISO rod install,
5 AC framing, barrel ceiling, et cetera.

6 BBC removed the tower crane a month ago,
7 so P. Walls could get these areas, and we are not
8 taking advantage of it with a few guys working
9 ceilings on two. What does that imply to you, if
10 anything?

11 A. Just what I was saying before, that it
12 doesn't seem to be a priority. It doesn't seem
13 to be something that they're really pushing.
14 It's, hey, this is where you need to --

15 Q. All right. If you would then, let's
16 summarize for his Honor, your opinions to a
17 reasonable degree of certainty on period 2 of
18 Mr. Doran's analysis, if you will.

19 A. So the primary item on period 2 is that
20 the delay -- the delay from the baseline schedule
21 to this update, this time period is that 203 days
22 of delay to the -- that Mr. Doran alleges as to
23 the structure.

24 But I think we've made clear that that
25 delay, the delay in the structure, the real delay

1 in the structure is only 73 days. You take out
2 the 20 days or the 21 days for the hurricane, and
3 the one day other than that, and we're really
4 down to 54.

5 So Mr. Doran has 168 days during that
6 time, and I think it's 53. That's a huge
7 difference. So that's the primary. The second
8 item is that the critical path, what he called
9 the as built critical path at that time does not
10 confirm to what the contemporaneous schedule was.

11 It doesn't -- if Balfour knew that the
12 second floor was critical, I would expect to see
13 real progress, and as we've talked about with
14 period 3, that whole period, there was a lot of
15 delay that was lost on that second floor without
16 it ever being considered to be on the critical
17 path. If they had known that there was
18 critical -- if the owner had known that was on
19 the critical path, there could have been a
20 difference.

21 Q. Does the contractor have any obligation
22 during the job to advise the owner of what the
23 actual delays are, where the critical path is?

24 A. Yes.

25 Q. And what benefit does the owner have?

1 What benefit does the owner get from the
2 contractor who is able to tell the owner what the
3 delay is, where it is and what the effect of it
4 is and when it's going to be over? What benefit
5 does the owner get from that information?

6 A. They get a ton of benefit. They can
7 look at where they want to make changes. They
8 can make changes to things that aren't critical
9 or they can be willing to pay for delay that
10 might be critical.

11 You can make a positive decision to say,
12 I'm willing to pay for that or I'm willing to pay
13 for acceleration. I'm willing to pay something
14 for that contractor to accelerate because I want
15 that change. I want that difference.

16 But if you don't know that that's on the
17 critical path or if you're not told that that's
18 on the critical path, now to hear afterwards that
19 that long period of time was caused by something
20 that was never on the critical path, there's
21 nothing the owner can do about it. It's too
22 late.

23 Q. All right. Now, you say that instead of
24 Mr. Doran's 168, you came up with 53. Are you
25 saying that the owner is responsible for those 53

1 days?

2 A. No.

3 Q. Okay.

4 A. I'm not testifying as to what the cause
5 was or whether -- or what was on the critical
6 path at that time. I'm saying that the
7 contemporaneous schedules don't show it, and I
8 can't look at it and see cause and effect.

9 BY MR. BUNDY:

10 Q. So assuming there was a 53 day delay,
11 whose responsibility is it under the contract
12 documents to prove responsibility for that 53
13 days?

14 A. The contractor.

15 Q. All right. Let's go to period 3. What
16 was Mr. Doran's period 3?

17 A. Period 3 is essentially from the time
18 they were able to start the ceiling framing in
19 the ballroom to the time that the drywall was
20 able to be completed in the ceiling. I have to
21 look and see what exactly -- how many days that
22 was.

23 But basically it expands the time frame
24 from August 11th of 2000 -- no, I'm sorry, from
25 March 3rd of 2017 to October 7th of 2017. So

1 it's a seven month time frame, and during that
2 time, 95 days was lost.

3 And Mr. Doran's conclusion is that 95
4 days was lost on the second floor in the ballroom
5 due to a bunch of -- a sequence of changes. So
6 he shows a timeline that shows a bunch of
7 changes, a bunch of things that happened in that
8 area.

9 Q. And what is your analysis of his
10 position? What is your position on that period 3
11 delay?

12 A. So in summary, at the beginning of the
13 period, there was 10 weeks of float on that
14 activity.

15 Q. And that 10 weeks of float was
16 determined by whom?

17 A. BBC's schedule. I'm not making an
18 independent analysis of what's the critical at
19 that time. It's BBC's contemporaneous schedule
20 on March 3rd; so it was 10 weeks of float to the
21 critical path. And then, at the end of that
22 period, the activity that Mr. Doran says is
23 critical on that same floor has 13 weeks of
24 float. So it's clear that -- clear to me that
25 something else is critical and not the second

1 floor.

2 Q. All right, sir. Were there any
3 subcontractor problems during Mr. Doran's period
4 3?

5 A. Yes.

6 Q. Would you tell us about those?

7 A. Just in summary, there were some
8 problems with getting the proper manpower, and
9 there were problems with guest room drywall and
10 the MEP work.

11 BBC issued cure notices to the
12 electrician and to the HVAC subcontractor and had
13 executive meetings with the electrician and
14 drywall subcontractor to address -- to get them
15 to increase the manpower.

16 Q. All right. Well, let's go through
17 these, please. In March of '17, did you find any
18 information regarding Watson Electric? Any
19 problems with their work?

20 A. Yes. So this first meeting was in
21 March -- or their first e-mail was March 15 of
22 2017. Per our meeting last week -- so this is
23 Mr. Starcevic's e-mail, so it's a BBC e-mail to
24 Watson Electric.

25 Per our meeting last week, Watson was to

1 complete level 5 guest rooms by 3/10/17 and start
2 level 6 guest rooms on 3/13/17. Neither of these
3 states were accomplished. We also failed
4 multiple overhead inspections on level 2 and
5 level 3, partly due to Watson deficiencies.
6 Provided manpower count and recovery schedule to
7 show your claim and get back on schedule.

8 Q. Keep going.

9 A. Include all rough-in testing inspection
10 dates through (inaudible) and completion of all
11 loose ends, fire caulking punch on level 1
12 through 5 and repair of any damage caused to
13 other trades. Holes in walls, removed
14 insulation, et cetera.

15 Q. Did you see any pattern or any recurring
16 damage to the work by subcontractors to other
17 subcontractor's work on this project?

18 A. There's lots of mentioned information,
19 and it gets really severe in this period into the
20 next period, especially with respect to the
21 sprinkler contractor. The sprinkler contractor
22 on the third through eighth floor put in the
23 wrong kind of heads. They put in semi -- you can
24 see that the heads, and you weren't supposed to.
25 They were supposed to be completely enclosed up

1 above. And so you're supposed to have something
2 that pops off so -- when the sprinkler goes off.
3 And what that caused is --

4 Q. Let me stop you there. Did the
5 sprinkler contractor put in the heads specified
6 by the specifications initially?

7 A. No.

8 Q. Okay. And when that head was -- and was
9 that information available to BBC as well as the
10 subcontractor doing the work? If they chose to
11 look, they would have known it was the wrong
12 head?

13 A. Yes.

14 Q. Okay. And it's part of what you hire a
15 construction manager for is quality control?

16 A. Of course, yes.

17 Q. Okay. So explain to the Judge then,
18 when they put this head in, it's the wrong
19 sprinkler head, and this is sprinkler heads in
20 how many different rooms?

21 A. I don't know. Third through eighth
22 floor. So it's -- I don't think the eighth floor
23 had drywall in yet, so they probably hadn't
24 completed the work going up to the eighth floor.

25 Q. Essentially every room in the hotel?

1 A. Right.

2 Q. Okay. Every guest room in the hotel,
3 they put in the wrong sprinkler head, so --

4 A. There's 350 heads that had to be
5 changed.

6 Q. 350 heads that had to be changed?

7 A. I don't know if it's --

8 Q. Okay. And this was in March of '17?

9 A. Yeah. I don't know if it was in every
10 room or any of that. I know that it's 350 heads.

11 Q. I'm good with 350. What was the state
12 of completion when they finished putting in the
13 wrong sprinkler head? By that, I mean, was the
14 sheetrock up? What was in place?

15 A. The sheetrock was in place.

16 Q. Was the sheetrock mudded?

17 A. It had been finished, yes.

18 Q. Had it been painted?

19 A. Some of it had been painted.

20 Q. Okay. So if the proper sprinkler head
21 had been put in, what would have been the next
22 step? Finish painting?

23 A. Finish painting.

24 Q. Okay. So the wrong sprinkler head was
25 put in. What was involved in the 350 instances

1 in order to correct that defective work?

2 A. The contractor, Pasco, had to go back in
3 and cut around each sprinkler head, make the
4 change -- cut the drywall around the sprinkler
5 heads, make the change, and then Precision had to
6 come back in and patch that -- patch those --
7 each of those holes.

8 Q. Would the contractor coming back in to
9 change the sprinkler head affect other trades
10 working in that room doing other jobs?

11 A. It could have. It depends on where it
12 was in the process. But we do know that the
13 estimate from the Precision Drywalls for that
14 work was in the --

15 Q. Is there a line item or a schedule, a
16 baseline schedule created by BBC on this job that
17 says, repair defectively installed sprinkler
18 heads? Did they plan on that when they planned
19 this job?

20 A. No.

21 Q. Okay. Should they have?

22 A. No.

23 Q. Okay. So we've got Watson. What about
24 BMCC in April of 2017 during this period? What,
25 if anything, did you find the records showed

1 regarding their work?

2 A. So in April of 2017, there's another
3 e-mail from Mr. Starcevic, on April 5th of 2017.
4 It was brought to our attention that BMCC will
5 not be ready for framing inspection on level 5 b
6 until next Wednesday, April 12th.

7 It's a 15-day delay to the framing
8 inspection. Must be cured immediately. We need
9 a plan for BMCC to -- by close of business Friday
10 and how you intend to make up for lost time on
11 levels 6, 7, and 8. Call me with questions.

12 Q. Did you see any evidence that Mr. Doran
13 considered this issue in his analysis?

14 A. No.

15 Q. All right. Now, in May of '17, during
16 this same period, were there any -- did you find
17 anything related to the work of either Precision
18 and/or Watson?

19 A. This is where the -- BBC basically
20 initiated executive meetings with both Precision
21 and Watson to talk about manpower, to try to get
22 them to increase the manpower.

23 Q. And this e-mail is dated May 1. Who is
24 it Tony Stoneking? Is that who wrote this?

25 A. Yes.

1 Q. And who is he? Do you know what his job
2 was or his position was?

3 A. I don't offhand. The project executive,
4 I think.

5 Q. All right. Now, in May of '17,
6 Precision Walls, did they -- did you find any
7 indication that they were damaging the work of
8 other trades or vice versa?

9 A. Vice versa.

10 Q. Okay. So what did you find?

11 A. So this is May 5th, 2017, e-mail from
12 Precision.

13 Q. All right. Tell us what you found. If
14 you would, just read whatever you think is
15 significant.

16 A. I have requested, in numerous meetings,
17 that the damages to our work stop, and this is
18 obviously not the case. Not only are we having
19 to expend manpower that could be doing more
20 productive things, there are issues in pictures
21 shown below. They had pictures shown.

22 We're becoming a scapegoat for everyone
23 to not complete their work overhead. Precision
24 Walls has taken ownership of the areas where
25 drywall was not hung correctly around pipes and

1 had to re-fix these locations.

2 Q. Well, let's talk a minute about
3 Precision Walls' failure to correctly handle or
4 correctly hang drywall around pipes. Are you
5 familiar with that problem?

6 A. Yes. I mean, generally speaking,
7 they -- this is usually in the corridor type
8 work, and they have to be -- they have to be fire
9 caulked, et cetera. So the drywall has to be put
10 in there as fire rated.

11 Q. But are you aware that this causes
12 problems with the finished plumbing fixtures, or
13 do you have any knowledge of that?

14 A. I don't know.

15 Q. Okay. But it's an acknowledgement of
16 Precision Walls, that they in fact had not hung
17 drywall correctly around pipes, right?

18 A. Right.

19 Q. All right. Let's move on. How about
20 Watson Electric? Did you find anything in your
21 review of the documents relevant to Watson
22 Electric during this period?

23 A. Well, first the -- some of the
24 activities that were in the schedules took
25 significantly more time than what was planned.

1 To the extent that, you know, that really was in
2 the daily reports, we've got a ton of -- I would
3 say it's June 21st, 2017, Watson working on all
4 levels to resolve QC issues, roughing in on level
5 8.

6 Q. And what does QC mean?

7 A. Quality control. So if there's any
8 problems with defective work or quality control.
9 The same thing, July 13th of 2017, with Watson
10 working on all levels to resolve QC issues
11 throughout the building. Installing the light
12 fixtures, rough-in on seven and eight. And then
13 on July 25th, working with Nexgen on all levels
14 to resolve QC issues throughout the building.

15 Q. Do you have any indication of whose QC
16 issues they're talking about? Are they talking
17 about their own issues or somebody else's?

18 A. This appears to be QC issues for work
19 done by Watson.

20 Q. All right. How about in September of
21 '17? Did you find anything related to any of
22 Watson's work in that time frame?

23 A. This is an e-mail from Ryan Ledford
24 dated Tuesday, September 19th, 2017, and it talks
25 to specific issues with Watson.

1 So the top of the issues, it is obvious
2 that Watson and other trades are overwhelmed by
3 the amount of work to complete. They simply
4 don't have enough manpower to handle the
5 activities at hand. And then he follows up with,
6 it's a red herring to state that design issues
7 are holding up work.

8 Q. Let me stop you there. Who is Ryan
9 Ledford?

10 A. He is one of the project engineers on
11 the project.

12 Q. And he wrote to whom? Who did he write
13 this e-mail to?

14 A. To David Stanton.

15 Q. And what was his job?

16 A. I don't know where exactly he stands.
17 Maybe the president of Balfour Beatty.

18 Q. And there was -- and he CC'd Tim Spano
19 and Nick Starcevic, correct?

20 A. Yes.

21 Q. And he says, it's a red herring to state
22 the design issues are holding up work, right?

23 A. That's what he says.

24 Q. Did you find any e-mails or notes or any
25 indication that either Mr. Stanton, Mr. Spano, or

1 Mr. Starcevic wrote to Mr. Ryan Ledford and said,
2 no, you're wrong, it's not a red herring?

3 A. I didn't see anything.

4 Q. All right. Let's keep on going. What
5 was below that that you thought was significant?

6 A. Well, this is a situation in August 31st
7 of 2018. It's a statement by Tony Stoneking. He
8 is the BBC vice president. Watson is a good sub
9 for the past 20 years with me, but has greatly
10 struggled on the last two jobs at Marion Square
11 and Garner.

12 Yes, I know there are two sides to every
13 story, especially at Marion, but this is a huge
14 job and tight schedule with no margin for error.
15 On those two jobs, they struggled with quality
16 manpower, supervision, safety practices, quality
17 installations, refusing to do changes at Garner,
18 so not here. Change order price inflation, all
19 of which ties up a lot of our resources.

20 Q. I don't know. Let's go back one. Did
21 you read the last portion of the one previously
22 with Watson?

23 A. No. Ryan Ledford's statement, after
24 saying it's a red herring, to state the design
25 issues are holding up work, he says, it's due to

1 poor QC, that we are in a position now where
2 multiple trades must be involved to fix these
3 issues.

4 Q. Okay. And that was the same one we
5 talked about earlier. Did you see any return
6 correspondence, meaning the people he sent this
7 to that said, no, QC problems are not; you're
8 wrong about that?

9 A. No.

10 Q. Okay. All right. So what is your --
11 how do we summarize your analysis of Mr. Doran's
12 period 3?

13 A. So, essentially, I believe the as built
14 critical path, again, is undocumented and doesn't
15 match, doesn't correspond at all, completely
16 conflicts with the contemporaneous schedules at
17 the time.

18 Ten days -- ten weeks of float at the
19 beginning, 13 weeks of float on activities that
20 he calls the as built critical path at the end,
21 and at the same time there are things going on
22 with the subcontractors, manpower problems, et
23 cetera, during the same period that really
24 weren't accounted for in that analysis.

25 Q. All right. Let's go to period 4.

1 THE COURT: Let's take a break.

2 MR. BUNDY: Sure.

3 (A recess transpired.)

4 THE COURT: Okay.

5 MR. BUNDY: If it pleases the
6 Court.

7 THE COURT: Yes, sir.

8 BY MR. BUNDY:

9 Q. Mr. Boe, let's talk about Mr. Doran's
10 period 4. Refresh the Judge's recollection, if
11 you would, about what Mr. Doran's period 4 was.

12 A. Mr. Doran's period 4 essentially is a
13 period of seven or eight months. Let me get to
14 that. It was the period from October 7th of 2017
15 to June 18th of 2018.

16 So, you know, a good portion, 254 days,
17 and during that period, 141 days of delay
18 occurred according to Mr. Doran. And that delay
19 all occurred -- the critical path of the as
20 built -- of his as built critical path showed the
21 barn doors, the changes through the barn doors
22 and then the completing of the installation of
23 the barn doors was the cause of delay during that
24 period.

25 Q. Do you have any criticism of that

1 analysis?

2 A. As with the other periods, the item that
3 he chose as the as built critical path was never
4 critical on the contemporaneous schedules.

5 So, again, this is -- I don't want to
6 say it's the easy way out, but it kind of is the
7 easy way out. To pick an item that took a long
8 time rather than looking at the details to figure
9 out what was driving from month to month, what
10 really drove the project during that time.

11 And frankly, sometimes it is that big
12 picture, that long delay that might be the actual
13 critical path. But usually at least the
14 schedules, the contemporaneous schedules, will
15 eventually tell you that that was what was
16 critical. And that just isn't the case.

17 Q. So put aside what Mr. Doran may have
18 speculated or wanted to believe, what did the
19 people building and planting the job believe at
20 that time relative to these doors --

21 MR. HILDEBRAND: Objection, Your
22 Honor. Calls for speculation.

23 BY MR. BUNDY:

24 Q. -- based upon the schedules?

25 A. Yeah.

1 Q. What did -- I mean, what did the
2 schedule that applied to that period created by
3 Balfour Beatty show as it related to the
4 criticality, if any, of the barn doors?

5 A. They had float available throughout the
6 period.

7 Q. So either the people on the job were
8 wrong or Doran was wrong?

9 A. Right.

10 Q. They both can't be right, correct?

11 A. That's right.

12 Q. And these learned treatises that you
13 rely on in arriving at your conclusion, typically
14 which trumps the expert's belief or the schedules
15 in place by the people actually doing the work?

16 A. My experience, it's the schedules on the
17 project, the contemporaneous schedules, and it
18 does make sense.

19 Q. Who is in the best position to know?

20 A. Right. There has to be -- well,
21 sometimes the expert is, and I admit it.
22 Sometimes the expert is in a better position to
23 know when it's a small change from the critical
24 path with some difference, sometimes that's the
25 case.

1 But most of the time -- you have to have
2 evidence, though. You have to have an idea. You
3 have to have something solid that says, I'm going
4 to differ with that schedule because of
5 something. There's going to be something there.
6 And I haven't seen anything that tells me that
7 this was really what was driving that project for
8 144 days of delay.

9 There were tons of our things going on,
10 and honestly, Mr. Doran talked to several other
11 items during this period. He talked to stair 4
12 changes. He talked to some elevator change. He
13 talked to a front desk, an addition of the front
14 desk, and he talked about the pool.

15 The problem with that kind of -- you
16 know, first you state that the critical path is
17 driven by these barn doors, and that wasn't what
18 was on the critical path on the project. But
19 that's your as built critical path. And then you
20 have a subgroup that says stair 4. Well, stair 4
21 did have some schedules, contemporaneous
22 schedules where stair 4 was on the critical path.
23 But eventually the changes weren't done on stair
24 4.

25 The elevator change has to do with a

1 change that was made in June of 2018. So
2 Mr. Doran seems to assume that because it was
3 made in June, therefore, it must be critical, and
4 I can't go there. If it was critical, if the
5 change was made out there, what was -- why wasn't
6 the elevator done long before that? I don't know
7 the answer.

8 Q. During this period, did the -- BBC
9 continue to experience subcontractor caused
10 delays?

11 A. Yes.

12 Q. During period 4?

13 A. Yeah.

14 Q. Would you give the Judge examples and
15 what your investigation revealed?

16 A. And I think the primary item is the
17 Precision Walls that -- between Precision Walls
18 and Pasco, the repair of those -- of those holes
19 is primarily during this period, not the previous
20 period, sorry. I was getting a little bit of
21 ahead of myself on that.

22 So beginning in December of 2017,
23 there's some manpower problems with Precision
24 Walls. From Mr. Starcevic to Precision, it is
25 very clear that Precision Walls needs more

1 framers, hangers, finishers on the project. We
2 have walked this list twice now and mostly remain
3 status quo. And now we have lost two days on
4 hanging level 8.

5 If we don't see the appropriate actions
6 taken in the next 48 hours, we bring in necessary
7 manpower to get this job finished. So they're
8 threatening to bring in additional manpower
9 because Precision Walls was not meeting the
10 schedule.

11 Q. In order to supplement the
12 subcontractor's forces, what generally is
13 required in terms of the status of the job?

14 A. I mean, I guess theoretically, you can
15 terminate -- you can terminate for convenience
16 and bring in somebody else. But generally
17 speaking, it's -- you have a good reason that you
18 need that additional work done.

19 You're paying extra money -- real extra
20 money to get that work done. It's -- it's an
21 indicator that it might be critical. I take that
22 and the information from the schedule and
23 whatever else contemporaneous documents might
24 tell me to make that analysis.

25 Q. All right. And then what about

1 December? There's an e-mail from Spano to
2 Precision Walls.

3 A. Right.

4 Q. December the 19th of 2017?

5 A. Right. So Mr. Spano says, there is no
6 (inaudible) here. Just want to complete the job
7 and stop weekly schedules slipping from items in
8 areas that are in our control and not caused by
9 changes of the owner. I look forward to walking
10 again tomorrow, and I hope that most of these
11 items can be crossed off the list.

12 So it's not saying that there aren't
13 some problems from the owner. And we're talking
14 in this case about upper floors. That's the work
15 that Precision is working on at that time in
16 December of 2017.

17 Q. So at least we have one indication over
18 a four-year job for Mr. Spano that at least some
19 things were not caused by changes of the owner?

20 A. Right.

21 Q. Do you recognize where the one day came
22 from?

23 A. No.

24 Q. All right. In 2018, with Precision
25 Walls, what did you learn about that from your

1 investigation?

2 A. Well, so there is an e-mail from
3 Mr. Starcevic on January 3rd, to Precision Walls.
4 Why have finishers not been on level 8? I'm not
5 sure we're getting our point across because we
6 have seen no increase in manpower over the last
7 month, and the same areas continue to drag along.

8 The original list below remains largely
9 incomplete with our notes (inaudible). And the
10 point here, at the same time, the contemporaneous
11 schedule shows -- shows a near critical path
12 minus 200 days of float.

13 And I frankly don't know what the
14 contemporaneous schedule showed about the
15 critical path. So I've written down near
16 critical for the eight floor drywall, frequent
17 finish drywall ceilings.

18 COURT REPORTER: Can you speak up
19 just a little bit?

20 THE WITNESS: Sure.

21 Tape and finish drywall ceilings and
22 soffits at level 8.

23 And we were able to track that and know
24 that there was -- between the beginning of this
25 period and the time when that eighth floor work

1 was actually done, it was about six weeks of
2 delay. There was delay from December into
3 January. Now, I'm not saying --

4 BY MR. BUNDY:

5 Q. And that six weeks --

6 A. I'm not saying that it's critical. I'm
7 not saying that's it's --

8 Q. I understand that.

9 A. -- contemporaneous schedules --

10 Q. But the six weeks delay, your analysis
11 is based on BBC's schedule, right?

12 A. My review was based on BBC's schedule.

13 Q. You just simply took their
14 contemporaneous schedule and compared that to the
15 actual work, and it shows six week delay --

16 A. Right.

17 Q. -- in that work?

18 A. In a pretty short time, two or three
19 months.

20 Q. All right. Now, with regard to
21 Precision Walls, there was a notice to cure
22 issue -- a notice to cure issue in January 2018?

23 A. So a notice to cure was issued on
24 January 8th from Mr. Starcevic, see the attached
25 notice of cure.

1 We have walked the building weekly, sent
2 lists and add on-site coordination meetings in an
3 attempt to draw attention to the lack of manpower
4 and quality control on-site. We have not seen an
5 improvement over the last month, and the schedule
6 continues to slip. Please respond.

7 Q. Okay. So overall, can you tell us how
8 many notices to cure were issued to Precision
9 Wall over this job?

10 A. I can't.

11 Q. All right. Well, let's go on to Pasco.
12 I think that Pasco -- this is the sprinkler
13 problem that we discussed?

14 A. Yes.

15 Q. It's a different period?

16 A. And I mean, factually, it's the same --

17 Q. Well, let's --

18 A. Factually, it's the same points. The
19 wrong sprinkler heads were -- were installed, had
20 to be replaced, causing rework by the -- not just
21 Pasco but also with Precision.

22 Q. Okay. Well, let's look at this e-mail
23 from Alec Dooley to Dean Smith and Pat. It
24 says -- it's to the Pasco team, concealed
25 sprinkler heads. Are you with me?

1 A. Yes.

2 Q. Dated October 9, 2017. If you would,
3 tell us what this e-mail reflects.

4 A. Well, it says, it has been brought to
5 our attention over the past week or so, so
6 October, right at the beginning of this period --
7 over the last week or so about the installation
8 of concealed heads on the project.

9 To be clear, our contract with Pasco
10 states, concealed heads included in all first and
11 second floor public areas, and all areas with
12 chips in wallboard ceilings. Concealed heads
13 also included for guest room floors three to
14 eight. All public hard ceilings are concealed
15 heads.

16 It's my observation that many of the
17 heads installed to this point on the guest room
18 floors are not concealed-type sprinklers heads.
19 Please advise as to when this will be corrected.
20 If need to discuss further (inaudible), we will.

21 Q. Do you know whether it's possible to
22 determine, by looking at a sprinkler, whether
23 it's concealed or not? Whether the head is
24 concealed or not?

25 A. My limited knowledge of sprinkler heads

1 would say, yes, I know that you can.

2 Q. So it would have been possible if BBC
3 had wanted to, to have looked at the work that
4 was going on when the first one went in to
5 determine they were improper?

6 A. Yes.

7 Q. Okay. Let's go to the next one. This
8 was in October of 2017. This is roughly close to
9 the next day, I guess. First, that last one was
10 October 9. Now, we're on October 10, right?

11 A. Yes.

12 Q. And tell us what this reveals.

13 A. This is an e-mail from Mr. Spano to Alec
14 Dooley. It's both internally to Balfour Beatty
15 and to Pasco.

16 Gentlemen, this is a major issue, as you
17 will now need to open up ceilings. You need to
18 immediately address the seventh floor to stay
19 ahead of the drywall hangers. Then proceed to
20 the eighth floor after tomorrow's inspection, and
21 then get to the third floor, which has already
22 been -- which already has painted ceilings and
23 fixtures just going in. This cannot delay the
24 ninth floor completion that is holding up the
25 ceiling inspection now.

1 So it's not a simple problem. It's
2 through many floors, and it requires a lot of
3 leeway.

4 Q. Do you have an opinion as to whether
5 this would cause congestion of various people
6 working in the room?

7 A. It certainly would in an area where they
8 are actually doing real work, where they have
9 other work to do.

10 Q. And do you have an opinion as to whether
11 that could result in loss of productivity?

12 A. Yeah. Yes, it could.

13 Q. And could it result in increased costs?

14 A. It almost certainly would.

15 Q. Have you seen any evidence that BBC has
16 made any attempted to conduct any of these
17 increased costs from their claim?

18 A. That's not my scope.

19 Q. Let's go to December 14, 2017, with
20 regard to sprinklers, from Starcevic to various
21 people.

22 A. Right.

23 Q. Entitled, concealed sprinkler heads in
24 the guest rooms.

25 A. And this one says, we have an issue with

1 sprinkler heads in the guest rooms, and all need
2 to be replaced. Please price a small patch for
3 each pending, assuming completing a floor at a
4 time in every guest room.

5 There is between 350 to 400 in total.
6 There should really be one trip to each room. We
7 will need to execute this work as swiftly and
8 cleanly as possible since we are not stopping
9 with other activities.

10 Q. And are not is in all caps, right?

11 A. Yes, sir.

12 Q. Okay. All right. What you got next on
13 this issue?

14 A. Well, with regard to this, on December
15 26th, 2017, Precision Walls came out with an
16 estimate for change order. And it basically
17 says, there was an initial list of 150 patches.
18 It's going to be difficult to make the patch
19 disappear in the level 4 ceiling.

20 If you have any questions, let me know.
21 So they're working on how much it would cost
22 because these are supposed to be a level 4
23 finish. How much would it cost to repair these
24 things once the correction is made.

25 Q. Well, let's look at the numbers. It

1 says, 12 man hours per patch times 350 locations,
2 right?

3 A. Yes.

4 Q. Can you give me any idea of what would
5 make up 12 hours to do a patch on one sprinkler
6 head?

7 A. Not really.

8 Q. Got any idea of how many men it would
9 take and what they would be doing for 12 hours on
10 one sprinkler head?

11 A. This is patching the ceiling. So what
12 they're really talking about is --

13 Q. Well, the response was, please provide
14 more details on how you came up with 4200 hours.

15 A. Right. And the reason, I mean, that I
16 would say is, they're worried that they can't get
17 the proper finish to get it so that it fades in
18 so that you can't see it. And if you can see it,
19 but it's not going to be acceptable.

20 Q. Okay. So law firms like to get about
21 2400 hours a year out of some lawyer per year, so
22 this is roughly two years worth for work if you
23 had one guy doing it?

24 A. Yes.

25 Q. All right. If you could, just wrap up

1 this sprinkler defect issue in your mind for the
2 Judge.

3 A. Right. So this sprinkler activity just
4 required -- required them to go into these
5 ceilings, rip out -- and my understanding is that
6 because the contractor -- because Precision
7 wanted so much money for it, they ended up --
8 Balfour Beatty ended up hiring a different
9 contractor to come in and do that -- to finish
10 the work.

11 So the change order ended up going to
12 somebody else with additional work, rather than
13 the folks who were doing the actual work here.
14 But that 4200 hours -- I don't know what the
15 number ended up being, but it was -- it's a
16 significant amount of work.

17 And I will point out that none of that
18 is in the schedule. It is not in the
19 contemporaneous schedules. They didn't put an
20 activity in there. It's not in the as built
21 schedule. It is not in Mr. Doran's analysis.

22 And in fact, one of the things that
23 Mr. Doran points out is that there was a change
24 order done where there was -- I can't remember
25 which term it was. On his -- his page 56 of his

1 slides, he talked about CCD number 3, which was
2 custom color sprinkler heads. And in that
3 situation, he was talking about this as it was
4 close to critical or somewhat critical, and that
5 happened in April of 2018.

6 Well, that change was only for the
7 second floor, and it was 64 hours in total to
8 replace, to buy new sprinkler heads, just the
9 concealed part, and replace it. 64 man hours, as
10 opposed to -- and that's in his report and on
11 the -- but this item over here with 4200 hours,
12 that -- and that only -- that doesn't include the
13 sprinkler guy. That only includes the finisher.

14 Q. All right. So let's wrap up period 4
15 and summarize your analysis of period 4 for the
16 Judge from Mr. Doran's analysis.

17 A. So we're back to the same thing. The
18 critical path, he testified that the critical
19 path was the barn doors. They were never
20 critical in the contemporaneous schedules.

21 I don't know how he got to that
22 conclusion that the barn doors were critical. He
23 testified that stair 4 and some elevators and the
24 front desk and the pool all might have been also
25 critical.

1 But really, one of the things that I
2 noted from the -- from reading the transcript was
3 kind of a discussion where it was -- it was a
4 question from Mr. Hildebrand that said, if you --
5 so if we find out at some point that the -- and
6 obviously I'm summarizing and trying to do this
7 as well as I can -- but if the critical path is
8 barn doors, and we find out that the barn doors
9 problems wasn't caused -- wasn't an owner
10 problem, then you've got down below it, stair 4,
11 and that's critical.

12 And you've got below that, elevator
13 change, and you've got below that, front desk.
14 So that's the critical path. Well, that's really
15 not how delay analysis works. I mean, there
16 was -- Mr. Doran said, yes, as an answer to that.
17 But I think it was -- I think he misunderstood
18 the question -- or at least maybe I did. I don't
19 think so.

20 But the idea is, if you have one of
21 those paths that's not their fault, that's not
22 the owner's fault, that's what concurrency turns
23 into. If this is -- these items are all
24 concurrently critical, if they're critical or
25 very close to critical and one of those items was

1 caused by the contractor, that's all it takes.

2 It doesn't matter what the weight of all
3 these things is, and it doesn't matter that
4 there's -- there's three or four charts that
5 Mr. Doran included that include 15, 20 items that
6 he lists down. And those don't matter at all.

7 What matters is the critical path and
8 near critical, if you can show that it's within a
9 few days of critical. But you can't -- the
10 weight of having -- it's back to those RFIs. The
11 weight of having thousands of RFIs, it doesn't
12 matter. It's a question of what caused the real
13 critical path delay, and can you demonstrate it.

14 Q. All right. Let's move to his final
15 period, period 5, and if you would refresh the
16 Judge's recollection about Doran's position on
17 his period 5.

18 A. Okay. So basically, this period begins
19 in June of 2018. And it ends with Mr. Doran
20 stated December 28th, 2018, substantial
21 completion of this work.

22 One thing is, the substantial completion
23 declared by the architect is significantly later.
24 It's in February of 2019. I didn't -- don't come
25 to a conclusion as to whether any of this is

1 right or not. I didn't perform an opinion or an
2 evaluation of what this substantial completion
3 date was.

4 So I'm just kind of pointing this out.
5 But during this period, Mr. Doran has a delay of
6 76 days, and it appears to be a delay due to the
7 elevators. But there's also discussion of the
8 pool. There is also a discussion of some other
9 things during that period.

10 I -- my review of the elevator
11 (inaudible) was there was lots more going on than
12 just the change that was issued in June of 2018,
13 that there was something that drove the project
14 out to June of '19 and then beyond that. And
15 Otis had some real problems with completion.
16 There was a cure notice written to Otis the
17 elevator manufacturer and the installer during
18 this project.

19 So during October and November of 2018,
20 Otis didn't complete its remaining work on
21 elevators one through five because it's -- it put
22 its crews on other jobs, and these are from
23 letters and e-mails from BBC. Otis had the DOL
24 elevator inspection move to an alternate job,
25 Otis's job site in November 9th of 2018.

1 So instead of coming to this project,
2 they went to an alternate site. You know that
3 date had been scheduled for Hotel Bennett. The
4 failure to pass the inspection was due to
5 unfinished wiring as opposed to the changes by
6 the South Carolina codes, according to the
7 documents. And I'm not an expert in codes or
8 electrical or elevator work.

9 And then on November 17th, BBC provided
10 a formal notice to cure and notice of delay on
11 this for its failure to complete its work and
12 threaten notice with liquidated damages. It just
13 doesn't appear that that delay is caused by
14 elevators.

15 Q. All right. And the final issue, I want
16 to discuss with you. As part of your review or
17 analysis of Mr. Doran's work product, did you
18 look into whether or not there existed any
19 manpower issues that BBC had with its
20 subcontractors?

21 A. We attempted to do some analysis to try
22 to find out. From daily reports, et cetera, we
23 found lots of different locations where there
24 were discussions of manpower, problems with
25 manpower.

1 (DFT. EXH. 91 was marked for
2 identification.)

3 Q. I hand you now what's been marked as
4 Defendant's Exhibit 91 for identification and ask
5 you if you can identify that document?

6 A. This is a portion of our December 15th,
7 2020 --

8 Q. Is this your work pocket?

9 A. Yes.

10 Q. Did you assemble this document?

11 A. Yes.

12 MR. BUNDY: Your Honor, I move to
13 introduce this into evidence, Exhibit 91?

14 THE COURT: His report?

15 MR. BUNDY: Sir?

16 THE COURT: Is this his report?

17 MR. BUNDY: Well, it's just the
18 report on manpower, that's it.

19 THE COURT: Manpower.

20 MR. BUNDY: It's not his entire
21 report.

22 THE COURT: Okay.

23 MR. BUNDY: It's just the one issue.

24 MR. HILDEBRAND: This is part of
25 his prior reports?

1 THE WITNESS: Part of the December
2 15th, 2020 report.

3 MR. HILDEBRAND: Were these numbers
4 on them?

5 MR. BUNDY: Huh?

6 MR. HILDEBRAND: Were these numbers
7 on here before?

8 THE WITNESS: No, the handwritten
9 numbers were not.

10 MR. HILDEBRAND: So this is not --

11 MR. BUNDY: The numbers relate to
12 the tabs.

13 MR. HILDEBRAND: Right. But that
14 wasn't in his report.

15 MR. BUNDY: The tabs weren't?

16 THE WITNESS: No. The information
17 on the letters -- I don't understand the
18 question, sir.

19 MR. HILDEBRAND: Right. Just this
20 page was in your report, correct?

21 THE WITNESS: Yes.

22 MR. HILDEBRAND: Right. So the
23 rest of this was not in his report.

24 MR. BUNDY: It's the documents
25 underlined that make up his demonstrative

1 evidence which I intend to introduce into
2 evidence, right?

3 THE COURT: Okay. Okay.

4 MR. BUNDY: This is the
5 demonstrative evidence. It's under the Rule 1006
6 that we've been talking about.

7 THE COURT: Right.

8 MR. BUNDY: And all of this is the
9 basis for this.

10 THE COURT: For this?

11 MR. HILDEBRAND: Well, if I'm going
12 to get a summary, then I need to get it in
13 advance and see these documents.

14 I didn't know that he was going to
15 introduce these background documents or I would
16 have had -- I certainly would have read them and
17 would have wanted time to be able to
18 cross-examine him and cross-examine him with this
19 in his deposition.

20 THE COURT: All right. Just one
21 second. So what I need to make sure I'm clear
22 on, this document has been produced previously?

23 MR. BUNDY: Yes, it has.

24 THE COURT: And it was produced as
25 part of his report?

1 MR. BUNDY: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. HILDEBRAND: Not in this form,
4 though. It didn't have these numbers on them.
5 This is not -- if he wants to introduce it, I
6 think he needs to introduce it like it was in
7 this report.

8 MR. BUNDY: The numbers simply
9 relate to the tabs that this information was
10 contained in.

11 THE COURT: Okay. All right.

12 MR. BUNDY: Each square identifies
13 the document. So I don't know how he could have
14 been confused or otherwise unaware of what these
15 were based on. 4/6/18, okay? It references the
16 document. I don't know what else I could have
17 told him other than this.

18 MR. HILDEBRAND: It just has the
19 day, it doesn't -- about this document. It could
20 have been a daily report. It could have been an
21 e-mail. It could have been an -- whatever, I
22 don't know.

23 It's just -- if you want to introduce
24 this as he had it in his report, the clean copy
25 and without the tabs, then that's one issue. But

1 I don't think it's appropriate for him to come in
2 for the first time and show these documents and
3 not for me to have a chance to --

4 MR. BUNDY: I can do this another
5 way. Take out the -- if you would, remove the
6 chart, please.

7 MR. HILDEBRAND: And you can
8 substitute a copy of the one that he had in his
9 report if you want to.

10 BY MR. BUNDY:

11 Q. The documents that are tabs in this book
12 1 through 39, you assembled these documents; is
13 that correct?

14 A. Yes.

15 Q. And these are documents out of the books
16 and records of Balfour Beatty Construction,
17 correct?

18 A. They're documents obtained through
19 discovery.

20 Q. And they're part of the business records
21 of Balfour Beatty, correct?

22 A. Yes.

23 Q. Produced in discovery by Balfour Beatty?

24 A. Yes.

25 MR. BUNDY: And I move to introduce

1 them in evidence.

2 MR. HILDEBRAND: Your Honor, he
3 can't -- I'm sorry.

4 THE COURT: All right. So here's
5 what I'm going to allow you to do.

6 Mr. Hildebrand, if you'd like -- my understanding
7 is that this document is the same. It's now been
8 added to by the tabs that establish what the
9 findings were in this timeline?

10 MR. BUNDY: Right.

11 THE COURT: That's basically what
12 this is, right?

13 MR. BUNDY: That's it, yeah.

14 THE COURT: And our timeline.
15 Would you like time overnight to review the
16 supporting documentation that goes with the
17 exhibit, the first page?

18 MR. HILDEBRAND: Well, at least,
19 Your Honor.

20 THE COURT: Sure.

21 MR. HILDEBRAND: But --

22 MR. BUNDY: It's a good time to
23 stop anyway.

24 THE COURT: Is it?

25 MR. BUNDY: Yeah, because this is

1 the last thing I'm going to do.

2 THE COURT: Okay. Okay.

3 MR. HILDEBRAND: So he is finished
4 except for this?

5 MR. BUNDY: Yeah.

6 MR. HILDEBRAND: So you're
7 finished; so I will just start with my
8 cross-examination tomorrow.

9 MR. BUNDY: Well, after I finish.

10 THE COURT: Well, I'm sure he wants
11 to go into it with him.

12 MR. BUNDY: No, I'm not. I'm going
13 to ask him questions about it.

14 THE COURT: Yeah, yeah.

15 MR. HILDEBRAND: Okay. All right.

16 THE COURT: I will allow it, but I
17 want to give you the opportunity to review it to
18 see if you have -- so you can prepare to have
19 some questions for it. Okay?

20 MR. HILDEBRAND: Okay.

21 MR. BUNDY: Is that okay with you,
22 or do you want to keep going? I mean, I don't
23 have anything else for him.

24 THE COURT: That might be a good
25 time to stop.

1 MR. BUNDY: I think so.

2 MR. HILDEBRAND: Okay. May I?

3 THE COURT: Go ahead -- go ahead
4 and let's get straight what we're talking about
5 here. But the report itself has been submitted
6 as part of his initial report is what I
7 understand.

8 What he's done here is, he has gone back
9 and said, this is the basis for my findings in
10 that same report. Okay? So it sounds to me like
11 it's the same report. It's just been documented
12 by whatever.

13 And then I want to give you the
14 opportunity to see if what's documented is in
15 fact what's documented.

16 MR. HILDEBRAND: Okay. I
17 appreciate that.

18 THE COURT: Okay?

19 MR. HILDEBRAND: May I also ask him
20 what he's been referring to? Can you tell me
21 what this is?

22 THE WITNESS: It's my notes,
23 basically. I ---

24 MR. BUNDY: Could we wait until we
25 get to cross?

1 MR. HILDEBRAND: Well, I haven't
2 seen this, and I think I'm entitled to see this
3 also.

4 MR. BUNDY: I haven't moved it into
5 evidence.

6 MR. HILDEBRAND: Right, but he has
7 been reading from it.

8 MR. BUNDY: Well, when it gets to
9 be your turn, you can ask him questions about it.
10 I would like to do wait -- I'd like to do this to
11 where I ask questions first, and then I finish,
12 and he asks the questions.

13 MR. HILDEBRAND: Well, can I get a
14 copy of this, Your Honor?

15 THE COURT: Any objection to that?

16 MR. BUNDY: No, no, no. I don't
17 have any objection to it.

18 THE COURT: Okay. And you can
19 review that tonight as well.

20 MR. HILDEBRAND: All right. I can.

21 MR. BUNDY: We can put it into
22 evidence if you want. Do you want to put it into
23 evidence?

24 MR. HILDEBRAND: No. I just want
25 to read it.

1 THE COURT: I doubt that. I
2 suspect that's past recollection recorded is what
3 I suspect that is. I don't have any --

4 MR. BUNDY: Well, he's got the
5 right to put it in --

6 THE COURT: All right.

7 MR. BUNDY: -- if he wants to put
8 it in, but I'll put it in for him.

9 MR. HILDEBRAND: I just don't know
10 what it is, Your Honor.

11 THE COURT: All right. I'm with
12 you. All right. Let's go ahead, and we can
13 conclude for the day. We will start back,
14 mr. Boe, with you in the morning. Just come on
15 in, and let's start back at 9:30. I think that
16 seems to be the time that works for everybody.

17 And you just come right on in, and you
18 will be under oath. And I have to admonish you
19 again not to speak to these lawyers or anybody
20 else about your testimony overnight. But I look
21 forward to see you again in the morning. All
22 right. Very good.

23 Anything further?

24 MR. HILDEBRAND: And who will your
25 next witness be?

1 MR. BUNDY: Pardon me?

2 MR. HILDEBRAND: Who will your next
3 witness be?

4 MR. BUNDY: Probably Grady, Grady
5 Query.

6 THE COURT: Okay. All right. All
7 right folks, see y'all in the morning.

8 MR. BUNDY: Thank you, Judge.

9 (The hearing was concluded at
10 4:51 P.M.)

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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 hearing was by me duly sworn to testify
9 to the truth, the whole truth, and nothing but
10 the truth in the within-entitled cause; that said
11 hearing was taken at the time and location
12 therein stated; that the testimony of the witness
13 and all objections made at the time of the
14 examination were recorded stenographically by me
15 and were thereafter transcribed by computer-aided
16 transcription; that the foregoing is a full,
17 complete and true record of the testimony of the
18 witness and of all objections made at the time of
19 the examination; and that the witness was given
20 an opportunity to read and correct said hearing
21 and to subscribe the same.

22 Should the signature of the witness
23 not be affixed to the hearing, the witness shall
24 not have availed himself/herself of the
25 opportunity to sign or the signature has been
26 waived.

27 I further certify that I am neither
28 related to nor counsel for any party to the cause
29 pending or interested in the events thereof.

30 Witness my hand, I have hereunto
31 affixed my official seal on August 31, 2022 at
32 Charleston, Charleston County, South Carolina

33 _____
34 Jennifer M. Adams
35 Court Reporter And Notary Public
36 My commission expires: 03/15/2032

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

5 BALFOUR BEATTY CONSTRUCTION,)
 6 LLC,) VOLUME TWELVE
 7) Case No.
 8 Plaintiff,) 2019-CP-10-1108
 9)
 10 -versus-)
 11)
 12 LIBRARY ASSOCIATES, LLC; AND)
 13 METROPOLITAN LIFE INSURANCE)
 14 COMPANY, A NEW YORK CORPORATION)
 15)
 16)
 17 Defendants.)

18 -----
 19 LIBRARY ASSOCIATES, INC.,)
 20)
 21 Defendant/Third-Party Plaintiff,)
 22)
 23 -versus-)
 24)
 25 LITHKO CONTRACTING, LLC; GUY M.)
 BEATY, INC.; BERNHARD MMC, LLC)
 GULF STREAM CONSTRUCTION CO.,)
 INC; PRECISION WALLS, INC.;)
 PALMETTO AUTOMATIC SPRINKLER)
 COMPANY, INC.; ET AL,)
)
 Third-Party Defendants.)

18 -----
 19 Hearing before the Honorable Mikell R.
 20 Scarborough, reported by Jennifer M. Huggins,
 21 Court Reporter and Notary Public, at 9:30 a.m. on
 22 October 26, 2021 at 100 Broad Street, Courtroom
 23 2A, Charleston, South Carolina.
 24
 25

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1 THE COURT: All right. Did you get
2 a chance to review a document last night?

3 MR. HILDEBRAND: I did, Your Honor.
4 I think where we are is that -- you'll recall
5 that when I called our experts, we -- I attempted
6 to introduce e-mails and other file documents
7 into evidence.

8 And under the most vociferous objections
9 by Mr. Bundy that, no, that's not an exception to
10 the business rule, and those can't be admitted.
11 And Your Honor ruled on that, and you said,
12 unless they -- the witness has identified those
13 documents, that an expert can refer to those, and
14 if there's a summary, then they can certainly
15 include those in their opinions, but they don't
16 come in to evidence.

17 And I've got a copy of -- I actually
18 went back and I'm happy to hand it to the Court,
19 where the Court ruled on that specifically in our
20 case. So I think, certainly to be fair to both
21 sides, but also I think that Mr. Bundy is
22 judicially estopped -- having taken that position
23 in our case, I think he's judicial estopped from
24 now taking the contrary position in his case.

25 And also, I think that it's -- second, I

1 think it's the law of the case. You can now rule
2 on that, that those actual documents are not
3 admitted into evidence.

4 THE COURT: All right. So tell me
5 what you've got -- tell me what your transcript
6 is so I'm sure we're talking about apples and
7 apples and not apples and oranges.

8 MR. HILDEBRAND: Yes, sir.

9 THE COURT: All right. Thank you.

10 MR. HILDEBRAND: Yes, sir. This is
11 a copy.

12 THE COURT: So this is supporting
13 documents for a summary of information? Is that
14 what this is purported to be?

15 MR. HILDEBRAND: Right. And we had
16 the same thing in our case. We had a lot of
17 summaries, and you ruled on it.

18 THE COURT: Here the objection was
19 that the underlying document was not admissible,
20 correct?

21 MR. HILDEBRAND: Right, Your Honor.
22 I think what you established previously -- and,
23 gosh, we went through this with every single
24 witness because Mr. Bundy was just adamantly
25 opposed to anything coming into evidence without

1 strenuous objections and dotting the eyes and
2 crossing the Ts, that the witness had to be
3 there. It had to be a blanket business saying
4 oh, these are these records. Didn't do it.

5 Each witness, you'll recall, he required
6 and then you required me to ask the witness, did
7 you get this document? Are you shown on it? Are
8 you knowledgeable about it? And if so, then you
9 can admit it.

10 But these documents that Mr. Boe wants
11 to introduce, he's not on any of those. Those
12 are documents from other people. So he can
13 certainly give his opinions if he wants to about
14 what he thinks the evidence shows as he's done
15 already, but I don't think that those documents
16 come in.

17 THE COURT: Okay. All right. I'm
18 with you on that one.

19 Mr. Bundy?

20 MR. BUNDY: Thank you, Your Honor.
21 Once again, we're comparing apples and oranges,
22 and I'm not sure that referring to the South
23 Carolina Rules of Evidence judicially estops me
24 from introducing evidence later in the case. I'm
25 not familiar with that doctrine.

1 THE COURT: I don't agree with
2 that.

3 MR. BUNDY: I'm not a judge. I
4 don't know how I can be judicially estopped. So
5 at any rate, what we have is a summary under
6 1006. That's this document, just this document,
7 right?

8 THE COURT: Right.

9 MR. BUNDY: If Your Honor would --
10 I'm going to go through every single one of these
11 and put them in evidence. Okay. As an
12 example --

13 THE COURT: Well, let me just ask
14 you this before we go into that: Are they
15 statements against interest?

16 MR. BUNDY: They're statements
17 against interest. They're business records.
18 They're the documents that -- for instance, let's
19 just pick one. Here's an e-mail from Daniel
20 Ricky. He was the superintendent, right, for
21 Balfour Beatty. He wrote to Tim Spano, who was
22 his boss. Okay?

23 Here's what he says, and it's dated --
24 it's Dan Ricky, Balfour Beatty Construction.
25 These are statements against interest, and what

1 he says is, how much more do I have to take from
2 them? They keep pushing us to the right. Why is
3 Lithko only sub making things work out here and
4 sacrificing to move the train. Please help. I
5 thought I was back in commercial and done with
6 these bullshit excuses.

7 If that's not a statement against
8 interest, I don't know what is. And every one of
9 these documents that back up this, all right, are
10 business records and statements against interest.
11 This is apples and oranges.

12 What the rule says is, contents of
13 voluminous writings, et cetera, et cetera,
14 provided the underlying data are admissible in
15 evidence. Well, clearly all of these things are
16 admissible into evidence. But in addition to
17 that, I'm going to put them in evidence.

18 THE COURT: All right.

19 MR. BUNDY: I can go through if we
20 need to and go through every single document
21 first, put them in evidence, lay the foundation,
22 and I can ask him about his summary. I thought
23 it would just be easier to do it this way. This
24 doesn't matter to me. Whatever Your Honor wants.

25 THE COURT: Okay. All right.

1 MR. BUNDY: But I'm glad to go
2 through every single letter, and I will.

3 MR. HILDEBRAND: Well, Your Honor,
4 that's exactly what we tried to do. And all of
5 the -- I could go through all of the documents
6 that our experts were going to introduce into
7 evidence, and they were all statements against
8 interest. They were all smoking guns. They were
9 all damaging documents to Mr. Bundy.

10 And he said, no, unless you -- unless he
11 is on those or he can show that they were
12 directed to him, then they don't come into
13 evidence. He can talk about his summary. And
14 his summary is okay. It -- just because the
15 underlying data might be admissible through some
16 other witnesses doesn't mean that they're
17 admitted.

18 So if he wants to, he's got to jump
19 through the hoops. If he wants to, then he can
20 do that. Then he can introduce those documents.
21 But I think the summary would come in. But
22 again, just to be consistent, that's exactly what
23 we tried to do with our experts.

24 MR. BUNDY: Your Honor, I don't
25 believe that Mr. Hildebrand's inability to get

1 evidence in prejudices my ability. I just simply
2 know how to do it and he doesn't. It's that
3 simple.

4 THE COURT: All right. Let me --
5 here's my ruling. It is definitely not judicial
6 estoppel and neither is it the law of the case,
7 its admission or admissibility of the documents.

8 The parties have agreed that the summary
9 or the chart, whatever you want to call that, is
10 admissible under Rule 1006. The dispute is over
11 whether or not the underlying supporting
12 documentation is admissible.

13 What I'm going to do is, I will have you
14 present the chart, and then to the extent that
15 you want to take him through the underlying
16 documentation, we're going to have to rule on the
17 admissibility of each and every one of those.
18 Okay?

19 MR. BUNDY: Perfect. And,
20 Your Honor, maybe to help the record, so it will
21 be clear on the record, the exhibit is Exhibit
22 91.

23 THE COURT: Okay.

24 MR. BUNDY: And within Exhibit 91
25 there are 25 -- 39 tabs. So I would suggest that

1 we refer to the document in tab No. 1 as 95-1.

2 THE COURT: Okay.

3 MR. BUNDY: 91-1, 91-2. That way
4 when you rule, you can say, 91-2 is not in; 91-3
5 is or however it goes. And that way we don't
6 have to have another 36 exhibit stickers.

7 THE COURT: Got it.

8 MR. BUNDY: Is that okay?

9 THE COURT: I agree with that, and
10 that's fine. All right. So then we can identify
11 them.

12 MR. HILDEBRAND: We can do it that
13 way, but it might be a lot of quicker,
14 Your Honor, to -- I think they're all basically,
15 if you rule on one, then the same ruling would be
16 as to all of them because he's not on any of
17 those documents.

18 THE COURT: Right.

19 MR. HILDEBRAND: So I don't know
20 that we -- it seems to me it would be -- it's up
21 to you. It might move things along much more
22 quickly if you just ask him to identify one of
23 them.

24 I think they're all otherwise
25 duplicative. And just say, okay, are you on

1 this, and then were you copied on it? Is this
2 part of your business records? This is just a
3 suggestion, Your Honor.

4 THE COURT: Well, I think the
5 question for the Court is, one, just because it's
6 attached to this, and it may be a business record
7 or was produced as a business record, that in and
8 of itself does not resolve the hearsay objection.

9 The hearsay objection, there's got to be
10 some other basis for it. If it's an admission
11 against interest by a party, well, there's your
12 hearsay. It's non-hearsay at that point, and
13 then it's admissible.

14 That's why I say, if they're all the
15 same and you're telling me it's a blanket
16 objection, then we can just cross it on the first
17 one. But if there's any difference in there,
18 then y'all just need to bring that to my
19 attention. Okay?

20 MR. BUNDY: I think we need to deal
21 with each one of them individually.

22 THE COURT: All right. Okay.

23 DIRECT EXAMINATION

24 BY MR. BUNDY:

25 Q. Good morning, Mr. Boe.

1 A. Good morning.

2 MR. BUNDY: Your Honor, at this
3 point, I would move to introduce the Hotel
4 Bennett manpower issues chart, which is Exhibit
5 91.

6 THE COURT: 91. Okay. In
7 evidence.

8 (DFT. EXH. 91 was received in
9 evidence.)

10 MR. BUNDY: It's in evidence?

11 THE COURT: Yes.

12 MR. BUNDY: Okay.

13 BY MR. BUNDY:

14 Q. All right. Mr. Boe, do you have the
15 exhibit in front of you?

16 A. I do.

17 Q. What you have in front of you is now
18 Exhibit 91.

19 A. I understand.

20 Q. Who created Exhibit 91, Mr. Boe?

21 A. I did.

22 Q. Okay. And why did you create it?

23 A. Just to get -- just to show that over
24 time, there were a lot of manpower issues
25 throughout the project time frame. So rather

1 than pull each and every one of those into the
2 report, we put a time line.

3 Q. And that would be the type of task that
4 somebody who was forensically analyzing the
5 schedule would typically engage in, right? Check
6 manpower?

7 A. Yes.

8 Q. That's not unusual?

9 A. No.

10 Q. In fact, it's what you would expect,
11 correct?

12 A. Yes.

13 Q. Okay. Approximately how much time -- or
14 you can quantify it in money. What did
15 Mr. Bennett pay for this? If you had to put a
16 price on it, what did he pay for it?

17 MR. HILDEBRAND: Objection,
18 Your Honor.

19 Q. How much time did you spend preparing
20 this document?

21 MR. HILDEBRAND: Objection.
22 Relevancy, Your Honor.

23 THE COURT: I'm going to allow it.
24 Go ahead.

25 THE WITNESS: So the biggest part

1 of the task is going through all of those
2 business records, all of those e-mails to try to
3 find specifics either to manpower -- we go
4 through all of those documents. So that part of
5 the task is one of the biggest things that we do.

6 BY MR. BUNDY:

7 Q. And how much time did -- how many
8 documents did you look through in order to find
9 the documents that found their way in this chart?

10 A. It's certainly tens of thousands. It
11 could be 100,000. I'm just not sure about the
12 total number. There's a lot of e-mails on this.

13 Q. How many people worked on it?

14 A. Three people.

15 Q. Okay. So tens of thousands, maybe up to
16 \$100,000 was spent to create this?

17 A. No, no. That was how many documents.

18 Q. Oh, how many documents.

19 A. That part of the task is probably
20 \$150,000. I mean, that part of the task is a
21 huge effort to go through and find what the
22 issues were that were identified in the meeting
23 minutes and that kind of things and the e-mails.

24 Q. And tell me where these documents were.
25 I mean, what categories were they? How were they

1 produced to you? What had to be done in your
2 offices in order to come up with this?

3 A. Well, part of the documents were in a
4 concordance database. Part of the documents were
5 from subcontractors. We got those at different
6 times during the process.

7 We got a lot of information early. Once
8 we got the notice that -- the deadline for the
9 reports, we went to work in earnest to identify
10 that, find out what problems were on both sides,
11 if you could identify in the e-mails. This is
12 what resulted as part of the rebuttable report.

13 So this was mostly produced between
14 the -- this item itself was mostly produced
15 between the November 15th receipt of Mr. Doran's
16 first report and the December 15th time frame
17 when this was issued with our rebuttal report.
18 But the vast part of the issue analysis, the
19 issue identification was done before that.

20 Q. Do you know whether or not the documents
21 you looked at in order to arrive at Exhibit 91
22 were those same documents available to Balfour
23 Beatty?

24 A. Yes.

25 Q. Okay. How do you know that?

1 A. Well, they're -- the vast majority of
2 these are e-mails to or from Balfour Beatty.
3 There's some that came from -- directly from
4 them.

5 Q. And were those documents available to
6 Doran, to the best of your information and
7 belief?

8 A. As far as I know, they should have been.

9 Q. And would they have been available to
10 the best of your information and belief to all
11 the experts hired by Balfour Beatty in this case?

12 A. Yes.

13 Q. Okay. Do you have an opinion as to
14 whether or not Mr. Doran, based on his testimony,
15 was mentally capable of preparing a document like
16 this from the same documents you had? Could he
17 have done this as far as you know?

18 MR. HILDEBRAND: Objection,
19 Your Honor.

20 THE COURT: I will sustain that.

21 MR. BUNDY: Okay. Thank you.

22 BY MR. BUNDY:

23 Q. All right. Let's start with the chart,
24 please, on the far left-hand corner on the top.
25 1/14/16. Do you see that?

1 A. Yes.

2 Q. And that document or that notation in
3 your chart here -- and this is just a time line,
4 right?

5 A. Yes.

6 Q. For the record, I guess if somebody was
7 trying to describe -- how would you describe this
8 document if you wanted to describe it to somebody
9 who didn't have it in front of you, to look at?
10 How would you describe it?

11 A. It's a time base or time scale list of
12 documents, chronology of items that occurred.

13 Q. Okay. And your intent in preparing the
14 document was to show what?

15 A. Just that from the very early stages to
16 the very latest stages, there were manpower
17 problems identified by Balfour Beatty or by
18 subcontractors.

19 Q. Before you began your inquiry into this
20 particular issue, did you know the result?

21 A. Not really. I mean, we knew that there
22 were some allegations.

23 I think I probably in the initial
24 meeting you had with us, you might have mentioned
25 that -- I'm sure you mentioned that there were

1 manpower problems on the project. But, no, we
2 didn't know that it would go across. We didn't
3 know the extent.

4 Q. Okay. So this chart was not reverse
5 engineering? You didn't start out by saying, I'm
6 going to prove lack of manpower and then
7 manufacture things to prove that result?

8 A. No. I couldn't have done that.

9 Q. Okay. Let's look at what I guess we
10 could refer to as -- for identification, as
11 Exhibit 91-1. Do you have that in front of you?

12 A. Yes.

13 Q. Would you describe it, please?

14 A. The top e-mail is an e-mail from Daniel
15 Ritchie of Balfour Beatty dated January 14, 2016
16 to Tim Spano of Balfour Beatty, Robert Cotherman
17 and Jeff Sandeen, all of Balfour Beatty. And the
18 subject is Marion Square notice of delay for lack
19 of manpower and materials.

20 Q. And is that subject matter why this
21 document found its way in this exhibit book and
22 the notation on this chart?

23 A. Yes. And it's -- it's in response to a
24 WSI e-mail that say that this minute, every
25 single crew is really busy. It means, if you do

1 not have nothing for us, to continue today or
2 tomorrow.

3 It seems like the best we can go back is
4 going to be Monday. And the response from Daniel
5 Ritchie was, how much more do I need to take from
6 them if they keep pushing us.

7 Q. What is the context of this last
8 statement, I thought I was back in commercial and
9 done with this expletive excuses?

10 A. I don't know.

11 MR. HILDEBRAND: Objection,
12 Your Honor. Calls for speculation.

13 MR. BUNDY: Your Honor, I would
14 move to introduce Exhibit 91-1 into evidence.

15 MR. TERRY: Objection, Your Honor.

16 THE COURT: All right.

17 MR. TERRY: Do you want me to go
18 first?

19 THE COURT: Let me hear from
20 Mr. Hildebrand first.

21 MR. HILDEBRAND: Your Honor, this
22 is exactly what we went through before, and I
23 said that these were not subject to the hearsay
24 rules because they were in admissions. They're
25 statements against interest. I made all these

1 same objections, and you ruled it.

2 You said, he can testify about his
3 opinions and do the summaries but the underlying
4 data do not come in. And I don't see any
5 difference, and I don't see an exception that --
6 for the exact same reasons that you ruled before
7 for these documents. I don't think that they
8 come into evidence.

9 THE COURT: All right. Very good.
10 Mr. Terry?

11 MR. TERRY: Your Honor, before we
12 get to the hearsay rule, we first have to deal
13 with the authentication of the document.

14 THE COURT: Right.

15 MR. TERRY: Mr. Boe can't
16 authenticate the document. It's not his
17 document. It's not his business record.

18 It doesn't matter whether there's an
19 exception to the hearsay rule such as the
20 business record or such as an admission against
21 interest. It's simply inadmissible because he
22 can't authenticate the document; therefore, we
23 object.

24 THE COURT: Okay.

25 MR. BUNDY: The document itself

1 authenticated. It came out of their files,
2 right? The notion that the documents they
3 produced to us in discovery were in -- are they
4 now saying that their own documents are
5 unauthentic and not real and not accurate and not
6 their documents?

7 The authentication rule relates to
8 documents that have no basis and fact, that came
9 from nowhere. These documents came from them in
10 discovery. They were kept in the normal course
11 of their business. They're statements against
12 interest.

13 The notion that these documents --
14 they're not the original. If that was the rule,
15 I would have to find the -- and there's no such
16 thing as an original e-mail. I can't bring in
17 bits and bites and put them in here. This is a
18 document they produced. It's self-authenticated.

19 MR. HILDEBRAND: Your Honor, if I
20 May.

21 THE COURT: Sure.

22 MR. HILDEBRAND: That's exactly
23 what I've argued previously. I said, look, these
24 are their documents. And many of the documents
25 that our experts tried to introduce were e-mails

1 by, among, and between that we got from
2 Mr. Bundy. They all came from his files. It's
3 the exact same thing.

4 And I argued, look, they're -- and I
5 said, Your Honor, it's really just an issue of --
6 is there any real question about where these
7 documents came from? I argued that. You said,
8 no, I want to stick to -- they are not
9 self-authenticated, and you ruled against me on
10 that.

11 And I don't think that it's fair, and I
12 think it would be highly prejudicial for my
13 experts not to, while they were here and who've
14 now left, to be able to introduce all the
15 documents under the same grounds that I argued,
16 which are the same ones that Mr. Bundy is now
17 trying to argue -- to allow these documents in.

18 I just think it's -- it would be
19 prejudicial and it would be inappropriate quid
20 pro quo. Thank you.

21 MR. TERRY: Your Honor, May I?

22 THE COURT: Go ahead.

23 MR. TERRY: Your Honor, these
24 documents are not self-authenticated simply
25 because they come from someone's record. Just

1 last night, Mr. Bundy's office produced documents
2 from Otis Elevator. It doesn't make them
3 self-authenticated because they were produced by
4 him or by anyone else.

5 The way you authenticate a document is
6 to have someone who actually can testify as to
7 the truth and accuracy of the document, and that
8 was -- is the same today as it was the day it was
9 created. Mr. Bundy first has to jump through the
10 hoop of authenticating the document. Then we can
11 decide whether it's a hearsay objection.

12 THE COURT: All right. Rule 901
13 address authentication. 901(a). The requirement
14 of authentication or identification as a
15 condition precedent to admissibility is satisfied
16 by evidence sufficient to support a finding that
17 the matter in question is what its proponent
18 claims.

19 I think on that basis, I think it can
20 come in. I don't know that I've heard this man's
21 name before or not, Daniel Ritchie. But clearly
22 he's a Balfour Beatty employee speaking to people
23 who I do know who are Balfour Beatty employees.
24 I'm going to allow it.

25 MR. BUNDY: Thank you, Your Honor.

1 All right.

2 (DFT. EXH. 91-1, was marked for
3 identification and admitted into evidence.)

4 BY MR. BUNDY:

5 Q. All right. Let's go to number -- you've
6 got a number here. There's a little circle on
7 each one; is that correct?

8 A. Yes.

9 Q. And that circle simply relates back to
10 the tab number, correct?

11 A. That's right.

12 Q. Okay. So if we just go in chronological
13 order or numeric order, the next one would be
14 1/18/16. And the note is -- well, you tell me
15 what the note is. What is the significance?

16 A. WSI, lack of materials and manpower.

17 Q. All right. Let's go to tab 2 which
18 would be Exhibit 91-2. Do you have it in front
19 of you?

20 A. I do.

21 Q. All right. And it's from Joe
22 Lauricella. Do you know who he is?

23 A. Yes.

24 Q. He was with Balfour Beatty. What was
25 his job?

1 A. Balfour Beatty scheduler.

2 Q. He was the scheduler?

3 A. Yes.

4 Q. Okay. And it was sent to Tim Spano,
5 Cotherman. Cotherman was with Balfour Beatty,
6 correct?

7 A. Yes.

8 Q. And what was his job?

9 A. I don't know.

10 Q. And what is the subject?

11 A. The subject is MSH004 updated schedule
12 and reports.

13 Q. All right. What does MSH stand for?

14 A. Marion Square Hotel.

15 Q. And 004 relates to what?

16 A. Update number 4 of the project.

17 Q. Schedule update number 4, right?

18 A. Yes.

19 Q. Correct?

20 A. Yes, sir.

21 MR. BUNDY: That's what we
22 discussed yesterday, Your Honor.

23 BY MR. BUNDY:

24 Q. All right. Tell me what the
25 significance of this document is in your search

1 for manpower issues.

2 A. Well, it shows a couple of things. The
3 thing that we identified on the time line was a
4 note from Mr. Lauricella saying that the
5 waterproofing subcontractor -- well, it says,
6 team attaches the update.

7 Below I have listed a few of the issues
8 that have or are still impacting the job for the
9 past month. Waterproofing subcontractor, both
10 lack of materials and manpower. The next line
11 says, tower crane down for approximately seven
12 days. That's not what I noted on this.

13 Q. But there are at least four bullet
14 points related to -- and described as impacting
15 the job?

16 A. Yes.

17 Q. And this is from the scheduler of the
18 job?

19 A. Yes.

20 Q. Okay.

21 MR. BUNDY: Your Honor, I move to
22 introduce Exhibit No. 91-2 into evidence.

23 MR. TERRY: Same objection,
24 Your Honor. And in this case, Mr. Boe doesn't
25 even know who Mr. Cotherman is.

1 MR. BUNDY: Mr. Cotherman is one of
2 five.

3 THE COURT: He's one of five.
4 Mr. Spano is on there. He's testified; so I know
5 who he is. All right. Admitted over objection.

6 MR. HILDEBRAND: Same objection.

7 THE COURT: Same objection. All
8 right.

9 (DFT. EXH. 91-2, was marked for
10 identification and admitted into evidence.)

11 BY MR. BUNDY:

12 Q. All right. Let's go to number 3. It's
13 dated -- notation number 3 -- 2/29/16. Will you
14 tell us -- read your note, please, and then refer
15 to the exhibit and tell us why you put this on
16 your chart.

17 A. In brackets it says, WSI, and then it
18 says, will not be here until lunchtime. Once
19 again, they are running the job.

20 Q. Okay. And if you would, let's refer to
21 Exhibit No. 3. Would you go to it and tell me
22 what in that exhibit you deem relevant to your
23 issue of manpower?

24 A. So this is from Mr. Ritchie to Mr. Spano
25 and copied to Mr. Cotherman. Basically it says,

1 everything Lithko and I said we were going to do,
2 we accomplished. I called Ronnell yesterday at 6
3 p.m. He said they would be here. If they cannot
4 do their work during that -- I skipped. The job
5 site hours are 7 a.m. to 6 p.m. If they cannot
6 do their work during that time, then we should be
7 able to slap a notice on them.

8 Q. Slap a cure notice? Is that what he's
9 referring to?

10 A. Could be or some other kind of notice.

11 Q. What does he mean when he says, I'm
12 tired of staying late for these ass clowns
13 because they do and work when they want to?

14 MR. HILDEBRAND: Objection,
15 Your Honor.

16 MR. TERRY: Objection, Your Honor.

17 MR. BUNDY: Pardon me?

18 MR. TERRY: Objection. It calls
19 for speculation.

20 MR. HILDEBRAND: Objection. It
21 calls for speculation. He isn't the writer of
22 the e-mail. He can't testify about that.

23 MR. BUNDY: So he's not qualified
24 to tell us what an ass clown is?

25 THE COURT: I will sustain that.

1 MR. BUNDY: Thank you. Your Honor,
2 I move to introduce Exhibit 91-3.

3 MR. HILDEBRAND: Same objection,
4 Your Honor.

5 MR. TERRY: Same objection,
6 Your Honor. And just for the record, I'm Don
7 Terry on behalf of Watson Electrical and Lithko
8 Contracting and Old North State Masonry.

9 THE COURT: Just so I'm clear, WSI,
10 is that Watson? That's not Watson, is it?

11 MR. TERRY: No, Your Honor.

12 THE COURT: Okay. All right. Just
13 so I'm clear. All right. Objections noted and
14 overruled.

15 MR. BUNDY: Thank you, Your Honor.

16 (DFT. EXH. 91-3, was marked for
17 identification and admitted into evidence.)

18 BY MR. BUNDY:

19 Q. All right. Mr. Boe, the second -- it
20 looks like there's -- is there another e-mail
21 behind this one?

22 A. This is the initial e-mail of the group,
23 I believe.

24 Q. Is there a second page to that one?
25 I've got a 229 on mine.

1 A. They're out of sequence from Bates
2 numbers; so I can't tell if it's related.

3 Q. All right. Let's go to number -- well,
4 there's two numbers 3's, I guess is what I'm
5 getting at. There are two number 3's, right?

6 A. Yes.

7 Q. Okay. Let's look at the top number 3
8 dated 2/29. That's the second page. Are you
9 with me?

10 A. Yes.

11 Q. All right. What is the rationale for
12 putting this is in there?

13 MR. BUNDY: And, Your Honor, this
14 is the second page behind.

15 THE COURT: Okay.

16 THE WITNESS: So this is another
17 e-mail from Daniel Ritchie to Ronnell Murray and
18 the waterproofer, to Robert Cotherman and
19 Mr. Spano. The subject is WSI. And it says, we
20 need more manpower. You don't currently have
21 enough men to meet the three weeks scheduled.

22 Q. All right. And he goes on to explain
23 that, at least according to this, they start at
24 11, take lunch, et cetera, et cetera, right?

25 A. Yes.

1 Q. And it has more derogatory expletives in
2 this e-mail, correct?

3 A. Yes.

4 MR. BUNDY: I think Your Honor has
5 already -- I wanted to make sure that you saw
6 that. Is this in evidence as well?

7 THE COURT: Yes.

8 MR. BUNDY: Okay. Thank you,
9 Your Honor.

10 BY MR. BUNDY:

11 Q. All right. Let's move on to number 4.
12 This is a 3/1/16 notation you make. Will you
13 tell us why you put this note in and explain the
14 document that backs it up, please?

15 A. Again, this is a Mr. Ritchie e-mail to
16 the waterproofer and to the -- and to Mr. Robert
17 Greer at WSI with a copy to Mr. Spano and
18 Mr. Cotherman.

19 And he says, do you have more manpower
20 coming? We just spoke with your guy, and he said
21 it will be end of the day tomorrow before half of
22 section 6 is ready. And it won't be until
23 Saturday until the remainder is finished. This
24 is unacceptable. Get me another crew in
25 Charleston today. We cannot let the schedule

1 push a week.

2 Q. Okay. And what is underneath that?

3 A. This will push vertical. At this rate,
4 we will have the elevator deck poured before
5 section 7. I need an answer in the next 30
6 minutes on what the plan is.

7 Q. All right. And what is underneath
8 there?

9 A. It looks like several photos were
10 provided, and it asks -- again, this is the day
11 before. What about all these areas that are
12 ready and have -- what about all these areas that
13 are and have been since 7 a.m.?

14 I can take pictures, too, but it will
15 not speed up the job. If you had a competent
16 person, we might be able to get something done.
17 Send more men and a competent person.

18 Q. Thank you.

19 MR. BUNDY: All right. Your Honor,
20 I move to introduce 91-4.

21 MR. TERRY: Objection, Your Honor.

22 MR. HILDEBRAND: Objection.

23 THE COURT: Admitted over
24 objection.

25 MR. BUNDY: Sir?

1 THE COURT: Admitted over
2 objection.

3 MR. BUNDY: Okay. Thank you.

4 (DFT. EXH. 91-4, was marked for
5 identification and admitted into evidence.)

6 THE COURT: Y'all have a continuing
7 objection. If you want to add something along
8 the lines, you can. Okay. I'll acknowledge that
9 for you for the record.

10 MR. HILDEBRAND: Thank you.

11 MR. BUNDY: Thank you, Your Honor.

12 BY MR. BUNDY:

13 Q. All right. Mr. Boe, the next one is --
14 because now we're below the line, it looks like?

15 A. Yes.

16 Q. Okay. It's number 5. It's dated
17 May 19, '16. If you would, tell us what your
18 note was and why it's here and the significance
19 of the document that backs it up in your opinion.

20 A. It says, to date, this has not been
21 going well. Lithko continues to lose days at
22 each update and completing valuable flow from the
23 schedule, Lauricella. And this -- and the date
24 here -- it's a Lauricella e-mail, May 19th.

25 I guess I kind of noted that each of

1 these has a BBC Bates number at the bottom, which
2 is -- sometimes there are documents with Bates
3 numbers and sometimes there aren't. This is a
4 May 19th e-mail to Mr. Spano and Mr. Starcevic
5 and several other people, including Daniel
6 Ritchie.

7 And the subject is MSH-11; so that's the
8 schedule update number 11. Team, attached is the
9 updated schedule. Based on our meeting with
10 leadership, we've gone through the schedule and
11 completed the following tasks.

12 I'm trying to find that. Review the
13 schedule, the structure. Lithko to improve on
14 cycle time. To date, this has not been going
15 well. Lithko continues to lose days with each
16 update and completing valuable float from the
17 schedule.

18 Q. If you would, would you refresh the
19 Judge's recollection about what float is and what
20 the significance of completing float would mean
21 to a contractor and his scheduler, if anything?

22 A. Sure. And in this case, this would
23 indicate that that activity wasn't critical, that
24 there was some amount of float, some amount of
25 leeway for that contractor, if he delays a few

1 days here and there, maybe he won't become
2 critical.

3 But the completion of float by itself, I
4 mean, it does indicate that that activity right
5 there is not critical right then. But it's --
6 the mention of it is likely to mean that it's
7 getting close.

8 Q. Well, when you lose float, can you get
9 it back? Once you've lost that float on that
10 activity, can you get it back?

11 A. Well, yes. Theoretically, you can get
12 it back, if you accelerate and overcome either
13 that activity or the following activity. So you
14 can get it back, but you've -- you've lost it for
15 now with this schedule update.

16 MR. BUNDY: Your Honor, I move to
17 introduce 91-5 into evidence.

18 THE COURT: All right. Over
19 objection, into evidence.

20 MR. BUNDY: Thank you, Your Honor.

21 (DFT. EXH. 91-5, was marked for
22 identification and admitted into evidence.)

23 BY MR. BUNDY:

24 Q. All right. Let's move on to 6, and the
25 note here is on June 6, 2016. Would you answer

1 the same question again, please?

2 A. Sure, the statement says, manpower is
3 tough in Charleston, referencing a Lithko
4 schedule slip from Mr. Spano.

5 Q. All right.

6 A. So this has several e-mails at the top,
7 and getting them to the -- like, at the bottom of
8 the page, from Mr. Spano, Marty, per our
9 discussion, look hard at getting the first two
10 floors driving ASAP.

11 So this is June of 2016, and I think --
12 think outside the box, trying to look at ways we
13 can get all the equipment into the basement.
14 Dan, let's be prepared to respond to the schedule
15 slip and plan for recovery. Tony will not be
16 happy that there's no recovery plan with Lithko
17 after asking for six to eight weeks last visit.

18 So this would indicate that there has
19 been a schedule slip of some kind as of June 6th.
20 But it frankly doesn't say that it's critical or
21 not critical.

22 MR. BUNDY: All right. Your Honor,
23 I move to introduce exhibit 91-6.

24 THE COURT: In evidence over
25 objection.

1 MR. BUNDY: Thank you, Your Honor.

2 (DFT. EXH. 91-6, was marked for
3 identification and admitted into evidence.)

4 BY MR. BUNDY:

5 Q. All right. Let's move on to notation 7,
6 which I believe there's two entries. If you
7 would explain those two entries and the
8 documentation that you found to justify these
9 entries in your manpower analysis.

10 A. Okay. The first is from Mr. Spano. It
11 says, Lithko has been averaging about 25 men on
12 site. It's half the crew size that should be on
13 this project.

14 And again, the top e-mail is from
15 Mr. Starcevic on June 7th talking about attaching
16 the notice of delay and demand for cure. The
17 quote that I've got there is in the second part,
18 which is from Mr. Spano to Anthony Hazen at
19 Lithko and copied to Mr. Starcevic, Mr. Ritchie,
20 and several other people.

21 And the subject is, schedule delay and
22 manpower issues, quality control issues, QC
23 issues, and recovery schedule. So the first part
24 of this: Anthony, after our last schedule
25 discussion with you, Mike and Josh, you guys

1 brought in a 10K -- some kind of a crane -- to
2 help with the front entrance which definitely
3 helped, but the L3, level 3 last pour still
4 slipped.

5 As you see below, we're tracking 11 days
6 behind the 4/11 structure schedule and were to be
7 making up time. So you're slipping and you were
8 supposed to be making up time. It goes -- the
9 table crew was pushing to get one-quarter of the
10 deck, then drops back to do drop down beams and
11 fill in while more tables are being set.

12 Getting a quarter deck only allows MCC,
13 the mechanical contractor to start the layout.
14 Even if it's a half deck to get our controls, and
15 the same goes for Watson Electrical. This
16 shortened layout time has only benefited Lithko
17 not to slip further behind, when in reality, it
18 should have gained BBC with days on schedule.

19 And ultimately, it gets to, Lithko has
20 been averaging about 25 men on site, which as we
21 both know is half the crew size that should be on
22 this job. It goes on. We currently have no
23 (inaudible) in the sequence and there should be a
24 table that -- with drop beam and fill crew, et
25 cetera.

1 It also shows a QC concern down below
2 it, talking about problems with the level 3 west
3 slab. The bottom line says, please address the
4 manpower QC issues immediately and give us a plan
5 tomorrow by noon.

6 Q. All right. And then I think there were
7 two on this one, were there not? Yes. There
8 were two. There's one 6/7. There's two 6/7
9 letters, correct?

10 A. Let's see.

11 Q. Two references?

12 A. So the other is Mr. Starcevic, and the
13 note says, the project schedule is currently 11
14 day of calendar days behind schedule, in large
15 part due to Lithko, and that's in the top e-mail
16 of the previous page. June 7 from Mr. Starcevic
17 to Michael Rohrer at Lithko with a copy to
18 Ritchie, et cetera.

19 Q. And attached was a delay and demand for
20 cure, right?

21 A. Right. And a note that the project was
22 currently 11 calendar days behind schedule, in
23 large part due to Lithko Contracting, with no
24 indication for recovery.

25 MR. BUNDY: Your Honor, what I'd

1 rather do is instead of him reading to you, is to
2 just give you a minute or two to read it yourself
3 if that's satisfactory. You let me know when
4 you're ready to move on, and I'll move on. Is
5 that workable?

6 THE COURT: This is working well;
7 so I'm just looking through here.

8 MR. BUNDY: Okay.

9 THE COURT: All right. That was as
10 of the 7th for the date?

11 MR. BUNDY: Yes. Your Honor, I
12 would move to introduce 91-7.

13 THE COURT: It's moved in evidence
14 over objection.

15 MR. BUNDY: Thank you, Your Honor.

16 (DFT. EXH. 91-7, was marked for
17 identification and admitted into evidence.)

18 BY MR. BUNDY:

19 Q. All right. Mr. Boe, let's move on to --
20 I think we're back above the line now. Number 8.
21 It's a notation of 7/8/16. Are you with me?

22 A. Yes.

23 Q. All right. If you would, just the same
24 question. I don't want to ask you the same
25 question over and over again, but you know what I

1 want; so if you would just proceed. Thank you.

2 A. Sure. July 8th, 2016. Tim is teeing
3 ONSM -- I have it in brackets -- up already
4 because they suck, and we need to take any
5 excuses away. That's from Mr. Ritchie. And
6 that's essentially what it says in the top line
7 of this -- of this e-mail from Mr. Ritchie to
8 Anthony Hazen of Lithko.

9 And below that are several places where
10 it talks to CMU before; so Mr. Spano writing to
11 Mr. Holloway of Old North State talking about
12 specific -- looking at details of manning and
13 scaffolding and CMU and where they are.

14 Q. Okay.

15 A. The rest of this is a sequence of
16 e-mails where Mr. Spano is asking for how many
17 people are going to be here, when are they going
18 to be here, exactly how many trials are we
19 talking about, and he's not seeming to get an
20 answer. And so it's this frustration getting to
21 the end.

22 MR. BUNDY: Your Honor, I move to
23 introduce Exhibit 91-8 into evidence.

24 THE COURT: All right. In evidence
25 over objection.

1 (DFT. EXH. 91-8, was marked for
2 identification and admitted into evidence.)

3 BY MR. BUNDY:

4 Q. All right, sir. Let's go to number 9.
5 This is a notation you made in your chart of
6 August 16, 2016, the same question.

7 A. And the notation says, we need to
8 discuss several items controlled by ONS that
9 affect the BBC schedule.

10 So this is at a time when -- well, I
11 guess, just to give some context, during this
12 time, this is -- Mr. Doran's period 2 when the
13 critical path was up the structure, you know,
14 driving out to get that pool set.

15 And the contemporaneous critical path on
16 those schedules, I can't begin to remember all
17 the details. But I know that the masonry has
18 indicated it as critical during this time. But I
19 don't know if it was this work.

20 So this is an e-mail that starts out
21 from Tim Spano, August 16, and to Tim Holloway,
22 Joe Anastasi from Old North State, Chip Venable
23 and Mr. Starcevic, Mr. Ritchie and Mr. Dale.
24 Down -- maybe half the page down, on August 16 at
25 3:02, Mr. Spano wrote, I hear you, but we need to

1 discuss several items controlled by ONS that
2 affect the BBC schedule on the call today.

3 MR. BUNDY: Your Honor, I move to
4 introduce Exhibit 91-9.

5 THE COURT: All right. In evidence
6 over objection.

7 MR. BUNDY: Thank you, Your Honor.

8 (DFT. EXH. 91-9, was marked for
9 identification and admitted into evidence.)

10 BY MR. BUNDY:

11 Q. All right. Let's move to item number 10
12 on your chart, please, the same question. And I
13 believe there are two entries on this one.

14 A. Okay. That's two entries. One for
15 Mr. -- both for Mr. Dean, it looks like, both on
16 August 26th. The first one says, these projects
17 have clearly been impacted by ONSM, and the
18 second one says, ONSM are about to screw
19 themselves.

20 So this is several pages. And usually,
21 I like to start at the back. The bulk of this
22 string of e-mails is about a different project,
23 and there's only -- there's only a small area
24 where it talks to the -- this project,
25 specifically, and it's Mr. Dean. So at the top

1 of what amounts to the third page.

2 Q. Is there a BBC Bates number on these
3 documents?

4 A. Yes.

5 Q. Could you give us the BBC Bates number
6 of the documents you're speaking of, please?

7 A. BBC underscore e-mails underscore
8 00004592. And at the top of that, it says, let's
9 make sure we have properly notified ONSM on, it
10 looks like, four different projects.

11 But one of those is Hotel Marion Square,
12 if they have not already been notified. These
13 projects have clearly been impacted by ONSM, and
14 I don't want there to be any misunderstandings as
15 suggested below.

16 MR. BUNDY: Your Honor, I would
17 move to introduce 91-10.

18 THE COURT: All right. In evidence
19 over objection.

20 MR. BUNDY: Thank you, Your Honor.

21 (DFT. EXH. 91-10, was marked for
22 identification and admitted into evidence.)

23 BY MR. BUNDY:

24 Q. All right. Mr. Boe, let's move onto
25 number 11, same question.

1 A. Sure. The note says, October 14, 2016.

2 A mason who was already struggling with masons
3 and manpower. So that's a pretty shortened
4 statement, but anyway, that's from Mr. Ritchie.

5 So this is a sequence of e-mails. The
6 third on the first page is from Mr. Ritchie to
7 Tim Quinn, Timothy Quinn at Lithko, Mr. Beach at
8 Lithko and Mr. Starcevic and Spano and Alec
9 Dooley are copied. And it concerns reshores on
10 level 5.

11 Tim Josh, did you ever hear back from
12 the Doca engineer on whether we need to leave the
13 reshores in place in order to pour level 9. I
14 cannot find information. The question is whether
15 the mason can get started on the -- on its work.

16 Ultimately, please advise as it would
17 help us stocking ahead of time to hit production
18 work on 11/1 and have the entire floor cleared of
19 reshores to not stop the mason, who is already
20 struggling with masons and manpower.

21 Q. For the Court's edification, will you
22 explain what reshoring is and how -- put this
23 e-mail in context for him, please?

24 A. Sure. This is trying to explain that
25 you have to have -- you have to have bracing for

1 floors below when you're going to pour concrete
2 above. So you have bracing for a certain number
3 of floors.

4 In this case, there were going to --
5 this bracing of these reshores had to stay in
6 place for three floors under normal circumstances
7 and on the ninth floor, there was an engineer
8 that thought that they need to stay in place for
9 four floors.

10 And if that was the case, that wasn't
11 something that was planned for in the schedule,
12 and that would cause the mason not to be able to
13 get started. They wouldn't be able to -- it's a
14 lot less efficient for the mason, even though
15 they're working around the outside, to get their
16 stuff stocked in there and to get it working.

17 MR. BUNDY: Your Honor, I move to
18 introduce 91-11 into evidence.

19 THE COURT: Number 11?

20 MR. BUNDY: That's the one we're on
21 now, I believe.

22 THE COURT: All right. Yeah. In
23 evidence over objection.

24 MR. BUNDY: Thank you.

25 (DFT. EXH. 91-11, was marked for

1 identification and admitted into evidence.)

2 BY MR. BUNDY:

3 Q. Let's move on to number 12, please, your
4 notation of 12/16/16.

5 A. 12/16 says -- it's a note from
6 Mr. Starcevic -- have concerns that ONSM has the
7 proper manpower and supervision on site. And
8 this is an e-mail from Mr. Starcevic to Joe
9 Anastasi at Old North Masonry, copied to several
10 other people at Old North.

11 And Mr. Spano and Mr. Ritchie, Jeff
12 Sandeen and Marty Dale. And the subject is a
13 sequence of numbers. That's probably a contract
14 number, a notice of delay and a demand for cure,
15 hotel at Marion Square. And it looks like
16 there's an attachment for that notice of delay.

17 So this is a notice of delay from
18 Mr. Starcevic to Old North, details below. We
19 have concerns that Old North has the proper
20 manpower and supervision on site to meet the
21 schedule and quality necessary to complete this
22 project.

23 We continue to get excuses on why work
24 cannot be done instead of solutions to make this
25 project a success. Jumping ahead a little bit,

1 it says, ONSM needs to submit a plan to address
2 all areas that are behind the schedule with the
3 appropriate manpower.

4 Now, this is December of 2016. So this
5 is essentially very soon after the ninth floor
6 was topped out before the -- the tower crane gets
7 taken out in February.

8 MR. BUNDY: Your Honor, I move to
9 introduce 91-12 in evidence.

10 THE COURT: All right. In evidence
11 over objection.

12 MR. BUNDY: Thank you, Your Honor.

13 (DFT. EXH. 91-12, was marked for
14 identification and admitted into evidence.)

15 BY MR. BUNDY:

16 Q. Let's move on to 13.

17 A. Item 13 is January 11th of 2017.

18 Mr. Starcevic says, we feel strongly that ONSM
19 needs more manpower and a plan. Well, I don't
20 see that quote.

21 Q. You don't see it?

22 A. I don't.

23 Q. Okay. We will take that one out. Let's
24 move on to 14. 1/23/17.

25 THE COURT: Let me stop you before

1 you move on to there. I do have a question.

2 MR. BUNDY: Sir?

3 THE COURT: I do have a question on
4 that one.

5 MR. BUNDY: Okay.

6 THE COURT: There's a discussion in
7 the headline, schedule update, 1/10/17. We
8 talked yesterday about the schedules having a
9 series of numbers. Each time a schedule is
10 changed, does it get its own number?

11 THE WITNESS: Generally speaking, I
12 think it's usually the official schedule that
13 gets forwarded to the owner or to the -- you
14 know, that's circulated to the subs or whatever.
15 Those get an official number. And sometimes
16 there's an interim schedule.

17 When we received all the Primavera
18 files, all of the schedule files from the -- in
19 discovery, we got 150 schedules. And really,
20 they're -- you know there's only 48 updates. So
21 there are some interim schedules that are issued.
22 We haven't paid much attention, frankly, to
23 those.

24 THE COURT: Okay. All right.

25 BY MR. BUNDY:

1 Q. If you would, let's go to -- I wanted to
2 bring one thing to your attention. On BBC e-mail
3 68, 5627 on the first page, it says, we're
4 pulling the tower crane the first week in
5 February. The schedule is wrong. Do you know
6 what the context of that is?

7 A. Yeah. There's an earlier e-mail in this
8 string that says that they were going to move
9 the -- the tower crane is scheduled to move March
10 10th.

11 And there was a time when we talked
12 about it. It wasn't in the schedule originally.
13 I know it got put into -- that removal got put
14 into the schedule update number 19 with a string
15 of activities that went to the ceiling in the
16 second floor.

17 But it -- that date, the date of moving
18 the crane jumped around some. It moved out as
19 far as March 10th. And then they wanted to do it
20 earlier. They managed -- and they did get it
21 done February 2nd.

22 MR. BUNDY: Your Honor, I'm going
23 to move -- I would move to put this into evidence
24 and strike the note, the corrected chart because
25 he said, this doesn't reflect it. So what I'd

1 like to do is one, move to put this into evidence
2 as 91-13, and then I'm going to strike out -- and
3 I would ask Your Honor to do the same thing on
4 the chart, strike that notation.

5 THE COURT: Strike 13 notation.

6 Okay. All right. So noted.

7 MR. BUNDY: Thank you, Your Honor.

8 (DFT. EXH. 91-13, was marked for
9 identification and admitted into evidence.)

10 BY MR. BUNDY:

11 Q. All right. Let's move on to 14,
12 Mr. Boe.

13 A. January 23, 2017, and it's Mr. Starcevic
14 saying, I have requested additional manpower to
15 maintain the schedule but have seen no
16 substantial increase.

17 And the initial e-mail here is an e-mail
18 from Mr. Starcevic to Joe Anastasi from Old North
19 State and several other people at Old North
20 State, Mr. Spano, Gino Cassetto, Jeff Sandeen,
21 Shelly Goodwin. And it has to do with MSH019
22 detail schedule of 12/13/16.

23 So this is -- this is the schedule that
24 I was talking about with putting that logic into
25 the update.

1 THE COURT: Right.

2 THE WITNESS: And it goes through
3 again and it's -- it says, this schedule needs to
4 write a plan for all deficient areas listed below
5 to complete by January 28th, 2017, and level 7
6 complete by 2/3/17.

7 And the quote that we had before was --
8 had requested additional manpower. So we feel we
9 have been more than lenient with Old North State
10 and given ample opportunity for ONSM to cure
11 their deficiencies.

12 We have requested additional manpower to
13 maintain the schedule. We have seen no
14 substantial completion of current production. So
15 it's directing Old North State to provide a
16 recovery schedule of adequate manpower addressed
17 to each activity by close of business, January
18 24th.

19 BY MR. BUNDY:

20 Q. I would like you to look at something on
21 this Bates stamp document BBC e-mail 0094116. Do
22 you have that in front of you?

23 A. Yes.

24 Q. Down in the -- right above
25 Mr. Starcevic's name, it says, see link for

1 1/23/17 masonry progress photos, and it has an
2 https site. Is that the -- and it says, BBC U.S.
3 Egnyte. Is that the Egnyte site where all of
4 these documents were kept in the cloud, so to
5 speak?

6 A. That's what I understand.

7 Q. And that the same Egnyte site that was
8 cutoff by BBC?

9 MR. HILDEBRAND: Objection. Calls
10 for speculation. He doesn't know that.

11 THE COURT: I will sustain that.

12 BY MR. BUNDY:

13 Q. How many -- were you able to count how
14 many notices to cure or notices of cure were sent
15 by BBC to its various subcontractors during this
16 job?

17 A. I didn't count them.

18 Q. Do you have any idea? Is it more than
19 10, less than 10?

20 A. I'm sure it's more than 10, but there
21 were -- I know three in period 2 to Old North.

22 Q. Okay.

23 A. There are were a lot on March 15th of
24 2017, maybe five or six.

25 MR. BUNDY: Okay. All right. I

1 would move to introduce Exhibit 91-14 into
2 evidence, Your Honor.

3 THE COURT: All right. In evidence
4 over objection.

5 MR. BUNDY: Thank you, Your Honor.

6 (DFT. EXH. 91-14, was marked for
7 identification and admitted into evidence.)

8 BY MR. BUNDY:

9 Q. All right. Let's move on to 16,
10 February 11, 2017. Tell us why you put the
11 notation in, same question.

12 A. So this is ONSM, 20-plus people and no
13 competent person. No one on site currently is
14 capable of the work, nor is their leadership to
15 direct it, says Mr. Starcevic.

16 So this is an e-mail from Mr. Starcevic
17 to Chip Venable at Old North State, several --
18 copied to several other people at Old North State
19 and then a copy to Mr. Spano, Jeff Sandeen, and
20 Alec Dooley and some others at Balfour Beatty.
21 And it's a notice of delay and demand to cure, 72
22 hours to Old North State. It sounds like this is
23 a response to -- or it's a response
24 correspondence.

25 So there are a few clarifications to

1 your letter that need to be made. And it goes
2 through the process and the progress of each of
3 the areas that were listed in that -- in that
4 curing list. Let's see. What did I pick out?

5 The last paragraph on the first page, a
6 January 24th response, shows no commitment by Old
7 North State Masonry to cure the schedule. We're
8 now plus or minus 50 days behind schedule, mostly
9 in part to masonry.

10 After we acknowledge and pay for the
11 added time on level 1, level 3 and level 4.
12 We've tried routine players on this project and
13 understood the difficulty of the logistics;
14 however, ONSM bid a job that had tight logistics,
15 no lay down, aggressive schedule, interior
16 coordination.

17 Old North State needs to provide in
18 writing a commitment to finishing CMU on this
19 project by 2/24. That includes all punch due
20 work, topping out miscellaneous walls, stairs, et
21 cetera, et cetera.

22 Q. If you would, let's turn -- now, all of
23 the pages in this Exhibit 15 are Bates stamped as
24 BBC documents, correct?

25 A. Correct.

1 Q. Produced by Balfour Beatty, correct?

2 A. Yes.

3 Q. Okay. Let's go to the back document,
4 which is 00107147 in the middle of the page. Are
5 you with me?

6 A. Yes.

7 Q. Is this another notice to cure from
8 Starcevic to Old North State Masonry?

9 A. I think it's the same one we looked at
10 just a minute ago.

11 MR. BUNDY: All right. I would
12 move to introduce 91-15 into evidence,
13 Your Honor.

14 THE COURT: All right. In evidence
15 over objection.

16 MR. BUNDY: Thank you, Your Honor.

17 (DFT. EXH. 91-15, was marked for
18 identification and admitted into evidence.)

19 BY MR. BUNDY:

20 Q. Let's move on to 16, Mr. Boe. What is
21 this about?

22 A. 16, the note says, 20-plus people and no
23 competent person. No one on site currently is
24 capable of the work, nor is there leadership to
25 direct it.

1 That's -- it's an e-mail from
2 Mr. Starcevic to Joe Anastasi from Old North
3 State and several other people from Old North
4 State, Mr. Sandeen, Mr. Spano, Marty Dale. And
5 it says, Toby slash Joe. I'm very disappointed
6 that you have 20-plus people on site and no
7 competent person.

8 We are dismantling the scaffold, laying
9 block on multiple floors, working on perimeters
10 and heights, et cetera. And Jamaica is the most
11 qualified person on site. While he works hard,
12 he's not a competent person for ONSM.

13 It also goes to all three cast-in window
14 openings that need to be cleaned. So there were
15 some problems with precast where the window
16 openings were. And then it discusses some
17 quality issues with the cleaning discussed, et
18 cetera. That is all.

19 MR. BUNDY: Your Honor, I move to
20 introduce 91-16 into evidence.

21 THE COURT: All right. In evidence
22 over objection.

23 MR. BUNDY: Thank you, Your Honor.

24 (DFT. EXH. 91-16, was marked for
25 identification and admitted into evidence.)

1 BY MR. BUNDY:

2 Q. All right. Let's move on to 17,
3 notation 17 on your chart, Exhibit 91, please.

4 A. The note is February 14th, 2017. And it
5 says, Pasco is falling behind schedule, from
6 Mr. Starcevic. It's an e-mail dated February
7 14th, Mr. Starcevic to (inaudible) Badal from
8 Pasco and with a copy to Marty Dale from Balfour
9 Beatty.

10 And it says, manpower and scope add HMS.
11 The e-mail says, Pasco is falling behind schedule
12 and needs a few things addressed. The intent was
13 to hang drywall ceilings on level 1 yesterday,
14 but we still do not have fire protection fire
15 walls. What is going on?

16 Q. What did Pasco do? What was their job?

17 A. They're the sprinkler installer.

18 Q. Those are the ones -- those are the
19 people that put in the wrong sprinkler heads 350
20 times?

21 A. Yes.

22 MR. BUNDY: Okay. I move to
23 introduce Exhibit 17 (sic).

24 THE COURT: All right. In
25 evidence.

1 MR. BUNDY: Thank you, Your Honor.

2 (DFT. EXH. 91-17, was marked for
3 identification and admitted into evidence.)

4 BY MR. BUNDY:

5 Q. All right. Let's move on to 18,
6 Mr. Boe.

7 A. There it is. March 2nd, 2017. Ninth
8 floor behind schedule; stopped on first due to
9 other trades not yet on schedule. And this is
10 from Morgan at Precision Walls.

11 So this is an e-mail from Troy Morgan at
12 Precision Walls to Jeff Sandeen on March 7, 2017,
13 with the subject of Marion. And it says, Jeff
14 gathered intel from our troops today, and here's
15 our position. Ninth floor, we are behind
16 schedule. Tidying up loose ends on the first and
17 second. Some we own; the majority we don't.

18 We have stopped hanging some ceilings on
19 first due to other trades. Hanging on third full
20 tilt but still leaving lose ends behind out of
21 our control such as pocket doors. Framed up to
22 the seventh floor for the most part except for
23 areas. So this is just laying out what their
24 status is on the project and whether they're
25 late.

1 Our plan is to have nine, one, and two
2 complete with what is available by the end of
3 next week, starting on the 8th. Next week, we
4 will up our manpower a bit. By the end of next
5 week, all mechanics on the first, second, and
6 ninth can concentrate on three through eight.

7 Q. What does he say about the electrician?

8 A. He says, the electrician seems to be
9 blaming us for holding him up; but from what I
10 gather, that's not case.

11 Q. And what is the next sentence? When
12 eight is framed, he will be exposed?

13 A. When eight is framed, he will be
14 exposed.

15 MR. BUNDY: Your Honor, I move to
16 introduce --

17 THE WITNESS: And it also says,
18 anything you can do to let us hang ceilings on
19 one and two would be appreciated; so then this is
20 March 2nd.

21 MR. BUNDY: I move to introduce
22 91-18 into evidence.

23 THE COURT: All right. Over
24 objection in evidence.

25 (DFT. EXH. 91-18, was marked for

1 identification and admitted into evidence.)

2 BY MR. BUNDY:

3 Q. Notation 19 on your chart, please.

4 A. Number 19 says, ONSM, defects in stair
5 3, need to address the lack of manpower. So this
6 is again a several-paged e-mail.

7 And if you go to the last page, which is
8 BBC e-mails and the rest of Bates number
9 00326120, it says, this is from Gino Cassetto,
10 general superintendent to Toby Holloway with a
11 copy to Tim Spano. As discussed yesterday, we
12 surveyed stair number 3 today. Out of plumb
13 block and concrete.

14 The survey is attached. Note the
15 dimensions shown are estimated. We would ask
16 that ONSM provide a lift and operator, and we can
17 put a tape measure to each level to confirm this.
18 But it's obvious that the block facing that
19 (inaudible). So they had to replace that area of
20 block slash concrete.

21 Q. All right. If you would, go two pages
22 up. 00326118. And if you would start with the
23 notation to Toby at the bottom.

24 A. Per the below e-mail and attached survey
25 from Gino, see attached notice of -- notice to

1 cure the masonry defects in stair 3. The walls
2 out of plumb are to be demoed, rebuilt, and
3 cleaned up by 3/17/17, March 17, 2017.

4 We also need to address the lack of
5 manpower and efficiency in stone setting, and it
6 goes through some details about how late they are
7 and some apparent reasons why. Essentially, it's
8 saying they're way slower than what was planned.

9 MR. BUNDY: Do you want to take a
10 break, Judge?

11 THE COURT: I'm good.

12 MR. BUNDY: Okay. I move to
13 introduce 91-19.

14 THE COURT: All right. In evidence
15 over objection.

16 (DFT. EXH. 91-19, was marked for
17 identification and admitted into evidence.)

18 BY MR. BUNDY:

19 Q. All right. Let's move on to 20, please.

20 A. Number 20 is March 6th of 2017. Pasco
21 is behind on level 4 and up the building from
22 Mr. Starcevic. And this is from Mr. Starcevic.
23 I think at the bottom of the first page, March
24 6th of 2017, subject to Mr. Badal from Pasco with
25 copies to Johnny Eldridge from Balfour Beatty,

1 Tim Spano, Alec Dooley, and Marty Dale.

2 Manpower and scope, and we're back in
3 the same position being behind on level 4, left
4 the building. You need to man up and get through
5 level 7 by 3/20. So this is March 6th. In my
6 opinion, you need three crews out here working on
7 all three floors to meet those dates. Please
8 respond with your plan to get back on schedule.

9 MR. BUNDY: Your Honor, I move to
10 introduce 91-20.

11 THE COURT: All right. In
12 evidence.

13 (DFT. EXH. 91-20, was marked for
14 identification and admitted into evidence.)

15 BY MR. BUNDY:

16 Q. All right. Mr. Boe, 21.

17 A. March 7th, 2017. The note says, BBC
18 removed the tower crane a month ago, not taking
19 advantage of it. Behind schedules on floor 1
20 through 5.

21 From Mr. Starcevic, we went through this
22 yesterday, talking about the -- basically,
23 there's an e-mail from Mr. Spano that goes
24 through and says essentially what this talked
25 about, removed the tower crane a month ago, and

1 they're not talking advantage of it.

2 And then there's a response from
3 Precision, but that quote is next on the second
4 page. That would be the bottom paragraph. We
5 also have a lot of areas on floor 2 for ceiling
6 framing, ISO rod and install, A/C framing barrel,
7 ceiling, et cetera. BBC removed tower crane a
8 month ago so P Walls could get these areas, and
9 they're not taking advantage of it with a few
10 guys working on the ceiling.

11 So this is where Mr. Doran has said the
12 critical path is on the second floor, you know,
13 in this area. And they're -- this is
14 communication Mr. Spano thought was important.
15 He also covers a whole bunch of other areas in
16 this e-mail with -- you know, in this sequence of
17 e-mails with other information, and it can be
18 seen by Mr. Zinna's response that he is
19 responding to not just that but lots of other
20 areas.

21 But in his response, he says, level 2
22 has a vast list of loose ends and unanswered
23 issues that were not created by Precision Walls.
24 We did not agree. One of them was that there's
25 missing punch steel numbers delaying, and I think

1 there's something in here about numerous pipes
2 are out of claim for the fire walls.

3 But it does say that the design was
4 changed from the gable and framing of the third
5 floor terraces. But I don't think that has
6 anything to do with the second floor ballroom.
7 And it does say that the second floor overhead
8 inspection failed again today, what we talked
9 about before. There was no evidence of any
10 issues related to Precision Walls.

11 THE COURT: The boxed quotes -- the
12 quote that's attributed to Starcevic on 21, but
13 I'm not seeing Mr. Starcevic speaking here. I'm
14 just not finding that in this document.

15 THE WITNESS: Well, I agree.

16 THE COURT: Maybe that is --

17 THE WITNESS: That's Spano. So let
18 me just find that specific --

19 THE COURT: Would that be
20 Mr. Spano's e-mail then?

21 THE WITNESS: It should be Spano.

22 THE COURT: Yeah.

23 THE WITNESS: Yeah, sorry.

24 THE COURT: Gotcha. Okay. That's
25 at the bottom on 496.

1 MR. BUNDY: Thank you, Your Honor.

2 91-21, move to put it into evidence.

3 THE COURT: Yes.

4 (DFT. EXH. 91-21, was marked for
5 identification and admitted into evidence.)

6 BY MR. BUNDY:

7 Q. Let's go to 22, please.

8 A. 22 says about Pasco, level 6 is two
9 weeks behind with no available manpower. It was
10 agreed with your superintendent that Pasco needs
11 two additional crews.

12 And that's from Mr. Starcevic. And
13 that's with -- right at the top of that e-mail
14 string. It says, from Mr. Starcevic to Mr. Badal
15 and somebody else from Pasco with copies to
16 Mr. Spano and several people from Balfour Beatty.
17 Level 6 is two weeks behind with no available
18 manpower, and we also need guys in the basement
19 on level 5.

20 It was agreed with your superintendent
21 that you need two additional crews on site to get
22 caught up and stay up to speed through your
23 testing -- through your testing through eight.
24 Consider this a notice to cure and get additional
25 manpower on site within 48 hours.

1 Q. So now this is a notice to cure with
2 Pasco?

3 A. Yes.

4 MR. BUNDY: I'd move to put 91-22
5 into evidence, Your Honor.

6 THE COURT: Yes.

7 MR. BUNDY: Thank you.

8 (DFT. EXH. 91-22, was marked for
9 identification and admitted into evidence.)

10 BY MR. BUNDY:

11 Q. All right. Let's move on to 23,
12 Mr. Boe.

13 A. March 15, 2017, Pasco needs additional
14 manpower on site, Mr. Starcevic. So this is an
15 e-mail from Mr. Starcevic to Mr. Badal of Pasco
16 with copies to Mr. Spano and Mr. Dooley and
17 Mr. Dale and Mr. Sandeen.

18 And attached is the -- the subject is
19 Pasco demand for cure, and there's some attached
20 date of construction logistics and a letter,
21 demand for cure. And it says, see attached
22 demands for cure -- demand for cure at Hotel
23 Marion Square. Previous review on site are a
24 handful of issues.

25 Number 2A under schedule, it says, it is

1 evident that Pasco needs additional manpower on
2 site. Please provide a manpower account and
3 recovery schedule to show your plan to get back
4 on schedule.

5 MR. BUNDY: Move to introduce 91-23
6 into evidence.

7 THE COURT: All right. In evidence
8 over objection.

9 MR. BUNDY: Thank you, Your Honor.

10 (DFT. EXH. 91-23, was marked for
11 identification and admitted into evidence.)

12 (DFT. EXH. 91-24 was marked for
13 identification.)

14 BY MR. BUNDY:

15 Q. Your note 24, Mr. Boe.

16 A. 24. March 15, 2017, the exterior skin
17 continues to slip. ONSM necessary manpower is
18 not on site. Mr. Starcevic.

19 This is an e-mail from Mr. Starcevic to
20 Old North State, Mr. Venable, with copies to
21 several people from Old North State and to
22 Balfour Beatty, and it's a notice of cure --
23 notice of demand for cure having to do with a
24 long litany of items.

25 Under schedule it says, the exterior

1 skin continues to slip. It is evident that we
2 are not achieving the agreed-to rate of
3 installation due to a multitude of issues. BBC
4 acknowledges not all issues are a hundred percent
5 ONSM. BBC has gone above and beyond to
6 coordinate with ONSM precast site to provide
7 hooks necessary for installation.

8 It is clear that the necessary manpower
9 is not on site as Toby Holloway promised an
10 expert crew on site March 13th, 2017, to speed up
11 installation, and that crew is not on site as of
12 3/15.

13 MR. BUNDY: I move to introduce
14 91-24.

15 THE COURT: In evidence.

16 (DFT. EXH. 91-24 was received in
17 evidence.)

18 MR. BUNDY: Thank you, Your Honor.

19 (DFT. EXH. 91-25 was marked for
20 identification.)

21 BY MR. BUNDY:

22 Q. Number 25. It's a March 15 letter or
23 e-mail. Watson was to complete level 5 guest
24 rooms by March 10, 2017, and start level 6 guest
25 rooms on March 13, 2017. Neither of these dates

1 were accomplished. From Mr. Starcevic.

2 The e-mail itself is a -- is from
3 Mr. Starcevic to Mr. Winovich at Watson and
4 several other -- Watson and Balfour Beatty people
5 are copied, and the subject is Watson demand for
6 cure.

7 The e-mail says, see attached notice of
8 demand for cure for Hotel Bennett. There are
9 currently (inaudible) -- at yesterday's meeting
10 on site there are a number of issues needed to be
11 addressed. See below.

12 And under schedule, it says, per our
13 meeting last week, Watson was to complete level 5
14 guest rooms by 3/10 and start level 6 guest rooms
15 on 3/13/2017. Neither of these dates were
16 accomplished.

17 We also failed multiple overhead
18 inspections on level 2 and level 3 partly due to
19 level -- to Watson deficiencies. Provided
20 manpower and recovery schedule to show you the
21 plan to get back on schedule.

22 So this is a notice to cure Watson now?

23 A. Yes.

24 MR. BUNDY: Would move to introduce
25 Exhibit 25 in evidence.

1 MR. TERRY: Your Honor, I object
2 again. In this particular case, the -- you know,
3 you spoke in this item which requires that the
4 deponent provide some evidence that the document
5 is what it says it is. Then the evidence would
6 be to get examples of what those -- that evidence
7 might be.

8 The very first one is -- the most often
9 used is by a witness with knowledge. Mr. Boe has
10 no knowledge.

11 The other things in Rule 901 and 902,
12 signature or handwriting authentication and
13 things of that nature. Frankly, Mr. Boe just
14 doesn't have the knowledge to authenticate any of
15 these documents.

16 THE COURT: I understand that, but
17 it also reads, by way of illustration only and
18 not by way of limitation, so I think they are
19 purported to be what they're purported to be.
20 They're BBC e-mails. I'm going to allow them
21 into evidence. We'll take a break right now.

22 MR. BUNDY: Thank you, Your Honor,
23 and I would move it, so it's in evidence?

24 THE COURT: It's in evidence.

25 (DFT. EXH. 91-25 was received in

1 evidence.)

2 (DFT. EXH. 91-26 was marked for
3 identification.)

4 MR. BUNDY: We will start with 26.

5 THE COURT: Yes.

6 (A recess transpired.)

7 BY MR. BUNDY:

8 Q. All right. Mr. Boe, I believe we were
9 on 26; is that correct?

10 A. Correct.

11 Q. If you would then explain your note 26,
12 which is a -- I think April 5, '17 notation.

13 A. Sorry. The way these jump around --

14 THE COURT: You have to find them
15 sometimes.

16 BY MR. BUNDY:

17 Q. 26.

18 A. April 5th of 2017, BMCC will not be
19 ready on level 5, 15-plus delay to framing
20 inspection. Mr. Starcevic.

21 That's basically the e-mail at the
22 bottom of the first page of item 17 from
23 Mr. Starcevic to Erik Stor and then to several
24 other people including Mr. Stanton, Mr. Dooley,
25 so several different folks.

1 And the title of it is level 5,
2 completion to cure notice. It was brought to our
3 attention that BMCC will not be ready for framing
4 inspection on level 5 until next Wednesday, April
5 12th. This is a 15 plus day delay for the
6 framing inspection on level 5 and must be cured
7 immediately. We need a plan from BMCC by close
8 of business April 7th for completion of level 5
9 and how you intend to make up for lost time on
10 level 6, level 7, level 8.

11 Q. Is this the first notice to cure to
12 BMCC?

13 A. I think so.

14 Q. What was BMCC's response to this cure
15 notice?

16 A. Essentially that they're committed to
17 bring the schedule back, and he's going to bring
18 his general superintendent, Rusty Williams, on
19 site for several weeks to assist the project team
20 and provide additional supervision and six
21 additional plumbers. So he is going to increase
22 manpower.

23 Q. In the response, do you see any denial
24 of the statements made in the cure notice e-mail?

25 A. Not that I remember. I don't think

1 there was anything for that.

2 Q. So he is not denying there's a 15-plus
3 day delay. He just says, this is how we're going
4 to fix it?

5 A. Yes.

6 MR. BUNDY: I move to introduce 26.

7 THE COURT: In evidence.

8 (DFT. EXH. 91-26 was received in
9 evidence.)

10 (DFT. EXH. 91-27 was marked for
11 identification.)

12 BY MR. BUNDY:

13 Q. 27.

14 A. 27 is May 1st, 2017, and it discusses --
15 the quote here -- or the -- on the chart. It's
16 David's executive meeting needs to increase
17 manpower for Precision, and it's from Tony
18 Stoneking. The e-mail is from Mr. Stoneking to
19 Mr. Sandeen at BBC.

20 Well, that's the -- sorry. He says he
21 added number 10, but the original e-mail is from
22 Mr. Stoneking to Mr. Sandeen and it walks through
23 several items for an executive meeting that
24 they're planning on.

25 And item 2 of that is David's executive

1 meeting needs to increase manpower for Precision
2 and Watson.

3 MR. BUNDY: Move to introduce 27.

4 THE COURT: All right. In
5 evidence.

6 (DFT. EXH. 91-27 was received in
7 evidence.)

8 (DFT. EXH. 91-28 was marked for
9 identification.)

10 Q. Let's move on to 28.

11 A. Item 28 is dated 9/19, September 19,
12 2017, and the quote on the chart is, It is
13 obvious that Watson and other trades are
14 overwhelmed by the amount of work to complete.
15 They simply don't have enough manpower to handle
16 the activities at hand. And that's from Ryan
17 Ledford.

18 This e-mail string is really a string of
19 e-mails that -- where Mr. Winovich from Watson
20 Electric says where he is and what -- some
21 problems that he has had. And seems to be
22 appealing to Mr. Stanton that it's not their
23 fault.

24 And the response ultimately from
25 Mr. Ledford, who is project engineer for Balfour

1 Beatty on the site, was, At first the status was
2 accurate, but there might be a couple items that
3 were -- that had been wrapped up. There is a
4 long list. While Kevin does attempt to stay on
5 top of issues, it's obvious that Watson and other
6 trades are overwhelmed by the amount of work to
7 complete. They simply don't have enough manpower
8 to handle the activities at hand.

9 And he follows that up with, As you
10 know, it's a red herring to see that the design
11 issues are holding up work. The design issues
12 are probably less than 10 percent of the list.

13 So there was a list that was attached to
14 this that showed a bunch of items that were
15 deficient, that were behind schedule, et cetera.

16 The bulk of the list contains issues
17 like fire caulking, moving outlets or lights that
18 were not installed per the dimensions of the
19 contract drawings. Missing or covered up
20 devices. There are over 66 issues that we have
21 caught so far just on level 7. Just allow us to
22 get to an overhead inspection.

23 And he adds that, Due to poor quality
24 control, we're in a position where multiple
25 trades must be involved to fix these issues,

1 which disrupts the flow of work.

2 MR. BUNDY: All right. Move to
3 introduce 28.

4 THE COURT: In evidence over
5 objection.

6 (DFT. EXH. 91-28 was received in
7 evidence.)

8 (DFT. EXH. 91-29 was marked for
9 identification.)

10 BY MR. BUNDY:

11 Q. Thank you. 29.

12 A. 29 is October 3rd of 2017, and it says,
13 we currently lack framing completion on every
14 floor of the hotel and need multiple framers.
15 That's Mr. Spano.

16 It's really the first of the e-mails
17 that's on the last page of this document from
18 Mr. Spano. On October 3rd it says, guys, we
19 provided P Walls a contact to Gray Framing that
20 the Marion owner provided us, and we heard they
21 were contacted by P Walls about working on
22 another job, not Marion. We don't know if this
23 is the case, so can you comment on it.

24 We currently lack framing completion on
25 every floor of the hotel and need multiple

1 things, thanks.

2 MR. BUNDY: Move to introduce 29.

3 THE COURT: All right. In
4 evidence.

5 (DFT. EXH. 91-29 was received in
6 evidence.)

7 (DFT. EXH. 91-30 was marked for
8 identification.)

9 BY MR. BUNDY:

10 Q. Mr. Boe, 30?

11 A. 30 says, October 18, 2017, Precision
12 added additional folks at MSH but not enough and
13 have actually lost some of their framers which
14 they need desperately. It's from Mr. Sandeen.
15 It's the first e-mail of that document,
16 Mr. Sandeen to Mr. Pat Dean, and the subject is
17 Marion Square. They have added additional folks,
18 approximately 45, total count approximately 45 at
19 MSH, but not enough and have actually lost some
20 of the framers which they need desperately.

21 Dean is telling me to walk the areas
22 with P Walls and their management so they know
23 what they need. I would be able to give
24 additional specifics later.

25 MR. BUNDY: Move to introduce 30.

1 THE COURT: All right. In
2 evidence.

3 (DFT. EXH. 91-30 was received in
4 evidence.)

5 (DFT. EXH. 91-31 was marked for
6 identification.)

7 BY MR. BUNDY:

8 Q. 31, Mr. Boe.

9 A. 31 says December 15, 2017. It's very
10 clear that Precision Walls needs more framers,
11 hangers and finishers. Mr. Starcevic.

12 This is I think in the first section.
13 Yes. Mr. Starcevic e-mailed 12/15/2017 to
14 Mr. Zinna at Precision Walls with copy to several
15 BMCC -- I'm sorry, Balfour Beatty people.

16 Precision Walls, area of concern. Mike
17 Troy, it's very clear that Precision Walls needs
18 more framers, hangers, and finishers on the
19 project. We have walked this list twice now, and
20 they mostly remain status quo. And now we've
21 already lost two days on hanging paper. If we
22 don't see the appropriate actions taken within
23 the next 48 hours, we will bring in the necessary
24 manpower to get this job finished.

25 MR. BUNDY: Move to introduce 31.

1 THE COURT: All right. In
2 evidence.

3 (DFT. EXH. 91-31 was received in
4 evidence.)

5 (DFT. EXH. 91-32 was marked for
6 identification.)

7 Q. All right. Mr. Boe, 32.

8 A. 32 says January 8th of 2018. Precision,
9 lack of manpower and quality control on site.
10 The schedule continues to slip. Mr. Starcevic.

11 This e-mail string starts with the
12 discussion of the 350 -- between 350 and 400
13 areas where sprinkler heads had to be changed and
14 they had to be replaced. And I think ultimately
15 it leads to, that somebody else is doing that
16 work.

17 Yeah, on the first page of this e-mail
18 -- this is the second page. So it's BBC e-mails
19 01244806. At the bottom it says -- Mr. Zinna
20 says, I'm told that level 5 is doing sprinkler
21 head patching. So they don't -- this isn't --
22 that isn't the work Precision had to do. It was
23 another contractor brought in to do it.

24 And Mr. Starcevic right above that says,
25 between the amount of work that you're struggling

1 to staff already and the exorbitant pricing, we
2 are not asking anyone else to perform this work
3 currently. If you can reasonably price the scope
4 and catch up your contracted work, we can
5 reevaluate.

6 Q. Mr. Boe, do you know whether or not P
7 Walls fixed this work or somebody else fixed it?

8 A. I believe it was level 5, another
9 subcontractor.

10 Q. Okay. All right. And then the last --
11 on page 124485 from Starcevic to Zinna, what is
12 that -- what is he saying here?

13 A. Well, Mr. Zinna responded that they're
14 not having problems with manpower. It was just
15 that the holiday weekends and holiday weeks were
16 immediately predecess -- with predecessors, and
17 so that's why the manpower was down and that they
18 would have a full staff back Monday, January 8,
19 to continue our work.

20 Q. Let me ask you this. In the contract,
21 is there a holiday exception to having to work?

22 A. I don't think so.

23 Q. Go ahead.

24 A. But bottom line usually it's planned,
25 and so in either case, if it's not work, it's not

1 a time extension. So this is just a response
2 that says you don't get extra time for working on
3 and not working on the holidays.

4 Q. That's just up at the top?

5 A. Yes.

6 MR. BUNDY: Move to introduce 32,
7 Your Honor.

8 THE COURT: All right. In
9 evidence.

10 (DFT. EXH. 91-32 was received in
11 evidence.)

12 MR. BUNDY: Thank you, Your Honor.

13 (DFT. EXH. 91-33 was marked for
14 identification.)

15 BY MR. BUNDY:

16 Q. 33, Mr. Boe?

17 A. 33 is January 16, 2018, and it says, it
18 is clear to us that BMCC needs quite a few more
19 people, and that's from Mr. Dale. At the bottom
20 of that first -- there's only one page in this
21 exhibit -- from Mr. Dale, January 16th, to
22 Mr. Robert Weyer from BMCC, copy to several
23 Balfour Beatty people.

24 Just a follow-up that the mixing valve
25 installation is scheduled for this weekend and

1 will be done on Saturday to minimize disruption
2 of activities to other trades. Please take a
3 look -- a minute to look at the areas we need you
4 working in and try to get more manpower.

5 We will be -- I skipped a couple
6 sentences, but we will be continuing at this pace
7 so it's clear to us you need quite a few more
8 people for the next little while.

9 MR. BUNDY: All right. Move to
10 introduce 91-33, Your Honor.

11 THE COURT: All right. In
12 evidence.

13 (DFT. EXH. 91-33 was received in
14 evidence.)

15 (DFT. EXH. 91-34 was marked for
16 identification.)

17 Q. 34, Mr. Boe?

18 A. 34 is January 23rd, 2018. It's about
19 Pasco. Current manpower on site cannot keep up.
20 You continue to hold up the critical path.
21 Mr. Starcevic. On January 23rd. It's at the top
22 of the e-mail string. Mr. Starcevic to Mr. Spano
23 and Michael McGregor from Pasco and several other
24 people from Pasco and Balfour Beatty.

25 And the subject is Pasco needing more

1 manpower. Pasco team, it is apparent that the
2 current manpower on site cannot keep up with the
3 work available. You continue to hold up the
4 critical path so maintaining a four-man crew for
5 40 hours a week is not cutting it.

6 Unfortunately, we're at the point of
7 putting Pasco on default notice. We need to know
8 what you're doing to cure this issue. So this is
9 January of 2018.

10 Q. And in January 2018, what period -- what
11 Doran period are we in?

12 A. This is period 4 of 5.

13 Q. Okay. This is period 4 of 5. And the
14 project manager is saying that the critical path
15 is where?

16 A. He doesn't say what the area is, but he
17 is only saying to -- he's saying to Pasco that
18 their work is on the critical path.

19 Q. So at least that's what the project
20 manager thinks?

21 A. Right.

22 Q. At that time?

23 A. Right.

24 Q. And what was Mr. Doran's opinion in
25 period 4 in his analysis?

1 A. That during this period, the barn doors
2 were on the critical path.

3 Q. The barn doors?

4 A. The doors into the bathroom, the barn
5 doors.

6 Q. Do you see any reference here to barn
7 doors?

8 A. No.

9 MR. BUNDY: Move to introduce 34,
10 Your Honor.

11 THE COURT: All right. In
12 evidence.

13 (DFT. EXH. 91-34 was received in
14 evidence.)

15 (DFT. EXH. 91-35 was marked for
16 identification.)

17 BY MR. BUNDY:

18 Q. 35, Mr. Boe?

19 A. January 24, 2018, BMCC, need more
20 manpower on site. Mr. Starcevic. And it's in
21 the second part of this -- the lower part of this
22 page from Mr. Starcevic to Robert Weyer and to
23 several people from BMCC and Balfour Beatty.

24 Robert, it's unacceptable that we don't
25 have water on level 3. The cleaner now has

1 (inaudible), and you guys are still messing
2 around with water on level 3. I know you
3 discussed this yesterday, but you need more
4 manpower on site.

5 MR. BUNDY: Move to introduce 35,
6 Your Honor.

7 THE COURT: All right. In
8 evidence.

9 (DFT. EXH. 91-35 was received in
10 evidence.)

11 (DFT. EXH. 91-36 was marked for
12 identification.)

13 BY MR. BUNDY:

14 Q. 36, Mr. Boe?

15 A. 36. January 27, 2018, BMCC have limited
16 manpower from Pieniak. So the e-mail is from
17 Shanti Pieniak to Robert Weyer at BMCC.
18 Mr. Pieniak is a Balfour Beatty employee, and
19 it's copied to several other Balfour Beatty
20 employees.

21 It says in the second paragraph,
22 obviously I know you're super busy with all the
23 (inaudible) stuff and have limited manpower.
24 Just trying to give you a heads up. So this was
25 RFI pricing.

1 Get back to the first one. Watson
2 ripped up that wall a decent amount. I don't
3 know where this RFI is with the pricing, but
4 Watson ripped up that wall a decent amount, and
5 the painter hasn't gotten up there yet. So it
6 would be a good time to get GA up there to move
7 this stuff and get this finished.

8 But this really refers to a change.

9 MR. BUNDY: Move to introduce 36,
10 Your Honor.

11 THE COURT: All right. In
12 evidence.

13 (DFT. EXH. 91-36 was received in
14 evidence.)

15 (DFT. EXH. 91-37 was marked for
16 identification.)

17 BY MR. BUNDY:

18 Q. 37, Mr. Boe?

19 A. 37. February 17, 2018, Pasco refuses to
20 work overtime. You continue to hold up other
21 trades, says Mr. Starcevic.

22 MR. BUNDY: Move to introduce 37.

23 THE COURT: In evidence.

24 (DFT. EXH. 91-37 was received in
25 evidence.)

1 (DFT. EXH. 91-38 was marked for
2 identification.)

3 BY MR. BUNDY:

4 Q. 38, Mr. Boe?

5 A. Sorry. 3/16/18. Stop holding up BBC
6 and its subcontractors says Mr. Simonton. So
7 this is -- this is the second e-mail on this page
8 from Mr. David Simonton to Mr. Michael McGregor
9 from Pasco and copied to several Pasco and
10 Balfour Beatty people.

11 Michael, two months and still waiting on
12 PASCO's response to working adequate hours, days,
13 crews, and to stay focused on this project and to
14 stop holding up BBC and subcontractors in
15 completing this project and ultimate turnover to
16 the owner. I would like to know your off-and-on
17 approach to managing and manning this project
18 with all of your QA/QC issues and incomplete work
19 in place. Please enlighten myself and my team.

20 MR. BUNDY: Move to introduce 38,
21 Your Honor.

22 THE COURT: In evidence.

23 MR. BUNDY: Thank you.

24 (DFT. EXH. 91-38 was received in
25 evidence.)

1 (DFT. EXH. 91-39 was marked for
2 identification.)

3 BY MR. BUNDY:

4 Q. 39, Mr. Boe?

5 A. 39 is April 6th of 2018. When is Pasco
6 going to step up and put forth the necessary
7 manpower to maintain the schedule? This is
8 Mr. Starcevic.

9 At the bottom of that first page,
10 Mr. Starcevic e-mailed to Mr. McGregor from
11 Pasco, a copy of this to Mr. Spano and Mr. Dale.
12 Pasco is once again not working on Friday and
13 Saturday.

14 This continues to be a problem and major
15 concern and a commitment you made to have
16 pressure on the building this week. When is
17 Pasco going to step up and put forward the
18 necessary manpower to maintain the schedule?

19 MR. BUNDY: Move to introduce 39.

20 THE COURT: All right, it is.

21 (DFT. EXH. 91-39 was received in
22 evidence.)

23 MR. BUNDY: Mr. Boe, answer any
24 questions these gentlemen may have for you.

25 THE COURT: All right.

1 CROSS-EXAMINATION

2 BY MR. HILDEBRAND:

3 Q. Hello, Mr. Boe. We met virtually. I
4 took your deposition. I'm Tom Hildebrand. Of
5 course, I represent Balfour Beatty in this
6 matter, and I've got some questions for you in
7 follow-up.

8 Now, the first question I have is that
9 you did not do -- I think it was one of the first
10 questions that Mr. Bundy asked you in your direct
11 examination. You were not hired to do a delay
12 analysis in this matter, correct?

13 A. That's true.

14 Q. Right. And you did not do a critical
15 path analysis in this matter, correct?

16 A. I didn't do an independent critical path
17 analysis, that's true.

18 Q. Right, right. And this really gets down
19 to the nub of scheduling and delay claims and is
20 that -- when you have a job that might go on for
21 a long period of time, there might be a lot of
22 delays that occur, but unless they are on the
23 critical path and unless they affect the critical
24 path, then they are really irrelevant as far as
25 the final delay analysis is concerned, correct?

1 A. You're pretty -- that's pretty much an
2 accurate statement. It's on or near, very near
3 the critical path but yes.

4 Q. Right. And, in fact, the judge was
5 explaining this at some length to Mr. Doran with
6 the Thanksgiving dinner example. Have you ever
7 heard that one?

8 A. I read his testimony.

9 Q. Have you ever heard that one before?

10 A. Yes.

11 Q. Steve Huyghe claims to be the author --
12 the inventor of that. Do you know Mr. Huyghe?

13 A. Yes.

14 Q. And do you know if that's correct or
15 not?

16 A. I have no idea. One of my partners used
17 it at some point to a bad effect.

18 Q. All right. I'm with you. Did
19 Mr. Doran's explanation to the Judge and his use
20 of that, did that make sense to you? I know it's
21 simplistic but trying to explain, did that really
22 kind of hit the nub of what CPM analysis is in a
23 very basic way?

24 A. I don't like it as an example, but it
25 hits a good part of some of the points, but it

1 doesn't do it all and it doesn't look at like the
2 complexity of it. It doesn't look at what's the
3 real cause of how you figure it out.

4 Q. No. I'm talking about the Thanksgiving
5 turkey example.

6 A. No. I understand. It doesn't get for
7 me to the level -- It's just -- I guess it's
8 oversimplistic for me.

9 Q. Right. But what it really boils down to
10 is that I, as a layman, can look at letters in
11 the file and say, oh, gosh, well, I see that
12 that's a delay if somebody is -- my clients
13 putting down more notice of delay of a
14 subcontractor and, therefore, it's my opinion
15 that that delays the job and I can come in here
16 and try to say, okay, there's the delay and try
17 to convince the Judge that proves there was a
18 delay and the critical path was delayed.

19 But that's really irrelevant. That's
20 what you as an expert -- and you've spent 30
21 years now doing this -- is you try to look
22 through -- look, it might be a lot of smoking
23 guns. What this client says, what that client
24 says really doesn't matter.

25 Let's look at the documents, and then

1 I've got to go through all of these facts and
2 distill them to a critical path analysis so that
3 I can then tell the Judge, okay, is this on a
4 critical path or not? That's what it really
5 boils down to, isn't it?

6 A. No.

7 Q. What it --

8 A. It does not boil down to that for the
9 person that has the -- that has the burden. You
10 know, Mr. Doran has -- BBC has the burden to do
11 that analysis and to show it.

12 But they have to also take into account
13 all of the things that happened on the project,
14 not just pick out, you know, a long path that
15 looks good but doesn't really reflect what
16 happened on the project.

17 Q. Well, I understand that you disagree
18 with Mr. Doran's testimony. But as far as
19 individual examples -- okay. There might have
20 been a delay here or a delay here -- because you
21 did not do a critical path delay analysis, at
22 best we can say those are things that you suspect
23 might have affected the critical path?

24 MR. BUNDY: Objection. Your Honor,
25 I realize this is cross-examination. I believe

1 the rules require one question at a time, and I'm
2 hearing five to six questions at a time here, so
3 would you just -- my objection is one question at
4 a time, please.

5 THE COURT: So noted.

6 BY MR. HILDEBRAND:

7 Q. Well, the issue here is whether the
8 particular examples that you have brought up,
9 whether they actually impacted the critical path,
10 correct?

11 A. Well, ultimately, the question would be
12 what was the critical path?

13 Q. Right. And these examples would be --
14 might have some relevance if you had done a
15 critical path analysis as to what he thought was
16 on the critical path and whether the -- these
17 examples delayed it, correct?

18 A. But my look at these issues -- and I
19 won't say that all of those issues on that list
20 were critical or were critical according to the
21 contemporaneous schedules, but that would be my
22 comparison. Compared to the contemporaneous
23 schedules, how close to critical might they be?

24 Q. Right.

25 A. That's how I would do it, and that's how

1 I have done it. So when I know that masonry was
2 on the critical path of the contemporaneous
3 schedule, you're right, I haven't done a detailed
4 critical path analysis from beginning to end to
5 figure out what was critical at one point in
6 time.

7 But I can look at the contemporaneous
8 schedule and look at the documents that are
9 occurring in the time period.

10 Q. Okay. Fair enough.

11 A. They're at least close to what they
12 thought was critical path.

13 Q. They're close, and they're things that
14 you suspect. Again, if you had done a critical
15 path analysis and a delay analysis in this case,
16 then the items that you articulated may have
17 impacted the critical path. But we don't know
18 that because at this point they're things simply
19 that you suspect might or might not have, but you
20 can't testify that any of them actually did,
21 correct?

22 A. Or things that Mr. Doran didn't take
23 into account and --

24 Q. Well, you --

25 MR. BUNDY: Objection. He's not

1 letting the witness answer the question.

2 THE COURT: Go ahead, and let him
3 answer.

4 BY MR. HILDEBRAND:

5 Q. I'm sorry. Go ahead, Mr. Boe.

6 A. I don't know what my answer was.

7 Q. Yeah -- and I was about to follow up
8 with you. You said you don't know that some of
9 the things that you brought up were things that
10 Mr. Doran did not take into account ever. Did
11 you ever -- do you know if Mr. Doran was deposed
12 in this case?

13 A. I don't. I don't think he was.

14 Q. Do you know why he wasn't?

15 MR. BUNDY: Objection, relevance.
16 How can that possibly be relevant in this case?

17 THE COURT: I will sustain that.

18 BY MR. HILDEBRAND:

19 Q. Well, did you ask --

20 MR. HILDEBRAND: I think it might
21 be, Your Honor. I'm just asking if he had --

22 THE COURT: You're on cross. Go
23 ahead. Go forward.

24 BY MR. HILDEBRAND:

25 Q. Just very simply, if there were

1 questions that you had of Mr. Doran, then they
2 could have been propounded to him in a deposition
3 or otherwise, but that wasn't done, was it?

4 A. No. That's not really part of my job.

5 Q. Okay. Were you here during Mr. Doran's
6 testimony?

7 A. No.

8 Q. Were you here during any of the
9 testimony of the other Balfour witnesses?

10 A. No.

11 Q. And now, as far as the -- I understand
12 that you believe that a time-impact analysis,
13 which is what you would have done had you been --
14 I would assume, is that correct, you would have
15 done a time-impact analysis if you had been asked
16 to do a delay analysis on this project?

17 A. Time-impact analysis is kind of a
18 confusing term because there's a forensic use of
19 it and then there's a -- during the project type
20 use, so I don't use that term anymore.

21 Q. What do you use?

22 A. I use contemporaneous period analysis or
23 windows approach, and I try not to label it too
24 hard. I go according to what amounts to a
25 contemporaneous period analysis where you're

1 looking at the schedule.

2 So looking at the schedule as time goes
3 on and observing, figuring out if you have to
4 make changes and then observing what caused
5 delay, what was delayed in each of these little
6 slices month to month.

7 Q. Okay. Well, I understand that you
8 believe that a contemporaneous analysis or --
9 would you mind if I use time-impact analysis?

10 A. That's what we used to call it. I can't
11 argue too much.

12 Q. I will probably use your terminology,
13 but I understand that that's what you prefer.
14 That's what you do and that's how you like to
15 give your testimony.

16 And you told the Judge that under some
17 of the standards that have been published, that
18 that is -- that time-impact analysis is one of
19 the nine recognized -- eight which you think --
20 one of the nine you said was just -- is now
21 pretty well --

22 MR. BUNDY: Your Honor, where is
23 the question? Pardon me. Where is the question
24 here? I mean, this is a little speech. Can we
25 just get questions?

1 THE COURT: Overruled. Go ahead.

2 BY MR. HILDEBRAND:

3 Q. My simple question is, you like a
4 time-impact analysis. You testified that
5 Mr. Doran uses an as planned, as built analysis,
6 and that is one of the eight recognized methods,
7 as I understood your testimony -- the way that
8 Mr. Doran did his analysis is one of the eight
9 that is recognized, correct?

10 A. It's -- I don't know about the term
11 "recognized". It's one of the eight that's in
12 that standard, so it's not rejected by that
13 standard by any means because nothing is
14 rejected. So I guess "recognize" is okay.

15 Q. Well, when I reviewed the document that
16 you introduced yesterday, I didn't see a listing
17 anywhere in there where it says this is a ranking
18 of the committee that drafted this document, that
19 this is the one that is best and the most
20 accurate, and this is the most used.

21 That was simply your opinion as to what
22 you thought was the -- when you gave that ranking
23 yesterday, that was simply your opinion. It's
24 not in the document, is it?

25 A. It's not in the document. There's been

1 a lot of things written about it and a lot of
2 papers, a lot of books, et cetera, that talk to
3 that subject. There's always been a few
4 practitioners or some practitioners that want to
5 espouse as planned, as built, or even impact the
6 as planned.

7 So there's always been a few people out
8 there that go after some of the other items. But
9 I think it's pretty much recognized in the
10 industry. The more detailed it looks, are of
11 more value.

12 Q. Okay. I'm handing you a document that's
13 called capital project management. Do you
14 recognize that?

15 A. Well, that's just the header from our
16 website, yes.

17 Q. Well, I'm sorry. It identifies
18 concurrent delay.

19 A. Yes.

20 Q. And in fact, I think this was noted on
21 your CV as one of the publications that you've
22 done; is that correct?

23 A. Yep.

24 MR. HILDEBRAND: I would like to
25 introduce this into evidence, Your Honor.

1 THE COURT: All right. I'm trying
2 to give you a number. We had -- we were working
3 in the 400s, but we had gotten to 332 previously.

4 MR. HILDEBRAND: 342 was our last
5 number.

6 THE COURT: 342?

7 MR. HILDEBRAND: Was our last
8 number.

9 THE COURT: So this should be 343
10 perhaps.

11 MR. HILDEBRAND: Yeah.

12 MR. BUNDY: Objection. It's
13 hearsay in all the matters of -- he can certainly
14 ask the witness questions about the document, but
15 it's hearsay.

16 THE COURT: You can mark it for ID
17 purposes.

18 MR. HILDEBRAND: Yes, sir, but I --
19 okay. I will ask him more background.

20 (PLF. EXH. 343 was marked for
21 identification.)

22 BY MR. HILDEBRAND:

23 Q. You actually drafted this document,
24 didn't you?

25 A. I wrote it.

1 Q. Right. Okay.

2 MR. HILDEBRAND: So I would like to
3 introduce this into evidence, Your Honor.

4 THE COURT: He is the author?

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: I will allow it. It
7 will come in.

8 (PLF. EXH. 343 was received in
9 evidence.)

10 BY MR. HILDEBRAND:

11 Q. So this is a document that you authored
12 identifying concurrent delay. Let's work through
13 this because I have a couple questions.

14 What makes delay concurrent? In the
15 second paragraph. Simply stated, concurrent
16 delay occurs when a contractor and an owner have
17 both caused independent critical path delays,
18 delays that affect the completion date of a
19 project during the same approximate time period.

20 So current delay is when you have an
21 owner-caused delay and a contractor-caused delay
22 and they're both on a critical path; is that
23 right?

24 A. Right. They both impact end date.
25 There's more to it than that, but yes.

1 Q. I'm going to work through it step by
2 step. And then this next paragraph is really
3 important I think to this case.

4 The most important question to ask in
5 determining whether delays are concurrent is
6 this: Are the individual impacts critical to
7 completion? Often hundreds of delays -- hundreds
8 of delays occur on a project that absorb float
9 within the schedule but do not ultimately
10 postpone the completion date.

11 Is that your writing?

12 A. Yeah.

13 Q. And based on your experience on a
14 complicated project like this, it's not unusual
15 to have hundreds of delays that occur that are
16 not on the critical path, agreed?

17 A. Of course.

18 Q. Only delays that extend completion can
19 be considered concurrent; is that correct?

20 A. Essentially, yes. It's fleshed out
21 further as we go along.

22 Q. So in our Thanksgiving dinner example,
23 if you have a start date -- a start time, finish
24 time with the turkey, when you do the -- cook the
25 green beans, if you're 10 minutes late doing the

1 green beans, as long as it doesn't run past the
2 end time of the turkey, then that really doesn't
3 matter, correct?

4 A. If there's float available to the
5 activities. If there's float available to
6 activities and they're just absorbing float and
7 not impacting the end date, then that's true.

8 Q. All right. Let's turn to page 3 of your
9 article. All right. So on page 3 -- I'm going
10 to try to cut this a little bit short so we can
11 kind of cut to the nub of it. There is a heading
12 called independent impacts. Do you see that,
13 third paragraph down?

14 A. Yes.

15 Q. Okay. So before this, you had gone
16 through an example to show where a design impact
17 affected the critical path, and you talked about
18 that a little bit ago. I'm going to try to cut
19 this a little bit short.

20 So your statement is -- well, right
21 before it says impact -- independent impacts,
22 there is the sentence, thus, the demolition
23 impact did not cause critical path delays to the
24 completion of the project. It merely observed
25 the float.

1 That's what you told us a minute ago,
2 correct?

3 A. Absorbed, yes.

4 Q. Here's the important part. Independent
5 impacts. For delay to be concurrent, the impacts
6 must also be independent; that is, the impacts
7 created by one party cannot be caused directly or
8 indirectly by the other party.

9 So that's where we really get to with a
10 root cause analysis in delay claims, is it might
11 look at first blush like one party might be
12 delaying the project. And if you look at what
13 they're doing, you might say, gosh, they're
14 behind schedule.

15 But what you're getting to here is a
16 root cause analysis. Just because you can't look
17 at something just in a minute snapshot, you have
18 to look at the whole project and do a full
19 project CPM analysis like you told me about to
20 determine whether this isolated delay was
21 actually independent or whether it might have
22 been caused by something else. Is that a fair
23 statement?

24 A. No. You're assuming that I have some
25 kind of responsibility to do a delay analysis.

1 Q. No, no, no.

2 A. I don't have a responsibility.

3 Q. I understand that.

4 A. The whole discussion about root cause is
5 something that talks to cause and effect. What
6 was the cause of the specific delay? And, you
7 know, my -- it wasn't my burden on this job to
8 determine that.

9 Q. I understand what you did and didn't do,
10 and I'm just asking you questions about your
11 paper and your opinions of what you published.

12 So what you recognize is that because
13 you might have an isolated delay -- and it may
14 even be on the critical path -- that delay may
15 have been caused -- the root cause of that delay
16 may have been some previous design error or some
17 other issue that would cause that delay. Is that
18 a fair statement?

19 A. I think that's a fair statement. Let me
20 just give you a quick example.

21 Q. I don't need an example. If you can
22 just answer the question.

23 MR. BUNDY: He's entitled to
24 explain his answer.

25 THE COURT: I'm going to allow him

1 to explain his answer. If you want to, go ahead.

2 THE WITNESS: I just try to think
3 in terms of, there could be two sequential
4 problems. So if you have one problem that leads
5 to another problem -- my example is the elevator
6 problems on this project. So there's elevator
7 problems that occur that were Otis Elevator being
8 late, being delayed, being whatever, so the work
9 didn't get done.

10 When the owner made a change later, that
11 doesn't make the whole delay -- just what you
12 said, it doesn't make the whole delay the owner's
13 fault. It makes that piece of the delay -- if
14 there is a delay, it makes that piece of the
15 delay.

16 So, yeah, it doesn't say the owner's
17 delay caused all of this. It says the owner's
18 delay caused part of it. So it wasn't
19 independent.

20 BY MR. HILDEBRAND:

21 Q. I gotcha. Okay. And fair enough. I
22 mean, it works both ways.

23 There could be -- regardless of whether
24 the delay is a construction delay or a design
25 problem for us, what you have to look at is what

1 is the root cause, what actually caused this
2 independent delay, and it may be it was caused by
3 some predecessor act that is not readily apparent
4 by just looking at the independent delay; is that
5 a fair statement?

6 A. I'm still having some trouble with it,
7 and part of it is my reaction to the root cause
8 language because it's not really used in -- you
9 know, generally speaking, I don't think it's used
10 in our part of the industry. I think in terms of
11 a forensic structure analysis, what's the root
12 cause of this structural failure? So I just try
13 to -- I try to --

14 Q. That's what you would do in a delay
15 analysis?

16 A. Right. I will try to get past that. So
17 if I had the duty -- if I had the responsibility
18 to figure out what exactly were the concurrent
19 delays, I would have to figure out what was
20 critical first. So what's critical?

21 And then, yes, you have to say how was
22 that impacted, was it impacted, and is it
23 independent? So how was it impacted and was it
24 independent? And that's really my chief
25 complaint with Mr. Doran's analysis.

1 Q. Let's turn to the next paragraph in the
2 second sentence where it says, in actuality.

3 A. Where is this? I'm sorry.

4 Q. The next paragraph down, the second
5 sentence where it says, in actuality.

6 A. It's inside that second sentence -- it's
7 in the same paragraph, under that --

8 Q. Yes, sir. All the way down to the
9 bottom. Okay.

10 A. Sorry. There it is. I'm a little slow.

11 Q. Yes, sir. It's a bottom paragraph where
12 it says, in actuality, all the way at the bottom.

13 A. Do you want me to read it?

14 Q. No. In actuality, the apparent delay to
15 the demolition work was the result of the
16 redesign of the mechanical system. The delay
17 would not have occurred if there were no
18 redesign.

19 When the contractor became aware of the
20 redesign delay, it was not required to strictly
21 adhere to the schedule when it knew that delay
22 had occurred. A contractor is not required to
23 hurry up and wait but can reallocate its
24 resources to take advantage of other delays; is
25 that true?

1 A. Well, that's my paper. It was actually
2 a case that I worked on with the Department of
3 Justice where the contracting officer or the
4 contract personnel for the owner essentially said
5 because a contractor didn't do -- didn't perform
6 their work in the ceiling, that they were
7 supposed to do previous -- and before the
8 mechanical system could be installed -- the
9 government rep wanted to say that that delay was
10 concurrent, and I said that's not concurrent.
11 You made a change six months ago so that
12 contractor doesn't have to do that.

13 So in that case I just told my client,
14 We have to figure out how to pay.

15 Q. Okay. Fair enough.

16 The manpower analysis -- or not
17 analysis. You did not do a manpower analysis in
18 this matter to determine what impacts, if any, to
19 the critical path that a -- that manpower issues
20 created; is that a fair statement?

21 A. I didn't do a delay analysis concerning
22 manpower. It's a hard thing to do.

23 Q. Right. So what you noted again in some
24 of your examples was there were some manpower
25 shortages, but -- or there were some manpower

1 criticisms from the general contractor to the
2 subcontractors, but whether this affected the
3 critical path, you don't know, correct?

4 A. Except that they said on a fairly
5 regular basis that -- the Balfour Beatty
6 personnel said or they thought that this was a
7 critical or I --

8 Q. Well --

9 MR. BUNDY: Let him finish.

10 A. Or I noted that it was -- it was near
11 the critical -- on or near the critical path of
12 the contemporaneous schedule.

13 Q. Well, when you do -- when you are called
14 in on a project to do a critical path analysis,
15 do you -- you do your own analysis. You don't
16 just ask the client, you tell me what the
17 critical path is and take their word for it. You
18 do your own analysis, don't you?

19 A. Absolutely.

20 Q. And that's required, you think, and
21 appropriate for a professional to do, correct?

22 A. Yeah, but that doesn't mean I ignore
23 contemporaneous documents.

24 Q. I understand.

25 A. I look at all the evidence that I can

1 find as to what's critical, and that might be
2 included in what's critical. And I might end up
3 saying, you know what? That isn't what was
4 critical. The schedule shows there was something
5 else that was critical, but I don't ignore it in
6 any case.

7 Q. Let's turn to -- you did a report in
8 this matter. And this was a rebuttal to Mark
9 Doran's report. And on -- you can pull that up.
10 It's Exhibit B, and I would like to turn to page
11 5, please. And at the very last paragraph at the
12 bottom there, the first sentence of that last
13 paragraph. This is in your rebuttal report?

14 A. It is.

15 Q. Okay. There can be no argument that the
16 owner made significant changes to the project or
17 that some of those changes would impact the
18 contract completion date. Is that your writing?

19 A. Yes.

20 Q. Okay. But you did not do the delay
21 analysis to determine how much of the delays on
22 this project were caused by owner redesigns,
23 correct?

24 A. No, I didn't. Again, this is a duty
25 question. It's a question --

1 MR. BUNDY: I believe the rule
2 requires that if the lawyer is going to ask him
3 to read part of the document, the witness can
4 read the rest of it. Now, if I object -- I would
5 suggest that the client be -- the witness be
6 entitled to read the rest of his statement there
7 because he stopped.

8 MR. HILDEBRAND: Your Honor, he can
9 certainly -- if wants to do redirect and have him
10 read that out, I'll -- I don't know how much he
11 wants to read or whatever, but he certainly can
12 do it on redirect.

13 THE COURT: I will allow that or if
14 he has any explanation he wants to give, he's
15 entitled to do that.

16 THE WITNESS: It just says what I
17 just said, I think. I didn't believe that I had
18 the duty or was required -- it was required of
19 BBC to create that delay analysis.

20 BY MR. HILDEBRAND:

21 Q. Right. And I understand you're critical
22 of Mr. Doran's report, and you have a lot of
23 negativity in there, but I'm just reading one
24 point, this one point, that you did acknowledge
25 that there were owner delays that -- significant

1 owner design delays that impacted the job.

2 A. That isn't what I said. I said
3 significant changes to the project, and some of
4 those changes would have impacted the contract.

5 Q. I'm sorry. I didn't mean to misstate.
6 Significant changes. All right. At the -- are
7 you ever called in on a project to do an analysis
8 after the project has been completed?

9 A. Often.

10 Q. It's not unusual?

11 A. Not unusual.

12 Q. Okay. And are you sometimes called in
13 to do -- to be a consultant or an expert right
14 when the claim is -- the project is finished, but
15 it's right when the claim is beginning?

16 A. Yes.

17 Q. Okay. So when Mr. Bundy went through
18 the claim documents yesterday and asked you your
19 opinions on those, did you understand that to
20 be -- an assertion by the contract that he was
21 making a claim?

22 But did you understand, based on your
23 experience and what normally happens in a delay
24 claim, that that would be the starting point and
25 then experts would come in like yourself,

1 Mr. Doran, and witnesses would be deposed and
2 that the claim would be developed through
3 litigation and that ultimately somebody like
4 Judge Scarborough would decide the issues as
5 they're developed during the litigation?

6 A. But that's the thing. It doesn't have
7 to be that way. It could be a developer claim
8 that makes sense and -- like the claim that I was
9 talking about with the mechanical contractor
10 where they made the claim.

11 They did have one person that held them
12 up to get into a litigation, but they didn't even
13 have to have a report before -- I could read that
14 claim and say, the government is wrong and the
15 contractor is right and we should settle this.

16 But there wasn't enough information
17 there for us to do that. And that would have
18 been the right path. That would have been a
19 great path to work on. It just wasn't ready. It
20 wasn't done.

21 Q. Okay. Maybe that's the best -- the
22 ideal situation, but it's not unusual in your
23 experience, is it, Mr. Boe, that when the project
24 has ended that the claim needs to be developed at
25 this point through expert witnesses and discovery

1 in order to come to some resolution?

2 MR. BUNDY: Objection, relevance.

3 The contract provides what's required in the
4 claim -- what should be in the claim, and the
5 claim should be provided -- what should the --
6 whether this condition preceded or not. What
7 Mr. Boe's experience is completely irrelevant.
8 Thank you, Your Honor.

9 MR. HILDEBRAND: Well, Your Honor,
10 Mr. Bundy was asking about custom and experience,
11 and he asked Mr. Boe the same questions.

12 THE COURT: Objection noted.
13 Overruled. Go ahead. Do you want to restate the
14 question?

15 MR. HILDEBRAND: Yes.

16 BY MR. HILDEBRAND:

17 Q. So it's not unusual -- it might be ideal
18 that at the end of the project if the person
19 making the claim has everything perfect, every I
20 dotted and every T crossed and everything is
21 right there and both parties can come to an
22 agreement on a resolution, that might be the
23 perfect resolution.

24 But it's not unusual in the industry and
25 based on your experience that further discovery

1 and further analysis by experts is necessary
2 before a resolution can be attained; is that a
3 fair statement?

4 A. I mean, of course that's true. Of
5 course it's true that they -- that these cases do
6 come that way. But there are not very many
7 projects or claims that I see, you know, usually
8 on either side where there isn't a delay
9 analyses. There isn't something that says here's
10 what was critical on the project at least.

11 Q. Let's talk about the original schedule.
12 Now, the original schedule was based on a project
13 that was referenced in the GMP documents. Do you
14 understand that?

15 A. Yes.

16 Q. All right. So do you have an opinion
17 here today as to whether -- if those GMP
18 documents had not changed and assuming that there
19 were no errors or omissions in the drawings,
20 whether that original schedule would have worked?

21 A. Well, the original schedule wasn't going
22 to work.

23 Q. The project could not be completed in
24 the 28 months. That's your opinion?

25 A. No. No, no, no. That schedule couldn't

1 work.

2 Q. Okay.

3 A. I'm not saying the project couldn't be
4 completed in 28 months. I don't know. That
5 would be speculation. The way the schedule was
6 put together had a built-in delay that Balfour
7 didn't know about at the time. They missed
8 that -- taking out the tower crane, et cetera.

9 Q. Okay. Good point. So is it all that
10 unusual to have a schedule that is not -- that
11 has errors or omissions when it's done and that
12 subsequent changes have to be made by a
13 contractor in order to finish the project on
14 time?

15 A. No schedule is perfect, but to have a
16 four-month bust in the schedule is pretty
17 unusual. I don't see that very often.

18 Q. Well, it's only -- to say that it's four
19 months -- I probably said that the schedule
20 showed the second floor work being started in
21 August and that -- the crane being removed in
22 November.

23 A. Right. But there's a month worth of
24 work between -- not the crane being removed, but
25 the pool being set. The pool was set, but then

1 there's a month.

2 There's 28 days worth of work that was
3 being put into day 19, and so it's not a month
4 before. A month worth of work that had to take
5 place between then and when you could actually
6 start the work again on the second floor.

7 Q. A month worth of work on the second
8 floor?

9 A. No, no. A month's worth of work taking
10 out crane, doing the infill work, making sure
11 that it was watertight so that you could start
12 that ceiling work on the site.

13 Q. Okay. What we don't know and what would
14 be speculation on your part at this point is we
15 don't know, one -- recognizing or assuming for
16 argument that your assessment of the schedule is
17 correct and it did not -- the original schedule
18 by Balfour was correct -- that was a terrible
19 question. I will start over.

20 Let's assume that what you said was
21 correct, that the original schedule by Balfour
22 did not show having the crane removed and that
23 would have -- without any changes, that was going
24 to cause a delay to the schedule and the job.
25 Okay?

1 A. Yes, sir.

2 Q. All right. You don't know when Balfour
3 would have recognized that issue, correct?

4 A. I only know when we included it in the
5 schedule. So I know when they added that string
6 of activities to the schedule, and that's 19
7 months in the project.

8 Q. Right, but --

9 A. I'm sure they recognized it sometime
10 before and had to develop what that logic was.

11 Q. What I'm getting at -- and maybe I'm
12 going about this wrong, being a little too
13 verbose when I can simply -- sometimes issues in
14 the schedule are -- there is a problem. The
15 contractor recognizes it, and then the contractor
16 comes up with a work-around so that he could
17 still finish the job on time, correct?

18 A. Fixes it by accelerating something
19 downstream or making some kind of change.

20 Q. Right.

21 A. And so if it was brought up right at the
22 baseline, that would be one thing, but what we've
23 got here is blaming the delay. And including
24 that piece of the delay is just not right. You
25 just can't -- that part of it is clearly not the

1 owner's fault. It doesn't have anything to do
2 with the -- any delay to the structure that
3 occurred.

4 Q. But what impacts, if any, that the --
5 how Balfour might have done a work-around for the
6 crane issue or the pool issue, you just don't
7 know in this case and -- correct?

8 MR. BUNDY: Your Honor, he is
9 asking the witness to speculate. I don't --

10 MR. HILDEBRAND: I'm just asking
11 him to admit that it would be speculation.

12 BY MR. HILDEBRAND:

13 Q. You just don't know what Balfour might
14 have done when they noticed that issue to try to
15 mitigate, correct?

16 A. All I know is that the schedule didn't
17 reflect a four-month collapse of anything out in
18 the future work when they did recognize it. What
19 they did see is that this work has to be done,
20 and we have to connect the dots.

21 And now Mr. Doran says that's the
22 critical path and all of it is the owner's fault.
23 That's not right.

24 Q. Right. Well, the original schedule in
25 this case contemplated a hotel -- again, it was

1 reflected in the GMP.

2 A. Yes.

3 Q. So what was actually built after all of
4 the changes, there's no way that that original
5 schedule could have been followed to have
6 constructed the hotel as it was ultimately
7 constructed because there were a lot of changes,
8 agreed?

9 A. I don't agree. I mean, I know there was
10 a lot of changes, but the way you do delay
11 analysis is you look at what those schedule
12 changes are. You can't just say, well, there
13 wasn't any way -- the baseline, that goes away
14 because we have changes.

15 Q. I'm not saying that goes away. I'm just
16 saying that that baseline schedule, you couldn't
17 have -- it's an impossibility for it to have been
18 implemented as it was drafted because there was
19 so many changes.

20 A. How about this? Changes perhaps almost
21 certainly impacted the schedule, and so because
22 of the changes, you wouldn't have been exactly
23 that way. You know, that baseline schedule
24 wouldn't have been exactly that way.

25 Certainly changes were made later in the

1 completion date of that schedule, but there's
2 always -- there's always an argument that changes
3 are made later because the project is late.

4 You know, you don't make changes to the
5 kitchen -- and this is not an example from this
6 project. You don't make changes to the kitchen
7 for an electrical outlet until you know where
8 exactly -- what piece of equipment is going in
9 and where exactly the plug needs to be.

10 So if the kitchen is built a year late
11 because of delays for some other reason -- you
12 made a change out here past the completion date,
13 then it's not necessarily something that gets you
14 delayed beyond the completion date, and that's
15 just an example.

16 Q. Okay. Fair enough. And did you do an
17 analysis on the second-floor ceiling and all
18 ballroom ceiling changes and the fact that
19 columns were removed? Did you do any analysis to
20 determine what the delays to the critical path
21 were because of those design changes?

22 A. My review of the contemporaneous
23 schedule tells me that that wasn't critical path.
24 So I mean, just looking at the contemporaneous
25 schedules, there were 10 weeks of float at the

1 beginning of that path and 13 weeks at the end,
2 which means that during that entire time, there
3 was a bunch of float.

4 So any really detailed look at that
5 would have been -- would have told me that was
6 absorbing float during that entire time. There
7 was delay during that time, but I don't see that
8 that was -- could be the cause.

9 Q. Have you had --

10 A. The answer to your question is, no, I
11 haven't done that analysis.

12 Q. Okay. Thank you.

13 MR. HILDEBRAND: If you will give
14 me just a second, Your Honor.

15 THE COURT: Okay.

16 MR. HILDEBRAND: May I have just a
17 couple minutes, Your Honor?

18 THE COURT: Sure.

19 MR. BUNDY: Do you want to take a
20 break, Judge?

21 THE COURT: Yeah. Do you want to
22 take five minutes?

23 MR. BUNDY: That would be great for
24 five, yes, sir.

25 THE COURT: It's almost 12:30. Go

1 ahead and y'all figure out where we can finish it
2 up or let me know.

3 (A recess transpired.)

4 MR. HILDEBRAND: I do have some
5 additional questions that might take just a
6 little bit so it might be a good time to break
7 for lunch.

8 THE COURT: Okay. Let's go ahead
9 and break. It's about 12:30. Let's plan to come
10 back at 2 o'clock. Thank you.

11 (A recess transpired.)

12 THE COURT: All right.

13 Hi, Mr. Hildebrand.

14 MR. HILDEBRAND: Hi, sir.

15 THE COURT: Still on your case.

16 CROSS-EXAMINATION

17 BY MR. HILDEBRAND:

18 Q. All right. Mr. Boe, I don't have a
19 whole lot of questions, but I do have some. You
20 talked about there were a number of questions by
21 Mr. Bundy regarding the claim that was made at
22 the end of the project. Do you remember that?

23 A. Yes.

24 Q. Did you review the claim that was made
25 by Balfour regarding the sixth floor delays?

1 A. I did.

2 Q. Was that properly documented in your
3 view?

4 A. I would say that that was much closer to
5 properly documented, but there were schedules
6 involved, and there were more in terms of --
7 well, because it was a very tight window, it was
8 a time frame that they were recognizing between a
9 short period, they could see perhaps better than
10 looking at a huge, broad area.

11 Q. Okay. Did the architect consider
12 that -- to your knowledge, that claim to have
13 been appropriately documented for them to reach a
14 decision?

15 A. I think they recommended a number.

16 Q. Do you know if that was paid?

17 A. I don't think it was. I don't think
18 there was agreement for the change order.

19 Q. Okay. Now, for you to have done a full
20 start to finish detail delay analysis on those,
21 which you told us you haven't done, can you tell
22 the Judge approximately how many hours or what
23 sort of effort that would have encompassed?

24 A. I think I discussed it in my deposition
25 as being an effort of about \$200,000 to \$250,000.

1 Q. All right.

2 A. And that's really a rough number because
3 you never know what -- you know, things -- what
4 wild goose chases you go on when you're trying to
5 do that.

6 Q. Okay. And to do that, you would have
7 to -- if you were to have done that report, you
8 wouldn't have just dropped every other case and
9 every other matters you had and devoted
10 exclusively your time to do it, it would have
11 taken some period of time, I would guess, to
12 accomplish that; is that correct?

13 A. Yes.

14 Q. About how long would you anticipate that
15 would have taken?

16 A. I mean, because this is a very busy
17 time, I don't know that I could -- I wouldn't
18 have committed to anything shorter than four to
19 six to eight months.

20 Q. Okay. How about in early 2019? Were
21 you busy then?

22 A. Yes, not to the same extent, but for
23 some reason, once COVID hit, we got really busy.

24 Q. Okay. Well, good for you.

25 A. Not good for everybody else.

1 Q. It's an ill wind that blows no man any
2 good. All right, sir. So back in 2019, so would
3 you approximate it would have taken four to six
4 months?

5 A. At least. But I didn't have the
6 information to do that.

7 Q. Okay. So for Balfour to have done a
8 full report with a full CPM analysis, it would
9 have been difficult, would you agree, if not
10 possible, for them to have provided that to the
11 owner in January of 2019, when the claim letter
12 was drafted?

13 A. It would have been difficult, but I
14 think the real point was that that should have
15 been kind of developed as it went for the earlier
16 periods.

17 Q. Well, and you would agree, wouldn't you,
18 that the -- preparing a report and a claim for
19 Judge Scarborough to try to get his arms around
20 and understand is a lot of different because he's
21 starting at ground zero as far as the facts go,
22 and he has to educate himself.

23 But on a project like this, your
24 audience, the owner and the architect, should
25 have an extremely high degree of knowledge of the

1 facts and what delays occurred and what issues
2 occurred and such; would you agree?

3 A. I think that they have an idea of what
4 occurred on the project, but they don't have an
5 idea of what your position is on what's critical,
6 what critically delayed the project, and the
7 specific allegations, the cause and effect
8 pieces.

9 They can either say, yes, we agree with
10 that, that's what the critical path was during
11 that time, and we agree with that. Maybe that 20
12 days and the -- on the sixth floor, and the
13 disagreement was 20 versus 25. I don't know what
14 that was, but if you took those pieces, I think
15 that possibly those -- those things could have
16 been resolved. But to just wait, I think it was
17 problematic. It's a problem.

18 Q. Okay. And you may have answered this,
19 and I apologize if I'm repeating myself. But
20 you -- there was a lot of testimony in your
21 direct about things that Mr. Doran may have
22 considered or perhaps should have considered or
23 that perhaps you would have considered if you
24 were doing a report. But what he actually
25 considered, you don't know; is that correct?

1 A. I certainly don't know -- I can't say
2 that he didn't look at something and disregard
3 it. I can say that there's evidence of what the
4 critical path is. That's contemporaneous
5 evidence that he clearly either didn't look at
6 it, or he disregarded it. And I think he was
7 wrong to disregard it.

8 Q. Okay. Is it unusual, when you testify
9 as an expert in a matter either before an
10 arbitration board or litigation, that your
11 opinions are pretty drastically different than
12 the opinions of the opposing experts?

13 A. It happens both ways, actually, and it's
14 kind of -- well, actually, I should preface that
15 with, yes, once you get to actual trial. You
16 don't get to trial if the positions aren't
17 different, if there aren't, you know, large
18 differences.

19 But a lot of my cases end up settling
20 earlier because we have some agreement on the
21 delays, and sometimes I have even stipulated with
22 the opposing expert as to what the delays were
23 and what the amounts were and neither of us had
24 to testify at trial.

25 Q. Okay. And in this case, you don't know

1 how many days of compensable delay you would have
2 arrived at had you done a full delay analysis
3 because you didn't do one, right?

4 A. That's right.

5 Q. We went through -- you went through in
6 detail with Judge Scarborough, letters and
7 e-mails from Balfour to its subcontractors, where
8 Balfour sometimes in fairly innocuous tones and
9 sometimes in very colorful tones and sometimes in
10 extremely strident tones will say, get off your
11 behind; you're behind schedule, and you need to
12 move forward. Do you remember doing that?

13 A. Yes.

14 Q. All right. And those are in Exhibits 90
15 or 91?

16 A. 91, I believe.

17 Q. Okay. And you would agree with me that,
18 even on a project that is experiencing no delays,
19 it is appropriate for a general contractor to
20 push its subs and to crack the whip and to prod
21 and push and poke constantly to keep them moving,
22 correct?

23 A. I agree. What I try to look at is the
24 context as to -- it's not normal, I don't
25 believe, to do a cure notice, to give notice of

1 delay. It's not.

2 And then to say that something is
3 critical in that contemporaneous document, to
4 that -- and I know that sometimes the field folks
5 have a different idea of what critical means, but
6 when they use that term, they're ascribing
7 something real, delay.

8 Q. Well, but that really depends on what
9 Balfour's -- what its habits and customs -- what
10 the habits and customs are of its foreman and
11 superintendents, how they normally -- what they
12 meant and what was in their minds, you really
13 don't know? All you know is that those were
14 sometimes strident letters to the subcontractors,
15 agreed?

16 A. I don't know what's in their mind,
17 that's true.

18 Q. All right. And even if the project is
19 on schedule and even if an activity has float, so
20 it can start earlier or start later, so there's
21 float on it, it would be appropriate for a
22 general contractor to -- if it looks like that
23 float might start to get erased and the
24 subcontractor might be just a little bit behind
25 schedule, it's perfectly appropriate for him to

1 write letters and put them on notice, you need to
2 get going and get this thing up to speed,
3 correct?

4 A. And we saw that in at least one of the
5 letters where I noted that they said that they
6 said that they were absorbing float rather than
7 just -- rather than saying it's critical, they
8 said, you are -- this is absorbing float faster
9 than it should be.

10 Q. All right. You've reviewed the Mark
11 Doran's report, correct?

12 A. Yes.

13 Q. And he says that, as of July 23, 2016,
14 which is when the sixth floor issue hit, there
15 had been a number of challenges and delays and
16 setbacks on the project, but that they had been
17 addressed and that the project was on schedule as
18 of that point, but about a day behind. Do you
19 generally agree with that statement?

20 A. I think what he said was that it was one
21 day behind and then somehow 15 more days got
22 added to that. So it was 20 days for the
23 hurricane, one additional day. I know there was
24 another day in there someplace, but I don't know
25 the -- I'm not going to quibble about one day --

1 and then 15 days of delay to the structure. So
2 15 days where they were not able to do anything.

3 Q. Okay. Well, maybe it wasn't exactly on
4 schedule, but in terms of the ultimate delay
5 opening from the original schedule date, which
6 was around 500 days, that was a pretty very minor
7 in time, agreed?

8 A. Yes.

9 Q. Okay. And do you generally agree with
10 his conclusion there?

11 A. Yes.

12 Q. All right.

13 A. With the exception that, by that time,
14 the schedule bust having to do with the tower
15 crane hadn't been inserted in the schedule.

16 Q. Right. I understand. And, again, we
17 don't know how that would have developed because
18 we don't know what Balfour would have done to
19 address that, correct?

20 A. (No audible response.)

21 Q. Never mind. Let me just move on. So
22 the fact that the project was on schedule as of
23 the sixth floor delays, is -- and that there were
24 prior delays and challenges, does that --

25 MR. BUNDY: Objection. He has

1 misstated what the witness said as a predicate to
2 his question.

3 MR. HILDEBRAND: Well, I will
4 restate it.

5 THE COURT: All right.

6 BY MR. HILDEBRAND:

7 Q. Do you agree that there were documented
8 delays and challenges that had occurred on the
9 project prior to the sixth floor issue going?
10 Have you reviewed the file enough to offer an
11 opinion on that?

12 A. Yes, there were delays. Again, I didn't
13 do the critical path analysis. I'm pretty sure
14 there were delays during that period.

15 Q. All right. And the fact that Balfour
16 had brought the schedule current, does that
17 indicate to you that it had the ability to get
18 back on track with the schedule?

19 A. I guess I have trouble answering it.
20 The schedule showed that the projection at that
21 time would complete 21 plus 15 days after the
22 contract completion date, something like that.
23 And so it showed that they had scheduled around
24 whatever critical delays, if any, had occurred
25 during that previous time.

1 So there certainly were -- we know that
2 there were bumps. There were complaints about
3 waterproofing and some other problems with the
4 structure before that day. But I don't know that
5 there were critical path delays that kicked out
6 the schedule or if things were going from a
7 critical path standpoint as well.

8 Q. Now, you had in the -- when you went
9 through the notices in Exhibit 91, the letters
10 that range from -- just various letters and
11 e-mails that were written to subcontractors,
12 those, you identified, as notices from Balfour to
13 subcontractor X, that subcontractor X, you are
14 behind and you need to get moving. You need --
15 your manpower is short, and you need to
16 supplement reenforces, correct?

17 A. For the most part, that was the purpose
18 of that exhibit.

19 Q. Right. But what we don't know and what
20 you don't know, because you haven't done a delay
21 analysis is, okay, what happened as a result of
22 Balfour giving those subcontractors notice,
23 correct?

24 A. Well, except that a lot of these kind of
25 have the details after the facts, and we say, we

1 told you on such and such date, you need to have
2 more people or double your crews or whatever, and
3 it's clear that you didn't do that, and so you've
4 had this much time.

5 Now, I don't know if that's critical
6 path time or not critical path time. But in some
7 cases, they told them, it's an after-the-fact
8 notice.

9 Q. Right. But even if it's after the fact,
10 we don't know what happened as a result of
11 that -- of those notices on whether the
12 subcontractors, for aspects of their work that
13 were done after that, whether they were able to
14 accelerate or if they were able to make up time
15 or what their responses were.

16 In other words, what the responses of
17 the subs were to those notices, we don't know and
18 you don't know, correct?

19 MR. BUNDY: Your Honor, I have to
20 object. That's about three or four different
21 questions. I'm not sure which question this
22 witness is expected to answer. There were at
23 least three questions in that litany of
24 questions.

25 BY MR. HILDEBRAND:

1 Q. Did you understand the question?

2 A. I think so.

3 Q. Okay. Can you answer?

4 A. Except that, as I said before, some of
5 those responses are listed in the e-mail; so it's
6 a string of e-mails that says at the beginning,
7 you're short of manpower, and then it walks
8 through and says, you're still short of manpower.

9 So in that case, you've seen what that
10 resulted, you know, but in some cases, yes,
11 you're right. In some cases, I don't see the
12 next step except to see if there's a cure notice
13 or notice of delay in addition to that.

14 Q. Right. If Balfour's witnesses were to
15 look at those and say -- and testify that, when
16 subcontractor X got the notice and by gosh, the
17 fear got in them and they jumped and brought in
18 additional men, you wouldn't be able to -- you
19 have no evidence from the record to dispute that.
20 Is that a fair statement?

21 MR. BUNDY: Objection, Your Honor.
22 He is asking the witness to speculate, pitting
23 one witness against the other, and I've not heard
24 any testimony like that. So he's asking this
25 witness to speculate about testimony that has not

1 been put before this Court.

2 THE COURT: Mr. Hildebrand, do you
3 want to respond to that?

4 MR. HILDEBRAND: Your Honor --

5 THE WITNESS: I'm sorry?

6 MR. HILDEBRAND: Never mind. I
7 will withdraw the question.

8 THE COURT: All right. Very good.

9 BY MR. HILDEBRAND:

10 Q. Let's turn to, if you would, please,
11 Exhibit 30 -- or tab 30 and Exhibit 91-30.

12 A. All right.

13 Q. Are you with me?

14 A. Yes.

15 Q. All right. And can you turn to the
16 second page which is the start of that e-mail?

17 A. Yes.

18 Q. And this is an e-mail from Precision
19 Walls, Allen -- I'm sorry, Brian Allen, rather,
20 to Pat Dean. It says, Pat, and then the third
21 paragraph, we are losing money on this job
22 already, based on all the other delays and
23 jumping around the job to try to keep our
24 manpower productive. We cannot afford to flood
25 job with workers anymore without productive work

1 out ahead of us.

2 If there are -- do you know what delays
3 occurred on this job and what impacts those
4 delays may have had on subcontractors as far as
5 their scheduling their manpower?

6 A. So this goes beyond critical path
7 scheduling is what you're trying to say, that
8 the -- sometimes it doesn't matter if that's on
9 the critical path or not. And it can be
10 inefficient, and it can cause delay to a
11 subcontractor.

12 Do I know all of the details of the
13 small delays or the -- each change to the subs?
14 No, I can't know that, but that --

15 Q. Well, do you know that that was a small
16 delay or a small change?

17 A. This here?

18 Q. Yes, sir.

19 A. No, no. I'm not assuming it's a small
20 change.

21 Q. Okay.

22 A. He said he's jumping around, and it's
23 based on -- he says, it's based on other delays.

24 Q. Okay. You testified that you reviewed
25 48 schedules that were promulgated by Balfour in

1 this matter, correct?

2 A. I don't know if it was 48 or 46 or 52,
3 but I know there's 48 number of days.

4 Q. Okay. And there were 150 schedules that
5 were published?

6 A. Yes.

7 Q. So you didn't review 102 of them for
8 whatever reason, agreed?

9 A. No, no, no. We definitely -- we have an
10 index of all of those. We had to open them to
11 find out -- because some of them are early
12 versions. For example, I think number 13, update
13 13 says, draft on it, or one of the other ones
14 says draft.

15 And so we wanted to open those to see
16 what -- see if that was the final version or if
17 it wasn't. In some cases, we had to open up
18 things just to see what the last one that was
19 delivered was. So there was multiple numbers.

20 Q. Well, yeah, and maybe I should clarify
21 the question. Not that you didn't have eyes on
22 there, but enter the other 102 scheduled -- but
23 you didn't take them into account? You didn't
24 review them into any detail with regard to
25 including them in your reports for your opinions,

1 correct?

2 A. That's true. If I thought there was
3 some reason to include, then I would have, but I
4 didn't.

5 MR. HILDEBRAND: All right. That's
6 all, I have. Thank you.

7 THE COURT: All right. Mr. Bundy?

8 MR. TERRY: Your Honor, we have
9 some questions.

10 THE COURT: You would like some,
11 Mr. Terry?

12 MR. TERRY: Yes, sir.

13 THE COURT: Okay.

14 MR. TERRY: And to be clear,
15 Your Honor, and as you allow, I will ask
16 questions on behalf of Watson and Mr. Windle will
17 ask question on behalf of Old North State and
18 Lithko.

19 THE COURT: All right. Okay.

20 CROSS-EXAMINATION

21 BY MR. TERRY:

22 Q. Good afternoon, Mr. Boe, I'm Don Terry.
23 I believe we met during your deposition. I
24 represent Watson Electric Construction. I only
25 have a few questions just to try to clarify what

1 you've said. As I understand it, it's your
2 opinion that Balfour Beatty's schedules were
3 missing logic, meaning the ties between
4 activities, right?

5 A. Logic and activities.

6 Q. Right. And it was missing activities,
7 thank you. And that means that the project's
8 critical path on these schedules of missing logic
9 and activities would not be properly identified,
10 correct?

11 A. That's possible.

12 Q. Okay. And it also means that the float
13 that was identified on those schedules is also
14 possible that it was wrong, right?

15 A. Oh, certainly.

16 Q. Okay. And so your analysis was that you
17 took schedules that you knew were wrong, and you
18 used them to determine whether activities were on
19 critical path when you were discussing these
20 various subcontractor e-mails earlier, right?

21 A. That's not really true. I mean, I know
22 that the schedule was revised in number 19, and
23 that's before period 2 ends. So it's December of
24 2016, I think, anyway.

25 And so what we're really talking about

1 is, well, okay -- wait. What you said is true.
2 When it comes to the schedule and at the end of
3 period 2, period 1, that schedule hadn't been yet
4 revised, and it showed a critical path that still
5 had the second floor on the critical path because
6 of delays in masonry.

7 Q. And then one of your criticisms, as I
8 understand, of Mr. Doran is that he may have
9 manipulated the as built schedule, right?

10 A. That's a possibility.

11 Q. And if the schedule were wrong, as
12 you've testified, you would recommend he actually
13 would manipulate it so it would be right,
14 correct?

15 A. No. He can make changes to the
16 schedule, and you make those changes and they're
17 reasonable changes. And then you figure out what
18 the critical path was. That's what my analysis
19 would have done.

20 Q. And to be clear, you've never determined
21 that Watson Electric Construction delayed the
22 critical path of this project, correct?

23 A. That's right.

24 Q. And you never determined that Watson had
25 any actual manpower problems at all, right?

1 A. I haven't independently determined it.
2 I rely on what Balfour Beatty had to say
3 contemporaneously.

4 Q. Okay. And in your experience, when a
5 subcontractor sends a notice to the general
6 contractor of delay or claim, isn't one of the
7 first things that the general contractor does is
8 say, you're delaying the project, you need more
9 people?

10 A. So the starting part of that question
11 was, when the subcontractor accuses the general
12 of delay? I know that that happens. I don't
13 know that it's a typical response.

14 Q. You see it regularly, though?

15 A. I see it.

16 MR. TERRY: That's all the
17 questions I have. Thank you.

18 CROSS-EXAMINATION

19 BY MR. WINDLE:

20 Q. Good afternoon. I'm Steele Windle. I
21 represent Lithko and Old North State Masonry.

22 A. Okay.

23 Q. Just a couple of points. One, your
24 testimony earlier was that you believe you have
25 reviewed most all of the documentation relating

1 to this project; is that accurate?

2 A. I've reviewed all of the documents or
3 the vast majority of documents that have been
4 issued in discovery.

5 Q. Okay. And your focus was on
6 correspondence between the parties, right?

7 A. Well, that was a part of it.

8 Q. Part of it. That was an important part,
9 was it?

10 A. Oh, it is.

11 Q. Yeah. And you took snippets of those
12 communications and read them to the Judge today,
13 didn't you?

14 A. Yes.

15 Q. The snippets that you read were critical
16 of subs, right?

17 A. I think --

18 Q. -- for the most part?

19 A. In some cases, that's probably for the
20 most part. The things that I read yesterday
21 were -- went both ways, I think, to some extent.

22 Q. But if you reviewed all the
23 documentation or attempted to, you know that
24 there were responses from Old North State Masonry
25 and Lithko to Balfour in regards to those

1 notices, don't you?

2 A. Yes.

3 Q. You didn't read those to the Judge, did
4 you?

5 A. No.

6 Q. So there's more to the story than what
7 you've testified about today, isn't there?

8 A. Well, I can't deny that there's --

9 Q. Evidence yet to come?

10 A. There's always more evidence.

11 Q. Okay. Thank you. Your testimony was
12 that -- part of your testimony was that these
13 notices are a step or could be a step toward
14 termination, right?

15 A. Yes.

16 Q. Okay. But what you can tell the Judge
17 today is that, despite all the notices that you
18 read about any -- well, I can't say about any
19 subs, but about Lithko and Old North State
20 Masonry, they were never terminated, were they?

21 A. They finished the job.

22 Q. They finished the job. They weren't
23 even supplemented, were they?

24 A. Not as far as I know.

25 Q. And supplementation is hiring someone

1 to -- Balfour hiring another subcontractor to do
2 part of Old North State or Lithko's work in order
3 to get it done correctly. That didn't happen,
4 did it?

5 A. Right, it did not happen.

6 Q. Okay. The other point I want to make is
7 the fact that you didn't do your own independent
8 critical path analysis. This is a delay case,
9 right?

10 A. It is.

11 Q. And the issue in the case is, was there
12 a delay, number one; number two, what caused the
13 delay; number three, who's responsible -- well,
14 the duration of the delay, and then who is
15 responsible, right?

16 A. Essentially.

17 Q. Essentially. But in order to answer
18 those questions and to determine responsibility
19 for a critical path delay, you have to do your
20 critical path analysis, don't you?

21 A. No.

22 Q. Okay. What you testified is that there
23 were criticisms of subcontractors including Old
24 North State and Lithko, right?

25 A. Yes.

1 Q. But what you didn't tell the Judge and
2 what you can't tell the Judge is that any of
3 those words on those papers were a critical path
4 delay because you haven't done a critical path
5 delay analysis; isn't that accurate?

6 A. I haven't done a critical path delay
7 analysis.

8 Q. So my statement is accurate, isn't it?

9 A. I can't say that any of the specific
10 documents -- any of those specific documents
11 caused critical path delay.

12 MR. WINDLE: Thanks. That's what I
13 wanted the Judge to know. No further questions.

14 REDIRECT EXAMINATION

15 BY MR. BUNDY:

16 Q. Mr. Boe, you were asked if you were here
17 when Mr. Doran testified, right?

18 A. Yes.

19 Q. You weren't here, right?

20 A. I wasn't here.

21 Q. But you know what he said, don't you?

22 A. Yes, I do.

23 Q. How do you know what he said if you
24 weren't here?

25 A. I read the transcript.

1 Q. Oh, you read the transcript. You were
2 asked about whether -- you were asked about what
3 it would cost an owner to do a critical path
4 schedule on this job, right?

5 A. Yes.

6 Q. A couple of hundred thousand bucks,
7 right?

8 A. Yes. Over and above what I --

9 Q. Whatever.

10 A. -- we've already done.

11 Q. Well, if you compare the contractor's
12 knowledge about his job over three years, where
13 it has his own schedule. He created the
14 schedule. He updated it 40-some-odd times,
15 right? He should be able to come up with a
16 critical path every month doing that entire job,
17 right?

18 A. Yes.

19 Q. Okay. And so the owner is at an extreme
20 disadvantage, but the general contractor doesn't
21 even know where the critical path is and can't
22 produce a document where he asked for 22 million
23 dollars that even shows where it is, right?

24 MR. HILDEBRAND: Objection.

25 Your Honor, this is leading. This is redirect.

1 This is not cross-examination.

2 MR. BUNDY: All right. I'll
3 withdraw the question.

4 THE COURT: All right.

5 BY MR. BUNDY:

6 Q. Now, you were just asked about
7 subcontractor claims and contractor claims and
8 all that sort of stuff.

9 Are you aware there was an agreement
10 between the subcontractors -- certain
11 subcontractors, specifically Old North State
12 Masonry, Lithko, and at one time, Watson, by and
13 between Balfour Beatty and those entities not to
14 make claims against each other until after all of
15 this was over with?

16 MR. TERRY: Objection.

17 Q. Are you aware of that?

18 MR. HILDEBRAND: Objection,
19 Your Honor.

20 THE COURT: All right.

21 MR. HILDEBRAND: This is redirect.
22 There is nothing about the joint venture
23 agreement or nothing that would lead to that.

24 THE COURT: All right.

25 MR. HILDEBRAND: -- from the

1 questions that would be --

2 THE COURT: Noted.

3 Mr. Terry?

4 MR. TERRY: I object as well.

5 Additionally, he has no -- he can't discuss any
6 agreement that he is not a party to or has no way
7 of having any knowledge of.

8 THE COURT: That's pretty
9 self-explanatory, is it not?

10 MR. BUNDY: What's that?

11 THE COURT: What is your question?
12 Did he know about it?

13 MR. BUNDY: Yes. It was brought up
14 on re -- on cross-examination, he was asked by
15 the last lawyer that examined him about claims
16 back and forth between subs and this and that and
17 the other and the general contractor and how it
18 was common to do all these things.

19 And all I wanted to find out from him
20 is, was he aware that there was this
21 conspiratorial agreement to not do these claims
22 until later. That's my question. Just, is he
23 aware of that?

24 THE COURT: All right. You can ask
25 him was he aware of any type of agreement.

1 BY MR. BUNDY:

2 Q. Were you aware of any type of agreement?

3 A. No.

4 Q. Does the contract have claims
5 procedures?

6 A. Yes.

7 Q. Okay. And in your experience,
8 30-some-odd years, is it preferable to handle
9 claims as they come up during the job, or do you
10 wait until the end of the job and try to solve
11 problems that occurred two and three years
12 earlier?

13 MR. HILDEBRAND: That's leading,
14 Your Honor. Objection.

15 BY MR. BUNDY:

16 Q. When is the best time to resolve claims
17 on the job?

18 A. During the job.

19 Q. And what does the contract say regarding
20 when you resolve claims on the job?

21 A. I'm sure -- I just can't tell you
22 exactly what the contract says.

23 Q. Does the contract provide for notice of
24 claim?

25 A. Yeah. I believe it's 20 days.

1 MR. BUNDY: That's all I have.

2 Thank you.

3 THE COURT: 20 days was your
4 answer, right?

5 THE WITNESS: Yes.

6 THE COURT: Yeah.

7 MR. HILDEBRAND: Nothing further,
8 Your Honor.

9 THE COURT: All right. Mr. Boe, I
10 just have -- I think it's just one question, and
11 I'm pretty sure -- you may have covered it. I
12 just want to make sure. You did not do a
13 critical path analysis, you've been clear about
14 that.

15 THE WITNESS: Yes, sir.

16 THE COURT: But when you were first
17 presented with the claim, I think your
18 testimony -- I was just trying to verify this --
19 your claim was that there was no critical path
20 analysis that was submitted along with that claim
21 to allow you to be able to adequately resolve or
22 investigate the claim. Is that the gist of what
23 your initial testimony was?

24 THE WITNESS: Right. The only --
25 the only portions of the claim -- there were some

1 general allegations that talk to, for sure, the
2 structure and the design problems up front, but
3 just nothing that said, this is the critical
4 path. This is where the problems were on the
5 project. This is what extended the project.

6 And usually, it's at least some specific
7 periods or saying at these specific times, et
8 cetera. I mean, it could have been in a form,
9 something like what Mr. Doran presented. At
10 least that is something that we can analyze and
11 look at and disagree with, honestly. But at the
12 same time, find out where we do have some
13 agreement hopefully to try to help resolve.

14 THE COURT: But what you're
15 saying -- I guess your testimony is, without that
16 analysis, it's difficult to make that
17 determination; is that what I understand you're
18 saying?

19 THE WITNESS: What we find is that
20 we couldn't. There is that long list of notice
21 of delays to the owners in some of the backup
22 documents, but even that doesn't tell what's
23 critical and what's not and how much the
24 allegation is, about specific amounts of time.

25 THE COURT: Okay. All right.

1 THE WITNESS: Okay.

2 THE COURT: Gentlemen, any
3 questions? Any follow-up questions?

4 MR. BUNDY: No, Your Honor.

5 THE COURT: Mr. Boe, can he be
6 relieved?

7 MR. BUNDY: Yes, Your Honor.

8 THE COURT: Well, Mr. Boe, happy to
9 have you stick around, but you can come right on
10 out of that witness chair, if you would like.

11 And, Mr. Bundy, just so I'm clear, I
12 assume he is an expert witness. Can he be
13 excused at this time? All right. Very good.
14 Thank you very much, Mr. Boe.

15 MR. BUNDY: Your Honor, my next
16 witness will be Grady Query.

17 THE COURT: All right. Mr. Query,
18 come on forward.

19 (GRADY QUERY, having first been
20 duly sworn, testified as follows:)

21 THE COURT: Please be seated, and
22 if you would give us your full name and address
23 for the record, please, sir.

24 THE WITNESS: It's Grady Wolfram,
25 W-O-L-F-R-A-M, Query, Q-U-E-R-Y. And my address

1 is 4617 Lazy Creek Lane, Wadmalaw Island, South
2 Carolina 29487.

3 THE COURT: Thank you, sir. All
4 right.

5 Mr. Bundy?

6 MR. BUNDY: May it please the
7 Court.

8 THE COURT: Yes, sir.

9 DIRECT EXAMINATION

10 BY MR. BUNDY:

11 Q. Grady, give us your educational
12 background, please.

13 A. I graduated from Florida Southern
14 College with a degree in mathematics, with an
15 emphasis in computer science.

16 Q. And are you a member of any associations
17 or --

18 A. The AGC, Charleston Contractor's
19 Association.

20 Q. Are you a license general contractor?

21 A. What's that?

22 Q. Are you licensed?

23 A. No, sir.

24 Q. What is your work experience?

25 A. I graduated college, and I started

1 working part-time in computers, working for
2 Senator Hollings, doing his -- setting up his
3 database and also working part-time for the
4 family business, which was a pesticide and
5 industrial chemical business.

6 Q. When was that?

7 A. That was in 1990.

8 Q. Okay.

9 A. And then that's segued into working
10 full-time for the family business because they
11 were consolidating three manufacturing plants:
12 One in Charlotte; one in Gaston; one in
13 Charleston to a central location on Johns Island.

14 And I worked for a couple of years to
15 basically consolidate that, and mostly
16 construction, setting up, fitting that plant.
17 And then, at the same time, we were phasing out
18 fluorocarbons and also made it a hydrocarbon
19 gassing house.

20 And once that was done, I wasn't really
21 interested in working in the pesticide business;
22 so I segued and started with another partner of a
23 bottled water business. And we constructed and
24 had certified a bottling plant and bottled
25 5-gallon bottles and distributed them, and we --

1 that didn't last very long.

2 And then I was looking, you know, for a
3 new career, and basically, I had a friend who was
4 starting his own scheduling company, partnered
5 with a claims consultant, and just, you know,
6 talked to him about it.

7 And it was basically -- enjoyed
8 construction, and it was basically just applying
9 a mathematical algorithm to a list of
10 construction items with relationships. And that
11 sounded right up my alley, and I was good with
12 computers and started working for him, and have
13 been doing it for 27 years now.

14 Q. Okay. And give me some of your -- give
15 me some history of some of the jobs you've done,
16 some of your clients locally, nationally or
17 whatever.

18 A. Worked on a 3.6 billion dollar resort
19 and a casino, the largest casino in the Caribbean
20 at that time -- I think still it is. And I was
21 responsible for developing a large part of that
22 target schedule.

23 And then, at the end, it was
24 maintaining -- and then, at the end, it was
25 responsible for maintaining the majority of it

1 except for just the outside landscaping items.
2 Also did extensive work in Clark County doing --
3 in Las Vegas, doing McCarran Airport expansions
4 and worked there, and also pumping stations,
5 different infrastructure for that county.

6 And I have worked here doing -- worked
7 on the Ashley River Tower, the 250 million
8 dollar, was the lead scheduler there, the
9 Hollings Cancer Center, the dental school.

10 We did this building, and have done --
11 and currently my business is -- we're just new
12 construction for representing general
13 contractors, and we are doing 1.6 billion dollars
14 of work.

15 I'm currently -- have developed the
16 scheduling in maintaining over 700 million
17 dollars of work right now for around 30 different
18 projects, the largest of which is the 280 million
19 dollar, Tennessee Valley Associate Authorities,
20 the main systems control center that controls the
21 entire TVA grid. I'm responsible to multi-bid --
22 it's a multi-prime contract. I'm responsible for
23 about 230 million dollars for that.

24 Also, doing a 130 million dollar
25 pharmacy out of Boston, the 40 million dollar

1 Charleston County Social Services hub off of
2 Rivers.

3 Q. Who is your client in that?

4 A. That's Evans Construction.

5 Q. All right. I think I get the gist of
6 your work. What you're doing is not -- that's
7 not forensic scheduling, is it?

8 A. We are doing a forensic schedule right
9 now for a project that was delayed which was the
10 welcome center on I-95.

11 Q. Well, if you would, tell the Judge, what
12 is the difference between scheduling a job when
13 it starts for the actual construction of
14 something as opposed to a forensic sort of
15 postmortem, right?

16 A. Exactly.

17 Q. What is the difference?

18 A. I mean, you would -- initially, it's a
19 collaborative effort -- for a new construction,
20 it's a collaborative effort of looking into and
21 familiarizing yourself with the plans and
22 specifications, contract requirements.

23 And then, you know, meeting with the
24 general contractor and understanding his means
25 and methods and how he wants to approach it, and

1 then developing that network and baseline
2 schedule. And then, as that progresses, you
3 maintain that schedule and update it on a
4 periodical basis.

5 The forensic work would be coming in
6 sort of cold to the project and then applying,
7 you know, an appropriate technique to then -- and
8 analyze what went wrong, looking at all the --
9 you know, all the documents available to you.

10 Q. All right, sir. Okay. Have you taught
11 any courses in scheduling? Do you currently
12 teach scheduling?

13 A. I have given courses in scheduling. I
14 recently spoke at the Advanced Planning and
15 Scheduling conference in Dallas, and I was asked
16 to present on basically quality control
17 procedures for claims analysis.

18 MR. BUNDY: Your Honor, at this
19 time, I would offer Mr. Query as an expert in
20 construction scheduling, forensic scheduling,
21 scheduling jobs and the analysis of those, as
22 well as an expert in construction techniques and
23 construction generally.

24 THE COURT: All right. Did you
25 hear all those things?

1 MR. HILDEBRAND: I didn't,
2 Your Honor.

3 THE COURT: All right. Scheduling
4 expert.

5 MR. BUNDY: Construction generally,
6 aspects of construction generally, how things are
7 built, how things are put together, how the
8 construction is scheduled, and the -- how to
9 schedule a job and the forensic aspect of it,
10 which is sort of a postmortem idea.

11 THE COURT: All right.

12 MR. HILDEBRAND: Your Honor, he is
13 not a general contractor, as I understand it. He
14 is not an architect or has no other professional
15 licenses. And he wasn't -- he didn't get a
16 degree in scheduling in college. He has got some
17 on-the-job scheduling as a -- scheduling
18 experience as a scheduler.

19 And I would be willing to agree to him
20 testifying as a scheduling expert, but I don't
21 think that he has been qualified for all the
22 other opinions.

23 And in fact, when I took his deposition,
24 he said that he had had one five minute
25 conversation with plaintiff's counsel -- I'm

1 sorry, with Library's counsel prior to giving his
2 opinions, and simply was going to testify about
3 some reports that he did during construction.
4 That's all he said he was asked to do, and that's
5 what I questioned him on.

6 So I'm willing to stipulate that he is
7 going to testify about his scheduling reports
8 that he did, and so, again, as a scheduling
9 expert. But all of these other things, I do not
10 agree to. I don't think he's been qualified to.

11 THE COURT: Okay.

12 MR. BUNDY: Well, regardless of
13 whether he's willing to stipulate to anything, my
14 client, through experience and education and what
15 he has been doing, the notion -- this gentleman
16 has done 3 billion dollars worth of scheduling
17 all across this country and gave seminars in
18 Texas, and he is not qualified to talk about
19 construction and scheduling is a little bit over
20 the top.

21 I think Your Honor would be well --
22 would benefit from Mr. Query's knowledge,
23 training, and expertise.

24 THE COURT: All right. But clearly
25 he's qualified as a scheduling expert, and that

1 would entail forensic scheduling. To what extent
2 have you been involved with the construction
3 aspect of these projects, either licensed or as a
4 builder?

5 THE WITNESS: As a builder? I
6 mean, I have built two houses. So I had --
7 that's residential.

8 THE COURT: Okay.

9 THE WITNESS: And I was the GC on
10 that, as you're allowed to build, you know, be a
11 GC for your own residence.

12 THE COURT: Sure.

13 THE WITNESS: I mean, like I said,
14 I did not -- that was 3.5 billion just on one
15 project. So I've done tens of billions of
16 dollars worth of construction scheduling, and
17 also, you know -- that's just for the general
18 contractor.

19 We also represent -- the owner's
20 representative did not do -- schedule oversight
21 for Charleston County School District for the
22 current 1.1 billion dollar building program. And
23 sorry.

24 MR. BUNDY: May I ask him one
25 question?

1 THE COURT: Sure.

2 BY MR. BUNDY:

3 Q. In order to schedule a job and know how
4 things -- how long they're going to take and what
5 order to put them in, do you have to understand
6 how the building is going to be put together and
7 how it's to be constructed? Do you need to
8 understand the process in order to schedule it?

9 A. It certainly helps.

10 Q. Okay. So if you didn't know how
11 concrete was poured and how storms were made and
12 all of those things, you would know how much time
13 to put in and what order it would go in, would
14 you?

15 A. Not unless you were spoon fed and just
16 basically did data entry.

17 Q. And how much work do you think you would
18 get, as a scheduler, if you didn't understand how
19 buildings were put together and know how to read
20 plans and specifications?

21 A. I would be back in the water business.

22 THE COURT: All right.

23 Mr. Hildebrand?

24 MR. HILDEBRAND: Your Honor, again,
25 he is a scheduling expert. I understand that he

1 works on construction projects. He works with
2 contractors. That's what he does. That does not
3 make him a contractor. That does not make him an
4 architect.

5 That does not make him an expert to
6 offer opinions about construction schedules and
7 everything else -- I'm sorry, construction
8 contracts and everything else. He is simply a
9 scheduler.

10 And for Mr. Bundy to say, yeah, you work
11 on it; your scheduling relates to construction
12 projects, therefore it's -- he's so intuitive
13 that he can testify as a contractor and offer
14 construction things and everything else.

15 I don't know why he is trying to
16 schedule him -- trying to get him qualified on
17 all these other issues. He has been identified
18 as a scheduling expert. That's what I took his
19 deposition on, and I think that's what he should
20 be qualified to, simply on that.

21 THE COURT: All right. I will
22 qualify him as a scheduling expert, and to the
23 extent that that involves construction, I'm going
24 to give him some leeway on that.

25 MR. HILDEBRAND: All right. Thank

1 you, Your Honor.

2 BY MR. BUNDY:

3 Q. All right. Let's talk a minute about
4 how you got involved on this project. When did
5 you get hired, by whom, and for what purpose?

6 A. I was approached in August of 2017. I
7 received a call from Mr. Clements with Matrix,
8 and he expressed an interest in having me come
9 onboard to basically -- we really hadn't defined
10 my role at that point, just that there was a
11 troubled project and that they had sort of lost
12 faith in the schedule's ability to forecast a
13 completion date.

14 Q. Okay. And who was the scheduler that
15 scheduled this job for Balfour Beatty?

16 A. Joe Lauricella.

17 Q. Joe Lauricella?

18 A. Thank you.

19 Q. Okay. Did you ever meet with him?

20 A. I know I met with him in person on one
21 occasion.

22 Q. Okay. But you understood it was his
23 schedule?

24 A. Yes, sir.

25 Q. Okay. And how were you paid -- how were

1 you paid on this job?

2 A. We had agreed to -- once our services
3 were defined, we agreed to a flat fee, I believe,
4 of \$4,800 to do an initial audit on the schedule
5 and how it -- you know, whether it's a viable CPM
6 and that it can -- you know, can perform the
7 functions of a construction schedule,
8 documenting, forecasting, and coordinating.

9 Q. So you were first hired -- what is it to
10 do a schedule audit? What is a schedule audit?

11 A. Basically, we want them to basically --
12 it can take many forms. We really wanted to sort
13 of drill down on all three of those because
14 that's -- basically, the main functions of the
15 CPM scheduling is being able to forecast the
16 completion date for future work, coordination of
17 near term work.

18 And then also a secondary function is to
19 document, and, you know, to document when things
20 actually happened when you apply actual dates and
21 they're locked into the schedule.

22 Q. Do you have an opinion to a reasonable
23 degree of certainty whether a CPM schedule is a
24 necessary tool that a contractor needs in order
25 to build a structure such as the Hotel Bennett?

1 A. I'm rather biased in that opinion. Yes,
2 I think that's a necessary tool, yes.

3 Q. And in fact, if that tool is broken,
4 will it affect the building and the building of
5 the project?

6 A. Absolutely.

7 Q. Okay. So is your audit, in effect, the
8 way -- to determine whether the tool, the
9 scheduling tool works or not, is broken or not?

10 A. Yes, sir.

11 Q. Okay. Now, have you seen the contract
12 in this case?

13 A. I have.

14 Q. Okay. There is a written contract
15 between these parties, right?

16 A. Yes, sir.

17 Q. Okay. Now, if you would, let's look at
18 the contract. I think it's in front of you.
19 It's exhibit -- I believe this is 91.

20 MR. HILDEBRAND: Your Honor?

21 THE COURT: Just one second. Yes,
22 sir.

23 MR. HILDEBRAND: I've taken this
24 man's deposition. He was identified as a
25 scheduling expert, and he issued -- he came out

1 on site, and he said that he was simply asked to
2 look at the schedule to determine if the
3 completion date that Balfour was saying --
4 Balfour was saying the hotel would be finished
5 was accurate or not, and he issued several
6 reports on that.

7 I've taken the depositions of Kim Brown,
8 and she said the exact same thing. His only
9 involvement was to look at the bottom of
10 scheduling -- to look at the completion date to
11 see whether they were accurate or not. I've
12 taken the deposition of Michael Bennett, he said
13 the same thing. I've taken the deposition of Jim
14 Clements, he said the same thing.

15 So what he did was, he looked at the
16 completion dates and issued reports, and that's
17 all he did. He did not -- he hasn't been
18 identified, and when I took his deposition about
19 offering opinions about the contract or anything
20 else, then I would say, absolutely, that he just
21 needs to restrict his opinions to what he did on
22 the job because that's what he testified about.

23 He didn't do any delay analysis. He
24 didn't do -- all he did, he said, was issue these
25 reports, and prior to his deposition, had had one

1 five minute conversation with plaintiff's (sic)
2 counsel. So I would ask the Court to enforce
3 what he said he did in his deposition and not
4 allow his opinions or testimony to go beyond
5 that. Thank you.

6 THE COURT: Okay. Noted.

7 MR. BUNDY: It might be helpful if
8 I got to ask my question before the question is
9 objected to. It might make things a little
10 quicker, but we can do it this way. And I will
11 stipulate that Mr. Hildebrand likes to take
12 depositions. I don't.

13 This is a breach of contract action,
14 okay? And this contract has a section entitled,
15 contractor's construction schedules which sets
16 forth the contractual requirements of the
17 schedule. All I want to do is inform this Court
18 of the requirements of the contract.

19 It is a contract case, notwithstanding
20 it's had a hard time to get it back to that. In
21 addition to that, our complaints specifically
22 says that they breached the contract by not
23 complying with the requirements of the contract
24 as it relates to the schedules.

25 All I want to do is to bring to your

1 attention what was required because this
2 gentleman went out and looked at their schedule
3 and has opinions, right? He's not going to offer
4 an opinion that it breached the contract. Whoa,
5 Well, that's your job.

6 THE COURT: Right.

7 MR. BUNDY: But it is my job to
8 bring to your attention what the contract says,
9 so his testimony will make some sense to you.

10 THE COURT: I'm in agreement with
11 that. I think he's still laying a foundation.
12 I'm going on allow it. Go ahead.

13 MR. BUNDY: Thank you, Your Honor.
14 BY MR. BUNDY:

15 Q. All right, Mr. Query. These parties
16 signed the contract, and it's Exhibit -- it's the
17 AIA 201-2007 edition -- AIA 201-2007 edition.

18 MR. BUNDY: For the record,
19 Your Honor, its Exhibit 56.

20 THE COURT: All right.

21 THE WITNESS: I'm not sure if that
22 matches.

23 THE COURT: The A133 is the front
24 part.

25 MR. BUNDY: It's A201.

1 THE COURT: A201 is going to be
2 about an inch into it. 201 is in there.

3 BY MR. BUNDY:

4 Q. All right. Are you good?

5 A. Yes, thank you.

6 Q. All right. If you would, turn to page
7 17 of the AIA document A201-2007 edition. Are
8 you there?

9 A. Got it. Yes, sir.

10 Q. Paragraph 3.10.1. Do you see that under
11 contractor's construction schedule?

12 A. Yes, sir.

13 Q. Okay. Would you read it for the record,
14 that paragraph, please.

15 A. The contractor shall prepare and submit
16 for the owners and architects that have
17 permissions, the contractor's construction
18 schedule for the work within 14 days after being
19 awarded the contract. The schedule should not
20 exceed time limits current under the contract
21 document.

22 The documents shall be revised at
23 appropriate intervals as required by the
24 conditions of the work and project shall be
25 related to the entire project to the extent

1 required by the contract documents, and shall
2 provide for expeditious and practical execution
3 of the work.

4 Q. All right. 3.10.2, what does that
5 require?

6 A. The contractor shall prepare and keep
7 current for the architect's approval, a schedule
8 of submittals, which is coordinated with the
9 contractor's construction schedule and allows the
10 architect reasonable time to review -- the
11 architect reasonable time to review the
12 submittals.

13 Q. 3.10.3, what does it require?

14 A. The contractor shall perform the work in
15 general accordance with the most recent schedules
16 submitted to the owner and architect.

17 Q. 3.10.4, what does it require?

18 A. The contractor will be required to
19 comply with the following as they relate to the
20 planning and scheduling of the work.

21 Q. All right. Let's start with the first
22 thing that's required under 3.10.4.1. What does
23 that require?

24 A. The contractor shall include in his
25 price, adequate time to properly schedule all

1 aspects of the contract documents. The
2 contractor shall deliver to the owner and
3 architect an initial construction schedule within
4 14 days of the notice to proceed, or at such time
5 as may be mutually agreed upon by the owner,
6 architect, and contractor.

7 Once all data needed by the contractor
8 is obtained, the contractor will then develop an
9 overall construction schedule that, when
10 complete, will be the guide against which the
11 contractor's performance and progress of work
12 will be measured.

13 When the construction schedule is
14 complete, the contractor, after consultation with
15 all subcontractors and materials, suppliers,
16 shall confirm in writing to the architect that
17 the construction schedule is reasonable and
18 achievable by the contractor, subject to any
19 extensions of time as provided for elsewhere in
20 the contract documents.

21 The contractor shall therefore give
22 prompt specific notice to the owner and to the
23 architect of any change in the logic of the
24 construction schedule or any part thereof, the
25 removal of any restraints or the reduction or

1 increase of any durations.

2 Q. What does 3.10.4.2 require of the
3 schedule?

4 A. The construction schedule shall be a
5 critical path method, CPM type of schedule
6 consisting of one, a single critical path
7 delineation; two, designations of detailed
8 activities and a restraint in relationships;
9 three, milestones and restraints for all
10 activities including owner-awarded contracts
11 through the date of project completion, and four,
12 dates for submission and return of shop drawings
13 and other submittals.

14 The dates for submission and return of
15 shop drawings must be reviewed and approved by
16 the architect. The construction schedule must
17 show all activities necessary for substantial
18 completion as defined by section 9.8 and
19 elsewhere in the construction documents.

20 Q. All right. What does 3.10.4.3 require?

21 A. The contractor shall meet with the
22 architect after creation of the initial
23 construction schedule and will work in good faith
24 with the architect to establish a schedule for
25 turnaround times for shop drawings and other

1 submittals and times for responses to RFIs.

2 Q. And what does 3.10.4.4 require?

3 A. The contractors shall coordinate the
4 construction schedule with the various schedules
5 of the owners, other contractors, suppliers, and
6 vendors, if any.

7 The contractor shall immediately notify
8 the owner and architect of any unresolved
9 conflicts between the various contractors,
10 suppliers, and vendors, and any delay among them
11 that may affect the progress of the work.

12 The responsibility does not alter any
13 other provisions of the contract documents
14 including the obligations of the contractor with
15 respect to the contract time, the construction
16 schedule, or the management and coordination of
17 the work.

18 Q. What does 3.10.4.5 require?

19 A. Periodic meetings will be held at least
20 once per month to assess the state of completion
21 of the project and to update the construction
22 schedule as necessary.

23 Based on observations and assessments
24 made at these meetings, the contractor shall
25 take, or in the event the delay in question is

1 not the responsibility of the contractor, propose
2 the necessary and appropriate actions to resolve
3 the issues that could delay the work and to
4 outline and implement plans to remedy work behind
5 schedule.

6 Q. What does 3.10.4.6 require?

7 A. The architect and owner shall be
8 provided copies of the construction schedule as
9 periodically updated in electronic format as
10 maintained by the contractor.

11 Q. What does 3.10.4.7 require?

12 A. The contractor is solely responsible for
13 its obligations regarding the construction
14 schedule.

15 Review of the initial construction
16 schedule and subsequent reviews of the
17 construction schedule by the architect and owner
18 do not operate to imply agreement by the --
19 sorry, do not operate to imply agreement by the
20 architect or owner that the means and methods of
21 planning of the work utilized by the contractor
22 are adequate or will accomplish the work in the
23 time shown on the construction schedule.

24 The contractor shall take all actions to
25 ensure the work's successful planning and

1 execution within the stipulated contract time.

2 Additionally, review of the construction
3 schedule by the owner for its consultants shall
4 not make the owner or architect responsible for
5 the contractor's scheduling obligations or the
6 accuracy of the construction schedule prepared by
7 the contractor.

8 Q. And what does the final 3.10.4.8
9 require?

10 A. The contractor represents the owner that
11 the initial construction schedule and all
12 subsequent construction schedules, in
13 parentheses, including updates and amendments,
14 have been prepared in good faith and are accurate
15 to the best of the contractor's knowledge.

16 The contractor acknowledges that the
17 owner and the architect will rely on the
18 construction schedule in regard to any and all
19 decisions or actions by either in regard to the
20 project.

21 Q. In your opinion, is the scheduler on
22 this job an important aspect of what the
23 construction manager was to provide?

24 A. Yes.

25 Q. All right. So let's talk about when you

1 first got involved when Mr. Clements called you.

2 What was the date again, Mr. Query?

3 A. It was -- I don't remember the exact
4 date of the phone call, but I believe it was
5 sometime in August 2017.

6 Q. Okay. Now, in August or September of
7 '17, this lawsuit was two years away from being
8 filed, correct?

9 A. Yes.

10 Q. Okay. So you weren't hired, at least at
11 that time, when there was an pending litigation,
12 right?

13 A. It was understood the project was in
14 trouble, but that was not what I was hired for.

15 Q. Nobody was hoping for litigation as far
16 as you know?

17 A. No.

18 Q. Okay. So you started out, and you went
19 to -- and what did you do? What was the time?
20 When did you go out to the job and what did you
21 do?

22 A. We went out -- we received the schedule
23 that we were going all get the audit was before
24 August 2017 schedule prepared by -- it was an
25 updated schedule prepared by Balfour Beatty.

1 Q. And that would have been
2 Mr. Lauricella's schedule?

3 A. Yes, sir.

4 (DFT. EXH. 94 was marked for
5 identification.)

6 Q. Okay. I'm going to hand you what's been
7 marked for identification as Defendant's Exhibit
8 94 for identification and ask if you can identify
9 that document?

10 A. That is the audit that I prepared.

11 Q. This is the first audit you did?

12 A. Yes, sir.

13 Q. Okay. And this is your work product,
14 your document, you're the author of it?

15 A. Yes, sir.

16 MR. BUNDY: Your Honor, I move to
17 introduce Exhibit 94 into evidence.

18 MR. HILDEBRAND: No objection.

19 THE COURT: Without objection.

20 (DFT. EXH. 94 was received in
21 evidence.)

22 MR. BUNDY: Judge, I'm going to
23 strike out the ID, and I'm going to hand it to
24 you.

25 THE COURT: All right, sir. Thank

1 you.

2 BY MR. BUNDY:

3 Q. All right. Mr. Query, walk me through
4 this document. You can either read it,
5 paraphrase it, or whatever you think is the most
6 beneficial way to handle it.

7 A. All right. I did an initial job --

8 MR. HILDEBRAND: Wait for a second,
9 please.

10 BY MR. BUNDY:

11 Q. Go ahead.

12 A. We did several job walks there. I did
13 an initial job walk on -- I don't remember the
14 exact date -- and took notes, general notes
15 concerning what I -- observations of the
16 construction site.

17 Q. All right. Well, it says here you did
18 it on August the 28th.

19 A. Yeah. And then we did -- I did another
20 job walk on -- well, actually I didn't. I had --

21 Q. And one three weeks later?

22 A. Yes.

23 Q. It's in the letter. You can use the
24 letter if you need to.

25 A. No. Well, we did several walks coming

1 up to that. So on the 27th, we did a partial
2 walk. I couldn't stay there because I couldn't
3 get back in the building because that was the day
4 that there was a shooting. It was at the
5 restaurant right next door.

6 So the 28th, went there for the final
7 walk, did the -- and basically observed the
8 status of the schedule -- of the construction
9 compared back to the 4 August schedule.

10 Q. And you started out with your executive
11 summary of findings, correct?

12 A. Exactly.

13 Q. This is a letter you wrote to me, right?

14 A. Correct.

15 Q. This is a letter you wrote to me?

16 A. Yes, sir.

17 Q. Okay. And what were your findings in
18 your executive summary?

19 A. So the first -- as spelled out here, the
20 first exercise of audit reviews the accuracy of
21 short-term forecasted progress, and we did that
22 by observing manpower totals for each area.

23 So we walked through and just documented
24 exactly who was on site and the status of that
25 site and -- and took pictures of what it was, and